

# The Integrated and Coordinated Approach to Sexual Misconduct: *Understanding the Intersection of Title IX, the Clery Act and the Violence Against Women Act*

North Dakota University System

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# Overview of Day One



- The National Context
- The Campus Context
- The Regulatory Framework
- The Coordinated Institutional Response
- The Confidentiality Conundrum
- Training Overview

# Overview of Day Two



- Investigations
- Dynamics of Sexual Assault, Harassment, Intimate Partner Violence & Stalking
- The Role of the Investigator
- Investigative Protocols
- Trauma Informed Investigative Practices
- Forensic Interviewing
- Evaluating Credibility
- The Role of the Adjudicator
- Coordination with Law Enforcement

# The Fine Print



- Language
  - Individuality
  - Inclusivity
- Sensitivity
  - Respect for self
  - Respect for others
- Statistics
  - Vary greatly in reliability and accuracy
  - Never a substitute for good independent judgment and careful attention to the facts
  - References here provide information about prevalence and context, but do not provide exhaustive list of available research.

# The Federal Mandates

- Title IX of the Education Amendments of 1972
  - Prohibits discrimination on the basis of sex in educational institutions
- The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act
  - Requires policies and procedures for sexual assault
  - Requires timely warning and external reporting of crimes
- Section 304 of the Violence Against Women Reauthorization Act of 2013
  - Extends Clery to include dating violence, domestic violence and stalking

# The Enforcement Scheme



- Title IX
  - U. S. Department of Education, Office for Civil Rights (OCR)
  - Removal of federal funding
- Clery
  - U.S. Department of Education, Federal Student Aid, Clery Compliance Division
  - \$35,000 fine per violation
- VAWA
  - U.S. Department of Education, Federal Student Aid, Clery Compliance Division
  - \$35,000 fine per violation

# The National Context:

*Why Now?*



# A Call to Action



- April 4, 2011 Dear Colleague Letter
- High profile civil and criminal actions
- Coordinated activism
  - Complainant/victim/survivors (i.e. Know Your IXs, End Rape on Campus, SurvJustice)
  - Respondents (FIRE - Foundation for Individual Rights in Education, COTWA - Community of the Wrongly Accused, Harvard Law professors)
  - The Alumni Network – coordination of alumni from colleges and universities across the country
  - FAR – Faculty Against Rape
- Pervasive mass media coverage
- The impact of social media

# Legislative Action



- Evolving Legislation
  - 2013 Reauthorization of VAWA (Campus SaVE Act)
  - Negotiated Rule Making Process (10/20/2014)
- Ongoing Legislative Efforts
  - Senate HELP Committee
  - McCaskill Questionnaire and Report
  - CASA, HALT, SOS

# Executive Branch Action

- National Center for Campus Public Safety
  - \$2.3 million Department of Justice Grant
- Increased and Expanded Enforcement Efforts by DOE
  - OCR has publically released the names of 90+ colleges and universities under investigation
- Questions and Answers on Title IX and Sexual Violence (April 29, 2014)
- Voluntary Resolution Agreements
  - Recent findings by OCR that schools are not in compliance

# The White House Steps In



- Rape and Sexual Assault: A Renewed Call to Action
  - White House Commission on Women and Girls
- Presidential Memorandum Establishing a White House Task Force to Protect Students from Sexual Assault
- Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault (April 29, 2014)

# Judicial Branch Action



- State and federal court actions
  - By both complainants and respondents
  - Deliberate indifference/monetary damages
  - Amicus support by DOE/DOJ?
- Courts offering injunctive relief before process is final
- Settlements
  - Confidential
  - Public



- Increased and expanded enforcement efforts
  - Title IX (investigations/findings of non-compliance)
  - Clery/Campus Save (investigations/increased fines)
- Increased civil litigation from both complainants and respondents
- Increased scrutiny of criminal investigations
- New federal and state legislation
- Increased mass and social media attention

# The Campus Context:

## *Sexual Misconduct in the Campus Setting*





# The Student Perspective



- Don't know how to find information
- Don't know what to expect in the process
- Lack of clarity in the policy
- Not informed of all options
- Not being treated fairly
- Feeling judged or isolated
- Inadequate support during and after the process
- Lack of transparency in the process
- Dissatisfaction with the outcomes
- Failure to warn/log/report
- Complainants discouraged from reporting



# The Student Perspective



- Parties not informed of rights in process
- Failure to provide an adequate, reliable, and impartial investigation
- Adjudications lack fair, informed process
- Harassment during the adjudication process
  - Inadequate training of implementers
  - Inadequate training of hearing panels
- Complaint process not prompt and equitable
- Failure to accommodate documented disabilities
- Inadequate sanctions
- Inconsistent granting of appeals
- Unequal access to appeals
- Retaliation concerns
- Inadequate education and prevention programs

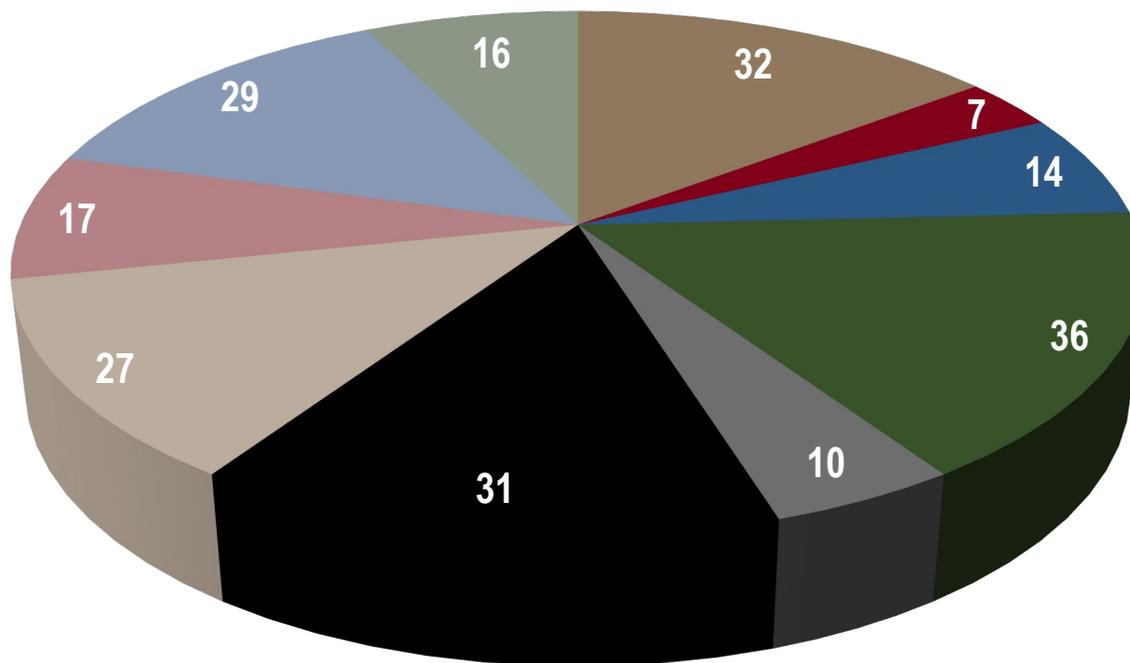
# The Student Perspective

- Rape myths perpetrated by administration
- Retaliation concerns
- Inadequate education and prevention programs
- Lack of communication and coordination compound the impact on students
- Faced with an overly legalistic process with no one to translate policy into terms the student can understand
- Feeling like you have to be—or get—your own attorney and prove your own case, rather than the college or university taking responsibility to ask questions and gather necessary evidence to figure out what happened

# The Institutional Perspective



- Personal/Emotional Concerns
- Policy Concerns
- Reporting
- Investigations
- Coordination of Constituencies
- Resources
- Implementation and Process Concerns
- Confidentiality & Complainant/No Consent
- Evaluating Credibility
- Training



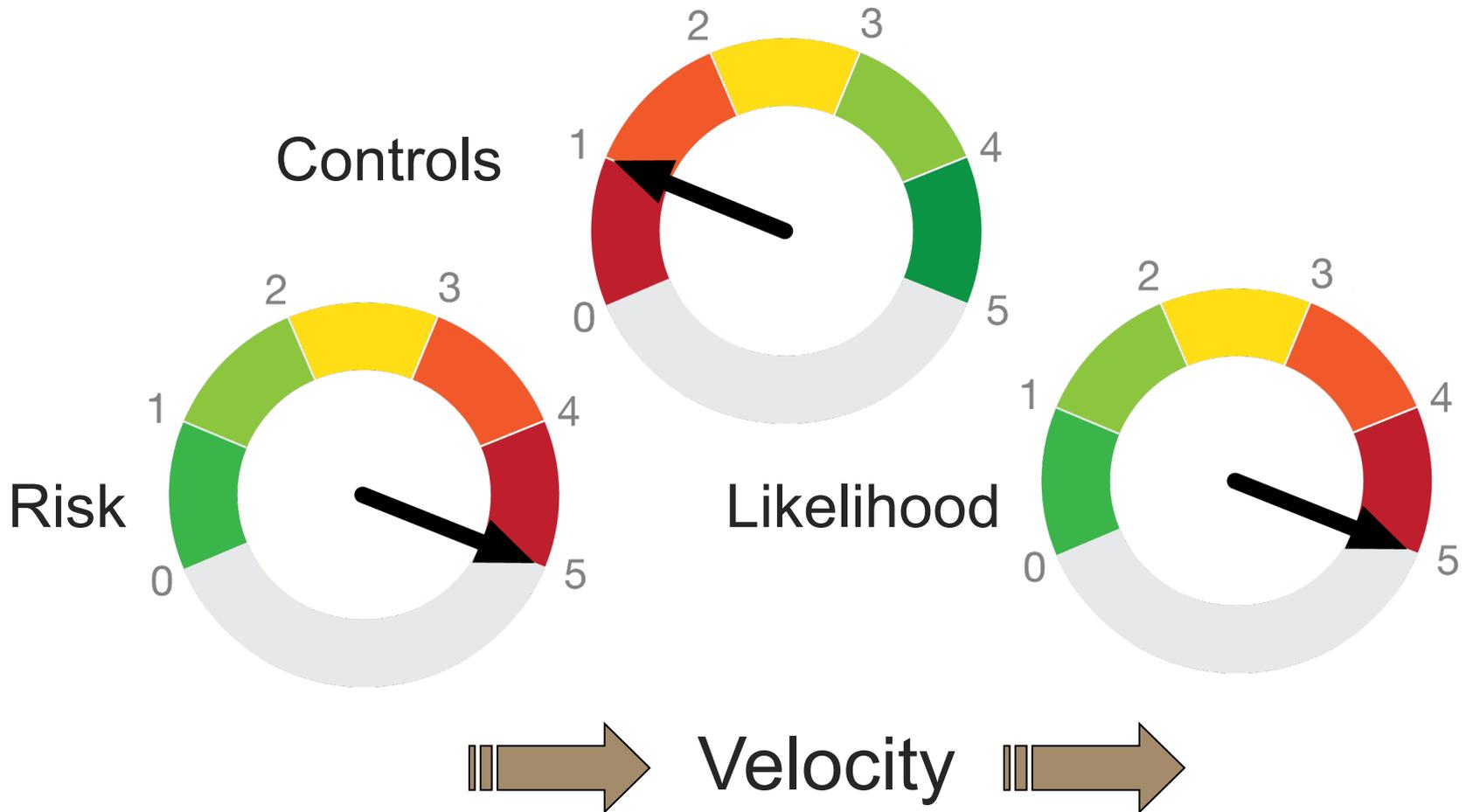


# The Institutional Perspective

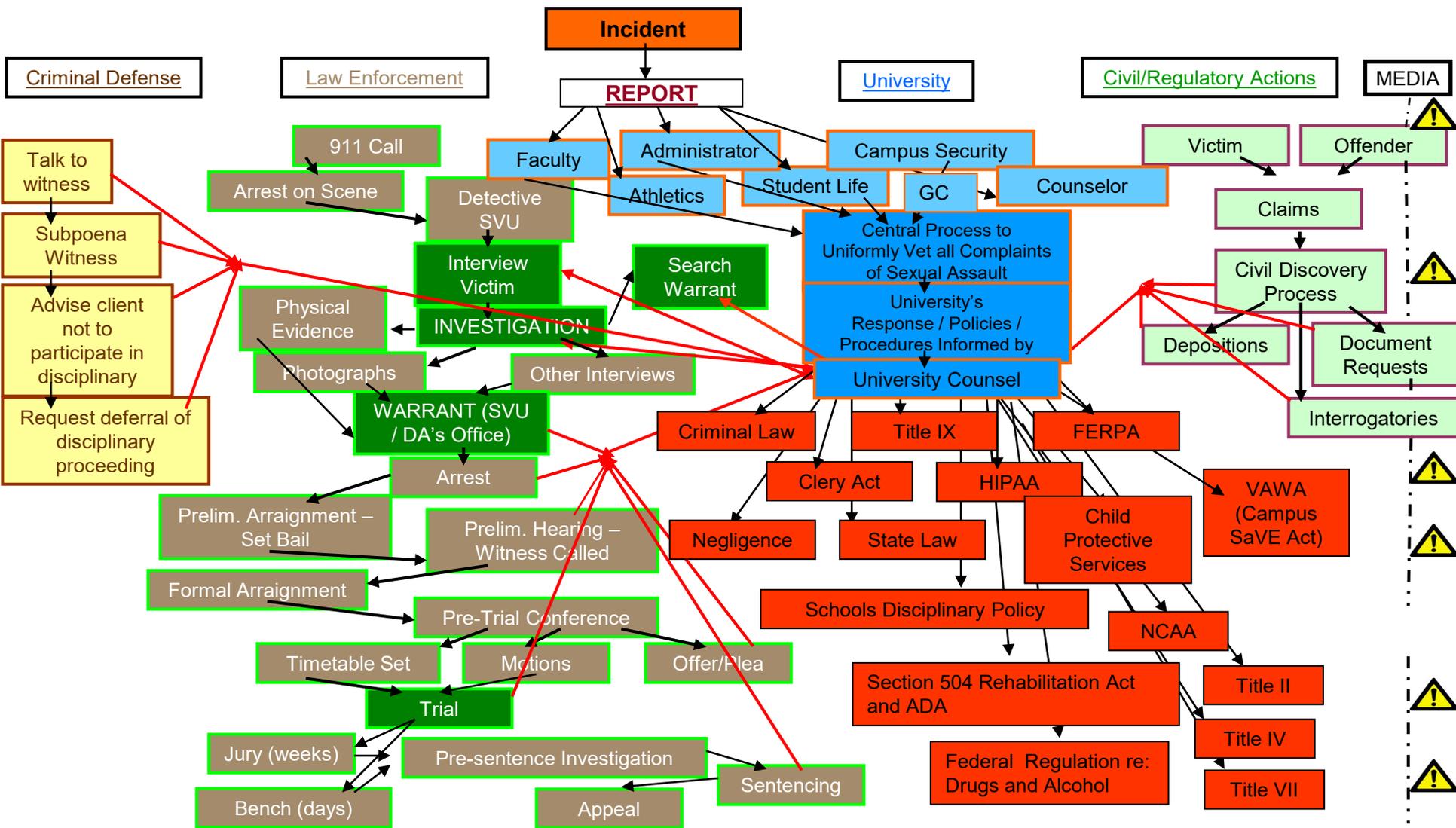


- Confidentiality and complainant/no consent
- Personal/emotional concerns
- Implementation and process concerns
- Coordination of constituencies
- Investigations
- Evaluating credibility
- Training
- Resources
- Reporting
- Policy concerns

# Risk, Likelihood, Controls, Velocity



# The Challenge of the Context

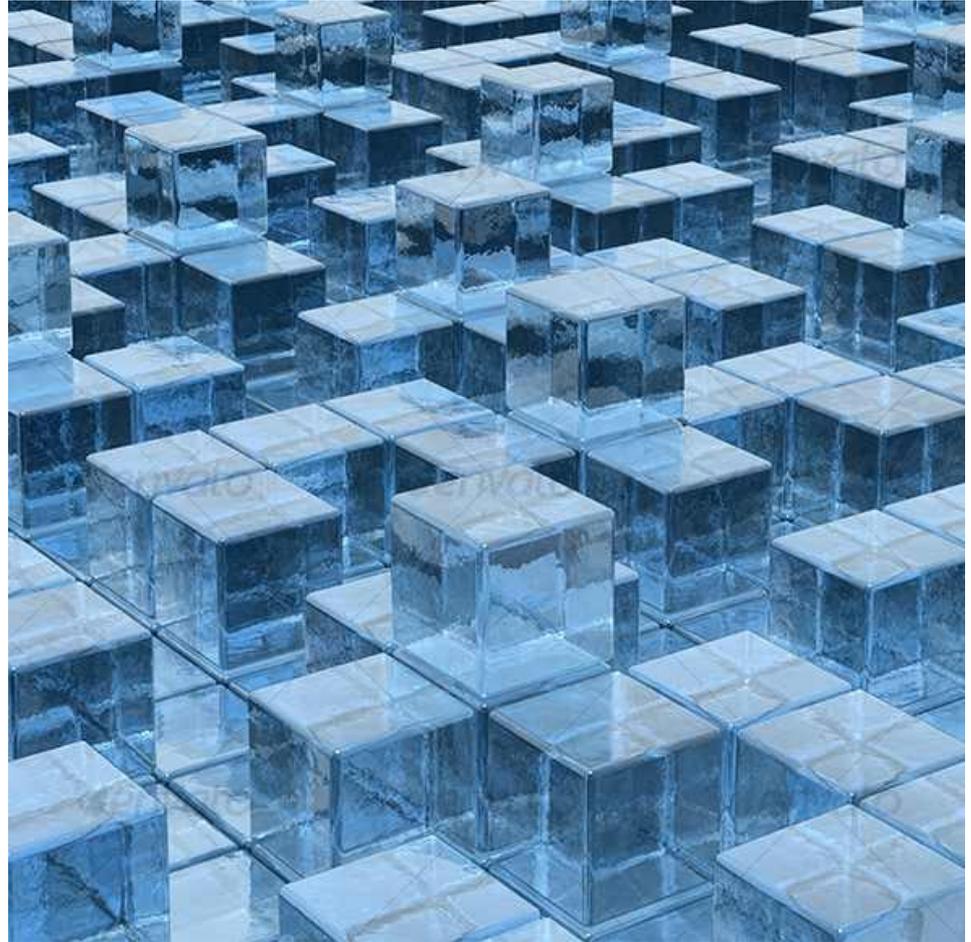


# Higher Education vs. Criminal Justice

- The Issue:
  - Word against word credibility cases
  - Little to no physical evidence
- The Institution:
  - All things to all people
  - Limited toolkit, skillset and resources
  - No ability to “pass”
  - No immunity
- The Law:
  - Conflicting and overlapping requirements
  - Law, implementing regulations, guidance
  - No standards of care re: implementation
- The Reality
  - Subjective assessments
  - Perception of institutional bias

# The Context

- Regulatory Framework
- Dynamics of Sexual Misconduct
- Individual Culture, Climate, History, Resources, Policies, Procedure, and Personnel of the Institution

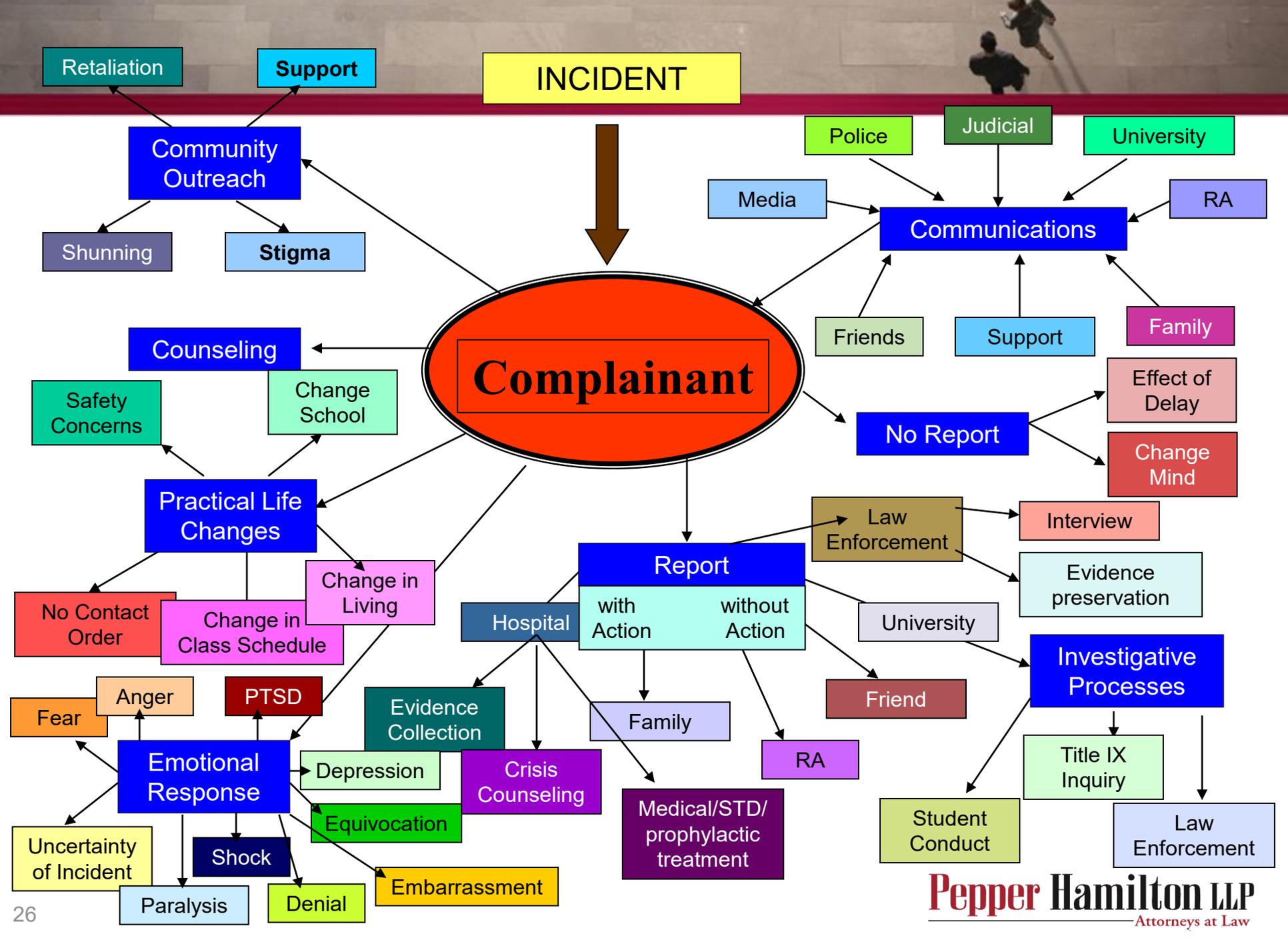


# The Regulatory Framework

- Title IX
  - Implementing Regulations
  - 1997 Guidance
  - 2001 Guidance
  - Dear Colleague Letters
  - Questions and Answers on Title IX and Sexual Violence (April 29, 2014)
  - Voluntary Resolution Agreements
- The Clery Act
- 2013 Amendments to the Violence Against Women Act (Campus SaVE Act)
- FERPA
- Federal and state laws
  - Criminal statutes (including child pornography)
  - Mandatory reporting of child abuse
  - Sex offender registration

# The Dynamics of Sexual Assault

- Nature of victimization
- Counter-intuitive victim behaviors
- Delay in reporting
- Wavering level of cooperation/recantation
- Role of drugs and alcohol
- Most sexual assaults committed by someone known to the victim
- Most sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation
- Likelihood of repeat offenders and undetected predators
- Concerns over false reports
- Little to no physical or forensic evidence
- Most common defense is consent
- Decisions based solely on credibility
- Inability to completely eliminate occurrence
- Emotionally charged and incendiary in nature



**INCIDENT**

**Complainant**

**Community Outreach**

Retaliation

Support

Shunning

Stigma

Counseling

Safety Concerns

Change School

**Practical Life Changes**

No Contact Order

Change in Class Schedule

Change in Living

Fear

Anger

PTSD

**Emotional Response**

Depression

Equivocation

Shock

Denial

Embarrassment

Paralysis

Hospital

with Action

without Action

Crisis Counseling

Medical/STD/prophylactic treatment

Family

Friend

RA

Police

Judicial

University

Media

RA

**Communications**

Friends

Support

Family

**No Report**

Effect of Delay

Change Mind

Law Enforcement

Interview

Evidence preservation

University

**Investigative Processes**

Title IX Inquiry

Law Enforcement

Student Conduct

# ALLEGATION



Student Conduct

Law Enforcement

Title IX Investigation

School

Parents

Peers

Information

Legal Rights

Community Reaction

Media

Questions  
?????

Support

Shunning

Attorney

Emotional Response

Practical Life Changes

Fear

Shame

Embarrassment

Financial

No Contact Order

Change in Class Schedule

Change Living

Denial

Anger

# CONSEQUENCES

Sanction

Arrest

Fine

Exoneration

Expulsion



- Each institution is unique in:
  - Institutional values
  - Policies and procedures
  - Resources
  - Personnel
  - Public vs. Private
  - Culture
  - Challenges
- OCR has high level mandates, but is not prescriptive
- Institutions have broad discretion in policies, procedures, structure and personnel
- Prevention and education programming and training can be tailored to the institution

# Regulatory Framework



# Title IX



## Title IX

- “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”
- Prohibits sexual harassment, including sexual violence and all forms of sexual misconduct
- Institutional obligation regardless of any law enforcement action
- Once school **knows or reasonably should know** about student or employee harassment that creates a hostile environment, school must take **immediate and corrective action** to:
  - Eliminate the harassment
  - Prevent its recurrence
  - Address its effects
- School must provide appropriate interim remedies to address safety and well-being of both parties prior to the final outcome of the investigation

# Conduct Covered Under Title IX



- Sexual discrimination and harassment
  - Verbal
  - Physical
  - Electronic
- Sexual violence
  - Rape
  - Sexual Assault
  - Exploitation
- Stalking
  - Cyberstalking
- Interpersonal violence
  - Intimate partner violence
  - Domestic violence
  - Dating violence
  - Relationship violence
- Retaliation
- Gender-based discrimination and harassment
- Bullying/hazing

# Scope of Coverage of Title IX



- Applies to **student-to-student** harassment based on hostile environment if conduct is sufficiently serious that it interferes with or limits a student or employee's ability to participate in or benefit from the school's program
  - The more severe the conduct, the less need there is to show a repetitive series of incidents to prove hostile environment, particularly if the harassment is physical (e.g. rape=hostile environment)
- Protects **third parties** from sexual harassment or violence in an institution's programs and activities
  - E.g.: Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall
- Prohibits discrimination/harassment **by or against faculty & staff**

# Scope of Title IX Coverage



- Title IX also prohibits **gender-based harassment**, including:
  - Acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, even if those acts do not involve conduct of a sexual nature
  - Sex-based harassment by those of same sex
  - Discriminatory sex stereotyping (e.g., harassment of LGBTQ students)

# Scope of Coverage of Title IX



- Protects students and employees in connection with all the academic, educational, extracurricular, athletic and other programs that occur:
  - On-campus
  - Off-campus activities that are school-related (school bus, class at another location, field trip)
  - On campus retaliation following an off-campus, non-school event

DCL, p. 3-4

# Scope of Title IX

- School must process **all** complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct:
  - occurred in the context of an education program or activity or
  - had **continuing effects** on campus or in an off-campus education program or activity
  - Even if there are no continuing effects of the off-campus sexual violence, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence
- School may need to gather additional information in order to make such a determination

Questions and Answers on Title IX and Sexual Violence, F-4, p. 29-30.

# Scope of Title IX



- “The **mere presence** on campus or in an off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment.”

Questions and Answers on Title IX and Sexual Violence, F-4, p. 29-30.

# Who Can File a Title IX Complaint



- A harassed student or employee
- The student's parent or guardian
- A third party
- Anyone who requests action on the student or employee's behalf

DCL, p. 4

# Who Enforces Title IX?



- Department of Education's Office for Civil Rights
- “The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.”
- Enforces laws that prohibit discrimination in education on basis of race, color, national origin (Title VI), sex (Title IX), disability (Section 504 and ADA) and age (Age Discrim. Act 1975)



- OCR actions include:
  - Investigating individual complaints
  - Conducting agency-initiated compliance reviews
  - Providing technical assistance to promote voluntary compliance
- Negative OCR findings can result in:
  - Department of Education proceedings resulting in loss of federal funding
  - Referral to Department of Justice

# 1997 Guidance

- Applicability of Title IX
- Liability of a school for sexual harassment
- Welcomeness
- Severe, persistent, or pervasive
- Notice
- Recipient's response
- Prompt and equitable grievance procedures
- First Amendment

**Once a school has notice of possible sexual harassment** of students — whether carried out by employees, other students, or third parties — **it should take immediate and appropriate steps to investigate** or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. **These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.**

# 2001 Guidance

- Comply with Title IX and Title IX regulations as a condition for receiving Federal financial assistance (p. 3)
- Agree that education programs or activities will be operated in compliance with Title IX regulations, including taking any action necessary to remedy discrimination or the effects of discrimination in programs (p. 3)
- Provide for prompt and equitable resolution of complaints of discrimination on the basis of sex (p. 19)
- Have a policy and grievance procedures that provide effective means for preventing and responding to sexual harassment (p. 19)
- Not hesitate to respond to sexual harassment in **the same reasonable, commonsense manner** as it would to other types of serious misconduct (p. iii)
- Designate at least one employee to coordinate efforts to comply with and carry out Title IX responsibilities and to ensure **consistent practices and standards** in handling complaints (p. 21)
- Make sure that all designated employees have adequate **training** as to what conduct constitutes sexual harassment, where to report it, and how the grievance procedures operate (p. 21)
- Ensure that employees are **trained** so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials (p. 13)
- Provide **training** for the larger school community to ensure that students, parents, and teachers can recognize harassment if it occurs and know how to respond (p. 17)

# 2001 Guidance

- Good judgment and common sense of teachers and school administrators are important elements of a response that meets Title IX requirements
- Doing nothing is always the wrong response
- Depending on the circumstances, there may be more than one right way to respond
- OCR always provides the school with actual notice and the opportunity to take corrective action before issuing a finding of violation
- Effectiveness is based on a reasonableness standard

# Dear Colleague Letter: Oct. 26, 2010



- Emphasized that “some student misconduct that falls under a school’s anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department’s Office for Civil Rights (OCR)... by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.”
- “Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.”
  - “Schools are responsible for addressing harassment incidents that it knows or reasonably should have known about.”
  - “A school has notice of harassment if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment.”
- Provides a road map as to what a school should do once it is aware of harassment incidents.

# Dear Colleague Letter: April 4, 2011



- A “significant guidance document” issued by the OCR
- Expands upon 2001 Revised Sexual Harassment Guidance
- OCR advises recipients to:
  - Examine current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in the DCL and the Revised Sexual Harassment Guidance issued in 2001; and
  - Implement changes as needed (p. 6)
- Provides a road map as to how OCR will evaluate whether a school is in compliance

# Dear Colleague Letter: April 4, 2011



- Grievance procedures must be prompt and equitable
- Investigation must be adequate, reliable, and impartial
- Both parties must have opportunity to present witnesses and other evidence
- Both parties must be afforded similar and timely access to any information that will be used at hearing
- All persons involved must have training or experience in handling complaints of sexual harassment and sexual violence and in the college's grievance procedures

# Dear Colleague Letter: April 4, 2011



- Intersection with the Family Education Rights and Privacy Act (FERPA)
  - After a college’s judicial process concludes, FERPA influences how colleges can relay the outcome to the complainant and the public
    - Both parties must be notified, in writing, about the outcome
    - FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student
    - Colleges cannot require a complainant to abide by a nondisclosure agreement
    - A postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense

# Dear Colleague Letter: April 24, 2013



- Retaliation against individuals who complain formally or informally to a college about potential civil rights violations or participate in an OCR investigation and/or proceeding is a violation of federal civil rights laws
  - Retaliation includes intimidating, threatening, coercing, or in any way discriminating against the individual
- If a federal funding recipient retaliated in violation of federal civil rights laws, the OCR will seek the recipient's voluntary commitment through a resolution agreement to take specific measures to remedy the violation
  - The resolution must ensure that the individual who was retaliated against receives redress and that the funding recipient complies with the prohibition against retaliation in the future
  - Monetary relief may be appropriate based on the facts of the case

# Dear Colleague Letter: April 24, 2013



- To ensure compliance in the future, the OCR could require the recipient to:
  - Train employees about the prohibition against retaliation and ways to avoid engaging in retaliation
  - Adopt a communications strategy for ensuring that information concerning retaliation is continually being conveyed to employees
  - Incorporate the prohibition against retaliation into relevant policies and procedures
  - Implement an outreach strategy to reassure the public that the recipient is committed to complying with the prohibition against retaliation

# Questions & Answers on Title IX and Sexual Violence



- Developed to answer questions that arose from the April 4, 2011 Dear Colleague Letter
- Explicit in its inclusiveness of **all** students at recipient institutions
- Significant guidance document
- Expands and increases the OCR's enforcement efforts
- Provides more proscriptive guidance

# Questions & Answers on Title IX and Sexual Violence



- School's obligation to respond
- Students protected by title IX
- Procedural requirements
  - Provides clarity on timing
- Responsible employees and reporting
- Confidentiality and obligation to respond
  - Provides a factors to consider when a complainant does not want to proceed
- Investigations and hearings
  - Favors investigative model
  - Clarifies the 60 day rule
  - Some use of rape shield exceptions
- Interim measures
- Remedies and notice of outcome
- Appeals
- Title IX training, education and prevention
- Retaliation

# Voluntary Resolution Agreements



- Notre Dame College, September 2010
- Eastern Michigan University, November 2010
- University of Notre Dame, July 2011
- Yale University, June 2012
- Xavier University, July 2012
- University of Montana, May 2013
- State University of New York, September 2013
- Tufts University, April/May 2014
- Virginia Military Institute, May 2014
- Cedarville University, June 2014
- The Ohio State University, September 2014
- Princeton University, November 2014
- Southern Methodist University, December 2014
- Harvard Law School, December 2014

# The Clery Act

- The Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f), enacted in 1990, requires schools that receive federal financial assistance—either directly or indirectly—to maintain and publish information about crime on or near their campus
- The purpose of the Clery Act is to provide students, their families, and employees with accurate, complete, and timely information about campus safety to better inform future decisions

# The Clery Act

- Clery requires that schools report offenses and disclose statistics for crimes that were reported to the local police and individuals designated as campus security authorities (CSAs)
- Reportable crimes include those that occurred on campus, in or on campus buildings or property, or on public property within or immediately adjacent to and accessible from the school's campus
- Reporting is required as long as there is a reasonable basis for believing the information
  - Does not need to have been investigated by the police or CSA
  - Does not require a finding of guilt or responsibility
  - Must be more than rumor or hearsay

# The Clery Act

- Schools must maintain a public daily log of all crimes reported to CSAs
- The report must contain information about:
  - Where the crime occurred
  - The type of crime
  - To whom the crime was reported
  - When the crime was reported
- Only sworn law enforcement can unfound a report
- When reporting sex crimes, the offenses should be divided into two categories: forcible and non-forcible
  - **Forcible sex offenses** include any sexual act directed against another person either forcibly and/or against that person's will. Examples are forcible **rape**, forcible sodomy, sexual assault with an object, and forcible **fondling**
  - **Non-forcible sex offenses** are against the person's will and the victim is incapable of giving consent. Examples include **incest** and **statutory rape**

# The Clery Act

- Schools must give a timely warning notification to the public for crimes that are a continuing threat to students and employees
  - The decision whether to warn should be made on a case-by-case basis taking into consideration the nature of the crime, the threat of continuing danger, and coordination with law enforcement
  - If a school concludes that a warning is appropriate, the warning should be made in a format that is reasonably likely to reach the entire campus community, e.g., e-mail, intranet, text message

# The Clery Act

- Develop educational programs to promote awareness of rape, acquaintance rape, and other forcible and non-forcible offenses
- Develop procedures students should follow if a sex offense occurs, including:
  - Reporting procedures
  - The importance of preserving evidence
- Provide information on a student's option to notify appropriate law enforcement authorities, ensuring that students know what this entails
- Provide notification to students that the university will assist them in notifying these authorities
- Provide notification to students of existing on and off campus counseling, mental health, or other student services for victims of sex offenses
- Duty to warn/timely warnings (not precluded by FERPA)
- Provide notification to students that the university will consider changing a victim's academic and living situation after an alleged sex offense, and the options for those changes if they are requested by the victim and are reasonably available
- Develop procedures for campus disciplinary action in cases of an alleged sex offense
- Make clear that the accuser and accused are entitled to the same opportunities during a disciplinary proceeding
- Inform the accuser and the accused of the outcome of any institutional disciplinary proceeding that is brought alleging a sex offense (not precluded by FERPA)
- Develop sanctions the university may impose following a final determination of an institutional disciplinary proceeding regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses

# Who Enforces Clery?



- Department of Education's Clery Act Compliance Division
  - Conducts investigations
  - Issues findings of violation
- Sanctions:
  - Civil penalties up to \$35,000 per violation
  - Limitation or suspension from participating in federal student financial aid programs
  - Loss of eligibility to participate in federal student aid programs



- Requires incidents of **domestic violence, dating violence and stalking** be disclosed in annual campus crime statistic reports
- Expands definition of reportable hate crimes to include bias based on a victim's **national origin or gender identity**
- In timely warning, must **withhold the names of victims** as confidential
- **Annual training** on issues related to domestic violence, dating violence, sexual assault and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability
- Institution may not retaliate, intimidate, threaten, coerce or discriminate against any individual for exercising rights or responsibilities
- Established collaboration between the DOJ, Education, and Health and Human Services to collect and disseminate best practices for preventing and responding to domestic violence, dating violence, sexual assault, and stalking
- Compliance by March 7, 2014
- Negotiated rulemaking finalized October 20, 2014
- Implementable July 1, 2015



- Statement of policy re:
  - Programs to prevent domestic violence, dating violence, sexual assault and stalking
  - Procedures institution will follow once incident has been reported
    - Standard of evidence
    - Possible sanctions or protective measures
    - Procedures victim should follow
    - Procedures for disciplinary action
    - Information about how institution will protect the confidentiality of victims
    - Written notice of resources
    - Written notice of accommodations
- The minimum standards for institutional **disciplinary procedures**:
  - Prompt, fair, and impartial investigation and resolution
  - Conducted by trained officials
  - Both parties entitled to same opportunities to have others present, including the opportunity to be accompanied by an advisor of their choice
  - Both parties shall be simultaneously informed in writing of
    - Outcome
    - Appeals procedures
    - Any change to the results that occurs prior to final resolution
    - When results become final

- Education programs shall include:
  - **Primary prevention** and awareness programs for all incoming students and new employees;
    - Statement of prohibition
    - Definitions of local jurisdiction
    - Definition of consent
    - Safe and positive options for **bystander intervention**;
    - Information on **risk reduction** to recognize warning signs of abusive behavior; and
  - **Ongoing prevention and awareness** programs for students and faculty
- Students or employees who report will receive written rights and options
  - Importance of preservation of evidence
  - How to report
  - Options re: law enforcement, including notice of option to notify or decline to notify law enforcement and to be assisted by campus authorities if **reporting a crime** to law enforcement
  - Obtain or enforce a **no contact** directive or restraining order
  - **Options to change** academic, living, transportation, or working situations to avoid a hostile environment, regardless of whether victim chooses to report the crime to campus police or local law enforcement
  - **Resources**: existing counseling, health, mental health, victim advocacy, legal assistance, and other services available both on-campus and in the community

# Definitions: Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
  - (1) The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
  - (2) For the purpose of this definition-
    - (i) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
    - (ii) Dating violence does not include acts covered under the definition of domestic violence.
  - (3) For the purposes of complying with the requirements of this section and section 668.41, any incident meeting this definition is considered a crime for the purposes of Clery Act reporting.

# Definitions: Domestic Violence



- (1) A felony or misdemeanor crime of violence committed--
  - (i) By a current or former spouse or intimate partner of the victim;
  - (ii) By a person with whom the victim shares a child in common;
  - (iii) By a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner;
  - (iv) By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or
  - (v) By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
- (2) For the purposes of complying with the requirements of this section and section 668.41, any incident meeting this definition is considered a crime for the purposes of Clery Act reporting.

# Definitions: Stalking



- (1) Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - (i) Fear for the person’s safety or the safety of others; or
  - (ii) Suffer substantial emotional distress.
- (2) For the purpose of this definition--
  - (i) *Course of conduct* means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person’s property.
  - (ii) *Substantial emotional distress* means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.
  - (iii) *Reasonable person* means a reasonable person under similar circumstances and with similar identities to the victim.
- (3) For the purposes of complying with the requirements of this section and section 668.41, any incident meeting this definition is considered a crime for the purposes of Clery Act reporting.

# Highlights from the Negotiated Rules



## Clarity in definitions and terms:

- Use of inclusive language
  - Removal of heteronormative he/she binary language
  - Definition of reasonable person: a person *under similar circumstances with similar identities* to the victim
- Streamlining of the UCR definitions to provide consistency and avoid redundancy
  - 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.”
  - Removal of sodomy and assault with an object
  - Now: rape, fondling, statutory rape and incest

# Highlights from the Negotiated Rules



- Provide the accuser and the accused with the **same opportunities** to have others present during any institutional disciplinary proceeding, including the opportunity to be **accompanied to any related meeting or proceeding by the advisor of their choice**
- **Not limit the choice of advisor or presence** for either the accuser or the accused in any meeting or institutional disciplinary proceeding
- However, the institution **may establish restrictions regarding the extent to which the advisor may participate** in the proceedings, as long as the restrictions apply equally to both parties
- Advisor means **any individual** who provides the accuser or accused support, guidance, or advice

# Highlights from the Negotiated Rules



## Procedures:

- Explicit provision noting that institutions **may extend** their reasonably prompt timeframes for **good cause** with written notice to the accused and accuser of the delay and the reason for the delay
- Language that allows institutions to share information about accommodations protective measures with others if necessary to implement them
- Must provide **timely notice** of meetings and **timely and equal access** to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings
- Must provide **rationale** for result and outcome

# Highlights from the Negotiated Rules



Programs to prevent dating violence, domestic violence, sexual assault, and stalking:

- Comprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault, and stalking that--
  - (i) Are culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome; and
  - (ii) Consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community and societal levels.

# Who Will Enforce VAWA?



- Department of Education's Clery Act Compliance Division
  - Ability to fine \$35,000 per violation for “Title IX” concepts embedded in VAWA
- How will this change the landscape?
- How will OCR and DOE work together on overlapping claims?

# White House Task Force: Overview



- White House Task Force to Protect Students from Sexual Assault
  - Mandate: To strengthen federal enforcement efforts and provide schools with additional tools to help combat sexual assault on their campuses
  - Focus on postsecondary schools
  - 90 day national conversation
  - Thousands participated
  - Function – “advisory only”

*January 22, 2014 White House Memoranda announcing Task Force*

# White House Task Force: Members



Co-chaired by designees from the Office of the Vice President and the White House Council on Women and Girls

- Attorney General
- Secretary of the Interior
- Secretary of Health and Human Services
- Secretary of Education
- Director of the Office of Science and Technology Policy
- Director of the Domestic Policy Council
- Cabinet Secretary
- Heads of agencies/offices as the Co-chairs may designate



## **ACTION STEPS AND RECOMMENDATIONS**

- **Identifying the Problem: Campus Climate Surveys**
- **Preventing Sexual Assault on Campus**
- **Responding Effectively** When a Student is Sexually Assaulted
- **Improving the Federal Government's Enforcement Efforts and Making Them More Transparent**

# White House Task Force Report



- Climate surveys
- Sample policy language
- Policy checklist
- Memorandums of understanding
- Victim services
- What to look for in the future
  - Increased enforcement efforts
  - Increased resources and support
  - “Our work continues”

# The Coordinated Institutional Response



# Key Elements

- Independent Title IX Coordinator
- Coordinated multi-disciplinary response team
- Delineation of confidential resources vs. reporting options
- Integration of reporting responsibilities:
  - Responsible employee
  - Campus Security Authority
  - Mandatory reporter of suspected child abuse
- Centralized reporting and review process
- Adherence to clear and easily accessible policies and procedures
- Trauma-informed investigations and practices
- Procedures for resolution that recognize:
  - Complainant autonomy/agency
  - Fundamental fairness
  - Remedies-based options
  - Sanctions-based options
- Communication and transparency to tend to the individual and community
- Consistent training, education, and prevention programs
- Tracking and monitoring of incidents and climate

# Integration and Coordination



# The Title IX Coordinator



- Coordinates the recipient's compliance with Title IX
- Responsibilities include:
  - Oversees all Title IX complaints
  - Identifies and addresses any patterns or systemic problems
  - Meets with students and employees as needed
- Should not have other job responsibilities that may create a conflict
- A school may designate more than one coordinator
  - Must have clearly delineated responsibilities
  - Must have titles reflecting supporting role

# The Title IX Coordinator



- Title IX coordinator must have appropriate authority, access, autonomy, and resources
- Oversight vs. in the weeds
- Structural considerations
  - Reporting structure and chain of command
  - Where do they sit?
- Use of deputy coordinators
  - Subject matter (policy, prevention, case management)
  - Procedure based (student, faculty, employee processes)
- Dedicated investigator?

# The Title IX Multi-Disciplinary Team



- Core stakeholders
  - Title IX Coordinator
  - Student conduct
  - Campus safety/police
  - Human resources
  - Dean of faculty
- Additional stakeholders
  - Campus mental health
  - Health center
  - Clergy
- Clearly delineated roles and responsibilities
- Plan in advance
- Coordinated communication
- Documentation and record-keeping
- Template communications
  - Cooperative complainant
  - Reluctant complainant
  - Third-party report



# The Title IX Team: Environment



- The gift of time
- Tone at the top
- Team building
- Resources – budget, personnel, materials, professional development
- Commitment and consistency
- Clear expectations and enforcement
- Development of the compassionate compliance

# Title IX Response Team Protocols

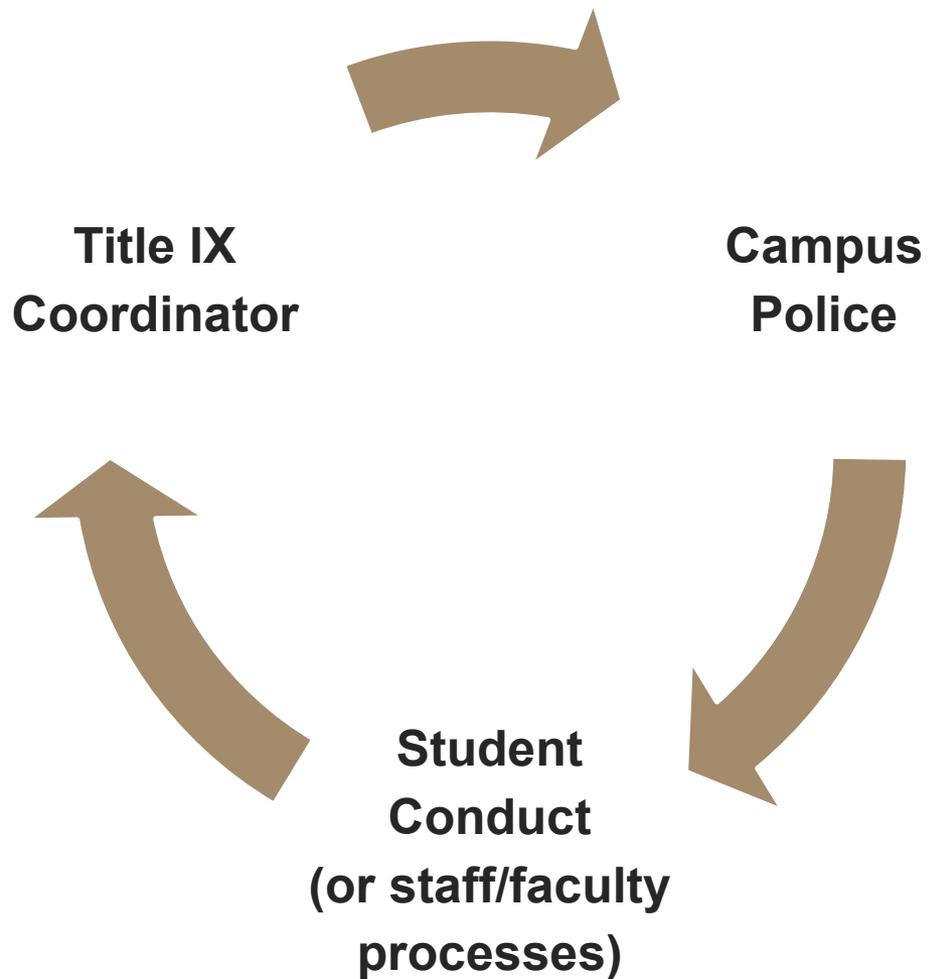


- Document reasoning of decisions made during the process (reinforce institutional memory of process)
- Sensitive and informed communication style
- Reinforce tone, content and choices in writing
- Follow-up communications
- Identify and integrate available sources of information

# Why Document?

- Support parties to process
- Informed communication among Title IX team
- Reflects compliance
- Contemporaneous record
- In the event of an OCR complaint - Document requests
  - To provide OCR with documentation that it implemented the above items within 15 calendar days. This includes a copy of the documents that the University adopted and provided notice of its revised Title IX grievance procedures, any agendas, outlines, handouts, and sign-in sheets from the training(s) provided to faculty and staff, a description of the qualifications of the presenters, a copy of the training program developed, and a copy of the notice sent out
  - To submit to OCR copies of the complete documentation of all sexual harassment investigations that the University conducted during the 2012-2013 and 2013-2014 academic years respectively, including but not limited to interview memoranda, investigation notes, evidentiary documents such as transcripts and records, written findings of fact and other conclusions, and appeal decisions

# Central Review Process/ Multi-disciplinary Team



# Support and Advocacy



- Provide balanced access to support and advocacy
  - Recommend dedicated victim advocate through campus or community
  - Identify dedicated resource for respondents
- Benefits of clearly defined and visible advocacy
  - Helps students feel tended to and connected to the process
  - Can help set and manage expectations

# Separation of Roles



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

# The Role of the Advocate



- For the complainant
  - Crisis intervention and support
  - Information and referral
  - Guidance about options
  - Regaining power and control
- For the campus
  - Visible message of commitment to the issues
  - Provide a network of resources
  - Connect to broader community
- During the interview
  - Comfort
  - Understanding
  - Support
  - Enhanced communications

# The Role of Student Affairs



- Interim remedies and accommodations
  - Residence modification
  - Academic accommodations and schedule modification
  - No contact directives
  - Link to counseling resources
- Process-based advice
  - Procedures
  - Options
  - Time frames
- Advisor to process (in addition to advocate)

# The Role of the Investigator



- School takes the lead
  - *Not* the burden of the complainant or respondent
- Goals:
  - Gather the most robust set of facts
  - Listen with an earnest intent to understand
  - Learn, not assume
  - Tend to the individual
  - Search for corroboration
  - Assess credibility
- A good investigator should be:
  - Objective
  - Fair
  - Impartial
  - Open-minded
  - Professional
  - Appropriate in demeanor
  - An active listener
  - Polite and respectful to *all* parties

# Confidential Resources



- Students or employees wishing to obtain confidential assistance may do so by speaking with professionals who are obligated by law to maintain confidentiality
- Confidential resources generally include medical providers, mental health providers, clergy, and rape crisis counselors
- Exceptions to confidentiality include:
  - Mandatory child abuse reporting
  - Tarasoff imminent risk of harm to self or others
  - State felony or sexual assault reporting



- All agents, employees, and volunteers participating in a domestic violence or sexual assault program shall maintain the confidentiality of:
  - the address, telephone number, and other identifying information of a shelter, safe home, and place of emergency safe housing;
  - name, address, telephone number, personally identifying information, and case file or history of any client receiving services from a domestic violence or sexual assault program; and
  - name, address, telephone number, and other identifying information of an agent, employee, or volunteer providing services under a domestic violence or sexual assault program.

N.D. Century Code § 14-07.1-18

# Confidential Resources

- OCR does not require campus mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student
- Professional counselors and pastoral counselors whose official responsibilities include providing mental-health counseling to members of the school community are not required by Title IX to report *any* information regarding an incident of alleged sexual violence to the Title IX coordinator or other appropriate school designee

(Questions and Answers on Title IX and Sexual Violence, Question E-3, p. 22)

# Non-professional Counselors or Advocates

- Includes all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers ("non-professional counselors or advocates"), including front desk staff and students
- OCR interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student's consent
  - Professional counselors or advocates are valuable sources of support for students
  - OCR strongly encourages schools to designate these individuals as confidential sources
- In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women's centers, health centers
- Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student

(Questions and Answers on Title IX and Sexual Violence, Question E-3, p. 22-24)

# Confidential Resources vs. Reporting Options



- Confidential Resources
  - Medical services
  - HIPAA
  - Mental health/counseling
  - Clergy
  - Rape crisis counselor
- Structural Challenges
  - Employees with multiple hats, e.g., counselor and administrator
- Reporting Options
  - Emergency for safety, physical, or emotional
  - Dedicated campus access points
    - Title IX
    - Campus safety/police
    - Student conduct
    - Human resources
  - To any school employee
  - Anonymous
  - Law enforcement

# Integration of Reporting Responsibilities



- Clery: Campus Security Authority
- Title IX: Responsible Employee
- Mandatory Child Abuse Reporting
- State Law Violations
- Streamline messaging and communications to set consistent expectations
- Simplify training objectives and programming
- Reinforce central reporting to allow professionals to respond in a consistent manner
- Eliminate ad hoc responses

# Training: Reporting Responsibilities



- Identify and notify who is in each category
- Training
  - First response
  - Where to report
  - What to report
  - What happens when reporting
  - Documentation?
- Oversight
- Responsibility

# Title IX: Responsible Employee



- A school is on notice if a responsible employee **knew or should have known** about harassment that creates a hostile environment
- Responsible Employee
  - Has the **authority** to take action to redress harassment
  - Has the **duty** to report sexual harassment or other misconduct
  - Is someone an individual **could reasonably believe** has this authority or responsibility
- Whether an employee is a responsible employee or whether it would be reasonable for a student to believe the employee is, even if the employee is not, will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and school practices and procedures, both formal and informal.

2001 Revised Sexual Harassment Guidance

# Title IX: Responsible Employee



- Accordingly, schools need to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials
- Training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported

2001 Revised Sexual Harassment Guidance

# Title IX: Responsible Employee



- A responsible employee **must** report incidents of sexual violence to the Title IX coordinator or other appropriate school designee
- Title IX coordinator **must** be informed of all reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office
- A responsible employee **must** report *all relevant details* about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation, including:
  - The names of the alleged perpetrator (if known)
  - The student who experienced the alleged sexual violence
  - Other students involved in the alleged sexual violence
  - Relevant facts, including the date, time, and location

(Questions and Answers on Title IX and Sexual Violence, Question D-1, D-3, p. 14-16)

# Title IX: Responsible Employee



- In evaluating whether an employee is a responsible employee, consider school policies and procedures to:
  - Determine if employee has the general authority to take action to redress misconduct or the duty to report misconduct to appropriate school officials, as well as whether students could reasonably believe that employee has this authority or duty
  - Determine whether school has informed students employee is generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct to the Title IX coordinator or other appropriate school officials
  - Determine if employee has an obligation to report other student violations of school policy (e.g., drug and alcohol violations or physical assault)
- If an employee is required to report other misconduct that violates school policy, then the employee would be considered a responsible employee obligated to report incidents of sexual violence that violate school policy

(Questions and Answers on Title IX and Sexual Violence, Question D-5, p. 17-18)

# Clery: Campus Security Authority



- “Campus security authority” is a Clery-specific term that encompasses four groups of individuals and organizations associated with an institution:
  - A campus police department or a campus security department of an institution
  - Any individual(s) who have responsibility for campus security but who do not constitute a campus police department or a campus security department (guard, escort, etc.)
  - Any individual or organization specified in an institution’s statement of campus security policy as an individual or organization to which students and employees should report criminal offenses
  - An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings

# North Dakota Mandatory Child Abuse Reporting



- Enumerated professionals required to report when a reporter **has knowledge of or reasonable cause to suspect** that a child is abused or neglected if the knowledge or suspicion is derived from information received by that person in that person's official or professional capacity
- Reporter can be anonymous and reporter's identity is maintained as confidential
- Reports involving known or suspected institutional child abuse or neglect must be made and received in the same manner as all other reports made under this chapter
- Protections against retaliation in the institutional setting



## Some states require reporting of:

- All felonies
- All sexual assaults or homicides on campus

## Some states require reporting by:

- Health care professionals based on nature of report by patient
  - Typically sexual assault with physical injury

# The Responsible Employee as First Responder



- Empathetic listening
  - Thank you for sharing this with me.
  - I am sorry you are going through this.
  - Let me help you get to the right place.
- I will share this information to:
  - Make sure you get the support and resources needed
  - Put you in contact with
    - university personnel who will explain your options on and off campus
- Coordinate transportation for medical examination, law enforcement report, and/or preservation of evidence
- Reassure that a report to the university does not take away the student's ability to choose how to proceed

# Stop, Drop, and Roll



- **Stop:** Assess safety and need for emergency response
  - How long ago did the incident happen?
  - Is there an immediate safety threat?
  - Is there a need for immediate medical attention?
- **Drop:** Document the report
  - Take basic information as to who, what, when, where
- **Roll:** Roll it out to the Title IX team
  - Get the report to the professionals
  - Triggers the university's response

# Leave It to the Professionals



- Allow the experienced and trained professionals to:
  - Conduct independent investigation or gather facts without direction from supervisor
  - Counsel the accused or reporting party
  - Notify the accused of allegations
  - Explain to an involved party how the process works
- Please avoid the temptation to:
  - Discuss the information with other individuals
  - Mediate between the parties or third parties
  - Encourage a party not to file a report
  - Take any action other than necessary immediate steps

# Centralized Review Process



- Coordination of information and personnel
  - Clearly delineated roles and responsibilities
  - Build in regular and open lines of communication
  - Sequence events in advance
- Separate support and advocacy from investigation and adjudication
- Template communications
- Central tracking for patterns
- Documentation/records
- Ensure consistent implementation:
  - Accommodations
  - Protective measures
  - Investigative practices
  - Sanctions
  - Community remedies
- Transparency in outcomes

# Integration and Coordination



# Title IX Assessment



- Assess immediate safety and well-being
- Gather basic facts
- Notify of right to contact or decline to contact law enforcement and seek medical treatment
- Notify of importance of preservation of evidence
- Enter into daily crime log
- Assess for timely warning
- Identify resources
- Offer accommodations
- Provide process options
- Assess for pattern
- Ascertain complainant's wishes
- Discuss barriers to proceeding
- Evaluate individual vs. campus safety
- Assign advocate/support person

# The Institutional Response



- Procedures for resolution that recognize:
  - Complainant autonomy/agency
  - Fundamental fairness
    - Notice
    - Opportunity to be heard
    - Opportunity to respond
- Remedies-based options
- Discipline-based options
- Balance in process
  - Complainant and respondent entitled to the same opportunities to have others present during a disciplinary proceeding
  - Provide parties with the same rights in regard to the participation of lawyers
  - If a school provides for appeal of the findings or remedy, it must do so for both parties
  - Consistent with FERPA, notify both parties, in writing, about the outcome of both the complaint and any appeal

# Remedies-based Resolution



- Remedies-based:
  - Voluntary; cannot compel cooperation
  - Complainant may end at any time
  - May not use mediation for sexual assault
  - Does not result in disciplinary action against the respondent
  - Can be an effective means of eliminating, preventing, and addressing harassment

# Authority for “Informal” Response



- Once a school has notice of possible sexual harassment . . . it should take **immediate and appropriate steps to investigate or otherwise determine what occurred and take steps** reasonably calculated to **end** any harassment, **eliminate** a hostile environment if one has been created, and **prevent** harassment from occurring again
- **These steps are the school's responsibility** whether or not the student who was harassed makes a complaint or otherwise asks the school to take action

1997 Guidance

- **Good judgment and common sense** of teachers and school administrators are important elements of a response that meets the requirements of Title IX
- Doing nothing is always the wrong response
- Depending on the circumstances, there may be **more than one right way to respond**

2001 Guidance

# Authority for “Informal” Response



- Grievance procedures may **include informal mechanisms** for resolving sexual harassment complaints if the parties **agree** to do so
- Not appropriate for a complainant **to be required** to work out the problem directly with the respondent
  - Not without **appropriate involvement** by the school
- Complainant must be notified of the **right to end** the informal process at any time
- In sexual assault, **mediation** will not be appropriate even on a voluntary basis

2001 Guidance, p. ;21; DCL, p. 8-9

# “Authority” for “Informal” Response

- Yale:
  - **If informal process(es) are available**, the option for complainants to bypass an informal process for a formal process at any point, per the complainants’ discretion
  - No complainant will be required to have **face-to-face interaction** with an alleged perpetrator in any informal resolution or **mediation** involving a complaint of sexual assault
- Xavier:
  - To assure that the University will not use **mediation and other informal mechanisms** to resolve allegations of sexual assault, and **to only offer an informal process to resolve other types of sexual harassment complaints on a voluntary basis** when appropriate, with notification of the right to end the informal process at any time and begin the formal stage of the complaint process

# “Authority” for “Informal” Response

- SUNY:
  - Revise grievance procedures to include:
    - **Investigation** of complaints when the complainant does not choose to proceed with an informal or formal resolution or a hearing;
    - **An obligation to make reasonable efforts to investigate** and address instances of sex discrimination when it knows or should have known about such instances, regardless of complainant cooperation and involvement
  - Clarification that **any informal resolution mechanism** set forth in the procedures will only be used if the parties voluntarily agree to do so:
    - Complainant **should not be required to resolve the problem directly** with the respondent;
    - Some **instances when the informal resolution mechanism may be inappropriate** (e.g., mediation is prohibited in cases of sexual assault, and *those involving a student complaining of sexual harassment against an employee in a position of authority over the student*); and
    - Complainant must be notified of the **right to end the informal process** at any time and begin the formal stage of the complaint process.

# Discipline-based Resolution



- When to move forward with an investigation
- Scope of the investigation:
  - Threshold vs. finding of fact
- Adjudication
  - Administrator, hearing panel, or external adjudicator
  - Preponderance of the evidence
- Appeal
  - Individual or committee?
  - Grounds
- 60 day timeframe

# Tending to the Individual



- Tend to the individual through:
  - Practices informed by an understanding of the impacts of trauma and the dynamics of sexual assault
  - Regular communications
  - Ensuring appropriate support through an advocate, advisor, or support person
  - Adhering to time frames and communicating regarding delays
  - Implementing appropriate interim protections and remedies

# Tending to the Individual



- Understanding the student perspective for complainants and respondents
  - Build in a debrief
  - Seek feedback through broad-based community engagement
  - Allow for anonymous feedback

# The Confidentiality Conundrum



# The Confidentiality Conundrum



- A school should take requests for confidentiality seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence.

(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 20)

# The Dynamics of Trauma



- Nature of sexual and gender-based harassment and violence
  - Delay in reporting
  - Barriers to reporting and proceeding with formal action
  - Reluctance to report to law enforcement
- Schools should be mindful that traumatic events such as sexual violence can result in delayed decision-making by a student who has experienced sexual violence.

(Questions and Answers on Title IX and Sexual Violence, Question E-2, p. 20-21)

- Hence, a student who initially requests confidentiality might later request that a full investigation be conducted.

(Questions and Answers on Title IX and Sexual Violence, Question E-2, p. 20-21)

# Institutional Obligation



## Complainant may:

- Request anonymity
- Not share the name of the respondent
- Request that no investigation occur
- Request that no complaint be pursued
- Decline to participate or share information
- Decline law enforcement notification

## Institution must:

- Take all reasonable steps to investigate
- Inform complainant that ability to respond may be limited
- Balance request against competing considerations
- Pursue other steps to limit the effects of the alleged harassment and prevent its recurrence

# The Confidentiality Conundrum



- When honoring a complainant's request:
  - School should still take all reasonable steps to respond to the complaint consistent with the student's confidentiality request and determine whether interim measures are appropriate or necessary
  - May limit the school's ability to respond fully to an individual allegation of sexual violence

(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 20)

# The Confidentiality Conundrum



- Balancing competing considerations
  - Agency and autonomy of an adult complainant/victim/survivor
  - Fundamental fairness/due process of the respondent
  - Broader responsibility to campus safety
- Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention

(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 19)

# The Confidentiality Conundrum



- Title IX coordinator is generally in the best position to evaluate confidentiality requests
- School may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests
- School should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them

(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 19)

# The Confidentiality Conundrum



- Schools should inform and obtain consent from the complainant... before beginning an investigation

(DCL, p. 5)

- OCR strongly supports a student's interest in confidentiality in cases involving sexual violence

(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 18)

- There are situations in which a school must override a student's request for confidentiality in order to meet its Title IX obligations

(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 18-19)

- Disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence

(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 18-19)

# The Confidentiality Conundrum



- “If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take **all reasonable steps** to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation.”
- If complainant requests confidentiality, school should inform complainant:
  - Ability to respond may be limited
  - School will take steps to prevent retaliation and take strong responsive action if it occurs

(DCL, p. 5)

# The Confidentiality Conundrum



- Evaluate a request for anonymity in the context of institution's responsibility to provide a safe and nondiscriminatory environment for all students
- Inform the complainant if confidentiality cannot be ensured
- Pursue other steps to limit the effects of the alleged harassment and prevent its recurrence

(DCL, p. 5)

# The Confidentiality Conundrum



- If a student requests that his or her name not be revealed to the Respondent or asks that the school not investigate or seek action against the alleged Respondent, the school **should**:
  - Inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the Respondent
  - Explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs

(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 19)

# The Confidentiality Conundrum



- “Thus, the school may weigh the request for confidentiality against:
  - The seriousness of the alleged harassment
  - The complainant’s age
  - Whether there have been other harassment complaints about the same individual
  - The alleged harasser’s rights to receive information about the allegations if the information is maintained by the school as an “education record” under FERPA.”

(DCL, p. 5)

# The Confidentiality Conundrum



- When weighing a student's request for confidentiality that could preclude a **meaningful** investigation or potential discipline of the Respondent, a school should consider a range of factors:
  - Circumstances that suggest there is an increased risk of the Respondent committing additional acts of sexual violence or other violence
    - Whether there have been other sexual violence complaints about the same Respondent
    - Whether the Respondent has a history of arrests or records from a prior school indicating a history of violence
    - Whether the Respondent threatened further sexual violence or other violence against the student or others
    - Whether the sexual violence was committed by multiple Respondents

# The Confidentiality Conundrum



- Circumstances that suggest there is an increased risk of future acts of sexual violence under similar circumstances
  - Whether the student's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group).
- Whether the sexual violence was perpetrated with a weapon
- Age of the student subjected to the sexual violence
- Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence)

(Questions and Answers on Title IX and Sexual Violence, Question E-2, p. 21-22)

# The Confidentiality Conundrum



- School should take all reasonable steps to respond to the complaint consistent with the request
- May limit the school's ability to respond fully to an individual allegation of sexual violence
- Steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the Respondent or revealing the identity of the student complainant include:
  - Providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred;
  - Providing training and education materials for students and employees;
  - Changing and publicizing the school's policies on sexual violence; and
  - Conducting climate surveys regarding sexual violence.
  - Putting a Respondent on notice of allegations of harassing behavior without revealing, even indirectly, the identity of the student complainant

(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 20)

# The Confidentiality Conundrum

- School must determine **whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students**, including the student who reported the sexual violence
  - If the school has **credible information** that the alleged perpetrator has committed **one or more prior rapes**, the **balance of factors** would compel the school to investigate the allegation of sexual violence, and if appropriate, pursue disciplinary action in a manner that may require disclosure of the student's identity to the alleged perpetrator

(Questions and Answers on Title IX and Sexual Violence, Question E-2, p. 21-22)

# The Confidentiality Conundrum

- School must determine **whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students**, including the student who reported the sexual violence
  - If the school has **no credible information about prior sexual violence** committed by the alleged perpetrator and the alleged sexual violence was not perpetrated with **a weapon** or accompanied by **threats** to repeat the sexual violence against the complainant or others or **part of a larger pattern at a given location or by a particular group**, the **balance of factors** would likely compel the school to respect the student's request for confidentiality

(Questions and Answers on Title IX and Sexual Violence, Question E-2, p. 21-22)

# The Confidentiality Conundrum



- It is important for an institution to manage expectations and provide information regarding confidentiality and its limits to campus communities before an incident occurs or a report is made.

# A Practical Response

- Ensure policies clearly identify reporting options and support resources both on and off campus
- Delineate confidential resources vs. non-confidential reporting options in policy and training
- Ensure all employees are familiar with Title IX reporting expectations
- Offer clear and easy to follow guidance about what happens when a report is received
- Foster a climate that encourages reporting by providing consistency in message, policy, procedure, and outcome

# Training



# Training: 1997 and 2001 Guidance



- Make sure that all designated employees have **adequate training** as to what conduct constitutes sexual harassment, where to report it, and how the grievance procedures operate. 1997/2001
- Ensure that employees are **trained** so that those with authority to address harassment know how to **respond appropriately**, and other responsible employees know that they are obligated to report harassment to appropriate school officials. 2001



- Specific training for **implementers** and **adjudicators** relating to the school's grievance procedures and its proper response to complaints of sexual harassment and sexual violence.

2011 DCL at 4, 7-8, 12; Title IX Q&A at 38-42.

- Title IX requires adequate, reliable, and impartial investigations that are conducted by **investigators** with **sufficient experience or training**.

2011 DCL at 9-12.

# Training: Dear Colleague Letter 4/4/11



- Students, faculty and staff must be trained on policy and grievance procedures: who, what, when, how, where
- Ensure that **all persons involved in implementing grievance procedure** (e.g. Title IX Coordinators, investigators, and adjudicators) have training in the **recipient's grievance procedure**
- Ensure that **all persons involved in implementing grievance procedure** (e.g. Title IX Coordinators, investigators, and adjudicators) have in training in **confidentiality requirements**
- In **sexual violence cases**, the **fact-finder and decision-maker** should have **adequate training or knowledge regarding sexual violence**

# Training: Q & A on Title IX and Sexual Violence



- No minimum number of hours required for Title IX and sexual violence training at every school
- Training should be provided on a regular basis
- Each school should determine based on its particular circumstances:
  - How such training should be conducted
  - Who has the relevant expertise required to conduct the training
  - Who should receive the training
- Ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX
- Should also have methods for verifying that the training was effective



## School should ensure that:

- **Responsible employees with the authority to address** sexual violence know how to respond appropriately to reports of sexual violence
- **Other responsible employees** know that they are obligated to report sexual violence to appropriate school officials
- **All other employees** understand how to respond to reports of sexual violence
- **Professional counselors, pastoral counselors, and non-professional counselors or advocates** also understand the extent to which they may keep a report confidential

# Training: Q & A on Title IX and Sexual Violence (Employees)



- Practical information about how to prevent and identify sexual violence, including same-sex sexual violence
- The behaviors that may lead to and result in sexual violence
- The attitudes of bystanders that may allow conduct to continue
- The potential for revictimization by responders and its effect on students
- Appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language
- The impact of trauma on victims
- The person(s) to whom such misconduct must be reported
- Responsible employees' reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, as well as provide the contact information for the school's Title IX coordinator
- Responsible employees should inform students of:
  - the reporting obligations of responsible employees; students' option to request confidentiality and available confidential advocacy, counseling, or other support services;
  - Their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement

# Training: Q & A on Title IX and Sexual Violence (Implementers)



- All persons involved in implementing a school's grievance procedures (*e.g.*, Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures.

Q & A, J-3.

# Training: Q & A on Title IX and Sexual Violence (Implementers)



- Working with and interviewing persons subjected to sexual violence
- Information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence
- The proper standard of review for sexual violence complaints (preponderance of the evidence)
- Information on consent and the role drugs or alcohol can play in the ability to consent
- Importance of accountability for individuals found to have committed sexual violence
- Need for remedial actions for the perpetrator, complainant, and school community
- How to determine credibility
- How to evaluate evidence and weigh it in an impartial manner
- How to conduct investigations
- Confidentiality
- The effects of trauma, including neurobiological change
- Cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds

Q & A, J-3.

# Training: Q & A on Title IX and Sexual Violence (Students)



- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies
- The school's definition of consent applicable to sexual conduct
- How the school analyzes whether:
  - Conduct was unwelcome under Title IX
  - Unwelcome sexual conduct creates a hostile environment
- Reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting
- The school's grievance procedures
- Disciplinary code provisions and the consequences of violating those provisions
- Effects of trauma, including neurobiological changes
- The role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence
- Strategies and skills for bystanders to intervene to prevent possible sexual violence
- How to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance
- Title IX's protections against retaliation

# Training: Q & A on Title IX and Sexual Violence (Implementers)



- In rare circumstances, employees involved in implementing a school's grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school's training.
- For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school's current grievance procedures may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school's grievance procedures.
- In-depth knowledge regarding Title IX and sexual violence is particularly helpful.

Q & A, J-3.

# Training: Q & A on Title IX and Sexual Violence (Implementers)



- Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school's grievance procedures have the requisite training or experience is for the school to provide **regular training to all individuals involved in implementing the school's Title IX grievance procedures even if such individuals also have prior relevant experience.**

Q & A, J-3.

# Training: The Clery Act

- Develop educational programs to promote awareness of rape, acquaintance rape and other forcible and non-forcible offenses



- Education programs **should** include:
  - **Primary prevention** and awareness programs for all incoming students and new employees;
    - Statement of prohibition
    - Definitions of local jurisdiction
    - Definition of consent
    - Safe and positive options for **bystander intervention**;
    - Information on **risk reduction** to recognize warning signs of abusive behavior; and
  - **Ongoing prevention and awareness** programs for students and faculty.

- The minimum standards for institutional **disciplinary procedures**:
  - **Prompt, fair, and impartial investigation and resolution**
  - **Conducted by trained officials**
  - Both parties entitled to same opportunities to have others present, including the opportunity to be accompanied by an advisor of their choice
  - Both parties shall be simultaneously informed in writing of
    - Outcome
    - Appeals procedures
    - Any change to the results that occurs prior to final resolution
    - When results become final

Section 304 of the VAWA Reauthorization Act of 2013



- In addition, VAWA requires **annual** education of implementers on:
  - the issues related to domestic violence, dating violence, sexual assault and stalking
  - how to conduct an investigation and hearing process that:
    - protects the safety of victims and
    - promotes accountability.

Section 304 of the VAWA Reauthorization Act of 2013

# Training and Support – Title IX Team



- Support Title IX compliance team members
  - Environment
  - Resources
  - Training
- Consider **content** and **types** of training
  - Online, in person and other training options
  - Mandatory vs. discretionary training
  - Who conducts the training? Should it be outsourced?
- Develop coordinated response protocols

# Training: Strategic Planning



- Who to train?
- All campus constituents
  - Students
    - First years
    - Returning students
  - Faculty
  - Staff
    - New hires
- Implementers
- Adjudicators
- Investigators

# Training: Strategic Planning



## Structure

- Deputy for Training (oversees student, faculty and staff training)
- Ownership of process
- Coordinates training resources

## Mandatory vs. discretionary training

- Essentials
- Tailored needs

## Calendar

- Annual trainings
- Ongoing follow-ups

# Training: Strategic Planning



## Multi-modalities

- Debriefs
- Online
- Conferences
- On-campus, in-person

## Identify and scaffold topics

- Primer
- Prioritize follow-up topics

## Trainers

- Identify internal resources
- Affordable and quality subject matter experts

# Training: Strategic Planning



- Relevant, coordinated and consistent message
- Consider benchmarking for standard of care
  - Content,
  - Nature and type,
  - Frequency
  - New compliance obligations
- Produce Training Manual – law, guidance, policies, procedures, trainings, articles, template communications, checklists

# Training: Communications



- Communications
  - Tone, content and timing
  - Campaign, branding, materials
  - In person, website, paper, poster, magnets
  - Radio, television, web, film
  - Core constituencies – students, faculty, staff, administration, board, alumni
    - Case participants
    - General Education and Training
  - Community partners – local law enforcement, advocacy groups, local hospitals
  - Regional Office for Civil Rights

# Your Homework



- Identify your team
- Assess your policies
- Assess your structure
- Review prior cases
- Engage your community
  - Students
  - Faculty
  - Staff
  - Leadership
  - Local partners
- Make a plan with measurable action items:
  - Task force
  - Consider external policy audit
  - Constituency survey
  - Training and education schedule

# Questions & Answers



# Overview of Day Two



- Investigations
- Dynamics of Sexual Assault, Harassment, Intimate Partner Violence & Stalking
- Investigative Protocols
- Forensic Interviewing
- Trauma Informed Investigative Practices
- Evaluating Credibility
- The Role of the Adjudicator
- Coordination with Law Enforcement

# Investigations



# The Changing Times



- The traditional student conduct model of asking each party to write their own statement, conducting little to no additional investigation, and requiring a student to present their own case at a panel hearing may not satisfy Title IX mandates.
- The lack of a competent and thorough investigation has the potential of leading to inequitable findings by a panel that bases a decision on incomplete development of facts or reliance on information that is not fully developed or supported by other corroborative information.

# “Investigation”

- The process used to resolve sexual violence complaints
- Includes the fact-finding investigation and any hearing and decision-making process the school uses to determine:
  - (1) whether or not the conduct occurred; and,
  - (2) if the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include:
    - imposing sanctions on the Respondent; and,
    - providing remedies for the complainant and broader student population.

Questions and Answers on Title IX and Sexual Violence, F-1, p. 24-26.

# Title IX Grievance Procedures



- Separate grievance procedures are not required...
  - So long as they comply with the prompt and equitable requirements of Title IX (DC, p. 8)
- A school's investigation and hearing processes cannot be equitable unless they are impartial (DCL, p. 12)
- Any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed (DCL, p. 12)

# Title IX Grievance Procedures



- Must afford a prompt and equitable resolution
- Can use:
  - Student disciplinary procedures
  - General Title IX grievance procedures
  - Sexual harassment procedures
  - Separate procedures to resolve sexual violence complaints

Questions and Answers on Title IX and Sexual Violence, C-5, p. 14.

# Title IX Grievance Procedures

- Provisions for adequate, reliable, impartial and prompt investigation of complaints
  - Include the opportunity for both parties to present witnesses and evidence
  - Provide interim measures before the final outcome of the investigation
  - Provide periodic updates on the status of the investigation
  - Apply preponderance of the evidence

Questions and Answers on Title IX and Sexual Violence, A-5, p. 3; C-5, p. 12-14.

# Balance and Equity

- A balanced and fair process that provides the same opportunities to both parties will lead to **sound and supportable** decisions
  - Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.
  - If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties
  - If the school permits one party to submit third-party expert testimony, it must do so equally for both parties.
  - If the school provides for an appeal, it must do so equally for both parties.
  - Both parties must be notified, in writing, of the outcome of both the complaint and any appeal

Questions and Answers on Title IX and Sexual Violence, F-1, p. 24-26.

# Role of the Investigator

- Investigator takes the lead on the investigation
  - Not the burden of the complainant or respondent
- Goals:
  - To gather the most robust set of facts
  - To listen with an earnest intent to understand
  - To learn, not assume
  - To tend to the individual
  - Search for corroboration
  - Assess credibility
- Key tasks:
  - Manage expectations
  - Regular and timely communications
- Documentation/Report
  - Verbatim/“quotes”
  - Areas of agreement and disagreement
  - To record or not to record?

# Who Investigates?

- Who investigates?
  - Student conduct
  - Campus safety/police
  - Attorney
  - Dedicated Title IX investigator
  - EEO/Human Resources
  - Social worker
  - External investigator
  - Title IX Coordinator?
- Scope of investigation:
  - Fact-gathering only
  - Threshold
  - Preliminary or advisory
  - Final finding
- May vary based on role of respondent
  - Student
  - Staff
  - Faculty

# Internal Investigator



## Pros:

- Cost effectiveness
- Familiarity with institution, personnel, policies, practices, values and history
- Minimize workplace disruption
- Capacity to implement and monitor recommendations

## Cons:

- Objectivity
- Perceived institutional bias
- Distrust of “inside” investigator
- Time commitment
- Capacity and experience
- Comfort/ability to ask difficult questions

# External Investigator



## Pros:

- Expertise
- Independence
- Credibility
- Focus
- Time

## Cons:

- Cost
- Less institutional control
- Distrust of the “outsider”
- Lack of familiarity with institution

# Scope of the Investigation



- Investigation may include, but is not limited to:
  - Conducting interviews of the complainant, the alleged perpetrator, and any witnesses;
  - Reviewing law enforcement investigation documents, if applicable;
  - Reviewing student and personnel files; and
  - Gathering and examining other relevant documents or evidence

# Investigation



- The specific steps in an investigation will vary depending upon:
  - The nature of the allegations
  - The source of the complaint
  - The age of the student(s)
  - The size and administrative structure of the school
  - Other factors
- In all cases, the inquiry must be prompt, thorough, impartial, adequate (DCL) and reliable (DCL)
- Whether it is reasonable for the school to investigate in response to a third party report will vary depending upon:
  - Source and nature of the information
  - Seriousness of the incident
  - Specificity of the information
  - Objectivity and credibility of the source
  - Whether individuals can be identified
  - Whether individuals want to pursue the matter

2001 OCR Guidance

# Scope of the Investigator's Role



- Does the investigator merely gather evidence?
- Does the investigation make credibility determinations?
- Does the investigator make findings of fact?
- Does the investigator make findings as to policy violations?
- Does the investigator make recommendations of sanctions?
- Is there a separate adjudicator?
- Is the adjudicator bound by the investigator's findings?

# Who Adjudicates?

- Manner of adjudication
  - Investigative model
  - Individual official or administrator as adjudicator
  - Hearing panel
- Composition of panel
  - Students?
  - Faculty?
  - External professionals?
- Imposition of sanctions/remedies
  - Investigator?
  - Panel?
  - Disciplinary authority?
- Considerations in sanctioning
  - Guidelines?
  - Presumptive?
  - Mandatory?
- Appeals?

# Burden of Proof



Beyond a Reasonable Doubt

Clear and Convincing Evidence

Preponderance of the Evidence

Some Evidence

# Burden of Proof



- More likely to be true than not
- More probable than not
- The greater weight of the evidence
- Tipping the scale ever so slightly
- 51 %
- Based on the more convincing evidence and its probable truth or accuracy, not on the amount
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

# Prompt Response



- “Designated and reasonably prompt time frames for the major stages of the complaint process” (DCL, p. 9)
- “Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint” (DCL, p. 12)
- “Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment” (DCL, p. 12)”

# Prompt Response

- The 60-calendar day timeframe for investigations is based on OCR's experience in typical cases
- Refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community
- Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school's response was prompt and equitable as required by Title IX

Questions and Answers on Title IX and Sexual Violence, F-8, p. 31-32.

# Prompt Response

- OCR does not require a school to complete investigations within 60 days
- Rather, OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable
  - Will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct
  - Investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks
  - A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.
- Because timeframes for investigations vary and a school may need to depart from the timeframes designated in its grievance procedures, both parties should be given periodic status updates throughout the process.

Questions and Answers on Title IX and Sexual Violence, F-8, p. 31-32.

# Dynamics of Sexual Assault, Harassment, Intimate Partner Violence & Stalking



# Recap re: Statistics



- Every case is unique in its facts and circumstances
- In *every* case, we should ensure an adequate, reliable and impartial investigation
- In *every* case, we should apply independent judgment and common sense to reach a determination based on all of the known facts
- We may *never* punt to statistics to help us with the hard calls

# Staggering Statistics

- **35 out of every 1000 women are sexually assaulted**  
*DOE Summary of Crime Statistics*
- **3383 sex offenses were reported by college students in 2009**  
*DOE Summary of Crime Statistics*
- **80% to 90% are acquaintance rape and involve drugs or alcohol**  
*DOJ, National Institute of Justice, 2005*
- **“nearly half of America's 5.4 million full-time college students abuse drugs or drink alcohol on binges at least once a month.”**  
*National Center on Addiction and Substance Abuse at Columbia University 2007*

# Prevalence in the LGBTQ Community

- Lesbians and gay men reported intimate partner violence and sexual violence over their lifetimes at levels equal to or higher than those of heterosexual individuals
- Bisexual women (61.1 percent) report a higher prevalence of rape, physical violence, and/or stalking by an intimate partner compared to both lesbian (43.8 percent) and heterosexual women (35 percent)
- Of the bisexual women who experienced intimate partner violence, approximately 90 percent reported having only male perpetrators, while two-thirds of lesbians reported having only female perpetrators of intimate partner violence

National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, January 25, 2013

# The Dynamics of Sexual Assault



- Nature of victimization
- Counter-intuitive victim behaviors
- Delay in reporting
- Wavering level of cooperation/recantation
- Role of drugs and alcohol
- Most sexual assaults committed by someone known to the victim
- Most sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation
- Likelihood of repeat offenders and undetected predators
- Concerns over false reports
- Little to no physical or forensic evidence
- Most common defense is consent
- Decisions based solely on credibility
- Inability to completely eliminate occurrence
- Emotionally charged and incendiary in nature

# Sexual Assault on College Campuses



- Most sexual assaults are committed by someone known to the complainant
- Most sexual assaults result in delayed reporting or no report at all
- Most sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation due to drugs or alcohol
- Most sexual assaults lack physical evidence
- Most common defense is consent

# Most Sexual Assaults Are Committed By Someone Known to the Complainant

- **Between 73% and 80% of rape cases, the complainant knew the perpetrator.** National Institute of Justice, 2000, 2005 National Crime Victimization Survey.
- **90% of college women who were complainants of sexual assault knew their attacker prior to the assault.** Bureau of Justice Statistics, 2000, National Commission on Substance Abuse at Colleges and Universities.
- **Among rape complainants, only 16.7% of female and 22.8% of male complainants were raped by strangers.** The 2006 National Crime Victimization Survey.
- **67% of women who were sexually assaulted identified their perpetrator as a non-stranger.** Callie Rennison, National Crime Victimization Survey: Criminal Victimization
- **8 out of 10 complainants of sexual assault know their assailant.** Callie Rennison, Rape and Sexual Assault: Reporting to Police and Medical Attention
- **6 out of 10 sexual assaults occurred in the complainant's home or at the home of someone known to them.** Michael Rand & Shannan Catalano, Criminal Victimization, 2006
- **80-90% of sexual assaults on campus are non-stranger sexual assaults.** DOJ, National Institute of Justice, 2005.

# Non-Stranger Sexual Assault



- Force is typically not physical
- Does not involve use of weapons
- Force likely to be moral, intellectual, emotional or psychological
- Often plays upon vulnerability that arises from intoxication of complainant
- Relationship issues greatly affect delay in reporting
- Varying degrees of relationship/trust

# Most Sexual Assaults Lack Physical Evidence

- **5% of forcible rape complainants have serious physical injury.** Callie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000.*
- **Most complainants of sexual assault either delay seeking or do not seek medical treatment.** Callie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000.*
- **There is typically little physical corroborating evidence in acquaintance rape prosecutions.** (Corinne Casarino, *Civil remedies in Acquaintance Rape Cases*, 6 *B.U. Pub. Int. L.J.* 185, 189 (1996).)

# Absence of Trauma



- Heger:
  - 2384 children referred for possible sexual abuse
  - Less than 4% had of children evaluated for CSA had diagnostic medical findings
  - Girls more likely to disclose abuse than boys
  - Older children more likely to disclose abuse than younger children
  - Older children more likely to disclose penetration
- Kellogg:
  - *Normal Does Not Mean Nothing Happened*
  - Review of 36 **pregnant** adolescents presenting for sexual abuse evaluations
  - 5 % definitive findings of penetration
  - 60 % normal or non-specific findings
  - 22 % inconclusive findings

Heger, A. et al. Child Abuse and Neglect 26(2002)645-659.

Kellogg et al. Pediatrics 2004;113:e67.

# Why Exams May Be Normal



- Nature of assault may not be damaging
  - Grooming of complainant
  - Increasing sexual nature of contact
  - Most sexual assault is physically atraumatic
- Perception of “penetration”
  - In vs. on
  - Vulvar/Gluteal Coitus
- Disclosure may be delayed
  - Days to years after assault
- Complete healing can occur
  - Most superficial injuries heal without residual effects
  - Healed lacerations may be a fraction of original size when repair complete
  - Similar to biting inside of cheek
- Perpetrator wants continued access to the complainant
- Body is doing is what it is designed to do

# Understanding Physical Evidence



- Criminalistics Laboratory: Blood, Rape Kit, Saliva, Physical Evidence (clothing & bedding)
- Rape Kit: P-30, prostatic acid phosphatase, seminal fluid
- DNA Identification Laboratory
- DNA: included, excluded, or cannot be excluded
- Forensic Evidence:
  - “For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.” (DCL, p. 12, n. 30)

# Counter-Intuitive Victim Behaviors



- It is unlikely that a complainant will be a “perfect victim”
- Demeanor may range from:
  - hysteria
  - crying
  - rage
  - laughter
  - calmness
  - unresponsiveness
- There is no one typical reaction

# Counter-Intuitive Victim Behaviors



- Limited or no verbal or physical resistance offered
  - Paralyzing fear or terror
  - Disbelief/denial/disassociation
  - Belief that it escalate the offender's actions
  - Preservation of dignity
- Displaying non-victim like behavior after the event
  - Shock/disbelief
  - Rush to normalization
  - Fear of offender reaction

# Counter-Intuitive Victim Behaviors



- Questioning of event and actions:
  - I should/shouldn't have . . .
  - Why did/didn't I . . .
- Effect of victim's own misconceptions:
  - I led him on . . .
  - Not enough force/no weapon used . . .
  - Not a stranger . . .

# Counter-Intuitive Victim Behaviors



- Effect of power differential
- Preservation of dignity
- Cultural or religious influences
- Processing of incident not linear
- Flat affect at hearing panel
  - May suppress emotions to hide effect
  - May have become immune to retelling account
  - May be a factor of stage of recovery

# Understanding the Impacts of Trauma



- What is trauma?
  - A response to an event that a person experiences, witnesses, or confronts with actual or threatened death or serious injury, or threat to physical integrity of oneself or others.
  - Response often includes intense fear, helplessness, or shock
- Trauma . . . .
  - Can result in a disorganization of the person's mind
  - Can cause one to lose the ability to process information if not addressed
  - Can affect every aspect of one's life
  - Is linked to depression, anxiety, poor health....and more victimization
  - Can lead to negative coping behavior

# Understanding the Impacts of Trauma



- Difficulties of Processing Trauma
  - Response may vary as a result of accumulating incidents or other personal stress
  - Age at time of assault
    - Human brain does not complete development until age 25
  - Way others view the incident
- Impacts on memory
  - Stress affects how a brain establishes, stores and retrieves memories
  - Major trauma may lead to fragmented recall
  - Differences in account over time may reflect memory processes rather than inattentiveness or deceit

# Understanding the Impacts of Trauma



- Sexual assault victims areas of loss
  - Physical
  - Social
  - Emotional
  - Financial
  - Academic
- Difficulty in decision-making based on:
  - Self-blame
  - Fear
  - Anger
  - Heightened vulnerability
- Intensity of reactions:
  - Thoughts of costs
  - Resources
  - Friend/family response
  - Time involved
  - Reliving the event
  - Emotional/psychological impact creates a roadblock to behavior
  - Violation deepens – takes no or little action

# Stages of Recovery

- Initial Shock: physical and emotional range of reactions from withdrawal to highly expressive emotions
- Denial (pseudo-adjustment): wanting to forget about the assault, attempting to continue normal routine to quiet inner turmoil
- Reactivation: prompted my memories or recurring feelings; may include flashbacks, a sense of vulnerability, mistrust, physical complaints
- Anger: towards self, friends, society, legal system, the respondent
- Integration: thoughts and feelings become integrated into life experience and an individual begins to move forward

Adapted from Ann Franke, Sexual Misconduct Complaints, 17 Tips for Student Discipline Adjudicators

# Sexual Assaults Are Grossly Under Reported

- **60% of all sexual assaults are unreported.** Callie Rennison, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000.
- **Only 25% of intimate partner sexual assaults are reported.** Michael Rand & Shannan Catalano, Criminal Victimization, 2006.
- **Rape/sexual assaults by strangers are more likely to be reported to police than those committed by intimate partners, relatives, friends or acquaintances.** Bureau of Justice Statistics Special Report, March 2003
- **1 in 6 men and 1 in 4 women will experience a sexual assault in his or her lifetime.** Bureau of Justice Statistics 2000.
- **35 out of every 1000 women are sexually assaulted.** DOE Summary of Crime Statistics.
- **1 in 5 women will be raped in her college career.** DOE Summary of Crime Statistics.
- **52% of gay men and lesbians reported at least one incident of coercion by a same-sex partner.** National Crime Victimization.

# Delay in Reporting



- Delay in reporting
  - Expectation of prompt/fresh complaint
  - Did the victim understand the significance of the act?
- Consider barriers to reporting
  - Ask the why without judgment
  - Help me understand . . .

# Barriers to Reporting



- Fear of not being believed
- Fear of retaliation
- Fear a loss of privacy
- Fear of being blamed
- Incident may be trivialized
- Incident may be minimized
- Self-doubt:
  - Who to tell?
  - How to report?
  - When to report?
  - Why report?
- Ensure process for reporting that is:
  - Known to victims
  - Convenient for victims
  - Professional
  - Victim-centered
  - Private

# Barriers to Reporting

- *My mother said that's what happens when you drink.*
- *I thought I was at fault because I didn't lock my door.*
- *I had a party and he came. It must be my fault.*
- *I was drinking with him. He will say we just got drunk and had sex.*
- *I let him give me a ride home and I invited him in for a bit. Maybe I led him on.*
- *I have been sexually assaulted before...guess I just deserve it.*
- *I don't want to be "that girl"*

# Disclosure

- A process where an individual reveals abuse or assault
- On-going, not a one time event
- Denial, tentative, active, recantation, reaffirmation
- Accidental – victim's secret is found out
- Purposeful – victim makes decision to tell
- Understand the real life repercussions of disclosing
- How was disclosure received?
- Recantation does not end the investigation or process

# Triggers for Accidental Disclosure



- Act is witnessed by another individual
- Victim tells friend or confidant, who reports abuse
- Victim is questioned after witness observes incident or interaction
- Letter/journal/diary found by parent/friend
- Medical concerns (STD, pregnancy)

# Triggers for Purposeful Disclosure



- Sexual education program at school or church
- Disclosure by friend or peer of their own sexual abuse
- Perpetrator leaves the campus or no longer has access to victim
- Perpetrator returns to victim's life after absence
- Desire to protect friends or others at risk
- Anger
- Maturity
- Medical concerns (STD/pregnancy)



- **Recantation is NORMAL**
- Don't be shocked when victim recants or waivers – be shocked when they don't!
- Tremendous actual & emotional costs of disclosure
- Possibility that recantation is real
- Does NOT end the investigation or the process

# Direct Causes of Recantation



- Complainant is blamed by family, friends, or respondent
- Direct threats to complainant by respondent/others
- Indirect threats (shunning) to complainant by community members
- Complainant is stigmatized, labeled or the object of ridicule on campus
- Pressure by any individual to recant
- Emotional blackmail by respondent (I'll be kicked out of school)

# Indirect Causes of Recantation



- Love for the respondent
- Loss of offender in life
- Fragmented peer group/community
- Effect on family members (sadness/depression)
- Lack of support by family
- Feeling guilty/responsible
- Fear of testifying
- Does not have desire or emotional fortitude to endure process
- Change in living conditions
- Change in financial status
- Change in school, neighborhood, circle of friends
- Multiple interviews & medical procedures
- Does not want respondent to suffer consequences
- Does not want to relive incident again
- Only wanted abuse to stop
- Just wants life to get back to normal

# False Reports



- **Estimates for the percentage of false reports in sexual misconduct cases – 2-8%** False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault. Lonsway, Ambolt, and Lisak
- **Statistics on false reports rates range from 1.5% to 90%.** Rumney, 2006
- **Query the reliability of these statistics based on:**
  - Definition
  - Credibility of review
  - Criteria
  - Sample

# Intimate Partner Violence



- Intimate partner violence is often referred to as dating violence, domestic violence or relationship violence
- Intimate partner violence includes any act of violence or threatened act of violence against a person who is, or has been involved in, a sexual, dating, domestic or other intimate relationship with the Respondent
- It may involve one act or an ongoing pattern of behavior.
- Intimate partner violence may take the form of threats, assault, property damage, stalking, violence or threat of violence to one's self, one's sexual or romantic partner or to the family members or friends of the sexual or romantic partner

# Intimate Partner Violence



- 25% of all women and 8% of all men have been victims of IPV
- 64% of violent acts against women (rape, physical assault, and stalking) were perpetrated by an intimate partner
- Women between ages 16 – 24 experience the highest rate of IPV.
- 32% of college students are victims of IPV.
- 1/3 of college students report physically assaulting a dating partner in previous 12 months.

(NVAW Survey, 2000)

# Stalking

- Between 1 in 4 and 1 in 6 women and 1 in 13 and 1 in 19 men have experienced stalking victimization at some point during their lifetime in which they felt fearful and/or believed that they or someone close to them would be harmed or killed
- 66% of female victims and 41% of male victims of stalking are stalked by a current or former intimate partner
- More than half of female victims and more than 1/3 of male victims of stalking indicated that they were stalked before the age of 25
- About 1 in 5 female victims and 1 in 14 male victims experienced stalking between the ages of 11 and 17

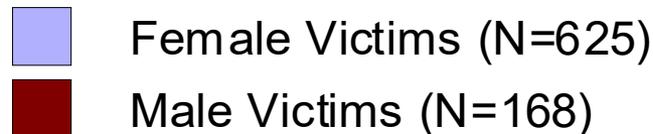
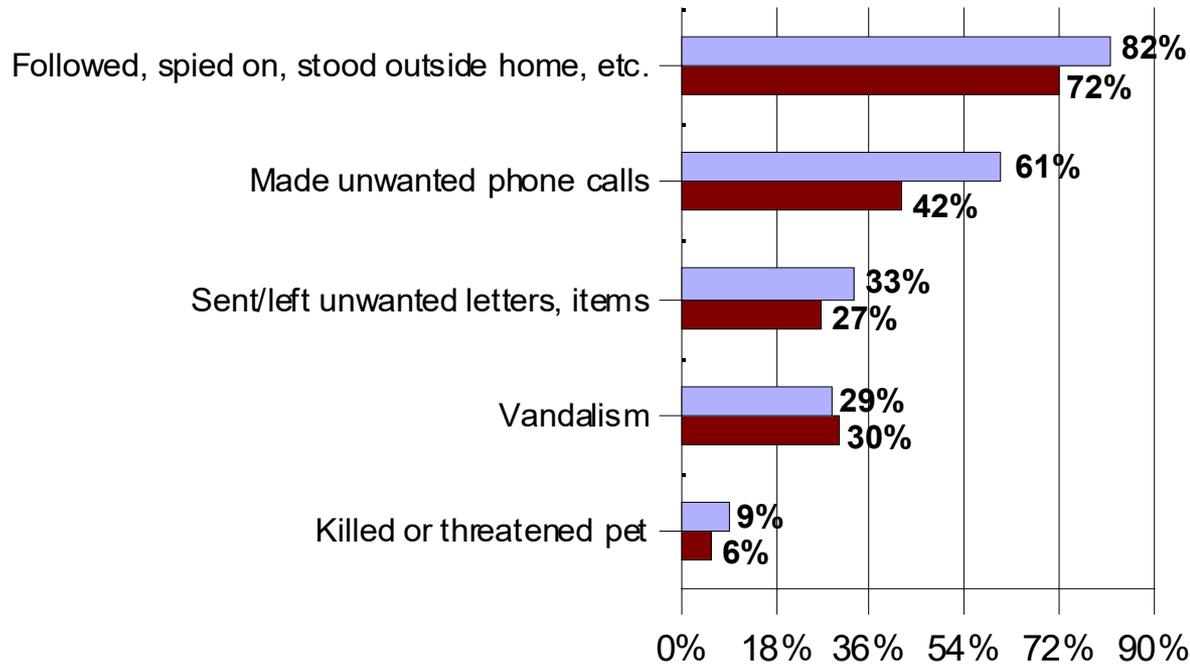
Michele C. Black et al., "The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report," (Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 2011)

# Intimate Partner Violence: Stalking



## Stalking Behaviors

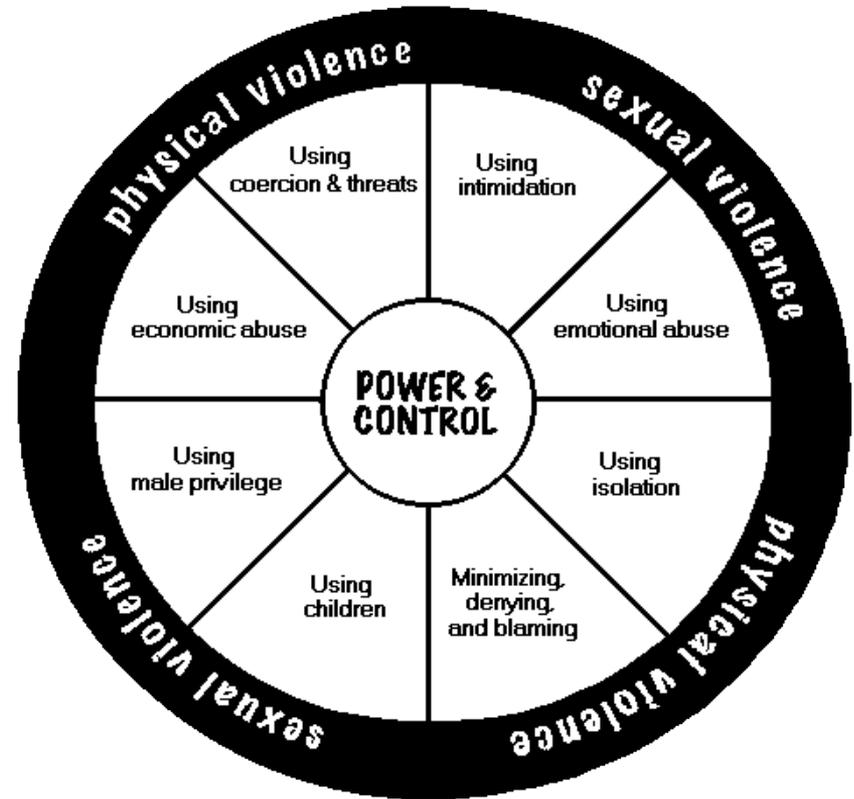
Percentage of cases



Margolis Healy & Associates LLC

# Intimate Partner Violence

- Power, Control & Authority
- Domination
- Isolation
- Verbal & Physical Abuse



# Complainant's Word Alone

- Complainant's word alone sufficient to sustain burden of proof – preponderance of the evidence.
  - “A single instance of sexual harassment is sufficiently severe to create a hostile environment.” (DCL, p. 3)
- The word of a complainant need not be corroborated, if it is believed by the fact-finder:
  - Most states have a statute or case law supporting this proposition
- The law recognizes the nature of sexual offense:
  - Behind closed doors
  - No witnesses
  - No physical evidence

# Understanding Predatory Behavior



- Extremely adept at identifying “likely” complainants, and testing prospective complainants’ boundaries;
- Plan and premeditate their attacks, using sophisticated strategies to groom their complainants for attack, and to isolate them physically;
- Use “instrumental” not gratuitous violence; they exhibit strong impulse control and use only as much violence as is needed to terrify and coerce their complainants into submission;
- Use psychological weapons – power, control, manipulation, and threats – backed up by physical force, and almost never resort to weapons such as knives or guns;
- Use alcohol deliberately to render complainants more vulnerable to attack, or completely unconscious

Lisak D. & Miller P. M. (2002) *Repeat rape and multiple offending among undetected rapists.*

# Defenses to Sexual Assault



- Fabrication (It didn't happen)
  - Used when there is no corroborating physical or eyewitness evidence
- Identification (Someone else did it)
  - Used when there is corroborating physical evidence to establish that act occurred
- Consent
  - Used when there is DNA or other identification evidence
- Consent is the most common defense in acquaintance rape prosecutions.

Corinne Casarino, Civil remedies in Acquaintance Rape Cases, 6 B.U. Pub. Int. L.J. 185, 189 (1996).

# Investigative Protocols



# Investigative Protocols



- Developing an investigation plan
- Maintaining a working chronology
- Building a timeline
- Communications
- Documenting interviews
- Gathering physical evidence
- Investigative report
- Privacy and retaliation considerations

# Developing an Investigative Plan



- Develop an investigative plan at the outset
- Make list of witnesses and order of interviews
- Make list of other possible sources of evidence
  - How will the evidence be obtained
- Use checklists to ensure that all possible sources of evidence are considered

# Developing an Investigative Plan



- Explore multiple sources for potential witness interviews:
  - Complainant
  - Respondent
  - Any witnesses to the alleged incident
  - Any witnesses to the disclosure(s)
  - First responder personnel
    - Hospital
    - Police
    - Campus
  - Any other alleged victims of the respondent
  - Any witnesses to relevant prior contact between Complainant and Respondent
  - Other witnesses identified through interviews

# Developing an Investigative Plan



- Maintain flexibility and revise the plan as the investigation reveals other potential sources of evidence
- Look for continually evolving evidence
  - Social media
  - Recent contact between the Complainant and the Respondent
  - Acts of retaliation

# Developing an Investigative Plan



- Be mindful of timeliness and schedule interviews immediately
  - Leave time for follow-up interviews
  - Memories generally do not improve with time
  - Limit effect of witnesses talking to one another
  - Assume there will be delays outside of your control and plan accordingly

# Maintaining a Working Chronology



- Maintain a chronology of the investigation including dates/times of interviews, meetings, requests for evidence, receipt of evidence, and all other key events
- Ensure that the investigation is completed within the institution's time frame

# Building a Timeline

- Create a timeline of events of the incident
  - Remember to include key events other than the alleged sexual assault itself: i.e., relevant prior contact; other complainants; disclosure
- Create a timeline of the relationship between the parties
- Identify witnesses to each event
- Identify any other evidence relevant to each event
- Note where there is agreement/disagreement as to events

# Communications

- Ensure active and regular communication with complainant and respondent regarding procedure and what can be expected.
- Be sensitive, courteous, and professional in all communications. The investigation is stressful on all involved.
- Maintain a working list of contact information for all relevant parties.
- Document all communications.

# Documenting Interviews

- Take detailed notes of interviews
  - Details are essential to assessing corroboration.
- Determine method of note-taking – handwritten notes, computer, recording
- Preferred method employs two interviewers in which one person focuses on thorough notes
- Use verbatim quotes where possible.
  - Assists in evaluating the “ring of truth.”

# Documenting Interviews



- Maintain interview documentation in investigation file.
- Remember that students have a right to view their student file.

# Gathering Physical Evidence



- Physical Evidence may include:
  - Injuries; Photographs of injuries; Medical records
  - Communication records such as telephone, email, voicemail, text, social media, etc.
  - Security monitoring video; Visitor logs
  - Clothing; Bedding; Other tangible objects
  - Photographs of scene
  - School records
  - 911 tape; Police records
  - Forensic evidence such as DNA
    - Note: Forensic evidence must be reviewed by a trained forensic examiner

# Gathering Physical Evidence



- Important to preserve evidence, whether or not law enforcement is involved.
- Ensure the proper medical or forensic personnel handle forensic evidence.
- All physical evidence, whether subject to forensic analysis or not, should be preserved and the chain of custody should be maintained.
- Maintain a relationship with law enforcement in order to coordinate to the extent possible.
- Remember to take photographs: injuries, scene, clothing.
- Draw a diagram of the scene.
- Use experts where necessary.
- Again, timeliness is key.

# Report Writing Techniques



- Report writing:
  - Professional
  - Balanced and neutral
    - Content
    - Linguistics
  - Avoid declarative credibility language
    - “Unreliable” vs. insufficient information
    - Recognize perspective of the parties
  - Use of verbatim quotes

# Investigative Report



- Final investigative report includes a detailed summary of the investigation and all factual findings.
- Depending on the institution's policy, the report may also include:
  - Credibility determinations.
  - Finding, by a preponderance of the evidence, of whether the conduct occurred.
  - Finding of whether the conduct violated any institution policies.
  - Recommendation for sanctions.
- In some cases, there will be no further adjudication or hearing process.

# Investigative Report



- Summary of investigation:
  - Identify all witnesses interviewed and the dates of the interviews.
  - List any other evidence collected and date of collection.
  - Where applicable, explain reasons for failure to interview witnesses or failure to collect pieces of evidence.

# Investigative Report



- Factual findings:
  - Describe the circumstances of the initial report.
  - Describe the allegations as presented in the initial report.
  - Explain the roles of the parties and witnesses and their relationships to one another.
  - Provide a detailed summary of all of the information received with an analysis of the evidence supporting facts.
  - Must include details of the sexual misconduct.

# Review of Report



- Allow opportunity to review report before finding is made
- Assure accuracy of information
- Reconcile conflicts
- Identify additional information/witnesses
- Demonstrate thoroughness of investigation
- Allow parties to supplement, not replace or edit
- VAWA: timely access to all information that will be used

# Privacy Considerations

- Inform all witnesses that the information will be shared with school personnel
- Inform all witnesses that the information may be shared with law enforcement
- Inform all witnesses that the information will not be shared with others beyond the need to know circle
- Request that witnesses keep the contents of the interview confidential
- Request that witnesses not discuss the underlying events with other potential witnesses

# Retaliation Considerations



- Discuss importance of non-retaliation with all parties
- Discuss with the respondent that any acts of retaliation could be used as evidence against him/her

# Forensic Interviewing



# Forensic Interviewing



- Narrative and Follow Up
- Corroboration
- Questioning Techniques
- Informed and Sensitive Communications

# Narrative and Follow Up



- Invest in learning the language of your witness
- Allow your witness to give a narrative
- Refrain from interrupting or from asking clarifying questions
- Go back and follow up to clarify details
- Explore areas of inquiry that can be corroborated
- Identify circumstances of disclosure and prompt complaint witnesses

# Narrative and Follow Up



- Look beyond the initial set of information
- Ask yourself:
  - What would I want to know?
  - What is missing here?
  - What questions do I still have?
  - How can I corroborate my victim/witness?
- Organization, knowledge, and fluency

# Corroboration

- Exhaustive search for corroboration
- Assess import of lack of corroboration
- Question opportunity, access, means, and motive
- Test the sensory and emotional details
- Take the claims/defenses to their logical ends and explore logical inconsistencies
  - Denial
  - Identity
  - Consent

# Questioning Techniques



- Be alert to your non-verbal communication
- Pay attention to tone of voice and volume level
- Avoid asking questions that imply a value judgment
- Maintain attentive posture and good eye contact
- Exercise reflective listening in framing next question

# Questioning Techniques



- Thoroughly prepare for interview by listing all questions and/or subject matters to be covered but. . . LISTEN!
  - Pay attention to what the witness says and respond accordingly.
- Explore the entire incident and investigative process with witness

# Questioning Techniques



- Focus on sensory details
- Pay attention to emotional cues and responses
- Look for any evidence of motive/bias/interest, even where not immediately apparent
- Listen for “ring of truth” answers
- Rely upon maps, photos, charts where available
- Create running timeline
- Pay close attention to the circumstances of the disclosure

# What to Ask

- Do I need to know the information?
- When questions arise, it can be helpful to walk yourself through the following set of questions:
  - Will an answer to my question help me understand if a violation of policy occurred?
  - Will getting an answer to this question influence my decision?

# How to Ask



- Consider the language you use to phrase your question carefully
  - Why didn't you scream for help?  
versus  
Can you talk about how you reacted to \_\_\_\_\_?
  - Did you lead him/her on?  
versus  
How did you communicate that this was unwanted behavior?
- Avoid compound or multiple questions

# Should I Ask?

- Am I hurting the complainant by asking questions about the alleged assault?
- While it may be hard for a person to recall traumatic events, you should remember that your role is to gather and fully assess the facts. In order to do this, you will likely have to ask some difficult questions. Remember:
  - The complainant will have been prepared to understand the process
  - We should not make assumptions about the complainant's fragility or vulnerability
  - Important questions should not be intentionally avoided
- It may be helpful to explain why you are asking the question

# The Continuum Approach



- Open-ended
  - Calls for narrative or recall
- Focused
  - Directs the witness to a particular area of focus
- Multiple choice
  - Provides a range of options, “or some other way”
- Yes/No
  - Seeks to clarify a specific point
- Leading
  - Assumes the answer . . .

# Some Useful Phrases

- **Could you/would you be willing to** tell us more about....?
- **How** did you feel about...?
- **What** did you do after...?
- **What happened** then?
- **Can you** explain to me what you meant when you said....?
- **How** did ...?
- **Can you help me** understand ...?

# Potential Victim-Blaming Questions



- *Why didn't you tell him directly to stop commenting on your body?*
- *Why did you wait so long to report this?*
- *If you were sexually assaulted, why didn't you go to the hospital right away?*
- *You had the chance to report this incident to the police, why didn't you choose to do that?*
- *How did the respondent get your clothes off without a struggle?*
- *Did he/she say "no" like she/he meant it?*
- *Was the complainant flirting with the respondent that evening?*
- *What was the complainant wearing that evening?*
- *If you don't remember everything that happened that night, how are we supposed to know what happened?*

Adapted from Ann Franke, Sexual Misconduct Complaints, 17 Tips for Student Discipline Adjudicators

# Better Framing

- *It says in the investigative report that you felt drunk and were wobbly. Can you elaborate on that?*
- *The investigative report indicates that the respondent kept buying you shots. Can you tell me what you remember about that?*
- *We understand you told X that you had a lot to drink that night. We think it may be helpful for us to get a clearer picture of how much you drank and how you felt it affected you. Can you tell us about that?*
- *We want to understand the dynamic between you and your partner better. Can you help us understand the options that you felt you had available to you at that time?*
- *We are hoping you could tell us more about how you were feeling at that time.*

# Informed and Sensitive Communication



- Using open and conversational communication style
  - Not a “gotcha”
- Listen – don’t assume!
- Embrace the uncomfortable, the pause and the silence
  - Take a break
  - Offer reassurance
  - Reschedule
- Support the witness by:
  - Demonstrating acceptance
  - Using reflective listening
  - Avoiding emphasis on “you”
  - Explain the purpose of the questions
  - Allow support person

# Trauma-Informed Investigative Practices



# The Impacts of Trauma



- Trauma . . .
  - Can result in a disorganization of the person's mind
  - Can cause one to lose the ability to process information if not addressed
  - Can affect every aspect of one's life
  - Is linked to depression, anxiety, poor health....and more victimization
  - Can lead to negative coping behavior
- Difficulties of Processing Trauma
  - Response may vary as a result of accumulating incidents or other personal stress
  - Age at time of assault
- Impacts on Memory
  - Stress affects how a brain establishes, stores and retrieves memories
  - Major trauma may lead to fragmented recall
  - Differences in account over time may reflect memory processes rather than inattentiveness or deceit

# Stages of Recovery

- Initial Shock: physical and emotional range of reactions from withdrawal to highly expressive emotions
- Denial (pseudo-adjustment): wanting to forget about the assault, attempting to continue normal routine to quiet inner turmoil
- Reactivation: prompted my memories or recurring feelings; may include flashbacks, a sense of vulnerability, mistrust, physical complaints
- Anger: towards self, friends, society, legal system, the respondent
- Integration: thoughts and feelings become integrated into life experience and an individual begins to move forward

Adapted from Ann Franke, Sexual Misconduct Complaints, 17 Tips for Student Discipline Adjudicators

# Trauma-Informed Practices



- Investigations and hearings should be conducted in a manner that does not inflict additional trauma on the complainant
- Build trust and facilitate communication
- Postpone judgment; keep an open mind
- Role of the Advocate
- Separation of Support and Investigation
- Protocols
  - Autonomy
  - Flexibility
- Interview
- Documentation
- Communications
- Evidentiary Issues

# Investigation Protocols



- Institution should “own” the investigation
  - Parties should not be required to obtain, interview or ensure witnesses’ presence
  - Parties should not be *required* to write their own statements
- Parties should have equal access to information that will be used in the process
  - Build in follow up interview
  - Allow for review of investigative report

# The Interview



- Recognize the impact of trauma on memory
  - Allow the witness to give a narrative
  - Use open-ended free recall questions
  - Build in an opportunity for follow up
- Consider timing and location
- Allow a support person to be present
- Be transparent about how information will be used
- Develop rapport and allow for closure
- Allow sufficient time for thorough exploration of the issues

# Communications

- Identify contact person for complainant to avoid the need to coordinate with multiple departments
- Ensure regular and timely communications re: next steps, expectations, timing and delays
- Check in!!
- Follow up in person meetings and telephone calls with written memory markers
- Use sensitive and informed tone and content
- Use common and consistent language among team members

# Evaluating Credibility



# Evaluating Credibility



- Demeanor, Interest, Detail, Corroboration, Common Sense
- Investigating Issues of:
  - Consent
  - Alcohol/Incapacitation
  - Intimate Partner Violence

# Credibility Factors

- Assessing credibility factors:
  - Demeanor
  - Interest
  - Detail
  - Corroboration
  - Common Sense
    - Testing the inherent plausibility in light of the known information

# Demeanor



- Elicit information from all witnesses as to demeanor at earlier times:
  - Initial Responding Witness
  - Investigator
  - Hospital
  - Family members / friends
- Demeanor during proceedings
- Note changes in demeanor

# Demeanor



- Complainant/respondent may be affected by emotional component of sexual assault allegations
- Range of behaviors and emotional reactions vary
- Requires individual credibility assessment of each witness
- May be adolescent in nature: confrontational, hostile, nervous laughter, inappropriate smiling, absence of tears or emotion

# Interest, Motive, Bias

- If respondent and complainant know each other:
  - Explore past relationship
  - Introduce positive elements of relationship
- Explore effects of incident:
  - Monetary or proprietary loss
  - Emotional loss/fear/loss of safety or security
- Explore effects of incident:
  - Emotional: fear, intimidation, worry, anxiety
  - Actual: financial, time, participation in the process
- How will the life of the witness be impacted by the outcome



- Explore all details of event – before, during, and after
- Surrounding details – seemingly insignificant facts that may have greater import
- Sensory details – using the five senses to describe the physical reality of the crime
- Behavioral changes and responses
- Emotional cues and indicators
- Listen for “ring of truth” language on the periphery

# Corroboration

- Cross reference complainant and respondent accounts with all other evidence and witnesses' statements
- Look to attendant details and behavior pre- and post-incident by both parties
- Focus on resolution of conflicts through believable evidence and common sense
- Outline case by issue and cross reference with all available evidence including timelines

# Corroboration

- Verify any statements obtained from witnesses by the first responding officer(s)
- Obtain statements from witnesses not interviewed in the preliminary investigation
- Re-photograph any non-genital injuries in order to document changes
- Determine whether a search warrant is needed for any aspect of the investigation
- Identify and contact others who may have been victimized by the respondent

# Corroboration



- Consider other attendant details such as:
  - Respondent's size in relation to complainant
  - Location of incident (consider isolation of complainant)
  - Any change in complainant's demeanor, personality, or routine after the incident
    - i.e., roommate noticed that complainant began wearing baggy clothes and stopped attending class regularly

# Common Sense



- Testing the inherent plausibility in light of the known information
- How does it all fit together?
- Does it make sense in the context of
  - These individuals?
  - The setting?

# Integrated Analysis

<b>Dynamics of Sexual Assault</b>	Informed understanding based on competent experts / debunking the myths.
<b>Demeanor</b>	Did the witness speak in a convincing manner? Was he/she uncertain, confused, self-contradictory or evasive?  How did he/she look, act and speak while testifying / reporting?
<b>Interest / Motive / Bias</b>	Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect his/her testimony?
<b>Detail</b>	Use direct quotes from testimony or statements.  How well could the witness remember and describe the things about which he/she testified?  Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth or old age or by any physical, mental or intellectual deficiency?
<b>Corroboration</b>	How well did the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses?  Was it contradicted or supported by the other testimony and evidence?
<b>Common Sense</b>	Does it all add up? (Gut check)  Is there something missing?

# Integrated Analysis



	Time	Date	Place	Relationship	Issue 1: Consent	Issue 2: Drugs / Alcohol
Complainant						
Accused						
Witnesses						
Physical Evidence						
Records						

# Questions to Consider: Credibility Generally



- As judges of the facts you are sole judges of the credibility of the witnesses and their testimony.
- This means you must judge the truthfulness and accuracy of each witness's testimony and decide whether to believe all or part or none of that testimony.
- The following are some factors that you may and should consider when judging the credibility and deciding whether to believe or not to believe testimony:

# Questions to Consider: Detail



- Was the witness able to see, hear or know the things about which he testified?
- How well could the witness remember and describe the things about which he testified?
- Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth or old age or by any physical, mental or intellectual deficiency?

# Questions to Consider: Interest



- Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect his testimony?

# Questions to Consider: Demeanor



- Did the witness testify in a convincing manner?
- How did he look, act and speak while testifying?
- Was his testimony uncertain, confused, self-contradictory or evasive?

# Questions to Consider: Corroboration



- How well did the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses?
- Was it contradicted or supported by the other testimony and evidence?

# Questions to Consider: Common Sense



- Does it make sense in light of all facts and circumstances?



## 2001 Revised Sexual Assault Guidance:

- Based on the totality of the circumstances (p. 9)
- Witness statements (p. 9)
- Level of detail and consistency (p. 9)
- Existence or absence of corroborative evidence (p. 9)
- Prior bad acts and/or prior false reports (p. 9)
- Reaction or behavior after the alleged incident (p. 9)
- Behavioral changes (p. 9)
- Prompt complaint/disclosure (p. 9)
- Other contemporaneous evidence (p. 9)

# Credibility Considerations from OCR



## 1997 Sexual Harassment Guidance:

If there is a dispute about whether harassment occurred or whether it was welcome -- in a case in which it is appropriate to consider whether the conduct could be welcome -- determinations should be made based on the **totality of the circumstances**. The following types of information may be helpful in resolving the dispute:

- **Statements by any witnesses** to the alleged incident.
- **Evidence about the relative credibility** of the allegedly harassed student and the alleged harasser. For example, the level of **detail and consistency** of each person's account **should be compared** in an attempt to determine who is telling the truth. Another way to assess credibility is to see if **corroborative evidence is lacking where it should logically exist**. However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.

## 1997 Sexual Harassment Guidance:

- **Evidence that the alleged harasser has been found to have harassed others** may support the credibility of the student claiming the harassment; conversely, the student's claim will be weakened if he or she has been found to have made **false allegations against other individuals.**



## 1997 Sexual Harassment Guidance

- Evidence of the allegedly harassed student's **reaction or behavior after the alleged harassment.**
  - For example, were there **witnesses who saw the student immediately after** the alleged incident who say that the student appeared to be upset?
  - However, it is important to note that **some students may respond to harassment in ways that do not manifest themselves right away**, but may surface several days or weeks after the harassment.
  - For example, **a student may initially show no signs** of having been harassed, but several weeks after the harassment, there may be significant changes in the student's behavior, including **difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.**



## 1997 Sexual Harassment Guidance

- Evidence about whether the student claiming harassment filed a complaint or **took other action to protest the conduct** soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the complainant may not be believed rather than that the alleged harassment did not occur.
- Other **contemporaneous** evidence. For example, did the student claiming harassment write about the conduct, and his or her reaction to it, soon after it occurred (e.g., in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

# Evaluating Changes in Account

- Explore all circumstances of each account
- Understand the who, what, and where of the interview
- Ask the “why” (without asking why) questions to explore:
  - State of mind
  - Life circumstances at the time
  - Perception of interviewer/process
  - Changes in interest or motivation
- Inquire directly about inconsistencies
- Attempt to reconcile where possible

# Evidentiary Issues



- Always consider relevance
- Admission of medical information
  - Consider need for expert guidance in understanding and interpreting information
  - If provided voluntarily by the complainant, should be shared with the respondent
- Admission of mental health records
- Character evidence

# Complainant's Prior History



- Using prior sexual history of the complainant
  - Clear criteria for use may remove barrier to reporting
  - Ensure prehearing procedures for review
  - Ensure adjudicator receives appropriate instructions
  - “The alleged perpetrator should not be given access to communications between the complainant and the counselor or information regarding the complainant’s sexual history.” (DCL, p. 11, n. 29)
- Recognize that the respondent may have knowledge as to the complainant’s sexual history, shared or otherwise
- Rape shield laws preclude the use of direct or reputational evidence as to a complainant’s past sexual history unless a relevant, exculpatory evidentiary link can be established
- In general, prior consensual relationships between the accused and the accuser are admissible

# Evidentiary Issues: Prior Sexual History



- Questioning about the complainant's sexual history with anyone other than the Respondent **should** not be permitted
  - 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

Questions and Answers on Title IX and Sexual Violence, F-7, p. 31.

- Consider its relevance, based on articulable facts, to
  - Explain physical injury or trauma
  - Other considerations

# Evidentiary Issues: Pattern Evidence



- Prior bad acts/pattern evidence
  - May be relevant and probative
  - Use at fact-finding *and* at sanction
- Consider relevance to:
  - Intent/Knowledge/state of mind
  - Motive
  - Opportunity
  - Lack of mistake
  - Pattern
  - Identity
  - Information that is inextricably interwoven with the facts

# Prior Bad Acts or Pattern Evidence



- Using prior misconduct of the respondent
  - Clear criteria for when it may be considered:
    - Used as evidence in determining responsibility?
    - Used as evidence in determining sanction only?
  - Ensure prehearing procedures for review
  - Ensure adjudicator receives appropriate instructions
  - Under traditional relevance analysis, evidence of other complaints against a respondent may be admissible
  - “Weigh... whether there have been other harassment complaints about the same individual” (DCL, p. 5)

# Investigating: Consent



- Fabrication (It didn't happen)
  - Used when there is no corroborating physical or eyewitness evidence
- Identification (Someone else did it)
  - Used when there is corroborating physical evidence to establish that act occurred
- Consent
  - Used when there is DNA or other identification evidence
- Consent is the most common defense in acquaintance rape prosecutions.

Corinne Casarino, Civil remedies in Acquaintance Rape Cases, 6 B.U. Pub. Int. L.J. 185, 189 (1996).

# Investigating: Consent



- Explore nature of relationship
- Evaluate prior communication styles
- Identify manner of communication during incident from the perspective of each
  - Words
  - Actions
- Focus on circumstances of disclosure
- Objective and reasonable standard
- Evaluate effect of any alcohol use

# The Role of Alcohol



- Central nervous system depressant
- Impairs cognition and psychomotor skills
- Progressively impairs all body functions
- Decreases inhibitions
- Impairs perceptions
- May cause blackouts or loss of consciousness
- May cause memory loss
- Effects exacerbated when mixed with other drugs
- Intoxication breeds vulnerability
- Victim may less likely to realize that offender is trying to sexually assault them
- Offender may not need to use physical force depending on impairment level of victim
- Victim may not realize incident has occurred
- Victim may delay in reporting for multiple reasons
- No toxicological evidence of BAC/impairment level due to delay in report

# The Role of Alcohol



- **80% to 90% of sexual assaults on campus are acquaintance rapes and involve drugs or alcohol.**  
DOJ, National Institute of Justice, 2005.
- **“Nearly half of America’s 5.4 million full-time college students abuses drugs or drinks alcohol on binges at least once a month.”** National Center on Addition and Substance Abuse at Columbia University 2007.
- **90% of campus rapes are alcohol related.** Bureau of Justice Statistics, 2000, National Commission on Substance Abuse at Colleges and Universities

# Value Judgments re Alcohol



- Can you commit rape if you are drunk?
- Can you consent if you are drunk?
- Tendency to blame the victim for voluntarily intoxication
- Women who drink excessively or get drunk tend to be viewed as more sexually available or more likely to engage in sex
- Facilitates shifting the blame onto the victim and masking the underlying criminal intent

# Investigative Challenges re Alcohol



- Lack of memory
- Inability to give detail
- Victim may have been unconscious or in and out of consciousness
- Delay in reporting based on:
  - May not know event occurred
  - Victim may not recognize it as lack of consent
  - Feeling of contributory negligence
  - Concerns over conduct policy consequences

# Investigating: Alcohol/Incapacitation



- Ask questions about intoxication and capacity.
- Be sensitive but direct.

# Drawing the Line



- Understanding the difference between intoxication and incapacitation
  - Impaired judgment vs. unconscious, unaware, or otherwise physically helpless
  - Incapacitation: a state where a person lacks the capacity to appreciate the nature of giving consent to participate in sexual activity
- Effect of a blackout?
  - A person in an alcoholic blackout state may appear to act normally, but have no memory of these events
  - If the person in a blackout affirmatively gives words or actions indicating a willingness to engage in sexual activity and the other person is unaware—or reasonably could not have known—of the alcohol consumption or blackout – has consent been given?

# Investigative Tools re Alcohol



- Assess pre-incident behavior
- Assess quantity/quality of alcohol use
- Identify expectations/mind set of each party
- Assess ability to reasonably know level of intoxication of other party
- Seek information from other witnesses as to the level of incapacitation
- Assess post-incident behavior
- Assess circumstances of disclosure & reaction to disclosure
- Consciousness of guilt

# Investigating: Intimate Partner Violence



- Understand the nature and context of the relationship
- Return to time line to focus on prior incidents of violence and/or control
- Seek electronic messages (email, text, Facebook)
- Speak with roommates, close friends

# Role of the Adjudicator



# Lessons From Life



- Be objective
- Be professional
- You don't have to be an expert
- Be an active listener
- There are no winners here
- Your job is not to make everybody happy
- Common sense evaluation of credibility

# Lessons From Life: Be Objective



- Set aside personal biases and prejudices
- Be careful to avoid making assumptions as to how a person “should” react
- You cannot put yourself in the shoes of the victim or the accused
- Be careful not to allow emotion overrule reason

# Lessons From Life: Be Professional



- Maintain an appropriate demeanor at all times
- Do not get emotionally vested
- Be polite and respectful to all parties
- Maintain appropriate sensitivity to difficult testimony

# Lessons From Life: You Are an Expert



- Use the tools you already have
- Basic knowledge of human behavior
- Common sense
- Understanding of campus setting and context
- Trust your gut
- Jury of your peers

# Lessons From the Law: Substantive



- Types of evidence
- Burden of proof: Preponderance of the evidence
- Relevance
- Character evidence
- Other crimes evidence
- Victim's word alone may be enough to find responsibility if believed by a preponderance of the evidence
- Victim's sexual history (rape shield)

# Types of Evidence



- Witness testimony
- Written documents
  - Prior witness statements
  - Medical records
- Physical objects
- Social media: texts, Facebook, Twitter, e-mail
- Direct vs. circumstantial
- Reasonable inferences that can be drawn from evidence

# Lessons From the Law: Procedural



- How to deal with inadmissible evidence when it arises
- Proper question techniques
- Proper deliberation techniques
- Keep questions of responsibility for a violation and sanction separate
- Decision should not be outcome driven or sanction driven

# How to Deal with Inadmissible Evidence



- Advance determinations of challenged evidence key
- How do you unring the bell?

# Questioning Techniques



- Be alert to your non-verbal communication
- Pay attention to tone of voice and volume level
- Avoid asking questions that imply a value judgment
- Maintain attentive posture and good eye contact
- Exercise reflective listening in framing next question

# Deliberation Techniques



- Discuss ground rules and manner of deliberation in advance
- Be respectful to your fellow panel members
- Each panelist has an equal voice, irrespective of role on campus
- Be willing to listen to the perspective of the other panelists

# Deliberation Techniques



- Gather all documents and exhibits in advance
- Use cross-referencing grids/matrices
- Identify specific elements of alleged misconduct from policy definitions
- Begin by identifying areas of agreement as to evidence
- Identify conflicts and prioritize
- Discuss each conflict individually
- Articulate your position and support it from the evidence

# Non-Consensual Sexual Intercourse=



A Person

Penetration or Intercourse

Against a Person

- Without consent or
- By force



# Integrated Analysis

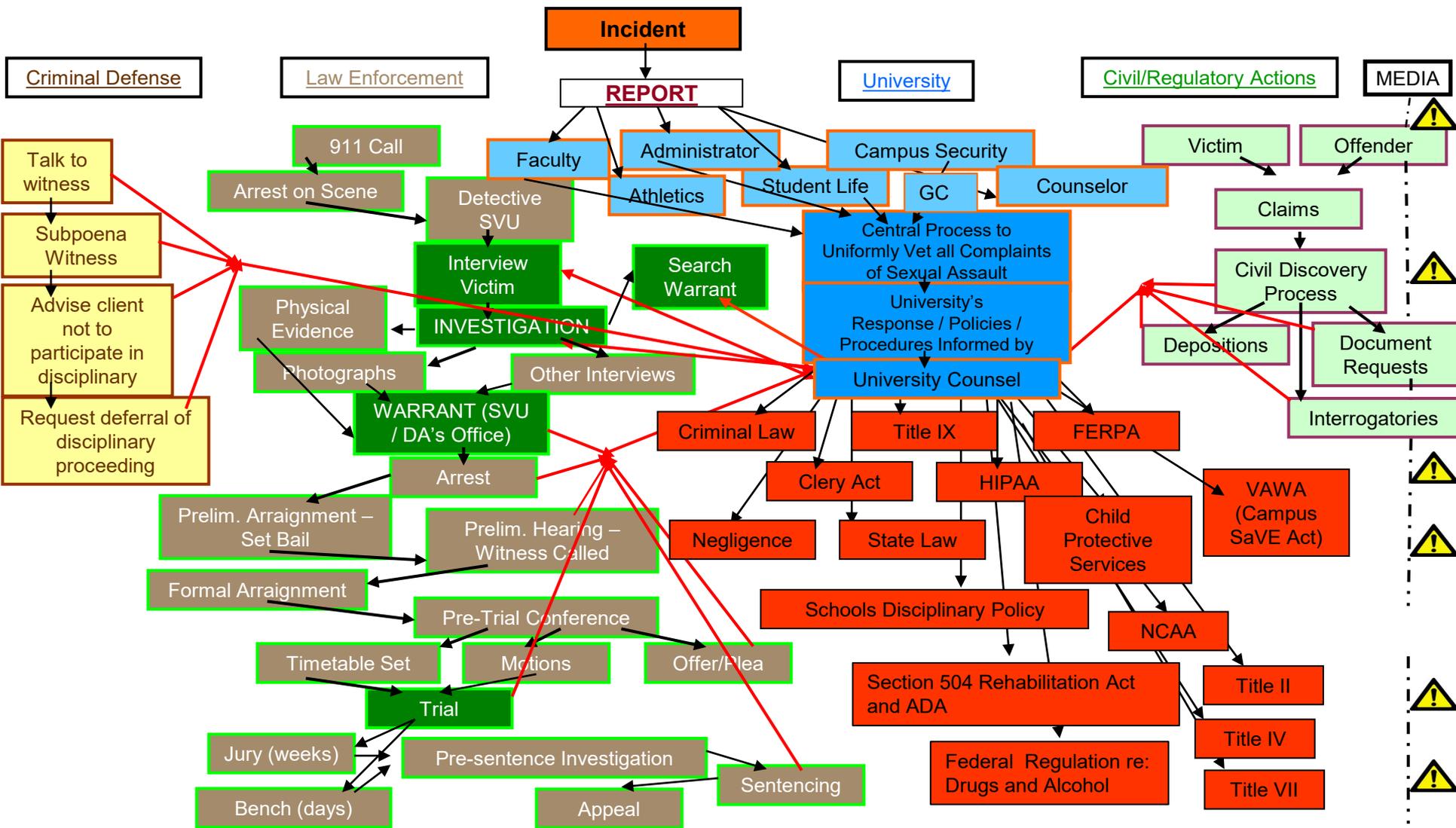


<b>Elements:</b>	X <sub>1</sub> Person	X <sub>2</sub> Penetration or Intercourse	X <sub>3</sub> Against a Person	X <sub>4</sub> - Without consent or - By force
Complainant				
Accused				
Witnesses				
Physical Evidence				
Records				

# Coordination with Law Enforcement



# The Challenge of the Context



# Two Distinct Systems & Processes



- Title IX investigation is not discretionary
- Same procedural protections and legal standards are not required
- Title IX does not require a school to report alleged incidents of sexual violence to law enforcement

Questions and Answers on Title IX and Sexual Violence, F-2, p. 27.

# Dear Colleague Letter



- “A law enforcement investigation does not relieve the school of its **independent Title IX obligation to investigate** the conduct” and “resolve complaints promptly and equitably”

Dear Colleague Letter, April 4, 2011, p. 4

# Title IX and Criminal Process



- “Police investigations may be useful for fact-gathering, but because the standards for criminal investigations are different, **police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX.**
- Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.”

Dear Colleague Letter, April 4, 2011, p. 10

# Dear Colleague Letter

- Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.”

Dear Colleague Letter, April 4, 2011, p. 10

# Questions & Answers on Title IX & Sexual Violence



- While a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence.
- Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.

Questions and Answers on Title IX and Sexual Violence, F-2, p. 27.

# Questions & Answers on Title IX & Sexual Violence



- School **should** coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator
- School **should** also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event
- School **may** consult with local or campus law enforcement or a forensic expert to ensure that any forensic evidence is correctly interpreted by school

Questions and Answers on Title IX and Sexual Violence, F-1, p. 24-26.

# Questions & Answers on Title IX & Sexual Violence



- **Should not** wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation.
- **May** need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence
- Still **must** take interim measures to protect the complainant in the educational setting
- School **should** continue to update the parties on the status of the investigation and inform the parties when the school resumes its Title IX investigation

Questions and Answers on Title IX and Sexual Violence, F-3, p. 28.

# Questions & Answers on Title IX & Sexual Violence



- If a school delays the fact-finding portion of a Title IX investigation, the school **must** promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation
- The school **should not** delay its investigation until the ultimate outcome of the criminal investigation or the filing of any charges

Questions and Answers on Title IX and Sexual Violence, F-3, p. 28.

# Dear Colleague Letter



- “In one recent OCR sexual violence case, the prosecutor’s office informed OCR that the police department’s evidence gathering stage typically takes three to ten calendar days, although the delay in the school’s investigation may be longer in certain instances.”

Dear Colleague Letter, April 4, 2011, p. 10

# Correcting the DCL



- “The DCL states that in one instance a prosecutor’s office informed OCR that the police department’s evidence gathering stage typically takes three to ten calendar days, although the delay in the school’s investigation may be longer in certain instances.”
- “OCR understands that this example may not be representative and that the law enforcement agency’s process often takes more than ten days.”
- “OCR recognizes that the length of time for evidence gathering by criminal investigators will vary depending on the specific circumstances of each case.”

Questions and Answers on Title IX and Sexual Violence, F-3, p. 28.

# VAWA and Criminal Process



- “Policies shall address procedures victims should follow if a sex offense, domestic violence, dating violence, sexual assault, or stalking has occurred, including information in writing about:
  - Options regarding law enforcement and campus authorities, including notification of the victim's options:
  - Notify proper law enforcement authorities, including on-campus and local police;
  - Be assisted by campus authorities in notifying law enforcement authorities **if the victim so chooses**; and
  - **Decline to notify the authorities”**

2013 Reauthorization of the Violence Against Women Act -March 2013

# Memorandum of Understanding Considerations



- Intersection of Crimes/Prohibited Conduct
- Reporting Protocols
- Complainant's Wishes (FL State Article)
- Evidence Collection/Interpretation
- Joint Interviews? Joint Statements?
- Sharing of Information
- Timely Warning Considerations
- Access to Community Members

# Title IX and Criminal Law Considerations



- Definitions
- State Law Requirements
- Discretion to Pass
- Immunity
- Separation of Roles
- Rules of Evidence
- Physical Evidence Collection and Evaluation
- Time
- Subpoena Power
- Search Warrants
- Detention

# Memorandum of Understanding



- OCR **recommends** that a school work with its campus police, local law enforcement, and local prosecutor's office to learn when the evidence gathering stage of the criminal investigation is complete
- The School **may** also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations
- Any MOU or other agreement **must** allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws

Questions and Answers on Title IX and Sexual Violence, F-3, p. 28.

# Memorandum of Understanding



- Schools, local law enforcement agencies, local prosecutors, medical providers, and victims' advocates **should** draft a shared Memorandum of Understanding (MOU)
- MOU **should** include clear policies on when a school should refer a matter to local law enforcement
- MOU **should not** prevent a school from notifying complainants of their Title IX rights, the school's grievance procedures, or taking interim steps to ensure safety and well-being while law enforcement fact-gathering is in progress

# Coordination With Law Enforcement



- School **should** instruct law enforcement employees to:
  - Notify complainants of their right to file a Title IX complaint in addition to a criminal complaint
  - Report incidents of sexual violence to the Title IX Coordinator if the complainant consents
- Law enforcement **should** be trained on the school's grievance procedures and any other procedures used for investigating reports of sexual violence
- Law enforcement **should** receive copies of the school's Title IX policies

# Coordination With Law Enforcement



- Title IX Coordinator **should** be given access to school law enforcement unit investigation notes and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation
- Title IX Coordinator **should** be available to provide assistance to school law enforcement employees regarding how to respond appropriately to reports of sexual violence
- School **should** notify a complainant of the right to file a criminal complaint, and **should not** dissuade a victim from doing so either during or after the school's internal Title IX investigation

# Coordination With Law Enforcement



- Protocols may be established for using a sexual assault examination kit and subsequent forensic testing even if criminal charges are not pursued
- The standards by which law enforcement officials evaluate whether to proceed with a case may be different than standards employed on campuses
- The institutional burden of proof is lower and the goal broader in Title IX educational and remedial scope, meaning institutions need to proceed regardless of a criminal prosecution

# Coordination with Law Enforcement



- Develop a collaborative relationship
  - In advance of the crisis
  - Mutual education re: shared values/goals
  - Leadership and frontline officers & investigators
- Prepare:
  - Gather all relevant personnel
  - Gather all relevant documents
  - Have informed facilitator and decision makers present
- Communication, communication, communication!
- State law confidentiality issues

# Coordination with Law Enforcement



- Respect for integrity of law enforcement investigation
  - Defer to law enforcement's right to notify respondent of charges
  - Preservation of evidence
  - Impose interim protective measures
- Sharing of Information
  - By agreement
  - By subpoena
- Cutting Edge
  - Interview memos
  - Joint interviews
  - Forensic evidence gathering

# Checklists



# Incident Response Checklist



- Introduction focusing on safety and wellbeing
- Communication regarding preservation of evidence
- Support with transportation to obtain medical services and/or law enforcement support
- Inform / discharge duties
  - Options
  - Protections
  - Services
  - Clery Act:
    - Importance of prompt complaint
    - Importance of gathering evidence
  - Title IX / DCL:
    - Confidentiality limitations
    - Facilitation of report to police

# Incident Report Form



- Time and date of report
- Time and date of incident
- Location of incident
- Information about the Victim/Survivor:
  - Name
  - Sex
  - Affiliation
  - Residence
- Information about the Assailant:
  - Name (if known)
  - Relationship to victim
  - Sex
  - Number of assailants
- Information about the Assault:
  - Type of coercion/force
  - Physical injury
  - Penetration
  - Sexual contact without penetration
  - Reported to police

# Investigation Checklist

- Victim's name or anonymity requested
- Place of occurrence
- Nature of occurrence
- Time of occurrence
- Time of reporting
- Alcohol involved: Drugs involved
- Physical Injury
- Name of accused; known or unknown
- Other crimes evidence/priors
- Complainant's description of event
- Names of witnesses
- Interviews of all parties
- Prior contacts between complainant and accused
- School records
- Intimidation attempts
- Court / Cease & Desist Orders
- Physical evidence:
  - Injury / Medical Evidence - records
  - Security Monitoring Records / Visitor Logs / Audio-Video recordings
  - Telephone records
  - Voicemail
  - Text / E-mail / Social Media
  - Clothing / Tangible Objects
  - Any other physical / forensic evidence
- 911 Tape
- Photographs of the scene
- Photographs of injuries
- Advised re: law enforcement report
- Advised re: preservation and medical treatment
- Advised re: counseling
- Concerns regarding safety of community
- Discharge Title IX responsibilities
- Discharge Clery responsibilities

# Investigation Checklist: Complainant



- Reports are consistent over time?
  - Is the complainant's basic story consistent?
  - Is basic timeline consistent?
  - Do allegations change? If so, is there a reasonable explanation?
    - Over time?
    - During therapy?
    - With different interviewers?
    - In terms of content?
- Circumstances at time of report?
  - Where?
  - To whom?
  - When?
  - Why?
  - Demeanor?
  - Corroborated by witness?
- Circumstances at time of prior disclosure(s)?
  - Where?
  - To Whom?
  - When?
  - Why?
  - Demeanor?
  - Corroborated by witness?
- Any change in behavior/demeanor/routine after alleged incident?
- Explore past relationship:
  - Whether and how long he or she had known the accused?
  - Circumstances of their meeting
  - Extent of any previous relationship
  - Details of any prior sexual relationship

# Investigation Checklist: Complainant



- Overall credibility?
  - Cognitive impairment?
  - Evidence of psychosis?
  - Evidence of coaching?
  - Current situation impacted by results of conclusions?
  - Demeanor?
    - At time of event?
    - At time of reporting?
    - As reported by other witnesses? If so, identify witnesses.
    - In our interview?
- Secondary gain?
  - Financial?
  - Situational?
  - Occupational?
- Interests or bias?
- Details of description:
  - Central issues?
  - Peripheral issues?
- Corroboration?
- Do facts hang together? Why? Why not?

# Investigation Checklist: Respondent



- Other acts/behaviors suggestive of poor judgment?
  - Evidence of substance abuse?
    - If so, is it admitted?
  - Evidence of impulse control issues?
    - If so, is it admitted?
  - Admission of physically inappropriate behavior?
  - Admission of sexually inappropriate behavior?
  - Evidence of fabrication in record (not limited to allegation)?
- Overall Credibility
  - Demeanor?
  - Interest or bias?
  - Corroboration?
  - Do facts hang together? Why or Why no?
- Any witness intimidation?
- Past History
  - Evidence of other misconduct or disciplinary action?
    - Theft/misappropriation?
    - Legal history?
    - Substance abuse?
    - How did the accused handle these events?
  - Evidence of problematic behavior in multiple assignments?
  - Troubled relationships?
  - History of previous sanctions?
  - History of treatment/intervention of inappropriate or concerning behaviors?
  - Previous outside evaluations?
  - Previous concerns re: protection of others?