Program Goals

- Maintain a compassionate and sensitive approach
- Seek the truth
- Evaluate all relevant information to determine whether a preponderance of the evidence exists
- Impose accountability for conduct that violates our community standards
- Maintain professionalism and consistency in process and procedures
Caveat About Statistics

- Statistics vary greatly in reliability and accuracy
- For every statistic, there is an exception to the rule
- While useful for cataloging what we know about human behavior, statistics should never be a substitute for good independent judgment and careful attention to the facts
- Many statistical analyses are available regarding sexual assault, but any use or reference to statistics is meant to provide information about prevalence and context and not provide an exhaustive list of the available research
Overview

Session 1

- Part 1: Overview of Relevant Legal Authority
- Part 2: The Coordinated Institutional Response
- Part 3: Dynamics of Sexual Assault
- Part 4: Role of the Investigator
- Part 5: Investigative Protocols

Session 2

- Part 6: Forensic Interviewing
- Part 7: Evaluating Credibility
- Part 8: Coordination With Law Enforcement
Part 1
Overview of Relevant Authority
Integration and Coordination

- Legal authority
- Dynamics of sexual misconduct
- Individual culture, climate, history, resources, policies, procedure, and personnel of the institution
Small Group Discussion

- Discuss how students perceive and actually experience your campus’ policies, procedures, and personnel made available to respond to sexual misconduct.

- Based on your group’s discussion, identify two student perceptions to share with all meeting participants.
The Institutional Perspective

- Personal/Emotional Concerns
- Implementation and Process Concerns
- Investigations
- Training

- Resources
- Reporting
- Evaluating Credibility

- Policy Concerns
- Confidentiality & Complainant/No Consent
- Coordination of Constituencies

- 36
- 31
- 27
- 29
- 17
- 16
- 32
- 7
- 14
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

- **Controls**: 1
- **Risk**: 4
- **Likelihood**: 3
- **Velocity**: 5
The Challenge of the Context
The Challenge of the Context

ALLEGATION

Student Conduct
Title IX Investigation
Information
Legal Rights
Media

Respondent

Questions???
Attorney

Law Enforcement
School
Parents
Peers
Community Reaction

Support

Emotional Response
Fear
Shame
Anger
Embarrassment

Sanction
Financial
Fine
Exoneration
Expulsion

Practical Life Changes
No Contact Order
Change in Class Schedule
Change Living

Arrest

Pepper Hamilton LLP
Attorneys at Law
Laws and Regulations

- Federal criminal statutes
- State criminal statutes
- State child protection statutes
- Federal sex offender registration statute
  - SORNA/The Adam Walsh Act
- State sex offender registration statutes
  - Megan’s Law
- Title IX
  - 1997 Guidance
  - 2001 Guidance
  - Dear Colleague Letters
  - Voluntary Resolution Agreements
- The Clery Act
- The Campus SaVE Act
- HIPAA
- FERPA
Intersection of Laws and Regulations

Central Process to Uniformly Vet all Complaints of Sexual Assault

University’s Response / Policies / Procedures Informed by

Title IX

FERPA

HIPAA

State Law

Schools Disciplinary Policy

Clergy Act

Negligence

Criminal Law

Log

Report

Warn

Policy Requirements

Victim Rights/Services/Procedures

Offender Rights/Services

Consult Policy

Remedial Response

Investigate

See Outline

Comply with Subpoena

Requests of Law Enforcement

Federal/State Statutes

Victim Rights/Services/Procedures

Offender Rights/Services

General

Investigating Sexual Assaults in Higher Education

Key

CMS - Centers for Medicare and Medicaid Services

DHS - Dept. of Human Services

DOE - Dept. of Education

HHS - Health and Human Services

OCR - Office for Civil Rights

PA-AG - PA Attorney General

NCAA - National Collegiate Athletic Association
Title IX

- Applies to recipients of federal financial assistance
- Prohibits discrimination on the basis of sex in:
  - Education programs and activities
  - Employment (similar to other federal and state laws)
- Sexual discrimination includes sexual harassment and sexual violence, all of which interfere with a student’s right to receive an education free from discrimination or an employee’s right to a discrimination-free work environment

Title IX, 20 USCA, Sec. 1681

- Provides that “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.”

- Sexual harassment is a form of “discrimination” under Title IX

- Protects students and employees from sexual harassment by any school employee, another student, or a non-employee third party
A school violates Title IX if it **has notice** of a sexually hostile environment and fails to take **immediate and effective corrective action**

A school has notice if a **responsible employee knew or, in the exercise of reasonable care, should have known** about the harassment
A responsible employee includes any employee who:

- Has the authority to take action to redress the harassment
- Has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or
- A student 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 so will vary depending on various factors (i.e. age and education level, position held by employee, procedures)
Sexual Harassment

- Conduct that is:
  - Sexual in nature
  - Unwelcome, and
  - Sufficiently serious that it interferes with or limits an individual’s ability to participate in or benefit from a school’s education programs and activities (or in the employee context, employment)

- Includes
  - Unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature

- Encompasses a broad range of conduct, including sexual violence and other sexual misconduct
Forms of Sexual Harassment

- Touching of a sexual nature
- Making sexual comments, jokes, or gestures
- Writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials
- Calling students sexually charged names
- Spreading sexual rumors
- Rating students on sexual activity or performance
- Circulating, showing, or creating e-mails or websites of a sexual nature
Sexual Violence

- A form of sexual harassment prohibited by Title IX
- Physical sexual acts perpetrated
  - Against a person’s will; or
  - Where a person is incapable of giving consent due to:
    - Use of drugs or alcohol
    - An intellectual or other disability
- Includes acts such as rape, sexual assault, sexual battery, and sexual coercion
Gender-based Harassment

- 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)
## Conduct Covered Under Title IX

- **Sexual discrimination and harassment**
  - Verbal
  - Physical
  - Electronic

- **Sexual violence**
  - Rape
  - Sexual Assault
  - Exploitation

- **Stalking**
  - Cyberstalking

- **Interpersonal violence**
  - Intimate partner
  - Domestic
  - Dating
  - Relationship

- **Retaliation**

- **Gender-based discrimination and harassment**

- **Bullying/hazing**
Title IX

- If school knows or reasonably should know about student or employee harassment that creates a hostile environment

- School must:
  - Eliminate the harassment
  - Prevent its recurrence
  - Address its effects

- Requires grievance procedures for “prompt and equitable” resolution of student and employee complaints

- A school violates Title IX if it:
  - Has notice of a sexually hostile environment; and,
  - Fails to take immediate and corrective action
Scope of Title IX

- Protects students and employees in connection with academic, educational, extracurricular, athletic, and other programs that occur:
  - On campus
  - Off campus activities that are school-related (study abroad program, class at another location, field trip)
  - On campus retaliation following an off campus, non-school event
Scope 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’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 education 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 students or employees

- Protects students and employees from sexual harassment
Filing 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
Enforcement of Title IX

- Department of Education’s Office for Civil Rights (OCR)

- “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 Discrimination Act of 1975)
Enforcement of Title IX

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
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 the Title IX regulations, including taking any action necessary to remedy its discrimination or the effects of its discrimination in its 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 appropriate corrective action before issuing a finding of violation.

- Effectiveness is based on a reasonableness standard.
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.”
- “A school has notice of harassment if a reasonable 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 their 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
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

Investigating Sexual Assaults in Higher Education
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 ensure that the recipient complies with the prohibition against retaliation in the future.
- Monetary relief may be appropriate based on the facts of the case.
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 conveyed to employees
- Incorporate the prohibition against retaliation into relevant policies and procedures
- Implement a public outreach strategy to reassure the public that the recipient is committed to complying with the prohibition against retaliation
If a recipient engaged in retaliation and refuses to voluntarily resolve the violation or fails to live up to its commitments in the resolution agreement, the OCR will take enforcement action by:

- Initiating administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance made available through the Department; or
- Referring the case to the Department of Justice for judicial proceedings
Voluntary Resolution Agreements

- Notre Dame College, Sept. 2010
- Eastern Michigan University, Nov. 2010
- University of Notre Dame, July 2011
- Yale University, June 2012
- Xavier University, July 2012
- University of Montana, May 2013
Voluntary Resolution Agreements: Key Themes

- **Student-focused remedies:**
  - Include in task force membership

- **Remedial measures in:**
  - Title IX procedural requirements
  - Reporting/implementation
  - Education and prevention

- Annual “climate checks” of student body to gauge effectiveness of remedial measures

- Title IX Coordinator to review campus police records for violations of Title IX and respond

- Coordinate with local law enforcement to ensure Title IX compliance in instances of reported criminal conduct

- Provide participants with Title IX rights and resources and take any necessary steps to ensure their safety and safety of campus community

- College to pay for complainant’s counseling expenses

- Use of informal processes for resolution

- Training – entire campus, implementers, adjudicators, “responsible employees”
Voluntary Resolution Agreements: Combined Elements

- To adopt a “preponderance of the evidence” standard
- To clarify a complainant’s option to pursue a criminal complaint and require a written confirmation of complainant’s choice
- To allow, in extraordinary circumstances, to proceed despite a law enforcement investigation where a threat to the safety of the complainant and/or other students exists
- To advise complainants that the university will investigate allegations of sexual harassment, and take appropriate action, even if the complainant does not wish to pursue the disciplinary process, but that any response by the university may be hindered by the complainant’s wishes for anonymity and/or inaction
- To issue “No contact” orders to all parties to an alleged sexual assault promptly after the university receives notice of a complaint
- To initiate discussions with the complainant about academic, extracurricular activities, housing, and on campus dining arrangements of the parties to determine if adjustments in schedules or housing are necessary with minimal the burden on the complainant’s educational program
- To provide both parties the opportunity to present witnesses and other evidence, and equivalent notice of the process, access to peer support, information about procedures, and written notice of the outcome
- To include a reference to cyber-harassment in the university’s IT policy
- To prohibit actual or threatened retaliation or any act of intimidation by third parties as well as accused students
- To make the medical, counseling, and pastoral resources available to complainants
Voluntary Resolution Agreements: Combined Elements

- To provide for alternative arrangements for complainants who do not want to be present in the same room as the accused during the disciplinary hearing

- To allow the complainant to initiate a case review upon the completion of the disciplinary hearing process

- To use standardized, detailed, and complete investigation reports

- To develop written materials summarizing the rights, under Title IX and the university’s policies and procedures, of all victims of sexual harassment

- To provide such materials to anyone alleging sexual harassment within 24 hours of receiving the complaint

- To provide an adequate, reliable, and impartial investigation of all complaints, including the opportunity for the parties to present witnesses and other evidence

- To designate Title IX Coordinator(s) and clearly publish the individual(s)’ name or title, office address, and telephone number and define their responsibilities

- To thoroughly train all who will be directly involved in processing, investigating, and/or resolving complaints

- To develop and widely publish detailed grievance procedures that include:
  - How the procedures apply
  - How to file a complaint
  - With whom a complaint is filed
  - Definitions
  - Timeframes
  - Information on confidentiality
  - Information on retaliation
Voluntary Resolution Agreements: Combined Elements

- To widely publish a notice of nondiscrimination
- To establish a committee of students to identify strategies for broader compliance
- To include programs on Title IX in student orientations
- To designate an “on-call” contact for victims of sexual assault
- To develop and widely publish a document for victims of sexual assault providing support information including the “on-call” contact
- To develop and widely publish a second document on the definitions of sexual harassment and assault and the grievance procedure
- To conduct climate checks with students to assess the effectiveness of remedial measures
- To review matters handled solely by law enforcement for violations of Title IX requiring further remedies
- To provide the Title IX Coordinator with access to law enforcement records of its investigation and findings regarding Title IX investigations, so long as it does not significantly compromise any pending criminal proceeding
- To hold campus events raising awareness for Title IX
- To clarify that the university should not use mediation and other informal mechanisms for resolving allegations of sexual assault
- To provide both parties notice of the opportunity to appeal the findings
- To assure both parties that the appeal will be conducted in an impartial manner by an impartial decision-maker
To continue educational efforts to promote responsible drinking

To conduct a semiannual review of all formal and informal Title IX complaints brought to the university Title IX Coordinator and Deputy Title IX Coordinators, before the university-wide committee on sexual misconduct, any other grievance procedures, and/or independently investigated by the university in order to identify and address any patterns or systemic problems

To continue efforts to expand student leadership councils to promote norms of responsible conduct

To launch, and continue to widely publicize on an annual basis, a website specific to the university-wide committee on sexual misconduct to raise awareness about its function and availability

To study and address issues related to hazing and initiations by student organizations

To develop a monitoring program to assess the effectiveness of its anti-harassment efforts

To provide complainants information about their Title IX rights and available resources, such as counseling, the local rape crisis center, and their right to file a complaint with a local law enforcement agency

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

To strengthen students’ understanding, through education and enforcement, that they are subject to the undergraduate regulations both on and off campus
Voluntary Resolution Agreements: Combined Elements

- To hold trainings for sophomore students, including on bystander intervention, and reaffirm the topics presented to freshman students.

- To maintain all records of informal and formal complaints, consistent with the university’s procedures.

- To invite staff and faculty to participate in one or more offered in-depth training sessions and to participate in refresher sessions on an annual basis thereafter.

- 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.

- To add additional representative leaders from the student community to the Title IX Committee.

- To provide sessions that cover the university’s grievance procedures for Title IX complaints as part of the annual student orientation for new students, annual refresher sessions for returning students, and annual residence life orientation for students in campus housing.
University of Montana Investigation

- Joint Investigation by DOJ and OCR
  - May 9, 2013
- Definition of “sexual harassment” and “hostile environment” and related disciplinary considerations
- Interim Measures
  - May include “taking disciplinary action against the harasser” before the resolution of the complaint
Sexual Harassment Prevention Training for Students

- “At a minimum, these sessions will be provided as part of the annual student orientation for new students . . . the class registration process for returning students, and annual residence life orientation for students residing in campus housing.”
  - Grievance process and procedures
  - Conduct prohibited; how and to who reports should be made
  - Different process options from reporting prohibited conduct
  - Link between alcohol and drug use and sexual assault
  - Title IX rights
  - Available resources
  - OCR enforcement
Employee Reporting and Training

- Reporting is required from any university employee “who [is] not statutorily barred from reporting”
- “All university staff and faculty” must receive Title IX training
- Employees “who will be directly involved in processing, investigating, and/or resolving complaints of sex discrimination or who will otherwise assist in the coordination of the university’s compliance with Title IX” must have training on how to “coordinate and cooperate with law enforcement during parallel criminal and Title IX proceedings”
Reporting Tracking System

- Electronic database that will contain “The date and nature of the complaint or other report ...; the name of the complainant or that the complaint was anonymous; the name of the person(s) who received the complaint or made the report; the name(s) of the accused; the name(s) of the person(s) assigned to investigate the complaint, take any interim measures, and bring disciplinary charges (where relevant); the interim measures taken, if any; the date of the findings; the date of any hearing; the date of any appeals; and a summary of the findings at the initial hearing and appeals stages
May 29, 2013 email from OCR-PLG@ed.gov

- OCR’s regulations and policies do not require or prescribe speech, conduct, or harassment codes that impair the exercise of rights protected under the First Amendment.

- The May 9 resolution agreement and letter to the University of Montana are entirely consistent with the First Amendment, and did not create any new or broader definition of unlawful sexual harassment under Title IX or Title IV.

- Defined sexual harassment and hostile environment.

- Encouraged students to bring complaints.

- Encouraged schools to apply their rules in a manner that respects the legal rights of students and faculty, including the First Amendment.
July 12, 2013 letter from OCR to AAUP

In your letter, you express concern that the resolution of the Montana case involved a “redefinition of sexual harassment” that threatens academic freedom. Letter at 2. We can assure you that the Findings Letter and Agreement do not redefine sexual harassment or eliminate the inquiry into whether the harassment is objectively offensive. Indeed, both documents’ definitions of sexual harassment and hostile environment are completely consistent both with the First Amendment and with longstanding Title IX guidance that has been applied by three Administrations. See Department of Education, Office for Civil Rights (OCR), Revised Sexual Harassment Guidance (2001); Department of Education, OCR, Dear Colleague Letter (2006) (enclosing 2001 Guidance and explaining that “the guidance outlines standards applicable to OCR’s enforcement of compliance in cases raising sexual harassment issues”); Department of Education, OCR, Dear Colleague Letter: Sexual Violence (Apr. 4, 2011).

It is also important to note that the Findings Letter and Agreement in the Montana case represent the resolution of that particular case. We hope that these documents will be helpful for schools seeking to address problems similar to those that were identified at the University of Montana. Each school, however, will need to take into account the circumstances on its own campus in adopting practices to comply with Title IX.
The Clery Act

The April 4, 2011 Dear Colleague Letter references and captures the sexual misconduct components of Clery and encourages coordinated integration.
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 all 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.

- Furthermore, it is not necessary for the crime to have been investigated by the police or CSA, nor must a finding of guilt or responsibility be made. As long as there is a reasonable basis for believing the information and it is not rumor or hearsay, it should be reported under Clery.
The Clery Act

- 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

- When reporting sex crimes, the offenses should be divided into two categories: forcible and non-forcible

- Forcible sex offenses include:
  - Any sexual act that is directed against another person either forcibly and/or against that person’s will or
  - Non-forcible or against the person’s will and the victim is incapable of giving consent

- Examples of forcible sex offenses are forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. Examples of non-forcible sex offenses include incest and statutory rape.
The Clery Act

- Schools must maintain a public daily log of all crimes reported to schools’ CSAs
- 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 by schools 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 including information so that students know what notifying law enforcement authorities entails
- Provide notification to students that the university will assist them in notifying these authorities
- Provide notification to students of on and off campus counseling, mental health, or other student services for victims of sex offenses
- 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
- Duty to warn/timely warnings (not precluded by FERPA)
On March 7, 2013, President Obama signed a bill to reauthorize the Violence Against Women Act, which included the Campus Sexual Violence Elimination Act.

- Requires disclosure of incidents of domestic violence, dating violence, sexual assault, and stalking in annual campus crime statistic reports.
- Students or employees reporting victimization will be provided with their written rights to:
  - Obtain assistance from campus authorities if reporting a crime to law enforcement.
  - Change academic, living, transportation, or working situations to avoid a hostile environment.
  - Obtain or enforce a no-contact directive or restraining order.
  - Have a clear description of their institution’s disciplinary process and know the range of possible sanctions.
  - Receive contact information about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available both on campus and in the community.
Campus SaVE Act

- The minimum standards for institutional disciplinary procedures covering domestic violence, dating violence, sexual assault, and stalking ensure:
  - Disciplinary proceedings will have a prompt, fair, and impartial investigation and resolution and will be conducted by officials receiving annual training on domestic violence, sexual assault, and stalking
  - Both parties may have others present during the disciplinary proceeding and any related meeting, including an advisor of their choice
  - Both parties will receive written outcomes of all disciplinary proceedings at the same time
Campus SaVE Act

- Instructs colleges and universities to provide programming for students and employees addressing the issues of domestic violence, dating violence, sexual assault, and stalking. Education programs should include:
  - Primary prevention and awareness for all incoming students and new employees
  - Safe and positive options for bystander intervention
  - Information on risk reduction to recognize warning signs of abusive behavior
  - Ongoing prevention and awareness for students and faculty

- Established collaboration between the Departments of Justice, 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
Questions & Answers
Part 2

The Coordinated Institutional Response
Integration and Coordination

- Regulatory framework
- Dynamics of sexual misconduct
- Individual culture, climate, history, resources, policies, procedure, and personnel of the institution
The Institution

- No such thing as “best practices”
- Each school is unique in:
  - Institutional values
  - Policies and procedures
  - Resources
  - Personnel
  - Public vs. private
  - Culture
  - Challenges
- Assess history and current climate
- Evaluate coordination of systems and personnel
- Danger of misinformation
- Perceptions are reality: Do you know yours?
- Define your consistent tone and message
Integration and Coordination

- Ensure a coordinated and integrated institutional response through:
  - Education and information in advance about policies, procedures, resources, and reporting options
  - Consistent training of all employees
  - Centralized reporting, investigation, and resolution
  - Routine Title IX assessment and discharge of Clery obligations in every case
  - Adequate and reliable investigation
  - Prompt and equitable grievance procedures
  - Individual and community remedies for safety, climate, and culture
Integration and Coordination

Title IX Assessment or Review:

Dean of Students (Student Conduct) → Title IX Coordinator/Deputy Title IX Coordinator → Campus Police

Implement Support:
- Advocacy
- Accommodations
- Process

Remedies Based:
- Non-Judicial
- Individual and Community Remedies

Discipline Based:
- Judicial
  - Investigation
  - Hearing/Sanction
  - Appeal

Title IX Assessment:
- Immediate Safety & Well-Being
- Basic Facts
- Notify of right 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
- Assign advocate/support person
- Assess for pattern
- Ascertain complainant’s wishes
- Discuss barriers to proceeding
- Evaluate individual vs. campus safety

Title IX Guide: Investigating Sexual Assaults in Higher Education

Investigating Sexual Assaults in Higher Education
A Coordinated and Integrated Approach

- Structure
  - Title IX Coordinator
  - The Title IX multidisciplinary team
  - Support and advocacy

- Understanding confidentiality
  - Confidential resources v. reporting options
  - Role of the responsible employee
  - The confidentiality conundrum

- Tending to the individual
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 v. 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
Benefits of the Multi-Disciplinary Team Approach

- Centralized review process (Title IX team)
- Coordination of information for:
  - Investigation/review/assessment
  - Support services
- Education and consistency in message
  - Confidential resources
  - Reporting options

- Reporting
  - Clear employee/staff/faculty policies regarding duty to share
- Clearly delineated options for proceeding under the appropriate grievance procedure
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
### Incident Response and Management

#### 1. Incident

#### 2. Incident reported verbally to:
- Administration
- Campus LE/PS
- Athletics
- Student/Friend
- Faculty
- Student Life
- General Counsel
- Health Services
- Hotline
- Office of President
- Clery: CSA

#### 3. Incident report form filed

#### 4. Central process to uniformly vet all complaints of sexual assault
Central Review Process/Multi-disciplinary Team

- Title IX Coordinator
- Campus Police
- Student Conduct (or staff/faculty processes)
The Role of the Advocate

- For the victim
  - Crisis intervention and support
  - Information and referral
  - Guidance about options
  - Regaining power and control

- For the campus
  - Visible message of commitment to the issues
  - Provides a network of resources
  - Connects 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
  - Timeframes

- Advisor to process (in addition to advocate)
Helpful Resource

- Sexual Assault Support Checklist
Small Group Discussion

- Discuss how you provide support on your campus.
  - Is it separate from your investigative and adjudicative options?
  - Do you provide balanced support for a complainant and a respondent?

- What institutional challenges do you face in ensuring a coordinated response?
  - What can you do to manage those challenges?
Students or employees wishing to obtain confidential assistance may do so by speaking with professionals who are obligated by law to maintain confidentiality.

Although there are exceptions based on state law, these confidential resources generally include medical providers, mental health providers, clergy, and rape crisis counselors.

- Mandatory child abuse reporting
- Tarasoff imminent risk of harm to self or others
- State law felony or sexual assault reporting
Confidential Resources v. 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
  - To any school employee
  - Anonymous
  - Law enforcement
Reporting by Responsible Employees

- A school is on notice if a responsible employee knew or should have known about harassment that creates a hostile environment.

- Knew or should have known: knowledge is attributed to the institution based on the knowledge of an agent or responsible employee.

- “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.
Reporting by Responsible Employees

- Clear delineation between confidential resources, whether on campus or in the community, and reporting options

- Disclosures to any responsible employee of a school must be shared with the administrators on campus specifically charged with implementing the school’s Title IX response

  - We recommend that all school employees, including faculty, staff, administrators, student employees who have a responsibility for student welfare be required to share with a member of the Title IX team any report of sexual harassment or misconduct they receive or of which they become aware

  - Examples of students who may have a duty to share the information with the centralized Title IX team include residential assistants or counselors, peer advocates, and peer educators
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 the 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
The Confidentiality Conundrum

- “Schools also should inform and obtain consent from the complainant… before beginning an investigation.” (DCL, p. 5)

- “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.” (DCL, p. 5)

- 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
The Confidentiality Conundrum

- Evaluate a request for anonymity in the context of its responsibility to provide a safe and nondiscriminatory environment for all students

- Inform the complainant if it cannot ensure confidentiality

- Pursue other steps to limit the effects of the alleged harassment and prevent its recurrence
“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

- 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 v. 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
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 timeframes 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
Small Group Discussion

- Share an experience with a prior matter that challenged you.
  - What are some of the issues a complainant faces when reporting sexual misconduct?
  - What are some of the issues a respondent faces when accused of sexual misconduct?
Questions & Answers
Part 3
Dynamics of Sexual Assault
Recap About 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 the known facts
- We may never punt to statistics to help us with the hard calls
Staggering Statistics

- 35 out of every 1,000 women are sexually assaulted\(^1\)
- 3,383 sex offenses were reported by college students in 2009\(^2\)
- 80% to 90% are acquaintance rape and involve drugs or alcohol\(^3\)
- “Nearly half of America's 5.4 million full-time college students abuse drugs or drink alcohol on binges at least once a month.”\(^4\)

1. DOE Summary of Crime Statistics
2. DOE Summary of Crime Statistics
3. DOJ, National Institute of Justice, 2005
4. National Center on Addiction and Substance Abuse at Columbia University 2007
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%) report a higher prevalence of rape, physical violence, and/or stalking by an intimate partner compared to both lesbian (43.8%) and heterosexual women (35%).

Of the bisexual women who experienced intimate partner violence, approximately 90% 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, Centers for Disease Control and Prevention, Jan. 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
  - Result in delayed reporting or no report at all
  - Are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation due to drugs or alcohol
  - Lack physical evidence

- Most common defense is consent
Most Sexual Assaults Are Committed by Someone Known to the Complainant

- In 73% to 80% of rape cases, the complainant knew the perpetrator.¹
- 90% of college women who were complainants of sexual assault knew their attacker prior to the assault.²
- Among rape complainants, only 16.7% of females and 22.8% of males were raped by strangers.³
- 67% of women who were sexually assaulted identified their perpetrator as a non-stranger.⁴
- 8 out of 10 complainants of sexual assault know their assailant.⁵
- 6 out of 10 sexual assaults occurred in the complainant's home or at the home of someone known to them.⁶
- 80% to 90% of sexual assaults on campus are non-stranger sexual assaults.⁷

2. Bureau of Justice Statistics, 2000, National Commission on Substance Abuse at Colleges and Universities
3. The 2006 National Crime Victimization Survey
4. Callie Rennison, National Crime Victimization Survey: Criminal Victimization
5. Callie Rennison, Rape and Sexual Assault: Reporting to Police and Medical Attention
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.¹

- Most complainants of sexual assault either delay seeking or do not seek medical treatment.¹

- There is typically little physical corroborating evidence in acquaintance rape prosecutions.²

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Absence of Trauma

- 2,384 children referred for possible sexual abuse
- Less than 4% 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

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


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 v. 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 what it is designed to do
Understanding Physical Evidence

- Criminalistics laboratory: blood, rape kit, saliva, physical evidence (clothing and 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)
Based on your experience, what type of physical evidence might you expect to find in sexual assault cases?

What are some reasons that such evidence might not be present in a case?
Counter-Intuitive Victim Behaviors

- Complainant is unlikely to 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 resistance will escalate 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
- Cause one to lose the ability to process information if not addressed
- Affect every aspect of one’s life
- Be linked to depression, anxiety, poor health….and further victimization
- Lead to negative coping behavior
Understanding the Impacts of Trauma

- **Difficulties of processing trauma**
  - Varying responses due to 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 by 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 Under-reported

- 60% of all sexual assaults are unreported\(^1\)
- Only 25% of intimate partner sexual assaults are reported\(^2\)
- Rape/sexual assaults by strangers are more likely to be reported to police than those committed by intimate partners, relatives, friends, or acquaintances\(^3\)
- 1 in 6 men and 1 in 4 women will experience a sexual assault in his or her lifetime\(^4\)
- 1 in 5 women will be raped in her college career\(^5\)
- 52% of gay men and lesbians reported at least one incident of coercion by a same-sex partner\(^6\)

5. DOE Summary of Crime Statistics.
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
- Ongoing, 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

- Recantation is normal.
- Don’t be shocked when victim recants or waives – be shocked when they don’t!
- Tremendous actual and 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 to complainant by community members (shunning)
- 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 and 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% to 8%\(^1\)
- Statistics on false reports rates range from 1.5% to 90%.\(^2\)
- Query the reliability of these statistics based on:
  - Definition
  - Credibility of review
  - Criteria
  - Sample

1. *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault.* Lonsway, Ambolt, and Lisak
2. Rumney, 2006
A student reports that s/he was sexually assaulted by a classmate while they were at a party.

Two weeks later, the student calls and says that s/he made it up because s/he was angry at the classmate.

- What do you do?
- What questions do you ask?
- Who else do you talk to?
- What do you say to the student?
Intimate Partner Violence

- Intimate partner violence (IPV) is often referred to as dating violence, domestic violence, or relationship violence.

- IPV 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.

- IPV 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 family members or friends.
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 and 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 to 6 women and 1 in 13 to 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 and 41% of male victims are stalked by a current or former intimate partner.

- More than 1/2 of female and more than 1/3 of male stalking victims indicated that they were stalked before the age of 25.

- About 1 in 5 female and 1 in 14 male victims experienced stalking between the ages of 11 and 17.

Intimate Partner Violence: Stalking

Stalking Behaviors

Percentage of cases

- Followed, spied on, stood outside home, etc. 72%
- Made unwanted phone calls 61%
- Sent/left unwanted letters, items 33%
- Vandalism 30%
- Killed or threatened pet 6%

Female Victims (N=625)

- Followed, spied on, stood outside home, etc. 9%
- Made unwanted phone calls 18%
- Sent/left unwanted letters, items 27%
- Vandalism 29%
- Killed or threatened pet 9%

Male Victims (N=168)

- Followed, spied on, stood outside home, etc. 6%
- Made unwanted phone calls 42%
- Sent/left unwanted letters, items 36%
- Vandalism 29%
- Killed or threatened pet 6%

Margolis Healy & Associates LLC
Intimate Partner Violence

- Power, control, and authority
- Domination
- Isolation
- Verbal and 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.

Part 4

Role of the Investigator
The Role of the Investigator

- The traditional student conduct model of asking each party to write his/her own statement, conducting little to no additional investigation, and requiring a student to present his/her 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.
A good investigator should be:

- Objective
- Fair
- Impartial
- Open-minded
- Professional
- Appropriate in demeanor
- An active listener
- Polite and respectful to all parties

A good investigator should not:

- Allow emotion to overrule reason
- Make assumptions as to how a person “should” react
- Pre-judge the facts
- Put him/herself in the shoes of the victim or the accused
- Allow bias or prejudice to affect his/her judgment
In-house 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
Identifying Our Own Biases

- What does rape look like?
- Victim-blaming
  - What was she thinking when
  - What did she think was going to happen?
- Over-identifying with complainant or respondent
  - I would have
  - If it was me
  - That could have been me
- Counter-intuitive victim behaviors
- Culture/diversity/world view
Importance of Language

- Legal/campus/ethical
- Rape v. sexual assault
- Victim v. survivor
- Consent
- Alcohol/other drug-facilitated incidents
- Investigation v. review or inquiry
- Sexual “misconduct” and sexual harassment
Role of the Investigator

- Investigator takes the lead on the investigation
  - 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

- Key tasks
  - Manage expectations
  - Regular and timely communications

- Documentation/report
  - Verbatim/“quotes”
  - Areas of agreement and disagreement

- Search for corroboration
- Assess credibility
Diversity and Culture

- Sensitivity to language and bias
  - LGBTQ
  - Cultural differences
- Reporting barriers
- Communication differences/impediments
Scope of the Investigator’s Role

■ Does the investigator:
  □ Merely gather evidence?
  □ Determine credibility?
  □ Make findings of fact?
  □ Identify policy violations?
  □ Recommend sanctions?

■ Is there a separate adjudicator?

■ Is the adjudicator bound by the investigator’s findings?
Scope of the Investigator’s Role

- Separate grievance procedures are not required…
  - So long as they comply with the prompt and equitable requirements of Title IX (DCL, 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)

  - Is your fact-finder/decision-maker separate and independent from your investigator?
MUST

- Promptly investigate to determine what occurred and then take appropriate steps to resolve the situation

- Determine, consistent with state and local law, whether appropriate law enforcement or other authorities should be notified

- Promptly resume and complete its fact-finding for the Title IX investigation once notified that the police department has completed its gathering of evidence

- Process off campus complaints in accordance with its established procedures
  - Consider the effects of the off campus conduct when evaluating whether there is a hostile environment on campus

SHOULD

- Promptly investigate to determine what occurred and then take appropriate steps to resolve the situation

- Notify a complainant of the right to file a criminal complaint and not dissuade a victim from doing so either during or after the school's internal Title IX investigation

- Not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation

- Follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred

- If an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner
“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)
Know the answers to these questions for your institution:

- Is 60 days a hard and fast rule?
  - Good cause
  - Communication with both parties
  - Estimated completion date

- How do we handle breaks?
Investigator as Fact-Finder

- In many instances, the investigator may be the initial or only finder of fact

- **Burden of Proof:** preponderance of the evidence
  (DCL, p. 11)
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
Small Group Discussion

- Who investigates on your campus?
- Discuss any barriers caused by perception or bias for or against a department.
- Is there a better model?
Questions & Answers
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 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 timeframe.
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
  - 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

- The first, most crucial step is to preserve evidence, whether or not law enforcement is involved

- For reports that occur soon after the incident:
  - Ask whether the victim has bathed, urinated, or made other physical changes since the incident
  - Ask the victim to use a clean jar to collect the urine should the victim have to urinate
  - Let the victim know that other evidence may still be identified and recovered even if the victim has bathed or made other physical changes

- Ensure the proper medical or forensic personnel handle forensic evidence
Gathering Physical Evidence

- All physical evidence, whether subject to forensic analysis or not, should be preserved and the chain of custody should be maintained.

- Ensure that evidence collection and maintenance is documented including:
  - Date of evidence recovery
  - Location of evidence recovery
  - Person who recovered evidence
  - All persons who handled evidence
  - Location of evidence storage

- Ensure that evidence is stored in a secure location

- Document any time the evidence is removed
Gathering Physical Evidence

- 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
  - Physical evidence can be lost, destroyed, or contaminated
  - Injuries heal quickly
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 record 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
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
All written investigative reports should contain:

- The name and sex of the alleged victim and, if different, the name and sex of the person reporting the allegation
- A statement of the allegation, a description of the incident(s), and the date(s) and time(s) (if known) of the alleged incident(s)
- The date that the complaint or other report was made
- The date the accused was interviewed
- The names and sex of all persons alleged to have committed the alleged harassment
- The names and sex of all known witnesses to the alleged incident(s)
- The dates that any relevant documentary evidence (including cell phone and other records as appropriate) was obtained
- Any written statements of the complainant (or victim, if different from the complainant)
- The date on which the university deferred its investigation and disciplinary process because the complainant filed a law enforcement complaint and, as applicable, the date on which the university resumed its investigation and disciplinary process
- The outcome of the investigation and, if any, disciplinary process
- The response of university personnel and, if applicable, university-level officials, including any interim and permanent steps taken with respect to the complainant and the accused
- A narrative of all action taken to prevent recurrence of any harassing incident(s), including any written documentation
Privacy Considerations

- Inform all witnesses that the information:
  - Will be shared with school personnel
  - May be shared with law enforcement
  - Will not be shared with others beyond the “need to know” circle

- Request that witnesses:
  - Keep the contents of the interview confidential
  - Avoid discussing 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
Questions & Answers
Title IX Compliance Training

Investigating Sexual Assaults in Higher Education

Gina Maisto Smith  Leslie M. Gomez
Part 6
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
- Set the stage for a follow-up interview
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 consider the following:
  - 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 and carefully phrase questions
  - “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 difficult for a person to recall traumatic events, your role is to gather and fully assess the facts. You will likely have to ask some difficult questions. Remember:
  - The complainant will be prepared to understand the process
  - Do not make assumptions about the complainant’s fragility or vulnerability
  - Important questions should not be intentionally avoided

- Explain why you are asking the question
The Continuum Approach

- Open-ended
  - Calls for narrative or recall

- Focused
  - Directs the witness to a particular issue

- 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

- Responding to “triggers”
  - Telling a horrible story is not easy!
  - Offer breaks
  - Offer water and tissues
  - Reassure the victim
  - Explain the purpose of the questions
- Listen – don’t assume!

- Support the complainant by:
  - Demonstrating acceptance
  - Using reflective listening
  - Avoiding emphasis on “you”
  - Using open communication – have a conversation
Small Group Exercise

- Interactive Interviewing Activity
Questions & Answers
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 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

- If respondent and complainant know each other:
  - Explore past relationship
  - Introduce positive elements of relationship

- Explore effects of incident:
  - Emotional: fear, intimidation, worry, anxiety
  - Actual: financial, time, participation in the process

- How the life of the witness will 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
Consider other attendant details such as:

- Suspect’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
  - E.g., roommate noticed that complainant began wearing baggy clothes and stopped attending class regularly
Common Sense

- Testing 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

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

<table>
<thead>
<tr>
<th>Time</th>
<th>Date</th>
<th>Place</th>
<th>Relationship</th>
<th>Issue 1: Consent</th>
<th>Issue 2: Drugs / Alcohol</th>
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<td>Complainant</td>
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</table>
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?
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
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.

Investigating: Consent

- Always start with 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
Investigating: Alcohol/Incapacitation

- Ask questions about intoxication and capacity
- Be sensitive but direct
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 be 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.¹

- “Nearly half of America’s 5.4 million full-time college students abuse drugs or drink alcohol on binges at least once a month.”²

- 90% of campus rapes are alcohol related.³

1. DOJ, National Institute of Justice, 2005.


3. Bureau of Justice Statistics, 2000, National Commission on Substance Abuse at Colleges and Universities
Alcohol: Value Judgments

- Can you commit rape if you are drunk?
- Can you consent if you are drunk?
- Tendency to blame the victim for voluntary 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
Alcohol: Investigative Challenges

- 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
Alcohol: Investigative Tools

- Assess pre-incident behavior
- Assess quantity/quality of alcohol use
- Identify expectations/mindset 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 and reaction to disclosure
- Consciousness of guilt
Investigating Intimate Partner Violence

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

X1 + X2 + X3 + X4

A Person + Any Act of a Sexual Nature + Against an Individual +

- Coercion or force or
- Incapacitation or
- No consent

f1 + f2 + f3 + f4
## Integrated Analysis

### Elements:

<table>
<thead>
<tr>
<th></th>
<th>( X_1 ) Person</th>
<th>( X_2 ) Any Act of a Sexual Nature</th>
<th>( X_3 ) Against an Individual</th>
<th>( X_4 )</th>
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<tbody>
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<td>Complainant</td>
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<td>Coercion or force; or</td>
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Helpful Resources

- Incident Response Checklist
- Incident Report Form
- Investigation Checklist
- Investigation Checklist: Complainant
- Investigation Checklist: Respondent
Questions & Answers
Part 8
Coordination With Law Enforcement
“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”

“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.” (DCL, p. 4, 10)
“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.”

“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.” (DCL, p. 10)
Memorandum of Understanding

- Schools, local law enforcement agencies, local prosecutors, medical providers, and victims’ advocates should draft a shared Memorandum of Understanding (MOU)

- Any agreement or MOU with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably (DCL, p. 10)

- 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 the 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

Eastern Michigan University Voluntary Resolution Agreement

- The university will review its campus police records for a prior “school year and, for any complaint of sexual assault that was treated solely as a criminal matter and/or where the Title IX Coordinator was not involved, the university’s Title IX Coordinator will review the matter to determine whether sexual harassment occurred in violation of Title IX and whether the remedies provided were effective. If not, the university will promptly take measures, should the victim or the perpetrator still be enrolled as a student, to ensure the sexual harassment was fully and effectively addressed.”

Notre Dame College Voluntary Resolution Agreement

- The college will review its campus police records for previous years “for any complaint of sexual assault/sexual violence that was treated solely as a criminal matter and/or where the Title IX Coordinator was not involved, the college’s Title IX Coordinator will review the matter to determine whether sexual harassment occurred in violation of Title IX and whether the remedies were effective in making the victim whole. If not, the college will promptly take measures, should the victim still be enrolled as a student, to ensure the sexual harassment was fully and effectively addressed.”
Coordination With Law Enforcement

- University of Montana MOA Regarding Office of Public Safety’s Response to Sexual Assault

  - Take affirmative steps to clarify, through policies, procedures, and/or training, the respective roles and responsibilities of MPD and OPS pursuant to the MOU between those two agencies

  - Take affirmative steps to ensure effective communication and coordination between OPS, UM, and MPD

- Xavier University Voluntary Resolution Agreement

  - The university will review its campus police records for previous years for “complaints of sexual assault/sexual violence that were treated solely as a criminal or disciplinary matter and/or where the Title IX Coordinator was not involved, the university’s Title IX Coordinator will review the matter to determine whether the victim or the alleged perpetrator is still enrolled as a student and, if the incident(s) in question raise possible sexual harassment, take appropriate steps to address the harassment.”
Coordination With Law Enforcement

- Who is responsible for carrying out Title IX notifications?
- Who in your community is best positioned/suited to conduct fact-finding?
- How do you coordinate the sharing of information?
- How do you ensure that you thoroughly capture and integrate all necessary information?
- What are the FERPA considerations?
- What local laws impact this coordination?
Small Group Discussion

- What challenges do you anticipate in coordinating with law enforcement?
- What are some possible solutions to resolve those challenges?
Questions & Answers
Appendix

Policy Considerations
Policy Considerations

Consider the following policy questions:

- Does your policy:
  - Communicate your values?
  - Thoroughly implement the law?
  - Provide practical procedures?
  - Incorporate an awareness of the dynamics of sexual violence?
  - Create a perception of bias as to what kind of response a complainant chooses?
  - Incorporate effective tools to address safety and retaliatory conduct?

- Provide for balanced access to support for the respondent?
- Include periodic or annual reviews to incorporate changes in the law and lessons learned through application of the policy?

- Are your policies and procedures effectively communicated to your constituents?
- Are administrators well informed about policy and responding in a timely and consistent fashion?
Policy

Where is the policy located and how is it structured?
- Alphabetical
- Multiple policies
- Umbrella policy

Language
- Tone
- Value-laden terms
- Consistency

Organization
- Modular
- Intuitive
- Redundant

Web-based
- Searchable
- Links

Supported by
- Flow charts
- Clear step-by-step guidance
- FAQs

Consistent definitions

Alignment
Key Policy Components

- Institutional values
- Notice of non-discrimination
- Purpose
- Set behavioral expectations
- Scope
  - Applies to all community members
  - On and off campus
- Privacy v. confidentiality
- Resources
- Confidential
  - Campus
  - Community
- Interim remedies
- Reporting options
- Emergency assistance for safety, physical and emotional well-being
- All responsible employees directed to share with central review process
- Investigative/review process
- Complainant no consent
- Threshold determination?
Key Policy Components

- Procedures for resolution
  - Based on role of the respondent
  - Must be in alignment
  - Timeframes for investigation, hearing, and appeal

- Definitions
  - Sexual harassment
    - Forms
    - Examples
  - Sexual violence
    - Tie to sexual harassment

- Prohibited forms of conduct
- Consent

- Incapacitation
- Intimate partner violence
- Prior sexual history or pattern evidence
- Consensual relationships
  - Prohibited
  - Discouraged

- Child protection policies
- Mandatory reporter obligations

- Protections
  - No retaliation
  - Alternative presence
  - No cross-examination

Definitions
- Sexual harassment
  - Forms
  - Examples
- Sexual violence
  - Tie to sexual harassment

Prohibited forms of conduct

Consent

Pepper Hamilton LLP

United Educators

Investigating Sexual Assaults in Higher Education 249
Key Policy Components

- Preponderance of the evidence standard

- Impartial hearing officers to resolve complaints

- Due process:
  - Ensure due process rights of the accused do not restrict or unnecessarily delay the Title IX protections for the complainant

- Procedure to preserve documentation of all proceedings

- Timeframes
  - 60 days is guideline
  - Key is regular and timely communication

- Can extend when circumstances require additional time

- 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
Policy Considerations

- Defining conduct
- Defining consent/incapacitation
- Prior bad acts or pattern evidence
- Complainant’s prior history
- Scope of the investigator’s role
Each institution should clearly define:

- Prohibited conduct
- Consent
  - Burden on the initiator?
  - Affirmative communication?
- Intoxication, impairment, and incapacitation
  - Where do you draw the line?

Ensure that you are familiar with your institution’s definitions and can clearly articulate them.
SEXUAL MISCONDUCT =

A Person + Any Act of a Sexual Nature + Against an Individual + - Coercion or force or - Incapacitation or - No consent

f1 + f2 + f3 + f4
Defining Conduct

- Sexual misconduct
  - Umbrella v. specific forms of prohibited conduct

- Sexual assault
  - All forms of sexual contact?
  - Differentiate between penetrating acts and touching?

- Use of the term rape?

- Federal definition vs. state definition

- Stalking

- Sexual exploitation

- Indecent exposure

- Intimate partner violence

- Retaliation

- Failure to comply
Defining Conduct

- Intimate Partner Violence
  - Act of violence or threat of violence by someone with whom the complainant is or has been in a sexual, dating, domestic, or other intimate relationship
  - Includes sexual violence
  - Stand alone violation or holistic approach?
Defining Consent

- Each participant should obtain and give effective consent in each instance of sexual activity.

- Informed, freely and actively given, mutually understandable words or actions, which indicate a willingness to participate in mutually agreed upon sexual activity.

- In the absence of mutually understandable words or actions, whose responsibility is it to make sure that the other is consenting?

- Relying solely upon non-verbal communication can lead to miscommunication.

- If confusion or ambiguity on the issue of consent arises anytime during the sexual interaction, the sexual activity should cease.
Defining Consent

- Consent may not be inferred from silence, passivity, or lack of active resistance alone.

- A current or previous dating or sexual relationship (or the existence of such a relationship with anyone else) may not, in itself, be taken to imply consent.

- Consent to one type of sexual act may not, in itself, be taken to imply consent to another type of sexual act.

- Consent to sexual activity may be withdrawn at any time, as long as the withdrawal is communicated clearly; upon clear communication, all sexual activity must cease.
Defining Consent

- Consent which is obtained through the use of fraud or force, whether that force is physical force, threats, intimidation, or coercion, is ineffective.

- One may not engage in sexual activity with another who one knows, or should reasonably have known, is incapacitated as a result of alcohol or other drugs.

- The use of alcohol or other drugs can have unintended consequences and can create an atmosphere of confusion over whether consent is freely and effectively given.

- Being intoxicated or high does not diminish one’s responsibility to obtain consent and is never an excuse for sexual misconduct.
Intoxication v. Incapacitation

- Understanding the difference between intoxication and incapacitation
  - Impaired judgment v. 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

- The vomit rule

- Effect of a blackout
  - A person in an alcoholic blackout state may appear to act normally – may walk, talk, drive, etc., 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, then consent may be considered to have been given
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)
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
Questions & Answers