

Your Role as an Advisor

Under the Title IX Grievance Process
The Final Rule

Agenda

1. Title IX
2. Title IX at UNC Asheville
3. Advisor Role

What is Title IX

- Parker Poe video -- timestamp :46 - 3:06
- Sexual Misconduct and Interpersonal Violence Policy - Stands (unaffected by the Final Rule, current Policy is Compliant)
 - a. Sexual Misconduct
 - b. Sexual Harassment
 - c. Interpersonal Violence
 - d. Faculty, Staff, and Students application
- The Final Rule impacted the procedural requirements for addressing TIXSH complaints (Title IX Sexual Harassment)
 - a. This includes the role, scope and purpose of advisors during that grievance process
 - b. Includes a narrower definition of TIXSH on campus
 - c. Includes a dismissal analysis and appeal

Title IX at UNC Asheville

1. Complaint and Notification

- a. Supportive Measures - Complainant and Respondent
- b. Informal Process
- c. Formal Process
- d. Notification Required when Actual Knowledge is present
- e. Notification applied to both informal and formal process

2. Dismissal Analysis

- a. Does the behavior meet the TIXSH definition - which has been narrowed
- b. If not, case dismissed -- behavior sent to be addressed through other policies

3. Investigation

- a. Applied only to Formal Process
- b. Presumption of Not Responsible until the investigation concludes

4. Hearing

- a. Advisors required
- b. Can be attorneys

5. Resolution

- a. Outcomes in writing to both parties
- b. Appeal options

Complaint and Notification

- Supportive Measures (applied to both parties for informal and formal options)
 - Counseling
 - Course Adjustments
 - Class Schedule
 - Escorts
 - Work Schedule
 - No Contact Orders
 - Leaves of Absence
 - Monitoring
 - Safety Plans
 - Living Accommodations
 - Parking Issues
 - Other options as needed/identified and vary on the circumstances of the case and the needs of the parties
 - Notification required simultaneously for either process
- Informal Process
 - Mutually agreed upon process
 - Educational Sanctions Only
 - Notice required throughout
 - No formal record keeping of case, agreement or sanctions
 - Can move to formal at any time for both parties
 - No appeal
- Formal Process
 - Investigation required
 - Hearing required to resolve - no administrative resolution permitted
 - Formal Findings and Resolution
 - On record from start to finish
 - Highest sanction is Expulsion
 - Appeals can be sought by either party
 - 2 levels of appeal

Dismissal Analysis

1. Title IX Coordinator required to do a dismissal analysis for all complaints
2. The TIXSH behavior must meet the narrowed definition of the Final Rule
 - a. Behavior had to occur in the United States
 - b. Behavior had to meet all three standards: Severe, Persistent, AND Pervasive
 - c. Behavior had to take place within an educational program or activity
 - i. Off campus parties in which an issue occurred would be dismissed here
 - ii. On campus parties/events/activities including residence halls would meet TIXSH
3. Dismissed complaints under Title IX can still be addressed through other policies --- likely applicable to Human Resources Policies and Student Code of Community Standards

Investigation

- Unbiased and Impartial to both parties
- 2 investigator model
- Advance written notice of the interview and schedule
- During the interview
 - Advisors can take notes to ask their party about later
 - Advisors cannot be disruptive or interrupt the interview
 - Advisors cannot answer on behalf of the party
 - These interviews are 100% about the parties - not the advisors
 - Be prepared for the interviews to include and cover very explicit territory of a sexual nature that may be uncomfortable
 - Investigators will also collect evidence from the parties and ask for electronic communication documentation across many platforms; and verbal accounts from witnesses
- Each party may present evidence on their behalf to the investigators
 - Each party has a chance to respond to the evidence collected by the other party in writing
 - Investigator report may also be responded to in writing by both parties
 - You may help your party with these written responses if they desire your help; you may offer to help but they can deny your help with no questions asked

Hearing

Sexual Misconduct Hearing Board (3 of 8 members serve at each hearing)

- Impartial and unbiased and objective
- Parties can be in person; hearings can be conducted virtually; parties are never forced to be in the same room and accommodations are provided
- Parties will have the opportunity to pose questions to the other party; you will be required to present the questions on their behalf as they will not be allowed to cross question each other directly
 - The board will determine if the questions posed will be permitted to be answered by the other party (irrelevant, duplicative, sexual history, or privileged information cannot be asked).
 - Your party does have to answer any and all questions posed to them by the opposing party's advisor and the board members hearing the case
- The Board, as an agent of the University, records the hearing. You are not permitted to do so and neither is your party. You and your party can review the University's recording for appeal purposes.

Resolution

- Informal
 - Mutually agreed upon - otherwise it goes to a formal process or it is dismissed
 - No appeal option
 - Educational Sanctions only
 - Outcomes delivered in writing to both parties
 - Hearing Officers
 - Dr. Fox, Blair Jenkins will be the decision makers in informal process complaints
- Formal
 - Live hearing required in these cases
 - Advisors required for each party at the hearing
 - Ed sanctions plus suspension and expulsion allowed here
 - Outcomes delivered to both parties in writing
 - Sexual Misconduct Hearing Board -- 8 trained Faculty and Staff members that ONLY hear Sexual Misconduct Cases and serve as the decision makers for formal process (3/hearing)
 - Appeals allowed -- 2 levels

Advisor Role

- Parker Poe Video - Timestamp - 5:15 - 6:54
- [Advisor Form](#)
- Advisors Play a background role in these cases
 - You won't be interviewed
 - You won't testify
 - Your speaking role at the hearing will be limited to posing questions to the other party on behalf of the party you are supporting
 - You are not encouraged nor will you be asked to share your personal views on the situation in which you find yourself representing a particular party
 - You are only advising students, you will not advise any employee that is going through this process
 - You are there to support and advocate because you care about this community not because you agree with every action the party you are supporting engaged in

Practical Considerations

If your party wants you to attend a meeting or interview with them:

- Be as flexible as your schedule will allow to make the scheduled appointment with the party
- Be timely to the appointment with your party
- Raise scheduling conflicts immediately
 - Especially important with the hearing because advisors are required to attend for parites
 - And the coordination of hearings is most involved

Questions??

“We act as if there is a single traffic light, red or green. But sex is a road lined with intersections, which way to go, when to slow down, to yield, to stop, to speed up.”

“I am a victim, I have no qualms with this word, only with the idea that it is all that I am.”

Video

Advisors help in different ways.



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Your Role as an Appeals Officer

Under the Title IX Grievance Process
The Final Rule

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1. Title IX Final Rule Changes
2. UNC Asheville Procedural Impacts
3. Appeals Role

What is Title IX

- Sexual Misconduct and Interpersonal Violence Policy - Stands (current Policy is Compliant, definitions have to change so those will be incorporated)
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 - c. Includes a dismissal analysis and appeal
 - d. Parker Poe Timestamp -- 0.00-11:18 Watch

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 - Investigator report may also be responded to in writing by both parties
 - You may help your party with these written responses if they desire your help; you may offer to help but they can deny your help with no questions asked

Advisor Role

- You must include advisors and ensure their participation - mandated rule
- [Advisor Form](#)
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 - You won't testify
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 - You are there to support and advocate because you care about this community not because you agree with every action the party you are supporting engaged in

Hearing Option A - Informal Process

- Title IX Coordinator is lead Coordinator for case management throughout this process up until the hearing is scheduled.
- Hearing Officers are lead decision makers for informal process
 - We liken this to Administrative Resolutions or Mediation under past rules/practices
 - Differences:
 - Mutual agreement to engage in this type of hearing
 - Mutual agreement to identified sanctions
 - The hearing must be live with the parties and the hearing officer
 - The hearing officer must allow cross questioning through the role of the advisors
 - Only Educational Sanctions are permitted -- no suspension or expulsion can be considered
 - Final outcomes, with rationale must be documented and reviewed by TIXC
 - No Appeal option for either party
 - Once the case is resolved, there is no standing record of the case -- it is not part of the file
 - No formal investigative report, but you will receive access to all known information

Hearing Option B - Formal Process

Sexual Misconduct Hearing Board (3 of 8 members serve at each hearing)

- Impartial and unbiased and objective
- Parties can be in person; hearings can be conducted virtually; parties are never forced to be in the same room and accommodations are provided
- Parties will have the opportunity to pose questions to the other party; you will be required to present the questions on their behalf as they will not be allowed to cross question each other directly
 - The board will determine if the questions posed will be permitted to be answered by the other party (irrelevant, duplicative, sexual history, or privileged information cannot be asked).
 - Your party does have to answer any and all questions posed to them by the opposing party's advisor and the board members hearing the case
- The Board, as an agent of the University, records the hearing. You are not permitted to do so and neither is your party. You and your party can review the University's recording for appeal purposes.

Continued

- Title IX Coordinator is lead coordinator of requirements until the end of the Investigation. An investigative report will be required for formal process.
- Hearing Officers act as lead conduct/hearing officers in coordinating the needs of the Sexual Misconduct Board for a live hearing for formal processes. The TIXC is there to support and guide, but letters, schedules, and all other documentation comes from the Hearing Officers as agents of the SMHB to resolve cases through the formal complaint process.
- Formal
 - Live hearing required in these cases
 - Advisors required for each party at the hearing
 - Ed sanctions plus suspension and expulsion allowed here
 - Outcomes delivered to both parties in writing - More detailed now than in past - mandated
 - Sexual Misconduct Hearing Board -- 8 trained Faculty and Staff members that ONLY hear Sexual Misconduct Cases and serve as the decision makers for formal process (3/hearing)
 - Appeals allowed -- 2 levels

Accessing an Appeal

Parker Poe - .58 - 4:33

Three (and only 3) bases for appeal

1. Procedural Irregularity
2. Conflict of Interest/Bias
3. New Evidence

*You cannot grant an appeal because you or one of the parties involved does not like the outcome. You are not conducting a *de novo* review; meaning you look at a case and make a brand new fresh decision. You are only reviewing the work of your colleagues based on the 3 pieces of analysis above.

Procedural Irregularity

The appellant must:

1. Identify a procedural irregularity
 - a. Appeals officers must know the process in full in order to identify these irregularities
 - b. Dismissal Analysis, Investigation, Hearing, and Ruling - are the procedural areas of consideration in determining irregularities
2. Make a case that it (the irregularity) affected the outcome of the matter
 - a. If this can be proven then the appellant should be successful in their appeal
 - b. If this cannot be proven the appellant should not be successful in their appeal

Both factors have to be present for a successful appeal. Factor 1, may be easy to identify given the nuances of Title IX wrapped up in human error --- but proving factor 2 will be more difficult for the appellant.

Example

The investigator asked the respondent to get a witness statement from anyone who could support her alibi. Respondent failed to do so. She ultimately was found responsible for stalking. The respondent appeals.

Does a procedural irregularity exist?

The school bears the burden of gathering evidence and information under the new rule
- not either party

Did this irregularity affect the outcome?

Yes, if the lack of a corroborated alibi could have been a critical element in establishing responsibility

Conflict of Interest/Bias

The Appellant must:

1. Identify a conflict of interest or bias
 - a. Did bias/conflict of interest exist at any point during the process among the individuals working this case
 - b. Title IX Coordinator, Investigators, Hearing Officers are the members to review regarding claims of bias and conflict of interest
2. Make a case that it affected the outcome of the matter
 - a. Looking specifically at the individuals involved in working the case to determine this
 - b. Conflicts of Interest and Bias do not apply to witnesses in the case, only those working it

Example

In response to current events, professor pens an op-ed arguing that sexual harassment investigations have become “witch hunts” and that “no man is safe from accusations that his very existence is oppressive and traumatizing to victims of real or imagined advances. Professor later serves as hearing officer and finds the male Respondent not responsible for sexual harassment.

Can we identify a bias or conflict of interest?

Yes, in favor of male respondents based on this philosophy.

Did the bias affect the outcome?

Based on these factors, it is a reasonable conclusion that this bias affected the outcome

New Evidence

The Appellant must:

1. Identify new evidence that was not reasonably available at the time of determination.
 - a. Must demonstrate that the evidence was not available at the time of the determination
 - b. This requires questioning around why evidence was available within the 5 days required for appeal vs. when the decision was made
 - i. 5 days is not a long time to suddenly have new evidence available that was not available before in such a narrow timeframe.
2. Make a case that it affected the outcome of the matter
 - a. Would the evidence, that is now newly available within the appeal timeframe have made a difference in the ruling

Example

After being found responsible for expressive harassment under Title IX, Respondent goes to new lengths to retrieve old texts and produces texts demonstrating that the Complainant regularly laughed at and expressed approval of communication he later alleged were unwanted and made him feel uncomfortable.

Is there new evidence?

Yes, but it was reasonably available previously

Did this affect the outcome?

Not applicable because first requirement was not met

Did the issue affect the outcome?

Practical Considerations

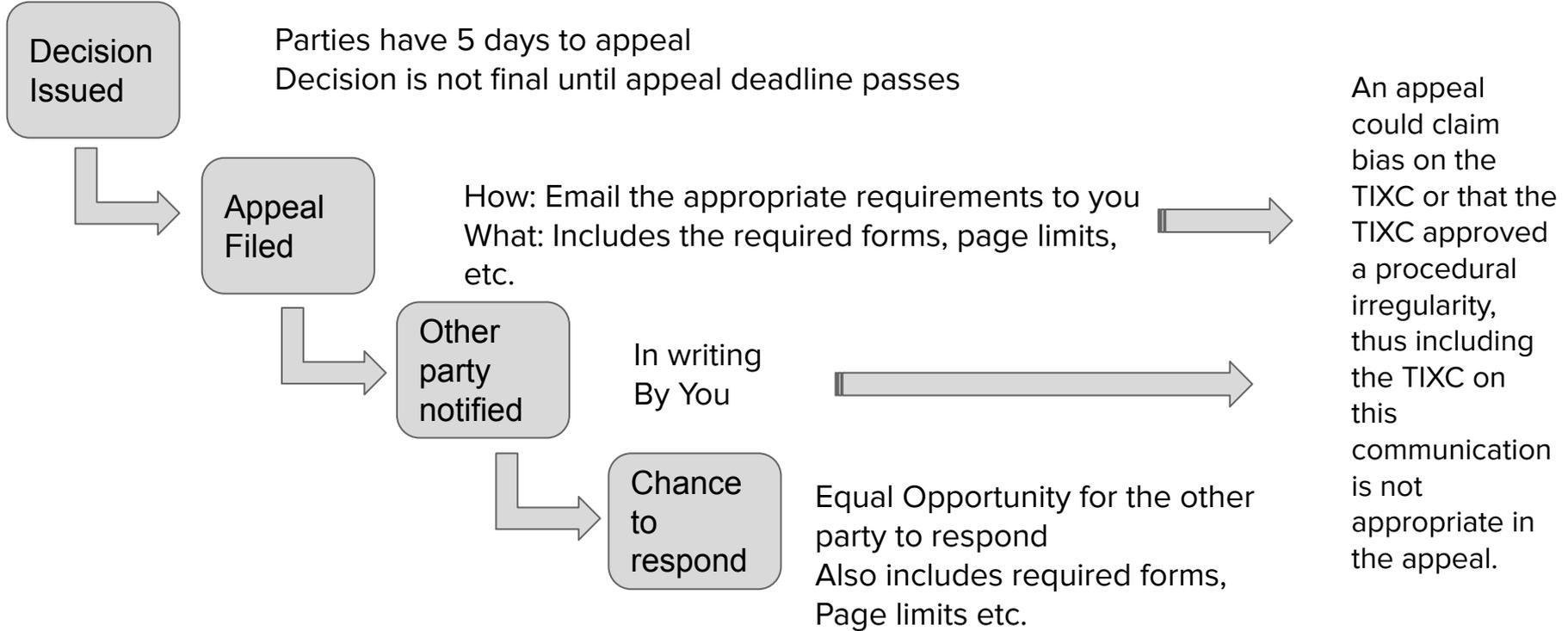
1. List the alleged policy violations
2. Catalogue the elements of those offenses
3. Consider whether the issue impacted the establishment of an element (either prevented it from being established or allowed it to be established)

Example: Offensive Sexual Touching (Violation)

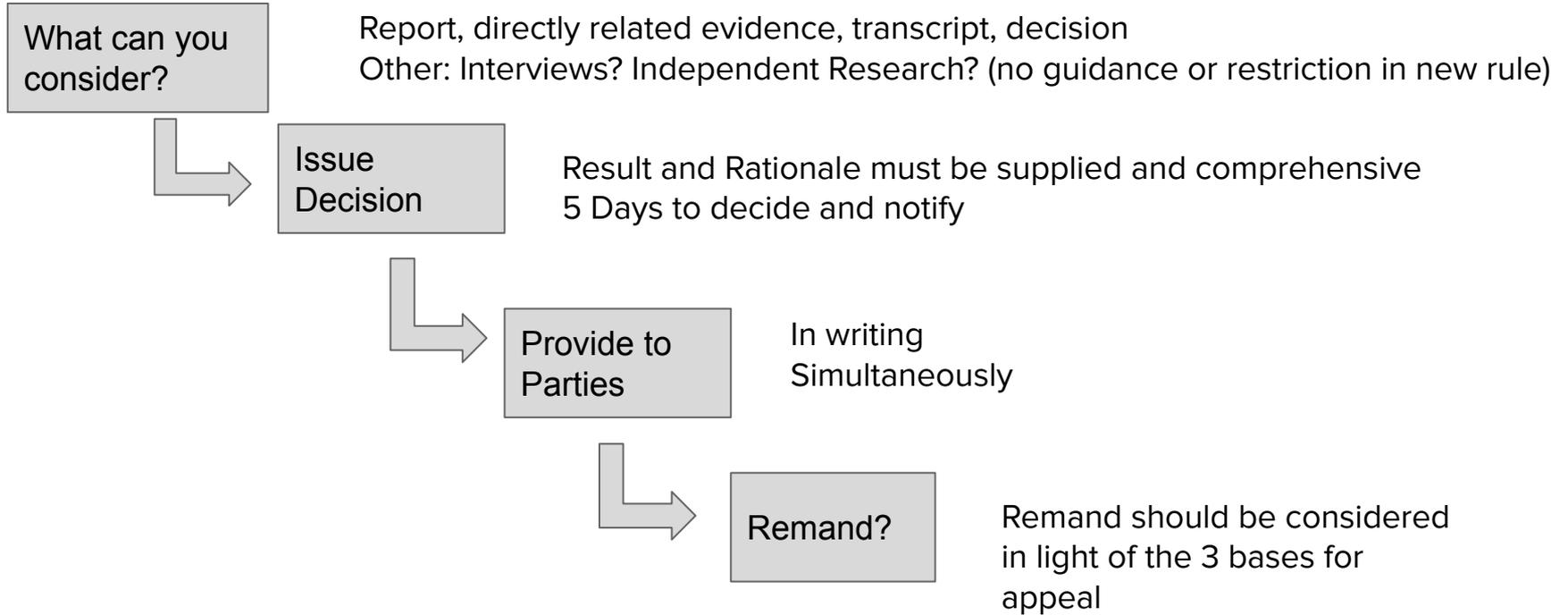
Elements to establish the policy was violated

1. Intentional Touching --- did the issue impact the establishment of this element?
2. Without Consent -- did the issue impact the establishment of this element?
3. Of another person's intimate parts (specify the part) -- did the issue impact the establishment of this element?
 - a. If the answer is no to all of these - then the issue did not affect the outcome
 - b. If the answer is yes to any of these - then the issue did affect the outcome

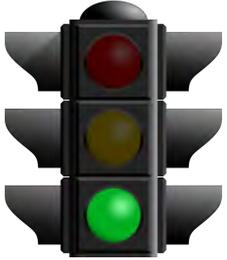
Steps of the Appellate Process



Steps of Your Decision Process



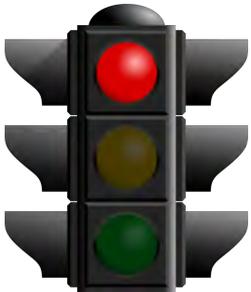
When is remand appropriate?



New Evidence: Remand for mini hearing to consider new evidence. Not looking at everything, just the new evidence and a decision on considering that evidence is made.



Procedural Irregularity: You can reverse a decision that was made based on an irregularity. In that case a remand is not needed. (Example: Dismissal Analysis) You should only remand the case if a do-over is necessary based on the irregularity.



Bias/Conflict of Interest: You can't remand the case to the same biased participants. Do you reverse the decision or do you have to start over from the beginning?

Questions?

- Updates to policy to include the procedural elements are forthcoming
- Forms for appeals and requirements will be shared with all when an appeal is filed
- Expected date for all training, policies, procedures, and web updates on the new rule is September 18.

Assessing Credibility

Role of the Sexual Misconduct Hearing Board

Why do you need to know this? Isn't this the investigators job?

- Yes, but as person who reviews the investigative reports, understanding how, why, where and what lead an investigator to an assessment of credibility or not is important as it may cloud your judgement in the hearing process.
- If you are unaware of common occurrences that investigators must assess as they determine if a policy violation occurred, you may find yourself at odds with the investigator's finding for reasons that are not just.
- Knowing how this works allows you to take a position that is reasonably and justly at odds with the investigators' findings when you have a basic understanding of what goes into these assessments.

Credibility

- Process of weighing the accuracy and veracity of evidence
- Investigators evaluate the source, the content, and plausibility of what is offered
- When source, content, and plausibility are strong then credibility is strong
- Credibility is best established through corroboration
- Credibility exists on a 100 point scale, with the most credible evidence at 100 and the least at 0
- Most evidence is lies somewhere in between
- Investigators must determine where believing one party over another is enough to establish a policy violation

Terms

1. Accuracy: The quality or state of being correct or precise
2. Veracity: Habitual truthfulness, conformity to facts
3. Plausibility: The quality of seeming reasonable or plausible
4. Corroboration: Evidence which confirms or supports a statement, theory, or finding
5. Preponderance of Evidence: If Credibility dips below 50%, the witness or evidence is less credible than more, so whatever tips the scale one way or the other is enough to establish a preponderance of evidence. It is more likely than not....

Considerations

- Positional/Locational Credibility: Could witnesses have heard what they said they heard; see what they saw; or know what they claim to know based on the position or location of events that were offered
- Credentials/Knowledge/Expertise: Experts and other credentials must be established not assumed
- Neutrality: The more loyal a witness is to one party over the other the more biased their evidence may be; Neutral witnesses may be more objective than partisan witnesses
- Impartiality: Fairness
- Objectivity: Absence of bias

Corroboration

Not about witnesses agreeing with one party over another but rather about the evidentiary support for what a witness contends through the evaluation of source, content, and plausibility.

- Source: Is the person providing information developed a reputation for habitual truthfulness?
- Content: Is the substance of the information provided accurate?
- Plausibility: Is the information being shared by a truthful person probable?

Biased Sourcing

- Victim Blaming Statements: “That Bitch, she was asking for it.”
- Group defensiveness (teams; fraternities; clubs): “Bro-Code”
- Self Protection: Fear of getting into trouble
- Revenge: Making a claim to punish someone in retribution for a separate issue of misconduct
- Second hand information: Lack of proximity detracts from credibility and this can develop in two ways;
 1. What was heard from the responding party after the fact
 2. What was heard from the responding party’s best friend after the fact

Triangulation

- The use of two or more data points to extrapolate or infer that a third data point is more likely than other possibilities.
 - If X and Y are true, Z is more likely to be true than A, B, or C.
 - Example: Repeat Offenders of Harassment or Sexual Misconduct
- Avoid Micro-Expression analysis and gestic - you aren't an expert in this
 - Crossing limbs, looking up to the right, and other so called telltales are not evidence and can't be data points.

Credibility Assessment in Context

- Harassing behavior: if it is established that the behavior continued after the responding party was informed it was unwelcome, this adds credibility to the reporting party's account as corroborative
- Major inconsistencies in testimony: Would likely detract from credibility
- Minor inconsistencies in testimony: Would not detract from credibility; figuring out why a person lied (to avoid punishment on an alcohol violation for example) is important in determining if the lie proves or disproves the underlying interpersonal violence allegation
- Delays in reporting: Do not detract from credibility; fear of retaliation or a lack of trust in the process do not mean a person is lying
- False Reporting: There is a difference between someone thinking a violation occurred and an actual violation occurring; that is not a false report even if it is not a policy violation

Continued

- Documents such as diaries, calendar entries, journals, notes, or letters describing the incidents can add to credibility, but can also be manufactured after the fact. So Investigators must Trust, but verify.
- Telling another person about the behavior may add to credibility, but if the accounts provided to others vary meaningfully, that can also undermine credibility
- Other allegations about the responding party could add to the credibility of the allegation
- The fact that a relationship was at one time or in some aspects consensual does not detract from credibility nor is it a defense against a subsequent charge
- Impact matters, intent does not

Continued

- Not knowing behavior is unwelcome is not a defense, rather the reasonable person standard in assessing if the behavior would have been deemed unwelcome and offensive is employed
- The fact that the person who made the allegation did not tell the alleged harasser that the behavior was offensive does not affect credibility
 - Many people are fearful of doing so
 - There is no obligation of the reporting party to inform the responding party that the behavior is offensive
- Motivation to lie, exaggerate, or distort information should be assessed when there are differences in what was reported or questions about veracity and accuracy

Important Credibility Questions

- How might a reasonable person react to the incident?
- What was the effect of the behavior on the reporting party?

A preponderance can be established simply because the investigator believes one party and not the other, based on the assessment of credibility of the party and the evidence provided.

Defense Explanations

People who have engaged in sexual misconduct may explain and defend it in ways that do not justify their actions and should not add to their credibility.

- It was an accident. I didn't meant to make them uncomfortable when I touched their crotch.
- I didn't know coercion was a thing nor did I know it was against any policy.
- She was giving me signals that let me know she wanted it, like kissing me back.
- She's a slut so I am surprised that she is accusing me of this.
- It wasn't a big deal, a simple kiss - I am not sure why he is so bothered by it.

Irrelevant Responding Party Defenses

- Character Witnesses: “He is such a good kid; I can’t believe he would do that.”
- Popularity with other students and staff: “Everybody likes them, I just don’t think they would do that.”
- No history of past problems: “She has never been in trouble before.”
- Academic performance: “How could he do this, he is such a good student.”
- Athletic performance: “She is a star athlete, she wouldn’t jeopardize the success of the team by engaging in this behavior.”
- Degree Completion: “It’s his last semester before graduation so if he did this the punishment should not affect his entire future.”

Irrelevant Reporting Party Statements

- Clothing - “Just look at what they were wearing” - Clothing does not cause the sexual misconduct to occur nor does it give anyone permission to touch or make remarks to the person
- Appearance - “She couldn’t have been raped, she is too ugly, nobody would touch her”
- Flirting - “He flirted with me all night, how could he not have expected sex?”
- Males being victims - “Why didn’t he just take it as a compliment like a man?”
- Sexual Orientation - “Listen, she came out of the closet and told everyone. Of course she is fresh meat this was totally expected.”

Abductive Reasoning: An Example

Fred fondled Shelly's breasts without consent and admitted it. = X

Fred also tried to give a handjob to Bill claiming he had consent when in fact he did not. = Y

Joe came forward alleging that he believed Fred fondled his penis one night while sleeping in Fred's room, but isn't positive because he was asleep and knows that Fred likes girls. = Z (potential as we don't know yet if this occurred)

By triangulating X and Y, I can believe the inherent plausibility of Z's allegation.

Continued

Investigator's Note:

I know that Fred may like girls, but also wants to touch penises. Therefore, X does not rule out Z. It makes Z more plausible than any alternative explanations given.

I also know that Fred has fondled a penis before without consent and that Z has no idea about X and Y. Thus, Z's belief that he was fondled while sleeping is not influenced by anything but his own belief. He can't fully self-corroborate because he can't say for sure that the conduct occurred as he was asleep.

Triangulating from X and Y makes Z more likely than not, because both are part of a pattern that Fred has enacted before, and Y occurred under similar circumstances to Z.

Conclusion

This is how abductive reasoning for the inherent plausibility of the assault on Z comes from what investigators know about X and Y, not really because of the weight of Z's evidence, itself.

Similarly, investigators use triangulation to adduce inherent implausibility, when Y and X don't make Z more likely but Z is asserted as the logical inference if Z and Y are true. Z will fail when X and Y triangulate to an alternative explanation rather than to Z.

Now you know....Tips for Board Members

1. Parties will want to verify the credentials and knowledge of the investigators.
 - a. When you receive a report from an investigator their credentials should be listed. If they aren't you can ask the investigators to speak to their knowledge, experience or credentialing.
2. Examine the way the investigator assessed credibility.
 - a. If it makes sense through inherent plausibility, then getting to a preponderance is likely easier to identify as a panel.
3. Determine if the investigator used a consistent method to assessing the credibility of all parties and witnesses.
 - a. Credibility should be explained in the report. If the explanation employs a different litmus test for one person over others without sufficient explanation; the discrepancy needs to be addressed in the hearing.
4. Ask the Investigator Questions, not just the parties.
 - a. If the report doesn't add up, you have a responsibility to call the investigator out on that and if the answer is not satisfying you may justly find yourself at odds with the finding.

Cross Examination Questions

Parties have the right to ask each other questions regarding their testimonies.

The board is responsible for ensuring that the questions asked by parties are relevant. Understanding that irrelevant questions around credibility, like clothing, appearance, and past sexual history, are not acceptable questions for the parties.

Relevant questions can come through the board that specifically address the details of each party regarding the how, when, what, why, and where.

Questions?

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3. Hearing Officer Role Under the new Rule

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- b. Can be attorneys

5. Resolution

- a. Outcomes in writing to both parties
- b. Appeal options

Complaint and Notification

- Supportive Measures (applied to both parties for informal and formal options)
 - Counseling
 - Course Adjustments
 - Class Schedule
 - Escorts
 - Work Schedule
 - No Contact Orders
 - Leaves of Absence
 - Monitoring
 - Safety Plans
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 - Other options as needed/identified and vary on the circumstances of the case and the needs of the parties
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2. The TIXSH behavior must meet the narrowed definition of the Final Rule
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 - b. Behavior had to meet all three standards: Severe, Persistent, AND Pervasive
 - c. Behavior had to take place within an educational program or activity
 - i. Off campus parties in which an issue occurred would be dismissed here
 - ii. On campus parties/events/activities including residence halls would meet TIXSH
3. Dismissed complaints under Title IX can still be addressed through other policies --- likely applicable to Human Resources Policies and Student Code of Community Standards
4. Parker Poe Timestamp -- 9:10 - 35:55 -- WATCH

Advisor Role

- You must include advisors and ensure their participation - mandated rule
- [Advisor Form](#)
- Advisors Play a background role in these cases
 - You won't be interviewed
 - You won't testify
 - Your speaking role at the hearing will be limited to posing questions to the other party on behalf of the party you are supporting
 - You are not encouraged nor will you be asked to share your personal views on the situation in which you find yourself representing a particular party
 - You are only advising students, you will not advise any employee that is going through this process
 - You are there to support and advocate because you care about this community not because you agree with every action the party you are supporting engaged in

Investigation

- Unbiased and Impartial to both parties
- 2 investigator model
- Advance written notice of the interview and schedule
- During the interview
 - Advisors can take notes to ask their party about later
 - Advisors cannot be disruptive or interrupt the interview
 - Advisors cannot answer on behalf of the party
 - These interviews are 100% about the parties - not the advisors
 - Be prepared for the interviews to include and cover very explicit territory of a sexual nature that may be uncomfortable
 - Investigators will also collect evidence from the parties and ask for electronic communication documentation across many platforms; and verbal accounts from witnesses
- Each party may present evidence on their behalf to the investigators
 - Each party has a chance to respond to the evidence collected by the other party in writing
 - Investigator report may also be responded to in writing by both parties
 - You may help your party with these written responses if they desire your help; you may offer to help but they can deny your help with no questions asked

Top 10 Things....

To know about Adjudications under the new rule.

Parker Poe Video Timestamp --- 40:59 - 1:34.13

Part 1 Complete

On Friday:

- Hearing Officer Role in Informal Process
- Hearing Officer Role in Formal Process
- Scenario Run through

Hearing Option A - Informal Process

- Title IX Coordinator is lead Coordinator for case management throughout this process up until the hearing is scheduled.
- Hearing Officers are lead decision makers for informal process
 - We liken this to Administrative Resolutions or Mediation under past rules/practices
 - Differences:
 - Mutual agreement to engage in this type of hearing
 - Mutual agreement to identified sanctions
 - The hearing must be live with the parties and the hearing officer
 - The hearing officer must allow cross questioning through the role of the advisors
 - Only Educational Sanctions are permitted -- no suspension or expulsion can be considered
 - Final outcomes, with rationale must be documented and reviewed by TIXC
 - No Appeal option for either party
 - Once the case is resolved, there is no standing record of the case -- it is not part of the file
 - No formal investigative report, but you will receive access to all known information

Running an Informal Live Hearing

Initial Steps (Completed by TIXC)

- Review party identities to ensure that you have no conflict of interest or bias that would prevent a HO from serving impartially.
- Review applicable policies and procedures and seek guidance and clarification as necessary.
- Make the information related to the case available to the assigned Hearing Officer
- Assign/Ensure that each party will have an advisor present to conduct cross-questioning.
- Schedule a hearing location with three separate rooms or schedule a remote hearing. Give 7 days notice to each party. Ensure that the parties' advisors can attend the hearing.

Pre-Hearing Tasks (Completed by Hearing Officer)

- Prepare any questions you want to ask the parties during the live hearing.
- Create and/or Review and practice the hearing script. Include that the informal process requires mutual agreement and there are no appeals available to either party.
- Remind parties that they can move from informal to formal at any time.
- Use elements of the prohibited conduct definition(s) to guide your preparation and analysis.

Continued

Hearing

- Use the hearing script to make introductory remarks and explain hearing rules and procedures and to guide the hearing.
- Ask each party what outcome they are hoping for by engaging in the informal process for this case.
- Allow both parties to recount their stories, ask your prepared or follow up questions.
- Allow for cross-questioning by the parties' advisors.
- After each cross-question posed by a party's advisor, determine whether to allow or exclude the question and provide a rationale for any exclusion.

Post Hearing Tasks

- Using the preponderance of evidence standard, methodically review the information as applied to each element of the applicable prohibited conduct definition(s) and determine the harms and reparations that will be suggested to the parties
- Document the rationale for your suggestions and communicate your findings and outcomes to the parties.
- Establish agreement on the outcomes from both parties.
- Deliver a final outcome letter to both parties identifying what was agreed upon in the informal process.

Hearing Option B - Formal Process

Sexual Misconduct Hearing Board (3 of 8 members serve at each hearing)

- Impartial and unbiased and objective
- Parties can be in person; hearings can be conducted virtually; parties are never forced to be in the same room and accommodations are provided
- Parties will have the opportunity to pose questions to the other party; you will be required to present the questions on their behalf as they will not be allowed to cross question each other directly
 - The board will determine if the questions posed will be permitted to be answered by the other party (irrelevant, duplicative, sexual history, or privileged information cannot be asked).
 - Your party does have to answer any and all questions posed to them by the opposing party's advisor and the board members hearing the case
- The Board, as an agent of the University, records the hearing. You are not permitted to do so and neither is your party. You and your party can review the University's recording for appeal purposes.

Continued

- Title IX Coordinator is lead coordinator of requirements until the end of the Investigation. An investigative report will be required for formal process.
- Hearing Officers act as lead conduct/hearing officers in coordinating the needs of the Sexual Misconduct Board for a live hearing for formal processes. The TIXC is there to support and guide, but letters, schedules, and all other documentation comes from the Hearing Officers as agents of the SMHB to resolve cases through the formal complaint process.
- Formal
 - Live hearing required in these cases
 - Advisors required for each party at the hearing
 - Ed sanctions plus suspension and expulsion allowed here
 - Outcomes delivered to both parties in writing - More detailed now than in past - mandated
 - Sexual Misconduct Hearing Board -- 8 trained Faculty and Staff members that ONLY hear Sexual Misconduct Cases and serve as the decision makers for formal process (3/hearing)
 - Appeals allowed -- 2 levels

Running a Formal Live Hearing

Initial Steps (Completed by the TIXC)

- Review party identities to ensure that you have no conflict of interest or bias that would prevent HO or SMCB members from serving impartially.
- Review the Formal Complaint and Notice of Allegations to identify applicable prohibited conduct definitions.
- Reach out to SMHB in consultation with the HO and review the procedural elements of the Live Hearing and the SMHB role.

Initial Steps (Completed by the HO)

- Reach out to SMHB in consultation with the TIXC and review the procedural elements of the Live Hearing and the SMHB role.
- Make the investigate report available to the identified members of the SMHB will be hearing the case

Initial Steps (Completed by the SMHB)

- Review the investigative report, directly related evidence not included in the report but gathered and provided by the investigators, the parties' responses to that evidence, and the parties' pre-hearing submissions.
- Use elements of the prohibited conduct definition(s) to guide your preparation and analysis.

Continued

Pre-Hearing (HO)

- Schedule a hearing location with three separate rooms or schedule a remote hearing.
- At least seven days prior to the hearing, send a Notice of Hearing to the parties with the hearing date, time, and location.
- Determine the order of witness testimony at the hearing and arrange for their attendance.
- Invite the parties to submit questions that they anticipate asking at the hearing.
- Prior to the hearing, ensure that each party will have an advisor present to conduct cross-questioning.
- Create/ Review and practice the hearing script with the SMHB members and chair.
- Ensure that all previously-reviewed evidence (both relevant and directly related) will be available for the parties to use at the hearing.

Pre-Hearing (SMHB)

- Create/ Review and practice the hearing script with the SMHB members and chair.
- Prepare direct examination questions that you will ask the investigators, parties, and witnesses.

Continued

Hearing (HO)

- Arrive early to test the recording equipment and ensure that it is working properly. Ensure the use of breakout rooms for the parties and witnesses is accessible and private to maintain the separation required in a live hearing.
- If the hearing is virtual, ensure all equipment for all parties, SMHB, and witnesses is working properly and easily accessible.
- Be available to help with procedural questions, clarifications, and/or technical issues that may come up in a live or virtually live hearing

Hearing (SMHB)

- Use the hearing script to make introductory remarks and explain hearing rules and procedures and to guide the hearing.
- After each cross-examination question posed by a party's advisor, determine whether to allow or exclude the question and provide a rationale for any exclusion.
- Go through the list of questions the SMHB developed in preparation for the hearing that have not already been answered.
- The SMHB Chair is the moderator and ensures that all parties are respectful to all involved with their behaviors and professionalism. The Chair facilitates the hearing and with the help of the HO ensures all parties have had opportunities to state their case, defend themselves, and ask questions of the other party through the advisor.

Continued

Post-Hearing (HO)

- Be available to provide sanction consultation to the SMHB when applicable.
- Receive the document crafted by the SMHB that provides the rationale for the findings and the sanctions.
- Craft the final outcome letter based on this documentation and send to TIXC for review.
- Once reviewed, send the Final Outcome Letter, with appellate information, to the parties simultaneously. CC TIXC

Post-Hearing (SMHB)

- Using the preponderance of the evidence standard, methodically review the evidence as applied to each element of the applicable prohibited conduct definition(s) and make your responsibility determination. (2 out of 3 must agree on outcome)
- Identify sanctions that are aligned with the finding and charges. SMHB members may ask clarifying questions to the HO during their sanction deliberation. (All 3 members must agree to the sanctions).
- Document the rationale for your responsibility determination and the sanctions. This documentation can and should be crafted as a group (see template). Send the document to the HO.

Part III Scenario

Parker Poe -- Timestamp -- 1:39.37 - 2:19.40

Miscellaneous

- Attorney Form -- Being updated
- FERPA Form --- Being updated
- SMIPV Policy -- Updated by Spring Semester
- Appeals

Questions?

Your Role as a Hearing Officer

Under the Title IX Grievance Process
The Final Rule
SMHB

Agenda

1. Title IX Final Rule Changes
2. UNC Asheville Procedural Impacts
3. Hearing Officer Role Under the new Rule

Today:

- About 1 hour and 39 minutes of Video Clips with Information
- 20 minutes of UNC Asheville specific

Parker Poe Timestamp -- 0.00 - 9:10

What is Title IX

- Sexual Misconduct and Interpersonal Violence Policy - Stands (unaffected by the Final Rule, current Policy is Compliant)
 - a. Sexual Misconduct
 - b. Sexual Harassment
 - c. Interpersonal Violence
 - d. Faculty, Staff, and Students application
- The Final Rule impacted the procedural requirements for addressing TIXSH complaints (Title IX Sexual Harassment)
 - a. This includes the role, scope and purpose of advisors during that grievance process
 - b. Includes a narrower definition of TIXSH on campus
 - c. Includes a dismissal analysis and appeal

Title IX at UNC Asheville

1. Complaint and Notification

- a. Supportive Measures - Complainant and Respondent
- b. Informal Process
- c. Formal Process
- d. Notification Required when Actual Knowledge is present
- e. Notification applied to both informal and formal process

2. Dismissal Analysis

- a. Does the behavior meet the TIXSH definition - which has been narrowed
- b. If not, case dismissed -- behavior sent to be addressed through other policies

3. Investigation

- a. Applied only to Formal Process
- b. Presumption of Not Responsible until the investigation concludes

4. Hearing

- a. Advisors required
- b. Can be attorneys

5. Resolution

- a. Outcomes in writing to both parties
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Parker Poe Video Timestamp --- 40:59 - 1:34.13

Part 1 Complete

Next time, Part 2:

- Policies and Terms
- Hearing Officer Role in Informal Process
- Hearing Officer Role in Formal Process - SMHB
- Scenario Run through

Part 2

- Preliminary Policy Review
- Hearing Option A - Informal Process
- Hearing Option B - Formal Process
- Scenario
- Purpose of the Board (UNCA Specific)
- Who Commits Campus Sexual Assault

Sexual Misconduct and Interpersonal Violence Policy

<https://titleix.unca.edu/>

<https://titleix.unca.edu/policies/key-terms/>

<https://titleix.unca.edu/policies/university-policies/>

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- Document the rationale for your responsibility determination and the sanctions. This documentation can and should be crafted as a group (see template). Send the document to the HO.

Determinations

- Responsible
 - Preponderance of Evidence
 - Sexual Misconduct and Interpersonal Violence Policy
 - $\frac{2}{3}$ agreement required
- Not Responsible
 - Appeals
 - Other sexual Harassment Cases
 - $\frac{2}{3}$ agreement required
- Sanctions
 - Available sanctions based on type of conduct
 - Agreement required
- Justification and Rationale
 - Documented reasoning among all board members
 - Agreement required

Determination Elements

- Identification of the allegations
- Description of the Procedural steps
- Findings of fact
- Conclusions regarding application of school rules to the facts
- State of result as to each allegation
 - Determination of responsibility
 - Rationale
 - Sanctions
 - Remedies provided the reporting party
- Procedures for the party to appeal

Scenario

Parker Poe -- Timestamp -- 1:39.37 - 2:19.40

Break

Lets mute and stop cameras for a 5 minute break.



Purpose

Purpose of the panel is to hear cases and reports involving incidents of sexual misconduct that violate University Policy and the Community Code of Standards. The SMHB is considered a separate hearing panel from the Conduct Boards that adjudicate violations of the standards that do not fall under sexual misconduct.

The board determines decisions of responsibility based on the facts of the case and the policy that has been allegedly violated.

Composed of 3-5 faculty and staff members; no students.

The SMHB is part of the citizenship education process, but specific to sexual misconduct incidents. The Title IX Coordinator in partnership with the Citizenship Education Office provides oversight, guidance, training, and ongoing assessment of the SMHB.

Competencies

- familiarity with basic rules of evidence regarding relevance, credibility and rape shield rules
- thoroughly versed in an analytical approach to determining if a policy was violated
- comprehension on questioning and deliberation techniques
- understand Rape Trauma Syndrome and common rape myths
- sensitization to what the complainant is experiencing
- rights of the reporting party
- finding of responsibility is by majority quorum
- sanctions for findings of responsibility must be unanimous
- biased claims and dual party accommodations
- involvement of attorneys
- deliberation
- record keeping

Who Commits Campus Sexual Assault?

— Sexual Misconduct Hearing
Board —

**Tell me everything you know about who commits
Sexual Assault on Campus?**

Who are the perpetrators?

Lisak and Miller, 2002 - assessed characteristics at a single point in time

- small number of men, commit vast number of rapes, AND
- they committed rape consistently over time
- led to a focus on detecting this small number of serial perpetrators

Swartout, et al., 2015 - based on patterns over time

- subset of perpetrators did commit multiple acts of rape over time, BUT
- majority of perpetrators do not chronically offend over time
- 10.8% of college men complete rape before or during college (this is higher than we previously believed)
- 75% perpetrated rape during one year; 25% perpetrated during two + years

Risk Factors

- Objectification and depersonalization
- Hostile beliefs about women
- Desire to be in control
- Acceptance of violence against women
- Past Physical and Sexual Abuse
- Victim or witness of violence or sexual assault
- Substance abuse
- Sexual addictive behaviors or impulses
- Family or societal support for a rape or assault culture
- Negative masculine attitudes
- Past relational experiences as predictor for IPV

Statistics (Vary due to under-reporting)

Rape/Sexual Assault

- 1 in 3 worldwide
- 1 in 4 TO 1 in 6 on campuses (actual or attempted)
- 3% false reporting rate is in line with all other false crime reports
- 90% of perpetrators are non-strangers
- 10% are male victims

Intimate Partner Violence

- 1 in 3 women have experienced

Continued

Stalking

- 1 in 6 women
- 1 in 19 men
- Majority are stalked by someone they know
- Often, but not always, stalking is based on gender/sex of victim (i.e. Title IX)

Harassment

- Common on college campuses, but most do not report
- Most common report is when behavior is perpetrated by faculty/staff to students

Environment

- Grooming behaviors for sexual assault and IPV may also be seen in social settings created by high risk groups and or levels of male entitlement found often in fraternities and athletics (but not exclusive to these two groups)
- Environments are created with an unequal mix of gender participating in the party, gender separation throughout the event, and men treating women less respectfully with degrading jokes and conversations
- Settings may include loud music to limit conversation and to provide only options to “filthy bathrooms” only
 - These are all examples of lessening a person’s options to support and safety

Environment Continued

Groups can foster hateful, misogynistic ideologies that contribute to a rape culture and to the acceptance of IPV

The University of Virginia Arlington had a fight song that contained the lyrics:

“All you girls never let a Cavalier an inch above your knee. He’ll take you to his fraternity house and fill you full of beer. And soon you’ll be the mother of a bastard Cavalier!”

A Georgia Tech fraternity (Phi Kappa Tau) sent an email to members titled “Luring your rape--bait.” It included the following grooming advice for members:

“If they are hammered at any point before midnight, just skip the chit chat and go dance... Always start with the making out!!!! No raping. If anything ever fails, go get more alcohol.”

Takeaways...

- A higher proportion of men are considered rapists than was previously believed, but a majority reports rape at only one time point.
- Perpetrators are more heterogeneous in terms of their risk factors, methods of coercion, and patterns of offending over time.
- In addition to detecting perpetrators, recognize that rape is impulsive, opportunistic, and occurs in intimate/dating relationships.

Interpersonal Violence (IPV) Considerations

What to look for

Escalation of physical or sexual violence threats

Negative attitudes about women in relationships

Stressors such as employment or financial problems

Mental health or substance abuse problems

Shifts in power and control dynamics

Tracking a person's movement or location

Blocking an exit through physical presence or threat of violence

Isolation of individual from friends and acquaintances

Embarrassing a person or an attack on self esteem through disparaging remarks

Insulting or objectifying a person

Continued

IPV often involves the abuser setting ultimatums or threats to the victim through coercion and verbal aggression

This can be done to isolate the person from help and support or to create such a sense of fear and danger that compliance is the more likely outcome

They tend to have hardened views around control and jealousy, seeing others' as property for which their behavior, social environment, and access to information must be controlled at all times

Stalking behaviors fall in an upward trajectory from initial exploratory to more intense and invasive behaviors

- Hyperintimacy
- Proximity/Surveillance
- Invasion
- Proxy pursuit
- Intimidation/Harassment
- Coercion, restraint, and aggression

Patterns and Perpetrators

- Men make up the majority of perpetrators
- 50-75% incidents involve drugs or alcohol (less than what we originally thought and less than what we see on our campus which is about 90% of incidents)
- Male perpetrators engage in victim blaming as part of the rationale for the assault
- Perpetrators tend to have higher levels of hostility towards women, lower levels of empathy, and more likely to hold traditional gender role stereotypes
- A single behavior on one day is meaningless, we look at patterns of behavior in the person's background to determine their level of risk for committing violent acts (inappropriate or out of control anger, repeated rule-breaking, poor coping skills, equal opportunity hating, prior violent acts, etc.)

Predatory Perpetrator

- It is hard to identify a predator absent of evidence of a pattern of acts
- We can't profile/base decisions on personality characteristics
- Experienced Investigators develop spidey sense that informs their investigations and this information is, in some form, passed to the hearing board through the final report
- This information may be found in various sections of the report based on what the investigator is documenting during their examination, for example:
 - Background and/or history of the case may reveal incidents of past behaviors only if relevant to the case -- an experienced investigator will make that connection if it exists
 - Investigators are permitted and encouraged to document non-verbal clues in their reports in addition to what is being actually said under the complainant and respondent statement sections of the report

Inferences

- Can the responding parties empathize
- Do they show genuine remorse
- Are they able to reflect on how they have impacted another human being
- Are their justifications of their acts nothing more than attacks on their accuser
- Are they externalizing responsibility, rationalizing, or trying to justify abuse
- What is the emotional state of each party
- Is the story consistent with multiple witness accounts, (notwithstanding natural memory loss, disordered storytelling, and other symptoms of trauma demonstrated by the complainant)
- Is there any additional information (email, text, fb messages, etc) that lead investigators to believe there is more than what is being shared, etc.

Part 2 Complete

Next time, Part 3:

- Board Competencies
- Neurobiology of Trauma
- Case Study

Part 3

- Max and Elise
- Board Competencies
- Neurobiology of Trauma
- Case Study

Case Study

Max and Elise

- What are the alleged policy violations?
- What facts will you be looking for from the investigators?
- How will you assess credibility?
- Is there an issue of consent that can be defined?
- Is there an issue of incapacitation?
- Based only on the information you have, go to your break out room assignments and discuss with other board members.
- Return in 10 minutes to share your groups' determination

Competencies Overview

- Enforcing the standards of the community by submitting to the true ethic of student conduct.
- Highest priority and most important discipline is to determine if someone violated a policy - not determine if someone did “right or wrong”.
- Understand and apply the standard of proof in context, meaningfully.
- Assess carefully. What are facts, opinions, and circumstances? How does the information add up?
- Police yourselves. When a line of inquiry veers into bias or irrelevance, correct the problem. When a procedural error is made, cure it.

Continued

- Some cases will require expertise depending on the complexity. We will figure out what we need to know in advance and give all parties notice that we are calling in experts as a neutral resource for the panel.
- Bring common sense and good judgement to the table. Do not bring common knowledge. Be skillful in saying what you don't know rather than assuming you know.
- Developmental theory should be viewed as it applies to the campus conduct context, allowing us to keep developmentalism in perspective.
 - The idea that a student shouldn't be held accountable because they are only "18 or 19" is developmentalism run amok. Students should be encouraged to mature and we should challenge their decisional ethics -- but this is different than excusing the behavior. Behavior either violates policy or it doesn't. It is not a function of age or maturity.

Evidentiary Issues

- Certain evidence should not be considered in a campus hearing, even if it is offered in testimonials and/or investigative reports.
- Irrelevant evidence should not be deliberated upon, and this includes information within the protections of rape shield rules, if it could prejudice the fairness of the process.
- Rape shield rules prevent respondents or their advisors/attorneys from introducing evidence of complainant's sexual behavior, history, or reputation.
- You are obligated to prevent such information from coloring your decision and you should not consider it in deliberations.
- Evidence lacking in credibility should not be considered by this board.

Examples of Irrelevant Information

- The color of underwear the complainant had on
- What the complainant was wearing
- Who else the complainant had sex with, even if they engaged in multiple consensual partners in one night - it does not mean that sex with the respondent was consensual
- If the complainant had sex with the respondent in the past. Our policy clearly states that previous consensual sexual activity does not guarantee future consensual sex
- How flirtatious a complainant was at a party or how much they made out. Consent by our policy must be fluid and continuous throughout.
- Consent for other sexual acts prior to the act of nonconsensual sex. Our policy says consent can be taken away at any time.

Questioning the parties involved during a hearing

Ask questions about the facts - isolate opinions and leave your own out of it.

Ask questions about the circumstances - do not make judgements and do not share your opinions of the acts you learn about with parties.

Ask questions for clarity - do not ask for specific details unless absolutely necessary and relevant.

Most of the details should be in the investigative report you receive, do not re-traumatize the complainant.

If the respondent wants to provide a witness we didn't know about, determine if you will allow it based on the rights of the respondent and with agreement from the complainant if possible.

Analysis

Our college prohibits sexual activity when it occurs under the following circumstances (these are the questions of analysis to ask in deliberation):

1. Was it forced
2. Was it non-consensual
3. Was the complainant incapacitated and was that incapacity known or should have reasonably been known by the respondent

Force

- Physical force
 - Violence, abuse, compulsion
- Threats
 - Harassment
- Intimidation
 - Implied threats, abuse
- Coercion
 - Pressure, duress, cajoling, compulsion, abuse
 - Defined in terms of seduction. Does the person want to be convinced? Seduction is welcome and reasonable -- coercion is unwelcome and unreasonable. When was the line crossed from seduction to coercion?
 - intensity, frequency, duration, and isolation
- Some overlap, consider the example below.
 - Stephanie is told by her professor that if she doesn't sleep with him, he will fail her. This is quid-pro-quo harassment. If she sleeps with him however, its sexual assault by forcible compulsion.

Consent

An action is “without that person’s consent” when it is inflicted upon a person who has not freely and actively given consent. Consent is an understandable exchange of affirmative actions or words which indicate an active, knowing, and voluntary agreement to engage in mutually agreed upon sexual activity. Consent is not freely given when it is in response to force or threat of force or when a person is incapacitated by the (voluntary or involuntary) use of drugs or alcohol or when the person is otherwise physically helpless and the person performing the act knows or should reasonably know that the other person is incapacitated or otherwise physically helpless. A person is not required to physically resist sexual conduct in order to show lack of consent. Past consent for sexual activity does not imply ongoing future consent. Minors cannot give consent.

Incapacitation - The Most Complex by Far

- Two Forms
 - Mental - cognitive impairment
 - Physical - state or condition
- Alcohol-induced incapacitation
 - Influence - as soon as one has anything to drink
 - Impairment - as soon as alcohol enters the bloodstream and increases with consumption
 - Intoxication or Inebriation - corresponds to a .08 blood alcohol concentration
 - Incapacitation is a state beyond intoxication
 - Incapacitation is often confused with the other 4 'i's'
 - The distinction is important in determining policy violations based on our definition of consent as previously defined
 - Incapacity can be defined with respect to how the alcohol consumed impacts on someone's decision making capacity, awareness of consequences, and ability to make fully informed judgements.

Continued

- Definition of Incapacity
 - “Having sex with someone whom you know to be, or should know to be, incapacitated (mentally or physically) is a violation of the sexual misconduct policy.”
 - Our definition within consent again reads --- a person is incapacitated by the (voluntary or involuntary) use of drugs or alcohol or when the person is otherwise physically helpless and the person performing the act knows or should reasonably know that the other person is incapacitated or otherwise physically helpless.
- Common Sense Definition
 - In order to consent effectively to sexual activity, you must be able to understand Who, What, When, Where, Why AND How with respect to that sexual activity.

Assessing Incapacity

Incapacity is dependent on many or all of the following factors

- Body Weight, Height, Size
- Tolerance for alcohol and other drugs
- Amount, pace and type consumed
- Food intake prior to consuming
- Voluntariness of consumption
- Propensity for blacking out mentally or physically
- Genetics

Evidence of incapacity comes from context clues such as:

- A witness or the accused may know how much the other party consumed
- Slurred speech
- Bloodshot eyes
- Alcohol on breath
- Shaky equilibrium
- Vomiting
- Outrageous or unusual behavior
- Unconsciousness

*None, except the last, in and of themselves may constitute incapacitation. We apply the standard of evidence in totality of the information.

Other considerations

- Blackouts - inability at the time to form conscious intentions and understand consequences (it is not just amnesia)
- Sexual Politics - as a way to cloud judgement regarding incapacitation
 - “She brought him to her room”
 - “She got herself drunk”
 - “He was asking for it, the little princess”
- “But I was drunk too, so she raped me”
 - rarity to have mutual incapacitation, if he was victimized he would have reported, being drunk (not incapacitated) does not excuse the act of sexual misconduct
- Poor judgement by respondent - “should they have reasonably known”
 - what would a reasonable person, in the position of the respondent, have known?
- Poor judgment by complainant
 - at no point is it appropriate to excuse a violation of policy by the respondent because of poor judgement or a lack of responsibility by the complainant
 - the question we ask is if the respondent is culpable - not if the complainant was irresponsible

Coherent Analytic - Force, Consent, Incapacity

Ask 3 questions, in this order (order matters and should be done in deliberation):

1. Is there evidence of the use of force, as force is defined under our policy?
 - a. If yes, then you are done. Violation of policy occurred and sanction him accordingly.
 - b. Force, in and of itself, is a violation of policy and asking about consent or incapacity is irrelevant.
2. Is there evidence that the complainant was incapacitated, and that the respondent knew that, or that we believe they should have known?
 - a. If yes, then asking about consent in this case no longer matters and becomes a distraction. Instead we need to determine if the respondent knew.
 - b. Is there evidence to show they knew? If so, policy violated and sanction accordingly.
 - c. But should he have known as a reasonable person? If so, policy violated and sanction.

Continued

3. What specific words (or actions) by the complainant reasonably indicated to the respondent that he had consent for each of the specific sexual activities that took place?
 - a. No force, no incapacitation - then we must ask the question of consent. We determine if there is evidence that shows words or actions that are reasonable indications of consent. If so, no violation.
 - b. If evidence exists that words or actions were not given to obtain consent then it is a violation and they should be sanctioned accordingly. Silence is not consent. Consent cannot be assumed.

Sanctions - will be reviewed at time of any hearing

Here are some examples that range depending on misconduct:

- Counseling
- Education
- Reflective Papers
- Community Service
- Restorative Justice
- Residence Hall Ban
- Suspension
- Expulsion

Break

Lets mute and stop cameras for a 5 minute break

Agenda

- Introduction to Trauma
- Impact of Trauma
- Considerations
- Unique Considerations
- Case study

What is Trauma

Exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity. May result from:

- War
- Natural Disasters
- Sexual Violence
- Relationship Violence
- Stalking

Perceived Threat

When the Amygdala senses a threat in the form of sexual assault, it signals to the Hypothalamus, which signals the pituitary gland, which signals to the Adrenal Gland, which releases hormones or chemicals throughout the body to help react to the threat and likely trauma.

- The Amygdala does not distinguish between “types” of sexual assault (i.e. stranger or acquaintance) but interprets them equally as threats to survival.
- The physiological response of the brain to threat releases a hormonal flood that accounts for the behaviors that are commonly visible in the aftermath of trauma

Hormonal Flood

Catecholamines (adrenaline): responsible for flight or fight or freeze; create mobilization (immobilization) but impair rational thought and decision making

Opioids: released to deal with pain, create flattening effect

Cortisol: effects energy availability

Oxytocin: promotes good feelings to counterbalance sensation of pain

- Victims take 200 days to get to a coherent state after trauma, yet our cases have to be completed from start to finish within 60 (FYI)

Flooding

The hormonal flood may last for 96 hours and may be reactivated by a triggering event

Hormones are released in varying amounts and may result in behavioral differences among victims:

- Fight, Flight, Freeze -- reactions are not a choice, impacted by a chemical surge that impairs their ability to rationally think
- May present to you as confused, laughing, crying, flat, angry, irritable or variable

Tonic Immobility (Freeze)

Hormonal flood and dysregulation of the autonomic nervous system can cause the body to shut down

Rape induced paralysis

Up to ½ of those who experience a sexual assault will also experience tonic immobility where they know what is happening but they cannot fight; biological response based on survival

Memory and Sexual Assault

Hippocampus is the “memory maker” processes information into memories:
Memory is formed in 2 steps

- Encoding - organizing sensory information coming into the brain
- Consolidation - grouping into memories and storing the stimulus

The hormonal flood doesn't interfere with the laying down of memory or its accuracy but does impair the ability of the hippocampus to consolidate memory

- May create fragmented memories
- Recall can be slow and difficult
- Alcohol will interfere with encoding, the hormonal flood will not

Impact of Trauma

Physical toll on body - Headaches, Body Aches, GI Issues

Compromised decision making

Emotional Swings

Self-medicating behaviors

Victim response to trauma also impacted by

- Personality
- Coping Strategies
- Available support systems and resources
- General resilience
- Past history of traumatic experiences
- Cultural differences in the perception and expression of trauma
- Normalization/adaptation

Considerations

Days after the event or after they have been triggered about the event is not a good time to interview victims and expect a story that is not affected by neurological reactions; these reactions should not be viewed as credibility assessments

- Sleep cycles -- 1-2 sleep cycles makes a big difference in connecting memories
- Nonlinear accounts
- If alcohol is additional factor, narrow and detailed questions will be difficult for victims to access and may create additional stress
- Open ended questions should be used; use feeling questions as well
- Don't interrupt or barrage with questions
- Use strategies tied to senses that may help them pull out fragmented memories
- Allow time

Questioning

- Be aware of why victims responses will vary and how
- Be mindful that recall is often difficult and slow after trauma or triggered trauma
- Clarify, don't paraphrase
- Do not judge or blame - language matters
- Avoid re-traumatization
- Prioritize developing rapport and building trust
- Emphasize transparency and predictability

Trauma Informed Response

- Promotes safety
- Recognizes the impact of trauma on cognitive, physical, psychological, emotional, and neurobiological level
- Understands how trauma can impact one's world
- Recognizes the need for support and positive relationships
- Honors choice of the victim with the goal of empowerment
- Is respectful, considers boundaries and privacy

**IT ALSO ENSURES THAT DUE PROCESS FOR RESPONDING PARTIES IS NOT AFFECTED*

Victims might shut down if...

- You give unsupportive responses
- You take control of conversation more than you have to
- You escalate the situation
- You define or label their experience
- You ask “Why” questions
- You verbalize judgement
- You insist that they must press charges

Unique considerations

Populations

- Male Victims
- LGBTQI Victims
- International victims
- Victims with disabilities
- Victims with mental health issues
- Victims of drug facilitated assaults
- Victims of repeat assaults
- Underreporting
- Stereotyping
- Internalized and/or institutionalized bias/prejudice
- Lack of informed available resources
- Students with autism accused of predatory behavior
- Faculty interviews
- Staff Interviews
- Employee/student interviews

Case Study

Dr. Rogers and Helen

- Hearing Officer(s) Specific:
- What are the alleged policy violations?
- What facts will you be looking for from the investigators?
- How will you assess credibility?
- Is there an issue of consent that can be defined?
- Is there an issue of incapacitation?
 - How will it be assessed

Go to the break out room to discuss the case with your board partners.

Take 10 minutes to make a determination based on the limited information you have and in line with our policies.

Rejoin the larger group to discuss these outcomes.

Part 3 Complete

Next time, Part 4:

- Running a hearing
 - Using the Hearing Officer
- Managing Advisors
 - Using the Hearing Officer
- Determination Letters
 - Using the Hearing Officer
- Case Studies
 - Jenny and Ben
 - Joyce and Dr. Rollins
- Final Questions

Running a Hearing

- Initial Steps
 - Report/Evidence Review
 - Elements of Prohibited Conduct
- Pre-Hearing
 - Create, review, and practice a script
 - Prepare direct examination questions
- Hearing
 - Use the script
 - Determine if offered cross examination questions are permissible
 - Ask board questions
 - Moderator Role
- Post-Hearing
 - Preponderance of Evidence ($\frac{2}{3}$)
 - Sanctions (3/3)
 - Documentation and Rationale

Decision Maker Checklist

- Role of Title IX
- Role of Hearing Officer
- Role of SMHB

Checklist Review

To speak or not to speak...

Write a script.....

Breakout Rooms

10 minutes

Practice the script.....

Sarah, Cate, Jordan

Stan, Robert

Come back and share the script.

Managing Advisors

Parents/Guardians and Friends

- FERPA Release Required
- Cannot answer for student
- Is there to support
- Can request a break
- Cannot be asked questions
- Must be respectful and not address the other party directly

Attorneys/School Assigned Process Advisors

- Serves as the person to ask questions on behalf of the party they represent
- Cannot respond on behalf of the student
- Can advise the student before answering questions
- Can request a break
- Cannot be asked questions
- Must be respectful and not address the other party directly
- Attorney Release and Non-Attorney release must be complete for advisors of choice
- FERPA Release must be complete for Advisor of Choice

Determination Letters/Final Outcomes

Determination

- Determination of Responsibility with rationale based on prohibited conduct
 - 2 of the 3 members must agree
- Determine sanctions
 - All 3 members must agree to sanctions

Checklist

Outcome Letter

- Rationale for determination and sanctions is clearly documented and agreed upon by all members of the board
- Outcome letter lists all steps University has taken from the time the complaint was issued
 - Use the hearing officer role to help create this and ensure it is compliant with the new rule

What is wrong with this picture?

Read the outcome letter

[Stan and Jordan](#)

Identify issues

[Robert, Sarah, Cate](#)

Identify what is missing

10 minutes in BO Rooms

Come back and share

Mini Practice

You: Serve on the Sustainability Committee of the University, and have developed a great relationship with the committee members, including the students serving.

Student A: Reporting Party, sorority member, average student, served on a joint committee with you about 2 years ago. Alleges that student B videotaped their consensual sexual act without her knowledge and then showed the video to other members of fraternity and sorority life.

Student B: Responding Party, fraternity member, excellent student, currently serves on the sustainability committee. Received the notice of allegations and issued a counter report alleging student A did consent to the video and was aware that he was going to show it at a party. She agreed to the viewing.

- The case survived the dismissal analysis, was investigated, and you are now the assigned as a hearing officer.

Mini-Practice

TIXC can justify your service with the reporting party.
Too sticky in regards to the responding party --
recused from case.

- Is there a ^{Potentially} Conflict of Interest/Bias? How will this be sorted with the TIXC?
- Policy and Procedure review/plan questions and clarity
 - What part of the policy do the allegations pertain to? Sexual Exploitation Clery - Stalking
 - What questions do you have related to that policy that need to be clarified with the TIXC?
- Review of complaint and notice of allegations questions and clarity
 - Do the allegations match the policy definitions? For the benefit of someone other than the one being exploited; lack of consent; survived the dismissal analysis due to factors
 - Are their lingering questions about the dismissal analysis that need clarity from the TIXC?
- Elements of allegations should be seen in the investigative report
 - What are the elements the investigation will pursue to determine if a policy violation occurred

Exploitation, Consent, Benefit of others, reasonable person, objectively offensive, discriminatory effect

Mini - Practice

Here is what you know:

- The responding party says all steps were consented to by the reporting party
- The reporting party says she just learned that their sex act was recorded and she did not give permission, and she did not give permission to have it viewed.
- The video was made 1 year ago based on timestamps
- The video was shown to others 6 mos ago according to witness statements
- The reporting party says she just learned that their sex act was recorded and she did not give permission, and she did not give permission to have it viewed.
- 4 parties that attended the viewing did not think it was their place to tell the reporting party that the video existed; they did not know if the video was consented to by both parties - all have same story
- The video was shown to others 6 mos ago according to witness statements
- Responding party says reporting party is now pissed because he has a new girlfriend
- Reporting party says responding party is manipulative and is currently abusing his girlfriend by having sex with her while she is sleeping
- Responding party says the reporting party is a whore and agreed to all of this and is now pissed because he has a new girlfriend
- Reporting party is a whore

In the hearing

- Do you ask the witnesses to retell their stories? **Maybe - if inconsistent**
- Do you point out the discrepancies in the hearing with the parties? **Save for rationale**
- Do you view the video?
 - Rationale for your decision?
 - To what purpose will it serve?
 - What will you ask?
- What is relevant? Directly Related? Not Related?
 - Relevant**
 - Directly Related**
 - Not Related**
- **What are the sanctions you will consider?**

Case Studies

Jenny and Ben

- What are the alleged policy violations?
- What facts will you be looking for from the investigators?
- How will you assess credibility?
- Is there an issue of consent that can be defined?
- Is there an issue of incapacitation?

Joyce and Dr. Rollins

- What are the alleged policy violations?
- What facts will you be looking for from the investigators?
- How will you assess credibility?
- Is there an issue of consent that can be defined?
- Is there an issue of incapacitation?

Go to your break out room with your board members and discuss the cases. Come back to discuss with the larger group in 20 minutes.

What questions will you ask of the Investigators in the hearing?

What will you ask the reporting party?

What will you ask the responding party?

BACK

New Information

Joyce and Dr. Rollins

1. Joyce reported a similar complaint against a different professor one year ago. The details of the complaint have the following in common:
 - a. Joyce drank too much alcohol
 - b. Joyce's memory lapsed
 - c. Joyce instigated meetings with male professors in courses she was not doing well in
2. Dr. Rollins was reported for sexual harassment 2 years ago by a female colleague who alleged that he asked her to have a threesome with him and his wife on multiple occasions

Jenny and Ben

1. Ben's BAC was a 1.03.
2. Jenny introduces you to another woman who was terrorized by Ben when Ben was in high school. This woman is not a student at your college.
3. Ben has been diagnosed with severe depression and he takes pills and drinks regularly to self medicate.
4. Jenny told Ben that she wanted to be with him exclusively prior to the incident. And that once she told Ben that she had stopped seeing other men. Ben does not believe her.

Now what? Back to BO Rooms. 10 mins

Final Questions

Are you ready for your first hearing?

No Worries....you shouldn't be overly confident at this point. Just understand the process generally and the steps you will need to take. In future sessions together, we will discuss and practice:

- Blackouts and Assessing Credibility (October 6)
- Case Study on Force (October 23)
- Coercion vs. Seduction (November 6)
- Case Study on Incapacitation (November 13)

For now, what questions do you have?

October 6, 2020

Blackouts and Credibility

**Hearing Board Members
Resolution Facilitators**

Blackouts

Consent

- Voluntary.
- Enthusiastic/positive.
- Ongoing.
- Can't occur with minors.
- Can't occur when incapacitated.
- Not be taught in the negative.
- Part of a positive discussion.
- Clear, and Knowing, and Voluntary (or affirmative, conscious, and voluntary), Words or actions, That give permission for specific sexual activity.
- It is not coercion or incapacitation
 - Incapacitation: A state where someone cannot make rational, reasonable decisions because the person lacks the capacity to give knowing consent (e.g., to understand the “who, what, when, where, why, or how” of the sexual interaction).
 - Coercion: Unreasonable pressure for sexual activity. When individuals makes it clear to you that they do not want sex, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive.

Confusing “I” words

- Influence: the moment someone consumes alcohol
- Impairment: relates to the alcohol in the bloodstream (BAC)
- Intoxication: Condition of being drunk
- Inebriation: Condition of being drunk.

Those listed above are not Incapacitation. In the above, persons may be able to understand the who, what, why, where, and how. These words also refer to strictly alcohol, though a person can be incapacitated from a variety of other drugs.

Incapacity Question

Is there a preponderance of evidence that the alleged victim was incapacitated by alcohol, other drugs, or sleep? **AND**

Did the accused student know as a fact that the alleged victim was incapacitated? **OR**

Should the accused student have known from the circumstances that the alleged victim was incapacitated?

If someone does not know the how, what, where, why, and who of a situation; incapacitation is at issue. If they don't know these 6 elements, examine blackout possibility.

Blackouts

Blackout - Amnesia for places people went or things that they did while intoxicated; can involve spotty memory (fragmentary blackout) or large missing chunks of time (en bloc blackout).

Blacking Out vs. Passing Out:

- Blacking out from alcohol implies that a person is awake and functioning but unable to create memories for events and actions.
- Passing out implies a person is asleep or unconscious from drinking too much.
- The two states are quite different.

Continued

“The most common form of blackout involves spotty memories for events, with islands of memories separated by missing memories in between. This form often is referred to as a fragmentary blackout, a grayout, or a brownout. With this type of blackout, focusing on the islands of memories often helps cue recall for some, but not all, of the missing pieces.”

“Full and complete amnesia often spanning hours or more is known as an en bloc blackout. With this severe form of blackout, trying to fill in the missing pieces typically is fruitless. The memories were never formed and so no amount of digging will uncover them. They simply don’t exist.”

www.spectrum.niaaa.nih.gov/archives/V6I2Jun2014/features/light.html

Common Blackouts

“During a blackout, the ability to remember things that happened before the blackout typically is spared. Because of this, even in the midst of a blackout, a person can carry on conversations and even tell stories about events that happened years ago or earlier in the evening while they were intoxicated but not yet in the blackout.”

Anything a person can do while they are drunk and not blacked out they can do while they are blacked out—they just won't remember it the next day. Depending on how impaired the brain regions involved in decision making and impulse control are, the missing events could range from mundane behaviors, like brushing teeth, to dangerous and traumatic events like driving a car, getting into a fight, or committing—or being the victim of—a sexual assault or other crime.

En Bloc Blackouts

“En bloc” blackouts are stretches of time where the drinker has absolutely no memory at all. Blackouts do not involve a loss of consciousness. However, blackouts may precede passing out or losing consciousness.

A subject, who has usually consumed large quantities of alcohol rapidly, can still engage in complicated activities from holding a conversation, to driving, to dancing, to having sexual relations, etc. However, he/she may not remember all, most, or even any of his/her actions or behaviors.”

Signs

- Gross motor impairment
- Lack of physical control
- Blurred Vision
- Loss of balance
- Feelings of Euphoria turn to unpleasant feelings
- Judgement and perception is severely impaired
- One may become aggressive
- There is an increase risk of injury to self or others

Assessing Credibility

Credibility

Serves as an aid in your assessment and analysis of policy violations from an evidentiary perspective.

In the context of investigations, credibility is the accuracy and reliability of evidence. To assess credibility you have to evaluate the source, the content, and the plausibility of the information offered.

When source, content, and plausibility are strong - credibility is strong.

It can be conceptualized on a scale of 0-100% where evidence is rarely 100% credible or 0% credible; most evidence falls in between.

Your job is to figure out where credibility falls on the scale, especially when evidence is evenly split and the finding hinges on the credibility of the parties.

Continued

As you weigh evidence to determine whether a preponderance of the evidence supports a finding of responsibility, each and every piece of relevant evidence must be evaluated for its credibility.

- If a piece of evidence is more credible than not, then it is considered credible, and can influence to some degree the broader preponderance analysis.
- If evidence is not credible (less than 50%) then it does not tip the preponderance scale in favor of that evidence.
- Importantly, regarding a piece of evidence as not credible does not mean the evidence has no impact on the finding.
- Evidence that is not credible may tip the scale in the opposite direction if it undermines the credibility of other evidence.

Example

Party A introduces a witness who provides testimony that is patently false, depending on how far along the continuum the witness's testimony is toward 0 percent, that witness's testimony may also have a negative impact on the credibility of the party who provided the witness (Party A).

- Evidence is interlinking to form complex webs of interrelated parts. When one piece lacks credibility, it can impact the credibility and weight of the other pieces.
- BUT, credibility is not an on/off switch, usually witnesses provide evidence that is a mixture of credible and not credible. Therefore, one false statement does not mean you can't believe anything the witness tells you.

Establishing Credibility

Corroboration - Best establishes credibility when it is obtained through sufficient independent evidence supporting facts.

Multidimensional - Location and position can impact the credibility of a witness statement

Neutrality - witnesses with no loyalties to the parties may be more objective

Impartiality/Objectivity - the more loyal a witness to one party or the other, the more biased their testimony may be. Relationships of the parties and witnesses may matter in credibility.

Proximity - What someone witnesses in person is most valuable; what they heard from a party after the fact is less valuable; what they heard from a third party is not valuable.

Inherent Plausibility - Given what you know, does the story make sense? Triangulate.

Additional considerations

Bias Must be considered - i.e. victim blaming

Analysis of microaggressions or gestures

Avoid Analyzing these - you are not an expert

Inconsistencies

Examine and remember memories can naturally evolve

Lying

People can lie in one area and tell truth in another, so it's not a total killer - determine if the lie is material to the allegations

Delay in reporting

Does not affect credibility - common

Changes in behavior

May add to credibility or not - folks react differently and that is okay

Accounts told to these folks after an incident tend to not have the information unfiltered by time, reflection and bias.

Witness who were told immediately about the incident but not involved in it

Additional allegations raised

Shouldn't be rumors and may impact it

Acts that were consensual at one time

No Impact

A person did not tell the alleged harasser at the time of the behavior No Impact

Explaining why the misconduct occurred

- I didn't know
- She's a flirt
- It wasn't a big deal

Do not add to credibility

Credibility Items by Party

Reporting Party - Do not add or detract

- Clothing
- Appearance
- Flirting Behavior
- Male Victims
- Sexual Orientation

Responding Party - These are irrelevant

- Character witnesses and the character evidence they provide
- Popularity with staff and other students.
- No history of past problems.
- Academic performance.
- Importance to a team or program.

Questions to consider:

- How might a reasonable person react to the incident(s)?
- What was the effect of the behavior on the reporting party?
- Did the individual have a particular reason not to tell the truth?
- Is the evidence offered inherently plausible?
- Is there evidence corroborating the information provided by a witness?
- Is there anything missing from the testimony that the witness/party may be omitting?
- Did the individual have the opportunity and ability to observe the things they discussed?
- Is there relevant past conduct that needs to be considered?
- Was the witness/party under the influence of any substance that may impact the credibility of their testimony?

Practice Time

Breakout Room A: Jordan, Cate, Patrick - Case Study

Breakout Room B: Melanie, Blair - Case Study

Consent and Force
October 23, 2020
Hearing Officers

Non-Consensual Sexual Contact and Intercourse

Asking the right Question: As difficult as these cases can be due to lack of clarity or available evidence, the decision making process for these cases is a fairly straightforward five-step process:

1. Gather the evidence - Investigators
2. Evaluate the credibility of the evidence - Investigators and Officers
3. Assess the evidence against the elements of the policy - Hearing Officers
4. Analyze and weigh the sufficiency of the evidence - Investigators and Officers
5. Render a determination and reduce it to writing - Hearing Officers

A Practical rubric...?

The allegations we address are never easy so we employ a rubric that has demonstrated durability in the field of Title IX in that it makes tough decisions easier for those called to make them.

- Policy Definitions
- Model of Proof
- Force 
- Incapacitation
- Consent

Policy Definitions

Non-Consensual Sexual Contact is:

- Any intentional sexual touching,
- However slight,
- With any object,
- By a person upon another person,
- That is without consent and/or by force

Sexual contact includes: intentional contact with the breasts, buttock, groin, genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; OR any other intentional bodily contact in a sexual manner.

Continued

Non-Consensual Sexual Intercourse is:

- Any sexual intercourse,
- However slight,
- With any object,
- By a person upon another person,
- That is without consent and/or by force

Intercourse includes: vaginal or anal penetration by a penis, object, tongue, or finger, and oral copulation (mouth to genital contact), no matter how slight the penetration or contact.

Model of Proof

Is the definitions in the policy itself. These terms are almost identical, except that with non-consensual sexual touching - there is an element of intent that does not exist in non-consensual intercourse.

- Someone can accidentally brush someone's buttock in a crowded place/line etc
- It is hard to imagine that someone does not intentionally have intercourse with someone else

Non-consensual Intercourse is a type of non-consensual sexual touching, which is why the definitions overlap, however with intercourse, it is more invasive and more serious conduct which requires a more serious and narrow sanction (expulsion, suspension) in many cases.

Determining if non-consensual contact occurred...

1. Was there sexual contact by one person upon another, no matter how slight, as defined in the policy? IF YES,
2. Was it intentional? IF YES,
3. Was it by force? IF YES...policy was violated. IF NO,
4. Was it without consent, as consent is defined in the policy? If YES, there is a policy violation. If NO, there is no policy violation.

Determining if Non-Consensual Intercourse occurred...

1. Was there sexual intercourse by one person upon another, no matter how slight, as defined in the policy? IF YES,
2. Was it by Force? IF YES - the policy was violated. IF NO,
3. Was it without consent, as consent is defined in the policy? IF YES, there is a policy violation; IF NO, there is no policy violation.

What is the Rubric then?

The Rubric intends to answer deeper issues and questions related to force, capacity, and consent that still need to be addressed. The rubric helps us focus on asking the right questions for each allegation so that we have a better chance of getting the right answer. There are 3 questions we ask that are rooted in policy and for which prohibit sexual activity when it occurs under the following circumstances:

1. When it is forced
2. When the reporting party is incapacitated and that incapacity is known to or should have been known to the responding party; or
3. When it is non-consensual.

Force, incapacity, and consent

Incapacity is a form of non-consent, but the rubric separates it out further, which we will get into in a future meeting.

You should analyze both force and consent constructs to determine if policy was violated, but in an allegation of where force results in consent (don't hurt me, I'll do whatever you want), it is the force analysis that matters, not the consent analysis. Sometimes force results in consent as with threats, intimidation, and coercion. Because this consent is not voluntary, it is not valid consent, and the force analysis is the one that matters. It is best to analyze (cleaner) constructs in the following order:

- Force
- Incapacity
- Consent

Analyzing FORCE

If force is present in any facts of a case, then incapacity and consent rarely need to be assessed. If someone is forced into sexual activity, then their level of capacity is largely irrelevant. The force is what violates the policy, whether they are fully sober or completely unconscious.

- Kink
- Physical Violence
- Threats
- Intimidation
- Coercion

Kink

- Not all force of violence is non-consensual
- Kink relationships tend to value consent very highly, and there is (or should be) a lot of communication about it - far more than in non-kink encounters
- When force is being analyzed in Kink encounters, what we are looking for is if consent existed, or whether use of force exceeded that which was agreed upon, or whether force continued despite the exercise of an agreed upon safe word or other negotiated boundaries.
 - These would be policy violations
 - Even if someone is harmed in the sexual interaction, as long as they explicitly consented to being harmed, there is no basis for a policy violation

Outside of Kink, the force paradigm is one where if sexual contact is forcible, violent, and/or against the will of the reporting party - it is a violation of policy. Force has 4 forms: Physical Violence, Threats, Intimidation, and Coercion.

Physical Violence

- No matter how slight, the intentional physical violence upon another, use of physical restraint, or the presence of a weapon to gain sexual access will constitute the use of force.
 - Physical Pressure vs. Physical Violence: The analysis must account for the nature of sexual intimacy, which often has some physical elements to it that may not constitute physical force.
 - Someone uses physical pressure to help facilitate a change in position during sex;
 - Someone places their hands on someone's head during oral sex;
 - Or someone pressing down on someone in missionary position
- The key question is if someone used physical violence as a way to enable them to gain sexual access.

Threats

- If a threat is used to obtain sex, force is present. The degree of an actionable threat is up to the university (investigators and hearing officers) to determine.
- Any threat that causes someone to do something they would not have done absent the threat could be enough to prove force.
- This is especially true when the person being threatened believed the threatener had the will and capacity to carry out the threat.
- This construct does not apply to negotiations over sex - which we will unpack in our coercion discussion. Leverage and power must be present in the analysis of threats.
 - If you do not have sex with me, I will kill you.
 - If you do not have sex with me, I will harm someone you are close to.
 - If you do not have sex with me, I will tell people you raped me.
 - If you do not have sex with me, I will fail you in my course.

Intimidation

Intimidation is an implied threat, whereas threats are clear and overt.

- If you don't have sex with me, I will fail you ---- Threat
- If you have sex with me, you'll get an A in my class -- Intimidation

A threat “threatens” a benefit, so the later is not a threat because there is no negative condition attached. If the student agrees to sex is it because the faculty member is in a position of power and authority over her? The A grade is offered here and it is overt. What is implied is what the professor might do to the student if she does not comply with the request.

Continued

There are subjective and objective requirements to the proof of intimidation

Subjectively, the reporting party must have felt intimidated, but objectively, we must be able to say that the actions would have been intimidating to a reasonable person as well.

For example, a woman may claim that they are intimidated by a man because of the man is much larger than the woman. When asked if the man menaced her or used his size to make her feel unsafe, the woman says no. Therefore just because she subjectively felt intimidated, objectively there is no intimidation established.

However, had the man blocked her path - even if he never touched her - we could objectively reason that intimidation is established.

Coercion

This element of force includes pressure, duress, cajoling, and compulsion.

It is the most likely type of force in college settings.

In a sexual context, coercion is an unreasonable amount of pressure to engage in sexual activity.

What is unreasonable is a matter of community standards.

It is helpful to establish the difference between coercion and seduction. We will do this in our next meeting together to get more detailed and specific about assessing coercion.

Practice Time

Rubric

Case Study A - Robert, Stan, Blair

Case Study B - Jordan and Sarah

Coercion vs. Seduction
November 6, 2020
Hearing Officers

Coercion

4th and final element of FORCE

- Includes elements of pressure, duress, cajoling, and compulsion
- The most common type of Force seen on college campuses
- In a sexual context, coercion is an UNREASONABLE amount of pressure to engage in sexual activity
- It is helpful then to contrast coercion with seduction and elucidating this distinction is key in cases of allegations related to coercion
- Both involve convincing someone to do something you want them to do, so how do they truly differ?

Does the person being pressured WANT to be convinced

Seduction

- Sexual advances are ultimately welcome
- One wants to do some convincing and the person who is the object of that sexual attention wants to be convinced
- Seek to persuade one and the other is willing to go along
- Two people are playing the same game
- Seduction can become coercion when too much pressure crosses the line

Coercion

- One wants to convince someone, but that person makes it clear that they do not want to be convinced
- They do not want to play along
- They do not want to be persuaded
- Coercion begins not when one makes the sexual advances, BUT when one realizes the other does not want to be convinced - AND the person pressuring for sexual activity pushes past that point
- Coercion is a matter of degree - not an on/off switch the minute one pushes past the point of what is welcome

How do we know what crosses a line?

Our community asks...

- What amount of pressure is UNREASONABLE, beyond the indication that the pressure is unwelcome?

We determine what is UNREASONABLE by examining four functions of the pressure:

- Duration
 - Frequency
 - Isolation
 - Intensity
- Intensity can impact my coercive effect, probably more so than the other three factors. Let's take a closer look...

Example: Let's say I approached you at a crowded bar and started to come on to you. If I pressure you for sex for 5 minutes, will I get very far? What if I pressure you for 30 minutes? Or for 3 hours?

- Do I have a better chance of success if I have a longer duration in which to pressure you?
Yes. Duration of the pressure must be evaluated.
- In 30 minutes, if I ask you 2-3 times for sex would that be less successful than if I asked you 30 times within the same 30 minute period?
Yes. Frequency can enhance the coercive effect.
- What if we weren't at a bar? Would my pressure be more or less effective if we were together in my room with no one else present?
Coercion is likely more effective if I isolate you.

Intensity

We're at the bar, and I'm trying to convince you to have sex with me. I spend a half-hour telling you all the reasons why you should have sex with me. I am really doing a great sell job, as I know my product better than anyone. I tell you that I'm the best lover you'll ever have. I challenge you to ask anyone in the bar, knowing they will vouch for my prowess. I tell you that you owe it to yourself to fly Air Jill. I tell you this is one roller-coaster ride you just don't want to miss. I give you my best Lounge Lizard act. Not buying it? I know why. The problem isn't me. Any reasonable person would jump on the experience I am offering. The problem, I see now, is YOU.

So I change tactics....

Intensity Continued

I tell you various iterations of the following...

You come into a bar, dressed to kill, flirt with me, and then think you can tease me and say no? You're just a tease. You like to lead folks on and then let them dangle.

You're probably frigid. You should take a chance, you might just like it. What are you, some sort of religious freak? God won't know if we do it just once. I won't tell him.

What are you the last virgin in captivity? Everyone is doing it. Come on. Virginity is way overrated.

Are you afraid your parents are going to find out? I won't tell them, I promise. Loosen up. Relax.

Do you see the intensity difference?

I can talk myself up to you until I am blue in the face, and I have a First Amendment Right to tell you how great I am in the sack. It's not coercive - it's obnoxious.

On college campuses we often find that coercion results in consent, but it is not sincere, positive, or enthusiastic consent. It's more like, "Fine, then just get it over with. That is a useful mental in determining if the amount of pressure was UNREASONABLE or not.

If I assail your core values, your morals, your religion, I very well may be transgressing our community standard on intensity.

In summary, once you draw a line indicating that you don't want to play my game, and I pressure you beyond that point, seduction will become coercive.

What amount of pressure is reasonable is a function of the duration, frequency, isolation, and intensity of my pressure.

Once our community standard is exceeded, it is appropriate for you to label my coercion as force.

Irrational Definitions of Coercion

“Coercion is the use of emotional manipulation to persuade someone to do something they may not want to do - like being sexual or performing certain sexual acts. Example of some coercive statements include:

- If you love me, you would have sex with me.
- If you don't have sex with me, I will find someone who will.
- I'm not sure I can be with someone who doesn't want to have sex with me.”

“Coercion can also take the form of, ‘If you don't have sex with me, I'm breaking up with you’, even if it's not as explicit like that, but if your relationship has created that type of coercion where you feel like you have to have sex with them to keep them in that relationship, that could definitely be a form of coercion where we would say you're not giving consent...under university policy, consensual unwanted sex would not be considered consensual sex and a student could go through a formal sexual misconduct case.”

Why are these irrational for our community standards?

Reality

We do not have an established zero tolerance policy (as the previous definitions infer) or standard for negotiation in sexual relationships.

There is such a thing as unwanted consensual sex, but as the descriptor indicates, it is consensual.

This is important.

It is not sexual misconduct by any construction of our policies or beliefs about best practice.

In every generation there has been a term for behaviors that don't cross the line of sexual misconduct, but are still disrespectful.

An individual may reflect on a sexual encounter and wish they had acted differently or may be embarrassed by their own prior conduct. This does not, without additional facts, meet the criteria for Nonconsensual Contact or Sex.

Students have called it “gray rape”, “regretted sex”, “rapey”, and “unwanted consensual sex”.

Decision makers are the rational arbiters of walking this admittedly fine line. Remember if everything is discriminatory than discrimination means nothing.

When the assessment of boundary-crossing behavior honors the subjective perceptions of the reporting party over the objective assessment of a reasonable person - we start down a slippery slope.

Operative Understanding

Coercion = Sexual Misconduct – This is not up for debate. The debate is about what constitutes coercion. Perhaps you take the position that everyone has a right to say no, should not have to repeatedly say no, negotiate (about their body), or make some concessions for the sake of peace or to keep a relationship. While I may agree, the questions are:

Are we creating a no-negotiation college bubble that is going to fail our students when they eventually get out into the larger world and realize that people negotiate sex in relationships all the time, and they won't know how to do so?

- If a student chooses to make those concessions, does that make it sexual misconduct?
- We must maintain objective standards for sex offenses while acknowledging that legitimate feelings of harm and trauma that can occur in “less than ideal sex” circumstances. Just because a behavior does not cross a line does not mean it is not harmful, a betrayal of trust, or emotionally painful.
- Can we or should we distinguish between sexual misconduct and “sex for the sake of peace” as sexual misconduct?

Consent is imperfect

Because consent is an imperfect construct, applying it with rote literalism will not produce good results.

We should impose our discipline for abusive transgressions, those actions according to law that have a discriminatory effect on the basis of sex or gender. Rudeness, insensitivity, underdeveloped communication skills, all need to be corrected by the appropriate intervention. Which may not be discipline across the board. Each case is unique and should be treated as such.

Late adolescence can teach people how to become sexual beings, but we can't expect that students arrive at college fully equipped to think and act as mature, respectful sexual partners. They will fumble a bit. They will fail to make each sexual interaction ideal. They will not live up to our standards or theirs.

So, should we discipline them for that developmental failure?

Case Study

Liz and Neveah

- Breakout Groups
 - Blair, Patrick, Sarah
 - Jordan, Stan, Robert, Melanie
- Discussion
 - Does the totality of the evidence (so far) suggest an abusive series of encounters?
 - Do you have evidence that Neveah was trying to groom Liz or sway her sexual orientation?
 - Does the behavior cross the line of seduction into coercion based on everything you know about consent and our policy?
 - What is your finding? Sanctions?