

TITLE IX TRAINING
Roanoke College
Investigators and Adjudicators

January 9, 2020

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Agenda for Day

- Opening Overview of Key Principles (45 mins.)
- Break-out Sessions (1 hr.)
 - Investigators
 - Adjudicators
- Analysis of vignettes and discussions (45 mins.)

GOAL

- Provide information to better equip you to carry-out important roles under College's Sexual Misconduct Policy

Current Status

- WaPo reported (Oct. 15, 2019) AAU survey reported sexual violence at 33 of 62 leading research universities (25.9% female and 6.8% male) continues to be an issue¹
- Legal Framework continues to be uncertain
 - Sept. 2017 – Rollback of 2011 and 2014 Guidance
 - New Proposed Regulations (100,000 comments)
 - Cross-Examination
 - 2020 Election
- Key Point – It is the College's burden – not the parties – to gather sufficient evidence to reach a fair and impartial determination. Each party must have equal opportunity to be involved and access to all information relied upon.
- Discussion focuses on student vs. student claims, but claims can be made by and against faculty and staff.
 - Baylor faculty sued alleging forced out after falsely accused of sexual assault by student – “presumed guilty” - biased Investigator/hearing officers

¹ Survey of 831,000 students with 181,000 responses

Your Policy is the Guidepost

- The touchstone of your investigation and hearing processes is the College's Policy
 - Guides the Process
 - Frames the Questions
 - Establishes procedural protections

Before You Get Involved

1. Incident is reported
 - No time limit or geographic restriction
 - Many possible Reporting Parties
2. Evaluation of interim measures (72 hours)
3. Initial meeting with Alleged Victim
 - Policy provided and process explained
 - Confidentiality issues reviewed (FERPA consent)
 - Assist Complaint filing process
 - No contact order/accommodations
4. Initial meeting with Respondent – if Complaint filed
 - Written details of Complaint (date, alleged victim, location and nature of alleged misconduct)
 - Policy and process reviewed
 - Confidentiality reviewed (FERPA consent)
5. Determination that investigation should/must proceed
6. Investigators Appointed – Parties have 3 days to object
7. Investigation and Investigative Report
8. Evaluation of Report – decide need for hearing
9. Hearing

Working with Parties and Witnesses

- Be sensitive, courteous, and professional in all communications
 - The investigation is stressful and challenging for all involved
- Work hard to develop a rapport with parties and witnesses
 - Do your best to use an empathetic, nonjudgmental and collaborative approach to facilitate a conversation, not an interrogation
 - Open the meeting with questions to put witness at ease so that s/he feels more comfortable sharing information that can be deeply personal
- Show sensitivity and impartiality/lack of bias
 - LGBTQ individuals
 - Cultural differences

Working with Parties and Witnesses (cont'd.)

- Be alert to your own non-verbal communication
- Pay attention to tone of voice and volume level
- Avoid asking questions that imply a value judgment
- Exercise active listening in framing your next question
- Look for any evidence of motive/bias/interest, even where not immediately apparent

Be Self-Aware

- Refrain from lecturing or attempting to use interview as a “teachable moment”
 - Stay in your lane – gather relevant information – let others focus on conduct counseling
- Be curious
 - Do not assume that your own experience or understanding of an event is the same as someone with a different background
 - Be curious and ask questions
 - Tread carefully when exploring issues of sex identity
 - Avoid assumption that a person’s sexual identity must be a factor; instead, be curious and ask if the person thinks it does and, if so, how?

The Seven Deadly Sins of Title IX Investigators, (2016) whitepaper published by ATIXA.

A Note Regarding Language

- The well-intentioned use of words can be misunderstood, misinterpreted, and assigned different or greater meaning than intended
- Consider the evolution of language used in Sexual Misconduct guidance and policies:
 - Victim, Survivor, Accuser, Complainant ✓
 - Predator, Perpetrator, Accused, Respondent ✓
- The same words can often be imbued with different meanings – clarify slang and other terms used

Key Policy Definitions

(See Handout)

- **Sexual Misconduct**
 - Dating Violence
 - Domestic Violence
 - Non-forcible sex acts
 - Sexual assault and rape
 - Sexual exploitation
 - Sexual harassment
 - Stalking

Consent – Core Issue

- Mutually understandable words or actions that indicate a willingness to participate in mutually – agreed upon sexual activity
 - Must be informed (cannot use trickery)
 - Must be freely and actively given (cannot involve physical force, duress, intimidation or threats of bodily injury)
- Judged by “reasonable person” – not purely subjective
- Consent cannot be inferred from
 - Silence, passivity or lack of resistance alone
 - Existence of a dating/sexual relationship
 - Attire
 - Spending money
 - Prior Consent
- Ambiguity – stop and clarify

Seeking Facts Related to Consent

- Always start with nature of relationship
- Ask about prior communication styles for consent, if any
- Ask questions to understand what the Complainant said and did to convey consent or lack thereof
- Ask questions to understand any specific words (or actions) of Complainant that Respondent understood to indicate consent for each sexual activity that took place
 - Adjudicators must evaluate whether words or actions provided reasonable indication of consent
- Focus on circumstances of disclosure to others (e.g., temporal proximity, substance of disclosure, etc.)
- Ask questions to enable the decision maker to evaluate effect of any alcohol use on ability to consent

Challenges Related to Alcohol Use

- Understand Immunity Rule and application
- Delay in reporting based on:
 - Concerns over conduct policy consequences
 - Lack of knowledge what occurred
 - Complainant may blame themselves due to intoxication or may not recognize lack of consent
- One or both parties may have been unconscious or in and out of consciousness
- Lack of memory
- Inability to give details

Inquiring about Potential Incapacitation

- Be sensitive but ask direct questions
- Ask questions about pre-incident behavior
- Ask questions about quantity/quality of alcohol use (other drugs – what about combinations)
- Seek relevant information from others as to parties' consumption, behavior, and conduct
- Ask questions about ability to reasonably know level of intoxication of other party
- Ask questions about post-incident behavior

Evaluating Relevance

- Information is relevant if it bears on the ultimate question whether the alleged conduct (e.g., sexual assault) occurred
- The following factors are important when assessing or considering relevance of information provided:
 - Personal knowledge (can be knowledge of the alleged assault or of information directly related to the incident in question)
 - Gossip and second- or third-hand information is less likely to be relevant even if the witness is credible
- At hearing, Chair makes decision on relevance

Demeanor

- Take note of demeanor – and any changes in demeanor – of parties and witnesses during interviews
 - Complainant/Respondent may be affected by emotional components of sexual assault allegations
 - Range of behaviors and emotional reactions vary
 - May be confrontational or hostile
 - May engage in nervous laughter, inappropriate smiling
 - May be absence of tears or emotion
- Speak with others with information about Complainant's demeanor at earlier times
- Be cautious of relying on stereotypes and generalizations

Trauma – Informed Response

- Investigations into sexual assault and intimate partner allegation can be aided by an understanding of the possible neurobiological effects of trauma
- Previous OCR Guidance (2014) specifically required providing practical information about the impact of trauma on victims to help minimize the reliance on stereotypes about victim behavior
 - In 2017 OCR withdrew this Guidance. The Acting Head urged caution as “trauma – informed techniques [may] bleed over into a presumption of bias and detract from fundamental tenets of fairness and impartiality.”¹

¹ See Developments in Title IX, Part 2. *A Conversation with OCR Acting Assistant Secretary Candice Jackson* (NACUA Briefing Sept. 26, 2017.)

What is a Trauma-Informed Response?

The Neurobiology of Trauma

When a person experiences a traumatic event, “fight or flight” hormones and neurotransmitters flood the body, affecting the way the brain encodes memories – so much so that they can be disjointed and out of chronological order. Researchers say the traumatized brain can capture vivid sensory details of a life threatening event – what a weapon looked like or how a room smelled – while completely skipping over or scrambling details such as time or location.

See David Lisak, Ph.D. (<https://www.youtube.com/watch?v=py0mVt2Z7nc>)

Trauma – Impacted Behaviors

- Some scientists have reported the following types of behavior can be common to those who experience violence and trauma
 - Delays in reporting the incident
 - Inability to object or respond to assault during incident because triggered by prior incident
 - Counterintuitive behavior (continued contact with accused after incident reported)
 - Partial memory – gaps in recollection
 - Inconsistent or evolving accounts of what occurred
 - Impact of alcohol/drug usage

NACUA Notes - Jerry J. Nolan, JD, *Promoting Fairness in Trauma-Informed Investigator Training* (February 8, 2018)

Practical Information About Trauma's Impact

- Scientific opinions differ on the effect of trauma on memory
 - You do not need to determine scientifically whether an individual was traumatized, or by what, or what the precise effect the trauma has in a specific case
 - Goal is to understand potential effects and to avoid uncritical assumptions or biases about whether a complainant is “lying” if s/he cannot remember every detail of event in chronological order
 - Gaps in memory or partial recall may, or may not be related to a traumatic event – it is important to gather as much information as possible.
- It is critical to demonstrate fairness to all parties and avoid “sex stereotypes or generalizations”

Practical Information About Trauma's Impact (cont'd.)

- Evidence of behaviors that may be related to trauma does not require adjudicators to accept everything a Complainant recalls as absolutely true or to require a finding of violation
- Investigators – understanding potential impact of trauma allows them to better frame questions that will encourage a witness to share what they do recall without demanding total recall in chronological order
- The open-ended, Funnel Technique (next slide) of questioning can be useful, applies equally to Respondents who are often traumatized as well
- Adjudicators – do not substitute scientific theories for evidence. Do not abdicate your fact-finding responsibilities by relying on stereotypes in a particular case or presumptions based on theories

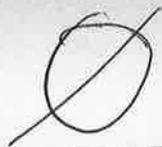
Funnel Technique¹

- Consider this approach for both Complainant and Respondent
- What are you able to tell me about your experience?
- Do not cross-examine or demand a chronological recitation
 - Provide lots of space for witness to gather thoughts and share
 - Do not interrupt narrative – go back and fill-in gaps
- Can you tell me more about _____?
- How do you feel at this point?
- What did you think at that point?
- Do you recall any smells or sounds?
- What was the most difficult part of this experience?
- After s/he has fully shared, circle back to seek clarification of key issues

¹ The Funnel Technique is similar the Forensic Experiential Trauma Interview (FETI) technique was developed by the US. Army Military Police to be used in conducting interviews of those who have experienced various forms of traumatic events.

Sensitive But Thorough

- It is essential that Investigators and Adjudicators seek clarification of inconsistencies and counterintuitive behavior from both parties.
- Not all are necessarily result of trauma-related hormones or trauma-impacted memory – some may bear on credibility
- Critical to remember while impact of trauma can be very real for some is not a substitute for a decision on what happened in this case based on available evidence
- In seeking details and addressing inconsistencies avoid blunt and judgmental questions:
 - Do you think that was a smart idea?
 - Why didn't you try to leave?
 - Why didn't you scream or hit him?
 - Do you think your clothing invited his attention?



Examples – Seeking Important Details

1. Complainant stayed in room alone with Respondent
 - Blunt – “Why did you decide to stay in rooms when others left/no one else was there”
 - Sensitive – “I am not looking to blame you, but is there a reason you decided to stay. I’d like to include it in my report,” or “Help me understand...”
2. Calls and Texts
 - Blunt – “When you went into her/his room – did you use your phone to call/text anyone?”
 - Sensitive – “Did you receive or send any texts or calls while in her/his room?”
3. Protection
 - Blunt – “Did you talk about using protection before having sex?”
 - Sensitive “Did the topic of protection come up and, if so, how?”

Examples – Seeking Important Details (cont'd.)

4. Delay in Reporting

- Blunt – “Why did you wait so long to report?”
- Sensitive – “Can you explain your thought process regarding your decision to report this incident?”

5. “Normal Interactions” After Assault

- Blunt – “Why did you _____?”
- Sensitive – “Help me understand your thought process when you _____ (sent text/meet him/her)”

Questions ?