

# An Integrated and Coordinated Approach to Conducting Title IX Investigations: *Understanding the Intersection of Title IX, Clery and VAWA*

## Arcadia University

Gina Maisto Smith | Leslie M. Gomez | January 17-18, 2017

# Agenda: Day One



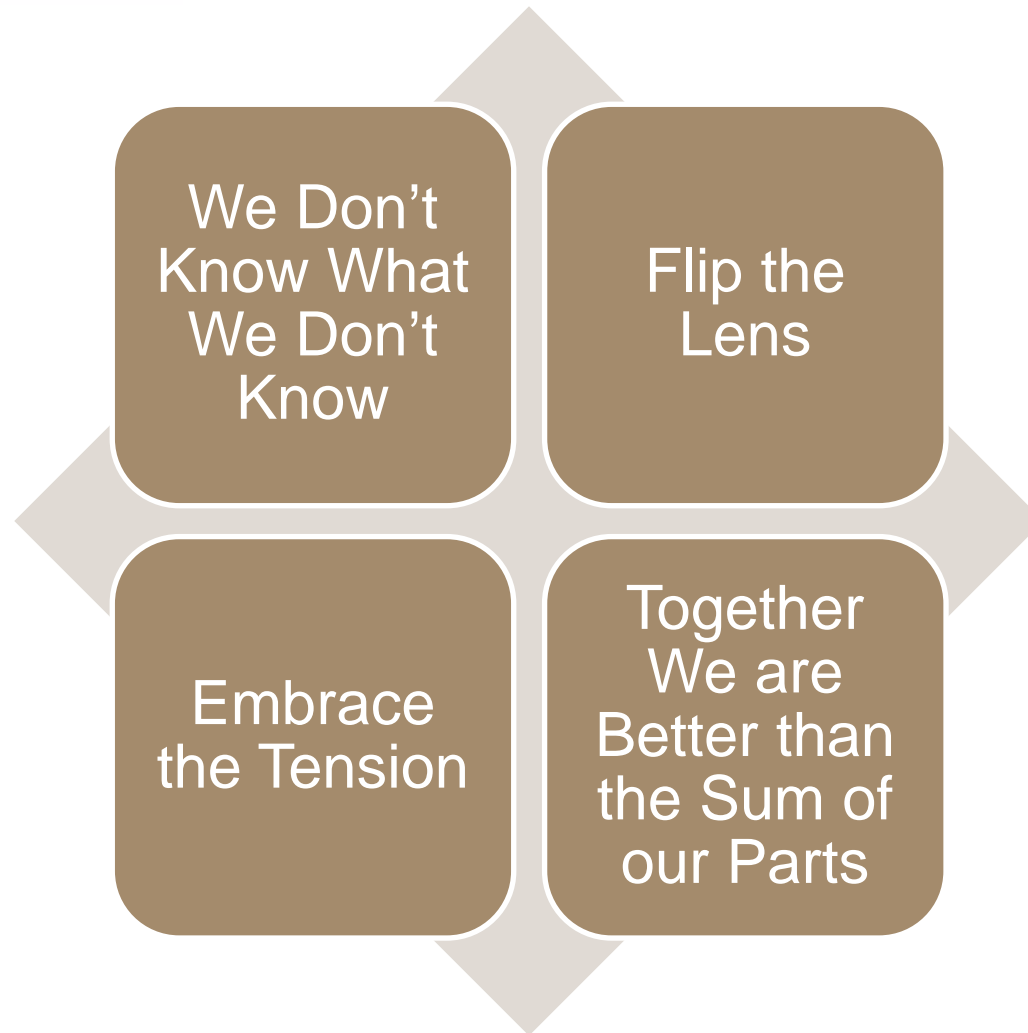
- The Context
- Overview of Regulatory Framework
- Overview of Effective Practices
- Structure of the Investigation and the Role of the Investigator

# Agenda: Day Two

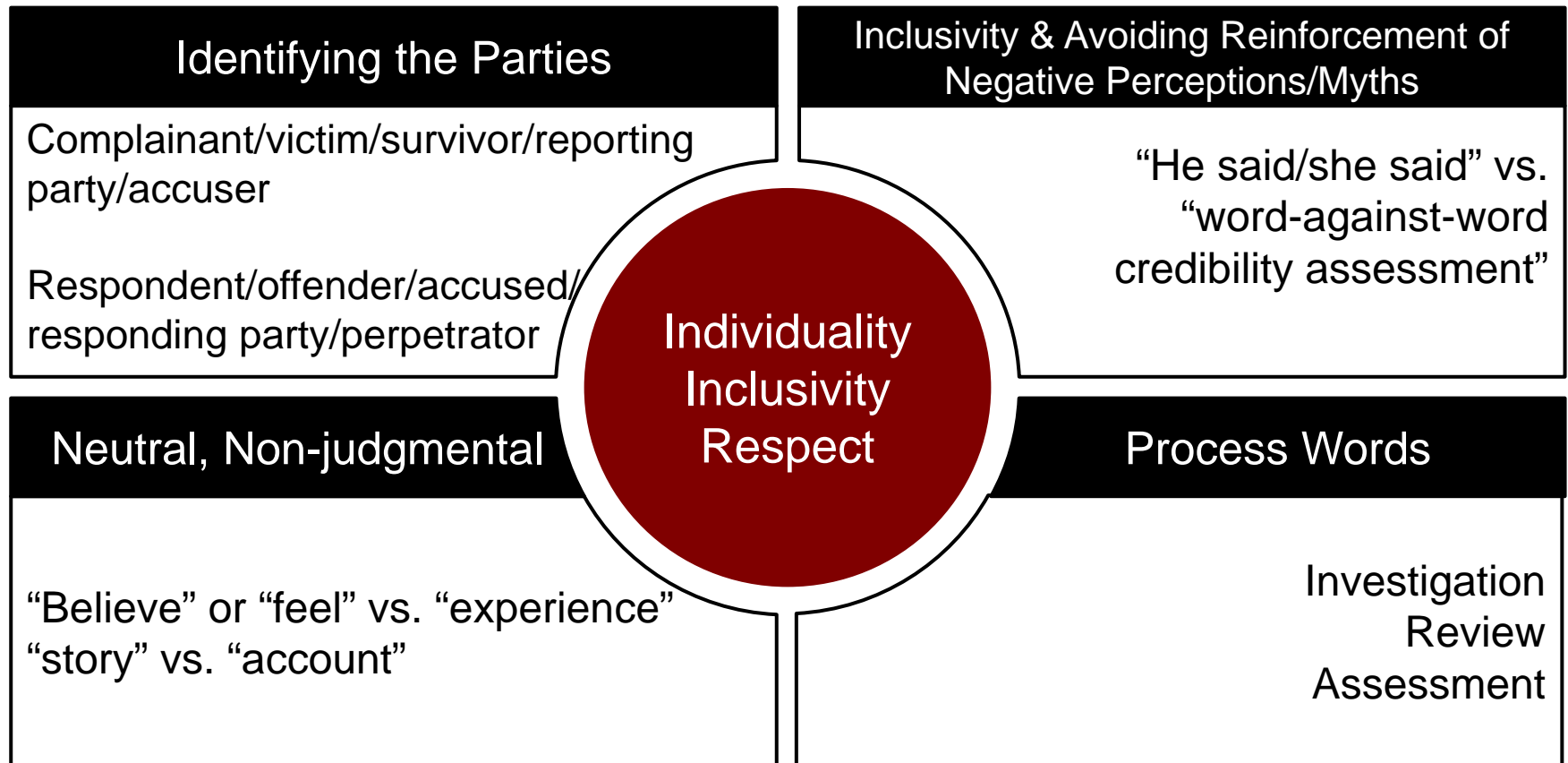


- Dynamics of Interpersonal Violence
- Investigative Protocols
- Forensic Interviewing
- Evaluating Credibility

# Framing the Conversation



# Awareness of the Impact of Language



# Caveat About Statistics



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

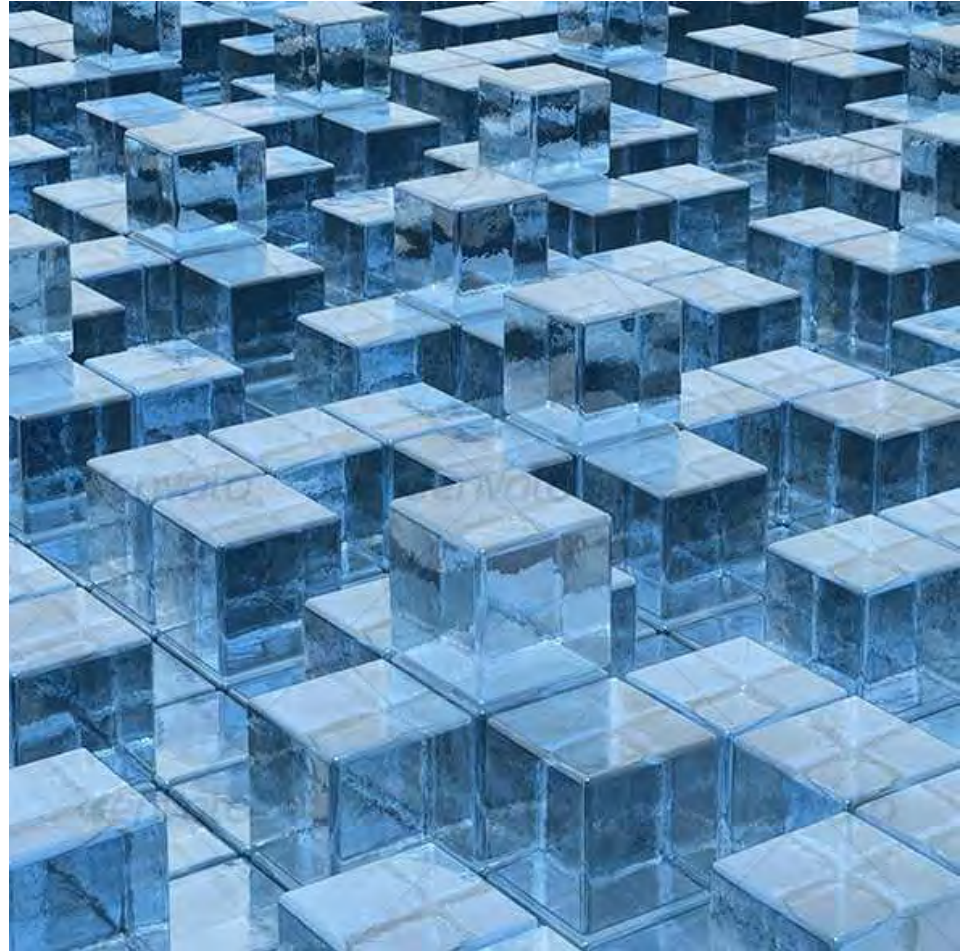
# The Context



# The Context



- Regulatory Framework
- Dynamics of Trauma & Sexual and Gender-Based Harassment and Violence
- Individual Culture, Climate, History, Resources, Policies, Procedure, and Personnel of the Institution





# Title IX Obligations

If harassment has occurred, **doing nothing is always the wrong response.** However, depending on the circumstances, there may be **more than one right way to respond.** The important thing is for school employees or officials to pay attention to the school environment and not to hesitate to respond to sexual harassment **in the same reasonable, commonsense manner** as they would to other types of serious misconduct.

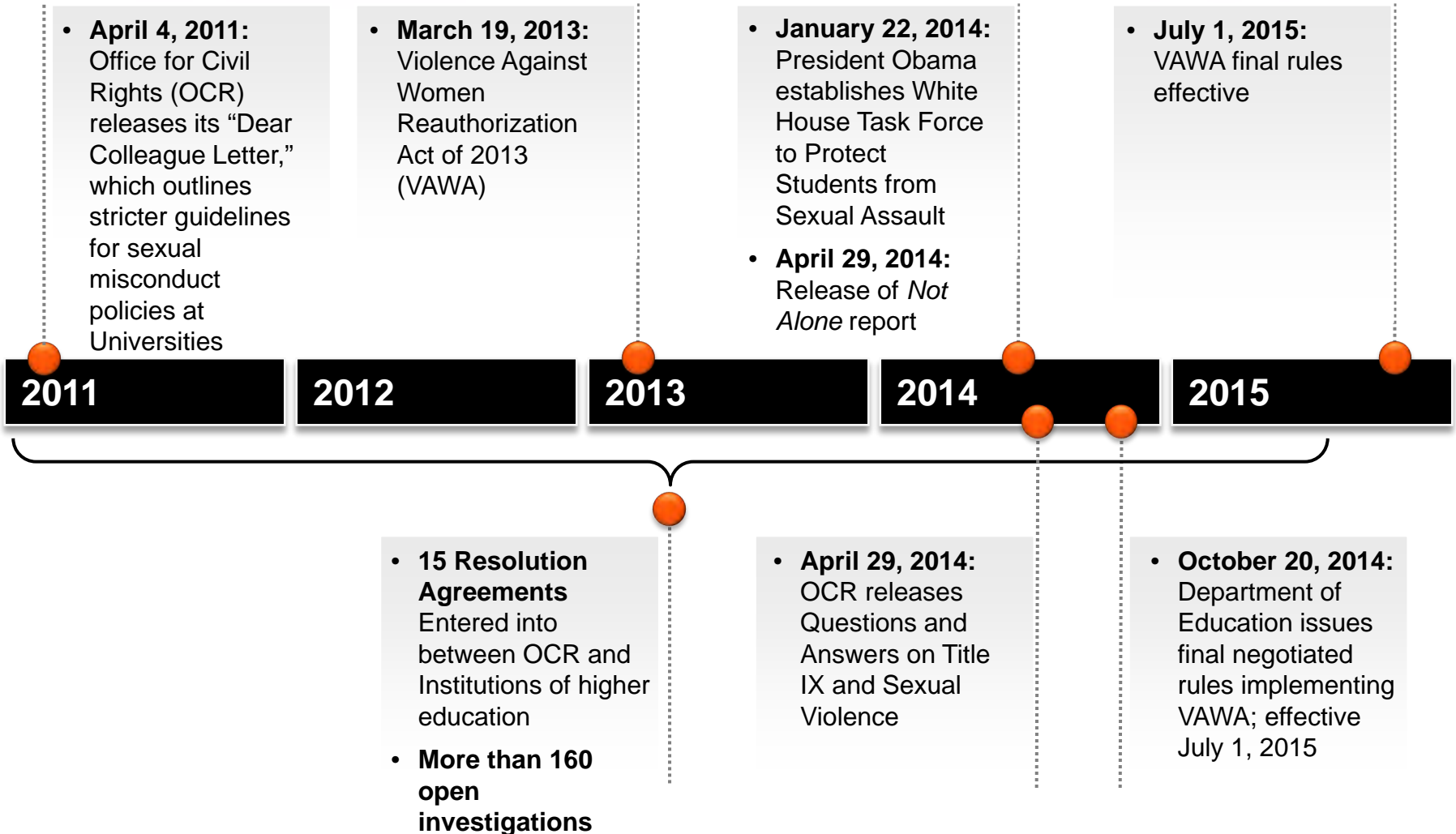
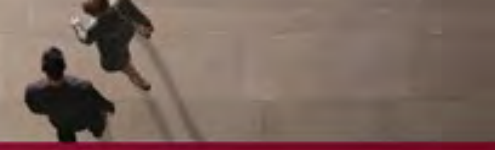
Department of Education Office for Civil Rights  
2001 Revised Sexual Harassment Guidance

# The Federal Mandates

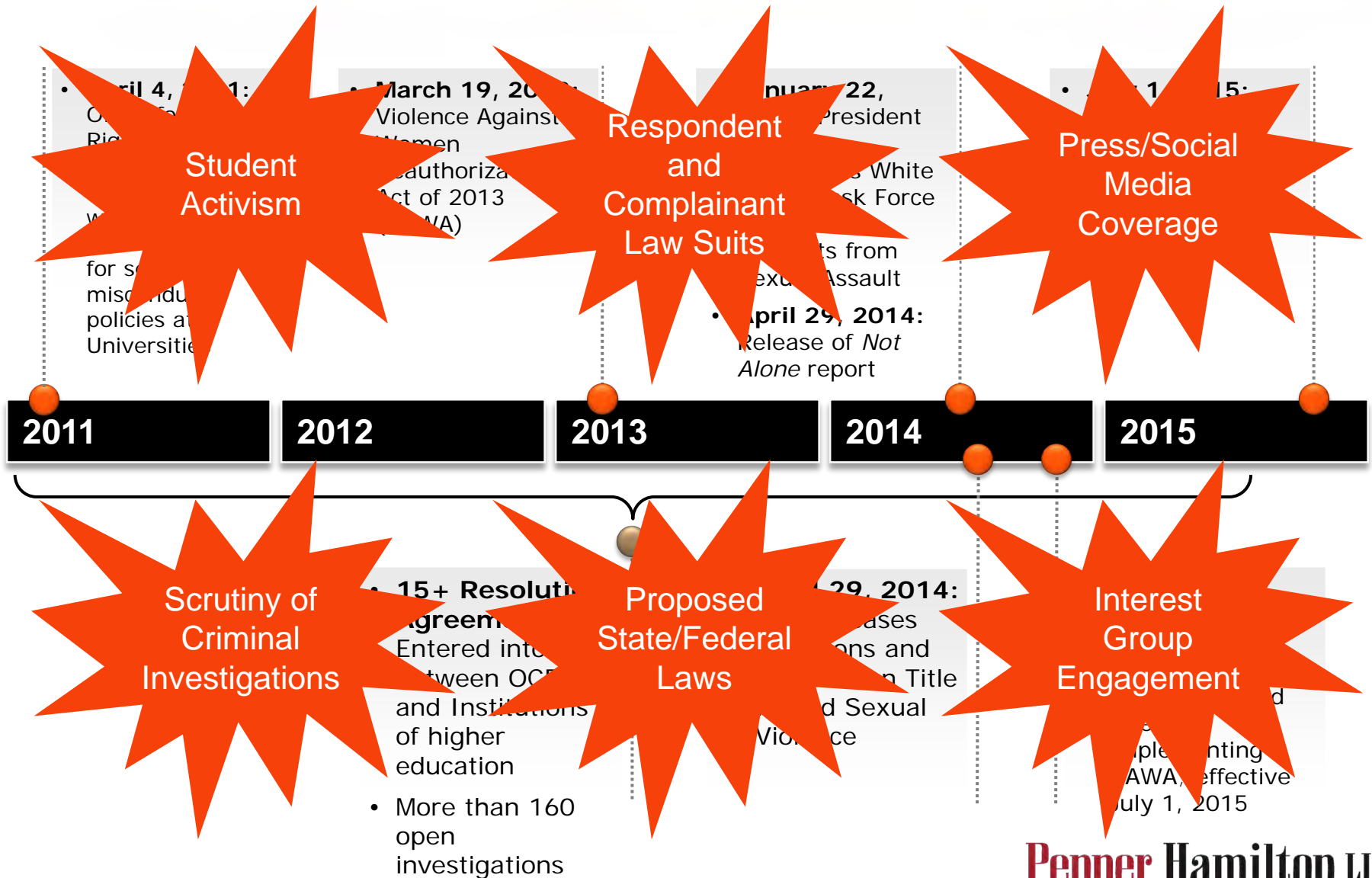


- Title IX of the Education Amendments of 1972
  - Prohibits discrimination on the basis of sex in educational institutions
- The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act
  - Requires policies and procedures for sexual assault
  - Requires timely warning and external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

# Evolution of Federal Guidance, Legislation and Enforcement Efforts



# External Challenges



# The Hierarchy



- Title IX
- Title IX Implementing Regulations
- 2011 Dear Colleague Letter
- 2014 Q&A
- 1997 Sexual Harassment Guidance
- 2001 Revised Sexual Harassment Guidance
- Dear Colleague Letters
  - Bullying
  - Hazing
  - Title IX Coordinator
  - Retaliation
- Resolution Agreements with up to 120 in the queue
- White House Task Force Report (2014)
- Rolling resource documents on [notalone.gov](http://notalone.gov)

# Government Action

Legislative Action	Executive Action	Judicial Action
<ul style="list-style-type: none"><li>• Evolving laws<ul style="list-style-type: none"><li>– VAWA</li><li>– Negotiated Rulemaking</li></ul></li><li>• Federal bills<ul style="list-style-type: none"><li>– CASA</li><li>– HALT</li><li>– SOS</li></ul></li><li>• State bills</li></ul>	<ul style="list-style-type: none"><li>• Evolving guidance<ul style="list-style-type: none"><li>– Dear Colleague Letter</li><li>– Q &amp; A on Title IX &amp; Sexual Violence</li></ul></li><li>• Expanded enforcement efforts</li><li>• White House Task Force</li><li>• State Summits</li></ul>	<ul style="list-style-type: none"><li>• State and federal court action<ul style="list-style-type: none"><li>– By complainants and respondents</li></ul></li><li>• Injunctive relief mid-process</li><li>• Settlements</li><li>• Amicus by DOE/DOJ?</li></ul>

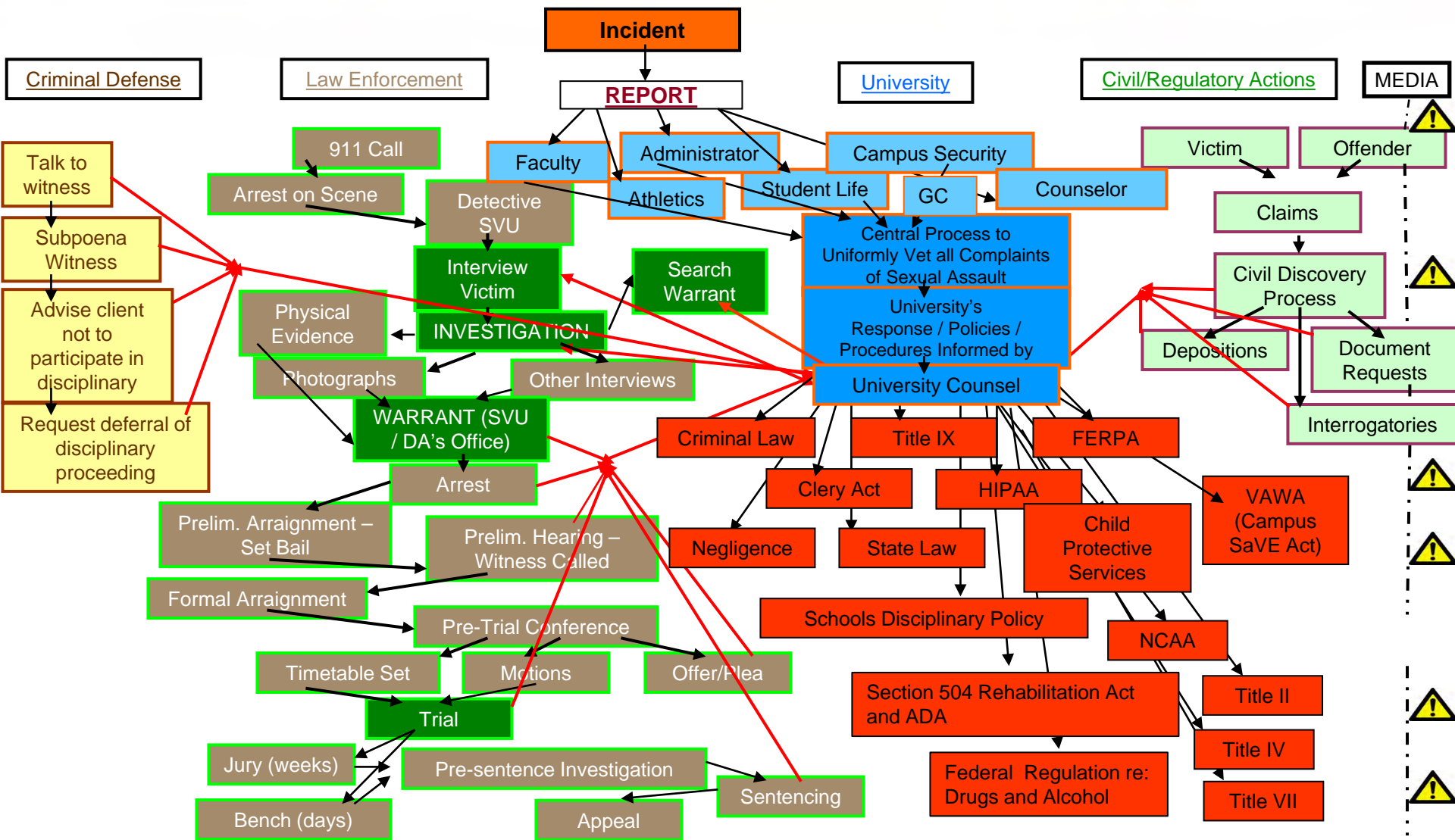
# Increase in Enforcement Actions

Since 2011 colleges and universities have experienced an exponential increase in the number of Title IX administrative enforcement actions by OCR



<http://www.huffingtonpost.com/entry/education-department>

# The Challenge of the Context





# Title IX and Law Enforcement: Two Distinct Systems



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

“Police investigations may be useful for fact-gathering, but because the standards for criminal investigations are different, **police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX.**”

“Conduct **may constitute unlawful sexual harassment** under Title IX **even if the police do not have sufficient evidence** of a criminal violation.”

# VAWA and Criminal Process



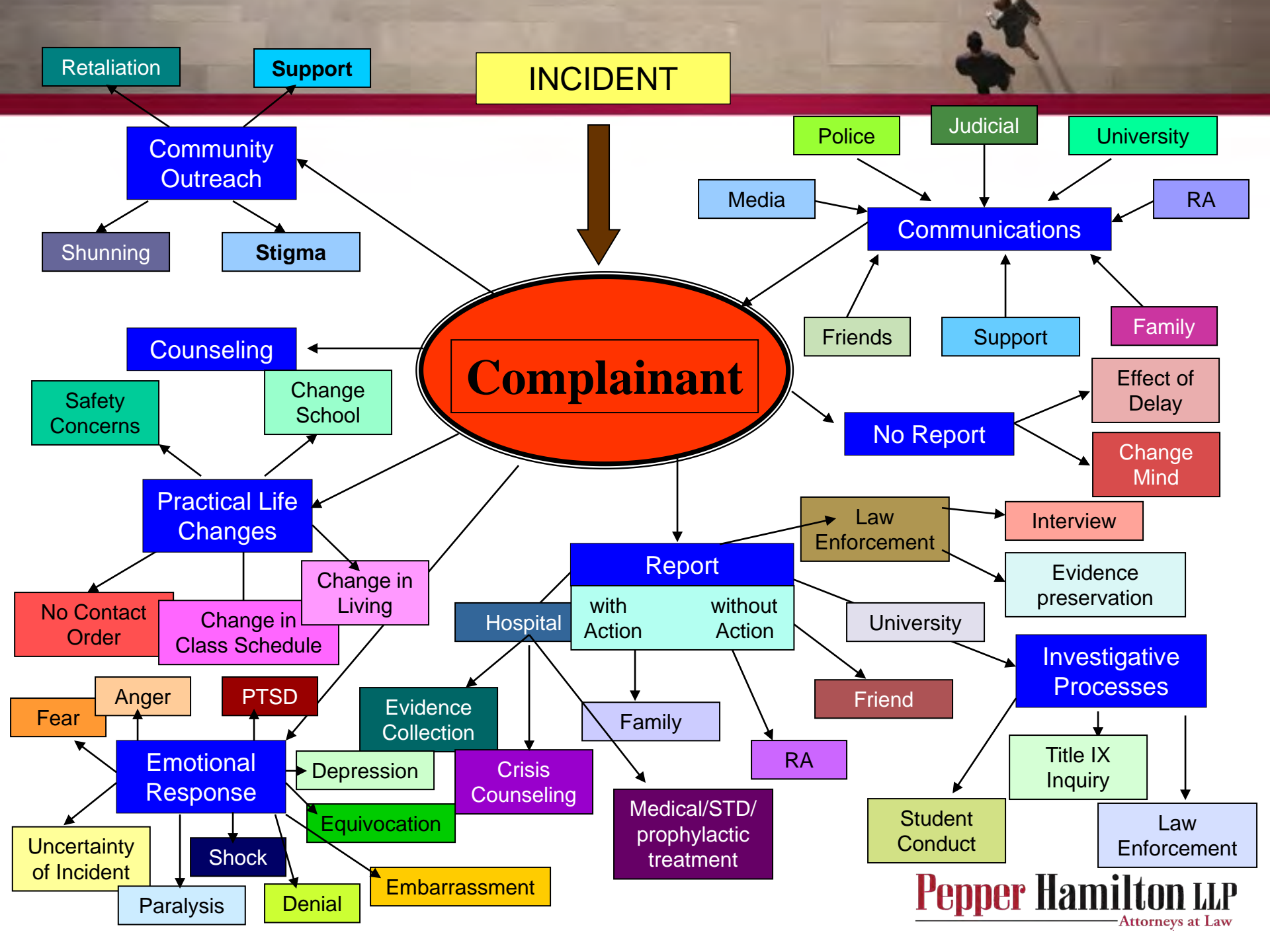
- “Policies shall address procedures victims should follow if a sex offense, domestic violence, dating violence, sexual assault, or stalking has occurred, including information in writing about:
  - Options regarding law enforcement and campus authorities, including notification of the victim's options: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

Reauthorization of the Violence Against Women Act of 2013

# Higher Education & Criminal Justice



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



# ALLEGATION

**Respondent**

# CONSEQUENCES

Student  
Conduct

Law  
Enforcement

Title IX  
Investigation

School

Parents

Peers

Information

Community  
Reaction

Legal Rights

Support

Shunning

Media

Questions  
?????

Attorney

Emotional Response

Practical Life Changes

Fear

Shame

Embarrassment

Financial

No Contact  
Order

Change in  
Class Schedule

Change  
Living

Denial

Anger

Sanction

Fine

Exoneration

Expulsion

Arrest



- “Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience.”

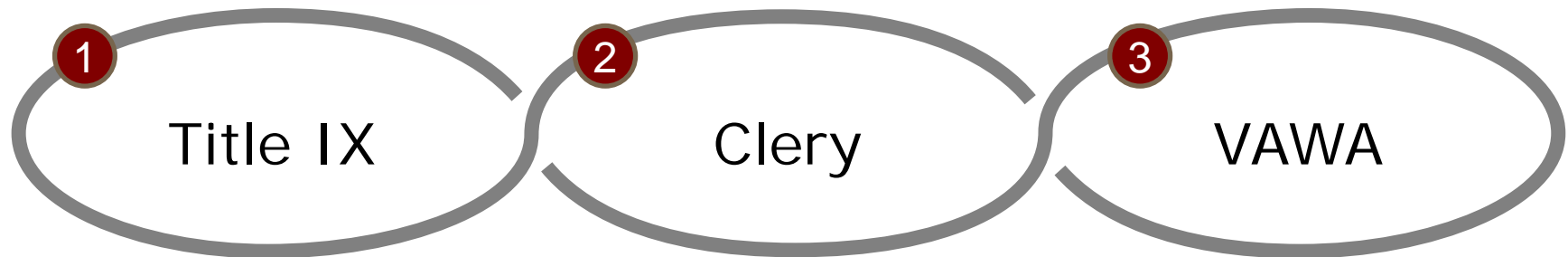
Department of Education Office for Civil Rights  
2001 Revised Sexual Harassment Guidance

- Institutions have broad discretion in policies, procedures, structure and personnel
- Prevention and education programming and training can be tailored to the institution

# Overview of the Regulatory Framework



# Federal Regulatory Framework



## ***Title IX of the Education Amendments of 1972***

- Prohibits sex discrimination in educational institutions that receive federal funds

## ***The Jeanne Clery Act (1990)***

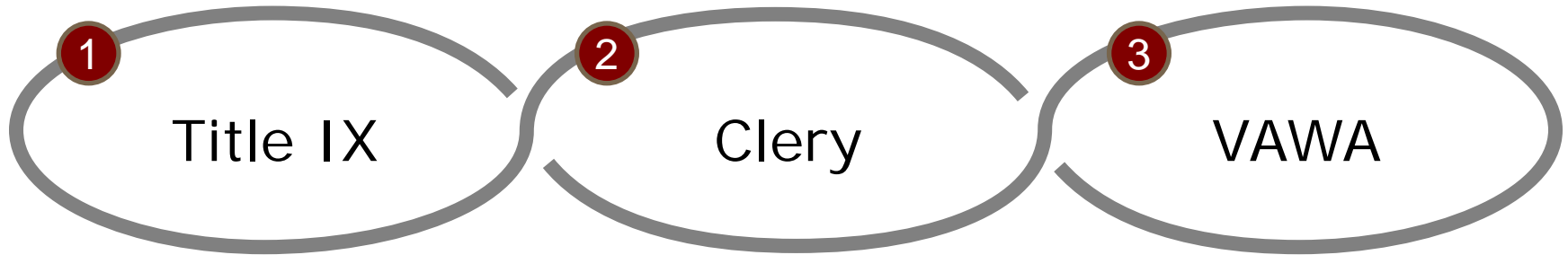
- Requires reporting of crimes, timely warnings, education/prevention programs, and policies and procedures for sexual assault

## ***The Violence Against Women Reauthorization Act of 2013***

- Amends Clery to expand sexual assault requirements and include dating violence, domestic violence, and stalking; applies to all students and employees



# The Enforcement Scheme



Title IX

Clery

VAWA

*Title IX of the Education Amendments of 1972*

*The Jeanne Clery Act (1990)*

*The Violence Against Women Reauthorization Act of 2013*

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

# Understanding Title IX

## The Law:

*“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”*

20 USCA Sec. 1681

# Understanding Title IX

## Who Must Follow:

- All recipients of federal financial assistance

## Who it Protects:

- Protects students, employees, and third parties from sexual and gender-based harassment and violence by any school employee, another student, or a non-employee third party.

## Who can file:

- A student or employee, parent or guardian, third party, or **anyone** who requests action on the student or employee's behalf

# Understanding Title IX

## Scope of Title IX:

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

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

# Understanding Title IX

## What it Does:

- **Prohibits discrimination** on the basis of sex in:
  - Education programs and activities
  - Employment (similar to other federal and state laws)

## Scope of Conduct:

- Sexual discrimination
- Sexual harassment
- Sexual violence
- Gender-based harassment

# Sexual and Gender-Based Harassment and Sexual Violence



- **Sexual Harassment** is conduct that is:
  - Sexual in nature, unwelcome, and sufficiently severe, persistent or pervasive that it interferes with an individual's employment or educational environment, participation in a university program or activity, or receipt of a legitimately requested service
  - Hostile environment under subjective and objective standard
- **Gender-based harassment**
  - Acts of verbal, nonverbal, or physical aggression; intimidation; or hostility based on sex, even if those acts do not involve conduct of a sexual nature
  - Sex-based harassment by those of same sex
  - Discriminatory sex stereotyping (e.g., harassment of LGBTQ students)
- **Sexual Violence**
  - physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent

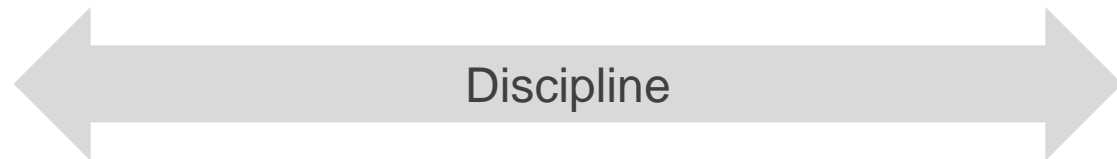
# Spectrum of Conduct



**Appropriate**

**In Violation  
of Policy**

**Unlawful**



# Understanding Title IX

## Core Tenets:

- When a school **knows or reasonably should know** of possible sexual violence, it must take **immediate** and appropriate steps to investigate or otherwise determine what occurred
- If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to
  - **Eliminate** the hostile environment
  - **Prevent** its recurrence
  - **Address** its effects
- School must protect the complainant and ensure his or her safety as necessary, including taking **interim steps** before the final outcome of any investigation



# Understanding Title IX

## Core Tenets:

- Requires **grievance procedures** for “**prompt and equitable**” resolution of student, employee and third party complaints;
- A school violates Title IX if it “**has notice**” of a sexually hostile environment and fails to take **immediate and effective corrective action**.
- A school has notice if a **responsible employee** knew or, **in the exercise of reasonable care, should have known** about the harassment.

# Understanding Title IX

## Notice:

- Some examples of notice include:
  - **Direct notice:** filing a report, third party report, witness
  - **Indirect notice:** a member of the local community, social networking sites, the media.
- In some situations, if the school knows of incidents of sexual violence, **the exercise of reasonable care should trigger an investigation** that would lead to the discovery of additional incidents.
  - Pattern of conduct: several acts of sexual violence against different students
  - Pervasiveness of conduct: widespread, openly practiced, or well-known among students or employees
- “In those cases, OCR may conclude that the school should have known of the **hostile environment**. In other words, if the school would have found out about the sexual violence **had it made a proper inquiry**, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry.”

# Understanding Title IX



## Responsible Employee

- A responsible employee includes any employee who:
  - Has the **authority to take action** to redress the harassment
  - Has the **duty to report to appropriate school officials** sexual harassment or any other misconduct by students or employees or
  - A **student could reasonably believe has this authority** or responsibility
- Whether an employee is a responsible employee or whether it would be reasonable for a student to believe the employee is will **vary depending on various factors** (i.e., age and education level, position held by employee, procedures)

# Resolution Agreements: Key Themes



- Student-focused remedies
  - Include in task force membership
- Remedial measures in:
  - Title IX procedural requirements
  - Reporting/implementation
  - Education and prevention
- Annual “climate checks” of student body to gauge effectiveness of remedial measures
- Title IX Coordinator to review 3 years of prior cases (including campus police records) for violations of Title IX and respond appropriately
- Coordinate with local law enforcement to ensure Title IX compliance in instances of reported criminal conduct
- Provide participants with Title IX rights and resources and take steps to ensure their safety and the safety of campus community
- Individual remedies (pay for complainant’s counseling expenses)
- Use of informal processes for resolution
- Training – entire campus, implementers, adjudicators, “responsible employees”

# OCR Resolution Agreements

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

# OCR Resolution Agreements



- Michigan State University  
September 2015
- University of Virginia  
September 2015
- Occidental College     June  
2016
- Minot State University   July  
2016
- Frostburg State University  
September 2016
- Wesley College  
October 2016
- CUNY Hunter College  
October 2016
- University of New Mexico  
October 2016

# Understanding Clery (VAWA)



- Applies to sexual assault, dating violence, domestic violence and stalking
- Applies to Clery-defined crimes reported to **campus security authorities** that occur on Clery geography
  - On campus
  - On a noncampus building or property
  - On public property
- Reporting of crime statistics through
  - Daily crime log
  - Annual security report
- Duty to warn/timely warnings

# Clery Act Requirements



**Collect,  
Classify, and  
Count Crime**



**Issue  
Campus  
Alerts**

(Timely Warnings &  
Emergency  
Notifications)



**Publish an  
Annual  
Security  
Report**

**All Institutions Must**



# Clery Act Requirements



**Disclose  
Missing Student  
Protocols**



**Maintain a Daily  
Crime Log**



**Maintain a Daily  
Fire Log and  
Publish an  
Annual Fire  
Report**

**Institutions with Campus Police and/or Student Housing Must**

# Clery on Sexual Offenses

- Educational programs to promote awareness
- Procedures students should follow if a sex offense occurs, including:
  - Reporting procedures
  - The importance of preserving evidence
- Information on law enforcement reporting options and how the University can assist
- Notifying students of existing resources and services
- Duty to warn/timely warnings (not precluded by FERPA)
- Notifying students of university accommodations after an alleged sex offense
- Develop procedures
- Same opportunities for accuser and accused during a disciplinary hearing
- Notify of outcomes
- Develop sanctions

# VAWA: Overview



- Expands Clery requirements to dating violence, domestic violence and stalking
- Applies to students and employees
- Expands training requirements
- Details prescriptive processes to respond to dating violence, domestic violence, staking, and sexual assault (prescriptions overlap, but are not precisely aligned with Title IX)
- Statement of policy re: programs to prevent domestic violence, dating violence, sexual assault and stalking

# VAWA: Overview



- Requires incidents of sexual assault, domestic violence, dating violence, and stalking be disclosed in annual campus crime statistic reports
- Expands definition of reportable hate crimes to include bias based on a victim's national origin or gender identity
- In timely warning, must withhold the names of victims as confidential
- Institution may not retaliate, intimidate, threaten, coerce, or discriminate against any individual for exercising rights or responsibilities

# VAWA: Procedures



- Procedures institution will follow once incident has been reported
  - Standard of evidence
  - Possible sanctions or protective measures
  - Procedures victim should follow
  - Procedures for disciplinary action
  - Information about how institution will protect the confidentiality of victims
  - Written notice of resources
  - Written notice of accommodations

# VAWA: Prompt, Fair, and Impartial Investigation and Resolution



- Officials are appropriately trained and do not have a conflict of interest or bias for or against the accuser or the accused
- The proceeding is completed in a reasonably prompt timeframe
- The accuser and the accused have equal opportunities to have others present, including an advisor of their choice
- The accuser and accused are given timely notice of meetings at which one or the other or both may be present
- The accuser, the accused, and appropriate officials are given timely and equal access to information that will be used during informal and formal disciplinary meetings and hearings

# VAWA: Prompt, Fair, and Impartial Investigation and Resolution



- Explicit provision noting that institutions may extend their reasonably prompt deadlines for good cause with written notice to the accused and accuser of the delay and the reason for the delay
- The accuser and the accused receive simultaneous notification, in writing, of the result of the proceeding, the rationale, any available appeal procedures, any change to the results that occurs prior to final resolution and when results become final

# VAWA: Role of the Advisor



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



# VAWA: Education Programs



- Education programs shall include:
  - Primary prevention and awareness programs for all incoming students and new employees
  - Ongoing prevention and awareness programs for students and faculty
- Investigators shall receive annual training on issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

# Definitions: Dating Violence



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

# Definitions: Domestic Violence



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

# Definitions: Stalking



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

# White House Task Force: Overview



- Mandate: To strengthen federal enforcement efforts and provide schools with additional tools to help combat sexual assault on their campuses with a focus on postsecondary schools
- Task Force Report Recommendations
  - **Identifying** the problem: **campus climate surveys**
  - **Preventing** sexual assault on campus
  - **Responding effectively** when a student is sexually assaulted
  - **Improving the federal government's enforcement** efforts and **making them more transparent**

# White House Task Force



Function: Advisory only...

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

# Intersection of Title IX and Clery/VAWA



# Intersections: Scope

## Title IX

- Sex discrimination
- Sexual and gender-based harassment
- Sexual violence
- Scope
  - On campus
  - In the context of any school program or activity
  - Continuing effects on campus
  - Consistent with other school policy

## Clery

- Sexual assault
- Dating violence
- Domestic violence
- Stalking
- Other Clery crimes
- Scope
  - On Clery geography (for counting)
  - Across campus (for policies and procedures)



# Intersections: Key Distinctions



- Definitions are not consistent
- Procedural requirements differ
  - Burden of proof
  - Written notice of rights
  - Advisor of choice
  - Equal and timely access to all information that will be used
  - Notice of outcome
- Different enforcement mechanisms

# Definitions/Concepts



## Title IX

- *Sexual Violence*: Physical sexual acts perpetrated **against a person's will** or where a person is **incapable of giving consent** (e.g., due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent).
- A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.

## Clery/VAWA

- *Sexual Assault*: An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's UCR program.
- *Rape*: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, **without the consent** of the victim.

# VAWA: User Manual from the FBI's UCR Program



- *Sex Offenses*: Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
- *Fondling*—The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- *Incest*—Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- *Statutory Rape*—Sexual intercourse with a person who is under the statutory age of consent.

# Procedural Elements



## Title IX

- Preponderance of the evidence
- Inform of all resources and options
- Notify of option to go to law enforcement
- Must provide equal access to process
- Notice of outcome, but only notice of sanctions that directly relate to the complainant
- Complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing (Access to this information must be provided consistent with FERPA)

## Clery/VAWA

- Must state burden of proof
- Must give written notice of rights
  - Describe **range** of protective measures and must list **ALL** sanctions
- Decline to notify law enforcement
- Right to advisor of choice
- Simultaneous written notice of outcome, sanction and rationale
- Timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings (Compliance with this section does not constitute a violation of FERPA)

# Notice of Outcome



## Title IX

- Must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence.
- Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school.

## Clery/VAWA

- Require simultaneous notification, in writing, to both the accuser and the accused, of—
  - (A) The result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking;
  - (B) The institution's procedures for the accused and the victim to appeal the result of the institutional disciplinary proceeding, if such procedures are available;
  - (C) Any change to the result; and
  - (D) When such results become final.



## Title IX

- Any employee who has the authority to take action to redress the harassment
- Anyone who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees
- An individual who a student could reasonably believe has this authority or responsibility

## Clery

- A campus police department or a campus security department of an institution
- Anyone responsible for campus security but does not constitute police or security
- Anyone designated to receive crime reports
- Officials of an institution with significant responsibility for student and campus activities

# Intersections



- CSAs are generally considered to be responsible employees
- May intersect with other reporting responsibilities:
  - Academic integrity
  - State law
  - Child abuse
  - Elder abuse
  - Health care professionals
- Neither has responsibility to investigate

# Reporting Responsibilities



<b>Duty</b>	<b>CSA</b>	<b>Responsible Employee</b>
<b>To Whom</b>	Official or office designated by the institution to collect crime report information	Title IX Coordinator
<b>What</b>	Clery offenses on Clery geography	Sexual harassment and violence
<b>Content</b>	Nature of crime, date and time it occurred, date and time reported, location	Names of reporting party, alleged perpetrator (if known), other students involved, and any other relevant facts (date, time, and location)
<b>Anonymity</b>	Can be non-identifiable information	Must include identifying information
<b>Notice</b>	Direct reports only	Indirect and direct reports (knew or should have known)
<b>Timing</b>	Immediately; Ongoing	Immediately*



# Policy Considerations



- Framing the policy
  - Non-Discrimination and Harassment
  - Sexual Misconduct +
  - Interpersonal Violence
- Why does it matter?
  - Advisor of choice
  - Burden of proof
  - Equal and timely access to all information
  - Notice of outcome
  - Consistency in definitions
  - Ease of access

# Personnel Considerations: Staffing



- Title IX Coordinator
- Clery Coordinator
- VAWA Coordinator?

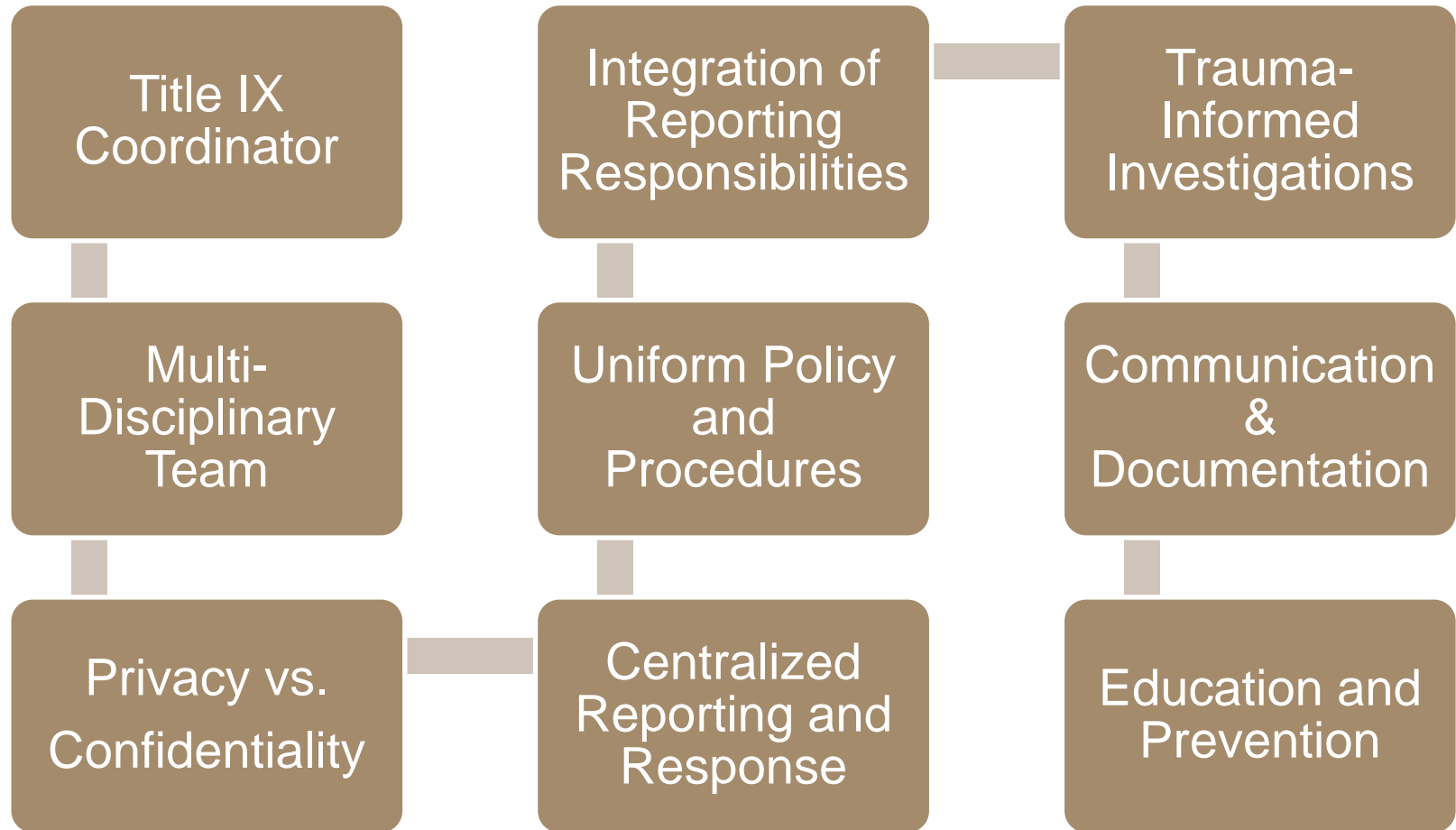
# Questions & Answers



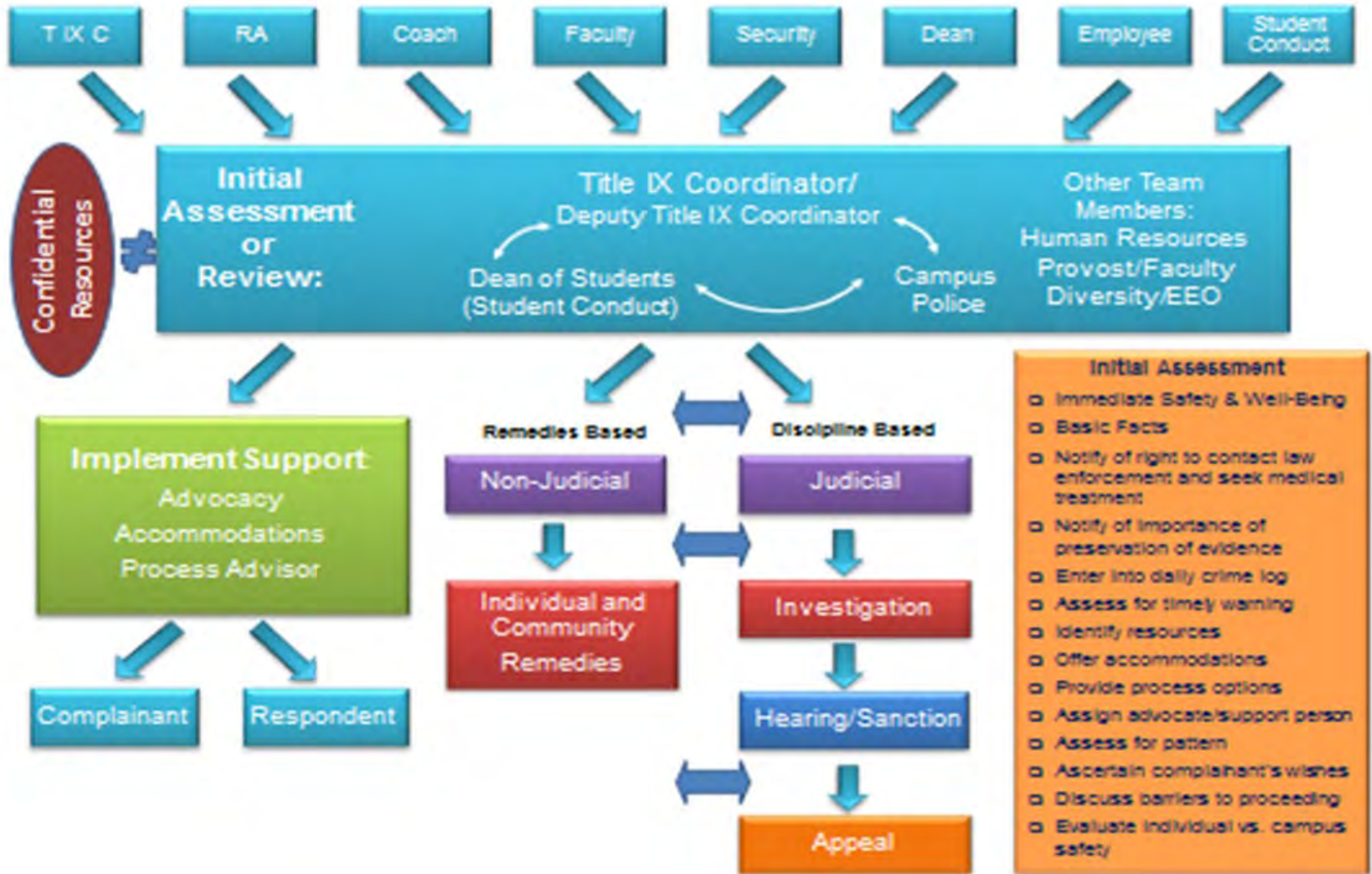
# Overview of Effective Practices



# Key Elements of Effective Practices



# Integration and Coordination



# Key Elements of Effective Practices



- Title IX Coordinator
  - Independent
  - Appropriately resourced
- Coordinated multi-disciplinary response team
  - Coordination of information
  - Coordination of personnel
- Privacy v. confidentiality
  - Distinction between confidential resources and reporting options
  - Informed reporting
- Integration of reporting responsibilities:
  - Responsible Employee
  - Campus Security Authority
  - Mandatory reporter of suspected child abuse

# Key Elements of Effective Practices



- Uniform policy and procedures for resolution:
  - Complainant autonomy/agency
  - Fair and impartial practices
  - Remedies-based options
  - Sanctions-based options
- Centralized reporting and review process
  - Consistent institutional responses
  - Tracking and monitoring of incidents and climate
- Trauma-informed investigations and practices
- Communication
  - Consistency and transparency
  - At the individual and community level
- Education, prevention and training programs



# The Title IX Coordinator



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

# The Title IX Coordinator



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

# Title IX Multi-Disciplinary Team



- Core stakeholders
  - Title IX Coordinator
  - Student conduct
  - Campus safety/police
  - Human resources
  - Dean of faculty
- Additional campus stakeholders
  - Counseling
  - Health center
  - Advocacy
- Community partners
  - Law enforcement
  - Prosecutor
  - Hospital/Medical Providers
  - Community crisis or advocacy centers
    - Rape Crisis Counselors
    - Domestic Violence Counselors

# Centralized Review Process



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

# The Title IX Team: Environment



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

# Title IX Response Team Protocols



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

# Why Document?

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

# Support and Advocacy



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



# Separation of Roles



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

# Confidential Resources



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

# Confidential Resources



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

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

# Non-professional Counselors or Advocates

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

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

# Confidential Resources vs. Reporting Options



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

# Integration of Reporting Responsibilities



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

# Training: Reporting Responsibilities



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

# Title IX: Responsible Employee



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

2001 Revised Sexual Harassment Guidance



# Title IX: Responsible Employee



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

2001 Revised Sexual Harassment Guidance

# Title IX: Responsible Employee



- A responsible employee **must** report incidents of sexual violence to the Title IX coordinator or other appropriate school designee
- Title IX coordinator **must** be informed of all reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office
- A responsible employee **must** report *all relevant details* about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation, including:
  - The names of the alleged perpetrator (if known)
  - The student who experienced the alleged sexual violence
  - Other students involved in the alleged sexual violence
  - Relevant facts, including the date, time, and location(Questions and Answers on Title IX and Sexual Violence, Question D-1, D-3, p. 14-16)

# Title IX: Responsible Employee



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

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

# Clery: Campus Security Authority



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

## Some states require reporting of:

- All felonies
- All sexual assaults or homicides on campus

## Some states require reporting by:

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

# The Responsible Employee as First Responder



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

# Stop, Drop, and Roll



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

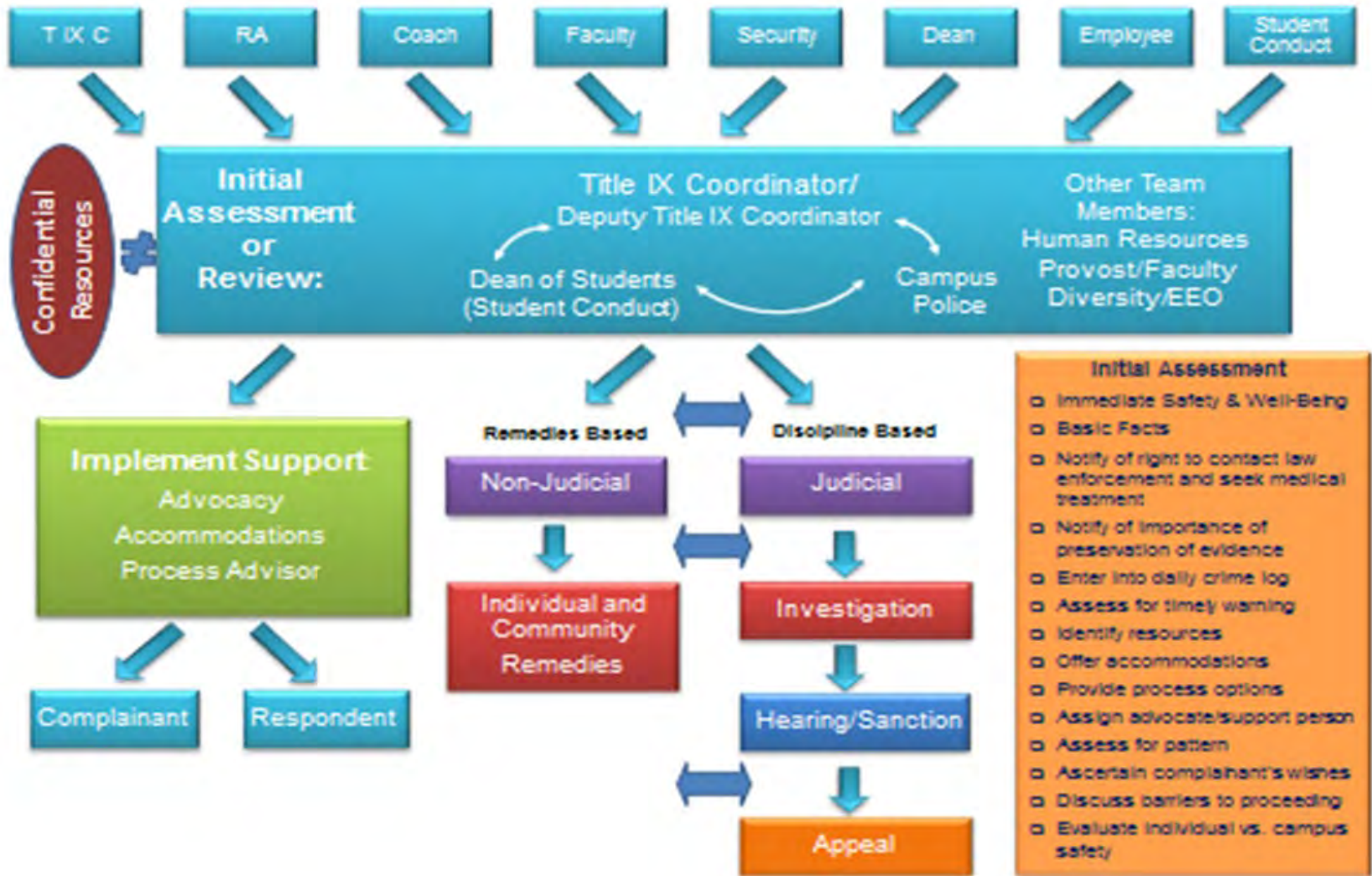
# Leave It to the Professionals



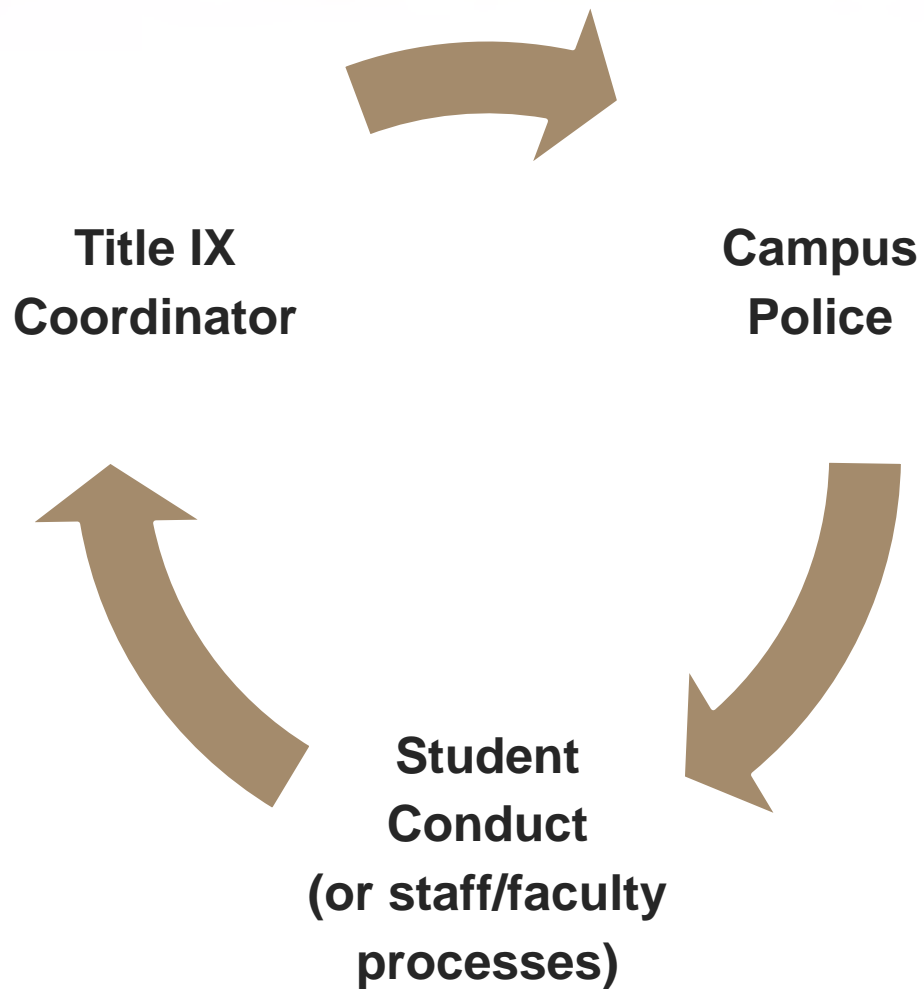
- Allow the experienced and trained professionals to:
  - Conduct independent investigation or gather facts without direction from supervisor
  - Counsel the accused or reporting party
  - Notify the accused of allegations
  - Explain to an involved party how the process works
- Please avoid the temptation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



# Integration and Coordination



# Central Review Process/ Multi-disciplinary Team



# Centralized Review Process



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

# Title IX Assessment → Investigation



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

# Practical Implications: Documenting Key Decisions



- Timely warning
- Interim measures
  - Suspension
  - Protective measures
- Request for “confidentiality”
- Steps taken to eliminate, prevent & address
- Investigative chronology
- Outcome
- Sanction
- Identify decision-maker(s)
- Outline key factors
- Outline steps taken
- Communicate to parties
- Document in file
  - Capture emails
  - Capture phone calls

# Interim Measures



- Range of available measures
  - Remedial
  - Protective
- “Reasonably available”
- Factors to consider in implementation
  - When to take action against a respondent
- Defining decision-making authority
- Enforcement

# Practical Implications: Evaluation Panel



- Multi-disciplinary team
- Regular communication
- Sharing of information
- Set factors to consider in each report
- Documentation of information sought and received
- Clear decision-making authority

# Review Committee Template Form Elements



- Details of review committee meeting
  - Date, time, location, attendees, attendees
- Circumstances of report:
  - Reporter
  - Date of report to reporter
  - Date and time of notice to Title IX Coordinator of initial report
  - Reporting method
- Details re: parties:
  - Complainant
  - Respondent
- Details of incident:
  - Date and location of incident
  - Nature of report
- Available information re: incident
  - Witnesses
  - Independent evidence
- Classification of report
  - Potential policy violation
  - Is conduct a felony?
- Clery timely warning analysis
- Interim remedial or protective measures taken or considered
- Complainant's preference for proceeding
- Information pertaining to risk factors in Q&A on Title IX and Sexual Violence
- Determination of health and safety exception



# The Dynamics of Trauma



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

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

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

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

# The Confidentiality Conundrum



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

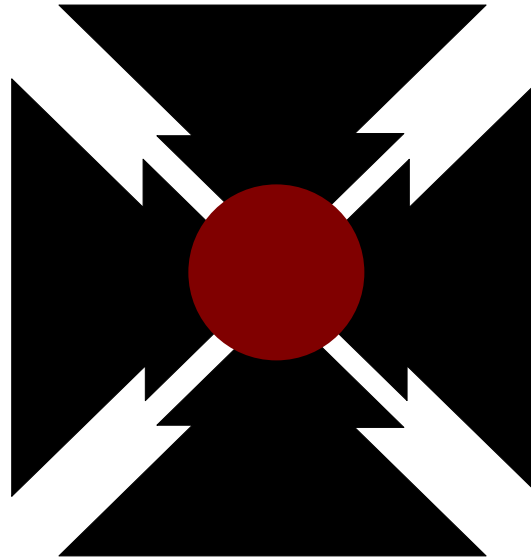
(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 19)

# The Confidentiality Conundrum



Schools should **inform and obtain consent from the complainant...**  
before beginning an investigation  
(DCL, p. 5)

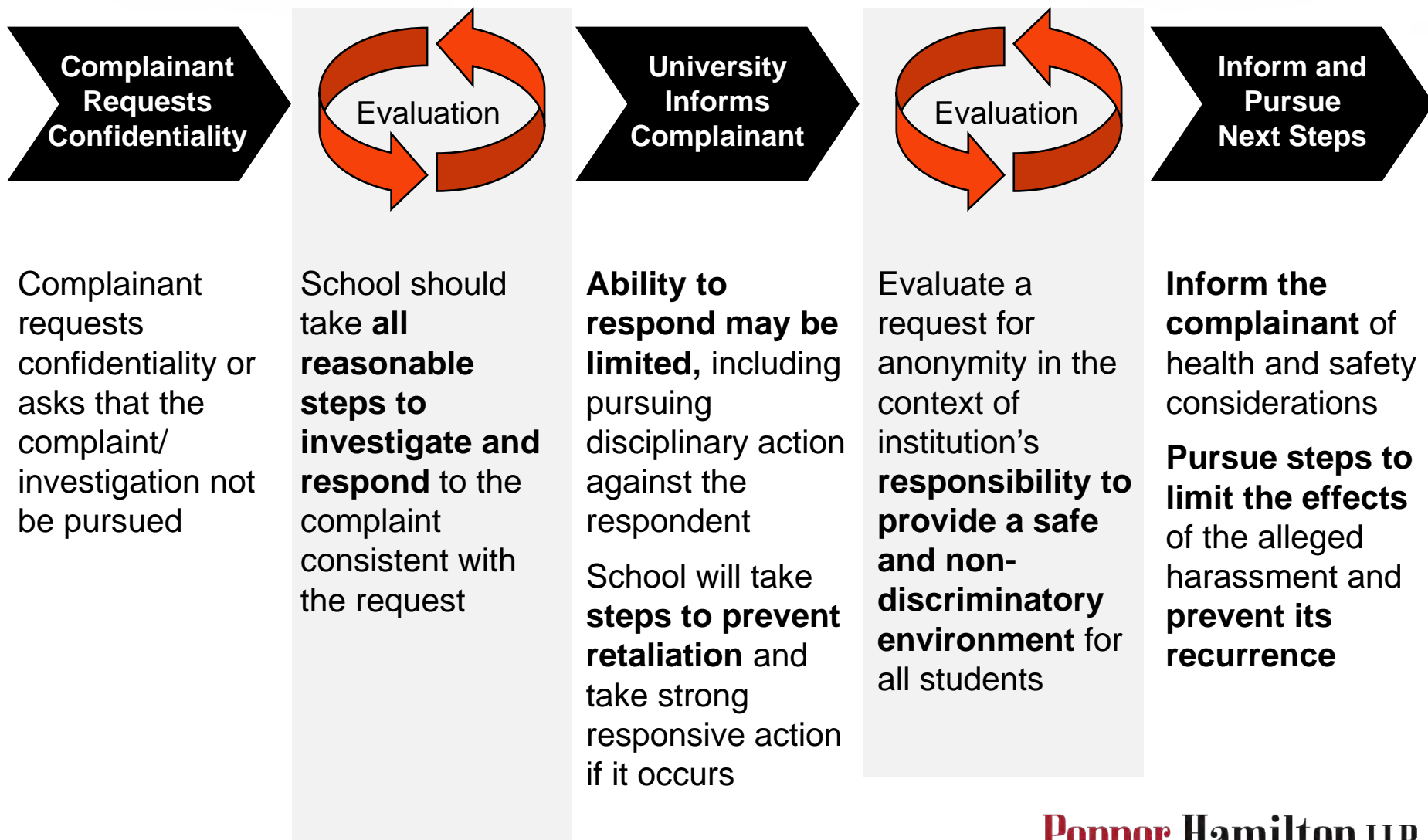
OCR **strongly supports a student's interest in confidentiality** in cases involving sexual violence  
(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 18)



There are **situations in which a school must override a student's request for confidentiality** in order to meet its Title IX obligations  
(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 18-19)

**Disregarding requests for confidentiality can have a chilling effect** and discourage other students from reporting sexual violence  
(Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 18-19)

# Navigating the Confidentiality Conundrum



# Balance Confidentiality With Community Safety

When weighing a student's request for confidentiality that could preclude a **meaningful** investigation or potential discipline of the respondent, a school should consider a range of factors:

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- Seriousness
- Weapon
- Threats to repeat
- Complainant's age
- Other harassment complaints
- One or more prior sexual assaults committed by respondent
- Pattern of perpetration (e.g., via illicit use of drugs or alcohol, at a given location, or by a particular group)
- History of arrests or records indicating a history of violence
- Multiple respondents
- Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence)

Source: OCR Dear Colleague Letter, April 4, 2011, p. 5; Questions and Answers on Title IX and Sexual Violence, Question E-1, p. 19, Question E-2, p. 21-22

Note: The alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under FERPA" is another consideration that the school must balance.

# The University can take important steps short of initiating formal action



**Steps a school can take** to limit the effects of the alleged sexual violence and prevent its recurrence **without initiating formal action** against the respondent **or revealing the identity** of the complainant include:

---

- Providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred
- Providing training and education materials for students and employees
- Changing and publicizing the school's policies on sexual violence
- Conducting climate surveys regarding sexual violence
- Putting a respondent on notice of allegations of harassing behavior without revealing, even indirectly, the identity of the student complainant

# The Confidentiality Conundrum



- Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response **requires expertise and attention**
- Title IX coordinator is generally in the best position to evaluate confidentiality requests
- School should ensure that it assigns these responsibilities to **employees with the capability and training** to fulfill them

# A Practical Response



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



# Tending to the Individual



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

# Questions & Answers



# The Structure of the Investigation and the Role of the Investigator



# The Changing Times



- The traditional student conduct model of asking each party to write their own statement, conducting little to no additional investigation, and requiring a student to present their own case at a panel hearing will not satisfy Title IX mandates.
- Institution should “own” the investigation
  - Parties should not be required to obtain, interview or ensure witnesses’ presence
  - Parties should not be *required* to write their own statements

# The Changing Times



- The lack of a competent and thorough investigation has the potential of leading to inequitable findings by a panel that bases a decision on incomplete development of facts or reliance on information that is not fully developed or supported by other corroborative information.

# “Investigation”

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

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

# Title IX Grievance Procedures



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

# Title IX Grievance Procedures

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

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



# Balance and Equity

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

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

# Scope of the Investigation



- Scope of the investigation
  - Threshold, preliminary, advisory, final finding
- Does the investigator:
  - Merely gather evidence?
  - Determine credibility?
  - Make findings of fact?
  - Identify policy violations?
  - Recommend sanctions?
- Is there a separate adjudicator?
  - Is the adjudicator bound by the investigator's findings?

# Scope of the Investigation



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

# Investigation



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

2001 OCR Guidance

# Investigation



- Choice of language
  - Investigation
  - Review
  - Assessment
- Who investigates?
  - Student conduct
  - Campus safety/police
  - Attorney
  - Mental health professional
  - Dedicated Title IX investigator
  - EEO/human resources
  - External investigator
- Considerations
  - Use of investigative team
  - Training and experience
  - Impartiality
  - Campus culture
  - Avoid role conflict
    - Clearly delineate victim support from impartial investigation
    - Consider separation of fact-gather and fact-finder
  - Comprehensive interview techniques
  - Evidence collection

# Role of the Investigator



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

# The Role of the Investigator



- A good investigator should be:
  - Objective
  - Fair
  - Impartial
  - Open-minded
  - Professional
  - Appropriate in demeanor
  - An active listener
  - Polite and respectful to all parties
- A good investigator should not:
  - Allow emotion to overrule reason
  - Make assumptions as to how a person “should” react
  - Pre-judge the facts
  - Put him/herself in the shoes of the victim or the accused
  - Allow bias or prejudice to affect his/her judgment

# In-house Investigator



- **Pros**
  - Cost effective
  - Familiar with institution, personnel, policies, practices, values, and history
  - Minimizes workplace disruption
  - Capacity to implement and monitor recommendations
- **Cons**
  - Objectivity
  - Perceived institutional bias
  - Distrust of “inside” investigator
  - Time commitment
  - Capacity and experience
  - Comfort/ability to ask difficult questions



# External Investigator



- **Pros**

- Expertise
- Independence
- Credibility
- Focus
- Time

- **Cons**

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

# Identifying Our Own Biases



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

# Diversity and Culture



- Sensitivity to language and bias
  - LGBTQ
  - Cultural differences
- Reporting barriers
- Communication differences/impediments

# Prompt Response



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

# Prompt Response



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

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

# Prompt Response



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

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

# Prompt Response



- Know the answers to these questions for your institution:
  - Is 60 days a hard and fast rule?
    - Good cause
    - Communication with both parties
    - Estimated completion date
  - How do we handle breaks?

# Coordination with Law Enforcement



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



# Coordination with Law Enforcement



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

# Coordination With Law Enforcement



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

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

# Investigator as Fact-finder



- In many instances, the investigator may be the initial or only finder of fact.
- **Burden of Proof:** preponderance of the evidence  
(DCL, p. 11)

# Burden of Proof



- Beyond a reasonable doubt
- Clear and convincing evidence
- **Preponderance of the evidence**
- Some evidence



# Burden of Proof



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

# Trauma-Informed Practices

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

# Process Expectations in the Criminal Context



- Right to counsel
- Right to confrontation
- Freedom from self-incrimination
- Freedom from unlawful search and seizure
- Presumption of innocence
- Proof beyond a reasonable doubt
- Additional procedural protections
  - Notice
  - Discovery
  - Fair and impartial adjudicator
  - Appeal rights

# Due Process on Campus



- ***“The fundamental requisite of due process of law is the opportunity to be heard.”***
  - *Goss v. Lopez*, 419 U.S. 565, 577-579 (U.S. 1975)
- ***If “rudimentary elements of fair play” are followed, the requirements of due process of law will have been fulfilled.***
  - *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961).
- ***In the context of student discipline, due process requires only “notice and a [meaningful] opportunity to be heard.”***
  - *Smith v. The Rector and Visitors of the University of Virginia*, 78 F. Supp. 2d 533 (WD Va. 1999) (citing *Dixon v. Alabama State Bd. of Educ.*); see also *Keerikkattil v. Hhrabowski*, 2013 U.S. Dist. LEXIS 135331, at \*18-19 (D. Md. Sept. 23, 2013)



# Due Process on Campus



- What “due process” is required in a particular situation is generally a highly individualized factual determination dependent on the facts of each particular situation, including the severity of the potential punishment and the nature of the proceeding.

# Investigation Protocols: Evidentiary Issues



- Always consider relevance
- Admission of medical information
  - Must be accompanied by expert guidance
  - If provided voluntarily by one party, must be shared with the other
- Admission of mental health records
- Admission of statements of unavailable witnesses
- Admission of police report
- Prior bad acts/pattern evidence
  - May be relevant and probative
  - Use for fact-finding and sanction
- Prior sexual history of the complainant
  - Generally barred
  - Limited grounds for admission

# Be Prepared



- Cross-complaints
  - Rush to the courthouse steps
  - Mid-process allegations
- “False Reports”
- Recantations
- Consolidation requests
  - Multiple allegations
  - Other conduct violations
- Unexpected evidence & witnesses

# Communications

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

# “Investigation”

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

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

# Title IX Grievance Procedures

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

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

# Balance and Equity

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

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

# Burden of Proof



- Beyond a reasonable doubt
- Clear and convincing evidence
- **Preponderance of the evidence**
- Some evidence





# Burden of Proof



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

# Authority for “Informal” Response

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

1997 Guidance

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

2001 Guidance

# Authority for “Informal” Response



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

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

# “Authority” for “Informal” Response

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

# “Authority” for “Informal” Response

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

# “Informal” Resolution

- Remedies-based
  - Individual
  - Community
- Not based on imposition of discipline or sanction
- Participation is voluntary
  - Cannot compel cooperation
  - Complainant may end informal resolution at any time
- In the appropriate case, can be an effective means of eliminating, preventing and addressing harassment
- Complainant may be able to remain confidential
- May or may not involve notifying the respondent
- Mechanisms:
  - May use mediation for cases that do not involve sexual assault
  - Voluntary resolution
  - Directed action by school
- Can incorporate principles of restorative justice
- Maintain records for pattern evidence

# Questions & Answers



# Dynamics of Interpersonal Violence





# Recap About Statistics



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

# Staggering Statistics



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

1 *DOE Summary of Crime Statistics*

2 *DOE Summary of Crime Statistics*

3 *DOJ, National Institute of Justice, 2005*

4 *National Center on Addiction and Substance Abuse at Columbia University 2007*

# Prevalence in the LGBTQ Community



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

National Intimate Partner and Sexual Violence Survey, Centers for Disease Control and Prevention, Jan. 25, 2013

# The Dynamics of Sexual Assault



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

# Sexual Assault on College Campuses



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

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



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

#### Sources:

- 1.National Institute of Justice, 2000, 2005 National Crime Victimization Survey.
- 2.Bureau of Justice Statistics, 2000, National Commission on Substance Abuse at Colleges and Universities.
- 3.The 2006 National Crime Victimization Survey.
- 4.Callie Rennison, National Crime Victimization Survey: Criminal Victimization
- 5.Callie Rennison, Rape and Sexual Assault: Reporting to Police and Medical Attention
- 6.Michael Rand & Shannan Catalano, Criminal Victimization, 2006
- 7.D.O.J, National Institute of Justice, 2005.

# Non-Stranger Sexual Assault



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

# Most Sexual Assaults Lack Physical Evidence



- 5% of forcible rape complainants have serious physical injury.<sup>1</sup>
  - Most complainants of sexual assault either delay seeking or do not seek medical treatment.<sup>1</sup>
  - There is typically little physical corroborating evidence in acquaintance rape prosecutions.<sup>2</sup>
1. Callie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*.
  2. Corinne Casarino, *Civil Remedies in Acquaintance Rape Cases*, 6 *B.U. Pub. Int. L.J.* 185, 189 (1996).



# Absence of Trauma



- 2,384 children referred for possible sexual abuse
- Less than 4% of children evaluated for CSA had diagnostic medical findings
- Girls more likely to disclose abuse than boys
- Older children more likely to disclose abuse than younger children
- Older children more likely to disclose penetration
- **Normal does not mean nothing happened**
- Review of 36 **pregnant** adolescents presenting for sexual abuse evaluations
  - 5% definitive findings of penetration
  - 60% normal or non-specific findings
  - 22% inconclusive findings

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

Kellogg et al. Pediatrics 2004;113:e67.

# Why Exams May Be Normal



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

# Understanding Physical Evidence



- Criminalistics laboratory: blood, rape kit, saliva, physical evidence (clothing and bedding)
- Rape kit: P-30, prostatic acid phosphatase, seminal fluid
- DNA Identification Laboratory
- DNA: included, excluded, or cannot be excluded
- Forensic evidence:
  - “For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.” (DCL, p. 12, n. 30)

# Understanding the Neurobiology of Trauma\*



- Amygdala
  - Scans for danger
  - Interprets sexual assault as threat to survival
  - Initiates neurobiological reaction
- Neurobiological response is fight, flight or freeze
  - Based on release of adrenals/hormonal flooding
  - Body decides reaction based on hormones
- Effects can last up to 96 hours post incident
- Effects can reactivate when triggered

\*Rebecca Campbell, Michigan State University

# Understanding the Neurobiology of Trauma: the HPA Axis



- Amygdala recognizes threats
- Sends signal to Hypothalamus
- Hypothalamus sends a signal to the Pituitary gland
- Pituitary communicates with Adrenal glands
- Adrenal glands release
  - Catecholamine: fight or flight (adrenaline)
  - Cortisol: energy available
  - Opioids: prevent pain
  - Oxytocin: promotes good feelings

# Emotional Reactions

- Variations in response are based on variations in adrenal gland releases
  - Flat affect (opioid)
  - Giggling demeanor (oxytocin)
  - Impaired rational thought (catecholamine)
  - Hyper/jangled (catecholamine)
- Tonic Immobility
  - Complete shut down/rape-induced paralysis
  - Autonomic/mammalian response to extremely fearful situation

# Processing of Memories

- Brain
  - Gathers sensory information – visual, auditory, tactile
  - Organizes information to form memories
- Trauma hormones interfere with the consolidation of memories
  - Memories are scattered/fragmented
  - Random, not linear
- Memory recall may can be slow and difficult
  - Content is accurate, just may take some time and patience for it to come together
- Sleep helps memory consolidation

# Counter-Intuitive Victim Behaviors



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



# Counter-Intuitive Victim Behaviors



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

# Counter-intuitive Victim Behaviors



- Questioning of event and actions
  - I should/shouldn't have
  - Why did/didn't I
- Effect of victim's own misconceptions
  - I was drinking
  - I consented to some of the acts
  - I put myself in that position
  - Not enough force/no weapon used
  - Not a stranger
  - I have been abused before – it must just be me

# Counter-intuitive Victim Behaviors



- Effect of power differential
- Preservation of dignity
- Cultural or religious influences
- Processing of incident not linear

# Sexual Assaults Are Under-reported



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

# Sexual Assaults Are Under-reported



- Callie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000.*
- Michael Rand & Shannan Catalano, *Criminal Victimization, 2006.*
- *Bureau of Justice Statistics Special Report, March 2003*
- Bureau of Justice Statistics 2000
- DOE Summary of Crime Statistics
- National Crime Victimization

# Delay in Reporting

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

# Barriers to Reporting

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

# Disclosure

- A process where an individual reveals abuse or assault
- On-going, not a one time event
- Stages of Disclosure:
  - Denial
  - Tentative
  - Active
  - Recantation
  - Reaffirmation
- Triggers for Disclosure
  - Accidental – victim's secret is found out
  - Purposeful – victim makes decision to tell



# Triggers for Accidental Disclosure



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

# Triggers for Purposeful Disclosure



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

# Recantation

- Understand the real life repercussions of disclosing
- How was disclosure received?
- Tremendous actual & emotional costs of disclosure
- Possibility that recantation is real
- Does NOT end the investigation or the process
- Explore direct and indirect causes of recantation

# Direct Causes of Recantation



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

# Indirect Causes of Recantation



- Love for the respondent
- Loss of offender in life
- Fragmented peer group/community
- Effect on family members (sadness/depression)
- Lack of family support
- Feeling guilty/responsible
- Fear of testifying
- No desire or emotional fortitude to endure process
- Change in living conditions
- Change in financial status
- Change in school, neighborhood, circle of friends
- Multiple interviews and medical procedures
- Does not want respondent to suffer consequences
- Does not want to relive incident again
- Only wanted abuse to stop
- Just wants life to get back to normal

# False Reports



- Estimates for the percentage of false reports in sexual misconduct cases – 2% to 8%<sup>1</sup>
- Statistics on false reports range from 1.5% to 90%.<sup>2</sup>
- Query the reliability of these statistics based on:
  - Definition
  - Credibility of review
  - Criteria
  - Sample

1. *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*. Lonsway, Ambolt, and Lisak

2. Rumney, 2006

# Intimate Partner Violence



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

# Intimate Partner Violence



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

NVAW Survey, 2000



# Stalking



- Between 1 in 6 women and 1 in 19 men have experienced stalking victimization at some point during their lifetime
- 66% of female and 41% of male victims are stalked by a current or former intimate partner
- More than 1/2 of female and 1/3 of male stalking victims indicated that they were stalked before the age of 25
- About 1 in 5 female and 1 in 14 male victims experienced stalking between the ages of 11 and 17

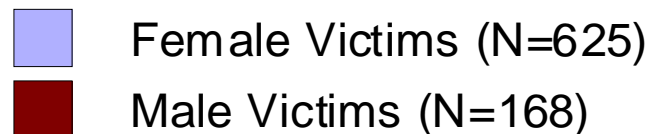
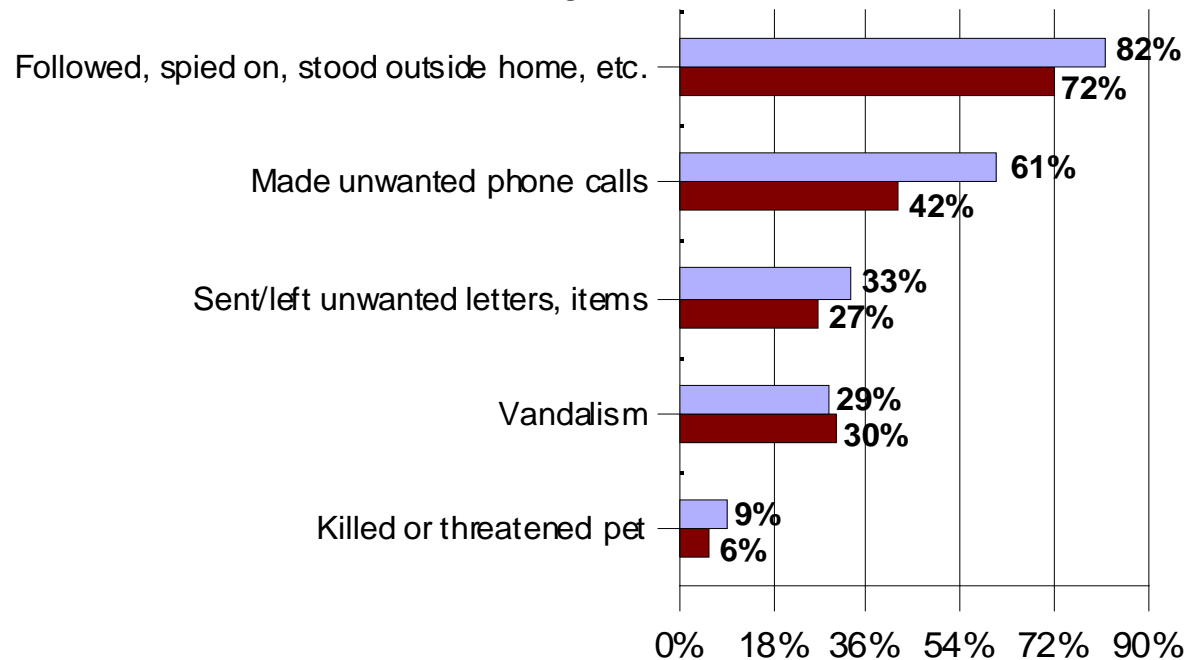
Michele C. Black et al., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* (National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 2011)

# Intimate Partner Violence: Stalking



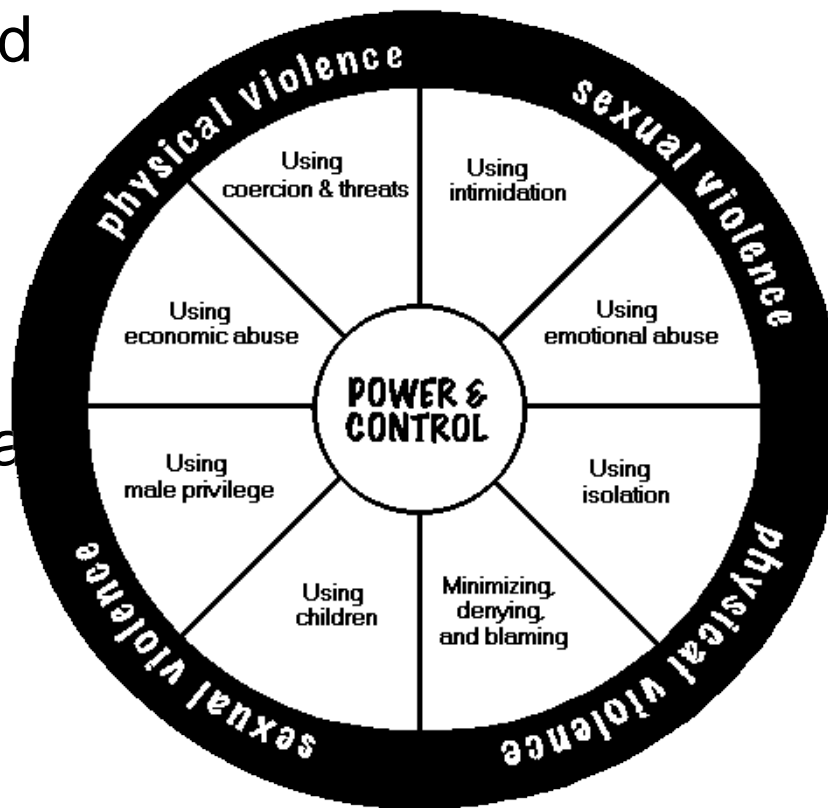
## Stalking Behaviors

Percentage of cases



# Intimate Partner Violence

- Power, control, and authority
- Domination
- Isolation
- Verbal and physical abuse



Margolis Healy & Associates LLC

# The Role of Corroboration



- The word of a complainant need not be corroborated, if it is believed by the fact-finder by a preponderance of the evidence (most states have a statute or case law supporting this proposition)
- Complainant's word alone may be sufficient to sustain burden of proof
- The law recognizes the nature of sexual offense
  - Behind closed doors
  - No witnesses
  - No physical evidence

# Understanding Predatory Behavior



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

Lisak D. & Miller P. M. (2002) *Repeat Rape and Multiple Offending Among Undetected Rapists*.

# Defenses to Sexual Assault



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

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

# Questions & Answers



# Investigative Protocols





# Investigative Protocols



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

# Developing an Investigative Plan



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

# Developing an Investigative Plan



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

# Developing an Investigative Plan



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

# Developing an Investigative Plan



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

# Maintaining a Working Chronology



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

# Building a Timeline



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



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



# Documenting Interviews



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

# Documenting Interviews



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

# Gathering Physical Evidence



- Physical evidence may include:
  - Injuries, photographs of injuries, medical records
  - Communication records such as telephone, email, voicemail, text, social media
  - Security monitoring video, visitor logs
  - Clothing, bedding, other tangible objects
  - Photographs of scene
  - School records
  - 911 tape, police records
  - Forensic evidence such as DNA

\*Note: Forensic evidence must be reviewed by a trained forensic examiner

# Gathering Physical Evidence



- Important to preserve evidence, whether or not law enforcement is involved
- Limited window for evidence collection
  - 72 to 96 hours for a sexual assault nurse examination
  - Physical evidence in clothing or on bedding may last indefinitely
- Ensure the proper medical or forensic personnel handle forensic evidence

# Gathering Physical Evidence



- All physical evidence, whether subject to forensic analysis or not, should be preserved and the chain of custody should be maintained
- Ensure that evidence collection and maintenance is documented including:
  - Date of evidence recovery
  - Location of evidence recovery
  - Person who recovered evidence
  - All persons who handled evidence
  - Location of evidence storage
- Ensure that evidence is stored in a secure location
- Document any time the evidence is removed

# Gathering Physical Evidence



- Maintain a relationship with law enforcement in order to coordinate to the extent possible
- Remember to take photographs: injuries, scene, clothing
- Draw a diagram of the scene
- Use experts where necessary
- Again, timeliness is key
  - Physical evidence can be lost, destroyed, or contaminated
  - Injuries heal quickly

# Report Writing Techniques



- Report writing:
  - Professional
  - Balanced and neutral language
    - Content
    - Linguistics
  - Avoid declarative credibility language
    - “Unreliable” vs. insufficient information
    - Recognize perspective of the parties
  - Comment on the evidence, not the parties
  - Avoid the “you”
  - Use of verbatim quotes

# Investigative Report



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



# Investigative Report



- Use template format with consistent language and content across investigations
- Leave sufficient time for writing, editing, proof reading and review by a fresh set of eyes
- Use of language
  - Non-judgmental
  - Consistent with the policy
- Provides a road map to the reader
- Provides a referendum on fairness, bias, completeness and competence

# Investigative Report



- Begin with introduction of parties, relationship to one another relationship to the institution
- Describe when and how report was received
- Outline basic nature of report as presented by the complainant
- Outline response to the report by the respondent
- Include notice of investigation
- Specify policy violations at issue
- Identify role of the investigator
- Reinforce procedural protections and protocols

# Investigative Report



- Summary of investigation
  - Identify all witnesses interviewed by name and record dates of the interviews
  - Chart may be helpful to identify roles and organize information
  - List any other evidence collected and date of collection
  - Where applicable, explain reasons for inability or decision not to interview witnesses or collect pieces of evidence
  - Reiterate interview protocols

# Investigative Report



# Investigative Report



- Provide a detailed summary of all of the information received
- Maintain the “source” of the information
  - Interview
  - Documentary evidence
- Must include details of the prohibited conduct that speak to the procedural elements

# Investigative Report



- Outline areas of agreement/disagreement (areas where the information is contested/not contested)
- Include timeline for synthesis and analysis of facts
- If making determinations of credibility or findings of fact:
  - Tie discussion and rationale to the elements of the potential policy violations
  - Identify the elements
  - Identify the evidence that supports/rebutts the establishment of the elements
  - Evaluate and analyze credibility factors

# Investigative Report



- If making the determination of responsibility
  - Make finding as to sufficiency, by a preponderance, to support finding of responsibility
    - Sufficient or insufficient
    - NOT a finding by a preponderance that event did not occur
  - Must provide rationale
    - Can be concise, but must communicate salient elements of finding
    - Again, comment on evidence, not the people
    - Avoid extraneous and tangential comments
    - Remain closely tied to the facts and reasonable inferences

# University of Notre Dame Resolution Agreement



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



# Privacy Considerations



- Inform all witnesses that the information:
  - Will be shared with school personnel
  - May be shared with law enforcement
  - Will not be shared with others beyond the “need to know” circle
- Request that witnesses:
  - Keep the contents of the interview confidential
  - Avoid discussing the underlying events with other potential witnesses

# Retaliation Considerations



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

# Investigation Protocols



- University should “own” the investigation
  - Parties should not be required to obtain, interview or ensure witnesses’ presence
  - Parties should not be *required* to write their own statements
  - A thorough investigation is the College’s responsibility
- Parties should have equal access to information that will be used in the process
  - Opportunity to review and adopt statement
  - Build in follow up interview
  - Allow for review of investigative report
  - Opportunity to challenge or offer additional information/witnesses

# Questions & Answers



# Forensic Interviewing



# The Interview



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

# Forensic Interviewing



- Narrative and follow up
- Corroboration
- Questioning techniques
- Informed and sensitive communications

# Narrative and Follow Up



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



# Narrative and Follow Up



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

# Corroboration



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

# Questioning Techniques



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

# Questioning Techniques



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

# Questioning Techniques



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

# What to Ask

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

# Should I Ask?

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

# The Continuum Approach

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



# Some Useful Phrases

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



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

# Questions & Answers



# Evaluating Credibility

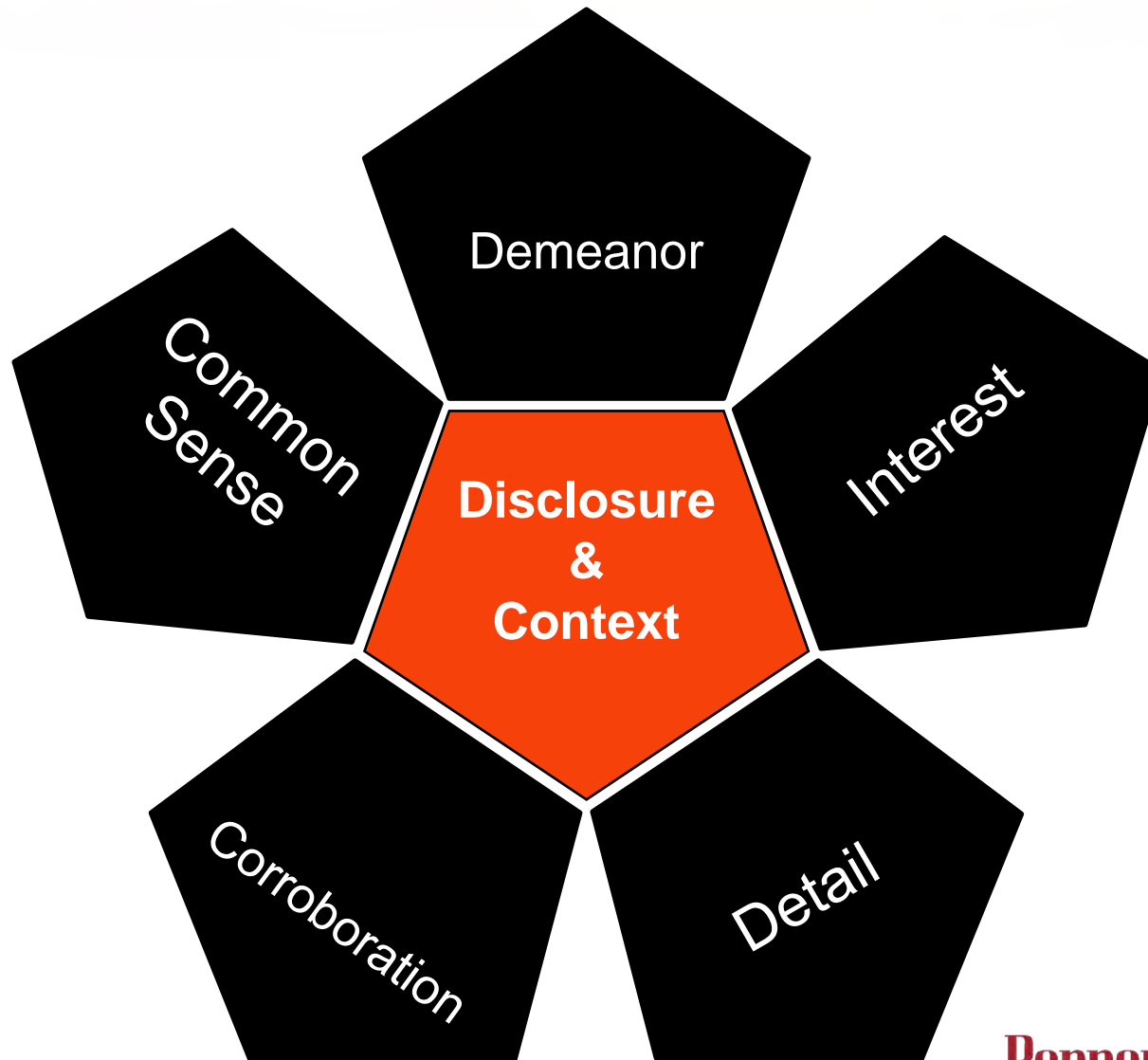


# Evaluating Credibility



- Investigating Credibility in the context of:
  - Sexual Assault
  - Dating violence
  - Domestic violence
  - Stalking
  - Other forms of sexual and gender-based harassment and violence
- Common Challenges
  - Consent
  - Alcohol/incapacitation
  - History of the individual and community relationships

# Evaluating Credibility



# Credibility Factors



- Assessing credibility factors:
  - Demeanor
  - Interest
  - Detail
  - Corroboration
  - Common sense
- Testing inherent plausibility in light of the known information, relationships, and circumstances of the disclosure



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





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



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



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

# Corroboration



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

# Corroboration



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

# Corroboration



- Consider other attendant details such as:
  - Size differential for complainant and respondent
  - Location of incident
    - Isolation of complainant
    - Potential witnesses or reasons for lack of witnesses
  - Any change in complainant's demeanor, personality, or routine after the incident
    - E.g., roommate noticed that complainant began wearing baggy clothes and stopped attending class regularly

# Common Sense



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

# Questions to Consider: Credibility Generally



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



# Questions to Consider: Detail



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

# Questions to Consider: Interest



- Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect his testimony?
- Did the witness stand to receive any benefit from a particular outcome?

# Questions to Consider: Demeanor



- Did the witness testify in a convincing manner?
- How did the witness look, act, and speak while testifying?
- How did the witness' nonverbal communications (posture, gestures, facial expressions, eye contact) match the verbal communications (voice, expression)?
- Was the testimony uncertain, confused, self-contradictory, or evasive?

# Questions to Consider: Corroboration



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

# Questions to Consider: Common Sense



- Does it make sense?

# Integrated Analysis

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

# Evaluating Changes in Account



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

# Evidentiary Issues



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



# Complainant's Prior History



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

# Evidentiary Issues: Prior Sexual History



- Questioning about the complainant's sexual history with anyone other than the Respondent **should** not be permitted
  - Mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence

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

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

# Evidentiary Issues: Pattern Evidence



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

# Prior Bad Acts or Pattern Evidence



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

# Investigating: Consent



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

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

# Investigating: Consent



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

# Investigating: Alcohol/Incapacitation



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

# The Role of Alcohol



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



# The Role of Alcohol



- 80% to 90% of sexual assaults on campus are acquaintance rapes and involve drugs or alcohol.<sup>1</sup>
- “Nearly half of America’s 5.4 million full-time college students abuse drugs or drink alcohol on binges at least once a month.”<sup>2</sup>
- 90% of campus rapes are alcohol related.<sup>3</sup>

1. DOJ, National Institute of Justice, 2005.

2. National Center on Addition and Substance Abuse at Columbia University 2007.

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

# Alcohol: Value Judgments



- Can you commit rape if you are drunk?
- Can you consent if you are drunk?
- What is the impact of voluntary intoxication?

# Drawing the Line

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

# Alcohol: Investigative Challenges



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

# Investigative Tools re Alcohol



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

# Investigating Intimate Partner Violence



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

# SEXUAL MISCONDUCT =

X1

+

X2

+

X3

+

X4

A Person

Any Act of a  
Sexual Nature

Against an  
Individual

- Coercion or force or
- Incapacitation or
- No consent



f1

+

f2

+

f3

+

f4



## 2001 Revised Sexual Assault Guidance:

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



# Credibility Considerations from OCR



## 1997 Sexual Harassment Guidance:

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

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



## 1997 Sexual Harassment Guidance:

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



## 1997 Sexual Harassment Guidance

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



## 1997 Sexual Harassment Guidance

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

# Helpful Resources



- Incident Response Checklist
- Incident Report Form
- Investigation Checklist
- Investigation Checklist: Complainant
- Investigation Checklist: Respondent

# Incident Response Checklist

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

# Incident Report Form

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

# Investigation Checklist

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



# Investigation Checklist: Complainant



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

# Investigation Checklist: Complainant



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

# Investigation Checklist: Respondent

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

# Questions & Answers



# Additional Guidance re: Coordination with Law Enforcement



# Memorandum of Understanding



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

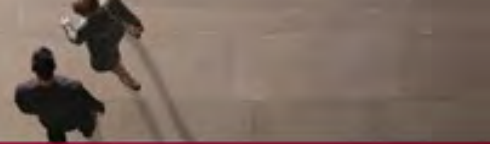
Questions and Answers on Title IX and Sexual Violence, F-3, p. 28.

# Memorandum of Understanding



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

# White House Task Force Report on MOUs



- Responding Effectively
  - Recognizes the need to develop collaborative relationships between external law enforcement and Title IX processes
  - MOUs can:
    - Help open lines of communication
    - Increase coordination among campus security, local law enforcement, and community victim services groups
    - Improve security on and around campus
    - Make investigations/prosecutions more efficient
    - Increase officers understanding of the unique needs of sexual assault victims



# Sample MOU : Sexual Assault Provisions



- Purpose
- Communication and Coordination
- Sexual Assault Prevention
- Response to Reported Sexual Assault
- Training
- Miscellaneous

# University of California Model MOU



- Improving Communication, Coordination, and Collaboration
- Championing Campus and Community Safety
- Upholding Civil Rights, Civil Liberties, and Victims' Rights
- Centering the Victim's Needs in Responses to Sexual Assault
- Ensuring Accountability & Auditing
- Specialized Training and Knowledge
- Respecting the Unique Needs of Undocumented

<http://oag.ca.gov/campus-sexual-assault>

# Coordination with Law Enforcement



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

# Coordination with Law Enforcement



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

# Two Distinct Systems & Processes



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

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

# Title IX and Criminal Process



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

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

# Questions & Answers on Title IX & Sexual Violence



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

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

# Questions & Answers on Title IX & Sexual Violence



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

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



# Questions & Answers on Title IX & Sexual Violence



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

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

# Questions & Answers on Title IX & Sexual Violence



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

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

# Correcting the DCL



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

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

# VAWA and Criminal Process



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

2013 Reauthorization of the Violence Against Women Act -March 2013

# Title IX and Criminal Law Considerations



- Definitions of Conduct/Crimes
- Criminal History Protections/FERPA
- Sharing of Information
- Physical Evidence Collection and Evaluation
- Timely Warning Considerations
- Super Powers
  - Subpoena
  - Search Warrants
  - Arrest and Detention

# Coordination With Law Enforcement



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

# Questions & Answers





- This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.
- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
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