

Balance in Process: Fairness in Title IX Investigations

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October 8, 2015





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GOALS

- Help you assess hearing and investigative processes on your campuses
- Become comfortable with the uncomfortable
- Understand barriers to coming forward with claims of sexual assault, both external and internal
- Understanding and avoiding biases about the “hook-up” culture
- The investigative process:
 - Planning the Investigation
 - Gathering Evidence
 - Questioning Witnesses
 - Evaluating Consent and Credibility

THE BASICS

- ❑ Institutions have a duty to respond to complaints of sexual misconduct promptly and impartially
- ❑ Investigate what occurred, and then take appropriate steps to resolve the situation
- ❑ Notify complainant of right to file a criminal complaint, but don't wait for outcome of criminal proceeding
- ❑ Equal opportunity and resources for both sides: what's good for the Goose...

A Friend's Call



Issue Spotting

- Student's lack of awareness of College's sexual assault procedures
- Understanding the friend's reluctance to report
- Lack of memory – potential incapacitation?



Reasons that Reports of Sexual Assault are Delayed, or Not Made

- Do not see the incident as serious enough to report
- Are not clear that a crime has been committed
- Don't want family to know
- Fear of retaliation
- Fear of police treatment
- Lack of "proof"
- Fear of not being believed
- Conflicted feelings about the possible consequences for the respondent

Misperceptions on The Experience

In a study by the National Institute of Justice, participants were asked whether an **incident characterized as rape** by the researchers *was* rape. The response?

48.8% said **“Not Rape”**

4.7% said **“I don’t know”**

Why?

In part, trust. 90% of college women know the person who sexually assaulted them

Counterintuitive Response? Or Adaptive Behavior?

- ❑ Delay in reporting is a common coping mechanism
- ❑ Variability in behavior is common (e.g., attentive and cognizant on one day; apprehensive or pre-occupied on another)
- ❑ Investigator must ensure these typical reactions are not misinterpreted as reflecting a lack of credibility

The Complainant's Call



◀ Back to Phone 10:34 AM
◀ Messages Kevin



Are you did??!?

📷 iMessage

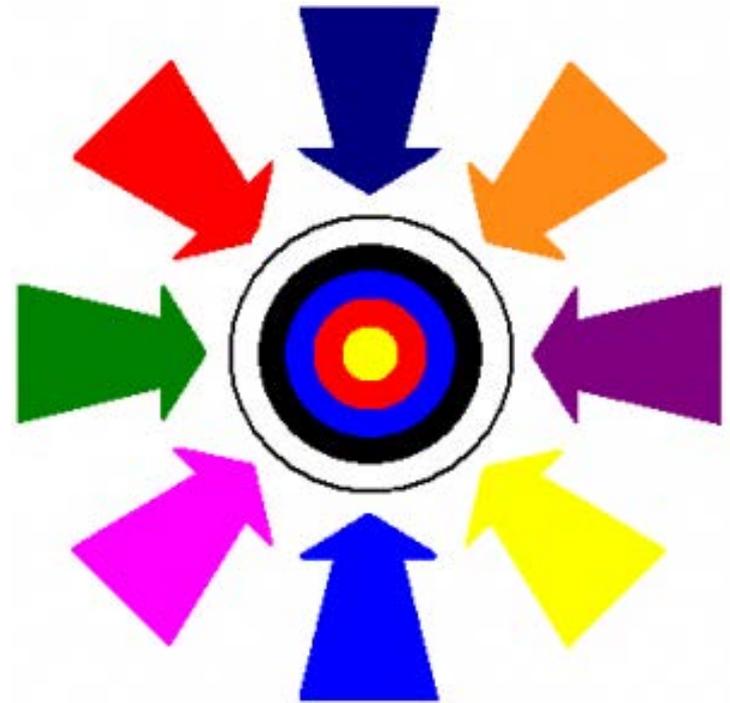


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Issue Spotting

- ❑ Location: Does it matter?
- ❑ Understanding the “hook-up” culture, and avoiding bias
- ❑ Handling complainant’s requests for confidentiality, or no investigation
- ❑ Intoxication, or incapacitation?
- ❑ Initial gathering and preservation of evidence



Hook-Up Culture

- Hook-Up: Casual sexual contact, ranging anywhere from kissing to intercourse, in a non-relationship context (and without any promise of one).
- Very different meanings to different students
- Men and women may experience *similar emotional* outcomes, but *different reputational* outcomes: conquests vs. easy
- Be aware of impact on student's willingness to report and investigator's subconscious bias

Addressing the Request for Confidentiality

- ❑ OCR “strongly supports” a student’s interest in confidentiality
- ❑ When student requests confidentiality or no investigation, the institution “should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator.”
- ❑ But, institution must balance student’s request against overall responsibility to provide safe campus environment.

Maintaining Confidentiality

- Employees have differing abilities to maintain confidentiality, *but privacy should be respected at all time* – information should only be shared to the extent required to respond appropriately to reports of sexual misconduct
- Communications to certain employees are privileged, meaning that the employee is not required to disclose reports and may provide complete confidentiality, e.g., religious counselors, psychiatric counselors

Weighing the Request for Confidentiality: Considerations

- ❑ Are there **other sexual violence complaints** about alleged perpetrator?
- ❑ Does the alleged perpetrator have **arrests or records indicating history of violence**?
- ❑ Were **multiple perpetrators** involved?
- ❑ Do circumstances suggest a **pattern**, and an increased risk of similar violence?
- ❑ **Age** of the student subjected to sexual violence
- ❑ **Use of a weapon**
- ❑ School's ability to obtain **evidence**
- ❑ **DOING NOTHING IS NEVER THE RIGHT RESPONSE**

Remedial Efforts, Without Full Investigations

- ❑ Increased monitoring, supervision or security at locations or activities
- ❑ Increased training or educational materials for students & employees (including to targeted groups)
- ❑ Revisiting and/or publicizing sexual violence policies
- ❑ Climate assessment/victimization surveys
- ❑ Put alleged perpetrator on notice, without revealing complainant's name

Initial Evidence Gathering and Preservation

- Identification of other witnesses, including fresh complaint witnesses
- Texts and Emails
- Photos and video; pictures of condition

Seven Habits and Skills of Highly Effective Investigators

- ❑ Remains respectful, open-minded and non-judgmental – doesn't take sides
- ❑ Understands the dynamics of sexual assault
- ❑ Actively listens and quickly creates rapport and trust with all types of students and all levels of employees
- ❑ Obtains detailed information about difficult subject matter – able to discuss intimate issues without awkwardness

Seven Habits and Skills of Highly Effective Investigators – Plus One

- ❑ Writes thorough, yet concise, reports with strong analysis of the evidence
- ❑ Feels comfortable making and standing by decisions based on the preponderance of the evidence standard
- ❑ Has a thick skin and can handle feeling unappreciated
- ❑ Willing to work to develop more than 7 habits and skills – this work takes experience, talent, and even *more* experience

An Effective Investigator Does Not...

- ❑ Pre-judge the facts before all sides are heard
- ❑ Have preconceptions about how a party “should” act
- ❑ Allow bias or assumptions color the investigation or judgment
- ❑ Make decisions based on emotion, rather than reason

Developing the Investigative Plan

- ❑ Determine the scope of the investigation – what is the subject of the complaint?
- ❑ Prepare a preliminary timeline
- ❑ Identify witnesses, including “fresh complaint” or “outcry” witnesses
- ❑ Determine order of examination
- ❑ Sharpen questions

Gathering Materials: Preparing for the Deep Dive

- Review applicable policies and procedures
- Identify additional sources of evidence, and then get it
 - Campus police or security reports
 - Surveillance video
 - Entry/Exit logs: Card swipes
 - Photos or videos from phones
 - Texts and social media messages (SnapChat, Instagram)
 - Information from prior investigations?

Making the Witness Comfortable

- Conduct interviews in person?
- Is the location sufficiently private?
- Will the witness feel safe?
- Is a translator needed?
- Are any assistive devices needed?
- How to handle the “advisor of choice”?
- How to handle the reluctant witness?
- Balance sensitivity with need to obtain information

Fairly Gathering Evidence: Asking the Questions

- Provide witness sufficient context to enable a full and fair opportunity to respond
- Explain importance of honesty, institution's prohibition on retaliation, and the investigatory process
- Start with short, neutral, non-judgmental, and open-ended questions – *who, what, where, when* and *how* (may avoid “*why*”)
- Ask varied questions on same subject, and allow time to respond

Fairly Gathering Evidence: Asking the Questions

- ❑ Avoid editorializing, interrupting, or commenting
- ❑ Learn the language – ask for clarification of unfamiliar or slang words – be sure that you and the witness mean the same thing (e.g. “hook-up”)
- ❑ Avoid interrupting the flow of the narrative – encourage the witness to keep talking (the wonder of “Silence”)
- ❑ Establish the chronology, and confirm that you’ve got it right
- ❑ Exhaust the inquiry – “Is there anything else you want me to know?” (Repeat)

Fairly Gathering Evidence: Asking the Questions

- ❑ Raise tough questions later in interview, to prevent witness from “shutting down”
- ❑ Don’t ask questions about complainant’s sexual encounters with persons other than respondent, and vice-versa (unless pattern)
- ❑ Stay focused on the policy violations – avoid turning the interview into a character assessment of any party
- ❑ Invite witness to provide relevant witnesses and documentation (e.g., medical records, diary entries, calendars, Facebook posts, emails and texts)

Evaluating Credibility

- Use the interview to assess the credibility of the witnesses, taking into account:
 - The person's opportunity and capacity to observe
 - Contradiction or consistency with other evidence
 - Prior inconsistent statements, or prior lies
 - Motive to lie or bias
 - Improbability of person's account (does it make sense?)
 - Demeanor (open and cooperative vs. evasive, argumentative, hostile) – *but be careful*

Evaluating Consent

- ❑ Avoid preconceptions and misconceptions about how a “victim” should behave
- ❑ Understand institution’s policies on **Consent** and **Incapacitation**
- ❑ Avoid bias related to alcohol consumption and “hook-ups”
- ❑ Understand the full extent of the COMMUNICATION between parties, and any prior communication behaviors
 - Words
 - Actions and Conduct

A Definition of Consent

- ❑ Must be informed and voluntary
- ❑ Can be withdrawn at any time
- ❑ Can be given by words or actions, as long as those words or actions create mutually understandable permission regarding the scope of sexual activity
- ❑ Silence or absence of resistance does not imply consent
- ❑ Past consent to sexual activity with another person does not imply ongoing future consent with that person or consent to that same sexual activity with another person

There is NEVER Consent When:

- A party has used coercion, intimidation, force or threats against the individual
- The individual:
 - Has a mental, intellectual, or physical disability;
 - Is under the age of 16;
 - Is asleep, blacked out, unconscious, or physically helpless;
 - Is incapacitated, including through use of alcohol or drugs

A Definition of Incapacitation

- The person is unable to make informed, rational judgments and decisions
- The person is unconscious, asleep, or otherwise unaware that the sexual activity is occurring
- When drugs or alcohol are involved, incapacitation may be measured by evaluating how the substances affect:
 - Decision-making capacity
 - Awareness
 - Ability to make informed judgments

Signs of Incapacitation

- Signs of Incapacitation include:
 - Lack of control over physical movements (e.g., stumbling, falling down)
 - Lack of awareness of circumstances or surroundings
 - Inability to speak or communicate orally, or the inability to communicate for any reason

“So, How Much Did You Have to Drink?”

- That’s not sufficient
- The impact of alcohol (and drugs) varies from person to person: same number of drinks may have vastly different impacts on different persons
- Goals: assess the impact of alcohol or drug consumption on a particular witness

Intoxication vs. Incapacitation: Consumption

- ❑ Type of alcohol consumed?
- ❑ Over what period of time?
- ❑ How quickly?
- ❑ Any food consumed? How much? When?
- ❑ Taking any medication that has restrictions regarding alcohol consumption?
- ❑ “Can you describe the impact that the consumption of alcohol had on you?”

Intoxication vs. Incapacitation: Behavior and Conduct

- ❑ Was the complainant ever unconscious? Did s/he regain consciousness during the incident? If so, what did the respondent do?
- ❑ Did the complainant black out?
- ❑ Did the complainant vomit?
- ❑ What was the complainant's condition when last seen by reliable third-party witnesses?
- ❑ Did the complainant seem to understand where s/he was and where s/he might be going?

Intoxication vs. Incapacitation: Behavior and Conduct

- ❑ Could the complainant walk? Steady or unsteady?
- ❑ Could the complainant speak clearly? Slurred words?
- ❑ What physical tasks did the complainant perform, and how well did s/he perform them? (e.g., using a cellphone, lighting own cigarette, walking)
- ❑ Could the complainant make and maintain eye contact?
- ❑ Was the complainant able to remove his or her own clothes?
- ❑ Anything to suggest that a complainant may have been less capable of making important decisions, such as whether to have sex?

Making the Decision: Wrestling with the Preponderance of the Evidence

- ❑ If civil juries can apply it, you can to.
- ❑ Determine the necessary elements of the charge
- ❑ Wait until all evidence is gathered before rendering a decision
- ❑ Be reasonable and impartial
- ❑ Recognize, but do not consider, the “impact” of your decision

Making the Decision: Wrestling with the Preponderance of the Evidence

- Review and evaluate all the evidence, and only the evidence
- Evaluate the versions of events
 - Is there corroborating evidence for either party's account?
 - Did anyone make statements that later proved untrue? (Consider the opportunity for follow-up)
 - Did anyone's version of events differ significantly from the accounts of other witnesses?
 - Did anyone's version of events conflict with written evidence gathered?
 - Was anyone notably forthcoming or evasive? How so?

Making the Decision: Wrestling with the Preponderance of the Evidence

- Determine the weight of evidence – its quality and strength
- Draw reasonable inferences
- “Is it more likely than not true that the respondent engaged in the conduct alleged?”
 - Did parties engage in particular sexual activity?
 - Was complainant legally capable of giving consent?
 - Did complainant’s words or actions clearly indicate voluntary agreement to engage in a particular sexual activity?

Preparing Your Report

- ❑ Describe the allegations investigated
- ❑ Summarize the interviews and evidence considered
- ❑ Describe the accuser's and accused's accounts of:
 - Events preceding the Incident
 - The Incident
 - Events following the Incident
- ❑ Identify the point about which the accounts agree and disagree
- ❑ Consider and address corroborating evidence
- ❑ Focus on factual observations and conclusions
- ❑ Address credibility of the parties
- ❑ Reach conclusions on whether policies were violated

Q & A



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