

Colorado Christian University

Title IX

Investigator Training

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Disclaimer:

This presentation may contain material that may be difficult for some listeners. If you need a break at any time, please take one.

Key Terms

- Complainant (CP) – individual who is alleged to be the victim of conduct that could constitute harassment or discrimination based a protected class.
- Respondent (RP) – individual who has been reported to be the perpetrator of conduct that could constitute harassment or discrimination based on a protected class.
- TIX – Title IX
- TIXC – Title IX Coordinator

Understanding Title IX

“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

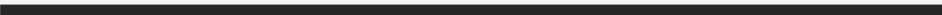
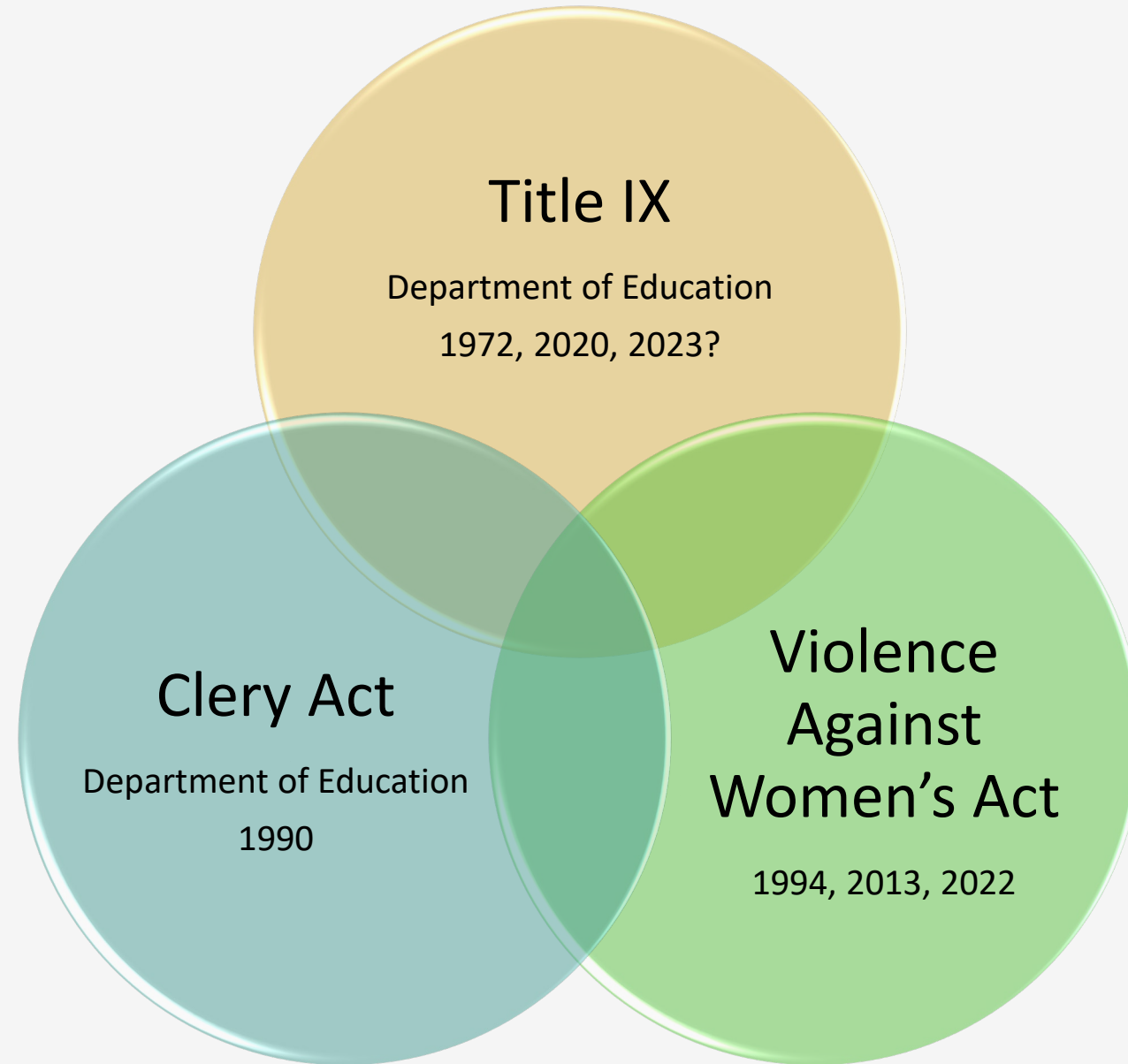
- When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred
- If an investigation reveals that sexual harassment created a hostile environment, the school must then take prompt and effective 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

- 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.

Scope



Scope of CCU's educational programs or activities – Understanding TIX Sexual Harassment

- An Employee conditions the provision of an aid, a benefit, or a service on another Employee's or a Student's participation in unwelcome sexual conduct (i.e., Quid Pro Quo sexual harassment); or
- A Student, Employee, or Third Party (to the extent applicable) engages in unwelcome conduct on the basis of sex that would be determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies another person equal access to the University's programs or activities; or
- A Student, Employee, or Third Party engages in Sexual Assault, Domestic Violence, Dating Violence, or Sexual and/or Gender-based Stalking; and
 - The alleged conduct was perpetrated against a person in the United States; and
 - The conduct took place within the University's programs and activities. Conduct takes place within the "University's programs and activities" when that conduct occurs:
 - in a location, at an event, or in a circumstance where the University exercises substantial control over both the respondent and the context in which the conduct occurs; or
 - in any building owned or controlled by a student organization recognized by the University. Events that occur off campus or in locations with no connection to the University are unlikely to be considered a University program or activity.

2020 Title IX Regulations vs. 2023 possibilities

- 2020 Regulations
 1. In the United States
 2. Conduct within University's programs and activities –
 - location, at an event, or in a circumstance where the University exercises substantial control over both RP and the context in which the conduct occurs OR
 - In any building owned or controlled by a student organization recognized by the University.
- Examples of “University programs or activities”?
- Proposed changes – Appearing probably in Spring 2023
 - Scope alteration?
 - Definitions updated?
 - Processes shifted?

The Challenge of the Context

- Criminal Defense

- Interview witnesses
- Request records
- May not choose to participate in University process
- Request defer school disciplinary proceeding/investigation

- School Report and Process

- Various individuals involved possibly - teachers, students, parents, etc
- Advisors
- Consider school policy, state law, criminal process, HIPAA, FERPA
- School process

- Parental inquiries

- Law Enforcement

- Interviews and/or possible arrest
- Physical evidence
- Search warrant
- Investigation
- Formal arraignment
- Pre-hearing and motions
- Trial elements with long timeframe

- Civil/Regulatory Actions

- Civil Discovery, Depositions, Interviews
- Regulatory agencies

- Media Inquiries

**Types of Prohibited
Conduct Covered under
CCU's
Title IX Policy**

Discriminatory Harassment

Hostile Environment

“Unwelcome conduct by any member or group of the community on the basis of actual or perceived membership in a class protected by policy or law.”

- may NOT result in discipline.
- addressed through respectful conversation, remedial actions, education, Alternate Resolution, and/or informal resolution options.

“unreasonably interferes with, limits, or effectively denies an individual’s educational or employment access, benefits, or opportunities.” May result from “harassing verbal, written, graphic, or physical conduct that is severe or pervasive AND objectively offensive.”

- may impose sanctions through application of the grievance process.

Sexual Harassment

- Quid Pro Quo Sexual Harassment
- Severe, Pervasive and Objectively Offensive Sexual Harassment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

Quid Pro Quo Sexual Harassment:

- An employee of the recipient,
- Conditions the provision of an aid, benefit, or service of the recipient,
- On an individual's participation in unwelcome sexual conduct

Severe, Pervasive and Objectively Offensive Sexual Harassment

- Unwelcome conduct
- Determined by a reasonable person,
- To be so severe, and
- Pervasive, and
- Objectively offensive,
- That it effectively denies a person equal access to CCU's educational program or activity.

Examples of Sexual Harassment

Workplace: <https://youtu.be/-EGnBik6LdM>

Students: <https://youtu.be/HKk-pbeW3ic>

Sexual Assault

A. Sex offenses, Forcible:

- Any sexual act directed against another person,
- without the consent of the Complainant,
- including instances in which the Complainant is incapable of giving consent.

B. Forcible Rape:

- 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 Complainant.

C. Forcible Sodomy:

- Oral or anal sexual intercourse with another person,
- forcibly,
- and/or against that person's will (non-consensually), or
- not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age, per state law, or because of temporary or permanent mental or physical incapacity.

Sexual Assault continued

D. Sexual Assault with an Object:

- The use of an object or instrument to penetrate,
- however slightly,
- the genital or anal opening of the body of another person,
- forcibly,
- and/or against that person's will (non-consensually),
- or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age, per state law, or because of temporary or permanent mental or physical incapacity.

E. Forcible Fondling:

- The touching of the private body parts of another person (buttocks, groin, breasts),
- for the purpose of sexual gratification,
- forcibly,
- and/or against that person's will (non-consensually),
- or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age, per state law, or because of temporary or permanent mental or physical incapacity.

Sexual Assault continued

F. Sex Offenses, Non-forcible:

- Incest

1. non-forcible sexual intercourse,
2. between persons who are related to each other.

- Statutory Rape

1. Non-forcible sexual intercourse,
2. with a person who is under the statutory age of consent of the State of Colorado.

Use of physical violence and/or physical imposition to gain sexual access. Force also includes threats, intimidation (implied threats), and coercion that is intended to overcome resistance or produce consent.

Sexual activity that is forced is, by definition, non-consensual, but non-consensual sexual activity is not necessarily forced. Silence or the absence of resistance along is not consent. Consent is not demonstrated by the absence of resistance. While resistance is not required or necessary, it is a clear demonstration of non-consent.

Unreasonable pressure for sexual activity. Coercive conduct differs from seductive conduct based on factors such as the type an/or extent of the pressure used to obtain consent. When someone makes clear that they do not want to engage in certain sexual activity, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive.

Force

Coercion

CONSENT

IT'S SIMPLE AS TEA

- Knowing, and
- Voluntary, and
- Clear permission
- By word or action
- To engage in sexual activity.

*Note the following:

- Consent can be withdrawn or ratified once given.
- Consent to some sexual contact cannot be presumed to be consent for other sexual activity.
- Proof of consent or non-consent is not a burden placed on either party. Based on totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred.

<https://www.youtube.com/watch?v=fGoWLWS4-kU>

Consent

Incapacitation

- A person cannot consent if they are unable to understand what is happening or is disoriented, helpless, asleep, or unconscious, for any reason, including by alcohol or other drugs.
- May include incapacity resulting from temporary or permanent physical or mental health condition, involuntary physical restraint, and/or the consumption of incapacitating drugs.
- When someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/informed consent (e.g. to understand the “who, what when, where, why, or how” of their sexual interaction).
- Not synonymous with intoxication, impairment, blackout, and/or being drunk.

Dating Violence

- a) Violence,
- b) On the basis of sex,
- c) Committed by a person,
- d) Who is in or has been in a social relationship of a romantic or intimate nature with the Complainant.
 - The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of relationship, type of relationship, and frequency of interaction between the persons involved in the relationship.
 - May include but is not limited to: sexual or physical abuse or the threat of such abuse.
 - Does not include acts covered under the definition of domestic violence.

Domestic Violence

- a) Violence,
- b) On the basis of sex,
- c) Committed by a current or former spouse or intimate partner of the Complainant,
- d) By a person with whom the Complainant shares a child in common, or
- e) By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
- f) By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of the State of Colorado, or
- g) By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of the State of Colorado.

Stalking

- a) Engaging in a course of conduct,
- b) On the basis of sex,
- c) Directed at a specific person, that
 - Would cause a reasonable person to fear for the person's safety, or
 - The safety of others; or
 - Suffer substantial emotional distress.

*For the purposes of this definition –

- Course of conduct means two or more acts, including, but not limited to, acts in which the Respondent directly, indirectly, or through third parties, by any action, method, device, or means, follow, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
- Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

Sexual Exploitation – taking non-consensual or abusive sexual advantage of another for their own benefit or for the benefit of anyone other than the person being exploited, and that conduct does not otherwise constitute sexual harassment under this policy.

Examples:

- Sexual Voyeurism
- Invasion of sexual privacy
- Taking pictures, video, or audio recording of another in a sexual act, or in any other sexually-related activity when there is a reasonable expectation of privacy during the activity, without the consent of all involved in the activity, or exceeding the boundaries of consent (ex. Allowing someone to hide in a closet and observe sexual activity).
- Prostituting another person
- Engaging in sexual activity with another person while knowingly infected with HIV, STD, or STI without informing the other person of the infection.
- Causing or attempting to cause incapacitation
- Misappropriation of another person's identity for dating/sexual connections.
- Forcing a person to take action against that person's will by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity
- Knowingly soliciting a minor for sexual activity
- Engaging in sex trafficking
- Creation, possession, or dissemination of child pornography

**Other Civil
Rights Offenses
under TIX
policy**

**Other Civil
Rights
Offenses
under TIX
policy
continued**

- Threatening or causing physical harm, extreme verbal, emotional, or psychological abuse, or other conduct which threatens or endangers the health or safety of any person;
- Discrimination
- Intimidation
- Hazing
- Bullying

*See policy for additional details on these types of prohibited conduct.

Retaliation

Protected activity: reporting an incident that may implicate this policy, participating in the grievance process, supporting a Complainant or Respondent, assisting in providing information relevant to an investigation, and/or acting in good faith to oppose conduct that constitutes a violation of this Policy.

Prohibited for any member of CCU community to take materially adverse action by intimidating, threatening, coercing, harassing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by law or policy, or because the individual has made a report or complaint, testified, assisted, or participate or refused to participate in any manner in an investigation, proceeding, or hearing under this policy and procedure.



Practice...

C and D work in the same office together. About 3 months ago, D started to occasionally make comments on how attractive and good-looking C is. Each time D did this, C tried to bring the conversation back to something work related. D started making pointed comments about C's attire and physique. C was very uncomfortable by the comments and asked D to stop making them. D said, "why can't you appreciate a compliment? It's all positive statements." C reported the conduct to the supervisor within the office, but the supervisor told C "The compliments sound harmless. Take it positively." C was not sure what to do then, but thought it might not be a big deal and tried to simply work with D.

D then started to come by C's desk throughout the day. D would put a hand on C's shoulder or touch the base of C's neck. D has rubbed C's back for entire conversations. Once D grazed C's buttocks, but C tried to believe it was an accident. C thought about going to the supervisor but recalled the previous conversation and decided to handle the behavior alone.

Additionally, D has started texting C on C's personal cell phone. D frequently sends GIF's and emojis that C believes are sexual in nature. C has tried to make jokes about the behavior and images to not make things awkward at work, but C is incredibly uncomfortable. C is fairly confident that D drove by C's home last weekend more than once. C is not sure how D knows where C's home is located. On Monday, D was standing at C's car in the campus parking lot when C left the office. Then, yesterday (Thursday) when C left the office, there was a wrapped package on C's car. C opened the package and inside was a bottle of wine and an XXX movie. There was a card inside that said

"how about we Netflix and chill? Is that still a thing? LOL

- D"

C is distraught, feels unsafe, and has come to Human Resources to get assistance in handling the matter.

What type of prohibited conduct might apply?



Grievance Process Basic Requirements Overview

Process Basic Requirements

- Treat parties equitably
- Presumption of non-responsibility
- Reasonably prompt time frames with extensions for good cause
- Practitioners trained and free from conflict of interest/bias
- Uniform standard of evidence
- Advisor of choice
- Restricted use of privileged information
- Objective evaluation of all relevant evidence
- Credibility determinations not based on person's status
- Range of supportive measures, remedies, and sanctions
- Remedies only following a finding of responsibility
- Sanctions only following the grievance process
- Designated appeal grounds

Regardless of which process (A or B) is applicable, when a complaint is received, the TIXC will do the following initially:

- **Determine appropriate supportive measures**
- **Assess jurisdiction**
- **Violence Risk Assessment with assessment team**
- **Determine applicable Process (A or B)**
- **Provide procedural options:**
 - **Supportive and remedial response**
 - **Informal resolution option**
 - **Formal investigation and grievance process**
- **Determine applicability, if any, of Dismissal (mandatory or discretionary)**

Interim and/or Supportive Measures

- Interim Measures provided in writing
- Support/advocacy/intake functions are separate from investigative/adjudicative functions.
- Options for, available assistance in, and how to request changes to:
 - Academic
 - Living
 - Extracurricular
 - Transportation
 - Working
 - Protective Measures
- If requested by the Complainant and if reasonably available
- **Regardless of whether the Complainant chooses to file a formal report with the University or law enforcement.**

*Supportive measures and assistance beyond interim measures may be provided to both parties. These are non-punitive and non-disciplinary individualized services. These are meant to preserve each party's access to education program or activity pending the outcome of an investigation.

TIX Coordinator Determines Jurisdiction

- As long as one of the parties is a CCU student, faculty, or staff, the TIXC can provide reasonable assistance and possible opportunity of process.
- Basic Jurisdiction Steps:
 - Overall TIX assessment (1. role 2. type of conduct 3. TIX/Non-TIX - US, programs/activities)
 - Example: Complainant is an CCU student; Respondent is not – no jurisdiction
- Complainant is offered support when affiliated with the University regardless of whether formal process occurs.
- Protections potentially apply to: faculty, staff, students, visitors.
- Assess location of incident and whether tied to CCU program/activity (Title IX vs. Non-Title IX prohibited conduct) to determine appropriate process options.
- For grievance process options, Respondent must be affiliated with CCU.

TWO PROCESS OPTIONS:

Process A – Qualifying allegations of sexual harassment (including sexual assault, dating violence, domestic violence, and stalking) involving students, staff, administrator, or faculty members.

- In the United States
- Conduct within University's programs and activities –
 - location, at an event, or in a circumstance where the University exercises substantial control over both RP and the context in which the conduct occurs OR
 - In any building owned or controlled by a student organization recognized by the University.

Process B – Other policies and beyond jurisdictional scope of Process A

- Example: Outside of United States at study abroad program.

*Note: Both processes have informal and formal procedural options.

Procedural Options Offered under Process A:

Informal Resolution –

- **When the parties agree to resolve the matter through an alternate resolution mechanism including mediation, restorative practices, etc;**
- **When Respondent accepts responsibility for violating policy, and desires to accept a sanction and end the resolution process; or**
- **When the TIXC can resolve the matter informally by providing supportive measures to remedy the situation.**

Alternate Resolution – informal process, including mediation or restorative practices

Formal Grievance Process – involves an investigation and hearing

Informal Resolution* or Alternate Resolution** (Informal/Restorative Options)

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. Examples:

- 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 harassment
- Conducting climate surveys regarding sexual violence
- Putting a respondent on notice of allegations of harassing behavior

* All parties and TIXC must agree on responsibility, sanctions, and/or remedies. Not appealable.

** Voluntary and remedies-based resolution option. All parties and TIXC must agree to alternate resolution for this option to be used.

Process A – allegations of sexual harassment (sexual assault, dating violence, domestic violence, stalking) meeting TIX requirements

- Receive a formal complaint
- Assessment – chooses Formal grievance Process
- Notice of Investigation Allegations (NOIA) to parties
- Investigation
- Evidence Review – review and response period
- Investigative Report – review and response period
- Pre-Hearing Meeting
- Hearing
- Decision Rendered and Sanctions, if appropriate
- Appeals

Procedural Options Offered under Process B:

Informal/Alternate Resolution (supportive/remedial response)

– less serious offenses and only when all parties agree to Alternate Resolution, or when the Respondent is willing to accept responsibility for violating policy, or when the TIXC can resolve the matter informally by providing remedies to resolve the situation.

Administrative Resolution – investigation of policy violation(s) and recommended finding, subject to a determination by a TIXC and the opportunity to appeal to an Appeal Panel or an Appeal Decision maker.

Process B – applicable when Process A is not – protected class harassment or discrimination or sexual harassment when jurisdiction does not fall in Process A

- Receive a formal complaint
- Assessment – chooses Administrative Resolution option
- Notice of Investigation to parties
- Investigation
- Evidence Review – review and response period
- Investigative Report – includes relevant evidence, analysis, credibility assessments, and recommended finding(s)
- TIXC or designee makes final determination and sanction(s), if applicable
- Appeals

Through all stages of a formal grievance process...

- Presumption of innocence for Respondent throughout the grievance process. A Respondent is provided a thorough, transparent, and equitable process under CCU's Title IX Policy. No punishment if there is not a determination of responsibility.
- Preponderance of the evidence standard utilized (“more likely than not”).
- Parties may have an “advisor of choice” present at meetings throughout process if desired.
- Written notices and access to review evidence/reports, if applicable.

School vs. Criminal Process – Two Independent Processes

- School process is separate from the criminal process; however, records may be subpoenaed.
- Timelines will run separately.
- Burden of proof is different.
- Do not forget possible duty to report if the individual is a minor and the behavior may constitute child abuse...

**Title IX
Coordinator:**

Rick Garris

**Deputy Title IX
Coordinators:**

Lauren Williams and
Sharon Felker

Reporting and Confidentiality

All “mandated reporters” are to report to the TIXC actual or suspected: sexual or gender-based harassment, sexual assault, stalking, dating or domestic violence, or retaliation regardless of where or when the alleged misconduct occurred.

- Includes student employees and graduate assistants.

Exception – Confidential Resources

- Any employee who is an on-campus licensed health service provider, clinical, or mental-health professional (at CCU Counseling Center) when acting in that professional role in the provision of services to a patient.
- On-campus pastors working within the scope of their pastoral duties.
- Off-campus non-employees who have a confidential privilege (medical, clinical, legal, mental-health, etc).

What is your role?

- Take initial reports?
- Support/advocacy/intake functions are separate from investigative/adjudicative functions?
- Informal Resolution Officer?
- Investigator?
- Hearing Panel Member/Decision Maker?
- Appeals Officer?

*Today's focus is on the role of the INVESTIGATOR; however, you may be called to serve in other capacities.

Whatever your role may be...

- You must avoid conflicts of interest
- You must avoid bias
- You may not make a prejudgment of the facts at issue
- You need to have a presumption that the Respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

Role of the Investigator

Investigative Challenges

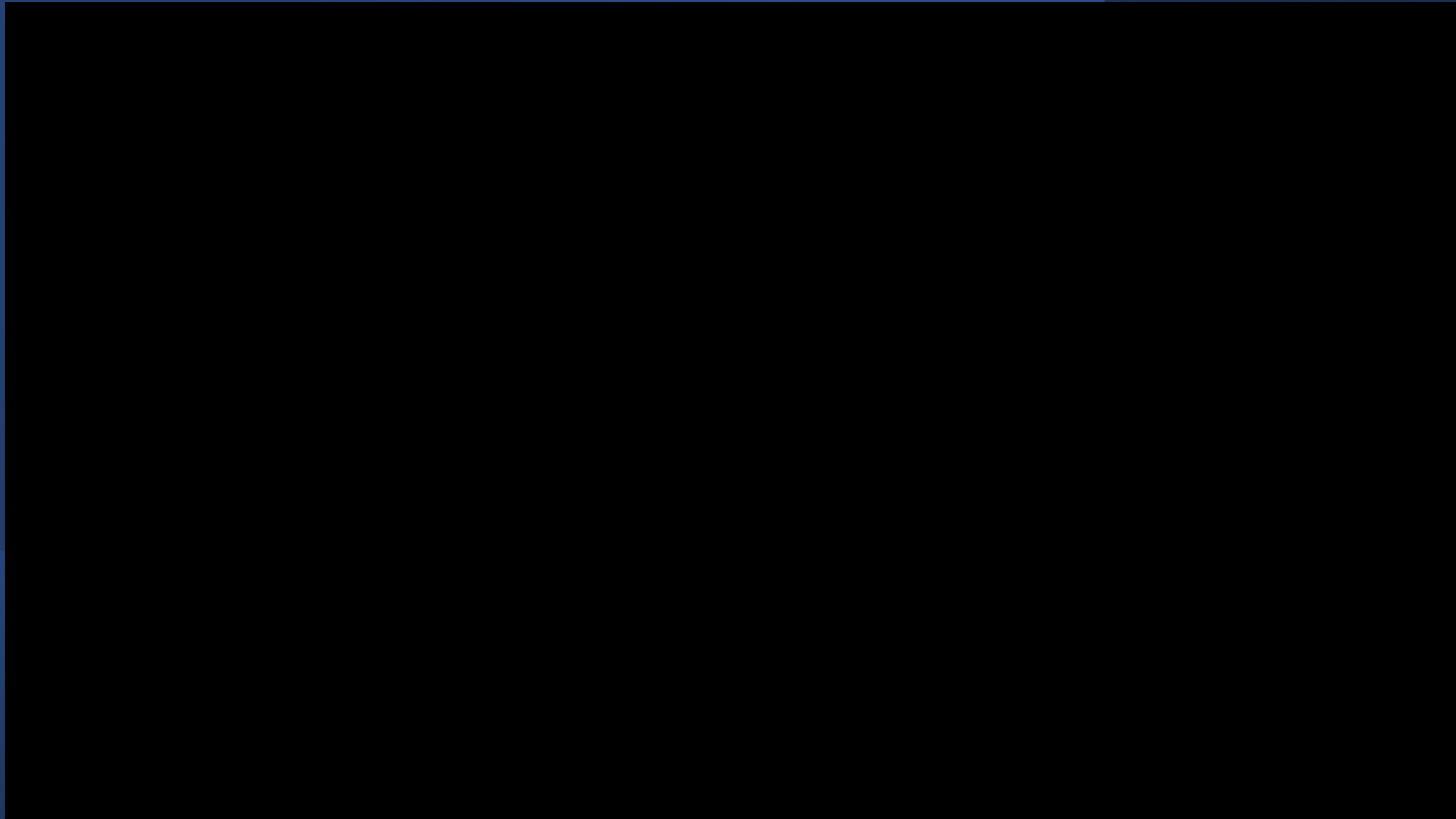
What are some challenges you have faced, generally speaking, when conducting an investigation?

Investigator's Role

- **Investigator takes the lead on the investigation**
 - Not the parties' burden
- **Goals:**
 - Maintain neutrality
 - To gather the most robust set of facts
 - To listen with an earnest intent to understand
 - To learn, not assume
 - Search for corroboration
 - Assess credibility
- **How many investigators?**
- **Expectations with two – both present and engaged**
- **Key tasks:**
 - Manage expectations
 - Regular and timely communications
- **Documentation/Report**
 - Verbatim/“quotes”
 - Areas of agreement and disagreement
 - Note-taking vs. recording

Investigator's Role continued

- **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 Complainant or Respondent
 - Allow bias or prejudice to affect his/her judgment



The Dynamics of Trauma

- Nature of sexual and interpersonal 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 an individual who has experienced sexual violence.
- Hence, an individual who initially requests confidentiality might later request that a full investigation be conducted.

Investigation Protocols

Investigation Protocols Overview

- **Developing an investigation plan**
- **Maintaining a working chronology**
- **Building a timeline**
- **Communications**
- **Prepping questions prior to an interview**
- **Documenting interviews**
- **Gathering physical evidence**
- **Investigative report**
- **Privacy and retaliation considerations**

Protocols continued

- **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 – 2020 Regs. – Gather evidence sufficient to reach a determination regarding 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
 - Maintain the original and create addendum for any changes
 - Allow parties to pose questions for participants

Preparing for the interview

- **Interview Protocols**
 - Introduction templates
 - Scope of interview
 - Role of each investigator
 - Conclusion
 - Location of interview
- **Question preparation**
 - Subjects that will be covered and then questions about each subject
 - Tornado approach – broader and then more specific...leave no stone uncovered
 - Open-ended questions
 - Review evidence – what do you have, what would you like to try to gather, any drawings helpful?
- **Teamwork – know your role in the room**

Interviewing

Interview Overview

- **Recognize the potential impacts of events of parties/witnesses on memory and presentation**
 - Allow the witness to give a narrative
 - Use open-ended free recall questions
 - Build in an opportunity for follow up questions
- **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**

Practical Considerations

- **Developing rapport**
 - Allow additional time for interview
 - Conversational language and tone
 - Avoid distractions
- **Privacy considerations**
 - Private setting
 - Advisor of choice present
 - Location of interview
- **Sharing documents**
- **Assess the space prior to commencing**

Interviewing

- Intro – explain note taking, recording, ask if any questions before commencing fact gathering.
- Note taking – details and all who are present
- Use consistent language
- Offer breaks
- Avoid interruption and utilize open-ended questions
- Ask about documentation and witnesses
- Timing of interviews
- Listen for additional allegations/issues
- Attempt to establish timeline
- End with next steps

Framing Questions

- Be aware that questions about drugs and alcohol are often subject to misinterpretation
 - Avoid scale question
 - Avoid determining blood alcohol content unless reviewing medical records utilizing this metric.
 - Gather as many details as possible to create a visual timeline of events.
- Explain amnesty, if applicable.
- Ask sensory questions – 5 senses
- Explain the reasons for your questions
 - Help them understand why a question is relevant with context if it's possible the individual may not understand.
 - Assessing for incapacitation
 - Evaluating the “lens” through which the party or witness observed the events (opportunity to see, hear, understand, and remember)
- Explain that you will ask similar questions of all witnesses
- Invite the person to ask questions before you go further

Assessing Credibility

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

Identify and Elevate Concerns

Be aware of signs of distress

- **Personal**
 - Excessive fatigue, dramatic weight changes, poor hygiene, disorientation, withdrawal, increased drug or alcohol use, social self-isolation
- **Academic**
 - Decline in attendance, falling asleep in class, missing assignments, drastic drop off in quality of work
- **Verbal**
 - Expressing feelings of depression, isolation, hopelessness, or expressing suicidal or homicidal ideation
- **Other**
 - Peers or others expressing concerns



PRACTICE

**Evidentiary
Considerations –
Relevant for
Investigators and
Decision Makers**

Evidentiary Considerations

- **Privileged Information and Records**
- **Relevance**
- **Prior Sexual History**
- **Prior to Subsequent Misconduct**
- **Directly Related Evidence**
- **Setting Evidentiary Rules**

Privileged Information

Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under legally recognized privilege, unless the person holding such privilege has waived the privilege.

Cannot access, consider, disclose, or otherwise use a party's records made or maintained by a physician, psychiatrist, psychologist, or otherwise recognized professional/paraprofessional...unless the University obtains that party's voluntary, written consent to do so for a grievance process.

Prior Sexual History

Questions and evidence about the CP's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the CP's prior sexual behavior are offered:

- To prove that someone other than the RP committed the conduct alleged by the CP, or
- To prove consent, if the questions and evidence concern specific incidents of the CP's prior sexual behavior with respect to the RP.

***Only applies to CP** – the Dept reiterates that the rape shield language in this provision does not pertain to the sexual predisposition or sexual behavior of the RP, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.

Prior and Subsequent Misconduct

- **2020 Regs do not prohibit the use of prior or subsequent misconduct – evidence of inappropriate behavior by an alleged harasser is permitted if relevant**
- **In a hearing, schools need to determine if the conduct is:**
 - Relevant
 - May be used in determining responsibility
 - May be used in sanctioning
- **If so, will need to set criteria for consideration**

Prior and Subsequent Conduct Practically

- **May be relevant to demonstrate:**
 - Intent/Knowledge
 - Motive
 - Opportunity
 - Lack of mistake
 - Pattern
 - Identity
 - Information that is inextricably interwove with the facts
- **Consider prejudicial vs. probative value**
- **May not adopt a rule excluding relevant evidence because such relevant evidence my be unduly prejudicial, concern prior bad acts, or constitute character evidence.**

Prior and Subsequent Conduct Practically

- **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
 - Interview professional tied and need approval from student
- **Admission of mental health records**
- **Admission of statements of unavailable witnesses**
- **Compelling witness participation**
- **Admission of police report**
 - Interview police officer
 - Make available for questioning at hearing
- **Considerations regarding character witnesses**
- **Prior bad acts/pattern evidence (Respondent/Complainant)**
 - May be relevant and probative
 - Use for fact-finding? Sanction?
- **Prior sexual history of the complainant**
 - Generally barred
 - Limited grounds for admission

Evidence – Directly related

- **Information within evidence (documents, interviews, medical records) may be redacted if:**
 - Not directly related, or
 - Privileged, or
 - Obtained without proper consent.
- **A University may permit or require the investigator to redact information...such as information protected by a legal recognized privilege...contained within documents...that are directly related to the allegations, before sending the evidence to the parties for inspection and review.**
- **If University knows a recording is unlawfully/illegally created, then the recipient should not share a copy of such unlawful recording. Ex. Two party recording states**

Investigative Report

Investigative Report

- **Use template format with consistent language and content across investigations**
- **Language: balanced, neutral, and non-judgmental**
- **Avoid declarative credibility language**
 - “Unreliable” vs. insufficient information
 - Recognize perspective of the parties
 - Comment on the evidence, not the parties
- **Use verbatim quotes**
- **Leave sufficient time for writing, editing, proof reading, and review by a fresh set of eyes.**

Investigative Report Format Overview

- **Cover Sheet**
- **Table of Contents**
- **Jurisdictional Statement**
- **Interview Summaries**
- **Alleged implicated prohibited conduct policy language**
- **Relevant evidence**

Scope of Review of Report

- Parties may make corrections, provide appropriate context, and prepare their responses and defenses before the investigative report is finalized. There are two windows of time that are afforded.
- If relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker can take that into account in assessing the credibility of parties, and the weight of evidence in the case.
- When report is finalized, it is provided to the parties and Decision Maker a minimum of 10 days prior to a hearing, if applicable. Investigator will serve as a “witness” during the hearing.

Role of Decision Maker **– Process A**

Role of the Decision Maker in a Hearing – Relevance, Decision, Sanction, and Notification

- Facilitate hearing protocols.
- Pose questions, if applicable.
- Before party or witness answering cross-examination or other question, the Decision-Maker must first **determine whether the question is relevant**.
- Decision-Maker must **explain** to the party proposing the question any **decision to exclude a question as not relevant**.
- **Determine Responsibility** – Ultimate determination regarding responsibility – independent obligation to objectively evaluate relevant evidence and make a credibility determination.
- **Sanction** – if found responsible
- **Issue Written Determination** – simultaneous written determination regarding responsibility including:
 - Identification of allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through determination
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the recipient's code of conduct to the facts
 - Rationale
 - Appeal procedures

Advisor of Choice – in Hearing

- Ask the other party and any witnesses relevant questions and follow-up questions including those challenging credibility.
- Cross-examination at the live hearing must be conducted directly, orally preferred, and in real time by the party's advisor of choice and never by a party personally.
- Party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear.
- If party does not have an advisor present at the live hearing, the University must provide without fee or charge to that party, an advisor of the University's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on a party's behalf. May need to stop the hearing to do so.
- Where one party does not appear and that party's advisor of choice does not appear, a University-provided advisor must still be available to cross-examine the other appearing party "on behalf of" the non-appearing party.

Cross- Examination by Advisor in Hearing – TIX matters (Process A)

- Ask the other party and all witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Conducted directly, orally, and in real time by the party's advisor of choice.
- Equal opportunity to inspect and review any evidence obtained as party of investigation that is directly related to the allegations. Made available at the hearing to be able to refer to it including for purposes of cross-examination.
- Intended to give parties opportunity to meaningfully challenge plausibility, reliability, credibility, and consistency of the other party and witnesses.
- Cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue.

Cross- Examination

- Only **relevant** cross-examination and other questions may be asked of a party or witness.
- Before a party or witness answers a question, the decision-maker must first determine whether the question is relevant. Build in these pauses.
- Decision-maker must explain any decision to exclude a question as not relevant.
- May give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing. May also ask the advisor why they deem a question is relevant before making a ruling.

Role of the Decision Maker – Relevance

Must consider relevant evidence with the following conditions:

- A CP's prior sexual behavior is irrelevant (unless questions or evidence about prior sexual behavior meet one of two exceptions);
 - To prove that someone other than the RP committed the conduct alleged by the CP, or
 - To prove consent, if the questions and evidence concern specific incidents of the CP's prior sexual behavior with respect to the RP.
- Information protected by any legally recognized privilege cannot be used; no party's treatment records may be used without that party's voluntary, written consent; and
- Statements not submit to cross-examination cannot be relied on by the decision-maker. **OLD RULE – NEW RULE – CAN BE RELIED ON**

Victims Rights Law Center v. Cardona, No. CV 20-11104-WGY, 2021 WL 3185743, at 1 (D. Mass. July 28, 2021). In the ruling, the court found a part of the 2020 Title IX Rules to be arbitrary and capricious (34 C.F.R. § 106.45(b)(6)(i)). This part of the rule, increasingly being referred to as “the suppression clause”, prohibited decisionmakers from relying on statements that are not subject to cross-examination during the hearing. On August 10, 2021, the court issued an order in which it clarified that its decision applied nationwide. On August 24, 2021, the Office for Civil Rights (OCR) issued guidance that, due to the court's order, it would immediately cease from enforcing that provision and that, “[p]ostsecondary institutions are no longer subject to this portion of the provision.”

Role of Decision Maker **– Process B**

**Sanctioning –
see policy scope**

Questions



Use of Slides

- 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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