

SHARP: Southeastern Harassment/Assault Response and Prevention

Are you ready to Be SHARP?

Civil Rights & Title IX Committee

- Concept:
 - Train each committee member on policy, investigations, and hearings even if their primary role will be as a hearing officer only.
- There is a slight chance you could be asked to investigate. If so, you will not be alone. There will always be a Title IX Coordinator or Deputy Title IX Coordinator to offer guidance. And investigations done by Committee Members are done in teams.

Civil Rights & Title IX Committee

Historically, this committee is busiest on matters relating to Title IX. Not all sexual or gender-based misconduct falls under the regulatory framework of Title IX, and this means that other processes are used to handle misconduct that is prohibited but not in the Title IX orbit: supervisory discretion, and student conduct processes.

While much of the training focus is on Title IX, the ideas and concepts are largely transitive to other indices of discrimination.

University Nondiscrimination Statement

- Southeastern Oklahoma State University, in compliance with applicable federal and state law and regulations, does not discriminate and prohibits discrimination on the basis of race, color, genetic information, religion, national origin, sex, age, disability, sexual orientation, gender identity, or status as a veteran in any of its policies, practices, procedures, or programs. This includes, but is not limited to: admissions, employment, financial aid, and educational services.

New Regulations have new training requirements for Title IX

- This series of videos is intended to train Civil Rights & Title IX Committee members on the full range of civil rights issues handled under our policy.
- Title IX in particular has big new changes, and substantial new training requirements.

Title IX (Under Final Rule §106.45(b)(1)(iii))

Training Topic	the definition of sexual harassment in §106.30	the scope of the recipient's education program or activity	how to conduct an investigation and grievance process, including:			how to serve impartially, including:			Technology	when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in §106.45 (b)(6)	to create an investigative report that fairly summarizes relevant evidence	
			hearings	appeals	informal resolution processes	by avoiding prejudgment of the facts at issue	conflicts of interest	bias				
Where Applicable	Elementary	✓	✓	Optional*	✓	✓	✓	✓	✓	-	✓	✓
	Secondary	✓	✓	Optional*	✓	✓	✓	✓	✓	-	✓	✓
	Post-Secondary	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Who receives the training	Title IX Coordinators	✓	✓	-	-	If TIXC is facilitator	✓	✓	✓	-	-	If TIXC is investigator
	Investigators	✓	✓	-	-	-	✓	✓	✓	-	-	✓
	Decision-makers	✓	✓	✓	✓	-	✓	✓	✓	✓	✓	-
	person who facilitates an informal resolution process	✓	✓	-	-	✓	✓	✓	✓	-	-	-
Relevant Portion(s) of Preamble <i>See, 85 Fed. Reg. 30026 (May 19, 2020)</i>	30036-38, 30139-77.	30194-212, 30255.	30311-67.	30275-77, 30395-99.	30399-408.	30247, 30252, 30254, 30258, 30264.	30100, 30250, 30252, 30367-70.	30084, 30248, 30250-52.	303	30098, 30105, 30221, 30235, 30247-49, 30291, 30293-94, 30303-07, 30319, 30331, 30337, 30343, 30349, 30351-54.	30248, 30304-08, 30310, 30349, 30353-54.	

*Hearings are optional for both Elementary and Secondary schools. However, with or without a hearing, decision-makers must provide an opportunity for the parties to submit written questions they wish to be asked of witnesses, receive answers, and submit any written follow-up questions. Final Rule § 106.45(b)(6)(ii).

Training must go beyond Title IX

- The VAWA amendments to Clery in the 2014 regulations require training on:
 - Issues related to dating violence, domestic violence, sexual assault and stalking.
 - How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.
- The Civil Rights & Title IX Policy covers a number of other types of investigations/cases:
 - Disability discrimination or accommodation appeals
 - Racial discrimination
 - National Origin discrimination
 - Religious discrimination
 - Veteran discrimination
 - And other protected classes under the University nondiscrimination statement

Training roadmap:

- VIDEO 1: Title IX Definition of Sexual Harassment 35 CFR § 106.30
- VIDEO 2: Title IX Scope of Educational Program or Activity
- VIDEO 3: Title IX Conflict of Interest, Bias, Presumption of non-responsibility, prejudgment of facts, impartiality.
- VIDEO 4: Title IX Relevance of evidence, hearing questions, sexual predisposition, and prior sexual behavior
- VIDEOS 5 through 9: Title IX Investigations and Investigative Reports that fairly summarize the evidence. 35 CFR § 106.45(b)(6)
- VIDEO 10: Title IX Hearings and Appeals

Training roadmap:

- VIDEO 11: VAWA/Clery – Dating Violence, Domestic Violence, Sexual Assault, and Stalking.
- VIDEO 12: Ensuring victim safety and Institutional accountability.
- VIDEO 13: Title VII Investigations (Race, Color, National Origin, Sex, Religion).
- VIDEO 14: Disability Discrimination and Accommodation Appeals.
- VIDEO 15: Retaliation
- [Last slide of this video.]

Title IX Sexual Harassment Definition

Video One of the SHARP Training Series

§ 106.30 has a mandatory definition

- (i) An employee conditioning educational benefits on participation in unwelcome sexual conduct (i.e., quid pro quo);
- (ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity; or
- (iii) Sexual assault (as defined in the Clery Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

What does the Dept. of Ed. Say?

- “serious incidents that jeopardize equal educational access exceed the threshold and are actionable.” 85 Fed Reg. 30160
- Generally: only apply the “severe, pervasive, **and** objectively offensive” analysis for a hostile environment analysis, not the quid pro quo harassment or the VAWA/Clery offenses – which are considered to be per se actionable if true.

Quid Pro Quo Harassment

- (i) An employee conditioning educational benefits on participation in unwelcome sexual conduct (i.e., quid pro quo);
- “Unwelcome” is looked at in a subjective manner that takes into account whether the complainant sees the conduct as unwelcome (more on this later).
- DOES NOT need to be severe, pervasive, and/or objectively offensive for there to be a violation.
- Can be expressly communicated, or implied from the circumstances.
- If such a proposition came from a non-employee it could be considered under the second or third prong of harassment, but not the first.

Hostile Environment: Severe, Pervasive, and Objectively Offensive

(ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity;

- Language is intended to protect free speech when the conduct in question is expressive or purely verbal conduct.
- The Title VII standard (in the workplace) is “severe or pervasive” which seems to be a lesser standard. **DO NOT GET THESE CONFUSED.**
- There is no intent requirement. There should be no attempt to rationalize the behavior, only an attempt to determine if the definition is met.
- “must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a reasonable person standing in the shoes of the complainant.” 85 Fed. Reg. 30156

Unwelcome Conduct and the Reasonable Person Standard

- Look at the conduct as if you were a reasonable person in the same position, and same unique circumstances of the complainant's position in the case.
- Would a reasonable person in such a position feel the conduct was unwelcome?
- Dept. of Ed. Says: “[it]depends on a constellation of factors including the ages and numbers of parties involved.” 85 Fed. Reg. 30150

When Considering Hostile Environment, it must effectively deny equal access to an education program or activity

- “Title IX is concerned with sex discrimination in an education program or activity” and “does not stand as a Federal civility code that requires [educational institutions] to prohibit every instance of unwelcome or undesirable behavior.” See 85 Fed. Reg. at 30170.

Dating Violence, Domestic Violence, Sexual Assault, and Stalking

- These are defined in policy using the mandatory Clery Act definitions.
- No “severe, pervasive, and/or objectively offensive” analysis is needed – only a determination of whether the definitions are met.
- Even a single instance of sexual assault can be a violation.
- Southeastern’s definition of consent is highly important in these cases.
- More information on these offenses in VIDEO 7.
- [Last slide of this video.]

The Scope of Southeastern's Education Programs and Activities

Video Two of the SHARP Training Series

Educational Program or Activity

- Only applies to sexual harassment “in an education program or activity of the recipient against a person in the United States”

Education Program or Activity

- Includes “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs”
 - Includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution
 - Complainant must be participating in, or attempting to participate in, the recipient’s educational program or activity at the time of filing a Formal Complaint

What about off campus?

- Does not apply to study abroad.
- Off-campus conduct covered if any of three conditions are met:
 - The off-campus conduct occurs as part of the recipient's operations;
 - The recipient exercised substantial control over the respondent AND the context of alleged sexual harassment that occurred; or
 - The incident occurred at an off-campus building owned or controlled by a student organization officially recognized by the institution
 - Does not matter if recipient exercised substantial control over the respondent—officially recognizing the student organization is enough

Institution must have “substantial control.”

- “Substantial control”—no single factor is determinative, but consider whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred.

Online Harassment

- Program or activity includes all operations, which “may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, recipient.”
- But does an institution have substantial control over a student while studying remotely?
 - “A student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstances over which the recipient exercises substantial control.”
- [Last slide of this video.]

Conflict of Interest, Bias, and Neutrality

Video Three of the SHARP Training Series

What will this video cover, exactly?

- §106.45(b)(1)(iii) requires training on: “...how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- The four items in yellow, above, are covered in this video. The Title IX regulations do not offer substantive definitions, but there are some hints as to the intentions of these phrases.

Conflict of Interest

- The phrase “conflict of interest” is found verbatim 67 times in the Title IX sexual harassment regulations.
- The existence of a conflict of interest on the part of an investigator or hearing decision-maker can be grounds for an appeal, if it affected the outcome.

What is NOT a Conflict of Interest?

Just some examples:

- A female victim of sexual assault is not automatically biased against men.
- A self described feminist is not automatically biased against men.
- Someone who has been a victim advocate is not automatically biased against respondents.
- Employees are not automatically conflicted because of their employment.

Conflict of Interest

- Exists when the investigator or hearing decisionmaker knows one of the parties or witnesses as a friend, family member, or in another capacity that
 - Affects their neutrality or ability to be nonprejudicial.
 - Tends to cause them to give undue deference toward complainant or respondent.

Conflict of Interest

- Also exists when the investigator or hearing decisionmaker has a substantial reason to defer to a party or witness because of an employment relationship, social relationship, community relationship, etc.
 - A person should not investigate or make decisions about their supervisor, church deacon, or personal mentor.
 - A person should not investigate or make decisions about their employee subordinate if there is a close working relationship that would be strained by decisions made in the civil rights setting.
- In short: there should be no factor causing the investigator or decisionmaker to have any pause in being fair, neutral, and genuinely unbiased. Even prior animosity between the official and the party can serve to create a conflict of interest because of the interest in revenge.

Then, what is bias?

- Conflict of interest is situational: such as not wanting to disparage a supervisor, for fear of employment or career related consequences. Bias is more about deference or animosity based in having *genuine* favor for a person, or resentment toward a person.
- Bias is any inclination, preconception, or other “lean” that favors or disfavors a party.

What if I have a Bias or CoI?

- If you feel that you have, or have developed, a bias or conflict of interest at any time in the performance of your duties as an investigator or hearing decisionmaker, you must inform the Title IX Coordinator **BEFORE** continuing in that capacity in any way. You may need to withdraw from the case.
- You are of course permitted to develop an *objective position*, uninfluenced by a conflict or bias, over the course of an investigation or hearing, for or against a party due to the evidence, credibility analysis, and logical reasoning.
- Do not confuse your rational skills for bias. Do not confuse your legitimate decision-making skills for bias.

Bias and CoI shorthand:

- Don't serve if a party or witness is:
 - Your friend
 - A *close* colleague
 - A supervisor or direct subordinate
 - Associated with you closely even outside of work or friendship
 - Church
 - Community organizations
 - Research cooperation
 - Someone who you already favor or disfavor for any reason.
 - Someone you already implicitly trust or distrust.

Prejudgment of the Facts at Issue

- Sometimes an investigator or decision-maker may learn information about the case that causes them to prejudge a party, or make unreasonable and uninformed determinations about the facts. This is particularly an issue when the official has a bias about the circumstances from past experience.
- This is especially the case when an official cannot separate specific facts from sweeping generalizations and stereotypes.
- Example: A hearing panelist was one themselves falsely accused of misconduct and is unreasonably skeptical of any complaining party.
- Example: An investigator learns that the respondent lives a lifestyle they personally disfavor, and therefore assumes they are “slutty” or “permissive” in all sexual encounters such as the one at issue in the case.
- Example: A hearing panelist hears that a person had 5 beers, and since the panelist always feels drunk after 5 beers, automatically assumes everyone who has 5 beers is incapable of effective consent to sex.

Presumption of not-responsible, for the Respondent

- It is a REQUIREMENT of Title IX Regulations that investigators and hearing decision-makers maintain an understanding that the Respondent is presumed not-responsible for misconduct until all the evidence has been collected and analyzed, and a hearing has ended, and deliberations have begun.
- If you cannot maintain this understanding, you should not serve as a Title IX official.

Presumption of not-responsible, for the Respondent

- It is permissible for you to form the preliminary skepticism, intuitive searching, and lines of inquiry that are natural upon learning any circumstantial or direct evidence. But you cannot at any point presume the respondent is responsible – you must instead keep an open mind. This is sometimes difficult, but crucial for the following reasons:
 - If you feel you've already made up your mind, you are less likely to genuinely listen to further inculpatory or exculpatory evidence that might change your mind.
 - If you feel you've already made up your mind, this serves to color the way you view all future evidence, interviews, witness testimony, and reports.

Presumption of not-responsible, for the Respondent

- Respondents should not have to prove their innocence and do not have such a burden.
- Notwithstanding the presumption of non-responsibility, credibility determinations cannot be based on a party's status as a complainant or respondent, and recipients must reach determinations without prejudging the facts at issue and by objectively evaluating all relevant evidence.

Presumption of not-responsible, for the Respondent

- The presumption does not allow, much less require, an investigator or hearing decision-maker to presume that a respondent is truthful or credible.
- Merely the presumption of non-responsibility serves to ensure that a respondent is not treated as responsible prior to a final determination. Being treated in such a manner can prejudice that final determination.
- Do not let any emergency removal defeat your presumption of non-responsibility.
- [Last slide of this video]

Relevance of evidence and Rape Shield Protections

Video Four in the SHARP Training Series

Evidence Relevance

- The Department of Education encourages institutions to apply the “plain and ordinary meaning” of relevance in their determinations. 85 Fed. Reg. 30026, 30304.

Evidence Relevance

- Relevant evidence can be direct or circumstantial.
- Relevant evidence is information that aids the decision maker, as opposed to merely exposing the decision maker to irrelevant reputational tarnish, and facts that do not touch on the decision being made.
- **Relevant information will aid the decision-maker in making the underlying determination of whether an event/conduct did or did not occur. So long as it achieves this end, even background and contextual information may indeed be relevant.**
- Both inculpatory and exculpatory evidence is relevant.
- Generally, much information is relevant, and erring on the side of relevance is the “safer” direction when relevance is closely debated.

Evidence Relevance

- You CANNOT implement a rule that prohibits RELEVANT evidence just because the information is also unduly prejudicial, concerns prior bad acts, or constitutes character evidence.
- Relevant evidence is admissible, period.
- Just because it's relevant, doesn't mean it's trustworthy. Decision makers retain the ability to determine how much weight, if any, to give to relevant evidence.
- High Value Examples: (1) Testimony with multiple corroborations, none of which are impeached. (2) Direct physical evidence. (3) Photographic evidence.
- Low Value Examples: (1) Impeached or uncorroborated testimony. (2) circumstantial time and place information. (3) History that may corroborate present allegations in terms of pattern or predation.

Prohibition on Testimonial Reliance where there is no Cross-X

- In the event that any party declines to participate, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- This applies to statements made by ANY party or witness, not just statements by the complainant. This even applies to investigators, University officials, and other persons who may have statements as evidence.

Relevant Hearing Questions

- Questions and answers in a live hearing are evidential, and subject to the same relevance screening as any other evidence.
- **A relevant question seeks to elicit information that will aid the decision-maker in making the underlying determination of whether an event/conduct did or did not occur. Even information that may be considered background or contextual information may be relevant if it aids in understanding information used by the decisionmaker to fully understand.**

Relevant Hearing Questions

- The fact to which the evidence is directed need not be in dispute, often background although it does not involve a disputed matter is often offered as an aid to understanding an event or circumstance.
- Relevant questions need to be considered even if a party or advisor believes the danger of unfair prejudice substantially outweighs their probative value.85 Fed. Reg. 30026, 3029
- Only irrelevant questions, including about the complainant's prior sexual history, maybe excluded.

RAPE SHIELD RELEVANCE ISSUE

- Questions and evidence about the “complainant’s sexual predisposition or prior sexual behavior” are not relevant, unless:
 - Such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - If the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.
- 34 C.F.R. §106.45(6)(i).

Privileged Information

- Questions that constitute, or seek disclosure of, information protected under a legally-recognized privilege are automatically irrelevant. 34 C.F.R. § 106.45(1)(x).

Making relevance determinations

- In a hearing, the panel has the ability to choose whether they deem a question asked to any party or witness as relevant. In our process this will operate as a pause after a question is orally posed by one of the party's advisors.
- During the pause, the decision-making panel may determine to bounce the question as irrelevant, and permit it not to be answered. The panel may vote if the panel is divided on relevancy. If the question is indeed bounced due to irrelevancy the panel must announce on the record a reason for doing so.
 - A standard explanation would be : “This question is not probative on any material fact concerning the allegations.”
- [Last slide of this video]

Investigations and Investigative Reports (Part 1)

Video Five in the SHARP Training Series

Before an investigation

- Pre-Investigation Process Documents for the parties
 - Sexual Violence Supportive Measures Checklist
 - Summary of Resources
 - Investigation Process Overview
 - Investigation and Hearing Flow Chart
 - Investigation Notice
 - Information about Informal Resolution

Notice

- Must provide notice of the allegations of sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. §106.45(b)(2)(A)
- For an employee respondent, can interview the respondent without disclosing the complainant's identity, as long as no disciplinary action is taken without following the grievance process. 85 Fed. Reg. 30287

List of Notice Requirements

- The letter of notification must include the following and take place **PRIOR TO ANY INVESTIGATIVE MEETING OF ANY KIND**:

[§106.45(b)(2)(B)]:

- Statement that respondent is presumed not responsible and that a determination of responsibility is made at the conclusion of the grievance process
- Inform parties they may have an advisor of their choice, who may be an attorney
- Inform parties they may inspect and review evidence.
- Inform parties of any provision in policy/code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- Written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to participate.

Supplemental Notice

- If the investigation uncovers additional allegations which were not included in the initial notice, must provide notice of the additional allegations to the involved parties whose identities are known. §106.45(b)(2)(ii)

Interviewing Parties

- The burden is now clearly on the institution to compile evidence.
- You must allow “sufficient time for the party to prepare to participate” before interviews
 - You need to consider this when scheduling the interview.
 - You may want to look at the class schedule, and choose a time when not in class with a reasonable amount of notice and be consistent with this for both parties.
 - This “sufficient time” standard mentions parties not witnesses—presumably they do not require as much time to prepare.
- [Last slide of this video]

Investigations and Investigative Reports (Part 2)

Video Six in the SHARP Training Series

Evidence Gathering

- The burden of gathering evidence sufficient to reach a determination is on the institution, not the parties. §106.45(b)(5)(i).
- Must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. §106.45(b)(5)(ii)
 - Parties do not have a right to depose others or issue subpoenas. 85 Fed. Reg. 30306
- Cannot restrict the parties' ability to discuss the allegations being investigated. §106.45(b)(5)(iii)

Evidence Review

- Both parties must have an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations, including the evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence, whether obtained from a party or other source. § 106.45(b)(3)(vi)
 - Inculpatory – evidence that tends to show Respondent is responsible
 - Exculpatory – evidence that tends to show Respondent is not responsible
- No definition of “directly related” evidence in the Regulations, but may mean more than just evidence that is “relevant” – institution has discretion. 85 Fed. Reg. 30310
 - Relevance determined by “applying logic and common sense” but not by applying legal expertise. 85 Fed. Reg. 30320
- Investigator should not screen out evidence the investigator does not believe is relevant. 85 Fed. Reg. 30304

Sharing the Evidence for Review by the Parties

- Large production before the investigative report is issued
 - Before the investigator issues their report, the parties must have at least ten days to review “any” relevant information “**directly related** to the allegations raised in a formal complaint” gathered by the investigators, including both inculpatory and exculpatory evidence. At the end of that ten day period, the parties have the right to submit a written response.
- More narrow production
 - Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

Sharing the Evidence for Review by the Parties

- Before the investigator issues their report, the parties must have at least ten days to review “any” relevant information “**directly related** to the allegations raised in a formal complaint” gathered by the investigators, including both inculpatory and exculpatory evidence. At the end of that ten day period, the parties have the right to submit a written response.
- If the written response triggers additional investigative responsibilities and those responsibilities uncover additional evidence, then the parties will be given another opportunity to respond. This may result in a second cycle of inspection and review of evidence, if not more, so the complexities of this process should be factored into your planning.

Evidence Sharing

- The Ed Department does not require or recommend a particular means of sharing this information.
- What is the DOE trying to address?
 - The Department is critical of policies requiring parties “to sit in a certain room in the recipient’s facility, for only a certain length of time, with or without the ability to take notes while reviewing the evidence, and perhaps while supervised by a recipient administrator”; such practices “have reduced the meaningfulness of the party’s opportunity to review evidence and use that review to further the party’s interests.” 85 Fed. Reg. 30,026, 30,307

What evidence must be shared?

- Share evidence that is “directly related to the allegations,” even if that evidence will not be relied upon in reaching a determination.

Example

- For example, an investigator may discover during the investigation that evidence exists in the form of communications between a party and a third party (such as the party's friend or roommate) wherein the party characterizes the incident under investigation. If the investigator decides that such evidence is irrelevant (perhaps from a belief that communications before or after an incident do not make the facts of the incident itself more or less likely to be true), the other party should be entitled to know of the existence of that evidence so as to argue about whether it is relevant. See 85 Fed. Reg. at 30,304.

What about academics?

- “If the academic record of a party is directly related to the allegations of sexual harassment, then the recipient may obtain, access, use, and disclose such evidence as part of the investigation.” 85 Fed. Reg. at 30,432
 - Examples the DOE provides include attendance records.

What if the evidence is directly related but not relevant?

- Although the complainant's prior sexual behavior is "irrelevant" under the Final Rule, the institution nevertheless must share prior sexual history if such evidence is directly related to the allegations because it may be "offered to prove that someone other than the respondent committed the conduct alleged by the complainant or to prove consent."
- [Last slide of this video]
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Investigations and Investigative Reports (Part 3)

Video Seven in the SHARP Training Series

Writing the Investigative Report

- **Summary of Investigation:** Gives an overview of who you have talked with, who did not participate but you reached out to, documents you requested (which were or were not acquired)
- **Involved Parties:** Basic information about the complainant and respondent – Role on campus, employment or major and year in school. For witnesses, this is more about how the witness is related to the incident and who the witness is connected to (complainant, respondent, both, neither)
- **Background information:** How they know each other, length of relationship

Writing the Investigative Report

- Review of Supporting Materials: Do not just add documents to the investigation report. An investigator's role is more than just talking to the participants but also looking at relevant materials. For students, this is social media and text messages, videos, SANE Exams, security video footage. For employees, this could be getting emails.
- Don't forget an investigation could require you to leave your office- take pictures, make a diagram.
- Information about Interactions
- Some might call this credibility assessment. We are getting away from this.
- Acknowledgements of gaps in content and efforts taken to resolve.

Investigation Report

- Investigator/s Names
- Purpose of Report
- Summary of Investigation Process
- Involved Parties
- Incident Specifics
 - Date of Incident
 - Date of Report
 - Location
- Background Information
- Reported Information
- Consent Chart
- Review of Supporting Materials
- Alleged Violations
- Information about Interactions (credibility assessment)

Reported Information

Reported from Complainant	Reported from Respondent
Prior to Date Party	
<ul style="list-style-type: none"> Jane Snapchatted John and said “Hey there is a date party, do you want to come?” John arrived at Jane’s apartment around 10 pm. Jane offered John a beer and gave it to him while she continued to get ready. 	<ul style="list-style-type: none"> Jane asked John to come to her date party after their student organization meeting. John arrived at Jane’s apartment around 9pm. Jane gave John a beer, he was never asked if he wanted a beer.
On the Bus to the Date Party	
<ul style="list-style-type: none"> Jane expressed the bus was full so Jane lapped John on the bus ride to the date party. John was signing her songs that were playing on the bus. Jane defined John was doing this in a sexual nature. 	<ul style="list-style-type: none"> John provided video of Jane lapping on the bus. John shared that he sat with his legs close together because he was not comfortable with the lapping situation.
<p>Witness, Jill</p> <ul style="list-style-type: none"> Jill confirmed that Jane and John were on the same bus as her and she say them lapping. Jill did not report seeing anything that would make her think either of them were uncomfortable. 	
After Date Party	

Consent Chart

	Complainant's Account	Respondent's Account
What sexual contact occurred?	Touching of her breasts by John. Touching of her vagina by John.	Making out. Touching of Jane's vagina.
What sexual contact was not consensual?	Jane reports no sexual contact was consensual.	The making out was mutual. John reports he thought he had consent from Jane so the contact was consensual.
Who is the initiator of the sexual contact?	Jane reports John was the initiator of the sexual contact.	Jane came into his room and took her top off. He is not sure how the making out started.
How was consent given or not given?	Jane reports she never gave consent.	John reports the making out was mutual and Jane participated in the kissing. Jane took off her shirt an action of consent.
Level of incapacitation	Jane reported consuming not a full solo cup of vodka with a mix, jello shots, and a little bit of dark liquor – one to two shots. Jane defines she went to sleep and that her body was in and out of consciousness.	John defines he was drunk. He consumed 10-15 shots of vodka, whiskey, and Baileys he also had a couple of beers. Consumed alcohol to the point where parts of the night he does not remember.
Knowledge of level of incapacitation [Last slide of this video]	Jane defined John was very intoxicated.	John knew that Jane has a least one shot to drink and maybe took shots with other people.

Investigations and Investigative Reports (Part 4)

Video Eight in the SHARP Training Series

Preponderance Standard Required

- Use language the community understands
 - 50.1%
 - “More likely than not”
 - The “tipped scale”
 - Try NOT to use just the term “preponderance of the evidence” - it is not common language.

Strategy is Key

- The investigation team, in consultation with the Title IX Coordinator strategizes the entire investigation. This includes:
 - What Policy(s) elements may have been violated?
 - What are the undisputed facts? Which ones are significant to the investigation?
 - What are the facts in dispute? Which ones are significant to the investigation?
 - Who do you need to interview?
 - What should be the order of the interviews

Other Elements to Consider in Strategy

- What are the key issues involved?
 - What additional strategies do you need to address key issues?
- What additional documentary evidence will be important to the investigation?
- Discuss your Methodology for this case (what approach will you use?)
- Timeline (within 30-60 days will vary by case)

What Kinds Of Notes Should Be Kept?

- Assemble an investigative file and keep it in a secure location
- Keep a timeline of the steps in the process, including dates of all meetings and interviews
- Interviews - notes vs. recording
- Interviews - hand written vs. computer
- Interviewee verification

Investigation Notes

- Notes should be complete and detailed
 - Important for assessing credibility
 - Decision may turn on small details
- Where possible, include verbatim statements on critical issues – paraphrasing can later become problematic
- Keep notes on what is told to the complainant, respondent and witnesses
- Summarize perceptions and explanations of credibility, honesty, etc

What Role Does the Investigator Play in an Eventual Hearing?

- The investigator is the key witness at any hearing
- The investigation report is admitted as evidence
- Other witnesses can be called, or the investigation may summarize their testimony
- The investigator can attest to credibility, call attention to discrepancies, and arrange for expert sources of information, as needed

Investigations and Investigative Reports (Part 5)

Video Nine in the SHARP Training Series

General Interview Skills

- Plan the order of interviews; may be beneficial to interview Respondent last
- Most beneficial to conduct interviews in person
- Interviews should be conducted in a neutral setting
- Explain process, your role as a neutral fact finder, and privacy protections and limitations
- Discuss thoroughness and the need for completeness; make sure parties don't leave facts out because they are afraid of getting into trouble

General Interview Skills

- Establish rapport before questioning
- Ascertain who the individual is and their relation to the other parties in the case
- Document whether the individual is cooperative or resistant
- Be professional: gather the facts, make no judgments, make no statements about the parties

General Interview Skills

- Outline your interview questions but be flexible
- Get detailed- do not leave a question unanswered
- Pay attention to alcohol/drug consumption and timing of consumption
- Beneficial to have two interviewers- one to record and one to question and observe demeanor
- Be cognizant of the difference between what was “heard” (rumor) and what was “witnessed” (facts)

General Interview Skills

- Ask who else you should talk to and ask for any relevant documentation (i.e. texts, emails)
- Let parties know you may need to follow up with them as the investigation progresses
- Recommend that the parties and witnesses not discuss the investigation
- Discuss non-retaliation

Interviewing the Complainant

- Acknowledge difficulty of reporting and thank them. Acknowledge that they may have told this story multiple times already
- Provide a copy of your policies and procedures
- Ask them to share a complete account of what occurred
- Get detailed- do not leave a question unanswered
- Ask about outcry witnesses and possible documentation such as blogs or journals
- Ask what the complainant's motivation is for reporting and what they hope to see as a result

Interviewing the Complainant

- Find out if their academics and/or work have been affected
- Advise that the complaint will be discussed with the Respondent and witnesses
- Discuss non-retaliation and intermediary steps such as no contact orders and class changes
- Discuss counseling options if they are not already connected
- Let the complainant know next steps and when they will hear from you, and that they can contact you anytime with questions or any problems that rise

Interviewing the Respondent

- Acknowledge difficulty of the situation and thank them for meeting with you
- Provide a copy of your policies and procedures
- Ask them to share a complete account of what occurred
- Question the Respondent as to the allegations- ask a combination of open and closed ended questions
- Get detailed- do not leave a question unanswered
- Ask about witnesses and any other relevant information
- Ask about possible motivation for complaint

Interviewing the Respondent

- Let the Respondent know next steps and when they will hear from you, and that they can contact you anytime with questions
- Discuss counseling options if they are not already connected
- Discuss non-retaliation and any intermediary steps such as no-contact orders, housing moves and exclusions
- If interim suspension is employed, review the terms and provide a time frame
- It may be useful for the interviewer to receive training on interviewing and interrogation, such as is conducted by law enforcement

Interviewing Witnesses

- It may be helpful to not label the allegations as “sexual misconduct” or “sexual harassment”
- Ascertain relation to the other parties in the case
- Ask questions; address the need for complete truthfulness
- Ask for opinions
- Ask if they have been contacted already by one of the parties

Interviewing Witnesses

- Ask if they have made any previous statements, such as to private investigators
- Ask if there is anything you should know that was not been covered
- Discuss non-retaliation
- Discuss privacy
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Hearings and Appeals

Video Ten in the SHARP Training Series

Live Hearings are Required

- Institutions must provide for a live hearing to determine responsibility. § 106.45(b)(6)(i)
- No hearing board required; decision-maker can be a single individual. 85 Fed. Reg. 30248
 - Students are allowed to participate in the decision-making role if institution chooses to do so.
- Live hearing includes virtual hearings, as long as the parties can see and hear each other. § 106.45(b)(6)(i)
- Institution must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review. § 106.45(b)(6)(i)

Hearings

- Southeastern is allowed to adopt rules governing the procedural aspects of hearing. 85 Fed. Reg. 30361
- Considerations:
 - Can parties make opening or closing statements?
 - Process for making objections to the relevance of questions and evidence?
 - Institution is allowed to have a rule that does, or does not, give parties or advisors the right to discuss relevancy with the decision-maker during the hearing. 85 Fed. Reg. 30343
 - Reasonable time limitations on a hearing?
 - Rules of decorum of participants and advisors

Hearings

- Each party's advisor must be permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. § 106.45(b)(6)(i)
 - Parties **are not** allowed to cross-examine each other or witnesses. Must be done by an advisor or not at all.
- Cross-examination must be done orally and in real time by the advisor. § 106.45(b)(6)(i)
- Only relevant cross-examination and other questions may be asked of a party or witness. § 106.45(b)(6)(i)
- Before a party or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. § 106.45(b)(6)(i)
 - Cannot require written submission of questions before the hearing. 85 Fed. Reg. 30335

Reminder

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; proved, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. § 106.45(b)(6)(i)
 - Option: consider having party/witness appear at hearing, verbally confirm that investigative report fairly summarizes their statement, and allow parties' advisors to cross-examine.

Decision-Maker Independence

- The decision maker cannot be the Title IX Coordinator or the investigator(s). § 106.45(b)(7).
- The decision maker is “under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report.” 85 Fed. Reg. 30314.
- The decision maker has “the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker’s own initiative to aid the decision-maker in obtaining relevant evidence...and the parties have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspectives about the evidence.” 85 Fed. Reg. 30331
- Institution could have a hearing officer to oversee or conduct the hearing that is separate from the decision maker. 85 Fed. Reg. 30372

Determining Responsibility

- Content of Determination of Responsibility:
 - Must be in writing. § 106.45(b)(7)(i)
 - Identify the allegations potentially constituting sexual harassment. § 106.45(b)(7)(ii)
 - Describe the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held. § 106.45(b)(7)(ii)
 - Findings of fact supporting the determination. § 106.45(b)(7)(ii)
 - Conclusions regarding the application of the institution's code of conduct to the facts. § 106.45(b)(7)(ii)
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the institution imposes on the respondent, and whether remedies designed to restore or preserve equal access to the institution's education program or activity will be provided by the institution to the complainant. § 106.45(b)(7)(ii)
 - The procedures and permissible bases for the complainant and respondent to appeal. § 106.45(b)(7)(ii)
 - The parties must be notified simultaneously. § 106.45(b)(7)(iii)

Sanctioning

- Regulations do not set out sanctions that should be imposed when a respondent is found responsible. 85 Fed. Reg. 30394
- DOE specifically declined to mandate suspension or expulsion – “recipients deserve flexibility to design sanctions that best reflect the needs and values of the recipient’s educational mission and community.” 85 Fed. Reg. 30407
- “Nothing in these final regulations precludes a recipient from adopting a zero tolerance policy.” 85 Fed. Reg. 30383
- “[t]he final regulations do not preclude a recipient from imposing student discipline as a part of an ‘educational purpose’ that may differ from the purpose for which a recipient imposes employee discipline.” 85 Fed. Reg. 30377
- Transcript notations – “The Department intentionally did not take a position...on transcript notations or the range of possible sanctions for a respondent who is found responsible for sexual harassment.” 85 Fed. Reg. 30394

Sanctions should remediate the barrier to access

- Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made. § 106.45(b)(1)(i)
- Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Remedies may include the same individualized services described...as 'supportive measures'; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. § 106.45(b)(1)(i)
- The Title IX Coordinator is responsible for implementing remedies. § 106.45(b)(7)(iv)
- When the final determination has indicated that remedies will be provided, the complainant can then communicate separately with the Title IX Coordinator to discuss what remedies are appropriate. 85 Fed. Reg. 30392
 - Remedies that do not directly affect the respondent must not be disclosed to the respondent. 85 Fed. Reg. 30425

Do not confuse remedies with supportive measures, although they may be similar.

- “Remedies may include the same individualized services described in § 106.30 as ‘supportive measures’ but...remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. Beyond this, the Department believes recipients should have the flexibility to offer such remedies as they deem appropriate to the individual facts and circumstances of each case, bearing in mind that the purpose of remedies is to restore or preserve the complainant’s equal access to education.” 85 Fed. Reg. 30391
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Dating Violence, Domestic Violence, Sexual Assault, and Stalking.

Video Eleven in the SHARP Training Series

What is Sexual Assault?

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- The Clery amendments state that sexual assault is, “[a]n offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's UCR program...”
- Those corresponding definitions are:

What is Sexual Assault?

- 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.
- 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 age or 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.

What is 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. 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.
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

What is Domestic Violence?

- A felony or misdemeanor crime of violence committed:
 - By a current or former spouse or intimate partner of the victim;
 - By a person with whom the victim shares a child in common;
 - By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
 - 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;
 - 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.

What is Domestic Violence?

- To categorize an incident as Domestic Violence, the relationship between the perpetrator and the victim must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship

What is Stalking?

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his/ her safety or the safety of others; or suffer substantial emotional distress.

More on Stalking

- 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.
- Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.
- Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.
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Ensuring Victim Safety and Promoting Offender Accountability

Video Twelve in the SHARP Training Series

Victim Safety

- Keep in mind victim safety is paramount throughout the process of any Civil Rights investigation and/or hearing. The presumption of non-responsibility for the respondent does NOT prevent the University from implementing supportive measures for the complainant, who may very well be a victim of a crime. Therefore: supportive measures can include measures that promote that person's safety throughout the investigation and hearing.
 - Moving from one residence hall to another.
 - Assistance in connecting them with law enforcement, or the DA's office.
 - Measures to keep complainant separate from respondent, such as enrollment in different classes, or strict enforcement of no-contact orders.
 - Hearings designed to reduce interaction while preserving the "live hearing" and "cross examination" regulatory rights.
 - Panic buttons.
 - Reinforcement of Southeastern's Amnesty Policy for witnesses, etc.

Institutional Accountability

- The burden of investigation is on the University, not the complaining party.
- Of course, the complainant may provide evidence in their possession.
- But this does not excuse the obligation of the University to request this information as a part of the investigative procedure.

Offender Accountability

- The VAWA Amendments to Clery, and subsequent regulations, emphasize that there must be accountability when an institution determines that a person is responsible for misconduct. This means, in part, that the sanctions must be appropriate to remediation. It is not enough to sanction a responsible respondent with educational programming if that does not make the victim safe, and if that does not make the campus community safe. The level of sanctioning should in a phrase: fit the offense.
- Remember:
 - END the harm.
 - PREVENT future harm.
 - REMEDY the circumstances from which the harm came.
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Title VII

Investigations

Video Thirteen in the SHARP Training Series

Definitional Difference

- “The Department is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both Title VII and Title IX will need to comply with both sets of obligations.” See 85 Fed. Reg. at 30440.

Definitional Difference

- Title VII makes it unlawful for employers to discriminate “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” Though Title VII’s antidiscrimination provisions do not expressly prohibit harassment, the Supreme Court and federal circuit courts interpret Title VII’s prohibition against discrimination in the “terms, conditions, or privileges of employment” to prohibit **harassment** based on race, color, religion, sex, or national origin

Definitional Difference

- The Supreme Court’s legal standard for analyzing harassment claims—including sexual harassment claims—primarily focuses on whether the alleged conduct is “severe **or** pervasive” enough to create an abusive or hostile work environment for the victim.
- Under this existing standard, even if a victim were to experience offensive or harassing conduct, a harasser’s actions will not constitute a Title VII violation unless those acts in total were “severe or pervasive” enough to create an “abusive” or “hostile” work environment.
- In a nutshell: Title VII has a looser definition of harassment. Easier for the facts to meet this definition for a range of conduct.

The Title VII Harassment Formula

- Courts vary in their formulations of this overall analysis, but generally require that the plaintiff satisfy the following elements to establish a prima facie showing of actionable harassment (including that the conduct was sufficiently severe or pervasive, as analyzed under the last “objective” prong):
 - He or she belongs to a protected category under Title VII;
 - The conduct was unwelcome;
 - The conduct was based on the plaintiff’s protected category; the plaintiff subjectively viewed the harassment as creating an abusive work environment; and
 - A “reasonable” person would also objectively view the work environment as abusive.
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Disability Discrimination and Accommodation Appeals

Video Fourteen in the SHARP Training Series

The ADA

- To be protected by the ADA, one must have a disability, which is defined by the ADA as a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.

The Legal Floor

- ‘Accessible’ means a person with a disability is afforded the opportunity to **acquire the same information, engage in the same interactions, and enjoy the same services as a person without a disability in an equally effective and equally integrated manner, with substantially equivalent ease of use.** The person with a disability must be able to obtain the information as fully, equally and independently as a person without a disability. Although this might not result in identical ease of use compared to that of persons without disabilities, it still must ensure equal opportunity to the educational benefits and opportunities afforded by the technology and equal treatment in the use of such technology.” (Resolution Agreement South Carolina Technical College System OCR Compliance Review No. 11-11-6002, [emphasis added])

Disability Accommodations

- Students must self-disclose that they have a disability, and request accommodation.
- The request need not come from the student directly.
- The request might be made to anyone, but should be redirected immediately to Disability Services.
- The request may be casual and informal, yet still deserve redirection to Disability Services.
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Retaliation

Video Fifteen in the SHARP Training Series

Retaliation under Title IX

- The University nor any other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.
- Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX constitutes retaliation.

Retaliation under Title VII

- The EEO laws prohibit punishing job applicants or employees for asserting their rights to be free from employment discrimination including harassment. Asserting these EEO rights is called "protected activity," and it can take many forms. For example, it is unlawful to retaliate against applicants or employees for:
 - filing or being a witness in an EEO charge, complaint, investigation, or lawsuit
 - communicating with a supervisor or manager about employment discrimination, including harassment
 - answering questions during an employer investigation of alleged harassment
 - refusing to follow orders that would result in discrimination
 - resisting sexual advances, or intervening to protect others
 - requesting accommodation of a disability or for a religious practice
 - asking managers or co-workers about salary information to uncover potentially discriminatory wages.

Retaliation in a nutshell

- When a Respondent, or the University itself, takes adverse action against a complainant or someone who has supported or provided information in a civil rights grievance, AND the adverse action is for retaliatory motive, then the retaliation is prohibited.
- The nexus between **adverse action** and **retaliatory motive** is crucial.
- While tricky, the motive *can* be inferred from the circumstances.