

Grievance Pool and Title IX Team Annual Training

ARKANSAS TECH UNIVERSITY

AUGUST 15 AND 16, 2022

Roadmap

- Policy Overview
- Confidentiality, Resources, and Remedies
- Fairness, Equity, and Due Process
- Bias, Impartiality, and Objectivity
- Investigations Overview
- Role of the Advisor
- Terminology and Analysis
- Institutional Procedures Overview
 - Force, Incapacity, Consent
 - Weighing Evidence
 - Relevance
- Hearing Resolution
 - Preparing for the Hearing
 - Rendering a Finding
 - Generating a Rationale
 - Appeals
- Questioning
- Case Study Assessment

Training Outcomes

As a result of attending this training, participants will be able to:

- Formulate example questions for a hearing
- Categorize evidence as relevant or irrelevant to a determination
- Evaluate a report to determine if a party violated policy
- Write an example rationale statement for a hearing determination
- Develop appropriate sanctions for a finding of responsibility

Welcome and Policy Overview

AMY PENNINGTON

ASSOCIATE VICE PRESIDENT/DEAN OF STUDENTS AND TITLE IX
COORDINATOR

Title IX Defined

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs and activities that receive federal financial assistance.

“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 educational program or activity receiving federal financial assistance.”

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

Types of Discrimination Under Title IX

- Harassment (Sexual Misconduct);
- Failure to provide equal opportunity in athletics;
- Discrimination in a school's science, technology, engineering, and math (STEM) courses and programs;
- and discrimination based on pregnancy.

Harassment (Sexual Misconduct) Includes...

- Sexual Harassment
 - Quid Pro Quo
 - Hostile Environment
- 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 ATU's educational program or activity.
- The "Big Four" (VAWA Sect. 304)
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking

*Sexual Exploitation

Government Oversight of Title IX

- The Office for Civil Rights (OCR) under the U.S. Department of Education is responsible for establishing the compliance standards to be applied in investigations and enforcement of Title IX regarding harassment (sexual misconduct).
- OCR standard indicates that upon receipt of **notice**, the Recipient (ATU) must take immediate and appropriate steps to investigate what occurred and take prompt and effective action to end the harassment, remedy the effects, and prevent the recurrence.

Office for Civil Rights (OCR):
U.S. Department of Education
400 Maryland Avenue, SW Washington, D.C. 20202-1100
Customer Service Hotline #: (800) 421-3481
Facsimile: (202) 453-6012
DD#: (877) 521-2172
Email: OCR@ed.gov
Web: <http://www.ed.gov/ocr>

Little Rock Area Office
820 Louisiana Street, Suite 200
Little Rock, AR 72201
Phone: 1-800-669-4000
Facsimile: 501-324-5991
TDD#: 1-800-669-6820

For complaints involving employees:
Equal Employment Opportunity Commission (EEOC)
1-800-669-4000 or <https://www.eeoc.gov/>

Proposed New Regulations from Department of Education (ED)

Policy on Nondiscrimination

ATU adheres to all federal and state civil rights laws and regulations prohibiting discrimination in public institutions of higher education.

ATU does not discriminate against any employee, applicant for employment, student, or applicant for admission on the basis of:

Color, sex, sexual orientation, gender identity, race, age, national origin, religion, veteran status, genetic information, disability, or any other protected category under applicable local, state, or federal law, including protections for those opposing discrimination or participating in any grievance process on campus or with the Equal Employment Opportunity Commission.

Policy covers nondiscrimination in both **employment** and access to **educational** opportunities.

Policy on Disability Discrimination and Accommodation

- ATU is committed to full compliance with the Americans With Disabilities Act of 1990 (ADA), as amended, and Section 504 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified persons with disabilities, as well as other federal and state laws and regulations pertaining to individuals with disabilities.
- The ADA also protects individuals who have a record of a substantially limiting impairment or who are regarded as disabled by ATU, regardless of whether they currently have a disability. A substantial impairment is one that significantly limits or restricts a major life activity such as hearing, seeing, speaking, breathing, performing manual tasks, walking, or caring for oneself.

Notice of Harassment and Discrimination

Notice to ATU: Actual Knowledge

“Responsible Employees”

- Employees at ATU who are required to report actual or suspected discrimination or harassment to the Title IX Coordinator immediately.
- Responsible Employees include: President, Chancellor, Vice Presidents, Chief Officers, Associate Vice Presidents, Assistant Vice Presidents, Academic Deans, Academic Department Heads and Program Chairs, Dean of Students, Associate Deans, Assistant Deans, Area Coordinators, Athletic Director, Head Coaches, Assistant Coaches, Faculty Advisors for Student Groups, Employees in the Department of Public Safety, Resident Directors, Resident Assistants.

Notice of Harassment and Discrimination

Notice to ATU: Actual Knowledge

“Officials with Authority” (OWAs)

- “Officials with the authority to institute corrective measures on the recipient’s behalf”
- Charges ATU with actual notice and triggers our response obligation

Intersection of roles:

- Responsible Employees
- OWAs
- Campus Security Authorities (Clery)
- Mandatory Reporters

Jurisdiction

Harassment (Sexual Misconduct) Occurring in a School's "Education Program or Activity" and "in the United States"

- Title IX mandatory dismissal
- Process A and Process B
- Student Code of Conduct
 - Off-Campus Conduct
 - Violence Risk Assessment through Care Team

Confidentiality, Resources, & Remedies

STACY GALBO

ASSISTANT DEAN FOR STUDENT CONDUCT/DEPUTY TITLE IX
COORDINATOR/INVESTIGATOR

Confidentiality

- Consider reporting responsibilities (Responsible Employee, OWAs, CSAs)
 - Most employees are not confidential, but we keep information as private as possible
 - Once a report is made, information is only shared on a need-to-know basis
 - Privacy of investigative materials
-
- What happens if a Complainant does not want to move forward?
 - What happens if a Complainant or other reporting party is anonymous or requests anonymity?
 - Pattern, Predation, Threat, Violence/Weapon, Minors

When Should You Report?

- An individual notifies you
- You witness the behavior
- The behavior is widespread, openly visible, or well-known to students, faculty, and staff
- What could an individual disclosure look like?
 - Descriptive vs. labels
 - Third party
 - Unrelated (or related) policy violation
 - “They didn’t disclose, but...”

Disclosures 101

- Be open, honest, receptive, and empathetic
- Be a good listener
- Be transparent; Explain your reporting requirements
- Provide **all** information to the Title IX Coordinator or on the online form
- Provide information on campus resources such as medical services and/or counseling;
Remember: you are not a source of privilege or confidentiality
- No employee may discourage an individual from reporting
- Reluctant Complainants

The Role of a Caring Professional

A CARING PROFESSIONAL DOES:

Listen compassionately.

Answer questions about the process.

Help students identify concerns (safety or otherwise).

Connect students with resources and problem solve to address those concerns.

Practice self care and ask for help.

A CARING PROFESSIONAL DOES NOT:

Offer legal advice.*

Provide therapy.*

Make decisions and choices for the student.

Tell the student how they should feel about what has happened or what is happening.

Expect to know all the answers.

Confidential Resources

ATU Health and Wellness Center

Counseling Services

Confidential Resource. Professional, licensed counselors who provide mental-health counseling to members of the school community (and including those who act in that role under the supervision of a licensed counselor) are generally not required to report any information about an incident to the Title IX Coordinator without a party's permission. Contact the HWC by phone at (479) 968-0329

- Kristy Davis, kdavis51@atu.edu
- Craig Witcher, cwitcher@atu.edu
- Janis Taylor, jtaylor78@atu.edu
- Hunter Bramlitt, jbramlitt@atu.edu
- Leann Watson, lwatson12@atu.edu
- Justin Qualls, jqualls1@atu.edu

Confidential Resources

ATU Health and Wellness Center

Health Services

Confidential Resource. The medical professionals who work in the on-campus health center can generally talk to an individual without revealing any personally identifying information about an incident to the University. An individual can seek assistance and support from these professionals without triggering a university investigation that could reveal the party's identity or that the individual has disclosed the incident. Contact the HWC by calling (479) 968-0329.

- Cori Hinson, RN, cpoore1@atu.edu
- Brittany Holt, LPN, bholt9@atu.edu
- Robin Koontz, APRN, rkoontz@atu.edu
- Ashley Shrives, Nurse Practitioner; ashrives@atu.edu
- Heather Stout, RN, hstout1@atu.edu
- Kyle Wewers, APRN, kwewers2@atu.edu

Other On-Campus Resources

- Department of Public Safety

Russellville: 716 N. El Paso Avenue and available by phone at 479-968-0222 or dialing 911 (24/7).

Ozark: 1700 Helberg Lane, Collegiate Center, Room 100C and available by phone at 479-508-3359 or by dialing 911. (Monday through Friday, 8 a.m. to 5 p.m.)

Off Campus Assistance: Law enforcement assistance is available off campus through the Russellville and Ozark Police Departments 24 hours a day, 7 days a week by calling 911.

- CARE Team: ATU's Behavioral Intervention Team (<https://www.atu.edu/careteam/>)
- Disability Services: (479) 968-0302, TTY: (479) 964-3290, email at disabilities@atu.edu, or stop by the office located in the Doc Bryan Student Services Building, Suite 141. An online application for services can be found at www.atu.edu/disabilities/
- Human Resources: (479) 968-0396, 715 N. El Paso

Off-Campus Resources

Victim Assistance Outreach Program

The 5th Judicial District Prosecuting Attorney's Office's Victim Assistance Outreach Program provides assistance with:

Orders of Protection

Contacting Law Enforcement Agencies

VINE (Victim Identification and Notification Everyday)

Arkansas Crime Victims Reparations Program (assists with financial compensation, counseling, lost wages, and funeral expenses)

Information on the criminal court process

The Arkansas Victim Assistance Coordinator for **Pope County** can be reached at 479-968-8600. The Coordinator for **Johnson County** can be reached at 479-667-0544, and the Coordinator for **Franklin County** can be reached at 479-705-0579.

ATU Counseling Services can also refer students, faculty, and staff to off-campus mental health professionals.

• **Ozark Rape Crisis Center**

- 24-hour crisis intervention
- Advocacy services
- Hospital accompaniment
- 800-818-1189

• **Sexual Assault Crisis Response of Central Arkansas (Conway)**

- 866-358-2265

• **River Valley Shelter (Domestic Violence—Russellville)**

- 24-hour crisis intervention
- Case management
- Emergency shelter
- 479-968-3110

• **St. Mary's Regional Medical Center (Russellville)**

- 479-968-6211
- Evidence collection/medical care

• **Mercy Hospital (Ozark)**

- 479-667-4138
- Evidence collection/medical care

Supportive Measures

Non-disciplinary, non-punitive individualized services available for both parties as appropriate and reasonably available.

Actions may include, but are not limited to:

- Referral to counseling, medical, and/or other healthcare services
- Referral to community-based service providers
- Visa and immigration assistance
- Student financial aid counseling
- Safety planning
- Providing campus safety escorts
- Providing transportation accommodations
- Implementing contact limitations (no contact directives) between the parties
- Education to the institutional community or community subgroup(s)
- Altering campus housing assignment(s)
- Altering work arrangements for employees or student-employees

Supportive Measures

- Academic support, extensions of deadlines, or other course/program-related adjustments
- Campus ban letters
- Timely warnings
- Class schedule modifications, withdrawals, or leaves of absence
- Increased security and monitoring of certain areas of the campus
- Any other actions deemed appropriate by the Title IX Coordinator or the AA/EEO Officer
- Privacy when providing supportive measures
- Accommodations

Contact limitations

- Violations of no contact directives will be referred to appropriate student or employee conduct processes for enforcement.
- Enforcement of non-University orders

Fairness, Equity, and Due Process

STACY GALBO

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Fairness, Equity, and Due Process

- **Disparate treatment** refers to policies, practices, rules, or other systems that are intentionally discriminatory.
- **Disparate impact** refers to policies, practices, rules, or other systems that appear to be neutral, but result in a disproportionate impact on protected groups.

Equality



Equity



Justice



What is Due Process?

- Federal and state constitutional and legal protections ensuring no public entity deprives someone of education or employment without substantive and procedural fairness
- The set of rights-based protections that accompany disciplinary action by a school, college, or university
- Informed by law, history, public policy, culture, etc.
- Historically focused on the rights of the Respondent
- Perceptions of “due process” can be connected to perceptions of legitimacy of a process’s outcome

Due Process in Decision

A decision must:

- Be appropriately impartial and fair (both finding and sanction).
- Be neither arbitrary nor capricious.
- Be based on a fundamentally fair rule or policy.
- Be made on good faith (i.e. without malice, ill-will, conflict, or bias).
- Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.

Procedural Due Process/ Equity Requirements

- Detailed and specific Notice of Allegation and/or Investigation
- Notice of Hearing
- Right to present witnesses
- Right to present evidence
- Right to an advisor of their choice
- Opportunity to be heard and address the allegations and evidence
- Right to appeal
- Right to Cross-Examination
- Right to review all relevant evidence AND the investigation report prior to a decision

Protection Against Retaliation

ATU policy protects against retaliation for the following:

1. Reporting an incident,
2. participating in the grievance process,
3. assisting in providing information relevant to an investigation,
4. and/or acting in good faith to oppose conduct that constitutes a violation of the ATU policy.

ATU is prepared to take appropriate steps to protect individuals who fear that they may be subjected to retaliation.

It is prohibited for any member of the ATU community to intimidate, threaten, coerce, harass, or discriminate against any individual for making a report or participating in the process.

Bias, Impartiality, and Objectivity

WILLIAM TITSWORTH

ASSISTANT DEAN FOR STUDENT CONDUCT AND LEAD INVESTIGATOR



Impartiality and Objectivity

Bias

- People do not shed their values, beliefs and life experiences at the hearing room door. Nor should we expect them to
- While bias is inevitable, it does not necessarily undermine the fairness or appropriateness of a hearing board's decision
- The key is recognizing the bias and ensuring it does not impact one's decision because bias that serves as the basis for the outcome of the hearing is improper
- Hearings must be based on evidence, not on personal beliefs about a complaint

Prejudice

- To “pre-judge”
- “Prejudice” – Any preconceived opinion or feeling, either favorable or unfavorable (dictionary.com) § Often based on things we have previously read, our own experiences
- Prejudice – An unfair feeling of dislike for a person or group because of race, sex, religion, etc. – A feeling of like or dislike for someone or something especially when it is not reasonable or logical (merriam-webster.com)

Implicit Bias

Implicit bias (also called unconscious bias) refers to attitudes and beliefs that occur outside of our conscious awareness and control.

Implicit biases are unconscious attitudes and stereotypes that can manifest in the grievance process.

Explicit biases are biases we are aware of on a conscious level.

There are many different examples of implicit biases, ranging from categories of race, gender, and sexuality.

These biases often arise as a result of trying to find patterns and navigate the overwhelming stimuli in this very complicated world. Culture, media, and upbringing can also contribute to the development of such biases.

<https://www.simplypsychology.org/implicit-bias.html>

Impartiality and Objectivity

Bias and Prejudice-Common Issues

- Role of Alcohol
- Own experiences...
- Student-Athletes
- Fraternity/Sorority Life
- Disabilities & Mental Illness
- International Students
- Sex/Gender
- Gender Identity
- Race
- Ethnicity
- Religion or Religious beliefs
- Academic Field of Study/Major
- Veteran Status
- Socioeconomic Status
- Politics
- Attitude
- Pre-disposition towards one party

Implicit Bias

Ways to Reduce Implicit Bias

- Looking beyond your own point of view, so that you can consider how someone else may think or feel about something.
- Understanding what implicit biases are, how they can arise, how, and how to recognize them in yourself and others are all incredibly important in working towards overcoming such biases.
- Learning about other cultures or outgroups and what language and behaviors may come off as offensive are critical as well.

<https://www.simplypsychology.org/implicit-bias.html>

Impartiality and Objectivity

- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised.
- Also, having disciplined a student or employee previously is often not enough to create a conflict of interest.

Investigations Overview

WILLIAM TITSWORTH

Criminal v. Title IX Investigations

- A complainant has the ability to pursue either a Title IX complaint through ATU or a criminal complaint through the appropriate law enforcement agency, or both.
- A criminal investigation is conducted by police or law enforcement with subpoena power, while Title IX investigations are conducted by university employees.
- A standard of evidence known as “beyond a reasonable doubt” is applied to criminal cases, while “preponderance of the evidence” applies to Title IX cases.
- The two cases may run parallel.
- Sanctions, such as expulsion or suspension, apply to Title IX, while criminal penalties can include prison and sex offender registration.

10 Steps of the Investigative Process

1. Notice/Complaint Received
2. Initial Assessment
3. Investigation Basis and Appointment of Investigators
4. Notice of Investigation and Allegations
5. Develop Strategic Investigation Plan
 - Witness list
 - Evidence list
 - Investigation timeframe
 - Order of party/witness interviews

10 Steps of the Investigative Process

6. Conduct Investigation (thorough, reliable, and impartial)
 - Interview witnesses
 - Gather relevant evidence
7. Complete Investigative Report (Draft)
8. Investigative Report Provided to Parties/Advisors & Ten (10) Day Review/Comment Period
9. Incorporation of Relevant Elements/Evidence/Revisions into Finalized Investigative Report and Presented to Title IX Coordinator for Review and Feedback
10. Final Investigative Report Provided to Parties/Advisors for Review (Minimum of Ten (10) Business Days Before Hearing Date)

Role of the Advisor

STACY GALBO

ATIXA GUIDE TO EFFECTIVE ADVISING IN FORMAL TITLE IX PROCEEDINGS

Advisor's Role

Advisor of Choice:

- Parties have the right to have an **Advisor of their choice** to assist them throughout the process, to include attending any meetings and interviews.

ATU-Appointed Advisor

- Advisor may accompany the party throughout the entire resolution process, but they are only required at the hearing to perform cross-examination.

ATU-Appointed Advisors

- Advisee is not the Advisor's "client"
- Not governed by any "privilege"
- Keeps information private
- May not like or believe an advisee
- Offer a compassionate listening ear when the advisee needs to vent.
- Be aware of referral sources for your advisee.
- Be aware of and advise your advisee to steadfastly follow any supportive measures that have been put into place.

Advising in the Grievance Process

- Help your advisee to understand institutional policies and procedures.
- Help your advisee to understand the differences between the criminal justice process and ATU's grievance processes.
- Prepare your advisee for all meetings, interviews, and hearings.
- Accompany your advisee to all meetings, interviews, and hearings.
- Assist your advisee in presenting information clearly during any interviews conducted (taking breaks during the interview).
- Help your advisee to identify the names of witnesses and lines of questions that are relevant to the issues at hand (get contact information beforehand if possible).

Advising in the Grievance Process

- Help your advisee to identify, gather, review, organize, and present any evidence they may wish to submit (photographs, screenshots, texts, etc.)
 - Make sure your advisee brings any devices that contain evidence so that investigators can see originals when possible.
 - Make sure your advisee does not alter or omit any evidence as this will likely be quickly discovered and would be harmful to their credibility.
- Help your advisee to review the investigative report and case file documents and respond as needed.
- Help your advisee identify gaps in the investigation and suggest additional relevant questions or areas of focus.
- Your advisee has the right to not attend or participate in any or all steps in the process, but you want to discuss with them how non-participation will affect the process.

Advising in the Grievance Process

- Attend the hearing and conduct cross-examination of the other party and any witnesses during the hearing.
- Assist your advisee in understanding any determinations made by the Hearing Panel.
- Assist your advisee in preparing an impact statement to be read by the Hearing Panel during the sanctioning phase should the Respondent be found responsible for violating ATU policy.
- Assist your advisee in submitting a request for an appeal, if warranted.
- Assist your advisee in paying attention to deadlines throughout the process.
- Keep an eye open for procedural errors and biases as the resolution process unfolds, and contact the Title IX Coordinator or other appropriate administrator as warranted to raise your concerns.

Terminology and Analysis

STACY GALBO

Terminology and Analysis

Sexual Harassment:

Acts of sexual harassment may be committed by any person upon any other person, regardless of the sex, sexual orientation, and/or gender identity of those involved.

Sexual harassment, as an umbrella category, includes the offenses of sexual harassment, sexual assault, domestic violence, dating violence, and stalking.

Terminology and Analysis

Sexual Harassment, at ATU, is defined as follows:

Conduct on the basis of sex/gender or that is sexual satisfies one or more of the following:

1. Quid pro quo:
 - a. an employee of ATU,
 - b. conditions the provision of an employment or educational benefit, aid, or service of ATU,
 - c. on an individual's participation in unwelcome sexual conduct.

Terminology and Analysis

2. Sexual Harassment (Hostile Environment):

- a. unwelcome conduct,
- b. determined by a reasonable person,
- c. to be so severe, and
- d. pervasive, and,
- e. objectively offensive,
- f. that it effectively denies a Complainant equal access to ATU's education program or activity.

Terminology and Analysis

Unwelcome

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent).

Reasonable Person

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

Terminology and Analysis

Severe

- Physical conduct is more likely to be severe
- Accompanied by threats or violence
- Consider the circumstances (e.g., the ability for Complainant to remove themselves from the harassment)

Terminology and Analysis

Pervasive

- Widespread
- Openly practiced
- Well-known among students or employees – reputation of a department, person, etc.
- Occurring in public spaces (more likely to be pervasive)
- Frequency of the conduct is often a variable in assessing pervasiveness (look to intensity and duration)
- Unreasonable interference with school or job

Terminology and Analysis

Objectively Offensive

- Reasonable person standard in context
- “I know it when I see it...”
- Age and relationships of Complainant and Respondent
- Number of persons involved
- Frequency
- Severity
- Physically threatening
- Humiliating
- Intimidating
- Ridiculing
- Abusive

Terminology and Analysis

Hostile Environment: Totality of the Circumstances

- Hostile environment analysis requires that you evaluate the “totality of the circumstances.”
- Totality of the circumstances to consider:
 - Frequency, nature, and severity of the conduct (see factors previously discussed)
 - Identity of and relationship between the parties
 - Age of the parties
 - Size of the school, location of the incidents, and context in which they occurred

Terminology and Analysis

Hostile Environment: Totality of the Circumstances

- Totality of the circumstances to consider:
 - Whether the conduct unreasonably interfered with the Complainant's educational/work performance
 - Effect on the Complainant's mental or emotional state
 - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
 - Whether the speech or conduct deserves the protections of academic freedom or First Amendment protection

Terminology and Analysis

2. Sexual Harassment:

- a. unwelcome conduct,
- b. determined by a reasonable person,
- c. to be so severe, and
- d. pervasive, and,
- e. objectively offensive,
- f. that it effectively denies a Complainant equal access to ATU's education program or activity.

Terminology and Analysis

Sexual Harassment Analysis

A male student was walking across campus when he heard sounds coming from a window. Approaching the window, he realized it was a ground floor residence hall window, partially open (as were the blinds), and that the sounds coming from the room were sex sounds. He looked in and saw one of his good friends having sex with a female student. He took out his iPhone and began video recording them. As he was recording, an RA walked by and stopped him. When questioned, the student denied sharing the recording with anyone else, and agreed to delete it on the spot at the RA's behest. Both students who were recorded declined to file a complaint, saying they thought it was funny.

Terminology and Analysis

Sexual Harassment Analysis

A group of five women stand outside the cafeteria rating the “skankiness” of other women as they walk by, using a ten-point scale. They each write their ratings on individual small whiteboards, then hold them up for all to see. They also make comments on the white boards about the number of partners the rated women have had, who they have been with, their preferred positions, etc. The comments are snapped and shared amongst a large group of students watching the spectacle, some of whom know that the comments are accurate, but are not things these women would want widely circulated. Several of the women who are rated file complaints.

Terminology and Analysis

3. Sexual Assault, any sexual act directed against a Complainant, defined as:

a. 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.

Terminology and Analysis

b. 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 or because of temporary or permanent mental or physical incapacity.

Terminology and Analysis

c. Sexual Assault with and 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 or because of temporary or permanent mental or physical incapacity.

Terminology and Analysis

d. 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 or because of temporary or permanent mental or physical incapacity.

Terminology and Analysis

e. Sex Offenses, Non-forcible:

i. Incest:

- Non-forcible sexual intercourse,
- between persons who are related to each other,
- within the degrees wherein marriage is prohibited by Arkansas law.

ii. Statutory Rape:

- Non-forcible sexual intercourse,
- with a person who is under the statutory age of consent of 14.

Terminology and Analysis

4) Dating Violence, defined as:

- 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.
 - i. The existence of such a relationship shall be determined based on the complainant'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. For the purposes of this definition—
 - ii. Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
 - iii. Dating violence does not include acts covered under the definition of domestic violence.

Terminology and Analysis

5) Domestic violence, defined as:

- a. felony or misdemeanor crimes,
- b. on the basis of sex,
- c. committed by a current or former spouse or intimate partner of the Complainant under family or domestic violence laws of Arkansas, and
- d. includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a Complainant, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior, by a person who-
- e. is a current or former spouse or intimate partner of the Complainant, or person similarly situated to a spouse of the Complainant;
- f. is cohabitating, or has cohabitated, with the Complainant as a spouse or intimate partner;
- g. shares a child in common with the Complainant;
- h. commits acts against a youth or adult Complainant who is protected from those acts under the family or domestic violence laws of the jurisdiction.

To categorize an incident as Domestic Violence under this Policy, the relationship between the Respondent and the Complainant 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.

Terminology and Analysis

Economic abuse, in the context of domestic violence, dating violence, and abuse in later life, means behavior that is coercive, deceptive, or unreasonably controls or restrains a person's ability to acquire, use, or maintain economic resources to which they are entitled, including using coercion, fraud, or manipulation to—

Restrict a person's access to money, assets, credit, or financial information;

Unfairly use a person's personal economic resources, including money, assets, and credit, for one's own advantage; or

Exert undue influence over a person's financial and economic behavior or decisions, including forcing default on joint or other financial obligations, exploiting powers of attorney, guardianship, or conservatorship, or failing or neglecting to act in the best interests of a person to whom one has a fiduciary duty.

Terminology and Analysis

Technological abuse means an act or pattern of behavior that occurs within domestic violence, sexual assault, dating violence or stalking and is intended to harm, threaten, intimidate, control, stalk, harass, impersonate, exploit, extort, or monitor, except as otherwise permitted by law, another person, that occurs using any form of technology, including but not limited to: internet-enabled devices, online spaces and platforms, computers, mobile devices, cameras and imaging programs, apps, location tracking devices, or communication technologies, or any other emerging technologies.

Terminology and Analysis

Abuse later in life means neglect, abandonment, economic abuse, or willful harm of an adult aged 50 or older by an individual in an ongoing relationship of trust with the victim *or* domestic violence, dating violence, sexual assault, or stalking of an adult aged 50 or older by any individual. This definition does not include self-neglect.

Terminology and Analysis

6) Stalking, defined as:

- a. engaging in a course of conduct,
- b. on the basis of sex,
- c. directed at the Complainant, that
 - i. would cause a reasonable person to fear for the person's safety, or
 - ii. the safety of others; or
 - iii. suffer substantial emotional distress.

For the purposes of this definition —

1. 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, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
2. Reasonable person means a reasonable person under similar circumstances and with similar identities to the complainant.
3. Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

Institutional Procedure Overview

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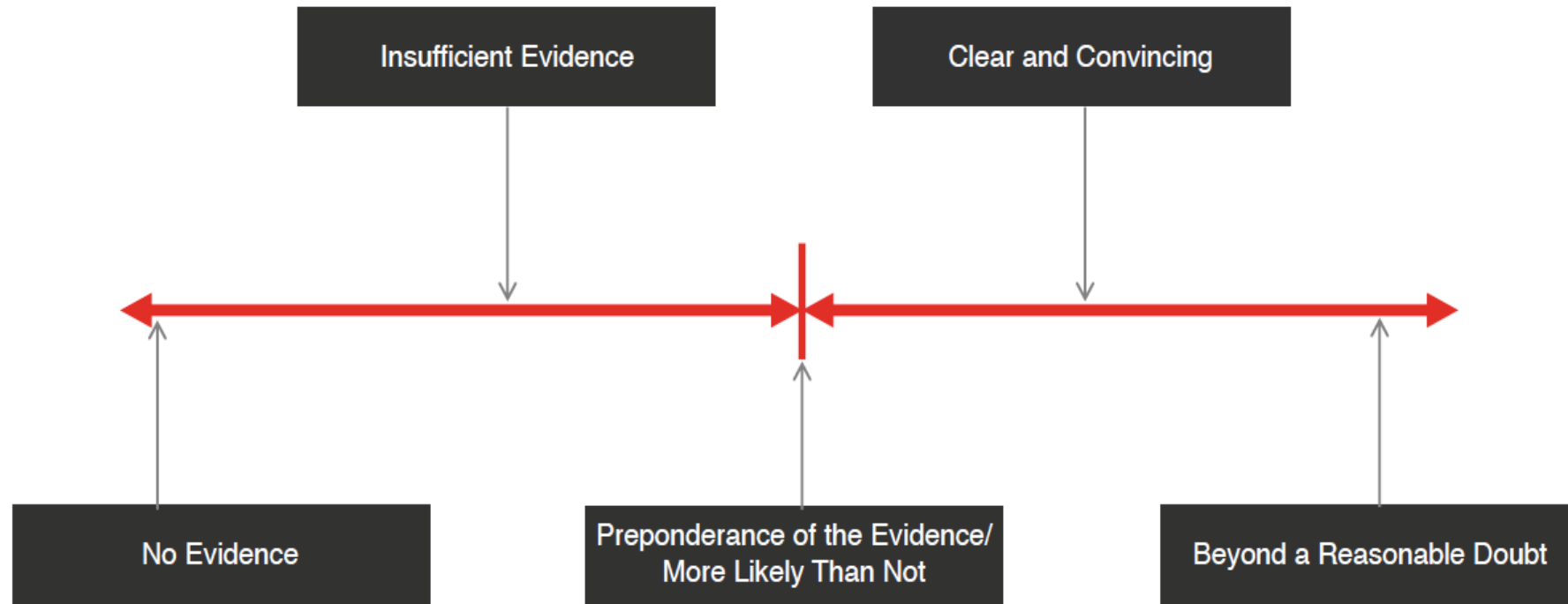
A solid green horizontal bar spanning the width of the slide, located at the bottom.

You do not have a side.
You represent the
process.

Presumption of Non-Responsibility

The Respondent is presumed not responsible. Any finding of responsibility comes at the conclusion of the process.

EVIDENTIARY STANDARDS



Force, Incapacity, and Consent: Three Questions

1. Was force used by the Respondent to obtain sexual access?
2. Did the Respondent know, or should they have known, that the Complainant was incapacitated (alcohol, other drugs, asleep, etc.)?
3. What clear words or actions by the Complainant gave the Respondent permission for the specific sexual activity that took place?

Force

Was force used by the Respondent to obtain sexual access?

There are four types of force to consider:

- Physical violence -- hitting, restraint, pushing, kicking, etc.
- Threats -- anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
- Intimidation -- an implied threat that menaces and/or causes reasonable fear
- Coercion – the application of an unreasonable amount of pressure for sexual access.
 - Consider the following:
 1. Frequency
 2. Intensity
 3. Isolation
 4. Duration

Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force.

Force

If force, in any of the four forms was used, stop here. You are done.

The policy has been violated. Consent and incapacity are irrelevant at this point.

Sanction appropriately to:

- Bring an end to the discrimination
- Prevent its future recurrence
- Remedy the effects on the Complainant

Incapacity

Did the Respondent know, or should the Respondent have known that the Complainant was incapacitated (alcohol, other drugs, asleep, etc.)?

Address this question second, because it can be ruled out quickly and efficiently if alcohol, drugs or other incapacity are not in issue. If not, move on to the third and final question about consent.

If incapacity could be involved, there is a two-step analysis →→→

Incapacity

First, was the Complainant incapacitated at the time of sex?

- Could the Complainant make rational, reasonable decisions?
- Could the Complainant appreciate the situation and address it consciously such that any consent was informed
- knowing who, what, when, where, why and how

Second, did the Respondent know of the incapacity (fact)?

Or, should the Respondent have known from all the circumstances (reasonable person)?

Incapacity

What was the form of incapacity?

- Alcohol or Other Drugs
- Not impaired, not under the influence, not drunk, but incapacitated
- Administered voluntarily or without Complainant's knowledge
- Rape drugs
- Mental/cognitive impairment
- Injury
- Sleep

Incapacity

Incapacitation is a determination that will be made after the incident in light of all the facts available

Assessing incapacitation is very fact-dependent

Blackouts are frequent issues

- Blackout = incapacitation
- Blackout = no working (form of short term) memory, thus unable to understand who, what, when, where, why or how
- Partial blackout must be assessed as well

What if the Respondent was drunk too?

Incapacity

If the Complainant was not incapacitated, move on to the third question.

If the Complainant was incapacitated, but:

- The Respondent did not know it = policy not violated.
- The Respondent should not have known it = policy not violated. Move on to third question.

If the Complainant was incapacitated, and:

- The Respondent knew it = policy violation. Sanction.
- The Respondent should have known it = policy violation. You are done. Sanction accordingly.

Consent

Question Three is the consent question:

What clear words or actions by the complainant gave the accused student permission for the specific sexual activity that took place?

- Informed (knowing)
- Voluntary (freely given)
- Active (not passive)
- Clear words or actions
- Indicating permission to engage in mutually agreed upon (sexual) activity

Consent Continued

At the heart of the idea of consent is the idea that every person has a right to personal sovereignty (autonomy): a right not to be acted upon by someone else in a sexual manner unless he or she gives clear permission to do so.

With this idea comes the understanding that consent can be broad or narrow, and can be limited, such as in cases where someone is willing to engage in some forms of sexual activity, but not in others.

Consent means two (or more) people deciding together to do the same thing, at the same time, in the same way, with one another.

Consent Continued

- Consent may be given verbally or nonverbally, but it must be communicated clearly in whatever form
- Silence and/or passivity is not consent
- Must be a verbal or non-verbal “Yes”
- Consent is in doubt when a party to a sexual interaction is making assumptions about what their partner does or does not want.
- Absence of clear signals means no consent, not try it and see if s/he likes it or objects.
- The idea of pure, autonomous consent completely rules out any requirement to show the use of force, or any type of resistance.
- Yet, the use of force or the showing of resistance would demonstrate non-consent.

Who Must Consent?

- All parties to a sexual interaction
- Consent requires that the person initiating the sexual activity get permission to do so, and that permission does not exist in the absence of resistance.
- Passively allowing someone to touch you in a sexual manner is not consent.

Consent is NOT Always Valid

There are circumstances where even when consent is given, it is not valid.

Consent would be invalid when:

- forced, threatened, intimidated, coerced,
- when given by a mentally or physically incapacitated person,
- or when given by a minor.

Consent Continued

- To be valid, consent must be given prior to or contemporaneously with the sexual activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it.
- You can place any conditions you want on your willingness to consent.
- Making someone touch you is as inappropriate as touching someone else, where no consent is given.
- If someone won't touch you, and you have to physically manipulate them to get them to touch you sexually, you automatically have a consent problem.
- Unless they freely give consent, you can't take it.

Question Three

What clear words or actions by the complainant gave the Respondent permission for the specific sexual activity that took place?

If the Respondent can answer this question with evidence of sufficient words or actions, you are done. There is no policy violation.

Weighing Evidence

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Types of Evidence

- Documentary evidence (supportive writings or documents)
- Electronic evidence (photos, text messages, and videos)
- Real evidence (physical objects)
- Direct or testimonial evidence (personal observation or experience)
- Circumstantial evidence (requires inference)
- Hearsay evidence (Stacy told me that William took a two hour lunch)
- Character evidence (rarely useful)
- Only assign weight to these when relevant and credible

Weighing Evidence Impartially

Credibility- the process of weighing the accuracy and reliability of evidence.

To assess credibility, evaluate the following:

1. Source- where is the information coming from?
2. Content- could the witness hear what they say they heard?
3. Plausibility- does the information even make sense to a reasonable person?

When all three are strong, credibility is strong.

Think of credibility on a 100% scale:

- i. If it dips below 50% the witness or evidence doesn't weight the scale.
- ii. If the witness or evidence is more credible than not it does weight the scale for determining a preponderance.

Weighing Evidence

Credibility weighted on neutrality, impartiality, and objectivity:

1. The more loyal a witness is based on relationship to one party, the more biased their evidence could be.
2. Neutral witnesses may be more objective than partisan witnesses.

Credibility is best established through corroboration, which is provided through sufficient independent evidence:

1. Corroboration is more than another witness who agrees with the first.
2. You need evidentiary support for what the witness contends.
3. What is observed in person is most valuable, what you heard from the responding party about the incident after the fact is less so, and what you learned from the responding party's best friend about the incident is even less so.

Weighing Evidence

Abductive Reasoning:

Credibility can also be assessed by triangulation-

1. Use two or more data points to extrapolate or infer that a third data point is more likely than other possibilities.
2. Triangulation is simply being faced with two plausible explanations (b & c) and deciding which is the more plausible (likely) based on the fact that you know a & d to be true. based on what you know about a & d, b is more likely than c.

Weighing Evidence

- Avoid micro-expression analysis and gestics unless you are an expert.
- Major inconsistencies would likely detract from credibility.
- If established, continuation of harassing behavior after the responding party was informed it was unwelcomed would be corroborating.
- Documents such as diaries, calendar entries, journals, notes, or letters describing the incident(s) can add to credibility, but can also be manufactured after-the-fact. The adage, “trust, but verify,” applies.
- Telling another person about the harassment may add to credibility, but if the accounts provided to others vary meaningfully, that can also undermine credibility

Weighing Evidence

- Motivation to lie, exaggerate, or distort information should be assessed when there are differences in what was reported or questions about veracity or accuracy.
- Questions to consider in assessing credibility:
 1. How might a reasonable person react to the incident(s)?
 2. What was the effect of the behavior on the Complainant?
- A preponderance can be established simply because you believe one party and not the other, based on assessment of credibility of the party and the evidence provided.

Weighing Evidence

- Explanations of why the harassment occurred do not add to credibility.
- People who have sexually harassed others often acknowledge their behavior but explain and defend it in ways that do not justify their actions and should not add to their credibility.
- To the contrary, such excuses should be seen as admissions of having engaged in sexually harassing behaviors.
- For example:
 - “I didn’t know it was against the rules.”
 - “I was just joking around.”
 - “I was just flirting with her.”
 - “She was leading me on!”

Weighing Evidence

The following do not add or detract from credibility of the responding party because they are irrelevant:

- Character witnesses. (“He is such a good kid; I know he would never do that.”)
- Popularity with staff and other students. (“Everybody likes him; I just don’t believe he would do that.”)
- No history of past problems. (“She’s never been in trouble before.”)
- Academic performance. (“But he’s a really good student. His professors really like him.”)

Weighing Evidence

The following do not add or detract from credibility of the Complainant:

- Clothing. (“Just look at what she was wearing.”) Clothing does not cause sexual harassment, nor does it give anyone permission to touch or make sexual remarks.
- Appearance. (“She is so pretty no wonder he did it,” or “she is so unattractive! I don’t believe anyone would do that to her.”)
- Flirting behavior. (“He’s always flirting with the boys, what did he expect?”)
- Males being Complainants. (“He should have realized she meant it as a compliment.”)
- Sexual orientation of Complainant (“listen, he came out of the closet and told everyone. He should have expected that people would act like this.”)
- Finally, politics, including athletics participation, concern about the team, concern about “getting a good student in trouble,” whether someone is a last semester senior, etc., cannot impact decisions about whether a policy has been violated.

Relevance

- Evidence that is relevant helps to prove or disprove whether or not a policy violation occurred or speaks to the credibility of the complainant, respondent, or witness.
- Investigators have already done some preliminary assessment of relevance based on what is included in the investigative report.
- Ultimately, relevance at the hearing will be determined by the decision-makers.
- Relevant evidence must be evaluated impartially.
- Character evidence is of little to no value.
- Impact statements may be useful during sanctioning, but are of little evidentiary value during the hearing.
- Complainant's prior sexual behavior is irrelevant with limited exceptions.

Hearing Resolution

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Preparing for the Hearing

- The Hearing Panel will most likely meet prior to the scheduled hearing.
- The Panel will review the investigative report.
- The Panel will compile relevant questions for the parties and any witnesses.
- The Panel will discuss anticipated relevance issues.
- The Advisors will be asked to pause after questions and before the question is answered, the decision-makers will make a relevancy determination.

Hearing Technology

- Webex Meetings will be used when a virtual option is needed.
- Each hearing will be recorded, and there will be one verbatim record.
- Any technology needed to review evidence will be provided, i.e. videos, photos, card swipes, etc.

Rendering a Finding

- Decisions must be based on the facts in the investigative report and presented at the hearing, not any outside evidence.
- The Panel must first determine whether or not the policy was violated. The sanction discussion will take place if they reach a finding of responsibility.
- Don't let the severity of the case change your standard of evidence.

Sanctions

Sanction appropriately to:

- Bring an end to the discrimination
- Prevent its future recurrence
- Remedy the effects on the Complainant

Sanctions for serious misconduct should be aimed at protecting the Complainant and the community.

Sanctions

- Progressive discipline when appropriate
- Warning
- Probation
- Loss of Privileges (ban from library)
- Educational Sanction (Judicial Educator Module, policy reviews, etc.)
- Discretionary Sanctions
- Monetary Fine
- Housing Suspension
- University Suspension
- Expulsion
- Termination of Employment

Generating a Rationale

- Once the Panel has a finding and determined any appropriate sanctions, a written determination is composed.
- The determination includes a rationale statement.
- The written determination is be shared with both parties.

Appeals

- Any party may file a request for appeal, but it must be submitted in writing to the Title IX Coordinator within five (5) days of the delivery of the Notice of Outcome.
- Student appeals will be decided by the Vice President for Student Affairs. Employee appeals will be decided by the appropriate Vice President or Athletic Director.
- If the Respondent is a faculty member with tenure or with a special or probationary appointment, the procedures set forth in the Academic Termination Policies and Procedures section of the Faculty Handbook shall govern the Respondent's appeal.
- All parties will be kept informed of any appeals and be given an opportunity to respond.
- Sanctions will be stayed during the appeal unless removed on an emergency basis after safety and risk analysis.
- Not intended to provide for a full re-hearing.

Appeals Continued

Appeals are limited to the following grounds:

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
3. The Title IX Coordinator, investigator(s), or Decision-Makers had a conflict of interest or bias for or against complainants or respondents generally or the specific complainant or respondent that affected the outcome of the matter.

Dishonesty During the Process

- University community members are expected to participate in the process and be honest.
- Failure to do so may result in violation of the Acts of Dishonesty Policy for students and disciplinary measures for employees.

Questioning

WILLIAM TITSWORTH

Questioning

- Have a purpose for asking every question.
- Be sure to ask a question, not make a speech.
- Ask questions about the allegations and the evidence and the policy elements.
- Don't be accusing or argumentative.
- Don't make questions too long or confusing.
- Listen carefully and adapt follow-up questions.

Questioning

- Focus on areas of conflicting evidence or gaps of information.
- Avoid evaluative responses to a person's answers.
 - E.g.: That's too bad, I'm glad you said that.
- Do not moralize.
- Do not blame the Complainant (often called "victim-blaming").
 - E.g.: Why didn't you hit him? Why didn't you leave? Why did you get so drunk?
 - Complainants' responses to trauma are quite varied.
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "fooled around," and "had a few drinks."

Questioning

- Open-ended questions (tell us...who, what, how?)
- Close-ended questions (Did you, were you?) – Use infrequently, but when needed to drill down on a specific issue.
- Careful with Compound Questions – I have two questions, First..., Second...
- Multiple Choice Questions – Were you a), b), c)
- Avoid leading questions – (Isn't it the case that...?)

Case Study Assessment

WILLIAM TITSWORTH

Case Studies; Bill and Sarah/Amy and Todd

Break off into groups of three to create hearing panels, review the case studies, and make the following determinations:

- Is Bill responsible for violating the policy based on a preponderance of evidence standard because Sarah was incapacitated when the sexual activity occurred and he should have known? Is Bill responsible for violating the policy based on a preponderance of evidence standard because Sarah didn't consent to sexual activity? Explain why or why not highlighting some relevant pieces of evidence in a brief statement of finding.
- Is Todd responsible for violating the policy based on a preponderance of evidence standard of proof because Amy was incapacitated when the sexual activity occurred and he should have known this fact? Explain why or why not highlighting some relevant pieces of evidence in a brief statement of finding.

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