

## What Title IX Coordinators, Investigators, Decision-Makers and Informal Resolution Facilitators Need to Know About Their Obligations Under 2020 Title IX Regulations

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### Topics for Discussion 8/5/20 (Whole Group)

- Pertinent Regulatory Background
- Overview of U-M Framework, Individuals With Reporting Obligations and Confidential Resources
- Focusing on Conduct, Not Gender
- Definitions of Sexual and Gender-Based Misconduct and Title IX Misconduct
- Scope of University's Education Programs and Activities
- Serving Impartially, Including by Avoiding:
  - Prejudgment of the Facts at Issue
  - Conflicts of Interest, and
  - Bias
- Ensuring that Witness-Centered Investigation and Adjudication Approaches are Applied in a Manner that is Demonstrably Impartial, Thorough, and Fair to All Parties

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### Topics for Discussion 8/6/20

- Discussion with Decision-Makers:
  - Conducting Hearings
  - “Directly Related” and “Relevance” Concepts
  - Special Evidentiary Issues
  - Sanctioning Considerations
- Discussion with Investigators
  - “Directly Related” and “Relevance” Concepts
  - Special Evidentiary Issues
  - Preliminary and Final Investigative Reports

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## Pertinent Regulatory Background

## The Long Road to the New Regulations...

- **September 7, 2017:** Department of Education Secretary Betsy DeVos announces notice and comment process
- **September 22, 2017:** OCR issued:
  - Dear Colleague Letter ("2017 DCL") withdrawing 2011 DCL and 2014 Q&A
  - Q&A on Campus Sexual Misconduct ("2017 Q&A")
- **November 16, 2018:** Proposed Regulations Posted
  - Officially published in Federal Register later in November, 2018
  - Fact Sheet and Summary also posted

## The Long Road to the New Regulations...

- Approximately 125,000 public comments were submitted
- **May 6, 2020:** Final Regulations Posted
  - Officially published in Federal Register May 19, 2020
- **August 14, 2020:** Final Regulations Effective



## NACUA NOTES

### J. Nolan, "Promoting Fairness in Trauma-Informed Investigation Training"

- National Association of College and University Attorneys ("NACUA") NACUANOTE, February 8, 2018, Vol. 16 No. 5
  - cited once in Title IX regulations Preamble

Updated Holland & Knight white paper version available at:

<https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>

- cited 8 times in Title IX regulations Preamble

## Scope of Institutional Responsibility

- Institution must respond when it has:
  - “Actual knowledge”
    - When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator
  - of “sexual harassment” (as newly defined)
  - that occurred within the school’s “education program or activity”
    - “includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred
    - Fact specific inquiry focused on control, sponsorship, applicable rules, etc.
  - against a “person in the United States” (so, not in study abroad context)

## Selected Procedural Changes

- Must investigate “formal complaints”
- Must satisfy certain notice and ongoing notice requirements
- Must produce investigation report with certain elements
- Must give parties and advisors opportunity to review all information “directly related to allegations”
  - Broader than:
    - “all relevant evidence” as otherwise used in Title IX regulations, and
    - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

## Selected Procedural Changes

- New procedures require that schools:
  - Ensure that burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties
  - Provide equal opportunity for parties to present witnesses and other inculpatory and exculpatory evidence;

## Selected Procedural Changes

- New procedural regulations require that schools:
  - Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence
  - Essentially, follow many aspects of Sixth Circuit’s *Doe v. Baum* decision in student and employee cases involving alleged Title IX Sexual Harassment
- Many other changes will be discussed as they are applied in context of new University procedures

## Overview of U-M Framework Individuals with Reporting Obligations Confidential Resources

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### Student Sexual Misconduct Procedures Investigative Resolution

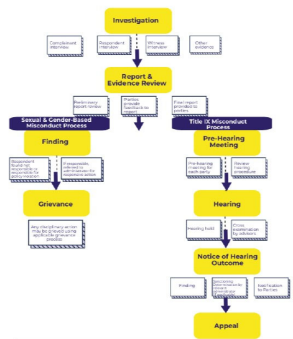


Office for Institutional Equity (OIE) Office for Student Conflict Resolution (OSCR)

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### Staff & Faculty Sexual Misconduct Procedures Investigative Resolution

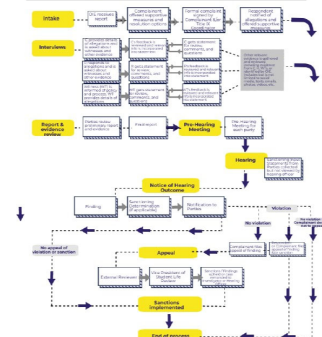


Office for Institutional Equity (OIE)

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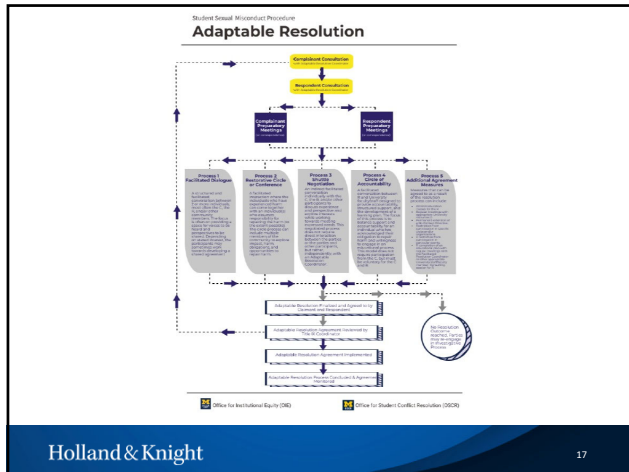
### Student Sexual Misconduct Procedures Investigative Resolution



Office for Institutional Equity (OIE) Office for Student Conflict Resolution (OSCR)

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### Individuals With Reporting Obligations

- Subject to exceptions explained below, IROs are required by University policy to share with OIE details they receive about Prohibited Conduct within 48 hours of learning those details
- Failure to do so as required by policy may result in discipline up to and including termination of employment

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### Two Categories of IROs

- Officials With Authority to Institute Corrective Action must report such information to OIE even if learned about:
  - Outside the scope of their employment, or
  - When communicated/disclosed during
    - A classroom discussion
    - In an assignment for a class and
    - In discussions outside of class time (e.g., during office hours related to the assignment), or
    - As part of a research project directly associated with the class
- Other IROs must report unless learned about outside scope of employment, in academic contexts listed above or some other contexts discussed below

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### Officials With Authority

- Officials With Authority to Institute Corrective Action include:
  - Board of Regents members, President, Executive Officers/Chancellors
  - Deans
  - Department Chairs
  - Student Life staff members responsible for discipline/sanctions/remedies in response to non-academic student misconduct (excluding student staff)
  - Athletic Director and Varsity Head Coaches
  - OIE Directors (including Assoc./Assist. Dirs.), and
  - Title IX Coordinators

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## Individuals With Reporting Obligations

- IROs who are not Officials With Authority must report information about Prohibited Conduct to OIE within 48 hours unless learned about:
  - Outside the scope of their employment, or
  - When communicated/disclosed during
    - A classroom discussion
    - In an assignment for a class
    - In discussions outside of class time (e.g., during office hours related to the assignment),
    - As part of a research project directly associated with the class
    - at sexual misconduct public awareness events, or
    - unless otherwise provided in the IRB-approved consent, during a non-minor participant's involvement as a subject in an IRB-approved human subjects research protocol

## Individuals With Reporting Obligations

- IROs who are not Officials With Authority include:
  - Vice, associate and assistant Executive Officer/Chancellor, Dean and Department Chair roles
  - Academic and staff supervisors (i.e., employees who have authority to hire, transfer, suspend, layoff, recall, promote, discharge, reward or discipline other employees)
  - All Student Life staff members (including any individual, whether an Employee or not, who serves as a coach of a club sports team), excluding clerical, custodial, maintenance, and dining employees
  - Resident-Advisors in Housing and Residential Education

## Individuals With Reporting Obligations

- IROs who are not Officials With Authority include:
  - All athletics staff members, excluding clerical, custodial, maintenance and dining employees
  - All OIE staff, excluding clerical employees, interns and student staff
  - All DPSS staff members, excluding clerical, custodial and maintenance employees
  - All HR staff members (central, school, college, division, and/or unit) who are responsible for handling employment issues, excluding clerical and transactional employees
  - All faculty and staff members who provide direct oversight of University-related travel abroad experiences for students, including University-sponsored study abroad, research, fieldwork, or internship programs
  - All faculty and staff members who accompany students on University-related travel abroad

## Individuals With Reporting Obligations

- IROs who are not Officials With Authority include:
  - All faculty and staff serving as identified advisors to student organizations required by their campus to have a named faculty or staff adviser.
    - For Ann Arbor, this includes faculty and staff serving as identified advisors to Sponsored Student Organizations
    - For Dearborn, this includes faculty and staff serving as identified advisors to Sponsored Student Organizations and Registered Student Organizations
    - For Flint, this includes faculty and staff serving as identified advisors to Recognized Student Organizations
- Unless designated as an IRO in another role at the University, staff and faculty members who serve as such advisors are only IROs with respect to concerns they become aware of connected to the student organization they advise

## Confidential Resources

- "Confidential Resources" are available to provide individuals with assistance, support, and additional information and who are prohibited from disclosing confidential information unless:
  - (1) given permission by the person who disclosed the information;
  - (2) there is an imminent threat of harm to self or others;
  - (3) the conduct involves suspected abuse of a minor under the age of 18; or
  - (4) as otherwise required or permitted by law or court order.
- Confidential Resources may be required to report non-identifying information to DPSS for crime reporting purposes.

## Confidential Resources

- Confidential Resources are identified in Umbrella Policy
- Examples include:
  - Sexual assault advocates (e.g., SAPAC)
  - Counseling offices and services for students, student athletes, and employees
  - Health services
  - Ombuds

## Non-Confidential Resources

- "Non-Confidential Resources" are available to provide individuals with assistance, support, and additional information, but who are not designated as confidential and may have broader obligations to report information that is shared with them.
- Non-Confidential Resources will make reasonable efforts to respect and safeguard the privacy of the individuals involved.
- Privacy means that concerns about Prohibited Conduct will only be shared with University representatives, such as
  - OIE, responsible for assessment, investigation, or resolution of the report or otherwise properly responding to issues raised;
  - to DPSS for crime statistics reporting; and
  - to the extent required by law or court order.

## Non-Confidential Resources

- Non-Confidential Resources are listed in the Umbrella Policy
- Examples:
  - Dean of Students offices
  - Respondent Support Program (in Ann Arbor DOS Office)
  - Academic, Staff and Michigan Medicine Human Resources offices
  - Center for Social Justice and Inclusion (Dearborn Campus)
- Additional information about these and other resources is contained in the Our Community Matters Resource Guides for each campus

## Focus on Conduct, Not Gender

## Focus on Conduct, Not Gender

- » Majority of reported incidents and investigations in university context involve cisgender heterosexual women as complainants and cisgender heterosexual men as respondents, but:
  - The gender, gender identity and/or sexual orientation of any party to an investigation should have no bearing on how colleges and universities will investigate

## CDC National Intimate Partner and Sexual Violence Survey, Summary Report (2011)

- » 16,507 survey respondents
- » Found that men and women had similar prevalence of nonconsensual sex in the previous 12 months
- » Estimated 1.270 million women raped and 1.267 million men "made to penetrate"

[http://www.cdc.gov/ViolencePrevention/pdf/NISVS\\_Report2010-a.pdf](http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf)

## Focus on Conduct, Not Gender

- » See *Nungesser v. Columbia Univ.*, 169 F.Supp.3d 353, 365 n.8 (S.D.N.Y. 2016) (citing Lara Stemple and Ilan H. Meyer, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 Am. J. Of Public Health, e19 (June 2014)
  - (“noting that although the idea of female perpetrators sexually assaulting male victims is ‘politically unpalatable,’ studies have found that up to 46% of male victims report a female perpetrator”)) (parenthetical note in *Nungesser*)
- » *Sexual Victimization of Men* article is available here:
  - [https://www.researchgate.net/publication/262306031\\_The\\_Sexual\\_Victimization\\_of\\_Men\\_in\\_America\\_New\\_Data\\_Challenge\\_Old\\_Assumptions](https://www.researchgate.net/publication/262306031_The_Sexual_Victimization_of_Men_in_America_New_Data_Challenge_Old_Assumptions)



## Focus on Conduct, Not Gender

*Sexual Victimization of Men* article observes in part (with citations):

- » Portraying male victimization as aberrant or harmless adds to the stigmatization of men who face sexual victimization
- » Fallacies described as “rape myths” in context of female victimization have been discredited in American society (to some extent), but this discourse has not been developed in the context of male victims
- » Myths regarding sexual assault of men pose obstacles to men coping with victimization

## Focus on Conduct, Not Gender

- » See also Jessica A. Turchik, *Sexual Victimization Among Male College Students: Assault Severity, Sexual Functioning, and Health Risk Behaviors*, *Psych. of Men & Masculinity*, Vol. 13, No. 3, 243-255 (2012) (available at: [https://www.researchgate.net/publication/232425813\\_Sexual\\_Victimization\\_Among\\_Male\\_College\\_Students\\_Assault\\_Severity\\_Sexual\\_Functioning\\_and\\_Health\\_Risk\\_Behaviors/link/09e41510807d975c0a000000/download](https://www.researchgate.net/publication/232425813_Sexual_Victimization_Among_Male_College_Students_Assault_Severity_Sexual_Functioning_and_Health_Risk_Behaviors/link/09e41510807d975c0a000000/download) )
- » 299 male college students asked whether they had experienced at least one sexual victimization experience since age 16:
  - 21.7% reported unwanted sexual contact, 12.4% reported sexual coercion, and 17.1% reported completed rape
  - 48.4% of these experiences involved female perpetrators

## Court Decisions Focused on Conduct, Not Gender

- » *Nungesser v. Columbia University*, No. 1:15-cv-3216-GHW (S.D.N.Y. March 11, 2016)
- » Court granted University's motion to dismiss “successful” respondent's claim that University failed to appropriately address public statements and activism by complainant in his case because, e.g.:
  - Plaintiff's claim was based on the “logical fallacy” that because the allegations against him concerned a sexual act, that everything that follows from it is “sex-based” for Title IX purposes
  - Personal animus by complainant against him was based on their belief that he raped them, not per se because he is male
  - Persons of any gender may be perpetrators or victims of sexual assault

## Court Decisions Focused on Conduct, Not Gender

- » *Doe v. University of Chicago*, No. 16 C 08298 (N.D.Ill. September 20, 2017)
- » “Successful” plaintiff/respondent claimed that University's response to public statements about him by complainant was so inadequate as to violate Title IX
  - Court rejected claim for the most part, holding, among other things:
    - Personal animus expressed toward someone because they are believed to have engaged in sexual assault is not per se discrimination because of sex for Title IX purposes

### Court Decisions Focused on Conduct, Not Gender

*John Doe v. Columbia College Chicago*, 2017 WL 4804982 (N.D.Ill. Oct. 25, 2017):

- » “As in *University of Chicago*, any harassment that Doe suffered at the hands of Roe and her friends—including the alleged physical assault, the verbal comments made to Doe, and the social media comments and text messages—was ‘because they believed he had committed sexual assault or because of personal—not gender—animus.’”
- » “Doe’s own allegations make clear that he was harassed because of his relationship with Roe and because of his status as a person accused of sexual assault, not because of his gender.”

### Court Decisions Focused on Conduct, Not Gender

*John Doe v. Columbia College Chicago*, 2017 WL 4804982:

- » “Roe and her followers’ social media statements about Doe, for example, labeled him a “predator,” a “rapist,” and a “danger” to CCC’s students. Even viewed in the light most favorable to Plaintiff, these statements are not gender-based harassment because they derive solely from Doe’s status as a person who Roe and her friends believed committed a sexual assault, not from Doe’s status as a male.”
- » As the court in *Nungesser* explained, calling someone a rapist is not “inherently gendered.”

### Recognize Potential for Retaliation

- » It should be noted that these court decisions focused on whether respondent/plaintiff was subjected to sex discrimination for purposes of Title IX
- » It should be recognized that adverse actions taken against respondents could implicate:
  - prohibitions against Retaliation (discussed below) and/or
  - other University conduct policies

### Colleges and Universities are “Anti-SA, Anti-IPV, Anti-Stalking”

- » Universities are opposed to prohibited misconduct that is established by the evidence in a particular case
- » They are not opposed to anyone on the basis of their gender
- » *Gomes v. Univ. of Maine Sys.* (D. Me. 2005): “There is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it. It is another matter altogether to assert that, because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.”

## Definitions of Sexual and Gender-Based Misconduct and Title IX Misconduct

## Sexual and Gender-Based Misconduct Definitions

- » "The University must define and respond to Title IX Misconduct as required by regulations issued in May 2020 by the U.S. Department of Education to implement Title IX of the Education Amendments of 1972, codified at 34 C.F.R. Part 106 (the "Title IX Regulations").
- » The Title IX Regulations allow the University to define and regulate Prohibited Conduct that falls outside the definition of Title IX Misconduct, but which the University is committed to addressing as a matter of University policy and/or as required by other applicable law.
- » Accordingly, the University's Policy prohibiting Sexual and Gender-Based Misconduct and Title IX Misconduct is consistent with the Title IX Regulations, as well as the University's mission and commitment to ensuring a safe and non-discriminatory campus community."

## Sexual and Gender-Based Misconduct Definitions

- » The SGBM Policy prohibits two broad categories of misconduct:
  - **Sexual and Gender-Based Misconduct** (i.e., Sexual Assault; Sexual Exploitation; Sexual Harassment; Gender-Based Harassment; Sex and/or Gender-Based Stalking; Intimate Partner Violence; Sex and Gender-Based Discrimination; Retaliation and Violation of Supportive Measures); and
  - **Title IX Misconduct** (i.e., *Quid Pro Quo* Sexual Harassment; Severe, Pervasive and Objectively Offensive Sexual Harassment; Sexual Assault; and Sex-Based Intimate Partner Violence and Stalking; as defined by and within the scope of Title IX).

## Sexual and Gender-Based Misconduct Definitions

**Sexual Assault** is "Sexual Contact that occurs without Consent.

- » Sexual Contact includes:
  - » Intentional sexual touching of another person's breasts, buttocks, or genitals, whether clothed or unclothed (including intentional touching with ejaculate);
  - » Intentional sexual touching with one's breast, buttocks, or genitals (including touching with ejaculate);
  - » Making a person touch another person or themselves with or on any of these body parts; and/or
  - » Vaginal, oral, or anal penetration or contact by a penis, tongue, finger, or other object."

## Sexual and Gender-Based Misconduct Definitions

- » Sexual Exploitation is "intentional conduct by which an individual takes or attempts to take non-consensual sexual advantage of another for one's own benefit, or to benefit anyone other than the one being exploited."
- » "Examples of Sexual Exploitation include doing any of the following:
  - Intentionally or knowingly causing the Incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give Consent to Sexual Activity;
  - Intentionally or knowingly engaging in voyeurism, including observing or allowing another(s) to observe private sexual or intimate activity (e.g., disrobing, bathing, toileting) without the Consent of the individual(s) being observed, whether from a hidden location or through electronic means (e.g., Skype or live-streaming of images);"

## Sexual and Gender-Based Misconduct Definitions

"Examples of Sexual Exploitation include doing any of the following: . . .

- » Intentionally or knowingly recording or photographing, or disseminating or posting images of private sexual or intimate activity and/or a person's intimate parts (including genitalia, groin, breasts and/or buttocks) without Consent;
- » Intentionally or knowingly, without Consent, engaging in the recruitment, transportation, harboring, or receipt of a person(s) for the purposes of a commercial sex act(s);

## Sexual and Gender-Based Misconduct Definitions

- "Examples of Sexual Exploitation include doing any of the following: . . .
- » Intentionally or knowingly demanding financial compensation, Sexual Contact, or some other benefit under threat of disseminating or posting an image, video or other recording, of private sexual or intimate activity and/or a person's genitalia, groin, breasts, and/or buttocks;
  - » Intentionally or knowingly exposing another person to a sexually transmitted infection without the other's knowledge; and/or
  - » Intentionally or knowingly, through one's actions, aiding or assisting another person in committing an act of Prohibited Conduct."

## Sexual and Gender-Based Misconduct Definitions

- » "Sexual Harassment is any unwelcome conduct of a sexual nature, whether verbal, graphic (e.g., pictures and videos), physical, or otherwise, when:
  - Submission to such conduct is made, either explicitly or implicitly, a term or condition of a person's employment, education, living environment, or participation in any University Program or Activity;
  - Submission to or rejection of such conduct by an individual is used as the basis for or a factor in decisions affecting that individual's employment, education, living environment, or participation in a University Program or Activity; and/or
  - Such conduct creates a hostile environment."

## Sexual and Gender-Based Misconduct Definitions

- » "A hostile environment exists when the unwelcome conduct of a sexual nature is sufficiently severe, persistent, or pervasive that it unreasonably interferes with an individual's participation in a University Program or Activity or creates an intimidating, hostile, offensive, or abusive environment for that individual's participation in a University Program or Activity.
- » Conduct must be deemed severe, persistent, or pervasive from both a subjective and an objective perspective.
- » Although a hostile environment is generally created through a series of incidents, for purposes of this Policy, a severe incident, even if isolated, can be sufficient."

## Sexual and Gender-Based Misconduct Definitions

- » "This definition of Sexual Harassment addresses intentional conduct. It may also include conduct that results in negative effects even though such negative effects were unintended.
- » Unwelcome conduct of a sexual nature constitutes Sexual Harassment if a Reasonable Person would consider it sufficiently severe, persistent, or pervasive as to interfere unreasonably with academic, other educational, or employment performance or participation in a University activity or living environment."
- » SGBM Policy includes several examples

## Sexual and Gender-Based Misconduct Definitions

- » "**Gender-Based Harassment** includes harassment based on actual or perceived sex, sexual orientation, gender identity, gender expression, or pregnancy.
- » Such harassment may include acts of aggression, intimidation, or hostility, whether verbal, graphic, physical, or otherwise, even if the acts do not involve conduct of a sexual nature, when the behavior:
  - Adversely affects a term or condition of an individual's employment, education, living environment, or participation in a University Program or Activity;
  - Is used as the basis for or a factor in decisions affecting that individual's employment, education, living environment, or participation in a University Program or Activity; and/or
- » Creates a hostile environment for that individual's participation in a University Program or Activity.
- » Subjective/objective test applies to gender-based harassment as well

## Sexual and Gender-Based Misconduct Definitions

- » "**Sex and/or Gender-Based Stalking** occurs when an individual engages in a course of conduct directed at a specific person under circumstances that would cause a Reasonable Person to:
  - Fear for his or her safety or the safety of others; or
  - Suffer substantial emotional distress."
- » "For purposes of this definition of Sex and/or Gender-Based Stalking only, the definition of "Reasonable Person" is a Reasonable Person under similar circumstances and with similar identities to the Complainant."
- » "Course of conduct means two or more acts, including but not limited to, acts in which a person directly, indirectly or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about another person, or interferes with another person's property."

## Sexual and Gender-Based Misconduct Definitions

- » **"Intimate Partner Violence"** collectively "IPV", includes Dating Violence and Domestic Violence.
- » The term "Dating Violence" means violence committed by a person:
  - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - Where the existence of such a relationship shall be determined based on the reporting party's statement and with a consideration of the following factors:
    - 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 it is not limited to, sexual or physical abuse or the threat of such abuse."

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## Sexual and Gender-Based Misconduct Definitions

- » "The term "Domestic Violence" includes felony or misdemeanor crimes 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 Michigan, or
  - 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 Michigan.

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## Sexual and Gender-Based Misconduct Definitions

- » **"Sex and Gender-Based Discrimination"** is conduct that is based upon an individual's sex, sexual orientation, gender identity, gender expression, or pregnancy that:
  - Adversely affects a term or condition of an individual's employment, education, living environment, or participation in a University Program or Activity; and/or
  - Is used as the basis for or a factor in decisions affecting that individual's employment, education, living environment, or participation in a University Program or Activity.
- » SGBM policy examples

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## Sexual and Gender-Based Misconduct Definitions

- **"Title IX Misconduct:**
  - Occurs in the United States;
  - Occurs in a University Program or Activity; and
  - A Formal Complaint must also be filed."

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## Sexual and Gender-Based Misconduct Definitions

Title IX Misconduct: ...

- Is conduct on the basis of sex in which:
  - An Employee conditions the provision of a University aid, benefit, or service on an individual's participation in unwelcome sexual conduct;
  - A Student, Employee, or Third Party engages in unwelcome conduct determined by a Reasonable Person to be so severe, pervasive, and objectively offensive that it effectively denies another person equal access to a University Program or Activity; or
  - A Student, Employee, or Third Party engages in:
    - Sex or Gender-Based Stalking (defined above);
    - Dating Violence (defined above);
    - Domestic Violence (defined above); or
    - Sexual Assault [defined below] . . . ."

## Sexual and Gender-Based Misconduct Definitions

**Sexual Assault** as defined in FBI/UCR/NIBRS includes:

- **Rape:**
  - "The carnal knowledge of a person (i.e., penile-vaginal penetration), without the Consent of that person, including instances where the person is incapable of giving Consent because of their age or because of their temporary or permanent mental or physical incapacity (it should be noted that either females or males could be Complainants under this definition)
  - Oral or anal sexual intercourse (i.e., penile penetration) with another person [without Consent including because of age or incapacity]
  - To use an object or instrument (e.g., an inanimate object or body part other than a penis) to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, [without Consent including because of age or incapacity]"

## Sexual and Gender-Based Misconduct Definitions

**Sexual Assault** as defined in FBI/UCR/NIBRS includes:

- **"Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of that person, including instances where the person is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity
- (for purposes of this definition, "private body parts" includes breasts, buttocks, or genitals, whether clothed or unclothed)"

## Sexual and Gender-Based Misconduct Definitions

**Sexual Assault** as defined in FBI/UCR/NIBRS includes:

- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law; or
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of Consent.

### Sexual and Gender-Based Misconduct Definitions

- “**Reasonable Person**” means a person using average care, intelligence, and judgment in the known circumstances.”
- “**Sexual Activity** refers to any conduct of a sexual nature for which Consent is required under this Policy (i.e., Sexual Contact, as defined below and behaviors identified in the definition of Sexual Exploitation, below, that require consent).”

### Sexual and Gender-Based Misconduct Definitions

- “**Consent** is a clear and unambiguous agreement, expressed outwardly through mutually understandable words or actions, to engage in Sexual Activity.”
- “A person who initiates Sexual Activity is responsible for obtaining Consent for that conduct.
- Consent cannot be obtained by Force or in circumstances involving Incapacitation, as defined below.”

### Sexual and Gender-Based Misconduct Definitions

- “In evaluating whether Consent was given under this Policy, the issue is:
  - Did the person initiating Sexual Activity know that the conduct in question was not consensual?
  - If not, would a Reasonable Person who is unimpaired by alcohol or drugs have known that the conduct in question was not consensual?
- If the answer to either of these questions is “Yes,” Consent was absent and the conduct is likely a violation of this Policy.”

### Sexual and Gender-Based Misconduct Definitions

- “Consent is not to be inferred from silence, passivity, or a lack of resistance, and relying on non-verbal communication alone may not be sufficient to determine Consent.
- Consent is not to be inferred from an existing or previous dating or sexual relationship.
  - Even in the context of a relationship, there must be mutual Consent to engage in any Sexual Activity each time it occurs.
  - In cases involving prior or current relationships, the manner and nature of prior communications between the parties and the context of the relationship may have a bearing on the presence of Consent.
- Consent to engage in a particular Sexual Activity at one time is not Consent to engage in a different Sexual Activity or to engage in the same Sexual Activity on a later occasion.”



## Sexual and Gender-Based Misconduct Definitions

- "Consent can be withdrawn by any party at any point.
  - An individual who seeks to withdraw Consent must communicate, through clear words or actions, a decision to cease the Sexual Activity.
  - Once Consent is withdrawn, the Sexual Activity must cease immediately.
- Given the inherent power differential in the context of a professional faculty- student, staff-student or supervisor-supervisee interactions, when the Respondent is the faculty member, staff member, or supervisor, the University will generally apply heightened scrutiny to an assertion of Consent."

## Sexual and Gender-Based Misconduct Definitions

- "**Force** includes the use of physical violence, threats, and/or coercion.
  - Physical violence means that a person is exerting control over another person through the use of physical force.
  - Examples of physical violence include hitting, punching, slapping, kicking, restraining, strangling, and brandishing or using any weapon.
- Threats are words or actions that would compel a Reasonable Person to engage in unwanted Sexual Activity.
  - Threats may be implicit or explicit, but must be of such a nature that they would reasonably cause fear.
  - Examples include threats to harm a person physically or to cause a person academic, employment, reputational, or economic harm."

## Sexual and Gender-Based Misconduct Definitions

- "**Coercion** is the use of an unreasonable amount of pressure that would overcome the will of a Reasonable Person.
  - Coercion is more than an effort to persuade, entice, or attract another person to engage in Sexual Activity.
- When a person makes clear a decision not to participate in a particular Sexual Activity, a decision to stop, or a decision not to go beyond a certain sexual interaction, continued pressure can become coercive.
- In evaluating whether Coercion was used, the University will consider:
  - (1) the frequency, intensity, and duration of the pressure;
  - (2) the degree of isolation of the person being pressured; and
  - (3) any actual or perceived power differential between the parties in the context of their respective roles within the University."

## Sexual and Gender-Based Misconduct Definitions

- "**Incapacitation or Incapacitated** means that a person lacks the ability to make informed, deliberate choices about whether or not to engage in Sexual Activity.
- Consent cannot be gained by taking advantage of the Incapacitation of another, where the person initiating Sexual Activity knows or reasonably should know that the other is Incapacitated.
- A person who is Incapacitated is unable to give Consent because of mental or physical helplessness, sleep, unconsciousness, or lack of awareness that Sexual Activity was requested, suggested, initiated, and/or is taking place.
- A person may be Incapacitated as a result of the consumption of alcohol or other drugs, or due to a temporary or permanent physical or mental health condition."

### Sexual and Gender-Based Misconduct Definitions

- "When alcohol or other drugs are involved, Incapacitation is a state beyond drunkenness or intoxication.
  - A person is not necessarily Incapacitated solely as a result of drinking or using drugs; the level of impairment must be significant enough to render the person unable to give Consent.
- In evaluating Consent in cases of alleged Incapacitation, the University considers:
  - Did the person initiating Sexual Activity know that the other party was Incapacitated?
  - If not, would a Reasonable Person who is unimpaired by alcohol or drugs have known that the other party was Incapacitated?
- If the answer to either of these questions is "Yes," Consent was absent and the conduct is likely a violation of this Policy."

### Sexual and Gender-Based Misconduct Definitions

- "One is not expected to be a medical expert in assessing Incapacitation by drugs or alcohol.
- One must look for the common and obvious signs that show that a person may be Incapacitated, regardless of the amount of alcohol or drugs consumed.
- Although every individual may manifest signs of Incapacitation differently, typical signs include
  - slurred or incomprehensible speech,
  - unsteady manner of walking,
  - combativeness,
  - emotional volatility,
  - vomiting, or
  - incontinence."

### Sexual and Gender-Based Misconduct Definitions

- "A person who is Incapacitated may not be able to understand some or all of the following questions:
  - Do you know where you are?
  - Do you know how you got here?
  - Do you know what is happening?
  - Do you know whom you are with?"

### Sexual and Gender-Based Misconduct Definitions

- "**Retaliation** means an adverse action taken against a person for
  - making a report or Formal Complaint of Prohibited Conduct;
  - being alleged to have committed Prohibited Conduct;
  - assisting or participating, or refusing to participate, in any proceeding under this Policy.
- Retaliation may include intimidation, threats, coercion, or discrimination including adverse employment or educational actions that would discourage a Reasonable Person from engaging in activity protected under this Policy.
- The exercise of rights protected under the First Amendment does not constitute Retaliation.
- Pursuit of civil, criminal, or other legal action, internal or external to the University does not constitute Retaliation."

### Sexual and Gender-Based Misconduct Definitions

- “**Protected Activity**” includes most elements of participation in the University’s processes related to this Policy, including but not limited to
  - reporting Prohibited Conduct;
  - pursuing a resolution of Prohibited Conduct;
  - providing evidence in any investigation or hearing; or
  - intervening to protect others who may have experienced Prohibited Conduct.
- Retaliation against any person because of Protected Activity is prohibited under this Policy, . . . .”

### Sexual and Gender-Based Misconduct Definitions

- **Violation of Supportive Measures** is Prohibited Conduct under SGBM Policy
- Supportive measures are:
  - “individualized services, accommodations, and other assistance that the University offers and may put in place, without fee or charge.
  - Supportive Measures are designed to restore or preserve equal access to the University’s Programs and Activities, protect the safety of all parties and the University’s educational environment, and/or
  - deter Prohibited Conduct,
  - without being punitive or disciplinary in nature or unreasonably burdening the other party.”

### Scope of University’s Education Program or Activity

### University’s “education program or activity”

- “A University ‘Program or Activity’ includes:
  - (1) any location, event, or circumstance where the University exercises substantial control over both the Respondent and the context in which the conduct occurs;
  - (2) any building owned or controlled by a Student organization recognized by the University; and
  - (3) a University campus.
- Conduct that occurs off campus in locations or at events with no connection to the University is unlikely to occur in a Program or Activity of the University.”

### Decision Point: School's "education program or activity"

- "[N]othing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient's education program or activity."
- Given this change, universities **had to decide** whether to prohibit and investigate sexual misconduct that occurs outside more narrowly-defined "education program or activity"
- University of Michigan decided to do so

### Education Programs and Activities at U Michigan

- » Discussion of:
  - Examples, and
  - Scenarios

### Impartiality: Avoiding Prejudgment, Conflicts of Interest, and Bias

### Impartiality: Avoiding Prejudgment of Facts at Issue

From Title IX 2020 Regulation Preamble:

- » "the Department's interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what 'men' or 'women' do or do not do."

## Impartiality: Avoiding Prejudgment and Bias

From Title IX Regulation Preamble:

- » "Contrary to the concerns of some commenters, a prohibition against reliance on sex stereotypes does not forbid training content that references evidence-based information or peer-reviewed scientific research into sexual violence dynamics, including the impact of trauma on sexual assault victims."
- » "Rather, § 106.45(b)(1)(iii) cautions recipients not to use training materials that 'rely' on sex stereotypes in training Title IX personnel on how to serve in those roles
  - impartially and without prejudgment of the facts at issue,
  - meaning that research and data concerning sexual violence dynamics may be valuable and useful,
  - but cannot be relied on to apply generalizations to particular allegations of sexual harassment."

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## Impartiality: Avoiding Prejudgment and Bias

» Analogous regulatory language:

- Regulations' "presumption of non-responsibility" requires schools to investigate and resolve complaints: "without drawing inferences about credibility based on a party's status as a complainant or respondent."
- Hearing officers must not have "bias for or against complainants or respondents generally or for an individual complainant or respondent"

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## Impartiality: Avoiding Prejudgment and Bias

- » Preamble repeatedly warns against risk of "sex-based bias" in decision-making
- » Preamble:
  - "To the extent that commenters accurately describe negative stereotypes applied against students with disabilities, and particularly against students with disabilities who are also students of color or LGBTQ students, the final regulations expressly require recipients to interact with every complainant and every respondent impartially and without bias."
  - "A recipient that ignores, blames, or punishes a student due to stereotypes about the student violates the final regulations."

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## Impartiality: Avoiding Prejudgment and Bias

- » Practical application of these concepts in investigations:
  - Do not rely on cultural "rape myths" that essentially blame complainants
  - Do not rely on cultural stereotypes about how men or women purportedly behave
  - Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases

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### Impartiality: Avoiding Prejudgment and Bias

- » Practical application of these concepts in investigations and adjudications:
  - Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence
  - Avoid any perception of bias in favor of or against complainants or respondents generally
  - Employ interview and investigation approaches that demonstrate a commitment to impartiality

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### Impartiality: Avoiding Conflicts of Interest

- » Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors
- » Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents

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### Impartiality: Avoiding Conflicts of Interest

- » Department’s response:
  - Department’s authority is over schools, not individual investigators and other personnel,
  - so Department will focus on holding school’s responsible for impartial end result of process,
  - without labeling certain administrative relationships as per se involving conflicts of interest

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### Impartiality: Avoiding Conflicts of Interest

- » Department also rejected commenters’ arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience
  - “Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased” WHILE
  - “exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents”

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## Impartiality: Avoiding Conflicts of Interest

### » Discussion:

- University procedures for identifying and addressing potential conflicts of interest
- Addressing potential conflicts that arise during investigation or resolution process

## Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

### » Bottom line:

- Focus on facts of every individual case
- Strive to conduct investigations, formal proceedings and adaptive resolution processes in manner that will not allow even a perception of prejudgment or bias
  - for or against any party, or
  - for against complainants or respondents generally

Ensuring that Witness-Centered Investigation and Adjudication Approaches are Applied in a Manner that is Demonstrably Impartial, Thorough, and Fair to All Parties



## NACUA NOTES

### J. Nolan, "Promoting Fairness in Trauma-Informed Investigation Training"

- National Association of College and University Attorneys ("NACUA") NACUANOTE, February 8, 2018, Vol. 16 No. 5
  - cited once in Title IX regulations Preamble

Updated Holland & Knight white paper version available at:

<https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>

- cited 8 times in Title IX regulations Preamble

### Interviewing and Questioning for Clarification

- Following witness-centered approaches may yield better information, but:
  - It is crucial to interview and question witnesses for clarification
- Promotes accuracy and fairness
- If done appropriately, should not alienate witnesses
- Examples of how to present evidence, statements of other witnesses to parties

### Fair, Witness-Centered Approach

Investigators should seek clarification on crucial points, but starting with a more open-ended, witness-centered approach can:

- Yield more, and more accurate, information
- Better encourage witness participation
- Be less likely to interfere with authentic memory

### Fair, Witness-Centered Approach

- Even witnesses who do not appear to have experienced trauma (e.g., many respondents), may be experiencing substantial stress due to investigation and interview setting
- Same open-ended questioning approach is just as effective when used with respondents
  - And should be used if used with complainants, to promote neutrality
- As with complainants, should not rely unduly on “presentation as evidence”

### Fair, Witness-Centered Approach

- Like complainants, respondents can be provided opportunity for open-ended narrative
- Sensory information can be gathered from respondents
- Avoiding leading questions, yes/no questions, paraphrasing, etc. is important for respondent questioning as well
- Neutral, open-ended questioning approach may be used with both parties



## Appeals

### Appeal Grounds in All Cases

- Either party in any case may file a written appeal from a Hearing Outcome
- Either party in student or employee respondent cases may appeal the determination regarding responsibility on the following bases only:
  - Procedural irregularity that materially affected the outcome of the matter
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could materially affect the outcome of the matter; and/or
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that materially affected the outcome of the matter

### Additional appeal ground in student cases

- Either party in a student respondent case may appeal the sanction on the following ground:
  - The sanction was clearly inappropriate and/or disproportionate to the conduct for which the person was found responsible

### Appeal Timing and Documents

- Appeals must be filed within 14 calendar days of the date of the issuance of the Hearing Outcome
- The appeal shall consist of a plain, concise written statement of no more than ten (10) pages, outlining the basis for appeal and all relevant information to substantiate the appeal
  - If a party's appeal includes an assertion that new relevant evidence unavailable earlier in the proceedings exists and that includes written or other documentary evidence, such evidence will not be subject to this page limit
- Each party will be given the opportunity to review and respond in writing, up to ten (10) pages, to an appeal submitted by the other party
  - Any response by the opposing party must be submitted within 14 calendar days of when notice was provided to that party

## Information Considered on Appeal

- The following provisions apply in student and employee respondent cases:
  - The external reviewer will review the matter based on the issues identified in the appeal(s) materials
- The external reviewer may, at any time, freely consult with or request additional information from the Title IX Coordinator, the Office of General Counsel, and other University administrators as necessary

## Additional Student Respondent Case Provisions

- The following additional provisions apply in student respondent cases:
  - The external reviewer has the authority to determine the appropriateness of evidence, including whether certain evidence should be considered, and the strength and value that evidence will be given
  - In deciding an appeal of the finding or the sanction, the external reviewer may consider
    - the investigation report
    - the hearing transcript
    - the Hearing Outcome, including the sanctioning determination
    - any written appeal by the parties outlining any basis for altering the finding of responsibility and/or sanctions; and
    - any sanctioning input statements
- The external reviewer also may consider any other materials the University (or the external reviewer) deems relevant and that have been shared with the parties

## Decisions in Student Respondent Cases

- The external reviewer may conclude that there are no relevant issues of concern, and therefore, recommend that the hearing outcome and/or the sanctioning determination be affirmed
- In the alternative, the external reviewer may identify issues of concern
- If so, the external reviewer will provide, in writing, to the case manager, copying the Title IX Coordinator, one of the following recommended actions and any additional instructions or recommendations they deem appropriate under the circumstances:
  - If there was a significant deviation from procedure that impacted the outcome of the case in a way that is fundamentally unfair, remand the matter to the Title IX Coordinator or the hearing officer, as appropriate, with corrective instructions from the external reviewer

## Decisions in Student Respondent Cases

- In the alternative, the external reviewer may identify issues of concern (continued)
  - If new information that was unavailable with reasonable diligence and effort earlier in the proceedings would alter the hearing outcome, remand the matter to the hearing officer to determine whether a new hearing is necessary and/or whether any modifications may need to be made to the hearing outcome
  - If the Title IX Coordinator, investigator, or hearing officer had a conflict of interest or bias for or against Complainants or Respondents generally, or the individual Complainant or Respondent that affected the outcome of the matter, remand the matter to the AVPIE to find a replacement for whomever was biased

### Decisions in Student Respondent Cases

- In the alternative, the external reviewer may identify issues of concern (continued)
  - If the external reviewer determines the sanctions to be clearly inappropriate or disproportionate, they will alter the sanctions or interventions accordingly
- A parallel process may be followed if parties wish to appeal a matter again after a remand

### Decisions in Student Respondent Cases

- The external reviewer will provide the determinations to the VPSL or their designee who may accept or modify the determinations made by the external reviewer within 72 hours of receiving the external reviewer's decision.
- If the VPSL or their designee does not complete the review within 72 hours, the review will be waived and the external reviewer's determination will be deemed final.
- The VPSL's final and unreviewable decision will be made available to the participating parties, in writing, simultaneously, by OSCR.

### Decisions in Employee Respondent Cases

- The external reviewer will strive to complete the appeal review within 14 calendar days of receipt of all documents and requested information
- The external reviewer will issue a written decision describing the result of the appeal and the rationale for the result and OIE will provide the written decision simultaneously to both parties
- The external reviewer's decision on any appeal is the final step in the University's Title IX Misconduct process

### Appeal Grounds Discussion

- Procedural irregularity that materially affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could materially affect the outcome of the matter; and/or
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that materially affected the outcome of the matter

### Appeal Grounds Discussion (Additional Ground in Student Cases)

- Either party in a student respondent case may appeal the sanction on the following ground:
  - The sanction was clearly inappropriate and/or disproportionate to the conduct for which the person was found responsible

### Discussion with Decision-Makers

### Topics for Discussion 8/6/20

- Discussion with Decision-Makers:
  - Conducting Hearings
  - “Directly Related” and “Relevance” Concepts
  - Special Evidentiary Issues
  - Sanctioning Considerations
- Discussion with Investigators
  - “Directly Related” and “Relevance” Concepts
  - Preliminary and Final Investigative Reports

### Conducting Hearings

### Conducting Hearings

- **NOTE:** These slides regarding hearing procedures are drawn from University's student procedures
- Employee Title IX Misconduct hearing procedures are substantially the same unless otherwise noted

### Conducting Hearings

- "The hearing officer has broad authority to determine
  - the order of presentation,
  - timing,
  - overall duration of the hearing,
  - what information and evidence will be heard,
  - what information and questions are relevant to the determination of the matter,
  - and, with rationale, what cross-examination questions will or will not be permitted."

### Conducting Hearings

- "The hearing officer also is responsible for maintaining an orderly, fair, and respectful hearing
  - and has broad authority to respond to disruptive or harassing behaviors,
  - including adjourning the hearing or excluding the offending person(s)."

### Conducting Hearings

#### **"Technology Used at the Pre-Hearing Meetings and Hearing.**

- As a default [in student cases], the live hearing will be conducted virtually, with technology enabling all participants (hearing officer, parties, advisors, and witnesses) to see and hear one another in real time.
- "May be" virtual in employee cases
- Alternatively, the University in its discretion may decide for the hearing to occur with the parties located in separate rooms of the same location
  - with technology enabling the hearing officer and the parties to simultaneously see and hear the party or the witness answering questions."

## Conducting Hearings

### Pre-Hearing Meeting

- [E]ach party will meet separately with the hearing officer
  - to plan for the hearing and to identify their advisor (who may also attend the pre-hearing meeting);
  - to review the Formal Complaint and issues of interest to the hearing officer and the party;
  - to describe the procedures to be followed at the hearing;
  - [in student cases] to discuss . . . the process of raising a concern that the Associate Director of OSCR (or designee) cannot conduct a fair and unbiased review;
  - to identify the names of the witnesses that will be asked to appear;
  - to discuss any technology that will be used at the hearing and how to operate such technology; and
  - to answer any other questions or share information prior to the hearing.

## Conducting Hearings

### Pre-Hearing Meeting

- "The hearing officer also will discuss the time allotted for the hearing and any time limitations.
- [in student cases] [t]he hearing officer will provide all relevant and significant information to the parties at the pre-hearing meeting.
- If either party does not attend the pre-hearing meeting, the hearing officer will determine whether and how that absence affects the ability of the University to move forward with the hearing, as well as the hearing schedule.
- The parties and the hearing officer are expected to identify witnesses for the hearing by the pre-hearing meeting."

## Conducting Hearings

### Technology to be Used in Live Hearings

- Discussion of:
  - Technology options, and
  - Respective responsibilities for operating technology

## Conducting Hearings

### Advisors

- Each party may have an advisor of their choice present at the hearing.
- The advisor does not participate in the hearing except for the limited purpose of conducting cross-examination on behalf of that party.
- Advisors may be, but are not required to be, attorneys.
- If a party does not have an advisor of their choice present at a hearing, the University will, without fee or charge to the party, provide an advisor of the University's choice,
  - for the sole and limited purpose of conducting cross-examination on behalf of that party

## Conducting Hearings

### Advisors

- At a time and in a manner deemed appropriate by the hearing officer, the advisor for each party will be permitted to ask the other party and any witnesses all relevant cross-examination questions and follow-up questions, including those challenging credibility.
- Except for that limited role, advisors may not participate actively in the hearing and may not speak or otherwise communicate on the part of their advisee.
  - However, the advisor may request to consult privately in a non-disruptive manner with their advisee during the hearing and/or at a recess in the hearing.

## Conducting Hearings

### Advisors

- The University reserves the right to take appropriate action regarding any advisor who disrupts the process,
- or who does not abide by the restrictions on their participation as determined in the sole discretion of the hearing officer,
- which may include exclusion of the advisor from the hearing
- and the appointment of an alternate University-provided advisor.

## Conducting Hearings (Student Case Language)

### "Conduct of the Hearing and Relevance

- The hearing is not intended to be a repeat of the investigation.
- Before the hearing, the hearing officer will receive
  - a copy of the final investigation report,
  - any attachments thereto, and
  - copies of the parties' written responses to the investigation report, if any,
  - which will be part of the information of record to be considered by the hearing officer.
- The hearing officer will review the final investigation report and related materials and will be well versed in the facts of the case."

## Conducting Hearings (Student Case Language)

### Conduct of the Hearing and Relevance

- Attendance at the hearing is limited to the parties, advisors, witnesses, hearing officer, case manager, and OSCR Associate Director (in student cases) and parties, advisors, witnesses and University representatives (in employment cases)
- If a party chooses to avail themselves of a University-provided advisor to conduct cross-examination at the hearing, but the party has been working with a different advisor prior to the hearing, both advisors may also attend;
  - however, only the University-provided advisor for the purposes of cross-examination may participate directly in the hearing.
- Other University administrators may attend at the request of or with the prior approval of the hearing officer, but the parties will be notified in advance of anyone who will be in attendance.

## Conducting Hearings

### Conduct of the Hearing and Relevance

- Subject to the discretion of the hearing officer, hearings will ordinarily begin with introductory remarks by the hearing officer,
  - followed by the hearing officer asking relevant initial questions of the parties.
- During this portion of the hearing, advisors may confer privately and in a non-disruptive manner with their advisee,
  - but they are not allowed to make opening statements or otherwise address the hearing officer or anyone else present at the hearing.

## Conducting Hearings

### Conduct of the Hearing and Relevance

- After the hearing officer has asked their initial questions of the parties, the hearing officer will permit each party's advisor to ask the other party all relevant questions and follow-up questions, including those challenging credibility.
- The hearing officer may ask follow-up questions as necessary.
- Subject to the discretion of the hearing officer, the questioning of witnesses will generally follow a similar process, whereby the hearing officer will pose relevant questions to witnesses, and then the parties' advisors will be permitted to ask relevant questions of witnesses.
- Such cross-examination of the parties and witnesses by advisors will be conducted directly, orally, and in real time by the party's advisor of choice and never by the party personally.

## Conducting Hearings

### Conduct of the Hearing and Relevance

- Only relevant cross-examination and other questions may be asked of a party or witness.
- Before a Complainant, a Respondent, or a witness answers a cross-examination or other question, the hearing officer will first determine
  - whether the question is relevant and
  - explain any decision to exclude a question as not relevant.
- Advisors may raise concerns to the hearing officer about any decision regarding relevance at the time the decision is made.

## Conducting Hearings

### Conduct of the Hearing and Relevance . . . .

- At the discretion of the hearing officer, parties
  - (but not their advisors)
- will be given an opportunity to make a closing statement at the conclusion of the hearing.



### Additional Employment Case Language

- **Generally, only information that is provided to, or otherwise obtained by, the OIE investigator during the course of the investigation may be considered in the determination of whether a Policy violation occurred.**
- Any and all information for consideration by the hearing officer must be provided to the investigator during the investigation phase of the process and otherwise will not be allowed during the hearing
  - unless the party asking that additional information be considered has clearly demonstrated that such information was not reasonably available to the parties at the time of the investigation or that the evidence has significant relevance to a material fact at issue in the investigation.

### Additional Employment Case Language

- If, after the final investigation report is issued, a party provides or identifies evidence that they did not previously provide or identify despite that evidence being reasonably available to them during the investigation process,
  - the hearing officer may, at their discretion, draw a negative inference from the party's delay in providing or identifying the evidence.

### "Directly Related" and "Relevance" Concepts

### "Directly Related" Evidence

#### 2020 Title IX Regulation:

- » Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- » Including evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source
- » So that each party can meaningfully respond to the evidence prior to the conclusion of the investigation

### "Directly Related" Evidence

- » In Preamble, Department declines to define "directly related" further, indicating that it "should be interpreted using [its] plain and ordinary meaning."
- » Department notes that term aligns with (similarly undefined) term in Family Educational Rights and Privacy Act ("FERPA"), which defines covered education records in part as documents that are:
  - "directly related to a student; and
  - Maintained by an educational agency or institution . . . ."
- » Department ties parties' right to review directly related information under Title IX regulations with Department's prior position that students may review FERPA-protected information about other students if necessary to preserve their due process rights

### "Directly Related" Evidence

- » Term is broader than:
  - "all relevant evidence" as otherwise used in Title IX regulations, and
  - "any information that will be used during informal and formal disciplinary meetings and hearings" as used in Clery Act
- » Point of information-sharing provision is to promote transparency and allow parties to object to investigator's conclusion that certain evidence is not relevant, and argue why certain evidence should be given more weight
- » Cautious approach:
  - Read term broadly, withholding or redacting information only where explicitly irrelevant under regulations (see below), or where not related to allegations

### "Relevant" Evidence

- » Investigative reports must "summarize relevant evidence"
- » The Department declines to define "relevant", indicating that term "should be interpreted using [its] plain and ordinary meaning."
- » See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:
  - "Evidence is relevant if:
    - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
    - (b) the fact is of consequence in determining the action."

### "Relevant" Evidence

- » Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
  - Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight
- » Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
  - Each party's right to argue their case, and
  - Fact that decisions regarding responsibility will be made at hearing, not investigation stage

## Special Evidentiary Issues

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## Special Evidentiary Issues

- » 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,
  - concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent or
  - due process would otherwise require such questions and evidence under applicable laws.

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## Special Evidentiary Issues

- » Information protected under a legally recognized privilege
  - (e.g., privileged communications between a party and their physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in a treatment capacity, or privileged communications between a party and their attorney),
- » are not considered unless the information is relevant
  - and the person holding the privilege has waived the privilege.

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## Special Evidentiary Issues

- » If a party or witness does not submit to cross-examination at the live hearing,
  - the hearing officer will not rely on any Statement of that party or witness in reaching a determination regarding responsibility.
- » The hearing officer will not draw an inference about the determination regarding responsibility based solely on a party or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

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## Special Evidentiary Issues (Student Cases)

- » Generally, the hearing officer will exclude from the hearing any witness who was not previously identified to the other party.
- » If the party wishing to present a witness has clearly demonstrated that a witness not interviewed during the investigation was not reasonably available (or not reasonably known to the parties) at the time of the investigation or that the witness is likely to have information that has significant relevance to a material fact at issue in the investigation,
  - the hearing officer has the discretion to allow that witness to be interviewed.
- » The interview will generally be conducted by the investigator and a summary of information provided by the witness will be made available to both parties for their review and comment prior to the hearing.

## Written Determinations

### **“Determination Regarding Responsibility.”**

- » The hearing officer will strive to complete the written determination regarding responsibility (the “Hearing Outcome”) within 30 calendar days of the hearing.
- » The hearing officer will apply the preponderance of the evidence standard when making such determinations.”

## Written Determinations

- » The Hearing Outcome will include:
  - Identification of the section(s) of the Policy alleged to have been violated;
  - A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including but not limited to, as applicable, the notification to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of definitions of Prohibited Conduct in the Policy to the facts; . . . .”

## Written Determinations

- » “The Hearing Outcome will include: . . . .
  - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility; and
  - Identification of the University’s procedures and permissible bases for the Complainant and Respondent to appeal.”

## Written Determinations

- » "The hearing officer will provide the case manager with the Hearing Outcome.
- » If there is a finding that the Respondent is not responsible for a violation of the Policy, the case manager will share the Hearing Outcome with the parties.
- » If there is a finding that the Respondent is responsible for a violation of the Policy, the case manager will share the determination regarding responsibility with the [sanctioning officer] for a sanctioning determination.
- » If sanctions are appropriate, they will be assigned in accordance with Section (VII)(E) below and the hearing officer will update the Hearing Outcome to include the sanctioning determination."

## Sanctioning Considerations

## Sanctioning Considerations- Student Cases

- » "If the Respondent is found to have violated the Policy, the Respondent will be sanctioned and appropriate remedies will be provided to the Complainant.
- » In keeping with the University's commitment to foster an environment that is safe, inclusive, and free from discrimination and harassment, the University has wide latitude in the imposition of sanctions and remedies tailored to
  - the facts and circumstances of the Prohibited Conduct,
  - the impact of the conduct on the Complainant and University Community, and
  - accountability for the Respondent."

## Sanctioning Considerations- Student Cases

- » "Sanctions or interventions may also serve to remedy the discriminatory effects of the Prohibited Conduct on the Complainant and others, including any systemic actions found to be appropriate for the broader University Community.
- » Remedies will be designed to restore or preserve equal access to the University's Program or Activity."

## Sanctioning Considerations- Student Cases

### "Party Input Regarding Desired Remedies

- » Within seven (7) calendar days following the hearing,
  - but prior to the date on which the hearing officer issues their determination,
  - the Complainant and Respondent may each offer a brief written input statement to the OSCR Associate Director regarding desired remedies should the hearing officer determine that the Respondent violated the Policy.
  - The written input statements may not exceed five (5) pages, including attachments.
- » The OSCR Associate Director will share the input statement(s) with the other party, but not with the hearing officer."

## Sanctioning Considerations- Student Cases

### "Party Input Regarding Desired Remedies . . . .

- » An input statement from the Complainant is a written statement describing the impact of the Prohibited Conduct on the Complainant and expressing the Complainant's preferences regarding appropriate remedies and sanctions if the hearing officer determines the Respondent violated the Policy.
- » An input statement from the Respondent is a written statement explaining any factors that the Respondent believes should mitigate or otherwise be considered in determining the remedies and sanctions if the hearing officer determine the Respondent violated the Policy. . . . .
- » The Associate Director may use information from these statements to help determine the Respondent's sanction."

## Sanctioning Options- Student Cases

- » **Disciplinary Probation:** A designated period of time during which the Student is not in good standing with the University. The terms of disciplinary probation may involve restrictions of Student privileges and/or set specific behavioral expectations
- » **Restitution:** Reasonable compensation limited to the actual and verifiable replacement or repair value of property lost or damaged
- » **Restriction from Employment at the University:** Termination of or prohibition on University employment
- » **Class/Workshop/Training/Program Attendance:** Enrollment in and verified completion of a class, workshop, training, online learning, program, and/or follow up meetings with staff members any of which could help the Student and/or the University community

## Sanctioning Considerations- Student Cases

- » **Educational Project:** Completion of a project specifically designed to help the Student understand why certain behavior was inappropriate and to prevent its recurrence
- » **University Housing Removal:** Removal from University housing. Removals may be temporary or permanent depending on the circumstances
- » **Permanent or Fixed-Duration Removal from Specific Courses or Activities:** Suspension or transfer from courses or activities at the University for a specified period of time
- » **Permanent No Contact:** Restriction from entering specific University areas and/or from all forms of contact with certain persons

### Sanctioning Options- Student Cases

- » **Suspension:** Separation from the University for a specified period of time or until certain conditions are met
- » **Expulsion:** Termination of Student status for an indefinite period
- » **Transcript Notation, Hold, and/or Notification to Other Institutions:** A notation of non-academic disciplinary action may be made on a transcript and/or the University may notify other institutions of non-academic disciplinary action
  - In addition, the University may place a hold on transcripts, meaning that the University may prevent a Student from registering for classes, receiving a copy of their transcript/diploma, or both

### Sanctioning Options- Student Cases

- » **Withholding, Delaying, or Revoking the Conferral of the Degree:** The University may delay the conferral of the degree pending the outcome of an investigation or withhold the conferral of the degree due to a finding of Prohibited Conduct
  - In extraordinary circumstances, the University may revoke the conferral of the degree.
- » If a Student-Employee is found to have engaged in Prohibited Conduct, the Student-Employee may be subject to sanctions both in connection with their employment and in connection with their Student status, as appropriate under this and other applicable processes

### Corrective Action- Employee Cases

- » Corrective action will be determined by the Respondent's supervisor or other appropriate University administrator(s)
- » Corrective action generally will be issued within 30 calendar days of the issuance of the final investigation report
  - except for matters involving Title IX Misconduct, in which case the corrective action will be made and shared with the hearing officer, who will include them in the written determination, as discussed above

### Corrective Action- Employee Cases

- » The scope of possible corrective actions will be dependent upon employee disciplinary procedures applicable to the Respondent, but may include one or more of the following:
  - Required education and/or training
  - Informal and/or formal counseling
  - Progressive disciplinary action
  - Permanent one-sided no-contact directive
  - Transfer of position
  - Ineligibility for merit increase, sabbatical leave, and/or other discretionary benefits

## Corrective Action- Employee Cases

- » The scope of possible corrective actions will be dependent upon employee disciplinary procedures applicable to the Respondent, but may include one or more of the following (continued):
  - Removal of administrative appointment
  - Restriction on access to students, support services, and/or facilities
  - Demotion
  - Suspension
  - Termination of employment
  - Referral of matters in which faculty members were found responsible for a Policy violation or violations through these procedures for separate consideration for sanctioning purposes under Regents' Bylaw 5.09, and/or
  - Restriction from future employment at the University

## Discussion with Investigators

## "Directly Related" and "Relevance" Concepts

## "Directly Related" Evidence

### 2020 Title IX Regulation:

- » Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- » Including evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source
- » So that each party can meaningfully respond to the evidence prior to the conclusion of the investigation



### "Directly Related" Evidence

- » In Preamble, Department declines to define "directly related" further, indicating that it "should be interpreted using [its] plain and ordinary meaning."
- » Department notes that term aligns with (similarly undefined) term in Family Educational Rights and Privacy Act ("FERPA"), which defines covered education records in part as documents that are:
  - "directly related to a student; and
  - Maintained by an educational agency or institution . . . ."
- » Department ties parties' right to review directly related information under Title IX regulations with Department's prior position that students may review FERPA-protected information about other students if necessary to preserve their due process rights

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### "Directly Related" Evidence

- » Term is broader than:
  - "all relevant evidence" as otherwise used in Title IX regulations, and
  - "any information that will be used during informal and formal disciplinary meetings and hearings" as used in Clery Act
- » Point of information-sharing provision is to promote transparency and allow parties to object to investigator's conclusion that certain evidence is not relevant, and argue why certain evidence should be given more weight
- » Cautious approach:
  - Read term broadly, withholding or redacting information only where explicitly irrelevant under regulations (see below), or where not related to allegations

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### "Relevant" Evidence

- » Investigative reports must "summarize relevant evidence"
- » The Department declines to define "relevant", indicating that term "should be interpreted using [its] plain and ordinary meaning."
- » See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:
  - "Evidence is relevant if:
    - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
    - (b) the fact is of consequence in determining the action."

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### "Relevant" Evidence

- » Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
  - Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight
- » Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
  - Each party's right to argue their case, and
  - Fact that decisions regarding responsibility will be made at hearing, not investigation stage

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## Special Evidentiary Issues

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## Special Evidentiary Issues

- » “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,
  - concern specific incidents of the Complainant’s prior sexual behavior with respect to the Respondent and are offered to prove consent or
  - due process would otherwise require such questions and evidence under applicable laws.”

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## Special Evidentiary Issues

- » “Information protected under a legally recognized privilege
  - (e.g., privileged communications between a party and their physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in a treatment capacity, or privileged communications between a party and their attorney),
- » are not considered unless the information is relevant
  - and the person holding the privilege has waived the privilege.”

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## Special Evidentiary Issues

- » “If a party or witness does not submit to cross-examination at the live hearing,
  - the hearing officer will not rely on any Statement of that party or witness in reaching a determination regarding responsibility.
- » The hearing officer will not draw an inference about the determination regarding responsibility based solely on a party or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”
- » Nonetheless, investigators should summarize information from parties and witnesses as it is provided, because how this rule will be applied will not be established definitively until the hearing.

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## Preliminary and Final Investigative Reports

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## Summarizing “Relevant” Evidence

- » Again, Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
  - Subject to parties’ right to argue upon review of “directly related” evidence that certain information not included in investigative report is relevant and should be given more weight
- » Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
  - Each party’s right to argue their case, and
  - Fact that decisions regarding responsibility will be made at hearing, not investigation stage

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## Investigative Reports

### » Regulation:

- “Prior to completion of the investigative report, the [school] must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and
- the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.”

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## Investigative Reports

### » Regulation:

- Investigative reports must “fairly summarize relevant evidence”
- “at least 10 days prior to a hearing . . . 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.”
- » Investigator does not need to revise investigative report in light of this written response from parties

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## Witness-Centered Interview Concepts

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## What is Certified FETI®?

[www.CertifiedFeti.com](http://www.CertifiedFeti.com)

These slides are only authorized to provide general information on what a Forensic Experiential Trauma Interview® is. Use of these slides to instruct, in any way, on how to conduct a Forensic Experiential Trauma Interview® is strictly prohibited.

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## WHAT IS FETI?

The Forensic Experiential Trauma Interview® is a science and practice-based interviewing methodology informed by the current research on the neurobiology of trauma and memory.

FETI provides interviewers with a framework to maximize the opportunities for information collection and accurately document the interview in a neutral, equitable, and fair manner.



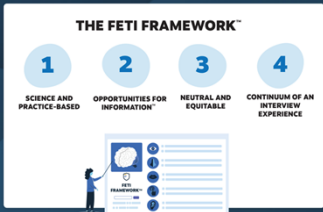
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## ONE METHODOLOGY

One way of interviewing for all situations and all participants.



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**THE FETI FRAMEWORK™**

- 1 SCIENCE AND PRACTICE-BASED
- 2 OPPORTUNITIES FOR INFORMATION™
- 3 NEUTRAL AND EQUITABLE
- 4 CONTINUUM OF AN INTERVIEW EXPERIENCE

A key part of the Methodology includes the FETI Framework™, which outlines the skills, abilities and information necessary to conduct a Forensic Experiential Trauma Interview.

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**ON SCIENCE AND TRAUMA**

Any life event has the potential to be stressful or traumatic. Information on neuroscience and brain-based responses informs the FETI® Methodology to provide a better understanding of how high-stress or trauma may affect behavior and memory.

Certified FETI® courses do not train any individual to connect an interview participant's behavior to trauma, stress or any other experience that may be perceived to cause influence on a person's actions.

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**GOAL OF A FETI® INTERVIEW**

To obtain what the participant is **ABLE TO** tell the interviewer.

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The FETI Framework™ provides interviewers with instruction on how to

**COLLECT THE DOTS**

**NOT**

**CONNECT THE DOTS™**



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## CERTIFIED FETI<sup>®</sup> METRICS

The following provides a synopsis of the metrics when evaluating a FETI<sup>®</sup> Interview:



- ✓ The interviewer demonstrates appropriate neutrality and equity. For example, the interviewer is not aligned with or supporting any side and remains impartial and unbiased, not assumptive or judgmental.
- ✓ The interviewer opens the interview with empathy. This can be as simple as expressing appreciation (e.g. 'Thank you for being willing to speak with me today') or a more in-depth exploration of the System of Security<sup>™</sup> taught in the Introduction to FETI<sup>®</sup> course.
- ✓ The interview is accurately documented using the participant's exact words and not a synopsis of what was said.

 (CONTINUED) 

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## CERTIFIED FETI<sup>®</sup> METRICS



- ✓ The interviewer demonstrates compassion and genuine empathy to the participant. For example, it would be appropriate for the interviewer to say to the participant, "I appreciate you being willing to speak with me."
- ✓ The interviewer maintains their appropriate role during the entire interview. For example, the interviewer does not attempt to "connect the dots" and focuses only on "collecting the dots".
- ✓ The interviewer uses Brain-Based Cues<sup>®</sup> throughout the interview. Brain-Based Cues<sup>®</sup> shorten and simplify the way an interviewer provides opportunities for the participant to share information about aspects of their experience.
- ✓ An interviewer does not ask compound, leading, assumptive, minimizing, sequencing, yes/no or why questions during any part of the interview.

 (CONTINUED) 

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## CERTIFIED FETI<sup>®</sup> METRICS

- ✓ The interviewer utilizes Unidirectional Interviewing<sup>™</sup> during the entire interview. Unidirectional Interviewing<sup>™</sup> assists an interviewer with understanding the difference between an interview and a conversation allowing for information to come from the participant without interruption or input from the interviewer. This includes not paraphrasing, changing the participants words, confronting or providing the participant with advice, opinion or personal information from the interviewer.
- ✓ The interviewer is intentional about their Interviewer Person<sup>™</sup> which includes tone, facial expression, empathic listening, physical presentation, mindset and body language.
- ✓ The focus of a "successful" interview is solely on the knowledge, skills and abilities of the interviewer and not on the information that was provided by the interviewee.

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## WHAT FETI<sup>®</sup> IS NOT

The following are examples of approaches that are not consistent with the Certified FETI<sup>®</sup> Methodology:

- ✗ The interviewer asks the participant to recall information in a specific sequential order.
- ✗ The interviewer asks the participant to imagine something during the interview.
- ✗ The interviewer sympathizes or offers platitudes to the participant during the interview. For example, saying "I'm sorry this happened to you."
- ✗ The interviewer uses rapport techniques such as theme building, or finding common interests, complimenting the participant, or identifying similar experiences to create connection.

 (CONTINUED) 

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## WHAT FETI® IS NOT

- ✗ The interviewer offers opinions to the participant during the interview. For example, "You're so brave for being here", "I believe you", "What happened isn't your fault" or "You're doing the right thing by speaking with me".
- ✗ The interviewer draws conclusions or assesses credibility during the interview based on the information provided by the interviewee.
- ✗ The focus of a "successful" interview is on the information provided by the interviewee.
- ✗ The interviewer enters an interview with a predetermined list of questions about what they think is needed from the interviewee.
- ✗ The interviewer provides intervention or problem-solving during the interview. For example, "Next time you should ..." or "Is it possible you could have ..."



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**READ THE FULL PAPER ON THE FETI METHODOLOGY**

You can download and read the full introductory paper at [www.certifiedfeti.com/intro-paper](http://www.certifiedfeti.com/intro-paper)

**DOWNLOAD LATEST CERTIFIED FETI METRICS**

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## NACUA NOTES

### J. Nolan, "Promoting Fairness in Trauma-Informed Investigation Training"

- National Association of College and University Attorneys ("NACUA") NACUANOTE, February 8, 2018, Vol. 16 No. 5
  - cited once in Title IX regulations Preamble

Updated Holland & Knight white paper version available at: <https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>

- cited 8 times in Title IX regulations Preamble

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## Interviewing and Questioning for Clarification

- Following witness-centered approaches may yield better information, but:
  - It is crucial to interview and question witnesses for clarification
- Promotes accuracy and fairness
- If done appropriately, should not alienate witnesses
- Examples of how to present evidence, statements of other witnesses to parties

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### Fair, Witness-Centered Approach

Investigators should seek clarification on crucial points, but starting with a more open-ended, witness-centered approach can:

- Yield more, and more accurate, information
- Better encourage witness participation
- Be less likely to interfere with authentic memory

### Fair, Witness-Centered Approach

- Even witnesses who do not appear to have experienced trauma (e.g., many respondents), may be experiencing substantial stress due to investigation and interview setting
- Same open-ended questioning approach is just as effective when used with respondents
  - And should be used if used with complainants, to promote neutrality
- As with complainants, should not rely unduly on “presentation as evidence”

### Fair, Witness-Centered Approach

- Like complainants, respondents can be provided opportunity for open-ended narrative
- Avoiding leading questions, yes/no questions, paraphrasing, etc. is important for respondent questioning as well
- Neutral, open-ended questioning approach may be used with both parties

### Thank You!



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