



2022-2023

Office of Equity and Inclusion

## Title IX & Sexual Violence Investigations

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## Outline of Today's Presentation

- Review System Procedure 1B.3.1
- Laws and Policies
- Forms of Discrimination
- Sexual Violence Background
- Pre-Investigation Planning
- Conducting Interviews and Trauma Informed Care
- Affirmative Consent, Intoxication versus Incapacitation and Informal Resolution
- Resources
- Questions/Discussion

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## What Is Title IX?

- Title IX is a federal civil rights law prohibiting sex discrimination in all facets of the educational setting
- By accepting federal funds, institutions agree not to discriminate on the basis of sex or allow the separation of the sexes in curriculum and extracurricular activities, unless permitted by the statute
- Failure to comply may result in liability on the part of the institution

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## Title IX

- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.
  - *20 U.S.C. §1681 (1972)*

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## Timeline

- November 16, 2018 US Department Of Education (DOE) Notice of Proposed Rule-making.
- Final Rule published on May 6, 2020 -- effective on August 14, 2020.
- Revised System Procedure 1B.3.1 finalized on August 14, 2020.
- Biden administration releases proposed new regulations on June 23, 2022.
- Comment period closed on September 12, 2022 (approximately 240,000 comments).

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## Overall Process Map

- Old 1B.3.1 Procedure
  - Complaint, Investigation, Decision-maker, internal appeal, Ch. 14 if serious student sanction.
- New 1B.3.1 Procedure
  - Formal Complaint, Investigation (with enhanced requirements), Ch. 14 hearing, Decision-maker, internal appeal.
- Also consider Policy 1B.1 and student conduct processes for non-Title IX sexual harassment and jurisdiction.
- Basic legal responsibility = deliberately indifferent standard.

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## Three Quick Deliverables (or To Do's)

- Update your web-sites and information to the new System Procedure 1B.3.1.
- Notice of Title IX Coordinator.
- Notice of Non-Discrimination.

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## Notice of Title IX Coordinator

- Each college and university must notify applicants for admission and employment, students, employees, and all unions holding collective bargaining agreements with the college or university of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated at the Title IX Coordinator.

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## Notice of Non-Discrimination

- Each college and university must notify applicants for admission and employment, students, employees and all unions holding collective bargaining agreements with the college and university that the college or university does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner. Inquiries about the application of Title IX may be referred to the Title IX Coordinator and/or the United States Department of Education.

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## Key Elements of the New Procedure

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## Definition of Title IX Sexual Harassment

- Conduct based on sex that occurs in a college or university's program or activity in the United States that satisfies one or more of the following:
  - An employee of the college or university conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the college or university's education program or activity; or
  - Sexual assault, dating, intimate partner, and relationship violence; and stalking as defined in Board Policy 1B.3.

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## Formal Complaint

- Defined as
  - Document filed by a complainant or signed by the Title IX Coordinator alleging Title IX sexual harassment against a respondent and requesting investigation.
  - At the time of filing a formal complaint of Title IX sexual harassment, a complainant must be participating in or attempting to participate in the education program or activity of the college or university with which the formal complaint is filed.
- See template.

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## Educational Program or Activity

Includes locations, events, or circumstances over which the college or university exercised substantial control over both the respondent and the context in which the Title IX sexual harassment occurred, and also includes any building owned or controlled by any officially recognized student organization of the college or university.

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## Title IX Coordinator

- Employee designated by the president to coordinate the college or university's efforts to comply with its Title IX responsibilities and Board Policies 1B.1 and 1B.3.
- This does not have to be one person – can have deputy Title IX Coordinators, Investigators, etc.

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## Supportive Measures

- Designed to preserve or restore a student’s access to the education program or activity, with or without a formal complaint (“non-disciplinary, non-punitive individualized services” available to both complainant and respondent).
- Examples
  - Academic course adjustments.
  - Counseling.
  - No-contact orders.
  - Dorm room reassignments.
  - Leaves of absences.
  - Class Schedule changes.

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## Reporting

- Internal Reporting = New Procedure is the same as Old Procedure (3 buckets).
  - Required Reporters.
  - Confidential Resources (not required to internally report).
  - Encouraged Reporters.
- Clarifies that reporting is to Title IX Coordinator.
- New Information on External Mandatory Reporting.

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## Investigation and Resolution

- Title IX Coordinator.
  - Discuss options with complainant – supportive measures, referral to law enforcement, filing a formal complaint, pursuing other policy processes (1B1, student conduct, etc.)
  - If formal complaint.
    - Determines Jurisdiction.
    - Conflicts.
    - Information to complainant and respondent (see form notice of allegations).

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## Conflict of Interest

- Title IX Coordinator to identify any real or perceived conflict of interest in proceeding as the Title IX Coordinator, for the decision-maker, and/or for any person designated to facilitate an informal resolution.
- Assign new person.

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## Informal Resolution

- School may facilitate an informal resolution process at any time before reaching a determination regarding responsibility provided that each party provides their voluntary, written consent to the process.
- Any party may withdraw from informal resolution process and return to formal complaint process.
- Informal resolution shall not be used to resolve allegations that an employee sexually harassed or assaulted a student.

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## Interim Actions

- Employee reassignment or administrative leave.
  - Discuss with HR/LR.
- Student summary suspension.
- No real change to prior practice = note that the regulations use the term “emergency removal.”

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## No Basis to Proceed Determinations: Title IX Sexual Harassment

- Must dismiss formal complaint if:
  - The conduct would not constitute Title IX Sexual Harassment, even if proved;
  - The conduct alleged did not occur in the college or university's educational program or activity;
  - The conduct did not occur against a person in the United States
- May dismiss formal complaint if:
  - The complainant, at any time, notifies the Title IX Coordinator that they would like to withdraw the formal complaint;
  - The respondent is no longer enrolled or employed by the institution; or
  - Specific circumstances prevent the college or university from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- And Remember -- At the time of filing a formal complaint of Title IX sexual harassment, a complainant must be participating in or attempting to participate in the education program or activity of the college or university with which the formal complaint is filed.

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## Dismissals, continued

- Must promptly notify both the complainant and the respondent of any dismissal.
- May consider other policy avenues (1B.1, student conduct, etc.).

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## Investigatory Process

- Essentially the same as the 1B.1.1 investigatory process. **BUT**
  - Required presumption of innocence notice in notice of allegations (see template).
  - Consider both inculpatory and exculpatory evidence.
  - Not use questions or evidence that involve a legally recognized privilege.
  - Before completing investigation report – send to both the complainant and respondent and their advisors, if any, the evidence subject for inspection and review. Both parties must have at least 10 calendar days to submit a written response to the evidence, which must be considered before completing the report.

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## Timely Completion

- Timely completion after a complaint = no strict timeline.
- Reasonable cause for delay includes considerations such as
  - Absence of a party, an advisor, or a witness;
  - Concurrent law enforcement activity;
  - The need for language assistance or accommodation of disabilities.

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## Formal Hearing

- If complaint not resolved then:
  - Prepare investigation report; and
  - Refer the matter for a formal hearing.
  - At least ten (10) days prior to formal hearing, parties and advisors, receive the investigation report for their review and response (consult AAG as this should be done through the Ch. 14 process).
- Formal Hearings for Title IX sexual harassment complaints conducted by the Office of Administrative Hearings.
  - Notify assigned Assistant Attorney General or OGC that Ch. 14 required.
  - Assigned Assistant Attorney General will initiate and arrange for the Ch. 14.
  - See information sheet on Ch. 14 hearings.
  - Costs.

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## Standard of Evidence

- Remains preponderance of the evidence.

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## Decision-maker

- ALJ prepares report and recommendation.
- Decision-maker receives report and recommendation and decides
  - Whether the policy has been violated; and
  - On appropriate sanctions if the policy has been violated.
  - Issues a written determination that includes:
    - Identification of allegations;
    - Description of procedural steps;
    - Findings of fact supporting the determination;
    - Conclusions as to responsibility and any sanctions
    - Procedures for appeal.
  - The required elements may be satisfied by adopting all or portions of the report and recommendation.

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## Appeals

- Within ten (10) calendar days.
- Both parties may appeal final decision and an appeal of a dismissal of a formal complaint.
- Grounds for appeal
  - Procedural irregularity;
  - New evidence;
  - Conflict of interest.

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## When Student Discipline Final

- Either
  - Date of written determination on appeal; or
  - If no appeal, the date on which the appeal would no longer be timely.

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## Advisors

- Process Advisors
  - Both complainant and respondent may have an advisor of their choice;
  - Campus will provide if either party does not have their own.
- Advisors at the Ch. 14 Hearing.
  - Both complainant and respondent may have an advisor of their choice.
  - Campus will provide if either party does not have their own.

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## Education and Training

- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must be made publicly available on the college or university's website.

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## Document Retention

- 7 years.

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## LAWS AND POLICIES

### Title IX

- Title IX responsibilities
  - to address allegations of sexual harassment,
  - how to conduct Title IX investigations,
  - information on the link between alcohol and drug abuse and sexual harassment and violence and
  - best practices to address those concerns

## VAWA

**Name of the Law:** Violence Against Women Act (VAWA)

**Why it matters:** The Violence Against Women Act creates and supports comprehensive, cost effective responses to domestic violence, sexual assault, dating violence and stalking. Up for renewal every five years, each VAWA reauthorization builds on existing protections and programs to better meet survivors needs.

**When it passed:** 1994, reauthorized last 2022

-NNEDV

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## THE CLERY ACT

**Name of the law:** Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics (Clery) Act

**Why it matters:** The *Clery Act* requires greater transparency and timely warnings from colleges and universities about crimes that are committed on campus, including crimes of sexual violence.

**When it passed:** 1990; most recently amended by Campus SaVE Act in 2013.

The *Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act*, or the *Clery Act*, requires public and private colleges and universities to disclose information about certain crimes that occur on or near campus. The Act applies to all colleges and universities that receive any federal funding, including student financial aid.

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## AMENDMENTS TO THE CLERY ACT: Campus SaVE ACT

On October 20, 2014 the Department of Education published the VAWA regulations which imposed expanded obligations on colleges and universities, effective July 1, 2015:

- Additional crimes of domestic violence, dating violence and stalking are added to the Clery Act
- Institutions must adopt policy statements regarding sexual assault, domestic violence, dating violence and stalking which must include: educational programs for new students and employees, ongoing prevention programs, reporting procedures, institutional disciplinary procedures
- Institutions must address how they complete publicly available record-keeping while still maintaining the confidentiality of those who choose to report a violation
- Updates to reporting obligations

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## Minn. Stat. 135A.15

- Requires colleges and universities to have an online reporting system (must accommodate anonymous complaints)
- Requires **annual training** for campus administrators responsible for investigating or adjudicating complaints on sexual assault or persons responsible for responding to reports of sexual assault—including investigators and decisionmakers

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## Minnesota State Colleges & Universities

- 1B.1 – Covers Sexual Harassment and Other Protected Class Harassment and Discrimination
- 1B.1.1 – Includes the procedures for investigating and adjudicating 1B.1 and 1B.3 cases
- 1B.3 – Covers Sexual Violence and other forms of sexual discrimination
- 1B.3.1 – Includes procedures for investigating and adjudicating Title IX sexual harassment cases

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## Minnesota State's 1B.1 Policy on Equal Opportunity & Nondiscrimination in Employment & Education

The **1B.1 Policy** addresses:

- Equal opportunity for students and staff
- Nondiscrimination
- Harassment
- Discrimination
- Protected Class
- Sexual harassment
- Retaliation

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## Minnesota State's 1B.3 Policy on Sexual Violence

The **1B.3 Sexual Violence Policy** addresses:

- Affirmative Consent
- Sexual Violence
  - Dating, intimate partner, and relationship violence
  - Non-forcible sex acts
  - Sexual Assault
  - Stalking

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## FORMS OF SEXUAL DISCRIMINATION

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## Title IX Sexual Harassment

- An employee of the college or university conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the college or university's education program or activity; or
- Sexual assault; dating, intimate partner, and relationship violence; and stalking as defined in Board Policy 1B.3

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## Sexual Harassment

- **Quid Pro Quo**
  - Can only be carried out by a teacher, administrator, or staff member
- **Two factors:**
  1. Unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; and
  2. Submission to, or rejection of, such conduct results in adverse educational or employment action

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## Sexual Harassment

### TO CONSTITUTE SEXUAL HARASSMENT, THE CONDUCT:

- DOES NOT have to include an intent to harm
- DOES NOT need to involve repeated incidents
- DOES NOT need to be directed at a specific target
- DOES NOT have to be by a member of the opposite sex

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## Sexual Harassment

### Hostile Environment

- Occurs when harassment is sufficiently severe, pervasive, and objectionably offensive that it effectively denies a person equal access to the college's or university's education program or activity
- Can be created by instructors/faculty, administrators, staff members, other students
- Can occur off campus

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## Stalking

- Unwanted Phone Calls
- Unwanted Voicemails
- Unwanted Text Messages
- Spying
- Sending unwanted gifts
- Letters
- E-mails
- Social media use
- Showing up at a location

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## Relationship/Dating Violence

- Physical harm or abuse
- Threats of physical harm or abuse

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## Retaliation

- Occurs when an adverse educational action is taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct

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## Know the Policies

Why is this important to an investigation?

-It helps you determine if an investigation is appropriate

\*Who does the policy apply to?

\*What do the terms refer to?

-It helps you frame the ultimate investigative questions in issue

-You understand the elements of a claim

-You have time to seek guidance, if needed

-You prepare for and conduct thorough interviews and minimize any unnecessary re-interviews

-You provide the decisionmaker with necessary information to make a decision

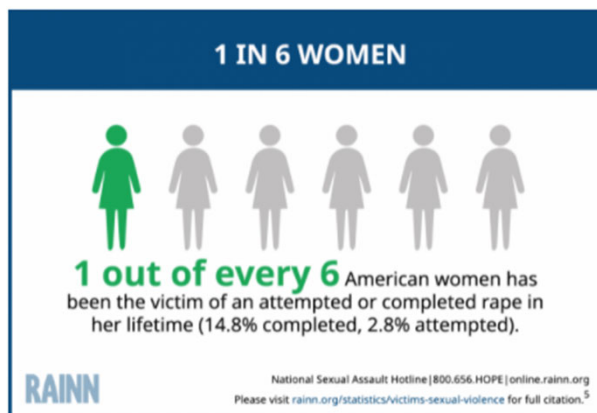
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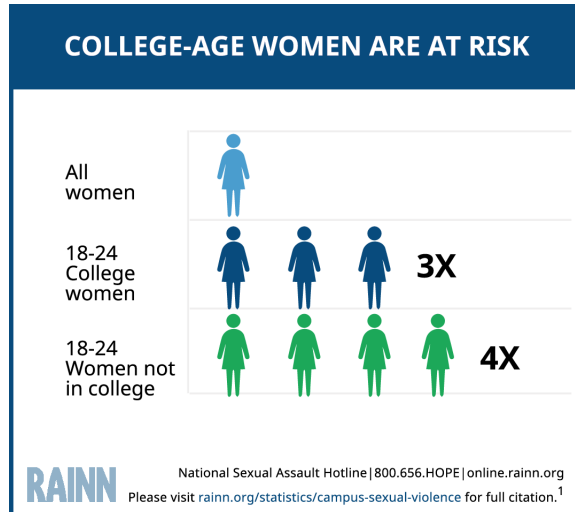
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## PREVALENCE OF SEXUAL VIOLENCE

## THE ISSUE OF SEXUAL ASSAULT



# THE ISSUE OF SEXUAL ASSAULT

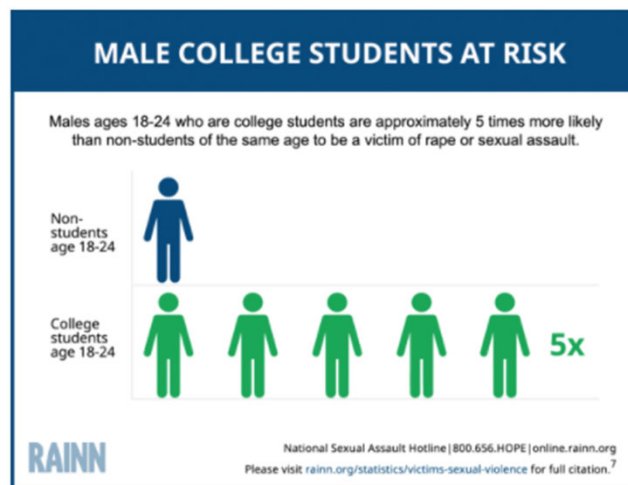


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# THE ISSUE OF SEXUAL ASSAULT



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## THE ISSUE OF SEXUAL ASSAULT

- 13% of all students experience rape or sexual assault through physical force, violence, or incapacitation (among all graduate and undergraduate students).
- 21% of transgender, genderqueer, nonconforming (TGQN) college students have been sexually assaulted, compared to 18% of non-TGQN females, and 4% of non-TGQN males.
- Among graduate and professional students, 9.7% of females and 2.5% of males experience rape or sexual assault through physical force, violence, or incapacitation.
- Among undergraduate students, 26.4% of females and 6.8% of males experience rape or sexual assault through physical force, violence, or incapacitation.
- 5.8% of students have experienced stalking since entering college.

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## THE ISSUE OF SEXUAL ASSAULT CONT.

- More than 50% of college sexual assaults occur in either August, September, October, or November.
- Freshmen and sophomores are at greater risk than upperclassmen (“red zone” during their first few months of their first and second semesters in college)
- 60% of sexual assaults of college students occurred on campus
- 10.3% took place in a fraternity
- 70% of females assaulted on campus knew their attacker
- Students with disabilities experience assault 50% more frequently than students without disabilities
- Sexual assault victim/survivors are more likely to suffer from depression and/or post-traumatic stress disorder, abuse alcohol and drugs, and/or contemplate suicide

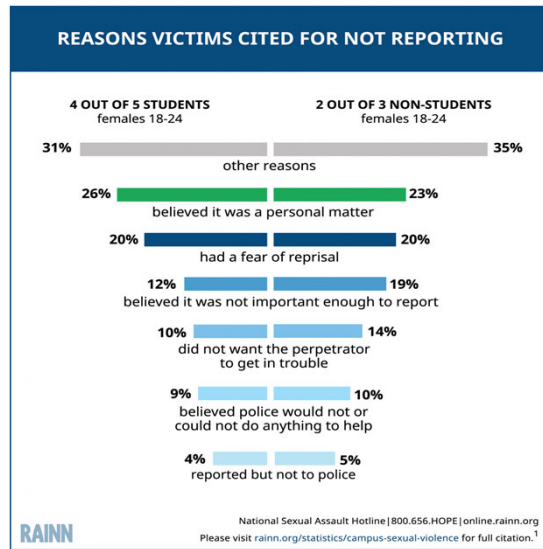
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## REPORTING SEXUAL VIOLENCE



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## Bias in Sexual Violence Investigations

Title IX requires a college or university to conduct a “prompt, thorough and impartial inquiry.”

Bias is defined as “to feel or show inclination or prejudice for or against someone or something.”

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## Investigator-Specific Biases

- Complainant/Respondent is likeable/sympathetic
- Complainant/Respondent is not likeable/sympathetic
- Repeat Complainant/Respondent
- Fact pattern similar to a prior, unrelated investigation
- Complainant/Respondent behavior patterns

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## Cultural Considerations

- Communication styles
- Attitudes toward conflict
- Approaches toward completing tasks
- Decision-making styles
- Approaches to knowing
- Attitudes toward disclosure
  - Appropriate to share emotions, reasons for conflict

--Sue Ann Van Dermyden, 2017

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## Investigation Impact

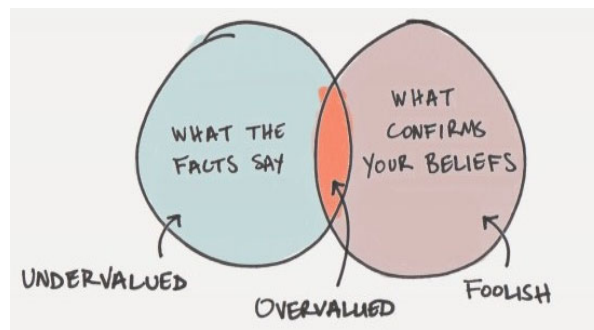
- Establishing rapport
- Language may need to be altered
- Storytelling style may need to be accommodated
  - Linear versus circular styles
- Recognize ethnocentric behaviors
  - Assumption that own culture is “right” while others are “wrong”
- Avoid stereotyping and assumptions

--Sue Ann Van Dermyden, 2017

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## Confirmation Bias



--JamesClear.com

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## What other role might bias play in an Investigation?

- Priming – Your pre-investigation or mid-investigation thoughts about the case
  - “This is a really bad case.”
  - “This person has complained three times before.”
  - “This is low level.”
- Phrasing – The way you ask a question can influence the answer – The misinformation effect
  - Do you get headaches frequently, and if so, how often? 2.2/week
  - Do you get headaches occasionally, and if so, how often? 0.7/week
  - How long was the movie? 130 minutes
  - How short was the movie? 100 minutes

Headaches: Elizabeth Loftus (1975); Movie: Richard Harris (1973)

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## Sexual Violence Case Specific Biases

- The subject matter of these cases is often personal and very intimate
- Most of us hold our own conscious beliefs and practices when it comes to this content area so it is important not to intentionally or unintentionally cast your lens on the matters you investigate
  - Your own sexual experiences
  - Moral or religious views about sex
  - Comfort level in using terms – subject matter

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## Alcohol and Drug Use Biases

- You may have your own views on and experiences with:
  - Alcohol use
  - Drug use
- These things may have impacted your life

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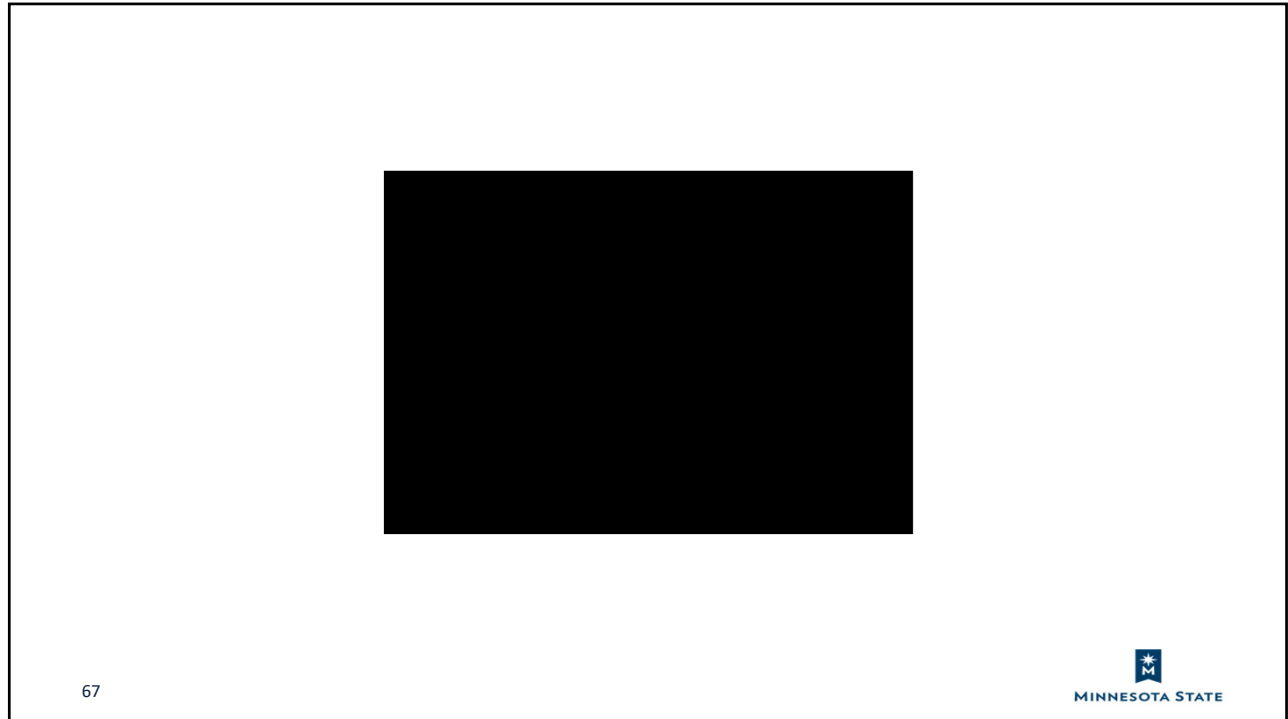
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## Rape Myth Acceptance

- Many studies have found that the higher the rape myth acceptance (stereotypical beliefs about rape), the more responsibility is attributed to the victim/survivor.
  - The victim/survivor wanted it
  - The person causing the harm didn't mean to
  - Clothing
  - Alcohol

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## Counterintuitive Behavior of Rape Victims

- Delay in reporting
- Change in account of what happened
- Unexpected demeanor/disposition
- Unexpected behavior
  - Contact with person who caused the harm
  - Resumption of normal routine
  - Subsequent sexual activity (sometimes with the person who caused the harm)

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## Significant Time Between Incident And Report

- The norm when the person causing the harm was not a stranger
- Many victim/survivors are able to report only after they receive the necessary support to do so
- Why do they wait? For many of the same reasons they later recant
  - They fear repercussions
  - They are pressured by others not to report
  - They feel shame, embarrassment
  - They are afraid of the person who caused the harm
  - They are afraid of not being believed
  - Fear that nothing will be done about it

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## Scenario

Jo and Sam broke up and Sam is not taking it very well. For the past two- or three-weeks Sam has been texting Jo and begging to get back together. Sam has also shown up at Jo's off-campus apartment and left presents twice. Jo has made it clear that they feel bad about the breakup, but that they need Sam to "move on". Sam cannot seem to move on and continues to text, show up and call Jo. Today, Jo posted a picture on social media with a new partner, Taylor. Sam does not take it well and calls Jo and threatens to kill themselves. Jo's roommate Chandler comes to you, the investigator and reports this, but says Jo doesn't want to get anyone in trouble.

Are there any assumptions that you made in reading this report?

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## PRE-INVESTIGATION PLANNING

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## Pre-Investigation Steps

- Review the report/complaint to determine potential process for investigation and/or resolution
- Ensure appropriate individuals are informed and proper documentation of report/complaint (gatekeeping)
- Ensure notice given to complainant of options and rights
- Determine if there are any immediate needs and/or safety concerns that need to be addressed
- Conduct intake with the complainant
- Assess for supportive and interim measures
- Begin to develop your investigation strategy

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## Notice of Complainant Options and Rights

Following a report of sexual violence, the complainant must be promptly notified of their options and rights, including, but not limited to:

- How to obtain immediate medical assistance
- Where and how to report incidents (college/university and law enforcement)
- On- and off-campus resources, including counseling, mental health services, etc.
- Right to report to law enforcement and rights under the crime victims bill of rights
- Assistance available to preserving materials for investigation

- 1B.3.1 Procedure, Part 5., Subpart C. 3. and 4.

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## Interim Actions - Emergency Removal

- Institution may remove a respondent from the education program or activity on an emergency basis if institution:
  - Undertakes an individualized safety and risk analysis;
  - Determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations justifies removal; and
  - Provides the respondent with notice and an opportunity to challenge the decision immediately following removal

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## Supportive Measures

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge to complainant or respondent
- Before or after the filing of a formal complaint or where no formal complaint has been filed

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## Complainant Intake

- Welcome and introductions
- Review purpose of the intake meeting
- Discuss the 1B.3 Policy and 1B.3.1 Procedure
- Explain the process, resolution options, appeal rights, etc.
- Inform complainant about retaliation prohibition under 1B.3.1 Procedure
- Review the Data Privacy Notice (Tennessee Notice) and address confidentiality
- Confirm complainant is a current student or attempting to participate in an education program or activity at the college/university where the complaint is being filed

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## Complainant Intake (Cont.)

- Discuss availability of interim/supportive measures
- Establish understanding of complainant's intentions
  - Do they want to tell their story or be heard?
  - Are they requesting an investigation?
  - Are they considering to submit a formal complaint?
- Share campus and other available resources

If Complainant wants to file a formal complaint, explain process further and next steps dependent on resolution option they want to pursue.

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## Reluctant Complainants

If Complainant does not want to proceed with a formal complaint, consider factors that may necessitate a formal complaint by the Title IX Coordinator.

A Complainant may request confidentiality, that nothing be done, or say that they don't want to participate in investigation. In response, consider whether to:

- Explain further confidentiality in the process
- Discuss further protections against retaliation in the policies/procedures
- Explain responsibility of institution to maintain safe and non-discriminatory environment, which may mean actions will be taken
- Explain what options are available if an investigation does not proceed
- Explain limitations in response without participation

*Note:* Document the Complainant's request, any actions taken, and explanation of why an investigation was or was not pursued

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## Notice of Allegations

- Upon formal complaint, provide written notice to both parties including:
  - Statements that:
    - Respondent is presumed not responsible
    - Determination of responsibility is made at the conclusion of the 1B.3.1 process
    - Right to advisor of choice who may be but is not required to be an attorney
    - Parties may inspect and review evidence
    - Inform parties of prohibiting knowingly making false statements

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## More on Notifications for Complainant and Respondent

- Notice to Complainant regarding status of complaint
  - Summary of allegations
  - Applicable policies and procedures
  - Resolution process or investigation notice
  - Interim/Supportive measures taken (e.g. no contact directives, housing relocation, etc.)
  - Prohibition of retaliation reminder
- Respondent must be provided written notice of the existence and general nature of the complaint, as well as:
  - Applicable policies and procedures
  - Resolution process or investigation notice
  - Interim/Supportive measures taken (e.g. no contact directives, housing relocation, etc.)
  - Prohibition of retaliation

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## CONDUCTING INTERVIEWS WITH TRAUMA INFORMED CARE

Starting at 12:55 PM

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## Interview Environment

- Ideal interview space is:
  - Safe (physically and emotionally)
  - Private
  - Neutral (in location and décor)
  - Comfortable (in furnishings and in size)
  - Set up to promote dialog
  - Designed to reduce distractions
- Interview space should reflect environment free of:
  - Elements of bias
  - Conflicts of interest

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## Interview Prep

- Consider dress/appearance
- Consider language needs
- Things to have on hand:
  - Business cards/contact information for investigator(s)
  - Written copies of campus and community resources
  - Written copies of relevant policies and procedures
  - Paper and pen for student to take own notes, if desired
  - Device for taking photos (e.g. cell phone, digital camera)
- Consider having on hand:
  - Tissues
  - Water (or other beverage to offer)
  - Candy/mints
  - Stress ball, slinky, etc. (No sharp objects)

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## Interviewing Tips: Self-Check

- Attend to own non-verbal behaviors
  - Focus on student, rather than on advisor, support person, attorney
  - Present open posture
  - Balanced eye contact
- Practice active listening
- Demonstrate empathy, but with proper boundaries
  - Treat interviewee as a whole person recognizing their humanity
  - Remain neutral
  - Sample language
  - Allow space for decisions
- Be mindful of own reaction to triggering information
  - Consult with colleagues to learn more about your own non-verbal cues

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## Interviewing Tips: Interviewee

- Acknowledge interview may include sensitive, triggering and difficult discussion
- Ask the interviewee to use their own language
- Follow up on the meaning of slang terms (e.g. “hook-up”)
- Be aware of language differences in how words may be defined given cultural and social backgrounds

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## Virtual Interviews

- Use unique meeting IDs with passwords for each interview
- Ensure privacy settings are enabled
- Discuss ground rules for all parties (e.g. no recordings, breaks, etc.)
- Ensure needed documents are readily available (policies, procedures, flowcharts, etc)
- Close all unnecessary windows and silence notifications (e.g. incoming email alerts)

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## Framing the Interview

- Welcome and introductions
- Build rapport
- Provide overview of the process and purpose of the meeting
  - Explain investigatory process, resolution options/process, appeal rights
  - Have written copies of these materials available
- Review rights and options specific to interviewee role
  - Complainant/respondent rights differ from witness
  - Discuss confidential resources, availability of interim measures and supports, other available resources

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## Set Interview Expectations

- Review roles of interview attendees (investigator, notetaker, interviewee, advisor)
- Discuss process issues (e.g. Does the party intend to cooperate?)
- Discuss note taking and access to investigatory information
- Discuss how breaks will be handled, if needed

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## Goals of Questioning

- Establishing a narrative and timeline of events
- Clarify conflicting information
- Understand how each involved party perceived the events

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## Tips for Questioning

- Ask open-ended questions
- Listen more than speaking, and be comfortable with silence
- Allow time for people to answer questions
- Use an appropriate tone
- Identify conflicting information
- Ask for clarification
- Ask questions that reveal attitude and belief
- Keep it simple

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## Determine What to Ask

- Ask yourself:
  - What information do I need to gather?
  - Do I need to know more about the information?
  - Will an answer to my question help me to understand what happened?
  - Will getting an answer to this question inform the decision?
  - What facts may be in dispute?
- In framing the questions, be sensitive to the emotional states of both complainant and respondent, as well as other parties involved
- Do not make assumptions about complainant's fragility or vulnerability
- Important/relevant questions should always be asked

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## Types of Questions

- “**What**” questions ask for facts and details
- “**How**” questions ask about the process, sequence of events, or focus on emotions
- “**Who/When/Where**” questions ask for the specifics of the situation

Avoid:

- “**Why**” questions that could be perceived as judgmental
- Questions that imply judgment
- Leading Questions
- Multiple choice questions
- Asking more than one question at one time

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## Examples of Leading Questions

- Q1: *Were you feeling stressed when you told your roommate what happened?*
- Q2: *Were you drunk after having 7 drinks?*
- Q3: *Were you worried after the complainant left your room?*

How can we ask these questions differently?

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## Questions to Help Gain Clarification

- Would you be willing to tell me more about...?
- How did you feel about...?
- What did you do after...? What happened then?
- What did you mean when you said ...?
- What was your reaction to ...?
- How did you become involved in ...?
- What is your understanding of...?

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## Additional Questioning Tips

- Ask them to physically demonstrate what happened as appropriate
- Ask them to draw maps, diagrams, room layout, floorplan, etc
- Ask them if they have documents or other evidence that they discuss, and ask them if they would be willing to share
- Avoid interrupting
- Observe body language
- Consider cultural differences

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## Complainant Investigatory Interview

- Minimize the number of interviews and interviewers
  - Could be retraumatizing to have to retell story multiple times
- Ask questions that speak to sensory elements of incident that may help with recalling details
  - Sight, smell, taste, texture, sound, etc.
- Ask questions that speak to emotional elements of incident that may generate recall of details
- Allow complainant to express their feelings

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## Respondent Initial Meeting

- Welcome and introductions
- Review purpose of the initial meeting
- Discuss the 1B.3 Policy and 1B.3.1 Procedure
- Explain the process, resolution options, appeal rights, etc.
- Inform complainant about retaliation prohibition under 1B.3.1 Procedure
- Review the Data Privacy Notice (Tennessee Notice) and address confidentiality
- Confirm Respondent is a current student

Consider Respondents may be reluctant to participate because they may be concerned of the impact on criminal proceedings

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## Initial Respondent Meeting (Cont.)

- Discuss Respondent Options
  - Right to a written response to the allegations
  - Discuss other individuals that are permitted to accompany the respondent during investigative interviews and the extent of their involvement.
- Notice respondent which type of complaint process Complainant has selected (Formal or Informal Resolution)
- Explain the Informal Resolution process
- Discuss supportive measures
- Discuss timelines
- Discuss any interim actions that may take place based upon the allegations of the complaint
- Any additional information

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## Respondent Investigatory Interview

- Undergoing an investigation may cause the Respondent to feel:
  - Stressed
  - Shame and/or embarrassment
  - Anger
  - Hopeless
- Important to provide respondent with appropriate resources/support
  - Respondent who feel supported may be more likely to participate in process
- Trauma-informed practices may be appropriate to use with Respondents as well

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## Witness Interviews

- Address confidentiality
- Address prohibition against retaliation
- Explain hearing involvement, if applicable
- Connect to resources

### Witnesses can:

- Fill in gaps in timeline
- Provide information about parties' alcohol/drug use
- Provide information regarding observable behaviors indicating possible incapacitation
- Provide corroborating information to that provided by other parties

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## Cultural Considerations in Interviews

- Continuum of honesty and face-saving
  - Some cultures do not equate face-saving with an outright lie. Parties from such cultures may believe they you can read the context of when they are telling a story in a way to preserve someone's dignity or privacy.
- In-group/out-group rigidity or flexibility
  - For cultures with rigid in-group/out-group boundaries, they may be very hesitant to disclose to someone outside of the group.
- Linear v Non-linear narration
  - Some may rely on linear storytelling, but others may have a culture of non-linear storytelling. Linear may appear cooperative, while non-linear may appear as obscuring the truth.

It is important to clarify any details that are not clear to you.

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## Gathering Information

### Notetaking:

- Verbatim notes are not needed, but quotes can be helpful
- Notes should be thorough and clear
- Develop system of symbols to denote important items and indicate where follow up questions are necessary
- Clean up and finalize notes soon after interview
- Consider using dictation software to save time

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## Gathering Information (Cont.)

### Documentary information can include:

- Text messages and call logs
- Photographs
- Social Media posts
- Video
- Building/swipe access records
- Medical records/SANE records
- Guest lists
- Bar or restaurant receipts

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## Closing the Interview

- Connection to additional witnesses/information
  - Do you have any texts, pictures, etc. that may be related to this incident?
  - Is there anyone else you can think of that I should talk to? What information do you think they may be able to provide?
- Wrap up questions
  - Is there anything else you think I need to know?
  - Is there anything you were expecting me to ask that I didn't?
  - Do you have any questions at this time?

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## Conclusion of the Interview

- Thank them for their cooperation
- Remind them of any action items
- Give them your contact information in case they remember anything
- Explain future procedures and timeline
- Remind them about the prohibition of retaliation and procedure for reporting

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## Trauma Informed Interviewing

- Most investigators and decisionmakers believe when a victim/survivor experiences trauma, the brain records most of the event including the “Who, What, Where, Why, When and How,” as well as other details of the event
- Most investigators are trained to obtain this type of information in interviews with victim/survivors
- High-stress situations can result in a trauma response on the part of the victim

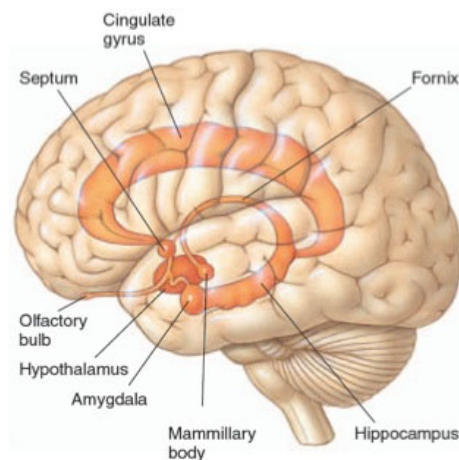
Source: [http://www.army.mil/article/72055/Army\\_expert\\_receives\\_national\\_recognition\\_for\\_combating\\_sexual\\_assault](http://www.army.mil/article/72055/Army_expert_receives_national_recognition_for_combating_sexual_assault)

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## Neuroscience – The Limbic System



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## Responses of the Brain & Body During Trauma



- **Freeze**
  - Assess situation, avoid (more) attack
- **Flight and Fight**
  - Avoid (more) attack
- When **flight** is impossible & **fight** useless.....
  - **Dissociation**
    - Protect from overwhelming sensations & emotions
  - **Tonic Immobility**
    - Last ditch effort to avoid (more) attack – or at least survive

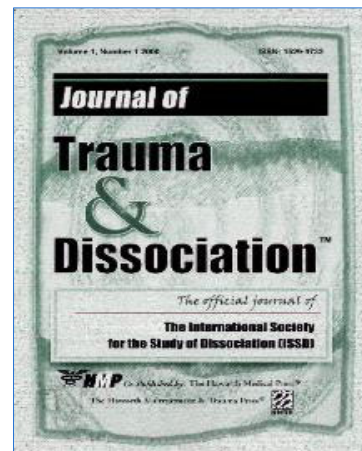
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## Dissociation

- Defense mechanism (of the brain) to protect against overwhelming sensations & emotions
  - Occurs automatically, without trying
- Portions (i.e., memories) of an experience that are normally linked together become “dis-associated”
- Examples (during & immediately following a trauma):
  - “Blanked out” or “spaced out” – in some way felt that I was not part of what was going on
  - What was happening seemed unreal to me – like I was in a dream or watching a movie or a play
  - Felt “disconnected” from my body



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## Tonic Immobility

- Uncontrollable response
- Mentally know what's happening but physically unable to move (like being awake during surgery)
- Rate of occurrence
  - 12 – 50% victim/survivors of rape experience tonic immobility during assault (most studies are closer to 50%)
- Caused by:
  - Fear
  - Physical restriction
  - “Perceived” inability to escape

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## Memory Fragmentation

- Memory recall can be very slow and difficult (or not possible)
  - Memories are “fragmented” – they come only in bits and pieces (often do not follow a timeline)
  - Process can be very frazzling and frustrating for victims

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## Traumatic responses can alter...

- Physiology
  - Heart rate, respirations, dilated pupils, dry mouth, knot in the stomach
- Affective (mood and emotion) responses
  - Fear, helplessness, horror
- Cognitive (thought) processing
  - Memory – fragmented, out of sequence
  - Time distortion
  - Increased confabulation
  - Trauma memory and recall

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## Trauma and Memory

- The body and brain react to and record trauma in a different way than we believed traditionally
- Many professionals were trained to believe that even when a person experiences a traumatic event, the pre-frontal cortex records the vast majority of the event including: Who, What, When, Where, Why, and How

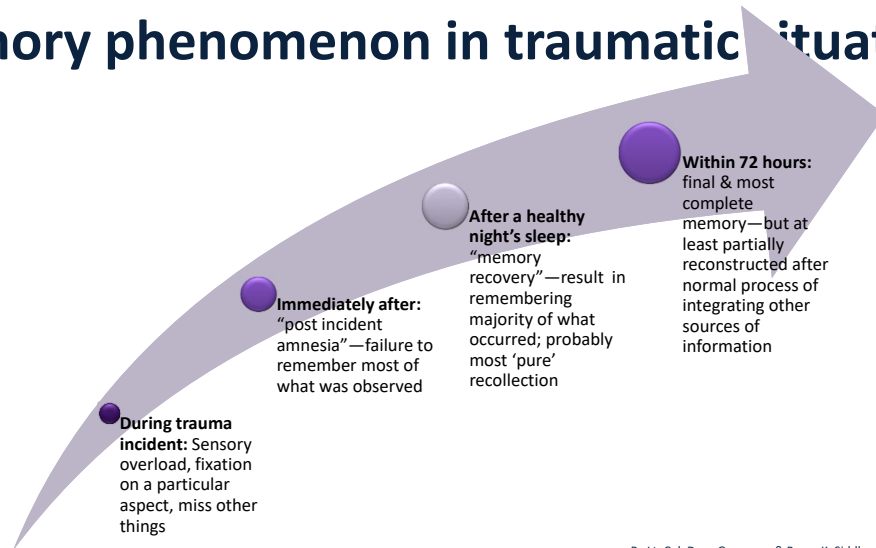
[The Forensic Experiential Trauma Interview](#), Strand & Heitman

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# Memory phenomenon in traumatic situations



By Lt. Col. Dave Grossman & Bruce K. Siddle  
*The Firearms Instructor: The Official Journal of the International Association of Law Enforcement  
Firearms Instructors*  
Issue 31 / Aug 2001

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## The Impact of Trauma on Victim/Survivor Behavior

- The effects of trauma can influence behavior of a victim/survivor during an interview
- People are often reluctant to recall experiences that evoke negative feelings and emotions such as anger, fear, humiliation, or sadness

--Strand, 2013

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## Scenario

Dave has worked at Minnesota State Community College in the Bursar's Office for over 32 years. He recently left his partner Mary, whom he has been married to for 30 years. Dave filed for divorce because she has physically hit him after calling him names and withholding money from him. Mary works at Minnesota State University a few miles away, in facilities. Dave and Mary's daughter, Madison, contacts HR this morning because:

- 1) Mary has been drunk for 3 days and has told the kids that if she cannot have Dave, no one can.
- 2) Mary admitted to Dave that she came to Dave's campus this morning and flattened his tire; and
- 3) Mary has called Dave's cell phone today 8 times while he was working. Dave called Madison and warned her that Mary is drunk, and it might be a good idea to avoid her today.

HR calls Dave in, and he denies everything and says he is "fine".

What trauma-informed considerations might you have reaching out to Dave?

What other actions might you consider taking?

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## INFORMAL RESOLUTION

## Informal Resolution

**Subpart A.** Informal resolution. A college or university may offer an informal resolution process if a formal complaint is filed and after providing both parties a notice of allegations. The parties must **voluntarily consent, in writing, to the informal resolution process**. At any time before agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the process with respect to the formal complaint. This procedure neither prevents nor requires the use of informal resolution by individuals who believe they have been subject to conduct in violation of Board Policy 1B.3. Informal resolution shall not be used to resolve allegations that an employee sexually harassed a student.

## Informal Resolution (cont.)

### Examples of Possible Educational and Restorative Activities

- Mutual no contact
- Mutual agreement to change classes or lab schedules
- Agreements on occupying shared spaces
- Residence community room reassignments and future assignments
- Agreements on what to do off campus if the parties cross paths
- Impact Statement
- Education

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## Affirmative Consent

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**CONSENT**  
IT'S SIMPLE AS TEA

of initiating sex, you're making them a cup of tea.

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## Affirmative Consent – 1B.3 Policy Language

### What is Affirmative Consent?

- Consent is **informed, freely given, and mutually understood** willingness to participate in sexual activity that is expressed by **clear, unambiguous, and affirmative words or actions.**
- A lack of protest, absence of resistance, or silence alone does not constitute consent, and past consent to sexual activities does not imply ongoing future consent. The existence of a dating relationship between the people involved or the existence of a past sexual relationship does not prove the presence of, or otherwise provide the basis for, an assumption of consent. Whether the respondent has taken advantage of a position of influence over the complainant may be a factor in determining consent.

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## Affirmative Consent Questions Answered

- Who has the responsibility to obtain affirmative consent?
- Can affirmative consent be revoked?
- Who can give affirmative consent?

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## Scenario

Lisa and Steve are first-year students at Patterson State University. They both live in Kent Hall and both on the 3<sup>rd</sup> floor. They met during orientation and hit it off. They have been dating for two weeks. Last night, a residential staff member received a report from another resident that Lisa was crying in the bathroom. The resident states that Lisa told them that Steve kept pressuring her (Lisa) to have sex and she agreed, but only if he used a condom. Halfway through intercourse, Lisa said she noticed that Steve had removed the condom. She asked him why, and he said, "The sex is way better." Lisa let him finish but has not talked with him since. The resident thinks the residential staff should keep an eye on Lisa because she is really upset and disappointed at Steve.

What questions would you consider asking the complainant?  
What questions would you consider to ask the respondent?

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# INTOXICATION VERSUS INCAPACITATION

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## **Incapacitation is ...**

- A state where a person cannot make an informed and rational decision to engage in sexual activity.
- A person who was incapacitated due to the influence of drugs, alcohol, and/or medication and could not understand the fact, nature or extent of the sexual activity.

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## **What are you evaluating?**

- Whether the complainant was incapacitated and, therefore, unable to give consent to sexual activity.

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## Areas of Inquiry

- Body weight, height and size;
- Tolerance for alcohol and other drugs;
- Gender
- Amount, pace and type of alcohol or other drugs consumed
- Signs of intoxication
- Food and non-alcoholic drinks

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## Assessment of Incapacitation

- Obvious indicators
  - Physically helpless?
    - Difficulty with motor skills, like walking
  - Unable to communicate?
    - Cannot communicate consent to sexual activity
    - Cannot communicate unwillingness to engage in sexual activity

--Keith Rohman, 2017

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## Assessment of Incapacitation

- Other indicators:
  - Does the person know where they are or how they got there?
  - Did the person do things in public that were out of character?
  - Possible memory blackout
  - Cannot verbalize coherently
  - Bizarre or risky action

--Keith Rohman, 2017

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## Assessment of Knowledge

- If the investigator finds complainant was incapacitated, investigator must evaluate respondent's level of knowledge of the level of incapacitation.
- Assess whether the Respondent knew or reasonably should have known that the Complainant was unable to consent to the sexual activity.

--Keith Rohman, 2017

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## Analysis

- What is the evidence that the complainant was under the influence of alcohol and/or drugs?
- Did the alcohol and/or drugs cause the complainant to be incapacitated?
- What did the respondent know, or what should the respondent have known, about the complainant's level of intoxication and/or incapacitation?

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## Scenario

Angela and Aaron have been dating for two years at State Community College and have engaged in consensual sexual intercourse. They both live on campus. One night while becoming intimate, Angela stops and says she doesn't feel like having sex that night. Aaron continues to touch her which Angela enjoys but says that she got him excited, and it isn't fair of her to lead him on like that. Later that night they have a few alcoholic drinks and Angela falls asleep. She wakes up and finds Aaron on top of her having sexual intercourse. She says nothing and after intercourse tries to go back to sleep.

What evidence do you need to gather for the Investigative Report?

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## CONTACT INFORMATION

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<http://www.minnstate.edu/system/equity/>