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Title IX Hearing Officer and Decision-Maker Training

Johns Hopkins University


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Presenters



Stephen J. Vaughan
Partner
T: 202.857.4585
E: stephen.vaughan@wbd-us.com



Benita Jones
Of Counsel
T: 919.484.2349
E: benita.jones@wbd-us.com



Amanda Ames
Of Counsel
T: 202.857.4494
E: amanda.ames@wbd-us.com

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Agenda

- 1 Introduction and Training Goals
- 2 Legal Updates and Requirements
- 3 The Formal Grievance Process
- 4 Trauma informed
- 5 Decision-Making Phases
 - Prepare for hearing
 - Conduct hearing
 - Make Determination
 - Sanctions and remedies
 - Draft notice of determination
 - Appeals
- 6 Case Study throughout

Intro Legal Process Trauma Informed Decision Making Case Study

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Intro

Introduction

- Welcome
- About us
- About you
- About the work we all do
- Breaks!

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Intro

Training Goals: Going Beyond What is Required by Title IX and VAWA

- Training Requirements for Decision-Makers:
 - Definition of sexual harassment
 - Institution's Policies and Procedures
 - Scope of your programs/activities
 - How to conduct an investigation and grievance process, including hearings and appeals
 - How to serve impartially and without bias and without prejudice
 - Relevant evidence and how it should be used during a proceeding
 - Proper techniques for questioning witnesses
 - Issues of relevance to draft reports that fairly summarize evidence*
 - Conducting hearings that protect complainant's safety and promote accountability (impact of trauma)*
 - Technology to be used at any hearing

Maintain training records (7 years) and post on website

*VAWA only

Legal

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Legal

Legal Updates

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Legal Updates

- Final Regs – *effective* August 2020
- July 20, 2021 Q&A
- LGBTQ guidance
- *Victim Rights Law Center et al. v. Cardona et al.*, Civil Action No. 20-11104-WGY, 2021 WL 3185743 (D. Mass.)
- **OCR Letter to Students, Educators, and other Stakeholders re *Victim Rights Law Center et al. v. Cardona* (August 24, 2021)**
- Notice and Comment for Final Regs – May 2022

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Legal Requirements – Title IX (20 U.S.C. § 1681)

“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”

and

On May 6, 2020, the Department of Education released new Title IX regulations, with mandatory implementation date of August 14, 2020

- Apply to all institutions that receive federal funds, including financial assistance
- Cover students, employees, and third parties
- Include all forms of discrimination based on sex such as sexual harassment and differential treatment
- Enforced by the Office for Civil Rights and courts

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Legal Requirements – Violence Against Women Act (“VAWA”)

- Amended Clery Act through the Campus Sexual Violence Act (“SaVE Act”) provision, Section 304
- Added domestic violence, dating violence, and stalking to the Clery crimes (which already included sexual assault)
- Requires adoption of institutional policies and procedures to address and prevent campus sexual violence
- Requires training of institutional personnel and students
- Requires prevention and awareness programs
- Clery Act Enforcement

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General Title IX Regulations & VAWA Requirements

“Recipients” of federal funds must:

- Disseminate a policy that includes a Notice of Nondiscrimination
- Designate a Title IX Coordinator
- Adopt, publish, and follow grievance procedures that are equitable, prompt, and effective and provide for adequate, thorough, reliable, fair, and impartial investigations and adjudications
- Take action to address and prevent sex-based discrimination
- Train individuals serving in specified roles

Other Applicable Laws

- Family Educational Rights and Privacy Act (FERPA)
 - Exceptions under Title IX and VAWA for files shared during the process that permit disclosure of materials the laws require to be shared
 - Remedies are not shared except as necessary to enforce them (Title IX exception is for sharing the fact remedies were provided but not the details)
- Title VII
- Disability and Accommodations
- Mandatory reporting laws requiring the reporting of child abuse and neglect
- State laws

JHU’s Policy on Sexual Harassment and Misconduct

- The Johns Hopkins University Sexual Misconduct Policy and Procedures (“SMPP”)
 - Appendix G: Procedures for Title IX Sexual Harassment
 - Appendix H: Procedures for Other Sexual Misconduct

Legal Requirements: The Fundamental Obligation

Under **Title IX**, an institution is obligated to respond when: it has **“actual knowledge”** of **“sexual harassment”** involving a person who is participating or attempting to participate in an **“education program or activity”** of the institution and when the sexual harassment is directed against a person **in the United States**

VAWA:

- Allegation of sexual assault, dating violence, domestic violence, or stalking
- Involving student or employee
- Regardless of location and participation in program/activity

Title IX Response:

Actual Knowledge

Sexual Harassment

Education Program or Activity

In the United States

Title IX Response:

Actual Knowledge

Sexual Harassment

Education Program or Activity

In the United States

Legal Requirements: Actual Knowledge and Officials with Authority

“means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the university who has the authority to institute corrective measures on behalf of the recipient”

- Notice need not be in the form of a Formal Complaint
- Constructive notice or vicarious liability “are insufficient to constitute actual knowledge”
- Mere ability or obligation (by policy) to report sexual harassment does not make you an official with authority
- Having been trained to report sexual harassment does not make you an official with authority

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Title IX Response:

- Actual Knowledge
- Sexual Harassment
- Education Program or Activity
- In the United States

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Legal Requirements: Title IX Sexual Harassment Defined

Conduct on the basis of sex that satisfies one or more of the following:

- (1) **Quid pro quo**: an employee conditions an aid, benefit, or service of recipient on an individual’s participation in unwelcome sexual conduct;
- (2) **Hostile environment**: 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 recipient’s education program or activity; or
- (3) **“sexual assault,” “dating violence,” “domestic violence,” or “stalking”**

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Legal Requirements: Title IX Sexual Harassment Defined

Sexual Assault: any sexual act direct against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. This includes:

- **Rape:** carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- **Sodomy:** oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Legal Requirements: Title IX Sexual Harassment Defined

Sexual Assault (cont.):

- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.

Legal Requirements: Title IX Sexual Harassment Defined

- **Dating violence:** any act of 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 is determined based on a consideration of the length, type, and frequency of interactions between the persons involved in the relationship.
- **Domestic violence:** a felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, 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 the jurisdiction.

Legal Requirements: Title IX Sexual Harassment Defined

- **Stalking:** a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress
- **Course of conduct:** two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property
- **Reasonable person:** a reasonable person under similar circumstances and with similar identities to the Complainant
- **Substantial emotional distress:** significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling

* The VAWA crimes as defined in the Clery Act

Title IX Response:

- Actual Knowledge
- Sexual Harassment
- Education Program or Activity
- In the United States

Legal Requirements: Education Program or Activity

- Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
 - On campus or
 - Off campus, when:
 - Part of the recipient's operations
 - Occurs at any building owned or controlled by an officially recognized student organization (e.g., fraternities and sororities)

Title IX Response:

- Actual Knowledge
- Sexual Harassment
- Education Program or Activity
- In the United States

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Legal Requirements: Response to Sexual Harassment

If recipient has actual knowledge, Recipient/Title IX Coordinator must:

- Respond promptly in a manner that is not *deliberately indifferent*, meaning the response cannot be clearly unreasonable in the known circumstances
- Follow the Title IX Regulations "Grievance Process"
- Promptly contact the Complainant to discuss availability of *supportive measures*
- Consider Complainant's wishes with respect to the supportive measures
- Inform Complainant of availability of supportive measures regardless of whether a formal complaint is filed
- Explain the process of filing a Formal Complaint
- Provide written notice of rights and options for allegations of sexual assault, dating violence, domestic violence, and stalking (VAWA)
- Notify Complainant of right to report to law enforcement and offer assistance (VAWA)

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Legal Requirements: Response to Sexual Harassment

Framework:

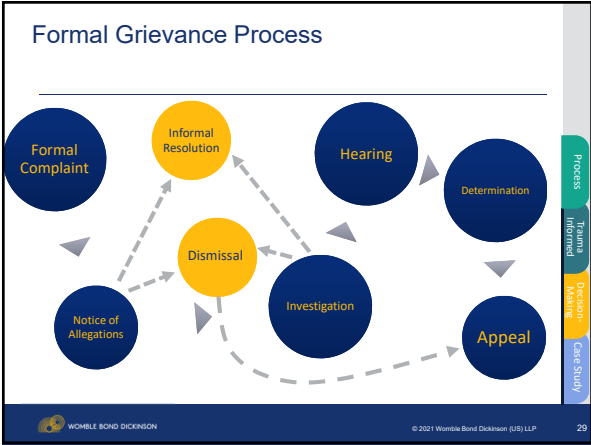
- Title IX:** actual knowledge, sexual harassment, in education program or activity, directed against someone in the US
- VAWA:** sexual assault, dating violence, domestic violence, or stalking; involving a student or employee; regardless of participation in program/activity
 - Some cases will involve both
- Others could be neither (e.g., hostile environment-type sexual harassment that is not severe, pervasive, or objectively offensive) and are governed by your Policies

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The Grievance Process

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Reports vs. Formal Complaints

Some process begins upon the receipt of information containing allegations of sexual harassment, a "report"

- Often made to others outside the Title IX team
 - Faculty, staff, employees, and student employees ("Responsible employees" under your policy?)
 - Confidential resources
 - Friends, fellow students, and family members
- Title IX Coordinator or designee determines the required (and equitable) response and promptly contacts Complainant

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Title IX “Formal Complaint” Initiates Grievance Process

Formal Complaint under Title IX (but not required by VAWA):

1. Document;
2. Filed by a Complainant (or parent/guardian with legal right to do so) or signed by the Title IX Coordinator;
3. Alleging Sexual Harassment against a Respondent; **and**
4. Requesting an investigation of an allegation of Sexual Harassment

Important!

- Cannot be filed anonymously
- Can be filed in person, by mail, email using Title IX Coordinator’s contact information or any other method designated (e.g., online reporting form)
- Must have digital signature or other confirmation for Complainant
- Title IX Coordinator who signs a Formal Complaint is not a “party”
- Complainant’s identity, if known, must be disclosed to Respondent (in contrast to a “report”)
- Complainant must be participating/attempting to participate in program or activity
- No statute of limitations
- **Consolidation of Formal Complaints permitted for cases arising out of same facts or circumstances**

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Supportive/Interim Measures

Non-disciplinary, non-punitive, individualized services offered, as appropriate, as reasonably available, and without fee or charge to the Complainant or Respondent before or after the filing of a Formal Complaint or where none has been filed.

- Designed to restore or preserve equal access to the recipient’s program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s education environment, or deter sexual harassment
- Must maintain as confidential to the extent that doing so would not impair the ability to provide them
- Also known as “interim measures” for sexual assault and VAWA crimes
- *If the action is listed your policy as a sanction, it is likely disciplinary or punitive*

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Supportive/Interim Measures

Title IX Regulations, they may include:

- Mutual restrictions on contact between the parties—**most common**
- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Changes in work or housing locations
- Leaves of absence
- Increased security or monitoring of certain areas of the campus
- Or other similar measures chosen by recipient
 - Or third parties who can provide services (MOUs)
- **Must consider Complainant’s desires for the options**

Some examples from JHU Policy:

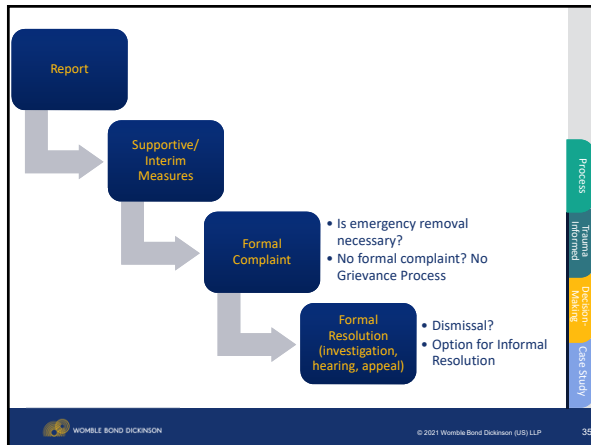
- Moving residences on-campus;
- Adjusting work schedules;
- Changing academic schedules;
- Changing advisors;
- Parking and/or transportation accommodations;
- Rescheduling examinations;
- Allowing withdrawal from or re-taking classes without penalty;
- Providing access to tutoring or other academic support;
- Prohibiting attendance at group or organizational informal or formal functions overseen by the University;
- Administrative leave for non-student employees;
- Issuing mutual “no contact” orders;
- Assistance connecting with medical and/or mental health services;
- Change in dining location;
- Access to safety escort services;
- Assistance connecting with a supporter.

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Emergency Removal/Administrative Leave

Emergency removal process is permitted, when:

- after an individualized safety and risk analysis, recipient determines there is an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment
 - Must provide Respondent notice and opportunity to immediately challenge decision
- A recipient may place a non-student employee on administrative leave during the pendency of a grievance process.



Formal Grievance Process

Basic Requirements:

- No bias or conflicts of interest (as to party type generally or individuals)
 - Training required for all roles!
- Treat parties equitably
 - Participation in process and submission of evidence
 - Advisors and limits to participation (cannot limit cross-examination)
 - Access to directly related and relevant evidence
- Follow Grievance Process before imposing sanctions or other non-supportive measures
- Remedies designed to restore or preserve access to education or activity (need not be non-disciplinary or non-punitive) – occurs after a determination of responsibility

Formal Grievance Process

Basic Requirements (cont.):

- Describe range of supportive measures
- Remedies are often extensions of supportive/interim measures
Complainant received during process
- Presumption of not responsible
- State the standard of evidence and use the same one for all Formal Complaints regardless of who the parties are
 - Preponderance or clear and convincing
- Cannot seek to collect information protected by legally recognized privilege unless the privilege has been waived
- Same for medical treatment records unless voluntary, written consent

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Formal Grievance Process

Basic Requirements (cont.):

- Reasonably prompt timeframes (temporary delays for good cause)
 - For each phase of the process (some are specified in the Regs)
 - With written notice to the parties citing reasons for delay and upon resuming investigation
 - Good cause includes: absence of party, advisor or witness unavailable; language assistance/disability accommodation; or concurrent law enforcement activity (brief, for fact gathering, not criminal prosecution)
- Objective evaluation of all evidence, inculpatory and exculpatory
 - Credibility determinations cannot be based on status as Complainant, Respondent, or witness
- Describe range of sanctions and remedies
- Procedures and grounds for appeals
- **Plus any provisions, rules, or practices adopted by institution**

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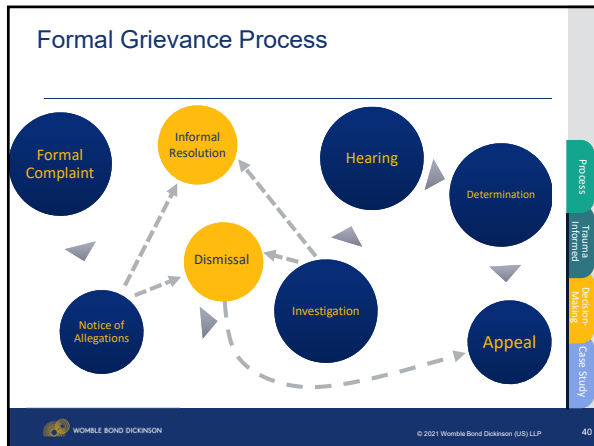
Formal Grievance Process — Dismissals

Two types:

1. Mandatory dismissal of Title IX Formal Complaint, when:
 - the allegation, even if proved, would not need meet sexual harassment definition;
 - did not occur in education program or activity; or
 - did not occur against a person in the U.S.
2. Discretionary dismissal (*at any time*), if:
 - Complainant provides written notice to Title IX Coordinator of withdrawal of Formal Complaint or allegations
 - Respondent no longer enrolled in or employed by recipient
 - specific circumstances prevent recipient from gathering sufficient evidence to reach a determination as to the Formal Complaint

In either case, recipient must promptly send a written notice of dismissal and the specific reasons for it, simultaneously to the parties (appealable)

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The Decision-Making Process

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Whose responsibility is it?

The **burden of proof** and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties.

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Understanding Roles — Title IX Coordinator

High level, directly or through designee:

- Coordinating the recipient's response to discrimination on the basis of sex, including sexual harassment and misconduct
- Ensuring process is free from known or reported conflicts of interest or bias
- Responding to reports alleging sexual harassment
- Determining the appropriate process
- Overseeing the grievance process
- Ensuring the process is user-friendly
- Coordinating the effective implementation of supportive/interim measures
- Overseeing training requirements
- Separating roles and responsibilities
- Ensuring process is compliant and effective

Understanding Roles — Title IX Coordinator

Ground level, upon receipt of a report/complaint:

- Receipt of report and/or formal complaint
- Meeting with Complainant
- Safety and risk analysis (Complainant and community)
 - Removal process, if applicable (very rare)
- Written notice of rights to Complainant and preservation of evidence (VAWA compliant)
- Notification of right to contact law enforcement (and note differences)
- Notification of right to obtain medical treatment
- Supportive/Interim measures
- Evaluate availability of informal resolution
- Evaluate potential grounds for dismissal
- Decision to move forward with an investigation
- Determination of which policy/process will be followed

Understanding Roles — Investigator's Work

- Undertake a **thorough search for relevant facts and evidence** pertaining to a particular case, while operating **under the constraints** of conducting and concluding the investigation under designated, reasonably prompt timeframes and without powers of subpoena."
- Such conditions limit the extensiveness or comprehensiveness of the efforts to gather evidence while reasonably expecting you to gather evidence that is available
- Culminating with the Final Investigative Report and investigation file
 - Summary of "directly related" evidence (must be available at the hearing)
 - Final report containing relevant evidence
 - With copies of both to the parties and advisors for review and response
- *For VAWA: only access to information used by decision-makers*

“Directly Related” and Relevant Evidence

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Understanding Roles — Staying in Your Lane

Recipient's Role	Hearing Officer's Role
<ul style="list-style-type: none"> · Complying with legal obligations · Establishing and overseeing grievance process (bias and conflict free) · Intake · Notice of rights · Dismissals and removal · Clery/timely warnings/ASR · Supportive/Interim measures · Providing support resources · Establishing advisor parameters · Conducting compliant investigation · Extending case deadlines · Coordinating hearing process 	<ul style="list-style-type: none"> · Participating in required trainings · Identifying conflicts or bias concerns · Reviewing investigative report and responses · Preparing for the hearing · Conducting hearing · Asking questions of parties and witnesses · Making relevancy and evidentiary rulings · Making credibility determinations · Making a finding · Determining sanctions?

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Understanding Roles — Coordination Between Decision-Maker and Title IX Coordinator

- Who will:
 - Decide when the case events, such as the hearing, will occur
 - Decide who participates in the hearing
 - Communicate with the parties, including issuing timely notice of meetings to the parties for pre-hearing, hearing, or related events
 - Communicate/arrange for witness participation
 - Pre-hearing
 - Decisions about delay for good cause and send notices of delay
 - Responsibility for technology during the hearing
 - Prepare opening scripts or remarks for the hearing
 - Ensure compliance with timeframes in policy and required by Title IX

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Understanding Roles — Title IX Dividing Lines

- Title IX Coordinator can be an investigator but cannot be a decision-maker
 - Can make recommendations regarding findings
- Investigator cannot be a decision-maker (no single investigator model)
 - Can make recommendations regarding findings
- BUT decision-maker, regardless of recommendations, must independently and objectively evaluate the relevant evidence (no deferential treatment)

Title IX Legal Requirements — Hearings

- Live hearing, in-person or virtual (with security measures)
- At the request of either party, hearing to take place with *parties* in separate rooms with technology enabling the decision-makers to simultaneously *see and hear the person answering questions*
- Parties entitled to an advisor of their choice
 - advisor role can be limited (to asking questions)
 - if party does not have advisor or advisor does not attend the hearing, institution must provide without charge (if party refuses, loses the right)
 - no requirement that institution-provided advisor be an attorney or have experience or training (“read” party’s questions)
 - not required to be free from bias or conflicts
- Party can also be accompanied by others if “required by law” (e.g., language assistance or disability)

Title IX Legal Requirements — Hearings

- Providing for cross-examination:
 - of parties and witnesses by allowing each party’s advisor of choice to ask “all relevant questions and follow-up questions,” including those challenging credibility
 - conducted directly, orally, and in real time by the party’s advisor and never by the party personally
- **If party or witness does not submit to cross-examination (including those who provide testimony but directly or indirectly fail or refuse to answer any question posed by advisor), then their statements cannot be considered by the decision-maker**
 - **Regardless of the reason, even death**
 - **All statements that are not the alleged harassment, including reports, records, text messages and communications, and accounts**
- Institution cannot require party or witness to participate, although the reason for not participating may be important (threat? safety? retaliation?)
- **Decision-maker cannot draw inference “solely” based on lack of participation or testimony**

Title IX Legal Requirements — Hearings

- Before a question can be answered, the hearing officer must determine whether it is relevant and explain any decision to exclude a question that is not relevant:
 - Mechanics: question posed, pause, hearing officer makes relevancy determination, and, if permitted, question answered
 - Can decide that duplicative questions are not relevant
 - Questions that assume facts not in evidence, are prejudicial, or appear misleading are to be permitted, if relevant
- Can permit discussion about the relevancy determination
 - otherwise the parties can address it through an appeal
- Must create an audio recording, audiovisual recording, or transcript of the live hearing and make it available to the parties for review and inspection

Decision Making
Case Study

Understanding Impartiality: Bias and Conflicts of Interest

- Case-by-case examination of the "particular facts"
- Recipients are encouraged 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."
- If someone has a material connection to a dispute, or the parties involved, and a reasonable person would question that person's ability to be impartial
- Could be based on a number of factors or connections, including prior or existing relationships, prior interactions or involvement, professional experience and activities, areas of study, or the decision-maker's position on campus
- Cannot make decisions based on characteristics of the parties—must be based on the facts of the case

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Trauma Informed

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Trauma Informed Education

Experience and research reveal:

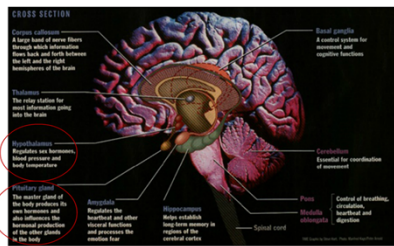
- Sexual assault on campus often involves people who know each other
- Complainants frequently blame themselves
- Complainants commonly delay in reporting or do not report
- Cases often involve friendship groups
- Different people respond to trauma differently
- Alcohol is frequently involved
- Appearing to display symptoms of trauma does not mean that trauma was suffered

Neurobiology of Sexual Assault

The Neurobiology of Sexual Assault

Neurobiology of Sexual Assault: Trauma and Impact on the Brain

Brain Regions Impacted by Trauma

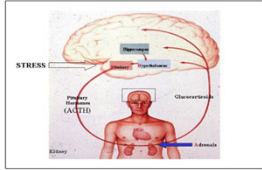


Neurobiology of Sexual Assault: Trauma and Impact on the Brain

Brain-Body Regions Impacted by Trauma

HPA Axis

Balances body following stress by releasing of various hormones/chemicals



SOURCE: Southwick et al., 2005

Neurobiology of Sexual Assault: Trauma and Impact on the Brain

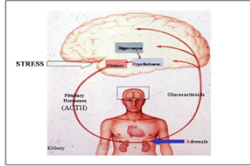
Brain-Body Regions Impacted by Trauma

Catecholamines: Fight or flight response

Cortisol: Energy available

Opioids: Prevent pain

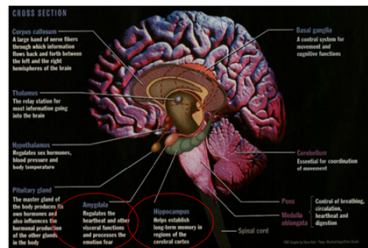
Oxytocin: Promotes good feelings



SOURCE: Southwick et al., 2005

Neurobiology of Sexual Assault: Trauma and Impact on Memory

Brain Regions Impacted by Trauma



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Neurobiology of Sexual Assault: Trauma and Impact on Memory

Memory Processes Impacted by Trauma

Hippocampus processes information into memories

Encoding = Organizing sensory information

Consolidation = Grouping information into memories and storing them

Amygdala specializes in the processing of emotional memories (works with the hippocampus)

Both structures are VERY sensitive to hormonal fluctuations

SOURCE: Southwick et al., 2005

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Neurobiology of Sexual Assault: Trauma and Impact on Memory

Like These . . .

Catecholamines: Fight or flight response

Cortisol: Energy available

Opioids: Prevent pain

Oxytocin: Promotes good feelings

THESE HORMONES IMPAIR MEMORY CONSOLIDATION

SOURCE: Southwick et al., 2005

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Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

What Happens During A Sexual Assault

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    graph LR
      A[Amygdala Detects Threat] --> B[Activates Hypothalamus]
      B --> C[HPA Axis Kicks In Hormonal Flood]
    
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SOURCE: Banks, 2002; Southwick et al., 2005

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Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

What Happens During A Sexual Assault

Catecholamines Increase

• Impairs rational thought

Opioids Increase

• Causes flat affect

Corticosteroids Decrease

• Reduces energy

SOURCE: Banks, 2002; Southwick et al., 2005

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 Decision Making
 Case Study

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Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

What Happens During A Sexual Assault

Amygdala Detects Threat

→

Activates Hypothalamus

→

HPA Axis Kicks In Hormonal Flood

↓

Can Trigger a Complete "Shut Down" in the Body

SOURCE: Banks, 2002; Southwick et al., 2005

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Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

Tonic Immobility (TI)

- AKA: "Rape-induced paralysis"
- Autonomic (uncontrollable) mammalian response in extremely fearful situations
- Increased breathing, eye closure, paralysis
- 12-50% rape victims experience TI during assault
- TI is ~more common in victims who have been assaulted before (childhood, adolescence, or adult)

SOURCE: Foa et al., 2007; Calzone et al., 1993; Heldt et al., 2005

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Recap of How Trauma Plays Out in Sexual Assault

- Flight/Flee – Try to run or get away from the threatening situation
- Fight – Body tries to fight back against the traumatic event
- Limits Rational Thought Process
- Flat Affect
- Freeze – Unable to move or fight back

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Neurobiology of Sexual Assault: What Happens in Terms of Memory?

What Happens During A Sexual Assault

```

    graph TD
      A[Increased Stress Hormones] --> B[Impaired Functioning in Hippocampus]
      B --> C[Memories Fragmented]
      C --> D[Memory Recall Can Be Slow & Difficult]
      D --> E[Events of the Assault CAN Be Recalled Accurately]
  
```

BUT ...
 Alcohol use during the assault may prevent encoding, which means there's nothing to retrieve

SOURCE: Koss et al., 1995, 1996; Rozendael et al., 2009; Rubin et al., 2008

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Neurobiology of Sexual Assault: What Happens in Terms of Memory?

Case Study: Memory Fragmentation

- 25 year-old woman
- Raped by a friend's brother at 4th July party
- Filed police report
- Detective interview was when it all went to hell

"He wouldn't let up, pounding me with question after question. Trying to trick me, trying to get me to mess up. I wanted to say, 'hold on, give me a minute to think.' No, he kept coming at me."

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Neurobiology of Sexual Assault: What Happens in Terms of Memory?


Case Study: Memory Fragmentation

"It was classic good-cop / bad-cop. He stormed off and another detective sat down next to me. He offered me a cup of coffee.

Coffee? OK fine. How do I take it? WHAT? Why does he care how I take my coffee?

Well, he did.

He made me coffee. He gave me time to just sit, collect my thoughts."


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Neurobiology of Sexual Assault: What Happens in Terms of Memory?

Case Study: Memory Fragmentation

"We talked it through. And I didn't feel rattled and freaked out. I'm sure I was incoherent and he just let it roll. He was patient.

I felt like I was piecing it together, like a puzzle, we were putting together a puzzle together.

And drinking coffee."


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Neurobiology of Sexual Assault: What Happens in Terms of Memory?


Case Study: Memory Fragmentation

I: So, why did you do that? (give her the coffee)


R: It helps. Not the coffee so much, just the moment to let it all come together in their heads.

I: What do you mean?

R: I don't know why it's like that, I've just noticed that over the years. If you give them a few minutes to breathe . . . it starts to make more sense. I don't know why, it just does.



MEMORY CONSOLIDATION
A DOCUMENTED NEUROBIOLOGICAL CONDITION



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Neurobiology of Sexual Assault: What Happens in Terms of Memory?


Case Study: Memory Fragmentation

I: Were you worried that if you gave her some time, she'd just make something up?

R: Nah, not really. I mean, some victims lie, but most don't. Besides, if they're lying, we'll catch 'em at it eventually. I think it's just hard for victims to talk about and we just need to have a little patience.




**MEMORY
CONSOLIDATION**
A DOCUMENTED
NEUROBIOLOGICAL CONDITION


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Recap of Trauma's Impact on Memory


- Slowed Recall
- Disorganized and Fragmented
- May appear like the story is changing
- If alcohol was involved the memory may not be retrievable


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Neurobiology of Sexual Assault: What Does This Mean For Practitioners?

Take Home Lessons

- Neurobiological changes can lead to flat affect or "strange" emotions or emotional swings
 - "Hormonal soup"
 - Misinterpreted as being cavalier about it or lying
 - Wide range of emotions are in fact normal and it can be helpful to normalize those reactions



SOURCE: Campbell & Patterson, 2011
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Neurobiology of Sexual Assault: What Does This Mean For Practitioners?

Take Home Lessons

- Neurobiological changes can make memory consolidation and recall difficult
 - Story may come out fragmented or "sketchy"
 - Misinterpreted as evasiveness or lying
 - The content of the memory is accurate, just may take some time and patience for it to come together

SOURCE: Campbell & Patterson, 2011; Koss et al., 1995, 1996


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Neurobiology of Sexual Assault: What Does This Mean For Practitioners?

Take Home Lessons

- Tonic immobility is often frightening to victims
 - Associated with increased self-blame
 - Associated with decreased likelihood of seeking help
 - Friends, family, service providers reactions to a disclosure of TI are often hurtful
 - Helpful to explain what TI is and normalize it


SOURCE: Foa et al., 2007; Gelfano et al., 1993; Heldt et al., 2005; Marx et al., 2008


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Related Concepts to Consider

- Secondary Victimization
 - "the victim-blaming attitudes, behaviors, and practices that exacerbate sexual assault survivors' trauma" or cause them to relive it
 - "made them feel guilty, depressed, anxious, distrustful of others, and reluctant to seek further help"
 - questions about decision-making, alcohol consumption, sending mixed signals, or appearance/clothing
- Use of sensory information to help recall memory affected by experiencing trauma
 - Asking about what the person could see, smell, taste, feel, or hear


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Thank You

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Training
Internal
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The Decision-Making Phases

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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Make Determination
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals

Decision Making
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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
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- 5) Draft notice of determination
- 6) Appeals

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Decision-making Phases: Prepare for Hearing

Preparation (Procedural):

- Complete decision-maker training
- Complete institution-specific training on policies and hearing technology
 - Know who will have what technology responsibilities during the hearing
- Understand the roles and procedural rules of order for the hearing
 - Know who the hearing participants are and each person's role
 - Hearing panel? Single hearing officer? Chair?
 - Know the hearing mechanics: opening and closing statements? Direct exam? Investigator testify?
 - Who will make relevancy determinations and what are the expectations or requirements?
 - Who is charged with enforcing procedural rules?
 - Who coordinates witnesses and testimony?
 - Who pushes hearing along from one action to the next?
 - Time limits?

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Decision-making Phases: Prepare for Hearing

Preparation (Procedural):

- Know decorum requirements imposed by institution, such as
 - Participants required to be respectful and professional
 - One person speaks at a time
 - Do not interrupt testimony or hearing officer
 - No additional recordings
 - Wait for hearing officer to rule before answering questions
- Cross-examination to be respectful, non-abusive, and cannot be used to intimidate party or witness
- Parties are permitted to consult with advisor during hearing (Title IX requirement)
- Roles of advisors

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Decision-making Phases: Prepare for Hearing

Preparation (Procedural):

- Will the hearing be a “closed record”
- Know if there are limits to the evidence to be presented
 - Only “directly related” evidence collected by the investigator?
 - Only evidence contained in the investigative report?
 - Permitted to present new evidence at the hearing?
- Who is responsible for having all “directly related evidence” available to use at the hearing
- What is the process, if any, for deciding party objections about directly related evidence not included in the final report
- How are decisions about who testifies, in what order made
- Pre-hearing conference?

Decision
Making
Case Study

Decision-making Phases: Prepare for Hearing — Prehearing Conferences

- Not required by the Regs
- Can be in-person/virtual with party and advisor
- Cover the procedural basics
 - Use of technology
 - Roles: hearing officers, parties, advisors, witnesses, investigator, and hearing coordinator
 - Decorum
 - Cross-examination
 - Conflicts
 - Privacy/Confidentiality/Limits to use of information
- Scope of and procedures for introduction of evidence
- Preview of cross-examination questions or other evidence?
- Confirm participation in hearing
- Find out if the party has an advisor or will need one (required for cross)
- Best person to convene the conference? (not the hearing chair?)

Decision
Making
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Decision-making Phases: Prepare for Hearing

Preparation (Substantive):

- Review file, which should include:
 - Notice of investigation
 - Final Investigative Report and exhibits (“directly related evidence”?)
 - Party responses (and anticipate arguments for hearing)
 - Policies and definitions—know the elements
 - Pertinent pre-hearing conference information
- Review file....
- Determine what factual questions need to be decided
 - Evaluate all related, existing evidence
 - Identify consistencies and inconsistencies in material information
 - Identify information gaps and sources to fill them
- Determine what witnesses you want to question
- Draft questions (and confer with other panelists and/or counsel)

Decision
Making
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Decision-making Phases: Prepare for Hearing

Preparation (Substantive):

Relevant evidence:

- “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
- “focus investigations and adjudications on **evidence** pertinent to **proving whether facts material** to the **allegations** under investigation **are more or less likely to be true** (i.e., on what is relevant).”

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Decision-making Phases: Prepare for Hearing

Preparation (Substantive):

- Know your Policy on the “suppression provision” of the Regs that was vacated by the *Cardona* court and :
 - “If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”
- OCR affirmed that “a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility.”

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Decision-making Phases: Prepare for Hearing — Opening Script

- The basics:
 - Date and time
 - Parties
 - Closed hearing
 - Note the recording (confirm they are not? Pan the room?)
 - Purpose of the hearing
- Explain hearing officer or panel's role
- Rules of decorum (see previous slide)
- Policy against retaliation
- Confirm review of contents of investigative report and role of the report in the hearing (do not need to repeat the information)

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Decision-making Phases: Prepare for Hearing — Opening Script

- Describe hearing procedures and order
 - Openings; direct/narrative; questions of parties and witnesses; closings?
 - Investigator testimony?
 - Advisors and hearing officer(s) to ask questions
 - Opportunity for party to explain relevancy of some questions (or is the decision final)
 - Roles of advisors
 - Scope of evidence at hearing
 - Time limits
 - Breaks
 - Amnesty

Decision
Narrative
Case Study

Decision-making Phases: Prepare for Hearing — Opening Script for Testimony

Prior to any party or witness testimony:

- Script transitions for each phase of the hearing
- State who they are or ask that they identify themselves
- Advise of recording and confirm that they are not
- Explain who will ask them questions and the process (pause before answering)
- Explain that may be difficult questions about sensitive matters
- Ask them not to read anything into the questions
- Tell them they can ask for a break, if needed
- Tell them to let you know if any question is unclear, confusing, or difficult to understand
- For witnesses, instruct them to keep information confidential
- Reminder of any amnesty provision
- Ask for their commitment to tell the truth

Decision
Narrative
Case Study

Decision-making Phases: Prepare for Hearing — Closing Script for Testimony

Prior to any party or witness being dismissed:

- **Ask the parties if they have any further questions for the witness**
- Reminders about confidentiality and retaliation
- Thank witnesses for their time

Decision
Narrative
Case Study

Decision-making Phases: Prepare for Hearing — Closing Script for Hearing

- Hearing concluded
- If applicable, provide information related to the next phase (sanctions?)
- Communicate any additional deadlines
- Explain your next steps
- Reminder about retaliation policy
- Contact appropriate officials with any further questions about the process
 - Hearing coordinator
 - Title IX Coordinator

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The Title IX Coordinator has received notification from the University's online reporting system. Celia alleges that Ryan had sexual intercourse with her and had her perform oral sex on him while she was blacked out.

On August 17, 2021, Celia submitted a complaint alleging that Ryan sexually assaulted her. In her complaint, Celia alleged that Ryan had vaginal sex with her and had her perform nonconsensual oral sex on him while she was blacked out on May 8, 2021.




Case Study



Excerpt from Amended Notice of Allegations:

Cella submitted a formal complaint of alleged nonconsensual sexual penetration (vaginal and oral) with her and nonconsensual fondling of her breasts and Ryan's penis in her room in the University's apartment complex.



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JHU Definition of Title IX Sexual Harassment

- The term "Title IX Sexual Harassment" means conduct on the basis of sex* that satisfies one or more of the following:
 - An employee conditioning educational benefits on participation in unwelcome sexual conduct (quid pro quo);
 - Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity; and/or
 - Sexual Assault, Dating Violence, Domestic Violence, or Title IX Stalking

**including conduct based on sexual orientation and gender identity or expression*

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JHU Definition of Non-Title IX Sexual Harassment

- The term "non-Title IX sexual harassment," whether between people of different sexes or the same sex, includes, but is not limited to, conduct that does not meet the definition of Title IX Sexual Harassment but otherwise constitutes unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal, electronic or physical conduct of a sexual nature when:
 - The respondent is a non-employee and submission to such conduct is implicitly or explicitly a term or condition of an individual's participation in an educational program or activity;
 - The respondent is a non-employee and submission to or rejection of such conduct by an individual is used as the basis for academic decisions, evaluation or advancement; or
 - Such conduct creates a non-Title IX hostile environment ("non-Title IX hostile environment").
- Examples include: comments about appearance in a sexually suggestive way; staring/making obscene gestures or noises; repeatedly asking someone on a date; "flashing" or exposing body parts; sexual coercion; intentional sexual touching that does not meet the definition of Title IX Sexual Harassment; disrobing; spreading sexual rumors; rating peers or colleagues with respect to sexual performance; non-consensual observation, photographing, or recording of sexual activity or nudity; non-consensual distribution or dissemination of photographs/recordings of sexual activity/nudity, including photographs/recordings made consensually; allowing a third party to observe sexual activity without the consent of all parties; and prostituting/trafficking another person

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JHU Definition of Non-Title IX Hostile Environment Harassment

- A “non-Title IX hostile environment” results from unwelcome sexual or sex-based conduct (including sexual orientation-based and/or gender identity/expression-based conduct) that does not meet the definition of Title IX Sexual Harassment but is so severe, pervasive, or persistent that it unreasonably interferes with, limits, or deprives a member of the community of the ability to participate in or to receive benefits, services, or opportunities from the University’s education or employment programs and/or activities. A “non-Title IX hostile environment” can be the result of acts committed by any individual or individuals, including any member of the University community. To assess whether the alleged conduct has created a hostile environment under this definition, the University considers all relevant evidence, weighs a variety of factors, and evaluates the conduct at issue from both a subjective and objective perspective.

Case study

JHU Definition of Sexual Assault

- The term “**sexual assault**” includes the following actual or attempted acts:
 - **Rape (except Statutory Rape):** The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.

Case study

JHU Definition of Sexual Assault (cont.)

- **Sodomy:** Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.

Case study

JHU Definition of Consent

- Sexual activity of any kind requires “consent,” which consists of the following:
 - Consent means clear and voluntary agreement between participants to engage in the specific act.
 - Consent requires a clear “yes,” verbal or otherwise; it cannot be inferred from the absence of a “no.”
 - Consent must be ongoing throughout a sexual encounter and can be revoked at any time.
 - Consent to some sexual acts does not necessarily imply consent to others.
 - Past consent does not mean ongoing or future consent.

Case study

JHU Definition of Consent (cont.)

- Consent cannot be obtained by pressure, threats, coercion or force of any kind, whether mental or physical. Consent means actually agreeing to the specific sexual activity, rather than merely submitting as a result of pressure, threats, coercion or force of any kind, whether mental or physical.
- Consent cannot be obtained from an individual who is under the legal age of consent.
- Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another.

Case study

JHU Definition of Consent and Incapacitation

- Consent cannot be obtained from someone who is unconscious, asleep, physically helpless, or **incapacitated** (including, but not limited to, mentally incapacitated). A person is **incapacitated** when they are unable to make a rational decision because the person lacks the ability to understand their decision. A person who is **incapacitated** is unable to consent to sexual activity. A person can become **incapacitated** as a result of physical or mental disability, involuntary physical constraint, being asleep or unconscious, or consumption of alcohol or other drugs. A person can consume alcohol and/or drugs without becoming **incapacitated**. A person who engages in sexual activity with someone that person knows or reasonably should know is **incapacitated** does not have consent and will be found responsible for a Policy violation.

Case study

JHU Definition of Retaliation

- The term "retaliation" means intimidating, threatening, coercing, harassing, taking adverse employment or educational action against, otherwise discriminating against an individual in any way, and/or interfering with any right or privilege secured by Title IX or its implementing regulations, including through online communications and activities such as social media, because the individual made a report or complaint under this Policy or these Procedures, participated in any way in the investigation or resolution of such a report or complaint, opposed conduct that they reasonably believed to be prohibited under this Policy, these Procedures, or applicable law regarding discrimination or harassment, or exercised any right or responsibility under this Policy or these Procedures.

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JHU Definition of Retaliation (cont.)

- Retaliation includes conduct that is reasonably likely to deter an individual from making a complaint or report under this Policy or from participating in the investigation or resolution of a complaint or report, or from opposing conduct that they reasonably believe to be prohibited under this Policy, these Procedures, or applicable law regarding discrimination or harassment.

Case Study

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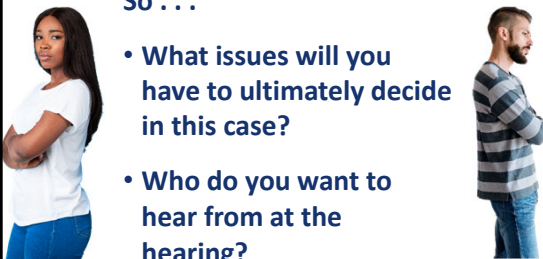
Review the Final Investigative Report and Party Responses

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So . . .

- What issues will you have to ultimately decide in this case?
- Who do you want to hear from at the hearing?



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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Make Determination
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals

Decision Making Case Study

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Decision-Making Phases: Conduct Hearing

Suggested practices:

- Follow your scripts
- Follow your institution's processes and procedures for the phases of the hearing absent unusual circumstances
- Ensure whomever you might need is reachable (Title IX Coordinator, counsel, back-up advisors)
- Be consistent in procedures and in-hearing decisions:
 - Relevancy determinations
 - Use of evidence
 - Breaks
 - Your manner and demeanor
 - Any latitude to parties or advisors should be equal
- *If you are concerned about what to do in the moment, pause the proceedings to seek assistance*

Decision Making Case Study

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Decision-Making Phases: Conduct Hearing — Questions by Advisors and Relevancy

Follow the same process for each question:

- Question asked
- Witness must pause (you will have to remind them)
- Determine and communicate whether the question is relevant and can be answered
 - “The basic test for relevance is whether the question posed is probative of the question of responsibility. In determining whether a question is relevant, the Department explains that the decision-maker must focus on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.”
 - If relevant, use consistent form: e.g., “you can answer,” “please answer,” “go ahead,” or “OK” (notify parties/witnesses/advisors)

Decision-Making Phases: Conduct Hearing — Questions by Advisors and Relevancy

Can exclude/deem the question not relevant (must articulate reasons) if:

- Harassing
- Duplicative/repetitive
- Irrelevant (remember that you can later decide the appropriate weight)
 - **Form language:** “It is sufficient, for example, for a decision-maker to explain that a question is irrelevant because . . . the question asks about a detail that is not probative of any material fact concerning the allegations.”
 - Know whether you are permitted to allow each party to weigh-in on the issue (*recommended*)
- Regs deem them irrelevant/prohibit them:
 - Regarding prior sexual behavior or predisposition of Complainant (unless offered to prove consent or to show someone other than respondent committed the alleged conduct)
 - **Form language:** “It is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions.”
- Regs prohibit them
 - Privileged records or medical/treatment records without consent or written authorization

Decision-Making Phases: Conduct Hearing — Questions by Advisors and Relevancy

The Regs do not permit you to categorically exclude questions that:

- Are compound
- “Assume facts not in evidence”
- Lack foundation
- Are unreliable or hearsay
- Are unclear
- Are prejudicial
- Hearsay

But:

- You are charged with assigning the appropriate weight to the evidence

Decision-Making Phases: Conduct Hearing — Convey Impartiality

Beyond **being** impartial and not prejudging, take steps to help **communicate** your impartiality :

- Avoid confusion: explain and establish your role clearly and early and return to it as needed throughout the hearing
 - Remember, you are not a judge and this is not a courtroom
- Demonstrate impartiality through neutral language
 - Do not use conclusory language about contested or unknown facts
 - Do not appear to take sides or even agree with the party/witness account
 - Use terms "account" or "experience," not "story" or "version"
- Maintain your calm demeanor
 - Do not react or supply energy to the information received or generally (words or expressions/body language)
 - Stay engaged, visually and verbally (as appropriate)

Decision-Making Phases: Conduct Hearing — Asking Questions

In advance, determine the critical issues:

- What do I need to know
- Why do I need to know it
- How do I obtain the information

Decision-Making Phases: Conduct Hearing — Asking Questions

- Better to use open-ended questions, whenever possible
- Listen carefully to the answers to know what follow-up questions are necessary
- Be careful about relying on party responses to poorly worded questions on critical issues
- Seek details to close information gaps
- Seek clarity for information or evidence that is vague or non-specific
- Know the difference between information that is necessary and information that might satisfy curiosity (problematic)
- Understand the source of the information (personal knowledge v. hearsay)
- Be very careful about relying on demeanor

Live Hearing

Case study

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Case Study



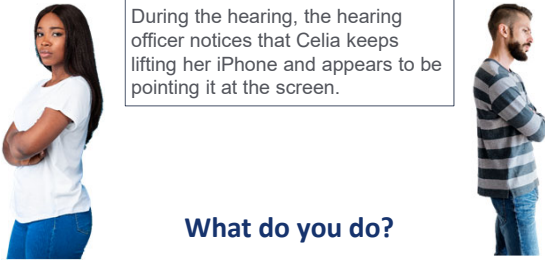
After you complete the opening scripts, the hearing begins with opening statements. Celia, as the Complainant, goes first. You let her know that she can begin but Celia's advisor starts to deliver the opening statement.

What should you do?

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During the hearing, the hearing officer notices that Celia keeps lifting her iPhone and appears to be pointing it at the screen.

What do you do?


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Case Study



When Celia's advisor is questioning Ryan about Ryan's statements that Celia opened the apartment door on her own, Ryan asked to take a break to speak with his advisor.




What do you do?




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Ryan and his advisor participate in the hearing from separate locations due to the new COVID restrictions. During his testimony an adult sits down next to him appears to be comforting him. You stop the proceeding and ask Ryan who is next to him. Ryan tells you that he has a support person with him to help calm his nerves.




Any concerns?




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Just as Emma is about to be questioned by Celia's advisor, Celia's advisor asks if he could speak to the hearing panel privately.




What do you do?




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Case Study



You ask Celia the basis for the request to speak privately and she tells you that it is something about Emma. You offer Celia the opportunity to share the concern, and she tells you that she can tell Emma and Ryan are both in Ryan's apartment.




Is that a concern?


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Case Study



When it's Sophie's turn to answer questions, she tells you that she prepared a written statement she would like to read.




She should probably read it before the questioning begins, right?


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Case Study



During Bryce's questioning, Celia's advisor asks him for more information about his interview statements that Ryan had a reputation for sleeping with band members. Ryan slams his hand on his desk and yells at the advisor to stop.



What do you do?

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Bryce tells you that he is not willing to answer any more questions.

What do you do?

Case Study

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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) **Make Determination**
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals

Decision Making Case Study

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Phase: Decision-Making — Making Determinations

Fundamentals:

- Are you making the decision alone or with others?
 - Know the mechanics of your deliberations
 - What records, if any for the deliberations
- Following the hearing, determine whether additional information or investigation is needed
 - How is that decided
 - What process is in place
 - With whom would you confer

Decision Making Case Study

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Phase: Decision-Making — Making Determinations

Fundamentals:

- Burden of proof is on the institution, not on the parties
- Presumption of not responsible
- ***Must objectively evaluate and weigh all relevant evidence necessary to independently reach a determination regarding responsibility and, if applicable, any appropriate remedies or sanctions***

Decision Making Case Study

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Phase: Decision-Making — Making Determinations

Breadth of potential relevant evidence:

- Statements, accounts, and testimony (direct and indirect)
- Texts, chats, and other electronic messages/communications
- Photos and videos
- Voicemails
- Recordings
- Emails
- Social media posts
- Surveillance video
- Access data: Wi-Fi, key card
- Police report
- Medical and treatment records (must have a written waiver)
- Employment/student records
- Diagrams, maps, and drawings

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Phase: Decision-Making — Making Determinations

Evidence that is always **irrelevant** under **Title IX**:

- Complainant's sexual predisposition or prior sexual behavior (unless one of the two exceptions apply)
- Medical, psychological, or treatment records (without voluntary, written consent)
- Information protected by legally recognized privilege without a waiver
- **Party or witness statements that have not been the subject of cross-examination at a live hearing**
- Know your current policy
- ***This applies broadly, including to not answering just one question posed by the advisor (intentionally or unintentionally)***

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Phase: Decision-Making — Making Determinations

For Title IX, cannot categorically exclude evidence, including:

- Lie detector results
- Expert reports
- Medical records, including rape kits (but must have written consent)
- Character evidence
- Prior bad acts
- Witness statements submitted by party or their advisor
- *Unduly prejudicial/evidence "whose probative value is substantially outweighed by the danger of unfair prejudice"*

BUT: you are permitted to assign the proper weight to such evidence

Phase: Decision-Making — Making Determinations

Keep in mind what must be decided:

- Make a decision about whether the policy was violated
- For sexual harassment: determine what conduct occurred and whether it was welcomed or unwelcomed
- For sexual contact: what conduct occurred and was it with consent or without consent
- Using the applicable **standard of evidence**
- With rationale for finding on each allegation
- Sanctions (institution-specific)
- Remedies (institution-specific)

Phase: Decision-Making — Making Determinations

Standard of evidence:

Preponderance: more likely than not that respondent violated the policy (50% and a feather) or insufficient evidence to conclude it is more likely than not (used by JHU)

Clear and convincing: "highly probable" that respondent violated the policy or insufficient evidence to conclude it is "highly probable"

- Under Title IX, must apply the same **standard of evidence** to all Formal Complaints of sexual harassment

Phase: Decision-Making — Making Determinations

Determine **weight** to be given to relevant evidence:

- Regs require consideration of both inculpatory and exculpatory—what does that mean?
 - Weigh evidence that supports the finding/conclusion
 - Weigh certain evidence that does not support the finding/conclusion—acknowledge and address it (including witness or party statements)
- Will need to explain factors for some evidence “outweighing” other evidence—what are the reasons?
- Employ common sense – does the evidence make sense?
 - On its own and in reference to other evidence
- Matters that feel like one person’s word versus another’s? How do you evaluate **credibility**?

Decision Making
Case Study

Phase: Decision-Making — Making Determinations

Credibility:

- Credibility cannot be based on status (complainant, respondent, or witness)
- Is there corroborating evidence and information
 - Objective documentation
 - Contemporaneous accounts and information
- Is it based on firsthand knowledge—how did the person obtain the information
- Is the information “plausible”? Common sense?
- How strong is their recollection or confidence in the accuracy of the information
- Was the person forthcoming with the material information

Decision Making
Case Study

Phase: Decision-Making — Making Determinations

Credibility (cont.):

- Does the person have a reason to not be truthful about that information
 - In both directions: self-serving statements and statements against interest (if the fact is harmful to the person but they disclose it anyway)
- Relationship of person providing information to each of the parties
- Other factors impacting believability?
 - Prior bad acts or pattern of this conduct
 - Substantially similar and distinct conduct? Allegations or determinations?
 - Timing?
- **Demeanor? (risky)**

Decision Making
Case Study

Make your Determination About Whether the Policy Was Violated and Provide Rationale

Case Study

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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Make Determination
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals

Decision Making Case Study

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Phase: Decision-Making — Sanctions and Remedies

- Know your role
- Separate the finding on responsibility from the sanctions and remedies
 - If credibility is part of the sanctions determination, whomever makes credibility determinations should decide sanctions
- Know your process
 - Based solely on the investigation and hearing files?
 - Parties to submit impact statements?
- Sanctions and remedies should align with the determination
 - "close evidentiary calls" do not warrant lesser sanctions
 - evidentiary standard should not be raised because of the severity of the sanctions
- Designed to stop the discriminatory conduct, prevent its recurrence, and address its effects

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Phase: Decision-Making — Sanctions and Remedies

- Range of possible sanctions should be listed in your policy (required by VAWA)
 - Requires the sanctions to be specific, including the type and length of suspension and reinstatement requirements
 - Sanctions must be included in notice of determination
 - Any information relied upon by decision-makers must be available to parties
- Sanctions must be included in the singular Notice of Determination (Title IX)

Decision Maker
Case Study

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Phase: Decision-Making — Sanctions and Remedies

Considerations for Sanctions contained in JHU's Policy:

- The specific misconduct at issue
- The circumstances accompanying any lack of consent (e.g., force, threat, coercion, intentional incapacitation, etc.);
- Respondent's state of mind (bias-motivated, reckless, negligent, etc.);
- Respondent's prior disciplinary history;
- The safety of the University community;
- Impact or mitigation statement by one or both parties;
- Respondent's conduct during the investigation and resolution process; and
- Such other factors as the resolution panel deems appropriate

Decision Maker
Case Study

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Phase: Decision-Making — Sanctions and Remedies

Sanctions in JHU Policy:

- Reprimand/warning;
- Changing the Respondent's academic or employment schedule;
- Disciplinary probation;
- Revocation of honors or awards;
- Loss of privileges;
- Imposition of conditions of employment;
- Restricting access to University facilities or activities, including student activities and campus organizations;
- Mandatory training;
- Service hours;

Decision Maker
Case Study

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Phase: Decision-Making — Sanctions and Remedies

JHU Sanctions Options (cont.):

- Alcohol and/or drug assessment or counseling;
- Issuing a "no contact" order to the Respondent or requiring that an existing order remain in place
- Moving the Respondent's residence on campus;
- Dismissal, termination or restriction from University employment;
- Making a former University employee or student (including those expelled or terminated pursuant to these sanctions) ineligible for hire or rehire by the University;
- Removal from student housing;
- Demotion or other removal from a management, supervisory or leadership role(s);
- A full or partial ban from campus (either limited time or indefinite);
- Transcript notations;

Phase: Decision-Making — Sanctions and Remedies

JHU Sanctions Options (cont.):

- Deferred suspension;
- Restriction from University sponsored or affiliated events;
- Pay reduction;
- Loss of raise;
- Loss of supervision or oversight duties;
- Referral for further sanctioning pursuant to applicable policies and/or procedures;
- Employment record notations, including an ineligibility for rehire notation;
- Suspension;
- Expulsion; and
- Revocation of degree.

Phase: Decision-Making — Remedies

Remedies:

- Often resemble supportive measures and extend them when the Respondent is not suspended/expelled but are disciplinary
- Restore Complainant's access to education programs and activities
- Benefit the community
- Common Remedies:
 - No contact order (directed to Respondent)
 - Academic/employment support, services, flexibility, and adjustments necessary (backward and forward looking)
 - Counseling and medical services
 - Loss of privileges or participation for Respondent
 - Limited access to campus or facilities for Respondent
 - Campus escorts
 - For the community: trainings, surveys (e.g. Greek life), and education

Phase: Decision-Making — Remedies

Examples of Remedies from JHU Policy:

- Providing an escort for passage between classes and activities;
- Ensuring the Complainant and Respondent do not share classes or extracurricular activities;
- Moving the Respondent or Complainant (if the Complainant requests to be moved) to a different residence hall;
- Providing victim focused services including medical, counseling and academic support services, such as tutoring; and
- Arranging for the Complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty.

Decision-Making Phases

- 1) Prepare for hearing
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Phase: Decision-Making — Draft Notice of Determination

Title IX and VAWA require a written Notice of Determination (policy determines whether it is required for non-Title IX sexual harassment)

Format of Notice of Determination (which aligns with Regs):

- Summary of allegations
- Summary of procedures
- Policy Provisions Section
- Findings of Fact
- Decision
- Rationale for the Decision
- Sanctions, Rationale, and Remedies
- Appeal Process

Phase: Decision-Making — Draft Notice of Determination

Title IX requires that it include:

- **Identification of allegations potentially constituting sexual harassment**
 - Summarize the allegations contained in the Formal Complaint
 - All allegations, for both parties, in a factual and concise manner
- **Description of the procedural steps from formal complaint through determination, including all:**
 - notifications to parties,
 - interviews with parties and witnesses,
 - site visits,
 - methods used to gather other evidence,
 - any hearing held
- Include information about who was present and their roles

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Phase: Decision-Making — Draft Notice of Determination

Policy Provision Section:

- Identify the policies at issue
- Include applicable definitions
 - Regarding conduct (e.g., sexual assault, consent, incapacitation) and the elements
 - Standard of proof
 - Burden of proof
 - Presumption of not responsible
 - Retaliation, if applicable

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Phase: Decision-Making — Draft Notice of Determination

- **Findings of fact supporting the determination**
- **Conclusions regarding application of policy to the facts**
- **Statement of, and rationale for, the result as to each allegation, including determination regarding responsibility, sanctions, and whether remedies designed to restore or preserve equal access to education program/activity to complainant**

In practice:

- Discuss of all the material facts;
- Apply the policy definition and standard of proof to the facts;
- To reach conclusions that are;
- Explained through the evidence available: how it was **weighed**, and how it supports, or does not support, the outcome (including credibility)

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Phase: Decision-Making — Draft Notice of Determination

Findings and Rationale (cont.)

- **Sanctions and rationale**
 - And procedure for failing to abide by them
- **Remedies provided**
 - Notify Complainant of the remedies
 - Notify Respondent of whether remedies (generally) have been provided (Title IX provides this FERPA exception) but not the details
 - For VAWA, there is no FERPA exception to permit disclosure of information about remedies that do not involve the Respondent (like no contact orders)

Phase: Decision-Making — Draft Notice of Determination

- **Procedures and basis for appeal**
 - Explain the process, general requirements, roles, and the timeframes
 - Permissible grounds for appeal
 - How to file it
 - On what timeline
 - To be decided by whom (by name, title, or otherwise)
- Plus any other grounds listed in the policy

Phase: Decision-Making—Draft Notice of Determination

Delivery of the Notice of Determination (Title IX):

- Know in advance who is responsible for delivering the notice to the parties
- Must be a written notice
- Must be provided to the parties simultaneously

VAWA crimes:

- Simultaneous notice, when the decision becomes final
 - AND for any change to the results prior to it becoming final

Effective Date (Title IX Regs):

- Final at conclusion of appeal or, if no appeal is filed, on the date on which the appeal would no longer be considered timely

Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Make Determination
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Phase: Decision-Making — Appeals

- Must be offered to both parties
- Appeal bases must include:
 - Procedural irregularity that affected the outcome
 - New evidence that was not reasonably available at the time the determination regarding responsibility (or dismissal) was made, that could affect the outcome
 - Title IX Coordinator, Investigator, 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 affected the outcome
- Plus any other grounds listed in the policy

Phase: Decision-Making — Appeals

JHU Appeal Grounds for Title IX:

- A procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- The Title IX Coordinator, investigator or determination panel (or member thereof) 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; and/or
- In cases where one or more of the parties is a student, the hearing determination or sanction.

Phase: Decision-Making — Appeals

Additional Requirements (Title IX):

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties
- Decision-maker for appeal cannot be:
 - Decision-maker on the determination of responsibility or dismissal
 - Investigator who investigated
 - Title IX Coordinator
- Comply with prohibitions on bias and conflict of interest
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Issue a written decision describing the result of the appeal and the rationale
- Provide the written decision simultaneously to the parties

Phase: Decision-Making — Appeals

VAWA:

- No appeal requirement but, if provided, it must be offered equally to the parties with the same procedural protections as provided throughout the process

Recordkeeping — Title IX

Must maintain certain records for seven years, including:

- For each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required by the Regulations, any disciplinary sanctions imposed on the Respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the education program or activity
- Any appeal and the result
- Informal resolution
- Supportive measures
- Training materials for Title IX Coordinators, Investigators, decision-makers, and those who facilitate informal resolution (and post on website)
- Actions taken in response to a report or formal complaint sufficient to document why the response was not deliberately indifferent



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2021 Title IX/VAWA Hearing Officer Training

Excerpt from Complaint

The Title IX Coordinator has received notification from the University's online reporting system. Celia alleges that Ryan had vaginal sex with her and had her perform nonconsensual oral sex on him while she was blacked out on May 8, 2021.

Excerpt from Notice of Allegations

On August 17, 2021, Celia submitted a complaint alleging that Ryan sexually assaulted her. In her complaint, Celia alleged that Ryan engaged in nonconsensual sexual penetration with her and had her perform nonconsensual oral sex in her room in her off-campus apartment.

Excerpt from Amended Notice of Allegations

Celia submitted a formal complaint of alleged nonconsensual sexual penetration (vaginal and oral) with her in her room in the University's apartment complex.

Excerpt from Amended Notice of Allegations

Celia submitted a formal complaint of alleged nonconsensual sexual penetration (vaginal and oral) with her and nonconsensual fondling of her breasts and Ryan's penis in her room in the University's apartment complex.

Definitions

Definition of Sexual Assault:

The term "sexual assault" includes the following actual or attempted acts:

Rape (except Statutory Rape): The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.

Sodomy: Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of

giving consent because of their age or because of their temporary or permanent mental or physical incapacity.

Definition of Consent:

Sexual activity of any kind requires “consent,” which consists of the following:

- Consent means clear and voluntary agreement between participants to engage in the specific act.
- Consent requires a clear “yes,” verbal or otherwise; it cannot be inferred from the absence of a “no.”
- Consent must be ongoing throughout a sexual encounter and can be revoked at any time.
- Consent to some sexual acts does not necessarily imply consent to others.
- Past consent does not mean ongoing or future consent.
- Consent cannot be obtained by pressure, threats, coercion or force of any kind, whether mental or physical. Consent means actually agreeing to the specific sexual activity, rather than merely submitting as a result of pressure, threats, coercion or force of any kind, whether mental or physical.
- Consent cannot be obtained from an individual who is under the legal age of consent.
- Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another.

Definition of Incapacitation:

Consent cannot be obtained from someone who is unconscious, asleep, physically helpless, or **incapacitated** (including, but not limited to, mentally incapacitated). A person is **incapacitated** when they are unable to make a rational decision because the person lacks the ability to understand their decision. A person who is **incapacitated** is unable to consent to sexual activity. A person can become **incapacitated** as a result of physical or mental disability, involuntary physical constraint, being asleep or unconscious, or consumption of alcohol or other drugs. A person can consume alcohol and/or drugs without becoming **incapacitated**. A person who engages in sexual activity with someone that person knows or reasonably should know is **incapacitated** does not have consent and will be found responsible for a Policy violation.

Definition of Retaliation:

The term “retaliation” means intimidating, threatening, coercing, harassing, taking adverse employment or educational action against, otherwise discriminating against an individual in any way, and/or interfering with any right or privilege secured by Title IX or its implementing regulations, including through online communications and activities such as social media, because the individual made a report or complaint under this Policy or these Procedures, participated in any way in the investigation or resolution of such a report or complaint, opposed conduct that they reasonably believed to be prohibited under this Policy, these Procedures, or applicable law regarding discrimination or harassment, or exercised any right or responsibility under this Policy or these Procedures.

Retaliation includes conduct that is reasonably likely to deter an individual from making a complaint or report under this Policy or from participating in the investigation or resolution of a complaint or report,

or from opposing conduct that they reasonably believe to be prohibited under this Policy, these Procedures, or applicable law regarding discrimination or harassment.

Excerpts from Final Investigative Report

Background Information

Celia and Ryan (each age 20) both recently started their junior year at My State University (MSU). Both stated that they have known each other through the marching band since their first weeks at MSU during the Fall 2019 semester during “band camp.” They agree that spent a lot of time together at band parties after football games with their friends Bryce, Matt, Sophie, and Emma. Celia and Ryan agree that in the fall of 2019, Ryan and Emma became involved in a short-lived romantic relationship that fell apart because of the pandemic. Celia stated she and Ryan continued to see each other through virtual meetings during the COVID lockdown these interactions continued for the fall 2020 semester, which was also conducted virtually as a result of the pandemic. The parties agree that they started to spend more time together in spring 2021 and had sex on a couple of occasions before the night of May 8, 2021.

The Parties’ Interactions early in the Spring Semester (2021)

The parties agreed that during the first week back they spent a lot of time together. The agreed that they attended a band party at an off-campus apartment where they danced together most of the night before going back to Ryan’s apartment and having consensual sexual intercourse. Celia stated “we were not boyfriend/girlfriend or dating or anything like that,” and Ryan stated they were “just having fun.” Ryan stated he “liked hanging out with Celia” but “never wanted it to be much more than that.” The parties agree that they also had sex after another party prior to the instant conduct. Ryan stated that he felt Celia “really pushed” for those to happen, although he is “never going to say no to a good time.”

Allegation of Sexual Assault on May 8, 2021

The Off-Campus Party

Celia’s Account

Celia stated that she pre-gamed with Sophie for an hour or two at their apartment before going to a big band senior sendoff party. Celia stated she believed they started pre-gaming while eating pizza around 7:00 or 7:30 PM. Celia stated she had three vodka-cranberry drinks during the pre-game, while Sophie had two. Celia stated that Sophie poured the drinks, so she was not sure how much alcohol she consumed, but she could taste the vodka and she was “buzzed and feeling relaxed.” Celia stated that she and Sophie walked to the party around 9:00 PM.

Celia stated that, when she and Sophie arrived at the party, they both grabbed a solo cup of jungle juice, which is made with some secret band formula. Celia stated that, later when she and Sophie went for a second cup of jungle juice, she noticed Ryan was talking and laughing with Emma, who had not been at a band party all semester. Celia stated that it was “strange” to see Ryan with Emma. She stated that refilled her cup with jungle juice, made eye contact, and thought he was signaling for help. She stated that she then slowly walked over to Ryan and asked him to dance. Celia stated that the two of

them began dancing, and Emma left. Celia said she and Ryan continued to dance “for a while.” Celia said that, at the beginning of their time dancing, she was “upset” at Ryan for talking with Emma, so she told Ryan “We can dance, but we’re not doing anything after that.” Celia said that Ryan asked “why” and she responded “not until I know where we stand.” Celia stated that Ryan pulled her close but her recollections were starting to get “a bit hazy” at that point and she felt like she was having a hard time keeping up with the movement. Celia stated she remembered watching others playing beer pong after they danced but only has “flashes” after that.

Celia stated she drank at least four cups of jungle juice at the party, but she does not recall drinking any additional drinks. Celia stated she was probably a nine on a 10-point scale and that she was “blacked out” for most of the night after that point.¹ When asked why a 9, Celia stated that she remembers feeling “woozy,” having trouble with her thoughts, slurring her words, and stumbling around at the party before she later lost her memory.

Ryan’s Account

Ryan stated that he and Bryce had a few beers and tacos at their apartment before the party. He stated that, according to his app, they took an Uber to the party around 8:15 PM.

Ryan stated that Emma had told him she would be at the party that night, and when he arrived at the party, he and Bryce went to talk to her. Ryan stated that he and Emma had dated for a while but broke up because he “wasn’t feeling the whole distance thing.” Ryan stated that he and Emma were laughing and getting along “really well” during their conversation until Celia came over and interrupted them. Ryan stated that, upon Celia’s arrival, Emma told them to “go ahead and talk” and walked away. Ryan stated that Celia then said “aren’t you going to ask me to dance now?” and they walked to the area where others were dancing. Ryan said he was “at first a little frustrated” by how Celia treated Emma.

Ryan stated that, while dancing, Celia asked a lot of questions about Emma and seemed jealous, which surprised him because he and Celia were not in a relationship. Ryan stated that once they started dancing, they quickly “got into the groove,” even grinding at one point after Celia kept holding onto to him and pressing against him. Ryan stated that, after he and Celia had danced a while, they each grabbed another cup of jungle juice and resumed dancing. Ryan stated it was becoming too difficult for them to dance because Celia kept spilling her drink so they went over to watch the group play beer pong. Ryan stated that he noticed Celia was starting to doze off and asked her if she was okay. Ryan stated Celia responded by saying “let’s go back to my place.” Ryan stated that he remembers seeing Celia fumble over her phone in her purse and trying to send a text.

In his initial interview, Ryan stated that he did not know how many drinks Celia had at the party but she “definitely put down a few.” In a subsequent interview, Ryan stated that he did not see Celia finish any drink at the party. He stated Celia spilled her first drink while they were dancing and “put down” the drink they got together on a table right after she got it. When asked to rate Celia, Ryan stated there were both probably a five or six because they were laughing and having a good time. When asked, he

¹ The investigator asks the person to rate themselves on a scale of 1 (sober) to 10 (passed out). The scale is used for comparison purposes to help understand how that person rated their own intoxication level, how it relates to others’ accounts, and what impact they associated with the rating. How a person is rated is determinative of whether that person or someone else is intoxicated.

stated she was talking a little louder than normal and slurred her words a little but was “totally understandable.”

Sophie’s Account

Sophie agreed that she and Celia have been best friends since they met and have been roommates all year. She stated that, on the night in question, they pre-gamed more than usual for the party with fruity vodka drinks in solo cup. Sophie stated she thought Celia had two or three drinks, while Sophie said she “definitely” had two. Sophie stated that they each had a slice or two of pizza before walking to the party around 9:00 PM. Sophie said that Celia was “happy” and “pretty normal” on the walk to the party.

Sophie stated that they each grabbed a jungle juice when they arrived and then wound up talking with different friends. Sophie stated that later in the evening she noticed Ryan and Celia dancing “really closely” and remembered seeing Ryan getting another jungle juice for Celia.

Sophie stated that, later, Celia and Ryan came over to her, Bryce, and Matt, and Sophie noticed that Celia was red in the face and sweating a lot, and Ryan “had his hands all over” Celia. Sophie stated that Celia looked “drunker than usual,” although still “not the drunkest I’ve seen her.” Sophie stated that she has seen Celia black out on at least three previous occasions. Sophie stated that Celia was being “loud” and “over the top” when she talked but was still conversing. Sophie stated that Celia might have been a “7ish” on a 1 to 10 scale because of how she looked and how she was acting. As for herself, Sophie said she was “getting drunk” at that point – maybe a “6 or so” on a 1 to 10 scale, because she was “definitely tipsy” but “not drunk.”

Sophie stated that she did not notice Celia and Ryan leave the party but later saw a text from Celia that was sent around 11:02 PM that said, “DONit wait fur m3. Goinj wit Ryeen.” When asked whether it was common for Celia to send a text like that, Sophie stated, “no, not at all, she’s a journalism major, her texts are always perfect, even when we are out drinking.” Sophie stated that she responded to the text and called Celia right away because she was worried, but Celia did not respond.

Bryce’s Account

Bryce stated that he and Ryan are best friends and roommates and pre-gamed with a few beers together before taking an Uber to the party around 8:30 PM. Bryce stated that, after he and Ryan got to the party, Ryan went straight to the jungle juice. Bryce stated that Ryan was “nervous” to see his ex Emma for the first time since they had broken up. Bryce stated that Emma met up with them while they were drinking jungle juice. Bryce stated that, after they had been talking and drinking multiple cups Celia came up to them in “a flurry” and “pulled Ryan away.” Bryce stated he noticed Celia and Ryan were “really getting down” on the dance floor and Ryan looked like he was “out to score” with Emma or Celia that night. Bryce stated that, since breaking up with Emma, Ryan had developed “a bit of reputation” over the past semester for sleeping around the band.

Bryce stated that Celia and Ryan came over to them later in the night while he was talking with Sophie and Matt. Bryce stated he remembered thinking that both Ryan and Celia seemed “pretty drunk,” but could not remember specifics besides both of them “kind of swaying” as they walked shoulder to shoulder. Bryce stated he didn’t even finish his cup at the party because he had to work in the morning.

Matt's Account

Matt stated that he was at the party and “was already pretty gone” when Celia came up to him, Ryan, Bryce, and Emma. Matt said he thought Celia “kind of got in Emma’s face” and “dragged” Ryan onto the dance floor. Matt said he thought he later remembered seeing Ryan and Celia dancing and thinking that Celia was “all over the place”; he said it was “hard to miss her on the dance floor.” He said he “doesn’t remember a ton” from that night but thinks he talked to them as part of a group.

Emma's Account

Emma stated that she reached out to Ryan because she “missed him” and asked that they talk at the party. Emma stated that, after arriving at the party, she went over to get some jungle juice and saw Ryan and Bryce. Emma stated that she, Bryce, and Ryan talked for “a good while” and were having “a lot of fun” and drinking jungle juice. Emma stated that Matt also joined the three of them at some point and that he looked like he had pre-gamed “a little too much.”

Emma stated the night “took a turn for the worse” when Celia came rushing up at some point and “literally pushed herself between Ryan and me,” and began “pulling” Ryan onto the dance floor, which really upset her. Emma stated she left the party shortly after because seeing them grinding on each other was too painful.

The Walk to Celia's Apartment

Celia stated that her apartment is about a two-minute walk from the party. Celia stated that the apartment complex is privately owned, and MSU placed her there when COVID precautions required the University to find additional student housing options. Celia stated that she does not have a clear recollection of leaving the party. Celia stated that she did not recall the walk home or entering her apartment.

Ryan stated that Celia was “acting a little weird” on the walk home by “mumbling more than talking.” Ryan stated could not hear everything Celia was saying, but he said that he sometimes has hearing issues when he is drunk. Ryan stated that Celia was clinging to him and kept “nuzzling up” against his arm so they walked pretty slowly. Ryan stated that Celia tripped on the stairs up to her apartment and scrapped her knee when she fell. When asked how it happened, Ryan stated it was because of the lack of light in the stairwell and Celia’s notorious “clumsiness.” Ryan stated that Celia unlocked the door to her apartment without having any issues using her key.² Ryan stated that he had a clear memory of the walk and evening. Ryan said that Celia was “definitely on the far side of tipsy,” but he didn’t think it was more than at previous parties. Ryan stated he thought Celia was “probably a 7” on a 1 to 10-point scale because she was louder than normal, laughing a lot, and swaying a little when she walked and that he was at a similar level of intoxication.

² Surveillance footage obtained by the investigator from the apartment complex shows Celia walking arm in arm with Ryan up the stairs, fumbling to find her keys in her purse, and dropping the keys on the ground twice while trying to unlock the door. The footage also shows that, after Celia dropped the keys the second time, Ryan picked up the keys and opened the apartment door for her.

The Events in Celia's Apartment

Ryan stated that, once inside Celia's apartment, they walked to the kitchen together. He stated there was a pizza box on the counter with some pizza in it, and he began to eat a piece of pizza. Ryan stated Celia said "something like I'll be back" and "sort of ran down the hallway." He stated that a few minutes later, he went to see what she was doing. He stated that he went into Celia's room and she was standing there in a towel with wet hair. He stated that she smiled at him as she removed the towel and put on a bra and underwear. Ryan stated that she fell down while pulling her sports bra over her head and then stuck her hand out towards him as if to indicate she was fine. Ryan said that Celia then put a robe on over her underwear.

Ryan stated that he then turned off the light and got into her bed wearing only his boxers. Ryan said that, after he got into bed, Celia leaned over and began kissing him and things "progressed from there." Ryan stated that she "initiated the hook up." When asked what he meant, Ryan stated that she removed her robe, smiled at him while standing there with just her bra and underwear on, got into bed, and kissed him on the lips.

Celia stated that she had a "flash" of memory of them kissing. Celia stated she remembered Ryan pulled off her bra and then tried to remove her underwear, but she pushed his hands away. After that "flash," Celia doesn't remember what happened in the bedroom. When asked whether there was any conversation at that time, Celia stated none that she could remember.

Ryan stated that he removed his own underwear and Celia removed her bra, but when he went to remove Celia's underwear, she said "uh-uh" and moved his hands around her body. Ryan stated that Celia had removed her robe in a way that indicated she wanted to "hook up" looked at him while she was getting into bed, and then started kissing him when they were in the bed. Ryan also stated that, while they were cuddling and still kissing, Celia started to rub his penis up and down. Ryan stated that he had guided Celia's hand down to his penis until Celia began moving her hand. In a subsequent interview, when asked what words or actions indicated to him that Celia was consenting to Celia touching his penis, Ryan stated "all of the stuff leading up to it" and "that she started moving her hand up and down." Ryan stated that next Celia rolled over and was on her back on the bed and he was on his side. Ryan stated he was kissing Celia and touching her breasts. When asked what words or actions indicated to him that Celia was consenting to him touching her breasts, Ryan stated it was because Celia had moved his hands there earlier when he went to take off her underwear. Ryan stated that he did not think Celia would have placed his hands there earlier if she was not okay with her breasts being touched. Ryan stated that he moved his groin area up to Celia's mouth and positioned his penis at her lips. He stated that Celia then put his penis in her mouth and began performing oral sex on Ryan. When asked what words or actions indicated to him that Celia was consenting to performing oral sex on him, Ryan said that Celia began rubbing his penis on her own earlier and that, when Ryan moved his groin closer to Celia's mouth, she grabbed his penis and put her mouth around it on her own.

Ryan stated that after a couple of minutes, Celia put both hands on his shoulders before she "pushed the front of my shoulders straight ahead and scooted her body down the bed." Ryan stated that Celia stated something like "you know I don't want that right now," which meant to him that she wanted to have sex. Ryan stated that he said, "sure, let's do it." Ryan stated that he started kissing Celia again. Ryan stated he was positioned on his knees between Celia's legs and as she moved her body down, he moved his knees toward the foot of the bed. Ryan stated that he guided Celia fully onto her back and put his penis near Celia's vagina. Ryan stated that he asked "now?", and Celia "'moaned mmm -

mmmm,” which Ryan thought meant “yes,” so he inserted his penis into her vagina. When asked what words or actions indicated to him that Celia was consenting to sexual intercourse, Ryan said that Celia’s moan and her response indicated to him that she wanted to have sex. Ryan said that Celia also “would have said no” if she didn’t want to. Ryan noticed that Celia arms were on the sides of the bed as they were having sex and she was occasionally moving her head and tilting her chin back. Ryan stated that Celia was “about as active” as normal, until at one point when things picked up, they slipped off the bed. When asked what happened, Ryan said Celia “sort of slipped off the side” and they “both went down to the floor.” Ryan stated that he asked Celia if she was okay and she said “fine or something like that” before she crawled back up on the bed, first with her hands and then with her knees. Ryan stated that he was tired and assumed Celia was tired. Ryan stated it seemed like the sex was over and so he helped Celia put her underwear on. Ryan stated that it was “like dressing a child—I did all the work for her while she lay there.” Ryan stated that he and Celia then fell asleep spooning each other, with him behind Celia until they woke up the next morning.

Celia stated that she did not remember sleeping with Ryan at all. When asked in a subsequent interview, Celia stated that she did not know that they had engaged in the other sexual activity. Celia stated her next memory was waking up in the morning.

In a subsequent interview, Ryan stated that he went to the bathroom in the middle of the night. He stated that the shower was running in the bathroom and there was a strong smell. He stated that he followed the odor and saw vomit between the toilet and the shower. In his initial interview, Ryan said that after noticing the vomit, he turned off the shower and returned to bed. In a subsequent interview, he stated that, when he saw the vomit, he “freaked out.” He said he “had no idea” Celia had thrown up and had tried to call Bryce. When asked why he did not reveal this information earlier, Ryan said that he “had been told by his attorney” not to tell the investigator those details because they were not important and made him look guilty.

The Parties’ Interactions the Next Morning

Celia’s Account

Celia stated that her next memory was waking up when it was light out. She stated she was not sure where she was and she still felt drunk and sick to her stomach. Celia stated that she told Ryan did not remember much of anything about the night and asked Ryan what happened. She stated that Ryan told her that she invited him back to her place, where she did a “striptease,” kissed him in bed, and then “you did some stuff to me.” Celia stated that she asked Ryan what that meant and he said “you basically asked if you could give me a blowjob.” Celia stated she had a memory of them kissing in bed, but she did not think she could have given Ryan a blowjob because she doesn’t like to do that. Celia stated that before she could ask Ryan more, he was up, dressed, and hurrying out the door. Celia stated that she found her phone on the floor near her dresser right after Ryan left and it was 9:44 AM. She stated that she also saw her “indecipherable” text to Sophie at 11:02 PM and had no memory of sending it.

Celia stated that she got up to go take a shower and noticed that she had some pain in her vaginal area and felt her skinned knee. She stated she realized Ryan had not told her everything. She stated that the smell of the vomit triggered a memory of her getting sick there after coming home.

Celia stated that, after cleaning up, she woke up Sophie. She stated she told Sophie she was still drunk and hardly remembered anything after dancing at the party. She stated she told Sophie about Ryan saying that she gave him oral sex, and Celia being pretty sure they did more than that.

Celia stated that, after her headache had cleared up, she texted Ryan, “can we talk?” to which Ryan responded a few hours later with, “sorry about everything. we were too drunk.” Celia stated that she thought this message was Ryan’s “cowardly way” apologizing for taking advantage of her while also blaming her for having too much to drink. Celia stated that she responded to Ryan by saying, “that doesn’t cut it Ryan—did you have sex with me?” but he never responded to the text. Celia stated that because Ryan did not respond, she went and had a SANE exam that night and the nurse told her there was evidence that sexual intercourse has occurred.

Celia stated that she talked to Sophie about the text exchange later that evening. She stated that Sophie asked about Ryan and she told Sophie that “Ryan apologized for everything he did to me.” Celia stated, “to be clear, I was way too drunk to have consented to anything that night and Ryan knew it.”

Ryan’s Account

Ryan said that when he and Celia woke up the next morning, Celia said she didn’t remember what they did in bed. Ryan said that Celia asked what happened and Ryan said “we did a bunch of the same stuff we always do when we are drunk.” Ryan initially said that he didn’t tell Celia everything that had happened because he “didn’t want her to feel guilty for coming on so strong.”

Ryan stated that as soon as he got home, he told Bryce that he slept with Celia, but “now she says she doesn’t remember anything.” Ryan stated that Bryce told him to “not worry about it.”

Ryan stated that he started feeling “bad” when he got a text from Celia asking to talk. Ryan stated he responded with “sorry about everything. we were way too drunk.” Ryan stated that Celia then asked him directly, via text, whether they slept together, but Ryan did not respond. Ryan stated that he was too embarrassed and scared to talk about it. Ryan stated he was hoping that, with finals approaching, everything would “blow over.” Ryan stated that he did not have any interactions with Celia for the rest of the school year after that.

Sophie’s Account

Sophie stated she next remembered Celia waking her up sometime the next morning. Sophie stated that Celia told her she was still drunk and smelled of alcohol. Sophie stated that Celia was upset and talked about not remembering the party the previous night. Sophie stated that Ryan had “vaguely” told Celia he and Celia had “done things,” when Celia was “pretty confident” they had slept together. Sophie stated she remembers being “worried” about Celia. Sophie stated that, later that evening, Celia said that “Ryan had apologized for everything he did.” Sophie stated Celia “didn’t want to talk about it” and “needed to think about what she wanted to do.” Sophie stated that they did not talk about that night again for the rest of the school year.

Bryce’s Account

Bryce stated that, the next morning when Ryan got back to the apartment, Ryan was “fidgety.” He stated Ryan told him that Celia was “all over him,” at her apartment so they had sex. He stated that

Ryan said he woke up to go to the bathroom in the middle of the night and saw that she had thrown up in the bathroom. Bryce stated that Ryan was “totally freaking” and talking about how he “had no idea she was that drunk.” Bryce stated that Ryan kept repeating “she seemed okay.” Bryce stated he was surprised because Celia “did not seem to the point of throwing up.” Bryce stated that his immediate concern, though, was to calm Ryan down. Bryce stated that he told Ryan to “try not to think about it for now” and to “focus on getting through finals.” Bryce stated that they talked about it a few more times but basically had the same conversation each time.

The Parties’ Subsequent Interactions

Celia’s Account

Celia stated that she and Ryan did not interact over the summer that followed. Celia stated she was convinced that Ryan had sexually assaulted her but “wasn’t sure” if she “wanted to ruin Ryan’s life” by reporting it, and she didn’t want “to be labeled a victim.” She stated that the next time she saw Ryan was at a band party in early August. She stated he came up to her and starting talking about how excited he was for the school year and how great it was that he was back together with Emma. Celia stated that she was shaking the entire time and wanted to get away but she froze. She stated she realized that she was no longer comfortable being around him and that “something needed to happen.” Celia stated that on August 17, 2021, she filed an online Title IX report, alleging that Ryan had engaged in non-consensual sexual intercourse with her when she was “black out drunk.” Celia said that she has not spoken to anyone about the incident since the investigation started, except “to warn” Emma. Celia said that she told Emma “to watch out” because she “didn’t want to see anyone else get hurt,” but Emma “kind of blew [her] off.”

Ryan’s Account

Ryan stated that he did not speak with Celia again until they returned to school in August for the current semester. Ryan stated that they “avoided each other” during band camp and rehearsals. Ryan stated that, during the first band party, Celia approached him. Ryan stated that Celia asked when he and Emma got back together but seemed “shaky.” Ryan stated they had “small talk” for a few minutes before Celia left with Sophie. Ryan stated the “whole thing was weird” and Celia seemed “angry” and “out of sorts.” Ryan stated that he believes Celia’s report was fabricated because she was mad at him for getting back together with Emma.³ Ryan also stated that he knew Celia had a history of dating women, so he wondered whether Celia was embarrassed that she had been “all over a guy” in public.

Emma’s Account

Emma stated that she and Ryan got back together over the summer when they were both interning in the same city. Emma stated that when she and Ryan began talking about dating again, Ryan had told her “all about” the incident with Celia. Emma said that Ryan told her that, after the band party in May, Ryan slept with Celia in Celia’s apartment, because Celia was “all over him” and “told him how she wanted to have sex.” Emma stated Ryan also told her that Celia was “really drunk” and had “thrown up in the

³ In response to Ryan’s statement that she filed the complaint to get back at him, Celia stated that she learned during band camp that Ryan was dating Emma again but that “didn’t impact her decision to report.” Celia stated “I filed the report because I could not stand to be around that lying rapist.”

bathroom.” Emma stated that Ryan said he “felt guilty afterward” because he knew that he “really wanted to be with Emma.” Emma stated that she believed Ryan, especially because she saw how much Celia “was throwing herself at Ryan during the party” – “even before she was drunk.”

Emma stated that her relationship with Ryan was “going well,” other than when Celia “accosted” her on campus by blurting out, “I don’t know what you’re doing with that rapist. If I were you, I would get away as fast as you get.” Emma stated that she was “taken aback” by Celia’s words but still believed Ryan had not done anything wrong. Emma stated that she told Celia “that’s not your concern” and walked away. Emma said she has been avoiding Celia since.

Excerpts from the Parties’ Response to the Investigative Report

Excerpt from Celia’s Response:

I cannot believe that Ryan would tell the investigator that I have relationships with women. That is absolutely untrue and is blatant retaliation against me. He thinks he can say these things to get me to give up my case. As everyone said, I was obviously too drunk to consent to any sexual activity that occurred that night. Consent is not about guessing. He makes it sound like I was doing all of these things but his own words prove that he did not have my consent.

Excerpt from Ryan’s Response:

It should be clear by now that I was worried about everything that happened with Celia. I was not afraid of what happened but I was trying to avoid causing her any more pain. I felt bad for her and the situation but I did not do anything wrong. I did not rape her as she told Emma and anyone on campus that could hear her. Notice that Celia did not deny the words she said, the striptease, the kissing, or her touching of me and all but asking for sex. That is because when we were there, in the moment, she was consenting to them.

I know Emma tried to be as truthful as possible because she told me so. She confused some of the things I said to her and mixed up the words a little but the point she makes is true. She knows me better than anyone and knows I would never have sex without clear consent. Speaking of which, I am furious that the investigator included Bryce’s inaccurate statement about me “sleeping around” with band members. What would my past have to do with anything? The investigator never asked me about it and it is not true. Maybe I exaggerated a little during drunken guy talk but I have only slept with Emma and Celia.