

THE ATIXA PLAYBOOK

Best Practices for the Post-Regulatory Era

Nedda Black, J.D., LMSW
Michael Henry, J.D.
W. Scott Lewis, J.D.
Leslee Morris, J.D.
Anna Oppenheim, J.D.
Saundra K. Schuster, J.D.
Brett A. Sokolow, J.D.
Daniel C. Swinton, J.D., Ed.D.



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AUTHORED BY:

NEDDA BLACK, LCSW, J.D.
MICHAEL HENRY, J.D.
W. SCOTT LEWIS, J.D.
LESLEE MORRIS, J.D.
ANNA OPPENHEIM, J.D.
SAUNDRA K. SCHUSTER, J.D.
BRETT A. SOKOLOW, J.D.
DANIEL C. SWINTON, ED.D., J.D.

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INTRODUCTION	4
If Everything is Discriminatory, Then Discrimination Means Nothing	5
A Note about Tone	8
WHY ARE COLLEGES IN THE BUSINESS OF ADDRESSING SEX OFFENSES?	10
TERMINOLOGY	14
<i>Avoid the VAWA Offense Definitions as the Basis for Policy</i>	15
<i>The Centrality of Hostile Environment Analysis</i>	17
<i>Terms Finding Favor in 2017</i>	18
MODELS OF PROOF FOR SEXUAL MISCONDUCT OFFENSES	19
Preponderance of the Evidence	19
Sexual Harassment	21
<i>Quid Pro Quo Harassment</i>	21
<i>Model Policy</i>	21
<i>Model of Proof</i>	21
<i>Rubric</i>	22
<i>Retaliatory Harassment</i>	23
<i>Hostile Environment</i>	23
Non-Consensual Sexual Contact and Non-Consensual Sexual Intercourse	34
<i>Asking the Right Question</i>	34
<i>Model Policy</i>	34
<i>Model of Proof</i>	35
<i>Rubric</i>	36
<i>Force</i>	37
<i>Incapacitation</i>	43
<i>Consent</i>	50
<i>Tying the Three Elements into an Analytic</i>	52
<i>Section Conclusion</i>	55
<i>Are You the Sex Police?: A supplement to the consent discussion above</i>	55
<i>Case Study #1– Liz and Neveah</i>	58
<i>Case Study #2 – Wes and Tameka</i>	63
Sexual Exploitation	67
<i>Model Policy</i>	67
<i>Model of Proof</i>	67
<i>Rubric</i>	67
<i>Determination</i>	70
Intimate Partner Violence	71
<i>Model Policy</i>	71
<i>Model of Proof</i>	71
<i>Rubric</i>	71
<i>A Two-Prong Analysis</i>	71
Stalking	78
<i>Stalking Dynamics and Statistics</i>	78
<i>Model Policy</i>	80
<i>Model of Proof</i>	80
<i>Rubric</i>	81
<i>Determination</i>	83

Sex Discrimination	85
<i>Model Policy</i>	85
<i>Model of Proof</i>	85
<i>Rubric</i>	85
<i>Pregnancy</i>	85
<i>Athletics</i>	86
<i>Admissions</i>	92
<i>Student Organizations</i>	93
<i>Religious Exemptions</i>	94
Gender Discrimination	95
<i>Model Policy</i>	95
<i>Model of Proof</i>	95
<i>Rubric</i>	95
<i>Gender and Gender Identity: Understanding the Terminology</i>	95
Retaliation	98
<i>Model Policy</i>	98
<i>Model of Proof</i>	98
<i>Rubric</i>	98
ASSESSMENT, ANALYSIS, AND RESOURCES	101
Credibility	101
<i>Don't Lie to Me: Common Errors in Assessing Credibility Effectively</i>	101
Due Process Commitment	108
<i>The NCHERM Group Statement of Commitment to Due Process Protections</i>	108
<i>Due Process Checklist</i>	108
Cross-Claims, Counter-Claims, and Retaliation	110
<i>The Wesley College OCR Determination</i>	112
CONCLUSION	115
ABOUT THE AUTHORS	117

This publication is dedicated to those who want to do the right things for the right reasons and not because some statute says you have to.

The ATIXA Playbook
Best Practices for the Post-Regulatory Era

INTRODUCTION

We started out writing our annual Whitepaper, and it turned into a book: *The ATIXA Playbook*. We expect that this publication will become your essential “how to” playbook for ensuring that the resolution of sexual misconduct allegations at your college is done right. The subtitle, “Best Practices for the Post-Regulatory Era,” is one we have chosen carefully. We know that “best practices” is a buzz-phrase, and that it can lack meaning in some contexts. We also recognize that there is little empirical data available in the field from which best practices can be derived. Instead of offering you empirical best practices, or stating that best practices are what we say they are, we believe that best practices represent a range of practices, and emerge from a consensus within the field.

Thus, if you agree that this *Playbook* represents best practices, then it does. If not, we’re content to let the field determine what weight these ideas should hold. We think our track record speaks well of our ability to identify, discern, and develop practices that have been adopted throughout

“Best practices may have a better chance to emerge now that higher education will be able to re-envision what we should be doing, rather than what we must be doing.”

higher education. In an era when those practices are now potentially less likely to be dictated from Washington, D.C., our obligation is to ensure that the field has guidance on what it should be doing, without the pressure of intense regulatory enforcement. In fact, best practices may have a better chance to emerge now that higher education will be able to re-envision what we should be doing, rather than what we must be doing.

It has been nearly six years since the Department of Education issued a Dear Colleague Letter¹ (DCL) on Title IX that catalyzed a fundamental reshaping of how colleges and universities address sexual misconduct. In that time, a profession of Title IX administrators has evolved; bureaucracies have been created to support reporting, investigation, and response structures; and a substantial increase in reporting by victims/survivors has resulted from concerted education, awareness, and training efforts. The field of higher education has made solid progress on incident response, on providing initial actions and remedies, and on revising policies and procedures.

Almost all colleges have an identified Title IX Coordinator, and many are full-time positions. It will be interesting to see what gains are potentially jeopardized over the next four years given the shift in political winds, but Title IX is not a flash in the pan. Title IX has an enduring legacy that be-

¹ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

gan 45 years ago, and will last well beyond the next four years. Similarly, The NCHERM Group has been helping to lead the field on the issue of college sexual misconduct since well before the DCL, and this *Playbook* is part of how we'll continue to demonstrate that leadership whether Title IX is a priority in Washington, D.C. or not. It's a priority for us. Higher education isn't headed back to the pre-2011 era, and one of the reasons we wrote a book rather than a Whitepaper this year is to help point the way forward for our field.

The NCHERM Group has typically focused our annual Whitepaper on topics where gaps exist in the field so that we can accurately identify a weakness, and provide the practical advice that begins to move the field toward filling the gap with stronger practices. We have focused in the past on topics such as incident response and investigation, as well as the unique sociology of addressing intimate partner violence in a college environment. This year, three themes emerged for this *Playbook*. Our first theme was to offer best practices for the post-regulatory era, taking a long view of where we have been and where we are going. The second theme is to help colleges and universities hone the substantive decisions that are being made regarding allegations of sexual misconduct and other behaviors covered by Title IX and the Violence Against Women Act (VAWA) § 304 through a set of comprehensive models of proof. Third, this is a politically opportune moment to offer a spirited defense of why colleges address sexual violence; and why we can, should, and will continue to do so.

If Everything is Discriminatory, Then Discrimination Means Nothing

The bulk of this *Playbook* is focused on the second theme, offering models of proof for policy, how to apply policy, and how to analyze the complex evidence of an allegation of sex discrimination to determine by a preponderance of evidence whether policy has been violated. This new professional class of Title IX administrators that is now a fixture in higher education is transformative in many positive ways, but there are also drawbacks. You're likely familiar with the common metaphor: when you're a hammer, everything looks like a nail. To bend that metaphor to the current state of the field, when you're in charge of assuring civil rights on a college, everything can begin to look like discrimination. *But, if everything is discriminatory, then discrimination means nothing.* We believe, and want, discrimination to mean something. We don't want it watered down, honored in the breach, or broadened to the precipice of incoherence. So, coherence on what discrimination is, and what it is not, is what this *Playbook* will deliver.

Along the way, we're going to address another concern which is a high priority for us, and that is due process. Some pockets in higher education have twisted the DCL and Title IX into a license to subvert due process and to become the sex police. This *Playbook* will push back strongly against both of those trends in terms of best practices. By design, models of proof address the substantive due process of making a reliable determination, and we include below a critical checklist tool for you on substantive and procedural due process. Our concerns around procedural due process are so significant that they continue to be a top priority in our trainings. In 2017, we'll be offering a series of due process-specific trainings and tracks, to bolster the due process elements of our training curricula that have always been part of our emphasis.

If you need an extensive written guide, the Foundation for Individual Rights in Education's (FIRE) *Guide to Due Process and Campus Justice* says what needs to be said about this topic.² It is free and available online. Why re-invent the wheel? Where we depart with FIRE is that FIRE seeks to expand college due process and push it well beyond what the courts have required. We like college due process just the way it is, because we believe the protections that courts currently afford within college processes are well-balanced against the educational and developmental aims of the college conduct process. We believe higher education can acquit fairness without higher standards of proof, actual cross-examination, and full-on, adversarial hearings presented by attorneys.³

“Sharpen the qualifications of those at your colleges who are the custodians of due process and advance the level of training that is afforded to them.”

Ultimately, you will determine whether FIRE's vision of expanded due process becomes the law of our land. The field is losing case after case in federal court on what should be very basic due process protections. Never before have colleges been losing more cases than they are winning, but that is the trend as we write this. The courts are not expanding due process yet, but are insisting that colleges provide the full measure of college-based due process that has been required

over almost 60 years of litigation by students. Now, the Office for Civil Rights (OCR) is adding pressure by holding colleges accountable for due process failures under Title IX. And, some courts are willing to hold private colleges to elevated procedural fairness, as if they were public universities. That backdrop means we all need to sharpen our games, or the courts and Congress may sharpen them for us.

Why are we systemically failing to protect the rights of all students? FIRE took a shot at higher education on January 19th, 2017, calling administrators amateurs in addressing sexual violence.⁴ If you resent that characterization, we need to stop resembling it. Sharpen the qualifications of those at your colleges who are the custodians of due process and advance the level of training that is afforded to them. Read recent decisions involving George Mason University, James Madison University, and Brandeis University⁵ to realize how far we still need to come in this field. Don't be fooled by the fact that higher education wins some of these lawsuits, as the law favors institutions. The bar on due process lawsuits is high, and courts have been deferential to college disciplinary decisions, though that historical deference is eroding as judges lose patience with skewed college proceedings.

² <https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/>

³ We do agree with FIRE that definitions of hostile environment sexual harassment should be more rigorous, and ATIXA's model policy has long-used the rigorous definition from the Supreme Court's decision in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

⁴ <https://www.thefire.org/law-enforcement-involvement-key-to-protecting-students-from-sexual-assault/>

⁵ <http://ia801309.us.archive.org/2/items/gov.uscourts.vaed.314481/gov.uscourts.vaed.314481.92.0.pdf>; <http://www.vawd.uscourts.gov/OPINIONS/DILLON/5.15cv35doevalger.3.31.16.pdf>; <https://www.documentcloud.org/documents/2799157-John-Doe-v-Brandeis-University-3-31-2016-Ruling.html>

Now, higher education needs to start winning because of its excellence and because it is highly respectful of student rights. If being a custodian of due process is a mid-level management role on college campuses, that does not mean it has to be a mid-level institutional priority. The courts can't expand due process if case after case shows judges that higher education is exceeding the due process floor set by federal law. We critique FIRE for its failure to meaningfully advocate for the civil rights of victims, but FIRE is right about this. Our goal is to help the field fulfill the current mandates of law, and move out of the current cycle of tempting courts to turn college resolutions into exact replicas of the criminal justice process.

In 2005, The NCHERM Group's Whitepaper was entitled, *The Typology of Campus Sexual Misconduct Complaints*. It became the seminal Whitepaper for the field by offering models of proof for the assessment and analysis of allegations of sexual violence. More than ten years later, we are using this publication to update and expand on our seminal 2005 work. More importantly, we are bringing the same practical, decision-making guidance of that Whitepaper to the broader range of misconduct that now falls within the rubric of Title IX and VAWA Section 304. This *Playbook* offers decision-making rubrics not just for sexual violence, but for sexual harassment, intimate partner violence, and other forms of sex and gender discrimination. We hope that it will be as seminal to the field as the 2005 original, if not more so.

While the original 2005 Whitepaper was published under The NCHERM Group's auspices, since 2011 we have placed an emphasis on publishing Title IX-related content through ATIXA, a membership association managed by The NCHERM Group. Founded in 2011, ATIXA is the nation's only membership association dedicated solely to compliance with Title IX and the support of our more than 3,500 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification, having certified more than 3,000 Title IX Coordinators and more than 8,000 Title IX Investigators since 2011. For more information, visit www.atixa.org.

In addition to expanded policy rubrics, this *Playbook* has a substantial section dedicated to the assessment of credibility, as policy analysis is only one part of the analyses involved in an investigation. In addition to the application of policy, practitioners need to be able to make professional assessments of credibility, which is a weakness in the investigation reports we review from our clients. The frameworks and analytical tools offered below should allow professionals in the field to elevate the precision of the credibility assessment task, which in turn should elevate the fairness of resolution proceedings, the accuracy of their determinations, and the defensibility of those determinations in court. To elevate that precision, special sections of this *Playbook* take a deep dive on issues of coercion and how to apply the consent construct in theory, not just in practice. Two cases studies complete the discussion with a focus on practical application and analysis of both policy and credibility.

“We intend this publication to build on the strong foundation of victim-centered (not victim-favoring) work we have done, rather than to weaken it.”

Substantively, this *Playbook* is the only guidance of its kind in the field. We hope that it becomes an indispensable tool for those who are charged with making the right decisions on sexual misconduct allegations at colleges and universities. While we have never published a guide of this scope or length before, the importance of this subject matter requires us to go further and deeper than we have previously. The rights and well-being of our community members depend on it.

A Note about Tone

There are some readers who might perceive this publication to be less victim-centered than our previous body of work. We'd suggest that perception is only accurate in comparison to the tone of our past work, which was needed at the time we wrote it, to catalyze an important shift needed in the field at that time. Now, the tone of this publication is appropriate to the environment in which we are writing today. As times change, our guidance has to as well. We intend this publication to build on the strong foundation of victim-centered (not victim-favoring) work we have done, rather than to weaken it. The concepts of consent and the transparent models of proof offered here are victim-centered at an elemental level, because they represent an evolution from where the field was twenty years ago, when it was not victim-centered. The entire college resolution process is now designed to operate from a victim-centered place, with strong procedural protections, though it can still fail to be victim-centered in execution on some campuses. With a solid history of writing about and advancing those procedural protections for victims/survivors, we can now also see the need to ensure those protections are just as strong for responding parties.

The overall tone of this *Playbook* is about striking the right balance between student rights, with the understanding that being off-balance in the long-run isn't good for victims/survivors or for those accused. There are always unintended consequences to showing favoritism. If a college is known to be biased toward responding parties, this can chill the willingness of victims/survivors to report. If a college is known to be biased toward reporting parties, a victim/survivor's sense of safety or justice based on the campus outcome in the short run may be quickly compromised by a court order or lawsuit reinstating the responding party, giving her a Pyrrhic victory, at best. What is needed for all of our students is a balanced process that centers on their respective rights while showing favoritism to neither. Not only is that best, it is required by law.

Title IX Coordinators write to us, worried that their annual summaries show that they are finding no violation of policy 60% of the time in their total case decisions. They feel like somehow that is wrong, or not as it should be, as if there is some proper ratio of findings that we are supposed to be reaching. We wrote in 2014 of our concerns with the types of allegations being made on college campuses,⁶ but that is inevitable. With all the training and education being directed at students, more are coming forward, and that education brings allegations of all kinds out of the woodwork, some based strongly in fact, others that are baseless, and most that are somewhere in between.

That 2014 Open Letter took issue with growing imbalance in the field, and we fear three years later that it is taking far too long for higher education to self-correct. This *Playbook* roadmaps

⁶ <https://www.ncherp.org/wordpress/wp-content/uploads/2012/01/An-Open-Letter-from-The-NCHERM-Group.pdf>

what that self-correction should look like. We hope that our readers do not see the rights of the parties as a zero sum game, where protecting one requires compromising the other. Responding parties should want their colleges to provide strong victim services, and reporting parties should insist that the full measure of due process be accorded to those who are being accused. We believe – strongly – that colleges can and should provide the full measure of student rights and accord equal dignity to all parties to an allegation of sexual misconduct.

April 2017

WHY ARE COLLEGES IN THE BUSINESS OF ADDRESSING SEX OFFENSES?

Sexual politics are front-and-center for higher education as the new administration settles in to its role in Washington. Many are questioning whether the administration will make changes to the enforcement of Title IX, in sharp contrast to the rapid advancement of enforcement and administrative guidance during the Obama administration. Opponents of Title IX are seizing on this opportunity to champion the idea that colleges should not be in the business of addressing sexual violence cases at all. These opponents see sexual violence solely as a criminal matter best handled by the courts. Those who see the necessity of addressing sexual violence in college need to be offering public counterpoint to these opponents, to ensure that the public debate airs all sides of this argument, and to ensure that the true intent of the opponents of Title IX is revealed.

Colleges have addressed sexual violence as a policy violation for more than 30 years. Colleges did not get into the business of addressing sexual violence because of Title IX. Colleges have

“The college process and the criminal process are separate and distinct functions.”

confronted sexual violence since long before the issuance of the seminal Department of Education OCR Dear Colleague Letter on Title IX and Campus Sexual Violence, dated April 4th, 2011.⁷ That letter helped to shape colleges’ responses to sexual violence, but did not create the practice of

addressing this issue by institutions of higher education. The idea that colleges should not be in the business of addressing rape cases is one of the most common platforms on which Title IX opponents stake their claims. Colleges never have and never will address the crime of rape. Nor will colleges administratively address other crimes. Colleges have no administrative authority to address crimes of any kind. Crimes are the sole responsibility of law enforcement agencies.

The college process and the criminal process are separate and distinct functions. Colleges have sets of rules comprising codes of conduct. These rules address behaviors that often have parallels to crimes, but the behaviors themselves are treated as policy violations by colleges. These behaviors include underage drinking, vandalism, theft, hazing, arson, and more. While these offenses may constitute crimes, which may (or may not) be addressed criminally, colleges also address these behaviors as policy violations.

To remain logically consistent, those who argue that sexual violence should not be addressed by colleges *because* it is a crime should argue by extension that all misconduct that is also a crime should not be addressed by colleges. The inconsistency in this position is revealed by the fact that opponents of Title IX single out only sex offenses. Colleges must be able to self-regulate in order to maintain order and safety.

⁷ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

Opponents of Title IX also suggest that colleges should not be in the business of addressing sexual violence because law enforcement agencies are better trained to address these incidents. While it is true that colleges struggle with difficult sexual violence allegations, so does the criminal justice system, leading to the current status quo, where most victims/survivors choose not to report these crimes to law enforcement officials at all. While any bureaucracy can have corrupting influences, the media tends to highlight the exceptions, without placing them in their proper context, and presents all colleges as incompetent or corrupt at addressing sexual violence. That just isn't the case. If the criminal justice system struggles with sexual violence cases, the tendency to hold colleges to a higher standard than criminal justice authorities is both an unrealistic and an unfair expectation. Consider how the narrative broke down when the *Rolling Stone* article about the University of Virginia was examined carefully.⁸ A UVA dean recently won a \$3 million defamation lawsuit against *Rolling Stone* because of its false narrative of administrative corruption.⁹ If that edited, vetted, and published story of alleged college indifference and institutional betrayal was so dramatically inaccurate, consider how many others are as well.

Despite the prevalence of sexual violence on colleges, criminal conviction rates for these cases remain remarkably low. The Brock Turner sentencing¹⁰ demonstrates that even when convictions do occur, significant flaws in the system remain. Perhaps it is best to acknowledge the reality of the situation: these cases are difficult, regardless of whether they are addressed by colleges or criminal authorities. When allegations of sexual violence proceed through the college process, and not through the courts, we must remember that the victim/survivor wants to go through the college process. Additionally, college policies addressing sexual violence almost always define the offenses differently than criminal statutes do, which further differentiates the college process from the criminal process.

More importantly, colleges regard sexual violence as a form of sex discrimination, the correct legal status under Title IX. Sexual violence is an extreme form of unwelcome sexual conduct. It is a subcategory of sexual harassment, which itself is a subcategory of discrimination based on sex. Similarly, stalking and intimate partner violence on colleges are behaviors addressed not as crimes, but as forms of sex discrimination. Thus, to remove sexual violence as an offense at colleges would cause colleges to be non-compliant with federal law under Title IX. If the opponents of Title IX were to succeed, colleges would address all forms of sex discrimination under Title IX, except when sexual violence occurred. Yet, sexual violence and sexual harassment are legally indistinguishable under Title IX, so how would colleges address some forms of sexual harassment and not others? And, why would colleges refrain from addressing only the harassment that has a parallel in criminal law? The logic of such a position is hard to support when analyzed from this perspective.

Several proposals (e.g., in Washington, D.C.¹¹ and the Georgia State Legislature¹²) have been advanced to address perceived problems with the collegiate approach to sexual violence. These

⁸ For a summary of the entire situation, see: <http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405>

⁹ https://www.nytimes.com/2016/11/05/business/media/rolling-stone-rape-story-case-guilty.html?_r=0

¹⁰ <http://www.cnn.com/2016/09/02/us/brock-turner-college-athletes-sentence/>

¹¹ <https://www.congress.gov/bill/114th-congress/house-bill/3403/text>

¹² <https://www.billtrack50.com/BillDetail/773405>

proposals would require that all acts of sexual violence reported to college officials be referred to appropriate law enforcement for resolution. This sounds reasonable until you acknowledge that the actual effect will not be the referral of all sexual violence in college to law enforcement. The actual result will be that the vast majority of college sexual violence simply won't be reported by victims/survivors at all. Rather than prosecuting more sex offenders criminally, the result will be a significant drop in the number of reported sex offenses. ATIXA believes that sex/gender equity is an inherent good, that colleges benefit from the evolution toward being more equitable communities, and that victims/survivors must have a safe space within those college communities to report allegations of sexual violence.

Instead of using the criminal justice system to make colleges safer, the result of these proposals, if implemented, will be the absolute opposite. In fact, such changes are likely to embolden sex offenders, who will be assured that their offenses are unlikely to be reported. This, in turn, would result in an environment that would be far less safe than if colleges had maintained their own internal resolution systems.

Perhaps that's exactly what those who are opponents of Title IX want: a system where men aren't held accountable for their violence against women?¹³ So, do the opponents of Title IX seek only to reassert male privilege over the autonomy of women's bodies?¹⁴ No, of course not. Some are genuinely concerned that colleges don't afford adequate due process to accused students. Unlike Title IX opponents however, we do not view this as a zero sum game, where providing for the needs of victims/survivors must inherently compromise the rights that attach to those who are accused of sexual violence. In fact, colleges must do both, and they must do both better.

However, FIRE and other organizations like Stop Abusive and Violent Environments (SAVE)¹⁵ and Families Advocating for Campus Equality (FACE)¹⁶ want full-blown adversarial college hearings with the right to attorney representation and a higher standard of proof than the now-mandated preponderance of the evidence standard. They ignore (conveniently) that turning the college process into the criminal process will have the same chilling effect on the willingness of victims/survivors to report offenses to their colleges as that which currently plagues the criminal justice system. Or, maybe that is exactly their intent? Opponents also ignore the wisdom of the last 55 years of due process jurisprudence, which has resisted imposing criminal levels of due process on college administrative proceedings in the United States.

¹³ While the point here is to address the majority of cases, in which men are typically the alleged perpetrators and women are typically the alleged victims, we in no way intend to minimize or negate the experiences of men who are victims, nor those whose perpetrator was a woman.

¹⁴ He or she or they or other terms that recognize fluid or non-binary identities.

¹⁵ <http://www.saveservices.org/>

¹⁶ <https://www.facecampusequality.org/>

Currently, students have the absolute right to be advised by counsel during every step of a college's resolution process for allegations of sexual violence. Turning the process into an adversarial one with attorneys pitted against each other only makes sense when analogizing college offenses to crimes and ignores the fact that students already have access to their counsels' advice under existing law. In the United States, employees facing discipline from their employers have the right to consult counsel, but rarely have the right to be represented by counsel in internal disciplinary matters. The same is true for most employees of colleges. Why should it be any different for students facing internal discipline, but no loss of life or liberty?

With respect to the preponderance of the evidence standard, this is a debate that will continue for many years to come. But there are two important points to consider. First, any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. No other evidentiary standard is equitable. Second, "preponderance of the evidence" is the standard used universally in civil rights resolutions in the United States. It is not unique to Title IX. It is the standard for Title IV, Title VI, and Title VII, at the federal level, and for almost all state civil rights laws. It is the standard utilized by OCR and all other federal agencies that oversee civil rights equity. In 2011, when OCR imposed the preponderance standard on schools under Title IX, it wasn't imposing a new standard, it was simply stating the (already existing) fact that preponderance of the evidence is the applicable standard of the courts and of OCR, and thus must be applied by colleges to achieve equitable compliance. No other standard is appropriate because these are civil discrimination protections, not criminal statutes.

TERMINOLOGY

As part of the mission of serving higher education well, we must revisit the terminology we use on colleges to address the various forms of sex and gender discrimination that occur. In our original 2005 Whitepaper, we popularized the term *sexual misconduct* as a framework that encompassed the offenses of non-consensual sexual intercourse (NCSI), non-consensual sexual contact (NCSC), sexual harassment, and sexual exploitation. We stand by this term. This choice has proven controversial, all the more so as the term has been widely adopted. Some people think it waters down the meaning of rape, or is an effort by colleges to minimize the significance of the misconduct by failing to call it what it really is: rape. But, in a college context, it really is sex or gender discrimination, as we noted above, sometimes in physical form.

Rape is a felony found by a jury beyond a reasonable doubt to have occurred. Sexual misconduct is a policy offense that is determined by college administrators to have been more likely than not to have occurred. We hope that colleges will continue to talk about rape and sexual assault in all literature supporting victims/survivors, and in terms of education and training. But, not as policy. Those who want to shut down the ability of colleges and universities to address sexual violence seek to do so on the premise that these acts are crimes best handled elsewhere. It is our responsibility, in part with the terms we choose, to teach the outside world that colleges are not in the business of addressing crimes, but policy violations. Keeping the terms distinct is one of the best ways to do that. The goal is not to water down the term rape, or cover-up serious sex offenses at colleges. In fact, rather than watering down the act of rape, our definition of it is more expansive than just about any state's criminal definition of the act. It requires more respect and more communication and is clearer about the role of alcohol and other drugs.

Those in the advocacy world have occasionally voiced to us that the terms we have chosen work against the ability of victims/survivors to self-identify or to have their experiences validated. That may be true, but we can't allow the fallacy of perfection to undermine the important work of distinguishing policy from crime. There are no perfect terms, and it really isn't the job of a college to validate that a student has been raped (though we understand why students feel it is important for colleges to do so). We haven't found terms better than those we use, though we readily admit they have drawbacks. They have fewer drawbacks than other alternatives we have considered. Our terms are also less likely to be reversed by judges than the use of criminal terms by colleges that are more and more often subject to defamation claims in court.¹⁷ Paradoxically, while our terms seem to displease some victims/survivors, they make it more likely that a finding of sexual misconduct will be upheld in court, which is very helpful to victims/survivors.

We also acknowledge that the use of policy terms does water down the sting of the offense in another interesting way. Whether we like it or not, tagging someone as a rapist in our society comes along with considerable stigma for those being asked to do the tagging. It shouldn't, but it does. One by-product (not intended by us, but welcomed) of using policy-based terms rather than criminal terms has been that it has become easier for college administrators to apply a label to the acts when making a finding. It's easier to conclude that a student has committed non-con-

¹⁷ https://scholar.google.com/scholar_case?case=10981507656681737078&hl=en&as_sdt=6&as_vis=1&oi=scholar

sensual sexual intercourse than it is to state that they have raped someone. We have also found with surveys that policy terms like ours aid in victim self-identification by the clarity of behavior they describe, and have led to a subsequent increase in reporting. We can argue that this “re-branding” process should not be the case in an ideal world, but in the real world, criminal rape allegations in court suffer from low conviction rates, in part for the same reason. Why replicate that problem on colleges if we don’t have to?

Avoid the VAWA Offense Definitions as the Basis for Policy

VAWA Section 304 has re-popularized *sexual violence* as a policy term. That’s not an umbrella term like sexual misconduct; sexual violence would only encompass sexual assault and rape behaviors as a policy term. We have ambivalent feelings about using *sexual violence* as a policy term. Many sex offenses are not, in fact, physically violent. We know the word violence is used in the term *sexual violence* in a broader sense, to connote sexually transgressive acts, but the common understanding is narrow, and we worry about the field applying the term too literally, and thus foreclosing findings on offenses that don’t demonstrate use of violence (as opposed to non-consent).

Put another way, we’ve been trying for more than a generation now in the anti-sexual violence movement to move away from force and resistance constructs and toward consent-based policies and laws. Adopting the term sexual violence now just feels contrary to exactly the progress we’ve tried to make as a society in accepting that non-consent is enough to prove an offense without any use of violence. Thus, that term wouldn’t be an improvement, in our opinions. In a similar vein, we are also very pleased by the effectiveness of the two-tiered offense structure we have popularized, where non-consensual sexual intercourse (NCSI) is the policy correspondent of rape, and non-consensual sexual contact (NCSC) is the policy correspondent of sexual assault. Tiering the offenses has had important and lasting positive benefits for the field, especially in terms of getting tougher on sanctions for the NCSI offense. We suppose you could do that within an umbrella term of sexual violence, but part of our intention all along has been to help the field understand that violence is not the prerequisite of a sex offense; consent is. Why confuse things now?

Similarly, while VAWA Section 304 has popularized the term sexual violence, we are concerned not just with the use of that term, but with the fact that colleges are using the VAWA Section 304 definitions of the “Big Four” offenses (sexual violence, dating violence, domestic violence, and stalking) as policy. This was not the intent of Congress or the Department of Education. The VAWA offenses and their definitions were intended solely for the purpose of the reporting of crime statistics. They were neither intended, nor meant to be used as policy terms by colleges, and they do not represent best practices. VAWA Section 304 has in fact blurred the policy/crime distinction we feel is so essential, by having colleges report policy offenses as crimes for purposes of public disclosure. Still, we must continue to make the distinction between policy violations and crimes a viable one, because colleges lack the basic legal authority to administratively determine that crimes have occurred.

Consider, for example, that the terms domestic violence and dating violence have been considered obsolete in the field for almost a generation. *Intimate partner violence* is the preferred term, and also obviates the need for two separate offenses based on dating or domesticity, a distinction that is unnecessary on colleges. Further, the VAWA definitions of these offenses are cumbersome, incorporate state laws (which blurs the crime/policy distinction we feel is so important), confusingly include sexual violence, and somehow fail to clarify that the offenses are also forms of sexual harassment under Title IX. Thanks, Congress!

The definition of stalking in VAWA Section 304¹⁸ – derived from the model definition by the Stalking Resource Center at the National Center for Victims of Crime (NCVC)¹⁹ – is worse. It's so broad as to be virtually meaningless, and could be constitutionally overbroad if misapplied on a public university campus. It also fails to distinguish lurking behaviors from stalking behaviors, which on many of our colleges has the unfortunate result of holding students who completely lack menacing intent accountable for stalking behaviors. Many institutions see this manifest with students who are on the Autism spectrum accountable for stalking behaviors when they don't have a menacing bone in their bodies.

VAWA defines stalking as “engaging in 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.” By looking only at the fear perception of the target, rather than also looking at the intent/conduct of the alleged perpetrator, the definition problematically lumps all lurkers and stalkers into the same category. We contend that this definition is broad enough to include a situation where a faculty member fails a student twice on two different assignments. Twice establishes the course of conduct, and failing the student twice could cause them to suffer substantial emotional distress. Is the student being stalked or graded? The federal definition fails to incorporate the critical concept of menace or intent to harm, which is essential to a finding of stalking.

We have fixed that in our section on stalking, below. Some might critique that our definition disempowers colleges from addressing the pre-cursor behaviors in stalking that occur before it becomes menacing, such as fixating on a target with too much attention, incessantly sending flowers or gifts, etc. We disagree. Unwelcome conduct of a sexual nature is sexual harassment and can be addressed as such. We already have the policy tool in sexual harassment to address behaviors that are pre-cursors to menacing stalking without having to water down the meaning of the term stalking. Further, we need to keep in mind the discrimination framework for all these offenses. What all these terms are intended to prohibit, from an overarching perspective, is the creation of a hostile educational environment on the basis of sex or gender. Low-level stalking, harassment, IPV, even NCSC, may not rise to the level of creating a hostile environment on the basis of sex. OCR has said so, and the courts say so frequently, as well.

¹⁸ “Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress” (34 CFR Part 668, P. 62784, Federal Register / Vol. 79, No. 202 / Monday, October 20, 2014)

¹⁹ “A course of conduct directed at a specific person that would cause a reasonable person to feel fear.” <http://www.victimsof-crime.org/our-programs/stalking-resource-center/stalking-information#what>

As you think about whether to use VAWA definitions as policy, keep in mind that these definitions are unlikely to align with your state law, and that the VAWA definition of sexual assault doesn't do a great job addressing alcohol issues, if you are looking for other reasons to eschew using VAWA offenses in your policies. In summary, then, this section lays out why use of the VAWA Big Four definitions as policy is not only *not* a best practice, but is a potential risk management nightmare that could engender lawsuits, confusion, and bad results.

The Centrality of Hostile Environment Analysis

OCR has clarified that not all IPV or sexual misconduct is covered by Title IX because it does not always rise to the level of creating a hostile environment.²⁰ It is not legally a *fait accompli*²¹ that grabbing someone by the buttocks creates a hostile environment for them on the basis of sex, though the act is technically a sexual assault (actually battery), criminally. That act may create a hostile environment on the basis of sex, or it may not, but that is a finding we must make, and not a conclusion we may assume. Thus, not all sexual assault is covered by Title IX, though all NCSC may be a policy violation. The same is true for stalking, which isn't always sex-based. The overwhelming majority of stalking in college likely is, but stalkers may fixate on traits and characteristics, not just sex. Similarly, all IPV may be prohibited

by a college, but not all IPV will rise to the level of creating a hostile environment on the basis of sex. And, all sexual harassment may be prohibited by a college, but not all sexual harassment will create a hostile environment, either. It is the hostile environment in all these offenses that triggers the application of Title IX, whereas VAWA Section 304 has no such threshold, and covers the Big Four offenses regardless of their severity (for purposes of reporting crime statistics and conferring rights under the statute).

This leads to a very important learning outcome regardless of what terminology you use. When alleging sexual misconduct, if the allegation is NCSI or NCSC, you must also investigate to determine whether sexual harassment occurred, and whether it created a hostile environment on the basis of sex or gender. When investigating IPV, stalking, or bullying, you must also do an assessment of sexual harassment and hostile environment. These offenses intersect and overlap. Sexual violence is only covered by Title IX because it is an extreme form of unwelcome sexual conduct, which is sexual harassment. The same is true for IPV and stalking. Those are legal intersections, but there is also overlap. Some IPV will also be NCSC or NCSI. Some stalking

“It is not legally a fait accompli that grabbing someone by the buttocks creates a hostile environment for them on the basis of sex, though the act is technically a sexual assault (actually battery), criminally. That act may create a hostile environment on the basis of sex, or it may not, but that is a finding we must make, and not a conclusion we may assume.”

²⁰ Letter to ATIXA from OCR, via email, dated June 11, 2015 (archived in the ATIXA member library online).

²¹ Our editors insist we define this for you, so this is Latin for “a done deal.”

may involve IPV, NCSC, or NCSI. Make sure that the responding party is notified of all policies allegedly violated, and make findings specific to each and every policy that is implicated.

Terms Finding Favor in 2017

We offer some additional updates to policy terminology that are important to this publication as the field moves away from resolutions rooted in the student conduct process and toward civil rights terms and resolution formats. We now refer to “allegations” rather than “complaints,” as “complaints” may have a pejorative overtone as if someone is complaining about something. Frankly, the correct legal term is “grievance,” but that seems to have a different application on many public college campuses, as a means for employees to grieve discipline, so allegation is now our preferred term. We have shifted away from the terms “charges,” “accuser” or “accused,” and “accusation,” because of the criminal allusions, and have also moved away from the terms “complainant” and “respondent,” as these are the terms of civil court proceedings, and invoke the “complaint” term again.

Instead, we now call the parties to an allegation the “reporting party” and the “responding party.” We prefer the neutrality of these terms. Some people have shown confusion about what happens if the reporting party did not in fact report the offense, but we call that person the reporting party regardless to show a status in the process, not whether they are the reporter of misconduct. Some colleagues have then asked, “Well, what do we call the person who reports the offense, if that person isn’t the reporting party?” We’re not sure why we need to call them anything, actually. We just refer to them in records as the person who brought the allegation(s) forward or as a third-party reporter. We are also trying to move away from terms in policy that imply conclusions or adversarial relationships. To that end, we recommend against using the term “victim” in policy, though of course using “victim” and/or “victim/survivor” in victim-services literature and in resource guides is appropriate. Similarly, we avoid the use of the term “perpetrator” in policy for the same reasons. Finally, we recommend against using the term “against” as in “bringing charges against a student” because of the adversarial tone it brings to a non-adversarial, civil rights-based resolution process.

MODELS OF PROOF FOR SEXUAL MISCONDUCT OFFENSES

This next section, and the bulk of this *Playbook*, features models of proof for eight different forms of sexual misconduct: NCSI/NCSC, sexual harassment, sex discrimination, gender discrimination, sexual exploitation, stalking, retaliation, and IPV. The definitions are drawn from the ATIXA model policies,²² though you can create models of proof for your own policies, to the extent they differ from the ATIXA models. Creating a model of proof is simply the process of taking a definition of an offense and breaking it down into its constituent elements – those components that must be proven in order to show a violation by a preponderance of the evidence. Then, you use the checklist as a guide when you analyze a potential policy violation, to ensure that your assessment of the facts tracks precisely with the requirements of your institutional policy.

“The models of proof are designed to help you move past your gut assessment of the facts, and to a fully analytical assessment by matching facts to policy elements. People trust their gut assessments, but our gut is informed as much by our biases as our lenses of clarity, and we all have both.”

Below, we have created a model of proof for each of these eight offenses, and then offered an extensive discussion about how to analyze each element of the policy. In some sections, we have offered the discussion in rubric form, where we think it will be helpful to fit the elements of a policy into a specific rubric to facilitate ease of – and accuracy of – the analysis you will provide. The models of proof are designed to help you move past your gut assessment of the facts, and to a fully analytical assessment by matching facts to policy elements. People trust their gut assessments, but our gut is informed as much by our biases as our lenses of clarity, and we all have both. While the concept of neuroplasticity – the brain’s ability to adjust, reorganize, or adapt – has put an end to dualistic thinking about left and right brains, there are “right brain” dominant functions that feel evidence and give us our “gut” reactions. Then, there are “left brain” controlled logical and analytical processes that help us to weigh, quantify, and parse information. In any investigation of sexual misconduct, the parties are owed the best of your thinking, including both by your gut and your logical mind.

Preponderance of the Evidence

Finally, before we embark on the eight policy models of proof, it is useful to offer a brief reminder about the preponderance of the evidence here, to prime your mind before you read further about applying the policies. Preponderance of the evidence is the equitable standard of proof for a behavior covered by Title IX.²³ The preponderance has been alternately described as the greater weight of evidence (picture the scales of justice, tipped slightly one way or the other), as what is

²² <https://atixa.org/resources/model-policies/>

²³ It is sometimes referred to as a burden of proof, mistakenly. The burden of proof is the legal obligation on the institution to show whether its policies have been violated. It meets its burden by using the preponderance of the evidence as the standard of proof.

more likely than not, 50.01 percent, or 50 percent plus a feather. In this sense, Investigators and final decision-makers are feather hunters, trying to find any feathers provided by the evidence and weight them on the scale – and on either side of the scale. A feather can weigh as much as a real feather, or as much as a cinder block, depending on the nature of the evidence, but it must be there, or there is no policy violation. The question is not what happened, but what can be proven or shown by the evidence. If the evidence is 50/50, the tie goes to the responding party. Every time. Preponderance is not a high standard, and thus it must be respected steadfastly. You may feel deep down that the responding party did what was alleged, but you can't hold the individual accountable based on your gut feeling. It's not what you feel, but what is proven by more than 50%, with reliable, relevant, and credible evidence.

Sexual Harassment

Sexual harassment is a form of sex discrimination²⁴ covered by Title IX and takes three forms: *Quid Pro Quo* Harassment, Hostile Environment Harassment, and Retaliatory Harassment.²⁵

Quid Pro Quo Harassment

This form of sex- or gender-based harassment relies heavily on a power or authority imbalance between those involved, such as an intimate relationship between a supervisor and a supervisee or a faculty member and a student. *Quid pro quo* literally means “something for something” or “this for that” in Latin, implying a trade. Under the law, the trade is suspect when a power imbalance is in play. Let’s look at the definition.

Model Policy²⁶

- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature
- by a person having power or authority over another
- when submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating, evaluating, or providing a benefit to an individual’s educational or employment development or performance.

Model of Proof

- ☐ Sexual advances
AND/OR
- ☐ Requests for sexual favors
AND/OR
- ☐ Other verbal or physical conduct of a sexual nature
AND
- ☐ Unwelcome
AND
- ☐ By a person having power or authority over another
AND
- ☐ Submission to such sexual conduct is an explicit term or condition of
 - rating
AND/OR
 - evaluating
AND/OR
 - providing a benefit to an individual’s educational or employment development or performance.

²⁴ See e.g.: *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 283 (1998).

²⁵ These are not all covered by VAWA §304, a key distinction between VAWA and Title IX.

²⁶ The ATIXA model policy here roughly tracks the Equal Employment Opportunity Commission (EEOC) language defining *quid pro quo* offenses, as that language has become a legal term of art, but modifies it for the college setting.

OR

- Submission to such sexual conduct is an implicit term or condition of
 - rating
AND/OR
 - evaluating
AND/OR
 - providing a benefit to an individual's educational or employment development or performance.

It is important to note that not all relationships between such individuals qualify as sexual harassment, because many of those relationships or situations are not unwelcome. Further, many relationships where one person has power or authority over another do not have explicitly or implicitly placed conditions, potential benefits, expectations, or detriments on one of the individuals, which prevent it from becoming *quid pro quo* harassment. Stated differently, there is a difference between conduct that violates only institutional consensual relationship policies (e.g.: a consensual relationship between a faculty member and student) and harassing-level *quid pro quo* misconduct.

The power or authority imbalance can be formal or informal. In some instances, the authority or power over another is formalized in terms of structure or hierarchy, such as supervisor-supervisee or faculty-student, where the student is in the faculty member's class. At other times the power or authority can be informal, such as a faculty member who offers to write a letter of recommendation for a student in exchange for sexual favors. Indeed, use of leverage or threats can both negate the validity of a person's consent to sexual activity, as well as create a *quid pro quo* harassment situation.

Rubric

Employing the above definition, a finding of *quid pro quo* harassment must answer each of the following four questions accordingly:

1. Are there sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature present? If not, there is no policy violation. If so,
2. Is such conduct welcome? If so, there is no policy violation.²⁷ If not,
3. Is there a formal or informal power or authority imbalance between the parties? If not, there is no policy violation. If so,
4. Did the person with power or authority explicitly or implicitly condition the rating, evaluation, or receipt of a benefit to an individual's educational or employment development or performance on submission to the unwelcome sexual conduct? If not, there is no policy violation. If so, policy has been violated.

²⁷ A consensual relationships policy violation may exist, but this would not constitute sexual harassment.

Retaliatory Harassment

Retaliation is defined as a stand-alone sex/gender discrimination offense below. All that is needed in this section, therefore, is to remind you that if the adverse action required by the definition of retaliation takes the form of harassment, the conduct can be both sexual harassment and retaliation. It is also possible that retaliatory actions can take the form of hostile environment harassment, and an institution should analyze such conduct using both the retaliation rubric below, as well as the standard hostile environment analysis below. For example: a student alleges sexual violence by another student and the institution begins an investigation. The responding party is angry at the reporting party and while the investigation into the sexual violence is ongoing, the responding party distributes nude videos and photos of the reporting party on social media. This action likely constitutes hostile environment harassment as a retaliatory mechanism and it should be addressed using both the retaliation and hostile environment lenses.

Hostile Environment

For Title IX to apply, conduct or speech must reach the level of creating a hostile environment. Understanding at what point harassing conduct rises to the level of hostile environment is therefore a critical element in addressing issues of sex- and gender-based harassment.

In 1999, the U.S. Supreme Court defined hostile environment in a Title IX context, noting that the unwelcome conduct of a sexual nature must be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”²⁸ The court added that institutions must determine whether a hostile environment exists by looking at the “constellation of surrounding circumstances, expectations, and relationships.”²⁹ Subsequently, OCR and the Department of Justice have confusingly answered the question of how to define a hostile environment from the perspective of an administrative agency, but they have not taken an identical approach to the courts.

Model Policy

Applying and interpreting these various standards, ATIXA developed the following model definition of hostile environment sexual harassment, in part by separating the two concepts of sexual harassment and hostile environment, and elaborating the difference between the reporting/remedial standard (sexual harassment) and the disciplinary/free speech standard (hostile environment):

Sexual harassment is:

- *Unwelcome,*
- *Sexual, sex-based and/or gender-based,*
- *Verbal, written, online and/or physical conduct.*

²⁸ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

²⁹ *Id.* at 651 (citing *Oncale v. Sundowner*, 523 U.S. 75 (1998))

All sexual harassment should be reported to college officials who will provide informal and remedial responses. Sexual harassment may also be subject to discipline when it rises to the level of creating a hostile environment.³⁰

Model of Proof

- ☐ Unwelcome
 - ☐ Sexual
AND/OR
 - ☐ Sex-based
AND/OR
 - ☐ Gender-based
AND
 - ☐ Verbal
AND/OR
 - ☐ Written
AND/OR
 - ☐ Online
AND/OR
 - ☐ Physical conduct

Model Policy

- A hostile environment is created when sexual harassment is:
- Severe, or
- Persistent or pervasive,³¹ and
- Objectively offensive, such that it:
 - *unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the institution's education or employment programs.*

Models of Proof

There are several ways to reduce this to a model of proof, depending on how you decide to divide the elements. Here are a few examples, the first being the most academically rigorous parsing of the policy elements into a checklist:

- ☐ Severe
OR
- ☐ Persistent
OR
- ☐ Pervasive
AND

³⁰ Sexual harassment may be subject to discipline at a public university IF AND ONLY IF it rises to the level of creating a hostile environment.

³¹ Private institutions may prefer the OCR standard: sufficiently severe or pervasive.

- ☐ Objectively offensive
AND
- ☐ A limitation or deprivation
AND
- ☐ Of educational or employment program
AND
- ☐ Participation,
OR
- ☐ Benefits

If that format is a little too cumbersome, this is another version that is a more compact decision-tree:

- ☐ Severe
OR
- ☐ Persistent or Pervasive
AND
- ☐ Objectively offensive
AND
- ☐ A limitation or deprivation of educational or employment
AND
- ☐ Participation or benefits

Or, an even more simplified third variation:

- ☐ Severe or Persistent or Pervasive
AND
- ☐ Objectively offensive
AND
- ☐ A limitation or deprivation of educational or employment participation or benefits

Rubric

1. Does evidence show unwelcome conduct? If so,
2. Was the conduct sex- or gender-based or of a sexual* nature (*or was there conduct targeted toward any member of a protected class)? If so,
3. Was the expression severe or persistent or pervasive? If so,
4. Was the conduct or expression also objectively offensive; and if so,
5. Did the individual(s) impacted experience a limitation or deprivation of their educational or employment participation or benefits?

If the answer is yes to each question above, there is a policy violation. If the answer to *any* question is no, there is no policy violation. Similarly, with the checklist model of proof, are all of the AND boxes checked? If so, there is a policy violation. If not, there is no violation. If you'd like a clever shortcut (and this is one we always use ourselves), flip the rubric, asking the 5th question first:

1. Did the individual(s) impacted experience a limitation or deprivation of their educational or employment participation or benefits. If not, there is no policy violation. If so,
2. Does evidence show unwelcome conduct? If not, there is no policy violation. If so,
3. Was the conduct of a sexual* nature (*or was there conduct targeted toward any member of a protected class)? If not, there is no policy violation. If so,
4. Was the expression severe or persistent or pervasive? If not, there is no policy violation. If so,
5. Was the conduct or expression also objectively offensive? If no, there is no policy violation. If yes, policy has been violated.

By flipping the rubric, you'll gain some efficiency if there was no education or employment impact, because without that first element, none of the other elements matters. It's a way to "early fail" the rubric as you analyze, something we use quite often as a tool during preliminary inquiries into hostile environment allegations.

The policy construction distinguishing between the basic definition of sexual harassment and conduct that is subject to discipline ensures protection of the principles of free speech and academic freedom. It is also helpful to foster reporting of low-level behaviors that may not rise to the level of discipline, but should be addressed and reported before the situation rises to the level of creating a hostile environment.

Determining if conduct or speech rises to the level of a hostile environment requires an understanding of the meaning of the terms severe, persistent/pervasive, objectively offensive, and an understanding of what constitutes an unreasonable interference with educational or employment access. Some conduct may meet the criterion for each of these elements, but meeting each element is not necessary to find a hostile environment. Conduct need not be severe, **and** persistent or pervasive, and objectively offensive. Rather, conduct can be sufficiently severe and objectively offensive that it creates a hostile environment. Similarly, persistent or pervasive conduct that does not qualify as severe, can, in tandem with objective offense, create a hostile environment. Before expanding on the analysis, it is critical to have an understanding as to what the terms severe, pervasive, persistent and objectively offensive mean.

Severe

The severity of an incident depends largely on the nature and scope of the alleged conduct, although you can also look at its impact. Some physical conduct does not require repetition to qualify as severe. Any single act of penetration, anal, oral or vaginal, will automatically be seen by most courts as sufficiently severe. Additionally, if the behavior is humiliating, threatening, or violent, that heightens the severity of the incident. Comments, jokes, classroom comments, online postings, photographs, etc. are typically not, on their own, sufficiently severe to create a hostile environment. In this way, offensiveness and severity are linked. That which is merely offensive, rather than objectively offensive, is unlikely to meet the test for severity. This is a critical element that cannot be overstressed, as many members of college communities expect harsh and rapid responses to conduct that, while perhaps mean, hateful, rude, or insulting, does not rise to the level of being severe, and does not warrant discipline, though it may need to be remedied.

Persistent

An analysis of persistence typically centers on the conduct's frequency; whether and how often the unwelcome conduct is repeated. Additionally, the relative intensity and duration of the conduct, coupled with whether it is welcome, informs a finding of persistence. The more actions approach severity, the less persistence is required to meet the definition. The less severe the conduct, the more persistence will be necessary to cause a discriminatory effect. The longer an action or incident lasts, or the more often conduct is repeated, the more likely it will be deemed persistent in a hostile environment determination.

Pervasive

Pervasiveness hinges on how widespread, openly-practiced, prevalent, and/or distributed the conduct is. Unwelcome sex- or gender-based conduct that is well-known among students or employees can qualify as pervasive. Conduct that occurs in public spaces is more pervasive than conduct in private. Relatedly, online, electronic, or social media postings and conduct, which often spread rapidly and widely, heighten the pervasiveness by which offensive and unwelcome content can be disseminated.

Objectively Offensive

Whether the conduct is objectively offensive is a critical element that must be present for conduct to qualify as creating a hostile environment. This standard requires application of the reasonable person standard, and context matters. Would a reasonable person *in the context in which the conduct occurred* deem the conduct to be objectively offensive? Both subjective and objective elements are necessary in finding a hostile environment. The subjective element is often satisfied by determining whether the recipient (either the intended target, or an offended third party) found the conduct unwelcome. Unwelcome isn't the same thing as offensive, but many behaviors that are unwelcome are so because they are offensive. Elements to examine include, but are not limited to: the age and relationships of those involved; the frequency of the conduct; the severity of the conduct; whether the conduct is physically threatening, humiliating, ridiculing, intimidating, or abusive; and the number of persons involved. Critical to remember is that just because conduct offends, is mean, or is hateful, does not mean it creates a hostile environment. It must also meet the other criterion described throughout this section.

“As we evaluate sexual harassment allegations, many of us are challenged to properly contextualize those allegations within the frameworks of the First Amendment and/or academic freedom.”

Hostile Environment, the First Amendment, and Academic Freedom

As we evaluate sexual harassment allegations, many of us are challenged to properly contextualize those allegations within the frameworks of the First Amendment and/or academic free-

dom. While the First Amendment ostensibly impacts only public institutions and all institutions in California (unless religiously-affiliated), many private colleges respect the First Amendment's protections, even if they are technically free from constitutional mandates. Regardless of public or private status, academic freedom provides a set of protections for speech at all institutions. Thus, any assessment of hostile environment sexual harassment must also assess whether the harassing speech deserves the protections of the First Amendment and/or academic freedom. This is a litmus test, and it functions like an on/off switch. If speech is protected by either the First Amendment or academic freedom, it cannot create a hostile environment, by definition. Speech that creates a hostile environment, by definition, cannot be speech that is protected by either the First Amendment or academic freedom.³²

The increased scrutiny of reports of hostile environment harassment, combined with the emerging awareness of the impact of "trigger words," has brought the issue of sexual harassment involving faculty and students into the classroom as never before, setting up the potential for conflict with firmly held beliefs of academic freedom.

Faculty, Employees, and the First Amendment

Although many faculty members declare that academic freedom is assured through the First Amendment, it was actually first defined by the American Association of University Professors (AAUP) in its "Declaration of Principles" in 1915.³³ That declaration stated, "academic freedom has traditionally had two applications- to the freedom of the teacher and to that of the student. Academic freedom of the teacher comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action." In 1940, the AAUP refined this earlier definition in their *"Statement of Principles on Academic Freedom and Tenure"* to include:

- "Teachers are entitled to full freedom of research and in the publication of the results, subject to the adequate performance of other academic duties; but research for pecuniary return should be based on an understanding with the authorities of the institution.
- Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter, which has no other relation to their subject.
- When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, show respect for the opinion of others and should make every effort they are not speaking for the institution."³⁴

³² http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/the_intersection_of_free_speech_and_harassment_rules.html

³³ <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>

³⁴ AAUP, 2001 pp. 3-4.

While the AAUP holds fast to its declaration of academic freedom, the U.S. Supreme Court has never fully accepted that term as the AAUP has defined it as a legal right. In *Sweezy v. New Hampshire*³⁵ the Court recognized First Amendment rights of “institutional academic freedom.” The Court identified institutional academic freedom as: who may teach; what may be taught; how shall it be taught; who may be admitted to study. This institutionally-owned set of rights is a far cry from the perceptions of faculty about their wide latitude for expression in the classroom, and thus sets a stage for continuing conflict when faculty comments or opinions in the classroom target a protected class of individuals or are overtly sexual in nature.

Some examples include:

- A University of Kansas faculty member who was terminated after commenting in class, “As a white woman, I just never have seen the racism.... [referring to the riots in Missouri]. It’s not like I see [n-word redacted] spray painted on walls.” Students protested following this comment and sought her termination. She argued that she was comparing the University of Kansas to the University of Missouri and that she never directed the word at anyone and used it as an example of a slur, not to hurt anyone.³⁶
- Professor Laura Kipnis was charged with creating a sexually hostile environment at Northwestern University following her publication of a scholarly article, “Sexual Paranoia Strikes Academe,” in which she challenged Title IX’s expanding reach and stated that “sexual panic rules.”³⁷ She was subjected to a 72-day investigation that resulted in a “not responsible” finding, yet left her traumatized by the experience and fearful for her job.³⁸
- Theresa Buchanan was a tenured Associate Professor at Louisiana State University who had taught there for 20 years in the Pre-K-3rd grade teacher preparation program. She was charged with violating the university’s sexual harassment policy because of complaints from students that she used profanity and sexual language in the classroom. She responded that her use of profanity was in keeping with her particular pedagogical style and that she occasionally used sexual language and humor in lessons and role-playing as a way to keep students engaged. Although the faculty committee voted unanimously not to terminate her, the President did terminate her, stating that she created a hostile learning environment that amounted to sexual harassment and that her behavior put the university at risk of sexual harassment lawsuits. Indeed it did; she has filed a lawsuit for damages and is seeking reinstatement to her position.³⁹

These examples help illustrate that politics, social media, special interest groups, and college and community pressures can and do influence our decision-making in cases of academic free-

³⁵ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

³⁶ <https://www.insidehighered.com/news/2016/05/18/professor-says-she-was-fired-over-well-intentioned-ill-received-class-discussion>

³⁷ <http://laurakipnis.com/wp-content/uploads/2010/08/Sexual-Paranoia-Strikes-Academe.pdf>

³⁸ <http://www.chronicle.com/article/My-Title-IX-Inquisition/230489/>

³⁹ Summary of case: <https://www.insidehighered.com/news/2015/09/02/aaup-report-alleges-violations-academic-freedom-due-process-new-report-professors> Lawsuit: <https://www.thefire.org/complaint-and-exhibits-a-c-in-buchanan-v-alexander-et-al-2/>

dom. These examples also show that analyzing academic freedom often requires a concurrent analysis of the principles of freedom of expression and the First Amendment.

While there should be a balancing test applied in any set of circumstances in which the First Amendment rights of a faculty member are weighed against the rights of an institution to maintain a non-disruptive learning environment, how far can a faculty member go in expressing personal opinions or posing challenging questions? Just as not all speech or expression is protected under the First Amendment, not all comments, opinions, or expressions are protected within the classroom, or even in circumstances outside the classroom where the faculty member's speech is associated with their position at the institution.

Generally, a faculty member will retain freedom of expression when the subject matter of the challenged speech, opinion, or expression is germane to the subject matter being taught and has an identified nexus to the pedagogy of the course. However, when the challenged opinion, expression, or speech does not have a sufficient nexus and is used merely for effect or shock-value, then the faculty member's protections under academic freedom or freedom of expression are likely to be vulnerable to challenge.

The criteria below offer you a checklist to assess the questions of welcomeness, severity, and objective offense that are elements above. If there is a hostile environment allegation, or the institution seeks to have control over the actions of faculty related to their behavior in the classroom, the institution must assess:

1. Does the challenged expression have sufficient pedagogical nexus to the subject matter being taught? Does the expression by the faculty member undermine the legitimate goal or mission of the institution?
2. Does the classroom expression conflict with college policies and standards for professional conduct?
3. Does the in- or out-of-classroom expression interfere with the faculty member's performance of their duties?
4. Is the challenged expression being addressed in a completely content-neutral way because of its disruptive effect, or is it being addressed because of the content of the speech?
5. And, as a mitigating factor, did the faculty member alert the class, either verbally or in the syllabus, that there would be discussion of a provocative, possibly triggering nature?

The situation for faculty and staff at public institutions is different from those at their private school counterparts. At a public institution, the First Amendment offers a layer of protection for out-of classroom expression, in addition to language in Faculty or Staff Handbooks or employment contracts.

Faculty and staff members at private institutions, however, lack First Amendment protections and are entirely governed by the Staff or Faculty Handbook or employment contracts. Accord-

ingly, they run the risk of challenge and discipline by their institution for out-of-the classroom expression, especially when the speech of an employee uttered outside of the classroom setting or the academic context is found to be “offensive” or “demeaning” based on sex or gender.

As discussed, the way in which the institution responds to offensive expression will rely heavily on the status of the individual, with faculty protected by academic freedom, subject to the limitations previously discussed, and staff members maintaining far less latitude in free expression in the context of their jobs.

The way an institution responds is also governed by the location of the expression. Institutional offices are considered non-public forum environments. This means that the institution has far broader latitude in proscribing expression in that setting. The applicable standard in these circumstances is merely one of “reasonable limitations” on expression, consistent with the particular office or institutional environment.⁴⁰ The U.S. Supreme Court applied the balancing of employer and employee interest in *Garcetti v. Ceballos*⁴¹ and held that in the context of public employment generally, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” The Supreme Court reasoned that restricting speech that “owes its existence” to a public employee’s job responsibilities does not infringe any liberties the employee enjoys as a private citizen. Interestingly enough, however, that same court, in a majority opinion stated an “academic freedom” caveat: “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” The *Garcetti* decision left unanswered the argument, however, that sexually harassing speech by public employees, in the course of their professional roles, that is unrelated to scholarship and teaching, may well be outside the protections of academic freedom and the First Amendment.

Expression outside the boundaries of the physical institution or institutional context of both faculty and staff employees at public institutions is afforded far less protection. In 1968, the U.S. Supreme Court in *Pickering v. Board of Education*⁴² held that a faculty member can only succeed on a First Amendment claim if, on balance, his or her interest “in commenting upon matters of public concern” outweighs “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” However, a public employee’s speech on a matter of public concern may still be disciplined “if the expression contains knowing or reckless falsehoods or the statements were the sort to cause a substantial interference with the ability of the employee to do his job.”⁴³ By contrast, faculty and staff at private institutions have almost no protection outside of the institution.

⁴⁰ *Connick v. Myers*, 461 U.S. 138 (1983).

⁴¹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

⁴² *Pickering v. Board of Education*, 391 U.S. 563 (1968), was a case in which the Supreme Court of the United States held that in the absence of proof of the teacher knowingly or recklessly making false statements, the teacher had a right to speak on issues of public importance without being dismissed from his or her position. The case was later distinguished by *Garcetti v. Ceballos*, 547 U.S. 410 (2006), where the Court held that statements by public employees made pursuant to their employment have no First Amendment protection.

⁴³ *Id.*

Students and the First Amendment

And that brings us to students and the First Amendment. What are the obligations and limitations of colleges when a student has allegedly engaged in sexually harassing expression? Earlier in this section, we provided a comprehensive description of how to address sexually harassing expression that causes a hostile environment within the context and boundaries of the institution, but what about the circumstances in which a student's expression occurs in cyberspace, such as on social media sites? How should a college respond when a student's expression offends, maligns, embarrasses, demeans, or degrades another member of the college community? Unfortunately, far too many institutions react and respond with a heavy hand (especially when those expressions are directed toward a faculty or staff member) by imposing discipline.

Two cases decided by the 3rd Circuit U. S. Court of Appeals, *Layshock v. Hermitage School District*⁴⁴ and *J.S. v. Blue Mountain School District*,⁴⁵ have provided guidance in determining appropriate responses to reports of sexually harassing expression in cyberspace. While a Circuit court decision is not decisive or controlling the way a Supreme Court decision would be, other circuits have since followed the 3rd Circuit. In both of those cases, students using their own computers off-campus from the school, engaged in shocking, embarrassing, demeaning, and degrading postings that directly implicated a teacher and an administrator. In both cases the students were suspended from school. Both students initiated First Amendment lawsuits. The 3rd Circuit heard the appeal and found in favor of the students in both cases.

These outcomes remind us that the *Tinker v. Des Moines Independent Community School District*⁴⁶ standard – that neither students nor employees “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”⁴⁷ – is alive and well, and while a student's expression may occur outside the schoolhouse gate, we may not engage in disciplinary action (for purely outside or external cyber speech) that separates a student from their education unless there is a sufficient nexus between the speech and a substantial disruption of the school environment that results. This is a reminder for public institutions to be wary of punishing speech for merely the anticipation of a disruption, or because another student or employee was offended. We are required to apply the same standard of severe, persistent or pervasive, and objectively offensive to the cyber speech that we would if the same expression occurred on campus, along with a requirement for substantial disruption to the school community or mission. The court was also clear that, had the students utilized the school's computing resources to engage in these activities, the school may have had a stronger case for restricting the speech. The court also noted that had the speech been of a threatening nature – and the threat deemed credible – the institution's actions would have been viewed in a much different light.

Recently the courts have allowed students to be disciplined in a fashion for off-campus/online speech. In *Oyama v. University of Hawaii*⁴⁸ and *Keefe v. Adams*,⁴⁹ students were not permitted to proceed in their programs as a result of their posts on social media. However, it is important

⁴⁴ 593 F.3d 249 (3d Cir. 2010), *aff'd en banc*, *Layshock ex rel. v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011).

⁴⁵ *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *rev'd en banc*, 650 F.3d 915 (3d Cir. 2011).

⁴⁶ 393 U.S. 503 (1969).

⁴⁷ *Id.* at 506.

⁴⁸ *Oyama v. Univ. of Haw.*, 813 F.3d 850 (9th Cir. 2015).

⁴⁹ *Keefe v. Adams*, 2016 WL 6246869 (8th Cir. Oct. 26, 2016).

to note that the rationale was that their conduct was so “unprofessional” as to violate the standards of their professions, and the restrictions were reasonably applied. This is consistent with the *Tatro v. Univ. of Minnesota* findings from a few years prior, and shows a continuing erosion of First Amendment protections as it relates to off-campus and online social media posts.⁵⁰ That said, schools should be very wary to see this as an open door to expand their definitions of “professional conduct” in order to discipline off-campus or online speech they just don’t like. Instead, schools should continue to use the above analyses to determine if the speech is harassing, disruptive, or a true threat.

Students at private institutions do not have First Amendment protections,⁵¹ though we encourage all institutions to promote the free and open exchange of ideas.

⁵⁰ 816 NW 2d 509 (2012).

⁵¹ Except in California under the Leonard Law, which applies the free speech protections under the California Constitution, as well as the First Amendment of the U.S. Constitution, to all public and private colleges and universities. California Education Code § 94367.

Non-Consensual Sexual Contact and Non-Consensual Sexual Intercourse

Asking the Right Question

Analyzing these types of allegations is frequently vexing for the investigators and fact-finders who are called upon to do so. Sexual offense allegations can be heart-wrenching, preying on our emotional reasoning, our sexual politics, our gender-role expectations and stereotypes, our basic sense of fair play, and our innate notions of right and wrong. Administrators report to us that these allegations can be brutal for them to resolve, because of the lack of clarity. We may “know” what happened, but we can’t “show” what happened, in the sense that evidence to support allegations may not be available. Yet, despite the complexity we attribute to sexual misconduct allegations, decision-making is a fairly straightforward five-step process:

1. Gather the evidence;
2. Evaluate the credibility of the evidence;
3. Assess the evidence against the elements of the policy;
4. Analyze and weigh the sufficiency of the evidence;
5. Render a determination and reduce it to writing.

If the greater weight of the evidence is uncertain, it probably results from one or two factors. First, your skills at feather-hunting and/or feather-weighting may need to be more finely honed,⁵² or second (and relatedly), emotional reasoning, sexual politics, gender-role expectations and stereotypes, rape myths, and pressures from OCR (real or imagined) all too often churn together to give us a muddled result.⁵³ This section offers Investigators and fact-finders a tool for consistent analysis and clear decision-making. These allegations are never easy. But, this rubric has become an industry standard over the last twelve years for its durability and the way it makes tough decisions easier for those called upon to make them.

Model Policy

Non-Consensual Sexual Contact is:

- any intentional sexual touching,
- however slight,
- with any object,
- by a person upon another person,
- that is without consent and/or by force.⁵⁴

Sexual Contact includes:

- intentional contact with the breasts, buttock, groin, or genitals, or touching an-

⁵² And, may we suggest you avail yourselves of the series of highly-evolved and time-tested trainings offered by ATIXA to help you hone your skills: <https://atixa.org/events/training-and-certification/>

⁵³ Okay, the case could just be a complete mess, too.

⁵⁴ The use of force is not “worse” than the subjective experience of violation of someone who has sex without consent. However, the use of physical force constitutes a stand-alone non-sexual offense as well, as it is our expectation that those who use physical force (restrict, battery, etc.) would face not just sexual misconduct allegations, but allegations under the code for the additional assaultive behavior.

- other with any of these body parts, or making another touch you or themselves with or on any of these body parts; or
- any other intentional bodily contact in a sexual manner.

Non-Consensual Sexual Intercourse is:

- any sexual intercourse,
- however slight,
- with any object,
- by a person upon another person,
- that is without consent and/or by force.⁵⁵

Intercourse includes:

- vaginal or anal penetration by a penis, object, tongue, or finger, and oral copulation (mouth to genital contact), no matter how slight the penetration or contact.

Model of Proof

The model of proof for these offenses is the policy itself, because we have written it in element format already. The analysis only varies between them as to whether the contact is sexual touching or sexual intercourse. There is an element of intent in the NCSC definition that is not in the NCSI definition, but the definitions are otherwise identical. You can image a non-intentional sexual contact, such as brushing someone's breast or buttocks in a crowded bar without meaning to, which is not an offense, but it is hard to image someone having sexual intercourse unintentionally. Thus, intent is not a requirement of the NCSI offense. Intersectionally, these offenses have overlap because intercourse is a type of sexual touch, and thus intercourse would be included in NCSC, but only intercourse is included in NCSI, though intercourse is also a type of contact. NCSC is thus the broader offense, and NCSI is narrower, as to the contact each encompasses. Typically, NCSI would pertain to more invasive, and thus more severe conduct, for which suspension, expulsion, or termination would commonly result. NCSC merits a wider range of sanctions, from warning to expulsion, because of the wide range of behaviors covered by that offense.

An example of a question set for the NCSC offense is:

1. Was there sexual contact by one person upon another, no matter how slight, as defined in the policy? If yes,
2. Was it intentional? If yes,
3. Was it by force? If yes, policy was violated. If no,
4. Was it without consent, as consent is defined in the policy? If yes, there is a policy violation, if no, there is no policy violation.

⁵⁵ *Id.*

The set for NCSI is simpler still:

1. Was there sexual intercourse by one person upon another, no matter how slight, as defined in the policy? If yes,
2. Was it by force? If yes, policy was violated. If no,
3. Was it without consent, as consent is defined in the policy? If yes, there is a policy violation, if no, there is no policy violation.

Rubric

While the basic question rubric above is helpful, there are deeper issues and questions related to force, capacity, and consent that still need to be addressed. The expanded rubric below does so. The rubric for NCSC and NCSI is about ensuring that for each and every allegation, we are asking the right questions. If we ask the right question, we'll have a better chance of getting the right answer. The three questions that should be asked are rooted in policy. All colleges should prohibit sexual activity when it occurs under the following circumstances:

1. When it is forced; or
2. When the reporting party is incapacitated, and that incapacity is known to or should have been known to the responding party; or
3. When it is non-consensual.

It is important to understand that incapacity is a form of non-consent, but our rubric classifies it as incapacity, separate from the consent inquiry, for reasons that will be apparent below. Usually, only one of these constructs will apply to your assessment, in the end, but you should answer each question each time you analyze an allegation, to make sure you don't miss anything. An example would be when a student alleges that they were incapacitated and that they did not consent. In our investigation reports, we would typically then analyze both questions, which may then place the finding on more than one of the grounds of force, consent, and incapacity. Another example would be when someone forces sex on another person, and that person also does not consent. You should analyze both force and consent constructs to determine if policy was violated, whereas in an allegation where force results in consent ("don't hurt me, I'll do what you want"), it is the force analysis that matters, not the consent analysis. This will become clearer as you read on, but the interaction of force and consent is important to understand. Using force to gain sexual access may or may not result in valid consent, but may result in acquiescence or passivity, to avoid or minimize the effects of the violence. Sometimes, force results in consent, as with threats, intimidation, and coercion. Because this consent is not voluntary, it is not valid consent, and the force analysis is the one that matters. Typically, we encourage assessing each of the three constructs in the order they are presented here: force, then incapacity, then consent. It is the most effective approach we have found, and the best way to keep each assessment clean and separate from the others, which is how this rubric is meant to be used.

Force

Let's start with an analysis of force. Force is a good place to start analyzing because if it is present, then incapacity and consent rarely need to be assessed. It makes sense that if someone is forced into sexual activity, their level of capacity is largely irrelevant. The force is what violates the policy, whether they are fully sober or completely unconscious. The literature of the field tells us that force is fairly uncommon in college investigations, used instrumentally rather than gratuitously, for the most part. Thus, it won't typically be an issue in your investigations, but when it is, it's the only construct that matters. Usually, you can rule it in quickly, and focus on it, or rule it out and move on to the incapacity analysis. That makes for efficient progress through the three questions.

Kink

The primary wrinkle in the force analysis is that kink is becoming more and more common in students' sexual lives, and thus in the reports of sexual misconduct we receive. Perhaps inspired by *Fifty Shades of Grey*, Bondage and Discipline, Dominance and Submission, or Sadism and Masochism (BDSM) relationships, safe words, and dominant/submissive behaviors are more common than when we wrote the original Whitepaper twelve years ago. To understand how this impacts our force analysis, we must realize that not all force or violence is non-consensual. In fact, kink relationships tend to value consent very highly, and there is a lot of communication about it, far more so than in many non-kink sexual interactions. We talked above about an analysis where force results in consent (perhaps as the result of a threat), which is a policy violation. But, in kink interactions, consent can result in force, and this is usually not a policy violation. Thus, the force analysis below explicitly pertains to non-consented-to use of force, and not to kink. In kink interactions and relationships, the key to proper analysis is assessing whether consent existed, or whether use of force exceeded that which was agreed upon (also a consent analysis), or whether force continued despite the exercise of an agreed upon safe word or other negotiated boundaries. These would be policy violations. Your personal approval or disapproval of kink is irrelevant. Even if someone is harmed in the sexual interaction, as long as they explicitly consented to being harmed, you have no basis to second-guess their sexual mores any more than they have a right to question yours.⁵⁶

Outside of kink interactions, the force paradigm is one where if sexual contact is forcible, violent, and/or against the will of the reporting party, it is a violation of policy. Some antiquated policies still speak to resistance by the reporting party, and this too is part of the force paradigm, as resistance may be shown in the face of force. It may also be used to prove non-consent. In the ATIXA model, force can take four forms: physical violence, threats, intimidation, and/or coercion.

Physical Violence

Physical violence is the most obvious force construct, equated with violence or the use of a weapon. No matter how slight, any intentional physical violence upon another, use of physical

⁵⁶ Obviously, religiously-affiliated institutions are free to take a more restrictive stance, but if so, we recommend you are clear about that in policy.

restraint, or the presence of a weapon to gain sexual access will constitute the use of force. To be clear, not all physical pressure eliminates consent. If someone is hit, held down, pushed, restrained, or otherwise acted upon violently, that evidences the use of force. However, an analysis of force must account for the nature of sexual intimacy, which often has some physical elements to it. For example, if a person uses physical pressure (not physical violence) to help facilitate a change in positions, places their hands on a person's head during oral sex or is simply pressing down upon a person while in the missionary position, this does not typically constitute physical force. The key question is whether the physical violence enabled the person's ability to gain sexual access. Some versions of Feminist theory advance the idea that the act of penetration itself is enough to constitute force, but that construct is not used in the ATIXA model policy because the consent construct more effectively protects bodily autonomy.

Threats

The law defines a threat narrowly: as a direct threat of death or grave bodily injury. "If you don't have sex with me, I will kill you." If a threat is used to obtain sex, force is present (the law calls it forcible compulsion). We give a much broader interpretation than the law does regarding what constitutes a threat. For us, any threat that causes someone to do something they would not have done absent the threat could be enough to prove force. This is especially true when coupled with evidence that the threatened individual reasonably believed the threatener had the will and capacity to carry out the threat. While this is not a strict legal interpretation, it certainly is useful for college policies, if not taken to an extreme. For context, please see the section on distinguishing coercion and negotiation below, because the same analysis can be applied to threats. While it is true that if I threaten you with a negative consequence, and that threat causes you to acquiesce in sexual activity, force is present, and sexual misconduct has occurred, it is also true that the construct is meant to apply to the kinds of threats listed below, and not to negotiations over sex. While we may not want people to exert power or leverage in sexual situations, not all such exertions are threats that are tantamount to the use of force. While this may seem a little nebulous, it is up to each college community to determine how much of a threat is an actionable threat, as a community standard.

- "If you do not have sex with me, I will harm someone close to you."
- "If you do not have sex with me, I will tell people you raped me."
- "If you do not have sex with me, I will hurt you."
- "If you do not sleep with me, I will fail you in my course."

Intimidation

Are threats and intimidation different from one another, and if so, how? This is a difficult question to answer, and for colleges whose policies prohibit both, they are often interpreted as synonyms. But, they are not entirely synonymous. We define intimidation as an implied threat, whereas threats are clear and overt. For example, we have recognized that "If you don't sleep with me, I will fail you" is a threat. Yet, many of us would agree that it would be just as inappropriate for a professor to say "If you have sex with me, you'll get an A in my class." But, would that be a threat? No. A threat has to have a negative condition attached. This example "threatens" a bene-

fit. We would argue that could be intimidation, rather than a threat.⁵⁷ If the student agrees to sex, is it because the faculty member is in a position of power and authority over her? What is offered here, the A grade, is overt. What is implied is what the professor might do to the student if she does not comply with his request.

We do not mean to suggest that just having power or authority over someone is inherently intimidating. When we talk about intimidation as a type of force, it describes a situation when someone uses their power or authority to influence someone else. For example, a female student once explained that she “was intimidated” by her date because he was bigger than she was. When asked if he menaced her, or used his size to make her feel that she was in jeopardy, she said no. She may have felt intimidated, but that does not mean that he intimidated her. Like sexual harassment, there are subjective and objective requirements to the proof of intimidation. Subjectively, the reporting party must have felt intimidated, but objectively, we must be able to say that the actions would have been intimidating to a reasonable person, as well. If he had pinned her into a corner, and had used his size to menace her or block her exit, we would find this to be intimidation equating to the use of force, even if he never touched her. Otherwise, any woman could argue that a sexual overture by any man larger than she was inherently intimidating. The average-sized man is bigger than the average-sized woman, so size alone cannot be enough to establish intimidation.

Coercion

Finally, the fourth element of force is coercion. Coercion includes elements of pressure, duress, cajoling, and compulsion. Coercion is the type of force most likely to be present in college sexual misconduct allegations. In a sexual context, coercion is an *unreasonable* amount of pressure to engage in sexual activity. What is unreasonable is a matter of community standards. Sometimes, it is helpful to identify coercion by contrasting it with seduction, and all Investigators and fact-finders need to be able to elucidate this distinction. Society defines seduction as reasonable, and coercion as unreasonable. Both involve convincing someone to do something you want them to do, so how do they truly differ? The distinction is in whether the person who is the object of the pressure wants or does not want to be convinced. In seduction, the sexual advances are ultimately welcome. You want to do some convincing, and the person who is the object of your sexual attention wants to be convinced. Seek to persuade them, and they are willing to go along. Two people are playing the same game.

“In a sexual context, coercion is an unreasonable amount of pressure to engage in sexual activity. What is unreasonable is a matter of community standards. Sometimes, it is helpful to identify coercion by contrasting it with seduction, and all Investigators and fact-finders need to be able to elucidate this distinction.”

⁵⁷ It is, of course, also a form of *quid pro quo* harassment, but if the student goes through with it, an allegation of NCSI should also be investigated.

Coercion is different because you want to convince someone, but they make it clear that they do not want to be convinced. They do not want to play along. They do not want to be persuaded. And the coercion begins not when you make the sexual advance, but when you realize they do not want to be convinced, and you push past that point. Seduction can become coercion. Yet, coercion is a matter of degree, rather than being an on/off-switch the minute you push past the point where the pressure is unwelcome. Bright-line thresholds in this arena are rare, as context matters. Some amount of pressure is reasonable and socially acceptable, but too much pressure crosses the line. That line begins when someone makes it clear that pressure is unwelcome, and for some communities, any additional pressure is unacceptable. This is a very intolerant threshold. Other communities ask what amount of pressure is unreasonable, beyond the indication that pressure is unwelcome. For these communities, determining what is unreasonable should be a function of four things: duration, frequency, isolation, and intensity.

Let's say I approached you at a crowded bar, and started to come on to you. If I pressure you for sex for five minutes, will I get very far? What if I have 30 minutes to pressure you, or three hours? I have a better chance of success if I have a longer duration in which to pressure you, so the duration of the pressure is something Investigators and fact-finders need to consider to assess whether the amount of pressure applied is reasonable or unreasonable. Let's look at frequency. If I have 30 minutes, and I ask you for sex two or three times, would that be less successful than if I asked you 30 times in that 30-minute timeframe? Of course. Frequency can enhance the coercive effect. The duration of the pressure is also something Investigators and fact-finders need to look to in assessing whether the amount of pressure applied is reasonable or unreasonable. The same is true of isolation. What if we weren't at a bar? Would my pressure be more or less effective if we were together in my room on campus, with no one else present? My coercion will likely be more effective if I isolate you. Isolation is something Investigators and fact-finders need to consider to assess whether the amount of pressure applied is reasonable or unreasonable.

Finally, intensity can impact my coercive effect, probably more so than the other three factors. We're at the bar, and I'm trying to convince you to have sex with me. I spend a half-hour telling you all the reasons why you should have sex with me. I'm really doing a great sell job, as I know my product better than anyone. I tell you that I'm the best lover you'll ever have. I challenge you to ask any woman in the bar, knowing they will vouch for my prowess. I tell you you owe it to yourself to fly Air Brett. I tell you this is one roller-coaster ride you just don't want to miss. I give you my best Lounge Lizard act. Not buying it? I know why. The problem isn't me. Any reasonable person would jump on the experience I am offering, literally. The problem, I see now, is YOU. So, I change tactics. "You come into a bar, dressed to kill, flirt with me, and then think you can tease me and say no? You're just a tease. You like to lead men on and then let them dangle. You're probably frigid. You should take a chance, you might just like it. What are you, some sort of religious freak? God won't know if we do it just once. I won't tell him. What are you, the last virgin in captivity? Everyone is doing it. Come on. Virginity is way overrated. Are you afraid your parents are going to find out? I won't tell them, I promise. Loosen up. Relax."

Do you see the intensity difference? I can talk myself up to you until I am blue in the face, and I have a First Amendment right to tell you how great I am in the sack. It's not coercive, it's obnox-

ious. But, if I turn on you, and start to attack you, rather than sell myself, there is a qualitative difference. If I assail your core values, your morals, your religion, I very well may be transgressing the community standard on intensity.

In summary, once you draw a line indicating that you don't want to play my game, and I pressure you beyond that point, seduction will become coercive. What amount of pressure is acceptable is a function of the frequency, intensity, isolation and duration of my pressure. Once your community standard is exceeded, it is appropriate for you to label my coercion as force. In investigations, we often find that coercion results in consent, but it is not sincere, positive, or enthusiastic consent. It's more like, "Fine, then just get it over with." That's a useful telltale as Investigators and fact-finders are looking to determine whether the amount of pressure was reasonable or unreasonable.

Since we (well, since Brett wrote it, considering he used himself as the hypothetical Lounge Lizard) wrote this section in 2005, much has changed. Today, at many colleges, coercion is becoming a tool of the sex police. Take the following statement from one college as an example:

Coercion is the use of emotional manipulation to persuade someone to do something they may not want to do — like being sexual or performing certain sexual acts. Examples of some coercive statements include: "If you love me, you would have sex with me," "If you don't have sex with me, I will find someone who will," and "I'm not sure I can be with someone who doesn't want to have sex with me."⁵⁸

And, look at these recent statements from another university:

Coercion can also take the form of, "If you don't have sex with me, I'm breaking up with you," even if it's not explicit like that, but if your relationship has created that type of coercion where you feel like you have to have sex with them to keep them in that relationship, that could definitely be a form of coercion where we would say you're not giving consent ...under university policy, consensual unwanted sex would not be considered consensual sex and a student could go through a formal sexual misconduct case.

"When the assessment of boundary-crossing behavior honors the subjective perceptions of the reporting party over the objective assessment of a reasonable person, we start down a slippery slope of utopian sex."

This type of irrationality, and that's exactly what this is, is gripping more than just these two colleges. These kinds of institutions are establishing a zero tolerance standard for negotiation in sexual relationships. That's not The NCHERM Way. There is such as thing as unwanted consensual sex, but as the descriptor indicates, it is consensual. This is important. It is not sexual

⁵⁸ Citation omitted so as not to call out any specific school. This could happen anywhere.

misconduct by any construction of our policies or beliefs about best practices. While we're glad we're not in college today, that is little help to students caught in this Kafka-esque sexual fun-house where up is down and down is up.

In every generation, there has been a term for behaviors that don't cross the line of sexual misconduct, but are still disrespectful. Additionally, an individual may reflect on a sexual encounter and wish they had acted differently or may be embarrassed by their own prior conduct. This does not, without additional factors, meet the elements of NCSI or NCSC. Students have called it "gray rape," "regretted sex," "rapey," and now "unwanted consensual sex." College administrators must be the rational arbiters of walking this admittedly fine line, and woe be to the administrators at places like these colleges when it comes time to prove in court that they are not biased on the basis of gender. *Remember, if everything is discriminatory, then discrimination means nothing.* When the assessment of boundary-crossing behavior honors the subjective perceptions of the reporting party over the objective assessment of a reasonable person, we start down a slippery slope of utopian sex. However, it is the objective standard that matters.

An operative understanding for this discussion is that coercion = sexual misconduct. That shouldn't be up for debate. The debate is about what constitutes coercion, right? Perhaps you take the position that everyone has a right to say no, should not have to repeatedly say no, negotiate (about their body), or make some concessions for the sake of peace or to keep a relationship. We agree, but the question is, if one of your students does so, does that make it sexual misconduct? Can we or should we distinguish between sexual misconduct and "less than ideal sex?" Does it diminish what sexual misconduct is to deem that "sex for the sake of peace" is sexual misconduct?

Let's say in my relationship that I want sex (could be oral/anal/vaginal) and I am not getting sex or the sex I want. If I say to my partner, "In order for me to be happy, I need to be in a relationship with a partner who wants sex (oral/anal/vaginal) with me. I'd like that to be with you, but if not, I respect your boundaries but need to find someone who will have sex (oral/anal/vaginal) with me. The choice is yours...." If my partner then decides to do the acts I want so that I can be happy in the relationship (and implicit is that they are "equally" free to act and that they decide there is something they want in being in a relationship with me that makes it worth it to them to compromise their boundary), have they been coerced?

Have I just sugarcoated a threat? Isn't this just a nice way of saying "If you won't have (oral) sex with me, I'll break up with you or I won't date you?" Is it not sexual misconduct if I sugarcoat it, but sexual misconduct if I just lay the threat out there bluntly? Do I have a right to ask this? Does my partner have a right to refuse? Have I crossed the line if I ask with this condition and I get consent? Some colleges and administrators are blurring the line between teaching sexual ethics and preventing illegal sex discrimination. Is that what we, as educators, should be doing? Are we creating a no-negotiation college bubble that is going to fail our students when they eventually get out into the real world and realize that people negotiate sex in relationships all the time, and they won't know how to do so?

On a fairness level, if your college doesn't believe that negotiation is an acceptable word (because you believe that what is really happening is coercion), or something acceptable to do in sexual dynamics, then we need to be fair to students by telling them clearly in policy and education as soon as they arrive that, "on this campus, you can't negotiate for sex. If you do, we'll sanction you." Some truth in advertising could go a long way here if that is your college philosophy, but we really hope it isn't. The current political environment isn't the right time to become militant about consent or coercion, if there ever is a right time. There will be a backlash, so be careful what you wish for. Yes, there are waves of students across colleges that want us to redefine sex offenses to align with their sexual mores, and they want "rapey," "gray," "regretted sex" to be considered policy violations. When they are college administrators someday, that will be their prerogative. Until then, we feel strongly that today's administrators must resist this push, and maintain objective standards for sex offenses. We also acknowledge the legitimacy of feelings of trespass, even trauma, such students might endure after such an experience. Just because behavior does not cross a line does not mean it is not harmful, a betrayal of trust, or emotionally painful. We trust that colleges will afford resources, counseling, and support to such students, regardless of whether their allegations factually cross the line or not.

Can colleges that subscribe to the no-negotiation philosophy honestly say that they are making it clear to students what their interpretation of the coercion policy will be? The college above publishes it in pretty clear examples on its website, right? Now, the above-referenced article means that university's community knows how its administrators interpret coercion. But, what about before that article was published? Those administrators gave those quotes because they clearly want students to know how they interpret policy. Is that enough? Maybe those standards are taught in other ways on these colleges (and others like them) as well? We hope so.

Maybe we should be telling prospective students about this in admissions materials even before they arrive, so that they can make an informed choice about the college they want to enroll in, and the rules under which they wish to live? What do you think of that as a recruitment tool? We think this is another manifestation of the very real tension between consent utopians and consent realists. So, which kind of college is yours? Overreaching on coercion is just another way of being the sex police. We've stated before that's not our philosophy. For those who argue that stricter approaches are their prerogative, they may be, but when higher education gets away from the golden mean, Congress or state legislatures tend to push through more regulation or rigid laws sooner or later. The next four years may not be especially hospitable to zealous sexual correctness.

Incapacitation

Let's start the section with an important point. Your institutional sexual misconduct policy needs to be based on incapacity. Not intoxication. Not impairment. Not inebriation. Not being under the influence. Not being too drunk to consent. If you choose any other basis than incapacity, it is going to run you into trouble under Title IX. And, frankly, unless you have religious or moral reasons, there is no reason that you should have a problem with drunk sex, legally. If two people want to go out, get drunk, and hook up, why are we trying to police that? As long as they are

okay with what they did, it's none of our business. Distinguishing between drunkenness and incapacity is a main goal of this section, along with providing tools for assessing incapacity. Here is what the ATIXA model policy says about incapacity:

- Sexual activity with someone you know to be or should know to be incapacitated constitutes a violation of this policy.
 - Incapacitation can occur mentally or physically, from developmental disability, by alcohol or other drug use, or blackout.⁵⁹
 - The question of what the responding party should have known is objectively based on what a reasonable person in the place of the responding party – sober and exercising good judgment – would have known about the condition of the reporting party.
 - Incapacitation is a state where someone cannot make rational, reasonable decisions because they lack the capacity to give knowing consent (e.g., to understand the “who, what, when, where, why, or how” of their sexual interaction).
 - This policy also covers a person whose incapacity results from mental disability, sleep, unconsciousness, involuntary physical restraint, or from the taking of rape drugs.

Here are some critical understandings that we should all have about incapacity. First, there are two forms of incapacity, mental and physical. Mental incapacity results from cognitive impairment, such as developmental disability. Temporary mental incapacity can result from conditions such as epilepsy, panic attacks, and flashbacks. Physical incapacity results from a physical state or condition, such as sleep or alcohol or other drug consumption. As we build knowledge of trauma, and its impact on the body during a perceived threat event, we can add to the body of incapacity knowledge. During trauma, the body's autonomic responses include fight, flight, and freeze. For some reason, these three seem to fall into a pattern in our experience, where fight is most common when facing IPV, flight is most common in stalking incidents, and freeze is most common to sex offenses. Of course, any of the three reactions can occur with any perceived threat, but the key point to take away here is that freeze as a response can be a form of physical incapacity.

The most common form of incapacity is alcohol-induced incapacitation. Yet, it is often confused with what we call the “i-words” that often are applied to alcohol use. There are five i-words: (under the) influence, impairment, intoxication, inebriation, and incapacitation. They are not synonymous, and are more-or-less listed in order of severity of alcohol effect. One becomes under the influence of alcohol as soon as one has anything to drink. Impairment begins as soon as alcohol enters the bloodstream, and increases with consumption. Intoxication and inebriation are synonyms, as is drunkenness, and corresponds to a .08 blood alcohol concentration under most state laws. Incapacitation is a state beyond drunkenness or intoxication. What is confusing about

⁵⁹ Blackout, as it is used in scholarly literature, refers to a period where memory formation is blocked. A period of consistent memory loss is termed a blackout, whereas periods where memory is both lost and formed intermittently can be referred to in the literature as a brownout. Neither state of blackout nor brownout automatically indicates incapacitation, but factual context can establish that a blackout or a brownout is occurring in an individual who is incapacitated (where incapacity is defined as an inability to make rational, reasonable decisions or judgments). It is a mistake to automatically associate memory loss with incapacitation; they are often coupled, but not always (see e.g.: Mundt & Wetherill – 2012; NIH 2004).

incapacity is that it may have nothing to do with an amount of alcohol or a specific blood alcohol concentration. In fact, some drunk people will be incapacitated, and some will not. Incapacity can be defined with respect to how the alcohol consumed impacts on someone's decision-making capacity, awareness of consequences, and ability to make fully-informed judgments. The most obvious form of incapacity is sleep or unconsciousness. A sleeping or unconscious person can't make informed judgments about sex, and neither can a person whose incapacity from alcohol is equivalent to being asleep.

Incapacity Defined

So, incapacitation is a state beyond intoxication, where decision-making faculties are dysfunctional. In order to consent to sexual activity, you must be able to understand Who, What, When, Where, Why, and How with respect to that sexual activity. This is another way of stating the law's expectation that consent be informed, and any time it is not, consent cannot be effective. Where someone lacks the ability to make rational, reasonable judgments (for any reason, but commonly as a result of alcohol (or other drug) consumption), they are incapacitated. An incapacitated person could be stark naked, demanding sex, but if they are incapacitated at the time, and that is known or should be known to the responding party, any sexual activity that takes place is misconduct, and any factual consent that may have been expressed is IRRELEVANT. For example, a blacked-out person may say "yes" when asked if they want to have sex but, if incapacitated, they will not know they are saying it. Another way to think about incapacity is as a period of temporary disability.

Blackouts

It is important to understand what we now know about how "blackouts" may be related to, yet are distinct from, incapacitation. A previous version of this Whitepaper equated blackout with incapacity, but research conducted since that Whitepaper was published has caused us to retract that equivalence. Unfortunately, decoupling blackout from incapacity makes it harder to assess these kinds of allegations, but we cannot ignore the empirical research for the sake of convenient analysis. Students may use the term "blacked out" to describe their physical reaction to excessive alcohol or drug use, but what does that term actually mean? The term "blackout" refers to a situation when a person is awake and functioning, but is unable to create memories for events and actions. "Blackout" thus refers to amnesia for places a person went or things they did while intoxicated. Not all blackouts are the same. An individual may experience an *en bloc* blackout, where large chunks of time are missing from their memory, often spanning hours or more.

More common is the *fragmentary* blackout, often referred to as a brownout or greyout, where memory may be spotty. Blacking out is distinct from passing out, where a person is asleep or unconscious from excessive alcohol consumption. Comparatively, blackouts do not involve a loss of consciousness, although a blackout could precede passing out or losing consciousness. In understanding the phenomenon of blackouts, the following description from the National Institute on Alcohol Abuse and Alcoholism may be helpful: "Blackouts are periods of amnesia during which a person actively engages in behaviors like walking and talking, but does not create memories for these events as they transpire. This results in missing periods of time in the person's

autobiographical record.”⁶⁰ Someone experiencing a blackout may, while in the blackout state, be able to recall events that happened earlier in the evening or in the past, and may be able to do the same activities they could do under normal circumstances, but they are not creating memories for the events that occur during the blackout. To others, they may appear to be fully functional.

The ability to effectively consent to sexual activity is tied to *capacity*, or more precisely, to *incapacity*. Someone experiencing a blackout, a brownout, or a greyout, may or may not be incapacitated. Lacking memory after an incident does not automatically mean they lacked decision-making capacity for an act as it transpired. For this reason, policy language should be precise and not conflate terminology. The most straight-forward way to compose a policy on incapacity is with the following language:

“Having sex with someone whom you know to be, or should know to be, incapacitated (mentally or physically) is a violation of the sexual misconduct policy.”

You may choose to define incapacitation in your policy, as well. We prefer the following common sense definition: Incapacitation is defined as a state where someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/informed consent (e.g., to understand the “who, what, when, where, why, or how” of their sexual interaction).

Assessing Incapacity

Physical incapacities are sometimes quite overt, and other times more subtle. Incapacitation is usually a subjective determination that you will make after the incident, in light of all the facts available. Rarely is there objective evidence of incapacity, though increased use of video and social media is changing that to some extent. Incapacitation is subjective because people reach incapacitation in different ways and as the result of different stimuli. Individuals exhibit incapacity in different ways. Incapacity is dependent on some or all of the following factors:

- Body weight, height, and size;
- Tolerance for alcohol and other drugs;
- Amount, pace, and type of alcohol or other drugs consumed;
- Amount of food intake prior to consumption;
- Voluntariness of consumption;
- Vomiting;
- Propensity for blacking out (mentally or physically);
- Genetics.

⁶⁰ National Institute on Alcohol Abuse and Alcoholism (June 2014). *Shining a Light on Alcohol Blackouts*, *NIAAA Spectrum*, Vol. 6, Iss. 2. Access at <https://www.spectrum.niaaa.nih.gov/archives/V6I2Jun2014/features/light.html>

Evidence of incapacity can come from a combination of context clues, such as:

- A witness or the responding party may know how much the other party has consumed;
- Slurred speech;
- Bloodshot eyes;
- The smell of alcohol on the breath;
- Shaky equilibrium;
- Vomiting;
- Outrageous or unusual behavior;
- Unconsciousness.

None of these facts, except for the last, may constitute – in and of themselves – incapacitation. But, the process of finding someone responsible for a violation of the sexual misconduct policy involves an accretion of evidence, amounting to a sufficient or insufficient meeting of the standard of proof. A preponderance may be met with some combination of the first seven, or all eight factors. For example, it might be met if someone is passing in and out of consciousness, and there is a high probability they could pass out again. Or, it might be met if someone is vomiting so violently and so often that they are simply in such bad shape that they cannot be said to have capacity.

Sexual Politics

One of the factors that leads to clouded judgment on the issue of incapacity is the very sexual context of the issue. Each of us has sexual politics, whether we admit it or not. Our sexual politics derive from our morals, religious values, open- or close-mindedness, sexual histories, role models, and culture, amongst other factors. They play into our decisions on sexual misconduct, especially with respect to incapacity. “She was asking for it.” “She brought him to her room.” “She got herself drunk.” “Well, he was drinking too. Maybe she raped him.” These rape myths have adherents because of sexual politics. The best way to address the myths of incapacity is with a story, believe it or not, about a Mercedes™. You have to remove incapacity from the sexual context to truly understand it, so please indulge this fantastical exploration from a different tangent.

Can a Mercedes™ be a Sexual Metaphor?

Let’s suppose that I like Mercedes-Benzenes™ and I have always wanted one. You know the one I mean, right? The red one. The convertible. The \$100,000 one. So, one night I go out drinking with my buddies. We down a few beers, and somehow, the car comes up in conversation. They tell me, “You know, Brett, you deserve that Mercedes™. You work hard, you should have it.” We have some more to drink. I begin to think I do deserve it. Finally, by the end of the night, I’m in my cups (pretty drunk). They’re egging me on now. “Just lease it. You don’t have to have \$100k now. Pay later.” I’m sufficiently drunk that I start to believe them. I work hard. I deserve that car. I stumble out of the bar, and march right down to my local all-night, drive-thru Mercedes™ dealership. I pull up to the window, and the salesman greets me. I tell him I want that

red convertible. Sure, he says, noting that I'm obviously drunk to the point of incapacity. Just sign right here. He even manages to tack on extra for the floor mats and undercoating. No one pays

“An agreement to have sex is a contract. Just like buying a car, buying a house, getting married, and any number of personal transactions. All parties to the contract must have a full understanding of all the terms of the agreement, and must accept them.”

for undercoating. But, I sign, and drive off in my dream car. The next morning, I wake up next to my wife. “Honey, I had the best dream last night. I dreamt I bought that Mercedes™ I’ve always wanted.” She looks out the window and points. “I don’t think it was a dream.” Whoops. I look out. There it is, in the driveway. The signed lease is sitting on my nightstand, too. \$1,500 a month. Not a mortgage, a lease. My wife takes one look, and in the way only my wife can, tells me to take it back. “I can’t,” I say, “I signed a lease.” She doesn’t care. I have to take it back.

car back. He laughs. I tell him I was drunk. I didn’t know what I was doing. Yes, you sure were, he agrees. But, once you buy a prize, it’s yours to keep. I insist. He refuses. I sue him (after all, I am a lawyer).

I drive back to the dealership, and there is the guy from last night. I tell him he needs to take the

So, what is the judge going to do? Will I win? Does the dealer have to take the car back and cancel the lease? It may surprise you to know that the answer is yes. We formed an agreement, but in order for a contract to be legally valid, there must be a meeting of the minds. All parties to the contract must have a full understanding of all the terms of the agreement, and must accept them. Simply, we must understand Who, What, When, Where, Why, and How. If any material term of the agreement is missing, there is no contract. The agreement is invalid. The court will require the dealer to take the car back and cancel the lease if I was incapacitated, did not know what I was doing, and my state was known to the dealer, or he should have known.

Why do you care about a Mercedes™? You care because an agreement to have sex is a contract. Just like buying a car, buying a house, getting married, and any number of personal transactions. This story helps to cut through the mythology and the politics. I wanted the car (sex). I came to your dealership (room). I signed the deal (consented). But, I did not understand any of the terms and conditions, so no sale (sexual misconduct). I think we would all agree that the dealer took advantage of a beyond-drunken customer, regardless of whether I made it easier for him to do so. The law protects us from being taken advantage of by unscrupulous dealers and opportunistic sexual aggressors. Incapacity is a broad legal concept. Applying it to sex is just one narrow window of its applicability. (For the record, I neither own nor lease a red, \$100,000 Mercedes™ convertible.)

But, I Was Drunk Too, So She Raped Me

What if the responding party’s defense is “Well, I was drinking too. Maybe she raped me.” How does that hold up to the Mercedes™ analogy? Let’s assume the salesman at the drive-in window is incapacitated, too. Now, both people on either side of the transaction are unable to appreciate

Who, What, When, Where, Why, and How. Doesn't that just make an already invalid transaction all the more invalid? Sure, it does. Arguing that "he was drunk too" doesn't function to excuse the misconduct, especially since it is almost always disingenuous. If he really felt victimized, why didn't he make an allegation? Let's be more specific. Most of the time, when someone argues they were drunk too, this is inadmissible evidence. We must remember that almost all colleges have a rule that being drunk does not excuse a policy violation, and even if you don't have that rule spelled out (you should), being drunk does not excuse the violation of a policy, or the trespass on another human being. What often occurs is a situation where the reporting party is incapacitated, and the responding party is merely drunk. In theory, a mutual incapacity could exist, but let's not jump to that conclusion too readily.

Jumping to Conclusions

In all of the combined years of your authors' practice, we have NEVER seen a true case of mutual incapacity. We don't doubt it could exist, but it's a unicorn. We have seen plenty of cases where two people were drunk, but that is not a policy violation at most colleges. But, mutual incapacity? How would two genuinely incapacitated people have the physical coordination necessary for sexual intercourse? And if they did, how would they remember it? The courts operate on the presumption that if a man is able to engage in and complete the act of sexual intercourse, he is not incapacitated.⁶¹ We have heard stories of students using Cialis™ to counteract what they call "beer dick," and if you have that factual situation, you'll have to piece through whether the evidence indicates intentional predation, or whether the mutual incapacity makes it impossible, from an evidentiary perspective, to determine who did what to whom. Of course, heterosexual sexual intercourse isn't the only way to have sex. Incapacity might make it difficult to achieve penetration by a penis, but lots of sex doesn't involve penetration. Or penises. So, this example is heteronormative. Perhaps in a non-penetrative interaction, mutual incapacitation could be likelier? It could be, but then we'd still have the issue of proof. How would incapacitated people prove incapacity? Maybe we'd find independent corroboration. But, who initiated what? Who is the reporting party and who is the responding party? There is a strong likelihood that we could not find a preponderance to establish a violation in such a case.

Self-Incapacitation

There is another issue with respect to incapacitation. Many Investigators and fact-finders get hung up on the distinction between allegations where the responding party incapacitates the reporting party, and allegations in which the reporting party self-incapacitates. For purposes of a resolution under Title IX, whether the reporting party self-incapacitates or not should not impact the finding. The question under the policy is whether the reporting party was incapacitated, not how they became incapacitated. While self-incapacitation may not impact the finding, it may have an impact on the sanction. It would be perfectly reasonable for a fact-finder to consider a harsher sanction to a student accused of deliberately and surreptitiously plying someone with spiked punch or a rape drug,⁶² than it would in a fact pattern where the reporting party had self-incapacitated.

⁶¹ *Mallory v. Ohio University*, 76 Fed. Appx. 634 (6th Cir. 2003).

⁶² By the way, since we wrote the original Whitepaper, rape drug cases have become something of a unicorn as well, at least in our practice. There are plenty of allegations of rape drugs, but their use is rarely, if ever, proven by evidence. We do have a ton of students who don't know how to drink, and who are surprised by how alcohol impacts them. But, this is inexperience,

Poor Judgment by the Responding Party

An interesting question we are often asked is the following: If the policy asks not only whether the reporting party was incapacitated, but also if the responding party knew that or should have known it, what should the responding party have known when they themselves have been drinking? The “should have known” part of the policy – what lawyers call constructive knowledge – can be misleading. It is not a subjective question of what the responding party should have known. It is an objective question that might be better phrased as “what would a reasonable person, in the position of the responding party, have known?” And, of course, a reasonable person under the law is assumed to be sober and using good judgment. That’s what reasonable people do.

Poor Judgment by the Reporting Party

At no point is it appropriate to excuse a violation of policy by the responding party because of poor judgment or a lack of responsibility by the reporting party. Two wrongs do not make a right. To blame the reporting party for irresponsible decisions confuses the difference between responsibility and culpability. The question in a college resolution is whether the responding party is culpable for a violation, not whether the reporting party was irresponsible (though they may have been). It is also inappropriate to hold the reporting party accountable for any minor policy violation they may have engaged in during the incident.⁶³ Further, allowing a responding party to file an unfounded counter-claim against the reporting party could make the institution a party to retaliation under Title IX. Where a counter-claim is valid, it ought to be addressed in a separate resolution process, in most circumstances.

Consent

Consent is the third of the three constructs discussed in this section, and “affirmative” consent is a political hot potato as of this writing. Fortunately, consent isn’t really controversial amongst students right now. They’ve embraced it. This generation of students owns consent, and that is a positive shift that was even underway twelve years ago when we published the original Whitepaper. So, why did we place quote marks around the term “affirmative” above? Because we don’t use the term. Using the modifier “affirmative” belies a misunderstanding of what consent is, as if there is some other kind of consent. So, for the record, consent is affirmative, by definition. Consent in sex is simply clear permission by word or action for specific sexual activity. The ATIXA model policy is consent-based, it frames consent positively (by its presence, not its absence), and it is a pure-consent construct. That means that the policy is violated by non-consent, without any other requirements of proof, such as force or resistance.

Consent as a concept is one whose time has come because of the resonant way in which the idea of consent ratifies the right we all have to bodily autonomy. We all have the right not to be

not a drugging. There is also the issue of how alcohol interacts with other drugs. This trend away from using rape drugs on campuses may be in part because it is relatively easy for a predator to find a self-incapacitated person than to take the risk of incapacitating someone with a drug. As we always teach our students, alcohol is the rape drug of choice on college campuses. Also, we use the accepted phrase “rape drug” while noting that we do not apply criminal language when discussing policy terminology.

⁶³ For additional reading, see ATIXA’s Position Statement in Favor of Amnesty Policies at <https://atixa.org/wordpress/wp-content/uploads/2017/02/2017February-Final-ATIXA-Position-Statement-in-Favor-of-Amnesty-Policies.pdf>

acted upon by someone else unless and until we give permission for it. Consent is a requirement for mutual respect, and the need to communicate that respect by word or action. Ideally, consent is neither given nor received, but exchanged. Bodily autonomy is key here, because other than defining sex offenses by consent, the only other two choices are to define it by force or by resistance. But, it is not true that someone's autonomy is only violated if they are forced, or if they resist the act. Autonomy is not respected any time something is taken from someone without their consent.

There are those, however, who believe that consent-based policies are unfair. They've conveniently linked affirmative consent to a due process failure, but that is just sleight-of-hand because they don't want to be seen as simply opposing the concept of consent, outright, which is what they are actually doing. Still, part of the goal of this publication is to ensure that you are using the consent construct correctly, so this must be briefly addressed for any of you who might misunderstand or misapply it.

The assessment of consent is a determination by the institution, not something proved by the reporting party or the responding party. The college determines whether its policy was violated, and has the burden to do so. The college does not place the burden on the reporting party to prove non-consent, and it does not place the burden on the responding party to prove consent. The concept of the presumption of innocence is based in criminal law, and really doesn't apply to college processes in a linear legal fashion.⁶⁴ However, it is important to state that while colleges don't really presume anything, because presumptions are a criminal construct, we certainly cannot presume that a responding party is in violation of our policies unless and until he⁶⁵ can prove he obtained consent. It is not the burden of the responding party to show consent, but the burden of the college to prove non-consent.

Put another way for simplicity, if the parties are equally persuasive as to their assertions of consent and non-consent, the college has not met its burden and the responding party cannot be found in violation of the sexual misconduct policy. The opponents of consent insist that "affirmative" consent is burden-shifting by design, and that the shift in burden is a violation of due process and unconstitutional. Precision is important here. By design, consent shifts the burden to a sexual initiator or actor to obtain consent, from a policy perspective, but it does not shift the burden to them to prove that consent if sexual misconduct is alleged. Put succinctly, it shifts the burden in the bedroom, but not in the college "courtroom."

Due process hawks won't agree, and will continue to insist that the consent construct offends the U.S. Constitution, but we consider ourselves due process hawks, and we have a question: If "affirmative" consent is unconstitutional, why then isn't the burden-shifting in robbery unconstitutional, too? You see, if someone takes something from you without your permission, it's a robbery. But, if they take it from you with your permission, it is borrowing, or a gift. Thus, property crimes like robbery, theft, and larceny are consent crimes. Take the property without consent and you have committed a crime. Take the property with consent and you have a brand new bicycle. If it isn't unconstitutional burden-shifting to undergird property crimes with consent, it isn't a due

⁶⁴ Mostly because the Fifth Amendment does not strictly apply to college processes in the way it does to criminal proceedings.

⁶⁵ He or she or they or other terms that recognize fluid or non-binary identities.

process issue to do it with sexual misconduct, either, as long as you don't misapply it by placing a burden of proof on the responding party that a consent-based policy does not require. Another analogy might be to fighting. Do it on the street, without the other person's okay, and you could be arrested for assault or battery. Do it in a ring, with the other person on board, we'll call it boxing, and you could be paid for it. Or at least get a good workout. Consent. It turns a crime into a sport, and it's a perfectly viable and constitutional legal concept.

Colleges differ in how they define consent. Here are the rules related to consent from the ATIXA model policy:

Consent is:

- clear, and
- knowing, and
- voluntary,
 - *words or actions,*
 - *that give permission for specific sexual activity.*

Additional clarification:

- Consent is active, not passive.
- Silence, in and of itself, cannot be interpreted as consent.
- Consent can be given by words or actions, as long as those words or actions create mutually understandable permission regarding willingness to engage in (and the conditions of) sexual activity.
 - *Consent to any one form of sexual activity cannot automatically imply consent to any other forms of sexual activity.*
 - *Previous relationships or prior consent cannot imply consent to future sexual acts.*
 - *Consent can be withdrawn once given, as long as that withdrawal is clearly communicated. Once consent is withdrawn, sexual activity must stop reasonably immediately.*
 - *In order to give consent, one must be of legal age.*

For more on consent, see the supplemental section ahead where we apply these concepts in two case studies on [page 58](#) and [page 63](#).

Tying the Three Elements into an Analytic

Now that we have a comprehensive understanding of force, incapacity, and consent, we can weave them into a coherent rubric. The rubric is a three-question progression that can be applied to any NCSC and/or NCSI allegations. The order in which we ask our questions is important because if the answer to the first question is yes, you don't need to progress to questions two and three. If the answer to the second question is yes, you don't need to progress to question three. The first question is:

Is there evidence that force was used to gain sexual access (as force is defined under college policy)?

If the answer is yes, you are done (unless there is a kink interaction, as discussed earlier). Find the responding party in violation of your policy, and sanction proportionally to the severity of the violation. Do not pay any attention to issues of consent or incapacity that may be present in the allegations once you find that force was used. They are irrelevant if force was present. Force, in and of itself, establishes a policy violation. Inquiring about consent is a distraction. For example, I threaten you: “If you don’t have sex with me, I’ll kill you.” You respond “Do whatever you want, just don’t kill me.” You just consented. If we engage in a consent-based inquiry, the answer is yes, there was consent. Again, if you ask the wrong question, you get the wrong answer. If the answer to the question of whether force was used is no, then we have to inquire into incapacity as the second question. Incapacity is a smart second question from an efficiency perspective, because it can be quickly ruled out in any allegation in which alcohol, sleep, or other incapacitating conditions are not alleged. And, asking about consent before incapacity may lead you to the wrong outcome; some incapacitated people do consent, in fact, but that consent is not valid. The incapacity question, as above, is:

Was the reporting party incapacitated, and did the responding party know that, or should they have known it?

You will only engage in inquiry on this second question if there is evidence that the reporting party was developmentally disabled, asleep, using alcohol or other drugs, or has any condition that might produce blackouts, loss of consciousness, or similar temporary incapacities. We already know that force is not an issue, because you have ruled it out with the first question in the rubric. The critical competency here is to make sure you do not indulge in a consent-based inquiry. Just like it is within a force-based inquiry, a consent-based inquiry is irrelevant here. Even if the reporting party verbally consented, or signed a contract, they cannot validly consent if they are incapacitated. THERE IS NOTHING AN INCAPACITATED PERSON CAN DO OR SAY TO MEANINGFULLY, VALIDLY CONSENT TO SEX. Too many incapacity inquiries become mired in “but she came on to him.” It does not matter. If the evidence shows, by a preponderance, that the reporting party was incapacitated, move on to the below sub-questions about the responding party’s knowledge. If the evidence does not show incapacity, move on to the third question in this analytic (consent).

“If the light is yellow, that’s still a violation... if the responding party argues ‘I asked her, and she did not respond (by word or action), so I thought it was okay,’ you are done... You thought you were going to get through the intersection in time, but you caused a collision.”

Does the evidence show that the responding party knew – as a fact⁶⁶ – that the reporting party was experiencing this incapacity? If so, find the responding party in violation of your policy, and sanction proportionally to the severity of the violation. If not, ask the next question.

Should a reasonable person, in the position of the responding party, have known of the reporting party's incapacity? If so, find the responding party in violation of your policy, and sanction proportionally to the severity of the violation. If not, you have determined that this allegation cannot be resolved using an incapacity construct. Move on to the third question in this rubric, the consent question:

What words (or actions) by the reporting party gave the responding party permission for the specific sexual activities that took place?

This is a pin-down question directed to the responding party. If the evidence shows words or actions that are reasonable indications of consent, you are done. There is no violation of policy. But, if the evidence does not show words or actions that are reasonable indications of consent, find the responding party in violation of your policy, and sanction proportionally to the severity of the violation. Consent is the primary inquiry you will need to assess allegations today, though in 2005, the incapacity construct was used more frequently than the consent analysis. The answer to the consent question is either a green light, a yellow light, or a red light. If green, go. There is no violation. If red, you likely have a predatory offender on your hands. If the light is yellow, that's still a violation. It's reckless and risky to run yellow lights. For example, if the responding party argues "I asked her, and she did not respond (by word or action), so I thought it was okay," you are done. No consent was communicated by word or action. Consent cannot be assumed through silence alone, and this is a violation of policy. You thought you were going to get through the intersection in time, but you caused a collision.

In rare cases, you may need a few other consent-based inquiries. For example, you may need to ask whether the reporting party was of legal age. Or, if the reporting party agrees that he did consent, you may need to ask whether he withdrew that consent. If he did, and that withdrawal was clearly communicated to the responding party and the responding party did not stop reasonably immediately, that is sexual misconduct. One of the benefits of this analytic is that it will help you to more effectively control inflammatory evidence, such as evidence about the sexual character of the parties. When you are asking only these three questions, it becomes more difficult to see how information about sexual history or character can help to answer any of these questions. Sexual character is usually a way for sexual politics to seep into the inquiry, and the rubric is designed to screen them out. Of course, sexual character isn't always irrelevant. When a party puts their own character into evidence, you have a right to inquire into it. And, when you are investigating a predatory pattern, character evidence can help you to establish a pattern.

⁶⁶ Factual evidence of knowledge of incapacity is relatively rare. It might appear in cases where the responding party admits to a witness that she knew, or where it is stated in a text message or on video, or by admission. But, practically speaking, almost all incapacity analysis hinges on the "should have known" element of constructive knowledge.

Section Conclusion

If you ask these three questions, in this order, it will impose discipline on your decision-making process. At many colleges, we have so embraced the concept of consent that we tend to over-apply it to all sexual misconduct allegations. This leads to flawed analyses. Hopefully, the message that has emerged from this section is about when and how to apply the consent construct, and when the force and/or incapacity constructs should be used, to the exclusion of consent-based inquiries. Where you find the other inquiries seeping into the question you are analyzing, you will have to challenge whether those inquiries aid in your decision, or confuse the issue you are trying to isolate. We think you will find this rubric to be of great aid in the vast majority of allegations you encounter.

Are You the Sex Police?: A supplement to the consent discussion above

One of the reasons we prioritized re-issuing and updating the 2005 Whitepaper this year is to provide further corrective direction as higher education continues to veer off-course in its resolutions of college sexual violence allegations. The NCHERM Group is widely credited with helping to popularize and institutionalize consent-based policies in higher education. As such, we have a responsibility to the field to make sure that this body of knowledge is used correctly, and to continue our thought-leadership on the ways that consent is applied in theory and practice. As usual, we'll be blunt. Some of you have become the sex police. Maybe you wound up in this role as the result of political pressures – real or imagined – that make you feel like you need to be policing student sexual mores. Or, for some of you, you took the 2011 DCL as a license to become the sex police that you always wanted to be. Or, maybe it has been a gradual and inadvertent shift for you. For whatever reason, if you have become the sex police, we want you to know that The NCHERM Group condemns what you are doing in the strongest possible terms and entreats you to change your thinking and your practices. Our tone in this section reflects the gravity and import of the situation.

Sex policing isn't working for you. The field is being hammered by an unprecedented wave of litigation, and higher education is losing! Do you remember the days when judges were deferential to the internal disciplinary decisions of college administrators? If those days are rapidly receding or are gone, you have to ask yourselves what role you have played in that. If you are the sex police, your overzealousness to impose sexual correctness is causing a backlash that is going to set back the entire consent movement. It is imperative that you self-correct and find a golden mean or middle path on this issue. You are sowing the seeds of your own destruction. We've been beating this drum since 2012, and we will get progressively louder and louder until you get it. If you persist, you will touch off a new wave of due process protections in the courts and in Congress, which will once again skew the playing field for victims and those who are accused – a playing field some of us have worked our entire careers to level. You don't want that because it will deeply inhibit your ability to spread the sexual correctness to which you are so very wedded. So, stop it. Now.

If you don't know what we mean by sex policing, it's happening on two levels: the substantive and the procedural. Procedurally, responding parties need to be accorded the full measure of their rights. The courts are starting to smack colleges down left and right when due process corners

“Human interactions are messy, confusing, and illogical. That includes sexual interactions. You should be struggling to apply the consent rules at your college. You should be wrestling with them, challenging your understandings, and trying to find the right balance.”

are cut, bias is in play, and politics motivate the imposition of corrupt outcomes. You need to get your procedural houses in order, because no one is served when the court overturns your decision, especially you, so why drive toward an outcome that won't be sustained by the scrutiny of the courts?⁶⁷ We want you to suspend and expel those who commit sexual violence at colleges. This has been a central theme of our work for almost 20 years. But, we need you to do it by the book. If the preponderance of the evidence standard of proof is a fairly minimal standard on the continuum of proof, we need you to apply it with steadfast rigor.

Preponderance is an on/off switch. You're either over 50% with the evidence you have found, or you're at 50% or under. Play it straight and keep your thumb off the scale. The NCHERM Group's Managing Partner, Daniel Swinton, says it best when he trains on Title IX: “If you picture the scales of justice, with evidence on either side, the Title IX Coordinator is the post in the middle, holding up the scales. The upright neutrality of the post allows the scale to tip, but does not cause it to do so. The evidence does, and nothing else should.”

For those of you who relish being the sex police, we don't respect what you are doing. Your thumb is on the scale, and if you intend to keep it there, we beseech you to at least be intellectually honest about it. Your students should know that you intend to examine their sexual decisions under a microscope. Your applicants should know that when choosing a college, you err on the side of caution and kick accused students out even if the evidence is uncertain. They should know you aren't just victim-centered, you are victim-favoring. Perhaps many students will like that. They will seek your college out because of your bias. But, for those that don't, the truth in advertising will help them to choose a college that values fairness and equity, if that is their preference. It's ours.

The rest of you have your thumbs on the scale inadvertently. Some of you stumbled into sex policing and simply need some perspective to realize you've gone too far. You are willing to self-correct, and we are eager to help you. We want you to be victim-centered. Every college should be. But, being victim-centered is different than being victim-favoring, and we recognize and honor that you are intent upon learning how to find the correct balance and upon affording equal dignity to every student, regardless of their role in your resolution process. You're our kind of administrator, so keep reading – this section is for you!

⁶⁷ And we'll note, as we have since day one, that the offending colleges being slapped the hardest by the courts are not those who have shifted to the civil rights model, but those who still cling to using the traditional student conduct process to resolve allegations of civil rights discrimination.

That brings us to the second form of sex policing, which is substantive. Put simply, you are misunderstanding or misapplying the rules. “Affirmative consent” policies are the norm now on colleges, and they are a boon to the cause of equity, but they need to be used correctly or the entire concept will get a bad name. Consent is clear permission for sex by word or action. It’s an elegant concept that is simple to capture in policy, but difficult to apply in practice. We can’t change that for you. Human interactions are messy, confusing, and illogical. That includes sexual interactions. You should be struggling to apply the consent rules at your college. You should be wrestling with them, challenging your understandings, and trying to find the right balance between being the sex police and allowing free reign for abusive sexual practices. Some of you are off track because you are applying a utopian lens to consent. You consciously or unconsciously want sex to be ideal, every time. Get over that. Sex is rarely ideal, especially for those 18-24 in age. Having less-than-ideal sex is unfortunate, but probably universal at some point for all people who are sexually active. We have to be able to separate less-than-ideal sexual experiences from those that are sexually transgressive of our rules. How?

To do so, we must understand that consent is imperfect in both theory and practice. It wasn’t meant as a perfect construct, but as a better construct than the force and resistance-based policies that defined sex offenses a generation ago. Because consent is an imperfect construct, applying it with rote literality will not produce good results. Consent is meant to be applied in context, not in a vacuum that assumes all students are equal and all sexual events have parity to all other sexual events. Our consent rules need to be malleable to account for the vagaries of the human experience, and we need to be flexible enough to allow for the fact that human communication and interaction are imperfect. Late adolescence can teach people how to become sexual beings, but we can’t expect that students arrive at college fully equipped to think and act as mature, respectful sexual partners. They will fumble a bit. They will fail to make each sexual interaction ideal. They will not live up to our standards or theirs. So, should we discipline them for that developmental failure? We should impose our discipline for abusive transgressions, those actions according to OCR that have a discriminatory effect on the basis of sex or gender. Rudeness, insensitivity to one’s partner, having underdeveloped communication skills – these are behaviors that need to be corrected by appropriate intervention – but only the sex police believe they need to be disciplined.⁶⁸

In being sensitive to our own tendencies to want to be the sex police, we also need to consider that issue of intent. Should we give someone a break if they transgress against another student, but didn’t intend to do so? No, of course not. But, intent is much more complex than just the simple question of whether someone meant to transgress against another person’s sexual boundary. At this point in our understanding of consent theory, we’d say that intent is an aggravating factor, for sure. If you have the intent to violate someone, that heightens the abusiveness of the act. But, lacking the intent can mean a lot of different things, depending on context. It can mean carelessness, recklessness, naïveté, drunkenness, and many other things which may equate to a violation of policy, or might not. It’s not fair to say that the lack of intent means someone didn’t violate the rules, but we need to become better at reading the context to know more precisely what the lack of intent means to our ultimate determination of an allegation.

⁶⁸ It is important to note that some may self-define as survivors based on such experiences and are entitled to access support services, even if not policy processes.

To help us get there, we posit that you should look at consent more as transactional and contextual, meaning that we view the entire sexual interaction and the context of the larger relationship. We contrast that to an approach that is more particularized and occurrence-based, where finders-of-fact tend to hyper-focus on each touch within a sexual interaction and ignore the larger context of the relationship. There are always exceptions, but you will be best served by evaluating consent based on the perspective of a reasonable person who is viewing the totality of the circumstances. That means we look at the whole relationship or interaction (the transaction), not just one time that someone might have touched someone else problematically (the occurrence). And, we ask how a reasonable person would view the situation, and whether through that lens the behavior does or does not cross the line. Two case studies will demonstrate the reasonable person concept and the transaction concept. Approach them as if they are a Facebook™ quiz that lets you figure out your sex policing tendencies on a scale of 1 to 100.

Case Study #1– Liz and Neveah

Liz and Neveah are roommates on your campus. Liz is a virgin and identifies as straight. Neveah identifies as sexually fluid, and is very sexually experienced compared to Liz. One night after they have gone to bed, Liz heard Neveah masturbating along with the sound of a vibrator. The next day, Liz asked Neveah about it, and Neveah was very open with her, explaining that she has a “Bunny” which she described as a vibrator designed to allow her to penetrate herself while simultaneously stimulating her clitoris to climax. She was not apologetic or embarrassed that Liz overheard her masturbating, and asked Liz if she masturbates. Liz shyly said no and Neveah offered to teach her how if she is interested. She asked if Liz wants to see the Bunny. Liz seemed curious, so Neveah took it out and showed it to Liz. Liz immediately said she could never use it because she was diagnosed with vaginal hypoplasia, meaning a very narrow vaginal canal, and that the Bunny would never fit.

Neveah, sensing Liz’s growing interest, told her that she can use the Bunny on Liz if Liz would like, and go very gently with it to ensure that it doesn’t hurt. Alternately, she told Liz she can just use the Bunny’s “ears” on Liz, without penetrating her, if it’s too tight. Liz said she’ll think about it, and Neveah could see the flush on Liz’s face and how excited she was. Later that night, Neveah was more open about her masturbation and started to use the Bunny on herself while Liz was watching from across the room. She then asked Liz if Liz wants to try it. Liz agreed, but asked Neveah to show her how to do it, the first time. Neveah cleaned the Bunny, lubricated it, and slowly penetrated Liz with it. She asked Liz to tell her if it is painful at any point. Neveah began to use the Bunny on Liz, and Liz flinched in pain, telling Neveah to go slower. Neveah slowed down, and soon Liz was uncomfortable again. Neveah shifted the position of the Bunny and Liz became more comfortable. Neveah used the Bunny on Liz until she climaxed. Neveah tells Liz, “if you liked that, you should feel my tongue on you next time.” Liz smiled, and they go to bed.

The next night, Neveah again offers to use the Bunny on Liz. Liz agrees, but is immediately uncomfortable with the sensation of penetration by the vibrator. Neveah repositions it several times, but can’t find a comfortable position for Liz. Liz tells Neveah to stop because she is sore from the night before. Neveah stops penetrating Liz, and uses the “ears” of the Bunny to stim-

ulate Liz without penetrating her. While doing so, Neveah also uses her tongue to bring Liz to climax, and Liz presses her hands against Neveah's head as she does this. Afterward, Neveah asked Liz to use the Bunny on her, which Liz did. The women kissed and spent the night in the same bed.

The next night, Neveah climbed into bed with Liz, and began to perform oral sex on her. She told Liz she had lubed the Bunny and it was ready for her. Liz agreed and then allowed herself to be penetrated by the Bunny, and while it was still uncomfortable, it was less so than the night before. At one point, Liz cried out in pain, and Neveah repositioned the Bunny for greater comfort. Liz then seemed to get more into it, was arching her back and moaning with pleasure, and Neveah continued. Neveah also slapped Liz on the buttocks several times as they engaged in sexual contact. As Neveah continued with the Bunny, Liz called out in pain again, saying, "No. Stop." Neveah withdrew the Bunny slightly and eased up on the speed settings of the vibrator. She repositioned the Bunny again to ensure Liz's comfort, and penetrated her gently once again, but Liz pushed her hand away, making her stop, crying that she was just too tight for it. They went to bed.

The next day, Liz was talking with Burke, a woman on the hall who identifies as lesbian. Burke asked Liz if Neveah had turned her into a "lez" yet. Liz pretended not to understand, and Burke said, "She'll groom you and the next thing you know, she'll turn you into one of us." Liz suddenly realized that that was Neveah's plan to seduce her all along. She became very uncomfortable with Neveah as a roommate, someone she thought was trying to help her become more sexually comfortable as a friend, but who was really coming on to her as a girlfriend. Liz went back to her room and told Neveah how uncomfortable she was, and that all sexual contact needed to end. Neveah, who had perceived her encounters with Liz as a budding romance, was shocked, but agreed to keep things platonic.

The more Liz thought about it, the more upset she became. She felt betrayed by her roommate. Three days later, she went to the Title IX office and reported what happened. Neveah was notified of three alleged offenses: Non-Consensual Sexual Contact for performing cunnilingus on Liz without consent during the second encounter; Non-Consensual Sexual Intercourse for continuing to penetrate Liz with the Bunny during the third encounter after Liz said, "No. Stop"; and intimate partner violence, for slapping Liz on the buttocks during sex without consent.

Discussion

STOP HERE. It's time to analyze this fact-pattern and develop a gut check on what you think. Does your gut tell you that each of these behaviors does, technically, violate your consent policy? Many people would say so. But, take a step back and look at the totality of their interactions. Answer these questions:

- Does the totality of the evidence suggest an abusive series of encounters?
- Do you have evidence that Neveah was trying to groom Liz or sway her sexual orientation?

- Do you have evidence that Neveah intended to discriminate against Liz or cause her a hostile environment on the basis of sex?
- What assumptions did you make about Liz's allegations?
- Do you have evidence that Neveah meant to transgress Liz's sexual boundaries?
- What do you think Neveah's responses to these allegations would be?

Neveah was shocked by the allegations. She realized that Burke might be interested in Liz, and was poisoning their budding relationship. She insisted that she had been incredibly respectful of Liz, not abusive. Neveah said that she constantly checked in with Liz during sex, repositioned the Bunny to ensure Liz's comfort, and stopped when asked. She said she did not realize that Liz wanted her to stop that last time, thinking that like previous times, Liz meant she just needed to adjust the Bunny. Once she realized that Liz really meant stop, she stopped right away, and had only penetrated her once after she said to stop, to adjust the vibrator. So, is this a misunderstanding or a sex offense?

If you determined that this is sexual misconduct, you're confusing Liz's discomfort with her own sexual experimentation with a non-consensual sexual experience. Please understand that it is the unanimous consensus of all eight authors of this *Playbook* that Neveah should be found *not* in violation of the sexual misconduct policy. Maybe Neveah did seduce Liz. That's not against policy. Maybe Neveah did want Liz to explore her sexuality or sexual orientation. That's not uncommon

“To understand why this isn't sexual misconduct, you need to understand the concept of ratification, which means retroactive consent demonstrated after the fact.”

in college, and as long as it isn't coercive, that isn't sexual misconduct. But, you might be thinking, don't Neveah's behaviors meet the definitions of sexual misconduct and intimate partner violence? Don't you have to stop when someone tells you to stop in the middle of sexual intercourse? Don't we teach our students that? Don't we tell them you can't touch someone sexually without getting permission first? We don't want our students slapping each other during sex, do we?

Becoming the sex police can be a little insidious, creeping up on us without our even realizing we are propagating an orthodoxy of sexual correctness. It's true that Liz told Neveah to stop during the third interaction, and that Neveah did not stop. If a male student kept thrusting when his female partner told him to stop, would we look at this differently? The ATIXA model policy says that if your partner withdraws consent, you must stop in a reasonably immediate time. That is what Neveah did. One additional thrust of the vibrator was not meant to be abusive, but to try to make Liz more comfortable, and she stopped within several seconds of understanding what Liz really wanted. Thus, the context is what matters here. At first, Neveah was not clear whether Liz was telling Neveah to stop, or communicating that she was uncomfortable with the position of the Bunny. Liz is saying now that she wanted Neveah to stop, and maybe that is true, but Neveah was thinking about the second sexual interaction, and how she had to position the Bunny carefully so that it did not hurt Liz, just as she had done earlier in the third sexual interaction as well. She thought she could reposition it similarly during the third interaction when Liz said stop,

to increase Liz's comfort and make sure it hurt less. Was this a reasonable interpretation by Neveah? Yes, Neveah's interpretation was reasonable when considered in the context of the totality of the circumstances surrounding their interactions.

Did she have reason to believe that Liz really wanted her to stop penetrating her entirely, or that she just wanted Neveah to be more gentle or to reposition the vibrator? If Neveah moved the Bunny and was then more gentle with it as the result of Liz's objection, wasn't she trying to make her partner more comfortable? How is that discriminatory? Doesn't no mean no, though? Well, during the second encounter, when Liz said stop, it meant a need to re-position. Isn't it reasonable to think the same context applied to the third encounter? After all, Neveah was clear that, after she tried to reposition the Bunny during the third encounter and Liz was still in pain, she needed to stop and she did. We can't chalk this up to a miscommunication about what Liz wanted, but Neveah's interpretation of the situation is reasonable given the totality of the circumstances.

Yes, but what about the oral sex during the second encounter? Taken together with what happened in the third encounter, doesn't the totality of the evidence show that Neveah was pushing Liz past her boundaries? I hope we can agree that when Neveah was using the Bunny's ears on Liz, and then began to use her tongue, Neveah did not have Liz's clear permission to do so. That was not consent, and most people can respect the distinction between agreeing to stimulation by an object and the use of someone's tongue. Permission for one does not imply permission for the other. To understand why this isn't sexual misconduct, you need to understand the concept of ratification, which means retroactive consent demonstrated after the fact. This happens in sex ALL THE TIME, though we don't account for it in our policies. Liz continued to have sexual interactions and want sexual interactions with Neveah after the oral sex. They had oral sex a second time. Liz pressed Neveah's head toward her as Neveah performed cunnilingus. That ratifies it after the fact, even if Neveah didn't strictly ask for consent when she first did it.

Not objecting to something is not the same thing as ratification, so be careful not to confuse those two things. While it's entirely possible that Liz was comfortable with a friend teaching her how to use a sex toy, but wholly uncomfortable with engaging in sexual activity directly with another female without the sex toy as a buffer, that's not the evidence we have here. Should Neveah have asked first? Sure. But, is it a sex offense that she didn't? Not in this context. Failing to object is passive. Ratification is an active participation subsequent to an encounter that began without clear consent.

Well, what about the butt slapping, then? *Fifty Shades of Grey* was a movie that made more than half a billion dollars at the box office in 2015. Light bondage and practices drawn from the BDSM world have gone mainstream. Again, context is everything. Was Neveah trying to abuse her partner? No. Should she have asked first? Sure, but to call a few slaps on the butt during sex a form of intimate partner violence is to water down what intimate partner violence is to the point of meaninglessness. ***If everything is discrimination, then discrimination means nothing.*** Many of our students are influenced by mainstream erotic and even hardcore pornography. You can't assume you can treat your partner the way it is depicted on screen, but we need to take into

account that for many of our students, if they have learned their sexual mores from pornography, this is an opportunity to re-socialize them, educationally, in respectful sexual patterns. What they think is normative is potentially going to be different than our sexual norms.

A twist on the ratification concept is tied to what happens to consent in relationships. We can debate whether what Liz and Neveah had was a relationship. We can survey the literature of the field that tells us that today students avoid relationships in favor of casual hook-ups. But, half of the investigations we do involve students in relationships or who were recently in relationships. To apply consent rationally to the relationship context, you have to accept that if students change your rules by creating their own, the best practice is to hold them to THEIR rules to assess consent, rather than to college policy. We know it sounds wrong to say that investigators should ignore college policy, but we have to allow couples in relationships the ability to define consent for themselves, otherwise unfairness results. If a couple loves to have incapacitated sex, and they have it dozens or hundreds of time with no issue at all, it is simply unfair to call that a violation of policy. This is related to the kink argument, above, as well. It's not okay to force someone in sex until it's okay to force someone in sex. Kink couples are rewriting our policies for their own sexual mores.

The key to understanding how relationships change the meaning of consent is that investigators have to be able to discern what the rules are that the couple have adopted, and need to be able to show that those rules operated clearly and were long-standing, understood, and/or explicitly agreed to. When they can so discern, investigators should apply the rules the couple has devised instead of college definitions of consent. An example will illustrate this idea. Suppose that a male student and female student have been dating for four months. In that time, it is found that there were at least 20-40 instances where the couple had sex that was initiated when the male student was aroused and began pushing his erection up against the female student. This led to sex over and over again, without any verbal exchange.

When the relationship ended, the female student made allegations of sexual misconduct, specifically that he was always pushing his erection up against her to initiate sex, and that he never had her consent to keep pushing his erection at her all the time. Without the context of this relationship, putting your erection up against someone without their consent is NCSC. But, in this relationship, evidence showed that every time he did this, the couple wound up having consensual sex. So, one way to analyze this is to say that she ratified the technically non-consensual touch by her later actions to participate willingly in sex as a result of the touch. Another way to analyze this is to say that this couple developed their own rules for consent. Those rules don't work for or apply to any other student, but they work for them, and we are going to hold them to those rules, not our policy, because we have evidence that they clearly adopted their own standard for consent. It would be manifestly unfair to hold the male student accountable for something the female student was okay with forty times, just because it technically violates our policy on consent. This is the introduction to the need to apply the reasonable person lens to our understanding of consent, as well.

A second case study will challenge us to apply the reasonable person lens.⁶⁹

Case Study #2 – Wes and Tameka

Tameka was flirting with Harris at the party. She told him if he agreed to date her, she would hook up with him that night. He told her he wasn't the dating type. Later, friends saw Tameka flirting with another student, Wes. The friends also testified that they saw Tameka and Wes walking hand-in-hand away from the party toward her residence hall. Surveillance video from the hall cameras shows that the two entered her residence hall at 11:14pm and proceeded to the common lounge, which was empty. While there is no audio, the video showed the two kissing, and then showed Tameka on top of Wes while he was lying on the couch. The video showed that she was grinding on him as he fondled her breasts, first over and then under her shirt. At one point, her breasts were clearly exposed on camera. They were on the couch for 23 minutes. The video then shows them getting up, and Tameka leading Wes down the hall by the hand. Their stories diverge at this point.

Tameka stated that she was going to see Wes out, but had to go to the bathroom. She stopped at her room on the way out. She let him into her room to wait and asked him to be quiet because her roommate was sleeping. She went into the bathroom and said that after she used the bathroom, he pushed his way inside the door and closed it behind him, before she had a chance to put her pants back on. She said that he then told her she couldn't leave him hanging, referring to their activity in the common lounge. He asked her for a handjob, and she agreed. He took off his shorts. She proceeded to rub his penis with her hand. He then asked her for a blowjob, but she said no, and continued with the handjob. As she gave him the handjob, he fondled her breasts and they kissed. He then began to rub between her legs and she allowed this and continued the handjob. He then penetrated her with his finger. She moved his hand away, stopped rubbing his penis, and told him he needed to leave. His account differed considerably.

Wes said that while on the couch in the common room, he suggested they go to her room and continue things more privately. She told him that her roommate was there and would be asleep at that hour. She then suggested they could go in her bathroom. They agreed, got up from the couch and she led him by the hand to her room, reminding him they needed to be quiet because her roommate would be asleep. They entered the room, and then went into the adjoining bathroom. There, she took off his shorts and hers and began to give him a handjob. He asked for a blowjob, but she said no and continued to rub his penis. During the handjob, they kissed and he fondled her breasts. He then began to rub her between her legs and she continued the handjob and was making moaning sounds. He teased her that she needed to be quiet or she'd wake her roommate. He then penetrated her vagina with his finger, and she immediately moved his hand away from her. She continued the handjob until he climaxed. Video shows that she escorted him from the residence hall at 12:24am, shows that she held the door open for him as he exited, and that they kissed as he left.

⁶⁹ Some people think it's important to debate the reasonable person standard. We do not. OCR says it's the reasonable member of a college community. For our purposes, we always interpret the standard to be a reasonable person in the same or similar circumstances, so it is contextual.

At 10:04am the next day, Tameka texted Wes, asking him how she should refer to their “couple status” when she told her roommate about the night before. At 10:18am, Wes texted her that he felt really guilty about what they did the night before because he had a girlfriend. He told Tameka that she was really nice, but that she needed to stay in the friend zone and that he hoped he hadn’t led her on. When she got the text, she immediately removed him from her contacts and blocked him on social media. She told her roommate that she needed to find someone who was ready for a serious relationship, and that the night before with Wes had been a mistake. Wes told his roommate that he felt bad that he had led her on.

By that evening, rumors were circulating that Wes had assaulted Tameka. He heard the rumors from a friend and decided he needed to address them. He texted Tameka at 8:40pm, “Please tell people I didn’t rape you. Some people are spreading a rumor.” She texted back at 8:42pm, “but u did rape me. Don’t contact me again.” The next morning, Wes went to the dean to address these rumors because he wanted to be clear that he had not raped Tameka. When he recounted to the dean what had happened, and concluded that they hadn’t even had sex, so he couldn’t have raped her, the dean informed him that it sounded from the story like he might have raped her. Wes was placed on interim suspension and an investigation was initiated. Wes tried to file a counter-claim that the handjob was not consensual, but the Title IX Coordinator decided it was retaliatory and did not take it forward.

Discussion

STOP HERE. Do you agree with this dean? Is she a steadfast protector of student welfare, or a card-carrying member of the sex police? If you consider the totality of the circumstances, there is a clear subtext to the allegations, right? Tameka was looking for a relationship. She rejected Harris when all he wanted was a hookup. She then attempted a relationship with Wes, but wound up being used by him and feeling rejected. That rejection could have been motivation to tell people that Wes assaulted her (she later filed a formal allegation and participated in the investigation), but that only addresses her motivation to report, and not the underlying question of whether what she was reporting was a violation policy. Are we troubled by the fact that she did not consider it sexual misconduct that morning, and came out of the interaction thinking that they were dating? Sure. It goes to her credibility. For some people, though, the reality of victimization takes a while to dawn on them, whether out of shock, denial, or a failure to self-identify. When that is the reason for delay, it is not a credibility concern.

You might think that Wes described a situation to the dean that is arguably sexual misconduct, regardless of Tameka’s motivation to report it, right? Let’s break it down. Wes and Tameka agreed that the sexual activity on the couch was consensual. But, what about the sexual activity in the bathroom? She performed the handjob voluntarily. It wasn’t coerced or forced. Thus, she consented to it. Whether he consented to being touched is a question we will address shortly. Their kissing was mutual, according to both of them, and she did not raise the fondling of her breasts as an issue. However, if you are a literalist about consent, he did fondle her breasts without consent. You can make a ratification argument here, though, because he didn’t ask to fondle her breasts in the common room, either, but she participated when he did. There is an

interesting question, too, about whether her consent to fondling her breasts earlier in the common room remained valid ten minutes later in the bathroom. We would say it did. And, we would argue that he had consent to touching her vulva and fondling her genital area by ratification. In the course of a sexual transaction, she permitted him to touch her, and continued to touch him as she did so, without objection. That's ratification. So, the only remaining question is whether his act to penetrate her with his finger was without consent. We believe a reasonable person would believe that act was consensual. How can this be? He penetrated her without asking, and her response clearly shows she did not welcome his penetration.

The construct of consent in sexual interactions is governed by policies, but as we noted above, it is not a perfect construct, in the sense that theory and practice do not fully align. Policies require clear actions or words indicating permission. So, if you think about it, there is no way to kiss someone without asking first, if you take the concept of consent literally. If I move in to kiss someone, I cannot know the conduct is agreed to unless I ask, because even if they move in to kiss me, they cannot know I am consenting unless they ask. So, rather than strictly adhering to such rigidity, we allow some non-verbal, unspoken rules to govern our sexual interactions. Many of us move in for a kiss, mutually, on the basis of context, without asking. And, in certain circumstances, consent can be assumed; for example, if you kiss me, I can kiss you back. I don't have to ask or clarify that. I am not expected to simply passively receive the kiss. The "clear words or action" part of the policy takes over from there. We can kiss, but what happens next has to be the result of agreement by word or conduct, if the interaction is to escalate sexually. Think of it as being akin to levelling up in a video game. Once you unlock a level, you are free to explore that level, but you can't move on to the next level until you unlock the achievement for that level (in this case, by having clear consent).

If a female student is voluntarily stroking a male student's penis, he is within the bounds of consent to reciprocate by touching her vulva and using his fingers to penetrate her vagina. This is really no different – in terms of reciprocity – than if a woman begins to stroke a man's chest, and he responds by fondling her breasts. It is artificial in the extreme to expect verbal requests in such a context, "I see that you are touching my pecs...does that mean I can caress your breast? If so, left, right, or both? And, is that your left or my left?" That's not how sexual communication works, as noted in describing the kiss, above. Consent is designed to allow such reciprocation without resorting to asking, **but** clarifying communication **is** required if one or both of the partners wish to elevate or progress the level of sexual interaction. If the partners are now caressing each others' chests, and one wants to touch the genitals of the other, that cannot be assumed to be okay, based on the sexual activity already taking place. To move to genital contact, there again must be communication that establishes consent. Consent theory supports this. Some acts are mutual, others require additional communication and clarification.

"As you can now see, a consent policy is viable in theory, but can become absurd in practice if taken to an extreme. You are the guardians of applying the reasonable person standard to these interactions."

When a female student is voluntarily giving a male student a hand job, and he reciprocates by touching and fingering her vulva and vagina, if she denies having consented to being touched/penetrated solely because he didn't ask, we would say that a preponderance of evidence shows that they engaged in mutually consensual fondling of each other's genitals. To conclude otherwise would require that the male partner to say something like, "I see your hand is on my penis, may I now place my hand between your legs?"

That is not how sexual communication occurs, and it is not how consent policies were intended to function. To see the logic of this, take it to its extreme. Imagine that sexual intercourse is taking place. The female partner raises her hips on her male partner's penis. When she does, he hesitates, and says, "May I thrust my penis in response?" If the female partner says "yes," he may thrust back. How many times? Once? Many times? Does he need to clarify that, or is it assumed once they are having intercourse that thrusting is going to occur, positions may be changed, and there will likely be an ejaculation as a result? It is assumed, but according to policy, it's really not explicitly agreed to, is it?

Some of you will make a distinction with Wes and Tameka out of the fact that the sex acts weren't really mutual. They fondled each other's genitals, but she was penetrated and he was not. To that, we say that is a distinction that arises solely from anatomy, but it is no more invasive to a man to have a non-consensual handjob than it is to a woman to be fingered without consent. A man can be subject to sexual misconduct without being penetrated, so we need to stay focused on the video game metaphor. What Tameka did to Wes and what Wes did to Tameka each occurred on the same level of the game. No one upped the level without asking, and Wes respected her instruction to stop when he did something that went beyond her boundaries. This does not make him in violation of policy. That's what a reasonable person would say. I can fondle you if you are fondling me; I don't have to ask you. For anyone who wishes to insist that he is in violation of policy, we require you to be consistent. If your purist approach to consent demands that you find him in violation of policy for penetrating her, then you must also be willing to find her in violation for giving him a handjob without his consent. If that is your preferred approach, we think you are being absurd, but at least you will keep the legal profession gainfully employed for many years to come.

As you can now see, a consent policy is viable in theory, but can become absurd in practice if taken to an extreme. You are the guardians of applying the reasonable person standard to these interactions. We know this challenges an orthodoxy that may be widely accepted in the field, but the question is whether we are trying to govern every nuance of sex as if we are the sex police, or whether we are trying to establish reasonable rules to regulate inherently ambiguous human behavior in a way that minimizes the risk of harm to those involved? If you need a litmus test for whether you have become the sex police, ask yourself whether the college-age version of you would hate what you have become. If so, let's recalibrate. One way to do so is to refocus and rededicate ourselves to due process and protecting the rights of ALL students.

Sexual Exploitation

Model Policy

Sexual exploitation is a policy we innovated more than fifteen years ago, and it is the Swiss Army Knife™ of sexual misconduct policies. It is flexible, precise, useful, and can get you out of a jam. College students are on an ever-evolving path of abusive practices, often aided by technology, and rather than try to keep up by writing policy after policy, we simply wrote a policy broad enough to encompass whatever they think of next.

ATIXA's model policy states that sexual exploitation *“occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute one of other sexual misconduct offenses.”* In considering the behavior at issue, you must gather as much information as possible about the circumstances. First consider whether the conduct violates another policy, because sexual exploitation defines itself as only applying when other policies do not. Think of it less as a catch-all – the catch-all in this area is sexual harassment – and more as a policy-of-last-resort. And, this policy is not designed as an end-run around the NCSC and NCSI definitions for those of you looking to find the sex police version of the broken tail light. If other policies don't apply, or if it is not entirely clear, then you must analyze the following elements individually, at least initially.

Model of Proof

The policy may be parsed into the following elements:

Sexual Exploitation includes, but is not limited to:

- ☐ Non-consensual or abusive conduct,
- ☐ That takes sexual advantage of another person,
- ☐ For the responding party's own advantage or benefit OR to benefit/advantage anyone other than the individual being exploited *AND*,
- ☐ Does not constitute any other sexual misconduct offense addressed in your institution's policy

Rubric

To turn this into a question-based rubric, you'd come up with something like this:

1. Was there non-consensual or abusive conduct (see example list on p. 31-32); If no, this policy has not been violated. If yes,
2. Did the conduct take sexual advantage of another person; If no, the policy has not been violated. If yes,

3. Was the conduct for the responding party's own advantage or benefit OR to benefit or advantage anyone other than the individual being exploited? If no, this is not a policy violation. If yes,
4. Does the conduct constitute any other sexual misconduct offense addressed in your institution's policy? If no, policy was violated. If yes, use other applicable policies instead.

Let's address each element in turn.

Non-consensual OR abusive

To determine whether behavior is non-consensual or abusive, you must first isolate the behavior at hand. Consider all information available that would help you ascertain the nature of the behavior. Communicate with the parties, as well as other individuals that may be knowledgeable about the situation, to understand the conduct from different vantage points. If appropriate, it may be helpful to create a timeline or other type of visual depiction of the conduct (a flowchart, for example) to understand the behavior and its course. Remember that reporting parties may not consider the unwelcome conduct at issue as exploitative or identify the behavior as sexual exploitation. They are not policy experts, you are. Their labelling has no impact on whether the conduct constitutes a violation of policy.

In assessing the behavior to determine whether it is consensual, make sure you have a working understanding of your institution's definition of consent. Analyze the conduct pursuant to this established definition. Additionally, consider whether the reporting party has informed the responding party that the conduct is unwelcome. This is not a requirement, but could aid in the evidence of proof. If available, review social media messages, texts, and other forms of communication that may support the idea that the behavior is not consensual. Has the reporting party communicated their reaction(s) with other individuals who could confirm their position? If possible, review blog posts, social media, and other journaling methods that may corroborate or refute the reporting party's account of the conduct.

If you have determined the conduct is non-consensual, you can proceed to analyze the second element of this policy – whether the responding party has taken sexual advantage of the reporting party by the conduct at issue. If you determine the conduct is consensual, however, you must continue to the next prong of this analysis: whether the conduct is abusive. In analyzing whether the behavior is abusive (the policy intentionally does not define this term, though you may choose to), consider whether there was physical or emotional harm to the reporting party, whether the conduct transgressed against a socially acknowledged norm or boundary, violated privacy, or took advantage of a known weakness, youth, misunderstanding, inexperience, or naïveté. Again, communication with the parties and others who are familiar with the parties and the circumstances will provide you with a more complete awareness of the complexities of the situation.

Although there are circumstances where conduct is clearly abusive, it is highly likely you will encounter situations that are much less clear cut. In these instances, using a reasonable person standard is an imperative tool in assessing the conduct. How would a reasonable person, without any particular eccentricities, who is in roughly the same demographic as the reporting party, consider the behavior at issue? Would that reasonable person consider the conduct abusive?

Taking sexual advantage of another

Once you have determined that the conduct is either non-consensual or abusive (or both), proceed to the second element of the policy. In assessing whether the conduct takes sexual advantage of another individual, there are several questions to consider which will help with this determination. They are as follows:

- Does/did the responding party hold power or leverage over the reporting party?
- Is/was there an expectation of trust?
- Was there an exploitation of a weakness?
- Did the responding party lead the reporting party to believe their interest in the reporting party was genuine and then betray that trust?
- Has the responding party employed manipulation or misrepresentation?

Keep in mind that there must be a sexual element involved, or a selection of the target on the basis of sex or gender. As in the analysis of the first element of this policy definition, you need to carefully examine the circumstances of the situation and understand the dynamics between the parties. None of the questions above will necessarily lead to a dispositive conclusion of whether the conduct takes sexual advantage of another. When considered together, however, the process of asking these questions and ascertaining the responses will aid your analysis significantly.

*For the responding party's own advantage or benefit **OR** to benefit or advantage anyone other than the individual being exploited*

The fundamental issue in this analysis is whether someone, *other than the reporting party*, is benefiting in some way from the conduct. Look at the effect, or potential effect of the behavior and consider the possible ramifications. Think creatively about potential benefits, which may not be readily apparent and may include monetary remunerations, personal gratification (sexually or otherwise), and advancement in social status, among other advantages.

Importantly, a reporting party may have obtained *some* type of benefit from some aspect of the conduct at issue – this fact alone does not necessarily prevent the conduct from satisfying this element. One example of this is a reporting party who has benefited from consensual sex with the responding party, yet the responding party has proceeded to exploit the reporting party by sharing video in a non-consensual manner for a third party's benefit. Keep in mind as well that the benefit(s) may not have occurred yet and may be "traded" for other benefits. For example, consider an individual who films a sexual encounter and then, without the reporting party's consent, emails the video to a friend with the understanding that the friend will help the responding

party on an upcoming paper assignment. This would likely constitute sexual exploitation under the promoted policy.

The behavior does not constitute any other sexual misconduct offense addressed in your institution's policy

The final element of this policy is that the conduct at hand must not fall within the definition of any other sexual misconduct offense within your institution's policy. Although important to consider before proceeding with your analysis of the elements, once you conclude your assessment of the above elements, review this issue once again prior to rendering a determination to ensure you are not conflating policy violations.

Determination

As previously noted, in rendering your determination, it is imperative to work through each element separately. Consider the supporting and refuting evidence. Consider the relationship between the parties and any relevant history.

Taken again from the ATIXA model policy, illustrative examples of sexual exploitation may include, but are not limited to:

- *Invasion of sexual privacy,*
- *Prostituting another person,*
- *Non-consensual digital, video or audio recording of nudity or sexual activity,*
- *Unauthorized sharing or distribution of digital, video or audio recording of nudity or sexual activity,*
- *Engaging in voyeurism,*
- *Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex),*
- *Knowingly exposing someone to or transmitting an STI, STD or HIV to another person,*
- *Intentionally or recklessly exposing one's genitals in non-consensual circumstances,*
- *Inducing another to expose their genitals,*
- *Sexually-based stalking and/or bullying may also be forms of sexual exploitation.*

“It is important to remember that ‘regretted’ sexual encounters do not, on their own, constitute sexual exploitation.”

As with NCSI and NCSC, it is important to remember that “regretted” sexual encounters do not, on their own, constitute sexual exploitation. An individual may reflect on a sexual encounter and wish they had acted differently or may be embarrassed by their

own prior conduct. This does not, without additional factors that meet the elements articulated above, constitute sexual exploitation.

Intimate Partner Violence

Model Policy

Per the ATIXA Model Policy, Intimate Partner Violence (IPV) is defined as: *any instance of violence or abuse—verbal, physical, or psychological—that occurs between those who are in or have been in an intimate relationship with each other.*

Model of Proof

- ☐ Violence or
- ☐ Abuse
 - Verbal and/or
 - Physical, and/or
 - Psychological
- ☐ Occurring between those who are in or have been in an intimate relationship to each other

Rubric

1. Did violence or abusive behavior occur? If no, the policy was not violated. If yes,
2. Did the behavior occur between those who are in or were in an intimate relationship to each other? If no, the policy was not violated. If yes, policy was violated.

A Two-Prong Analysis

To make a finding of responsibility for an allegation of intimate partner violence, one must establish, by a preponderance of the evidence, both prongs of the IPV definition referenced above, namely that: (1) the responding party more likely than not committed a form of violence or abuse upon the reporting party, and (2) the relationship between the reporting and responding party is more likely than not one of an intimate nature, or has been intimate in the past.

Prong 1: Violence or Abuse

To establish the first prong, we need to understand what types of behavior constitute violence or abuse. You'll notice that the IPV definition is intentionally written broadly, to encompass the numerous types of violence or abuse that can occur. We can think about violence or abuse as occurring in three main forms: verbal, physical, and emotional/psychological.

Verbal Abuse

Verbal abuse is the extreme or excessive use of language, often in the form of insults, name-calling, and criticism, designed to mock, shame, embarrass, or humiliate the other intimate partner. Verbal abuse often has the aim of diminishing the reporting party's self-esteem, dignity, or

security. Importantly, like other forms of verbal sexual harassment, the alleged verbal behavior must be: (1) objectively offensive and (2) sufficiently severe, persistent, or pervasive. Singular statements and isolated incidents will likely fall short of this sufficiency standard and thus will not constitute verbal abuse within the IPV framework. As an investigator of an IPV allegation, refrain from overstepping by unnecessarily inserting yourself into what some would call “lovers’ quarrels” or “relationship drama.” Those types of behaviors may be ripe for counseling or conflict resolution, but not for resolution under Title IX or VAWA §304. You are not the relationship police, so be scrupulous when establishing that alleged verbal abuse does, in fact, rise to the level of verbal sexual harassment under the traditional hostile environment standard. This standard is also helpful when it comes to questions of whether or how you address IPV occurring between two employees where the abuse is entirely off-campus. What is particular to IPV are the ways that verbal abuse can manifest. Common forms include gaslighting, double binds, body shaming, dominating, emotional blackmail, hidden daggers, baiting, infantilization, and dozens of other commonly recognized tactics.⁷⁰

Physical Violence or Abuse

Physical violence or abuse occurs when one intentionally or recklessly (1) causes bodily harm; (2) attempts to cause another bodily harm; or (3) puts another in fear of imminent bodily harm. Put simply, if one *does* harm, *tries* to do harm, or *imminently threatens* to do harm to an intimate partner, the behavior will likely constitute violence or abuse under an IPV policy. Conventional battery, such as punching, slapping, scratching, or otherwise striking an intimate partner—with any part of one’s body or with any object—constitutes physical violence. A common misconception, though hopefully growing less common, is that intimate partners, by the very nature of their relationship, consent to sexual activity with one another such that sexual abuse of a spouse or partner is impossible. We know, of course, that this is categorically false, as consent in some form is required for *any* sexual act, regardless of the relationship or prior history of the involved parties.⁷¹ Accordingly, any form of non-consensual sexual activity within the context of an intimate partner relationship constitutes sexual—and thus physical—abuse under the IPV definition. Other forms of physical abuse include keeping an intimate partner captive, preventing them from leaving, or otherwise restraining them against their will.

Emotional/Psychological Abuse

Emotional and psychological abuse involves a persistent pattern or prolonged climate of dominating or controlling behavior, often involving some type of power imbalance. The abuser’s behavior is often intended to terrorize, intimidate, isolate, or exclude an intimate partner, and can often result in measureable psychological harm, such as depression, anxiety, or post-traumatic stress symptoms. Examples include relentless denigration and disparagement, threatening to harm a beloved pet or destroy sentimental possession(s), as well as financial and economic abuse and blackmail.

⁷⁰ For more information, visit <http://mindbodyintegrativecounseling.com/types-of-verbal-and-emotional-abuse/>

⁷¹ This does not mean that we completely ignore the history between the parties because it does help inform what consent looks like in their relationship.

The above types of abuse can also occur concurrently. For example, an abuser might engage in both physical and psychological abuse by controlling what his partner is allowed to do during the day, who she is allowed to talk to, and when she can leave the house. Similarly, an abuser might engage in verbal, sexual, and psychological abuse by continually telling his girlfriend things like, “If you don’t have sex with me, I’ll just tell everybody that we did. And if you’re bad in bed, I’ll break up with you and tell everyone that you cheated on me with the whole football team. You might think you have a good reputation, but people actually think you’re a whore.”

Collecting Evidence of Violence or Abuse

Evidence of verbal abuse will often include testimonial evidence from the reporting party about what was said, when it was said, the context in which it was said, and whether there were witnesses to the statements. Witness statements will often consist of a roommate who heard the yelling and commotion, or a friend or family member who overheard a spouse screaming on the phone.

In today’s digital age, with numerous mechanisms of communication, verbal abuse will often extend to text messages, emails, voicemails, and social media. Importantly, digital communications are almost always documentable, providing investigators with rare physical evidence that might corroborate that verbal abuse had occurred. Allegations of emotional and psychological abuse will likely yield the same type of evidence. Keep in mind, however, that positive or complimentary digital communications do not necessarily refute the allegations of abuse.

Witnesses may also recall when the reporting party first told them about their relationship issues, providing a valuable timestamp and corroboration for the reporting party’s allegation of an ongoing or long-lasting climate of abuse. Many victims of IPV attempt to conceal the fact that they are being abused, and so critical corroborating evidence may not come in the form of third-party knowledge of actual emotional or verbal abuse, but in the form of friends and family who notice shifts in mood, personality, and/or habits.

With physical abuse, in addition to a reporting party’s testimony that the abuse occurred—which is evidence in and of itself—physical violence can also leave marks, scratches, bruises and other visual indications. Friends, family members, or colleagues who notice these injuries provide an investigator with valuable corroborating witness testimony, even if the marks or bruises have since healed. Additionally, reporting parties sometimes take pictures of their injuries using digital cameras, computers, or their mobile phones. Even if they can’t provide the actual photos, they may have shown those photos to others, again providing an investigator with valuable corroborating testimony, which can be even more critical if an abuser found the photos on the phone and deleted them.

Allegations of Mutual Abuse

Very cagey abusers set up their own defenses well in advance. Sometimes that defense is mutual abuse. In one recent investigation, a responding party encouraged his girlfriend to burn

his arm with cigarettes, telling her it was the only way he could feel anything. But, when she finally reported his abuse of her, his response was, “Well she abused me too, look at these burn marks for proof.” A responding party, upon learning of an allegation that he physically abused his ex-girlfriend, might contend that she had also hit, scratched, or otherwise physically harmed him during their relationship, and that if he is being investigated for physical abuse then so should she. To be clear, mutual abuse is neither common nor is it truly mutual.

Thorough investigations into these types of situations typically reveal a primary aggressor, with one party often experiencing verbal and emotional abuse well beyond just the alleged physical abuse. If there is insufficient evidence to identify a primary aggressor, then each allegation of IPV should be investigated and resolved independently, as distinct policy violations. It does not matter who started it, who made it worse, or who hit the other harder. Abuse is abuse, and where there is no primary aggressor, each instance of abuse must be addressed accordingly. Additionally, policies should include some type of provision regarding self-defense, so that reporting parties are not held accountable if/when the responding party’s counter-claim of physical violence is shown to more likely have been committed defensively.

Further, we mentioned above that one of the common trauma responses to IPV is the fight response. Thus, pay careful attention to the language of the reporting party when they describe responsive violence. They often don’t realize (or don’t want to admit) they did not have control over their response, when in fact admitting that would help their cause. Probe around how they struck out, what their thoughts were when they did, how they decided where and how to strike out, etc. If their brain simply sent the fight signal, there is unlikely to have been a thought process behind it, and they’ll say things like, “it wasn’t like me,” or “something just came over me,” or “the next thing I knew, I had slapped him.” Part of the reason why this is key, of course, is that someone isn’t committing mutual abuse when their autonomic nervous system is controlling their responses. In fact, it’s even possible for the brain to perceive a threat based on a prior pattern, and trigger a fight response even when there is no actual impending harm. Thus, there may be times when the “victim” appears to strike out unprovoked, and the skilled investigator will know to probe what the previous pattern of violence has been to determine if the reporting party (or their brain) perceived a potential threat, and the fight response kicked in for self-preservation.

Prong 2: Intimate Partner Relationship

The second prong in the IPV analysis is the determination of whether the relationship between the reporting and responding parties constitutes an intimate partner relationship, either presently or in the past. This prong is critical because it differentiates IPV from other forms of general misconduct. For instance, physical abuse without the intimate partner component in most cases constitutes simple assault, just as verbal abuse without the intimate partner component might constitute verbal sexual harassment. What makes striking a spouse or partner different from striking a fellow patron at a bar is that we choose our romantic partners based, at least in part, on their sex (e.g. a heterosexual male chooses a female romantic partner partly because that person is female, just as a lesbian chooses a female romantic partner in part because that person is female).

Intimate partner relationships are thus often inextricably tied to gender in a way that other types of relationships are not, and this is true regardless of the abuser's or victim's gender, gender identity, or sexual orientation.⁷² And, to the extent that violence or abuse within the context of that intimate partner relationship creates a hostile educational environment for the victim of that abuse, those incidents will fall under the purview of Title IX as forms of sex or gender-based harassment. The critical takeaway here is that it is the job of the Investigator to determine that sex or gender is, at least in part, a basis for the IPV, and not simply to assume it. Without that basis, IPV is still a policy violation and will fall under VAWA §304, but it will not fall within Title IX.

“Intimate partner relationships are thus often inextricably tied to gender in a way that other types of relationships are not, and this is true regardless of the abuser’s or victim’s gender, gender identity, or sexual orientation.”

To be considered intimate, a relationship must include (or have included) some romantic, sexual, and/or domestic element. Common intimate partner relationships are:

- Married Partners – two individuals who are legally married.
- Domestic Partners – two individuals who live together AND who are romantically interested in one another (not simply roommates, regardless of state law); can be married or unmarried; can include a sexual component, but does not have to.
- Dating Partners – individuals who are romantically interested in one another; can be a couple (dating each other exclusively) or dating casually (concurrently dating other people); can include a sexual component, but does not have to.
- Sexual Partners – individuals who have engaged in at least one sexual act with one another.

In most cases, engaging in sexual activity will create the presumption of an intimate partner relationship, even if it occurred sometime in the past and even if it happened only once. Accordingly, a one night stand that happened six months prior could potentially constitute an intimate partner relationship for the purposes of an IPV analysis, *so long as* there was a preponderance of evidence demonstrating that the subsequent violence or abuse now being alleged was connected to or predicated upon some aspect of the prior sexually intimate relationship.

This often plays out as lingering jealousy, residual anger or resentment, feeling slighted or used, or delayed retribution for some past wrong an abuser felt was committed against them. For example, a male student shoves an ex-lover into a wall because he's jealous of her new boyfriend or love interest. This incident could occur a week or even a year after their breakup and still constitute IPV, given the connection of jealousy to the prior intimate relationship. It is, of course, possible for violence or abuse to have no nexus with the prior sexual activity, in which case the alleged violence or abuse would likely fall under a general misconduct provision (assault, threat, stalking, etc.) and Title IX would not be applicable. As an investigator, your job is to collect all

⁷² Selection of partner, at least in part, on the basis of sex may not be the case with individuals who identify pansexual or gender-fluid, so this is not a blanket statement.

evidence that either proves or disproves the causal relationship between the subsequent abuse and the sexually intimate relationship.

Further, a relationship can be considered intimate even if that relationship has no sexual component whatsoever. An entirely non-sexual relationship can still possess the love, closeness, and intimacy necessary to be considered an intimate partner relationship, and in fact many dating relationships lack a sexual component, particularly in their early stages. Moreover, a non-sexual relationship can still be considered intimate partner even if the parties themselves, for whatever reason, deny that the relationship is romantic. For example, two students may insist that they are not dating and refuse to be labeled a “couple,” perhaps out of embarrassment or as the result of parental or social pressure, and abstain from any sexual activity for religious reasons, but nonetheless appear to observers as being romantically interested in one another. Despite their statements to the contrary, evidence acquired through investigation may indicate that, rather than the purely platonic relationship they would have everyone believe them to have, it is more likely that they are involved in an intimate relationship and simply refuse to acknowledge or publicly profess it.

Collecting Evidence of an Intimate Partner Relationship

So, what do we look for to determine whether a relationship is intimate in nature? The best evidence regarding the relationship between the reporting and responding parties is likely their own statements and how they describe their relationship with one another. Do both deny an intimate partner relationship? Does one say they have been dating for a couple months, while the other says they were never a thing and has never had nor expressed romantic feelings toward the other?

Terminology can sometimes create an investigative hurdle, with older generations using terms like “going out” and “going steady,” while younger generations use terms like “hooking up” and “just talking” and “friends with benefits.” And even these terms can mean different things to different people. In fact, in today’s college culture, “just talking” is often used to describe a more casual stage in the dating progression that comes before “being together,” which is a more common way of saying two individuals are “officially dating.” It is not unusual for couples who describe themselves as “just talking” to be sexually active together. Thus, for an investigator, these types of responses require follow-up questions to clarify what is meant by the descriptor used and what types of interactions it entails.

More often than not, reporting and responding parties will be open about their relationships, making differentiating intimate partner from platonic relationships fairly straightforward. And since most people tell their social circles about their relationships or love interests, there are often witnesses who can corroborate that the two are indeed a couple. Facebook™ usually can, as well, assuming you don’t snoop around privacy settings to see a status. Even in these situations, Investigators must be diligent in collecting and documenting evidence of the intimate partner relationship to firmly establish an allegation as being IPV.

It is when both parties either deny the existence of an intimate partner relationship or when the statements of the reporting and responding parties contradict, with one vehemently denying ever being intimate with or ever having romantic feelings for the other, that the investigator must delve deeper, using all available evidence to discern the true nature of the relationship. In these cases, the witness statements of friends, family members, and classmates are all the more critical. Text messages and social media interactions also tend to offer valuable evidence, as they may be the only physical and documentable form of communication between the reporting and responding parties. For instance, while a responding party may initially deny any intimate or romantic connection to the reporting party, past conversations he had with her via text message, a medium he likely thought to be fairly private at the time, may turn out to be rather compelling evidence. Analyzing how the reporting and responding parties interacted with one another, the types of activities they did together, what language they used when referring to one another, and how their relationship was perceived by witnesses will provide a preponderance of evidence either supporting or discrediting the existence of an intimate partner relationship.

Stalking

Stalking, a term that has made its way into both popular vernacular and culture, can be quite difficult to identify, especially at first glance. As a determination of stalking requires you to consider the totality of the circumstances, a more comprehensive understanding of stalking dynamics will better equip you to render your determination. Let's address what we know about stalking patterns and then proceed to ATIXA's recommended stalking policy. We will then focus on each element of the policy so that you feel comfortable investigating and rendering decisions on allegations of stalking.

Stalking Dynamics and Statistics

There are multiple types of stalking, but the most common by far in the education context is Simple Obsessional.⁷³ This type of stalking occurs when an individual is fixated on another person with whom they had, have, or wish to have, some manner of personal relationship. It is important to note that stalking typically follows an upward trajectory toward violence and there is a significant intersection of stalking conduct and relationships characterized by interpersonal violence.

Studies show that female victims are much more likely to be stalked by men, while male stalking victims are stalked by both male and female perpetrators in approximately equal measure.⁷⁴ Individuals between the ages of eighteen and 24 experience the highest rates of stalking, making colleges a hotbed for this conduct.⁷⁵ Stalking tactics vary significantly, but the most frequently reported tactics are the following: being watched or followed; being spied on with a listening device, camera, or global positioning system; being approached in unwelcome places (e.g., home, school, or work); receiving unwelcome voice, text, or computer (social media or instant) messages; and receiving unwelcome telephone calls, including hang-ups.⁷⁶

Most stalking victims know their stalkers, although the extent and degree of this familiarity varies. The majority of female stalking victims are stalked by current or former intimate partners. Male stalking victims are stalked, in approximately equal measure, by current and former intimate partners as well as acquaintances. Regardless of gender, victims are also stalked by complete strangers and family members.⁷⁷ Most stalkers use more than one tactic to follow, track, and/or pursue their victims and utilize different temporal patterns.⁷⁸ Keep in mind that stalking is unusual in that it may occur even without contact or interaction between the two parties.

⁷³ http://www.esia.net/Forms_of_Stalking.htm

⁷⁴ In 2010, approximately 2,883,000 women and approximately 940,000 men reported being stalked. Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R. (2011). The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. Please note that for the purposes of describing stalking patterns, this section refers to a gender binary because it is commonly covered in research and published studies. The authors fully recognize that trans, transitioning, and other individuals who do not identify with the gender binary experience stalking.

⁷⁵ *Id.*; William J. Fremouw, Darah Westrup & Jennifer Pennypacker, Stalking on Campus: The Prevalence and Strategies for Coping with Stalking, 42 *J. Forensic Sci.* 666-669 (1997); Beth Bjerregaard, An empirical study of stalking victimization, 15 *Violence and Victims* 389-406 (2000).

⁷⁶ NISVS, *supra* at 29.

⁷⁷ *Id.*

⁷⁸ Mohandie, K., Meloy, J.R., McGowan, M.G., & Williams, J. (2006). The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers, 51(1) *J. Forensic Sci.*

In the college context, stalking often goes unreported, and commonly resolves itself when individuals transition out of the community or transition into other relationships. Occasionally, the stalking behavior will re-emerge in a pattern as the new relationship unravels as well. Those who are overly controlling in relationships tend to want to control their partner after a breakup, sometimes, as well. Frankly, truly menacing stalking that escalates to violence is fairly rare at colleges. Mostly, we have messy breakups that have some precursor or light stalking elements, or an inability to let go and have a healthy breakup. What this means is that college Investigators tend to be less familiar with how to investigate stalking, because they simply lack experience due to the low volume of allegations that just aren't nearly as frequent as is reporting of sexual violence or IPV.

Perhaps the most vexing situations for colleges with respect to stalking, in addition to lack of exposure, come from two issues, the first of which is the Title IX/VAWA intersection of stalking, and the second is what we call the issue of lurking. Let's discuss the Title IX/VAWA intersection first.

Under Title IX, stalking has to be either sex- or gender-based. It also has to create a hostile environment under the definitions provided above, to fall within Title IX. Most stalking in the college context won't rise to that level. Then, there is VAWA. VAWA uses a broad definition for stalking, unlike Title IX, and does not impose a requirement that the stalking be based on sex (although most stalking in colleges is sex-based, at least in part). That means, because of the intersection of these laws, that colleges have to address stalking whether it is discriminatory or not. But, as we noted above, colleges don't have to use the VAWA definition as policy; only for the reporting of stalking statistics. That is helpful, because, as briefly described in the VAWA definitions section earlier, the VAWA definition problematically fails to differentiate between lurking and stalking.

Let's dig a little deeper into lurking and stalking and discuss the two in comparison. Lurking is a type of fixation behavior that feels like stalking to the person who is the target. But, the lurker's intentions are very different from the stalker's. The lurker isn't a jilted lover or former partner, typically, but is often an unrequited lover who often does not know how to express their affection in healthy ways. Their attention is unwelcome, but their intention is not menacing. To the contrary, they want a relationship very much. But, unwelcomed romance, or its pursuit, is still creepy. Lurkers tend to maintain a steady-state to their interest, rather than the pattern of escalation over time, leading to violence, that characterizes stalking. The challenge to investigators is that stalkers and lurkers can look similar in pattern to their targets (stalkers have targets, lurkers have subjects), such that lurking is often reported as stalking. And, unfortunately, lurking meets the VAWA definition of stalking, because that definition is so poorly constructed. But, we don't have to make the same mistake with college policy. Understanding these differences will help investigators and fact-finders to differentiate the lurker from the stalker.

“Let’s dig a little deeper into lurking and stalking... Lurking is a type of fixation behavior that feels like stalking to the person who is the target. But, the lurker’s intentions are very different from the stalker’s.”

Where this really comes to a head is with our population of students who are on the autism spectrum. They are prone to fixating, and don't read the social cues of disinterest well from the people on whom they are fixating. Community colleges, in particular, knew exactly where this paragraph was heading as soon as they started reading it, because 98% of what is reported to them as stalking is completely benign lurking by a student who has no malicious intent. If the framers of VAWA knew that its definition of stalking was being used to discriminate against students on the autism spectrum, we are sure they'd be aghast.

Don't get us wrong here, both lurkers and stalkers need to stop their behavior, but disciplining a lurker for puppy dog love or failure to read social cues is harsh and unnecessary. And, sanctioning a student on the spectrum for these kinds of behaviors is often not the best approach to changing the behaviors; sanctioning does not suddenly help someone improve their ability to read social cues or accept rejection. An intervention, coaching, cognitive behavioral therapy and other modalities, however, can help them understand the problematic nature of their behavior. Thus, our definition seeks to maintain that element of menace that differentiates stalking from lurking.⁷⁹

As we noted previously, this means the precursor behaviors in stalking that occur before menace kicks in won't be covered by this definition (and, of course, we want to intervene before the threshold of violence), but the above definition of sexual harassment will cover these behaviors adequately. That, to us, is a better approach than watering down the definition of stalking to the point of meaninglessness.

Model Policy

Stalking is repetitive and menacing pursuit, following, harassing, and/or interfering with the peace and/or safety of another.

Model of Proof

- ☐ Repetitive
AND
- ☐ Menacing
AND
- ☐ Pursuit
OR
 - ☐ Following
Or
 - ☐ Harassing
Or
 - ☐ Interfering
AND
- ☐ With the peace of another
OR
- ☐ With the safety of another

⁷⁹ Again, please note that the impact on the subject can feel the same regardless of intent, so ensure reporting parties receive information on support services.

Rubric

1. Was there interference with the peace or safety of another? If not, there is no policy violation. If so,
2. Was it the result of repetitive and menacing pursuit, following, harassing or interfering? If not, there is no policy violation. If so, there is a policy violation.

Repetitive

One assessment that must be made is whether the action(s) at issue is repetitive (or continuous). While this may seem simple in theory, isolating the conduct in practice is not always an easy task.

To constitute repetitive conduct, there must be at least two occurrences, although the repeated conduct does not have to be of the same type, or a long string of continuous incursions. To determine if the conduct is repetitive, consider the following questions: When did the action commence? Has the reporting party been bothered more than once? When did the reporting party first become aware of the conduct? Is there a pattern that the responding party has employed? Has the responding party used multiple methods to track, follow, or contact the reporting party? Has the conduct ceased or is it still ongoing? When was the last act?

The answers to these questions will help determine if there is more than one action at issue. The conduct need not, and likely will not, be of the same type. For analysis of this element, focus should be placed simply on determining whether there were two or more instances of behavior. If you determine that there was simply one act, you do not need to continue your analysis: there is no policy violation. If there are two or more acts, you must continue to assess the conduct. Keep in mind as well that when someone comes to believe they are being stalked, they are often identifying the behavior because it somehow became obvious to them. In most stalking investigations, however, you will find many steps taken surreptitiously by the stalker well before anything became apparent to their target. Thus, stalking looks very different from the vantage point of the stalker than it does from the vantage point of their target, who will most likely report it to you as a single incident. Whether you can find the precursor behaviors is an open question, but you need to know to look for them, as it is highly likely they are there, if indeed the conduct is stalking.

Menacing

In addition to being repetitive, the conduct at issue must *also* be menacing. In other words, the conduct must intend to control someone, restore a relationship at any cost, or obtain some other desired end for which the stalker is willing to cause harm if they don't get what they want. It is often hard to decipher a stalker's intent to cause harm, but that is what we are looking for. When we can't figure out the intent behind behaviors that include following, pursuit, harassment, or interference, we tend to look at whether the conduct is threatening or meant to frighten or intimidate. We prefer to look at the behavior from the perspective of the responding party, rather than

just the subjective perception of the behavior by the reporting party (e.g., is it *meant* to frighten, rather than just, “is it frightening?”). Menacing is included in this definition to separate stalking from lurking, as detailed above.

In order to ascertain whether the conduct is menacing, it is important to determine the relationship, if applicable, between the parties, both currently and in the past. Understanding the scope and nature of the relationship and interactions between the parties, even if they seem minimal or innocuous at first, will be essential to providing the relationship dynamic insights you will need to determine if stalking is occurring. Communication with both parties, as well as friends, co-workers, and others who may have witnessed or heard about the behavior, is paramount to understanding the conduct at issue and how it is intended and perceived.

There are certain instances where the question of whether the conduct is menacing is incontrovertibly clear, such as repeated threats indicating a clear intent to harm, or repeated online posts with negative comments and information about an individual’s specific whereabouts. There are other situations, however, that are much more ambiguous. Certain behavior, considered in isolation or from an outsider’s perspective, may not seem particularly pernicious, which is why it is imperative to consider the totality of the circumstances, including the scope of the conduct and its effects on the reporting party. A reporting party need not identify or label the conduct as menacing for the conduct to qualify as stalking, because menacing is really about the stalker’s intent. As discussed in more detail below, the standard used to determine whether the conduct is menacing is a reasonable person standard, given the circumstances. Would a reasonable person, placed in the reporting party’s shoes, believe that harm is impending and/or feel threatened by the behavior?

Pursuit, following, harassing, and/or interfering with the peace and/or safety of another

Information gathered in assessing the menacing element of this policy will likely overlap with your analysis of this element, which should focus on the action itself. What has the responding party done? How has the responding party targeted the reporting party? While not at all exhaustive, the below are examples of tactics and actions that could constitute stalking if the other elements of the policy definition are met:

- Unwelcome phone calls, voice or text messages, hang-ups
- Unwelcome emails, instant messages, messages through social media
- Unwelcome cards, letters, flowers, or presents
- Watching or following from a distance, spying with a listening device, camera, or global positioning system (GPS)
- Installing tracking apps or keystroke recorders on electronic devices
- Approaching or showing up in places such as the target’s home, workplace, or school when it is unwelcome
- Leaving strange or potentially threatening items for the target to find
- Sneaking into target’s home or car and doing things to scare the target or let the target know the stalker has been there⁸⁰

⁸⁰ NISVS, *supra* at 29.

Technology also serves as a forum for various stalking methods. Impersonating the target online, spamming the target's email accounts, using passwords to access or hack accounts, and posting information about the target are notably different tactics, but each may constitute stalking. In evaluating the behavior, remain open to different tactics: while there are frequently used methods, there is no "typical" stalking conduct.

Consider as well how the actions have affected the reporting party. Look at changes in behavior and routine to determine if the peace and or safety of the reporting party has been affected. Keep in mind that people experience, and react to, stalking tactics in unique ways and various combinations. Given that, stalking victims often experience one or more of the following:

- Self-blame
- Guilt, shame, or embarrassment
- Frustration, irritability, anger
- Shock and confusion
- Fear and anxiety
- Post-traumatic stress disorder (PTSD)
- Emotional numbness
- Difficulties with concentration
- Flashbacks
- Isolation/disconnection from others
- Vulnerability/trust
- Inability to perform at school
- Depression
- Sleep disturbances, nightmares
- Sexual dysfunction
- Fatigue
- Appetite loss/overeating
- Self-medication with alcohol/drugs
- Attention deficits
- Work performance issues

Determination

To render an accurate and appropriate finding, analyze each component of the policy separately, at least initially. This will provide you with a more complete comprehension of the behavior you are assessing and will make it easier to determine whether there has been a policy violation. All three elements must be present to constitute stalking pursuant to ATIXA's promulgated policy.

In analyzing these three elements, apply a reasonable person standard. Ask questions such as: How would a reasonable person feel if placed in the circumstances at hand? As with the previous analyses using the reasonable person, there is a subjective and an objective element as you consider not only how the reporting party considers the conduct, but *also* how the reasonable person would consider the conduct. Would the conduct at issue be menacing to that reasonable

person? Would it interfere with a reasonable person's peace and/or safety? If the behavior does not constitute the behavior described in this element, and you determine that the conduct would not interfere with the peace and/or safety of a reasonable person, there is no policy violation.

For these purposes, a "reasonable person" is a neutral, rational, cautious individual, without significant eccentricities or foibles, who adheres to societal norms. This could be the reasonable member of a college community, as OCR states, or could be a reasonable person who is roughly the same age, sex and gender identity as the reporting party, placed in the reporting party's shoes, and faced with the reporting party's circumstances. Courts and agencies apply different standards, but we blend various approaches in our own investigations by assuming that it is the reasonable person in the same or similar circumstances.

Other forms of analyses are also important. For example, work with the reporting party to document the actions and create a timeline. If the conduct is ongoing, encourage the reporting party to keep track of the behavior by retaining messages or writing down details, such as the date,

"For these purposes, a 'reasonable person' is a neutral, rational, cautious individual, without significant eccentricities or foibles, who adheres to societal norms."

time, and place the conduct took place. Utilize your IT staff to help you use apps like TrapCall to identify masked caller IDs, learn how to unhide surveillance apps on phones, or identify malware.

As you understand and assess the conduct, keep in mind that reporting parties may not identify or consider the conduct at issue as stalking. The behavior may start out as welcome or merely annoying and evolve, over time and repetition, into behavior that meets the three elements of the policy. Remember that physical or corroborative evidence of stalking may be difficult to

obtain and understanding the context of the behavior and the relationship between the parties is imperative to assessing whether the action constitutes stalking.

Sex Discrimination

Sex discrimination by an institution is, of course, prohibited under federal law. In our models, we also wanted to be explicit that discrimination by third parties, not just by the institution, is prohibited. This section discusses both institutional and individual acts of discrimination.

Model Policy

Sex discrimination: actions that deprive other members of the community of educational or employment access, benefits, or opportunities on the basis of sex or gender.

Model of Proof

- ☐ Action on the basis of sex or gender
- ☐ That deprives a member of the community of educational or employment
- ☐ Access
- OR
- ☐ Benefits
- OR
- ☐ Opportunities

Rubric

1. Was a member of the community deprived of educational or employment access, benefits, or opportunities? If not, there is no policy violation. If so,
2. Was that deprivation on the basis of sex or gender? If not, there is no policy violation. If so, find a policy violation.

The discriminatory effect – the deprivation of access, benefits, or opportunities – in this section is identical to the discussion of that discriminatory effect when it creates a hostile environment on the basis of sex or gender, addressed earlier. Thus, that discussion will not be repeated here. Please refer to p. 21-25 as needed. You may see sex discrimination allegations in hiring, promotion, admissions, athletics, pregnancy/parenting, and a host of other programmatic areas.

Pregnancy

Sex discrimination includes discrimination based on pregnancy and such discrimination is prohibited and illegal in admissions, educational programs and activities, hiring, leave policies, employment policies, and health insurance coverage. Title IX requires that pregnant students be treated the same way as a student with any other temporary disability, and they must be given an opportunity to make up missed work wherever possible. Stated differently, pregnant students cannot be required to provide doctor's notes or medical verification of the need for accommodations if the college does not require such documentation from all others with temporary disabilities. Extended deadlines, make-up assignments (papers, quizzes, tests, and presentations),

tutoring, independent study, online course completion options, and incomplete grades that can be completed at a later date, should all be employed, in addition to any other ergonomic and assistive supports typically provided by your Disability Services office.

The college should take measures that enable appropriate treatment of a pregnant student, which includes granting the student leave or accommodations as long as deemed medically necessary. Medical necessity can be dictated by the student's physician.

To the extent possible, you should take reasonable steps to ensure that pregnant students who take a leave of absence or medical leave return to the same position of academic progress that they were in when they took leave. In some cases, this is not possible, but the onus is on the college to restore the student as closely as possible to their pre-leave status. The Title IX Coordinator should have the authority to determine that such accommodations are necessary and appropriate, and to inform faculty members of the need for such accommodations. Faculty and staff need to be trained accordingly. Indeed, one of the most significant problems with pregnancy discrimination is the unwillingness of faculty or administrators to accommodate pregnant students. Many employees are so concerned that a student will abuse the accommodations that the employee refuses to provide what is necessary. You need to help them get over it. Willingly provide academic and additional support, resources, and accommodations to pregnant students and those students who are parenting who experience childbirth-related medical needs for class absence and/or accommodation for a reasonable period of time post-delivery.

Athletics

Before embarking on a discussion of sex discrimination in athletics, it is critical to understand the historical context. Both prior to its passing and since it was enacted, college athletics has asked repeatedly to be exempted from Title IX – and that request has been soundly rejected every time. In fact, it was college athletics that was one of the earliest programs to receive additional regulatory insight from the Department of Health, Education and Welfare (HEW)⁸¹ under Title IX. This policy interpretation was released in 1979, and forms the foundation of an examination of sex discrimination under Title IX. It is known as “The Three Part Test,” that addresses institutional Title IX compliance in terms of male and female student-athlete participation. While compliance with at least the test is required, it can also assist Title IX coordinators to determine whether there are glaring inequities in athletics.

Remember, at the heart of Title IX is a mandate for equity in offerings of educational program opportunities for men and women – including athletics. The mandate extends not just equity of opportunity, but of benefit and experience. In the athletic arena, Title IX compliance centers on the student-athlete experience; are the experiences of male and female athletes equitable?

This section is designed to give the Title IX coordinator enough information to know how to begin to ask the right questions, scratch the surface, and begin to recognize the early signs of sex discrimination – it is not intended to be an instructive discourse on a full athletic audit.

⁸¹ When Title IX was passed in 1972, regulatory oversight was assigned to the Department of Health, Education, and Welfare (HEW). When HEW was replaced by the Department of Education and the Department of Health and Human Services in 1980, regulatory oversight for Title IX shifted to the newly-created Department of Education.

To be compliant with the Three-Part Test under Title IX, a school need only meet **one** of the parts. The Three-Part Test is:

Part 1: Opportunities for males and females substantially proportionate to their respective enrollments.

To meet Part 1, schools will typically look at a snapshot of their full-time enrollment (not usually including on-line only enrollment, as those students would typically not be able to participate in sport) in the fall. Then the number of opportunities offered to men and women should very closely mirror this enrollment. Note that for most colleges today, women represent between 50%-65% of enrollment, necessitating a shift for many programs around the country.

Part 1 is truly the aspirational part, and luckily, there is a form that all colleges fill out that gives us a look at the raw data. It is located at <https://ope.ed.gov/athletics/#/> and an administrator can review a lot of data, discussed more in depth below. But for Part 1, the first number to check is the Participant List. This will include total and unduplicated participants (there can be dual/triple sport athletes – very common is indoor/outdoor track). The overall number should reflect the enrollment percentages of men and women, but sometimes you have to look inside the numbers to find a culture of discrimination.

Here are some common red flag examples, that may require more information:

- Stacking a team. There are 37 men on the baseball team and 58 on the women's softball team. Clearly, players numbered 38-58 on the softball team are likely not having the same experience as the others. This is sometimes done to add female members to the overall numbers (or males, if the opposite is true) to reach Part 1. It doesn't have to be apples to apples either, in terms of the same sport for men and women. The softball team in this scenario may have 35, but the women's volleyball team could have 30 (usually around 20 is normal).
- Counting an athlete multiple times. This is a bit harder to note, but there have been instances where the same woman runs indoor track, outdoor track, and cross country, but she gets counted as three women; while her male counterpart gets counted as one man.
- Counting practice players as a different sex. Occasionally, some women's sports (e.g., basketball) will use males as practice squad players. Those men are afforded opportunities that females are not. Some schools attempt to count them as women to boost their numbers. This is not common, but is illustrative of why you must look inside the numbers.

These are just a few ways schools have found to cheat over the years – your compliance officer in athletics should have reports and data to help you (e.g. rosters).⁸² There are also resource materials that can help you to begin an internal audit.⁸³

⁸² Beware the department that cuts men's sports to achieve equity, as this can have a harmful effect on the culture in the department. Imagine the Athletic Director saying, "Well, we had to cut men's golf to be compliant with Title IX, so those guys are just gone. I didn't want to, but what was I going to do?" The feeling will very likely be one of animus towards the female athletes and coaches, as a result.

⁸³ <https://titleixspecialists.com/title-ix-books/>

Part 2: Where one sex has been underrepresented, a history and continuing practice of program expansion responsive to the developing interests and abilities of that sex.

This Part is suffering as of late, as Title IX has been in place for 45 years and athletics has been around for all of them. Title IX coordinators should look at the strategic plan for growth of the underrepresented sex (typically women) in sports, to assure that the department is sticking to that plan and is able to demonstrate a continuing practice that is in fact expanding opportunities. A key variable with this part is “continuing practice,” as that requires an active strategic plan demonstrating where the program has been and where it is going, to achieve compliance. Simply adding a women’s sport every four or five years is unlikely to fulfill this part as there should be a deliberateness to the actions taken.

Part 3: Where one sex is underrepresented and cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program.

This Part requires a fair amount of documentation, and surveys of (typically) female students’ interests should be done to support the proof of Part 3 compliance. Club sports can be fostered toward becoming varsity sports or varsity sports can be created from scratch (if a school can start a football program from nothing, surely a women’s lacrosse team can be established as well.) All the data seems to point to women having a growing interest in sport (one need only look at the last U.S. Olympic team, which fielded more women that medaled than men), so a college saying that women just aren’t interested seems to be facially questionable as a statement. The question in response to that is, have we created the right opportunities and experiences for them to have interest and thrive? Schools need to look at what competition opportunities are available in the region or conference, and whether creating a new team would allow those athletes to participate in the same level of competition as other athletes. Simply elevating a sport to intercollegiate status will not fulfill this part if there are not other intercollegiate programs in the conference or surrounding area against whom the team can reasonably compete.

“The Laundry List”⁸⁴

Once opportunities have been looked at using the three-part test, the next step is to gauge the kind of benefits, kind of opportunities, and kind of treatment, and the availability and quality of all of these – otherwise known as “The Laundry List.” This list includes:

- Equipment and supplies
- Scheduling (games and practice times)
- Travel and per diem allowance
- Assignment and compensation of coaches and tutors
- Opportunity for coaching and academic tutoring
- Locker rooms and other facilities
- Medical and training services
- Housing and dining services

⁸⁴ www2.ed.gov/about/offices/list/ocr/docs/interath.html

- Publicity
- Recruitment of student athletes
- Provision of support services

Looking into discrimination in these areas requires significant attention to detail and we strongly recommend tracking these areas closely each semester. Even in light of the significant guidance and direction in these areas, there are, unfortunately, still some very obvious examples of students being treated disparately, or in more direct terms – discriminatorily.

In analyzing the Laundry List, colleges should keep in mind that the primary principle is comparing the student athlete experience between men and women. Their experiences should provide them with substantially similar opportunities and benefits. Their experiences, equipment, and resources need not be identical, but should be of the same quality and availability across all male and female student athletes.

Equipment and supplies. This does not require a one-for-one comparison. For example, just because the men's soccer team received new uniforms this year doesn't mean the women's team necessarily gets new ones, too. One needs to look holistically at the department's strategic plan for equipment and uniform replacement. Some equipment lasts longer than others. Some equipment costs more than others (e.g. horse stables and care costs more than soccer equipment; football uniforms cost more than basketball). Some logos change. Some equipment requirements change. But if the school alters its logo, and only football and men's basketball get updates, that is a red flag.

Scheduling (games and practice times).

Do the teams have equal access to practice facilities? Does that access take into account academic schedules? It is all well and good that the men's and women's soccer team both have the field for the same amount of time, but if one gets to practice at 6pm and one at 9pm, there could be an equity issue (easily resolved by rotation). The same goes for games – are they scheduled in a manner that is conducive to attendance (which can affect experience) and academics?

“In analyzing the Laundry List, colleges should keep in mind that the primary principle is comparing the student athlete experience between men and women. Their experiences should provide them with substantially similar opportunities and benefits.”

Travel and per diem allowance. Is one team staying in the Hilton Garden Inn™, and the other in the Super 8™? Is one team staying two-to-a-room, while another is staying four-to-a-room?⁸⁵ These numbers are easy to gauge. They are either comparable or they are not. Be on the lookout for “donated” food, too. Whenever we see on TV the buffet meals provided for a football team, you have to wonder what the bill is per player, and if the women's lacrosse team is eating that well?

⁸⁵ One coach actually told me that the football players needed their own rooms in a nicer hotel than any other sport because, “They're bigger than the girls.”

Assignment and compensation of coaches and tutors. This one is a little more difficult to measure, because coaches' salaries are largely market driven. That said, the quality of the coach is the key variable. Stated differently, are the student athletes receiving comparable quality coaching? If a school goes on a search to hire the best men's basketball coach they can, and he has a resume that includes championships and tournaments, but they pick a women's head coach with little-to-no experience, it is a possible red flag. However, if both teams are successful and both coaches are good, the disparity may be compliant under Title IX. Again, the variable is the quality of the student athlete experience, not necessarily the comparative resumes of the coaches themselves. The Equity in Athletics Data Analysis (EADA) report⁸⁶ prepared by each athletic department on an annual basis gives a nice overview of how many full-time, part-time, and volunteer coaches are assigned by sport. In tutoring, how are the tutors compensated? Does one team have more per capita than another? Are they athletic department tutors, but one sport gets first access or more access? Again, the answers may require a deeper dive *and* a 50,000 foot view.

Opportunity for coaching and academic tutoring. This is similar to the above, but focuses on the opportunities available for people to participate in these areas.

Locker rooms and other facilities. Take a tour of the locker rooms, stadiums, and arenas. This is an area where one-to-one measurements matter. Sometimes literal measurements – like measuring the men's and women's locker rooms for the same sport. (Basketball is always an interesting one.) Where there is inequity, what is in the works for improvement? How soon? The horror stories here abound. Example: a school built a million dollar baseball field, while the softball team shared the city softball field. Media boxes, dugouts, bleachers, benches, and weight rooms all matter here.

Medical and training services. Quality, quantity (per capita), and availability. These should be easy questions to which to get answers.

Housing and dining services. See above on per diem. Generally, all the athletes live in similar housing and eat at the same facility (sometimes the same as all the rest of the students). The food at the "athletic dining hall" (if there is one) tends to be better/healthier than the general student body has access to,⁸⁷ and usually there is not a dining facility for just one sport. If there is, that is a problem.

Publicity. Walk around campus. Look at posters, marketing, media guides, and advertisements. Departments have improved in this area over the last several years. Look in the department's offices – are the trophy cases equitable (assuming championships have been won)? It's the little subliminal messaging that can cumulate like a micro-aggression – setting the tone and culture of the whole department.

⁸⁶ <https://ope.ed.gov/athletics/#/>

⁸⁷ This has changed significantly over the years, as student dining has improved dramatically – in choices and in quality; in some cases, rendering the "athletics dining facility" a moot point.

Recruitment of student athletes. Look at budgets, schedules, and the number of players needed. For some, travel may cost more (some better recruits for certain sports come from overseas), so the answers are not always obvious.

Provision of support services. The truly 50,000 foot view. If a male athlete needs other support (mental health for example), does his team have access to resources that a women's team does not? Does the women's team have access and the men's does not? Look at ALL the other areas where the department provides support for teams and aim for equity in all of these areas.

Booster money and car washes. While these are not in the laundry list, they warrant a quick mention. The enforcing bodies have been relatively consistent in this area. If a donor wants to give \$50,000 to baseball, it is not immediately incumbent on the department or college to give \$50,000 to softball, but they need to match the improvement in a timely fashion and on a departmental level, not just with the comparable sport. This is why donors are increasingly asked to give to the department (or institution), not a sport. The same concept applies when a team raises its own money (e.g. car wash, bake sale). The department needs to make up the difference departmentally to achieve gender equity. That said, if a Title IX administrator sees the water polo team having a bake sale, the administrator needs to ask why that team is raising its own money when the other teams seem to have enough. (Note: sometimes it is innocent, e.g., one team wants to play in an off-season tournament out of the country that was not originally budgeted for.)

As a reminder, this is just scratching the surface. In order to be vigilant in this arena, the Title IX Coordinator will need to, at a minimum:

- Get to know the compliance officer
- Get to know your coaches
- Have a good working relationship with the Athletic Director (AD) and senior staff, as well as the Senior Woman Administrator (SWA).

The Title IX coordinator should also:

- Get the EADA report and the strategic plan
- Do focus groups or interviews with athletes and coaches
- Work with athletics on developing interest and abilities surveys
- Tour the facilities
- Go to games and practices
- Get copies of all marketing and media materials
- Also, most association and conference rules mirror the law (for the most part), but be familiar with those rules, too.

While it may be that one or two large potential violations create a Title IX issue for your college, it is just as likely to be the "death by a thousand cuts." Lots of small problems that culminate in a culture that devalues one gender is an insidious form of discrimination. This may manifest in language, attitude, money, marketing, or planning. Look at the big picture, as well as the details. Sadly, this devaluing culture is also what can contribute to the harassment and assaults mentioned above. Finally, Title IX coordinators should be reminded that these same rules apply to

recreational, club, and intramural sports: are they all offered and supported in a gender-equitable, non-discriminatory fashion?

Admissions

Undergraduate private college admissions are exempt under Title IX and may discriminate on the basis of sex. Admissions and access to higher education were one of the primary targets of Title IX when it was first enacted, and it does require all graduate programs, vocational programs, professional education (whether public or private), and public universities to conduct admissions and recruitment activities that are non-discriminatory on the basis of sex and gender. As a result, the Title IX coordinator should regularly examine the annual admissions data by gender, in all colleges/schools, programs, course access, as well as graduate and professional programs and opportunities, as well as by college (read: major and/or department), as well as access to upper level and graduate programs, because “admissions” also includes access to these programs.

For example, let’s look at a field historically dominated by one sex: nursing. Let’s say that 5% of the students admitted to the Nursing Program are men. The Title IX Coordinator asks why and is told that the pool of applicants was only 10% men, and only the 5% were as qualified as the 95% of the women who were admitted. That sounds good, but a deeper analysis should be done. First, is that statement true? Second, why was the pool only 10% men? Is this true whether we

“The Title IX Coordinator should regularly examine the annual admissions data by gender, in all colleges/schools, programs, course access, as well as graduate and professional programs and opportunities, as well as by college (read: major and/or department), as well as access to upper-level and graduate programs.”

are discussing a two-year program or admission to the last two years of a program? Why is the program not recruiting for gender equity, especially in a field so in demand? Is there something about what is being said or done in marketing to subliminally discourage men from applying (e.g., are there any male faculty or staff members)?

The same analysis could apply to teaching, engineering, computer science, welding, or aviation. It is notable that, not so long ago, law school was disproportionately male. But changes in recruiting, admissions materials, and access have changed that over the last 30 years, and subsequently changed the world. Almost every program that has historically been dominated by one sex has great recruiting materials

designed to create more balance – so why isn’t the program in review using them?

The same goes for program completion and success. Most colleges do a good job with this, but if there is a statistical drop that disproportionately affects one sex more than the other, the Title IX coordinator needs to examine that. This will mean talking to students, faculty, academic advisors, and more. The Title IX coordinator will need to look at placements for clinical rotations,

grade distributions, and maybe even sit in on some classes to see how the “feel” is for the minority sex. Much like athletics, it may not be one or two glaring things, but a culture that has developed over time.

The Title IX coordinator will need to have access to all the information referenced above, and should be very wary when told they can’t have that access. It is imperative that the academic departments and the admissions office understand that the Title IX coordinator’s role is consistent with theirs, as well as with the institutional mission – to increase diversity in all programs and ensure all students’ success.

Student Organizations

Since the Supreme Court’s 2011 “all-comers” ruling in *Christian Legal Society v. Martinez*,⁸⁸ most colleges have implemented membership requirements for student organizations to accept all-comers. Many colleges have robust anti-discrimination statements, and tout all-comers policies, yet allow a number of single-sex student organizations to persist. This conflict between policy and practice creates a Title IX issue that should be addressed. Unless Title IX provides an exception allowing single-sex membership (as it does for fraternities and sororities), student organizations are expected to allow all participation by all genders.

Pageants, Date Auctions, Rate the Incoming Class, walk through campus sing-alongs, and other “fun” events can create a culture that is not only overtly hostile and discriminatory, but one that also discourages reporting because of fear of destroying tradition or not being able to join the groups. And while Greek Life comes to mind immediately, bands, clubs, and honor societies (and their alumni) are certainly not immune from engaging in overtly discriminatory behaviors that create a hostile environment.

The Title IX coordinator needs to work closely with student affairs or student involvement offices to get a better understanding of why a potentially problematic event is being planned or has occurred. How long has it been going on? What was the original intent of the tradition? (Not all of them started out to be offensive or discriminatory.) This may make it easier for the Title IX coordinator to effect change, as opposed to the head-on “This stops now!” approach that may not garner the support of even senior administration. Of course, there are some events that just cannot go on any longer (the Yale parade of male students while chanting “No means yes, Yes means anal!” from several years back comes to mind⁸⁹), but some can be modified to address their original intent. One common example is shifting from Homecoming King and Queen to “Homecoming Court.”

Lastly, much like in admissions, the Title IX coordinator may note trends in certain groups that were designed to be co-educational, but where one sex does not seem to thrive or stay in the club. The Title IX coordinator can and should ask why this is the case. Sometimes an allegation will generate the inquiry, but not always. Student Affairs/Student Life keeps records on club ros-

⁸⁸ 561 U.S. 661 (2011)

⁸⁹ <http://www.reuters.com/article/us-sexual-harassment-yale-idUSTRE74H06W20110518>

ters, and could be able to provide trend analysis if asked.⁹⁰ Again, the Title IX coordinator should be wary when met with resistance – but aware they may have stumbled on to a “tradition” or ways that some groups have found to subtly exclude one sex or gender.

Religious Exemptions

Some faith-based institutions have asked for religious exemptions from Title IX, particularly in the areas of sexual orientation, gender identity, and transgender status. They have asked for immunity in the areas of admissions, housing, and discipline. To date, OCR seems willing to grant these exemptions when asked and, given the current administration, this is not expected to change in the near term. The Title IX coordinator of the faith-based school should be aware when these requests are made, and, offer suggestions and advice for how broad an exemption to request or how it should be implemented. For example, the Title IX coordinator can use survey and focus group data to inform how the college can best support its LGBTQIA communities in light of the exemption. The Title IX coordinator should be among those leading the college’s efforts toward equity and inclusion, and this may put them at odds with other institutional leaders. In such times, the Title IX coordinator can focus the discussion on the core principles of gender equity and access, or the practical issues of recruitment and retention, rather than on morality, religion, or politics. Treating all students with equal dignity is Title IX’s rallying cry.

⁹⁰ An example: The scuba club was almost all male. This seemed odd, and, upon examination, it was learned that a tradition (with the blessing – and at times participation – of the advisor) was a naked gauntlet that had to be run through the evening before the first dive. No one was excluded from this “voluntary” event, and some women who joined the club were told how excited the “upper class” members were to see them that night. So most dropped out. But no one complained until questions were asked later.

Gender Discrimination

Model Policy

Gender discrimination: actions that deprive other members of the community of educational or employment access, benefits, or opportunities on the basis of sex or gender.

Model of Proof

- ☐ Action on the basis of sex or gender
- ☐ That deprives a member of the community of educational or employment
- ☐ Access
- OR
- ☐ Benefits
- OR
- ☐ Opportunities

Rubric

1. Was a member of the community deprived of educational or employment access, benefits, or opportunities? If not, there is no policy violation. If so,
2. Was that deprivation on the basis of sex or gender? If not, there is no policy violation. If so, find a policy violation.

Discriminatory or harassing actions can take many forms, including physical, verbal, written, and/or digital form, and could include conduct that is threatening, harmful, intimidating, or humiliating. It is important to recognize that not all conduct that is unwelcome or unpleasant will rise to the level of gender-based harassment. In order to be categorized as gender-based harassment, the conduct must: (1) target others based on their gender identity or expression, and (2) be sufficiently severe, pervasive, or persistent, and objectively offensive, that it limits the student's ability to participate in or benefit from opportunities offered by a school. Whether there was an *intent* to harass on the part of the responding party is not part of the analysis in determining whether gender-based harassment and/or discrimination occurred; only evidence of discriminatory *effect* is relevant, though evidence of intent would be an aggravating factor.

Gender-based discrimination is a subcategory of sex-based discrimination and describes conduct that targets others on the basis of their gender identity or gender expression (e.g., their failure to exhibit the stereotypical characteristics of their gender, or their failure to conform to traditional norms of masculinity or femininity).

Gender and Gender Identity: Understanding the Terminology

An individual's "gender identity" is the "internal sense of gender." This may be different from the sex (male or female) which that person was assigned at birth, as it is captured on the birth cer-

tificate. An individual is “transgender”⁹¹ when their gender identity is different from the sex which they were assigned at birth. A “transgender female” is someone who identifies as female, but was assigned the sex of male at birth, and a “transgender male” is someone who identifies as male, but was assigned the sex of female at birth. “Gender transition” describes the process by which an individual changes their gender identity, and it can include dressing differently, adopting a new name, and/or changing the preferred pronouns (he/she/they) by which they wish to be addressed to be consistent with their new gender identity. It does not need to include hormones, physical or bodily expressions of transition, or gender reassignment, but it can if the transitioning person chooses to do so.

Gender expression is how an individual outwardly manifests their inner gender identity to the world. An individual’s gender expression may or may not match their internal sense of gender, or it may do so only at certain times. While sex is viewed largely as a binary – male or female – the concept of “gender” is better understood as a spectrum. While an individual’s gender expression may be masculine or feminine, some people prefer to express in a way that is gender-neutral or gender-fluid.⁹²

Students, staff, and faculty have a right to be treated equitably regardless of their gender identity, just as they have a right to be treated equitably regardless of their sex. This means that schools have an obligation to ensure that transgender, transitioning, and gender non-conforming stu-

“While sex is viewed largely as a binary – male or female – the concept of ‘gender’ is better understood as a spectrum.”

dents are provided equal access to educational programs and activities, notwithstanding the objections of peers, parents, or members of the community. The desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students. If schools segregate the sexes for the

purpose of accessing academic and/or extracurricular activities, facilities, and accommodations, transgender students must be allowed to access and participate in those activities, accommodations, and facilities that are consistent with their gender identity. Put another way, schools that segregate should only do so by gender identity/ expression, not sex. Schools may not impose requirements on transgender students that are not imposed on other non-transgender students.

Sexual orientation and sex discrimination

Title IX does not prohibit discrimination that is based exclusively on sexual orientation. However, it is not uncommon for discrimination/harassment on the basis of sexual orientation to cross over into discrimination/harassment on the basis of gender identity and expression. For example, if someone is harassed because, as a gay individual, he/she is failing to behave as others expect him/her to, including expressing interest in members of the same sex, that can result in a hostile environment for that individual, and it can effectively limit the ability of that individual to access or participate in the school’s educational programs. Here is an example implicating gender discrim-

⁹¹ We recognize that many prefer the use of other terms such as trans, transmale, transfemale, etc. We have used transgender as that is the term used most often by OCR and the courts.

⁹² <http://www.transstudent.org/gender>

ination, not harassment: if an administrator says, “I won’t hire gay men because I don’t believe in their lifestyle,” Title IX is not implicated (perhaps non-discrimination policies at your college on sexual orientation would be, though.) But Title IX *is* implicated when an administrator says, “I won’t hire gay men for the job because they’re not man enough to do it.” Implicating masculinity or femininity implicates gender.

Sexual orientation, gender identity, or expression of the responding party

The actual or perceived sexual orientation, gender identity, and/or gender expression of the person engaging in gender-based harassment do not dictate whether that conduct constitutes gender-based harassment. It is not uncommon for people in civil rights contexts to assume that those who are engaged in harassment or discrimination cannot have engaged in the alleged conduct if they possess similar characteristics to those they have allegedly targeted. For example, the assumption may be made that a transgender male cannot discriminate (either constitutionally or by law) against a transgender male subordinate on the basis of gender identity. Such an assumption would be wrong. Harassment and discrimination are not limited to people who are not members of the group that is being targeted for harassment/discrimination.

Sexual orientation, gender identity, or expression of the reporting party

Similarly, the actual sexual orientation, gender identity, and/or gender expression of the individual alleging harassment are also not relevant to the question of whether the conduct by the responding party constitutes gender-based harassment. In other words, if someone is targeted for failing to conform to traditional norms of femininity, their actual sexual orientation (or what others perceive it to be) is irrelevant to the question of whether they were the target of gender-based discrimination. Whether someone is *actually* lesbian or transgender, or *actually* gay or heterosexual, is also not relevant to whether they were harassed or discriminated against on the basis of gender. For example, if a man is harassed for being atypically effeminate, it is not relevant to the investigation whether he is, in fact, gay. Put another way, if the man is heterosexual, it does not negate any conduct directed toward him on the basis of his real or perceived gender non-conformity or expression.

Retaliation

Retaliation is a form of sex discrimination that is prohibited largely to promote reporting of, and cooperation with, investigations and policy resolutions involving harassment and discrimination.

Model Policy

Retaliation is defined as any adverse action taken against a person participating in a protected activity because of their participation in that protected activity.

Because retaliation is a separate form of discrimination (and potentially harassment, as noted above), institutions should conduct a prompt, thorough, reliable, and impartial investigation into the alleged retaliation that is in addition to its investigation of the initial allegation or protected activity. As a result of the chilling effects retaliation may have on reporting and participating in sex/gender discrimination investigations, determinations of retaliation warrant serious sanctions.

Model of Proof

The model of proof for retaliation is simple because our definition is not complex:

- ☐ Adverse action
- ☐ Taken against a person participating in protected activity
- ☐ Because that person was engaged in protected activity

Rubric

1. Was there any adverse action taken? If no, policy has not been violated. If yes,
2. Was the adverse action taken against someone who is/was participating in protected activity? If no, policy has not been violated. If yes,
3. Was the action taken because the person was engaged in protected activity? If no, policy was not violated. If yes, policy was violated.

For retaliation to exist, the first question that must be answered is:

Did the reporting party engage in protected activity?

This is usually a straightforward analysis and common examples of protected activity are:

- Reporting sex discrimination, including sexual harassment and assault
- Filing a discrimination complaint
- Assisting someone in reporting discrimination or filing a complaint
- Participating in any manner in a discrimination investigation (such as a witness)
- Protesting any form of sex discrimination (e.g., lack of equity in athletics)

If an individual has engaged in protected activity, the next step is to determine whether the individual has been subjected to an adverse action.

Was the reporting party subsequently subjected to adverse action?

If there is no adverse action, the claim of retaliation fails. It is critical to note that while some actions are retaliatory in nature, they can be largely non-actionable. Social isolation or ostracism of the person who engaged in the protected activity, or treating that person rudely or meanly, may not be something that warrants discipline for retaliation. Institutions should still address it informally as they are able, but retaliation policies do not necessarily protect an individual from being treated differently or poorly by peers or others. It does, however, protect against actions or treatment that substantially impact a person's ability to engage in the college's educational or employment program.

Actionable adverse actions come in many forms, such as:

- Negative performance evaluation
- Demotion
- Termination
- Receiving a bad grade
- Discipline
- Removal from a committee

If an individual has engaged in protected activity and then is subject to adverse action, move to question three:

Do the circumstances suggest a connection between the protected activity and adverse action?

Common questions in determining a causal connection would be a) Whether the individual accused of retaliation knew about the protected activity? and b) How soon after the protected activity did the adverse action occur?

If the alleged retaliator was unaware of the protected activity, there is no retaliation. This is because establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate. Intent can be difficult to determine and must often be inferred from the evidence. For example, a faculty member who gives a student a bad grade on an assignment, yet does so without being aware that the student has filed a harassment allegation about the faculty member, cannot be held responsible for retaliation. Even if the faculty member is aware of the allegation, an investigation would still have to determine whether the bad grade was motivated by the student's allegation.

If the circumstances suggest a connection between the protected activity and the adverse action, this creates an inference that retaliation is present. From an investigation standpoint, it is now up to the person(s) alleged to have engaged in the retaliation to rebut or refute this inference.

What is the stated non-retaliatory reason for the adverse action?

For example, the following non-retaliatory reasons would support the adverse action as being appropriate and therefore not retaliatory:

- The explanation for why the adverse action was taken makes sense.
 - E.g.: The work performance of the person who engaged in the protected activity warrants negative action, a new supervisor with a different approach or new expectations.
- The adverse action was consistent with established policy or practice.
- No adverse action was taken against others who engaged in protected activity.
- The reporting party was treated the same as other individuals.

“Just because someone has engaged in a protected activity does not mean they are immune from legitimate adverse actions.”

If the explanation provided is not legitimate on its face, retaliation is present. If, however, the explanation makes some sense based on the context and other evidence, go to the next question. Just because someone has engaged in a protected activity does not mean they are immune from legitimate adverse actions.

Once reasons for the adverse action are provided, the heart of the investigation rests on the final question:

Is there evidence that the stated reason is legitimate, or is it a pretext?

The following can undermine the legitimacy of the adverse action and strengthen the claim that the adverse action was motivated by the reporting party’s protected activity:

- The explanation given for the adverse action is not credible.
- Other actions by the same individual are inconsistent with the explanation.
- The explanation is not consistent with past policy or practice.
- There is evidence of other individuals treated differently in similar situations.

While context dependent, if the stated reason is legitimate and is consistent with current and past practices and the individual has not been singled out, there is typically no basis to find that retaliation has occurred.

ASSESSMENT, ANALYSIS, AND RESOURCES

Credibility

The next section of this *Playbook* turns us from the models of proof to additional information that will aid in your assessment and analysis of policy violations from an evidentiary perspective, specifically: how to assess credibility.

Don't Lie to Me: Common Errors in Assessing Credibility Effectively

According to the Equal Employment Opportunity Commission's (EEOC) *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* dated June 18, 1999,⁹³ the five factors to include in assessments of credibility are:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

In the context of investigations, credibility is the accuracy and reliability of evidence. To assess credibility, you have to evaluate the source, the content, and the plausibility of the information offered. When source, content, and plausibility are strong, credibility is strong. Credibility can be thought of existing on a 100 point scale, with the most credible evidence being 100%, and the least credible evidence being worth 0%. Evidence is rarely 100% credible or 0% credible; most evidence falls somewhere in between. Your job is to figure out where credibility falls on the scale of 0-to-100%, especially where evidence is evenly split and the finding hinges on the credibility of the parties.

As you weigh evidence to determine whether a preponderance of evidence supports a finding of responsibility, each and every piece of relevant evidence must be evaluated for its credibility. If a piece of evidence is more credible than not, then it is considered credible and can impact, at least to some degree, the broader preponderance analysis. If evidence is not credible (i.e., less than 50% credible), it does not tip the preponderance scale in favor of that evidence. Importantly, regarding a piece of evidence as not credible does not mean the evidence has no impact on the finding. Evidence that is not credible may tip the scale in the opposite direction if it undermines the credibility of other evidence. For example, if one of the parties puts forth a witness who provides testimony that is patently false, depending on how far along the continuum the witness's

⁹³ <https://www.eeoc.gov/policy/docs/harassment.html>

testimony is toward zero percent, that witness's testimony may also have a negative impact on the credibility of the party who provided the witness. Evidence often interlinks to form a complex web of interrelated parts. When one piece lacks credibility, that can impact the credibility and weight of the other pieces. But, credibility is not an on/off switch; usually witnesses provide evidence that is a mixture of credible and not credible. One false statement does not mean you can't believe anything the witness tells you.

Credibility is best established through corroboration, which is obtained through sufficient independent evidence supporting the fact(s) at issue. Corroboration is not merely another witness who agrees with the first witness, as they could be lying to support each other. Rather, corroboration consists of *evidentiary support* for the information the original witness presented. For example, if a witness testifies that several people took a Lyft™ home from the bar, corroboration might consist of a Lyft™ receipt.

Credibility is multidimensional, in that a witness's location and position can impact the credibility of their statement(s). Could a witness actually hear what they say they heard? See what they say they saw? Know what they claim to know? Some aspects of credibility are based on credentials, knowledge, and expertise, but these factors need to be established through verification and foundation, not assumed. Other aspects of credibility are based on neutrality, impartiality, and objectivity. Neutral witnesses (who have no loyalties to the parties) may be more objective than partisan (biased toward a specific party) witnesses. The more loyal witnesses are based on their relationships to one party, the more biased their evidence may be.

Lack of temporal proximity or proximity to the source of information detracts from credibility and is relevant to both you and those you interview. What someone witnessed in person is most valuable. What they heard from the responding party about the incident after the fact is less valuable, and what they learned after the fact from the responding party's best friend about what the responding party told her is even less valuable.

Temporal proximity can also affect credibility, particularly since incidents are often not reported until days, weeks, months, even years later. Be mindful of witnesses using qualifiers like, "I think," "I'm pretty sure," and "I seem to remember," particularly when a significant period of time has elapsed since the incident. Through follow-up questioning, you need to distinguish between those details the witness is sure of from the details the witness remembers less clearly. Inconsistencies, memory errors, or contradictions in recall regarding details the witness is admittedly unsure about may be less damaging to that witness's credibility than if the witness had stated that they were absolutely sure. Involved parties may also write down certain events in a diary, blog, or letter/email/text to a friend or family member. This type of written memoranda may serve as corroborating evidence for that witness's eventual statement to an Investigator. Documents such as diaries, calendar entries, journals, notes, texts, emails, or letters describing the incident(s) can add to credibility, but can also be manufactured after-the-fact. The adage, "Trust, but verify," is a good rule to live by.

Another important aspect of credibility is the inherent plausibility of the evidence offered. Given what you know, does the story make sense? One way to articulate inherent plausibility is to use logical connections and extensions, known as abductive reasoning, to support a plausibility argument. Plausibility stems largely from triangulation, which means using two (or more) data points to extrapolate or infer that a third data point is more likely than other possibilities. If X and Y are true, Z is more likely to be true than W, another alternative possibility. The result is a belief in the inherent plausibility of the information.

Example of Triangulation

Henry, a male student, fondled the breasts of a female student without consent, and admitted it. This is our X. Henry also tried to give a hand job to a male student, and claimed he had consent, but it was determined by a preponderance of the evidence that he did not have consent. This is our Y. Z, a third potential victim, then came forward and alleged that he believed his penis was fondled by Henry one night while sleeping in Henry's room, but isn't positive, because he was asleep and believes that Henry likes girls.

Given the above, what does the information we know about X and Y allow us to conclude about Z's allegation? By triangulating X and Y, we can believe the inherent plausibility of Z's allegation.

As the Investigator, we know that Henry likes to touch female breasts but we also know that he likes to touch penises. We have no idea if that means he likes men, and that is not of concern to us as the Investigator. But I know X does not rule out Z. Y makes Z more plausible than W, an alternative explanation we might have. We also know that Henry has fondled a penis before without consent, and that Z has no idea about X and Y. Thus, Z's belief that he was fondled while sleeping is not influenced by anything but his own belief. He can't fully self-corroborate, because he can't say for sure that the conduct occurred, because he was asleep. But, triangulating from X and Y makes Z more likely than not, because both are part of a pattern that Henry has exhibited before, and Y occurred under very similar circumstances to Z.

This is how abductive reasoning assists in assessing the inherent plausibility of the alleged assault on Z: We don't depend on the weight of Z's evidence, itself; and, while we may not have a complete set of facts, we use what we know about X and Y to make a determination about Z. Similarly, we can use triangulation to adduce inherent implausibility, when X and Y triangulate to W, and not Z, making Z inherently implausible.

Below are additional considerations that are useful in assessing credibility:

Consideration of bias, overt and subtle, of which the witness may not even be aware, is also important. Bias may include: victim-blaming attitudes, group defensiveness (think: teams and fraternities), and fear of possible repercussions. The presence of bias must be considered when assessing credibility.

Analysis of micro-expressions and gesticulations should be avoided unless you are an expert and have discovered someone's tell for deceit. Otherwise, do not consider the act of crossing limbs, looking up to the right, and other so-called "tells" as evidence. If a person's body language changes significantly from their established body language when you ask a question or raise a certain topic (we call this a departure from baseline), that is typically a prompt to ask more questions. It is not necessarily evidence of deceit, rather an indication there may be more to examine.

Inconsistencies and contradictions in testimony should be evaluated. Major inconsistencies in testimony are more likely to (but do not necessarily) detract from credibility than minor inconsistencies. Sometimes, inconsistencies and contradictions can result from one's memory evolving over the telling of a story, as questions are asked of the witness, more details are recalled, and additional intellectual connections are made in the witness's mind. Other times, inconsistencies and contradictions might be the result of unconscious fabrication of "recall" on the part of a vulnerable or fearful witness who is especially concerned with pleasing the investigator or concealing memory gaps. And still other times, inconsistencies or contradictions may indicate conscious lying.

Lying itself, through commission or omission, is not an outright credibility killer, because people may lie in one area while being honest in another. The job of the investigator is to determine whether the lie is material to the allegations (e.g., lies about facts that tend to prove or disprove the underlying allegations) or about a peripheral matter and potentially motivated by other concerns (e.g., lies about alcohol consumption motivated by a desire to avoid an alcohol violation), or if the lie otherwise reveals critical information about the overall credibility of that witness.

A delay in reporting does not necessarily detract from credibility. Individuals may delay reporting for a variety of reasons that do not damage their credibility, including: fear of retaliation, not knowing or trusting the policy or the individuals in charge of implementing the policy, fear of being blamed, shame, or not recognizing the behavior for what it was. Alternatively, reporting parties may decide to report as retribution for a more recent circumstance, such as after a nasty breakup or upon discovering a partner's infidelity. While these circumstances do not inherently damage the credibility of the reporting party, they do add another piece of evidence that must be evaluated against all other available evidence. There may be multiple pieces of credible evidence supporting that the reporting party is overstating or sensationalizing the incident, which, taken with a witness's statement about the reporting party's desire to harm the respondent as reprisal for a bad breakup, may render the evidence of the recent breakup more impactful to credibility. Alternatively, there may be credible evidence demonstrating that the alleged misconduct more likely than not occurred, such that testimony regarding the reporting party's retributive intent may explain why they reported, but not support any kind of fabrication. Evidence regarding a delay in reporting should be evaluated in totality, along with other evidence regarding credibility.

Changes in the behavior of the reporting party after the incident might add to credibility, including: avoiding class, meetings, or certain areas on campus; struggling to keep up academic performance; and seeking psychological counseling. While the lack of these behaviors may detract from credibility, it also may not. All such evidence should be taken in totality with other evidence.

Individuals are affected differently and will react with varying degrees of intensity and complexity to the events that they experience. A reporting party could be displaying the “classic” symptoms of traumatic response because they *believe* an incident occurred, not because it actually did. A reporting party may exhibit signs consistent with the “classic” traumatic response because they want you to think it occurred, not because it actually did.⁹⁴ Or, a reporting party telling the absolute truth may not exhibit outward signs of trauma at all.

The existence of witnesses who were told immediately about the incident may add to credibility because the account provided to such witnesses by the reporting party is often unfiltered by time, reflection, and bias. But if the accounts provided to others vary significantly, these reports can undermine credibility.

“The fact that a relationship was consensual at one time, in some aspects, or for certain interactions, does not detract from credibility nor is this a defense against a subsequent allegation of sexual misconduct.”

The raising of additional allegations by witnesses about the responding party could add to credibility of the reporting party’s allegations, depending on the context and plausibility of the additional allegations. If other individuals have made similar allegations about the responding party in the past, this should be explored to the degree necessary to determine if these past allegations support the credibility of the present allegation. On the other hand, piling on rumors about past conduct by the responding party which cannot be substantiated could undermine the investigators’ belief in the validity of the reporting party’s allegations at all.

The fact that a relationship was consensual at one time, in some aspects, or for certain interactions, does not detract from credibility nor is this a defense against a subsequent allegation of sexual misconduct. Consensual relationships can be followed by sexual misconduct, such as when one person tries to end the relationship and the other individual exploits the power dynamics to intimidate the former partner into staying in the relationship or engaging in certain behavior. People can also be assaulted after consensual sexual acts, or engage in consensual sexual acts after having been assaulted. Neither is uncommon.

The fact that the person who made the allegation(s) did not tell the alleged harasser that the behavior was offensive does not affect credibility, nor should it make you think differently about the reporting party. There are many legitimate reasons a reporting party might not have communicated a feeling of offense to the responding party, including disparity in power between the reporting and responding parties. The test for harassment does not require the reporting party to inform the responding party that behavior was offensive. That said, if you can establish that the harassing behavior continued after the responding party was informed that the behavior was unwelcome, this information would corroborate the reporting party’s claim that the responding party’s conduct was “unwelcome.”

⁹⁴ The frequency with which this occurs is not known.

Explanations for why the misconduct occurred do not add to credibility. Individuals who have sexually harassed others often acknowledge their behavior but explain and defend it in ways that do not justify their actions and should not add to their credibility. To the contrary, these excuses or “explanations” should be considered admissions of having engaged in a pattern of sexually harassing behaviors. For example:

- *“I didn’t know it was against the rules.”*
- *“I was just joking around.”*
- *“She flirts all the time.”*
- *“I was just flirting with him.”*
- *“She was asking for it. She was leading me on!”*
- *“You have to understand, we guys have special needs.”*
- *“It’s no big deal. I don’t know why he is so upset.”*
- *“I wasn’t lying. She really is a slut (or bitch, whore).”*
- *“She’s a snitch for telling on me.”*

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

- Character witnesses and the character evidence they provide. (*“I’ve known him for fifteen years, he is such a good kid; I know he would never do that.”*)
- Popularity with staff and other students. (*“Everybody likes him; I just don’t believe he would do that.”*)
- No history of past problems. (*“She’s never been in trouble before.”*)
- Academic performance. (*“But he’s a really good student. His professors really like him.”*)
- Importance to a team or program. (*“He’s our best athlete/trainer/tutor.”*)

The following do not add to or detract from credibility of the reporting party:

- Clothing. (*“Just look at what she was wearing.”*) Clothing does not cause sexual harassment, nor does it give anyone permission to touch or make sexual remarks.
- Appearance. (*“She is so pretty, no wonder he did it,”* or *“She is so unattractive! I don’t believe anyone would do that to her.”*)
- Flirting behavior. (*“He’s always flirting with the boys, what did he expect?”*)
- Male victims. (*“He should have realized she meant it as a compliment.”*)
- Sexual orientation of victim (*“Listen, he came out of the closet and told everyone. He should have expected that people would act like this.”*)

Questions to consider in assessing credibility:

- How might a reasonable person react to the incident(s)?
- What was the effect of the behavior on the reporting party?
- Did the individual have a particular reason not to tell the truth?

- Is the evidence offered inherently plausible?
- Is there evidence corroborating the information provided by a witness?
- Is there anything missing from the testimony that the witness/party may be omitting?
- Did the individual have the opportunity and ability to observe the things they discussed?
- Is there relevant past conduct (i.e. similar allegations) that needs to be considered?
- Was the witness/party under the influence of any substance that may impact the credibility of their testimony?

Past History. We investigate in the real world every day. In the real world, the past sexual history between the parties matters to context, and sometimes is the most compelling determining factor in an investigation. So, OCR's declaration that past sexual history should not be admitted is over-protective at best and fundamentally naïve at worst. The past sexual history of the responding party is relevant to establishing pattern abuses of others (even the EEOC says so, above), but the same is true for establishing pattern within a relationship. Many cases hinge on consent and if the parties have a sexual history together, how consent is given or received in their interactions can be critical.

We agree that the reporting party's general past sexual history should normally be out-of-bounds, but if he has a history of alleging sexual misconduct after bad breakups, we need to know that. The sexual history between the parties is fair game for the investigators' inquiry, but they may come to realize that it is irrelevant once they analyze it. Still, they must analyze it to determine whether it is relevant or not. It goes fundamentally to credibility if, as we stated above, there is a motive for bringing the allegation other than the desire to report misconduct. That motive may not destroy credibility, but fairness to the responding party demands

that investigators explore that motive to determine how it impacts on the credibility of the reporting party. Rather than hard-and-fast rules in the admissibility of past sexual history, we want investigators to be able explore it fully between the parties, but to only go more widely outside of that context when there is a compelling justification to do so. Fishing expeditions and character assassinations by "slut shaming" are not permitted.

“OCR’s declaration that past sexual history should not be admitted is over-protective at best and fundamentally naïve at worst. The past sexual history of the responding party is relevant to establishing pattern abuses of others.”

Importantly, a decision of preponderance can be made that misconduct occurred when the evidence of the allegation(s) is credible, even if there were no witnesses to the misconduct. Put another way, a preponderance can be established simply because you believe one party and not the other, based on assessment of credibility of the parties and the evidence provided.

Due Process Commitment

We've been thinking about ways to advance the commitment of the field to due process, and since administrators are always asking students to sign pledges as a symbol of prevention, we came up the idea for this oath or commitment statement as a pledge you can make to prevent due process violations in your conduct or resolution process.

Maybe you'll frame it and hang it on your wall?

The NCHERM Group Statement of Commitment to Due Process Protections

As a college administrator, you have my commitment to your due process rights.
Specifically, I commit to the following ten assurances...

1. I promise to provide you with a neutral, unbiased, impartial, and objective decision on whether your behavior(s) violates college policy.
2. I commit to understanding and owning my own biases and to check them at the door.
3. I promise to recuse myself from the process should I identify a conflict-of-interest, or should a conflict be brought to my attention.
4. I promise to follow college procedures without material deviation.
5. I promise to honor your humanity and the equal dignity of all participants in the conduct process, and to conduct the process with as much transparency as I can.
6. I commit that I will not find you in violation of college policy unless a preponderance of the evidence establishes that a violation occurred.
7. I promise that the college has the burden of proving whether you violated policy or not; that burden is not on either party.
8. I commit to afford equitable procedural protections to all parties to an allegation of misconduct.
9. I promise not to prejudge the allegations that have been made, and to reserve judgment until all evidence has been gathered.
10. I commit to sufficient annual training and professional development to assure the competence of my role.

Due Process Checklist

Below, we've crafted a practical checklist of due process protections that should be afforded by every college. If you are intrigued by this content, please attend one of our upcoming due process trainings⁹⁵ to learn more about how to operationalize these ideas.

- ☐ Right to notice of investigation that includes a reasonable description of the allegations
- ☐ Right to access to an advisor of your choice throughout the process
- ☐ Right to the least restrictive terms necessary if interim suspension is implemented, and a right to challenge the imposition of the interim suspension

⁹⁵ <https://atixa.org/events/training-and-certification/>

- ☐ Right to uninfringed due process rights, as detailed in the college's procedures, if subject to interim actions
- ☐ Right to clear notice of the policies allegedly violated if and when the formal allegation is to be made
- ☐ Right to clear notice of any hearing in advance, if there is to be a hearing
- ☐ Right to receive COPIES of all reports and access to other documents/evidence that will be used in the determination, reasonably prior to the determination (these may be provided in redacted form)
- ☐ Right to suggest witnesses to be questioned, and to suggest questions to be asked of them (excluding solely character witnesses)
- ☐ Right to decision-makers and a decision free of demonstrated bias/conflict of interest (and advance notice of who those decision-makers will be)
- ☐ Right to clear policies and well-defined procedures that comply with state and federal mandates
- ☐ Right to a process free of (sex/gender/protected class etc.) discrimination
- ☐ Right to an investigation interview conducted with the same procedural protections as a hearing would be (because the interview is an administrative hearing)
- ☐ Right to a fundamentally fair process (essential fairness)
- ☐ Right to know, fully and fairly defend all of the allegations, and respond to all evidence, on the record
- ☐ Right to a copy of the investigation report prior to its finalization or prior to the hearing (if there is one)
- ☐ Right to know the identity of the reporting party and all witnesses (unless there is a significant safety concern or the identity of witnesses is irrelevant)
- ☐ Right to regular updates on the status of the investigation/resolution process
- ☐ Right to clear timelines for resolution
- ☐ Right to have procedures followed without material deviation
- ☐ Right to a process that conforms to all pertinent legal mandates and applicable industry standards
- ☐ Right to have only relevant past history/record considered as evidence
- ☐ The right to have the burden of proving a violation of policy borne by the college
- ☐ Right to the privacy of the resolution/conduct process to the extent of and in line with the protections and exceptions provided under state and federal law
- ☐ Right to a finding that is based on the preponderance of the evidence
- ☐ Right to a finding that is neither arbitrary nor capricious
- ☐ Right to be timely informed of meetings with each party, either before or reasonably soon thereafter (unless doing so would fundamentally alter or hamper the investigation strategy)
- ☐ Right to sanctions that are proportionate with the severity of the violation and the cumulative conduct record of the responding party
- ☐ Right to the outcome/final determination of the process in writing as per VAWA §304
- ☐ Right to a detailed rationale for the finding/sanctions
- ☐ Right to an appeal on limited, clearly identified grounds
- ☐ Right to competent and trained investigators and decision-makers
- ☐ Right to a written enumeration of these rights

Cross-Claims, Counter-Claims, and Retaliation

Today, male students claim to be experiencing discrimination in a variety of ways as the college sexual misconduct resolution process unfolds. Administrators are often vexed by these claims and how to address them. There are a variety of answers, depending on the claim, and this section really applies to all responding parties, not just men, of course. In light of the OCR decision in the Wesley College investigation, administrators would be wise to view the rights of responding parties more expansively under Title IX.

First, if you are given notice of discrimination by a responding party, you are legally obligated to investigate it, assuming it is a good faith claim. You really won't know whether it is made in good faith in most cases until you conduct an investigation. Usually, the preliminary inquiry is used to determine the basis for the claim and how it should be disposed of or addressed. In some instances, you are facing a claim of discrimination as a result of your process, whether it is an assertion that investigators are biased, coordinators are conflicted, or that the process is somehow out to get men and that the administrators are gender-biased. In others, the responding party wants to file a cross-claim or counter-claim (we use the terms interchangeably) stating that the reporting party's allegations are, in fact, a form of discrimination against the responding party. But, they may just be alleging problematic behaviors rather than explicitly requesting a cross-claim, and you have to ascertain the true nature of their notice to you. Finally, the responding party may allege sexual harassment or retaliation directly by the reporting party, by third parties, or the by college itself, necessitating an appropriate response.

Given the way the deliberate indifference standard works in court, the worst thing you can do with any of these types of allegations is to ignore them. The best practice is to process these claims like any other allegation under your policies: to vet them for good faith, sufficiency, and reasonable cause to believe that college policies may have been violated. Give yourself some wiggle room in your policies to reserve the right to process cross-claims either together with the underlying claim or separately and thereafter. If you don't reserve the right to delay your process to address a counter-claim after you address the underlying claim, you'll be stuck using the same 60-day timeline you have in place for all allegations. The reason you can delay your processing of a counter-claim is to protect against the possibility that it is being made in retaliation against the reporting party, and you don't want the college to become party to that retaliation by entertaining it. Often, the best practice is to assess the counter-claim after the underlying claim is resolved, and in light of what was found in that underlying allegation. Delay is also often effective in discouraging the filing of retaliatory counter-claims, once the responding party realizes his claim isn't going to "cancel out" the underlying allegation.

Sometimes, the counter-claim and the underlying claim should be entertained simultaneously (as in the case of an allegation of mutual incapacity, for example), or both claims should be investigated jointly, even if their resolutions are bifurcated. Sometimes, it is most efficient to investigate all claims at once, especially when the facts alleged in both arise from the same sexual transaction. While we have said this previously, it bears mentioning again, and in very explicit terms. If two students have had sex in circumstances where their conditions were similar – let's

say mutual intoxication – if you process an allegation that the male student has engaged in sexual misconduct with the female student and he alleges in response that he was just as drunk as she was, you will need to process that allegation to determine its validity. To hold a male student accountable for a drunken hook-up without holding a female student equally accountable, again if both are in a similar condition, is a form of potential gender discrimination. Further, if you refuse to process that counter-claim, the college is now engaged in gender discrimination, for which the respondent may also try to file a grievance. So, both the underlying claim and the refusal to entertain the counter-claim can be grieved by the responding party as potential forms of sex/gender discrimination (one by the reporting party and other by the college). They may also form the basis of a selective enforcement claim under Title IX in court.

More needs to be said about the specifics of the offenses. Incapacity and mutual incapacity have been addressed thoroughly above. Sex with a drunk person should not be a form of sexual misconduct, but if your policy makes it such, then you must apply the rule equitably. If a drunk couple has sex with each other, you must apply the policy to both, not just to the alleging party. However, we believe that holding the first reporting party accountable could also be seen as a form of retaliation for making the allegation, which is why an intoxicated sex policy is not a best practice.

Further forms of discrimination against the responding party can include sexual harassment and retaliation. For example, if the reporting party in a sexual misconduct investigation and her friends trash the reputation of the responding party on campus prior to the resolution of the allegation, they could be speaking their truth. They may also cross the line into creating a hostile environment for the responding party. These are among the most difficult decisions, because the reporting party has a right to speak her truth, and in fact may have a First Amendment right to do so, but imputing a crime to someone can also be a form of defamation. While we don't recommend that colleges get into the middle of defamation disputes between students, legally, the impact of spreading such allegations can form the basis of a hostile environment allegation by the responding party. Much will depend on the truth of the allegations, and whether a policy violation is found by the college on the underlying claim. If so, the reporting party and her friends are allowed to share the outcome and finding.

But, if the responding party is found not to have violated policy, but the reporting party and friends continue to allege sexual misconduct did occur, this might be the basis for a finding that they are creating a hostile environment for the responding party on the basis of sex. Care must be taken in such situations to avoid disciplining someone who may have been sexually assaulted for sharing her truth, so the college may choose to resort to conflict resolution, mediation, and other forms of informal remedy to stop the hostile environment and prevent its recurrence. However, if both parties are dug in and public (as happened in the notorious Nungesser/Sulkowitz "mattress case" at Columbia⁹⁶), the college may be wisest to remain neutral, mitigate the hostility with whatever remedies it can, and allow the courts or OCR to navigate the question of whose rights are superior. In one case we can recall, the college wound up sending an announcement that the responding party had been cleared, at his insistence, to the entire college community,

⁹⁶ <http://columbiaspectator.com/news/2014/09/02/emma-sulkowicz-performance-art-draws-support-campus-activists/> and <http://columbiaspectator.com/news/2015/04/30/nungesser-lawsuit-claims-columbia-violated-title-ix/>

as a form of remedy. This is extreme, but still an important example of the reputational harm that can arise from these allegations, and the care that colleges need to take, accordingly.

Another form of this issue is when the responding party asserts that the allegations are themselves a form of retaliation by the reporting party for committing some bad act (breaking up with her, cheating on her, etc.): the reporting party “weaponizes” the sexual misconduct allegation as a form of reprisal. We’re not suggesting this is common, but it is far more common than it used to be. The use of the term “retaliation” as a buzz word doesn’t make it so, though. Allying a policy violation with knowing falsity is a policy violation itself, and may also be a form of sexual harassment. But, by definition, it cannot be retaliation in the technical sense of the term though the behavior feels retaliatory in a lay sense of the word. To establish retaliation, as noted above, the party experiencing adverse action must have been engaged in protected activity at the time. In this example, the responding party is only engaged in protected activity once the allegation is made, not before. Thus, retaliation is not the applicable policy, but sex/gender discrimination and/or hostile environment may be.

Similarly, the responding party may inaccurately categorize post-incident harassment of him by the reporting party and her friends as retaliatory. As noted just above, this is actually a form of harassment, not a form of retaliation. To establish retaliation, the adverse action must be taken against someone engaged in protected activity *because* they engaged in protected activity. Here, the adverse action is being taken because of the underlying activity, not because of the protected activity of engaging in the sexual misconduct allegation and resolution process. While this is a nuance, it is an important one.

The Wesley College OCR Determination

While this *Playbook* touts itself as informing the post-regulatory era, some regulatory action is worthy of specific attention, as it significantly reflects the mood and tenor of the field, not to mention the fact that it’s premature to assume OCR is out-of-business. OCR’s Wesley College resolution is one such case.

For those of you who need deeper insight into the transformative OCR ruling on the Wesley College investigation, here is a brief overview. First, this is only one of three OCR letters to address the issue of due process (Minot State⁹⁷ and Christian Brothers⁹⁸ being the other two) but the most direct letter we have that makes the case for Title IX-derived due process rights at a private college. Whether OCR sees Title IX as an independent source of these rights, or is simply reflecting on rights OCR believes are otherwise legally protected which OCR should be enforcing, this decision is notable as more and more courts seem to be affording due process rights (or the equivalent) to students enrolled in private colleges, including recent decisions at the University of Southern California⁹⁹ and Brandeis University.¹⁰⁰

⁹⁷ <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05142061-a.pdf>

⁹⁸ <https://www.ncherm.org/documents/80-ChristianBrothersUniversity-04032043.pdf>

⁹⁹ <http://cases.justia.com/california/court-of-appeal/2016-b262917.pdf?ts=1459881022>

¹⁰⁰ <https://www.documentcloud.org/documents/2799157-John-Doe-v-Brandeis-University-3-31-2016-Ruling.html>

Second, and perhaps more important, OCR defied expectations in issuing a letter that seems broader in protective scope than many anticipated. OCR signaled last year that it intended to issue resolutions protecting the rights of accused students, but the big question was how far would OCR go? Would OCR protect men from discrimination on the basis of sex, as it must under Title IX, or would OCR take the further step of determining that responding parties have rights under Title IX, whether they are men or not. OCR chose the latter, bolder, and broader approach.

“The 29-page Resolution letter OCR sent to Wesley College on October 12, 2016...mirrors ATIXA’s long-held stance that institutions must treat the parties in a sexual misconduct allegation with equal dignity.”

The question of whether responding parties have independent rights under Title IX, or rights only as men who may experience discrimination, is important, as OCR has couched this as an equity issue, not an explicit issue of sex-based discrimination. Maybe OCR sees those as the same thing, but if OCR meant to issue a narrowly tailored resolution, they could have done so. OCR did not, but it also didn’t give us significant explanation for the source or basis of these rights. If this body of knowledge evolves as OCR issues more resolution letters, we’ll be sure to keep you abreast as they do.

The following is a detailed summary of key information found in the 29-page Resolution letter OCR sent to Wesley College on October 12, 2016.¹⁰¹ This letter, more than any other to come from OCR, mirrors ATIXA’s long-held stance that institutions must treat the parties in a sexual misconduct allegation with equal dignity.

“The College thereby denied the accused student procedural protections to which he was entitled under Title IX, and under the College’s own written procedures.”

“OCR determined that the accused Student was entitled to procedural protections that the College did not afford him. In processing the complaint against the accused Student, the College did not satisfy Title IX, the College did not comply with its own procedures and, in fact, the College acted in direct contradiction of its procedures and as a result the resolution of the complaint was not equitable.

It is critical, for purposes of satisfying the Title IX requirement that procedures be ‘equitable,’ that the accused Student have a reasonable opportunity to present his version of the events, particularly in response to adverse findings which the College relied upon in imposing the substantial penalty meted out to the accused Student – expulsion. Thus, in conclusion, OCR determined that the College failed to provide an equitable investigation and resolution of the complaint involving the accused Student, including failures to follow many procedural elements set forth in its *Title IX Policies and Procedures*.”

¹⁰¹ <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf>

OCR found that:

- “The accused Student was not given an opportunity to share his version of events and to benefit from an investigation of the accuracy of that version of events...”
- The accused Student was not provided with the opportunity to challenge evidence that the College relied upon in imposing his interim suspension...
- The accused Student was never afforded his resolution options...
- The Student was not provided an adequate opportunity to defend himself at the Hearing...
- The accused Student may not have been provided sufficient time to participate in the process.”

OCR also challenged the process Wesley used to interim suspend the other three accused students. OCR indicated that “the College may not be affording accused students their basic procedural protections by imposing immediate suspensions without conducting a sufficient assessment of the risk to the community, while also considering the rights of the parties, including the accused student.”

Among the more typical measures such as revising grievance procedures and improving training for the college community, especially the Title IX Team, OCR required something it has never done before – it required the institution to provide remedies to four accused students under Title IX. OCR instructed that Wesley College must:

“Determine whether it engaged in a sufficient level of inquiry and consideration of the rights of students, including the accused Student and Students 1, 2 and 3, and Student 4, and the risk of the threat to the school community prior to imposing interim suspensions upon the accused Student and Students 1, 2 and 3, and provide specific remedial actions if warranted, including, but not limited to, removal of each expulsion from all relevant educational records, as well as an offer to allow the accused Student and/or Students 1, 2 and 3 to complete their degrees at the College and reimburse them for documented costs incurred for enrollment at a different educational institution, and any other appropriate measure.”

This is a revolutionary approach for OCR that changes the entire fabric of Title IX enforcement and fully reflects the idea that Title IX focuses on equity for both parties, not just the reporting party.

CONCLUSION

Many of you have been on a journey with us for almost 20 years. What a ride! Together, we are reshaping sexual conduct at colleges toward healthier and more respectful norms. It has been and continues to be an honor to push the great wheel forward along with you. We dedicated this publication on the title page, as follows:

“This publication is dedicated to those who want to do the right things for the right reasons and not because some statute says you have to.”

This dedication is for the true believers, but let’s admit, we’re relatively rare. Many in our field act out of a sense of obligation or to satisfy a compliance mandate, but we all can operate from our higher selves, or whatever you wish to call it. To do so, you have to be willing to accept constructive criticism and decide how you want to let it impact you.

We’ve been subject to a lot of criticism ourselves, constructive and not. We have to decide how much of that criticism to heed, and how much to continue to adhere to our True North no matter what our detractors say. It’s a balance, and we pick and choose, just as everyone does. In this *Playbook*, we’ve been tough critics of some of you in the field. We hope you see it as constructive criticism. We’re not inherently critical of higher education. We’d say nothing but glowing things if you deserved nothing but glowing things. Instead, we are agents of change and we know you are on an evolutionary path as professionals. Our role is to provoke you, to challenge you, and to call you to do better when we know you can. If we’re successful, we speed and smooth your evolutionary path, helping you to grow as professionals, and become more successful practitioners. If this *Playbook* helps you to do so in any way, we will count it a success.

We hope we are role-modeling that evolutionary path ourselves. The 2005 Whitepaper was seventeen pages long. Brett was a sole practitioner and wrote it himself. Today, The NCHERM Group is comprised of 30 consultants and fifteen executive staffers. This *Playbook* brings eight leading experts in the field together as authors because our voices are stronger together. To evolve in our thinking, we had to transform seventeen pages into a 130-page book, because changing times require not only an update, but an expansion. Since 2005, neuroscience has transformed our understandings of blackouts. That means a lot of what we wrote and taught in 2005 is now superseded. The pendulum on consent has swung far since 2005, and back again. Today, male students accused of sexual misconduct have Title IX rights and due process is a hot topic. It’s our job to keep our material fresh, and to continue in our learning about our own areas of subject matter expertise, and then turn it around and make it accessible to you.

Finally, we’ve been fairly assertive in this publication about taking on the opponents of Title IX, as we call them. FIRE, SOS, FACE, SAVE, “Empowering Victims,” etc. We have no doubt that those organizations are staffed with people who all have their own True North, and who believe they are pushing their own wheels forward. Some have come to this work through great personal tragedy. We disagree with them on some issues, and agree with them on others, but it’s not personal. They write their op-eds, we write ours, and so goes the dualistic universe. This

Playbook gives us a chance to voice what we believe in with crystal clarity, without adulteration, and to counter the perspectives of those whose positions do not match our own. If we give you a few talking points along the way as you debate these issues at your own colleges, so much the better.

More than anything else, we hope we have provided substantive leadership on the policy and analytical challenges that sexual misconduct allegations pose for every college. At a time when the government influence on these issues may be waning, a greater emphasis on identifying, discussing, and debating best practices like those identified in this *Playbook* will help to guide the field forward. With that, we wish you good luck, and remind you that you can always call on us when you need our expertise to help you navigate a tough set of facts.

ABOUT THE AUTHORS

Nedda Black, J.D., LMSW has been working in a variety of capacities within higher education since 2012, having assumed significant responsibility for Title IX policies, education, and implementation at the University of California, Hastings College of the Law, not long after the Office for Civil Rights released its 2011 Dear Colleague Letter. Over the last several years, Black has played a central role in Title IX implementation, including: ensuring Title IX compliance on a number of fronts; conducting Title IX training and serving as the institution's Title IX investigator; and drafting Annual Security Reports, Memoranda of Understanding, Codes of Conduct, and the College's new Title IX policy. Prior to law school, Black worked as a licensed master social worker in New York City, with special focus on trauma, including survivors and perpetrators of domestic violence, gang violence, prison violence, sexual violence, sexual assault, and child abuse, neglect, and molestation. She has continued to fulfill her passion for direct services through extensive volunteer work with the homeless and for a variety of social justice causes. Black is a graduate of the University of California Hastings College of the Law, New York University, and California State University. She is licensed to practice law in the state of California and the District of Columbia.

Michael Henry, J.D. serves as The NCHERM Group's Lead Investigator, performing external investigations for K-12 and higher education clients across the country. Prior to joining The NCHERM Group, Henry served as the Deputy Title IX Coordinator, Lead Title IX Investigator, and Director of the Office for Student Rights & Resolution at Texas Tech University. While at Texas Tech, Henry investigated and adjudicated employee and student cases of discrimination, harassment, and gender-based violence, as well as incidents of hazing and other forms of organizational misconduct within the university's Greek community. Henry authored and revised extensive portions of the university's conduct policy and procedure, trained University Discipline Committees, and developed institutional and system-wide operating policies related to discrimination, harassment, and Title IX. Henry has worked extensively with both university and municipal police departments, developing MOUs and joint interview protocols for Title IX investigations, and has provided education and prevention programming for faculty, staff, and students. Henry is a graduate of the Texas Tech University School of Law and has experience in civil litigation, as well as having worked in the Appellate Division of the Lubbock District Attorney's Office. Henry has presented at the Association for Student Conduct Administration (ASCA) National Conference, served as a Faculty Fellow at the Gehring Academy, and has trained Title IX Coordinators and Investigators as a faculty member for ATIXA.

W. Scott Lewis, J.D. is a Partner with The NCHERM Group, LLC. He served as the 2013-2014 President of the National Behavioral Intervention Team Association (NaBITA) and is a founder and Advisory Board member of ATIXA. Previously, he served as Special Advisor to Saint Mary's College in South Bend, IN and as Assistant Vice Provost at the University of South Carolina, where he was also on the faculty, teaching courses in Education, Law, Political Science, and Business. He has worked with the Department of Justice's Office of Violence Against Women as a trainer and consultant, as well as a consultant to the Office of the Vice President and the White House Task Force on issues of sexual misconduct and Title IX. Additionally, he serves

as a consultant to the U.S. Olympic Committee in areas around sexual misconduct and equity. Lewis brings over 20 years of experience as a student affairs administrator, faculty member, and consultant in higher education. He completed his undergraduate work in Psychology and his graduate work in Higher Education Administration at Texas A&M University and received his law degree and mediation training from the University of Houston. He lives in Denver, Colorado.

Leslee Morris, J.D. is a Title IX Investigator for the San Diego Community College District. She was previously an Associate Attorney with The NCHERM Group, LLC and a member of the Advisory Board of ATIXA. She received her law degree and mediation training from the University of Colorado (CU) School of Law. She was admitted to the Colorado bar in 2000 and served as an associate in the Office of University Counsel at CU, specializing in employment discrimination cases. She also served for nine years as an investigator in the Student Conduct Office at CU, specializing in civil rights-based grievances, and as the Title IX Compliance and Grievances Coordinator for National University in La Jolla, California. Prior to law school, Morris was a Policy Analyst for a nonprofit organization in New York City where she specialized in child welfare and juvenile justice issues.

Anna Oppenheim, J.D. is an Associate Attorney with The NCHERM Group, LLC. She advises colleges and universities on ongoing misconduct investigations and often serves as an external investigator for issues of complex sexual misconduct as well as employment matters, retaliation, and harassment. Oppenheim also is responsible for drafting policies and best practices for educational institutions on a wide range of matters, in addition to assisting with policy implementation. Prior to joining The NCHERM Group, LLC, she worked as a civil rights attorney at a boutique plaintiff's employment discrimination firm in Center City, Philadelphia, where she focused on advising current employees on issues involving sexual harassment. Oppenheim also served as an investigator for the Office of the Inspector General in Philadelphia, where she specialized in cases involving sexual misconduct by government employees. She has experience conducting mediations and other forms of alternate dispute resolution, and has developed and presented seminars and trainings related to complex employment matters, ethical obstacles in the workplace, and gender and diversity issues, both in the United States and internationally. A Philadelphia native, Oppenheim received her law degree from Temple University and her Bachelor of Arts from Dartmouth College.

Saundra K. Schuster, J.D. is a Partner with The NCHERM Group, LLC. She is a founder of ATIXA and a member of its Advisory Board. She was formerly General Counsel for Sinclair Community College in Dayton, Ohio and Senior Assistant Attorney General for the State of Ohio in the Higher Education Section. Schuster is a recognized expert in preventive law for education, notably in the fields of sexual misconduct, First Amendment, risk management, student discipline, campus conduct, intellectual property, and employment Issues. Prior to practicing law, Schuster served as the Associate Dean of Students at The Ohio State University. Schuster has more than 25 years of experience in college administration and teaching. She frequently presents nationally on legal issues in higher education. Schuster holds Masters degrees in Counseling and Higher Education Administration from Miami University, completed her coursework for her Ph.D. at The Ohio State University, and was awarded her law degree from the Moritz College

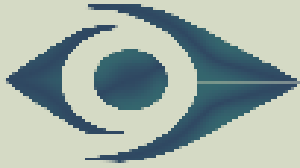
of Law, The Ohio State University. She is a past President of the National Behavioral Intervention Team Association (NaBITA).

Brett A. Sokolow, J.D. is a higher education attorney who specializes in high-risk campus health and safety issues. He is recognized as a national leader on campus sexual violence prevention, response, and remediation. He is the founder, President, and CEO of The NCHERM Group, LLC, which serves as legal counsel to over 70 colleges and universities. The NCHERM Group has consulted with more than 3,000 college campuses. Sokolow is the Executive Director of ATIXA. He frequently serves as an expert witness on sexual assault and harassment cases, and he has authored twelve books and more than 50 articles on campus safety and sexual assault. He has provided strategic prevention programs to students at more than 2,000 college and university campuses on sexual misconduct and alcohol. He has authored the conduct codes of more than 75 colleges and universities. The ATIXA Model Sexual Misconduct policy serves as the basis for policies at hundreds of colleges and universities across the country. The NCHERM Group has trained the members of more than 700 conduct hearing boards at colleges and universities in North America. ATIXA has certified more than 8,400 school and campus Title IX Coordinators and civil rights investigators. Additionally, Sokolow is the Founder and Past President of the National Behavioral Intervention Team Association (NaBITA), and is a Directorate Body member of the American College Personnel Association – College Student Educators International (ACPA) Commission on Student Conduct and Legal Issues. Sokolow is a 1993 graduate of the College of William and Mary and a 1997 graduate of the Villanova University School of Law.

Daniel Swinton, J.D., Ed.D. is Managing Partner of The NCHERM Group, LLC and Senior Associate Executive Director of ATIXA. Prior to that, he served as Assistant Dean and Director of Student Conduct and Academic Integrity at Vanderbilt University. Swinton received his Bachelor's degree from Brigham Young University, his law degree from the J. Reuben Clark Law School at BYU, and a doctorate in higher education leadership and policy from Vanderbilt University's Peabody College. He is a member of the Tennessee State Bar. Swinton has presented nationally on issues such as sexual misconduct on college campuses, legal issues in student affairs and higher education, student conduct policies and procedures, mediation, and behavioral intervention teams. Swinton also served as President of the Association for Student Conduct Administration (ASCA) in 2011-2012.

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