ARKANSAS COLLEGES OF HEALTH EDUCATION

Title IX Hearing Officer Training

“The hope is that both parties, along with their friends, classmates, and parents, as well as OCR and the courts, will recognize that the disciplinary process must respect and balance the rights and interests of all involved, and will accept the outcome as the product of a fair, rational system — even if they disagree with that outcome. The perception of fair treatment goes far toward making the result palatable.”

- “Doing the Right Thing in Sexual-Misconduct Cases” by Elizabeth Mulvey. *The Chronical of Higher Education*. April 30, 2017.

Training: Content

- The Legal Framework of Title IX
- The Higher Education Context
- ACHE Policy and Process
  - Applying the standard of proof
  - Types of conduct that constitute sexual violence
  - Types of information
  - Determining relevance
  - How to evaluate credibility
  - Evaluating consent and the role of drugs/alcohol

The Title IX Patchwork

- Title IX
  - Agency and subagency guidance
  - Voluntary Resolution Agreements
  - New regulations in 2020
- The Clery Act
- The Campus SaVE Act
- FERPA
- Federal/State criminal, child protection and sex offender statutes

Title IX of the Education Amendments of 1972

"No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

The Clery Act

- The Clery Act is a federal statute that requires colleges and universities participating in federal financial aid programs to investigate and report individual incidents and collect and report annual aggregate statistics on enumerated crimes which occur on or near campus. 20 U.S.C.A. § 1092(f).

- The Clery Act also contains the definitions of domestic violence, dating violence, sexual assault, and stalking as used in Title IX's definition of sexual harassment. If any conduct falls under these definitions, it must be addressed through the Title IX framework.

Campus SaVE Act

- On March 7, 2013, President Barack Obama signed a bill to reauthorize the Violence Against Women Act. Included in the bill was the Campus Sexual Violence Elimination Act.
- Established collaboration between the DOJ, Education, and Health and Human Services to collect and disseminate best practices for preventing and responding to domestic violence, dating violence, sexual assault, and stalking
- Compliance was required by March 7, 2014

Campus SaVE Act

- Expands definition of reportable hate crimes to include bias based on a victim's **national origin or gender identity**
- Requires incidents of **domestic violence, dating violence and stalking** be disclosed in annual campus crime statistic reports
- In timely warnings, institutions must **withhold the names of victims** as confidential

Campus SaVE Act

- Policies shall address the following areas:
  - **Education programs** to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking, which shall include:
    - **Primary prevention and awareness programs** for all incoming students and new employees, which shall include:
      - A statement that the institution **prohibits** the offenses **of domestic violence, dating violence, sexual assault**, and **stalking**;
      - The **definition** of **domestic violence, dating violence, sexual assault**, and **stalking** in the applicable jurisdiction;
      - The **definition** of **consent**, in reference to sexual activity, in the applicable jurisdiction;
      - Safe and positive options for **bystander intervention** that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault, or stalking against a person other than such individual;
      - Information on **risk reduction** to recognize warning signs of abusive behavior and how to avoid potential attacks;
      - Information described in the policies “shall address the following areas” section.

Campus SaVE Act

- **Ongoing prevention and awareness campaigns** for students and faculty, including information described in the primary prevention and awareness programs for all incoming students.

- Possible **sanctions** or **protective measures** that the institution may impose following a final determination of an institutional disciplinary procedure regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking.
- **Procedures** victims should follow if a sex offense, domestic violence, dating violence, sexual assault, or stalking has occurred, including information in writing about:
  - The **importance of preserving evidence;**
    - May be necessary to the proof of criminal domestic violence, dating violence, sexual assault, or stalking, or in obtaining a protection order.
  - Who the alleged offense should be **reported** to;

Campus SaVE Act

- **Procedures** for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking, which shall include **a clear statement** that
  - The proceedings shall:
    - Provide a **prompt, fair, and impartial investigation and resolution**; and
    - Be conducted by officials who receive **annual training** on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.
  - The accuser and the accused are entitled to the **same opportunities** to have **others present** during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an **advisor of their choice**; and

Campus SaVE Act

- Both the accuser and the accused shall **be simultaneously informed**, in writing, of:
  - The **outcome** of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking;
  - The institution's **procedures** for the accused and the victim to **appeal the results** of the institutional disciplinary proceeding;
  - Any **change to the results** that occurs prior to the time that such results become final; and
  - When such results become **final**.

Campus SaVE Act

- Information about how the institution will protect the **confidentiality** of victims, including how publicly-available recordkeeping will be accomplished **without the inclusion of identifying information** about the victim, to the extent permissible by law.
- Written notification of victims about options for, and available assistance in, **changing academic, living, transportation, and working situations**, if so requested by the victim and if such accommodations are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.

- A **student or employee** who reports to an institution of higher education that the student or employee has been a victim of domestic violence, dating violence, sexual assault, or stalking, whether the offense occurred on or off campus, shall be provided with a **written explanation of the student or employee's rights** and options.
- No officer, employee, or agent of an institution participating in any program under this title shall **retaliate, intimidate, threaten, coerce, or otherwise discriminate** against any individual for exercising their rights or responsibilities under any provision of this subsection.

The Higher Education Context

Student Concerns filed in OCR complaints

- Lack of clarity in policy
- Not being informed of all available options
- Not being treated fairly
- Feeling judged or isolated
- Inadequate support during and after the process
- Lack of transparency
- Dissatisfaction with outcomes
- Failure to warn/log/report
- Complainants discouraged from reporting
- Parties not informed of rights in process
- Failure to provide an adequate, reliable, and impartial investigation
- Adjudications lack fair, informed process

The Higher Education Context

Student Concerns filed in OCR complaints

- Harassment during the adjudication process
  - Inadequate training of implementers
  - Inadequate training of hearing panels
- The complaint process not prompt and equitable
- Failure to accommodate documented disabilities
- Inadequate sanctions
- Retaliation concerns
- Inconsistent granting of appeals
- Unequal access to appeals
- Inadequate education and prevention programs
- Rape myths perpetrated by administration
- Lack of communication and coordination that compound the impact on students

ACHE Sexual Harassment and Sexual Misconduct Policy

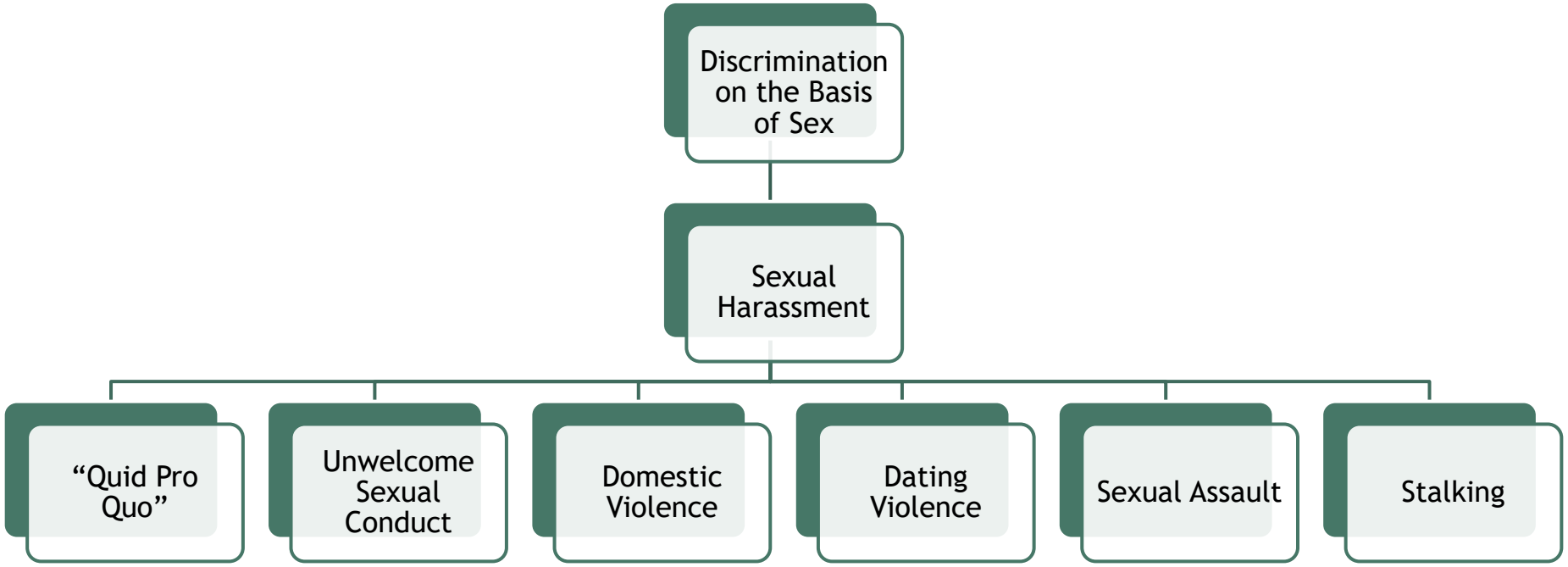
- ACHE's Sexual Harassment and Sexual Misconduct Policy has two sets of definitions. The first set of definitions is the sexual misconduct definitions under Title IX. If an individual's conduct falls into this category, that individual must go through the Title IX grievance process.
- The second set of definitions includes misconduct that does not qualify under the Title IX definitions but that may otherwise rise to the level of sexual harassment under ACHE policy or are relevant to the determination of sexual misconduct. If an individual's conduct falls into this category, that individual will not go through the Title IX grievance process, but still may be subject to disciplinary measures.
- This determination is made by the Title IX Coordinator.

What does Title IX Cover?

- **Sex-Based Discrimination**
  - Equal treatment and access to educational programs.
- **Sexual Harassment**
  - Sexual Misconduct (including sexual assault, dating violence, stalking, etc.)

- When a member of the school community sexually harasses another, a hostile environment is created if the conduct is sufficiently serious that it interferes with student's ability to participate in or benefit from a school's programs.

What is Sex Discrimination under Title IX?



Title IX Sexual Harassment

- Sexual harassment under Title IX is conduct on the basis of sex that satisfies one of the following:
  - "Quid Pro Quo" Harassment: harassment by a school employee when the employee conditions an educational benefit or service on an individual's participation in unwelcome sexual conduct.
  - Unwelcome conduct that a reasonable person would find so severe, pervasive, AND objectively offensive that it denies a person equal educational access.
  - Any instance of sexual assault, dating violence, domestic violence, or stalking, as defined by the Clery Act. § 106.30(a).
- It is the Title IX Coordinator's duty to determine if the misconduct falls within one of these categories. If it does not, the complaint should be dismissed, but may be referred to other ACHE officials or committees as appropriate.

Clery Act Definitions

- Domestic Violence: Domestic violence includes felony or misdemeanor crimes of violence committed by:
  - a current or former spouse or intimate partner of the victim,
  - a person with whom the victim shares a child in common,
  - a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,
  - A person similarly situatied to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or
  - Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction. 20 U.S.C.A. § 12291(a)(8).
- Example: A student's wife is waiting for her husband outside of his on-campus classroom building. She attacks her husband with a knife when he exits the building.

Clery Act Definitions

- Dating Violence: Dating violence is violence committed by a person:
  - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - Where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship
    - The type of relationship
    - The frequency of interaction between the persons involved in the relationship. 20 U.S.C.A. § 12291(a)(10).
- Example: A male student cuts his ex-girlfriend with a knife during an altercation in an on-campus residence.

Clery Act Definitions

- Sexual Assault: Sexual assault is any offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI. 20 U.S.C.A. § 1092(f)(6)(A)(v).
  - Forcible Sex Offenses: any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent
    - Forcible Rape (except Statutory Rape)
    - Forcible Sodomy
    - Sexual Assault with an Object
    - Forcible Fondling
  - Nonforcible Sex Offenses: unlawful, nonforcible sexual intercourse (except Prostitution Offenses)
    - Incest
    - Statutory Rape

Clery Act Definitions

- Stalking: Stalking means 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. 20 U.S.C.A. § 12291(a)(30).
- Example: A male employee reports that he is being followed by a woman he met at a coffee shop off-campus. The woman began showing up at ACHE and would not leave the employee alone. The woman follows the employee around campus and the employee fears for his safety.

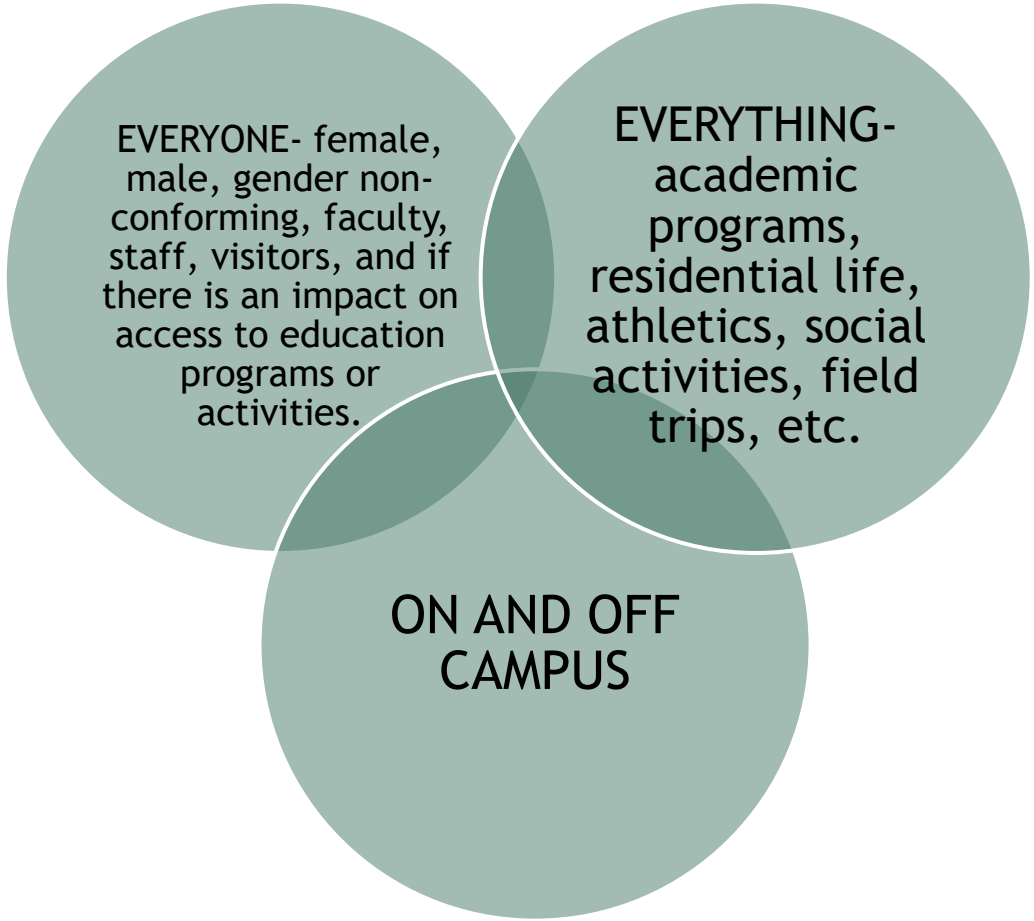
ACHE's Education Program or Activity

- For misconduct to fall under the Title IX framework, the misconduct must occur within ACHE's education program or activity to an individual in the United States. This is a very fact-specific inquiry that must be addressed on a case-by-case basis.
- ACHE's education program or activity includes locations, events, or circumstances over which ACHE exercises substantial control over (1) the accused individual and (2) the context in which the sexual harassment occurred.
  - This includes programs and activities that occur both on and off-campus, as well as on computer and internet networks and digital platforms.
  - This also includes any building owned or controlled by a student organization that is officially recognized by ACHE. § 106.44(a).

ACHE's Education Program or Activity

- Examples of ACHE's education program or activity include:
  - Sexual harassment between two students in one student's dorm room/on-campus residence (85 FR 30093)
  - A student using a personal device to perpetrate online sexual harassment during class time (85 FR 30202)
  - Sexual harassment between two students when one student has graduated from one program but intends to apply to a different program, or where the graduated student intends to remain involved with ACHE's alumni programs and activities (85 FR 30138)
  - Sexual harassment between two individuals when one individual is on a leave of absence (85 FR 30138)

Title IX Application



ACHE Title IX Coordinator

Laurel McIntosh, M.Ed.
Senior Assistant Dean of Student Affairs (479) 308-2200
laurel.mcintosh@acheedu.org

Reporting to the Title IX Coordinator ensures that information regarding resources, reporting options, and employee and student rights is provided to the alleged target of sexual misconduct.

ACHE Title IX Grievance Process: Overview

- The Title IX grievance process must:
  - Treat parties equitably
  - Provide for an objective evaluation of evidence
  - Include training for Title IX Coordinators, investigators, decision-makers, and facilitators of informal resolution processes
  - Be sure that Title IX Coordinators, investigators, decision-makers, and facilitators are free of bias and/or conflicts of interest
  - Presume innocence of the Respondent
  - Provide reasonably prompt time frames
  - Describe the range of outcomes (possible remedies and/or sanctions)
  - Abide by the preponderance of the evidence standard
  - Include a right to appeal
  - Describe the range of supportive measures for Complainants and Respondents
  - Explain the types of information protected by certain legal privileges

ACHE Title IX Grievance Process: Initial Assessment

- Upon receiving a report of a possible Title IX violation, the Title IX Coordinator will first make an initial assessment of the reported information.
- If the initial assessment does not indicate a possible Title IX violation, the matter will be dismissed.
- If the initial assessment does indicate a possible Title IX violation, the Title IX Coordinator will conduct an intake meeting with the Complainant and/or alleged victim.
- The Complainant may request that no complaint be filed, but the Title IX Coordinator has discretion to determine if that request may be honored or not.

ACHE Title IX Grievance Process: Investigation

- If the Title IX Coordinator determines that an investigation should take place, he or she will provide written notice to the Complainant and the Respondent that the matter has been referred to a full comprehensive investigation.
- The Investigator will gather additional information through interviews of the Complainant, Respondent, and witnesses and synthesize the information in a report that will be provided to the Title IX Hearing Officer.
- The Final Investigation Report will be provided to both parties, and the parties will have at least 10 days to review the report before any next steps.

ACHE Title IX Grievance Process: Hearing

- The Title IX Hearing Officer will review the information presented in the investigation report and determine if an individual(s) violated ACHE's Title IX Policy in a live-hearing format.
- The Hearing Officer is responsible for the administration of the hearing, including procedural matters and decisions leading up to the hearing, determinations about the relevancy of information, appropriate and inappropriate lines of questioning, and overall decorum and conduct of the proceedings.
- A typical hearing may include:
  - A brief opening statement by the Complainant and/or Respondent, with follow-up questions posed by the Hearing Officer
  - Information presented by the parties or witnesses deemed relevant by the Hearing Officer, with follow-up questions posed by the Hearing Officer
  - Cross-examination of parties and witnesses by the parties' advisors with questions deemed relevant by the Hearing Officer
  - Brief concluding remarks by the Complainant and/or Respondent

ACHE Title IX Grievance Process: Decision

- Following the conclusion of the hearing, the Hearing Officer will deliberate and determine whether the evidence establishes that it is more likely than not that the Respondent committed a violation of ACHE's Title IX Policy.
- If the Hearing Officer determines that it is more likely than not the Respondent committed a violation of ACHE's Title IX Policy, the Hearing Officer will assign sanctions.
- The Hearing Officer will notify the Complainant and Respondent of the outcome simultaneously.

Requirement for Findings

- To establish a violation has occurred, Complainant must provide information that:
  - Constitutes a violation of the *ACHE Sexual Harassment and Sexual Misconduct Policy*
  - *C*orroborates the alleged behavior charged, and
  - Determines the accused student's/student organization's responsibility for the behavior reported.

Requirement for Findings (Cont.)

- If above 3 criteria met by preponderance, then:
  - Must find that a violation has occurred, and
  - Must find Respondent responsible for the violation

- Hearing Officers members **MAY NOT** consider:
  - Whether or not a student knew that they were violating a policy. Ignorance is not an excuse.
  - If a student makes a claim of diminished capacity due to alcohol or other drugs.
  - A claim that behavior was motivated by the unsubstantiated behavior of another as a legitimate defense.

Sexual Misconduct

- Sexual Misconduct
  - All forms of harassment and violence that are sexual in nature
- Sex-Based Harassment
  - Title IX
    - Quid Pro Quo, unwelcome sexual conduct, sexual assault, dating violence, domestic violence, and stalking
  - Other Sex-Based Harassment under ACHE Policy
    - Non-consensual sexual contact, sexual exploitation, and other sexual misconduct that does not fall under the Title IX definitions
- Sex-Based Violence
  - Intimate partner or domestic partner violence, dating violence, attempted or completed rape, and other forms of sexual assault

Standard of Proof

- Grievance procedures must use the *preponderance of evidence* standard to resolve complaints.
  - Must be more than 50% sure (51% or 50.1%)

Types of Information in a Title IX Investigation

- Oral Statements
  - Eyewitness, other witnesses, experts, investigators, character witnesses
- Written statements
- Physical objects and other kinds of records
  - Text messages, voicemails, results of a medical exam
- Documents
  - Court or medical records*, diagrams

*Note: ACHE personnel involved in the Title IX grievance process may not have access to any party's medical, psychological, or similar records or any other information protected by a legal privilege without that party's written, voluntary consent. (§ 106.45(5)(i)).

Types of Information (Cont.)
(Types of Supporting Facts)

- Direct Evidence (based on personal observation or experience)
  - Eyewitness testimony, photograph, other “direct” proof
  - If credible, establishes the fact one is trying to prove
- Circumstantial Evidence
  - Requires an inference; one must infer the fact one is trying to prove
- Documentary Evidence
  - Any supportive writings or documents including statements, reports, etc. that support or deny a fact at issue
- Hearsay or “secondhand” Evidence
  - Permitted in student/employee conduct hearings
  - Statements made by one person about statements they heard from someone else

Types of Information (Cont).

- To evaluate information, ask three questions:
  - Is the information relevant?
    - Is it related to the matter at issue and to what the party is trying to prove?
  - Is the information credible?
    - How believable is it?
  - Is the information convincing?
    - How strongly does it convince you of what the party is trying to prove?

Determining Relevance

- Information is *relevant* when, if true, it supports/proves, or undermines/disproves, any disputed fact that is of consequence to the determination of the case

Determining Relevance (Cont.)

- Information can be:
  - Relevant to an actual issue or action
  - Relevant to credibility of a witness or information
- Important considerations:
  - Efficiency
  - Fairness

Determining Relevance (Cont.)

- **Test for relevance**
  - A) What facts are you trying to prove/determine?
  - B) Does the information help prove or disprove a fact?
  - C) Is the fact important in deciding a case?

Determining Relevance (Cont.)

- Useful information in a hearing to help separate relevant from irrelevant information:
  - Motivation
  - Ability
  - Malice
  - Threats, expressions, or earlier similar acts implying or denoting intent
  - Other behavior that tends to shake your belief in a person's testimony

Evaluating Credibility

- “Credibility determination is neither an exact science nor a purely rational process.”
- Even in a situation where it appears to be one person’s word against another’s, it is very rarely a “draw,” as one person usually comes across as more credible than the other, or there is some kind of corroborative information.
  - If it IS a complete draw, then need to fall back on the fact that the student is presumed innocent unless proven “in violation,” and that the University has the burden of proof.

Evaluating Credibility (Cont).

- Inconsistency may or may not be important, depending on several factors:
  - is there is a reasonable explanation?
  - is the point significant or trivial
- Just because a witness's statement may vary over time, that does not compel a conclusion that the witness is lying
  - The variation might have resulted from memory lapse
- Too much consistency could mean the story is rehearsed or memorized.

Evaluating Credibility (Cont). (General Guidelines)

- Weighing one person's word against another
  - Barring other forms of evidence, the testimony of the unbiased person is given more weight.
- Multiple witnesses corroborating the same set of facts
  - it is only in a very rare situation that the number of witnesses be considered as a factor in determining responsibility.
- When the student introduces character witnesses
  - The testimony of these witnesses will be of minimal value in determining responsibility
  - Only exception would be if witness has information which suggests the student was physically unable to commit the violation

Evaluating Consent

- Be familiar with ACHE's policy definition of Consent
- Avoid misconceptions about responses to assault
  - Whey did she/he wait to report the assault?
  - Why did she/he first say she/he did not want us to take action but now she/he does?
  - Why does she/he describe events in a piecemeal fashion, rather than in a neat chronology?
  - Why does she/he come forward and state that she/he now remembers more about an event that she/he didn't tell in her/his first interview? Multiple witnesses corroborating the same set of facts
  - it is only in a very rare situation that the number of witnesses be considered as a factor in determining responsibility.
- Reactions of those who experience sexual assault may appear counter-intuitive but in fact are quite common
  - Reaction to trauma should not be misinterpreted as reflecting a lack of credibility about consent

Evaluating Consent (Cont.) (Role of alcohol/drugs)

- Evaluating intoxication vs. incapacitation and avoiding bias related to alcohol consumption
  - Gauge the impact of alcohol consumption by asking questions such as:
    - What type of alcohol did you consume?
    - Over what period of time did you consume the alcohol?
    - How quickly was the alcohol was consumed?
    - Did you consume any food? How much? When?
    - Were you taking any medication that has any restrictions regarding consumption with alcohol?
    - Can you describe the impact that the consumption of alcohol had on you?

Evaluating Consent (Cont.) (Role of alcohol/drugs)

- Was individual incapacitated by use of alcohol? Important to help distinguish sexual assault from a consensual (albeit intoxicated) sexual encounter. Possible factors to consider :
  - Was the complainant conscious or unconscious? Did s/he regain consciousness during the incident? If so, what did the respondent do?
  - Did the complainant black out at any point?
  - Did the complainant vomit at any point?
  - What was the complainant's condition when last seen by reliable third-party witnesses?
  - Did the complainant seem to understand where s/he was and where s/he might be going?
  - Could the complainant walk, or did someone have to assist or carry the complainant?
  - Could the complainant speak or communicate clearly? Was s/he slurring?

Evaluating Consent (Cont.) (Role of alcohol/drugs)

- What physical tasks did the complainant perform, and how well did s/he perform them?
  - For example, was the complainant using a Smartphone, and did his or her coordination seem impaired? Could the complainant make and maintain eye contact with others?
- Was the complainant able to remove his or her own clothes?
- Is there anything to suggest that a complainant may have been less inclined to participate in consensual intercourse at the time of the incident?
- These questions may seem invasive but are important in evaluating consent and incapacitation to help reach and support the ultimate conclusion about consent

Evaluating Consent (Cont.)

- In many sexual assaults, only the complainant and respondent were present. Pursue and evaluate other evidence to make an informed judgment call on the question of consent:
  - Witness accounts
  - Social Media postings
  - Student ID card swipes
  - Surveillance videos

Evidentiary Issues

- During the hearing:
  - Allow the witness to give a narrative
  - Use open-ended free recall questions
  - Build in an opportunity for follow-up
  - Be transparent about how information will be used
  - Develop rapport and allow for closure
  - Allow sufficient time for thorough exploration of the issues

Evidentiary Issues (Cont.)

- Always consider relevance
- Admission of medical information*
  - Consider need for expert guidance in understanding and interpreting information
  - If provided voluntarily by the complainant, should be shared with the respondent
- Admission of mental health records*
- Character evidence

* Note: ACHE personnel involved in the Title IX grievance process may not have access to any party's medical, psychological, or similar records or any other information protected by a legal privilege without that party's written, voluntary consent. (§ 106.45(5)(i)).

Evidentiary Issues (Cont.)

- Prior Sexual History
  - Questioning about the complainant's sexual history with anyone other than the Respondent should not be permitted
    - Mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence
  - Consider its relevance, based on articulable facts, to:
    - Explain physical injury or trauma
    - Other considerations

Evidentiary Issues (Cont.)

- Pattern Evidence
  - Prior bad acts/pattern evidence
    - May be relevant and probative
    - Use at fact-finding and at sanction
  - Consider relevance to:
    - Intent/state of mind/motive
    - Absence of mistake
    - Pattern
    - Identity

Cross-Examination

- During the live hearing, the parties' advisors may cross-examine other parties and witnesses. **No party can ever be allowed to personally question or cross-examine anyone.** § 106.45(b)(6).
  - If a party shows up to a hearing without an advisor, ACHE must provide an advisor free of charge to that party. § 106.45(b)(6).
- The Hearing Officer must decide if a question is relevant **before** the party or witness has to answer it. Along with the previously discussed techniques for determining relevance, the Hearing Officer should consider:
  - The Complainant's privacy. The Complainant's privacy must be protected by only allowing questions or evidence about prior sexual history in two narrow circumstances:
    - Where such information is offered to prove that someone other than the Respondent committed the alleged sexual harassment
    - Where such information relates to sexual behavior between the Complainant and the Respondent and is offered to prove consent § 106.45(b)(6).

Cross-Examination (Cont.)

- If a party or witness chooses not to appear at the live hearing, or chooses not to answer cross-examination questions, the Hearing Officer must exclude that party's or witness's statements and evaluate any evidence that does not involve those statements. § 106.45(b)(6).
- The Hearing Officer must never make inferences about the determination regarding responsibility based on the fact that a party or witness did not attend the hearing or submit to cross-examination. § 106.45(b)(6).
  - Remember, the Respondent should be presumed innocent throughout the Title IX grievance process until a determination of responsibility is made based on an objective evaluation of evidence.

Questioning Techniques

- Use Open-ended Questions
  - Who, what, how, etc.
  - Will allow the student to answer as long as he/she desires, yielding more information than requested
- Closed-ended questions often result in a “yes/no” response, not offering much information
  - Did you? Were you?

Questioning Techniques (Cont.)

- Avoid Multiple Choice Questions!
  - This type of question provides the charged student with the answer the hearing panel members wish to hear
  - Does not bring out the most relevant information
- Example:
  - Q: "What were your feelings when you broke the window? Were you angry, elated, frustrated, or just letting off steam? This was right around finals time."
  - A: "Oh, I was just letting off steam, exams weren't going well…"
    - The student will always choose the one that he or she thinks is least incriminating!
- Ask the question and stop!

Questioning Techniques (Cont.)

- Silence is Golden
  - Do not be alarmed when a question is asked and the person does not respond immediately.
  - Allow the person ample time to think without undue pressure to respond quickly.
  - If the person needs clarification, let him or her ask for it; don’t assume that she or he does not understand the question.

Things to Remember

- Carefully listen to everything that is said.
- Watch for non-verbal behaviors which may indicate attitudes, true feelings, or emotions.
- Be sure you clarify any conflicting information before you enter into deliberation. Continue to ask questions until you have all of the necessary facts regarding the incident. Do not wait until you are in deliberation and then start guessing at reasons why the information presented was conflicting.
- Carefully examine the time/date sequence of the incident. Follow-up on contradictions when questioning.

Things to Remember

- Avoid jumping from one line of questioning to another; attempt to examine an area completely before moving on.
- Avoid unnecessary writing during the hearing. You should be concentrating on the content while developing lines of questioning. The digital recorder will provide a complete record of the hearing.

Things to Remember

- Maintain your concentration throughout the hearing and remain attentive. Good posture and eye contact should be demonstrated anytime the hearing is in session.
- Never accuse a student or participate in heated arguments. Maintain your composure even if others do not.
- Carefully prepare your questions in advance. Avoid questions that are not relevant to the hearing.

Sanctions

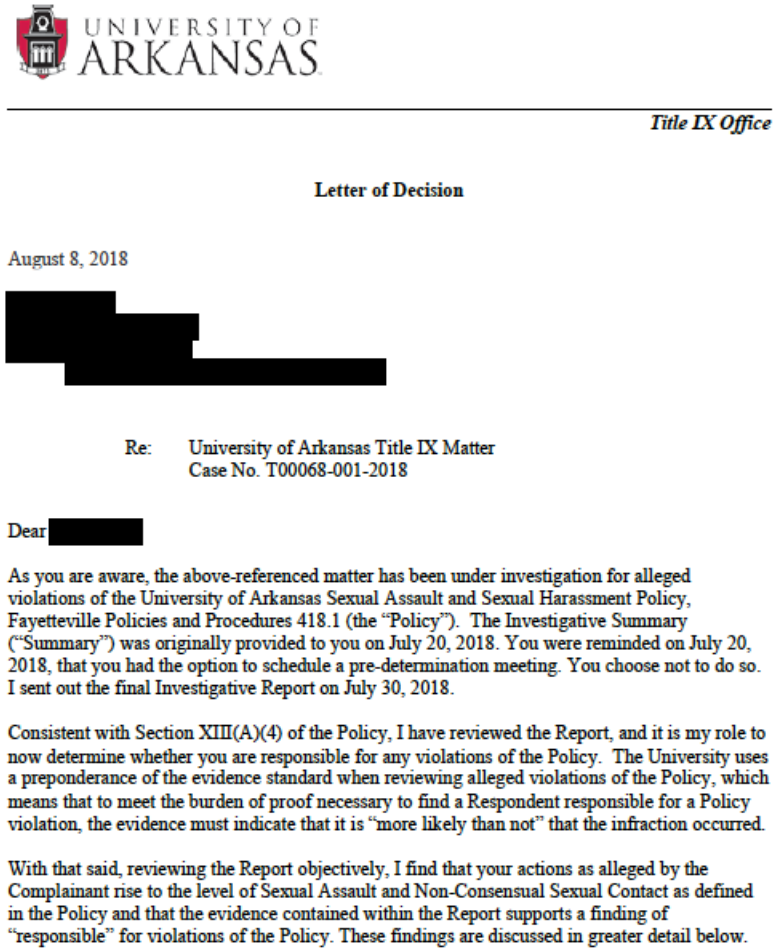
- Consider the following facts in determining the appropriate sanction:
  - Whether or not the circumstances suggest there is an increased risk of the Respondent committing additional acts of sexual harassment, including;
    - Whether there have been other sexual harassment complaints about the same Respondent
    - Whether the Respondent has a history of violence
    - Whether the Respondent threatened further sexual violence or other violence
  - Whether or not the circumstances suggest there is an increased risk of future acts of sexual harassment under similar circumstances
  - Whether or not the sexual harassment was perpetrated with a weapon or had other aggravating considerations
  - Whether the Respondent would be likely to pose a threat to the safety and/or well-being of the Complainant and/or the ACHE community generally and, if so, the nature and extent of the threat
  - The impact of the conduct on the Complainant and/or the ACHE community
  - Any other mitigating, aggravating, or compelling circumstances in order to reach a just and appropriate resolution in the case

Structure of Outcome Letters

- **Introductory paragraphs**

- Mention:
  - Dates of any meetings
  - Opportunities given to review investigative report
  - Whether or not they provided additional material or questions to investigator

  - **Goal**: make it clear to the reader how much opportunity he/she had to participate in the process.



UNIVERSITY OF ARKANSAS

Title IX Office

Letter of Decision

August 8, 2018

[redacted]

Re: University of Arkansas Title IX Matter
Case No. T00068-001-2018

Dear [redacted]

As you are aware, the above-referenced matter has been under investigation for alleged violations of the University of Arkansas Sexual Assault and Sexual Harassment Policy, Fayetteville Policies and Procedures 418.1 (the "Policy"). The Investigative Summary ("Summary") was originally provided to you on July 20, 2018. You were reminded on July 20, 2018, that you had the option to schedule a pre-determination meeting. You choose not to do so. I sent out the final Investigative Report on July 30, 2018.

Consistent with Section XIII(A)(4) of the Policy, I have reviewed the Report, and it is my role to now determine whether you are responsible for any violations of the Policy. The University uses a preponderance of the evidence standard when reviewing alleged violations of the Policy, which means that to meet the burden of proof necessary to find a Respondent responsible for a Policy violation, the evidence must indicate that it is "more likely than not" that the infraction occurred.

With that said, reviewing the Report objectively, I find that your actions as alleged by the Complainant rise to the level of Sexual Assault and Non-Consensual Sexual Contact as defined in the Policy and that the evidence contained within the Report supports a finding of "responsible" for violations of the Policy. These findings are discussed in greater detail below.

Structure of Outcome Letters (Cont.)

- **Introduction:**
  - Briefly explain the Policy
  - Briefly explain the procedural steps taken by the school
  - Explain the standard of proof (Preponderance of evidence)
  - Give the outcome: “I find that your actions as alleged by the Complainant do/do not rise to the level of “Sexual Assault” as defined in the Policy”

Structure of Outcome Letters (Cont.)

- **Explain the Facts**
  - Use the report
  - Thorough
  - Focus on only relevant facts
  - Provide quotes, if possible.
  - Keep a neutral tone
  - Do not bring in outside information

Summary of Material Facts[1]

The factual allegations in this matter are largely undisputed. The Complainant reported to the University of Arkansas Title IX Office that on May 22, 2018, you penetrated her vagina with your fingers without her consent.

The Complainant explained that on the night of the incident, she was with you and two mutual friends, [redacted] and [redacted]. The Complainant stated that the four of you decided to hang out at Ms. [redacted] residence for the evening. The Complainant stated that the four of you drank alcohol and socialized, though nobody was intoxicated, and you all watched a movie. According to the Complainant, after falling asleep on the floor next to you, she was awakened by you penetrating her vagina with your fingers. The Complainant stated that during this encounter, you were whispering things to her such as, "do you like that?" The Complainant stated that she reacted with shock and told you to stop. The Complainant stated that you did not stop but continued to touch her in a very forceful manner for approximately two to three minutes. The Complainant stated that during that time, you also took her hand and placed it on the outside of your pants.

The Complainant stated this experience "scared" her and that she got up from the floor to go sleep in Ms. [redacted]' upstairs bedroom. The Complainant stated that you followed her upstairs and got in bed with her and continued to touch her. The Complainant stated that you put both arms around her and grasped her tightly and touched her breasts. Thereafter, according to the Complainant, she left Ms. [redacted]s bedroom and was driven home by Ms. [redacted] in an emotionally distraught state. Both Ms. [redacted] and Mr. [redacted] were interviewed and corroborate that they observed the Complainant walk down the stairs crying and visibly upset.

Structure of Outcome Letters (Cont.)

- **Findings Section:**
  - Define the Policy definitions
  - State the conclusion (again)
  - Use the facts to provide a detailed rationale to support your conclusion

Findings

A. Sexual Assault

The University Policy defines Sexual Assault as follows:

> An actual or attempted sexual contact with another person without that person's consent. Sexual assault includes but is not limited to involvement in any sexual contact when the victim is unable to consent; intentional and unwelcome touching of, or coercing, forcing, or attempting to coerce or force another to touch a person's intimate parts (defined as genital area, groin, inner thigh, buttocks, or breast); and sexual intercourse without consent.

The University Policy further defines "consent" as:

> [A] clear, knowing and voluntary decision to engage in sexual activity [that is] given without coercion, force, threats, or intimidation. Consent must be "active, not passive," and it may be given by "words or actions, as long as those words or actions consist of an affirmative, unambiguous, conscious decision by each participant, to engage in mutually agreed-upon sexual activity.

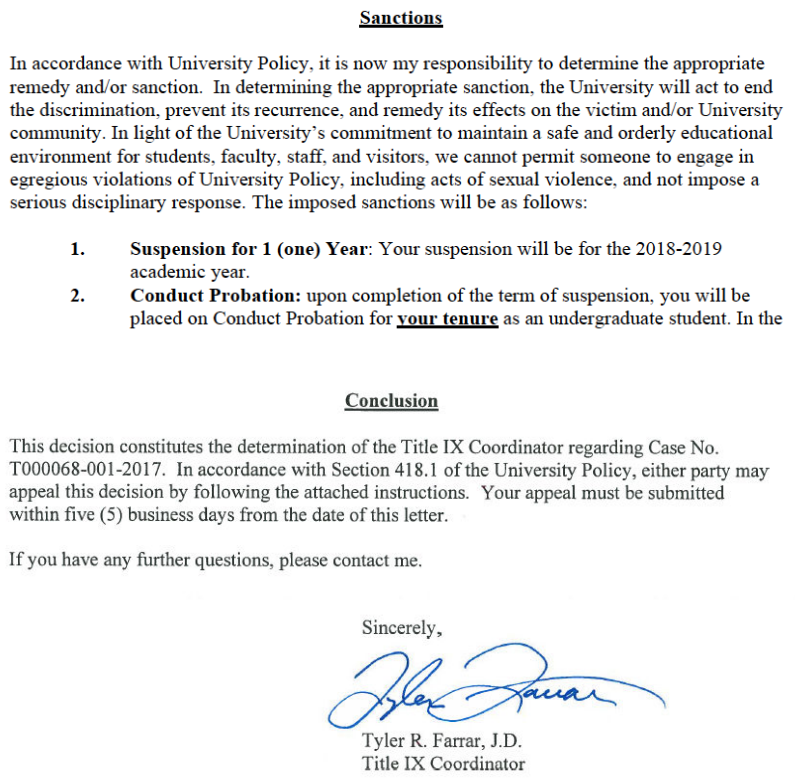
I find that your behavior on the night of the incident, as described by the Complainant and largely corroborated by your own statements, constitutes Sexual Assault in violation of University Policy. The Complainant has alleged that you penetrated her vagina with your fingers while she was sleeping and that you continued to do so after she woke up. The Complainant stated that after asking you to stop that you continued to forcefully touch her, not just initially but also when you followed her to the upstairs bedroom. You have admitted to placing your hand in the Complainant's pants but you did not admit to penetrating the Complainant's vagina with your fingers. You stated that the Complainant grabbed your hand to stop your movements.

Structure of Outcome Letters (Cont.)

Sanctions (if necessary):
- Explain why the sanction is appropriate
- Clarity is important

Remedies (if necessary):
- Explain why the remedy is appropriate
- Clarity is important

Conclusion:
- Provide any remaining necessary information (ex: how to file an appeal, the permissible bases for appeal).



Sanctions

In accordance with University Policy, it is now my responsibility to determine the appropriate remedy and/or sanction. In determining the appropriate sanction, the University will act to end the discrimination, prevent its recurrence, and remedy its effects on the victim and/or University community. In light of the University's commitment to maintain a safe and orderly educational environment for students, faculty, staff, and visitors, we cannot permit someone to engage in egregious violations of University Policy, including acts of sexual violence, and not impose a serious disciplinary response. The imposed sanctions will be as follows:

1. **Suspension for 1 (one) Year**: Your suspension will be for the 2018-2019 academic year.
2. **Conduct Probation:** upon completion of the term of suspension, you will be placed on Conduct Probation for **your tenure** as an undergraduate student. In the

Conclusion

This decision constitutes the determination of the Title IX Coordinator regarding Case No. T000068-001-2017. In accordance with Section 418.1 of the University Policy, either party may appeal this decision by following the attached instructions. Your appeal must be submitted within five (5) business days from the date of this letter.

If you have any further questions, please contact me.

Sincerely,

Tyler R. Farrar, J.D.
Title IX Coordinator

Goals of Outcome Letters

- Clarity
- Understanding the audience
  - Both parties, an appellate panel, courts, OCR, etc.
- Thorough but not too long
- A final product that both sides will consider “palatable”

Questions