

# Baylor University Title IX Office Investigator Training

## Fair, Equitable, Witness-Centered Investigations

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# Topics for Discussion

- Title IX regulations update
- Importance of gender neutrality
- How traditional interviewing techniques can interfere with witness participation and recall of authentic memories
- How witness-centered interview techniques account for the ways in which memory can be affected by trauma, stress, alcohol, and the passage of time
- How to ensure that witness-centered interview techniques are applied in a manner that is demonstrably balanced, thorough, and fair to all witnesses

# Title IX Background

- » 2001: OCR issues *Revised Sexual Harassment Guidance*, available at: <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (“2001 Guidance”)
- » 2006: OCR issues Dear Colleague Letter on Sexual Harassment, available at: <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> (“2006 DCL”)

# Title IX Background

- » **April 2011** Office for Civil Rights (OCR) “*Dear Colleague*” letter (“2011 DCL”) (WITHDRAWN)
- » **April 2014** OCR Q&A on Title IX and Sexual Violence (“2014 Q&A”) (WITHDRAWN)

# Title IX Background

- » **September 7, 2017** Department of Education Secretary Betsy DeVos announces notice and comment process
- » **September 22, 2017:** OCR issued:
  - Dear Colleague Letter (“2017 DCL”) withdrawing 2011 DCL and 2014 Q&A
  - Q&A on Campus Sexual Misconduct (“2017 Q&A”)

# Title IX Background

- » Posted November 16, 2018
- » Officially published in Federal Register later in November, 2018
- » Fact Sheet and Summary also posted
- » See:  
[https://www2.ed.gov/about/offices/list/ocr/new\\_sroom.html](https://www2.ed.gov/about/offices/list/ocr/new_sroom.html)

# “Guiding Principles” for Proposed Regulations

- » “Rulemaking Process: It is important to address this issue through notice-and-comment rulemaking rather than non-binding guidance. The Department looks forward to the public’s comments, and has benefitted from listening sessions and discussions with students, schools, advocates, and experts with a variety of positions.”
- » “Greater Clarity: The proposed regulation seeks to ensure that schools understand their legal obligations and that complainants and respondents understand their options and rights.”

# “Guiding Principles” for Proposed Regulations

- » **“Increased Control for Complainants:** The Department recognizes that every situation is unique and that individuals react to sexual harassment differently. The proposed regulation seeks to ensure that schools honor complainants’ wishes about how to respond to the situation, including increased access to supportive measures.”
- » **“Fair Process:** The proposed regulation is grounded in core American principles of due process and the rule of law. It seeks to produce more reliable outcomes, thereby encouraging more students to turn to their schools for support in the wake of sexual harassment and reducing the risk of improperly punishing students.”

# Title IX Background

- » Over 125,000 comments were submitted
- » Department must:
  - Categorize comments
  - Articulate responses to comments if declining to make changes
  - If making changes, determine whether further notice and comment is necessary

# Proposed Regulations: Significant Substantive Changes

# Proposed Regulation Sexual Harassment Definition

- Previous OCR guidance required schools to investigate “unwelcome conduct of a sexual nature”
- Proposed regulation defines sexual harassment as:
  - Employee’s conditioning aid, benefit, service on participation in sexual conduct (i.e., *quid pro quo*)
  - Sexual assault (as defined by Clery Act)

# Proposed Regulation Sexual Harassment Definition

- Proposed sexual harassment definition:
  - “Unwelcome conduct that is so severe, pervasive and objectively offensive that it denies a person access to the recipient’s education program or activity”
  - This is SCOTUS definition
  - Intended to “promote protection of free speech and academic freedom”
- Proposed regulation:
  - No need to investigate “unwelcome conduct of a sexual nature” that falls below threshold

## Decision Point: Sexual Harassment Definition

- OCR Background & Summary:
  - “Within due process guardrails, . . . [schools] retain pedagogical control over their educational environments.”
  - “For example, the regulation **does not** prevent (or require) a school from using affirmative consent in the school’s code of conduct, and
  - **does not** prevent a school policy from prohibiting sexual behavior that does not meet the Title IX definition of harassment.”

## Decision Point: Sexual Harassment Definition

- Given this proposed change, schools **will likely have to decide**:
  - Whether to narrow definition of prohibited sexual behavior to higher threshold of sexual harassment adopted in proposed regulation
  - Whether to investigate only reports that, if established by evidence, would meet higher threshold, OR
  - Whether to continue to prohibit and investigate “unwelcome conduct of a sexual nature” as defined in many current policies

## Proposed Regulation re Scope of Institutional Responsibility

- Institution must respond when it has:
  - “Actual knowledge”
  - of “sexual harassment” (as newly defined)
  - that occurred within the school’s “education program or activity”
  - against a “person in the United States”

## Proposed Regulation re Scope of Institutional Responsibility

- “Formal complaint” triggering response obligation is:
  - Document signed by complainant or Title IX Coordinator alleging covered sexual harassment and requesting initiation of grievance procedures (as outlined below)

## Proposed Regulation: “Actual Knowledge”

- “Actual knowledge”:
  - School has actual knowledge when report is made to “official with authority to take corrective action”
  - Title IX Coordinator will always be such an official
  - Fact-specific inquiry regarding other officials (fair to assume narrow definition)
  - “Mere ability or obligation to report” does not meet threshold

## Decision Point: “Actual Knowledge”

- Given likely narrowing of responsibility to respond to reports to “official with authority to take corrective action”
- Schools **will have to decide** whether to:
  - Adopt narrower definition as threshold for encouraging reporting and taking action, OR
  - Continue to
    - define “responsible employees” broadly (e.g., to include faculty)
    - encourage reporting broadly, and
    - take action based on reports to faculty and others

## Proposed Regulation: School's "education program or activity"

- School's "education program or activity":
  - Not simple "artificial bright-line" on/off campus distinction
  - Does not simply depend on geographic location of activity
  - Examples given: Did conduct occur in location/context where school:
    - Owned premises
    - Exercised oversight, supervision or discipline, or
    - Funded, sponsored, promoted or endorsed event

## Decision Point:

School's "education program or activity"

- "Importantly, nothing in the proposed regulations would prevent [a school] from initiating a student conduct proceeding . . . [regarding reported] sexual harassment that occurs outside the [school's] education program or activity."
- Given this likely change, schools **will have to decide** whether to prohibit and investigate sexual misconduct that occurs outside more narrowly-defined "education program or activity"

## Proposed Regulation: “person in the United States”

- Proposed regulation limits Title IX to discrimination “against a person in the United States”
- OCR Summary: person’s being “in the United States’ (affecting, for example, study abroad programs); this is a necessary precondition because the text of the Title IX statute limits protections to ‘person[s] in the United States’”

Decision Point:  
“person in the United States”

- “Importantly, nothing in the proposed regulations would prevent [a school] from initiating a student conduct proceeding . . . [regarding reported] sexual harassment that occurs . . . ( . . . as to conduct that harms a person located outside the United States, such as a student participating in a study abroad program).”
- Given this likely change, schools **will have to decide** whether to prohibit and investigate sexual misconduct that occurs outside the U.S.

## Proposed Regulation: “Safe Harbors”

- Proposed regulation provides that Title IX Coordinator “must file a formal complaint” if they have “actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment”
- If school does so its response is not deliberately indifferent (even if complainants choose not to participate in investigation, and no disciplinary action can be taken)

# Proposed Regulation: “Safe Harbors”

- School is not deliberately indifferent when in absence of formal complaint it:
  - Offers and implements supportive measures to preserve complainant’s access to the school’s education program or activity, and
  - Informs complainant of right to file formal complaint at that time or a later date
    - Specific notice requirements are detailed in regulation

## Proposed Regulation: Selected Additional Issues

- OCR won't find deliberate indifference:
  - “merely because [it] would have reached a different determination based on an independent weighing of the evidence”
- “[T]reatment of the respondent may constitute discrimination on the basis of sex under Title IX.”

# “Supportive Measures”

- “Supportive measures”:
  - “non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge”:
    - To the complainant or the respondent
      - Before or after the filing of a formal complaint or
      - Where no formal complaint has been filed

## “Supportive Measures”

- Supportive measures “are designed to”:
  - Restore or preserve access to school’s education program or activity, without unreasonably burdening the other party
  - Protect the safety of all parties and the school’s educational environment, and
  - Deter sexual harassment

# “Supportive Measures”

- Supportive measures may include:
  - Counseling
  - Extensions of deadlines or other course-related adjustments
  - Modifications of work or class schedules
  - Campus escort services
  - Mutual restrictions on contact between the parties
  - Changes in work or housing locations
  - Leaves of absence
  - Increased security and monitoring of certain areas of the campus
  - And other similar measures

# “Emergency Removal”

- Emergency removal may still be appropriate, provided that school:
  - Undertakes “individualized safety and risk analysis
  - Determines that an immediate threat to the health or safety of students or employees justifies removal, and
  - Provides respondent with notice and opportunity to challenge decision immediately following the removal
- Administrative leave of non-students during investigations also permitted

# Proposed Regulations: Significant Procedural Changes

## OCR “Fact Sheet” Summary of Procedural Changes

- “To achieve fairness and reliable outcomes, the proposed regulation would require **due process protections**, including:
  - A **presumption of innocence** throughout the grievance process, with the **burden of proof on the school**
  - **Live hearings** in the higher education context
  - A **prohibition of the single-investigator model**, instead requiring a decision-maker separate from the Title IX Coordinator or investigator”

## OCR “Fact Sheet” Summary of Procedural Changes

- “To achieve fairness and reliable outcomes, the proposed regulation would require **due process protections**, including: . . .
  - The clear and convincing evidence or preponderance of the evidence standard, subject to limitations
  - The opportunity to **test the credibility** of parties and witnesses through **cross-examination**, subject to ‘rape shield’ protections”

## OCR “Fact Sheet” Summary of Procedural Changes

- “To achieve fairness and reliable outcomes, the proposed regulation would require **due process protections**, including: . . .
  - Written **notice of allegations** and an equal opportunity to **review the evidence**
  - Title IX Coordinators, investigators, and decision-makers **free from bias or conflicts of interest** and
  - **Equal opportunity for parties to appeal**, where schools offer appeals.”

# Proposed Procedural Changes

- The proposed procedural changes, if adopted as proposed, will require a comprehensive overhaul of Title IX policies
- New language regarding various notices, presumptions of innocence, and revised hearing procedures will be necessary
- With that qualification, in interest of time we will address here the most dramatic proposed changes

# Proposed Procedural Changes

- Proposed regulations:
  - Must investigate “formal complaints”
  - Must satisfy certain notice and ongoing notice requirements
  - Must produce investigation report with certain elements
  - Must give parties opportunity to review evidence as detailed in proposed regulations

# Proposed Procedural Changes

- Proposed procedures would require that schools must:
  - (i) Ensure that burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties
  - (ii) Provide equal opportunity for parties to present witnesses and other inculpatory and exculpatory evidence;
  - (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

# Proposed Procedural Changes

- Proposed procedures would require that schools must:
  - (iv) Provide parties with same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding
  - however, school may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties (and advisors are allowed to conduct cross examination)
  - (v) Provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate;

# “Live Hearings”

- “At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”
- “Such cross-examination at a hearing must be conducted by the party’s advisor of choice, notwithstanding the discretion of the recipient . . . to otherwise restrict the extent to which advisors may participate in the proceedings.”
  - Requirements are taken from *Doe v. Baum, Univ. of Michigan, et al.*, 903 F.3d 575, 581 (6th Cir. Sept. 7, 2018)

# “Live Hearings”

- “If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination.”
- “All cross-examination must exclude evidence of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove
  - that someone other than the respondent committed the conduct alleged by the complainant, or
  - if the evidence concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent.”

# “Live Hearings”

- “At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.”
  - Rationale taken from *Doe v. Baum* (6<sup>th</sup> Cir. 2018)
- “The decision-maker must explain to the party’s advisor asking cross-examination questions any decision to exclude questions as not relevant.”

# “Live Hearings”

- “If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility”
  - Rationale taken from *Doe v. Baum* and other Sixth Circuit precedent

# “Live Hearings”

- For what it’s worth:
  - OCR “cross examination by advisors” approach relies upon Sixth Circuit’s September, 2018 *Doe v. Baum* decision, BUT
  - After proposed regulations published, the First Circuit decided, in *Haidak v. UMASS-Amherst* (August 6, 2019), that direct cross examination by advisors was not necessary to satisfy constitutional due process requirements, and that “inquisitorial model”-style live questioning by hearing panelists could suffice

# Prohibition of Single-Investigator Model

- Proposed regulation:
  - “The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.”
- This and “live hearing” requirement effectively prohibit “single investigator” and “investigation only” models

# Standard of Evidence

- Schools may use either:
  - preponderance of the evidence standard or
  - clear and convincing evidence standard
- May employ preponderance of the evidence standard only if use that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction

## Decision Point: Standard of Evidence

- Must also apply same standard of evidence for complaints against students as it does for complaints against employees, including faculty
- But, can choose to use clear and convincing for sexual harassment only, even if use preponderance for other types of misconduct
- Schools **will have to decide** whether to use preponderance or clear and convincing standard and
- Schools **will have to decide** whether to use clear and convincing standard for sexual harassment only, even if use preponderance for other types of misconduct

## Proposed Regulations: Employment Issues

- Current Regulation states that:
  - “A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.”
  - 34 CFR 106.8(b) (emphasis added)

# Proposed Regulations: Employment Issues

- Proposed regulation (preamble):
  - “Employees of a school may have rights under both Title IX and Title VII. To the extent that any rights, remedies, or procedures differ under Title IX and Title VII, this provision clarifies that nothing about the proposed regulations is intended to diminish, restrict, or lessen any rights an employee may have against his or her school under Title VII.”
  - “Proposed section 106.8(d) would clarify that the recipient’s policy and grievance procedures apply to all students and employees”
- Impact of live hearing/cross examination requirements to existing employee procedures could be very significant

## Proposed Regulations: Informal Resolution

- Schools may facilitate informal resolution of sexual assault reports if:
  - Parties are provided written notice of:
    - The allegations
    - The requirements of the informal resolution process, including any rule that precludes parties from resuming formal complaint process
    - Any consequences from participating, including records that will be maintained or could be shared
  - School obtains parties' voluntary, written consent to informal resolution process

# Proposed Regulation: Appeals

- Contrary to 9/22/17 OCR Q&A (which said that schools could choose to allow appeals by respondents only), proposed regulations provide that:
  - if either party has a right to appeal, both parties have a right to appeal

## Proposed Regulation: Remedies

- “An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent”
  - “Such remedies must be designed to restore or preserve access to the recipient’s education program or activity”
- “An equitable remedy for a respondent must include due process before any disciplinary sanctions are imposed”

# Proposed Regulation: Training

- Proposed regulation re training:
  - Schools “must ensure that coordinators, investigators, and decision-makers receive training on both the definition of sexual harassment and how to conduct an investigation and grievance process, including hearings, if applicable, that protect the safety of students, ensure due process protections for all parties, and promote accountability.
  - “Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment”

# NACUANOTE Comment

- When asked to clarify remarks made during a September 28, 2017 NACUA Briefing about whether the concept of trauma-informed training and awareness continues to be meaningful to OCR in light of the 2017 Q&A, Acting Assistant Secretary of Education Candice Jackson responded in part as follows:
  - While trauma-informed approaches that are grounded in science benefit sexual violence investigations, trauma-informed techniques should be undertaken contemporaneously with a rigorous commitment to a fair process for all parties. Trauma-informed investigation techniques that bleed over into a presumption of bias detract from the fundamental tenets of fairness and impartiality that are hallmarks of student disciplinary proceedings.

Nolan, J., NACUANOTE “Promoting Fairness in Trauma-Informed Investigation Training” (Feb. 8, 2018)

# Proposed Regulation: Recordkeeping

- School must create, make available to parties, and maintain for three years records of
  - Each sexual harassment investigation
  - Any appeal and the result therefrom
  - All materials used to train coordinators, investigators, and decision-makers regarding sexual harassment
- Must also create and maintain records of any actions, including supportive measures, taken in response to report or formal complaint of sexual harassment

# Notice and Comment Process

# Notice and Comment Process

- OCR sought public comment on several “directed questions” including:
  - “**Applicability of the rule to employees.** Like the existing regulations, the proposed regulations would apply to sexual harassment by students, employees, and third parties. The Department seeks the public’s perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.”

# Notice and Comment Process

- OCR sought public comment on several “directed questions” including:
  - “The proposed rule would require recipients to ensure that Title IX Coordinators, investigators, and decision-makers receive training on the definition of sexual harassment, and on how to conduct an investigation and grievance process, including hearings, that protect the safety of students, ensures due process for all parties, and promotes accountability.
  - The Department is interested in seeking comments from the public as to whether this requirement is adequate to ensure that recipients will provide necessary training to all appropriate individuals”

# Notice and Comment Process

- OCR sought public comment on several “directed questions” including:
  - whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate, and
  - if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed

# Notice and Comment Process

- OCR sought public comment on several “directed questions” including:
  - Department seeks comments on the extent to which institutions already have and use technology that would enable the institution to fulfill requirement that “live hearings” be conducted through use of remote access technology if requested by parties without incurring new costs or
  - whether institutions would likely incur new costs associated with this requirement

# Preliminary Thoughts on Navigating Proposed Regulatory Environment

- Consider school's position on **decision points** now, even during notice/comment period
- Recognize that substantial process revisions will be necessary
- Recognize that professionalizing hearing officers will likely be required

# Current Practices and Trends in Investigating and Adjudicating Reports of Sexual Assault on Campus

# Gender Neutrality is Crucial

- » Majority of reported incidents and investigations involve cisgender heterosexual women as complainants and cisgender heterosexual men as respondents, but:
  - The gender of any party to an investigation should have no bearing on how the University will investigate
- » Colleges and universities are opposed to sexual misconduct, IPV and stalking; they are not opposed to anyone because of their sex

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

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

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

# Gender Neutrality is Crucial

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

# Gender Neutrality is Crucial

- » See also Jessica A. Turchik, *Sexual Victimization Among Male College Students: Assault Severity, Sexual Functioning, and Health Risk Behaviors*, *Psych. of Men & Masculinity*, Vol. 13, No. 3, 243-255 (2012) (available at: <https://www.apa.org/pubs/journals/features/men-13-3-243.pdf> )
- » 299 male college students asked whether they had experienced at least one sexual victimization experience since age 16:
  - 21.7% reported unwanted sexual contact, 12.4% reported sexual coercion, and 17.1% reported completed rape
  - 48.4% of these experiences involved female perpetrators

# Court Decisions on Gender Neutrality

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

# Court Decisions on Gender Neutrality

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

# Court Decisions on Gender Neutrality

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

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

# Court Decisions on Gender Neutrality

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

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

# Gender Neutrality is Crucial

- » Respondents of any gender could of course be subjected to sexually-discriminatory hostile environment if demonstrated by facts of a particular case
- » Even if not necessarily a sex-based hostile environment, if conduct that violates other institutional policies is directed at a respondent, institutions should take appropriate action under the circumstances

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

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

# Witness-Centered Investigations

# Traditional Interviewing Techniques

- Often focus on “who, what, when, where, why”
- Often focus on what investigator needs, e.g.:
  - Developing a chronology
  - Fitting facts into policy violation elements framework
- Investigator’s determinations and (worse yet) pre-determinations of what is relevant, and what is not, can be controlling
  - Investigator often interrupts witness to seek immediate clarification
- Common questioning techniques:
  - Leading questions
  - Yes/no or choice questions
  - Paraphrasing for “clarification”
- “Why did you/why didn’t you” questions that can discourage participation

# “Malleability of Memory”

Elizabeth Loftus, Ph.D., “Planting misinformation in the human mind: A 30-year investigation of the malleability of memory,” *Learning & Memory* (2005) (reviews 30 years of research)

- Summarizes research on “misinformation effect”, whereby study subjects report that they “remember” observing details in scenarios that were not actually there, because researchers intentionally misinformed them that those details were there
- Subjects found to be more susceptible to effect where:
  - Relatively more time had passed between observation and test
  - Subject self-reported they often had lapses in memory and attention
- Article notes that in the “real world”, “misinformation” that contaminates memory can come from:
  - Witnesses’ talking to each other
  - Leading questions or suggestive techniques
  - Media coverage

# “Creating False Memories”

Elizabeth Loftus, Ph.D., “Creating False Memories,” *Scientific American* (Vol. 277 #3, pp. 70-75)

- Loftus and others did “lost in the mall” experiments in which adult study subjects were asked to “try to remember” events that a family member had told the researchers about
- Subjects were given three one-paragraph descriptions of events that had actually happened to the subjects in childhood, as reported by relatives, and one description of a “lost in the mall” event that had not actually happened
- 29 percent remembered, either partially or fully, the false event
- Takeaways:
  - “Memories are more easily modified . . . when the passage of time allows the original memory to fade.”
  - “Corroboration of an event by another person can be a powerful technique for instilling a false memory.”

## National event focuses on trauma and memory

“This Kavanaugh hearing is a blown-up politicized version of exactly what Title IX investigators face every day.”

Unidentified commenter quoted in “The Kavanaugh-Ford Hearing and Campus Sexual Assault: 3 Parallels”, *Chronicle of Higher Education* (Sept. 27, 2018) (available at:

<https://www.chronicle.com/article/The-Kavanaugh-Ford-Hearing-and/244662> ).



## NACUANOTES

- **J. Nolan, “Promoting Fairness in Trauma-Informed Investigation Training”**
  - National Association of College and University Attorneys (“NACUA”) NACUANOTE, February 8, 2018, Vol. 16 No. 5
- Updated H&K white paper version available at:  
<https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>

# Putting Discussion in Context

- This discussion concerns potential effects of trauma that some people may experience in some situations
- No part of discussion should be misunderstood to suggest that all individuals will experience trauma, emotionally or physically, in a certain, “dose-dependent” way
- Scientific theories about the potential effects of trauma should never be used to determine responsibility for misconduct in a specific investigation

# Potential Effects of Trauma

- During sexual assault or other traumatic event, individual may experience a threat to survival
- Body may summon energy to fight/flee/freeze
- May result in shock, “dissociation,” and / or other involuntary responses during and after violence
- Memory of traumatic event may be fragmented/impaired due to neurobiological factors

# Hypothalamus Pituitary Adrenal Axis Substances

- Catecholamines
  - Neurotransmitters such as norepinephrine that influence behavior
    - e.g., fight, flight or freeze
- Cortisol and adrenaline: increase energy
- Endogenous opioids: block pain and/or emotion
- Oxytocin: promotes feelings of well-being

# Potential Effects of HPA Axis Substances on Memory

- Structures in brain involved in encoding memory (e.g., hippocampus) may be sensitive to HPA axis substances
- HPA axis substances may interfere with or affect encoding of memory

# Potential Effects of Trauma on Memory

- Memories for traumatic incident are no more or less likely to be inaccurate than memories for a non-traumatic event
- Central details may be remembered very well, but peripheral details less so
- Be very thoughtful about how much weight to place on witness's presentation given potential effects of trauma, stress, alcohol, cultural factors, etc.
  - Recognize that presentation may not necessarily be “evidence”

# Potential Effects of Trauma on Memory

- Generally in interviews we expect to hear information generated by the cerebral cortex – organized, chronological.
- With individual who has experienced trauma, the information recalled regarding traumatic incidents may not be organized and/or chronological.
- Shouldn't assume disorganized reporting is evidence of EITHER:
  - false reporting
  - existence of trauma

# “The Cognitive Interview” (1992)

- **Fisher and Geiselman, “Memory-Enhancing Techniques for Investigative Interviewing: The Cognitive Interview” (1992)**
- Used primarily by law enforcement
- Extensively studied for effectiveness
  - See “THE COGNITIVE INTERVIEW: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years,” 16 Psych. Pub. Pol. and L. 340 (Nov. 2010)
- Language of book is “couched in terms of police investigations” because that is context in which authors did practical aspects of their research, but authors suggest that “[n]on-police investigators . . . [can] simply modify the general concepts to make them compatible with their particular investigative conditions.” (p. 4)
- Approach not designed for Title IX context and I wouldn’t recommend following it per se in Title IX/Clery investigations
- I’m discussing it here to demonstrate its commonality with the Forensic Experiential Trauma Interview

# “The Cognitive Interview” (1992)

- Suggests based on psychological research that some “memory-related” problems may be due not to a witness’s not having certain stored memories, but rather by “inappropriate retrieval”
- Certain interviewing approaches may “indirectly control the [witness’s] retrieval plan, and the more efficiently they guide the [witness] to search through memory the more information they will uncover.” (p. 14)
- CI encourages the investigator to understand that the witness, not the investigator, should be the “central character in the interview,” (p. 15)
- CI “not intended as a recipe”
  - Investigator should “use good judgment and change directions as unexpected conditions arise”
  - CI offered as “a general guiding principle . . . to be used in concert with sound judgment and the flexibility to respond to the unanticipated.” (p. 15)

# “The Cognitive Interview” (1992)

## “Dynamics of the Interview” (Chapter 3)

- Examples given are, frankly, dated and gender-stereotypical
  - male pronouns are used to describe the police officer
  - investigators and interviewees are usually referred to as women
- Submits that most effective interviewers ask the least questions and encourage the witness do most of the talking (p. 20)
- **Advocates encouraging witness to take active role in interview by:**
  - **Using open-ended questions**
  - **Not interrupting witnesses in middle of open-ended narrative (pp. 20-21)**

# “The Cognitive Interview” (1992)

## “Dynamics of the Interview” (Chapter 3)

- Suggests interviewer should “**avoid making judgmental comments and asking confrontational questions**” unless “certain” there is deception involved (p. 26)
- Encourages interviewer to obtain all that can be obtained through open-ended questions before addressing inconsistencies and conflicting information, which can be done “later in the interview” (p. 26)

# “The Cognitive Interview” (1992)

## “Overcoming Eyewitness Limitations” (Chapter 4)

- Chapter includes many suggested techniques for, and generalized statements about, police investigations that would not translate well to neutral, Title IX/Clery investigative interview context, but general observations of note include (at pp. 41, 44-45)
  - Encouraging witnesses to **share details as they come to mind**, rather than requiring witnesses to respond only to the questions asked or stick to a chronology or what they might think are more central details
  - Encouraging witnesses to share, rather than suppress or edit out, potentially inconsistent statements, **then following up later for clarification**
  - Encouraging witnesses to **take their time** and **share as much detail as they can**

# “The Cognitive Interview” (1992)

## “Mechanics of Interviewing” (Chapter 6)

- Not all aspects of law enforcement-focused discussion and examples would translate well to neutral, Title IX/Clery investigative context, but some noteworthy general concepts include:
  - **Use neutral questions rather than leading questions**
  - **Avoid negative wording** (e.g., “You don’t know X, do you?”)
  - **Avoid compound questions**
  - **Avoid unnecessarily complex questions**
  - **Avoid jargon and technical terminology**
  - **Generally use open-ended rather than closed questions, and only used closed questions strategically, once basic answers to closed questions were established through responses to open-ended questions**
  - **Pace questioning slowly and allow pauses between questions to encourage witnesses to speak more freely**
  - **Inquiring about touch, smell and taste sensory impressions**

# “The Cognitive Interview” (1992)

- “THE COGNITIVE INTERVIEW: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years,” 16 Psych. Pub. Pol. and L. 340 (Nov. 2010) reviewed numerous studies of CI and noted among many other observations that:
  - When used under laboratory conditions, interviews conducted using CI and modified CI produced more recollection of correct details when compared to other specified interview techniques
  - Research on effectiveness of CI when used in interviews that occurred long after an event was lacking
  - Modified, simpler versions of CI (e.g., that focused on context reinstatement and encouraging the witness to “report everything”) were still more effective than other specified interview techniques

# Forensic Experiential Trauma Interview

- Open with empathy
- What are you able to tell me about your experience?
- Help me understand your thoughts when . . .
- What are you able to remember about (sight, sound, smell, taste, touch, body sensation)?
- What were your reactions to this experience (physically/emotionally)?
- What was the most difficult part of this for you?
- What, if anything, can't you forget?
- How has this experience impacted you?
- Clarify other information and details using FETI methodology
- Closure (prepare for future information sharing)

# Forensic Experiential Trauma Interview

Things to Avoid, per FETI:

- Interruption
- Leading/Assumptive Questions
- Why questions
- Confrontational questions
- Yes/no questions and choice questions
- Compound questions
- Paraphrasing, rephrasing or repeating
- Sequencing
- Minimizing (i.e., “Tell me a little bit about . . . “)
- Sharing personal information, advice or opinions

# Interviewing and Questioning for Clarification

- It is crucial to interview and question witnesses for clarification
  - Promotes accuracy and fairness to all parties
  - If done appropriately, avoids alienating witness from investigation process and victim-blaming

# Fair, Witness Centered Approach

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

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

# Summary and Questions

