



# Student Disciplinary Council & Title IX Adviser Refresher Training

November 29, 2023



# SDC Hearing Board Refresher Training



Welcome & Introductions



Investigative Process



Advice and Lessons from an AAG



Trauma Informed Questioning



Student Conduct Code & Title IX Updates



Panel Discussion



# Title IX & Sexual Misconduct Process- Student Respondent

## Report

- Incident is reported to the Title IX Coordinator
- Student Care Team or Title IX Coordinator reaches out to the complainant to offer supportive measures, resources, and explain reporting options
- Director of Student Conduct & Title IX Coordinator assess the situation for interim restrictions

## Complaint

- Complainant can file a report with the police and/or the university
- If the complainant wishes to move forward (or the Title IX Coordinator), the investigation and hearing process is initiated

## Title IX or Not?

- Title IX Coordinator determines whether or not the complaint is considered a “formal Title IX complaint” or not



# Title IX & Sexual Misconduct Process- Student Respondent

## Respondent Notified

- Notice of investigation and allegations provided to the respondent
- Respondent is offered supportive measures by the Student Care Team

## Investigation

- Investigator conducts an investigation. Complainant, respondent, and witnesses are interviewed. Evidence gathered and summarized in a report.

## Hearing

- Student Rights & Responsibilities conducts a hearing with live witnesses. Student Disciplinary Council determines whether or not the student is responsible for misconduct. Presiding officer determines the sanction.



# Purpose of the Investigation

- For Title IX cases, EWU must conduct an investigation before a complaint can be sent to hearing
- Burden of gathering evidence is on EWU, not the parties
- Must not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence



# Role of the Investigator



Remain impartial at all times



Provide both parties with an equal opportunity to submit, inspect, and review any evidence obtained during the process that is directly related to the allegations raised in the complaint



Create an investigative report that fairly summarizes relevant evidence



No surprises- each party knows what information has been submitted and has a chance to respond before the investigation is completed



# **COMMON QUESTIONS ABOUT INVESTIGATIONS**



# Common Questions About Investigations

- How do you decide who to interview?
- How do you try to contact people? What if they do not respond?
- What if the police have already done an investigation?
- Can a party refuse to participate in the investigation?
- Why don't you investigate concerns about the complainant's behavior? Or additional concerns raised by the witnesses?





# Student Conduct Code Update- Admissibility of Evidence

- Federal court determined the Title IX regulation prohibiting the admission of evidence unless the speaker subjected themselves to cross-examination was arbitrary and capricious. *Victim Rights Law Center, et al. v. Cardona*, 552 F.3d 104 (D. Mass. 2021).
- OCR confirmed schools should no longer follow this regulation and university must consider “all relevant evidence” even if a witness does not testify.
- As a result, EWU updated its Student Conduct Code.
  - *WAC 172-121-122: “Evidence, including hearsay evidence, is admissible if in the judgment of the CRO it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.”*



# Questions for AAG

- What weight should the investigative report be given?
- Should the SDC essentially start from scratch and ask questions the investigator previously asked?
- Can the SDC consider information contained in the investigative report if the witness who provided the information does not testify at the hearing?



# Advice for the SDC from AAG



# Trauma-Informed Questioning

- In response to the anticipated trauma of sexual assault, hormones are released into the body which impact:
  - Ability to react physically
  - Ability to think rationally
  - Ability to consolidate or group memories
- This is a neurobiological response, not a choice.



# Trauma-Informed Questioning

- Be cognizant of why someone may have responded in a “counterintuitive” manner
- Be mindful that recall is often difficult and slow following trauma
- Use nonjudgmental/ non-blaming language
- Avoid re-traumatization (but you still must ask the necessary questions)
- Prioritize developing rapport and giving options
- Emphasize transparency and predictability



# Trauma Informed Questions

- Introduction to Trauma Informed Practices: <https://youtu.be/IR4vVO-gXmg?feature=shared>
- Freezing: <https://youtu.be/DPqN789i00U?feature=shared>
- Group Activity



# Title IX Advisor Refresher Training Agenda



Additional Title IX  
Updates



Tips for Serving as an  
Advisor



Advice from an AAG



# Title IX- Scope of Responsibility

- EWU's obligations to its students to provide an educational environment that is free from discrimination is more expansive than its responsibilities under Title IX
  - *Brown v. State of Arizona (9<sup>th</sup> Cir. 2023)*: university may be responsible for abuse that took place off-campus because they exercised substantial control over the student
  - *Pacific University (2023)*: \$4 million jury verdict against the university for inappropriately handling a Title IX case, even though it followed Title IX regulations
  - *Barlow v. WSU (Wash. Sup. Ct. TBD)*: question of liability when a university finds a student responsible for a Title IX issue, issues a lower-level sanction, and the student then rapes another student off-campus





# Focus on Sexual Harassment

- When serving on the SDC, you may be evaluating sexual harassment in a purely student situation or in an employment situation (Title IX, Title VII, and WLAD)
- In an employment setting, EWU is directly responsible for any sexual harassment engaged in by its student employees or regular employees



# Hostile Environment Sexual Harassment

- Unwelcome conduct on the basis of sex that creates a hostile environment.
- Determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies the complainant equal access to the university's programs or activities.

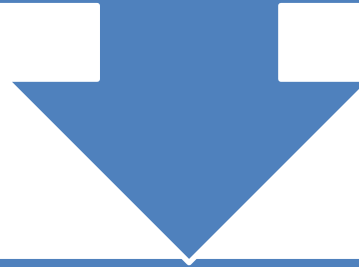


# Is the conduct severe, pervasive & objectively offensive?

Did Not Meet the Standard	Met the Standard
Once instance of being called a gay slur by another student. <i>Doe v. Princeton Univ.</i> (3 <sup>rd</sup> . Cir. 2019)	Soccer coach repeatedly and consistently making inappropriate sexual comments. <i>Jennings v. Univ. North Carolina</i> (4 <sup>th</sup> Cir. 2007)
An isolated hug, even if forced upon the recipient. <i>Mosavi v. Mt. San Antonio College</i> , 805 F. App'x 502 (9 <sup>th</sup> Cir. 2020)	Single act of pressing up against someone in a sexual way. <i>Ault v. Oberlin College</i> (6 <sup>th</sup> Cir. 2015)
A singled comment that someone was “beautiful”, along with glancing. <i>Klocke v. Univ. of Texas at Arlington</i> (5 <sup>th</sup> Cir. 2019)	Gender-neutral profanity accompanied by obscene gestures towards a female employee’s private parts. <i>Xiayuan Tang v. Citizens Bank</i> (1 <sup>st</sup> Cir. 2016)



Physical conduct is generally more serious than verbal conduct



Consider factors such as:

Type, frequency, and duration of the conduct;

Identity of and the relationship between the respondent and the complainant;

Number of individuals involved

Size of the workplace or environment, location of the incidents, and the context;

Acts of verbal, nonverbal, or physically aggression, intimidation or hostility based on sex.



# Music Creating A Hostile Environment

- *Sharp v. S&S Activewear, L.L.C.* (9<sup>th</sup> Cir. 2023)- when “sexually graphic, violently misogynistic” music is played routinely, it can constitute sexual harassment.
  - Does not need to be directly targeted at a particular person or be targeted towards a particular gender
  - Examples were songs like “Blowjob Betty” by Too \$hort that contained “very offensive lyrics that glorified prostitution” or “Stan” by Eminem describing extreme violence against women
  - Court indicated conduct is to be viewed cumulatively and contextually, rather than in isolation. While offhanded comments and isolated incidents may not create a pervasively hostile environment, repeated and prolonged exposure to sexually foul and abusive music polluted the workplace and constituted sexual harassment



# Common Misconceptions About Sexual Harassment

Misconception	Truth
Male vs. female	Sexual harassment can be perpetrated by anyone and anyone can be harassed
Opposite gender/gender identity	
Positions of authority	
Motivated by a sexual desire	Sexual motivation is not required. Many times harassment is motivated by dominance, power, or bullying
Academic Freedom	The First Amendment does not protect speech that meets the definition of sexual harassment
It was just a joke...	Even if someone intends for a statement to be funny, it may be offensive to others. Sexual harassment is viewed from the perspective of a reasonable person in the complainant's circumstances
It was a compliment...	Reasonable person in the complainant's circumstances...



# Q&A for SDC Participants



# Updates for Advisors





# Questions?

