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Offices of Equity and Inclusion and General Counsel

# Title IX & Sexual Violence Investigations

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Minnesota State

# Outline of Today's Presentation

- Review System Procedure 1B.3.1
- Laws and Policies
- Forms of Discrimination
- Sexual Violence Background
- Pre-Investigation Planning
- Conducting Interviews and Trauma Informed Care
- Affirmative Consent, Intoxication verses Incapacitation and Informal Resolution
- Resources
- Questions/Discussion



# What Is Title IX?

- Title IX is a federal civil rights law prohibiting sex discrimination in all facets of the educational setting
- By accepting federal funds, institutions agree not to discriminate on the basis of sex or allow the separation of the sexes in curriculum and extracurricular activities, unless permitted by the statute
- Failure to comply may result in liability on the part of the institution



# Title IX

- 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.
  - *20 U.S.C. §1681 (1972)*

# Timeline

- November 16, 2018 US Department Of Education (DOE) Notice of Proposed Rule-making.
- Final Rule published on May 6, 2020 -- effective on August 14, 2020.
- Revised System Procedure 1B.3.1 finalized on August 14, 2020.
- Biden administration releases proposed new regulations on June 23, 2022.
- Comment period closed on September 12, 2022 (approximately 240,000 comments).
- Revised regulations released on April 29, 2024 – effective August 1, 2024. Task force readied necessary revisions. BUT – litigation and injunctions.

# Overall Process Map

- Former 1B.3.1 Procedure
  - Complaint, Investigation, Decision-maker, internal appeal, Ch. 14 if serious student sanction.
- Current 1B.3.1 Procedure
  - Formal Complaint, Investigation (with enhanced requirements), Ch. 14 hearing, Decision-maker, internal appeal.
- Also consider Policy 1B.1 and student conduct processes for non-Title IX sexual harassment and jurisdiction.
- Basic legal responsibility = deliberately indifferent standard.

# Three Basic Deliverables

- Update your web-sites and information to the new System Procedure 1B.3.1.
- Notice of Title IX Coordinator.
- Notice of Non-Discrimination.

# Notice of Title IX Coordinator

- Each college and university must notify applicants for admission and employment, students, employees, and all unions holding collective bargaining agreements with the college or university of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated at the Title IX Coordinator.





# Notice of Non-Discrimination

- Each college and university must notify applicants for admission and employment, students, employees and all unions holding collective bargaining agreements with the college and university that the college or university does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner. Inquiries about the application of Title IX may be referred to the Title IX Coordinator and/or the United States Department of Education.

# Key Elements of the Current Procedure

# Definition of Title IX Sexual Harassment

- Conduct based on sex that occurs in a college or university's program or activity in the United States that satisfies on or more of the following:
  - An employee of the college or university conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the college or university's education program or activity; or
  - Sexual assault, dating, intimate partner, and relationship violence; and stalking as defined in Board Policy 1B.3.

# Formal Complaint

- Defined as
  - Document filed by a complainant or signed by the Title IX Coordinator alleging Title IX sexual harassment against a respondent and requesting investigation.
  - At the time of filing a formal complaint of Title IX sexual harassment, a complainant must be participating in or attempting to participate in the education program or activity of the college or university with which the formal complaint is filed.
- See template.

# Educational Program or Activity

Includes locations, events, or circumstances over which the college or university exercised substantial control over both the respondent and the context in which the Title IX sexual harassment occurred, and also includes any building owned or controlled by any officially recognized student organization of the college or university.

# Title IX Coordinator

- Employee designated by the president to coordinate the college or university's efforts to comply with its Title IX responsibilities and Board Policies 1B.1 and 1B.3.
- This does not have to be one person – can have deputy Title IX Coordinators, Investigators, etc.

# Supportive Measures

- Designed to preserve or restore a student’s access to the education program or activity, with or without a formal complaint (“non-disciplinary, non-punitive individualized services” available to both complainant and respondent).
- Examples
  - Academic course adjustments.
  - Counseling.
  - No-contact orders.
  - Dorm room reassignments.
  - Leaves of absences.
  - Class Schedule changes.

# Reporting

- Internal Reporting = Current Procedure is the same as Old Procedure (3 buckets).
  - Required Reporters.
  - Confidential Resources (not required to internally report).
  - Encouraged Reporters.
- Clarifies that reporting is to Title IX Coordinator.
- New Information on External Mandatory Reporting.



# Investigation and Resolution

- Title IX Coordinator.
  - Discuss options with complainant – supportive measures, referral to law enforcement, filing a formal complaint, pursuing other policy processes (1B1, student conduct, etc.)
  - If formal complaint.
    - Determines Jurisdiction.
    - Conflicts.
    - Information to complainant and respondent (see form notice of allegations).

# Conflict of Interest

- Title IX Coordinator to identify any real or perceived conflict of interest in proceeding as the Title IX Coordinator, for the decision-maker, and/or for any person designated to facilitate an informal resolution.
- Assign new person.

# Informal Resolution

- School may facilitate an informal resolution process at any time before reaching a determination regarding responsibility provided that each party provides their voluntary, written consent to the process.
- Any party may withdraw from informal resolution process and return to formal complaint process.
- Informal resolution shall not be used to resolve allegations that an employee sexually harassed or assaulted a student.

# Interim Actions

- Employee reassignment or administrative leave.
  - Discuss with HR/LR.
- Student summary suspension.
- No real change to prior practice = note that the regulations use the term “emergency removal.”

# No Basis to Proceed Determinations: Title IX Sexual Harassment

- Must dismiss formal complaint if:
  - The conduct would not constitute Title IX Sexual Harassment, even if proved;
  - The conduct alleged did not occur in the college or university's educational program or activity;
  - The conduct did not occur against a person in the United States
- May dismiss formal complaint if:
  - The complainant, at any time, notifies the Title IX Coordinator that they would like to withdraw the formal complaint;
  - The respondent is no longer enrolled or employed by the institution; or
  - Specific circumstances prevent the college or university from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- And Remember -- At the time of filing a formal complaint of Title IX sexual harassment, a complainant must be participating in or attempting to participate in the education program or activity of the college or university with which the formal complaint is filed.

# Dismissals, continued

- Must promptly notify both the complainant and the respondent of any dismissal.
- May consider other policy avenues (1B.1, student conduct, etc.).

# Investigatory Process

- Essentially the same as the 1B.1.1 investigatory process. **BUT**
  - Required presumption of innocence notice in notice of allegations (see template).
  - Consider both inculpatory and exculpatory evidence.
  - Not use questions or evidence that involve a legally recognized privilege.
  - Before completing investigation report – send to both the complainant and respondent and their advisors, if any, the evidence subject for inspection and review. Both parties must have at least 10 calendar days to submit a written response to the evidence, which must be considered before completing the report.

# Timely Completion

- Timely completion after a complaint = no strict timeline.
- Reasonable cause for delay includes considerations such as
  - Absence of a party, an advisor, or a witness;
  - Concurrent law enforcement activity;
  - The need for language assistance or accommodation of disabilities.



# Formal Hearing

- If complaint not resolved then:
  - Prepare investigation report; and
  - Refer the matter for a formal hearing.
  - At least ten (10) days prior to formal hearing, parties and advisors, receive the investigation report for their review and response (consult AAG as this should be done through the Ch. 14 process).
- Formal Hearings for Title IX sexual harassment complaints conducted by the Office of Administrative Hearings.
  - Notify assigned Assistant Attorney General or OGC that Ch. 14 required.
  - Assigned Assistant Attorney General will initiate and arrange for the Ch. 14.
  - See information sheet on Ch. 14 hearings.
  - Costs.

# Standard of Evidence

- Remains preponderance of the evidence.

# Decision-maker

- ALJ prepares report and recommendation.
- Decision-maker receives report and recommendation and decides
  - Whether the policy has been violated; and
  - On appropriate sanctions if the policy has been violated.
  - Issues a written determination that includes:
    - Identification of allegations;
    - Description of procedural steps;
    - Findings of fact supporting the determination;
    - Conclusions as to responsibility and any sanctions
    - Procedures for appeal.
  - The required elements may be satisfied by adopting all or portions of the report and recommendation.

# Appeals

- Within ten (10) calendar days.
- Both parties may appeal final decision and an appeal of a dismissal of a formal complaint.
- Grounds for appeal
  - Procedural irregularity;
  - New evidence;
  - Conflict of interest.

# When Student Discipline Final

- Either
  - Date of written determination on appeal; or
  - If no appeal, the date on which the appeal would no longer be timely.

# Advisors

- Process Advisors
  - Both complainant and respondent may have an advisor of their choice;
  - Campus will provide if either party does not have their own.
- Advisors at the Ch. 14 Hearing.
  - Both complainant and respondent may have an advisor of their choice.
  - Campus will provide if either party does not have their own.

# Education and Training

- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must be made publicly available on the college or university's website.
- OCR complaints on this issue.

# Document Retention

- 7 years.





MINNESOTA STATE

# FEDERAL AND STATE LAWS AND POLICIES

# Violence Against Women Act

## Reauthorized and effective Oct. 2014:

- Prompt, fair, and impartial process: initial investigation to final result
- Process must be consistent with institution's policies and transparent to both parties
- Both parties shall have:
  - Equal opportunities to have others present, including advisor of choice
  - Timely notice of meetings and who will be present
  - Timely and equal access to information used during disciplinary meetings and hearings

# VAWA, continued

- Officials shall be **trained annually**, including having no conflict of interest or bias for or against either party
- **Reasonably prompt timeframe**, which may be extended for good cause with written notice to both parties, stating the delay and the reason
- Both parties shall receive **simultaneous notification**, in writing, of the result of the proceeding, including rationale, sanctions, available appeal, and any changes to the results, and when the results become final

# Clery Act, amended

## Amended by VAWA, Campus SaVE Act, effective July 1, 2015

- Inclusion in crime report of the following: sexual assault, domestic violence, dating violence, and stalking
  - Required updates to policy and procedure
  - Required documentation maintenance of these matters
- Requires reporting of crime stats: daily crime log, annual security report
- Includes a duty to warn/timely warnings
- Primary prevention and awareness programs for all incoming students and new employees
- Campus brochure (VAWA § 304): info for victims, shared with mandated reporters and OWAs

# VAWA, 2022

## Reauthorized and effective Oct. 2022

- Revised and expanded definitions, including domestic violence
- Funding for increased services and support for survivors from underserved and marginalized communities, including LGBTQIA+ survivors
- Funding for pilot program: Sexual violence restorative practices
- Task Force on Sexual Violence in Education
- Mandated interpersonal violence campus climate survey
- Examination of student loan issues

# Sexual Harassment & Violence Policy

## Minnesota State Statute 135A.15

- Required policy, including sexual assault definition, victims' rights, and uniform amnesty
- Coordination with local law enforcement
- Online reporting system, including anonymous reports
- Data collection and reporting to OHE (due Oct 1)

# Minnesota Policy 135A.15, continued

- Comprehensive training
  - For new, incoming students: 10-day deadline
  - Requires **annual training** for campus administrators responsible for investigating or adjudicating complaints on sexual assault or persons responsible for responding to reports of sexual assault—including investigators and decisionmakers
  - Individuals responding to reports of sexual assault
- Student health services screening; counseling designated staff

# Minnesota State

- Board Policy 1B.1 Equal Opportunity and Nondiscrimination in Employment and Education
- Board Policy 1B.3 Sexual Violence
- System Procedure 1B.1.1 Investigation and Resolution
- System Procedure 1B.3.1 Response to Sexual Violence and Title IX Harassment



# Minnesota State Board Policy 1B.1

The Equal Opportunity & Nondiscrimination in Employment & Education Policy addresses:

- Equal opportunity for students and staff
- Nondiscrimination
- Harassment
- Discrimination
- Protected Class
- Sexual harassment
- Retaliation

# Sexual harassment, per 1B.1

- Unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct, and other verbal or physical conduct of a sexual nature and;
- The conduct has a negative or is likely to have a negative effect on the complainant or the workplace or the educational environment.

# Sexual Harassment

## **TO CONSTITUTE SEXUAL HARASSMENT, THE CONDUCT:**

- DOES NOT have to include an intent to harm
- DOES NOT need to involve repeated incidents
- DOES NOT need to be directed at a specific target
- DOES NOT have to be by a member of the opposite sex

# Minnesota State Board Policy 1B.3

The Sexual Violence Policy addresses:

- Affirmative Consent
- Sexual Violence
  - Dating, intimate partner, and relationship violence
  - Non-forcible sex acts
  - Sexual Assault
  - Stalking

# Title IX Sexual Harassment

- Conduct on the basis of sex
  - Employee conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct [*Quid pro quo*]
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's education program or activity [Hostile environment]
  - Sexual assault; dating, intimate partner, and relationship violence; and stalking [1B.3 conduct, Clery crimes]

# *Quid Pro Quo*

- Accused harasser or Respondent: must be an employee (e.g. an instructor, administrator, or staff member)
- **Evaluating elements:**
  1. Explicitly or implicitly conditioning the provision of an aid, benefit, or service of the college or university
  2. Upon the Complainant's submission to, or rejection of, unwelcome sexual advances, requests for sexual favors, or other verbal or physical sexual conduct

# Sexual Harassment: Hostile Environment

- Occurs when harassment is sufficiently severe, pervasive, and objectionably offensive that it effectively denies a person equal access to the college's or university's education program or activity
- Can be created by instructors/faculty, administrators, staff members, other students
- Verbal conduct or behavior
- Under 1B.3.1: must occur within programs or activities, in the US

# Sexual Assault

- An actual, attempted, or threatened sexual act with another person without that person's affirmative consent.
- Sexual assault includes but is not limited to:
  1. Involvement without consent in any sexual act in which there is force, expressed or implied, or use of duress or deception upon the victim.
  2. Involvement in any sexual act when the victim is unable to give consent.
  3. Intentional and unwelcome touching of a person's intimate parts (defined as primary genital area, groin, inner thigh, buttocks, or breast); or coercing, forcing, or attempting to coerce or force another to touch a person's intimate parts.
  4. Offensive sexual behavior directed at another, such as indecent exposure or voyeurism.



# Affirmative Consent

Consent is **informed, freely given, and mutually understood** willingness to participate in sexual activity that is expressed by **clear, unambiguous, and affirmative words or actions**.

It is the responsibility of the person who wants to engage in sexual activity to ensure that the other person has consented to engage in the sexual activity.

Consent must be present throughout the entire sexual activity and can be revoked at any time.

If coercion, intimidation, threats, and/or physical force are used, there is no consent.

If the complainant is mentally or physically incapacitated or impaired so that the complainant cannot understand the fact, nature, or extent of the sexual situation, there is no consent; this includes conditions due to alcohol or drug consumption, or being asleep or unconscious.

# Affirmative Consent, cont.

A lack of protest, absence of resistance, or silence alone does not constitute consent, and past consent to sexual activities does not imply ongoing future consent. The existence of a dating relationship between the people involved or the existence of a past sexual relationship does not prove the presence of, or otherwise provide the basis for, an assumption of consent.

Whether the respondent has taken advantage of a position of influence over the complainant may be a factor in determining consent.

# Dating, intimate partner, and relationship violence

- Physical harm or abuse
- Threats of physical harm or abuse
- Arising out of a personal intimate relationship

# Stalking

Conduct directed at a specific person based on sex that is unwanted, unwelcome, or unreciprocated and that would cause reasonable people to fear for their safety or the safety of others or to suffer substantial emotional distress

Some examples:

- Unwanted Phone Calls
- Unwanted Voicemails
- Unwanted Text Messages
- Spying
- Sending unwanted gifts
- Letters
- E-mails
- Social media use
- Showing up at a location

# RETALIATION

**Retaliation is prohibited at Minnesota State.**

Actions by a student or employee intended as retaliation, reprisal, or intimidation against an individual for making a complaint or participating in any way in a report or investigation under the 1B.3 policy

# Know the Policies and Procedures

- It helps you determine if an investigation is appropriate

  - \*Who does the policy apply to?

  - \*What do the terms refer to?

- It helps you frame the ultimate investigative questions in issue

- You understand the elements of a claim

- You have time to seek guidance, if needed

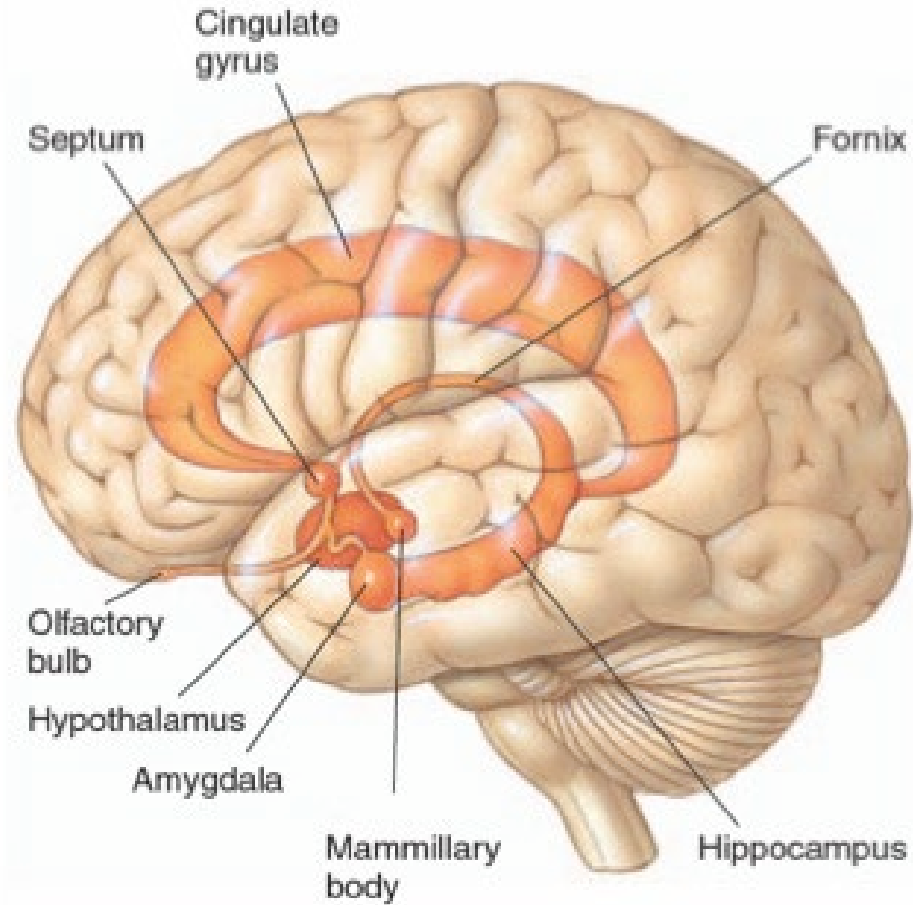
- You prepare for and conduct thorough interviews and minimize any unnecessary re-interviews

- You provide the decisionmaker with necessary information to make a decision



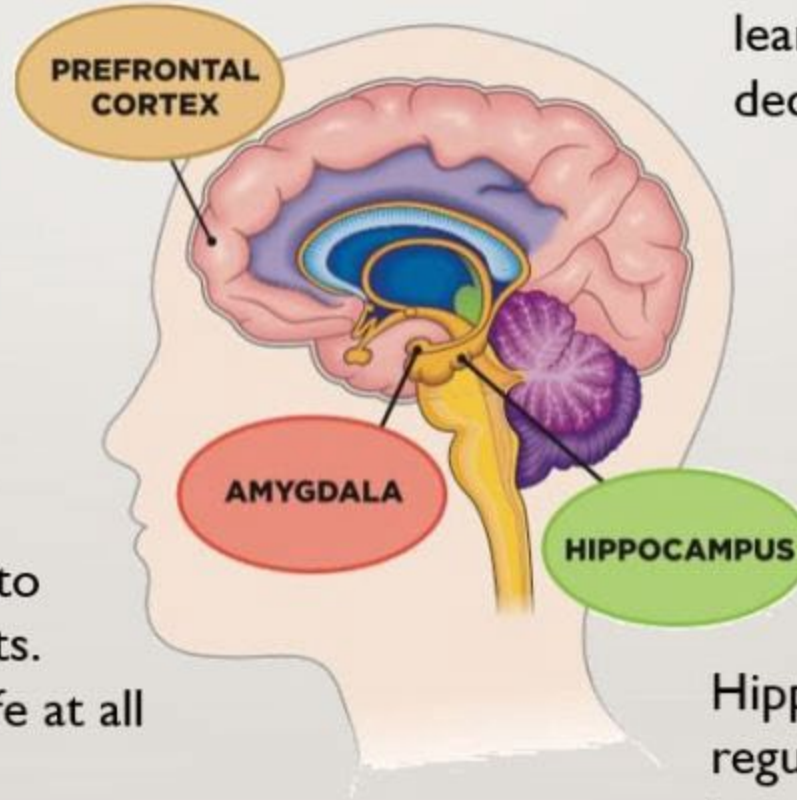
# NEUROBIOLOGICAL RESPONSES TO TRAUMA

# Neuroscience – The Limbic System





# THE BRAIN

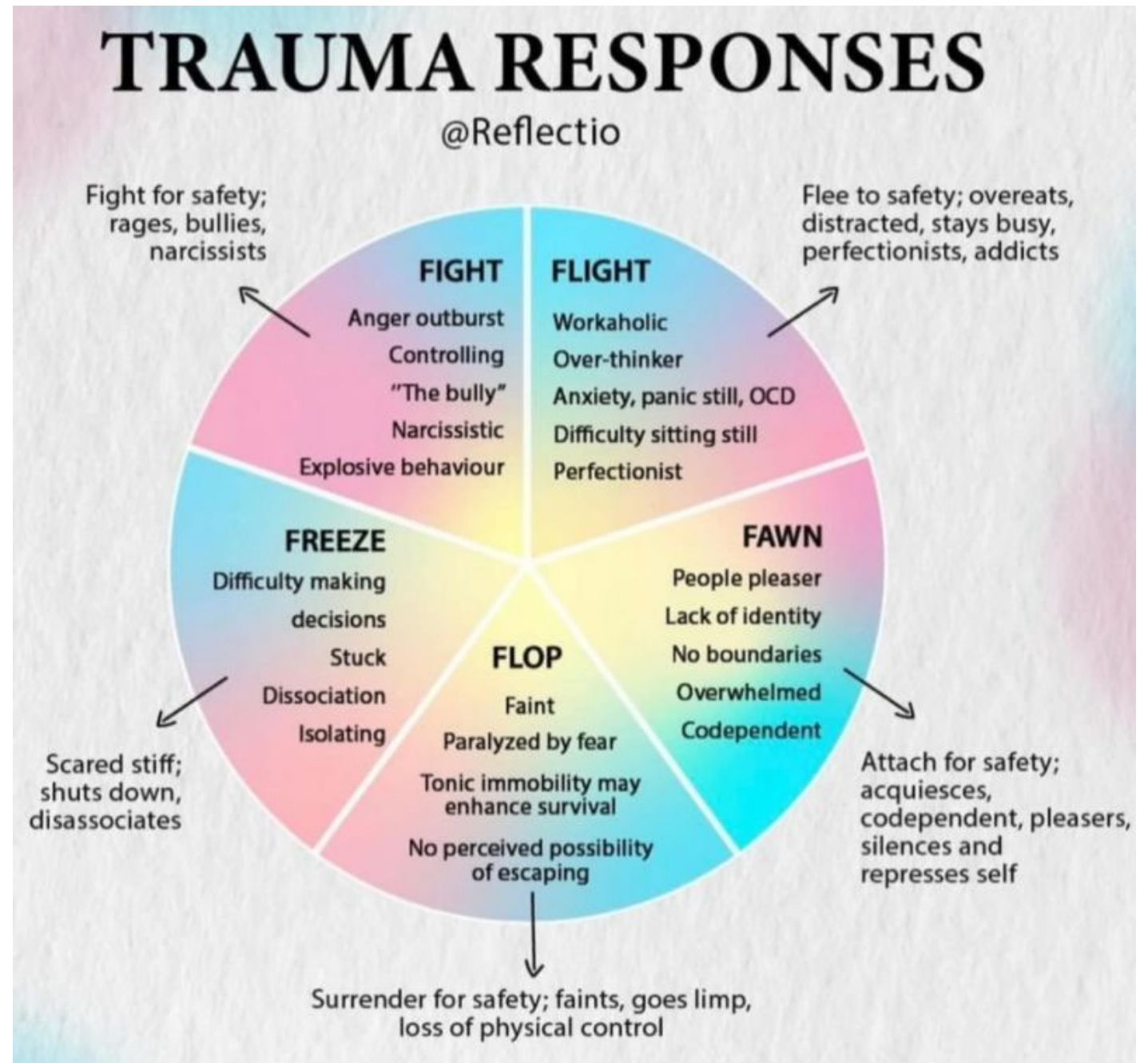


Prefrontal Cortex: complex learning and thoughtful decision-making.

Amygdala: Fight/flight/freeze to prepare for emergency events. Programmed to keep you safe at all costs.

Hippocampus: Limbic System - regulates motivation, emotion, learning and memory.

# Responses of the Brain & Body During Trauma



# Memory Fragmentation

- Memory recall can be very slow and difficult (or not possible)
  - Memories are “fragmented” – they come only in bits and pieces (often do not follow a timeline)
  - Process can be very frazzling and frustrating for victims

# Traumatic responses can alter...

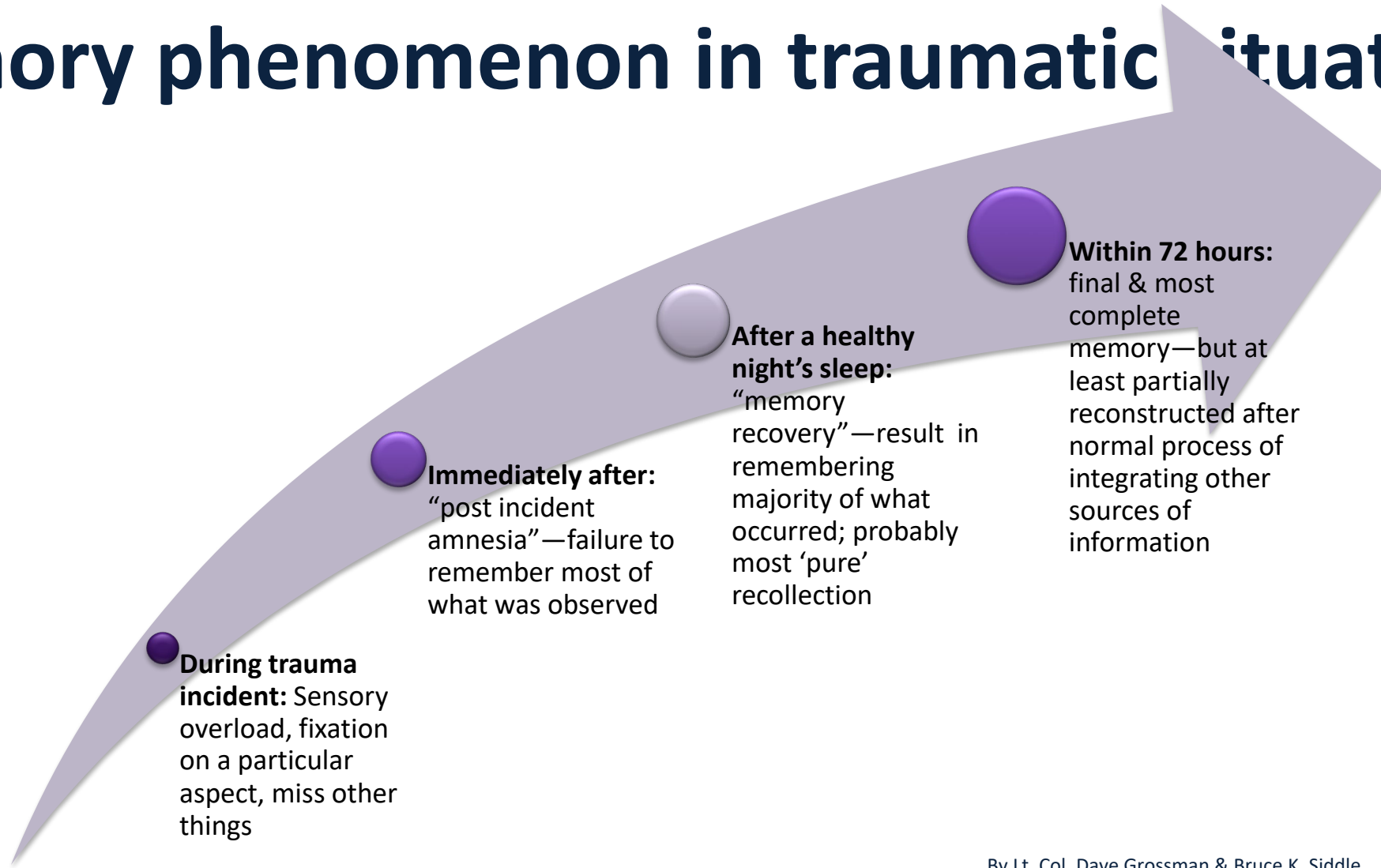
- Physiology
  - Heart rate, respirations, dilated pupils, dry mouth, knot in the stomach
- Affective (mood and emotion) responses
  - Fear, helplessness, horror
- Cognitive (thought) processing
  - Memory – fragmented, out of sequence
  - Time distortion
  - Increased confabulation
  - Trauma memory and recall

# Trauma and Memory

- The body and brain react to and record trauma in a different way than we believed traditionally
- Many professionals were trained to believe that even when a person experiences a traumatic event, the pre-frontal cortex records the vast majority of the event including: Who, What, When, Where, Why, and How

The Forensic Experiential Trauma Interview, Strand & Heitman

# Memory phenomenon in traumatic situations



By Lt. Col. Dave Grossman & Bruce K. Siddle  
*The Firearms Instructor: The Official Journal of the International Association of Law Enforcement  
Firearms Instructors*  
Issue 31 / Aug 2001

# The Impact of Trauma on Victim/Survivor Behavior

- The effects of trauma can influence behavior of a victim/survivor during an interview
- People are often reluctant to recall experiences that evoke negative feelings and emotions such as anger, fear, humiliation, or sadness

--Strand, 2013

# Trauma Informed Interviewing

- Most investigators and decisionmakers believe when a victim/survivor experiences trauma, the brain records most of the event including the “Who, What, Where, Why, When and How,” as well as other details of the event
- Most investigators are trained to obtain this type of information in interviews with victim/survivors
- High-stress situations can result in a trauma response on the part of the victim

Source: [http://www.army.mil/article/72055/Army\\_expert\\_receives\\_national\\_recognition\\_for\\_combating\\_sexual\\_assault](http://www.army.mil/article/72055/Army_expert_receives_national_recognition_for_combating_sexual_assault)



# Trauma-informed Approach

- Framing and phrasing meeting invitations, email communications
- Pre-interview framing: “it’s okay if you don’t remember something today,” “sometimes it takes time to remember, which is okay”
  - Also clarify: “if you don’t remember yourself but your friends told you that’s what happened, please share that”
- Let Complainant talk uninterrupted and ask clarifying questions afterwards
  - Consider explaining questions (e.g. “I’m trying to image that”)
  - Avoid asking “why” and victim-blaming; instead “tell me more” or “what do you remember next”
- Consider asking questions about the other senses
  - Is there any smell about the room that you remember?
  - Do you recall what color the walls or bed was?
  - Were there any sounds or noises that you remember– music? Voices?
- Do not insist in chronological order retelling; gather the information and organize it





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# PREVALENCE OF SEXUAL VIOLENCE

# Rape Myth Acceptance

- Many studies have found that the higher the rape myth acceptance (stereotypical beliefs about rape), the more responsibility is attributed to the victim/survivor.
  - The victim/survivor wanted it
  - The person causing the harm didn't mean to
  - Clothing
  - Alcohol

# Common Behavior for Victims of Rape

- Delay in reporting
- Change in account of what happened
- Unexpected demeanor/disposition
- Unexpected behavior
  - Contact with person who caused the harm
  - Desire to resume “normal” routine
  - Subsequent sexual activity (sometimes with the person who caused the harm)

# Significant Time Between Incident And Report

- The norm when the person causing the harm was not a stranger
- Many victim/survivors are able to report only after they receive the necessary support to do so
- Why do they wait? For many of the same reasons they later recant
  - They fear repercussions
  - They are pressured by others not to report
  - They feel shame, embarrassment
  - They are afraid of the person who caused the harm
  - They are afraid of not being believed
  - Fear that nothing will be done about it

# Bias in Sexual Violence Investigations

Title IX requires a college or university to conduct a “prompt, thorough and impartial inquiry.”

Bias is defined as “to feel or show inclination or prejudice for or against someone or something.”

# Sexual Violence Case Specific Biases

- The subject matter of these cases is often personal and very intimate
- Most of us hold our own conscious beliefs and practices when it comes to this content area so it is important not to intentionally or unintentionally cast your lens on the matters you investigate
  - Your own sexual experiences
  - Moral or religious views about sex
  - Comfort level in using terms – subject matter



# Alcohol and Drug Use Biases

- You may have your own views on and experiences with:
  - Alcohol use
  - Drug use
- These things may have impacted your life

# Investigator-Specific Biases

- Complainant/Respondent is likeable/sympathetic
- Complainant/Respondent is not likeable/sympathetic
- Repeat Complainant/Respondent
- Fact pattern similar to a prior, unrelated investigation
- Complainant/Respondent behavior patterns

# Cultural Considerations

- Communication styles
- Attitudes toward conflict
- Approaches toward completing tasks
- Decision-making styles
- Approaches to knowing
- Attitudes toward disclosure
  - Appropriate to share emotions, reasons for conflict

--Sue Ann Van Dermyden, 2017

# Investigation Impact

- Establishing rapport
- Language may need to be altered
- Storytelling style may need to be accommodated
  - Linear versus circular styles
- Recognize ethnocentric behaviors
  - Assumption that own culture is “right” while others are “wrong”
- Avoid stereotyping and assumptions

--Sue Ann Van Dermyden, 2017

# What other role might bias play in an Investigation?

- Priming – Your pre-investigation or mid-investigation thoughts about the case
  - “This is a really bad case.”
  - “This person has complained three times before.”
  - “This is low level.”
- Phrasing – The way you ask a question can influence the answer – The misinformation effect
  - Do you get headaches frequently, and if so, how often? 2.2/week
  - Do you get headaches occasionally, and if so, how often? 0.7/week
  - How long was the movie? 130 minutes
  - How short was the movie? 100 minutes

Headaches: Elizabeth Loftus (1975); Movie: Richard Harris (1973)





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# **PRE-INVESTIGATION STEPS**

***TITLE IX COORDINATOR ROLE***

# Prior to investigation

- Review of report, complaint
- Evaluate based on elements of policy (resolution options)
- Assess immediate needs and safety concerns
- Notice of options and rights to Complainant (Title IX)
  - Medical assistance and preservation of evidence
  - Reporting assistance to law enforcement
  - Referrals to on- and off- campus resources



# Outline specific for Complainant

- Intake with Complainant
  - Policy and procedure information
  - Data privacy and confidentiality
  - Policy elements, effect/impact
  - Nonretaliation expectation and protection
  - Offer and provide supportive and interim measures
  - Rights to advisor of choice
  - Discuss resolution options: Informal and Formal
  - Discuss hesitations, reluctance if any

# NOTICES FOR PARTIES

- Notice of Allegations to Complainant, Respondent
  - Respondent is presumed not responsible
  - Determination of responsibility is made at conclusion of process
  - Right to advisor of choice, may be but not required to be an attorney\*
  - Parties right to inspect and review evidence
  - Prohibition of knowingly making false statements

- Complaint details
  - Complainant: status of complaint; summary of allegations
  - Respondent: existence, general nature of complaint and Complainant's name
- Applicable policies and procedures
- Resolution process or investigation notice
- Interim/Supportive measures taken
- Prohibition of retaliation

# Outline specific for Respondent

- Initial meeting with Respondent
  - Policy and procedure information
  - Data privacy and confidentiality
  - Process steps, resolution options, appeal rights, etc.
  - Nonretaliation expectation and protection
  - Supportive and interim measures
  - Referral to on- and off-campus resources
  - Resolution options: Informal and Formal
  - Discuss hesitations, criminal proceedings if any



# INFORMAL RESOLUTION PROCESS

# Informal Resolution (1B.3.1)

**Subpart A.** Informal resolution. A college or university may offer an informal resolution process if a formal complaint is filed and after providing both parties a notice of allegations. The parties must **voluntarily consent, in writing, to the informal resolution process.** At any time before agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the process with respect to the formal complaint. This procedure neither prevents nor requires the use of informal resolution by individuals who believe they have been subject to conduct in violation of Board Policy 1B.3. Informal resolution shall not be used to resolve allegations that an employee sexually harassed a student.



# Informal Resolution (cont.)

## Examples of Possible Educational and Restorative Activities

- Mutual no contact
- Mutual agreement to change classes or lab schedules
- Agreements on occupying shared spaces
- Residence community room reassignments and future assignments
- Agreements on what to do off campus if the parties cross paths
- Impact Statement
- Education





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# **INVESTIGATION PROCESS**

***INVESTIGATOR ROLE, 1B.3.1 PROCEDURE***

- Title IX Coordinator
- Initial notice of allegations sent pre-investigation
  - Communicate if you determine additional allegations to be considered (not included in initial notice)
- Investigative Meetings
  - Equal opportunities (witnesses, process advisors, document and information submissions)
  - Equitable allowance by Complainant and Respondent to provide inculpatory and exculpatory information

- Meeting Complainant and Respondent
  - Specific notice templates for Complainant and Respondent
  - Process advisors, licensed attorneys
  - Rape Shield, for Complainant
  - Trauma-informed interviewing
    - Minimize, limit Complainant retelling story
    - Ask about sensory, emotional elements
    - Ask, recognize emotional response and feelings
    - Ask broader questions about day, night, situation
- Meeting with witnesses
  - Name will be disclosed
  - Live hearing participation

- Evidence review
  - Both parties have right to review evidence prior to completion on Investigative Report
  - Establish process with Title IX Coordinator
    - Organize and label materials
    - Receive responses for consideration
- Investigative report
  - Submit to Title IX Coordinator to review for completeness
  - Report review and response by parties managed by Title IX Coordinator



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# INVESTIGATION TECHNIQUES

## COMMON CAMPUS INTERVIEW PRACTICES

- First: build rapport, review rights, overview of process and interview expectations
- Allow telling of story/experience however they choose
- Start with broad/open ended questions; funnel to clarifying questions
- Additional questions/things left unanswered
- Boundary setting and referrals to support services, resources

- Encourage use of language they feel comfortable with
- Ask what words or phrases mean to them
- Ask them to physically demonstrate provide spatial clarification
- Ask them to draw a place or physical space
- Be mindful of your tone, eye contact, phrasing, and nonverbals
- Allow for quiet time, reflection, consideration of a question

- Be mindful of cultural differences
  - Continuum of honesty and face-saving
  - In-group vs. out-group
  - Linear vs. non-linear narrative
- Check biases, especially when assessing credibility
- Ask questions in a way that does not assign responsibility, blame, or guilt



## TRAUMA-INFORMED APPROACH CONSIDERATIONS

- Create safe and comfortable interview environment/setting
- Acknowledge sensitivity and difficulty of topics
- Understand the effects of trauma and triggers
  - Memory impacted, recall over time
  - Emotions and sensory details may be triggers
  - Varying emotions during interview
- Attend to your own reactions or triggers

## VIRTUAL INTERVIEWS

- Via Zoom, unique meeting IDs and passwords
- Enabled privacy settings
- Mute, silence notifications
- Close unnecessary, unrelated windows
- Agreement of expectations
- Documents queued up; use screen sharing

# Conclusion of the Interview

- Thank them for their cooperation
- Remind them of any action items
- Give them your contact information in case they remember anything
- Explain future procedures and timeline
- Remind them about the prohibition of retaliation and procedure for reporting

# Affirmative Consent

# Affirmative Consent Questions Answered

- Who has the responsibility to obtain affirmative consent?
- Can affirmative consent be revoked?
- Who can give affirmative consent?



MINNESOTA STATE

# INTOXICATION VERSUS INCAPACITATION

# Incapacitation is ...

- A state where a person cannot make an informed and rational decision to engage in sexual activity.
- A person who was incapacitated due to the influence of drugs, alcohol, and/or medication and could not understand the fact, nature or extent of the sexual activity.

# What are you evaluating?

- Whether the complainant was incapacitated and, therefore, unable to give consent to sexual activity.



# Areas of Inquiry

- Body weight, height and size;
- Tolerance for alcohol and other drugs;
- Gender
- Amount, pace and type of alcohol or other drugs consumed
- Signs of intoxication
- Food and non-alcoholic drinks

# Assessment of Incapacitation

- Obvious indicators
  - Physically helpless?
    - Difficulty with motor skills, like walking
  - Unable to communicate?
    - Cannot communicate consent to sexual activity
    - Cannot communicate unwillingness to engage in sexual activity

--Keith Rohman, 2017

# Assessment of Incapacitation, continued

- Other indicators:
  - Does the person know where they are or how they got there?
  - Did the person do things in public that were out of character?
  - Possible memory blackout
  - Cannot verbalize coherently
  - Bizarre or risky action

--Keith Rohman, 2017

# Assessment of Knowledge

- If the investigator finds complainant was incapacitated, investigator must evaluate respondent's level of knowledge of the level of incapacitation.
- Assess whether the Respondent knew or reasonably should have known that the Complainant was unable to consent to the sexual activity.

--Keith Rohman, 2017

# Analysis

- What is the evidence that the complainant was under the influence of alcohol and/or drugs?
- Did the alcohol and/or drugs cause the complainant to be incapacitated?
- What did the respondent know, or what should the respondent have known, about the complainant's level of intoxication and/or incapacitation?

# Assessing Credibility

# *Analyzing certain qualities and factors*

- Demeanor: noted reactions to allegations or information shared; behaviors or feelings shared with others
- Logic and consistency: consistency with what others shared (including possible witnesses); plausible explanations
- Corroborating evidence: any admission or rationalizing of conduct; specific denial; witnesses with the opportunity to observe, recognize, or understand the situation
- Circumstantial evidence: statements or behavior in other situations that support or refute alleged conduct
- Note: trauma-informed approach

## **NOTE: 1B.1 and 1B.3 Report Conclusions**

- No policy violation findings
- No references to laws or illegal behavior
- No recommendations
- No decisions for outcomes



## **NOTE: Findings of fact are not findings of policy**

- The **Respondent** admitted to ....
- While the **Complainant** asserted that the Respondent..., the **Respondent** does not recall ever....
- **Witness 2** stated they observed the Complainant and the Respondent...

# CONTACT INFORMATION

Individuals	
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