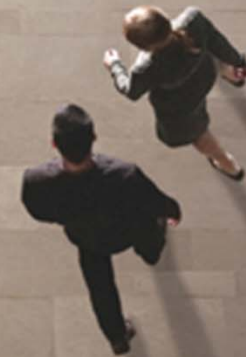


Sexual Assault Policies Under Scrutiny:

*Enhancing the Institutional
Response through a Coordinated
and Integrated Approach*



Gina Maisto Smith | Leslie M. Gomez | 2013

Overview

- The National Conversation
- The Context
 - Regulatory Framework
 - Dynamics of Sexual Assault
 - Your Institution
- A Coordinated and Integrated Approach
 - Structure
 - Policy
 - Understanding Confidentiality
 - Investigations
 - Resolution

The National Conversation

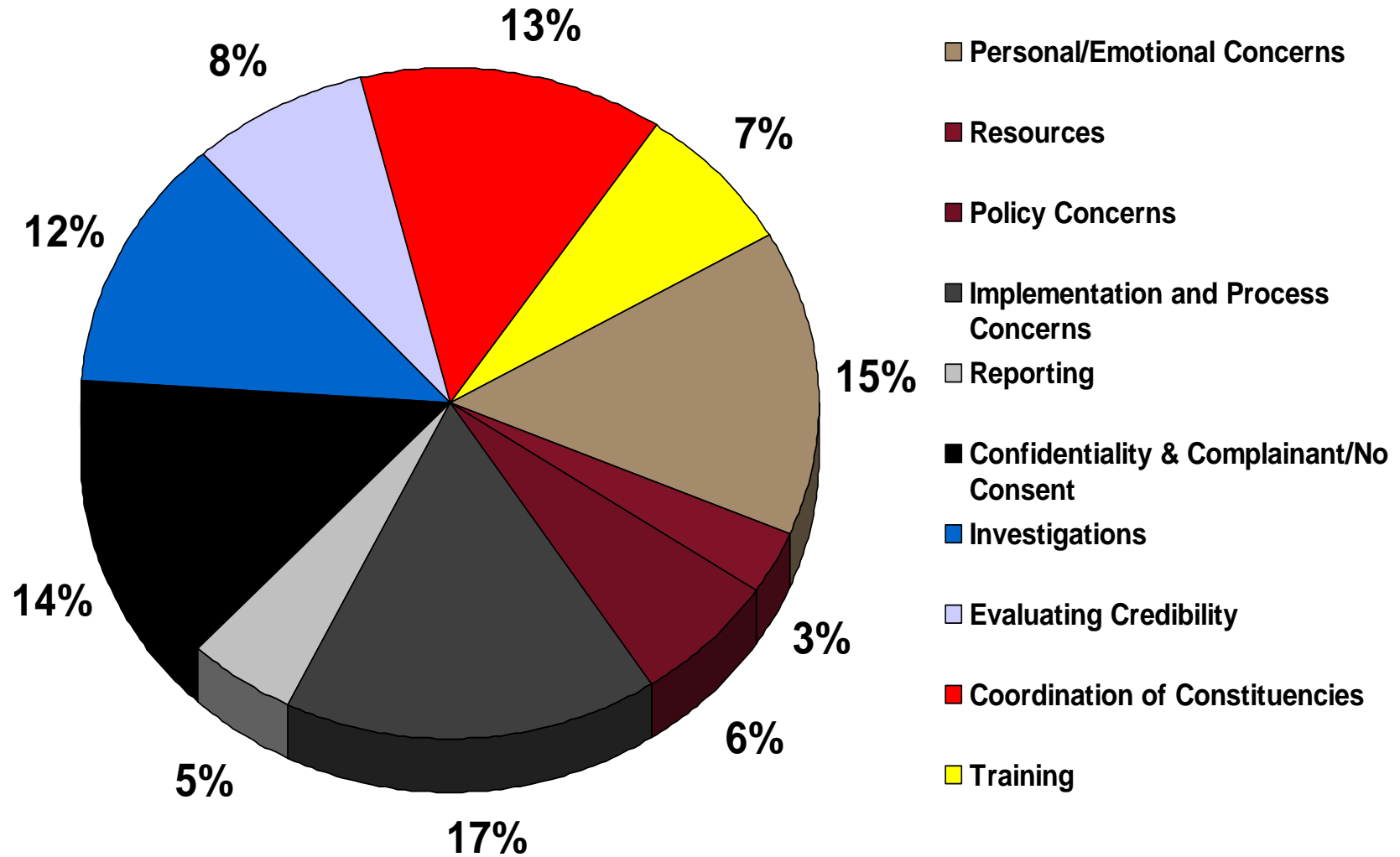


The Paradigm Shift



- April 4, 2011 Dear Colleague Letter
 - A “call to action”
- High profile civil, criminal and regulatory actions in the college and university context
- Courage of complainant/victim/survivors to speak publicly
- Social media
- Evolving legislation
 - Reauthorization of VAWA and Campus SaVE Act

The National Conversation



The Reality



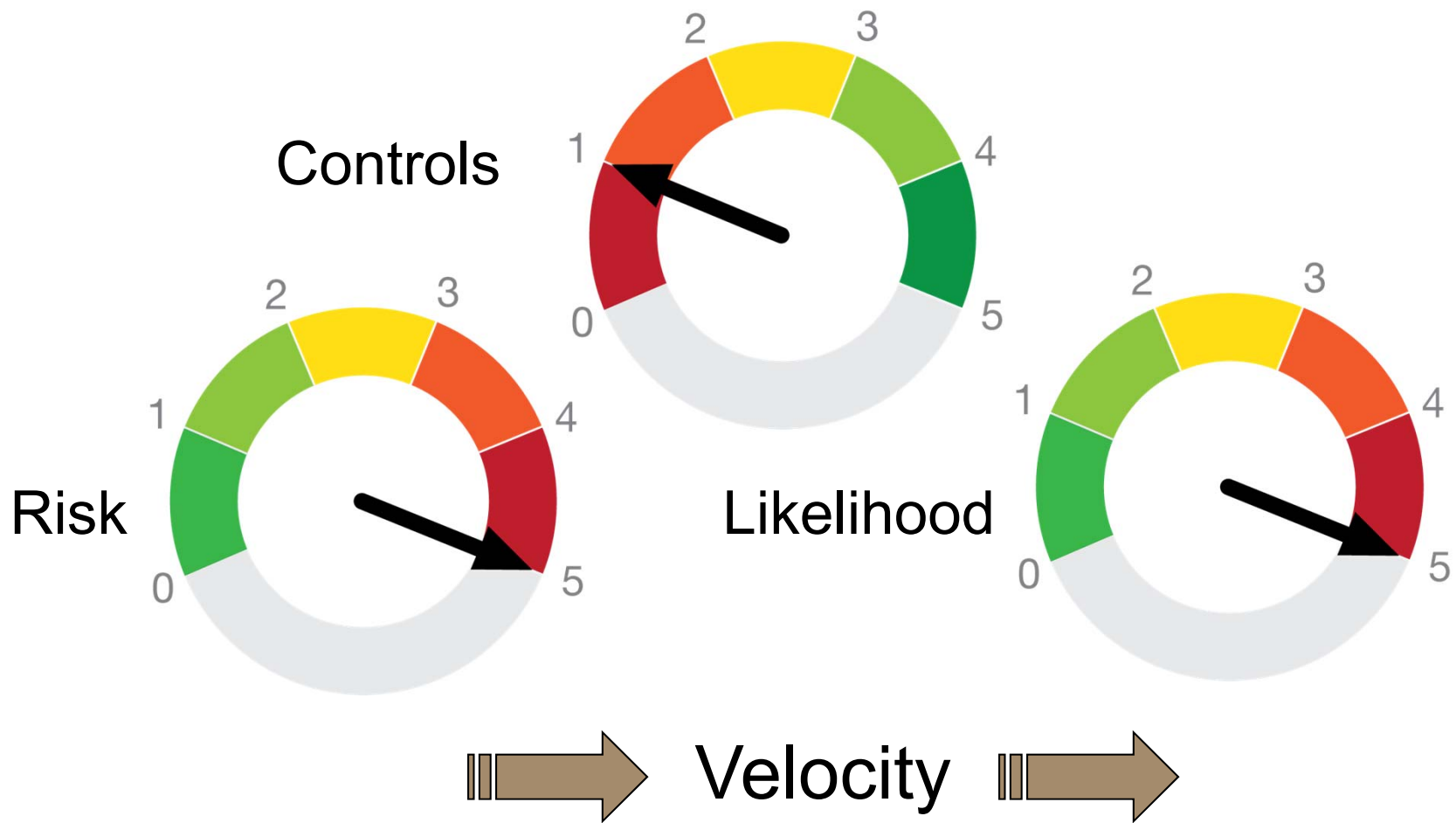
- High likelihood of occurrence
- Barriers to reporting
- The role of “administration”
- Perceived failure to tend to the individual
- Active use of social media by students
- Challenges:
 - Policy consistency and effectiveness
 - Coordination of personnel and information
 - Investigative capacity
 - Evolving state and federal guidance

The Student Perspective



- Don't know how to find information
- Don't know what to expect
- Not being told all the options
- Not being treated fairly
- Feeling judged or isolated
- Not having the right support during or after the process
- Concerns about investigative, adjudicative and sanctioning aspects of the process
- Lack of transparency
- Dissatisfaction with outcomes

Risk, Likelihood, Controls, Velocity



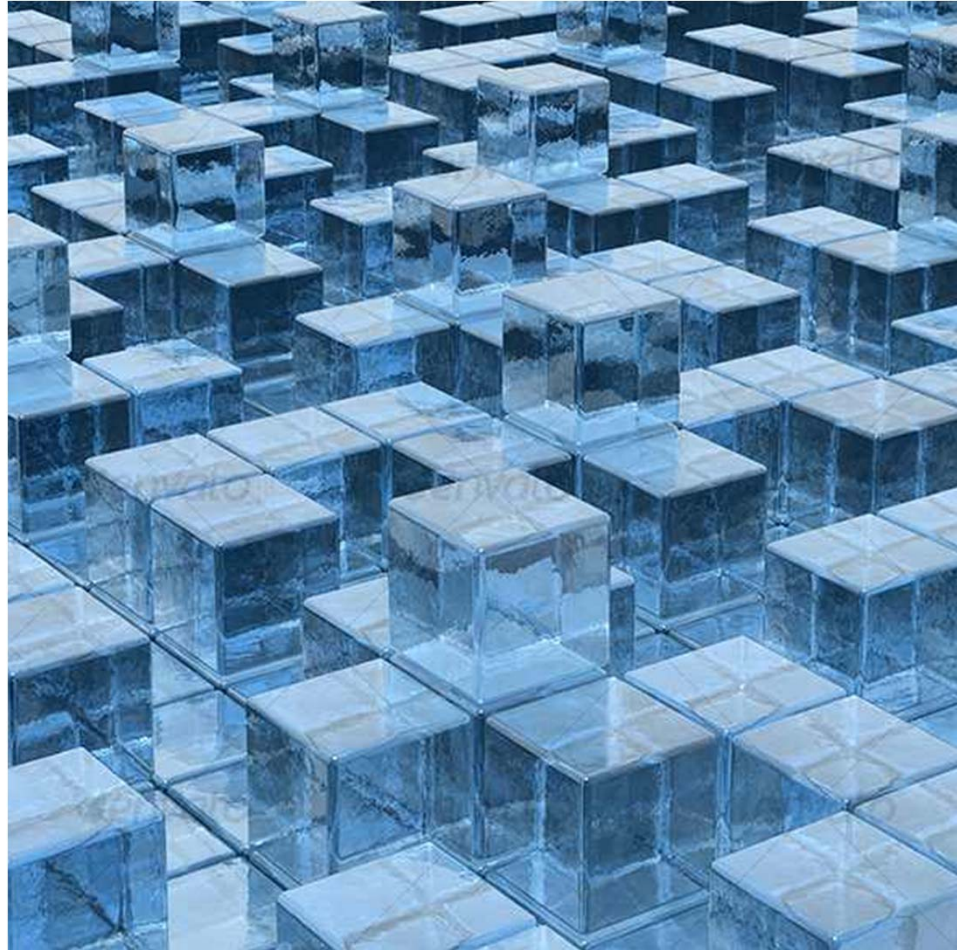
The Context:

Sexual Misconduct in the Campus Setting

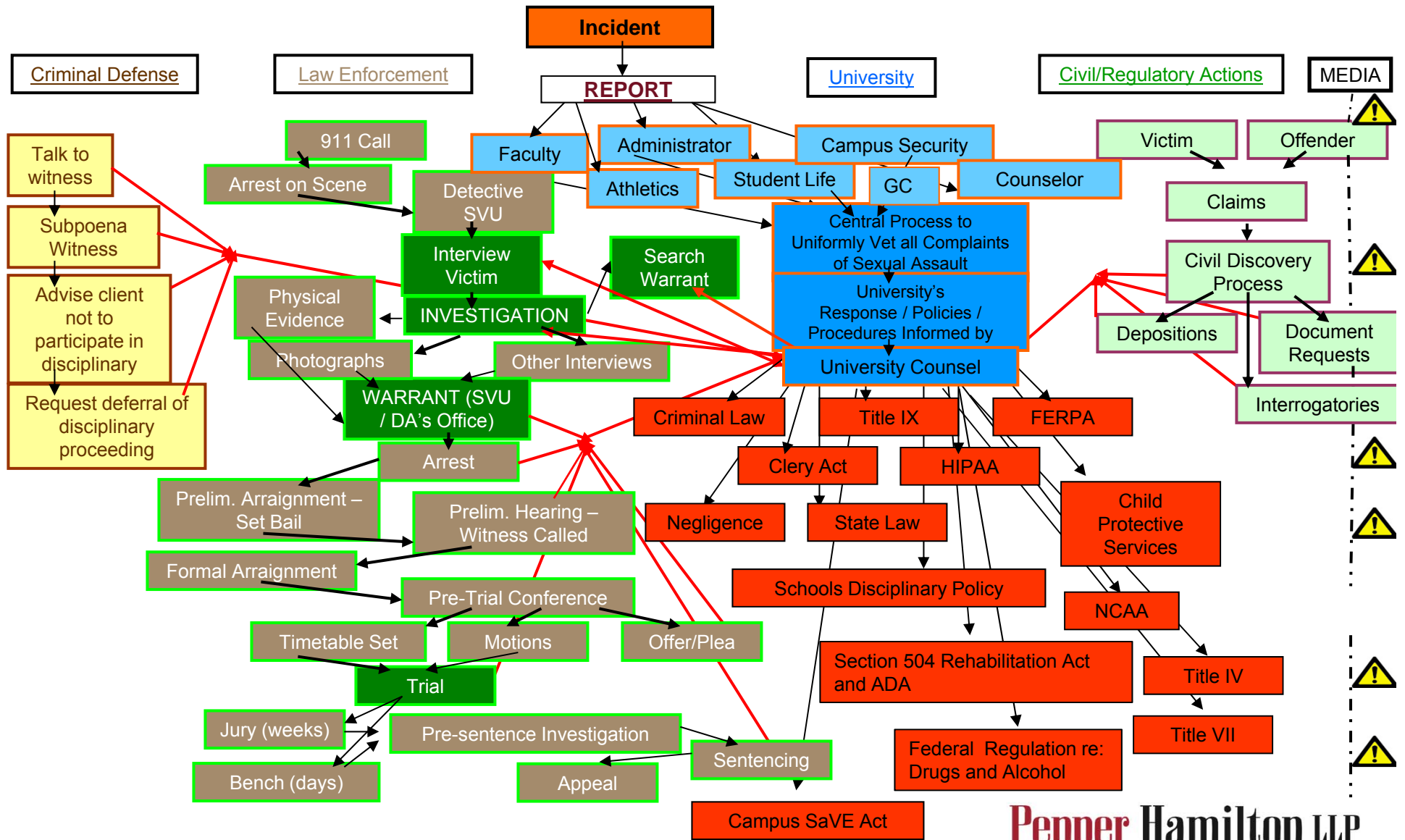


The Context

- Regulatory Framework
- Dynamics of Sexual Misconduct
- Individual Culture, Climate, History, Resources, Policies, Procedure, and Personnel of the Institution



The Challenge of the Context



The Regulatory Framework

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.”
- Prohibits sexual harassment, including sexual violence and all forms of sexual misconduct
- Once school **knows or reasonably should know** about student or employee harassment that creates a hostile environment, school must take **immediate and corrective action** to:
 - Eliminate the harassment
 - Prevent its recurrence
 - Address its effects
- School must provide appropriate interim remedies to address safety and well-being of both parties prior to the final outcome of the investigation

The Regulatory Framework

- Sexual Harassment Guidance 1997
- 2001 *Revised Sexual Assault Guidance*
 - Doing nothing is always the wrong response
 - Depending on the circumstances, there may be more than one right way to respond
- April 4, 2011 Dear Colleague Letter
 - Examine current policies and procedures on sexual harassment and sexual violence and implement changes as needed
- Voluntary Resolution Agreements

High Level Mandates:

- Notice of Non-discrimination
- Title IX Coordinator
- Grievance Procedures
 - Prompt and equitable
 - Notice
 - Adequate, reliable, and impartial investigation of complaints
 - Designated and reasonably prompt time frames
 - Notice of outcome
- Education and Prevention
- Remedies and Enforcement
- Training

The Regulatory Framework



- October 25, 2010
Dear Colleague Letter
on Bullying and Hazing
 - Bullying as a form of harassment that can create a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school
- April 24, 2013
Dear Colleague Letter
on Retaliation
 - Addresses retaliation against individuals who complain formally or informally to a college about potential civil rights violations or participate in an Office of Civil Rights (“OCR”) investigation and/or proceeding

Clery Requirements, 20 U.S.C. § 1092

- Develop educational programs to promote awareness of rape, acquaintance rape and other forcible and non-forcible offenses
- Develop procedures students should follow if a sex offense occurs, including:
 - Reporting procedures
 - The importance of preserving evidence
- Provide information on a student's option to notify appropriate law enforcement authorities including information so that students know what notifying law enforcement authorities entails
- Provide notification to students that the university will assist them in notifying these authorities
- Provide notification to students of existing on and off campus counseling, mental health or other student services for victims of sex offenses
- Provide notification to students that the university will consider changing a victim's academic and living situation after an alleged sex offense, and the options for those changes if those changes are requested by the victim and are reasonably available
- Develop procedures for campus disciplinary action in cases of an alleged sex offense
- Make clear that the accuser and accused are entitled to the same opportunities during a disciplinary proceeding
- Inform the accuser and the accused of the outcome of any institutional disciplinary proceeding that is brought alleging a sex offense (Not precluded by FERPA)
- Develop sanctions the university may impose following a final determination of an institutional disciplinary proceeding regarding rape, acquaintance rape or other forcible or non-forcible sex offenses
- Duty to warn/Timely warnings (Not precluded by FERPA)

Campus Sexual Violence Elimination Act (Campus SaVE ACT)

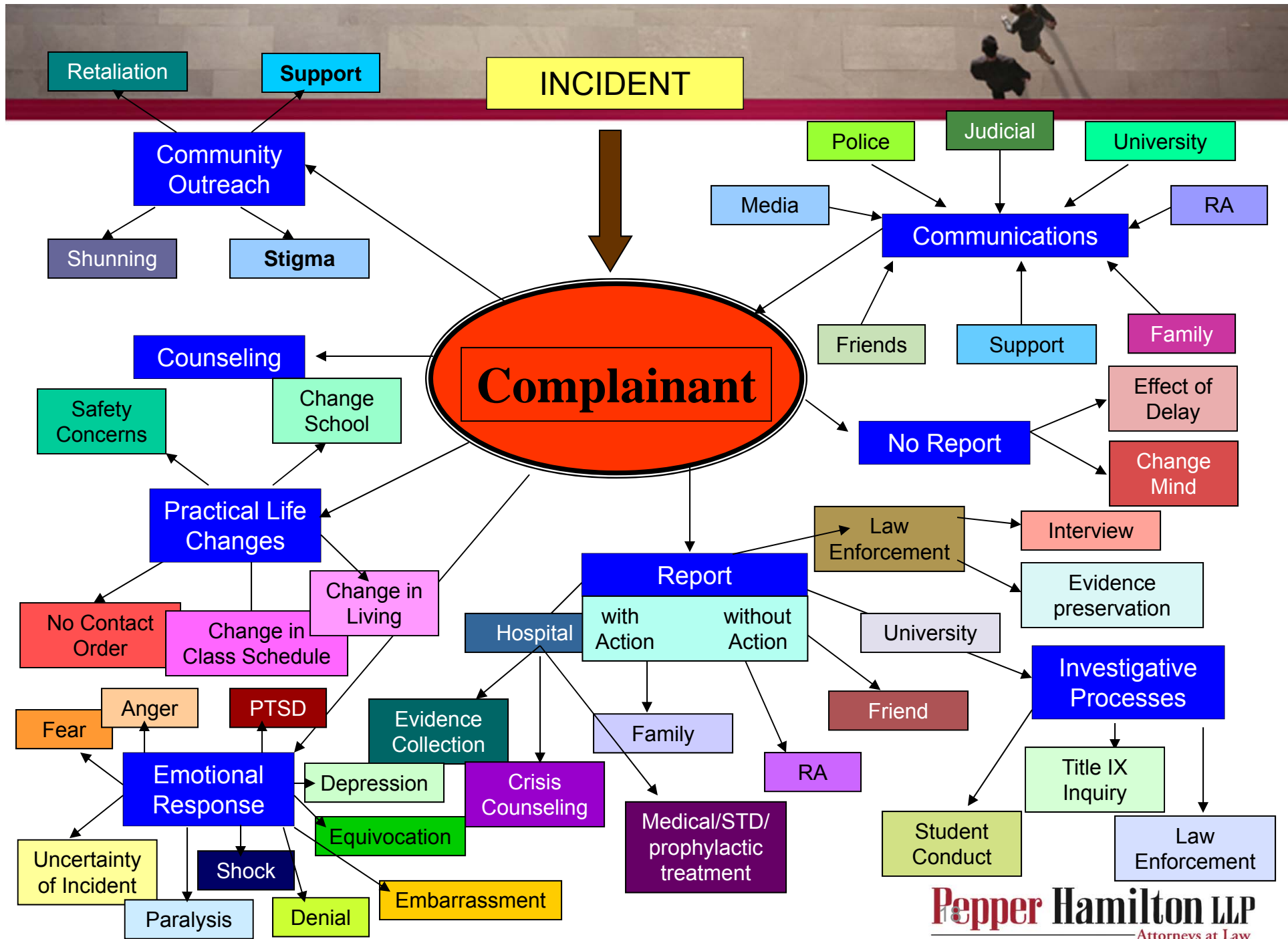


- ❑ **Requires incidents of domestic violence, dating violence, sexual assault, and stalking be disclosed in annual campus crime statistic reports**
- ❑ Students or employees reporting victimization will be provided with their written rights to:
 - ❑ Be **assisted** by campus authorities if reporting a crime to law enforcement
 - ❑ **Change** academic, living, transportation, or working situations to avoid a hostile environment
 - ❑ Obtain or enforce a **no contact** directive or restraining order;
 - ❑ Have a **clear description of their institution's disciplinary process and know the range of possible sanctions**; and
 - ❑ Receive **contact information about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available** both on-campus and in the community
- ❑ Instructs colleges and universities to provide **programming** for students and employees addressing the issues of domestic violence, dating violence, sexual assault and stalking, including primary prevention, bystander intervention, risk reduction
- ❑ The minimum standards for institutional **disciplinary procedures covering domestic violence, dating violence, sexual assault, and stalking ensure:**
 - ❑ Disciplinary proceedings will have a **prompt, fair, and impartial investigation and resolution** and will be conducted by officials receiving annual training on domestic violence, sexual assault, and stalking;
 - ❑ Both parties may have **others present** during the disciplinary proceeding and any related meeting, including an **advisor of their choice**; and
 - ❑ Both parties will receive **written outcomes** of all disciplinary proceedings at the same time
- ❑ Established **collaboration** between the U.S. Departments of Justice, 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**

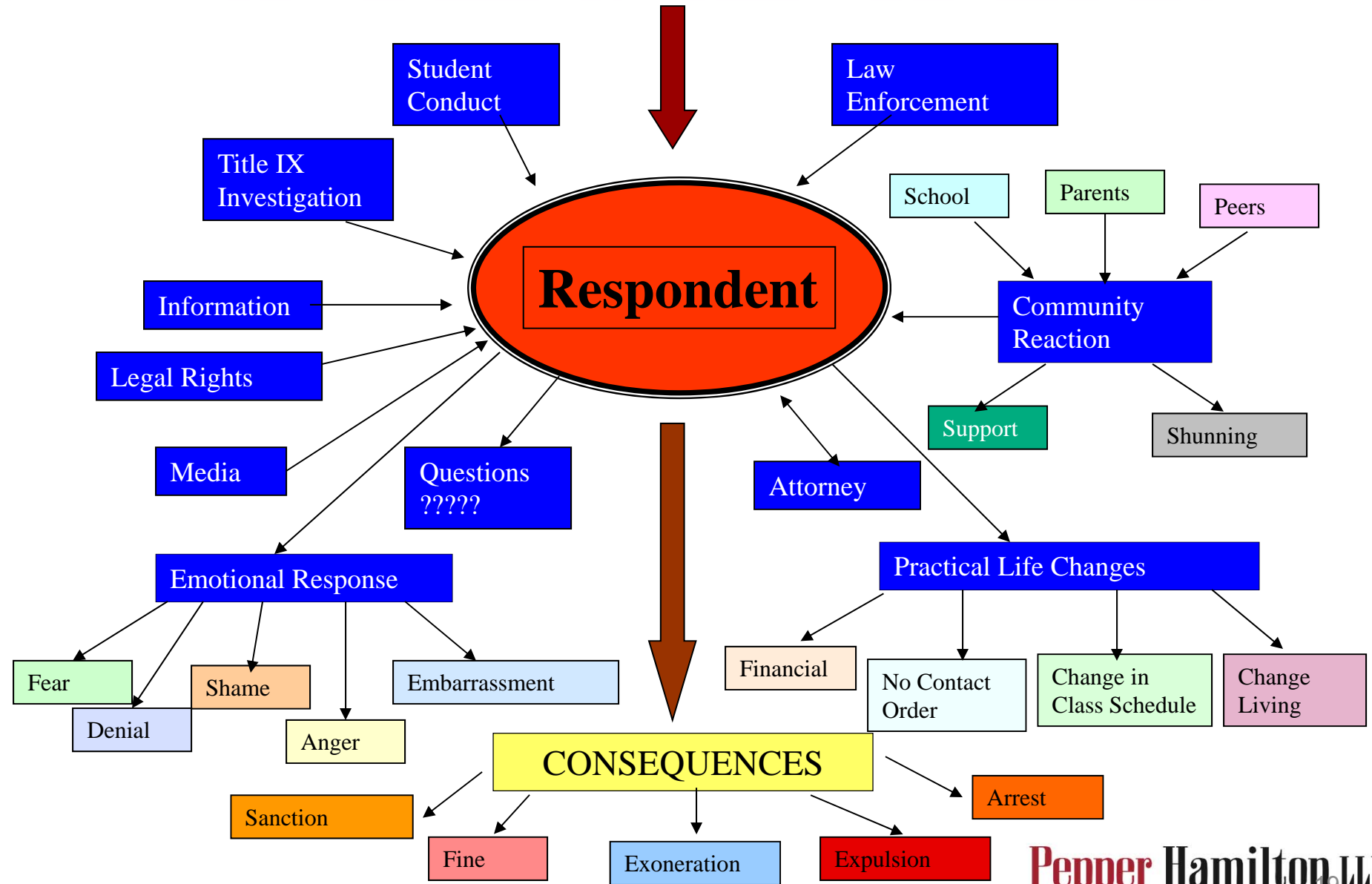
The Dynamics of Sexual Assault



- Nature of victimization
- Counter-intuitive victim behaviors
- Delay in reporting
- Wavering level of cooperation/recantation
- Role of drugs and alcohol
- Most sexual assaults committed by someone known to the victim
- Most sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation
- Likelihood of repeat offenders and undetected predators
- Concerns over false reports
- Little to no physical or forensic evidence
- Most common defense is consent
- Decisions based solely on credibility
- Inability to completely eliminate occurrence
- Emotionally charged and incendiary in nature



ALLEGATION



Your Institution

- No such thing as “best practices”
- Each school is unique in:
 - Institutional values
 - Policies and procedures
 - Resources
 - Personnel
 - Public vs. Private
 - Culture
 - Challenges
- Assess history and current climate
- Evaluate coordination of systems and personnel
- Danger of misinformation
- Perceptions are reality: do you know yours?
- Define your consistent tone and message

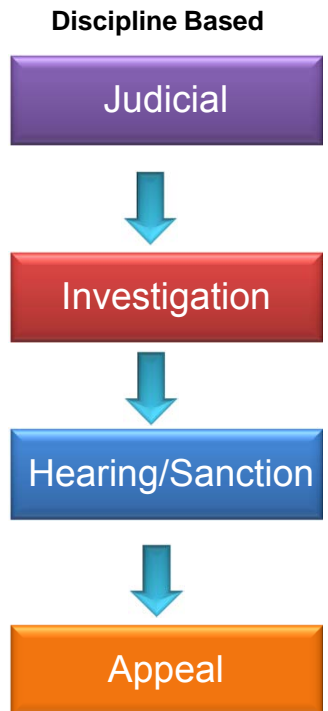
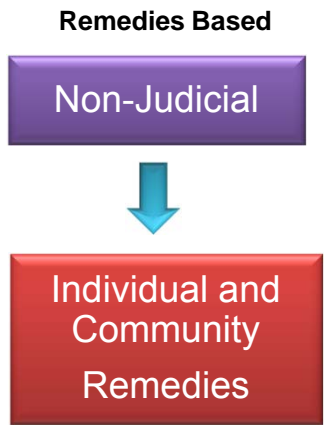
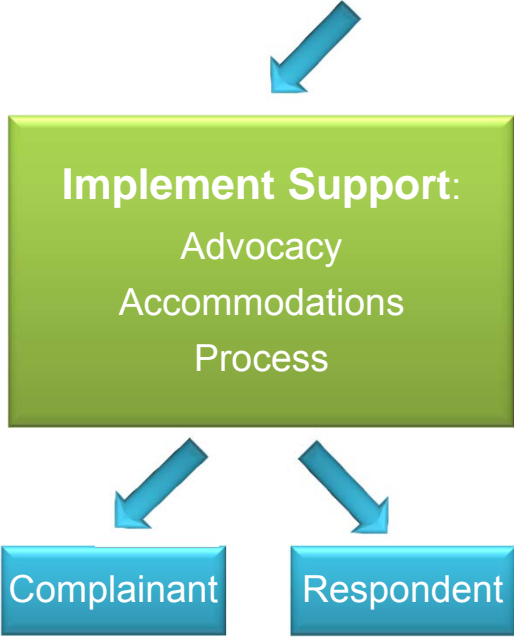
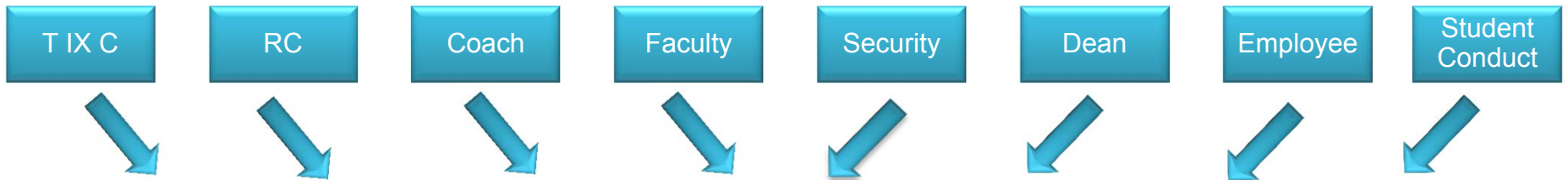
The Coordinated and Integrated Response



A Coordinated and Integrated Approach



- Structure
 - Centralized Review Process (Title IX Team)
 - Title IX Coordinator
 - Support and Advocacy
- Policy
- Understanding Confidentiality
 - Confidential Resources vs. Reporting Options
 - Role of the Responsible Employee
 - The Confidentiality Conundrum
- Investigation
- Resolution
 - Informal Resolution
 - Formal Resolution



- Title IX Assessment**
- Immediate Safety & Well-Being
 - Basic Facts
 - Notify of right to contact law enforcement and seek medical treatment
 - Notify of importance of preservation of evidence
 - Enter into daily crime log
 - Assess for timely warning
 - Identify resources
 - Offer accommodations
 - Provide process options
 - Assign advocate/support person
 - Assess for pattern
 - Ascertain complainant's wishes
 - Discuss barriers to proceeding
 - Evaluate individual vs. campus safety

Centralized Review Process



- Coordination of information for:
 - Investigation/review/assessment
 - Support services
- Education and consistency in message re:
 - Confidential resources
 - Reporting options
- Reporting
 - Clear employee/staff/faculty policies re: duty to share
- Clearly delineated options for proceeding under the appropriate grievance procedure based on the role of the respondent

Centralized Reporting



1    Incident

2  Incident reported verbally to:

Administration

Campus LE/PS

Athletics

Student/Friend

Hotline

Clery: CSA

Faculty

Student Life

General Counsel

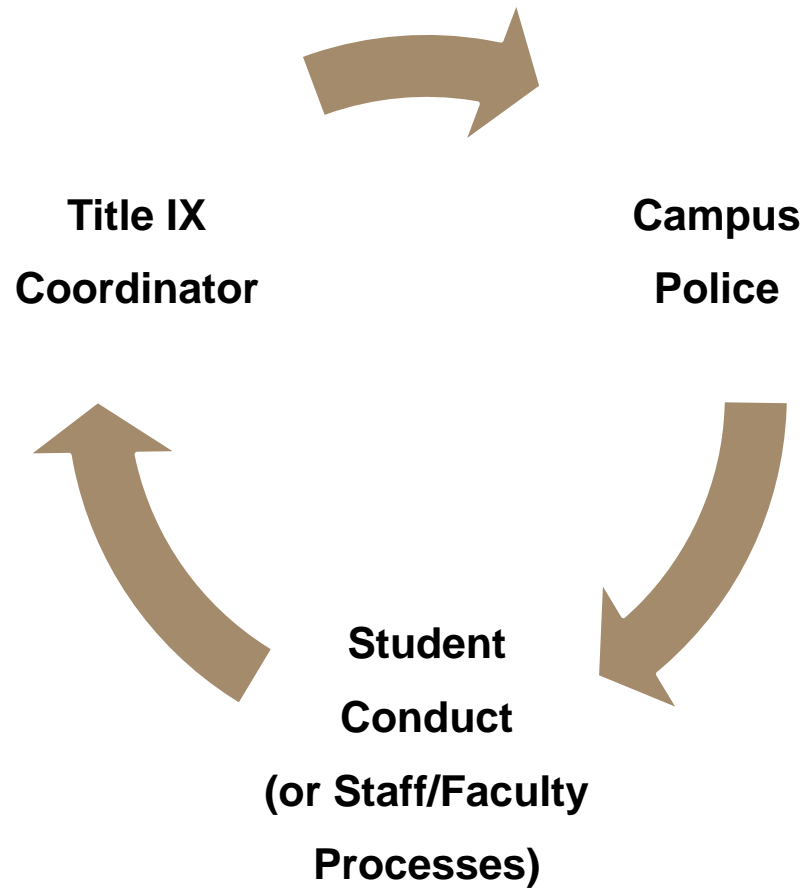
Health Services

Office of President

3  Incident report form filed

4  Central process to uniformly vet all complaints of sexual assault

Central Process/Review Team



The Title IX Team



- Core stakeholders
 - Title IX Coordinator
 - Student conduct
 - Campus safety/police
 - Human resources
 - Dean of faculty
- Additional stakeholders
 - Campus mental health
 - Health Center
 - Clergy
 - Advocate
- Clearly delineated roles and responsibilities
- Plan in advance
- Coordinated communication
- Documentation and record-keeping
- Template communications
 - Cooperative complainant
 - Reluctant complainant
 - Third party report

The Title IX Coordinator



- Coordinates the recipient's compliance with Title IX
- Responsibilities include:
 - Oversee all Title IX complaints
 - Identify and address any patterns or systemic problems
 - Be available to meet with students and employees as needed
- Should not have other job responsibilities that may create a conflict
- A school may designate more than one coordinator
 - Must have clearly delineated responsibilities
 - Must have titles reflecting supporting role

The Title IX Coordinator



- Title IX coordinator must have appropriate authority, access, autonomy, and resources
- Oversight vs. in the weeds
- Structural considerations
 - Reporting structure and chain of command
 - Consider independence and conflict issues
- Use of deputy coordinators
 - Subject matter (policy, prevention, case management)
 - Procedure based (student, faculty, employee processes)
- Dedicated investigator/adjudicator?

Support and Advocacy



- Provide balanced access to support and advocacy
 - Recommend dedicated victim advocate through campus or community
 - Identify dedicated resource for respondents
- Separate support and advocacy role from investigation and adjudication
- Benefits of clearly defined and visible advocacy
 - Helps students to feel tended to and connected to the process
 - Can help set and manage expectations

Policy: Initial Considerations



- Location
 - Alphabetical?
 - Multiple policies?
 - Umbrella policy?
- Language
 - Tone
 - Value-laden terms
 - Consistency
- Organization
 - Modular
 - Intuitive
 - Redundant
- Web-based
 - Searchable
 - Links
- Supported by
 - Flow Charts
 - Clear step by step guidance
 - FAQ
 - Consistent definitions
- Alignment

Policy: Key Components

- Institutional values
- Notice of non-discrimination
- Purpose
 - Set behavioral expectations
- Scope
 - Applies to all community members
 - On and off campus
- Privacy vs. confidentiality
- Resources
 - Confidential
 - Campus
 - Community
- Interim remedies
- Timeframes for investigation, hearing, and appeal
- Reporting options
 - Emergency assistance for safety, physical and emotional well-being
 - *All* employees directed to share with central review process
- Investigative/review process
 - Complainant no consent
 - Threshold determination?
- Procedures for resolution
 - Jurisdiction based on role of the respondent
 - Consistent application of principles of fundamental fairness, promptness, equity and thoroughness

Policy: Key Components

- Definitions
 - Sexual harassment
 - Forms
 - Examples
 - Sexual violence
 - Tie to sexual harassment
 - Prohibited conduct
 - Consent
 - Incapacitation
 - Intimate partner violence
- Prior sexual history or pattern evidence
- Consensual relationships
 - Prohibited?
 - Discouraged?
- Child protection policies
 - Mandatory reporter obligations
- Protections
 - No retaliation
 - Alternative options for appearance at hearing
 - No direct cross-examination by respondent of complainant

The Confidentiality Conundrum



- “Schools also should inform and obtain consent from the complainant ... before beginning an investigation.” (DCL, p. 5)
- “If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take **all reasonable steps** to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation.” (DCL, p. 5)
- If victim requests confidentiality, school should inform complainant:
 - Ability to respond may be limited
 - School will take steps to prevent retaliation and take strong responsive action if it occurs
- “Thus, the school **may weigh** the request for confidentiality against ...:
 - the seriousness of the alleged harassment;
 - the complainant’s age;
 - whether there have been other harassment complaints about the same individual; and
 - the alleged harasser’s rights to receive information about the allegations if the information is maintained by the school as an “education record” under FERPA” (DCL, p. 5)

A Practical Response

- Ensure policies clearly identify reporting options and support resources both on and off campus
- Delineate confidential resources vs. non-confidential reporting options in policy and training
- Ensure all employees are familiar with Title IX reporting expectations
- Offer clear and easy to follow guidance as to what happens when a report is received
- Foster a climate that encourages reporting by providing consistency in message, policy, procedure, and outcome

Resources vs. Reporting Options



- Confidential Resources
 - Medical Services
 - HIPAA
 - Mental health/counseling
 - Clergy
 - Rape crisis counselor
 - Ombuds?
- Structural Challenges:
 - Employees with multiple hats, e.g., counselor *and* administrator
- Reporting Options
 - Emergency for safety, physical or emotional
 - Dedicated campus access points
 - Title IX
 - Campus safety/police
 - Student conduct
 - To *any* school employee
 - Anonymous
 - Law enforcement

Reporting: Role of the Responsible Employee



- A school is on notice if a responsible employee **knew or should have known** about harassment that creates a hostile environment
- Knew or should have known: knowledge is attributed to the institution based on the knowledge of an agent or **responsible employee**
- “Responsible employee”
 - has the **authority** to take action to redress harassment;
 - has the **duty** to report sexual harassment or other misconduct; or
 - is someone an individual **could reasonably believe** has this authority or responsibility

Investigation

- Choice of language:
 - Investigation
 - Review
 - Assessment
- Who investigates?
 - Student conduct
 - Campus safety/police
 - Attorney
 - Mental health professional
 - Dedicated Title IX investigator
 - EEO/Human Resources
 - External investigator
- Considerations:
 - Training & experience
 - Impartiality
 - Culture of campus
 - Avoid conflict in roles
 - Clearly delineate victim support from impartial investigation
 - Consider separation of fact-gather and fact-finder
 - Comprehensive interview techniques
 - Evidence collection

Investigation



- School takes the lead
 - *Not* the burden of the complainant or respondent
- Goals:
 - To gather the most robust set of facts
 - To listen with an earnest intent to understand
 - To learn, not assume
 - To tend to the individual
 - Search for corroboration
- Key tasks:
 - Manage expectations
 - Regular and timely communications
- Documentation/Report
 - Verbatim/“quotes”
 - Areas of agreement and disagreement
 - FERPA?
- Coordination with law enforcement/campus safety and security

“Informal” Resolution



- Remedies-based
 - Individual
 - Community
- Non-judicial; does not involve disciplinary action
- Voluntary participation
- Complainant may remain confidential
- May or may not involve notifying the Respondent
- Complainant may end informal resolution
- Mechanisms:
 - Mediation
 - Not for sexual violence
 - Direct approach
 - Action by school
- Maintain records for pattern evidence

“Formal” Resolution

- Panel vs. Administrator
- Composition of the hearing board
 - Students?
 - External professionals?
- Sanctions
 - Panel recommendation?
 - Administrator?
- Timeframes
 - 60 days is guideline
 - Key is regular and timely communication
 - Can extend when circumstances require additional time
 - School breaks and graduation
- Balance in Process
 - Complainant and Respondent entitled to the same opportunities to have others present during a disciplinary proceeding
 - Provide parties with the same rights in regard to the participation of lawyers
 - If a school provides for appeal of the findings or remedy, it must do so for both parties
 - Consistent with FERPA, notify both parties, in writing, about the outcome of both the complaint and any appeal
- Effect of withdrawal from school

“Formal” Resolution

- Preponderance of the evidence standard
- Defining conduct, consent, and interplay with alcohol
 - Provide clear standards for use by adjudicator
 - Consent
 - Burden on the initiator?
 - Affirmative communication?
 - Intoxication, impairment & incapacitation
 - Where do you draw the line?
- Protections:
 - Impartial and objective board
 - Parties should not be allowed to question or cross-examine each other during the hearing
 - Alternative means of participation
- Due Process:
 - Ensure due process rights of the accused do not restrict or unnecessarily delay the Title IX protections for the complainant
- Procedure to preserve documentation of all proceedings

Your Homework



- Identify your team
- Assess your policies
- Assess your structure
- Review prior cases
- Engage your community
 - Students
 - Faculty
 - Staff
 - Leadership
 - Local partners
- Make a plan with measurable action items:
 - Task force
 - Consider external policy audit
 - Constituency survey
 - Training and education schedule
- Change the conversation

Questions & Answers