

# Student Conduct Hearings and Title IX

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## Overview

- Scope of Title IX
- Definitions
- Dynamics of Sexual Assault
- UND's Responsibilities
- SRC Hearings Involving Sexual Violence
- How to Offer Support



## SCOPE OF TITLE IX



## Title IX

- Title IX is part of the Education Amendments of 1972
  - “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”
  - 20 U.S.C. §§1681 et seq.
  - Just 37 words with a big impact



## Institutional Response

- The mission of Title IX is to reduce or eliminate barriers to educational opportunity caused by sex discrimination
- Title IX is concerned with *institutional response* to discrimination
- Failure to respond appropriately can result in loss of Title IV funding
- UND's policies prohibit sex discrimination and guide our response when it occurs



## Scope of Title IX

- Much broader than just athletics
- Prohibits sex discrimination in all areas, including:
  - Admissions
  - Recruitment and retention
  - Scholarships and fellowships
  - Counseling and appraisal materials
  - Administration of courses
  - Marital/parental status and pregnancy
  - Harassment
  - Employment



## Who is Protected

- Protects students from sexual harassment, including sexual violence, in an institution's education programs and activities, including
  - All academic, educational, extracurricular, athletic and other programs
  - Activities that are on-campus, off-campus, in-transit, and sponsored at other locations, etc.

## Who is Protected

- Protects employees from sexual discrimination and harassment
- Protects third parties from sexual harassment or violence in an institution's education programs and activities
  - High school student participating in college's recruitment program
  - Visiting student athlete
  - Camp participants

## What is Prohibited

- Prohibits sex-based discrimination and harassment including
  - Unwelcome acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex, even if those acts do not involve conduct of a sexual nature
  - Sex-based harassment whether by those of the same sex or not
  - Discriminatory sex stereotyping and harassment of LGBTQ+ individuals
  - Sexual violence

## What is Prohibited

- Prohibits discrimination/harassment by faculty, staff and students
- Prohibits retaliation against an individual for opposing or reporting discrimination, complaining about discrimination or participating in a discrimination investigation

## Non-Verbal Sexual Harassment

- Sexually suggestive staring, leering, sounds or gestures
- Sexually suggestive or degrading images
  - Emails
  - Posters
  - Graffiti
- Use of such images to advertise events

## Verbal Sexual Harassment

- Sexual slurs, insults or catcalls
- Sexual, sexist or heterosexist remarks or jokes about someone's body, clothing, activities or sexual orientation
- Unwelcome sexual propositions, demands or pressure for sexual favors
- Requests for romantic or sexual relations by a person in authority, combined with an implicit or explicit threat or reward

## Physical Sexual Harassment

- Unnecessary and unwanted physical contact (touching, brushing, hugging, pinching)
- Unwelcome fondling or kissing
- Physical assault because of a person's sex, gender identity or sexual orientation
- Sexual exploitation
- Sexual violence



## Sexual Violence

- Sexual violence is a form of sexual harassment prohibited by Title IX and VAWA
- Sexual violence is a physical sexual act perpetrated against a person's will or where a person is incapable of giving consent
- Includes rape, sexual assault, sexual battery, sexual coercion, domestic violence, dating or relationship violence and stalking



## Consent

- Often the key question to be determined in a sexual violence case
- Sex or sexual contact without consent is a policy violation involving Title IX



## UND Definition of Consent

- For purposes of sexual misconduct consent is defined as affirmative, informed, voluntary, and active permission to engage in a mutually agreed-upon sexual act or contact. Consent is expressed by clear and unambiguous words or actions that a reasonable person in the circumstances would believe communicate a willingness to participate in a sexual act or contact.



## UND Definition of Consent

- It is the responsibility of each person who wishes to engage in a sexual act or contact to obtain consent. Silence, the lack of protest, or the absence of resistance does not indicate consent. Consent may be initially given but withdrawn at any time. Consent to a past sexual act or contact does not imply consent to a future sexual act or contact. Consent to one form of a sexual act or contact does not imply consent to other forms of sexual acts or contacts. Being impaired, such as by drugs or alcohol, does not eliminate a person's responsibility to obtain consent.



## UND Definition of Consent

- Consent cannot be obtained:
  - By the use of physical force, threats, intimidation, deception, or coercion;
  - From one who is incapacitated due to the use of drugs or alcohol;
  - From one who is asleep or unconscious;
  - From one who is unable to understand the nature or extent of the sexual situation or is unable to communicate because of mental or physical condition; or
  - From one who is not old enough to give consent under North Dakota law.



## Evaluating Consent

- Was permission given for the sexual contact?
  - Affirmative through clear and unambiguous words or actions
  - Informed means they understood what was happening
  - Voluntary = no coercion, deception or threats
  - “Giving in” after threats of harm against the victim or others is not consent
  - Active, not passive or absence of “no”
  - “Yes” to one act is not automatically “yes” to another act
- Would a reasonable person in those circumstances have believed consent was given?

## Incapacitation

- Another key issue to be determined
- If an individual is incapacitated, they cannot give consent
- Incapacitation is more than intoxication

## UND Definition of Incapacitation

- Incapacitation means that a person lacks the ability to make informed, rational judgments about whether or not to engage in a sexual act or contact.

## Evaluating Incapacitation

- Was the Complainant’s ability to make decisions impaired?
  - A person is not necessarily incapacitated as a result of using drugs or alcohol.
  - A person does not have to be sleeping or passed out to be incapacitated.
  - Incapacitation and its signs vary from person to person

## Evaluating Incapacitation

- Common signs may be
  - Slurred speech
  - Difficulty walking
  - Combativeness or emotional volatility
  - Vomiting
  - Person unable to understand where they are or how they got there
  - Difficulty performing simple tasks, texting, ordering food

## Evaluating Consent in Alleged Incapacitation Case

- Two questions:
  - Did the person initiating the sexual activity know that the other person was incapacitated?
  - If not, should a reasonable person in the same situation have known that the other person was incapacitated?
- If the answer to either question is yes, consent was absent

## Evaluating Consent in Alleged Incapacitation Case

- Did the Accused know or should have known of incapacitation?
  - How much did the Complainant drink? In what time period? How much food?
  - How was Complainant behaving?
  - Did Accused see any of that?
  - How much time did they spend together?
- Being intoxicated or incapacitated does not relieve a person's obligation to get consent

## DYNAMICS OF SEXUAL ASSAULT

## 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

## Dynamics of Sexual Assault

- 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

## Trauma Victims and Witnesses

- May not experience trauma same way we experience non-traumatic event
- Body and brain react differently
  - Higher functioning parts of brain shut down
  - More primitive portions of brain take over
  - Record information differently
  - Record senses and experiences but not specific details we may expect someone to remember

## Trauma Victims and Witnesses

- May be unable to accurately remember details
  - Color of shirt, hair color, location
- Or may provide inaccurate information and details
- May provide new or different information at later time
- This does not mean the victim is lying

## Trauma Victims and Witnesses

- Stress and trauma interrupt the memory process
- Can change memories in ways most people do not understand
- “Inconsistent statements equal a lie.” We now know this is not true.



## Trauma Victims and Witnesses

- Inconsistent statements from victims of trauma are not only normal, but can provide strong evidence the memory came from severe stress of trauma
  - Evidence the memory was encoded by primitive parts of the brain during stress instead of higher functioning areas of the brain



## Trauma Victims and Witnesses

- Physical reaction during interviews
  - Used to believe change in body language, lack of eye contact, flat affect, many pauses, were signs of deception
  - Research shows these occur naturally when people are highly stressed or traumatized
  - Does not mean the victim/witness is lying



## Trauma Victims and Witnesses

- Forensic Experiential Trauma Interview
  - Process developed to interview victims of trauma
  - Reaches memories recorded in primitive parts of the brain
  - Focuses on victim’s physical and emotional experience
    - Five senses
    - Emotional and physical reaction



## UND AND EMPLOYEE RESPONSIBILITIES



## UND’s Responsibilities

- Respond promptly and effectively if UND knows or reasonably should know about sexual harassment or sexual violence that creates a hostile environment
- Conduct a prompt investigation to determine what occurred and take appropriate steps to resolve the situation
  - Eliminate harassment
  - Prevent its recurrence
  - Address its effects



## Hostile Environment Sexual Harassment

- Behavior that is unwelcome and sufficiently severe, persistent or pervasive so as to interfere with or limit a student's ability to participate in or benefit from the university's programs or activities
  - Also applies to employment

## Examples of Hostile Environment Sexual Harassment

- "Severe or pervasive" sexual harassment:
  - Persistent unwelcome remarks about someone's body parts or looks (in person or on the internet)
  - Displaying pornography on a laptop in class so that others stop coming to class or cannot concentrate
  - Stalking
  - Quid pro quo – "if you have sex with me, then . . ."
- One incident of harassment can create a hostile environment if sufficiently severe
  - Sexual violence

## UND's Responsibilities

- Provide appropriate interim measures to address safety and well-being of both parties prior to outcome of the investigation
  - Change in housing, class schedule, dining hall or work schedule
  - On-campus no-contact directive
  - Police escort
  - Re-assigned parking
  - Referral to University Counseling Center or outside provider
  - Withdrawal from class or University

## UND's Responsibilities

- Provide a balanced and fair process to both parties
  - Process is same for both parties
  - Support for both parties during investigation
  - Both parties receive equal access to information
  - Both have right to appeal outcome of hearing
    - Appeal result could change hearing decision or modify sanction to be more stringent or more lenient

## UND's Responsibilities

- Use preponderance of evidence standard
  - More likely than not
- A criminal investigation does not relieve UND of its duty under Title IX to resolve complaints promptly and equitably
  - UND process could have different result than criminal investigation

## UND's Responsibilities

- Whenever possible, UND respects a complainant's request to not take disciplinary action against the respondent
  - Must consider campus safety concerns
- Both parties will be notified if full investigation proceeds

## If Complainant does not want full investigation

- UND is limited in ability to fully respond
- Interim measures still available
- Remedies such as education may be appropriate
- UND will support Complainant
- Complainant can request investigation or administrative action at a later date



## Employee Responsibilities

- Those employees designated as Responsible Employees are obligated to share information regarding potential Title IX violations with the Title IX Coordinator
- All other employees are encouraged to share information with the Title IX Coordinator



## SRC HEARINGS



## Investigative Process

- Both parties informed of rights and responsibilities
  - Can choose to participate or not
- If this may be a case for which suspension is considered
  - Complainant and Accused Student assigned process advisors to help them navigate
  - Complainant and Accused Student may have advocate or advisor present for interviews and meetings



## Investigative Process

- Before a hearing is scheduled, a trained investigator(s) has interviewed all parties and witnesses who have chosen to participate
  - If parties or witnesses choose not to participate, investigation goes forward without the benefit of that person's information
- Investigators prepare interview summaries, which both parties may review and offer addenda



## Investigative Process

- Investigators provide formal report to Director of Office of Student Rights & Responsibilities, who serves as Hearing Officer
- After reviewing all available information, Hearing Officer makes recommendation for finding and sanctions, as appropriate



## Pre-Hearing Process

- Complainant and Accused may submit additional relevant information for SRC consideration
- Complainant and Accused provided with copies of all relevant information gathered
- Complainant, Accused, Hearing Officer and SRC members may call witnesses to appear at hearing



## SRC Hearings

- Complainant and Accused Student allowed to each have fully participating advocate at hearing
  - Advocates allowed to present opening statement, question witnesses and present closing argument
- Hearing Chairperson is charged with keeping hearing running smoothly and in accordance with hearing rules



## SRC Hearings

- Remember that the hearing is the highest student disciplinary process at UND
- Involve intensely personal, private and traumatic incidents
- Be aware of how you may be affected
- Cannot allow your own personal experiences to influence your decisions



## Appropriate Questions

- You should only be asking questions to help you determine if the *Code* was violated
- Important to remember what is relevant to the particular hearing
  - What facts will help to prove or disprove the allegation
  - For example, what facts will help to show whether or not consent was present



## Inappropriate Questions

- Information that is not relevant to decide if a *Code* violation occurred
- Sexual history or past sexual partners, etc.
- Clothing choices



## However . . .

- There may be times when these questions are relevant
  - Sexual experiences with the same person may be important to show how consent was given in the past
  - Clothing may be important to show ease or difficulty of removing, etc.



(Acting outside your role on the SRC)

## HOW TO OFFER SUPPORT



## Confidential Resources

- UND has options for a person who wants to receive confidential support following sexual violence
  - University Counseling Center – for students
  - Student Health Services– for students
  - Employee Assistance Program – for staff and faculty
  - Community Violence Intervention Center – for students, staff and faculty
- Off-Campus
  - Health care providers, mental health counselors, domestic violence advocates and religious or pastoral counselors can provide confidential services



## Other Campus Resources

- While these may be required to report incidents of sexual harassment or violence, they provide support services
  - Office of Student Rights & Responsibilities
  - University Police Department
  - Title IX Coordinator
  - Human Resources



## When someone seeks help from you

- Is this an emergency?
  - 911
  - UND Police
  - Emergency Room
- Do they feel safe?
  - Do they need new housing for tonight?
  - Is there a friend to stay with?
  - Is there someone they want to call?



## When someone seeks help from you

- If you are a Responsible Employee explain that you can keep this information private but not confidential
  - Required to share with Title IX Coordinator
  - Will only tell those people who need to know to provide help



## When someone seeks help from you

- Help them understand they still have choices about how to proceed
  - Reporting to the Title IX Coordinator doesn't necessarily mean there will be a formal investigation if the complainant doesn't want that
- Report incident as soon as possible to Title IX Coordinator or a Deputy Coordinator



## When someone seeks help from you

- Tell Complainant about resources available
  - University Counseling Center – confidential
  - Employee Assistance Program – confidential
  - CVIC - confidential
  - UND Police
  - OSRR
  - Human Resources
  - Title IX Coordinator



## When someone seeks help from you

- Understand that it took a lot of courage to tell you
- Support them
- Listen without judging or giving advice
- Do not criticize their feelings
- Do not criticize their actions



## Title IX Coordinators at UND

- A report of sexual harassment or sexual violence can be made to any of the following:
- Title IX Coordinator
  - Donna Smith
    - Equal Employment Opportunity/Affirmative Action
    - 777.4171, [donna.smith@UND.edu](mailto:donna.smith@UND.edu)
- Deputy Title IX Coordinators
  - Connie Frazier
    - Housing/Dining, 777.3775, [connie.frazier@UND.edu](mailto:connie.frazier@UND.edu)
  - Cassie Gerhardt
    - Student Involvement & Parent Programs, 777.3667, [cassie.gerhardt@UND.edu](mailto:cassie.gerhardt@UND.edu)
  - Daniella Irle
    - Athletics, 777.4036, [daniella.irle@UND.edu](mailto:daniella.irle@UND.edu)



## Title IX Coordinators at UND

- Eric Plummer
  - Public Safety/UPD, 777.3391, [eric.plummer@UND.edu](mailto:eric.plummer@UND.edu)
- Alex Pokornowski
  - OSRR, 777.2892, [alex.pokornowski@UND.edu](mailto:alex.pokornowski@UND.edu)
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## Questions?

- Thank you!

