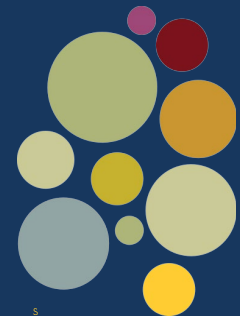


Conducting Sexual Misconduct Hearings

Adjudicator Training Fall 2023

Presented By:
Peter G. Phaiah, Ph.D.
NMT Title IX Coordinator





Agenda

- Related Statistics (FYI)
- Relevant Laws and Policies
- Common Biases and Misconceptions Related to Sexual Misconduct
- Training Requirements
- The Effects of Trauma
- Adjudication Procedures, Protocols and Best Practices
- Deliberation
- Determination
- Discussion of the adjudication of a hypothetical case
- Resources
- Q&A



Related Statistics

- 1 in 6 men and 1 in 4 women will experience a sexual assault in his or her lifetime (Bureau of Justice Statistics)
- 1 in 5 women have been sexually assaulted while in college (National Institute of Justice, U.S. Department of Justice, CSA, 2007)
- Only 25% of intimate partner sexual assaults are reported (Michael Rand & Shannan Catalano, *Criminal Victimization*, 2006)
- Rape/sexual assaults by strangers are more likely to be reported to police than those committed by intimate partners, relatives, friends, or acquaintances (Bureau of Justice Statistics Special Report)
- 80% to 90% are acquaintance rape and involve drugs or alcohol (*DOJ, National Institute of Justice*)

Relevant Laws and Policies



Related Regulations

- **2013 Campus Sexual Violence Elimination Act** (Campus SaVE) was one of the most recent, and far reaching, in a long line of laws that protect students from sexual violence and harassment. This was the result of the reauthorization of the Violence Against Women's Act (VAWA 2013)
- The **Campus SaVE Act** requires institutions to have prevention, education, policy, response and crime reporting training for all faculty, staff, and students on sexual misconduct, including sexual assault, domestic violence, dating violence, and stalking.

Title IX

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et. Seq., with implementing regulations, 34 C.F.R. Part 10, is a comprehensive federal law that prohibits *discrimination* on the basis of *sex* in any federally funded education program or activity. Sexual harassment, sexual assault, relationship violence, stalking, and other forms of sexual misconduct are considered sexual discrimination under federal law, all of which interfere with a student's right to receive an education free from discrimination or an employee's right to a discrimination-free work environment.

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 educational program or activity receiving Federal financial assistance”

- *Peter Phaiah is Tech’s Title IX Coordinator*
- *Mikell Coleman is Tech’s Title IX Investigator*

Title IX Responsibility

If a school knows or reasonably should know* about sexual harassment that creates a hostile environment, it must take immediate action to:

- Eliminate it,
- Prevent its recurrence, and
- Address its effects



* May be changing w/new Admin.

Relevant University Policies

- ***New Mexico Tech Sexual Misconduct Policy***
- **Employee Handbook**
- **Regulations Governing Academic Freedom and Tenure**
(currently silent)
- **University's Guidelines for Code and Citizenship Policy**
 - **Student Conduct Code**

Statements Regarding Sexual Violence

- The New Mexico Tech prohibits sexual violence including domestic violence, dating violence, sexual assault, stalking, and sexual harassment.
- The New Mexico Tech does not discriminate on the basis of sex in its educational programs. Sexual harassment and sexual violence are types of sex discrimination.

Sexual Assault, Stalking and Intimate Relationship Violence Policy

The University prohibits retaliation against an individual for:

- reporting sexual misconduct; or
- participating in a University investigation or hearings for sexual misconduct.

Sexual Assault, Stalking and Intimate Relationship Violence Policy

Sexual assault is:

Actual, attempted or threatened sexual contact with another person without that person's consent.

Sexual Assault, Stalking and Intimate Relationship Violence Policy

Consent is:

an informed, freely and affirmatively communicated willingness to participate in sexual activity that is expressed by clear and unambiguous words or actions.

Clear and unambiguous words or actions are:

those that a reasonable person in the circumstances would believe communicate a willingness to participate in a mutually agreed upon sexual activity.

(See Hand-out)

Sexual Assault, Stalking and Intimate Relationship Violence Policy

The following factors should be considered when determining consent:

- It is the responsibility of each person who wishes to engage in the sexual activity to obtain consent.
- A lack of protest, the absence of resistance and silence do not indicate consent.
- The existence of a present or past dating or romantic relationship does not imply consent to future sexual activity.

Sexual Assault, Stalking and Intimate Relationship Violence Policy

There is no consent when:

- There is physical force, threats, intimidation or coercion.
- There is incapacitation due to the influence of drugs or alcohol.
- There is the inability to communicate because of a physical or mental condition
- An individual is asleep, unconscious or involuntarily physically restrained.
- An individual is unable to understand the nature or extent of the sexual situation because of mental or physical incapacitation or impairment.
- One party is not of legal age to give consent pursuant to New Mexico state law.

Sexual Assault, Stalking and Intimate Relationship Violence Policy

Stalking is:

A course of conduct directed at a specific person that is unwanted, unwelcome, or unreciprocated and that would cause a reasonable person to feel fear.

Sexual Assault, Stalking and Intimate Relationship Violence Policy

Incapacitation is:

The physical and/or mental inability to make informed, rational judgments. States of incapacitation include, without limitation, sleep, blackouts, and flashbacks. Where an intoxicant is involved, incapacitation is a state of intoxication where the intoxicant consumed impairs a person's decision-making capacity, awareness of consequences, and ability to make fully informed judgments.

Sexual Assault, Stalking and Intimate Relationship Violence Policy

Intimate Relationship Violence is:

Physical harm or abuse, and threats of physical harm or abuse, arising out of a personal, intimate relationship.

Sexual Assault, Stalking and Intimate Relationship Violence Policy

Sexual harassment :

- Quid pro quo
 - Individual in position of authority
 - Conditions a benefit
 - Sexual advance, sexual favors, other conduct of a sexual nature
- Hostile environment
 - (Student) Sufficiently serious that it denies or limits a student's ability to participate in or benefit from an education program or activity
 - (Employee) Severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive

Sexual Assault, Stalking and Intimate Relationship Violence Policy

Sexual harassment is :

- unwelcome conduct of a sexual nature that influences employment or academic decisions;
- unreasonably interferes with an individual's work or academic performance; or
- creates a hostile working or academic environment

Broad Title IX Protections/Scope

- Gender-based Discrimination
 - Items on previous slides (e.g. Sexual Assault, Sexual Harassment)
 - Title IX's prohibitions on discrimination based on sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity."
 - Protects LGBTQ individuals
 - Transgender
 - Pregnancy & Parenting
 - Preferred Name & Gender Pronouns (e.g. Paula)

The Effects of Trauma

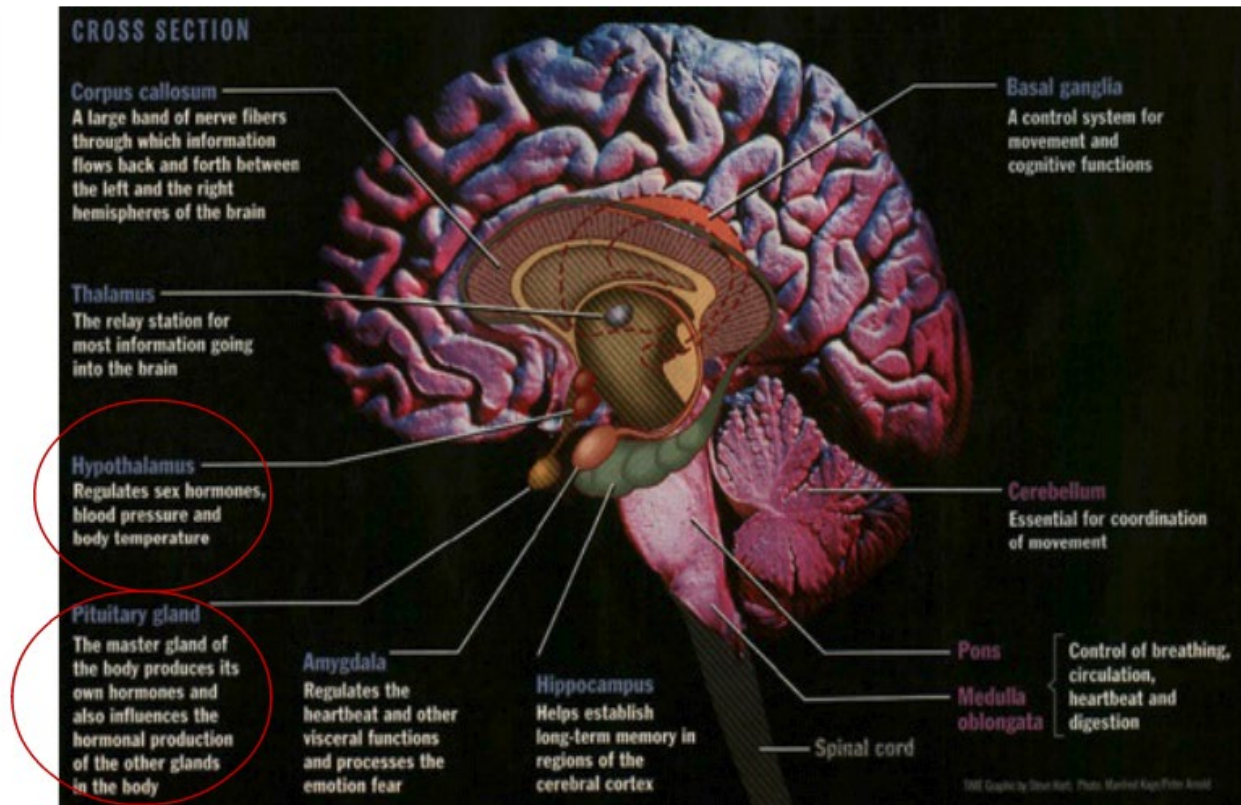
The Effects of Trauma

COMMON VICTIM RESPONSES:

- Initial denial of incident
- No reporting/delayed reporting
- Maintaining contact with perpetrator
- Fight, flight, or freeze

NEUROBIOLOGY OF SEXUAL ASSAULT

Brain Regions Impacted by Trauma

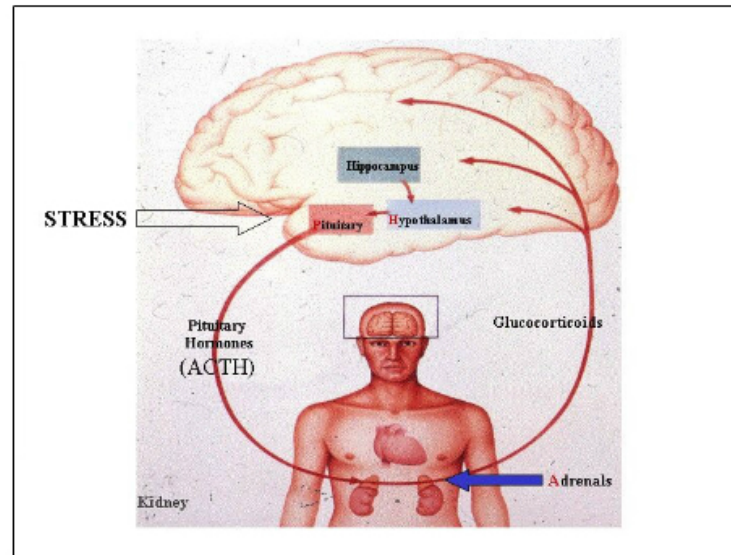


NEUROBIOLOGY OF SEXUAL ASSAULT

Brain-Body Regions Impacted by Trauma

HPA Axis

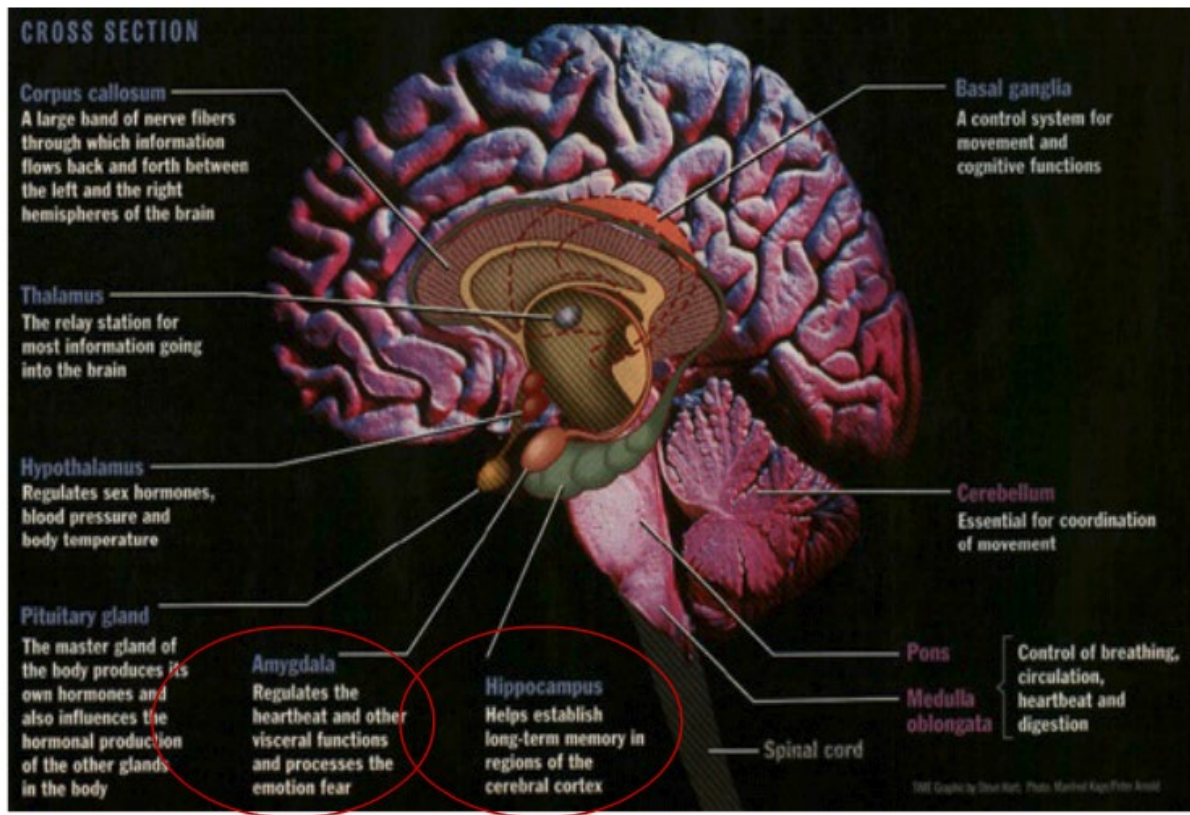
Balances body following stress by releasing of various hormones/chemicals



SOURCE: Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT

Brain Regions Impacted by Trauma



NEUROBIOLOGY OF SEXUAL ASSAULT

Memory Processes Impacted by Trauma

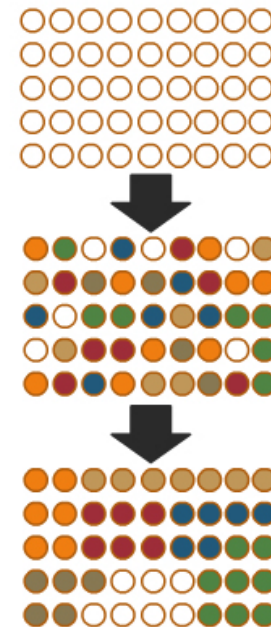
Hippocampus processes information into memories

Encoding = Organizing sensory information

Consolidation = Grouping information into memories and storing them

Amygdala specializes in the processing of emotional memories (works with the hippocampus)

Both structures are VERY sensitive to hormonal fluctuations



SOURCE: Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT

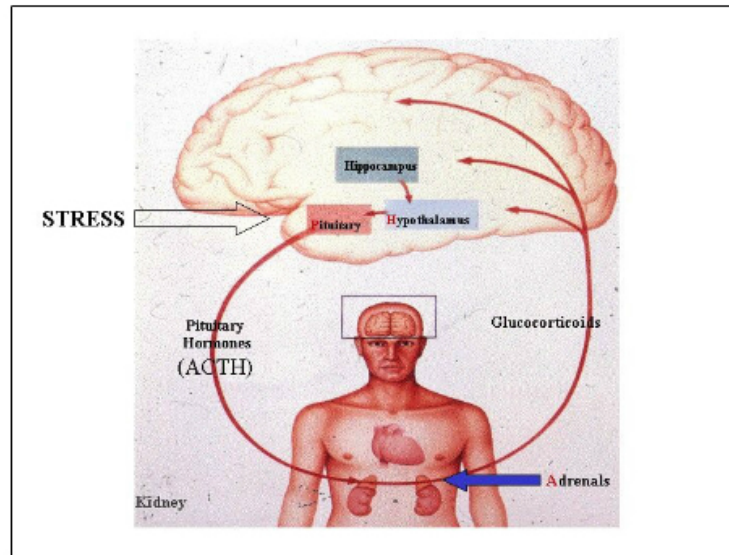
Like These . . .

Catecholamines: Fight or flight response

Cortisol: Energy available

Opioids: Prevent pain

Oxytocin: Promotes good feelings



THESE HORMONES IMPAIR MEMORY CONSOLIDATION

SOURCE: Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT

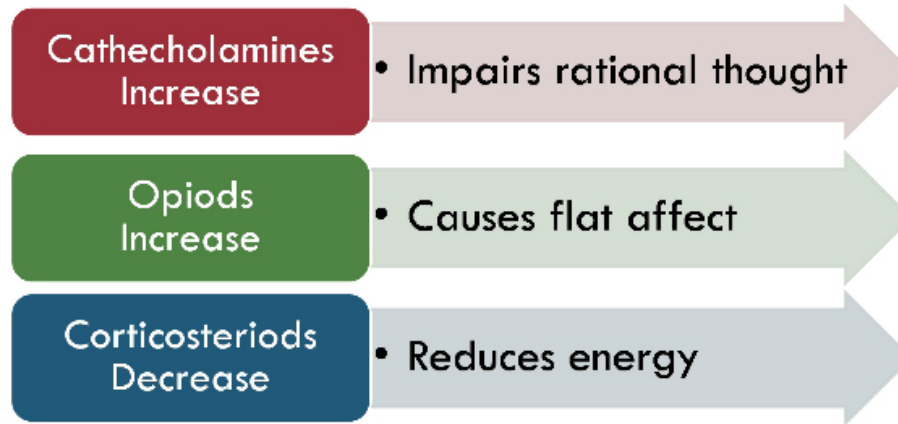
What Happens During A Sexual Assault



SOURCE: Banks, 2002; Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT

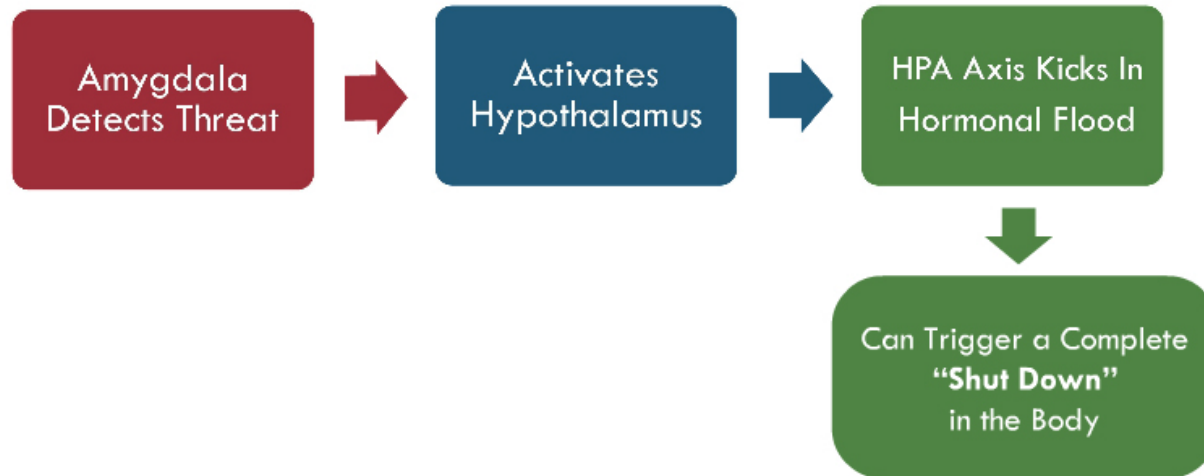
What Happens During A Sexual Assault



SOURCE: Banks, 2002; Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT

What Happens During A Sexual Assault



SOURCE: Banks, 2002; Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT

Tonic Immobility (TI)

- AKA: “Rape-induced paralysis”
- Autonomic (uncontrollable) mammalian response in extremely fearful situations
- Increased breathing, eye closure, paralysis
- 12-50% rape victims experience TI during assault
- TI is ~more common in victims who have been assaulted before (childhood, adolescence, or adult)

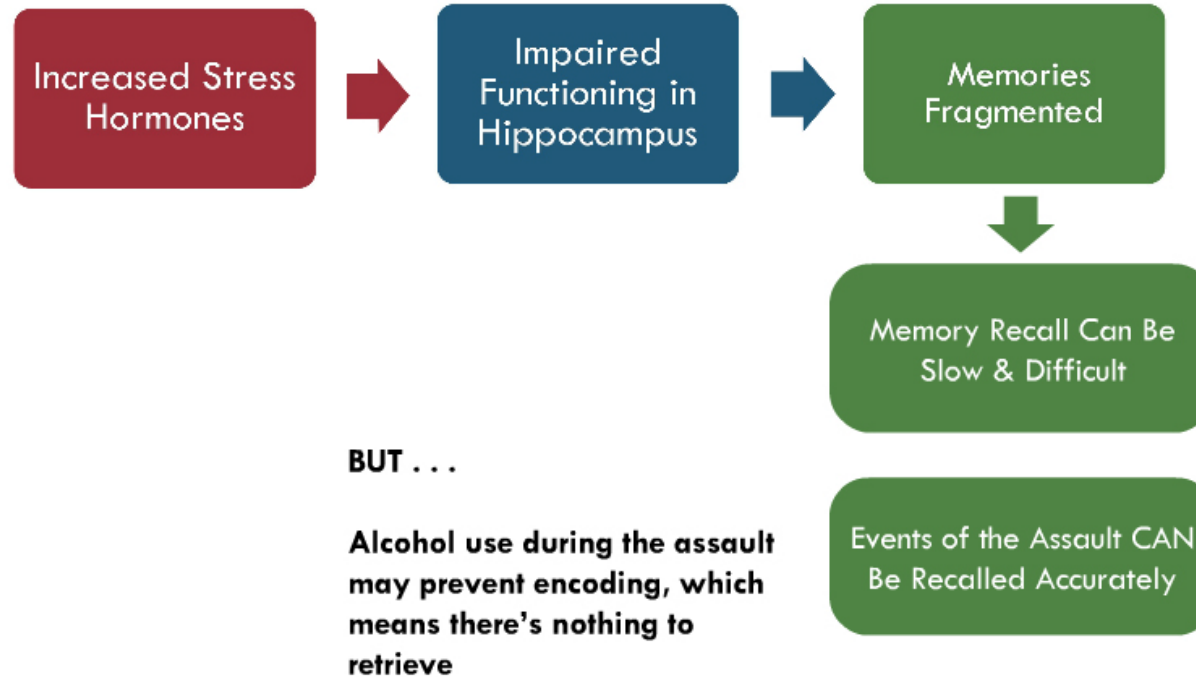
SOURCE: Fuse et al., 2007; Galiano et al., 1993; Heidt et al., 2005

COMMON BEHAVIORS DURING ASSAULT

- Impaired rational thought
- Flat affect
- Reduced energy
- Flight
- Fight
- Freeze

MEMORY

What Happens During A Sexual Assault



SOURCE: Koss et al., 1995, 1996; Roozendaal et al., 2009; Rubin et al., 2008

IMPACT OF TRAUMA ON MEMORY

- Memories accurately stored
- Memory recall slow
- Fragmented story
- Concentration difficult
- Alcohol exception—may impact storage and accuracy of memories

IMPACT OF CULTURE

- Survivors' experiences of sexual assault are not universal
- A survivor's cultural background is one of many factors that may impact the way that the individual reacts to sexual assault
- Different cultural backgrounds will influence individuals in different ways
- Be aware of and sensitive to possible cultural influences
- Incorporate training as appropriate

STAGES OF RECOVERY

- **Initial shock**
 - Physical and emotional reactions ranging from withdrawal to expressive emotions
- **Denial**
 - Wanting to forget, attempting to continue normal routine
- **Reactivation**
 - Prompted by memories or recurring feelings
- **Anger**
 - Toward self, friends, society, legal system, respondent
- **Integration**
 - Thoughts and feelings become integrated into life experience and an individual begins to move forward

Adapted from Anne Franke, *Sexual Misconduct Complaints, 17 Tips for Student Discipline Adjudicators*. Available at <http://legalmomentum.org/resources/guide-university-discipline-panels-sexual-violence> .

Secondary Victimization

- The attitudes, beliefs and behaviors that victims experience as victim blaming and insensitive
- It exacerbates their trauma and it makes them feel like what they're experiencing is a second rape — hence the term “secondary victimization”

Secondary Victimization

- Examples of Behavior:
 - Discouraging the victim from making the report
 - Telling them it's not serious enough to pursue
 - Asking about dress, behavior, or what they might have done to provoke the assault
- Psychological impact on victims:
 - Blamed
 - Depressed
 - Anxious
 - Violated
 - Reluctant to seek help

Common Biases and Misconceptions Related to Sexual Misconduct

Common Biases & Misconceptions Related to Sexual Misconduct

- The typical assailant is neither a violent stranger nor a good guy who just drank too much.
- A victim may not physically resist.
- A victim may contact the assailant afterwards.
- A victim may not report the incident immediately.
- A victim may not have a clear memory of the incident.
- A victim may display a flat affect while testifying.

Myths of Rape

Myth	Reality
Rape is primarily sexually motivated	Rape combines elements of power, anger and sexuality
Rapists are usually strangers	Most perpetrators are known to the victim
The victim did something to cause the rape	No behavior warrants being raped; under no circumstances can the victim be blamed
Acquaintance rape is not as traumatic	There are no differences in victim psychological symptoms between acquaintance and stranger rape

- Sexual assault happen in all communities. Male survivors, survivors of color, lesbian, gay, bisexual and transgendered survivors all experience similar reactions to those described above. However, they are also likely struggling with the additional burdens of stereotypes, racism, homophobia and other oppressions, often leaving them feeling even more isolated, confused, ashamed, frightened, and less likely to seek support.

Adjudication Procedures, Protocols and Best Practices

Student Conduct Process

NMT's Title IX Investigator is a neutral party that investigates sexual misconduct reports through an **informal process**.

- Interview the parties and witnesses, review documents and social media communications and gather other information.
- Determine by a preponderance of the evidence whether the University's policies have been violated.
- Determine appropriate responsive and/or disciplinary action.

Standard of Proof



- Beyond a reasonable doubt
- **Clear and convincing evidence***
- Preponderance of the evidence
- Some evidence
- This is the Standard that Tech utilizes in its Title IX cases.

Standard of Evidence: *Standard of evidence* is the degree of certainty required to establish a violation has occurred. New Mexico Tech utilizes the clear and convincing standard of evidence for resolving complaints under our Sexual Misconduct policy. In the clear and convincing evidence standard the degree of certainty is that it is substantially more likely to be true than untrue; highly probable.

Since Tech or the complainant bears the burden of proof, they must show that the truth of the allegations against the respondent is highly probable (*clear and convincing* proof or approximately 75% level/degree of confidence +/-). This is a more stringent standard than a preponderance of the evidences standard but less stringent than a beyond a reasonable doubt standards.

The Hearing Process

The Student and Faculty Conduct Committee Hearing Panel (“Panel”) must utilize a **clear and convincing evidence standard** when determining whether sexual misconduct occurred.

E.g., make a finding it is substantially more likely to be true than untrue; highly probable sexual misconduct or Prohibited Conduct occurred.

The Hearing Process

- Presence of parties at the hearing
- Afford equitable opportunity to be present at the hearing.
- If one party is allowed to be present for the entire hearing, the other party must be similarly allowed.
- If requested, the University should arrange so that the complainant and accused student do not have to be present in the same room at the same time.
- The University cannot require a complainant to be present at a hearing as a prerequisite to proceed with the hearing.

The Hearing Process

Cross-examination of witnesses at the hearing

- Both parties must be allowed equal cross-examination of witnesses, if at all.
- Federal guidance “strongly discourages” a school from allowing the parties to personally question or cross-examine each other.

The Hearing Process

Evidence of a complainant's sexual history

- Do not permit evidence about the complainant's sexual history with anyone other than the accused student.
- The mere fact of a current or previous consensual dating or sexual relationship between the parties does not imply consent.

The Hearing Process

The Panel should ensure that hearings are conducted in a manner that does not inflict additional trauma (secondary victimization) on the complainant.

- Allow complainants to provide information on how the reported conduct impacted them.
- Avoid-victim blaming questions.
- Maintain hearing decorum.

The Hearing Process

- Uncomfortable questions, inferences, suggestions may come up – it is your responsibility to ask questions that you feel you need to know the answer to in order to make a decision
- Advocates (through complainant or respondent) and University presenter ask questions they feel are important for panel to hear the answer to.

The Hearing Process

- Any potential violation of the University's Student Conduct Code will be addressed separately from the sexual violence allegation.
- **The use of alcohol or drugs never makes the victim at fault for sexual violence.**
- The use of alcohol or drugs is NO EXCUSE for perpetrating of an act sexual violence.

During Questioning

- Do not appear to take sides
- Use impartial language
- He/she may be defensive
- Memory may be impaired by alcohol
- Be sensitive to secondary traumatization, but ask the tough questions

Deliberation

Evidentiary Consideration

- Always consider relevance
- Types of evidence
 - Parties' statements
 - Fact witnesses' statements
 - Character witnesses' statements
 - Other character evidence
 - Medical information (including mental health records)
 - Consider need for expert guidance in understanding and interpreting information

Evidentiary Consideration

- Prior sexual history
 - The complainant's sexual history with anyone other than the respondent should not be considered or shared with the respondent
 - The mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence

Evidentiary Consideration

- Weighing Evidence / Assessing Credibility:
 - Is information the witness provided accurate based on other evidence?
 - How did the witness learn the facts?
 - How well did he or she recall facts?
 - How forthcoming was the witness? Did the witness seem honest and sincere?
 - What are the possible motives for being less than truthful?
 - What is the witness's relationship to the complainant and respondent?
 - Are there other factors that bear on the believability of the witness?

Evidentiary Consideration

- **Consent** is words or overt actions by a person clearly indicating a freely given present agreement to perform a particular sexual act. Consent must be informed and freely and actively given.
- **Consent** can only be given by someone who acts freely, voluntarily, and with knowledge of the nature of the act involved.
- **Consent** can be withdrawn at any time. Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and obtaining consent.
 - A person cannot give consent if that person: Is incapacitated by drugs or alcohol;
 - Is threatened, coerced or intimidated into submission;
 - Is not conscious;
 - Is physically incapacitated;
 - Is mentally incapacitated; or
 - Is not of legal age to consent (assume 16 is the age of consent in the state).

Evidentiary Consideration

- Because these previous factors prevent an individual from consenting to sexual contact, this means that sexual contact with someone who is incapacitated or intimidated in any of the ways described above, or who is not of legal age, is by definition sexual assault.
- Furthermore, consent cannot be inferred from:
 - Permission for one particular act;
 - A prior sexual, romantic or marital relationship;
 - An existing sexual, romantic or marital relationship;
 - Silence, or an absence of resistance; or
 - Prior sexual activity with other individuals.

Evidentiary Consideration

- Difficult consent issues:
 - Incapacitation (including conditions resulting from alcohol or drug consumption or being asleep or unconscious)
 - Coercion

(see Consent hand-out for more consideration)

Evidentiary Consideration

The Panel should be aware of what might seem like counterintuitive behavior as the result of trauma.

- Texting an accused student after an incident
- Getting aspects of the story confused
- Emphasizing facts that seem unimportant
- Expressing concern for the accused
- Freezing in the moment or not being able to respond

Determination

Determination

- Finding re: policy violation
 - Sexual contact/harassment
 - Consent/unwelcomed
- Sanctions
- Remedies
- Provide written notice of determination

Determination

- Statistics have no probative value (shown earlier as a FYI)
- The primary question is “What happened?”
NOT “Who is lying?”/“Who is telling the truth?”/“What is the motivation to lie?”
- “Was Consent Given”

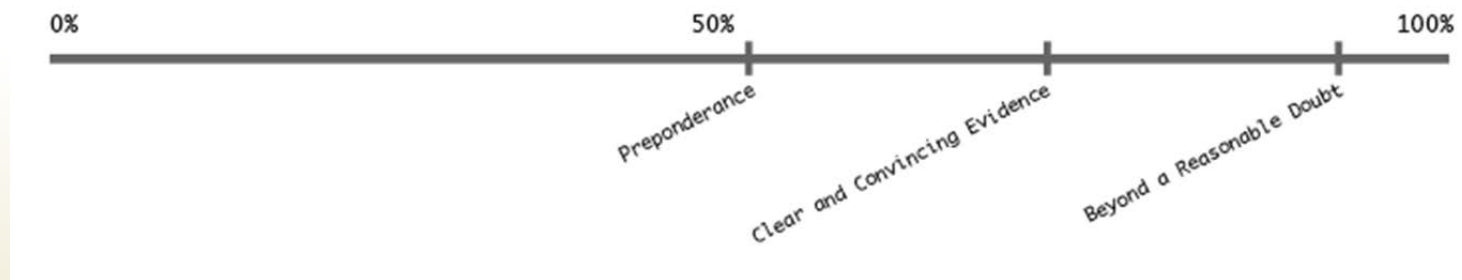
Determination

Considerations for determining sanctions:

- the healing and safety of victim-survivors
- the safety of the community
- holding perpetrators accountable for their conduct
- See hand-out “Title IX Sanctioning Guideline”

Determination Findings

- Standard of Proof
 - “Clear and convincing” (not “beyond a reasonable doubt” or “Preponderance of the evidence”)
 - Decision-maker(s) must ultimately decide whether it that it is substantially more likely to be true than untrue; highly probable that a policy violation has occurred



Determination Findings

- Must decide either that:
 - It was “substantially more likely to be true than untrue; highly probable” that the Respondent violated the institution’s sexual misconduct policy
OR
 - That there was insufficient evidence to establish “that it is substantially more likely to be true than untrue; highly probable” that the Respondent violated the institution’s sexual misconduct policy

Typical Fact Scenarios

- The SGA has a sleepover and one student attempts to engage another sexually in the night.
- A student awakes after attending a party and is missing an item of clothing.
- Two students watch a movie together in their dorm room and there is a misunderstanding.

Contact Information:

Peter Phaiah, NMT Title IX Coordinator

(575)835-5953 or (575) 322-0001 cell.

titleixcoordinator@nmt.edu

Fidel Student Center, Rm. 238

Question & Answers Session

Thank you!

