



AMERICAN **BAR** ASSOCIATION™

Commission on Domestic
& Sexual Violence

Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence



DISCLAIMER: The views expressed herein are those of the ABA Commission on Domestic & Sexual Violence. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association or any of its entities.

What is this document?

This document contains recommendations for colleges and universities seeking to improve their campus student conduct processes for complaints of gender-based violence.

The recommendations are based on research, interviews, and focus groups with higher education professionals from a variety of campus types, including community colleges and Minority-Serving Institutions. Given the input we received from these stakeholders as a part of our three-year drafting and revision process, we believe that these recommendations provide an invaluable distillation of best practices for college and university campuses across the U.S.

Who is it for?

These recommendations are designed for the variety of professionals who are involved in addressing student complaints of gender-based violence, whether they are campus employees or external professionals tasked with assisting with such complaints. The recommendations have been crafted with these professionals' wide diversity of academic disciplines, career backgrounds, and expertise in mind.

But we already have a student conduct process.

The recommendations do provide advice for a hypothetical school building its student conduct process from the ground up. For schools that have taken some of these steps, the recommendations will provide information about other steps they could take to improve their processes. For those schools that already have a comprehensive process in place, the recommendations can be used to review, audit, or oversee the functioning of their systems.

How to use the recommendations

- **Sections I – IV provide context.** These sections offer an overview of the problem and the reason why recommended best practices would be helpful; a history of the project; the scope of the recommendations; and reference materials such as a glossary and federal law summary.
- **Section V provides the recommendations.** Recommended investigation processes appear in Section V as brief “black letter” practices followed by explanatory commentary and resources for further study.
- **Appendices provide guidance on important ancillary matters.** [Appendix A](#) addresses factors to consider in choosing an investigative model; [Appendix B](#) outlines some considerations regarding a restorative justice approach.

Acknowledgements

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I. Introduction

While precise statistics on the prevalence and rates of domestic violence, dating violence, sexual assault, and stalking¹ at institutions of higher education (“IHEs”)² across the country are difficult to come by, most studies in the U.S. indicate that between twenty and twenty-three percent of female undergraduates and approximately five percent of male undergraduates have experienced some form of sexual abuse or assault.³ For young adults who identify as lesbian, gay, bisexual, transgender, or questioning/queer (“LGBTQ”), the rates of sexual victimization trend even higher; twenty-one percent of LGBTQ college-aged students report sexual victimization, compared to eighteen percent of non-LGBTQ females and four percent of non-LGBTQ males.⁴ Across all groups, rates of reporting are low. Only approximately twenty percent of female student survivors report incidents of abuse to relevant authorities, and studies indicate that distrust of and perceptions about unfairness within campus conduct processes may, in part, bolster this reluctance to report.⁵

Widespread concerns about the fairness of the process are not unfounded. Gender, racial, and LGBTQ bias and stereotyping plague investigations of allegations of gender-based violence, and sexual violence in particular.⁶ Judges, juries, and campus administrators still rely on age-old tropes that a woman who is drunk or dressed provocatively is “asking for it”; that rape requires knives, guns, and a back alley; that dispute about valid consent is simply a “misunderstanding”; or that the victim “cried rape” the next morning due to regret.

Yet for survivors of gender-based violence, the process of moving forward is complicated if the policies designed to protect them and hold perpetrators accountable routinely fail to do that job, and instead place the burden on survivors to singlehandedly manage their own trauma and healing. Despite federal obligations, most campus procedures are *ad hoc*, and fail to guide the conduct of proper investigations aimed at protecting all of their students.⁷

¹ Domestic violence, dating violence, sexual assault, and stalking are all defined by the federal Violence Against Women Act (“VAWA”) at 34 U.S.C. § 12291(a). Throughout these Recommendations and commentary, these four terms may also be referred to as “gender-based violence.”

² “Institution of higher education” is defined by the federal Higher Education Act at 20 U.S.C. § 1001. Throughout these Recommendations and commentary, institutions of higher education may also be referred to as “IHEs.”

³ There are a range of national studies and surveys that aim to capture the rate and prevalence of sexual assault, particularly for student and non-student adults aged 18–24. See *The National Intimate Partner and Sexual Violence Survey (NISVS)*, NAT’L CTR. FOR INJURY PREVENTION & CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/datasources/nisvs/index.html> (last updated June 19, 2019). See also *Campus Sexual Violence: Statistics*, RAINN (Rape, Abuse, and Incest National Network), <https://www.rainn.org/statistics/campus-sexual-violence> (last visited July 16, 2019); U.S. DEP’T OF JUST., OFF. OF JUST. PROGS., BUREAU OF JUST. STATS., RAPE AND SEXUAL VICTIMIZATION AMONG COLLEGE-AGED FEMALES, 1995–2013 (Dec. 2014), available at <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>; DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (Sept. 21, 2015), available at <http://www.upenn.edu/ir/surveys/AAU/Report%20and%20Tables%20on%20AAU%20Campus%20Climate%20Survey.pdf>. For individual stories describing the experience of sexual assault on college campuses, see Emily Kassie, *Male Victims of Campus Sexual Assault Speak Out ‘We’re Up Against A System That’s Not Designed to Help Us,’* HUFFINGTON POST (Jan. 27, 2015), https://www.huffpost.com/entry/male-victims-sexual-assault_n_6535730; Emma Sulkowicz, *‘My Rapist Is Still on Campus,’* TIME (May 15, 2014), <https://time.com/99780/campus-sexual-assault-emma-sulkowicz>; Marc Tracy & Dan Barry, *The Rise, Then Shame, of Baylor Nation*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/sports/baylor-football-sexual-assault.html>.

⁴ RAINN, *supra* note 3.

⁵ *Id.* See CANTOR ET AL., *supra* note 3 (surveying University of Pennsylvania student community on rates of sexual victimization, but also perceptions about the reporting process, support of the student body, and bystander intervention, among other related topics).

⁶ See generally U.S. DEP’T OF JUST., IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE (Dec. 2015), available at <https://www.justice.gov/opa/file/799366/download>.

⁷ See Sara Ganim & Nelli Black, *An imperfect process: How campuses deal with sexual assault*, CNN (Dec. 21, 2015), <https://www.cnn.com/2015/11/22/us/campus-sexual-assault-tribunals/index.html> (“From campus to campus, the process varies.”).

It is against this backdrop that the ABA Commission on Domestic & Sexual Violence undertook to establish comprehensive recommendations for IHEs seeking to implement, revise, or improve campus student conduct processes and policies for addressing domestic violence, sexual assault, dating violence, and stalking. These *Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence* (“Recommendations”) are the result. The Recommendations walk IHEs through establishing or revising campus student conduct processes, including guidance on planning, partnership, and coordination; providing flexible support for both survivors and the accused; administrator training, investigation, and hearing protocols; and development of appropriate sanctions. The overarching goal of the Recommendations is to transform the way IHEs think about not just student conduct processes and sanctions, but primary, secondary, and tertiary prevention of gender-based violence. Only through a comprehensive infrastructure that aims to address the immediate and long-term consequences of violence and abuse *and* to prevent acts of violence and abuse from occurring, will IHEs be able to effectively support complainants and accused, and work to eradicate gender-based violence.

Transparent, clear, and comprehensive policies and procedures that guide competent and fair investigations and lead to appropriate sanctions are critical to ensuring the safety of all students attending IHEs. Through these Recommendations, the ABA Commission on Domestic & Sexual Violence hopes to influence the adoption and revision of campus student conduct processes by IHEs as they strive to create a safe learning environment for everyone.

II. References

A. List of Abbreviations

ABA	American Bar Association
CMT	Case Management Team
CCRT	Coordinated Community Response Team
HSI	Hispanic-Serving Institution (20 U.S.C. § 1101(a)(5))
HBCU	Historically Black College or University (20 U.S.C. § 1060)
IHE	Institution of Higher Education
IVRT	Intimate Violence Response Team
IDP Hybrid	Investigation + Deliberative Panel Hybrid Model
Clery Act	The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 U.S.C. § 1092(f))
LGBTQ	Lesbian, Gay, Bisexual, Transgender, or Questioning/Queer
MOU	Memorandum of Understanding
MSI	Minority-Serving Institution (20 U.S.C. § 1067q)
Project	<i>Project on Improving Campus Student Conduct Processes for Gender-Based Violence</i>
Recommendations	<i>Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence</i>
RSC	Respondent Services Coordinator
RJ	Restorative Justice
SANE	Sexual Assault Nurse Examiner
SART	Sexual Assault Response Team
Title IX	Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.)
TCU	Tribal College or University (20 U.S.C. § 1059c(3))
OCR	U.S. Department of Education, Office for Civil Rights
OVW	U.S. Department of Justice, Office on Violence Against Women
VAWA	Violence Against Women Act (34 U.S.C. §§ 12291 et seq.)
VSP	Victim Services Professional

B. Glossary

These definitions are provided for the purpose of clarifying how the following terms are used in these Recommendations. IHEs should develop their own definitions for terms used in their policies, including definitions for the prohibited conduct.

1. **Gender-Based Violence:** Gender-based violence is an umbrella term for the VAWA-based definitions⁸ for “domestic violence,” “dating violence,” “sexual assault,” or “stalking,” as well as other forms of violent conduct that IHEs are required to address under other laws such as Title IX of the Educational Amendments of 1972 (“Title IX”) or state laws, or that IHEs choose to prohibit between members of the IHE community. Violence is gender-based when it is intentionally directed at individuals because of their gender or when it disproportionately affects people of a certain gender. While a majority of gender-based violence is directed at cis-gender women and girls, cis-gender boys and men can also be victims. LGBTQ people experience gender-based violence at extraordinarily high rates. Common forms of gender-based violence include domestic and dating violence, sexual violence, stalking, and violence based on gender stereotypes, such as stereotypes about sexual orientation or gender identity.
2. **Dating Partner:** Dating partner “refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, and where the existence of such a relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.”⁹
3. **Victim and Survivor:** Victim and survivor are used interchangeably to refer to people who disclose or report that someone has committed gender-based violence against them. Neither term indicates a finding of responsibility for gender-based violence.
4. **Perpetrator:** A perpetrator is a person who has been found responsible for gender-based violence, or used in discussions in which it can be assumed the person committed the violence, such as in statistical analyses.
5. **Complainant:** A complainant is a party who files a complaint that initiates a campus student conduct proceeding. In the vast majority of cases, the complainant will be the student victim, but in rare cases, a third party who is neither student victim nor accused student may be the complainant.
6. **Respondent:** A respondent is a person who has been accused in a formal student conduct proceeding, before any finding regarding responsibility is made.
7. **Accused:** An accused is a person who has been accused outside a formal student conduct proceeding, before any finding regarding responsibility is made.
8. **Party:** A party is either the complainant or respondent in a campus student conduct proceeding.
9. **Disclosure:** A disclosure is when a survivor tells a campus official about his or her victimization to access services. A disclosure is to be kept confidential by that official and does not require a victim to identify any person as having committed the violence or the IHE to take action against any person who the victim identifies as having committed the violence.
10. **Report:** A report is a recounting of the information shared with a non-confidential or responsible employee by a survivor about an incident of gender-based violence.

⁸ See 34 U.S.C. § 12291(a).

⁹ 34 U.S.C. § 12291(a)(9).

- 11. Complaint:** A complaint is an official request by the victim for investigation, a fact-finding determination and potential sanctioning of an accused individual based on the victim's report.
- 12. Case Management Team:** A case management team ("CMT") is a team comprised of IHE staff who provide gender-based violence-related services to students and/or who investigate and resolve reports and complaints of gender-based violence. The CMT maintains consistent coordination of reported cases, provides case management for all ongoing cases, ensures all cases are addressed efficiently and effectively, and coordinates communications with complainant and respondent. The Title IX Coordinator, as well as the Victim Services Professionals ("VSPs") recommended by the Recommendations, should be on the CMT. Other IHE staff who might serve on a CMT include, but are not limited to health professionals, counselors, security and conduct officers, disability services staff, and equal educational and/or employment opportunity staff.
- 13. Title IX Coordinator:** A Title IX Coordinator is at least one designated employee who coordinates a federally funded school districts', colleges', or universities' efforts to comply with and carry out their responsibilities under Title IX of the Education Amendments of 1972, which prohibits sex discrimination in education programs and activities.¹⁰
- 14. Advisor and Pool of Advisors:** An advisor is "any individual who provides the accuser or accused support, guidance, or advice."¹¹ IHEs may train a pool of advisors the parties can—but are not required to—choose from. Providing a pool of advisors could significantly reduce disparities between parties. The pool of advisors should be trained in the IHE's policies and procedures related to investigations.
- 15. Trauma-Informed Practices:** Trauma-informed practices are practices—including investigations and delivery of services—designed with the known effects of violence and trauma in mind, including on parties' and witnesses' abilities to access an education. Trauma-informed practices are provided and structured with an understanding of the impact of involvement in interpersonal violence and victimization. To provide trauma-informed services, all staff who are likely to provide direct services to students should understand how violence impacts the lives and education of the people being served, so that every interaction is consistent with the recovery process and reduces the possibility of re-traumatization.
- 16. Protective Measures, Interim Measures, Supportive Measures, and Accommodations:** These terms are all used to identify services, modifications, and methods of separating students following a disclosure or report of gender-based violence. Such measures include stay-away orders; changes to housing, classes, transcripts, and academic policies based on the victim's request; and services related to medical care, counseling, financial aid, immigration status, and advocacy within campus proceedings and processes, as well as outside the institution.
- 17. Comprehensive Prevention:** Includes primary, secondary and tertiary forms of prevention.¹² **Primary Prevention** seeks to prevent gender-based violence before it starts. **Secondary Prevention** responds to gender-based violence immediately or very soon after the violence is perpetrated, often focusing on interventions to address the trauma of gender-based violence and the harms that gender-based violence victims and accused individuals typically experience, affecting their health, their relationships with others, and their abilities to work and/or go to school. **Tertiary Prevention** addresses the long-term consequences of gender-based violence, using longer term campus responses, programs, and resources for direct victims, secondary

¹⁰ 34 C.F.R. § 106.8.

¹¹ 34 C.F.R. § 668.46(k)(3)(ii).

¹² JENNY DILLS ET AL., NAT'L CTR. FOR INJURY PREVENTION & CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL VIOLENCE ON CAMPUS: STRATEGIES FOR PREVENTION 6 (2016), available at <https://www.cdc.gov/violenceprevention/pdf/campusv-prevention.pdf>.

victims, those responsible for committing gender-based violence, and the community as a whole.

- 18. Fact-Finding, Fact-Finder, and Factual Findings:** These terms refer, respectively, to the process of gathering, synthesizing, and drawing conclusions regarding whether allegations are accurate and supported by a sufficient amount of evidence to meet the applicable evidentiary standard, to the persons who engage in that process, and to the results of that process.
- 19. Investigative Model:** The Investigative Model is a method of investigation and fact-finding in which skilled professional investigators gather evidence and interview parties and witnesses in separate, individual meetings, then write an investigative report where they review the evidence, make factual findings and determine whether there has been a policy violation. The findings then go to an IHE decision-maker for determination of sanctions, if any.
- 20. Investigation + Deliberative Panel Hybrid Model:** The Investigation + Deliberative Panel Hybrid (“IDP Hybrid”) Model combines the Investigative Model with a deliberative panel so that professional investigators make factual findings as in the Investigative Model, but then a deliberative panel reviews the investigation report and the investigators appear before the panel to answer questions before the panel makes a final decision. The parties may also opt to appear before the panel to make statements. The deliberative panel finds the facts, determines responsibility for violation of IHE student conduct requirements, and, in some instances, recommends or issues sanctions based on the report and the testimony.

C. Relevant Laws

IHEs that receive federal funds, including through student loans provided by the federal government to individual students, must comply with a variety of federal laws to continue to receive that funding. Campus student conduct procedures in gender-based violence cases may also be governed by state or local law. Because these Recommendations are designed for use by IHEs throughout the United States, this section will only discuss federal laws.

Campus student conduct procedures that investigate and resolve campus gender-based violence complaints are governed primarily by two federal statutes: Title IX and the Clery Act, as amended by the Violence Against Women Reauthorization Act of 2013. The remainder of this section will discuss each of these statutes in broad terms, but it is not intended to assist an IHE with legal compliance with these laws, nor is this discussion intended to provide legal advice to IHEs or any other entity/individual.

1. Title IX

Title IX of the Education Amendments Act of 1972 (“Title IX”) is a comprehensive federal law that prohibits discrimination on the basis of sex in any federally funded education program or activity. The principal objective of Title IX is to avoid the use of federal money to support sex discrimination in education programs and to provide individual citizens effective protection against those practices. Title IX applies, with a few specific exceptions, to all aspects of federally funded education programs or activities.

Sexual harassment has long been recognized as a form of sex discrimination, and U.S. Department of Education, Office for Civil Rights (“OCR”) guidance notes that a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.¹³ OCR guidance further states

¹³ U.S. DEP’T OF EDUC., OFF. FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 6 (2001), *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE].

that, where a school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately. In particular, when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond.¹⁴ Title IX regulations require schools to adopt and publish student conduct procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct.¹⁵

2. The Clery Act

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act") is a federal statute requiring colleges and universities participating in federal financial aid programs to maintain and disclose campus crime statistics and security information. The U.S. Department of Education conducts reviews to evaluate an institution's compliance with the Act.

The Clery Act is ultimately a consumer protection statute that requires IHEs (1) to provide information to the public about policies related to certain crimes that are perpetrated on or adjacent to campus, and reports received by IHEs of those crimes; and (2) to provide and describe in their annual security reports certain programs and procedures for preventing and responding to gender-based violence.

The Clery Act and its regulations take an overall approach that is similar to and consistent with Title IX's approach, requiring that campus disciplinary proceedings in cases of alleged gender-based violence be prompt, fair, and impartial.¹⁶ The comprehensive prevention requirement is found in the Clery Act requirement that IHEs provide information to the campus and the public regarding their "programs to prevent" gender-based violence.¹⁷ The Clery regulations define "programs to prevent" gender-based violence as "[c]omprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault, and stalking."¹⁸

3. The Violence Against Women Reauthorization Act of 2013

The federal Violence Against Women Act ("VAWA"), first passed in 1994, provides grant monies and legal remedies to address gender-based violence.¹⁹ The statute has been reauthorized by Congress several times, most recently with the passage of the Violence Against Women Reauthorization Act of 2013, which included provisions that amended the Clery Act, including adding domestic and dating violence and stalking to institutional reporting obligations, requiring prevention programs, and adding new rules and transparency requirements regarding campus disciplinary processes related to gender-based violence.

The U.S. Department of Education convened a Negotiated Rulemaking Committee in January 2014 to develop a set of proposed regulations implementing the amendments, which were published for public comment in June 2014. The final regulations were published in October 2014 and went into effect July 1, 2015.²⁰

¹⁴ *Id.*

¹⁵ See 34 C.F.R. § 106.8(b); *id.* at 3.

¹⁶ 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(aa); 34 C.F.R. § 668.46(k)(2)(i).

¹⁷ 20 U.S.C. § 1092(f)(8)(A)(i).

¹⁸ 34 C.F.R. § 668.46(a).

¹⁹ U.S. DEP'T OF JUST., *OVW Grants and Programs*, <https://www.justice.gov/ovw/grant-programs> (last updated Feb. 5, 2019).

²⁰ 34 C.F.R. § 668.

The amendments to the Clery Act expanded IHEs' responsibilities regarding gender-based violence significantly, adding domestic and dating violence and stalking to institutional reporting obligations, requiring prevention programs, and adding new rules and transparency requirements regarding campus disciplinary processes related to gender-based violence.²¹

D. Organization of Recommendations

For the reasons articulated in Appendix A, this document recommends that IHEs adopt either the Investigative Model or the Investigation + Deliberative Panel Hybrid ("IDP Hybrid") Model for campus student conduct processes. Because the investigation cannot be separated from what happens before it or what happens after it, the Recommendations include sections on Pre-Investigation Matters such as reporting structures, and Post-Investigation Matters such as sanctioning. The bulk of the Recommendations are in the Investigation Matters section.

²¹ *Id.* For more information on the VAWA amendments to the Clery Act, see CLERY CTR. FOR SECURITY ON CAMPUS, *Checklist: VAWA Amendments to Clery* (2013), <http://www.changingourcampus.org/resources/white-house-gbv-resources/VAWA-Clery-Checklist.pdf>; U.S. DEP'T OF ED., *THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING* (2016), *available at* <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

III. History

The ABA Commission on Domestic & Sexual Violence created the *Project on Improving Campus Student Conduct Processes for Gender-Based Violence* (“Project”) to develop recommendations for colleges and universities seeking to improve their campus student conduct processes for complaints of domestic violence, dating violence, sexual assault, and stalking. These Recommendations describe best practices rather than legal requirements, and are designed for a variety of professionals at an IHE, regardless of legal expertise.

Because of the relative lack of attention that has been paid to certain types of IHEs’ responses to gender-based violence (including commuter/community colleges and Minority-Serving Institutions (“MSIs”), such as Historically Black Colleges and Universities (“HBCUs”), Tribal Colleges and Universities (“TCUs”), and Hispanic-Serving Institutions (“HSIs”)), the research and information-gathering conducted for these Recommendations made special efforts to focus on those institutions’ experiences and needs regarding gender-based violence. The Project team sought input from campus stakeholders across the United States, with targeted attention to MSIs, including to the Title IX Coordinator listed on the American Association of University Women’s website for every HBCU, and every TCU listed in the federal Integrated Postsecondary Educational Data System. These campus stakeholders included nationally-recognized subject matter experts, practitioners, and academics. The Project team looked at the campus stakeholders’ experience on their college or university campuses with the goal of understanding the realities that diverse ranges of campuses across the U.S. face when it comes to campus student conduct processes on gender-based violence.

The Project team conducted individual phone calls with various campus stakeholders. The individuals on these phone calls reached out directly to the Project to provide more detailed information regarding their work around these issues. The Project team also intentionally reached out to Title IX stakeholders at U.S. Department of Justice, Office on Violence Against Women (“OVW”) campus grantees that are MSIs. The individual and conference phone calls provided more detailed insight into what is and is not working when it comes to specific campus student conduct processes.

To receive substantive and structural feedback on early drafts, the Project team convened three in-person peer review meetings and received written commentary as well. The peer reviews took place in Washington, D.C. and gathered campus stakeholders from MSIs, private and public schools, community colleges, commuter, and residential campuses across the country, including: Title IX Coordinators & Directors of Student Conduct; campus investigators (in house and contracted); civil attorneys; gender-based violence experts and technical assistance providers; law professors; criminal defense attorneys; TCU experts; private family law firm litigators; Clery and Title IX compliance experts; university general counsels; prosecutors; and Deans of Students. Given the input we received from these stakeholders as a part of our three-year drafting and revision process, we believe that these Recommendations provide an invaluable distillation of best practices for college and university campuses across the United States.

IV. Purpose & Scope

These Recommendations are designed for those professionals who are involved in addressing student complaints²² of gender-based violence at an IHE, whether they are IHE employees or external professionals tasked to assist with such complaints. The Recommendations have been crafted with these professionals' wide diversity of academic disciplines, career backgrounds, and expertise in mind.

In addition, the Recommendations acknowledge the enormous variety of IHEs throughout the United States, all of which must address gender-based violence affecting their students in ways that fit with their institutions as a whole. As described above, the Project team's information gathering process aimed to ensure that the Recommendations address the experiences and needs of community colleges and MSIs. Another point of diversity between IHEs is how extensively they have adjusted their student conduct process to address the gender-based violence happening within their campus communities. Some IHEs have taken almost all the steps outlined in these Recommendations, whereas others have taken almost no changes or piecemeal changes. These Recommendations therefore take a comprehensive approach, providing advice for a hypothetical IHE building its student conduct process for gender-based violence from the ground up (in the context of a comprehensive effort to address prevention of gender-based violence). For the IHEs who have taken some of these steps, the Recommendations will provide information about other steps they could take to improve their processes. In addition, those IHEs that already have a comprehensive process in place can use these Recommendations to review, audit, or oversee the functioning of their systems.

The Recommendations also take into account a common concern for many different types of institutions: a general dearth of resources available to address gender-based violence on campus. A lack of human resources is a particular problem, including a lack of employees with expertise in responding to gender-based violence. Limited historic attention and funding for professionals addressing gender-based violence have made it difficult for even those IHEs in a financial position to hire additional professional staff to quickly bring in individuals with the appropriate training and experience. These Recommendations themselves can provide some no-cost information and guidance, and further, there are recommendations throughout that offer suggested alternatives for lower-cost options.

Finally, the Recommendations are crafted to help IHEs fit investigations of gender-based violence into a comprehensive prevention structure.²³ "Comprehensive prevention" incorporates three forms of prevention: primary, secondary, and tertiary prevention. Primary prevention seeks to prevent gender-based violence before it begins. Secondary prevention responds to gender-based violence immediately or very soon after the violence is perpetrated, often focusing on interventions to address the trauma of gender-based violence and the harms that gender-based violence victims typically experience, affecting their health, their relationships with others, and their abilities to work and/or go to school. Tertiary prevention addresses the long-term consequences of gender-based violence, using long-term campus policies, programs, and resources to address the harms experienced by and/or the needs of both direct victims and accused individuals. Tertiary prevention also develops appropriate interventions

²² These Recommendations address student-on-student complaints. Complaints involving faculty or staff of the IHE require a different analysis, not contemplated here.

²³ "Comprehensive prevention" is referenced in the regulations for the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), as amended by the Violence Against Women Reauthorization Act of 2013. A primary drafter of these Recommendations chaired the subcommittee that drafted several iterations of the regulations' language referring to "comprehensive prevention," and served as a Negotiator in the Negotiated Rulemaking that adopted this definition. See *generally* VAWA Negotiated Rulemaking Committee 2013 (Feb. 21, 2014), <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-negotiators2014.pdf>. As intended, "comprehensive prevention" refers to the Centers for Disease Control and Prevention's model explaining how various governmental, institutional, and community responses to sexual violence could and should be viewed as working together to prevent such violence in a comprehensive fashion. MARGARET BROME ET AL., CTRS. FOR DISEASE & CONTROL, SEXUAL VIOLENCE PREVENTION: BEGINNING THE DIALOGUE 3 (2004), *available at* <https://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf>.

for secondary victims, those responsible for committing gender-based violence (whether they have been accused or not), and the community as a whole. Together, these three forms of prevention comprehensively seek to dismantle cultural supports for gender-based violence and change campus cultures so that harmful conduct like gender-based violence is not the common experience in American higher (and K-12) education that it is today.

The systems IHEs put in place to investigate and resolve gender-based violence complaints between students are key components to effective secondary and tertiary prevention. IHEs may be called upon to investigate a complaint of gender-based violence either immediately after the violence occurs or at some later point, and the form and results of their investigations have important short- and long-term consequences for many IHE members and the school itself. In addition, the effectiveness of an IHE's investigation of gender-based violence complaints influences the effectiveness of primary prevention programs since, in the experience of many of the campus professionals who participated in drafting this document, students are less likely to take primary prevention educational messages seriously when the IHE's investigations do not appear to be undertaken seriously and/or to be fair.

V. Recommendations

A. Establishing a Comprehensive Response System

Establishing a comprehensive system for responding to complaints is as important, if not more important, than the investigation itself, because having such a system in place will determine how effectively an investigation is conducted and will enable the IHE to fit its investigations into its overall efforts to comprehensively prevent gender-based violence. Successful investigations will be difficult, if not impossible, to achieve without IHEs first completing the important work of developing an infrastructure to support them.

- 1. Institutions of Higher Education should convene and train members of a Coordinated Community Response Team.**
- 2. Institutions of Higher Education should, through the Coordinated Community Response Team, develop, adopt, and widely disseminate gender-based violence policy and procedures tailored to that institution.**
- 3. Institutions of Higher Education should hire or designate staff to oversee and coordinate investigations.**
- 4. Institutions of Higher Education should hire, designate, and/or contract with culturally competent professionals to investigate gender-based violence cases.**
- 5. Institutions of Higher Education should hire, designate, and/or contract with culturally competent Victim Service Professionals with a privilege under state law.**
- 6. Institutions of Higher Education should hire or designate a culturally competent Respondent Services Coordinator.**
- 7. Institutions of Higher Education should establish a gender-based violence Case Management Team to coordinate activities on individual gender-based violence cases.**
- 8. Institutions of Higher Education should enter into Memoranda of Understanding with local law enforcement, other Institutions of Higher Education (especially if they are in a consortium), and any local organizations engaging in primary, secondary, and/or tertiary prevention who will provide services to the institution community.**
- 9. Institutions of Higher Education should define the role of advisors and consider collecting and training a pool of potential advisors for referral to parties.**
- 10. Institutions of Higher Education should establish confidential and non-confidential reporting options that allow student victims to decide whether to initiate an investigation by university officials and, if they wish to report to police, to receive the institution's assistance in such reporting.**
- 11. Institutions of Higher Education should facilitate a reporting system that identifies students accused of repeat gender-based violence by multiple victims.**
- 12. Institutions of Higher Education should establish mechanisms for helping all student victims to access "accommodations" "supportive measures," "protective measures" and/or "interim measures," both on- and off-campus, regardless of reporting status.**
- 13. The Coordinated Community Response Team should develop and implement a comprehensive and effective training regimen for all members of the institution community that is trauma-informed, culturally competent, and tailored to roles in the comprehensive response system.**

1. Institutions of Higher Education should convene and train members of a Coordinated Community Response Team.

Commentary

In order to properly investigate a complaint of gender-based violence, IHEs should develop policies that prohibit gender-based violence as a matter of internal school rules, as well as investigation procedures for complaints of gender-based violence. IHEs should also hire or designate various staff who perform key functions in the investigations. Lastly, IHEs should institute mechanisms to allow students to report a gender-based violence incident, to coordinate the handling of such a report both inside and outside the IHE, and to train students and staff in the IHE's gender-based violence policies and procedures. Even if some or more of these tasks have already been accomplished, IHEs need to form a Coordinated Community Response Team ("CCRT") that can oversee and evaluate the effectiveness of these systems, make sure that they are consistently enforced, and make any necessary changes in a manner that is responsive to the campus as a whole.

At a minimum, the CCRT should determine and identify its priorities among the following tasks/activities and develop a plan for which individual members or other IHE staff should lead and/or implement the CCRT's priorities and decisions regarding these tasks/activities:

- (1) hire or designate a Title IX Coordinator and/or Deputy Title IX Coordinator responsible for gender-based violence investigations;
- (2) hire or designate one or more Victim Services Professionals ("VSPs");
- (3) designate support persons and services for respondents;
- (4) write a gender-based violence Student Conduct Policy and Procedures;
- (5) hire or designate investigators for gender-based violence cases;
- (6) establish confidential and non-confidential reporting options for students;
- (7) establish ways to provide and refer student victims to services and resources for safety planning, accommodations, and/or "interim measures";
- (8) establish and identify appropriate members of a Case Management Team ("CMT");
- (9) negotiate a Memorandum of Understanding ("MOU") with local law enforcement;
- (10) determine a training regimen (including who will conduct trainings, who will be trained, and what the training curriculum will include);
- (11) gather a pool of potential Advisors for referral to Parties; and
- (12) oversee all aspects of the IHE's comprehensive gender-based violence prevention system (including matters related to campus gender-based violence that are not discussed in these Recommendations).

These tasks need multiple people working in a collaborative and coordinated fashion to accomplish them. Well-functioning systems (team or response) regarding a problem as difficult and widespread as gender-based violence require community buy-in. The CCRT accomplishes both goals at once, by gathering members of the IHE community who have helpful skills and knowledge for comprehensively preventing gender-based violence and who represent different parts of the IHE community. In the parlance of higher education, CCRTs are well-functioning campus-wide committees or commissions. As a matter of gender-based violence prevention, CCRTs are also a proven and widely-used mechanism for comprehensive prevention.

IHEs should resist objections to convening a CCRT because individual employees or offices dislike committee work or do not want to collaborate with others on gender-based violence matters. Even

when a CCRT feels divided or has conflicts at first, doing the work to agree on a policy, procedure, or approach to various gender-based violence-related matters creates a campus-wide community investment in the decisions ultimately reached and is more likely to avoid dysfunction and encourage collaboration long-term. As many of the IHE professionals who responded to the online assessment indicated, individual cases of gender-based violence can be very difficult and stressful. IHEs that have employees who have built trust through the work of the CCRT and have strong collegial relationships forged through the CCRT will be in the best position to make the right decisions and to take the best steps when challenging individual cases inevitably present themselves.

Membership on the CCRT should be determined based on a mix of individual and positional factors. Certain members of the CCRT should serve on the team because their positions and roles put them in contact with parties or involve them in some aspect of the IHE's comprehensive gender-based violence prevention plan. These position-based members should include the Title IX Coordinator, any VSPs, staff providing respondents' services, any campus public safety officials, any in-house counsel for the IHE, staff from any campus resource centers, such as the LGTBQ, multicultural and women's centers, international or immigrant student offices, and disabilities service professionals. Other members, such as faculty members who have done significant community service with a local anti-gender-based violence organization, whose research focuses on gender-based violence, and/or who have expertise working with sex offenders, should be included for more individualized contributions. Professionals from off-campus, including staff from local anti-gender-based violence organizations, service providers who work with underrepresented communities, local law enforcement, and individuals with expertise and/or training working with sex offenders should also be included. Finally, interested students should be included in the CCRT's membership.

The CCRT should reflect the demographics of the campus, without creating "token" representation from certain groups. All members of the CCRT should be empowered to speak up and have others listen. The CCRT should be chaired or co-chaired by those with a track record for inclusive leadership and the skills needed to lead a large committee effectively. Broad, representative, and diverse members, as well as effective leadership, will increase the CCRT's effectiveness.

Once the CCRT is convened, it should start its work by gathering information and doing training, even if the members have been trained and a lot of information has already been gathered. Those staff who are on the team because of their office's gender-based violence-related work should present on their office's work, and any other offices doing gender-based violence work that are not on the CCRT should be invited to attend. Depending on the needs of the group, training from outside experts may also be helpful. The goal of this period of training and information sharing is to educate each CCRT member about the many facets of comprehensive gender-based violence prevention, training which should make them not only more expert themselves but also a source of trainers for the rest of the campus.

For more information about CCRTs, see:

- DONNA M. BARRY & PAUL M. CELL, CIVIL RES. INST., *CAMPUS SEXUAL ASSAULT RESPONSE TEAMS* (2d ed. 2016).
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Basic Agreements* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-Basic-Agreements.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Building a Structure* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-Building-a-Structure-Form.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Creating a Mission Statement* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-CREATING-A-MISSION-STATEMENT-Worksheet.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Sample Organizational Structures* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-SAMPLE-ORGANIZATIONAL-STRUCTURES.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Sample Values* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-Sample-Values.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Sample Values Statements* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-SAMPLE-VALUES-STATEMENTS.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Conflict Resolution Scenarios* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CONFLICT-RESOLUTION-SCENARIOS.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Ethical Communication: A Tool for Resolving Conflict* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/ETHICAL-COMMUNICATION-AS-A-TOOL.pdf>.
- U.S. DEP'T OF JUST., *IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE* (2015), available at <https://www.justice.gov/opa/file/799366/download>.

2. Institutions of Higher Education should, through the Coordinated Community Response Team, develop, adopt, and widely disseminate gender-based violence policy and procedures tailored to that institution.

Commentary

An IHE cannot adequately or safely investigate and resolve a gender-based violence complaint without a policy and procedures. As noted in [Recommendation 1](#), this policy and these procedures should be written by the CCRT, with much of the actual drafting done by appropriate individual staff members (such as the Title IX Coordinator, other Title IX staff and in-house VSPs) and then vetted and approved by the CCRT. Most importantly, IHEs should not simply adopt another IHE's or even a "model" policy and procedures without carefully considering each detail and making sure each detail fits that IHE. Policies and procedures adopted wholesale and without considering the individual characteristics of each IHE have a high likelihood of creating significant problems when they are implemented. Like with the CCRT, a proactive investment of time and effort on the

front end will pay for itself when a difficult and stressful gender-based violence case occurs, as is unfortunately likely to happen.

In crafting the policy and procedures, the CCRT should select an investigation model such as the ones discussed in [Appendix A](#). These Recommendations strongly advise that IHEs select the Investigation Model or the IDP Hybrid Model, as discussed in [Appendix A](#).

In addition, many IHEs often find themselves in a reactive position once a controversial case is pending. Knowing this, an effective CCRT can proactively anticipate issues that are likely to be controversial based on school-specific factors and begin working in a multi-disciplinary way to address them. These proactive discussions can pull in appropriate colleagues to address key issues such as state and federal law, current procedures, etc. Some suggested areas include, but are not limited to, the following:

- (1) The CCRT should decide what its policy on timely warnings should be (see [Recommendation 16](#) for further discussion of timely warnings).
- (2) The CCRT should develop policies that make clear whether amnesty (e.g., for drug/alcohol violations, or other less serious policy violations) will be available to parties or witnesses. The IHE policy should contain key substantive standards, such as a definition of what constitutes consent.
- (3) The CCRT should identify which employees should be confidential resources for victims and develop a mechanism or mechanisms to make sure students are aware of these designations.
- (4) The CCRT should articulate not only the IHE's rules on a range of issues (e.g., the protections for private information shared in the proceeding, the prohibition on retaliation, the parameters of the advisor's role in the proceeding, and whether student and/or employee witnesses are required to participate/share information in a student conduct process if asked), but also the sanctions that the IHE will use for violations of those rules.
- (5) The CCRT should determine what the IHE will do if a complainant decides not to cooperate with an investigation once it has begun, what the consequences should be for a respondent who refuses to participate in the proceeding, and impact and consequences on the student conduct process of a respondent's withdrawal from the IHE before a finding is made (e.g., notation on transcript).
- (6) The CCRT should decide what its policy will be regarding the recording of interviews. Audio-recorded interviews provide an accurate and undisputable record and are more conducive to having a single investigator conducting interviews. However, the CCRT should determine how the policy will direct investigators to proceed if one party refuses consent to recording. Absent a policy authorizing audio-recording, the CCRT should adopt a policy by which investigators conduct interviews in pairs.
- (7) The CCRT should determine whether the IHE will provide for appeals in its campus student conduct process, and, if so, how the IHE should structure the appeals process. Affording the right to appeal to both parties is a best practice. If the CCRT does determine that it will give students an opportunity to appeal, the IHE should articulate this clearly in its written policy. By doing this, the IHE ensures that both parties are aware of the ability to appeal and how the appeals process works.
- (8) Although an IHE may be tempted to give authority over appeals to the President, Provost, and/or other similar high-level officials, those officials may find it difficult to find time for the training they will need to decide appeals in gender-based violence cases. Because what an IHE does at the appeals stage has the potential to undo most, if not all, of the previous work that an IHE has often put significant resources into doing well, it is critical that appeals officials receive training at least in the topics listed in [Recommendation 13](#). If

the President, Provost, and/or other similar high-level officials are too busy to do a series of such trainings, the IHE should designate someone else at the IHE to hear appeals, and make sure that person or persons have time to become well trained on this topic.

- (9) If some at the IHE are interested in offering Restorative Justice (“RJ”) options, the CCRT should educate itself on the state of the research, because heavy disagreement exists about whether RJ can be used in gender-based violence cases in a manner that will not further harm victims. Such research is currently being conducted to determine under what conditions IHEs should offer RJ in the context of gender-based violence.

For more information about developing campus gender-based violence policies and procedures, see:

- NAT’L CTR. FOR INJURY PREVENTION & CTRS. FOR DISEASE CONTROL & PREVENTION, *PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES: LESSONS FROM RESEARCH AND PRACTICE* (2014), *available at* <http://changingourcampus.org/resources/not-alone/preventing-sexual-violence-on-college-campuses-lessons-from-research-and-practice.508.pdf>.
- U.S. DEP’T OF JUST., OFF. OF VIOLENCE AGAINST WOMEN, *Minimum Standards for Establishing a Mandatory Prevention and Education Program for all Incoming Students* (2008), *available at* <https://www.justice.gov/sites/default/files/ovw/legacy/2008/01/11/campus-minimum-standards-orientation.pdf>.
- U.S. DEP’T OF JUST., OFF. OF VIOLENCE AGAINST WOMEN, *Minimum Standards of Training for Campus Security Personnel and Campus Disciplinary and Judicial Boards* (2008), *available at* <https://www.justice.gov/sites/default/files/ovw/legacy/2008/01/11/campus-trainingstandards-le.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *WHERE TO START: UNDERSTANDING AND IMPLEMENTING YOUR CAMPUS RESPONSE PROTOCOL TO CONFIDENTIAL REPORTING* (2015), *available at* <http://www.changingourcampus.org/resources/administrators/WTS-Confidentiality-and-Responsible-Employees.pdf>.

For more discussion on Restorative Justice, see [Appendix B](#) of these Recommendations.

3. Institutions of Higher Education should hire or designate staff to oversee and coordinate investigations.

Commentary

According to federal regulations passed in 1975, all schools, including IHEs, must have a Title IX Coordinator to coordinate their efforts to comply with Title IX’s broad prohibition on sex discrimination in any education program or activity receiving federal financial assistance.²⁴ These Recommendations advise that IHEs, particularly larger IHEs, hire and/or designate other staff, in addition to the designated Title IX Coordinator, to investigate gender-based violence complaints. These staff should have the skills to take on the professional investigator roles contemplated by the IDP Hybrid Model and Investigative Model selected by these Recommendations as the best investigation models to use in gender-based violence cases. Title IX Coordinators and other Title IX staff also serve as critical staff on both CCRTs and Case Management Teams (“CMTs”), where they are often in the best position to do the detailed work of writing the first drafts of policies, procedures, presentations, and training materials that are virtually impossible to write in a committee meeting.

²⁴ 34 C.F.R. § 106.8(a).

For more information on Title IX Coordinators, see:

- Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681-1688 (2012)).
- U.S. DEP'T OF ED., OFF. CIV. RIGHTS, *Dear Colleague Letter: Title IX Coordinators* (Apr. 24, 2015), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.
- U.S. DEP'T OF ED., OFF. CIV. RIGHTS, TITLE IX RESOURCE GUIDE (Apr. 2015), available at <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.
- ASS'N FOR STUDENT CONDUCT ADMINISTRATION, STUDENT CONDUCT ADMINISTRATION & TITLE IX: GOLD STANDARD PRACTICES FOR RESOLUTION OF ALLEGATIONS OF SEXUAL MISCONDUCT ON COLLEGE CAMPUSES (2014), <http://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf>.
- CTR. FOR CHANGING OUR CAMPUS CULTURE, *Sexual Misconduct Complaints: 17 Tips for Student Discipline Adjudicators*, <http://changingourcampus.org/2016/11/21/sexual-misconduct-complaints-17-tips-for-student-discipline-adjudicators/> (last updated 2012).

4. Institutions of Higher Education should hire, designate, and/or contract with culturally competent professionals to investigate gender-based violence cases.

Commentary

In hiring, contracting with, or designating professional investigators, IHEs should consider factors such as whether they are needed full-time or part-time, their likely caseload, the institutional and geographic location of the investigator's office (considering factors that maximize the investigators' abilities to be independent and neutral, and to protect the parties' and witnesses' privacy and confidentiality) and whether there is interest and opportunity to hire an investigator as a part of a consortium of IHEs.

IHEs should also consider the following qualifications when seeking an investigator:

- (1) knowledge of the dynamics of gender-based violence and trauma-informed practices;
- (2) cultural and linguistic skills;
- (3) skills and experience in alternative dispute resolution and trauma-informed interviewing and investigation techniques;
- (4) high-level analytic and writing skills (for sorting and sifting through evidence, then summarizing it in a report);
- (5) professionalism for building trust and the integrity of the process;
- (6) emotional intelligence for building rapport and reading witnesses' and parties' comfort levels; and
- (7) demonstrated competence in handling privacy and confidentiality issues in a sensitive manner.

IHEs have several options that they can use to calibrate putting a professional investigator in place in a way that fits the needs of their community. They can hire new staff devoted full-time to gender-based violence cases. They can hire new full-time staff who split their time between gender-based violence cases and other investigations or other gender-based violence prevention efforts. They can contract on a case-by-case basis with an investigator or pool their resources with other IHEs

to create a consortium. Finally, they could designate an existing employee who works on Title IX or other civil rights matters to conduct investigations. IHEs should take into consideration questions like those listed here in choosing between these options.

IHEs should keep various structural and individual issues in mind in deciding who should conduct investigations and how investigators should fit into the IHE's overall structure. For instance, if an IHE designates an existing employee who works on Title IX or other civil rights matters to conduct investigations, ideally that employee should not be the Title IX Coordinator, to avoid concentrating too much decision-making power in a single person. Should it be necessary for the Title IX Coordinator to act as the only investigator, an IHE should institute other safeguards like those built into the IDP Hybrid Model. Similarly, the IHE should structure investigators' roles to maximize independence, neutrality, and protections of parties' and witnesses' privacy and confidentiality.

As with all hiring decisions, IHEs should also look for certain professional characteristics and experience in an investigator, skills that will maximize investigators' effectiveness in such key investigative tasks as conducting trauma-informed interviews of the parties and witnesses, making credibility determinations, synthesizing evidence, and writing reports.

For more information about ideal investigator characteristics, see:

- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).

5. Institutions of Higher Education should hire, designate, and/or contract with culturally competent Victim Service Professionals with a privilege under state law.

Commentary

Student victims may prefer not to initiate a gender-based violence investigation, or not to initiate an investigation in the immediate aftermath of the gender-based violence. A non-exhaustive list of common reasons why student victims decline to initiate an investigation includes concerns about keeping information regarding the gender-based violence and other private information confidential, concerns that the student victim will be disciplined for policy violations like using alcohol or drugs during the gender-based violence incident(s), fear of retaliation by the accused student or the accused student's friends, or not wanting to get the accused student in trouble. If a student chooses not to initiate an investigation, they still should have access to services, resources, and accommodations (also referred to as "supportive measures" or "interim measures," depending on the context) that can help them to heal from trauma and reestablish their previous educational trajectories.

The most trauma-informed, effective, and efficient way for IHEs to assist student victims in accessing these services, resources, and accommodations is to hire one or more culturally competent VSPs or to pay an outside anti-gender-based violence organization to work with student victims on these matters. Having VSPs on staff can allow student victims to go to one person to get information about and referrals to appropriate services, as well as direct assistance in accessing accommodations. The assistance with accommodations is particularly important, as it saves the student victims from having to repeatedly recount the gender-based violence, potentially to multiple professors, deans, and other staff (including student staff) to access changes in housing arrangements, extensions on course assignments, excused class absences, etc. As these Recommendations discuss in [Appendix A](#), such repeated retellings are retraumatizing. In addition, like in the disability context, students should not have to seek accommodations directly from professors and others because those employees may have an unsupportive or discriminatory reaction to students. These dynamics

make it likely that, without VSPs' assistance, many student victims will be unable to access the accommodations to which they are legally entitled.

VSPs should be culturally competent and able to assist a wide range of diverse survivors. However, for a range of reasons such as conflicts of interest, VSPs should not be required to assist respondents. Respondents should access services through the Respondent Services Coordinator ("RSC") discussed in [Recommendation 6](#), below. IHEs should hire or contract with VSPs who demonstrate such knowledge and skills. Because not all students will wish to access services and resources on campus, IHEs should also provide both on-campus and off-campus VSP options to survivors.

In addition to being effective and efficient from the student victims' perspective, hiring or contracting with VSPs is efficient and cost-effective for the IHE. VSPs will bring much professional expertise to campus, can improve the institutional memory about gender-based violence prevention efforts, and serve as critical members of the CCRT discussed above and the CMT discussed below. VSPs are also experts in the dynamics of gender-based violence, so they are an invaluable resource for delivering primary prevention programming to students and staff.

For more information about VSPs, see:

- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *The Role of Campus Victim Advocacy and the Clery Act*, available at <http://www.changingourcampus.org/documents/The-role-of-campus-victim-advocacy-and-the-Clery-Act-FINAL.pdf> (last visited July 19, 2019).
- WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, *Building Partnerships with Local Rape Crisis Centers: Developing a Memorandum of Understanding* (Apr. 2014), available at <https://www.justice.gov/archives/ovw/page/file/910381/download>.
- WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, *Building Partnerships among Law Enforcement Agencies, Colleges, and Universities: Developing a Memorandum of Understanding to Prevent and Respond to Sexual Assault* (Jan. 2015), available at <https://www.justice.gov/archives/ovw/page/file/910376/download>.

6. Institutions of Higher Education should hire or designate a culturally competent Respondent Services Coordinator.

Commentary

Being accused of committing gender-based violence is a very stressful experience, and one that has a number of serious potential consequences, some that could manifest quite quickly after a formal accusation is made. If a respondent is later found responsible for having committed gender-based violence, the stress and the seriousness of the consequences will only increase. Even if a respondent is not found responsible for committing gender-based violence, the respondent may experience difficulty in returning to student life after going through the student conduct process.

An RSC should—by directly working with respondents or via a network of other trained staff or off-campus clinicians who work with individual respondents—help respondents understand their rights and responsibilities in a campus student conduct proceeding and other affected areas.²⁵ The coordinator can explain and help respondents navigate the student conduct process, including by helping the respondent to understand how to comply with no contact or protective orders issued by the IHE or a local court, as well as to locate an advisor for the student conduct process, provided

²⁵ VAWA funding cannot be used to hire or support an RSC. See generally 34 U.S.C. § 12291(b)(5).

the respondent wishes to have an advisor who is internal to the IHE's community. The RSC can and should also make referrals to campus and community resources for counseling, legal services, alternative housing, course changes and other needs, as well as assist with securing an interpreter or translator, if the respondent needs one. The RSC may also help the student understand the campus code of conduct as well as their behaviors leading to the event. For respondents who have been found responsible for committing gender-based violence, the RSC should be able to refer the respondent to clinicians or programs specializing in treatment for individuals with sexual behavior problems on or off campus.

In addition, if the respondent stays on campus after the conclusion of the student conduct process, either because the respondent was not found responsible or because the IHE found the respondent responsible for gender-based violence and assigned a sanction that allows the respondent to stay on or return to campus, the respondent may need additional assistance in navigating the campus post-student conduct process. A respondent found responsible and returning to campus may need specific services as well as a safety plan to ensure that their return is supported, and their behaviors are carefully monitored. Responsible respondents will likely also benefit from having services in place that can assist them in continuing to learn how to avoid problematic situations and prevent future harmful behaviors. A respondent who was found not responsible may also need specific services and accommodations post-student conduct process. Such educational services are likely helpful to the IHE as well as to the complainant, if the complainant remains on campus after the responsible respondent's suspension ends. Respondent services coordination can also assist the IHE, particularly for other individuals impacted by the conduct, as well as by implementing systemic responses when the incident involves groups (including but not limited to Greek life, athletics, and other institution-specific organized groups).

All staff working with respondents should receive training on relevant policies and processes, essential campus and community resources, and their roles in helping students through the process. Because these staff could work with a student found responsible for committing gender-based violence who stays on campus or returns to campus, they should also receive specialized training in working with adolescents and young adults with problematic sexual behaviors. This specialized training is available through a number of organizations such as the Association for the Treatment of Sexual Abusers, NEARI Press, Safer Society Foundation, the National Adolescent Perpetrator Network, as well as a number of statewide organizations. It may be helpful to establish a working relationship with a local treatment provider with an MOU before there is a crisis situation on campus.

For more information about respondent services, see:

- UNIV. OF CAL. SEXUAL VIOLENCE PREVENTION & RESPONSE, *If you've been accused*, <http://sexualviolence.universityofcalifornia.edu/accused.html> (last visited July 19, 2019).
- ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, *An Overview of ATSA*, <http://www.atsa.com/atsa-history> (last visited July 19, 2019).
- TEXAS YOUNG LAWYERS ASS'N, *Guide for College Students – the Accused*, <http://notavictim.tyla.org/accused/guide-college-students> (last visited Aug. 5, 2019).

7. Institutions of Higher Education should establish a gender-based violence Case Management Team to coordinate activities on individual gender-based violence cases.

Commentary

Once an IHE has the basic personnel structure in place to adequately investigate gender-based violence complaints and has written the policy and procedures those personnel will follow to conduct those investigations, a gender-based violence CMT should be established to monitor and coordinate on individual cases to ensure that parties' needs and their contacts with different parts of the campus are monitored and coordinated. The CMT should include, at a minimum, the VSPs, the RSC, and other personnel from relevant Student Affairs and academic departments. Such teams are often referred to as Sexual Assault Response Teams ("SARTs") or Intimate Violence Response Teams ("IVRTs"), but "CMT" more obviously encompasses all forms of gender-based violence.

For more information about CMTs, SARTs, and IVRTs, see:

- HALLIE MARTYNIUK, PENNSYLVANIA COALITION AGAINST RAPE, HOW TO IMPLEMENT AN INSTITUTION-BASED SEXUAL ASSAULT RESPONSE TEAM (SART) (2012), *available at* http://www.pcar.org/sites/default/files/resource-pdfs/prea_how_to_implement_an_institution-based_sart.pdf.
- *Sex, Relationships, and Respect on Campus Safety Card*, FUTURES WITHOUT VIOLENCE, *available at* <https://www.futureswithoutviolence.org/whos-got-your-back-college-campus-safety-card> (last visited July 19, 2019).
- Ashley Maier & Alexa Priddy, *Comprehensive Prevention Efforts: How SARTs Can Play a Role*, <http://archive.constantcontact.com/fs071/1102532390527/archive/1102765377362.html#LETTER.BLOCK18> (last visited July 19, 2019).

8. Institutions of Higher Education should enter into Memoranda of Understanding with local law enforcement, other Institutions of Higher Education (especially if they are in a consortium), and any local organizations engaging in primary, secondary, and/or tertiary prevention who will provide services to the institution community.

Commentary

Assisting student victims and respondents with their range of needs following gender-based violence often requires IHEs to interact and cooperate with entities outside the campus, including local law enforcement, other IHEs, and local organizations like rape crisis centers or battered women's shelters. This need to work with others exists for all IHEs, but is an even larger issue for commuter, community, or other non-residential colleges, and for IHEs that participate in an IHE consortium or are in close geographic proximity to another IHE, leading to much interaction between students of different campuses. Just like the trusting relationships IHE professionals can develop with each other through the CCRT or a CMT, relationships with those outside the IHE can and should be built by doing the work to reach MOUs that create and define the parameters of partnerships in which both partners have an investment and will collaborate long-term. Professionals inside and outside the IHE will be in the best position to make the right decisions and to take the best steps when challenging individual cases inevitably present themselves if they make this a proactive investment of time and effort on the front end.

In addition, MOUs can address specific goals, such as how to address particular needs or concerns by certain communities regarding their interactions with law enforcement or the IHE. The MOU should outline issues including the roles of each party to the MOU, and how the parties will craft

the MOU to best address the needs or concerns of specific communities vis-à-vis law enforcement and/or the IHE.

For more information about MOUs, see:

- WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, *Building Partnerships with Local Rape Crisis Centers: Developing a Memorandum of Understanding* (Apr. 2014), available at <https://www.justice.gov/archives/ovw/page/file/910381/download>.
- WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, *Building Partnerships among Law Enforcement Agencies, Colleges, and Universities: Developing a Memorandum of Understanding to Prevent and Respond to Sexual Assault* (Jan. 2015), available at <https://www.justice.gov/archives/ovw/page/file/910376/download>.
- U.S. DEP'T OF JUST., *STALKING: LAW ENFORCEMENT RESPONSE* (1995), available at <http://www.markwynn.com/stalking/stalking-law-enforcement-response.pdf>.
- BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., *CAMPUS SECURITY GUIDELINES: RECOMMENDED OPERATIONAL POLICIES FOR LOCAL AND CAMPUS LAW ENFORCEMENT AGENCIES* (2009), available at https://www.bja.gov/Publications/MCC_CampusSecurityGuidelines.pdf.
- INT'L ASS'N OF CAMPUS L. ENFORCEMENT ADMINISTRATORS, DOMESTIC PREPAREDNESS COMM., COMMUNICATIONS SUBCOMM., *STRENGTHENING COMMUNICATION BETWEEN CAMPUS PUBLIC SAFETY AND FEDERAL, STATE, AND LOCAL EMERGENCY RESPONDERS* (Oct. 10, 2006), available at <https://transition.fcc.gov/pshs/docs/clearinghouse/StrengtheningCommunications101006-1.pdf>.

9. Institutions of Higher Education should define the role of advisors and consider collecting and training a pool of potential advisors for referral to parties.

Commentary

The 2013 VAWA amendments to the Clery Act provide that IHEs must give students the opportunity to have an “advisor of their choice” at IHE disciplinary proceedings and related meetings and proceedings. The Clery regulations do not allow IHEs to limit a student’s choice of advisor.²⁶ Because IHEs are not required to pay for students to have advisors of any kind, many inequities can arise, and the IHE professionals who shared information for this project noted that, particularly when an IHE uses the Hearing Model or Investigation + Hearing Hybrid (“IH Hybrid”) Model, respondents who are able to afford a lawyer fare better in the investigation than respondents who do not have sufficient funds. Several victims’ rights attorneys have likewise pointed out many reasons why victims’ rights are better protected when victims can obtain representation from attorneys. Finally, the potential and actual disparities between the parties in a single case, when one is represented by an attorney and the other is not, and the damage those disparities do to the perceived fairness of the proceeding, are so commonly remarked upon among IHE professionals, they are virtually an automatic observation in any conversation about the “advisor of their choice” provision.

Some disparities can be addressed through the investigation model itself. Many investigations of gender-based violence cases using models with adversarial hearings depend heavily on the parties and their advisors to present evidence, persuade fact-finders to give sufficient weight to the pieces of evidence presented, and generally assert and protect the parties’ rights in the proceeding. This dependence is mainly created because hearings imitate court proceedings. Unlike court proceedings,

²⁶ 20 U.S.C. § 1092(f)(8)(B)(iv)(II); 34 C.F.R. § 668.46(k)(2)(iv).

however, hearings are often not presided over by an IHE professional with a law license, never mind the level of legal knowledge and experience of most judges. In addition, these professionals often rotate on and off hearing panels, and there may not be a mechanism, such as court precedent, that encourages consistency. Therefore, using hearings can also lead to inconsistent application of IHE rules and applicable legal requirements, which results in greater risks of more expensive liability for the IHE. Choosing a less adversarial, less court-like investigation model reduces the dependence on advisors and therefore the disparities that can arise when the parties' advisors differ in relevant skills and training.

IHEs can also reduce disparities by clearly defining the limits of the advisor's role in the proceeding, including by adopting a rule known colloquially as the "potted plant rule" whereby the advisor may be present but may not participate or speak in meetings with investigators. The Clery Act regulations allow IHEs to restrict the advisor's role in the proceeding in such a manner, and its practice by IHEs has helped to reduce the disparities between the parties.

In addition, some IHEs have begun developing a pool of in-house advisors who parties can ask to advise them. Although students are not required to select from that pool, IHEs' experience is that most students will select from such a pool when it is available. If implemented in as equitable a manner as possible, and making sure to avoid conflicts of interest (e.g., by not requiring a VSP to be available as an advisor to both respondents and survivors or not requiring the RSC to be available as an advisor for both survivors and respondents), providing a pool of in-house advisors could significantly reduce disparities between parties. IHEs could certainly include lawyers in that pool, especially when the IHE has a law school, but these Recommendations do not take a position on whether an IHE should include lawyers in the IHE-provided pool of advisors.

IHEs that wish to take this approach should ideally gather a pool of advisors before an active investigation occurs, and make sure that they are trained in the school's policies and procedures related to investigations.

For more information on advisors, see:

- 34 C.F.R. § 668.46(k)(2)(iii),(iv).
- Kelly Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 DRAKE L. REV. 293 (2016).
- Merle Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. L. & FEM. 123 (2017).

10. Institutions of Higher Education should establish confidential and non-confidential reporting options that allow student victims to decide whether to initiate an investigation by university officials and, if they wish to report to police, to receive the institution's assistance in such reporting.

Commentary

Schools should establish dual paths whereby student victims may make disclosures to certain IHE staff who will keep that information confidential, or student victims may report non-confidentially to other IHE staff. This system is similar to the restricted and unrestricted reporting system used in the U.S. military for many years with significant success. With two choices of how to report, student victims can, essentially, make the decision about whether to initiate an investigation by the IHE.

If they wish to initiate an investigation, victims can officially report to a "responsible employee" or to the Title IX Coordinator. The IHE would subsequently investigate, unless the victim explicitly

requests that there be no investigation and the IHE grants that request. The IHE is also obligated to include in its annual security report under the Clery Act a statement of policy on a victim's option to be assisted by campus authorities in notifying law enforcement, if the victim so chooses (the Clery Act also requires that this statement of policy include a victim's option not to report to law enforcement).²⁷

There is also a confidential path, which allows a victim to disclose to a staff member in order to access services and accommodations/supportive measures for healing, but not to initiate an investigation unless the victim later decides to make an official report. In the military system, this commonly done process would be described as turning a restricted report into an unrestricted report.

IHEs should have both paths available because allowing student victims maximum control over decisions related to initiating an investigation is an important aspect of healing after gender-based violence, and is therefore trauma-informed. In addition, particularly in cases of domestic violence, dating violence, and stalking, this control is an important safety measure, as victims generally know best when an abuser is most dangerous.

In order to make both paths available, IHEs should clearly designate which staff are confidential and which are non-confidential and communicate that designation to students. Title IX Coordinators are clearly non-confidential, whereas VSPs should be confidential. For other IHE employees, their responsibilities to act on or report information disclosed or reported to them, and how these responsibilities intersect with victims' requests for confidentiality, should be made clear to victims.

For more information about reporting structures, see:

- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *WHERE TO START: UNDERSTANDING AND IMPLEMENTING YOUR CAMPUS RESPONSE PROTOCOL TO CONFIDENTIAL REPORTING* (2015), *available at* <http://www.changingourcampus.org/resources/administrators/WTS-Confidentiality-and-Responsible-Employees.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Campus Victim Advocates and the Clery Act*, *available at* <http://www.changingourcampus.org/documents/The-role-of-campus-victim-advocacy-and-the-Clery-Act-FINAL.pdf> (last visited July 22, 2019).
- INT'L ASS'N OF CHIEFS OF POLICE, *Sexual Assault Supplemental Report Form*, *available at* <https://www.theiacp.org/sites/default/files/all/2016%20SA%20Supplemental%20Report%20Form.pdf> (last visited July 22, 2019).
- HALLIE MARTYNIUK, PENNSYLVANIA COALITION AGAINST RAPE, *HOW TO IMPLEMENT AN INSTITUTION-BASED SEXUAL ASSAULT RESPONSE TEAM (SART)* (2012), *available at* http://www.pcar.org/sites/default/files/resource-pdfs/prea_how_to_implement_an_institution-based_sart.pdf.
- U.S. ARMY SEXUAL HARASSMENT/ASSAULT RESPONSE & PREVENTION, *Reporting Options*, https://www.sexualassault.army.mil/policy_restricted_unrestricted_reporting.aspx (last visited July 22, 2019) (discussing the two reporting options available for sexual assault victims in the military).
- DEP'T OF DEFENSE SAFE HELPLINE, *Reporting Options*, <https://www.safehelpline.org/reporting-option> (last visited Nov. 18, 2019).

²⁷ 20 U.S.C. § 1092(f)(8)(B)(iii)(III).

11. Institutions of Higher Education should facilitate a reporting system that identifies students accused of repeat gender-based violence by multiple victims.

Commentary

IHEs should consider providing technology to students that facilitates reporting of gender-based violence in a trauma-informed manner and that can assist the IHE in identifying individuals who are reported to have committed gender-based violence repeatedly, against multiple victims. Certain applications allow victims to make a written report that is kept “in escrow” (i.e. not released to any other person) until certain conditions are met, such as a second victim reporting that the same individual committed an act of gender-based violence against that second victim. Once the preset conditions are met, the written report is released by the application to the IHE. Beneficial consequences for healing from trauma have been associated with such apps, making them both trauma-informed and helpful for identifying those individuals reported as committing gender-based violence against multiple victims.

Third parties may report gender-based violence directed at another person to a responsible employee. Such reports present specific confidentiality concerns. First, the IHE staff receiving the report should seek full information about the violence directly from the victim immediately after the third-party report is made and should be extremely careful not to notify the abuser accidentally. Especially in domestic violence, dating violence, and stalking situations, notifying the abuser could be dangerous for the victim, and, as stated above, victims are generally the best judge of how unsafe they are.

For more information about “escrowing” apps, see:

- CALLISTO, <https://www.projectcallisto.org> (last visited July 22, 2019).
- Tovia Smith, *How Smartphone Apps Could Change The Way Sexual Assault Is Reported*, NPR, Aug. 21, 2018, available at <https://www.npr.org/2018/08/21/637122361/how-smartphone-apps-could-change-the-way-sexual-assault-is-reported>.
- Jessica Ladd, *The reporting system that sexual assault survivors want*, TED (Feb. 2016), https://www.ted.com/talks/jessica_ladd_the_reporting_system_that_sexual_assault_survivors_want?language=en.

12. Institutions of Higher Education should establish mechanisms for helping all student victims to access “accommodations” “supportive measures,” “protective measures” and/or “interim measures,” both on- and off-campus, regardless of reporting status.

Commentary

Measures designed to help survivors in a variety of ways, often referred to as “accommodations” or other “protective measures,” can help survivors feel safe, have the time and space needed to heal from trauma, and continue with their educations on an educational trajectory as close as possible to their original one. Depending on the particular accommodation or protective measure, the IHE may need to provide it directly (e.g., only the IHE can provide academic accommodations) or help a survivor access resources from outside the IHE. The Clery regulations state that IHEs must make changes to academic, living, transportation, and working situations, or provide protective measures, if the victim requests them and they are reasonably available, regardless of whether the

victim chooses to report to law enforcement.²⁸ In addition, it may be appropriate for a school to take “interim measures” during the investigation of a complaint, including separating the student victim and the accused student(s).²⁹

This document recommends that IHEs directly provide or help students to access such resources, accommodations, and protective measures, and provide what are often referred to as “supportive measures,” even if there is no specific legal requirement to do so or no gender-based violence complaint has been filed to initiate an investigation. Because supportive measures are always best practice regardless of whether they are legally required, they are particularly relevant to commuter, community, or other non-residential colleges, as well as colleges in a consortium or close physical proximity. That is, even if student victims at these IHEs are victimized by people who are not students of that IHE, the IHE still should assist these students with the resources, accommodations, and protective measures they need to heal and get back onto their original educational trajectory. The assistance that IHEs can offer in this regard range from issues completely within the power of the IHE, like allowing a student victim to take an exam at a later date, to matters clearly not in the IHE’s control, but where a thoughtful, culturally competent referral and support can make a huge difference, such as facilitating a student victim’s obtaining a civil protection order from a local court (obtaining a protection order does not require representation by a lawyer, but it is very helpful to have legal representation in such proceedings, and IHEs can offer valuable assistance to a victim to identify a lawyer).

As noted in [Recommendation 5](#), the most effective and efficient method for providing access to resources, accommodations, and protective measures is hiring or designating one or more VSPs on the IHE’s staff, who can help student victims meet their enormous range of needs through referrals to other specialists and direct advocacy such as contacting deans and professors to arrange academic accommodations. Short of hiring or designating such a professional in-house, IHEs should contract with a local anti-gender-based violence organization to provide this specialized service.

These Recommendations also encourage IHEs to provide interim measures for respondents, especially under circumstances where accommodations or interim measures taken to protect the survivor prior to a responsible or not-responsible finding could result in consequences such as losing financial aid or losing legal immigration status. The types of interim measures from which respondents could benefit include access to an RSC or referrals to community resources. In addition, IHEs should offer supportive measures to respondents who remain on campus in some capacity post fact-finding and sanctioning/intervention determination.

²⁸ 34 C.F.R. § 668.46(b)(11)(v).

²⁹ REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 13, at 16.

For more information about providing accommodations, supportive measures, protective measures, and/or interim measures, see:

- WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, *Sample Language for Interim and Supportive Measures to Protect Students Following an Allegation of Sexual Misconduct* (Sept. 2014), available at <https://www.justice.gov/ovw/page/file/910296/download>.
- STALKING RES. CTR., *Stalking Safety Planning* (2009), <https://victimsofcrime.org/our-programs/past-programs/stalking-resource-center/help-for-victims/stalking-safety-planning>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *WHERE TO START: A GUIDE FOR SAFETY PLANNING* (2014), available at <http://www.changingourcampus.org/resources/administrators/WTS-Safety-Planning.pdf>.
- LOVE IS RESPECT, *A COLLEGE STUDENT'S GUIDE TO SAFETY PLANNING*, available at http://www.loveisrespect.org/pdf/SafetyPlan_College_Students.pdf (last visited July 22, 2019).
- ACLU, *The Right to Safe Housing on College Campuses for Survivors of Sexual Assault, Stalking, Domestic Violence, and Dating Violence* (Sept. 2010), available at https://www.aclu.org/sites/default/files/field_document/studen__housing_factsheet.pdf.

13. The Coordinated Community Response Team should develop and implement a comprehensive and effective training regimen for all members of the institution community that is trauma-informed, culturally competent, and tailored to roles in the comprehensive response system.

Commentary

General agreement exists on the point that training is both necessary and important, but how the training should be delivered, how to make it cost-effective, and what its content should be may be subject to much debate. For this reason, having the CCRT take the lead on determining how trainings will be provided and conducted, designating which organizations or individuals will conduct trainings, deciding which kinds and levels of training should be provided to each member of the IHE community, and ensuring that the training curriculum will be trauma-informed, culturally competent, and represent the diversity of the IHE community is the best approach. CCRT members are also more likely to have the expertise in gender-based violence and the IHE's policies because of the training and work they do as CCRT members. This training and expertise potentially makes CCRT members a good source of trainers and will help CCRT members determine an appropriate, trauma-informed, and culturally competent curriculum.

At a minimum, the CCRT should identify a range of staff who are potential “first responders” to receive training in the scope and dynamics of gender-based violence in general and in the IHE's campus community (drawing from data collected in a campus climate survey, for instance), in trauma-informed and culturally-competent practices, implicit biases, the dual path reporting system (particularly regarding which staff are designated as confidential and non-confidential employees), steps to take for providing accommodations, and the policies and procedures relevant to gender-based violence. Training should also include presentations by, and introductions to, the Title IX Coordinator and any Title IX office staff, as well as presentations by, and introductions to, the on-campus or off-campus VSPs and RSCs.

Investigators will also require training, at least in the IHE-specific policies and procedures, although depending on their background and experience, they may not require training in investigation skills. Previous experience investigating non-gender-based violence matters, however, will often provide insufficient professional experience for investigating gender-based violence cases, and an investigator should receive specialized training in trauma-informed and culturally-competent

investigation techniques, such as forensic interviewing, implicit biases, and potentially risky but highly effective techniques such as cognitive interviewing (discussed in [Recommendation 28](#)).

Even more importantly, if the IHE student conduct process includes a right to appeal, those IHE staff or officials who are charged by the IHE student conduct process with considering and deciding appeals should be trained, at a bare minimum, in the following topics: the scope and dynamics of gender-based violence in general and in the IHE's campus community (drawing from data collected in a campus climate survey, for instance); trauma-informed and culturally-competent practices; the dynamics of implicit bias; and the IHE's policies and procedures relevant to gender-based violence. If they choose to allow appeals, the CCRT and IHE should anticipate the training needs of those deciding appeals and ensure that these staff or officials receive training. As noted in [Recommendation 2](#), if the IHE gives appeal authority to the President, Provost, and/or other similar high-level officials, those officials should receive training at least in the topics listed here. If the President, Provost, and/or other similar high-level officials are too busy to attend such trainings, the IHE should not have these upper-level administrators decide appeals.

For more resources on training, see:

- INT'L ASS'N OF CHIEFS OF POLICE, *Trauma Informed Sexual Assault Investigation Training*, <http://www.theiacp.org/Trauma-Informed-Sexual-Assault-Investigation-Training> (last visited July 22, 2019).
- NAT'L INITIATIVE FOR BUILDING CMTY. TRUST & JUST., *Implicit Bias*, <https://trustandjustice.org/resources/intervention/implicit-bias> (last visited July 22, 2019).
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Basic Agreements* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-Basic-Agreements.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Building a Structure* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-Building-a-Structure-Form.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Creating a Mission Statement* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-CREATING-A-MISSION-STATEMENT-Worksheet.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Sample Organizational Structures* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-SAMPLE-ORGANIZATIONAL-STRUCTURES.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Sample Values* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-Sample-Values.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Sample Values Statements* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CCRT-SAMPLE-VALUES-STATEMENTS.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Conflict Resolution Scenarios* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/CONFLICT-RESOLUTION-SCENARIOS.pdf>.
- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *Ethical Communication: A Tool for Resolving Conflict* (2016), available at <http://changingourcampus.org/resources/white-house-gbv-resources/ETHICAL-COMMUNICATION-AS-A-TOOL.pdf>.

B. Investigation Practices

The Recommendations in this Section are designed to provide detailed advice to IHE professionals on how to best conduct an investigation of an individual complaint of gender-based violence using the Investigative Model or the Investigation + Deliberative Panel Hybrid (“IDP Hybrid”) Model, or some combination of characteristics of each. They draw from the experiences of IHEs and other professionals who shared information for this project, as well as publicly-available print materials regarding conducting investigations in the workplace and are referenced at the end of the commentary for each recommendation, including this one.

The recommendations are ordered based on the typical chronology of steps in a well-done investigation, with the slight adjustment to the order of the Recommendations on interviewing, which group all of the Recommendations that apply to all interviews first ([Recommendations 20–29](#)), then list the Recommendations that are specific to complainants, respondents and third-party witnesses in the order that investigators should interview these witnesses and parties ([Recommendations 30–34](#)), as discussed in [Recommendation 20](#).

In addition to the sources noted in individual Recommendations, the following sources provide helpful information for multiple parts of the investigation process:

- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).
- *OnLine Training Institute*, *END VIOLENCE AGAINST WOMEN INT’L*, <https://www.evawintl.org/onlinetraining.aspx> (last visited July 19, 2019).
- RUSSELL W. STRAND, U.S. ARMY MIL. POLICE SCH., *THE FORENSIC EXPERIENTIAL TRAUMA INTERVIEW* (2018), available at <https://www.mncasa.org/wp-content/uploads/2018/07/FETI-Public-Description.pdf>.
- CTR. FOR CHANGING OUR CAMPUS CULTURE, *Investigating Campus Sexual Misconduct Complaints* (May 24, 2014), http://changingourcampus.org/wp-content/uploads/2016/11/dojovw521.mp4?_1.

- 14. Investigators should send written notice to the parties of the institution’s intention to investigate, the expectation that they will both participate in the investigative process, including by agreeing to be interviewed, the consequences of not participating in the proceeding, and the rules and procedural protections of the investigation.**
- 15. Student-victim requests for confidentiality should typically be granted, with rare exceptions. To ensure informed decision-making by all students, IHEs should make efforts to inform students that confidentiality of a report or complaint cannot be guaranteed.**
- 16. Appropriate Institution of Higher Education staff should determine whether a timely warning should be provided to the campus.**
- 17. Investigators and/or other Institution of Higher Education staff should determine whether any parallel proceedings are occurring based on the same facts, including a criminal investigation or a civil protective order.**
- 18. Investigators should identify, locate, preserve, and secure, then review and analyze available documentary, physical, and other tangible evidence, including any report made from a preliminary interview, while honoring parties’ refusal to produce certain private information such as counseling or medical records.**

19. Investigators should discuss with the parties whether they intend to have an advisor accompany them during the proceeding, refer them to potential advisors if they intend to bring an advisor but do not have one, and make sure they understand how the institution's policies define the advisor's role in the process.
20. Investigators should decide on a planned order for interviews, while remaining flexible should circumstances change and make a different order more effective. After completing the initial interviews of the parties and the interviews of third-party witnesses, investigators should conduct final interviews with the complainant first, and then the respondent. Absent particular compelling circumstances, no further interviews should be conducted after the respondent's final interview.
21. Prior to conducting each interview of a party or a witness, investigators should discuss with the parties the institution's recording policy and whether the parties will bring an advisor to the interview, and remind them and the advisors of the advisor's permitted role in the interview, as well as the consequences for advisors violating the institution's rules of participation.
22. Investigators should make a serious effort to select an interview location that will create the most productive environment for the interview and maximize the comfort level of the interviewee, while still having the appropriate office equipment.
23. Investigators should interview in pairs, with one investigator asking questions and the other taking notes, or should record the interviews, provided the institution's policy requires recording. If investigators take notes, they should ask the interviewee to review and sign the notes at the conclusion of the interview.
24. At the outset of each interview, investigators should explain, as a general matter, the interview's purpose, the investigation procedures, the institution's obligation to investigate, and any amnesty policies that are applicable. Investigators should also explain the privacy standards for what the interviewee shares in the interview, according to the institution's policy as set by the Coordinated Community Response Team.
25. After explaining the purpose of the interview, investigators should review the notice that the interviewee was sent prior to the interview, outlining the rules of the investigation and the interview. The interviewee (and their advisor) should sign the notice, acknowledging that it has been explained to them, they understand the rules, and they will comply with those rules.
26. Investigators should decide whether to disclose the names of any witnesses or share information gathered from witnesses by balancing witness privacy protection with the need to conduct an effective investigation.
27. Throughout each interview, investigators should have a copy of the institution's gender-based violence policies and procedures and any other information regarding the relevant policies of the school.
28. Investigators should have proven experience, skills and training in, and use, to the extent possible, the following interviewing techniques in a linguistically and culturally-responsive manner:
 - a. balancing neutrality and empathy throughout the interviews;
 - b. utilizing trauma-informed interviewing methodologies that recognize the biological and neurological effects that trauma can have on memory function;
 - c. asking open-ended questions that use the interviewee's terms for body parts and avoid jargon; and

- d. asking interviewees for any other information the interviewee remembers or wants to add.**
- 29. At the close of each interview, after the interviewee signs the interview notes, investigators should conclude by:**
 - a. asking about other evidentiary sources that investigators should look into;**
 - b. reiterating the rules of investigation and the student's rights in the proceeding; and**
 - c. provide any referrals to services needed by the interviewee.**
- 30. In the initial interview with the complainant, investigators should seek to gather oral evidence (as well as any documentary, physical, and other tangible evidence that investigators have not already gathered from the complainant), on the following events and circumstances:**
 - a. the respondent's actions prior to, during, and after the reported gender-based violence;**
 - b. the complainant's behavior prior to, during, and after the reported gender-based violence;**
 - c. where the complainant and respondent first came into contact;**
 - d. the complainant's relationship with the respondent, if any;**
 - e. the chronology of the specific gender-based violence acts to which the complainant was subjected and the relevant surrounding circumstances (including the specific and general environmental factors surrounding those acts);**
 - f. how each instance of violent conduct overrode the victim's will, including by incapacitation due to fear or alcohol/drugs/substances, by psychological, emotional, or physical coercion, by threats, intimidation, or controlling behaviors, and/or by physical violence;**
 - g. any witnesses to each instance of reported gender-based violence, the aftermath of each instance, respondent's conduct toward others, especially any conduct involving other incidents of gender-based violence, and/or respondent's pattern of conduct toward complainant, if a pattern exists;**
 - h. any information about other persons who have discussed (even if they did not officially report) gender-based violence by the respondent against others besides complainant;**
 - i. the impact that the gender-based violence has had on the complainant's health, education, and life;**
 - j. whether the complainant is experiencing additional gender-based violence or harassment since the reported instance(s) of gender-based violence and, if so, the facts related to that subsequent and/or ongoing gender-based violence or harassment; and**
 - k. what the complainant would like to see happen as a result of her/his complaint.**
- 31. Investigators should interview any first responder who conducted a preliminary interview with the complainant.**
- 32. When interviewing third-party witnesses, investigators should ask broad, open-ended questions so as not to violate individuals' privacy or divulge information learned from other sources.**
- 33. In the initial interview with the respondent, investigators should ask respondents for a response to each substantive allegation against them (not skipping any), allowing respondents to see the complainant's statement only during the interview and for this specific purpose.**

- 34. In addition to utilizing the general approach and techniques articulated elsewhere in these Recommendations, when interviewing the respondent, investigators should seek to:**
 - a. explain the process, its rules, and the accused student's rights in the process;**
 - b. normalize the process;**
 - c. ask open-ended questions both about the general context of respondent's life and about the allegations;**
 - d. prepare for respondent's denial of responsibility and how the investigator will respond;**
 - e. ask questions that pull (rather than push);**
 - f. explore connections between actions;**
 - g. ask for clarification;**
 - h. summarize facts already shared;**
 - i. affirm participation, disclosures made, and responsibility taken; and**
 - j. answer questions and discuss next steps.**
- 35. At the close of evidence gathering, if the accounts of the parties still conflict, investigators should make credibility assessments based on the totality of the evidence. Investigators should also consider the consistency of each party's account, including whether they were internally consistent, consistent with the observations provided by others, and consistent with documentary, physical, and other tangible evidence.**
- 36. Investigators should memorialize and summarize the sifted and synthesized evidence from the investigation into an initial written report.**
- 37. Investigators should make a copy of the initial report available to the parties for comments, then make changes to the report that are adequately justified in the parties' comments, and submit the final report either to the Institution of Higher Education or to the Deliberative Panel, with a simultaneous copy to the parties that attaches the parties' comments.**
- 38. If the Institution of Higher Education chooses to use the Investigation + Deliberative Panel Model, the Deliberative Panel should have an opportunity to question the investigators and hear the statements of any parties who wish to speak to the Panel, before issuing a decision on the complaint based on the preponderance of the evidence.**

- 14. Investigators should send written notice to the parties of the institution's intention to investigate, the expectation that they will both participate in the investigative process, including by agreeing to be interviewed, the consequences of not participating in the proceeding, and the rules and procedural protections of the investigation.**

Commentary

Written notice including the information specified by this Recommendation should be sent so that all of the parties understand both their rights and their obligations. IHEs should also make an effort to send such notice simultaneously and, if needed, to work with the complainant before or as soon as possible after notice is sent so the complainant and a VSP can develop a safety plan for the complainant.

Notice should include, but is not limited to, the IHE's rules regarding confidentiality of the proceeding, the prohibition on retaliation, the advisors' roles, and the availability of an in-house pool of potential advisors, should the IHE have developed such a pool. With regard to confidentiality and procedural protections, parties should be advised that the IHE balances confidentiality, procedural protections related to issues such as witness cross-examination, and the IHE's need to conduct an effective investigation, and that none of these goals and values is absolute or necessarily overrides the others.

- 15. Student-victim requests for confidentiality should typically be granted, with rare exceptions. To ensure informed decision-making by all students, IHEs should make efforts to inform students that confidentiality of a report or complaint cannot be guaranteed.**

Commentary

Victims who report to a responsible employee or directly to the Title IX Coordinator but who want their report kept confidential may request that their report be treated confidentially when discussing their options with IHE staff for moving forward after making an official report. If this request for confidentiality is granted, it generally also means that the IHE will not start an investigation, since there is rarely a way to investigate without breaking confidentiality.

IHEs should generally grant student victim requests for confidentiality. However, if the IHE staff have information indicating that the respondent has engaged in repeated gender-based violence against multiple victims or otherwise presents a continuing threat to the victim or others in the IHE community (e.g., if respondents carry firearms, have a protection order against them by the victim or others, or are otherwise likely dangerous to themselves or others), the IHE staff should decide whether to initiate an investigation without the victim's cooperation. In making this decision, the IHE staff should consider the evidence accumulated to date and whether the victim believes that the victim will be less safe if the victim cooperates with the IHE's investigation. The IHE staff should only initiate such an investigation after informing the victim and taking additional safety precautions that the victim believes will provide sufficient protection.

For more information about granting or denying confidentiality requests, see:

- CAMPUS TECHNICAL ASSISTANCE & RES. PROJECT, *WHERE TO START: UNDERSTANDING AND IMPLEMENTING YOUR CAMPUS RESPONSE PROTOCOL TO CONFIDENTIAL REPORTING (2015)*, *available at* <http://www.changingourcampus.org/resources/administrators/WTS-Confidentiality-and-Responsible-Employees.pdf>.

- 16. Appropriate Institution of Higher Education staff should determine whether a timely warning should be provided to the campus.**

Commentary

The Clery Act requires that IHEs issue timely warnings of some reports of gender-based violence.³⁰ The CCRT should have developed a policy for the circumstances and procedures under which the IHE will issue timely warnings. It is particularly important to establish those policies and procedures in advance to address the interaction between timely warnings and victim privacy and confidentiality.

³⁰ 20 U.S.C. § 1092(f)(3); 34 C.F.R. 668.46(e).

For more information about timely warnings, see:

- S. Daniel Carter, *Timely Warning v. Emergency Notification: What's the Big Difference?*, CAMPUS SAFETY, Apr. 15, 2014, available at <https://www.campusafetymagazine.com/university/timely-warnings-vs-emergency-notifications-what-s-the-big-difference/>.
- CLERY CTR. FOR SECURITY ON CAMPUS, *Ongoing Disclosures (Timely Warning, Emergency Notification, Evacuation) Policies Checklist* (2016), <https://clerycenter.org/wp-content/uploads/2016/11/Timely-Warning-Checklist.pdf>.

17. Investigators and/or other Institution of Higher Education staff should determine whether any parallel proceedings are occurring based on the same facts, including a criminal investigation or a civil protective order.

Commentary

Investigators and/or other IHE staff should be aware of whether other proceedings might be occurring, particularly a criminal proceeding or a civil protection order proceeding. In the case of a parallel police investigation, having an MOU with local law enforcement is particularly helpful. Although it is important to be aware of parallel proceedings, IHEs need to make their own, independent decision under their own policies about an alleged student conduct violation, rather than relying solely on the outcome in a criminal proceeding, which involves a different standard of proof than that applicable to student conduct violations.

For more information about parallel proceedings, see:

- INT'L ASS'N OF CHIEFS OF POLICE, NAT'L L. ENF'T POL'Y CTR., *Response to Victims of Crime* (Concepts & Issues Paper, Aug. 2010), available at https://www.nccpsafety.org/assets/files/library/Response_to_Victims_of_Crime_Paper.pdf.
- Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281 (2016), available at <http://www.yalelawjournal.org/forum/for-the-title-ix-civil-rights-movement-congratulations-and-cautions>.
- Michael N. Webster, MARGOLIS HEALY, *Concurrent Criminal and Title IX Investigations* (Apr. 2017), available at http://www.margolishealy.com/files/resources/White_Paper_TIX_Investigations_Final.pdf.

18. Investigators should identify, locate, preserve, and secure, then review and analyze available documentary, physical, and other tangible evidence, including any report made from a preliminary interview, while honoring parties' refusal to produce certain private information such as counseling or medical records.

Commentary

Collecting documentary, physical, and other tangible evidence should be done as quickly as possible, to the extent it is available, and its collection complies with often changing laws. Investigators should consult with the IHE's counsel regarding the applicable laws and, if investigators are not full-time employees, should determine with the IHE's counsel which IHE staff member ought to collect the evidence, and whether it can be collected prior to notice of the investigation being

sent to the parties and any witnesses. Collecting some physical evidence can be difficult and not particularly useful, if the IHE does not have access to facilities that can test for forensic evidence, so investigators should use their judgment on what physical evidence it makes sense to collect.

The collection should continue as the investigation proceeds and the witnesses identify further evidence that is available. The investigators should keep originals of all relevant or potentially relevant evidence collected in a secure location, and make copies to be used during the investigation.

The kind of evidence that this Recommendation contemplates includes, but is not limited to, security videotapes, photographs (electronic or print), text messages, email messages, instant messenger or other online chat app records, video or audio recordings of oral online or telephonic interactions between the parties, other social media-based records, relevant medical and counseling records, journals or notes kept by witnesses or parties, calendar entries, voicemail messages, telephone records, and other computer records. If first responders who were not the investigators responded to the student victim's initial report and prepared any incident report or similar document as a result of that response, the first responder's report should be collected and preserved as quickly as possible. Security videotapes should also be a priority, as many security camera recordings are not re-watched and are only kept for a short period of time unless a request is made to review them. Note, however, that with electronic evidence such as text messages, emails, and social media, investigators should only collect evidence provided or offered by the parties and avoid engaging in tactics such as invasive searches of parties' social media sites without their knowledge or demands that parties surrender their phones, thus giving investigators access to private information that may have no relevance to the matter under investigation.

Certain evidence may implicate the parties' privacy and may have been created in the course of a relationship protected by state privilege laws or otherwise treated as confidential, such as with a medical or counseling professional, including evidence like that collected in any Sexual Assault Nurse Examiner ("SANE") exam, parties' medical records prior to the investigation commencing and before or after the gender-based violence incident, and any communications or documented medical diagnoses. Parties may not want to share such evidence with the investigators, and they should not be pressured to do so, nor should the investigators or anyone else at the IHE seek to access that evidence through alternative channels, such as accessing SANE, medical, or counseling records of students who saw counselors or doctors or had a SANE exam done at the IHE's medical or counseling facility. However, the investigators should explain to the parties why and how the investigators anticipate the evidence being helpful to the investigation, should offer the investigator's best possible prediction of with whom the investigator would need to share the evidence with during the remainder of the investigation, and should check with the parties one more time, after some days, to see if they have changed their mind.

For more information on identifying, locating, preserving, securing, reviewing, and analyzing documentary, physical, and other tangible evidence, see:

- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).
- *Forensic Evidence*, END VIOLENCE AGAINST WOMEN INT'L, <https://www.evawintl.org/Library/Documents.aspx?StaticCategory=true&CategoryId=335> (last visited Aug. 5, 2019).

- 19. Investigators should discuss with the parties whether they intend to have an advisor accompany them during the proceeding, refer them to potential advisors if they intend to bring an advisor but do not have one, and make sure they understand how the institution’s policies define the advisor’s role in the process.**

Commentary

Under the Clery Act, students must have the opportunity to bring an “advisor of their choice” to disciplinary proceedings and related meetings and proceedings. As a logistical matter, the investigators should know in advance whether an advisor will accompany a student. In addition, the discussion with the parties provides an opportunity for the investigator to advise the party as to whether they should bring an advisor, which for several reasons the investigator should generally encourage. First, if one party is bringing an advisor, the fairness of the proceeding will be improved if both parties have advisors. Likewise, if one party’s advisor is an attorney, the other party may want to consider bringing an attorney. Lastly, if the party wishes to bring an advisor but has not been able to identify one, the investigators likely can, and if they can, should, refer the party to potential advisors. If the IHE has developed a pool of advisors, the investigator should make sure to draw the parties’ attention to the availability of that pool of advisors, even though the pool should already have been mentioned in the written notice discussed in [Recommendation 14](#), above.

Investigators should also explain to parties what the allowable role is for advisors under the IHEs’ policies (as written by the CCRT—see [Recommendation 9](#), and what the consequences are under the policy for an advisor violating such policies).

For more information about advisors, see:

- 34 C.F.R. § 668.46(k)(2)(iii),(iv).
- CLERY CTR. FOR SECURITY ON CAMPUS, *Checklist: VAWA Amendments to Clery* (2017), https://clerycenter.org/wp-content/uploads/2017/04/VAWA_Checklist.pdf.

- 20. Investigators should decide on a planned order for interviews, while remaining flexible should circumstances change and make a different order more effective. After completing the initial interviews of the parties and the interviews of third-party witnesses, investigators should conduct final interviews with the complainant first, and then the respondent. Absent particular compelling circumstances, no further interviews should be conducted after the respondent’s final interview.**

Commentary

Investigators should consider the specific context and circumstances of each case in coming up with an order of interviews. For instance, one possible order, potentially helpful when a complainant’s initial statement is very detailed, might be:

- (1) complainant (initial interview);
- (2) witnesses identified by the complainant or investigators, including any first responder who conducted a preliminary interview immediately after the gender-based violence;
- (3) respondent (initial interview);
- (4) respondent’s witnesses;
- (5) complainant (final interview); and

- (6) respondent (final interview).

Investigators could also follow another typical order:

- (1) complainant (initial interview);
- (2) respondent (initial interview);
- (3) witnesses identified by the parties or investigators, including any first responder who conducted a preliminary interview immediately after the gender-based violence;
- (4) complainant (final interview);
- (5) respondent (final interview).

Although there are circumstances when needed follow-up questions will require a third interview of one or both parties, investigators should make every effort to limit complainant and respondent's interviews to two. To avoid interviewing new witnesses after the second (and intended to be final) interviews with each party, moreover, parties should be encouraged to provide the names of as many of their potential witnesses as possible at their initial interviews or shortly thereafter, and informed that any witnesses they identify at the final interviews will need to be able to testify to compelling, new, and/or direct evidence.

Final interviews should be conducted for the limited purposes of:

- (1) obtaining each party's reaction to the evidence gathered;
- (2) presenting the complainant with an opportunity to comment on the respondent's and witnesses' testimony regarding the reported gender-based violence and related circumstances; and
- (3) giving the respondent an opportunity to hear evidence gathered since the first interview, including the names of witnesses, and a second chance to present a defense to the allegations.

By holding final interviews with the parties and making every effort, absent compelling circumstances, to make these the last interviews held, investigators will appropriately balance process and promptness. Complainants will get an opportunity to react to the evidence produced by respondents and third-party witnesses, whose names should be disclosed so long as there are no compelling reasons to keep their identities private. Respondents will get an opportunity to react to evidence gathered since the respondent's first interview, when not all third-party witness names, testimony, and other evidence had been gathered yet. While compelling circumstances may justify a third interview with one or both of the parties, investigators should seek to avoid scheduling third interviews.

If any party offers any additional witness names during this final interview, investigators should be very circumspect in interviewing additional third-party witnesses identified at this late point, which will help ensure that resolution of the complaint is prompt and equitable under the Title IX regulations.³¹ To prevent any of the parties from deliberately delaying a conclusion to the investigation, investigators should obtain a full explanation from the party offering the additional witness regarding (1) why the party believes the witness will provide evidence that will affect investigators' conclusions regarding the allegations, (2) why such evidence is not duplicative of other witness testimony, and (3) why the party did not put the witness's name forward when asked for the names of third-party witnesses or at another point prior to the final party interview. Based on this explanation, investigators should determine whether the witness may in fact provide

³¹ See 34 C.F.R. § 106.8(b).

previously unavailable evidence that will have a significant effect on the investigators' conclusions, justifying an interview of the additional witness.

For more information about determining the order of interviews, see:

- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).
- UN WOMEN, VIRTUAL KNOWLEDGE CTR. TO END VIOLENCE AGAINST WOMEN & GIRLS, *Steps for Conducting Interviews* (Dec. 30, 2011), <http://www.endvawnow.org/en/articles/1139-steps-for-conducting-interviews.html>.

- 21. Prior to conducting each interview of a party or a witness, investigators should discuss with the parties the institution's recording policy and whether the parties will bring an advisor to the interview, and remind them and the advisors of the advisor's permitted role in the interview, as well as the consequences for advisors violating the institution's rules of participation.**

Commentary

Although IHEs are not permitted to restrict parties' choice of advisor or the ability of the advisor to attend all related meetings and proceedings, the Clery regulations allow IHEs to restrict the extent of the advisor's participation in interviews and meetings, including by adopting a rule known colloquially as the "potted plant rule," whereby the advisor may be present but may not participate or speak in the meeting.³²

As noted in [Recommendation 19](#), the CCRT should have set the parameters of an advisor's participation, and any sanctions for violations of its rules, when it wrote the IHE's gender-based violence policies and procedures, and communicated those to the parties and their advisors repeatedly. Nevertheless, investigators should take the time to remind the parties and advisors of those rules at the same time that they confirm whether advisors are attending the parties' interviews.

- 22. Investigators should make a serious effort to select an interview location that will create the most productive environment for the interview and maximize the comfort level of the interviewee, while still having the appropriate office equipment.**

Commentary

The investigator should try to locate and use a quiet, private, and neutral location that the witness or party is likely to find convenient. To maximize the interviewee's comfort level and build rapport, the environment and investigator should try not to appear intimidating (e.g., by sitting in a higher chair, behind a large desk, or in a position where the investigator blocks the only exit).

Because the investigator's office may not be the ideal location for the interview, any alternative location should still have appropriate office equipment, including a printer, to print necessary documents and to facilitate the preferred notetaking process outlined in [Recommendation 23](#). Given the need to make the interviewees comfortable and to refrain from intimidating them, interviews should not be held in a public safety, campus police, or similar location.

³² 34 U.S.C. § 668.46(k)(2)(iv); see also Violence Against Women Act, 79 Fed. Reg. at 62,773 (2014) (stating that institutions may restrict an advisor's role, such as prohibiting the advisor from speaking during the proceeding, addressing the tribunal, or questioning witnesses).

For more information about selecting a location for the interview, see:

- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).
- UN WOMEN, VIRTUAL KNOWLEDGE CTR. TO END VIOLENCE AGAINST WOMEN & GIRLS, *Steps for Conducting Interviews* (Dec. 30, 2011), <http://www.endvawnow.org/en/articles/1139-steps-for-conducting-interviews.html>.

23. Investigators should interview in pairs, with one investigator asking questions and the other taking notes, or should record the interviews, provided the institution's policy requires recording. If investigators take notes, they should ask the interviewee to review and sign the notes at the conclusion of the interview.

Commentary

The CCRT should have determined whether to have investigators record interviews, the parameters around interview recording, or to have investigators investigate in a pair, where one focuses on asking questions and the other takes notes. If the CCRT adopts a policy that authorizes recording, the investigator should start the recording, confirm immediately that the witness or party agrees to recording, and inform the witness or party of the right to stop the recording at any time.

If the CCRT makes a policy decision not to require recording or a witness or party objects to being recorded, the investigator should bring another investigator or a notetaker to the interview, who should type notes on a laptop computer. The investigators should explain the notetaking process and explain that contemporaneous notes are being taken because they are more accurate than notes after the fact, but they will not be a transcript-like document.

The CCRT could also adopt in its policy an approval process for the investigator's notes that would operate approximately in the following manner: (1) at the end of the interview, the investigator would print and show the notes to interviewees and ask interviewees if they would like to make any changes or clarifications; (2) based on the interviewee's response, the investigator should make those changes, print a corrected copy and ask the interviewee to sign the notes as an indication that they are accurate. One downside to such an approach can be that it would likely preclude notetakers from revising the notes after the interview (e.g., correcting typographical errors; spelling out shorthand notations; or incorporating the interviewer's secondary set of notes). To solve this problem, some investigations are structured to include a second meeting with witnesses to go over the finalized notes. Some schools adopt a variation on this approach, abbreviating the process by providing the opportunity to review notes (either at the end of the interview or in a second meeting) only to the parties.

If interviewees refuse to sign the notes, investigators should not pressure or try to compel them to do so. Investigators also should not give the interviewee a copy of the notes to keep, even if the interviewee requests one, because accidental or intentional distribution of such copies would be disruptive to the investigation and potentially violate the privacy of the parties or witnesses. If investigators are authorized to record the interview, they should still consider taking notes and asking interviewees to sign them.

Regardless of whether the CCRT allows or requires recording, the recording or the investigators' notes should be retained and safeguarded, according to the IHE's policy, for a set period of time, then destroyed according to the IHE's policies.

For more information on recording interviews, see:

- *Can we record the victim interview or will that violate the victim's rights?*, END VIOLENCE AGAINST WOMEN INT'L, <https://www.evawintl.org/PAGEID3/Best-Practices/FAQs/Recording-Interviews> (last visited Aug. 5, 2019).
- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).

- 24. At the outset of each interview, investigators should explain, as a general matter, the interview's purpose, the investigation procedures, the institution's obligation to investigate, and any amnesty policies that are applicable. Investigators should also explain the privacy standards for what the interviewee shares in the interview, according to the institution's policy as set by the Coordinated Community Response Team.**

Commentary

This Recommendation advises that investigators begin each interview in this way (excluding any conversation regarding recording, discussed in [Recommendation 23](#)) because they are designed to balance—to the extent possible—neutrality with interviewee comfort and understanding of why they are being interviewed. For example, in trying to put interviewees at ease, investigators should not reveal significant details about the investigation itself that could undermine its neutrality by suggesting certain responses. The investigators should specify that the interview is only one step in the investigation and that no determination will be made until all relevant evidence is gathered and all witnesses are interviewed. The investigators should stress that it is important for the interviewee to be candid and to provide complete, accurate responses.

Investigators should advise the interviewees that they may take breaks, and that they should feel free to interrupt the investigation at any point they remember new information, want to correct an error, or have a question. Investigators should remind interviewees, however, that the investigators may ask, when they return from the break, whether they communicated about the case with anyone, via any communication method, during the break, including with any advisor who accompanied them to the interview.

For more information about explaining the purpose of and setting the tone for the interview, see:

- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).

- 25. After explaining the purpose of the interview, investigators should review the notice that the interviewee was sent prior to the interview, outlining the rules of the investigation and the interview. The interviewee (and their advisor) should sign the notice, acknowledging that it has been explained to them, they understand the rules, and they will comply with those rules.**

Commentary

As a safeguard to confirm that parties and advisors read the notice (discussed in [Recommendation 14](#)) that was earlier sent to them, the investigator should go over the notice before getting to substantive questions, and ask the parties, their advisors, and witnesses to sign the statement.

26. Investigators should decide whether to disclose the names of any witnesses or share information gathered from witnesses by balancing witness privacy protection with the need to conduct an effective investigation.

Commentary

Each party and any witnesses who the investigators believe know of other potentially helpful witnesses should be asked to provide the names of witnesses to whom they would like the investigators to speak, as well as a brief description of the evidence about which the party or witness anticipates the witness will testify. Investigators should interview those witnesses who are anticipated to have evidence that could affect the result of the investigation.

Although investigators should seek out each party's list of witnesses, investigators are not obligated to disclose the names or any information about witnesses to other parties or witnesses. To the contrary, to the extent the investigator could inadvertently divulge private information, witnesses could communicate with each other regarding the case, and/or the risk of retaliation could be increased, all of which could harm the investigation, investigators should be careful regarding such disclosures and only share names or other information about parties or witnesses with others for weighty reasons.

Nevertheless, investigators may decide to provide such information when they feel that fairness concerns and/or the effectiveness of the investigation outweigh the benefits of protecting witnesses' identities or information. Ultimately, it is up to the investigators to balance these considerations, and parties and witnesses should have already been informed of the investigators' discretion and responsibilities on this issue, as discussed in [Recommendation 24](#).

For more information about identifying witnesses and disclosing and protecting witness identities, see:

- Viktoria Kristiansson & Charlene Whitman-Barr, *Identifying, Investigating, and Prosecuting Witness Intimidation in Cases of Sexual Abuse in Confinement*, 26 STRATEGIES IN BRIEF (AEQUITAS), Sept. 2015, available at <https://www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/Sexual%20Abuse%20in%20Confinement.pdf>.
- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).

27. Throughout each interview, investigators should have a copy of the institution's gender-based violence policies and procedures and any other information regarding the relevant policies of the school.

Commentary

Even if investigators are familiar with all of the IHE's gender-based violence policies and procedures, it is helpful to have a copy for reference with any skeptical witnesses or parties.

28. Investigators should have proven experience, skills and training in, and use, to the extent possible, the following interviewing techniques in a linguistically and culturally-responsive manner:

- a. balancing neutrality and empathy throughout the interviews;**
- b. utilizing trauma-informed interviewing methodologies that recognize the biological and neurological effects that trauma can have on memory function;**

- c. asking open-ended questions that use the interviewee's terms for body parts and avoid jargon; and**
- d. asking interviewees for any other information the interviewee remembers or wants to add.**

Commentary

In general, investigators should recognize that speaking with the investigators will likely feel like a stressful experience for all parties and many witnesses. Investigators should seek to minimize that stress while at the same time maintaining their neutrality. Specific techniques that investigators can use include expressing friendliness and support, including by asking at the beginning of questioning and at any later point when needed, how the interviewee is feeling. In addition, the investigators can acknowledge that the investigation itself is an ordeal, especially for the parties, talk with the interviewee (at as many points as they feel are necessary but at least once at the end of the interview) regarding the interviewee's needs for various services and supports, and make any needed referrals to such services and support. Because language barriers may affect the interviewee's level of comfort, investigators should be aware of and attempt to alleviate such barriers, including by allowing the interviewee to answer questions or express thoughts in the language they feel most comfortable speaking. For similar reasons, investigators should also attempt to uncover, acknowledge, or address any cultural norms or barriers that may affect the interviewee's comfort level.

Throughout the interview, investigators should refrain from offering their opinion, listen actively, make eye contact frequently (but without staring), pay attention to the interviewee's body language and speak slowly, using short sentences and pausing between sentences. Investigators should remember that some interviewees may have experienced trauma, either in connection with the events under investigation, or in some other part of their life that the investigation or the events under investigation have elicited. For interviewees who the investigator has reason to believe experienced trauma, the investigators can use several trauma-informed interviewing techniques, including maximizing interviewees' control by giving them as much choice as possible about the environment of interview (e.g., allowing them to select their seat before the investigators sit down and giving them a choice of beverage), thanking them for being a member of the team that is trying to resolve this case, and explicitly confirming that you are taking the experiences that the interviewee is sharing very seriously.

Asking open-ended questions is particularly important at the beginning of the interview. Questions as simple as "Can you tell me what happened?" or "What did you see or hear?" will likely get the interviewee talking, and investigators should try not to interrupt the flow of the interviewee's narrative unless it becomes excessively repetitive. Once the narrative is complete, going back to ask specific questions about certain parts of it can help address details and complete the narrative to the best of the interviewee's recollection.

Investigators should remember that the neurobiological effects of trauma often cause a trauma victim's memories to become disordered, not following the usual linear pattern in which most people remember events. Therefore, investigators should avoid asking questions that assume a complainant can give a neat, linear account or using questions a complainant is likely to interpret as blaming (e.g., "Why did you ____?" and "Did you try to leave?"). Instead, with someone who has experienced trauma, investigators should ask open-ended questions, beginning with "who," "what," "why," "where," and "how," and be extra careful to allow the interviewee to talk through her/his narrative without interruption, even if it seems to jump around. The investigator can work with the interviewee later in the interview or after the interview to reconstruct the proper order of events. In addition, investigators should frequently encourage the interviewee to provide as much information as possible, even if the information might seem trivial.

For interviewees experiencing particular problems recalling all of the circumstances surrounding a traumatic event, investigators should consider using cognitive interviewing techniques to jog interviewees' memories, as long as doing so is advisable based on the circumstances of the traumatic event(s) and the interviewee's individual reactions to trauma. However, the use of cognitive interview strategies should be undertaken in a later, separate interview, when the proper precautions can be put in place and the cognitive interview can be done with particular care, ideally by someone trained in cognitive interviewing, and certainly with safeguards such as having a VSP with the interviewee before, during, and after the interview just in case the experience of recollection prompted by cognitive interviewing techniques causes the interviewee to relive the traumatic experience in a way that causes greater trauma.

If the interviewee and investigators agree that an additional cognitive interview should be done, the investigators should use one or more of the following cognitive interviewing techniques to help the interviewee recall the traumatic event(s). First, the investigator can ask the interviewee to reconstruct the circumstances of the traumatic event(s), including the environment, location of furniture, lighting, people, or objects, as well as anything else that is important to the circumstances surrounding the traumatic event, then ask interviewees to reconstruct how they felt at the time of the assault and to describe their reactions. Second, investigators could ask interviewees to recall the traumatic event(s) in reverse chronological order, which can prompt an interviewee to examine her or his actual memory of the event in a clearer and more detailed way. Finally, the investigators could ask interviewees to recall the traumatic event(s) chronologically, but from a different perspective, such as that of a third-party potential or actual observer, a technique that may be useful for interviewees who dissociate or experience frozen fright because the dissociation might feel to them as if they observed the assault from an external perspective.

An investigator may also ask a party what the other party heard, saw, or perceived in some other way during the traumatic event(s), but should use the utmost care in utilizing such a technique with parties who have reported experiencing trauma due to the conduct of that other party. Although such a technique could lead to significant information that they might have forgotten to include initially, many trauma survivors will find it very difficult to be asked to empathize with a person who they have experienced as harming them.

Finally, concluding the interview by asking interviewees for any other information the interviewee remembers or wants to add may help interviewees to mention issues about which they have been thinking through some portion of the interview but that they did not discuss because they did not see an appropriate way to raise it. It may also provide a type of pause in the interview that could prompt interviewees to reflect on an issue that the interviewee did not think of during the faster pace of the rest of the interview. Even if neither of these effects occurs, this kind of question can help transition to the items that investigators should discuss at the close of the interview.

For more information about interview techniques for building trust and rapport but not sacrificing neutrality, crafting effective interview questions, ordering interview questions, using trauma-informed interviewing practices, including recognizing the risks of cognitive interviewing and conducting cognitive interviews, and effectively concluding interviews, see:

- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).
- *Courses*, END VIOLENCE AGAINST WOMEN INT'L, <https://www.evawintl.org/WebinarDetail.aspx?webinarid=1065> (last visited Aug. 5, 2019).
- Rebecca Campbell, *The Neurobiology of Sexual Assault*, Presentation for U.S. Dep't of Just., Nat'l Inst. of Just. Translational Criminology Seminar Series (Dec. 3, 2012), *available at* <https://nij.gov/multimedia/presenter/presenter-campbell/Pages/presenter-campbell-transcript.aspx>.
- RUSSELL W. STRAND, U.S. ARMY MIL. POLICE SCH., *THE FORENSIC EXPERIENTIAL TRAUMA INTERVIEW* (2018), *available at* <https://www.mncasa.org/wp-content/uploads/2018/07/FETI-Public-Description.pdf>.
- mediaco-op, *Trauma and the Brain*, YOUTUBE (Sept. 21, 2015), <https://www.youtube.com/watch?v=4-tcKYx24aA>.

29. At the close of each interview, after the interviewee signs the interview notes, investigators should conclude by:

- a. asking about other evidentiary sources that investigators should look into;**
- b. reiterating the rules of investigation and the student's rights in the proceeding; and**
- c. provide any referrals to services needed by the interviewee.**

Commentary

The information discussed with interviewees at the close of the interview may vary somewhat depending on whether the interviewee is the complainant, respondent, or a third-party witness. In particular, both the written information about their rights during the remainder of the proceeding and the types of services they are likely to need will vary somewhat.

However, investigators can and should use the conclusion of the interview with each interviewee first to: (1) ask interviewees for the names of additional witnesses or people with whom the investigators should meet; (2) ask interviewees if there is any documentary, physical, and/or other tangible evidence that investigators should gather; and (3) remind interviewees to write down any new information they may think of later, and how to contact the investigators with that information.

Second, every interviewee should be reminded of the importance of keeping the process private (i.e. only sharing information about the student conduct process with those who need to know to investigate and/or respond), the prohibition on retaliation against anyone involved in the proceeding, how and to whom to report retaliation, and the consequences for retaliating. The interviewee should also be given any written information about their rights during the remainder of the proceeding. Finally, the investigators should ask about the interviewee's needs for any services (even if some services have already been arranged) and should provide referrals to such services when needed.

With regard to complainants specifically, the Clery Act requires that IHEs include in their annual security reports a statement of policy that student victims have the option to report or not

report to local law enforcement and to have IHE assistance in reporting.³³ To help implement this policy, investigators should make sure complainants know how to report to local, non-campus law enforcement, that they understand who on the IHE's staff can assist them in reporting to law enforcement, and that they also understand that they are not required to report to law enforcement. Investigators should also ask complainants about their needs for additional safety planning and accommodations, in addition to services generally, even if an IHE has already assisted the complainant with these matters, as the complainant's needs for safety planning and accommodations may change over time. Lastly, especially when investigating complaints of gender-based violence for a commuter community, or otherwise mainly nonresidential campus or for a consortium of IHEs, investigators should ensure that complainants are aware of civil legal remedies such as protection orders.

30. In the initial interview with the complainant, investigators should seek to gather oral evidence (as well as any documentary, physical, and other tangible evidence that investigators have not already gathered from the complainant), on the following events and circumstances:

- a. the respondent's actions prior to, during, and after the reported gender-based violence;**
- b. the complainant's behavior prior to, during, and after the reported gender-based violence;**
- c. where the complainant and respondent first came into contact;**
- d. the complainant's relationship with the respondent, if any;**
- e. the chronology of the specific gender-based violence acts to which the complainant was subjected and the relevant surrounding circumstances (including the specific and general environmental factors surrounding those acts);**
- f. how each instance of violent conduct overrode the victim's will, including by incapacitation due to fear or alcohol/drugs/substances, by psychological, emotional, or physical coercion, by threats, intimidation, or controlling behaviors, and/or by physical violence;**
- g. any witnesses to each instance of reported gender-based violence, the aftermath of each instance, respondent's conduct toward others, especially any conduct involving other incidents of gender-based violence, and/or respondent's pattern of conduct toward complainant, if a pattern exists;**
- h. any information about other persons who have discussed (even if they did not officially report) gender-based violence by the respondent against others besides complainant;**
- i. the impact that the gender-based violence has had on the complainant's health, education, and life;**
- j. whether the complainant is experiencing additional gender-based violence or harassment since the reported instance(s) of gender-based violence and, if so, the facts related to that subsequent and/or ongoing gender-based violence or harassment; and**
- k. what the complainant would like to see happen as a result of her/his complaint.**

Commentary

Asking these questions will allow investigators to gather important facts detailing the conduct, interactions, and/or relationship between the respondent and the complainant before, during and after the gender-based violence incident(s).

³³ 20 U.S.C. § 1092(f)(8)(B)(iii)(III).

Specific areas about which the investigators should gather information include whether alcohol, drugs, and/or other substances were a factor in any of the reported violent incidents, including whether the gender-based violence was facilitated by alcohol, drugs, and/or other substances. In addition, investigators should try to learn whether the complainant was alone with the respondent at all times related to each reported gender-based violence incident or if others were around, and, if so, who those other people were. For gender-based violent conduct reported as nonconsensual or unwelcome, investigators should also seek information about what the complainant said or did or did not say or do during each incident of gender-based violence that might demonstrate that the conduct was unwelcome and/or lacked consent. One method for eliciting this information is to ask complainants about their thoughts during the violent conduct as well as any words, actions, or responses the complainant used to express these thoughts to the respondent. In addition, investigators can ask about the complainant's specific behaviors, but these should include the full spectrum of ways that victims might communicate that they do not consent to certain conduct, or find it to be unwelcome. For instance, complainants could react to gender-based violence by being completely passive/nonresponsive, not reciprocating any sexual acts initiated by the respondent (including by giving no response at all), communicating consent/welcomeness for some activities but not for others, expressing reluctance to engage in the activity, saying "no," "stop," "I don't want to do this," or making similar negative statements, and/or physically fighting and resisting the respondent.

Investigators should be careful to identify cases of gender-based violence where the reported violence is occurring in the context of an ongoing relationship and/or involving stalking behaviors. When such a case is identified, investigators should ask questions dealing with topics such as the relationship as a whole, patterns of conduct, and any behaviors the complainant found controlling, threatening, frightening, etc., especially when repeated over a period of time.

Finally, the investigators should ask complainants questions relevant to the aftermath of each instance of violence and their report of it, as well as about any ongoing aspects of the gender-based violence, including related to their health, life, and education after the reported violent incident(s) and whether the respondent or anyone else has committed additional or ongoing acts of gender-based violence or harassment against them since the original report. If the respondent or anyone else has committed additional acts of gender-based violence or harassment against the complainant, the investigators should make additional queries about that additional violence/harassment. Such queries should ask about who is engaging in that further misconduct, the basic facts of that violence/harassment, complainants' thoughts on why this additional and/or ongoing abusive behavior is being directed at complainant, whether the complainant believes the conduct is retaliatory, and what additional resources, accommodations, or protective measures the complainant needs to address the effects of this ongoing and/or retaliatory conduct. Investigators should also assure the complainant that they will be investigating the reported ongoing and/or retaliatory conduct and that the IHE will take appropriate action to stop the conduct, remedy its effects, and prevent its recurrence.

For more information about trauma-informed interviewing practices and interviewing complainants and/or gender-based violence victims, see:

- Joanne Archambault & Roger Canaff, End Violence Against Women Int'l, Interviewing the Victim: Technique Based on the Realistic Dynamics of Sexual Assault (Aug. 9, 2012) (presentation available at <https://www.evawintl.org/images/uploads/CompTA/Training%20Materials/Victim%20Interviewing%20Webinar-3pp.pdf>).
- JOANNE ARCHAMBAULT & KIMBERLY A. LONSWAY, END VIOLENCE AGAINST WOMEN INT'L, INTERVIEWING THE VICTIM: TECHNIQUES BASED ON THE REALISTIC DYNAMICS OF SEXUAL ASSAULT (June 2019), available at <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=657>.
- UN WOMEN, VIRTUAL KNOWLEDGE CTR. TO END VIOLENCE AGAINST WOMEN & GIRLS, *Steps for Conducting Interviews* (Dec. 30, 2011), <http://www.endvawnow.org/en/articles/1139-steps-for-conducting-interviews.html>.
- RUSSELL W. STRAND, U.S. ARMY MIL. POLICE SCH., THE FORENSIC EXPERIENTIAL TRAUMA INTERVIEW (2018), available at <https://www.mncasa.org/wp-content/uploads/2018/07/FETI-Public-Description.pdf>.
- Viktoria Kristiansson & Charlene Whitman-Barr, *Identifying, Investigating, and Prosecuting Witness Intimidation in Cases of Sexual Abuse in Confinement*, 26 STRATEGIES IN BRIEF (AEQUITAS), Sept. 2015, available at <https://www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/Sexual%20Abuse%20in%20Confinement.pdf>.
- INT'L ASS'N OF CHIEFS OF POLICE, NAT'L L. ENF'T POL'Y CTR., *Response to Victims of Crime* (Concepts & Issues Paper, Aug. 2010), available at https://www.nccpsafety.org/assets/files/library/Response_to_Victims_of_Crime_Paper.pdf.
- Elaina Roberts, Stalking Resource Center, Part 2: Stalking Evidence: What to Look For and How to Get it Admitted (Aug. 23, 2017), available at https://www.bwjp.org/resource-center/resource-results/part_two_stalking_evidence_what_to_look_for_and_how_to_get_it_admitted.html.
- Donna Kelly & Justin Boardman, Trauma-Informed Victim Interviews (TIVI) (Dec. 14, 2018), available at <https://www.bwjp.org/resource-center/resource-results/trauma-informed-victim-informed-interview-for-the-justice-system.html>.

31. Investigators should interview any first responder who conducted a preliminary interview with the complainant.

Commentary

Depending on the specific circumstances of the reported gender-based violence being investigated, some IHE staff member or other person may have been a first-responder who conducted a preliminary interview or otherwise interacted with the parties or witnesses. If so, the investigators should collect any written report of what first responders observed at the location(s) to which the first responders were called and of the first responders' interactions with the parties or witnesses. In addition, the investigators should interview any first responders about those interactions and/or observations, and any reports written about either or both.

For more information about interviewing and working with first responders, see:

- Nicole Cain, *Interviewing Strategies for Sexual Assault and Rape Investigations*, IN PUBLIC SAFETY, Apr. 20, 2015, available at <https://inpublicsafety.com/2015/04/interview-strategies-for-sexual-assault-and-rape-investigations/>.
- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).

32. When interviewing third-party witnesses, investigators should ask broad, open-ended questions so as not to violate individuals' privacy or divulge information learned from other sources.

Commentary

Because of the need to keep all information shared by witnesses and parties as private as possible, investigators should ask very broad questions such as “What did you see?” “What did you hear?” “When did this occur?” or simply ask the witness to “Describe [respondent]’s behavior toward [complainant] and toward other students, staff, or faculty.” If the witness spoke with a party close in time to the reported gender-based violence, investigators could ask questions such as “What did [complainant or respondent] tell you? When did they tell you this?” The primary goal of the interview is to gather evidence from witnesses that corroborate, contradict, or otherwise add content, context, or different perspectives to the parties’ accounts, or that provide more detail on evidence found in the documentary, physical, and other tangible evidence already collected or mentioned by other witnesses.

It is ideal, and a good sign, that information related to the investigation has been kept as private as possible, when witnesses do not know why they have been asked to meet with the investigators. However, oftentimes the rumor mill has given a witness at least an idea of what the investigators want to discuss. Under these circumstances, a witness may feel a sense of loyalty to, or sense of fear of, the complainant or respondent, and this loyalty or fear may lead the witness to resist providing a detailed account of what they observed or spoke about with a party, for fear that it will contradict the party’s account. If the investigators are confronted with such a situation, they should explain to the witness that when the witness does not share any information, the witness cannot help the party because although the witness’s account may not contradict the party’s account, it also cannot corroborate the party’s account.

For more information about interviewing third-party witnesses, see:

- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).
- Viktoria Kristiansson & Charlene Whitman-Barr, *Identifying, Investigating, and Prosecuting Witness Intimidation in Cases of Sexual Abuse in Confinement*, 26 STRATEGIES IN BRIEF (AEQUITAS), Sept. 2015, available at <https://www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/Sexual%20Abuse%20in%20Confinement.pdf>.

- 33. In the initial interview with the respondent, investigators should ask respondents for a response to each substantive allegation against them (not skipping any), allowing respondents to see the complainant's statement only during the interview and for this specific purpose.**

Commentary

Best practice counsels against investigators providing a written copy of the complaint to the respondent before or after the initial interview. Investigators should prepare how they will ask the respondent about each allegation (i.e. indirectly or directly).

- 34. In addition to utilizing the general approach and techniques articulated elsewhere in these Recommendations, when interviewing the respondent, investigators should seek to:**
- a. explain the process, its rules, and the accused student's rights in the process;**
 - b. normalize the process;**
 - c. ask open-ended questions both about the general context of respondent's life and about the allegations;**
 - d. prepare for respondent's denial of responsibility and how the investigator will respond;**
 - e. ask questions that pull (rather than push);**
 - f. explore connections between actions;**
 - g. ask for clarification;**
 - h. summarize facts already shared;**
 - i. affirm participation, disclosures made, and responsibility taken; and**
 - j. answer questions and discuss next steps.**

Commentary

As with the complainant, the initial interview with the respondent is most likely to be most successful the less confrontational it is. Investigators should approach the interview by recognizing that, even if the respondent has not experienced trauma, the investigation will be tremendously stressful for the respondent. Therefore, to the extent possible, investigators should take a compassionate approach in the interview. They should make sure to communicate clearly what the process will look like, what the respondent's rights are, and what rules the respondent needs to follow as a part of the process. Investigators should answer the respondent's questions, and inform the respondent of the next steps in the process.

Investigators should also seek to normalize the process by making it clear that neither the investigators nor the process as a whole is about labeling the respondent as a good or bad person. Instead, investigators should make clear that they are focused on determining what the respondent's actions and choices were during the events in question, and what investigators' expectations are for the respondent's disclosures, including that telling the truth is the only expectation, that disclosures will be most helpful if they are complete and accurate (e.g., no guessing, "don't admit to things you didn't do"), and that it is better to not answer a question or come back to a question rather than lie. Investigators might also emphasize the advantages of being truthful, such as by asking the respondent to articulate the benefits of being trusted.

Investigators should spend some time on background questions on topics such as the respondent's family, friends, studies, and social life at school, and any exposure to and attitudes regarding matters relevant to the allegations. For both background and more specific questions, investigators should use open ended and inviting questions, such as "Tell me about your relationship with ____"; "Tell

me what you and ____ were doing on ____ day,” “Let’s start at the beginning and go through each step of what happened,” “How does that work?” “Tell me more about that, what does that look like?” Particularly if they suspect deception, investigators can use “pulling,” not “pushing” questions such as, “How could someone do something like that?” or, “So what would make someone do something like that?” Questions can also explore connections between actions, such as “What was the connection between ____ and touching ____?” or “Tell me how ____ may have influenced what you did to ____?”

Investigators should prepare how to continue the conversation in the face of any denials. For instance, if the respondent denies the allegations completely, investigators might say: “Tell me why someone would say this about you” or “Tell me how you found out about what ____ said.” In another example, if the respondent says, “My parents would freak out if I did that,” investigators could respond with, “So you’re concerned what your parents might think about you, tell me about that.” In addition, investigators should ask why the respondent believes the complainant filed the complaint and why the respondent believes the complainant might lie. Other useful methods for moving the interview forward include summaries (e.g., “So let’s go over this,” “Let me make sure I’ve got everything straight; this is what you have said so far.”), asking for clarification, and asking follow-up questions (e.g., “How many times?” “What other sexual acts occurred?” “How long did it go on for?” “How did they act when this was going on?” “What did they say next?” “What were their reactions?” “What went into making sure no one saw?”).

An investigator’s goal should still be to obtain information similar to that discussed with the complainant, including regarding:

- (1) the respondent’s actions prior to, during, and after the reported gender-based violence;
- (2) the complainant’s behavior prior to, during, and after the reported gender-based violence;
- (3) where the complainant and respondent first came into contact;
- (4) the complainant’s relationship with the respondent, if any;
- (5) the chronology of the specific acts being investigated;
- (6) what the respondent thinks the complainant heard, saw or perceived during the reported incident(s) of gender-based violence; and
- (7) any witnesses with whom the respondent wants the investigators to speak.

At the conclusion of the interview, investigators should, in addition to the items listed in [Recommendation 29](#), affirm the respondent’s participation in the interview and thank the respondent for any responsibility taken, even if minimal. Investigators should also discuss safety with the respondent: both that of the respondent’s and other involved parties.

- 35. At the close of evidence gathering, if the accounts of the parties still conflict, investigators should make credibility assessments based on the totality of the evidence. Investigators should also consider the consistency of each party’s account, including whether they were internally consistent, consistent with the observations provided by others, and consistent with documentary, physical, and other tangible evidence.**

Commentary

Once investigators have completed their evidence gathering, investigators should synthesize the evidence and draw conclusions about whether gender-based violence has occurred as reported, and what policy violations the respondent has engaged in, if any.

Many investigations that have reached the point of having gathered all the evidence discussed in these Recommendations will present investigators with fundamentally conflicting accounts by the parties as to whether gender-based violence occurred as reported and whether the respondent has engaged in any misconduct prohibited by the IHE. In order to make it possible for the Deliberative Panel or another decision-maker (if the IHE uses a variation on the Investigative Model that does not include a Deliberative Panel) to understand all of the evidence gathered and its relevance and significance, investigators must sift and synthesize the evidence in preparation for summarizing it in a report.

As a part of the sifting and synthesizing process, and assuming that conflicts remain between the parties' accounts, investigators should consider whether credibility issues affect the analysis of the evidence, in whole or in part. This "totality of the circumstances" determination means that any single factor is highly unlikely to be determinative. Therefore, investigators should consider in a group such factors as the inherent plausibility of each party's account, any evidence corroborating each party's account, and each party's demeanor, motive to falsify, and relevant past record. Investigators should already have checked the Title IX Coordinator's files to determine whether other complaints of gender-based violence besides complainant's have been filed against the respondent. General student conduct files maintained outside the Title IX Coordinator's office may serve a similar purpose for the credibility determination, and investigators should check to see if those files contain evidence of other misconduct by either party that implicates truthfulness with regard to non-trivial matters.

Although investigators should be cautious about wholesale determinations about the relative credibility of the parties' accounts, there may be rare cases where such a determination may be necessary. Nevertheless, in most cases where credibility plays a part, it is usually confined to discrete factual disputes that cannot otherwise be decided on the weight of the evidence. Therefore, in most cases, while credibility plays a role, it will not be the only factor.

For more information about synthesizing evidence and/or making credibility determinations, see:

- U.S. EQUAL EMP. OPPORTUNITY COMM'N, EMPLOYMENT GUIDANCE (Mar. 19, 1990), *available at* <https://www.eeoc.gov/eeoc/publications/upload/currentissues.pdf>.

36. Investigators should memorialize and summarize the sifted and synthesized evidence from the investigation into an initial written report.

Commentary

The initial report should include discussion of:

- (1) the investigation timeline, beginning with the date the complaint was filed and ending with the date that the last piece of evidence was collected;
- (2) the number of participants in the investigation, including the names and numbers of witnesses interviewed, including students, staff, faculty, and off-campus individuals, as well as any witnesses identified by the parties who were not interviewed and why;
- (3) the locations where interviews and other evidence collection occurred (including any visits made to locations where the gender-based violence was reported to have occurred);
- (4) the investigation process;
- (5) any factors not already discussed contributing to the investigation's analysis and findings;

- (6) each of the complainant's allegations, investigators' conclusions as to whether the allegation is substantiated based on the weight of the evidence, and the evidence gathered supporting that conclusion;
- (7) any other factors relevant to the credibility of the parties or their accounts; and
- (8) the overall conclusion of the report as supported by the weight of the evidence.

In compiling and writing the report, investigators should focus on establishing the reliability of their conclusions through emphasizing the competence, thoroughness, confidentiality, trauma-informed nature, and breadth of the investigation. The reliability of these conclusions will increase the certainty of the case's resolution, will discourage appeals, and will make successful appeals extremely unlikely, all of which will also enhance promptness. The level of privacy that the investigation achieved and maintained will ordinarily be a factor enhancing its reliability, as will factors such as its speed, as long as that speed did not interfere with the investigation's thoroughness, because a faster investigation that is nevertheless not rushed can increase accuracy.

To protect their privacy, parties should be identified simply as "complainant" or "respondent" unless it is necessary to use their names, in which case investigators should endeavor to use only party initials unless the parties themselves request that their names be used. Although the report will list witnesses in the appropriate section (as referred to in number (2) above), witnesses' names should be kept out of other parts of the report unless that will undermine the report's credibility. The list provided according to number (2) above should also include a key so that references to witnesses that eliminate names (e.g., "Witness 1") will be clear.

The report's discussion of the parties' and witnesses' credibility should explain in careful detail the analysis undertaken in [Recommendation 35](#), as well as review, if applicable, any reasons investigators believe the witnesses or parties had to fabricate stories or to falsely support one of the parties. Investigators' individualized conclusions about each of the complainant's allegations should be handled similarly, being sure to assess the reliability of the evidence, based on factors such as whether it comes from firsthand knowledge or hearsay.

The report should ultimately reach a decision as to whether the conduct found to have occurred, based on the weight of the evidence, constituted gender-based violence and violated a specific IHE policy and/or student conduct provision.

IHEs should remember that a finding that the evidence fails to reach the evidentiary threshold for a student conduct violation is not equivalent to a finding that gender-based violence did not occur or that the complainant lied, but is simply an assessment of the sufficiency of the evidence available. Because the complainant retains the burden of proof, this means that, if the evidence is insufficient to reach the standard of proof, the complainant will simply not prevail.

For more information about writing investigation reports, see:

- BETH K. WHITTENBURY, *INVESTIGATING THE WORKPLACE HARASSMENT CLAIM* (A.B.A., 2012).

- 37. Investigators should make a copy of the initial report available to the parties for comments, then make changes to the report that are adequately justified in the parties' comments, and submit the final report either to the Institution of Higher Education or to the Deliberative Panel, with a simultaneous copy to the parties that attaches the parties' comments.**

Commentary

Regardless of whether an IHE chooses the Investigative Model or the IDP Hybrid Model, the investigators and IHE should provide a copy of the investigators' initial report for the parties' comments before the report is finalized, specifying that it is confidential and setting a reasonably prompt deadline by which comments must be returned. If the IHE chooses to use a version of the Investigative Model that does not include a Deliberative Panel, it is particularly critical that investigators provide a mechanism for the parties to read and respond to the report. However, even in the case of the IDP Hybrid Model, providing the initial report for comment and making edits based on those comments, prior to the Deliberative Panel convening, adds dramatically to the efficiency of the Deliberative Panel's meeting and gives the investigators the ability to correct actual mistakes or clarify issues. Following this process can also help to reduce appeals.

The IHE should consider the pros and cons of various methods for making the initial report available to the parties for comment. The IHE could make the initial report available electronically in ways that offer various levels of security, depending on the information technology available to the IHE. The IHE could also arrange with each party to make the initial report available to the party in hard copy at a specified time and place. If made available in hard copy, the IHE should allow the party as much time with the report as possible/within reason.

To avoid delay and keep the resolution of the complaint prompt, the time period for the parties to comment should be kept relatively short. A week is ideal unless there are reasons why the parties should be given a longer period, such as exams being in progress or about to start. Investigators should make every effort not to issue the initial report during such times, and if doing so is inevitable, the IHE should arrange for the parties to be accommodated for the time period allocated to commenting, and for a reasonable time afterward so they can prepare for exams.

For more information about the process of incorporating feedback from parties into a complaint investigation report, see:

- INT'L ASS'N OF CHIEFS OF POLICE, *Sexual Assault Incident Reports* (Aug. 18, 2018), available at <https://www.theiacp.org/sites/default/files/all/s/SexualAssaultGuidelines.pdf>.

- 38. If the Institution of Higher Education chooses to use the Investigation + Deliberative Panel Model, the Deliberative Panel Model should have an opportunity to question the investigators and hear the statements of any parties who wish to speak to the Panel, before issuing a decision on the complaint based on the preponderance of the evidence.**

Commentary

In preparation for the Deliberative Panel hearing, investigators should send a copy of the semi-final report to the parties and Deliberative Panel members, who the IHE selected and scheduled for the Deliberative Panel hearing. On the date of the Deliberative Panel hearing, the investigators should appear before the panel to answer questions about the report, and the Deliberative Panel should hear the statements of any parties who wish to speak to the panel. If the Deliberative Panel needs the investigators to make additional edits or to make changes that address some of the

Panel's questions, the Panel should wait to issue a decision until after those changes are made or questions resolved.

In this latter case, investigators should make whatever changes to the report they feel respond to the Deliberative Panel's questions and the parties' statements, and submit the final report to the panel, with a simultaneous copy to the parties.

Once satisfied with the report and investigators' answers to its questions, the Deliberative Panel should issue a decision on the complaint as to whether it is more likely than not that the reported gender-based violence occurred, and/or that respondent violated a specific IHE policy or student conduct provision. If the evidence supporting the complainant's allegations exceeds the "more likely than not" threshold and reaches higher evidentiary standards, the Deliberative Panel should not hesitate to note in its decision that the higher evidentiary threshold has been met. The IHE should then send notice of the decision simultaneously to all parties.

C. Post-Investigation Matters

This Section addresses matters that occur after the investigation has been concluded with a decision (the "investigation result"), by either the investigators (in the Investigative Model or some variation without a Deliberative Panel) or the Deliberative Panel (in the IDP Hybrid Model), that it is more likely than not that gender-based violence occurred and that the respondent violated a specific IHE policy and/or code of conduct provision. These Post-Investigation Recommendations consider matters related to appeals of the investigation result, sanctioning practices, and general steps that IHEs should take when respondent is found "not responsible" for gender-based violence and when a respondent is found "responsible" for gender-based violence.

- 39. Notwithstanding the outcome of an investigation, complainants and respondents should have access to the services, resources, accommodations, and protective measures that the Institution of Higher Education would provide to any eligible student, regardless of reporting status.**
- 40. At the close of an investigative process, whatever the outcome, Institutions of Higher Education should remind both parties that the prohibition on retaliation is still in force.**
- 41. If the respondent is found responsible for the reported gender-based violence, the Institution of Higher Education should determine an appropriate sanction based on the sanctioning practices established by the Coordinated Community Response Team in the written policies and procedures for gender-based violence cases.**
- 42. Sanctions should be designed to serve clear purposes related to comprehensive prevention and to remedying the violation of the complainant's rights, and Institution of Higher Education officials must be able to articulate a clear rationale for the sanction they selected.**
- 43. Investigation and sanctioning should be handled by different personnel.**
- 44. Mandatory sanctions should be avoided in favor of considering a series of factors and how they will fulfill the purposes of remedying the harm to the complainant and/or comprehensive prevention.**

45. The sanctioning practices developed by the Coordinated Community Response Team should include a plan for re-entry of sanctioned students into the campus community.

46. If appeals are permitted, they should be limited to those cases in which the outcome of the investigation might have been seriously affected either by a procedural error, or by previously unavailable relevant evidence. As with all gender-based violence complaints, Institutions of Higher Education must consider and decide the appeal promptly.

39. Notwithstanding the outcome of an investigation, complainants and respondents should have access to the services, resources, accommodations, and protective measures that the Institution of Higher Education would provide to any eligible student, regardless of reporting status.

Commentary

Just because an investigator determines that a complaint of gender-based violence does not meet the evidentiary standard does not mean that a complainant lied about experiencing gender-based violence or filed a false report. Nor does it mean that the complainant did not experience trauma and harm to their educational experience and that the complainant will not need services, resources and accommodations to overcome that trauma and get back on their previous educational trajectory. All that it means is that the investigators did not find sufficient evidence to decide that it was “more likely than not” that the respondent was responsible for gender-based violence and a school violation. As a general matter, IHEs should treat the complainant the same way as they would have if the complainant had reported confidentially and no investigation had been conducted. Specifically, complainants should still have access to the kinds of services, resources, accommodations, and protective measures that the IHE would have provided to student victims who did not want their reports investigated.

In addition, the IHE should continue to offer the respondent access to the services, resources, and accommodations offered while the investigation was in process.

40. At the close of an investigative process, whatever the outcome, Institutions of Higher Education should remind both parties that the prohibition on retaliation is still in force.

Commentary

Although it may be understandable that parties may feel angry, resentful, or experience trauma because of the student conduct process, parties acting on those feelings to harass the other party or parties (either directly or through friends) or to file a misconduct complaint for “false reporting” or something similar likely would cause the party to run afoul of the retaliation prohibition about which they were informed at the inception of the investigation. Indeed, unless the IHE has clear evidence that a party engaged in affirmative dishonesty, the IHE should not enable a party to retaliate using the IHE’s student conduct process. Instead, the IHE should remind both parties that the retaliation prohibition is still in place and that harassment by the party or the party’s friends, as well as filing a student conduct complaint against the other party, could be considered retaliation.

41. If the respondent is found responsible for the reported gender-based violence, the Institution of Higher Education should determine an appropriate sanction based on the sanctioning practices established by the Coordinated Community Response Team in the written policies and procedures for gender-based violence cases.

Commentary

IHEs have wide discretion to determine how they sanction respondents who they have found responsible for gender-based violence, and should think carefully about sanctions. The Clery regulations require IHEs to include in their annual security reports a statement of policy that lists all of the possible sanctions that the institution may impose for gender-based violence.³⁴ They also require written, simultaneous notification to the complainant and respondent of any sanctions imposed, and the rationale for them.³⁵ As discussed above, the Clery Act and regulations require that IHEs adopt comprehensive programming and strategies to prevent gender-based violence.³⁶ In addition, both the U.S. Supreme Court and OCR have articulated Title IX's concerns with prevention. First, the 1999 U.S. Supreme Court case that established the "deliberate indifference" standard for peer harassment cases stated that schools would not be liable for damages under Title IX unless their deliberate indifference "cause[s] [students] to undergo" harassment or "make[s] them liable or vulnerable" to it.³⁷ Second, OCR has long articulated the role of Title IX's student conduct procedure requirement in ensuring that a school takes effective actions to end harassment, prevent its reoccurrence, and, as appropriate, remedy its effects.³⁸ Because sanctions are an important form of prevention, thoughtful and effective sanctioning is important to help any school seeking to comply with these mandates.

The pressure to conflate fact-finding and sanctioning is increased by mandatory sanctions. Therefore, these Recommendations support a third sanctioning practice: avoiding mandatory sanctions. Because mandatory sanctions leave no discretion to IHE personnel to determine a reasonable sanction, those personnel who feel strongly, for instance, that Respondent X should not be sanctioned with expulsion (the mandatory sanction for gender-based violence on Respondent X's campus) will find Respondent X not responsible for gender-based violence, even if a more objective fact-finder would find Respondent X responsible. Under these circumstances, Complainant X's position in the proceeding and well-being are harmed, as Complainant X now incorrectly thinks that several important representatives of the campus community do not believe the Complainant or are biased in some way.

For more information about sanctioning, see:

- DAVID R. KARP ET AL., *CAMPUS PRISM, A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES* (2016), *available at* https://www.skidmore.edu/campusrj/documents/Campus_PRISM__Report_2016.pdf.

³⁴ 34 C.F.R. § 668.46(k)(1)(iii).

³⁵ 34 C.F.R. §§ 668.46(k)(2)(v)(A), (k)(3)(iv).

³⁶ 20 U.S.C. § 1092(f)(8)(A)(i); 34 C.F.R. § 668.46(a).

³⁷ *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 644–45 (1999).

³⁸ See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 13, at ii–iii, 14.

42. Sanctions should be designed to serve clear purposes related to comprehensive prevention and to remedying the violation of the complainant's rights, and Institution of Higher Education officials must be able to articulate a clear rationale for the sanction they selected.

Commentary

Sanctions are linked to all three components of comprehensive prevention: primary, secondary, and tertiary prevention. Sanctions are most obviously a method of tertiary prevention because they potentially establish long-term consequences for students found responsible for gender-based violence. Some sanctions, such as monetary compensation and separation of the complainant and the respondent, can be a form of secondary prevention because secondary prevention is focused on addressing the harms to victims. Other sanctions, such as requiring a student found responsible for sexual violence to do community service at a rape crisis center without an evidence-based determination that doing so is safe for the center's clients, could undermine an IHE's secondary prevention efforts. Lastly, sanctions must be consistent with primary prevention programming. For example, a school that has a bystander intervention primary prevention program but is unwilling to seriously sanction students found responsible for gender-based violence risks sending an inconsistent message that undermines the effectiveness of the primary prevention program by causing bystanders to ask: "Why should I, as an individual bystander, intervene in a situation that may lead to violence when the school is unwilling to intervene by seriously sanctioning students?"

These Recommendations recognize that sanctioning is often characterized by much controversy. IHEs have faced much public criticism generally for overly lenient sanctioning. At the same time, many IHE professionals object to punitive sanctioning practices as not in keeping with the educational missions of IHEs and the professional norms of student conduct as a field, a sentiment that finds agreement among some who object to treating a civil and human rights issue (i.e. gender-based violence) as if it is solely a criminal law issue. Some commentators, IHE professionals, and IHE students have pressed for mandatory sanctions, only to have others from their own communities oppose them. In addition, some have expressed concern about serial gender-based violence perpetrators being able to move from IHE to IHE because of IHEs' varying and non-standardized transcript notation policies. Finally, a group of IHE professionals, legal scholars, and social scientists have supported IHEs exploring, considering, and/or adopting Restorative Justice ("RJ") practices as one option for sanctioning respondents found responsible for gender-based violence.

Sanctioning is also one of the least transparent and therefore least studied areas. As a result, very little data is available to inform IHEs or these Recommendations regarding which types of sanctions IHEs should adopt. There are, however, some sanctioning practices that will help IHEs select an effective sanction.

An effective sanction is one that fulfills its purpose. This means that sanctions must be selected and designed with specific purpose(s) in mind. Both articulating the purpose and selecting the sanction(s) most likely to fulfill that purpose in turn require a thoughtful and reflective approach to sanctioning. Fortunately, such a thoughtful and reflective approach will also allow an IHE to fulfill its obligation under the Clery regulations to provide a rationale for why it chose the sanction it did.³⁹

The Clery Act and Title IX also provide guidance as to the purposes that sanctions should aim to fulfill. The Clery Act's requirement that IHEs engage in comprehensive prevention, the preventive focus of the "deliberate indifference" standard, and OCR's directive that schools stop harassment, prevent its recurrence, and, as appropriate, remedy its effects all suggest that sanctions should be designed to remedy the harm to the complainant, to prevent future gender-based violence or, ideally, both. For instance, the IHE could require the respondent to monetarily compensate the complainant for the harm caused and as many of the health, educational, and economic consequences of that

³⁹ 34 C.F.R. §§ 668.46(k)(2)(v)(A), (k)(3)(iv).

harm as possible. The IHE could also suspend the respondent until the complainant graduates, especially if the complainant experiences trauma as a result of contact with the respondent, as many complainants do. The IHE could also suspend the respondent until the respondent fulfills an approved treatment program. Or the IHE could select some combination of these three that would fulfill the goals of remedying the complainant's harm and/or preventing future harm.

43. Investigation and sanctioning should be handled by different personnel.

Commentary

IHEs should designate separate IHE personnel to investigate and act as fact-finders to determine whether gender-based violence reported by a complainant “more likely than not” occurred, whereas IHEs should designate other personnel to determine appropriate sanctions once the investigators/fact-finders have determined that a respondent is responsible for gender-based violence.

These decisions should be made by different personnel because putting both sanctioning and fact-finding in the hands of the same group of IHE professionals risks allowing a professional's views on appropriate sanctions to influence that professional's views on whether the available evidence indicates that a respondent is “more likely than not” responsible for an incident or series of incidents of gender-based violence. This conflation of sanctioning considerations with the fact-finding process has many negative consequences, especially when combined with the effect of mandatory sanctions, addressed below. Most importantly, this conflation puts pressure on those who are fact-finders to find facts that will lead to the sanction that they support (and that they will have the power to impose). While that pressure still exists in models where the fact-finding and the sanctioning decisions are in the hands of separate personnel, it is reduced considerably when these two decisions are separated.

In addition, leaving fact-finding and sanctioning in the same hands is inappropriate for the Investigation Model and IDP Hybrid Model that these Recommendations advise IHEs to adopt. This is because the Investigation Model and IDP Hybrid Model employ primarily investigators who are professional fact-finders, oftentimes somewhat separate from the campus community, as is appropriate for the more technical endeavor of fact-finding. In contrast, sanctioning symbolizes the values of the community. Therefore, sanctioning should be done by those who represent the campus community and its values. Moreover, because fact-finding is technical and sanctioning is value-laden, putting these decisions in the hands of the same person or group of persons is likely to corrupt the fact-finding process, making it actually or seemingly less neutral, and more biased.

44. Mandatory sanctions should be avoided in favor of considering a series of factors and how they will fulfill the purposes of remedying the harm to the complainant and/or comprehensive prevention.

Commentary

Instead of mandating certain sanctions, IHE professionals charged with thinking through and selecting or designing sanctions should consider factors such as (1) the complainant's wishes; (2) the severity of respondent's conduct; (3) the respondent's prior conduct history; (4) campus safety and maintenance of a supportive living and learning environment; (5) any retaliation post reporting (such as a no contact order violation). Considering such factors will assist IHE professionals charged with sanctioning to select or design a sanction most likely to fulfill the purposes of remedying the harm to the complainant and/or preventing future harm.

45. The sanctioning practices developed by the Coordinated Community Response Team should include a plan for re-entry of sanctioned students into the campus community.

Commentary

When selecting or designing a sanction, IHE professionals should also plan for how it will handle post-sanction consequences and events. Especially in cases where the sanction does not involve permanent separation from the IHE, and sometimes even in cases of expulsion, the respondent may return to the campus or not leave the surrounding community. Therefore, the sanctioning process must consider reintegration issues. This is especially true when the complainant will still be on campus, but is a factor to consider in all cases. Even in cases of expulsion, should the respondent remain in the community surrounding campus, the IHE should consider what its plan will be to address any impact on the complainant or community. Considerations related to reintegration, in particular, suggest that sanctions such as requiring completion of an approved treatment program may be particularly helpful.

46. If appeals are permitted, they should be limited to those cases in which the outcome of the investigation might have been seriously affected either by a procedural error, or by previously unavailable relevant evidence. As with all gender-based violence complaints, Institutions of Higher Education must consider and decide the appeal promptly.

Commentary

Like in courts, the decision-makers deciding appeals in IHE student conduct proceedings make decisions based on a paper record. They are therefore not in a position to make accurate determinations on fact-finding issues, such as determining witness credibility, because those issues cannot be observed by reading text on a page. However, procedural errors can be accurately diagnosed and analyzed based on a paper record, and whether the error in question could have a significant effect on the investigation result is a matter of logic and analysis, but does not require direct observation of witnesses or evidence. Therefore, appeals alleging procedural errors that would significantly affect the investigation result are within the competence of an appeals decision-maker and provide a compelling reason for appeal.

Likewise, new evidence that was not available at the time of the investigation but that could significantly affect the investigation result is appropriate for an appeals decision-maker because the investigator who did the fact-finding leading to the investigation result never observed the new evidence, and the appeals decision-maker will either have to directly observe and consider the evidence or send it to the original investigators for consideration. Neither of these options require a decision on a factual matter to be made on the basis of a paper record.

IHEs should also be careful, when an appeal is allowed, to complete it promptly. IHEs are obligated to act promptly under both the Clery Act and Title IX and therefore should not allow a party to delay resolution of a gender-based violence proceeding unreasonably through the appeal process.⁴⁰ For the same reason of avoiding undue delay, only evidence that was unavailable during the investigation should be considered “new evidence” justifying an appeal. If evidence was available during the investigation but simply not disclosed and the IHE nevertheless considered it on appeal, incentives would be created for parties to withhold evidence during the fact-finding investigation and then introduce that evidence during the appeal, which could call into question the accuracy of the original facts found and require additional steps that would delay the resolution of the investigation.

⁴⁰ 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(aa); 34 C.F.R. § 668.46(k)(2)(i).

Appeals should only be considered and decided by staff or officials who have received training in: the scope and dynamics of gender-based violence in general and in the IHE's campus community (drawing from data collected in a campus climate survey, for instance); trauma-informed and culturally-competent practices; the dynamics of implicit bias; and the IHE's policies and procedures relevant to gender-based violence. IHEs are encouraged to provide additional training to appeals officers, but the topics just listed are the minimum training that appeals officers should get. As already mentioned, if an IHE staff member or official is unable to devote the time to training, they should not be designated to consider and decide appeals.

APPENDIX A: Factors Considered in Investigation Model Recommendation

Most IHEs are using one of four basic models for their gender-based violence campus student conduct processes:

- **Investigative Model:** A method of investigation and fact-finding where skilled professional investigators gather evidence and interview parties and witnesses in separate, individual meetings, then write an investigative report where they review the evidence, make factual findings and determine whether there has been a policy violation. The findings then go to an IHE decision-maker for determination of sanctions, if any.
- **Hearing Model:** A method of investigation and fact-finding where both parties present evidence and witnesses in support of their factual account over a single day or several days, generally while both parties are present, to a neutral panel of university community members who are not professional investigators and who make factual findings after hearing testimony from all parties and witnesses. These panelists do not conduct their own investigation but make factual findings after hearing testimony from all parties and witnesses. This model thus puts more pressure on parties to retain lawyers, since the panel's role is passive and the parties present evidence.
- **Investigation + Hearing Hybrid ("IH Hybrid") Model:** This model combines the Investigative and Hearing Models so that the investigator's report goes to the hearing panel and the panel reviews it along with hearing testimony from parties and witnesses, then makes factual findings based on the report and the testimony, determines responsibility for violation of IHE student conduct requirements, and, in some instances, recommends or issues sanctions based on the report and the testimony.
- **Investigation + Deliberative Panel Hybrid ("IDP Hybrid") Model:** This model combines the Investigative Model with a deliberative panel so that professional investigators make factual findings as in the Investigative Model, but then a deliberative panel reviews the investigation report and the investigators appear before the panel to answer questions before the panel makes a final decision. The parties may also opt to appear before the panel to make statements. The deliberative panel finds the facts, determines responsibility for violation of IHE student conduct requirements, and, in some instances, recommends or issues sanctions based on the report and the testimony.

These Recommendations advise IHEs to adopt the Investigative Model or Investigation + Deliberative Hybrid (IDP Hybrid) Model for such investigations for the following reasons:

Fit with comprehensive prevention. Provisions of the Clery regulations that deal with gender-based violence prevention define prevention as comprehensive programming and strategies intended to end domestic violence, dating violence, sexual assault, and stalking, and the Centers for Disease Control and Prevention define comprehensive prevention as referring to primary, secondary, and tertiary

prevention.⁴¹ The Investigative and IDP Hybrid Models achieve the comprehensive prevention goal more effectively than the others by:

- Requiring any party or witness who has experienced trauma to undergo fewer potentially re-traumatizing events such as repeated recounting of the traumatic events; contact between complainant and respondent during proceedings; and direct divulgements of deeply private information to the larger number of people inherent in a traditional hearing process, potentially including people with whom the complainant has an ongoing relationship that will be inevitably affected by such disclosures.
- Promoting greater sustainability as long-term responses to violence by being more affordable long-term for IHEs.
- Facilitating post-proceeding psycho-social treatment and education of accused students who are found responsible for committing gender-based violence by avoiding the adversarial structure of a traditional hearing.

IHE professionals prefer them. These Recommendations were crafted using a process which consulted more than 225 higher education professionals. Some provided opinions via the peer review process, others via an electronic survey instrument, and some via individual or group conference calls. Among the IHE professionals involved in the drafting of these Recommendations, there was a clear consensus that the Investigative Model and IDP Hybrid Model were preferred. The level of agreement was noteworthy not only because of its breadth, but also because of the diverse institutions and experiences of those IHE professionals. For example, those most likely to approve of their model for investigations were at institutions using the Investigative Model, IDP Hybrid Model, or some combination of the two. In contrast, several of the minority of individuals at institutions that used the Hearing Model or IH Hybrid Model expressed frustration with those models and interest in the Investigative Model and IDP Hybrid Model as better alternatives.

Efficient use of limited IHE resources. The resource restrictions faced by most IHEs (and most acutely by MSIs and commuter/community colleges), coupled with concerns about providing sufficient support to all students, both victims and respondents, involved in gender-based violence cases, also favor the Investigative Model and IDP Hybrid Model. Conducting gender-based violence investigations competently and well requires a lot of training, in the dynamics and scope of gender-based violence, in trauma-informed practices for working with students in such cases, in general investigation techniques, in the IHE's policies and procedures, and in relevant legal requirements. Under the Investigative and IDP Hybrid Models, the IHE can contract with an outside professional for specific cases, or train a limited number of existing employees who will be responsible for multiple investigations (including those not involving gender-based violence), and who will be able to develop expertise in such investigations and improve their quality over time. Even though hiring a professional investigator is a substantial initial investment, its costs lessen over time as the IHE benefits from the investigator's expertise and the IHE's initial investment. In addition, because investigators interview the parties and witnesses individually, with at most two investigators, scheduling can be expected to be easier, and the investigation can be completed more promptly. Finally, the two selected models are more conducive to allowing those IHEs that wish to create a consortium that can share the expense of hiring professional investigators to do so, an option that a number of IHE professionals found appealing when they replied to the online assessment.

⁴¹ The full definition of "Programs to prevent dating violence, domestic violence, sexual assault, and stalking" is "(i) Comprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault, and stalking that—(A) Are culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome; and (B) Consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels." 34 C.F.R. § 668.46(a). For the CDC definition of comprehensive prevention, see BROME ET AL., *supra* note 23, at 3; JENNY DILLS ET AL., *supra* note 12, at 6.

APPENDIX B: Practice for Further Exploration & Research: Restorative Justice

Restorative Justice (“RJ”) encompasses a range of non-adversarial techniques used to understand the harm caused by certain conduct (here, gender-based violence) and possible ways to repair that harm. Done well, RJ can “help participants to feel supported by the institution rather than alienated by it.”⁴² These Recommendations support engaging in further exploration and research on how RJ could be used as an alternative to traditional sanctioning of campus gender-based violence. This support is limited to research because of the dangers in doing RJ poorly, a serious risk if individual IHEs offer RJ without adequate knowledge or resources.

In addition to supporting further research on RJ, these Recommendations set out several conditions that are necessary to any use of RJ in the campus context. First, IHEs using RJ must commit to making a significant investment of time and money, including by hiring or contracting with experienced RJ practitioners to assist the CCRT in designing the process, training IHE staff, negotiating a “use immunity” MOU with the appropriate prosecutor’s office, and providing the resources necessary on an ongoing basis to have trained and capable practitioners lead the process and provide extensive supports to prepare all parties to engage in it. Second, these Recommendation advise against using RJ practices while the accused student is still contesting the complaint and responsibility for the gender-based violence. An RJ process should be used only when the respondent has admitted responsibility for the gender-based violence and both the complainant and respondent have agreed to use it after being given full and extensive information about what the RJ process does and how it operates. The respondent’s acknowledgment of responsibility must be made before the RJ process can begin because the harm that the complainant and others have experienced cannot be understood and repaired until the fact of the harm is acknowledged by the respondent, which means that the fact-finding process has concluded.

For more information about RJ in campus gender-based violence cases, see:

- Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147 (2017).
- DAVID R. KARP ET AL., *CAMPUS PRISM, A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES* (2016), *available at* https://www.skidmore.edu/campusrj/documents/Campus_PRISM__Report_2016.pdf.

⁴² DAVID R. KARP ET AL., *CAMPUS PRISM, A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES* 4 (2016), *available at* https://www.skidmore.edu/campusrj/documents/Campus_PRISM__Report_2016.pdf.



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