Applied Investigative Training for Investigative Teams and Hearing Panels

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Applied Investigative Training for Investigative Teams and Hearing Panels: Agenda

- Initial review under the procedures for the Sexual and Gender-Based Harassment Policy (S&GBHP), the Interim Title IX Sexual Harassment Policy (ITIXSHP), and the Interim Other Sexual Misconduct Policy (IOSMP).
- Investigative Planning and Identifying and Evaluating Evidence
- Community Relationships in Investigations
- LGBTQ Communities: Terminology and Best Practices
- The Neurobiology of Trauma
- Cultural Sensitivity: Cultural Factors May Impact Investigations
- Conducting Interviews: What We Know from Experience Interviewing Parties and Witnesses
- Drafting Investigative Reports

What do we need to learn from Complainant during initial review?

Encourage Complainant to be as specific as possible, understanding that flexibility is essential as narrative approaches my vary and may not be linear/chronological.

- Who: names, title, School or unit, other contact information
- What: specific description of the behavior, Complainant's response, the outcome of the incident or incidents
- Where: specific location: building, floor, room, outside; where within that location?
- When: date/time of each incident
- Effect of harassment on Complainant:
  - Academic or work performance?
  - Participating in University programs or activities?
  - Social impact?
  - Ongoing interaction with Respondent?
  - Physical or emotional health?

Observations During Meetings with Parties

- Note demeanor, including changes when certain topics discussed
- Offer a break
- Reassure party that you are asking questions to better understand their information, however they choose to provide it.

Other Preliminary Information

- *Check internal records* regarding other disciplinary actions or incidents of notice regarding Respondent, if any, but remember: "These Procedures presume that the Respondent is not responsible for an alleged Policy violation until a final determination regarding responsibility is made." (Explicit in ITIXSHP and IOSMP; implicit in S&GBHP.)

- Check with School or unit Title IX Resource Coordinators and central Title IX Office who may possibly have notice of similar conduct
  - Does Respondent work/teach/attend class at other Schools?
  - Has the employee worked in other buildings? Other departments within the University?

Questions to Consider

- How does the information provided fit within the definition of sexual harassment or other sexual misconduct that applied at the time of the conduct?
- If true as alleged, would it be a violation of the applicable policy(ies)?
- Any indication that the scope of the possible harassment (S&GBHP, ITIXSHP, and IOSMP)/hostile environment (S&GBHP, IOSMP) may be broader than what was originally written in the complaint?
- Might local rules apply/also apply to certain conduct? (check with School or unit)

New Title IX Regulations, Effective August 14,2020, Are Not Retroactive

According to the U.S. Department of Education, Office for Civil Rights Questions and Answers Regarding the Department's Final Title IX Rule, September 4, 2020:

"Consistent with the Department's statements in the preamble to the Title IX Rule [i.e., the new Title IX regulations] regarding non- retroactivity, the Rule does not apply to schools' responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school's Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred. In other words, the Rule governs how schools must respond to sexual harassment that allegedly occurs on or after August 14, 2020."

Investigative Planning and Identifying and Evaluating Evidence

Witnesses

After collecting information from the Complaint, the initial review discussion, the Response, and the post-Response interviews, as applicable, you should have information about the allegations*:

- Others who may have seen or heard any aspect of the incidents
- Could parties hear others talking? Any sense others were nearby?
- Anyone either party may have told or texted immediately following the incident/next day/later

* See flow chart of the investigative process for the S&GBHP at Harvard ODR Investigation Process Flowcart FINAL_web. Flow charts for the interim policies will be developed.

Witnesses, cont.

- Those identified by each of the parties
- Those identified by other witnesses
- Those Investigative Team identifies as potential witnesses
- Supplement list during investigation as new leads become known

Witnesses, cont.

Witness questions

- Sketch out areas of evidence you expect to gather from them
- Focus on disputed facts
- Focus on what is needed to prove/disprove Policy(ies) violation and understand the breadth
- If possible, review written/physical evidence first
- List of questions, but be prepared to follow up on new avenues/adjust to different narrative approaches

Witness order

- Relationship to parties and other witnesses may impact interview order
- Availability – work schedule/upcoming vacation
- Ordering to reduce need to circle back

Other Evidence

- Based on allegations, where would you likely find evidence?

- Always remember responsibility to conduct a prompt and equitable investigation and hearing for *both* parties

Community Relationships in Investigations

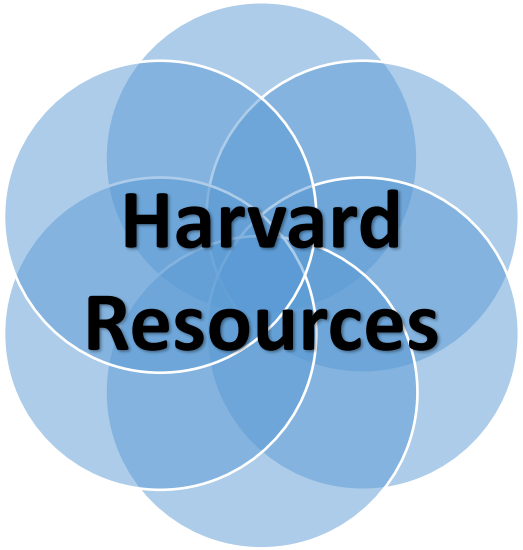
Sexual Harassment Resources

Title IX Office (merging into new Office for Gender Equity)

Title IX Resource Coordinators

Ombudsman

ODR



Chaplains

HUPD

HUHS

CAMHS

Examples of Resources

- Administrative/Review/Conduct/Disciplinary Boards; HR, Resident or Assistant Deans
- Title IX Resource Coordinators, Designees, Liaisons
- Office of Sexual Assault Prevention & Response (OSAPR) merging with Title IX Office into new Office for Gender Equity (OGE)
- Harvard University Police Department (HUPD)
- Harvard University Health Services (HUHS)

Title IX Resource Coordinator Role vs. Designee Role

	Title IX Resource Coordinator	Designee
Notice of Incident	• Responds to notice	
Informal Resolution	• Implements supportive measures • Might handle informal resolution following the filing of a formal complaint (Interim Title IX Sexual Harassment Policy)	

Formal Complaint	• Informed of complaint by University Title IX Coordinator
	• Updated throughout process by ODR
	• Implement supportive measures
	• Monitor supportive measures
		• Initial Review of Complaint
		• Investigation (participation varies as decided by the Schools using the Designee Model)
		  • Case planning meetings
		  • Interviews
		  • Site visits
		  • Review of other evidence
		  • Participate in drafting Investigative Report (making recommended findings of fact under ITIXSHP before case goes to hearing)

Investigation Complete	• Receives Investigative Report	

Sexual Harassment/Assault Resources & Education (SHARE)*

SHARE counselors provide:

- confidential/ privileged crisis counseling
- confidential/privileged support for individuals who engage in causing harm
- a confidential/privileged space to process one's experiences
- support group participation
- information about restorative practices
- **24/7 crisis hotline at +1 (617) 495-9100**

OFFICE FOR Gender Equity SHARE

*As of July 6, 2021, the Title IX Office and the OSAPR, merge to become the Office for Gender Equity (OGE). The SHARE arm of OGE provides confidential/privileged counseling to the Harvard community.

HUHS

- Services/resources for parties
- Expert witnesses: ODR has interviewed experts about, e.g.,
  - Intoxication and incapacitation
  - Sexually transmitted infections
  - Bruising and other manifestations of physical injury
  - Sleep disorders

HARVARD UNIVERSITY
Health Services

huhs.harvard.edu

HUPD

Procedures for S&GBHP Section III.G (Staff)/Section III.H (Students): "Coordination with Law Enforcement Authorities"

- "In all cases, the Investigative Team will have completed the **initial review without delay** and, as appropriate, will have proposed interim measures to the School Title IX Coordinator."
- "[T]he Investigative Team will . . . **assess and reassess the timing** of the investigation . . . so that it does not compromise the criminal investigation."

All communications with HUPD about an ODR investigation should be made by ODR staff only, per HUPD-ODR protocols.

hupd.harvard.edu

LGBTQ Communities

Terminology & Best Practices

Harvard Policies & Guidelines

Harvard University Interim Title IX Sexual Harassment Policy

Harvard University is committed to maintaining a safe and healthy educational and work environment in which no member of the University community is, **on the basis of sex, including sexual orientation or gender identity,** excluded from participation in, denied the benefits of, or subjected to discrimination in any University program or activity. Sexual harassment, including sexual violence, is a form of sex discrimination in that it denies an individual equal access to the University's programs or activities.

Personnel Manual: Discrimination Policy and Review Procedure

Discrimination on the basis of race, color, **sex, gender identity, sexual orientation**, religion, creed, national origin, age, ancestry, veteran status, disability unrelated to job requirements, genetic information, military service, pregnancy, or any other legally protected basis is unlawful and intolerable to the University.

Reference: https://hr.harvard.edu/staff-personnel-manual/general-employment-policies/discrimination-policy-and-review-procedure

Guidelines for Gender Inclusivity in the Workplace

- Privacy and confidentiality
- Names, gender, and pronoun usage
- Workplace attire
- Access to restroom and locker room facilities

Reference: https://dib.harvard.edu/guidelines-gender-inclusivity-workplace

LGBTQ Terminology

Important Note About Language

- Terms
  - can mean different things to different individuals
  - may be reclaimed by certain segments of LGBTQ communities, but not by others
- There is no one “LGBTQ community”

Gender Definitions & Terms

- **Cisgender:** An umbrella term for those whose gender identity and sex assigned at birth align in a traditional sense (eg, a man assigned a male sex at birth). Sometimes the shortened “cis” is used.

- **Gender Expression and Presentation:** How someone communicates their gender through clothing, hairstyle and grooming, body language, behavior, and other aspects of outwardly displaying gender.

- **Gender Identity (GI)** is a person’s inner sense of being a woman, man, another gender, or having no gender at all. GI does not necessarily align in a traditional sense with the sex a person is assigned at birth (typically female or male). GI may also change over time for some people.

Source: lgbt.hms.harvard.edu/terminology

Gender Definitions & Terms, cont.

- **Gender Nonbinary:** Umbrella terms used to describe people whose gender falls outside of the traditional gender binary structure of woman or man, including individuals who identify as neither a woman nor man, who identify as both a woman and a man, or whose gender identity fluctuates or changes. Individuals in this group may or may not identify with the term "transgender." (Other identities under this umbrella may include: Genderfluid, Genderqueer, and more.)

- **Intersex** (sometimes called "Differences in Sex Development," or DSD) describes diversity in sex characteristics whereby reproductive organs, genitals, or other sexual anatomy differ from traditional expectations for "female" or "male." Sometimes intersex traits are noticed at birth and sometimes not until puberty or later. This is not the same as transgender, as sex development is different from gender identity. Intersex can be used as an identity term for someone with one of these traits. Intersex people may identify with a range of sexual orientations and gender identities.

Source: lgbt.hms.harvard.edu/terminology

Gender Definitions & Terms, cont.

- **Queer:** Describes people who think of their sexual orientation or gender identity as outside of societal norms (ie, not straight or cisgender). Some people view the term queer as more fluid and inclusive than traditional identities. Although queer was historically used as a slur, it has been reclaimed by many in the LGBTQIA+ as a term of empowerment.

- **Transgender:** An umbrella term for people whose gender identity and sex assigned at birth do not align based on traditional expectations (eg, a man assigned a female sex at birth). Sometimes the shortened "trans" is used.

Source: lgbt.hms.harvard.edu/terminology

Sexual Orientation

Sexual Orientation is how a person defines their physical, emotional, and romantic attachments to other people.

- Includes one's attraction, behavior, and identity, all of which may change over time for some people.
- Transgender people may have any sexual orientation, like cisgender people

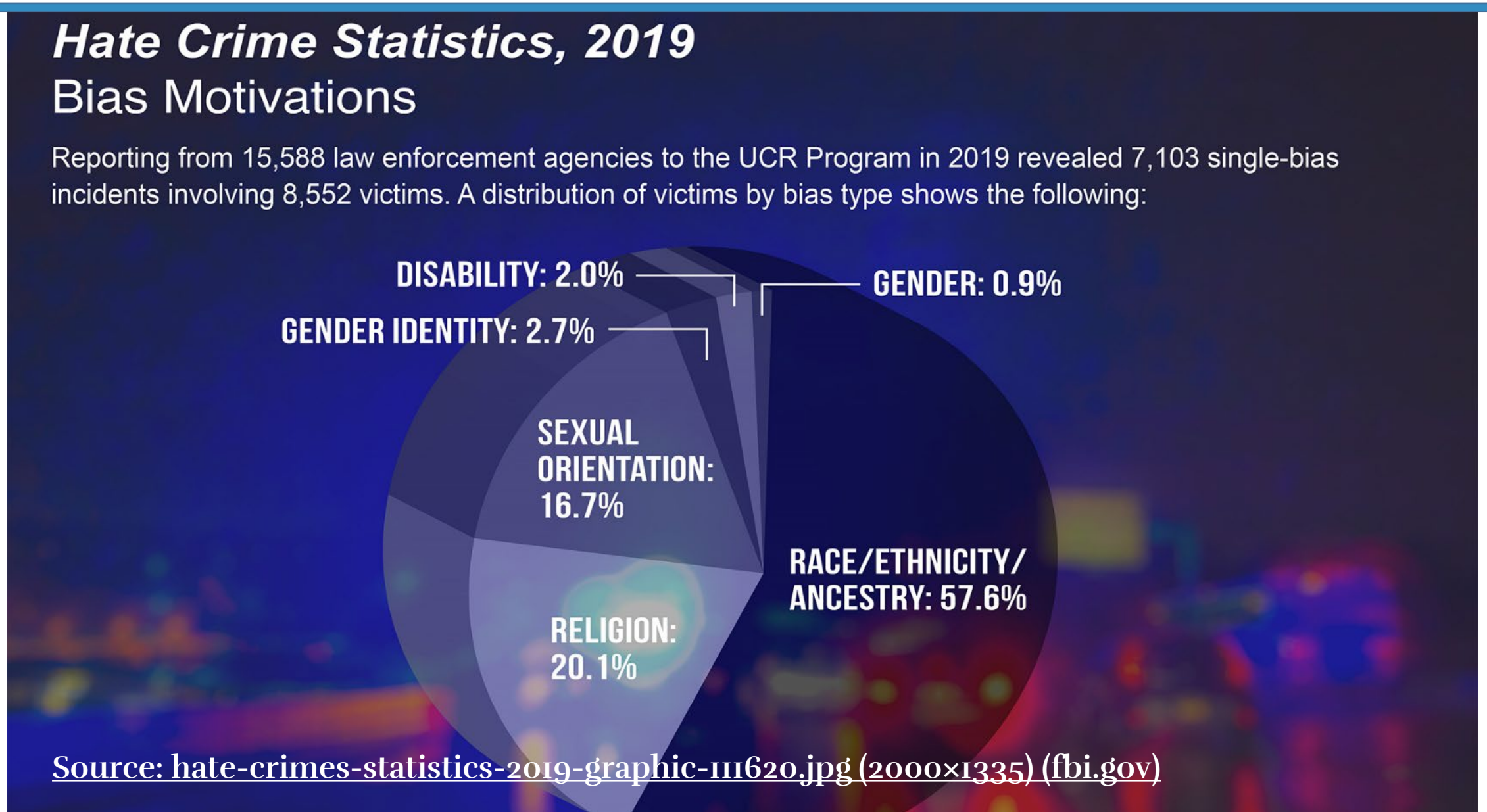
Terms

- Asexual
- Lesbian, Gay (L,G)
- Bisexual (B)
- Pansexual
- Queer or Questioning (Q)
- Straight/Heterosexual
- And more….
- Some people identify with multiple terms

Source: Harvard Medical School Sexual and Gender Minority Health Equity Initiative (Updated May 1, 2020)

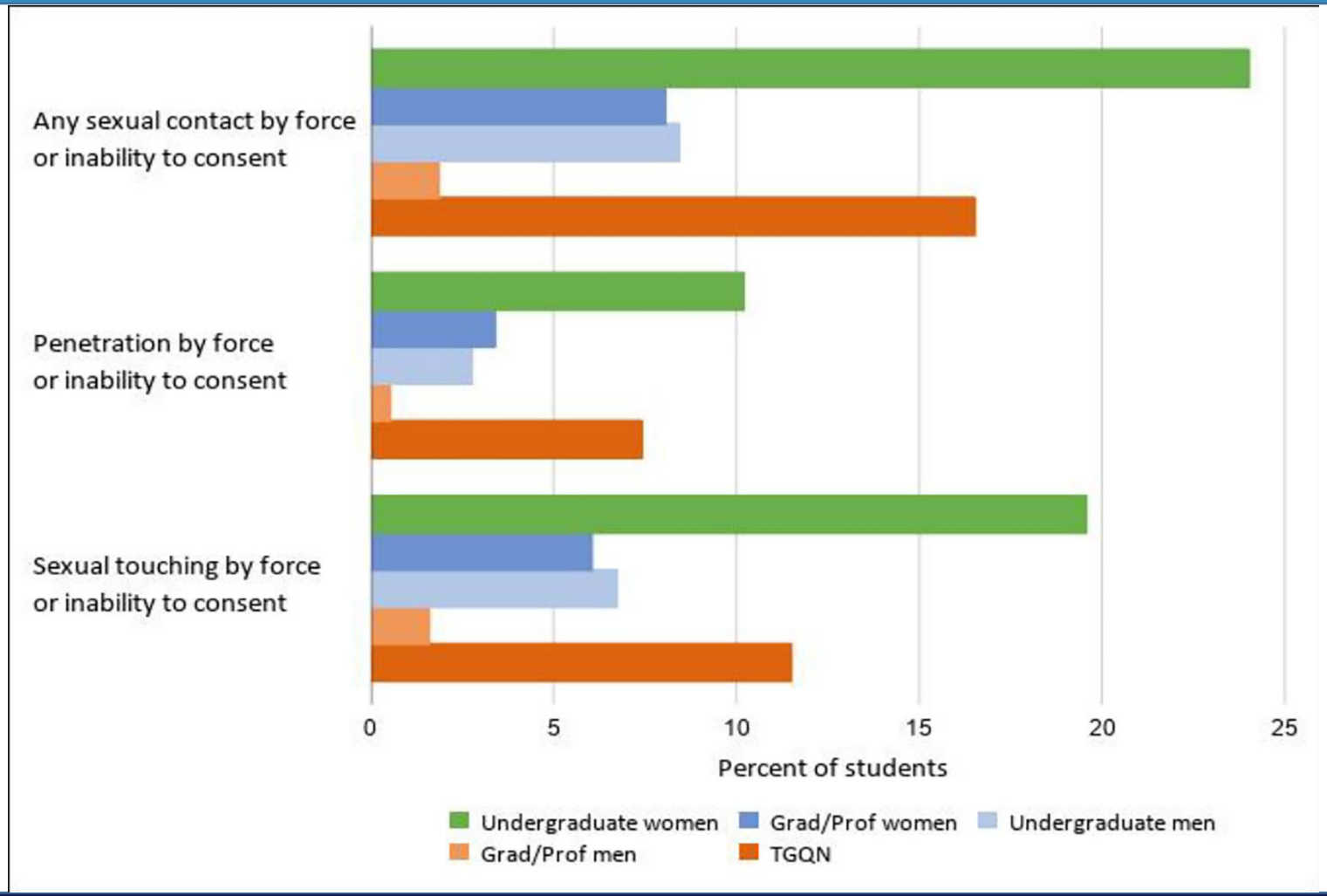
Contextualizing These Communities

Anti-LGBTQ Hate Crimes



Source: hate-crimes-statistics-2019-graphic-111620.jpg (2000×1335) (fbi.gov)

Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct, Harvard, Figure 3 (Sept. 2019): "TGQN" Students



Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct, Harvard (Sept. 2019): TGQN Students, cont.

Penetration by physical force or inability to consent. Focusing on incidents of penetration since entering Harvard University, among undergraduates, 10.2 percent of women and 2.7 percent of men reported this type of victimization. There is a statistical difference between undergraduate women and men. Among graduate/professional students, 3.4 percent of women and 0.5 percent of men reported they experienced this type of victimization. There is a statistical difference between graduate/professional women and men. Among TGQN students, 7.4 percent reported they were a victim. There is not a statistical difference between TGQN students and undergraduate women.

Key Takeaways

Key Takeaways

- ✓Name and pronouns
- ✓Privacy
- ✓Diversity of experiences
- ✓Language: best practices

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The Neurobiology of Trauma

U.S. DOJ, Office of Justice Programs, National Institute of Justice, Dr. Rebecca Campbell, Michigan State University: Take Home Lessons

Neurobiological changes resulting from a traumatic experience can lead to flat affect or "strange" emotions or emotional swings

- Wide range of emotions are in fact normal
- Story may come out fragmented or "sketchy"; does not necessarily mean evasiveness or lying (https://nij.ncjrs.gov/multimedia/video-campbell.htm, December 2012)

Source: Campbell & Patterson, 2011

Neurobiology of Trauma: Ongoing Scholarly Inquiry

- "[T]he mind does not operate like a video recorder, infallibly encoding our experiences, traumatic or otherwise. And recollection is not like a replay of one's experience. Rather, autobiographical recall entails reassembly of encoded elements of the event distributed throughout the brain. Terror during trauma focuses one's attention, strengthening memory for the most salient features of the experience, and occasionally at the expense of less salient ones[.]" – **Professor Richard McNally, Harvard Department of Psychology, "What is PTSD?"** ***The Guardian*****, 5 October 2016**

- "Our memories are not perfect reconstructions of the past. Instead, remembering a past event is a combination of processes, piecing together many separate details, and making inferences to fill in the gaps to create a coherent whole. . . . Our current drives, biases, stereotypes, and expectations can all affect that inferential process . . . . [C]onverging evidence demonstrates that experiences of trauma . . . are also vulnerable to memory distortion." – **Professor Deryn Strange, John Jay College of Criminal Justice,** ***Psychology Today*****, May 23, 2016**

Neurobiology of Trauma: Ongoing Scholarly Inquiry, cont.

"In a comprehensive study, Rubin, Deffler, et al. (2016) assessed 60 trauma-exposed adults, half of whom had PTSD. The authors matched the groups in terms of trauma type (e.g., combat, childhood sexual abuse, accidents) and other variables. Participants recounted three traumatic, three very positive, and three very important memories. Each narrative was audiotaped, transcribed, and subjected to 28 measures of coherence. Most measures indicated that trauma memories were as coherent as very positive and very important memories, and participants with PTSD had no less coherent memories than did trauma-exposed participants without PTSD. Trauma memories were slightly less coherent than other memories on some measures but slightly more coherent on other measures. Taken together, these data counter the claim that trauma memories are characterized by a lack of narrative coherence, especially in individuals with PTSD. Although Brewin (2016) challenged this conclusion, Rubin, Berntsen, Ogle, Deffler, and Beckham (2016) convincingly rebutted Brewin's critique." – Retrieving and Modifying Traumatic Memories: Recent Research Relevant to Three Controversies - Iris M. Engelhard, Richard J. McNally, Kevin van Schie, 2019 (sagepub.com)

Neurobiology of Trauma: Ongoing Scholarly Inquiry, cont.

- "We know of no scientific studies that support th[e] contention of neurobiological response differences between perpetrators and victims."
- "[I]t is clear that the influence of stress and emotion on the brain are complex and multifaceted, leading at times to the enhancement of memory and at other times to the disruption of encoding and retrieval processes."

Source: Meissner, C.A. & Lyles, A.M. Title IX Investigations: The Importance of Training Investigators in Evidence-Based Approaches to Interviewing – ScienceDirect, *Journal of Applied Research in Memory and Cognition* (December 2019).

Neurobiology of Trauma, cont.

- "Much of what people think they know about trauma is far more conjectural than empirical."
- "Put succinctly, the presence of trauma is not a substitute for the absence of evidence."
- "Missing information should not be held against someone, if it is missing as the result of trauma, but trauma itself does not provide a rationale for bolstering credibility in the absence of evidence."

Source: Association of Title IX Administrators Position Statement, Trauma-Informed Training and the Neurobiology of Trauma, August 16, 2019, 2019-ATIXA-Trauma-Position-Statement-Final-Version.pdf. (Harvard is not a member of this Association.)

Neurobiology of Trauma: From the Preamble to the New Title IX Regulations (the "Preamble"*)

Preamble, pp. 590-591 [30069]: "The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings. The final regulations require impartiality on the part of Title IX personnel (i.e., Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions) to reinforce the truth-seeking purpose of a grievance process. The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking." (*All page citations are to the unofficial version of the Preamble to the new Title IX regulations, with the official page citations, published in the *Federal Register* on May 19, 2020 at 85 Fed. Reg. 30026 (codified in 34 C.F.R. Part 106), in "[]." The Preamble is not part of the regulations, but it is useful for training because it is commentary by the agency charged with interpreting and enforcing the regulations.)

Neurobiology of Trauma: From the Preamble to the New Title IX Regulations, cont.

Preamble, pp. 590-591, cont. [30187]: "While the final regulations do not use the term 'trauma-informed,' nothing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) [prohibiting 'a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent'] and other requirements in § 106.45 ['Grievance process for formal complaints of sexual harassment']."

Neurobiology of Trauma: From the Preamble to the New Title IX Regulations, cont.

Preamble, p. 590, footnote 817 [30187, fn. 817]: [Citing] Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019) (white paper summarizing trauma-informed approaches to sexual misconduct investigations, identifying scientific and media support and opposition to such approaches, and cautioning institutions to apply trauma- informed approaches carefully to ensure impartial investigations)

Source: www.hklaw.com/-/media/files/insights/publications/2019/07/fairequitabletraumainformed-investigationtraining.pdf?la=en

Neurobiology of Trauma: From the Preamble to the New Title IX Regulations, cont.

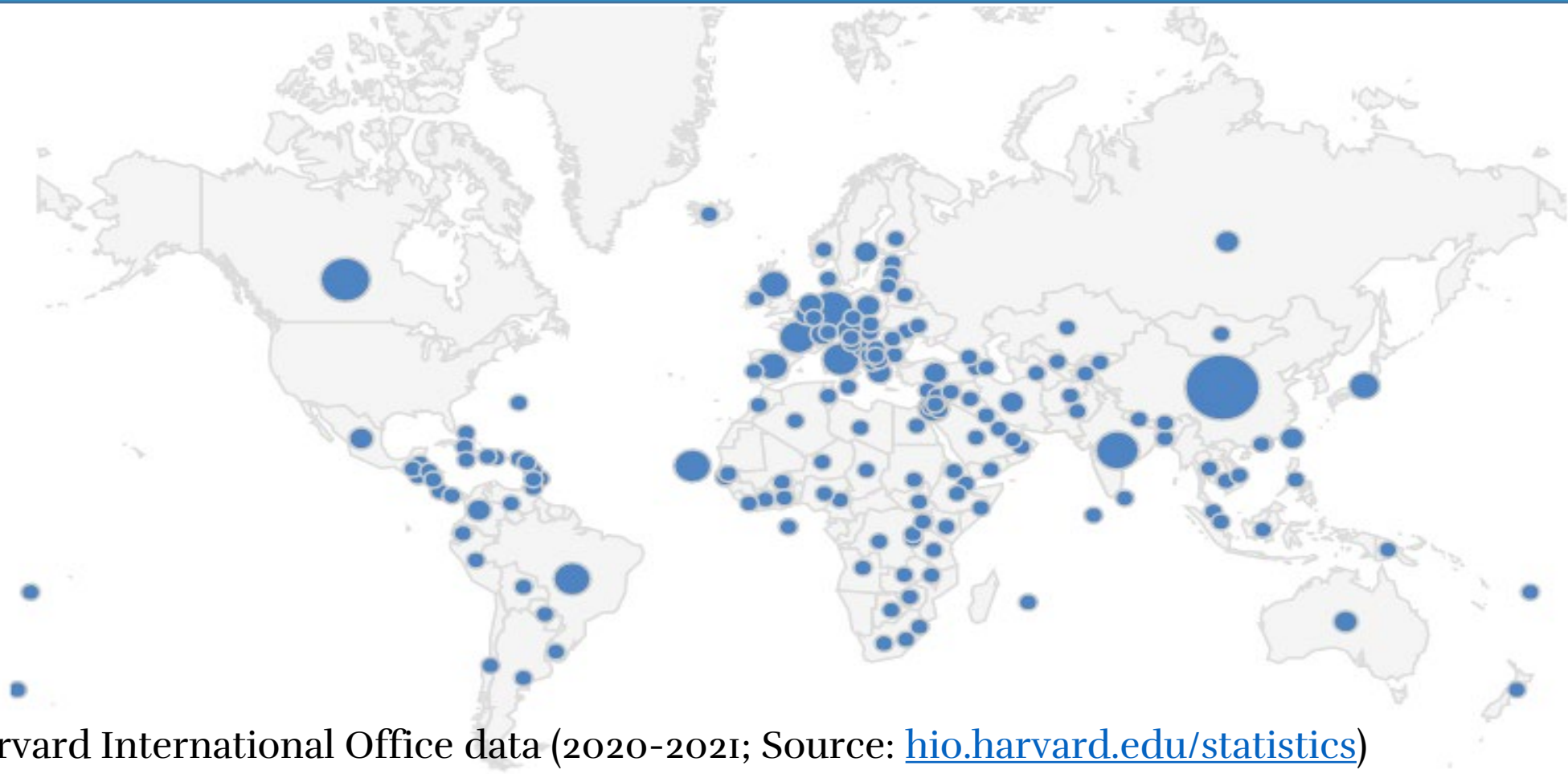
Preamble:

- p. 804 [30245]: "Being sensitive to the trauma a complainant may have experienced does not violate § 106.45(b)(1)(i) [a grievance process must '[t]reat complainants and respondents equitably'] or any other provision of the grievance process, so long as [. . .] 'being sensitive' does not lead a Title IX Coordinator, investigator, or decision-maker [e.g., a hearing or appellate panelist] to lose impartiality, prejudge the facts at issue, or demonstrate bias for or against any party."
- p. 1088 [30323]: "As attorneys and consultants with expertise in Title IX grievance proceedings have noted, trauma-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases."

Cultural Sensitivity

Cultural Factors May Impact Investigations

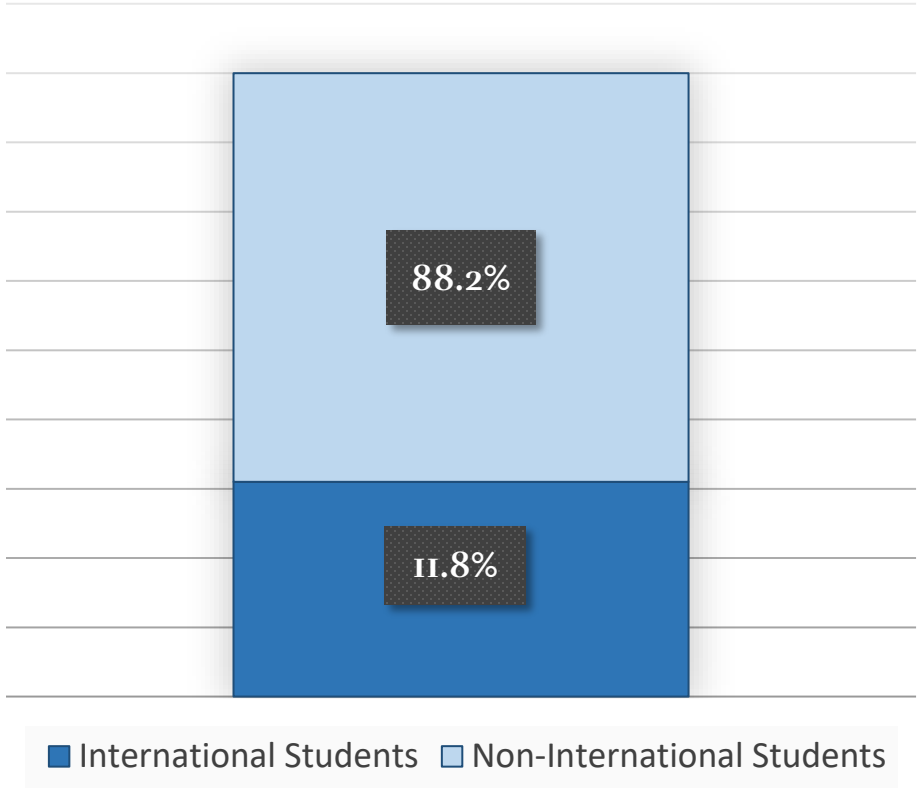
Harvard's Diverse Geographic Representation



Harvard International Office data (2020-2021; Source: hio.harvard.edu/statistics)
*approximately 9,977 students and scholars; 160 countries

Harvard College Class of 2024 Statistics

"Geographical breakdown"



"Ethnicity"

African American	14.7%
Asian American	24.4%
Hispanic or Latino	12.7%
Native American	1.8%
Native Hawaiian	0.3%

Source: college.harvard.edu/admissions/admissions-statistics

International Representation in ODR Cases

Since 2014, Complainants and Respondents have been from the following countries (other than the U.S., including first-generation immigrants):

- Argentina
- Australia
- Brazil
- Bulgaria
- Canada
- China
- Costa Rica
- El Salvador
- England
- France
- Haiti
- Ireland
- Jordan
- Kenya
- Mexico
- New Zealand
- Peru
- Poland
- Russia
- Scotland
- Somalia
- South Korea
- Turkey
- Zimbabwe

Translation and Interpretation

- Might be requested based on objectively demonstrable need by, e.g., a staff member (i.e., because for Harvard students a certain level of English fluency is typically required as a condition of admission) participant in an investigation
  - translation of written documentation
  - verbal interpretation during interview
- The party or witness must request a translator or interpreter; ODR as a neutral cannot suggest that the party or witness may need either

Translation and Interpretation, cont.

ODR may secure a neutral English translation if the English translations provided by the respective parties are in what ODR deems to be material conflict. ODR also sometimes secures a neutral English translation of a non-English communication translated into English by only one party, for ODR's reasons such as sampling for accuracy. Moreover, ODR will not seek a neutral English translation of a non-English communication that both parties have translated into English, if ODR has not deemed the difference between the parties' English translations to be material, even if a party nevertheless asserts that the difference is, in their own view, material.

Translation and Interpretation, cont.

Also note that ODR will generally not credit any bracketed commentary inserted by parties into their own English translations of non-English documents. Each party is, on the other hand, always free to seek neutral English translations of their own, by a qualified professional translator (with documentation thereof), at the party's own expense. ODR will always independently reach out to a translator secured by a party, in order to verify both the professional qualifications of the translator and the neutrality of the translation process. ODR will inform both the party and the party's translator that the party's translator's response to ODR's questions is voluntary, but if the party's translator does not choose to respond to ODR, ODR will not rely on the translation.

Variance in Cultural Norms

Cultural norms ODR has encountered:

- Propriety of hugging a co-worker, peer, or subordinate
- Propriety of kissing a co-worker, peer, or subordinate on one or both cheeks (as a greeting)
- Cultural stigma surrounding infidelity
- Proper amount of physical space between individuals in the workplace/eye contact
- Pursuit of romantic relationships
- Drinking behavior
- Discussion of feelings
- Interpretation and use of certain words, messages, symbols, including "jokes"
- Gender roles, e.g., "appropriate" careers

This is why it is so important that ODR looks at both objective and subjective factors with regard to unwelcome conduct.

Additional Considerations for International Students

What issues arise with respect to international students and undocumented students who experience sexual violence?

- Title IX protects all students located in the United States, regardless of their country of origin
  - Must ensure all students are aware of their rights
- Student visas may require full course load; prior approval required for reduced course load
- Invoking immigration status or threatening deportation may be seen as retaliatory

Conducting Interviews

What We Know from Experience Interviewing Parties and Witnesses

Framing Interviews with the Parties

- Outline briefly how the interview will be conducted with some indication of the objective.
- The names of witnesses and the content of interviews that may be relied on by ODR in findings of fact/determination will be shared with both parties.

Interviewing the Parties

- Remind parties of the right to a personal advisor.
- Remind Respondent that advised in Policy to seek legal counsel before making any written or oral statements when allegations, if true, might constitute criminal conduct.
- Remind parties of the right to consult an attorney at any time during the investigation.

Interviewing Respondent

- Elicit Respondent's version of events, suggestions for witnesses, other evidence, in same level of detail as Complainant's version. (Parity/neutrality/impartiality)

- Explain process, which Policy standards may have been violated, and what to anticipate.

- Explain that confidentiality/retaliation provisions also protect the Respondent.

Interviewing Witnesses

- Share as little information as possible with witnesses to gather the evidence that is needed
- Explain that confidentiality and retaliation provisions apply
- Explain that witness interview summaries of information directly related to the allegations under investigation will be shared with the parties
- At conclusion, ask if anything else to share?

During the Interview

Listen with purpose. Always keep in mind the specific relevant information that you, with the burden of proof, need to verify or refute the potential Policy violation(s) you are investigating, even while allowing for a wide variety of narrative approaches and while being neutral and trauma-informed.

Attending: to pay attention to

Attending is when the interviewer indicates, through both words and body language, including posture, that she or he is paying close attention to the interviewee and wants to hear what the interviewee has to say. If you are feeling fatigued, it is okay to ask for a break.

Beginning the Interview

- Explain the interview process
  - may have to redirect the discussion if it gets into areas not relevant (S&GBHP and IOSMP) or not directly related (ITIXSHP) to the investigation
- In ODR's experience, interviews can vary greatly in length, from less than an hour to, in rare situations, 8 or more interview sessions lasting one to three hours.

General Interviewing Strategies

- Ask questions that are relevant and within the scope of the investigation

Ordinarily:

- Ask open-ended, general questions calling for narrative answers before focusing on narrower, specific questions
- Avoid leading questions; ask questions in a manner that discloses the minimum amount of information
- Avoid compound questions
- Elicit facts rather than conclusions
- Do not ask questions that assume information that hasn't been established yet

General Interviewing Strategies, cont.

<u>As applicable</u>:

Must be willing to ask difficult or sensitive questions in order to understand the intimate details of the incident; reassure the interviewee that this is ODR's role, and we do so without any, e.g., value judgment

- Ask in a neutral, receptive manner

General Interviewing Strategies, cont.

- Clarify conflicting statements, information behind opinions, contemporaneous documentation
- Avoid premature conclusions or assumptions about the facts (neutral/impartial)
- Ask and order questions in ways to encourage parties and witness to provide information that will help the investigator to, sooner or later, relate events chronologically, emphasizing that the ultimate burden to eventually relate events chronologically is, like the burden of gathering evidence itself, always on the investigator, not the parties.

General Interviewing Strategies, cont.

- Ask only for firsthand knowledge from witnesses, including, e.g., the witness explaining what Complainant, Respondent told him or her relevant to the matters at issue

- Ask witnesses to identify all individuals who may have relevant information and the nature of that information

- Ask witnesses to identify any relevant documents

Putting the Interviewee at Ease

- NEUTRAL/IMPARTIAL
- Professional
- Polite
- Attentive

Probing

Q. What is probing?

A. Asking follow-up questions about a given interview response to identify and obtain more specific information that the initial response may have behind it.

Probing, cont.

- Be silent – sometimes an effective probe.
- If it appears you may have provoked a negative emotion from an interviewee, e.g., anger, hostility, indignation, or fear, one way of letting the emotion defuse is not to persist but to circle back to the subject again later once the interviewee has regained composure, and/or offer to take a break.

Interviewing Challenges

Dealing with Negative Feelings

Witness is responding negatively to something interviewer is doing

- Listen closely and watch non-verbal cues to gauge total message
- Try to identify the source of the problem
- Reflect your understanding of the problem in simple terms
- Concentrate on the response
- Acknowledge the problem again, alter any behavior on your part that is contributing to a negative response, and continue the interview

Assessing Witness Credibility and Relevance

- Was the witness able to see, hear, or know the things about which they reported?
- How well could the witness remember and describe the things about which they reported?
- Did the witness have any interest in the outcome of the complaint or any other motive that might go to the weight of the information provided? Any indication the witness was coached?

Assessing Witness Credibility and Relevance, cont.

- Uncertain, confused, self-contradictory, or evasive during the interview? Possible legitimate reasons for this?

- Make sense considering the totality of the information gathered to date, including, e.g., the evolving timeline of the case, site visits (if applicable), other party and witness information, and other documentary, etc., evidence?

- Make sense considering the known relationships in the case?

Drafting Investigative Reports

Findings of Fact and Determination: S&GBHP and IOSMP

The Investigative Team will make findings of fact, applying a preponderance of evidence standard, and determine based on those findings of fact whether there was a violation of the Policy.

Factual findings on each issue investigated:

The Report should summarize the key facts supporting each finding, including information obtained through party and witness interviews and documents.

Material conflicting information should typically be identified. If the Investigative Team was able to resolve the conflict, the report should indicate how (for example, by corroborating documents or witnesses, if applicable).

Analysis and Determination: Based on the findings of fact on the preponderance of the evidence, was the Policy violated?

Drafting the Report

Be objective, neutral, and precise in your summary of the evidence and findings of fact (S&GBHP and IOSMP) or recommended findings of fact (ITIXSHP).

Recommended Findings of Fact: ITIXSHP

- The Investigative Team makes recommended findings of fact in the investigative report, applying a preponderance of the evidence standard.

- The Hearing Panel independently makes the determination regarding responsibility, applying a preponderance of the evidence standard.

Recommended Findings of Fact: ITIXSHP, cont.

Recommended factual findings on each issue investigated

- The investigative report should summarize the key facts supporting each recommended finding, including information obtained through party and witness interviews and documents.
- Material conflicting information should typically be identified. If the Investigative Team was able to resolve the conflict, the report should indicate, in the recommended finding, how (for example, by corroborating documents or witnesses, if applicable).

Recommended Findings of Fact: ITIXSHP: Evidence

In gathering and weighing evidence, the Investigative Team will note that whether conduct is unwelcome is subjective, that is, based on whether the person subject to the conduct viewed it as unwelcome. However, in making recommended findings of fact as to whether consent was communicated by the person subject to the conduct, and as to the elements of severity, pervasiveness, objective offensiveness, and denial of equal access, consideration should be given not only to the subjective perspective of the person subject to the conduct, but also to the objective view of a reasonable person, based on the totality of the circumstances.

Recommended Findings of Fact: ITIXSHP: Evidence, cont.

The following types of information may be helpful in making recommended findings of fact, while avoiding prejudgment of the facts at issue:

- an objective evaluation of all relevant evidence – including both inculpatory (tending to support that the alleged conduct occurred) and exculpatory (not tending to support that the alleged conduct occurred) evidence;
- statements by any witnesses to the alleged incident;
- information about the relative credibility of the parties and witnesses, so long as credibility determinations are not based on a person's status as a complainant, respondent, or witness;
- the detail, consistency, and plausibility of each person's account;
- the absence of corroborating information where it should logically exist;

Recommended Findings of Fact: ITIXSHP: Evidence, cont.

The following types of information may be helpful in making recommended findings of fact, while avoiding prejudgment of the facts at issue, cont.:

- information that the Respondent has been found to have committed sexual misconduct or harassment;
- information that the Complainant has been found to have made false allegations against others;
- information about the parties' reaction or behavior after the alleged incident; and
- information about any actions the parties took immediately following the incident, including reporting the matter to others.

A Brief Look Back at Today's Agenda

- Initial review under the procedures for the three policies: S&GBHP, ITIXSHP, and IOSMP
- Investigative Planning and Identifying and Evaluating Evidence
- Community Relationships in ODR Investigations
- LGBTQ Communities: Terminology and Best Practices
- The Neurobiology of Trauma
- Cultural Sensitivity: Cultural Factors May Impact ODR Investigations
- Conducting Interviews: What We Know from Experience Interviewing Parties and Witnesses
- Drafting Investigative Reports