

## Guidelines for Adjudicating Sexual Misconduct Cases

Much work has been done over the years to create a procedure for responding to sexual misconduct cases that takes into account some of the unique attributes of these allegations. For a number of years, Judicial Affairs worked closely with staff from the Center for Women Students and the Centre County Women's Resource Center in creating guidelines for responding to victims and accused students. One of the significant outcomes of these efforts was the creation of a training manual for responding to incidents of sexual misconduct. Each JA designee should have a copy of this manual for reference. The information which follows in this section is intended to assist the JA Designee in working through cases involving sexual misconduct. It begins with some considerations for both the accused student and victim as well as general considerations for the Designee or Board Members who may work on a case.

### ***Consideration for the Accused Student***

- Whether responsible or not responsible, the allegation of this type of behavior may be overwhelming.
- Often, when asked if a person has committed a sexual assault they would say no, however asking if they participated in certain "behaviors" may get a different response.
- We are addressing a topic that the student may not have ever discussed in public before.
- The support system for the accused student will vary – friends, family may or may not be aware or if aware, may not be supportive.
- The emotions of the accused may range throughout the proceedings; they may find themselves trying to defend actions that even they do not understand.
- The typical level of sanction in these cases will warrant some level of suspension – the pressure on the student may be expressed in anger, frustration, fear, even humor.

### ***Consideration for the Alleged Victim***

- Consider the personal nature of the information they are sharing; Info not shared even with close friends, but now with strangers.
- Victim may be hesitant to acknowledge behaviors which are violations of policy for fear of recourse.
- Responses of Victim will vary – anger, fear, anxiety, guilt, self-blame, shame, may all be apparent.
- Victim may present as calm, composed, subdued, crying.
- Recall may come in waves. Victims may recall things in hearings that they did not recall initially.
- Victims may be non-trusting of the process and those who represent the process – this could be a direct outcome of what has occurred – someone they trusted betrayed them.
- Although the percentage of false reports is 2%, most victims assume they are not believed. Otherwise – why would there be a hearing?
- Victims need evidence of concern, safety, and security & validation of feelings; this can be difficult given the unbiased approach necessary for the Board.

## ***Consideration for Designees, Board members, etc.***

- We come to the table with biases and assumptions from our own experience with the issue.
- Most have not had experience in questioning others about their sexual experiences.
- We need to acknowledge the difficulty it may be for students involved to talk about their personal lives to strangers.
- During a disciplinary conference or a hearing we need to keep our own responses and reactions in check and know when it would be best to request a break.
- We may be challenged to distinguish between violations of policy and poor judgment.
- Board members must be comfortable knowing that their decision may lead to a student's separation.
- We need time to process feelings associated to our personal reaction to what is being shared in the hearing.

## ***Tools for Use in Sexual Misconduct Cases***

An important aspect in sexual misconduct cases is determining consent and whether or not it was provided willingly. The two charts which follow should designees and board members in making these determinations.

### **The Response Continuum: From Written Consent to Self-Defense\***

1. Written Consent:

Admittedly unrealistic in most sexual situations but, often raised as a question in educational programs, especially by men (“What do we need, a signed contract or what?”). It is an explicit and verifiable expression of consent.

2. Explicit verbal consent:

Saying “Yes” to a specific sexual activity. Both the language and the exact sexual activity are clear and specific.

3. Explicit nonverbal consent:

Reciprocating a sexual activity or initiating a more intimate sexual activity, such as kissing someone in return or taking off the partner's clothes. When appropriate to the context and “in sync” with the partner's behavior, such nonverbal communication can be almost as clear as a verbal expression of consent.

4. Ambiguous verbal and nonverbal consent:

Expressing some sort of consent in words or actions, but not clearly tied to a sexual activity. For example, saying “Let's spend the night together” or getting up to turn off the lights after reciprocating a kiss. The ambiguity leaves the interpretation of the behavior particularly vulnerable to misunderstanding based on the other person's assumptions and attitudes.

5. Absences of consent, acquiescence:

Expressing little or no consent or refusal. For example, acting passive and quiet.

6. Ambiguous verbal and nonverbal refusal:

Expressing vague reluctance or discomfort, such as “I’m not sure this is a good idea,” or minimally reciprocating a sexual activity. Again, this ambiguous communication is particularly vulnerable to misunderstanding.

7. Explicit nonverbal refusal:

Actively interrupting a specific sexual activity, such as pushing a partner’s hand away or getting up and getting dressed.

8. Explicit verbal refusal:

Clearly saying “No” to a specific sexual activity, such as: “Stop touching me there…” or “I don’t want to have sex with you.”

9. Physical Resistance:

Actively struggling to stop all physical contact or get away. Screaming or calling for help.

10. Fighting back in self-defense:

Actively punching, kicking, etc. to protect oneself by injuring the assailant. In the extreme, this would include “justifiable homicide” in self-defense.

**The Influence Continuum: From Invitation to Weapons\***

1. Simple verbal request or invitation:

Making a request or invitation in the context of a relationship, for example, “would you like to have sex tonight?”

2. Nonverbal request:

Initiating sexual activity in the context of a relationship and adjusting any further contact to the person’s response

3. Bargaining with positive consequences within the relationship:

Trying to influence the other person to have sex by pointing out the positive consequences of doing so. This may sometimes be seen as a “sales pitch” or a promise, depending on the circumstances. For example, “If you do have sex with me, we will get engaged.”

4. Quid quo pro bargaining:

Claiming to have “earned” sexual contact, or that the other person “owes” it, based on something already done or offered. For example, “You owe me sex because of all the money I spent on you tonight at dinner.” A variation is claiming the other person is obligated to have sex because of something the other person has already done (e.g. “you owe me sex of because how you were flirting”).

5. Bargaining with negative consequences within the relationship:

to influence the other person to have sex by pointing out the damage to the relationship of not complying. This can be viewed as giving the person an informed choice, warning, or a threat. For example, “If you don’t have sex with me, I’ll be hurt… I’ll pout… I’ll start dating someone else.”

6. Emotional intimidation:  
Threatening or actually making verbal attacks against the person as a whole, in ways which are more abusive than simple expressions of anger and which cause broad emotional injury.
7. Role intimidation:  
Threatening or actually using the authority of one's job or role to threaten loss of income or status. For college students, using one's social standing to threaten the loss of status in social groups would be considered here.
8. Physical intimidation:  
Refusing to leave the other's room, invading personal space, etc., but not actually making physical contact.
9. Use of physical force to dominate or compel:  
Grabbing, holding, twisting arms, etc., in order to continue sexual activity. This includes physically insisting on continuing sexual contact in the face of resistance.
10. Use of physical force to cause additional injury:  
Punching, slapping, choking, etc., which causes injury beyond the sexual assault.
11. Use of weapons:  
Threatening or actually injuring with a knife, gun or weapon.

*\*Information provided by Lawrence A. Tucker at ASJA Conference 1995*

### ***Protocol for Working with Victims in Cases Involving Sexual Misconduct***

The following protocol has been established in an effort to provide Penn State Judicial Affairs Designees with a step-by-step overview of our system-wide response of managing student discipline cases related to sexual misconduct.

When responding to an allegation, it is important that victims are made aware of the following:

- Medical Support Services on campus
- Health Center/local hospital/CART Team contact for participation in an exam
- Police Services personnel or local law enforcement that may handle an investigation
- Explanation and option for an Administrative Directive
- Campus support services: counseling and psychological services, victim advocate
- Community agency that responds to sexual assault, rape or harassment/stalking: is there a 24 hour hotline or a person who would be available during off-hours?
- Statewide or nation-wide phone numbers and web-sites for information
- Housing: possible shelter options for the victim on and off-campus (important to mention that this is if they would like this option, not that we believe that they need to leave the environment).
- Support staff to assist in retracting public/directory information of the student, i.e. changing e-mail, phone number and/or living address information

- 1) If you are the first contact with the victim, review resources available. Be sure that she/he is not currently in danger, or if she/he is, help determine a safety plan. This may include medical assistance, shelter/housing options, and emotional support.
- 2) In your first meeting with the victim, try to ascertain what, if anything, she/he would like to have happen. Although she/he may have been a victim of a violation of policy, she/he may not want to follow through with any type formal action (see manual for explanation of what victim may be experiencing).
- 3) Explain to the victim prior to them disclosing their story that her/his participation in the process is voluntary and if for any reason they wish to discontinue, she/he may do so. However, you will need to inform the victim that the University reserves the right to continue with the process without the victim's participation under certain circumstances such as: when there is enough independent information available that would support a violation of the Code; when a weapon was involved; when we believe the alleged perpetrator would be a danger to themselves or others; or when it is an incident involving a stranger, etc. If we need to proceed forward without the victim's consent we may need to use the Police as our complainant (you should consult when presented with this type of case).
- 4) If the victim has made a statement to the Police prior to meeting with you, she/he may wish to use the same statement in filing a complaint with you. This is actually the best strategy since there will be a consistent story. As well, the student may not be comfortable repeating the incident again. However, if the victim would prefer to write a new complaint, encourage them to do so. It is important that the victim focuses on the facts of the incident, and to be aware that the alleged perpetrator will see the complaint. If the victim is going to leave your office to prepare their complaint, suggest that they have an advocate or other support person available in the event that preparing the statement proves to be difficult.
- 5) In the event the victim requests only an Administrative Directive, please place a case note in JACS indicating the date the request was made. It is important to clarify that if the victim wishes to proceed in the future, we would be willing to review the allegation as long as the alleged perpetrator has student status.

Unless clearly warranted by the circumstances, rather than you assigning the victim a formal Administrative Directive (for no contact with the accused student), you should advise them that any initiated contact with the recipient of the directive by victim could void the original directive for no contact. Clarify that the accused student may request an administrative for the victim and at that point one would be issued. You should also explain the University response in cases where a student violates a directive.

- 6) Allow the victim time to determine their best course of action. If an advocate is not with them, remind them that they can bring an advocate to any future meetings, and that it may be most appropriate to move ahead with the directive (if they request one). After the initial meeting with the accused, give feedback to the victim.
- 7) If the victim wishes to file a formal complaint, review the process of the Disciplinary Conference, the types of charges and sanctions specific to the behavior described, the definition of consent and how we make our determination, and the process of accepting or contesting a charge.

8) If it seems appropriate at the first meeting with the accused, explain to the accused the Hearing Board process, his/her rights and the victim's rights. This discussion, however, may be more appropriate in a follow-up meeting following the disciplinary conference.

9) When discussing victim's rights in a hearing, please focus on the following:

- The choice to participate either for the entire hearing or only for her/his testimony.
- The opportunity to testify with special accommodations: i.e. over the phone, behind a screen, video teleconference at other location of her/his choice, etc.
- The victim's right to have an advocate from on or off-campus: this should be strongly encouraged if there is a hearing so there is someone to provide unconditional support throughout the process.
- The option to have no direct contact with the charged student: i.e. questions from the accused student would be posed to a third party (i.e. the chairperson) and then relayed to the victim.
- The option to provide questions to the Presenter prior to or during the hearing that she/he may incorporate into questioning the accused student.
- The right to provide a victim impact statement that will be reviewed only by the board in the event that the charged student is found responsible. The impact statement may be considered when the board is determining a sanction.
- The opportunity to request a recess during the hearing if she/he needs a break or wishes to consult with you or the chairperson.
- Assuming she/he will be participating in the hearing, the option to appeal the Hearing Board's decision (see victim appeals in the manual).
- The victim will have the right to know the outcome of the process however, it will be imperative for you to discuss his/her responsibility of keeping the information confidential.

10) At the end of your first meeting with the victim, review the next steps in the process (if there are any). If she/he is only requesting a directive, you may contact her/him after you have issued the directive. If she/he files a formal charge, let her/him know that you will set up an appointment with her/him after you meet with the student in the Disciplinary Conference.

11) Be clear about information she/he has shared with you that she/he may not want you to share with the charged student, i.e. counseling services she/he is receiving, medical attention, whether or not she/he is filing criminal charges, etc.

## ***Guidelines for Adjudicating Sexual Assault Hearings***

### **I. Confidentiality is Essential**

All those present at any time during a hearing must be reminded that the process is confidential and not to be discussed outside of the hearing room.

### **II. An Orderly Process**

The Chairperson will inform all parties of their respective roles: the board chair, the board members, the presenter, the advocate for the victim, the advisor for the accused and any attorneys involved.

### **III. Minimize Adversarial Features**

Direct questioning by the accused student of the victim should not occur and vice versa. Questions should be directed to the Chair who shall then pose the question to the witness.

### **IV. Appropriate Questioning**

The Chair shall determine the appropriateness, relevance and admissible nature of any question posed by any party. Questions on the topic of unrelated past sexual activity are not allowed. *In sexual assault hearings, the presenter may ask the complainant if she/he has any additional redirect questions for any of the witnesses or the accused. The chair will determine the appropriateness of such questions.*

### **V. Sensitivity Counts**

Be aware that board members may be of differing developmental levels of awareness on the subject and may harbor personal feelings and biases. Board members will be reminded to be sensitive to all parties at the Hearing and to focus on the Hearing process.

### **VI. Gathering the Facts**

The primary role of all is to gather the facts and circumstances which inform the board as to what happened.

### **VII. Deliberating the Facts**

The board should consider the validity of the charges only after gathering and reaching a consensus upon what happened.

## ***Elements in a Sexual Assault Hearing:***

### **Rights of the Complainant (Victim)**

Throughout the Judicial process, the complainant maintains certain rights to ensure fairness and safety. Some of those rights are outlined below:

- To have the assistance of a victim/witness advocate throughout the entire process.
- To have an Administrative Directive sent immediately to the accused that forbids him/her from contacting you by any method, including through friends or acquaintances.
- If an Administrative Directive is violated the accused may receive an Interim Expulsion.
- To be relocated within the residence halls if a threat is present or in some cases to have the accused relocated.

- To hear the outcome of the discipline process.

In the event of a hearing:

- To present testimony either in person or by phone.
- To be questioned and provide responses to the accused through a third party.
- If presenting testimony in person, the option to observe the entire hearing.
- To meet with the presenter prior to and during the hearing to develop questions.
- To submit a victim impact statement to be considered by the Hearing Board before a sanction is assigned.

### **Rights of the Accused**

Throughout the Judicial Process, accused students maintain certain rights to ensure fairness. In order for the victim/ complainant to have as much information as possible concerning the process, some of those rights in reference to a discipline hearing are outlined below:

- To be informed in writing of all charges at least five (5) business days before any hearing. This right may be waived by the accused.
- To decline to testify or answer questions.
- To question witnesses that appear in person or by telephone at any hearing and to present witnesses of fact.
- To decide between an open or closed hearing.
- To appeal the hearing decision if it involves a sanction of Deferred Expulsion or greater.
- In cases where the accused student is facing criminal charges, their attorney may be present, but not actively participate.
- In cases where the accused is allowed to have an attorney present, to have an advisor from the University community attend the hearing.
- To NOT have the hearing taped.