


*2019-2020  
SEXUAL AND  
GENDER-BASED  
MISCONDUCT  
TRAINING*

*Session #1: Introduction, Overview, and Adjudication (Part 1)*

*September 6, 2019*


# *Introductions*

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- Attendees:
    - Name
    - Position on Campus
    - Role in SGBM Process
  - Initial Questions & Logistics
  - Terminology
  - Asking Questions & Open Discussion Throughout
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# *A Note About Privacy During Training*

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- Throughout our time together, we may reference past cases.
  - Please do not use names of people involved in cases.
  - Please do not share information outside of this group.
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# *Goals for Today*

- Briefly review the policies and statutes that guide our work
  - Review Sexual and Gender-Based Misconduct Policy and Procedures as they relate to our case study
  - Review general roles & responsibilities
  - Start reviewing adjudication process and analysis
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# *Why are we here?*

- Title IX of the Education Amendments of 1972
    - “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”
    - Thorough, Unbiased, Fundamentally Fair Response Process:
      - End the discrimination
      - Prevent its reoccurrence
      - Remedy the effects upon the victim & community
  - Regulations, Guidance, and Dear Colleague Letters from Office of Civil Rights – 2011, 2014, 2015, 2017, and 2019 (?)
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# *Why are we here?*

- Campus SaVE Act and VAWA of Clery Act
    - Federal law signed in March 2013
    - Address campus sexual assault in terms of crimes and how college/universities must handle them
    - Applies to sexual assault, domestic violence, dating violence and stalking
  - New York State Education Law Article 129-B (Enough is Enough)
    - Passed in July 2015
    - Applies to all colleges/universities in NYS, public and private
    - Provides requirements for affirmative consent definition and handling sexual assault, domestic violence, dating violence and stalking
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# *Reporting Resources*

- Prior to formally filing a report with the College, who could a Reporting Individual speak to that is confidential?
    - Confidential: cannot disclose any information without written permission from the student
    - On-campus
      - Health Services
      - Counseling Center
      - SGA attorney consultation
    - Off-campus
      - Saratoga Hospital
      - Wellspring
  - All these resources are available to any student at any time during the process as well.
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# *Confidential Resources*

- Health Services can provide:
  - General wellness check
  - STI/HIV Testing & Retesting
  - STI Prophylaxis
  - Plan B

All services listed are free for Reporting Individuals

- Counseling Center can provide:
  - Individual Counseling
  - After hours emergency counseling
  - Victim support services
  - Consultation, Education & Training
  - Referrals to area providers


All services listed are free.

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# *Confidential Resources*

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- Wellspring Advocate can provide:
    - Safety planning
    - Shelter
    - Crisis counseling
    - Legal Advocacy
    - Accompaniment
  - Saratoga Hospital Emergency Room can provide:
    - Sexual Assault Forensic Exam with Sexual Assault Nurse Examiner
    - General wellness check
    - STI/HIV Testing
    - STI/HIV Prophylaxis
    - Plan B
- 

# *Sexual Assault Forensic Exam*

Exam with Sexual Assault Nurse Examiner (SANE)

- Forensic exam designed to collect evidence
- Exams take hours and are quite invasive
- Patient can refuse any part of the exam
- Wellspring advocate is called and made available at any time
- Police are NOT notified without the patient's request
- Exam/samples will not be run/tested without a report to police.

Should be completed within 96 hours (4 days) of assault  
Hospitals hold evidence for a minimum of 30 days

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# *Reporting Resources*

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- Who could a Reporting Individual speak to that is anonymous?
  - Anonymous: date, time, location, and general category are shared for Clery; no identifying information is shared
  - On-campus
    - Victim Advocates, Health Promotion
      - Jen McDonald
      - Kim Golemboski
      - Wendy Walker
    - Peer Health Educators
  - Online reporting form
    - [Skidmo.re/sgbmanon](https://skidmo.re/sgbmanon)

# *Anonymous Resources*

- Victim Advocates can provide:
    - Anonymous support & reporting options
    - Information about the on-campus process
    - Information about reporting off-campus
    - Accommodations
    - Act as an SGBM Advisor for the on-campus process
  
  - Victim Advocates cannot:
    - Provide or require therapy
    - Aid in activism or public discussion/dialogue of individual cases (even with the consent of the victim)
    - Talk to parents, faculty, or other concerned parties without the written consent of the student
    - Pressure a student into reporting or not reporting an incident(s), either on-campus or off-campus
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# *Anonymous Resources*

- Peer Health Educators can provide:
    - Peer-to-peer support for Reporting Individuals
    - Information on reporting options
    - General sexual health information
  
  - Online Anonymous Reporting Form
    - Provides an option for victims to report an incident without meeting with a person
    - Contact information only needed if they want someone to contact them
    - Information collected is used for Clery purposes and general campus climate concerns
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# *Reporting Resources*

- Who could the Reporting Individual speak to that is private?
  - Private: as required by position, all information must be shared with the Title IX Coordinator
  - On-Campus:
    - Title IX Coordinator
    - Title IX Deputy Coordinator
    - Campus Safety
    - VP Student Affairs/Dean of Students
    - Student Affairs
    - Resident Assistants & Peer Mentors

# *2019-2020 Procedural Roles of TIXC, Deputy TIXC, & Campus Safety*

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- Title IX Coordinator – Joel Aure
  - Case Manager: Intakes, Investigation Oversight, Accommodations & Interim Measures
  - Adjudication Panel Logistics
  - Restrictions Tracking & Maintenance (Pre and Post-Adjudication)
- Title IX Deputy Coordinator – Gabriela Melillo
  - Primary investigator of SGBM cases
- Campus Safety
  - May receive initial reports of SGBM
  - Duty to respond to safety concerns
    - Provide emergency services such as, transport to hospital, immediate room change, etc.
  - Provide list of resources to Reporting Individuals
  - May co-investigate


# *Reporting Resources*

- Who could the Reporting Individual speak to that is not private and non-confidential?
  - Required by federal law to report all information to Title IX Coordinator
    - Student Affairs Staff (except Counseling Center, Health Services, Victim Advocates)
    - Residential Life Staff (professional staff, Resident Assistants and Unit Assistants)
    - Faculty
    - All Non-Confidential Staff, including Coaches & Athletics Personnel)
    - Any student in a position of authority, and any staff or faculty member not identified as a confidential source (includes Peer Mentors, RAs, and Peer Advisors)




# *Why do Responsible Employees Need to Report?*

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- All Reporting Individuals have the right to the same information and resources.
  - TIXC acts as a catch-all to make sure all students receive the same information and that we can document when and what information was shared.
  - TIXC provides information about resources, interim measures, and reporting options.
  - TIXC has information about other reports that may be important in regards to trends and patterns.
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# *Reporting Off-Campus*

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- If the Reporting Individual wanted to report to someone outside of the College, who could they speak to?
    - Saratoga Springs Police Department
    - New York State Police Campus Sexual Assault Victims Unit
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# *Skidmore's Sexual and Gender- Based Misconduct Policy*


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- The main components:
    1. Jurisdiction
    2. Affirmative Consent
    3. Prohibited Conduct
    4. Reporting Options
    5. Investigation and Adjudication Process
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# *Jurisdiction*


- Jurisdiction defined:
    - Complaints when a student is the accused are handled by the Title IX Coordinator or Title IX Deputy Coordinator
    - Complaints when a staff or faculty member is the accused are handled by Saytra Green, Assistant Director of Employment & Workforce Diversity in Human Resources
    - Complaints when a third party/individual not affiliated with Skidmore is accused cannot be handled through our adjudication process but the same resources and accommodations will be offered to the Reporting Individual
    - Reporting Individuals can be a student, staff member, faculty member, or third party/individual not affiliated with Skidmore. Reporting Individuals may be of any gender identity/expression or sexual orientation.
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# *Jurisdiction*

- Skidmore policy applies to conduct occurring on Skidmore college property or at College-sanctions events or programs that take place off-campus, including study abroad and internship programs.
  - Skidmore policy also applies to off-campus conduct that is likely to have a substantial adverse effect on any member of the Skidmore College community or Skidmore College.
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# *Meeting with the Title IX Coordinator*

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- RI would meet with TIXC to receive all options and decide whether to file a formal complaint to the College
  - What would the next steps be?
    - Interim measures and accommodations
    - No Contact Order issued
    - TIXC meets with Responding Student to inform them of the complaint, review interim measures, offer accommodations, and explain that RS must contact investigators within 48 hours to schedule investigation interview
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# *Request for No Further Action*

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- What factors would we consider if the Reporting Individual requested no further action?
    - Past complaints about Responding Student; pattern of perpetration; history of Responding Student; multiple Responding Students
    - Use of a weapon or violence
    - If Reporting Individual is a minor
    - If conduct represents an escalation in behavior by the Responding Student
    - The risk of the Responding Student committing future acts
    - Threat to greater community
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# *Prohibited Conduct*

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- What violations should the Responding Student be charged with based on the Reporting Individual's statement?
  - Sexual Harassment
  - Sexual Assault
    - Sexual penetration
    - Sexual touching, disrobing, and/or exposure
  - Sexual Exploitation
  - Intimate Partner Violence
    - Domestic Violence, Dating Violence
  - Stalking
  - Attempted Act
  - Retaliation




# *Prohibited Conduct*

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  - Attempted Act
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# *Affirmative Consent*

- Knowing, voluntary, and mutual decision among all participants to engage in sexual activity
  - Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in sexual activity.
  - Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity or gender expression.
  - Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act.
  - Consent may be initially given but withdrawn at any time. Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity.
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# *Incapacitation*

- A state where someone cannot make rational, reasonable decisions because they lack the capacity to give knowing consent (e.g., to understand the “who, what, when, where, why or how” of their sexual interaction).
  - Incapacitation can also occur because of an individual’s physical or mental condition or disability that impairs the individual’s ability to provide consent. Incapacitation as a result of a physical or mental condition includes, but is not limited to, being: (i) asleep or in a state of unconsciousness; (ii) physically helpless; or (iii) involuntarily restrained.
  - Depending on the degree of intoxication, someone who is under the influence of alcohol or drugs may be incapacitated and unable to consent to sexual activity. Being drunk or intoxicated, however, does not necessarily render someone incapacitated. The impact of alcohol or drugs varies from person to person.
  - Whether sexual activity with an incapacitated person constitutes gender-based misconduct depends on whether the Responding Student knew or should have known of the Reporting Individual’s incapacitation.
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# *Role of SGBM Advisors*

## Trained Advisors:

Denise McQuade

Brenda Pashley

Jamin Totino

Andrew Krzystyniak

Eun-sil Lee

## Victim Advocates:

Kim Golemboski

Jen McDonald


Wendy Walker

Wellspring

## Role of SGBM Advisors for Reporting Individuals and Responding Students

- Help students to understand the SGBM process
- Counsel and support student throughout the process
- Provide advice on procedural matters
- Assist student as they prepare for the panel review
- Attend any and all investigation meetings and panel review
- Assist with available accommodations
- Help students to understand the outcome and sanctions (if applicable)
- Provide support after the formal process concludes

# *Next Steps*

- Formal complaint and any information already provided to TIXC is turned over to the Investigators.
  - Investigators will be meeting with witnesses identified by the Reporting Individual.
  - Responding Student must schedule first interview with Investigators within 48 hours of receiving the complaint form.
  - TIXC will monitor the status of the investigation and continue to answer any process questions that arise.
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# *Role of SGBM Investigator*

## **Trained Investigators:**

Gabriela Melillo

Tim Munro

Glen Vidnansky

Rich Roberts

External Investigators

## Role of Investigators

- Use a co-investigator model primarily
- Fact-finding process, not decision makers
- Meet with Reporting Individual, Responding Student and all witnesses to gather statements and other information (photos, phone records, swipe records, etc.)
- Prepares the Investigation Report used by SGBM Adjudication Panel
- Facilitates the asking of any questions from any party to another party

# *Next Steps*

- Entire packet is turned over to the Conduct Administrator from the Investigators.
- At this point, Investigators are done with the case pending any questions from the Adjudication panel that may require follow-up.



# *Role of the SGBM Conduct Administrator*

## **SGBM Conduct Administrator:**

Joel Aure

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## Roles & Responsibilities of the SGBM Conduct Administrator

- Schedule, manage logistics, and administer Commenting Session
- Conflict checks
- Set up recording equipment
- Monitor statements made by the parties and warn parties as needed
- Drafting outcome letter at the direction of panel
- Notify both RS and RI of Panel's final outcome, in writing, simultaneously
- Coordinates appeal process
- Ensure/track non-restriction sanction completion



# *SGBM Adjudication Panel Members*

## **Panel Members:**

Beth DuPont	
Robin Adams	Michael Ennis-McMillan
Paula Brehm	Chris Kopec
Natasha Bruce	Mariel Martin
Eliza Camire-Akey	Paul Sattler
Gail Cummings-Danson	Brian Stephenson
Monica Das	Joan Swanson

- Panel Make-Up
  - Pool of trained administrative staff members appointed by DoS/VP SA & trained faculty members appointed by FEC to serve on FAB for 2 overlapping terms
  - Gender diversity ensured
  - Members are scheduled by SGBM Conduct Administrator for each panel review
  - Must attend all training sessions before sitting on first panel
- Roles & Responsibilities
  - Inform TIXC about any possible conflicts of interest
  - Thoroughly review investigation packet & analyze information needed to make final decision
  - Communicate with the Conduct Administrators prior to final panel review to clarify any lingering questions
  - Make decision about whether there was a violation.
  - Apply/recommend sanctions if appropriate;

# *Panel Review Process*

- Review packet
  - Submit questions to SGBM Conduct Administrator
  - 30-minute commenting session
    - Reporting Individual and Responding Student in attendance
    - No new information allowed
    - No witnesses invited
    - No impact statements given (RI/RS must submit these beforehand)
  - General panel and advisor decorum:
    - Active listening & being present
    - Be “a person” first
    - Body language & audibility awareness
    - Look at who is speaking
    - Don’t leaf through the packet in a disruptive way
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# *Panel Review Process*

- After commenting session, panel makes decision of responsibility using preponderance of evidence
    - If in violation, impact statement is read and prior conduct history is given to the panel; move onto sanctioning
    - If no violation, panel members are dismissed pending rationale
  - All decision, regardless of outcome, require a written rationale for each charge and sanctions
  - Written rationales are included in the outcome letter that both RI/RS receive via email, simultaneously
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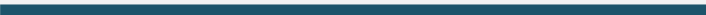
Joan Swanson

- Not the Role of Panel Members
  - No communication with RI/RS
  - Not an investigator; do not directly question RI/RS/witnesses
  - Not an advisor or advocate to RI/RS: do not walk them through the process or advocate on their behalf
  - Do not speak publically about any cases
- Expectations of Panel Members
  - Make unbiased decisions regarding violations of SGBM Policy based on materials and factual available
  - Remove themselves if there is a concern of bias (e.g. previous relationship with any person involved)
  - Maintain confidentiality: receive a lot of information regarding the incident(s) and investigation(s) and they cannot share that information.

# *Where are we now?*

Stay the course. Keep improving.

- Current Policy & Best Practices
  - Trauma-Informed ≠ Bias
  - Fundamentally Fair ≠ Victim Blaming
- Improve where we can
  - Increased awareness, education & transparency
  - Strengthening communication
  - Combatting myths & falsehoods
- Monitoring broader issues/trends
  - TROs (Doe v. Rhodes College)
  - Jurisdiction (Doe v. University of Virginia)



# *Where are we going?*

We will be the map.

- Department of Education Proposed Regulations
    - Live Hearing
    - Cross-Examination by Trained Advisors
    - Hearing Participation Require to Proceed
    - Jurisdiction
  - The Senate’s Reauthorization of the Higher Education Act
  - Sixth Circuit – Doe v. Baum (2018)
    - “... if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”
  - First Circuit – Haidak v. University of Massachusetts – Amherst (2019)
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# *What Happens Next?*

Joel Aure

Title IX Coordinator

518-580-5708

[jaure@skidmore.edu](mailto:jaure@skidmore.edu)

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- Questions?
- Session #2 – September 13:
  - Adjudication (Part 2)
  - Non-SGBM Conduct Adjudication
  - Trauma
- Session #3 – September 20
  - Mock Adjudication Panel
  - Remaining Questions
- Session #4 – September 27
  - Investigator Training
  - Open to all but required for Investigators, Victim Advocates, and SGBM Advisors



# SGBM Adjudication Training

SESSIONS 1 & 2

SEPTEMBER 6 & 13, 2019



# Who we are

- ▶ Joel Aure, Title IX Coordinator
- ▶ Rob Manfredo, Esq., Attorney with Bond, Schoeneck & King (slides provided)

# Outline

- ▶ How to Review the Investigation Packet
- ▶ Determining Credibility
- ▶ Assessing Capacity When Alcohol/Drugs Are Involved
- ▶ Determining Responsibility & Understanding Preponderance of the Evidence
- ▶ Determining Sanctions
- ▶ Writing Rationales for Findings
- ▶ Appeal Process
- ▶ Evaluating Non-SGBM Social Conduct Charges



# Reviewing the Investigation Packet

UNDERSTANDING THE INFORMATION

# Reviewing the Investigation Packet

- ▶ Review and understand the charges
- ▶ Review all the material carefully & thoroughly – get a general overview of the case
- ▶ Review it a second time and note all areas of consistency in the information
  - ▶ You don't need additional verification or questioning on these issues
- ▶ Read it a third time to identify inconsistencies in the information
  - ▶ This is the area you will need to concentrate your questions
- ▶ Consider both inculpatory & exculpatory information.

# Reviewing the Investigation Packet

- ▶ Identify additional questions for RI, RS, and witnesses
  - ▶ Was there corroborating evidence?
- ▶ Review the policy or section of the policy alleged to have been violated
  - ▶ Note any words that are unfamiliar and discuss
  - ▶ Parse all the policy elements
  - ▶ Identify the elements of each offense alleged
  - ▶ Break down the constituent elements of each relevant policy

# Submitting Questions

- ▶ All questions should be submitted in writing to the Title IX Coordinator & Conduct Administrator to communicate with the Investigators.
- ▶ Investigators will evaluate whether or not questions have already been answered in information given
  - ▶ If not, Investigators will contact RI, RS, or witnesses to acquire additional info to provide answers
- ▶ Additional information collected will be given to RI, RS, and Panel prior to 30-minute commenting session



# Determining Credibility

HOW TO ADDRESS CONFLICTING EVIDENCE

*Who  
Determines  
Credibility??*





# Determining Credibility

- ▶ Will credibility be an issue?
  - ▶ Yes, credibility will virtually ALWAYS be an issue
  - ▶ Expect word-against-word
  - ▶ As judges of the facts, you alone determine the truthfulness of each participant, and you must be prepared to make credibility determinations.
  - ▶ The **quality** of the testimony is controlling, not the **number** of participants who testify

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# Determining Credibility

- ▶ How do you weigh credibility when you can't question the parties?
  - ▶ Accuracy/Clarity – If you don't understand something you have read, consider why.
  - ▶ Corroboration/Contradictions in the timeline or facts (look for gaps in the story)
    - ▶ Information/materials that should logically be available/present
  - ▶ Admissions and Denials
  - ▶ Motivation and Bias
  - ▶ Evasiveness/Ambiguity in answering questions
  - ▶ Statements of other witnesses or evidence that corroborates or undermines the contentions of the parties.

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# Determining Credibility

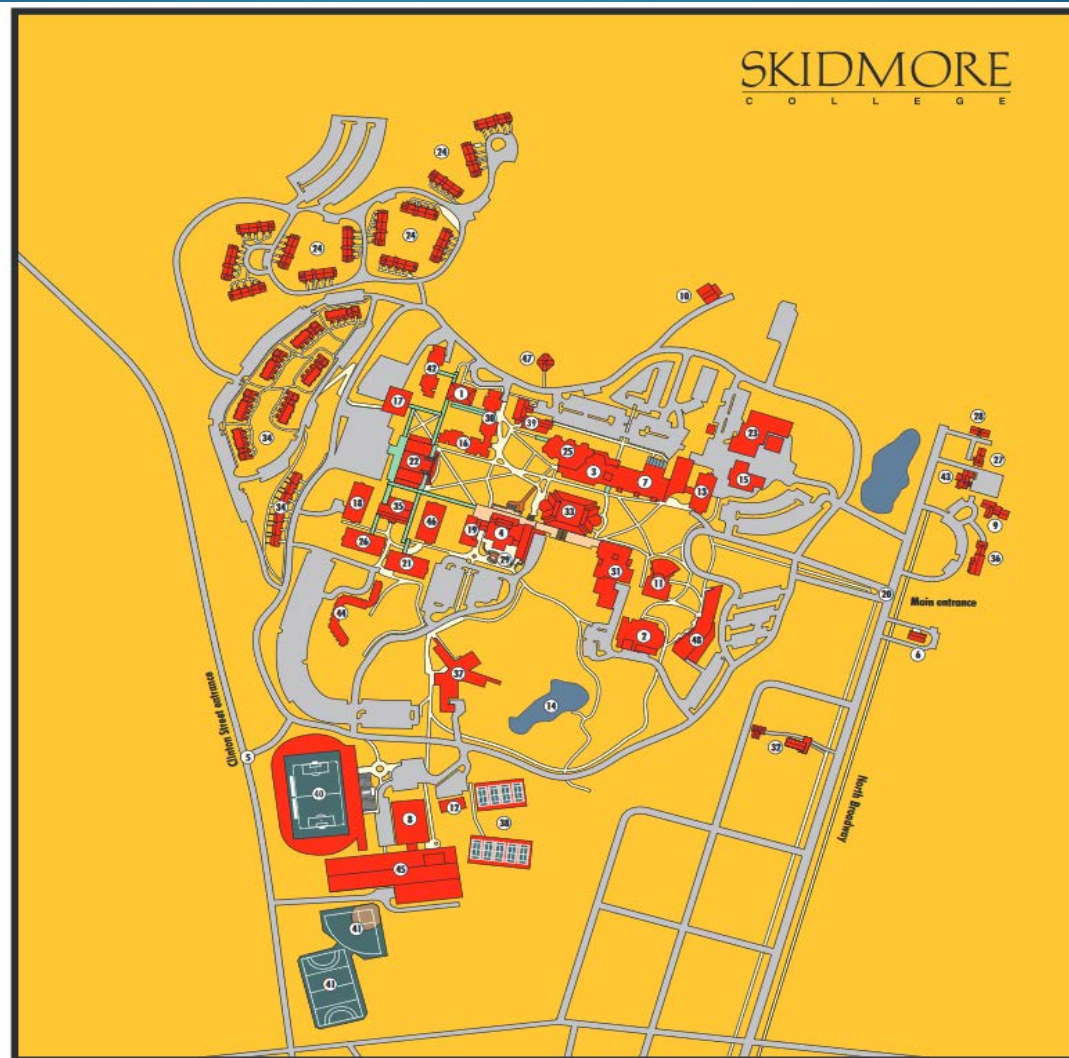
- ▶ Look for corroboration
  - ▶ Text messages
    - ▶ Increasingly, a place for proof
    - ▶ From RI, RS, and other witnesses
  - ▶ Call Logs
  - ▶ “Footprint” Materials (ie. receipts, ticket stubs, card swipes, etc.)
  - ▶ Social media posts
  - ▶ Screenshots/Photocopies verified by Investigators (in the meeting)
  - ▶ Pictures, Videos, & Audio

(cont'd)

# Determining Credibility

- ▶ Looking for corroboration (continued):
- ▶ Incidental witnesses
  - ▶ Have no inclination/bias towards RI or RS
  - ▶ Can be very important regarding capacity
  - ▶ Who did they bump into?
  - ▶ What did they notice – able to stand, talk, look in eye, speak coherently?
  - ▶ May be able to confirm timing or location of events

# On-Campus Locations & Movement



# Determining Credibility

## ▶ Factors in Evaluating Credibility:

- ▶ No particular formula for evaluating truthfulness and accuracy .
- ▶ In life, you frequently decide the truthfulness and accuracy of statements made to you by other people.
- ▶ Some of the same factors can be used to make those decisions when evaluating the testimony provided by witnesses in a case in addition to the training-based deductions.

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# Determining Credibility

- ▶ Questions to consider when weighing credibility:
  - ▶ Did the participant have an opportunity to see or hear the events about which they testified?
  - ▶ Did the participant have the ability to recall those events?
  - ▶ Was the testimony of the participant plausible and likely to be true, or was it implausible and not likely to be true?
  - ▶ Was the testimony of the participant consistent or inconsistent with other testimony or evidence in the case?
  - ▶ Was the participant intoxicated or impaired at the time of the events?

(cont'd)

# Determining Credibility

- ▶ Inconsistent Statements
  - ▶ Consider whether and to what extent inconsistent statements affect the truthfulness or accuracy of that participant's testimony
  - ▶ Significant vs Minor?
    - ▶ Multiple perspectives?
    - ▶ Investigators – "Help me understand..." vs "Gotcha"  
Mistakes

(cont'd)



# Determining Credibility

## ▶ Falsification of Information

- ▶ If you find that any person has intentionally provided info falsely as to any material fact, you may disregard that person's entire testimony
- ▶ Or, you may disregard so much of it as you find was untruthful, and accept so much of it as you find to have been truthful and accurate
- ▶ In either case, intentionally falsifying a material fact should raise serious doubts as to the credibility of a witness.

(cont'd)

# Determining Credibility

## ▶ Motive

- ▶ You may consider whether a participant had or did not have, a motive to lie, omit info, or provide misleading info.
- ▶ If a person had a motive to lie, you may consider whether and to what extent, if any, that motive affected the truthfulness of testimony.
- ▶ If a person did not have a motive to lie, you may consider that as well in evaluating the truthfulness.

# Potential Trauma & Credibility

- ▶ May not remember what happened at all, or may not remember the order in which it happened.
- ▶ May appear calm after sexual assault, with no affect.
- ▶ May have frozen during sexual assault, rather than fight or flight.
- ▶ May delay reporting as a coping mechanism.
- ▶ These symptoms are not by themselves corroborative or inculpatory.

# Alcohol and Credibility

- ▶ Alcohol can impact ability for parties and witnesses to remember events clearly or chronologically
  - ▶ Statements can change over time because memory comes back gradually.
- ▶ **Beware confusing trauma or alcohol use with credibility issues and vice versa.**



# Assessing Capacity

UNDERSTANDING AOD USE IN SGBM  
CASES

# Intoxication Vs Incapacitation

- ▶ **Intoxication:** a state of drunkenness
- ▶ Signs of intoxication
  - ▶ Slurred speech, weaving or stumbling while walking, exaggerated emotions

- ▶ **Incapacitation:** a state where someone cannot make rational, reasonable decisions because they lack the capacity to give knowing consent (e.g., to understand the “who, what, when, where, why or how” of their sexual interaction).
- ▶ Signs of incapacitation:
  - ▶ Inability to speak coherently, confusion of basic facts (day of the week, birthdate, president, etc.), inability to walk unassisted, passing out

# Intoxication vs. Incapacitation

- ▶ **Intoxication:** a state of drunkenness
  - ▶ 60% of college students (nationally) drank alcohol within the past month; 2 out of 3 of them engaged in binge drinking\*
  - ▶ At least 50% of all violent crimes involve alcohol consumption by the perpetrator, victim or both\*\*
  - ▶ One can engage in consensual sex after drinking alcohol, but when one person becomes incapacitated, they are unable to give affirmative consent.

\*Data comes from study by SAMSHA in 2014

\*\*Data from study by Collins and Messerschmidt 1993

# Intoxication vs. Incapacitation

- ▶ **Incapacitation:** a state where someone cannot make rational, reasonable decisions because they lack the capacity to give knowing consent (e.g., to understand the “who, what, when, where, why or how” of their sexual interaction).
- ▶ Incapacitation may occur because of the individual’s age. Under New York law, the age of consent is 17 years of age and, therefore, a person under the age of 17 lacks the capacity to provide affirmative consent.



# Intoxication vs. Incapacitation

- ▶ Incapacitation can also occur because of an individual's physical or mental condition or disability that impairs the individual's ability to provide consent. Incapacitation as a result of a physical or mental condition includes, but is not limited to, being:
  - ▶ (i) asleep or in a state of unconsciousness;
  - ▶ (ii) physically helpless; or
  - ▶ (iii) involuntarily restrained.

# Intoxication vs. Incapacitation

- ▶ Depending on the degree of intoxication, someone who is under the influence of alcohol or drugs may be incapacitated and unable to consent to sexual activity.
- ▶ Being drunk or intoxicated, however, does not necessarily render someone incapacitated.
- ▶ The impact of alcohol or drugs varies from person to person.

# Intoxication vs. Incapacitation

- ▶ Did the Responding Student know or should have known of the Reporting Individual's incapacitation?
  - ▶ Pinpoint when/where should have known this in the investigation materials.
- ▶ The question of what a Responding Student knew or should have known is objectively based on what a reasonable person in the place of the Responding Student, sober and exercising good judgment, would have known about the condition of the Reporting Individual.

# Evaluating Capacity

- ▶ What kind of information are you realistically able to review?
  - ▶ What kind of alcohol and/or drugs? How much?
  - ▶ Who provided the alcohol?
  - ▶ Food in their system & physical symptoms
  - ▶ Slurred speech, inability to walk, loss of consciousness, vomiting, unusual behavior, other context clues
  - ▶ Student's assessment of their own intoxication level
  - ▶ Student's assessment of the other party's intoxication level
  - ▶ Witness statements
  - ▶ Medical documentation
  - ▶ A person who initiates any sexual act must consider whether a person may be incapacitated or approaching incapacitation.

# Evaluating Capacity

- ▶ Is it more likely than not the RI was incapacitated?
- ▶ Did the person initiating any specific act know that their partner was incapacitated?
- ▶ Would a reasonable person have known that the RI was incapacitated?

If the answer to any of these questions is “yes” and the sexual act(s) are corroborated, then the RS did not have affirmative consent.

# Alcohol and Affirmative Consent

- ▶ Impact of alcohol and other drugs varies from person to person
  - ▶ The initiator should be cautious before engaging in sexual contact or intercourse when either party has been drinking alcohol or using other drugs
- ▶ Alcohol or other drugs may create ambiguity for either party as to whether affirmative consent has been sought or given
  - ▶ The initiator has the burden to show they had affirmative consent during the investigation
- ▶ If one has doubt about either party's level of intoxication, the safe thing to do is to forgo all sexual activity.

# Consent & Incapacitation

- ▶ Under the Affirmative Consent definition, an individual who is incapacitated cannot give consent.
- ▶ However, if you determine that it was more likely than not that the RI was NOT incapacitated, that does not automatically mean that everything was consensual.
- ▶ A separate consent analysis should be done.

CONTENT OMITTED

PROPRIETARY TO BOND, SCHOENECK &  
KING



# Questions

Joel Aure

Title IX Coordinator

518-580-5708

[jaure@skidmore.edu](mailto:jaure@skidmore.edu)

- ▶ Did we cover all questions?
- ▶ What other information do you need to be successful?
- ▶ Training Dates:
  - ▶ Session #3: Friday, Sept 20 from 9:00 am-12 pm
    - ▶ Case Studies
  - ▶ Session #4: Friday, Sept 27 from 9am - 12pm
    - ▶ Investigator Training