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TITLE IX TRAINING

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AMENDED REGULATIONS IMPLEMENTING TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (TITLE IX) - 34 CFR PART 106

- THE REGULATIONS ESTABLISH OBLIGATIONS FOR RESPONDING TO ALLEGATIONS OF SEXUAL HARASSMENT
- REGULATIONS HAVE THE FORCE AND EFFECT OF LAW
- EFFECTIVE ON AUGUST 14, 2020 – PROSPECTIVE APPLICATION
- NOTICE OF PROPOSED RULEMAKING FOR NEW REGULATIONS ISSUED IN JUNE 2022

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TITLE IX

DEFINITIONS – LAYING THE FOUNDATION

TITLE IX PROHIBITS SEX DISCRIMINATION

"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 . . ."

20 U.S.C. § 1681(A)

TRAINING REQUIREMENT

THE FINAL RULE REQUIRES THAT RECIPIENTS MUST, AMONG OTHER THINGS: "ENSURE THAT TITLE IX COORDINATORS, INVESTIGATORS, DECISION-MAKERS, AND ANY PERSON WHO FACILITATES AN INFORMAL RESOLUTION PROCESS, RECEIVE TRAINING ON:

- the definition of sexual harassment in § 106.30;
- the scope of the recipient's education program or activity;
- how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable;
- and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias." . . . "

34 CFR 106.45(B)(1)(III)

DEFINITION – SEXUAL HARASSMENT UNDER TITLE IX

SEXUAL HARASSMENT IS CONDUCT ON THE BASIS OF SEX THAT SATISFIES ONE OR MORE OF THE FOLLOWING:

- *Quid pro quo* harassment by school's employee;
- Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; or
- Any instance of sexual assault, dating violence, domestic violence, or stalking.

34 CFR 106.30(A)

CONSENT

- DEFINED BY THE SCHOOL
  - Generally: informed, freely, and actively given
- WHAT IT IS NOT:
  - Agreeing to a sexual act due to coercion, intimidation, threat of force, or force
  - Withdrawn
  - Given by minors (16 years old), persons not legally competent, or incapacitated persons (alcohol, drugs - voluntary or involuntary)
  - Given by unconscious, unaware, or otherwise physically helpless or injured persons

INSTITUTIONAL OBLIGATION TO RESPOND

A SCHOOL VIOLATES A STUDENT'S TITLE IX RIGHTS WHEN IT ENGAGES IN DELIBERATE INDIFFERENCE

- Deliberate indifference is when a school has "actual knowledge" of sexual harassment and its response is "clearly unreasonable in light of the known circumstances"
- Actual Knowledge means notice of actual or alleged sexual harassment to:
  - A recipient's Title IX Coordinator; or
  - Official with authority to institute corrective measures

34 C.F.R. 106.30(A)

INSTITUTIONAL OBLIGATION TO RESPOND

INSTITUTIONAL RESPONSE TRIGGERED BY REPORT OR FORMAL COMPLAINT:

- "Formal Complaint" is a document filed by a complainant or signed by the Title IX Coordinator. C.F.R. 106.30(A)
  - REQUIREMENTS :
    - a document or electronic submission that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint;
    - alleging that a respondent(s) has engaged in conduct prohibited under the University's Sexual Misconduct Policy; and
    - requesting that the University investigate the allegation
- "Report" is a complaint of sexual harassment not meeting Formal Complaint requirements.

DEFINITION - PARTIES

COMPLAINANT

- An individual who is alleged to be the victim of conduct that could constitute sexual harassment
  - Must actually or attempt to participate in educational program or activity at time of filing

RESPONDENT

- An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

34 C.F.R. 106.30(A)

DEFINITION - SCHOOL'S JURISDICTION

LIMITED TO SEXUAL HARASSMENT IN A SCHOOL'S EDUCATIONAL PROGRAM OR ACTIVITY, AGAINST A PERSON IN THE UNITED STATES.

- Educational Program or Activity includes:
  - Locations, events or circumstances where school exercises substantial control over respondent and context; or
  - Building owned or controlled by "officially recognized" student organization.
- Does not preclude action under other conduct policies

34 C.F.R. 106.44

COMPLAINT DISMISSAL

- Dismissal of Complaint Prior to Resolution
  - Mandatory
    - Conduct alleged if proved would not constitute sexual harassment as defined in the regulations (e.g., occurred outside U.S.)
  - Discretionary
    - Complainant withdraws complaint or refuses to participate
    - Respondent is no longer a student or employee
    - Institution has no authority over Respondent
  - Must provide notice of dismissal and opportunity for parties to appeal
  - Dismissal does not preclude action under other conduct policies

34 C.F.R. 106.45

TIX, REFERRAL, OR DISMISSAL?

- Complainant, an undergraduate student, alleges that her supervisor in her job as a peer alcohol educator engaged in a consensual romantic relationship with her, and let her skip meetings that were mandatory for other student workers.
  - What information do you need to know?
  - What action do you take if, after you notify the supervisor of the investigation, he resigns?

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TITLE IX GRIEVANCE PROCESS

THE SCHOOL'S OBLIGATION TO RESPOND

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

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FOLLOWING A REPORT OF SEXUAL HARASSMENT:

- Promptly contact complainant to discuss availability of supportive measures and explain process for filing a formal complaint
- Must document reasons why supportive measures not provided

34 C.F.R. 106.44

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

SUPPORTIVE MEASURES:

- Non-disciplinary, non-punitive individualized services provided to complainant and respondent to restore or preserve equal access
  - Examples: Counseling, extensions of deadlines, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence

34 C.F.R. 106.30

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

FOLLOWING FORMAL COMPLAINT OF SEXUAL HARASSMENT:

- Immediately send notice of allegations to complaint and respondent
- Offer supportive measures
  - Must document why supportive measures not provided
  - Best practice: document offer and supportive measures that are implemented
- Initiate formal grievance process (investigation, hearing, appeal)

34 C.F.R. 106.44

INITIAL NOTICE REQUIREMENT

NOTICE OF ALLEGATION INCLUDES:

- Notice of grievance process
- Notice of allegations with sufficient details
- Presumption of non-responsibility
- Notice of right to advisor of choice who may be (but is not required to be) attorney
- Notice of right to review evidence
- Notice of prohibition of false statements

34 C.F.R. 106.45

FORMAL GRIEVANCE PROCESS REQUIREMENTS

PROCEDURAL DUE PROCESS

- Requires at a minimum notice and a meaningful opportunity to be heard and an impartial decisionmaker

FIRST AMENDMENT

- Protects freedom of speech
- No Gag Orders
  - Cannot prohibit parties from discussing (speaking or writing about) allegations under investigation
  - TIX Regulations: Cannot restrict parties from gathering and/or presenting relevant evidence

FIFTH AMENDMENT

- Right against self-incrimination
- TIX Regulations: Cannot require respondent to appear at meetings or hearings, or provide evidence (and cannot draw negative inference for refusal to participate)

SIXTH AMENDMENT

- Accused has right to confront accuser
- TIX Regulations: School must offer cross examination at hearing

FORMAL GRIEVANCE PROCESS REQUIREMENTS

TIMELY PROCESS

- Must follow reasonably prompt timeline (established by School policy) for completion of grievance process and reasonable extensions for good cause only
  - Most notify parties of extension with reason

34 C.F.R. 106.45

FORMAL GRIEVANCE PROCESS

EQUITABLE TREATMENT OF COMPLAINANTS AND RESPONDENTS

- Presumption that respondent is not responsible
- Determination of responsibility, remedies, and sanctions can only be made at conclusion of compliant formal grievance process
- School has burden of collecting evidence and establishing responsibility
- Parties have equal opportunity to have others present during any institutional disciplinary proceeding, including right to be accompanied by advisor of their choice

34 C.F.R. 106.45

OBJECTIVE EVALUATION OF ALL RELEVANT EVIDENCE

- Consider both inculpatory and exculpatory evidence
- Credibility may not be based on status as complainant, respondent, or witness

34 C.F.R. 106.45

NO CONFLICT OF INTEREST OR BIAS

- Conflict of interest exists when individual's knowledge of the matter or relationships with parties or witnesses (personal or professional) would preclude impartiality
- Bias is an unfair prejudice in favor or against a party
- Must report actual and potential conflicts of interest to the Title IX Coordinator

34 C.F.R. 106.45

FORMAL GRIEVANCE PROCESS

INSTITUTION MUST ESTABLISH THE STANDARD OF REVIEW TO BE USED IN GRIEVANCE PROCESS

- Preponderance of the evidence **or** clear and convincing evidence
  - Preponderance = more likely than not
- Same standard for all formal complaints
- Same standard for employees, faculty, and students
- Standard applied by decision-makers (cannot be Title IX Coordinator or Investigators)

34 C.F.R. 106.45

STANDARD OF REVIEW

BASED ON AN IMPARTIAL REVIEW AND EVALUATION OF ALL EVIDENCE DEVELOPED

- Establish the elements of each claim
- Consider strength of evidence (incriminating and exculpatory)
  - Corroborating evidence not required. 85 FED. REG. 30384.
- Evaluate credibility of witnesses and parties
  - Credibility may not be based on status as complainant, respondent or witness
- Draw reasonable inferences

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

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INFORMAL RESOLUTION PROCESS IS AVAILABLE

- Only available if:
  - Formal complaint has been filed
  - School provides notice disclosing allegations and informal process requirements
  - Case does not involve employee on student sexual harassment
  - School obtains voluntary, written advance consent (parties cannot be forced to participate)
- School can facilitate at any time prior to determination
- Parties can return to formal grievance process before resolution

34 C.F.R. 106.45

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COMPLAINT COMPLEXITIES

EMERGENCY REMOVAL

RESPONDENT MAY BE REMOVED FROM EDUCATIONAL PROGRAM OR ACTIVITY WHEN:

- Determination that respondent poses an immediate threat to physical health or safety of anyone
- Determination based on an individualized safety and risk assessment
- Threat arises from allegations of sexual harassment
- Respondent has opportunity to challenge removal immediately

34 C.F.R. 106.44(C)

COMPLAINANT – NO FORMAL COMPLAINT

- If a student requests anonymity or does not want to proceed:
  - Only initiate a grievance process against complaint's wishes if doing so is not clearly unreasonable in light of the known circumstances.
    - Title IX Coordinator decides
  - Must document reasons why response to sexual harassment complaint was not deliberately indifferent. 34 C.F.R. 106.44(C)
  - Must notify complainant if it cannot honor request for confidentiality
  - Must consider the respondent's rights to receive information about the allegations as an "education record" under FERPA.
  - Always provide supportive measures.

COMPLAINANT – NO FORMAL COMPLAINT

- Possible factors to consider in weighing a student's request:
  - Complainant's wishes regarding how the school should respond to the allegations
  - Safety concerns
  - Possible impacts on other members of the community
    - Pattern of alleged sexual misconduct by a particular respondent
    - The respective level of authority of the parties

85 FED. REG. 30045

COMPLAINANT – NO FORMAL COMPLAINT

- You are the Title IX Coordinator at Western Massachusetts University (WMU). Every April, WMU hosts a concert called SpringFest on campus.
- You receive a report from Public Safety that two current students were arrested for drunkenly grabbing the rear ends of other attendees at the concert.
- The police report that you are provided indicated that the students were identified but not arrested, because the complainants did not wish to cooperate with the police.

COMPLAINANT – NO FORMAL COMPLAINT

- Does the following information change your decision:
  - One of the potential Respondents is identified as a graduate student who also serves as a Teaching Assistant; the potential Complainant are all undergraduate students.
  - One of the potential Respondents was arrested for the same behavior at last year's SpringFest, but in that case the complainants also refused to cooperate with the police.
  - One of the potential Complainants tells you that they are happy to participate in the process, but only if their identity is not shared with one of the Respondents.

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INVESTIGATORS

DUTIES & RESPONSIBILITIES OF A TITLE IX INVESTIGATOR

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TITLE IX COORDINATOR

- The Title IX Coordinator is the **designated university official** with primary responsibility for **coordinating the university's compliance with Title IX**. This includes providing leadership for Title IX activities; providing consultation, education and training; and helping to **ensure the University responds appropriately, effectively, and equitably to Title IX issues.** 34 C.F.R. 106.8(A)

TITLE IX INVESTIGATOR

- **Assists the Title IX Coordinator** in carrying out the University's efforts to prevent and effectively respond to issues of sexual misconduct and discrimination.
- **Conducts prompt and thorough student-based investigations as assigned by the Title IX Coordinator** including: identifying and interviewing parties and witnesses, ensuring victim access to a variety of on and off-campus resources and interim measures where appropriate, gathering and securing relevant documentation which may include confidential information used in determining responsibility. 34 C.F.R. 106.45

REQUIREMENTS FOR INVESTIGATORS

- Training topics must include:
  - Definition of sexual harassment,
  - Scope of "educational program or activity,"
  - Investigation and grievance process, policies,
  - Impartiality,
  - Rape shield protections,
  - Relevance (in creating an investigative report), and
  - Any technology used at a live hearing

34 C.F.R. 106.45(B)(1)(III)

REQUIREMENTS FOR INVESTIGATORS

- Impartial
- Knowledge of policies and procedures
- How to conduct investigations
- Credibility determinations
- Confidentiality
- Evaluation of evidence in an impartial matter

34 C.F.R. 106.45(B)(1)(III)

REQUIREMENTS FOR INVESTIGATORS

A good investigator should be:

- Objective
- Fair
- Impartial
- Open-minded
- Professional
- Detail Oriented
- Organized
- Appropriate in demeanor
- Active listener
- Polite and respectful to all parties

A good investigator does not:

- Allow emotion to overrule reason
- Make assumptions as to how a person "should" react
- Pre-judge the facts
- Put self in the shoes of victim or the respondent
- Allow bias or prejudice to affect judgment
- Assume that a person is acting a certain way because of their role in the process

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INVESTIGATION ORGANIZATION & PLANNING

ORGANIZATION

- Organization is critical to conducting an effective and compliant investigation
  - Initial assessment of claims
  - Determine resource requirements
  - Create the investigation file
  - Coordinate with other departments
  - Open an investigation log
  - Review communication and notice requirements

DEVELOPING THE INVESTIGATIVE PLAN

- Determine the scope of the investigation – what is the subject of the complaint?
- Review relevant policies and records
- Draft a list of preliminary claims and the elements of each
- Create a preliminary chronology of events
- Identify known percipient witnesses and determine order of examination
- Prepare questions and inquiry topics
- Evaluate potential disability accommodations

EVIDENCE GATHERING

- Familiarization with location
- Identification of other witnesses, including fresh complaint witnesses
- Texts and Emails (check policies)
- Photos and video; pictures of condition
- Identify additional sources of evidence
  - Police or security reports
  - Surveillance video
  - Entry/Exit logs: Card swipes
  - Photos or videos from phones
  - Texts and social media messages

EVIDENCE GATHERING

- Police Reports
  - Investigators should be given access to school law enforcement reports, notes and findings as necessary, so long as it does not compromise the criminal investigation
  - Investigators must be aware that standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual misconduct violates University policy
  - Use of police reports may reduce or eliminate the need for separate interviews of parties and witnesses
- Application of M.G.L. Chapter 41 Sec. 97D
  - Confidentiality of police reports concerning rape, sexual assault and domestic violence

EVIDENCE GATHERING

- Medical Reports
  - Medical reports may provide significant relevant evidence concerning allegations of sexual misconduct. Investigators must be cautious and ensure that such reports are appropriately obtained, validated and maintained
  - May require the assistance of appropriate medical professionals to assist them in understanding and evaluating the relevance (but may still be “directly related”)

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CONDUCTING INTERVIEWS

INTERVIEW TECHNIQUES & COMMON ISSUES

- Controlling the interview
- Broad to narrow, open ended questioning
- Note taking / documentation
- Traps for the unwary
  - Assumption is the enemy of logic
  - Do not suggest answers for your questions. For example:
    - Q: Did you grab her leg or just happen to bump into her?
    - Q: Did you call her a “bitch” out of anger or were you just kidding?
    - Q: Did you just get into her bed or did she motion for you to come over?
- Responding to typical witness behaviors

PREPARATION AND INITIAL MATTERS

- Identify appropriate time and location for interview
- Provide written notice for the interview
  - address accommodation needs and rules concerning attendance and participation of advisor
- Prepare, prepare, prepare
- Assemble documents and other materials you will use (note - may need to disclose to interviewee)
- Create an outline for the interview. The outline is a guidance document (be flexible and prepared to deviate)
- Provide an introduction concerning the investigatory process and the role of the Investigator
- Advise interviewee of rights and expectations in the investigation process

ASKING THE QUESTIONS

- Provide witness sufficient context to enable a full and fair opportunity to respond
- Explain importance of honesty, institution's prohibition on retaliation, and the investigatory process
- Start with short, neutral, non-judgmental, and open-ended questions – who, what, where, when and how (sometimes "why")
- Ask varied questions on same subject, and allow time to respond

ASKING THE QUESTIONS

- Avoid editorializing, interrupting, or commenting
- Ask for clarification of unfamiliar slang words – be sure that you and the witness mean the same thing (e.g., “hook-up”)
- Avoid interrupting the flow of the narrative – encourage the witness to keep talking (the wonder of “Silence”)
- Establish the chronology, and confirm that you’ve got it right
- “Is there anything else you want me to know?”

ASKING THE QUESTIONS

- Raise tough questions later in interview, to prevent witness from “shutting down”
- Don’t ask questions about complainant’s sexual encounters with persons other than respondent
- Stay focused on the policy violations – avoid turning the interview into a character assessment of any party
- Invite witness to provide relevant witnesses and documentation (e.g., medical records, diary entries, calendars, Facebook posts, emails and texts)

CLOSING THE INTERVIEW

- Review and confirm statements
- Confirm additional evidence and witnesses identified by the interviewee
- Direct witness to provide all documents and/or records referenced within a specified time period
- Notify concerning possibility of follow up meeting
- Advise about institution's prohibition on retaliation, and expectations concerning confidentiality and privacy
- Direct the interviewee to contact investigator with any additional information or concerns regarding possible retaliation.

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COMPLETING THE INVESTIGATION

FORMAL GRIEVANCE PROCESS

COMPLETING THE INVESTIGATION

- Preparing the investigation file
- Review and analyze the evidence
- Review the elements of each claim to ensure that you have all of the relevant evidence that the decisionmakers will need to make a decision
  - DO NOT apply the standard, issue preliminary findings or recommendations
- Assess confidentiality and privilege issues
- Review outstanding issues with Title IX Coordinator
- Before completing investigation report, send all evidence under review to each party and their advisors, and give them 10 days to submit a written response
- Finalize and submit the investigation report to each party and their advisors at least 10 days before the hearing, and give them adequate time to review and provide a written response
- Revise investigation report to incorporate written response, if applicable
- Finalize and submit the investigation report
- Secure and preserve the investigation file

INVESTIGATION REPORT

- Must fairly summarize relevant evidence
- The Report must be clear, concise, correct and supported.

34 C.F.R. 106.45

INVESTIGATION REPORT

- Report should contain:
  - Identity of the Complainant (or, if filed by the School, the name of the Title IX Coordinator);
  - A statement of the allegation, a description of the incident(s), and the date(s) and time(s) (if known) of the alleged incident(s);
  - The date that the formal complaint was made;
  - Identification of applicable policies and charged violations;

INVESTIGATION REPORT

- The date the respondent was interviewed;
- The identity, age and status of all parties and witnesses;
- The dates that any relevant evidence was obtained;
- Any dates that the School paused or resumed its investigation and why (e.g., because the complainant filed a law enforcement complaint);
- Fairly summarize the relevant evidence;
- Comply with confidentiality and privilege requirements;
- State whether supportive measures were provided, but ***do not*** identify measures provided.

INVESTIGATION REPORT

- In addition, the following information is recommended for inclusion in the report:
  - A list of all exhibits referenced in the report (each exhibit should be attached as an addendum to the report)
  - A list of all individuals interviewed with the date and time of each interview
  - A statement addressing reasons for any delays in the investigation
  - Identify advisors and/or counsel involved on behalf of each participant, if any
  - Summaries of statements

INVESTIGATION REPORT

- Equal access to inspect and review all evidence gathered during the investigation that is "directly related" to the allegations (broader than relevance)
  Including evidence Institution does not intend to rely on
  - Prior to completing investigation report, must send evidence to parties and provide 10 days to submit a written response
  - Send copy of final report to parties for review and response at least 10 days prior to hearing.

34 C.F.R. 106.45

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EVIDENTIARY COMPLEXITIES

RELEVANCE, CREDIBILITY, CONSENT, INTOXICATION, AND TRAUMA

STANDARDS FOR COMPLIANCE

- Presumption that respondent is not responsible.
- Determination of responsibility can only be made at conclusion of process.
- Institution has burden of collecting evidence and establishing responsibility.

34 C.F.R. 106.45

CONFIDENTIAL & PRIVILEGED INFORMATION

- Must keep confidential:
  - Identity of parties and witnesses (report or formal complaint) except as permitted by FERPA, required under law, or necessary to conduct Title IX proceedings
  - The provision of supportive measures except as necessary to provide the same. 34 C.F.R. 106.30
- Cannot seek, disclose, or use privileged information (unless waived by privilege holder):
  - Attorney – client
  - Spousal privilege
  - Domestic violence victims' counselor - victim
  - Sexual assault counselor - victim
  - Communications to clergymen
  - Social worker – client
  - Psychotherapist - patient
- Treatment records may not be used in grievance process without voluntary, written consent

34 C.F.R. 106.45

RELEVANCE OF QUESTIONS & EVIDENCE

RELEVANCE

- Evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence
- Remember rape shield protections

ASKING THE QUESTIONS

- Assess the credibility of the witnesses, taking into account:
  - The person's opportunity and capacity to observe
  - Contradiction or consistency with other evidence
  - Prior inconsistent statements, or prior lies
  - Motive to lie
  - Improbability of person's account (does it make sense?)
  - Demeanor (open and cooperative vs. evasive, argumentative, hostile) – *but be careful*

CREDIBILITY CONSIDERATIONS

- Based on the totality of the circumstances
- Witness statements
- Level of detail and consistency
- Existence or absence of corroborative evidence
- Prior bad acts and/or prior false reports
- Reaction or behavior after the alleged incident (*but not how you think a person should respond*)
- Prompt complaint/disclosure
- Other contemporaneous evidence

CONSENT COMPLEXITIES

- Words or activities which indicate a willingness to participate in specific sexual activity
- Alcohol (Drugs)
- Intoxicated ≠ Incapacitated
- Inability to make informed, rational judgments and decisions
- When drugs or alcohol are involved, incapacitation should be measured by evaluating how the substances affect:
  - Decision-making capacity
  - Awareness
  - Ability to make informed judgments

CONSENT COMPLEXITIES

- It is important to recognize and evaluate the impact of actual and/or apparent authority on consent.
- Consent to a romantic relationship may not be valid where either person has direct or indirect power or control over any aspect of the other person's academic or employment environment (emphasis added).

INTOXICATION V. INCAPACITATION ISSUE

- Goals: assess the impact of alcohol or drug consumption on the parties and percipient witnesses.
- The impact of alcohol (and drugs) varies from person to person: cannot ask “how many drinks did you have?”

INTOXICATION V. INCAPACITATION ISSUE

- Type of alcohol consumed?
- Over what period of time?
- How quickly?
- Any food consumed? How much? When?
- Taking any medication that has restrictions regarding alcohol consumption?
- “Can you describe the impact that the consumption of alcohol had on you?”

INTOXICATION V. INCAPACITATION ISSUE

- Could the complainant walk? Steady or unsteady?
- Could the complainant speak clearly? Slurred words?
- What physical tasks did the complainant perform, and how well did s/he perform them? (e.g., using a Smartphone, lighting own cigarette, walking)
- Could the complainant make and maintain eye contract?
- Was the complainant able to remove his or her own clothes?

INTOXICATION V. INCAPACITATION ISSUE

- Was the complainant ever unconscious? Did s/he regain consciousness during the incident? If so, what did the respondent do?
- Did the complainant black out?
- Did the complainant vomit?
- What was the complainant's condition when last seen by reliable third-party witnesses?
- Did the complainant seem to understand where s/he was and where s/he might be going?

TRAUMA-INFORMED INVESTIGATIVE PRACTICES

- A trauma-informed approach or training on trauma-informed practices may be appropriate as long as such an approach or training is consistent with § 106.45(b)(1)(iii), which requires recipients to:
  - Train Title IX personnel to serve impartially, without prejudging the facts at issue, using materials free from reliance on sex stereotypes
  - Title IX personnel to avoid conflicts of interest and bias for or against complainants or respondents generally or an individual complainant or respondent.

THE IMPACTS OF TRAUMA

- Trauma
  - Can result in a disorganization of the person's mind
  - Can cause one to lose the ability to process information if not addressed
  - Can affect every aspect of one's life
  - Is linked to depression, anxiety, poor health…and more victimization
  - Can lead to negative coping behavior

TRAUMA-INFORMED INVESTIGATIVE PRACTICES

COUNTER-INTUITIVE RESPONSES

- Displaying behavior after the event that does not conform with misperceptions about how a complainant "should" react
- Wide range of demeanor
- No one typical or "right" reaction
- Limited or no verbal physical resistance offered

- Questioning of event and actions
- Effect of complainant's own misconceptions
- Effect of power differential
- Preservation of dignity
- Cultural or religious influences
- Processing of incident not linear

TRAUMA-INFORMED INVESTIGATIVE PRACTICES

THE IMPACTS OF TRAUMA (CONT'D)

- Difficulties of Processing Trauma
  - Response may vary as a result of accumulating incidents or other personal stress
  - Age at time of assault
- Impacts of Memory
  - Stress affects how a brain establishes, stores and retrieves memories
  - Major trauma may lead to fragmented recall
  - Differences in account over time may reflect memory processes rather than inattentiveness or deceit

CANNOT AUTOMATICALLY ASSUME WITNESS IS MORE OR LESS CREDIBLE DUE TO TRAUMA

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ADJUDICATORS

DUTIES & RESPONSIBILITIES OF TITLE IX ADJUDICATORS & ADVISORS

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TITLE IX ADJUDICATOR

- Hearing board members are responsible for assisting in the overall implementation of procedures to ensure all participants receive the equality and fair process rights granted to them throughout the hearing process.
- Hearing board chair has additional responsibility for the overall implementation of formal hearing procedures.

TITLE IX ADVISOR

- Advisors are responsible for helping participants prepare for student conduct meetings or conferences, accompanying the party in any conduct proceedings, advising the participant in the sharing of information, and assisting during the appeals process.

34 C.F.R. 106.45

REQUIREMENTS FOR ADJUDICATORS & ADVISORS

- Training topics must include:
  - Definition of sexual harassment,
  - Scope of "educational program or activity,"
  - Investigation and grievance process, policies,
  - Impartiality,
  - Rape shield protections,
  - Relevance (in creating an investigative report), and
  - Any technology used at a live hearing

34 C.F.R. 106.45(B)(1)(III)

REQUIREMENTS FOR ADJUDICATORS & ADVISORS

CAMPUS SAVE ACT

- Procedures for Campus disciplinary hearings must be conducted by officials, who at a minimum, receive annual training on issues related to Violence Against Women (“VAWA”) crimes – (Sexual Assault, Domestic Violence, Dating Violence and Stalking). (Campus SaVE Act)

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ADJUDICATION ORGANIZATION & PLANNING

HEARING RULES

LIVE HEARINGS

- Hearings may be conducted in-person or at the institution's discretion, virtually by means of technology enabling the participants to see and hear each other simultaneously.
- Each party's advisor will have the opportunity to cross-examine the opposing party and witnesses – directly, orally and in real time
- Decision-maker(s) must determine if questions are relevant before party/ witnesses responds. However, cannot require submission of questions in writing in advance
- Institution must provide an advisor for any party who does not have one present at the hearing
  - Institution chooses the advisor who may be, but is not required to be, an attorney to conduct cross-examination
  - Advisor is provided without cost to the party

34 C.F.R. 106.45

HEARING RULES
(CONT'D)

RECORDING

- Institution must record hearings (audio, audiovisual, or transcript) and make it available to the parties for review

34 C.F.R. 106.45

HEARING RULES (CONT'D)

STATEMENTS AND ADMISSIONS

- *Victim Rights Law Center et al. v. Cardona* (1st Cir. 2021)
  - Court struck down Title IX regulations that required a party or witness to be subject to cross examination in order for other statements to be considered.
    - Ex., statements to the investigator, to police, in texts/social media
  - Adopted by OCR in August 2021
- Hearing Panel may consider statements of parties/witnesses who do not appear
  - *WEIGH ACCORDINGLY*

STATEMENTS AND ADMISSIONS – DISCUSSION

- Complainant alleges that while she was incapacitated by alcohol, Respondent kissed and groped her in a parking lot outside a dorm.
- Witness A tells the investigator that she was in her room at the dorm at the time of the incident and observed Complainant walking across the parking lot in a straight line, without assistance.
- At the hearing, Respondent's advisor provides photographs showing heavy vegetation between Witness A's window and the parking lot.
- Questions for Witness A at the hearing?
  - What if Witness A doesn't show up?

PREPARATION AND INITIAL MATTERS

- Review investigation report
- Identify appropriate time and location for hearing
- Provide written notice for the hearing
  - address accommodation needs and rules concerning attendance and participation of advisor
  - Give sufficient time to prepare
- Prepare, prepare, prepare
- Assemble documents and other materials you will use
- Create an outline for the hearing. The outline is a guidance document (be flexible and prepared to deviate)
- Inform parties you will be recording and start the recording at the beginning of each hearing
- Advise hearing attendees of rights and expectations in the adjudicatory process
- Explain importance of honesty, institution's prohibition on retaliation, and the adjudicatory process

PREPARATION AND INITIAL MATTERS

AIC Sexual Misconduct Policy: *In advance of the hearing, parties will be given the opportunity to request that certain witnesses be called at the hearing. The Chief Hearing Officer has the discretion to exclude from the hearing evidence/witnesses/questions deemed irrelevant.*

- Consider asking parties to provide questions in advance
  - Cannot require, but may be helpful

PREPARATION AND INITIAL MATTERS

AIC Sexual Misconduct Policy: *At the Chief Hearing Officer's discretion, pre-hearing meetings may be scheduled with each of the parties and their advisers to explain the hearing protocol. Each party may make requests related to the format or the nature of their participation in the hearing.*

- Discuss relevance of questions/witnesses → ask parties directly why a certain witness is relevant or necessary

- Be prepared for questions:
  - Can I turn off my camera?
  - Can I take breaks?
    - Breaks while a question is pending?
  - How long will the hearing take?

ASKING THE QUESTIONS – THINGS TO DO

- Short, neutral, non-judgmental, and open-ended questions
- Who, What, Where, When and How (sometimes “Why”)
- Ask for clarification of unfamiliar slang words – be sure that you and the witness mean the same thing (e.g. “hook-up”)
- Fill in gaps in the Investigator’s report
- When consent is at issue, probe conclusory statements, e.g., the sex was consensual.
  - What is it that led you to believe he/she consented to sex?
  - What did she do that led you to believe he/she consented?

ASKING THE QUESTIONS – IS THIS RELEVANT?

- Complainant asks Witness A, “Did Respondent want to have sex with Complainant?”
- Complainant asks Witness A, “Did Respondent tell you that she wanted to have sex with Complainant?”
- Texts between Complainant and Witness A discussing that the parties had sex while Complainant was drunk.
- Text messages between Respondent and Witness A, in which Witness A uses racially insensitive language.
- Text messages between Respondent and Witness A, in which Witness A writes, “I don’t want a person like you at my school.”

ASKING THE QUESTIONS – THINGS TO AVOID

- Questions and evidence about a complainant's prior sexual history are irrelevant unless:
  - Offered to prove that someone other than the respondent committed the conduct alleged by the complaint, or
  - Concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent
- Avoid judgmental questions, e.g.,
  - "Why didn't you resist?"
  - "What were you wearing when you went to his room?"

BIAS IN A HEARING PANEL

- Decision-makers may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent
  - Training materials may not rely on sex stereotypes, and must promote impartial investigations and adjudications
  - Trauma-informed practices can be implemented in non-biased manner
    - Cannot assume complainants are always truthful
    - Cannot scrutinize inconsistencies more closely for respondent vs. complainant
    - Must permit relevant questions to be asked

BIAS IN A HEARING PANEL

- *Doe v. the Trustees of the University of Penn*. (E.D. PA 2017)
  - Panel was trained with materials that "encourage investigators and adjudicators to believe the accuser, disregard weaknesses and contradictions in the accuser's story, and presume the accused's guilt" → potential Title IX violation
  - Statements from training materials:
    - False accusations of rape are not common
    - Victims may experience fragmented recall, and "recount a sexual assault somewhat differently from one retelling to the next."
    - An alleged perpetrator may have "apparent positive attributes such as talent, charm, and maturity" but these are "generally irrelevant."
    - A "typical rapist operates within ordinary social conventions to identify and groom victims."

ASKING THE QUESTIONS – DISCUSSION

- What about Respondent's sexual history?
  - From AIC Sexual Misconduct Policy: *Information concerning incidents of similar conduct or acts of violence on the part of the Respondent prior or subsequent to the conduct raised in the Complaint, whether or not the subject of another Complaint or finding of responsibility, may be deemed relevant to the assessment of responsibility for conduct alleged in a complaint, if such information indicates a history of conduct related to the conduct alleged in the complaint.*
- Considerations
  - Rumors vs. findings

ASKING THE QUESTIONS – DISCUSSION

- What about Respondent's sexual history?
  - Complainant alleges that Respondent invited her to his room after a party. Complainant says that she repeatedly told Respondent that she only wanted to kiss, but that he repeatedly grabbed her breasts and tried to put his hands in her pants.
  - Complainant offers Witness B, who will discuss an incident two weeks later, where she was at a party with Respondent, she asked him to stop touching her, and he refused to do so.
    - Would you hear from Witness B?
    - How would you communicate your decision?

CLOSING THE HEARING

- Advise about institution's prohibition on retaliation, and expectations concerning confidentiality and privacy
- Direct the parties and witnesses to contact investigator/Title IX Coordinator with any additional information or concerns regarding possible retaliation.

DECISION

WRITTEN NOTICE OF DECISION REQUIRED

- Simultaneous notice to parties

34 C.F.R. 106.45

DECISION

MUST INCLUDE:

- Identification of allegations potentially constituting sexual harassment;
- Description of procedural steps;
- Findings of fact supporting the determination;
- Conclusions regarding application of code of conduct to the facts;
- Rationale for the result as to each allegation, what disciplinary sanctions will be imposed, and any remedies provided to Complainant (with appropriate confidentiality);
- School's procedures and permissible bases for appeal.

34 C.F.R. 106.45(B)(7)(II)

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APPEALS

APPEALS

INSTITUTION MUST OFFER BOTH PARTIES AN APPEAL FROM

- Determination regarding responsibility, and
- Dismissal of a formal complaint or any allegations therein on the following grounds:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

34 C.F.R. 106.45

RETALIATION IS PROHIBITED

Cannot retaliate against any individual for making a report or complaint, testifying, assisting, or participation or refusal to participate, in any manner, in any investigation, proceeding or hearing under regulations

34 C.F.R. 106.71

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RECORDKEEPING

34 C.F.R. 106.45(B)(10)

QUESTIONS?