



BOWDITCH & DEWEY, LLP | OCTOBER 25, 2023

SEXUAL MISCONDUCT & TITLE IX TRAINING

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PART 1: TITLE IX, STATE AND FEDERAL REGULATIONS

TITLE IX PROHIBITS SEX DISCRIMINATION

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“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)



INSTITUTIONAL OBLIGATION TO RESPOND

FOR INCIDENTS INVOLVING STUDENTS: COLLEGE
MUST NOT BE DELIBERATELY INDIFFERENT

- Did the college know of the discrimination?
- Was its response reasonable?

OTHER STANDARDS MAY APPLY FOR EMPLOYEE
VS. EMPLOYEE INCIDENTS

- Ex. - In MA, employers are strictly liable for harassment by supervisors

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 **ONLY**
- Regulations have the force and effect of law
- Effective on August 14, 2020 – Prospective Application
- Proposed **NEW REGULATIONS ISSUED** in June 2022 – still not final!



DEFINITION - JURISDICTION

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

- 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





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)



DEFINITION – SEXUAL HARASSMENT UNDER TITLE IX (CONT'D)

IF CONDUCT MEETS THE TITLE IX DEFINITION, MUST FOLLOW
PROCESS / STANDARDS SET FORTH IN REGULATIONS

- Standards for dismissal
- Investigation, sharing evidence with parties
- Hearing, with cross examination
- Right to appeal

34 CFR 106.30(A)

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)

MASSACHUSETTS CAMPUS SEXUAL VIOLENCE ACT, M.G.L. C. 6 SECTION 168D AND E

- Requirements for MA institutions of higher ed
- Broader application than Title IX regulations
- Governs response to sexual misconduct
 - Surveys, support mechanisms
 - Policies for handling reports





JURISDICTION AND DEFINITIONS

- Defines sexual misconduct to include sexual violence, relationship violence, gender-based violence (including based on gender identity), sexual harassment, and stalking
- Jurisdiction: applies “regardless of where the offense occurred”
- Policies/procedures for responding to sexual misconduct must include notice, right to advisor, right to review evidence, etc.

34 C.F.R. 106.44

TRAINING REQUIREMENT

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M.G.L. C. 6 SECTION 168E REQUIRES THAT INDIVIDUALS WHO PARTICIPATE IN THE IMPLEMENTATION OF A SCHOOL'S DISCIPLINARY PROCESS FOR COMPLAINTS OF SEXUAL MISCONDUCT, SHALL RECEIVE TRAINING INCLUDING:

- Information on working with and interviewing persons subjected to sexual misconduct;
- Information on the particular types of conduct that constitute sexual misconduct;
- Information on consent and the role drugs and alcohol may play in an individual's ability to consent;
- Effects of trauma;
- Cultural competence;
- How sexual misconduct may impact individuals with disabilities;
- Due process/fundamental fairness

TRAUMA-INFORMED PRACTICES

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- 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 DYNAMICS OF SEXUAL VIOLENCE

- Nature of victimization
- Counter-intuitive behaviors
- Delay in reporting
- Wavering level of cooperation/recantation
- Role of drugs and alcohol
- Sexual assaults may be committed by someone known to complainant
- Sexual assaults may be achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation
- Rarely eyewitnesses
- Little to no physical or forensic evidence
- Most common defense is consent
- Decisions based solely on credibility
- Inability to completely eliminate occurrence
- Emotionally charged and incendiary in nature

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 may not be linear

TRAUMA-INFORMED INVESTIGATIVE PRACTICES

(CONT'D)

Research is ongoing:

- Campbell & Patterson, 2011:
Neurobiological changes resulting from a traumatic experience can lead to a flat affect or “strange” emotions or emotional swings
 - Account of incidents may be fragmented or “sketchy,” without necessarily meaning evasiveness



TRAUMA-INFORMED INVESTIGATIVE PRACTICES (CONT'D)

Research is ongoing:

- Meissner & Lyles (2019): “[I]t is clear that the influence of stress and emotion on the brain are complex and multifacted, leading at time to the enhancement of memory and at other times to the disruption of encoding and retrieval processes.”



TRAUMA-INFORMED INVESTIGATIVE PRACTICES

(CONT'D)

Research is ongoing:

- McNally (2021): All autobiographical memory is reconstructive, and “does not operate like a videotape” – traumatic memory may be no different.
- Rubin, Deffler (2016): Trauma memories were as coherent as important positive memories → lack of narrative coherence may not indicate trauma.



Practice pointers

- ATIXA Position Statement:
 - The presence of trauma is not a substitute for the absence of evidence
 - “Missing information should not be held against someone, if it is missing as the result of trauma, but trauma itself does not provide a rationale for bolstering credibility in the absence of evidence.”
- **Department of Education, Preamble to 2020 Title IX Regulations:**
 - **“The final regulations require impartiality on the part of Title IX personnel.**
- **“The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking.”**

CULTURAL CONSIDERATIONS FOR DIVERSE POPULATIONS

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CULTURAL SENSITIVITY

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Undergraduate Student Characteristics	
Percent of undergraduates who are female	54%
Percent of full-time undergraduates	94%
Percent of undergraduates by race/ethnicity	
American Indian or Alaska Native	0%
Asian	1%
Black or African American	26%
Hispanic/Latino	24%
Native Hawaiian or Pacific Islander	2%
White	34%
Two or More Races	4%
Race and ethnicity unknown	5%
U.S. Nonresident	4%

Source: www.aic.edu/about/fast-facts

CULTURAL SENSITIVITY (CONT'D)

CULTURAL NORMS MAY INCLUDE:

- Propriety of certain touches (hugging, kissing)
- Stigmas surrounding sexual activity
- Physical space between individuals
- Pursuit of romantic relationships
- Drinking behavior
- Communication style
- Behavior in response to questioning

Source: www.aic.edu/about/fast-facts





PRACTICE TIPS

- Review credibility determinations, inferences made for signs of implicit bias
- OK to ask clarifying questions
- Explain your role, the process (repeatedly, if necessary)
- Provide support resources

Source: www.aic.edu/about/fast-facts

CULTURAL SENSITIVITY

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Don't assume you know the meaning of slang/general terms (ex. "hook up")

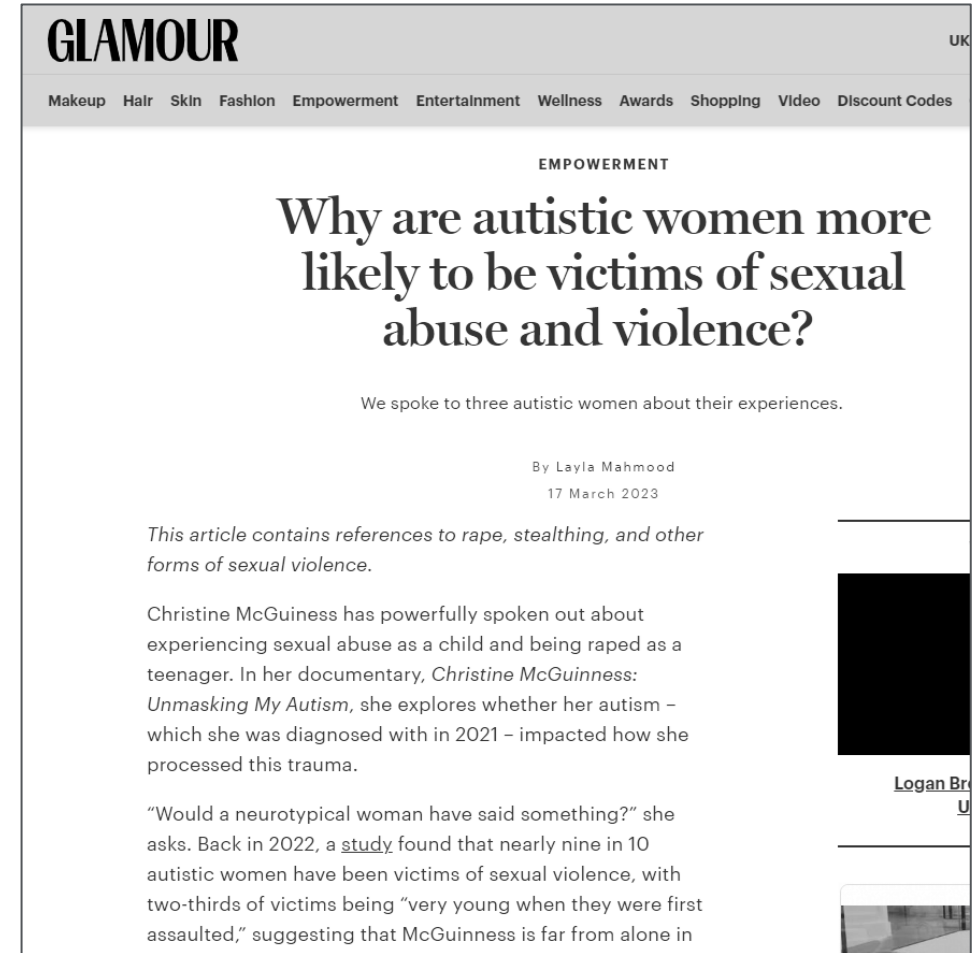


Source: www.aic.edu/about/fast-facts

INDIVIDUALS WITH DISABILITIES

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- People with intellectual disabilities are more than seven times more likely to be the victims of sexual assault
 - Heightened risk during all parts of their day
 - More likely to be assaulted by someone they know
- Neurodivergent individuals may also be more likely to experience sexual abuse
- Disabilities may impact
 - Peer support networks
 - Social communication/perception
 - Ability/willingness to report



Source: www.aic.edu/about/fast-facts

DUE PROCESS & FUNDAMENTAL FAIRNESS

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DUE PROCESS

- Clause of the constitution gives students a right to a public education, which cannot be taken away without due process
- Obligations are imposed on private universities by the Title IX rules, and by contractual obligations to students
 - Process should be a consideration for any disciplinary proceeding which may result in suspension/expulsion

DUE PROCESS (CONT'D)

HOW MUCH PROCESS IS DUE?

- Per TIX regulations and MA law, hallmarks of due process are the right to review and respond to evidence

TIX

- Specific notice requirements
- Right to review evidence gathered, and respond in writing
- Right to engage in cross examination
- Right to advisor

MA LAW

- Notice
- Equal Opportunity to inspect and review evidence
 - Right to advisor

COLLEGES SHOULD BE AWARE OF ANY ADDITIONAL PROCEDURES THAT THEIR HANDBOOKS PROVIDE

QUESTIONS?



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