



BOWDITCH

BOWDITCH & DEWEY, LLP | AUGUST 4 & 6, 2020

TITLE IX TRAINING

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WHO WE ARE



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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

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TITLE IX GRIEVANCE PROCESS

DEFINITIONS – LAYING THE FOUNDATION

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)

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 BOWDITCH

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.

DEFINITION – SEXUAL HARASSMENT UNDER TITLE IX BOWDITCH

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

- *Quid pro quo* harassment by school's non-student 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.

QUID PRO QUO

- A non-student employee conditioning an educational decision or benefit on the student's submission to unwelcome sexual conduct

DEFINITION – SEXUAL HARASSMENT UNDER TITLE IX BOWDITCH

ALL RELEVANT CIRCUMSTANCES SHOULD BE CONSIDERED TO DETERMINE WHETHER THE CONDUCT IS SUFFICIENTLY SEVERE, PERVASIVE AND OBJECTIVELY OFFENSIVE TO DENY EDUCATIONAL ACCESS, INCLUDING:

- The degree to which the conduct affected one or more student's education
- The type, frequency, and duration of the conduct
- The identity of and relationship between the alleged harasser and the subject or subjects of the harassment
- The number of individuals involved
- The age and sex of the alleged harasser and the subject or subjects of the harassment
- The location of the incidents, and context in which they occurred
- Other incidents of gender-based, but nonsexual harassment

DEFINITION – SEXUAL HARASSMENT UNDER TITLE IX

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DOMESTIC VIOLENCE

- A felony or misdemeanor crime of violence committed by:
 - Current or former spouse/intimate partner;
 - Person the victim shares a child with;
 - Person cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
 - Person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred;
 - Any other adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction where violent crime occurred.

STALKING

- Engaging in a course of conduct (two or more acts) directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others; or suffer substantial emotional distress.

DEFINITION – SEXUAL HARASSMENT UNDER TITLE IX BOWDITCH

DATING VIOLENCE

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Existence of relationship based on reporting party's statement and consideration of relationship length, relationship type, and frequency of interaction between persons in relationship.

SEXUAL ASSAULT

- Forcible and non-forcible sex offenses defined by the FBI's NIBRS crime reporting system
 - Rape (both forcible and non-forcible statutory rape): Non-consensual sexual intercourse
 - Sodomy oral or anal sexual intercourse: Non-consensual oral or anal sexual intercourse
 - Sexual assault with an object: Non-consensual genital or anal penetration with an object or instrument
 - Fondling: Non-consensual touching of private body parts for purpose of sexual gratification
 - Incest: Non-consensual sexual intercourse between related persons who cannot legally marry

DEFINITION – CONSENT

- BURDEN IS NOT ON RESPONDENT TO PROVE CONSENT
- WHAT IT IS:
 - Informed, freely, and actively given
 - Mutually understandable words or actions which indicate a willingness to participate in mutually agreed upon sexual activity
- 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)
 - Given by persons not legally competent
 - Given by incapacitated persons (alcohol, drugs, voluntary, or involuntary)
 - Given by unconscious, unaware, or otherwise physically helpless or injured persons

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

- Deliberate indifference exists 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
 - Any official of the recipient who has authority to institute corrective measures on behalf of the school
 - School has authority to designate any number of officials with authority
 - School can still designate mandatory reporters and require them to report, but they cannot trigger actual knowledge
- Actual knowledge can exist without a formal complaint

INSTITUTIONAL RESPONSE TRIGGERED BY REPORT OR FORMAL COMPLAINT:

- “Report” requires supportive measures and explanation of formal complaint process
 - Must document decision not to provide supportive measures and explain why it was not clearly unreasonable in light of known circumstances
- “Formal Complaint” requires investigation and compliant grievance process (or dismissal)
 - Formal complaint can only be filed by complainant or signed by the Title IX Coordinator
 - Must be in writing and signed
 - Anonymity

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
 - Must be 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

DEFINITION - SCHOOL'S JURISDICTION

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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.
- School can use code of conduct policies to address conduct falling outside of Title IX jurisdiction

- Dismissal of Complaint Prior to Resolution
 - Mandatory
 - Conduct alleged if proved would not constitute sexual harassment as defined in the regulation (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

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TITLE IX GRIEVANCE PROCESS

THE SCHOOL'S OBLIGATION TO RESPOND

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

FOLLOWING A REPORT OF SEXUAL HARASSMENT:

- Promptly contact complainant to discuss availability of supportive measures (no safe harbor) and explain process for filing a formal complaint
 - Supportive measures are 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
- Must document reasons why supportive measures not provided

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

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FOLLOWING FORMAL COMPLAINT OF SEXUAL HARASSMENT:

- Immediately send notice of allegations to complainant and respondent
- Offer supportive measures (no safe harbor)
 - Must document why supportive measures not provided
- Initiate formal grievance process (including investigation, hearing, and appeal)

INITIAL NOTICE REQUIREMENT

- Notice of allegations sent to parties, including
 - 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

FORMAL GRIEVANCE PROCESS REQUIREMENTS BOWDITCH

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

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

EQUITABLE TREATMENT OF COMPLAINANTS AND RESPONDENTS

- Presumption that respondent is not responsible
- Determination of responsibility, remedies to complainant, and sanctions/other non-supportive measures can only be made at conclusion of compliant formal grievance process
- School has burden of collecting evidence and establishing responsibility
- Provide the complainant and respondent with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice

OBJECTIVE EVALUATION OF ALL RELEVANT EVIDENCE

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

NO CONFLICT OF INTEREST OR BIAS

- Conflict of interest exists when individual's knowledge of the matter or personal or professional relationships with complainant, respondent, or witnesses would preclude individual from being able to investigate or adjudicate the case fairly and impartially
- Bias is defined as an unfair prejudice in favor or against a complainant or respondent
- Individuals who believe they have a conflict of interest must inform the Title IX Coordinator

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

- Preponderance of the evidence **or** clear and convincing evidence
- Same standard must apply to all formal complaints of sexual harassment
- Standards applied to employees (including faculty), must be applied to students
- Standard applied by decision-makers (Title IX Coordinator and Investigators cannot be decision-makers)

STANDARD OF REVIEW

PREPONDERANCE OF THE EVIDENCE

- More likely than not (50% plus a feather)

CLEAR AND CONVINCING EVIDENCE

- Highly probable (about 75%)
- Lower standard than “beyond a reasonable doubt” (applied in criminal cases – about 95%)

STANDARD OF REVIEW

BASED ON AN IMPARTIAL REVIEW AND EVALUATION OF ALL EVIDENCE DEVELOPED

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

STANDARD OF REVIEW

REASONABLE INFERENCE

- “[C]onclusions which are regarded as logical by reasonable people in the light of their experience in life.” Lannon v. Hogan, 719 F.2d 518, 521 (1st Cir. Mass. 1983)

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

INFORMAL RESOLUTION PROCESS IS AVAILABLE

- Informal resolution process, such as a mediation, does not involve a full investigation and adjudication
- 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 informal resolution process at any time prior to reaching a determination
- Parties can withdraw from informal resolution process and resume formal grievance process at any time prior to reaching a resolution

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COMPLAINT COMPLEXITIES

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

- Emergency Removal of Respondent
 - 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 must be made based on an individualized safety and risk assessment
 - Threat arises from allegations of sexual harassment
 - Respondent is given an opportunity to challenge removal immediately

- Supportive measures must be confidential except as necessary to provide them
 - Report can state supportive measures provided
 - School must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding

COMPLAINANT – NO FORMAL COMPLAINT

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- If a student requests his/her name not be revealed to the alleged respondent or that the school not investigate or seek action against the alleged respondent, the school should:
 - Only initiate a grievance process against complaint's wishes if doing so is not clearly unreasonable in light of the known circumstances.
 - In that case, Title IX Coordinator will sign and file a formal complaint.
 - Decision not to investigate will be evaluated under the deliberate indifference standard (whether decision was clearly unreasonable in light of the known circumstances).
 - School must document its reasons why it believes its response to a sexual harassment incident was not deliberately indifferent (106.44(a); 105.45(b)(10)(ii)).
 - Always provide supportive measures.

COMPLAINANT – NO FORMAL COMPLAINT

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- Example factors that may be appropriate to consider in weighing a student's request (referenced in the preamble):
 - Complainant's wishes regarding how the school should respond to the allegations
 - Pattern of alleged sexual misconduct by a particular respondent
 - The respective level of authority of the parties

COMPLAINANT – NO FORMAL COMPLAINT

- Examples of other factors that may be appropriate to consider in weighing a student's request (not referenced in the preamble):
 - Respondent history of arrests or records from a prior school indicating a history of violence
 - Respondent threatened further sexual misconduct or other violence against the student or others
 - The sexual misconduct was committed by multiple perpetrators
 - Report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group
 - Allegation is that sexual misconduct was perpetrated with a weapon
 - Other means exist to obtain relevant evidence (e.g., security cameras or personnel, physical evidence)
 - The respective ages of the parties
 - Impact on the school's ability to provide a safe and nondiscriminatory environment for all students

COMPLAINANT – NO FORMAL COMPLAINT

- At the end of the day it is the Title IX Coordinator who is responsible for making the decision
- Even if the school cannot take disciplinary action against the respondent, the school must discuss supportive measures with complainant
- School must notify complainant if it cannot honor request for confidentiality

COMPLAINANT – NO FORMAL COMPLAINT

- Request for confidentiality imposes a new investigation requirement
- Can the University go forward without the complainant?
- Must consider the respondent's rights to receive information about the allegations if the information is maintained by the school as an "education record" under FERPA
- How would the scope/effectiveness of the investigation be impacted?
- How could confidentiality be protected?

COMPLAINANT – NO FORMAL COMPLAINT

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- The Title IX Coordinator assigns you to investigate a report concerning a student who just returned from a University sponsored trip to London. The report was made by a faculty advisor who was on the trip.
- The advisor reported that one night during the trip, the female student returned to the hotel after a night out and told the advisor she had been sexually assaulted by another student. The student was upset and crying, and appeared to have abrasions and a bruise developing on the side of her face.
- The student told the faculty advisor what happened, including the name of the alleged perpetrator. After relating the story, the student stated that she did not want the University to pursue the matter and that she did not want to make a complaint or for anyone to know what had happened to her.

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INVESTIGATORS

DUTIES & RESPONSIBILITIES OF A TITLE IX INVESTIGATOR

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.

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.

REQUIREMENTS FOR INVESTIGATORS

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- Training topics must include:
 - Definition of sexual harassment,
 - Scope of “educational program or activity,”
 - Investigation and grievance process, policies,
 - Impartiality, and
 - Relevance (must create investigative report fairly summarizing relevant evidence)

- Campus SaVE Act
 - Proceedings must be conducted by officials who, at a minimum, receive annual training on:
 - issues related to dating violence, domestic violence, sexual assault, and stalking
 - how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

REQUIREMENTS FOR INVESTIGATORS

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- Impartial
- Knowledge of policies and procedures
- How to conduct investigations
- Credibility determinations
- Confidentiality
- Evaluation of evidence in an impartial matter
- Remedial actions for respondent, complainant and school community

REQUIREMENTS FOR INVESTIGATORS

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A good investigator should be:

- Objective
- Fair
- Impartial
- Open-minded
- Professional
- Detail Oriented
- Organized
- Appropriate in demeanor
- An 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

HALLMARKS OF AN EFFECTIVE INVESTIGATION

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- Quality
- Timely
- Fair
- Well Documented

- Title IX: Investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence
- VAWA Section 304: The Campus Sexual Violence Act (“Campus SaVE Act”)
 - Requires a prompt, fair, and impartial process from the initial investigation to the final result

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INVESTIGATION ORGANIZATION & PLANNING

- 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

Investigation Log Investigator:		Matter:	Date Opened: Date Closed	Page __ of __
Date	Action	Follow-Up Required	Notes	

- 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
- Prepare a preliminary timeline
- 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

- 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 policy reports may reduce or eliminate the need for separate interviews of parties and witnesses
- Application of M.G.L. Chapter 41 Sec. 91D
 - Confidentiality of police reports concerning rape, sexual assault and domestic violence

- 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

- 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

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- 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

- The Report must be clear, concise, correct and supported.
- At a minimum, report should contain:
 - The name and sex of the complainant and, if different, the name and sex of the person reporting the allegation;
 - 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 complaint or other report was made;

- Identification of applicable policies and charged violations
- The date the respondent was interviewed;
- The names and sex of all persons alleged to have committed the alleged harassment;
- The names and sex of all known witnesses to the alleged incident(s);
- The dates that any relevant documentary evidence (including cell phone and other records as appropriate) was obtained;

- Any written statements of the complainant (or victim, if different from the complainant);
- The date on which the University deferred its investigation and disciplinary process because the complainant filed a law enforcement complaint and, as applicable, the date on which the University resumed its investigation;
- Fairly summarize the relevant evidence;
- Complying with confidentiality and privilege requirements, include any interim and permanent steps taken with respect to the complainant and the respondent.

- 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

- 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.

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EVIDENTIARY COMPLEXITIES

RELEVANCE, CREDIBILITY, CONSENT, INTOXICATION, AND TRAUMA

- 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

- Must keep confidential:
 - Identity of complainants, respondents, and witnesses (whether identified in connection with report or formal complaint) except as permitted by FERPA, required under law, or as necessary to conduct Title IX proceedings
 - The provision of supportive measures except as necessary to provide the same
- 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

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

NOT ALL EVIDENCE IS CREATED EQUAL

- Determining the weight of the evidence is not a mathematical exercise.
- Some evidence is more equal than other evidence.
- Example types of evidence
 - Percipient Witness Testimony
 - Independent Witness Testimony
 - Hearsay Evidence

- 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
- Behavioral changes
- Prompt complaint/disclosure
- Other contemporaneous evidence

CREDIBILITY CONSIDERATIONS

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- Demeanor
- Interest, Bias, Motive
- Detail
- Corroboration
- Common Sense

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).

- 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

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- 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?”

- 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 BOWDITCH

- 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
- Most sexual assaults committed by someone known to complainant
- Most sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation
- Likelihood of repeat offenders and undetected predators
- Concerns over false reports
- 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 not linear

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

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

- 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 contact?
- Was the complainant able to remove his or her own clothes?

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ADJUDICATORS

DUTIES & RESPONSIBILITIES OF TITLE IX ADJUDICATORS & ADVISORS

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.

REQUIREMENTS FOR ADJUDICATORS & ADVISORS

- Training topics must include:
 - Definition of sexual harassment,
 - Scope of “educational program or activity,”
 - Investigation and grievance process, policies,
 - Impartiality
 - Technology to be used at a live hearing (adjudicators), and
 - Relevance of questions and evidence (adjudicators)

REQUIREMENTS FOR ADJUDICATORS & ADVISORS

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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)

REQUIREMENTS FOR ADJUDICATORS & ADVISORS

- Due Process at Private Schools.
 - By Contract/Policy, not Constitution
- Title IX and VAWA disciplinary proceedings must be fair and equitable to both the victim and the accused.
- Equal treatment of the Alleged Victim and the Alleged Perpetrator is required.
- Common Sense Fairness.
- What is allowed for one must be allowed for the other.
- A Hearing that is Fair and Impartial to Both.

(Campus SaVE Act)

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ADJUDICATION ORGANIZATION & PLANNING

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

HEARING RULES (CONT'D)

RECORDING

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



STATEMENTS AND ADMISSIONS

- If a party is not subject to cross-examination, their prior statements in writing or otherwise, cannot be relied on in making determinations responsibility
- No inference as to responsibility
- Cannot rely on other witnesses concerning prior statement
- Cannot rely on police or other reports about a party's statements contained therein if the party is not subject cross-examination

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
- Provide an introduction concerning the hearing process and the role of the Investigator
- Advise hearing attendees of rights and expectations in the adjudicatory process
- Explain importance of honesty, institution's prohibition on retaliation, and the adjudicatory process

ASKING THE QUESTIONS – THINGS TO DO

- 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
- Ask for clarification of unfamiliar slang words – be sure that you and the witness mean the same thing (e.g. “hook-up”)
- 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?
- Establish the chronology, and confirm that you’ve got it right
- Give the Complainant and the Respondent an opportunity to add information.

- 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?
- When drugs or alcohol make consent questionable, see suggested areas of inquiry below.
- Explore material inconsistencies with prior statements.
 - According to the police report/prehearing statements provided to the Panel, you said a friend let you into the complainant's dorm. In your opening statement, you indicated that the complainant let you in. Could you clarify this?

ASKING THE QUESTIONS – THINGS TO AVOID

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- Avoid questions that call for speculation or guessing, e.g.,
 - Why did the victim do that?
- Personal knowledge – avoid asking witnesses questions about their opinions or about subjects on which they lack knowledge, but do probe when the basis for a witness statement is unclear, e.g.,
 - How do you know that [Complainant] wanted to have sex with the accused?
- 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?

- Questions and evidence about a complainant’s prior sexual history are irrelevant (“rape shield protections”) 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?”

CLOSING THE HEARING

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

DECISION

WRITTEN NOTICE OF DECISION REQUIRED

- Simultaneous notice to parties

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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

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

QUESTIONS?

