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
TITLE IX

DEFINITIONS – LAYING THE FOUNDATION
TRAINING REQUIREMENT (TITLE IX)

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)
TRAINING REQUIREMENT (MA)

MASS. 2021 CAMPUS SEXUAL ASSAULT LAW TRAINING REQUIREMENTS:

• Confidential resource provider and Title IX Coordinator - Awareness and prevention of sexual misconduct and in trauma-informed response.

• All participating individuals - Handling sexual misconduct complaints and the College’s disciplinary process, including but not limited to:
  • working with and interviewing persons subjected to sexual misconduct;
  • types of conduct that constitute sexual misconduct;
  • consent and the role of drugs and alcohol;
  • the effects of trauma, including any neurobiological impact on an individual;
  • cultural competence training;
  • sensitive and compassionate communications training and location of services;
  • how sexual misconduct may impact individuals with developmental or intellectual disabilities;
  • principles of due process.
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 SUBJECT TO DISCRIMINATION UNDER ANY EDUCATION PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE . . .”

20 U.S.C. § 1681(A)
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)
QUID PRO QUO

- A non-student employee conditioning an educational decision or benefit on the student’s submission to unwelcome sexual conduct
- The quid pro quo nature of the incident can be implied by the circumstances, not just by express communications
- Complainant’s subjective statement that they found the conduct unwelcome is sufficient
HOSTILE WORK ENVIRONMENT

- Unwelcome conduct which is sufficiently severe, pervasive AND objectively offensive to deny educational access
  - Based on a reasonable person standard
  - Consider all relevant circumstances, including “ages, disability status, positions of authority of involved parties, and other factors.” 85 FED. REG. 30150.
- “Unwelcome Conduct” is subjective. 85 FED. REG. 30159.
DEFINITION – SEXUAL HARASSMENT UNDER TITLE IX

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 on the School to establish, not the respondent or complainant

• Definition cannot vary between grievance processes or between parties in the same process.

85 FED. REG. 30125
DEFINITION – CONSENT (CONT’D)

• 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), 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
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

• 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 (no safe harbor)
  • Must document why supportive measures not provided

• 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
FORMAL GRIEVANCE PROCESS

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
FORMAL GRIEVANCE PROCESS

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
• 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

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%)

85 FED. REG. 30026, 30073.
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
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

• 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
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)
CONFIDENTIALITY

• Supportive measures must be confidential except as necessary to provide them

• 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

34 C.F.R. 106.44(C)
CONFIDENTIAL RESOURCE PROVIDER

• Campus Security Policy
  • Must designate at least one “Confidential Resource Provider”
  • Provides confidential resource for information concerning rights, options and services concerning sexual issues of misconduct
  • Communications with Confidential Resource Provider are privileged

MA 2021 CAMPUS SEXUAL VIOLENCE LAW
COMPLAINANT – NO FORMAL COMPLAINT

• If a student reports anonymously 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
  • 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

• Examples of other factors that may be appropriate to consider in weighing a student’s request:
  • Respondent’s history of arrests or violence
  • Threats of further sexual misconduct or other violence
  • Multiple perpetrators
  • Pattern of perpetration (e.g., via illicit use of drugs or alcohol)
  • 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
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.
INVESTIGATION OVERVIEW
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. 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

- 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

• 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
HALLMARKS OF AN EFFECTIVE INVESTIGATION

- Quality
- Timely
- Fair
- Well Documented
HALLMARKS OF AN EFFECTIVE INVESTIGATION

• 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
GENERAL RULES

• Must investigate
• Must provide written notice of investigative interviews and meetings with sufficient time for the party to prepare
• May not restrict party’s ability to discuss allegations or gather and present evidence
• Right be accompanied by an advisor of their choice

34 C.F.R. 106.45(B)(5)
GATHERING EVIDENCE

• Burden of proof and gathering evidence rests on the recipient, not the parties
• Investigator must gather all evidence sufficient to reach a determination regarding responsibility
• Parties have equal opportunity to present witnesses (fact and expert) and inculpatory/exculpatory evidence
• Cannot use, seek, or rely on privileged evidence without waiver

34 C.F.R. 106.45(B)(5)
REVIEWING EVIDENCE

• Parties have equal opportunity to inspect and review any evidence obtained during the investigation that is directly related to the allegations in the formal complaint.

• Evidence must be sent to parties and advisors in electronic or hard copy format.

• Parties have at least 10 days to respond in writing to directly related evidence.

• Investigator must consider responses before finalizing investigative report.

34 C.F.R. 106.45(B)(5)
INVESTIGATIVE REPORT

• Investigative report must fairly summarize all relevant evidence
• Must be sent to parties and advisors for their review and written response at least 10 days prior to the hearing (in hard copy or electronic format)

34 C.F.R. 106.45(B)(5)
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.

34 C.F.R. 106.45
REQUIREMENTS FOR ADJUDICATORS

• 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

• Proceedings must be conducted by individuals who receive annual training on issues relating to sexual misconduct, investigatory procedures and hearing procedures to protect the safety and rights of students and employees and promote accountability. (MA Campus Sexual Violence Law)
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)
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)
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

• The regulations stated that if a party is not subject to cross-examination, their prior statements in writing or otherwise, cannot be relied on in making determinations 34 C.F.R. 106.45

• On July 28, 2021 the Federal District Court in Massachusetts struck down this provision in Victim Rights Law Center et al. v. Cardona, No. 1:20-cv-11104, 2021 WL 3185743.

• On August 1, 2021, the Department of Education announced that it will not enforce this provision
DECISION

WRITTEN NOTICE OF DECISION REQUIRED

• No later than 7 business days after final determination

MA CAMPUS SEXUAL VIOLENCE LAW

• Simultaneous notice to parties

34 C.F.R. 106.45
APPEAL OVERVIEW
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
RETRALIATION 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
RECORDKEEPING

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

• 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).
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

• 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?
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 contact?
- Was the complainant able to remove his or her own clothes?
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.
# Trauma-Informed Investigative Practices

## 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, intimidated, 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
TRAUMA-INFORMED INVESTIGATIVE PRACTICES

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

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
CULTURAL COMPETENCE

• Awareness and inclusivity of cultural needs and impacts
• Impacts on grievance process may include but are not limited to:
  • Barriers to reporting and participation
  • Access to supportive services
  • Bias and blindspots
  • Interaction with authority figures
  • Language barriers
  • Interview approach
CULTURAL COMPETENCE

• Open and understanding; observe and listen
• Prepare questions in advance
• Use inclusive language, accurate pronouns and pronunciations
• Avoid spontaneous judgment
• Avoid generalizations
• Assess continuously and re-evaluate prior assessments
SUPPORTING PARTIES WITH DISABILITIES

• Experience higher rates of sexual misconduct
• May exacerbate psychological, physical and behavioral effects
• Impacts on grievance process may include but are not limited to:
  • Barriers to reporting and participation
  • Access to supportive services
  • Bias and blindspots
  • Need for accommodations
SUPPORTING PARTIES WITH DISABILITIES

• Make no assumptions
• Speak directly with the student or employee; involve others only with consent
• Identify barriers to services
• Provide accommodations
QUESTIONS?