Title IX Coordinator and Investigator Training Class

Presented by DSA Associates:

Cathy Cocks
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(Limited permission is granted to each attendee of this class to make training materials available per the requirements outlined in the Title IX Regulations published on May 19, 2020)
Title IX Coordinator & Investigator Training

Online Course Agenda

11am-5pm EDT each day
Breaks: 1:00pm - 1:30pm; 3:30pm - 3:45pm

Day 1 - Understanding Title IX
- Module 1: Introductions and Definition of Terms
- Module 2: Title IX Overview
- Module 3: Clery for Title IX Practitioners
- Breakout room (if time)

Day 2 - Title IX Coordinator and Policy Development
- Review and Reflection
- Module 4: Policy Development
- Module 5: Title IX and Athletics
- Module 6: Campus-wide Education
- Breakout room (if time)

Day 3 - Process Considerations
- Review and Reflection
- Module 7: Consent and the Role of Alcohol and Other Drugs
- Module 8: Special Considerations
- Breakout room (if time)

Day 4 - Process Stages
- Review and Reflection
- Module 9: Intake and Supportive Measures
- Module 10: Evidence Collection and Investigatory Process
- Module 11: Interviewing
- Breakout room (if time)

Day 5 - Case Evaluation
- Review and Reflection
- Module 12: Credibility and Relevancy
- Module 13: Resolutions and Outcomes
- Final Activity
Ms. Stafford was the Chief of Police at The George Washington University in Washington, DC from 1992-2010. During her distinguished 26 year career in the law enforcement and security industry, she worked in Campus Law Enforcement for 23 years at Bucknell University, Butler University, and most recently, at the George Washington University, where she served as Chief of Police of a 176 member police department for 18 years. Chief Stafford retired from active law enforcement on May 5, 2010. She has a Bachelor’s Degree in Criminal Justice from Mansfield University and has a Master’s of Science Degree in Education from Bucknell University. Chief Stafford is a Certified Litigation Specialist.

As one of the nation’s premier campus police chiefs, she is a much sought after speaker, consultant, educator, expert witness, and instructor on campus security, campus safety and law enforcement related issues and on compliance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (The Clery Act) and the security and safety requirements of the HEOA.

Chief Stafford has won numerous accolades for her 26 years of service in the law enforcement field. She won the “Breaking the Glass Ceiling” award in 2002 in honor of her ongoing contributions to improving the law enforcement profession. In 2004, Stafford was honored by the European Association for Campus Security for her expertise and achievements in campus security. Campus Safety Magazine awarded her their 1st Annual Campus Safety Director of the Year Award for 2006. In June 2008, Chief Stafford was presented with the Distinguished Young Alumni Award by her alma mater, Mansfield University in Pennsylvania.

She has been a member of the International Association of Campus Law Enforcement Administrators (IACLEA) since 1990 and she served on the Board of Directors from 2000-2005. She served as the Chair of the IACLEA Accreditation Commission from 2005-2008 and she served as the 45th President of the International Association of Campus Law Enforcement Administrators in 2003-2004, she was the first female to hold that office.

Chief Stafford has been a keynote speaker and has conducted presentations on the Clery Act for various organizations, including IACLEA, NACUBO, American Council on Education (ACE); the Stetson Law Conference, Security on Campus Inc, and other video/teleconference training companies.
She was a member of the IACLEA Government Relations Committee from 1995 to 2010 and was the Committee Chair from 1998 to 2000. Chief Stafford has testified at several congressional hearings, one at the request of the U.S. House of Representatives in July of 1997 and two at the request of the U.S. Senate in March of 1998 and July of 2015. Chief Stafford was selected to represent IACLEA as the primary negotiator during the 1999 and 2009 Negotiated Rule Making processes sponsored by the Department of Education regarding the development of final rules for the implementation of the Clery Act. She is a nationally recognized expert on compliance with the Clery Act.

Chief Stafford has been a featured speaker in many other areas of security and safety for the American Council on Education (ACE); American Association of State Colleges and Universities (AASCU); National Association of Student Personnel Administrators (NASPA), the National Association of College and University Business Officers (NACUBO); University Risk Management and Insurance Association (URMIA); Stetson University College of Law; and the International Association of Campus Law Enforcement Administrators (IACLEA).

Chief Stafford led the GW Police Department as the agency became an internationally accredited law enforcement agency with the Commission of Law Enforcement Accreditation (CALEA) in March of 2006 and the agency was successfully reaccredited in March of 2009. The agency subsequently achieved accreditation with the International Association of Campus Law Enforcement Administrators in May of 2007. She was chosen to become an assessor for CALEA in March 2006 and she is currently an IACLEA assessor, and as such, she has completed numerous on site assessments for those organizations.

She has published more than a dozen articles in various professional journals and magazines. She was one of the lead authors of the International Association of Campus Law Enforcement Administrator’s Blueprint for Safer Campuses: An Overview of the Virginia Tech Tragedy and Implications for Campus Safety. This document, unveiled at a press conference sponsored by the Woodrow Wilson School at Princeton University on April 18, 2008, is a roadmap for campus safety and security. The Blueprint for Safer Campuses outlines the guiding principles for campus safety and security worldwide.
Adrienne Meador Murray began her career in municipal law enforcement as a civilian employee with the City of Richmond Police Department (Virginia). She graduated from the Virginia Commonwealth University Police Training Academy and began her career as a sworn police officer for the University of Richmond (UR) Police Department (Virginia). At UR, Murray progressed through the ranks from a night shift patrol officer to Operations Lieutenant (overseeing criminal investigations, crime prevention and patrol) over the span of a decade before becoming the Chief of Police at Davidson College in North Carolina. Most recently, Murray served as Chief of Police at Trinity Washington University (in Washington, D.C.). In January 2014, Murray joined the National Association of Clery Compliance Officers & Professionals (NACCOP) and D. Stafford & Associates where she currently serves as Executive Director of Training and Compliance Activities after having been affiliated with D. Stafford & Associates as a part-time Associate since 2012.

As the Executive Director of Training and Compliance Activities, Murray builds on her 17-year career in law enforcement in which she became a nationally recognized expert in the field of best practice postsecondary institutional response to the sexual victimization of college women in the United States and in Canada. She is also a trained civil rights investigator and is well respected throughout the country for her ability to aid institutions in understating how to do best practice criminal and civil rights investigations concurrently. She is well known for her work in having provided support, advocacy and criminal investigative services for victims of sexual assault, stalking and intimate partner violence and is a sought-out speaker and investigator. She has expertise in the construction of best practice law enforcement standard operating procedures and training police officers to respond in best practice and trauma-informed ways to victims of sexual assault and intimate partner violence. In her current role, Murray coordinates curriculum development and instruction for national classes, including basic and advanced sexual misconduct investigation classes; an investigation of dating violence, domestic violence and stalking class; and a Title IX Coordinator/Investigator class offered through D. Stafford & Associates. To date, Murray has trained more than 2,500 criminal and civil rights investigators throughout the U.S.
Drawing on her experiences as a trained criminal and civil rights investigator, Murray also oversees independent investigations of complex sexual misconduct cases; conducts audits of Title IX/VAWA Compliance; drafts institutional sexual misconduct policies and procedures; and conducts campus-based trainings pertaining to the resolution of sexual misconduct offenses on college and university campuses. Murray frequently presents at regional and national conferences on topics such as the *Sexual Victimization of College Women*, *Understanding Consent and Incapacitation*, and *Responding to Sexual Assault on Campus: Clery Act and Title IX Implications*. Murray also conducts provincially specific sexual misconduct trainings throughout Canada.

Murray is a graduate of the University of Richmond, where she received her Bachelor's Degree in Applied Studies in Human Resource Management. Murray is also a graduate of the 235th session of the prestigious FBI National Academy where she was awarded a graduate certificate in Criminal Justice. She has authored numerous journal articles.
Ms. Cocks has been a higher education professional for over thirty years. Her work with D. Stafford & Associates focuses on Title IX investigations and training; assessment of student affairs policies, practices and services; and behavioral threat assessment. Cathy was the Director of Community Standards for the University of Connecticut for 14 years where she managed the student conduct process, which included managing all Title IX cases involving student respondents and chaired the University’s student threat assessment team. Prior to that, she held several positions within Residential Life at the University of Connecticut and Roger Williams University.

She is a faculty member for the Association for Student Conduct Administration’s (ASCA) Donald D. Gehring Academy teaching on subjects such as ethics, governance, threat assessment, media relations, and higher education trends. She was an affiliated faculty member for many years in the University of Connecticut’s Higher Education and Student Affairs Master’s program teaching “The Law, Ethics, and Decision-Making in Student Affairs.”

Cathy has co-authored the “Philosophy of Student Conduct” chapter in the 2nd edition of “Student Conduct Practice” (2020) and was a member of the writing team for CAS Standards’ Cross-functional Framework for Identifying and Responding to Behavioral Concerns.

Cathy is a Past President of ASCA. She has also served as a Circuit representative, co-chair of the Public Policy and Legislative Issues Committee, and as a member of the ASCA Expectations of Members Task Force. Cathy has served in a variety of leadership roles in NASPA Region I.

She was the 2015 recipient of ASCA’s Donald D. Gehring Award. She is a past recipient of the NASPA Region I Mid-Level Student Affairs Professional Award and the NASPA Region I Continuous Service Award.
She earned her Master’s degree in Higher Education Administration from the University of Connecticut and Bachelor’s degree in Communications/Media from Fitchburg State University.
Beth Devonshire, Consultant

Equity Compliance and
Title IX/Civil Rights Training

Beth Devonshire, Esq., has been an Associate with DSA since 2012 and she became a full-time consultant in August of 2018. She was the Associate Dean of Students at UMass Boston from November 2016 to July 2018. In that role, Beth administered the student conduct system, chaired the CARE and BIT Teams, served as the Deputy Title IX Coordinator, oversaw the U-Access (an office dedicated to assisting students who are dealing with a multitude of issues such as food insecurity, homelessness, emancipation from foster care, and chronic poverty), and acted as a liaison with the various constituencies around the University. Additionally, Beth was responsible drafting the policies and procedures related to students. Prior to that, Beth was the Director of Student Conduct at Bridgewater State University and the Director of Community Standards Stonehill College. Before beginning her career in Higher Education, Beth served as a clerk for the Justices of the Superior Court, and in various positions for the Massachusetts House of Representatives. Beth has also presented extensively on Title IX including presentations to Colleges, State Wide Organizations, Regional Conferences, and at the OCR Title IX Conference in March of 2011.

Additionally, Beth has given multiple presentations on other legislation and legal issues effecting higher education, including FERPA, Clery and Alcohol and Other Drug Prevention. Beth is the former National Knowledge Community Public Policy Liaison for NASPA, and also the former Massachusetts Public Policy Liaison for MA NASPA. Beth also served as the Director of the Legislative Committee for The Association for Student Conduct Administrators (ASCA) for two years. In those roles, Beth was charged with keeping abreast of proposed and passed legislation and cases impacting higher education and communicating those changes to the membership.

Before beginning her career in Higher Education, Beth served as a clerk for the Justices of the Superior Court from 2006-2007. Prior to that, Beth worked at the Massachusetts State House as Deputy Attorney for House Ways and Means, Chief of Staff for the Committee on Election Laws and as a Researcher for the Committee on Local Affairs.
Devonshire currently serves as an Associate for D. Stafford & Associates, a highly reputable consulting firm specializing in delivering on organizational, physical security, vulnerability and arming assessments; Clery Act compliance audits; assessments of Title IX compliance; Behavioral Intervention Team and Student Conduct Assessments and Training; and a host of other services related to security, safety and compliance for institutions of higher education.
Ann Todd
Consultant, Equity Compliance and Civil Rights Investigations

Ann Todd, Esq is a seasoned civil rights investigator in higher education for D. Stafford & Associates (DSA). Ms. Todd is a graduate of Davidson College with a degree in psychology and holds a JD from the University of Nebraska. Prior to joining DSA, she practiced law in Charlotte, NC, specializing in employment and civil rights and worked for a number of non-profit organizations. She returned to her alma mater (Davidson College) in 2008 and worked there through March of 2016 serving as the Assistant Director of Human Resources with the responsibility of managing employee relations and the learning and development function.

Ms. Todd joined the DSA in 2015 and currently serves as the Consultant, Equity Compliance and Civil Rights Investigations. She is the Senior Investigator for the DSA Title IX Investigation Team. She conducts external investigations on behalf of colleges and universities, specializing in investigating student allegations of sex discrimination, sexual assault, intimate partner violence, and stalking. Additionally, she brings a strong Human Resources background to investigating a range of employee misconduct—from performance issues to discrimination.

In addition to conducting investigations, Ms. Todd is a frequent speaker and consultant on Title IX investigations, conducting 20-30 courses every year on best practices for investigating sex discrimination and sex crimes on campus. She works with schools to draft policies and processes that provide equity and fairness to all parties involved and is adept at facilitating discussions with institutions to ensure the end product represents the values of the campus community.

Ms. Todd is a member of the NC Bar and a Certified Clery Compliance Officer through the National Association of Clery Compliance Officers and Professionals (NACCOP). She is also a certified 360 facilitator through the Center for Creative Leadership. She lives in Davidson, NC where she volunteers on a number of local and town boards.

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ASR: Annual Security Report (often used as a reference to the Annual Security Report and/or the Annual Security and Fire Safety Report) that must be published by each institution of higher education.

CSA: Campus Security Authority—Individuals on each campus who have been identified by the Department of Education as persons who are required to report crimes that they become aware of to the Reporting Structure at each institution.

DCL: Dear Colleague Letter—this is a formal name of the method of communication from the Department of Education to college campuses. It is like naming their official “memo” to campuses.

FERPA: Family Educational Rights and Privacy Act—governs the confidentiality of student records.

FNE: Forensic Nurse Examiners

GO: General Order—some departments describe their operating procedures as general orders

HEOA: Higher Education Opportunity Act—the broader law that contains the Clery Act language and the fire safety and missing person language that is in the law but not contained within the “Clery Act” portion of the law.

HIPAA: Health Insurance and Privacy and Portability Act—governs privacy of medical records.

MOU: Memorandum of Understanding—an official agreement developed between agencies.

NIBRS: National Incident-Based Reporting System. 1 of 2 crime reporting systems developed by the FBI, but not the system that you are required to use for Clery Reporting—the only portion of this system that is used for Clery Act purposes are the 4 forcible and 2 non-forcible sex offense definitions.

OCR: Office of Civil Rights—the unit of the Department of Education that oversees Title IX Compliance.

PD: Police Department

PS: Public Safety

PNG: Persona-non-Grata—process used by some campuses not keep students from entering certain areas of the campus or the entire campus (administrative process) versus legal bar notice or trespass warning.

SACC: Sexual Assault Crisis Center, also known as Women’s Center.

SANE: Sexual Assault Nurse Examiner
SART: Sexual Assault Response Team

SOP: Standard Operating Procedures—some departments describe their operating procedures as Standard Operating Procedures. Some call them General Orders, etc...

SWA: Senior Women’s Administrator (Athletics)

TWN: Timely Warning Notice

UCR: Uniformed Crime Report. This is 1 of 2 crime statistics reporting systems developed by the FBI. Institutions are required to use UCR Standards for counting and classifying crimes for reporting the Clery statistics.

VAWA: Violence Against Women Act
TITLE IX

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ISSUANCE OF CERTIFICATES FOR COMPLETION OF DSA/NACCOP CLASSES

To receive a certificate for classes held by D. Stafford & Associates, LLC or the National Association of Clery Compliance Officers and Professionals (NACCOP), attendees must attend the majority of the class. This includes in-person classes and virtual classes. DSA and NACCOP understands that attendees may need to miss class for a legitimate reason for longer periods of time or may need to leave the room during a class for a few minutes to take a phone call or attend to other business. That said, our general rule of thumb for our 4 and 5 day classes is that if an attendee misses more than 1 hour of class time, they will not be issued a certificate of completion for the class. If the class is a 1, 2 or 3 day class, the amount of time that can be missed may be less, as classes of those lengths are more condensed.

For virtual classes, because we can’t see all of the attendees all of the time like we can in an in-person class (based on the attendee controlling whether they have their camera turned on or not), the criteria for receipt of a certificate is determined based on missed class time (no more than 1 hour or less, depending on the length of the class) and participation in the Attendance Polls that will be launched throughout each day of class. Attendance polls are left up for approximately 5 minutes and the instructor notifies the attendees that a poll is being launched before doing so, to ensure that everyone who is there can/will respond to the poll. If there is an issue with responding to the attendance poll, the attendee would need to immediately notify the Administrative Support person in the course via the chat function in the zoom platform. That way we can immediately resolve any issues and give the attendee credit for being in attendance for the poll. Notifying us hours or days after having an issue with not being able to complete the attendance poll will not allow us to give the attendee credit for being in class during the poll.

Our classes qualify for credit toward a Master’s Degree at New England College (and regardless if you decide to seek credit or not, but accreditation requirements mandate that we follow the same standards for all class attendees), so we have strict attendance standards that we follow for issuance of a certificate, which equates to verification that the participant attended the complete class. For DSA and NACCOP, issuance of a Certificate of Completion is verification of that fact.

If the attendee missed class for a legitimate reason, that doesn’t mean that an attendee wasn’t there for much of the class and that they didn’t benefit from that attendance. It just means that based on the missed time and/or attendance polls (in virtual classes only), we aren’t able to issue you a certificate of completion.

If an attendee has to miss time in class, the instructions attendees receive before the class provide instructions for notifying the Administrative Support person about the time that will be missed IN ADVANCE, so we can jointly identify what blocks of instruction will be missed, and the DSA/NACCOP team will then work with the attendee to see if we can get them in a future class module to make up that material, which would result in us being able to issue the attendee a certificate. We provide this service and opportunity at no additional cost, as we want each attendee to finish the class and get a certificate of completion. Effective communication by each attendee is the key to this option.
Introduction and Terms

AGENDA

- Introductions
- Terms

Introduction

Name
Institution
How long have you been doing this work?
Attorneys

- Not your attorney
- Consult with YOUR legal counsel

The Laws

- **Title VII** of the Civil Rights Act of 1964
  - Violence Against Women Reauthorization Act of 2013
- **Title IX** of the Education Amendments of 1972

Language

- **Civil Rights**
  - Complainant vs. respondent (must use for Title IX)
  - Accuser vs. accused
  - Reporting party vs. responding party

- **Criminal** (for purposes of concurrent investigations)
  - Victim vs. suspect/perpetrator
Parties

- **Complainant**
  - An individual who is alleged to be the victim of conduct that could constitute sexual harassment

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

- **Witness**
  - Any individual who has direct knowledge of an incident

Outcomes

- **Findings**
  - "Responsible" or "Not Responsible"
  - "In Violation" or "Not In Violation"
  - "Substantiated" or "Unsubstantiated"
  - "Founded" or "Unfounded"

- **Criminal Findings**
  - "Guilty" or "Not Guilty" (Innocent)

  A False Report/False Allegation is not the same thing as a finding of "Not Responsible."

Standard of Proof

- **Preponderance of the Evidence**
  - Based on the evidence presented, it is more likely than not that...

- **Clear & Convincing Evidence**
  - Based on the evidence presented, it is highly probable that ...

- **Evidence Beyond a Reasonable Doubt**
  - Highest level of proof which is used in criminal cases and therefore, not applicable.
Umbrella Terms

- **Sexual harassment** is a form of sex discrimination prohibited by Title IX.
- **Sexual assault** means an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting program. Defined under the Clery Act.
- **Sexual misconduct** is a term often used in school policies to adequately describe the spectrum of unwanted behaviors.

Terminology

- Androgynous
- Asexual
- Bisexual
- Cisgender
- Gay
- Gender dysphoria
- Gender expression
- Gender fluid
- Gender identity
- Gender non-conforming
- Gender queer
- Intersex
- Lesbian
- LGBTQ
- Non-binary
- Oozing
- Pansexual
- Queer
- Questioning
- Sexual orientation
- Transgender
Title IX Overview

Agenda

- History
- Case Law
- The Law & Regulations
Sexual Harassment Guidance Timeline

<table>
<thead>
<tr>
<th>Year</th>
<th>Guidance</th>
</tr>
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<tbody>
<tr>
<td>1972</td>
<td>Title IX passed</td>
</tr>
<tr>
<td>1997-2000</td>
<td>Guidance</td>
</tr>
<tr>
<td>2001-2006</td>
<td>Guidance</td>
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<tr>
<td>2008-2010</td>
<td>Guidance</td>
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<tr>
<td>2011-2017</td>
<td>Guidance</td>
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<tr>
<td>2018-2020</td>
<td>Guidance/Regs</td>
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The Law

United States Code
Title 20—Education
Section 1681

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, except that:

<table>
<thead>
<tr>
<th>Statute</th>
<th>Overview</th>
</tr>
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<tbody>
<tr>
<td>Title IX</td>
<td>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, except that:</td>
</tr>
<tr>
<td>20 USCA § 1681</td>
<td></td>
</tr>
</tbody>
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Title IX
20 U.S. Code § 1681

Exceptions:
3) religious organizations; 4) military services or merchant marines; 5) traditional single-sex institutions; 6) social fraternities and sororities and voluntary youth organizations; 7) Boy or girl conference; 8) Father-son/mother-daughter activities; 9) "beauty pageants."

CASE LAW

https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf
GEBSER v. LAGO VISTA IND. SCHOOL DISTRICT, SCOTUS (1998)

“The question in this case is when a school district may be held liable in damages in an implied right of action under …Title IX… for the sexual harassment of a student by one of the district’s teachers. We conclude that damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.”

DAVIS v. MONROE COUNTY BOARD OF EDUCATION, SCOTUS (1999)

“We consider here whether a private damages action may lie against a school board in cases of student-on-student harassment. We conclude that it may, but only where the harassment is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”

JACKSON v. BIRMINGHAM BOARD OF EDUCATION, SCOTUS (2005)

“We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination.”
FITZGERALD V. BARNSTABLE SCHOOL COMMITTEE, SCOTUS (2009)

“…Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for §1983 suits as a means of enforcing constitutional rights. Accordingly, we hold that §1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools.”

DOE V. CINCINNATI, 6TH CIRCUIT (2017)

“Here, the University’s disciplinary committee necessarily made a credibility determination in finding John Doe responsible for sexually assaulting Jane Roe. Doe’s failure to provide any form of confrontation of the accuser and the lack of cross-examination of adverse witnesses gave the exclusively ‘he said/she said’ nature of the case. Defendants’ failure to provide any form of confrontation of the accuser made the proceeding against John Doe fundamentally unfair.”

DOE V. BAUM, 6TH CIRCUIT (2018)

“…if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”
HAIDAK v. UMASS-AMHERST,
1ST CIRCUIT (2019)

"...we find that the university violated Haidak's federal constitutional right to due process in suspending him for five months without prior notice or a fair hearing, but that it did not thereafter violate his rights in expelling him after providing a fair expulsion hearing."

"Some opportunity for real-time cross-examination, even if only through a hearing panel."

DOE v. UNIVERSITY OF THE SCIENCES,
3RD CIRCUIT (2020)

"We hold that USciences's contractual promises of "fair" and "equitable" treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses— including his or her accusers. We do not, however, attempt to prescribe the exact method by which a college or university must implement these procedures."
Interpreting Laws

Law  Regulations  Substantive guidance

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Title IX Overview

Applies to Higher Ed and K-12  Limited regulations pre-2020  Covers wide range of sex discrimination

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2020 Regulations

PREAMBLE  PROCESS FOR SEXUAL HARASSMENT ONLY  TECHNICAL ASSISTANCE

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21
§106.3 – Remedial Action

Fix it

No monetary damages

§106.6 – Effect of Other Requirements and Preservation of Rights

Constitutional Rights
FERPA
Title VII
Parents and guardians
State and local laws

§106.8(a) Designation of Coordinator

Title IX Coordinator
Notification of parties
Contact information
Reporting information
§106.8(b) Dissemination of Policy

Title IX Coordinator contact information

Grievance procedure

United States

§106.8(C) Adoption of Grievance Procedure

“Grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with §106.45 for formal complaints as defined in §106.30.”

§106.8(d) Application Outside of the United States

Only applies to US (and US territories)

Use other policy

No Clery conflicts
Submit in writing
Specific tenant
Not required
Raise any time

§106.30 Definitions – Actual Knowledge

“Actual knowledge means notice of sexual harassment or allegations of 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 recipient.”

Title IX Coordinator
Official with authority
Different K-12 standard
Designation
Not same as CSAs
§106.30 Definitions – Complainant & Respondent

- **Complainant**
  "an individual who is alleged to be the victim of conduct that could constitute sexual harassment"

- **Respondent**
  "an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment"

§106.30 Definitions – Formal Complaint

- "... a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment."
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
- "Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party."
§106.30 Definitions - Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;

PRONG 1: Quid Pro Quo

Must be an employee (not volunteer, visitor, student)

"This for that" harassment

When favorable professional or educational treatment is conditioned on a sexual activity

PRONG 2: Hostile Environment+ (The Davis Standard)

No definition of consent required

Not the same Title VII "hostile environment" or 2001 Guidance

First Amendment protections
PRONG 3: The VAWA Offenses

- Sexual Assault
  - Rape
  - Fondling
  - Incest
- Intimate Partner Violence
  - Dating Violence
  - Domestic Violence
- Stalking

§106.30 Definitions – Supportive Measures

"Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed."

"Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment."
§106.44 Recipient’s Response to Sexual Harassment; (a) General Response to Sexual Harassment

- Deliberately Indifferent
- Educational Program or Activity
- Equitable
- Contact Complainant
- Online

§106.44 (c) Emergency Removal; (d) Administrative Leave

Emergency removal
Administrative leave

§106.45 Grievance Process for Formal Complaints of Sexual Harassment (a) Discrimination

"A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX."

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§106.45 Grievance Process for Formal Complaints of Sexual Harassment, (b) Grievance Process, (1) Basic Requirements

- Equitable Evaluations
- Objective Evaluations
- Impartiality and Training
- Presumption of Not Responsible
- Prompt Time Frames

§106.45 Grievance Process for Formal Complaints of Sexual Harassment, (b) Grievance Process, (2) Notice

- Notice requirements
- Additional allegations

- Range of sanctions and remedies
- Standard of evidence
- Appeal
- Supportive measures
- Respect privilege
§106.45(b)(3) Dismissal of a Formal Complaint

Must dismiss:

- Behavior does not constitute sexual harassment
- Did not occur in educational program or activity, not in the United States

May dismiss:

- Complainant withdraws formal complaint
- Respondent no longer enrolled/employed
- Insufficient evidence

§106.45(b)(4) Consolidation of a Formal Complaint

- Multiple respondents
- More than one complainant against one or more respondent
- One party against other party

§106.45 Grievance Process for Formal Complaints of Sexual Harassment, (b) Grievance Process, (5) Investigation
§106.45(b)(8) Appeals

MUST have:
- Procedure
- New evidence
- Conflict or bias that impacted outcome

Additional grounds permitted

Decision-maker can have no other role

Reasonably prompt time frame

Notification of appeal

Equal opportunity to respond

Written outcome rationale
§106.45(b)(9) Informal Resolution

- Notice
- Voluntary
- Not allowed for Employee/student

§106.45(b)(10) Recordkeeping (seven years)

- Case Materials
- Training materials

§106.71 Retaliation

- Prohibited
- Intimidation, threats, coercions, discrimination
- May use same grievance procedure
- 1st Amendment
- False reports

§106.71 Amendment
Title IX Personnel – Title IX Coordinator

- Coordinates all Title IX efforts
- Disseminates policy
- Receives reports and/or outreach to complainant
- Accepts or signs formal complaints
- Accepts complainant’s withdrawal of complaint
- Coordinates effective implementation of supportive measures and remedies

Title IX Personnel – Decision-Maker

- Only one role within a case (hearing officer or appeal officer)
- May ask questions in hearing
- Determine relevancy of questions in hearing
- Issues written determination of responsibility

Title IX Personnel – Investigator

- Gathers relevant evidence
- Collects for sharing all evidence obtained that is related...
- Does not limit the ability of the parties to gather and share evidence
- Drafts final investigative report
Facilitate the informal resolution process

Receive same training as other Title IX Personnel

Facilitator

- Informal Resolution

- Title IX Personnel

- Facilitate the informal resolution process
- Receive same training as other Title IX Personnel

School-provided Advisors

- Institutions must provide an advisor if a party does not have one at hearing
- Conducts cross examination of witnesses and opposing party
- Receives evidence and investigation report
- No training requirement

Who does everything else?

- Emergency removal decisions (and appeals)
- Determine bias and conflict of interest
- Make dismissal decisions
- Appoint Title IX Personnel
- Interpret policy
- Draft and send notice documents
- Implement sanctions

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All Title IX Personnel:
- Definition of sexual harassment
- 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
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

Decision-makers:
- Technology to be used at a live hearing
- Issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant

Investigators:
- Issues of relevance to create an investigative report that fairly summarizes relevant evidence
The Clery Act
FOR TITLE IX PRACTITIONERS

Agenda
- The Clery Act (with Title IX Intersections)
  - CSAs
  - Crimes
  - Geography
  - Campus Alerts
- VAWA
  - Amendments/Definitions
  - Procedural Requirements
  - Education Requirements

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Key Requirements of the Clery Act
- Collect, Classify, and Count Crime Reports/Statistics
- Public Disclosures
- Publish Annual Security Report
- Submit Crime Statistics to the Department

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Key Requirements (part 2)

- Provide Educational Programs and Campaigns on Dating/Domestic Violence, Sexual Assault, & Stalking
- Have Procedures for Institutional Disciplinary Action for DV/DV/SA/S
- If you have a campus police or security department: Publish Daily Crime Log
- If you have residential facilities: Fire Log, Fire Safety Report, Missing Persons Procedures

COUNTING CRIME STATISTICS

1. Was the crime reported to a Campus Security Authority?
2. Is the crime a Clery Act crime?
3. Did the crime occur on or within the institution’s reportable Clery geography?
Campus Security Authorities (CSA)

Campus police/security
Security responsibility
Individual or organization where crimes should be reported
An official with responsibility for student and campus activities

Campus Security Authorities (CSA)

Who is never a CSA?

Professional Counselors
Licensed, professional counselors. Includes individuals who are unlicensed and uncertified but acting under the supervision of an exempt counselor, e.g., a graduate student doing an internship.

Pastoral Counselors
NOTE: These positions are exempt only when acting within the scope of their duties as a counselor or trainee.

CSA FUNCTION
A CSA's function is to report allegations of Clery Act crimes and its related faith.

REPORT
Reporting Considerations

Title IX—“Officials with authority to institute corrective action on behalf of the institution”

- Title IX Coordinator
- Official(s) who can institute corrective measures on behalf of the school
- Any other person who is designated by the institution as a person who shall report

Clery Act—CSAs

- Campus police department
- Responsible for security
- Individuals to whom crimes should be reported
- “Officials with significant responsibility for student and campus activities”
- Local law enforcement

COUNTING CRIME STATISTICS: CLERY CRIMES

Three Part Test

1. Was the crime reported to a Campus Security Authority?
2. Is the crime a Clery Act crime?
3. Did the crime occur on or within the institution’s reportable Clery geography?
Clery Crime Categories

- Primary Crimes
- Hate Crimes
- Arrests and Referrals for Drug, Liquor and Weapon Violations
- Dating Violence, Domestic Violence and Stalking Incidents (VAWA Crimes)

Clery Reportable Crime Categories

- Murder/Non-negligent Manslaughter*
- Negligent Manslaughter*
- Sex Assault*
- Rape
- Fondling
- Incest
- Statutory Rape
- Robbery*
- Aggravated Assault*
- Burglary*
- Motor Vehicle Theft*
- Arson*

- Arrests and Disciplinary Referrals for:
  - Liquor
  - Drugs
  - Weapons
  - Domestic Violence
  - Dating Violence
  - Stalking
  - Hate Crimes for *, plus
  - Larceny-Theft
  - Simple Assault
  - Intimidation
  - Destruction/Damage/Vandalism of Property

Counting Clery Crimes

If a crime is reported (and otherwise meets the three-part test) it is counted.

- Includes attempts
- Includes cases a DA would reject
- Includes cases of “not responsible”
- Does NOT include every conduct code violation

It is not the word used but the facts of the case that determine how it gets counted.
Three Part Test

1. Was the crime reported to a Campus Security Authority?
2. Is the crime a Clery Act crime?
3. Did the crime occur on or within the institution’s reportable Clery geography?
Impact of Location & Party

- 2020 Title IX Regulations
  - Conduct that occurs within its "education program or activity"
  - Against a person within the United States
  - School must have exercised substantial control over both the respondent and the context in which the sexual harassment occurs
  - Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution
- Clery Act
  - On-campus; on public property within or immediately adjacent to and accessible from the campus; in or on non-campus buildings or property that your institution (or a recognized student organization) owns/controls
  - May include some study abroad programs
  - For VAWA crimes, must use processes even if occurs off-campus

Geography versus Jurisdiction

- Geography is the defined physical area in which the Clery Act attaches. A crime MUST occur within the institution's physical Clery geography to be captured.

- Jurisdiction generally describes authority to apply law to a certain area and/or to certain persons. For example, under Title IX, an act may not physically occur on campus, but if it occurs within certain programs between certain people, Title IX attaches.
Public Disclosures

- Daily Crime Log
- Annual Security Report (ASR)
- Emergency Notifications/Timely Warning Notices

Timely Warning/Emergency Notification

<table>
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<th>TIMELY WARNING (TWN)</th>
<th>EMERGENCY NOTIFICATION (EN)</th>
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<tbody>
<tr>
<td>Legal Standard</td>
<td>Serious or continuing threat</td>
<td>Immediate threat to health and safety</td>
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<tr>
<td>Circumstance</td>
<td>Carry-reportable crimes that have been reported (occurred in past)</td>
<td>Carry-reportable crimes as well as other types of emergencies (happening right now or about to happen)</td>
</tr>
<tr>
<td>Audience</td>
<td>Community-wide</td>
<td>Can send to a segment of the community, if appropriate</td>
</tr>
<tr>
<td>When Issued</td>
<td>As soon as pertinent information is available</td>
<td>Upon confirmation of emergency (when possible)</td>
</tr>
<tr>
<td>Follow-Up</td>
<td>Not Required</td>
<td>Required</td>
</tr>
</tbody>
</table>
Timely Warning Decisions

EVERY Clery-reported crime must be assessed on a case-by-case basis for timely warning purposes.

The nature and type of the crime

The continuing danger to the campus community

Duties Under VAWA

- Added “Dating Violence, Domestic Violence, & Stalking” to list of countable Clery crimes
- Added training and procedural requirements for DVDVS Crimes (including Sexual Assault)
- Added Gender Identity to Hate Crime categories

VAWA Crime Categories

- Added process and procedures to address Clery crimes (including Sexual Assault)
- Added training on harassment, discrimination, and retaliation for students and employees.
- Added Gender Identity to Hate Crime categories.
Clery Crime Categories

Primary Crimes
Hate Crimes
Arrests and Referrals for Drug, Liquor and Weapon Violations
Dating Violence, Domestic Violence and Stalking Incidents (VAWA Crimes)

Rape
Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This definition includes any gender of victim or respondent.

Fondling
The touching of the private body parts of another person for the purpose of sexual gratification without consent of the victim, including instances where the victim is incapable of giving consent b/c of his/her age or temporary or permanent mental or physical incapacity.
Consent

The Clery Act does not require any particular definition of consent
ASR must include definition of consent as defined by jurisdiction (state law)
Institution should have a definition in their institutional sexual misconduct policy

Sexual Assault

INCEST
Non-consensual sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law

STATUTORY RAPE
Non-consensual sexual intercourse with a person who is under the statutory age of consent

Domestic Violence

A felony or misdemeanor crime of violence committed by:
   a) a current or former spouse or intimate partner of the victim
   b) by a person with whom the victim shares a child in common
   c) by a person who is cohabitating with, or has cohabited with the victim as a spouse or intimate partner
   d) by a 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 OR
   e) by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred
What is a “Crime of Violence?”

According to Section 16 of title 18 of the United States Code, the term “crime of violence” means an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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.

1. The existence of such a relationship shall be based on the reporting party’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

2. For the purposes of this definition—
   A. Dating Violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
   B. Dating violence does not include acts covered under the definition of domestic violence.

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

a) Fear for the person’s safety or the safety of others; or

b) Suffer substantial emotional distress.
Stalking (related definitions)

d) Course of conduct means two or more acts, including, but not limited to, acts which the stalker directly, indirectly, or through third parties, by any action, method, device, or means—follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person’s property.

b) Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.

c) Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Discussion: What’s Missing?

- Are there sex-based offenses that are not included here but should be included in our conduct codes?
- Are there other behaviors that are sex-based that are not included here but should be included in our conduct codes?
Response Requirements for VAWA Offenses

Procedures an institution will follow when offense reported

Procedures victims of VAWA Offenses should follow

and make sure it is all in WRITING.

Written Explanation of Student or Employee's Rights

(b)(11)(vii) “When a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section...”
1. The importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order
   - Not required but recommended: Where to obtain forensic exams, contact info, does not require police report and can have exam now, decide later

2. How and to whom the alleged offense should be reported
   - List any person or organization that can assist the victim
   - Recommended: Also include community organizations

3. Notification of the victim’s option to
   - Notify proper law enforcement authorities, including on-campus and local police;
   - Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and
   - Decline to notify such authorities

4. The rights of victims and the institution’s responsibilities for
   - Orders of protection;
   - “No contact” orders;
   - Restraining orders; or
   - Similar lawful orders issued by a criminal, civil, tribal, or institutional authorities

5. Options for, available assistance in, and how to request changes to (if requested and reasonably available)
   - Academic, living, transportation, working

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Written Explanation of Rights and Options

7. Confidentiality
   - Publicly available recordkeeping has no personally identifying information about the victim, (not required for respondent but best practice in most cases)
   - Accommodations and protective measures are confidential to the extent they can be without impairing the ability to provide them

8. Disciplinary Procedures
   - An explanation of the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as required by paragraph (k)

Response to "Actual Knowledge"

- 2020 Title IX Regulations
  - Contact the Complainant
  - Offer and/or implement supportive measures
  - Explain the process for filing a formal complaint
- Clery Act
  - Written explanation of victim’s rights and options including:
    - procedures to follow (preserve evidence, report)
    - Information about confidentiality
    - Existing counseling, mental health, assistance etc.
    - Access to law enforcement and no contacts etc.
    - Changes to academic, living, transportation and working situations, institutional procedures
    - Process for Institutional disciplinary process
    - Assess for Timely Warning Notice OR Emergency Notification

Clery Requirements for Disciplinary Proceedings

- Anticipated timelines ("reasonably prompt")
- Decision-making process
- How to and options for filing a school complaint (with contact info)
- How school determines which process to use
- Who makes decisions
- Include employee procedures
- Use procedures regardless of Clery geography
Advisors under Clery

Advisor Requirement
- Advisor - individual who provides support, guidance, or advice
- Do not limit the choice of advisor
- May restrict participation if apply equally
- Provide timely notice of meetings
- May form a pool of people
- Can remove a disruptive advisor
- Could allow them to serve as a proxy
- Don’t have to delay for them (but encouraged to be reasonable)

Standard of Evidence
- 2020 Title IX Regulations
  - Either the preponderance of the evidence standard or the clear and convincing standard but must be the same for all sexual misconduct
- Clery Act
  - Any standard of evidence ... must include in policy
  - Would not prohibit using different standards for different groups
**Informal Resolutions**

- Can offer, but may not require
- Not allowed for “employee on student” sexual harassment
- Party may withdraw up to a point

**Clery Act**

- Written information about procedures the institution will follow for VAWA offense (does not differentiate between formal vs informal)

---

**Formal Complaint Rights**

**2020 Title IX Regulations**

- Treat equitably with goal to restore/preserve access to education; due process for respondent;
- Include presumption of not responsible
- Include any discipline for false statements
- Reasonably prompt time-frames
- Describe the range of sanctions

**Clery Act**

- Prompt, fair, and impartial investigation and resolution
- Anticipated timeframes
- List all possible sanctions for each offense (employees and students)
- Consistent with policy and transparent
- Not required to list all protective measures

---

**Formal (Live Hearing)**

**2020 Title IX Regulations**

Requires live hearing with cross examination by advisor

**Clery Act**

Clery is silent regarding live hearing
Written Determination

Title IX
- Identification of the allegations
- Procedural steps taken from receipt through determination
- Notiﬁcations to the parties
- Interviews with parties and witnesses
- Site visits
- Methods used to gather other evidence
- Hearings held
- Findings of fact supporting the determination
- Conclusion regarding the application of code of conduct to the facts
- Result (responsibility, rationale, sanctions, remedies for each allegation)
- Appeals procedures
- When such results become final

Clery Act
- Result (include any sanctions and rationale for results and sanction)
- Appeals procedures
- Any change to the result
- When such results become final

Clery Requirements for Officials
- Training must be described in ASR
- Annual
- Should include (at a minimum):
  - Relevant evidence and how it should be used
  - Proper interview techniques
  - Basic procedural rules for conducting a proceeding
  - Avoiding actual/perceived conﬂicts
- Can be in person or electronic (webinar or video)

Bias Free and Training for “Officials”

Title IX (“Title IX Personnel”)
- Training for all as...
  - 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
  - how to serve impartially, including by avoiding prejudgment of the facts
- Decision Makers
- training on any technology and on issues of relevance
- Investigators
- relevance to create an investigative report that fairly summarizes
- Training materials must not rely on sex stereotypes

Clery (“Ofﬁcials”)
- Annual training on...
  - the issues related to dating violence, domestic violence, sexual assault, and stalking
  - how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability
**Appeals**

2020 Title IX Regulations
- Must offer both parties an appeal
- Based on specific grounds

Clery Act
- Not required (but must provide notice if allowed along with appeal procedures)
- Simultaneous written decision describing result, sanction, any changes to the result, when it becomes final

---

**Recordkeeping**

2020 Title IX Regulations
- 7 years

Clery Act
- Retain all records used in compiling ASR for three years from the latest publication of the report to which they apply (in effect 7 years)

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**VAWA Education Requirements**

---
Primary Prevention Best Practices

“Programming, initiatives, and strategies intended to stop dating violence... stalking... before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in a health and safe directions.”

- Not required that all students take or attend (but mandate encouraged)
- Must show “good faith effort” to reach them with “active notification”
- Format and timeframe encouraging maximum attendance
- Equally important to prevent perpetration as it is to prevent victimization

Primary Prevention & Awareness

“The institution’s primary prevention and awareness programs for all incoming students and new employees, which must include...”

- Statement prohibiting dating violence
- Definitions of dating violence
- Definition of consent
- Safe and positive options for bystander intervention
- Information on risk reduction
Ongoing Prevention & Awareness

“Ongoing prevention and awareness campaigns for students and employees...must provide the same information as the primary awareness and prevention programs”

- Deeper dives
- Sustained over time
- Promote services
- Range of strategies/audiences
  - Social media, email, posters, ads
  - Take Back the Night
  - Sports teams, Greek, dorms
  - Student fairs or campus events
  - DV program for supervisors

CSA Training (Recommendations, Not Requirements)

- Role of a CSA
- Provide Reporting materials
- Map of Clery geography
- Definitions of Clery crimes
- Forms for documenting and reporting
- Importance of documentation
- Need for timely reporting
- “Super CSAs?”
- Personally Identifiable Information
Drafting the Policy

Agenda

- Policy vs. Procedures
- Important considerations
- Policy sections
- Additional considerations
Policy vs Procedure

Policy
What are the rules, why they exist, when they apply

Internal Procedures
Step by step actions for the staff

External Process Information
Information through a notice letter or information sheet explaining the process and steps for the involved parties

Example

Policy statement
- Prior to completion of the investigative report, the Respondent and Complainant, and their respective advisors, if any, will be provided a copy of the evidence in an electronic format or a hard copy. The parties will have 10 calendar days to submit a written response.

Internal procedure
- All documents considered evidence should be converted and merged into one pdf.
- The pdf should be watermarked for each party, and security settings should be set to prohibit editing.
- A transfer link is sent to the parties simultaneously via email.

External process information
- Prior to the completion of the report, you and your advisor, if applicable, will receive a Dropbox link to access a copy of the evidence. You will have until [DATE] to review the evidence and provide a written response to the investigator. To provide the written response, use the following link: [submission link].

Example

Policy statement
- Either party may request, no later than seven calendar days prior to the hearing, for the hearing to occur with the parties located in separate rooms with technology enabling the hearing body and parties to simultaneously see and hear the party or the witness answering questions.

Internal procedure
- Notify both parties of the request for a virtual hearing;
- Book the space and technology;
- Send login information to the hearing officer and parties;
- Include an instruction sheet on using the technology.

External process information
- Either the Complainant or Respondent may request to have the parties located in separate rooms and the hearing will be held using Zoom technology. If you wish to utilize this option, you must notify [name] at [email] no later than [DATE].
Important Considerations

- Scope
- MOUs
- Multiple campuses
- Jurisdiction

Title IX
- Sexual harassment
- Gender-based harassment

Clergy
- Domestic violence
- Stalking
- Dating violence
- Sexual assault
- Rape

EEO policies

Employee handbooks

Conduct policies

and criminal
When Multiple Policies May Apply

<table>
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<tr>
<th>LAW</th>
<th>WHO</th>
<th>WHAT</th>
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<td>TITLE VI</td>
<td>STUDENTS</td>
<td>RACE, COLOR, OR NATIONAL ORIGIN</td>
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<td>TITLE VII</td>
<td>EMPLOYEES</td>
<td>RACE, COLOR, RELIGION, SEX</td>
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<td>EMPLOYEES</td>
<td>VETERANS</td>
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Discussion: Different Voices

- Who should be around the table when drafting the policy?
Competencies

Laws and legal issues  Cultural competencies  Campus climate  Campus politics  Approval process

POLICY SECTIONS

Statement of Policy  Related Policies  Applicability/Jurisdiction  Title IX Coordinator  Employee Responsibilities  Definitions  Prohibited conduct  Reporting Options  Supportive Measures  Accommodations and Interpretive Services  Interim Action  Grievance Procedures  Education and Prevention  Interpretation and Revision  Record Management  Interpretation and Revision
Applicability – Individuals

- Students
- Employees
- Students in dual credit/enrollment programs
- Students in institution-operated K-12 schools

Title IX Coordinator

- Role
- Contact information
- Additional coordinators/deputies?

Employee Responsibilities

- Reporter
- Witness
- Advisor
**Definitions from Title IX Regulations**

**Education Program or Activity:** Includes locations, events, or circumstances over which the institution exercises substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. This does not include education programs or activities outside of the United States.

**Actual knowledge:** Actual knowledge means notice of sexual harassment or allegations of 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 recipient, or to any employee of an elementary and secondary school.

**Formal Complaint:** A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
Definitions from Title IX Regulations

- **Complainant:** An individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent:** An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

**Supportive Measures:** Nondisciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.

Other Recommended Definitions

- **Advisor:** Any person who accompanies a respondent or complainant during the investigatory process and/or hearing. Except for conducting cross-examination at a hearing, the advisor’s role is limited to providing support and guidance to their advisee and the advisor may not speak or otherwise represent their advisee throughout the process. If an advisor of the party’s choice does not attend the hearing, the institution will provide an advisor of the institution’s choice for the sole purpose of conducting cross-examination on behalf of the party.
Other Recommended Definitions

- **Decision-maker(s):** Annually trained University official(s) authorized to determine emergency removals, conduct hearings, and/or review appeals. Decision-maker(s) may only serve one role within a case and must be free of bias or a conflict of interest.
- **Witness:** Any individual who has direct knowledge of an incident. Character witnesses are not part of the Title IX grievance process.

Decisions About Definitions

- **Day:** Identify that a day is “calendar day” if that is what you are using.
- **Employee:** Is there a definition of “employee” that is institutionally-accepted? Who interprets that definition?
- **Student:** Is there a definition of “student” that is institutionally-accepted? Who interprets that definition?

Title IX Specific Prohibited Conduct

- Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking
- Retaliation
Reporting Options

- Institution
- And/or
- Law Enforcement

Reminder: Clery Obligations about Reporting
1. Evidence preservation
2. How and to whom to report
3. Notification of options
4. Rights of victims and responsibilities of institution
5. Existing resources
6. Options for available assistance and how to request changes
7. Confidentiality
8. Disciplinary procedures

Supportive Measures
- Counseling
- Course-related
- Modifications of work/class schedules
- Campus escort services
ADDITIONAL CONSIDERATIONS

Update References to Title IX

Conduct code  Minors on campus  Inappropriate relationships
Vendor contracts  Collective bargaining agreements

Potential conflicts  Preemption

State and Local Laws
Discussion:
First Amendment

- How does the First Amendment come into play with our processes?
- How do we reference it in the policy?

Discussion:
Time Implications of Reports

- How are you managing active cases?
- If a report is submitted for an incident that occurred prior to the implementation of the policy, what applies?
Title IX and Athletics

Agenda

- Compliance
- Inclusion of LGBTQ+ student-athletes
- NCAA Sexual Violence policy
- Miscellaneous

An athletics program can be considered gender equitable when the participants in both the men’s and women’s sports programs would accept as fair and equitable the overall program of the other gender. No individual should be discriminated against on the basis of gender, institutionally or nationally, in intercollegiate athletics.

NCAA Gender Equity Task Force, 1992
Three-part Test

Substantially proportionate
Program expansion
Interest and abilities

PART 1 – Substantially Proportionate
Athletic opportunities substantially proportionate to enrollment

Part 2 – History and Continuing Practice of Program Expansion
- History or continuing practice of adding programs
- Adding or upgrading teams
- Expansion plan
Part 3 – Interests and Abilities

Unmet interest  Sustainability  Competition

Scholarships

- Athletic-based award compared to percentage of M/F student athletes
- Other awards not counted

Equal Athletic Opportunities – Laundry List

- Equipment and supplies
- Scheduling
- Travel and per diem
- Tutors
- Coaching
- Facilities
- Locker rooms, fields
- Medical and training
- Housing and dining
- Publicity
- Support services
- Recruiting
Inclusion of LGBTQ+ Student Athletes

- Transgender participation guidance
  - FTM taking testosterone can compete on men’s team
  - MTF taking suppression medication can compete on men’s team
- If not taking medication, participation on assigned birth gender
  - FTM can participate on men’s or women’s team
  - MTF may not compete on women’s team

NCAA SEXUAL VIOLENCE POLICY

History
- 2011 Summit
- 2014 Resolution
- 2017 Policy
- 2017 and 2019 Toolkit

Principles
- Policy and procedures
- Education
- Collaboration

Attestation Form
- Knows procedures
- Policies available
- Education requirements

Investigations
- Staff must cooperate
NCAA Sexual Violence Policy – May 2020

- New Requirements regarding investigation, discipline, or criminal conviction
  - Student-athlete disclosure
  - Institutions must share information
  - Policy directing staff to information
- Effective date 21-22

NCAA Sexual Violence Policy – The Tool Kit

- Leadership
- Collaboration
- Compliance
- Education
- Student-Athlete engagement
- Additional materials

Regulation Implications

- Supportive measures - non-disciplinary
- Communication restrictions
- Fact-specific
- Changing class schedule “more acceptable” than removal from sports team
- Disciplinary if it is listed
- Emergency removal
  - Immediate threat to PHYSICAL health or safety
Name, Image, and Likeness

Funding through an outside source
Schools provide education and resources

eSports

WOMEN 5% OF ESPORT ATHLETES
THREE-PART TEST
ON-LINE HARASSMENT
Discussion: Moving Forward

- Who is in charge of athletic compliance efforts on your campus?
- How can you work with athletics in terms of sexual violence?
- What strategies are effective?
Agenda

- VAWA Training Requirements
- Title IX Requirements
- Bringing Prevention to Campus
- Models of Prevention
From the VAWA Regulations…

(j) ... an institution must include in its annual security report a statement of policy that addresses the institution’s programs to prevent dating violence, domestic violence, sexual assault, and stalking.

Programs to Prevent VAWA Crimes

Programs to prevent dating violence, domestic violence, sexual assault, and stalking include both primary prevention and awareness programs directed at incoming students and new employees and ongoing prevention and awareness campaigns directed at students and employees, as defined in paragraph (j)(2) of this section.

- Culturally relevant
- Inclusive
- Sustainable
- Responsive
- Informed by research
- Consider environmental risk and protective factors as they occur on the...
  - Individual
  - Relationship
  - Institutional
  - Community
  - Societal
Primary Prevention Programs Requirements

- Institutional statement
  - Definitions
  - Bystander intervention
  - Risk reduction

Primary Prevention Programs

- Informed by research and assessment
- Stop before they occur through the promotion of positive behaviors
- Encourage Bystander intervention
- Seek to change behavior and social norms

Ongoing Prevention Programs

- Programs and campaigns that are:
  - Sustainable
  - Increased understanding
  - Range of strategies
  - Inclusive audience
Awareness Programs

- Community-wide or audience-specific programming, initiatives, and strategies that increase audience knowledge and share information and resources to prevent violence, promote safety, and reduce perpetration.

Bystander Intervention

1. Bystander Intervention means safe and positive options that may be carried out by an individual or individuals to prevent harm or intervene when there is a risk of dating violence, domestic violence, sexual assault, or stalking. Bystander intervention includes recognizing situations of potential harm, understanding institutional structures and culture conditions that facilitate violence, overcoming barriers to intervening, identifying safe and effective intervention options, and taking action to intervene.

Clergy Handbook Guidance

- Community involvement:
  - Local rape crisis centers
  - Local law enforcement officials
  - Social services personnel
  - Coalitions against domestic and sexual violence

- Not required for all to attend
- Can combine topics
Primary Prevention Programs

Delivery Options
- In-person interactive workshops
- Theater performances
- Presentations
- Videos
- Online interactive training

Considerations: community college, campus is closed, adult learners, traditional aged students
Campus Community: Who is included?

- Students
- Employees
- "Mandatory Reporters"
  - Title IX
  - School policy
  - State law
- "Title IX Personnel"
  - Title IX Coordinators
  - Investigators
  - Decision-makers
  - Informal Resolution Facilitator

Mandatory Reporters

- Institutions decide for student disclosures
- Who are mandatory reporters?
- No reporting obligation
- Report with consent
- No training requirement but you should
- Different than state law regarding "mandated reporters"

Title IX Personnel
§ 106.45 (1)(iii): Title IX Training – Bias

- “Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decisionmaker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”
- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- The Department leaves recipients flexibility to decide the content of the training required for Title IX personnel under that provision, and nothing in the final regulations precludes a recipient from addressing implicit or unconscious bias as part of such training.

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§ 106.45 (1)(iii): Title IX Training

- “A recipient must 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.”

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§ 106.45 (1)(iii): Title IX Training

- A recipient must ensure that decision-makers receive training on:
  - any technology to be used at a live hearing and
  - on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.
- A recipient also must ensure that investigators receive training on:
  - issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.
Recordkeeping

- 7 years
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.
Who’s Around the Table?

How many tables?  Who is at the table?

Essential Campus Components

Coalition Building  Policy Analysis  Data Collection  Inclusive Programming  Male Involvement  Social Marketing

Coalition Building

- Collaboration
- Share knowledge
- “Check ins”
Mission
Easy to understand
Information
Easily accessible

Data Collection

Primary prevention efforts
Program development
Different methods
Increased understanding

Inclusive of Marginalized Populations

ADA compliant
Interpreters
Universal design
Safe spaces
Inclusive training material
Challenge stereotypes
Effective Prevention Strategies

- Comprehensive
- Varied teaching methods
- Sufficient dosage
- Theory driven
- Positive relationships
- Appropriately timed
- Socio-culturally relevant
- Well-trained staff
- Outcome evaluation

Different Prevention Efforts

Primary Prevention
Secondary Prevention
Tertiary Prevention

The Public Health Approach

Define → Identify → Develop → Adopt
# Social-Ecological Model

## Level

<table>
<thead>
<tr>
<th>Level</th>
<th>Influences</th>
<th>Strategy</th>
<th>Prevention activities example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>Personal traits and beliefs</td>
<td>Positive attitudes</td>
<td>Mentoring and education</td>
</tr>
<tr>
<td>Relationship</td>
<td>Peers and family</td>
<td>Modeling behavior</td>
<td>Bystander</td>
</tr>
<tr>
<td>Community</td>
<td>Institutional relationships</td>
<td>Policies and processes</td>
<td>Social media</td>
</tr>
<tr>
<td>Societal</td>
<td>Belief systems and social norms</td>
<td>Laws</td>
<td>Target lawmakers</td>
</tr>
</tbody>
</table>

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**ALCOHOL RELATED STRATEGIES**

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Discussion: Different Populations

- What strategies do you consider based on population?
  - Students
  - Employees
  - Special Populations

Examples

- Clothesline project
- Take back the night
- Walk a mile in our shoes
- It’s on us
- Bystander
- One Love
- 360 Stay Safe
## Primary Prevention - Incoming Students

<table>
<thead>
<tr>
<th>Name of Program</th>
<th>Date Held</th>
<th>Location Held</th>
<th>Which Prohibited Behavior Covered?</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Year Student Orientation</td>
<td>8/15/2013</td>
<td>Main Auditorium</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>First Year Student Orientation</td>
<td>8/16/2013</td>
<td>Main Auditorium</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>Transfer Student Orientation</td>
<td>8/15/2013</td>
<td>South Hall</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>Law School Student Orientation</td>
<td>8/17/2013</td>
<td>North Hall</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>Graduate School Orientation</td>
<td>8/16/2013</td>
<td>East Hall</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>Bystander Intervention Training</td>
<td>8/17/2013-8/19/2013</td>
<td>Fair Sports Complex</td>
<td>SA*</td>
</tr>
</tbody>
</table>

## Primary Prevention - Incoming Employees

<table>
<thead>
<tr>
<th>Name of Program</th>
<th>Date Held</th>
<th>Location Held</th>
<th>Which Prohibited Behavior Covered?</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Employee Orientation</td>
<td>01/15/2013</td>
<td>Human Resources</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>New Employee Orientation</td>
<td>03/18/2013</td>
<td>Human Resources</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>New Employee Orientation</td>
<td>06/21/2013</td>
<td>Human Resources</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>New Employee Orientation</td>
<td>08/25/2013</td>
<td>Human Resources</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>New Employee Orientation</td>
<td>09/10/2013</td>
<td>Human Resources</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
</tbody>
</table>

## Ongoing Prevention - Students

<table>
<thead>
<tr>
<th>Name of Program</th>
<th>Date Held</th>
<th>Location Held</th>
<th>Which Prohibited Behavior Covered?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Behind Closed Doors Skits</td>
<td>3/15/2013</td>
<td>Main Auditorium</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>Behind Closed Doors Skits</td>
<td>9/03/2013</td>
<td>Main Auditorium</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>Residence Hall Speaker Series-1</td>
<td>2/17/2013</td>
<td>Cold Residence Hall</td>
<td>DoV, DaV</td>
</tr>
<tr>
<td>Residence Hall Speaker Series-4</td>
<td>12/02/2013</td>
<td>Cold Residence Hall</td>
<td>S</td>
</tr>
</tbody>
</table>
| Clothesline Project                      | 10/01/2013 | Student Commons Main Floor | DoV, DaV, SA*               
| Vagina                                   | 12/02/2013 | Main Auditorium | SA*                              |
| Poetry Speak Out                          | 03/19/2013 | Student Commons Lounge | DoV, DaV                      |
| Safe Zone Hate Crime Prevention           | 11/02/2013-11/04/2013 | Office of Diversity & Inclusion | DoV, DaV, SA & Stalking (LGBTQ) |
## Ongoing Prevention - Employees

<table>
<thead>
<tr>
<th>Name of Program</th>
<th>Date Held</th>
<th>Location Held</th>
<th>Complied with Section</th>
<th>Which Prohibited Behavior Covered</th>
</tr>
</thead>
<tbody>
<tr>
<td>Faculty Spring Orientation</td>
<td>01/15/2013</td>
<td>Graduate School Faculty Conference Room</td>
<td>Yes</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>Faculty Spring Orientation</td>
<td>03/18/2013</td>
<td>Arts &amp; Sciences Conference Room</td>
<td>Yes</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>Faculty Fall Orientation</td>
<td>08/20/2013</td>
<td>West Court Room</td>
<td>Yes</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>Staff In Service</td>
<td>09/11/2013</td>
<td>Human Resources</td>
<td>Yes</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>Money Campaign: &quot;Challenging Myths and Stereotypes About Victims of Rape in HEC&quot;</td>
<td>11/01/2013 to 12/01/2013</td>
<td>Posters placed in Faculty lounges in Main Hall B1-B5, King Hall, offices of advisors</td>
<td>No</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
<tr>
<td>Web-based Training: &quot;The Role of Faculty in Assisting Students Who Disclose Abuse&quot;</td>
<td>04/10/2013</td>
<td>Provost Smith</td>
<td>Yes</td>
<td>DoV, DaV, SA &amp; S*</td>
</tr>
</tbody>
</table>

## Final Thoughts

Develop a plan
Clery requirements
Primary and ongoing programs
Prevention
Documentation
Consent

Agenda

- Consent
- Drugs and alcohol
- Incapacitation
Discussion:

- When is touching ok?
- When is sexual touching ok?
- How do you know if you have consent?
- How do you know when consent is withdrawn?

Consent

- Sexual permission
- Verbal
- Non-verbal
- Policy

GOT CONSENT?
Affirmative Consent

Yes means Yes!

§106.30 Definitions – Consent

“The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault . . .”

Key Elements

- Mutually agreed upon
- Informed and freely given
- Initiator responsibility
- Positions of power
- Silence and prior relationships
- Verbal consent
- Incapacitation
- Withdrawal

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Consent Is Absent when…

**Force**
- Physical
- Coercion
- Intimidation
- Threat

**Incapacitation**

---

Physical Force

- **Holding down**
- **Forced to touch**
- **How much?**

---

Coercion

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Intensity</th>
<th>Duration</th>
<th>Isolation</th>
</tr>
</thead>
<tbody>
<tr>
<td>?</td>
<td>Now</td>
<td>5 minutes?</td>
<td>Library</td>
</tr>
<tr>
<td>Twice</td>
<td>?</td>
<td>?</td>
<td>Bar</td>
</tr>
<tr>
<td>Fifty times</td>
<td>?</td>
<td>2 days?</td>
<td>?</td>
</tr>
</tbody>
</table>
Substance Use
SAMHSA, Center for Behavioral Health Statistics and Quality, National Survey on Drug Use and Health, 2018

- 51.5% have used marijuana (Aged 18 to 25)
- 11.4% have used cocaine (Aged 18 to 25)
- 16.4% have used hallucinogens (Aged 18 to 25)
- 51% have used alcohol (Aged 12 or older)
- 24.5% have binged alcohol use (Aged 12 or older)
- 6.1% have heavy alcohol use (Aged 12 or older)

Stimulants
A substance that raises levels of physiological or nervous activity in the body
“Uppers”

Examples: ADHD medications, Methamphetamine, Ecstasy
Depressants

Inhibit the function of the central nervous system
Relaxing, decreased inhibitions
Examples: “benzos,” sleeping pills, marijuana

“Downers”

Other Drugs

Hallucinogens

Opioids

What is a Drink?

12 OZ BEER
4-5 OZ OF WINE
1.5 OZ 80 PROOF
What is a Drink in College?

- Water bottle
- Boxed wine
- Solo cups

Impact of Alcohol Consumption Levels

<table>
<thead>
<tr>
<th>Cognition (new brain)</th>
<th>Psychomotor functions</th>
<th>Involuntary functions</th>
</tr>
</thead>
<tbody>
<tr>
<td>judgment</td>
<td>coordination</td>
<td>vomiting</td>
</tr>
<tr>
<td>inhibition</td>
<td>balance</td>
<td>blackout</td>
</tr>
<tr>
<td>personality</td>
<td>eye focus</td>
<td>pass out</td>
</tr>
<tr>
<td>intellect</td>
<td>speech</td>
<td>respiration</td>
</tr>
<tr>
<td>emotion</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Levels of Consumption

- Impairment
- Intoxication
- Incapacitation
**Impairment**

- The state of being diminished or weakened due to the consumption of alcohol.
- Alcohol is a nervous system depressant.
- Impairment begins as soon as alcohol enters the bloodstream.
- Impairment increases with consumption of alcohol.

**Question:** Can two initially IMPAIRED people legally have sexual intercourse?

---

**Intoxication**

- An act or instance of inebriation; drunkenness.
- Intoxication is legally met when an individual’s blood alcohol level reaches .08 or greater.

**Question:** Can two INTOXICATED people legally have sexual intercourse?
Incapacitation

Physical and mental impairment
Temporary or permanent
Decisions and judgement
Unconscious, sleep, blackout

Incapacitation – Not Alcohol Related

Physical Mental

Unconscious Sleep Blackout
Incapacitation Questions

- Were any parties or witnesses INCAPACITATED?
- Were any parties or witnesses IMPAIRED to a degree that it would impact memory and actions?
- Were any parties impaired during the interview to a degree that it would impact recall and judgement?

Impact BAC
- Time
- Amount consumed

Impact Presentation
- Food and water
- Sleep
- Drugs

Blood Alcohol Content
- Number of drinks
- Body weight
- Time
Incapacitation

- Smell
- Slurred speech
- Bloodshot eyes
- Cannot stand
- Cannot walk
- In and out of consciousness
- Blackout
- Vomiting
- Behavior

Lack the ability to determine:
- Who is having sex with them?
- When are they having sex?
- Where are they having sex?
- What is the sexual act?

Two-Step Determination

- Was the Complainant Incapacitated?
- Did the Respondent (or would a reasonable person) know?
Special Considerations

Agenda

- Conflicts of interest and bias
- Unique considerations
- Understanding stress and trauma
Conflicts of Interest

Roles on campus  Past employment  Volunteering  Social media presence

Recognizing Bias

Discussion: Bias

What is the difference between implicit bias and explicit bias?
Additional Considerations

Low reporting
Who is reporting?
More reports of stranger rape than acquaintance rape
More likely to report when a different race

Barriers to Reporting

Race
Sexual Orientation
Disabilities

Impact on Reporting

Race
Sexual Orientation
Disability
Employee/Student Relationships

- Policy
- Power dynamics
- Reporting

Issues for IPV Cases

- Cooperation
- Predominant aggressor
- Cross-claims
- Threat teams
- Safety plans
Keep in Mind

Application Neutral Fact-finder

Comparison

Stress Trauma

NEUROBIOLOGY
Intake and Supportive Measures

Agenda

- Review Title IX and Clery Regulations
- Contacting the Complainant
- Contacting the Respondent

Title IX Case Flowchart

- Title IX Coordinator
  - Informed (Actual Knowledge)
  - Outreach and Supportive Measures
  - Complainant Decision
  - Formal Complaint Signed
  - Investigation/Hearing/Appeal
  - Case closed (except for supportive measures)
  - Title IX Coordinator may sign complaint

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Actual Knowledge

Title IX
- "Actual knowledge means notice of sexual harassment or allegations of 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 recipient, or to any employee of an elementary and secondary school." 

Clery
- Campus police, security, or official with significant responsibility for student and campus activities
- "Official" is any person who has the authority and the duty to take action or respond to particular issues on behalf of the institution

Actual Knowledge - Next Steps
- Contact Complainant
- Meeting
- Written Communication
- Offer Support & Provide Rights
2020 Title IX Regulations - Supportive Measures

- Non-disciplinary, non-punitive, individualized services
- Offered as appropriate, as reasonably available, and without fee or charge
- To the complainant and/or the respondent
- Before or after the filing of a formal complaint or where no formal complaint has been filed
- Designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment
- The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures

- Counseling
- Extensions of deadlines or other course-related adjustments
- 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
- Increased security and monitoring of certain areas of the campus and other similar measures
### Clery Support Services and Resources

<table>
<thead>
<tr>
<th>Counseling</th>
<th>Health</th>
<th>Mental health</th>
<th>Victim advocacy</th>
<th>Legal assistance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Visa and immigration assistance</td>
<td>Student financial aid</td>
<td>Other on-campus services</td>
<td>Other off-campus services</td>
<td></td>
</tr>
</tbody>
</table>

### Clery Accommodations

- Filed/Signed
- Alleging sexual harassment
- Requesting an investigation (or informal option)

### Clery Protective Measures

- Title IX Formal Complaint

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Meeting Review

What is the Difference?

- Confidentiality
- Privacy

Follow-Up Steps
Evidence Collection and the Investigatory Process

Agenda

- Investigators
- Developing an Investigative Strategy
- Breaking Down the Definitions
- Evidence Collection
Investigative Strategy

Scope

- Notice of Allegation
- Notice of Investigation
- Policy Definitions
- Rights of the Parties

Methodology (and who does what?)

- Liaisons
- Logistics
- Internal Communications
Challenges: Evidence Considerations

- Testimonial Evidence
- Non-Testimonial Evidence

Challenges: Other

What issues could come up given the facts of the case?

Pre-Work

- Draft Questions
- Initial Evidence Collection
Sexual Harassment under Title IX

1. An employee of the recipient conditioning the provision of aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity;

PRONG 1: Quid Pro Quo

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct.

PRONG 2: Hostile Environment +

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.

PRONG 3: Sexual Assault

Rape is the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim.
PRONG 3: Intimate Partner Violence

**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.

**Domestic Violence:** A felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim.

PRONG 3: Stalking

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following: Stalking

Stalking is defined as engaging in a course of conduct 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

Retaliation
Types of Evidence

- Real evidence
- Demonstrative
- Documentary
- Testimonial

Ability to Utilize Evidence

All Evidence

- Directly relevant to allegations
- Relevant

Relevant
Other Sources of Evidence

Photographs  Text messages  Social media/dating apps  Documents (diagrams, memos, letters, notes)

Voicemail  Phone logs  Guest lists

Floorplans

Diagrams
The Regs on Evidence

- Any evidence obtained
- directly related to the allegations
  - including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and
  - inculpatory or exculpatory evidence whether obtained from a party or other source
- So that a party can meaningfully respond

Evidence Collection

Everything Collected

Directly Related

Relevant

Everything BUT...

- Complainant's sexual predisposition or prior sexual behavior unless...
  - offered to prove that someone other than the respondent committed the conduct alleged or
  - complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent
- Physician, psychiatrist, psychologist records in connection with the provision of treatment to the party
  - unless voluntary, written consent
“Directly Related”: in the comments

- “interpreted using their plain and ordinary meaning”
- We note that “directly related” in § 106.45(b)(5)(vi) aligns with requirements in FERPA, 20 U.S.C. 1232g(a)(4)(A)(i). (“information directly related to a student.”)
- “directly related” may sometimes encompass a broader universe of evidence than evidence that is “relevant.”
Interviewing Agenda

- Interviewing Basics
- The DSA Interview Outline
- Stress, Trauma, and the Interview
- Sample Questions

What are Interviews

- Part of Evidence (Testimonial)
- Conversation
- Structured
Interview Golden Rules

Preparation
Environment
Flexibility

Interview Preparation

Research
- The incident
- The policy
- Topics of inquiry

Pre-draft questions
- Background questions
- Narrative question
- Case Specific Questions

Preliminary Info
- Procedural
- Recordkeeping
- Notice

INTERVIEW – WHAT TO BRING
Flexibility

I pledge to...
Be open-minded
Consider different theories of a case
Roll with the surprises
Adapt to the room

The DSA Interview Outline
- Preliminaries
- Background
- Narrative
- Clarification
- Case Questions
- Closing
Interviewing Bad Habits

- Interrupting
- Two questions at once
- Not listening for the answer
- Avoiding the hard questions
- Lost focus on elements
Re-traumatization

Safety and Wellbeing
Maintain privacy and confidentiality

Kept up to date
Empathy and respect

Question Format

Tone Phrasing Open-ended Safe Judgment-free

Witness Interviews

Follow same interview structure Assess credibility Confidentiality/Privacy How do they "know"?
RESPONDENT - POTENTIAL DEFENSES

- Victim consented and is now lying (Regret? Guilt?).
- Victim consented but does not remember due to intoxication.
- The sexual misconduct did not occur (victim was mistaken).
- The sexual misconduct occurred but a different assailant.

SAMPLE QUESTIONS

RECREATE THE SCENE
Physical Space

Sensory

SMELLS  TEMPERATURE  TOUCH  SOUNDS  LIGHT  TASTE
Harassment Questions

Elements of the Policy Violations

Consent
Credibility and Relevancy

Agenda

- Detecting deception
- Credibility checklist
- Relevancy

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What is the percentage of people who cannot go 10 minutes without lying??

Credibility Checklist

Truthfulness
Past behaviors
Post-assaultive behaviors
Corroborating evidence
Ability to perceive
Ability to remember
Plausibility
Demeanor
Motivation
Bias
Bias

- Personal preference
- Impartiality
- Internal Biases

Confirmation Bias
- Confirmed preconceived opinion

Availability Bias
- Most important to the memory immediately recalled

Hindsight Bias
- See things as more predictable than they were

Foresight Bias
- Ability to predict future events

Gender Bias
- More likely to believe one gender over another

Race
- More likely to believe one race over another

Other Factors that Impact Credibility

Memory and trauma

Cross-cultural issues
What Does Relevancy Mean?

- Directly related to the issue and helps prove or disprove the issue AND fact must be material to an issue in the case
- Makes something more/less true or more/less false
- The tendency to make a fact more or less probable than the fact would be without the evidence
- Questions are irrelevant when they are not related to the issue at hand

Other Ways to Put It...

- The evidence does not need to be conclusive
- The evidence constitutes a link in the chain of proof
- The evidence, in connection with other evidence, helps “a little”

Relevancy Exceptions

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
Resolutions and Outcomes

Agenda

- Informal resolution
- Formal resolution
- Sanctions and remedies
- Appeals
§106.45(b)(9) – Informal Resolution

“However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication...”
Notice

Voluntary

Not allowed for Employee Respondent/Student Complainant

Both parties must agree

Acceptance of Responsibility

Sanctions

Records subject to subpoena

What happens if it becomes a formal resolution?

Incomplete requirements

Required record keeping

Is it considered "conduct history"?
"Combining the investigative and adjudicative functions in a single individual may decrease the accuracy of the determination regarding responsibility, because individuals who perform both roles may have confirmation bias and other prejudices that taint the proceedings, whereas separating those functions helps prevent bias and prejudice from impacting the outcome."

Formal Resolution – Considerations

- Scheduling
- Decision maker(s)
- Advisors
- In person or virtual

Live Hearings

- Must provide for a live hearing
- At the request of either party, the recipient must provide for a live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions
- Must create an audio recording or transcript and make available.
Advisors

“If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.”

Cross Examination

“At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally.”

Relevancy

“Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”
Relevancy

Prior sexual history
Privileged information
Duplicative
Why are you asking the question?

Participation

"If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility."

Formal Resolution – Making a Finding

Policy language - Alleged violations
Weighing the evidence
Determined behaviors
Standard of evidence
A recipient may impose disciplinary sanctions upon a respondent after a grievance process that complies with § 106.45. "The Department does not prescribe whether disciplinary sanctions must be imposed, nor restrict recipient's discretion in that regard. As the Supreme Court noted, Federal courts should not second guess schools' disciplinary decision, and the Department likewise believes that disciplinary decisions are best left to the sound discretion of recipients."
### Status
- Expulsion, separation, probation

### Prevention
- Protective measures, restrictions, separation

### Educational
- Action plans

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Formal Resolution - Disciplinary Sanctions

#### Aggravating factors

#### Mitigating factors

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Formal Resolution - Disciplinary Sanction

<table>
<thead>
<tr>
<th>Nature of violation</th>
<th>Precedent</th>
<th>Mitigating Factors</th>
<th>Aggravating Factors</th>
<th>Sanction(s)</th>
</tr>
</thead>
</table>

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### Formal Resolution – Remedies

- Make permanent supportive measures
- One-sided no contact orders
- Restrictions from locations
- Restrictions from activities

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### Written Outcome

- Allegations
- Procedural steps
- Findings of fact
- Conclusion/application
- Rationale for each allegation (determination, sanctions, remedies)
- Appeal procedures

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### Live Hearing Recording or Transcript

- Recording
- Transcript
Must offer
Three bases: Procedure, New evidence, Conflict or bias.
Additional grounds permitted
No other role for appeal officer

Notification
Comply with appeal standards
Equal opportunity to respond
Issue written decision with rationale and simultaneously
When is the Decision Final?