



Title IX Leadership Training July 26, 2022

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Agenda

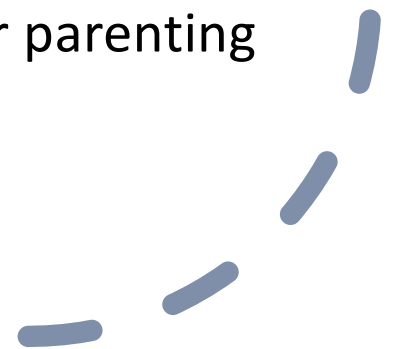
1. Title IX, Relevant Laws & Policies
2. Title IX Jurisdiction and Prohibited Conduct
3. Affirmative Consent, Standard of Proof and Range of Sanctions
4. The Process
5. Conducting Investigations (brief break to read hypo)
 - A. Setting a Foundation
 - B. Developing an Investigation Plan
 - C. Relevance
 - D. Impact of Drugs and Alcohol
 - E. Prior Conduct
 - F. Avoiding Bias
 - G. Trauma
6. Final Investigation Report Considerations
7. Appeal Grounds
8. Selected Case Law Updates
9. NPRM Updates: A Preview

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What is Title IX of the Education Amendments of 1972?

Title IX is the federal law that prohibits discrimination based on sex or gender stereotyping — including sexual harassment and violence, relationship violence, and stalking — in any educational, athletic, or other program or activity of a federally funded school, if it jeopardizes a person's equal access to education. Title IX also prohibits discrimination against pregnant or parenting students.



Additional Relevant Laws & Policies

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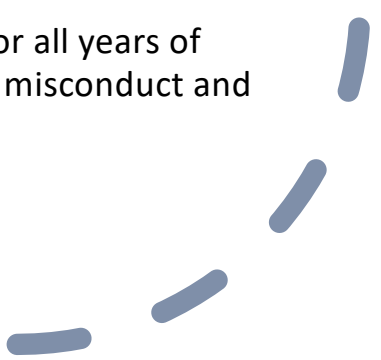
Violence Against Women Act

- Many attributes incorporated in Title IX, e.g., advisors
- Incorporates Clery Act obligations

Massachusetts Act Relative to Sexual Violence on Campus

- Sets additional training requirements within 45 days of matriculation/employment
- Requires MOUs with sexual violence and domestic violence resources if not on campus
- Additional reporting requirements and climate surveys sporadically
- Additional training requirements for people in process

NCAA's Board of Governor's Policy on Campus Sexual Violence

- Requires attestation from all student-athletes for all years of participation to report prior adjudicated sexual misconduct and certain criminal convictions
 - Ongoing, general training obligations
- 

Specific Training Requirements

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Requirement	Title IX	MA Law
Definition of sexual misconduct	X	X
Jurisdictional Requirements: scope of education, program and activity per Title IX	X	
Conducting investigations, hearings, appeals, and informal resolution, as applicable, as well as investigative report drafting. (Technology at hearing.)*	X	X
Impartiality; unbiased approach. MA also refers to this as cultural competence: e.g., how race, national origin, gender identity, and disability may be important considerations.	X	X
Relevance at hearing; sexual predisposition and prior sexual history not relevant except for certain purposes	X	
Interviewing people subject to sexual assault; impact of trauma and neurobiological impact		X
Information on consent and role of drugs/alcohol		X
Principles of due process and fundamental fairness		X

Title IX Jurisdiction Requirements

- Definition: the conduct alleged in a formal complaint could constitute Sexual Harassment, as defined by the local policy.
- Location:
 - Conduct occurred in an educational program or activity controlled by the institution
 - Conduct occurred in the United States
 - What about study abroad?
 - Note that Preamble said Title IX was *not* extraterritorial, but many institutions seek to extend protections to study abroad. (Hint: stay tuned for the updates.)
- Complainant Status: Complainant is participating, or attempting to participate, in an education program or activity

Education Programs and Activities

- Generally, applies to all activity that occurs on campus or on other property owned or occupied by the institution
- Includes off-campus locations, events, or circumstances over which the institution exercises substantial control
- “Education Program or Activity” refers to the following examples at many institutions:
 - in-person and online educational instruction
 - employment
 - research activities
 - extracurricular activities
 - athletics
 - residence life
 - dining services
 - performances
 - community engagement and outreach programs
 - others?

Discrimination, Harassment, and Sexual Violence Policy

Purpose

To define, prevent, and respond to discrimination and harassment, including sexual violence. This Policy reflects the University's compliance with Title IX and other federal and state laws.

Scope

Lesley University community, including faculty, adjunct faculty, staff, students, alumni/ae, vendors, contractors, consultants, guests, and visitors.

Policies

[Academic Policies](#)[Behavior Policies](#)[Data Security Policy](#)[Discrimination and Harassment
Complaint Resolution Procedure](#)[Discrimination, Harassment, and Sexual
Violence Policy](#)[Domestic Violence Leave Policy](#)[Drone Policy](#)[Hoverboard policy](#)[Lender Code of Conduct](#)[Prohibition of Weapons Policy](#)[Smoke-Free Environment Policy](#)[Unequal Consensual Relationships
Policy](#)[Whistleblower Policy](#)[Acceptable Use of Technology Policy](#)

What is Prohibited By Title IX

*Note: Lesley's definitions are more detailed and incorporate jurisdictional requirements and examples. Always start with Lesley's specific policy language.

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Sexual Harassment

- A. Two types:
 - i. Quid Pro Quo: requiring submission to sexual or romantic conduct that is made either explicitly or implicitly a term or condition of an individual's academic or employment success.
 - ii. Hostile Environment: conduct has the purpose or effect of substantially interfering with an individual's work performance, or creating an intimidating, hostile, and offensive living, learning, or work.
- B. Behavior must be severe and pervasive, as well as subjectively (offensive to the individual that is targeted) and objectively offensive (offensive to a reasonable person in that position).
 - i. Note that this definition may change in updated regulations

What is Prohibited By Title IX

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Sexual Assault

- A. Having or attempting to have sexual intercourse or sexual contact with another individual without consent. This includes lack of consent, the use or threat of force or coercion, or where an individual is incapacitated.
- B. Sexual contact is a broad term and could include the touching of various body parts.
- C. Sexual assault, may, but does not require any form of penetration, e.g., touching certain body parts of another person, without consent, may constitute sexual assault.
- D. Includes behavior like rape, statutory rape, fondling, and incest.

What is Prohibited By Title IX

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Dating Violence

- A. Violence committed by a person who is or has been in a romantic or intimate relationship with the victim.
- B. Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.



What is Prohibited By Title IX

Domestic Violence

Violence committed by a current or former spouse or intimate partner of the victim, or someone similarly situated; a person with whom the victim shares a child in common; or 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 location in which the crime of violence occurred.

What is Prohibited By Title IX

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Stalking

- A. A course of conduct directed at a specific person that would cause a reasonable person to: fear for their safety or the safety of others; or suffer substantial emotional distress. This includes cyber-stalking and other forms of unwelcome contact with another person.
- B. May involve individuals who are known to one another or have an intimate or sexual relationship, or may involve individuals not known to one another.



Retaliation

Retaliation*

Adverse or negative actions taken against an individual for reporting a violation of institutional policies or participating in a review process. For example, if a student was removed from a student group after submitting a Title IX complaint against the leader of the group, that could be retaliatory if it is attributable to the report.

Can be incorporated into a Title IX-related policy or adjudicated separately by a community standards or human resources-type office.

*Not a specific Title IX charge, but can impact Title IX matters significantly and may be rolled into Title IX processes depending on circumstances.

What About?

- Behavior that doesn't happen under Title IX jurisdiction?
- What about behavior that occurs internationally?
- What about claims like Sexual Exploitation, or taking advantage of another in a sexual manner, e.g., recording and/or sharing a recording of sexual activity?
- What do we do about behavior that occurs online? What if it is retaliatory?

Affirmative Consent

- “Affirmative, voluntary, mutual agreement” to have sexual contact.
- Expressed by “outward demonstration, verbally or non-verbally, through mutually understandable words or actions.”
- Agreeing to participate in sexual activity without any coercion, force, fear, or intimidation. “Silence or lack of resistance does not constitute consent.”
- “Consent can be revoked at any time. Revocation of consent must be expressed by outward demonstration, verbally or non-verbally, through mutually understandable words or actions.”
- “Neither past consent nor prior consensual sexual activity, by itself, constitutes consent to future sexual contact.”
- Consent can never be given by someone who is under the statutory age of consent (in Massachusetts, that means under the age of 16); asleep, unconscious, or incapacitated due to drugs or alcohol

Standard of Proof: Preponderance of the Evidence

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- Totality of the evidence will be considered to determine whether the respondent is more likely than not to have been responsible for a violation of the policy in question.
- The preponderance of the evidence standard is not the standard used for criminal culpability in most jurisdictions and a determination of responsibility does not equate with a finding of a violation of criminal laws.



Sanctions

- Punitive or educational measures imposed in response to a determination that an individual has violated institutional policy.
- Sanctions may include, but are not limited to: expulsion, termination, suspension, probation, reprimand, warning, restitution, education/counseling requirement; restrictions on participation in a program or activity; loss of privileges; loss of leadership opportunities or positions; housing restriction; and/or restrictions on employment.
- NOTE: Sanctions may not be issues prior to adjudication. Think carefully about supportive measures and emergency removal decisions which may be deemed punitive.

Punitive?

- A complainant is in a theater production with respondent. The complainant wants respondent removed from the production.
- Respondent is a varsity athlete. Lesley is thinking about removing the student from athletics pending Title IX investigation.
- Respondent is head of Student Government Association and charged with sexual assault that is receiving high exposure on social media. Community wants administration to remove student from leadership role.

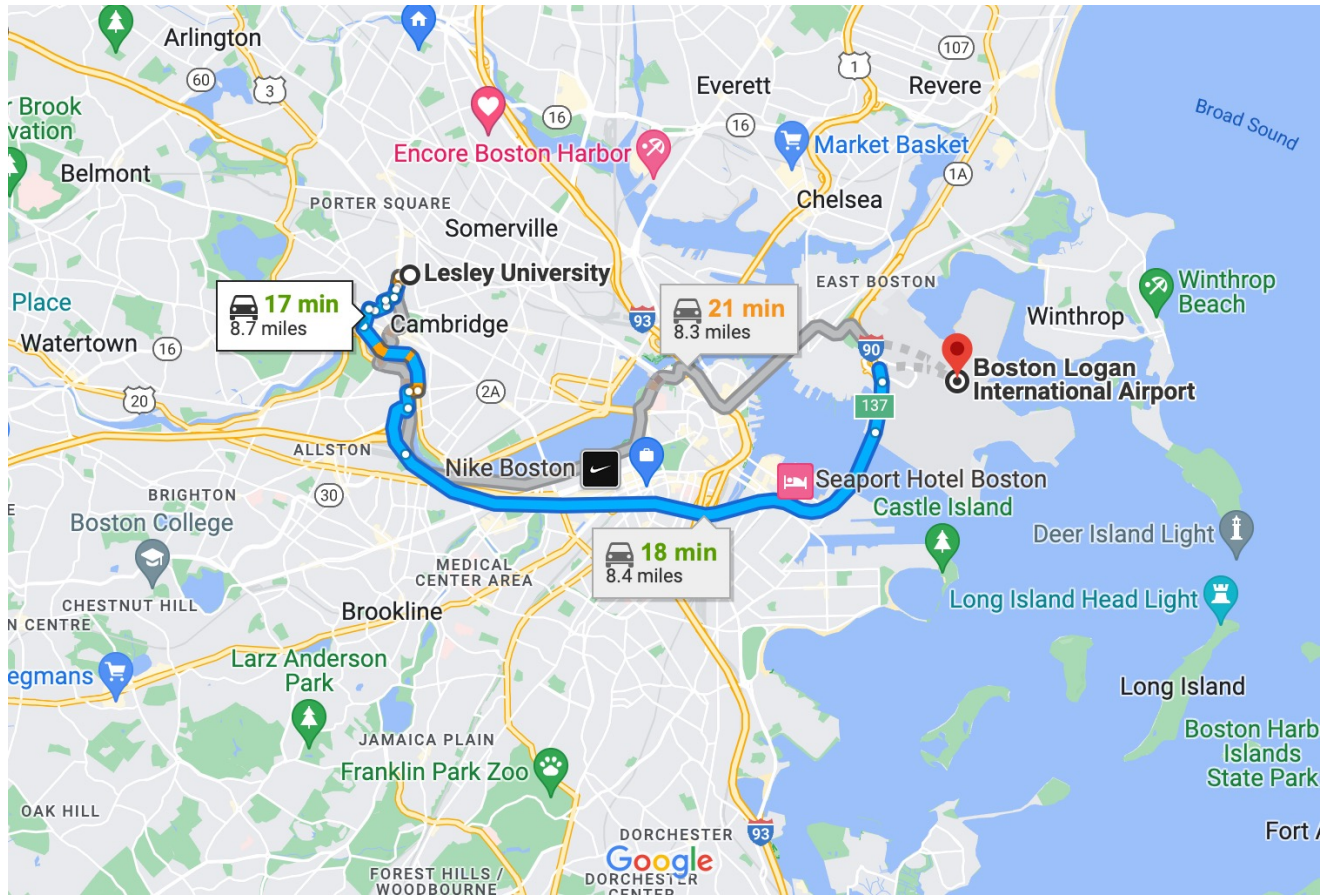
Appeals

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or
- The Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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Conducting Investigations

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Hypothetical Exercise

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- Riley and Taylor are both chemistry majors at Wood College (WC), and they initially met in the entering class of 2024 group chat in the summer of 2020. Like many schools, WC offered primarily remote education due to COVID-19 until the fall of 2021. Because of that, many students chose to host meet ups outside and near home.
- At one such event in the summer of 2021 (just before returning to campus), Riley was introduced to Taylor, but did not speak for more than a few minutes. The event ended early and, once home, Riley told a friend, Jesse, that Taylor seemed different from their online persona: they were “aggressive, rude, unkempt, and focused primarily on weird conspiracies.”
- Still, that night Taylor followed Riley on Instagram and Tik Tok. Not wanting to seem rude, Riley followed Taylor back. Riley immediately noticed specific posts on Taylor’s Instagram: selfies with multiple guns, and quotes that Riley interpreted to be prejudiced towards certain groups, e.g., “i can’t believe everyone thinks its normal for men to use the women’s bathroom. sickos.” Riley felt uncomfortable and immediately unfollowed Taylor.

Hypothetical Exercise

- The next day Riley woke up to six Instagram notifications – all from Taylor and which Riley shared:
 - *1:00 AM: why did you unfollow me*
 - *1:50 AM: did i do something wrong, Riles?*
 - *3:00 AM: it just seems weird that you would follow then unfollow*
 - *3:33 AM: ok i am getting the sense you didnt like what i post*
 - *4:00 AM: if you dont like guns why do you live in Statesville, Riles?? we all hunt and like guns here. someone should force you to hold a gun before you get pissy*
 - *4:25 AM: i bet if i showed up to your house with my hunting rifle you'd change your mind and follow me back*
- Taylor also sent Riley a Tik Tok video that featured a current WC student talking about Greek life and how most weekends are spent “getting drunk sex.” The other video was of a person cleaning a gun with the caption “How I prepare for dates.”

Hypothetical Exercise

- Riley felt very uncomfortable. Riley blocked Taylor and texted another friend, Rowan, about what happened. Riley did not hear from Taylor for several weeks and was distracted with planning for a return to campus.
- On the second day back on campus, Riley received three texts from an unknown number between noon and midnight. Each text just said, *"hi riles unblock me."* Taylor was one of the few people Riley blocked, so Riley assumed it might be Taylor but was too afraid to reply. Riley blocked the number and tried to ignore it.
- Over the next two weeks, Riley received nine texts from different, unknown numbers that all said, *"riles please talk to me."* These messages came primarily in overnight/early morning hours, and none of Riley's friends referred to them as "Riles."
- Riley was also messaged on Zoom by three different classmates who said that Taylor was asking people in other classes about Riley. Riley felt deeply uncomfortable but did not say anything; Riley felt that if the behavior was ignored, it would stop.

Hypothetical Exercise

- Riley received an invitation to a Greek-hosted “NO-VID COVID” party, which was advertised as a masquerade ball, where guests were required to wear masks to comply with the College’s masking policy. Someone posted on YikYak that the party started at 10 PM and the drinks would “have a little extra” so people wouldn’t have to keep removing masks. After feeling isolated for almost two years, Riley decided they were going to this party with some friends, Alexis and David.
- Once at the party, Riley was given a drink and within minutes was “feeling fuzzy and warm.” Riley had another drink and began dancing with friends. Alexis leaned over and said, “Molly is kicking in.” Riley was confused until Alexis told Riley that they heard the “little extra” in the drinks was Molly (or Ecstasy/MDMA). Riley panicked and went to the bathroom.
- As Riley left the bathroom and was preparing to head home, they were approached by someone wearing sunglasses and a mask, which was odd. The person seemed to know Riley and Riley’s major, and Riley assumed the drugs may be impacting their recognition, so they said hello but that they were trying to find their friends and leave.

Hypothetical Exercise

- The person Riley just met said that they knew a shortcut to get through the crowded party, which had already broken pretty much all the COVID rules. Riley, fearing discipline if campus authorities found the party, said ok and followed the person.
- Riley does not remember much more until they woke up in a strange bed about two hours later. Riley was alone and scared. Riley tried to button their shirt but realized most of the buttons were broken. They also felt sore over most of their body.
- Riley assumed the worst and walked to campus police to ask for a ride to a local hospital. At the hospital, a Sexual Assault Nurse Examiner (SANE) examined Riley and shared that there were no traces of bodily fluid, but Riley had bruises and abrasions consistent with sexual activity. Riley promptly threw up. That night, Riley received another anonymous text: *“have a good time[?] I did.”*
- Riley filed a Formal Complaint against Taylor with the Title IX Office the next day.

What Happens Now? It Depends...

If the complainant is not sure if they wish to go forward:

- Supportive measures still available
- Informal resolution and/or investigation process require “formal complaint”

If the complainant does wish to move forward:

- Formal Complaint (jurisdictional requirements are met)
- Informal Resolution Option
 - Not allowed in matters involving employee on student sexual harassment
 - Both parties must agree; either party can leave at any time
 - Models: mediation vs. restorative justice. Challenges?
- Formal Investigation
- Hearing
- Appeal Rights

Investigations:

Setting a Solid Foundation

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- Who, What, When, Where, and *maybe* Why
- What is the crucial information to be gained from this investigation?
 - Actions: What was observed? What was the understanding of the situation?
 - Dates and chronology of events
 - Words: What was said? Who said it? Exactly what language or words were used?
 - “Should I try to capture exact quotes? How much?”
 - Where did behavior happen?
 - “How far back should I go in the evening in question? The bar? The pre-gaming in the dorm? Should I visit locations?”
 - What relationship do witnesses have with the parties?

Setting a Solid Foundation, cont.

- What types of e-messaging, *e.g.*, email, text messages?
 - Take time to figure out how information is typically stored and best manner of collecting information.
 - Party/witness messaging can be critical to timeline development, *e.g.*, “Leaving for the party now!”
- What other factual sources may exist? Card swipe data, security video? May require a separate interview with campus security/IT officials.
- What other information do you need to formulate an impartial narrative of events and implications?

Developing an Investigative Plan

An opportunity to think through the details of an investigation:

- Review notice letters:
 - What are the allegations? Is connection to institutional policy clear?
 - Have you received training on the institutional policy?
 - Any known investigative challenges, *e.g.*, trauma or refusal to participate by parties/witnesses?
- How will you take conduct interviews? Note-taking? How will you collect documents referenced by any party or witness? How will you answer process questions?
- Establish a standard introduction that can be fairly read to both parties and witnesses, *e.g.*, notice about retaliation, explanation of how you will report information, etc.

Revisit the plan after every interview.

Relevance: Questions and Evidence

- Court standard: does the probative value outweigh the potential prejudicial impact?
- Does the evidence in question go towards providing or disproving responsibility (i.e., inculpatory or exculpatory)?
- “The investigator may also collect and examine any physical evidence or documents, emails, text messages, etc. that may be relevant to the events in question.”
- If the Investigator determines proposed witnesses, documents, and/or questions are not relevant, these decisions may be challenged in report review period.
- Separate rules for prior conduct and sexual history.

Hypothetical Exercise

- Under the institutional policy, Taylor had an opportunity to respond to the allegations in the notice letter, but declined to do so “on the advice of counsel.” Taylor agreed to be interviewed, however.
- During Taylor’s interview, they refused to provide their phone or access to their text messages. Their advisor politely asks if the Investigator has a subpoena and, if not, that the phone is the “physical embodiment of Taylor’s First Amendment rights to speech and expression.” The Advisor says they would like to “go on record” as “reserving the right to share the phone contents only as relevant.” Taylor’s advisor reminds the Investigator the institution has the burden to make its case.
- When confronted by Riley’s allegations, Taylor confirms they connected with Riley briefly on Instagram and TikTok, but denies sending any of the additional messages. When pressed, Taylor says that maybe Riley *“is just an asshole who likes to toy with people online. Did you ever think about that? Did you look into other people they may have followed and unfollowed? Maybe if this weren’t a woke, feminist, witch hunt, you would.”*

Impact of Drugs and Alcohol

- A. Drugs and alcohol can cloud judgment and interfere with clear communication, and clear communication is necessary for consent.
- B. Use of drugs and alcohol may impact understanding, communication, and/or ability to take part in any form of sexual activity.
- C. The big question for investigators/adjudicators: intoxication versus incapacitation.
 - What types of drugs/alcohol?
 - How much? Usual amount ingested?
 - Physical impact?
 - Cognitive impact?
 - Visible signs?
 - Witness statements?
 - Other forms of evidence?

Hypothetical Exercise

- Taylor confirmed "hooking up" with Riley. But Taylor's perspective is different: "Yeah, we made out and I used my hands to get Riley off in some room at the party, but they provided affirmative consent and said they only had two drinks. Riley seemed totally fine and they even told me what music to play on my phone.... Ultimately, I got bored and returned to the party to find some more fun."
- Asked to account for Riley's buttons being popped off, Taylor said that Riley did that when they ripped off their shirt. Taylor said it was a joke as Riley was lip synching to some Cardi-B song Taylor didn't know well. Taylor remembers the song was sexual and Riley was singing the words in Taylor's ear.
- Taylor indicated that they had several drinks that night so they couldn't remember "all the details." Taylor said Riley would probably remember more. At this point, Taylor paused and said: "I just realized...I was *way drunker* than Riley. I think Riley sexually assaulted me. I'd like to make a formal report to you that I was sexually assaulted."

Hypothetical Exercise

- Other witnesses confirm that Riley had two large drinks of the punch from the party, but no one knows what was in the punch or who made it.
- No one admits to making the YikYak posting about something “extra” being in the drinks.
- Riley’s friends recalled that Riley was behaving unusual that night, particularly by disappearing for most of the night, “which is unlike Riley. Riley is usually all in; ride or die, ya know?”
- Alexis confirms they told Riley there was Molly in the drinks but said that was just a rumor. Alexis also confirms Riley only used Molly one other time to their knowledge and is not a heavy drinker. Alexis cannot recall if Riley’s speech was slurred or if they had trouble walking but Alexis says they were also “pretty wasted.”
- David shares a text from Riley from the night in question, which read: “*RU+_Alexis hereee.... Hosp...psycho frm texrt...ew, Daviddd ...* 🙄😭🤔.” David said this was an uncharacteristic message and he responded with “*RU OK?*”

Prior Conduct

- Investigators may gather information about the **prior or subsequent conduct** of the Respondent for purposes of determining:
 - Pattern
 - Knowledge
 - Intent
 - Motive

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Sexual Predisposition or Prior Sexual Behavior

The Investigator will typically **not** gather evidence (including asking questions) about a party's "sexual predisposition or prior sexual behavior" **unless** the evidence:

- Is offered to prove someone other than Respondent committed the alleged conduct;
- Relates to specific instances of the parties' prior sexual behavior with each other and are offered to prove or disprove consent;
- Is relevant to explain an injury; and/or,
- Is relevant to show a pattern of behavior

Evidence should not be gathered if only to to speak to a party's reputation or character

Short Hypotheticals re: Prior Conduct

- Complainant says that several of their other friends have claimed that Respondent coerced them into sexual interactions and offers to share the names if the Investigator is serious about “looking at the Respondent’s MO.”
- Respondent says Complainant had frequently asked them to “choke them” during sex because it enhanced sexual satisfaction. Complainant alleged Respondent choked them during the most recent sexual activity and provided photographs taken by police of bruises around their neck.
- Witness, a roommate of Respondent, states that Respondent commonly brings sexual partners back to their shared apartment. Witness states that *“I just hear the sexual partners tell [Respondent] to ‘slow down’ or worse, I hear no communication at all,”* which Witness equates to no consent. Witness states on a handful of occasions they heard what they believe to be crying from the room.

Avoiding Bias

Stereotype-Based Bias

- Stereotypes based on race, gender, sexual orientation, religion, etc.

Confirmation Bias

- A phenomenon that explains how people tend to seek out information that:
 - Confirms their existing opinions, and
 - Overlooks or ignores information that refutes their beliefs

Individual Biases

- Specific biases that an investigator may have based upon personal prior experiences outside of the case at hand.

Cultural Competency (term used by MA law)

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Race, National Origin Biases

- Stereotypes should be avoided; good to have a second reader to review
- Be careful of stereotypes put forward by the parties

Gender or Gender Identity Biases

- Understanding the gender identity spectrum
- Avoiding assumptions around types of claims, e.g., trying to fit a same sex or trans-

Disability-Based Biases v. Accommodations

- Accommodations allowed, should be provided.
- Disability does not negate potential responsibility
- Avoid stereotypes about disabilities

Short Hypotheticals re: Bias

- Respondent is a member of the football team and Complainant alleges that the entire football was involved to cover it up. *"They can do whatever they want on this campus."*
- Respondent is male, 6'6" tall, and weighs 300+ lbs. Complainant is female, 5'3" tall and 135 lbs. Respondent claims he is a victim of dating violence and is afraid to travel to certain parts of campus.
- Complainant is a devout member of a religion that believes sex should be saved for marriage. Complainant states that this is "relevant evidence" that they did not willingly consent to the sex in question. Complainant "begs" you to speak with a leader of their religious group "to help you understand."
- Either party states that they have a language processing related disability and asks for a reader during the report review period. What steps do you take? Considerations?
- What potential biases could have arisen in the hypothetical problem? How do you check your bias as the investigation progresses?

Impact of Trauma

- What is trauma?
 - Neurobiological response often similar to flight or fight
 - May impact memory and timelines
- Who can experience trauma?
 - Anyone: either party, any witness
 - Can be from the event at issue or prior events, *e.g.*, triggering events.
 - Does that mean an individual that experienced trauma is always being truthful?
 - Being trauma-informed does not mean that you should avoid critical questions; rather, it is a matter of how do you ask the questions in a thoughtful manner.
- Be mindful not to assume credibility – in either direction – *solely* based on trauma.

Hypothetical Exercise

Respondent's Stated Trauma:

After being notified about Riley's Title IX complaint, Taylor filed a counter claim. Taylor feels they are being harassed by Riley for their political beliefs and that Riley orchestrated the campus to attack those beliefs. Taylor claims they are constantly taunted and attacked on campus and people have written things like *"Racist Transphobe fuck off"* in permanent marker on the message board outside their dorm room. Taylor also claims classmates have *"tried to drag me on social media."* Taylor says they rarely leaves their dorm room anymore and does not want to share witness names because Taylor does not want others *"subjected to the thuggery of the woke student body mob allowed by the college."*

Final Investigation Report

Typical checklist:

- Identity of parties and witnesses;
- Dates of conducted interviews;
- Summary of the allegations;
- Policy alleged to be violated by the conduct;
- Summary of the investigation process;
- Relevant statements of parties and witnesses;
- Summary of relevant evidence gathered;
- Description of relevant, material disputed and undisputed facts;
- Description of how and when parties were given the opportunity to review evidence; and
- Explanations for why evidence or witnesses proposed by the parties were not considered.

What do I look for in my review?

- Clear identity of parties and witnesses, including how they move through the process;
- Procedural history can be helpful if relevant;
- Any investigative challenges and how they present;
- Clear narrative:
 - You lived in the investigation; I did not.
 - What might be confusing? Roadblocks?
 - Benefits of second reader.
 - Benefits of time/space to review.
- Connect facts to elements of the alleged offense;
- Explanations for how evidence or witnesses proposed by the parties were weighed or dismissed;
- **Understandability for a novice audience.**

Updated Proposed Regulations: A Preview

*Note that this is just an initial reading of the NPRM

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- NPRM Issued on June 23, 2022: 50th Anniversary of Title IX
- Expansion of Scope: 34 C.F.R. § 106.10 includes sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
 - *But see* State of Tennessee v. DOE (July 18, 2022): injunction granted; likely appeal to 6th Circuit – won't impact draft rules, but could impact long term.
- Hostile environment language: Unwelcome sex-based conduct that is sufficiently severe or pervasive, that based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity

Updated Proposed Regulations: A Preview

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- Jurisdiction continues to be around institutional control, but may also extend to institutional disciplinary authority, i.e., how far does institutional discipline reach.
- Language also indicates that education program or activity may be outside of U.S.
- Emergency removal process largely stays the same.
- Confidentiality vs. responsible employees: seems to extend explicitly to faculty as responsible employees, even confidential employees must provide Title IX contact information.

Updated Proposed Regulations: A Preview

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initial reading of the
NPRM

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- Re-introduction of investigator model; live hearing is not always required. Investigator model must provide:
 - Equitable access to report and materials remains;
 - Reasonable opportunity to review and respond to Report
 - Decision-maker – which could be investigator – poses questions raised by the party.
- Actual knowledge and deliberate indifference refer to more traditional language: “[M]ust take prompt and effective action to end any sex discrimination ... prevent its recurrence, and remedy its effects.”

Case Law Updates

- Stonehill (2021) Selective enforcement and erroneous outcome claims. District Court dismissed both, as well as contract and tort claims. On appeal to First Circuit. Based on BC I (2018), BC II (2019), Sonoiki v. Harvard (2020) – could be impacted.
- Doe v. Wentworth (2022): Complainant's erroneous outcome challenge survives MTD – prior sexual behaviors were included in investigative report.
- Doe v. Regents of the University of California (2022): Plaintiff paired generic allegations of “external pressures” from the federal government with “internal pattern and practice of bias” with “specific instances of bias in Doe’s case[.]” Specific instances included multiple statements by various university personnel such as “no female has ever fabricated allegations against an ex-boyfriend in a Title IX setting.”

Case Law Updates

- Doe v. Princeton (2022): the plaintiff included two allegations which, combined with generic allegations of external pressure from the government, stated a plausible Title IX disparate treatment claim. First, the plaintiff alleged that the university encouraged the female complainant to pursue a formal complaint on one hand but encouraged the male plaintiff not to do so. Second, the plaintiff alleged that the university ignored the complainant's more serious violation of a no-contact order but initiated a formal disciplinary process against him for a less serious violation of the order.
- State of Tennessee v. U.S. Dept. of Educ. (2022): 20 state attorney generals seek to enjoin Title IX NPRM and effectively prohibit Bostock application
- Barlow v. Washington State Univ. (2022): 9th Circuit certified two question to state supreme court re: "special relationship" regarding protecting students from sexual misconduct.

Case Law Updates

- Peltier v. Charter Day School (2022): 4th Circuit holds that sex-based dress codes are within purview of Title IX
- Karanik et al. v. Cape Fear Academy (2022): PPP loan may obligate a private (non-FFA) institution to follow Title IX
- Speech First v. Cartwright (Univ. of Cent. FL) (2022): whether discrimination and harassment policy violates First Amendment
- Clemson Settlement: Jury award \$5.3M to a student falsely accused of sexual misconduct under defamation and civil conspiracy claims

Case Law Updates

*Just from yesterday

7/26/22

- Webster v. Chesterfield County School Board (2022): 4th Circuit affirms summary judgment for school, but holds that student on teacher sexual harassment can rise to a violation of Title VII via hostile environment theory – balance student's right to public education against employees right to discrimination free working environment
- Perlot v. Univ. of Idaho (2022): preliminary injunction against a school; district court highlighted that differing viewpoints related to sex are not per se harassment



Questions?