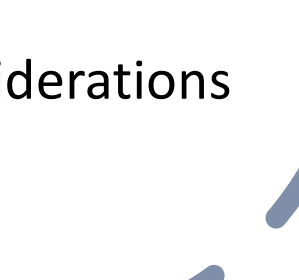


**Investigation and
Adjudication Training
March 27, 2023**

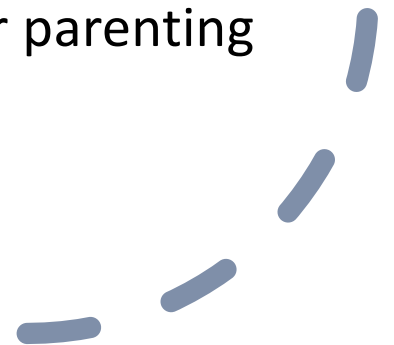
Phil Catanzano
Education & Sports Law Group

Agenda

1. Title IX, Relevant Laws & Policies
 2. Affirmative Consent, Standard of Proof and Range of Sanctions
 3. Conducting Investigations & Adjudications
 - 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
 4. Final Investigation Report Considerations
 - A. Avoiding Bias
 - B. Applying the Standard of Proof
 - C. Writing Tips
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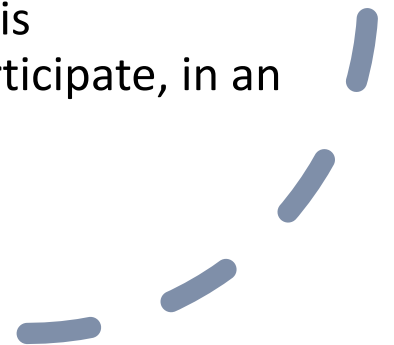
What is Title IX of the Education Amendments of 1972?

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.




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

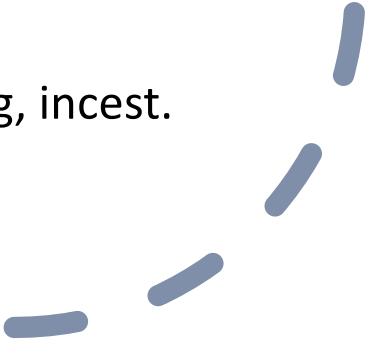


Sexual Harassment

- 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).




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, fondling, incest.
- 




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.
- 




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.





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

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.



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

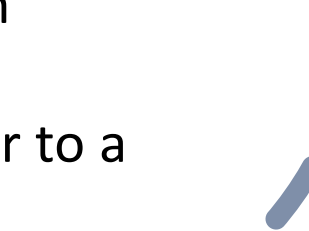
Standard of
Proof:
Preponderance
of the Evidence

- 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

*Check local policies for range of 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.
 - No sanction can be imposed prior to a finding of responsibility.
- 



Conducting Investigations

Setting a Solid Foundation

- 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.

Relevance: Questions and Evidence

Sample Policy Language:

- The Investigator will take reasonable steps to gather *relevant evidence*. The Investigator may exclude evidence they determine to be *irrelevant or immaterial*.
- Often relevance must be considered on a case-by-case basis.
- What concerns do you have about this policy language? For your purposes as an investigator? For an adjudicator?

Relevance Hypothetical Exercise

- A witness observed the behavior in question and wants to be interviewed about what they saw.
- A witness is in class with the Complainant or Respondent, but they said that they did not observe the conduct alleged.
- A video or audio recording of the party in question.
- A letter from a religious leader who says that the Complainant or Respondent is not a good person.


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?



Prior Conduct

Investigators may gather information about the **prior or subsequent conduct** of the Respondent for purposes of determining:

- Pattern
 - Knowledge
 - Intent
 - Motive
- 

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 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

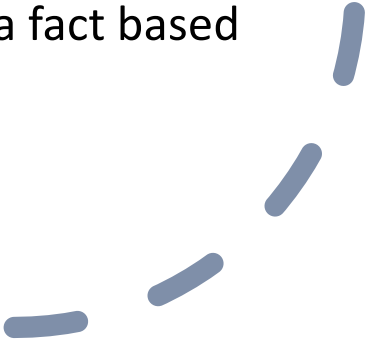
Stereotype-Based Bias

- 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

Prejudgment & Conflicts

- You should not prejudge a case or a fact based on bias of any form.
 - Avoid any conflicts of interest.
- 

Short Hypotheticals re: Bias

- Respondent is a member of the football team and Complainant alleges that the entire football team must know what happened and probably was involved in some way to cover it up. *“They can do whatever they want on this campus.”*
- Respondent is 6’6” tall, and weighs 300+ lbs. Complainant is 5’3” and 135 lbs. Respondent claims he is a victim of dating violence and he 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 “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.”
- What potential biases have come up in other cases? What potential biases could have arisen in the hypothetical problem? How do you check your bias as the investigation progresses?

Impact of Trauma

- 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.

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.

Appeal Grounds

Both parties may appeal based on one or more of the following grounds:


- **Procedural Error**
 - Procedural error(s) that materially affected the outcome of the matter
- **New Evidence**
 - New evidence which was not available or known (and could not have reasonably been known) at the time of the final determination which materially affected the outcome of the process
- **Conflict of Interest/Bias**
 - Appealing party must describe the alleged conflict of interest or bias held by the individual and how this altered/impacted the outcome



The Adjudication Process

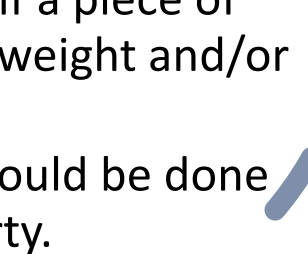


Fair Process Required

- Both Simmons and Wentworth have Policies require fair process and parity of process for both parties.
 - Assumption of not-responsible until adjudication is completed.
 - Both parties have several, equal opportunities to participate, be heard, and suggest evidence.
 - Should not be disciplining, punishing, or taking away opportunity pre-adjudication
- 



Relevance

1. Refers to a fact, witness, or other piece of information that a reasonable person could conclude makes a material fact more or less likely to be true.
 2. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are generally not relevant, unless such questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
 3. Relevance is broadly defined, but the Determination Panel determines (a) if a piece of evidence is relevant, and (b) assigns weight and/or credibility to the evidence.
 4. Key issue: making determinations should be done without bias for or against either party.
- 

Relevance Examples

Decide if the following are relevant and, if so, what factors would be considered for credibility:

1. A party submits a letter from a religious leader or a parent that speaks to what a good person they are and that they could never do the act alleged.
2. The Determination Panel finds several inconsistencies in a party's statement of what happened on the night in question, how do you weigh evidence they provide?
3. A party states that they had five drinks of an alcoholic punch at a party after they arrived at 11pm, but other witnesses state that they are almost certain the punch ran out at 10pm.
4. That same party in example 3 shares a picture of themselves with a bright green drink in hand at what looks like a party. The punch was agreed to be bright green by several witnesses. What questions do you ask about this piece of evidence?

Preponderance of the Evidence

- 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.
- Not the same as criminal culpability (beyond a reasonable doubt) or a “clear and convincing standard.”
Preponderance is commonly described as “50% and a feather.”
- Outside processes, e.g., a dismissal of a criminal complaint or allegations at a prior school, typically should not impact a decision unless containing relevant information about the allegations at issue.
- Focus solely on the investigation file that you receive access to before beginning your review. Do not make assumptions about any allegation/issue.

Quick Questions

Imagine you are Determination Officer and a fellow Determination Officer makes the following statements. How do you correct them?

1. "I watch a lot of true crime documentaries, and if one member of the Panel disagrees, it is a 'hung panel' and the Respondent is not responsible."
2. "I did not see a toxicology report in the Investigative Report, so there is no way anyone could know how intoxicated the Respondent/Complainant was..."
3. "I could totally see the Complainant's allegations happening just as they described. I was class of 1994, so I know this place..."
4. "There are only two witnesses, Complainant and Respondent. Both are credible and I'm at 50/50 on who I believe. But sexual misconduct is a blight on society and must be remedied, so I'm going to vote responsible."

Outcome Drafting – Methodology

Briefly describe the Determination Panel’s approach to demonstrate that you followed the key policy elements.

- Policy: “Policy defines sexual exploitation, in relevant part, as “[a]n act or acts committed through non-consensual abuse or exploitation of another person’s sexuality for the purpose of sexual gratification, financial gain, personal benefit or advantage, or any non-legitimate purpose.”
 - What about the examples in the definition?
- Standard of Review: Preponderance of the evidence standard.
- Basic Procedural Context: “the Determination Panel reviewed the Investigation Report and all exhibits, as well as both parties’ responses to that Report. The Panel also heard from Witness A on DATE. The Panel opted not to interview either party.”

Quiz: What should I do if the investigative report does not address an element of the alleged offense or a claim in its entirety?

Elements of Sexual Assault

- Having or attempting to have sexual intercourse OR
- Having or attempting to have sexual contact (touching of various body parts, without penetration)
- With another individual
- Without consent
 - No affirmative consent
 - Use of threat or force
 - Coercion
 - Individual incapacitated



Outcome Drafting – Describe the Key Evidence

- Describe Key Evidence
 - What are the elements from the checklist?
 - What evidence supports those elements or disproves them?
- Describe Critical Decision Points
 - Example: Party A stated they had seven drinks and had trouble standing, demonstrating their intoxication. Party B stated that they observed complainant have one drink they “nursed all night” and dancing. The Determination Panel credits Party A because of Witness X, Y, and Z’s corroboration that Party A had six drinks before coming to the party.
- In Some Circumstances, Describe Evidence Weighing
 - Example: Party B stated they were not at the party, but Witnesses X, Y, and Z stated they saw Party B at the party....While the witnesses were suggested by Party A, they did not evidence bias and Party B did not suggest any witnesses to this point. Importantly, Witness Y provided a video that showed Party B at the party.

Outcome Drafting – Show Your Work

Show your work; rely on facts, not vibes.

- Compare the following:
 - “Both parties were probably drunk, and it’s a fair assumption that both parties lacked a coherent thought at the party. Both parties seemed nice, so this must have been a miscommunication...The Complainant described that they were extremely drunk and never consented to the behavior in question.”

Versus

- “The Panel credited Complainant’s statement that they had four drinks. The Panel also credited Witness A, who observed Complainant have ‘approximately 3-5 drinks.’ Witness B stated that they saw Complainant drinking a brown liquor that was refilled twice, and observed Complainant leaning against Respondent by 11 pm. Given these statements from the hearing, the Panel did not credit Respondent’s statement that Complainant was not drinking at all.”

Additional Drafting Tips

- Cite to the record where possible and be specific, e.g., “Witness A stated...”
- Aside from Policy definitions, use quotes judiciously.
- Avoid compound statements that can be confusing or open to interpretation.
- This need not be a complicated, quasi-academic discussion; clear, direct statements are almost always better.
- Avoid generalizations or statements attributed to several individuals, particularly if it is unclear of who said what. Your job is to dig through that or ask the investigator to clarify if necessary.
- Avoid overly personal or inflammatory discussions unless necessary. “Necessary” information can often be measured based on whether the information is a critical element of a claim or a defense.
- Keep personal assumptions, opinions, or belief out!
- Don’t be afraid to push on evidence with Determination Panel members during deliberations, but try to reach consensus for outcome communications.

Understanding the Technology

- Using Zoom or some other program?
- Know how to record? When will you record? When will you go off the record?
- How will you orchestrate the parties? The witnesses?



Next Steps

Once the Determination Meeting is set, make sure you are prepared:

- Bring the file with you and make sure you've reviewed everything and taken time to think about it. (Tip: set personal report/file review time as a set time(s) in your schedule – don't wait until the last minute.)
- Have the Policy available to you – typically also an exhibit.
- Don't try to schedule "quick calls" or meetings during deliberations –decisions can take time. Schedule breaks as needed. No multitasking!
- Bring amenities, e.g., drinks, snacks, etc.; schedule breaks as needed
- Emotional preparation:
 - Serious cases; often difficult subject matter and facts
 - Be ready to be asked (and ask) challenging questions of co-panelists
- Follow the process: e.g., only start thinking of sanctions after a finding of responsible.



Questions?