



Integrating the Massachusetts Sexual Violence Law on Campus

Initial Training -- 2022

Refresher Training -- 2023

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Training Agenda

Session One: Introduction and Overview

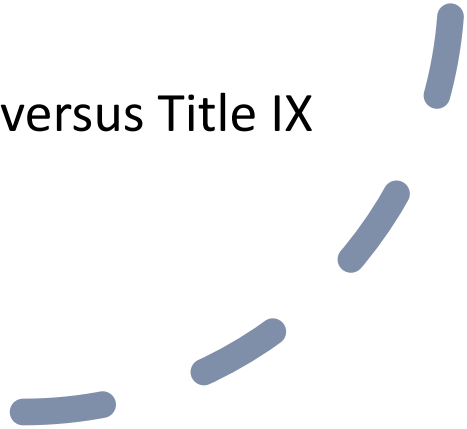
- Discuss the differences and overlap between Title IX and the Massachusetts Act Relative to Campus Safety and Violence Prevention Act (“CSVP”)
- Intake, supportive measures, emergency removal

Session Two: Investigations and Related Considerations Under Massachusetts CSVP

- Conducting investigations
- Trauma, drugs and alcohol, bias

Session Three: Adjudication and Policy Focus

Review Session

- Final discussion about Massachusetts CSVP versus Title IX
 - Drafting reports (for any case)
 - Discussing adjudications and appeals
 - Updates and the road ahead
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Session One: Introduction and Overview

Understanding the Differences between
State and Federal Law; Institutional Policy

Today's Agenda

A. Comparison: Title IX & the Massachusetts Act Relative to Sexual Violence on Campus

1. Training obligations for students and employees
2. Development of appropriate policies to comply with both state and federal laws (regular review required)
3. Memoranda of understanding with domestic violence and rape crisis response, as well as local law enforcement
4. Campus climate survey

B. Prohibited Conduct & Affirmative Consent

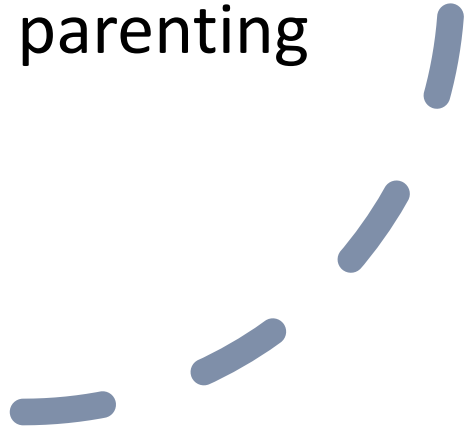
C. Hypothetical: Reporting & Intake, Bias

**Goal: incorporate required concepts as we go.*



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.



What does the Massachusetts CSVP Do Then?

- A. With regard process for resolving actual cases, significant overlap and/or deference to Title IX, e.g., hearing requirements, right to advisors, etc.
- B. Requires annual policy review
- C. Additional annual reporting requirements to the Massachusetts Department of Higher Education:
 1. Number of reports of sexual misconduct
 2. Number of reports of sexual misconduct investigated
 3. Number of findings of responsibility versus not responsible
 4. Data requested to be disaggregated by student v. student and student v. employee cases

Massachusetts CSVP Cont.

- D. Institutions required to have Memoranda of Understanding with local law enforcement, rape crisis counseling/response (e.g., BARCC), and a Dept. of Public Health approved domestic violence center (e.g., Casa Myrna, Elizabeth Stone House)
- E. Sexual misconduct survey at least every 4 years
 1. Demographic information
 2. Reported and unreported instances of sexual misconduct
 3. Student awareness of institutional policies
 4. Student and employee understanding around reporting
 5. Perception of campus safety
 6. Anonymous responses allowed

Who Reports?

- “[A] student or employee may choose to report sexual harassment to any trusted employee of the College. ... [A]ny faculty member, staff member, or other employee who receives a report of sexual harassment is not responsible for responding: he/she/they must immediately share the report with the Title IX Coordinator or the Deputy Title IX Coordinator for Students. The Title IX Coordinator and the Deputy Title IX Coordinator for Students are specifically charged with overseeing the investigation of and response to allegations of sexual harassment.”
- Individuals can also report anonymously per MA CSVP
- Confidential resources? Confidential resource provider?

What Happens with Reports

- **Review incident described in the report/notice**
 - How do these reports usually look at Cambridge College?
 - Details included typically?
- **Respond to reporter and develop information**
 - Ask questions about the reported incident
 - Provide information on interim and supportive measures
 - Provide support services and resources
 - Explain policies and procedure
 - Trauma informed responses
- **Investigate reports of possible violations of policies**
 - Internal or external investigators (pros and cons)
 - Potentially live hearing (under Title IX)
 - Adjudication and Sanction
 - Appeal options

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?

What is Prohibited By Title IX & College Policy?

*And, by extension, the Massachusetts CSVP

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

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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, fondling, incest.

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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.



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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.

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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.
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Sexual Exploitation

An 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 any other non-legitimate purpose. The act(s) of sexual exploitation are prohibited even if the behavior does not constitute another sexual misconduct offense. Sexual exploitation may involve individuals who are known to one another, have an intimate or sexual relationship, or may involve individuals not known to one another.

Retaliation

Retaliation

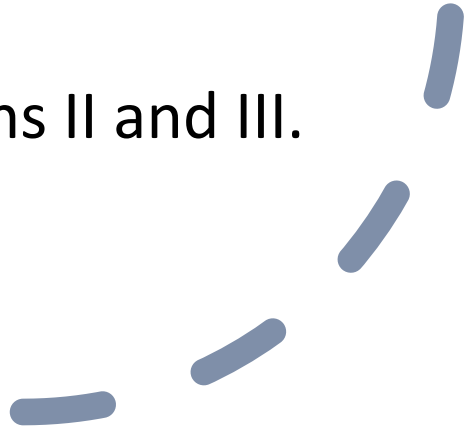
Adverse or negative actions taken against an individual for reporting a violation of institutional policies or participating in a review process. For example, if a student was removed from a student group after submitting a Title IX complaint against the leader of the group, that could be retaliatory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

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.
 - We will come back to this in Sessions II and III.
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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.

Bystander Intervention

The “four Ds” — Direct, Distract, Delegate, and Delay.

- Direct Intervention: If you feel comfortable, may include – “Hey everything ok,” “What’s going on here?”
- Distract: May be appropriate in an unfamiliar environment or where you are less comfortable; goal is to help the person who is a target of harassment leave – “Can’t find my phone, can you help?” Call or text the individuals involved.
- Delegate: When you cannot intervene directly, enlist help from others, e.g. contact a friend of a person involved.
- Delay: When you cannot help at the time or hear about an incident later. “I saw what happened, are you okay?” “Can I help you contact a confidential resource?”

How can this impact investigations?





Session Two: Conducting Investigations

A Discussion of Different Approaches

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.
- If the Investigator determines proposed witnesses, documents, and/or questions are not relevant, they must document their analysis in their Investigation Report.
- What concerns do you have about this policy language? For your purposes? For an adjudicator?

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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

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.



Session Three: Refresher

A Review for 2023

Investigation Report Writing


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.

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 decision-maker is charged with assigning high or low level of weight or credibility, so long as the evaluation treats both parties equally, i.e., do not assume facts against either party or start from a place of believing one party over another. Assess each piece of evidence on its merits.

Standard of Proof: Preponderance of the Evidence


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Unpacking the Preponderance Standard

What the “preponderance” standard is and what it is not:

1. Not the same as criminal culpability (beyond a reasonable doubt) or a “clear and convincing standard.” Commonly described as “50% and a feather.”
2. Materials decision-makers are provided with will include all inculpatory and exculpatory evidence found during the investigation or offered by the parties to assist the decision-makers in determining if allegations satisfy the preponderance standard
3. 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.

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.
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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



Questions?