Title IX Coordinator Training - MICU

August 4, 2020

9 a.m. - 2 p.m.

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Key Issues Covered by Title IX

- Recruitment, admissions, and counseling
- Financial assistance
- Athletics
- **Sex-based Harassment**
- Pregnant and Parenting Students
- Discipline
- Single-Sex Education (schools, classes, and extracurricular activities)
- Employment
- Retaliation

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Title IX Regulations

- Title IX's statutory language is brief.
- Federal government has issued guidance clarifying how it interprets and enforces those regulations
    - Obama 2011 and 2014 guidance
    - Trump 2017 Interim guidance

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Guiding Principles

- Rulemaking process rather than mere guidance
- Greater clarity to ensure that all schools clearly understand their legal obligations under Title IX and that all students clearly understand their options and rights
- Fair process for the accused

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Timing Problems

What about claims regarding events that occurred before August 14, but whose investigation hasn't started?

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Timing Problems

What about claims regarding events that occurred before August 14, but whose investigation hasn't started?

What if the investigation was started but is not completed by August 14th?

What if a case has been resolved but an appeal is initiated after August 14th?

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What's New?

- Roles (the same but different)
- Sexual Harassment Definition
- Scope of Coverage
- Supportive Measures
- Grievance & Hearing Procedures
  - Live Hearings, Advisors, Cross Examination, "single investigator" model is banned
- Mandatory Training / Retention of Records

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Key Roles

- Title IX Coordinator (must be an employee)
- Investigator
- Advisor (party permitted to have an advisor of his/her choice)
- Decision-maker(s)

Key Change: The Decision-maker **cannot be** the same person as the Title IX Coordinator or the Investigator.

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Sexual Harassment Definition

(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; or

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(3) "Sexual assault" as defined in 20 U.S.C.1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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Let’s consider a few examples…

What if the students want to remain anonymous. Can/should the school investigate?

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Off-Campus Harassment

- Covers sexual harassment occurring “in the school’s education

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Off-Campus Harassment

- What is the school's "education program or activity?"
  - Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
  - Specifically includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Fraternity or Sorority Housing? Athletic Housing?

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Training Requirements

- Must train all Title IX personnel on:
  - Key definitions.
  - How to conduct investigations/grievance process.
  - How to be impartial.
- Must provide decision-makers and investigators with training on evidentiary issues.
  - Relevancy.
  - Rape shield protections.
- Must train decision-makers on any technology using at hearings.

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Does This Situation Justify an Emergency Removal?

The weekend offender strikes again…

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Non-Retaliation Provision

- Any person retaliated against can file a complaint with the school and the school must have a procedures in place for the prompt and equitable resolution of those complaints
- Any situation that could “chill” the bringing of Title IX violations can qualify as retaliation
- Regulations provide that protected speech under the First Amendment never constitutes retaliation.

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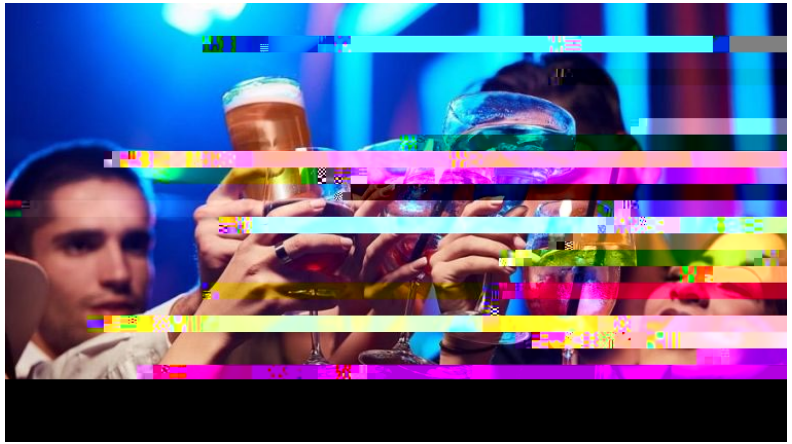
Is this retaliation?

A complainant reports a sexual assault that happened while under the influence of alcohol at a party and is punished for underage drinking – a code of conduct violation.



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Mandatory Dismissals

- Alleged actions fail to meet definition of sexual harassment
-

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Informal Resolution Process

- Requires *voluntary* and *written* consent from both parties
  - Can *not* be a condition of employment or enrollment
- Unavailable if respondent is an employee (including faculty) of the school
- May take any form, but the school must must provide a facilitator who
  - is free from conflicts of interest or bias
  - has received special training
- Either party may abandon the informal resolution process *"at any time prior to agreeing to a resolution"* and proceed the investigation and hearing process

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Investigation & Hearings Topics

- Big Picture Items
- Roles Within School's Title IX Department
- Evidence Gathering
- Hearings
- Advisors & Cross Examinations

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Roles Within School's Title IX Department

- Single investigator model is no longer allowed
  - Investigators and Decision Maker(s) cannot be the same in any given case
- All individuals in the case must be unbiased

This is one area that could result in requiring additional staff!

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Timeline

- Investigations need to be done in order to provide a prompt resolution
- Interview the Complainant first to identify any witnesses
- Witnesses frequently name more witnesses
-

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Investigation Overview

- Coordinate with law enforcement as needed
  - Never force *or* discourage a complainant go to the police
- Gather as much evidence as possible
  - Texts, e-mails, pictures, etc.
- Strategically schedule interviews
  - But surprise interviews are now barred
- Conduct an exhaustive and complete investigation

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Explain the Procedure

- Set the tone for the interview
- Review the policy as necessary
  - Be clear about privacy/anonymity
  - Explain what steps have been taken
  - Remind them of anti-

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Hearings

- Hearings are now *mandatory* for all post-secondary schools
- Must be conducted live with both parties able to simultaneously see and hear each other
  - If requested by either party, the hearing can be conducted in separate rooms with technology to enable this requirement
  - Can also be done virtually

How can hearings be conducted during quarantine?

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Hearings

- Recordings of the hearings must be available for all parties to inspect and review
  - Audio
  - Audiovisual
  - Transcript

Disability accommodations must still be made!

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Advisors & Cross Examinations

- Cross-examinations are now allowed by regulation
- Parties can *not* directly cross-examine each other
  - Questions must be asked by a parties advisor or attorney
- Schools must provide an advisor for the purpose of cross-examinations if parties do not have one
  - Does not have to be a lawyer

This is another area that may result in requiring additional staff!

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Are these questions relevant?

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Presented by Mark Scudder

GRIEVANCE PROCEDURE: POST-HEARING

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Post-Hearing Topics

- Evidentiary Standards
- Determinations
- Remedies
- Appeal Process
- Record Retention

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Why would a University choose one standard over the other?

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Written Determinations Must Include:

- Identification of the allegations potentially constituting sexual harassment;
- Description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;
- Statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes eTc 0 Tw 7Eh78 Td(r)1Tw3 (.9 (g)2na)3Tw T955

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Appeals

- Both parties have the right to appeal
  - At dismissal; or
  - At the completion of the formal grievance process

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Record Retention

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Consequences of Potential Noncompliance

Department of Education Office of Civil Rights

- Potential steps
  - Complaint
  - Investigation
  - Enforcement action
- Publication

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Consequences of Potential Noncompliance

- Civil suit
  - Private right of action
- Relations: campus, alumni, community, public

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Policy Considerations

- Where do you want your university to come down on certain issues?
  - How difficult will it be to prove sexual harassmesmeesmeemut the egal adv

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Presented by Janilyn Daub

MODEL POLICY

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Who must receive notice of the policy?

- Students (current and applicants)
- Employees (current and applicants)
- Unions or Professional Organizations

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Grievance Process

- The policy must include information on how to report or file
- The Grievance Process must include:
  - Standard of Evidence
  - Presumption of Innocence
  - “Reasonably prompt time frames”
  - Range of sanctions
  - Procedures and permissible bases to appeal
  - Range of supportive measures available to each side

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Model Policy - Definitions

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Actual Knowledge

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Consent

The final regulations do not require a definition of consent. As such, your university's final

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I. SCOPE

Remember:

This policy covers sexual harassment in any medium that occurs in a University's educational program or activity and in some off campus situations. The University has a duty to respond when they have actual knowledge of a violation.

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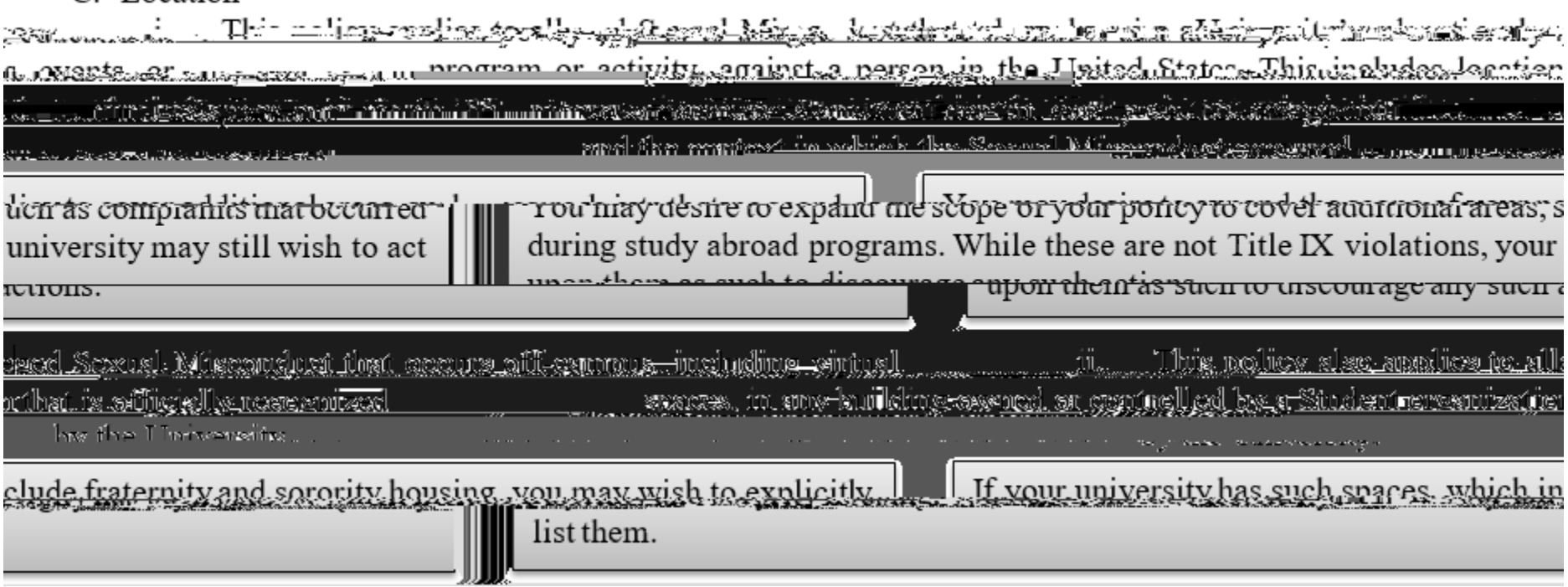
I. SCOPE

C. Location



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III. EMPLOYEES WITH AUTHORITY TO INSTITUTE CORRECTIVE MEASURES

Under the new regulations, the University's duty under Title IX is triggered when it has of an alleged violation. Actual Knowledge is assumed when the Title IX Coordinator or any official of the University who on behalf of the University is made aware of an allegation. It is left up to the University to define which individuals have such authority. In order to limit liability to the University, it is recommended to keep this list narrowed to specific individuals.

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III. EMPLOYEES WITH AUTHORITY TO INSTITUTE CORRECTIVE MEASURES

Who ***could*** you include?

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III. EMPLOYEES WITH AUTHORITY TO INSTITUTE CORRECTIVE MEASURES

Who ***could*** you include?

Who ***should*** you include?

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IV. EMPLOYEE DUTY TO REPORT

Who ***could*** you include?

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IV. EMPLOYEE DUTY TO REPORT

Who ***could*** you include?

Who ***should*** you include?

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VI. CONFIDENTIALITY AND PRIVACY

Key Points:

- Complainants have a right to privacy and can request that no formal investigation or disciplinary action follow
- BUT the University can decide to proceed anyways on a case-by-case basis
  - At that point the Complainant has no obligation to proceed as part of the investigation

How confidential are witnesses' identities?

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XI. PROCESS ABUSE

A. No member of the University Community may:

participating in a process, or carrying out a responsibility covered by this policy;

is policy; ii. Make, in bad faith, materially false statements in or related to a process covered by th

olicy; or iii. Disrupt or interfere with the orderly conduct of any proceeding conducted under this

this policy. iv. Fail to comply with any directive, sanction, or corrective action issued pursuant to

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MODEL POLICY: PROCEDURE

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III. INFORMAL RESOLUTION

F. Informal resolution can take any form that the parties agree upon. The Title IX Coordinator or designee ... on that adequately resolves the needs of the parties. ... will work with the parties to develop a form of resoluti

This may include:

...that your university deems appropriate. The included informal ... | ...nformal resolution can take any form... ...ples that your university may choose to adopt in full or in part. Your ... | ... resolution options are provided as exam... ...on in place that you may substitute for these. ... university may also have additional forms of alternative resoluti...

...uding, but not limited to, the Complainant and the Respondent, which allows for voices to be ... incl... ...heard and ... ...perspectives to be shared. Depending on stated interests, participants may work towards ... ...the development of a shared agreement.

Shuttle Mediation: An indirect version of the facilitated dialogue ii.

Circle of Accountability: A facilitated interaction between the Respondent and University faculty iii.

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IV. FORMAL RESOLUTION & HEARINGS

Investigation Key Points:

- Meet with parties separately and collect information & evidence
- Neither the complainant nor respondent are required to participate in the investigation process
- Parties have an equitable right to:
  - Notice, a prompt process, equal access, advisors, and trained investigators without conflict or bias
- Investigative report cannot be finalized until *all* evidence is shared with the parties
- Investigative report to be circulated to both parties upon completion

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IV. FH8&(2(i)&ef1 (s2A (3)7.LLP)ef1 (sE)1F)7.1S)v (8i)

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Resolution

ii. The Decision Maker(s) bases all conclusions by examining all evidence from the investigation and

erance of the Evidence" or "Clear

The new regulations allow for a choice between two standards: "Preponde

rd. Insert the appropriate language in brackets below into the bracketed

preponderance of the evidence standa

portion of the sentence above.

y than not that
or violating this

[preponderance of the evidence] standard: If [the evidence indicates that it is more likel
Respondent committed the alleged act(s)], then the Respondent will be found responsible fo
policy.

han untrue that
or violating this

[clear and convincing] standard: If [it is highly and substantially more likely to be true t
Respondent committed the alleged acts(s)], then the Respondent will be found responsible fo
policy.

rdless of if the respondent is a student, staff, or faculty member.

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V. APPEALS PROCESS

A. If either party disagrees with the outcome of the Decision Maker(s)'s determination, they may file a

decision.

d The time frames provided here are recommended to promptly resolve cases, however they may be extende

or shortened to meet your university's expectations and standards.

B. Appeals may be filed due to:

i. A procedural irregularity that affected the outcome.

or dismissal.

nt that affected the outcome of the matter of the Investigator or complainant, or responde

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Key Takeaways

- No longer a safe harbor, now required by law
- Only if actual knowledge in a controlled area in the US.
- Redefine sexual harassment (severe *and* pervasive)
- Lower evidentiary standard
- Increase due process protections for the accused.
  - Investigations—notice requirements and evidence sharing
  - Hearings—with cross-examination
- Enlarge Title IX department
  - No single investigator
  - No conflicts

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Presented by Janilyn Daub

NEXT UP: INVESTIGATOR TRAINING & DECISION MAKER/ADVISOR TRAINING

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Next Up in our Title IX Compliance Program

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QUESTIONS?

Submit through the chat window!

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Thank You For Attending!

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