

TITLE IX TRAINING

Massachusetts Community Colleges

September 17, 2020

OUR SERVICES

- Title IX, Civil Rights, and Misconduct Investigations
- Decision Makers and Hearing Officers
- Policy and Program Reviews
- Trainings

DAN SCHORR

RELEVANT LAW

TITLE IX

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

- **Discrimination:** An intentional or unintentional act which adversely affects employment and/or educational opportunities because of a person's membership in a protected class or association with a member(s) of a protected class.

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- **Gender-Based Discrimination:** Unwelcome conduct of a nonsexual nature based on a student's actual or perceived sex, including conduct based on gender identity, gender expression, and nonconformity with gender stereotypes, where:
 - submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or education; and/or
 - submission to, or rejection of, such conduct by an individual is used as a basis for academic or employment decisions affecting that individual; and/or
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- Title IX

- Complainant contacts the Title IX Coordinator or designee and makes a

- Within 10 days of the decision maker's receipt of the report, a hearing is held
- Title IX Coordinator or designee:
 - Schedules the hearing
 - Notifies the parties, advisors, and witnesses of the hearing
 - Provides the decision maker with appropriate materials
 - Coordinates videoconferencing as necessary
 - Secures a hearing location
 - Acts as liaison between parties and decision maker on procedural matters
- Decision maker conducts the hearing, including:
 - Decision maker summarizes the Hearing Policy
 - Title IX Coordinator or designee briefly states allegations and summarizes the investigative report
 - Advisors question parties and witnesses by presenting questions through the decision maker
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NON-TITLE IX DEFINITIONS

- Sexual harassment reports may fall outside the scope of Title IX requirements, in which case they will proceed through the existing Complaint Process using the Title IX definitions or the following definition.
- **Sexual Harassment:** Sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature when:
 - submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment or academic decisions; or
 - such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's academic or work performance by creating an intimidating, hostile, humiliating or sexually offensive learning or working environment.

NON-TITLE IX PROCESS

- Complainant contacts the Title IX Coordinator or designee and makes a complaint
- Respondent is noticed in writing about the complaint and may submit a written response within 10 days
- Informal resolution options are offered to the complainant
- An investigation is conducted within 30 days of respondent's written response, where practicable, including:
 - Interviews with both parties, who may be accompanied by advisors of their choice
 - Analysis of the allegations and defenses presented
 - Consideration of relevant documents provided by parties and witnesses or otherwise obtained
- The investigator prepares a Report of Preliminary Findings, which is delivered to the parties
- Parties have 10 days to submit Rebuttal Statements
- Within 7 days, the investigator delivers a Report of Final Findings and Recommendations to the President's Designee, who issues a written decision to the parties within 10 days of receipt
- Each party may file an appeal with the President within 5 days of receiving the decision

INITIATING THE PROCESS

GENERAL GUIDANCE

- Be fair and objective
- Do not pre-judge
- Avoid conflicts of interest (including the *appearance* of a conflict)
- Maintain independence
- Stay professional
- Do not discuss opinions or conclusions
- Words matter
- Listen, listen, listen!
- Protect confidentiality
- Be prompt, but take the needed time
- Prevent retaliation
- Treat all parties equally

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UNDERSTANDING CONSENT

- Mutual and voluntary
- Affirmative
- Revocable
- Past consent does not imply current/future consent
- Consent to certain acts does not imply consent to other acts
- Power dynamics
- Age of consent
- Forcible compulsion
- Threats – actual or implied
- Expressed lack of consent
- Incapacitation

AN ALLEGATION LANDS ON YOUR DESK...

- Listen carefully and with compassion
- Provide access to needed services
- Explain process, your role, and complainant's right to independently involve law enforcement
- Gather basic information: Who? What? When? Where? How?
- Identify an initial list of potential witnesses
- Identify steps needed to obtain evidence
- Understand context to the allegations, relationship between the parties, and motivation for coming forward
- Assure the complainant that you take the matter seriously
- Explain confidentiality
- Do not express opinions or comment on character of others
- How to handle an anonymous report

EVALUATE THE REPORT

- Search files of past reports or investigations
- Review school policy
- Determine whether an investigation is necessary
- If allegation involves potential child abuse, report to authorities in accordance with law regardless of your determination of credibility

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INTERIM MEASURES

- Can implement any time during investigation when needed

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PLANNING THE INVESTIGATION

- Who will conduct the investigation?
- Scope of investigation
- Key fact issues
- Who needs to be interviewed?
- In what order?
- What evidence needs to be collected?
- Who needs to be notified?

- New regulations provide option for a complainant to withdraw from a formal complaint, at which time the Title IX Coordinator may dismiss the investigation or may continue to investigate
- However, even if the process continues without complainant, regulations require that if “a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility”
- Without a complainant, you must rely upon other evidence to “build” your case, which is often difficult

You receive the following email from sophomore, Nick Brooks:

I've been avoiding writing this, but I want to let you know that last week, at a welcome party for Environmental Club, junior Ava Alexander grabbed my crotch area and butt a few times. She was laughing like it was a joke, but it made me feel really uncomfortable and seeing her around campus has been tough since then. I'm nervous because I know I have to see her again at the next club meeting. I don't want her to get kicked out of the club, especially since she's running for president, but I'm really anxious about it and it's been

CONDUCTING INTERVIEWS

- The complainant
- The respondent
- Anyone who was present for and observed a relevant incident
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BE TRANSPARENT

- Clearly introduce yourself and your role as an independent investigator
- Explain how you will be conducting a comprehensive, prompt, and fair investigation
- Be clear that you are there to listen to everything they have to say, review their evidence, and speak with their witnesses
- Do not make promises you cannot keep and keep your promises
- Set realistic timelines and keep them apprised of the process as it progresses
- State upfront that you may need to follow up with them or re-interview them
- Be clear about policies regarding activities such as drug/alcohol use

- Treat the interviewee with **respect, empathy, and kindness**
- Recognize that this is difficult for all involved
- Offer services/resources to both parties, as well as witnesses if needed
- Be open-minded and non-judgmental
- Remember that many cases are in gray areas, and most people are telling you some version of their truth
- Make your body language reflect your listening stance
- If an interviewee becomes confrontational, don't mirror their demeanor – keep calm, take a break, redirect
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BE COMFORTABLE

- Be/act comfortable with sexual terms, behaviors, and choices
- In video interviews, be/act comfortable with videoconferencing
- If you are uncomfortable, they will be uncomfortable
- Allow them to speak in their own language (crude language, etc.), but clarify
- If there is something that makes you uncomfortable:
 - Do research
 - Practice talking about it
 - Re-evaluate whether you are the right person for the interview
- Be aware of unconscious bias and the power positions & identities you bring into the room

HAVE A REAL CONVERSATION

- Bring your real personality into the interview and engage in a conversation: **listen** and **respond**
- Don't be afraid to be personal
- Be true to your own style of speaking
- Be flexible and let the conversation take its natural course
- Guide the conversation, but let them set their own pace and tell their story in their way
- Utilize silence, especially when you ask hard questions

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EXERCISE: INTERVIEWING

What steps should you take before interviewing Dr. Becker?

What information do you hope to obtain during the interview?

What interview challenges do you anticipate?

MOCK INTERVIEW

COLLECTING EVIDENCE

TWO TYPES OF EVIDENCE

DIRECT vs. CIRCUMSTANTIAL

EVIDENCE EXAMPLES

- Text messages
- Social media
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OBTAINING EVIDENCE

- Instruct parties and witnesses to preserve evidence
- Go to the source and get primary documentation when possible
- Deleted items may still exist
- Be aware of fakes



ASSESSING CREDIBILITY

CREDIBILITY FACTORS

- Inherent plausibility and logic of story
- Consistency
- Demeanor
- Level of detail provided
 - Beware of the “categorical denial”
- Past record and pattern behavior
- Cross-corroboration
- Corroboration by evidence
- Not a moral judgment on honesty
- Evaluating credibility is a continuous process

EXERCISE: ASSESSING CREDIBILITY

Think about our interviews with Nick and Dr. Becker:

Did you believe Nick's account?

Why? What factors of his interview made him seem more or less credible?

Did you believe Dr. Becker's account?

Why? What factors of his interview made him seem more or less credible?

DOCUMENTING THE INVESTIGATION

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DOCUMENTING INTERVIEWS

Smith said that she knew Robertson and that he was “more a friend of [Johnson’s].” She said in the first few weeks of the Fall 2019 semester, Robertson would come to the office and spend time talking with Johnson at her desk. Smith said that Johnson told her that she spent time with Robertson outside of work on several occasions, but they were “never that serious.” Smith also stated that she was aware that Johnson and Robertson frequently communicated via text message during the day.

Jones stated that during the party, he believed Hill “got some wrong signals” from McCall

EXERCISE: DOCUMENTING INTERVIEWS

What's wrong with these summaries?

- *Rodriguez said he couldn't see what was going on with Murphy and Novak, but Novak was always acting weird with people around campus. Murphy told him later that Novak had made inappropriate comments to him.*
- *Ibrahim said that Rossi touched her and her friends' boobs and butts.*
- *Persaud said that he asked Wilson not to mock him in front of the class. Persaud exclaimed, "I told her not to, but she did it anyway!"*
- *Miller said that prior to the incident involving Devi, he had sent an e-mail to Williams, in which he wrote about other incidents when Devi touched him inappropriately. He said that Devi touched his penis over his pants and that he was upset about this.*

- Scope: a clear description of the scope and procedural history of the investigation
- Executive Summary: bulleted high-level facts, findings, recommendations, and conclusions, but do not overgeneralize or misrepresent facts
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SUMMARY OF EVIDENCE

Brown said that Leland tried to “create a negative narrative” about her and was “very forceful in doing so,” and therefore if people at the College did not have the opportunity to get to know Brown themselves, they would have believed Leland’s narrative. Roux said that Leland frequently complained to him about Brown. He said that Leland would make comments such as, “She’s a liar,” “You can’t trust her,” and “Don’t trust her.”

When asked whether she ever spoke negatively about Brown to Roux, including calling Brown a “liar,” Leland stated that she spoke with Roux about her problems with Brown’s performance but never used that specific language.

Mendel and Aguero both reported that they then entered a smaller stairwell, which Aguero described as “colder” than the first one. They both stated that Mendel sat on the stairs and Aguero stood by the door, which was closed.

Aguero reported that Mendel then asked her if she wanted to sit down and said, “I can make room,” and she told him, “No, I’m going to go.” Both parties reported that Mendel stood up and said, “I can warm you up.” Aguero said that Mendel then started to touch her buttocks. Mendel also reported that he touched Aguero’s buttocks.

Aguero explained, “I don’t know, I just froze because I didn’t know what to do.” She said that she told Mendel, “Maybe we should go. I’m tired.”

SUMMARY OF FINDINGS

Jensen also alleged that because of Popa's negative opinion of Jensen and Popa's friendship with Li, Li was not supportive of Jensen's implementation of the new software system. Li stated that she was supportive of the new system and Jensen's other initiatives. The investigators found Li credible in this account based on the overall consistency in her narrative and cross-corroboration with other witnesses. Based on the available evidence and by a preponderance of the evidence standard, Li's actions did not constitute harassment, discrimination, or otherwise inappropriate behavior toward Jensen.

HEARINGS

- Decision maker
- Title IX Coordinator
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- Decision maker should meet with advisors in pre-hearing conference to clearly communicate procedural rules for hearing
- Hearing Policy:
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CONDUCTING CROSS-EXAMINATION

- Follow rules of the hearing and defer to the decision maker
- Understand your advisee's account
- Ask questions in order to elicit information that will help support your advisee's account and/or cast doubt on the other party's account
- Use the principles of "Asking the Hard Questions" when questioning a party or witness about uncomfortable or difficult subjects
- Do not exclude a question because it makes you uncomfortable to ask it
- Do not bully or become confrontational with a party or witness
- Be professional and diligent
- Listen for gaps or areas for follow-up questions

- The decision maker may prohibit certain types of questions from being asked of parties and witnesses. Some irrelevant types of questions might include:
 - Questions about a party or witness's sexual history
 - Questions about a party or witness's health, including mental health
 - Questions about other aspects of a party or witness's life that are not pertinent to the alleged conduct
 - Questions to establish character
 - Questions that make assumptions or improperly blame a complainant or witness for the alleged conduct
 - Questions that are phrased rudely or unkindly, or intended to bully a party or witness
 - Questions that ask the party or witness to speculate
 - Questions that the party or witness would not know the answer to
- Ultimately, the decision maker must decide question relevance based on the facts and circumstances of the matter

EXERCISE: CROSS-EXAMINATION

Think about the proceedings against Dr. Becker.

Imagine you are Dr. Becker's advisor at the hearing, and you are asking questions of Jane, the complainant. What kind of questions would you ask Jane?

Ensure that your questions are relevant, BUT properly and diligently explore topics needed to support Dr. Becker's account and defenses.

EVALUATING THE EVIDENCE

- Decision maker must consider the evidence presented in the investigative report and/or the hearing
- For hearings, do not consider any statements from a party or witness who was not cross-examined in making final determination
- Decision maker must not draw any inference about responsibility based solely on a party or witness's refusal to submit to cross-examination
- Evaluation of the evidence includes credibility assessment, analysis of discrepancies and corroboration, and comparison to policy
- **All judgments must be defensible and based in evidence and policy**
- Determine responsibility based on a preponderance of the evidence
- Determinations and reasoning must be documented in a letter or report

FINAL CONSIDERATIONS

HOW DO SCHOOLS GET IN TROUBLE?

- Lack of promptness
- Displays of partiality or bias
- Inequitable treatment of parties
- Compromising confidentiality
- Poor planning
- Failure to thoroughly evaluate all relevant witnesses and evidence
- Offering opinions
- Overpromising
- Not consistently and equitably following policies and procedures
- Failure to maintain relevant documents and evidence
- Not including exculpatory information in the investigative report
- Failure to properly document and justify conclusions and actions
- Not consulting counsel when potential legal issues / litigation arise

