

TITLE IX: THE CHANGING LANDSCAPE

SOME THINGS CHANGE, OTHERS REMAIN THE SAME

OVERVIEW

- Not only about sexual assaults
- Secretary of Education & Dear Colleague Letters
- Ripped from the Headlines
- Title VII & Title IX
- Trauma Informed Investigations
- Sexual Assaults
- Burden of Proof

WHAT IS TITLE IX?

Title IX is a federal law that prohibits sex-based discrimination in education programs or activities that receive federal financial assistance.

Title IX of the Education Amendments Act of 1972

"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."

For the first 25 years or so after its passage, Title IX was primarily associated with providing female students with equal access to academic and athletic programs. Thanks to Title IX, there has been a significant increase in the number of female athletes participating in high school and intercollegiate sports.



TITLE IX – MORE THAN SEXUAL ASSAULTS

1

Conduct audits/inspections of athletic programs and facilities

2

Conduct inspections of admissions to determine if there are disparities between men and women

3

STEM Programs – are there sexual disparities

MORE THAN...

Publish, at least annually, a "Title IX – State of the Campus" Report

If your campus has regular Executive Compliance meeting the Title IX Coordinator should report potential trends and other relevant information

Develop an expansive educational awareness program

CAMPUS SAVE ACT

- In 2013, the Campus Sexual Violence Elimination (SaVE) Act was signed into law as part of the Violence Against Women Act (VAWA) Reauthorization Act of 2013.
- The Campus SaVE Act became effective on July 1, 2015. It imposes several new requirements regarding sexual violence, domestic violence, dating violence, and stalking. Among other things, the Campus SaVE Act requires schools to provide primary prevention and awareness programs for all incoming students and new employees and ongoing prevention and awareness programs for students and faculty.

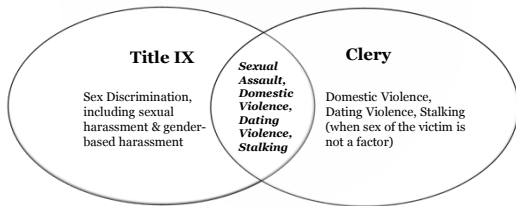


**VAWA/ VIOLENCE AGAINST WOMEN
REAUTHORIZATION ACT
CAMPUS SAVE ACT**

Requires training employees and students on sexual violence, bystander intervention and campus resources for victims of sexual assault for institutions of higher education



TITLE IX & CLERY (CAMPUS SAVE/VAWA)



- Shared requirements:
- Develop and publicize policies and procedures
 - Provide training
 - Investigate
 - Parity and fairness for parties
 - Protect confidentiality

CLERY & TITLE IX

Each year, institutions must disclose campus crime statistics and information about campus security policies as a condition of participating in the federal student aid programs.

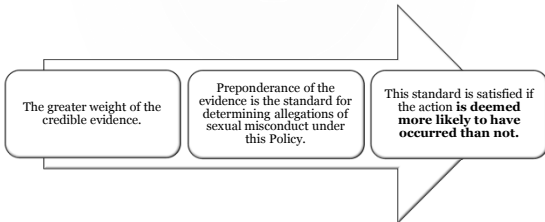
The Violence Against Women Reauthorization Act of 2013 amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking, and to include certain policies, procedures, and programs pertaining to these incidents in the annual security reports.

TRUMP ADMINISTRATION Q & A

- Eliminated the Obama Administration Dear Colleague Letters and replaced them with the Q & A

STANDARD OF PROOF

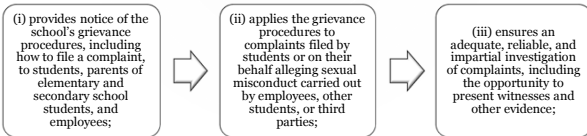
PREPONDERANCE OF THE EVIDENCE



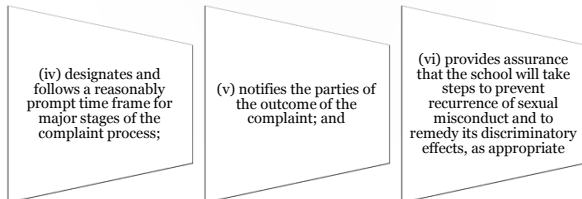
CLEAR AND CONVINCING EVIDENCE

- “A medium level of burden of proof which is a more rigorous standard to meet than the preponderance of the evidence standard, but a less rigorous standard to meet than proving evidence beyond a reasonable doubt. In order to meet the standard and prove something by clear and convincing evidence, a party must prove that it is substantially more likely than not that it is true.” Legal Information Institute, Cornell University

ELEMENTS OF A PROMPT AN EQUITABLE INVESTIGATION



ELEMENTS CON'T



SCHOOL'S INVESTIGATIVE RESPONSIBILITY

Burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed.

Investigator must be free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.

EQUITABLE INVESTIGATION

Requires a trained investigator who will –

Analyze and document the available evidence to support reliable decisions

Objectively evaluate the credibility of parties and witnesses

Synthesize all available evidence—including both inculpatory and exculpatory evidence

And take into account the unique and complex circumstances of each case

TITLE VII & TITLE IX SEXUAL HARASSMENT

• **Sexual Harassment:** Unwelcome conduct of a sexual nature including but not limited to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, when submission to such conduct is made either explicitly or implicitly a term or condition of a person's student status, employment, or participation in University activities; such conduct is sufficiently severe or pervasive that it interferes with an individual's education, employment, or participation in University activities, or creates an objectively hostile environment; or such conduct is intentionally directed towards a specific individual and has the effect of unreasonably interfering with that individual's education, employment, or participation in University activities, or creating an intimidating, hostile, or offensive environment. Sexual harassment is a form of sex discrimination that includes

SEXUAL ASSAULTS

Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, **without the consent** of the victim.

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, **without the consent** of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

TRAUMA INFORMED INVESTIGATION

WHY “TRAUMA-INFORMED”?

To avoid re-traumatizing victims and perpetuating a hostile environment



Better investigations

AND OF COURSE...

Because OCR says so



See, e.g., OCR's Questions and Answers about Title IX and Sexual Violence (April 14, 2014), University of Virginia Resolution Agreement, OCR Docket No. 11-11-6001 (Sep. 17, 2015)

WHAT IS TRAUMA?

Psychological trauma is the **unique individual experience** of an event or enduring conditions, in which:

The individual's ability to integrate his/her emotional experience is overwhelmed, or

The individual experiences (**subjectively**) a threat to life, bodily integrity, or sanity

Esther Giller, Sidran Institute. What is Psychological Trauma? (1999) <https://www.sidran.org/resources/for-survivors-and-loved-ones/what-is-psychological-trauma/>

INTIMIDATION

Intimidation: Unlawfully placing another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack.

WHAT IS TRAUMA, CONT.

"[T]rauma is defined by the *experience of the survivor*. Two people could undergo the same noxious event and one person might be traumatized while the other person remained relatively unscathed." - Esther Giller



WHO SHOULD BE TRAUMA-INFORMED?

Title IX Coordinator

Campus "communicators" and first responders

- "Any school officials responsible for discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence." (2011 OCR Q&A, E-2)

Investigator(s)

Campus law enforcement

Legal counsel

Hearing/appeals officers and panels—anyone involved in grievance process

Service providers such as counselors and other healthcare professionals

Other employees and faculty

Students

THE IMPACT OF TRAUMA

Factors That Tend to Increase Traumatic Impact of Event

Severity

If it is interpersonal (as opposed to noninterpersonal, such as accidents and natural disasters)

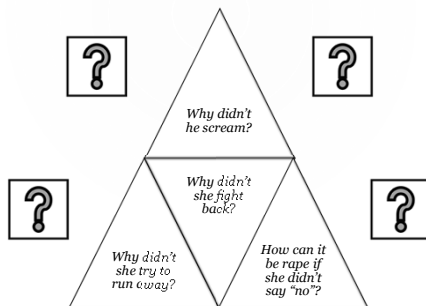
- Interpersonal traumas may impact victim's views regarding safety, intimacy, and trustworthiness of others

When it is chronic or repeated

- Persistent traumas may leave the survivor feeling overwhelmed, helpless, and with a sense that the trauma is inescapable

(Wamser-Nannay and Vandenberg, 2013)

COUNTERINTUITIVE VICTIM BEHAVIOR



CONSENT IS

A voluntary, **mutually** understandable agreement

That **clearly** indicates a willingness to

Engage in each instance of sexual activity

Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent

CONSENT IS NOT

A person cannot consent when it results from:

(a) the use of physical force,

(b) a threat of physical force,

(c) intimidation,

(d) coercion,

(e) incapacitation or

(f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity

CONSENT AN AFFIRMATIVE DEFENSE?



- Respondent says, I was so drunk I was under the belief that she consented.
- Valid Defense?
- Who has the burden of proof?
- Mistake of Fact

INCAPACITATION/IMPAIRED

Incapacitation: A state of being that prevents an individual from having the capacity to give consent. In other words, a person is incompetent.

Asleep or unconscious

Impaired by a drug, alcohol, or other similar substance

Suffering from mental disease or defect or physical disability

HOW DO YOU DETERMINE IMPAIRED?

• "First, does the person possess the cognitive ability to appreciate the nature of the conduct in question, and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person.

• "All the surrounding circumstances are to be considered in determining whether a person gave consent (, or whether a person did not resist or ceased to resist only because of another person's actions.)"

US Army Trial Judiciary Benchbook, 2017

RESPONDENT: I TOO

I was so intoxicated that I was under the mistaken belief that she consented.

A reasonable person would conclude that she consented.

WHO BEARS THE BURDEN OF PROOF?

- Respondent
- Complainant

QUESTIONS



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