IN THIS ISSUE

From the Field
Kansas State University unsuccessfully argued that it didn’t have to take action on a report of sexual assault because the alleged assault took place off campus.
Page 2

Compliance Corner
Know what to divulge about transferring students to their new institutions, and what to ask about those transferring in.
Pages 4–5

Professional Perspective
Kelley Marie Adams, Senior Program Manager and Advocate at Massachusetts Institute of Technology, discusses why MIT’s climate assessment efforts were such a success.
Pages 6–7

Coordinator’s Corner
Sirena Cantrell, the Dean of Students and Title IX Coordinator at the Mississippi University for Women, offers five points to consider about trauma.
Page 8

ABOUT US

The NCHERM Group, LLC., a law and consulting firm offering systems-levels solutions to create safer campuses, and the Association of Title IX Administrators, which provides networking and professional development for Title IX Coordinators, publish Title IX Today, its companion website, www.TitleIX.Today, and subscriber e-newsletter.

THE LEAD | INVESTIGATIONS

Know how to navigate the memory minefield in Title IX cases, Part 1

By Nedda Black, JD, LMSW, Contributing Editor
This is the first in a three-part series that delves into the phenomenon called “repressed memory” to help Title IX Investigators better navigate cases in which claims of deficient or repressed memory are asserted.

It is not uncommon for Title IX Investigators to encounter claims of “repressed memory,” because it is an idea that has been woven into the consciousness of the general public for several generations now, through the popular media, as well as through the teachings of mental health practitioners. Research as recent as 2013 has shown that a significant majority of clinicians and the general public still believe that traumatic memories are “repressed” and subject to delayed retrieval, notwithstanding the bad publicity that has befallen repressed memory since the 1990s, when the so-called “memory wars” culminated in high-profile cases involving false memories of sexual abuse. The damage caused to individuals and families by false claims of repressed memory “retrieval” was covered widely in the press. The False Memory Syndrome Foundation was founded in response to those cases. Experts like Elizabeth F. Loftus have made names for themselves challenging the scientific validity of repressed memory claims in court — in some cases, to the point of infamy, as Loftus herself has at times been referred to as a “get-out-of-jail-free card” and a “star defense witness.”

Consequently, the memory wars have pitted memory experts and researchers who question the scientific legitimacy of “repressed memories” against therapists who ascribe to the belief that “the patient’s truth” is all that matters. As one therapist is quoted as saying in the work of the preeminent memory expert and Harvard Professor of Psychology, Daniel L. Schacter: “We all live in a delusionary world, just more or less delusional.” Since only the most sensationalized aspects of the warring factions get any traction in the media, the greatest casualty of these wars has been the science of memory.

As in all so-called wars, there does not seem to be room for an argument that these two “sides” need not be seen as being in conflict at all, since the goals of clinicians and researchers are fundamentally different. Researchers seek to study and explain naturally-occurring phenomena. Clinicians seek to treat patients by helping them understand themselves in relation to the world around them (their “truth”). The object of the researcher’s focus is the phenomenon, while the object of the clinician’s focus is the individual. A clinician who becomes more focused on a phenomenon than on the individual risks sacrificing the individual’s well-being to a personal or political agenda. Thus, when clinicians state that the patient’s truth is

Continued on p. 3.
FROM THE FIELD | LIABILITY

KSU argument that it didn’t have to act because incident occurred off campus fails

By Cynthia Gomez, Editor

The fact that a Title IX-related incident occurs off campus does not mean that an institution has no duty to act, as the recent case of Farmer v. Kansas State University illustrates.

Tessa Farmer, a Kansas State University student, claimed that she was sexually assaulted by another student at a fraternity party during the spring 2015 semester after becoming intoxicated from alcohol supplied by the fraternity. She reportedly left the party, but returned after “T.R.,” a member of the fraternity, called and asked her to return, then picked her up in his car and brought her back to his room, where they engaged in sexual intercourse. Farmer discovered “C.M.,” a stranger to her, hiding in the closet after T.R. left the room. C.M. sexually assaulted her, and was still in the room when T.R. returned, according to her. T.R. reportedly was not surprised at C.M.’s presence. C.M., who turned out to be his roommate, later admitted that T.R. had instructed him to hide in the closet while he had sex with Farmer.

Farmer went to the hospital for a rape kit and reported the incident to the police. Just days later, she also reported the rape to the Director of KSU’s Center for Advocacy, Response, and Education, who allegedly told her that her only options were filing reports with the police or the campus interfraternity council. She pursued both options. Months later, she learned that the interfraternity council had taken no actions against he fraternity, and hadn’t even investigated the accused student. Only after completing the semester did she learn that she could file a complaint under Title IX with the Office of Institutional Equity. She did so, but the institution allegedly refused to investigate because the incident occurred off campus.

She sued, claiming deliberate indifference. The university argued that it had no obligation to respond to incidents occurring at off-campus fraternity houses, and that Farmer failed to explain how its lack of action caused her further harm. The court denied the university’s motion to dismiss the case.

It noted that KSU considers fraternities to be part of its extracurricular activities, and that KSU knew of the hostile environment created and its “concrete, negative effect on [T.F.’s] ability to receive an education,” creating a duty on the institution’s part to respond.
paramount, they are simply reiterating what is their legitimate area of focus.

Researchers are bound by the mandates of the scientific method, whereas clinicians are bound by the mandate to do no harm. While these goals intersect at certain junctures (e.g., understanding how false memories are created can help clinicians avoid doing harm their patients), they are otherwise divergent. Therefore, asking clinicians what they “believe” about repressed memory is not as important as asking them how they navigate the phenomenon when they encounter it in practice. Clinicians are also an invaluable resource to researchers in that they see and experience phenomena on a level that researchers otherwise cannot access. Unfortunately, words like “war” and even “debate” stoke conflict and undermine potential avenues for collaboration.

It is not the purpose of this series to take sides in the memory wars or to resolve the question of what is most properly the therapist’s role, but rather to provide a framework for understanding memory that can be useful to a Title IX Investigator when confronted with a reporting party who is claiming certain memory deficiencies or using buzz words, like “repressed” or “suppressed.” Our goal is fundamentally divergent from both the researcher and the clinician. We inhabit a forensic world, where the inner truths of the parties are only important to the degree that they help illuminate what actually happened, and whether the events objectively describe a policy violation. The parties’ truths are irrelevant if they are not the truth. But separating the truth from the parties’ respective truths can be like trying to defuse a bomb without color-coded wires. How do we know what the truth is — especially when the reporting party is claiming to have a memory of the incident that is blurry, fragmented, or eternally evolving?

One of the keys to navigating this question is to first keep distinct in our minds a reporting party’s use of particular buzz words from the phenomenon described by those words. In other words, the fact that a reporting party states that a memory has been “repressed” does not make it so. It is integral to our human nature to try to find words to describe what we are experiencing. Reporting parties will similarly reach for terminology to describe what they are experiencing, based on what they have learned about particular phenomena from the media, without consideration for the scientific validity of their application of that terminology to their situation. It is our job to see past the terminology to the facts, and not to assume anything by the use of the terminology alone. This does not apply only to memory “repression,” but also to “post-traumatic stress disorder,” a term that is frequently thrown about by reporting parties who have no basis for using the word other than a belief that these words accurately describe what they are subjectively experiencing. The idea is not to become confrontational with the reporting party (which would be ill-advised), but rather to listen with a third ear and ensure that all such claims are thoroughly investigated and not simply taken at face value. (E.g., Has a clinician diagnosed the reporting party with PTSD? If so, can documentation be provided by that clinician showing the connection between the PTSD and the allegations?)

Scientific research does not provide a definitive answer to the question of what the truth is when it comes to repressed memory claims, so we are left on our own to navigate the memory minefield. The lack of any definitive answer from the scientific literature also means that reporting parties are no more in a position to know whether their memory is veritably “repressed” than we are, making repressed memory one more claim that must be evaluated along with all others. We must dispense with black-and-white polarities and embrace a more nuanced spectrum of understanding.

**Continued from p. 1.**

**KEY TAKEAWAYS**

- The inner truths of the parties in a Title IX-related report are only important to the degree that they help illuminate what actually happened, and whether the events objectively describe a policy violation.

- A reporting party’s use of particular buzz words should be separated from the phenomenon described by those words, as their application of particular terms to their situation may be faulty.

- It is our job to see past the terminology to the facts, and not to assume anything by the use of the terminology alone.

- Claims of repressed memories should be evaluated along with all others, as reporting parties are in no better position than Investigators to know whether their memory has been veritably “repressed.”

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KEY TAKEAWAYS

» Just sending copies of outcome letters from students’ disciplinary cases is not advisable, as they may provide more information than institutions to which students are hoping to transfer need.

» Provide a summary stating the violation with which students were charged, the school’s finding, the sanctions imposed, whether sanctions were completed, and students’ current standing.

» Ask about students’ disciplinary histories at prior institutions as a way to support them on your campus to promote honesty and determine the needed supports.

Know what to divulge, and what to ask, of transferring students

By W. Scott Lewis, J.D.

Some colleges and universities have always asked about students’ disciplinary histories, as have some programs, including those in the medical and allied health professions, law, and law enforcement, as part of the admissions process. However, as Title IX and sexual assault concerns have come to the forefront, placing institutions in legally and politically precarious positions for the misconduct of students with a history of misconduct, more schools have begun inquiring into transferring students’ disciplinary past at previous institutions.

While this is not a new practice, and while many schools have long included notations about disciplinary actions in students’ transcripts, what is new is the level of inquiry in which some institutions are engaging. Just a few years back, conduct offices would typically respond to requests from other institutions for information about students’ disciplinary histories by sending brief summaries stating the violation with which students were charged, the school’s finding, the sanction imposed, and whether the sanction was completed and the student was now in good standing again. Back then, even sending a copy of an outcome letter was relatively common, as outcome letters were pretty simple documents that listed only the charge, finding, sanction, and final outcome.

But with institutions now required to add their rationalization in reaching decisions in outcome letters (at least in Title IX cases), as well as list the evidence on which decisions were based, sending an outcome letter to another institution is really providing much more information than the new institution may need or is even asking for. One issue with sending outcome letters is that a lot can be surmised from what’s written in them, and even more may be speculated.

For example, if a school says that it came to a determination of responsibility in a sexual misconduct case because it found a witness to be more credible than the responding party, the assumption from the person reading the letter may be that that responding party is a liar, lacks integrity, or is a predator. Of course, none of those assumptions may be true, and the assumptions may not even be made consciously; regardless, offering a document with that information makes it easier for the official from the requesting institution to act in a biased manner.

The solution is simple and is a return to older practices: provide a mere summary to a requesting institution, listing no more than the charge, responsibility determination, sanction, whether the sanction was completed, and the student’s current standing. Yet, people are curious creatures. Campus officials from an admitting institution might still call a student’s previous institution to ask for more information, regardless of whether or not that information is actually needed. The rise in transcript notations, which sometimes raise more questions than they answer, makes this even likelier.

So what should campus officials tell administrators from other institutions calling about students who are seeking to transfer in from theirs?
If officials have already provided a summary with the basic information noted earlier, they should tell the requesting administrators that the needed information has already been provided, and that they are unwilling to engage in any type of further conjecture about students or the conduct board’s decision-making process in students’ cases. (Note: they may or may not be privy to that information anyway). Further, the officials should encourage the requesting administrators to sit down for a conversation with the students, who can provide further details about the case. After all, no one knows more about a specific student than the actual student.

You might even consider telling the administrator that if in the course of a conversation with a student, the student says something that sounds out of bounds, you are willing to confirm or deny the information provided. For example, a student who was suspended for two years for a violation of a school’s sexual misconduct policy might say something like, “I can’t believe that happened. All I did was touch her butt.” Such a statement would likely raise a red flag for an admissions representative, since the sanction would likely seem so out of balance with the alleged act. In that case, it would be appropriate to tell the inquiring admissions administrator that the student was found responsible for a more serious sexual misconduct violation than unwanted touching. At that point, if the admitting school wants to take some negative action against the student, it has a better rationale, as the student has been overtly dishonest with the admissions representative.

Colleges and universities should be asking students to explain any disciplinary history. In today’s highly litigious society, it’s important to remember that knowing something doesn’t increase your liability; not knowing something that you perhaps should have known might, however. One potential problem is that unless they are receiving a transcript from a school that does disciplinary transcript notations, schools are relying on applicants themselves to disclose information that they may think could be used negatively against them.

While certainly, a highly selective institution may choose not to admit a student with a disciplinary past, most colleges will not automatically reject an applicant with a disciplinary history.

Yet, students may hesitate to disclose information about a past disciplinary finding and sanction because they may think that it would preclude them from enrollment. Schools can overcome this challenge by letting incoming students know that while some disciplinary actions may preclude them from certain initial privileges such as on-campus housing, the schools are asking for this information as a way to ensure that students can be provided with the kinds of support they will need to be successful at the institutions. In fact, rather than asking only about prior disciplinary actions and/or convictions, a concern that this approach may have a disproportionate effect on minorities. But that only matters if the institution is using the information as an automatic preclusion to enrollment. Since the school is not doing this, again it is incumbent on the institution to let students know that the institution will not define them by something that happened in their past, but rather wants to support them moving forward.

In fact, I would challenge institutions to try this approach and measure student success and persistence. Such institutions will find that student outcomes are better when they ask students to disclose information about past crimes, charges, and disciplinary actions and then use that information to extend support to students. Personal challenges will often bleed into students’ academic lives, hindering their ability to focus on their studies and move forward to graduation; schools are there to help them overcome those challenges.
Learn from MIT’s success implementing climate surveys

By Amy Murphy, Ph.D., Contributing Editor
Kelley Marie Adams, Senior Program Manager and Advocate at Massachusetts Institute of Technology’s Violence Prevention & Response unit, discusses the successful administration of a climate survey. With more than six years at MIT and previous experiences as a research fellow at Boston University, Adams also shares her perspectives on violence prevention and advocacy work.

What helped MIT administer its survey successfully?
One thing that we found to be particularly helpful was inserting open-ended comment boxes on every page of the survey. That strategy gave people a chance to say, “Hey, you’re not capturing my experience,” or “This doesn’t make sense.” For example, our survey did not address male violence in which a male is forced to penetrate someone else. We had men bring this form of violence to our attention by writing in about it. A great deal of the feedback we received via write-in responses is helping to shape the next campus surveys.

At the very end of the survey, we also asked a question that asked students which resources they would use or not use if assaulted in the future, and why or why not. We had 1,400 people share different reasons. We were able to then provide different reports to the various departments on campus about students’ misperceptions, fears, and obstacles to seeking assistance.

How did you gain support for a climate survey?
I remember discussing the limited resources at institutions while studying public health in graduate school. We talked about being ready to pounce on your moment to move initiatives forward. MIT gave us that moment. An alumna published her survivor story in the newspaper. The new President and Chancellor responded with various communications and initiatives relaying that we were not going to stand for sexual violence and harassment. They expressed a commitment to collecting more data to learn about the issue on our campus. As a result, a taskforce of individuals began working together on climate initiatives, including the survey. For campuses without that momentum, I’ve learned you can often make an argument for the need to conduct climate surveys by connecting them to mission-critical priorities, such as student retention and success.

How have the results been used so far?
One of the outcomes from the survey results was being able to show that sexual violence and sexual harassment is happening, and that there is a high need for services. We were able to go from two and a half to six and a half full-time employees, including a dedicated staff member for...
peer education. Students confirmed through the survey that they did not have adequate access to basic sexual health and sex education. That resulted in a new peer education program called Pleasure, which had a very successful first year, with 30 trained educators.

The taskforce on sexual assault prevention and education also released a report with a number of recommendations for moving forward after the survey. They included increasing access for faculty and staff to information and training on Title IX responsibilities and response skills. We are also focusing on how to make sure that students have a strong initial dose of education on these issues. However, equally important to us is maintaining messages and information to them throughout their college careers.

In addition, we have made a great deal of progress with fraternities and sororities. Party Safe Plus is a sexual violence education program connected to social host training. Through Sorority Training Addressing Risk, — or STAR — we incorporated trainings for the various sorority houses related to bystander intervention and responding to disclosures of sexual assault. Sometimes, people don’t want to hear about sexual assault. Framing it as a way of supporting friends, we got students to be more open to it.

What is the relationship between your department and the Title IX Coordinator?

We have a strong partnership with our Title IX Office. Our Title IX Coordinator’s advocacy background aligned immediately with our office’s focus on supporting victims and survivors. Moreover, she has been willing to share her broader access to audiences across campus to afford our office greater visibility. Her stance is that if people are coming to report an incident, she wants them to be well supported throughout the process. She champions a team approach for providing services and education.

Can you tell us about other initiatives at MIT related to Title IX?

We are excited to be part of a multi-campus grant called, “Enhancing Campus Sexual Assault Prevention Efforts through Situational Interventions: Adapting an Evidence-Based Model.” We will be adapting Nan Stein’s work at Wellesley Centers for Women with middle and high school students on sexual harassment. One of her studies deployed a multi-level intervention in which she created a map of the school and asked students to tell them where the safe and the bad spots were. She learned that there was a lot of sexual harassment around the water fountain while girls waited to fill their water bottles. By simply moving the water fountain to just outside the teacher’s lounge, that hostile environment was eliminated. The grant’s focus goes beyond the individual level of prevention work and considers the campus and community environmental factors, as well as policy.

Why do you feel that schools should invest in advocacy positions and trainings?

Because the advocate’s role is to support the parties, the presence of an advocate increases the chances that students will continue through the institution’s process, even if it’s a very difficult one for them. No one wants to hurt students. Investigators must ask difficult questions and engage in uncomfortable interactions, but they are not trying to harm students. However, it may feel that way to students on the receiving end. But the more support that students have, the more successful the process will be and the healthier it will be for involved students.

About the Author

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Understand the impact of victim trauma: 5 important points to consider

Sirena Cantrell, the Dean of Students and Title IX Coordinator at the Mississippi University for Women, has served in various roles when it comes to sexual assault, from Advisor to now Coordinator. Understanding the impact of victim trauma is important in all roles dealing with sexual assault. Here, she offers five important points to consider about victim trauma.

1. **Trauma impacts the brain profoundly.** It physically changes the brain. The impacts of trauma are often misinterpreted. Traumatic memory is stored in the brain differently. Delayed reporting and an inability to recall details and sequence of events is common. By understanding these things, you will increase your effectiveness in conducting interviews.

2. **First impressions do matter.** Ensure that your marketing, education, and prevention messages are culturally relevant and inclusive of diverse communities. Victims will see your marketing materials on campus, and that first impression of your office will set the tone of investigations.

3. **Listening is key.** Sometimes, we can get caught up in asking questions and seeking clarification, but there are times when we need to go back to the basics and just listen.

4. **Victim-blaming should be avoided.** Make sure you do not blame victims during interviews with them and throughout the different investigation phases. Victim-blaming can be secondary trauma to the assault.

5. **A trauma-informed approach is best.** Begin with understanding the physical, social, and emotional impact of trauma on victims. This approach can change the way we respond and investigate, and most importantly, the way in which we interview victims. Seek out training opportunities to add this skill to your tool box.