



Robbins Schwartz
One Team. Making Your Mission Ours.

Training for Lewis and Clark Community College Title IX Team

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Introduction



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Day 1 Agenda

- Overview of Relevant Laws
- Key Definitions
- Title IX Jurisdiction
- Enforcement of Title IX and Related Laws
- LCCC Policy and Procedures
- Reporting Sex-Based Misconduct
- College's Response to Reports
- Trauma and Trauma-Informed Practices
- Introduction to the Grievance Process
- Putting It All Together!



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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

Overview of Relevant Laws



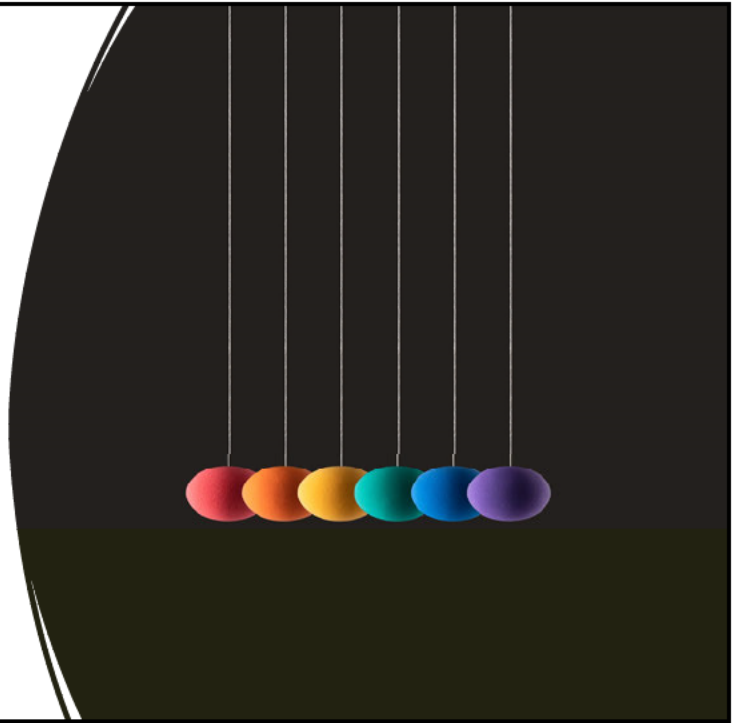
Relevant Laws

Title IX of the Education Amendments of 1972 ("Title IX")
Title VII of the Civil Rights Act of 1964 ("Title VII")
Illinois Human Rights Act ("IHRA")
Preventing Sexual Violence in Higher Education Act ("PSVHEA")
Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act")
Violence Against Women Act ("VAWA")

Title IX



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Background on 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 educational program or activity receiving Federal financial assistance...” 20 U.S.C. § 1681(a); 34 C.F.R. § 106.31(a).



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What About Sexual Harassment?

- Although Title IX does not expressly mention sexual harassment, Congress, federal agencies, and courts have interpreted the statute to prohibit sexual harassment in education programs and activities.



Current Landscape – 2020 Regulations

- Released in May 2020 after formal rulemaking process.
- Went into effect on August 14, 2020.
- Expressly address institutions' obligations to address **sexual harassment** in their educational programs and activities.



Current Landscape – 2020 Regulations

- Major changes from prior guidance interpreting Title IX:
 - Narrower definition of sexual harassment
 - Jurisdictional limitations
 - Single investigator model prohibited
 - Live hearing required for higher education institutions



Changes on the Horizon – 2023 Regulations?

- Department of Education is finalizing review of public comments to proposed amendments to Title IX regulations that were released in Summer 2022.
- Finalized amendments anticipated to be released in early 2024.
- Effective date: TBD (but in 2020, effective date was ~90 days after release).



Changes on the Horizon – 2023 Regulations?

- Likely changes:

- Broader definition of “sex-based harassment”
- Expanded jurisdiction
- Single investigator model permitted
- Live hearings permitted, but not required
- Expanded protections for transgender and nonbinary students and pregnant and parenting students



Changes on the Horizon – 2023 Regulations?

- So long as the Department of Education’s review of the current Title IX regulations is ongoing and until any new regulations go into effect, institutions must continue to comply with the existing regulations.



Title VII



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Title VII

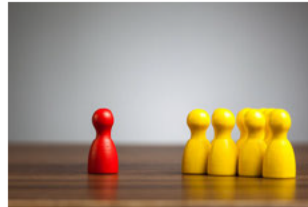
- Prohibits discrimination, including discrimination based on sex, in employment. This includes sex-based harassment.
- Also prohibits disparate treatment based on sex, which may include treatment based on sex-based stereotypes.



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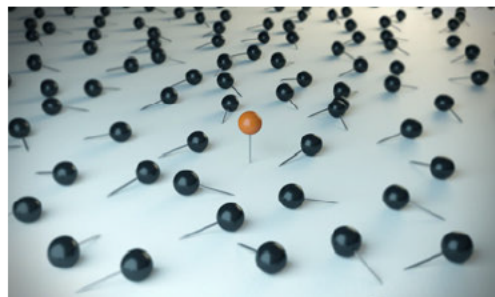
Title VII

- Prohibits retaliation for protected activity.
 - Protected activity can include actions such as filing a charge of discrimination, complaining to one's employer about job discrimination, requesting accommodation under the EEO laws, participating in an EEO investigation, or otherwise opposing discrimination.

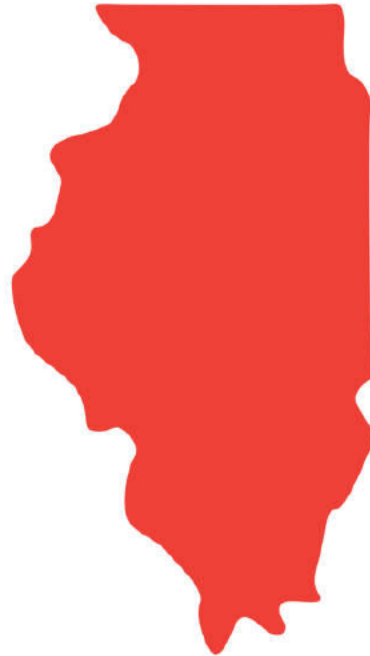


Title VII

- Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment and discrimination in the workplace.
- Employers have a duty to investigate allegations of workplace harassment or discrimination.



Illinois Human Rights Act



Illinois Human Rights Act

- Prohibits discrimination, including in employment.
- Also prohibits sexual harassment in elementary, secondary and higher education.



IHRA Prohibitions

- Prohibits unlawful discrimination on the basis of:

Race	Color	Religion
Sex	Age	National origin
Citizenship status	Ancestry	Marital status
Parental status	Pregnancy	Family status
Sexual orientation	Gender identity	Source of income
Military status	Housing status	

Disability/handicap unrelated to an individual's ability to perform the essential functions of their job



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IHRA Prohibitions

- In the context of a higher education institution, it is a civil rights violation:
 - For any representative of the institution to commit or engage in sexual harassment.
 - For an institution to fail to take remedial action, or to fail to take appropriate disciplinary action against a representative employed by such institution, when such institution knows that such representative was committing or engaging in or committed or engaged in sexual harassment.



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Clery Act and Violence Against Women Act



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Clery Act/VAWA

- The Clery Act requires institutions to maintain and disclose crime statistics and security information.
- VAWA expands on the rights afforded to campus survivors of sexual assault, domestic violence, dating violence, and stalking.



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Preventing Sexual Violence in Higher Education Act



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Preventing Sexual Violence in Higher Education Act

- Requires Illinois higher education institutions to adopt comprehensive policies concerning sexual violence, domestic violence, dating violence, and stalking.



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Required PSVHEA Policy Components

- Uniform definition of consent
- Procedures that students may follow if they choose to report an alleged violation of the comprehensive policy, regardless of where the incident of sexual violence, domestic violence, dating violence or stalking occurred
- Option for students to electronically report
- Option for students to anonymously report
- Option for students to confidentially report
- Option for reports by third-parties and bystanders



Required PSVHEA Policy Components

- Procedures for responding to reports of alleged sexual violence, domestic violence, dating violence and stalking
- Statement of the higher education institution's obligation to provide survivors with concise written information concerning the survivor's rights and options upon receipt of a report of an alleged violation of the comprehensive policy

Required PSVHEA Policy Components

- Name, address and telephone number of the medical facility nearest to each campus of the higher education institution where a survivor may have a medical forensic examination completed at no cost to the survivor pursuant to the Sexual Assault Survivors Emergency Treatment Act
- Name, address, telephone number and website, if available, of community-based, State, and national sexual assault crisis centers
- Statement notifying survivors of the interim protective measures and accommodations reasonably available from the higher education institution
- Institution's complaint resolution procedures that comply with the minimum complaint resolution procedures set forth in Section 25 of the Act



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Required PSVHEA Policy Components

- Statement of the range of sanctions that may be imposed following the implementation of the institution's complaint resolution procedures in response to an alleged violation of the comprehensive policy
- Immunity for students who in good faith report an alleged violation of the comprehensive policy to a "responsible employee" so that the reporting student will not receive a disciplinary sanction for a student conduct violation (e.g., underage drinking) revealed in the course of reporting, unless the violation was "egregious" (e.g., an action that places the health or safety of another person at risk)
- Statement prohibiting retaliation against those who in good faith report or disclose an alleged violation of the policy, file a complaint, or otherwise participate in the complaint resolution process and available sanctions for individuals who engage in retaliatory conduct.



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Key Definitions



Title IX Sexual Harassment

- 1 Quid pro quo harassment by a college employee
- 2 Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access
- 3 Any instance of sexual assault, dating violence, domestic violence, or stalking

Title IX Sexual Harassment: **Quid Pro Quo**

- When an employee of the institution conditions aid, benefits, pay, a position or other opportunities for advancement on an individual's submission to unwelcome sexual conduct.



"My math professor offered extra credit if I sent him inappropriate sexual pictures of myself."

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Title IX Sexual Harassment: **"Hostile Environment"**

"My classmate is always making sexual comments and gestures at me. It's so bad that I am considering switching sections so I won't have to interact with him in class."

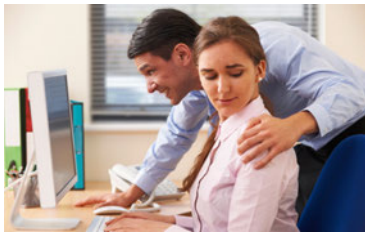


- Unwelcome
- Severe and pervasive and objectively offensive
- Denial of equal educational access

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Title IX Sexual Harassment: “Hostile Environment”

- Compare with Title VII definition for workplace hostile environment claims:
 - Unwelcome sexual advances and other conduct of a sexual nature having the purpose or effect of interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.



Title IX Sexual Harassment: “Hostile Environment”

- Compare with IHRA definition
 - Any conduct of a sexual nature exhibited by an education representative toward a student, when such conduct has the purpose of substantially interfering with the student's educational performance or creating an intimidating, hostile or offensive educational environment.



Title IX Sexual Harassment: Specific Acts

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



**As defined under the Clery Act/VAWA*

Title IX Sexual Harassment: Specific Acts

Sexual Assault

- An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting program.

Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for the person's safety or the safety of others; or
 - Suffer substantial emotional distress.

Title IX Sexual Harassment: **Specific Acts**

Domestic Violence

- 1) Felony or misdemeanor crimes committed by a current or former spouse or intimate partner under the laws of the jurisdiction and, in the case of victim services, includes the use or attempted use of physical abuse or sexual abuse.
- 2) A pattern of any other coercive behavior (not necessarily criminal) committed, enabled, or solicited to gain or maintain power and control over a victim, by a person who:
 - is a current or former spouse or intimate partner, or person similarly situated to a spouse of the victim;
 - is cohabitating or has cohabitated with the victim as a spouse or intimate partner;
 - shares a child in common with the victim; or
 - commits acts against an adult or youth victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.



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Preventing Sexual Violence in Higher Education Act: **Sexual Violence**

- Physical sexual acts attempted or perpetrated against a person's will or when a person is incapable of giving consent, including without limitation:
 - Rape
 - Sexual assault
 - Sexual battery
 - Sexual abuse
 - Sexual coercion



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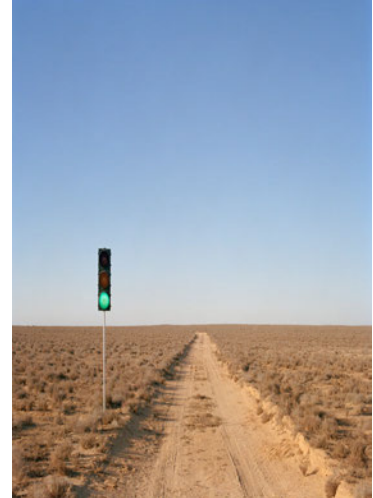
PSVHEA: Sexual Violence and Consent

Must be freely given

May not be inferred from lack of resistance, submission resulting from the use of threat or force, a person's manner of dress, a person's consent to past sexual activity, or a person's consent to engage in sexual activity with another person

Cannot be given by a person who is unable to understand the nature of the activity or give knowing consent due to circumstances (*i.e.*, incapacitation due to alcohol or drugs, age, incapacitation due to mental disability)

May be withdrawn at any time



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Key Definitions: Hypothetical

- A student member of the Debate Club reports that they were sexually harassed by the Club advisor.
- What types of evidence/information would be relevant to determining whether the alleged harassment was severe, pervasive, and objectively offensive?

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Jurisdiction



Jurisdiction Under Title IX

- The Title IX regulations apply only to alleged sexual harassment that occurs “in the institution’s education program or activity, against a person in the United States.”



Title IX Jurisdiction: Scope of College's Education Program or Activity

- Includes:
 - Locations, events, or circumstances over which the institution exercised substantial control over both the respondent and the context in which the sexual harassment occurred; and
 - Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Title IX Jurisdiction: Scope of College's Education Program or Activity



- Examples for discussion:
 - Hotel during overnight athletic competition?
 - Local business where students are participating in work-study employment?
 - On campus at 2:00 a.m. on the weekend?

Jurisdiction: “...in the United States”

- To fall under Title IX, the alleged misconduct must have occurred in the United States.
 - If not, look into other applicable laws (e.g., PSVHEA)
- Example: sexual assault that occurs during a study abroad program?



Jurisdiction: Hypothetical

- Compare:
 - A faculty member allegedly sexually assaults a student while at an off-campus academic conference.
 - A faculty member allegedly sexually assaults another faculty member while at a third faculty member's home for a birthday party.
- Which type of alleged misconduct falls under Title IX?
- What are the College's response obligations with regard to each type of alleged misconduct?

Break



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Enforcement of Title IX and Related Laws



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Administrative Enforcement



Title IX Enforcement

- The U.S. Department of Education's Office for Civil Rights ("OCR") is responsible for administrative enforcement of Title IX.
- OCR has the authority to investigate complaints alleging violations of Title IX by recipients of federal funds.
- Where OCR finds that a violation has occurred, it may order corrective action by the recipient.
- Filing an OCR complaint does not preclude an individual from also filing a Title IX lawsuit in court.

Title VII Enforcement

- The Equal Employment Opportunity Commission (“EEOC”) is charged with enforcing Title VII.
- The EEOC has the authority to investigate charges of workplace discrimination and harassment.
- The role of the EEOC is to investigate and assess charges of workplace discrimination and harassment.



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Title VII Enforcement

- If the EEOC finds that discrimination occurred, it will make efforts to settle the charge.
- If the EEOC is unable to settle the charge, it has the authority to protect the rights of individuals and the interests of the public.



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IHRA Enforcement

- A charge of discrimination can be initiated by calling, writing, or appearing in person at the Illinois Department of Human Rights' Chicago or Springfield office within **300 days** of the date the alleged abuse took place
 - Except for cases involving alleged housing discrimination, which have a one-year filing deadline.
- The Illinois Human Rights Act empowers two entities, the Illinois Department of Human Rights and the Illinois Human Rights Commission, to play coordinated but separate roles related to the Act's enforcement.



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IHRA Enforcement

Department of Human Rights	Human Rights Commission
Filing of Charges	Independent Review of Dept. Findings
Mediation	Adjudication of Complaints
Investigation	Appeals of Decisions
Findings and Results	
Legal Review	



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Enforcement by the Courts



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Liability Under Title IX

For an educational institution receiving federal financial assistance to be held liable under Title IX, a plaintiff must satisfy the following three elements:

1. They were subjected to sexual harassment, as defined under Title IX;
2. They provided actual notice of the alleged harassment to an appropriate person at the institution; and
3. The institution's response to the alleged harassment amounted to deliberate indifference.



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“Deliberate Indifference Standard” Under Title IX

- Once an institution has actual knowledge of alleged sexual harassment, the institution must respond **promptly** and in a manner that is not “**clearly unreasonable in light of the known circumstances.**”



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Liability Under Title VII/IHRA

Manager or Supervisor Harassment

- Employer is **strictly liable**, regardless of whether employer knew of the harassment
- *But* affirmative defense available where employer can show:
 - It exercised reasonable care to prevent and correct any harassing behavior; and
 - Complainant reasonably failed to take advantage of preventative or corrective opportunities



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Liability Under Title VII/IHRA

Co-Worker and Non-Employee Harassment

- Employer is liable only if employer **knew or reasonably should have known** of the harassment and **failed to take prompt corrective action**



Policy Prohibiting Sex-Based Misconduct



Policy Prohibiting Sex-Based Misconduct

- Prohibits all forms of “sex-based misconduct,” including but not limited to:
 - Sex discrimination
 - Sexual harassment
 - Sexual violence
 - Domestic violence
 - Dating violence
 - Stalking



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Policy Prohibiting Sex-Based Misconduct

- Applies to:
 - Students
 - Employees & independent contractors
 - Volunteers
 - Visitors
 - Board members



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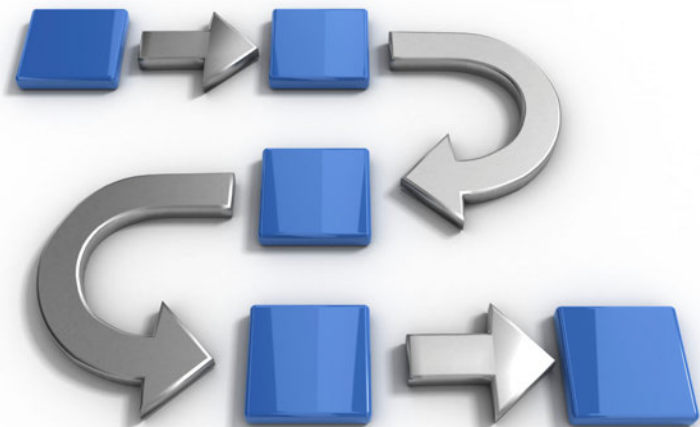
Policy Prohibiting Sex-Based Misconduct

- Prohibits retaliation against any person reporting alleged sex-based misconduct or participating in an investigation of alleged sex-based misconduct
- Directs the administration to establish, maintain and publish procedures implementing the Policy.



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Sex-Based Misconduct Procedures



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Purpose of Procedures

- Implement the College's Policy Prohibiting Sex-Based Misconduct.
- Ensure a safe and healthy educational and employment environment.
- Meet relevant legal requirements.



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Jurisdiction

- Procedure applies to alleged sex-based misconduct whenever the alleged misconduct occurs:
 - On campus; or
 - Off campus property if:
 - The conduct was in connection with a College or College-recognized program or activity; or
 - The conduct may have the effect of creating a hostile environment for a member of the College community.
- Broader than Title IX jurisdiction



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Role of Title IX Coordinator



- Coordinate LCCC's compliance with Title IX and related laws.
- Oversee LCCC's response to all reports of alleged sex-based misconduct.
- Analyze reports to determine appropriate method for processing and reviewing.
- Oversee grievance process for formal Title IX/PSVHEA complaints.
- Coordinate the provision of supportive measures and implementation of remedies.
- Ensure adherence to policies/procedures.
- Ensure appropriate training is provided to students, faculty and staff.



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Options for Assistance Following Incident of Sex-Based Misconduct

- On- and Off-Campus Counselors and Advocates
 - Lewis and Clark Counseling Services
 - Metro East Every Survivor Counts
- Emergency Response
 - Lewis and Clark Campus Safety
- Healthcare
 - Alton Memorial Hospital
 - OSF St Anthony's Health Center
 - Anderson Hospital
- Illinois Department of Human Rights sexual harassment and discrimination helpline



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Reporting Alleged Sex-Based Misconduct



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Reporting Generally

Who can report?

- Anyone – including students, employees and community members
- Need not be the person who is alleged to be the victim of the misconduct

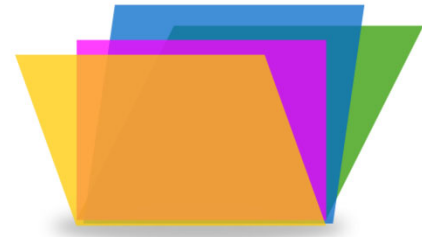
To whom should reports be made?

- Title IX Coordinator
- Any member of management
- Any responsible employee (students only)

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Student Reporting



- Reporting to Responsible Employees
 - L&C CC's REs include:
 - Title IX Coordinator(s)
 - College Administrators
 - Supervisors and Managerial Staff
 - Faculty
 - Campus Safety Officers
 - Coaches
 - Advisors (including Student Club Advisors)
 - REs must report all relevant details to the Title IX Coordinator, if known.

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Student Reporting



- Confidential Reporting
 - Confidential Counselor Terri Austin (taaustin@lc.edu)
 - Confidential Advisors are not required to report any information about an alleged incident to the Title IX Coordinator without the student's permission.

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Student Reporting

- Anonymous and/or Electronic Reporting
 - Students may report anonymously online.
 - Before the student enters information, the system will notify the student that entering personally identifiable information may serve as notice to the College for purposes of triggering an investigation.



Employee Reporting

- Employees should report to the Title IX Coordinator or Director of Human Resources



College's Response to Reports of Alleged Sex-Based Misconduct



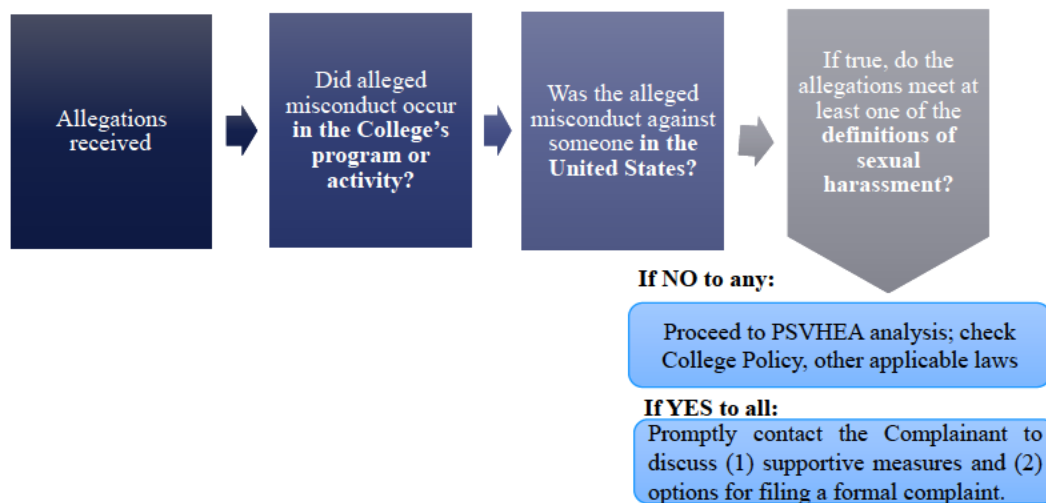
College Response: Key Definitions

- **Complainant:**
 - Individual who is alleged to be the victim of sex-based misconduct
- **Respondent:**
 - Individual who is reported to be the perpetrator of sex-based misconduct

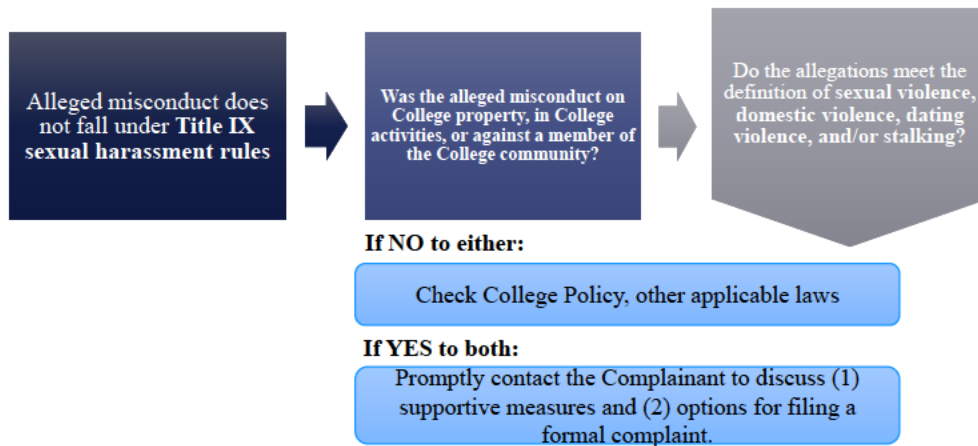
College Response Process

- Step 1: Analyze the Report
 - Does Title IX apply?
 - Does the Preventing Sexual Violence in Higher Education Act apply?

Title IX: Jurisdiction Analysis



Preventing Sexual Violence in Higher Education Act: **Jurisdiction Analysis**



College Response Process

- Step 2: Contact and meet with the Complainant
 - Remember: "Complainant" is defined as the individual who is alleged to be the victim of alleged sex-based misconduct.
 - May not be the person who made the report.

College Response Process

- Step 3: Discuss and offer supportive measures.
 - Individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party
 - Designed to ensure equal educational access, protect safety, or deter sexual harassment

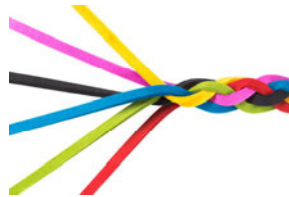
Supportive Measures

- Examples of supportive measures:
 - Schedule changes
 - Counseling services
 - Housing accommodations
 - Leaves of absence
 - Extensions or other academic accommodations
 - Mutual no-contact directives



Supportive Measures

- The Title IX Coordinator is responsible for coordinating appropriate supportive measures.
- Such coordination may require consultation with other College personnel (campus police, registrar, counseling staff, faculty, etc.).



Supportive Measures: Hypothetical

- You teach a statistics course at the College. One of your students, Alex, contacts you to report that another student, Sam, has been making inappropriate comments and gestures toward Alex during class. Alex says she asked Sam to stop, but his behavior has only gotten worse. Alex says she is having trouble concentrating during class and asks if you can move Sam to a different class section.
 - How should you respond to Alex?
 - Should you move Sam into a different class section? Why or why not?

College Response Process

- Step 4: Explain the process for filing a **formal complaint**

Trauma and Trauma-Informed Practices



Definition of Trauma

- Trauma, in the typical medical sense, refers to any injury.
- The term also covers the sort of injury that alters a person's view of the world (such as witnessing a catastrophic event, enduring ongoing abuse at home).



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Definition of Trauma

- The U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration defines trauma as:
 - *The result of an event, a series of events, or a set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well being.*



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Types of Traumatic Life Experiences

Physical or sexual abuse	Abandonment, neglect, or betrayal of trust	Death or loss of a loved one
Caregiver having a life-threatening illness	Domestic violence	Poverty and chronically chaotic housing and financial resources
Automobile or other serious accident	Bullying	Life-threatening health situations or painful medical procedures
Witnessing or experiencing community violence	Witnessing police activity or having a family member incarcerated	Life-threatening natural disasters
Acts or threats of terrorism	Military combat	Historical trauma

Source: <https://educationnorthwest.org/sites/default/files/resources/trauma-informed-practices-postsecondary-508.pdf>



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Trauma on College Campuses

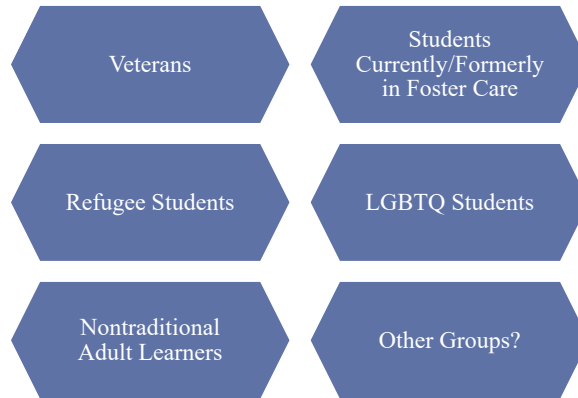
- Out of every 1,000 people in the general population, about 108 are suffering the effects of trauma.
- By the time they reach college, 66 to 85 percent of youth report having been exposed to a traumatic event during their lifetime, with many reporting multiple exposures.

Sources: <https://safesupportivelearning.ed.gov/Trauma-Sensitive-Campus-Health-Centers;>
<https://educationnorthwest.org/sites/default/files/resources/trauma-informed-practices-postsecondary-508.pdf>



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Student Groups at Elevated Risk

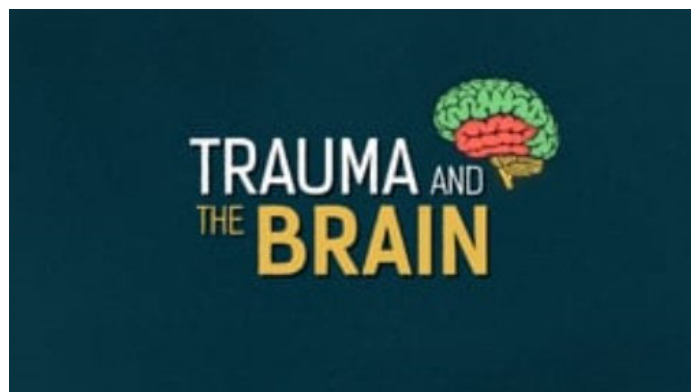


Source: <https://educationnorthwest.org/sites/default/files/resources/trauma-informed-practices-postsecondary-508.pdf>



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The Neurobiological Impact of Trauma



Source: "Trauma and the Brain: Understanding Abuse Survivors' Responses," NHS Lanarkshire (2015), available at: <https://vimeo.com/126501517>



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Trauma-Informed Practices

Core Principles of Trauma-Informed Practices	
Safety	Trustworthiness
Choice and Control	Collaboration
Empowerment	

Source: <https://educationnorthwest.org/sites/default/files/resources/trauma-informed-practices-postsecondary-508.pdf>



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Trauma-Informed Practices

- How can we apply trauma-informed practices in the context of a Title IX proceeding?
 - Consideration of supportive measures
 - Explanation of process, roles, expectations
 - Flexibility in questioning/obtaining evidence
 - Environmental considerations
 - Communication strategies

Sources: <https://store.samhsa.gov/sites/default/files/pep23-06-05-005.pdf>;
<https://victimrights.org/wp-content/uploads/2020/11/Tool-for-Incorporating-Trauma-Informed-Practices-into-Final-Title-IX-Rule-Legal-Framework.pdf>



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Grievance Process for Formal Complaints



Filing of Formal Complaints

Formal complaint:

- Document filed by a Complainant or signed by Title IX Coordinator, alleging:
 - (a) sexual harassment, as defined under Title IX; and/or
 - (b) sexual violence, domestic violence, dating violence or stalking, as defined under the PSVHEA.
- At the time the Complainant files a formal complaint, the Complainant must be participating in or attempting to participate in the College's education programs or activities (either as a student or an employee).

Formal Complaint: Hypothetical

- A student, Paula, graduates in June. In July, Paula applies for a research assistant position at the College for the upcoming fall semester. Paula finds out that the faculty member assigned to review her research assistant application is her former Biology instructor, who made inappropriate and offensive sexual comments toward Paula when she was in his class. Paula contacts the Title IX Coordinator and states that she would like to file a formal Title IX sexual harassment complaint against the faculty member.
- Can Paula file a formal Title IX complaint? Why or why not?



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Signing of Formal Complaint by Title IX Coordinator

- There are circumstances where a Title IX Coordinator may need to sign a formal complaint, triggering the formal complaint investigation process.
- This often arises in situations where:
 - The Complainant is not eligible to file a formal complaint themselves (i.e., because the Complainant is not deliberately indifferent for the Title IX participating in or attempting to participate in the College's educational programs or activities); or
 - The Complainant is eligible to file a formal complaint but elects not to do so.
- Key question: Would it be deliberately indifferent for the Title IX Coordinator not to sign a formal complaint?



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Signing of Formal Complaint by Title IX Coordinator

- Example of a situation where the Title IX Coordinator may be required to sign a formal complaint:
 - The College has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority.
- This is because the College “has a Title IX obligation to provide all students, not just the Complainant, with an educational environment that does not discriminate based on sex.” July 2021 Q&A on Title IX Regulations.



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Notice of Allegations

- Upon the Title IX Coordinator’s receipt of a formal complaint, the Title IX Coordinator must issue a notice of allegations to both parties, simultaneously.
- The notice of allegations must inform the parties of:
 - The grievance process, including informal resolution options;
 - The allegations;
 - The presumption of non-responsibility on the part of the Respondent;
 - The parties’ right to an advisor;
 - The parties’ right to inspect and review evidence; and
 - The Code of Conduct provisions prohibiting knowingly furnishing false information during the grievance process.



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Emergency Removal of Respondent

- Prior to initiating or completing the grievance process in response to a formal complaint, the College may remove a Respondent from its education program or activity on an emergency basis.
 - Only permitted where College has determined, based on an individualized safety and risk analysis, that an immediate threat to the physical health or safety of an individual arising from the allegations of sexual harassment justifies removal.
- The College must provide the Respondent with notice and an opportunity to challenge the decision immediately following the removal.



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Administrative Leave

- The College may place an employee on administrative leave during the pendency of the grievance process in response to a formal complaint.
 - Check applicable CBA provisions.



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Informal Resolution

- Requires both parties' voluntary, written consent.
- May occur at any time after the parties receive the initial notice of allegations and prior to a determination regarding responsibility being reached.
- Party may withdraw at any time prior to reaching a resolution.
- Not permitted in allegations of employee sexual misconduct toward a student.



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Consolidation of Formal Complaints

- Title IX Coordinator may consolidate formal complaints where the allegations of sex-based misconduct arise out of the same facts or circumstances.

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Dismissal of Formal Complaints

Mandatory Dismissal

- The College must dismiss a formal Title IX sexual harassment complaint where the Title IX Coordinator or designated Investigator determines that the conduct alleged in the formal complaint:
 - (a) Does not meet Title IX's definition of sexual harassment; and/or
 - (b) Does not satisfy Title IX's jurisdictional requirements.
- *Note: Dismissal does not preclude action altogether – just for purposes of Title IX.*



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Dismissal of Formal Complaints

Discretionary Dismissal

- The College may, but is not required to, dismiss a formal complaint where:
 - The Complainant gives written notification of their desire to withdraw the formal complaint or certain allegations;
 - The Respondent is no longer enrolled in or employed by the College; or
 - Specific circumstances prevent the College from gathering evidence sufficient to reach a determination.



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Dismissal of Formal Complaints

- A party may appeal a decision to dismiss a formal complaint or allegations therein.



Quiz Time

- In each of the following scenarios, is dismissal mandatory or discretionary?
 1. The respondent resigns from employment at the College.
 2. The respondent gets arrested and is being held without bond pending their criminal trial.
 3. After initiating the investigation, the investigator determines that all of the conduct alleged by the complainant occurred while the parties were on a college-sponsored trip to Spain.

Day 1: Putting it All Together



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Hypothetical #1

- You overhear a coach telling one his players that she reminds him of his favorite professional athlete. You ask the student about it, and she says that the coach has told her this several times. She also tells you that the coach refers to her by the athlete's name and calls her "Babe" when she plays well in a game. The student says she likes the special attention from her coach, but she has noticed the other players seem uncomfortable with how the coach treats her and have stopped inviting her to team get-togethers.
 - Assuming the allegations are true, could the coach's conduct meet the definition of sexual harassment?
 - How would you respond in this situation?

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Hypothetical #2

- You are a Department Chair. One of the instructors in your Department contacts you to report that her students are referring to her as their “girlfriend” during class. In addition, she notes that several students have jokingly asked to take her on a date after class in front of the other students. The instructor reports that she typically responds to the comments and jokes by laughing or saying, “I’m married,” but that the comments and jokes are making her feel increasingly uncomfortable.
- Could the students’ alleged conduct constitute sexual harassment?
- Should you report the instructor’s allegations?

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Day 2 Agenda

Conflicts of Interest and Bias

The Investigation

The Live Hearing

Post-Hearing Procedures

Appeals

Case Studies

Putting It All Together – Again!



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Avoiding Conflicts of Interest & Bias



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Conflicts of Interest & Bias

- Title IX Regulations provide that any individual designated to serve as the Title IX Coordinator, Investigator, Decision-Maker, Appellate Decision Maker must not have a conflict of interest or bias for or against complainants or respondents generally or an individual Complainant or Respondent.
- Can be a basis for appeal if the conflict of interest or bias affects the outcome.

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Conflicts of Interest

- The PSVHEA requires that an institution have a sufficient number of individuals trained to resolve complaints so that:
 - A substitution can occur in the case of a conflict of interest; and
 - Any appeal brought by a party will be heard by an individual with no prior involvement in the initial determination or finding.

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Conflicts of Interest



- Key question:
 - Does the Title IX team member's prior or existing relationship with or knowledge of a party prevent the team member from serving impartially?

Conflicts of Interest

- Where a Title IX team member self-identifies a conflict of interest, they should notify the Title IX Coordinator that they will need to recuse themselves.
- Where a party believes that a team member has a prohibited conflict of interest, the party must contact the Title IX Coordinator to request a substitution.
 - The Title IX Coordinator may request information from the team member to help them evaluate the claim.

Bias

- Title IX Regulations prohibit bias for or against:
 - Complainants or respondents generally; and/or
 - An individual Complainant or Respondent.



Bias

- **How** might bias be exhibited in the context of Title IX proceedings?
 - Making decisions based upon stereotypes, personal opinions, or something other than the facts/evidence.
 - Treating the complainant and respondent differently based upon their sex or other protected characteristic.

Bias

- **When** might bias be exhibited in the context of Title IX proceedings?
 - Deciding whether to sign a formal complaint against a Respondent?
 - Considering what supportive measures are appropriate?
 - Conducting investigatory interviews?
 - Providing the parties with access to evidence?
 - Assessing the parties' credibility?

Tips for Promoting Objectivity/Impartiality

- Avoid pre-judging the facts.
 - Wait until all evidence is presented to determine whether policy violation occurred.
- Create and follow checklists.
 - Procedural requirements
 - Allegations to be proven/disproven
- Document treatment of both parties.
 - Opportunities to provide evidence
 - Details of the parties' interviews (time to prepare, breaks, advisors' roles, etc.)
 - Access to relevant evidence
 - Offering flexibility or granting requests for accommodations
- Document rationale for credibility determinations.



Conflicts of Interest & Bias: Hypothetical

- You serve on the College's Behavioral Intervention Team. At a BIT meeting several months ago, you took part in a decision to remove a Respondent from the College's educational program on an emergency basis. The College subsequently conducted a Title IX investigation with respect to that Respondent, and you have just been appointed to serve as the Hearing Officer for the case.
- Do you have a prohibited conflict of interest?

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The Investigation



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Investigator's Role Generally



- Ensure sufficient and objective evidence is gathered so that the Decision-Maker/Hearing Officer can determine whether the allegations of Title IX sexual harassment are substantiated.
- May be called upon to testify as a witness during the live hearing.
- No requirement or prohibition on making a recommendation with respect to a determination regarding responsibility, but must prepare an investigation report summarizing the relevant evidence upon completion of investigation.

Key Rules for Investigators



- “Single investigator” model is prohibited (for now)
 - An Investigator assigned to investigate a formal complaint may not also serve as the Hearing Officer/Decision-Maker for that complaint.
 - Title IX Coordinator may serve as an Investigator, but not as a Decision-Maker.
- Investigator must provide parties with advance written notice of interviews/meetings at which their participation is expected.
- Investigator must provide parties with equal access to inspect and review relevant evidence and, at conclusion of investigation, must send parties a copy of all relevant evidence directly related to complaint allegations.

Rights Afforded to Parties During Investigation

- The Investigator must provide both parties with:
 - Advance written notice of any interview or meeting at which their participation is expected;
 - An opportunity to be accompanied to any interview or meeting by an advisor of their choice, who may be an attorney;
 - An equal opportunity to provide fact and expert witnesses and other inculpatory or exculpatory evidence; and
 - Equal access to inspect and review all evidence that is directly related to the complaint allegations.
- The Investigator may not restrict the parties' ability to discuss the complaint allegations during the pendency of the investigation.



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Conducting Investigatory Interviews



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Title IX Requirements

- Send notice of any interview or meeting and give each party sufficient time to prepare.
- Give parties equal opportunity to select advisor of their choice.
- Provide equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- Avoid “gag orders.”
 - College may not prohibit either party from discussing the allegations.



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Preparing for Interviews

- Review:
 - The formal complaint
 - Relevant policies and procedures
 - Relevant student or employee records
 - Any documentary evidence received so far
- As applicable, check for employee notice or union representation requirements
- Decide whether to conduct the interview by videoconference, in person, or by phone
- Schedule meetings promptly



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Advisors

- Both parties may select an advisor of their choosing
 - May, but need not be, an attorney
- Advisor's role is to provide support, guidance, advice
 - May not answer questions on behalf of the party
- Parameters for both parties' advisors must be the same



Beginning the Interview

- Introductions
- Explain purpose of interview
- Remind party and advisor of expectations concerning advisor's role
- Review any other ground rules (taking breaks, reviewing documents, etc.)



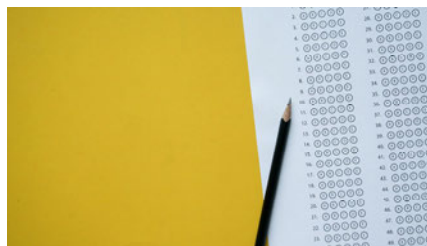
Questioning

- Open-ended questions are best
 - Closed-ended:
 - Q: “Were you in Frank’s office when the phone rang?”
 - A: “No.”
 - Open-ended:
 - Q: “Where were you when the phone rang?”
 - A: “I was in the hallway outside Frank’s office.”



Questioning

- Avoid multiple choice questions
 - Bad Example: “Were you in Frank’s office, the hallway, or the stairwell when the phone rang?”
- Avoid compound questions
 - Bad Example: “Where were you and who were you with when the phone rang?”



Questioning

- The interviewee must fully understand the question to give a reliable answer
- If the interviewee asks you to repeat or rephrase a question, do so
- Give the interviewee time to think and respond before asking the next question
- Complete a line of questioning before moving on to questioning about a different issue



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Questioning

- When possible, clarify issues on which there is conflicting testimony before concluding the interview
- Ask whether any witnesses can confirm the interviewee's testimony
- Obtain names and, if necessary, contact information for witnesses
- Confirm timeline for providing documents or other physical evidence referenced during interview



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Assessing Credibility



- Factors for determining credibility of a witness:
 - Does the witness have personal knowledge of the facts?
 - Does the witness have any reason to be untruthful?
 - Does the witness have a bias, hostility, or some attitude that affected the truthfulness of their testimony?
 - Does the witness have a special relationship with a party?
 - Was the witness' testimony consistent with other testimony or the evidence presented?
 - Has the witness made inconsistent statements?
 - Is there evidence of trauma that could impact the witness' testimony?



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Assessing Credibility



- Quality over quantity: the testimony of a single, disinterested witness is more reliable than the testimony of multiple biased witnesses
- Example:
 - The College's baseball coach is the Respondent and is alleged to have sexually assaulted the Complainant in the athletic training room immediately after a game
 - Which testimony is more reliable in an interview?
 - The testimony from 4 players stating that the Respondent always treats them respectfully
 - The testimony from a waiter at a nearby restaurant stating he served the Respondent at the restaurant immediately after the game



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Considerations for Employee Respondents

- As applicable, include the right to union representation in the notice and check other CBA requirements
- Request that they document testimony by a written, signed statement or fact chronology
- Document union representation, any critical factual admissions, and the opportunity to respond to allegations



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PSVHEA Allegations

- Coordinate with law enforcement
- For cases involving sexual abuse of a minor, coordinate with DCFS and/or Children's Advocacy Center
- Use survivor-centered and trauma-informed response training on sexual violence, domestic violence, dating violence, and stalking



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Other Best Practices for Interviews



- Avoid volunteering information
- Never promise confidentiality
- Have a second investigator or administrator/non-union employee present to help with notetaking
 - Take your own notes at or immediately afterward
 - Give a basis for your credibility assessments
- Advise that retaliation is prohibited
 - “Gag orders” vs. prohibiting harassment, discrimination, or retaliation

Investigatory Interview Hypothetical

- Jane filed a formal complaint alleging that her professor, Mr. Jones, started giving her lower grades on her assignments after she turned down his requests to take her on a date. You have been appointed to conduct the investigation into Jane’s complaint.
 - Who should you interview?
 - In what order should you conduct the investigatory interviews?

Evidence and Investigation Report Procedures



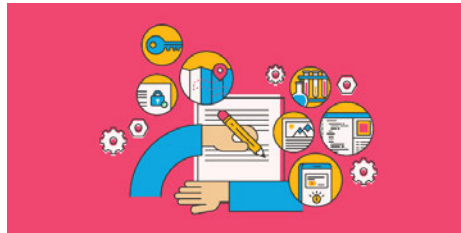
Relevant Evidence

- “Relevant” means useful in determining:
 - The truth or falsity of specific factual allegations
 - Whether the facts establish an element of the relevant type(s) of sexual harassment
 - What potential sanctions/discipline or remedies are appropriate



Relevant Evidence

- Note evidentiary limitations for:
 - Information protected by a legally recognized privilege
 - Party's medical, psychological, or other similar treatment records
 - Prior disciplinary history



Rape Shield Protections

- Evidence about Complainant's **sexual pre-disposition** or **prior sexual behavior** is not relevant unless:
 - Evidence is offered to prove that someone other than Respondent committed the alleged conduct; or
 - Evidence concerns specific incidents of Complainant's prior sexual behavior with respect to Respondent and is offered to prove consent.



Access to Evidence

- Both parties must have equal access to inspect and review all evidence that is directly related to the complaint allegations.
- At end of investigation and before completing investigation report, Investigator must send both parties a copy of all relevant evidence.
 - Be mindful of FERPA/student privacy considerations
 - Consider whether redactions are necessary
 - Notify parties of parameters/limitations on re-disclosure of records and evidence



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Preparation of Investigation Report

- Parties must be given at least 10 days to review and submit written response to evidence, which Investigator must consider prior to completing the investigative report.
- Investigator must create an investigative report that fairly summarizes the relevant evidence.



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Preparation of Investigation Report

- Components of investigation report:
 - Summary of complaint allegations
 - Definition(s) of sexual harassment and any other misconduct at issue
 - Description of steps in the investigation process
 - Summary of supportive measures, emergency removal, and/or administrative leave
 - Summaries of relevant evidence from:
 - Interviews
 - Documents
 - Written responses
 - Recommended findings of fact (optional)



Parties' Response to Investigation Report

- At least 10 business days prior to the hearing, the Title IX Coordinator must:
 - Send to each party (and their advisors) the investigative report; and
 - Afford the parties 10 business days to submit a written response to the report.

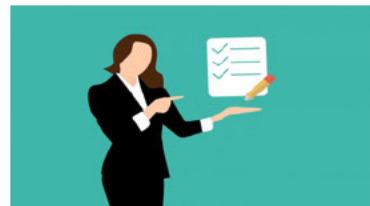
The Live Hearing



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Hearing Officer's Role Generally

- Preside over live Title IX hearing.
- Ensure that parties' advisors are afforded opportunity to conduct cross-examination of opposing party and witnesses.
- Determine relevance and permissibility of cross-examination questions in real time.



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Hearing Officer's Role Generally

- Ensure hearing procedures are followed and applied consistently and equitably.
- Determine responsibility (and sanctions, if appropriate) using preponderance of the evidence standard.
- Issue written determination to both parties simultaneously, with information regarding appeal rights.



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Pre-Hearing Procedures

- Gather investigation materials from Title IX Coordinator.
 - Formal complaint
 - Initial written notice of allegations
 - Parties' written response to evidence (if any)
 - Investigation report
 - Parties' written responses to investigation report (if any)
- Police reports, photographs, video footage, e-mail communications, text messages or other supporting evidence gathered by Investigator



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Pre-Hearing Procedures

- Conduct preliminary review of investigation materials.
- Make checklist of allegations to be proven/disproven, noting the evidence gathered relative to each allegation during the investigation.



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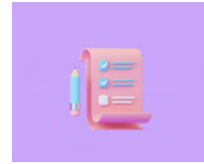
Sample Checklist of Allegations

Complainant, a student, alleges that Respondent, an adjunct faculty member, engaged in unwelcome conduct of a sexual nature that a reasonable person would find so severe, pervasive and objectively offensive that it deprived a person equal educational access.

Date of Alleged Incident	Complainant's Allegation	Respondent's Response	Other Evidence
8/16/2020	R sent C a private chat message during Zoom class session saying "You look beautiful today. Stay after class?" At the end of class, R verbally asked C to stay in the Zoom session so he could "answer her question about the last quiz." C said she had to go and signed off with the rest of the class.	R denies messaging C privately and denies ever telling C that she looked beautiful. R admits he asked C to stay in the Zoom after class so he could answer her question about the quiz.	No copy of private chat message; class was not recorded. W1 and W2 recall R asking C to stay after class to discuss the last quiz. W1 says C looked "uncomfortable."

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Pre-Hearing Procedures



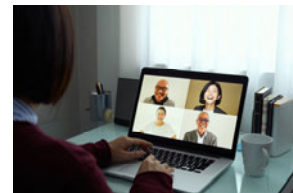
- Ensure all pre-hearing steps have occurred.
 - 1) Did Title IX Coordinator issue written notice of hearing to both parties at least ten (10) business days prior to the hearing?
 - 2) Was a copy of Investigation Report enclosed with hearing notice or otherwise provided to the parties at least ten (10) business days prior to the hearing?
 - 3) Did either party request a substitution of the Hearing Officer? If so, what was the outcome?
 - 4) Did either party request that the hearing be conducted virtually or with the parties in separate rooms?
 - 5) Do both parties have an advisor to conduct cross-examination during the hearing?



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Pre-Hearing Procedures

- Conduct optional pre-hearing conference.
 - Hearing Officer has discretion to hold a pre-hearing conference with the parties, their advisors, and other appropriate individuals.
 - Need not be held in person or with all parties at the same location.
 - Possible topics for discussion:
 - Format of hearing
 - Accommodations needed (if any)
 - Rules of decorum
 - Procedures for opening/closing statements, direct and cross-examination, objections
 - Other evidentiary issues/concerns
 - Proposed witnesses and exhibits



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Pre-Hearing: Hypothetical

- You have been appointed to serve as the Hearing Officer for a Title IX case involving a student complainant and an employee respondent. Two days before the scheduled hearing, the complainant notifies you that she just secured an attorney to serve as her advisor during the hearing, but that the attorney is not available on the scheduled hearing date. The complainant requests that the hearing be postponed to a later date so that her advisor can attend.
- What should you do?

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The Hearing



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Hearing Procedures

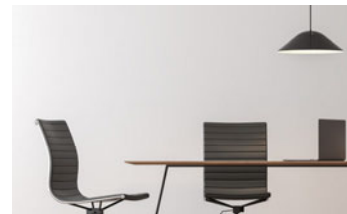


- 1) Go “on the record”
- 2) Introduction by Hearing Officer
- 3) Identification of individuals present
- 4) Preliminary review of hearing procedures by Hearing Officer
- 5) Optional opening statements by parties
- 6) Optional presentation of information by Title IX Coordinator and/or Investigator



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Hearing Procedures



- 7) Complainant’s presentation
 - “Direct” testimony by Complainant
 - Cross-examination of Complainant by Respondent’s advisor (*remember rape shield protections*)
 - “Direct” testimony by Complainant’s invited witnesses
 - Cross-examination of Complainant’s witnesses by Respondent’s advisor
- 8) Respondent’s presentation
 - Same procedures as above



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Hearing Procedures

9) Questioning by Hearing Officer

- May occur after each party or witness testifies, or at the end after all parties and witnesses have testified.

10) Brief closing statements by parties

11) Conclude hearing and go “off the record.”



Live Hearing: Hypothetical #1

- You are serving as the Hearing Officer during a live hearing involving an alleged student-on-student sexual assault. The Respondent brought his defense attorney as his advisor. The attorney has refused to allow the Respondent to speak and has advised him not to answer any questions. The attorney has objected to every cross-examination question posed by the Complainant's advisor and has begun slamming his fist down on the table whenever the Complainant's advisor asks a question that he doesn't like. You have warned the Respondent's advisor several times about his behavior, but each time he has responded that he is “just being a zealous advocate” or “just doing [his] job.”
 - What should you do?

Live Hearing: Hypothetical #2

- You are the appointed Hearing Officer on a stalking case. The Complainant reported the stalking to the local police department, in addition to making a report with the Title IX Coordinator. During the investigation, the Investigator obtained a copy of the police report from the local police department and attached it to the Investigation Report.
- Is the police officer who completed the police report required to appear at the hearing as a witness?
- If the police officer does not attend the hearing, may you consider the police report in reaching a determination regarding responsibility?
- If yes, how much weight should you give the police report?



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Live Hearing: Hypothetical #3

- An employee filed a formal Title IX sexual harassment complaint alleging that his supervisor engaged in quid pro quo harassment by demoting him after he refused to submit to the supervisor's sexual advances. An investigation was conducted, and you are now presiding over the live hearing.
- Can the Complainant's advisor ask the Respondent whether he has ever slept with a subordinate?
- Can the Respondent's advisor ask the Complainant whether he has ever slept with the Respondent?



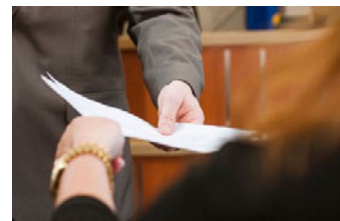
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Post-Hearing Procedures



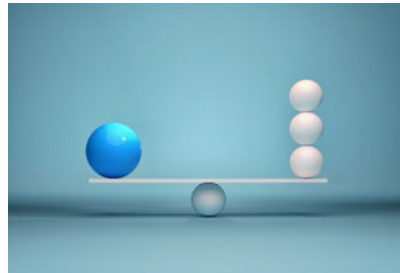
Considering Evidence

- Relevant documents may include, but are not limited to:
 - Formal complaint
 - Notice of allegations
 - Written statement(s) and responses by the parties and/or witnesses
 - Investigation report
 - Police reports, photographs and/or video footage (if any)
 - Hearing testimony and/or documents presented during hearing
 - Prior discipline records
 - Only relevant to issue of appropriate sanction



Preponderance of the Evidence Standard

- “More likely than not”
- Whether the facts supporting the allegations have greater weight/strength than the facts presented in denial of the allegations
- If 50/50, no violation.



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Issues for Determination

- 1) Does the testimony and evidence presented establish that the alleged conduct occurred?

Things to Consider:	
Admission or denial by Respondent	Witness corroboration
Physical evidence (i.e. photographs, video footage)	Prior consistent (or inconsistent) statements by parties and witnesses
Post-incident conduct of parties	Credibility of parties and witnesses

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Issues for Determination

- 2) Does the conduct constitute Title IX sexual harassment or a PSVHEA offense?
- Quid pro quo harassment by a College employee
 - Unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access
 - Any instance of sexual assault, dating violence, domestic violence or stalking (as defined in Clery Act/VAWA)
 - Sexual violence (as defined in PSVHEA)

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Issues for Determination

- 3) If the answers to questions 1 and 2 are “yes,” what sanctions and/or remedies are appropriate?



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Determining Appropriate Sanctions

- Relevant considerations include, but are not limited to:
 - Severity of the misconduct
 - Consequences/impact of the misconduct (both actual and potential)
 - Disciplinary history (or lack thereof)
 - Aggravating or mitigating factors (Respondent's intent/motivation, willingness to accept responsibility for their actions, etc.)



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Determining Appropriate Remedies



- May (but need not) be the same “supportive measures” that were afforded to Complainant during grievance process.
- Examples:
 - Ongoing counseling or mental health supports
 - Academic adjustments or accommodations
 - Modifications to class schedules
 - No-contact directives
 - Other campus safety measures

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Written Determination

- Components
 - Identification of allegations
 - Description of procedural steps taken
 - Findings of fact supporting determination
 - Conclusion regarding application of conduct standards
 - Statement and rationale for result of each allegation
 - Procedures and permissible bases for party to appeal



Written Determination

- Must be issued to both parties simultaneously within 7 business days of decision being reached.
- Consult College Procedures for any requirements regarding method of transmission (i.e. via e-mail, U.S. mail, certified mail, etc.).
 - As a best practice, issue the letter both electronically and in hard copy.

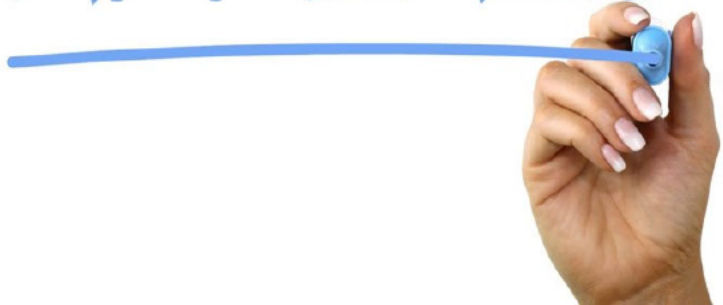
Break



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Appeals

APPEALS



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Appeals

- Both parties have right to appeal:
 - Any determination regarding responsibility
 - Any dismissal of a formal complaint or allegations therein

Permissible Grounds for Appeal

- Procedural irregularity occurred
- New evidence or information exists that could affect outcome
- Conflict of interest or bias on part of Title IX Coordinator, Investigator or Hearing Officer which affected outcome
- Sanction disproportionate to violation

Written Request for Appeal

- A party wishing to appeal should submit a written request to the Title IX Coordinator, which identifies the ground(s) on which the party seeks to appeal the determination or dismissal.



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Written Request for Appeal

- Within seven (7) business days of the Title IX Coordinator's receipt of the appeal request, the Title IX Coordinator will:
 - 1) Forward the appeal request to the Appellate Decision-Maker; and
 - 2) Issue a notice of appeal to both parties.



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Notice of Appeal

IMPORTANT NOTICE

- Informs parties that an appeal has been filed.
- Notifies parties of the Appellate Decision-Maker appointed to review the appeal.
- Informs parties of their right to submit a written statement in support of or challenging the appeal.

Appellate Decision-Maker's Role

- Review and decide appeals of determinations of responsibility and dismissals of formal complaints.
- Ensure appeal procedures are implemented consistently and equitably.
- Issue written determination to both parties simultaneously within appropriate timeframe.

Relevant Materials

Investigation Report

Determination of
Responsibility or Notice of
Dismissal

Hearing transcript/recording;
other evidence gathered during
investigation and/or presented
during live hearing

Other relevant materials,
depending on basis for appeal

Tip: Appellate Decision-Maker may gather information beyond that contained in the investigation record if necessary to thoroughly review and consider the appeal.



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Written Statements

- Before reaching a determination regarding an appeal, both parties must be given an opportunity to submit a written statement in support of or challenging the appeal.
- As a best practice, we recommend directing the parties to submit their written statements directly to the Appellate Decision-Maker.



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Possible Outcomes of Appeal



Affirm



Reverse



Modify



Dismiss

Best Practices for Considering Appeals

- The appealing party has the burden of demonstrating why the determination of responsibility (or associated sanction) or dismissal decision should be overturned.
- The Appellate Decision-Maker is not required to meet with the parties or other individuals when reviewing/considering the appeal.
 - In most cases, meeting with the parties or other individuals will not be necessary; the Appellate Decision-Maker should not “re-investigate” the matter.

Best Practices for Considering Appeals

- In cases where the appeal is based on an alleged procedural error, consider whether such procedural error was harmless.
- If so, you may affirm the finding notwithstanding the procedural error.
 - Example: The Respondent did not receive certified mail copy of the initial written notice of the allegations, but it is documented elsewhere that the Respondent received the notice via e-mail and had an opportunity to review and respond to the allegations during an in-person interview with the Investigator. The Respondent also participated in the live hearing and was able to cross-examine the Complainant and several witnesses.



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Best Practices for Considering Appeals

- In cases where a party's appeal is based on the discovery of new evidence, determine whether the new evidence would have impacted the outcome if it were considered by the Hearing Officer.
- If not, you may affirm the finding despite the new evidence.



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Best Practices for Considering Appeals

- In cases where a party's appeal is based on an alleged conflict of interest or bias on the part of the Title IX Coordinator, Investigator or Hearing Officer, consider:
 - Whether the individual in question had a prior or existing relationship with or knowledge of the Complainant or Respondent that impacted their ability to serve impartially
 - Whether such relationship or knowledge affected the outcome of the case
- You may need to gather additional information from the individual in question concerning his/her relationship with or knowledge of the parties.



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Best Practices for Considering Appeals

- In cases where a party's appeal is based on an allegation that the sanction is disproportionate with the violation, consider:
 - The severity of the misconduct for which the Respondent was found responsible
 - The rationale for the sanction imposed
 - This information should be contained in the determination of responsibility
 - The Respondent's disciplinary history (if prior discipline was relevant to the determination of an appropriate sanction)
 - The appealing party's rationale or explanation for why the sanction was disproportionate



193

Written Determination



Must be issued to both parties simultaneously within 7 business days of the conclusion of the appeal review



Affirms, reverses or amends the determination of responsibility or notice of dismissal (or dismisses appeal if request failed to establish sufficient grounds for appeal)



Describes outcome and rationale

Notes that decision by Appellate Decision-Maker is final

Appeals: Hypothetical #1

- The Complainant, a student, accused her instructor of Title IX sexual harassment, claiming that he made ongoing inappropriate comments to her, both during and outside of class. Following an investigation and hearing, the Hearing Officer determined that there was insufficient evidence to find that the Respondent engaged in Title IX sexual harassment. The Complainant appealed the determination, claiming that another student in the class told her that she witnessed the Respondent's inappropriate comments on at least 2 occasions.
 - Has Complainant established sufficient grounds for an appeal?
 - What additional information might be helpful in making this determination?

Appeals: Hypothetical #2

- You are reviewing an appeal in a student-student Title IX sexual harassment proceeding. Both parties have submitted written statements concerning the appeal. In reviewing the Complainant's written statement, it appears that the statement was written by the Complainant's advisor (who is an attorney) and not by the Complainant himself.
- What should you do?



196

Appeals: Hypothetical #3

- An employee supervisor was determined to have engaged in quid pro quo sexual harassment by demoting his employee after the employee refused to submit to the supervisor's explicit sexual advances. The Complainant has appealed the determination of responsibility on the ground that the sanction the Hearing Officer recommended (a two-day suspension without pay) is disproportionate with the violation. The Complainant asserts that the Respondent should have been terminated.
- What information should you consider when reviewing the Complainant's appeal?
- If you determine that the recommended sanction is disproportionate with the violation, what should you do?



197



198

Milligan v. Board of Trustees of Southern Illinois University, 686 F.3d 378 (7th Cir. 2012)

- Facts:

- Samuel Milligan, a Southern Illinois University (SIU) chemistry student, applied for and was hired to work in the University's chemical stockrooms. Dr. Cal Meyers, a professor emeritus who donated \$2.5 million dollars to fund a research program at SIU, worked in an office across the hall from Milligan's stockroom.
- One day in the hall, Meyers told Milligan that his hair would make him "a very sexy lady," and then giggled and squeezed Milligan's buttocks.
- Milligan reported the incident to his supervisor, Chris Kraft, who stated, "That sounds like something [Meyers] would do," and offered to accompany Milligan to talk to someone about it. Milligan declined.

199

Milligan v. Board of Trustees of SIU

- Facts:

- A week later, Meyers approached Milligan and asked where he could rent his hair because it would look “pretty sexy on a lady,” and joked that he would date Milligan if he were female.
- Milligan’s mother set up a meeting with SIU’s Chemistry Department Chair, Gary Kinsel, who indicated that Dr. Meyers could not be held accountable for his actions because he was an “old man with a compromised mental state.” Kinsel also stated he had no disciplinary authority over Dr. Meyers but indicated he would arrange a meeting with someone who did.



200

Milligan v. Board of Trustees of SIU

- Facts:

- Milligan was subsequently relocated to the second-floor stockroom with the same number of hours. He did not object to this reassignment.
- The following week, Milligan again encountered Meyers, who grabbed him near the belt line, “very close to his genital area.”
- Milligan then met with Meyers’ supervisor, described the incidents, and indicated he wished to file a formal complaint, despite the supervisor’s implications that he should not proceed with a complaint, as it was “[Milligan’s] word against Meyers’.”



201

Milligan v. Board of Trustees of SIU

- Facts:
 - During the supervisor's investigation, it was revealed that a female Chemistry Department employee had previously been harassed by Meyers. The harassment included both inappropriate comments and touching.
 - SIU concluded that Meyers had violated its sexual harassment policy and issued a letter of reprimand directing Meyers to cease contact with student workers and attend a sexual harassment training within a month.
 - Meyers then began trying to determine who complained about him, even asking Milligan a few months later if it had been him.
 - SIU eventually determined that Meyers failed to complete the sexual harassment training and banned him from campus, subject to arrest for trespassing. Meyers continued to appear on campus, however, and he was never arrested; public safety would simply escort him off campus.



202

Milligan v. Board of Trustees of SIU

- Facts:
 - Milligan subsequently changed his major from Chemistry to creative writing, supposedly due to wanting to get out of the Hall where Meyers' office was.
 - A few months later, Milligan's supervisor told him he would no longer work in the chemical stockrooms due to his waning interest in the job and poor work performance.



203

Milligan v. Board of Trustees of SIU

Procedural History:

- Milligan sued SIU under Title VII and Title IX for creating a hostile work and educational environment, and for retaliating against him for complaining about the harassment.
- The District Court granted summary judgment in favor of SIU.



204

Milligan v. Board of Trustees of SIU

Holding and Analysis:

- The Court of Appeals affirmed, holding that:
 - SIU's response to the professor's inappropriate comments and touching (a letter of reprimand and no-contact directive, followed by a subsequent ban from campus) was reasonably likely to prevent future harassment; and
 - The six months between Milligan's harassment complaint and his notice that he would no longer retain his position did not create a triable issue for his retaliation claim.



205



Milligan v. Board of Trustees of SIU

Questions for Discussion:

- Did Milligan's supervisor respond appropriately to Milligan's report?
- Did the Chemistry Department Chair respond appropriately to Milligan's report?
- Was it appropriate for Milligan's supervisor to reassign Milligan to the second-floor stockroom after receiving his report of alleged harassment by Meyers?



206

Doe v. Columbia College Chicago, 933 F.3d 849 (7th Cir. 2019)

• Facts:

- Student Jane Roe accused student John Doe of sexual assault after the two engaged in what she reported were non-consensual sexual relations.
- Columbia conducted an investigation and disciplinary hearing as a result of Roe's allegations.
- Doe was given multiple opportunities to submit exculpatory evidence to Columbia during the investigation, which he failed to do. After the investigation was complete, Doe was given an opportunity to review the investigative materials and the evidence submitted by Roe.



207

Doe v. Columbia College Chicago

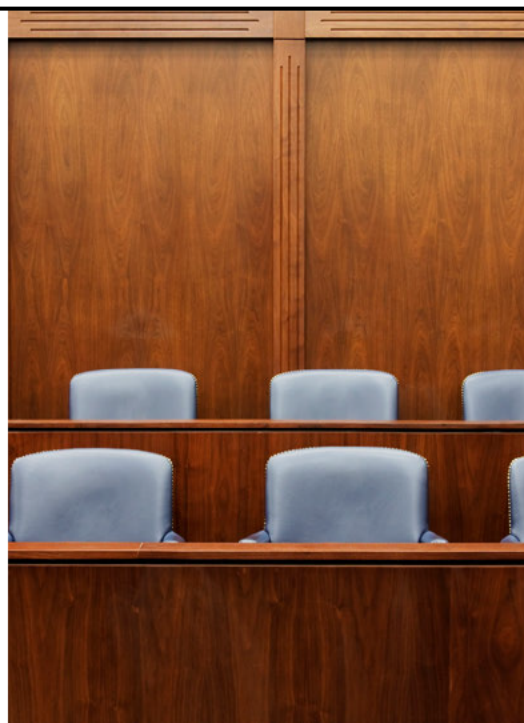
- Facts:
 - Shortly before the hearing, Doe contacted the Title IX Coordinator to report that he had been physically and verbally harassed by Roe and her friends since the alleged incident.
 - The Title IX Coordinator requested the names of the individuals who committed the acts Doe described, but Doe refused to provide any names. The Title IX Coordinator also suggested that she and Doe meet in person to discuss his concerns, but Doe refused to meet without his attorney present.
 - The associate vice president for campus safety and security contacted Doe and met with him twice to address his concerns. Campus safety and security was able to identify the student who struck Doe and addressed the issue, and Doe was instructed to inform Columbia if he had any further interaction with the student.



208

Doe v. Columbia College Chicago

- Facts:
 - Following the formal disciplinary hearing, a panel weighed the evidence and found that some of Roe's allegations were proven by a preponderance of the evidence, and some were not. As a result, Doe was suspended from Columbia for an academic year.



209

Doe v. Columbia College Chicago

- Procedural History:

- Doe sued Columbia for alleged violations of Title IX, breach of contract, promissory estoppel, negligent infliction of emotional distress, intentional infliction of emotional distress, and negligence, arising out of Columbia's investigation and adjudication of Roe's sexual assault complaint.
- The District Court dismissed Roe's Title IX claims. Doe appealed.



210

Doe v. Columbia College Chicago

Holding and Analysis:

- The Seventh Circuit affirmed, holding (in pertinent part) that Doe failed to sufficiently allege:
 - That the investigation and adjudication of Doe's complaint were impacted by anti-male bias
 - That Doe was subjected to harassment on the basis of sex
 - That the College acted with deliberate indifference with regard to the alleged harassment Doe reported



211

Doe v. Columbia College Chicago

- Question for Discussion:

- If Doe had reported the alleged punching incident and social media posts to you, his baseball coach, rather than directly to the Title IX Coordinator, what would you have done with that information?



212

Moylan v. McHenry County College, 2015 IL App (2d) 140770-U (2015)

- Facts:

- Wendy Moylan, MCC's Director of Resource Development, filed a formal complaint of sexual harassment against a coworker, alleging three incidents of sexual harassment.
- Specifically, Moylan alleged that the coworker advised her to "sex it up," told her a joke of a sexual nature, and pulled her into a subordinate's office to watch a video of a sexual nature in front of two other employees.

213

Moylan v. McHenry County College

- Facts:
 - MCC's Assistant Vice President of Human Resources initiated an investigation and ultimately determined that the coworker's conduct did not rise to the level of a violation of the College's sexual harassment policy.
 - The AVP of HR concluded that, although Moylan's coworker did not violate the College's sexual harassment policy, his conduct was unprofessional; thus, the AVP of HR recommended that he attend sexual harassment avoidance training and receive a written reprimand.



214

Moylan v. McHenry County College

- Facts:
 - Three months later, MCC launched a separate investigation into the use of its email system. During that investigation, MCC discovered large volumes of emails sent among Moylan and four other employees, including emails that were sexual and violent and that were sent to subordinates.
 - Moylan was placed on administrative leave pending an investigation into her emails for potential violations of the College's sexual harassment and anti-violence policies.



215

Moylan v. McHenry County College



- Facts:

- During the investigation into Moylan's emails, the AVP of HR discovered an email Moylan sent to several other employees, where she repeated her coworker's joke that she had previously reported.
- Moylan admitted that the coworker's jokes and comments were no worse than some that she had shared with friends via email.
- Moylan also admitted that she reported the coworker not because she was offended by his comments, but because she knew he was being considered for promotion and she did not believe his behavior was appropriate for a supervisor.
- As a result, the AVP of HR concluded that Moylan's sexual harassment complaint was false.



216

Moylan v. McHenry County College

- Facts:

- HR ultimately concluded that Moylan violated the College's email and sexual-harassment policies and recommended to the Board that she be terminated.
- After hearing the allegations and Moylan's response, the Board terminated Moylan.



217

Moylan v. McHenry County College

- Procedural History:
 - Moylan sued MCC, alleging that she was terminated in retaliation for filing the sexual harassment complaint against her coworker.
 - The District Court granted summary judgment in favor of the MCC. Moylan appealed.



218

Moylan v. McHenry County College

- Holding and Analysis:
 - The Appellate Court affirmed the District Court's grant of summary judgment to the College, holding that:
 - Moylan could not prove that her discharge was caused by her filing of the sexual harassment complaint
 - Moylan could not show that other similarly situated employees were treated more fairly than she was



219

Moylan v. McHenry County College

- Question for Discussion:
 - Was it appropriate for the College to investigate Moylan's complaint against her coworker in the first place?



220

Hall v. Millersville University, 22 F.4th 397 (3d Cir. 2022)

- Facts:
 - Karlie Hall started dating Gregorio Orrostieta in March 2014, while Karlie was a senior in high school. Orrostieta began exhibiting abusive behavior towards Karlie during this time.
 - In August of 2014, Karlie and her sister enrolled at Millersville University and lived in the dorms.
 - While at Millersville, Karlie continued her relationship with Orrostieta, and Orrostieta would frequently visit Karlie's dorm room and sometimes spend the night.



221

Hall v. Millersville University

- Facts:

- One evening, Karlie and Orrosteita engaged in a verbal argument in Karlie's dorm room. After hearing rustling sounds, followed by a female voice screaming, "ow," the RA knocked on Karlie's door and was greeted by Orrosteita, who admitted that things "got a little physical" when he was attempting to get into bed with Karlie.
- The RA observed that Karlie had been crying and that her face was red and puffy. Karlie informed the RA that she wanted Orrosteita to leave but did not say much else. The RA called the police to assist with removing Orrosteita from the dorm.
- The police arrived, and Orrosteita was removed. The responding officer arranged for Orrosteita's friend to pick him up from a nearby gas station, but did not create an incident report immediately.



222

Hall v. Millersville University

- Facts:

- The RA created an incident report, as required by Millersville's Title IX Policy, which included a general description of the events that transpired between Karlie and Orrosteita. The RA forwarded her report to two officials from the University's Title IX Office. One of the officials looked over the report and then filed it away. Neither official discussed the report with anyone immediately.
- Karlie's roommate, who had observed Karlie develop a black eye following the incident, contacted her mother and shared that she believed Orrosteita had hit Karlie, despite Karlie's account of what had happened. The roommate's mother called University Police, the University Counseling Department, and the Title IX Office to report Karlie's black eye and the alleged domestic assault, but the University officials with whom she spoke indicated that nothing could be done without a complaining witness.



223

Hall v. Millersville University

- Facts:
 - Karlie and Orrostieta's relationship continued to be "on again, off again." During Winter Break of 2014, Orrostieta was discovered in Karlie's dorm room, against the campus' no-visitor policy.
 - One night during second semester, other students reported hearing sounds of screaming and furniture moving coming from Karlie's dorm room. The RA knocked at Karlie's door, but heard nothing, so she did not investigate further.
 - That night, Orrostieta killed Karlie through "strangulation and multiple traumatic injuries," and potentially sexually assaulted her.



224

Hall v. Millersville University

- Procedural History
 - The Halls sued Millersville University under Title IX, alleging that the RA's failure to follow-up after hearing Karlie scream on the night of her murder, knowing that Orrostieta had previously been removed from campus at Karlie's request, constituted "deliberate indifference" to known sexual harassment on the part of the University.
 - The U.S. District Court for the Eastern District of Pennsylvania entered summary judgment in the University's favor. Plaintiffs appealed.



225

Hall v. Millersville University

- Holding and Analysis:
 - The Court of Appeals reversed and remanded, holding that:
 - The University had sufficient notice that deliberate indifference to sexual harassment perpetrated by guest could result in Title IX liability.
 - The record showed that the abuse and danger Karlie faced from Orrostieta were reported to several persons at Millersville who had authority to take corrective action, and thus, their responsive action (or inaction) could be indicative of deliberate indifference.



226

Hall v. Millersville University

- Question for Discussion:
 - If the roommate's parent had reported the alleged domestic violence incident to you, without any contact from Karlie, what would you have done with the information?



227

Day 2: Putting It All Together



228

Hypothetical

- Alex, a student, reports to her College advisor that a classmate, Aaron, has been making inappropriate sexual jokes and innuendos.
 - They both attended the same online summer school course.
 - They were assigned to work on a project together, much of which was to be done on their own time, over Zoom, and required the exchange of personal contact information.
 - After the project was complete, Aaron allegedly called Alex and asked her out. Alex said yes.
 - Alex states that they went on a few off-campus dates, but Alex decided not to pursue the relationship any further.



229

Hypothetical

- Alex alleges that Aaron began telling all of their mutual friends that Alex “sleeps around,” and he allegedly began making false statements that she sent him sexually explicit photos.
- Alex alleges that Aaron’s comments took place over the course of the summer, at various off-campus class gatherings where the instructor and other students were present.
- Most recently, they both attended the same party at a house owned by the College’s Peer Mentoring Club, of which Alex is a member.
- At the party, Aaron (who is 21) was drinking. He tried to pressure Alex (who is 19) into drinking as well. Alex reports that Aaron stated, “Rumor has it, you’re more fun when you’re drunk.”
- Alex reports that she told Aaron he was not funny, and to leave her alone.



230

Hypothetical

- Aaron reportedly became drunk, and one of Alex’s friends witnessed Aaron showing other party-goers a sexually explicit photo of a female and telling them it was Alex.
 - The photo did not show a face, so others at the party did not know if the photo was of Alex or not. Some male classmates seemed to believe Aaron.
- Alex is distraught. Aaron is enrolled in two of the same classes as Alex for the fall 2023 semester. Alex is considering dropping the classes so she will not have to interact with Aaron.
- The College advisor documents her discussion with Alex. What should the College advisor do with these allegations? Discuss.



231

Hypothetical

- Based on these facts, analyze the jurisdiction under Title IX.
 - Did Aaron's conduct occur in the College's education program or activity?
- Could Aaron's actions constitute Title IX sexual harassment?
- Reminder: Three types of sexual harassment:
 - Quid pro quo harassment by a college employee
 - Unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access
 - Any instance of sexual assault, dating violence, domestic violence or stalking



232

Hypothetical

- Alex files a formal complaint. The parties proceed to a live hearing.
 - Can Aaron's advisor ask Alex if she has ever had a sexual relationship with Aaron?
- After a full grievance process, the College's appointed Hearing Officer (who is close friends with the College advisor to whom Alex made her initial report) finds that Aaron is responsible for engaging in Title IX sexual harassment.
 - After receiving the Hearing Officer's determination, Aaron feels that the Hearing Officer had a conflict of interest that affected the outcome of the grievance process. He submits an appeal request to the Title IX Coordinator.
- What steps does the Title IX Coordinator need to take with respect to the appeal?



233



234

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A word cloud featuring the phrase "THANK YOU" in the center, surrounded by its translations in various languages: HVALA, OBRIGADO, GRAZIE, 谢谢, RAHMET, KIITOS, DANKE, SHUKRAAN, TAK, DANK JE, TAKK, ARIGATO, GRACIAS, BARKA, СПАСИБО, MERCI, and TACK. Each word is enclosed in a colorful speech bubble.

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235

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Emily Bothfeld counsels higher education institutions and K-12 school districts on various issues, including student discipline, Title IX, free speech and expression, student disability rights, board governance, and policy development. In her role leading the firm's Title IX practice, Emily performs extensive work with educational institutions to ensure compliance with Title IX and related laws in all aspects of employment and education, including recruitment, admissions, academic programs, counseling, financial assistance, athletics and extracurricular activities, and facilities access. Emily was instrumental in Robbins Schwartz's development of policies, procedures, and training materials for school districts and higher education institutions in response to the United States Department of Education's 2020 amendments to the Title IX regulations, and Emily has significant experience working closely with Title IX Coordinators and administrators tasked with investigating and adjudicating sexual harassment reports and complaints.

Emily also represents both educational institutions and private companies in matters related to student privacy. She regularly advises school districts regarding privacy considerations and compliance requirements associated with the use of educational technology platforms. She has significant experience negotiating data privacy agreements and education-related service agreements on behalf of schools and organizations. In 2020, Emily co-drafted the Illinois addendum to the National Data Privacy Agreement ("NDPA"), a standardized agreement used by school districts and educational technology vendors throughout the United States to streamline the contracting process and establish a consistent framework for protecting and managing student data. The NDPA is currently being utilized by approximately 750 school districts in Illinois and over 11,000 nationally to facilitate compliance with state and federal student privacy and security laws.

Emily has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education's Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General, and Illinois Department of Human Rights. Emily regularly defends educational entities in state and federal court in defending against constitutional, civil rights, and breach of contract claims.

Before joining Robbins Schwartz, Emily represented students with disabilities in special education matters. Emily attended the George Washington University Law School, where she was a member of the George Washington International Law Review and the GW Law Moot Court Board. Prior to attending law school, Emily taught high school mathematics and science in Hangzhou, China.



PRACTICE AREAS

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Higher Education
Special Education
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