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Training for Lewis and Clark Community College Title IX Personnel

December 7 and 9, 2021

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Training for Lewis and Clark Community College Title IX Personnel

Presented By: Emily P. Bothfeld & Michelle L. Weber
December 7 and 9, 2021

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Day 1 Agenda

- 1) Overview of Relevant Laws
- 2) Key Definitions
- 3) Title IX Jurisdiction
- 4) Sex-Based Misconduct Policy
- 5) Sex-Based Misconduct Procedures
- 6) Reporting of Sex-Based Misconduct
- 7) Liability Under Title IX and Related Laws
- 8) Case Studies
- 9) Hypotheticals

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Overview of Relevant Laws



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Relevant Laws

- The relevant requirements of the below laws have been incorporated into the College's Sex-Based Misconduct Policy and Procedures:
 - Title IX of the Education Amendments of 1972 ("Title IX")
 - Title VII of the Civil Rights Act of 1964 ("Title VII")
 - Preventing Sexual Violence in Higher Education Act ("PSVHEA")
 - Illinois Human Rights Act ("IHRA")
 - Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act")
 - Violence Against Women Act ("VAWA")

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Title IX



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Title IX Overview

- Title IX of the Education Amendments of 1972 provides that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefit 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).
- Title IX generally applies to all “educational institutions,” which are defined to include “any public or private preschool, elementary or secondary school, or any institution of vocational, professional or higher education...” 20 U.S.C. § 1681(c).

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Title IX Prohibitions



- In providing any aid, benefit or service to a student, institutions shall not, on the basis of sex:
 - Treat one person differently from another in determining whether such a person satisfies any requirement or condition for the provision of such aid, benefit or service;
 - Provide different aid, benefits or services or provide aid, benefits or services to recipients in a different manner;
 - Deny any person any such aid, benefit or service;
 - Subject any person to separate or different rules of behavior, sanctions or other treatment;

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Title IX Prohibitions

- In providing any aid, benefit or service to a student, institutions shall not, on the basis of sex:
 - Differently apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;
 - Aid or perpetuate discrimination against any person by providing significant assistance to any agency or organization which discriminates on the basis of sex in providing any aid, benefit or service to students or employees; or
 - Otherwise limit any person in the enjoyment of any right, privilege, advantage or opportunity.

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Title IX Sexual Harassment

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

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Title IX Sexual Harassment: 2020 Regulations

- On May 6, 2020, the U.S. Department of Education released new Title IX regulations establishing how education programs that receive federal funding must respond to sexual harassment under Title IX.
- Among other changes, the new regulations prescribe a narrower definition of sexual harassment than in previous Title IX guidance, and they require higher education institutions to follow detailed procedures—to include a live hearing with cross-examination—when adjudicating formal Title IX sexual harassment complaints.
- The regulations went into effect on August 14, 2020.

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Title IX Sexual Harassment: Recently Issued Guidance

- Since taking office, President Biden and his Administration have issued key guidance documents interpreting the 2020 regulations and taken action/steps signaling an intent to amend certain aspects of the regulations in the coming months.
 - March 2021 Executive Order
 - April 2021 Letter to Stakeholders
 - June 2021 Title IX Public Hearing
 - July 2021 Question & Answer Document
 - August 2021 Letter to Stakeholders

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Title IX Sexual Harassment: Current Status

- 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.

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Title IX Sexual Harassment: Impact of 2020 Regulations

- The new Regulations require:
 - Specific policy and procedure language
 - Staffing determinations
 - Training for all personnel involved in an institution's investigation and grievance process, including:
 - Title IX Coordinator(s)
 - Investigator(s)
 - Decision-Maker(s)
 - Appellate Decision-Maker(s)
 - Informal Resolution Facilitator(s)
 - Publishing of information and training materials on the institution's website

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Title VII



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Title VII Prohibitions

- Title VII of the Civil Rights Act of 1964 prohibits discrimination, including discrimination based on sex, in employment. This includes sex-based harassment.
- Title VII prohibits disparate treatment based on sex, which may include treatment based on sex-based stereotypes.
- Title VII also 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.

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Title VII Obligations

- 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.



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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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Clery Act and
Violence
Against Women
Act



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Overview of
the Clery Act

- The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act requires institutions to maintain and disclose crime statistics and security information.

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Overview of VAWA



- The Violence Against Women Act expands upon the rights afforded to campus survivors of sexual assault, domestic violence, dating violence, and stalking.
- Under VAWA, colleges and universities are required to:
 - Report domestic violence, dating violence, and stalking, beyond the crime categories the Clery Act already mandates;
 - Adopt certain student discipline procedures, such as for notifying purported victims of their rights; and
 - Adopt certain institutional policies to address and prevent campus sexual violence, such as policies regarding training of pertinent institutional personnel.

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VAWA & Clery Act Reporting

- The Clery Act and VAWA require annual reporting of statistics for various criminal offenses, including forcible and non-forcible sex offenses and aggravated assault, as well as domestic violence, dating violence and stalking, that occurred within the institution's "Clery geography" and that were reported to a campus security authority or local police agency.

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VAWA & Clery Act Reporting

- Campus Security Authority
 - Campus police and/or other security personnel
 - Any individual who is not part of a campus police or security department but who is otherwise responsible for campus security
 - Any individual or organization specified in an institution's statement of campus security policy as one to which students should report criminal offenses
 - An official of an institution who has significant responsibility for student and campus activities, including but not limited to, student housing, student discipline, and campus judicial proceedings



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VAWA & Clery Act Reporting

- Each institution should conduct a substantive review of all of its officials, including students with official duties such as resident assistants, and evaluate whether Clery designates those individuals as campus security authorities and thereby confers reporting obligations.
- Campus security authorities must be identified, be notified of their reporting obligations, be properly trained, and be provided with a mechanism for communicating reported incidents to appropriate officials.
- Crimes reported to a pastoral or professional counselor are not required to be reported by an institution under the Clery Act.

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Preventing Sexual Violence in Higher Education Act



IT'S TIME ... TO TALK ABOUT IT!

Talk early, talk often. Prevent sexual violence.

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Overview of PVSHEA

- The 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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PSVHEA Comprehensive Policy

- An institution's comprehensive policy must include:
 - A 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;
 - An option for students to electronically report;
 - An option for students to anonymously report;
 - An option for students to confidentially report;
 - An option for reports by third parties and bystanders;



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PSVHEA Comprehensive Policy

- An institution's comprehensive policy must include:
 - Procedures for responding to reports of alleged sexual violence, domestic violence, dating violence and stalking;
 - A 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;

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PSVHEA Comprehensive Policy

- An institution's comprehensive policy must include:
 - The 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;
 - The name, address, telephone number and website, if available, of community-based, State, and national sexual assault crisis centers;
 - A statement notifying survivors of the interim protective measures and accommodations reasonably available from the higher education institution;
 - The higher education 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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PSVHEA Comprehensive Policy

- An institution's comprehensive policy must include:
 - A 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); and
 - A statement prohibiting retaliation against those who in good faith report or disclose an alleged violation of this 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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PSVHEA Student Notification of Rights and Options

- Upon being notified of an alleged violation of the comprehensive policy by or on behalf of a student, a higher education institution must provide the survivor, when identified, with a concise notification of his/her rights and options.

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PSVHEA Student Notification of Rights and Options

- The notice must include:
 - The survivor's right to report or not report the alleged incident to the institution, law enforcement, or both, including information about the survivor's right to privacy and which reporting methods are confidential;
 - The contact information for the institution's Title IX coordinator(s), confidential advisors, a community-based sexual assault crisis center, campus law enforcement and local law enforcement;
 - The survivor's right to request and receive assistance from campus authorities in notifying law enforcement;
 - The survivor's ability to request interim protective measures and accommodations for survivors;
 - The institution's ability to provide assistance, upon the survivor's request, in accessing and navigating campus and local health and mental health services, counseling and advocacy services; and
 - A summary of the institution's complaint resolution procedures, if the survivor reports a violation of the comprehensive policy.

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PSVHEA Student Notification of Rights and Options



- Within 12 hours of receiving an electronic report, the higher education institution must respond to the electronic reporter and must provide the information required for the student notification of rights and options, along with a list of available resources.
 - Institutions are free to choose the manner in which they respond. If the response is provided verbally, however, the institution must subsequently provide written notification of the survivor's rights and options.

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PSVHEA Confidential Advisors

- All higher education institutions must provide students with access to confidential advisors to provide emergency and ongoing support to survivors of sexual violence.
- A "confidential advisor" is defined as "a person who is employed or contracted by a higher education institution" and who has received 40 hours of training on sexual violence before being designated a confidential advisor.
- After receiving the initial 40 hours of required training, confidential advisors must annually receive six hours of ongoing education training on issues related to sexual violence, as well as periodic training on the campus administrative processes, interim protective measures and accommodations, and complaint resolution procedures.
- Confidential advisors may not be individuals on campus who are designated as "Responsible Employees" under the institution's sexual misconduct policy/procedures.
- Nothing precludes an institution from partnering with a community-based sexual assault crisis center to provide confidential advisors.

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PSVHEA Confidential Advisors

- In the course of working with a survivor, confidential advisors shall:
 - Inform the survivor of the survivor's choice of possible next steps regarding reporting options and possible outcomes;
 - Notify the survivor of resources and services for survivors of sexual violence;
 - Inform the survivor of his/her rights and the institution's responsibilities regarding orders of protection, no contact orders, or similar lawful orders issued by the institution or a criminal or civil court;
 - Provide confidential services to and have privileged confidential communications with survivors of sexual violence;
 - Upon the survivor's request, and as appropriate, coordinate with campus officials, community-based sexual assault crisis centers or local law enforcement and, if requested, assist the survivor in contacting and reporting to campus officials, campus law enforcement, or local law enforcement; and
 - Upon the survivor's request, work with the necessary campus authorities to secure interim protective measures and accommodations for the survivor.

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PSVHEA Complaint Resolution Procedures



- On or before August 1, 2016, each campus of a higher education institution should have adopted a procedure to resolve complaints of alleged student violations of the comprehensive policy.
 - The College currently utilizes one complaint resolution procedure for any complaint alleging (a) Title IX sexual harassment and/or (b) one or more of the PSVHEA offenses.

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PSVHEA Complaint Resolution Procedures

- The complaint resolution procedures shall provide, at a minimum, all of the following:
 - The opportunity to request that the complaint resolution procedure begin promptly and proceed in a timely manner.
 - The institution shall determine the individuals who will resolve complaints of alleged student violations of the comprehensive policy.
 - All individuals whose duties include resolutions of complaints of student violations of the comprehensive policy shall receive a minimum of 8 to 10 hours of annual training on issues related to sexual violence, domestic violence, dating violence, and stalking and how to conduct the institution's complaint resolution procedures.
 - The institution shall have a sufficient number of individuals trained to resolve complaints so that a substitution can occur in the case of a conflict of interest or recusal and an individual with no prior involvement in the initial determination or finding can hear any appeal brought by a party.
 - The individual resolving the complaint shall use a preponderance of the evidence standard to determine whether the alleged violation of the comprehensive policy occurred.

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PSVHEA Complaint Resolution Procedures

- The complaint resolution procedures shall provide, at a minimum, all of the following:
 - The complainant and respondent shall (i) receive notice of the individual or individuals with authority to make a finding or impose a sanction in their proceeding before the individuals initiate contact with either party and (ii) have the opportunity to request a substitution if the participation of an individual with authority to make a finding or impose a sanction poses a conflict of interest.
 - The institution shall have a procedure to determine interim protective measures and accommodations available pending the resolution of the complaint.
 - Any proceeding, meeting, or hearing held to resolve complaints of alleged student violations of the comprehensive policy shall protect the privacy of the participating parties and witnesses.
 - The complainant, regardless of this person's level of involvement in the complaint resolution procedure, and the respondent shall have the opportunity to provide or present evidence and witnesses on their behalf during the complaint resolution procedure.
 - The complainant and the respondent may not directly cross examine one another, but may, at the discretion and direction of the individual resolving the complaint, suggest questions to be posed by the individual resolving the complaint and respond to the other party.

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PSVHEA Complaint Resolution Procedures

- The complaint resolution procedures shall provide, at a minimum, all of the following:
 - Both parties may request, and must be allowed, to have an advisor of their choice accompany them to any meeting or proceeding related to an alleged violation of the comprehensive policy, provided that the involvement of the advisor does not result in undue delay of the meeting or proceeding.
 - The complainant and the respondent may not be compelled to testify, if the complaint resolution procedure involves a hearing, in the presence of the other party. If a party invokes this right, the institution shall provide the procedure by which each party can, at a minimum, hear the other party's testimony.
 - The complainant and the respondent are entitled to simultaneous, written notification of the results of the complaint procedure, including information regarding appeal rights, within 7 days of a decision or sooner if required by State or federal law.

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PSVHEA Complaint Resolution Procedures

- The complaint resolution procedures shall provide, at a minimum, all of the following:
 - The complainant and the respondent shall, at a minimum have the right to timely appeal the complaint resolution procedure's findings or imposed sanctions if the party alleges (i) a procedural error occurred, (ii) new information exists that would substantially change the outcome of the finding or, (iii) the sanction is disproportionate with the violation. The individual reviewing the findings shall not have participated previously in the complaint procedure and shall not have a conflict of interest with either party. The complainant and respondent shall receive the appeal decision in writing within 7 days after the conclusion of the review of the findings or sanctions or sooner if required by federal or State law.
 - The institution shall not disclose the identity of the survivor or the respondent except as necessary to resolve the complaint or to implement interim protective measures and accommodations or when provided by federal or State law.

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PSVHEA Training, Education Awareness

- Each institution must prominently publish, timely update, and have easily available on its website, all of the following information:
 - The institution's comprehensive policy as well as options and resources available to survivors.
 - The institution's student notification of rights and options described in Section 15 of the Act.
 - The name and contact information for all the institution's Title IX coordinators.
 - An explanation of the role of (i) the Title IX coordinator, (ii) responsible employees under Title IX, (iii) campus security authorities under the Clery Act, (iv) mandated reporters under the Abused and Neglected Child Reporting Act and the reporting obligations of each, as well as the level of confidentiality each is allowed to provide to reporting students under relevant federal and State law.
 - The name, title and contact information for all confidential advisors, counseling services, and confidential resources that can provide a confidential response to a report and a description of what confidential reporting means.
 - The telephone number and website URL for community-based, State, and national hotlines providing information to sexual violence survivors.

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PSVHEA Training, Education, Awareness



- Institutions must provide sexual violence primary prevention and awareness programming for all students who attend one or more classes on campus. Each IHE's annual training must, at a minimum, provide information regarding:
 - The institution's definition of consent, inability to consent, and retaliation as they relate to sexual violence;
 - Reporting to the institution, campus law enforcement and local law enforcement;
 - Reporting to the confidential advisor(s) or other confidential resources;
 - Available survivor services; and
 - Strategies for bystander intervention and risk reduction.
- At the beginning of each academic year, each institution must provide each student with an electronic copy or hard copy of its comprehensive policy, procedures and related protocols.

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PSVHEA
Training,
Education,
Awareness

- All confidential advisors must have received an initial 40 hours of training on or before August 1, 2016 to be designated confidential advisors. Thereafter, confidential advisors must annually receive six hours of education training on issues related to sexual violence.
- Individuals who resolve complaints must receive at least 8-10 hours of annual training on issues related to sexual violence, domestic violence, dating violence and stalking and on how to conduct the institution's complaint resolution procedures.

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PSVHEA
Training,
Education,
Awareness

- Institutions must annually provide survivor-centered and trauma-informed response training to any employee who is involved in:
 - The receipt of a student report of an alleged incident of sexual violence, domestic violence, dating violence or stalking;
 - The referral or provision of services to a survivor; or
 - Any campus complaint resolution procedure that results from an alleged incident of sexual violence, domestic violence, dating violence or stalking.
- The Title IX coordinator(s), campus law enforcement and campus security are included within this training category.

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Illinois Human Rights Act



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IHRA Overview

- The Illinois Human Rights Act:
 - Prohibits discrimination in Illinois, including in employment.
 - Also prohibits sexual harassment in elementary, secondary and higher education.



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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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IHRA Enforcement

- A discrimination charge 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 discrimination 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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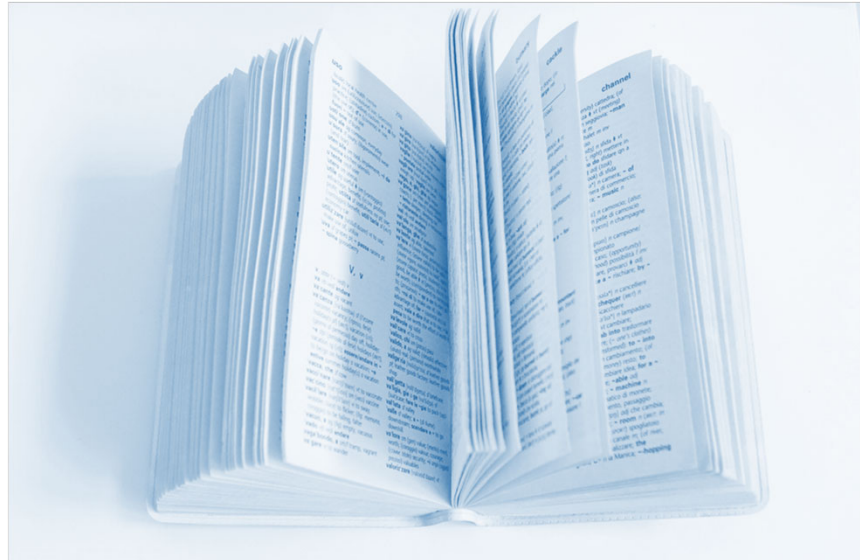
Questions?



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Key Definitions



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Title IX Sexual Harassment

Sexual harassment includes:

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 (as defined in Clery Act/VAWA)

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Title IX Sexual Harassment: Quid Pro Quo

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



- Example: Professor Jones promises his student, Jane, that he will give her an A on her midterm if she engages in sexual conduct in his office after class.

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Title IX Sexual Harassment:
“Hostile Environment”

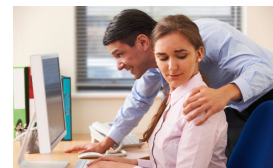
- Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access
 - Severe and pervasive and offensive
 - Denial of equal educational access

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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.



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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.

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Title IX Sexual
Harassment:
Other
Categories

- Title IX's definition of sexual harassment also includes:
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking

As defined under Clery Act/VAWA

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Sexual Assault, Dating Violence, & Stalking



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.

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Domestic Violence

Domestic Violence

A felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the victim;
- By a person with whom the victim shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
- By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
- By any other person against an adult or youth victim who is protected.

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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; and
 - Sexual coercion.

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Preventing Sexual Violence in Higher Education Act: Sexual Violence and Consent

- The PSVHEA requires that institutions adopt a policy which includes a definition of consent consistent with the Act, 110 ILCS 155/10.

- **Consent:**

- Must be freely given
- May not be inferred from lack of verbal or physical resistance, from submission resulting from the use of threat or force, from a person's manner of dress, from a person's consent to past sexual activity, or from a person's consent to engage in sexual activity with another person
- May be withdrawn at any time
- 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)

CONSENT



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Key
Definitions:
Hypothetical

- You have been assigned to investigate a formal complaint alleging that a student was sexually harassed by a faculty member's research assistant.
- 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



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Jurisdiction Under Title IX

- Institutions must respond when sexual harassment occurs **“in the institution’s education program or activity, against a person in the United States.”**

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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.



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

- LCCC examples for discussion:
 - Hotel during overnight athletic competition?
 - Local business where students are participating in work-study employment?
 - Off-campus College-sponsored guest lecture?
 - Other examples?

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**Jurisdiction:
"... in the
United States"**



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

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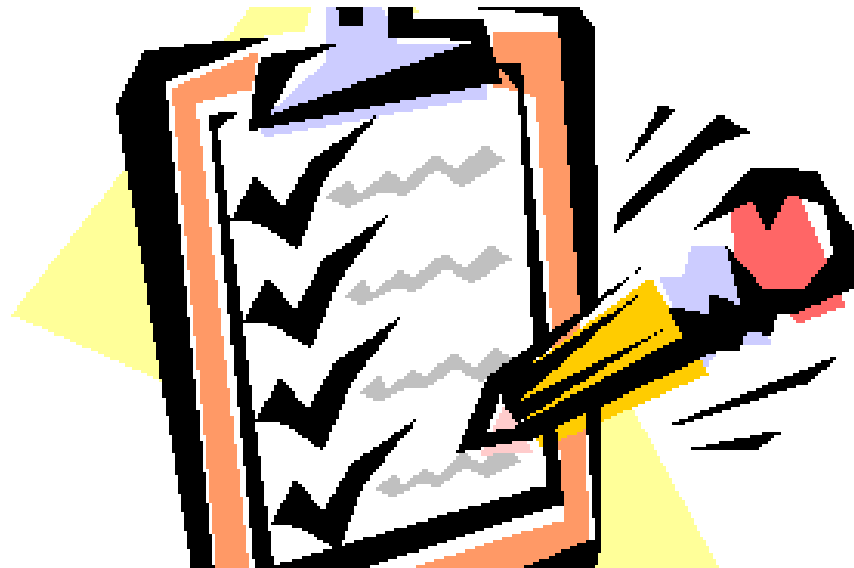
Jurisdiction: Hypothetical

- Compare:
 - A student allegedly sexually assaults another student while off-campus at an academic conference
 - A student allegedly sexually assaults another student while at a faculty member's home for a birthday party (the two students and faculty member are old friends from high school)
- Which type of alleged misconduct falls under Title IX?
- What are the College's response obligations with regard to each type of alleged misconduct?

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Policy Prohibiting Sex- Based Misconduct



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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

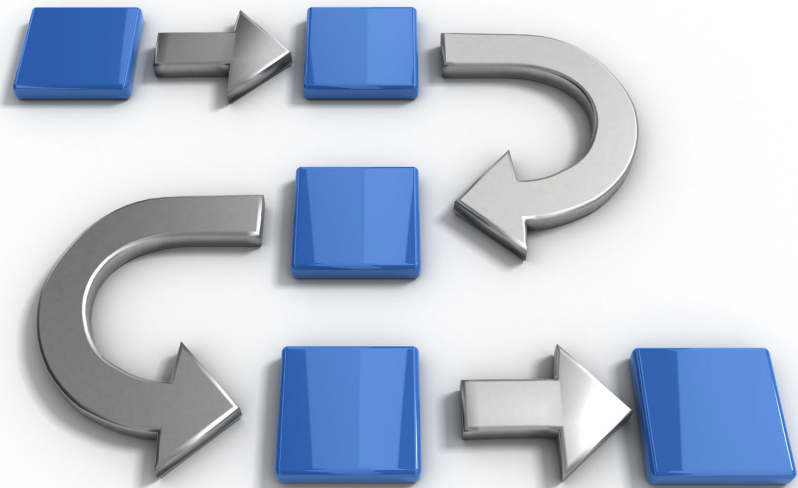
- Prohibits retaliation against any person reporting alleged sex-based misconduct or participating in an investigation of alleged sex-based misconduct
- Directs the administration to establish, maintain and publish procedures implementing the Policy.



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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
 - Call for Help (Sexual Assault Victim's Care Unit)
- Emergency Response
 - Lewis and Clark Campus Safety
- Healthcare
 - Lewis and Clark Family Health Clinic
 - 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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Questions?



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

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Student Reporting

- Reporting to Responsible Employees
 - LCCC's Responsible Employees 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.

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Employee Reporting

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

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Liability Under Title IX and Related Laws

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Standard for Liability Under Title IX

- For an educational institution receiving federal financial assistance to be held liable under Title IX, a plaintiff must demonstrate all of the following:
 1. The plaintiff was subjected to sexual harassment, as defined under Title IX;
 2. The plaintiff provided actual notice of the alleged harassment to an official with authority to institute corrective measures 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

- LCCC must respond to allegations of Title IX sexual harassment:
 - Promptly
 - In a manner that is not "clearly unreasonable in light of the known circumstances"

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Standard for Liability Under Title VII/IHRA

- Sexual Harassment by a Supervisor: Strict Liability Under the IHRA
 - An employer is strictly liable under the IHRA for sexual harassment of an employee by a supervisory employee
 - Note: This holds true even when the supervisor has no authority to affect the terms and conditions of the complainant's employment (i.e., the harasser is not the complainant's supervisor).

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Standard for Liability Under Title VII/IHRA



- Under Title VII, an employer may raise an affirmative defense when a complainant alleges sexual harassment by a supervisor without tangible employment action by proving two elements:
 - The employer exercised reasonable care to prevent and correct any harassing behavior; and
 - The complainant unreasonably failed to take advantage of the preventative or corrective opportunities.

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Standard for Liability Under Title VII/IHRA

- Sexual Harassment by a Co-Worker or a Third Party
 - If an employee is subject to a hostile environment by a co-worker (non-supervisor) or third party, the employer will be held liable if it:
 - Had knowledge *or should have had* knowledge of the harassment; and
 - Failed to take reasonable steps to remedy or end the harassment.

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Questions?



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Case Studies

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Case
Example 1:
*Milligan v.
Board of
Trustees of SIU*

Milligan v. Board of Trustees of Southern Illinois University

686 F.3d 378 (7th Cir. 2012)

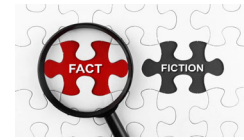
Facts:

- 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.

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*Milligan v.
Board of
Trustees of SIU*



Facts:

- One day, Milligan encountered Dr. Meyers in the hall, and Meyers told Milligan that “his hair would make him ‘a very sexy lady,’ and then giggled and squeezed Milligan's buttocks.”
- When Milligan reported the incident to his supervisor, Chris Kraft, Kraft stated “That sounds like something [Meyers] would do,” and offered to accompany Milligan to talk to someone about it. Milligan declined.

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*Milligan v.
Board of
Trustees of SIU*

Facts:

- At the time, SIU had a policy stating that any supervisor receiving a written or oral complaint must “take necessary action to resolve the complaint promptly” and consult the Affirmative Action Office to determine the appropriate course of action.

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*Milligan v.
Board of
Trustees of SIU*

Facts:

- A week later, Dr. Meyers again approached Milligan and allegedly 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 thereafter 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.” He also stated he had no disciplinary authority over Dr. Meyers but indicated he would arrange a meeting with someone who did.

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*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 Dr. Meyers who made the same comment and grabbed him near the belt line, “very close to his genital area.”
- Milligan then met with Dr. 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, and that it was “[Milligan’s] word against Meyers’.”

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*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 Dr. Meyers. The harassment included both inappropriate comments and touching.
- SIU concluded that Dr. 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.

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*Milligan v.
Board of
Trustees of SIU*

Facts:

- Dr. Meyers began trying to determine who complained, even asking Milligan a few months later if it had been him.
- SIU determined that Dr. Meyers failed to complete the sexual harassment training and banned him from campus, subject to arrest for trespassing, pending completion of a new investigation.
- Although Dr. Meyers continued to appear on campus, he was never arrested; public safety would simply escort him off campus.

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*Milligan v.
Board of
Trustees of SIU*



Facts:

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

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*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 also for retaliating against him for complaining about the harassment
- The District Court granted summary judgment in favor of SIU.

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*Milligan v.
Board of
Trustees of SIU*

Holding and Analysis:

- The Court affirmed the District Court's grant of summary judgment to SIU, 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.

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*Milligan v.
Board of
Trustees of SIU*

• Questions for Thought:

- 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 the College to reassign Milligan to the second-floor stockroom in response to receiving his report of alleged harassment by Meyers?



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*Milligan v.
Board of
Trustees of SIU*

- Key Takeaway: The standard for liability under Title VII and Title IX is high, and the Court’s analysis is fact-specific.
 - “Meyers’ treatment of Milligan—assuming it occurred as Milligan says—was despicable. If a comparable situation were to arise in the future, SIU would be well-advised to focus solely on whether the accusation is valid and not at all on the accused’s stature on campus. But as shown above, SIU responded reasonably to Milligan’s complaints about Meyers, and on this record a reasonable jury could not find SIU liable on his harassment claims.” 686 F.3d at 390.

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Case
Example 2:
*Doe v.
Columbia
College Chicago*

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.

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*Doe v.
Columbia
College Chicago*



Facts:

- Doe was given multiple opportunities to submit exculpatory evidence to Columbia during the investigation, which Doe failed to do. After the investigation was complete, Doe was given multiple opportunities to review the investigative materials and the evidence submitted by Roe.
- After the investigation was complete and before the hearing was held, Doe contacted Columbia's Title IX Coordinator to report that he had been physically and verbally harassed by Roe and her friends since the alleged incident. Doe reported that two of Roe's friends had "flipped him off," that he had been punched by someone who believed he had raped Roe, and that Roe and/or her friends had made harassing social media posts about him, referring to Doe as a "rapist" and "predator" and saying "boys like [Doe] are the reason #IneedFeminism."

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*Doe v.
Columbia
College Chicago*

Facts:

- The Title IX Coordinator requested the names of the individuals who committed the acts Doe described in the letter, 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. Doe was instructed to inform Columbia if he had any further interaction with the student.
- 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.

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*Doe v.
Columbia
College Chicago*

Procedural History:

- Doe sued the College 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 college's investigation and adjudication of Roe's sexual assault complaint.
- The District Court dismissed the suit for failure to state a claim.

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*Doe v.
Columbia
College Chicago*

Holding and Analysis:

- The Appellate Court affirmed the dismissal of Doe's Title IX claims, holding that:
 - Doe failed to sufficiently allege that the College's investigation and adjudication of the sexual assault complaint against him were affected by anti-male bias;
 - Doe failed to sufficiently allege that he was subjected to harassment on the basis of sex, as the social media posts that Doe brought to the College's attention appeared to have been motivated by a belief that Doe had raped Roe and not motivated by Doe's sex;
 - Doe failed to sufficiently allege that the College acted with deliberate indifference with regard to the alleged harassment that Doe

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*Doe v.
Columbia
College Chicago*

Holding and Analysis:

- The Appellate Court affirmed the dismissal of Doe's Title IX claims, holding that (continued):
 - Doe failed to sufficiently allege that the College's decision to suspend him was based on his decision to defend himself at the disciplinary hearing; and
 - Doe failed to sufficiently allege that the College retaliated against him by failing to discipline his alleged harassers.

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*Doe v.
Columbia
College Chicago*

• Question for Thought:

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

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*Doe v.
Columbia
College Chicago*



- Takeaways:
 - Respondents can (and do) bring Title IX claims too.
 - It is important to report *any* instance of alleged sexual harassment or retaliation that you observe or that is reported to you, regardless of the status of the reporting party.

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Case
Example 3:
*Moylan v.
McHenry
County College*

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

Facts:

- Wendy Moylan, McHenry County College'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.

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*Moylan v.
McHenry
County College*



Facts:

- The College's Assistant Vice President Human Resources initiated an investigation and ultimately determined that Moylan'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.

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*Moylan v.
McHenry
County College*

Facts:

- Three months later, the College launched a separate investigation into the use of its email system. During that investigation, the College 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 antiviolenence policies.

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*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.

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*Moylan v.
McHenry
County College*

Facts:

- HR ultimately concluded that Moylan violated the College's e-mail 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.

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*Moylan v.
McHenry
County College*

Procedural History:

- Moylan sued the College, 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 College.

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*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; and
 - Moylan could not show that other similarly situated employees were treated more fairly.

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*Moylan v.
McHenry
County College*



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

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*Moylan v.
McHenry
County College*

- Takeaways:
 - An employee's complaint is a protected activity so long as it is made in good faith, regardless of whether the complaint is ultimately found to have merit.

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Hypotheticals

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Hypothetical #1



- You are a Department Chair. One of the instructors in your Department contacts you to report that her students are calling her “honey” and “babe” 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.
 - Does the students’ alleged conduct constitute sexual harassment?
 - Do you have a duty to report the instructor’s allegations?

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Hypothetical #2

- You are a Literature professor. Gina, a student in one of your classes, tells you that another student in the class, James, asked her out and she said no. According to Gina, since that time, some of James's friends have been rude to Gina, make faces at her and have called her "stiff" and "prude."
 - Does James's conduct constitute sexual harassment?
 - Do James's friends' actions constitute sexual harassment?
 - What should you do in response to receiving Gina's report?

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Questions?



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Day 2 Agenda

- 1) Response to Reports of Sex-Based Misconduct
- 2) Grievance Process for Formal Complaints
- 3) Informal Resolution
- 4) Consolidation and Dismissal
- 5) Investigation of Formal Complaints
- 6) Live Hearings
- 7) Post-Hearing Procedures
- 8) Appeals
- 9) Conflicts of Interest and Bias
- 10) Trauma and Trauma Informed Care
- 11) Hypotheticals and Final Review

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



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College Response Process

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

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Title IX: Jurisdiction Analysis



If NO to any:

Proceed to PSVHEA analysis; check College Policy, other applicable laws

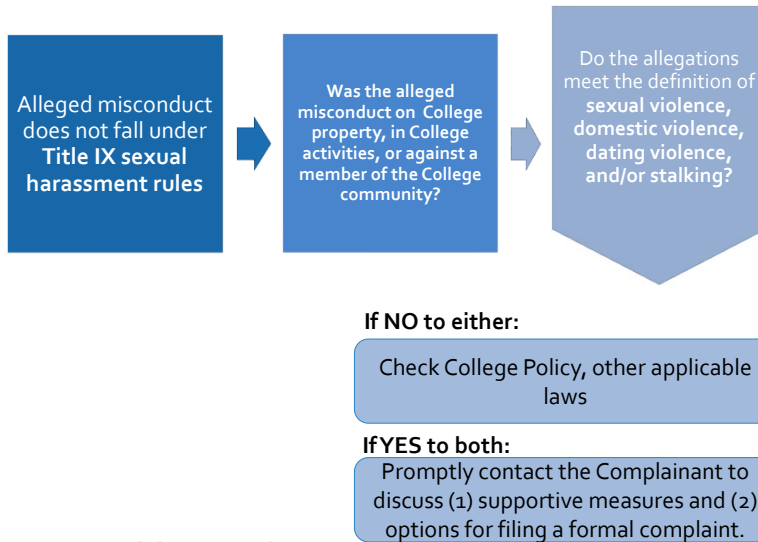
If YES to all:

Promptly contact the Complainant to discuss (1) supportive measures and (2) options for filing a formal complaint.

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Preventing Sexual Violence in Higher Education Act: Jurisdiction Analysis



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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



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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

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Supportive Measures



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

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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.)

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Supportive Measures Hypothetical

- Alex contacts you, the Title IX Coordinator, to report that another student in Alex's statistics course, Sam, made inappropriate sexual remarks in a private Zoom chat during a virtual lecture. Sam also allegedly messaged Alex on Instagram after class, and said, "Can't wait till we are back on campus... I'll have a seat saved for you, on my lap."
 - How should you respond to Alex?
 - Should you move Sam into a different class section?

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College Response Process

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

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Grievance Process for Formal Complaints



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Filing of Formal Complaint

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).

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Formal Complaint Hypothetical



A student graduates in June. In mid-July, the former student contacts the Title IX Coordinator to report that he was sexually harassed by a professor the previous February. The former student indicates that he would like to file a formal complaint.

- Can the former student file a formal complaint?
- What if the former student was just hired by the College to serve as an assistant basketball coach?

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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 up to the 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
 - 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



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Informal Resolution

- Fully discretionary: 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
- Not permitted in allegations of employee sexual misconduct toward a student

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Informal Resolution

- May not be required as condition of:
 - Enrollment/continuing enrollment
 - Employment or continuing employment
 - Enjoyment of any right
 - Waiver of the right to a formal investigation/adjudication
- Party may withdraw at any time prior to a resolution
 - Withdrawal triggers resumption of grievance process.

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Informal Resolution Documents

- Notice regarding informal resolution (to be enclosed with notice of allegations, where applicable)
- Consent to participate in informal resolution
- Resolution documentation/agreement template

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Consolidation and Dismissal of Formal Complaints



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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

- Under the Title IX Regulations, 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.

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Questions?



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Investigation of
Formal
Complaints



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Appointment of Investigator

- The Title IX Coordinator may serve as the Investigator or may appoint another individual or individuals to serve as the Investigator(s).
- Note staffing limitations:
 - The Investigator should not be in a supervisory position over the Decision-Maker or Appellate Decision-Maker.

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Investigator's Role

- The Investigator is not responsible for making a determination regarding responsibility
- The Investigator's role is to gather relevant evidence and information concerning the complaint allegations that will ultimately be considered by a separate Decision-Maker who is responsible for making the determination regarding responsibility.



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Required Notices During Investigation Phase

- Notice of allegations (with enclosed notice regarding informal resolution)
- Notice of investigative interview/meeting
- Notice of investigation evidence and right to submit response
- Notice of hearing, final investigation report and right to submit response
- Notice of dismissal, where applicable

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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
 - 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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Preparing for Investigatory Interviews

- In planning for investigatory interviews, make sure to thoroughly review the allegations, relevant policies/procedures, relevant records, and any documentary evidence received so far.
- Check for employee notice or union representation requirements, where applicable.
- Schedule meetings promptly
 - Notice of investigatory interview/meeting

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Preparing for Investigatory Interviews

- Plan your questions, considering:
 - Specific parts of the relevant definition(s) of sexual harassment and other misconduct
 - How to ask about specific allegations objectively and equitably
 - What additional facts might be helpful
 - “Point me in the right direction” questions
- Plan how to begin and end the interview

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Role of Advisor During Investigatory Interviews



- Both parties may select an advisor of their choosing
 - May, but need not be, an attorney
- Limitations on the role of the advisor are permitted.
 - Example: the advisor’s role is to provide support, guidance and advice; the advisor may not answer on behalf of the party.
- Parameters for both parties’ advisors must be the same.

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Investigatory Interview Hypothetical

- You are interviewing Jill, an employee who has been accused of sexual harassment. Jill brought her attorney Jack as her advisor, and Jack is making the interview difficult.
- What should you do if Jack:
 - repeatedly answers for Jill or “clarifies” her testimony?
 - objects to most of your questions and tells Jill she doesn’t have to answer?
 - demands to see evidence or have questions answered before Jill answers?

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Tips for Investigatory Interviews: 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.”



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Tips for Investigatory Interviews: Questioning

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

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Tips for Investigatory Interviews: Questioning

- The interviewee must fully understand the question to give a reliable answer
- If the interviewee asks you to repeat or rephrase a question, you should do so
- Give the interviewee time to think and respond before asking the next question



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Tips for Investigatory Interviews: Questioning

- Complete a line of questioning before moving on to questioning about a different issue
- When possible, clarify issues on which there is conflicting testimony before concluding the interview

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Tips for Investigations: Questioning

- Allow the interviewee to respond to each factual allegation
- Do not hesitate to ask follow-up questions
- Ask whether any witnesses can confirm the interviewee's testimony
- Obtain names and, if necessary, contact information for witnesses



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Tips for Investigative Interviews: 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's 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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Tips for Investigative Interviews: 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 they were with the Respondent at a restaurant immediately after the game; or
 - The testimony from a waiter at the restaurant stating he served the Respondent at the restaurant immediately after the game?

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Tips for Investigatory Interviews: Employee Respondents

- As applicable, include the right to union representation in the notice and check other CBA requirements
- Request that they document their 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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Tips for Investigatory Interviews: 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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Tips for Investigatory Interviews: Other Best Practices

- 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

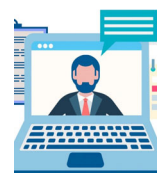
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Investigatory Interview Hypothetical

- Bonnie alleges that her coworker Clyde has been using his work laptop to cyberstalk her. Bonnie also reported the stalking to local law enforcement, with whom you have coordinated the timing of your interview of Clyde.
- Clyde comes to the interview but refuses to answer some questions, asserting his Fifth Amendment right against self-incrimination.
 - How should you respond?

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Access to Evidence

- At the conclusion of the investigation and prior to the completion of the investigation report, the Investigator must send both parties a copy of all relevant evidence.
 - Be mindful of FERPA and student privacy considerations.
 - Consider whether redactions are necessary
 - Notify parties of parameters/limitations on re-disclosure of records and evidence.
- The parties will have 10 business days to submit a written response to the evidence, which the Investigator must consider prior to completion of the investigation report.

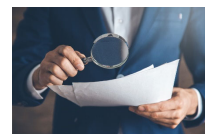
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Preparation of Investigation Report

- After receiving/reviewing the parties written responses, the Investigator must create an investigative report that fairly summarizes the relevant evidence, which the Investigator will forward to the Title IX Coordinator.
 - RS template investigation report
- Upon receipt of the investigator's report, the Title IX Coordinator will schedule a hearing.

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Parties' Response to Investigation Report

- At least 10 business days prior to the hearing, the Title IX Coordinator will:
 - Provide both parties with written notice of the hearing date, time, location, participants and purpose of the hearing;
 - 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.

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Investigation Process: Hypothetical

- You are investigating allegations that Jane's professor Mr. Jones started giving her lower grades on her assignments after she turned down his requests to take her on a date.
- Are either of the following relevant?
 - Jane's sexual orientation?
 - Jane's relationship with a teacher two years ago?
- When sharing evidence, should you redact:
 - Jane's grades in Mr. Jones' class or other classes?
 - Testimony from Jane's social worker?
 - The name of Katy, another student witness?
 - Mr. Jones' disciplinary history?

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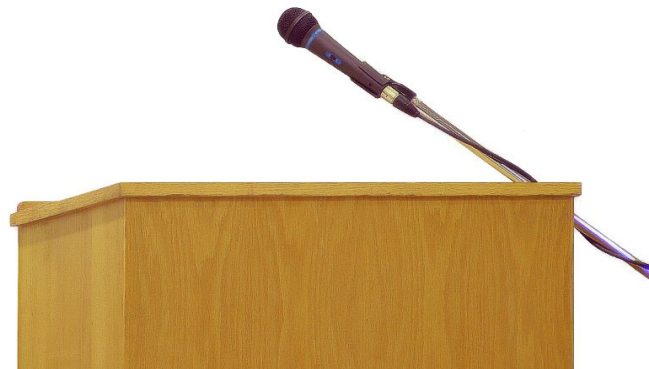
Questions?



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Live Hearings



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Appointment of Hearing Officer

- The Title IX Coordinator is responsible for appointing a Hearing Officer (or Hearing Panel) to preside over the live hearing.
- A party may request a substitution if the participation of the Hearing Officer poses a conflict of interest.
 - Must contact the Title IX Coordinator within three (3) business days after the party's receipt of the hearing notice to make such a request.

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Hearing Process

- Upon request, parties can be separated – requires appropriate technology
 - Must be requested at least **3 business days prior to hearing**
 - Must allow parties to simultaneously see and hear each other



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Technology

- Technology considerations:
 - Parties must be able to hear and see each other.
 - Parties and Hearing Officer must be able to view evidence being presented.
 - Consider screen-sharing and/or sending documents electronically in advance.
 - Parties should have ability to communicate with their respective advisors in private.
 - Consider “breakout rooms.”

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Advisors

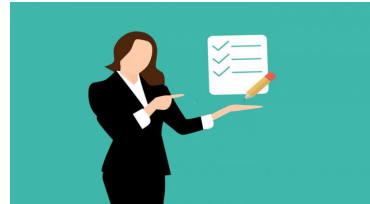
- Each party must be accompanied by an advisor who will be permitted to cross-examine the opposing party and any witnesses.
- If a party does not have an advisor available to conduct cross-examination, the College (Title IX Coordinator) must appoint one.
 - 3 business days’ notice required

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Hearing Officer's Role

- 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

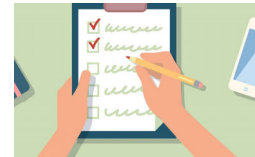
- Ensure hearing procedures are followed and applied consistently and equitably.
- Determine responsibility (and sanctions, if appropriate) using preponderance of the evidence standard.
- Issue written determination to both parties simultaneously, with information regarding appeal rights.

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Hearing Officer's Pre-Hearing Checklist

- 1) Did the Title IX Coordinator issue written notice of hearing to both parties?
- 2) Was a copy of the Investigation Report enclosed with the hearing notice or otherwise provided to the parties at least ten (10) business days prior to the hearing?



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Hearing Officer's Pre-Hearing Checklist

- 3) Did either party request a substitution of the hearing officer?
 - If yes, what was the outcome of that request? Is the decision documented in writing?
- 4) Did either party request that the hearing be conducted virtually or with the parties in separate rooms?
 - If yes, confer with Title IX Coordinator to ensure proper arrangements have been made.

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Hearing Officer's Pre-Hearing Checklist

5) Do both parties have an advisor to conduct cross-examination during the hearing?

- If a party requested that an advisor be appointed to conduct cross-examination, confirm that the appointment has occurred.



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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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Convening the Hearing



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Issues for Hearing

- Hearing Officer's role is to determine:
 - Whether facts presented establish that the alleged conduct occurred;
 - Whether that conduct constitutes Title IX sexual harassment, sexual violence, domestic violence, dating violence or stalking; and
 - If the answers to the above are "yes," which sanctions (if any) and remedies are appropriate.
- The evidence presented must be **relevant** to one or more of the issues above.

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Hearing Participants

- Hearing participants should include:
 - Hearing Officer
 - Complainant
 - Complainant's advisor
 - Respondent
 - Respondent's advisor
 - Title IX Coordinator
 - Investigator
 - Witnesses, if requested to attend by either party
 - Court reporter, if using one

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Hearing Procedures

1) Go "on the record"



- The Title IX Regulations require that an institution create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.
- 2) Introduction by Hearing Officer
 - 3) Identification of individuals present

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Hearing Procedures

4) Preliminary review of hearing procedures by Hearing Officer

- Explain how the hearing will progress from start to finish.
- Review expectations regarding behavior and being respectful of all individuals present.
- Review role of the advisor and expectations regarding advisors' conduct, and remind parties that they may not cross-examine each other directly.
- Explain procedures for presenting documents – ensure that copies are provided to the Hearing Officer and opposing party for review.
- Remind parties that only relevant questions may be asked, and explain process for how relevancy determinations will be made (i.e., the answering party/witness should pause before answering each question so the Hearing Officer may interject if question is deemed not relevant).

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Hearing Procedures



5) Complainant's presentation

- "Direct" testimony by Complainant
- Cross-examination of Complainant by Respondent's advisor
- "Direct" testimony by Complainant's invited witnesses
- Cross-examination of Complainant's witnesses by Respondent's advisor

6) Respondent's presentation

- "Direct" testimony by Respondent
- Cross-examination of Respondent by Complainant's advisor
- "Direct" testimony by Respondent's invited witnesses
- Cross-examination of Respondent's witnesses by Complainant's advisor

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Hearing Procedures

- 7) Questioning by Hearing Officer
 - May occur after each party or witness testifies, or at the end after all parties and witnesses have testified.
- 8) Brief closing statements by parties
 - Complainant's closing statement
 - Respondent's closing statement
- 9) Conclude the hearing and go "off the record."

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Considering Evidence

- Relevant documents may include, but are not limited to:
 - The formal complaint
 - The initial written notice of the allegations
 - Written statement(s) and responses by the parties and/or witnesses
 - The investigation report
 - Police reports, photographs and/or video footage (if any)
 - Prior discipline records
 - Only relevant to issue of appropriate sanction



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Cross-Examination

- Advisors are permitted to ask opposing party and witnesses **relevant** questions and follow-up questions.
 - Relevance determined by Hearing Officer.

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Rape Shield Protections

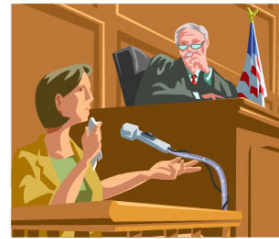
- Questions about the Complainant's sexual pre-disposition or prior sexual behavior are not permitted unless:
 - Offered to prove that someone other than the Respondent committed the alleged conduct; or
 - The questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

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Live Hearing Q&A

- Q: May the parties' advisors cross-examine the Investigator about their investigation report or the investigation process?



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Live Hearing Q&A

- Q: May the parties' advisors cross-examine the Investigator about their investigation report or the investigation process?
 - A: Yes, but this questioning is subject to the same limitations as other cross-examination questioning.

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Live Hearing Q&A

- Q: Is the College required to ensure that any witnesses interviewed during the investigation process appear at the live hearing?

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Live Hearing Q&A



- Q: Is the College required to ensure that any witnesses interviewed during the investigation process appear at the live hearing?
 - A: Generally, no. Colleges do not have subpoena power to compel parties and witnesses to attend hearing.

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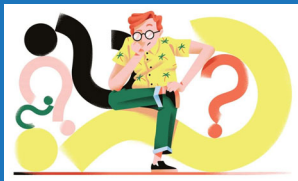
Live Hearing Hypotheticals

- 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 Hypotheticals



- 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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Live Hearing Hypotheticals

- 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?

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Post-Hearing Procedure



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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/or evidence presented establish that the alleged conduct occurred?

Things to Consider:

Admission or denial by the Respondent	Witness corroboration
Physical evidence (i.e. photographs, video footage)	Prior consistent (or inconsistent) statements by parties and witnesses
Post-incident conduct of the 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?
- Title IX sexual harassment includes:
 - 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 the Clery Act/VAWA)
 - Sexual violence includes physical sexual acts attempted or perpetrated against a person's will or when a person is incapable of giving consent, including but not limited to rape, sexual assault, sexual battery, sexual abuse and sexual coercion.

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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

- Goals in determining appropriate sanctions:
 - Educate the Respondent on the impact of their behavior
 - Prevent future inappropriate behavior by the Respondent
 - Deter other individuals from engaging in similar misconduct
 - Maintain a safe campus community

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Determining Appropriate Sanctions

- Aim to strike a balance between consistency and individuality.
 - Apply a consistent range of sanctions for a given violation, but take into account each case's unique circumstances.

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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 (i.e. Respondent's intent/motivation, Respondent's willingness to accept responsibility for their actions)



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Determining Appropriate Sanctions: Students

- A combination of administrative sanctions (i.e. warning, probation or suspension) and educational sanctions (i.e. participation in sexual harassment training) is permissible.
- Other possible sanctions include, but are not limited to:
 - Limitations on campus movement and participation in campus activities
 - Parameters around participation in extra-curricular activities
 - Ongoing monitoring

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Determining Appropriate Sanctions: Employees

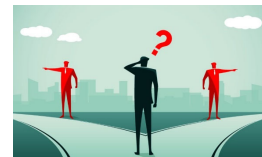
- Employee sanctions may include a warning, written reprimand, suspension, or recommendation for termination, as well as non-disciplinary sanctions such as training or counseling.
- It is important to review limitations and requirements under collective bargaining agreements and/or employee policies and procedures.

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Determining Remedies

- In addition to determining appropriate sanctions, the Hearing Officer must also determine whether any remedies designed to restore or preserve equal access to the college's education program or activity will be afforded to the Complainant.



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Determining Remedies

- Such remedies may include the same “supportive measures” that were afforded to the Complainant during the investigation process.
- Unlike supportive measures, however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent.

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Determining Remedies

- Examples of potential remedies:
 - 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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Implementation of Sanctions and Remedies

- The Title IX Coordinator is responsible for coordinating the effective implementation of any sanctions and/or remedies.

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Written Determination

- Must be issued to both parties simultaneously within 7 business days of decision being reached.
- Consult Sex-Based Misconduct Procedures for any requirements regarding the 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.



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Required Components of Written Determination

- Identification of allegations
 - See initial written notice of allegations and Investigation Report.
- Description of procedural steps taken
 - Should be included in Investigation Report; if not, request information from Title IX Coordinator.

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Required Components of Written Determination

- Findings of fact supporting determination
 - In most cases, this can be a brief 1-2 paragraph summary.
- Conclusions regarding application of conduct standards
 - General finding of whether the Respondent engaged in conduct prohibited by College's Sex-Based Misconduct Policy.



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Required Components of Written Determination

- Statement & rationale for result of each allegation, including:
 - Determination of responsibility
 - You must conclude whether each specific alleged incident occurred.
 - However, you may consider all alleged incidents as a whole when determining severity, pervasiveness and offensiveness and when determining whether the Complainant was deprived equal educational access.
 - Disciplinary sanctions being imposed
 - Disciplinary sanctions must be identified in both the Complainant's and Respondent's letter.
 - Whether any remedies will be provided to the Complainant
 - Need not identify the specific remedies in the Respondent's letter, unless such remedies involve the Respondent (i.e. a no-contact directive).

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Required Components of Written Determination

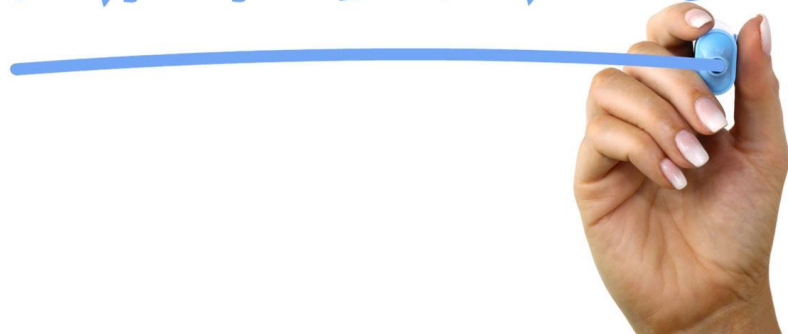
- Procedures and permissible bases for Complainant and Respondent to appeal

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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

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Permissible Grounds for Appeal

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



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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

- 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.

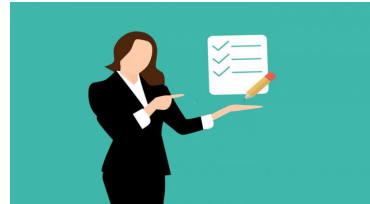


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Appellate Decision-Maker's Role

- 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.



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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 (e.g. prior discipline records of Respondent, new evidence submitted by appealing party, documentation of past interactions between parties and Title IX personnel).

Tip: You 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.
- Title IX does not delineate a timeframe for submission of the written statements.
 - RS notice of appeal directs parties to submit written statements within five (5) business days after their receipt of the notice.

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Possible Outcomes of Appeal



Affirm



Reverse



Modify



Dismiss

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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.



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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 affects 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

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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



Robbins Schwartz Appeal Determination Letter

Robbins Schwartz

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Appeal Hypothetical

- 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?

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Appeal Hypothetical



- The Title IX Coordinator issues the notice of appeal to both parties via email and regular mail on Monday, November 30. The parties' deadline to submit their written statements to you, the Appellate Decision-Maker, is Monday, December 7. On Wednesday, December 9, you return to your office for the first time in three weeks and find the Respondent's handwritten statement sitting on your desk. The statement is not dated.
 - Should you accept the Respondent's written statement?

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Appeal Hypothetical

- 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?

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Appeal Hypothetical

- 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?

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Questions?



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Conflicts of
Interest & Bias



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Conflicts of Interest & Bias

- The Title IX Regulations provide that any individual designated by an institution 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

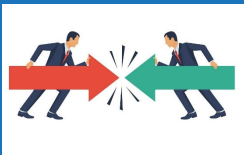
- Key question:
 - Does the Title IX team member's prior or existing relationship with or knowledge of a party prevent the team member from serving impartially?



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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.

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How to Address Implicit Bias

- More deliberate or conscious thinking
 - Allow time to fully think through a scenario before coming to a decision / conclusion
- Create and follow checklists
 - Procedural requirements
 - Allegations to be proven / disproven
- Document treatment of both parties and ensure it remains equitable
 - 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



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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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Questions?



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Trauma and Trauma-Informed Care

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Definition of Trauma

- Trauma in the typical medical sense refers to any injury. The term also covers the sort of hurt that alters a persons view of the world (e.g. witnessing a catastrophic event, enduring ongoing abuse at home).

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Definition of Trauma



- The 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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Protective Factors

- Those who are affected by trauma usually heal over time. Protective factors include individual resilience and strong emotional connections to safe and nonjudgmental people.
- A strong and supportive family can go far to mitigate the negative impact of the event and head off long-term traumatic stress.

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Cultural Issues

- Culture and religion, as well as racial identity, ethnicity, and socioeconomic status, can dictate what is considered shameful or taboo, how one expresses trauma, and on whom one can count for protection or safety.
- These factors can also influence the effectiveness of any given healing strategy.
- Thus, cultural awareness is essential to understanding a person's experience with trauma.

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Trauma Prevalence

- According to the National Council for Behavioral Health, up to 70% of adults in the U.S., or 223.4 million people, have experienced some type of traumatic event at least once in their lives.
 - See "How to Manage Trauma," available at: <https://www.thenationalcouncil.org/wp-content/uploads/2013/05/Trauma-infographic.pdf?dof=375ateTbd56>.
- These numbers represent the general population. Research demonstrates that members of the LGBTQ community experience even higher rates of trauma from bullying, feeling stigmatized by their family or religion, hate crimes, and exclusionary laws and policies.
 - See "Research Roundup: Traumatic Events and the LGBTQ Community," American Psychological Association, available at: <https://www.apaservices.org/practice/ce/expert/traumatic-events-lgbtq>.

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Common Causes of Trauma

- Experiencing or witnessing a physical or sexual assault
- Witnessing a threat or injury to a close family member or friend
- Experiencing a natural disaster
- Experiencing the death of a close family member or friend due to violence
- Being involved in an accident or fire

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Trauma on College Campuses



- As in most communities, campuses are subject to the full range of unlawful behavior, with sexual assault right behind burglary and car theft as the most common crimes.
- One comprehensive study found that 85% of surveyed college students had experienced at least one traumatic event in their lives, and one in five students experiences a traumatic event over a 2 month period in college.
 - See Frazier *et al.*, "Traumatic Events Among Undergraduate Students: Prevalence and Associated Symptoms," *Journal of Counseling Psychology* 56(3), 450-60 (2009).
- Given the trauma rates, one must conclude that American campuses serve thousands of individuals dealing with traumatic stress every day.

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Fight-Flight-Freeze

- Threats (whether real or imagined) activate a range of acute stress responses by the body, known as fight, flight, or freeze.
- The perceived intensity of the threat determines whether a person is likely to fight back, run away, or freeze out of terror.

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Fight-Flight-Freeze

- In the limbic system, whose primary function is self-preservation, more than a dozen structures help manage emotion, memory, and behavior.
- Two of them bear special attention.
 - The hippocampus keeps a person oriented to his or her environment and the amygdala above it processes a person's emotional reactions.
 - When a person is overwhelmed with fear, the amygdala can interfere with the hippocampus and cause memories of the event to be fragmented, out of order, and charged with terror.

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The Neurobiology of Trauma



- Trauma can lead to dysregulation in the brain, particularly in the nervous system and the limbic system.

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The Neurobiology of Trauma

- Effects of trauma on the brain:
 - Any trauma during birth to age 25 has the potential to disrupt typical neurodevelopmental processes and contribute to long-term consequences.
 - Chronic abuse and multiple traumas generally have a greater neurobiological impact.
 - Prolonged exposure to trauma leads to exposure to glucocorticoids (adrenal steroids) and elevated levels of catecholamines (adrenaline, serotonin, dopamine) which can result in impaired cognition, impaired emotional and behavioral regulation, and potential autoimmune disorders.
 - Permanence/impermanence of the damage is debatable. Some evidence suggests that the neurobiological effects of trauma are irreversible, while other studies suggest that neurogenesis is possible.

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Trauma Symptoms

» Common symptoms of trauma:

Memory lapses	Anxiety	Insomnia
Substance abuse	Mood swings	Irritability
Rage	Flashbacks	Denial
Hypervigilance	Passivity	Depression
Eating issues	Persistent fear	Obsessive behavior
Hurting oneself	Excessive risk taking	Inability to trust
Feeling shut down	Isolating oneself	Overworking

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Trauma Symptoms

- Sexual assault sets off a period of distress for almost all survivors. It can last from several days to several weeks. During that time, survivors cycle through a mix of intense feelings, often consisting of anxiety, anger, shame, stress, and fear. They often seem tense and distracted, confused and forgetful. They also may be physically sore or injured, nauseated, and suffering genital disturbances. Many feel isolated and alone with their pain. Education and aspiration can seem unimportant.
- Over time and with support from family, friends, community, and professionals, assault survivors can recover. Acceptance and validation for disclosing what happened are vital to reducing the sense of isolation and anxiety that an assault commonly produces. Eventually, personal coping strategies kick in. Through a process of grieving and assimilation, the assault becomes a painful part of the person's life, but one that he or she can live with.

SYMPTOMS



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PTSD

- If acute symptoms persist beyond a few weeks, survivors are at risk for developing the debilitating anxiety condition known as Post-Traumatic Stress Disorder, or PTSD.
- Three categories of PTSD symptoms:
 - Re-experiencing: reliving the event, often through flashbacks or nightmares;
 - Avoidance: escaping situations that trigger memories, which may cause the person to withdraw socially, leading to feeling emotionally dead and developing negative ways of thinking about oneself and others; and
 - Hyperarousal: a physiological condition marked by feeling extra alert to danger, often accompanied by sleep disturbances.

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PTSD

- Reminders of a traumatic event can produce hormones that disrupt the limbic system, creating fear networks that keep a person feeling almost perpetually threatened.
- Ordinary things can set off strong reactions that would seem inappropriate to the situation and yet they make sense in the context of trauma.

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Triggers

- Triggers = sensory stimuli connected with a person's trauma

- Common triggers:

Sense of being ignored

Angry facial expressions
Bright lights
Completing forms
Darkness
Impatient authorities
Long waits for services
Loud or abrupt noises
Odors
Signs and images
Songs

Aggressive behavior

Anniversaries
Colors
Crowds
Disorder or chaos
Lack of choices or options
Lost privileges
Not being believed
Requests to repeat one's story
Small spaces
Tone of voice.



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Dissociation

- Dissociation = “overload response” marked by a lack of connection in a person’s thoughts, memory and sense of identity.
- Even years after the traumatic event or circumstances have ceased, certain sights, sounds, smells, touches, and even tastes can set off, or trigger, a cascade of unwanted memories and feelings.
- When they do, the survivor might react with an adrenalin-charged fight-flight-or-freeze response or by dissociating.
- Dissociation separates a person emotionally from the trauma and, sometimes, from the current setting.

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Dissociation

- Signs of distress or dissociation can take a range of forms, including:
 - Emotional: anger or rage, anxiety, fear, helplessness, powerlessness, sudden sadness, suspicion, or worry;
 - Physical: headaches, holding one’s breath, increased respiration, light-headedness, nausea, rapid heart rate, rise in blood pressure, stomachache, sweating, or trembling;
 - Behavioral: argumentative, cringing or flinching, crying, restlessness, spaced out, vacant stare, startled response, stiffness or tension, uncooperativeness, or unresponsiveness; and
 - Cognitive: forgetfulness, fragmented reaction, inability to relate history, inability to decide, inability to focus or concentrate, or inability to speak or respond.

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Trauma-Informed Care



- In trauma-informed care all components of the service system are evaluated, in the light of understanding the role violence plays in the lives of survivors. This understanding is then used to accommodate the unique needs of trauma survivors. Services are delivered in a way that avoids unintended re-traumatization and facilitates survivor participation in decision-making.
- Trauma-informed care is grounded in the person's history and entire context of her/his experience and emphasizes choice, empowerment, and cultural competence.

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Trauma-Informed Care

- Key elements of trauma-informed care:
 - Collaboration
 - Using culturally-relevant approaches
 - Understanding a person's whole context
 - Establishing trust and safety
 - Instilling trauma-knowledge at all levels of systems
 - Using strengths-based approaches

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Collaboration

- Collaboration with the victim and other victim service professionals is an essential element of trauma-informed care.
- Collaboration with victims allows for a sharing of power and decision-making that can help to instill a sense of empowerment in the individual.
- Collaboration with other victim service professionals can strengthen the services a victim receives, as shared philosophies, practices, and information can help create an almost seamless approach to service delivery which lessens the potential for revictimization of the individual.

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Culturally Relevant Approaches



- Implementation of culturally-relevant approaches ensures that practices meet the needs of survivors of all cultures.
- Culturally-relevant approaches recognize the cultural context of an individual and aim to provide services that are sensitive and specific to each person's needs.
- Culturally-relevant approaches are not based on assumptions, but rather by learning and valuing the unique needs of an individual.

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Understanding the Person as a Whole

- Understanding a person as a whole is critical to understanding the many aspects that influence and affect a person's experience of sexual violence.
- Viewing the person as a whole assists service professionals in gaining an understanding of the context of the behavior and coping strategies that a victim may use.
- The context of an individual may include: familial, social, cultural, and geographical, to name a few.

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Building Trust and Safety

- Sexual violence can violate a person's sense of trust and safety. Therefore, when interacting with survivors, it is important to work to rebuild this trust and create a sense of safety. Building safety and trust helps to avoid re-traumatization and revictimization.

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Building Trust and Safety

- Building safety may involve:
 - Ensuring the survivor feels safe in his or her current environment;
 - Acting with an awareness of potential triggers;
 - Checking in to see if the survivor has adequate support and resources, and helping to provide connections to new resources; and
 - Respecting privacy and confidentiality.



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Building Trust and Safety

- Building trust may involve:
 - Checking in with the survivor to clarify his or her needs;
 - Transparency;
 - Consistent and reliable communication and actions; and
 - Collaborative decision-making

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Instilling Trauma Knowledge at All Systems

- Incorporating an understanding of trauma at all system levels is integral to ensuring that trauma-informed care exists at the core of an organization's operation.
- Complete integration of trauma-knowledge ensures that everyone a survivor may encounter in their interactions with your organization will be competent in professionally and thoughtfully meeting that survivor's needs.

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Instilling Trauma Knowledge at all Systems

- Instilling trauma-knowledge at all system levels may involve:
 - Altering staff perspectives and understanding of how various symptoms and behaviors represent adaptations to traumatic experiences;
 - Ongoing staff training, consultation, and supervision; and
 - Regular evaluation and modification of organizational practices to incorporate trauma-informed care principles.

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Questions?



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Hypotheticals
and Final
Review



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Hypothetical 1

- A student, Robin, comes to you to report that one of your colleagues in the Student Services office gave Robin a hug unexpectedly at an off-campus College-sponsored event a month ago. Robin says that, a week later, the colleague asked for Robin's cell phone number. Although Robin said no, the colleague was able to find the number and sent Robin a text saying, "Hey, dinner this weekend?"
 - You have known this colleague for years and the two of you are very good friends. Should you approach the colleague and ask whether Robin's allegations are true?
 - If not, how should you respond to Robin's report?

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Hypothetical 1

- Robin ends up filing a formal Title IX sexual harassment complaint against the colleague.
 - Can the Title IX Coordinator offer the parties the option of participating in informal resolution?
 - Can you serve as the appointed Hearing Officer for this case?

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Hypothetical 2

- You overhear a coach telling one his student athletes that she reminds him of his favorite Hollywood actress. You ask the student about it, and she says that the coach has told her this before. She also tells you that the coach refers to her by the actress's name and calls her "Doll" when she plays well in a game. The student says she loves 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.
 - What should you do with this information?

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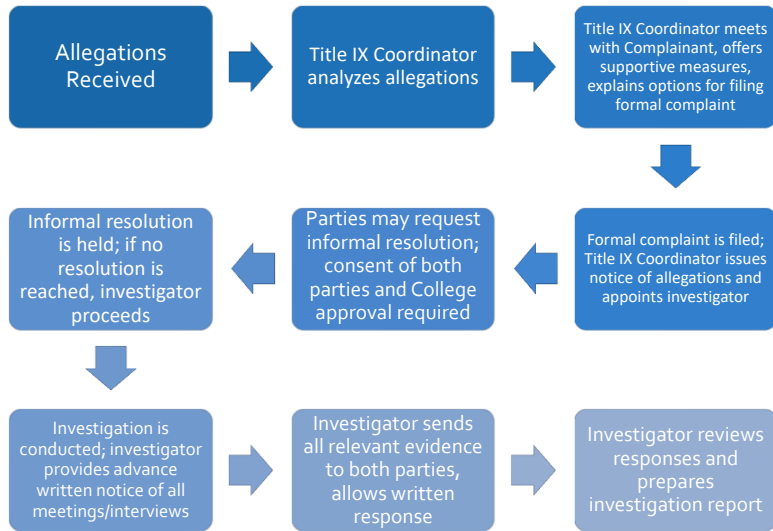
Hypothetical 3

- You just started working with Joe, a security officer. You observe that Joe enjoys joking and "horsing around" with his male coworkers. This horseplay includes slapping his male coworkers on the butt with an "atta boy" for a job well done, just as he did with his football teammates 25 years ago. Joe is a perfect gentleman to his female colleagues and tries not to display this behavior in front of them.
 - Does Joe's conduct constitute sexual harassment?
 - What, if anything, should you do about Joe's behavior?

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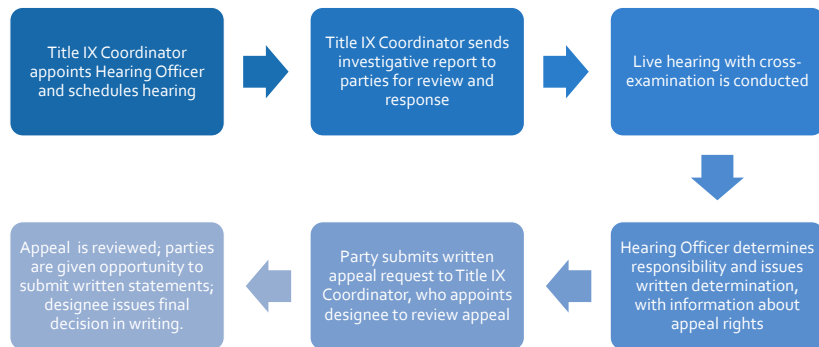
Final Review of Grievance Process (Pre-Hearing)



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Final Review of Grievance Process (Hearing + Appeals)



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Prior to 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.

RECENT PUBLICATIONS

"Disabled Athlete Can't Support ADA Claims," *Chicago Daily Law Bulletin* (2018)

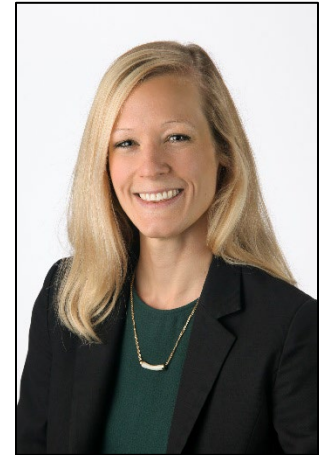
RECENT PRESENTATIONS

Legislative Update: A Review of New (and Proposed) Laws Affecting Illinois Community Colleges' Risk Management Practices, Illinois Community College Chief Financial Officers Fall Conference (October 2019)

A Student's "Right" to a College Education: Due Process Rights in Academic and Non-Academic Discipline, Illinois Community College Chief Student Services Officers' Summer Meeting (June 2019)

Updates and Recent Developments out of the U.S. Department of Education, Chicago Bar Association Education Law Committee Spring Seminar (March 2019)

Legal Hot Topics for Nursing Program Administrators and Faculty, Illinois Organization of Associate Degree Nursing (March 2019)



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Prior to joining Robbins Schwartz, Michelle worked as an attorney for Waukegan Public Schools and Chicago Public Schools, focusing in special education. She has experience counseling IEP teams and school administrators, representing districts in complex due process hearings and developing policies and procedures for school districts. Prior to starting law school, Michelle was a Middle School Language Arts Teacher in Los Angeles, CA.

RECENT PUBLICATIONS

"DeVos Rollbacks Could Hit Schools Hard," *Chicago Daily Law Bulletin* (2017)

RECENT PRESENTATIONS

Risk Assessments, Threat Assessments and the Impact on Students with Disabilities, Illinois Alliance of Administrators of Special Education Fall Conference (October 2019)

Escalating Student Behavior and Safety Concerns: Legal Options and Considerations, Illinois Alliance of Administrators of Special Education Winter Conference (February 2019)

Student Bullying Legal Framework & Recommended Practices, In-Service (August 2018)



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