



Sexual Harassment and
Title IX Compliance Report (85-608 Report)

September 15, 2021

Submitted by Kathy Ault, Title IX
Coordinator

As required by State of Nebraska statute 85-608, Western Nebraska Community College is submitting the mandatory Sexual Harassment and Title IX Compliance Report for the year 2021.

Western Nebraska Community College participated in several Title IX training opportunities to better understand the new Title IX regulation that went into effect on August 14, 2020. From May 6, 2020 through July 15, 2020, WNCC staff reworked and updated our Title IX policy and procedure to conform with the new regulation. Additionally, we trained advisors, investigators, decision makers, hearing officers. Also, faculty, staff and students were trained on the new policy and procedure.

Information for the 2021 report is as follows:

(a) Results of any campus climate survey related to sexual harassment.

- i. At this time, WNCC has not conducted a campus climate survey specifically related to sexual harassment.

(b) Information related to the training provided to Title IX coordinators, investigators, and decisionmakers regarding sexual harassment. Western Nebraska Community College provided the following training (all training documents are attached):

- i. Title IX Coordinator and Administrator Training Level Two – Pressures, Politics, Sanctions, Minors & MOUs 6/2019
- ii. Title IX Coordinator and Administrator Training Level Three – Compliance & Case Management 6/2019
- iii. Civil Rights Investigator Training Level Two 11/2019 and 3/2020
- iv. Title IX: The Department of Education’s Final Rule on Sexual Harassment 5/2020
- v. Title IX Hearing Officer and Decision-Maker Training 7/2020
- vi. Advisor Training 8/2020
- vii. Title IX Training 8/2020 – Presented to all staff and faculty
- viii. Clery Act Training 1/2021 – Presented to all staff and faculty
- ix. Rational Writing Course 5/2021
- x. Civil Rights Investigator Four Training 7/2021
- xi. Title IX Refresher 8/2021 – Presented to all staff and faculty

(c) Any policies, initiatives, or grievance procedures the postsecondary institution has adopted to address sexual harassment. WNCC updated the Sexual Harassment policy and procedure (all are attached) in July, 2020 to comply with the new regulation announced on May 6, 2020.

- i. Western Community College Area (WCCA) Board Policy BP-721
- ii. WNCC President’s Procedure on Sexual Harassment Grievance and Investigation Procedures

(d) Information on where the postsecondary institution's students and employees may receive immediate emergency assistance to address instances of sexual harassment.

- i. Emergency assistance information is listed on our VAWA Brochure (see attached)
- ii. Emergency assistance can also be provided by our School Resource Officer that is on campus (Interlocal Cooperation Agreement attached)
- iii. Information posted on WNCC's Title IX Compliance webpage (see attached).

(e) Information on how the postsecondary institution's students and employees may report concerns of sexual harassment to the postsecondary institution.

- i. Information on reporting is listed on our VAWA Brochure (see attached)
- ii. Information on reporting can also be provided by our School Resource Officer that is on campus (Interlocal Cooperation Agreement attached)
- iii. Students receive a Title IX presentation titled: Title IX and Your Role (presentation attached).
- iv. Information posted on WNCC's Title IX Compliance webpage (see attached).
- v. See Reporting Procedures beginning on Page 9 of the WNCC President's Procedure on Sexual Harassment Grievance and Investigation Procedures.
- vi. WNCC's Incident Reporting Form website (attached)
- vii. Title IX Statement published in handbooks and catalog (see examples attached)

(f) Information on resources, programs, and support available to the postsecondary institution's students and employees to address concerns of sexual harassment.

- i. Information regarding resources, programs and support are listed on our VAWA Brochure (see attached)
- ii. Resources, programs, and support can also be provided by our Security Officer that is on campus (Interlocal Cooperation Agreement attached)
- iii. All Residence Life students receive "A Culture of Consent" booklet (see attached).
- iv. See website information regarding Counseling Services.
- v. WNCC Counseling Center for WNCC students.
- vi. Employee Assistance Program for WNCC employees (see brochure).
- vii. WNCC's partnership with the DOVES Program (see brochure).

(g) Information on any of the postsecondary institution's student or employee-led organizations engaged in supporting victims of sexual harassment

- i. WNCC has a Criminal Justice Club that recognizes Sexual Assault Awareness Month as well as works closely with our local DOVES program (Sexual, Domestic & Dating Violence Services & Prevention). DOVES has provided 13 presentations for WNCC students from June 1, 2019 to June 30, 2021 through the Criminal Justice Club (see attached information).

(h) Any agreement between the postsecondary institution and a local law enforcement agency or the county attorney related to addressing instances of sexual harassment.

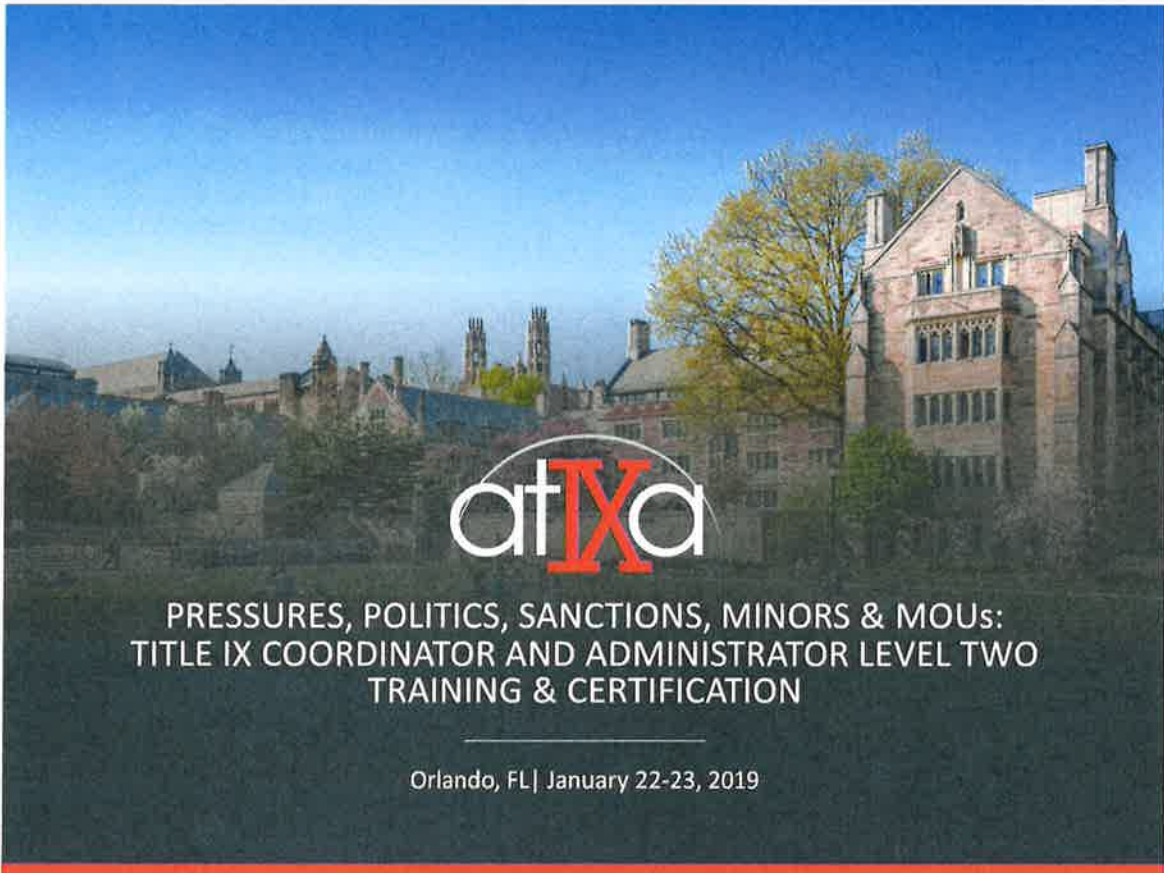
- i. Western Nebraska Community College has an Interlocal Cooperation Agreement with the City of Scottsbluff to provide a Security Officer on our campus.

As stated in Board Policy-721, Western Nebraska Community College is committed to providing an environment free from discrimination on the basis of sex and provides resources and services to assist students, faculty and staff in addressing issues involving sex discrimination. WNCC has provided effective training to provide these resources and services.



Section (b)i

Title IX Coordinator and
Administrator Training Level
Two – Pressures, Politics,
Sanctions, Minors & MOUs
6/2019



**PRESSURES, POLITICS, SANCTIONS, MINORS & MOUs:
TITLE IX COORDINATOR AND ADMINISTRATOR LEVEL TWO
TRAINING & CERTIFICATION**

Orlando, FL | January 22-23, 2019

YOUR FACULTY 



TANYKA M. BARBER, J.D.
Associate, TNG



DANIEL C. SWINTON, J.D., ED.D.
President, TNG
Vice President, ATIXA



BRIAN VAN BRUNT, ED.D.
TNG
Executive Director, NaBITA

COURSE AGENDA



Day 1

- I. Structuring Your Title IX Team
- II. Leveraging and Empowering Title IX Coordinator Authority
- III. Minors & Title IX
- IV. Pregnancy & Title IX
- V. Athletics & Title IX
- VI. Section 504
- VII. Sanctioning Best Practices

Day 2

- I. Appeals
- II. Managing Politics and Pressure
- III. Managing the Media
- IV. Title IX & Transgender Students
- V. MOUs
 - A. Local Law Enforcement
 - B. Advocacy Organizations
 - C. Local Schools (K-12)

A NOTE ABOUT TERMINOLOGY



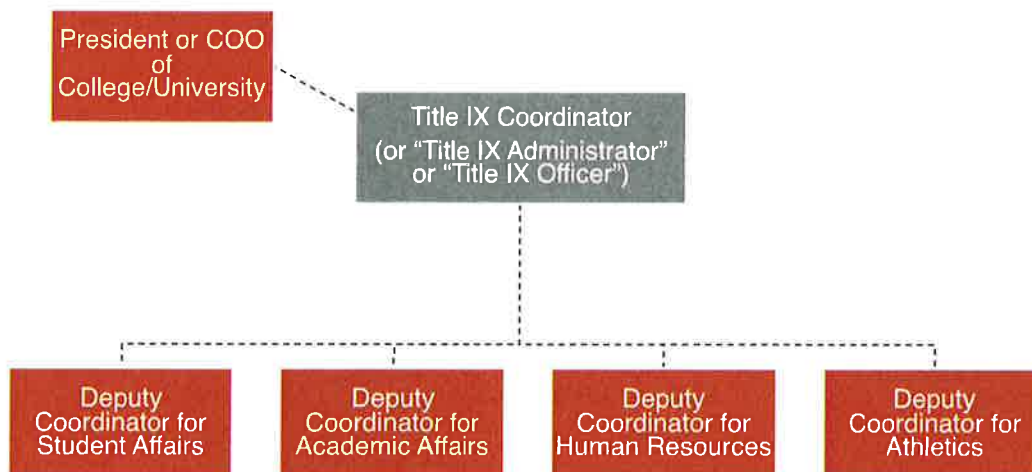
- “Victim” versus “survivor.”
 - Complainant, accuser, and **reporting party**.
- Gender pronouns.
- Rape, sexual assault, sexual violence, and sexual misconduct.
 - Any nonconsensual contact between two or more people, regardless of gender, act, or gratuitous violence.
 - Law vs. campus policy.
- Relationship/Interpersonal violence.
 - Dating violence and domestic violence/abuse.
- Accused, respondent, and perpetrator.

STRUCTURING YOUR TITLE IX TEAM

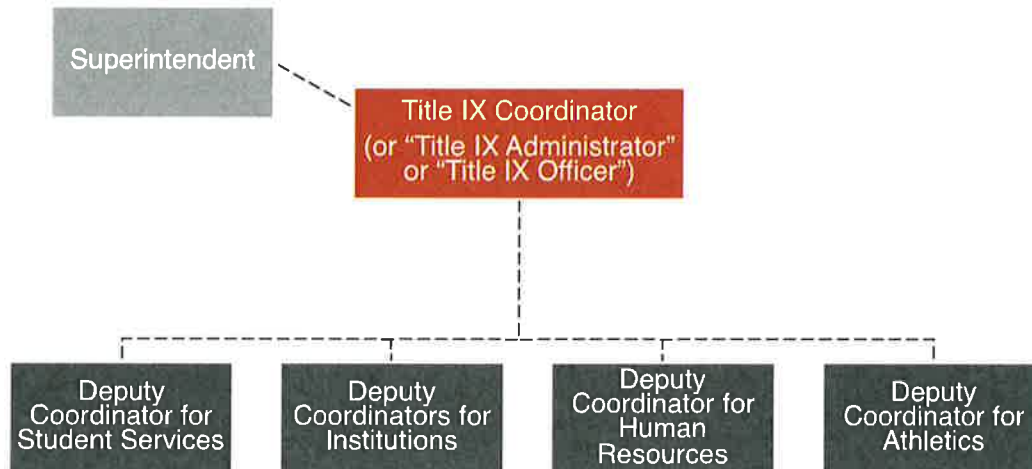
- Sample Core Team Structure
- Extended Team
- Discussion Questions



SAMPLE TITLE IX TEAM STRUCTURE FOR HIGHER EDUCATION



SAMPLE TITLE IX TEAM STRUCTURE



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TITLE IX TEAM STRUCTURE: ADDITIONAL ISSUES



- Job responsibilities of Deputy Coordinators?
 - Tailor scope and roles based on campus culture.
 - Delegation.
- Multiple campuses/locations.
 - Campuses within a larger system (e.g. SUNY schools).
 - Extension campuses.
 - Online communities.
 - District-level (K-12 and Community Colleges).
- Co-Coordinator?
- Dual-enrollment oversight?
- Investigator oversight.
- How is your campus/district/school structured?

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TITLE IX EXTENDED TEAM



- Include key constituencies not represented on core team.
 - E.g.: General counsel, residence life, Greek life, public safety, School Resource Officer, school counselors, etc.
- Regular meetings and coordination.
- Training and programming.
- Interaction with BIT.

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TITLE IX TEAM DISCUSSION QUESTIONS



- What does your core team look like?
 - Structure.
 - Roles and functions.
- What does your extended team look like (if applicable)?
- What is working?
- What is not working?
- What would improve your team/s and its/their functioning?

THE COORDINATOR: ADVANCED QUESTIONS CONFLICTS OF INTEREST?



- What does this mean?

However, when designating a Title IX coordinator, a recipient should be careful to avoid designating an employee whose other job responsibilities may create a conflict of interest. For example, designating a disciplinary board member, general counsel, dean of students, superintendent, principal, or athletics director as the Title IX coordinator may pose a conflict of interest (2015 DCL on Title IX Coordinators, p. 3).

THE COORDINATOR: ADVANCED QUESTIONS FULL-TIME COORDINATOR?



- *Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest and in many cases ensure sufficient time is available to perform all the role's responsibilities. If a recipient designates one employee to coordinate the recipient's compliance with Title IX and other related laws, it is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution, including those raising Title IX issues (2015 DCL on Title IX Coordinators, p. 3).*

THE COORDINATOR: ADVANCED QUESTIONS MULTIPLE COORDINATORS?



- *Although not required by Title IX, it may be a good practice for some recipients, particularly larger school districts, colleges, and universities, to designate multiple Title IX coordinators. For example, some recipients have found that designating a Title IX coordinator for each building, school, or campus provides students and staff with more familiarity with the Title IX coordinator. This familiarity may result in more effective training of the school community on their rights and obligations under Title IX and improved reporting of incidents under Title IX. A recipient that designates multiple coordinators should designate one lead Title IX coordinator who has ultimate oversight responsibility. A recipient should encourage all of its Title IX coordinators to work together to ensure consistent enforcement of its policies and Title IX (2015 DCL on Title IX Coordinators, p. 3).*

LEVERAGING & EMPOWERING TIX COORDINATOR AUTHORITY

- 2015 OCR Guidance & Resources
- Discussion

2015 LETTER TO TITLE IX COORDINATORS



- Thanks coordinators for their service and efforts.
- Stresses the centrality and import of the Title IX coordinator's work and responsibilities.
 - “You must have the full support of your institution.”
- Introduces the April 2015 “Dear Colleague Letter” to superintendents and presidents.
- Introduces the Title IX Resource Guide.

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APRIL 2015 DEAR COLLEAGUE LETTER: TITLE IX COORDINATORS



- Sent to all K-12 superintendents and all college presidents.
- Specifically applied the 2011 DCL on sexual violence to K-12.
- Targets the responsibilities, function, and centrality of the Title IX coordinator role.
- Reiterates requirement to designate a Title IX coordinator.
- Must have necessary positional and actual authority to perform their role.

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2015 DCL: KEY TITLE IX COORDINATOR CONSTRUCTS



- Independence.
 - Coordinator should report to senior leadership (e.g., \ president or superintendent).
 - Avoid conflicts of interest.
- Full-time?
 - “it is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution.”
- Multiple/deputies.
 - Must have “one lead Title IX Coordinator who has ultimate oversight responsibility.”

2015 DCL TITLE IX COORDINATOR



- Responsibility and authority.
 - Notified of **ALL** Title IX-related reports and complaints.
 - Coordinate all responses to complaints.
 - Monitor all outcomes.
 - Identify and address patterns.
 - Assess campus climate.
 - May determine outcome or institutional response to complaint.
 - Must be protected from retaliation.

2015 DCL TITLE IX COORDINATOR



- Visibility.
 - Notice of non-discrimination with Title IX and Coordinator information posted and included in virtually all publications, materials, and websites.
 - Encourages Title IX-specific website.
- Training.
 - Institutions must ensure coordinators are well-trained and up-to-date on all responsibilities and all applicable laws, policies, guidance, regulations, institutional policies, and procedures.

TITLE IX RESOURCE GUIDE (2015)



- Broad-ranging, topically-organized summary guide for coordinators.
 - Intended to help coordinators perform their jobs and receive needed support from their institutions.
- Topics addressed:
 - Scope of Title IX.
 - Coordinator's responsibilities.
 - Administrative requirements and oversight
 - E.g.: Grievance procedure requirements and notice of nondiscrimination.

- Topics addressed (cont.)
 - Key Title IX issues:
 - Recruitment, admissions, and counseling.
 - Financial assistance.
 - Athletics.
 - Sex-based harassment.
 - Pregnant and parenting students.
 - Discipline.
 - Single-sex education.
 - Employment.
 - Retaliation.
 - Information collection and reporting.

DISCUSSION LEVERAGING YOUR AUTHORITY

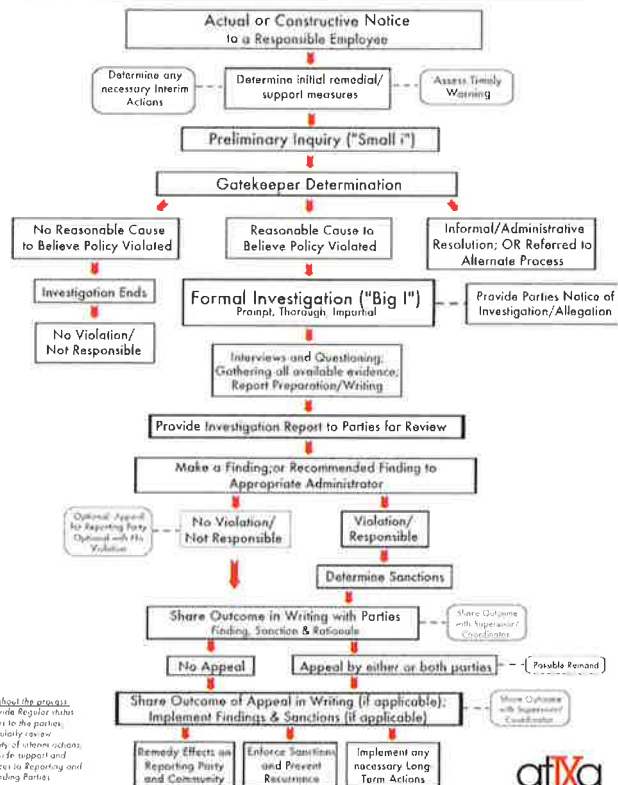
- What have you or your institution done to:
 - Leverage your authority and/or empower your position?
 - Enhance your institutional profile?
 - Get buy-in from senior leadership?
 - Get more resources:
 - For resolution-based efforts? (e.g., investigators)
 - For programming and education efforts?
 - For training efforts?
- What are you struggling with most?
- What has not worked?

ADJUDICATION PROCESS DISCUSSION

- Flowcharts

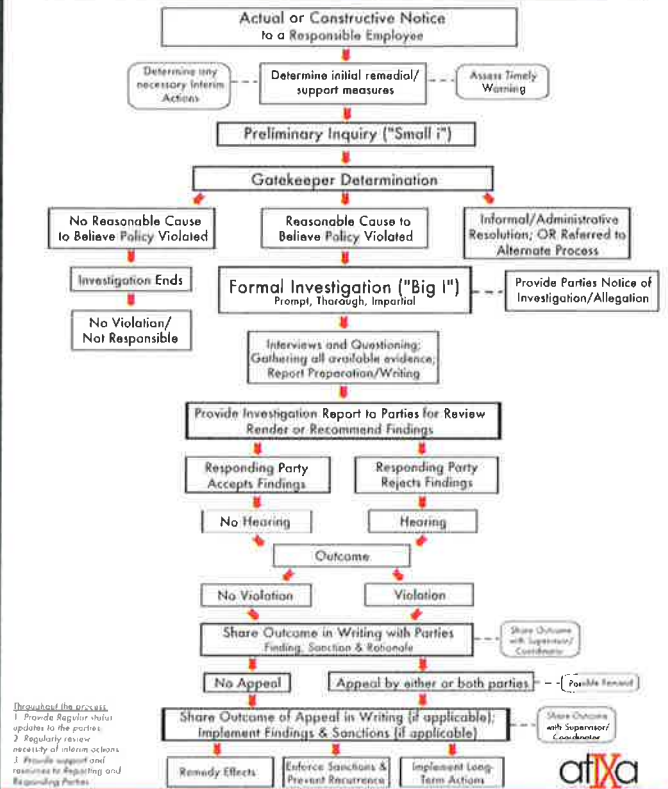
CIVIL RIGHTS INVESTIGATION MODEL

ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



INVESTIGATION AND HEARING PANEL HYBRID MODEL

INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



WHO RENDERS THE FINDING?



- Variations in role of decision process.
 - Investigator renders the finding.
 - Investigator recommends the finding to an administrator or hearing panel.
 - Investigator presents investigation report to administrator or hearing panel with findings.
 - Investigator presents investigation report to administrator or hearing panel without findings.
- Importance of investigation report.
 - How much credibility assessment and analysis to include?

WHAT ABOUT AN IN-PERSON HEARING?



- A formal in-person hearing, whether with a panel or an administrator, is increasingly viewed as necessary by the courts and OCR.
- Hearings facilitate the parties ability to review all available evidence and ask questions of witnesses and each other.
- A well-conducted civil rights investigation can result in an accepted finding and waiver of hearing by the responding party.
- Waivers must be freely decided and non-coerced.
- Hearings can still occur when information is contested.

WHAT ROLE DOES THE INVESTIGATOR PLAY IN AN EVENTUAL HEARING?



- The investigator is often the key witness at any hearing.
- The investigation report is admitted as evidence (redacted).
- Other witnesses can be called, or the investigator may summarize their testimony instead.
- If credibility must be assessed, it needs to be assessed in person by the decision-maker(s).
- The investigator's finding should not influence the hearing, so may be appropriate to withhold/redact that information and allow the decision-maker to be fully objective/impartial.

DISCUSSION OF YOUR PROCESS...



- How is your process structured?
- What is working well?
- What is not working well?
- What are your biggest concerns?
- How do your student and employee processes differ?
- What questions do you have regarding your process for your colleagues and the presenters?

PREGNANCY & TITLE IX

"A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex."

34 C.F.R. 106.40

- June 2007 "Dear Colleague Letter"
- June 2013 DCL on Pregnant and Parenting Students
- Regulatory Language
- Case Discussion

OCR, TITLE IX, AND PREGNANCY



- Admissions
- Academics
 - Registration
 - Coursework Accommodation and Completion
- Employment
 - Hiring
 - Benefits and bonuses
 - Leave and job protection upon return from leave
- Health Insurance Coverage
- Residence Halls
- Extra-curricular Activities
- Athletics

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PREGNANCY & TITLE IX: CULTURAL VARIABLES AND CHALLENGES



- Pervasive and systemic discrimination against women
- Male-as-breadwinner: Historical context
- Power and privilege
- Body integrity and choices
- Degree completion percentages
- The “Mommy Track”
- Academic and institutional deadlines, timeframes, and requirements that do not account for pregnancy
- Fear of women “abusing” accommodations or exceptions
- Accommodations often require more work on our part

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PREGNANCY & TITLE IX: CULTURAL VARIABLES AND CHALLENGES



- Admissions and hiring barriers
- Blaming women for their pregnancy
- Belief that pregnancy weakens a person
- The “inconvenience” created by a pregnant student or employee
- Conflicting valuation of priorities
- Perception of “special treatment”
- Religious beliefs on birth control, pregnancy, abortion, etc.
- Confluence of pregnancy with racial, ethnic, and other cultural variables
- What else?

PREGNANCY & TITLE IX: LEGAL FRAMEWORK

- Cannon v. U. of Chicago
- North Haven v. Bell
- Franklin v. Gwinnett
- Gebser v. Lago Vista
- Davis v. Monroe County Bd. Of Education

OCR, TITLE IX, AND PREGNANCY



June 25, 2007 “Dear Colleague Letter”

- Affirms the application of the pregnancy-related portions of the regulations to athletics departments, and summarized a school’s obligations to pregnant student-athletes.
- The June 25, 2007 DCL also includes:
 - Information on how to develop programs to support these students;
 - An overview of students’ rights under Title IX; and
 - Guidance on how to share your complaint if you feel your rights are not being met.
- While the pamphlet is focused on secondary education, the DCL states that “legal principles apply to all recipients of federal financial assistance, including postsecondary education.”

PREGNANCY & TITLE IX



- June 25, 2013 DCL on pregnancy and parenting students:
 - Educators must ensure pregnant and parenting students are not discriminated against.
 - Educators must ensure that pregnant and parenting students are fully supported in preparation for graduation and careers.
 - Secondary school administrators, teachers, counselors, and parents be well educated on the rights of pregnant and parenting students as provided under Title IX.

PREGNANCY & TITLE IX: REGULATORY LANGUAGE

"A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex."

34 C.F.R. 106.40

PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



Pregnancy defined

- "Pregnancy and related conditions:
 1. A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's **pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom**, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient." 34 C.F.R. 106.40

Physician Certification

- “Pregnancy and related conditions (cont.):
 2. A recipient **may require** such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation in the normal education program or **activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.**” 34 C.F.R. 106.40

Pregnancy as Temporary Disability

- “Pregnancy and related conditions (cont.):
 3. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom **in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.”
34 C.F.R. 106.40

PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



Leave Policies

- “Pregnancy and related conditions (cont.):
 4. In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as **a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.**” 34 C.F.R. 106.40

PREGNANCY & TITLE IX: OCR GUIDANCE



- “A school **may require** a pregnant student or student who has given birth **to submit medical certification** for school participation **only if the school also requires such certification from all students with physical or emotional conditions requiring the attention of a physician.**”
- “Thus, for example, a student who has been hospitalized for childbirth must not be required to submit a medical certificate to return to school if a certificate is not required of students who have been hospitalized for other conditions.”

PREGNANCY & TITLE IX: OCR GUIDANCE



- **“Schools cannot require a pregnant student to produce a doctor’s note in order to stay in school or participate in activities**, including interscholastic sports, unless the same requirement to obtain a doctor’s note applies to all students being treated by a doctor.”
- “That is, schools cannot treat a pregnant student differently from other students being cared for by a doctor, even when a student is in the later stages of pregnancy; **schools should not presume that a pregnant student is unable to attend school or participate in school activities.**”

Source: Department of Education, June 2018, Supporting the Academic Success of Pregnant and Parenting Students, p. 35

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PREGNANCY & TITLE IX: OCR GUIDANCE



- “When the student returns to school, **she must be reinstated to the status she held when the leave began**, which should include giving her the opportunity to make up any work missed.”
- “A school may offer the student alternatives to making up missed work, such as:
 - Retaking a semester
 - Taking part in an online course credit recovery program, or
 - Allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave.
- The student should be allowed to choose how to make up the work.”

Source: Department of Education, June 2018, Supporting the Academic Success of Pregnant and Parenting Students, p. 39

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- NCAA Guidance
 - A pregnant student-athlete’s physician should make medical decisions regarding sports participation
 - A student-athlete with a pregnancy-related condition must be provided with the same types of modifications provided to other student-athletes to allow continued team participation
 - Pregnant student-athlete cannot be harassed due to pregnancy
 - A student-athlete whose athletic career is interrupted due to a pregnancy-related condition will typically be entitled to a waiver to extend her athletic career.

- Nursing rooms, mothers’ lounges, etc.
- Children at school and in the classroom...No.
- Residence halls
 - Cannot remove prior to birth of child
 - Refund
 - Help
- Labs, chemicals, exposure to diseases, etc.
 - Reasonable restrictions for health and safety (as deemed by a physician) are permitted.
- Cohort programs
- Licensure requirements

SUPPORTING STUDENTS



- Develop support networks for students
 - E.g.: Pregnant and parenting student organizations (all-comers)
 - Classes: Pre-natal classes, parenting, life-skills, etc.
 - Work with student government
 - Harness knowledge and experience from employee programs
- Supporting partners or spouses:
 - Leave and/or excused absences
 - Treat with equal dignity and understanding
 - Stop asking “what do we have to do?” and instead shift to “what can we do?”

STRATEGIES FOR COMPLIANCE



- Detailed institutional policies
- Institutional enforcement procedures
- Centralized grievance process
- Title IX Coordinator’s central role
- Develop a Resource Guide
- Train and educate students, faculty, staff, administrators, coaches
- Flexibility (when possible) with course tracks
- Posters in residence halls and student spaces
- Work with Case Manager
- Focus on supportive services

TRAINING FOR STUDENTS



- Title IX's requirements and protections
- How to file a complaint
- Who is the TIX Coordinator (and deputies)?
- Online resources and tools
- Online reporting mechanism
- Empower to approach faculty, coaches, and administrators
- Train students to support each other
- Develop and support programming that targets barriers and problematic social context

TRAINING FOR FACULTY



- Faculty are typically the biggest area of institutional non-compliance with Title IX and pregnancy
- Title IX's requirements
 - Faculty should know that compliance often does require more effort on the part of faculty
 - Referral to Title IX Coordinator
- Provide faculty with a resource handout they can provide to students
- Blaming the student is NEVER acceptable
- TIX Coordinator should:
 - Train all faculty on requirements
 - Develop working relationships with Deans' offices and Department Chairs (when possible)

PREGNANCY & TITLE IX CASE DISCUSSION



- January 2018: Jill, a student, has had a difficult pregnancy and is six months pregnant. She has been able to maintain solid grades up to this point, but has just been informed by her doctor that she must stay in bed for the remainder of her pregnancy. She approaches her advisor and asks him what her options are with her coursework.



PREGNANCY & TITLE IX CASE DISCUSSION



- Sasha is an elementary education teacher who has fulfilled all of her course requirements and is one-third of the way through her required student teaching experience when she has a baby. She faced medical complications with the birth and her doctor tells her she will miss at least a month of her student-teaching. If her graduation date is delayed, she will miss that year's hiring cycle.
- What are some possible approaches?



ATHLETICS GENDER EQUITY CONSIDERATIONS

- Title IX Requirements
- Oversight of Athletics
- Equal Treatment Regulations

TITLE IX Sports Illustrated

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

—JUNE 23, 1972

OVERSIGHT OF ATHLETICS GENDER EQUITY



- Title IX compliance requirements:
 - Effective accommodation of interests and abilities.
 - Financial assistance proportionality.
 - Treatment of student-athletes.
- **Compliance** may be delegated to the senior women’s administrator or compliance officer in athletics.
- The oversight of compliance remains the responsibility of the Title IX coordinator.
 - Need for outside education.
- The dangers of being both.

TITLE IX & ATHLETICS



- Applies to:
 - Intercollegiate athletics
 - Interscholastic Athletics
 - Intramurals
 - Club teams/sports
- However, 3-Part Test and the 13 program components are typically not as problematic for Intramurals and Clubs because those programs are typically self-initiated and benefits provided by the institution are far fewer.

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TITLE IX & ATHLETICS



- Title IX DOES require an institution to:
 - Provide an equal opportunity for female and male students to become intercollegiate athletes
 - Analyzed by means of the three-part test
 - Provide equivalent treatment of participants in the overall women's program as compared to the overall men's program.
 - Analyzed according to 13 different program components.

Source: <https://www.collegeboard.com/2019/04/04/2019-04-04-Title-IX-and-Athletics/>

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TITLE IX & ATHLETICS



- Title IX does not require an institution to:
 - Provide the same funding to the overall women's and men's programs
 - Provide the same funding to men's and women's teams on the same sport
 - Provide specific benefits to teams
 - Offer the same number of teams for men and women
 - Offer the same sports for men and women
 - Provide the same benefits to men's and women's teams in the same sport
 - Compete at a specific level

Source: Valerie Woodworth Bennett (2014). Title IX and Intercollegiate Athletics, p. 9

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OVERSIGHT OF ATHLETICS GENDER EQUITY: THREE-PART TEST (1979)



Effective accommodation of interests and abilities:

- **Part 1:** Opportunities for males and females substantially proportionate to their respective enrollments; OR
- **Part 2:** Where one sex has been underrepresented, a history and continuing practice of program expansion responsive to the developing interests and abilities of that sex; OR
- **Part 3:** Where one sex is underrepresented and cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program.

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COUNTING PARTICIPANTS



- The following are not participants:
 - Unfilled team slots or positions
 - Club, intramural, and recreation program participants
 - Cheerleaders*
 - Athletes who quit or are cut BEFORE first competitive event of the season
 - Sport participants out of season (e.g.: spring football)
 - Scrimmage or practice squads
 - Student managers*, student coaches*, student trainers*
 - Students who are academically ineligible
 - Mid-year transfers if no spring season

*Even if they receive scholarships

Source: NCAA (2017), Information Guide for Intercollegiate Sports (2017-18), Chapter 10: Eligibility and Participation Policy Guidelines, The NCAA Best Practices Handbook, pp. 11-12.

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PART 1: PROPORTIONALITY



- Opportunities for males and females substantially proportionate to their respective enrollments
 - Substantially proportionate accounts for natural fluctuations in enrollment and participation rates, but institutions must adjust if shifted enrollment or participation shifts persist
 - OCR uses a case-by-case analysis, rather than a rigid statistical requirement (e.g.: within 1% of student body)
 - OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team

Source: OCR (2016), Compliance of the Intercollegiate Sports (2016-17), Subpart: The Best Practices

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PART 2: PROGRAM EXPANSION



- History and continuing practice of program expansion responsive to the developing interests and abilities of the underrepresented sex
 - In analyzing a history of program expansion, OCR considers:
 - An institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
 - An institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
 - An institution's affirmative responses to requests by students or others for addition or elevation of sports.

Source: OCR (1996). *Guidelines for intercollegiate athletics policy guidelines: The Three-Part Test*.

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PART 2: PROGRAM EXPANSION



- History and continuing practice of program expansion responsive to the developing interests and abilities of the underrepresented sex
 - In analyzing a continuing practice of program expansion, OCR considers:
 - An institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
 - An institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

Source: OCR (1996). *Guidelines for intercollegiate athletics policy guidelines: The Three-Part Test*.

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PART 3: FULL ACCOMMODATION



- Whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program
 - OCR will consider whether:
 - There is sufficient unmet interest to support an intercollegiate team
 - There is sufficient ability to sustain an intercollegiate team
 - There is a reasonable expectation of competition for the team

Source: OCR (1996). Classification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.

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LEVELS OF COMPETITION



OCR assesses compliance by examining:

1. Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; OR
2. Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

Source: OCR (1996). Classification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.

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FINANCIAL ASSISTANCE



- **Must provide reasonable opportunities for financial assistance to members of each sex in proportion to the participation rate of each sex in intercollegiate athletics.**
 - Does **NOT** require same number of scholarships for men and women or scholarship of equal value.
- Total amount awarded must be **“substantially proportionate to the participation rates”** of men and women in the institution’s athletic programs
- Disparities could be non-discriminatory in origin
 - E.g.: in-state vs. out-of-state recruits; reasonable professional decisions
- Also applies to work-related aid programs or loans

Source: HEW 1327, Intercollegiate Athletics Policy Statement

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OVERSIGHT OF ATHLETICS GENDER EQUITY



- Equivalent athletic benefits and opportunities:
 - Gauged by: availability, quality, kind of benefits, kind of opportunities, and kind of treatment. E.g.:
 - Equipment and supplies.
 - Scheduling (games and practice times).
 - Travel and per diem allowance.
 - Assignment and compensation of coaches and tutors.
 - Opportunity for coaching and academic tutoring.
 - Locker rooms and other facilities.
 - Medical and training services.
 - Housing and dining services.
 - Publicity.
 - Recruitment of student athletes.
 - Provision of support services.

Source: www2.ed.gov/about/offices/list/oea/vars/ovta.html

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EQUAL TREATMENT REGULATIONS

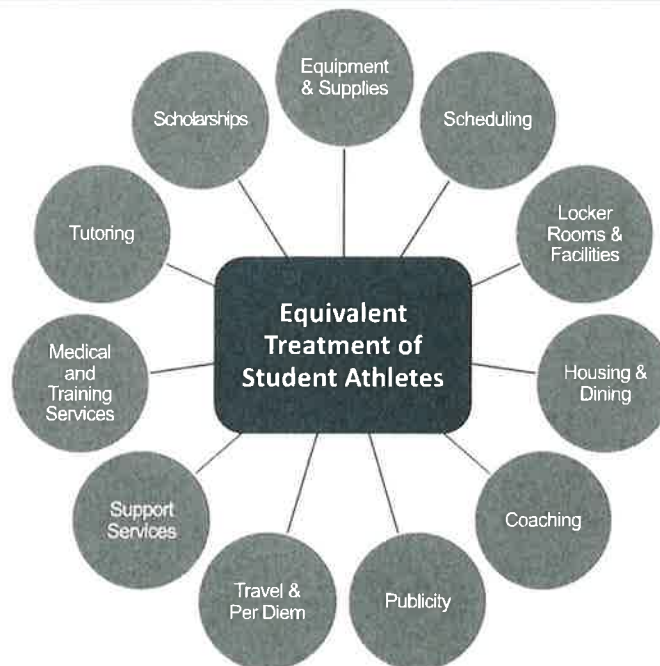


Equal opportunity:

A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the director will consider, among other factors:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms, practice, and competitive facilities;
8. Provision of medical and training facilities and services;
9. Provision of housing and dining facilities and services; and
10. Publicity.

OVERSIGHT OF ATHLETICS GENDER EQUITY



ATHLETICS: SEXUAL HARASSMENT CONSIDERATIONS

- Lessons from Cases
- Violence Against Women in the Athletic Department
- Case Examination
- Unique Challenges
- Remedies to Hostile Environment
- Considerations for Athlete Victims

LESSONS FROM CASES: REVISITED



- ***Simpson v. Univ. of Colorado Boulder.*** 500 F.3d 1170 (10th Cir. 2007).
 - Recruiting visits.
 - Off-campus parties.
 - Climate.
- ***Williams v. Bd of Regents of Univ. of Georgia.*** 477 F.3d 128 (11th Cir. 2007).
 - Recruit histories.
- ***Jennings v. UNC Chapel Hill.*** 482 F.3d 686 (4th Cir. 2007).
 - Climate in locker room.
 - Player evaluation meetings.

PREVALENCE OF VIOLENCE AGAINST WOMEN IN THE ATHLETIC DEPARTMENT



- Male athletes are more represented in violence against women statistics vs. their non-athlete counterparts.
- Male student athletes = 3.3% of student population.
 - 19% of sexual violence.
 - 35% of domestic violence.

Therese Brendert and Christel van der Wal-Grooten: Accidents and Violence Against Women Athletes: A Review of Cases with a Critical Reflection. *Journal of Sport and Social Issues*, 14(1), 2019, pp. 1-29

UNIQUE CHALLENGES



- Athletic department hostile educational environment.
- Student-athlete on student-athlete violence.
- Offender coach involvement.
- Offender and victim coaching pressures.
- Power dynamics or revenue vs. non-revenue sports.
- Focus on body.
- Male privilege.
- The power of a coach.
- Insular.



How to get in the door with compliance in the athletic department:

Building the necessary relationships for future compliance

AMERICANS WITH DISABILITIES ACT

- ADA/Section 504
- Addressing Mental Health Issues
- Animals on Campus

SECTION 504 COORDINATOR



- Section 504 of the Rehabilitation Act's regulations require that colleges:
 - “Designate at least one person to coordinate its efforts to comply.”
 - Adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of discrimination.

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SECTION 504/ADA COORDINATOR AND GRIEVANCE PROCEDURES



- Must provide oversight of disability program **compliance**.
 - This does not mean to hold the position of disability coordinator!
- Must ensure dissemination of notice of the institution's non-discrimination policy.
- Must ensure civil-rights based grievance procedures are in place to address complaints of discrimination.

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LEGAL LANDSCAPE OF DISABILITY LAW



- Titles II and III of the Americans with Disabilities Act of 1990 (ADA).
- Section 504 of the Rehabilitation Act of 1973.
- Fair Housing Act (FHA).
- State laws.

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WHY IS IT IMPORTANT TO UNDERSTAND DIFFERENT LAWS?



- Laws apply differently to public vs. private institutions.
- Laws apply different definitions and standards as it relates to service vs. assistance/comfort animals.
- Laws may impose different standards or response protocols.

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SECTION 504 OF THE REHABILITATION ACT, 1973

- A federal civil rights law, prohibits discrimination on the basis of disability in **all programs or activities that receive federal financial assistance**.
- Forbids institutions from excluding or denying individuals with disabilities an **equal opportunity** to receive program benefits and services.
- Codified at 29 U.S.C. § 701.
- Enforced by the U.S. Department of Education.
 - Compliance guidelines by OCR.
- Covers “any program or activity.”

WHO IS PROTECTED UNDER SEC 504?

- Under this law, **individuals with disabilities** are defined as:
 - Persons **with** a physical or mental impairment which substantially limits one or more major life activities;
 - Persons who have a **history** of having a physical or mental impairment; or
 - Persons who are **regarded as** having a physical or mental impairment that substantially limits one or more major life activities.

SECTION 504 SCOPE OF COVERED PROGRAMS



- All of the college's operations, programs, and activities are subject to Section 504 requirements, including:
 - Academics.
 - Athletics.
 - Employment.
 - Housing.
 - Events.
 - Web-based educational services.

SECTION 504 ADMINISTRATIVE REQUIREMENTS



- Schools must have clearly defined policies and procedures and implement them consistently.
- Schools must have preventive measures in place to position an institution to manage a report of disability-based discrimination.
- Schools must provide:
 - Notice of nondiscrimination.
 - Notice of 504/ADA coordinator.
 - Notice of 504/ADA grievance procedures.
 - Notice of how to obtain academic adjustments and auxiliary aids.

TITLE II & III ADA, 1990



- **Title II:**
 - Prohibits discrimination on the basis of disability by public entities, including state colleges and universities, regardless of whether they receive federal financial assistance.
- **Title III:**
 - Prohibits discrimination on the basis of disability in private education facilities and in the activities of places of public accommodation (businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA).

The language of ADA tracks Section 504 and explains that the remedies, procedures, and rights under the ADA are the same as under the Rehabilitation Act.

FAIR HOUSING ACT

(DEPARTMENT OF HOUSING & URBAN DEVELOPMENT)



- FHA makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a **dwelling**, or in the provision of services or facilities in connection with such a dwelling because of a handicap person ...”
- FHA applies to residential “dwellings,” a term that likely encompasses campus housing, including residence halls and dormitories.

HUD ASSISTANCE ANIMAL REQUIREMENTS



- Those seeking support must have a qualifying disability.
- The animal that individuals wish to accompany them is necessary to afford those persons with disabilities an equal opportunity to use and enjoy a dwelling.
- There is an identifiable relationship or nexus between the disability and the assistance the animal provides.

*There are no further requirements

HUD GUIDELINES



- As long as the animals alleviate the “effects” of the disability and the animals are reasonably supported, they are acceptable.
- Species other than dogs, with or without training, and animals that provide emotional support are recognized as necessary “assistance animals.”
- Courts have also upheld that animals need not be trained, nor do they need to be dogs to qualify as “reasonable accommodations.”
- Animals who pose a direct threat to the health and safety of others; who cause substantial physical damage to the property of others; who pose an undue financial and/or administrative burden; or would fundamentally alter the nature of the provider’s operations may be excluded.

WHAT IS A “MAJOR LIFE ACTIVITY”?



Major Life Activity

- Major life activities include:
 - Caring for one's self.
 - Walking.
 - Seeing.
 - Hearing.
 - Speaking.
 - Breathing.
 - Working.
 - Performing manual tasks.
 - Learning.

WHAT IS A “MAJOR LIFE ACTIVITY”?



Major Life Activity

- Examples of impairments which may substantially limit major life activities, even with the help of medication or aids/devices, are:
 - AIDS.
 - Alcoholism.
 - Blindness or visual impairment.
 - Deafness or hearing impairment.
 - Cancer.
 - Diabetes.
 - Drug addiction.
 - Heart disease.
 - Mental illness.
 - Learning disability.

WHAT IS A “MAJOR LIFE ACTIVITY”? (CONT.)



- For students, this means that a student with a qualifying disability will be “otherwise qualified” for admission to a specific academic program if he/she can meet all the necessary and articulated “essential functions” of the college program with reasonable accommodations.
- Student with disabilities are also protected from discriminatory harassment directed at them because of their disabilities.

ACCOMMODATION PROCESS



- Colleges and students should engage in an “interactive process” to determine appropriate accommodations that meet a student’s individual needs.
- If a student wants an academic adjustment, s/he has the initial obligation to provide notice to the institution of a qualifying disability and need for academic adjustment or auxiliary aid or services.
- Colleges may establish reasonable standards for documentation.
- Aids and adjustments must be provided in a timely manner.

CONSIDERATIONS FOR PROVIDING “EQUALITY” IN OPPORTUNITIES

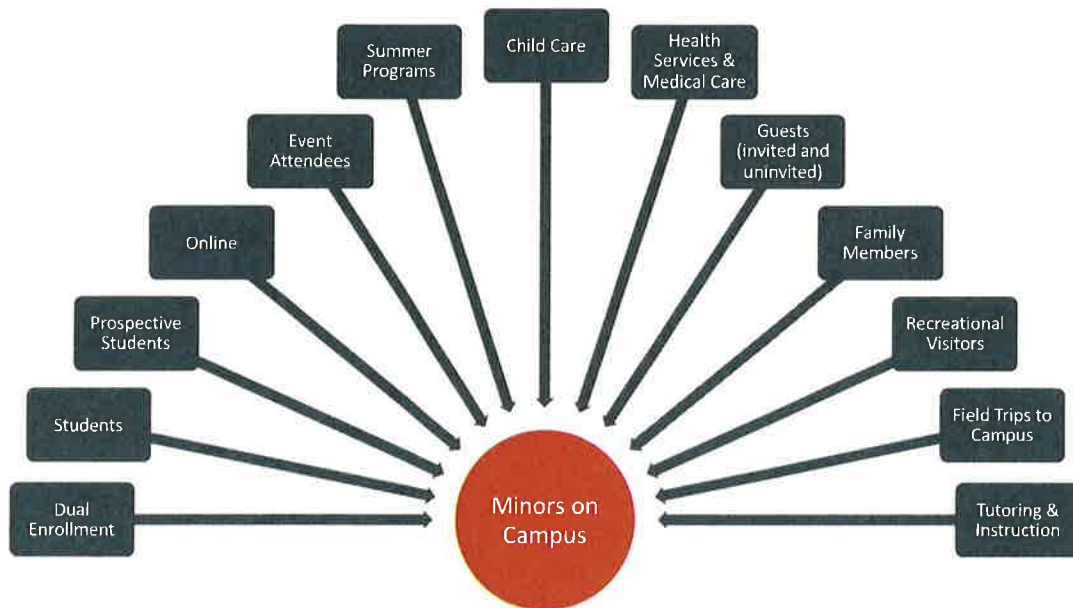


- What can the institution do to provide students with disabilities equal access to the educational benefits or opportunities provided through technology?
- How do the educational opportunities and benefits provided to students with disabilities compare to those provided to students without disabilities?
 - Are they equally available?
 - Are they available in a timely manner, similar to those provided to students without disabilities?
 - Will it be more difficult for students with disabilities to obtain the educational opportunities than for non-disabled students?

MINORS & TITLE IX

- Minors on Campus
- Operative Questions
- Sample Policy
- Abuse Prevention
- More Concerns





- Minors as students.
 - Students under the age of 18 may enroll full- or part-time in college. When they do, FERPA rights shift from their parents to them, and privacy protections attach to their education records.
- So, when are they “students?”
 - Dual enrollment.
 - High school on campus.
 - Continuing education.
 - Recruits.

MINORS AND TITLE IX: SOME OPERATIVE QUESTIONS



- How many minors are on your campus each day?
- Who knows they are there?
- Who is responsible for them?
- Do those parties know the different responsibilities in terms of:
 - Reporting/referring.
 - BIT/Title IX/Clery.
 - Parental notification.
- Are those parties trained/checked?
 - By whom?

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MINORS & TITLE IX: CAMPS EXAMPLE



- When is a camp “ours?”
- What are our responsibilities at each point on the continuum?



Not ours:

- Run by a different entity.
- They hire the staff.
- We rent them space only.

Kind of ours:

- The money comes through a shell or through the school first.
- The employees are our students or temp hires.
- May have our name on it – kind of.

Completely ours:

- The money comes into the school.
- The staff are our employees.
- It has our name on it.

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MINORS & TITLE IX



- Additional policy issues:
 - Classifying minors – see state law.
 - Jurisdiction.
 - Acts against or by non-affiliated persons (e.g., third parties, guests, invitees, and minors).
 - Who has access to minors?
 - Employees.
 - Students.
 - Quasi-employees.

MINORS & TITLE IX



- Additional policy issues:
 - Facility usage policies.
 - e.g.: Recreation center, overnight visitation, conference facilities, athletic facilities, event facilities, etc.
 - Communication and interaction with parents/guardians.
 - Communication and interaction with minors – who will have it?

MINORS & TITLE IX: SAMPLE POLICY



- Abuse involving minors – model policy language:
 - In addition to having students who are minors enrolled, [College] hosts minors as guests and as campers. [State] law narrowly imposes duties on mental health professionals, counselors, clergy, and law enforcement to report certain crimes involving minors, and abuse, to appropriate officials. [College]’s protocol is that **all employees will report all suspected child abuse, sexual abuse of minors, and criminal acts by minors to [the Security Office] without delay.** Clergy Act reporting of offenses for statistical purposes occurs whether victims are minors or adults.

Source: 2002 Model Code Project.

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MINORS & TITLE IX: ABUSE PREVENTION



- Preventing and detection – sexual abuse of minors:
 - Policies.
 - Screening and selection.
 - Training.
 - Monitoring and supervision.
 - Consumer participation – educate parents and guardians.
 - Reporting systems and mechanisms.
 - Response – prompt, effective, and compliant with laws.
 - Administrative practices.

Source: "Minors at the Perks of Off-Campus," Seton Hall Legal & Co.

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- Additional issues to consider:
 - Infants and nursing mothers (covered more in pregnancy section).
 - Student's children in the classroom.
 - Inadequate supervision.
 - Alcohol and controlled substances.
 - Unplanned time.
 - Restrooms, locker rooms, and residential facilities.
 - Issues of statutory rape (state law dependent).
 - Close-in-age exceptions to reporting/statutory.

SANCTIONING

- Sanctioning in Sexual Misconduct Cases
- Considerations
- Common Sanctions
- Sanctioning Pitfalls

SANCTIONING IN SEXUAL MISCONDUCT CASES (CONT.)



- **Title IX and case law require:**
 - Bring an end to the discriminatory conduct (Stop).
 - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct (Prevent).
 - Restore the reporting party as best you can to their pre-deprivation status (Remedy).
- Real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the reporting party and the community.

SANCTIONING CONSIDERATIONS



The sanction must be reasonable and reflect the severity of the behavior.

- May consider prior misconduct.
- The role of precedent.
- May consider attitude.
- Should be educational, but safety is primary consideration.
- What best compensates for loss or injury to school or persons.
- Compliant with laws and regulations (e.g.: Title IX).
- Should consider the education impact on the responding and reporting parties.

SANCTIONING IN SEXUAL MISCONDUCT CASES



- Investigation alone is not sufficient to overcome a deliberate indifference claim.
- Must be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s).
- What is appropriate?
 - Separation/expulsion.
 - Suspension.
 - Lesser sanctions.
- Engage in strategic education and training requirements.
- Conduct a risk assessment audit and mitigation process.

CONSIDERATIONS POST-FINDING



- Ensure remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- Take immediate steps to protect reporting parties even before the final outcome of investigation (e.g., no contact orders, etc.).
- Ensure that remedies are equitable.
- Consider restorative justice as part of remedial process.
- Monitor for retaliation and respond immediately to allegations.
- Regularly review policies, procedures, and practices to ensure they are in accordance with best practices, and state and federal case law.

COMMON STUDENT SANCTIONS



- Warning.
- Probation.
- Loss of privileges.
- Counseling.
- No contact.
- Residence hall relocation, suspension, or expulsion.
- Limited access to campus.
- Service hours.
- Online education.
- Parental notification.
- Alcohol and drug assessment and counseling.
- Discretionary sanctions.
- College suspension.
- College expulsion.

COMMON EMPLOYEE SANCTIONS



- Warning – verbal; written.
- Probation.
- Performance improvement/management process.
- Training (e.g., sensitivity training).
- Counseling.
- Loss of privileges.
- Reduction in pay.
- Loss of annual raise.
- Discretionary sanctions.
- Loss of supervisory or oversight responsibilities.
- Paid or unpaid leave.
- Suspension.
- Termination.

SANCTIONING PITFALLS



- Conflating finding and sanctioning processes.
- Timing of impact statements.
- Not targeted to stop, prevent, and remedy.
- Unwillingness to suspend or expel.
- Failure to address mitigating circumstances.
- Lock-step or automatic sanctioning – failure to address incident-specific circumstances.
- Holding sanctions in abeyance during appeal.

SANCTIONING PITFALLS



- Assumption that sanctioning is always the primary remedy.
- Likeability of parties: + & -
- Taking things personally as investigator/hearing officer.
- Bad precedent.
- Deviating dramatically from norms.
- Progressive sanctioning.
- Developmental? Remedial? Protective?

SANCTIONING PITFALLS



- Weak sanctions for retaliation.
- Weak sanctions for breach of no-contact orders.
- Weak sanctions for sexual violence.
- Disparate sanctions for same behavior.
- Abiding by the wishes of the victim(s).
- Privacy of sanctioning information.
 - Informing victims of sanctions.
 - Making an example.
- Others?

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WHAT SANCTIONS?



- A female staff member continues to make overt and tacit sexual advances towards a female colleague, even though the recipient of the behavior has repeatedly told the staff member that the advances are unwelcome.
 - The advances are verbal, as well as in emails and text messages.
 - Some of the more subtle advances have been in the company of others.
 - The victim complained because it is starting to impact her ability to focus at work.

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WHAT SANCTIONS?



- A male tenured faculty member is found responsible for non-consensual intercourse involving a female student who is not in any of the faculty member's classes.
 - The investigator determines that the student was incapacitated and the accused faculty member should have known of that incapacity.
 - The faculty member is a full professor holding a prestigious endowed chair position.
 - The student and the faculty member engaged in consensual sex five times after the non-consensual incident.
 - The student brought the allegation shortly after the faculty member began sleeping with the student's friend.

WHAT SANCTIONS?



- A severely intoxicated male student who lives on the sixth floor gets off the residence hall elevator on the fourth floor at the same time as a female student who lives on that floor. As the female student attempts to enter her room, the male student hugs and tackles her, holds her down, reaches up her skirt, moves aside her underwear, rubs his fingers along her clitoris and penetrates her digitally. The female student is able to free herself and rushes into her room, locking the door. The panel finds him responsible.

WHAT SANCTIONS?

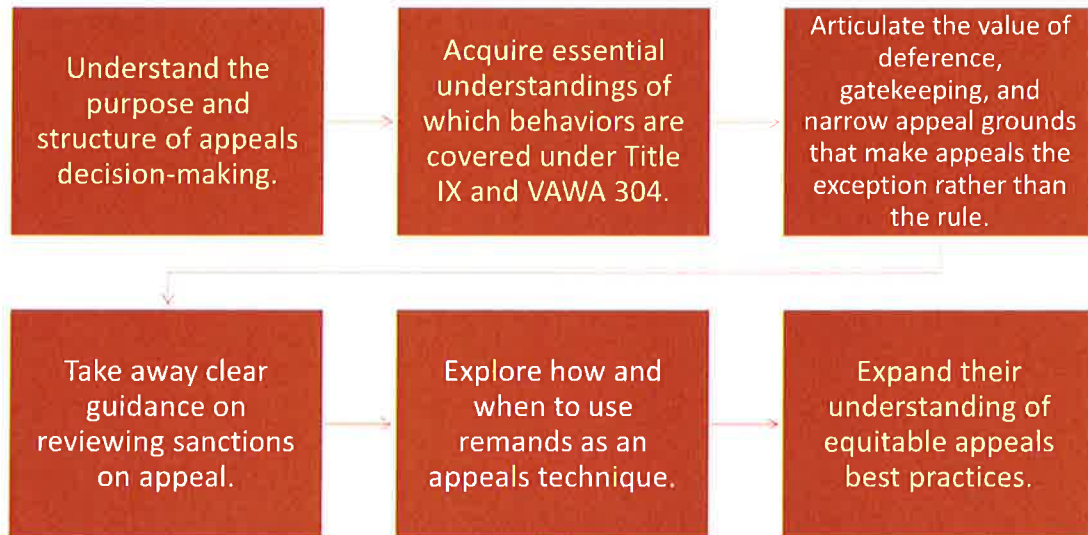


- Five members of the men's soccer team (Students A,B,C,D, and E) subject the first-year students to various hazing-related rituals, including paddling and pouring hot sauce on the first-year students' genitals.
 - Four students (A,B,C, and D) engage in the paddling.
 - Two students (A and B) poured hot sauce on the genitals of first-year students.
 - One student (E) was present throughout, but did not paddle or pour hot sauce on the first-year students.

APPEALS

- Objectives
- Key Elements
- Philosophical Basis for Appeals
- When Appeals Go Off the Rails
- Best Practices
- Possible Outcomes
- The Process
- Appeals and caselaw: John Doe v. The Rectors and Visitors of George Mason University

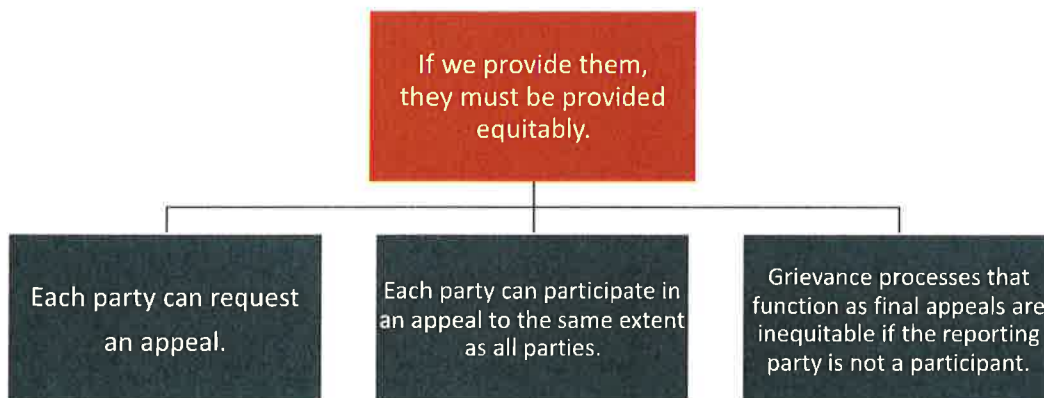
OBJECTIVES



INTRODUCTION



- Title IX, VAWA Section 304, and appeals best practices.
- Appeals are not required by federal law.



APPEALS: KEY ELEMENTS



One level of appeal is all you need.

Limit the grounds for appeal.

Show deference to initial decision

- Clear error in finding; compelling justification to change sanctions.

Sanctions usually take effect immediately.

Short window to request an appeal (3-7 days is common).

- Can always grant an extension if needed.

Document-based and recording review

- Limited interviews; NOT *de novo*.

Appeals should not be automatic; based on request.

Preponderance of evidence is standard for decision.

The Philosophical Basis for Appeals

- Making sure the procedures were followed to a fair result.
- That result may not be how you would have decided it, but the goal is to show deference on appeal unless there is **clear error**.
- Initial investigation and decision should be presumptively sufficient until evidence shows otherwise.
- Under Title IX, many appeals now implicate sufficiency of investigation, a new concern.



The Philosophical Basis for Appeals

- With the investigation now under a microscope on appeal, a layer of Title IX Coordinator sign-off after investigation is critical to the integrity of the investigation process (Facebook example).
- You may disagree with sanction, but there must be a **compelling justification** to change it, not mere disagreement.
- Sanctions must bring an end to discrimination and reasonably prevent its reoccurrence (Title IX).
- Remedies must repair the harm; make whole the victim and the community.

APPEALS BEST PRACTICES

- Remand. Your judgment is not better than that of others in the process. If there is a problem and you can send it back, do so.
- Problems with investigation can be repaired by re-opening the investigation, or in rare cases, by re-investigating.
- Problems with hearings can often be fixed by limited re-hearing. Re-dos should be rare.
- Between 80 and 90 percent of appeals should be denied. Of the remaining 10-20 percent, almost all should be remanded.

APPEALS BEST PRACTICES



- Joinder. Title IX sets up the potential for appeals of appeals of appeals.
- To avoid this (and you want to avoid it), you'll need a one-level appeal process (more levels are just bureaucracy and are not needed), where all parties are joined in the appeal regardless of whether they petition for it, and irrespective of what grounds are asserted.
- All viable grounds should be joined in one reconsideration with all parties participating.

APPEALS BEST PRACTICES



- Appeals are typically in writing.
- Review the investigation report, the hearing record, and all available documents.
- Interview the investigators, coordinator, and/or hearing officers/panelists.
- You may conduct limited interviews with the parties or witnesses as necessary, but avoid a full re-hearing. If needed, remand.
- Make an independent and impartial determination.
- Grounds for appeal or changes must be shown by evidence that is “more likely than not” under Title IX.

APPEALS BEST PRACTICES



- Letters of outcome, including finding, any sanctions, and rationale therefore, are applicable to appeals decisions under VAWA Section 304.
- Rights to advisors of the parties' choosing are as applicable to appeals as to any other stage in the process.
- If you are not eligible to hear appeals (provost, president, etc.), refer the angry parent on the phone to the proper official.

APPEALS BEST PRACTICES



- If the initial decision is presumptively correct, implement the sanctions immediately, not pending appeal.
- Coordinators or other administrators should have discretion to stay implementation of sanctions on a case-by-case basis, but the default should be that they go into effect immediately.
- Otherwise, we are saying the sanctions are presumptively incorrect until the appeal says they are OK.
- If that is the case, why not just skip the hearing and go right to the appeal?

APPEALS: GROUNDS FOR APPEAL

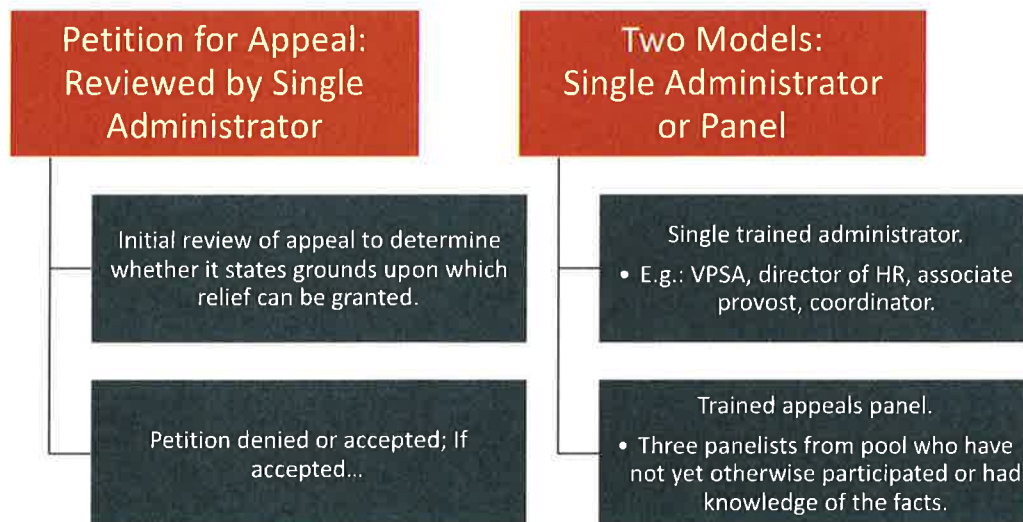


- A procedural error or omission occurred that significantly impacted the outcome of the hearing.
 - E.g.: Insufficient evidence to warrant the finding, substantiated bias, material deviation from established procedures, etc.
- To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially impact the original finding or sanction.
 - A summary of this new evidence and its potential impact must be included.
- The sanctions imposed are substantially disproportionate to the severity of the violation (or: the sanctions fall outside the range of sanctions the university/college has designated for this offense).

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APPEALS LOGISTICS



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COMMUNICATION PROTOCOLS



The status of the appeal is part of the status of the investigation. The reporting party is entitled to regular updates on this status.

When one party requests an appeal, the other party(ies) should be notified, and joined, either on the same basis that the appeal has been requested, or on other bases that they wish to assert as grounds.

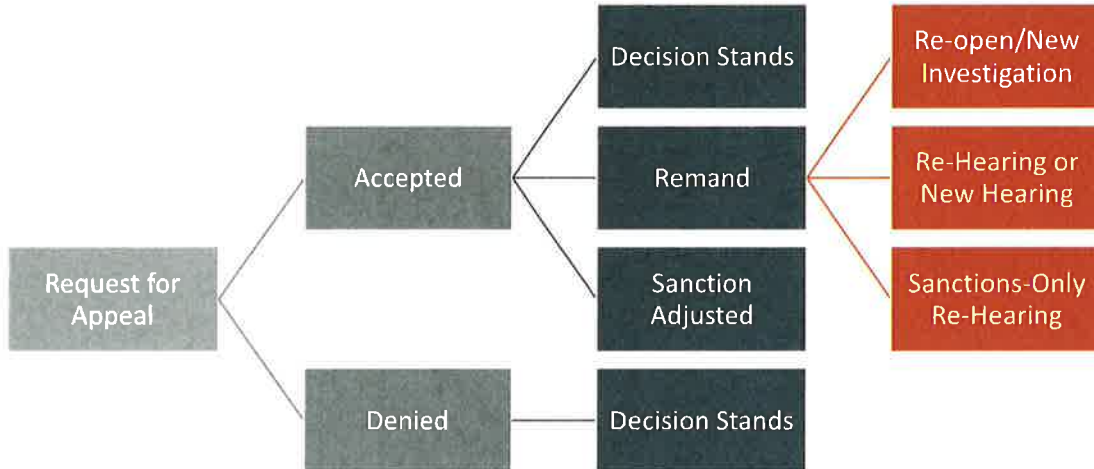
Exchange the appeals documents and requests between the parties, with an opportunity to respond.

POSSIBLE OUTCOMES



- Request for appeal is denied.
 - Decision stands.
- Request for appeal is granted.
 - Decision stands.
 - **This should be the norm.**
 - Remand.
 - To correct a procedural error or address new evidence.
 - Re-open investigation (full redo uncommon).
 - Re-hearing (usually partial, unless full re-hearing required).
 - To adjust the sanction.
 - Remand or sanction adjustment by appellate body.

THE APPEALS PROCESS



WHEN APPEALS GO OFF THE RAILS



Interventionist appeals officers who believe it is their job to second-guess.

Granting appeals for the chance at an educational conversation/to teach a lesson.

The liability risk of a too strong appellate authority.

Hierarchs as appeals officers – a common practice and is often a mistake.

Failure of adequate training.

Too much deference can also bite you (if the initial decision is wrong, or results from lack of training, you do have to set things right).

APPEALS: LESSONS FROM CASELAW



- The first and the second appellate officers held ex parte, off-the-record meetings with the accuser. Those meetings informed their appellate decisions, yet John Doe was not apprised of what took place in those meetings.
- The court wrote, “the failure to provide [John Doe], at a minimum, of a report of what transpired during the ex parte meetings such that [Doe] could defend himself against [the accuser’s] allegations in this meetings fell short of constitutionally adequate due process” (*Doe v. George Mason*, p. 20).

APPEALS: LESSONS FROM CASELAW



- The appellate officer had frequent and extensive ex parte contact with the reporting party regarding her allegations in the summer prior to the investigation and hearing, yet assigned himself as the appeal officer. The court held that these actions, especially at an institution with 5,000 employees, was a conflict of interest.
- **Key takeaway:** It is important that appellate officers are a step removed from the parties, the case, and the investigation. Especially at institutions with thousands of employees where a non-conflicted party could easily be trained and appointed.

- Fall 2012: “John Doe” was a first-year student at GMU and began a romantic and sexual BDSM relationship with “Jane Roe,” a student at another university.
- On Oct. 27, 2013, Jane alleged that she and Doe had a sexual encounter in Doe’s residence hall room, where:
 - Jane pushed Doe away, but he continued the sexual activity.
 - Doe asked later if she wanted to continue sexual activity and Jane and said, “I don't know.”
 - Doe continued with the sexual activity because Doe never used the agreed upon safe word (“Red”).

- Jane ended the relationship in January 2014.
- In March 2014, Doe sent Jane a text message that he would “shoot himself” if she did not contact him by the following day.
- In April 2014, Jane reported incidents of harassment and abusive behavior to her university.
- In May 2014, Jane reported to GMU police, who reported the incident to GMU student affairs.

**JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE
MASON UNIV.** USDC, E.D. VIRGINIA (SEPTEMBER 16, 2015)



- Following the report to GMU, GMU Asst. Dean has frequent contact with Jane over the summer regarding the report.
- In August, GMU Asst. Dean sent an email to Doe, indicating that he was accused of four violations of GMU's sexual misconduct policy.
- On Sept. 5, a hearing was held before a specially trained panel of three faculty and staff.
- On Sept. 12, 2014, the panel found Doe "not responsible" for each of the four alleged violations.
- On Sept. 19, 2014, Jane filed an appeal on the basis of "procedural irregularities" with the hearing.

**JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE
MASON UNIV.** USDC, E.D. VIRGINIA (SEPTEMBER 16, 2015)



- The deciding official for the appeal was the Asst. Dean who had frequent contact with Jane and who initially notified Doe of the accusations against him.
- Prior to rendering a decision on appeal, the Asst. Dean met with Jane and never told Doe about the meeting or informed him of what was discussed.
- Asst. Dean met with Doe as well, but after the Asst. Dean admitted he had already made up his mind.

**JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE
MASON UNIV.** USDC, E.D. VIRGINIA (SEPTEMBER 16, 2015)



- On appeal, the Asst. Dean reversed the hearing panel's decision and found Doe responsible for:
 - (i) penetration of another person without consent, and
 - (ii) communication that may cause injury, distress, or emotional and physical discomfort.
- The Asst. Dean provided no rationale for the decision.
- Doe appealed to the Dean of Students.
- DOS affirmed the decision, only stating that the sanctions were consistent with past practice.

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**JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE
MASON UNIV.** USDC, E.D. VIRGINIA (SEPTEMBER 16, 2015)



- Doe sued GMU, who filed a motion to dismiss all four allegations made by Doe.
 - 14th Amendment right to due process.
 - Free speech.
 - Disparate impact (Title IX) and (dismissed).
 - Intentional discrimination (dismissed).
- The district court then addressed cross-motions for summary judgment on the two claims remaining following motion to dismiss.

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- Court found that GMU violated Doe's due process by:
 - Failing to provide **notice** of all allegations used to make a decision.
 - **Deviating substantially** from its appellate procedures by having off-the-record meetings with Jane.
 - **Re-hearing the case on appeal** without providing Doe adequate opportunity to "mount an effective defense."
 - **Failing to provide a detailed rationale** for the appellate decisions.
 - **Pre-determining the outcome.**
 - Creating a significant **conflict of interest.**
 - Citing the Asst. Dean/Appellate officer's repeated contact with Jane prior to and while considering the appeal.

MANAGING POLITICS & PRESSURE

- Case Study
- Risks & Pressures
- Intangibles of Crisis
- Common Missteps



CASE STUDY



- Your institution has an award-winning diving program. In fact, the captain of the team (Cory) qualified for the upcoming Olympic Games next month, and represents the U.S.A.'s best hope for a gold medal. He is charming and charismatic and well-liked. You just received a call from a school in your league sharing with you that last weekend during an away meet, Cory allegedly engaged in a sexual encounter with a high school athlete who is 15 years of age.



CASE STUDY



- The high school student's father learned about it when he discovered pictures and text messages between his son and Cory and the son told him Cory coerced him into sex. The father reported this to the local police and plans to hold an interview with the press unless your school agrees to suspend Cory.
- Your president and board are encouraging you to hold off on the investigation for a few weeks, until after the Olympics — after all, the victim doesn't go to your school and it happened off-campus.

CASE STUDY



- The President reminded you that your school is on the national stage right now because of this great athlete and already alumni funding has increased, as well as admission applications. This would be devastating to your school if it leaked. The President reminds you that you are an employee at will.

Discussion questions:

- What are the issues presented?
- What action do you take? In what order?
- What are your concerns?

RISKS & PRESSURES



- Negligence claims still top the list.
- Discrimination claims (aggregate) are on the upswing.
- PR/reputational harm (specific campuses).
 - Social media and online environment greatly enhance these risks.
- Compliance risks (lower cost; higher profile).
 - OCR, DOJ, EEOC, etc.
- Donor dissatisfaction (endowment and capital project losses).

“INTERNAL” POLITICS & PRESSURES



- Board.
- Faculty leadership.
- Tenure.
- Unions.
- Student advocacy.
- Athletics.
- Colleges/schools.
- Silos.
- Graduate/professional vs. undergraduate.
- Departmental conflicts.
- Student publications (e.g., newspaper).
- Etc.

EXTERNAL POLITICS & PRESSURES



- Federal government.
 - Legislation – codified and pending.
 - Regulatory – OCR, DOJ, EEOC, etc.
- Federal courts.
- State government.
 - Funding.
 - Legislation.
- Student activists (e.g., victims' advocacy; accused advocacy).
- Attorneys.
- Media.
 - Social, print, and online.
 - Local and national.
- NCAA.
- AAUP.
- FIRE.
- Parents.
- Etc.

INTANGIBLES OF CRISIS



- Crises are an enormous time suck.
- Time spent on crisis management, response, and post-vention is time spent off-task and off-mission.
- Investments in prevention cost less than the resource drain, mission creep, and distraction of actual losses.
- Wise to budget for prevention, training, compliance, and professional development as investments or hedges,
 - It's cliché, but an ounce of prevention is worth a pound of cure.

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COMMON MISSTEPS



- Underestimating the seriousness of a situation or assuming it won't go public.
- Letting a situation fester or assuming it will resolve on its own.
- Failing to follow policies and procedures.
 - Knee-jerk reactions.
- Failing to consult legal counsel as early as the concerns arise and/or preventively.
- Failure to communicate internally, establish clear crisis communication protocols, and elaborate a disciplined approach to spokespersons.

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FROM THE HEADLINES DISCUSSION: WHAT CAN WE LEARN?



Title IX

- Baylor University
 - Title IX, external investigation, athletics, leadership, and fall-out
- Columbia University
 - Sexual violence, the Mattress, activism, and lawsuits
- Penn State University
 - Sexual violence, reporting, athletics, external investigation, and lawsuits

Not Title IX, but instructive

- University of Oklahoma
 - Fraternity chant, racism, social media, due process
- University of Missouri
 - Protests & activism, race, media, First Amendment, leadership

MANAGING THE MEDIA

- Case Study Continued

CASE STUDY



- You met with Cory and he admitted engaging in a sexual encounter at the swim meet last week, but stated that the other guy told him he was a student at the university. Cory is very upset because of the allegations. He says that neither his family nor his friends know he is “struggling with” his sexual orientation. He denies that the sexual encounter was in any way non-consensual. He asks you to do whatever you need to do to prevent the student’s father from doing an interview.



CASE STUDY



- It would harm him in many ways and tomorrow he’s scheduled to be featured in a Sports Illustrated pictorial article. The article was published and a day later the student’s dad held his own press conference. Now ESPN, your local TV station, and newspaper are calling you and sitting in your office. Thoughts?

Discussion questions:

- What does FERPA allow you to say?
- What are the issues regarding Cory?
- Are you conducting an investigation?

TITLE IX & TRANSGENDER STUDENTS

- OCR...?
 - Pronouns, preferred name
- Common Concerns and Current Challenges
 - Athletics
 - Restrooms and locker rooms
 - Fraternities and sororities
 - Housing
- Specific Issues
 - Sexual violence

TERMINOLOGY



- **Sex:** References chromosomes, hormones, reproductive organs, and genitalia.
- **Gender:** Refers to the attitudes, feelings, and behaviors that a given culture associates with biological sex.
- **Gender Identity:** Internal sense of gender.
- **Gender Expression:** Outward expression of gender, often through clothing, behavior, posture, mannerisms, speech patterns, and activities.
- **Sexual Orientation:** Attracted to sexually or romantically, on a continuum (e.g. gay, lesbian, bisexual, heterosexual, asexual, and pansexual).

TERMINOLOGY (CONT.)



- **Queer:** An umbrella term referring to LGBTQI individuals, and/or a nonbinary term used to reflect a fluid gender identity than societal gender “norms”
- **Cisgender:** Gender identity is consistent with the sex they were assigned at birth.
- **Transgender:** Umbrella term referring to a wide range of persons whose gender identity or expression may not match the gender assigned at birth.
- **Bisexual:** Attracted to people of the same as well as other genders.

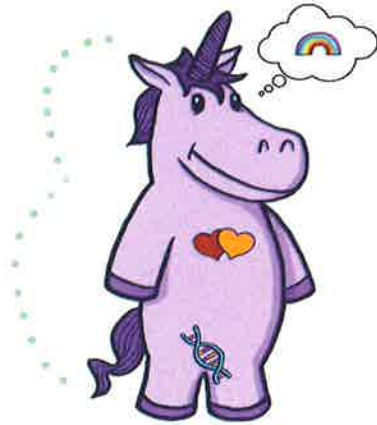
TERMINOLOGY (CONT.)



- **Heterosexual:** Attracted to people of a gender other than their own.
- **Asexual:** Minimal or no sexual attraction to others.
- **Intersex:** Born with genitalia, reproductive systems, and/or sex chromosomes of both males and females.
- **Pansexual:** Attracted to people regardless of gender.

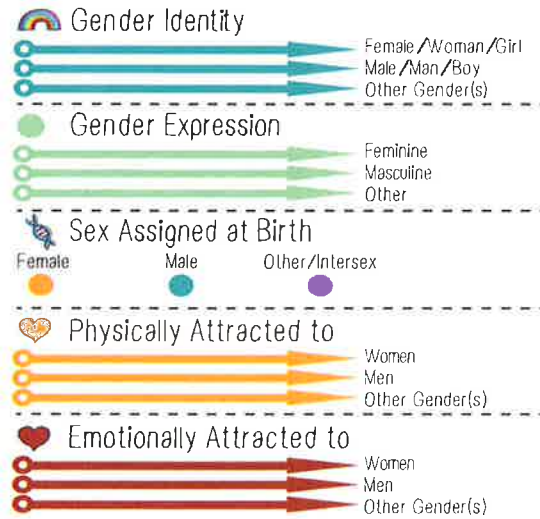
The Gender Unicorn

Graphic by:
TSER
Trans Student Educational Resources



To learn more, go to:
www.transstudent.org/gender

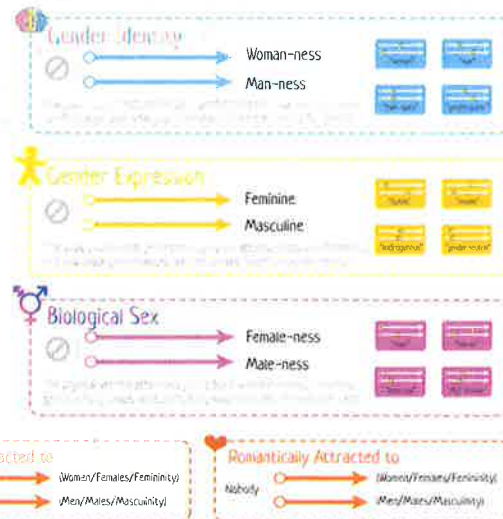
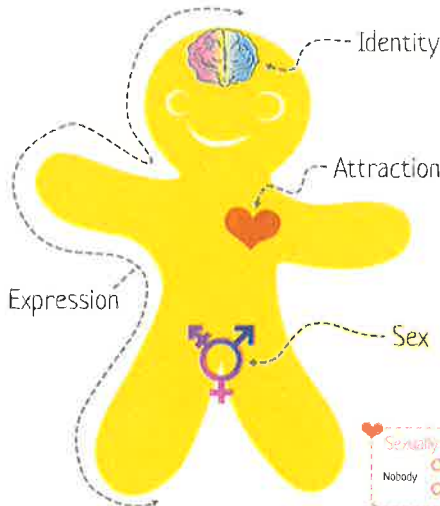
Design by I andyn Pan and Anna Moore



The Genderbread Person v3.3

its pronounced **METRO**sexual

Gender is one of those things everyone thinks they understand, but most people don't. Like everything, gender isn't black, it's not entirely red. In many cases it's both and a bit of this, a splash of that. This tasty little guide is meant to be an appetizer for gender understanding. It's okay if you're hungry for more, in fact, that's the idea.



For a bigger bite, read more at <http://bit.ly/genderbread>

TITLE IX & TRANSGENDER STUDENTS



- In May 2016, OCR released a Dear Colleague Letter specifically addressing Title IX's protections for transgender students.
- In February 2017, OCR revoked the DCL.
- In February 2017, ATIXA updated and re-released its position statement on Title IX, Gender Identity, and Gender Expression.
 - ATIXA believes that Title IX does protect students on the basis of gender identity.
- EEOC and numerous courts have determined gender identity is protected under Title VII.
- Sex and gender stereotypes and “gender non-conformity”

TITLE IX & TRANSGENDER STUDENTS



- Transgender students are disproportionately subjected to harassment and discrimination.
- Sexual violence statistics from the AAU's 2015 Climate Survey of 150,000 students:
 - Those identifying as TGQN have rates comparable, or in many cases slightly higher, than females.
 - Sexual misconduct involving penetration by force or incapacitation
 - Undergraduates identifying as TGQN had the highest rates (12.4%), followed by undergraduate females (10.8%) and graduate TGQN students (8.3%).

TITLE IX & TRANSGENDER STUDENTS



- Common Concerns and Current Challenges
 - State-based legislation.
 - Waffling OCR.
 - Conflict between Title VII (EEOC) and Title IX (OCR).
 - Possible federal legislation.
 - Discomfort and the claim of reverse discrimination.
 - Educating campus communities and constituencies.
 - Religious concerns
 - Religious Institutions, club or group membership and/or leadership, sharing of restrooms etc.

TITLE IX & TRANSGENDER STUDENTS



- Preferred Name & Pronouns
 - Education records
 - Databases and record systems
 - Identification documents
 - Classroom
 - The need to educate our communities
- Maintaining student privacy
 - Maintain privacy in relation to gender identity to the extent possible.
 - Students' sex, including transgender status, should not be included as directory information.

TITLE IX & TRANSGENDER STUDENTS



- Where sex-segregated activities and facilities are provided, transgender students should be allowed to both **participate** and **access facilities** consistent with their gender identity.
- **Restrooms and Locker Rooms**
 - Schools may not:
 - Require transgender students to use facilities inconsistent with their gender identity, nor
 - Require use of individual-user facilities where other students are not made to do so.
 - Individual-user options can be made available to all students voluntarily seeking additional privacy.

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TITLE IX & TRANSGENDER STUDENTS



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- **Athletics**

- Beware of requirements that rely upon overly broad generalizations or stereotypes.
- Discomfort with transgender students.
- NCAA and other organizations have specific policies regarding participation.

- **Single-Sex Classes**

- Transgender students are to be allowed to participate consistent with their gender identity.

- **Single-Sex Schools**

- Where Title IX does not apply, schools are not prohibited from inclusivity (i.e. a private undergraduate women's college may choose to admit transgender women).

- **Social Fraternities and Sororities**

- Exempt from Title IX, but may choose to be inclusive (i.e. a fraternity choosing to admit transgender men or a sorority choosing to admit transgender women).

- **Housing and Overnight Accommodations**

- Schools must allow transgender students access to housing consistent with their gender identity.
- Schools may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students.
- Schools can choose to honor a student’s voluntary request for single-occupancy accommodations.
- Consider summer camps, etc.

MOUS

- Local Law Enforcement
- Advocacy Organizations
- Local Schools (K-12)



MOU: LOCAL LAW ENFORCEMENT



- Who should be at the table?
- Interaction with Campus Police/Public Safety
- Scope
 - What crimes/type of incidents are covered
- Communication
 - Reporting – When, How, What, To Whom
 - Progress Updates
- Jurisdiction
 - Patrols, Response, Dual Jurisdiction, Arrests, Referrals, Maps

MOU: LOCAL LAW ENFORCEMENT



- Investigation
 - Timing; Sharing of Evidence/Information
 - Concurrent Investigations
- Remedies
 - Interim
 - Long-term
- Prevention
- Cross-Training
- Point of Contact

MOU: LOCAL LAW ENFORCEMENT



- Relevant Legislation
 - The Clery Act/ VAWA Sec. 304
 - Title IX
 - FERPA
 - Title IV
 - ADA/504
- Relevant Guidance
 - 2001 Guidance
 - 2011 DCL
 - 2014 Q&A on Title IX and Sexual Violence

MOU: ADVOCACY ORGANIZATIONS



- Scope
- Crisis Intervention
- Victim Advocacy
- Assistance with legal orders or protection, TROs, etc.
- Counseling
- Cross-Training
- Prevention & Educational Efforts
- Point of Contact

- Dual Enrollment
- Summer Camps
- Investigation
 - By whom
 - Sharing of Information and Evidence
 - Sharing of Outcomes
- Training
- Parental Involvement
- Police Notification



QUESTIONS?



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**Western Nebraska
Community College**

Section (b)ii

**Title IX Coordinator and
Administrator Training Level
Three – Compliance & Case
Management 6/2019**



**COMPLIANCE & CASE MANAGEMENT: TITLE IX
COORDINATOR AND ADMINISTRATOR TRAINING &
CERTIFICATION LEVEL THREE COURSE**

Orlando, FL
January 24-25, 2019

YOUR FACULTY 



DANIEL C. SWINTON, J.D., ED.D.
President, TNG
Vice President, ATIXA



TAMMY BRIANT, J.D.
Associate, TNG

COURSE AGENDA



- I. Managing**
 - i. Complex Cases
 - ii. Outside Investigators
 - iii. Multiple Victim or Perpetrator Situations
- II. Caselaw Review and Application to Professional Practice**
 - i. Appeals
 - ii. Retaliation
 - iii. First Amendment
 - iv. Title IX and Gender-based Claims
 - v. Due Process Key Case Law
- III. OCR Update: Review of the Proposed Regulations**
- IV. Train the Trainer: VAWA Section 304 Compliance**

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A NOTE ABOUT TERMINOLOGY



- “Victim” versus “Survivor.”
 - Complainant, accuser, and reporting party.
- Gender pronouns.
- Rape, sexual assault, sexual violence, and sexual misconduct:
 - Any nonconsensual contact between two or more people, regardless of gender, act or gratuitous violence.
 - Law vs. campus policy.
- Relationship/interpersonal violence:
 - Dating violence and domestic violence/abuse.
- Accused, respondent, and perpetrator...

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COMPLEX CASES AND RELATED ISSUES

- Complex Cases
- Outside Investigators
- Multiple Victim or Perpetrator Situations

MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- Larry Nassar was a team doctor for USA Gymnastics and Michigan State University.
- Graduated from U. of Michigan in 1985 and became an athletic trainer for USA Gymnastics in 1986.
- He received an osteopathic medical degree (D.O.) in 1993 from MSU and in 1996 became the medical coordinator for USA Gymnastics.
- In 1997, he became the MSU gymnastics team physician and an Assistant Professor.
- In August 2016, the *Indianapolis Star* published a piece (followed by many more) detailing the failures of USA Gymnastics in addressing sexual abuse. (<https://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/>)

MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- The morning the article was published, Rachel Denhollander, an attorney with three children wrote an email to the *Indianapolis Star*:
 - “My experience may not be relevant to your investigation, but I am emailing to report an incident that may be. I was not molested by my coach, but I was molested by Dr. Larry Nassar, the team doctor for USAG. I was fifteen years old, and it was under the guise of medical treatment for my back.”
- The *Indianapolis Star* began an investigation, interviewed Denhollander on camera, spoke with other former gymnasts and, in Sept. 2016, published another story, “Former USA Gymnastics doctor accused of assault” (<https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/>)

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MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- Some of Nassar’s behaviors included:
 - Using his bare hands to digitally penetrate the women and girls (penetration was almost always entirely unnecessary).
 - “Pelvic floor” adjustments.
 - Touch their breasts without medical necessity; and
 - Being visibly sexually aroused during treatments.
- He denied the allegations.
- Criminal charges filed against Nassar and in Nov. 2017, pleaded guilty to 10 counts of first degree criminal sexual conduct.
 - Nearly 100 victims/survivors provided impact statements during sentencing hearing.
 - Nassar sentenced to over 100 yrs in prison.

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MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- MSU had performed an investigation in 2014, based on a TIX complaint filed by an MSU student (Amanda Thomashow)
 - Thomashow accused Nassar of massaging her breasts and genital area during a medical exam.
 - The TIX Coordinator performed the investigation, concluding Nassar’s actions were “medically appropriate”
 - The TIXC reached this conclusion after consulting with four of Nassar’s colleagues at MSU
 - The TIXC provided MSU with a different, more detailed report than what was provided to Thomashow
- In 2016, following the *Indy Star’s* articles, victims/survivors began filing lawsuits against MSU.

MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- In May 2018, MSU agreed to a \$500 million settlement
 - \$425 million would be distributed among 333 claimants.
 - \$75 million would be set aside in a reserve fund for two years in case other survivors came forward.
 - MSU did not admit any wrongdoing as part of the settlement.
 - By comparison, Penn State’s initial settlement was \$109 million for over 30 victims/survivors
- Incidents led to investigations by the Michigan Attorney General, OCR, NCAA, US congressional committees, and the Michigan House of Representatives.
- Also, numerous USA Gymnastics and USOC officials have either been fired or resigned.

MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- Several high-level leaders hindered an appropriate University responses and subsequently experienced consequences:
 - University President resigned and charged with lying to law enforcement about her knowledge of the details of MSU’s Title IX investigation by the school into Nassar.
 - Dean of the College of Osteopathic Medicine, who was Nassar’s boss, stepped down from dean position and was charged with willful neglect of duty related to the Nassar scandal, fourth-degree criminal sexual conduct, and misconduct in office.
 - MSU gymnastics coach charged with lying to law enforcement relative to when she first became aware of allegations against Nassar.
 - On Jan 16, 2019, Interim President, John Engler, stepped down effective Jan. 23, in part because of comments re: victims/survivors seeking the “spotlight”

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MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- MSU commissioned the Michigan Attorney General’s office to conduct an investigation into the school’s handling of the Nassar situation
 - The lead investigator described his role was to determine, “Who knew what, when they knew it and what, if anything, they did about it.”
 - Investigators have accused MSU officials of attempting to “stonewall” their investigation, mislead the public
 - Of the 280 interviewed, 13 said they reported the abuse to an identified employee at or around the time it happened
 - Many reported to assistant coaches and athletic trainers
 - MSU had previously hired a law firm to conduct a privileged investigation into the matter; the results of that investigation are not public

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RECENT CASE LAW



LAWS, COURTS, AND REGULATIONS



- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by Courts and OCR
 - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
 - Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2001 Guidance)
 - Sub-Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2011 DCL)
- Federal Caselaw – **Force of law** based on jurisdiction
 - Supreme Court – binding on entire country
 - Circuit Courts of Appeal – binding on Circuit
 - District Court – binding on District
- State caselaw – **Force of law**; binding only in that state based on court jurisdiction

APPEALS

APPEALS: KEY ELEMENTS



- Appeal heard by an impartial person/board.
 - No conflict of interest.
- No new allegations permitted
- Typically no hearing → document-based and recording review.
- Limited exceptions to allowing new evidence to be considered on appeal.
- Limited grounds for appeal. *
- Deference to original hearing authority.
 - But not rubber-stamp.
- Written rationale for a decision.
- Equitable and prompt.

**JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE
MASON UNIV.** U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



- **Facts**

- “John Doe”, student at GMU, had a romantic and sexual BDSM relationship with “Jane Roe.”
- On October 27, 2013, Jane and Doe had a sexual encounter in Doe’s room, where Jane used her hand to push Doe away and said “I don't know” in response to a request for a sexual act, but allegedly never used the agreed upon safe word (“Red”).
- The relationship ended in January 2014
- In March 2014, Doe sent Jane a text message that he would “shoot himself” if she would not contact him by the following day.

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**JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE
MASON UNIV.** U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



- **Facts**

- In April 2014, Jane reported the events of October 2013 to her college’s Police Department, who contacted GMU Dean of Students Office.
- GMU Asst. Dean had frequent contact with Jane over the summer regarding the report.
- In August, GMU Asst. Dean sent an email to Doe, indicating that he was accused of four violations of GMU's sexual misconduct policy.
- Three-member, trained hearing panel found him “not responsible.”

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**JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE
MASON UNIV.** U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



• **Facts**

- Jane appealed, citing procedural irregularities
- Appellate officer = Asst. Dean who did intake, interacted frequently with Roe, and provided Doe of notice of the allegations
- During appeal, Asst. Dean met with Roe (not allowed)
 - Met with Doe as well, but admitted he already made a decision at that point.
- Asst. Dean reversed the panel’s decision and found Doe responsible for
 - (i) penetration of another person without consent and
 - **(ii) communication that may cause injury, distress, or emotional and physical discomfort (new allegation)**

**JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE
MASON UNIV.** U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



• **Facts**

- The Asst. Dean provided no rationale for the decision.
- Doe appealed to the Dean of Students, who affirmed, providing no rationale, other than consistency of sanctions with past practice
- Doe filed a lawsuit and the court rejected GMU’s Motion to Dismiss a 14th Amendment claim and a Free Speech claim

**JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE
MASON UNIV.** U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



- Court found that GMU infringed Doe’s right to free speech regarding the “shoot myself” comment
 - GMU’s policy was overbroad
 - The application of GMU’s policy abridged his right to free speech
 - That his comments did not fall under the “true threat” exception

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**JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE
MASON UNIV.** U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



- **Fourteenth Amendment claim:**
 - Court found John Doe possessed a Liberty Interest
 - Expulsion, coupled with a permanent transcript notation, can do significant harm to his reputation, integrity and his career and educational prospects.
 - GMU deprived him of that interest
 - He was expelled and a permanent notation was made on his transcript.
 - Deprivation effectuated without constitutionally sufficient due process

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- GMU violated Doe’s due process by:
 - Failing to provide **notice** of all allegations used to make a decision.
 - **Deviating substantially** from its appellate procedures by having off-the-record meetings with Jane.
 - **Re-hearing the case on appeal** without providing Doe adequate opportunity to “mount an effective defense.”
 - **Failing to provide a detailed rationale** for the appellate decisions.
 - **Pre-determining the outcome.**
 - Creating a significant **conflict of interest.**
 - Citing the Asst. Dean/Appellate officer’s repeated contact with Jane prior to and while considering the appeal.

RETALIATION

ELEMENTS OF A RETALIATION CLAIM



- The following elements establish an *inference of retaliation*:
 - Did the reporting party engage in protected activity?
 - Was reporting party subsequently subjected to adverse action?
 - Do the circumstances suggest a connection between the protected activity and adverse action?
- What is the stated non-retaliatory reason for the adverse action?
- Is there evidence that the stated legitimate reason is a pretext?

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CARLSON V. UNIVERSITY OF NEW ENGLAND U.S. 1ST CIR. (AUG. 10, 2018)



Retaliation-based case

- **Facts**
 - Lara Carlson hired by Univ. of New England in 2009 as tenure-track professor.
 - In 2011, Paul Visich (Carlson’s supervisor and tenure committee review chair) engaged in sexually harassing behaviors towards Carlson:
 - Touched Carlson’s knee, thigh, and hand.
 - Stared at her chest while speaking with her.
 - Sent her inappropriate and sexually charged emails and comments.
 - Carlson reported to HR and her Dean.
 - She asked he no longer supervise her or be the head of her tenure committee.
 - Neither happened.

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- **Facts (cont.)**

- She was forced her to meet with Visich directly, despite her objections.
 - No real progress following the meeting.
- Six months later, Visich:
 - Gave Carlson a very negative performance review.
 - “Rubbed her shoulder and back in an unwelcomed manner,”
 - Caused her to be removed as the head of College Bowl team, and made changes to the prerequisite to one of her courses that had the effect of radically diminishing its enrollment.

- **Facts (cont.)**

- Promotion and tenure review committee rejected Visich’s negative evaluation
 - At Carlson’s request (again), he was removed as chair of her tenure review committee.
- Carlson again requested a new supervisor.
- Dean refused, recommending she be transferred to a different department.
 - Carlson agreed, “if she were allowed to ‘keep [her] classes and continue to do [her] job.’”
- Carlson awarded tenure in 2014.

CARLSON V. UNIVERSITY OF NEW ENGLAND U.S. 1ST CIR. (AUG. 10, 2018)



• **Facts (cont.)**

- However, she was removed from teaching courses and advising students in previous department; also removed from their website, which had funding implications
- Received minimal raise (smallest since arriving at UNE)
- Filed a complaint in federal court alleging retaliation under Title VII and the Maine Human Rights Act
 - District Court granted summary judgment for UNE
- 1st Cir. Reversed, citing the department transfer, her removal from courses, etc. may constitute retaliation

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CARLSON V. UNIVERSITY OF NEW ENGLAND U.S. 1ST CIR. (AUG. 10, 2018)



• **Key Takeaways**

- A jury could find that the transfer was an adverse action:
 - UNE induced Carlson to agree to the department transfer under false pretenses and misrepresentations
 - UNE's Dean was inconsistent in her explanations of the changes to Carlson's teaching responsibilities (possible pretext)
 - Carlson would not have accepted the transfer but for the misrepresentations
 - UNE therefore could have been acting in retaliation, and these events would not have occurred but for her reports of Visich's harassment.
 - UNE did not put forward a non-retaliatory justification for why the Dean would have misrepresented impact of transfer on Carlson's teaching responsibilities.
- Salary issue dismissed.

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FIRST AMENDMENT CASES

TITLE IX & THE FIRST AMENDMENT



- **Title IX cannot be enforced or use to infringe on First Amendment protections.**
- **Time, place, and manner** limitations on expression must be applied consistent with the forum in question.
 - 1) Traditional; 2) Designated; 3) Limited Public; 4) Nonpublic
 - Content neutral.
 - Narrowly tailored to serve a significant state/gov't interest.
 - Leave ample alternative channels for communication of the information.
 - What about non-school-based speech?

TITLE IX & THE FIRST AMENDMENT



- Protected Speech
 - Offensive language.
 - Hate speech.
 - Time, Place, Manner restrictions.
 - Being a jerk.
- Unprotected Speech
 - Fighting Words; Obscenity; True Threat; Defamation.
 - Sexual and Racial Harassment (Hostile environment).
 - Incitement of Imminent Lawless Action.
- Controversial Speakers

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JOHN DOE V. VALENCIA COLLEGE U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)



- Facts
 - Koeppel (age 42) and Roe (age 24) were biology lab partners in summer 2014.
 - Koeppel bought Roe gifts and shared his affection for her.
 - Roe said she was not interested, had a boyfriend, and did not want to give him the wrong impression.
 - Koeppel saw a Facebook posting that made him think Roe was single again, so he reached out.
 - Roe and her boyfriend called Koeppel and told him to stop.
 - ***Koeppel did not stop.***

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JOHN DOE V. VALENCIA COLLEGE
U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)



- Facts:
 - During the investigation, Koeppel admitted he sent Roe inappropriate messages, many of them sexually and some sexually explicit photos.
 - Roe and boyfriend filed a complaint with police.
 - Police called Koeppel and told him to stop; **he didn't stop.**
 - In August, an emotional Roe reported to Valencia's Dean of Students.
 - DOS implemented a NCO and provided him notice of the charges.
 - Koeppel then sent 20 messages to Roe to convince her to withdraw her complaint.

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JOHN DOE V. VALENCIA COLLEGE
U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)



- Koeppel ultimately found responsible for Stalking – a violation Valencia's Code of Conduct and suspended for one year.
- Decision upheld on appeal.
- In his lawsuit, Koeppel alleged that Valencia
 - Violated his 1st Amendment rights
 - Valencia's policies were overbroad and vague
 - Valencia violated his due process rights
 - Valencia violated Title IX (erroneous outcome)
- Court rejected all of his arguments

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JOHN DOE V. VALENCIA COLLEGE
U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)



- The court upheld Valencia's stalking policy.
 - Koepfel argued it was subjective because it used the words "alarms, torments, or terrorizes,"
 - Court said Koepfel's conduct was "clearly proscribed" and the policy included language the actor's behavior must be willful, malicious, and repeated; and
 - Language that the victim must also be "reasonably and seriously alarm[ed], tormented, or terrorized."
- 1st Amendment not violated because he continued to harass her even after her repeated requests for him to stop, the police requesting him to stop, and a no contact order from the College.

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JOHN DOE V. VALENCIA COLLEGE
U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)



- Court relied on *Tinker v. Des Moines* (signature 1st Amendment case) to indicate he:
 - interfered with Roe's rights
 - Valencia is entitled to take off-campus jurisdiction
- Due process claim failed because he did not have a constitutionally protected right to enrollment at Valencia
 - Even if he did, court noted the school did not act in an arbitrary or capricious manner
- No erroneous outcome under Title IX because he failed to provide facts that cast "some articulable doubt on the accuracy of the disciplinary proceeding."
- Also under TIX, there is no casual connection between the outcome and gender bias

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**FEMINIST MAJORITY FOUNDATION V. UNIVERSITY
OF MARY WASHINGTON**
U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)



- November 2014: University of Mary Washington’s student senate voted to authorize male-only fraternities. Student members of Feminists United at UMW questioned the decision and were subsequently subjected to offensive and threatening anonymous messages posted on Yik Yak.
 - Yaks referred to Feminists United members by “femicunts, feminazis, cunts, bitches, hoes, and dikes”
 - Included threats to “euthanize,” “kill,” and “[g]rape” FU members.
 - Some Yaks named specific members and reported the location of one member in hopes that she would be confronted on campus.
- Feb/Mar 2015 - Feminist United members expressed concern for their safety due to online posts.

**FEMINIST MAJORITY FOUNDATION V. UNIVERSITY
OF MARY WASHINGTON**
U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)



- Although UMW held a listening session, Title IX Coordinator told Feminist United members that UMW had “no recourse” for such online harassment.
- UMW never investigated the harassment and threats, and never asked any law enforcement agencies to investigate them, citing concerns for infringing upon students’ First Amendment rights
- In May 2017, plaintiffs filed suit in Eastern District of Virginia, alleging UMW was deliberately indifferent to sex discrimination which served to create and foster a hostile campus atmosphere.

FEMINIST MAJORITY FOUNDATION V. UNIVERSITY OF MARY WASHINGTON

U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)



- In September 2017, the district court dismissed the complaint finding that the alleged harassment “took place in a context over which UMW had limited, if any, control.”
- U.S. Court of Appeals for Fourth Circuit vacated the dismissal of Title IX sex discrimination complaint and remanded for further proceedings.
- Court relied on *Davis* noting that an educational institution can only be liable for student-on-student sexual harassment when the institution “exercises substantial control over both the harasser and the context in which the known harassment occurs.”

FEMINIST MAJORITY FOUNDATION V. UNIVERSITY OF MARY WASHINGTON

U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)



- The court found that UMW had control or “disciplinary authority” over the harasser; UMW had ability to punish students who posted sexually harassing and threatening messages online.
- The court rejected the argument that UMW was unable to control the harassers because the offending Yaks were anonymous by noting UMW cannot escape liability when it never took any action to try to identify the harassers.
- The court found that although harassment occurred online, UMW had substantial control over the context of the harassment because the Yik Yak messages concerned events occurring on campus, specifically targeted UMW students, and originated on or within the immediate vicinity of the UMW campus utilizing the campus’ wireless network.

FEMINIST MAJORITY FOUNDATION V. UNIVERSITY OF MARY WASHINGTON

U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)



- The court noted UMW could have acted to disable access to Yik Yak campus-wide as it controlled activities that occurred on its network.
 - “[W]e cannot conclude that UMW could turn a blind eye to the sexual harassment that pervaded and disrupted its campus solely because the offending conduct took place through cyberspace.”
- UMW maintained that the First Amendment would be implicated if they punished students for their speech and barred students from accessing Yik Yak on UMW’s wireless network.
 - The court rejected this argument:
 - “(1) true threats are not protected speech, and
 - (2) the University had several responsive options that did not present First Amendment concerns.”

FEMINIST MAJORITY FOUNDATION V. UNIVERSITY OF MARY WASHINGTON

U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)



- The court agreed with the plaintiffs:
 - UMW could have addressed the conduct without exposing itself to First Amendment liability by:
 - Taking obvious and reasonable (such as more vigorously denouncing the conduct,
 - Conducting a mandatory assembly of the student body to discuss and discourage such harassment through social media,
 - Hiring an outside expert to develop policies for addressing and preventing harassment, or
 - Offering counseling services for those impacted by the targeted harassment).

CASE STUDY #1: "iPHONE"



CASE STUDY: IPHONE



- Maris has been dating Greg for the past few months after the two of them began hanging out following their Psychology 101 class. Greg is a swimmer on the university team. Maris is a first-year student and Greg is a junior.
- Maris has had a few sexual partners in the past and was immediately attracted to Greg, who was outgoing and gregarious, and well-liked on the team and at the parties they frequented together. Maris and Greg enjoyed an adventurous sex life that often included having sex in public places (like the bathroom at a restaurant and even in the swimming pool afterhours).

CASE STUDY: IPHONE



- Maris purchases a product called the we-vibe (<http://we-vibe.com>) that allows Maris to insert the vibrator and have the speed, duration, and vibration intensity controlled by an app on both her and Greg's phone.
- Their sex life includes the use of vibrators and toys and some light BDSM play. Both Greg and Maris have very high sex drives (having sex four to five times a day,) and this new toy is very much appreciated when they are apart.

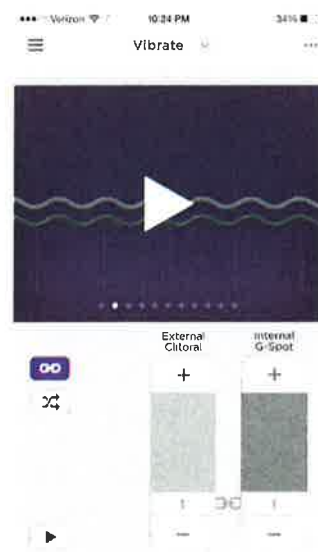
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CASE STUDY: IPHONE



- While Greg was at a party and Maris was in her dorm room, Greg received a text message from Maris, saying that she had turned on and inserted the vibrator and wanted Greg to help “get her off.”
- Greg agreed and opened the app on his phone. Maris continued to text him while Greg adjusted the controls of the vibrator inside Maris.



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CASE STUDY: IPHONE



- Jeff, a swimming teammate, saw Greg on his phone and asked what he was doing. Greg initially tried to avoid the conversation, but had consumed several drinks and eventually showed Jeff his phone.
- Greg showed him how the controls work on the phone — toggle slides for intensity — and how the top controls the pattern.
- A text notification from Maris popped up saying, “Want more. Harder.” Jeff asked to set the controls and Gregg shrugged and handed him the phone.

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CASE STUDY: IPHONE



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CASE STUDY: IPHONE



- Four other teammates saw Jeff and Greg talking and came over to investigate. The phone was passed around the team and everyone took a turn adjusting the controls and reading the texts from Maris. She wrote, “I love this!” and “You are going to make me cum!”
- The group of six laughed at this and Greg pulled up some naked pictures of Maris for them to look at. They talked about how hot she was and soon all six of them were sharing pictures of their girlfriends and people they have slept in a competition to see who had the “dirtiest” and “hottest” images.

CASE STUDY: IPHONE



- Maris and Greg signed off the app and agreed to see each other after the party. Greg was pretty intoxicated and made a joke about how his teammates helped out with the app. Maris became very upset about this and they had a big argument before she broke up with him and told him to get out of her room.
- In the morning, Maris shared this story with her RA and asked to make a complaint.

CASE STUDY: IPHONE



- If you were in the role of taking the complaint, what additional questions or information would you need to know?
- What are the Title IX issues in this case? How would you categorize the issues? What issues involve Greg? What issues involve his friends? What are the concerns with the other images on Greg's teammates phones?
- How does Maris and Greg's past sexual behavior impact the case?
- What would be the likely outcome of this case on your campus?

CASE STUDY: IPHONE



- What kind of conversation could Greg and Maris have had before Greg shared the we-vibe app or the pictures on his phone?
- What kind of prevention or education messaging might VAWA like to see to prevent a case like this from occurring? Which group or department should be involved in creating and sharing this message?
- What are some of the challenges technology presents in Title IX cases?

TITLE IX & GENDER-BASED CLAIMS

—
Gender Bias
Erroneous Outcome
Disparate Impact or Treatment

JOHN DOE V. PENN STATE UNIVERSITY **U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).**



- Incident involved a male and a female student and an allegation of non-consensual sexual penetration in Sept. 2016.
- Investigation began in Sept. 2016; Jane Roe never provided a written statement.
- Investigator allowed Doe to view a draft copy of the report in her office in his sixth meeting, but he could not take the report with him. This was also the first time he had seen the incident reports from Res. Life and Univ. PD. (the documents that represented the formal complaint).
- Investigator.
- In May 2017, Administrative Hearing officer found him responsible and recommended suspension until the end of 2017.

JOHN DOE V. PENN STATE UNIVERSITY
U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).



- Hearing held in June 2017.
 - Hearing Panel adhered strictly (and to its detriment) to the information contained in the investigator’s flawed report (which excluded key evidence) and did not allow Doe to submit key evidence or have his questions asked.
- Doe was not allowed to see Roe while she testified via webcam transmission; PSU policy required that Doe be allowed to see her.
- Found responsible.
 - Suspended through the end of 2017; required to undergo counseling; lost on-campus living privileges; and panel recommended his removal from the accelerated pre-med program (a significant sanction).

JOHN DOE V. PENN STATE UNIVERSITY
U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).



- Doe sued PSU, the TIX Coordinator, the Investigator, Administrative Hearing officer, Student Conduct administrator, and obtained a TRO against PSU prohibiting implementation of the sanctions.
- Among his allegations, Doe alleged violations of Due Process, Title IX, and Section 1983.
- PSU filed a Motion to Dismiss, which was denied in part and granted in part.
- Section 1983 claim: MTD denied in relation to the TIXC, Hearing Officer, and Investigator --> allowed to proceed against them in their individual capacities.
 - E.g.: Doe alleged lack of notice of the charges, lack of rationale in the “cursory and perfunctory decision letter.”

JOHN DOE V. PENN STATE UNIVERSITY
U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).



- Title IX claim of Erroneous Outcome
 - Alleged PSU’s process was unfair and biased toward the accuser – Court dismissed this argument, stating this may be a pro-victim bias, but not a sex or gender bias.
 - Alleged the DCL and external social and political pressure, including OCR investigation of PSU → Court said this does not infer gender bias, rather a pro-victim bias.
 - Alleged all students suspended or expelled for sexual misconduct were male → Court said this allegation was enough to survive the Motion to Dismiss.

JOHN DOE V. MIAMI UNIVERSITY, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Feb. 9, 2018)



- John Doe alleged that he was found responsible for sexual misconduct because he was male.
 - Erroneous Outcome claim. Requires plaintiff to show:
 - 1) facts sufficient to cast some doubt on the accuracy of the discipline proceeding, and
 - 2) a causal connection between the flawed outcome and gender bias.
- Both Doe and the reporting party were highly intoxicated. Miami U’s policy reads, “an individual cannot consent who is substantially impaired by any drug or intoxicant...”
 - BUT only Doe was charged, despite evidence he may have been more intoxicated.

JOHN DOE V. MIAMI UNIVERSITY, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Feb. 9, 2018)



- Miami U.'s process was very quick and Doe had 48 hrs. to provide evidence and witnesses.
- Doe sought and obtained a medical leave due to stress of the process.
- Prior to hearing, Doe was not provided the names of witnesses, nor given access to the investigation report.
- Investigator that provided him the charges was a member of the hearing board and allegedly dominated the hearing and stated to him, "I bet you do this (i.e. sexually assault women) all the time" during the hearing.
- Doe was found responsible and suspended for 3 terms.

JOHN DOE V. MIAMI UNIVERSITY, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Feb. 9, 2018)



- Court held in Doe's favor:
 - Transcript notation and Liberty Interest → heightened impact necessitates heightened due process.
 - Conflict of Interest: Administrator served conflicting roles. (investigator, hearing panel member, sanctioning agent)
 - Lack of Impartiality: Administrator had pre-determined Doe's guilt as demonstrated by her conduct in the hearing.
 - Withholding report reflected bias.

JANE ROE V. UNIVERSITY OF CINCINNATI
U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)



- **Facts**

- UC students, Jane Roe and John Doe attended a party where they consumed alcohol.
- Roe walked Doe home from the party because she was worried about his level of intoxication.
- Doe’s roommates were also concerned, asked Roe to leave, but she said she was dizzy and did not leave.
 - Roe allegedly told Doe’s roommates, “I promise you, nothing is going to happen. I’m just gonna give him his water, look him over, that’s it.”
- After arriving at home, Doe vomited.

JANE ROE V. UNIVERSITY OF CINCINNATI
U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)



- Roe allegedly locked the door, took off her clothes, “made out” with Doe, and was digitally penetrated by him. In the morning, Doe woke to find Roe in his room and blood on his hands and sheets.
- Doe was very upset and asked roommate to get Roe to leave.
- He reported the incident to military personnel that day (10/1/17).
- On 10/2/17, he filed a complaint with UC’s Title IX office; an investigation ensued.
- UC held an in-person hearing, after which the panel determined Doe was incapacitated and Roe should have known. She was suspended until Doe graduated.

JANE ROE V. UNIVERSITY OF CINCINNATI **U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)**



- Roe filed an injunction against UC to keep the finding and sanction from going into effect.
 - § 1983 claim, citing equal protection and due process violations

- Equal Protection
 - Roe claimed inequity because UC did not investigate her level of intoxication – Ct rejected this argument.
 - However, throughout UC’s process, Roe claimed the sex was consensual, that she was able to consent, and fully recalled the incident.
 - Roe also claimed UC was motivated to find women in violation of Title IX because of extensive TIX litigation against UC and public pressure.
 - She provided no statistics or evidence, so the court rejected this argument.

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JANE ROE V. UNIVERSITY OF CINCINNATI **U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)**



- Due Process claim
 - Roe felt she was not allowed sufficient opportunities for cross-examination
 - Court refused to adopt the 6th Circuit standard, stating that schools should be able to conduct hearings with greater flexibility
 - Not solely a credibility-based determination
 - There was a contemporaneous text message from Roe to a friend saying how intoxicated Doe was at the time of the incident.

NOTE: This case concluded a few weeks before the Baum decision, which may or may not have impacted the court’s decision.

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SNYDER-HILL, ET AL. V. THE OHIO STATE UNIVERSITY
U.S. DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)



- In July 2018, 10 former OSU students – Steve Snyder-Hill and nine other men – filed a lawsuit against OSU.
- The men alleged extensive sexual misconduct and assault by former OSU athletic team doctor, Student Health Services physician, and Assistant Professor, Dr. Richard Strauss:
 - Inappropriately touched and fondled their genitals during examinations.
 - Digitally penetrated their rectums, touched their bodies in other inappropriate ways, moaned during examinations
 - Made sexualized comments and asked inappropriate sexual questions.
 - Found reasons to examine their genitals even when the scope of their visit did not require such examination (example: an appointment for an ankle injury).
 - Plaintiffs also alleged Dr. Strauss completed rectal examinations when not medically necessary.

SNYDER-HILL, ET AL. V. THE OHIO STATE UNIVERSITY
U.S. DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)



- Administrators, coaches, and Athletic Directors are alleged to have known about the abuse, but failed to take corrective action leading to more victimization
 - Allegations span from 1978-1998.
- Since its initial filing, the number of plaintiffs has grown to thirty-nine (39) former OSU students
- Dr. Strauss committed suicide in 2005.
- As evidence of an ongoing culture of abuse, Plaintiffs referenced:
 - OSU’s decision to close its sexual assault prevention and response unit.
 - How OSU instructed students to see Dr. Strauss for exams after they had reported complaints of misconduct by Dr. Strauss.
 - OSU’s pattern of permitting other sexual predators within the campus community.

SNYDER-HILL, ET AL. V. THE OHIO STATE UNIVERSITY
U.S. DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)



- Many plaintiffs were unable to identify what happened to them as sexual assault until reports came out in 2018.
- The plaintiffs allege there could be thousands of victims given Dr. Strauss' 20 year tenure at OSU, as well as his prominent roles as an OSU Student Health Services physician and athletic teams doctor.
- Plaintiffs alleged that coaches and other professional staff members knew that Dr. Strauss was committing the abuse and that students regularly called him nicknames such as Dr. Balls, Dr. Nuts, Dr. Jelly Paws, and Dr. Cough.

DUE PROCESS

WHAT IS DUE PROCESS?



- Two overarching forms of due process:
 - **Due Process in Procedure:**
 - Consistent, thorough, and procedurally sound handling of allegations.
 - Institution substantially complied with its written policies and procedures.
 - Policies and procedures afford sufficient Due Process rights and protections.
 - **Due Process in Decision:**
 - Decision reached on the basis of the evidence presented.
 - Decision on finding and sanction appropriately impartial and fair.

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JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)



- Facts
 - John Doe and J.C. met at new student orientation in Fall 2011.
 - They became close friends and began a 21-month “intimate, sexually active, and...exclusive dating relationship”
 - After their relationship ended, they maintained a friendship for four months, but their friendship deteriorated.
 - Both John and J.C. were attracted to the same person, who rejected J.C.’s friend request.
 - The next day (6 months after relationship ended), J.C. filed a two sentence complaint: “Starting in the month of September 2011, the Alleged Violator of Policy [John] had numerous inappropriate, nonconsensual sexual interactions with me.”

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JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)



- **Facts**

- Upon receipt of this complaint, and without any additional information, Brandeis' Dean of Students immediately removed John from the residence halls, classes, his campus job, and his student leadership position.
- Two days later, John was charged with six potential violations:
 - Sexual misconduct
 - Taking sexual advantage of incapacitation
 - Lack of consent to sexual activity
 - Sexual harassment
 - Causing physical harm to another
 - Invasion of privacy

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JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)



- Brandeis had recently changed its procedures for sexual misconduct allegations that relied on the investigation and findings of a "Special Examiner" and:
 - Did not provide for a hearing
 - Did not allow the accused to know the details of the charges
 - Did not allow the accused to see the evidence prior to a decision
 - Did not allow the accused to see the Special Examiner's report until the process had concluded (including appeal)
 - Did not allow for cross-examination of the parties or witnesses (even through an intermediary)

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JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)



- Appeals

- “There was no right of appeal on the grounds
 - That there was insufficient evidence to sustain the findings
 - That the Special Examiner was mistaken as to any factual issue
 - That the Special Examiner acted arbitrarily or capriciously;
 - Moreover, the accused was expected to prepare his appeal without access to the Report on which the finding of responsibility was based.”

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JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)



- Doe was not provided with the Special Examiner’s report
- Had a summary read to him after the Special Examiner determined a finding
 - The Special Examiner’s finding was technically a “recommendation” to an administrator or panel, but in practice the recommendation was always adopted.
- John Doe was found responsible by the Dean of Students and a panel of three met privately to determine sanction.
- They sanctioned John with a disciplinary warning, a requirement to undergo sensitivity training, and a permanent notation on his transcript.
- An appellate group of three faculty denied John Doe’s appeal.

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JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)



- The Special examined 12 incidents and found John Doe responsible for four of them:
 - Touching J.C.'s groin while they watched a movie (they had sex for the first time the next night)
 - Looking at J.C.'s privates when they showered together.
 - Kissing J.C. to wake him up (something he did over the course of their relationship; S.E. rigidly determined J.C. was incapacitated and could not consent)
 - An incident where John allegedly attempted to perform oral sex on J.C. when he didn't want it.
- The S.E. relied heavily on the fact that John's answers to questions were inconsistent; **however, the questions were rarely specific enough to allow John to even know what he was supposed to address in his response.**

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JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)



- John Doe sued Brandeis citing eight causes of action, of which four survived Brandeis' motion to dismiss:
 - **Breach of contract – Motion denied**
 - **Breach of the implied covenant of good faith and fair dealing – Motion denied**
 - Estoppel and reliance – Motion granted
 - **Negligence – Motion granted in-part (negligent supervision claim survives)**
 - Defamation – Motion granted
 - Invasion of privacy – Motion granted
 - Intentional infliction of emotional distress – Motion granted
 - **Negligent infliction of emotional distress – Motion denied**
- *Note: While John Doe did not make a Title IX claim, this case is significant because of the due process and procedural elements involved in sexual misconduct cases.*

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JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)



- The court wrote a blistering and chastising decision, ultimately concluding that the composite picture painted by the numerous failures to provide a fundamentally fair process led to a denial of Brandeis's motion to dismiss.
- The court listed ten separate issues of procedural fairness:
 - No right to counsel
 - No right to confront accuser
 - No right to cross-examine witnesses
 - No right to examine evidence or witness statements
 - Impairment of the right to call witnesses and present evidence
 - No access to Special Examiner's report
 - No separation of investigatory, prosecution, and adjudication functions
 - No right to effective appeal
 - Burden of proof

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JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)



• Key Takeaways

- Provide a responding party with detailed allegations and allow them to respond to each of the allegations prior to rendering a finding.
- **Stop hiding the ball** – let the parties review reports
- Ensure appellate procedures allow a party to appeal on the basis that the decision “was not supported by the evidence, unfair, unwise or simply wrong.”
- It is not always enough to follow your procedures if those procedures are deficient in providing basic due process or fundamental fairness protections.
 - “Brandeis appears to have substantially impaired, if not eliminated an accused student's rights to a fair and impartial process.” (p.12).

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DOE V. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)



- Facts

- John Doe was a graduate student at UC
- Aug-Sept 2015: John Doe met Jane Roe on Tinder and after a few weeks, met in person, then went to his apartment, where they engaged in sexual intercourse
- Three weeks later, Roe reported to UC's Title IX office that Doe had sexually assaulted her.
- UC's Title IX office investigated the allegation (took nearly 5 months), then referred the matter to a faculty/student hearing board
- Evidence is disclosed to the accused in advance of the hearing

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DOE V. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)



- Facts

- Hearing provided a “circumscribed form of cross-examination” --> provide written questions to the panel who determine relevance and whether the question will be asked.
- Hearing held on June 27, 2016, but Roe did not attend
- Doe did not know Roe would not attend
- UC altered its procedures in her absence and Doe was unable to ask her any questions
- Chair read Roe's closing statement into evidence

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DOE V. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)



- Facts

- Hearing board deliberated, found Doe responsible, and recommended a 2-year suspension, which UC's Asst. Dean accepted.
- Appellate administrator recommended that UC lessen the suspension to 1 yr.
- UC's Dean of Student accepted this recommendation
- Doe informed of final decision in Sept. 2016, with sanction to start at the end of Fall 2016.

DOE V. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)



- Doe sued UC for violation of Title IX and violation of due process and moved for preliminary relief enjoining UC from enforcing the decision
 - Doe argued UC's action was unconstitutional, as he was provided no opportunity to cross-examine Roe, per UC procedures.
 - Dist. Ct. agreed.
- UC appealed the District Court's decision on the preliminary injunction
- 6th Circuit upheld the District Court's decision

DOE V. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)



- **6th Circuit's decision**

- Due process: **Where credibility is the deciding factor/pivotal issue**, the Complainant's absence from the hearing made it difficult and problematic for the "trier of fact" to assess credibility
- The inability to confront one's accuser rendered the process fundamentally unfair.
- Cross examination in some form is essential to due process, even if indirect or via video conferencing; does not have to be at the same level as a judicial trial
- Limited their decision to the facts of the case and UC's procedures, but it is a reflection of the due process needed when a student is facing suspension or expulsion.

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JOHN DOE V. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)



Due process-based case

- **Facts**

- Doe expelled from Cal Poly, San Luis Obispo in 2016 for sexual assault
- Cal Poly received notice from Jane Roe's roommates
- Doe and Roe attended a fraternity party, danced, and kissed
- Roe alleged they went to a room at the party where Doe:
 - Forcibly kissed Roe
 - Held her down on a bed
 - Bit her lip until it bled, and removed her shirt.
- Roe alleged she fought back and was able to leave the house.

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JOHN DOE V. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)



- Roe was reluctant to participate and provided a statement
- Roe refused to provide Doe's name, related text messages, or to participate in a formal resolution
- University initiated a "confidential resolution"
- Doe alleged encounter was consensual
- Eye witness walked in on Doe and Roe and said it appeared consensual
- Doe provided text messages after alleged incident between him and Roe
- Doe recommended three additional witnesses, who were not interviewed

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JOHN DOE V. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)



- Doe was expelled and his appeal was denied
- In his filing, Doe cited due process issues, such as:
 - Three additional witnesses who were not interviewed
 - Doe was not able to pose questions to Roe because she did not participate in the process
 - Doe was not able to pose questions, directly or indirectly, to Roe's roommates or other witnesses.
- Several key pieces of evidence were misrepresented in the investigation report
- Doe was informed of the determination of responsibility, but was told the investigation report was not yet complete
- Not allowed to review report

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JOHN DOE V. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)



- Judge ordered the expulsion be reversed.
- Judge noted that the University:
 - Failed to inform Doe of the complete allegations, including policies violated.
 - Failed to disclose all evidence on which the determination relied.
 - Failed to allow Doe to question Roe or witnesses, directly or indirectly, despite the university's reliance on the credibility of testimony.
 - Reached a determination that was not supported by substantial evidence.

JOHN DOE V. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)



- **Key Takeaways**
 - Reporting party's lack of participation is a significant due process concern.
 - Provide parties an opportunity to review and respond to all relevant evidence.
 - Question reporting and responding party's witnesses. If witnesses are not interviewed, document the rationale.
 - Provide for direct or indirect questioning between the parties and of witnesses
 - Provide an opportunity to review the investigation report once all evidence is collected.

JANE ROE V. JAVAUNE ADAMS-GASTON, ET AL.
U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)



- This case involved an Ohio State University student who was charged twice for sexual misconduct. She was initially suspended, then expelled following the second hearing.
- Roe argued that she was denied her right to due process because she was unable to cross-examine adverse witnesses during the hearing.
- She sought, and was awarded, a preliminary injunction against the university for her expulsion.
- In this case Ohio State conducted a thorough investigation and provided a written report to the hearing board including interview notes taken by the investigator.

JANE ROE V. JAVAUNE ADAMS-GASTON, ET AL.
U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)



- Both parties attended the first hearing.
- Hearing panel felt Roe was not credible and her account was not plausible, as compared to the complainants and witnesses.
- In the second hearing, the complainant did not attend, but sent a statement directly to hearing officer and asked that statements be read aloud during the hearing; Roe objected to the statements being read, but the statements were in the hearing packet.
- 3 adverse witnesses did not attend, but their statements were in the hearing packet.
- Hearing officer found Roe in violation; found her statement lacked credibility as compared with the credible and plausible statements of witnesses.
- Roe was expelled.

JANE ROE V. JAVAUNE ADAMS-GASTON, ET AL.
U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)



- Roe sued, stating OSU deprived her of due process because she could not cross examine the reporting party and the witnesses.
- The Court held that a hearing was necessary.
- The hearing does not need to have the formalities of a criminal trial but the accused student must be given an opportunity to respond, explain, and defend herself.
- Due process requires an opportunity to confront and cross examine adverse witnesses, especially where the evidence consists of the testimony of individuals whose memory might be faulty or motivated by malice or vindictiveness.
- Hearing panel should be given an opportunity to assess demeanor.

JOHN DOE V. UNIVERSITY OF MICHIGAN, ET AL.
U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)



- Doe completed all graduation requirements then was accused of sexual assault. He sought a preliminary injunction preventing the investigation, indicating Michigan's policy violated due process rights.
 - Doe alleged that due process requires a live hearing and an opportunity for cross examination.
- Michigan's policy provides for an investigation. The investigator provides the opportunity for the parties to pose questions to each other or to witnesses; investigator makes a finding and provides a rationale to the TIXC and General Counsel.
- Court found in Doe's favor, citing the high risk of harm (expulsion).

JOHN DOE V. UNIVERSITY OF MICHIGAN, ET AL.
U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)



- Court said Michigan’s method of private questioning through an investigator leaves Doe with no way of knowing which questions are actually being asked of adverse witnesses or their responses.
- Without a live proceeding, the court said the risk of an erroneous deprivation of Doe’s interest in his reputation, education and employment is significant.
- Interestingly, court did not require Michigan to change its process.

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JOHN DOE V. CLAREMONT MCKENNA COLLEGE
CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)



- May 2015, John Doe was found responsible for nonconsensual sexual intercourse with Jane Doe, a student from Scripps College.
- He was suspended for one year.
- The decision was made as a result of an “Investigation Findings and Review” committee – two CMC faculty/staff and the investigator.
- Procedures for the Committee “meeting” did not allow for questioning by the Committee or the parties.
- Jane did not attend the Committee meeting.
- The Investigator also did not ask Jane the questions John requested the investigator ask.

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JOHN DOE V. CLAREMONT MCKENNA COLLEGE CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)



- He petitioned in state court for a writ of administrative mandate to set aside the decision.
- Trial court denied the petition. Appellate court reversed.
- Court approvingly cited 6th Circuit’s Cincinnati decision regarding credibility determinations and the ability of the parties to pose questions to each other.
 - *“We hold that where, as here, John was facing potentially severe consequences and the Committee’s decision against him turned on believing Jane, the Committee’s procedures should have included an opportunity for the Committee to assess Jane’s credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee’s asking her appropriate questions proposed by John or the Committee itself.”*

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JOHN DOE V. CLAREMONT MCKENNA COLLEGE CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)



- Court recognized a college is not a court, that it cannot compel people to appear at a hearing, the burden of added procedures on the college, and the possibility of intimidating or retraumatizing the complainant.
 - *“In light of these concerns we emphasize, as did Cincinnati, that the school’s obligation in a case turning on the complaining witness’s credibility is to “provide a means for the [fact finder] to evaluate an alleged victim’s credibility, not for the accused to physically confront his accuser.”*
 - *“While we do not wish to limit the universe of ideas of how to accomplish this, we note that the mechanism for indirect questioning in Regents, including granting the fact finder discretion to exclude or rephrase questions as appropriate and ask its own questions, strikes a fair balance among the interests of the school, the accused student, and the complainant.”*

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JOHN DOE V. BAUM, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)



- Jane Roe accused John Doe of sexual misconduct – claiming she was incapacitated.
- The University of Michigan investigated over the course of 3 months, interviewing 25 people.
- “The investigator was unable to say that Roe exhibited outward signs of incapacitation that Doe would have noticed before initiating sexual activity. Accordingly, the investigator recommended that the administration rule in Doe’s favor and close the case.”
- Roe appealed.

JOHN DOE V. BAUM, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)



- The 3-member Appellate Board reviewed the evidence and reversed the investigator’s decision (did not meet with anyone or consider any new evidence). They felt Roe was more credible.
- Before sanctioning, Doe withdrew, one semester shy of graduation.
- Doe sued, alleging Title IX and Due process violations.
- On a Motion to Dismiss by Michigan, the District Court dismissed the case, but 6th Circuit reversed.
- The Due Process and the Title IX Erroneous Outcome claims survived.

JOHN DOE V. BAUM, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)



- **Due Process**

- "Our circuit has made two things clear: (1) if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and (2) when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination."
- "If a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."
 - Either directly by the accused or by the accused's agent.

JOHN DOE V. BAUM, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)



- **Title IX Erroneous Outcome**

- The due process issues cited above inform their finding.
- The attention gained because OCR launched an investigation two years ago that garnered and continued to garner attention, the complaint was filed by a female, Michigan could lose all of its funding, the news media beat up Michigan for not supporting victims enough,
- The Appellate Board dismissed all the evidence provided by male witnesses (caser was basically men on Doe's side, women on Roe's side) stating that they were biased because they were fraternity brothers of Doe, but made no such qualification for her witnesses (all of whom were her sorority sisters, but their decision made no mention of that).
- The Appellate Board made these judgments on a "cold record".
- "Taken together, male bias is a plausible explanation that is better explored in discovery."

JOHN DOE V. U. OF SOUTHERN MISSISSIPPI **S.D. MISS. (NOV. 27, 2018)**



- In July 2018, John Doe, a scholarship athlete, was accused of sexual misconduct
- The University conducted an investigation and sent Doe a summary of the interviews, requesting a response
- Doe did not respond and was subsequently found responsible and suspended for one year
- In September, he successfully filed for an injunction, prohibiting the University from implementing the sanction
 - He cited the draft, leaked regs as entitling him to more due process than the University provided him → Court rejected that claim
 - However, Court had concerns about the process, reinstated Doe as a student and a scholarship athlete.

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JOHN DOE V. U. OF SOUTHERN MISSISSIPPI **S.D. MISS. (NOV. 27, 2018)**



- University conducted a new hearing under substantially revised and enhanced procedures:
 - University updated based on Doe v. Cincinnati and U. of Miss. caselaw
 - Each party provided a separate room to observe entire proceedings
 - Advisors (as well as any attorneys) were allowed to observe as well
 - Parties could request a digital recording of the hearing
 - Parties received written summaries of evidence and provided an opportunity for review and response.
 - Parties could email follow-up questions to hearing panel, who would ask the questions, or reject a question at their discretion.

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JOHN DOE V. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)



- Doe filed a second injunction, citing especially the Proposed Regs., the 6th Circuit's *Baum* decision
 - Cited the inability to be in-person during questioning limited ability to determine credibility
 - Hearing Panel's ability to reject certain questions limited ability to cross-examine
- Court denied the injunction request, stating that the revised procedures "appear to adequately satisfy due process"

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JOHN DOE V. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)



- Court's decision
 - *Doe v. Baum* went "well beyond what was required" and declined to decide the current case consistent with *Baum*
 - University's revised procedures were consistent with *Doe v. Cincinnati*, which required the *decision-maker* to see the parties
 - Extensively analyzed 6th Circuit's overreach in *Baum*
 - *Due process does not require asking ALL questions posed by the parties*
 - Rejected Proposed Regs argument
 - "[T]here is no guarantee, or even probability, that the proposed regulations will be adopted wholesale as proposed."
 - "[I]t is not the federal agency's role to determine what constitutes adequate due process—such a determination remains the role of the courts."

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JOHN DOE V. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)



- Key Takeaways

- Splits with the *Doe v. Baum* decision, citing Baum's overreach
- Recognizes greater flexibility of due process in a school setting
- Credibility does not require physical presence, as long as decision-maker can see them
- Failure of injunction to require the University to wait for the Proposed Regs to be finalized likely chilled other similar injunctions
- Highlights possible Ultra Vires actions by Dept. of Ed.

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JOHN DOE V. U. OF SOUTHERN CALIFORNIA
CA. COURT OF APPEAL, 2ND APP. DISTRICT (DEC. 11, 2018)



- Facts

- April 2014, Doe and Roe attended a paint party
- Both had consumed alcohol prior to and during the party
- They went to Roe's apartment where Roe alleges Doe sexually assaulted her and engaged in nonconsensual vaginal and anal intercourse
- Investigation begun by USC investigator (April) → outsourced to an outside attorney (May) → transferred back to USC investigator (June)
- USC investigator did not re-interview key witnesses
- USC admin. determined Doe knew or should have known Roe could not consent.

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- **Facts**

- Roe did not remember much of what happened, but reconstructed events based on three witnesses interviewed by other investigator.
- USC administrator felt other witnesses were not “sufficiently reliable.”
- Doe was expelled from USC.
- USC denied Doe’s appeal.

- Trial court denied Doe’s petition to set aside his expulsion
- Ct. of Appeals:
 - Reversed, citing credibility of witnesses as a key issue → USC administrator should have interviewed key witnesses because their credibility was central to the finding.
 - Key discrepancies in testimony and evidence required further examination.
 - E.g.: there were red substances in Roe’s apt; were they paint or blood?
 - USC did not ask Roe to provide her clothes.
 - USC did not obtain, or seek to obtain rape treatment center medical records.

JOHN DOE V. U. OF SOUTHERN CALIFORNIA
CA. COURT OF APPEAL, 2ND APP. DISTRICT (DEC. 11, 2018)



- **Key Takeaways**

- A California state Ct of Appeals cited favorably to *U. of Cincinnati, Baum* and *Claremont McKenna*.
- Possibility of severe sanctions in a credibility-based case warrants a fair hearing to allow the decision-maker to determine witness credibility.
 - In-person in order to observe demeanor.
 - Directly address the witnesses and parties.
- When you are aware evidence exists, ask for it!
 - Thoroughness, fairness, and impartiality demand it.

LEE V. UNIVERSITY OF NEW MEXICO
U.S. DIST. CT., DISTRICT OF NEW MEXICO (SEPT. 20, 2018)



- UNM student, J. Lee was found responsible for sexual misconduct and expelled from UNM.
- Lee sued under Title IX, Breach of Contract, violation of due process, gender discrimination, and violation of NM Constitution.
- Due process claims to survived a motion to dismiss
 - UNM provided an evidentiary hearing for non-sexual misconduct related resolutions, but not for sexual misconduct.
 - UNM failed to properly inform Lee of all of the allegations (underage drinking)
- The court stated an ***investigation that relies on credibility requires a formal or evidentiary hearing including cross-examination of witnesses and presentation of evidence to preserve basic fairness.***

- Court stated that preponderance of the evidence standard is inappropriate where serious sanctions are possible, including expulsion and permanent transcript notation.
 - This is the first ruling to explicitly hold that the preponderance standard is constitutionally improper.
 - Favorably cited in the DOE’s proposed Title IX regulations to justify assertion that preponderance is inadequate “where the consequences of a finding of responsibility would be significant, permanent, and far-reaching.” (<https://www.federalregister.gov/d/2018-25314/p-142>)
- This decision falls in line with the 6th Circuit decision *Doe v. Cincinnati* relating to a formal evidentiary hearing when credibility is at issue and serious sanctions are possible.

OCR UPDATES



OVERVIEW OF PROPOSED REGULATIONS



- November 29, 2018: OCR published proposed amendments to Title IX regulations:
 - Provided 60 days for public comment – open until January 28th (period to be extended due to government shutdown)
 - OCR will then review comments and finalize the regulations
 - OCR has to respond materially to comments
 - Will amend the Code of Federal Regulations
 - **Will have the force of law once adopted**
 - Proposed amendments are significant, legalistic, and very due process-heavy
 - Will likely go into effect 30 days after final regulations published in Federal Register

RESPONSIBLE EMPLOYEES?



- Proposed regulations shift “actual notice” to:
 - Anyone who has the authority to take action to redress the harassment
 - All pre-K-12 teachers when conduct is student-on-student
- This is **ONLY** the standard for when OCR would deem a school to be on notice; it is the floor.
- ATIXA has not changed its recommendation to require all non-confidential employees to report harassment or discrimination
- Continue to train employees on obligation to report

DEFINITIONS: NOTICE



- “Notice” is the benchmark indicating when an institution is required to stop, prevent, and remedy
- Current OCR definition of notice – “knew or should reasonably have known”
 - Incorporates both actual and constructive notice
- Proposed regulations restrict to actual notice exclusively
 - *Actual knowledge* means notice to Title IX Coordinator or any official with authority to institute corrective measures
 - *Respondeat superior* or constructive notice insufficient
 - PK-12 teachers are “officials” – post-secondary faculty are not
 - Mere ability or obligation to report does not qualify as “official”

JURISDICTION



- Jurisdiction
 - *Davis* standard – control over the harasser and the context of the harassment
 - “occurs within its education program or activity”
- Geography should not be conflated with the Clery Act – education programs or activities can be off-campus, online
- Proposed regulations specify “harassment...against a person in the United States”
 - Unclear effect on study abroad programs or school-sponsored international trips – “nothing in the proposed regulations would prevent...”
- Open question of student/employee harassment of non-student/employee

JURISDICTION



- Current requirement to address on-campus effects of off-campus misconduct
 - Even if conduct took place outside education program or activity, schools responsible for addressing effects that manifest in the program/activity
 - Students and/or employee conduct outside program, IPV
- Leaked draft of regulations prior to publication indicated schools “are not responsible” for exclusively off-campus conduct but could be responsible for on-going on-campus /in program effects
- Published proposal eliminated this comment, presume *Davis* standard still applies – “nothing in the proposed regulations would prevent...”

DEFINITIONS: SEXUAL HARASSMENT



- Current OCR Definition of Sexual Harassment is “unwelcome conduct of a sexual nature”
 - Includes quid pro quo “requests for sexual favors”
 - When sexual harassment constitutes sex discrimination by causing a hostile environment (discriminatory effect), prohibited by Title IX
- Proposed regulations
 - Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (QpQ)
 - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity (HE)
 - Sexual assault, as defined in 34 CFR 668.46(a)
- No mention of retaliatory harassment in proposed regs

DELIBERATE INDIFFERENCE STANDARD



- In *Gebser* (1998) and *Davis* (1999), the Supreme Court held that a funding recipient is liable under Title IX for deliberate indifference **only** if:
 - The alleged incident occurred where the funding recipient controlled both the harasser and the context of the harassment;
AND
 - Where the funding recipient received:
 - Actual Notice
 - To a person with the authority to take corrective action
 - Failed to respond in a manner that was clearly unreasonable in light of known circumstances
- OCR has historically used a broader, less stringent standard

DUE PROCESS OVERVIEW



- Proposed regulations place heavy emphasis on due process protections for the responding party
- New standard of proof mandates
- Notice at various investigation stages
- Collection and production of evidence for review
- Mandate for determination and sanction process
- Live hearings with cross-examination
- Schools provide advisor; must allow advisor questioning of parties/witnesses

STANDARD OF PROOF



- Current OCR standard – preponderance of the evidence is standard civil court will use to evaluate school’s response
- Proposed regulations allow preponderance only if same for other conduct code violations, otherwise must use clear & convincing
- Effectively mandates clear & convincing for schools with higher standards for other proceedings (i.e. AAUP faculty hearings)
- May create incongruence between school process and court scrutiny (where preponderance will still be the standard)
- ATIXA position – preponderance only equitable standard

PROMPT



- Proposed regulations specify “prompt timeframes” written into grievance procedures
- Temporary delays only allowable for “good cause” and with written notice of the delay to parties
- OCR does not appear to contemplate reasonable delays at the earliest points of an investigation
- Responding party may not yet know of investigation or allegations – written notice of delay may be first indication

WRITTEN, DETAILED NOTICE



- Proposed regulations require several written, detailed notices to the parties
 - Any reasonable delay for good cause
 - Upon receipt of a formal complaint
 - Sufficient details – identity of parties, alleged violations, date, location
 - Sufficient time to prepare a response
 - Informal process requirements, if applicable
 - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare
 - Upon determination of responsibility, including sanctions
- Notice requirements may affect industry standard investigative practices
- *Doe v. Timothy P. White, et. al.*, (2018)

SUPPORTIVE MEASURES



- Non-disciplinary, non-punitive individualized services
- Must not unreasonably burden other parties
- Proposed regulations address mutual restrictions, neglect unilateral or individualized restrictions
- Appears to anticipate, but also prohibit, that one party will sometimes be restricted more than the other
- May chill reporting if automatic mutual restrictions limit access to education program

BURDEN OF PROOF ON FUNDING RECIPIENT TO GATHER EVIDENCE



- Burden of proof and burden of gathering evidence on the school, not the parties
- “Sufficient to reach a determination” = appropriately thorough?
- Unclear if all relevant evidence must be collected
- Parties may be able to request certain evidence be obtained
- Evidence collected by law enforcement is admissible
- Who determines what evidence is relevant and sufficient?

“PRESUMPTION OF INNOCENCE”



- Proposed regulations require published grievance procedures include a presumption of innocence for the responding party
- No change from effective procedures – determination has always been based on evidence
- Presumption is a legal framework, may create inequity
- Unclear how presumption will work procedurally
- Should there be an equitable presumption that the reporting party is telling the truth?

CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS

- Existing mandate for impartial resolutions with fair procedures
- Proposed regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party
- Training mandates apply to PK-12 as well as higher ed
- Unclear how prohibition of bias against reporting/responding parties establishes equity under Title IX or falls within OCR's statutory authority
- Due process mandate does not distinguish public v. private

INVESTIGATION AND RESOLUTION MODELS

- Treatment of reporting/responding parties may constitute discrimination
- The end of the single investigator model – live hearing required for all postsecondary resolution proceedings
- Must allow advisor to be present at all meetings, interviews, hearings
- If no advisor, school must provide one
- Statutory authority exceeded with procedural mandates?

PROVIDING PARTIES WITH COPIES OF ALL EVIDENCE



- All relevant evidence considered – inculpatory and exculpatory
- No restriction on discussing case or gathering evidence
- Equal opportunity to inspect all evidence, including evidence not used to support determination
- May chill reporting if irrelevant information must be provided to either party
- Unclear at what point in process evidence must be provided
- No limits on types/amount of evidence offered
- Creates possible equitable limits on evidence for both parties

PROVIDING COPIES OF INVESTIGATION REPORT FOR REVIEW AND COMMENT



- Proposed regulations mandate creation of an investigation report
- Must fairly summarize all relevant evidence
- Provided to parties at least 10 days before hearing or other determination
- Parties may review and submit written responses to report
- Unclear if analysis (including credibility) and findings of fact should be included
- Unclear if a full report or a summary is required

LIVE HEARING



- Proposed regulations mandate live hearing for postsecondary institutions, optional for PK-12
- Parties must attend hearing, otherwise all testimony submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator or the investigator
- Must allow live cross-examination to be conducted exclusively by each party's advisor (separate rooms still allowed)
- Unclear how irrelevant questions will be screened, but rationale for excluding questions required (verbal or written?)

ADVISORS



- Advisor can be anyone – no restrictions in proposed regulations
- If a party does not have an advisor to conduct cross-examination, the school must provide one
- Advisor must be “aligned with the party”
 - “Defense” and “prosecution” advisors?
- No prior training required, no mandate for school to train
- ED presumes no financial impact because all parties retain counsel; not at institutional expense
- Mandate for higher education only – PK-12 may still conduct indirect cross-examination through hearing administrator

APPEALS



- If schools offer appeals (not required), must be made available equitably
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to all parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

IMPACT ON EMPLOYEES



- Proposed regulations often refer exclusively to “students,” but employees are also affected
- Tenured faculty cross-examining students at a live hearing
- Faculty found responsible – sanctions affirmed by committee?
- Union employees – diminished right to an advisor because of union representation?
- Extensive due process protections for at-will employees accused of misconduct
- Potential inequity in employee processes for Title VII-based sexual harassment
 - More due process for sex discrimination than race discrimination

OTHER ELEMENTS IN THE PROPOSED REGS



- Remedial action required by OCR for noncompliance with Title IX will not include money damages
 - OCR clarifies that reimbursements or compensation do not fall within the meaning of this provision
- Institutions may presume religious exemption
 - If under OCR investigation, may then be required to submit exemption justification in writing
 - Allows institutions to avoid public assertion of exemption from certain civil rights protections
 - Problematic for students/employees who deserve to know if certain protections are not honored at their institution

OTHER ELEMENTS IN THE PROPOSED REGS



- Statement that proposed regulations do not restrict or deprive rights under the First, Fifth, and Fourteenth Amendments, FERPA, the Clery Act, or Title VII of the Civil Rights Act.
 - Clery/VAWA and FERPA considerations?
 - Clery Act provisions do not apply to PK-12 – the proposed regulations extend many Clery Act requirements to PK-12

OPERATING OUTSIDE THE TIX FRAMEWORK



- *Ultra vires?*
 - Require signed formal complaint rather than actual notice
 - Prescribed standard of evidence for Title IX procedures
 - Mandated standard of proof for other conduct procedures
 - Extension of Clery/VAWA definitions and requirements to PK-12
 - Require live hearings for Title VII sexual harassment procedures
 - Individualized safety and risk analysis prior to interim suspension on an “emergency basis”
 - Treatment of responding party may constitute discrimination
 - Regulation of due process elements in internal procedures – blanket application to public and private institutions
 - Notice requirement upon receipt of formal complaint
 - Mandatory live hearing at public and private higher education institutions
 - Recordkeeping requirements

PROVIDING PARTIES WITH COPIES OF ALL EVIDENCE



- All relevant evidence considered – inculpatory and exculpatory
- No restriction on discussing case or gathering evidence
- Equal opportunity to inspect all evidence, including evidence not used to support determination
- May chill reporting if irrelevant information must be provided to either party
- Unclear at what point in process evidence must be provided
- No limits on types/amount of evidence offered
- Creates possible equitable limits on evidence for both parties

PROVIDING COPIES OF INVESTIGATION REPORT FOR REVIEW AND COMMENT



- Proposed regulations mandate creation of an investigation report
- Must fairly summarize all relevant evidence
- Provided to parties at least 10 days before hearing or other determination
- Parties may review and submit written responses to report
- Unclear if analysis (including credibility) and findings of fact should be included
- Unclear if a full report or a summary is required

LIVE HEARING



- Proposed regulations mandate live hearing for postsecondary institutions, optional for PK-12
- Parties must attend hearing, otherwise all testimony submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator or the investigator
- Must allow live cross-examination to be conducted exclusively by each party's advisor (separate rooms still allowed)
- Unclear how irrelevant questions will be screened, but rationale for excluding questions required (verbal or written?)

ADVISORS



- Advisor can be anyone – no restrictions in proposed regulations
- If a party does not have an advisor to conduct cross-examination, the school must provide one
- Advisor must be “aligned with the party”
 - “Defense” and “prosecution” advisors?
- No prior training required, no mandate for school to train
- ED presumes no financial impact because all parties retain counsel; not at institutional expense
- Mandate for higher education only – PK-12 may still conduct indirect cross-examination through hearing administrator

APPEALS



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VAWA 2013 – SECTION 304 & CLERY

THE CLERY ACT & APPLICABILITY



- The Clery Act applies only to Post-Secondary Schools, Colleges, and Universities.
 - There is, however, is increasing traction within Congress to developing a similar mechanism within K-12.
- Most of the principles of The Clery Act/VAWA Sec. 304, are universal and instructive for all educational institutions, such as:
 - Policy best practices
 - Reporting
 - Transparency
 - Equitable resolution mechanisms
 - Due Process
 - Support for victims, etc.

THE CLERY ACT



Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)

- Crime reporting.
- Campus crime log.
- Campus Sexual Assault Victims Bill of Rights (1992).
- Primary crimes (7+3).
- Hate crimes (8 categories).
- Policy and procedure disclosures.
- Timely Warnings & Emergency Notifications.
- Sex offender information dissemination.
- Enforcement and fines.
- Violence Against Women Reauthorization Act of 2013 (VAWA) – Section 304.



THE CLERY ACT: CAMPUS SECURITY AUTHORITY



- **Clery identifies a CSA as:**
 - Campus police.
 - Non-police security staff responsible for monitoring campus property.
 - Individuals and offices designated by the campus security policies as those to whom crimes should be reported.
 - Officials of the institution with significant responsibility for student and campus activities.
- **Mandatory Reporting: All CSAs must report known crimes (primary and hate crimes) to chief campus CSA.**
 - What about speak outs such as Take Back the Night?

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THE CLERY ACT: CAMPUS SECURITY AUTHORITY



The Clery Act requires “Campus Security Authorities” (CSAs) to report certain incidents to the campus’s Clery Coordinator

- Dean of Students.
- Campus Public Safety/Campus Police.
- Director of Athletics, all athletic coaches – including part-time and graduate assistants.
- Faculty Advisor to student groups.
- RAs.
- Greek Life personnel.
- Title IX Coordinator.
- Most District Officials.
- Director of Campus Health or Counseling Center.
- Victim Advocates or others performing advocacy-based services.
- Ombuds.
- SART members.
- Local law enforcement contracted with the institution to provide campus/school-safety related services.

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RECENT CLERY AMENDMENT: VAWA REAUTHORIZATION & SECTION 304



VAWA Section 304:

- **Section 304** significantly amended the Clery Act.
- Created **extensive** new policy, procedure, training, education, and prevention requirements for:
 - Sexual assault.
 - Stalking.
 - Dating violence.
 - Domestic violence.
- Prohibits retaliation.

The “Big 4”

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VAWA 2013 SECTION 304 “PRIMARY” CRIMES



- Criminal homicide:
 - Murder and non-negligent manslaughter.
 - Negligent manslaughter.
- **Sex offenses:**
 - **Rape.**
 - **Fondling.**
 - **Incest.**
 - **Statutory rape.**
- Robbery.
- Aggravated assault.
- Burglary.
- Motor vehicle theft.
- Arson.
- **PLUS:**
 - **Dating violence.**
 - **Domestic violence.**
 - **Stalking.**

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VAWA 2013 – SEC. 304 UCR DEFINITIONS: SEXUAL ASSAULT



- **Sexual Assault:** *Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.*
 - Includes:
 - Rape
 - Fondling
 - Incest
 - Statutory Rape

VAWA 2013 – SEC. 304 UCR DEFINITIONS: SEXUAL ASSAULT



- **Rape**
 - *The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.*
- **Statutory Rape:**
 - *Sexual intercourse with a person who is under the statutory age of consent.*

VAWA 2013 – SEC. 304 UCR DEFINITIONS: SEXUAL ASSAULT



- **Fondling**

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

- **Incest**

- *Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.*

VAWA 2013 – SEC. 304: UCR DEFINITIONS: DATING VIOLENCE



- **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. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.*

VAWA 2013 – SEC. 304: UCR DEFINITIONS: DOMESTIC VIOLENCE



- **Domestic Violence**

- *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;*
- *By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.*

VAWA 2013 – SEC. 304 UCR DEFINITIONS: STALKING



- **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.*

- **Course of Conduct:** *two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.*

VAWA 2013 SECTION 304 BIAS AND HATE CRIMES



- Added two categories of actual or perceived bias.
 - Race.
 - Gender.
 - **Gender identity.***
 - Religion.
 - Sexual orientation.
 - **Ethnicity.***
 - **National origin.***
 - Disability.

VAWA SEC. 304: REPORTING CATEGORIES – HATE CRIMES



- **Reportable as hate crimes:**
 - Murder and non-negligent manslaughter.
 - Forcible sex offenses.
 - Non-forcible sex offenses.
 - Robbery.
 - Aggravated assault.
 - Burglary.
 - Motor vehicle theft.
 - Arson.
 - Larceny-theft.
 - Simple assault.
 - Intimidation.
 - Destruction/damage/vandalism of property.

DISCIPLINARY PROCEDURES UNDER VAWA SEC. 304

VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



- Prompt, Fair, and Impartial Process
 - Prompt, designated timeframes (can be extended for good cause with notice to parties).
 - Conducted by officials free from conflict of interest or bias for either party.
 - Consistent with institutions' policies.
 - Transparent to accuser and accused.
 - Timely and equal access to parties “and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings.”

VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



- Policy statements must also include:
 - “A clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged” VAWA offenses AND that,
 - “Describes **each type** of disciplinary proceeding used by the institution” including:
 - The steps.
 - Anticipated timelines.
 - Decision-making process.
 - How to file a disciplinary complaint (including contact information for the person or office to whom a report should be made).
 - How the institution determines which type of proceeding to use based on the circumstances of an allegation of a VAWA offense.

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VAWA 2013 SEC. 304 STANDARD OF EVIDENCE



- ASR Policy statement of disciplinary procedures must also include a description of the “standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of” the four VAWA offenses.
 - **No specific standard required**
- However, the institution must use the standard of evidence described in the statement in all such proceedings.

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VAWA 2013 SEC. 304 TRAINING



- Proceedings must “be conducted by officials who receive **annual** training on”:
 - Issues related to the four VAWA offenses
 - How to conduct an investigation and a hearing process that:
 - Protects the safety of victims.
 - Promotes accountability.
 - Caution: this does not mean the training should be biased or slanted in favor the reporting party.
 - Ensure training is equitable and covers not just victim-based issues, but also those pertaining to a responding party.

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VAWA 2013 SEC. 304 “PROCEEDING”



- “Proceeding” is defined broadly as:
 - “all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, **fact-finding investigations, formal or informal meetings, and hearings.**”
 - “Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim.”
- This disclosure is required for **any and all** faculty, student, and staff disciplinary procedures.
- “You must follow the procedures described in your statement regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred (i.e. on or off your institution’s Clery Act geography).”

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VAWA 2013 SEC. 304 ADVISORS



- Provide accuser and accused with the same opportunity to have others present including an advisor of their choice for “any institutional disciplinary proceedings” and “any related meetings”
 - An advisor is “any individual who provides the accuser or accused support, guidance or advice.”
 - An advisor is optional and can be anyone (including an attorney or a parent).
 - Institutions can restrict role of advisors in proceedings as long as both parties’ advisors have the same restrictions.
 - Institutions should notify parties of these restrictions prior to proceedings.
 - Institutions can train a pool of advisors the parties can use, but cannot restrict advisors to just the pool.
 - Advisors can serve as proxies if an institution so chooses.

VAWA 2013 SEC. 304 WRITTEN MATERIALS PROVIDED TO VICTIMS



- When a student or employee reports they have been a victim of any of the VAWA offenses (either on or off campus) the institution will provide the student or employee a written explanation of the [their] rights and options
 - **“Must be a prepared, standardized and written set of materials, including detailed information regarding a victim’s rights and options.”**
 - This does not mean that you hand the student a copy of the [ASR] or the policy statements contained in the [ASR].

VAWA 2013 SEC. 304 WRITTEN MATERIALS PROVIDED TO VICTIMS



- Written information should be provided to students and employees about existing resources (updated regularly):
 - Counseling & Mental Health
 - Health
 - Victim advocacy
 - Legal assistance
 - Visa and immigration assistance
 - Student financial aid
 - Other services available for victims
 - Both within the institution and in the community
- Information should include contact information about these resources, including how to access these resources.

NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.

VAWA 2013 SEC. 304 WRITTEN MATERIALS PROVIDED TO VICTIMS



- Written materials should also include victims about options for, and available assistance in, and how to request changes to:
 - Academic
 - Living
 - Transportation
 - Working situations, or
 - Protective measures (e.g., no contact orders, Orders of Protection, etc.)
- The institution must make such accommodations if the victim requests them and they are reasonably available.
 - “the institution is obligated to comply with a student [victim]’s reasonable request for a living and/or academic situation change following an alleged sex offense.”

NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.

VAWA: LAW ENFORCEMENT



- “Options about the involvement of law enforcement and campus authorities, including notification of the victim’s option to:
 - Notify proper law enforcement authorities, including on-campus and local police
 - Be assisted by campus authorities in notifying law enforcement authorities if the victim chooses, and
 - Decline to notify such authorities
 - Clarifications from The Clery Handbook:
 - An institution’s ASR statement must provide specific contact information for the authorities
 - An institution’s ASR statement must also explain what is involved in making a police report

*Note: The Clery Handbook adds: “The statement that your institution will comply with a student’s request for assistance in notifying authorities is **mandatory**.”*

VAWA 2013 SEC. 304 NOTIFICATION OF OUTCOME



- Require simultaneous notification, in writing, to both accuser and accused, of:
 - The result of any institutional proceeding arising from allegations of VAWA offenses.
 - Result “defined as any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution.”
 - Result = Finding, Sanction, and Rationale.
 - Note: The Clery Handbook contains an explicit FERPA exclusion.*
 - Procedures for appeal (if any).
 - Any change to results.
 - When such results become final.

VAWA 2013 SEC. 304 NOTIFICATION OF OUTCOME



- What must be included in the rationale?
 - How evidence and information presented was weighed.
 - How the evidence and information support the result and the sanctions (if applicable).
 - How the institution’s standard of evidence was applied.
 - Simply stating the evidence did or did not meet the threshold is insufficient.
- Simultaneous: “means that there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result.”

CASE STUDY: SEXUAL ASSAULT



- [Jane Doe] is not a Steubenville High student; she attended a smaller, religion-based school, where she was an honor student and an athlete.
- At the parties, the [Jane Doe] had so much to drink that she was unable to recall much from that night, and nothing past midnight, the police said. The girl began drinking early on, according to an account that the police pieced together from witnesses, including two of the three Steubenville High athletes who testified in court in October. By 10 or 10:30 that night, it was clear that the dark-haired teenager was drunk because she was stumbling and slurring her words, witnesses testified.

CASE STUDY: SEXUAL ASSAULT



- [Jane Doe] woke up long enough to vomit in the street, a witness said, and she remained there alone for several minutes with her top off. Another witness said [two football players] Mays and Richmond were holding her hair back.
- Afterward, they headed to the home of one football player who has now become a witness for the prosecution. That player told the police that he was in the back seat of his Volkswagen Jetta with Mays and the girl when Mays proceeded to flash the [Jane Doe]'s breasts and penetrate her with his fingers, while the player videotaped it on his phone. The player, who shared the video with at least one person, testified that he videotaped Mays and the girl "because he was being stupid, not making the right choices." He said he later deleted the recording.

Source: New York Times, "Rape Case Unfolds on Web; and Spills in City", Dec. 16, 2012



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CASE STUDY: SEXUAL ASSAULT



- [Jane Doe] "was just sitting there, not really doing anything," the player testified. "She was kind of talking, but I couldn't make out the words that she was saying."
- At that third party, the girl could not walk on her own and vomited several times before toppling onto her side, several witnesses testified. Mays then tried to coerce the girl into giving him oral sex, but the girl was unresponsive, according to the player who videotaped Mays and the girl.
- The player said he did not try to stop it because "at the time, no one really saw it as being forceful."
- At one point, [Jane Doe] was on the ground, naked, unmoving and silent, according to two witnesses who testified. Mays, they said, had exposed himself while he was right next to her.
- Richmond was behind her, with his hands between her legs, penetrating her with his fingers, a witness said.

Source: New York Times, "Rape Case Unfolds on Web; and Spills in City", Dec. 16, 2012

CASE STUDY: SEXUAL ASSAULT



- “I tried to tell Trent to stop it,” another athlete, who was Mays’s best friend, testified. “You know, I told him, ‘Just wait — wait till she wakes up if you’re going to do any of this stuff. Don’t do anything you’re going to regret.’ ”
- He said Mays answered: “It’s all right. Don’t worry.”
- That boy took a photograph of what Mays and Richmond were doing to [Jane Doe]. He explained in court how he wanted her to know what had happened to her, but he deleted it from his phone, he testified, after showing it to several people.
- The girl slept on a couch in the basement of that home that night, with Mays alongside her before he took a spot on the floor.
- When she awoke, she was unaware of what had happened to her, she has told her parents and the police. But by then, the story of her night was already unfolding on the Internet, on Twitter and via text messages. Compromising and explicit photographs of her were posted and shared.

179 Source: New York Times, “Rape Case Unfolds on Web and Sports City,” Dec. 16, 2012

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CASE STUDY: SEXUAL ASSAULT



- What are the possible policy violations?
- What issues of jurisdiction arise?
- How should the Coach and the Athletic Department respond?
- How should the high school respond? The District?
- Are there others besides Mays and Richmond who have violated your policies?
- How do you deal with the fact that Jane Doe was drinking and is underage?
- What other concerns or questions do you have about how to proceed?

Source: New York Times, “Rape Case Unfolds on Web and Sports City,” Dec. 16, 2012

ADDITIONAL VAWA 2013 SEC. 304 TRAINING REQUIREMENTS

- Consent
- Bystander Intervention

BRAINSTORMING TITLE IX AND VAWA SEC. 304



Some questions and thoughts to consider throughout our discussion:

- Inventory current practices?
- Strategic planning/incremental approach?
- What should your institution focus on first?
- Who takes the lead?
- How in the world are we going to do this?
- What are the barriers to fulfilling the training requirements for each level?
- What collaboration is needed to train each level?

VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS



- VAWA 2013 Sec. 304 requires an array of prevention-based programming In person.
 - Primary prevention programs for **all incoming students** and **new employees**;
AND
 - **Ongoing** prevention and awareness campaigns for **students and employees**” (includes faculty, staff, and administrators).

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VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS



“Incoming Students”

- ✓ First-year students.
- ✓ Transfer students.
- ✓ Student-athletes
- ✓ International students.
- ✓ Graduate students.
- ✓ Professional students.
- ✓ Online students.
- ✓ Others?

“New Employees”

- ✓ Full-time
- ✓ Part-time.
- ✓ Faculty – all levels.
- ✓ Staff.
- ✓ Administrators.
- ✓ Union and non-union.
- ✓ Student employees:
 - RAs, TAs, GAs...
- ✓ Others?

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VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS



- “Ongoing.”
 - Go beyond orientation programs.
 - Conduct follow-up programs.
 - Shift mentality from compartmentalized “prevention months” to “prevention year.”
 - Host speakers, film series, presentations by students, faculty, staff, online trainings/modules, discussion groups, social norming, etc.

VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS



- The institution’s prevention programming (both for incoming students/employees and ongoing campaigns) must include:
 - The applicable jurisdiction’s “**definition of consent** in reference to sexual activity.”
 - <http://atixa.org/resources/consent-statutes-by-state/>
 - “A description of safe and positive options for **bystander intervention**.”
 - Information on Risk Reduction
 - Information on Victim Services

VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS



- The institution's prevention programming (both for incoming students/employees and ongoing campaigns) must include (cont.):
 - “A statement that the institution...prohibits the crimes of...dating violence, domestic violence, sexual assault, stalking.”
 - Definitions of consent, dating violence, domestic violence, sexual assault, and stalking “in the applicable jurisdiction.”
 - Key Issue: Institutional definitions do NOT need to mirror VAWA/Clery or state-based definitions. Not considered a best practice.

VAWA SEC. 304 RESOLUTION PROCESS TRAINING

- Requirements for All
- VAWA Training for “Level A”

RESOLUTION PROCESS TRAINING REQUIREMENTS FOR ALL



- All students and employees.
 - Each type of disciplinary proceeding used by the institution.
 - How institution determines which type of proceeding to use.
 - Steps, anticipated timelines, and decision-making process.
 - Standard of evidence.
 - Full range of possible or available
 - Sanctions.
 - Remedies.
 - Protective measures.

RESOLUTION PROCESS TRAINING



- Rights of complainant and respondent during resolution processes (i.e. investigations, hearing, and appeal).
 - Advisors – role and function.
 - Timely notification requirements.
 - Notification of results (pre- and post-appeal).
 - (Parties may opt-out from receiving notification.)
 - Procedures for appeal.

VAWA 2013 – SEC. 304 TRAINING FOR TITLE IX ADMINISTRATORS



- Annual training for those who oversee Title IX compliance and those involved in disciplinary proceedings (e.g. investigators, hearing, and appellate officers) on:
 - Domestic violence, dating violence, sexual assault, and stalking.
 - How to conduct an **investigation** “that protects the safety of victims and promotes accountability.”
 - How to conduct a **hearing process** that protects the safety of victims and promotes accountability.”
 - Accordingly, these groups must also be trained annually on applicable disciplinary policies and procedures.

VAWA 2013 – SEC. 304 TRAINING FOR TITLE IX ADMINISTRATORS



- Key disciplinary process policies and procedures required for training:
 - Policies on SA, DV, DV, stalking, and consent.
 - Available remedies.
 - Thorough understanding of each stage of the processes.
 - Promptness.
 - Role and function of advisors for both parties.
 - Timely notice requirements.
 - Result notification.
 - Appellate policies and procedures.
 - Bias and conflicts of interest.
 - Retaliation.

VAWA SEC. 304 TRAINING SAMPLE SCENARIO

- Angela & James
- Discussion Points



SCENARIO DISCUSSION: ANGELA & JAMES



- On Friday, Sept. 5, Angela, a first-year student, attends an off-campus party after pre-gaming with her friends. From 9-10 p.m., Angela had four shots of vodka before arriving at the party, and upon arrival, was handed a solo cup of vodka-laden “punch” from a cooler. From 10 p.m.-12 a.m., Angela drinks two full cups of “punch.”
- Assume Angela has not eaten anything since 6 p.m.

SCENARIO DISCUSSION: ANGELA & JAMES



- James arrives at the party at 10:00 p.m. and soon begins dancing with Angela. James had two “Jack and Cokes” before the party, and from 10:00 p.m.-12:00 a.m., drinks 1 ½ cups of the vodka-laden punch.
 - James is also taking anti-depressants and took some of his roommate’s Adderall prior to a test Friday afternoon.

SCENARIO DISCUSSION: ANGELA & JAMES



- By midnight, James and Angela are getting more physically intimate and they are grinding into each other while dancing.
- Around midnight, Angela stumbles outside and throws up, leaning over the porch railing.
- Some of the partiers take video of Angela throwing up and post it to Twitter, tagging it #PartyFail.
- James goes looking for Angela and finds her outside, leaning over the porch looking queasy and offers to take her home. Angela’s friends see her stumbling away with James, but don’t want to get involved or “block” the situation.

SCENARIO DISCUSSION: ANGELA & JAMES



- The next morning, Angela wakes up naked, alone, with a pounding headache, and in a room she has never been in. She looks around and sees some of James' things and realizes she is in James' room. She also sees an empty condom wrapper on the nightstand and can feel that something happened.
- Angela quickly gathers her clothes and returns to her room, where she locks herself in her bedroom and cries.

SCENARIO DISCUSSION: ANGELA & JAMES



- Angela's roommate, Julia, can tell something is wrong with Angela, who is acting very withdrawn, cries a lot, and talks about going home because the institution is not a good fit for her. Julia also notices some new cuts on Angela's arms and thighs.
- Julia decides to address the situation directly with Angela, who then opens up about her experience with James. Angela shares that she feels James took advantage of her, but that she should have acted differently and put herself in that situation, so she is really to blame.

SCENARIO DISCUSSION POINTS



- Discussion points throughout the scenario:
 - Alcohol and its effects.
 - Bystander intervention opportunities and techniques.
 - Risk factors and risk mitigation.
 - Range of available remedies and campus resources.
 - Available disciplinary processes.
 - Possible sanctions.
 - Victimology and supporting victims.
 - What else?

QUESTIONS?



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Section (b)iii

Civil Rights Investigator
Training Level Two
11/2019 and 3/2020



CIVIL RIGHTS INVESTIGATOR
TRAINING & CERTIFICATION LEVEL TWO COURSE

January 30th – 31st, 2020 | Orlando, FL



YOUR FACULTY



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LEVEL 2 INVESTIGATIONS TRAINING



Agenda

- I. Effective Investigations
- II. Due Process
 - A. In Procedure
 - B. In Decision
- III. VAWA Sec. 304 & Clery Act
 - A. Disciplinary Procedures under Sec. 304
 - B. VAWA “Big Four” Crimes
- IV. Applying Institutional Policies
 - A. Three Types of Sexual Harassment
 - B. Non-Consensual Sexual Contact/Intercourse
 - C. Other Sexual Misconduct Offenses
- V. Consent Construct
 - A. Force
 - B. Incapacity
 - C. Effects of Intoxication
 - D. Timeline Construct
- VI. Investigating Retaliation

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Agenda

- I. Challenging Witnesses
 - A. Difficult
 - B. Lying
 - C. Resistant/Quiet
- II. Questioning Model
- III. Taking Notes
- IV. Evaluation of Evidence and Making Determinations
 - A. Credibility Assessment
 - B. Information Analysis
- V. Bias & Prejudice
 - A. Conflicts of Interest
 - B. Bias in Recent Case law
- VI. The Investigation Report
 - A. Essential Elements
 - B. Templates for Record-Keeping
- VII. Sanctioning
- VIII. Trauma and Investigations
 - A. Trauma & Interviewing
 - B. Trauma & Credibility
- IX. Inclusive Investigations

EFFECTIVE INVESTIGATIONS

- Active Accumulation of Evidence
- Consistent
- Planned/Strategic
- Documented
- Impartial



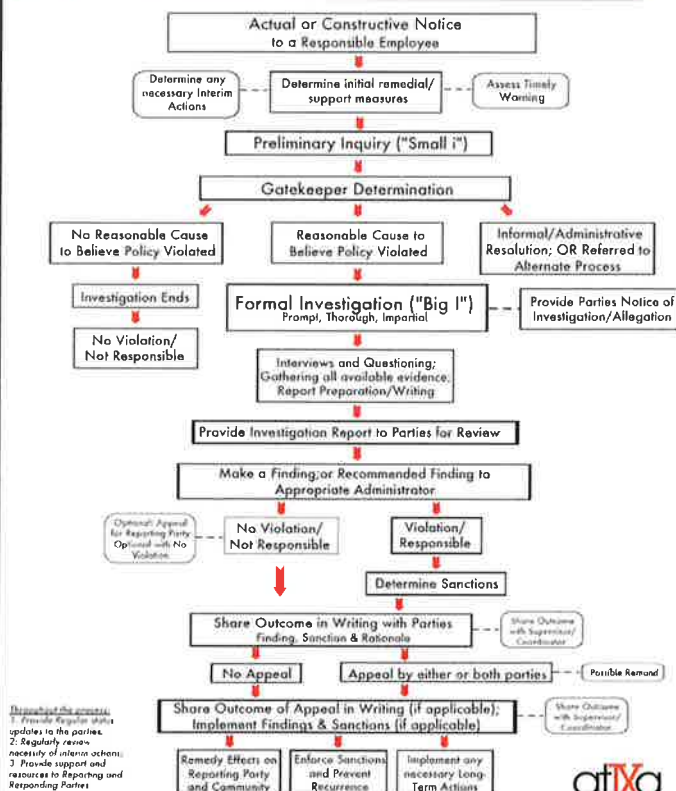
CIVIL RIGHTS INVESTIGATION MODEL HALLMARKS



- Active identification and strategic gathering of evidence.
- Investigation is the center of the procedure for resolution.
- Enhanced Due Process.
- Grounded in the concepts of neutrality and equity.
- Most effective for victim-based violations.

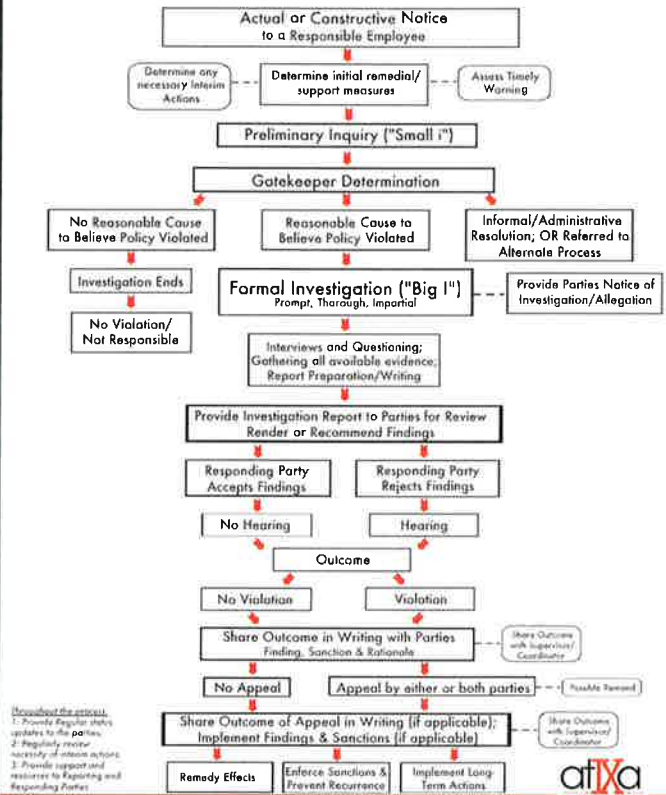
CIVIL RIGHTS INVESTIGATION MODEL

ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



INVESTIGATION AND HEARING PANEL HYBRID MODEL

INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



BRAINSTORMING SESSION



- Work with other attendees from your institution/district, or in groups of four to five.
- On your own, write a list of the three most attractive aspects of the civil rights investigation model for your institution/district.
- On your own, write a list of the three biggest impediments or challenges your school(s) may face in implementing or perfecting this model.
- Take turns sharing, and brainstorm as a group on ways to overcome the challenges. Share one challenge and one solution per group with the whole group.

DUE PROCESS

- What is Due Process?
- Due Process in Procedure
- Due Process in Decision

WHAT IS DUE PROCESS?



- The set of rights-based protections that accompany disciplinary action by a school, college or university.
- Dictated by law & regulations, courts, system, district, school, or college policies and procedures.
- Private schools refer to this as “Fundamental Fairness”
 - Though courts and OCR are increasingly using the term Due Process

EVOLUTION OF DUE PROCESS



- Evolution of Due Process in education
 - Dean Wormer; Principal Strickland (1950's)
 - *Dixon v. Alabama* (1961) & *Goss v. Lopez* (1975)
 - Constituency-based policies and procedures
 - Due Process & Student Conduct Administration
 - Title VII and HR Models
 - Civil Rights Investigation Model & Hearings
 - Current case law and OCR proposed regulations

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DUE PROCESS IN PROCEDURE



- A school's process should include (at a minimum):
 - Detailed and specific Notice of Allegation and/or Investigation.
 - Notice of Hearing.
 - Right to present witnesses.
 - Right to present evidence.
 - Right to an advisor of their choice
 - Opportunity to be heard and address the allegations and evidence.
 - Right to appeal (recommended).
 - Right to Cross-Examination
 - Right to review all relevant* evidence AND the investigation report prior to a decision.

*Proposed regulations state ALL evidence

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- A decision must:
 - Be based on a fundamentally fair rule or policy.
 - Be made in good faith (i.e. without malice, ill-will)
 - Be unbiased
 - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
 - Not be arbitrary or capricious.
- Sanctions must be reasonable, constitutionally permissible, and should relate to the violations

VAWA SEC. 304 & THE CLERY ACT

- Overview of the Clery Act and VAWA
- Institutional Disciplinary Policies and Procedures
- VAWA 2013's "Big Four" Crimes

THE CLERY ACT



Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)

- Crime reporting.
- Campus crime log.
- Campus Sexual Assault Victims Bill of Rights (1992).
- Primary crimes (7+3).
- Hate crimes (8 categories).
- Policy and procedure disclosures.
- Timely Warnings & Emergency Notifications.
- Sex offender information dissemination.
- Enforcement and fines.
- Violence Against Women Reauthorization Act of 2013 (VAWA) – Section 304.



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THE CLERY ACT & APPLICABILITY



- The Clery Act applies only to Post-Secondary Schools, Colleges, and Universities.
 - There is, however, is increasing traction within Congress to developing a similar mechanism within PreK-12.
- Most of the principles of The Clery Act/VAWA Sec. 304, are **universal and instructive for all educational institutions**, such as:
 - Policy best practices
 - Reporting
 - Transparency
 - Equitable resolution mechanisms
 - Due Process
 - Support for victims, etc.

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VAWA Section 304:

- Section 304 significantly amended the Clery Act.
- Created **extensive** new policy, procedure, training, education, and prevention requirements for:
 - Sexual assault.
 - Stalking.
 - Dating violence.
 - Domestic violence.
- Prohibits retaliation.

The “Big 4”

DISCIPLINARY
PROCEDURES UNDER
VAWA SEC. 304

VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



- Prompt, Fair, and Impartial Process
 - Prompt, designated timeframes (can be extended for good cause with notice to parties).
 - Conducted by officials free from conflict of interest or bias for either party.
 - Consistent with institutions' policies.
 - Transparent to accuser and accused.
 - Timely and equal access to parties “and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings.”

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VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



- Policy statements must also include:
 - “A clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged” VAWA offenses AND that,
 - “Describes **each type** of disciplinary proceeding used by the institution” including:
 - The steps.
 - Anticipated timelines.
 - Decision-making process.
 - How to file a disciplinary complaint (including contact information for the person or office to whom a report should be made).
 - How the institution determines which type of proceeding to use based on the circumstances of an allegation of a VAWA offense.

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VAWA 2013 SEC. 304 STANDARD OF EVIDENCE



- ASR Policy statement of disciplinary procedures must also include a description of the “standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of” the four VAWA offenses.
 - No specific standard required
- However, the institution must use the standard of evidence described in the statement in all such proceedings.

VAWA 2013 SEC. 304 TRAINING



- Proceedings must “be conducted by officials who receive annual training on”:
 - Issues related to the four VAWA offenses
 - How to conduct an investigation and a hearing process that:
 - Protects the safety of victims.
 - Promotes accountability.
 - Caution: this does not mean the training should be biased or slanted in favor the reporting party.
 - Ensure training is equitable and covers not just victim-based issues, but also those pertaining to a responding party.

VAWA 2013 SEC. 304 “PROCEEDING”



- “Proceeding” is defined broadly as:
 - “all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, fact-finding investigations, formal or informal meetings, and hearings.”
 - “Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim.”
- This disclosure is required for **any and all** faculty, student, and staff disciplinary procedures.
- “You must follow the procedures described in your statement regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred (i.e. on or off your institution’s Clery Act geography).”

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VAWA 2013 SEC. 304 ADVISORS



- Provide accuser and accused with the same opportunity to have others present including an advisor of their choice for “any institutional disciplinary proceedings” and “any related meetings”
 - An advisor is “any individual who provides the accuser or accused support, guidance or advice.”
 - An advisor is optional and can be **anyone** (including an attorney or a parent).
 - Institutions can restrict role of advisors in proceedings as long as both parties’ advisors have the same restrictions.
 - Institutions should notify parties of these restrictions prior to proceedings.
 - Institutions can train a pool of advisors the parties can use, but cannot restrict advisors to just the pool.
 - Advisors can serve as proxies if an institution so chooses.

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VAWA 2013 SEC. 304 WRITTEN MATERIALS PROVIDED TO VICTIMS

- When a student or employee reports they have been a victim of any of the VAWA offenses (either on or off campus) the institution will provide the student or employee a written explanation of the [their] rights and options
 - **"Must be a prepared, standardized and written set of materials, including detailed information regarding a victim's rights and options."**
 - This does not mean that you hand the student a copy of the [ASR] or the policy statements contained in the [ASR].

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VAWA 2013 SEC. 304 WRITTEN MATERIALS PROVIDED TO VICTIMS

- Written information should be provided to students and employees about existing resources (updated regularly):
 - Counseling & Mental Health
 - Health
 - Victim advocacy
 - Legal assistance
 - Visa and immigration assistance
 - Student financial aid
 - Other services available for victims
 - Both within the institution and in the community
- Information should include contact information about these resources, including how to access these resources.

NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.

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VAWA 2013 SEC. 304 WRITTEN MATERIALS PROVIDED TO VICTIMS



- Written Materials should also include victims about options for, and available assistance in, and how to request changes to:
 - Academic
 - Living
 - Transportation
 - Working situations, or
 - Protective measures (e.g., no contact orders, Orders of Protection, etc.)
- The institution must make such accommodations if the victim requests them and they are reasonably available.
 - “the institution is **obligated** to comply with a student [victim]’s reasonable request for a living and/or academic situation change following an **alleged** sex offense.”

NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.

VAWA: LAW ENFORCEMENT



- “Options about the involvement of law enforcement and campus authorities, including notification of the victim’s option to:
 - Notify proper law enforcement authorities, including on-campus and local police
 - Be assisted by campus authorities in notifying law enforcement authorities if the victim chooses, and
 - Decline to notify such authorities
 - Clarifications from The Clery Handbook:
 - An institution’s ASR statement must provide specific contact information for the authorities
 - An institution’s ASR statement must also explain what is involved in making a police report

*Note: The Clery Handbook adds: “The statement that your institution will comply with a student’s request for assistance in notifying authorities is **mandatory**.”*

VAWA 2013 SEC. 304 NOTIFICATION OF OUTCOME



- Require simultaneous notification, in writing, to both accuser and accused, of:
 - The result of any institutional proceeding arising from allegations of VAWA offenses.
 - Result “defined as any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution.”
 - Result = Finding, Sanction, and Rationale.
Note: The Clery Handbook contains an explicit FERPA exclusion.
 - Procedures for appeal (if any).
 - Any change to results.
 - When such results become final.

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VAWA 2013 SEC. 304 NOTIFICATION OF OUTCOME



- What must be included in the rationale?
 - How evidence and information presented was weighed.
 - How the evidence and information support the result and the sanctions (if applicable).
 - How the institution’s standard of evidence was applied.
 - Simply stating the evidence did or did not meet the threshold is insufficient.
- Simultaneous: “means that there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result.”

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VAWA “BIG FOUR” CRIMES: DEFINITIONS

- Dating Violence
- Domestic Violence
- Sexual Assault
- Stalking



VAWA 2013 – SEC. 304 UCR DEFINITIONS: DATING VIOLENCE



- **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. The existence of such a relationship shall be determined based on the reporting party’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.*

VAWA 2013 – SEC. 304 UCR DEFINITIONS: DOMESTIC VIOLENCE



- **Domestic Violence**

- *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;*
- *By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.*

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VAWA 2013 – SEC. 304 UCR DEFINITIONS: SEXUAL ASSAULT



- **Sexual Assault:** *Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.*
- Includes:
 - Rape
 - Fondling
 - Incest
 - Statutory Rape

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VAWA 2013 – SEC. 304 UCR DEFINITIONS: SEXUAL ASSAULT



- **Rape**

- *The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.*

- **Statutory Rape:**

- *Sexual intercourse with a person who is under the statutory age of consent.*

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VAWA 2013 – SEC. 304 UCR DEFINITIONS: SEXUAL ASSAULT



- **Fondling**

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

- **Incest**

- *Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.*

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- **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.*

- **Course of Conduct:** *two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.*

APPLYING INSTITUTIONAL POLICIES: ATIXA MODEL POLICIES

- Sexual Harassment
- Non-Consensual Sexual Contact
- Non-Consensual Sexual Intercourse
- Sexual Exploitation
- Stalking
- Relationship Violence
- Bullying
- Hazing
- Other Misconduct Offenses

Sexual harassment is:

- *Unwelcome*
- *Sexual, sex-based, and/or gender-based verbal, written, online, and/or physical conduct.*

- *Sexual harassment may be subject to discipline when it takes the form of:*
 1. *Quid Pro Quo harassment; and/or*
 2. *Retaliatory harassment; and/or*
 3. *Creates a hostile environment.*

QUID PRO QUO SEXUAL HARASSMENT



- *Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,*
- *By a person having power or authority over another, when*
- *Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual's educational [or employment] progress, development, or performance.*

RETALIATORY HARASSMENT



- *Any adverse employment or educational action taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct.*
- Also includes retaliation against a reporting party by the responding party or that person's friends or others who are sympathetic to the responding party.
- Also can include retaliation directed toward a third party because of that party's participation in a grievance process or for supporting a grievant.

HOSTILE ENVIRONMENT



- *A hostile environment is created when sexual harassment is:*
 - *Sufficiently severe, or*
 - *Persistent or pervasive, and*
 - *Objectively offensive that it:*
 - *Unreasonably interferes with, denies, or limits someone’s ability to participate in or benefit from the school’s educational [and/or employment], social and/or residential program.*

TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



- **Increasing problem of conflating discomfort or being offended with the higher standard of hostile environment**
- The frequency (persistent or pervasive), nature, and severity of the conduct.
- Whether the conduct was physically threatening.
- Whether the conduct was humiliating.
- The effect on reporting party’s mental or emotional state.

TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



- Whether conduct was directed at more than one person.
- Whether the conduct **unreasonably** interfered with the reporting party's educational or work performance.
- Whether the statement is an utterance of an epithet which is offensive, or offends by discourtesy or rudeness.
- Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment.

NON-CONSENSUAL SEXUAL CONTACT



- ***Non-consensual sexual contact is:***
 - *Any intentional sexual contact,*
 - *However slight,*
 - *With any object,*
 - *By a person upon another person,*
 - *That is without consent and/or by force.*

SEXUAL CONTACT DEFINED



- ***Sexual contact includes:***
 - *Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; OR*
 - *any other intentional bodily contact in a sexual manner.*

NON-CONSENSUAL SEXUAL INTERCOURSE



- ***Non-consensual sexual intercourse is:***
 - *Any sexual intercourse,*
 - *However slight,*
 - *With any object,*
 - *By a person upon another person,*
 - *That is without consent and/or by force.*

INTERCOURSE DEFINED



- ***Sexual Intercourse includes:***
 - *Vaginal or anal penetration by a penis, object, tongue or finger, and oral copulation (mouth to genital contact), no matter how slight the penetration or contact.*

SEXUAL EXPLOITATION



- ***Sexual Exploitation:***
 - *When an individual(s) takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, that behavior does not otherwise constitute one of the other sexual misconduct offenses. Examples of sexual exploitation include, but are not limited to...*

SEXUAL EXPLOITATION



- Examples
 - Invasion of sexual privacy.
 - Non-consensual digital, video, or audio recording of nudity or sexual activity.
 - Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity.
 - Engaging in voyeurism.
 - Going beyond boundaries of consent (e.g. letting friends hide in the closet to watch you having consensual sex).

SEXUAL EXPLOITATION



- Examples (cont.)
 - Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person.
 - Prostituting another person.
 - Intentionally/recklessly exposing one's genitals in non-consensual circumstances; inducing others to expose theirs.
 - Sexually-based stalking and/or bullying may also be forms of sexual exploitation.

STALKING



- **Stalking:**
 - Repetitive and menacing,
 - Pursuit, following, harassing, and/or interfering with the peace and/or safety of another.
- Note: This definition of stalking also allows campuses to distinguish stalking from lurking, which is often fixation without menacing or harmful intent, and which is often steady state, whereas stalking often becomes more intrusive over time.

STALKING



- May be a series of legal actions, but campus policy is not required to mirror criminal standards in most jurisdictions.
- Can be a form of sexual harassment, too.
- We distinguish the ATIXA model definition of stalking (as we do with Domestic Violence/Dating Violence) from the VAWA definitions which do not reflect best practices, and are used only for the reporting of crime statistics.

INTIMATE PARTNER VIOLENCE (IPV)



- *Violence or emotional abuse between those who are in or have been in an intimate or romantic relationship to each other.*
 - Examples include:
 - Physical abuse by a spouse or partner such as hitting, slapping, pushing, or strangling.
 - Sexual violence by a spouse or partner.
 - Extreme verbal abuse by a spouse or partner.
- Other terms include interpersonal violence, relationship violence, dating violence, and domestic violence.
- Typically involves another code violation.
- If based on gender/sex, would fall within Title IX.
- Combines the VAWA offenses of domestic and dating violence.

BULLYING



- *Defined as:*
 - *Repeated and/or severe,*
 - *Aggressive behavior,*
 - *Likely to intimidate or intentionally hurt, control, or diminish another person, physically or mentally,*
 - *That is not speech or conduct otherwise protected by the First Amendment.*
- Often includes comments about race, color, national origin, sex, sexual orientation, or disability.
- Often involves an imbalance of power, aggression, and a negative, repeated behavior.
- Bullying falls within Title IX when gender-based.

- **Hazing:**
 - *Acts likely to cause physical or psychological harm or social ostracism to any person within the school community, when related to the admission, initiation, pledging, joining, or any other group-affiliation activity (as defined further in the hazing policy).*
- When sexual in nature (sex or gender-based is not applicable here because of the fraternity/sorority exception under Title IX).

- Threatening or causing physical harm, extreme verbal abuse, or other conduct which threatens or endangers the health or safety of any person.
- Discrimination: actions that deprive other members of the community of educational or employment access, benefits, or opportunities on the basis of sex or gender.
- Intimidation, defined as implied threats or acts that cause an unreasonable fear of harm in another.
- Any rule violated on the basis of the reporting party's sex/gender, which is severe enough to cause a discriminatory effect.

CONSENT CONSTRUCT

- Force
- Incapacity
- Consent
- Case Study

CONSENT IS...



- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual activity.
- Cannot be obtained by use of:
 - Physical force, compelling threats, intimidating behavior, or coercion.
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated.

OVERVIEW OF THE 3 QUESTIONS



1. Was force used by the accused individual to obtain sexual access?
2. Was the reporting party incapacitated?
 - a. Did the accused individual know, or
 - b. Should s/he have known that the alleged victim was incapacitated (e.g. by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the reporting party gave the accused individual permission for the specific sexual activity that took place?

FORCE



- Was force used by the individual to obtain sexual access?
- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force.
- Types of force to consider:
 - Physical violence: hitting, restraint, pushing, kicking, etc.
 - Threats: anything that gets others to do something they wouldn't ordinarily have done absent the threat.

- Types of force to consider (cont.)
 - Intimidation: an implied threat that menaces and/or causes reasonable fear.
 - Coercion: the application of an unreasonable amount of pressure for sexual access.
 - Consider:
 - Frequency.
 - Intensity.
 - Duration.
 - Isolation.

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent.
- Incapacitation is a determination that will be made after the incident in light of all the facts available.
- Assessing incapacitation is very fact-dependent.
- Blackouts are frequent issues.
 - Blackout ≠ incapacitation (automatically).
 - Blackout = no working (form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how.
 - Partial blackout must be assessed as well.
- What if the responding party was drunk too?

- What was the form of incapacity?
 - Alcohol or other drugs.
 - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence.
 - Incapacity = an extreme form of intoxication.
 - Administered voluntarily or without reporting party's knowledge.
 - Rape drugs.
 - Mental/cognitive impairment.
 - Injury.
 - Asleep or unconscious.

- First, **was the reporting party incapacitated** at the time of sex?
 - Could the person make rational, reasonable decisions?
 - Could the reporting party appreciate the situation and address it consciously such that any consent was informed –
 - **Knowing who, what, when, where, why, and how.**
- Second, **did the responding party know** of the incapacity (fact)?
- Or, **should the responding party have known** from all the circumstances (reasonable person)?

SOME FACTS ABOUT ALCOHOL



- Most abused drug on college campuses.
- Most commonly used date rape drug.
- Time – the **only** sobering tool.
 - One “drink” per hour.
 - “Myth of puking.”
- Pace of consumption.
- Food in the stomach.
- Carbonation and alcohol.
- Medications and alcohol.

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COMMON INTOXICATION FACTORS



- Rate of consumption.
- Strength of drink.
- Food in the stomach.
- Body weight.
- Body type – body fat percentage.
- Gender:
 - E.g. enzymes, hormones, body fat, and water in body.
- Functional tolerance.
- Medications.
- Illness and dehydration.
- Fatigue.
- Caffeine.
- Genetics.
- Ethnicity.

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BAC/BAL



- One “drink” \approx .025 BAL.
 - 12 oz.
 - 5 oz. wine.
 - 1.5 oz. liquor (a typical “shot”).
- Metabolic rate – one drink per hour.
 - .015/hr. (avg.).
 - Dependent on age, gender, height, weight, medications, genetics, experience with drinking, etc.



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BAC/BAL



- .05-.07: Buzzed; feeling of well-being; minor memory and coordination impairment.
- .07-.09: Slight impairment of coordination, vision, reaction time; judgment and self-control reduced.
- .10 -.125: Significant impairment of coordination, reaction times, and judgment; possible slurred speech.
- .13-.15: Severe motor impairment; blurred vision, loss of balance; judgment and perception severely impaired.

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- .16-.19: “Sloppy drunk;” increased negative feelings; possible nausea; blackout possible.
- .20: Dazed and disoriented; possible difficulty standing or walking; possible nausea and vomiting; blackouts possible.
- .25: Severe mental, physical, and sensory impairment; nausea and vomiting – asphyxiation concerns; blackouts possible.
- .35: Possible coma; level of surgical anesthesia.
- .40: Coma possible; death possible due to respiratory arrest.

INCAPACITY ANALYSIS

- If the reporting party **was not** incapacitated, move on to the Consent analysis.
- If the reporting party **was** incapacitated, but:
 - The responding party did not know it, **AND**
 - The responding party would not have reasonably known it = policy not violated. Move to Consent analysis.
- If the reporting party **was** incapacitated, and:
 - The responding party **knew it or caused it** = policy violation. Sanction accordingly.
 - The responding party **should have known it** = policy violation. Sanction accordingly.

CREATE A TIMELINE



- First must determine by a “more likely than not” standard if the reporting party was incapacitated.
 - This inquiry will likely be triggered by statements such as: “The next thing I remembered was.....”
 - “I woke up and.....”
 - “I don’t remember anything after.....”
 - That is your cue to start a timeline of the events during the incident to make the first-level analysis of whether the reporting party was incapacitated (using a preponderance of the evidence standard).

TIMELINE CONSTRUCT



- Begin the timeline at the time the incident began, starting at the time the reporting party began consuming alcohol/engaging in recreational drug use. Ask:
 - What were you drinking (e.g. wine, beer, or hard liquor)?
 - How much were you drinking (e.g. shot, 12 oz., or large cup)?
 - How many drinks did you have?
 - Were you using any recreational drugs?
 - When did you eat? What did you eat?
 - Are you on any personal medications?

TIMELINE CONSTRUCT



- Continue the first five questions up until the point in time that reporting party indicates he/she cannot remember anything.
- **Note:** If reporting party did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. You will need to ask:
 - Where were you when you were drinking?
 - Did you leave your drink at any time then resume consuming?
 - Did anyone provide drinks for you?

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TIMELINE CONSTRUCT



- You will need to make an assessment if, based on the preponderance of the evidence, the reporting party was more likely than not incapacitated.
- If the answer is “No,” then you would proceed to the Consent analysis.
- If the answer is “Yes,” then go to part two of your analysis.
- Conduct the same timeline for the responding party, superimposed on the reporting party’s timeline.

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TIMELINE CONSTRUCT



- Ask the responding party if reporting party was:
 - Slurring words?
 - Stumbling?
 - Acting unusual (e.g. not making sense, appearing drunk, etc.)?
 - Falling asleep?
 - Throwing up?
 - Disoriented?
 - And, if responding party knows reporting party, was s/he acting different from the way s/he usually acts?

OVERVIEW OF THE 3 CONSENT QUESTIONS



1. Was force used by the Responding Party to obtain sexual or intimate access?
2. Was the Reporting Party *incapacitated*?
 - a) If so, could or should the Responding Party have reasonably known that the Reporting Party was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?

Note: The intoxication of the Responding Party can not be used as a reason they did not know of the Reporting Party's incapacity.
3. What clear *words* or *actions* by the Reporting Party gave the Responding Party permission for each sexual or intimate act as it took place?

There are four types of force to consider:

- Physical violence -- hitting, restraint, pushing, kicking, etc.
- Threats -- anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
- Intimidation -- an implied threat that menaces and/or causes reasonable fear
- Coercion – the application of an *unreasonable* amount of pressure for sexual access.
 - Consider:
 - Isolation
 - Frequency
 - Intensity
 - Duration
 - Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force

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INCAPACITY

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent
- Incapacitation is a determination that will be made after the incident in light of all the facts available
- Assessing incapacitation is very fact-dependent
- Blackouts are frequent issues
 - Blackout = no working (form of short-term) memory for a consistent period, thus the person is unable to understand who, what, when, where, why, or how
 - But the 2a question must be answered, as blacked out individuals are able to engage in activities that may not make 2a a definitive “yes”
 - Partial blackout or Brownout possibilities must be assessed as well
- What if the responding party was incapacitated as well?

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- What was the form of incapacity?
 - Alcohol or other drugs
 - Incapacity ≠ Impaired, drunk, intoxicated or under the influence
 - Incapacity = an extreme form of intoxication (alcohol)
 - Administered voluntarily or without reporting party's knowledge
 - Rape drugs
- Mental/cognitive impairment
- Injury
- Asleep or unconscious

- To better understand and determine the relationship between the use of alcohol and capacity it's important to understand there are multiple levels of effect of alcohol, along a continuum
 - The lowest level is impairment, which occurs with the ingestion of any alcohol. A synonym for impairment is “under the influence”
 - The next level is intoxication, also called drunkenness, similar to the state's drunk driving limit
 - A person can be drunk but still have the capacity to give consent

INCAPACITATION



- Incapacity is a level of alcohol consumption in which an individual is incapable of understanding information presented, appreciating the consequences of acting or not acting on that information and making an informed choice
 - Incapacitation is a state beyond drunkenness or intoxication, where decision-making faculties are dysfunctional.
- “Too intoxicated to consent” or “unable to consent as a result of AOD” are too limiting as policy standards, because they cannot cover the blackout situation where ***someone does consent to sex, but does not know that they are.***

INCAPACITATION



- In order to consent effectively to sexual activity, you must be able to understand Who, What, When, Where, Why ***and*** How with respect to that sexual activity.
- This is another way of stating the law’s expectation that consent be knowing or informed, and any time it is not, consent cannot be effective.
- To be more precise, an incapacitated person cannot give a ***valid*** consent.

BEHAVIORIAL CUES

- Evidence of incapacity may be in the report taken from context clues, such as:
 - Slurred speech
 - The smell of alcohol on the breath in combination with other factors
 - Shaky equilibrium; stumbling
 - Outrageous or unusual behavior
 - Passing out
 - Throwing up
 - Appearing Disoriented
 - Unconsciousness
 - Known Blackout
 - Although memory is absent in a blackout verbal and motor skills are still functioning.

INCAPACITY (RECAP)

2. **was the Reporting Party incapacitated** at the time of sex?

- Could they make rational, reasonable decisions?
- Could the reporting party appreciate the situation and address it consciously such that any consent was informed –

2a. **Did the Responding Party know** of the incapacity or, **could or should the Responding Party have known** from all the circumstances (a reasonable sober person standard)?

KNOWLEDGE CONSTRUCT



- These answers should be in the report if the primary consideration is the out of norm behaviors of the Reporting Party as a determination of Incapacity:
 - Did the Responding Party know the Reporting Party previously?
 - If so, was Reporting Party acting very differently from previous similar situations
 - Review what the Responding Party observed the Reporting Party consuming (via the timeline)
 - Determine if Responding Party provided any of the alcohol for the Reporting Party
 - Other relevant behavioral cues

BAC/BAL



- One “drink” \approx .025 BAL.
 - 12 oz.
 - 5 oz. wine.
 - 1.5 oz. liquor (a typical “shot”).
- Metabolic rate – one drink per hour.
 - .015/hr. (avg.).
 - Dependent on age, gender, height, weight, medications, genetics, experience with drinking, etc.



TIMELINE ANALYSIS



- The timeline in the report should begin at the time the incident began, starting at the time the Reporting Party began consuming alcohol/engaging in recreational drug use. The report should include:
 - What was consumed (e.g., wine, beer, or hard liquor)?
 - How much was consumed?
 - If any recreational or prescription drugs were used?
 - Food consumption and sleep.

TIMELINE CONSTRUCT (CONT.)



- If the Reporting Party did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. The report should address this.
 - Where were they when they were drinking?
 - Did you leave their drink at any time then resume drinking it?
 - Did anyone provide drinks for them? Who?
- There should also typically be a credibility analysis in the report regarding these answers.

FINAL INCAPACITY ANALYSIS



- If the Reporting Party was not incapacitated, move on to the Consent analysis (Question #3).
- If the Reporting Party was incapacitated, but:
 - The Responding Party did not know it, **AND**
 - The Responding Party could not have reasonably known it then the policy was not violated for this reason. Move on to the Consent analysis.
- If the Reporting Party was incapacitated, and:
 - The Responding Party **knew it or caused it** then there is a policy violation. Sanction accordingly.
 - The Responding Party **could or should have known it** then there is a policy violation. Sanction accordingly.

CONSENT



Question 3 is the Consent question:

- What clear *words* or *actions* by the Reporting Party gave the Responding Party permission for each sexual or intimate act as it took place?
- Equity demands a pure consent-based policy, defining what consent is rather than defining it by what it is not (e.g., force, resistance, against someone's will, unwanted, someone unable to consent, etc.).
- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

CONSENT IS...



- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual or intimate activity.
- Cannot be obtained by use of:
 - Physical force, compelling threats, intimidating behavior, or coercion.
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated.

CONSENT: RULES TO REMEMBER



- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated – verbally or non-verbally – by the person withdrawing it.

TIMELINE EXAMPLE

CREATING A TIMELINE



Use the preponderance of evidence standard.

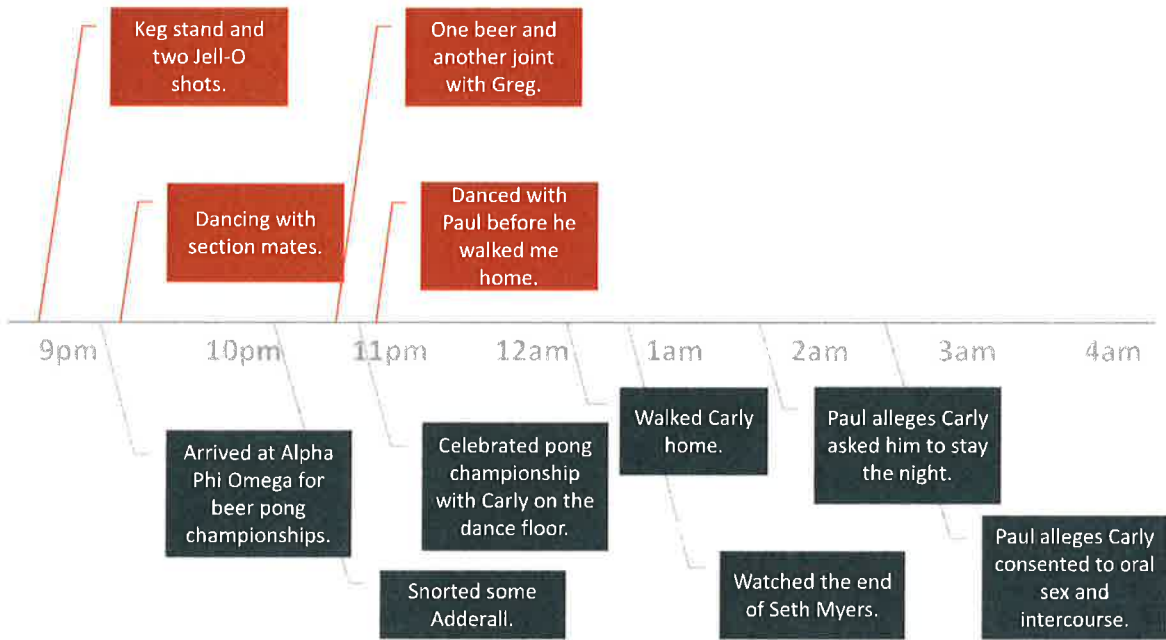
Use documentary evidence, e.g. texts to establish where, why, when, how, and who.

Match up as many times and locations as possible.

What did the other party observe?



CREATING A TIMELINE



INVESTIGATING RETALIATION CLAIMS

- Basic Legal Principles
- Investigating Retaliation Claims



RETALIATION BASIC LEGAL PRINCIPLES



Title IX regulations prohibit recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title IX.

- Protected activity under Title IX:
 - Reporting sex discrimination, including sexual harassment and assault.
 - Filing a discrimination complaint.
 - Assisting someone in reporting discrimination or filing a complaint.
 - Participating in any manner in an investigation of discrimination, for example as a witness.
 - Protesting any form of sex discrimination (e.g. lack of equity in athletics).

INVESTIGATING RETALIATION CLAIMS: KEYS TO UNDERSTANDING



- Establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate.
- Since someone's intention is rarely displayed openly, the legal framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

PRELIMINARY ELEMENTS OF A RETALIATION CLAIM



- The following elements establish an *inference of retaliation*:
 - Did the reporting party engage in protected activity?
 - Usually straightforward,
 - Unless there is a question of reasonableness of belief or manner.
 - Was reporting party subsequently subjected to adverse action?
 - Do the circumstances suggest a connection between the protected activity and adverse action?
 - Did individual accused of retaliation know about activity?
 - How soon after the protected activity did the adverse action occur?
 - If these three elements are not shown, the claim fails.

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RETALIATION AND ADVERSE ACTION



- Common definition of *adverse action*:
 - Significantly disadvantages or restricts the reporting parties as to their status as students or employees, or their ability to gain the benefits or opportunities of the program; or
 - Precluded from their discrimination claims; or
 - Reasonably acted or could act as a deterrent to further protected activity.
 - The U.S. Supreme Court and the federal courts have defined adverse action *very broadly*.

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INVESTIGATING RETALIATION CLAIMS: REBUTTING THE INFERENCE



- What is the stated non-retaliatory reason for the adverse action?
 - Is the explanation for the action legitimate on its face?
- Is there evidence that the stated legitimate reason is a pretext?
 - This is the heart of the case – is the explanation the true reason?
- The preponderance of the evidence must establish that the adverse action was motivated by retaliation.

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INVESTIGATING RETALIATION CLAIMS: IS THE EXPLANATION LEGITIMATE?



- Factors to consider:
 - The explanation makes sense.
 - The action was consistent with established policy or practice.
 - No adverse action was taken against others who engaged in protected activity.
 - Reporting party was treated the same as other individuals.

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INVESTIGATING RETALIATION CLAIMS IS THERE EVIDENCE OF PRETEXT?



- Factors to consider:
 - The explanation given is not credible.
 - Other actions by the same individual are inconsistent with the explanation.
 - The explanation is not consistent with past policy or practice.
 - There is evidence of other individuals treated differently in similar situations.

CHALLENGING WITNESSES

- Difficult Witnesses
- Lying Witnesses
- Resistant and/or Quiet Witnesses

DIFFICULT WITNESSES



- Set the tone:
 - Thank them.
 - Review your role as a neutral fact-finder.
 - Put them at ease – ask about them without being phony.
 - Acknowledge any hesitation/awkwardness as normal.
 - Review retaliation against a witness.
 - Review immunity.
 - Review confidentiality.
 - Review expectation of truthfulness.

LYING WITNESSES



- In a non-accusatory way, explain how their statements don't "make sense."
- Allow opportunity for witness to restate.
- Try to gauge why they are lying – Fearful? Embarrassed? Protective? Try to address their motivation individually, with understanding.
- If they continue to lie, confront and explain the repercussions for lying in an investigation.
- Calmly bring them back to the questions.
- If needed, leave the door open for follow up.

RESISTANT AND QUIET WITNESSES



- Gauge their resistance or hesitation and try to address their motivation individually.
- Answer their questions about the process.
- Back up when needed.
- If they open up, be responsive.
- Explain expectations of the school and rationale for the duty to participate.
- Advance preparation will help when open-ended questions don't work.

OTHER CONSIDERATIONS



- Consider carefully who should lead the interview.
- Ask open-ended questions first.
- Allow time.
- Use breaks.
- Remain calm and professional.
- If you ask a bad question, simply apologize, restate, correct, etc.
- Allow for flexibility.

QUESTIONING MODEL

Using a case study, the presenters will model questioning techniques for challenging witnesses.



QUESTIONING ACTIVITY WITH PARTICIPANTS



SCENARIO



- Tanya and Mark are students. Tanya has alleged that Mark had sex with her without her consent. She had been drinking before they met up at a party on a Saturday, and thinks he had been drinking, too. Mark asked her to come over to watch a sporting event and she thought others would be there. Some things happened she was OK with, but then it got to a point where she wasn't OK with what was happening. When it was over, she went back to her residence hall and met up with her friend, Amy.

TAKING NOTES

- What Kinds Of Notes Should Be Kept?
- Note-Taking



WHAT KINDS OF NOTES SHOULD BE KEPT?



- Assemble an investigative file and keep it in a secure location.
- Keep a timeline of the steps in the process, including dates of all meetings and interviews.
- Interviews – notes vs. recording.
 - Recording is becoming more common
- Notes – handwritten vs. computer.
- **Interviewee verification.**
- Records of all contacts, including emails and phone calls with all parties.

NOTE-TAKING



- Taking notes may slow down the interview in a good way – may help detect deception.
- Use pre-prepared numbered questions as a framework, but be flexible.
- Note-taking should occur throughout the entire interview, not just when the responding party makes a pertinent disclosure or an “incriminating” remark.
- Documentation is critical: you are creating the record of the complaint.
- Remember that students have the right to inspect their education record under FERPA.

NOTE-TAKING



- Notes should be complete and detailed.
 - Important for assessing credibility.
 - Decision may turn on small details.
- Where possible, include verbatim statements on critical issues – Use their words, not yours.
- Keep notes on what is told to the reporting party, responding party, and witnesses.
- You may want to summarize perceptions of credibility, honesty, etc.
 - Recognize, however, that all notes and evidence may be subject to review

NOTE-TAKING



- Remember that “sole possession” FERPA exception is very limited.
- Date all records and include who was present at any meetings; number pages.
- Review your notes before the interview concludes.
- Clarify anything you are unclear about.
- Document any refusal to answer, evasion, or refusal to participate.
- Capture key quotes.
- Review and finalize notes immediately upon completion of interview.

EVALUATION OF EVIDENCE AND MAKING A DETERMINATION

- Understanding Evidence
- Credibility
- Analyzing the Information
- Making a Determination

UNDERSTANDING EVIDENCE



- Formal rules of evidence do not apply. If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered.
 - Evidence is any kind of information presented with the intent to prove what took place.
 - Certain types of evidence may be relevant to the credibility of the witness, but not to the charges.
- Consider if drugs or alcohol played a role.
 - If so, do you know what you need to know about the role of alcohol on behavior? Timing? Incapacitation?
 - Look for evidence of prior planning.

CREDIBILITY



- Credible is not synonymous with truthful.
- Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading.
- Credibility is largely a function of consistency and corroboration.
- Refrain from focusing on irrelevant inaccuracies and inconsistencies.
- Pay attention to the following factors...

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FACTORS TO CONSIDER FOR CREDIBILITY



- Corroborating evidence
- Logic/internal & evidentiary consistency
 - Ask yourself, “Does this make sense?”
 - Be careful of own biases about what is or is not logical
- Inherent plausibility – is the evidence more likely than the alternative?
- Non-cooperation
 - Look for short, abrupt answers or refusal to answer.
 - OK to ask, “You seem reluctant to answer these questions – can you tell me why?”
- Demeanor (careful with this one)
 - Demeanor issues should be cue to ask more questions.

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MAKING CREDIBILITY DETERMINATIONS



- Look at consistency of story – substance and chronology of statements.
- Consider inherent plausibility of all information given.
- Is the evidence provided consistent with other credible evidence?
- Look for the amount of detail (facts) provided. Factual detail should be assessed against general allegations, accusations, excuses, or denials that have no supporting detail.
- Pay attention to non-verbal behavior, but do not read too much into it...this is not *Lie to Me*.

ANALYZING THE INFORMATION



- Examine only actions that have a direct relation to the situation under review or a pattern of incidents.
- Explore motivation, attitude, and behavior of reporting party, responding party, and witnesses.
- Apply relevant standards:
 - Force, incapacity, and consent.
 - Unwelcomeness, reasonable person, and discriminatory effect.
- Analyze the broadest, most serious violations first and make a determination of each and every violation alleged, element by element.

ANALYZING THE INFORMATION



- Assessing each answer: for each piece of information you have as a result of your analysis and matching your need to assess its evidentiary value. Measure with the following questions:
 - Is the question answered with fact(s)?
 - Is the question answered with opinion(s)?
 - Is the question answered with circumstantial evidence?



Withhold judgment until all the evidence has been considered.

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FOCUS ON WHAT YOU DON'T KNOW, RATHER THAN WHAT YOU DO



- Find an opportunity to let your subconscious work on the gaps in information (e.g. yoga, meditation, etc.).
- If you are too busy analyzing what you know, you will not focus on the need to identify what is missing, what is yet to be obtained, or why certain witnesses have not told you things that it would have been logical or expected to hear from them.
- Look for evidence that should be there that is not, for some reason.

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MAKING A DETERMINATION



- Review the institutional policies in play.
- Parse the policy.
 - Specific determination for each policy and each responding party.
- Pose key questions.
- Review the evidence and what it shows (relevance).
- Assess credibility of evidence and statements as factual, opinion-based, or circumstantial.
- Determine whether it is more likely than not policy has been violated.
- Cite concretely the reasons for you conclusions.

BIAS & PREJUDICE



“BIAS” DEFINED



- Tendency to believe that some people, ideas, etc. are better than others that usually results in treating some people unfairly.
- Strong interest in something or ability to do something.
- Inclination of temperament or outlook; especially a personal and sometimes unreasoned judgment (*merriam-webster.com*).
- “Biased” – To cause partiality or favoritism; influence, especially unfairly (*dictionary.com*).
- **“Confirmation Bias”**: The tendency to interpret new evidence as confirmation of one's existing beliefs or theories.
 - VERY common form of bias

“PREJUDICE” DEFINED



- Unfair feeling of dislike for a person or group because of race, sex, religion, etc.
- Feeling of like or dislike for someone or something especially when it is not reasonable or logical (*merriam-webster.com*).
- Any preconceived opinion or feeling, either favorable or unfavorable (*dictionary.com*).
- A prejudicial action is harmful to someone. In the investigation context, the “harm” is an unfair decision.

Key Issues

- Conscious vs. unconscious.
- Positive vs. negative.
- Social & cultural capital.
- Stereotyping.
- Cultural competence.
- Multi-partiality.
- Social justice.

- Common hot-button areas of bias & prejudice that impact investigators:
 - Sexual orientation.
 - Gender, transgender, and gender identity.
 - Race.
 - Ethnicity.
 - Religion or religious beliefs.
 - Political views.
 - Athletes.
 - Greek life.
 - Alcohol or drug use.
 - Sexual freedom

BIAS AND CONFLICT OF INTEREST



- Conflicts of interest create bias for or against
- Types of conflicts:
 - Wearing too many hats in the process
 - Legal Counsel as decision-maker
 - Non-impartial appellate officer, hearing officer, or board
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest
- Also, having disciplined a student or employee previously is often not a conflict of interest

BIAS ISSUES IN RECENT CASELAW



- Bias in Procedure
 - Exclusion of evidence
 - “Believe First” or “I believe you”
 - Failure to follow procedures
 - Placing burden of proof on the responding party
- Biased training materials
- Insufficient Training
- Bias due to internal and external pressures (e.g. politics, identity of the parties or parents, lawsuits and attorneys, etc.)
- Conflicts of interest

BIAS: SMALL GROUP DISCUSSION



- In small groups, discuss:
 - What are some bias-related issues you have seen in your work in higher education?
 - Are there bias/prejudices that you have seen on your campus?
 - How have you trained groups (faculty, staff, students) regarding bias and prejudice?
 - What has worked?
 - What has not worked?

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THE INVESTIGATION REPORT

UK

YOUR UNIVERSITY
LOGO HERE

SAMPLE TEMPLATE FOR INVESTIGATIVE REPORTS

This is just one example that may be useful. You should consult with a licensed attorney in your own jurisdiction before adopting this template.

University of Knowledge

Date of Report:

This report addresses alleged violations of the Policy Name(s) of the University of Knowledge. Names of Investigators conducted the investigation into these allegations. This report will determine whether it is more likely than not that there has been a violation of the relevant university policy or policies.

Executive Summary:

(Summarize findings here.)

Procedural History:

Include the date of the incident, the date on which it was reported, how and to whom (generally) it was reported, the date on which investigators were assigned to it, and the date on which the investigation closed.

On Month XX, 20XX, Reporting Party met with Name Here in the Office of Victim Assistance at University of Knowledge along with Name Other Present Parties. Reporting Party reported that General Allegations occurred on Month XX, 20XX. Reporting Party has not reported this matter to law enforcement at this time, although she is aware of this option.

This report was referred to Investigators Name Here and Name Here on Month XX, 20XX. Both investigators were present in person for each interview. They alternated questioning and note-taking roles. This investigation was completed on Month XX, 20XX.

Involved Parties:

Reporting Party is (e.g., a first-year undergraduate female residing in the residence halls).

1. Responding Party is (e.g., a male graduate student and a residence advisor in the residence halls).
2. Witness 1 is (e.g., a freshman female residing in the residence halls and Reporting Party's roommate).
3. Witness 2 is (e.g., a male undergrad living off-campus and a classmate and friend of Reporting Party).
4. Witness 3 is (e.g., an employee of Nearby Bar; employee is not affiliated with the university).

THE INVESTIGATION REPORT



- A skeleton template is helpful
- The investigation report is the one comprehensive document summarizing the investigation, including:
 - Detail the allegations and how they were brought forward.
 - Explain the role of the parties and witnesses, and any relations between them.
 - Results of interviews with parties and witnesses.
 - Results of interviews with experts.
 - Summary of other information collected (i.e. information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages, etc.).

THE INVESTIGATION REPORT



- Assess weight, relevance, and credibility of information gathered.
- Assess credibility of parties.
- Explain unsuccessful attempts to collect information and/or interview witnesses.
- Highlight key factual findings for each allegation.
- The report should reference or contain all policies and procedures currently applicable.

THE INVESTIGATION REPORT



- Develop how prior, similar acts by the responding party are relevant and to what.
- Measure the information gathered against the policies alleged to have been violated, applying the standard of proof (analysis).
- Depending on your procedures, recommend a determination on whether the policy has been violated, or make the determination.

ELEMENTS OF AN INVESTIGATION REPORT



- Case identification information:
 - Case number, investigator(s), date of notice, date assigned to investigator, and date investigation closed.
- Source of initial complaint/allegation:
 - Source of complaint, name and contact information of the reporting party, and status; same for responding party.
- Details from initial report/complaint:
 - Nature of incident.
 - How report was received (e.g. security incident report, hotline, face-to-face, web form, etc.).

ELEMENTS OF AN INVESTIGATION REPORT



- Document the purpose (scope) of the investigation.
 - This section must paint a clear picture of the investigation for the person reading the report.
 - Identify clearly which policies are in play.
- Document each of the tasks assigned and actions taken throughout the investigation, particularly if there are multiple investigators.
- Index all documentation relevant to the complaint.
 - E.g. research, notes, medical records, police reports, prior complaints, etc.

ELEMENTS OF AN INVESTIGATION REPORT



- Investigation interview:
 - Name/title of the interviewer(s).
 - Name of the persons interviewed and their role in the investigation – reporting party, responding party, witness, etc.
 - Names of any other people who sat in on the interview and their roles.
 - Location of the interview.
 - Interview date.
 - Detailed notes of interview.
- Incident log.
- Determination and action taken.

REVIEWING TEMPLATES FOR RECORDKEEPING AND REPORT-WRITING



- Format.
- Form.
- Flow.
- Style.
- Use of Appendices.
- Contents/Index.
- Tabs.
- Exhibits/Physical Evidence.

SANCTIONING IN SEXUAL MISCONDUCT CASES

SANCTIONING IN SEXUAL MISCONDUCT CASES



- **Title IX and case law require:**
 - Bring an end to the discriminatory conduct (Stop).
 - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct (Prevent).
 - Restore the reporting party as best you can to their pre-deprivation status (Remedy).
- Real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the reporting party and the community.

WHAT SANCTIONS?



- A student is found responsible for non-consensual sexual intercourse involving another student; the panel determined the reporting party was incapacitated and the responding party should have known of this incapacity.
 - The panel felt that part of the problem was the students' inexperience with sexual matters and poor communication.
 - The responding party is an excellent student and is well-liked by campus community; he will graduate in a month.
 - The reporting party indicates that she does not want the responding party to be suspended or expelled.

WHAT SANCTIONS?



- A male tenured faculty member is found responsible for non-consensual sexual intercourse involving a female student who is not in any of the professor's classes.
 - The investigator determines that the student was incapacitated and the responding faculty member should have known of that incapacity.
 - The faculty member is a full professor holding a prestigious endowed chair position.
 - The student and the professor had consensual sex five times after the non-consensual incident.
 - The student brought the allegation shortly after the faculty member began sleeping with the student's friend.

TRAUMA AND INVESTIGATIONS

- Introduction to Trauma
- Neurobiological Impact of Trauma
- Trauma and Interviewing
- Trauma and Credibility

WHAT IS TRAUMA?



- Exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity.
- May result from war, natural disasters, severely distressing events
- When the brain senses a threat, releases hormones or chemicals throughout the body to help react to the threat and/or trauma.
- The brain does not distinguish between “types” of sexual assault,
 - E.g. stranger or acquaintance, but interprets them equally as threats to survival.
- The brain also does not typically differentiate between an actual threat and a perceived or subjective threat.
 - Sometimes also a function of prior experiences, rather than the immediate situation.

HORMONAL FLOOD



- The hormonal flood may last for 96 hours (four days) and may be reactivated by a triggering event.
 - Physical toll on body: headaches, body ache, and GI issues.
 - Compromised decision-making.
 - Emotional swings.
 - Self-medicating behaviors.
- Yet we sometimes expect reporting parties to make major decisions and recount the incident during this time.

EFFECTS OF FLOODING



- Hormones are released in varying amounts and may result in behavioral differences among reporting parties:
 - Fight, Flight, Freeze – not a choice.
 - Impairs the ability to think rationally.
 - May present as confused, laughing, crying, flat, angry, irritable, or variable.
- Tonic immobility may be induced by the autonomic nervous system causing the body to shut down.
 - “Rape-induced paralysis.”
 - Know what is happening, but can’t fight.
 - Biological response based on survival; think of the animal world.

MEMORY AND TRAUMA



- Memory is formed in two steps:
 - Encoding: organizing sensory information coming into brain.
 - Consolidation: grouping into memories and storing the stimulus.
- Trauma can interfere with the encoding and/or the consolidation of memory.
- May create fragmented memories.
- Recall can be slow and difficult.
- Alcohol may interfere further with memory.
- However, sensory information (smell, sound, etc.), may still function properly.

ADDITIONAL TRAUMA RESPONSES



- Personality.
- Coping strategies.
- Available support systems and resources.
- General resilience.
- Past history of traumatic experiences.
- Cultural differences in the perception and expression of trauma.
- Normalization/Adaptation.
- Physical toll on body: headaches, body ache, and GI issues.
- Compromised decision-making.
- Emotional swings.
- Self-medicating behaviors.

TRAUMA & INTERVIEWING



- Expecting a reporting party to give a linear account in the days after an incident, or after having been triggered, is not always realistic.
- Memory fragmentation can occur.
- Having “inconsistent” memory, pausing, and stumbling to provide an account are not outside the bounds of what one could expect from a person who has experienced trauma.
- Considerations for credibility assessment?

TRAUMA & INTERVIEWING



- Allowance for sleep cycles prior to interviews (if within 96-120 hours).
 - One to two sleep cycles makes a big difference in ability to connect memories.
- A non-linear account, with jumping around and scattered memories is not uncommon.
- If alcohol is an additional factor, narrow and detailed questions will be difficult for reporting parties to access and may create additional stress.
- Use open-ended questions.
- Don't interrupt or barrage with questions.
- Use strategies that pull out fragmented memories.
- Be patient during the interview and allow time.

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TRAUMA & INTERVIEWING



- Empathy is critical.
 - However, remember to remain impartial.
- Tell me more about...
- Help me understand your thoughts when...
- What was going through your mind when...
- What are you able to remember about...?
 - 5 senses
- What were your reactions to this experience?
 - Physically
 - Emotionally
- What, if anything, can you not you forget about this experience?

Source: Patricia D. Law, John Russell, et al., *Formative Experiences in Trauma Interviewing: A Trauma-Informed Experience*.

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TRAUMA & CREDIBILITY



- Trauma may help explain elements that negatively impact a party's credibility
 - Inconsistencies in a reporting party's statement.
 - Lack of linearity in a reporting party's account or statement.
 - Reporting party's lack of memory about an incident.
 - Memory errors by the reporting party.
 - Reporting party's demeanor or affect.
 - Reporting party's brief answers, or answers lacking in detail.

TRAUMA & CREDIBILITY



- However, while trauma may help explain issues that impact credibility, it typically does NOT excuse them.
 - An assessment of credibility must focus on issues such as the reliability, consistency and believability of the parties.
 - If, for example, a reporting party's account is inconsistent or variable, lacking in detail, or has material memory gaps, it typically lacks credibility.
 - An understanding of trauma and its impact will provide insight as to why some credibility deficits exist, but a trauma-informed understanding should not materially impact a credibility assessment.
- Use caution because actual or perceived trauma may have little or nothing to do with consent.

INCLUSIVE INVESTIGATIONS

- Working with Gender Non-Conforming Individuals
- Working with LGBTQ Individuals
- Same-Sex Sexual Violence
- Hate-Based Misconduct

TERMINOLOGY



- **Sex:** References chromosomes, hormones, reproductive organs, and genitalia.
- **Gender:** Refers to the attitudes, feelings, and behaviors that a given culture associates with biological sex.
- **Gender Identity:** Internal sense of gender.
- **Gender Expression:** Outward expression of gender, often through clothing, behavior, posture, mannerisms, speech patterns, and activities.
- **Sexual Orientation:** Attracted to sexually or romantically, on a continuum (e.g. gay, lesbian, bisexual, heterosexual, asexual, and pansexual).

TERMINOLOGY



- **Queer:** An umbrella term referring to LGBTQI individuals, and/or a nonbinary term used to reflect a fluid gender identity than societal gender “norms”
- **Cisgender:** Gender identity is consistent with the sex they were assigned at birth.
- **Transgender:** Umbrella term referring to a wide range of persons whose gender identity or expression may not match the gender assigned at birth.
- **Bisexual:** Attracted to people of the same as well as other genders.

TERMINOLOGY



- **Heterosexual:** Attracted to people of a gender other than their own.
- **Asexual:** Minimal or no sexual attraction to others.
- **Intersex:** Born with genitalia, reproductive systems, and/or sex chromosomes of both males and females.
- **Pansexual:** Attracted to people regardless of gender.

Sexual Violence and Intimate Partner Violence Can Happen to Anyone...

- regardless of sex, gender, gender identity, and gender expression.
- regardless of sexual orientation.

- Lesbians and gay men reported IPV and sexual violence over their lifetimes at levels equal to or higher than heterosexuals:
- 44% of lesbian women, 61% of bisexual women, and 35% of heterosexual women experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.
- 26% of gay men, 37% of bisexual men, and 29% of heterosexual men experienced rape, physical violence, and/or stalking by an intimate partner at some point.
- Approximately one in five bisexual women (22%) and nearly one in 10 heterosexual women (9%) have been raped by an intimate partner in their lifetime.

RELUCTANCE TO REPORT



- Concern about a homophobic response.
- Concern about preconception that sexual assault cannot occur between same-sex partners.
- Fear of exposing LGBTQI community to negative stereotypes.
- Fear of the impact a report may have on a small, sometimes close-knit community at the school.
- Fear of reaction of family and friends.
- Fear of institution not understanding their identity, expression, or orientation.

RELUCTANCE TO REPORT



- Fear of being outed and implications for medical treatment.
- Concern about how “systems” will respond, especially law enforcement.
- Previous negative experiences with school staff, the law, or community members.
- Fear that male-on-male sexual violence in connection with hazing/bullying will be reduced to “boys being boys.”

CONSIDERATIONS FOR INVESTIGATIONS



- Educate yourself and your community
 - Do not expect parties to “educate you.” Stick to the facts.
 - Ask for additional education or training if needed.
- Be mindful of how power dynamics and targeting can come into play.
- Assume nothing and allow for self-identification.
- Provide a safe, non-judgmental, and respectful environment.

CONSIDERATIONS FOR INVESTIGATIONS



- A visible reaction may negatively impact rapport.
- Use inclusive language; reflect language used by the parties during interviews and in all communication.
- Anticipate heightened confidentiality concerns.
- Use your school/campus/district/community-based experts.
- Be aware of your biases.

HATE-BASED MISCONDUCT



- Targeting persons based on their real or perceived membership in an historically oppressed group.
 - When sex or gender is the basis, it's a TIX.
 - Be aware that trauma may be especially severe for the reporting party.
 - Reporting party may have heightened concerns about safety and retaliation.
 - Investigations may focus on identification of responding party or parties.

EXAMPLE



Jay is a student who is gay and a member of the school cheer team. A group of football players repeatedly ridicules Jay about his effeminate mannerisms and clothing, and threatens to harm him if they run into him off campus. Jay starts skipping cheer practice and eventually quits the team rather than face the continued harassment.

EXAMPLE



Ty, a student and RA who is biologically female but dresses and lives as a male, repeatedly catches a group of three students writing comments on the whiteboard on his door referring to him as “it.” The same group of students drunkenly confronts Ty in the hallway one night and starts pulling at his pajamas to “see what’s under there.” Ty moves off campus and gives up his job as an RA as a result.

QUESTIONS?



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Section (b)iv

Title IX: The Department of Education's Final Rule on Sexual Harassment

5/2020



National Association of College and University Attorneys

Presents:

**Title IX: The Department of Education's Final Rule
on Sexual Harassment**

Webinar

May 18, 2020

12:00 PM – 2:00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

Amy Foerster

Partner, Pepper Hamilton LLP

Pamela Heatlie

Director of the Office for Institutional Equity at the
University of Michigan, Dearborn, University of
Michigan

Joshua Richards

Partner, Saul Ewing Arnstein & Lehr, LLP

NACUA WEBINAR SERIES

March 18, 2020

TITLE IX: THE DEPARTMENT OF EDUCATION'S FINAL RULE ON SEXUAL HARASSMENT

SPEAKER BIOGRAPHIES



Amy C. Foerster is a partner with Pepper Hamilton LLP, where she co-chairs the firm's Higher Education Practice Group and also is a member of the Trial and Dispute Resolution Practice Group. Amy provides litigation, counseling and investigative services to colleges, universities and schools across the country, leveraging her broad higher education experience to provide practical advice in the myriad complex matters facing institutions of higher education. She has provided extensive advice to colleges, universities and K-12 schools in areas such as Title IX and the Clery Act, employee and student misconduct, fundraising and major gift agreements, federal and state regulatory compliance, governing board activities and shared governance. From 2013-2019, Amy was general counsel and chief of staff at Bucknell University. In this role, she was responsible for all legal affairs of the university, served as parliamentarian for the board of trustees, and oversaw the institution's risk management program. As chief of staff, she worked closely with the university's president to advance Bucknell's mission and strategic vision. Before joining Bucknell's leadership team, Amy was a litigation partner at Saul Ewing LLP, where she co-chaired the firm's higher education group. She previously served as a senior deputy attorney general with the Civil Litigation Section of the Pennsylvania Office of Attorney General and was an assistant counsel with the Pennsylvania Department of Education's Office of Chief Counsel, where she was primary counsel to the Office of Postsecondary and Higher Education. Amy received her B.A., magna cum laude, from Saint Mary's University of Winona, Minnesota, and her J.D. from the Dickinson School of Law of the Pennsylvania State University. Amy served as an at-large member of the Board of Directors of NACUA from 2013-2016 and was a 2012 recipient of NACUA's First Decade Award.



Pamela Heatlie is the Director of the Office for Institutional Equity at the University of Michigan - Dearborn. She previously served as an Associate Vice Provost for Academic and Faculty Affairs, Senior Director of the Office for Institutional Equity and Title IX Coordinator at the University of Michigan, Ann Arbor. Her work focuses on creating a welcoming, respectful and inclusive campus environment. Pam's particular areas of expertise include civil rights law and related investigations, DEI initiatives, and legal and compliance issues related to affirmative action. She has also taught the course "Title IX and Higher Education" at the University of Michigan Law School. Prior to becoming an administrator, Pam worked for fifteen years as in-house legal counsel to public universities. Her legal practice was wide-ranging, with a particular emphasis on employment law and student-related legal issues. She also taught "Legal Issues in Higher Education" at the University of Vermont and Eastern Michigan University. Pam received her BA with highest distinction from Wayne State University and her JD from the University of Michigan Law School.



Joshua W. B. Richards is a partner in the Philadelphia office of Saul Ewing Arnstein & Lehr, where he is the Vice-Chair of the firm's Higher Education Practice. Josh helps colleges and universities address legal issues through counseling, litigation, appeals and strategic responses to government enforcement, providing advice to his clients on a wide range of matters involving Title IX and the Clery Act, employment disputes, student conduct, faculty relations, board governance, financial exigency, data security, accreditation, minors on campus, and civil tort claims, including student death and abuse matters. Prior to joining Saul Ewing, Josh served as a Litigation Associate at Dechert LLP and was a Law Clerk for The Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania. Josh is a Trustee of Peirce College in Philadelphia, PA. He currently serves on the Committee on Program for the NACUA Annual Conference and in the past served two years as a member of the NACUANOTES Editorial Board. He has attended twelve NACUA programs, speaking at three and he also served as a speaker for a NACUA webinar as well as a NACUA briefing. Josh received his B.A. from Middlebury College and his J.D. from the University of Pennsylvania.

TITLE IX: THE DEPARTMENT OF EDUCATION'S FINAL RULE ON
SEXUAL HARASSMENT
CERTIFICATE OF ATTENDANCE

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- Attorneys from AK, AZ, CA, CO, CT, DE, HI, IL, IA, KY, MN, MO, MT, NH, NJ, NY, TN, VT, WI, or WY: Do not return this form to NACUA. Please keep this form for your records to submit directly to your state CLE commission or in case your state bar audits you for CLE compliance. Please also remember to sign the site roster, indicating your attendance, before you leave.
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Meredith McMillan
 Meredith McMillan, CMP
 NACUA: Meetings and Events Planner

TITLE IX: THE DEPARTMENT OF EDUCATION'S FINAL RULE ON
SEXUAL HARASSMENT
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 All participants are asked to sign-in, but if you are an attorney applying for Continuing Legal Education credits (CLEs), you **must** sign this attendance sheet to verify your attendance at this seminar. After completion, please return this form to NACUA (clecredit@nacua.org). *Total CLE Credits = 120 minutes

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Title IX: The Department of Education's Final Rule on Sexual Harassment

Presented by:
Autumn: As part of a series of webinars and university activities

In Cooperation with:
Michigan State University, University of Michigan, University of Michigan-Dearborn

Amy Foerster, Partner, Pepper Hamilton LLP
Pamela Heatlie, Director of the Office for Institutional Equity at the University of Michigan - Dearborn, University of Michigan
Joshua Richards, Partner, Saul Ewing Arnstein & Lehr

THE NACUA
NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

STATUS OF THE REGULATIONS

THE NACUA
NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS



Presenters



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THE NACUA
NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

STATUS OF THE REGULATIONS

- Released by ED informally on its website on May 6, 2020
- As of this morning, it is set to be published in the Federal Register on May 19, 2020
- Effective date: August 14, 2020

THE NACUA
NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

STATUS OF THE REGULATIONS

- Will the regulations really go into effect on August 14, though?
 - ED has publicly articulated an intent to begin enforcement on that date; no express “grace period”

STATUS OF THE REGULATIONS

- Will the regulations really go into effect on August 14, though?
 - But what about an injunction?
 - Likelihood?
 - Scope and effect
 - (Nationwide injunction? Part of the rule or all?)
 - Duration?
 - What would an injunction mean for compliance?

JURISDICTION

GEBSER/DAVIS FRAMEWORK

- OCR will use this three part framework to assess potential violations:
- Whether the institution had actual knowledge
 - Definition of actionable sexual harassment
 - Whether the institution's response demonstrated deliberate indifference



INSTITUTIONAL RESPONSE

- To a “report”
 - Offer of supportive measures
 - Explanation of formal complaint process
- To a “formal complainant”
 - Must investigate
 - Grievance process must be consistent with the regs
 - Unless circumstances requires (or permits) dismissal




ISSUE 1: “ACTUAL KNOWLEDGE”

- If one of these people know:
 - the Title IX Coordinator or
 - “any official...who has authority to institute corrective measures on behalf of the recipient”
- Information can come from any source
- Respondents don’t give you “actual knowledge” even if they are an official with authority (Title IX only, not Title VII)




JURISDICTIONAL ISSUES

1. When does the institution have “actual knowledge”?
2. What is a “program or activity”?
3. Who can be a complainant?
4. When a Title IX Coordinator must dismiss a formal complaint (and when they may)




WHO IS AN OFFICIAL WITH AUTHORITY?

- Institutions determine for themselves
- Supervisors and deans (see p. 344)
- Who else has authority to institute corrective measures? (check your list of sanctions)
- Not required to list OWAs in your policy (only have to list Title IX Coordinator)(p. 300)





WHAT ABOUT RESPONSIBLE EMPLOYEES?

- May still use this term
- May still require a broader set of employees to report, including all employees (and state law may require)
- But OCR will determine you have “actual knowledge” only when the person reporting is an “official with authority”
- Be mindful that your policy may create contractual liability




PROGRAM OR ACTIVITY

- Decision: Do you narrow the scope of your policy to exclude other student organizations (assuming the institution doesn't otherwise have substantial control over the event)?
- Will your community accept that?
- How will students know which organizations are which?




ISSUE 2: PROGRAM OR ACTIVITY

- Locations, events, or circumstances in which an institution exercises substantial control over both the respondent and the context in which the sexual harassment occurs
- Locations include buildings owned or controlled by officially recognized student organizations. §106.44(a)




PROGRAM OR ACTIVITY

- Training Required: Title IX Coordinator, investigator, decision-maker, those who facilitate informal resolution must be trained on “the scope of the recipient’s education program or activity”
- That training must be posted on the institution’s website





ISSUE 2: WHO CAN BE A COMPLAINANT?

- Student, employee or third party (including patients)
- A complainant must be participating in, or attempting to participate in, the institution's education program or activity at the time of filing a formal complaint.
- Attempting to participate –
 - Attending, on leave, graduated but intended return for another program/degree
 - Participation in alumni activities(?)





ISSUE 4: DISMISSAL

- Determined after formal complaint is received
- Sometimes dismissal is required
- Sometimes dismissal is permitted
- Dismissal can occur at any time during the investigation/hearing process




HOW ABOUT RESPONDENTS?

- [A]ny "individual" can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient. p. 416

"MUST DISMISS"

- Complaint must be dismissed if conduct:
 1. Would not constitute sexual harassment even if proved
 2. Did not occur in institution's program/activity
 3. Did not occur against a person in the United States





“MAY DISMISS”

1. If complainant requests to withdraw their complaint
2. If respondent is no longer enrolled or employed
3. When specific circumstances prevent gathering evidence sufficient to reach a determination



CONSIDERATIONS

- Do you want to use the same (Title IX reg) process for all sexual misconduct?
- Do you use parallel/branched processes?
- Serial processes:
 - Potential double jeopardy concerns for public institutions/harassment
 - A subsequent process not based on sex discrimination/harassment may be retaliation



IF YOU DISMISS

- Parties must receive simultaneous written notice of dismissal with reason(s) to the parties
- Parties must have an opportunity to appeal the dismissal
- Dismissal does not preclude other institutional action




QUESTIONS?







FORMAL GRIEVANCE PROCESS

EMERGENCY REMOVALS

Preamble:


- Not limited to instances of sexual assault.
- Removal cannot be based on generalized, hypothetical or speculative concerns.
- Recipient can determine the scope of removal.
 - Only certain aspects of the institution's programs or activities?
 - To suspend or not?
- No specific timeframes – may (not required to) reassess.

EMERGENCY REMOVALS

§106.44(c): May remove respondent from *education program or activity* if:

- Conduct an individualized safety and risk analysis,
- Determine that respondent poses an immediate [imminent] threat to the *physical* health or safety of *anyone* justifying removal,
- The threat arises from the allegations of sexual harassment, and
- Provide opportunity for respondent to challenge removal immediately thereafter.




EMERGENCY REMOVALS

Other Points to Consider:

- Who will conduct the assessment?
- Who will make the decision?
- Beyond verbalized threats, what information will be considered?
- Where is the line between suspension and accommodating ongoing participation?
- What about removal from other programs and activities?
- What will respondent's ability to challenge it look like?



CROSS-EXAMINATION / ADVISORS

§106.45(b)(6)(j): Cross-examination must:

- Be conducted by each party's advisor – directly, orally and in real time.
 - Allow all relevant questions and follow-up questions, including those challenging credibility.
 - If the party does not have an advisor, recipient must provide one at no cost.

Preamble:

- May not require that questions be in writing.
- May require advance notice of advisor.

CROSS-EXAMINATION / ADVISORS

Other Points to Consider:

- Require parties to provide advance notice of their advisor's attendance?
 - What if they are a no-show?
- Who will serve as advisors provided by the recipient?
 - Attorneys?
 - How will they be trained?
- To what extent should the recipients "prepare" parties for cross-examination?

CROSS-EXAMINATION / ADVISORS

- Advisor provided by institution need not be an attorney.
 - Need not be of "equal competency."
 - Role is to relay the party's questions (per Briefing).
- May remove disruptive advisors ... *carefully*.
- Decision-maker should evaluate cross-examination responses in context, including consideration of stress.
 - "Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence ..."

RELEVANCY DETERMINATIONS

§106.45(b)(6)(i): Decision-maker must determine whether questions are relevant and explain any decision to exclude.

- Questions and evidence about complainant's sexual predisposition or prior sexual behavior, unless to prove that someone other than respondent committed the conduct alleged or, if concerning specific incidents of complainant's conduct with respondent, offered to prove consent, are not relevant.
- Decision-makers [and investigators] must be trained on relevance.

RELEVANCY DETERMINATIONS

Preamble:

- May only exclude questions based on relevance.
 - Not because unduly prejudicial, concerning prior bad acts, or constituting character evidence.
 - May be deemed not relevant when duplicative of other evidence.
 - Exclude medical, etc. records without written consent and statements not subject to cross.
- May have rules or providing training on how to assign weight to a given type of relevant evidence.

RELEVANCY DETERMINATIONS

Other Points to Consider:

- Who will be (and advise) the decision-maker?
- How will the decision-maker be trained to navigate relevancy issues?
- What will it look like in practice?

RELEVANCY DETERMINATIONS

Preamble (con'd):

- Enough to say the question is not probative of any material fact.
- May have rules:
 - Precluding parties from challenging decision during the hearing.
 - Allowing decision-maker to revise explanation post-hearing.

STATEMENTS/ADMISSIONS

§106.45(b)(6)(j): If a party is not subject to cross-examination, then:

- No reliance on their statement in determining responsibility.
- No inference as to responsibility.

Preamble:

- Doesn't matter if it's a statement against interest.
- Doesn't matter if the witness is unavailable due to death or disability.



STATEMENTS/ADMISSIONS

Preamble (con'd):

- May not rely on an account of the statement from a friend.
- May not rely on police or SANE reports to the extent they include statements not subject to cross-examination.

Other Points to Consider:

- How can you work with a witness to get them there?
- How will you train decision-makers to deal with developments concerning statements?
- What if the statement is the alleged harassment?




HEARING DECORUM

Other Points to Consider:

- Require parties and advisors to acknowledge the rules of decorum?
- Who will enforce the rules of decorum?
 - How will you train decision-makers?




HEARING DECORUM

Preamble: May have rules that:


- Require advisors be respectful.
- Prohibit abusive or intimidating questioning.
- Deem repetition of the same question irrelevant.
- Specify any objection process.
- Govern the timing and length of breaks to confer.
 - Prohibit loud or disruptive conferring.
- Allow for the removal of advisors.
- Require that parties make any openings and closings.




PROCESS – STANDARD OF EVIDENCE

- A recipient's grievance process must—
 - State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard;
 - Apply the **same standard of evidence** for formal complaints against students as for formal complaints against employees, including faculty; and
 - Apply the same standard of evidence to all formal complaints of sexual harassment.

§ 106.45(b)(1)(vii)



PROCESS – STANDARD OF EVIDENCE

- **Simpler than the NPRM, but watch out for:**
 - State laws setting standards of evidence
 - CBAs or faculty handbooks that set standards of evidence
 - These may have **dispositive effect** if not renegotiated
 - **Collateral faculty processes (especially re tenure revocation)**
 - Do these resolve conduct falling into the definition of Sexual Harassment?
 - Potential issues re procedures used in those processes and whether the standard of evidence ratchets into Sexual Harassment resolutions
 - "These final regulations only prescribe a recipient's mandatory response to conduct that does meet their definition of sexual harassment[.]"

PROCESS – APPEALS – BIAS

- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias *for or against* complainants or respondents *generally* or the individual complainant or respondent that affected the outcome of the matter:
- What does bias mean here?
 - Recipients that our Title IX staff have careers prior to working at institutions, and often those careers may involve advocacy work.
 - But ED also has essentially told us we're on our own to figure this out:
 - "The Department further notes that the Title IX regulations do not further elaborate on what may constitute a conflict of interest or bias and that the Department has not issued any guidance on how to address such situations. The Department has been able to determine what constitutes a conflict of interest or bias without elaboration in the regulations, implementing the E-911 Act."
- **Some suggestions:**
 - Focus on the "that affected the outcome of the matter" language
 - Simply having authored an op-ed will not be enough in most cases
 - Nevertheless, there is some risk tolerance involved in staff members or third party personnel with outspoken backgrounds

PROCESS – APPEALS

- A recipient **must** offer both parties an appeal from
 - determination regarding responsibility, and
 - final sanctions, if any, or a formal complaint or any allegations thereinon the following bases:
 - *Procedural irregularity that affected the outcome of the matter;*
 - *New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and*
 - *The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias*
 - the individual complainant or respondent that affected the outcome of the matter
- A recipient may offer an appeal **on additional bases** so long as it does so equally to both parties, *e.g.* as to severity of the sanctions.

PROCESS – OTHER

- Institutions are free to adopt additional processes so long as they are offered on an equal basis
 - *E.g.* to help streamline the relevancy determinations during questioning
- Obligation to create and maintain a recording or transcript of the hearing

PROCESS – OTHER

- Outcome notification must be simultaneous, in writing, and must:
 - Identify the allegations potentially constituting sexual harassment;
 - Describe the procedural steps taken from the receipt of the formal complaint through the determination;
 - Contain findings of fact;
 - Describe conclusions regarding the application of the institution's code of conduct to the facts;
 - Make a determination as to responsibility, remedies, and sanctions; and
 - List the available bases for appeal.

THE REGS AND EMPLOYEES



PROCESS – VIRTUAL HEARINGS

- Live hearings may be conducted with all parties physically present in the same geographic location or, **at the recipient's discretion**, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants **simultaneously to see and hear** each other.
 - *Audio only does not pass muster*
 - *In theory, an institution could transition to a virtual-only hearing process (within the bounds of state and circuit-specific federal law)*
 - *What about access issues for students or employees who do not have access to hardware to participate virtually?*

EMPLOYMENT

- Applies to:
 - At will employees
 - Union employees
 - Employees in state employment systems
 - Patient complaints against medical professionals
- HR and labor and employment attorneys should be involved ASAP



EMPLOYMENT

1. Title IX vs. Title VII – knowledge and definition
2. Addressing a “formal complaint” (or lack of “formal complaint”) in the employment context
3. Extraterritoriality
4. Patient complaints against employees
5. The “confidentiality” aspect of retaliation




ISSUE 2: “FORMAL COMPLAINT” (OR NOT)

- No “formal complaint” is required under Title VII. You must address the matter if you “knew or should have known.”
- Ensure your policies and procedures:
 - Allow you to address matters when you learn of them, regardless of whether a “formal complaint” is received
 - If you prefer, to use a different procedure (e.g. no cross-examination, etc.) when no formal complaint is received or a formal complaint is dismissed




ISSUE 1: TITLE IX VS. TITLE VII

- Title VII defines sexual harassment as “severe or pervasive” not “severe and pervasive.”
- Title VII “knew or should have known” versus “actual knowledge”
- Title VII vicarious liability for acts of supervisors, no exception when the supervisor is the one engaging in the harassment




“FORMAL COMPLAINT” (OR NOT)


- Ensure that your training programs are synced to give a consistent message







ISSUE 3 : EXTRATERRITORIALITY

- Title IX – “must dismiss” a formal complaint if conduct is not against a person in the United States
- Title VII – applies to United States citizens working abroad
- Ensure your policies appropriately address employees working outside of the United States (and consider whether you should expand to include students and employees who are not US citizens), but your process does not have to comply with the Title IX regs.



ISSUE 5: RETALIATION & CONFIDENTIALITY

“The recipient must keep confidential the identity of...any individual who has been reported to be the perpetrator of sex discrimination, any respondent...except as may be permitted by...FERPA...or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.” §106.71(a)

ISSUE 4: ACADEMIC MEDICAL CENTERS

- Academic medical centers are not postsecondary institutions, even if affiliated with or considered a part of the same entity as the postsecondary institution (p. 1538)
- Patients may be offered informal resolution (p. 1540)
- Academic medical centers can use the live hearing process, but it is not required, and may use the written questions process established for K-12
- Applies to all complainants, not just patients

RETALIATION AND CONFIDENTIALITY

- Employment references?
- Obligations under NSF, NASA (and Simons Foundation) grant terms and conditions?
- Obligations to report to licensing boards?
- Other obligations that may not be “required by law”?



ADDITIONAL ISSUES

- Cannot use informal resolution for concerns brought by students against employees
- You can place non-student employees on administrative leave
- Some initial indication that a referral to tenure revocation process will be considered a remedy, versus removal of tenure (i.e., you may not have to rewrite your tenure revocation process)

QUESTIONS?

TECHNICAL ASSISTANCE

- Via email: OPEN@ed.gov
- OCR blog: www2.ed.gov/about/offices/list/ocr/blog/index.html

IMPLEMENTATION

COMMUNICATING WITH STAKEHOLDERS

- Current students
- Prospective / incoming students
- Parents
- Board
- Faculty and staff
- Advocacy groups
- Development staff

IMPLEMENTATION

- We are more consumed with *other* issues surrounding core functions, safety, re-opening to students, financial distress (and so on) than we have ever been
- Addressing COVID is a full time job for everyone, but there are only eighty-eight days from today until August 14

IMPLEMENTATION – RECOMMENDATIONS

1. Convene a working group comprised of stakeholders necessary to make changes that are as broad reaching as those required by the regulations. A start at suggested representation on the working group:

- OGC and/or outside counsel
- TIXC and Office of Institutional Equity staff
- Student affairs, student conduct
- Human resources, labor relations
- Provost's office

If you are on a large campus, consider creating sub-working groups for discrete issues like labor, faculty, etc.

IMPLEMENTATION – RECOMMENDATIONS

2. Gather all materials that may need to be revised or considered:
 - CBAs
 - Student and faculty handbooks
 - State laws that bear on investigations, adjudications, including the standard of evidence and limitations/prescriptions regarding the role of advisors and outcome notification
 - If you identify conflicts with state law, bring on government relations, and, depending on your state, consider looping in your state AG's office

IMPLEMENTATION – RECOMMENDATIONS

3. Identify community stakeholders that must, or should, weigh in on the new policy prior to implementation, and develop a communications plan with respect to each. *E.g.:*

- Governing board
- Office of the President
- Faculty senate
- Student government/press
- Campus advocacy groups

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Answers to legal questions often depend on specific facts, and state and local laws, as well as institutional policies and practices. The materials, PowerPoint slides, and comments of the presenters should not be used as legal advice. Legal questions should be directed to institutional legal counsel.

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IMPLEMENTATION – RECOMMENDATIONS

4. As a working group, draft and adopt a timeline:

- To have a final policy on August 14, when must key steps be accomplished to make sure drafting, input, revisions, and a final draft are rolled out?
- Communicate with all of the groups you identified on the prior slide
- Let them know *now* when to expect to be asked for feedback and that you will be on a tight schedule.

Title IX: The Department of Education's Final Rule on Title IX and Sexual Misconduct

NACUA Webinar
May 18, 2020

1. Holly Peterson, Associate Director of Legal Resources, "[Title IX Grid with Preamble Content](#)" (NACUA, May 18, 2020) (attached).
2. U.S. Department of Education, [Title IX Regulations Addressing Sexual Harassment](#) (May 6, 2020) (unofficial copy) (link only).
3. U.S. Department of Education, "[Title IX: U.S. Department of Education Title IX Final Rule Overview](#)" (May 6, 2020) (link only).
4. U.S. Department of Education, "[Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule](#)" (May 6, 2020) (link only).
5. U.S. Department of Education, "[Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule and Comparison to the NPRM](#)" (May 6, 2020) (link only).

National Association of College and University Attorneys
The Title IX Regulations

Unofficial Version Published on the U.S. Department of Education Website on May 6, 2020

[Accessibility](#) [Justification](#) [What Triggers an Institution's Obligations](#) [Demos's Prior to Final Rulemaking Process](#)
[General Requirements for Final Rules Process](#) [Physical Investigation](#) [Live Health Appeals](#)
[Informal Resolution](#) [Resolution](#) [Application to Enforce](#) [Reasonable](#) [Adoption and Discretion with Laws](#)
[Multistep](#) [Training](#) [Preamble](#) [Effective Date](#)

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
Definitions			
Actual Knowledge	"Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient."		§ 106.30
	"This [actual knowledge] standard is not met when the only official of the recipient with actual knowledge is the respondent."		§ 106.30
	"The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient."		§ 106.30

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
	Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment).		§ 106.8
Clear and Convincing Evidence		No Regulatory Definition: The Department declines to provide definitions of the "preponderance of the evidence" standard and the "clear and convincing evidence" standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in other legal contexts and intends the "preponderance of the evidence" standard to have its traditional meaning in the civil litigation context and the "clear and convincing evidence" standard to have its traditional meaning in the subset of civil litigation and administrative proceedings where that standard is used. Preamble Definition: "[H]aving confidence that a conclusion is based on facts that are highly probable to be true." Preamble Definition: A clear and convincing evidences standard of evidence is understood to mean concluding that a fact is highly probable to be true. <i>E.g. Sorkind/Koong v. Polmeier</i> , 378 F.3d 859, 866-67 (9th Cir. 2004) (a clear and convincing evidence standard requires "sufficient evidence to produce in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [sic] highly probable."); (internal quotation marks and citation omitted; brackets in original).	p. 1319
Complainant	"[A]n individual who is alleged to be the victim of conduct that could constitute sexual harassment"		p. 1314 p. 1314, n. 1473 § 106.30

National Association of College and University Attorneys

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
		Complainant Connection to Education Program or Activity: [A] complainant must be participating in, or attempting to participate in, the recipient's education program or activity at the time of filing a formal complaint. Alumni Complainants: A complainant who has graduated may still be "attempting to participate" in the recipient's education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient's alumni programs and activities. Complainants on Leaves of Absence: [A] complainant who is on a leave of absence may be "participating or attempting to participate" in the recipient's education program or activity. Prospective Enrollees: [A] complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is "attempting to participate" in the recipient's education program or activity.	p. 411 See also p. 708 p. 411 See also p. 709 p. 411 See also p. 709 p. 411 See also p. 709
Consent	The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault.	Definition Required: Recipients must clearly define consent and must apply that definition consistently.] Discretion to Craft Definition: The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.	§ 106.30 p. 364 See also p. 365 p. 363 See also pps. 345, 1195

National Association of College and University Attorneys

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
		Absence of or Negation of Consent: [T]he Department leaves flexibility to recipients to define consent as well as terms commonly used to describe the absence or negation of consent (e.g., incapacity, coercion, threat of force). Burden of Proof: [T]o the extent recipients "misuse affirmative consent" (or any definition of consent) by applying an instruction that the respondent must prove the existence of consent, such a practice would not be permitted. Burden of Proof: The final regulations do not permit the recipient to shift that burden to a respondent to prove consent, and do not permit the recipient to shift that burden to a complainant to prove absence of consent. Intersection with Rape Shield Provisions: The second of the two exceptions to the rape shield provisions refers to "if offered to prove consent" and thus the scope of that exception will turn in part on the definition of consent adopted by each recipient.	p. 487 <i>See also</i> p. 54-42 p. 364 p. 365 p. 1195
Days		[B]ecause the Department does not require a specific method for calculating "days," recipients retain the flexibility to adopt the method that works best for the recipient's operations, for example, a recipient could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations.	p. 591 <i>See also</i> pps. 1043, 1105, 1480
Deliberate Indifference	A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.		§ 106.44(a)
Directly Related		The Department declines to define certain terms in this provision such as "... evidence directly related to the allegations", as these terms should be interpreted using their plain and ordinary meaning.	p. 1017

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
Education Program or Activity	"[E]ducation program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.	We note that "directly related" in § 106.45(b)(5)(vi) aligns with requirements in FERPA, 20 U.S.C. 1232g(a)(4)(A)(i).	p. 1017 § 106.44(a)
Final Determination		A "final" determination means the written determination containing the information required in § 106.45(b)(7), as modified by any appeal by the parties.	p. 1340
Formal Complaint	[A] document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.		§ 106.30

Topic	Final Regulation	Selected Preamble Excerpts <i>Note. Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
Informal Resolution		The Department believes an explicit definition of "informal resolution" in the final regulations is unnecessary. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.	p. 1370
Preponderance of the Evidence		No Regulatory Definition: The Department declines to provide definitions of the "preponderance of the evidence" standard and the "clear and convincing evidence" standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in other legal contexts and intends the "preponderance of the evidence" standard to have its traditional meaning in the civil litigation context and the "clear and convincing evidence" standard to have its traditional meaning in the subset of civil litigation and administrative.	p. 1319
		Preamble Definition: [The] conclusion is based on facts that are more likely true than not.	p. 1314
		Preamble Definition: A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true. <i>E.g., Concrete Pipe & Prod. of Cal., Inc. v. Consir, Laborers Pension Tr. for S. Cal.</i> , 508 U.S. 602, 622 (1993) (a preponderance of the evidence standard "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence") (internal quotation marks and citation omitted).	p. 1314, n. 1472
Respondent	[A]n individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.		§ 106.30

Topic	Final Regulation	Selected Preamble Excerpts <i>Note. Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
Remedies	Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.	Student, Employee, and Faculty Respondents: [A]ny "individual" can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient.	p. 416
Sex (i.e. "Because of Sex")		No Regulatory Definition: The Department did not propose a definition of "sex" in the NPRM and declines to do so in these final regulations. Anyone May Experience Discrimination: Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation. Sex Stereotyping: Nothing in these final regulations, or the way that sexual harassment is defined in § 106.30, precludes a theory of sex stereotyping from underlying unwelcome conduct on the basis of sex.	p. 533 See also pps. 556, 557, 560 p. 556 See also pps. 554, 558, 561 p. 557

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
Sexual Harassment	<p>Conduct on the basis of sex that satisfies one or more of the following:</p> <p>(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or 2015 (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).</p>		§ 106.30
Supportive Measures	<p>[Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.</p>		§ 106.30

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
	<p>[Supportive] measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.</p>		§ 106.33
	<p>Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.</p>		§ 106.33

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
Jurisdiction			
Jurisdiction	A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. See regulatory definition <i>supra</i> p. 1.		§ 106.44 (c)
Actual Knowledge		Fact-Specific Inquiry: [D]etermining which employees may be officials with authority is fact-specific. Designate Officials with Authority to Implement Corrective Measures: A recipient also may empower as many officials as it wishes with the requisite authority to institute corrective measures on the recipient's behalf and notice to these officials with authority constitutes the recipient's actual knowledge and triggers the recipient's response obligations. Recipients may also publicize/assess of officials with authority. Designating Mandatory Reporters: [N]othing in the proposed or final regulations prevents recipients (including postsecondary institutions) from instituting their own policies to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment.	p. 311 p. 300 See also p. 320 p. 300 See also pps. 316, 320, 604

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
		Mandatory Reporter ≠ Employee with Authority to Implement Corrective Measures: [T]he mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. No Formal Complaint Required: [A] recipient may have actual knowledge of sexual harassment even where no person has reported or filed a formal complaint about the sexual harassment.	p. 321 p. 673
Sexual Harassment	See regulatory definition <i>supra</i> p. 8.	<i>Quid Pro Quo and Per Se Harassment:</i> [T]he other categories (<i>quid pro quo</i> ; sexual assault and three other Clery Act/VAWA offenses) . . . do not require elements of severity, pervasiveness, or objective offensiveness. Verbal Harassment: The three-pronged definition of sexual harassment in § 106.30 captures physical and verbal conduct serious enough to warrant the label "abused." Evaluating Severity, Pervasiveness, and Objective Offensiveness: Elements of severity, pervasiveness, and objective offensiveness must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a reasonable person standing in the shoes of the complainant. No Showing of Intent Required: The Davis standard does not require an "intent" element; unwelcome conduct so severe, pervasive, and objectively offensive that it denies a person equal educational opportunity is actionable sexual harassment regardless of the respondent's intent to cause harm. Sexual Exploitation: [S]exual exploitation constitutes sexual harassment as defined in § 106.30.	p. 425 See also pps. 432, 461, 469 p. 476 p. 477 pps. 515-16 p. 559

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
Education Program or Activity	See regulatory definition <i>supra</i> p. 5.		p. 630 <i>See also</i> p. 636
		<p>OJT Campus ≠ Outside Institution's Education Program or Activity. "[OJT campus" does not automatically mean that the incident occurred outside the recipient's education program or activity.</p> <p>Key Questions: Whether sexual harassment occurs in a recipient's education program or activity is a fact-specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred. There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection under the final regulations.</p> <p>Factors to Consider: whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred</p> <p>Factors to Consider: [N]o single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred.</p>	p. 654 <i>See also</i> pps. 624, 625-26
			p. 625
			p. 624 <i>See also</i> p. 644
		Recognized, OJT-Campus Student Organizations: [W]here a postsecondary institution has officially recognized a student organization, the recipient's Title IX obligations apply to sexual harassment that occurs in buildings owned or controlled by such a student organization, irrespective of whether the building is on campus or off campus; and irrespective of whether the recipient exercised substantial control over the respondent and the context of the harassment outside the fact of officially recognizing the fraternity or sorority that owns or controls the building.	p. 625-26

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
		Recognized, OJT-Campus Student Organizations: Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off-campus location not owned or controlled by the student organization yet involving members of the officially recognized student organization, the recipient's Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances.	p. 627
		Cyber Harassment: "[P]rogram or activity" encompasses "all of the operations of" such recipients, and such "operations" may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in, the operations of, the recipient.	p. 644
		OJT-Campus Conduct that has Effects in Education Program or Activity: [A] recipient may be deliberately indifferent to sexual harassment that occurred outside the recipient's control where the complainant has to interact with the respondent in the recipient's education program or activity, or where the effects of the underlying sexual assault create a hostile environment in the complainant's workplace or educational environment.	p. 636 <i>See also</i> p. 632
		Discretion to Levy Separate Conduct Charges for Misconduct Outside Education Program or Activity: [N]othing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity.	p. 631 <i>See also</i> p. 634
		Complainant Connection to Education Program or Activity: [A] complainant must be participating in, or attempting to participate in, the recipient's education program or activity at the time of filing a formal complaint.	p. 411 <i>See also</i> p. 708

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
Against a Person in the United States		No Extrajurisdictional Application. Study Abroad: We acknowledge the concerns raised by many commenters that the final regulations would not extend Title IX protections to incidents of sexual misconduct occurring against persons outside the United States, and the impact that this jurisdictional limitation might have on the safety of students participating in study abroad programs. However, by its plain text, the Title IX statute does not have extrajurisdictional application. Study Abroad: We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States.	p. 638 Pps. 656-67
Deliberate Indifference	See regulatory definition <i>supra</i> p. 4.	[Even in the absence of a Formal Complaint signed by the complainant], some circumstances may require a recipient (via the Title IX Coordinator) to initiate an investigation and adjudication of sexual harassment allegations in order to protect the recipient's educational community or otherwise avoid being deliberately indifferent to known sexual harassment	p. 389
What triggers an institution's obligations?			
General Obligations: Actual Knowledge	A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that		§ 106.44(a)

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
	is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.		
Obigation to Initiate a Formal Grievance Process: Formal Complaint	In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45.		§ 106.44 (b)(1)
	At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.		§ 106.30
		Institutional Form Prohibited: [E]ven if a recipient desires for complainants to only use a specific form for filing formal complaints, these final regulations permit a complainant to file a formal complaint by either using the recipient-provided form (or electronic submission system such as through an online portal provided for that purpose by the recipient), or by physically or digitally signing a document and filing it as authorized (i.e. in person, by mail, or by e-mail) under these final regulations.	p. 1638
		Detailed Facts Not Required: The § 106.30 definition of "formal complaint" requires a document "alleging sexual harassment against a respondent," but contains no requirement as to a detailed statement of facts.	p. 384

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
		No Statute of Limitations: [T]here is no time limit on a complainant's decision to file a formal complaint.	p. 345 See also p. 372, 689, 708
		Consolidation of Formal Complaints: [R]ecipients have discretion to consolidate formal complaints in situations that arise out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other.	pps. 968-69
		Consolidation of Formal Complaints: If there are multiple complainants and one respondent, then the recipient may consolidate the formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances, under § 106.45b(4). The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties.	p. 1498
		Filing by Title IX Coordinator: When a Title IX Coordinator believes that, with or without the complainant's desire to participate in a grievance process, a non-deliberately indifferent response to the allegations requires an investigation, the Title IX Coordinator should have the discretion to initiate a grievance process.	p. 386 See also pps. 389, 707
		Filing by Title IX Coordinator: The Title IX Coordinator may consider a variety of factors, including a pattern of alleged misconduct by a particular respondent, in deciding whether to sign a formal complaint.	p. 701
		Filing by Title IX Coordinator: [T]he Title IX Coordinator may take circumstances into account such as whether a complainant's allegations involved violence, use of weapons, or similar factors.	p. 702

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
		Filing by Title IX Coordinator (Limitations): [T]he decision of the Title IX Coordinator to file a Formal Complaint should be reached thoughtfully and intentionally by the Title IX Coordinator, not as an automatic result that occurs any time a recipient has notice that a complaint was allegedly victimized by sexual harassment.	p. 387
		Filing by Title IX Coordinator (Limitations): The Title IX Coordinator's decision to sign a formal complaint may occur only after the Title IX Coordinator has promptly contacted the complainant (i.e., the person alleged to have been victimized by sexual harassment) to discuss availability of supportive measures, consider the complainant's wishes with respect to process for filing a formal complaint. Thus, the Title IX Coordinator's decision to sign a formal complaint includes taking into account the complainant's wishes regarding how the recipient should respond to the complainant's allegations.	p. 701
		Third Parties Cannot File Formal Complaints: Other than a Title IX Coordinator, third parties cannot file formal complaints.	p. 354
		Anonymous Complaints: Where a complainant desires to initiate a grievance process, the complainant cannot remain anonymous or prevent the complainant's identity from being disclosed to the respondent (via the written notice of allegations).	p. 394
		Anonymous Complaints: When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations, § 106.45(f)(2) requires the recipient to send both parties details about the allegations, including the identity of the parties if known. . . . [T]he grievance process may proceed if the Title IX Coordinator	Pps. 395-96

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		determines it is necessary to sign a formal complaint, even though the written notice of allegations does not include the complainant's identity.	
		Unwilling Complainant: If the Title IX Coordinator signs a formal complaint against the wishes of the complainant, then the recipient likely will have difficulty obtaining evidence from the complainant that is directly related to the allegations in a formal complaint.	p. 1477
		Unknown Respondent: A recipient must investigate a complainant's formal complaint even if the complainant does not know the respondent's identity, at which time the recipient would be obligated to send both parties written notice.	p. 413
Obligation to Provide Supportive Measures: Actual Knowledge, With or Without Formal Complaint	The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. With or without a formal complaint, a recipient must comply with § 106.44.		§ 106.44(a)
		Examples of Supportive Measures: Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of	§ 106.44(b)(1) p. 1370

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		absence, increased security and monitoring of certain areas of the campus, and other similar measures.	
		Oral or Written Notice: No written document is required to put a school on notice (i.e., convey actual knowledge) of sexual harassment triggering the recipient's response obligations under § 106.44(a).	p. 384
		Third Party Reports: (A) Any person (including third parties) can report[.]	p. 351 See also pps. 605, 614
		Anonymous Reports: [] The final regulations do not prohibit recipients from implementing anonymous (sometimes called "blind") reporting.	p. 391
		Fact-Specific Analysis: [] The determination of appropriate supportive measures in a given situation must be based on the facts and circumstances of that situation.	p. 569
		Interactive Process: A recipient should engage in a meaningful dialogue with the complainant to determine which supportive measures may restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.	p. 669 See also p. 880, 921, 1022
		Confidentiality: If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).	p. 393 See also p. 614, 921, 1469

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		Burden on Parties: The plain language of the § 106.30 definition does not state that a supportive measure provided to one party cannot impose any burden on the other party; rather, this provision specifies that the supportive measures cannot impose an <i>unreasonable</i> burden on the other party.	p. 565
		Burden on Parties: [T]he [supportive] measure cannot punish, discipline, or unreasonably burden the respondent.	p. 566
		Burden on Parties (Examples): Removal from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is "unreasonable" does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30 definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth.	p. 570
		Burden on Parties (Examples): [W]here both parties are athletes and sometimes practice on the same field, consideration must be given to the scope of a no-contact order that deters sexual harassment, without unreasonably burdening the other party, with the goal of restricting contact between the parties without requiring either party to forgo educational activities. It may be unreasonably burdensome to prevent respondents from attending extra-curricular activities that a recipient offers as a result of a one-way no contact order prior to being determined responsible; similarly, it may be unreasonably burdensome to	p. 578 <i>See also p. 750</i>

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		restrict a complainant from accessing campus locations in order to prevent contact with the respondent.	
		Burden on Parties (Examples): A school may conclude that transferring the respondent to a different section of that class (e.g., that meets on a different day or different time than the class section in which the complainant and respondent are enrolled) is a reasonably available supportive measure that preserves the complainant's equal access and protects the complainant's safety or deters sexual harassment, while not constituting an unreasonable burden on the respondent (because the respondent is still able to take that same class and earn the same credit toward graduation, for instance). If, on the other hand, that class in which both parties are enrolled does not have alternative sections that meet at different times, and precluding the respondent from completing that class would delay the respondent's progression toward graduation, then the school may determine that requiring the respondent to drop that class would constitute an unreasonably burden on the respondent and would not qualify as a supportive measure, although granting the complainant an approved withdrawal from the class with permission to take the class in the future, would of course constitute a permissible supportive measure for the recipient to offer the complainant.	p. 754 <i>See also p. 881</i>
		Supportive Measures Cannot Amount to Sanctions: If a recipient has listed ineligibility to play on a sports team or hold a student government position, for example, as a possible disciplinary sanction that may be imposed following a determination of responsibility, then the recipient may not take that action against a respondent without first following the § 106.45 grievance process.	p. 570-71

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		<p><i>Note. Preamble does not have legal or regulatory force</i></p> <p>One Way No Contact Order May Be Appropriate in Limited Circumstances: §106.30 does not mean that one-way no-contact orders are never appropriate. A fact-specific inquiry is required into whether a carefully crafted no-contact order respecting the actions of only one party would meet the § 106.30 definition of supportive measures. For example, if a recipient issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or if a one-way no-contact order does not unreasonably burden the other party, then a one-way no contact order may be appropriate. . . . [E]mergency removal . . . could include a no-response or other no-contact order issued against a respondent.</p> <p>Title IX Coordinator Implements Supportive Measures: [T]he Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient's own system does not fall on the student receiving the supportive measures.</p> <p>Documentation Required for not Providing Supportive Measures: [I]f a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances under §106.45(b)(1)(i).</p> <p>Compliance Standard: A recipient will have sufficiently fulfilled its obligation to offer supportive measures as long as the offer is not clearly unreasonable in light of the known circumstances.</p>	p. 577
			p. 575 See also p. 880
			p. 567 See also pps. 598-599, 706
			p. 670

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Dismissal of Formal Complaint Prior to Full Resolution			
Grounds for Dismissal (Mandatory)	If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient 2022 must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.		§ 106.45(b)(3)(v)
Grounds for Dismissal (Discretionary)	The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to		§ 106.45(b)(3)(ii)

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	the formal complaint or allegations therein.		p. 688
		Meritless or Frivolous Allegations: Permitting a recipient to deem allegations meritless or frivolous without following the § 106.45 grievance process would defeat the Department's purpose.	p. 965-66
		Discretionary Dismissals: By granting recipients the discretion to dismiss in situations where the respondent is no longer a student or employee of the recipient, the Department believes this provision appropriately permits a recipient to make a dismissal decision based on reasons that may include whether a respondent poses an ongoing risk to the recipient's community, whether a determination regarding responsibility provides a benefit to the complainant even where the recipient lacks control over the respondent and would be unable to issue disciplinary sanctions, or other reasons. The final category of discretionary dismissals addresses situations where specific circumstances prevent a recipient from meeting the recipient's burden to collect evidence sufficient to reach a determination regarding responsibility; for example, where a complainant refuses to participate in the grievance process (but also has not decided to send written notice stating that the complainant wishes to withdraw the formal complaint), or where the respondent is not under the authority of the recipient (for instance because the respondent is a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complainant), and the recipient has no way to gather evidence sufficient to make a determination. This provision permits dismissal.	

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Written Notice Required for Dismissals	Upon a dismissal required or permitted pursuant to paragraph (b)(3)(f) or (b)(3)(g) of this section, the recipient must promptly send written notice of the dismissal and reason(s) herefor simultaneously to the parties.		§ 106.45(b)(3)(ii)
Discretion to Proceed with Conduct Action Pursuant to Institution's Community Standards	[A] dismissal [under this section] does not preclude action under another provision of the recipient's code of conduct.		§ 106.45(b)(3)(i)
		Discretion to Maintain and Enforce: Community Standards: [T]he three-pronged definition of sexual harassment in § 106.30 provides clear requirements for recipients to respond to sexual harassment that constitutes sex discrimination prohibited under Title IX, while leaving recipients flexibility to address other forms of misconduct to the degree, and in the manner, best suited to each recipient's unique educational environment.	p. 432 See also pps. 441, 457, 472, 481, 492, 496, 545
		Flexibility in Structuring Non-Title IX Proceedings: [I]f a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only	p. 482 See also p. 645, 687, 962, 963

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		where allegations concern sexual harassment covered by Title IX. Behavioral Expectations for Students and Faculty: [A] recipient's own code of conduct that might impose behavioral expectations on students and faculty, distinct from Title IX's non-discrimination mandate. Outside Program or Activity: [N]othing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity. Outside of U.S.: [N]othing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States.	p. 457 p. 631 See also p. 633, 635-36, 653 p. 660
General Requirements of Formal Grievance Process			
Equitable Treatment	A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a grievance process used by following § 106.45 before the imposition of any disciplinary sanctions or other actions that are supportive measures as defined in § 106.30, against a respondent. Treat complainants and respondents equitably by providing remedies to a complainant where a determination of		§ 106-44(a) § 106-45 (b)(1)(i)

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	responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.		
		Equal vs. Equitable: [W]ith respect to remedies and disciplinary sanctions, strictly equal treatment of the parties does not make sense, and to treat the parties equitably, a complainant must be provided with remedies where the outcome shows the complainant to have been victimized by sexual harassment; similarly, a respondent must be sanctioned only after a fair process has determined whether or not the respondent has perpetrated sexual harassment.	p. 793
Objective Evaluation of Relevant Evidence	[O]bjective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence.		§ 106-45 (b)(1)(ii)
		Different Evidence for Different Circumstances: [T]he type and extent of evidence available will differ based on the facts of each incident. Evaluating Evidence: "The Department is confident that recipients' desire to provide students with a safe, nondiscriminatory learning environment will lead recipients to evaluate sexual harassment incidents using common sense and taking circumstances into consideration, including the ages, disability status, positions of authority of involved parties, and other factors."	p. 808 p. 457

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No Conflicts of Interest or Bias	[A]ny individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, [must] not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.	<i>Note: Preamble does not have legal or regulatory force</i> Privileged Information Excluded: [The regulations] preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).	p. 811 § 106.45 (b)(1) (iii)
		Evaluating Bias: Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists.	pps. 827-28
		Initiation of Formal Complaint ≠ Bias: [When a Title IX Coordinator signs a formal complaint, that action does not place the Title IX Coordinator in a position adverse to the respondent; the Title IX Coordinator is initiating an investigation based on allegations of which the Title IX Coordinator has been made aware, but that does not prevent the Title IX Coordinator from being free from bias or conflict of interest with respect to any party.	p. 356 <i>See also</i> pps. 399, 400, 697, 1265
		Pursuing Investigation ≠ Bias: Deciding that allegations warrant an investigation does not necessarily show bias or	p. 399

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		prejudgment of the facts for or against the complainant or respondent.	p. 826
		No <i>per se</i> Conflicts Based on Job Title: [T]he Department declines to define certain employment relationships or administrative hierarchy arrangements as <i>per se</i> prohibited conflicts of interest under § 106.45(b)(1)(iii).	p. 827-28
		Curing Perceived Bias Through Training: The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially. Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents). bearing in mind that the very training required by § 106.45(b)(1)(ii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the	

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		person from obtaining the requisite training to serve impartially in a Title IX role.	
		Statutes Not Determinative of Bias: [T]he mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel	p. 829
		Trauma-Informed Approach: [T]rauma-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases.	p. 1088
		Trauma-Informed Approach: [E]xperts believe that application of [trauma-informed] practices is possible – albeit challenging – to apply in a truly impartial, nonbiased manner.	p. 842
		Trauma-Informed Approach: Being sensitive to the trauma a complainant may have experienced does not violate § 106.45(b)(1)(i) or any other provision of the grievance process, so long as what the commenter means by “being sensitive” does not lead a Title IX Coordinator, investigator, or decision-maker to lose impartiality, prejudice the facts at issue, or demonstrate bias for or against any party.	p. 842
Adequate and Unbiased Training	A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on the definition of sexual harassment in § 106.10, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process		§106.45(b)(1)(3)

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	including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.		
	A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.		§106.45(b)(1)(3)
	A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.		§106.45(b)(1)(3)
Presumption of Not Responsible	Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process		§106.45 (b)(1)(iv)

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Prompt Timeframe	Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes.		§ 106.45 (b)(1)(v)
		Institutional Discretion to Set Time Frames: [T]he recipient may select time frames under which the recipient is confident it can conclude the grievance process in most situations, knowing that case-specific complexities may be accounted for with factually justified short-term delays and extensions.	p. 890
		<i>Per se Unreasonable Timeframe:</i> Taking 45 days to respond to a request for access to records does not provide a reasonably prompt time frame for the conclusion of a grievance process.	p. 1471
Prompt Timeframe (Reasons for Delay)	[The process must] allow[] for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.		§ 106.45 (b)(1)(v)

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		No Specified Number or Days for Delay: [T]he Department declines to specify a particular number of days that constitute "temporary" delays or "limited" extensions of time frames.	p. 900
		Example of Good Cause: [T]he reasons for a party or witness's absence is a factor in a recipient deciding whether circumstances constitute "good cause" for a short-term delay or extension.	p. 902
		Example of Good Cause: [C]oncurrent law enforcement activity may constitute good cause for short-term delays.	p. 896
		Example of Good Cause: [T]he need for parties, witnesses, and other hearing participants to secure transportation, or for the recipient to troubleshoot technology to facilitate a virtual hearing, may constitute good cause to postpone a hearing.	<i>See also</i> p. 1484 PPS. 1227-28
		Not Good Cause: Delays caused solely by administrative needs, for example, would be insufficient to satisfy this standard.	p. 900
		Accommodating Schedules: While recipients must attempt to accommodate the schedules of parties and witnesses throughout the grievance process in order to provide parties with a meaningful opportunity to exercise the rights granted to parties under these final regulations, it is the recipient's obligation to meet its own designated time frames, and the final regulations provide that a grievance process can proceed to conclusion even in the absence of a party or witness.	p. 891
Describe Range of Sanctions and Remedies	Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility.		§ 106.45(b)(1)(vi)
Describe Standard of Evidence	State whether the standard of evidence to be used in determining responsibility is		§ 106.45(b)(1)(vii)

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	the preponderance of the evidence standard or the clear and convincing evidence standard		
	apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.		§ 106-45(b)(1)(vii)
Describe Mandatory Appeals Process and Bases for Appeals	Include the procedures and permissible bases for the complainant and respondent to appeal.		§ 106-45(b)(1)(viii)
Describe Range of Supportive Measures	Describe the range of supportive measures available to complainants and respondents	Range, not List: [] The Department is only requiring a recipient's grievance process to describe the range of supportive measures available rather than a list of supportive measures available.	§ 106-45(b)(1)(ix) p. 917
No Intrusion on Legally-Cognizable Privileges	The process must [] not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.		§ 106-45(b)(1)(x)

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Pre-Hearing Investigation			
Emergency Removal	Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.		§ 106-44 (c)
		Purpose: [E]mergency removal is for the purpose of addressing imminent threats posed to any person's physical health or safety, which might arise out of the sexual harassment allegations. When Appropriate: [E]mergency removal is not appropriate in every situation where sexual harassment has been alleged, but only in situations where an individualized safety and risk	p. 727 p. 728 See also pps. 734, 755, 759

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		analysis determines that an immediate threat to the physical health or safety of any student or other individual justifies the removal, where the threat arises out of allegations of sexual harassment as defined in § 106.30.	
		When Appropriate: [] the recipient should not remove a respondent from the recipient's education program or activity pursuant to § 106.44(c) unless there is more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety.	p. 758
		Examples: For example, if a respondent threatens physical violence against the complainant in response to the complainant's allegations that the respondent verbally sexually harassed the complainant, the immediate threat to the complainant's physical safety posed by the respondent may "arise from" the sexual harassment allegations. As a further example, if a respondent reacts to being accused of sexual harassment by threatening physical self-harm, an immediate threat to the respondent's physical safety may "arise from" the allegations of sexual harassment and could justify an emergency removal.	pps. 728-29 See also p. 954
		Limitations: An emergency removal under § 106.44(c) does not authorize a recipient to impose an interim suspension or expulsion on a respondent because the respondent has been accused of sexual harassment. Rather, this provision authorizes a recipient to remove a respondent from the recipient's education program activity when an individualized safety and risk analysis determines that an imminent threat to the physical health or safety of any person, arising from sexual harassment allegations, justifies removal.	p. 730
		No Specific Procedures Required: We do not believe that prescribing procedures for the post-removal challenge is	p. 744

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		necessary or desirable, because this provision ensures that respondents receive the essential due process requirements of notice and opportunity to be heard while leaving recipients flexibility to use procedures that a recipient deems most appropriate.	p. 747
		Length: The Department declines to put any temporal limitation on the length of a valid emergency removal.[] Deference: OCR will not second guess a recipient's removal decision based on whether OCR would have weighed the evidence of risk differently from how the recipient weighed such evidence.	p. 766
Administrative Leave	Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.		§ 106.44 (d)
		With or Without Pay: [] these final regulations do not dictate whether administrative leave during the pendency of an investigation under § 106.45 must be with pay (or benefits) or without pay (or benefits).	p. 768
		Student Employees: With respect to student-employee respondents, we explain more fully, below, that these final regulations do not necessarily prohibit a recipient from placing a student-employee respondent on administrative leave if doing so does not violate other regulatory provisions.	p. 771 See also p. 773.

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		<i>Note.</i> Student Employees: Administrative leave may jeopardize a student-employee's access to educational benefits and opportunities in a way that a non-student employee's access to education is not jeopardized. Accordingly, administrative leave is not always appropriate for student-employees. Student Employees: If a recipient removes a respondent pursuant to § 106.44(c) after conducting an individualized safety and risk analysis and determining that an immediate threat to the physical health or safety of any students or other individuals justifies removal, then a recipient also may remove a student-employee respondent from any employment opportunity that is part of the recipient's education program or activity.	p. 773 p. 774
Notice Requirement	Written notice required		§106.45(b)(2)
Contents of Notice	Notice of the recipient's grievance process that complies with this section, including any informal resolution process		§106.45(b)(2)(A)
	Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.		§106.45(b)(2)(B)

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		<i>Note.</i> The Department notices that the final regulations do not prevent a recipient from questioning an employee-respondent about sexual harassment allegations without disclosing the complainant's identity, provided that the recipient does not take disciplinary action against the respondent without first applying the § 106.45 grievance process (or unless emergency removal is warranted under § 106.44(c), or administrative leave is permitted under § 106.44(d)).	pps. 956-57
	{S}tatement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process		§ 106.45(b)(2)(B)
	The written notice must inform the parties that they may have an advisor of their choice, who may be an attorney		§ 106.45(b)(2)(B)
	The written notice must inform the parties that they may inspect and review evidence		§ 106.45(b)(2)(B)
	The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.		§ 106.45(b)(2)(B)

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	Provide to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.		§ 106.45(b)(5)(v)
Duty to Supplement Notice	If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.		§ 106.45(b)(2)(ii)
Consolidation of Formal Complaints	A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.		§ 106.45(b)(4)

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		Consolidation of Formal Complaints: [R]ecipients have discretion to consolidate formal complaints in situations that arise out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other.	Pps. 968-69
		Consolidation of Formal Complaints: If there are multiple complainants and one respondent, then the recipient may consolidate the formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances, under § 106.45(b)(4). The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties.	p. 1498
Gathering Evidence (Burden Rests with Recipient)	Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.		§ 106.45(b)(5)(i)
		Trauma-Informed Investigations: [N]othing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.	p. 591
		Trauma-Informed Investigations: Because cross-examination occurs only after the recipient has conducted a thorough investigation, trauma-informed questioning can occur by a recipient's investigator giving the parties opportunity to make statements under trauma-informed approaches prior to being cross-examined by the opposing party's advisor.	p. 1087

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Gathering Evidence (Restrictions re: Medical Records)	The recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent.		§ 106.45(b)(5)(i)
Gathering Evidence (Equal Opportunity)	Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.	Recipient Can Also Present Evidence: [The Department recognizes that the recipient is not a party to the proceeding, but this does not prevent the recipient from presenting evidence to the decision-maker, who must then objectively evaluate relevant evidence (both inculpatory and exculpatory) and reach a determination regarding responsibility.] Gathering Evidence (Limitations): [Parties to a Title IX grievance process are not granted the right to depose parties or witnesses, nor to invoke a court system's subpoena powers to compel parties or witnesses to appear at hearings, which are common features of procedural rules governing litigation and criminal proceedings.]	§ 106.45(b)(5)(ii) p. 971
Gathering Evidence (No Gag Orders)	Recipient must (i) Not restrict the ability of either party to discuss the		pps. 1026-27 § 106.45(b)(5)(iii)

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	allegations under investigation or to gather and present relevant evidence.		p. 986
		Prior Restraints: [A] recipient should not, under the guise of confidentiality concerns, impose prior restraints on students and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization. Witness Tampering: As to witness intimidation, such conduct is prohibited under § 106.71(a). As to whether a party approaching or speaking to a witness could constitute "tampering," the Department believes that generally, a party's communication with a witness or potential witness must be considered part of a party's right to meaningfully participate in furthering the party's interests in the case, and not an "interference" with the investigation. However, where a party's conduct toward a witness might constitute "tampering" (for instance, by attempting to alter or prevent a witness's testimony), such conduct also is prohibited under § 106.71(a). Interruption with Retaliation: [T]his provision in no way immunizes a party from abusing the right to "discuss the allegations under investigation" by, for example, discussing those allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation.	p. 989-90
			p. 987 <i>See also p. 991</i>
Right to an Advisor of Choice	Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their		§ 106.45 (b)(3) (v)

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	choice who may be, but is not required to be, an attorney.	"Representation" of Parties: A recipient may, but is not required to, allow advisors to "represent" parties during the entire live hearing. Advisors of Choice ≠ Right to Effective Representation: [P]roviding parties the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation. Correspondence with Advisors: The Department appreciates commenters' request that advisors be copied on all correspondence between recipients and the parties, but declines to impose such a rule.	p. 1155 p. 992 See also p. 1147, 1483-84 p. 1005
	The recipient may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding. The recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.		§ 106.45 (b)(3) (iv) § 106.45 (b)(3) (iv)
	Rules of Decorum: [T]he final regulations do not preclude a recipient from adopting and applying codes of conduct and rules of decorum to ensure that parties and advisors, including assigned advisors, conduct cross-examination questioning in a respectful and non-abusive manner, and the decision-maker remains obligated to ensure that only relevant questions are posed during cross-examination. Rules of Decorum: To meet this obligation a recipient also cannot forbid a party from conferring with the party's advisor.		pps. 1149-50 See also pps. 1114, 1114-15, 1145, 1150 p. 1145

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		although a recipient has discretion to adopt rules governing the conduct of hearings that could, for example, include rules about the timing and length of breaks requested by parties or advisors and rules forbidding participants from disturbing the hearing by loudly conferring with each other. Misbehaving Advisors: [T]he final regulations do not preclude a recipient from enforcing rules of decorum that ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing. If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor.	p. 1075
		Misbehaving Advisors: If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may provide that party with an advisor to conduct cross-examination on behalf of that party. If a provided advisor refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.	p. 1155
		Examples of Restrictions on Advisor Participation: Section 106.45(b)(5)(iv) (allowing recipients to place restrictions on active participation by party advisors) and the revised introductory sentence to § 106.45(b) (requiring any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties) would, for example, permit a recipient to require parties personally to answer questions posed by an investigator during an interview, or personally to make any opening or closing statements the	p. 997

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		Not Relevant: information protected by a legally recognized privilege, evidence about a complainant's prior sexual history, any party's medical, psychological, and similar records unless the party has given voluntary, written consent, and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross examination at a live hearing.	p. 980
		NDA's Permitted: [R]ecipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate any of the evidence subject to inspection and review.	p. 1019 See also pps. 1449, 1483, 1496
	Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.		§106.45 (b)(3)(v1)
		Hard or Electronic Copy Required: We believe it is important for the parties to receive a copy of the evidence subject to inspection and review.	p. 1025
		Corrections: [I]f the parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.	p. 1023 See also p. 1015
		Corrections: [I]f relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker	p. 1003

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		The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.	§106.45 (b)(3)(vi)
The Investigative Report	Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.		§106.45 (b)(3)(vii)
		Relevant Evidence Only: [A]ll evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be "relevant."	p. 1017 See also p. 815
		Redactions: [A] recipient may permit or require the investigator to redact from the investigative report information that is not relevant.	p. 1020
		May Include Facts and Interview Statements: A recipient may include facts and interview statements in the investigative report.	p. 1498
		May Include Recommended Findings or Conclusions: The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an	p. 1031

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		independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report. May Include Credibility Assessment but not Determination: If a recipient chooses to include a credibility analysis in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator. Section 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility. If an investigator's determination regarding credibility is actually a determination regarding responsibility, then § 106.45(b)(7)(i) would prohibit it.	p. 1498
		Consolidated Complaints: In the context of a grievance process that involves multiple complainants, multiple respondents, or both, a recipient may issue a single investigative report. Corrections: The parties then have equal opportunity to review the investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vi) and the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).	p. 1038 p. 815 See also p. 1041
Live Hearing Required	For postsecondary institutions only, the recipient's grievance process must provide for a live hearing.	The Live Hearing	§ 106.45 (b)(6)(i)

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		Single Investigator Model: Prohibited: [T]he final regulations "foreclose(s) recipients from utilizing a "single investigator" or "investigator-only" model for Title IX grievance processes. Hearing Boards Not Required: [T]he final regulations do not require hearing boards (as opposed to a single individual acting as the decision-maker). Students in Title IX Roles: [T]he final regulations do not preclude a recipient from allowing student leaders to serve in Title IX roles.	p. 1247 p. 813 p. 829
Live Hearing (may be Virtual)	Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.		§ 106.45(b)(6)(i)
Live Hearing (Recording or Transcript Required)	Recipients must create an audio or audiovisual recording, or transcript of any live hearing and make it available to the parties for inspection and review.		§ 106.45(b)(6)(i)
Questioning of Parties and Witnesses by Advisor	At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.		§ 106.45 (b)(6) (i)
		Direct Examination: Whether advisors also may conduct direct examination is left to a recipient's discretion.	p. 1154

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		"Representation" of Parties: A recipient may, but is not required to, allow advisors to "represent" parties during the entire live hearing. Rules of Decorum: A recipient may adopt rules of order or repetition to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant. Rules of Procedure: [A] recipient may, for instance, adopt rules that ... decide whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, place reasonable time limitations on a hearing, and so forth. "Rules of Evidence": [A] recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. "Rules of Evidence": The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence not relevant. "Rules of Evidence": [W]here a cross-examination question or prior bad acts under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decisionmaker's evaluation treats both parties equally.	p. 1155 p. 812 p. 1226 p. 812
		"Rules of Evidence": [A] recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. "Rules of Evidence": The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence not relevant. "Rules of Evidence": [W]here a cross-examination question or prior bad acts under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decisionmaker's evaluation treats both parties equally.	p. 1136 <i>See also pps 1114, 1227</i> p. 1137
		"Rules of Evidence": The final regulations do not preclude a recipient from adopting a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.	p. 1159

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		"Rules of Evidence": [I]f the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing. "Rules of Evidence": [A] decision-maker [is not required] to give a lengthy or complicated explanation [of a relevancy determination]; it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations. Revising Relevancy Determination: [N]othing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker's explanation that was provided during the hearing.	p. 1159 p. 1161 p. 1160
Cross-Examination (Direct, in Real Time)	Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.	No Subpoena Power: [R]ecipients have no ability to compel a party or witnesses to participate.	p. 1083 <i>See also pps 1176, 1178, 1330</i> § 106.45 (b)(6) (i)

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		Rules of Decorum: [R]espondents retain discretion under the final regulations to educate a recipient's community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices that apply equally to both parties to oversee cross-examination to ensure that questioning is relevant, respectful, and non-abusive. Rules of Decorum: The Department reiterates that recipients retain the discretion to control the live hearing environment to ensure that no party is "yelled" at or asked questions in an abusive or intimidating manner. Abusive Questioning (Caution): The Department appreciates commenters who described experiences being questioned by party advisors as feeling like the advisor asked questions in a disempowering, blaming, and condescending way; however, the Department notes that such questioning may feel that way to the person being questioned by virtue of the fact that cross-examination is intended to promote the perspective of the opposing party, and this does not necessarily mean that the questioning was irrelevant or abusive. Rules of Procedure (No Waiver of Questions): [T]he Department declines to allow a party or witness to "waive" a question. Faulty Memory ≠ Lying: [C]ross examination that may reveal faulty memory, mistaken beliefs, or inaccurate facts about allegations does not mean that the party answering questions is necessarily lying or making intentionally false statements.	Pgs. 1062-63 See also pps. 1054, 1059-60, 1065, 1072, 1074, 1075, 1226 p. 1089 p. 1075 p. 1183 p. 1053
Cross-Examination (Relevancy Requirement)	Only relevant cross-examination and other questions may be asked of a party or witness.	Determining Relevancy: [A]ny person's determination that a question is not relevant is made by applying logic.	§106.45 (b)(6) (i) p. 1159

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		and common sense, but not against a backdrop of legal expertise. Not Relevant: information protected by a legally recognized privilege; evidence about a complainant's prior sexual history; any party's medical, psychological, and similar records unless the party has given voluntary, written consent; and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross examination at a live hearing. Not Relevant: [T]he rape shield language deems irrelevant all questions or evidence of a complainant's sexual behavior unless otherwise allowed by these regulations. Other Questions: [A] recipient may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice.	p. 980 p. 1200 pps. 980-81
Cross-Examination (On-the-Spot Evidentiary Rulings)	Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.		§ 106.45 (b)(6) (i)
		No Prior Submission of Written Questions: [S]ubmission of written questions (for the purposes of ascertaining relevance), even during a live hearing, is not compliant with § 106.45(b)(6)(i).	p. 1132
		Training on Relevancy Required: In response to commenters' concerns about how to determine "relevancy" in the context	p. 810

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Cross-Examination: (Conducted by Advisor Only)	If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.	<i>Note: Preamble does not have legal or regulatory force</i> of these final regulations, we have revised § 106.45(b)(1)(ii) specifically to require training on issues of relevance (including application of the "rape shield" protections in § 106.45(d)(6)).	§ 106.45 (b)(6) (i)
		Personal Representation Prohibited: The Department has revised § 106.45(b)(6)(f) to expressly preclude a party from conducting cross-examination personally; the only method for conducting cross-examination is by a party's advisor.	p. 1132
		Attorney Advisor Not Required: [A] recipient may fulfill its obligation to provide an advisor for a party to conduct cross-examination at a hearing without hiring an attorney to be that party's advisor, and that remains true regardless of whether the other party has hired a lawyer as an advisor of choice.	p. 1150
		Parameters: [A]dvisors conducting cross-examination will be either professionals (e.g., attorneys or experienced advocates) or at least adults capable of understanding the purpose and scope of cross-examination.	p. 1109
		Equal Competency Not Required: The Department understands commenters' desire that both parties have advisors of equal competency during a hearing. However, the Department does not wish to impose burdens and costs on recipients beyond what is necessary to achieve a Title IX grievance process.	p. 1150
		No Fee or Charge Permitted: [W]here a recipient must provide a party with an advisor to conduct cross-examination at a live hearing that advisor may be of the recipient's choice, must be	p. 1120

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		<i>Note: Preamble does not have legal or regulatory force</i> provided without fee or charge to the party, and may be, but is not required to be, an attorney.	
		Advance Notification Permitted: The final regulations do not preclude recipients from adopting a rule that requires parties to inform the recipient in advance of a hearing whether the party intends to bring an advisor of choice to the hearing.	p. 1154
		Advisor "No Shows": [I]f a party appears at a hearing without an advisor the recipient would need to stop the hearing as necessary to permit the recipient to assign an advisor to that party to conduct cross-examination.	p. 1154 See also p. 1171
		Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if 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.	§ 106.45 (b)(6) (i)
		Only Applies to Complainants: The Department declines to extend the rape shield language to respondents.	p. 1191
		Only Applies to Complainants (Caution): [S]ome situations will involve counter-claims made between two parties, such that a respondent is also a complainant.	p. 1191
		Application: [T]he rape shield language deems irrelevant all questions or evidence of a complainant's sexual behavior unless offered to prove consent (and it concerns specific instances of	p. 1200

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		sexual behavior with the respondent); thus, if "consent" is not at issue – for example, where the allegations concern solely unwelcome conduct under the first or second prong of the § 106.30 definition – then that exception does not even apply, and the rape shield protections would then bar all questions and evidence about a complainant's sexual behavior, with no need to engage in a balancing test of whether the value of the evidence is outweighed by harm or prejudice.	
Cross-Examination (Refusal to Submit to Cross)	If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.		§ 106.45 (b)(6) (i)
		General: (O) nly statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility. Hearsay Generally: The Department disagrees that this provision needs to be included so that a party's statements to family or friends would still be relied upon even when the party does not submit to cross-examination. Even if the family member or friend did appear and submit to cross-examination, where the family member's or friend's testimony consists of recounting the statement of the party, and where the party does not submit to cross-examination, it would be unfair and	p. 1168 Pps. 1172-73

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		potentially lead to an erroneous outcome: to rely on statements untested via cross-examination. Statements Against a Party's Interest: The Department declines to add exceptions to this provision, such as permitting reliance on statements against a party's interest.	p. 1168
		Death or Disability of Party or Witness: (W) ritten statements cannot be relied upon unless the witness submits to cross-examination, and whether a witness's statement is reliable must be determined in light of the credibility-testing function of cross-examination, even where nonappearance is due to death or post-investigation disability.	p. 1177
		Police or SAFE Reports: (P) olice reports, SAFE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.	p. 1181
		Text Messages and Emails: This provision does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or e-mail thread) and one party refuses to submit to cross-examination and the other does submit, so that the statements of one party cannot be relied on but statements of the other party may be relied on.	p. 1182
		Video Evidence: (W) here a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination.	p. 1106 See also p. 1169
		Video Evidence that Includes Statements: If the case does not depend on party's or witness's statements but rather on other evidence (e.g., video evidence that does not consist of "statements" or to the extent that the video contains non-statement evidence) the decision-maker can still consider that other evidence and reach a determination, and must do so	p. 1169

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		without drawing any inference about the determination based on lack of party or witness testimony. Statements of Parties who Decline to Participate: Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process remains under no obligation to then participate in the grievance process, and the Department does not believe that exclusion of the complainant's statements in such a scenario is unfair to the complainant, who did not wish to file a formal complaint in the first place yet remains eligible to receive supportive measures protecting the complainant's equal access to education.	p. 1172
Standard of Evidence	preponderance of the evidence or clear and convincing evidence.	General: [T]he standard of evidence reflects the "degree of confidence" that a decision-maker has in correctness of the factual conclusions reached. Preponderance of the Evidence: [A determination] based on facts that are more likely true than not Clear and Convincing: having confidence that a conclusion is based on facts that are highly probable to be true >50% Required for Showing of Preponderance: Where the evidence in a case is "equal" or "level" or "in equipoise," the preponderance of the evidence standard results in a finding that the respondent is not responsible. Choosing Standard of Evidence: The Department expects that recipients will select a standard of evidence based on the recipient's belief about which standard best serves the interests of the recipient's educational community, or because State law requires the recipient to apply one or the other standard, or	§ 106.45(b)(1)(vii) p. 1306 p. 1314 p. 1314 p. 1298 p. 1320

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		because the recipient has already bargained with unionized employees for a particular standard of evidence in misconduct proceedings.	
Standard of Evidence (Same for Student and Employee Respondents)	Recipient must "apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment." The decision-maker(s) . . . cannot be the same person(s) as the Title IX Coordinator or the investigator(s).		§ 106.45(b)(1)(vii)
Decision Maker	The decision-maker(s) . . . cannot be the same person(s) as the Title IX Coordinator or the investigator(s).	Title IX Coordinator as Investigator: Section 106.45(b)(7)(i) does not prevent the Title IX Coordinator from serving as the investigator; rather, this provision only prohibits the decision-maker from being the same person as either the Title IX Coordinator or the investigator. Separate Decision Maker: [T]he decision-maker must not only be a separate person from any investigator but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report.	p. 1257 See also pps. 1265, 1266 p. 1056 See also p. 1063

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
		Role of the Decision Maker: [T]he decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker's own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party's unique perspectives about the evidence.	p. 1114
		Hearing Officer vs. Decision Maker: With respect to the roles of a hearing officer and decisionmaker, the final regulations leave recipients discretion to decide whether to have a hearing officer (presumably to oversee or conduct a hearing) separate and apart from a decision-maker, and the final regulations do not prevent the same individual serving in both roles.	p. 1266
Determination of Responsibility	Written determination required		§ 106.45 (b)(7)(i)
Determination of Responsibility (Content)	Identification of the allegations potentially constituting sexual harassment A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held Findings of fact supporting the determination		§ 106.45 (b)(7)(ii)

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
		Not Required: We decline to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, "all evidence," presented at a hearing, or how credibility assessments were reached. Weighing Credibility: [A]dmissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker.	p. 1326
		Weighing Credibility: [T]he degree to which any inaccuracy, inconsistency, or implausibility in a narrative provided by a party or witness should affect a determination regarding responsibility is a matter to be decided by the decision-maker after having the opportunity to ask questions of parties and witnesses, and to observe how parties and witnesses answer the questions posed by the other party.	p. 981 See also p. 1114, 1137
		Weighing Credibility: [C]redibility determinations are not based solely on observing demeanor, but also are based on other factors (e.g., specific details, inherent plausibility, internal consistency, corroborative evidence). Cross-examination brings these important factors to a decision-maker's attention.	p. 1081
		Weighing Credibility: [A] party's answers to cross-examination questions can and should be evaluated by a decision-maker in context, including taking into account that a party may experience stress while trying to answer questions. Because decisionmakers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory.	p. 1089

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
		<i>Note: Preamble does not have legal or regulatory force</i> Corroborating Evidence Not Required: [N]either the preponderance of the evidence standard, nor the clear and convincing evidence standard, requires corroborating evidence.	p. 1295 <i>See also</i> p. 1306
	Conclusions regarding the application of the recipient's code of conduct to the facts	[D]ecisionmakers [must] lay out the evidentiary basis for conclusions reached in the case, in a written determination regarding responsibility.	§ 106.45 (b)(7)(i)
	A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant		p. 814
			§ 106.45 (b)(7)(i)
		Description of Remedies <i>not</i> Included: [T]he nature of remedies provided does not appear in the written determination.	p. 1334 <i>See also</i> p. 1341
Determination of Responsibility (Simultaneous Notification)	The recipient's procedures and permissible bases for the complainant and respondent to appeal. Simultaneous notification of parties required		§ 106.45 (b)(7)(i)
		Finality: [T]he written determination becomes "final" only after the time period to file an appeal has expired, or if a party does	§ 106.45 (b)(7)(iii) p. 1338

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
Determination of Responsibility (Agency Deference)	The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.	<i>Note: Preamble does not have legal or regulatory force</i> file an appeal, after the appeal decision has been sent to the parties.	§ 106.44(b)(2)
		Deference: [T]he Department will refrain from second-guessing a recipient's determination regarding responsibility based solely on whether the Department would have weighed the evidence differently.	p. 713 <i>See also</i> pps. 714, 716, 1138, 1339-40
Sanctions		Specific Sanctions Not Required: The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment.	p. 1344 <i>See also</i> pps. 908, 1346, 1428
		Specific Sanctions Not Required: The Department declines to adopt a rule that would mandate suspension or expulsion as the only appropriate sanction following a determination of responsibility against a respondent; recipients deserve flexibility to design sanctions that best reflect the needs and values of the recipient's educational mission and community.	p. 1392
		Proportionality: [T]hese final regulations do not impose a standard of proportionality on disciplinary sanctions.	p. 908
		Mitigating Considerations: [A] respondent's lack of comprehension that conduct constituting sexual harassment violates the bodily or emotional autonomy and dignity of a	p. 434

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
		victim does not excuse the misconduct, though genuine lack of understanding may (in a recipient's discretion) factor into the sanction decision.	
		Zero Tolerance Policies: [N]othing in these final regulations precludes a recipient from adopting a zero tolerance policy.	p. 1302
		Sanctioning Pedagogy: Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an "educational purpose" that may differ from the purpose for which a recipient imposes employee discipline.	p. 1285
		Restorative Justice as Sanction: [A] recipient could use a restorative justice model after a determination of responsibility finds a respondent responsible; nothing in the final regulations dictates the form of disciplinary sanction a recipient may or must impose on a respondent.	p. 1388
		Transcript Notations: The Department intentionally did not take a position in the NPAM on transcript notations or the range of possible sanctions for a respondent who is found responsible for sexual harassment.	p. 1344 See also p. 1428
		Transfers: The Department does not regulate what information schools must share when a student transfers to a different school and declines to do so here.	p. 1476
		Effective Date of Sanction: [T]he final regulations obligate the recipient to offer supportive measures throughout the grievance process (unless failing to do so would not be clearly unreasonable) thus maintaining a status quo through the grievance process that may continue a short time longer while appeal is being resolved. The Department believes that in order for an appeal, by either party, to be fully effective, the recipient must wait to act on the determination regarding responsibility while maintaining the status quo between the	p. 1338-39

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
Remedies	Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.	<i>Note: Preamble does not have legal or regulatory force</i> parties through supportive measures designed to ensure equal access to education.	§ 106.45(b)(1)(i)
			§ 106.45(b)(1)(i)
		Remedies Evaluated Against Deliberate Indifference Standard: [A] recipient's selection and implementation of remedies will be evaluated by what is not clearly unreasonable in light of the known circumstances.	p. 800
		No Specific Remedies Required: The Department declines to require remedies for respondents in situations where a complainant is found to have brought a false allegation.	p. 804
		Types of Remedies: [R]emedies may consist of the same individualized services listed illustratively in § 106.30 as "supportive measures" but remedies need not meet the limitations of supportive measures (i.e., unlike supportive measures, remedies may in fact burden the respondent, or be punitive or disciplinary in nature).	p. 799 See also p. 909
		Types of Remedies: [R]emedies may include the same individualized services described in § 106.30 as "supportive	p. 1333

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
		measures" but that remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. Beyond this, the Department believes recipients should have the flexibility to offer such remedies as they deem appropriate to the individual facts and circumstances of each case, bearing in mind that the purpose of remedies is to restore or preserve the complainant's equal access to education.	
		Types of Remedies: Whether or not the commenter's understanding of prevention and community education programming would be part of an appropriate remedy for a complainant, designed to restore or preserve the complainant's equal access to education, is a fact-specific matter to be considered by the recipient.	p. 600
		Title IX Coordinator Implements Remedies: [The] Title IX Coordinator is responsible for effective implementation of remedies.	p. 914 See also p. 1334
		Title IX Coordinator Implements Remedies: [W]here the final determination has indicated that remedies will be provided, the complainant can then communicate separately with the Title IX Coordinator to discuss what remedies are appropriately designed to preserve or restore the complainant's equal access to education.	p. 1334 See also p. 1341
		Disclosure of Remedies to Respondent Prohibited: That remedy (which does not directly affect the respondent) must not be disclosed to the respondent.	p. 1459
Appeals			
Mandatory Appeals	A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's		§ 106.45 (b)(8)

Topic	Final Regulation	Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i>	Regulation Section or Preamble Page No.
Grounds for Appeal	dismissal of a formal complaint or any allegations therein (A) Procedural irregularity that affected the outcome of the matter (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.		§ 106.45 (b)(8)
		Procedural Irregularity: [P]rocedural irregularity ... could include a recipient's failure to objectively evaluate all relevant evidence, including incriminatory and exculpatory evidence.	P. 815
		Erroneous Relevancy Determinations: [P]arties may appeal erroneous relevancy determinations, if they affected the outcome.	p. 1159
Grounds for Appeal	A recipient may offer an appeal equally to both parties on additional bases.		§ 106.45(b)(18)

Topic	Final Regulation	Regulation Section or Preamble Page No.
Requirements for the Appeals Process	<p>Final Regulation</p> <p>Requirements for Appeals: (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties; (B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal; the investigator(s), or the Title IX Coordinator; (C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section; (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome; (E) Issue a written decision describing the result of the appeal and the rationale for the result; and (F) Provide the written decision simultaneously to both parties.</p>	§ 106.45(b)(8)

Informal Resolution		
Informal Resolutions Permitted	If the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication (under the circumstances described in the regulations)	§ 106.45 (b)(9)
	Discretionary: [N]othing in the final regulations requires recipients to offer an informal resolution process.	p. 1362
	Formal Complaint Required: [R]ecipients may not offer informal resolution unless a formal complaint has been filed.	p. 1367 See also pp. 1371, 1378, 1391
	Voluntary and Appropriate: [A] recipient may choose to offer the parties an informal process that resolves the formal complaint without completing the investigation and adjudication, but such a result depends on whether the recipient determines that informal resolution may be appropriate and whether both parties voluntarily agree to attempt informal resolution.	p. 1366-7
	Advisor Input: [W]e decline to mandate that the parties confer with an advisor before entering an informal resolution process, or to mandate that recipients provide the parties with advisors before entering an informal resolution process.	p. 1374
	Kinds of Informal Resolution: Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities.	p. 1370

			p. 1224
	Kinds of Informal Resolution (Administrative Disposition): Commentary: descriptions of an administrative disposition model or a proposed voluntary resolution agreement, are permissible under the final regulations if applied as part of an informal resolution process in conformity with § 106.45(b)(9), which requires both parties' written, voluntary consent to the informal process.		
	Kinds of Informal Resolution (Cannot Waive Hearing): The Department declines to authorize one or both parties, or the recipient, simply to "waive" a live hearing (as part of an informal resolution).		p. 1224
	Outcome: "[I]nformal resolutions . . . may result in disciplinary measures designed to punish the respondent.		p. 1370
	Withdrawal: "[W]e have revised § 106.45(b)(9) to expressly allow either party to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.		p. 1376 See also pps. 1384, 1391
	Finality: The Department expects informal resolution agreements to be treated as contracts; the parties remain free to negotiate the terms of the agreement and, once entered into, it may become binding according to its terms.		p. 1384
	Confidentiality: "[A] recipient may determine that confidentiality restrictions promote mutually beneficial resolutions between parties and encourage complainants to report, or may determine that the benefits of keeping informal resolution outcomes confidential are outweighed by the need for the educational community to have information about the number or type of sexual harassment incidents being resolved.		p. 1379 See also p. 1372
	Participants as Fact Witnesses in Later Proceedings: With respect to informal resolution facilitators potentially serving as witnesses in subsequent formal grievance processes, we leave this possibility open to recipients.		p. 1367
	Liability Exposure: With respect to recipients' potential legal liability where the respondent acknowledges commission of		p. 1391-92

	Title IX sexual harassment (or other violation of recipient's policy) during an informal resolution process, yet the agreement reached allows the respondent to remain on campus and the respondent commits Title IX sexual harassment (or violates the recipient's policy) again, the Department believes that recipients should have the flexibility and discretion to determine under what circumstances respondents should be suspended or expelled from campus as a disciplinary sanction, whether that follows from an informal resolution or after a determination of responsibility under the formal grievance process. Recipients may take into account legal obligations unrelated to Title IX, and relevant Title IX case law under which Federal courts have considered a recipient's duty not to be deliberately indifferent by exposing potential victims to repeat misconduct of a respondent, when considering what sanctions to impose against a particular respondent.		§ 106.45 (b)(9)
Informal Resolutions (Limitations)	A recipient may not require as a condition of enrollment or continuing enrollment, or employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints. . . . Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. . . .		
Informal Resolution (Written Notice Requirement)	To proceed with informal resolution, the recipient must provide the parties with written		§ 106.45 (b)(9)

<p>notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint; and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared."</p>						
<p>Informal Resolution (Voluntary, Written Consent Required)</p>						§ 106.45 (b)(9)
<p>Informal Resolution (Prohibition)</p>						§ 106.45 (b)(9)
Retaliation						
<p>Retaliation Prohibited</p>						§ 106.71

	<p>any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.</p>		§ 106.71
<p><i>Per se</i> Retaliation</p>	<p>Intimidation, threats, coercion, or discrimination, including charges against an individual for acts of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.</p>		<p>"For the Purpose of Interfering with any Right or Privilege": [I]f a recipient punishes a complainant or respondent for underage drinking, arising out of the same facts or circumstances as the report or formal complaint of sexual harassment, then such punishment constitutes retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations. If a recipient always takes a zero tolerance approach to underage drinking in its code of conduct and always imposes the same punishment for underage drinking, irrespective of the circumstances, then imposing such a punishment would</p>
			Pgs. 1876-77

	not be "for the purpose of interfering with any right or privilege secured by" Title IX or these final regulations and thus would not constitute retaliation under these final regulations.	
	Actual Knowledge Not Applicable: [] The actual knowledge requirement in these regulations applies to sexual harassment and does not apply to a claim of retaliation.	p. 1878
	Per Se Retaliation (Witness Intimidation): If a respondent reacts to a written notice of allegations by intimidating witnesses, such conduct is prohibited as retaliation. Examples (Threatening Visa Status): [] Intimidating to take retaliatory immigration action for the purpose of interfering with any right or privileged secured by Title IX or its implementing regulations may constitute retaliation.	p. 932 See also p. 1223 p. 1875
	Responding to Retaliation: A recipient's ability to respond to retaliation will depend, in part, on the relationship between the recipient and the individual who commits the retaliation.	p. 1875
		\$106.71
Per Se Retaliation—Exception	Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.	
	Example (False Statements): [] It would constitute retaliation to punish a party for false statements if that conclusion is reached solely based on the determination regarding responsibility.	p. 928

Application to Employees	General: [] The Department's final regulations apply to employees. Regulations Apply to All Classes of Employees: The Department believes that irrespective of position, tenure, part-time status, or at-will status, no employee should be subjected to retaliation or be deprived of employment as a result of allegations of sexual harassment without the protections and the process that these final regulations provide. Employees vs. Independent Contractors: The Department declines to State law with respect to employees, and State law will govern whether a person is an employee as opposed to an independent contractor. Volunteers: These final regulations also may apply to volunteers, if the volunteers are persons in the United States who experience discrimination on the basis of sex under any education program or activity receiving Federal financial assistance. Employee Only Allegations: The Department disagrees that the formal complaint process would be unworkable for cases involving only non-students. Employees Entitled to Same Benefits and Protections: Employees should receive the same benefits and due process protections that students receive under these final regulations, and these final regulations, including the due process protections in § 106.45, apply to employees. Independent Obligations to Comply with Title IX and Title VII: The Department is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both	p. 1519 See also pgs. 1510, 1536, 1538 p. 1531 p. 1553 p. 1544 p. 1539 p. 1519 p. 1514 See also pgs. 1515, 1520, 1523, 1524, 1547, 1548, 1551

Record Keeping (Supportive Measures)	<p>Maintain for 7 Years: For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complaint with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.</p>	§ 106.45 (b)(11)
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Start of Retention Period	<p>Maintenance of Party Access: In response to commenters' concerns that this provision giving the parties access to records might contradict the requirement to keep supportive measures confidential, the Department has revised § 106.45(b)(10)(i) to remove the language making records available to parties.</p> <p>[T]he date of the record's creation begins the seven year retention period.</p>	p. 1406
Preemption and Intersection with Other Laws		
Preemption	<p>To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.</p>	§ 106.6(b)
Intersection with Other Laws (First Amendment)	<p>Nothing in this [regulation] requires a recipient to . . . [r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution</p>	§ 106.6(d)(1)
	<p>Pure Speech may be Harassment: [E]xpressive speech, and not just physical conduct, may be restricted or punished as harassment.</p> <p>Pure Speech may be Unharassment: [T]he § 106.30 definition of sexual harassment is designed to capture non-speech conduct broadly (based on an assumption of the education-denying effects of such conduct), while applying the <i>Lewis</i> standard to verbal conduct so that the critical purposes of both Title IX and the First Amendment can be met.</p>	p. 426
	<p>Pure Speech may be Unharassment: [T]he § 106.30 definition of sexual harassment is designed to capture non-speech conduct broadly (based on an assumption of the education-denying effects of such conduct), while applying the <i>Lewis</i> standard to verbal conduct so that the critical purposes of both Title IX and the First Amendment can be met.</p>	p. 507

Intersection with Other Laws (Due Process)	Nothing in this [regulation] requires a recipient to . . . [d]eprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.	p. 471	<p>Overbreadth: [S]everity and pervasiveness are needed elements to ensure that Title IX's non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom.</p> <p>Prior Restraints: [A] recipient should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.</p>
Intersection with Other Laws (U.S. Constitution)	Nothing in this [regulation] requires a recipient to . . . Restrict any other rights guaranteed against government action by the U.S. Constitution.	p. 986	<p>§ 106.6(d)(2)</p>
Intersection with Other Laws (U.S. Constitution)	Nothing in this [regulation] requires a recipient to . . . Restrict any other rights guaranteed against government action by the U.S. Constitution.	p. 957	<p>§ 106.6(d)(3)</p>
Intersection with Other Laws (Title VII)	Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. or any regulations promulgated thereunder.	p. 719	<p>§ 106.6(f)</p>

Intersection with Other Laws (Title VII)	Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. or any regulations promulgated thereunder.	p. 719 See also pps 1514, 1515, 1520, 1523, 1524, 1547, 1548, 1551	<p>5th Amendment and Self-Incrimination: [T]hese regulations do not require a recipient to restrict any rights that would otherwise be protected from government action under the U.S. Constitution, which includes the Fifth Amendment right against self-incrimination.</p>
Intersection with Other Laws (Title VII)	Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. or any regulations promulgated thereunder.	p. 719 See also pps 1514, 1515, 1520, 1523, 1524, 1547, 1548, 1551	<p>There may be incidents of sexual harassment that implicate both Title VII and Title IX, and this Department will continue to administer Title IX and its implementing regulations and to refer to the EEOC to administer Title VII and its implementing regulations. Nothing in these final regulations precludes the Department from giving due weight to the EEOC's determination regarding Title VII under 28 CFR 42.610(j). The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX.</p>

Intersection with Other Laws (FERPA)	The obligation to comply with this part is not obtained or alleviated by the FERPA statute, 20 U.S.C. 1233g, or FERPA regulations, 34 CFR part 99.	§ 106.6(c)
Intersection with Other Laws (FERPA)	Directly Related (as Defined in FERPA and Applied to Title IX Proceedings): The Department previously stated: "Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning." The Department made this statement in response to comments regarding impairing due process in student discipline cases in its notice-and-comment rulemaking to promulgate regulations to implement FERPA. The evidence and investigative report that is being shared under these final regulations directly relate to the allegations in a complaint and, thus, directly relate to both the complainant and respondent.	p. 1488
Intersection with Other Laws (FERPA)	Direct Conflict: If there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.	p. 1456 See also p. 1455, 1461

Intersection with Other Laws (Clery Act)	Enforcement: As the Department administers both FERPA and Title IX, the Department will not interpret compliance with its regulations under Title IX to violate requirements in its regulations under FERPA.	p. 1468
Intersection with State Laws (Anonymous Reporting)	The Department does not perceive a conflict between a recipient's obligation to comply with reporting obligations under the Clery Act and response obligations under Title IX. Recipients who are obligated under State laws to offer anonymous reporting options may not face any conflict with obligations under the final regulations.	p. 662 p. 393
Intersection with State Laws (Consent)	The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.	p. 363 See also p. 1197
Intersection with State Laws (Emergency Removal)	State or local law may present other considerations or impose other requirements before an emergency removal can occur. To the extent that other applicable laws establish additional relevant standards for emergency removals, recipients should also heed such standards.	p. 731 See also p. 771
Intersection with State Laws (Sexual Harassment)	The Department does not view a difference between how "sexual harassment" is defined under these final regulations and a different or broader definition of sexual harassment under various State laws as creating undue confusion for recipients or a conflict as to how recipients must comply with Title IX and other laws. While Federal Title IX regulations require a recipient to respond to sexual harassment as defined in § 106.30, a recipient may also need to respond to misconduct that does not meet that definition, pursuant to a State law.	p. 442

		[I]f a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clearly that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations prohibits a recipient from doing so.	p. 481-82
Intersection with State Laws (Mandatory Reporting)		The final regulations do not contravene or alter any Federal, State, or local requirements regarding other mandatory reporting obligations that school employees have.	p. 606
Intersection with Accrediting Bodies and other Non-Legal Authorities (NCAA Guidelines)		The Department is not under an obligation to conform these final regulations with NCAA compliance guidelines and declines to do so. Any recipient may give coaches and trainers authority to institute corrective measures on behalf of the recipient such that notice to coaches and trainers conveys actual knowledge to the recipient as defined in § 106.30. Additionally, or alternatively, any recipient may train coaches and athletic trainers to report notice of sexual harassment to the recipient's Title IX Coordinator.	p. 330
Conflicts with Union Contracts		[I]n the event of an actual conflict between a union contract or practice and the final regulations, then the final regulations would have preemptive effect.	p. 594

Notifications		
Designation of a Title IX Coordinator	Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator." The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or other professional agreements with the recipient, of the name or title, address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph.	§ 106.8(c)
	[A] recipient has discretion to designate more than one employee as a Title IX Coordinator if needed in order to fulfill the recipient's Title IX obligations.	p. 574

Title IX Coordinator Contact Info	(1) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (e) of this section and the policy described in paragraph (f)(1) of this section on its website, if any, and in each handbook 2011 or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.	§ 106.8(b)(2)
Dissemination of Policy	Notification of policy. Each recipient must notify persons entitled to a notification under paragraph (e) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.	§ 106.8(b)(1)

Publication of Grievance Procedures	Adoption of grievance procedures. A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (e) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.	§ 106.8(c)
Training Materials	A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.	§ 106.45(b)(10)
	Keep Up to Date: <input type="checkbox"/> This provision requires the recipient to publish training materials which are up to date and reflect the latest training provided to Title IX personnel.	p. 1408

	<p>Obtain Permission to Post Proprietary Information: To the extent that commenters' concerns that a recipient may be unable to publicize its training materials because some recipients hire outside consultants to provide training, the materials for which may be owned by the outside consultant and not by the recipient itself, the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control.</p>	<p>p. 1409</p>
Training		
<p>Title IX Coordinators, Investigators, Decision-Makers, and Facilitators of an Informal Resolution Process</p>	<p>A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.</p>	<p>§ 106.45(b)(1)(iii)</p>

	<p>Definition of Consent: This includes "how to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45."</p>	<p>p. 365</p>
	<p>Curing Perceived Bias Through Training: The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially. Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-proclaimed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that a person biased for or against complainants or respondents), bearing in mind that the very training required by § 106.45(b)(1)(ii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.</p>	<p>p. 827-28</p>

Decision Makers	A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues or relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.		§ 106.45(b)(1)(iii)
Investigators	A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vi) of this section.		
Frequency	No Frequency Requirement: [The final regulations do not impose an annual or other frequency condition on the mandatory training required in § 106.45(b)(1)(iii)].		p. 833
Neutrality of Materials	Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.		§ 106.45(b)(1)(iii)

Make Training Materials Publicly Available on Website	A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.		§ 106.45(b)(1)
		Keep Up to Date: [This provision requires the recipient to publish training materials which are up to date and reflect the latest training provided to Title IX personnel].	p. 1408
		Obtain Permission to Post Proprietary Information: To the extent that comment concerns that a recipient may be unable to publicize its training materials because some recipients hire outside consultants to provide training, the materials for which may be owned by the outside consultant and not by the recipient itself, the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control.	p. 1409
Exemptions			
Religious Exemption	An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the institution's chief executive officer or other high-ranking official certifying that the institution's policies and procedures are consistent with the provisions of this part that conflict with a specific tenet of the religious organization.		§ 106.12(b)

<p>An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (e) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.</p>	<p>§ 106.12(b)</p>
<p>Asserting the Exemption: When the Department notifies a recipient that it is under investigation for noncompliance with this part or a particular section of this part, the recipient identifies the provisions of this part which conflict with a specific tenet of the religious organization.</p> <p>Burden on Recipient: Institution to Show Entitlement to and Scope of Exemption: [R]ecipients are not entitled to any type of formal deference when invoking eligibility for a religious exemption, and recipients have the duty to establish their eligibility for an exemption, as well as the scope of any exemption.</p>	<p>p. 1660</p>
	<p>p. 1661</p>

	<p>Limitation: [T]his does not prevent OCR from investigating or making a finding against a recipient if its religious tenets do not address the conduct at issue. In those cases, OCR will proceed to investigate, and if necessary, make a finding on the merits.</p>	<p>p. 1653 See also p. 1660</p>
Effective Date		
Effective Date	Effective Date: [T]he final regulations are effective August 14, 2020.	p. 1869
Prospective Application	Prospective Application: These final regulations will apply prospectively to give recipients adequate notice of the standards that apply to them.	p. 1345 See also p. 1348

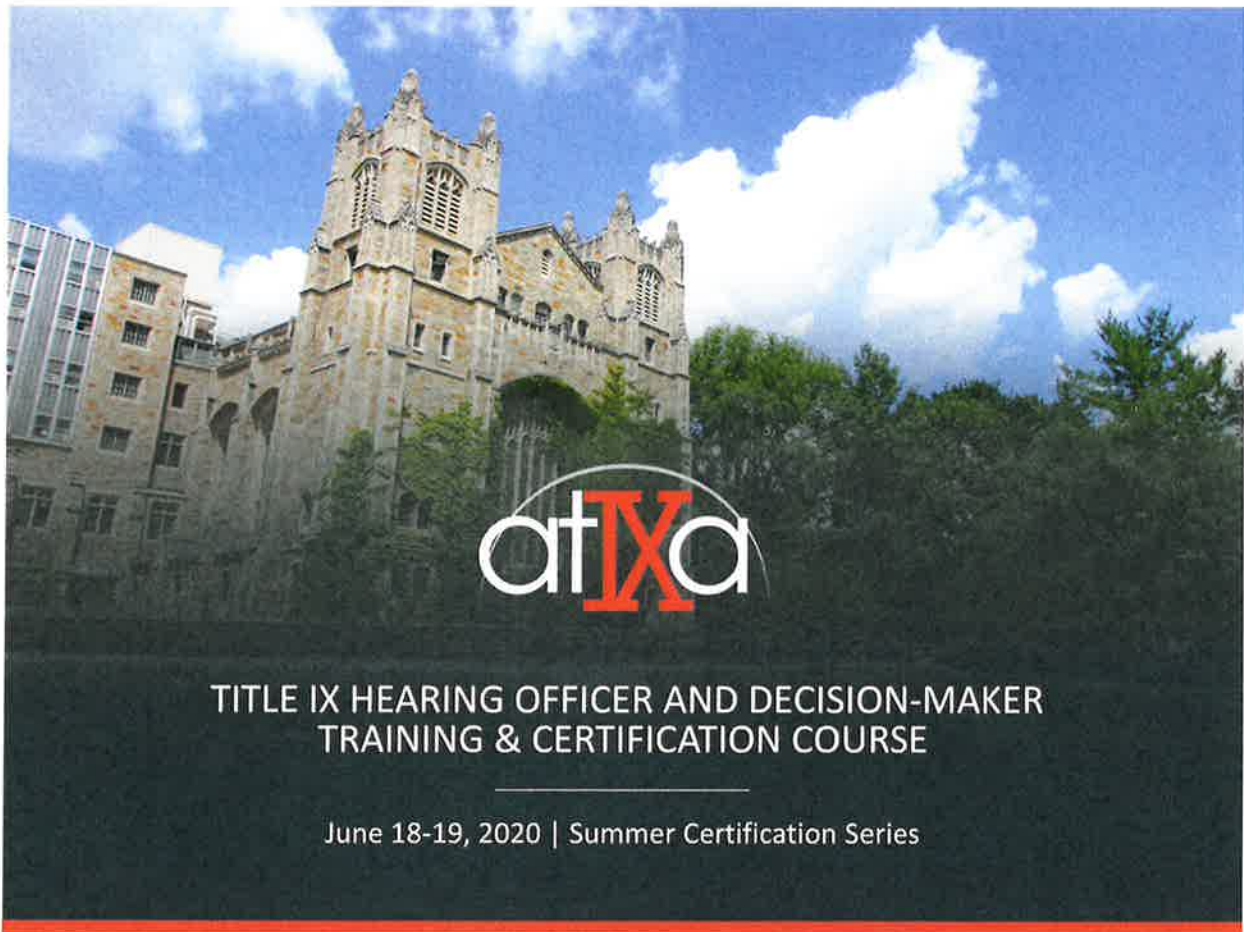
Prepared by NACUA, May 17, 2020.

The content should not be considered to be or used as legal advice. Legal questions should be directed to institutional legal counsel.



Section (b)v

Title IX Hearing Officer and
Decision-Maker Training
7/2020



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AGENDA: DAY ONE



- I. Mission/Role of Decision-Maker
- II. Due Process
 - Legal Foundations
 - Due Process in Procedure
 - Due Process in Decision
 - Procedural Rights in 2020 Regulations
 - Standard of Evidence
- III. The Title IX Process
 - Title IX Basics
 - Steps leading up to a Hearing
- IV. Policy Terms
 - Under § 106.45 of Title IX
 - Other
 - Retaliation
- V. ATIXA Consent Construct
- VI. Preparing for the Hearing
- VII. Questioning Skills
- VIII. Questioning Activity

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AGENDA: DAY TWO



- I. Quick Tips on Hearing Logistics
- II. Decision-Making Skills
 - Understanding Evidence
 - Relevance
 - Reliability/Credibility
 - Cross-Examination
- III. Mock Hearing
- IV. Deliberations
 - Analyzing information
 - Sanctions
 - Written Determinations
- V. Mock Deliberation
- VI. Appeals
- VII. Recordkeeping and Documentation
- VIII. Conflicts of Interest, Bias, and Recusal

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WHAT IS YOUR MISSION AS A DECISION-MAKER?

WHAT DOES IT MEAN TO BE A “DECISION-MAKER?”



- New Title IX regulations require a “decision-maker” to determine whether a Respondent has violated policy.
 - May be a single person (a/k/a “Hearing Officer”).
 - May be a panel of decision-makers.
 - May be internal or external individuals.
- Required separation of roles.
 - Title IX Coordinator may not serve as “decision-maker.”
 - Investigator(s) may not serve as “decision-maker.”
- Appellate decision-maker is a separate role.
 - May also be a single person or panel; previously uninvolved.

WHEN AND HOW THE “DECISION-MAKER” WORKS



- New Title IX regulations require that colleges and universities hold a live hearing.
 - May take place in person; however, must provide an option for a video conference.
 - Key new element is that the parties may cross-examine each other and witnesses, through an advisor.
- K-12 schools and other federal funding recipients (such as many hospitals with residency programs), need not conduct a live hearing, but must provide an opportunity for the parties to submit written questions for the other party/witnesses.
 - If a hearing is offered, it does not have to comply with §106.45.

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HEARING OFFICER/DECISION-MAKER RESPONSIBILITIES



Rank your Top 3 responsibilities as a decision-maker. Identify what you consider least important

	<u>Your Rank</u>	<u>Group Rank</u>
• Finding the truth	_____	_____
• Providing a just result	_____	_____
• Providing an educational process	_____	_____
• Making a safe community	_____	_____
• Upholding the institution’s policy	_____	_____
• Ensuring a fair process	_____	_____
• Protecting the institution from liability	_____	_____
• Punishing wrongdoing	_____	_____

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THE GOAL



AN EQUITABLE RESULT FROM AN EQUITABLE PROCESS

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HEARING OFFICER/DECISION-MAKER COMPETENCIES



- The Legal Landscape
- The Conduct/Disciplinary Process
- Understanding Investigations
- Title IX & VAWA Requirements
- Pre-Hearing Evidence Review
- Pre-Hearing Investigation Report Review
- Critical Thinking Skills
- How to Prepare for a Hearing
- Hearing Decorum
- Questioning Skills, including Relevance
- Weighing Evidence, including Relevance
- Analyzing Policy
- Applying Standards of Evidence
- Sexual Misconduct/Discrimination
- Technology Used at Hearing
- Controlling Evidence
- Managing Advisors
- SANE and Police Reports
- Presumption of Innocence
- Due Process and Fairness
- Domestic/Dating Violence
- Bias/Impartiality/Conflicts of Interest
- Stalking/Sexual Assault/Harassment
- Deliberation
- Sanctioning/Remedies
- Understanding the Appeal Process
- Cultural Competency
- Intersection with Mental Health Issues
- Concurrent Criminal Prosecutions
- Impact of Failing to Testify/Answer
- Drawing Inferences?
- Manage Accommodations During Process
- Fixing Procedural Deviations
- Managing Impact Statements
- Writing Decisions/Rationales
- Role in Appeal Process?

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THE CHALLENGE FOR HEARING OFFICERS/DECISION-MAKERS



- Community standards identify what constitutes sexual harassment within your community.
 - The definitions and procedures used may be impacted by Title IX requirements.
- It is not a question of right and wrong, but whether there has been a policy violation, proven by the standard of evidence.
- Your role is to impartially uphold the integrity of the process.
- You may not agree with your policy, but you must be willing to uphold it.

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Remember, you have no side other than the integrity of the process. And you represent the process.

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DUE PROCESS: LEGAL FOUNDATIONS

- *Dixon v. Alabama* (1961)
- *Esteban v. Central Missouri State College* (1969)
- *Goss v. Lopez* (1975)
- Title IX regulations (34 CFR Part 106)

DIXON V. ALABAMA STATE BD. OF ED. **294 F. 2D 150 (5TH CIR., 1961).**



- In February of 1960, six black students sat in at a public (all white) lunch counter and were arrested.
- Alabama State summarily expelled all of them without any notice of the charges or of a hearing, and no opportunity to provide evidence or defend themselves
- Federal appellate court established minimum due process requirements (reiterated by U.S. Supreme Court in *Goss v. Lopez* (1975)):
 - Students facing expulsion at public institutions must be provided with at least **notice of the charges** and an **opportunity to be heard**.
 - Ushered in most campus disciplinary and hearing-based processes.

- Specifically, the court set forth a number of due process-based guidelines, including:
 - Notice, with an outline of specific charges.
 - A fair and impartial hearing.
 - Providing names of witnesses to accused.
 - Providing the content of witnesses' statements.
 - Providing the accused an opportunity to speak in own defense.
 - The results and findings of the hearing presented in a report open to the student's inspection.

ADDITIONAL CASES

- ***Esteban v. Central Missouri State College***, 415 F.2d 1077 (8th Cir. 1969) added more specific requirements, Examples included:
 - Notices in writing with time to prepare
 - Hearing before the person or panel with authority to suspend or expel
 - Right to present evidence and witnesses
- ***Goss v. Lopez***, 419 U.S. 565 (1975).
 - U.S. Supreme Court validated the informal hearing requirements and extended to K-12 students informal hearings for students facing suspension.
 - Potential suspensions beyond 10 days or expulsions, however, require a more formal procedure to protect against unfair deprivations of liberty and property interests

DUE PROCESS

- What is Due Process?
- Due Process in Procedure
- Due Process in Decision
- Procedural Rights under 2020 Title IX Regulations
- Standard of Evidence

WHAT IS DUE PROCESS?



- Due Process (public institutions):
 - Federal and state constitutional and legal protections ensuring no public entity deprives someone of education or employment without substantive and procedural fairness. (5th and 14th Amendment)
- “Fundamental Fairness” (private institutions):
 - Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures.
 - Outcome neither arbitrary nor capricious; rationally related to facts and evidence.

WHAT IS DUE PROCESS?



- Ultimately, both are rights-based protections that accompany disciplinary action by an institution with respect to students, employees, or others.
 - Informed by law, history, public policy, culture etc.
- DP in criminal and civil courts vs. DP within an institution.
- DP analysis and protections have historically focused on the rights of the Respondent.
- A sexual assault can be a legal deprivation of a Complainant's substantive due process rights.
- Perceptions of "due process" can be connected to perceptions of legitimacy of a process's outcome.

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DUE PROCESS IN DECISION



Substantive Due Process

- **Due Process in Decision** - A decision must:
 - Be appropriately impartial and fair (both finding and sanction).
 - Be neither arbitrary nor capricious.
 - Be based on a fundamentally fair rule or policy.
 - Be made in good faith (i.e. without malice, ill-will, conflict, or bias).
 - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.

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DUE PROCESS CONCEPTS IN TITLE IX PROCESSES



Procedural Due Process:

- Consistent, thorough, and procedurally sound review of all allegations.
- Substantial compliance with written policies and procedures.
- Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws.
 - Clear, written notice of the allegations
 - Opportunity to present witnesses and evidence and be heard by the decision-maker

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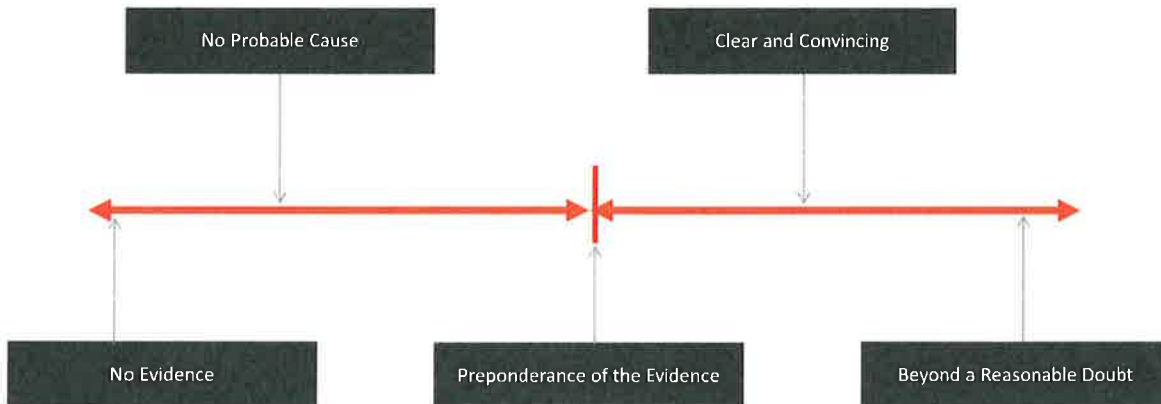
DUE PROCESS PROCEDURAL RIGHTS IN 2020 TITLE IX REGULATIONS



- Right to:
 - Present witnesses, including fact and expert witnesses.
 - Present and know inculpatory and exculpatory evidence.
 - Discuss the allegations under investigation without restriction.
 - Gather and present relevant evidence without restriction.
 - Have others present during any grievance proceeding/meeting.
 - Be accompanied to any related meeting or proceeding by an advisor of their choice, who may be, but is not required to be, an attorney.
 - Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigative interviews or other meetings, with sufficient time to prepare.
 - Inspect and review evidence and draft investigation report before finalized.
 - Right to argue for inclusion of “directly related” evidence at the hearing.
 - Ask relevant questions of the other party and witnesses through an advisor, in the presence of the decision-maker.

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EVIDENTIARY STANDARDS



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EVIDENTIARY STANDARD



Clear and convincing evidence: It is highly probable that policy was violated.

- Highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.
- 65% 75% 85% – part of the problem with this standard is there is no real consensus on how to quantify it.

Preponderance of the evidence: “More likely than not.”

- The only equitable standard
- 50.1% (50% plus a feather)
- The “tipped scale”

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THE “TITLE IX PROCESS:” WHAT HAPPENED BEFORE IT GOT TO A HEARING?

- Title IX
- The IX Commandments
- The General Phases of a Title IX Process
- Ten Steps of an Investigation
- Key Elements from new Title IX regulations

TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. PART 106



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

IX

THE IX COMMANDMENTS



Thorough	Reliable	Impartial	Investigation (prompt & fair – VAWA Sec. 304)
Prompt	Effective	Equitable	
Not act unreasonably to end the discrimination	Not act unreasonably to prevent recurrence	Act equitably to remedy effects	Remedies

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THE PROCESS



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10 STEPS OF AN INVESTIGATION



1. Receive Notice/Complaint.
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation to Parties/Notice of Formal Allegation (“Charge”).
5. Establish investigation strategy
6. Formal comprehensive investigation.
 - Witness interviews
 - Evidence gathering.
7. Draft report

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10 STEPS OF AN INVESTIGATION (CONT.)



8. Meet with Title IX Coordinator (or legal counsel) to review draft report & evidence.
9. Provide all evidence directly related to the allegations to parties and their advisors for inspection and review with 10 days for response.
10. Complete final report.
 - Synthesize and analyze relevant evidence (may include making recommended findings or conclusions)
 - Send final report to parties for review and written response at least 10 days prior to hearing.

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CIVIL RIGHTS INVESTIGATION MODEL VERSUS STUDENT CONDUCT MODEL



- How does this model differ from the student conduct model?
 - An active gathering of information by the investigator(s); not intended to “build a case.”
 - Does not impact the implementation of informal or alternative dispute resolution approaches.
 - Enhanced due process
 - Characterized by an intentional effort to make procedural and support mechanisms equitable.
 - Provides an appeal for all parties to the report, not just the Respondent.

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ADVISORS



- Advisor can be anyone; no restrictions in the regulations.
 - Already required under VAWA.
- If a party chooses an advisor who is also a witness, you will need to assess how that impacts their credibility as a witness.
- If a party does not have an advisor to conduct cross-examination at the live hearing, the institution must provide an advisor of the institution's choice without fee or charge to the party.
 - Not required to be an attorney.
 - No prior training required; no mandate for institution to train.
- Institutions may still limit the role of advisors during the hearing with the exception of cross-examination and the ability to confer with the party.

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ADVISORS



- Advisors chosen by the party must conduct thorough cross-examination.
- If they refuse, the institution will appoint an advisor who will do so.
- An advisor appointed for the party is required to conduct thorough cross-examination of the other party(ies);
 - Even if the party being advised doesn't want the advisor to do so, and is non-cooperative.
 - The regulations envision that the advisor may not do more than repeat or rephrase questions framed by the party, but in many hearings, expect that the advisor will be far more active and engaged than that.

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PRESUMPTION OF NON-RESPONSIBILITY



- Title IX regulations require that published grievance procedures include a statement of a presumption of non-responsibility for the Respondent until a final determination is made.
- Hopefully not a change from current procedures, because the determination has always been based on evidence, not presumptions.
- What would it mean to presume neither “guilt” nor “innocence?”
 - How does presumption work in light of an affirmative consent policy?
 - How is presumption of non-responsibility different than no presumption?
 - What does it take to overcome presumption?
 - Should there be an equitable presumption for the Complainant?
 - If so, what would it be?

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CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS



- Existing mandate for impartial resolutions with fair procedures.
 - Impartial, objective, unbiased, neutral, independent.
 - Discuss what each of these mean and how we bring these qualities to our decision-making.
- Final regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party.
 - What creates a conflict?
 - How can you assure that you don't have one?

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TRAINING MANDATES



- The definition of sexual harassment in § 106.30
- How to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.
- Understanding the scope of the recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
- How to serve impartially, by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Any technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

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PRE-HEARING PREPARATION



- Could include:
 - “Motions” hearing
 - Meeting of Panel
 - Review of Investigation Report
 - Review of file of “directly related” evidence that was not relied upon by investigators
 - Preparation of questions
- Must include:
 - Vetting of decision-maker/panel
 - Conflicts check
 - Recusal protocol
- What About?
 - Can you meet with investigators?
 - Should you meet with parties/advisors
 - How will you ensure rules of the hearing are followed?

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LIVE HEARING



- Final regulations mandate live hearing for higher ed.
 - Virtual hearings are permitted; do not violate due process
- Must create audio/audiovisual recording, or transcript, of hearing and make it available to the parties for inspection and review.
- Parties must attend hearing, otherwise all statements made by absent (or non-testifying) party must be excluded.
 - What are considered “statements” and what effect will this rule have?
- Decision-maker may not be Title IX Coordinator or the investigator.
 - Will there be a facilitator role? Who? What do they do?
- Must allow live cross-examination to be conducted exclusively by each party’s advisor (separate rooms still allowed).

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POLICY DEFINITIONS

- Sexual Harassment (Umbrella category)
 - Sexual Harassment (offense)
 - Quid Pro Quo Sexual Harassment
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking
- Retaliation

SEXUAL HARASSMENT POLICY



- Title IX regulations require each recipient to have an umbrella sexual harassment policy and define sexual harassment as conduct on the basis of sex that satisfies one or more of the following:
 - **QUID PRO QUO:** An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.
 - **SEXUAL HARASSMENT:** Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to the recipient's education program or activity
 - Education program or activity means employment, too!

Define **sexual assault** as (six sub offenses now):

- Sex Offenses, Forcible: Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.
 - **Forcible Rape:** Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.
 - **Forcible Sodomy:** Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (*non-consensually*) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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- **Sexual Assault With An Object:** To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (*non-consensually*) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- **Forcible Fondling:** The touching of the private body parts of another person (*buttocks, groin, breasts*) for the purpose of sexual gratification, forcibly and/or against that person's will (*non-consensually*) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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SEXUAL ASSAULT



Sex Offenses, Nonforcible: Nonforcible sexual intercourse.

- **Incest:** Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by state law.
- **Statutory Rape:** sexual intercourse with a person who is under the statutory age of consent of [age in your state].
 - This offense only applies if conduct is “consensual” with minor. If forced or against will of victim, revert to Forcible Rape definition.

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CONSENT



- Consent can be defined per state law or best practices.
 - ATIXA Model Definitions found in *1P1P* or *The Playbook*.
- Although the new regulatory definition of sexual assault is ostensibly consent based, it’s not a great analytical tool. Luckily, the wording is generic enough to permit ATIXA best practice interpretations to be fully applicable.
- Be aware that the FBI’s definition of rape (upon which the regulatory definition rests) will change again soon, likely in 2021. Your definition will have to shift then as well.
 - “carnal knowledge” coming soon to a campus sexual assault policy near you!

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Dating Violence is defined as

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant.
- The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- For the purposes of this definition,
 - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
 - Dating violence does not include acts covered under the definition of domestic violence.

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- Domestic Violence is defined as a felony or misdemeanor crime of violence committed:
 - By a current or former spouse or intimate partner of the Complainant;
 - By a person with whom the Complainant shares a child in common;
 - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
 - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
 - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].

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DOMESTIC VIOLENCE



- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates.
- The people cohabitating must be current or former spouses or have an intimate relationship.

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STALKING



- **Stalking** is defined as 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.
- For the purposes of this definition—
 - Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
 - Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
 - Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

Please, please, please, don’t interpret this to violate anyone’s First Amendment rights.

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TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR SEXUAL HARASSMENT



There has been an increasing issue of conflating discomfort or being offended with the higher standard of sexual harassment. There is a high bar for meeting this definition.

The circumstances to consider include:

- The nature, pervasiveness, and severity of the conduct.
- Whether the conduct was reasonably physically threatening.
- Whether the conduct was objectively and subjectively humiliating.
- The objective and subjective reasonable effect on the Complainant's mental or emotional state.
- Was there an effective denial of education or employment access?
- If SPOO, a discriminatory effect is presumed (proven)

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TOTALITY OF THE CIRCUMSTANCES



- Determine whether something is sex-based?
- Whether conduct was directed at more than one person.
- Whether a reasonable person would see/experience/determine the conduct to be SPOO?
 - What does it mean to be a reasonable person? Who is?
 - A reasonable person sits in the shoes of the Complainant.
- Whether the statement only amounts to utterance of an epithet that is offensive or offends by discourtesy or rudeness, and thus is not SPOO.
- Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment, which means it is not sexual harassment.

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OTHER ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION



- Though not part of the Title IX “Sexual Harassment” definition, other conduct could be prohibited under a campus sexual misconduct policy, including:
- **Sexual Exploitation**
 - Occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute sexual harassment.

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



Examples of sexual exploitation include, but not limited to...

- Invasion of sexual privacy.
- Non-consensual digital, video, or audio recording of nudity or sexual activity.
- Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity.
- Engaging in voyeurism.
- Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex).

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



- Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person.
- Intentionally or recklessly exposing one's genitals in non-consensual circumstances or inducing another to expose their genitals.
- Sexually-based stalking and/or bullying may also be forms of sexual exploitation.

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OTHER SEX-BASED MISCONDUCT OFFENSES THAT MAY BE ADDRESSED BY POLICY



- Bullying/cyberbullying.
- Hazing.
- Threatening or causing physical harm.
- Conduct which threatens or endangers the health or safety of any person.
- Discrimination.
- Intimidation.

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RETALIATION



- No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
 - Does this now apply to private colleges?
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation if it is based on more than evidence that a Respondent violated the sexual harassment policy.

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ATIXA CONSENT CONSTRUCT

- Force
- Incapacity
- Consent

CONSENT IS...



- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual or intimate activity.
- Cannot be obtained by use of:
 - Physical force, compelling threats, intimidating behavior, or coercion.
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated.

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OVERVIEW OF THE 3 CONSENT QUESTIONS



1. Was force used by the Respondent to obtain sexual access?
2. Was the Complainant incapacitated?
 - a. Did the Respondent know, or
 - b. Should s/he have known that the Complainant was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the Complainant gave the Respondent permission for the specific sexual activity that took place?

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There are four types of force to consider:

- **Physical violence** – hitting, restraint, pushing, kicking, etc.
- **Threats** – anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
- **Intimidation** – an implied threat that menaces and/or causes reasonable fear
- **Coercion** – the application of an *unreasonable* amount of pressure for sexual access.
 - Consider:
 - Isolation
 - Frequency
 - Intensity
 - Duration
- Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force

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- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent.
- Incapacitation is a determination that will be made after the incident in light of all the facts available.
- Assessing incapacitation is very fact-dependent.
- Blackouts are frequent issues.
 - Blackout = no working (form of short-term) memory for a consistent period, thus the person is unable to understand who, what, when, where, why, or how
 - But the 2a question must be answered, as blacked out individuals are able to engage in activities that may not make 2a a definitive “yes”
 - Partial blackout or “brownout” possibilities must be assessed as well

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- What was the form of incapacity?
 - Alcohol or other drugs
 - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence
 - Incapacity = an extreme form of intoxication (alcohol)
 - Administered voluntarily or without Complainant's knowledge
 - Rape drugs
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious

- First, **was the Complainant incapacitated** at the time of sex?
 - Could the person make rational, reasonable decisions?
 - Could the Complainant appreciate the situation and address it consciously such that any consent was informed –
 - **Knowing who, what, when, where, why, and how.**
- Second, **did the Respondent know** of the incapacity (fact)?
- Or, **should the Respondent have known** from all the circumstances (reasonable person)?

BEHAVIORAL CUES



- Evidence of incapacity may be taken from context clues in the relevant evidence, such as:
 - Slurred speech
 - The smell of alcohol on the breath in combination with other factors
 - Shaky equilibrium; stumbling
 - Outrageous or unusual behavior
 - Passing out
 - Throwing up
 - Appearing disoriented
 - Unconsciousness
 - Known blackout
 - Although memory is absent in a blackout, verbal and motor skills are still functioning.

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KNOWLEDGE CONSTRUCT



- The evidence might also include contextual information to analyze any behaviors by the Complainant that seem “out of the norm” as part of a determination of incapacity:
 - Did the Respondent know the Complainant previously?
 - If so, was the Complainant acting very differently from previous similar situations?
 - Review what the Respondent observed the Complainant consuming (via the report’s timeline).
 - Determine if Respondent provided any of the alcohol to the Complainant.
 - Consider other relevant behavioral cues.

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FINAL INCAPACITY ANALYSIS



- If the Complainant was not incapacitated, move on to the Consent analysis (Question #3).
- If the Complainant was incapacitated, but:
 - The Respondent did not know it, AND
 - The Respondent could not have reasonably known it then the policy was not violated for this reason. Move on to the Consent analysis.
- If the Complainant was incapacitated, and:
 - The Respondent knew it or caused it then there is evidence to determine that a policy violation occurred.
 - The Respondent could or should have known it then there is evidence to determine that a policy violation occurred.

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CONSENT



Question 3 is the Consent question:

- What clear *words* or *actions* by the Complainant gave the Respondent permission for each sexual act as it took place?
- If there are clear words or actions (by the standard of proof), there is no sexual assault. If there are no words or actions, or they are not clear, then there is no consent, and the finding is that a sexual assault occurred.
- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

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CONSENT: RULES TO REMEMBER



- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated – verbally or non-verbally – by the person withdrawing it.

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PREPARING FOR THE HEARING

PREPARING FOR THE HEARING



Always Review:

- The Respondent's written notice (NOIA) to understand all allegations.
- Review the policy alleged to have been violated.
 - Parse all the policy elements (what does it take to establish a policy violation?)
 - Identify the elements of each offense alleged.
 - Break down the constituent elements of each relevant policy.
- Review all the material carefully and thoroughly – get a general overview of the complaint.
- Review it a second time and note all areas of consistency of information.
 - You don't need additional verification or questioning on these issues, of assuming the accuracy of consistent information (but beware of suspiciously consistent stories).
- Read it a third time to identify inconsistencies in the information.
 - Here is where you will concentrate your questions.

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PREPARING QUESTIONS



- Write down the following as a reminder:
 - What do I need to know?
 - Why do I need to know it?
 - If the answer to this is not that it will help you determine whether or not a policy violation occurred and you can explain a rationale for that; then it is not something you need to know!
 - What is the best way to ask the question?
 - Who is the best person to get this information from? The investigator? A party? A witness?
- When dealing with conflicting or contested testimony apply a credibility analysis (covered later).

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PRE-HEARING MEETINGS



- Although not explicitly required or even mentioned in the Title IX regulations, it may be valuable to conduct pre-hearing meetings for each party.
- Pre-hearing meetings can provide an opportunity to:
 - Answer questions the parties and advisors have about the hearing and its procedures.
 - Clarify expectations regarding logistics, decorum, and technology (when applicable).
 - Clarify expectations regarding the limited role of advisors.
 - Discern whether parties intend to ask questions of any or all witnesses (in order to evaluate which witnesses should be invited to attend the hearing).
 - Invite parties to submit questions in advance, but don't not require it.
 - Discern any conflicts of interest/vet recusal requests.
 - Understand (and perhaps preliminarily field) any questions regarding relevance of evidence or questions.

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PREPARING FOR THE HEARING



- Dress professionally – Jeans, t-shirts, shorts, or sandals are not appropriate
- Arrive prepared and early
- Bring snacks and water/drinks
- Turn off your phone! And put it away!
- Bring a pen and paper or note-taking device
- Clear calendar after the hearing – deliberation could take 30 minutes or it could take much longer.
- Note-writing tips
 - Less is better; record what you need to make a determination.

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QUESTIONING SKILLS & GUIDELINES



QUESTIONING



- Your goal is to ensure that you understand information contained in the report:
 - Relevant facts about what happened during the incident
 - Any related events
 - Any corroborating information
- Use your questions to elicit details, eliminate vagueness, fill in the gaps where information seems to be missing.
- Your goal is not:
 - Satisfying your curiosity
 - Chasing the rabbit into Wonderland
- Do not expect the “Gotcha” moment. That is not your role. You are not prosecutorial.

IF YOU STILL HAVE TO ASK A QUESTION, ASK YOURSELF



- **Is the answer already in the report or documentation I have been provided?**
 - If not, why not? (Ask the Investigator this!)
 - You still will need to ask it again but keep the report in mind.
- **What do I need to know?**
 - Who is the best person to ask this of? Usually it will be the Investigator, first, and then the original source, if available; it may be good to ask the investigator if they asked it already and what answer they got.
- **Why do I need to know it?**
 - If it is not going to help you decide whether a policy was violated or not and you can explain how, then it is not a good question (though you may not know this until you hear the answer).
- **What is the best way to ask the question?**
- **Are you the best person to ask this question?**

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ASKING GOOD QUESTIONS



- Generally use open-ended questions (tell us..., who..., what..., how...)
- Try to avoid close-ended questions (Did you..., were you...)
- Don't ask Compound Questions
 - "I have two questions; First..., Second,..."
- Don't ask Multiple Choice Questions
 - Were you a or b?
- Avoid suggesting an answer in your question

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QUESTIONING SKILLS



- Listen carefully and adapt follow-up questions.
- Work from your prepared outline but stay flexible.
- Seek to clarify terms (when the report is silent) that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “acted weird,” “sketchy,” or “had a few drinks.”
- Be cognizant of the difference between what was “heard” (hearsay), what can be assumed (circumstantial), and what was “witnessed” (facts).
- Be aware of your own body language. Stay neutral, even if you hear something you distrust or dislike.

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QUESTIONING TIPS



- Restate/summarize what was said. Helps validate that you are listening and helps ensure you understand what is being said.
- Consider using these phrases:
 - “So it sounds like...”
 - “Tell me more...”
 - “Walk me through”
 - “Help me understand”
- Frame questions neutrally.
- Be on the lookout for “cued” responses or rehearsed or memorized answers.
- Handle emotions sensitively and tactfully.
- Observe body language, but don’t read too much into it.

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QUESTIONING ACTIVITY

QUESTIONING ACTIVITY



- After carefully reviewing the hearing packet, prepare the following:
 - Questions for the investigator
 - Questions for the Complainant
 - Questions for the Respondent
 - Questions for Witness #1 (if any)
 - Questions for Witness #2 (if any)
 - Questions for Witness #3 (if any)

QUICK TIPS ON HEARING LOGISTICS

THE HEARING: GENERAL LOGISTICS



- Recording
 - how, by whom, etc.
- Attendance by parties and witnesses
- Location and Room set-up
 - Comfort items (water, tissues, meals if needed)
 - Privacy concerns; sound machine
- Seating arrangements
- Materials
- Access to administrative support if needed (phones, copiers)
- Advisors
- Parties and witnesses waiting to testify
- Breaks
- Use of A/V
- Waiting for a decision

HEARING DECORUM



- Be professional, but not lawyerly or judge-like
 - This is not *Law and Order* – this is an administrative process at a school.
 - You are not cross-examining or interrogating, you are striving to determine whether the Respondent(s) violated the institutional policy.
- Be respectful
 - Tone, Manner, Questioning.
 - Sarcasm or being snide are never appropriate.
 - Maintain your composure: Never allow emotion or frustration to show.

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HEARING DECORUM



- Work to establish a baseline of relaxed conversation for everyone in the room.
- Maintain good eye contact; “listen with your eyes and your ears”
- Listen carefully to everything that is said.
 - Try not to write too much when people are talking
 - If questioning, focus on the answer, rather than thinking about your next question
- Nod affirmatively
- Do not fidget, roll your eyes, or give a “knowing” look to another panel member
- Do not look shocked, smug, stunned, or accusing

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THE HEARING



Tips for Hearing Officers/Decision-Makers

- Recognize the need for flexibility with the order of statements and questioning, depending on the circumstances.
- Be familiar with your institution's hearing procedures; review again before each hearing.
- If a procedural question arises that must be addressed immediately, take a short break to seek clarification.
- Will you have legal counsel available by phone/text/in person?
- Apply all appropriate institutional policies, procedures, and standards.

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THE HEARING



Hearing Testimony: The Role of the Chair/Decision-Maker

- Determine the relevance and appropriateness of questions. Pause after each question to “rule” on relevance. State your rationale for the record.
- When necessary, provide directives to disregard a question or information deemed irrelevant, abusive, or unduly repetitive.
- Manage advisors as necessary, including cross-examination.
- Maintain the professionalism of all Hearing Officers/Decision-Makers.
- Recognize your positional authority

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DECISION-MAKING SKILLS

- Understanding Evidence
- Relevance
- Reliability/Credibility
- Cross-Examination
- Analyzing the Information

UNDERSTANDING EVIDENCE



- The formal federal rules of evidence do not apply in Title IX hearings, but rules crafted by OCR for Title IX cases do.
- If the information helps to prove or disprove a fact at issue, it should be admitted.
- If credible, it should be considered.
 - Evidence is any kind of information presented with the intent to prove what took place.
 - Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly.

EVIDENCE



- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses, including experts
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered except that it must be relevant.
- Parties may have access to all gathered evidence that “directly relates” to the allegations available for reference and use at the hearing, but they must make the case for its relevance.

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ASK YOURSELF



Is it **relevant**?

Is it **reliable**?
(Is it credible?)

Will we **rely** upon it
as evidence
supporting a
rationale/the
written
determination?

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RELEVANCE



- Evidence is generally considered *relevant* if it has value in proving or disproving a fact at issue.
 - Regarding alleged policy violation and/or
 - Regarding a party or witness’s credibility.
- The investigator will have made initial relevance “decisions” by including evidence in the investigation report...
- But relevance is ultimately up to the decision-maker, who is not bound by the investigator’s judgment.
- **All** relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory.

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RELEVANCE



- If the investigator indicates an opinion on credibility, outcome, whether policy was violated, how evidence should be weighed, etc., that opinion or recommendation is not binding on the decision-maker.
- The decision-maker may consider it, but has to be objective and independent, and is free to accept or reject any recommendation of the investigator (or ask them not to make one)
 - Should you ask for it or ask the investigator to clarify their recommendations?

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UNDERSTANDING EVIDENCE



- Decision-maker may consider and assign weight to different types of evidence, when relevant and credible:
 - Documentary evidence (e.g. supportive writings or documents).
 - Electronic evidence (e.g. photos, text messages, and videos).
 - Real evidence (i.e. physical objects).
 - Direct or testimonial evidence (e.g. personal observation or experience).
 - Circumstantial evidence (i.e. not eyewitness, but compelling).
 - Hearsay evidence (e.g. statement made outside the hearing, but presented as important information).
- Decision-makers should typically disregard:
 - Character evidence (generally of little value or relevance).
 - Impact statements (typically only relevant in sanctioning).

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SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX REGULATIONS



- Evidence of the Complainant's prior sexual behavior or predisposition is explicitly and categorically **not relevant** except for two limited exceptions:
 - Offered to prove that someone other than the Respondent committed the conduct alleged, or
 - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant.
- Does not apply to Respondent's prior sexual behavior or predisposition.

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ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE IX REGULATIONS



Additional permissions required for:

- Records made or maintained by a:
 - Physician
 - Psychiatrist
 - Psychologist
- Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission.
 - This is complex in practice because you won't know to ask for permission unless you ask about the records first.

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2020 REGS: HEARING OR QUESTIONING (IN K-12)



- For IHEs, at the mandated hearing, the decision-maker must permit each party, through their advisor, to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- For K-12 schools, with or without a hearing, the decision-maker must, after the recipient has incorporated the parties' responses to the investigation report, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses.

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QUESTIONING & CROSS-EXAMINATION



- The live hearing requirement for higher education allows the parties to ask (direct and) cross-examination questions of the other party and all witnesses through their advisor.
 - Advisor of choice or an advisor provided by the institution, at no cost to the parties.
- Such cross-examination must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- Permit relevant questions and follow-up questions, including those challenging credibility. You may want an advisor to explain why they think a question is relevant or will lead to a relevant answer.
- Decision-maker must first determine whether a question is relevant and direct party to answer.
 - Must explain any decision to exclude a question as not relevant.
- Managing advisors.

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QUESTIONING & CROSS-EXAMINATION



- If the advisor seeks to ask a question that is potentially answered in the investigation report, that question should typically be permitted if relevant.
- If the question has already been answered by a witness or party at the hearing, the decision-maker or chair may deny the question as “irrelevant because it has already been answered,” or may ask the advisor why posing the question again is expected to lead to relevant evidence.

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QUESTIONING & CROSS-EXAMINATION



- If a party or witness does not submit to cross-examination at the live hearing, policy must clarify that the decision-maker(s) must not rely on any statement of that party or witness (from the investigation or hearing) in reaching a determination regarding responsibility.
 - This can be question-specific if a witness declines to answer questions about a particular statement, topic, or evidence.
- The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
 - What is an inference and how does it work?

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WHAT IS CREDIBILITY?



- Accuracy and reliability of information
- Ultimately the decision-maker's role to determine the credibility of testimony and evidence, and hence its reliability.
- "Credible" is not synonymous with "truthful"
- Memory errors, evasion, misleading may impact
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Credibility assessment may not be based on a person's status as a Complainant, Respondent, or Witness.

Sexual assault means an offense classified as a forcible or non-forcible sex offense under the uniform crime reporting system of the FBI.

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CREDIBILITY



- Inherent plausibility
 - “Does this make sense?”
 - Be careful of bias influencing sense of “logical.”
- Motive to falsify
 - Do they have a reason to lie?
- Corroboration
 - Aligned testimony and/or physical evidence.
- Past record
 - Is there a history of similar behavior?
- Demeanor
 - Do they seem to be lying or telling the truth?

*Enforcement Guidance
on Vicarious Employer
Liability for Unlawful
Harassment by
Supervisors*

EEOC (1999)

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FACTORS TO CONSIDER FOR CREDIBILITY



Corroborating evidence

- Strongest indicator of credibility.
- Independent, objective authentication.
 - Party says they went to dinner, provides receipt.
 - Party describes text conversation, provides screenshots.
- Corroboration of central vs. environmental facts.
- Not simply alignment with friendly witnesses.

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FACTORS TO CONSIDER FOR CREDIBILITY



Corroborating evidence

- Can include contemporaneous witness accounts.
 - More “separate” the witness, greater the credibility boost.
- Outcry witnesses.
 - Does what party said then line up with what they say now?
- Pay attention to allegiances.
 - Friends, roommates, teammates, group membership.
 - This can work both directions (ex. honest roommate).

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FACTORS TO CONSIDER FOR CREDIBILITY



Inherent plausibility

- Does what the party described make sense?
 - Consideration of environmental factors, trauma, relationships.
- Is it believable on its face?
- “Plausibility” is a function of “likeliness.”
 - Would a reasonable person in the same scenario do the same things? Why or why not?
 - Are there more likely alternatives based on the evidence?

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FACTORS TO CONSIDER FOR CREDIBILITY



Inherent plausibility

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
 - Could they have heard what they said they heard?
 - Were there other impediments? (darkness, obstructions).
- How good is their memory?
 - Temporal proximity based on age of allegations.
 - "I think," "I'm pretty sure," "It would make sense"

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TRIANGULATING CREDIBILITY



- One of the least used and least understood methods of assessing credibility is the triangulation method, which is rooted in abductive reasoning.
- Analysis of credibility often ignores this approach because it is less dispositive than corroboration, but it can still be enough to meet the standard of proof.
- Triangulation is simply being faced with two plausible explanations (B & C) and deciding which is the more plausible (likely) based on the fact that you know A & D to be true. Based on what you know about A & D, B is more likely than C.

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TRIANGULATING CREDIBILITY



- It's called triangulation because ABC forms a more coherent triangle than ABD, based on knowing all four data points. It's more of a stretch to draw the line from A-to-D than A-to-C.
- Triangulation has more utility when the standard of proof is preponderance, as opposed to clear and convincing evidence.
- Triangulation is the formal way of processing what leads you to determine why something is inherently plausible.
- When you determine inherent plausibility, it is because you are comparing, and deciding that B is more likely than C as an explanation or a fact to have occurred.

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FACTORS TO CONSIDER FOR CREDIBILITY



Motive to falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Think academic or career implications.
 - Also personal or relationship consequences.
- What if the allegations are false?
 - Other pressures on the reporting party – failing grades, dramatic changes in social/personal life, other academic implications.
- Reliance on written document during testimony.

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FACTORS TO CONSIDER FOR CREDIBILITY



Past record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations.
 - Even if found “not responsible,” may evidence pattern or proclivity.
- Written/verbal statements, pre-existing relationship.

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FACTORS TO CONSIDER FOR CREDIBILITY



Demeanor

- Is the party uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative.
- **BE VERY CAREFUL**
 - Humans are excellent at picking up non-verbal cues.
 - Human are terrible at spotting liars (roughly equivalent to polygraph).
- Look for indications of discomfort or resistance.
- Make a note to dive deeper, discover source

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CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS



- Under the 2020 regs, investigators may or may not assess credibility with or without rendering conclusions or making findings related to credibility but will help to roadmap where decision-makers should look for information critical to a determination.
- Language in an investigation report may look like this:
 - “Decision-makers will want to carefully review Mary’s testimony as to whether the conduct was welcome, in light of the testimony of W1.”
 - “Decision-makers may wish to focus on reconciling the testimony offered by Joe and by Witness 2 with respect to who engaged in the conduct first.”

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CREDIBILITY IN THE HEARING



- Distinguish performance/presentation skills from believability.
 - Make sure key witnesses will be present.
 - Make sure evidence has been verified.
- If any evidence/testimony must be subject to credibility assessment, and the evidence isn’t available or the witness/party does not participate, it may violate due process to consider that evidence/testimony and give it weight.
- 2020 regs are quite clear such evidence may not be considered if it relates to a statement previously made. Other evidence can be considered.
- What will the effect of that be on the process/decision?

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CREDIBILITY DETERMINATIONS POST-HEARING



- The decision-maker determines the greater weight of credibility on each key point in which credibility is at issue.
- First, narrow to the contested facts, and then make a credibility analysis (by the standard of proof) for each.
- Then, weight the overall credibility based on the sum total of each contested fact.
- Credibility exists on a 100 point scale.
- When you write the final determination letter, focus on what facts, opinion, and/or circumstantial evidence supports your conclusion. Offer a cogent and detailed rationale.

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A large red graphic occupies the bottom half of the page. It features a complex pattern of overlapping triangles and polygons in various shades of red, creating a textured, abstract background.

MOCK HEARING

MAKING A DECISION

- Deliberations
- Analyzing Information and Making Findings
- Sanctioning
- Written Determination

OVERVIEW OF THE DELIBERATION PROCESS



- Only decision-makers attend the deliberations.
 - Parties, witnesses, advisors, and others excused.
 - If Title IX Coordinator is present, they do not participate and only serve as a resource to the decision-makers.
 - ATIXA recommends they not participate. Same with legal counsel.
- Do not record; recommend against taking notes.
- Parse the policy again; remind yourselves of the elements that compose each and every allegation.
- Assess credibility of evidence and assess statements as factual, opinion-based, or circumstantial.
- Determine whether it is more likely than not that policy has been violated or determine whether highly probable if C&C standard applies.

DELIBERATIONS



General Information

- Anticipate that the panel/decision-maker must concretely articulate the rationale for and evidence supporting its conclusions.
- With a panel, the Chair must be a voting member.
- Typically, there is no specific order in which allegations must be addressed. When in doubt, start with the most serious.
- Chair should ensure that all viewpoints are heard.
- Neutralize any power imbalances among panel members, particularly based upon their position at the institution.
- Ensure an impartial decision that is free of substantive bias.

Withhold judgment until all the evidence has been considered.

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DELIBERATION



Foundation for Decisions

- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report or presented at the hearing.
- Do not turn to any outside “evidence.”
- Assess each element in the policy (e.g. intent, sexual contact, voluntary, etc.), separate it out and determine if you have evidence that supports that a violation of that element is proven. Assess evidentiary weight. Measure with the following questions:
 - Is the question answered with fact(s)?
 - Is the question answered with opinion(s)?
 - Is the question answered with circumstantial evidence?

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DELIBERATIONS



Findings, Impact Information, and Sanctions

- Separate the "Finding" from the "Sanction."
 - Do not use impact-based rationales for findings (e.g.: intent; impact on the Complainant; impact on the Respondent, etc.)
 - Use impact-based rationales for sanctions only.
- Complainant and Respondent should share impact statement(s) only if and after the Respondent is found in violation.
- Understand that the question of whether someone violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation.
- Be careful about not heightening the evidentiary standard for a finding because the sanctions may be more severe.

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SANCTIONING IN SEXUAL MISCONDUCT CASES



- Title IX and case law require:
 - Decision-maker should also decide sanction if credibility will influence the sanction
 - Not act unreasonably to bring an end to the discriminatory conduct (Stop)
 - Not act unreasonably to prevent the future reoccurrence of the discriminatory conduct (Prevent)
 - Restore the Complainant as best you can to their pre-deprivation status (Remedy)
- This may create a clash if the other sanctions only focus on educational and developmental aspects.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the Complainant and the community.

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COMMON STUDENT SANCTIONS



- Warning
- Probation
- Loss of privileges
- Counseling
- No contact
- Residence hall relocation, suspension, or expulsion
- Limited access to campus
- Service hours
- Online education
- Parental notification
- Alcohol and drug assessment, and counseling
- Discretionary sanctions
- College suspension
- College expulsion

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WRITTEN DETERMINATIONS



- Decision-maker issues a written determination regarding responsibility that includes the following:
 - Sections of the policy alleged to have been violated
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
 - Statement of and rationale for the result as to each specific allegation
 - Should include findings of fact supporting the determination and conclusions regarding the application of the policy to the facts
 - Sanctions imposed on Respondent
 - Any remedies provided to the Complainant designed to restore or preserve access to the education program or activity
 - Procedures and bases for any appeal

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WRITTEN DETERMINATIONS: LOGISTICS



- The decision-maker should author the written determination.
 - May follow a template provided by the Title IX Coordinator.
- The written determination should be provided to the parties simultaneously.
 - Follows existing VAWA/Clery requirements for higher education institutions, but now extends both to reach sexual harassment cases as well as applying to all K-12 determinations.
- The determination becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- FERPA cannot be construed to conflict with or prevent compliance with Title IX.
- Will this letter be reviewed by the Coordinator and/or legal counsel?

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MOCK DELIBERATION

APPEALS

- Elements under the 2020 Regulations
- Grounds for Appeal
- Process Flowchart
- Other ATIXA Recommendations

APPEALS



- The appeal decision-maker may be an individual or a panel.
 - Cannot be the Title IX Coordinator.
 - Cannot be the investigator or decision-maker in the original grievance process.
 - Recipient may run a pool of decision-makers who sometimes serve as hearing or appeal decision-makers
 - Recipient may have dedicated appeal decision-makers.
- When an appeal is filed, must notify the other party and implement appeal procedures equally for all parties.
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

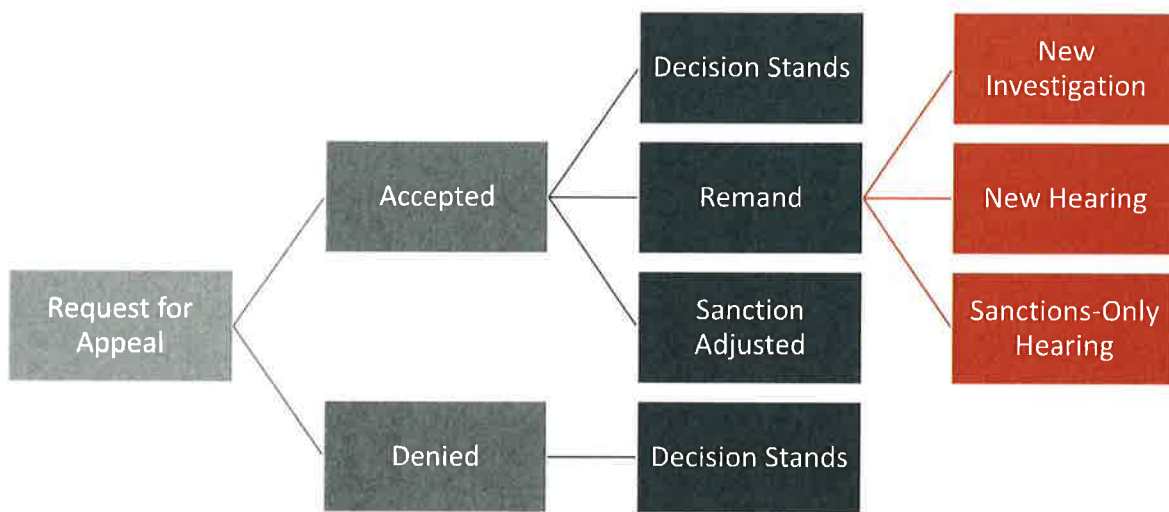
GROUNDS FOR AN APPEAL



- All parties may appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
 - Other additional bases (sanction?), as long as applied to the parties, equitably.

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APPEALS: THE PROCESS



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- One level of appeal.
- Short window to request an appeal.
 - May always grant an extension if necessary
- Document-based and recording review.
 - NOT de novo
 - In other words, not a “second-bite of the apple.”
- Deference to original hearing authority.

RECORD-KEEPING AND DOCUMENTATION

RECORD-KEEPING AND DOCUMENTATION



- Certain records must be created, retained, and available to the parties for at least **seven** years:
 - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
 - Any appeal and related result(s)
 - Any informal resolution implemented
 - Any supportive measures implemented
 - **For each formal complaint, must document the basis for why the institutional response was not deliberately indifferent**
- For each conclusion, must document the rationale for its determination
- Must document measures taken to preserve/restore access to education programs/activity

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BIAS, CONFLICTS OF INTEREST, AND RECUSAL

**Remember, you have no “side”
other than the integrity of the
process!**

BIAS

- Among the most significant problems for hearing decision-makers
- Bias can represent any variable that improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
 - Pre-determined outcome
 - Partisan approach by investigators in questioning, findings, or report
 - Partisan approach by hearing board members in questioning, findings, or sanction
 - Intervention by senior-level institutional officials
 - Not staying in your lane
 - Improper application of institutional procedures
 - Improper application of institutional policies
 - Confirmation bias
 - Implicit bias
 - Animus of any kind

BIAS AND CONFLICT OF INTEREST



- Conflicts of interest and bias are expressly prohibited in the 2020 Title IX regulations.
- Types of conflicts/bias:
 - Wearing too many hats in the process
 - Legal counsel as investigator or decision-maker
 - Decision-makers who are not impartial
 - Biased training materials; reliance on sex stereotypes
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised.
- Also, having disciplined a student or employee previously is often not enough to create a conflict of interest.

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RECUSAL



- Decision-makers may determine that they need to recuse themselves from hearing a particular case or a party might seek a decision-maker's recusal.
- This is why having an alternate decision-maker on hand is always wise.
- Your policy should define the process and circumstances by which a party may seek to recuse a decision-maker.
- Typically the Title IX Coordinator determines whether or not to honor the request.
- If you yourself discern that you are not able to hear a case impartially, please let your Title IX Coordinator know immediately.

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QUESTIONS?



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Section (b)vi

Advisor Training

8/2020

Title IX Advisor Training

August 2020

wnc.edu



POLICY STATEMENT:

Western Nebraska Community College is committed to providing an environment free from discrimination on the basis of sex and provides resources and services to assist students, faculty and staff in addressing issues involving sex discrimination. The College strictly prohibits any form of sexual harassment, which includes sexual harassment, sexual assault, dating violence, domestic violence, stalking, and retaliation (also referred to herein collectively as Prohibited Conduct). All reported incidents will be thoroughly investigated and those found responsible dealt with as necessary, whether criminally charged or handled through the College's Sexual Harassment Grievance and Investigation Procedure. Consistent with state and federal laws, this policy prohibits retaliation against a person for reporting discrimination and sexual harassment; or participating in the investigation or adjudication of such a complaint.

wnc.edu



Parties:

- **Complainant** - means an individual who is alleged to be the victim of conduct that could constitute sexual harassment based on a protected class; or retaliation for engaging in a protected activity.
- **Respondent** - means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment or retaliation for engaging in a protected activity.

Advisor means a person chosen by a party or appointed by the institution to accompany the party to meetings related to the resolution process, to advise the party on that process, and to conduct cross-examination for the party at the hearing, if any.

Steps to become an Advisor

1. Review Board Policy BP-721 Sexual Harassment (Regulatory Policy Standards)
2. Review the WNCC Sexual Harassment Grievance and Investigation Procedure.
3. Review the process flow charts.
4. Ask any questions you may have and communicate with the Title IX Coordinator, Kathy Ault, if any issues or questions arise.
5. Agree to attend future trainings as requested.

Other things to consider

- Availability
- FERPA and confidentiality
- Mandatory Dismissal
- Live hearing and cross examination
- **Relevance** - The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive. The Chair has final say on all questions and determinations of relevance. The Chair may consult with legal counsel on any questions of admissibility. The Chair may ask Advisors to frame why a question is or is not relevant from their perspective but will not entertain argument from the Advisors on relevance once the Chair has ruled on a question.

Other things to consider

- **Refusal to submit to cross-examination** - If a party or witness chooses not to submit to cross-examination at the hearing, either because they do not attend the meeting, or they attend but refuse to participate in questioning, then the Decision-maker(s) may not rely on any prior statement made by that party or witness at the hearing (including those contained in the investigation report) in the ultimate determination of responsibility. The Decision-maker(s) must disregard that statement. Evidence provided that is something other than a statement by the party or witness may be considered.
 - Appeals

Questions



Section (b)vii

Title IX Training

Presented to all staff and
faculty

8/2020

New Title IX Sexual Harassment Policy and Procedures

EFFECTIVE AUGUST 14, 2020

Today's Goals

- 1 – Announcement on May 6, 2020
- 2– New regulation effective: August 14, 2020
- 3– Procedure and Definition Changes
- 4- Mandatory Reporter Changes
- 5- New procedure (Title IX)
- 6– Questions

May 6, 2020 Announcement

On May 6, 2020, Department of Education issued a final regulation to strengthen Title IX protections for survivors of sexual misconduct and fight sexual harassment in schools.

- Provides due process protections to students and employees facing accusations of sexual harassment.
- Prescribes a transparent grievance process that includes a live hearing, as well as cross-examination.

New regulation effective: August 14, 2020

- Board Policy BP-720 Equal Opportunity Employer/Non-Discrimination
 - Presidential Procedure Appendix A-1-12
- Board Policy BP-721 Sexual Harassment (Regulatory Policy Standards)
 - Presidential Procedure Sexual Harassment Grievance and Investigation Procedure

Procedure and Definition Changes

- Definition of Sexual Harassment
- Responsible Employee
- Jurisdiction and Dismissal
 - Dismissal does not stop/preclude other institutional actions
- Advisors for both Claimant and Respondent
- Live Hearing with Cross Examination (advisors)

Mandatory Reporter Changes

Responsible Employees (Title IX) eff 8/14/2020

- The Title IX Coordinator or
- "any official who has authority to institute corrective measures on behalf of the recipient"
- Any faculty member leading, coordinating or supervising off-campus academic activities or programs such as special field trips, etc.
- See Sexual Harassment Grievance and Investigation Procedure for specific details.

WNCC Staff and Faculty

Reporting is an important tool to address Prohibited Conduct. Thus while all other employees who are not designated as Responsible Employees, they are also strongly encouraged to share any information about such conduct to the Title IX Coordinator, or designee.

New Procedure (Title IX)

- Policies and Procedures will be placed on the WNCC website and Biz Library.
- Please review them as soon as possible.

QUESTIONS

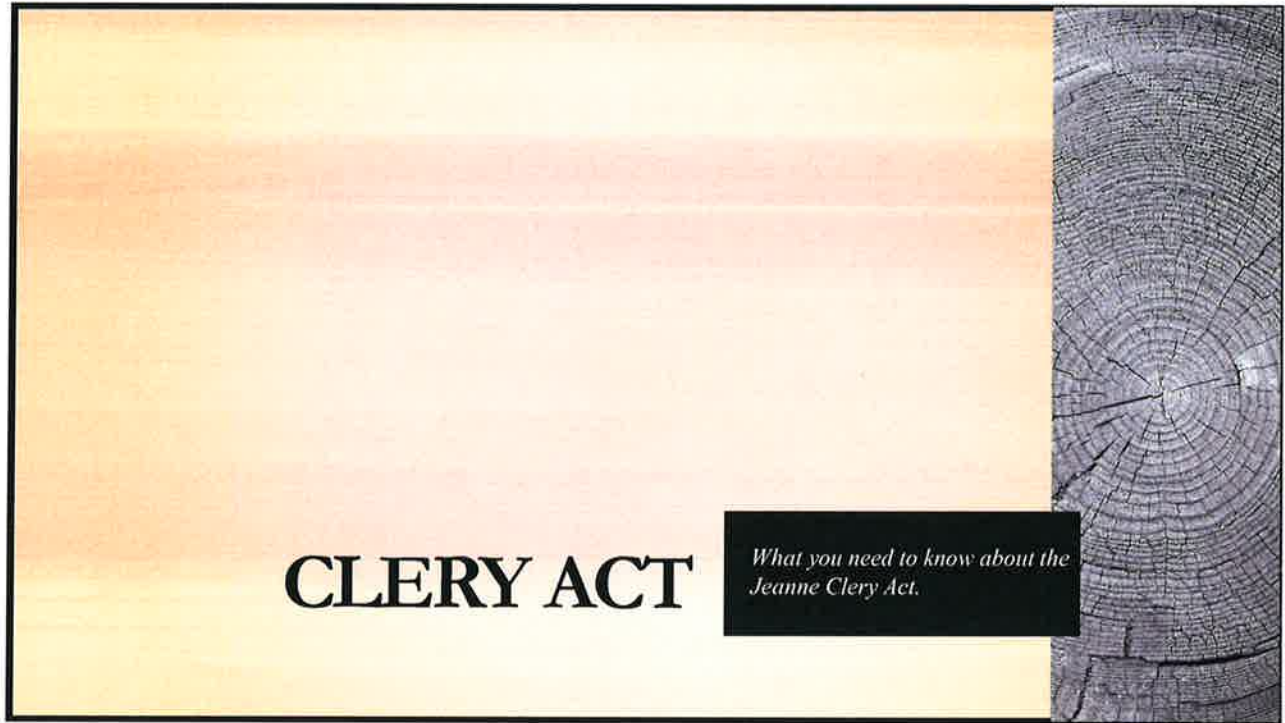


Section (b)viii

Clery Act Training

Presented to all staff and faculty

1/2021




CLERY ACT

What you need to know about the Jeanne Clery Act.

Jeanne clery

Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 USC § 1092(f))



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Why do we need this Act?

On April 5, 1986, Jeanne Clery was raped and murdered in her residence hall room, while she was enrolled at Lehigh University. In the aftermath of this event, the parents of Jeanne Clery learned students were unaware of the violent crimes that had taken place at the university.

The actions of the university signaled a lack of transparency that would result in petitioning for a systemic change.

Why do we need this act?

- This act requires colleges and universities to disclose crimes on campus and at college supported events and activities to disclose issues and violations in a timely manner;
- Report crimes occurring on all campus own, leased or rented geographic locations;
- Report on all sexual assaults, harassment and misconduct;

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Clery Requirements

- WNCC is required to collect, classify and count crime reports and statistics
 - Issues campus alerts and warning notifications;
 - Disclose missing student notification procedures;
 - Disclose procedures for institutional disciplinary actions
 - Keep a daily crime log;
 - Publish an Annual Security Report (Due October 1);
 - Submit crime and fire statistics to the Department of Education;
 - Provide educational programs and campaigns;
 - Disclose fire safety information

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Reportable information

VAWA Categories

- Dating Violence
- Domestic Violence
- Sexual Assault
- Stalking
- Title IX

Criminal Offenses

- Criminal Homicide-
 - murder, and non-negligent Manslaughter;
 - Negligent Manslaughter;
 - Sex Offenses -
 - Forcible and Non-forcible;
 - Robbery;
 - Motor Vehicle Theft;
 - Arson
- Hate Crimes –
- Arrests and Referrals for Disciplinary Action

5

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Campus security authorities

-
- Campus police
 - Security personnel
 - Individuals with security-related responsibilities.

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Geography

Clery Geography

- On campus
- Non-campus building or property;
- Public property



Southcliff Main Campus & Adjacent Properties: 1601 East 27th Street; Harmt Adams Technology Center, 2620 College Park; Conestoga Hall, 1311 East 27th Street; Pioneer Hall, 1409 East 27th Street; WNCG MWBC Building, 2617 College Park; Southcliff, NE: 17th Avenue Larkspur Drive.

Statistics - Liquor Law Violations

	On-Campus	On-Campus Housing	Non-Campus	Public Property	Total
2019	3	6	0	0	9
2018	0	25	0	0	25
2017	0	15	0	0	15

Scottsbluff Main Campus & Adjacent Properties: 1601 East 27th Street, Harms Advanced Technology Center, 2620 College Park, Conestoga Hall, 1311 East 27th Street, Pioneer Hall, 1409 East 27th Street, W NCC SWBC Building, 2617 College Park, Scottsbluff, NE; 17th Avenue Larkspur Drive,

Statistics – Title IX/VAWA (dating Violence)

	On-Campus	On-Campus Housing	Non-Campus	Public Property	Total
2019	0	1	0	0	1
2018	0	1	0	0	1
2017	0	0	0	0	0

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The Annual Security Report

To access the WNCC 2020 Annual Security Report

<https://www.wncc.edu/about-wncc/consumer-information/consumer-info-pdfs/2020-annual-safety-report.pdf>

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Non-Compliance

- Loss of Title IV Funding
- Fines

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A World of Thanks

Office of Human Resources
Environmental Health and Safety Coordinator
Office of Residence Life
Assessment & Institutional Effectiveness
Research
Office of Student Life
Office of Residence Life
Scottsbluff Fire Department
Scottsbluff Police Department
Alliance Police Department
Sidney Police Department
Sidney Fire Department



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THANK YOU

Norman Coley, Jr. ☐ 308.635.6050

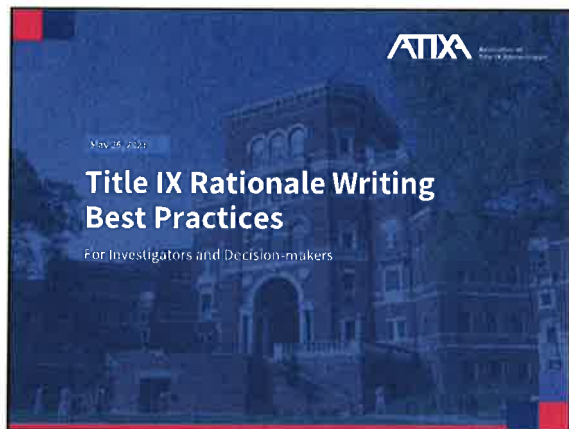
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Section (b)ix

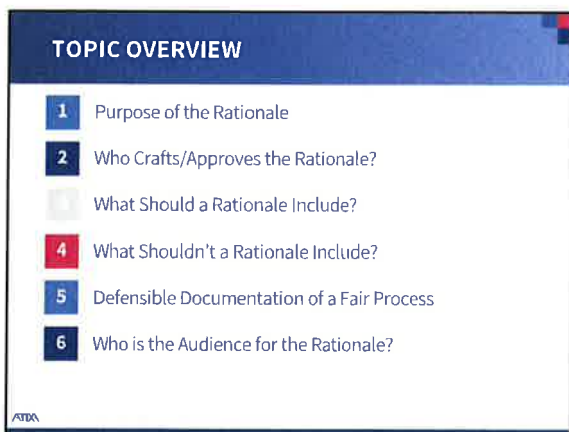
Rational Writing Course
5/2021



1



2



3

DEFINING TERMS

- The **rationale** is the basis for a decision
- In an outcome letter, the rationale includes the explanation of the basis for the finding, the final determination, and any sanctions imposed
- A **finding** is a determination that the facts occurred as alleged, by the standard of evidence
- A **final determination** (also: decision, outcome) is an application of the policy to the evidence in the case, to determine by the standard of evidence whether policy was violated
 - Yes or no question for each alleged policy violation
 - Can be the result of a hearing and/or an appeal

ATA

4

PURPOSE OF THE RATIONALE

- The rationale is either a stand-alone document or a section of a larger document:
 - Rationale for dismissal (or non-dismissal)
 - Rationale for emergency removal
 - Rationale for Investigator's recommended finding/outcome, if included within the investigation report
 - Rationale for hearing final determination and sanctions, within the hearing outcome letter
 - Rationale for appeal decision within appeal outcome letter
- When part of a letter of outcome, there will be other disclosures required by the regulations in that notice
- Rationale should clearly identify what information was used in reaching the finding and final determination, including sanctions

ATA

5

RATIONALES - 2020 TIX REGULATIONS

Required
<ul style="list-style-type: none">▪ Rationale for dismissal (or non-dismissal)▪ Rationale for hearing final determination and sanctions▪ Rationale for appeal decision
Implied
<ul style="list-style-type: none">▪ Rationale for emergency removal This rationale is implied by the regulations, since an individualized assessment must be done and can be challenged.
Permitted
<ul style="list-style-type: none">▪ Rationale for Investigator's recommended finding/outcome, if included within the investigation report If it is provided, it must be non-binding on the Decision-maker(s)

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6

RATIONALE TEMPLATE

- Summarize allegation(s)
- Include all policies potentially violated (per the Hearing Notice)
- Review evidence, then note which evidence was relied upon and which was not
 - If you are relying on evidence to make a determination, it needs to be cited in the rationale
 - Write from the premise that if you don't write it down, you will not get credit for the thoughtfulness of your analysis
 - If you did not rely on something, you need to say so, and state why

ATDA

7

RATIONALE TEMPLATE (CONT.)

- Summarize and assess credibility; make a relative credibility comparison and conclusion
- Make and explain your finding (by the standard of evidence)
- Make and explain your final determination (by the standard of evidence)
- State any sanctions imposed and the basis for choosing them
 - Include: precedent, prior history, aggravating and mitigating factors, evaluation of cumulative or collateral violations, pattern behavior, Complainant's request, etc.

ATDA

8

RATIONALE DRAFTING PROTOCOL

- Rationale for **dismissal** or **emergency removal** should be written by the Title IX Coordinator or designee (administrator who makes the decision).
 - This rationale can/should be **reviewed** (not written or rewritten) by TIXC and/or legal counsel prior to issuance
- **Hearing rationale** should be written by the Chair or Decision-maker. If more than one Decision-maker, either appoint a writer from panel, or share the writing collaboratively (not recommended).
 - This rationale can/should be **reviewed** (not written or rewritten) by TIXC and/or legal counsel prior to issuance
 - No matter what, all panel members should see, review, and sign off on final version

ATDA

9

RATIONALE DRAFTING PROTOCOL (CONT.)

- **Appeal rationale** should be written by Appeal Decision-maker. If more than one Decision-maker, either appoint a writer from panel, or share the writing collaboratively (not recommended).
- This rationale can/should be **reviewed** (not written or rewritten) by TIXC and/or legal counsel prior to issuance
- No matter what, all panel members should see, review, and sign off on final version

ATDA

10

KEEP YOUR AUDIENCE IN MIND

Write with the following audiences in mind:

- TIXC and/or legal counsel - can/should review all rationales
- The parties (and their Advisors, who are often attorneys) - receive copies of outcome letters
- The hearing Decision-maker(s) and/or Investigator(s) may see rationales from earlier or later stages in the process
- The Appeal Decision-maker - will review all rationales

Assume that you what write can/may be reviewed by parents/guardians, litigation counsel, your insurance company, OCR, reporters, judges, juries, the public, etc.

ATDA

11

BEST PRACTICE TIPS

- Write with one voice, not a committee
- All panelists should contribute to and/or review the rationale
- Don't issue dissents, or indicate what the vote was (2 to 1)
- Commonly 1-15 pages in length, depending on complexity
- Write in active voice (Ex. I determined vs. it was determined)
- If more than one Respondent, write a separate rationale for each one
- If the investigation report offers a rationale, and you simply adopt it as the final determination, it will be harder to defend the objectivity of the hearing decision

ATDA

12

BEST PRACTICE TIPS (CONT.)

- When there are multiple alleged violations, the rationale should typically flow from analysis of the broadest offense to the narrowest (rather than from most severe to least severe)
 - Include a rationale for each policy violation (if more than one)
- Ensure that the Decision-maker(s) arrive at the rationale independently and impartially. Your TIXC and legal counsel are there as guardrails, and to ask probing questions, but should not exert untoward influence on the outcome (assuming the TIXC is not a Decision-maker, though they may be for dismissals or emergency removal).

ATDA

13

CASE STUDY

Phoebe and Simon – A Bridge Too Far?

Simon and Phoebe have been dating for several months. They have been sexually active, including vaginal intercourse, multiple times. They have never discussed protection or contraception, but neither has ever used any during their sexual activities with each other. Phoebe is clear that Simon has never worn a condom during sex with her. Simon is unaware whether Phoebe has ever used any form of contraception.

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14

CASE STUDY

In discussing life goals generally, Simon has made it clear to Phoebe that he doesn't ever see himself having kids.

During all of their sexual interactions, as intercourse was headed toward climax, Simon has pulled out before ejaculating.

On the night in question, in the heat of their romantic intimacy, which had always involved missionary position consensual sexual intercourse, Phoebe instead positioned herself on top of Simon, and decided she wanted the experience of Simon ejaculating inside of her, to be as close to him as she possibly could.

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15

CASE STUDY

As their lovemaking neared climax, Simon realized he was pinned beneath Phoebe by the position, and that he was losing control. He said to her, "Wait," twice as he became increasingly distressed that he would not be able to pull out in time. Phoebe, caught up in the ecstasy of the moment, continued until Simon ejaculated inside of her.

Simon neither struggled nor physically attempted to remove Phoebe from her position or to pull his penis out before ejaculating because he realized it would be futile.

Simon became furious and broke up with Phoebe. He then filed a Title IX complaint alleging that she sexually assaulted him by forcing him to ejaculate inside of her, thus risking pregnancy that she knew he did not want.

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CASE STUDY

Phoebe responded that she was simply caught up in the moment, wanted to be close to the man she loved, did not know if she would become pregnant, and was unclear what Simon meant when he said "wait." She did not know that he was unwilling to ejaculate inside her, as they had never discussed it. She said she really didn't think about it much as she was in the throes of climax herself, but that she did not interpret "wait" as "stop," or she would have stopped.

Upon reflection, Phoebe stated to investigators that "wait" could have meant, "wait so that we can climax simultaneously," "wait, I want this to last longer," or "wait you're going too fast," but that she really did not consider what it meant in the moment.

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CASE STUDY

Simon clarified for investigators that his insistence in saying "wait" twice, plus the clear distress on his face should have made it clear to Phoebe that he meant to stop.

Phoebe responded to this evidence by stating that the look on his face was one of extreme pleasure, and that this was very clear to her. She also clarified that she was not pregnant.

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CASE STUDY

You have now been placed into a position of having to decide this matter and stating your rationale.

By a preponderance of the evidence, did Phoebe sexually assault Simon by having non-consensual sexual activity with him?

- If yes, why?
- If no, why not?

Be very clear in your reasoning.

ATIX

19

POLICY

Sexual assault, defined as:

- Any sexual act directed against another person,
 - without the consent of the Complainant,
 - including instances in which the Complainant is incapable of giving consent,

Consent, defined as:

- knowing, and
- voluntary, and
- clear permission
- by word or action
- to engage in sexual activity.

ATIX

20

ATIX Association of Trial Attorneys

Questions?

21



22



Section (b)x

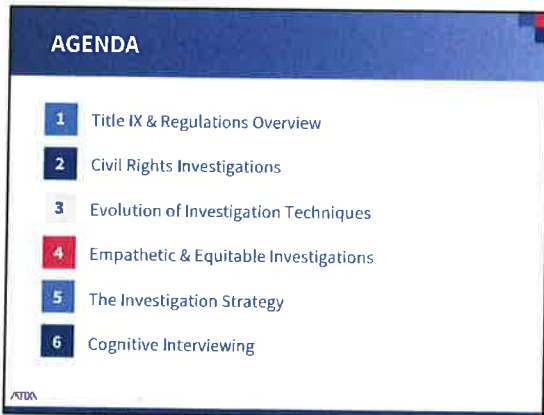
Civil Rights Investigator
Four Training
7/2021



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3

AGENDA

- 7 Rapport
- 8 Memory
- 9 Trauma Basics
- 10 Credibility
- 11 Sex and Gender-Inclusive Investigations
- 12 Interviewing Children

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4

TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

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

IX

ASTDA

5

2020 TITLE IX REGULATIONS

- Issued May 6, 2020 (Publication date May 19, 2020)
- Effective and enforceable August 14, 2020
 - Amend the Code of Federal Regs, and have force and effect of law
 - Some provisions already mandated by due process case law in some jurisdictions
 - Intervening variables (litigation and election) may impact enforcement in the shorter or longer term
 - Lawsuits against regs
- Significant, legalistic, surprisingly prescriptive, due-process heavy, and go well beyond what courts have required under 5th/14th Amendment case law

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6

NEUTRALITY AND OBJECTIVITY

- Grievance process must treat parties "equitably"
 - Must be designed to restore or preserve access to education programs
 - Must include enhanced due process protections before disciplinary sanctions are imposed
- Prohibits conflict-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or against an individual party
- All relevant evidence obtained must be **objectively** evaluated
- Mandates training on appropriate investigation, hearing, evidence, credibility, bias, conflict of interest

ATA

7

ADVISOR OF CHOICE

- Must allow Advisor to be present at all meetings, interviews, hearings
 - May not restrict who may serve as Advisor (though the Advisor has a choice in the matter)
 - May restrict Advisor participation as long as applied equally to all parties

ATA

8

ADVISOR OF CHOICE

- If a party does not have an Advisor to conduct cross-examination at hearing, the higher education institution must provide one
 - No fee or charge
 - Advisor of recipient's choice
 - May be an attorney
 - Can't be "fired" by party, but can be nullified by non-cooperation

ATA

9

BURDEN OF PROOF ON SCHOOL TO GATHER EVIDENCE

- The burden of proof and burden of gathering evidence rests with the school, not the parties
 - Recipient, not Respondent, must prove unwelcomeness or non-consent
- "Sufficient to reach a determination"
- Equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- Evidence collected by law enforcement *or any other source*
- Contracted/outsourced investigators do not absolve the school of responsibility for this provision

ATA

10

INVESTIGATION REPORT

- Regulations mandate creation of an investigation report
 - Report fairly summarizes all relevant evidence
 - What should go into a report? Hit the G.A.S.
 - **Gather** evidence
 - **Assess** credibility and relevance
 - **Synthesize** areas of dispute/agreement and all questions asked

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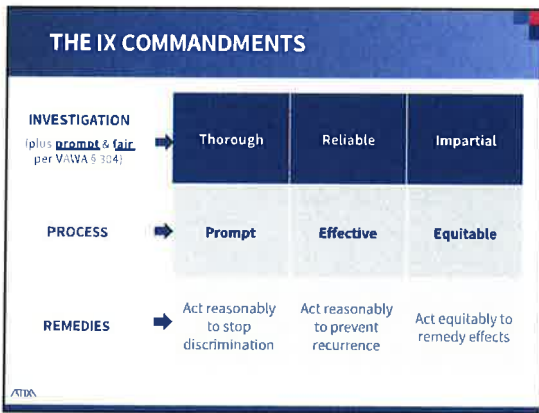
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PARTY ACCESS TO EVIDENCE/REPORT

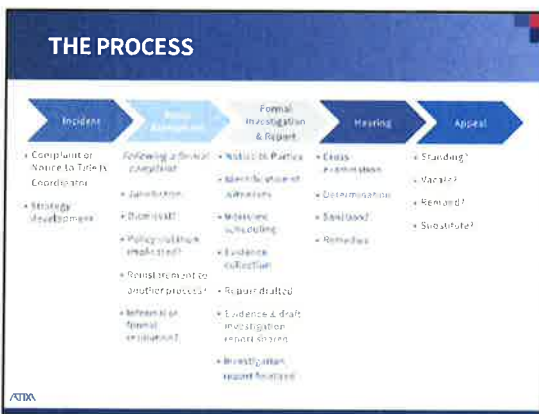
- Prior to the completion of the investigation report, all evidence related to allegations must be provided to the parties (and their Advisors, if any)
 - Parties must have at minimum of 10 days to review and submit written responses prior to finalizing investigation report
 - Parties must receive finalized report to review and submit written responses 10 days prior to hearing
 - Essential to develop a clear protocol and workflow for these steps

ATA

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14

- ### 10 STEPS OF AN INVESTIGATION
1. Receive Notice/Complaint
 2. Initial Assessment and Jurisdiction Determination
 3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
 4. Notice of Investigation and Allegations to Parties
 5. Establish investigation strategy
 6. Formal comprehensive investigation
 - Witness interviews
 - Evidence gathering
- ATDA

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10 STEPS OF AN INVESTIGATION

7. Draft report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence
9. Provide the draft report and all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
10. Complete final investigation report
 - Synthesize and analyze relevant evidence
 - Send final report to parties for review and written response at least 10 days prior to hearing

ADA

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**AS AN INVESTIGATOR,
YOU HAVE NO "SIDE"
OTHER THAN THE
INTEGRITY OF THE
PROCESS.**

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CIVIL RIGHTS INVESTIGATIONS

Investigation is the cornerstone of resolution.

- What happened?
- Who was affected?
- Stop and prevent
- Interim actions and supportive measures
- Scope, pattern, threats
- Documentation and recordkeeping
- "Not deliberately indifferent"

ADA

18

CIVIL RIGHTS INVESTIGATIONS

Investigations serve an institutional purpose, but do not serve the institution.

- Impartiality
- Transparency
- Equity
- Open and consistent communication
- Full and fair participation
- Published policy prohibitions
- Detailed procedures

ATDA

19

CIVIL RIGHTS INVESTIGATIONS

Investigations are as broad as the allegations require.

- Active identification and accumulation of evidence
- All relevant witnesses
- Evidence from all available sources
- Recommendations from parties
- Expert witnesses
- Prior substantially similar misconduct

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20

CIVIL RIGHTS INVESTIGATIONS

Investigations turn on reliable information.

- Party engagement
- Witness participation
- Corroborative evidence
- Thorough review
- Credibility assessment
- Evidentiary analysis
- Determination

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CIVIL RIGHTS INVESTIGATIONS

The best information comes from someone who feels safe and believes the process will work as promised.

- Transparency
 - Investigation's purpose
 - Potential outcomes
- Information sharing
- Consistent communication
- Reciprocity

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CIVIL RIGHTS INVESTIGATIONS

Rapport is one of the best tools for gathering reliable information.

- A relaxed interviewee (not on guard) is more forthcoming, less scripted, more introspective, and thoughtful
- Reduce anxiety
- Eliminate antagonism
- Gain trust

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CIVIL RIGHTS INVESTIGATIONS

Cognitive interviewing depends on rapport.

- "Enter someone else's world and make them feel that you understand them."
- "Speak in such a way that they enjoy listening. Listen in such a way that they enjoy speaking."
- "Build trust. Show you understand their needs and deliver on your promises."
- "If you can develop rapport, you can fill their needs and they will be able to fill yours."

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EVOLUTION OF INVESTIGATION TECHNIQUES

- Trial by Ordeal
- Wickersham Commission
- *Brown v. Mississippi* (1936)
- Moran & Scharff
- HIG Post-911 Report

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EVOLUTION OF INVESTIGATIONS

Trial by Ordeal

- Guilt or innocence of the accused was determined by subjection to dangerous or painful tests (such as submersion in water) believed to be under divine control
- Floating in water
- Carrying a hot iron
- Combat
- Open to interpretation based on what community knew about the individual

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EVOLUTION OF INVESTIGATIONS

The Third Degree

- Willful infliction of pain and suffering on criminal suspects
- 1931-32 Wickersham Commission – *Lawlessness in Law Enforcement*
- Found widespread use of the third degree
- Led to nationwide police reform of investigation and interrogation tactics

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EVOLUTION OF INVESTIGATIONS

Brown v. Mississippi, 297 U.S. 278 (1936)

- Ellington hanged, let down, hanged again, whipped
- Other defendants "laid over chairs and their backs were cut to pieces with a leather strap with buckles on it"
- All three eventually confessed
- "The rack and torture chamber may not be substituted for the witness stand"
- "Use of the confessions...as the basis for conviction and sentence was a clear denial of due process"

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EVOLUTION OF INVESTIGATIONS

Sherwood Ford Moran

- 1943 memo on interrogating Japanese POWs
- Preferred "interviewers" over "interrogators"
- Intimidating or authoritative attitude is counterproductive
- "Deep human sympathy can go with a business-like, systematic, and ruthlessly persistent approach"

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EVOLUTION OF INVESTIGATIONS

Hans Scharff

- German Luftwaffe interrogator
- Never used physical means to get information
- Seemed as if he was the prisoner's greatest advocate
- Jokes, homemade food, alcohol, swimming, tea
- POWs often offered information rather than responding to questions
- Confirmation interviewing

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EVOLUTION OF INVESTIGATIONS

UK P.E.A.C.E. Model (1990s)

- Introduction & process explanation
- Cognitive interview approach
 - Mentally re-live circumstances
 - Limited interviewer interference
 - Interviewee has greater control
- Agreement on summary of interview
- Final comments and thoughts
- Understanding of next procedural steps

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EVOLUTION OF INVESTIGATIONS

High-Value Detainee Interrogation Group 2016 Report

- Conducive context
- Develop and maintain rapport
- Elicit narratives, open-ended questions
- Assist memory recall
- Funnel questioning strategy
- Encourage highly detailed responses
- Strategically introduce evidence or information

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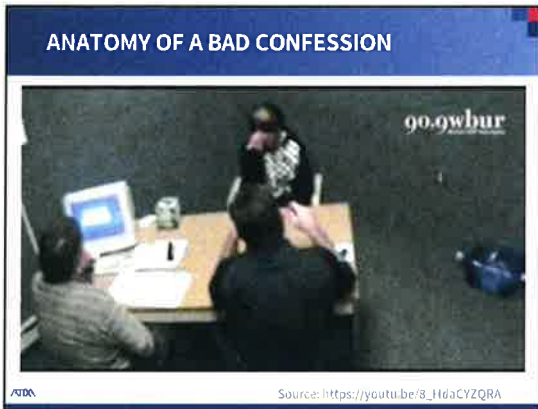
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INTERVIEW CRITIQUE

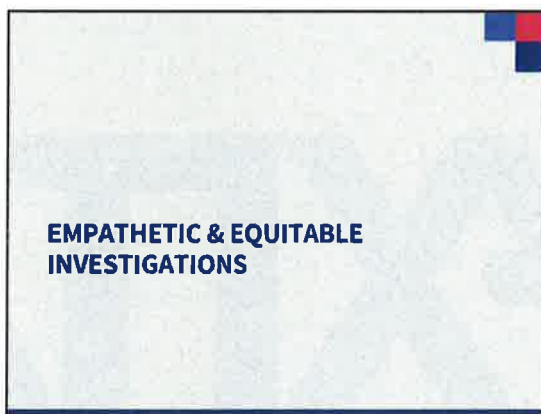
Watch the interview. → What's good? What's not so good? → Discuss.

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DUE PROCESS

Fairness in...

- The investigation
- Supportive measures
- Interim actions
- Interviews
- Access to information and evidence
- Determination/Outcome

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INTERVIEWING

- Remember this same story may have been repeated to multiple individuals
- Focus on what you need to know
- Plan strategic approach to interview
- Do your homework
- Communicate roles, expectations, purpose, timeline
- Develop questions ahead of time
- Strategize for breaks, pauses, Advisor conversation
- Choreograph interview start and conclusion

ATA

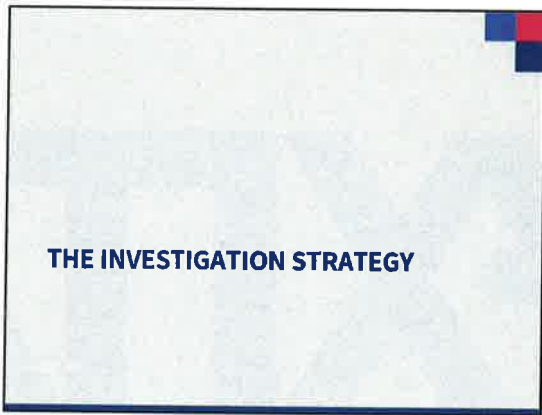
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STRATEGIZE

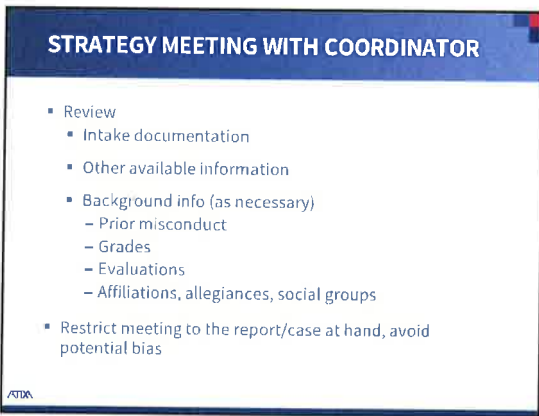
- How you will...
 - adapt to trauma indicators
 - build rapport with interviewee
 - assist in memory recall
 - test/assess credibility
 - evaluate and test evidence
 - handle disruptive Advisors
- Communication with co-investigator

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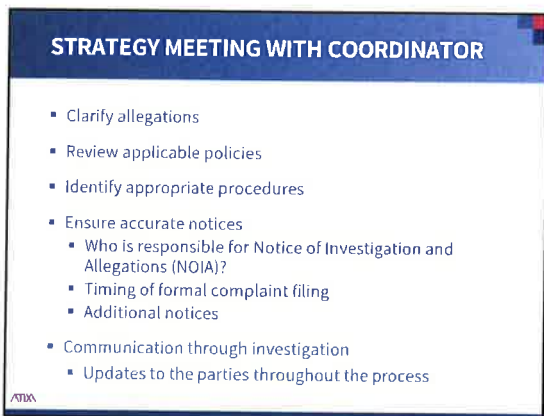
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STRATEGY MEETING WITH COORDINATOR

- Clarify roles & responsibilities
- TIXC as investigation supervisor
 - Information sharing restrictions
 - TIXC filling additional process role
 - Contact for Advisors
- Who schedules interviews?
- What should investigator refer or defer to TIXC?

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STRATEGY MEETING WITH COORDINATOR

- Identify implicated policy provisions
- Distill into models of proof
- Define scope of investigation
- Identify interview goals
- Identify potential obstacles/challenges
- Pattern and/or predation considerations
- Culture and/or climate investigations

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STRATEGY MEETING WITH COORDINATOR

- Establish preliminary investigation timeline
- Develop initial witness list
- Order of interviews
- What information is needed?
- What information is available?
- Anticipate allegiances
- Disrupt collusion potential

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STRATEGY NOTE: DISABILITY CONSIDERATIONS

- Are there accommodations needed per the disability services staff (based upon received documentation)?
- Are appropriate communication services available?
- Does the plan accommodate for extra time if needed?
- Are materials accessible in a way that meets known or potential needs?
- Supportive measure availability
- Allowance of additional support persons (and equitable reciprocation)

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STRATEGY MEETING WITH COORDINATOR

- Post-strategy meeting, there should be a plan
- TIXC confirms details in writing
- Investigator develops investigation plan
- Avoid material deviations
- Communication to parties

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STRATEGY EXERCISE

1. Read the intake report.	2. Review institutional procedures.	3. Identify important items to clarify with TIXC.
4. Identify facts central to the allegations.	5. Develop an initial witness list.	6. Plan initial interview order and schedule.

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STRATEGY EXERCISE

A former student of mine, Reese Smith, is harassing me and I am fearful for my safety. I have told him repeatedly to stop contacting me, but he keeps parking in front of my apartment and just watching it. He also waits for me after my classes and tries to talk to me. Reese and I met when I took a group of students to England on a study abroad trip last year for my Shakespeare class. On these trips, the group is small (around 10 people) and we all get very close to each other after spending days and evenings together. Reese and I became very close on the trip. It began as flirting on the flight to England and continued in my room one night. One evening Reese came to my hotel room to talk about a writing project for our course. I was winding down after a long day of touring and was enjoying a glass of wine.

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STRATEGY EXERCISE

I offered him one and he accepted. We worked through his outline for his paper and maybe had a few more glasses of wine. One thing led to another and we ended up having sex that night. We have continued to see each other over the past year when we could, even at my apartment when my roommates were out. There was a very strong attraction between us. He even took my Renaissance Literature class last spring so that we could see each other more often. You need to know I have a boyfriend from home and I told Reese about it. I said we needed to keep our relationship casual. Over the summer I was approached by the head of the English Department about applying for a tenure track teaching position. I was fearful the Department would find out about Reese and it would jeopardize my chance for the position.

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STRATEGY EXERCISE

I decided to break it off with Reese last month and told him we could not meet up anymore. I thought I had made it clear this was just fun and games, but he went ballistic and threatened to tell my boyfriend. He wants an explanation, but I don't want to tell him about the job because I'm afraid he will use that to hold over my head. For the past month, he has sent me endless numbers of texts, and e-mails, drives past my apartment, sits in front of my apartment in his car, stands outside my class, and then yesterday I looked out and he was in the English Department office while I was talking with the Dean! I was so upset I couldn't concentrate. You should also know that two tires on my car were slashed, I don't know what to do. Can I keep my name out of this and just have someone talk to him? I don't want anyone else to know about it, but I want him to stop harassing me.

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STRATEGY EXERCISE

1. Read the intake report	2. Review institutional procedures	3. Identify important items to clarify with TDC
4. Identify facts central to the allegations	5. Develop an initial witness list	6. Plan initial interview order and schedule

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INTERVIEWING CONSIDERATIONS

- Investigator bias
 - Approach to students, hourly employees
 - Stereotypical gender combinations
 - Sexual practices
- Cultural considerations
 - Presumptions attached to race, orientation, gender, religion
 - Teams, clubs, affiliations
 - Courting rituals
 - Communication, deception, rapport

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INTERVIEWING CONSIDERATIONS

- The Spiel
 - What information is required?
 - What information do they need?
 - Process
 - Role, expectations
 - Retaliation, amnesty
 - What would be helpful?
 - Clarify information source
 - Don't filter language
 - Anticipate reluctance, fear

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INTERVIEWING CONSIDERATIONS

- Prepare questions, but let them talk
 - Open-ended narratives
- Listen for answers before additional questions are posed
 - Actively update list of questions
 - Note discrepancies or follow-up
- Active listening skills
 - Eye contact, head nodding, summarization
 - Avoid distractions (watch, computer, notes, phones)
- Questions posed by other parties

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COGNITIVE INTERVIEWING

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THE STANDARD INTERVIEW

- Interviewers briefly established rapport with the witness
- Open-ended questions
- Narrative answers
 - "Tell me what happened"
- Direct questions that focus on details
- Neutral delivery
- Little effort to facilitate memory recall
- Passively waiting for questions to answer
- Linear questions track anticipated sequence of events

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THE STANDARD INTERVIEW

- Reduces amount of information collected
 - Witnesses withhold information
 - Witnesses do not provide unsolicited info
 - Answers tend to be abbreviated
 - Witnesses may provide answers of which they are unsure
- Tends to disrupt the natural process of memory searching

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COGNITIVE INTERVIEWING TECHNIQUES

- Based on:
 - Scientifically derived principles of memory and communication theory
 - Extensive analysis of law enforcement interviews
- Increases the amount of relevant information gathered
- Decreases the likelihood of recalling an event incorrectly
- Originally developed for use with victims and witnesses but since expanded

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COGNITIVE INTERVIEWING

- Interview v. interrogation
- Focus on collecting best information
- The value of rapport
 - Willingness to talk openly
 - Reduced anxiety about sensitive subjects
 - Sexual misconduct creates defensiveness, mistrust
 - Reduced sense of feeling "judged"
 - Lowered defenses
- The Lies Children Tell

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QUESTIONING

Following v. Leading Explaining v. Defending

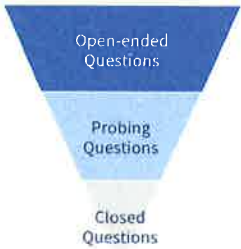
Clarifying v. Challenging Curiosity v. Suspicion

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QUESTIONING

- Funnel questioning technique
 - Open
 - Probing
 - Closed
- Open-ended questions invite a narrative
 - "What happened when..."
 - "Where did you go..."
 - "How would you describe..."

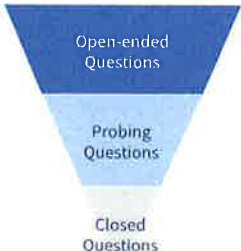


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QUESTIONING

- Probing focuses on areas of importance
 - Flesh out extra details
 - Explore motivations and intentions
- Closed questions establish and reestablish testimony
 - Test with repetition
 - Draw out disputed testimony



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SEQUENCE

<u>Introduction</u>	<u>Transfer Control</u>	<u>Probe</u>	<u>Recall</u>
<ul style="list-style-type: none">Used to develop rapportInform re: the processEstablish baseline communication expectationsReinstatement of the context	<ul style="list-style-type: none">Witness directs the interviewActive participationVolunteer information	<ul style="list-style-type: none">Identify central issuesExplore factual detailFunnelTriangulateCorroborate	<ul style="list-style-type: none">Facilitate recallVerbal and non-verbal expressionsSensory explorationExtensive detail

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FOLLOW-UP

- Probe scenes and images
 - Go to the scene to jog recall (careful of re-traumatizing)
- Recall of one detail can trigger recall of others
- Ask for information repeatedly using varied methods
 - Different perspectives
 - Different chronology (reverse order)
 - Facts, feelings, observations

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FOLLOW-UP

- Describe the event from a different physical or conceptual perspective
- Can you describe this from Annie's point of view? Put yourself where Annie was standing ... describe what she saw,
- Draw a picture or review photos/schematics

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FOLLOW-UP

- Jog recall through senses, not an event narrative:
 - "Are there specific scents or smells...?"
 - "Are there specific sounds (music, noise, snoring, dialogue, sirens, phones, texts, etc.)...?"
 - "Are there specific tastes ...?"
 - "Are there specific tactile (touching) experiences ...?"
 - "Are there specific sights or things you see ...?"

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FOCUS ON SPECIFICS

- Deep dive into detailed recall
- Review
- Check for accuracy and consistency
- Read notes back
- Correct errors or omissions
- New recollections or details
- Clarify contradictions or ambiguities

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CLOSE


- Contact you if they have new information
- Extends the life of the interview
- May result in more/better detail
- Anything else to add?
- Any individuals we should talk to?
- Any specific questions we should ask?

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CONSIDERATIONS

- This method requires the interviewer to essentially take the witness back to the scene
- Raises concerns of re-traumatization
- Interviews will likely take more time - schedule accordingly
- Consider explaining the interview approach
- Improves promptness of process
- Two investigators - the person asking questions must focus and stay with the witness during the recall process



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RAPPORT



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BUILDING RAPPORT

- Interviewer comfort level
- Self-awareness - personal prejudice/bias
 - Self-diagnosis
 - Self-correction
 - Self-improvement
- Trappings of authority
 - "Me" wall
- Proximity



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ETHICAL CONSIDERATIONS

- Dignified approach v. friendship
- Understanding v. agreeing
- Sympathy v. empathy
- Maintaining neutrality
- Practice active listening statements
 - "I understand" instead of "that makes sense"
 - "I know this is difficult" instead of "I'm sorry"

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PRACTICAL CONSIDERATIONS

- Dress
- Location
- Taking notes
- Recording
- Responses to emotion
- Length
- Breaks
- Entry/exit
- Buffer time

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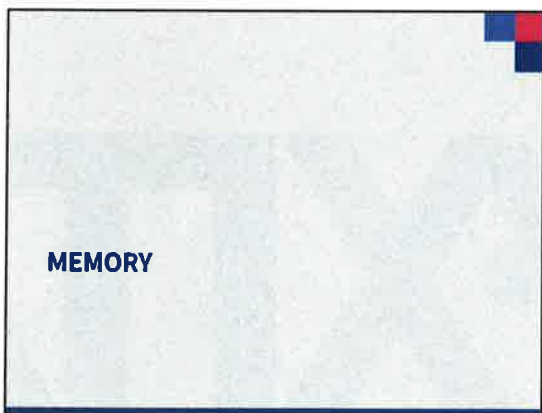
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DIFFICULT WITNESSES

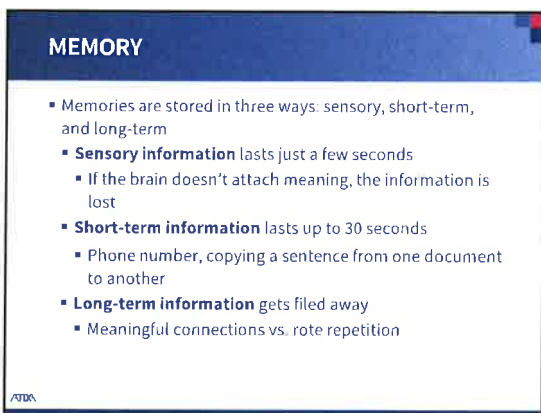
- Collaborative interviewing
- Mirroring
 - "Help me understand"
- Review of factual evidence
- Accept what is shared
- Highlight conflicts
- Draw out contradictory statements
 - "Make this make sense for me"
- The Columbo approach

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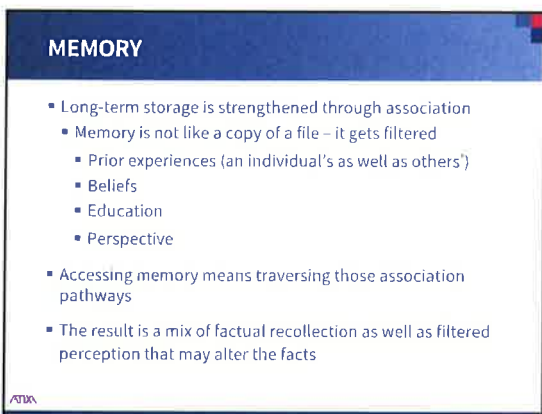
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MEMORY AND TRAUMA

- Trauma may cause the brain to block access
- When an event is too painful, information is still stored
- Access may be hindered or prohibited out of self-preservation
- Trauma-informed interviewing techniques lower the brain's defensive measures
- When the interviewee is in a safe environment, the brain is more willing to access and experience traumatic memories

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MEMORY AND TRAUMA

- Traumatic memories are highly filtered
 - Self-blaming
 - "Maybe I was too friendly"
 - "I dressed cute because I wanted to look professional – maybe I gave them the wrong impression"
 - Normalization
 - Engaging in subsequent consensual behaviors
 - Acting as though nothing is wrong
 - Lack of recall
 - Denial
- Trauma can impact complainants, respondents, and witnesses

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RECALL

- Repeated recollection can strengthen recall and improve accuracy
- Access pathways literally thicken
- CAUTION: holistic recall will yield far more accurate information
- Isolated questioning on critical moments will yield a larger variation of factual information mixed with perception
- Context improves accuracy
- Focus on broader recall, including innocuous details
- Use techniques to repeat events in different order, from different perspective

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QUESTIONING

- Be empathetic, but don't avoid repetition
- Tailor questions to take in the whole incident, not just pivotal moments
 - May require delaying closed-ended or funnel questioning
- Tie critical details to nonessential ones for continuity and improved factual accuracy
- Make space and time for recall to occur organically

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INTERVIEW EXERCISE

<p>Step 1</p> <p><u>Interviewee</u> Review the circumstances prompt.</p> <p><u>Interviewer</u> Read the interview outcomes sheet.</p>	⇒	<p>Step 2</p> <p>Do not share details from your respective prompts.</p> <p><u>Interviewer</u> Conduct interview and take notes related to interview outcomes sheet.</p>	⇒	<p>Step 3</p> <p><u>Interviewee</u> What helped, what hindered, what distracted, etc.</p> <p><u>Interviewer</u> What approaches did you use, effective/not effective, etc.</p>
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TRAUMA BASICS

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TRAUMA

- Brain responds to threat with defense cascade—not conscious decision making—beginning with freeze, which serves two purposes:
 - First: attempt to hide from detection, avoid threat/predator; done as an evolutionary reaction, not a conscious strategy or logically determined decision
 - Second: assess threat in preparation for response. (Pre-frontal cortex re-engages if assessment indicates threat has passed. Otherwise, the defense cascade continues.)

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TRAUMA

- Habitual behavior
 - Characterized by habitual (simplistic) speech/thoughts. The brain is not problem solving for speech or thoughts, rather, prioritizing the defense cascade.
 - Conflict/confusion between attachment circuitry and defense circuitry
 - When the first has been stimulated, the latter is less active. This delays defense engagement when the situation changes to threatening.

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TRAUMA

- Immobilization may occur due to three reactionary brain processes: dissociation, tonic immobility, and collapsed mobility
 - **Dissociation:** disconnection from body and experience; a reflex when escape is not a perceived possibility
 - **Tonic immobility:** inability to move or talk; often after a struggle or failed attempt to flee
 - ("I tried to fight, but I couldn't")

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TRAUMA

- **Collapsed mobility:** inability to move or talk; decrease in heart rate, of muscle tone
 - Some may describe "pretending to sleep" but it was not actually a conscious decision
 - May result in fainting
 - Offset is more gradual than with tonic

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LONGER TERM

- Hyper vigilance
- Sensitivity to triggers and re-traumatization
- Lower sense of safety
- Unreliable/decreased assessment of threat
- Brain reacts to threat
 - Material threat or re-experienced/triggered
- The brain is not just impaired by traumatic events; the complex processing is altered

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TRAUMA

- Recipients have worked to account for trauma in resolution processes with mixed success
- Some tendency to over- or under-compensate
 - Difficulty with recollection
 - Mixed up chronology
 - Absent or vague memory
 - Emerging memories
 - Variation in testimony or conflicting details
 - Total lack of recall
- *Doe v. Syracuse* (2019)

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TRAUMA-INFUSED

- "Trauma-infused" practices serve to better understand and communicate/interview
- Signs of trauma and related speech/actions should not be used to prove or disprove statements made by an interviewee
- The presence of trauma symptoms does not establish credibility
- The absence of "typical" signs does not equate to deception

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TRAUMA-INFUSED

- Infusion of trauma-informed practices should inform investigators' approach
 - Understand what you're observing and why
 - Interview location and setup
 - Plan for use of time, breaks
 - Questioning strategy and techniques
 - Assessment of credibility
- This is not intended to diagnose or label behaviors
- Strictly avoid clinical classification and use descriptive verbiage in notes/reports

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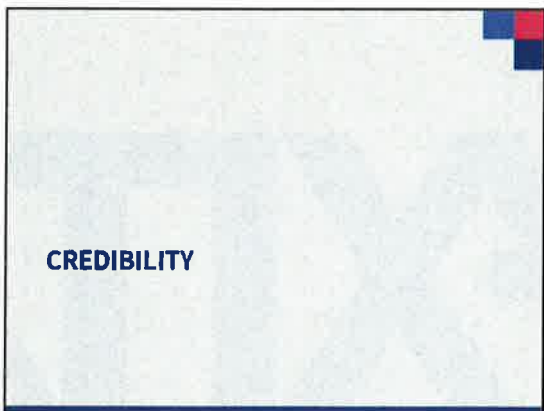
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RECALL AND CUES

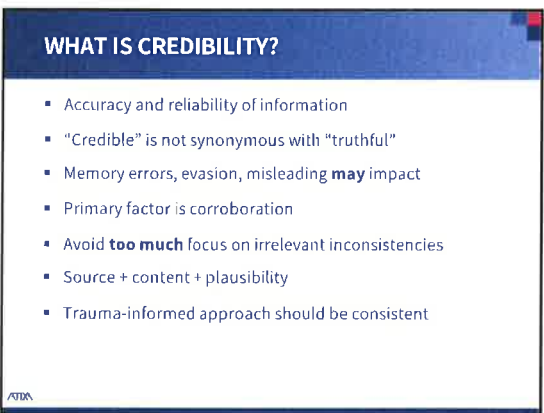
- Memory
- Time perception
- Layers, gaps, delay
- Central vs. peripheral details
 - Perception of the individual, not any tangible standard
 - Not encoded in the brain the same way, some details are recalled while others may be lost, never encoded at all, or may even change/develop over time.
- Sensory cues

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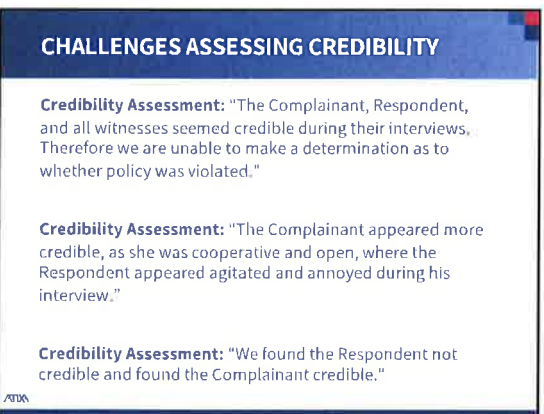
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DOE V. BAUM
903 F.3d 575 (6TH CIR. 2018)

- If a student at a public university is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension; and when the university's determination turns **on the credibility** of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination.
- If **credibility** is in question and material to the outcome of a university student disciplinary proceeding, due process requires cross-examination.
- See also - *Doe v. University of Cincinnati*, 872 F.3d 393 (6th Cir. 2017).

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HAIKAK V. UNIVERSITY OF MASSACHUSETTS
933 F.3d 56 (1ST CIR. 2019)

- "The [Sixth Circuit] took [its] conclusion one step further than we care to go, announcing a categorical rule that the state school had to provide for cross-examination by the accused or his representative in all cases turning **on credibility determinations**."
- If the school chooses to question the accuser in place of the accused, it must sufficiently probe **the credibility** of the accuser and the accusations.
- No reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.
- Interrogation of the accuser by an independent fact-finder may be enough to satisfy the guarantee of due process.

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101

2020 TITLE IX REGULATIONS

- For higher education institutions, at the mandated hearing, the decision-maker must permit each party, through their Advisor, to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- For K-12 schools, with or without a hearing, the decision-maker must, after the recipient has incorporated the parties' responses to the investigation report, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses.

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COMMON ERRORS IN ASSESSING CREDIBILITY

- Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety
- Misplaced emphasis on inconsistency of information provided by an interviewee
 - Research shows truthful memory recall includes the natural omission or subsequent recollection of details
- Confusion about memory
 - Stress and emotion may lead to enhancement of memory or to the disruption of encoding and retrieval processes

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COMMON CREDIBILITY ASSESSMENT ERRORS

- Misplaced focus on the status of the parties
 - No scientific studies support the notion of neurobiological response differences between perpetrators and victims
- Bias in interviews
 - Presumptions of guilt can influence credibility assessments

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RESEARCH FINDINGS

- "Liars" experience greater cognitive overload
- Truth tellers can generally provide more detail/information than "liars"
- "Liars" prepare for questions they anticipate
- "Liars" develop a relatively fixed narrative that they can provide consistently
- Interview tactics that leverage differences in cognitive processing and strategy use between "liars" and truth tellers
- Verbal cues and elicitation of verifiable details are most diagnostic of credibility

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INTERVIEW TACTICS

- Reverse Chronological Order
- Use of a Model Statement
- Asking unexpected questions
- Asking the individual to recall information in unexpected ways (e.g., sketch)
- Asking interviewees for details that the investigator can check
 - Truth tellers generally add more "checkable" details
 - Liars provide details that are difficult to verify
- The Funnel

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CREDIBILITY

- Inherent Plausibility**
 - "Does this make sense?"
 - Be careful of bias influencing sense of "logical"
- Motive to Falsify**
 - Do they have a reason to lie?
- Corroboration**
 - Aligned testimony and/or physical evidence
- Past Record**
 - Is there a history of similar behavior?
- Demeanor (use caution!)**
 - Do they seem to be lying or telling the truth?

*Enforcement Guidance
on Vicarious Employer
Liability for Unlawful
Harassment by Supervisors*

EEOC (1999)

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FACTORS TO CONSIDER FOR CREDIBILITY

- Inherent Plausibility**
 - Does what the party described make sense?
 - Consideration of environmental factors, trauma, relationships
 - Is it believable on its face?
 - "Plausibility" is a function of "likeliness."
 - Would a reasonable person in the same scenario do the same things? Why or why not?
 - Are there more likely alternatives based on the evidence?

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FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
 - Could they have heard what they said they heard?
 - Were there other impediments? (e.g., darkness, obstructions)
- How good is their memory?
 - Temporal proximity based on age of allegations
 - "I think," "I'm pretty sure," "It would make sense"

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FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Think academic or career implications
 - Also personal or relationship consequences
- What if the allegations are false?
 - Other pressures on the Complainant – failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

ATAA

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

- Strongest indicator of credibility
- Independent, objective authentication
 - Party says they went to dinner, provides receipt
 - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

- Can include contemporaneous witness accounts
 - More "separate" the witness, greater the credibility boost
- Outcry witnesses
 - Does what party said then line up with what they say now?
- Pay attention to allegiances
 - Friends, roommates, teammates, group membership
 - This can work both directions (e.g., honest roommate)

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TRIANGULATING CREDIBILITY

- One of the least used and least understood methods of assessing credibility is the triangulation method, which is rooted in abductive reasoning.
- Analysis of credibility often ignores this approach because it is less dispositive than corroboration, but it can still be enough to meet the standard of proof.
- Triangulation is simply being faced with two plausible explanations (B & C) and deciding which is the more plausible (likely) based on the fact that you know A & D to be true.
- Based on what you know about A & D, B is more likely than C.

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TRIANGULATING CREDIBILITY

- It's called triangulation because ABC forms a more coherent triangle than ABD, based on knowing all four data points. It's more of a stretch to draw the line from A-to-D than A-to-C.
- Triangulation is more helpful when the standard of proof is preponderance, as opposed to clear and convincing evidence.
- Triangulation is the formal way of processing what leads you to determine why something is inherently plausible.
- When you determine inherent plausibility, it is because you are comparing, and deciding that B is more likely than C as an explanation or a fact to have occurred.

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FACTORS TO CONSIDER FOR CREDIBILITY

Prior Record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
 - Even if found "not responsible," may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship
- Use caution; past violations do not mean current violations

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FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

- BE VERY CAREFUL
 - Humans are excellent at picking up non-verbal cues
 - Humans are terrible at spotting liars
- Is the party uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source

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OTHER FACTORS

- Credentials and expertise – established
- Neutrality
- Sobriety
- Continuation of the behavior
- Previous, similar, good faith allegations

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MAKING CREDIBILITY ASSESSMENTS

- Look at consistency of story – substance and chronology of statements,
- Consider inherent plausibility of all information given.
- Is the evidence provided consistent with other credible evidence?
- Look for the amount of detail (facts) provided. Factual detail should be assessed against general allegations, accusations, excuses, or denials that have no supporting detail,
- Pay attention to non-verbal behavior, but do not read too much into it

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CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

Regulations permit investigators to make credibility recommendations which can serve as a roadmap for Decision-maker but are not binding

- NOT GOOD
~~"The decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons..."~~
- GOOD
"Mark's testimony about X contradicts Mariana's testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana's testimony, not Mark's, during the investigation."

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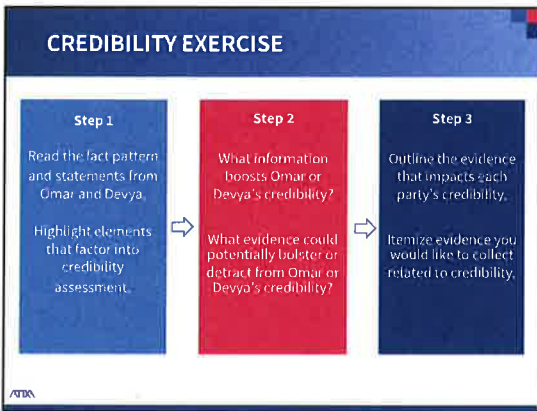
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CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

- Point the decision-maker without analysis or weighting
 - "Decision-makers will want to carefully review Mary's testimony as to whether the conduct was welcome, in light of the testimony of WL."
 - "Decision-makers may wish to focus on reconciling the testimony offered by Joe and by Witness 2 with respect to who engaged in the conduct first."

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CREDIBILITY EXERCISE

Omar and Devya have been friends since freshman year. Devya texted Omar and they met up at Devya's apartment before a party one weekend and did several shots. Devya felt comfortable with Omar because he was openly gay, and she asked him to help her pick her outfit for the evening, taking her clothes off in front of him multiple times as she tried different combinations. Omar would pull on and adjust her clothes as he considered each outfit, but Devya wasn't bothered by the physical contact, even when he pressed her breasts together to try to improve the appearance of her cleavage in one shirt.

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CREDIBILITY EXERCISE

When they got to the party, Devya lost track of Omar for a bit. She was happy to find him a little later, and they had fun dancing. Devya said Omar "grinded" on her, which was fine, but then he started putting his hands on her and groping her, which she was not okay with. They had danced together before, but this night felt different to her. Devya said Omar was much more drunk than she had ever seen him, and even though she continued to pull his hands away from her he wouldn't stop touching her body, including grabbing her breasts. Devya could feel Omar's erect penis through his pants when he rubbed against her.

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CREDIBILITY EXERCISE

At one point, Devya took Omar's hands into hers so they would be off her body, shouted "stop!" and they danced while holding hands. After a little bit, he put his hands back on her and rubbed her butt and started pretending to spank her. He wasn't hitting her hard, and it was clear he thought it was funny, but she didn't. She took his hands in hers and started dancing again. After a few minutes, a friend came up to Devya and asked if she was okay because she looked upset. Devya and her friend left the dance floor and her friend drove Devya home. During the drive, the friend mentioned that she saw what Omar was doing and that he seemed out of control. Devya talked to the same friend a little the next day, and they agreed that Devya should report Omar.

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CREDIBILITY EXERCISE

Omar denies the allegations. He agrees with Devya's account of the evening but does not remember the groping and grinding. He just remembers them dancing and having fun, and said that they were both touching each other, but "just in a fun, playful way." Omar doesn't remember Devya's friend, he just remembered that all of a sudden, Devya was gone. He texted to see where she went, but she never responded. Omar agrees that he drank a lot, but says he remembers the whole evening and thinks Devya is blowing it out of proportion. "Plus," he says, "I'm gay."

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CREDIBILITY EXERCISE

One of Omar's texts to Devya from after the party said "Hey, where did you go? We were having sooo much fun. Want to grab sushi tonight?" Devya wants Omar to understand what he did is wrong. He was out of control and he made Devya feel like a piece of meat with no control over her own body. She wants Omar to stay away from her.

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CREDIBILITY EXERCISE

Step 1 Read the fact pattern and statements from Omar and Devya. Highlight elements that factor into credibility assessment.	⇒	Step 2 What information boosts Omar or Devya's credibility? What evidence could potentially bolster or detract from Omar or Devya's credibility?	⇒	Step 3 Outline the evidence that impacts each party's credibility. Itemize evidence you would like to collect related to credibility.
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SEX AND GENDER-INCLUSIVE INVESTIGATIONS

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TERMINOLOGY

- **Sex:** references chromosomes, hormones, reproductive organs, and genitalia
- **Gender:** refers to the attitudes, feelings, and behaviors that a given culture associates with biological sex
- **Gender Identity:** internal sense of gender
- **Gender Expression:** outward expression of gender, often through clothing, behavior, posture, mannerisms, speech patterns, and activities
- **Sexual Orientation:** attracted to sexually or romantically, on a continuum (e.g., gay, lesbian, bisexual, heterosexual, asexual, and pansexual)

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TERMINOLOGY (CONT.)

- **Cisgender:** Denoting or relating to a person whose sense of personal identity and gender corresponds with their sex assigned at birth
- **Transgender:** Denoting or relating to a person whose sense of personal identity and gender does not correspond with their birth sex. A trans male has transitioned or is transitioning F→M. A trans female has transitioned or is transitioning M→F.
 - A person's current identity is likely the only identity that matters, unless they make it point to make sure you know they are trans
- **Gender-Variant/Diverse:** Denoting or relating to a person whose behavior or appearance varies or is diverse from prevailing cultural and social expectations about what is appropriate for their gender

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TERMINOLOGY (CONT.)

- **Gender Fluid:** Denoting or relating to a person who does not identify themselves as having a fixed gender
- **Nonbinary:** a term used to describe individuals who may experience a gender identity that is neither exclusively woman or man or is in between or beyond both genders
- **Queer:** Denoting or relating to a sexual or gender identity that does not correspond to established ideas of sexuality and gender, especially heterosexual norms
- **Intersex:** A term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male

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TERMINOLOGY (CONT.)

- **Bisexual:** attracted to people of the same as well as other genders
- **Heterosexual:** attracted to people of a gender other than their own
- **Asexual:** minimal or no sexual attraction to others
- **Pansexual:** attracted to people regardless of sex or gender

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TERMINOLOGY (CONT.)

- **Misgendering:** Refers to an inadvertent -- or more commonly intentional -- reference to a nonbinary person or transgender or transitioning person by a binary sex assignment or pronouns that do not match their gender identity or expression, or that are not their chosen pronoun(s)
 - Those who are cisgender should consider how it would feel if others insisted on calling you by a pronoun, name, or title that did not reflect your sex/gender
- **Deadnaming:** The use of the birth or other former name of any of the above categories of people without their consent when the individual has identified a different name or pronoun

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133

VIOLENCE AND SEXUAL ORIENTATION

Sexual Violence and Intimate Partner Violence Can Happen to Anyone...

- regardless of sex, gender, gender identity, and gender expression
- regardless of sexual orientation

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134

INCLUSIVITY EXERCISE

- What types of challenges might disrupt or impede an effective investigation based on the individuals and/or sexual practices involved?
 - Think about campus culture and presumptions related to race, ethnicity, religion, sexual orientation, gender identity, etc.
- How does the way an investigator responds to descriptions of preferences or practices that are "new" or "unfamiliar" to the investigator impact rapport with an interviewee?

135

RELUCTANCE TO REPORT

- Concern about a homophobic response
- Concern about preconception that sexual assault cannot occur between same-sex partners
- Fear of exposing LGBTQIA community to negative stereotypes
- Fear of the impact a report may have on a small, sometimes close-knit community at the school
- Fear of reaction of family and friends
- Fear of institution not understanding their identity, expression, or orientation

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RELUCTANCE TO REPORT (CONT.)

- Fear of being outed and implications for medical treatment
- Concern about how "systems" will respond, especially law enforcement
- Previous negative experiences with school staff, the law, or community members
- Fear that male-on-male sexual violence in connection with hazing/bullying will be reduced to "boys being boys"

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CONSIDERATIONS FOR INTERVIEWING

- Educate yourself and your community
 - Do not expect parties to "educate you"
 - Ask for additional education or training if needed
- Be mindful of how power dynamics and targeting can come into play
- Assume nothing and allow for self-identification
- Provide a safe, non-judgmental, and respectful environment
- Stick to the facts

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CONSIDERATIONS FOR INTERVIEWING

- A visible reaction may negatively impact rapport
- Use inclusive language; reflect language used by the parties and witnesses during interviews and in all communication
- Anticipate heightened confidentiality concerns
- Use your school/campus/district/community-based experts
- Be aware of your biases
 - Heteronormative stereotypes/assumptions
 - Ignorance or lack of experience
 - Presumptions about consent

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BIAS

- What bias is (explicit, implicit, confirmation, etc.)
- How to detect bias, dislike, improper doubt, prejudice, prejudgment, or favoritism
- How to correct bias
- How bias can arise in investigations
- How bias can arise in decision-making
- The bias that trauma-informed ideology and "start by believing" can create if not contextualized appropriately
- Bias in training materials

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BIAS (CONT.)

- Victim-blaming biases
- Victim-favoring biases (such as from medical evidence)
- The potential effect of systemic biases on outcomes and sanctions

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INTERVIEWING CHILDREN

- Forensic Interview Model
- General Recommendations

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INTERVIEWING CHILDREN

- Young v. very young students
 - High/middle/elementary school
- Gender considerations
 - More important to align investigator with party?
- Parent/guardian involvement
 - Timing of notice, parent as Advisor
- Interview locations
- K-12 v. Higher Education – differences in approach

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INTERVIEWING CHILDREN

Forensic Interview Model – Key Phases

- Rapport-building phase
 - Introductions
 - Set expectations
 - Practice narrative telling
 - "Tell me something about yourself"
 - "What do you like to do for fun?"

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INTERVIEWING CHILDREN

Forensic Interview Model – Key Phases (Cont.)

- Substantive phase
 - Discussion of incident with details and clarification
- Closure phase
 - Address socioeconomic needs of child
 - Connect with support and resources
 - Field questions from child

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INTERVIEWING CHILDREN

Trauma

- Impact of past and/or current trauma
- Coordination with law enforcement, child protective services, etc.
 - Limit number of interviews and impact on child
 - Multiple interviews may be necessary for a child to feel comfortable enough to provide a complete narrative

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INTERVIEWING CHILDREN

Memory

- Child-specific considerations that impact memory, recall, perception of an experience, ability to communicate, comprehension, attention span, etc.
 - Age
 - Physical and developmental disabilities
 - Cultural/language barriers
 - Emotional needs
 - Socioeconomic status

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INTERVIEWING CHILDREN

Reluctance to Disclose

- Age of child
- Relationship to responding party
- Family relationships
- Level of parental support
- Fear
- Social and/or community influences

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INTERVIEWING CHILDREN

Environment

- Child-friendly
- Comfortable
- Neutral setting
- Consider access to paper and markers (age dependent)
- Who is present for interview?
 - Team investigator approach may not be ideal
 - Potential influence and/or disruption by others present

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INTERVIEWING MINORS

General Recommendations

- Explain that you are going to be asking questions and you need them to be honest when they answer
 - It is okay to say, "I don't know," or, "I don't understand"
 - There are no right or wrong answers
 - Correct me if I say something wrong
- Use indirect questions provide a margin of safety for the child
 - Example: "Some students believe that it is nice for a teacher to hug a student. What do you think?"
- Limit the number of times a minor is interviewed; their testimony is easily influenced by the way questions are asked

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INTERVIEWING CHILDREN

The Interview

- Ask an open-ended, non-leading question that allows child to give you their narrative without interrupting
 - "Tell me why you came to talk to me today."
 - "Do you know why I'm here to talk to you today?"
- If child acknowledges incident, follow-up with:
 - "Tell me everything that happened."

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INTERVIEWING CHILDREN

The Interview

- If child doesn't acknowledge incident, may need to ask more closed-ended, targeted questions
 - Utilize information you have as part of allegations
 - Incremental approach (talk about unrelated issues then ease into allegations)
 - Interview aids (e.g., Human figure drawings, dolls, etc.)

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INTERVIEWING CHILDREN

The Interview

- Use reflection and paraphrasing
- Assess whether multiple incidents occurred
 - "Did this happen one time or more than one time?"
 - Use prompts to differentiate instances (e.g., first time, last time, etc.)
- Silence/hesitation is okay
- Assess any possible coaching
 - Ask about previous conversations
 - "Have you talked to anyone else about that?"
 - "How did you find out about that?"

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INTERVIEWING CHILDREN

Ending the Interview

- "Is there anything else you want to share?"
- "Is there anything else I need to know?"
- "Do you have anything you want to ask me?"
- Thank child for speaking with you
- Assess and offer support and resources
 - In-school and community-based
 - Counselors, social workers, psychologists, etc.
 - Academic support
 - Safety planning
 - Others?

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INTERVIEWING CHILDREN

Recommendations for Early Elementary-Aged Children

- Encourage the child to start with a narrative of what happened before asking about specifics
- Use short, simple sentences that incorporate the child's terms
 - If you are unfamiliar with their terms, ask: "What do you call X?" or "Tell me about..."
- Use names rather than pronouns
- Rephrase rather than restate a question if the child does not understand what is being asked
- Avoid question involving time

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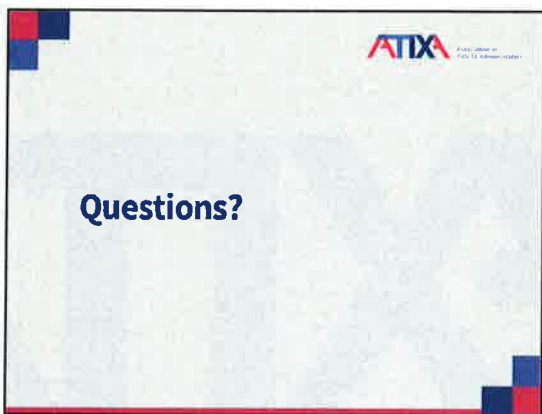
INTERVIEWING CHILDREN

Recommendations for Older Elementary-Aged Children

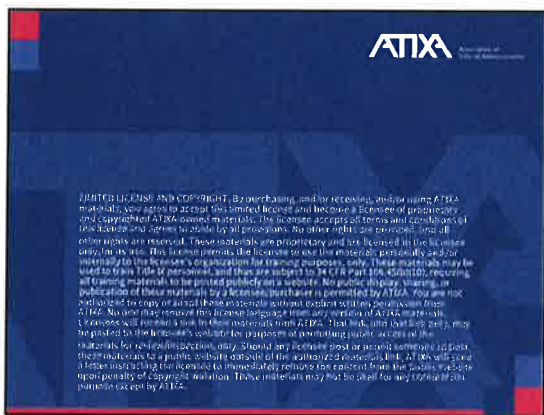
- Try to **determine** what the child understands by asking them to **repeat** what was said rather than asking, "Do you understand?"
- Try not to follow every answer with another question
 - Comment
 - Ask the child to elaborate
 - Acknowledge the child's response

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Section (b)xi

Title IX Refresher

Presented to all staff and
faculty

8/2021

Refresher: Title IX Sexual Harassment Policy and Procedures

Today's Goals

1. Title IX Coordinator and Deputies
2. Policies and Procedures
3. Mandatory Reporters
4. Definitions
5. Questions

Title IX Coordinator/Deputy Coordinators

- Title IX Coordinator
 - Kathy Aull, Executive Director of HR
- Title IX Deputy Coordinators
 - Norman Coley, Jr., Executive Dean of Students
 - Ryan Burgner, Athletic Director
 - Paula Abbott, Alliance and Sidney Centers Executive Director
 - Lisa Gion, HR Generalist (Recruitment & Retention)

Policies and Procedures

- Board Policy BP-720 Equal Opportunity Employer/Non-Discrimination
 - Presidential Procedure PP-720
- Board Policy BP-721 Sexual Harassment (Regulatory Policy Standards)
 - Presidential Procedure Sexual Harassment Grievance and Investigation Procedure

Policy and Procedure Location

www.wncc.edu

- Consumer Information Page
- Search: Title IX
- About WNCC, In This Section, Policies

Procedure

- Notice or Formal Complaint
- Supportive Measures & Initial Assessment
- Investigation or Informal Resolution*
- Formal Hearing
- Notice of Outcome, Determination and Remedies
- Appeal

Flowchart

◦ [https://www.wncc.edu/...](#)

Responsible Employees

Responsible Employees (Title IX)

WNCC is required to designate campus community members (Responsible Employees) who are responsible for reporting incidents of sexual misconduct to the Title IX Coordinator for the purpose of conducting an investigation into Prohibited Conduct. Once a Responsible Employee has actual knowledge of sexual misconduct (or allegations of sexual misconduct), the college is deemed to have notice of it, and is obligated to respond. As such, immediate reporting is crucial.

Mandatory Reporter

Responsible Employees (Title IX)

- The Title IX Coordinator or
- "any official who has authority to institute corrective measures on behalf of the recipient"
- Any faculty member leading, coordinating or supervising off-campus academic activities or programs such as special field trips, etc.
- See Sexual Harassment Grievance and Investigation Procedure for specific details.

WNCC Staff and Faculty

Reporting is an important tool to address Prohibited Conduct. Thus while all other employees who are not designated as Responsible Employees and are not required to report, they are also strongly encouraged to share any information about such conduct to the Title IX Coordinator, or designee.

Definition of Sexual Harassment

Sexual Harassment

- 1) Quid Pro Quo:
 - a. an employee of the recipient;
 - b. conditions the provision of an aid, benefit, or service of the recipient;
 - c. on an individual's participation in unwelcome sexual conduct.

Definition of Sexual Harassment

Sexual Harassment

- 2) Sexual Harassment:
 - a. unwelcome conduct;
 - b. determined by a reasonable person;
 - c. to be so severe, and
 - d. pervasive, and,
 - e. objectively offensive;
 - f. that it effectively denies a person equal access to the College's education program or activity.

Definition of Sexual Harassment

Sexual Assault

- a) Sex Offenses, Forcible:
 - Any sexual act directed against another person,
 - without the consent of the Complainant,
 - including instances in which the Complainant is incapable of giving consent.

Definition of Sexual Harassment

Sexual Assault

- a) Sex Offenses, Non-Forcible:
 - Incest:
 - 1) Non-f forcible sexual intercourse,
 - 2) between persons who are related to each other,
 - 3) within the degrees wherein marriage is prohibited by Nebraska law.
 - Statutory Rape:
 - 1) Non-f forcible sexual intercourse,
 - 2) with a person who is under the statutory age of consent of 16 years of age.

Definition of Sexual Harassment

Dating Violence

- a. violence,
- b. on the basis of sex,
- c. committed by a person,
- d. who is in or has been in a social relationship of a romantic or intimate nature with the Complainant.

Definition of Sexual Harassment

Domestic Violence

- a. violence,
- b. on the basis of sex,
- c. committed by a current or former spouse or intimate partner of the Complainant,
- d. by a person with whom the Complainant shares a child in common, or
- e. by a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
- f. by a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Nebraska, or
- g. by any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Nebraska.

Definition of Sexual Harassment

Stalking

- a. engaging in a course of conduct,
- b. on the basis of sex,
- c. directed at a specific person, that
 - i. would cause a reasonable person to fear for the person's safety, or
 - ii. the safety of others; or
 - iii. suffer substantial emotional distress.

Title IX Training

- Training
 1. Title IX Coordinator
 2. Civil Right Investigation Training
 3. Advisory Training
 4. Decision Maker/Hearing Officer
 5. Rationale Writing – Title IX

QUESTIONS



**Western Nebraska
Community College**

Section (c)i

**Western Community College
Area (WCCA)
Board Policy BP-721**

WESTERN NEBRASKA COMMUNITY COLLEGE

Western Community College Area Board of Governors' Policy

TITLE: Sexual Harassment Policy (Regulatory Policy Standards)

DIVISION: Western Nebraska Community College

CATEGORY: College Personnel/Student

REFERENCE: Title VII, 1964 Civil Rights Act; Title IX, Education Amendments of 1972; Nebraska Equal Opportunity in Postsecondary Education Act.

NUMBER: BP-721

APPROVAL/DATE: F. Lynne Klemke, President, WCCA Board of Governors
Date: July 15, 2020

Purpose

Western Nebraska Community College (WNCC) is committed to providing an environment free from discrimination on the basis of sex and provides resources and services to assist students, faculty and staff in addressing issues involving sex discrimination. The College strictly prohibits any form of sexual harassment, which includes sexual harassment, sexual assault, dating violence, domestic violence, stalking, and retaliation.

Scope

This policy applies to all members of the WNCC community: employees, regardless of their classification or status, and students.

WNCC has jurisdiction over a Respondent whenever prohibited conduct occurs in the College's education program or activity against a person in the United States.

Policy

Sexual harassment, sexual assault, dating violence, domestic violence and stalking are against the law and are prohibited conduct under WNCC policy. All reported incidents will be thoroughly investigated and those found responsible dealt with as necessary, whether criminally charged or be handled through the College's sexual harassment procedure. Consistent with state and federal laws, this policy prohibits retaliation against a person for reporting discrimination and sexual harassment; or participating in the investigation or adjudication of such a complaint.

Persons violating this policy will face strict discipline up to and including suspension, expulsion, termination, or be subject to legal proceedings.

Any person believing that he or she has been subject to prohibited sexual harassment, including sexual harassment, sexual assault, dating violence, domestic violence, stalking, or retaliation should file a complaint utilizing the College's Sexual Harassment Grievance and Investigation Procedure.

Applicability

The President is authorized and directed to adopt appropriate procedures to carry out this policy and comply with state and federal law.

Revising this Policy

This Board Policy supersedes any prior WNCC policy, procedure, guideline or handbook on this subject matter.

Adoption Date and Board of Governors' Minutes Item Number: 1979

Revision Date and Board of Governors' Minutes Item Number: August 18, 1982 Item I

November 14, 2001

July 15, 2020 Agenda Item I (1) (b)

Prior Policy Number: 415.0850.12 Discrimination, Harassment or Retaliation (employee)

Sponsoring Division/Department: Human Resources

Repeal Date and Board of Governors' Minutes Item Number: July 15, 2020 Agenda Item I (2) (f)

500.3801.14 Sexual Misconduct: Dating/Domestic Violence, Sexual Assault and Stalking



Section (c)ii

Section (e)v

WNCC President's Procedure
on Sexual Harassment
Grievance and Investigation
Procedures

WESTERN NEBRASKA COMMUNITY COLLEGE

SEXUAL HARASSMENT GRIEVANCE AND INVESTIGATION PROCEDURES

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1. POLICY STATEMENT:

Western Nebraska Community College is committed to providing an environment free from discrimination on the basis of sex and provides resources and services to assist students, faculty and staff in addressing issues involving sex discrimination. The College strictly prohibits any form of sexual harassment, which includes sexual harassment, sexual assault, dating violence, domestic violence, stalking, and retaliation (also referred to herein collectively as Prohibited Conduct). All reported incidents will be thoroughly investigated and those found responsible dealt with as necessary, whether criminally charged or handled through the College's Sexual Harassment Grievance and Investigation Procedure. Consistent with state and federal laws, this policy prohibits retaliation against a person for reporting discrimination and sexual harassment; or participating in the investigation or adjudication of such a complaint.

2. GLOSSARY

- *Advisor* means a person chosen by a party or appointed by the institution to accompany the party to meetings related to the resolution process, to advise the party on that process, and to conduct cross-examination for the party at the hearing, if any.
- Alternate Resolution Mechanism refers to an informal mechanism, including mediation, conference process, shuttle negotiation, etc., by which the parties reach a mutually agreed upon resolution of an allegation.
- *College* means the Western Community College Area which does business as Western Nebraska Community College and/or WNCC. Also referred to in Title IX regulations as the "Recipient".
- *Complainant* means an individual who is alleged to be the victim of conduct that could constitute sexual harassment based on a protected class; or retaliation for engaging in a protected activity.
- *Complaint (formal)* means a document submitted or signed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment or retaliation for engaging in a protected activity against a Respondent and requesting that the recipient investigate the allegation.
- *Confidential Resource* means an employee who is not a Mandated Reporter of notice of harassment and/or retaliation (irrespective of Clery Act Campus Security Authority status).
- *Day* means a business day when the College is in normal operation.
- *Education program or activity* means locations, events, or circumstances where the College exercises substantial control over both the Respondent and the context in which the sexual harassment occurs and also includes any building owned or controlled by a student organization that is officially recognized by the College.

- *Final Determination*: A conclusion by a preponderance of the evidence that the alleged conduct did or did not violate policy.
- *Finding*: A conclusion by a preponderance of the evidence that the conduct did or did not occur as alleged (as in a “finding of fact”).
- *Formal Grievance Process* means “Process A,” a method of formal resolution designated by the College to address conduct that falls within the policies included below, and which complies with the requirements of the Title IX regulations (34 CFR §106.45).
- *Grievance Process Pool* includes any investigators, hearing officers, appeal officers, and Advisors who may perform any or all of these roles (though not at the same time or with respect to the same case).
- *Hearing Decision-maker or Panel* refers to those who have decision-making and sanctioning authority within the College’s Formal Grievance process.
- *Hearing Officer* refers to the Chair of the Hearing Panel. The Hearing Officer may be a voting member of the panel or may be a non-voting member of the panel charged with conducting the hearing. The College reserves the right to utilize an external Hearing Officer.
- *Investigator* means the person or persons charged by the College with gathering facts about an alleged violation of this Policy, assessing relevance and credibility, synthesizing the evidence, and compiling this information into an investigation report and file of directly related evidence. The College reserves the right to utilize an external investigator.
- *Mandated Reporter* means an employee of the College who is obligated by policy to share knowledge, notice, and/or reports of harassment and/or retaliation with the Title IX Coordinator.¹ See, also, Responsible Employee set forth below.
- *Mandatory Reporting Laws* mean a specific Nebraska state law mandating the reporting of specified cases of abuse or neglect against minors. See, Neb. Rev. Stat. §28-711 (Child subjected to abuse of neglect; report; contents; toll-free number).
- *Notice* means that an employee, student, or third-party informs the Title IX Coordinator or other Official with Authority of the alleged occurrence of harassing, discriminatory, and/or retaliatory conduct.
- *Official with Authority (OWA)* means an employee of the College explicitly vested with the responsibility to implement corrective measures for sexual harassment and/or retaliation on behalf of the Recipient. Also known as a “Responsible Employee” in Title IX regulations and herein.

¹ Not to be confused with Nebraska’s mandatory reporting law which mandates the reporting of specified cases of abuse or neglect against minors (See, Neb. Rev. Stat. §28-711), though these responsibilities may overlap with those who have mandated reporting responsibility in this Policy.

- *Parties* include the Complainant(s) and Respondent(s), collectively.
- *Preponderance of the Evidence* is the standard of proof used by the College. The Respondent is presumed to be not responsible. This presumption may be overcome when there is a sufficient basis, by a preponderance of the evidence, to support a finding that a Respondent violated the policy. A preponderance of evidence means that it is more likely than not, based upon the totality of all relevant evidence and the reasonable inferences from that evidence, that the Respondent violated the policy.
- *Process A* means the Resolution Process for Alleged Violations of the Policy on Sexual Harassment as detailed below.
- *Process B* means any process designated by the College to apply only when Process A does not, as determined by the Title IX Coordinator.
- *Prohibited Conduct* is the umbrella term including the offenses of sexual harassment, sexual assault, stalking, dating violence and domestic violence and retaliation.
- *Recipient* means Western Nebraska Community College, WNCC, or the College; a postsecondary education program that is a recipient of federal funding.
- *Remedies* are post-finding actions directed to the Complainant and/or the College community as mechanisms to address safety, prevent recurrence, and restore access to the College's educational program.
- *Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment or retaliation for engaging in a protected activity.
- *Responsible Employee* means an employee of the College explicitly vested with the responsibility to implement corrective measures for sexual harassment and/or retaliation on behalf of the Recipient.
- *Resolution* means the result of an informal or Formal Grievance Process.
- *Sanction* means a consequence imposed by the Recipient on a Respondent who is found to have violated this policy.
- *Sexual Harassment* (or Prohibited Conduct) is the umbrella category including the offenses of sexual harassment, sexual assault, stalking, and dating violence and domestic violence.
- *Title IX Coordinator* is at least one official designated by the College to ensure compliance with Title IX and the Recipient's Title IX program. References to the Coordinator throughout this policy may also encompass a designee of the Coordinator for specific tasks.

- *Title IX Team* refers to the Title IX Coordinator, any deputy coordinators and any member of the Grievance Process Pool. The College reserves the right to utilize outside or external investigators and/or hearing officers.
- *Victim Advocate* means any employee or supervised volunteer of a domestic violence and sexual assault victim assistance program or of any other agency, business, or organization that is not affiliated with a law enforcement or prosecutor's office whose primary purpose is assisting domestic violence and sexual assault victims. See, Nebraska Victim Advocate confidentiality statutes at Neb. Rev. Stat. §§29-4301 to 29-4304.

3. APPLICABLE SCOPE

The core purpose of this policy is the prohibition of sexual harassment and retaliation (Prohibited Conduct). When an alleged violation of this policy is reported, the allegations are subject to resolution using the College's "Process A" or "Process B," as determined by the Title IX Coordinator, and as set out in further detail below.

- **Process A** is a method of formal resolution designated by the College to address conduct that falls within the policies included below, and which complies with the requirements of the Title IX regulations (34 CFR §106.45).
- **Process B** means any process designated by the College to apply only when Process A does not, as determined by the Title IX Coordinator. At all times, it is within the College's discretion to determine which policies apply and whether action will be taken under multiple policies. Some Prohibited Conduct may result in separate investigations and potential separate and additional sanctions under multiple College policies. For example, WNCC students are subject to the College's Student Code of Conduct Policy and Procedure and, depending on the nature of the Prohibited Conduct at issue, the College may proceed with procedures under both the Sexual Harassment Policy and the Student Code of Conduct separately or concurrently.

When the Respondent is a member of the College community, a grievance process may be available regardless of the status of the Complainant, who may or may not be a member of the College community. This community includes, but is not limited to, students, student organizations, faculty, administrators, staff, and third parties such as guests, visitors, volunteers, invitees, and campers.

The procedures below may be applied to incidents, to patterns, and/or to the campus climate, all of which may be addressed and investigated in accordance with this policy.

4. TITLE IX COORDINATOR

In accordance with Title IX regulations, WNCC has a designated Title IX coordinator. The Title IX Coordinator may be contacted by telephone, email or in person at the following:

Kathy Ault, Title IX Coordinator
Human Resources
1601 E. 27th Street
Scottsbluff, NE 69361
Phone: 308.635.6350
Fax: 308.635.6161
aultk@wncc.edu

The College's Title IX Coordinator oversees the implementation of the College's Sexual Harassment Policy and Procedure and has the primary responsibility for coordinating the College's efforts related to intake, investigation, resolution, and implementation of supportive

measures to stop, remediate, and prevents sexual harassment, and retaliation under this procedure.

5. CONFLICT OF INTEREST

The Title IX Coordinator manages the Title IX Team and acts with independence and authority free from bias and conflict of interest. The Title IX Coordinator oversees all resolutions under this policy and these procedures.

The members of the Title IX Team are vetted and trained to ensure they are not biased for or against any party in a specific case, or for or against Complainants and/or Respondents, generally.

To raise any concern involving bias, conflict of interest or misconduct by the Title IX Coordinator, contact the following:

Lynne Koski
Vice President of Administrative Services and
Chief Financial Officer
1601 E. 27th Street
Scottsbluff, NE 69361
308.635.6792
koskill@wncc.edu

Concerns of bias, a potential conflict of interest, or reports of misconduct by any other Title IX Team member should be raised with the Title IX Coordinator.

6. ADMINISTRATIVE CONTACT INFORMATION

Complaints or notice of alleged policy violations, or inquiries about or concerns regarding this policy and procedures, may be made internally to:

Kathy Ault, Title IX Coordinator
Human Resources
1601 E. 27th Street
Scottsbluff, NE 69361
Phone: 308.635.6350
Fax: 308.635.6161
aultk@wncc.edu

In addition, Institutional Officers listed below are designated as Title IX Deputy Coordinators and may be contacted for assistance:

- **Title IX Deputy Coordinator, Norman Coley, Jr.**, Dean of Students, WNCC 1601 East 27th Street, Scottsbluff, NE, 69361, 308.635.6123 or coleyn@wncc.edu

- **Title IX Deputy Coordinator, Ryan Burgner**, Athletic Director, WNCC 1601 East 27th Street, Scottsbluff, NE, 69361 308.635.6798 or burgnerr@wncc.edu
- **Title IX Deputy Coordinator, Paula Abbott**, Partnership & Inclusion Executive Director, WNCC 371 College Drive, Sidney, Nebraska 69162 308.254.7404 or abbottp@wncc.edu
- **Title IX Deputy Coordinator, Lisa Gion**, HR Generalist (Recruitment), Title IX Deputy Coordinator, WNCC 1601 East 27th Street, Scottsbluff, Nebraska 69361 | 308.635.6105 or gionl0@wncc.edu

The College has classified many employees as Responsible Employees who are Mandatory Reporters of any knowledge they have that a member of the community is experiencing sexual harassment and/or retaliation. The section below on Mandated Reporting details which employees have this responsibility and their duties, accordingly.

Inquiries regarding Title IX / Sexual Harassment may be made externally to:

Office for Civil Rights (OCR)

U.S. Department of Education
 400 Maryland Avenue, SW
 Washington, D.C. 20202-1100
 Customer Service Hotline #: (800) 421-3481
 Facsimile: (202) 453-6012
 TDD#: (877) 521-2172
 Email: OCR@ed.gov
 Web: <http://www.ed.gov/ocr>

-or-

Kansas City Office:

U.S. Department of Education
 Office for Civil Rights
 One Petticoat Lane
 1010 Walnut Street, Suite 320
 Kansas City, Missouri 64106
 Telephone: (816) 268-0582

For complaints involving employees:

Nebraska Equal Opportunity Commission:

Lincoln — Main Office

Nebraska State Office Building
 301 Centennial Mall South, 5th Floor
 P.O. Box 94934
 Lincoln, NE 68509-4934
 Phone: (402) 471-2024
 Toll Free Number: (800) 642-6112

Scottsbluff

Panhandle State Office Complex
 505A Broadway
 Suite 600
 Scottsbluff, NE 69363-3515
 Telephone: (308) 632-1340
 Toll Free: (800) 830-8633

Equal Employment Opportunity Commission (EEOC):

EEOC's Kansas City Area Office
Gateway Tower II
400 State Ave., Suite 905
Kansas City, KS 66101
Phone: 1-800-669-4000
TTY: 1-800-669-6820

7. NOTICE/COMPLAINTS OF SEXUAL HARASSMENT AND/OR RETALIATION

Notice or complaints of any form of Prohibited Conduct, including sexual harassment and/or retaliation may be made using any of the following options:

- 1) File a complaint with, or give verbal notice to, the Title IX Coordinator or any Deputy Title IX Coordinator at the following contact information:

Kathy Ault, Title IX Coordinator

Human Resources
1601 E. 27th Street
Scottsbluff, NE 69361
Phone: 308.635.6350
Fax: 308.635.6161
aultk@wncc.edu

Norman Coley, Jr., Deputy Title IX Coordinator

Dean of Students
1601 East 27th Street
Scottsbluff, NE, 69361
308.635.6123
colevn@wncc.edu

Ryan Burgner, Deputy Title IX Coordinator

Athletic Director
1601 East 27th Street
Scottsbluff, NE, 69361
308.635.6798
burgnerr@wncc.edu

Paula Abbott, Deputy Title IX Coordinator

Partnership & Inclusion Executive Director
371 College Drive
Sidney, Nebraska 69162
308.254.7404
abbottp@wncc.edu

Lisa Gion, Deputy Title IX Coordinator
HR Generalist (Recruitment)

1601 East 27th Street
Scottsbluff, Nebraska 69361
308.635.6105
gionl0@wncc.edu

Such a report may be made at any time (including during non-business hours) by using the telephone number or email address, or by mail to the office address, listed for the Title IX Coordinator or any other official listed.

- 2) Report online, using the Incident Reporting Form posted at https://cm.maxient.com/reportingform.php?WesternNebraskaCC&layout_id=10

Anonymous reports are accepted but can give rise to a need to investigate. The College tries to provide supportive measures to all Complainants, which is impossible with an anonymous report. Because reporting carries no obligation to initiate a formal response, and as the College respects Complainant requests to dismiss complaints unless there is a compelling threat to health and/or safety, the Complainant is largely in control and should not fear a loss of privacy by making a report that allows the Recipient to discuss and/or provide supportive measures.

A Formal Complaint means a document submitted or signed by the Complainant or signed by the Title IX Coordinator alleging a policy violation by a Respondent and requesting that the Recipient investigate the allegation(s).

A complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information in the section immediately above, or as described in this section. As used in this paragraph, the phrase “document filed by a Complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the Recipient) that contains the Complainant’s physical or digital signature, or otherwise indicates that the Complainant is the person filing the complaint, and requests that the Recipient investigate the allegations. A paper copy of the Title IX Grievance Form is also available upon request from the Title IX Coordinator.

If notice is submitted in a form that does not meet this standard, the Title IX Coordinator will contact the Complainant to ensure that it is filed correctly.

8. SUPPORTIVE MEASURES

The College will offer and implement appropriate and reasonable supportive measures to the parties upon notice of alleged Prohibited Conduct.

Supportive measures are those services, accommodations, and other assistance the College puts in place after receiving notice of Prohibited Conduct, but before any final outcomes (investigatory, disciplinary, or remedial) have been determined. **They include individualized services reasonably available to the College, and without fee or charge to the complainant or respondent, that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.**

The Title IX Coordinator promptly makes supportive measures available to the parties upon receiving notice or a complaint. At the time that supportive measures are offered, the College

will inform the Complainant, in writing, that they may file a formal complaint with the College either at that time or in the future, if they have not done so already.

The Title IX Coordinator works with the Complainant to ensure that their wishes are taken into account with respect to the supportive measures that are planned and implemented.

The College will maintain the privacy of the supportive measures, provided that privacy does not impair the College's ability to provide the supportive measures. The College will act to ensure as minimal an academic/occupational impact on the parties as possible.

The Recipient will implement measures in a way that does not unreasonably burden the other party.

These actions may include, but are not limited to:

- Referral to counseling services
- Referral to the College's Employee Assistance Program
- Referral to community-based service providers
- Visa and immigration assistance
- Student financial aid counseling
- Education to the institutional community or community subgroup(s)
- Altering campus housing assignment(s)
- Altering work arrangements for employees or student-employees
- Safety planning
- Providing campus safety escorts
- Providing transportation accommodations
- Implementing contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course/program-related Adjustments
- Notices Against Trespass
- Timely Warnings
- Class schedule modifications, withdrawals, or leaves of absence
- Increased security and monitoring of certain areas of the campus
- A combination of any of these measures
- Any other actions deemed appropriate by the Title IX Coordinator

Violations of no contact orders will be referred to appropriate student or employee conduct processes for enforcement.

9. EMERGENCY REMOVAL

If a Respondent's actions pose an immediate threat to the physical health or safety of any member of the College community, the College may utilize an Emergency Removal to remove a Respondent from a College education program or activity if:

- The College conducts an individualized safety and risk analysis;

- The College determines that the Respondent poses an immediate (imminent) threat to the physical health or safety of anyone justifying removal;
- The threat arises from allegations of sexual misconduct; and
- The College provides an opportunity for the Respondent to challenge the removal under these procedures.

The individual safety and risk analysis is performed by the Title IX Coordinator in conjunction with the Behavioral Intervention Team (also known as the BIT or CARE Team).

In all cases in which an emergency removal is imposed, the student will be given notice of the action and the option to request to meet with the Title IX Coordinator prior to such action/removal being imposed, or as soon thereafter as reasonably possible, to show cause why the action/removal should not be implemented or should be modified.

This meeting is not a hearing on the merits of the allegation(s), but rather is an administrative process intended to determine solely whether the emergency removal is appropriate.

When this meeting is not requested in the time-frame set out in the Notice, objections to the emergency removal will be deemed waived.

A Complainant and their Advisor may be permitted to participate in this meeting if the Title IX Coordinator determines it is equitable to do so.

This section also applies to any restrictions that a coach or athletic administrator may place on a student-athlete arising from allegations related to Title IX. There is no appeal process for emergency removal decisions.

A Respondent may be accompanied by an Advisor of their choice when meeting with the Title IX Coordinator for the show cause meeting. The Respondent will be given access to a written summary of the basis for the emergency removal prior to the meeting to allow for adequate preparation.

The Title IX Coordinator has sole discretion under this policy to implement or stay an emergency removal and to determine the conditions and duration. Violation of an emergency removal under this policy will be grounds for discipline, which may include expulsion.

The College will implement the least restrictive emergency actions possible in light of the circumstances and safety concerns. As determined by the Title IX Coordinator, these actions could include, but are not limited to: removing a student from a residence hall, temporarily re-assigning an employee, restricting a student's or employee's access to or use of facilities or equipment, allowing a student to withdraw or take grades of incomplete without financial penalty, authorizing an administrative leave, and suspending a student's participation in extracurricular activities, student employment, student organizational leadership, or intercollegiate/intramural athletics.

At the discretion of the Title IX Coordinator, alternative coursework options may be pursued to ensure as minimal an academic impact as possible on the parties.

Where the Respondent is an employee, existing provisions for interim action are applicable.

10. PROMPTNESS

All allegations are acted upon promptly by the College once it has received notice or a formal complaint. Complaints can take 60-90 business days to resolve, typically. There are always exceptions and extenuating circumstances that can cause a resolution to take longer, but the College will avoid all undue delays within its control.

Any time the general timeframes for resolution outlined in the College's procedures will be delayed, the College will provide written notice to the parties of the delay, the cause of the delay, and an estimate of the anticipated additional time that will be needed as a result of the delay.

11. PRIVACY

Every effort is made by the College to preserve the privacy of reports. The College will not share the identity of any individual who has made a report or complaint of harassment or retaliation; any Complainant, any individual who has been reported to be the perpetrator of sexual harassment or retaliation, any Respondent, or any witness, except as permitted by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g; FERPA regulations, 34 CFR part 99; or as required by law; or to carry out the purposes of 34 CFR Part 106, including the conducting of any investigation, hearing, or grievance proceeding arising under these policies and procedures.

For the purpose of this policy and procedure, privacy and confidentiality have distinct meanings.

Privacy means that information related to a complaint will be shared with a limited number of College employees who "need to know" in order to assist in the assessment, investigation, and resolution of the report. All employees who are involved in the Recipient's response to notice under this policy receive specific training and guidance about sharing and safeguarding private information in accordance with state and federal law. The privacy of student education records will be protected in accordance with the Family Educational Rights and Privacy Act ("FERPA"), as outlined in the Recipient's Student Records Policy. The privacy of employee records will be protected in accordance with Board of Governor's policies, including but not limited to BP-414, Confidentiality of Employee Records.

Confidentiality exists in the context of laws that protect certain relationships, including those who provide counseling services for the college. The College has designated individuals who have the ability to have privileged communications as Confidential Resources. For more information about Confidential Resources, see pages 27-28. When information is shared by a Complainant with a Confidential Resource, the Confidential Resource cannot reveal the information to any third party except when an applicable law or a court order requires or permits disclosure of such information. For example, information may be disclosed when: (i) the individual gives written consent for its disclosure; (ii) there is a concern that the individual

will likely cause serious physical harm to self or others; or (iii) the information concerns conduct involving suspected abuse or neglect of a minor, elders, or individuals with disabilities. Non-identifiable information may be shared by Confidential Resources for statistical tracking purposes as required by the federal Clery Act. Other information may be shared as required by law.

The College reserves the right to determine which College officials have a legitimate educational interest in being informed about incidents that fall within this policy, pursuant to the Family Educational Rights and Privacy Act (FERPA).

Only a small group of officials who need to know will typically be told about the complaint, including but not limited to: Title IX Coordinator, Title IX Deputies, Human Resources Office, Student Affairs, and the Behavioral Intervention Team.

Additionally, information will be shared as necessary with Investigators, Hearing Panel members / Decision-makers, the hearing officer, witnesses, and the parties. The circle of people with this knowledge will be kept as streamlined as possible to preserve the parties' rights and privacy.

The College may contact parents and/or legal guardians to inform them of situations in which there is a significant and articulable health and/or safety risk but will usually consult with the student first before doing so.

Confidentiality and mandated reporting are addressed more specifically below.

12. JURISDICTION OF THE COLLEGE

The Policy and Procedures applies to the education program and activities of the College, to conduct that takes place on a campus or on property owned or controlled by the College, at College-sponsored events, or in buildings owned or controlled by the College's recognized student organizations.

The Respondent must be a member of the College's community in order for its policies and procedures to apply. The College has jurisdiction over a Respondent whenever the Prohibited Conduct occurs:

- In the College's education program or activity, against a person in the United States;
- On campus, including campuses in Alliance, Scottsbluff and Sidney; or
- In off campus buildings owned or controlled by the College;
- In any building owned or controlled by a student organization that is official recognized by the College; or
- Off campus, if Prohibited Conduct occurs under circumstances over which the College exercised substantial control over both the Respondent and the context in which Prohibited Conduct occurs.

Regardless of where the conduct occurred, the College will address notice/complaints to determine whether the conduct occurred in the context of its employment or educational program or activity and/or has continuing effects on campus or in an off-campus sponsored program or activity. A substantial College interest includes:

- a. Any action that constitutes a criminal offense as defined by law. This includes, but is not limited to, single or repeat violations of any local, state, or federal law;
- b. Any situation in which it is determined that the Respondent poses an immediate threat to the physical health or safety of any student or other individual;
- c. Any situation that significantly impinges upon the rights, property, or achievements of oneself or others or significantly breaches the peace and/or causes social disorder; and/or
- d. Any situation that is detrimental to the educational interests or mission of the College.

If the Respondent is unknown or is not a member of the College community, the Title IX Coordinator will assist the Complainant in identifying appropriate campus and local resources and support options and/or, when criminal conduct is alleged, in contacting local or campus law enforcement if the individual would like to file a police report.

Further, even when the Respondent is not a member of the Recipient's community, supportive measures, remedies, and resources may be accessible to the Complainant by contacting the College's Title IX Coordinator or by contacting off-campus assistance for Sexual, Domestic and Dating Violence Services and Prevention at:

The DOVES Program*

Gering Office:

2035 10th Street
Gering, NE 69341

Alliance Office:

212 Box Butte Ave., Ste. B
Alliance, NE 69301

Sidney Office:

941 8th Avenue
Sidney, NE 69162

308-436-HELP (4357)
866-95-DOVES (36837)
515-599-6620 (Text Line)

*Extent of confidentiality set forth in Victim Advocate Confidentiality Statutes found at Neb. Rev. Stat. §29-4301 to 4304.

In addition, the College may take other actions as appropriate to protect the Complainant against third parties, such as barring individuals from College property and/or events.

When the Respondent is enrolled in or employed by another institution, the Title IX Coordinator can assist the Complainant in liaising with the appropriate individual at that institution, as it may be possible to allege violations through that institution's policies.

Similarly, the Title IX Coordinator may be able to assist and support a student or employee Complainant who experiences any form of Prohibited Conduct, including sexual harassment or retaliation, in an externship, study abroad program, or other environment external to the College where sexual harassment policies and procedures of the facilitating or host organization may give recourse to the Complainant.

13. TIME LIMITS ON REPORTING

There is no time limitation on providing notice/complaints to the Title IX Coordinator. However, if the Respondent is no longer subject to the College's jurisdiction and/or significant time has passed, the ability to investigate, respond, and provide remedies may be more limited or impossible.

Acting on notice/complaints significantly impacted by the passage of time (including, but not limited to, the rescission or revision of policy) is at the discretion of the Title IX Coordinator, who may document allegations for future reference, offer supportive measures and/or remedies, and/or engage in informal or formal action, as appropriate.

When notice/complaint is affected by significant time delay, the College will typically apply the policy in place at the time of the alleged misconduct and the procedures in place at the time of notice/complaint.

14. ONLINE SEXUAL HARASSMENT AND/OR RETALIATION

The policies of the College are written and interpreted broadly to include online manifestations of any of the behaviors prohibited below, when those behaviors occur in or have an effect on the Recipient's education program and activities or use College networks, technology, or equipment.

Although the College may not control websites, social media, and other venues in which harassing communications are made, when such communications are reported to the College, it will engage in a variety of means to address and mitigate the effects.

Members of the community are encouraged to be good digital citizens and to refrain from online misconduct, such as feeding anonymous gossip sites, sharing inappropriate content via social media, unwelcome sexual or sex-based messaging, distributing or threatening to distribute revenge pornography, breaches of privacy, or otherwise using the ease of transmission and/or anonymity of the Internet or other technology to harm another member of the College community.

Any online posting or other electronic communication by students, including cyber-bullying, cyber-stalking, cyber-harassment, etc., occurring completely outside of the College's control (e.g., not on College networks, websites, or between College email accounts) will only be subject to this policy when such online conduct can be shown to cause a substantial in-program disruption or infringement on the rights of others.

Otherwise, such communications are considered speech protected by the First Amendment. Supportive measures for Complainants will be provided, but protected speech cannot legally be subjected to discipline.

Off-campus harassing speech by employees, whether online or in person, may be regulated by the College only when such speech is made in an employee's official or work-related capacity].

15. POLICY ON NONDISCRIMINATION

Western Nebraska Community College does not discriminate on the basis of race, color, religion, national origin, sex or gender, age, disability, marital status, military veteran status, sexual orientation, gender expression/identity, or political affiliation, in its policies, practices, and activities related to employment, admissions, educational services/programming, student services/activities, or financial aid; as expressly prescribed by Institutional policy, state and federal laws, regulations and executive orders. Inquiries concerning the application of these policies, laws, and/or regulations to the College may be directed to the College's Compliance Officer for the Civil Rights Act(s), Title IX of the Education Amendments of 1972, Americans with Disabilities Act(s), and Section 504 of the Rehabilitation Act of 1973; Kathy Ault, Human Resources Executive Director, WNCC, 1601 East 27th Street Scottsbluff, NE 69361, aaultk@wncc.edu; 308.635.6350; or to the Director, Office of Civil Rights, U.S. Department of Education, One Petticoat Lane, 1010 Walnut Street, Suite 320, Kansas City, MO, 64106-2106.

16. DEFINITION OF PROHIBITED CONDUCT (SEXUAL HARASSMENT)

The Department of Education's Office for Civil Rights (OCR), the Equal Employment Opportunity Commission (EEOC), and the State of Nebraska regard Sexual Harassment as an unlawful discriminatory practice.

Acts of sexual harassment may be committed by any person upon any other person, regardless of the sex, sexual orientation, and/or gender identity of those involved.

The College has adopted the following definition of Sexual Harassment in order to address the unique environment of an academic community.

Sexual Harassment, as an umbrella category, includes the actual or attempted offenses of sexual harassment, sexual assault, domestic violence, dating violence, and stalking, and is defined as:

Conduct on the basis of sex or that is sexual that satisfies one or more of the following:

- 1) Quid Pro Quo:
 - a. an employee of the recipient,
 - b. conditions² the provision of an aid, benefit, or service of the recipient,
 - c. on an individual's participation in unwelcome sexual conduct.

- 2) Sexual Harassment:
 - a. unwelcome conduct,
 - b. determined by a reasonable person,
 - c. to be so severe, and
 - d. pervasive, and,
 - e. objectively offensive,
 - f. that it effectively denies a person equal access to the College's education

² Implicitly or explicitly.

program or activity.³

3) Sexual assault, defined as:

a) Sex Offenses, Forcible:

- Any sexual act⁴ directed against another person⁵,
- without the consent of the Complainant,
- including instances in which the Complainant is incapable of giving consent.⁶

b) Sex Offenses, Non-forcible:

³ Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent). Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

⁴ Sexual acts include:

Forcible Rape:

- Penetration,
- no matter how slight,
- of the vagina or anus with any body part or object, or
- oral penetration by a sex organ of another person,
- without the consent of the Complainant.

Forcible Sodomy:

- Oral or anal sexual intercourse with another person,
- forcibly,
- and/or against that person’s will (non-consensually), or
- not forcibly or against the person’s will in instances in which the Complainant is incapable of giving consent because of age[#] or because of temporary or permanent mental or physical incapacity.

Sexual Assault with an Object:

- The use of an object or instrument to penetrate,
- however slightly,
- the genital or anal opening of the body of another person,
- forcibly,
- and/or against that person’s will (non-consensually),
- or not forcibly or against the person’s will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Forcible Fondling:

- The touching of the private body parts of another person (buttocks, groin, breasts),
- for the purpose of sexual gratification,
- forcibly,
- and/or against that person’s will (non-consensually),
- or not forcibly or against the person’s will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

⁵ This would include having another person touch you sexually, forcibly, or without their consent.

⁶ This definition set is not taken from SRS/NIBRS verbatim. This definition has substituted Complainant for “victim,” has removed references to his/her throughout, has defined “private body parts,” has removed the term “unlawfully,” and has inserted language clarifying that the Recipient interprets “against the person’s will” to mean “non-consensually.”

- Incest:
 - 1) Non-forcible sexual intercourse,
 - 2) between persons who are related to each other,
 - 3) within the degrees wherein marriage is prohibited by Nebraska law.
 - Statutory Rape:
 - 1) Non-forcible sexual intercourse,
 - 2) with a person who is under the statutory age of consent of 16 years of age.
- 4) Dating Violence, defined as:
- a. violence,
 - b. on the basis of sex,
 - c. committed by a person,
 - d. who is in or has been in a social relationship of a romantic or intimate nature with the Complainant.
 - i. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition—
 - ii. Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
 - iii. Dating violence does not include acts covered under the definition of domestic violence.
- 5) Domestic Violence, defined as:
- a. violence,
 - b. on the basis of sex,
 - c. committed by a current or former spouse or intimate partner of the Complainant,
 - d. by a person with whom the Complainant shares a child in common, or
 - e. by a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
 - f. by a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Nebraska, or
 - g. by any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Nebraska.

*To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

- 6) Stalking, defined as:
- a. engaging in a course of conduct,
 - b. on the basis of sex,

- c. directed at a specific person, that
 - i. would cause a reasonable person to fear for the person's safety, or
 - ii. the safety of others; or
 - iii. Suffer substantial emotional distress.

For the purposes of this definition—

- (i) Course of conduct means two or more acts, including, but not limited to, acts in which the Respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- (ii) Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
- (iii) Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

It is Board policy that none of WNCC's employees (staff/faculty) shall engage in any activity or relationship that places them in a conflict of interest between their official activities and any other interest or obligation. All activities are to be conducted in a manner that is free of real or perceived conflict of interest or favoritism. A conflict of interest requires all employees to disqualify themselves from participating in a decision when a personal interest is present. In addition, employees shall avoid any relationship, influence or activity that may adversely affect or give the appearance of adversely affecting an employee's independent judgment in making decisions related to their job. Certain activities create a conflict of interest or appearance of favoritism unless they are properly disclosed, approved or managed. These activities can be undertaken only after appropriate disclosures, approvals or management in accordance with BP-410, Conflict of Interest and Code of Ethics (All Employees of Western Nebraska Community College).

The College reserves the right to impose any level of sanction, ranging from a reprimand up to and including suspension or expulsion/termination, for any offense under this policy.

c. Force, Coercion, Consent, and Incapacitation⁷

⁷ The definition of "consent" in the State of Nebraska is not specifically defined, however, the definition of "without consent" in Nebraska law is: (a)(i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;

(b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and

(c) A victim need not resist verbally or physically where it would be useless or futile to do so.

As used in the offenses above, the following definitions and understandings apply:

Force: Force is the use of physical violence and/or physical imposition to gain sexual access. Force also includes threats, intimidation (implied threats), and coercion that is intended to overcome resistance or produce consent (e.g., “Have sex with me or I’ll hit you,” “Okay, don’t hit me, I’ll do what you want.”).

Sexual activity that is forced is, by definition, non-consensual, but non-consensual sexual activity is not necessarily forced. Silence or the absence of resistance alone is not consent. Consent is not demonstrated by the absence of resistance. While resistance is not required or necessary, it is a clear demonstration of non-consent.

Coercion: Coercion is unreasonable pressure for sexual activity. Coercive conduct differs from seductive conduct based on factors such as the type and/or extent of the pressure used to obtain consent. When someone makes clear that they do not want to engage in certain sexual activity, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive.

Consent is:

- knowing, and
- voluntary, and
- clear permission
- by word or action
- to engage in sexual activity.

Individuals may experience the same interaction in different ways. Therefore, it is the responsibility of each party to determine that the other has consented before engaging in the activity.

If consent is not clearly provided prior to engaging in the activity, consent may be ratified by word or action at some point during the interaction or thereafter, but clear communication from the outset is strongly encouraged.

For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct. Reasonable reciprocation can be implied. For example, if someone kisses you, you can kiss them back (if you want to) without the need to explicitly obtain *their* consent to being kissed back.

See, Neb. Rev. Stat. §28-318(8). This definition is applicable to criminal prosecutions for sex offense in Nebraska but may differ from the definition used on campus to address policy violations. [Included for Clery/VAWA Section 304 compliance purposes].

Consent can also be withdrawn once given, as long as the withdrawal is reasonably and clearly communicated. If consent is withdrawn, that sexual activity should cease within a reasonable time.

Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). A current or previous intimate relationship is not sufficient to constitute consent.

Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the College to determine whether its policy has been violated. The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

Consent in relationships must also be considered in context. When parties consent to BDSM⁸ or other forms of kink, non-consent may be shown by the use of a safe word. Resistance, force, violence, or even saying “no” may be part of the kink and thus consensual, so the College’s evaluation of communication in kink situations should be guided by reasonableness, rather than strict adherence to policy that assumes non-kink relationships as a default.

Incapacitation: A person cannot consent if they are unable to understand what is happening or is disoriented, helpless, asleep, or unconscious, for any reason, including by alcohol or other drugs. As stated above, a Respondent violates this policy if they engage in sexual activity with someone who is incapable of giving consent.

It is a defense to a sexual assault policy violation that the Respondent neither knew nor should have known the Complainant to be physically or mentally incapacitated. “Should have known” is an objective, reasonable person standard that assumes that a reasonable person is both sober and exercising sound judgment.

Incapacitation occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/informed consent (e.g., to understand the “who, what, when, where, why, or how” of their sexual interaction).

Incapacitation is determined through consideration of all relevant indicators of an individual’s state and is not synonymous with intoxication, impairment, blackout, and/or being drunk.

This policy also covers a person whose incapacity results from a temporary or permanent physical or mental health condition, involuntary physical restraint, and/or the consumption of incapacitating drugs.

17. RETALIATION

⁸ Bondage, discipline/dominance, submission/sadism, and masochism.

Protected activity under this policy includes reporting an incident that may implicate this policy, participating in the grievance process, supporting a Complainant or Respondent, assisting in providing information relevant to an investigation, and/or acting in good faith to oppose conduct that constitutes a violation of this Policy.

The College and any member of the College's community are prohibited from taking materially adverse action by intimidating, threatening, coercing, harassing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by law or policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this policy and procedure.

Acts of alleged retaliation should be reported immediately to the Title IX Coordinator and will be promptly investigated. The College will take all appropriate and available steps to protect individuals who fear that they may be subjected to retaliation.

Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this policy and procedure does not constitute retaliation, provided that a determination regarding responsibility, alone, is not sufficient to conclude that any party has made a materially false statement in bad faith.

The exercise of rights protected under the First Amendment does not constitute retaliation. A good faith pursuit by either party of civil, criminal or other legal action, internal or external to the College, does not constitute retaliation.

18. REPORTING BY COLLEGE EMPLOYEES

WNCC is required to designate campus community members (Responsible Employees) who are responsible for reporting incidents of sexual misconduct to the Title IX Coordinator for the purpose of conducting an investigation into Prohibited Conduct. Once a Responsible Employee has actual knowledge of sexual misconduct (or allegations of sexual misconduct), the college is deemed to have notice of it, and is obligated to respond. As such, immediate reporting is crucial. Sexual misconduct includes sexual harassment, sexual assault, dating violence, domestic violence and stalking (also referred to herein as Prohibited Conduct) as defined in this procedure.

Not all College Employees are designated as Responsible Employees. Most WNCC faculty and staff members are not Responsible Employees. Only those individuals identified by title in the Responsible Employees section of this procedure are *required* to take action or report incidents of sexual harassment. The college encourages all other college employees and faculty members to: (1) assist a WNCC community member with reporting to the Title IX Coordinator and/or local law enforcement; and/or (2) assist a community member by directing the individual to resource and reporting options; (3) and/or report concerns to your supervisor or the Title IX Coordinator.

A. RESPONSIBLE EMPLOYEES / MANDATED REPORTERS

Responsible employees are mandated reporters who must promptly report any information they learn about suspected Prohibited Conduct to the Title IX Coordinator. Failure by a responsible

employee to timely report a suspected Prohibited Conduct may subject them to appropriate discipline, up to and including removal from their position.

Responsible Employees / Mandated Reporters must also promptly share all details of behaviors under this policy that they observe or have knowledge of, even if not reported to them by a Complainant or third-party.

Complainants may want to carefully consider whether they share personally identifiable details with non-confidential mandated reporters, as those details must be shared with the Title IX Coordinator.

The following individuals are, for purposes of the **Sexual Harassment Grievance and Investigation Procedures**, responsible employees:

- **ADVISING/STUDENT SUCCESS**
 - Student Success Director
 - Career Pathways & Advising Director
 - Student Engagement Director
- **ACADEMIC AFFAIRS / WORKFORCE DEVELOPMENT**
 - Dean of Instruction
 - Associate Dean of Instruction
 - Dean of Instruction & Workforce Development
 - Lifelong Learning Director
 - Workforce Development Director
- **ADMINISTRATION**
 - President
 - Executive Vice President
 - Vice President of Administrative Services
 - Vice President of Enrollment and Marketing
 - Human Resources Executive Director / Title IX Coordinator
- **ADMINISTRATIVE SERVICES**
 - Accounting Services Director
 - Assessment and Institutional Research Director
 - Bookstore Operations Director
 - Food Service Director
- **ATHLETICS**
 - Athletic Director
- **ENROLLMENT and MARKETING**
 - Admissions Director

- Financial Aid Director
- Information Technology Director
- Partnerships and Inclusion Executive Director
- Public Relations and Marketing Director
- FACULTY
 - Division Chairs
 - Any faculty member leading, coordinating or supervising off-campus academic activities or programs such as special field trips, etc.
- INSTRUCTIONAL SUPPORT
 - Associate Dean of Instructional Support
 - Adult Education Director
 - CollegeNOW! Director
 - Academic Testing & Tutoring Director
- STUDENT SERVICES / RESIDENCE LIFE
 - Dean of Students / TRIO Director
 - Assistant Dean of Students
 - Residence Life Director

Though this may seem obvious, when a Responsible Employee / Mandated Reporter is engaged in harassment or other violations of this policy / procedure, they still have a duty to report their own misconduct, though the College is technically not on notice when a harasser is also a Mandated Reporter unless the harasser does in fact report themselves.

It is important to clarify that a Mandated Reporter who is themselves the target of harassment or other prohibited conduct under this policy is not required to report their own experience, though they are, of course, encouraged to do so.

Any questions regarding who is a responsible employee should be directed to the Title IX Coordinator.

B. ALL OTHER EMPLOYEES

Reporting is an important tool to address Prohibited Conduct. Thus, while all other employees who are not designated as Confidential Resources should safeguard an individual's privacy, they are also strongly encouraged to share any information about such conduct with the Title IX Coordinator.

C. CONFIDENTIAL RESOURCES

If a Complainant would like the details of an incident to be kept confidential, the College has designated the Director of Counseling Services (and affiliated on-campus counselors) as a Confidential Resource:

College Counseling Center

Norman J. Stephenson, M.S., LADC, LMHP, CPC, LIMHP
Counseling Director

A Confidential Resource will not share information about an individual (including whether that individual has received services) unless (1) given permission to do so by the person who disclosed the information; (2) there is an imminent threat of harm to self or others; (3) there is reasonable cause to believe that a child has been subjected to child abuse or neglect or observes such child being subjected to conditions or circumstances which reasonably would result in abuse or neglect as set forth in Nebraska law; or (4) as otherwise required or permitted by law or court order.

Campus counselors and the Employee Assistance Program are available to help free of charge and may be consulted on an emergency basis during normal business hours.

Employees who are confidential resources and who receive reports within the scope of their confidential roles will timely submit anonymous statistical information for Clery Act purposes unless they believe it would be harmful to their client / patient.

Additionally, there are off-campus confidential resources available to Complainants under Nebraska’s Victim Advocate Confidentiality statutes. An example in the region served by the College includes the following:

The DOVES Program*

Gering Office

2035 10th Street
Gering, NE 69341

Alliance Office

212 Box Butte Ave., Ste. B
Alliance, NE 69301

Sidney Office

941 8th Avenue
Sidney, NE 69162

Telephone contact information:

308-436-HELP (4357)
866-95-DOVES (36837)
515-599-6620 (Text Line)

*The extent of confidentiality for resources like the DOVES Program are set forth in Nebraska’s Victim Advocate Confidentiality Statutes found at Neb. Rev. Stat. §§29-4301 to 4304.

D. ANONYMOUS NOTICE TO MANDATED REPORTERS

At the request of a Complainant, notice may be given by a Mandated Reporter to the Title IX Coordinator anonymously, without identification of the Complainant. The Mandated Reporter cannot remain anonymous themselves.

If a Complainant has requested that a Mandated Reporter maintain the Complainant’s anonymity, the Mandated Reporter may do so unless it is reasonable to believe that a compelling threat to health or safety could exist. The Mandated Reporter can consult with the Title IX Coordinator on that assessment without revealing personally identifiable information.

Anonymous notice will be investigated by the Recipient to the extent possible, both to assess the underlying allegation(s) and to determine if supportive measures or remedies can be provided.

However, anonymous notice typically limits the Recipient's ability to investigate, respond, and provide remedies, depending on what information is shared.

When a Complainant has made a request for anonymity, the Complainant's personally identifiable information may be withheld by a Mandated Reporter, but all other details must be shared with the Title IX Coordinator. Mandated Reporters may not be able to maintain requests for anonymity for Complainants who are minors and/or if they fall under Nebraska's mandatory reporting laws. See, for example: Neb. Rev. Stat. §28-711 (Child Subjected to abuse or neglect; report; contents; toll-free number).

19. WHEN A COMPLAINANT DOES NOT WISH TO PROCEED

If a Complainant does not wish for their name to be shared, does not wish for an investigation to take place, or does not want a formal complaint to be pursued, they may make such a request to the Title IX Coordinator, who will evaluate that request in light of the duty to ensure the safety of the campus and to comply with state or federal law.

The Title IX Coordinator has ultimate discretion over whether the College proceeds when the Complainant does not wish to do so, and the Title IX Coordinator may sign a formal complaint to initiate a grievance process upon completion of an appropriate violence risk assessment.

The Title IX Coordinator's decision should be based on results of the violence risk assessment that show a compelling risk to health and/or safety that requires the College to pursue formal action to protect the community.

A compelling risk to health and/or safety may result from evidence of patterns of misconduct, predatory conduct, threats, abuse of minors, use of weapons, and/or violence. The College may be compelled to act on alleged employee misconduct irrespective of a Complainant's wishes.

The Title IX Coordinator must also consider the effect that non-participation by the Complainant may have on the availability of evidence and the College's ability to pursue a Formal Grievance Process fairly and effectively.

When the Title IX Coordinator executes the written complaint, they do not become the Complainant. The Complainant is the individual who is alleged to be the victim of conduct that could constitute a violation of this policy.

When the College proceeds, the Complainant (or their Advisor) may have as much or as little involvement in the process as they wish. The Complainant retains all rights of a Complainant under this Policy irrespective of their level of participation. Typically, when the Complainant chooses not to participate, the Advisor may be appointed as proxy for the Complainant throughout the process, acting to ensure and protect the rights of the Complainant, though this does not extend to the provision of evidence or testimony.

Note that the College's ability to remedy and respond to notice may be limited if the Complainant does not want the College to proceed with an investigation and/or grievance process. The goal is to provide the Complainant with as much control over the process as possible, while balancing the College's obligation to protect its community.

In cases in which the Complainant requests confidentiality/no formal action and the circumstances allow the College to honor that request, the College will offer informal resolution options (see below), supportive measures, and remedies to the Complainant and the community, but will not otherwise pursue formal action.

If the Complainant elects to take no action, they can change that decision if they decide to pursue a formal complaint at a later date. Upon making a formal complaint, a Complainant has the right, and can expect, to have allegations taken seriously by the College, and to have the incidents investigated and properly resolved through these procedures. Please consider that delays may cause limitations on access to evidence, or present issues with respect to the status of the parties.

20. FEDERAL TIMELY WARNING OBLIGATIONS

Parties reporting sexual assault, domestic violence, dating violence, and/or stalking should be aware that under the Clery Act, the College must issue timely warnings for incidents reported to them that:

- (1) Pose a serious or continuing threat of bodily harm; or
- (2) Danger to members of the campus community.

The College will ensure that a Complainant's name and other identifying information is not disclosed, while still providing enough information for community members to make safety decisions in light of the potential danger. Further information on the College's Campus Timely Warning policies are set forth in the College's Annual Campus Security and Fire Report.

21. FALSE ALLEGATIONS / REPORTS / EVIDENCE

The College presumes that Complaints are filed in good faith. A finding that the behavior at issue does not constitute a violation of the Sexual Harassment Policy or that there is insufficient evidence to conclude that the alleged Prohibited Conduct occurred as reported, does not mean that the report was made in bad faith. The College encourages all individuals who have experienced or witnessed behavior they believe violates the Sexual Harassment Policy and this Procedure to report the matter so it may be addressed, without fear of consequences from the College even if their good faith report cannot be substantiated or the behavior does not constitute a violation of the Policy and Procedure.

Deliberately false and/or malicious accusations under this policy/procedure, however, are a serious offense and will be subject to appropriate disciplinary action. A person who makes a report of Prohibited Conduct to the College that is later found to have been intentionally false or made maliciously without regard for truth may be subject to College disciplinary action (Non-Academic Misconduct section of the Student Handbook and/or Employee Discipline).

This provision does not apply to reports made in good faith, even if an investigation of the incident does not find a Policy violation. Similarly, a person who intentionally provides false information to the College during a College investigation or disciplinary proceeding action may be subject to disciplinary action.

As a general matter, the College does not impose prior restraints on a students' or employees' ability to discuss the allegations under investigation, for example, with a parent, friend, or other source of emotional support, or with an advocacy organization. Witness intimidation or tampering, however, is prohibited under this procedure. A person is considered to have impermissibly tampered with a witness when he or she attempts to induce or otherwise cause a witness to testify or inform falsely or alter or prevent a witness's testimony.

Lastly, witnesses and parties knowingly providing false evidence, tampering with or destroying evidence, or deliberately misleading an official conducting an investigation can be subject to discipline under other institutional policies as applicable.

22. AMNESTY

The College community encourages the reporting of prohibited conduct and crimes by Complainants and witnesses. The College recognizes that there are times complainants or witnesses may be hesitant to report to College officials or participate in a grievance process because they fear that they themselves may be in violation of certain policies. Examples here can include situations like underage drinking or use of illicit drugs at the time of the incident. Respondents may be hesitant to be forthcoming during the process for the same reasons.

It is in the best interests of the College community that Complainants choose to report misconduct to College officials, that witnesses come forward to share what they know, and that all parties be forthcoming during the process.

To encourage reporting and participation in the process, the College maintains a policy of offering parties and witnesses amnesty from minor policy violations – such as underage consumption of alcohol or the use of illicit drugs – related to the incident.

Amnesty does not apply to more serious allegations such as physical abuse of another or illicit drug distribution. The decision not to offer amnesty is based on neither sex nor gender, but on the fact that collateral misconduct, while taken seriously, is typically addressed for all students within a progressive discipline system, and the rationale for amnesty – the incentive to report serious misconduct – is rarely applicable to Respondent with respect to a Complainant.

Students: The College recognizes that there are times students may be hesitant to assist others for fear that they may get in trouble themselves (for example, an underage student who has been drinking or using marijuana might hesitate to help take an individual who has experienced sexual assault to a campus security officer or campus official).

The College can offer students who offer help to others in need amnesty from minor policy violations as set forth herein. Although policy violations cannot be wholly overlooked, the College may provide purely educational options with no official disciplinary finding, rather than punitive sanctions, to those who offer their assistance to others in need.

Employees: The College recognizes that there may be times employees are hesitant to report sexual harassment or retaliation for fear that they might be subject to discipline themselves. For example, an employee who violated the conflict of interest / code of ethics policy regarding a close relationship and is then assaulted in the course of that relationship might hesitate to report the incident to College officials.

The College may, at its discretion, offer employee Complainants amnesty from such policy violations (typically more minor policy violations) related to the incident. Amnesty may also be granted to Respondents and witnesses on a case-by-case basis.

23. REPORTING TO LAW ENFORCEMENT

The College encourages anyone who experiences or witnesses Prohibited Conduct to make a report to law enforcement. Prompt reporting allows law enforcement to collect and preserve evidence. Any individual who wishes to pursue a criminal complaint, in addition to, or instead of, making a report to the College for a policy violation may contact law enforcement directly by contacting:

In case of a life-threatening emergency, make the following calls:

1. 911

The 911 operator will assist in directing the necessary response from emergency services, i.e., police, fire and paramedics. Be prepared to give the operator information about the emergency, including:

- Your name, address, and phone number for verification
- Description of suspicious person(s) or vehicle(s) involved (if applicable)
- On a first aid call, determine if the victim is conscious and breathing

Crimes of a non-emergent nature may be reported by calling the following based on your location:

ALLIANCE:

Alliance Police Department: (308) 762-4955

Box Butte County Sheriff: (308) 762-6464

SCOTTSBLUFF:

Scottsbluff Police Department: (308) 630-6261 (during business hours M-F, 7 a.m. to 4:00 p.m.)

(308) 632-7176 (after business hours)

Scotts Bluff County Sheriff: (308) 436-6667

SIDNEY:

Sidney Police Department: (308) 254-5515

Cheyenne County Sheriff: (308) 254-2922

24. FEDERAL STATISTICAL REPORTING OBLIGATIONS

Certain campus officials – those deemed Campus Security Authorities – have a duty to report the following for federal statistical reporting purposes (Clery Act):

- a) All “primary crimes,” which include homicide, sexual assault, robbery, aggravated assault, burglary, motor vehicle theft, and arson;
- b) Hate crimes, which include any bias-motivated primary crime as well as any bias motivated larceny or theft, simple assault, intimidation, or destruction/damage/vandalism of property;
- c) VAWA-based crimes,⁹ which include sexual assault, domestic violence, dating violence, and stalking; and
- d) Arrests and referrals for disciplinary action for weapons-related law violations, liquor-related law violations, and drug abuse-related law violations.

All personally identifiable information is kept private, but statistical information must be shared with the Dean of Students regarding the type of incident and its general location (on or off-campus or in the surrounding area, but no addresses are given) for publication in the Annual Security Report and daily campus crime log.

Campus Security Authorities include, but are not limited to:

- Dean of Students
- Director of Athletics
- Team coach
- Faculty advisors to a student group or student organization
- A student resident advisor or assistant
- A student who monitors access to residential environments
- Title IX Coordinator
- Contracted campus security officers

PROCESS A: COLLEGE RESOLUTION PROCESS FOR ALLEGED VIOLATIONS OF THE POLICY ON SEXUAL HARASSMENT

1. Overview

⁹ VAWA is the Violence Against Women Act, enacted in 1994 codified in part at 42 U.S.C. sections 13701 through 14040.

The College will act on any formal or informal notice/complaint of violation of the Policy that is received by the Title IX Coordinator or any other Official with Authority by applying these procedures, known as “Process A.”

The procedures below apply **only** to qualifying allegations of Prohibited Conduct / sexual harassment (including sexual assault, dating violence, domestic violence, and stalking, as defined above) involving students, staff, administrator, or faculty members.

If a dismissal occurs under Process A, the College will determine whether other procedures (known collectively as “Process B”) applicable to the resolution of such offenses apply. Process B can include other institutional policies as applicable.

Process B can also apply to sexual harassment (including sexual assault, dating violence, domestic violence, and stalking, as defined above) when jurisdiction does not fall within Process A, as determined by the Title IX Coordinator.

The procedures below may be used to address collateral misconduct arising from the investigation of or occurring in conjunction with reported misconduct (e.g., vandalism, physical abuse of another). All other allegations of misconduct unrelated to incidents covered by the Policy will be addressed through procedures described in the student, faculty, and staff handbooks.

2. Notice / Complaint

Upon receipt of a complaint or notice to the Title IX Coordinator of an alleged violation of the Policy, the Title IX Coordinator initiates a prompt initial assessment to determine the next steps the College needs to take.

The Title IX Coordinator will initiate at least one of three responses:

- 1) Offering supportive measures because the Complainant does not want to file a formal complaint; and/or
- 2) An informal resolution (upon submission of a formal complaint); and/or
- 3) A Formal Grievance Process including an investigation and a hearing (upon submission of a formal complaint).

The College uses the Formal Grievance Process to determine whether or not the Policy has been violated. If so, the College will promptly implement effective remedies designed to ensure that it is not deliberately indifferent to sexual harassment or retaliation, their potential recurrence, or their effects.

3. Initial Assessment

Following receipt of notice or a complaint of an alleged violation of this Policy, the Title IX Coordinator¹⁰ engages in an initial assessment, typically within one to five business days. The steps in an initial assessment can include:

- If notice is given, the Title IX Coordinator seeks to determine if the person impacted wishes to make a formal complaint, and will assist them to do so, if desired.
 - If they do not wish to do so, the Title IX Coordinator determines whether to initiate a complaint because a violence risk assessment indicates a compelling threat to health and/or safety.
- If a formal complaint is received, the Title IX Coordinator assesses its sufficiency and works with the Complainant to make sure it is correctly completed.
- The Title IX Coordinator reaches out to the Complainant to offer supportive measures.
- The Title IX Coordinator works with the Complainant to ensure they are aware of the right to have an Advisor.
- The Title IX Coordinator works with the Complainant to determine whether the Complainant prefers a supportive and remedial response, an informal resolution option, or a formal investigation and grievance process.
 - If a supportive and remedial response is preferred, the Title IX Coordinator works with the Complainant to identify their wishes, assesses the request, and implements accordingly. No Formal Grievance Process is initiated, though the Complainant can elect to initiate one later, if desired.
 - If an informal resolution option is preferred, the Title IX Coordinator assesses whether the complaint is suitable for informal resolution, which informal resolution mechanism may serve the situation best or is available, and may seek to determine if the Respondent is also willing to engage in informal resolution.
 - If a Formal Grievance Process is preferred, the Title IX Coordinator determines if the misconduct alleged falls within the scope of Title IX:
 - If it does, the Title IX Coordinator will initiate the formal investigation and grievance process, directing the investigation to address:
 - an incident, and/or
 - a pattern of alleged misconduct, and/or
 - a culture/climate concern, based on the nature of the complaint.
 - If it does not, the Title IX Coordinator determines that Title IX does not apply (and will “dismiss” that aspect of the complaint, if any), assesses which policies may apply, which resolution process is applicable, or referral of the matter for resolution under Process B. Please note that dismissing a complaint under Title IX is solely a procedural requirement under Title IX and does not limit the Recipient’s authority to address a complaint with an appropriate process and remedies.

a. Violence Risk Assessment

¹⁰ If circumstances require, the President or Title IX Coordinator will designate another person to oversee the process below should an allegation be made about the Coordinator or the Coordinator be otherwise unavailable or unable to fulfill their duties.

In many cases, the Title IX Coordinator may determine that a Violence Risk Assessment (VRA) should be conducted by the Behavioral Intervention Team (BIT) as part of the initial assessment. A VRA can aid in ten critical and/or required determinations, including:

- Emergency removal of a Respondent on the basis of immediate threat to physical health/safety;
- Whether the Title IX Coordinator should pursue/sign a formal complaint absent a willing/able Complainant;
- Whether to put the investigation on the footing of incident and/or pattern and/or climate;
- To help identify potential predatory conduct;
- To help assess/identify grooming behaviors;
- Whether it is reasonable to try to resolve a complaint through informal resolution, and what modality may be most successful;
- Whether to permit a voluntary withdrawal by the Respondent;
- Whether to impose transcript notation or communicate with a transfer Recipient about a Respondent;
- Assessment of appropriate sanctions/remedies (to be applied post-hearing); and/or
- Whether a Clery Act Timely Warning/Notice Against Trespass is needed.

Threat assessment is the process of evaluating the actionability of violence by an individual against another person or group following the issuance of a direct or conditional threat. A VRA is a broader term used to assess any potential violence or danger, regardless of the presence of a vague, conditional, or direct threat.

VRAs require specific training and are typically conducted by psychologists, clinical counselors, social workers, case managers, law enforcement officers, student conduct officers, or other Behavioral Intervention Team (BIT) Members.

A VRA authorized by the Title IX Coordinator should occur in collaboration with the Behavioral Intervention Team (BIT). Where a VRA is required by the Title IX Coordinator, a Respondent refusing to cooperate may result in a charge of failure to comply within the appropriate student or employee conduct process.

A VRA is not an evaluation for an involuntary behavioral health hospitalization (i.e., Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§71-901 to 71-963), nor is it a psychological or mental health assessment. A VRA assesses the risk of actionable violence, often with a focus on targeted/predatory escalations, and is supported by research from the fields of law enforcement, criminology, human resources, and psychology.

More about the Recipient's process for VRA can be found below in Appendix "C".

b. Dismissal (Mandatory and Discretionary)¹¹

The College must dismiss a formal complaint or any allegations therein if, at any time during

¹¹ These dismissal requirements are mandated by the 2020 Title IX Regulations, 34 CFR §106.45.

the investigation or hearing, it is determined that:

- 1) The conduct alleged in the formal complaint would not constitute sexual harassment as defined above, even if proved; and/or
- 2) The conduct did not occur in an educational program or activity controlled by the College (including buildings or property controlled by recognized student organizations), and/or the College does not have control of the Respondent; and/or
- 3) The conduct did not occur against a person in the United States; and/or
- 4) At the time of filing a formal complaint, a complainant is not participating in or attempting to participate in the education program or activity of the recipient.¹²

The College may dismiss a formal complaint or any allegations therein if, at any time during the investigation or hearing:

- 1) A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein; or
- 2) The Respondent is no longer enrolled in or employed by the recipient; or
- 3) Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Upon any dismissal, the College will promptly send written notice of the dismissal and the rationale for doing so simultaneously to the parties.

This dismissal decision is appealable by any party under the procedures for appeal below.

4. Counterclaims

The College is obligated to ensure that the grievance process is not abused for retaliatory purposes. The College permits the filing of counterclaims but uses an initial assessment, described above, to assess whether the allegations in the counterclaim are made in good faith. Counterclaims by a Respondent may be made in good faith, but are, on occasion, also made for purposes of retaliation. Counterclaims made with retaliatory intent will not be permitted.

Counterclaims determined to have been reported in good faith will be processed using the grievance procedures below. Investigation of such claims may take place after resolution of the underlying initial allegation, in which case a delay may occur.

Counterclaims may also be resolved through the same investigation as the underlying allegation, at the discretion of the Title IX Coordinator. When counterclaims are not made in good faith, they will be considered retaliatory and may constitute a violation of this policy.

5. Right to an Advisor

¹² Such a Complainant is still entitled to supportive measures, but the formal grievance process is not applicable.

The parties may each have an Advisor¹³ of their choice present with them for all meetings, interviews, and hearings within the resolution process, if they so choose. The parties may select whoever they wish to serve as their Advisor as long as the Advisor is eligible and available.¹⁴

Choosing an Advisor who is also a witness in the process creates potential for bias and conflict-of-interest. A party who chooses an Advisor who is also a witness can anticipate that issues of potential bias will be explored by the hearing Decision-maker(s).

The Recipient may permit parties to have more than one Advisor upon special request to the Title IX Coordinator. The decision to grant this request is at the sole discretion of the Title IX Coordinator and will be granted equitably to all parties.

a. Who Can Serve as an Advisor

The Advisor may be a friend, mentor, family member, attorney, or any other individual a party chooses to advise, support, and/or consult with them throughout the resolution process. The parties may choose Advisors from inside or outside of the College community.

The Title IX Coordinator will also offer to assign a trained Advisor for any party if the party so chooses. If the parties choose an Advisor from the pool available from the College, the Advisor will be trained by the College and be familiar with the College's resolution process.

If the parties choose an Advisor from outside the pool of those identified by the College, the Advisor may not have been trained by the College and may not be familiar with College policies and procedures.

Parties also have the right to choose not to have an Advisor in the initial stages of the resolution process, prior to a hearing.

b. Advisor's Role in Meetings and Interviews

The parties may be accompanied by their Advisor in all meetings and interviews at which the party is entitled to be present, including intake and interviews. Advisors should help the parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith.

The Recipient cannot guarantee equal Advisory rights, meaning that if one party selects an Advisor who is an attorney, but the other party does not or cannot afford an attorney, the Recipient is not obligated to provide an attorney.

c. Advisors in Hearings/Recipient-Appointed Advisor

Under U.S. Department of Education regulations under Title IX, a form of indirect questioning is required during the hearing, but must be conducted by the parties' Advisors. The parties are not permitted to directly question each other or any witnesses. If a party does not have an Advisor for a hearing, the College will appoint a trained Advisor for the limited purpose of conducting any questioning of the other party and witnesses.

¹³ This could include an attorney, advocate, or support person. The law permits one Advisor for each party (witnesses are not entitled to Advisors within the process, though they can be advised externally).

¹⁴ "Available" means the party cannot insist on an Advisor who simply doesn't have inclination, time, or availability. Also, the Advisor cannot have institutionally conflicting roles, such as being a Title IX administrator who has an active role in the matter, or a supervisor who must monitor and implement sanctions.

A party may reject this appointment and choose their own Advisor, but they may not proceed without an Advisor. If the party's Advisor will not conduct questioning, the College will appoint an Advisor who will do so thoroughly, regardless of the participation or non-participation of the advised party in the hearing itself. Questioning of the parties and witnesses may also be conducted by the Decision-maker(s) during the hearing.

d. Advisor's Role in Meetings and Interviews

The parties may be accompanied by their Advisor in all meetings and interviews at which the party is entitled to be present, including intake and interviews. Advisors should help the parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith.

The Recipient cannot guarantee equal Advisory rights, meaning that if one party selects an Advisor who is an attorney, but the other party does not or cannot afford an attorney, the College is not obligated to provide an attorney.

e. Pre-Interview Meetings

Advisors may request to meet with the administrative officials conducting interviews/meetings in advance of these interviews or meetings. This pre-meeting allows Advisors to clarify and understand their role and the College's policies and procedures.

f. Advisor Violations of Recipient Policy

All Advisors are subject to the same College policies and procedures, whether they are attorneys or not. Advisors are expected to advise their advisees without disrupting proceedings. Advisors should not address College officials in a meeting or interview unless invited to (e.g., asking procedural questions). The Advisor may not make a presentation or represent their advisee during any meeting or proceeding and may not speak on behalf of the advisee to the Investigator(s) or other Decision-maker(s) except during a hearing proceeding, during cross-examination.

The parties are expected to ask and respond to questions on their own behalf throughout the investigation phase of the resolution process. Although the Advisor generally may not speak on behalf of their advisee, the Advisor may consult with their advisee, either privately as needed, or by conferring or passing notes during any resolution process meeting or interview. For longer or more involved discussions, the parties and their Advisors should ask for breaks to allow for private consultation.

Any Advisor who oversteps their role as defined by this policy will be warned only once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting will be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator will determine how to address the Advisor's non-compliance and future role.

g. Sharing Information with the Advisor

The College expects that the parties may wish to have the College share documentation and evidence related to the allegations with their Advisors. Parties may share this information directly with their Advisor or other individuals if they wish. Doing so may help the parties participate more meaningfully in the resolution process.

The College also provides a consent form that authorizes the College to share such information directly with their Advisor. The parties must either complete and submit this form to the Title IX

Coordinator or provide similar documentation demonstrating consent to a release of information to the Advisor before the College is able to share records with an Advisor.

h. Privacy of Records Shared with Advisor

Advisors are expected to maintain the privacy of the records shared with them. These records may not be shared with third parties, disclosed publicly, or used for purposes not explicitly authorized by the College. The College may seek to restrict the role of any Advisor who does not respect the sensitive nature of the process or who fails to abide by the College's privacy expectations.

i. Expectations of an Advisor

The College generally expects an Advisor to adjust their schedule to allow them to attend College meetings when planned, but may change scheduled meetings to accommodate an Advisor's inability to attend, if doing so does not cause an unreasonable delay.

The College may also make reasonable provisions to allow an Advisor who cannot attend in person to attend a meeting by telephone, video conferencing, or other similar technologies as may be convenient and available.

j. Expectations of the Parties with Respect to Advisors

A party may elect to change Advisors during the process and is not obligated to use the same Advisor throughout. The parties are expected to inform the Investigator(s) of the identity of their Advisor at least two (2) business days before the date of their first meeting with Investigators (or as soon as possible if a more expeditious meeting is necessary or desired).

The parties are expected to provide timely notice to the Title IX Coordinator if they change Advisors at any time. It is assumed that if a party changes Advisors, consent to share information with the previous Advisor is terminated, and a release for the new Advisor must be secured. Parties are expected to inform the Title IX Coordinator of the identity of their hearing Advisor at least two (2) business days before the hearing.

For faculty members who are entitled to union representation, the College will allow the unionized employee to have their union representative (if requested by the party) as well as an Advisor of their choice present for all resolution-related meetings and interviews. To uphold the principles of equity, the other party (regardless of union membership) will also be permitted to have a second attendee be present for all resolution-related meetings and interviews. Advisors are all subject to the specific rules set forth herein and union representatives may not speak on behalf of their union member or otherwise take an active role in these proceedings unless they are also serving as an Advisor as defined and set forth herein. Witnesses are not permitted to have union representation or Advisors in grievance process interviews or meetings.

k. Assistance in Securing an Advisor

The Nebraska State Bar Association offers a pro bono legal assistance program through a network of attorney volunteers called the Volunteer Lawyers Project (VLP). Someone seeking assistance from the VLP can call the VLP Automated Telephone Information line at (402) 986-6501. Additional information regarding the VLP program can be found on the Nebraska State Bar Association Website at the following:

[https://www.nebar.com/page/VLPPublic#:~:text=The%20Volunteer%20Lawyers%20Project%20\(VLP,eligible%20low%20income%20Nebraska%20residents.](https://www.nebar.com/page/VLPPublic#:~:text=The%20Volunteer%20Lawyers%20Project%20(VLP,eligible%20low%20income%20Nebraska%20residents.)

For representation, Respondents may wish to contact organizations such as:

- FACE (<http://www.facecampusequality.org>)
- SAVE (<http://www.saveservices.org>).

Complainants may wish to contact organizations such as:

- The Victim Rights Law Center (<http://www.victimrights.org>),
- The National Center for Victims of Crime (<http://www.victimsofcrime.org>), which maintains the Crime Victim's Bar Association.
- The Time's Up Legal Defense Fund: <https://nwlc.org/times-up-legal-defense-fund/>

6. Resolution Processes

Resolution proceedings are private. All persons present at any time during the resolution process are expected to maintain the privacy of the proceedings in accordance with College policy. Although there is an expectation of privacy around what Investigators share with parties during interviews, the parties have discretion to share their own knowledge and evidence with others if they so choose, with the exception of information the parties agree not to disclose related to Informal Resolution, discussed below. The College encourages parties to discuss any sharing of information with their Advisors before doing so.

a. Informal Resolution

Informal Resolution can include three different approaches:

- When the Title IX Coordinator can resolve the matter informally by providing supportive measures (only) to remedy the situation.
- When the parties agree to resolve the matter through an alternate resolution mechanism as described below, including mediation, conference process, shuttle negotiation, etc., usually before a formal investigation takes place; see discussion in b., below.
- When the Respondent accepts responsibility for violating policy, and desires to accept a sanction and end the resolution process (similar to above, but usually occurs post-investigation); see discussion in c., below.

To initiate Informal Resolution, a Complainant needs to submit a formal complaint, as defined above. A Respondent who wishes to initiate Informal Resolution should contact the Title IX Coordinator.

It is not necessary to pursue Informal Resolution first in order to pursue a Formal Grievance Process, and any party participating in Informal Resolution can stop the process at any time and begin or resume the Formal Grievance Process.

Prior to implementing Informal Resolution, the College will provide the parties with written notice of the reported misconduct and any sanctions or measures that may result from

participating in such a process, including information regarding any records that will be maintained or shared by the College.

The College will obtain voluntary, written confirmation that all parties wish to resolve the matter through Informal Resolution before proceeding and will not pressure the parties to participate in Informal Resolution.

b. Alternate Resolution Mechanism

Alternate Resolution is an informal mechanism, including mediation, conference process, shuttle negotiation, etc., by which the parties reach a mutually agreed upon resolution of an allegation. All parties must consent to the use of an informal or Alternate Resolution mechanism.

The Title IX Coordinator may look to the following factors to assess whether Alternate Resolution is appropriate, or which form of Alternate Resolution may be most successful for the parties:

- The parties' amenability to Alternate Resolution;
- Likelihood of potential resolution, taking into account any power dynamics between the parties;
- The parties' motivation to participate;
- Civility of the parties;
- Results of a violence risk assessment/ongoing risk analysis;
- Disciplinary history;
- Whether an emergency removal is needed;
- Skill of the Alternate Resolution facilitator with this type of allegation;
- Complaint complexity;
- Emotional investment/capability of the parties;
- Rationality of the parties;
- Goals of the parties;
- Adequate resources to invest in Alternate Resolution (time, staff, etc.)

The ultimate determination of whether Alternate Resolution is available or successful is to be made by the Title IX Coordinator. The Title IX Coordinator maintains records of any resolution that is reached, and failure to abide by the resolution agreement may result in appropriate responsive/disciplinary actions. Results of complaints resolved by Informal Resolution or Alternate Resolution are not appealable.

c. Respondent Accepts Responsibility for Alleged Violations

The Respondent may accept responsibility for all or part of the alleged policy violations at any point during the resolution process. If the Respondent indicates an intent to accept responsibility for all of the alleged misconduct, the formal process will be paused, and the Title IX Coordinator will determine whether Informal Resolution can be used according to the criteria above.

If Informal Resolution is applicable, the Title IX Coordinator will determine whether all parties and the College are able to agree on responsibility, sanctions, and/or remedies. If so, the Title IX

Coordinator implements the accepted finding that the Respondent is in violation of College policy and implements agreed-upon sanctions and/or remedies, in coordination with other appropriate administrator(s), as necessary.

This result is not subject to appeal once all parties indicate their written assent to all agreed upon terms of resolution. When the parties cannot agree on all terms of resolution, the Formal Grievance Process will resume at the same point where it was paused.

When a resolution is accomplished, the appropriate sanction or responsive actions are promptly implemented in order to effectively stop the sexual harassment or retaliation, prevent its recurrence, and remedy the effects of the discriminatory conduct, both on the Complainant and the community.

d. Negotiated Resolution

The Title IX Coordinator with the consent of the parties, may negotiate and implement an agreement to resolve the allegations that satisfies all parties and the College. Negotiated Resolutions are not appealable.

7. Grievance Process Pool

The Formal Grievance Process relies on a pool of representatives of the College (“the Pool”) to carry out the process. Members of the Pool are announced in an annual distribution of this policy to all students, parents/guardians of students, employees, prospective students, and prospective employees.

The list of Pool members and a description of the Pool may also be obtained from the Title IX Coordinator.

a. Pool Member Roles

Members of the Pool are trained annually, and can serve in in the following roles, at the discretion of the Title IX Coordinator:

- To provide appropriate intake of and initial guidance pertaining to complaints
- To act as an Advisor to the parties
- To serve in a facilitation role in Informal Resolution or Alternate Resolution if appropriately trained in appropriate resolution methods (e.g., mediation, shuttle negotiation, conferences, etc.
- To perform of assist with initial assessment
- To investigate complaints
- To serve as a hearing facilitator (process administrator, no decision-making role)
- To serve as a Decision-maker regarding the complaint
- To serve as an Appeal Decision-maker

b. Pool Member Appointment

The Title IX Coordinator, in consultation with the President, appoints the Pool, which acts with independence and impartiality. Although members of the Pool are typically trained in a variety of skill sets and can rotate amongst the different roles listed above in different cases, the College can also designate permanent roles for individuals in the Pool, using others as substitutes or to provide greater depth of experience when necessary. The College also reserves the right to use appropriately trained external individuals to serve as investigators or hearing chairs / facilitators. This process of role assignment may be the result of particular skills, aptitudes, or talents identified in members of the Pool that make them best suited to particular roles.

c. Pool Member Training

The Pool members receive annual training jointly or based on their respective roles. This training includes, but is not limited to:

- The scope of the College's Sexual Harassment Policy and Procedures
- How to conduct investigations and hearings that protect the safety of Complainants and Respondents, and promote accountability
- Implicit bias
- Disparate treatment and impact
- Reporting, confidentiality, and privacy requirements
- Applicable laws, regulations, and federal regulatory guidance
- How to implement appropriate and situation-specific remedies
- How to investigate in a thorough, reliable, and impartial manner
- How to uphold fairness, equity, and due process
- How to weigh evidence
- How to conduct questioning
- How to assess credibility
- Impartiality and objectivity
- How to render findings and generate clear, concise, evidence-based rationales
- The definitions of all offenses
- How to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with policy
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
- How to serve impartially by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Any technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Issues of relevance to create an investigation report that fairly summarizes relevant evidence
- How to determine appropriate sanctions in reference to all forms of harassment and/or retaliation allegations
- Recordkeeping

Specific training is also provided for Appeal Decision-makers, intake personnel, Advisors (who are College employees), and Chairs. The College reserves the right to utilize an appropriately trained external hearing Chair. All Pool members are required to attend these trainings annually. The materials used to train all members of the Pool are publicly posted on the College's website under Title IX.

d. Pool Membership

The Pool includes representatives from College that shall be reviewed annually by the Title IX Coordinator. The College is able to utilize external investigators, hearing chairs / facilitators, and alternate resolution providers who are appropriately trained as necessary.

8. Formal Grievance Process: Notice of Investigation and Allegations

The Title IX Coordinator will provide written notice of the investigation and allegations (the "NOIA") to the Respondent upon commencement of the Formal Grievance Process. This facilitates the Respondent's ability to prepare for the interview and to identify and choose an Advisor to accompany them. The NOIA is also copied to the Complainant, who is to be given advance notice of when the NOIA will be delivered to the Respondent.

The NOIA will include:

- A meaningful summary of all of allegations,
- The identity of the involved parties (if known),
- The precise misconduct being alleged,
- The date and location of the alleged incident(s) (if known),
- The specific policies implicated,
- A description of the applicable procedures,
- A statement of the potential sanctions/responsive actions that could result,
- A statement that the College presumes the Respondent is not responsible for the reported misconduct unless and until the evidence supports a different determination,
- A statement that determinations of responsibility are made at the conclusion of the process and that the parties will be given an opportunity to inspect and review all directly related and/or relevant evidence obtained during the review and comment period,
- A statement about the College's policy on retaliation,
- Information about the privacy of the process,
- Information on the need for each party to have an Advisor of their choosing and suggestions for ways to identify an Advisor,
- A statement informing the parties that the College's Policy prohibits knowingly making false statements, including knowingly submitting false information during the resolution process,
- Detail on how the party may request disability accommodations during the interview process,
- A link to the College's VAWA Brochure,
- The name(s) of the Investigator(s), along with a process to identify, in advance of the interview process, to the Title IX Coordinator any conflict of interest that the

- Investigator(s) may have, and
- An instruction to preserve any evidence that is directly related to the allegations.

Amendments and updates to the NOIA may be made as the investigation progresses and more information becomes available regarding the addition or dismissal of various charges. If, in the course of the investigation, the College decides to investigate allegations about the complainant or respondent that are not included in the original NOIA, the College shall provide notice of additional allegations to the parties whose identities are known.

Notice will be made in writing and may be delivered by one or more of the following methods: in person, emailed to the parties' College-issued email or designated accounts, or mailed to the address specifically requested by a party. Once mailed, emailed, and/or received in-person, notice will be presumptively delivered.

9. Resolution Timeline

The College will make a good faith effort to complete the resolution process within a sixty-to-ninety (60-90) business day time period, including appeal, which can be extended as necessary for appropriate cause by the Title IX Coordinator, who will provide notice and rationale for any extensions or delays to the parties as appropriate, as well as an estimate of how much additional time will be needed to complete the process.

10. Appointment of Investigators

Once the decision to commence a formal investigation is made, the Title IX Coordinator appoints Pool members to conduct the investigation typically using a team of two investigators, usually within two (2) business days of determining that an investigation should proceed. The College also reserves the right to utilize appropriately trained external investigators.

11. Ensuring Impartiality

Any individual materially involved in the administration of the resolution process [including the Title IX Coordinator, Investigator(s), and Decision-maker(s)] may neither have nor demonstrate a conflict of interest or bias for a party generally, or for a specific Complainant or Respondent.

The Title IX Coordinator will vet the assigned Investigator(s) to ensure impartiality by ensuring there are no actual or apparent conflicts of interest or disqualifying biases. The parties may, at any time during the resolution process, raise a concern regarding bias or conflict of interest, and the Title IX Coordinator will determine whether the concern is reasonable and supportable. If so, another Pool member will be assigned and the impact of the bias or conflict, if any, will be remedied. If the source of the conflict of interest or bias is the Title IX Coordinator, concerns should be raised with the College's Executive Vice President.

The Formal Grievance Process involves an objective evaluation of all relevant evidence obtained, including evidence that supports that the Respondent engaged in a policy violation and

evidence that supports that the Respondent did not engage in a policy violation. Credibility determinations may not be based solely on an individual's status or participation as a Complainant, Respondent, or witness.

The College operates with the presumption that the Respondent is not responsible for the reported misconduct unless and until the Respondent is determined to be responsible for a policy violation by the applicable standard of proof.

12. Investigation Timeline

Investigations are completed expeditiously, normally within thirty (30) business days, though some investigations may take weeks or even months, depending on the nature, extent, and complexity of the allegations, availability of witnesses, police involvement, etc.

The College will make a good faith effort to complete investigations as promptly as circumstances permit and will communicate regularly with the parties to update them on the progress and timing of the investigation.

13. Delays in the Investigation Process and Interactions with Law Enforcement

The College may undertake a short delay in its investigation (several days to a few weeks) if circumstances require. Such circumstances include but are not limited to: a request from law enforcement to temporarily delay the investigation, the need for language assistance, the absence of parties and/or witnesses, and/or accommodations for disabilities or health conditions.

The College will communicate in writing the anticipated duration of the delay and reason to the parties and provide the parties with status updates if necessary. The College will promptly resume its investigation and resolution process as soon as feasible. During such a delay, the College will implement supportive measures as deemed appropriate.

College action(s) or processes are not typically altered or precluded on the grounds that civil or criminal charges involving the underlying incident(s) have been filed or that criminal charges have been dismissed or reduced.

14. Steps in the Investigation Process

All investigations are thorough, reliable, impartial, prompt, and fair. Investigations involve interviews with all relevant parties and witnesses; obtaining available, relevant evidence; and identifying sources of expert information, as necessary.

All parties have a full and fair opportunity, through the investigation process, to suggest witnesses and questions, to provide evidence and expert witnesses, and to fully review and respond to all evidence on the record.

The Investigator(s) typically take(s) the following steps, if not already completed (not necessarily in this order):

- Determine the identity and contact information of the Complainant
- In coordination with campus partners (e.g., the Title IX Coordinator), initiate or assist with any necessary supportive measures
- Identify all policies implicated by the alleged misconduct and notify the Complainant and Respondent of all of the specific policies implicated
- Assist the Title IX Coordinator with conducting a prompt initial assessment to determine if the allegations indicate a potential policy violation
- Commence a thorough, reliable, and impartial investigation by identifying issues and developing a strategic investigation plan, including a witness list, evidence list, intended investigation timeframe, and order of interviews for all witnesses and the parties
- Meet with the Complainant to finalize their interview/statement, if necessary
- Prepare the initial Notice of Investigation and Allegation (NOIA). The NOIA may be amended with any additional or dismissed allegations
 - Notice should inform the parties of their right to have the assistance of an Advisor, who could be a member of the Pool or an Advisor of their choosing present for all meetings attended by the party
- Provide each interviewed party and witness an opportunity to review and verify the Investigator's summary notes (or transcript) of the relevant evidence/testimony from their respective interviews and meetings
- Make good faith efforts to notify the parties of any meeting or interview involving the other party, in advance when possible
- When participation of a party is expected, provide that party with written notice of the date, time, and location of the meeting, as well as the expected participants and purpose
- Interview all available, relevant witnesses and conduct follow-up interviews as necessary
- Allow each party the opportunity to suggest witnesses and questions they wish the Investigator(s) to ask of the other party and witnesses, and document in the report which questions were asked, with a rationale for any changes or omissions
- Complete the investigation promptly and without unreasonable deviation from the intended timeline
- Provide regular status updates to the parties throughout the investigation
- Prior to the conclusion of the investigation, provide the parties and their respective Advisors (if so desired by the parties) with a list of witnesses whose information will be used to render a finding
- Write a comprehensive investigation report fully summarizing the investigation, all witness interviews, and addressing all relevant evidence. Appendices including relevant physical or documentary evidence will be included
- The Investigator(s) gather, assess, and synthesize evidence, but make no conclusions, engage in no policy analysis, and render no recommendations as part of their report
- Prior to the conclusion of the investigation, provide the parties and their respective Advisors (if so desired by the parties) an electronic or hard copy of the draft investigation report as well as an opportunity to inspect and review all of the evidence obtained as part of the investigation that is directly related to the reported misconduct, including evidence upon which the College does not intend to rely in reaching a

determination, for a ten (10) business day review and comment period so that each party may meaningfully respond to the evidence. The parties may elect to waive the full ten days. Each copy of the materials shared will be watermarked on each page with the role of the person receiving it (e.g., Complainant, Respondent, Complainant's Advisor, Respondent's Advisor).

- The Investigator(s) may elect to respond in writing in the investigation report to the parties' submitted responses and/or to share the responses between the parties for additional responses
- The Investigator(s) will incorporate relevant elements of the parties' written responses into the final investigation report, include any additional relevant evidence, make any necessary revisions, and finalize the report. The Investigator(s) should document all rationales for any changes made after the review and comment period
- The Investigator(s) shares the report with the Title IX Coordinator and/or College legal counsel for their review and feedback
- The Investigator will incorporate any relevant feedback, and the final report is then shared with all parties and their Advisors through secure electronic transmission or hard copy at least ten (10) business days prior to a hearing. The parties are also provided with a file of any directly related evidence that was not included in the report

15. Role and Participation of Witnesses in the Investigation

Witnesses (as distinguished from the parties) who are employees of the College are expected to cooperate with and participate in the College's investigation and resolution process. Failure of such witnesses to cooperate with and/or participate in the investigation or resolution process constitutes a violation of policy and may warrant discipline.

Although in-person interviews for parties and all potential witnesses are ideal, circumstances (e.g., study abroad, summer break) may require individuals to be interviewed remotely. Skype, Zoom, FaceTime, WebEx, or similar technologies may be used for interviews if the Investigator(s) determine that timeliness or efficiency dictate a need for remote interviewing. The Recipient will take appropriate steps to reasonably ensure the security/privacy of remote interviews.

16. Recording of Interviews

No unauthorized audio or video recording of any kind is permitted during investigation meetings. If Investigator(s) elect to audio and/or video record interviews, all involved parties must be made aware of audio and/or video recording.

17. Evidentiary Considerations in the Investigation

The investigation does not consider: 1) incidents not directly related to the possible violation, unless they evidence a pattern; 2) the character of the parties; or 3) questions and evidence about the Complainant's sexual predisposition or prior sexual behavior, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other

than the Respondent committed the conduct alleged by the Complainant, or if 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.

18. Referral for Hearing

Provided that the complaint is not resolved through Informal Resolution, once the final investigation report is shared with the parties, the Title IX Coordinator will refer the matter for a hearing.

The hearing cannot be less than ten (10) business days from the conclusion of the investigation – when the final investigation report is transmitted to the parties and the Decision-maker – unless all parties and the Decision-maker agree to an expedited timeline.

The Title IX Coordinator will select an appropriate Decision-maker or Decision-makers from the Pool.

19. Hearing Decision-maker Composition

The College will designate a single Decision-maker or a three-member panel from the Pool, at the discretion of the Title IX Coordinator. The single Decision-maker may also chair the hearing or a separate hearing chair / facilitator may also be used. With a panel, one of the three members may be appointed as Chair by the Title IX Coordinator or a separate non-voting Chair may be used.

The Decision-maker(s) will not have had any previous involvement with the investigation. The Title IX Coordinator may elect to have an alternate from the Pool sit in throughout the hearing process in the event that a substitute is needed for any reason.

Those who have served as Investigators will be witnesses in the hearing and therefore may not serve as Decision-makers. Those who are serving as Advisors for any party may not serve as Decision-makers in that matter.

The Title IX Coordinator may not serve as a Decision-maker or Chair in the matter but may serve as an administrative facilitator of the hearing if their previous role(s) in the matter do not create a conflict of interest. Otherwise, a designee may fulfill this role. The hearing will convene at a time determined by the Chair or designee.

20. Evidentiary Considerations in the Hearing

Any evidence that the Decision-maker(s) determine(s) is relevant and credible may be considered. The hearing does not consider: 1) incidents not directly related to the possible violation, unless they evidence a pattern; 2) the character of the parties; or 3) questions and evidence about the Complainant's sexual predisposition or prior sexual behavior, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that

someone other than the Respondent committed the conduct alleged by the Complainant, or if 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.

Previous disciplinary action of any kind involving the Respondent may be considered in determining an appropriate sanction upon a determination of responsibility. This information is only considered at the sanction stage of the process and is not shared until then.

The parties may each submit a written impact statement prior to the hearing for the consideration of the Decision-maker(s) at the sanction stage of the process when a determination of responsibility is reached.

After post-hearing deliberation, the Decision-maker renders a determination based on the preponderance of the evidence; whether it is more likely than not that the Respondent violated the policy as alleged.

21. Notice of Hearing

No less than ten (10) business days prior to the hearing, the Title IX Coordinator or the Chair will send notice of the hearing to the parties. Once mailed, emailed, and/or received in-person, notice will be presumptively delivered.

The notice will contain:

- A description of the alleged violation(s), a list of all policies allegedly violated, a description of the applicable procedures, and a statement of the potential sanctions/responsive actions that could result.
- The time, date, and location of the hearing and a reminder that attendance is mandatory, superseding all other campus activities.
- Any technology that will be used to facilitate the hearing.
- Information about the option for the live hearing to occur with the parties located in separate rooms using technology that enables the Decision-maker(s) and parties to see and hear a party or witness answering questions. Such a request must be raised with the Title IX Coordinator at least five (5) business days prior to the hearing.
- A list of all those who will attend the hearing, along with an invitation to object to any Decision-maker on the basis of demonstrated bias. This must be raised with the Title IX Coordinator at least two (2) business days prior to the hearing.
- Information on how the hearing will be recorded and on access to the recording for the parties after the hearing.
- A statement that if any party or witness does not appear at the scheduled hearing, the hearing may be held in their absence, and the party's or witness's testimony and any statements given prior to the hearing will not be considered by the Decision-maker(s). For compelling reasons, the Chair may reschedule the hearing.
- Notification that the parties may have the assistance of an Advisor of their choosing at the hearing and will be required to have one present for any questions they may desire to ask. The party must notify the Title IX Coordinator if they do not have an Advisor, and

the Recipient will appoint one. Each party must have an Advisor present. There are no exceptions.

- A copy of all the materials provided to the Decision-maker(s) about the matter, unless they have been provided already.¹⁵
- An invitation to each party to submit to the Chair an impact statement pre-hearing that the Decision-maker will review during any sanction determination.
- An invitation to contact the Title IX Coordinator to arrange any disability accommodations, language assistance, and/or interpretation services that may be needed at the hearing, at least seven (7) business days prior to the hearing.
- Whether parties can or cannot bring mobile phones/devices into the hearing.

Hearings for possible violations that occur near or after the end of an academic term (assuming the Respondent is still subject to this Policy) and are unable to be resolved prior to the end of term will typically be held immediately after the end of the term or during the summer, as needed, to meet the resolution timeline followed by the College and remain within the 60-90 business day goal for resolution.

In these cases, if the Respondent is a graduating student, a hold may be placed on graduation and/or official transcripts until the matter is fully resolved (including any appeal). A student facing charges under this Policy is not in good standing to graduate.

22. Alternative Hearing Participation Options

If a party or parties prefer not to attend or cannot attend the hearing in person, the party should request alternative arrangements from the Title IX Coordinator or the Chair at least five (5) business days prior to the hearing.

The Title IX Coordinator or the Chair can arrange to use technology to allow remote testimony without compromising the fairness of the hearing. Remote options may also be needed for witnesses who cannot appear in person. Any witness who cannot attend in person should let the Title IX Coordinator or the Chair know at least five (5) business days prior to the hearing so that appropriate arrangements can be made.

23. Pre-Hearing Preparation

The Chair or hearing facilitator after any necessary consultation with the parties, Investigator(s) and/or Title IX Coordinator, will provide the names of persons who will be participating in the hearing, all pertinent documentary evidence, and the final investigation report to the parties at least ten (10) business days prior to the hearing.

Any witness scheduled to participate in the hearing must have been first interviewed by the Investigator(s), unless all parties and the Chair assent to the witness's participation in the hearing. The same holds for any evidence that is first offered at the hearing. If the parties and

¹⁵ The final investigation report may be shared using electronic means that preclude downloading, forwarding, or otherwise sharing.

Chair do not assent to the admission of evidence newly offered at the hearing, the Chair may delay the hearing and instruct that the investigation needs to be re-opened to consider that evidence.

The parties will be given a list of the names of the Decision-maker(s) at least five (5) business days in advance of the hearing. All objections to any Decision-maker must be raised in writing, detailing the rationale for the objection, and must be submitted to the Title IX Coordinator as soon as possible and no later than two days prior to the hearing. Decision-makers will only be removed if the Title IX Coordinator concludes that their bias or conflict of interest precludes an impartial hearing of the allegation(s).

The Title IX Coordinator will give the Decision-maker(s) a list of the names of all parties, witnesses, and Advisors at least five (5) business days in advance of the hearing. Any Decision-maker who cannot make an objective determination must recuse themselves from the proceedings when notified of the identity of the parties, witnesses, and Advisors in advance of the hearing. If a Decision-maker is unsure of whether a bias or conflict of interest exists, they must raise the concern to the Title IX Coordinator as soon as possible.

During the ten (10) business day period prior to the hearing, the parties have the opportunity for continued review and comment on the final investigation report and available evidence. That review and comment can be shared with the Chair at the pre-hearing meeting or at the hearing and will be exchanged between each party by the Chair.

24. Pre-Hearing Meetings

The Chair may convene a pre-hearing meeting(s) with the parties and/or their Advisors to invite them to submit the questions or topics they (the parties and/or their Advisors) wish to ask or discuss at the hearing, so that the Chair can rule on their relevance ahead of time to avoid any improper evidentiary introduction in the hearing or provide recommendations for more appropriate phrasing. However, this advance review opportunity does not preclude the Advisors from asking a question for the first time at the hearing or from asking for a reconsideration based on any new information or testimony offered at the hearing. The Chair must document and share with each party their rationale for any exclusion or inclusion at a pre-hearing meeting.

The Chair, **only** with full agreement of the parties, may decide in advance of the hearing that certain witnesses do not need to be present if their testimony can be adequately summarized by the Investigator(s) in the investigation report or during the hearing.

At each pre-hearing meeting with a party and their Advisor, the Chair will consider arguments that evidence identified in the final investigation report as relevant is, in fact, not relevant. Similarly, evidence identified as directly related but not relevant by the Investigator(s) may be argued to be relevant.

The Chair may rule on these arguments pre-hearing and will exchange those rulings between the parties prior to the hearing to assist in preparation for the hearing. The Chair may consult with legal counsel and/or the Title IX Coordinator or ask either or both to attend pre-hearing meetings.

The pre-hearing meeting(s) will not be recorded.

25. Hearing Procedures

At the hearing, the Decision-maker(s) has the authority to hear and make determinations on all allegations of sexual harassment and/or retaliation and may also hear and make determinations on any additional alleged policy violations that have occurred in concert with the sexual harassment and/or retaliation, even though those collateral allegations may not specifically fall within the Policy.

Participants at the hearing will include the Chair (who may be the sole member of the panel, one of three (3) panel members, or a separate, non-voting member of the panel), any additional panelists, the Investigator(s) who conducted the investigation, the parties, Advisors to the parties, any called witnesses, the Title IX Coordinator and anyone providing authorized accommodations or assistive services.

The Chair will answer all questions of procedure. Anyone appearing at the hearing to provide information will respond to questions on their own behalf.

The Chair will allow witnesses who have relevant information to appear at a portion of the hearing in order to respond to specific questions from the Decision-maker(s) and the parties and will then be excused.

26. Joint Hearings

In hearings involving more than one Respondent or in which two (2) or more Complainants have accused the same individual of substantially similar conduct, the default procedure will be to hear the allegations jointly.

However, the Title IX Coordinator may permit the investigation and/or hearings pertinent to each Respondent to be conducted separately if there is a compelling reason to do so. In joint hearings, separate determinations of responsibility will be made for each Respondent with respect to each alleged policy violation.

27. The Order of the Hearing – Introductions and Explanation of Procedure

The Chair explains the procedures and introduces the participants. This may include a final opportunity for challenge or recusal of the Decision-maker(s) on the basis of bias or conflict of interest. The Chair will rule on any such challenge unless the Chair is the individual who is the subject of the challenge, in which case the Title IX Coordinator will review and decide the challenge.

The Chair and/or the hearing facilitator then conducts the hearing according to the hearing script. At the hearing, recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process are managed by a non-voting hearing chair or hearing facilitator appointed by the Title IX Coordinator.

The hearing facilitator may attend to: logistics of rooms for various parties/witnesses as they wait; flow of parties/witnesses in and out of the hearing space; ensuring recording and/or virtual conferencing technology is working as intended; copying and distributing materials to participants, as appropriate, etc.

28. Investigator Presents the Final Investigation Report

The Investigator(s) will then present a summary of the final investigation report, including items that are contested and those that are not, and will be subject to questioning by the Decision-maker(s) and the parties (through their Advisors). The Investigator(s) will be present during the entire hearing process, but not during deliberations.

Neither the parties nor the Decision-maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations, and the Investigators, Advisors, and parties will refrain from discussion of or questions about these assessments. If such information is introduced, the Chair will direct that it be disregarded.

29. Testimony and Questioning

Once the Investigator(s) present their report and are questioned, the parties and witnesses may provide relevant information in turn, beginning with the Complainant, and then in the order determined by the Chair. The parties/witnesses will submit to questioning by the Decision-maker(s) and then by the parties through their Advisors (“cross-examination”).

All questions are subject to a relevance determination by the Chair. The Advisor, who will remain seated during questioning, will pose the proposed question orally, electronically, or in writing (orally is the default, but other means of submission may be permitted by the Chair upon request if agreed to by all parties and the Chair), the proceeding will pause to allow the Chair to consider it (and state it if it has not been stated aloud), and the Chair will determine whether the question will be permitted, disallowed, or rephrased.

The Chair may invite explanations or persuasive statements regarding relevance with the Advisors, if the Chair so chooses. The Chair will then state their decision on the question for the record and advise the party/witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.

The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive. The Chair has final say on all questions and determinations of relevance. The Chair may consult with legal counsel on any questions of admissibility. The Chair may ask Advisors to frame why a question is or is not relevant from their perspective but will not entertain argument from the Advisors on relevance once the Chair has ruled on a question.

If the parties raise an issue of bias or conflict of interest of an Investigator or Decision-maker at the hearing, the Chair may elect to address those issues, consult with legal counsel, and/or refer them to the Title IX Coordinator, and/or preserve them for appeal. If bias is not in issue at the hearing, the Chair should not permit irrelevant questions that probe for bias.

30. Refusal to Submit to Cross-Examination and Inferences

If a party or witness chooses not to submit to cross-examination at the hearing, either because they do not attend the meeting, or they attend but refuse to participate in questioning, then the Decision-maker(s) may not rely on any prior statement made by that party or witness at the hearing (including those contained in the investigation report) in the ultimate determination of responsibility. The Decision-maker(s) must disregard that statement. Evidence provided that is something other than a statement by the party or witness may be considered.

If the party or witness attends the hearing and answers some cross-examination questions, only statements related to the cross-examination questions they refuse to answer cannot be relied upon. However, if the statements of the party who is refusing to submit to cross-examination or refuses to attend the hearing are the subject of the allegation itself (e.g., the case is about verbal harassment or a quid pro quo offer), then those statements are not precluded from admission. Similarly, statements can be relied upon when questions are posed by the Decision-maker(s), as distinguished from questions posed by Advisors through cross-examination.

The Decision-maker(s) may not draw any inference solely from a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions.

If charges of policy violations other than sexual harassment are considered at the same hearing, the Decision-maker(s) may consider all evidence it deems relevant, may rely on any relevant statement as long as the opportunity for cross-examination is afforded to all parties through their Advisors, and may draw reasonable inferences from any decision by any party or witness not to participate or respond to questions.

If a party's Advisor of choice refuses to comply with the College's established rules of decorum for the hearing, the Recipient may require the party to use a different Advisor. If a recipient-provided Advisor refuses to comply with the rules of decorum, the Recipient may provide that party with a different Advisor to conduct cross-examination on behalf of that party.

31. Recording Hearings

Hearings (but not deliberations) are recorded by the College for purposes of review in the event of an appeal. The parties may not record the proceedings and no other unauthorized recordings are permitted.

The Decision-maker(s), the parties, their Advisors, and appropriate administrators of the College will be permitted to listen to the recording in a controlled environment determined by the Title IX Coordinator. No person will be given or be allowed to make a copy of the recording without permission of the Title IX Coordinator.

32. Deliberation, Decision-making, and Standard of Proof

The Decision-maker(s) will deliberate in closed session to determine whether the Respondent is

responsible or not responsible for the policy violation(s) in question. If a panel is used, a simple majority vote is required to determine the finding. The preponderance of the evidence standard of proof is used. The hearing facilitator may be invited to attend the deliberation by the chair, but is there only to facilitate procedurally, not to address the substance of the allegations.

When there is a finding of responsibility on one or more of the allegations, the Decision-maker(s) may then consider the previously submitted party impact statements in determining appropriate sanction(s).

The Chair will ensure that each of the parties has an opportunity to review any impact statement submitted by the other party(ies). The Decision-maker(s) may – at their discretion – consider the statements, but they are not binding.

The Decision-maker(s) will review the statements and any pertinent conduct history provided by an appropriate administrator (if applicable) and will determine the appropriate sanction(s) (in consultation with other appropriate administrators as required).

The Chair will then prepare a written deliberation statement and deliver it to the Title IX Coordinator, detailing the determination, rationale, the evidence used in support of its determination, the evidence not relied upon in its determination, credibility assessments, and any sanctions.

This report is typically three (3) to five (5) pages in length and must be submitted to the Title IX Coordinator within two (2) business days of the end of deliberations, unless the Title IX Coordinator grants an extension. If an extension is granted, the Title IX Coordinator will notify the parties.

33. Notice of Outcome

Using the deliberation statement, the Title IX Coordinator will work with the Chair to prepare a Notice of Outcome. The Notice of Outcome will then be revised by College legal counsel. The Title IX Coordinator will then share the letter, including the final determination, rationale, and any applicable sanction(s) with the parties and their Advisors within 7 business days of receiving the Decision-maker(s)' deliberation statement.

The Notice of Outcome will then be shared with the parties simultaneously. Notification will be made in writing and may be delivered by one or more of the following methods: in person, mailed to the local or permanent address provided by the respective party, or emailed to the parties' College-issued email or otherwise approved account. Once mailed, emailed, and/or received in-person, notice will be presumptively delivered.

The Notice of Outcome will articulate the specific policy(ies) reported to have been violated, including the relevant policy section, and will contain a description of the procedural steps taken by the College from the receipt of the misconduct report to the determination, including any and all notifications to the parties, interviews with parties and witnesses, site visits, methods used to obtain evidence, and hearings held.

The Notice of Outcome will specify the finding on each alleged policy violation; the findings of fact that support the determination; conclusions regarding the application of the relevant policy to the facts at issue; a statement of, and rationale for, the result of each allegation to the extent the Recipient is permitted to share such information under state or federal law; any sanctions issued which the College is permitted to share according to state or federal law; and any remedies provided to the Complainant designed to ensure access to the College's educational or employment program or activity, to the extent the College is permitted to share such information under state or federal law (this detail is not typically shared with the Respondent unless the remedy directly relates to the Respondent).

The Notice of Outcome will also include information on when the results are considered by the College to be final, any changes that occur prior to finalization, and the relevant procedures and bases for any available appeal options.

34. Statement of the Rights of the Parties (see Appendix "B")

35. Sanctions

Factors considered when determining a sanction/responsive action may include, but are not limited to:

- The nature, severity of, and circumstances surrounding the violation(s)
- The Respondent's disciplinary history
- Previous allegations or allegations involving similar conduct
- The need for sanctions/responsive actions to bring an end to the sexual Harassment and/or retaliation
- The need for sanctions/responsive actions to prevent the future recurrence of sexual harassment and/or retaliation
- The need to remedy the effects of the sexual harassment and/or retaliation on the Complainant and the community
- The impact on the parties
- Any other information deemed relevant by the Decision-maker(s)

The sanctions will be implemented as soon as is feasible, either upon the outcome of any appeal or the expiration of the window to appeal without an appeal being requested.

The sanctions described in this policy are not exclusive of, and may be in addition to, other actions taken or sanctions imposed by external authorities.

a. Student Sanctions

The following are the usual sanctions¹⁶ that may be imposed upon students singly or in combination:

- *Warning*: A formal statement that the conduct was unacceptable and a warning that

¹⁶ College policies on transcript notation will apply to these proceedings.

further violation of any College policy, procedure, or directive will result in more severe sanctions/responsive actions.

- *Required Counseling*: A mandate to meet with and engage in either College-sponsored or external counseling to better comprehend the misconduct and its effects.
- *Probation*: A written reprimand for violation of institutional policy, providing for more severe disciplinary sanctions in the event that the student or organization is found in violation of any institutional policy, procedure, or directive within a specified period of time. Terms of the probation will be articulated and may include denial of specified social privileges, exclusion from co-curricular activities, exclusion from designated areas of campus, no-contact orders, and/or other measures deemed appropriate.
- *On campus housing relocation / suspension / expulsion*: Moving a student from one room to another and/or from one campus residence hall to another, separation of the student from campus housing for a designated period of time, or permanent removal of a student from any and all campus housing options.
- *Suspension*: Termination of student status for a definite period of time not to exceed two years and/or until specific criteria are met. Students who return from suspension are automatically placed on probation through the remainder of their tenure as a student at the College.
- *Expulsion*: Permanent termination of student status and revocation of rights to be on campus for any reason and/or to attend College-sponsored events.
- *Withholding Diploma*: The College may withhold a student's diploma for a specified period of time and/or deny a student participation in commencement activities if the student has an allegation pending or as a sanction if the student is found responsible for an alleged violation.
- *Organizational Sanctions*: Deactivation, loss of recognition, loss of some or all privileges (including College registration) for a specified period of time.
- *Other Actions*: In addition to or in place of the above sanctions, the College may assign any other sanctions as deemed appropriate.

b. Employee Sanctions/Responsive Actions

Responsive actions for an employee who has engaged in harassment and/or retaliation include:

- *Warning – Verbal or Written*
- *Performance Improvement Plan/Management Process*
- *Enhanced supervision, observation, or review*
- *Required Counseling*
- *Required Training or Education*
- *Probation*
- *Denial of Pay Increase/Pay Grade*
- *Loss of Oversight or Supervisory Responsibility*
- *Demotion*
- *Transfer*
- *Reassignment*
- *Assignment to new supervisor*
- *Restriction of stipends and/or professional development resources*

- *Suspension with pay*
- *Suspension without pay*
- *Termination*
- *Other Actions:* In addition to or in place of the above sanctions/responsive actions, the College may assign any other responsive actions as deemed appropriate.

Following the appeal rights set forth herein, termination of continuing contract faculty is also subject to Board of Governor's Non-Reappointment Procedures (Appendix A-4-81) and Neb. Rev. Stat. §85-1528.

36. Withdrawal or Resignation While Charges Pending

a. Students: If a student has an allegation pending for violation of the Policy, the College may place a hold on a student's ability to graduate and/or to receive an official transcript/diploma.

Should a student decide to not participate in the resolution process, the process proceeds absent their participation to a reasonable resolution. Should a student Respondent permanently withdraw from the College, the resolution process ends, as the College no longer has disciplinary jurisdiction over the withdrawn student.

However, the College will continue to address and remedy any systemic issues, variables that may have contributed to the alleged violation(s), and any ongoing effects of the alleged sexual harassment and/or retaliation. The student who withdraws or leaves while the process is pending may not return to the College. Such exclusion applies to all campuses of the College. A hold will be placed on their ability to be readmitted. They may also be barred from College property and/or events.

If the student Respondent only withdraws or takes a leave for a specified period of time (e.g., one semester or term), the resolution process may continue remotely and that student is not permitted to return to College unless and until all sanctions have been satisfied.

b. Employees: Should an employee Respondent resign with unresolved allegations pending, the resolution process ends, as the College no longer has disciplinary jurisdiction over the resigned employee.

However, the College will continue to address and remedy any systemic issues, variables that contributed to the alleged violation(s), and any ongoing effects of the alleged harassment or retaliation.

The employee who resigns with unresolved allegations pending is not eligible for rehire with the College of any campus of the College, and the records retained by the Title IX Coordinator will reflect that status.

All College responses to future inquiries regarding employment references for that individual will include that the former employee resigned during a pending disciplinary matter.

37. Appeals

Any party may file a request for appeal (“Request for Appeal”), but it must be submitted in writing to the Title IX Coordinator within 5 days of the delivery of the Notice of Outcome.

A single Appeal Decision-maker will Chair the appeal. The Decision-maker will not have been involved in the process previously, including any dismissal appeal that may have been heard earlier in the process.

The Request for Appeal will be forwarded to the Appeal Chair for consideration to determine if the request meets the grounds for appeal (a Review for Standing).

This review is not a review of the merits of the appeal, but solely a determination as to whether the request meets the grounds and is timely filed.

a. Grounds for Appeal

Appeals are limited to the following grounds:

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- (C) The Title IX Coordinator, Investigator(s), or Decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the specific Complainant or Respondent that affected the outcome of the matter.

If any of the grounds in the Request for Appeal do not meet the grounds in this Policy, that request will be denied by the Appeal Chair and the parties and their Advisors will be notified in writing of the denial and the rationale.

If any of the grounds in the Request for Appeal meet the grounds in this Policy, then the Appeal Chair will notify the other party(ies) and their Advisors, the Title IX Coordinator, and, when appropriate, the Investigators and/or the original Decision-maker(s).

The other party(ies) and their Advisors, the Title IX Coordinator, and, when appropriate, the Investigators and/or the original Decision-maker(s) will be mailed, emailed, and/or provided a hard copy of the request with the approved grounds and then be given 7 business days to submit a response to the portion of the appeal that was approved and involves them. All responses will be forwarded by the Chair to all parties for review and comment.

The non-appealing party (if any) may also choose to raise a new ground for appeal at this time. If so, that will be reviewed to determine if it meets the grounds in this Policy by the Appeal Chair and either denied or approved. If approved, it will be forwarded to the party who initially requested an appeal, the Investigator(s) and/or original Decision-maker(s), as

necessary, who will submit their responses in 7 business days, which will be circulated for review and comment by all parties.

Neither party may submit any new requests for appeal after this time period. The Appeal Chair will collect any additional information needed and all documentation regarding the approved grounds and the subsequent responses and the Chair will render a decision in no more than 7 business days, barring exigent circumstances. All decisions apply the preponderance of the evidence standard.

A Notice of Appeal Outcome will be sent to all parties simultaneously including the decision on each approved ground and rationale for each decision. The Notice of Appeal Outcome will specify the finding on each ground for appeal, any specific instructions for remand or reconsideration, any sanctions that may result which the College is permitted to share according to state or federal law, and the rationale supporting the essential findings to the extent the College is permitted to share under state or federal law.

Notification will be made in writing and may be delivered by one or more of the following methods: in person, emailed to the parties' College-issued email or otherwise approved account or mailed to the address specifically provided by the parties for this purpose. Once mailed, emailed and/or received in-person, notice will be presumptively delivered.

b. Sanctions Status During the Appeal

Any sanctions imposed as a result of the hearing are stayed during the appeal process. Supportive measures may be reinstated, subject to the same supportive measure procedures above.

If any of the sanctions are to be implemented immediately post-hearing, but pre-appeal, then emergency removal procedures (detailed above) for a hearing on the justification for doing so must be permitted within 48 hours of implementation.

The College may still place holds on official transcripts, diplomas, graduations, and course registration pending the outcome of an appeal when the original sanctions included separation.

c. Appeal Considerations

- Decisions on appeal are to be deferential to the original decision, making changes to the finding only when there is clear error and to the sanction(s)/responsive action(s) only if there is a compelling justification to do so.
- Appeals are not intended to provide for a full re-hearing (de novo) of the allegation(s). In most cases, appeals are confined to a review of the written documentation or record of the original hearing and pertinent documentation regarding the specific grounds for appeal.
- An appeal is not an opportunity for Appeal Decision-maker to substitute their judgment for that of the original Decision-maker(s) merely because they disagree with the finding and/or sanction(s).
- The Appeal Chair/Decision-maker may consult with the Title IX Coordinator on questions of procedure or rationale, for clarification, if needed. Documentation of all such

consultation will be maintained.

- Appeals granted based on new evidence should normally be remanded to the original Investigator(s) and/or Decision-maker(s) for reconsideration. Other appeals may be remanded at the discretion of the Title IX Coordinator or, in limited circumstances, decided on appeal.
- Once an appeal is decided, the outcome is final: further appeals are not permitted, even if a decision or sanction is changed on remand (except in the case of a new hearing). When appeals result in no change to the finding or sanction, that decision is final. When an appeal results in a new finding or sanction, that finding or sanction can be appealed one final time on the grounds listed above and in accordance with these procedures.
- In rare cases where a procedural or substantive error cannot be cured by the original Decision-maker(s) (as in cases of bias), the appeal may order a new hearing with a new Decision-maker(s).
- The results of a new hearing can be appealed, once, on any of the three available appeal grounds.
- In cases in which the appeal results in reinstatement to the College or resumption of privileges, all reasonable attempts will be made to restore the Respondent to their prior status, recognizing that some opportunities lost may be irreparable in the short term.

38. Long-Term Remedies/Other Actions

Following the conclusion of the resolution process, and in addition to any sanctions implemented, the Title IX Coordinator may implement additional long-term remedies or actions with respect to the parties and/or the campus community that are intended to stop the sexual harassment and/or retaliation, remedy the effects, and prevent reoccurrence.

These remedies/actions may include, but are not limited to:

- Referral to counseling and health services
- Referral to the Employee Assistance Program (EAP)
- Education to the individual and/or the community
- Permanent alteration of housing assignments
- Permanent alteration of work arrangements for employees
- Provision of campus safety escorts
- Climate surveys
- Policy modification and/or training
- Provision of transportation accommodations
- Implementation of long-term contact limitations between the parties
- Implementation of adjustments to academic deadlines, course schedules, etc.

At the discretion of the Title IX Coordinator, certain long-term support or measures may also be provided to the parties even if no policy violation is found.

When no policy violation is found, the Title IX Coordinator will address any remedies owed by the College to the Respondent to ensure no effective denial of educational access.

The College will maintain the privacy of any long-term remedies/actions/measures, provided privacy does not impair the Recipient's ability to provide these services.

39. Failure to Comply with Sanctions and/or Interim and Long-term Remedies and/or Responsive Actions

All Respondents are expected to comply with the assigned sanctions, responsive actions, and/or corrective actions within the timeframe specified by the final Decision-maker(s) (including the Appeal Chair/Panel).

Failure to abide by the sanction(s)/action(s) imposed by the date specified, whether by refusal, neglect, or any other reason, may result in additional sanction(s)/action(s), including suspension, expulsion, and/or termination from the College and may be noted on a student's official transcript.

A suspension will only be lifted when compliance is achieved to the satisfaction of the Title IX Coordinator.

40. Records Retention

The College will maintain for a period of seven (7) years records of:

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under federal regulation;
2. Any disciplinary sanctions imposed on the Respondent;
3. Any remedies provided to the Complainant designed to restore or preserve equal access to the College's education program or activity;
4. Any appeal and the result therefrom;
5. Any Informal Resolution and the result therefrom;
6. All materials used to train Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an Informal Resolution process. The College will make these training materials publicly available on the College's website; and
7. Any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment, including:
 - a. The basis for all conclusions that the response was not deliberately indifferent;
 - b. Any measures designed to restore or preserve equal access to the College's education program or activity; and
 - c. If no supportive measures were provided to the Complainant, document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

The College will also maintain any and all records in accordance with state and federal laws.

41. Disabilities Accommodations in the Resolution Process

The College is committed to providing reasonable accommodations and support to qualified

students, employees, or others with disabilities to ensure equal access to the College's resolution process.

Anyone needing such accommodations or support should contact the College's Disability Services Officer (DSO), who will review the request and, in consultation with the person requesting the accommodation and the Title IX Coordinator, determine which accommodations are appropriate and necessary for full participation in the process.

The College's Disability Services Officer (DSO) can be contacted at the following:

Norman Stephenson
Disability Services Officer
Western Nebraska Community College
1602 East 26th Street
Scottsbluff, NE 69361
Phone: (308) 635-6090
Email: stephens@wncc.edu

42. Training

The College will conduct necessary training for these procedures as set forth in the Title IX Regulations.

a. General Training Requirements

The Title IX Coordinator, investigators, decision-maker(s), hearing panelists and those who facilitate informal resolution process, shall receive training (as applicable):

- On the definition of sexual harassment set forth in this procedure.
- On the scope of the College's education program or activity (jurisdiction).
- On how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes as applicable.
- On how to serve, impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- On the definition of "consent" and how to apply definitions used by the College with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of this procedure.

b. Decision-Makers

In addition to those applicable training requirements set forth above, decision-makers / hearing panelists shall receive training on:

- Any technology to be used at a live hearing.
- On issues of relevance of questions and evidence; including when questions and

evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.

c. Investigators

In addition to those applicable training requirements set forth above, investigators shall receive training on:

- Issues of relevance to create an investigative report that fairly summarizes the evidence, as set forth in Section XII of this procedure.

d. Neutrality of Training Materials

Any materials used to train Title IX Coordinators, investigators, decision-makers, or as otherwise set forth herein, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

e. Publication of Training Materials

The College shall make the training materials set forth herein publicly available on its website, or, to the extent the College may be unable to publicize some of its training materials because some of the materials may be owned or licensed by an outside consultant and not by the college itself, the College shall list said materials on its website and make the content of said materials available upon request for inspection by members of the public.

43. Permissive Use / License

The Procedures set forth herein were modeled upon the ATIXA 2020 Interim Model Sexual Harassment Policies and Procedures. The use and adaptation of the model with this citation to ATIXA is permitted through a limited license to Western Nebraska Community College (WNCC). All other rights reserved. @2020. ATIXA.

44. Revision of this Policy and Procedures

This Policy and procedures supersede any previous policy(ies) addressing harassment, sexual misconduct and/or retaliation under Title IX and will be reviewed and updated annually by the Title IX Coordinator. The College reserves the right to make changes to this document as necessary, and once those changes are posted online, they are in effect.

During the resolution process, the Title IX Coordinator may make minor modifications to procedures that do not materially jeopardize the fairness owed to any party, such as to accommodate summer schedules. The Title IX Coordinator may also vary procedures materially with notice (on the institutional website, with the appropriate effective date identified) upon determining that changes to law or regulation require policy or procedural alterations not reflected in this Policy and procedures.

If government laws or regulations change – or court decisions alter – the requirements in a way that impacts this document, this document will be construed to comply with the most recent government regulations or holdings.

This document does not create legally enforceable protections beyond the protection of the background state and federal laws which frame such policies and codes, generally.

This Policy and procedures are effective August 14, 2020.

APPENDICES



Western Nebraska
Community College

TITLE IX DISCRIMINATION GRIEVANCE FORM (Sexual Harassment)

Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) is a federal law that prohibits discrimination on the basis of sex at educational institutions which receive federal financial assistance. **When the form has been completed and signed by you, and then signed by the Title IX Coordinator or a Deputy, your complaint has been properly received and noted by the College.** We will provide you with a copy of this form as well as complete information about the Title IX complaint process. **If you require emergency assistance, please call 911 immediately.**

<p>The Title IX Coordinator oversees the College's Sexual Harassment Policy and Procedure and has the primary responsibility for coordinating the College's efforts related to intake, investigation, resolution, and implementation of measures to stop, remediate, and prevent sexual harassment and retaliation at WNCC.</p>	<p>I am filing this complaint as a: check one: (v) <input type="checkbox"/> Anonymous</p>			
	<input type="checkbox"/> Faculty		<input type="checkbox"/> Staff	
	<input type="checkbox"/> Student		<input type="checkbox"/> (other) _____	
	Name			
	Department (if applicable)		WNCC Campus or Program (if applicable)	
	Cell Phone		Home Phone	
	Email			
Work Address / Dorm				
Home Address				
<p>Have you brought this matter to the attention of any other department(s) at the College? If so, please list the name(s) and department(s) of all other persons with whom you have discussed this matter.</p>				
<p>Type of Complaint Check all that apply (v) (complete definitions of each category are set forth in the Sexual Harassment Grievance and Investigation Procedure)</p>				
<input type="checkbox"/> Quid Pro Quo <input type="checkbox"/> Sexual Harassment <input type="checkbox"/> Sexual Assault <input type="checkbox"/> Dating Violence <input type="checkbox"/> Domestic Violence <input type="checkbox"/> Stalking <input type="checkbox"/> Retaliation <input type="checkbox"/> Other, please explain:				

Complaint: Describe your complaint. Please summarize below and attach additional pages describing your complaint if necessary.

Name of person or persons you believe committed the offense against you and how you have contact with them, e.g. supervisor, co-worker, faculty, student, etc.

Describe the corrective action you are seeking. Attach additional pages if necessary.

For retaliation complaints, please explain why you believe someone retaliated against you:

Witnesses (The relationship information requested means co-worker, supervisor, customer, faculty, fellow student, roommate, etc. Attach additional pages as needed)

1.	Relationship	Telephone
2.	Relationship	Telephone
3.	Relationship	Telephone

I certify the aforementioned is true and correct.



Your signature

Date

For the Title IX Coordinator and/or Designee

Complaint taken by

Signature

Print Name

Date

APPENDIX B

SEXUAL HARASSMENT GRIEVANCE AND INVESTIGATION PROCEDURE

STATEMENT OF RIGHTS OF THE PARTIES

- The right to an equitable investigation and resolution of all credible allegations of prohibited harassment or retaliation made in good faith to College officials.
- The right to timely written notice of all alleged violations, including the identity of the parties involved (if known), the precise misconduct being alleged, the date and location of the alleged misconduct (if known), the implicated policies and procedures, and possible sanctions.
- The right to timely written notice of any material adjustments to the allegations (e.g., additional incidents or allegations, additional Complainants, unsubstantiated allegations) and any attendant adjustments needed to clarify potentially implicated policy violations.
- The right to be informed in advance of any public release of information regarding the allegation(s) or underlying incident(s), whenever possible.
- The right not to have any personally identifiable information released to the public without consent provided, except to the extent permitted by law.
- The right to be treated with respect by College officials.
- The right to have College policies and procedures followed without material deviation.
- The right not to be pressured to mediate or otherwise informally resolve any reported misconduct involving violence, including sexual violence.
- The right not to be discouraged by College officials from reporting sexual harassment or retaliation to both on-campus and off-campus authorities.
- The right to be informed by College officials of options to notify proper law enforcement authorities, including on-campus and local police, and the option(s) to be assisted by College authorities in notifying such authorities, if the party so chooses. This also includes the right not to be pressured to report, as well.
- The right to have allegations of violations of this Policy responded to promptly and with sensitivity by College security officers and/or other College officials.

- The right to be informed of available interim actions and supportive measures, such as counseling; advocacy; health care; student financial aid, visa, and immigration assistance; or other services, both on campus and in the community.
- The right to a College-implemented no-contact order or a Notice Against Trespass against a non-affiliated third party when a person has engaged in or threatens to engage in stalking, threatening, harassing, or other improper conduct.
- The right to be informed of available assistance in changing academic, living, and/or working situations after an alleged incident of sexual harassment and/or retaliation, if such changes are reasonably available. No formal report, or investigation, either campus or criminal, needs to occur before this option is available. Such actions may include, but are not limited to:
 - Relocating an on-campus student's housing to a different on-campus location
 - Assistance from College staff in completing the relocation
 - Changing an employee's work environment (e.g., reporting structure, office/workspace relocation)
 - Transportation accommodations
 - Visa/immigration assistance
 - Arranging to dissolve a housing contract and a pro-rated refund
 - Exam, paper, and/or assignment rescheduling or adjustment
 - Receiving an incomplete in, or a withdrawal from, a class (may be retroactive)
 - Transferring class sections
 - Temporary withdrawal/leave of absence (may be retroactive)
 - Campus safety escorts
 - Alternative course completion options.
- The right to have the College maintain such actions for as long as necessary and for supportive measures to remain private, provided privacy does not impair the College's ability to provide the supportive measures.
- The right to receive sufficiently advanced, written notice of any meeting or interview involving the other party, when possible.
- The right to ask the Investigator(s) and Decision-maker(s) to identify and question relevant witnesses, including expert witnesses.
- The right to provide the Investigator(s)/Decision-maker(s) with a list of questions that, if deemed relevant by the Investigator(s)/Chair, may be asked of any party or witness.
- The right not to have irrelevant prior sexual history or character admitted as evidence.
- The right to know the relevant and directly related evidence obtained and to respond to that evidence.

- The right to fair opportunity to provide the Investigator(s) with their account of the alleged misconduct and have that account be on the record.
- The right to receive a copy of the investigation report, including all factual, policy, and/or credibility analyses performed, and all relevant and directly related evidence available and used to produce the investigation report, subject to the privacy limitations imposed by state and federal law, prior to the hearing, and the right to have at least ten (10) business days to review the report prior to the hearing.
- The right to respond to the investigation report, including comments providing any additional relevant evidence after the opportunity to review the investigation report, and to have that response on the record.
- The right to be informed of the names of all witnesses whose information will be used to make a finding, in advance of that finding, when relevant.
- The right to regular updates on the status of the investigation and/or resolution.
- The right to have reports of alleged Policy violations addressed by Investigators, Title IX Coordinators, and Decision-maker(s) who have received relevant annual training.
- The right to preservation of privacy, to the extent possible and permitted by law.
- The right to meetings, interviews, and/or hearings that are closed to the public.
- The right to petition that any College representative in the process be recused on the basis of disqualifying bias and/or conflict of interest.
- The right to have an Advisor of their choice to accompany and assist the party in all meetings and/or interviews associated with the resolution process.
- The right to the use of the appropriate standard of evidence, preponderance of the evidence, to make a finding after an objective evaluation of all relevant evidence.
- The right to be present, including presence via remote technology, during all testimony given and evidence presented during any formal grievance hearing.
- The right to have an impact statement considered by the Decision-maker(s) following a determination of responsibility for any allegation, but prior to sanctioning.
- The right to be promptly informed in a written Notice of Outcome letter of the finding(s) and sanction(s) of the resolution process and a detailed rationale of the decision (including an explanation of how credibility was assessed), delivered simultaneously (without undue delay) to the parties.

- The right to be informed in writing of when a decision by the College is considered final and any changes to the sanction(s) that occur before the decision is finalized.
- The right to be informed of the opportunity to appeal the finding(s) and sanction(s) of the resolution process, and the procedures for doing so in accordance with the standards for appeal established by the College.
- The right to a fundamentally fair resolution as defined in these procedures.

APPENDIX C: VIOLENCE RISK ASSESSMENT (VRA)

Threat assessment is the process of assessing the actionability of violence by an individual against another person or group following the issuance of a direct or conditional threat. A ***Violence Risk Assessment (VRA)*** is a broader term used to assess any potential violence or danger, regardless of the presence of a vague, conditional, or direct threat.

The implementation of VRAs require specific training and are typically conducted by psychologists, clinical counselors, social workers, case managers, law enforcement officers, student conduct officers, and/or other Behavioral Intervention Team (BIT) (sometimes also known as CARE teams) members.

A VRA occurs in collaboration with the BIT, CARE, and or threat assessment team and must be understood as an on-going process, rather than a singular evaluation or meeting. A VRA is not an evaluation for an involuntary behavioral health hospitalization (see, e.g. Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§71-901 to 71-963), nor is it a psychological or mental health assessment.

A VRA assesses the risk of actionable violence, often with a focus on targeted/predatory escalations, and is supported by research from the fields of law enforcement, criminology, human resources, and psychology.

When conducting a VRA, the assessor(s) use an evidence-based process consisting of:

1. an appraisal of ***risk factors*** that escalate the potential for violence;
2. a determination of ***stabilizing influences*** that reduce the risk of violence;
3. a contextual ***analysis of violence risk*** by considering environmental circumstances, hopelessness, and suicidality; catalyst events; nature and actionability of threat; fixation and focus on target; grievance collection; and action and time imperative for violence; and
4. the application of ***intervention and management*** approaches to reduce the risk of violence.

To assess an individual's level of violence risk, the Title IX Coordinator will initiate the violence risk assessment process through the BIT. The BIT will assign a trained individual(s) to perform the assessment, according to the specific nature of the Title IX case.

The assessor will rely on a consistent, research-based, reliable system that allows for the operationalization of the risk levels.

The VRA is conducted independently from the Title IX process, free from outcome pressure, but is informed by it. The individual(s) conducting the assessment will be trained to mitigate any bias and provide the analysis and findings in a fair and equitable manner.

The BIT/CARE team's assigned member conducts a VRA process and makes a recommendation to the Title IX Coordinator as to whether the VRA indicates there is a substantial, compelling, and/or immediate risk to health and/or safety of an individual or the community.



Section (d)i

Section (e)i

Section (f)i

VAWA Brochure

SEXUAL HARASSMENT

WHAT YOU NEED TO KNOW

Obtaining Information, Support and Assistance, Filing a Complaint

If you experience any form of sexual harassment, there are a number of ways you can report the incident as well as a wide array of services available to obtain the information, support, and assistance you need to ensure your health and safety, both emotional and physical.

DEFINITION: The College uses the term Sexual Harassment as an umbrella category including offenses of:

- **Sexual Harassment;**
- **Sexual Assault;**
- **Stalking;**
- **Dating Violence and**
- **Domestic Violence**

OPTIONS IMMEDIATELY AFTER INCIDENT

Seeking Confidential Crisis Counseling



There are a number of resources you may turn to for confidential advice, support and information in the immediate aftermath of an incident.

WNCC RESOURCES

WNCC Counseling Center: 308.635-6050 / 6090

COMMUNITY RESOURCES

The DOVES Program: 308.436.HELP (4357)

Seeking Emergency Medical Attention



You can receive health care (like medications to prevent infections or pregnancy) at Regional West Medical Center. To learn more about obtaining a Sexual Assault Evidence Collection Kit, contact the SANE Nurse at Regional West Medical Center (RWMC)

COMMUNITY RESOURCES (911 Emergency Svcs)

ALLIANCE:

Box Butte Gen. Hospital: 308.762.6660

SCOTTSBLUFF:

RWMC Emergency Medicine: 308.635.3711

SIDNEY:

Sidney Regional Medical Center: 308-254-5825

Reporting the Incident to the Police



Report an incident to the police by calling one of the numbers at right. Your decision to report to the police will not affect your ability to file a complaint through the College's procedure, which is independent of the criminal process.

HOW TO CONTACT THE POLICE

911

Alliance Police: 308.762.4955

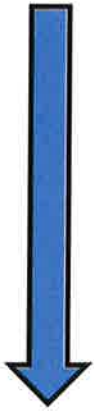
Scottsbluff Police: 308.632.6261

Scottsbluff After Hours: 308.632.7176

Scotts Bluff County Sheriff: 308.436.6667

Sidney Police: 308.254.5515

SEEKING PROTECTIVE SERVICES



You may choose either or both options

Student Services: Kathy Ault, WNCC's Title IX Coordinator can assist with a variety of measures including a no contact order, academic support, and housing accommodations, whether or not there is a formal complaint filed. Phone: 308.635.6350 or Email: aultk@wncc.edu for more information.

Protective Order: A court-issued order that can be enforced anywhere in the United States, no matter where you obtain it. A violation of it can result in criminal charges. The DOVES Program also can provide information and can support you through this process. If you get a protective order, WNCC will also work with you to make any accommodations necessary.

REPORTING OPTIONS



You may pursue either, both or none of these options. You are not required to file a report immediately; however it is important to preserve any evidence of the incident. Detailed information about your reporting options is available by contacting the Title IX Coordinator.

College Complaint	Criminal Complaint
<p>You may file a complaint with the College by contacting the Title IX Coordinator. Complaints may be filed under the College's Sexual Harassment Grievance and Investigation Procedures. The standard of proof is "a preponderance of the evidence;" and potential sanctions may include suspension or expulsion (for students) and termination (for employees). Contact Title IX Coordinator with questions.</p>	<p>You are not required to file a criminal complaint. If you choose to, WNCC will provide you with support throughout the process. You may file a criminal complaint by contacting the police. A criminal complaint is governed by applicable criminal statutes; the standard of proof is "beyond a reasonable doubt;" and potential sanctions include all applicable criminal sanctions, up to and including incarceration.</p>

THE COLLEGE'S RESPONSE



The College is committed to responding to sexual harassment and is required by Federal Law to investigate all allegations and take any remedial action deemed necessary to preserve your safety and that of the community, whether or not you wish to make a formal complaint. However, in planning any response, the wishes of the reporting student are given full consideration. You may receive assistance and support without disclosing the detail of the incident. Below is a chart to clarify the confidentiality levels of many campus resources.

Confidential	Non Confidential Options
<p>WNCC RESOURCES:</p> <p>Counseling Center: 308.635.6050</p> <p>Counseling Director and Disability Services Officer: 308.635.6090</p> <p>COMMUNITY RESOURCES:</p> <p>DOVES: 308.436.HELP</p>	<p>Title IX Coordinator/Investigator</p> <p>Title IX Deputies</p> <p>Dean of Students / Assistant Dean of Students</p> <p>Advisor / Faculty / Coaches</p> <p>Residence Life Director / Assistants / Staff</p>

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Section (h)i

Interlocal Cooperation Agreement

**INTERLOCAL COOPERATION AGREEMENT
FOR SECURITY OFFICER**

The parties to this Interlocal Cooperation Agreement for Security Officer ("Agreement") are the City of Scottsbluff, Nebraska, A Municipal Corporation, hereinafter referred to as "**CITY**", and Western Nebraska Community College, hereinafter referred to as "**COLLEGE**" who agree to provide the services of a Security Officer, hereinafter referred to as "**SO**" for the **COLLEGE**.

WHEREAS, the **CITY** and **COLLEGE** share the goal of promoting safety at the **COLLEGE** and a positive **COLLEGE** environment;

WHEREAS, the **CITY** and **COLLEGE** acknowledge that crime prevention is most effective when the **CITY** and the **COLLEGE** are working together in a positive and collaborative manner;

WHEREAS, the **CITY** and **COLLEGE** have each committed funds to pay the costs of assigning two (2) **SOs** at the **COLLEGE**; and,

WHEREAS, the purpose of the **SO** Program is to have police patrol, investigation, traffic regulation, and law enforcement activities conducted specifically in the **COLLEGE** environment and on **COLLEGE** premises.

NOW, THEREFORE, in consideration of the promises and covenants contained herein, **CITY** and **COLLEGE** agree as follows:

1. **Purpose** - The **COLLEGE** and **CITY** propose to accomplish the following with regard to having a **SO** in the **COLLEGE**:

1.1 To foster educational programs and activities that will increase students' knowledge of and respect for the law and the function of law enforcement agencies;

1.2 To create a common understanding that: (a) **COLLEGE** administrators, faculty and staff are ultimately responsible for **COLLEGE** discipline and culture; (b) **SOs** should not be involved in the enforcement of **COLLEGE** rules; and (c) a clear delineation of the roles and responsibilities of **SOs** as to student discipline, with regular review by the Parties, is essential;

1.3 To act swiftly and cooperatively when responding to major disruptions and criminal offenses at the **COLLEGE**, such as: security threats; terrorist activity; disorderly conduct; the possession and use of weapons on campus; the illegal possession, sale and/or distribution of controlled substances; and civil unrest;

1.4 To report crimes and to cooperate with law enforcement officials, and other criminal justice agencies, in their investigations that occur at the **COLLEGE** and **COLLEGE** related activities, both on and

off campus;

1.5 To encourage **SOs** to provide traffic control at **COLLEGE** when deemed necessary for the safety and protection of students and the general public when the regular patrol officer/deputy is not available; and

1.6 To promote respect for law enforcement officers, the **CITY** shall require the **SOs** to conduct themselves in a professional manner.

2. **Term and Cost Share** - **CITY** and **COLLEGE** agree to fully fund for one (1) year, beginning January 13, 2020 and ending December 31, 2020, the costs of the **SO**. The **COLLEGE** shall pay an amount equal to fifty percent (50%) and the **CITY** shall pay an amount equal to fifty percent (50%) of the costs, which are defined as the 9 month salary and fringe benefits including pension, FICA, disability, health & life insurance for two (2) full-time **SOs** working forty (40) hours per week during the school term. **CITY** will bill **COLLEGE** quarterly for **COLLEGE'S** share of the payments due hereunder, and **COLLEGE** shall pay such bills within thirty (30) days after the bills are received.

3. **Overtime** - If the **COLLEGE** requests or requires the **SOs** to work overtime, **COLLEGE** shall be billed the overtime worked, at the then existing salary and benefit rate. **COLLEGE** will be billed the overtime hours on a quarterly basis, and payment will be due from **COLLEGE** to **CITY** within thirty (30) days after receipt of said billing. The **CITY** shall be entitled to flex the **SO's** weekly hours as comp time or a flexible work schedule to avoid overtime charges, if **CITY** policy allows.

4. **SO Selection** - **CITY** will provide two (2) certified Nebraska Police Officers to act as **SOs** during the term of this Agreement. The **CITY** agrees that in accordance with the Nebraska Fair Employment Practice Act, Nebraska Revised Statute §48-1122, it will not discriminate against any employee or applicant for employment to be employed in the performance of this Agreement with respect to hire, terms, conditions, or privileges of employment because of race, color, religion, sex, disability, or national origin or similarly protected statutes of the employee or applicant. Neither of the parties shall, in the performance of this Agreement, discriminate or permit discrimination in violation of federal or state laws or local ordinances.

5. **Change in Assignment of SO** - The **CITY** and **COLLEGE** acknowledge that specific skills, experience, and expertise are important elements to the success of this Agreement. In the event that the current **SOs** are unable to perform their duties hereunder, due to illness, injury, relocation, career change or other extenuating circumstances, the **CITY** shall identify a successor to perform the duties set out in this Agreement, within a reasonable time frame, subject to availability of a certifiably trained **SO** or another officer comparably trained. The

COLLEGE'S financial obligations shall cease until a suitable replacement is selected and assigned. Training of a successor **SO** shall be the responsibility of **CITY**.

6. **Evaluations** - The **CITY** and **COLLEGE** shall enter into good-faith discussions to evaluate the **SOs** on a regular basis. The evaluation is to ensure that the **SOs** are meeting the requirements of the **COLLEGE** and the **CITY**. The **CITY** and **COLLEGE** shall coordinate efforts to conduct evaluations on employee's appraisal as established by **CITY** policy.

7. **Agreement Renewal** - This Agreement shall renew automatically for each successive contract year unless it is determined, after good-faith evaluations have been performed, that the **SOs** are not satisfactorily meeting the requirements of the Agreement. Any intention to not renew the Agreement must be mutually agreed upon by the **CITY** and **COLLEGE** no later than October 1 of a calendar year.

8. **Supplies and Equipment** - The **CITY** shall provide the **SOs** with standard police patrol vehicles and will maintain the vehicles, including all expenses associated with the operation of the vehicle and insurance. The **CITY** shall also provide the **SO** with uniforms, equipment, weapons, cellular phone and other law enforcement related items to conduct the job tasks described in this Agreement and in the job description and standards provided for the **SOs** position by the **CITY**. The **COLLEGE** agrees to provide the **SOs** with the usual and customary office supplies and forms required in the performance of their duties, a private office within the **COLLEGE** accessible to the students, a computer, printer, fax machine.

9. **SO Duties** - The duties of the **SO** shall be as follows:

9.1 Abide by the professional rules of conduct of a certified law enforcement officer;

9.2 Respond to students' questions;

9.3 Explain the law enforcement's role in society to students;

9.4 Demonstrate the concern of the **CITY** for students;

9.5 Provide safety and security for the campus;

9.6 Create good will and increase the understanding of law enforcement;

9.7 Strengthen student and law enforcement relationships;

9.8 Provide a forum where law enforcement, students and faculty become acquainted and earn mutual respect;

9.9 Open lines of communication between public agencies and students on campus;

9.10 Enforce federal, state and local criminal laws and ordinances, and assist administrators with the enforcement of **COLLEGE** policies and administrative regulations as specifically agreed to by the parties;

9.11 Investigate and report data of all events, criminal activity

committed on or adjacent to **COLLEGE** property, and at **COLLEGE** functions;

9.12 Provide consultation to students in special situations, such as students suspected of engaging in criminal misconduct, when requested by the **COLLEGE**;

9.13 Provide traffic control and enforcement on campus;

9.14 Provide monthly written reports to the **COLLEGE**.

10. **Roles and Responsibilities for SO Program Regarding College Discipline -**

10.1 Disciplining students for **COLLEGE**-based rule violations is the responsibility of the **COLLEGE** and **COLLEGE** administrators. Law enforcement is the responsibility of the **CITY**. The **CITY** and the **COLLEGE** shall use best efforts to follow the principles in this Interlocal Cooperation Agreement regarding the division between **COLLEGE** discipline and law enforcement.

10.2 **SOs** can provide assistance when (a) required by Nebraska State or City law; (b) when there is a threat to the safety of students, **COLLEGE** employees, visitors or public safety personnel or **COLLEGE** property; (c) to assist victims of crime, missing persons, and persons in mental health crisis; (d) in an attempt to prevent criminal activity from occurring; (e) it is required as part of emergency management response; or (f) as specifically agreed to by the parties herein.

10.3 **SO** should not act as a **COLLEGE** disciplinarian. **COLLEGE** staff should not involve **SOs** in disputes that are solely related to **COLLEGE** discipline. However, if the **COLLEGE** concludes an incident is a violation of the law, the **COLLEGE** may contact the **SOs** and the **SOs** shall then determine whether law enforcement action is appropriate.

10.4 **SOs** should not interview students or collect evidence for solely **COLLEGE** disciplinary purposes.

11. **SO Scheduling** - During the school year, the **SO** will work on all scheduled school days, Monday through Friday with adjustments as required for special school functions and activities as needed to equal 40 hours in one calendar week. Special assignments and time off will be approved by the **CITY**.

11. **SO Supervision** - The **SO** shall be an employee of the **CITY** at all times and for all purposes. The **CITY** shall be directly responsible for all employee costs, except as otherwise set forth herein. The supervision of the **SOs** shall be by the **CITY** with input from the **COLLEGE**. During any school crisis the **SO** shall immediately contact the Chief of Police.

12. **Insurance** - **CITY** shall provide all insurance for the **SOs** and the officer's activity with regard to this Agreement. This Agreement does not establish any partnership, joint venture, or any type of legal association between the parties, but is to be construed as an interlocal agreement between the parties.

13. **Entire Agreement, Severability** - This Agreement constitutes the entire agreement between the parties and may be amended only by a written document signed by the representatives of the legislative bodies of each of the parties. If any portion of this Agreement is deemed to be unenforceable or against public policy, it shall not affect the remaining portions of this Agreement.

14. **Controlling Law** - The terms of this Agreement shall be interpreted and enforced under the laws of the State of Nebraska.

15. **Default, Remedies** - Time is of the essence in performance of this Agreement. In the event of default by either party, the other party may pursue any right or remedy available to them at law or in equity for the enforcement and/or termination of this Agreement, and the ascertainment and collection of damages, including the right of specific performance.

16. **Training, testing** - The SOs will be subject to current procedures in effect for CITY employees including attendance at all mandated training and testing to maintain state peace officer certification. This training and certification takes place throughout the year and will necessitate the absence of the SOs from the COLLEGE.

17. **Confidential Information and FERPA** - Student "educational records" maintained by the COLLEGE are confidential information, governed and protected by the federal law known as the Family Education Rights and Privacy Act of 1974 (20 U.S.C. § 1232g), as amended, and its related regulations promulgated by the Department of Education, found at 34CFR Part 99. This Agreement shall refer to the Act and the regulations collectively as "FERPA". For purposes of this FERPA, the SO is designated as a COLLEGE official and as its law enforcement unit. The SOs are authorized by the COLLEGE to (1) enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the COLLEGE itself, or (2) maintain the physical security and safety of the COLLEGE. The CITY and the SOs agree to in all respects comply with all applicable provisions of FERPA. Nothing in this Agreement may be construed to allow either party to maintain, use, disclose, or share student record information in a manner not permitted by FERPA. The parties further acknowledge that the COLLEGE has implemented policies and guidelines which describe when and how protected student information may be obtained, shared, or otherwise disseminated and that the CITY and its agents are subject to such policies and guidelines and will comply with same. The COLLEGE shall provide a copy of these policies and guidelines to the SOs and the CITY.

18. **Record Requests** - The CITY and the COLLEGE are subject to the State's public record laws, found at Nebraska Revised Statute § 84-712 et seq. The parties understand that the terms of this Agreement require them to cooperate with respect to numerous records, in many formats, for purposes of fulfilling their respective

obligations. In the event either party receives a public record request seeking records or information which is or may be covered by this Agreement, the parties agree to provide notice to each other as soon as reasonably possible in order to discuss the disclosure requirements under those laws. The party receiving the request will have the ultimate decision-making authority on whether the records are disclosed, provided the other party has not elected to seek a judicial determination that such disclosure is not required.

19. **Administration** - The COLLEGE's President and the CITY's Chief of Police ("Administrators") shall be responsible for jointly administering the cooperative undertaking described in this Agreement. The Administrators, with the approval from the governing boards of each of the Parties, may take any action authorized, either explicitly or implicitly, by the Interlocal Cooperation Act, including any action that may be necessary to perform the duties and functions as provided in this Agreement.

20. **Inspection of CITY's Records** - The CITY shall establish and maintain books, records and documents (including electronic storage media) sufficient to reflect all income and expenditures of funds provided by the COLLEGE under this Agreement. All CITY records relating to this Agreement, regardless of the form in which they are kept, shall be open to inspection and subject to audit, inspection, examination, evaluation, and/or reproduction, during normal working hours, by the COLLEGE's agent or its authorized representative to permit the COLLEGE to evaluate, analyze, and verify the satisfactory performance of the terms and conditions of this Agreement and to evaluate, analyze, and verify any and all invoices, billings, payments, and/or claims submitted by the CITY pursuant to this Agreement.

21. **Body-Worn Cameras (BWCs)** - All parties agree that any use of BWCs by SOs must be subject to and in compliance with federal, state, and local laws and regulations regarding their use and operation. The CITY shall use its best efforts to notify the COLLEGE at least two weeks before its SOs assigned to the COLLEGE are to begin use of BWCs, and it will provide written information to the COLLEGE. Every SO equipped with a BWC shall be trained in the operation of the equipment prior to its use. To maximize the effectiveness of the BWC and the integrity of the video documentation, SOs shall adhere to the objectives and procedures outlined in this Agreement and the CITY's general operations orders or similar policies or procedures when they utilize BWCs. The CITY may, if not otherwise prohibited by law, provide to the COLLEGE copies of any such filming of students, parents, employees, or others upon COLLEGE property, upon request for such copies by the COLLEGE, as a law enforcement record. In the event that the CITY receives advice that providing a copy of such videos is prohibited, the CITY agrees to utilize its best efforts to facilitate the availability of its officer(s) that made the video to testify, upon request by the COLLEGE, in any disciplinary hearing concerning his/her/their knowledge of the facts and circumstances of the videoed incident. Any such film or video taken by, and kept in the possession of

CITY's SOs may be considered law enforcement records under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. sec. 1232g and 34 C.F.R. Sec. 99.8. Any copy of such film or video, if permitted by law to be provided to the COLLEGE, may become an educational record of the COLLEGE. The SO's shall at all times recognize and comply with the confidentiality of student and education records and may only seek such records in accordance with the requirements of COLLEGE policy and state and federal law.

22. **No Separate Legal Entity** - This Agreement does not establish a separate legal or joint entity.

23. **Manner of Acquiring, Holding, and Disposing of Real and Personal Property** - The Parties' will not be jointly acquiring, holding, or disposing of real property under this Agreement. In no event shall the Administrators have the authority to acquire real property on behalf of the Parties. The Administrators shall have the authority to acquire and hold any personal property that is needed or required for the implementation of any purpose of this Agreement. The title to all such personal property shall be held in the name of the acquiring party for the benefit of all Parties. The Parties shall have the authority to dispose of such personal property, provided that (a) any such disposal shall comply with state law, and (b) any funds raised from such sale shall be shared by the parties in proportion to their contribution made to obtain the property.

24. **Financing and Budgeting** - This Agreement and the matters contemplated herein do not require joint financing, nor shall a joint budget be required. Each party will budget separately to pay the costs and expenses that are incurred to fulfill its obligations under this Agreement. For planning and budgeting purposes, the CITY shall provide to the COLLEGE the estimated cost of the SO no later than October 15th of each year. The CITY will confirm to the COLLEGE the actual cost of the SO for the following COLLEGE year prior to July 1st.

25. **Expenses** - Except as otherwise provided herein, each party shall be responsible for its own expenses related to this Agreement.

26. **Taxes** - This Agreement does not grant the Parties any authority to levy, collect, or account for any tax authorized under Nebraska Revised Statutes sections 13-318 through 13-326 or 13- 2813 through 2816.

27. **Employment Eligibility Verification** - The Parties shall use a federal immigration verification system to determine the work eligibility status of employees and who are physically performing services within the State of Nebraska. If a party employs or contracts with any subcontractor in connection with this Agreement, the contracting party shall include a provision in the contract requiring the subcontractor to use a federal immigration verification system to determine the work eligibility status of new employees physically performing services within the State of Nebraska.

28. **Termination** - Either party may terminate this Agreement for any or no reason and at any time by giving the other party at least ninety (90) days prior written notice of the same. Provided, the written notice must be delivered to the other party prior to October 1 of a calendar year. Any joint funds or property in possession of the Parties as a result of this Agreement shall be divided and distributed to the party that contributed it or funded its purchases.

29. **Appropriation of Funds** - The Parties' obligations under this Agreement are expressly subject to the appropriation of funds by the COLLEGE's Board of Governors and the CITY's City Council. Further, in the event that funds are not appropriated in whole or in part sufficient for performance of the obligations under this Agreement, the Parties may terminate this Agreement.

[SIGNATURE PAGE WILL FOLLOW]

This Agreement was signed by each party on the date shown in the following acknowledgments.

CITY OF SCOTTSBLUFF, NEBRASKA
A Municipal Corporation,

WESTERN NEBRASKA COMMUNITY
COLLEGE,

By Raymond Gonzales
Raymond Gonzales, Mayor
City of Scottsbluff, Nebraska

By William W. Huff
12-18-19





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Section (e)iv

Information posted on WNCC's
Title IX Compliance webpage



Title IX Compliance

Equal Opportunity & Non-discrimination

Western Nebraska Community College does not discriminate on the basis of race, color, religion, national origin, sex or gender, age, disability, marital status, military veteran status, sexual orientation, gender expression/identity, or political affiliation, in its policies, practices, and activities related to employment, admissions, educational services/programming, student services/activities, or financial aid; as expressly prescribed by institutional policy, state and federal laws, regulations, and executive orders.

About Title IX

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any educational institution that receives federal funding. Western Nebraska Community College strictly prohibits any form of sexual harassment, which includes sexual harassment, sexual assault, dating violence, domestic violence and stalking. All reported incidents will be thoroughly investigated and those found responsible dealt with as necessary, whether criminally charged or handled through WNCC's Sexual Harassment Grievance and Investigation Procedure. College policy also prohibits retaliation against a person for reporting sexual harassment, or participating in the investigation or resolution of such a complaint.

Who is covered by Title IX?

Educational institutions that receive federal financial assistance are covered by Title IX. If only one of the institution's programs or activities receives federal funding, all of the programs within the institution must comply with Title IX regulations. All students, faculty and staff at WNCC are protected by Title IX in all aspects of WNCC's educational programs and activities. All forms of sexual harassment, including sexual harassment, sexual assault, dating violence, domestic violence, and stalking are violations of Title IX and prohibited by WNCC.

Complaints under Title IX at WNCC

Students: If you are a student who believes you have been subjected to sexual harassment under Title IX, you may report such harassment or file a formal complaint with the Title IX Coordinator.

Employees: If you are an employee who believes you have been subjected to sexual harassment under Title IX, or who wishes to file a complaint under Title IX, you can do so with the Title IX Coordinator.

Title IX Coordinator

In accordance with Title IX regulations, WNCC has a designated Title IX coordinator. This person is responsible for tracking and monitoring incidents of sexual harassment, which includes sexual harassment, sexual assault, dating violence, domestic violence, and stalking to ensure WNCC responds effectively to each complaint, and where necessary, for conducting investigations of particular situations. Questions regarding Title IX, as well as concerns and complaints of non-compliance, may be directed to:

Kathy Ault, Title IX Coordinator

Human Resources

1601 E. 27th Street

Scottsbluff, NE 69361

Phone: 308.635.6350

Fax: 308.635.6161

aultk@wncc.edu

In addition, Institutional Officers listed below are designated as Title IX Deputy Coordinators and may be contacted for assistance:

Title IX Deputy Coordinator, Ryan Burgner, Athletic Director, WNCC 1601 East 27th Street, Scottsbluff, NE, 69361 308.635.6798 or **burgnerr@wncc.edu**

Title IX Deputy Coordinator, Norman Coley, Jr., Executive Dean of Student Services, WNCC 1601 East 27th Street, Scottsbluff, NE, 69361, 308.635.6186 or **coleyn@wncc.edu**

Title IX Deputy Coordinator, Paula Abbott, Community & Business Partnerships Executive Director, WNCC 371 College Drive, Sidney, Nebraska 69162 308.254.7404 or **abbottp@wncc.edu**

Title IX Deputy Coordinator, Lisa Gion, HR Generalist, WNCC 1601 East 27th Street, Scottsbluff, Nebraska 69361 308.635.6105 or **gionl0@wncc.edu**

Who enforces Title IX?

The United States Department of Education's Office for Civil Rights (OCR) is in charge of enforcing Title IX. The Office for Civil Rights may be reached at:

Office for Civil Rights, U.S. Department of Education, One Petticoat Lane, 1010 Walnut Street, 3rd floor, Suite 320, Kansas City, MO 64106. 816.268.0550

Information regarding OCR can be found [here](#).

Failure to comply with Title IX

The penalty for failure to comply with Title IX in the most extreme circumstances can include the termination of all or part of an institution's federal funding. This includes grants, subsidies, and other program funds from the federal government. In addition to the loss of federal funds, institutions may be sued by those seeking redress for violations of Title IX. It is essential that institutions receiving federal financial assistances operate in a nondiscriminatory manner. While compliance with the law is everyone's responsibility at WNCC, the staff members who have primary responsibility for Title IX compliance are listed under Contact Information.

Other Resources

BP-720 Equal Opportunity Employer/Non-Discrimination

Appendix A-1-12 Discrimination, Harassment, or Retaliation Complaint Operating Procedure

Board Policy BP-721 – Sexual Harassment Policy (Regulatory Policy Standards)

Sexual Harassment Grievance and Investigation Procedure

WNCC Civil Rights Investigator Training (Level 4)

WNCC Title IX Training - August 2020

WNCC Title IX Advisor Training - August 2020

ATIXA Training Materials

Alliance Campus

1750 Sweetwater Ave.
Alliance, NE 69301
308.763.2000

Scottsbluff Campus

1601 E. 27th Street
Scottsbluff, NE 69361
308.635.3606

Sidney Campus

371 College Drive
Sidney, NE 69162
308.254.5450



Section (e)iii

Student presentation titled: Title
IX and Your Role

Title IX and Your Role

Making a Difference in Preventing Sexual Harassment
& Sexual Violence at WNCC

Agenda:

- What is Title IX?
- Why is it important?
- WNCC's role
- Some key definitions
- Reporting and College Response
- Campus Resources
- What's Next?

What is Title IX??

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

Title IX of the Education Amendments of 1972
Implementing Regulations at:

20 U.S.C. § 1681 & 34 C.F.R. Part 106

Sexual Discrimination, Violence, and Harassment on campuses

Title IX (1972)

• Federal law that prohibits sex discrimination in educational institutions

The Jeanne Clery Act (1998)

• Requires colleges and universities in the United States to disclose information regarding crime on and around campus

VAWA (2013) - Violence Against Women Act

• The Violence Against Women Act is aimed at improving how colleges address sexual violence; imposes obligations to revise policies and practices

Save Act (2014) - Campus Sexual Violence Elimination Act

• Part of the VAWA amendments, made changes to the Jeanne Clery Act; requires colleges to report additional sexually violent crimes

Why is Title IX important?

For the Claimant and Respondent

Physical
Mental
Academic
Social
Professional
Time and Costs
Reputational

Relevant Statistics

- 20% of college women and 6% of college men will be victims of attempted or actual sexual assault
- 13% of college women report being stalked each year
- 4 in 10 violent crimes against college students are committed while one or both parties are using drugs or alcohol
- In 8 out of 10 cases of rape, the victim knows the perpetrator
- More than 90% of sexual assault victims on college campuses do not report the assault
- National Sexual Violence Resource Center
<https://www.usvrc.org/statistics>

What is WNCC's Role?

Non-Discrimination and Title IX Policies/Procedures

Western Nebraska Community College does not discriminate on the basis of race, color, religion, national origin, sex or gender, age, disability, marital status, military veteran status, sexual orientation, gender expression/identity, or political affiliation, in its policies, practices, and activities related to employment, admissions, educational services/programming, student services/activities, or financial aid; as expressly prescribed by institutional policy, state and federal laws, regulations, and executive orders.

What is WNCC's Role?

Once there is knowledge of sexual harassment/sexual misconduct:

- 1). Take immediate and appropriate steps to **investigate** what occurred
- 2). Take prompt and effective action to:

Stop the harassment

Remedy the effects

Prevent the recurrence

Responsible Employee

- The Title IX Coordinator or Responsible Employee means an employee of the College explicitly vested with the responsibility to implement corrective measures for sexual harassment and/or retaliation on behalf of the Recipient.
- Any faculty member leading, coordinating or supervising off-campus academic activities or programs such as special field trips, etc.
- See Sexual Harassment Grievance and Investigation Procedure for specific details.

Responsible Employee

Reporting is an important tool to address Prohibited Conduct. Thus while all other employees who are not designated as Responsible Employees and are not required to report, they are also strongly encouraged to share any information about such conduct to the Title IX Coordinator, or designee.

Key Definitions:

Complainant

An individual who brings forth a report of a violation against whom a possible violation occurred.

Respondent

An individual accused of a violation

Key Definitions (cont.):

Sexual Harassment per Title IX

Sexual Harassment
Sexual Assault
Dating Violence
Domestic Violence
Stalking

Key Definitions (cont.):

Sexual Harassment

- 1) Quid Pro Quo:
 - a. an employee of the recipient,
 - b. conditions the provision of an aid, benefit, or service of the recipient,
 - c. on an individual's participation in unwelcome sexual conduct.
- 2) Sexual Harassment:
 - a. unwelcome conduct,
 - b. determined by a reasonable person,
 - c. to be so severe, and
 - d. pervasive, and,
 - e. objectively offensive,
 - f. that it effectively denies a person equal access to the College's education program or activity.

Key Definitions (cont.):

Sexual Assault

- a) Sex Offenses, Forcible:
 - o Any sexual act directed against another person.
 - o without the consent of the Complainant,
 - o including instances in which the Complainant is incapable of giving consent.

Key Definitions (cont.):

Sexual Assault

- b) Sex Offenses, Non-forcible:

Incest:

 - 1) Non-forcible sexual intercourse,
 - 2) between persons who are related to each other,
 - 3) within the degrees wherein marriage is prohibited by Nebraska law.
- Statutory Rape:
 - 1) Non-forcible sexual intercourse,
 - 2) with a person who is under the statutory age of consent of 16 years of age.

Key Definitions (cont.):

Dating Violence

- a. violence,
- b. on the basis of sex,
- c. committed by a person,
- d. who is in or has been in a social relationship of a romantic or intimate nature with the Complainant.

Key Definitions (cont.):

Domestic Violence

- a. violence,
- b. on the basis of sex,
- c. committed by a current or former spouse or intimate partner of the Complainant,
- d. by a person with whom the Complainant shares a child in common, or
- e. by a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
- f. by a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Nebraska, or
- g. by any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Nebraska.

Key Definitions (cont.):

Stalking

- a. engaging in a course of conduct,
- b. on the basis of sex,
- c. directed at a specific person, that
 - i. would cause a reasonable person to fear for the person's safety, or
 - ii. the safety of others; or
 - iii. Suffer substantial emotional distress.

Consent is:

- knowing, and
- voluntary, and
- clear permission
- by word or action
- to engage in sexual activity.

Reporting:

Report all Sexual Harassment, including sexual harassment, sexual assault, dating violence, domestic violence and stalking to the Title IX Coordinator immediately:

Kathy Ault, Title IX Coordinator
Human Resources
1601 E. 27th Street Scottsbluff, NE 69361
Phone: 308.635.6350
Fax: 308.635.6161
aultk@wncc.edu

Watch Consent Video

<https://www.youtube.com/watch?v=pZwvixVavnQ>

Scope of Jurisdiction

- In the College's education program or activity, against a person in the United States;
- On campus, including campuses in Alliance, Scottsbluff and Sidney; or
- In off campus buildings owned or controlled by the College;
- In any building owned or controlled by a student organization that is official recognized by the College; or
- Off campus, if Prohibited Conduct occurs under circumstances over which the College exercised substantial control over both the Respondent and the context in which Prohibited Conduct occurs.

Retaliation

The College and any member of the College's community are prohibited from taking materially adverse action by intimidating, threatening, coercing, harassing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by law or policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this policy and procedure.

Acts of alleged retaliation should be reported immediately to the Title IX Coordinator.

Campus Support and Resources

Title IX Coordinator, Kathy Ault, Executive Director of HR

Title IX Deputy Coordinators

Norman Coley, Jr., Dean of Students,

Ryan Burgner, Athletic Director,

Paula Abbott, Partnership & Inclusion Executive Director,

Lisa Gion, HR Generalist (Recruitment),

Campus Support

College Counseling Center

Norman J. Stephenson, Counseling Director

Be Proactive:

- First date or blind date? Check your date out with friends. Go to a public place and go with friends.
- Don't leave a party, concert, or bar with someone you just met or don't know well.
- Be wary of behavior that makes you feel uncomfortable. If it persists, leave.
- Stand up for yourself. If someone is pressuring you, make it clear that you don't like it.

If you are sexually assaulted, contact the local police department, or a campus official.

Whether committed by a stranger or someone you know, sexual assault is a violation of your body and your trust. Remember, it is never your fault. And, there are people at WNCC who can help.

If you are assaulted:

- Don't shower, wash, douche or change your clothes, even though that may be your immediate reaction. If you choose to press charges, evidence may still exist if you don't wash.
- Seek medical attention. You may have internal injuries, and you shouldn't live with the fear of STDs, AIDS or an unwanted pregnancy.
- Trained medical staff may also assist you in contacting experienced sexual assault response team members who can help you file a police report, collect and preserve evidence, and provide victim assistance and rape crisis advocacy services.
- Get counseling to help you deal with your feelings.

Remember:

- You have the right to set limits. Be aware of gender stereotypes such as "being assertive is not feminine" or "it's macho to score." These attitudes get in the way of honest relationships.
- Communicate your limits clearly and verbally.
- Trust your instincts. If a situation doesn't feel right, get away from it.
- Listen to what your partner is saying. Don't make assumptions.
- Speak up when others joke or talk about their sexual conquests. Let others know where you stand.
- Remember, drugs and alcohol decrease your ability to take care of yourself and make decisions.

It's safe to speak out and stand up:

Students are sometimes afraid to report incidents when drinking or drug use is a factor in the situation for fear that because they were present, they will get into trouble.

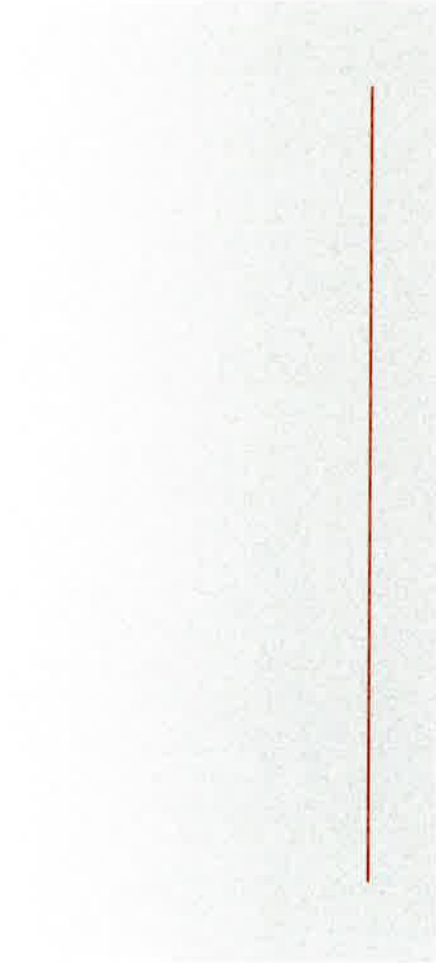
At WNCC we believe in safety first: In situations like these, any possible negative consequences for the reporter of the problem will be evaluated against the possible negative consequences for the student who needed assistance, those who assisted in an investigation about the incident, and/or the larger community.

In such cases, the positive impact upon the welfare of the community will be given great weight in determining the appropriate response to the student judicial code violations.

The College will consider very favorably the positive impact of reporting, aka of serving as an active bystander.



Questions?





Section (e)vi

WNCC Incident Reporting
Form from website



Incident Reporting Form

Western Nebraska Community College Incident Report

Reporting Party Information

Anonymous reports are appreciated, however, we strongly encourage your name and contact information.

Enable additional features by logging in. https://cm.maxient.com/reportingform.php?WesternNebraskaCC&layout_id=10&promptforauth=true

Your full name:


Your position/title:

Your phone number:

Your email address:

Nature of this report (Required):

Please Choose...

 Learn more

Urgency of this report (Required):


Date of incident (Required):

mm/dd/yyyy

Time of incident:

Location of incident (Required):

Please select a location ...

 Learn more

Specific location:

Involved Parties

Full Name

Role

Phone number

Email address

Add another party

Questions

Description of Behavior: Describe in detail any incidents in which the individual referenced above exhibited concerning behavior. Provide specific information such as dates, individuals involved (including the person's demeanor), location, and time of the occurrence. (Required)

Is there an immediate danger/threat of harm to self or others? (Required)

- Yes
- No
- I don't know

Has someone else been notified of your concern? (Required)

- Yes
- No
- I don't know

If yes, who was notified?

I am concerned about the following behaviors (check all that apply): (Required)

- Deterioration in quality of work
- Repeated absence from class or work coupled with signs of distress
- Disorganized or erratic performance/behavior
- Person sending frequent, lengthy, "ranting", threatening types of emails
- Physical Behaviors
- Dramatic change in energy levels
- Worrisome changes in hygiene or appearance
- Frequent state of intoxication (alcohol or other drugs)
- Self-mutilation (noticeable cuts or burns)
- Death of Family Member
- Death of Fellow Student
- Death of Non-Student/Other
- Destruction of Property
- Excessive Absences from Class
- Financial Concerns
- Injury/Illness - Hospital
- Injury/Illness - Other
- Mental Health Issues
- Misuse of Alcohol
- Misuse of Drugs
- Physical Health Issues
- Relationship Issues

- Self-Harm Attempt
- Self-Harm Ideation
- Transition/Involvement
- Unable to Locate Student
- Unusual Behavior
- Urgent Room Change
- Witness to an Incident
- Other

Please describe any threatening behaviors (check all that apply): (Required)

- Threats towards others
- Threats against self
- Destruction to property
- Verbal threats
- Racial hostility
- Gender hostility
- Sexual hostility
- Sexual violence
- Not applicable to situation

Was emergency services activated (fire, EMT, Police, DOVES, etc.)? (Required)

- Scottsbluff Police Department
- Scottsbluff Fire Department
- Valley Ambulance - EMT
- DOVES
- Scottsbluff County Sheriff
- Gering Fire Department
- Gering Police Department
- Nebraska State Patrol

- Air Link
- Scottsbluff Animal Control
- Other
- Nebraska National Guard
- Sidney Fire Department
- Sidney Police Department
- Cheyenne County Sheriff
- Sidney EMT
- Alliance Fire Department
- Alliance Police Department
- Box Butte Sheriff Office
- Alliance EMT
- Not Applicable

Was the individual unresponsive at any time? (Required)

- No
- Yes
- I do not know

Supporting Documentation

Photos, video, email, and other supporting documents may be attached below. 5GB maximum total size.

Attachments require time to upload, so please be patient after submitting this form.

Choose files to upload

Choose Files

Email me a copy of this report

Submit report

Section (e)vii

Title IX Statement published
in handbooks and catalog
(see examples from
Residence Life and Nursing
Program handbooks, and
College Catalog)

(The Title IX statement is published in all handbooks. Attached are examples of a limited number of handbooks and the catalog)

47 Sexual Harassment (Title IX)

WNCC is committed to providing an environment free from discrimination on the basis of sex and provides resources and services to assist students, faculty, and staff in addressing issues involving sex discrimination. The College strictly prohibits any form of sexual harassment, which includes sexual harassment, sexual assault, dating violence, domestic violence, stalking, and retaliation.

Sexual harassment, sexual assault, dating violence, domestic violence, and stalking are against the law and are prohibited under WNCC policy. All reported incidents will be thoroughly investigated and those found responsible dealt with as necessary, whether criminally charged or handled through the College's sexual harassment procedure. Persons violating this policy will face strict discipline up to and including suspension, expulsion, termination from employment, or be subject to legal proceedings. Any person believing that he or she has been subject to any form of prohibited sexual harassment, should file a complaint utilizing the College's Sexual Harassment Grievance and Investigation Procedure.

48 Tobacco Smoke and Vape Free College

WNCC's Tobacco-, Smoke-, and Vape-Free policy prohibits the use, sale, advertising, and sampling of all tobacco products by all persons on all three WNCC campuses (Alliance, Sidney, and Scottsbluff). This includes all buildings, vehicles, grounds, sidewalks, patios and parking lots, and other outdoor areas owned and/or operated by Western Nebraska Community College. Areas of campus that were previously designated as tobacco use areas are now 100% tobacco, smoke and vape-free.

The College is not requiring faculty, staff, and students to quit using tobacco products, but does expect the policy to be adhered to by all individuals on College property. Products used for cessation of tobacco use approved by the U.S. Drug and Food Administration, including alternative nicotine products, such as nicotine patches or medication, shall be allowed on College property as long as the product does not produce smoke or vapor emissions. (Board Policy-311)

49 Soliciting, Advertising, Petitioning and Selling

Canvassing or solicitation of funds, sales, membership, literature, signatures or subscription is prohibited in College owned buildings without written permission from the Dean of Students or designee. This policy applies to outside agencies, commercial enterprises, student organizations, and individual students. If commercial salespersons, agents, or solicitors are found, they should be reported to the Office of Student Life immediately 308.635.6050.

50 Tornado Information

Tornado watches and warnings are issued by the National Weather Service. Tornado watches are for wide areas exposed to a rapidly developing storm threat. Not every watch results in a severe weather during a tornado watch, you should be prepared to shelter in place.

DO:

- Stay close to the floor, cover your head with pillow/blanket, and shield yourself from flying debris.
- If immediately available, take a flashlight when you move to the place of shelter for a source of light in case the electricity fails.

AVOID: top floors, cafeteria and activity center areas.

Nursing Program Handbook

reasonable and timely manner. The accommodation process is an interactive one and requires full participation on the part of the student. Accommodations must be requested each semester that they are needed.

Students requiring or requesting assistance must contact the WNCC Counseling Director. Appropriate documentation verifying a student disability is required to make reasonable accommodations. Such documentation must be provided by a qualified health professional and must indicate the applicable diagnosis, must describe the impact of the disability on academic performance, and must support the need for the requested accommodations.

The College reserves the right to have the documentation reviewed by appropriate professionals. Failure to submit appropriate and complete documentation promptly will result in a delay in the accommodation process.

Any student who wishes to request accommodations, auxiliary aids, and services for a disability should download and print the request form, complete the information, and mail to the director of counseling. See Appendix for accommodation form.

Title IX Compliance

WNCC students have the right to an educational environment free from all forms of prohibited discrimination and sexual harassment (sexual assault, domestic and dating violence, and gender, orientation or sex-based bullying, stalking, or harassment). If you experience any form of gender, orientation or sex-based assault, discrimination, or harassment, know that WNCC has help and support available.

Please be aware that all college employees who become aware of these forms of discrimination and harassment are required to promptly report to the Title IX Coordinator or a Title IX Deputy Coordinator. This means that if you tell someone about a situation involving these issues, they must share the information with the college's Title IX Coordinator. The only exception is the college's counselor whose role provides a legal privilege of confidentiality.

If you wish to speak to someone confidentially, you can meet with the Counseling Director at the WNCC Counseling Center on the Scottsbluff campus located in the main building in the Student Learning and Engagement Center area, or by calling (308) 635-6090. Appointments are available on all WNCC campuses.

available in the Student Services Office and online at wncc.edu/about-wncc/consumer-information.

Student Right to Know & Campus Security Act

In compliance with federal regulations, WNCC annually compiles reports that indicate the College's graduation rates and the institution's current security program and crime statistics.

The Campus Security Act of 1994 (34 CFR Part 668) requires the College to report campus crime statistics for the following categories: murder/non-negligent manslaughter, forcible sex offenses, non-forcible sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, arson, and negligent manslaughter.

The campus crime statistics reports are available from Student Services or online at wncc.edu/about-wncc/consumer-information or through the Office of Postsecondary Education at ope.ed.gov/campusafety.

The graduation completion rate report is also available at wncc.edu/about-wncc/consumer-information.

Title IX Statement

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any educational institution that receives federal funding. WNCC strictly prohibits any form of sexual harassment, which includes sexual harassment, sexual assault, dating violence, domestic violence, and stalking. All reported incidents will be thoroughly investigated and those found responsible dealt with as necessary, whether criminally charged or handled through the College's sexual harassment grievance and investigation procedure. College policy also prohibits retaliation against a person for reporting sexual harassment or participating in the investigation or resolution of such a complaint.

Help and support are available for any student who experiences any form of sexual harassment. Questions or concerns about a student's rights or the resources available or to file a Title IX complaint, should contact the College's Title IX Coordinator:

Human Resources Executive Director

1601 East 27th Street, Scottsbluff, NE 69361
308.635.6105

If a student wishes to speak to someone confidentially, he or she should contact the Counseling Director at the WNCC Counseling Center on the Scottsbluff campus or by calling **308.635.6090**. Appointments are available at all WNCC locations.

For more information about reporting options and resources at WNCC and in the community, please visit wncc.edu/about-wncc/consumer-information.

Voter Registration

Western Nebraska Community College encourages all students to exercise their right to vote. Visit sos.nebraska.gov/elections/voter-forms to download a voter registration form.

Weapons Policy

The illegal possession, use, or sale of firearms, ammunition, major or minor explosives, or any lethal weapon is forbidden and subject to college discipline as well as criminal sanctions. The College prohibits permit holders who are authorized to carry a concealed handgun from carrying a concealed handgun into or upon the property of Western Community College Area, which operates WNCC.



Section (f)iii

Residence Life students receive
“A Culture of Consent” booklet

WHAT COMES BEFORE CONSENT?

There are multiple things to explore about your own needs surrounding sexuality before the issue of giving and obtaining consent comes into the equation. Some issues to consider on the continuum of healthy to unhealthy behaviors include...

- Your values and how they inform relationships
- How your actions do/don't reflect your values
- What your feelings are about having sex/not having sex
- How you develop emotional intimacy and vulnerability
- What and who you desire
- What your personal boundaries are related to sexual activity, including the use of birth control and/or barrier protection
- How to communicate these boundaries assertively
- How to navigate pleasure for yourself
- What you like and don't like to have done to your body
- How to communicate this to a partner
- What to do if your partner isn't listening
- How to ask for something to change within an intimate relationship
- Understanding various sexual orientations and gender identities, including your own
- How gender roles influence your approach to relationships
- Sexual health care for all life stages, including but not limited to prevention of sexually transmitted infections and pregnancy

Source: Lisa Currie, sexuality educator

Consent is All Around

Conversations about consent don't just involve sexual activity. We engage in consent conversations all the time, such as...

- May I take your picture?
- There's a hair on the back of your sweater — mind if I remove it?
- Is it okay if I give you a hug?
- Since I missed class on Tuesday, could I please copy your notes?
- I forgot my locker key. May I put my shoes in yours while we swim today?
- May I refill your coffee?
- Do you think I can get a ride?

Think about the last few weeks. What are some examples of conversations you've had with people where some version of consent has come into play?

Keeping these types of consent conversations in mind can help when it comes to addressing bigger issues like intimacy. Asking, communicating, listening, respecting, not assuming... all of these things and more go into our consent conversations, no matter the topic.

A CULTURE

OF CONSENT



CREATING A CULTURE OF CONSENT

It's everyone's responsibility to create a culture of consent among our campus community members. Instances of sexual violence — which are sexual acts committed against an individual without consent — have *no* place here. Learning about and practicing consent when it comes to sexual activity is a key way to prevent the harm of sexual violence.

Sexual Violence Includes...

- Sexual assault
- Sexual harassment
- Stalking
- Domestic violence
- Dating violence

“Consent means actively agreeing to be sexual with someone. Consent lets someone know that sex is wanted. Sexual activity without consent is rape or sexual assault.”

— Planned Parenthood.org

We must each work to ensure that all individuals have the right to enjoy and engage with their academic, professional and social spaces free from harassing, harmful behavior. And talking openly about consent will lead to enhanced understanding, the prevention of sexual violence and a campus climate of respect.

So, tune in to this guide to help spark honest conversations about consent.

A Community of Consent

We all play a role in creating a healthy, supportive community. Some ways you can help include...

- Educate yourself and others
- Understand sexual violence
- Understand and practice consent
- Be a role model for respect through language and behavior
- Intervene as a concerned bystander to interrupt a situation where someone may be in danger

HAVING POSITIVE SEXUAL INTERACTIONS

In order to have positive sexual interactions, partners balance their power and control by...

- Listening actively
- Asking for clarification
- Making sure they understand one another
- Respecting their partner's boundaries — and communicating about their own consenting
- Only participating when their partner is freely, knowingly and enthusiastically consenting
- Gaining consent for each sexual activity and not assuming anything
- Not being critical, insulting, degrading or humiliating
- Not being intimidating, threatening or coercive
- Speaking assertively (not passively or aggressively)
- Considering their partner's thoughts and feelings as important as their own
- Being equal in decision-making processes
- Not minimizing their partner's thoughts or feelings
- Being mindful of how their privileges (such as gender, race, age, etc.) influence their thoughts and actions and impact their partner
- Not proceeding unless everyone is capacitated
- Talking about safe sex expectations before the heat of the moment
- Showing their partner how they like to be touched
- Openly discussing respect, power and control in their interactions

“For me, I wanted to start out with the baseline that consent is the thing that you need in order to make the rest of the vehicle of sex go. Like, that is the gasoline. You need consent.”

— Any Rose Sulegal, *Action: A Book About Sex*

Sources: WellWVU, well.wvu.edu; Student Health and Counseling Services, “Sexual Communication,” UC Davis, shcs.ucdavis.edu; “Talking About Sex,” American Sexual Health Association, ashsexualhealth.org

Consent is

✓ **ACTIVE**

✓ **CLEAR**

✓ **ONGOING**

✓ **COHERENT**

✓ **VOLUNTARY**

ALWAYS ASK!

COMMUNICATING ABOUT CONSENT

Communicating about sexual consent can take practice, yet it's necessary — and can enhance the experience, too! It means there's no guesswork involved about what you and your partner like or want to do. The conversation is a two-way street.

Some questions you can ask each other include...

- How can I make you feel good?
- I'd really like to ___ — would you be into that?
- What do you want to do tonight?
- What are you comfortable with?
- Is this okay?
- Where do you want to be touched and how? And where should I steer clear of?
- Are you still enjoying this?
- What do you like to hear about yourself?
- Would ___ feel good to you right now?
- What are your turn-ons? Your turn-offs?
- Do you want to ___?
- Would it feel good if I ___?
- Or would you like it better if I ___?
- How do you feel about trying ___?

Be sure to make consent a conversation, asking questions if you're not sure, checking in with your partner and really listening to their answers. Speak assertively, listen actively, and consider your partner's thoughts and feelings as much as your own. Communicating in clear, respectful, open ways about sexual activity can definitely enhance the connection and experience!

Sources: Force: UpsettingRapeCulture.com; "How to be Successful: A Guide for UC Davis Students," UC Davis Student Health and Counseling Services Health Education & Promotion; American Sexual Health Association; ashsexualhealth.org

And responses can include things like...

- Yes, please!
- I'd like it if you _____.
- I'm not really into that, but maybe we can try _____.
- I love when you touch me there.
- I'm open to trying _____.
- I don't like _____, but _____ drives me crazy.
- Let's take a break for a second
- I'm not comfortable with that.
- I've changed my mind, let's stop.

Ask Your Partner for Their Yes

When you ask your partner for consent to engage in sexual activity, you demonstrate respect for that person and yourself.

"Asking for consent eliminates the entitlement that one partner feels over the other," according to Temple University's Wellness Resource Center. "Neither your body nor your sexuality belongs to someone else."

Source: Wellness Resource Center's "Consent" page, Temple University

ONGOING CONSENT COMMUNICATION

Sex can be amazing when there's no question about how your partner feels.

Getting consent, making sure you're both capacitated and knowing your partner is just as into the activity as you are can be so freeing. Ongoing communication can lead to this very positive feeling.

So, along the way, consider asking check-in questions such as...

- Does this feel okay?
- I want to make sure you want to do this. Should I keep going?
- What else would you be into?
- Would it be okay if I touched you...?
- How does this feel?
- Is there anything different you'd like me to do?
- Are you feeling comfortable?
- It's okay if you're not into this — we can do something else. What do you think?

IT'S BEST TO HAVE A VERBAL CONVERSATION ABOUT CONSENT

Consent is communicative. The look on someone's face and that person's body language are both ways of communicating. However, these are NOT reliable indicators of consent in sexual interactions.

Talking is the clearest way to make sure you and your partner are on the same page. Only relying on body language can be misleading. For instance, if someone's heart is racing and they're breathing heavily, this may mean that they're turned on, but it may also mean that they're uncomfortable, scared and feeling trapped.

"The best way to ensure a good experience is through developing communication skills. Expect to tell your partner what you desire but listen to your partner's wishes, too. If your partner needs encouragement to express his or her mind, do what good teachers do: Ask and listen! If you're mature enough to be having sex, you're mature enough to understand that the primary definition of 'intercourse' is communication."

— The WellWVU website at West Virginia University

Not Sure?

Stop and check in with your partner before continuing with any sexual activity if they do or say things such as...

- Avoid touch/don't touch you
- "I don't know, I want to but..."
- Turn their head or body away from you
- "Maybe..."
- Push you away
- "I'm not sure..."
- Lie still and not participate
- "Well, I think so..."
- Silence

When there's uncertainty in a partner's response, they are NOT giving consent. So, stop and talk about it right away.

HEALTHY, CONSENSUAL RELATIONSHIPS

Some common factors that signal you're likely in a healthy, consensual relationship include ...

- You and your partner treat one another with kindness, support, care and respect
- You are truthful and open with each other, without fearing one another's responses or judgments
- You participate in mutually-consensual activities, whatever your level of intimacy is
- Things move at a comfortable pace, without feeling rushed or out of balance
- There's no pressure to have sex — it's a mutual decision if the time feels right, if that's how each partner wants to proceed
- You consider and care for one another's physical and emotional well-being
- There's a sense of trust — and partners don't make you work hard to "prove" your trustworthiness
- Partners don't feel threatened when you spend time without them — instead, they encourage you to have friends and a life outside of your relationship
- Your partner respects your privacy — including who you text, what you communicate via social media and more
- You are equals, with no one person calling all the shots

In a Healthy Relationship, I...

- Feel comfortable talking about consent
- Am my partner's equal
- Build respect and trust
- Am safe

Sources: One Love, www.joinonelove.org; Cornell University Health, Sexual Health & Relationships, <https://health.cornell.edu/resources/health-topics/sexual-health-relationships>

UNDERSTANDING CONSENT

Sexual Consent is when all parties agree to engage in sexual activity. It must be freely, affirmatively and enthusiastically communicated among all individuals. In other words, **YES MEANS YES!**

Enthusiastic Consent encourages individuals to provide their yes, to express intent to participate and to ask their partner for their yes.

While it might be common to rely on nonverbal actions, it's the responsibility of the person initiating sexual activity to make sure they have consent. Asking for clear, enthusiastic and verbal expressions of consent can avoid any miscommunication.

Consent Is...

- Clear and communicative
- Active
- Mutual and respectful
- Voluntary
- Freely given without pressure, intimidation or fear
- Obtained at each step of sexual activity, each and every time
- Only able to be given by people of legal age in their jurisdiction
- Present throughout sexual activity
- Affirmatively and enthusiastically communicated between all individuals
- Able to be withdrawn *at any time*

Consent Is NOT...

- Flirting
- Silence
- Reluctance or saying "maybe"
- Persuasion or coercion
- Lack of protest or resistance
- Intoxication/Incapacitation
- Assumptions
- Sexual history
- Unconsciousness
- Revealing clothing
- Being in a relationship
- Previous sexual contact
- When someone in a position of authority makes you feel you don't have a choice

Sexually coercive behaviors such as threatening to break up with someone because they won't engage in sexual activity or pressuring them to consume a substance so their ability to consent is impaired might invalidate any expressions of consent and violate policy.

And, **incapacitation**, where someone is asleep, unconscious, drunk or drugged, or otherwise unable to give consent to sexual activity, means that consent *cannot* exist.

When It Comes to Consent, You Can Change Your Mind at Any Time

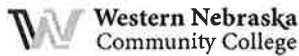
"You can withdraw consent at any point if you feel uncomfortable. It's important to clearly communicate to your partner that you are no longer comfortable with this activity and wish to stop. The best way to ensure both parties are comfortable with any sexual activity is to talk about it."

— Rape, Abuse & Incest National Network



Section (f)iv

**WNCC Counseling Services
webpage**



Counseling Services

College can evoke a wave of new emotions. Some are great, and some are overwhelming. Being able to identify and understand your mental health needs is critical to reach your personal and academic success. Counseling Services at WNCC is here to lend an ear and offer a hand.

WNCC has a licensed counselor on staff who is trained to help you resolve personal difficulties that interfere with optimal personal and academic functioning. Specifically, WNCC offers individual and group counseling, as well as substance abuse evaluation and education needed to assist students.

All services are free and confidential to WNCC students and their families. To schedule an appointment, call **308.635.6050** or email **counseling@wncc.edu**.

It is important to note there are legal limits to the confidentiality we can render. For instance, information regarding elderly abuse, as well as child abuse or neglect must be reported to the proper authorities. Additionally, if a student is involved in court proceedings, records can be subpoenaed, and if a student is viewed as a danger to him/herself or others, the necessary steps will be taken.

We also strongly discourage the use of email regarding personal problems, as we cannot guarantee the confidentiality of your correspondence.

Contact Counseling Services

Norman J. Stephenson, M.S., LADC, LMHP, CPC, LIMHP

Counseling Director

stephens@wncc.edu

P: 308.635.6090

F: 308.635.6023

Alliance Campus

1750 Sweetwater Ave.
Alliance, NE 69301
308.763.2000

Scottsbluff Campus

1601 E. 27th Street
Scottsbluff, NE 69361
308.635.3606

Sidney Campus

371 College Drive
Sidney, NE 69162
308.254.5450



Section (f)vi

WNCC Employee Assistance
Program brochure

CONNECTIONS

Employee Assistance Program | Employee & Family Solutions

Reach Out for Support



800-779-6125

www.connectionseap.com

TALK TO EXPERTS, BROWSE FOR INFORMATION,
AND FIND SERVICES FOR:

- Chemical & Substance Abuse
- Family Issues
- Mental Health
- Anxiety & Depression
- Personal Budget Consultation
- Elder Care-Find
- Child Care-Find
- Special Needs Child Consultation
- Adoption Information
- Pre-Natal Information
- Summer Camp-Find
- Legal-Attorney Consultation (Limited)
- Relationship Support
- Web-based Assessment Tools and Support

A 24-hour toll-free hot-line

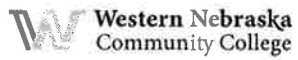
USERNAME: wnccomp
PASSWORD: eap



Section (f)vii

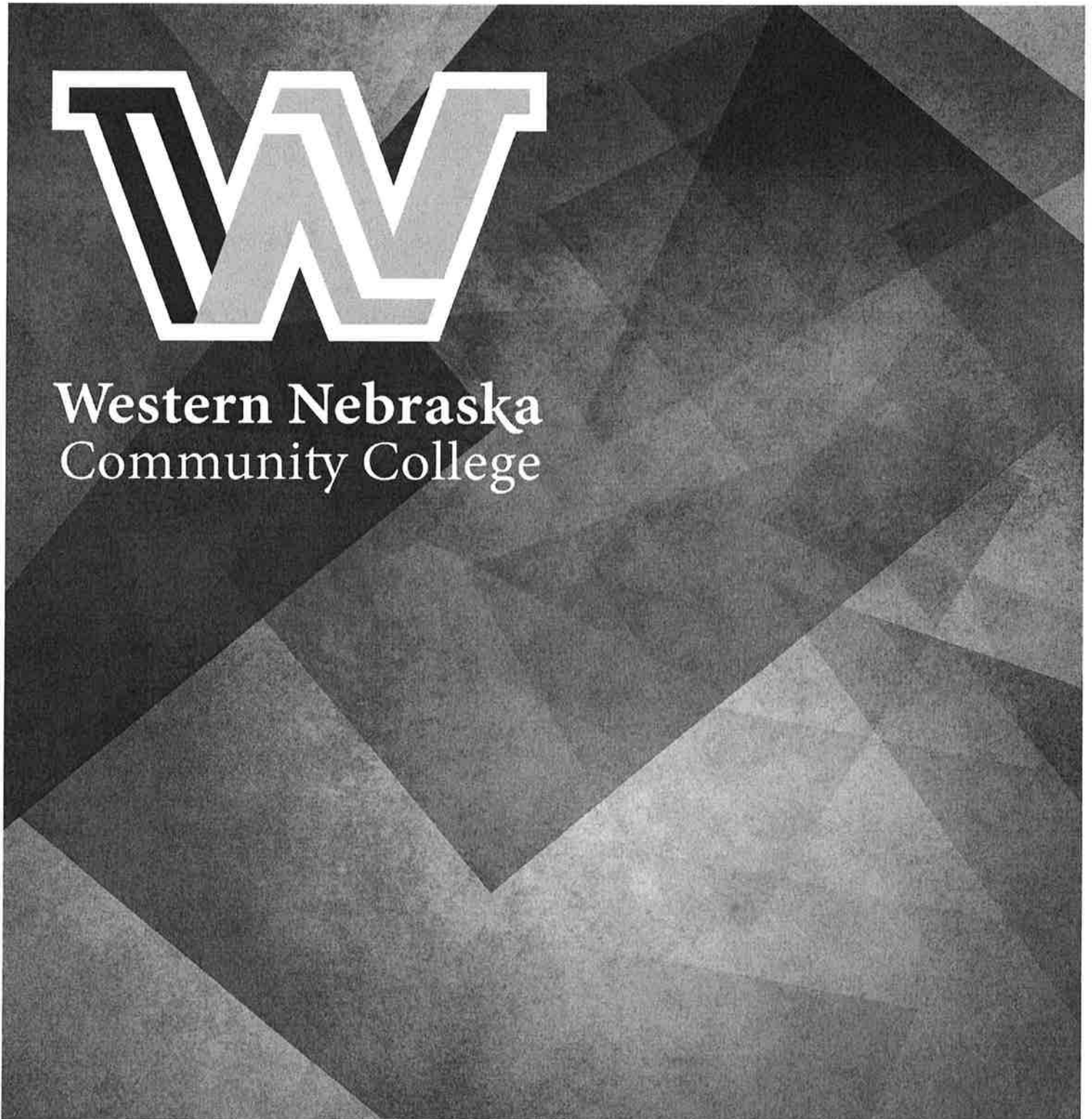
Section (g)i

WNCC partners with the
DOVES Program



WNCC Welcomes DOVES to Scottsbluff Campus

SEPTEMBER 28, 2015



Western Nebraska Community College is pleased to announce a new partnership with the DOVES Program. In an effort to provide easy accessibility for WNCC students, staff, and faculty, the DOVES Program has opened a new office in the Clark N. Williams Multicultural Learning Center on the Scottsbluff Campus.

The DOVES Program provides services for victims of domestic violence, dating violence, sexual violence, and stalking. The program serves women, men, teens, and children. Under the new partnership, DOVES is available to any student, staff, or faculty who needs to use their services or wants to refer someone to them. All DOVES services are free and confidential.

The partnership is a collaboration between former WNCC Dean of Instruction Garry Alkire, WNCC Student Services, and DOVES staff. WNCC President Dr. Todd Holcomb is pleased with the new partnership. "The opportunity to partner with the DOVES Program is a natural extension of the College's desire to meet the needs of our students and communities."

"At DOVES, we envision a community where every person has the right to feel safe, live free from sexual, domestic and dating violence, and expect healthy relationships," said Hilary Wasserburger, DOVES Executive Director. "Our partnership with WNCC is an extension of the work we're doing throughout the Panhandle. We believe our office space will make it easier for students, staff, and faculty to access our services. We're excited about this opportunity and thankful to the staff at WNCC who helped make this happen."

In addition, DOVES is partnering with WNCC's Student Life and Engagement Center to offer educational opportunities. Each month, these educational opportunities will center on different themes. "Outreach programs such as this are vital in promoting awareness around sexual violence prevention," said Sue Yowell, Vice President of Student Services.

DOVES office hours at WNCC are Tuesdays 12:00 - 4:00 p.m. and Wednesdays 8:00 a.m. - 12:00 p.m. DOVES will be hosting an open house Tuesday, September 29 from 12:00 - 4:00 p.m. The public is encouraged to attend.

Alliance Campus

1750 Sweetwater Ave.
Alliance, NE 69301
308.763.2000

Scottsbluff Campus

1601 E. 27th Street
Scottsbluff, NE 69361
308.635.3606

Sidney Campus

371 College Drive
Sidney, NE 69162
308.254.5450



Emergency Exit

Computer use can be monitored and is impossible to be completely cleared. If you are in danger, please use a safer computer.

Sexual, Domestic & Dating Violence Services & Prevention

24-Hour Helplines:
866-95-DOVES 308-436-HELP
24-Hour Text line: 515-599-6620

 Log In

Who We Are

The DOVES Program was founded in 1979 to provide support to victims of domestic violence in Scotts Bluff County. Since that time, our program has grown to assist victims of dating violence, sexual assault, and stalking as well. Today, the DOVES Program currently serves nine counties in Nebraska's Panhandle: Scotts Bluff, Cheyenne, Morrill, Kimball, Banner, Box Butte, Dawes, Sheridan, & Sioux Counties.

Our dedicated staff provide 24 hour assistance, offer immediate, on-going and long-term support, and connect individuals to other community resources. In doing so, we are able to help our clients overcome crises and empower them to be the change they want to see in their lives.

The DOVES Program is an independent non-profit organization with 501(c)(3) status. We are part of a network of community-based domestic violence and sexual assault programs providing services across Nebraska.

Our Mission

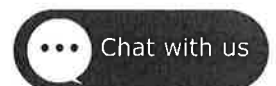
DOVES' mission is to ensure our empowerment-based and strengths-centered services are available and accessible to anyone who has experienced or been affected by sexual, domestic or dating violence.

Our Vision

At DOVES, we envision:

- A community free of sexual, domestic and dating violence,
- A community that fosters healthy sexuality,
- A community where every person feels safe and expects healthy relationships.

1





24-Hour Helplines

Our Locations:

308-436-HELP
866-95-DOVES
515-599-6620 Text Line
Email Us

PO Box 98
2035 10th ST
Gering, NE 69341

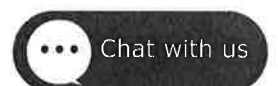
PO Box 981
212 Box Butte Ave Ste B
Alliance, NE 69301

342 Main ST
Chadron, NE 69337

1909 Cedar St (Sioux Villa)
1909 4th St (Postal)
Sidney, NE 69162

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Emergency Exit

Computer use can be monitored and is impossible to be completely cleared. If you are in danger, please use a safer computer.

Sexual, Domestic & Dating Violence Services & Prevention

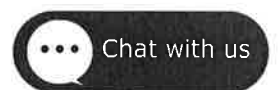
24-Hour Helplines:
 866-95-DOVES 308-436-HELP
 24-Hour Text line: 515-599-6620

Log In

Our Services

- All services are free and confidential
- 24-Hour Assistance
 - Toll-free Helpline
 - Texting line
 - Caring, trained advocates
- Immediate, Ongoing, & Long-Term Support
 - One on one support
 - Group support
 - Holistic healing
 - Coping skills
 - Connections to other community agencies
 - Connections & referrals for professional counseling
- Legal Advocacy
 - Assistance with Protection Order Applications
 - Immigration assistance
 - Attorney referrals
 - Court system information & support
- Medical Advocacy
 - Medical system information & support
 - Accompaniment to hospital, doctor, or clinic
- Emergency & Short-Term Financial Assistance
 - Transportation assistance
 - Food pantry
 - Emergency cell phones
 - Emergency safe shelter

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24-Hour Helplines

Our Locations:

308-436-HELP
866-95-DOVES
515-599-6620 Text Line
Email Us

PO Box 98
2035 10th ST
Gering, NE 69341

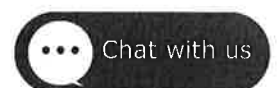
PO Box 981
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Chadron, NE 69337

1909 Cedar St (Sioux Villa)
1909 4th St (Postal)
Sidney, NE 69162

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Together, we can:

Talk about the sexual or domestic violence that has affected your life.

Meet with other service providers to help you access housing, food, or job-related resources.

Complete a protection order and go together to the hearing.

Visit the hospital or doctor with concerns related to an assault.

Discuss self-care and your journey of healing.

*we shine
brighter
together*

At DOVES we envision:

- A community free of sexual, domestic & dating violence,
- A community that fosters healthy sexuality,
- A community where every person feels safe and expects healthy relationships.

We have offices in:

Gering, NE
Sidney, NE
Alliance, NE
Chadron, NE

We travel throughout our 9 county service area to meet with clients.

www.DOVESProgram.com

For our non-discrimination policy, please contact us at 308-436-2787 or visit our website.

Let's see what we can do together!

The
DOVES
Program

866-95-DOVES
www.DOVESProgram.com

Our Services

All services are free & confidential

24-Hour Assistance

-Confidential hotline

-Caring, trained advocates

Immediate, Ongoing, & Long-Term Support

-Confidential, one on one support

-Group support

-Holistic healing workshops

-Coping skills

-Connections to other community agencies

-Connections & financial aid for professional counseling

Legal Advocacy

-Assistance with Protection Order

Applications

-Immigration assistance

-Attorney referrals

-Court system information & support

Medical Advocacy

-Medical system information & support

-Accompaniment to hospital, doctor, or clinic

Emergency & Short-Term Financial Assistance

-Transportation assistance

-Food pantry

-Emergency cell phones

-Short-term emergency safe shelter

You didn't deserve what happened to you.

Sexual assault is any sexual contact or behavior that occurs without YOUR explicit consent.

You didn't ask for it.

Domestic or dating violence is a pattern of behaviors used by your partner to maintain power and control over you.

You didn't cause it.

Stalking is repeated unwanted contact that directly or indirectly communicates a threat or makes you afraid for your safety.

Whether it happened a day, a month, a year, or a decade ago, we are here for you.

If you need to talk, please call us at 866-95-DOVES, text us at 515-599-6620, or chat with us online

M-F 8-5 at:

www.DOVESProgram.com

Kathy Ault

From: Tiffany Wasserburger
Sent: Monday, August 23, 2021 1:50 PM
To: Kathy Ault
Subject: Fw: WNCC Presentations

From: Lisa Peden <lisa@dovesprogram.com>
Sent: Monday, August 23, 2021 1:40 PM
To: Tiffany Wasserburger <wasser15@WNCC.EDU>
Cc: hilary@dovesprogram.com <hilary@dovesprogram.com>
Subject: RE: WNCC Presentations

Caution: This email originated from outside of WNCC
DO NOT CLICK links or attachments unless you recognize the sender and know the contents are safe.

I counted 13 presentations/ booths that were related to sexual violence from June 1, 2019 to June 30, 2021.

Hope this helps. 😊



Lisa Peden, Client Advocate
Business Phone: 308-436-2787
24-Hour Help Line: 866-95-DOVES (36837)
24-Hour Text Line: 515-599-6620
Lisa@DOVESProgram.com
www.DOVESProgram.com

PO Box 98 (Mailing Address) 2035 10th Street Street Gering, NE 69341	PO Box 981 212 Box Butte Avenue, Suite B Alliance, NE 69301	342 Main Street Chadron, NE 69337	1909 4th Street 1909 Cedar Sidney, NE 69162
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****E-mail accounts are not monitored 24-hours per day. If you need immediate assistance, please reach out through our 24-hour Help Line or Text Line.****

Kathy Ault

From: Tiffany Wasserburger
Sent: Monday, August 23, 2021 12:54 PM
To: Kathy Ault
Subject: Fw: Sexual Assault Awareness Month

From: Tiffany Wasserburger
Sent: Friday, April 9, 2021 3:26 PM
To: Scottsbluff Campus Faculty <Scottsbluff.Faculty@wncc.edu>; Scottsbluff Campus Staff <Scottsbluff.Staff@wncc.edu>
Subject: Sexual Assault Awareness Month

The Criminal Justice Club in association with the DOVES Program invites all students, faculty and staff to join us in recognizing Sexual Assault Awareness Month. We will be in the Pit on Monday April 12 from 9:00-Noon. Please wear teal (the official color of Sexual Assault Awareness) and stop by for some treats, to speak with DOVES and get your picture taken in support of survivors of this horrific crime.

Thanks so much for participating with WNCC's CJ Club and the DOVES Program as we work to end sexual violence!

Kathy Ault

From: Tiffany Wasserburger
Sent: Monday, August 23, 2021 1:01 PM
To: Kathy Ault
Subject: Fw: Sexual Assault Awareness Month

From: Tiffany Wasserburger
Sent: Friday, April 5, 2019 12:38 PM
To: Scottsbluff Campus Faculty <Scottsbluff.Faculty@wncc.edu>; Scottsbluff Campus Staff <Scottsbluff.Staff@wncc.edu>
Subject: Fw: Sexual Assault Awareness Month

Hi Everyone

The CJ Club will be working with the DOVES Program to recognize Sexual Assault Awareness Month and we invite you to join us.

On Tuesday April 9 and Tuesday April 23 from 9:30-11:30, we will be in the Pit for the annual Believe Don't Blame Photo Shoot. Wear teal as a sign of your support for survivors and pose for the camera! Believe Don't Blame pledges will also be available for your signature. The pledges will be posted throughout the campus as a visible sign of our support.

Throughout the month of April, we will also be displaying Quiet Voices, the stories of survivors who live and work in our own communities. Forms are available for anyone wishing to share their story- no names are required. This is a powerful way to recognize survivors' strengths and experiences.

Let me know if you have any questions.

Thanks so much for participating with WNCC's CJ Club and the DOVES Program as we work to end sexual violence!!

Tiffany

If you need help dealing with the effects of sexual violence toward you or anyone you know, please contact DOVES. They can help.

24-Hour Helplines: 308-436-HELP (4357)

866-95-DOVES (36837) 877-215-0167 (español)

Kathy Ault

From: Tiffany Wasserburger
Sent: Monday, August 23, 2021 1:01 PM
To: Kathy Ault
Subject: Fw: Sexual Assault Awareness Month

We did not have an event in 2020 because of COVID- Campus was shut down.

From: Tiffany Wasserburger
Sent: Friday, March 30, 2018 10:28 AM
To: Robyn lossi <iossir@WNCC.EDU>
Cc: Tammy DuBray <dubrayt@WNCC.EDU>; Linda Leisy <leisyl@WNCC.EDU>; Beverly Ackerman <ackerman@WNCC.EDU>
Subject: Sexual Assault Awareness Month

Hi Guys-long time no talk☺

The CJ Club will be working with the DOVES Program to recognize Sexual Assault Awareness Month and we invite your Campus to join us!

Tuesday April 3 is the National Day of Action, where we are asking WNCC staff and faculty to wear teal as a sign of our support for victims. We would love for your campus to take photos and send to me to be posted to Facebook for DOVES and WNCC!

Throughout the month of April, we will be displaying Quiet Voices, the stories of survivors who live and work in our own communities. The form for survivor stories are attached and we would be very happy to provide a drop box- just let me know where to send it. We usually recommend a quiet place so participants can share their stories anonymously if they so choose.

The CJ Club would also like to challenge every employee of your campus to sign the "Believe Don't Blame" pledge, which promises support to victims of sexual violence. These pledges will be posted throughout the campuses as a sign of our support to help end all sexual violence!! Our scanner is down today but I will send to you on Monday. Feel free to post these forms on your campus or, if you'd like, you can send back to me and I'll put with our group☺

Let me know if you have any questions.

Thanks so much for participating with WNCC's CJ Club and the DOVES Program as we work to end sexual violence!!

Tiffany