

# Robbins Schwartz

## Training for College of Lake County Title IX Personnel

August 4, 6 and 10, 2020

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COLLEGE OF LAKE COUNTY


# Training for College Title IX Personnel

Presented By: Frank B. Garrett III and Emily P. Bothfeld  
August 4, 6, and 10, 2020

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Background on New Title IX Regulations



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## Background

- September 22, 2017 – U.S. Department of Education released a Dear Colleague Letter formally withdrawing two key Obama-era guidance documents:
  - 2011 Dear Colleague Letter on Sexual Violence
  - 2014 Q&A on Title IX and Sexual Violence

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## Background

- Proposed Title IX Regulations released in November 2018
- 60-day public comment period
- Over 120,000 public comments received

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## Current Status

- Final Rules released on May 6, 2020 and published in Federal Register on May 19, 2020
- Effective date: **August 14, 2020**



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## Impact on Higher Education Institutions

- The new Rules require:
  - Revisions to institutional policies and procedures
  - Staffing determinations
  - Training for all personnel involved in an institution's investigation and grievance process, including:
    - Title IX Coordinator(s)
    - Investigators
    - Decision-makers
    - Appellate decision-makers
    - Informal resolution facilitators
  - Publishing of information and training materials on the institution's website

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## Overview of Relevant Laws



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## Relevant Laws

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

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## Relevant Laws

- **Title IX:** Prohibits sex-based discrimination, including sexual harassment, in educational programs and activities receiving federal financial assistance.
- **Title VII:** Prohibits discrimination, including discrimination based on sex, in the workplace.

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## Relevant Laws

- **Preventing Sexual Violence in Higher Education Act:** Requires Illinois higher education institutions to adopt comprehensive policies concerning sexual violence, domestic violence, dating violence and stalking.
- **Illinois Human Rights Act:**
  - Prohibits discrimination in Illinois, including in employment.
  - Also prohibits sexual harassment in elementary, secondary and higher education.



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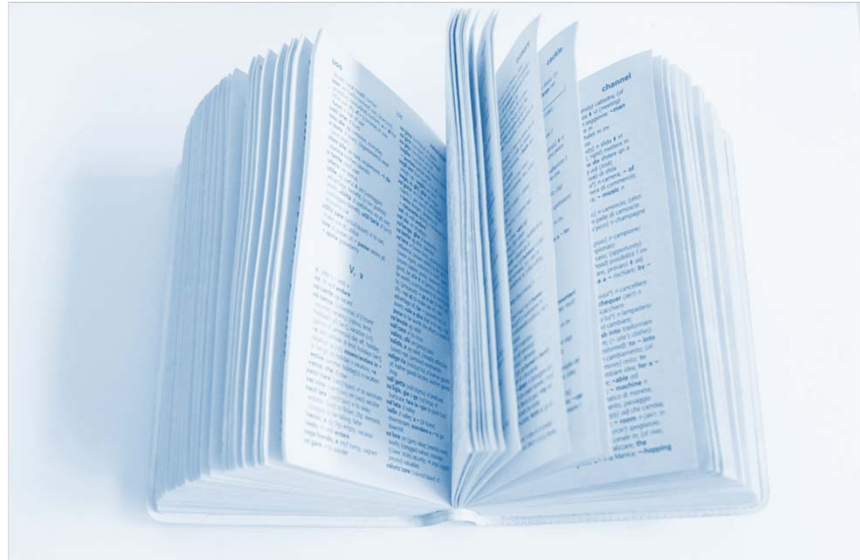
## Relevant Laws

- **Clery Act:** Requires institutions to maintain and disclose crime statistics and security information.
- **Violence Against Women Act:** Expands the rights afforded to campus survivors of sexual assault, domestic violence, dating violence, and stalking.

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## Key Definitions



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## Title IX Sexual Harassment

Sexual harassment includes:

1. **Quid pro quo** harassment by a college employee
2. Unwelcome conduct that a reasonable person would find **so severe, pervasive and objectively offensive** that it **denies** a person equal educational access
3. Any instance of **sexual assault, dating violence, domestic violence or stalking** (as defined in Clery Act/VAWA)

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

- When an employee of the College conditions aid, benefits, pay, a position or other opportunities for advancement on an individual's submission to unwelcome sexual conduct.
  - Example: Professor Jones promises his student, Jane, that he will give her an A on her midterm if she engages in sexual conduct in his office after class.

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Title IX Sexual Harassment: "Hostile Environment"

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



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

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Title IX Sexual Harassment: "Hostile Environment"

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

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## Title IX Sexual Harassment: "Hostile Environment"

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

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## Title IX Sexual Harassment: Other Categories

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



*As defined under Clery Act/VAWA*

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## Sexual Assault

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

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## 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.

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## Domestic Violence

- A felony or misdemeanor crime of violence committed:

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



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## Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to –

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

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

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

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

- The PSVHEA requires that institutions adopt a minimum definition of consent that is consistent with the Act. 110 ILCS 155/10.

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



- Consent:
  - Must be freely given
  - May not be inferred from lack of verbal or physical resistance, from submission resulting from the use of threat or force, from a person's manner of dress, from a person's consent to past sexual activity, or from a person's consent to engage in sexual activity with another person
  - May be withdrawn at any time
  - Cannot be given by a person who is unable to understand the nature of the activity or give knowing consent due to circumstances (i.e. incapacitation due to alcohol or drugs, age, incapacitation due to mental disability)

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## Key Definitions: Hypothetical

- You receive a report of a student being sexually assaulted by another student on campus.
- Do you need to evaluate the severity, pervasiveness, and offensiveness of the sexual assault?

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Key  
Definitions:  
**Hypothetical**

- You have been assigned to investigate a formal complaint alleging that a student was sexually harassed by his sociology instructor.
- What types of evidence/information would be relevant to determining whether the alleged harassment was severe, pervasive and objectively offensive?

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Jurisdiction



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## Jurisdiction Under Title IX

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

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

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

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

- CLC examples for discussion:
  - Grayslake campus?
  - Southlake campus?
  - Lake Forest Hospital where students are participating in clinical rotations?
  - Faculty member's home?
  - Social media?



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

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

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## Jurisdiction: Hypothetical

- Compare:
  - A student athlete allegedly sexually assaults another student athlete while off-campus at a sporting event with their team and coach
  - A student athlete allegedly sexually assaults another student athlete while at a friend's off-campus apartment
- Which type of alleged misconduct falls under Title IX?
- What are the College's response obligations with regard to each type of alleged misconduct?

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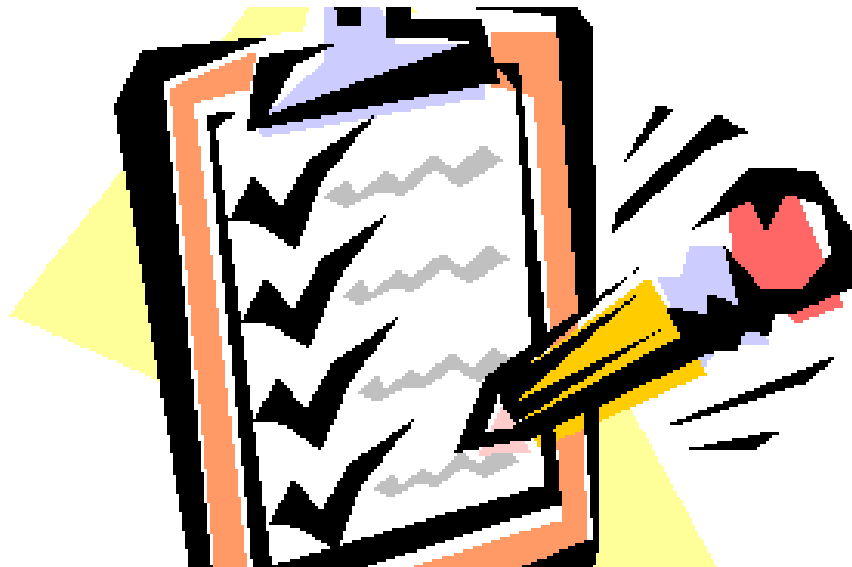
Questions?



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Proposed  
Sex-Based  
Misconduct  
Policy



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Proposed  
Sex-Based  
Misconduct  
Policy

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

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## Proposed Sex-Based Misconduct Policy

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



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## Proposed Sex-Based Misconduct Policy

- Prohibits retaliation against any person reporting alleged sex-based misconduct or participating in an investigation of alleged sex-based misconduct.

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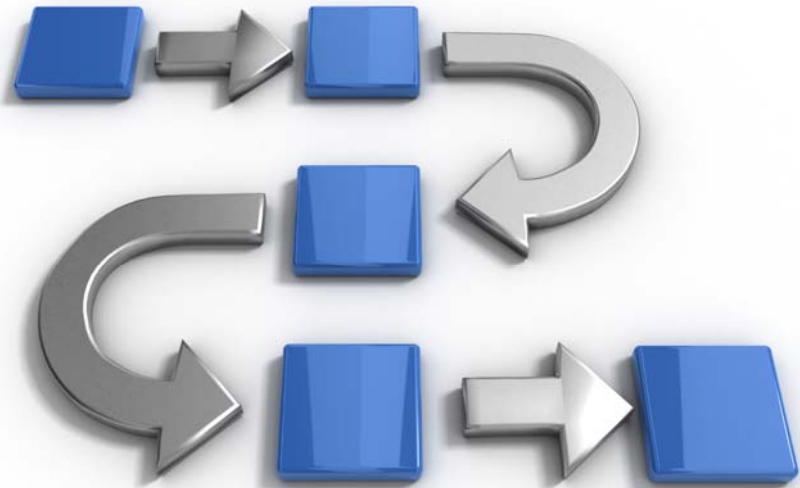
## Proposed Sex-Based Misconduct Policy

- Directs the College administration to establish, maintain and publish procedures implementing the College's Sex-Based Misconduct Policy.

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## Sex-Based Misconduct Procedures



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## Purpose of Procedures

- Implement College's (proposed) Policy Prohibiting Sex-Based Misconduct and (proposed) Policy on Nondiscrimination.
- Ensure a safe and healthy educational and employment environment.
- Meet relevant legal requirements.

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## Jurisdiction

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



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## Role of Title IX Coordinator

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

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## Options for Assistance Following Incident of Sex-Based Misconduct

- On- and off-campus mental health providers
  - Counseling and Psychological Services ("CAPS")
- On- and off-campus health care options
- Illinois Department of Human Rights sexual harassment and discrimination helpline

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## Reporting Alleged Sex- Based Misconduct



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## Reporting Generally

- Who can report?
  - Anyone – including students, employees and community members
  - Need not be the person who is alleged to be the victim of the misconduct
- To whom should reports be made?
  - Title IX Coordinator
  - Deputy Title IX Coordinator
  - College administrator
  - Any responsible employee (students only)

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## Student Reporting

- Reporting to Responsible Employees
  - All College employees are REs, except those employees designated as Confidential Advisors.
  - REs must report all relevant details to the Title IX Coordinator, if known.

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## Student Reporting

- Confidential Reporting
  - CAPS therapists are designated Confidential Advisors.
  - Confidential Advisors are not required to report any information about an alleged incident to the Title IX Coordinator without the student's permission.

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## Student Reporting

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

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## Employee Reporting

- Employees should report to:
  - Title IX Coordinator
  - Deputy Title IX Coordinator
  - Human Resources Department (who will then notify the Title IX Coordinator)

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## College Response to Reports of Alleged Sex- Based Misconduct



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## “Deliberate Indifference Standard” Under Title IX

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

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## College Response: Definitions

### **Complainant:**

- Individual who is alleged to be the victim of alleged sex-based misconduct

### **Respondent:**

- Individual who is reported to be the perpetrator of alleged sex-based misconduct

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## Overview of College Response Process

1. Analyze report to determine the appropriate method for processing/reviewing it.
2. For any report alleging Title IX sexual harassment and/or alleging sexual violence, domestic violence, dating violence or stalking pursuant to the PSVHEA, promptly contact the complainant.
3. Discuss and offer supportive measures.
4. Explain the process for filing a formal complaint.

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## College Response Process



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

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## Title IX: Jurisdiction Analysis



### If NO:

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

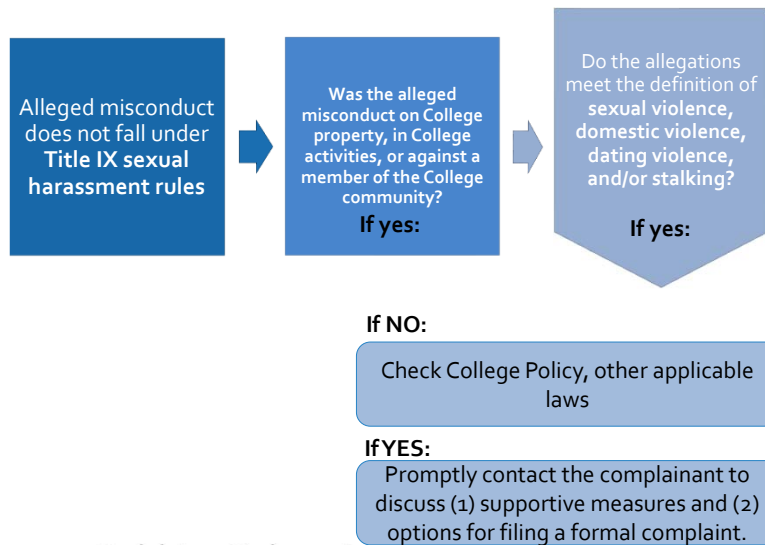
### If YES:

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

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



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## College Response Process

- Step 2: Contact the complainant.
  - Remember: "Complainant" is defined as the individual who is alleged to be the victim of alleged sex-based misconduct

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## College Response Process

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

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## College Response Process

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

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Questions?



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Grievance  
Process for  
Formal  
Complaints



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## Grievance Process for Formal Complaints

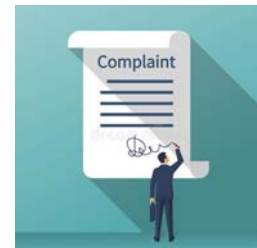
- Formal complaint: document filed by a complainant or signed by Title IX Coordinator alleging (a) sexual harassment in violation of Title IX and/or (b) sexual violence, domestic violence, dating violence or stalking in violation of the PSVHEA.

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## Grievance Process for Formal Complaints

- At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the College's education programs or activities, either as a student or an employee.



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## Formal Complaint Hypothetical

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

- Can the student file a formal complaint?
- What if the student is working as a research assistant for the summer?
- In the event the complainant cannot file a formal complaint, what options does the College have?

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## Grievance Process: Notice of Allegations

- Must be sent simultaneously to both parties after Title IX Coordinator's receipt of formal complaint.

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## Grievance Process: Notice of Allegations

- Informs the parties of:
  - The grievance process, including informal resolution options
  - The allegations potentially constituting Title IX sexual harassment, sexual violence, domestic violence, dating violence or stalking
  - The presumption of non-responsibility on the part of the respondent
  - The parties' right to an advisor
  - The parties' right to inspect and review evidence
  - The Code of Conduct provisions prohibiting knowingly furnishing false information during the grievance process.



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## Grievance Process: Emergency Removals and Administrative Leave

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

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## Grievance Process: Emergency Removals and Administrative Leave

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

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## Informal Resolution



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## Informal Resolution

- May occur at any time after the parties receive the initial notice of allegations and prior to a determination regarding responsibility being reached.

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## Informal Resolution

- Discretionary
- Requires complainant and respondent's **voluntary, written consent**
- Party may **withdraw** at any time prior to a resolution
  - Withdrawal triggers resumption of grievance process.

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## Informal Resolution



- May include:
  - Mediation
  - Restorative justice
- Not permitted in allegations of **employee** sexual misconduct toward a **student**

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## Informal Resolution

- May not be required as condition of:
  - Enrollment/continuing enrollment,
  - Employment or continuing employment,
  - Enjoyment of any right, or
  - Waiver of the right to a formal investigation/adjudication

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Consolidation  
and Dismissal of  
Formal  
Complaints



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Consolidation  
of Formal  
Complaints

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

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## Dismissal of Formal Complaints

- Mandatory dismissal for Title IX purposes where Title IX Coordinator or designated investigator determines that conduct allege in the formal complaint does not meet (a) Title IX's definition of sexual harassment and/or (b) Title IX's jurisdictional requirements.
  - Dismissal does not preclude action altogether – just for purposes of Title IX.

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## Dismissal of Formal Complaints

- Discretionary dismissal if:
  - Complainant notifies the Title IX coordinator in writing that complainant would like to withdraw formal complaint or certain allegations;
  - Respondent is no longer enrolled in or employed by the College; or
  - Specific circumstances prevent the College from gathering evidence sufficient to reach a determination.

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## Dismissal of Formal Complaints

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

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## Investigation of Formal Complaints



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## Investigations: Written Notice

- Written notice required to both parties:
  - Allegations (upon receipt of a formal complaint)
  - Investigative interviews, meetings, or hearings
  - Mandatory or discretionary dismissal

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## Investigations: Evidence

- Equal opportunity for parties to provide:
  - Fact witnesses
  - Expert witnesses
  - Inculpatory evidence
  - Exculpatory evidence
- No gag orders



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## Investigations: Advisors

- Both parties may select an advisor of their choosing
  - May, but need not be, an attorney
- Advisor's role is to provide support, guidance, advice
- May not speak on behalf of the party

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## Investigations: Best Practices

- Review the formal complaint, notice of allegations and any other records submitted prior to investigatory interviews
- Notify parties and advisors of investigatory interviews/meetings

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## Investigations: Best Practices

- Allow a response to each factual allegation.
- Ask whether any witnesses can confirm the party's testimony. Obtain names and, if necessary, contact information for witnesses.
- Be thorough when taking notes.
- Do not hesitate to ask follow-up questions.



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## Investigations: Best Practices

- Avoid volunteering information.
- Never promise confidentiality.
- Have two investigators present (or one investigator and one administrator/non-union employee) for all interviews – one focuses on the questioning and the other takes notes.

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## Investigations: Questioning

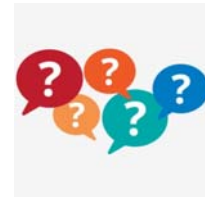
- Primary goal is to ascertain relevant facts and clarify any vague issues.

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## Investigations: Questioning

- “W” questions (who, what, when, where, why) are helpful for ascertaining relevant facts.



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## Investigations: Questioning

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

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## Investigations: Questioning

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

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## Investigations: Questioning

- The interviewee must fully understand the question in order to elicit a reliable answer.
  - If the interviewee asks you to repeat or rephrase a question, you should do so.



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## Investigations: Questioning

- Give the interviewee time to think and respond before asking your next question.
  - Do not assume that the interviewee doesn't understand the question; sometimes people just need a moment to gather their thoughts.

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## Investigations: Questioning

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

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## Investigation: Access to Evidence

- Both parties must have equal access to inspect and review all evidence that is directly related to the complaint allegations.



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Investigation:  
**Access to  
Evidence**

- At the conclusion of the investigation and prior to the completion of the investigator's report, the investigator must send both parties a copy of all relevant evidence.
- The parties will have 10 business days to submit a written response to the evidence, which the investigator must consider prior to completion of his/her investigative report.

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Investigation:  
**Access to  
Evidence**

- Be mindful of FERPA and student privacy considerations.
- Consider whether redactions are necessary.
- Notify parties of parameters/limitations on re-disclosure of records and evidence.

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## Investigation: Preparation of Investigation Report

- After receiving/reviewing the parties written responses, the investigator must create an investigative report that fairly summarizes the relevant evidence, which the investigator will forward to the Title IX Coordinator.



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## Investigation: Scheduling of Hearing

- Upon receipt of the investigator's report, the Title IX Coordinator will schedule a hearing.
- At least 10 business days prior to the hearing, the Title IX Coordinator will:
  - Provide both parties with written notice of the hearing date, time, location, participants and purpose of the hearing; and
  - Send to each party (and advisors) the investigative report.
  - The parties will have 10 business days to submit a written response to the report.

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## Live Hearings



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## Live Hearings: Process

- Conducted by designated Hearing Officer
  - Assigned by Title IX Coordinator
- A party may request a substitution if the participation of the Hearing Officer poses a conflict of interest.
  - Must contact the Title IX Coordinator within three (3) business days after the party's receipt of the hearing notice to make such a request.

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## Live Hearings: Process

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

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## Live Hearings: Technology

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



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## Live Hearings: Advisors

- College advisor appointed if none available
  - 3 business day notice is required.

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## Issues for Hearing

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

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## Preponderance of the Evidence Standard

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



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## Considering Evidence

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

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## Considering Witness Testimony

- Two types of witnesses:
  - Fact witnesses: Have knowledge of the facts and circumstances of the alleged incident(s)
  - Character witnesses: Have knowledge of a party's character generally
- The testimony of a character witness is typically of minimal value when determining responsibility, but may be considered when determining an appropriate sanction.
- The Hearing Officer has discretion to limit the number of witnesses at the hearing.

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## Determining Credibility

- Factors for determining credibility:
  - Does the party or witness have a reason to be untruthful?
  - Witnesses only: Does the witness have a special relationship with a party?
    - Compare testimony of respondent's sibling vs. testimony of third-party bystander.

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## Determining Credibility

- Quality over quantity
  - The testimony of a single, disinterested witness is more reliable than testimony of multiple biased witnesses.



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## Live Hearings: Cross- Examination

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

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## Live Hearings: Rape Shield Protections

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

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## Post-Hearing Procedure



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## Written Determination

- Issued to both parties simultaneously within 7 business days of decision being reached.

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## Written Determination

### Must include:

- Identification of allegations potentially constituting Title IX sexual harassment and/or sexual violence, domestic violence, dating violence or stalking
- Description of procedural steps taken
- Findings of fact supporting determination
- Conclusions regarding application of conduct standards
- Statement & rationale for result of each allegation, including:
  - Determination of responsibility
  - Disciplinary sanctions being imposed
  - Whether any remedies will be provided to the complainant
- Procedures and permissible bases for complainant and respondent to appeal

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## Determining Appropriate Sanctions



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## Determining Appropriate Sanctions

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

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## Determining Appropriate Sanctions

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



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## Appeals

# APPEALS



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## Appeals

- Both parties have right to appeal any determination regarding:
  - Responsibility
  - Dismissal of any formal complaint or allegations therein

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## Appeals: Grounds to Appeal

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



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## Appeals: Process

- Party must submit written appeal request to Title IX Coordinator
  - Within 7 business days of receipt of written determination or dismissal
- Written appeal request must identify the ground(s) on which the party seeks to appeal the determination or dismissal.

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## Appeals: Process

- Title IX Coordinator will forward written appeal request to designated appeals administrator
  - Appointed by Title IX Coordinator
  - No prior involvement in the underlying investigation or determination

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## Appeals: Process

- Appeals administrator will afford both parties the opportunity to submit a statement
- Written decision issued to both parties simultaneously within 7 business days of conclusion of the review
  - Describes outcome and rationale
- Decision is final

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## Best Practices for Reviewing Appeals



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## Best Practices for Reviewing Appeals

- Conduct an initial review of the party's written appeal request to determine whether the appeal is based on one (or more) of the permissible grounds.
  - If it is, proceed with reviewing the appeal.
  - If it is not, the appeal may be dismissed.

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## Best Practices for Reviewing Appeals



- Gather all relevant documentation regarding the underlying investigation and determination.

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## Best Practices for Reviewing Appeals

- The documents presented for review should include, at a minimum:
  - Initial written notice of allegations
  - Evidence gathered by the investigator, including the parties' written responses to the evidence
  - Investigator's report, including the parties' written responses to the investigation report
  - Hearing Officer's determination
  - Parties' statements in support of, or in opposition to, the appeal

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## Best Practices for Reviewing Appeals

- Consider whether the appeals administrator needs to meet with or obtain additional information from either party.
  - In most cases, this will not be necessary. The appeals administrator should not "re-investigate" the matter.
- Be mindful of appeal timelines.

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## Best Practices for Reviewing Appeals

- In cases where the appeal is based on alleged procedural error, consider whether such procedural error was harmless.
  - If so, the appeals administrator may affirm the finding notwithstanding the procedural error.

**ERROR**

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## Best Practices for Reviewing Appeals

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

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## Best Practices for Reviewing Appeals

- Issue the appeal decision to the both parties in writing, including a statement that the appeals administrator's decision is final.

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## Conflicts of Interest & Bias



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## What is a Conflict of Interest?

### Definition:

- “A situation in which the concerns or aims of two different parties or people are incompatible.”
- Not:
  - “I know both parties.”

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## What is bias?

### Definition:

- “Prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.”

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## How to Address Implicit Bias

- Check your implicit bias here: [Harvard Implicit Bias Test](#)
- More deliberate or conscious thinking
  - Sometimes called “Staring” (as opposed to “Blinking”)
  - This involves allowing yourself time to fully think through a scenario before coming to a decision/conclusion



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## How to Address Bias: Create a Checklist

- Create a checklist beforehand
  - Example: A pre-made checklist of allegations to be proven/disproven
- Decision-making checklists can encourage less biased decisions; they provide an objective framework to assess your thinking<sup>1</sup>
- Can be effective in overcoming stereotypes<sup>2</sup>
- Helps reduce the attention given to biased characteristics that may influence decision-making<sup>3</sup>

1. Arkes, Hal R. Arkes & Victoria A. Shaffer, Should We Use Decision Aids or Gut Feelings? in G. GIGERENZER & C. ENGEL, EDS., HEURISTICS AND THE LAW (2004).  
2. Isaac, Carol Isaac, Barbara Lee & Molly Carnes, Interventions That Reduce Implicit Bias in Hiring: A Systematic Review, 84 Academic Medicine 1440 (2009).  
3. Uhlmann, Eric Luis Uhlmann & Geoffrey L. Cohen, Constructed Criteria: Redefining When to Justify Discrimination, 16 PSYCHOL. SCI. 474 (2005).  
All materials compiled by the ABA Implicit Bias Toolkit, which can be found here: <https://www.americanbar.org/groups/diversity/resources/implicit-bias/>

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Questions?



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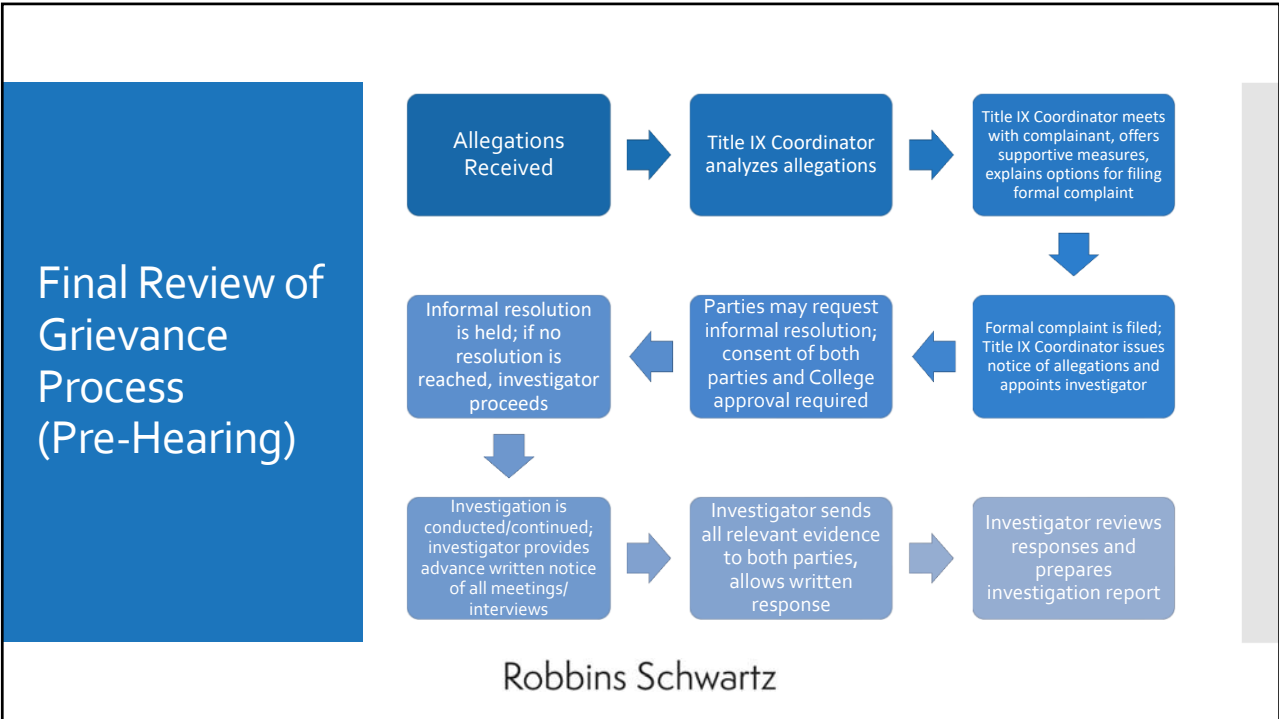
137

Final Review  
and  
Hypotheticals

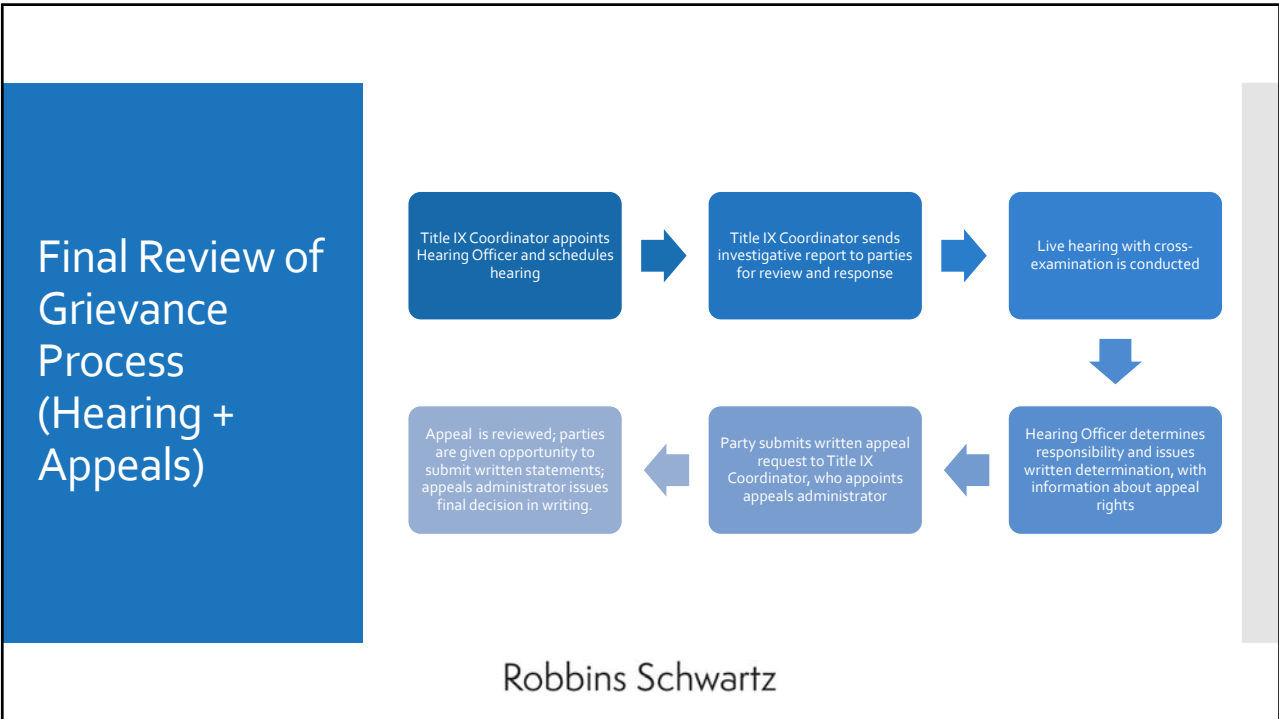


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## Hypothetical 1: Student vs. Student

The Title IX Coordinator receives an email from the women's basketball coach, stating that he overheard a player, Ann, discussing last weekend's off-campus party. Ann told her teammate that she was inappropriately touched by a male student from another college.

- How should the Title IX Coordinator proceed?

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## Hypothetical 1: Student vs. Student

Same scenario, but Ann tells her teammate that she was inappropriately touched by a student on the College's men's basketball team.

- Does this qualify as a report, even though Ann did not tell the Title IX Coordinator herself?
- What next step should the Title IX Coordinator take?

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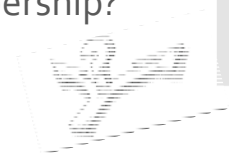


## Hypothetical 1: Student vs. Student

Ann files a formal complaint and the Title IX Coordinator issued the notice of allegations to both parties. Ann requests to participate in informal resolution. The respondent basketball player, Kyle, does not want to participate in informal resolution.

- Can the College require his participation in informal resolution as a condition of his continued enrollment?
- What about to keep his team membership?

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## Hypothetical 2: Student vs. Employee

The Title IX Coordinator receives a report from Professor Smith, who says that a student, Dave, has confided that a College administrator is willing to change Dave's grade to an "A" in any class he needs, so long as Dave agrees to participate in sexual activity.

- Can the College take steps to remove the administrator prior to undergoing a full investigation and grievance procedure?
- If so, how?

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## Hypothetical 2: Student vs. Employee

Dave files a formal complaint. At his investigation interview, Dave requests to resolve the complaint informally.

- If the administrator agrees, may the Title IX Coordinator proceed with informal resolution?

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## Hypothetical 2: Student vs. Employee

The matter proceeds to hearing. During the hearing, the administrator's advisor asks Dave if he has ever engaged in sexual activity with any other College staff.

- Is this question permissible?
- If not, what steps should the hearing officer take?



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### Hypothetical 3: Employee vs. Employee

Andy (a faculty member) tells his secretary, Brad, that Andy has been receiving sexually explicit photos from fellow faculty member Jane. Andy has asked Jane to stop, but she has not.

- Is the College on notice of a Title IX violation?
- Does Brad (secretary) have a reporting obligation?

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### Hypothetical 3: Employee vs. Employee

Same scenario, but Brad urges Andy to contact the HR department. Andy takes Brad's advice and reports to the HR Director.

- What steps should HR take after receiving this report from Andy?
- If the Title IX Coordinator determines that the allegations, if true, would not constitute sexual harassment under Title IX, can the College still investigate Andy's allegations? How?

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## Hypothetical 4: Student vs. Student

- Jen, a student, reports to her College advisor that a classmate, Kevin, has been making inappropriate sexual jokes and innuendos.
  - She and Kevin both attended the same virtual summer school course.
  - They were assigned to work on a project together, much of which was to be done on their own time, over Zoom, and required the exchange of personal contact information.
  - After the project was complete, Kevin allegedly called Jen and asked her out. Jen said no.
  - Jen states that Kevin began teasing her on social media and telling all of their mutual friends that Jen “is a prude.”

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## Hypothetical 4: Student vs. Student

- The teasing became increasingly more offensive, and he allegedly began making false statements that:
  - Jen is homosexual,
  - She is afraid to date because she is a hermaphrodite, and
  - That Jen sent him sexually explicit photos.
- Jen alleges that Kevin’s comments took place over the course of the summer, at various off-campus social distanced class gatherings where the instructor and other students were present.
- Most recently, Kevin and Jen both attended the same party at a house owned by the College’s Theater Club, of which Jen is a member.
- At the party, Kevin (who is 21) was drinking. He tried to pressure Jen (who is 19) into drinking as well. Jen reports that Kevin stated, “Some alcohol will allow you to drop your guard, and hopefully, allow me to drop your pants.”

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## Hypothetical 4: Student vs. Student

- Jen reports that she told Kevin he was not funny, and to leave her alone.
  - One of Jen's friends allegedly witnessed Kevin trying to pour some of his vodka into Jen's cup when she wasn't looking.
  - According to Jen's friend, when Kevin was caught, he laughed and told her to "Stop cock-blocking me."
- Jen is distraught. Kevin is enrolled in two of the same classes as Jen for the fall 2020 semester. Jen is considering dropping the classes so she will not have to interact with Kevin.
- The College advisor documents her discussion with Jen. What should the College advisor do with these allegations? Discuss.



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## Hypothetical 4: Student vs. Student

- Based on these facts, analyze the jurisdiction under Title IX.
- Reminder:
  - Kevin's behavior began after the completion of their virtual project. He teased her via social media.
  - Kevin's behavior continued at off-campus events where the instructor and other students were present.
  - Kevin's most recent actions were at a house owned by a College-recognized student organization during the first weekend of school.

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## Hypothetical 4: Student vs. Student

- Do Kevin's actions constitute Title IX sexual harassment?
- Reminder: Three types of sexual harassment:
  - **Quid pro quo** harassment by a college employee
  - Unwelcome conduct that a reasonable person would find **so severe, pervasive and objectively offensive** that it **denies a person equal educational access**
  - Any instance of **sexual assault, dating violence, domestic violence or stalking**

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## Hypothetical 4: Student vs. Student

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

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Final Questions?



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Frank represents and defends clients in both state and federal courts, at the trial and appellate levels. He also practices before various administrative agencies such as the Illinois Educational Labor Relations Board, the Illinois Human Rights Commission and the Equal Employment Opportunity Commission. Frank is a regular speaker on employment law topics at both the state and national level.

Frank is approved by the Illinois State Board of Education to provide school board member training. He is an active member of the American Bar Association and Illinois Council of School Attorneys.

### **AWARDS**

Illinois Leading Lawyer, Government and Regulatory-Related  
Illinois Leading Lawyer, Employment and School Law  
Illinois Super Lawyers

### **RECENT PUBLICATIONS**

"Extended Medical Leave Under ADA Soundly Rejected by 7th Circuit,"  
*Chicago Daily Law Bulletin* (2017)

"First Amendment Protections Get Broader for Government Employees,"  
*Chicago Daily Law Bulletin* (2016)

"Big-box Employee's Attempt to 'Scam' Company Undercuts FMLA Claims,"  
*Chicago Daily Law Bulletin* (2015)

Employers Must Rethink Employee 'Look' Policies After High Court Decision,"  
*Chicago Daily Law Bulletin* (2015)



### **PRACTICE AREAS**

Education Law  
Labor & Employment  
Litigation

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J.D., DePaul University  
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### **ADMITTED TO PRACTICE**

Supreme Court of the  
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U.S. Court of Appeals for  
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Trial Bar of the U.S.  
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Northern District of Illinois

U.S. District Court for the  
Northern District of Illinois

U.S. District Court for the  
Central District of Illinois

U.S. District Court for the  
Southern District of Illinois

Supreme Court of Illinois



“Using Social Network Screening as Part of the Hiring Process: Employers Should Proceed with Caution,” *Inquiry & Analysis*, National School Boards Association’s Council of School Attorneys (2013)

Contributing author, “Employment Discrimination,” *ILLINOIS SCHOOL LAW*, IICLE (1996, 1999, Supp. 2001, 2005, 2010 and 2012)

#### **RECENT PRESENTATIONS**

*Debunking Some Common Employee FMLA Leave Myths*, IASPA Annual Conference (January 2020)

*Legislative Update: A Review of New Laws Affecting Illinois Community Colleges*, Illinois Council of Community College Presidents Retreat (September 2019)

*Understanding New Changes to the Minimum Wage Law and Other Wage-Related Statutes*, Illinois GFOA Annual Conference (September 2019)

*Navigating the Legal Liability Minefield in the Recruitment, Interview and Selection of Qualified Applicants*, AASPA Personnel Administrator Boot Camp (June 2018)

*The Ever-Changing Landscape Under Title IX*, Joint meeting of Illinois Community College Presidents, Chief Academic Officers and Chief Student Services Officers (January 2017)

*Practical Guidance on Employee Misconduct Investigations and Discipline*, Illinois Association of School Personnel Administrators, Tenth Annual State Conference (January 2017)

#### **ORGANIZATIONS**

American Bar Association,  
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Emily practices in the area of education law with a focus on student and higher education matters. She counsels school districts and higher education institutions on a variety of issues, including matters related to student discipline, Title IX, free speech, student disability rights, student data privacy and policy development. She has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education's Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General and Illinois Department of Human Rights. Emily regularly represents school districts and higher education institutions in state and federal court on civil rights and constitutional claims and breach of contract claims.

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

### RECENT PUBLICATIONS

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

### RECENT PRESENTATIONS

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

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

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

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

*The Ever-Changing Landscape Under Title IX*, Joint meeting of Illinois Community College Presidents, Chief Academic Officers and Chief Student Services Officers (January 2017)



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U.S. Court of Appeals for the Seventh Circuit

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Supreme Court of Illinois

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Chicago Bar Association

Illinois Council of School Attorneys

National Council of School Attorneys

*FERPA and FOIA: Compliance and Considerations, Illinois Community College  
Chief Student Services Officers Winter Meeting (January 2017)*

*Residency and Homelessness: Legal Update and Considerations When  
Challenging a Student's Status (October 2016)*