



Robbins Schwartz
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Spoon River College Title IX Team Training: A Deep Dive Into the Investigator and Decision- Maker Roles

April 18, 2023

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Agenda

I. Overview of Grievance Process

II. Role of the Investigator

Conducting
Investigatory Interviews

Evidence and Investigation
Report Procedures

III. Role of the Hearing Officer

Pre-Hearing Procedures

The Hearing

Post-Hearing Procedures



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

Overview of Grievance Process



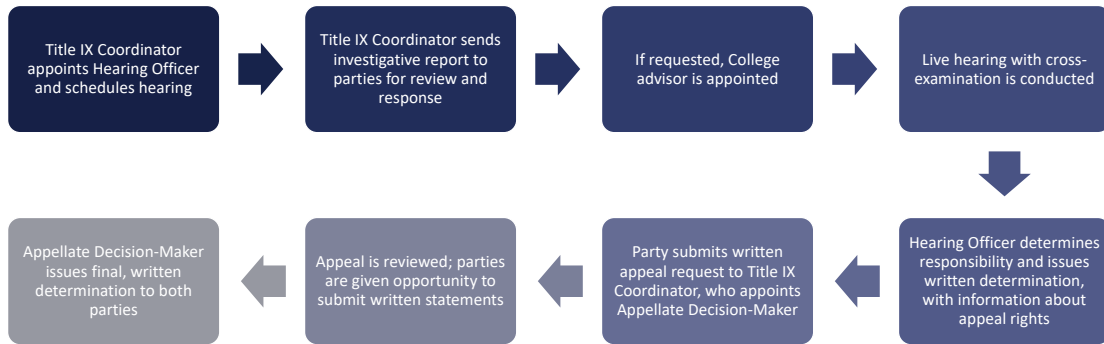
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Grievance Process (Pre-Hearing)



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Grievance Process (Hearing + Appeal)



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Role of the Investigator



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Investigator's Role Generally



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



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Key Rules for Investigators



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



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Conducting Investigatory Interviews



Title IX Requirements

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

Preparing for Interviews

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



Advisors

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



Beginning the Interview



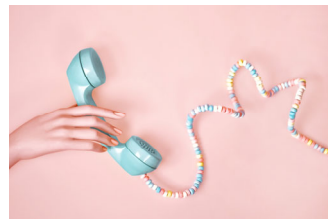
- Introductions
- Explain purpose of interview
- Remind party and advisor of expectations concerning advisor's role
- Review any other ground rules (taking breaks, reviewing documents, etc.)



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Questioning

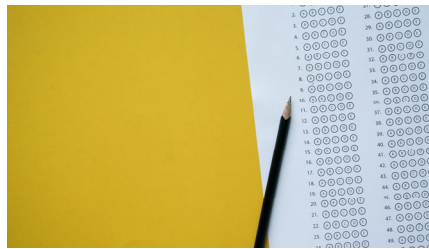
- Open-ended questions are best
 - Closed-ended:
 - Q: "Were you in Frank's office when the phone rang?"
 - A: "No."
 - Open-ended:
 - Q: "Where were you when the phone rang?"
 - A: "I was in the hallway outside Frank's office."



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Questioning

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



Questioning

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

Questioning

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



Assessing Credibility

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



Assessing Credibility



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



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Considerations for Employee Respondents

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



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PSVHEA Allegations

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



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Other Best Practices for Interviews

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



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Investigatory Interview Hypothetical

- Jane filed a formal complaint alleging that her professor, Mr. Jones, started giving her lower grades on her assignments after she turned down his requests to take her on a date. You have been appointed to conduct the investigation into Jane's complaint.

Who should you interview?

In what order should you conduct the investigatory interviews?



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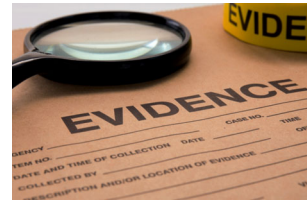
Evidence and Investigation Report Procedures



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Relevant Evidence

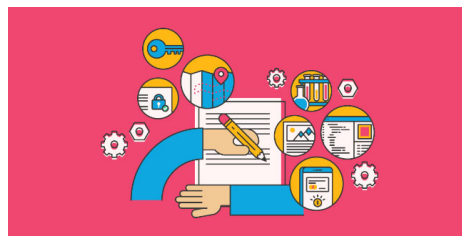
- “Relevant” means useful in determining:
 - The truth or falsity of specific factual allegations
 - Whether the facts establish an element of the relevant type(s) of sexual harassment
 - What potential sanctions/discipline or remedies are appropriate



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Relevant Evidence

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



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Rape Shield Protections

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



Access to Evidence

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

Preparation of Investigation Report

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



Preparation of Investigation Report

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



Questions?

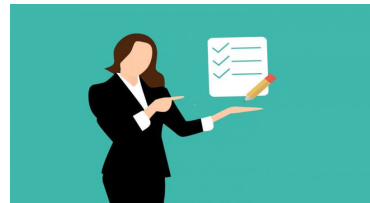


Role of the
Hearing
Officer



Hearing Officer's Role Generally

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



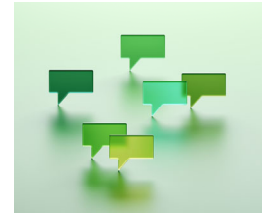
Hearing Officer's Role Generally

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



Pre-Hearing Procedures

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



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Pre-Hearing Procedures

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



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Sample Checklist of Allegations

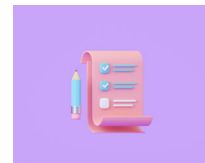
Complainant, a student, alleges that Respondent, an adjunct faculty member, engaged in unwelcome conduct of a sexual nature that a reasonable person would find so severe, pervasive and objectively offensive that it deprived a person equal educational access.

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



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Pre-Hearing Procedures



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



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Pre-Hearing Procedures

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



The Hearing



Hearing Procedures

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



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Hearing Procedures

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



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Hearing Procedures

- 9) Questioning by Hearing Officer
 - May occur after each party or witness testifies, or at the end after all parties and witnesses have testified.
- 10) Brief closing statements by parties
- 11) Conclude hearing and go “off the record.”



Live Hearing Hypothetical

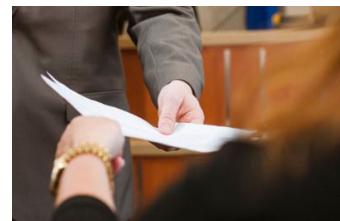
- You are serving as the Hearing Officer during a live hearing involving an alleged student-on-student sexual assault. The Respondent brought his defense attorney as his advisor. The attorney has refused to allow the Respondent to speak and has advised him not to answer any questions. The attorney has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

Post-Hearing Procedures



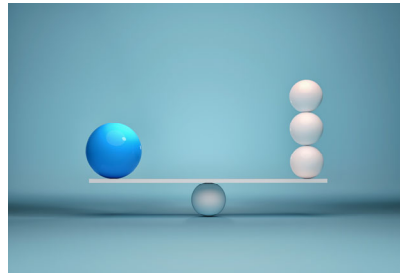
Considering Evidence

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



Preponderance of the Evidence Standard

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



Issues for Determination

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

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

Issues for Determination

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



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Issues for Determination

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



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Determining Appropriate Sanctions

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



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Determining Appropriate Remedies



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

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Written Determination

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



Written Determination

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

Questions?



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

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

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

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



PRACTICE AREAS

Education Law
Higher Education
Special Education
Student Discipline

EDUCATION

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B.S., *cum laude*,
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ADMITTED TO PRACTICE

U.S. Court of Appeals for
the Seventh Circuit

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

Supreme Court of Illinois

ORGANIZATIONS

Trustee, Associated
Colleges of Illinois

Chicago Bar Association

Illinois Council of School
Attorneys

National Council of School
Attorneys

RECENT PUBLICATIONS

“College Admissions Under Fire as Top Court Takes Affirmative Action Case,”
Chicago Daily Law Bulletin (2022)

“Disabled Athlete Can’t Support ADA Claims,” *Chicago Daily Law Bulletin* (2018)

RECENT PRESENTATIONS

Best Practices for Safeguarding Data in an Increasingly Digital World, SecurED Schools: K-12 Data Privacy and Cybersecurity Conference (January 2023)

Legal Gymnastics in the Age of COVID and Other Challenges, Illinois Council of Community College Presidents Retreat (January 2022)

Making Sense of the Alphabet Soup: FERPA, COPPA, SOPPA, ISSRA, MHDDCA, and PIPA and Strategies for Compliance, Secured Schools K-12 Data Privacy and Cybersecurity Conference (January 2022)

Preparing for Implementation of the New Title IX Regulations: Recommendations for Human Resources Professionals, Illinois Association of School Personnel Administrators (November 2020)

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)

