



Preparing for the New Title IX Regulations Effective August 14, 2020

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This PowerPoint and the accompanying presentation do not constitute legal advice.



Introduction



Why are we here?

- On August 14, 2020, the U.S. Department of Education's new regulations under Title IX of the Education Amendments of 1972 (Title IX) will go into effect.
 - These new regulations mark a significant departure from many aspects of the Obama-era guidance regarding schools' response to sexual harassment issues.
 - The Department has stated that the new regulations strengthen protections for survivors of sexual misconduct and restore due process in campus proceedings to strike a balance that is fair and ensures that all students are protected from sex discrimination.
- We have worked with the College to modify its Title IX policy and procedures to comply with these new regulations.



Why are you here?

- You have been identified as someone who will be involved with the College's Title IX process, either as the Title IX Coordinator or as an investigator, decision-maker, appeals reviewer, or informal resolution facilitator.
- We want you to become familiar with the new Title IX regulations and the College's updated Title IX policy, which go into effect on August 14, 2020.
- The new regulations also mandate training for certain Title IX personnel. This presentation will qualify as part of your required training.



What do you need to be trained on?

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
<u>Requirement #1: Conflicts of Interest & Bias</u>				
Against Complainants/Respondents Generally	X	X	X	X
Against an Individual Complainant/Respondent	X	X	X	X



What do you need to be trained on?

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
<u>Requirement #2: Key Definitions</u>				
Definition of Sexual Harassment	X	X	X	X
Scope of the College's Education Program or Activity	X	X	X	X



What do you need to be trained on?

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
<u>Requirement #3: Investigations & the Grievance Process</u>				
How to Conduct the Grievance Process	X	X	X	X
How to Conduct an Investigation	X	X	X	X
Hearings	X	X	X	X
Appeals	X	X	X	X
Informal Resolution Processes	X	X	X	X



What do you need to be trained on?

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
<u>Requirement #4: Impartiality</u>				
How to Serve Impartially	X	X	X	X
Avoiding Prejudgment of the Facts at Issue	X	X	X	X
Conflicts of Interest	X	X	X	X
Bias	X	X	X	X



What do you need to be trained on?

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
Additional Training Requirements				
Technology to be used at the Live Hearing			X	
Issues of Relevance of Questions and Evidence			X	
Relevancy of Questions and Evidence of a Complainant's Sexual Predisposition or Prior Sexual Behavior			X	
Issues of Relevance to Create an Investigative Report that Fairly Summarizes Relevant Evidence		X		



Overview of the New Title IX Regulations

A broad overview of the new procedural requirements leading up to the grievance process.

What do the new Title IX regulations address?

- The new regulations primarily focus on issues of sexual harassment. **Therefore, the College's new grievance procedure only applies to allegations of sexual harassment or complaints containing an allegation of sexual harassment.**
- All other complaints of sex-based discrimination (which are also protected by Title IX) will be processed under the College's existing grievance procedures for students and employees.
- Although most of your roles will be focused on formal complaints of sexual harassment and the ensuing grievance process, it is important to understand that the regulations impose new requirements on the College beginning with notice and reports of sexual harassment.

What are the notice requirements?

- Notice of the Title IX Coordinator: All applicants for admission, applicants for employment, students, employees, and any union or professional organization with a collective bargaining or professional agreement must be notified of the Title IX Coordinator's: (i) name or title; (ii) office address; (iii) email address; and (iv) telephone number.
- Publishing Notice: The College must prominently display the contact information for the Title IX Coordinator on its website and in each handbook or catalog it makes available to the above individuals/entities.

What are the notice requirements?

- Notice of Policy: All applicants for admission, applicants for employment, students, employees, and any union or professional organization with a collective bargaining or professional agreement must be notified that the College 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 its regulations not to discriminate in such a manner.
 - Such notice must state that the requirement not to discriminate in the education program or activity extends to admission and employment. It must also state that inquiries about the application of Title IX and its regulations to the school may be referred to the Title IX Coordinator, to the Assistant Secretary, or both.
- Notice of Grievance Process: All of the above individuals/entities must be notified of the College'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 College will respond.



How does the Title IX Coordinator receive reports of sex discrimination?

- Any person may report sex discrimination, including sexual harassment, to the Title IX Coordinator as follows:
 - In person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator; or
 - By any other means that result in the Title IX Coordinator receiving the person's verbal or written report.
- Reports can be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.



What happens when the College receives a report of sexual harassment?

- When the College receives actual knowledge of sexual harassment in an education program or activity of the College against a person in the United States, it must respond promptly in a manner that is not deliberately indifferent.
- We will spend the next few slides breaking down these key terms.

What is sexual harassment?

- Discrimination on the basis of sex includes sexual harassment. Sexual harassment is defined as conduct on the basis of sex that satisfies one or more of the following:
 - 1. A College employee conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct.**

This applies regardless of whether the “bargain” is communicated expressly or impliedly.

What is sexual harassment?

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 College's education program or activity.

Severity takes into account the circumstances facing a complainant, including the complainant's age, disability status, sex, or other characteristics.

Pervasiveness refers to a pattern of harassment.

Objective offensiveness refers to whether a reasonable person standing in the shoes of the complainant would find the conduct offensive regardless of whether the individual evaluating the conduct shares the same race, sex, age, or other characteristics as the complainant.

Denying equal access to educational opportunities is measured against the access of a person who has not been subjected to sexual harassment. It requires that a person's "equal" access to education has been denied, not that a person's total or entire educational access has been denied.

What is sexual harassment?

3. Sexual assault, dating violence, domestic violence, or stalking.

Sexual assault is defined as an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

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 victim and where the existence of such a relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

What is sexual harassment?

3. Sexual assault, dating violence, domestic violence, or stalking.

Domestic violence is defined as felony or misdemeanor crimes 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 Wisconsin's domestic or family violence laws, or 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 Wisconsin.

Stalking is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or suffer substantial emotional distress.



What is sexual harassment?

- For purposes of establishing sexual harassment under the College's Title IX policy, it is also important to understand the concept of consent. The College defines consent more strictly than State or federal law.
- **Consent** to sexual activity must be informed and freely and actively given through mutually understood words that indicate a willingness to participate in mutually agreed-upon sexual activity. The College requires a non-intoxicated, verbal, mutually understood "Yes" for sexual contact or intercourse to be considered consensual.

What is consent?

- Consenting to sexual activity requires a non-intoxicated, verbal, mutually understood communication free from threats, intimidation, or other coercion.
 - Returning to an individual's room, being physically aroused, removing clothing, stroking, assenting to dancing or cuddling, obtaining contraception, and such similar circumstances do not equate to a non-intoxicated, verbal, mutually understood "Yes" and, therefore, do not constitute consent.
 - Silence or inaction does not constitute consent.
 - Non-verbal actions should not be considered invitations for sexual contact or intercourse.
- Individuals who are below their normal cognitive function, inebriated, mentally or physically impaired or incapacitated, have a mental illness or deficiency, are unconscious for any reason, or are physically unable to communicate are assumed to be incapable of giving consent.
- Someone who is under the influence of alcohol and/or drugs may be physically unable to communicate and therefore may be unable to give consent.



What is actual knowledge?

- Notice to the Title IX Coordinator satisfies actual knowledge (unless this individual is the respondent).
- Notice to officials with authority to take corrective action with respect to sexual harassment satisfies actual knowledge (unless the individual is the respondent).
- Individuals with authority to take corrective action with respect to sexual harassment include Deans.



What is an education program or activity?

- Includes locations, events, or circumstances over which the College exercises substantial control over both the respondent and the context in which the sexual harassment occurs.
- Includes any building owned or controlled by a student organization that is officially recognized by the College (e.g., fraternities and sororities).
- “Education program or activity” does not include study abroad. This is because Title IX only applies to persons in the United States.



What is the scope of the College's education program or activity?

- The scope of the College's education program or activity includes, but is not limited to, the following:
 - All campus activities sanctioned and approved by the College;
 - All College-sponsored events, including sporting and team events;
 - Dormitories and official student housing;
 - Houses owned or controlled by the College's recognized sororities and fraternities; and
 - All buildings that are owned or controlled by a College-recognized student organization.



How is the College's response to a report of sexual harassment measured?

- The College is deliberately indifferent if its response to sexual harassment “is clearly unreasonable in light of the known circumstances.”
- Examples of deliberate indifference include:
 - Not offering supportive measures when a school has actual knowledge of sexual harassment in an education program or activity;
 - Not conducting a full investigation upon receipt of a formal complaint; and
 - Imposing discipline on the respondent without going through the grievance process.

How must the College initially respond to a report of sexual harassment?

- When the College has actual knowledge of sexual harassment in an education program or activity, it must initially offer supportive measures.
- The College must keep confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality will not impair the College's ability to provide the supportive measures.



What are supportive measures?

- Supportive measures are 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.
- They are designed to restore or preserve equal access to the College's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the College's educational environment, or deter sexual harassment.

What are supportive measures?

- Supportive measures may include, but are not limited to:
 - Counseling
 - Extensions of deadlines or other course-related adjustments
 - Modification 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

Who is responsible for coordinating supportive measures?

- When the College has obtained actual knowledge of sexual harassment in an education program or activity, the Title IX Coordinator must promptly contact the complainant regarding supportive measures. Specifically, the Title IX Coordinator must promptly contact the complainant to:
 - Discuss the availability of supportive measures;
 - 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 of sexual harassment.
- While the Title IX Coordinator is initially obligated to reach out to the complainant regarding supportive measures, the respondent also has an equal right to supportive measures.



Who is responsible for coordinating supportive measures?

- The Title IX Coordinator must document their response to a report (or formal complaint) of sexual harassment and the basis for that response. This includes documenting that they have offered supportive measures to restore or preserve equal access to the College's education program or activity.
- If the Title IX Coordinator does not provide a complainant with supportive measures, then he/she must document the basis for not doing so.

What if the respondent poses a safety risk?

- The College can remove a respondent from the education program or activity on an emergency basis. Emergency removal requires:
 - An individualized safety and risk analysis;
 - A determination 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
 - Providing the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- Subject to the above process, the College may remove a respondent without first having received a formal complaint of sexual harassment.

What is the difference between a report of sexual harassment and a formal complaint of sexual harassment?

- Unlike a report, which can be verbal and made by anyone (not just the complainant), a formal complaint is a document (including an electronic submission) filed by a complainant or signed by the Title IX Coordinator which alleges sexual harassment against a respondent and requests that the College investigate the allegation of sexual harassment.
- The formal complaint must contain the complainant's physical or digital signature, or otherwise indicate that the complainant is the person filing the formal complaint.
- Formal complaints may be filed with the Title IX Coordinator in person, by mail, or by email, by using the contact information required to be listed for the Title IX Coordinator, and by any additional method designated by the College.

What is the difference between a report of sexual harassment and a formal complaint of sexual harassment?

- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the College's education program or activity with which the formal complaint is filed.
- When the Title IX Coordinator signs a formal complaint, he/she is not a complainant or party. *Note that if the complainant chooses not to file a complaint, the Title IX Coordinator must either document his/her reasons for filing a complaint against the complainant's wishes or document his/her reasons for choosing not to file a formal complaint.*



Training Check-In



You have now been trained on: Requirement #2

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
<u>Requirement #2: Key Definitions</u>				
Definition of Sexual Harassment	X	X	X	X
Scope of the College's Education Program or Activity	X	X	X	X

Do you have any questions about the definition of sexual harassment under the new regulations or the scope of the College's education program or activity?



You will now receive training on: Requirement #3

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
<u>Requirement #3: Investigations & the Grievance Process</u>				
How to Conduct the Grievance Process	X	X	X	X
How to Conduct an Investigation	X	X	X	X
Hearings	X	X	X	X
Appeals	X	X	X	X
Informal Resolution Processes	X	X	X	X



The Grievance Process

For Formal Complaints of Sexual Harassment

What happens if the College receives a formal complaint of sexual harassment?

- A formal complaint of sexual harassment triggers the grievance procedure mandated under the new Title IX regulations. The grievance procedure is the investigation and determination process. It includes the following stages:
 1. Investigation Stage: The investigator gathers evidence sufficient to reach a determination regarding responsibility. The investigator then drafts a report that gives each party an opportunity to prepare their arguments and defenses for hearing.
 2. Hearing Stage: At post-secondary institutions, the grievance process must include a live hearing with cross-examination.
 3. Determination Stage: Following the live hearing, the decision-maker independently reaches a determination regarding responsibility and issues his/her determination to the parties.
 4. Appeals Stage: Either party can appeal the decision-maker's determination.

Are there basic rules for the grievance process?

- Presumption of Innocence: The respondent is presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Discussing Allegations: The College cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- No Retaliation: The College prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX or its regulations, 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 the College's policy, Title IX, or Title IX's regulations. Intimidation, threats, coercion, or discrimination for the purpose of interfering with any right or privilege secured by Title IX or its regulations constitutes retaliation.

Are there basic rules for the grievance process?

- Advisors: During the grievance process, all parties have the right to an advisor of their choice, who may be, but is not required to be, an attorney. The College may not limit the choice or presence of a party's advisor in any meeting or grievance proceeding. However, an advisor's active participation during the grievance process is limited to conducting cross-examination at the live hearing.
- Equal Opportunity to Present Witnesses and Other Evidence: The parties have an equal opportunity to present witnesses and other evidence, including fact and expert witnesses, and other inculpatory and exculpatory evidence. The parties also have an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint, including evidence upon which the College does not intend to rely in reaching a determination regarding responsibility.

Are there basic rules for the grievance process?

- Objective Evaluation of All Relevant Evidence: The parties have a right to an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence.
- Privacy Protections: The College 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 unless the school has obtained the party's voluntary, written consent.
- Privileged Information: The grievance process may 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 privilege has been waived). Privileges include, but are not limited to: attorney-client privilege, marital privilege, religious advisor privilege, physician-patient privilege, and psychologist-patient privilege.

Are there basic rules for the grievance process?

- No Conflict of Interest or Bias: Any individual designated by the College as a Title IX Coordinator, investigator, decision-maker, reviewer, or any person designated by the College to facilitate an informal resolution process may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- Credibility Determination: Credibility determinations may not be based on a person's status as a complainant, respondent, or witness. The College cannot give credence to a person's statements simply because of the position he/she holds.

How do you assess credibility?

- Guidelines for making credibility determinations:
 - Credibility should not be prejudged.
 - Credibility must be based on an objective evaluation of the relevant evidence in a particular case.
- Ways to assess credibility:
 - Appearance: Is the person nervous or looking away?
 - Consistency: Is the person's story consistent? Does it align with prior statements?
 - Evasiveness: Is the person being evasive?
 - Truth: Are there any components of the person's statement that you know are untrue?
 - Motive: Does the person have a motivation to lie?

What is the time frame for the grievance process?

- Reasonably Prompt Time Frame: The grievance process (up to and including an appeals determination, if applicable) shall be completed in a reasonably prompt time frame, which the College designates as ninety (90) days from receipt of the formal complaint.
- Temporary delays or limited extensions of time frames may be permitted 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 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.

What is the standard of evidence during the grievance process?

- The standard of evidence to be used for determining responsibility under this grievance procedure (and for all formal complaints of sexual harassment, including formal complaints against employees and students) is the preponderance of the evidence standard.
- What is a “preponderance of the evidence”? **Whether a fact is more likely than not to be true.**

How must the College initially respond to a formal complaint of sexual harassment?

- Upon receipt of a formal complaint, the Title IX Coordinator must promptly send a written notice to the known parties containing certain required information.
- Also note that, during the pendency of the grievance process, the College may place a non-student employee respondent on administrative leave.

What information is required in the initial written notice to the known parties?

- Notice of the grievance process, including informal resolution and the name of the individual assigned to conduct the investigation.
- Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in 34 C.F.R § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any interview.
 - Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under 34 C.F.R § 106.30, and the date and location of the alleged incident, if known.

What information is required in the initial written notice to the known parties?

- A statement 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.
- A statement that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney, and who may inspect and review evidence.
- A statement informing the parties of any provisions in the College's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

What happens after issuing the initial written notice to the known parties?

- Upon receipt of a formal complaint and a determination that the complaint is subject to this grievance procedure, the assigned investigator will investigate the formal complaint.
- Note that the College 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

What happens during the investigation?

- The specific steps of the investigation will vary based on the nature of the allegations and other factors; however, regardless of the specific process, the College's inquiry must be prompt, thorough and impartial.
- The investigation must be completed within the policy's designated timeframe.
- The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the College and not on the parties.

What happens during the investigation?

- The investigation process must include, at minimum, individual meetings with the complainant and respondent to discuss the substance of the complaint and to identify witnesses (lay or expert) and other inculpatory or exculpatory evidence.
- The investigator must provide advanced notice to the party, including the date, time, location, participants, and purpose of the investigative meeting in advance of the meeting to provide sufficient time for the party to prepare to participate.

What are best practices for conducting investigatory interviews?

- Thoroughly prepare in advance of each interview:
 - Determine the issues to be explored in each interview.
 - Prepare a detailed outline of key questions, including: (i) matters the interviewee should be asked about and all details regarding each; (ii) information the interviewee is believed to have; and (iii) information from others that the interviewee may be able to corroborate or refute.
- Conduct separate interviews, and do not have two or more interviewees in the same room.
- Start a new page of notes for each interview.
- Take detailed notes that are as close to verbatim as possible.
- Record observations of evasiveness, non-verbal cues, or contradictions in your notes.
- Avoid discussing theories, strategy, or other evidence with the interviewee.

What are best practices for conducting investigatory interviews?

- Use appropriate question formats:
 - Start off with open-ended questions.
 - Ask one question at a time.
 - Ask questions that force the interviewee to relay events chronologically.
 - Do not conclude the interview without asking the tough questions.
- Use the interview to gather (rather than give) information.
- Do not accept conclusory words or statements.
- Distinguish between first-hand knowledge and knowledge from others.
- Ask follow-up questions as necessary – get comfortable with straying from your prepared outline.

What are best practices for conducting investigatory interviews?

- Ask the interviewee to list all individuals who may have knowledge of any of the events.
- Always close the interview by asking, “Is there anything else you would like to add?”
- Request copies of any supporting documentation or evidence.
- Let the interviewee know that he/she should call you immediately if he/she has forgotten and later recalls any information or documents.

How does the investigation conclude?

- Prior to the conclusion of the investigation, the investigator must provide to the complainant and respondent (and their respective advisors, if any) the opportunity to review any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint.
 - This includes any evidence upon which the College does not intend to rely upon in reaching a determination regarding responsibility and inculpatory or exculpatory evidence from any source.
 - The evidence must be sent in an electronic format to the parties and any identified party advisor (unless requested by a party or advisor to be received in hard copy format).
- Each party will be given at least ten (10) calendar days to submit to the investigator a written response for consideration prior to conclusion of the investigation and completion of the investigative report.

How does the investigation conclude?

- The investigator will conclude the investigation by drafting a written investigative report that fairly summarizes the relevant evidence.
- The investigative report must also describe the procedural steps from receipt of the formal complaint through the conclusion of the investigation, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence

What constitutes relevant evidence for purposes of the investigative report?

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
Additional Training Requirements				
Issues of Relevance to Create an Investigative Report that Fairly Summarizes Relevant Evidence		X		

- The basic test for relevance is whether the evidence is probative of the question of responsibility.
- Evidence can be inculpatory (evidence that tends to show an individual’s involvement in an act) or exculpatory (evidence that tends to exonerate an individual).

At the end of this training section on relevance, please let us know if you have any questions.

What evidence is NOT relevant for purposes of the investigative report?

- The following evidence and information is deemed not relevant or otherwise not subject to use in the grievance process:
 1. Information protected by a legally recognized privilege;
 2. Evidence about a complainant's sexual predisposition;
 3. Evidence about a complainant's prior sexual behavior unless it is offered to prove that someone other than the respondent committed the alleged conduct or it concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is offered to prove consent;
 4. Any party's medical, psychological, and similar records unless the party has given voluntary written consent.

Do the parties get to review a draft of the investigative report?

- Before the investigative report have been finalized, each party (and their respective advisors, if any) will be provided with a draft copy of the investigative report.
- The draft report will be provided in an electronic format (unless requested by a party or advisor to be received in hard copy format).
- Each party will have five (5) calendar days to submit to the investigator any objections to the draft investigative report prior to its finalization.

How does the investigator issue the final investigative report?

- The final investigative report must be sent to the parties and any identified party advisor at least ten (10) calendar days prior to the live hearing.
- The final investigative report must be sent in electronic format (unless requested by a party or advisor to be received in hard copy format).
- The parties may review the final investigative report and provide a written response to the decision-maker prior to hearing and in accordance with the policy's designated timeframe.



Can a formal complaint be dismissed?

- Jurisdictional Dismissal: Under certain circumstances, a formal complaint of sexual harassment may not be subject to the jurisdiction of Title IX and the grievance procedure for complaints of sexual harassment.
- A formal complaint must be dismissed for purposes of sexual harassment under Title IX and its regulations (and removed from this grievance process) if:
 1. The conduct would not constitute sexual harassment as defined under 34 C.F.R § 106.30 even if proved;
 2. The conduct did not occur in the College's education program or activity; or
 3. The conduct did not occur against a person in the United States.
- Dismissing a formal complaint of sexual harassment for any of these reasons does not preclude action under another of the College's policies prohibiting misconduct.



Can a formal complaint be dismissed?

- Discretionary Dismissal: The College may dismiss a formal complaint as subject to this grievance process if, at any time during the investigation or hearing:
 1. The complainant submits a written request for withdrawal to the Title IX Coordinator;
 2. The respondent is no longer enrolled at or employed by the College; or
 3. The specific circumstances prevent the College from gathering evidence sufficient to reach a determination.
- Regardless of whether a formal complaint is subject to jurisdictional or discretionary dismissal, the Title IX Coordinator must promptly notify the parties, simultaneously and in writing, of the dismissal and reasons therefor. Parties can appeal the dismissal decision.

What happens after the investigative report has been issued?

- After the investigative report has been issued, there will be a live hearing.
- The College will schedule a live hearing before an appointed decision-maker to reach a determination regarding responsibility.
 - The decision-maker cannot be the Title IX Coordinator or investigator.
 - The College must create an audio or audiovisual recording, or transcript, of the live hearing and make it available to the parties for inspection and review.

Who schedules/coordinates the live hearing?

- The Title IX Coordinator is responsible for coordinating the live hearing process. This includes, but is not limited to:
 - Scheduling the hearing;
 - Notifying parties and witnesses of the hearing;
 - Ensuring that the decision-maker is provided with appropriate materials including any exhibits;
 - Coordinating technology;
 - Securing a location for the hearing; and
 - Providing for a record or transcript.
- The Title IX Coordinator will also act as liaison between the parties and the decision-maker on procedural matters.

How are parties notified of the live hearing?

- The Title IX Coordinator will provide the parties with written notice of the date, time, and location of the hearing in accordance with the policy's designated timeframe. The notice of hearing will also include the identity of the decision-maker.
- In accordance with the policy's designated timeframe, each party will provide to the decision-maker (i) the name of, and contact information for, the party's advisor (if any); (ii) any requests to consolidate pending cases for hearing; and (iii) a proposed witness list. *The investigator may be a witness at hearing. However, the decision-maker must independently reach a determination regarding responsibility without giving deference to the investigative report.*
- The decision-maker will make all determinations regarding pre-hearing matters and will promptly notify the Title IX Coordinator who, in turn, will promptly notify the parties.

Is the live hearing in-person, or can it be virtual?

- The live hearing can be physical or virtual.
- At the College's discretion, live hearings may be conducted either with all parties physically present in the same geographic location or with any or all parties, witnesses, and other participants appearing at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- At the request of either party, the College shall provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answering questions.



Is the live hearing in-person, or can it be virtual?

- The decision-maker will be trained in the technology to be used at the live hearing.

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
Additional Training Requirements				
Technology to be used at the Live Hearing			X	

Are there rules for the live hearing?

- Cross-Examination: At the live hearing, the decision-maker 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. 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.
- Advisors for Cross-Examination: If a party does not have an advisor present at the live hearing, the College must provide without fee or charge to that party, an advisor of the College's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
- Refusing Cross-Examination: If a party or witness does not submit to cross-examination at the live hearing, the decision-maker cannot rely on any statement of that party or witness in reaching a determination regarding responsibility. Moreover, the decision-maker 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.

Are there rules for the live hearing?

- Relevant Questions: Only relevant cross-examination and other questions may be asked of a party or witness. The basic test for relevance is whether the evidence is probative of the question of responsibility.

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
Additional Training Requirements				
Issues of Relevance of Questions and Evidence			X	
Relevancy of Questions and Evidence of a Complainant's Sexual Predisposition or Prior Sexual Behavior			X	

- *At the end of this training section on relevance, please let us know if you have any questions.*

Are there rules for the live hearing?

- Irrelevant Questions and Evidence: 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:
 1. Someone other than the respondent committed the conduct alleged by the complainant, or
 2. 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 (as consent is defined by the College).
- Other Forms of Irrelevant Evidence and Information: Information protected by a **legally recognized privilege** and any party's **medical, psychological, and similar records** unless the party has given voluntary, written consent.
- Determinations of Relevancy: Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker **must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.**

Are there rape shield protections at hearing?

- The final regulations protect complainants from being asked about or having evidence considered regarding sexual history and behavior. Specifically:
 - All questions and evidence of a complainant's sexual predisposition are irrelevant with no exceptions.
 - Questions and evidence about a complainant's prior sexual behavior are irrelevant unless they meet one of two defined exceptions: (1) they are asked/offered to prove that someone other than the respondent committed the alleged conduct; or (2) they concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent (as consent is defined by the College).
- These rape shield protections do not extend to respondents.

What happens after the live hearing?

- Following the live hearing, the decision maker will issue a written determination regarding responsibility. To reach this determination, the preponderance of the evidence standard must be applied.
- The decision-maker is under an obligation to objectively evaluate all relevant evidence. The decision-maker must independently reach a determination regarding responsibility without giving deference to the investigative report.

What needs to be in the decision-maker's written determination?

- The decision-maker's written determination must:
 - Identify the allegations potentially constituting sexual harassment;
 - Describe the procedural steps from 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;
 - Include the findings of fact supporting the determination;
 - Include the conclusions regarding the application of the College's code of conduct to the facts;
 - Include a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the College imposes on the respondent, and whether remedies designed to restore or preserve equal access to the College's education program or activity will be provided by the College to the complainant; and
 - Include the College's procedures and permissible bases for the complainant and respondent to appeal.

How do the parties receive the decision-maker's written determination?

- The decision-maker will provide his/her written determination to the parties simultaneously.
- The determination becomes final either on the date the College provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

Can the parties appeal the decision-maker's determination?

- Any party can appeal the decision-maker's determination regarding responsibility. Parties can appeal on the following bases:
 1. Procedural irregularity that affected the outcome of the matter;
 2. New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or
 3. The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainant or respondent generally or against the individual complainant or respondent that affected the outcome of the matter.
- Parties also have the right to appeal the College's mandatory or discretionary dismissal decision.



How can the parties file an appeal?

- Appeals must be filed with the Title IX Coordinator in accordance with the policy's designated timeframe.
- Upon receipt of the appeal, the Title IX Coordinator will notify the parties in writing that an appeal has been filed. The Title IX Coordinator will also appoint a reviewer to consider the appeal and notify the parties of the selected reviewer. *The reviewer cannot be the same person as the decision-maker, the investigator, or the Title IX Coordinator.*

What happens during the appeal?

- The reviewer will notify the parties of the appeal procedures and set a schedule for the parties to submit written statements in support of, or challenging, the outcome. The schedule will provide an opportunity for each party to respond to the arguments of the other party.
- Upon reviewing both parties' statements, the reviewer will issue a reasoned written decision describing the result of the appeal and rationale for the result. The written decision will be provided to both parties simultaneously.
- The reviewer's decision shall be final and binding upon the parties.



What remedies are available to complainants under the grievance process?

- This grievance process provides remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.
- The Title IX Coordinator is responsible for effective implementation of any remedies.

What remedies are available to complainants under the grievance process?

- Remedies must be designed to restore or preserve equal access to the education program or activity. The written policy identifies the range of possible remedies for students and employees.
- The grievance process may also provide for discipline or recommendations for discipline where a determination of responsibility for sexual harassment has been made against the respondent. The written policy also identifies the range of possible discipline for student and employees.
- Recommendations for discipline will be pursued according to applicable College policies.



What about informal resolution?

- At any time after receiving a formal complaint but before a determination regarding responsibility, the College may offer the parties the opportunity to engage in informal resolution of the formal complaint.
- **However, informal resolution may not be offered or utilized where the allegations involve an employee sexually harassing a student.**

What about informal resolution?

- The College must obtain the parties' voluntary, written consent to the informal resolution process.
- The Title IX Coordinator must also provide to the parties a written 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.
- A party may withdraw from the informal resolution process at any time prior to reaching an agreed resolution without affecting the proceedings.

What can the informal resolution process look like?

- Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.
- The parties have the freedom to choose the resolution option that is best for them.
- Informal resolutions may reach agreements between the parties, facilitated by the College, that include measures similar to supportive measures but which could also include disciplinary measures.
- Nothing in the final regulations requires informal resolution to involve the parties confronting each other or even being present in the same room.



Training Check-In



You have now been trained on: Requirement #3

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
<u>Requirement #3: Investigations & the Grievance Process</u>				
How to Conduct the Grievance Process	X	X	X	X
How to Conduct an Investigation	X	X	X	X
Hearings	X	X	X	X
Appeals	X	X	X	X
Informal Resolution Processes	X	X	X	X

Do you have any questions about how to conduct the grievance process, how to conduct an investigation, hearings, appeals, or the informal resolution process?



You will now be trained on: Requirements #1 and #4

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
<u>Requirement #1: Conflicts of Interest & Bias</u>				
Against Complainants/Respondents Generally	X	X	X	X
Against an Individual Complainant/Respondent	X	X	X	X
<u>Requirement #4: Impartially</u>				
How to Serve Impartially	X	X	X	X
Avoiding Prejudgment of the Facts at Issue	X	X	X	X
Conflicts of Interest	X	X	X	X
Bias	X	X	X	X

What does it mean to serve impartially?

- Serving impartially includes avoiding prejudgment of the facts at issue, avoiding conflicts of interest, and avoiding bias. To achieve this:
 - The College must respond promptly to every report of sexual harassment in a manner that is not deliberately indifferent.
 - Complainants should never be ignored or met with prejudgment.
 - The College must give every individual impartial, unbiased treatment regardless of personal characteristics.
 - The College must treat all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties.
 - Title IX personnel and the grievance process must not favor one party over another.
- The purpose of the grievance process is to seek out the truth. Above all, Title IX personnel must adhere to the truth-seeking purpose of the grievance process.

What does it mean to avoid prejudice of the facts at issue?

- Prejudgment of the facts at issue does not allow for objective evaluation of evidence and decreases the likelihood that the outcome will be accurate.
- Title IX personnel must always undertake an objective evaluation of the evidence.
- Title IX personnel should never make status-based inferences as to a person's credibility or make conclusions based on party status.

What is a conflict of interest?

- A conflict of interest involves a situation in which a person has a duty to more than one person or organization but cannot do justice to the actual or potentially adverse interest of both parties.
- A conflict of interest is present where an individual's personal interests or relationships conflict with his/her obligation to act in a neutral manner with regard to a complaint against a faculty member, staff member, or student.
- Examples of a conflict of interest include, but are not limited to:
 - Serving as both the Title IX Coordinator and a disciplinary hearing board member.
 - Serving as both the Title IX Coordinator and general counsel.
 - Serving as the investigator of a complaint where the respondent is the investigator's romantic partner.
 - Serving as a decision-maker where the complainant is a relative of the decision-maker.

What is bias?

- Bias is prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.
- Bias includes favoritism toward or against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability, immigration status, financial ability, or other characteristic. Permitting status-based inferences as to a person's credibility invites bias and partiality.
- Examples of prohibited bias include, but are not limited to:
 - Failing to offer supportive measures to a complainant simply because the complainant has been outspoken about certain issues on campus.
 - When a decision-maker issues a determination of responsibility against a respondent simply because the respondent belongs to an organization whose values the decision-maker opposes.
 - Refusing to thoroughly investigate a formal complaint because the investigator generally believes that all complainants are untrustworthy.

What if I have a conflict of interest or bias?

- Any individual designated by the College as a Title IX Coordinator, investigator, decision-maker, reviewer on appeal, or any person designated by the College to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally.
- Any individual designated by the College as a Title IX Coordinator, investigator, decision-maker, reviewer on appeal, or any person designated by the College to facilitate an informal resolution process, may not have a conflict of interest or bias for or against an individual complainant or respondent.

What if I have a conflict of interest or bias?

- If you have a conflict of interest or bias toward complainants or respondents generally, you must notify the Title IX Coordinator immediately. If you are the Title IX Coordinator, you must notify the College President or other designated party immediately.
- If you have a conflict of interest or bias toward a particular complainant, you must notify the Title IX Coordinator immediately. If you are the Title IX Coordinator, you must notify the College President or other designated party immediately.
- If you have a conflict of interest or bias toward a particular respondent, you must notify the Title IX Coordinator immediately. If you are the Title IX Coordinator, you must notify the College President or other designated party immediately.

How are concerns of conflict of interest and bias addressed in the grievance process?

- Sharing the Investigative Report Before Hearing: One purpose of sharing the investigative report before hearing is to prevent a biased outcome in the determination. By sharing the report prior to finalization, potential problems concerning errors, dissatisfaction, and the appearance of bias may be addressed.
- Simultaneous Sharing: Sharing dismissals and written determinations with the parties simultaneously avoids the appearance of bias.
- Objections to Assigned Investigators, Decision-Makers, and Reviewers: The College's Title IX policy affords parties the opportunity to object to the assigned investigator, decision-maker, or reviewer based on conflict of interest or bias.



Training Check-In



You have now been trained on: Requirements #1 and #4

	<u>Title IX Coordinator</u>	<u>Investigator</u>	<u>Decision-Maker</u>	<u>Informal Resolution Facilitator</u>
<u>Requirement #1: Conflicts of Interest & Bias</u>				
Against Complainants/Respondents Generally	X	X	X	X
Against an Individual Complainant/Respondent	X	X	X	X
<u>Requirement #4: Impartially</u>				
How to Serve Impartially	X	X	X	X
Avoiding Prejudgment of the Facts at Issue	X	X	X	X
Conflicts of Interest	X	X	X	X
Bias	X	X	X	X



You have now been trained on: Requirements #1 and #4

- Do you have any questions about:
 - Conflicts of interest or bias against complainants or respondents generally?
 - Conflicts of interest or bias against individual complainants or respondents?
 - How to serve impartially?
 - How to avoid prejudgment of the facts at issue?
 - Conflicts of interest?
 - Bias?

Other Key Aspects of the New Regulations

Are there confidentiality requirements?

- The College must keep the identity of any individual who has made a report or complaint of sex discrimination confidential.
- This includes any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as permitted by FERPA or as required by law, or carry out the purposes of the Title IX regulations, including the conducting of any investigation, hearing, or judicial proceeding arising thereunder.

Are there recordkeeping requirements?

- The College will comply with all recordkeeping requirements imposed by applicable law and regulations. This includes the following records:
 - Each sexual harassment investigation, including any determination regarding responsibility and any audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the education program or activity;
 - Any appeal and the result of that appeal;
 - Any informal resolution and the result of that informal resolution;
 - All Title IX training materials; and
 - Records of any actions, including any supportive measures (and the basis for providing or not providing supportive measures based on the deliberate indifference standard) taken in response to a report or formal complaint of sexual harassment.
- Beginning August 14, 2020, the above-cited records must be maintained for no less than seven (7) years from the conclusion of a matter (including any appeal).

Do the regulations prohibit retaliation?

- The College prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX or its regulations, 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 the College's policy, Title IX, or Title IX's regulations.
- Intimidation, threats, coercion, or discrimination, including charges against an individual for code 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 its regulations, constitutes retaliation.
- Complaints alleging retaliation may be filed according to the College's grievance procedures for sex discrimination.





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The Wharf
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