Sexual Harassment & Title IX

Investigator and Adjudicator Training

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AGENDA FOR TODAY

- Introductions
- What we will cover:
  - Brief orientation to TIX landscape and what is different now
  - The new Title IX regulations and the College's Title IX Policy, including:
    - Where and when Title IX applies / Scope of the College's education programs and activities
    - Conduct covered under Title IX / Definitions of sexual harassment
    - Title IX Policy and the grievance process (including investigations, hearings, appeals and alternative resolutions)
    - Relevance of questions/Evidence
    - Impartiality, conflicts of interest and bias

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Why you are here

- A *recipient* must ensure that Title IX Coordinators, investigators, adjudicators, and any person who facilitates an informal resolution process, receive training on:
- The definition of sexual harassment;
- The scope of the recipient's education program or activity;
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence;
- Adjudicators must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.

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Part One

Title IX Harassment – Where We Have Come From

A BRIEF HISTORY OF TITLE IX

- Title IX became law in 1972.
- It states, in relevant part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."
- Until 1998, if you asked someone about Title IX, the response would focus on athletics, and particularly on expanded opportunities for female athletes.

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Brief History: *GEBSER*

- In 1998, the Supreme Court decided *Gebser v. Lago Vista Independent School District.*
- Frank Waldrop, a teacher at Lago Vista, groomed Alida Gebser during her freshman year in high school, and the two began a sexual affair that spring. In January of her sophomore year, a police officer caught them engaging in sexual intercourse.
- Waldrop was arrested, and immediately fired.
- Gebser sued the school district under Title IX, seeking money damages.
- The Court held that where a school has **actual knowledge** of an employee sexually harassing a student but responds with **deliberate indifference** to such knowledge, the school itself has engaged in discrimination, subjecting the school to money damages in a private lawsuit under Title IX.
- The *Gebser* case was dismissed.

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Brief History: *DAVIS*

- In 1999, in *Davis v. Monroe County Board of Education*, the Supreme Court held that where sexual harassment is committed by a peer rather than an employee (i.e., student to student sexual harassment), the same standards of **actual knowledge** and **deliberate indifference** apply.
- The *Davis* Court additionally crafted a definition of when sex-based conduct becomes actionable sexual harassment, defining the conduct as **"so severe, pervasive, and objectively offensive"** that it denies its victims equal access to education.
- The *Davis* case was allowed to proceed.

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Brief History: Prior OCR Guidance

During the Obama Administration, the 2011 Dear Colleague Letter and 2014 Q&As established new requirements for Title IX compliance, including:

- Colleges must investigate any claim made by a student that they had been the victim of sex discrimination **in any form**, including sexual misconduct.
- Sexual misconduct was defined as sexual assault, sexual violence, sexual exploitation, or sexual harassment.
- Sexual harassment was defined broadly as any "unwelcome conduct of a sexual nature."
- Equally important, whether sexual conduct was unwelcome was judged by a **subjective, not an objective, standard**. Whether a reasonable person would consider the conduct to be unwelcome was irrelevant. What mattered was that the student believed they had been the victim of unwelcome conduct of a sexual nature.
- Except for a limited group of "confidential employees," any faculty or staff member had to report any possible sexual misconduct against a student.
- OCR asserted that preponderance of the evidence (more likely than not) was the standard by which sexual misconduct cases must be judged.
- There was no right to a formal hearing.

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Part Two

The New Title IX Regulations on Sexual Harassment & the College's Revised Title IX Policy

The New Title IX Regulations

- In May, 2020, the Department of Education published new Title IX regulations on sexual harassment. 34 C.F.R. Part 106. https://www2.ed.gov.about/offices/list/ocr/newsroom.html
- The regulations themselves are 7 pages in length.
- The explanatory preamble is over 500 pages!
- The effective date of the regulations was August 14, 2020.
- The 2020 regulations return the focus of Title IX response requirements by colleges to "**actual knowledge**" and "**deliberate indifference**."
- Only if a college has **actual knowledge** of **sexual harassment** in its education program or activity against a person **in the United States** does Title IX require it to respond promptly in a manner that is not **deliberately indifferent**, meaning not clearly unreasonable in light of the known circumstances.
- **Actual knowledge** means notice of sexual harassment or allegations of sexual harassment to **a Title IX Coordinator** or any official who has the authority to institute corrective measures on behalf of the college.

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How Might an Institution Be Deliberately Indifferent *(and subject to liability via OCR investigation or civil lawsuit)*?

- Failing to treat Complainants and Respondents equitably
- Presuming a Respondent is responsible before a determination is made following a hearing.
- Failing to objectively evaluate all relevant evidence.
- Failing to ensure that any individuals involved in the grievance process (coordinators, investigators, adjudicator) have appropriate training, and do not have conflicts of interest or bias
- Failing to conclude the grievance process promptly and explain reasons for delay.
- Failing to provide notices of meetings and hearings.
- Failing to provide opportunities for parties to review and respond to relevant evidence, both favorable and unfavorable.
- Failing to provide appropriate supportive measures.

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Deliberately Indifferent – continued

- Failing to allow parties to be accompanied to any meetings or hearings by an advisor of their choice.
- Failing to give parties the opportunity to present witnesses, as well as other relevant evidence.
- Placing the burden of gathering evidence and of proof on the Complainant.
- Restricting the parties from speaking about the case for their own emotional support and to prepare their case.
- Failing to follow confidentiality and privacy laws.

ALL OF THESE EXPECTATIONS ARE REFLECTED IN TITLE IX POLICY

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How Does the College Avoid Being Deliberately Indifferent?

- By appointing a Title IX Coordinator *(done)*.
- By adopting a policy that complies with the 2020 Title IX regulations *(done)*.
- By following the regulations and policy.
- By retaining required records to demonstrate compliance.

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Who is Covered by the Title IX Regulations Now?

- All matriculated students, including those on study away and those who are on a leave or suspension.
- Staff and faculty members employed in the College's education programs and activities
- Third parties who are participating in or attempting to participate in a College education program or activity (e.g., volunteers, high school students touring campus or attending campus programs, applicants for employment, participants in alumni programs, etc.).
- Only individuals are covered, not organizations such as student clubs or teams.

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Where Does Title IX Apply: "Education Programs and Activities"

- Under the new regulations, colleges only have a duty to respond to sexual harassment which occurs within their "education programs and activities."
- "Education, programs and activities" is defined as:

  "*locations, events or circumstances over which the College exercised substantial control over both the Respondent [alleged perpetrator] and the context in which alleged sexual harassment occurred and also includes any buildings owned or controlled by a student organization that is officially recognized by the College.*"

- The incident must have taken place in the United States.

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How is Sexual Harassment Defined under the Title IX Regulations: *Quid Pro Quo and Hostile Environment*

- The regulations prohibit **sexual harassment**. This term encompasses the following types of conduct on the basis of sex
- **Quid Pro Quo** harassment by an **employee** (*conditioning provision of the College's aid, benefit or service on an individual's participation in unwelcome sexual conduct*) against another employee or a student (e.g. a good evaluation for an employee; a better grade for a student).
- **Hostile Environment**: *Unwelcome conduct based on sex that a reasonable person would consider so* ***severe, pervasive AND objectively offensive*** *as to deny the victim equal access to the College's education programs and activities.*

The prior OCR Guidance definition was broader -- Unwelcome conduct that was sufficiently severe, persistent, OR pervasive so as to limit a student's ability to participate in or benefit from the College's education programs and activities.

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How is Title IX Sexual Harassment Defined: *Sexual Assault, Dating Violence, Domestic Violence, Stalking*

Sexual Assault (an offense classified as a forcible or non-forcible sex offense under the FBI's Uniform Crime Reporting System).

- **Forcible Sex Offenses**

1) **Forcible rape** (except statutory rape): The carnal knowledge of a person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their temporary or mental or physical incapacity.

2) **Forcible sodomy**: Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent or mental incapacity.

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Definitions: Sexual Assault, continued

3) **Sexual assault with an object**: To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.

4) **Forcible fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.

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Definitions: Sexual Assault, continued

- **Non-Forcible sex offenses** – Unlawful, non-forcible sexual intercourse, including incest and statutory rape.
  1) **Incest:** Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
  2) **Statutory rape:** Non-forcible sexual intercourse with a person who is under the statutory age of consent. There is no force or coercion used in statutory rape; the act is not an attack.

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Definitions: Dating Violence

- **Dating violence** is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship will be determined based on consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. Dating violence includes, but is not limited to:
  - Sexual abuse
  - Physical abuse
  - Emotional violence
  - The threat of such violence
  - Does not include acts that meet the definition of Domestic Violence

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Definitions: Domestic Violence

- 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 cohabiting 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 Maine, or by any other person against an adult or youth victim who is protected from that person's acts under Maine's domestic or family violence laws, including:
  - Domestic violence assault
  - Domestic violence criminal threatening
  - Domestic violence threatening
  - Domestic violence stalking
  - Domestic violence reckless conduct

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Definition: Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress. Examples of stalking may include:
  - Unwanted, intrusive, and frightening communications by phone, mail, and/or email
  - Repeatedly leaving or sending unwanted items such as gifts
  - Following or waiting for a person at places such as home, school, or work
  - Making direct or indirect threats of harm to a person, or to the person's children, relatives, friends, or pets
  - Damaging or threatening to damage property
  - Harassment through the Internet or social media
  - Posting information or spreading rumors about a person

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Definition: Retaliation

- Neither the College nor any person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because the individual made a report or formal complaint, testified, assisted, participated or refused to participate in any manner in an investigation, proceeding or hearing under the policy.
- Retaliation is addressed only through the Student Code of Conduct or the Staff/Faculty disciplinary process.
- Meaning that Investigators and Adjudicators will not deal with retaliation claims.

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Other Important Definitions: Consent

- The Bowdoin Title IX Policy definition of Effective Consent is as follows:

> *Words or actions that show a knowing and voluntary agreement to engage in mutually agreed-upon sexual activity. Effective Consent cannot be gained by Force, by ignoring or acting in spite of the objections of another, or by taking advantage of the Incapacitation of another, where the Respondent knows or reasonably should have know of such Incapacitation. The use of alcohol or other drugs will never function to excuse behavior that violates this Policy. Effective Consent is also absent when the activity in question exceeds the scope of Effective Consent previously given, including where consent was given to certain sexual activity under certain conditions (for example, with the use of a barrier method of birth control) and the activity in question violates any such conditions. In addition, certain states have designated a minimum age under which a person cannot give Effective Consent.*

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Other Important Definitions: Consent

- Under Bowdoin's Policy, Force is defined as:

  Physical force, violence, threat, intimidation or coercion.

- Coercion is defined as:

  The improper use of pressure to compel another to engage in or continue sexual activity against their will, including duress, cajoling, manipulation, and blackmail. Coercion occurs when a Respondent keeps pressuring the Complainant to acquiesce to sexual activity even after the Complainant has made clear that the pressure is unwelcome.

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Other Important Definitions: Incapacitation

- In the context of sexual activity, incapacitation means that a person lacks the ability or capacity to make informed, rational judgments about whether to consent to sexual activity.
- Incapacitation exists when a person is asleep or unconscious, and can also exist because of a temporary mental or physical health condition.
- Incapacitation can exist when a person is so impaired by alcohol or drugs that the person lacks the ability or capacity to make rational, reasonable judgments (i.e., beyond merely being drunk, intoxicated or "high").
- Some indications of incapacitation may include lack of control over physical movements, lack of awareness of circumstances or surroundings, and slurred speech.

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To summarize: What conduct is prohibited under the Title IX Policy?

- **Quid pro quo harassment** by an employee.
- Unwelcome conduct based on sex that is so severe, pervasive AND objectively offensive that it denies access to education programs and activities (referred to in the Title IX Regulations as **hostile environment harassment)**.
- **Sexual assault**:
  - Situations where there is actual sexual contact involving penetration.
  - Touching (fondling) of genitals, breasts, or buttocks.
- **Dating violence**.
- **Domestic violence**.
- **Stalking**.
- **Retaliation.**

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What is excluded from Title IX?

- Depending on the facts and circumstances, including the extent of the activity, behavior typically considered "sexual exploitation" may not, itself, amount to "sexual harassment" under Title IX (although it may be separately actionable by the College under a disciplinary policy)

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What is excluded from Title IX?

- Any sexual harassment occurring out of the United States.
- Any sexual harassment occurring in the United States, but in a location over which the institution has no control, unless (i) the off-campus incident occurs as part of the college's "operations," (ii) the College exercised substantial control over the respondent at that location, or (iii) the incident occurs at an off-campus building owned or controlled by a student organization.
- Sexting or emailing or oral comments that are unwelcome and sex-based, but are not so **severe, pervasive AND objectively offensive** that it effectively and objectively denies a person's access to educational programs and activities.
- Quid Pro Quo by one student on another student.

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Covered or Not?

- Student A, transferred from the College one year ago in his sophomore year, alleges that Student B fondled him at Student C's off-campus, private apartment in Brunswick (assuming no interest in alumni activities).
- Student D, who left the College because she claims that Student E repeatedly sent her pornographic and sexual texts and email (assuming she is hoping to return if the harassment ends).

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Other Disciplinary Action

- The regulations permit institutions to pursue disciplinary processes for behavior that falls outside of Title IX
- Bowdoin's Title IX policy states that behavior that falls outside of Title IX due only to where it occurs will be treated as an alleged disciplinary violation
- The same Title IX grievance process will apply
- For other sexual misconduct, separate student and employee disciplinary processes apply under separate policies

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"Report" of Sexual Harassment

- There is a difference between a **report** of sexual harassment and a **formal complaint** under the Title IX regulations.

- Upon receiving a **report**, which can come from anyone (and may be anonymous), the Title IX Coordinator must:
  - ✓ In consultation with the possible victim, offer **supportive measures.**
    - ✓ These are individualized services, previously referred to as "interim measures," such as no contact orders, changes to class or work locations, changes in residence, etc.
    - ✓ Any such supportive measures cannot "unreasonably" interfere with a Respondent's access to education programs and activities, and cannot be "disciplinary" before a determination of responsibility.
    - ✓ If supportive measures are not provided, the Title IX Coordinator must document why.
  - ✓ Explain the **Formal Complaint Resolution and Alternative (Informal) Resolution** processes to the possible victim. (The College cannot offer an Alternative (informal) Resolution process without a formal complaint first being filed.)

- Generally, the College does not need to act beyond these steps unless it receives a **formal complaint.**

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Formal Complaint of Sexual Harassment

- A **formal complaint** of Title IX sexual harassment:
- Initiates the Complaint Procedure.
- Can only be filed and signed by the person who claims to be the victim (**Complainant**) who is a student or employee (Also, recall that prospective students, applicants for employment and other third parties may also be able to file a formal complaint in certain circumstances.)
- A Title IX Coordinator can file a formal complaint in certain circumstances, but is not the Complainant.
- The Formal Complaint must be a document or electronic filing that includes a signature and provides:
  - ✓ Basic information regarding claimed sexual harassment (what lawyers call a short and plain statement of the claim), such as date, time, location, type of incident, name(s) of individuals involved; and
  - ✓ A request for an investigation of an allegation of sexual harassment.

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Formal Complaint, continued

- Formal complaints can be consolidated if they arise from the same incident/facts.
- Formal complaints may be amended (with notice to the parties).

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Mandatory Dismissal of Formal Complaints

- Under the Title IX regulations, the Title IX Coordinator **must** dismiss a formal complaint:
  - If the conduct alleged in the formal complaint does not constitute sexual harassment under the Title IX regulations; or
  - If the conduct alleged did not occur within the scope of the College's education programs and activities, or did not occur in the United States.
- The College will assess such conduct to determine if it violates another disciplinary policy

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Permissive Dismissal of Formal Complaints

- The Title IX Coordinator **may** dismiss a formal complaint:
  - If a Complainant withdraws the formal complaint, or withdraws particular allegations within the complaint;
  - The Respondent is no longer enrolled in or employed by the College; or
  - If there are specific circumstances that prevent the College from gathering evidence sufficient to reach a determination regarding the formal complaint.
- Parties have the right to appeal the decision to dismiss a formal complaint.

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Part Three

The Formal Resolution Process under the Title IX Policy – Alternate Resolutions, Investigations, Hearings, Sanctions and Appeals

Advisors for Parties

- The Title IX regulations require that parties be allowed to have an advisor of their choice throughout the formal resolution process, who may be an attorney.
- The advisor plays an important role at a live hearing, in conducting cross examination.
- In addition, Bowdoin permits parties to have a supporter for emotional and personal support during any meetings, the alternative resolution process and the formal resolution process. Supporters are trained members of the Bowdoin community.
- Advisors and supporters cannot speak on behalf of the party (except for advisor cross examinations at hearing).

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Notice of Formal Complaint

Parties must receive detailed written notice of a formal complaint that includes, among other things:

- Sufficient details known at the time – identities of parties, conduct alleged, dates and location *with sufficient time to prepare* for initial interview (no less than five days);
- A statement that the Respondent *is presumed not responsible* for the alleged conduct unless and until determined to be responsible at the conclusion of the process;
- Notice that the parties may have an advisor of their choice, who may be an attorney;
- Notice that the College, not any party**,** has the burden of gathering evidence and the burden of proof; and
- The name of the investigator, with sufficient time to raise concerns of conflict of interest or bias.

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Investigation of Formal Complaint

The investigator will:

- Interview the parties after they have received appropriate notice with sufficient time to prepare;
- Allow the parties to have their advisor at all meetings;
- Allow parties to identify witnesses, including expert witnesses and
  submit inculpatory and exculpatory evidence;
- Interview witnesses and conduct other appropriate fact-gathering activities (site visits, review of documents, etc.); and
- Consider evidence that is relevant and directly related to the allegations in the formal complaint.

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Investigation Cont.

The investigator will:

- Provide the parties with an equal opportunity to inspect and review any evidence that is obtained in the investigation, whether the investigator considers the evidence reliable or not, and including favorable and unfavorable evidence; parties permitted to submit written response.
- Give the parties the opportunity to respond to the evidence prior to the conclusion of the investigation.
- Give the parties the opportunity to respond to the investigation report before it is finalized.
- Issue an investigation report that fairly summarizes relevant evidence and submit it to the Title IX Coordinator.
- The investigator is permitted to comment on the credibility of a party, witness, or documentary evidence.
- Timelines are specified in the Policy

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Relevant Evidence

- The regulations do not define relevant evidence
- Generally, relevant evidence is evidence that tends to make a fact of consequence more or less probable than it would be without the evidence
- Additional limitations on consideration of certain evidence is discussed below

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Bowdoin's Process

- The formal complaint is referred to a trained, outside investigator to conduct an investigation.
- When the investigation is completed, the case proceeds to a live hearing.
- The hearing is presided over by a trained, outside Hearing Officer, who makes determinations based on a preponderance of the evidence standard, whether a Respondent is responsible or not responsible for a violation of the Policy.
- If there is a finding of responsibility, sanctions are determined by separate sanctioning Decision Makers:
- Any party has the right to appeal the decisions.

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Informal/Alternative Resolution

- Title IX regulations permit an Informal/Alternative Resolution Process if:
  - Formal complaint is filed.
  - Agreed to in writing by both parties, and the Title IX Coordinator believes the circumstances are appropriate.

- Exception: Cases alleging sexual harassment by an employee against a student may not be resolved by Alternative Resolution.

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Alternative Resolution

- Alternative Resolution is a facilitated process that does not involve an investigation or a sanction and allows the parties to attempt to reach an agreed-to resolution of the matter through an intermediary
- Any outcome agreement must be signed in writing by both parties and Title IX coordinator must approve any terms that involve the College
- If agreement is not reached, information from the Alternative Resolution process may not be used as evidence in the formal resolution process.
- The College or a party may, at any time prior to the conclusion of the Alternative Resolution process, elect to end the process and initiate the formal resolution process.
- An Alternative Resolution may be pursued at any time prior to the beginning of the hearing in the formal resolution process.

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The Live Hearing

- The Title IX regulations emphasize that the burden of proof rests with the College, not the Complainant or Respondent.
- The Title IX Coordinator will issue notice of the hearing, identifying the Hearing Officer (external) and the other Decision Makers (who determine sanctions).
- Hearing Officer presides over the live hearing, and will establish rules of decorum that parties and their advisors must follow.
- At the request of a Party (or College's discretion), the hearing will be held virtually with Parties in separate rooms that allows the Parties and Hearing Officer to see and hear each other.
- The hearing is recorded (audio, video or steno) and recording is made available to parties for inspection and review.

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Live hearing – continued

- Parties must have an advisor at the live hearing; an Advisor may be an attorney. If a party does not have an Advisor for the live hearing, the Title IX Coordinator will appoint an advisor for the party (at no cost).
- The parties (not advisors) may make opening and closing statements. Such statements will be directed to the Hearing Officer, and not an opposing party.
- The Title IX regulations specify that a party's advisor (and not the party) may cross-examine the other party and the witnesses.
- All evidence gathered in the investigation that is directly related to the allegations raised in the formal complaint, and which the investigator provided to the parties prior to the hearing, will be available at the hearing for purposes of reference and cross-examination.

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Live hearing – Continued

- At the hearing, the college and the Parties have an equal opportunity to present witnesses who have provided information to the Investigator, or who otherwise can offer relevant evidence.
- Could include expert witnesses.
- Witnesses appear only for their own testimony, but remain available for recall throughout the hearing.

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Live hearing – Presentation of Evidence

- After Opening Statements, the Complainant presents evidence. With the assistance of their Advisor, the Complainant may testify and offer the testimony of supporting witnesses in the order of the Complainant's choosing. The Complainant may not present any Respondent as a witness, without the Respondent's consent.
- The Title IX regulations require that a Respondent's Advisor (and not the Respondent) may cross-examine the Complainant and Complainant's witnesses.
- When the Complainant has completed the presentation of evidence, the Respondent, with the assistance of the Advisor, may testify and offer the testimony of supporting witnesses in the order of the Respondent's choosing. The Respondent may not present any Complainant as a witness, without the Complainant's consent.
- The Complainant's Advisor (and not the Complainant) may cross-examine the Respondent and Respondent's witnesses.
- The Hearing Officer may ask questions of any party or witness.

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Cross-Examination

- The Department of Education/OCR view the cross-examination requirement as a critical factor in providing due process to parties.
- Cross-examination is often adversarial, particularly where the credibility of a Complainant or Respondent is a critical element of the case.
- The regulations commentary provide that cross-examination may not be aggressive or abusive.
- Cross-examination includes permission to ask the opposing party and any other witnesses in the matter all ***relevant*** questions, including those challenging credibility.

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Rulings on Evidence (Relevance)

- The Hearing Officer will make determinations in real time regarding the relevance of questions posed by advisors and will explain any decisions to exclude any question/evidence. The formal rules of evidence do not apply.
- Advisors may object to questions posed by the other party's advisor on the grounds of ***relevance only***.
- Evidence will be considered by the Hearing Officer if it is relevant, and is of the type on which a reasonable person relies in their ordinary affairs.
- Evidence of sex stereotypes is not relevant

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Rulings On Evidence (Relevance)

- Questions and evidence about a Complainant's sexual predisposition or prior sexual behavior is not relevant, unless it:
    - is offered to prove that someone other than a Respondent committed the alleged conduct, or
    - concerns specific incidents of the Complainant's prior sexual behavior with a Respondent and is to prove consent.
- Evidence relating to a party's medical, psychological or similar records is not admissible unless the party has consented in writing to the disclosure of those records.
- Evidence that is protected from disclosure by the attorney-client privilege or other legally-recognized privilege or immunity in the State of Maine is not admissible unless the holder of the privilege has waived the privilege.

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Other Evidence That May Not Be Considered

- If a party or witness does not submit to cross-examination at the live hearing, the Hearing Officer must not rely on any statement of that party or witness in reaching a determination of responsibility.
- The Hearing Officer may not draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.

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Sanctioning Decision Makers

- If the Hearing Officer finds that the Respondent is responsible, the other Decision Makers will consider the matter and determine any appropriate sanction or remedy
- The sanctioning Decision Makers are:
  - Representatives from the Student Sexual Misconduct Panel (student cases).
  - Vice President/Dean of Academic Affairs in consultation with Vice President Human Resources (faculty cases); or
  - Appropriate Senior Officer in consultation with Vice President Human Resources (staff cases).

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Part Four

Decision-Making, Sanctions, Appeals, and Conflicts of Interest/Bias

The Decision and Outcome Letter

- Following objective consideration of all the relevant evidence (including cross-examinations), the Decision Makers will issue the decision, which will include:
  - Allegations potentially constituting sexual harassment;
  - Procedural steps (notice, investigation steps, hearings);
  - Findings of fact;
  - Conclusions regarding the application of Policy to the facts, and rationale for results;
  - Determination regarding responsibility;
  - Any disciplinary sanctions and whether remedies will be provided to the Complainant;
  - Procedure and bases for the parties to appeal.

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Sanctions

- Some of the potential sanctions for Student Respondents:
  - Reprimand;
  - Probation
  - Suspension
  - Permanent Dismissal
  - Withholding Diploma
  - Revocation of Degree

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Sanctions for Employees

- For Employee Respondents, sanctions may include, but are not limited to:
  - Trainings
  - Counseling
  - Verbal or written warnings
  - Probation
  - Demotion
  - Suspension with or without pay
  - Job in jeopardy action
  - Forfeiture of pay increase
  - Loss of privileges
  - Loss of supervisory responsibilities
  - Immediate termination of employment

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Other Sanctions and Remedies

- Decision Makers may impose other appropriate sanctions.
- The College will provide remedies to ensure that the Complainant has equal access to the College's education programs and activities (e.g., counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus)
- Additional remedies may be disciplinary and punitive in nature for the Respondent after a finding of responsibility.

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Appeals

- Parties may appeal:
  - Title IX Coordinator's decision to dismiss a Formal Complaint; and
  - Decision Makers' decision.
- Bases for appeal:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time of the decision that could affect the outcome of the matter; or
  - The Title IX Coordinator, investigator or a decision maker had a conflict of interest or bias for or against Complainants or Respondents generally, or the individually Complainant or Respondent that affected the outcome of the matter.

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Appeals - continued

- Review on appeal will be impartial and will include consideration of the written record of the matter and, where appropriate, consultation with other College officials.

- The Appeal Officer may:
  1) Deny the appeal and affirm the original decision;
  2) Grant the appeal and order a previously dismissed Formal Complaint to be reinstated;
  3) Grant the appeal and remand to the Decision Makers for further consideration;
  4) Grant the appeal and remand for a new live hearing before new Decision Maker(s); or
  5) Grant the appeal and revise the sanction.

- The Appeals Officer will issue a written decision, which shall be provided to both parties simultaneously. The written decision will describe the result of the appeal and the rationale.

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Conflict of Interest & Bias

- The Final Title IX Regulations mandate training on the topics of bias, conflict of interest, and impartiality of Title IX Coordinators, investigators, decision-makers, or "…person designated by a recipient to facilitate an informal resolution process."

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What is a Conflict of Interest or Bias?

- The Title IX regulations require that those involved in Title IX processes must not pre-judge the facts and must not be biased against or in favor of a particular class of parties in the complaint process.
  - Believing that a complainant, as a victim or survivor, should be presumptively believed constitutes bias.
  - Believing that all women or all men behave in a certain way constitutes bias.
  - Believing that complaints generally arise from sex that someone regrets constitutes bias.
  - Believing that accused parties are usually guilty constitutes bias.

Remember – The regulations require a presumption of non-responsibility on the part of a Respondent (until the point when the Hearing Officer makes a finding).

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Conflict of Interest/Bias - continued

- A conflict of interest or bias can also occur in a particular case, depending upon knowledge about or a prior relationship with individuals involved in a particular case (positive or negative).
- Conflict or bias on the part of Title IX Coordinator, investigator, or a decision maker is a basis for appeal.

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What Is Not Necessarily A Conflict of Interest or Bias

- Being a College employee.
- Past advocacy in the field of sexual violence.
- Conflict of interest and bias are judged by an objective standard - whether a reasonable person would believe bias exists.

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THANK YOU!

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