



Title IX

Guidance for Title IX Coordinators and Investigators

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Background

- The 2020 Title IX Regulations
 - Significant Provisions
- March 8 2021 *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
 - April 2021 – OCR launched “comprehensive review” of Title IX regulations
 - Public Hearing in June 2021
 - OCR plans to issue Notice of Proposed Rulemaking in May 2022
- Navigating the Title IX Process
 - Notice
 - Supportive Measures
 - Investigation
 - Decision-Making



Definition of Sexual Harassment

- Sexual harassment is:
 - Conditioning an aid, benefit, or service on an individual's participation in unwelcome sexual conduct (*quid pro quo*)
 - Unwelcome sexual behavior determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person **equal** access to a program or activity offered by the college
 - "Sexual assault," "dating violence," "domestic violence," or "stalking," as defined by federal statutes known as the Clery Act and the Violence Against Women Act (VAWA)
- The US Department of Education defines sexual harassment under Title IX to include harassment based on sexual orientation and gender identity.

Quid Pro Quo



- Generally, conditioning a benefit or aid offered by the college on acquiescence to a sexual advance
- Examples
 - A teacher who conditions a grade on such acquiescence
 - An administrator who conditions a promotion on such acquiescence
 - A school board member who conditions a his or her vote on such acquiescence



Effective Denial of Equal Access

- Unwelcomed sexual behavior a reasonable person determines is:
 - So “severe,” “pervasive,” and “objectively offensive”
 - That it effectively denies a person equal access to a program or activity offered by the college

This definition needs to be unpacked



Effective Denial of Equal Access

- Does this mean a person's "total or entire educational access has been denied?"
 - No. Complainants need not have "dropped out of school, failed a class, had a panic attack or otherwise reached a "breaking point" or exhibited trauma symptoms.
 - Schools cannot turn away a complainant because they are "not traumatized enough."



Effective Denial of Equal Access

- Examples may include:
 - Skipping class to avoid the harasser
 - Decline in GPA
 - Difficulty concentrating in class
 - Quitting a team or other extracurricular activity
- Complainant need not have “already suffered loss of education before being able to report sexual harassment” and while examples are illustrative, “no concrete injury is required” to provide an effective denial of equal access



Effective Denial of Equal Access - Hypotheticals

- An administrator or faculty member who:
 - Inappropriately touches a colleague or a student
 - Asks a student to turn on her camera so he “can see her pretty face”
- A female student or group of female students:
 - Who, daily, tease a male student about his sexual orientation in the dining hall, causing student to avoid the dining hall
 - Who frequently squeeze a male student's bottom and call him sexy. It bothers him and he's told them to stop, but it hasn't really impacted his daily life or education
- A male student Snaps a female student during class, telling her she “looks hot today” and asking her on a date. The female student is deeply uncomfortable because she has a history of trauma and starts skipping class.

Third Prong – Clery Act and VAWA

- **“Sexual Assault”** is an offense, classified as forcible or nonforcible sex offense by the FBI's uniform crime reporting system
- **Forcible Sex Offenses**
 - Forcible Rape, including where victim is incapable of giving consent because of age, or temporary or permanent mental or physical incapacity
 - Forcible Sodomy, similarly-defined
 - Sexual Assault with an Object, similarly-defined
 - Forcible Fondling, defined as forcibly touching of private body parts of another for sexual gratification, similarly-defined
- **Nonforcible Sex Offenses**
 - Incest
 - Statutory Rape. In Michigan, the age of consent is 16. However, statutory rape is defined to include consensual sex between teachers and students who are younger than 18.



Third Prong – Clery Act and VAWA

- “**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; and,
 - Where the existence of the relationship is determined by considering the following factors:
 - The length of the relationship
 - The type of relationship
 - The frequency of interactions

Third Prong – Clery Act and VAWA

- **“Domestic Violence”** includes 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 Michigan domestic or family violence laws, or by any other person against an adult or **“youth”** victim who is protected from that person's action under Michigan domestic or family violence laws
 - For purposes of this law, a “youth” is defined as a person from 11 to 24 years old
- **“Stalking”** is 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



Duty to Report

- All Baker College employee have a duty to report sexual assault, with limited exceptions
 - Legal or other privilege; Disclosures made at public support survivor events; Student-employees acting outside employment
- Most College employees have a duty to report sexual harassment, sex discrimination and retaliation within 2 days of becoming aware. This includes, but is not limited to:
 - Executive officers; Deans, Directors, Department Heads/Chairs; Graduate/Undergrad Chairs; Supervisors of 3 or more employees; Advisors to Student groups; Coaches; Resident Advisors; Individuals serving in Student Life/Campus Safety



Confidentiality

- All information connected with a report must be treated as confidential and only shared with individuals as necessary for conducting the investigation, providing supportive measures, or otherwise carrying out appropriate College functions
- If individual requests no investigation/discipline, Title IX Coordinator should provide information/supportive measures and evaluate whether request may be honored without threat to educational environment
- If Title IX Coordinator proceeds, individual has no obligation to participate



Key Terms

Complainant = an individual who is alleged to be the victim of conduct that could constitute sexual harassment

Respondent = an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment



Actual Notice - Definition

- The College is deemed to have actual notice of alleged sexual harassment if a Baker College Title IX Coordinator or *any official of the College who has authority to institute corrective measures on behalf of the College.*
 - Title IX Coordinators; Deputy Title IX Coordinators; Directors of Student Affairs, Assistant Directors of Campus Safety, Baker College President, Campus Presidents, Campus Directors, Directors of Campus Safety

The Title IX Coordinator

- Every college is required to appoint a Title IX Coordinator, whose job title includes the words “Title IX Coordinator”
- Every college is required to post the Title IX Coordinator’s contact information (i.e., office location, telephone number, and email address) on its website, to publish the contact information in all catalogues and handbooks
- Colleges are also required to post Title IX training on their websites





Title IX Coordinator's Duties

- To oversee the College's compliance with Title IX
- To respond to any report of sexual harassment against any College employee or student
- To identify and offer appropriate supportive measures to **both** Complainant and Respondent
- To oversee and/or participate in the resolution of any formal complaint of sexual harassment according to the College's grievance procedure



Responding to Reports of Sexual Harassment

- Reports of sexual harassment may be verbal or written and may be received at any time
- Upon receiving a report, the Title IX Coordinator must:
 - Contact Complainant as soon as practicable
 - Notify Complainant of his/her/their right to file a formal complaint and explain the grievance process
 - Discuss and implement “**supportive measures**”



Contacting Complainant

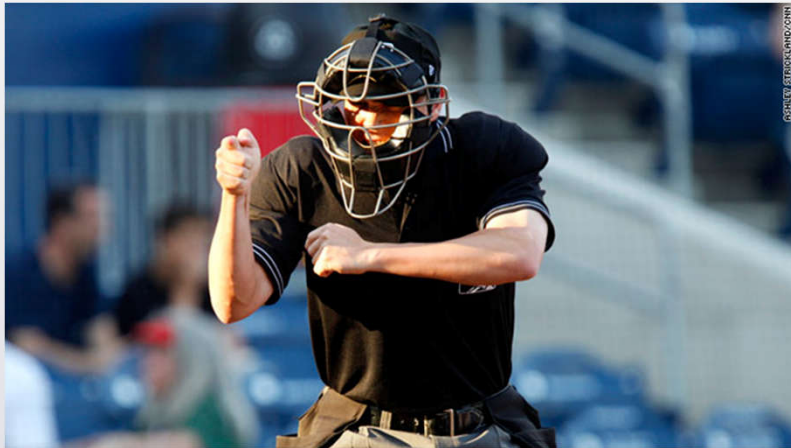
- Keep in Mind:
 - Complainant may not be aware of the report prior to notice from the Title IX Coordinator
 - An in-person or virtual meeting may be preferable to a telephone conversation
 - Complainant is probably not familiar with the complaint process or grievance procedure – Go slow and invite follow up!
 - “Supportive measures” can and should be implemented regardless whether a formal complaint is filed
 - It’s a lot to take in, and no final decisions need be made during the first conversation
 - The importance of emphasizing Title IX’s prohibition against retaliation
- **Take Notes!!**



Supportive Measures

- Title IX was enacted to prevent sex discrimination and harassment from adversely affecting access to educational opportunities
- Supportive measures should restore or ensure continued access to educational opportunities, must be free to Complainant, and may not be punitive or unreasonably burden Respondent
- Non-exclusive examples of supportive measures include: **no-contact orders, referrals to victim advocacy resources, counseling, or health services; academic support; course modifications; schedule changes; transfers; housing changes; increased security and monitoring**
- The Title IX Coordinator must consider, *but is not bound by*, Complainant's wishes

Temporary Removal



- The temporary removal of a Respondent-student is not a supportive measure
 - A Respondent-student may be removed based on an individualized assessment that he/she poses an immediate threat to the physical health or safety of Complainant or others
 - Due process must follow immediately
- A Respondent-employee may be placed on a temporary administrative leave



The Formal Complaint

- A formal complaint should describe the **who, what, why, where, and when**
- A formal complaint must be signed by Complainant
- A formal complaint may (and at times, must) be filed and signed by the Title IX Coordinator
 - Does the Title IX Coordinator have reason to believe that a student, employee or other community member poses a current threat to the educational environment?
 - Does the Title IX Coordinator have reason to believe that damage was done to the educational environment that would need to be redressed?



Presumption of Innocence

- Respondents are **always** presumed innocent; or, more technically, not responsible for sexual harassment
- Respondents may not be sanctioned unless and until an investigation is completed and a final decision rendered
- **Why?**



Notice

- The Title IX Coordinator must notify Complainant and Respondent, in writing, when a formal complaint is filed
 - Use Same Method for *Initial* Contact with Respondent that Used with Complainant
 - Written Notice to Respondent must include:
 - a statement of the allegations in sufficient detail to permit Respondent to prepare a response
 - a statement Respondent is presumed not responsible until a final decision is rendered
 - the parties' right to inspect the formal complaint and all relevant evidence
 - the parties' right to be represented by an advisor, who may be an attorney
 - any provision of the Student Code of Conduct prohibiting false statements or representations
 - Notice to Complainant contains the same information
- Supplemental notice must be provided if new allegations arise during the course of the investigation
- **Supportive measures must be offered, as needed**



Dismissals

- The Title IX Coordinator **must** dismiss a formal complaint if:
 - The allegations do not establish sexual harassment even if they are true
 - The allegations did not occur in connection with Baker College's programs or services
 - The allegations did not occur in the United States
 - Need to document basis for dismissal
- The Title IX Coordinator **may** dismiss a formal complaint if:
 - Respondent's employment with or enrollment in the college ends
 - Specific circumstances prevent the college from gathering sufficient relevant evidence to reach a final decision (e.g., passage of time, unavailability of witnesses or other information)



Dismissals – Settings that Fall Within Baker's Program or Services

- The following settings are considered “within the education programs or activities” of Baker College
 - Buildings or other locations that are part of the school's operations, including remote learning platforms;
 - Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred;
 - Did the College fund, promote or sponsor the event or circumstance where the harassment occurred?
 - Off-campus buildings owned or controlled by a student organization officially recognized by a post-secondary school, such as a building owned by a recognized fraternity or sorority



Dismissals - Hypotheticals

- Female student offended after male student told her in class that she looked “sexy”
- Male student complains that faculty member grades male students harder
- Student sexually assaulted by another student at an off-campus party
- After faculty member resigns, current student complains that the faculty member told her that he would “help her out” on her grade if she went on a date with him



Other Remedial Measures

- If Complaint is dismissed before investigative resolution, consider whether there are other remedial measures that would be appropriate to remedy the effects of harassment or prevent recurrence;
 - Climate checks
 - Sexual Harassment Training
 - Increased security or monitoring
 - Policy/procedure revision
 - Redress educational impact
 - Investigate under Code of Conduct



Informal Resolution

- Once a formal complaint is filed, the College may not informally resolve allegations of sexual harassment unless:
 - Complainant and Respondent have been advised of their rights and the circumstances in which informal resolution may preclude resumption of a formal complaint investigation
 - Complainant and Respondent have voluntarily consented to informal resolution, in writing
 - The Complaint is not against an employee
- Informal resolution may consist of the following, as well as other informal resolution procedures:
 - A written agreement, facilitated by the Title IX Coordinator or others
 - Restorative practices
 - Facilitated mediation



Appointing the Investigator

- The Title IX Coordinator or designee may serve as the Investigator
- Consider the Pros and Cons:
 - The Title IX Coordinator is very familiar with the college's Title IX policy, the requirements of Title IX, and has training and experience
 - After the parties receive the Title IX Coordinator's investigative report, one or both may not view the Title IX Coordinator as impartial



Fairness and Impartiality

- Bias
 - The Investigator may not be biased
 - Bias is a predisposition or preconceived opinion that prevents a person from impartially evaluating facts that have been presented for determination; a prejudice
- Prejudgment of Facts
 - Presumption of Innocence - Until the investigation is completed the Investigator must presume Respondent has not sexually harassed Complainant
- Conflict of Interest



Interviews and Information Gathering

- Interviewing Complainant and Respondent
 - Complainant and Respondent should be interviewed in every case
 - The interview must be preceded by written notice that gives the parties adequate time to prepare for the interview and:
 - identifies the date, time, and place of the interview
 - provides adequate information about the allegations to prepare
 - The Investigator should create a written summary of the interview as soon as practicable



Interviews and Information Gathering

- Interviewing Witnesses
 - Generally, all identified eye-witnesses should be interviewed
 - Questioning should cover the allegations, relationship to the parties, and the identification of other potential witnesses and information of which the parties may not be aware
 - The Investigator should create a summary of the interview as soon as practicable
- Securing Data, Documents, and Other Information



Interviews and Information Gathering

- Relevant Evidence
 - Title IX does not assume Investigators will apply the Rules of Evidence like lawyers in a trial
 - Investigators should consider information “relevant” if it makes the existence of an allegation, or a response to an allegation, more or less likely
- Rape-Shield
 - Information about the sexual behavior or proclivities of Complainant is not relevant, by definition, unless it is about Complainant's sexual behavior with Respondent to prove consent or to prove that someone other than Respondent committed the complained of conduct
- Privileged Information
 - The Investigator may not seek, access, or rely on privileged information (e.g., medical records) without a party's written consent



The Investigative Report

- The Investigator must complete a **preliminary** investigative report, which includes a fair summary of the relevant testimony and evidence
- At least 10 days before finalizing that report, the Investigator will provide all evidence that directly relates to the allegations to the Title IX Coordinator. The Title IX Coordinator will then provide that evidence to the parties.
 - Sensitive material should be handled with additional precautions
- The parties have at least 10 days to provide a written response to evidence
- The Investigator must consider any written responses and finalize the Investigation Report
- The Investigator should not resolve credibility issues, but should fairly summarize information that may bear on the Decision-Maker's resolution of credibility issues



The Decision-Maker

- The Decision-Maker determines whether Respondent sexually harassed Complainant.
- The Decision-Maker **may not** be the Title IX Coordinator or the Investigator
 - The Decision-Maker may not have bias or conflict of interest
 - Among other things, must be trained on how to be impartial and rule on evidentiary issues
- The Decision-Maker:
 - Reviews all of the information collected during the investigation
 - Under Baker's Title IX Policy, conducts a "pre-hearing conference" to answer questions and resolve witness or evidentiary issues
 - Conducts the live hearing, including ruling on any objections
 - Issues a decision concluding Respondent is or is not responsible for sexual harassment in violation of Title IX



The Live Hearing

- The Live Hearing may be in person or virtual, at Baker's discretion
 - Baker must honor a party's request to be in a separate room from other party
 - The Hearing must be memorialized through recording or transcript
- The Live Hearing does not follow courtroom procedures, but the parties may call witnesses and the Decision-Maker will make evidentiary rulings
- Witnesses are subject to cross-examination by the other party, but the parties cannot cross-examine each other directly
 - For Live Hearing, parties must have an advisor, and if they do not, the College must provide one
 - Only the advisor may cross-examine the other party
- The Decision-Maker may suspend the Live Hearing if decides that there are unresolved issues that should be clarified through further investigation



Decision – Weight and Credibility

- Under the regulations, if a witness is absent from the Live Hearing or refuses to submit to cross-examination, the Decision-Maker could not rely on any statement from that witness in reaching a determination of responsibility
 - This rule was enjoined by a federal court, and OCR recently issues a statement that it would not enforce
- Credibility determinations may be based on a variety of factors, including:
 - Ability and capability to observe
 - Consistency with other known facts
 - Consistency over time
 - Relationship to parties
 - Others
- The Decision-Maker may not make credibility determinations based on a person's status as a Complainant or Respondent



Decision – Standard of Proof

- The standard of evidence Baker applies is “**a preponderance of the evidence**”
- Proof by a “**preponderance of the evidence**” means the evidence on one side of a question is more convincing than the evidence on the other side
 - This concept must be distinguished from the quantity of the evidence
 - In other words, for a variety of reasons, one witness may be more convincing than two others



Decision-Maker's Report

- Within 15 days (if possible), the Decision-Maker must deliver a written decision concurrently to the parties and the Title IX Coordinator, which should include:
 - Complainant's allegations potentially constituting sexual harassment
 - Procedural steps taken to resolve allegations
 - Site visits, or other methods used to gather evidence
 - Findings of fact
 - The application of the College's Title IX policy and the college's student code of conduct
 - A statement of and rationale for the result as to each allegation; including determinations of responsibility, disciplinary sanctions, whether Complainant will be provided remedies to restore or preserve his/her equal access to the College's education programs and activities, and the procedure and bases for appeal
- If Respondent is found responsible, the Decision-Maker must consult on sanctions with:
 - The Campus Director of Student Affairs or Campus President/Director, if student;
 - VP of Human Resources, if employee

Appeals



- Complainant or Respondent may appeal the Decision-Maker's Decision within 10 days
- Bases for Appeal:
 - Procedural irregularity affecting the outcome
 - Newly discovered evidence not reasonably available at the time of determination/dismissal
 - Bias or conflict of interest on the part of the Investigator or Decision-Maker



Resolving Appeals

- Appellate Officer must:
 - Review the appeal
 - Determine whether the appeal implicates one or more the bases for appeal
- If not, the appeal should be denied
- If so, the Appellate Officer must:
 - Review the entire record
 - Decide whether to grant the appeal, in whole or in part
 - Affirm or reverse the Decision, in whole or in part
 - If necessary, remand the Decision to the Investigator or Decision-Maker for further action
- Decision are not final until the appeal process is over or the time for taking an appeal has passed with no appeal



Retaliation

- Retaliation is broadly prohibited by the new regulations
- **“For the purpose of interfering with Title IX rights” or “because the person has participated or refused to participate in any manner in a proceeding under Title IX regulations”**
- Charges against an individual for SCC violations not involving sex discrimination or sexual harassment, but arising out of the same facts or circumstances, constitute retaliation IF the purpose is to interfere with any right or privilege secured by Title IX

Recordkeeping



- Records related to alleged sexual harassment must be maintained for a **minimum of seven (7) years**
 - All records ... investigation records, disciplinary sanctions, remedies, appeals, supportive measures, etc.
 - Training records






Hypothetical #1

The College's Culinary Arts students attend a week-long event that takes place at a privately owned facility near Jackson, Michigan. The event is voluntary, but the chefs encourage students to participate. The rooms are segregated by sex.

Jake and Emily are 18 year old Freshman. They dated for two years in high school, but broke up two weeks before the event started.


The third night, several students, including Jake and Emily, get high after the faculty advisors go to sleep. Emily gets higher than she intended. Jake and Emily walk into the woods, hand-in-hand. The other kids go back to their rooms.

Emily returns to her cabin disheveled and sobbing, claiming she was raped by Jake. One of her roommates reports this to a faculty advisor who reports to the Title IX Coordinator, as required by College policy. The faculty advisor also takes Emily to the hospital.




The Title IX Coordinator contacts Emily to ascertain appropriate supportive measures and determine whether she wants to file a formal complaint. She does. She insists that Jake be removed from the culinary program and expelled from school. The Title IX Coordinator declines to remove Jake from the program or initiate disciplinary procedures. However, she does issue a mutual no-contact order.

The Title IX Coordinator decides to do the investigation herself. The Title IX Coordinator interviews Emily. Emily states:

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- She was high and doesn't remember everything that happened;
 - She remembers:
 - Walking into the woods with Jake;
 - Making out with Jake;
 - Telling Jake to stop because they had broken up;
 - Jake on top of her, engaging in intercourse against her will; and,
 - Going to the hospital.
 - She does not remember returning to her room.


The Title IX Coordinator also interviews Jake. Jake states:

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- He was high but remembers what happened;
 - Emily was also high, but acting normal;
 - They made out;
 - She started to perform oral sex on him then stopped, saying it was wrong because they had broken up;
 - They laid next to each other for a while and talked;
 - Without saying anything, she leaned over, kissed him and they started making out again;
 - Making out led to sex without another word being spoken;
 - The sex was no different than dozens of times when they were dating; and,
 - Suddenly, she pushed him off, jumped up, grabbed her clothes, and starting running toward her room.
 - He started to follow her but changed his mind and walked back to his room.



Questions – Hypothetical #1

- Does the Title IX Coordinator have the authority to investigate this case, which occurred off School District premises and on private property? If so, why?
- Can/should the Title IX Coordinator report this matter to the police? What is the likely effect of reporting to the police?
- Who else should the Title IX Coordinator interview?
- Is Jake's statement about previous sexual experiences with Emily relevant?
- The College has adopted a "preponderance of the evidence" standard for Title IX investigations. If, at the end of the day, the Decision-Maker determines the evidence is perfectly balanced what should be her conclusion?


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- How can the Decision-Maker resolve a case when Claimant says one thing and Respondent says another (i.e., he said – she said)? What factors may the Decision-Maker not take into account when making a credibility determination?
 - Assume the Decision-Maker concludes Jake is responsible for sexual harassment.
 - What is the appropriate penalty?
 - Jake appeals on the grounds his responsibility was not established by a “preponderance of the evidence.” What are the appellate officer’s options?
 - Assume the Decision-Make concludes Jake is not responsible for sexual harassment. How should the Title IX Coordinator address the inevitable concerns that will be raised by Emily?



Hypothetical #2

Jason and Jessica started “talking” after meeting in the dorms. Eventually, Jason persuaded Jessica to trade intimate pictures. Jessica broke up with Jason a few weeks later. Jason – while home for the weekend - texts Jessica's pictures to several friends in the dorm as revenge. Jessica finds out but, mortified, doesn't tell anyone.

Jessica, claiming illness, misses the first few days of class. Eventually, her roommate convinces her to go. The first day back is awful. Jessica thinks everyone is looking, whispering, laughing, and pointing. She tells her instructor, Ms. Anderson, she feels sick. Realizing something is wrong, Mrs. Anderson takes Jessica to her office where Jessica confides what happened.



Mrs. Anderson informs the Title IX Coordinator, Mrs. Goodman. Mrs. Goodman contacts Jessica to discuss supportive measures and Jessica's right to file a formal complaint. Mrs. Goodman suggests that, as other students have seen the pictures, it might best if Jessica transfers to another school for a fresh start. Mrs. Goodman also suggests it might be best to hold off on a formal Title IX complaint, as ordinary school disciplinary procedure will probably reach a more expeditious conclusion. Finally, Mrs. Goodman points out it might be wise to file a police report. Jessica and her parents decide to follow Mrs. Goodman's advice. Mrs. Goodman confirms their discussion in a letter, including a copy of the School District's Title IX policy, and, issues a no-contact order to Jason and Jessica.

The College initiates disciplinary action and temporarily suspends Jason. Separately, the police charge Jason, obtain a warrant, seize his phone and computers, and run down and seize most of the pictures. Jason is allowed to return the following semester.



In the meantime, Jessica is doing as well as might be expected at her new campus until she hears a rumor that Jason was allowed to return. She contacts Mrs. Goodman, who confirms Jason's status, but otherwise declines to provide an explanation based on Jason's "privacy rights." Jessica, outraged, insists on filing a formal complaint and consults a private attorney to determine what recourse exists against the College and/or Jason.



Questions – Hypothetical #2

- Assume the Title IX investigation determines the facts are exactly as described above.
- Did Jason's conduct occur within a program or activity of Baker?
- Is Jason responsible for sexual harassment?
- If Jason is responsible for sexual harassment:
 - What sanction is appropriate for Jason?
 - What remedy is appropriate for Jessica?
- What legal remedy does Jessica have against the School District?
- What is the moral of this story?

