

Title IX: A Review & Legal Update

An Overview of the Law and Discussion
of Best Practices and Procedures

Presented by
Christina L. Corl

DETERMINED.

DISTINCTIVE.

FEARLESS.™

Today's Presenter



Christina L. Corl

(614) 629-3018

ccorl@plunkettcooney.com

What is Title IX?

- Title IX of the Education Amendments of 1972
- Federal civil rights law that prohibits discrimination on the basis of sex in any education program or activity that receives federal funding



Title IX – Statutory Language

- ***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.***

Definitions

- Discrimination:
 - Sexual Harassment
 - Rape
 - Sexual Assault
- Sexual harassment: qualifies as discrimination if it is “so severe, pervasive, and objectively offensive that it effectively bars *a reasonable person* access to an educational opportunity or benefit.”
- Even a single instance of rape or sexual assault meets this standard.

Dear Colleague Letter (DCL)

- April 4, 2011 “Dear Colleague Letter” (DCL)
 - Guidance issued from the U.S. Department of Education
 - Issued shortly after the Department settled multiple cases arising from sexual harassment cases
 - Part of an emphasis by the Obama administration on Title IX violations

The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

In order to assist recipients, which include school districts, colleges, and universities. . . in meeting these obligations, this letter explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

Trump Administration

- On Sept. 22, 2017, the 2011 Dear Colleague Letter was rescinded.
- New rules announced in May 2020 – over 2,000 pages.
- The new rules refer to “requirements” of colleges and universities, not “guidance” as under Obama administration.

2020 Rules

- Schools required to “respond meaningfully to known reports” of sexual harassment or sexual assault and “to investigate” every formal complaint.



2020 Rules

- Complaining students must be offered supportive measures, including deterrence of further harassment and referrals to resources/counseling, etc. ... With or without a formal complaint.
- Supportive measures may include reassignment of classes or living arrangements.
- A complaining student may not be compelled or pressured to participate in an adjudicative process.

Continued

2020 Rules

- The institution only has an obligation to respond when it has “actual notice” of an alleged incident. This only occurs when a report is made to the institution’s Title IX coordinator or another employee who has authority to take corrective action on behalf of the institution.
- The method of notice may not be limited – may be by phone, email, in person, etc.

Continued

2020 Rules

- Requires a clear, predictable and transparent “Grievance Process” for adjudication of complaints.
- Expands the “jurisdiction” for complaints to “situations over which the school exercised substantial control” and also “buildings owned or controlled by student organizations officially recognized” by the school such as fraternity and sorority houses.
- Limits interim measures against the responding student.

Continued

2020 Rules

- Every formal complaint must be investigated, and the grievance process must include all of the following:
 1. Written notice of the allegations to both parties
 2. An opportunity for both parties to select an advisor who may or may not be an attorney
 3. Both parties may submit and review all evidence during the investigation

Continued

2020 Rules

4. Trained Title IX personnel must evaluate the evidence free of bias or conflicts
5. Written authorization to use any medical or psychological evidence during investigation
6. Consent before any informal resolution process
7. No informal resolution process if an employee has been accused of the sexual misconduct

Continued

2020 Rules

8. A presumption of innocence for the accused student with the “burden of proof” on the school
9. Uniform application of burden of proof whether the accused is a student or employee
10. Separate decision makers and investigators

Continued

2020 Rules

- 11. Live hearings with cross examination
- 12. Parties may not directly cross examine each other. All cross examination must be done by the student's "advisor" who may or may not be an attorney.
- 13. If a party cannot afford to hire an advisor, the school must provide an advisor to conduct cross examination at the live hearing.

Continued

2020 Rules

- 15. Prior sexual history questions prohibited.
- 16. Written decisions which contain an analysis of the reasoning for the outcome.
- 17. Effective remedies for complaining student if misconduct is found.
- 18. An equal opportunity to appeal any decision on the grounds of: procedural irregularity; new evidence; demonstrated bias of an investigator or decision maker.

Continued

2020 Rules

- 19. Prohibition of retaliation against parties, participants and witnesses
- 20. Maintenance of records, including reports, investigation materials, outcomes
- 21. Public disclosure of all training materials and training records for personnel and advisors

Continued

2020 Rules

- Participation at hearings:
 - If a party or witness does not submit to cross examination during a live hearing, the decision makers cannot rely on any pre-hearing statements of that party or witness.
 - Decision makers cannot draw any inference related to responsibility for misconduct if the student does not appear at hearing or does not submit to cross examination.

Collegiate Struggles

- Balancing act that must take place between rights of victim and rights of accused



The Training Conundrum

- Pre-Dear Colleague letter, training of hearing officers and hearing panels did not get much attention.
- Post-Dear Colleague letter, colleges and universities added curriculum to their training materials designed to disavow hearing officers of stereotypical notions regarding sexual assault (i.e., ... That a woman's clothing can lead to her being raped, that rapists are strangers who jump out of bushes.)

Continued

The Training Conundrum

- Male students suing colleges after being found responsible for sexual misconduct have had some success arguing that training designed to educate hearing officers on myths regarding sexual assault may actually serve to prejudice the hearing officers against male students.

2020 Training

- New regulations require that investigators and decision makers receive training on:
 - The definition of sexual harassment
 - How to conduct the grievance process, including investigations and hearings and how to prepare outcome documents
 - Relevance of questions and evidence, including questions about past sexual behavior or sexual stereotypes
 - Impartial investigations and bias

Training Failures

- *Doe v. Brown University*, U.S. District Court, Rhode Island
- Male student sued for Title IX violations and breach of contract after being dismissed from the University following a three-person hearing panel finding him responsible for non-consensual sex.
- District Court bench trial in September of 2016

Doe v. Brown University

- Panel members at Brown University had been trained that victims of sexual assault engage in counterintuitive behaviors such as maintaining contact with the alleged perpetrator and seeking to “normalize” the relationship with the perpetrator.

Continued

Doe v. Brown University

- One of the three panel members testified during the court bench trial that she “did not consider any of [complaining student’s] post-encounter conduct, including [any] text messages, as ‘evidence as to whether or not [the complaining student] had been sexually assaulted one way or another.’”

Continued

Doe v. Brown University

- The panel member's evaluation of the evidence was, at least in part, based on the training about counterintuitive behaviors exhibited by sexual assault survivors. The panel member concluded, "that it was beyond [her] degree of expertise to assess the [complaining student]'s post-encounter conduct ... because of a possibility that it was a response to trauma."

Continued

Doe v. Brown University

- The judge used, in part, the testimony of the panel member regarding the panel training to conclude that the accused student did not get a fair hearing.
- The judge ordered that the accused student be granted a new hearing.

Continued

Doe v. Brown University

- The opinion states, “It appears what happened here was that a training presentation was given that resulted in at least one panelist completely disregarding an entire category of evidence.”
- The post-encounter text messages and behavior of the accusing student.

Doe v. University of Pennsylvania

- Pending in the U.S. District Court for Eastern District of Pennsylvania
- U.S. District Judge on Sept. 13, 2017, denied defendant's motion to dismiss Title IX gender discrimination claims based, in part, on the University's training materials.
- The judge took issue with the following training materials:

Continued

Doe v. University of Pennsylvania

- With respect to accusing students: The training “advises of the potential for profound, long-lasting, psychological injury to victims; explains that major trauma to victims may result in fragmented recall, which may result in victims ‘recount[ing] a sexual assault somewhat differently from one retelling to the next’; warns that a victim’s ‘flat affect [at a hearing] does not, by itself, show that no assault occurred; and cites studies suggesting that false accusations of rape are not common.”

Continued

Doe v. University of Pennsylvania

- With respect to responding students: The training materials state that they may “have many ‘apparent positive attributes such as talent, charm, and maturity’ but that these attributes ‘are generally irrelevant to whether the respondent engaged in nonconsensual sexual activity.’ It also warns that a ‘typical rapist operates within ordinary social conventions to identify and groom victims’ and states that ‘strategically isolating potential victims[] can show the premeditation’ commonly exhibited by serial offenders.”

Painter v. Adams (UNC-Charlotte)

- A male student found responsible for sexual assault sued for violation of procedural due process.
- University's motion for summary judgment denied, in part, because the U.S. district judge was "troubled" by the training provided to the disciplinary panel.

Continued

Painter v. Adams (UNC-Charlotte)

- The panel refused to allow the accused student to submit post-incident text messages from the accusing student.
- Accused student offered the texts to disprove the accusing student's claim that she "had come to fear him" after sex.

Continued

Painter v. Adams (UNC-Charlotte)

- The panel chair testified that the panel training indicated that the panel was not to consider any evidence at the hearing that did not “directly answer the question of consent, to consent to sexual acts,” so post-encounter text messages were deemed not relevant.

Lessons: Impartiality and Bias

1. Except for evidence of a complaining student's prior sexual behavior, do not disregard any categories of evidence, including post-event communications between the parties.
2. Investigators and decision makers cannot engage in any “pre-judging” in the event of allegations of sexual misconduct.
3. Do not consider gender-based stereotypes.

Impartiality

- Impartiality (also called evenhandedness or fair-mindedness) is a principle of justice holding that decisions should be based on objective criteria, rather than on the basis of bias, prejudice, or preferring the benefit to one person over another for improper reasons.

Bias

- A particular tendency, trend, inclination, feeling, or opinion, especially one that is preconceived or unreasoned.
- Unreasonably hostile feelings or opinions about a social group; prejudice.

Sexual Harassment

- **Quid Pro Quo:** conditioning an educational benefit or service on student's willingness to participate in sexual harassment/activity.
- **Hostile Environment:** unwelcomed conduct which is so severe that it would deny a reasonable person access to educational benefit.
- **Clery Act/VAWA definitions:** Sexual assault, dating violence, stalking or domestic violence.

Clery Act/VAWA Definitions

- **Rape:**

- The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

Clery Act/VAWA Definitions

- **Domestic Violence:**

- A felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim; by a person with whom the victim shares a child in common; by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner; by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

Clery Act/VAWA Definitions

- **Dating Violence:**

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

Clery Act/VAWA Definitions

- **Stalking:**

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to (1) fear for the person's safety or the safety of others; or (2) suffer substantial emotional distress.

Relevance

Michigan Rules of Evidence:

- “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Relevance

- Per the new DOE regulations:
 - The sexual history or proclivities of the complaining student is not relevant to the claim of sexual misconduct, so that type of evidence should be disallowed in the hearing.

What is Evidence?

- Direct evidence and circumstantial direct evidence:
 - Direct evidence is simply evidence such as the testimony of an eyewitness which, if you believe it, directly proves a fact.
 - If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

What is Evidence?

- Circumstantial evidence:
 - Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may reasonably infer other related or connected facts that naturally and logically follow according to the common experience of people. For instance, if someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

Evidence & Credibility

- To weigh the evidence, you may be called upon to consider the believability of the witnesses. To do this, you will use the test of truthfulness that you use in your daily lives.

Continued

Evidence & Credibility

- Credibility tests include considering the manner in which the witness testified, the reasonableness of the testimony, the opportunity s/he had to see hear and know the things concerning which s/he testified, his/her accuracy of memory; frankness or lack of it; knowledge, interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Use these tests and assign to each witness's testimony such weight as you think proper.

Preponderance of the Evidence

- Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your minds the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may or may not be identical with quantity or the greater number of witnesses.

Continued

Preponderance of the Evidence

- **CONSIDER ALL EVIDENCE.** In deciding whether any fact in issue has been proved by a preponderance of the evidence in the case, the hearing panel may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who produced them.

Continued

Preponderance of the Evidence

- **EQUALLY BALANCED.** If the weight of the evidence is equally balanced or if you are unable to determine which side of an issue has the preponderance, the party who has the burden of proof has not established such issue by a preponderance of the evidence.
- Here, the University has the burden of proof, to demonstrate the misconduct “more likely than not” occurred in order to find responsibility.

Additional Considerations

- Not applicable to non-students
 - *Jennings v. Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007)
 - The plaintiff must allege that she is a student as an element of Title IX claim.
 - *Simpson v. Univ. of Colorado Boulder*, 500 F.3d 1170 (10th Cir. 2007)
 - High school girl attended off-campus party hosted by college football player for visiting recruits and alleged that she was sexually assaulted at the party – not a student and not protected.

Continued

Additional Considerations

- Retaliation a stand-alone claim
 - U.S. Supreme Court has recognized a retaliation claim under Title IX – *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)
 - Courts use the same retaliation framework as Title VII retaliation cases.
 - Elements: (1) protected activity; (2) known to the defendant; (3) adverse action; (4) but-for causation.

What is NOT included?

- Disparate impact:
 - No private right of action to enforce a disparate impact regulation under similarly worded Title VI
- Violation of federal Title IX regulations:
 - No implied private right of action for failure to comply with regulations alone

Baker College Title IX Nondiscrimination Policy

- All reports of an alleged Title IX violation by a student or employee alleging harassment, discrimination or retaliation.
- Allegations of Sex Discrimination and Retaliation should be reported to the Title IX Coordinator. Any investigation of Sex Discrimination and Retaliation will be investigated and resolved outside of the Title IX grievance process for Sexual Harassment complaints.

Continued

Baker College Title IX Nondiscrimination Policy

- Within the geographical territory of the United States of America
- While the complainant was participating in or attempting to participate in an educational program or activity of the College, including locations, events or circumstances in which the College exercised substantial control over both the respondent and the context in which the misconduct occurred and includes any building owned or controlled by a recognized student organization (e.g. fraternity house).

Continued

Baker College Title IX Nondiscrimination Policy

- **Report:** A verbal or written account of alleged sexual misconduct made to a person with authority to initiate corrective action.
- **Formal Complaint:** A formal document filed by a complainant alleging sexual misconduct against a respondent and requesting that the College investigate the allegation of Sexual Misconduct. Formal Complaints may also be filed by a Title IX Coordinator. When a Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party to the investigation or any process which may result from an investigation.

Baker College Title IX Nondiscrimination Policy

- **Initiation of corrective measures:**
 - Title IX Coordinator; Deputy Title IX Coordinators
 - Campus Presidents/Directors
 - Directors of Academic Affairs
 - Directors of Student Affairs
 - Directors/Asst. Directors of Public Safety

Continued

Baker College Title IX Nondiscrimination Policy

- **Initiation of corrective measures:**

- Baker College President
- Provost
- Chief Operating Officer

****Corrective action may be taken against any individual who has a duty to report and who fails to respond in a manner consistent with the provisions of applicable laws, regulations, policies, and procedures.**

Continued

Baker College Title IX Nondiscrimination Policy

- **Duty to report.** The following members of the College Community have an additional obligation to report all other incidents of Sexual Harassment, Sex Discrimination, and Retaliation when they receive a disclosure of Sexual Harassment, Sex Discrimination or Retaliation or become aware of information that would lead a reasonable person to believe that Sexual Harassment, Sex Discrimination or Retaliation may have occurred involving anyone covered under this policy.

»

Continued

Baker College Title IX Nondiscrimination Policy

- Duty to report:
 - a) Executive officers;
 - b) Deans, directors, department heads/chairs (including those serving in assistant or associate roles);
 - c) Graduate and undergraduate chairs;
 - d) Supervisors who have hiring or firing power over at least three employees who are not Student employees;

Baker College Title IX Nondiscrimination Policy

- Duty to report:
 - e) Faculty and staff who serve as advisors to College-recognized Student groups;
 - f) Any individual, whether an employee or not, who serves as a coach of a club sports team;
 - g) All individuals, including Student-employees (such as Resident Advisors) working in Student Life, Campus Safety, except those who serve in non-supervisory positions in dining services, clerical, or custodial/maintenance capacities;
 - h) Campus Security Authorities designed by the College under the Clery Act not otherwise specified in this provision; and
 - i) Individuals serving in any of the positions described above on an acting or interim basis.

Baker College Title IX Nondiscrimination Policy

- The new DOE regulations no longer allow an interim suspension of an accused student.
- *New option – Emergency Removal:*
 - The removal of a respondent from the University's educational programs or activities on an emergency basis, if it is determined that the respondent poses an immediate threat to the physical health and or safety of any student or other individual.

Continued

Baker College Title IX Nondiscrimination Policy

- **Definition of Consent:**
 - Consent is knowing, voluntary, and clear permission by word or action, to engage in mutually agreed upon sexual activity. Since individuals may experience the same interaction in different ways, it is the responsibility of each party to make certain that the other has consented before engaging in the activity. For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct.

Continued

Baker College Title IX Nondiscrimination Policy

- **Definition of Consent:**
- A person cannot consent if he or she is unable to understand what is happening or is disoriented, helpless, asleep or unconscious for any reason, including due to alcohol or other drugs. An individual who engages in sexual activity when the individual knows, or should know, that the other person is physically or mentally incapacitated has violated this policy.

Baker College Title IX Nondiscrimination Policy

- **Definition of Consent:**
- It is not an excuse that the individual responding party of sexual misconduct was intoxicated and, therefore, did not realize the incapacity of the other. Incapacitation is defined as a state where someone cannot make rational, reasonable decisions because they lack the capacity to give knowing consent (e.g., to understand the “who, what, when, where, why or how” of their sexual interaction). This policy also covers a person whose incapacity results from mental disability, involuntary physical restraint and/or from the taking of incapacitating drugs.

Continued

Baker College Title IX Nondiscrimination Policy

- **Definition of consent:**
- Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). A current or previous dating relationship is not sufficient to constitute consent. The existence of consent is based on the totality of the circumstances, including the context in which the alleged incident occurred and any similar previous patterns that may be evidenced. Silence or the absence of resistance alone is not consent. A person can withdraw consent at any time during sexual activity by expressing in words or actions that he or she no longer wants the act to continue; and, if that happens, the other person must stop immediately.

Baker College Title IX Nondiscrimination Policy

- **Effective Consent:**
- In the State of Michigan, a minor (meaning a person under the age of 16 years) cannot consent to sexual activity. This means that sexual contact by an adult with a person younger than 16 years old is a sexual assault, as well as a violation of this policy, even if the minor wanted to engage in the act.

Baker College Title IX Nondiscrimination Policy

- **Consent in Relationships:**
 - Current or past sexual relationships or current or past dating relationships are not sufficient grounds to constitute consent.
 - Regardless of past experiences with other partners or a current partner, consent must be obtained.

Baker College Title IX Nondiscrimination Policy

- **Confidentiality and Privacy:**
- If an incident is disclosed or reported to the College and the individual requests that no investigation be conducted or disciplinary action be taken, the Title IX Coordinator or Deputy Title IX Coordinator will explain that the College prohibits Retaliation and explain the steps the College will take to prevent and respond to Retaliation if the individual participates in a resolution process. The Title IX Coordinator or Deputy Title IX Coordinator will evaluate the request to determine whether the College can honor the request while still providing a safe and nondiscriminatory environment.

Baker College Title IX Nondiscrimination Policy

- **Confidentiality and Privacy:**
- A decision to proceed despite an individual's request will be made on a case-by-case basis after an individualized review, and the Complainant will be notified if such a decision is made. If the College proceeds with an investigation, the Complainant is under no obligation to proceed as a part of the investigation and no retaliation will result from the Complainant's decision not to participate.

Supportive Measures

- This may be requested by complainant, respondent, a witness, or other impacted members of the College community. Supportive measures are available regardless of whether a formal complaint is filed.
- Supportive measures:
 - a) Mutual no-contact directives
 - b) Referral to campus and community resources for victim advocacy, counseling, health services, legal assistance, immigration assistance, disability services;
 - c) Academic support including extensions of time and other course-related adjustments;

Continued

Supportive Measures

- d) Modification of work or class schedules;
- e) Change in work or housing locations;
- f) Change in reporting relationship;
- g) Consideration of leave requests; and
- h) Assistance with academic petitions.

Investigation/Resolution Options

- Complaint Procedures – Initial steps:
 - Formal complaints will be investigated whether filed by a student or filed by the Title IX Coordinator.
 - Prior to filing a formal complaint, the Title IX Coordinator may conduct an “initial assessment.”

Initial Assessment

- 1.) If the report relates to Sex Discrimination, Retaliation or another code of conduct violation, it will be investigated and resolved through other applicable policies.
- 2.) If the report is of Sexual Harassment and a formal complaint has not been filed, the Title IX Coordinator will promptly contact with Complainant to provide information about filing a formal complaint.
- 3.) The Title IX Coordinator will also discuss the availability of supportive measures, with or without filing a formal complaint, and the Complainant's wishes regarding possible supportive measures.

Continued

Initial Assessment

- Upon completion of an initial assessment, if the Complainant declines to file a formal complaint, the Title IX Coordinator will provide supportive measures to the Complainant as necessary and appropriate. The Title IX Coordinator also reserves the right to make a formal complaint.

Reporting to Law Enforcement

- Cannot force an alleged victim to make a report. Police report not prerequisite for Formal Complaint.
- Look out for “mandatory reporting” issues: may be required by state law to make the report depending on circumstances.
- If a complaint of sexual violence comes in to a responsible person, Clery Act is satisfied when violence is reported to a Title IX coordinator.

Notice of Investigation

- If a formal complaint is filed, the College cannot keep the name of the complaining student confidential because the responding student has a right to know the complaining student's name.
- The College will issue a written “Notice of Allegations” to the parties to initiate the investigation.
- Title IX Coordinator will appoint Investigator. Investigator cannot also be a hearing officer.

Continued

Notice of Investigation

Contents:(to be provided within 10 business days)

- a) The actual allegations of facts that constitute Sexual Harassment and any evidence that supports this;
- b) That there is a presumption of innocence in their favor;
- c) That all parties are entitled to an advisor of their choice;

Continued

Notice of Investigation

Contents:

- d) That all parties can inspect and review evidence; and,
- e) Information regarding any code of conduct provisions that prohibit false statements made in bad faith.

Outcomes of the Investigation

- Mandatory dismissal if the alleged behavior does not constitute sexual misconduct under the U.S. Department of Education's Title IX Regulations, in that it did not occur while the complainant was participating or attempting to participate in an educational program or activity of the College or did not occur within the geographical territory of the United States.
- Mandatory dismissals may be appealed.

Continued

Outcomes of the Investigation

- Case proceeds to hearing
- Permissive dismissal (any time during process), if complaint withdrawn in writing, if respondent is no longer enrolled/employed by the College or specific circumstances prevent the school from gathering sufficient evidence to reach a determination about allegations (e.g. lack of participation in the investigative process by parties or witnesses).

Informal Resolution

- If a formal complaint is filed alleging activity that falls under this policy, the Title IX Coordinator/Deputy Title IX Coordinator may offer to the parties an informal resolution process. If the parties mutually agree to participate in the informal resolution process, the Title IX Coordinator/Deputy Title IX Coordinator shall designate a trained individual to facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication. The informal resolution process may be used at any time prior to the decision-maker(s) reaching a determination regarding responsibility.

Informal Resolution

- If the Title IX Coordinator/Deputy Title IX Coordinator proposes an informal resolution process, the Title IX Coordinator/Deputy Title IX Coordinator shall provide to the parties a written notice disclosing:
 - 1. the allegations;
 - 2. 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; and
 - 3. any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

Informal Resolution

- 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. Before commencing the informal resolution process, the Title IX Coordinator/Deputy Title IX Coordinator shall obtain from the parties their voluntary, written consent to the informal resolution process. The informal resolution process is not available to resolve allegations that an employee sexually harassed a student.

Investigation

- During the investigation, the Investigator will seek to meet separately with the Complainant, Respondent, and any relevant witnesses who may have information relevant to the incident. The Investigator may also gather or request other relevant information or evidence when available and appropriate. Both the Complainant and Respondent will be asked to identify witnesses and provide other relevant information in a timely manner to facilitate prompt resolution of the case. All investigations will be conducted by a properly trained Investigator and may be outsourced at the College's discretion.

Conclusion of Investigation

- Upon completion of the investigation, a preliminary investigation report will be prepared which will be sent to each party and the party's advisor (if any). The purpose of this report is to provide both parties with an equal opportunity to inspect, review, and comment on any evidence relevant to the allegations raised in the formal report. The parties will have at least 10 days to submit a written response to the draft report. Written responses, if any, received prior to the deadline will be considered by the investigator prior to completion of the final investigation report.

Conclusion of Investigation

- In the investigation report, the investigator will summarize relevant evidence and will either find reasonable basis to proceed to hearing for some or all of the allegations made in the formal complaint, or no reasonable basis to proceed, resulting in a dismissal of the formal complaint.
- If the investigator finds that the matter should proceed to a hearing, the specific disciplinary sections allegedly violated will be listed as charges in the investigation report.

Hearings

- a) All hearings are overseen by a Decision Maker(s). All Decision Maker(s) have received special training on how to be impartial and make decisions on relevance. They are also assigned to cases by the Title IX Coordinator to avoid any bias and present an objective analysis of the evidence. In no case is the Investigator for a given case also the Decision Maker(s).

Continued

Hearings

- b) The Respondent is presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the end of the investigation and hearings.
- c) The Decision Maker(s) will 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 person holding the privilege has waived it. **Continued**

Hearings

- d) Credibility determinations may not be based on a person's status as a Complainant, Respondent, or witness.
- e) Hearings are not legal proceedings and do not follow courtroom procedure or the formal rules of evidence. During any hearings, each party must have an advisor present to ask questions to the other party. This advisor does not need to be licensed to practice law and may be a person of the party's choice or, if they do not have an advisor, the College will provide an advisor for them. **Continued**

Hearings

- **f) Questioning & Cross-Examinations**
 - 1. The Decision Maker(s) may question individual parties and witnesses.
 - 2. Parties will have the opportunity to cross-examine the party or witness. Parties may never ask questions directly, and questions must be asked to the other party through the use of a party's advisor. All questions asked must be relevant. Any questions determined not to be relevant by the Decision Maker(s) are not required to be answered.
 - 3. If a party or witness is absent from the live hearing or refuses to answer cross-examination or other questions, the Decision Maker(s) may not rely on any statement of that person in reaching a determination of responsibility. The Decision Maker(s) may not draw an inference about the determination regarding responsibility based solely on a party's or witness' absence from the live hearing or refusal to answer cross-examination or other questions

Continued

Hearings

- g) If, at any point during the hearing, the Decision Maker(s) determines that unresolved issues exist that could be clarified through additional investigation time, the Decision Maker(s) may suspend the hearing and reconvene it in a timely manner that accommodates further investigation.
- h) Hearings may be conducted virtually through the use of technology at the College's discretion. However, if either the Complainant or Respondent asks to be in separate rooms, the College must grant this request and provide appropriate technology to allow for simultaneous participation.
- i) All hearings will be memorialized through an audio or audiovisual record or transcript of the live hearing. The recording or transcript will be made available for parties to inspect and review following their completion.

Resolution/Notification of Outcome

- a) The Decision Maker(s) will communicate his or her decision to both parties, concurrently. The Decision Maker(s) will communicate the decision in writing and orally as soon as possible after the hearing. In all cases, the Decision Maker(s) will send the parties a final outcome letter within ten business days of the conclusion of the hearing.
- b) The Decision Maker(s) bases all conclusions by examining all evidence from the investigation and the hearing. Their conclusion is based on the “Preponderance of the Evidence” standard: If the evidence indicates that it is more likely than not, then the Respondent will be found responsible for violating this policy.

Continued

Resolution/Notification of Outcome

c) The Decision Maker(s)'s written decision must include the following information:

1. Identification of the allegations potentially constituting Sexual Harassment;
2. A description of the procedural steps taken from the 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;
3. Findings of fact supporting the determination;

Continued

Resolution/Notification of Outcome

- 4. Conclusions regarding the application of the College's code of conduct to the fact;
- 5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanction imposed upon the Respondent, and whether remedies designed to restore or preserve equal access to the College's education program or activity will be provided; and
- 6. The procedures and permissible bases for either party to appeal.

» Continued

Resolution/Notification of Outcome

- d) If the Respondent is found responsible for violating this policy, the Decision Maker will consult with at least one of the following administrators in order to determine the corrective actions and/or sanctions to resolve the case:
 - 1. The Campus Director of Student Affairs and Campus President/Director when the respondent is a student
 - 2. The Vice President of Human Resources when the respondent is an employee
- Any such corrective actions and/or sanctions will be outlined in the Decision Maker(s)'s written decision.

Sanctions

2) Corrective Actions/Sanctions:

- a) When the Respondent is a Student, potential sanctions may include, but are not limited to, formal reprimand, disciplinary probation, suspension, dismissal from housing, expulsion or any sanctions authorized under the student code of conduct.
- b) When the Respondent is an employee, corrective actions may be taken. Actions may include coaching, development plans, reduction in supervisory duties and leadership responsibilities, changes in salary, termination, and other appropriate corrective actions.

Continued

Sanctions

- c) Student employees may be subject to corrective action and sanctions under Student and/or employee policies depending on the nature of the case. For instance, a Student employee who is dismissed from the College may also be subject to termination or other corrective actions as found in the Student Employment Policy.

Any corrective actions or sanctions will not take effect until any appeals have been completed.

Appeals

- Either party may appeal the outcome of the hearing to the Title IX Coordinator. All appeals must be submitted in writing within ten business days of the receipt of the written outcome of the hearing.
- Appeals allowed on only limited grounds.

» Continued

Appeals: Grounds

- a) A procedural irregularity that affected the outcome.
- b) New evidence being discovered that was not reasonably available at the time of the determination or dismissal.
- c) A conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter of the Investigator or investigator(s), or decision-maker(s).

Appeals

- The Appeal Decision Maker will examine all evidence in order to determine if the appeal has merit. The Appeal Decision Maker will make an unbiased objective conclusion as to the appeal's merit and issue a written decision describing the result of the appeal and the rationale for the result; and will provide the written decision simultaneously to both parties.

False Allegations

- 1) It is a violation of the policy for anyone to make a false allegation of Sexual Harassment in bad faith. Corrective actions or sanctions may be imposed on individuals who in bad faith make false allegations of Sexual Harassment.
- 2) The absence of a finding of a policy violation is not equivalent to finding that the Complainant acted in bad faith.

Process Abuse: Prohibited Conduct

- a) Obstruct, prohibit, exert improper influence over, or interfere with any individual making a report, participating in a process, or carrying out a responsibility covered by this policy;
- b) Make, in bad faith, materially false statements in or related to a process covered by this policy;
- c) Disrupt or interfere with the orderly conduct of any proceeding conducted under this policy; or
- d) Fail to comply with any directive, sanction, or corrective action issued pursuant to this policy.

Writing Outcome Letters

- Brief but thorough
- Need to walk the line between providing too much of a narrative – because it provides ammunition in litigation – and providing enough of a rationale to satisfy the requirements of the Violence Against Women Act (VAWA).
- Do not need to recant the testimony of every witness.

Writing Outcome Letters

- First, list the date of the hearing and a brief summary of the factual allegations against the responding student.
- Second, list the conduct infractions with which he or she was charged.
- Third, simply list the evidence that was considered at the hearing – i.e., text messages, video tapes, etc.

Continued

Writing Outcome Letters

- Fourth, list the witnesses whose testimony was considered and whether the witnesses appeared live or via written statement.
- Fifth, list the evidence standard applied – preponderance of the evidence.
- Sixth, list how the decision maker weighed the evidence

Continued

Outcome Letter Sample Rationale

- In assessing the credibility and plausibility of the witness testimony and documentary evidence, the Decision Maker weighed the appearance of each witness; the reasonableness of the testimony; the opportunity the witness had to see, hear and know the things concerning which the witness testified; the witness' accuracy of memory, interest and bias, if any; together with all the facts and circumstances surrounding the testimony or documentary submission. *Continued*

Outcome Letter Sample Rationale

- Based on the Decision Maker's weighing of the evidence, it was determined that the preponderance standard was not met. The Board based this determination in part on your testimony that

_____. In addition, witnesses X, Y and Z provided testimony that corroborated elements of the information you shared.

Outcome Letters

- Next, if responsibility is found, address sanction and any continuing interim measures.
- Provide a brief rationale for the sanction
- Lastly, outline appeal rights

Questions?



Christina L. Corl

(614) 629-3018

ccorl@plunkettcooney.com



**Thank
You!!!**