

Training for Kaskaskia Community College Title IX Personnel – Session II

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Robbins Schwartz

College Response
to Reports of
Alleged Sex-
Based Misconduct



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“Deliberate
Indifference
Standard”
Under Title IX

- College must respond to allegations of Title IX sexual harassment:
 - Promptly
 - In a manner that is not “clearly unreasonable in light of the known circumstances”

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College
Response:
Definitions

Complainant:

- Individual who is alleged to be the victim of alleged sex-based misconduct

Respondent:

- Individual who is reported to be the perpetrator of alleged sex-based misconduct

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Overview of College Response Process

1. Analyze report to determine the appropriate method for processing/reviewing it.
2. For any report alleging Title IX sexual harassment and/or alleging sexual violence, domestic violence, dating violence or stalking pursuant to the PSVHEA, promptly contact the complainant.
3. Discuss and offer supportive measures.
4. Explain the process for filing a formal complaint.



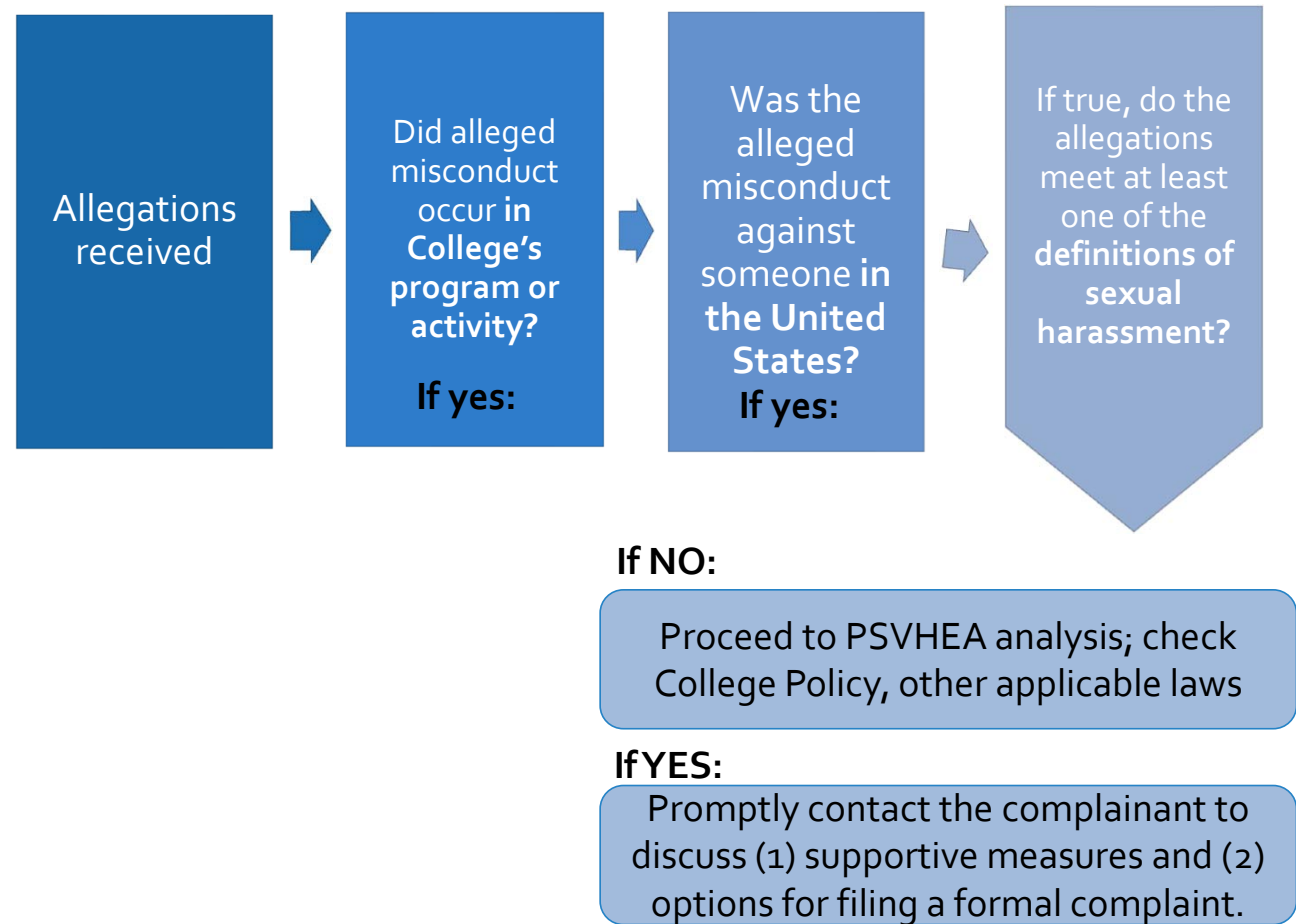
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College Response Process

- Step 1: Analyze the Report.
 - Does Title IX apply?
 - Does the Preventing Sexual Violence in Higher Education Act apply?

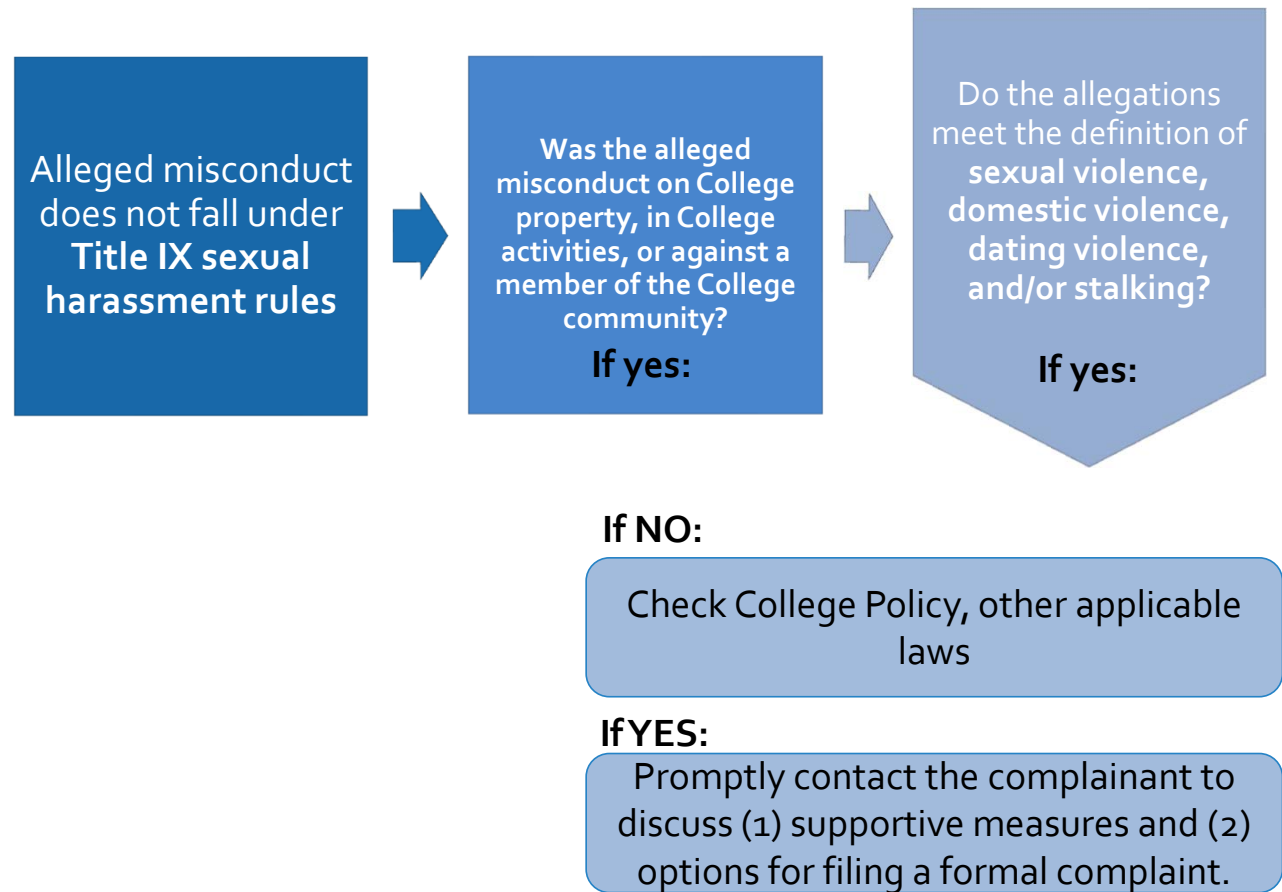
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Title IX: Jurisdiction Analysis



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Preventing Sexual Violence in Higher Education Act: Jurisdiction Analysis



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College Response Process

- Step 2: Contact the complainant.
 - “Complainant” is defined as the individual who is alleged to be the victim of alleged sex-based misconduct



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College Response Process

- Step 3: Discuss and offer supportive measures.
 - Individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party
 - Designed to ensure equal educational access, protect safety, or deter sexual harassment

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College Response Process

- Step 4: Explain to the complainant the process for filing a formal complaint.

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Grievance
Process for
Formal
Complaints



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Grievance Process for Formal Complaints

Formal complaint:

- Document filed by a complainant or signed by Title IX Coordinator alleging
 - (a) sexual harassment in violation of Title IX and/or
 - (b) sexual violence, domestic violence, dating violence or stalking in violation of the PSVHEA.
- At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the College's education programs or activities, (either as a student or an employee).

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Formal Complaint Hypothetical

A student graduates in June. In mid-July, the student contacts the Title IX Coordinator to report that she was sexually harassed by another student the previous February. The student indicates that she would like to file a formal complaint.

- Can the student file a formal complaint?
- What if the student is working as a research assistant for the summer?
- In the event the complainant cannot file a formal complaint, what options does the College have?

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Grievance Process: Notice of Allegations

- Must be sent **simultaneously** to both parties after Title IX Coordinator's receipt of formal complaint.
- Informs the parties of:
 - The grievance process, including informal resolution options
 - The allegations
 - The presumption of non-responsibility on the part of the respondent
 - The parties' right to an advisor
 - The parties' right to inspect and review evidence
 - The Code of Conduct provisions prohibiting knowingly furnishing false information during the grievance process.



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Grievance Process: Emergency Removals and Administrative Leave

- Prior to initiating or completing the grievance process in response to a formal complaint, the College may remove a respondent from its education program or activity on an emergency basis.
 - Only permitted where the College has determined, based on an individualized safety and risk analysis, that an immediate threat to the physical health or safety of an individual arising from the allegations of sexual harassment justifies removal.
- College must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.

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Grievance
Process:
Emergency
Removals and
Administrative
Leave

- The College may place an employee on administrative leave during the pendency of the grievance process in response to a formal complaint.

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Informal Resolution



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Informal Resolution

- Fully discretionary: Requires complainant and respondent's **voluntary, written consent**
- May occur at any time after the parties receive the initial notice of allegations and prior to a determination regarding responsibility being reached.
- May not be required as condition of:
 - Enrollment/continuing enrollment,
 - Employment or continuing employment,
 - Enjoyment of any right, or
 - Waiver of the right to a formal investigation/adjudication

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Informal Resolution

- Party may **withdraw** at any time prior to a resolution
 - Withdrawal triggers resumption of grievance process.
- May include:
 - Mediation
 - Restorative justice
- Not permitted in allegations of **employee** sexual misconduct toward a **student**

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Consolidation
and Dismissal of
Formal
Complaints



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Consolidation of Formal Complaints

- Title IX Coordinator may consolidate formal complaints where the allegations of sex-based misconduct arise out of the same facts or circumstances.

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Dismissal of Formal Complaints

Mandatory dismissal:

- Title IX Coordinator or designated investigator determines that conduct alleged in the formal complaint does not meet
 - (a) Title IX's definition of sexual harassment and/or
 - (b) Title IX's jurisdictional requirements.
- *Dismissal does not preclude action altogether – just for purposes of Title IX.*

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Dismissal of Formal Complaints

Discretionary dismissal if:

- Complainant gives written notification of desire to withdraw formal complaint or certain allegations;
 - Respondent is no longer enrolled in or employed by the College; or
 - Specific circumstances prevent the College from gathering evidence sufficient to reach a determination.
- A party may appeal a decision to dismiss a formal complaint or allegations therein.

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Investigation of Formal Complaints



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Investigations: Written Notice

- Written notice required to both parties:
 - Allegations (upon receipt of a formal complaint)
 - Investigative interviews, meetings, or hearings
 - Mandatory or discretionary dismissal

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Investigations: Evidence

- Equal opportunity for parties to provide:
 - Fact witnesses
 - Expert witnesses
 - Inculpatory evidence
 - Exculpatory evidence
- No gag orders

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Investigations: Advisors

- Both parties may select an advisor of their choosing
 - May, but need not be, an attorney
- Advisor's role is to provide support, guidance, advice
- May not speak on behalf of the party



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Investigation:
**Access to
Evidence**

- Both parties must have equal access to inspect and review all evidence that is directly related to the complaint allegations.
 - Be mindful of FERPA and student privacy considerations.
 - Consider whether redactions are necessary
 - Notify parties of parameters/limitations on re-disclosure of records and evidence.

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Investigation: Access to Evidence

- At the conclusion of the investigation and prior to the completion of the investigator's report, the investigator must send both parties a copy of all relevant evidence.
- The parties will have 10 business days to submit a written response to the evidence, which the investigator must consider prior to completion of his/her investigative report.

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Investigation: Preparation of Investigation Report

- After receiving/reviewing the parties written responses, the investigator must create an investigative report that fairly summarizes the relevant evidence, which the investigator will forward to the Title IX Coordinator.
- Upon receipt of the investigator's report, the Title IX Coordinator will schedule a hearing.



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Investigation: Preparation of Investigation Report

- At least 10 business days prior to the hearing, the Title IX Coordinator will:
 - Provide both parties with written notice of the hearing date, time, location, participants and purpose of the hearing; and
 - Send to each party (and advisors) the investigative report.
 - Allow parties 10 business days to submit a written response to the report.

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Live Hearings



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Live Hearings: Process

- Conducted by designated Hearing Officer
 - Assigned by Title IX Coordinator
- A party may request a substitution if the participation of the Hearing Officer poses a conflict of interest.
 - Must contact the Title IX Coordinator within three (3) business days after the party's receipt of the hearing notice to make such a request.

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Live Hearings: Process

- Upon request, parties can be separated – requires appropriate technology
 - Must be requested at least **3 days prior to hearing**
 - Must allow parties to simultaneously see and hear each other

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Live Hearings: Technology

- Technology considerations:
 - Parties must be able to hear and see each other.
 - Parties and Hearing Officer must be able to view evidence being presented.
 - Consider screen-sharing and/or sending documents electronically in advance.
 - Parties should have ability to communicate with their respective advisors in private.
 - Consider “breakout rooms.”

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Live Hearings: Advisors

- College advisor appointed if none available
 - 3 business day notice is required.

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Issues for Hearing

- Hearing Officer's role is to determine:
 - Whether facts presented establish that the alleged conduct occurred;
 - Whether that conduct constitutes Title IX sexual harassment, sexual violence, domestic violence, dating violence or stalking; and
 - If the answers to the above are "yes," which sanctions (if any) and remedies are appropriate.
- The evidence presented must be **relevant** to one or more of the issues above.

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Considering Evidence

- Relevant documents may include, but are not limited to:
 - The formal complaint
 - The initial written notice of the allegations
 - Written statement(s) and responses by the parties and/or witnesses
 - The investigation report
 - Police reports, photographs and/or video footage (if any)
 - Prior discipline records
 - Only relevant to issue of appropriate sanction



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Preponderance of the Evidence Standard

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

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Live Hearings: Cross- Examination

- Advisors are permitted to ask opposing party and witnesses all **relevant** questions and follow-up questions.
 - Relevance determined by Hearing Officer.

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Live Hearings: Rape Shield Protections

- Questions about sexual pre-disposition or prior sexual behavior are not permitted unless:
 - Offered to prove that someone other than the respondent committed the alleged conduct; or
 - Questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

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Post-Hearing Procedure



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Written Determination

- Issued to both parties simultaneously within 7 business days of decision being reached.

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Written Determination

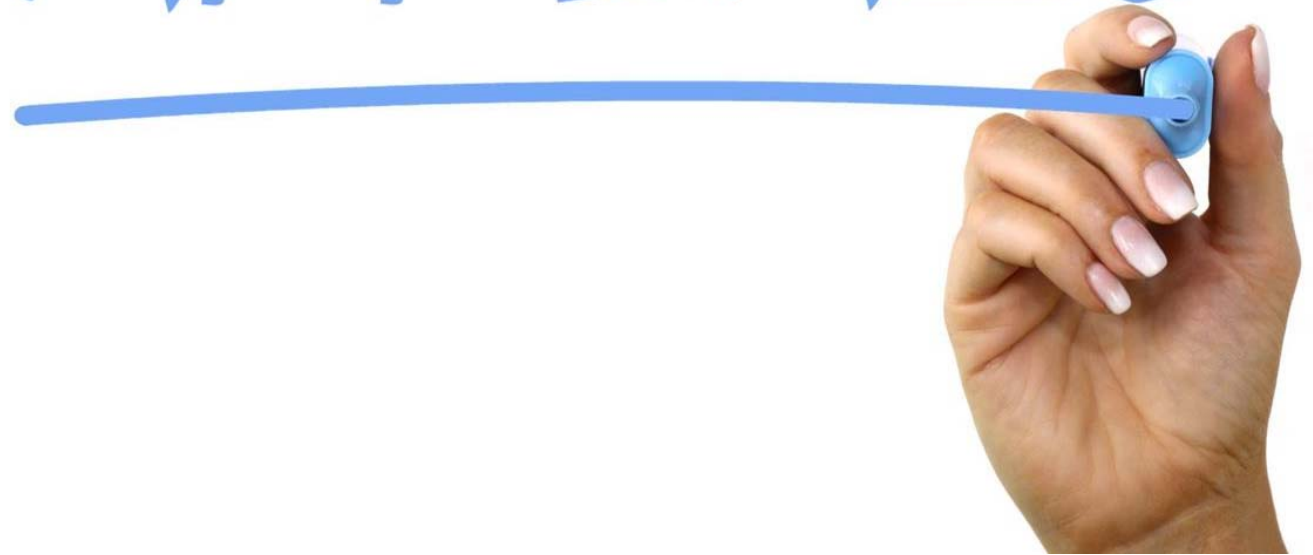
Must include:

- Identification of allegations potentially constituting Title IX sexual harassment and/or
- Description of procedural steps taken
- Findings of fact supporting determination
- Conclusions regarding application of conduct standards
- Statement & rationale for result of each allegation, including:
 - Determination of responsibility
 - Disciplinary sanctions being imposed
 - Whether any remedies will be provided to the complainant
- Procedures and permissible bases for complainant and respondent to appeal

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Appeals

APPEALS



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Appeals

- Both parties have right to appeal any determination regarding:
 - Responsibility
 - Dismissal of any formal complaint or allegations therein
- Party must submit written appeal request to Title IX Coordinator
 - Within 7 business days of receipt of written determination or dismissal
- Title IX Coordinator must forward request to **designated appeals administrator**

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Appeals: Grounds to Appeal

- a) Procedural irregularity occurred
- b) New evidence or information exists that could affect outcome
- c) Conflict of interest or bias which affected outcome, amongst:
 - Title IX Coordinator, Investigator, or Hearing Officer
- d) Sanction disproportionate to violation

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Appeals: Process

- Appeals administrator will afford both parties the opportunity to submit a statement
- Written decision issued to both parties simultaneously within 7 business days of conclusion of the review
 - Describes outcome and rationale
- Includes statement that **decision is final**

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Conflicts of Interest & Bias



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Conflict of Interest & Bias

Conflict of interest:

- “A situation in which the concerns or aims of two different parties or people are incompatible.”
 - Not: “I know both parties.”

Bias:

- “Prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.”

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How to Address Implicit Bias

- Check your implicit bias here:
[Harvard Implicit Bias Test](#)
- More deliberate or conscious thinking
 - Sometimes called “Staring” (as opposed to “Blinking”)
 - This involves allowing yourself time to fully think through a scenario before coming to a decision/conclusion

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How to Address Bias: Create a Checklist

- Create a checklist beforehand
 - For ex: A pre-made checklist of allegations to be proven/disproven
- Decision-making checklists can encourage less biased decisions; they provide an objective framework to assess your thinking¹
- Can be effective in overcoming stereotypes²
- Helps reduce the attention given to biased characteristics that may influence decision-making³

1. Arkes. Hal R. Arkes & Victoria A. Shaffer, Should We Use Decision Aids or Gut Feelings? in G. GIGERENZER & C. ENGEL, EDS., HEURISTICS AND THE LAW (2004).

2. Isaac. Carol Isaac, Barbara Lee & Molly Carnes, Interventions That Affect Gender Bias in Hiring: A Systematic Review, 84 Academic Medicine 1440 (2009).

3. Uhlmann. Eric Luis Uhlmann & Geoffrey L. Cohen, Constructed Criteria: Redefining Merit to Justify Discrimination, 16 PSYCHOL. SCI. 474 (2005).

All materials compiled by the ABA Implicit Bias Toolkit, which can be found here: <https://www.americanbar.org/groups/diversity/resources/implicit-bias/>

Questions?



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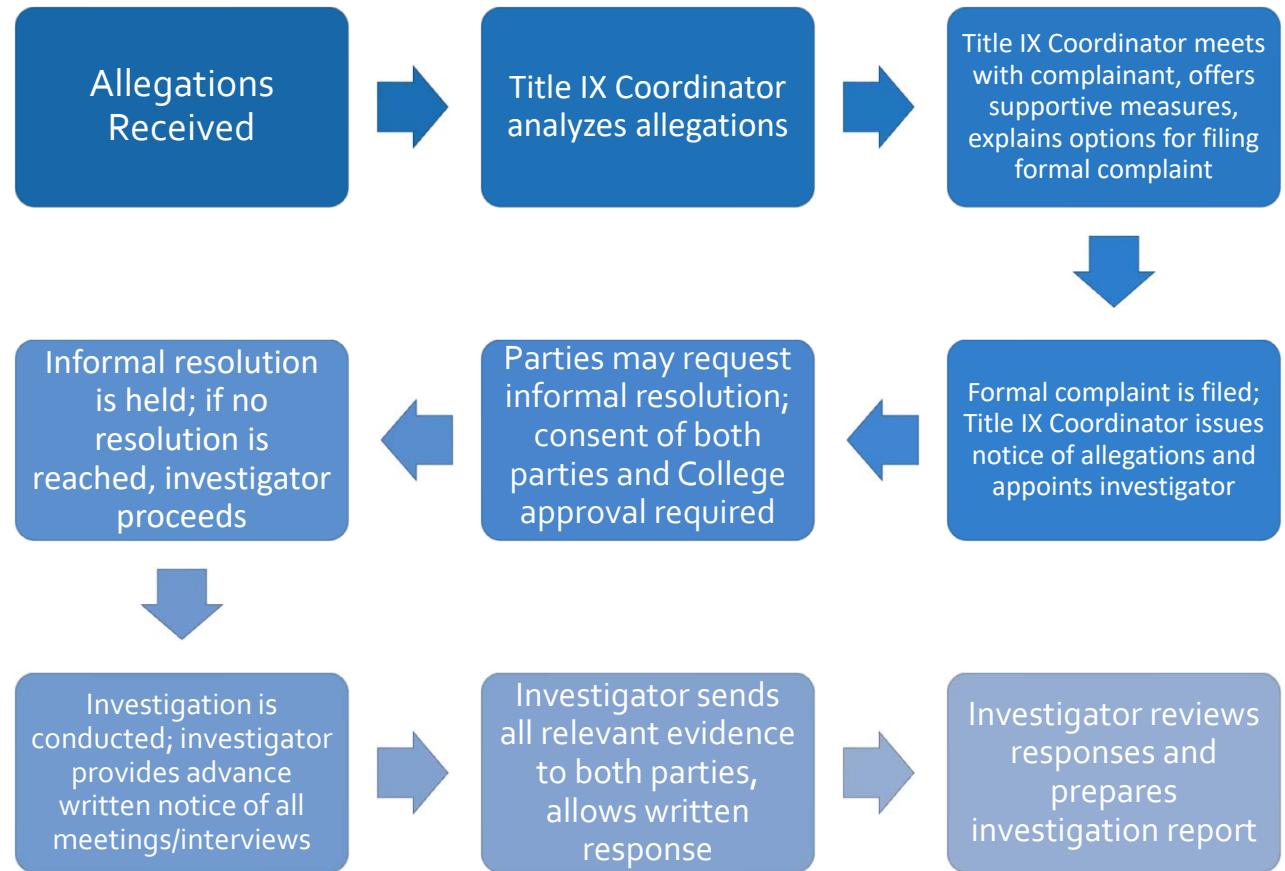
Final Review
and
Hypothetical



Prepare for
Success

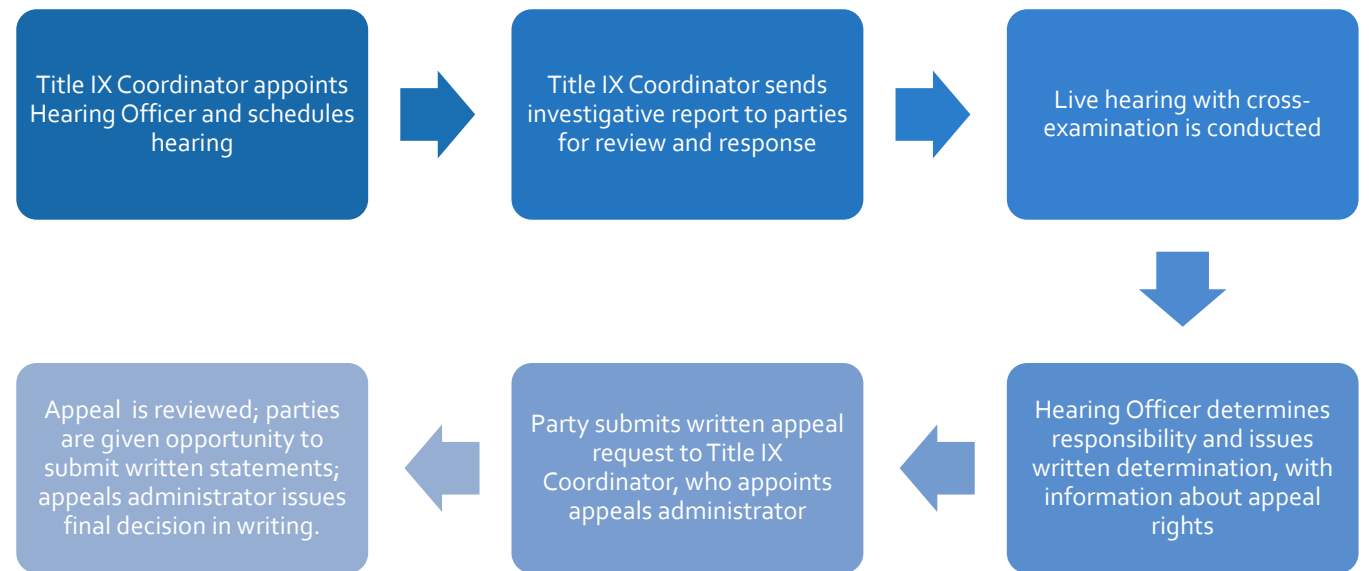
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Final Review of Grievance Process (Pre-Hearing)



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Final Review of Grievance Process (Hearing + Appeals)



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Hypothetical

- Jen, a student, reports to her College advisor that a classmate, Kevin, has been making inappropriate sexual jokes and innuendos.
 - She and Kevin both attended the same virtual summer school course.
 - They were assigned to work on a project together, much of which was to be done on their own time, over Zoom, and required the exchange of personal contact information.
 - After the project was complete, Kevin allegedly called Jen and asked her out. Jen said no.
 - Jen states that Kevin began teasing her on social media and telling all of their mutual friends that Jen “is a prude.”

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Hypothetical

- The teasing became increasingly more offensive, and he allegedly began making false statements that:
 - Jen is homosexual,
 - She is afraid to date because she is a hermaphrodite, and
 - That Jen sent him sexually explicit photos.
- Jen alleges that Kevin's comments took place over the course of the summer, at various off-campus social distanced class gatherings where the instructor and other students were present.
- Most recently, Kevin and Jen both attended the same party at a house owned by the College's Theater Club, of which Jen is a member.
- At the party, Kevin (who is 21) was drinking. He tried to pressure Jen (who is 19) into drinking as well. Jen reports that Kevin stated, "Some alcohol will allow you to drop your guard, and hopefully, allow me to drop your pants."

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Hypothetical

- Jen reports that she told Kevin he was not funny, and to leave her alone.
 - One of Jen's friends allegedly witnessed Kevin trying to pour some of his vodka into Jen's cup when she wasn't looking.
 - According to Jen's friend, when Kevin was caught, he laughed and told her to "Stop cock-blocking me."
- Jen is distraught. Kevin is enrolled in two of the same classes as Jen for the fall 2020 semester. Jen is considering dropping the classes so she will not have to interact with Kevin.
- The College advisor documents her discussion with Jen. What should the College advisor do with these allegations? Discuss.



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Hypothetical

- Based on these facts, analyze the jurisdiction under Title IX.
- Reminder:
 - Kevin's behavior began after the completion of their virtual project. He teased her via social media.
 - Kevin's behavior continued at off-campus events where the instructor and other students were present.
 - Kevin's most recent actions were at a house owned by a College-recognized student organization during the first weekend of school.
- Do Kevin's actions constitute Title IX sexual harassment?
- Reminder: Three types of sexual harassment:
 - **Quid pro quo** harassment by a college employee
 - Unwelcome conduct that a reasonable person would find **so severe, pervasive and objectively offensive** that it **denies a person equal educational access**
 - Any instance of **sexual assault, dating violence, domestic violence or stalking**

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Hypothetical

- Jen files a formal complaint. The parties proceed to a live hearing.
 - Can Kevin's advisor ask Jen if she has ever had a sexual relationship with Kevin?
- After a full grievance process, the College's appointed Hearing Officer (who is close friends with the College advisor to whom Jen made her initial report) finds that Kevin is responsible for engaging in Title IX sexual harassment.
 - After receiving the Hearing Officer's determination, Kevin feels that the Hearing Officer had a conflict of interest that affected the outcome of the grievance process. He submits an appeal request to the Title IX Coordinator.
- What steps does the Title IX Coordinator need to take with respect to the appeal?

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Questions?



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