

# Title IX: A Review & Legal Update

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

Presented by

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# Today's Presenter

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# What is Title IX?

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- 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

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- ***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

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- 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)

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- 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

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- 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

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



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# 2020 Rules

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- 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.

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# 2020 Rules

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- 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.

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# 2020 Rules

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- 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.

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# 2020 Rules

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- 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.

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# 2020 Rules

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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.

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# 2020 Rules

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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.

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# 2020 Rules

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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.

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# 2020 Rules

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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.

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# 2020 Rules

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- 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.

# 2020 Rules

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- 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.

# Miami University Interim Sexual Misconduct Protocol for Students

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- All reports of an alleged Title IX violation by a student will follow the Title IX Protocol for Students.
  - Issues between students or if student is alleged wrongdoer; if employee is alleged wrongdoer, follow Title IX Protocol for Employees
  - Arising under U.S. Department of Education's Title IX regulations or University's Code of Student Conduct

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# Miami University

# Sexual Misconduct Protocol

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- 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 University, including locations, events or circumstances in which the University 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).

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# Miami University

## Sexual Misconduct Protocol

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- **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 University 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.

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# Miami University

# Sexual Misconduct Protocol

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- **Initiation of corrective action:**
  - Office of Community Standards- Director, Associate and Assistant Directors
  - Title IX Investigator
  - Dean of Students
  - Title IX Coordinator; Deputy Title IX Coordinators
  - Office of Equity and Equal Opportunity Director and Associate Directors

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# Miami University

# Sexual Misconduct Protocol

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- Miami University Police Officers
- Office of Residence Life- Director, Associate Directors and Assistant Directors
- Vice President for Student Life
- Associate and Assistant Vice Presidents for Student Life
- Cliff Alexander Office- Director, Associate Directors, and Assistant Directors
- Intercollegiate Athletics- Coaches and Trainers

# Miami University

## Sexual Misconduct Protocol

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- 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.

# Miami University

## Sexual Misconduct Protocol

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- **Definition of Consent:**
  - Consent is a knowing and voluntary verbal or non-verbal agreement between both parties to participate in each and every sexual act.
  - Consent to one sexual act does not imply consent to other or all sexual acts.
  - Conduct will be considered “non-consensual” if no clear consent, verbal or non-verbal, is given. The absence of “no” does not mean “yes.”

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# Miami University

# Sexual Misconduct Protocol

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- **Definition of Consent:**
  - Person has the right to change one's mind at any time. In other words, consent can be withdrawn at any point, as long as the person clearly informs the other party of the withdrawal.
  - Taking drugs or consuming alcohol does not relieve the obligation to obtain consent.
  - A person is not required to physically or otherwise resist an aggressor.

# Miami University

# Sexual Misconduct Protocol

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- **Effective Consent:**
  - Effective consent can be given by words or actions so long as the words or actions create a mutual understanding between both parties regarding the conditions of the sexual activity.
    - Ask: “Do both of us understand and agree regarding the who, what, where, when, why, and how this sexual activity will take place?”

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# Miami University

# Sexual Misconduct Protocol

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- **Effective Consent:**
  - When a person affirmatively demonstrates that:
    - They do not want to have sex.
    - They want to stop any sort of sexual act.
    - They do not want to go any further, the other party must stop completely.
      - Continued pressure after that point can be coercive

# Miami University

# Sexual Misconduct Protocol

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- **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.

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# Miami University

# Sexual Misconduct Protocol

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- **Consent in Relationships:**
  - Consent can never be assumed, even in the context of a relationship.
  - A person has the right to say “no” and has the right to change their mind at any time.



# Miami University

## Sexual Misconduct Protocol

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- **A person cannot legally consent (no matter what they may say), if:**
  - Person is substantially impaired due to alcohol or drugs, incapacitated, or unconscious.
  - Person is physically or mentally disabled or incapacitated.
  - Person was coerced due to force, threat of force, or deception or when the person was beaten, threatened, isolated, or intimidated.

# Miami University

# Sexual Misconduct Protocol

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- **Limited Amnesty:**

- While the University does not condone underage drinking, illegal drug use, or violation of other University policies, it considers addressing sexual misconduct and interpersonal violence to be of paramount importance. To encourage reporting and adjudication of sexual misconduct and interpersonal violence, Miami University extends limited amnesty to both parties. The University will generally not seek to hold the student responsible for a violation of the law (e.g., underage drinking or illegal drug use) or Code of Student Conduct during the period immediately surrounding the alleged sexual misconduct or interpersonal violence.

# Miami University

# Sexual Misconduct Protocol

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- **Confidentiality:**

- A complainant may request confidentiality. The University takes such requests seriously; however, such requests may severely limit the University's ability to investigate and take reasonable action in response to a report. In such cases, or if applicable law requires, the University will not be able to keep the reporting confidential.

# Supportive Measures

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- This may be requested by complainant, respondent, a witness, or other impacted members of the University community. Supportive measures are available regardless of whether a formal complaint is filed.
- Deputy Title IX Coordinator will exercise discretion and sensitivity about sharing the identity of the student when arranging for supportive measures.
- Efforts will be made to maintain the confidentiality and privacy of the complainant unless one of the requested supportive measures requires revealing the identity of the complainant (e.g. a no contact directive). A student can access these services at any time, even if the student initially declined the service.

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# Supportive Measures

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- Academic support services and accommodations, including the ability to reschedule exams and assignments, change in class schedule, or tutoring
- Short- and long-term housing accommodations (available to Oxford students)
- On-campus counseling services and/or assistance in connecting to community-based counseling services
- Provide transportation/parking options
- Assistance connecting to community-based medical services

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# Supportive Measures

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- Assistance with completing the process of protecting a student's directory information at Miami University
- Work schedule or job assignment modifications (for University employment)
- Mutual No Contact Directive
- Assistance with connecting with resources regarding legal protections available to immigrants or international students in the form of U or T visas
- Information about and/or assistance with obtaining personal protection orders
- A combination of any of these measures

# Investigation

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- 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 a preliminary review in order to “weigh factors” for the potential filing of a formal complaint.

# Preliminary Review

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- Seriousness of the alleged violation (including whether the violation involved the use of a weapon, other illegal activity, illegal drug or intoxicants, multiple respondents, etc.)
- Whether there have been other complaints/ reports made regarding the respondent (e.g., a history of arrests, a record of misconduct at Miami or other institutions)
- Availability of other information to support the alleged violation

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# Preliminary Review

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- Whether the circumstances suggest there is an increased risk of the respondent committing additional sexual misconduct violations (e.g., a pattern of behavior)
- Whether the respondent has threatened the complainant or others
- Safety of the complainant and others

# Miami University

# Sexual Misconduct Protocol

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- **Reporting to Law Enforcement**
  - Cannot force an alleged victim to make a report
  - Look out for “mandatory reporting” issues: if the alleged victim is younger than 18 years old, required by state law to make the report.
  - If a complaint of sexual violence comes into a responsible person, Clery Act is satisfied when violence is reported to a Title IX coordinator.

# Notice of Investigation

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

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# Notice of Investigation

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- Notice of the investigation and disciplinary process, including any informal resolutions which may be available. A copy of the formal complaint received by Miami University identities of the parties involved in the incident, if known;
- The conduct allegedly constituting sexual misconduct and the specific sections of the Code of Student Conduct allegedly violated
- The date and location of the alleged incident, if known

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# Notice of Investigation

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- A copy of the Code of Student Conduct
- A statement that the respondent is presumed not responsible for the alleged conduct until a determination regarding responsibility has been made at the conclusion of the disciplinary process;
- The potential sanction(s) that Miami University may implement following any determination of responsibility
- A statement that the student may be accompanied throughout the process by an advisor of their choice who may be, but is not required to be, an attorney

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# Notice of Investigation

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- A statement that the complainant and respondents may request to inspect and review evidence
- A statement informing the parties that it is a violation of the “Dishonesty” section of the Code to knowingly make false statements or knowingly submit false information during the investigation or any resulting process under this Code
- The date, time and location of the initial investigatory interview(s)

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# Notice of Investigation

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- A statement informing the parties of the process which allows for the temporary delay of the investigation or any resulting process, or the limited extension of time frames for good cause. Good cause may include the absence of parties, a party's advisor, or witnesses, concurrent law enforcement activity, or the need to accommodate language assistance or accommodation of disabilities. The timeline may also be affected by the winter or spring break periods and summer or winter terms.

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# Notice of Investigation

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- A statement that if, in the course of an investigation, Miami University decides to investigate allegations of a sexual misconduct violation or any other Code of Student Conduct violation about the complainant or respondent that are not included in the Notice of Allegations, Miami University will provide notice of the additional allegations to the parties whose identities are known.
- The identity of the investigator



# Outcomes of the Investigation

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- 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 University, or did not occur within the geographical territory of the United States.
- Mandatory dismissals may be appealed.

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# Outcomes of the Investigation

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- Case proceeds to hearing
- Cases may be consolidated where complaints against multiple respondents, multiple complainants rise out of same facts and circumstances.
- Permissive dismissal (any time during process), if complaint withdrawn in writing, if respondent is no longer enrolled or circumstances prevent a full investigation and adjudication

# Conclusion of Investigation

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- The parties will have equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including all relevant evidence, including both those that tend to prove the allegations or absolve the respondent.

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# Conclusion of Investigation

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- Upon completion of the draft of the investigation report, the draft report will be sent to each party and the party's advisor (if any). The purpose of the draft 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.

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# Conclusion of Investigation

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- 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.

# Notice of Hearing

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- To be issued at least 10 days before hearing.
- Content of notice:
  - Description of violative conduct
  - Copy of Code of Student Conduct
  - Respondent presumed not responsible until proven responsible.
  - Description of potential sanctions

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# Notice of Hearing

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- Student allowed an advisor of choice who may be an attorney.
- Parties may request to review evidence.
- Violation of the Student Code of Conduct to make dishonest statements in investigation or hearing.
- Names of Hearing Panel members.
- Informing parties of circumstances for delay of process.

# Roles of Advisors

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- Cross-examination in a hearing must be conducted by a party's advisor, not the party themselves.
- All parties have the opportunity to be accompanied to a meeting or student conduct proceeding by an advisor of their choice, which may be an attorney.
- If a party does not have an advisor at the hearing to conduct cross-examination, one will be provided for them by Miami University.

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# Roles of Advisors

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- If an advisor does not adhere to the rules of decorum and other expectations communicated as part of the student conduct process, they may be dismissed from the process by the hearing authority or Office of Community Standards and barred from further participation and another advisor will be appointed.

# Hearing

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- Adjudication by a three-person hearing panel
- Hearing panel will rule on relevancy of all questions and will supervise cross examination. If witness is not present for cross examination, panel cannot consider prior written statement or interview of witness.
- If there are safety or other concerns, the University will accommodate separation.

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# Hearing

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- Parties are not required to divulge any medical, psychological, or similar privileged records as part of the student conduct process.
- An audio recording of the hearing will be made by the Office of Community Standards. The recording will be made available to the parties upon request.

# Written Notification of Outcome

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- Specific allegation that constitutes sexual misconduct
- Description of procedures that were followed, starting with the formal complaint and continuing through determination
- Finding of facts that support the outcome
- Conclusion applying the appropriate definition of the policies determined to have been violated

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# Written Notification of Outcome

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- Rationale for each allegation regarding the determination of responsibility, sanctions of the respondent and remedies for the complainant
- Appeal procedures

# Sanctions

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- Sanctions include suspension and dismissal and vary depending on the severity of the violation and the respondent's conduct history. Possible sanctions for Sexual Misconduct violations include as follows: dismissal, suspension, removal from campus housing, educational intervention, no-contact orders and/or restrictions from participating in intercollegiate athletics or co-curricular activities.

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# Sanctions

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- The notice of allegation will contain the possible sanctions that may be imposed if the respondent is found responsible.
- Remedies will be provided to the complainant as appropriate to restore or preserve equal access to the university's educational programs or activities.

# Appeals

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- Either party may appeal the outcome of the hearing to the Vice President of Student Life. All appeals must be submitted in writing within five (5) business days of the receipt of the outcome of the hearing.
- All parties will be notified when an appeal has been filed and will be provided with a copy of the appeal and given an opportunity to respond prior to the appeal being submitted to the Vice President for Student Life. The appeal(s) and any responses will be submitted to the Vice President for consideration.



# Appeals: Grounds

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- Conflict of interest or bias exists on the part of the investigator, Board member(s), or Title IX coordinator
- New information exists that was not reasonably available at the time the determination was made that is determined to be substantial enough to have changed the outcome of the hearing
- Procedural irregularity in the hearing of the case occurred that is found to be substantial enough to have changed the outcome of the hearing, including failure to objectively evaluate all relevant evidence or error(s) related to determination of relevance
- Inappropriate sanction

# Timelines

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- The University's investigation, disciplinary, and resolution processes generally take up to 120 business days depending upon the complexity of the matter.
- We conduct prompt and thorough investigations- typically within 45 business days of receipt of the report; hearings within 45 business days and any available appeals are typically resolved within 30 business days.

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# Timelines

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- On occasion the disciplinary process may be temporarily delayed for good cause including the absence of parties, a party's advisor, or witnesses, concurrent law enforcement activity (see section: Legal Options), or the need to accommodate language assistance or accommodation of disabilities.

# Role as an Advisor

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- Definitions of potential misconduct
- What should you be looking for during hearings
- Questioning witnesses, relevance, inadmissible information, credibility, etc.

# Sexual Harassment

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

# Clery Act/VAWA Definitions

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- **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

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- **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

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- **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

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- **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.

# Conducting Hearings

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- Standard of proof: more likely than not
- That means it is more probable that one version of events occurred than another.
- The **WEIGHT** of all of the evidence tips the scale to one side or the other.
- If the scales do not tip one way or the other, the standard of proof has not been met.

# Conducting Hearings

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- Weighing the evidence:
  - Where did it come from?
  - Is the source trustworthy?
  - Does the evidence make sense within a larger context or does it seem to not fit?
  - Is the evidence supported by other evidence?
  - How important is the evidence to the larger context of the case?

# Conducting Hearings

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- Judging credibility of witnesses:
  - weigh 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 of the witness, if any; together with all the facts and circumstances surrounding the testimony

# Hearing Procedures

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- SANE (Sexual Assault Nurse Examiner) reports
- Must be a certified copy of the report
- Can be used for only limited purposes (all other information redacted):
  - To prove that complaining student went to hospital
  - To document statements of complaining student for medical treatment purposes
  - Cannot be used to establish liability for assault

# Relevance

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- Ohio 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

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- 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?

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- 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?

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- Circumstantial Evidence:
  - Circumstantial evidence is 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 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

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- 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.

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# Evidence & Credibility

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- 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

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- 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.

# Cross Examination

- Effective cross examination first requires a thorough and complete understanding of all issues involved in the particular case.
- You will need to examine every document, investigation summary, summary of witness/party interviews
- You will need to develop a theory of the case. In other words, what are the main issues that are important to your student's case.

# Cross Examination

- It is typically not necessary to question every witness on every single topic.
- Prior to the hearing, you will have a list of the witnesses who will testify for the opposing party.
- You will draft an outline of what you want to accomplish with each witness. Witnesses may have information on various issues and not on others, so you need to identify the function of each witness for both your case and the opponent's case.

# Cross Examination

- For each witness, you will prepare a detailed list of questions on the topics you wish to address with each witness. You should follow the summary of the witnesses' testimony from the investigation.
- **HOWEVER, DO NOT TURN OFF YOUR EARS.** It is very important to listen closely to what the witness says during their initial/direct testimony. It could differ from what was stated during the investigation, so you may have to change focus.

# Cross Examination

- For each witness, consider whether to cross examine at all.
- What do they add to the case, if anything?
- Does their testimony hurt your student's case?
- Does their testimony actually help your student's case?
- If the witnesses' testimony does not add anything to the case or does not hurt your student, may decide to not cross the witness.



# Cross Examination

- The best cross examinations pick out a few points to address with the witness. You do not want to simply go over the witnesses' entire direct examination again, point by point.
- Ensure that each question you are asking the witness leads to a specific goal in your case.
- You will organize your questions in the order which makes the most sense to your case. You do not have to follow the order of the direct examination.

# Cross Examination

- Control your own demeanor during the examination. You project credibility if you are not arguing with the witness, if you are focused on the issues, are confident and pleasant.
- If your cross examination devolves into name-calling or arguing with the witness, the University's policies allow for your removal from the hearing.

# Cross Examination

- Keep it simple. Only one topic in each of your questions.
- Keep it short. If you drone on and on, it may appear to the panel that the witnesses' testimony is more important than it actually is.
- Ask only questions that help you. You should have an outline of exactly what you want to accomplish with each witness.

# Cross Examination

- Avoid open-ended questions. You will have an idea of the witnesses' testimony from both the investigation report and from the direct examination. Use that information to frame questions which can be answered in a "yes or no" response, rather than inviting some sort of long explanation. Cross examination uses the *questions themselves, not the answers*, to establish the point.

# Cross Examination

- Example:
  1. Not good form: “When did you decide to leave the bar that night?”
  2. Better: “You left the bar that night at 2 a.m., correct?”
  3. Not good form: “Explain why you wanted to leave the bar.”
  4. Better: “You left the bar because you were intoxicated, correct?”

# Cross Examination

- Again, many times cross examination establishes what you want through the question itself and it doesn't actually matter what the answer is.
- The go-to example: “When did you stop beating your wife?” There is no actual answer to that question, i.e. “I didn't stop” or “I stopped on Tuesday.” Whatever the response, you have already made a point with the question itself.

# Cross Examination

- If you have a witness who is adverse or whose testimony is harmful to your case, look for ways to challenge the credibility of the witness. Has he/she changed their story? Is their hearing testimony a little different than their statements to the investigator? Were they in a position to actually see what they claim to have seen? Are they biased against your student in some fashion? All are good areas of questioning.

# Cross Examination

- Know when to quit. Make your point(s) and stop. Resist the urge to ask questions again that elicited a helpful response from the witness. Just because you got a good answer the first time you asked, do not ask again because the witness could add more details or explanation that waters down the prior helpful response. Same with bad answers. Don't ask again because it just draws more attention to the unhelpful issue.



# Cross Examination

- Ask the panel for help with difficult witnesses. If the witness is being evasive or argumentative, ask the panel to instruct the witness to answer your question, rather than arguing with the witness yourself.

# Consent

- One significant area of cross examination will be whether there was consent to the sexual conduct.
- You **MUST** be familiar with the definitions of consent which are contained in the University's policies.
- You should plan on drafting cross examination questions centering on the issue of consent.

# Sample cross examination on consent

\*\* If you are cross examining a complaining student, focus your questioning on everything he/she said or did that a reasonable person would consider to demonstrate consent: 1.) Didn't you move his/her hand up your thigh? 2.) Didn't you take his/her face in your hands and initiate the first kiss? 3.) Didn't you suggest that he/she accompany you upstairs to your room? 4.) Didn't you send a text message the next day saying how much you enjoyed the evening?

# Sample cross examination on consent

\*\* If you are cross examining the responding student, focus on all the cues which should have put him/her on notice there was no consent: 1.) Didn't he/she push your hand off of his/her thigh? 2.) Didn't he/she pull back when you tried to kiss him/her? 3.) Didn't he/she say no when you asked him/her up to your room? 4.) Didn't he/she refuse to respond to your text messages the next day and block you from social media?

# Cross Examination

- There is no “one size fits all.”
- Every case is different.
- The only way to accomplish an effective cross examination is to know the case inside and out.
- A lot of pre-hearing preparation is required, coupled with paying attention to everything said during the hearing.
- Be prepared to pivot if there are any surprises.

# Questions?

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**Thank  
You!!!**