



MarymountManhattan

Title IX General Training  
September 2020

BIEDERMANN·HOENIG·SEMPREVIVO  
A PROFESSIONAL CORPORATION

# TOPICS COVERED

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- New York State Law: NYS Education Law 129-B
- Federal Laws: VAWA, Campus SaVE Act, Title IX
- New Title IX Regulations
- When a Complaint is Received
- Conflicts of Interest/Impartiality/Bias
- Title IX Investigations
- Hearings
- Investigation Reports
- Appeals
- Informal Resolution

**STATE LAWS:  
NYS EDUCATION LAW  
ARTICLE 129-B**

# NYS EDUCATION LAW 129-B

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- On July 7, 2015, Governor Cuomo signed the “Enough is Enough” legislation to combat sexual assault on college and university campuses in the State of New York. “Enough is Enough” applies to public and private colleges and universities in New York.

# NYS EDUCATION LAW 129-B

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## Some Requirements under “Enough is Enough”:

- Uniform Statement of Rights
- Students’ Bill of Rights
- Uniform Definition of “Consent”
- Alcohol and/or Drug Use Amnesty Policy



**ENOUGH IS  
ENOUGH**

# NYS EDUCATION LAW 129-B

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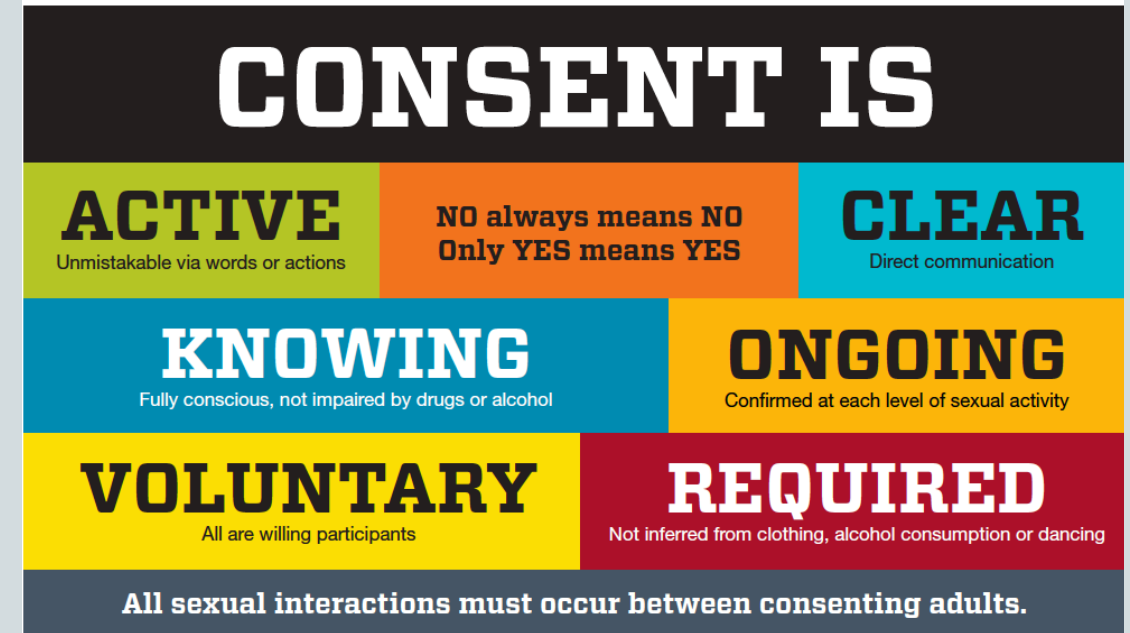
- **Students' Bill of Rights as it relates to investigations:**
  - The process is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard;
  - Be treated with dignity;
  - Be free from any suggestion that the reporting individual is at fault or should have acted in a different manner to avoid the crimes or violations; and
  - Describe the incident to as few institution representatives as practicable and not be required to unnecessarily repeat a description of the incident.

# NYS EDUCATION LAW 129-B

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- **Required Definition of Consent:**

- Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.
- Silence or lack of resistance, in and of itself, does not demonstrate consent.
- Consent may be initially given but withdrawn at any time.
- Consent cannot be given when a person is incapacitated.



# FEDERAL LAWS: TITLE IX, VAWA, & CAMPUS SaVE ACT



# VIOLENCE AGAINST WOMEN'S ACT (“VAWA”)

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Under the Campus Sexual Violence Act of VAWA, MMC must, among other things:

- Conduct internal sexual misconduct proceedings that are prompt, fair, and impartial
- Annually train college administration officials and employees responsible for investigating complaints of sexual misconduct

# TITLE IX OF THE EDUCATION AMENDMENT ACT OF 1972

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“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under an educational program or activity receiving federal financial assistance.”

# NEW TITLE IX REGULATIONS

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On May 6, 2020, the U.S. Department of Education released the Final Title IX Regulations. Unlike prior guidance, the new regulations are considered binding law after undergoing a formal notice and comment period.

- The new regulations went into effect on August 14, 2020.



# WHAT DOES TITLE IX PROHIBIT?

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- The new Title IX Regulations forbid sex-based discrimination, sexual harassment, sexual assault, and sexual violence in the College's Education and Program Activities in the United States.
- Title IX also forbids discrimination because of sex in employment and recruitment consideration or selection, whether full-time or part-time, under any education program or activity operated by an institution receiving or benefiting from federal financial assistance.

# KEY DIFFERENCES

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## OLD GUIDANCE

- “Preponderance of the Evidence Standard”
- Applies to all off-campus conduct that has an impact on the educational environment of an individual or institution’s population as a whole
- Institutions may offer the right of appeal but not required
- Informal Resolution prohibited

## NEW REGULATIONS

- Either “Preponderance of the Evidence” or “Clear and Convincing”
- Only applies to off-campus conduct that is part of an “Education Program or Activity”
- An equal right of appeal for all parties is required
- Informal Resolution permitted if certain conditions are met

# NEW REQUIREMENTS

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- Live Hearings
- Investigative Model that separates investigating from decision-making
- Clear Reporting Options, including electronic reporting methods
- First Response Protocol
- Training Requirements including publication on website
- New terminology: “Recipient;” “Complainant;” “Respondent”

# TITLE IX DEFINITIONS

# SEXUAL HARASSMENT

Conduct on the basis of sex that satisfies one or more of the following:

- (1) *Quid Pro Quo* – A College employee conditioning the provision of an aid, benefit, or service of the College on an individual’s participation in unwelcome sexual conduct;
- (2) *Sexual Harassment* – Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient’s education program or activity; or
- (3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).



# TITLE IX DEFINITIONS

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- **SEXUAL ASSAULT**: Includes the following conduct -
  - Forcible sexual acts, forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling
  - Non-Forcible Sexual Intercourse, including incest and statutory rape
- **DATING VIOLENCE**: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship



# TITLE IX 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 Complainant;
  - By a person with whom the Complainant shares a child in common;
  - By a person who is or has cohabitated with the Complainant as a spouse or intimate partner;
  - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of New York State;
  - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of New York State
- **STALKING**: engaging in a course of conduct directed at a specific person that would cause a reasonable person to –
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress.

# TITLE IX DEFINITIONS

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## **EDUCATION PROGRAM OR ACTIVITY:**

*“location, event or circumstance over which the Institution exercises substantial control over both the respondent and the context in which the sexual harassment occurs.”*

- The regulations extend the scope of “education program or activity” to any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, which includes school sanctioned sororities and fraternities.
- Title IX protections do NOT extend to students studying abroad, unlike under prior guidance.

# TITLE IX DEFINITIONS

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## **FORMAL COMPLAINT**

- A Formal Complaint is a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that MMC investigate the allegation of sexual harassment.
- The filing of a Formal Complaint will trigger the Title IX grievance process.

# TITLE IX DEFINITIONS

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## FACT PATTERN

You have been assigned to investigate a formal complaint alleging that a student was sexually harassed physically by her sociology professor during office hours.

- What types of evidence/information would be relevant to determining whether the alleged harassment was **severe, pervasive** and **objectively offensive**?

# TITLE IX RETALIATION

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- Title IX prohibits retaliation against an individual who makes a complaint of a Title IX violation or otherwise participates in the Title IX investigation process.

# RETALIATION

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- **Elements of retaliation:**

- (1) The individual was engaged in a protected activity (*i.e.* reporting a potential Title IX violation, participating in the investigation process);
- (2) The College was aware of the individual's participation in the protected activity;
- (3) There was an adverse action taken against the individual; and,
- (4) There was a causal connection between the protected activity and the adverse action taken against the individual.

# TITLE IX – HOSTILE ENVIRONMENT

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- The College's action or inaction in response to a Title IX Complaint may support a finding that the College maintains a **hostile environment** that permits ongoing Title IX violations.

# HOSTILE ENVIRONMENT

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- **Elements of hostile environment:**

- (1) The individual suffered intentional, unwanted treatment *because of* his or her sex;
- (2) The harassment was severe or pervasive;
- (3) The harassment affected the terms, conditions, or privileges of the education or work environment;
- (4) The harassment would detrimentally affect a reasonable person; and,
- (5) The College knew or should have known about the harassment and did nothing to stop the behavior.



# HARASSMENT - HOSTILE ENVIRONMENT

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- *New York State Law*

- On August 12, 2019, Governor Cuomo signed legislation enacting sweeping new workplace harassment protections.
- Eliminates restriction that harassment be "Severe or Pervasive" in order for it to be legally actionable.
- Mandates that all employment contract NDAs include language allowing employees to file a complaint of harassment or discrimination.
- Extends the statute of limitations for employment sexual harassment claims filed from one year to three years.

# INTERSECTION OF TITLE IX AND NYS 129-B

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- Sexual misconduct that does not fall under Title IX may still be covered under NYS 129-B and require a response from the College
- *“A reporting individual is encouraged to report sexual misconduct, domestic violence, dating violence and stalking regardless of where the incident occurred, or who committed it. Even if the College does not have jurisdiction over the responding individual, the College will still take prompt action to provide for the safety and well-being of the reporting individual and the broader campus community.”*  
(MMC Policy Section V)

# TITLE IX

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- **FACT OR FICTION:** A student who alleges to have experienced sexual harassment while participating in a summer program through the college in another state can bring a Formal Complaint to the Title IX Coordinator.
- **FACT OR FICTION:** After students graduate, they no longer have standing to make a Formal Complaint of sexual harassment or sexual assault to the College under Title IX.
- **FACT OR FICTION:** The Title IX Rule allows schools to continue to address misconduct that does not meet the definition of sexual harassment.

# WHAT ARE MMC'S OBLIGATIONS UNDER TITLE IX

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- Marymount Manhattan College is responsible for properly investigating all allegations of Title IX violations.
- The College's Title IX investigation must be adequate, reliable, impartial, and prompt and must include the opportunity for both parties to present witnesses and other evidence.

# MMC'S SEXUAL MISCONDUCT POLICY

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- Consistent with its obligations under all federal and state laws, MMC has enacted its own Policy on Sexual Misconduct, Sexual Assault, Stalking, and Relationship Violence.
- A copy of the College's policy can be found at [www.mmm.edu/offices/human-resources/policy-sexual-misconduct-sexual-assault-stalking-relationship-violence.php](http://www.mmm.edu/offices/human-resources/policy-sexual-misconduct-sexual-assault-stalking-relationship-violence.php)

# MMC'S SEXUAL MISCONDUCT POLICY

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## SCOPE

- This policy prohibits a broad range of behaviors that can create a hostile working, living or learning environment, including sexual assault and sexual harassment, collectively referred to as “sexual misconduct.”
- This policy applies to sexual misconduct whenever that sexual misconduct occurs:
  - On campus; and
  - At an off campus Education Program or Activity as defined in the Policy.
- Sexual Misconduct that occurs off campus and is not part of an Education Program or Activity shall be subject to review and/or investigation under other applicable Codes of Conduct of the College.

# TITLE IX COORDINATOR

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- MMC's Title IX Coordinator – Rebecca Mattis-Pinard
  - Telephone: 212.517.0563
  - Email: [rpinard@mmm.edu](mailto:rpinard@mmm.edu)
- The Title IX Coordinator ensures that the College is complying with Title IX regulations, including coordinating any investigations of complaints received pursuant to Title IX and implementing Title IX regulations.

# WHEN A COMPLAINT IS RECEIVED





# WHEN A COMPLAINT IS RECEIVED

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- All employees are strongly encouraged to report incidents of sexual misconduct to MMC's Title IX Coordinator, Rebecca Mattis-Pinard.
- Increased reporting helps the College to properly investigate and respond to instances of discrimination and harassment so that a hostile environment is not created.

# WHEN A COMPLAINT IS RECEIVED

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- **Immediately inform the Title IX Coordinator if possible.**
- When speaking to a Complainant, do the following:
  - First, advise the Complainant that his/her identity must be disclosed.
  - Listen to the Complainant.
  - Be supportive. Advise the Complainant that the College will review and respond to the allegations.
  - Document the allegations, including all facts as relayed.
    - Keep notes free from bias or any conclusions.
  - Request that the Complainant maintain any relevant evidence.
  - Inform the Complainant that the Title IX Office has information on various resources.

# WHEN A COMPLAINT IS RECEIVED

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Steps the College must take after being made aware of a potential Title IX Violation:

- The College must contact the Respondent and explain the reporting options, grievance process and supportive measures.
- Although the College shall seek consent from the Complainant before beginning an investigation, the College may be required to go forward with an investigation absent consent from the Complainant if the report presents a threat to the College community.
  - NOTE: If a Formal Complaint is filed for conduct that falls under Title IX, the grievance process is triggered.
- The College must inform the Complainant that it cannot ensure confidentiality and will take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality.
- Title IX Team members privy to information of a private nature should only discuss the evidence with individuals who are tasked with similar roles.

# INTERACTIONS WITH CRIMINAL INVESTIGATIONS

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- Reporting parties also have the right to bring a criminal complaint against the Respondent.
- The timing of a College's Title IX investigation will typically coincide with the timing of the criminal investigation. The College's investigation should continue unless it would interfere with the police's investigation.
- Efforts should be made to cooperate and coordinate with local law enforcement as much as possible during a concurrent criminal investigation.

# INTERACTIONS WITH CRIMINAL INVESTIGATIONS

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Keep in mind the purposes of MMC's Title IX investigations:

- A Title IX investigation is required to ensure that institutions provide a safe and nondiscriminatory environment for all students that is free from sexual harassment and sexual violence. The burden of proof is “preponderance of the evidence.”

# TITLE IX GRIEVANCE PROCESS

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When a Formal Complaint is received that alleges conduct that falls under Title IX, the following grievance process is triggered:

- Investigation
  - Interviews of reporting/responding parties and witnesses
  - Review of documents and other evidence
- Live Hearing
  - Conducted remotely via video conferencing
- Summary of relevant evidence and Investigative Report
- Appeal Process

# IMPARTIALITY, CONFLICTS OF INTEREST & BIAS

# IMPARTIALITY

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## **Impartiality is key to the Title IX formal grievance process**

- Serving impartially includes avoiding the following:
  - Prejudgment of the facts at issue
  - Conflicts of interest
  - Bias



# PREJUDGEMENT OF FACTS

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- **To prejudge is to pass judgment prematurely or without sufficient reflection or investigation.**
- Neither responding nor reporting parties should be met with prejudgment while participating in the Title IX process.

# PREJUDGEMENT OF FACTS

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- **Sex Stereotypes**
  - *Example:* Men cannot be sexually assaulted
  - *Example:* Women are more sensitive than men

# PREJUDGEMENT OF FACTS

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**Avoid prejudgment of the facts by doing the following:**

- Keep an open mind
- Do not jump to conclusions - explore all of the facts prior to making any conclusions
- Be particularly cautious about checking your assumptions in situations involving sexual assault, drugs, or alcohol use

# CONFLICTS OF INTEREST

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**A *conflict of interest* occurs when personal or private interests may compromise one's judgment, decisions, or actions**

- *Example of Potential Conflict:* The Decision Maker for a particular case has been the advisor of the Complainant for the past 2 years.
- *Example of Potential Conflict:* The investigator is the Vice President of a theater company owned by the Respondent's spouse.



# CONFLICTS OF INTEREST

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## **How do you determine whether a conflict of interest disqualifies you from serving in the grievance process?**

- First determine what kind of conflict it is
  - *Is it an actual conflict of interest?*
    - A direct conflict between one's official duties and responsibilities, and a competing personal interest or obligation
  - *A perceived conflict of interest?*
    - A situation where it could reasonably be perceived that a competing interest could improperly influence the performance of one's official duties and responsibilities
  - *A potential conflict of interest?*
    - Arises where a personal interest or obligation could conflict with one's official duties and responsibilities in the future

# CONFLICTS OF INTEREST

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**How do you determine whether a conflict of interest disqualifies you from serving in the grievance process?**

- Then ask yourself the following questions:
  - *Will this conflict prevent me from being able to impartially participate?*
  - *How would I feel if my colleagues became aware of the conflict?*
  - *How would I feel if the conflict appeared in the media with respect to the grievance process?*
  - *If I saw someone else with the same potential conflict, would I think they should be barred from participating?*

# BIAS

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**A *bias* is a tendency, inclination, or prejudice toward/against someone**

- Biases are often based on stereotypes, rather than actual knowledge of an individual or a particular circumstance and are frequently based on a person's gender, race, or sexual orientation
- Biases can result in prejudgments, which lead to improper decisions or potentially discriminatory practices
- *Example:* A Title IX Decision-maker finds a Complainant in a case more credible than a Respondent because the Complainant is a male.

# BIAS



You may or may not be aware of your own biases. Biases can be (and are often) **implicit**, meaning that certain attitudes and stereotypes can affect understanding, actions, and decisions in an unconscious manner.

## Ways to Combat Bias:

- Pay attention to your language
- Avoid generalizations
- Question your thinking and challenge your assumptions
- Listen carefully and openly



# IMPARTIALITY TIPS

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**Be sure to view and evaluate all evidence in an impartial manner.**

- Maintain objectivity.
- Do not consider interactions with the Respondent or Complainant that are not relevant to the investigation at hand.
- Do not seek information about the responding or Complainant from anyone not involved in the investigation.
- Do not let any preconceived notions about complainants and respondents generally affect how you conduct the investigation.
- Accept evidence at face value unless called into question by other evidence.
- Keep in mind that evaluating factual evidence may entail assessing the credibility of witnesses.

# IMPARTIALITY FACT PATTERN

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Daisy is a Decision Maker who conducts live hearings for the College's formal grievance process. Daisy is also an academic dean for the college, who strives to uphold the school's academic reputation. Daisy oversees programs to help students struggling in their courses. A student (with a 2.1 average GPA) made a formal complaint alleging that a classmate (with a 3.99 GPA) sexually harassed her in the campus library while completing work on a group assignment. Daisy is assigned to conduct the live hearing for this complaint.

**Are you concerned about Daisy's impartiality with respect to bias?**

# IMPARTIALITY FACT PATTERN

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- **Answer:** Potentially – Daisy’s affiliation/concern with the school's academic reputation may create an explicit bias in favor of the higher achieving student. Her affiliation may also create an implicit bias of which she is not aware or it may not be present. However, the fact that she oversees program to assist students struggling academically leads us to believe she most likely does not have bias on the basis of grades.
- **Reasoning:** Daisy may have an explicit bias in favor of students with strong academic records, which could lead Daisy to believe that students with good grades tell the truth, and students with bad grades do not tell the truth.
- Daisy could also hold implicit biases against poor performing students due to her role as an academic dean without recognizing the impact the role may have had on her thinking. Nonetheless, she may also not believe that the credibility of students depends on their grades, and therefore may not have a bias issue on this topic.

# TITLE IX INVESTIGATIONS

# TITLE IX INVESTIGATION

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The Title IX Coordinator has asked you to be the lead investigator of a Title IX complaint. Now what?

- Timing
- What information do you already have?
- Identify the key players
- Develop a plan

# TITLE IX INVESTIGATION

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What should an investigation consist of?

- A review of the policy alleged to be violated
- Separate interviews of the Complainant, the Respondent, and other witnesses (if applicable).
- A review of any relevant documents, photographs, or other materials.



# TITLE IX INVESTIGATION

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Rights of reporting parties and responding parties:

- Both parties have the right to participate in the investigative process or elect not to participate.
- Both parties may present evidence.
- Both parties are entitled to have an advisor of their choice present for all investigative and disciplinary proceedings. The advisor may be an attorney.

# TITLE IX INVESTIGATION

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## **General Tips for Investigators:**

- Maintain an appropriate relationship with the Complainant and Respondent throughout the investigation process.
- Remember that your job is to fact-find in an impartial manner.
- Investigators should conduct themselves in a professional manner during the investigation.
- Avoid making any assumptions or conclusions during the interview process.



# TITLE IX INVESTIGATION INTERVIEWS

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Investigators should conduct thorough interviews so as to limit, as much as possible, the amount of times that a Complainant is questioned about the incident.

# TITLE IX INVESTIGATION INTERVIEWS

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## **Before the interview:**

- The key to conducting a meaningful interview is to prepare.
- Review all documents/materials received prior to the interview.
- Review the definitions contained within the College's Sexual Misconduct Policy and other potentially relevant policies to determine what information you need to obtain.
- Prepare an outline.

# TITLE IX INVESTIGATION INTERVIEWS

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## **At the beginning of the interview:**

- Make it known that the College takes allegations of sexual misconduct very seriously.
- Acknowledge that you will be asking some difficult questions and explain your intent.
- Stress the importance of honesty during the interview.

# TITLE IX INVESTIGATION INTERVIEWS

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## **During the interview:**

- Have the interviewee tell his/her story first.
- When you start questioning, begin with general questions, but get more specific as the interview progresses.
- Get the details – the “who, what, when, where, why.”
- Identify all potential witnesses and relevant records.

# TITLE IX INVESTIGATION INTERVIEWS

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## **During the interview:**

- Make sure the interviewee answered the question you asked. Repeat questions if necessary.
- Listen to the answer and explore the unanticipated.
- Recognize that there will always be one or more competing interests.

# TITLE IX INVESTIGATION INTERVIEWS

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## **During the interview:**

- Question about any documents that might relate to the complaint (i.e. texts, photos, videos).
- Take notes throughout the interview detailing specific statements made.
- Be objective and free from bias.

# TITLE IX INVESTIGATION INTERVIEWS

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## **At the end of the interview:**

- Feel free to repeat significant facts to ensure that there are no miscommunications. If facts are specifically reconfirmed, be sure to indicate that in your notes.
- Also ask the individual being interviewed whether he or she has any questions or anything to add.
- Be as honest and upfront as you can about the situation but maintain confidences as much as possible.
- Advise the witness that it is his/her responsibility to maintain confidences outside of the interview.

# TITLE IX INVESTIGATION REFUSAL TO PARTICIPATE

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- The Complainant, Respondent, or any witness may leave the interview or choose to not participate in the investigation at any point in time.
- If the Complainant so chooses, the College must respect his/her decision, but then must decide whether the investigation should go forward without the Complainant.
- If the Respondent or a witness leaves the interview or refuses to participate, advise him/her that the administration will be forced to base its determination on all other evidence gathered.



# TITLE IX INVESTIGATION NOTES TAKEN DURING AN INTERVIEW

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## **Notes taken during the interview should be:**

- Objective and free from bias.
- Factual notes with no conclusions.
- Reviewed and finalized immediately after the interview.
- Dated and signed.

# TITLE IX INVESTIGATION AFTER THE INTERVIEW

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- Review notes taken during the interview to determine if any additional information is needed.
- Assess the need to re-interview someone if cause arises.
- Maintain confidentiality and respect the rights of all involved. Only share your interview findings and notes with specified College faculty and staff.

# SENSITIVE SUBJECT MATTER

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- Investigators should acknowledge the sensitive nature of what will be asked during the interview.
- Explain, however, that the College will be able to come to the most accurate determination after reviewing all of the evidence.
- Be aware that sexual violence may impact students differently depending on the cultural background of the student.
- Never assume that an individual is not telling the truth simply because he or she is not responding to the situation in the same manner as you would respond to the situation.

# SENSITIVE SUBJECT MATTER

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- Throughout the interview and Title IX investigation, avoid re-victimization.
- Preface the interview or particular questions with statements such as, “I am not implying that you should have taken this action nor am I passing any judgment, but I am collecting all the facts and need to determine exactly what happened.”
- Be sensitive to the fact that the Complainant could be suffering from emotional distress as a result of the incident.

# SENSITIVE SUBJECT MATTER

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- **Preparation in advance is imperative.**
  - Review your questions out loud so you are comfortable asking the questions.
  - Phrasing of questions is very important. Ensure that your wording or phrasing of questions is not thoughtless or inconsiderate.

# SENSITIVE SUBJECT MATTER

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- **Tips for interviews with sensitive subject matter:**
  - Start with the easier questions, such as the facts leading up to the incident.
  - Take breaks as needed.
  - Go with your gut – if you feel that the interviewee is getting worked up, take a step back, ask if he/she needs water or a break, to prevent the interviewee from completely shutting down.
  - Never say, “I know what you mean/you’re feeling.”
  - Never make assumptions – always ask follow-up questions and have the interviewee explain the situation in detail.

# TITLE IX INVESTIGATION REPORT

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- The Investigator will prepare an investigation report summarizing all evidence relevant to the claims and factual findings, and provide the final Investigation Report to the Title IX Coordinator and a separate decision maker to reach the determination regarding responsibility.
- Prior to the conclusion of the investigation, copies of all evidence directly related to the allegations made against the responding individual(s) and a copy of the Investigation Report, will be sent by the College to the parties and to the parties' advisors, if any.
- The parties will have ten (10) days to submit a written response, which the investigator will consider prior to completion of the investigative report.

# DRAFTING AN INVESTIGATION REPORT

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## **What to include in the Investigation Report:**

- Relevant facts gathered during the interview process.
- Explanation as to why some facts are more probative than others.
- Proofread, sign, and date each Investigation Report.



# TITLE IX INVESTIGATION STANDARD OF PROOF

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The Investigator's fact findings will be made using the "preponderance of the evidence standard."

- This standard requires that the information supporting a finding that the policy was violated be more convincing than the information in opposition to it.
- Under this standard, individuals are presumed not to have engaged in behavior that violates the policy.

# TITLE IX INVESTIGATION - RELEVANCE

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**RELEVANCE:** Information is relevant when the evidence directly relates to the issues being discussed or disputed.

- Keep in mind the difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.

# INVESTIGATION REPORT - RELEVANCE

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**To determine if a piece of information is relevant, ask yourself the following questions:**

- Is this information related to the applicable policy definitions?
- Would the omission of this information detract from someone's understanding of the allegations?
- Does this information provide context that is helpful for determining what occurred?

# INVESTIGATION REPORT/RELEVANCE

## CASE STUDY

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Maggie, a student, reports to her College advisor that a classmate, Dan, has been making inappropriate sexual jokes and innuendos at and about her.

- She and Dan 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, Dan allegedly called Maggie and asked her out. Maggie declined. Maggie states that Dan began teasing her on social media and telling all of their mutual friends that Maggie “is a prude.”
- The teasing became increasingly more offensive, and he allegedly began making false statements that:
  - Maggie is homosexual,
  - She is afraid to date because she is a hermaphrodite, and
  - That Maggie sent him sexually explicit photos.
- Maggie alleges that Dan’s false statements were made over the course of the summer, at various off-campus social distanced class gatherings set up by the Professor for students to meet each other and discuss potential research topics where the Professor and other students were present.

# INVESTIGATION REPORT/RELEVANCE

## CASE STUDY

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Is the activity complained of covered under Title IX?

- Did it occur on campus?
- Did it occur as part of an Education Program or Activity?
  - Did the College exercise substantial control over both the respondent and the context in which the sexual harassment occurred?
- Does the alleged conduct fall under the definition of sexual harassment?
  - Was it severe, pervasive and objectively offensive?

# INVESTIGATION REPORT/RELEVANCE

## CASE STUDY

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Maggie files a formal complaint and you investigate the allegations. You are drafting your investigation report. You learned the following information during your interviews of the parties and witnesses. Should you include them in your report?

1. Maggie used to date Dan's teammate on the College baseball team.
2. While at a party over the summer, Maggie's friend saw Dan try to pour some of his vodka into Maggie's cup when she wasn't looking.
3. Dan had been on academic probation the prior Spring semester for failing a class.
4. Maggie's friend sent her a screenshot of texts she received from Dan's friend about Maggie being a homosexual.
5. At the same party, Dan was drinking. He tried to pressure Maggie into drinking as well. Maggie reports that Dan stated, "Some alcohol will allow you to drop your guard, and hopefully, allow me to drop your pants."

# INVESTIGATION REPORT/RELEVANCE

## CASE STUDY

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**What issues do you see, if any, in the below portion of the Investigation Report?**

*I searched for Maggie on social media and found several pictures of her wearing bikinis and drinking alcohol. When asked about what happened at the party, Maggie stated that Dan tried to pour vodka into her drink when she was not looking. Maggie began to cry in our interview and was distraught. Maggie's friend, Sara, saw Dan try to pour the vodka.*

*When questioned about this, Sara stated that she stopped Dan and he said, "Stop being such a cock block." Sara was fidgety and laughed nervously when describing the encounter. She did not appear to be telling the truth. Sara stated that this happened at approximately 11:15 pm. She immediately told Maggie and they left the party and walked home to the dorms on campus. Sara and Maggie saw Dan the next day in the cafeteria and he ignored them. Sara is on academic probation and has to be contacted via Zoom. Sara stated that she was present the first time Maggie and Dan met but she did not appear to be telling the truth, as this contradicted both of their statements.*

# INVESTIGATION REPORT/RELEVANCE

## CASE STUDY

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The parties proceed to a live hearing. After a full grievance process, the College's appointed Decision Maker (who is close friends with the College advisor to whom Maggie made her initial report) finds that Dan is responsible for engaging in sexual harassment as defined in the Title IX regulations.

After receiving the Decision Maker's determination, Dan feels that the Decision Maker had a conflict of interest that affected the outcome of the grievance process. He submits an appeal request to the Title IX Coordinator.

**Does Dan have a valid claim that there was a conflict of interest here?**



# TITLE IX HEARINGS

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- Both parties have the right to submit, cross-examine, and challenge evidence at a live hearing, which will be recorded.
- Each party's respective Advisor will conduct cross examinations at the hearing.
- A Decision Maker will preside over the hearing and will determine whether a question is relevant before the party or witness is required to answer.
- Either party can request for the live hearing to take place in separate rooms. Participants may attend the hearing virtually, provided that all participants are able to see and hear each other.
- The Decision Maker will objectively review all relevant evidence set forth at the hearing, including evidence that is inculpatory and exculpatory.

# TITLE IX APPEALS

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The new regulations require the right of appeal be offered to both parties. Parties can appeal the outcome of a Title IX investigation on the following grounds:

- A material deviation from the procedures affected the outcome of the case;
- There is new and relevant information that was unavailable, with reasonable diligence and effort, at the time of the investigation, that could reasonably affect the findings; and/or,
- The Title IX Coordinator, investigator, or Decision Maker had a conflict of interest or bias that affected the outcome of the matter.

# TITLE IX APPEALS

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## APPEAL PROCEDURE

Appeals must be made in writing and submitted to the Title IX Coordinator within 14 calendar days of the notification of the decision regarding the outcome of the case.

- The Appeals Board consists of one faculty member and two staff members appointed by the College's President.
- The appeal is not a new hearing and will consist of a review of the record. Upon review, the Appeals Board may make one of the following decisions within 14 calendar days from the request for an appeal:
  - Uphold the original outcome(s);
  - Modify the sanction(s); or
  - Remand the case with corrective instructions to the investigators.

# TITLE IX INFORMAL RESOLUTION

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## **Conditions required for implementing Informal Resolution in a particular case:**

- All parties are provided with written notice of the allegations;
- All parties are informed of the requirements of the informal resolution process and any consequences of participating; and,
- The college obtains voluntary, written consent from all parties.

Informal Resolution is not permitted in cases with allegations of an employee sexually harassing a student.

# TITLE IX RESOURCES

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- <https://sites.ed.gov/titleix/>
- <https://sites.ed.gov/titleix/policy/#fact-sheet>



# ANY QUESTIONS?