



Center for Excellence in Education

CEHE Title IX Training - Session 1

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Training Agenda

- I. Jurisdiction & key Title IX definitions
- II. CEHE's Title IX policy
- III. Serving in Title IX roles with impartiality

TITLE IX – Jurisdiction & Key Definitions

- 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.
– 20 U.S.C. § 1681

DISCRIMINATION ON THE BASIS OF SEX

- CEHE receives “Federal financial assistance”; thus, its education programs and activities are covered by Title IX.
- A university that responds with deliberate indifference to actual knowledge of sexually harassing conduct occurring in its education program or activity has violated Title IX. - *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998).
- “Whether gender-oriented conduct rises to the level of actionable harassment thus depends on a constellation of surrounding circumstances, expectations, and relationships,...including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.” *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

RELEVANT SUPREME COURT CASES

Gebser – Teacher on Student Harassment

- A high school student and her parents sued a school district, seeking monetary damages under Title IX for a teacher's sexual harassment of student.
- No liability because the district lacked actual notice.

Davis – Student on Student Harassment

- Plaintiff's fifth-grade daughter was the victim of repeated acts of sexual harassment by a classmate, G.F., over a 5-month period.
- The harassment was not only verbal; it included numerous acts of objectively offensive touching
- G.F. ultimately pleaded guilty to criminal sexual misconduct.
- Plaintiff alleged that multiple victims were sufficiently disturbed by G.F.'s misconduct to seek an audience with the school principal.
- Plaintiff argued the harassment had a concrete, negative effect on her daughter's ability to receive an education.

RELEVANT TENTH CIRCUIT CASELAW

J.M. ex rel. Morris v. Hilldale Indep. Sch. Dist. No. 1-29,

397 F. App'x 445, 455 (10th Cir. 2010) – Denial of Equal Access to Education

- Plaintiff was ostracized by other students after teacher resigned (following their sexual relationship).
- Plaintiff was placed on antidepressants and anti-anxiety medication.
- Plaintiff's family felt it necessary to move to another school district.
- Even in the new school, Plaintiff continued to be afraid of the teachers and couldn't motivate herself to study.
- “All of these negative impacts on J.M.'s education resulted directly from the sexual relationship with Giacomo—regardless of any previous sexual relationships J.M. might have had and despite the fact that Giacomo did not apply force.”

RELEVANT TENTH CIRCUIT CASELAW

Doe v. Hutchinson, 728 F. App'x 829, 833 (10th Cir. 2018)– Sufficiently alleged pervasive sexual harassment

- Teacher “routinely and openly” spoke to and about female students in sexualized terms and spoke about his own sexual acts in front of students including Doe.
- Teacher made a crude statement, made in front of Doe’s gym class, that she was “used to having balls between her legs”;
- Teacher requested that another female gym student engage in a sexually suggestive dance; and
- Teacher boasted that he frequently convinced female students to remove their shirts and engage in activities only in their sports bras.
- Teacher repeatedly encouraged Doe’s boyfriend to share details of Doe’s sexual history with other students.

KEY DEFINITIONS - Parties

- **Complainant** – The complainant is an individual who is alleged to be the victim of conduct that could cause sexual harassment.
- **Respondent** – The respondent is an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Title IX Coordinator** – The Title IX Coordinator is designated and authorized by CEHE to oversee the investigation and adjudication of allegations of sexual harassment under Title IX.
- **Advisor** – The advisor conducts cross examination of individuals testifying in a live hearing under Title IX. A party may engage an advisor of the party's choice, but CEHE must appoint an advisor if a party does not have one.

TITLE IX JURISDICTION

- All of the following elements must be satisfied to trigger Title IX jurisdiction:
 - Discrimination on the basis of sex, including sexual harassment as defined under Title IX
 - *Quid pro quo* harassment,
 - Severe, pervasive and objectively offensive harassment, or
 - Certain criminal conduct: sexual assault, stalking, domestic violence, dating violence
 - Occurring in CEHE's "education program or activity"
 - Occurring against a person in the United States

THE MEANING OF “SEX” UNDER TITLE IX

- The new Title IX regulations do not define the term “sex.”
- The definition of sexual harassment is intended to cover “gender harassment” and “unwanted sexual attention” (assuming it is sufficiently severe, pervasive and objectively offensive).
- The definition of sexual harassment “applies equally to all persons regardless of sexual orientation or gender identity.”
- In June 2020, the U.S. Supreme Court held that the term “sex” in Title VII of the Civil Rights Act provided protection against discrimination with respect to sexual orientation and transgender status.

THE MEANING OF “PROGRAM OR ACTIVITY”

- **Broad Definition** - Title IX broadly defines the concept of “education program or activity” to include all of the following examples:
 - “all of the operations” of CEHE;
 - locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs;
 - buildings owned or controlled by CEHE recognized student organizations; and
 - off-campus harassment if CEHE exercised substantial control over the context and the alleged harasser.
- **Cyber-based Harassment** - “[U]se of e-mail, the internet, or other technologies may constitute sexual harassment as much as use of in-person, postal mail, handwritten, or other communications.”

SEXUAL HARASSMENT DEFINED

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- An employee of CEHE conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (a/k/a "*quid pro quo* 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 CEHE's education program or activity; or
- "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).

QUID PRO QUO HARASSMENT

Quid pro quo harassment under Title IX requires satisfaction of all of the following elements:

- The harassment must have been *performed by an employee* of CEHE;
- The harassment must have *taken the form of a bargain* for some type of CEHE “aid, benefit, or service” in exchange for any kind of sexual conduct; and
- The sexual contact at issue must have been “*unwelcome.*”

Covers a Broad Range of Sex-Based and Sexual Conduct

- The Department of Education instructs that “[*q*]uid pro quo harassment should be interpreted broadly.”
- Conduct falling far short of sex may form the basis a *quid pro quo* claim, e.g., “sex-based or other sexual conduct (e.g., back rubs or touching students’ shoulders or thighs).”

QUID PRO QUO – EMPLOYEE REQUIREMENT

- *Quid pro quo* harassment does not exist under Title IX unless it is carried out by an employee of CEHE.
- A non-employee cannot engage in Title IX *quid pro quo* harassment. Examples:
 - Non-employee students
 - Volunteers
 - All “others not deemed to be a recipient’s employee”
- If the respondent is not an employee of CEHE, the *quid pro quo* analysis ends.
- **NOTE:** The unwelcome conduct of a non-employee may constitute sexual harassment under the second or third prongs of the Title IX definition.

QUID PRO QUO – BARGAIN REQUIREMENT

- *Quid pro quo* harassment can occur where the “bargain” proposed is communicated expressly or impliedly.
- Context matters when inferring a *quid pro quo* “bargain” has been proposed.
 - the ages of the parties may be relevant
 - a power imbalance in the respondent-complainant relationship may, in some circumstances may allow such an inference.

QUID PRO QUO – UNWELCOME REQUIREMENT

- For Title IX purposes, *quid pro quo* harassment must involve conduct that was “unwelcome” when it occurred.
- The complainant’s subjective perspective determines this element.
- The complainant’s acquiescence may not be fatal to a *quid pro quo* claim.
 - “[W]hen a complainant acquiesces to unwelcome conduct in a *quid pro quo* context to avoid potential negative consequences, such ‘consent’ does not necessarily mean that the sexual conduct was not ‘unwelcome’ or that prohibited *quid pro quo* harassment did not occur.” – Preamble, pp. 447-48.
 - “*quid pro quo* harassment does not depend on whether ‘the student resists and suffers the threatened harm or submits and avoids the threatened harm...’” – Preamble p. 448, n. 645.

ILLUSTRATIONS OF THE *QUID PRO QUO* ANALYSIS

Is this an example of *quid pro quo* harassment under Title IX?

- A CEHE professor promises a student an “A” in the professor’s class if the student allows the professor to perform oral sex on the student, which the student does not want. **YES**
- A supervisory groundskeeper employee of CEHE tells a custodial employee of CEHE that the supervisor will approve the custodian’s PTO request in exchange for sex, which the custodian does not consider welcome. **YES**
- A professor offers to pay for an administrative assistant’s ticket to see a Colorado Rockies game in exchange for sex. **NO**

ILLUSTRATIONS OF THE *QUID PRO QUO* ANALYSIS

Is this an example of *quid pro quo* harassment under Title IX?

- A man visiting campus with his son who is a student solicits oral sex from one of his son's classmates in exchange for \$500. **NO**
- A coach employed by the CEHE tells a 16-year old student recruiting target that the coach will give the recruit an athletic scholarship in exchange for sex. **YES**
- A grant writer employed by CEHE has been flirting with a CEHE professor for weeks. The professor eventually agrees to have sex and offers to ask the grant writer's supervisor to give the writer a raise. **NO**

SEVERE, PERVASIVE AND OBJECTIVE OFFENSIVE

To qualify as sexual harassment under the second prong of Title IX's definition of that term, the following elements must be satisfied under a "reasonable person" standard in the position of the complainant:

- The conduct must be based on sex;
- The conduct must be unwelcome;
- The conduct must effectively deny access to an education program or activity of CEHE because it is so:
 - severe;
 - pervasive; and
 - objectively offensive.
- **NOTE:** The Title IX standard differs from the Title VII standard for harassment.

ANALYZING WHETHER THE CONDUCT WAS UNWELCOME

- Prohibited “sex-based harassment includes unwelcome conduct of a sexual nature but also includes unwelcome conduct devoid of sexual content that targets a particular sex.” – Preamble, p. 463, n. 670
- When conducting a jurisdictional analysis, the Title IX Coordinator should identify whether the allegations, if true, would establish that the alleged conduct was welcome or unwelcome by the complainant when it occurred.
- When investigating a formal complaint, the investigator should ask whether each act of alleged harassing conduct was welcome or unwelcome by the complainant when it occurred.

ANALYZING SEVERITY

- A complainant need not “prove severity”; instead, a complainant need only describe what occurred, and CEHE must then consider whether such occurrence was “severe from the perspective of a reasonable person in the complainant’s position.” – Preamble, p. 508
- Many factors may weigh on whether conduct is “severe” under the second prong of the Title IX definition:
 - Ages of the parties
 - Number of parties involved
 - Disability status of parties
 - Positions of authority of the involved parties
- The Department of Education identifies the following examples of conduct that may not satisfy the “severity” requirement:
 - Rubbing a student’s back – Preamble, p. 447, n. 643.
 - Discussion of “sexual issues even if that offends some people who hear the discussion” - Preamble, p. 460
 - “Vulgar or indecent” speech – Preamble, pp. 460-61
 - Microaggressions – Preamble, p. 495

ANALYZING PERVASIVENESS

- Merriam-Webster defines “pervasive” as “existing in or spreading through every part of something.”
- The Department of Education refused to remove the “pervasive” requirement despite concerns raised that a single incident of severe harassment may never satisfy the requirement.
- Department of Education examples of possible “pervasive” conduct:
 - Disseminating “revenge porn,”
 - Conspiring to sexually harass people (such as fraternity members telling new pledges to “score”),
 - Other unwelcome conduct that harms and humiliates a person on the basis of sex, particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement.

ANALYZING OBJECTIVE OFFENSIVENESS

- Whether conduct is “objectively offensive” must be evaluated from the perspective of “a reasonable person in the complainant’s position.”
– Preamble, p. 511
- This standard may be satisfied regardless of whether the respondent intended to offend. – Preamble, p. 516
- This exercise must not rely on sex stereotypes, e.g., considering offensiveness from a “male perspective” or “female perspective”; applying a “boys will be boys” approach, etc.

ANALYZING WHETHER EDUCATIONAL ACCESS IS IMPACTED

- This inquiry focuses on whether the harassing conduct “deprives the complainant of equal access, measured against the access of a person who has not been subjected to the sexual harassment.” – Preamble, p. 524
- “[N]o concrete injury is required,” but evidence of “unequal educational access” may include:
 - Skipping class to avoid a harasser;
 - A declining GPA;
 - Difficulty concentrating in class.
- What is not necessary to satisfy this requirement?
 - Failing a class;
 - Dropping out of school;
 - Experiencing any “particular symptoms” following alleged harassment.
- The nature of the relationship between the harasser and victim can be critically important to this analysis.
 - “Peer harassment, in particular, is less likely to satisfy [the requirement of showing a breach to Title IX’s guarantee of equal access to education benefits] than is teacher-student harassment.” – Davis, 526 U.S. at 653.

RESPECTING ACADEMIC FREEDOM

- Sexual harassment under Title IX must be understood in a manner that respects academic freedom and First Amendment rights.
- The Department endorses a different standard when speech, rather than conduct, is alleged as sexual harassment:
- **Speech-based harassment** “requires a narrowly tailored formulation that refrains from effectively applying, or encouraging” CEHE “to apply, prior restraints on speech and expression.”
 - *Quid pro quo* exception: “While *quid pro quo* harassment...involves speech, the speech is, by definition, designed to compel conduct”; thus, it can constitute per se actionable harassment.
- **Conduct-based harassment** “raises no constitutional concerns with respect to application of broader prohibitions.”

SEXUAL ASSAULT

- All forcible and non-forcible sex offenses described in the FBI’s Uniform Crime Reporting system constitute sexual assault under Title IX.
- Examples:
 - Forcible rape and attempted rape – Preamble, p. 541
 - Forcible sodomy
 - Forcible Fondling
 - Sexual assault with an object
 - Statutory rape
 - Incest
- The offenses constituting sexual assault depend on the absence “of consent of the victim.” – Preamble, p. 470
- The intent of the respondent is relevant to only one form of sexual assault: Fondling, which is touching another person “for the purpose of sexual gratification.”

DOMESTIC VIOLENCE

- The term “domestic violence” is defined by statute to mean:
 - “felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction”

See 34 U.S.C. § 12291(a)(8).

- **NOTE:** Must be “on the basis of sex” to trigger Title IX

DATING VIOLENCE

- The term “dating violence” is defined by statute to mean: “Violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship[,] (ii) The type of relationship[, and] (iii) The frequency of interaction between the persons involved in the relationship.”

See 34 U.S.C. § 12291(a)(10).

- **NOTE:** Must be “on the basis of sex” to trigger Title IX

STALKING

- The term “stalking” is defined by statute to mean:
 - “engaging in a course of conduct directed at a specific person that would cause a reasonable person to (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.”

See 34 U.S.C. § 12291(a)(30).

- Stalking must be “on the basis of sex” to constitute Title IX sexual harassment
- Other forms of stalking that are not sex-based (e.g., stalking an athlete due to celebrity worship rather than sex), no Title IX violation occurs.

CONSENT

For purposes of the Title IX Policy, the term consent means a knowing, voluntary agreement to engage in a specific form of sexual contact with another person.

- Clear "yes," verbal or otherwise, is necessary
- Must be ongoing throughout a sexual encounter and can be revoked at any time
- The clearest way to establish consent is through explicit, direct communication between (or among) the parties about the decision to engage in sexual activity

INSUFFICIENT EVIDENCE OF CONSENT

- Consent cannot be inferred from the absence of a “no.”
- Consent to some sexual acts does not constitute consent to others, nor does past consent to a given act constitute present or future consent.
- Consent cannot be obtained by threat, coercion, or force.
- Consent cannot be obtained from someone who is asleep or otherwise mentally or physically incapacitated, whether due to alcohol, drugs, or some other condition.

ANALYZING CONSENT DISPUTES

- If consent is placed in dispute by a party, all relevant facts and circumstances, including without limitation the following, should be considered:
 - the presence or absence of affirmative words or actions indicating a willingness to engage in sexual contact,
 - whether a reasonable person would have understood the words and acts at issue as expressing consent; and
 - whether there are any circumstances, known or reasonably apparent to any of the involved parties, demonstrating incapacitation or any other inability to make a voluntary choice to engage in sexual contact.

INCAPACITATION

Incapacitation means a person's physical and/or mental inability to make informed, rational judgments to the extent that the individual is incapable of giving consent.

Circumstances That May Cause Incapacitation:

- Uses of force or coercion
- Unconsciousness
- Drug and alcohol abuse (e.g., blackouts due to intoxication, etc.)

TITLE IX POLICY

- CEHE’s Title IX Policy prohibits all forms of sex discrimination, including sexual harassment, that occur against persons in the United States with respect to any of CEHE’s education programs or activities.
- CEHE has other policies that address sexual misconduct to the extent such conduct falls outside the scope of conduct prohibited by the Title IX Policy.
- CEHE reserves the right to address under CEHE’s other policies and procedures any conduct that is outside the scope of Title IX’s concept of “sexual harassment.”

TITLE IX POLICY – FUNDAMENTAL PRINCIPLES

- CEHE’s Title IX Policy requires equal treatment for all parties.
- Reliance on sex stereotypes is prohibited.
- Due process must be respected and provided in all procedures and processes under the Title IX Policy.
- CEHE will treat Complainants and Respondents equitably by offering to Complainants supportive measures, and by following a grievance process that complies with Section IV of the Title IX Policy before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a Respondent.

TITLE IX POLICY – REPORTING PROCEDURES

- Any person can make a report of sex discrimination, including sexual harassment, under CEHE’s Title IX Policy.
- When a Title IX Coordinator or CEHE’s CEO has actual knowledge of a sexual harassment allegation, the grievance procedures under the Title IX Policy are triggered.
- A complainant does not have to file a formal complaint in any case where a report of sexual harassment is made.
- In the absence of a formal complaint, no investigation will occur under the Title IX Policy; however, supportive measures will be offered and CEHE may address the reported conduct under its other policies.

TITLE IX POLICY - THE STANDARD OF PROOF

- The standard of proof has central weight and importance to competent hearing board decision-making.
- The standard of proof is the measure of evidence needed to convince a hearing board that the policy has been violated.
- The main standard of proof in use is the PREPONDERANCE OF THE EVIDENCE, also known as “more likely than not.”

PERPONDERENCE OF EVIDENCE

- Defined as that amount of evidence that makes it more likely than not that the facts demonstrate a violation of the Title IX Policy.
- “More likely than not” standard applies to all factual determinations under the Title IX Policy.

TITLE IX – TIMING CONSIDERATIONS

- An individual can make a report of sexual harassment to CEHE at any time.
- The “actual knowledge” (i.e., notice to Title IX Coordinator or CHRO) of sexual harassment triggers these response obligations:
 - Promptly contact the complainant
 - Offer supportive measures
 - Consider the complainant’s wishes with respect to supportive measures,
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
 - Explain how to file a formal complaint

TITLE IX – RESPONSE TO A FORMAL COMPLAINT

- Upon the filing or signing of a formal complaint, the Title IX Coordinator takes the following actions:
 - Performs a conflict of interest analysis
 - Performs a jurisdictional analysis
 - Provides notice of allegations to the respondent
 - Offers supportive measures to the respondent (note: such supportive measures should already have been offered to the complainant)
 - Assigns an investigator (who does not have a conflict of interest)
 - Identifies the appropriate decision-maker
 - Determines whether emergency removal or administrative leave should occur
- A case should be investigated and adjudicated within 90 days of the date on which a formal complaint is filed by a complainant or signed by the Title IX Coordinator.
 - The Title IX Coordinator can extend timelines for good cause
 - The Title IX Coordinator will provide written notice to the parties explaining the reason for any extension.

TITLE IX – PROCEDURE UPON DISMISSAL

- If at any point in the grievance process circumstances require mandatory dismissal, or if circumstances allow permissive dismissal and the Title IX Coordinator dismisses, the Title IX Coordinator must inform the complainant(s) and respondent(s) simultaneously in writing of any decision to dismiss a formal complaint (or any part thereof), including the reason(s) for that decision.
- The Title IX Coordinator should transfer the dismissed allegations to CEHE's office or Human Resources if such allegations may implicate policies administered by either of those departments.

EMERGENCY REMOVALS PERMITTED

- CEHE's Title IX Policy permits CEHE to implement an emergency removal of a Respondent where appropriate.
- This means a Respondent can be removed from any education program or activity of CEHE on an emergency basis and based on an individualized safety and risk analysis undertaken to determine that **an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal.**
- If an emergency removal occurs, CEHE will provide the Respondent with notice and an opportunity to challenge the decision immediately following the removal.

INFORMAL RESOLUTION OPTION

- CEHE's Title IX Policy allows the parties to a formal complaint to elect voluntarily to engage in informal resolution procedures in lieu of an investigation and/or hearing.
- Informal resolution can be elected at any time prior to the issuance of a post-hearing written determination.
- The grievance process will be held in abeyance while an informal resolution process is pending.
- All parties to a formal complaint must consent in writing.
- Any party can withdraw from an informal resolution process at any time prior to a resolution occurring.
- If an informal resolution process ends without resolution, the case returns to the grievance process.

TITLE IX – INVESTIGATION STAGE

- A conflict-free investigator will be assigned to a case by the Title IX Coordinator.
- The investigator is responsible for collecting and considering all available, relevant evidence. The investigator must perform an **objective evaluation** of all relevant evidence.
- The investigator must give each party equal opportunities to present and inspect evidence collected.
- All persons involved with an investigation must treat the investigator (and all other Title IX team members) with dignity and respect.
- All persons involved with an investigation must maintain professional decorum throughout the investigation.
- No threats of violence or other harm should be tolerated at any time during an investigation.

TITLE IX – INVESTIGATION REPORT

- Before an investigation report is completed, the investigator must allow the parties (and their advisors, if any) to inspect all of the evidence collected in the investigation with at least 10 calendar days to submit a written response to such evidence.
- Following that inspection stage, the investigator will prepare an investigation report fairly summarizing all relevant evidence collected in the investigation.
- The investigator must send the investigation report to the parties and their advisors at least 10 calendar days prior to any hearing on a formal complaint for their review and written response (if they choose to submit one).
- The investigator must provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.
- Any party whose participation is invited or expected will receive written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with sufficient time for the party to prepare to participate.

TITLE IX – HEARING STAGE

- The CEHE Title IX Policy requires a live hearing to take place on any formal complaint that is not resolved or dismissed.
- Hearings may take place in person or using a virtual platform. CEHE will determine the virtual platform to be utilized if a hearing occurs virtually.
- Any party can request a virtual hearing in lieu of a live hearing.
- The hearing officer (or such person's designee) will act as the host of a virtual hearing and will preside over all hearings—regardless of whether such hearings occur in person or virtually.
- Virtual hearings must be conducted in a manner that allows the parties, their advisors and the hearing officer to see and hear all participants at all times while the hearing is taking place.
- If audio or video lapses at any time for a party or an advisor, it is such person's responsibility to notify the hearing officer immediately.

TITLE IX – HEARING PROCEDURES

- The hearing officer is responsible for maintaining, and has the discretion to maintain, professional decorum in all hearings.
- The hearing officer will administer all direct questioning.
- Advisors will be allowed to conduct cross examination of all persons testifying at a hearing; however, before a cross-examination question is answered, the hearing officer shall rule on whether the question can be permitted.
- Advisors who fail to comply with hearing procedures or directives from the hearing officer will be barred from the hearing. CEHE will offer an alternative advisor to a party whose advisor has been barred from a hearing.
- A party has no right to “fire” an appointed advisor so long as the advisor is performing the obligation of posing relevant cross-examination questions that the party desires to be asked.
- CEHE’s Title IX Policy does not allow for *ex parte* communications with hearing officer.

TITLE IX – POST-HEARING WRITTEN DETERMINATION

- The hearing officer will consider the evidence presented at the hearing (with the exception of testimony submitted by a party who refuses to submit to cross-examination) and will issue a written determination on each issue presented by the formal complaint.
- The written determination will contain all of the information required in Section IV(D)(4)(h) of the Title IX Policy.
- The Title IX Coordinator is responsible for sending the written determination to the parties and should do so within one business day of receiving it from the hearing officer.
- The CEHE Title IX Policy does not permit motions or requests for reconsideration. Instead, a party who wishes to challenge any aspect of a written determination must use the appeal procedures to do so.

TITLE IX – AVAILABLE SANCTIONS - EMPLOYEES

- Verbal warning
- Performance/conduct improvement plan
- Written warning
- Disciplinary suspension (which may be with or without pay)
- Reassignment to a different department, team, or position (which may include a lateral transfer or a demotion)
- Adjustment of job description/authority
- Adjustment of salary or other forms of pay
- Termination of employment with eligibility to be rehired
- Termination of employment without eligibility to be rehired

TITLE IX – AVAILABLE SANCTIONS - STUDENTS

- Written warning
- Suspension
- Dismissal from school with eligibility to re-enter
- Dismissal from school without eligibility to re-enter

For student-employee Respondents, any combination of the disciplinary sanctions identified above may be imposed.

TITLE IX – APPEAL PROCEDURES

- Any party to a formal complaint can appeal the written decision of a hearing officer. Such appeals must be filed within 10 days of the date on which the Title IX Coordinator has provided notice of the hearing officer’s decision to the parties.
- Available grounds for an appeal:
 - Procedural irregularity that affected the outcome
 - New evidence not reasonably available that could affect the outcome
 - Conflict of interest by institutional participants that affected the outcome.
- To the extent an appeal is filed on a basis other than one of the above-mentioned grounds, it will be dismissed.
- Within 10 days of the notice of appeal being provided, each party can submit a written statement (up to 15 pages) in support of, or opposition to, the appeal.

TITLE IX – APPEAL DECISIONS

- Bearing in mind the time line for Title IX grievance processes under CEHE’s Title IX Policy, the appeal officer shall issue a written decision after the briefing period has ended.
- The written decision shall describe the result reached and the rationale(s) for that result.
- The written decision shall be provided simultaneously to the parties by the Title IX Coordinator.

TITLE IX – APPEAL FINALITY

A determination regarding responsibility becomes final either on the date that CEHE provides the parties with the written determination of the result of the appeal, if an appeal is filed, or on the eleventh (11th) calendar day following CEHE's provision of the hearing officer's written determination to the parties (if no appeal is filed by either party during the 10-day period for filing an appeal).

CONFIDENTIALITY AND RETALIATION

- Except where required otherwise by law or to carry out a grievance procedure or grievance process under CEHE's Title IX Policy, those holding roles in the Title IX process must maintain strict confidentiality regarding Title IX cases.
- Retaliation is strictly prohibited under the Title IX Policy:
 - for making a report or formal complaint of sex discrimination, including sexual harassment
 - for participating in good faith in any grievance procedure or grievance process
 - for choosing not to participate in a grievance procedure or grievance process

SERVING IN TITLE IX ROLES WITH IMPARTIALITY

Serving with impartiality means:

- Serving without bias
- Serving without prejudgment of the issues
- Serving without conflicts of interest

AVOIDING PREJUDGMENT

What does avoiding prejudice mean?

- Approach a Title IX role with an open mind.
- Those serving in Title IX roles must set aside what they may have heard about a particular case outside of the grievance process to ensure that there is no prejudice.
- Do not determine a person's credibility based on the individual's status as a Complainant or Respondent.
- Give each party equal benefits of the doubt.
- Title IX personnel are not prevented from understanding and taking into account each party's interests and the "stakes" at issue for each party, yet what is at stake does not, by itself, reflect on the party's truthfulness. – Preamble, p. 810
- Approach Title IX roles with respect for the presumption of non-responsibility that applies to Respondents.

AVOIDING BIAS

No aspect of the Title IX grievance procedures or grievance process can be influenced by bias.

- No reliance on sexual stereotypes is permitted, e.g., considering reasonableness from a “female perspective” or from a “male perspective”; harboring views such as “boys will be boys,” etc.
- Improper bias includes bias against complainants and respondents generally, as well as, bias against the individual Complainant or Respondent in a particular case.

Consideration should be given to statements and conduct outside of the Title IX process when determining whether someone can credibly serve in a Title IX role with impartiality. Examples:

- “I believe all women”
- “I believe all victims.”

AVOIDING CONFLICTS OF INTEREST

Examples of where a Title IX team member may have a conflict of interest that requires recusal:

- A close personal relationship exists with a party or key witness.
- There is a strong personal history (positive or negative) with any party or key witness that cannot be placed aside by the person holding the Title IX role.
- One of the individuals is an employee who reports to the Title IX team member as such party's supervisor.

THANK YOU



Center for Excellence in Higher Education

Title IX Training - Session 2

Travis R. Kearbey, Armstrong Teasdale LLP

August 26, 2020

Training Agenda

- IV. Service as a Title IX Coordinator
- V. How to conduct a Title IX investigation
- VI. How to conduct a Title IX informal resolution
- VII. How to conduct a Title IX hearing
- VIII. How to conduct a Title IX appeal
- IX. How to serve as a Title IX advisor
- X. Wrap-Up / Q&A

SERVICE AS A TITLE IX COORDINATOR

- Each person serving as a Title IX Coordinator is designated and authorized by CEHE to facilitate grievance procedures and grievance processes under CEHE's Title IX Policy.
- Title IX Coordinators are responsible for coordinating CEHE's efforts to comply with its responsibilities under Title IX of the Education Amendments Act of 1972 and federal regulations issued thereunder (collectively, "Title IX").

TITLE IX COORDINATORS – DIVISION OF LABOR

As a matter of default, CEHE has divided Title IX Coordinator responsibilities between two individuals:

Chelsea Jones

Sr. Leave Programs Specialist

chelseaj.jones@collegeamerica.edu

801-281-6962

Danielle Lammi

Corporate Director of Career Services

danielle.lammi@collegeamerica.edu

801-284-7535

The physical offices of the Title IX Coordinators are located at the following address:

4021 South 700 East, Suite 400

Salt Lake City, Utah 84107

TITLE IX COORDINATOR – NON-STUDENT CASES

- Absent a conflict of interest, Chelsea Jones serves as the Title IX Coordinator for the following cases:
 - Complaints where no current or prospective student is involved as a complainant or respondent.
 - Complaints involving a student-employee arising from such person's *employment* relationship with CEHE.

TITLE IX COORDINATOR –STUDENT CASES

- Absent a conflict of interest, Danielle Lammi serves as the Title IX Coordinator for the following cases:
 - Complaints where at least one current or prospective student is involved as either a complainant or respondent.
 - Complaints involving a student-employee arising from such person's *student* relationship with CEHE.

TITLE IX COORDINATOR – ACTUAL KNOWLEDGE

- The only persons who can receive “actual knowledge” of a report of sex discrimination, including sexual harassment, under Title IX are:
 - The individuals identified as Title IX Coordinators under CEHE’s Title IX Policy, and
 - CEHE’s CEO
- When other employees of CEHE become aware of sex discrimination, including sexual harassment, they should report it to the appropriate Title IX Coordinator, but CEHE’s obligation to initiate grievance procedures are not triggered until “actual knowledge” occurs.

TITLE IX COORDINATOR RESPONSIBILITIES – ACTUAL KNOWLEDGE

- Upon obtaining “actual knowledge” of sexual harassment allegations, the Title IX Coordinator must do the following:
 - Determine which Title IX Coordinator is responsible for the case
 - Analyze whether a conflict of interest will require the case to be handled by someone other than the default Title IX Coordinator
- Upon assignment of a case to the Title IX Coordinator, such person must:
 - Promptly contact the complainant
 - Offer supportive measures
 - Consider the complainant’s wishes with respect to supportive measures
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
 - Explain how to file a formal complaint
- **Document these steps in writing.**

TITLE IX COORDINATOR – SUPPORTIVE MEASURES

- **Definition.** The term “**supportive measures**” refers to non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- **Purpose.** Supportive measures should be designed to restore or preserve equal access to CEHE’s education programs or activities without unreasonably burdening the other party, including measures designed to protect the safety of all parties or CEHE’s education environment, or deter sexual harassment.

EXAMPLES OF SUPPORTIVE MEASURES

- Counseling,
- Extensions of deadlines or other course-related adjustments,
- Modifications of work or class schedules,
- Campus escort services,
- Mutual no-contact restrictions between the parties,
- Changes in work locations,
- Leaves of absence,
- Increased security and monitoring of certain areas of the campus, and
- Other similar measures.

ADDITIONAL OBLIGATIONS RELATING TO SUPPORTIVE MEASURES

- **Confidentiality.** The Title IX Coordinator and other CEHE employees must treat supportive measures confidentially.
- **Coordination and Implementation.** Regardless of when supportive measures are made under the Title IX Policy, the Title IX Coordinator assigned to a case is responsible for coordinating the effective implementation of supportive measures.

FORMAL COMPLAINTS

- **Definition.** The term “**formal complaint**” refers to a document filed by a Complainant or signed by a Title IX Coordinator alleging sexual harassment against a Respondent and requesting that CEHE investigate the allegation of sexual harassment.
- **Filing Method.** A formal complaint may be filed with a Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information listed for the Title IX Coordinator in the Title IX Policy.
 - Must be signed by the Complainant or otherwise must indicate the Complainant is filing the formal complaint, **or**
 - Must be signed by a Title IX Coordinator

FORMAL COMPLAINTS – SUBSTANTIVE REQUIREMENTS

- A formal complaint can be filed by a complainant or signed by the Title IX Coordinator in the absence of the complainant choosing to file, subject to these limitations:
 - The Complainant must be participating, or attempting to participate, in an education program or activity of CEHE; and
 - CEHE may close a case if the Respondent is permanently separated from CEHE.
 - The formal complaint must include allegations that, if true, would constitute sexual harassment as defined under Title IX.

FORMAL COMPLAINTS SIGNED BY THE TITLE IX COORDINATOR

- The Title IX Coordinator can sign a formal complaint alleging sexual harassment against one or more respondents and requesting that CEHE investigate the allegation of sexual harassment.
- Before doing so, the Title IX Coordinator will consider these factors:
 - severity and pervasiveness of the alleged sexual harassment;
 - any pattern of alleged misconduct attributed to the Respondent (e.g., serial predation);
 - risk of serious harm to any individual associated with CEHE;
 - any alleged violence, threats, use of weapons, or similar factors;
 - any involvement of law enforcement and/or criminal proceedings; and/or
 - any other factor, whose consideration is permitted by applicable law, that directly or indirectly implicates CEHE's interests in providing a safe and productive learning environment.

TITLE IX – RESPONSE TO A FORMAL COMPLAINT

- Upon the filing or signing of a formal complaint, the Title IX Coordinator takes the following actions:
 - Performs a conflict of interest analysis
 - Performs a jurisdictional analysis
 - Provides notice of allegations to the Respondent
 - Offers supportive measures to the Respondent (note: such supportive measures should already have been offered to the Complainant)
 - Explains the right to an advisor (and assign an advisor if a party does not engage an advisor of such party's choice)
 - Assigns an investigator (who does not have a conflict of interest)
 - Identifies the appropriate decision-maker / hearing officer
- A case should be investigated and adjudicated within 90 days of the date on which a formal complaint is filed by a Complainant or signed by the Title IX Coordinator
 - The Title IX Coordinator can extend timelines for good cause
 - The Title IX Coordinator will provide written notice to the parties explaining the reason for any extension

DEADLINES IN A TITLE IX CASE

- A case should be investigated and adjudicated within 90 days of the date on which a formal complaint is filed by a Complainant or signed by the Title IX Coordinator.
 - The Title IX Coordinator can extend timelines for good cause
 - The Title IX Coordinator will provide written notice to the parties explaining the reason for any extension.

TITLE IX COORDINATOR – CONFLICTS ANALYSIS

- When analyzing whether a conflict of interest exists, the Title IX Coordinator should do the following:
 - Self-reflect on whether the Title IX Coordinator has a conflict with respect to any aspect of the formal complaint
 - Ask each person assigned to a role in the Title IX case to confirm in writing the absence of a conflict of interest
 - Disqualifying conflicts include any relationship or other circumstance that would prevent an individual from approaching the case free of bias, prejudice of the facts or partiality.

TITLE IX – MANDATORY DISMISSALS

- **Mandatory Dismissal.** The Title IX Coordinator must dismiss a formal complaint insofar as it contains allegations that fit into any of the following categories:
 - conduct that would not constitute sexual harassment under Title IX;
 - conduct that did not occur in CEHE’s education program or activity; or
 - conduct that did not occur against a person in the United States
- **Permissive Dismissal.** CEHE has discretion to dismiss a formal complaint (or any part thereof) at any time (during an investigation or hearing) for the following reasons:
 - the Complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - the Respondent is no longer enrolled or employed by the recipient; or
 - specific circumstances prevent CEHE from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein

TITLE IX COORDINATOR – JURISDICTONAL ANALYSIS

- When analyzing jurisdiction, the Title IX Coordinator should do the following:
 - Treat the allegations in the formal complaint as true (i.e., asking the question: if true, would the alleged conduct constitute “sexual harassment”?)
 - Analyze the alleged behavior under each prong of the definition of “sexual harassment” to determine coverage:
 - 1) Bargaining conduct constituting *quid pro quo* harassment;
 - 2) Severe, pervasive and objectively offensive conduct; and
 - 3) Certain criminal conduct: sexual assault, stalking, domestic violence, dating violence
 - Keep in mind that the “on the basis of sex” element must be satisfied under all prongs of the sexual harassment definition.
 - Confirm the location where the harassment allegedly occurred

TITLE IX – PERMISSIVE DISMISSALS

- Permissive Dismissal. CEHE has discretion to dismiss a formal complaint (or any part thereof) at any time (during an investigation or hearing) for the following reasons:
 - the complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - the respondent is no longer enrolled or employed by the recipient; or
 - specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein

EXAMPLES OF “SPECIAL CIRCUMSTANCE” DISMISSALS

- Examples of “specific circumstances” permitting dismissal:
 - Circumstances “where the complainant has ceased participating in the process.” - Preamble, pp. 293, 938-39
 - Circumstances where the “passage of time” results in CEHE’s “inability to gather evidence sufficient to reach a determination regarding responsibility.” – Preamble, p. 373 n. 562
 - “When a formal complaint contains allegations that are precisely the same as allegations the recipient has already investigated and adjudicated.” – Preamble, p. 689 n. 939
 - If the respondent is not under CEHE’s authority (e.g., a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complaint), and CEHE “has no way to gather evidence sufficient to make a determination.” - Preamble, p. 966

TITLE IX – PROCEDURE UPON DISMISSAL

- The Title IX Coordinator must inform the complainant(s) and respondent(s) simultaneously in writing of any decision to dismiss a formal complaint (or any part thereof), including the reason(s) for that decision.
- The Title IX Coordinator should transfer the dismissed allegations to CEHE's Student Conduct office or Human Resources if such allegations may implicate policies administered by either of those departments.

TITLE IX COORDINATOR – ADVISOR ISSUES

- The Title IX Coordinator should advise a party of the right to an advisor of the party's choice.
- Advisors can be attorneys, but Title IX does not require an advisor to be an attorney.
- If a party does not engage an advisor, the Title IX Coordinator should appoint an advisor for that party.

Interacting with Advisors

- Advisors have no active participation rights under Title IX except for the right to cross-examine persons testifying in a live hearing.
- Maintain control, and treat each party's advisor equally.
- Demand professional decorum from all persons involved, including advisors.

TITLE IX – EMERGENCY REMOVALS & ADMIN LEAVE

Emergency Removals

- CEHE has the discretion to implement an emergency removal of a respondent where an individualized assessment reveals:
 - An immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment; however,
 - A respondent must receive an immediate opportunity to challenge the emergency removal

Administrative Leave for Employee-Respondents

- Non-student employees can be placed on administrative leave
- Administrative leave can be paid or unpaid, at CEHE's discretion

THE INVESTIGATOR'S ROLE

Following the filing of a formal complaint, the assigned investigator must perform the following tasks:

- Analyze and disclose whether the investigator has any conflicts of interest;
- Evaluate relevant evidence (according little, if any, weight to relevant evidence that would be excluded under the Federal Rules of Evidence);
- Provide the parties with the same opportunities to be accompanied to any related meeting or proceeding by the advisor of their choice;
- Provide written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings to any party whose participation is invited or expected with at least ten (10) calendar days for the party to prepare to participate;
- The investigator shall not restrict any complainant or respondent from discussing the allegations under investigation or gathering and presenting relevant evidence.

COLLECTING EVIDENCE IN AN INVESTIGATION

- All relevant evidence must be objectively evaluated (regardless of it consists of the parties' own statements, statements of witnesses, or other evidence).
- Corroborating evidence is good, but it is not necessary in every case. A party's statement, if credible, is evidence regardless of whether additional objective, corroborating evidence is available.
- Provide both parties equal opportunity to inspect any evidence directly related to the allegations in a formal complaint regardless of whether CEHE intends to rely on it in reaching a determination regarding responsibility and regardless of whether it is inculpatory or exculpatory .
- The evidence given to the parties for inspection and review must consist of all evidence directly related to the allegations; determinations as to whether evidence is "relevant" are made when finalizing the investigative report.

INVESTIGATIVE REPORTS

- Before completing an investigative report, the investigator must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.
- The parties will have at least 10 calendar days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- The investigator must create an investigative report that fairly summarizes relevant evidence.
- At least 10 days prior to a hearing on the formal complaint, the investigator must send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

TITLE IX – EVIDENTIARY STANDARDS

Standard of Evidence. The standard of evidence that applies to all Title IX cases is the **preponderance of the evidence** standard.

- Preponderance of the evidence means that the evidence is enough to cause the decision-maker to believe that a particular fact is more likely than not to be true
- This standard must be used uniformly for all cases regardless of respondent

Presumption of Innocence. There is a presumption that the respondent did not violate the policy until a determination otherwise is reached through the grievance process

Burden of Proof. CEHE bears the burden of proof and of collecting relevant information

TITLE IX – RULES OF EVIDENCE

ALL RELEVANT EVIDENCE IS ADMITTED UNLESS A TITLE IX EXCEPTION APPLIES. The complex rules that apply in state and federal courts for admission and exclusion of evidence do not apply to exclude relevant evidence in Title IX matters. The only exceptions are for:

- Legally privileged information;
- Sexual propensity evidence; and
- Evidence of prior sexual conduct (unless offered to prove consent or that someone other than the Respondent committed the alleged conduct)

Defining Relevance. Title IX does not define “relevance.”

- The term “relevance” should be given its common meaning: something is relevant if it is probative of, or tends to prove or disprove, a point that is at issue in the formal complaint.

Assigning Weight to Evidence. Although all relevant evidence should be considered, evidence with a low indicia of credibility should be assigned little weight, e.g., hearsay, unauthenticated documents, character evidence, etc.

TITLE IX – NO BIAS PERMITTED

No aspect of the Title IX grievance procedures or grievance process can be influenced by bias.

- No reliance on sexual stereotypes is permitted, e.g., considering reasonableness from a “female perspective” or from a “male perspective”; harboring views such as “boys will be boys,” etc.
- Improper bias includes bias against complainants and respondents generally, as well as, bias against the individual Complainant or Respondent in a particular case.

AVOIDING BIAS

- Recusal is necessary where a Title IX team member (e.g., Title IX coordinator, investigator, decision-maker, mediator, or appeal officer) feels bias for or against a party or with respect to complainants or respondents, generally, in a case.

Examples of where a Title IX team member may not be able to be impartial/unbiased:

- One of the involved individuals is a good friend.
- There is a strong personal history (positive or negative) with one or both of the individuals.
- One of the individuals is an employee who reports to the team member as such party's supervisor.

AVOIDING PREJUDGMENT

Presumption of Non-Responsibility

- Respondents are entitled to a presumption of non-responsibility for violating CEHE's Title IX Policy until they are adjudicated otherwise through a Title IX grievance process.
- The presumption of non-responsibility is not interpreted to mean that a respondent is considered truthful or that the respondent's statements are credible or not credible, based on the respondent's status as a respondent. – Preamble, p. 809-10.

Considering the "Stakes"

- Credibility should not be determined based on an individual's status as a Complainant or Respondent.
- Title IX personnel are not prevented from understanding and taking into account each party's interests and the "stakes" at issue for each party, yet what is at stake does not, by itself, reflect on the party's truthfulness. – Preamble, p. 810

ANALYZING WITNESS AND PARTY STATEMENTS

- Witnesses may see the same event, but interpret it differently.
- Individual backgrounds may solidify parts of an incident in a witness' mind, while other details remain vague.
- It is important to be aware of assumptions made by any party so that the Title IX grievance process is fair.
 - Focus on information about which the person giving a statement has personal knowledge.
 - Give little, if any, weight to hearsay evidence or evidence about which the person giving the statement has no personal knowledge.
 - Give little, if any, weight to opinion statements from a lay witness, including lay statements that purport to give “expert” opinions.
 - When a party offers “expert” testimony, analyze whether the proffered witness is qualified to provide the expert testimony. Give little, if any, weight if the witness does not possess adequate qualifications.

DEVELOPING WITNESS QUESTIONS

Rely on questions that do not suggest an answer.

- Avoid leading questions.
- Avoid asking “multiple choice” questions.
- Avoid assuming facts not in evidence when asking questions. Example:
 - When the sexual contact is in dispute: “Where were you when you had sex with the Complainant?”
- Avoid hypotheticals.
- Try to be precise in asking questions.

QUESTIONING TECHNIQUES

- Don't be afraid of silence; allow a person giving a statement to fill the silence when appropriate.
- Do not let anyone—including advisors—bully you away from a line of relevant questioning.
- Respect requests for clarification, but let the person who needs clarification request it.
- Requests for an investigator to “repeat” a question do not require the re-phrasing of the question.

ADDITIONAL QUESTIONING TECHNIQUES

- Take careful notes in an investigation and use notes of prior comments to develop additional questions. (In hearings, however, rely on transcription or other recording rather than taking notes.)
- Open-ended questions are often the strongest questions.
- Confront witnesses with hard questions, but avoid leveling accusations.
- Take careful notes of non-verbal behavior while conducting questioning.
- Follow up on contradictions.
- Avoid getting stuck on immaterial details.

INVESTIGATING CONSENT DISPUTES

If consent is placed in dispute by a party, the investigator should consider all relevant facts and circumstances, including without limitation the following:

- the presence or absence of affirmative words or actions indicating a willingness to engage in the sexual contact at issue,
- whether a reasonable person would have understood the words and acts at issue as expressing consent; and
- whether there are any circumstances, known or reasonably apparent to any of the involved parties, demonstrating incapacitation or any other inability to make a voluntary choice to engage in sexual contact.

FORCE – INCAPACITY – CONSENT

- Was force used by the respondent to obtain sexual access?
- What clear words or actions by the complainant gave the respondent permission for the specific sexual activity that took place?
- Was the complainant incapacitated?
 - Under CEHE's Title IX Policy, “[a] person is mentally or physically incapacitated when that person lacks the ability to make or act on considered decisions to engage in sexual activity.”

ASSESSING ALLEGATIONS OF FORCE

- Was force used by the respondent to obtain sexual access?
- Because consent must be voluntary (an act of free will) consent cannot be obtained through use of force
- Types of Force to consider:
 - Physical violence -- hitting, restraint, pushing, kicking, etc.
 - Threats & Intimidation -- anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
 - Coercion –frequency, intensity, duration, isolation

INCAPACITY

- First, was the complainant incapacitated at the time of the sexual activity?
 - Could the complainant make rational decisions?
 - Could the complainant appreciate the situation and address it consciously such that any consent was informed
 - Knowing who, what, when, where, why and how
- Second, did the respondent know of the incapacity?
- Or, should the respondent have known from all the circumstances (reasonable person)?

ASSESSING INCAPACITATION

- Assessing incapacitation is very fact dependent
- The use of alcohol or drugs may, but does not automatically, affect a person's ability to consent to sexual contact.
- If the degree of intoxication goes beyond the stage of mere reduced inhibition and causes the victim to not understand the nature and consequences of the sexual contact, the person cannot provide consent.
- Blackout Example
 - Blackout = incapacitation
 - Blackout = no working (form of short term) memory, thus unable to understand who, what, when, where, why or how
 - Partial blackout must be assessed as well
- Respondent Drunkenness
- Whether the complainant consented to sexual contact does not depend on whether the respondent was drunk
- The complainant's incapacitation will be assessed based on whether a reasonable sober person would have been able to ascertain that the complainant was incapacitated.

INCAPACITATION

- If the complainant was not incapacitated, move on to the 3rd question.
- If the complainant was incapacitated, but:
 - The respondent did not know it = ask next question;
 - The respondent could not have known it = the policy not violated. Move on to 3rd question.
- If the complainant was incapacitated at the time of sexual contact, and the respondent knew or should have known it, the sexual contact occurred without consent.

TITLE IX – INFORMAL RESOLUTION

- Permissible only after a formal complaint is filed
 - Parties must provide voluntary, written consent after receiving detailed notice of allegations and explanation of informal resolution process
 - Cannot compel students to agree to informal resolution as a condition of enrollment
 - Never permitted where accusation is that employee sexually harassed a student

THE ROLE OF THE INFORMAL RESOLUTION FACILITATOR

- When parties voluntarily consent to informal resolution, the Title IX Coordinator shall designate someone as the facilitator of the informal resolution process.
- The facilitator acts as a neutral mediator and can be a CEHE employee or a contractor engaged by CEHE
- Responsibilities of facilitator:
 - Caution parties that no gag orders are permitted under Title IX, but explain that the informal resolution process works best when all involved respect the confidentiality of the process.
 - Remain neutral but encourage parties to consider the pros and cons of proceeding with an investigation and/or hearing.
 - Conclude the informal resolution process when any party decides to withdraw.
 - If a resolution is reached, facilitate the execution of a written agreement memorializing the parties' resolution.
 - Explain that a formal complain that is resolved in the informal resolution process is considered closed and will not be reopened.

TITLE IX – ROLE OF HEARING OFFICER

- The hearing officer is the decision-maker for all Title IX cases
- In preparation of a hearing, the hearing officer should complete the following steps:
 - Analyze and disclose any conflict of interest
 - Review the hearing packet (which the Title IX Coordinator will provide) prior to the hearing:
 - Investigation Report
 - Statements
 - Incident Report(s)
 - Letters
 - Guidelines for Hearing
 - Give both parties (and their advisors) an equal opportunity to attend a pre-hearing conference to discuss hearing procedures and expectations

HEARING PROCEDURES AND RULES

- The hearing officer will preside over the hearing, administer procedural rules and maintain order during the hearing
 - The Title IX policy requires all parties, witnesses and advisors to maintain professional decorum throughout a hearing
 - The parties will receive an equal opportunity to appear for and participate in the hearing (with an advisor)
- For hearings occurring virtually, the hearing officer or such individual's delegate will act as the host for the virtual meeting platform
- Video and audio must be enabled and functioning for a parties, testifying witnesses, advisors and the hearing officer at all times while a hearing is in session
- Non-party witnesses should be sequestered from the hearing when not testifying
- If a participant disables audio or video, the hearing officer should pause the hearing and instruct the person to re-enable those functions before resuming the hearing

HEARING RULES – ADVISOR PARTICIPATION

- Witnesses will be called for testimony
 - The hearing officer will administer direct questioning
 - Each advisor will receive an opportunity to cross-examine each witness and testifying party
 - Before a witness or testifying party is required to answer a cross-examination question, the hearing officer will rule upon whether the question will be allowed
- Each complainant and respondent will have an opportunity to address the hearing officer verbally (either personally or through such party's engaged advisor) with an opening statement of up to 5 minutes in length
- The hearing officer has discretion to permit advisors to make objections to questions posed to individuals testifying at a hearing; if allowed, each party must be permitted to interpose such objections in a brief and professional manner
- The hearing officer has discretion to allow closing remarks, but if such remarks are allowed, each party will receive an equal opportunity to deliver such remarks

RULING ON CROSS-EXAMINATION QUESTIONS

- The hearing office will permit all questions seeking “relevant” evidence with the following exceptions:
 - Questions seeking legally privileged information will not be permitted
 - Questions about a complainant’s sexual predisposition will not be permitted, and
 - Questions about a complainant’s prior sexual behavior will not be permitted unless such questions are (1) offered to prove that someone other than the respondent committed the alleged sexual harassment, or (2) focused on sexual behavior between the complainant and the respondent and offered to prove consent

RULING ON CROSS-EXAMINATION QUESTIONS

- The hearing officer will provide a brief explanation for each ruling on whether a question will be permitted
- Title IX regulations do not require a hearing officer to give a lengthy or complicated explanation of a ruling on whether a question will be allowed
- Instead, it is sufficient, for example, for a decision-maker to explain:
 - That a question is irrelevant because the question calls for prior sexual behavior information without satisfying one of the two applicable exceptions, or
 - That, because the question asks about a detail that is not probative of any material fact concerning the allegations, it is irrelevant. – Preamble, p. 1161

EVIDENCE IS ADMISSIBLE IN TITLE IX HEARINGS IF RELEVANT

- Evidence that is inadmissible under the Federal Rules of Evidence is admissible in a Title IX hearing so long as it is relevant (except categories specifically excluded by the regulations).
- If evidence would not be admissible under the Federal Rules of Evidence, those rules should be treated as persuasive authority, which would result in according little weight to the evidence at issue by the hearing officer.
- However, strict adherence to the Federal Rules of Evidence is not required.

Examples of common evidentiary objections under the Federal Rules of Evidence:

- Hearsay
- Unfair prejudice
- Settlement negotiations
- Character evidence & prior bad acts
- Lay witness opinion
- Speculation
- Lacks Foundation
- Argumentative
- Asked and answered
- Compound question
- Leading question
- Relevance

REFUSALS TO SUBMIT TO CROSS-EXAMINATION

- If a party or witness does not submit to cross-examination at the live hearing, the hearing officer will not rely on any statement of that party or witness in reaching a determination regarding responsibility
- However, the hearing officer cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions

WRITTEN DETERMINATION

- The Hearing Officer must issue a written determination of whether a Title IX Policy violation has occurred in each case.
- The Hearing Officer must send the written determination to all parties simultaneously.
- The written determination must include:
 - the allegations potentially constituting sexual harassment;
 - a description of the procedural steps taken from the receipt of the formal complaint through the determination;
 - findings of fact supporting the determination;
 - conclusions regarding the application of CEHE's code of conduct to the facts;
 - the result (and rationale) as to each allegation, including a determination regarding responsibility;
 - any disciplinary sanctions CEHE imposes on the respondent;
 - any remedies to be provided to the complainant; and
 - the procedures and permissible bases for an appeal.

IDENTIFYING APPROPRIATE SANCTIONS

- Title IX regulations grant broad discretion to CEHE to determine the appropriate **sanctions** when CEHE's grievance process results in a finding that the Title IX policy has been violated.
- Relevant Considerations:
 - Precedent in similar circumstances, if any;
 - The severity of the conduct and its impact on the complainant; and
 - Whether the respondent can be rehabilitated.

IDENTIFYING APPROPRIATE REMEDIES

- Title IX regulations grant broad discretion to CEHE to determine the appropriate **remedies** when CEHE's grievance process results in a finding that the Title IX Policy has been violated.
- Relevant Considerations:
 - What, if any, equal access to CEHE's education program(s) or activity/activities has been lost or diminished by the violation of the Title IX Policy?
 - What, if anything, could be done to restore the Complainant's equal access to education programs and activities of CEHE?

TITLE IX – APPEALS

- Grounds for an appeal:
 - Procedural irregularity that affected the outcome
 - New evidence not reasonably available that could affect the outcome
 - Conflict of interest by institutional participants that affected the outcome
- When an appeal is filed the Title IX Coordinator must give written notice of the appeal to the other party
- The non-appealing party must be given a chance to respond
- Each party is allowed to appeal any decision of the hearing officer in whole or in part
- The Title IX Coordinator must provide appeal procedures equally to all parties

TITLE IX – ROLE OF THE APPEAL OFFICER

- Absent a conflict of interest, CEHE’s CEO will serve as the appeal officer to hear and decide any appeal that is filed under the Title IX Policy.
- The appeal officer will apply the preponderance of evidence standard in deciding an appeal.
- The appeal officer must do the following:
 - Analyze and disclose any conflict of interest.
 - Review all appeal materials relating to the case, including (without limitation) the notice(s) of appeal and briefing submitted by each party, all of which the Title IX Coordinator will provide to the appeal officer.
- The Appeal Officer will decide whether to affirm or overturn the challenged decision based on a review of each issue on appeal and upon considering only issues that have been properly appealed under CEHE’s Title IX Policy.
- The Appeal Officer will issue a written decision. The appeal officer’s decision shall be considered final.

TITLE IX – APPELLATE BRIEFING

Briefing Schedule

- CEHE’s Title IX Policy establishes a default briefing schedule:
 - Each party may submit to the Title IX Coordinator an appellate brief within 10 calendar days following the date on which the Title IX Coordinator has provided notice of the appeal to the parties.
 - Each party should submit the party’s appellate brief electronically (in MS Word format) to the Title IX Coordinator, using the email address for such person provided in CEHE’s Title IX Policy.
 - The Appeal Officer may grant an extension of time to submit such briefing.

Briefing Standards

- An appellate brief should not exceed 15 pages of double-spaced text (exclusive of any attachments). The Appeal Officer has the discretion to extend this page limitation.
- An appellate brief should take the form of a written statement in support of, or challenging, the outcome of a live-hearing in a case that is appealed under CEHE’s Title IX Policy.

APPEALS-WRITTEN DECISION AND FINALITY

- Following the briefing period, the appeal officer must issue a written decision describing the result of the appeal and the rationale for the result.
- Such written decision shall be provided simultaneously to the parties by the Title IX Coordinator.
- A determination regarding responsibility becomes final either on the date that CEHE provides the parties with the written determination of the result of the appeal, if an appeal is filed, or on the eleventh (11th) calendar day following CEHE's provision of the written determination to the parties (if no appeal is filed by either party during the 10-day period for filing an appeal).

ROLE OF THE ADVISOR

- Advisors have one regulatory obligation: pose relevant cross-examination questions in a live hearing at the party's request
- There is no claim for “ineffective assistance” by advisors who carry out their cross-examination obligations
- Additional roles can be assumed by an advisor:
 - Support for a party
 - Guidance with respect to the Title IX Policy, grievance procedures and grievance process
 - Providing opening and closing remarks at a hearing
 - Interposing objections, if permitted by the hearing officer, during the cross-examination of hearing witnesses

WRAP UP – QUESTIONS AND ANSWERS