



# New Title IX Regulations: What to Anticipate for Services, Policy, and Procedures

Bates College – July 16, 2020

## PRESENTER



**Kim Pacelli, J.D., M.Ed.**

Partner, TNG

Member, ATIXA Advisory Board

# GOALS AND LEARNING OUTCOMES



## This Morning's Goals

- Orient ourselves to big changes coming to Title IX policy and process.
- Provide context, background, and framework for Student Affairs and other key stakeholders at Bates.
- Anticipate what challenges will be for members of the Bates community
- Understand what your “role” may be
  - For some, formal changes and/or active participants in Title IX process.
  - For others, help students and colleagues to understand changes.

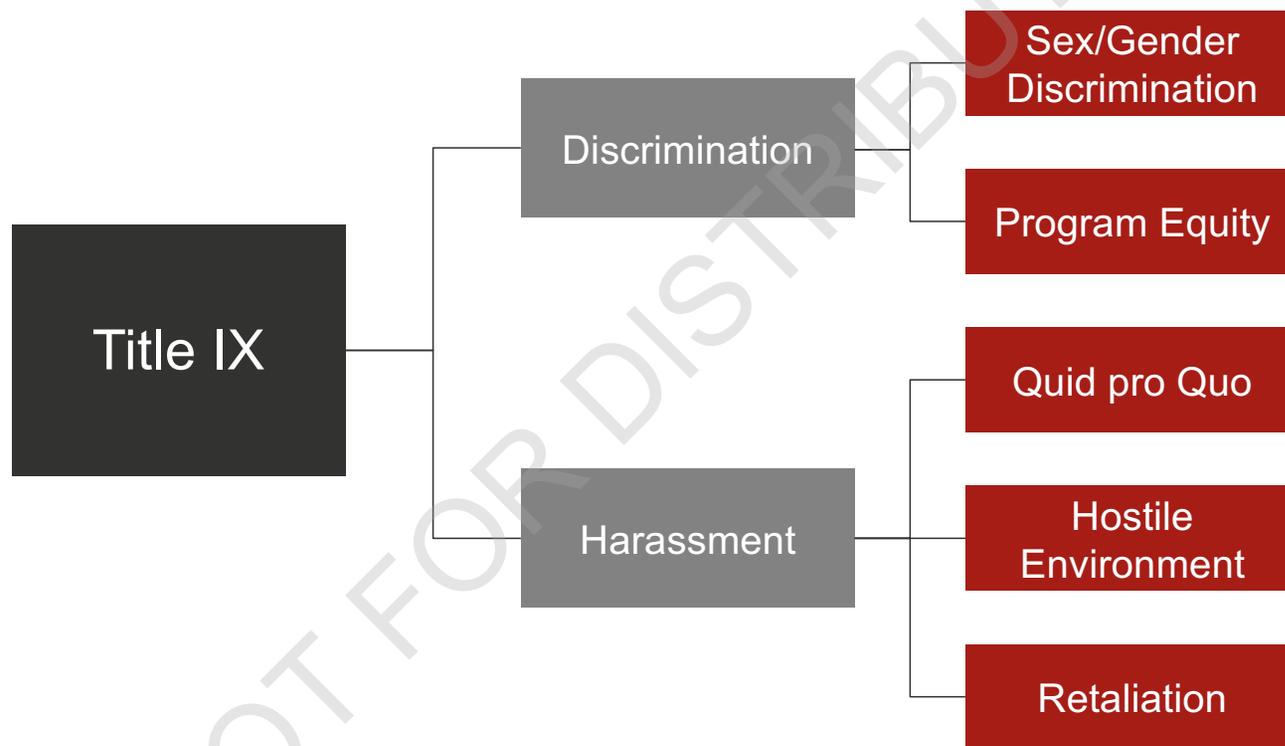
# ORIENTATION OR RE-ORIENTATION: WHAT IS TITLE IX?



## Title IX

“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 & 34 C.F.R. Part 106 (1972)*



## TITLE IX REGULATIONS ARE OFFICIALLY HERE



- Initially proposed in November 2018; subject to “notice and comment” period
- 124,000 comments received (including Bates!)
- Final regulations were released on May 6, 2020.
- Effective and enforceable on **August 14, 2020**.
  - Amends the Code of Federal Regulations and will have force and effect of law
  - Some provisions already mandated by court cases in some jurisdictions
  - Intervening variables (litigation and election) may impact enforcement in the shorter or longer term
  - Several lawsuits already filed to halt all or part of the regulations.
- Regulations are significant, legalistic, surprisingly prescriptive, very due-process heavy, and go well beyond what any court has required under 5<sup>th</sup>/14<sup>th</sup> Amendment case law.

# NEW TITLE IX REGULATIONS ARE ONLY PART OF THE (CHANGING) LEGAL LANDSCAPE



- Withdrawn:
  - 2011 Dear Colleague Letter (DCL)
  - 2014 Q&A on Title IX and Sexual Violence
  - 2016 DCL on Transgender Students
- Still in effect:
  - CLERY ACT, including the 2013 VAWA amendments
  - 1975 Regs, as amended
  - 2001 OCR Revised Sexual Harassment Guidance (has force and effect of law; conflicts with 2020 Regs)
  - 2003 DCL on Title IX and Free Speech
  - 2010 DCL on Harassment and Bullying
  - 2013 DCL on Pregnant and Parenting Students
  - 2015 DCL on the role of Title IX Coordinators
  - 2017 Q&A on Campus Sexual Misconduct issued as interim guidance, still apparently in place

## COMMITMENT BEYOND COMPLIANCE



- Industry standards = the floor. Best practices = the ceiling.
- Statutes, case law, and federal regulations set the floor.
- Aiming for the floor = doing the bare minimum.
  - Will continue the cycle of inequity and unfairness; advocates won't stand for it
- Civil rights issues demand more than the bare minimum
- Challenges for Bates now (and other peer institutions):
  - Prepare for compliance in time for August 14<sup>th</sup>.
  - Continue commitment to outstanding support for all individuals, including students and employees, involved in "Title IX processes."
  - Anticipate that these required policies and procedures will change again.

## AREAS OF KEY CHANGES



- Required Grievance Procedures
- Jurisdiction
- Notice to the College v. Formal Complaint
- Providing Notice to the Parties
- Definition of Sexual Harassment
- Supportive Measures
- Formal Investigation and Hearing Process
- Important Due Process Elements

## ANTICIPATE SOME SHIFTING TERMINOLOGY



ATIXA IS SHIFTING ITS TERMINOLOGY TO MATCH THE NEW REGS

- Various titles = Title IX Coordinator
- Reporting Party = Complainant
- Responding Party = Respondent
- Resolution = Grievance Process
- Non-consensual Sexual Intercourse or Contact = sexual assault
- Intimate Partner Violence = Dating and domestic violence

AND OCR DEFINITIONS OF THESE OFFENSES MUST BE ADOPTED:

- Including OCR definition of Sexual Harassment, Clery Act definition of sexual assault, and VAWA definitions of DV/DV and stalking.

# GRIEVANCE PROCEDURES



- Must include:
  - Presumption that responding party is not responsible until determination is reached
  - “Reasonably prompt” timeframes
    - Requirement to set specific timelines for major stages of the grievance process now gone
  - Range of possible sanctions and remedies (mirrors Clery Act mandate)
  - Description of standard of evidence
  - Bases and procedures for appeal
    - Appeal now required, equitably, on three grounds
  - Range of supportive measures available to all parties
    - Note shift from “interim measures” terminology
  - “Separation of Roles:” Title IX Coordinator, investigator(s), decision-maker(s), appeal decision-maker(s), informal resolution facilitators

## PROMPTNESS



- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- Concurrent law enforcement investigation does **not** relieve the burden of the school to investigate
- Temporary delays for “good cause” and with written notice of the delay to parties
  - Complexity of the investigation
  - Concurrent law enforcement investigation with time-dependent release of evidence
  - Delays for administrative needs are insufficient

## JURISDICTION – “IS IT A IX?”



- Emphasizes the *Davis* standard (decided by U.S. Supreme Court)
  - Control over the harasser and the context of the harassment
  - “education program or activity” means...
    - locations, events, or circumstances under substantial control
    - any building owned or controlled by an officially recognized student organization
- Regulations specify “harassment...against a person in the United States”
  - What about off-campus conduct, study abroad programs, or school-sponsored international trips?
  - Regs take position that Title IX does not reach international conduct
  - However, Bates can still assert jurisdiction as a matter of institutional policy.

## JURISDICTION – “IS IT A IX?”



- What about behavior that occurs elsewhere, but continues here on campus?
  - “Downstream effects” has been a common part of Title IX analysis for many years.
  - The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself).
  - As a private college, Bates has full latitude to hold individuals responsible for their behavior on- and off-campus.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
  - OCR adopts in the discussion a fairly broad definition of what could constitute attempting to participate.
  - Students, employees, prospective students, prospective employees, alumni, etc.

## “DELIBERATE INDIFFERENCE” STANDARD



- When Bates has **actual knowledge** of sexual harassment in an education program or activity of a recipient in the United States it must respond in a manner that is “**not deliberately indifferent.**”
- Mandatory dismissal
  - Does not constitute sexual harassment (as defined under the regs)
  - Does not fall within jurisdiction
    - Program or activity inside the United States
    - Complainant participating in or attempting to participate in ed program
- **Does not preclude action under another policy (other sex-based offenses, other civil rights issues, conduct code, employee professionalism standards, etc.)**

## WHEN IS BATES “ON NOTICE?”



- Distinct procedural steps - **actual knowledge** and **formal complaint**
  - Actual knowledge = notice of sexual harassment [or allegations] to TIXC
  - **Important role for “Responsible Reporters” continues – obligation to notify the TIXC of known or observed incidents or allegations**
  - Formal complaint = document filed by a complainant or signed by TIXC alleging sexual harassment against a respondent and requesting investigation
- “Should of known” standard still applies in some employment contexts, including supervisor obligations to notify HR of harassment.
- **Actual knowledge** triggers the obligation to offer supportive measures, explain grievance process (TIXC will handle.)
- **Formal complaint** triggers the obligation to investigate.

## REPORTING RESPONSIBILITIES AT BATES



- Nearly all Bates employees will remain Responsible Reporters
  - Obligation to notify Title IX Coordinator of known or observed incidents of sexual harassment
  - “Formal complaint” process allows the would-be complainant to retain a high degree of control over whether Bates moves forward with an investigation
- Some Responsible Reporters will *also* remain “Campus Security Authorities” under Clery
  - Student Affairs, Campus Safety, other individuals defined by Bates
  - Making a report to Title IX Coordinator will ensure Clery compliance issues (inclusion in crime statistics, for example).
- Confidential Reporters continue
  - On-campus: SAVA, CAPS, Chaplain
  - Off-campus: Sexual Assault Prevention and Response Services; Safe Voices

# DEFINITION OF SEXUAL HARASSMENT



**Mandates a six-part definition of “sexual harassment”**



Definitions are provided in regulations and/or refer to other federal laws (and generally track to FBI crime reporting definitions)

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

- Hostile environment sexual harassment
- Quid pro quo harassment
- Sexual assault
- Domestic violence
- Dating violence
- Stalking

Retaliation is also prohibited.

## § 106.30 – Sexual harassment



- **Quid Pro Quo**
  - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- **“Hostile Environment”**
  - 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;

## § 106.30 – Sexual harassment



**Sexual assault**, defined as:

- Sex Offenses, **Forcible**: Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.
  - Forcible Rape: Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.

## § 106.30 – Sexual harassment



- Forcible Sodomy: Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- Sexual Assault With An Object: To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

## § 106.30 – Sexual harassment



- Forcible Fondling: The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

## § 106.30 – Sexual harassment



- Sex Offenses, **Nonforcible**— Nonforcible sexual intercourse.
  - Incest: Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Maine law. (two degrees of consanguinity.)
  - Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent of 16.
  - Note Maine also has a “close in age” exception that 14- and 15-year olds may consent with partners less than 5 years older.

### 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. For the purposes of this definition—
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include acts covered under the definition of domestic violence.

## § 106.30 – Sexual harassment



### 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 cohabitating with, 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 Maine;
  - 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 Maine.

\*To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

## § 106.30 – Sexual harassment



**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.
- For the purposes of this definition—
  - Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
  - Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
  - Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

## OTHER SEX-BASED OFFENSES (OR OFFENSES BASED UPON OTHER PROTECTED CLASSES)



- Hazing?
  - Bullying?
  - Sexual exploitation?
  - Indecent exposure?
  - Other forms of harassment that do not meet the “severe and pervasive” standard?
  - Other forms of physical harm?
- 
- Bates may still include these among forms of “prohibited conduct” (and plans to do so), but they are not technically “a IX.”
  - Institutional policy choice is which resolution process to use.
  - Many institutions, and ATIXA’s model process, have modified procedures for incidents that are not “a IX” to allow for an analogous, but more streamlined process, for cases that do not fall within Title IX jurisdiction.

## NEUTRALITY, CONFLICT OF INTEREST, OBJECTIVITY



- Process must treat parties “equitably.”
  - Must be designed to restore or preserve access to education programs
  - Must include enhanced due process protections before disciplinary sanctions are imposed.
  - Fair under the circumstances.
- Prohibits conflict-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or against an individual party.
- All relevant evidence obtained must be **objectively** evaluated.
- Mandates training on appropriate investigation, hearing, evidence, credibility, bias, conflict of interest.

## SUPPORTIVE MEASURES



- Previously referred to as “interim measures.”
- Non-disciplinary, non-punitive individualized services for all parties.
- Must not unreasonably burden parties, protect the safety of parties and educational environment, and deter harassment.
- Must be offered to complainant upon notice of harassment.
- Also available to respondent.
- Must be available before, after, or in lieu of formal complaint.
- May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, **mutual** restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, etc.

## EMERGENCY REMOVAL



- May remove a respondent from a recipient's education program or activity on an emergency basis, provided that the school:
  - Undertakes an individualized safety and risk analysis,
  - Determines that an immediate threat to the *physical* health or safety of students or employees justifies removal, and
  - Provides the responding party with notice and an opportunity to challenge the decision immediately following the removal
  - Common for Behavioral Intervention Teams to conduct this assessment.
- May place a non-student employee respondent on administrative leave during the pendency of an investigation under current procedures for doing so

## NOTICE TO PARTIES



- Upon receipt of formal complaint, must provide written notice to the parties:
  - Relevant grievance procedures
  - Allegations with sufficient details: identity of parties, implicated policies, date, location if known
  - Statement that the respondent is presumed not responsible
  - Parties may request to inspect and review relevant evidence
  - Sufficient time to prepare a response
- Ongoing notice
  - Any reasonable delay for good cause
  - Any additional allegations
  - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare

## ADVISOR OF CHOICE



- Advisor can be anyone – no restrictions in proposed regulations (though the advisor has a choice in the matter)
- Must allow advisor to be present at all meetings, interviews, hearings
  - May not restrict who may serve as advisor
  - May restrict advisor participation as long as applied equally to all parties
- If a party does not have an advisor to conduct cross-examination at hearing, Bates must provide one
  - No fee or charge
  - Advisor of recipient's choice
  - Can't be "fired" by party, but can be nullified by non-cooperation

## BURDEN OF PROOF ON SCHOOL TO GATHER EVIDENCE



- The burden of gathering evidence rests with Bates, not the parties.
  - So it's not required that a respondent prove welcomeness or consent, Bates must prove unwelcomeness or non-consent.
- “Sufficient to reach a determination”
- Parties have equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Evidence collected by law enforcement *or any other source*.
- Requirements apply to outside investigator(s).

## PARTY ACCESS TO EVIDENCE/REPORT



- Regulations mandate creation of an investigation report
  - Report fairly summarizes **all relevant** evidence
- Prior to the completion of the report, **all evidence** directly related to allegations must be provided to parties
  - Parties must have at least 10 days to review and submit written responses prior to finalizing investigation report.
  - Parties must receive finalized report to review and submit written responses 10 days prior to hearing.
  - Essential to develop a clear protocol and workflow for these steps.

## LIVE HEARING/QUESTIONING



- Mandated live hearing for higher education institutions.
- Parties and witnesses must attend hearing and submit to live, advisor-led cross-examination
  - Otherwise **all statements** submitted by absent party during the investigation must be excluded by the decision-maker(s).
- Decision-maker(s) may not be Title IX Coordinator, the investigator, or the appeals officer
- Provisions for separate rooms, video-based hearing
  - Must be able to clearly hear and see other parties

## LIVE HEARING/QUESTIONING



- **Must allow live cross-examination** to be conducted exclusively by each party's advisor
  - Verbal, direct, in real time
- Each party must be permitted to ask the other party and all witnesses all relevant questions and follow-up questions
  - Including questions challenging credibility
- Each question must be cleared by decision-maker (chair) after being posed
- Questions deemed irrelevant may be excluded with rationale provided
- Must exclude complainant's sexual disposition or prior sexual behavior unless specifically relevant.

## DUE PROCESS: EVIDENCE



- All relevant and reasonably available evidence must be considered – inculpatory and exculpatory.
- No restrictions on discussing case or gathering evidence.
- Equal opportunity to:
  - Present witnesses
  - Present evidence
  - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered, except must be relevant and respect “rape shield” provision
- Includes all evidence directly related to the investigation, even evidence that determination does not, or will not, rely upon

## STANDARD OF PROOF

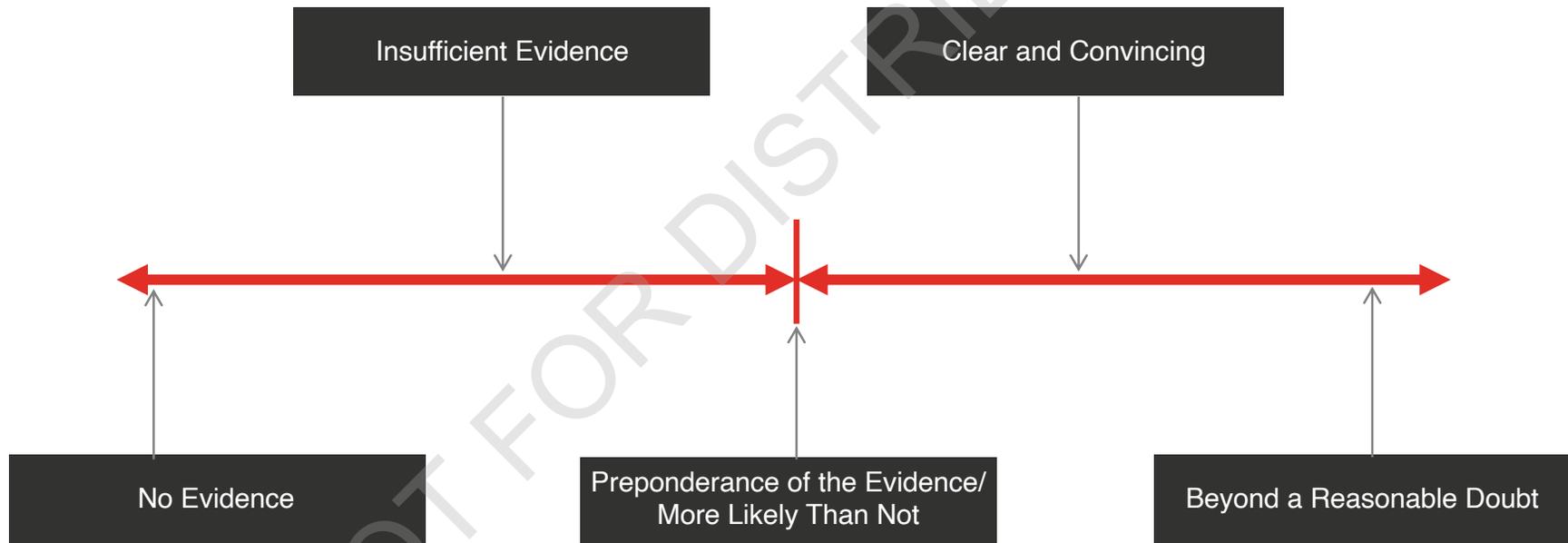


- Current industry standard is preponderance of the evidence
- OCR says recipients must now apply either the preponderance of the evidence standard or the clear and convincing evidence standard
- Standard of evidence must be consistent for all formal complaints of sexual harassment, regardless of policy or underlying statutory authority
- Must also apply the same standard of evidence for complaints against students as for complaints against employees, including faculty

# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



## OUTCOMES: WRITTEN DETERMINATIONS



- Required elements for written determinations:
  - Allegations potentially constituting sexual harassment (§ 106.30)
  - All procedural steps taken
  - Findings of fact supporting the determination
  - A determination on each allegation regarding responsibility, any disciplinary sanctions, remedies
  - The recipient's procedures and permissible bases for the complainant and respondent to appeal.
  - Document how recipient's response was not deliberately indifferent
- Provided simultaneously to the parties (already required under the Clery Act).

## APPEALS



- Appeals are available to both parties.
- May appeal a “dismissal” decision or a final determination.
- All parties receive notification of any appeal request.
- Opportunity for all parties to support or oppose outcome.
- Written decision with rationale delivered simultaneously to the parties.
- Appeal decision-maker cannot have had any other role in the investigation or resolution process.
- “Reasonably prompt” timeframe for producing appeal decision.

## INFORMAL RESOLUTION OPTIONS



- Title IX Coordinator and parties will determine when informal resolution is appropriate.
  - Does not preclude certain offenses from informal resolution.
- DOES preclude informal resolution for allegations that an employee harassed a student.
  - Employee-on employee informal resolution is permissible.
- Informal resolution allowed at any time prior to a final determination at discretion of TIXC
  - Formal complaint is required
- Must provide detailed notice to the parties:
  - Allegations, requirements of the process, circumstances that would preclude formal resolution, consequences of participation
- Must obtain voluntary, written consent

## ADDITIONAL REQUIREMENTS AND ISSUES



- Robust training mandates for investigators, coordinators, decision-makers, appeal officers, informal resolution facilitators
  - Conflicts of interest and bias, definitions, investigations, credibility issues, evidence issues and concepts, report and rationale-writing, hearings, appeals, informal resolution processes
  - No sex stereotypes, promote impartiality
  - Training materials must be maintained for seven years and posted on Bates's website
- Effect on faculty/staff/employee processes
- Extensive recordkeeping mandates

## HOW CAN I HELP?



- Remember that Title IX applies even in virtual/remote settings, and will continue to be an evolving challenge for the Bates community *in addition* to Covid-19 in Fall 2020.
- Understand your reporting obligations, and what will happen when you make your report to Title IX team:
  - Option to file a formal complaint, supportive measures
- Take time to understand Bates' revisions and process when they are ready in August.
- Help students, families, and colleagues to understand the context in which Bates has modified its policy and process.
- Consider if you would be willing to serve as an advisor to participants.
- Share concerns and feedback with the Title IX team.

# CONTACT INFORMATION

—  
[Kim.Pacelli@tngconsulting.com](mailto:Kim.Pacelli@tngconsulting.com)