

# 2020-21 Sexual Harassment & Misconduct

Kenyon College | Policy & Process Training | Process Personnel

July 22, 2020 | 2-3:30 p.m.

August 6, 2020 | 10:45 a.m. - 12:15 p.m.

# Terms, Roles, Prohibited Conduct

# Terms

- Title IX Coordinator
- Investigators
- Hearing Chair/Panel
- Adjudicator
- Appeal Officer
- Advisor
- Hearing
- Investigator Decision
- Supportive Measures
- Witness
- Title IX Dismissal
- Restricted Access
- Complainant
- Respondent
- Report
- Complaint
- Prohibited Conduct
- Formal Resolution
- Informal Resolution
- Remedies
- Preponderance of the Evidence

# Terms: Preponderance of the Evidence

(Section II. Glossary & Definitions)

“A preponderance of the evidence means that the information or evidence provided is more likely than not to be true. When evaluating the information and evidence, the decision-maker(s) will first evaluate the quality. The decision-maker(s) will consider all of the information and evidence regardless of its origin. Any information or evidence the decision-maker(s) find to be of high quality should be given more weight than any information or evidence the decision maker(s) find to be of low quality. Quality may or may not be identical with quantity, and sheer quantity alone should not be the basis for a finding of responsibility. The testimony of a single party or witness or a single piece of information or evidence may be sufficient to establish a fact.”

***Definition continued on next slide***



# Terms: Preponderance of the Evidence

(Section II. Glossary & Definitions)

“Decisions that require the use of an evidentiary standard (*determinations of responsibility, process appeals, challenges to Title IX dismissal, and findings of fact*) will be made after the decision maker(s) assess the quality of the information or evidence and unanimously determine that the decision is justified. That is, the decision-maker(s) should find that there is sufficient evidence that is relevant, probable, and persuasive to convince them that a particular assertion is more likely than not and that the evidence supporting such an assertion outweighs any evidence to the contrary.”

***Definition continued from previous slide***

# Roles

## **Title IX Formal Resolution**

- Title IX Coordinator
- Investigators
- Witness
- Hearing Chair/Panel
- Advisor (assigned if not chosen)
- Adjudicator = Advisory Role
- Appeal Officer

## **Non-Title IX Formal Resolution**

- Title IX Coordinator
- Investigators
- Witness
- Advisor (party chooses)
- Adjudicator
- Appeal Officer

# Prohibited Conduct (Section V.II.) Sexual Harassment - Title IX

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

- **Unwelcome conduct** determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to a program or activity; or
- **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 contact; or
- **Sexual Assault - as defined in NIBRS\***
  - Sexual Intercourse
  - Intentional Touching (fondling)
  - Sexual Intercourse with a relative
  - Statutory Rape
  - Dating Violence
  - Domestic Violence
  - Stalking

*\*National Incident-Based Reporting System*

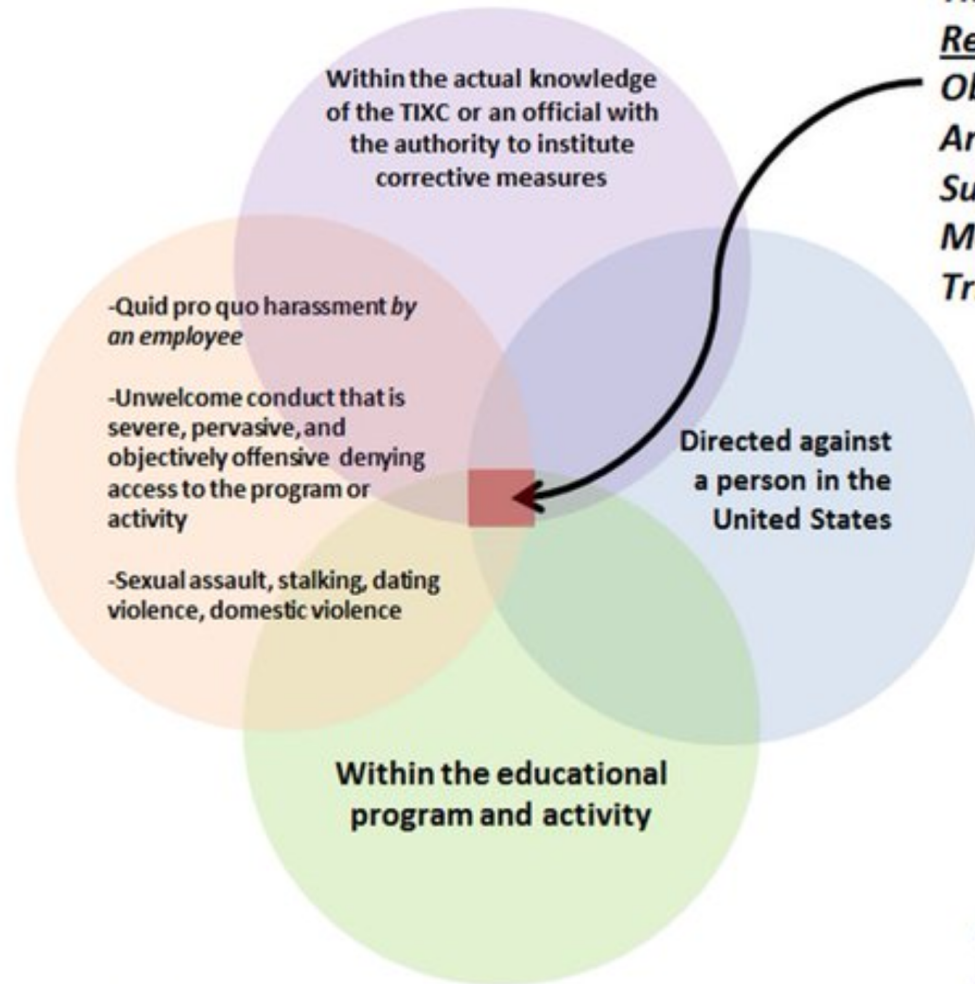
# Sexual Harassment - Title IX

## Jurisdiction Determination (Sections VII.A. & IX.G.3.)

- The conduct must have occurred against a person in the United States.
- The conduct must have occurred within the College's education program or activity:
  - (a) in a location, event, or circumstances over which the College exercised substantial control over both the respondent and the context in which the sexual harassment occurs or
  - (b) in relation to a building owned or controlled by a student organization that is officially recognized by the College.
- The complainant must be participating in or attempting to participate in the education program or activity of the College at the time the formal complaint is filed.

*Initial determination by the Title IX Coordinator. Investigators provide analysis as part of Investigative Report and then Title IX Coordinator makes final Title IX Dismissal.*

**Title IX**  
**Response**  
**Obligation**  
**Arises:**  
**Supportive**  
**Measures,**  
**Triage**





# Prohibited Conduct (Section V.II.)

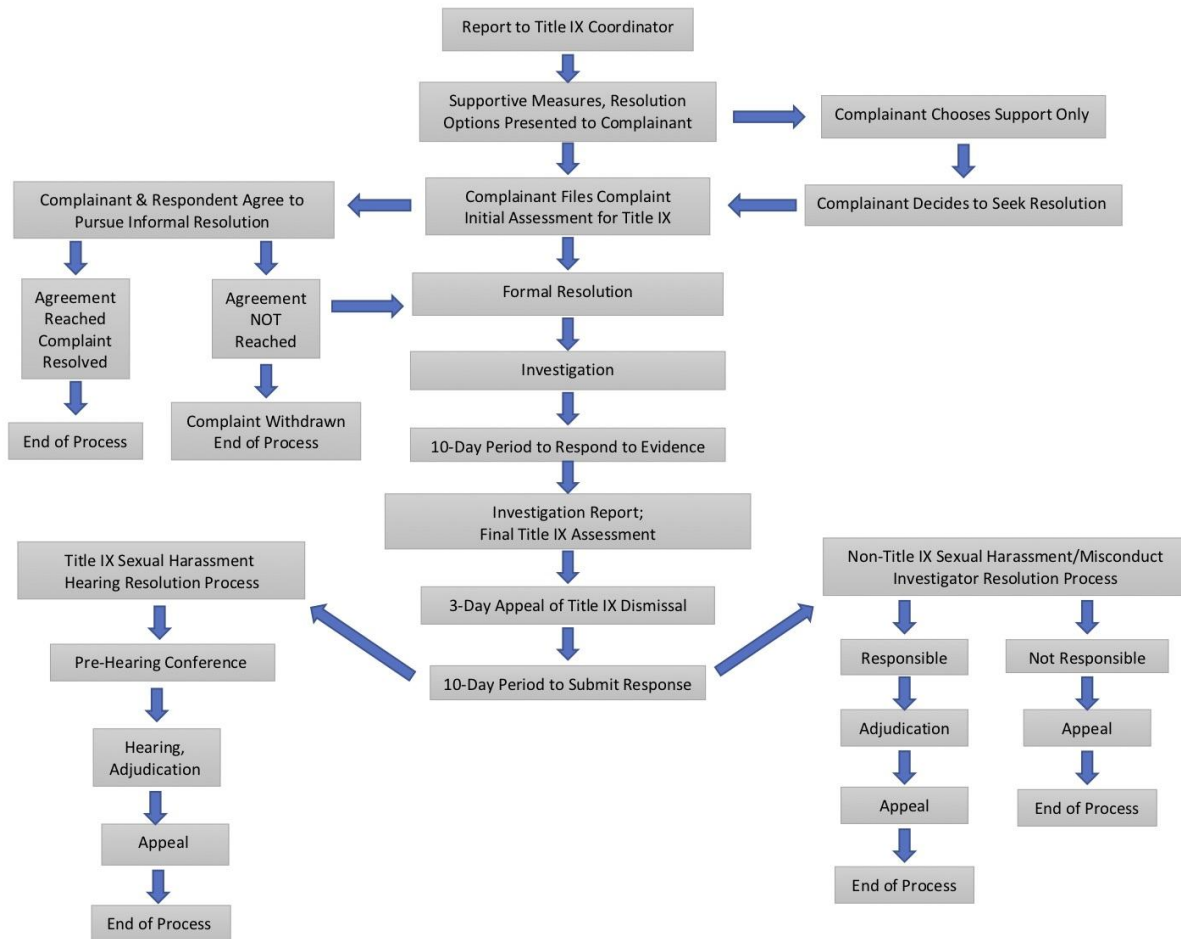
## Non -Title IX and Other Prohibited Conduct

- Sexual Assault - Non-TIX
- Dating Violence - Non-TIX
- Domestic Violence - Non-TIX
- Stalking - Non-TIX
- Sexual Harassment - Non-TIX
- Threats Toward an Intimate Partner
- Sex/Gender Discrimination
- Harassment on the Basis of Sex/Gender
- Sexual Exploitation
- Retaliation

Break for Questions

# Investigation & Resolution Options

## Sexual Misconduct Complaint Resolution Decision Tree



# Investigator Role (Section IX.G.1.)

“The Title IX Coordinator will designate two investigators to conduct an adequate, reliable and impartial investigation, one of which will typically be a College employee. The College may engage an external investigator as one or both of the two assigned investigators. In complex situations, the Title IX Coordinator may engage additional trained investigators to assist in gathering the information that will be considered by the primary investigators. The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the College and not the parties. The interviews will be recorded by the investigators.”



# Investigator Role (Section IX.G.1.)

“The parties will have an equal opportunity to present witnesses, including expert witnesses, and to submit evidence. The investigators will also gather any available physical evidence, including documents, communications between the parties, and other electronic records as appropriate and available. The parties may submit questions to be asked of parties and witnesses. Investigators will review submitted questions and, in their discretion, may choose which questions are necessary and appropriate to the investigation and conduct any follow-up, as they deem relevant.”

# Investigator Role - Review of Evidence (Section IX.G.2.)

“The evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint will be made available to the parties and their advisors, including the evidence upon which the College may not rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence. The parties will have 10 calendar days to review the evidence. The parties will be offered the opportunity to review the evidence and provide a written response that will be submitted to the investigators for the completion of the Investigation Report.”

# Investigator Role - Investigation Report (Section IX.G.3.)

“The investigators will consider whether the conduct alleged, if demonstrated by a preponderance of the evidence, would constitute “Sexual Harassment - Title IX,” in light of the evidence gathered during the investigation, and make a recommendation to the Title IX Coordinator regarding the same.”

“Title IX Coordinator will notify the parties, in writing, of the final assessment and whether or not the complaint will proceed to a hearing or be decided by the investigators.”

# Investigator Role - Investigation Report (Section IX.G.3.)

- Overview of the complaint made and summary of the investigative methodology
- Summary of relevant information gathered, including:
  - timeline of incident being investigated;
  - complainant's account of events;
  - respondent's account of events;
  - witness accounts;
  - evidence gathered;
- Areas of agreement;
- Areas of disagreement;
- Assessment of whether or not the complaint meets one or more of the required elements of the definition of sexual harassment under Title IX, including rationale; and
- Appendix containing all of the collected evidence.

# Investigation Report & Appeal T IX Dismissal

“Parties have 3 business days after receipt of the investigative report to submit in writing an appeal of a determination regarding whether the conduct constitutes “Sexual Harassment - Title IX.” The appeal will be considered by an appropriately trained staff member designated by the Title IX Coordinator.”

“The appeal decision will be communicated in writing to the parties, their advisors, and the Title IX Coordinator. The decision will also indicate the path for complaint resolution: Hearing Resolution or Investigator Resolution.”



Break for Questions 2

# Investigator Resolution - Non-Title IX (Section IX.G.5.)

## Determination

“The investigators will make a determination, by a preponderance of the evidence, whether there is sufficient information to support a finding of responsibility. The investigators’ finding, and the rationale for the finding, will be included in the final investigative report that will be shared with the parties by the Title IX Coordinator.”

# Investigator Resolution - Non-Title IX (Section IX.G.5.)

## **Determination: Evaluating Evidence**

“The investigators should first evaluate the quality of the evidence. The investigators should consider all of the evidence regardless of who provided it. Any evidence the investigators find to be of high quality should be given more weight than any evidence the investigators find to be of low quality. Quality may, or may not be identical with quantity, and sheer quantity alone should not be the basis for a finding of responsibility. The testimony of a single party or witness may be sufficient to establish a fact.”

### **Determination: Credibility Analysis**

“The investigators will evaluate all admissible, relevant evidence for weight or credibility. Credibility is not based solely on observing demeanor, but also considers detail, interest or bias, corroboration where it would reasonably be expected to exist, the circumstances of the disclosure, and the nature of the relationship.”

“The degree to which any inaccuracy, inconsistency, or implausibility in a narrative provided by a party or witness should affect a determination regarding responsibility is a matter to be decided by the investigators, after having the opportunity to ask questions of parties and witnesses, and to observe how parties and witnesses answer the questions posed by the other party. Corroborating evidence is not required.”

# Investigator Resolution: Adjudication (Section IX.G.5.)

1. For reports against students or student groups, the Adjudicator is typically the Director of the Office of Student Rights and Responsibilities.
2. For reports against staff, the Adjudicator is typically the Director of Human Resources or, if the Director of Human Resources is unable to serve, the Director of Student Rights and Responsibilities.
3. For reports against faculty, the Adjudicator is typically the Provost or, if the Provost is unable to serve, the Director of Human Resources.



# Investigator Resolution: Adjudication (Section IX.G.5.)

## **Factors Considered in Sanctioning**

“(1) the respondent’s prior conduct history; (2) how the College has sanctioned similar incidents in the past; (3) the nature and violence of the conduct at issue; (4) the impact of the conduct on the complainant; (5) the impact of the conduct on the community, its members, or its property; (6) whether the respondent has accepted responsibility for their actions; (7) any other mitigating or aggravating circumstances, including the College’s values.”

# Hearing Resolution - Title IX

# Hearing Resolution - Title IX (Section IX.G.6.)

“A Hearing Resolution will be used to resolve cases that include charges of Sexual Harassment - Title IX.

“A Hearing Resolution includes a pre-hearing conference, a live hearing, decisions about responsibility and sanctioning by the Hearing Chair or Panel, and an optional appeal process.”

# Hearing Resolution - Title IX (Section IX.G.6.) 2

## **Hearing Chair/Panel**

Typically one person serves as the Hearing Chair. This person facilitates the hearing, determines the order and flow of the hearing, makes decisions regarding relevance prior to a question being answered, makes the finding, and instances where the respondent is determined responsible, assigns the sanction/s.

# Hearing Resolution - Title IX (Section IX.G.6.)

## **Pre Hearing Conference**

- Each party will have their own pre-hearing conference.
- The Title IX Coordinator, the Hearing Chair, and the advisor must be in attendance.
- The advisors must share with the Hearing Chair their list of witnesses to appear at the hearing
- The Hearing Chair may, at their discretion, add names of other witnesses contained in the report for the purpose of appearing at the hearing and submitting to cross examination.

# Hearing Resolution - Title IX (Section IX.G.6.)

## **Live Hearing**

“The Hearing Chair will provide an introduction detailing the purpose of the hearing, have those present identify themselves and their role, remind all parties of the expectation to be candid and honest in their response, and provide a brief overview of the procedure and the anticipated order of the hearing.”



# Hearing Resolution - Title IX (Section IX.G.6.)

## **Cross-Examination**

“The advisors will be responsible for orally asking relevant questions, including those questions which challenge credibility, to the other party or parties and any witnesses directly, in real-time and in a manner that, in the Hearing Chair’s sole discretion, is not inappropriate, harassing, intimidating, irrelevant, or redundant.”

# Hearing Resolution - Title IX (Section IX.G.6.)

## Relevance

“Relevant questions are those tending to prove or disprove a fact at issue.”

“Before a complainant, respondent, or witness answers a question by an advisor, the Hearing Chair will first determine whether the question is relevant and briefly explain any decision to exclude a question as not relevant, or request rephrasing of the question. The Hearing Chair is not required to give a lengthy or complicated explanation of a relevancy determination during the hearing. The Hearing Chair may later send to the parties any revisions to the explanation of relevance that was provided during the hearing.”

# Hearing Resolution - Title IX (Section IX.G.6.) 7

## **Witness or Party Absent During Hearing**

“If a party or witness does not submit to cross-examination at the live hearing, the Hearing Chair/Panel must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”

Even if a witness or party speaks with investigators during the investigation, and the investigators include the person’s information in the Investigation Report.

# Hearing Resolution - Title IX (Section IX.G.6.)

## Exceptions to Cross-Examination Rule

“Video evidence showing the conduct alleged within a complaint may be considered, even if the party does not submit to cross-examination ... a respondent’s verbal or written conduct that is alleged to constitute the sexual harassment at issue is not considered to be the respondent’s “statement” and thus, information about or evidence of such conduct may be admitted even if the respondent does not submit to cross-examination.”

# Hearing Resolution - Title IX (Section IX.G.6.)

## **Decision, Finding, Sanction**

Decisions regarding responsibility will be made by the Hearing Chair/Panel and communicated to the parties and their advisors in writing within 15 business days from the conclusion of the live hearing. The Hearing Chair/Panel will also determine the sanctions. In determining the sanctions, the Hearing Chair/Panel will consult with the appropriate College staff member.

# Hearing Resolution - Title IX (Section IX.G.6.) 10

## Written Decision Letter

- Identification of the allegations potentially constituting policy violations
- Description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Summary of statements made at the hearing
- Findings of fact supporting the determination
- Conclusions regarding the application of the Policy to the facts
- Statement and rationale as to the finding for each allegation, including a determination regarding responsibility
- Disciplinary sanctions imposed on the respondent
- Whether additional remedies will be provided to the complainant
- Opportunity for appeal



# Appeal Process: Hearing & Investigator Resolution (Section IX.I.)

**In a request for an appeal, the burden of proof lies with the party requesting the appeal. Grounds for Appeal:**

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator, investigator(s), or Hearing Chair/Panel had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
- The decision of the investigators under Section XI.G.5, the Hearing Chair/Panel under Section XI.G.6, or the adjudicator under Section XI.G.5. was clearly erroneous based on the evidential record

# Information & Resources

- The following templates and guidance will be developed and shared:
  - Request for Interviews with complainant, respondent, witnesses
  - Format identifying the layout and required elements for the Investigation Report
  - Hearing Script
  - Hearing Decision Letter identifying the required elements the Hearing Chair must address
  - Adjudication Letter (non-Title IX)
  - Appeal Letter (Title IX Hearing and non-Title IX Investigator Resolution)
  - Instructions on where to place submitted evidence so it can be shared according to the College's established guidelines which prohibit forwarding, emailing, copying, etc.

# Information & Resources

- Kenyon's Policy and Flow Chart can be found at this web address:  
<https://www.kenyon.edu/directories/offices-services/ocr/title-ix-vawa/>
- US Dept of Education Office for Civil Rights Blog:  
<https://www2.ed.gov/about/offices/list/ocr/blog/index.html>
- Bricker & Eckler's Resource Center - DCL's, Regulations, Clery Statutes, etc.  
<https://www.bricker.com/resource-center/title-ix>

# Information & Resources

- Kenyon's Policy and Flow Chart can be found at this web address:  
<https://www.kenyon.edu/directories/offices-services/ocr/title-ix-vawa/>
- Samantha Hughes Contact Information:
  - Office: 740-427-5820 (forwards to cell)
  - Cell: 740-485-1041
- Kevin Peterson Contact Information:
  - Office: 740-427-5245
  - Cell: 740-485-2042

**Questions? Comments?**