

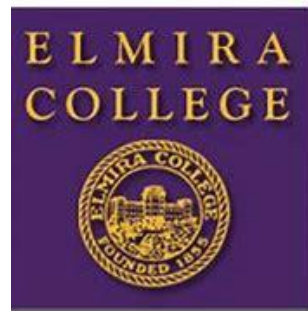


ELMIRA COLLEGE

Title IX Training ***Sexual Misconduct Policy***

***Introduction to New Policy & Training for
Investigators, Adjudicators and Appeal Panelists***

September 24, 2020





Training Overview

- Overview of Applicable Laws
- Understanding the New Title IX Regulations & College Policy
 - Definitions
 - Procedural requirements
 - Your role
- Importance of Transparency & Equity
- Navigating the Live Hearing
 - Managing Evidentiary Issues & Cross-Examination
- Standard of Proof
- Credibility Assessments By Hearing Panel
- Determining Responsibility
- Appeals



ELMIRA COLLEGE



Elmira's Title IX Coordinator

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College's Title IX website:

<https://www.elmira.edu/title-ix>

Applicable Laws

- Title IX (2020 Regulations)
- Violence Against Women Act (federal law)(2014)
- NY Education Law 129-B
 - “Enough is Enough” (2015)

Basic 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 educational program or activity receiving Federal financial assistance.*

Title 20 U.S.C Section 1681



Basic Title IX

- Non-discrimination on the basis of gender
- Title IX states that schools may not respond to allegations of sexual harassment with *deliberate indifference*.
 - Requires schools to respond promptly and reasonably to allegations of gender discrimination or harassment, including sexual harassment
 - Applies to the institution's entire education "program"
 - Under Title IX regulations, deliberate indifference entails "a response to sexual harassment that is clearly unreasonable in light of the known circumstances."

Basic Title IX

- Scope of Offenses
- The U.S. Department of Education Office of Civil Rights (OCR) has jurisdiction over educational institutions to investigate and review complaints under Title IX.
- OCR Guidance
 - 2001 Revised Sexual Harassment Guidance
 - September 2017 Q&A on Campus Sexual Misconduct
- Key concept of **equity** in the investigatory and disciplinary process
- OCR requires investigation/resolution to be prompt



Basic VAWA

- Violence Against Women Act (VAWA)
 - Historically, a law designed to increase criminal prosecution of crimes against women
 - 2014 amendments focus on four concepts:
 - Sexual assault
 - Dating violence
 - Domestic violence
 - Stalking
 - Created “**advisor of choice**” entitlement
 - Required increase in education/training, additional amounts of notification and policy elements

Basic Enough is Enough

- State law that went into effect in October 2015 (Article 129-B)– focuses on 4 categories (sexual assault, domestic violence, dating violence and stalking)
 - Right to an appeal before a panel if the respondent/accused is a student
 - Right to seek review of interim/corrective measures imposed
 - Single statewide definition of “affirmative consent”
 - Right to written notice in advance of any investigatory or disciplinary meeting
 - Right to have prior sexual history excluded if it involves any person other than the other party to the complaint

Title IX Regulations– Where we’ve been and where we are now

- Title IX regulations implemented in 1975 required “prompt and equitable process” for resolving complaints of sex discrimination
- Certain of OCR’s Guidance documents generated criticism and controversy over due process protections.
- On September 22, 2017, DOE rescinded previous Guidance and issued an interim September 2017 *Q&A on Campus Sexual Misconduct* pending implementation of amended Title IX regulations
 - Emphasized the importance of impartiality and avoidance of perceived conflicts of interest and biases for or against any party.
 - Directed that training materials and investigative approaches should not apply sex stereotypes or generalizations

Title IX Regulations– Where we've been and where we are now

- On November 16, 2018, over a year after rescinding the subregulatory guidance, the U.S. DOE published proposed amendments to the Title IX regulations.
- The final regulations were published on May 6, 2020.
- Final regulations are effective August 14, 2020.
 - Emphasis on due process and equity for both parties.
 - Emphasis on agency of the Complainant.



Scope of Title IX Coverage

- The new Title IX regulations create a more limited scope of coverage over prohibited sexual harassment.
 - Limited to conduct within the United States
 - Institution owns or exercises oversight, supervision or discipline over the premises at which an incident occurs
 - Institution funds, sponsors, promotes or endorses an event or circumstance in which an incident occurs
 - Complainant must be participating or seeking to participate in educational program or activity
- Precludes claims arising in study abroad programs and off campus conduct

Scope of Title IX Coverage

- What are Elmira's programs and activities?
 - Any on-campus premises
 - Any off-campus property that Elmira has substantial control over
 - Any building owned or controlled by a student organization that is officially recognized by the College
 - Activity occurring within computer or internet networks, digital platforms, and computer hardware or software owned or operated by Elmira College

Scope of Title IX Coverage

- College “may” investigate conduct falling outside this scope but “must dismiss” them for Title IX purposes.
- Mandatory Dismissal: Title IX Coordinator must dismiss allegations if they are not within the scope of Title IX:
 - Would not meet conduct definitions under Title IX even if proved
 - Conduct did not occur in the College’s education program or activity
 - Conduct did not occur in the United States
- Discretionary Dismissal: College may (and is required under other laws) address conduct that does not fall within Title IX’s limited scope of coverage under non-Title IX institutional policies so long as it is clear allegations do not fall within Title IX.
- Immediately appealable

Scope of Title IX Coverage

- Elmira's Policy Against Sexual Harassment & Other Sexual Misconduct contains 2 types of conduct violations:
 - Title IX conduct violations
 - College conduct violations
- Same process applies to all violations - Why?
 - Hybrid cases
 - Shifting understanding of alleged facts



Scope of Title IX Coverage

In accordance with Title IX as interpreted by the Department of Education, the College recognizes the following as conduct violations within the meaning of Title IX provided that the context and circumstances of the conduct fall within the scope of Title IX, including but not limited to that the Complainant was in the United States at the time of the alleged conduct, that the Complainant was participating in or seeking to participate in the College's education program or activity at the time of the complaint, and that the conduct occurred in the context of the College's education program or activity.

Elmira's Sexual Misconduct Policy

Types of Prohibited Conduct Under Elmira's Sexual Misconduct Policy

• Title IX Category Violations:

- Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

College Category Violations:

- Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking
- Sexual Exploitation
- Retaliation

Collectively referred to "Sexual Misconduct"

Sexual Harassment – Title IX

- The new Title IX regulations define sexual harassment narrowly to include the following conduct on the basis of sex:
 - An employee “conditioning the provision of an aid, benefit or service of the [school] on an individual’s participation in unwelcome sexual conduct”
(Quid pro quo harassment)
 - Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that effectively denies a person equal access to the school’s education program or activity
(Hostile environment harassment)

Sexual Harassment – College Category

- “Sexual harassment” means unwelcome, offensive conduct that occurs on the basis of sex, but that does not constitute sexual harassment as a Title IX Category Violation.
 - Broader scope -Need not be severe, pervasive & objectively offense
- Sexual harassment can be verbal, written, visual, electronic or physical. The fact that a person was personally offended by a statement or incident does not alone constitute a violation. Instead, the determination is based on a “reasonable person” standard and takes into account the totality of the circumstances.
- Considers the context of a communication or incident, the relationship of the individuals involved in the communication or incident, whether an incident was an isolated incident or part of a broader pattern or course of offensive conduct, the seriousness of the incident, the intent of the individual who engaged in the allegedly offensive conduct, and its effect or impact on the individual and the learning community.



Sexual Harassment

Unwanted, offensive behavior that occurs ***because of***

- gender
- gender identity
- gender expression
- sexual orientation

- ✓ The fact that an individual was offended is not alone enough
- ✓ The test is whether this would have been offensive to a reasonable person
 - ✓ An objective standard
- ✓ Can be a stand-alone charge or a “lesser included offense” together with sexual assault or other charge

Factors in Sexual Harassment

- Conduct has to be unwelcome
 - No real requirement that the offender have been “on notice”
 - Third-party harassment
- Evaluating the gravity of the situation
 - Verbal/visual vs. physical
 - A few isolated incidents vs. continual/pattern
- Intent of the offender is not an excuse

Sexual Assault – Title IX Violation

Any sexual act directed at another person, forcibly or against that person's will, or not forcibly or against the person's will where the victim is incapable of or has not given affirmative consent. Sexual assault consists of the following specific acts:

- **Rape:** the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without affirmative consent of the victim.
- **Nonconsensual Sexual Contact/Fondling:** The touching of the private body parts (including genitalia, anus, groin, breast, inner thigh or buttocks) of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.
- **Incest:** Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Non-forcible sexual intercourse with a person who is under the statutory age of consent. In New York, the statutory age of consent is 17 years old.



Domestic Violence – Title IX Violation

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, 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.

Dating violence – Title IX Violation

Dating violence –

- violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- existence of the relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

Stalking – Title IX Violation

Engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person to fear for the person's safety or the safety of others, or suffer substantial emotional distress.

- “Course of conduct” = 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” = reasonable person under similar circumstances and with similar identities to the victim

College Category Violations

- Sexual assault, domestic/dating violence and stalking –
 - definitions the same but the conduct does not constitute a Title IX category violation because of the context in which it occurs (for example, because the complainant was not in the U.S. at the time of the alleged conduct, because the complainant was not participating in or seeking to participate in the College's education program or activity at the time of the complaint, or because the conduct did not occur in the context of the College's education program or activity)



Sexual Exploitation – College Category

- Without affirmative consent, a person takes sexual advantage of another in a manner that does not constitute another violation of the policy
- Examples:
- Prostitution
- Observing or recording a sexual or other private activity
- Distributing intimate pictures of another without consent or beyond the boundaries of consent
- Voyeurism
- Exposing one's genitalia
- Engaging in consensual sexual activity while knowingly infected with HIV or other sexually transmitted disease without informing the other person of such infection.

Retaliation – College Category

- An adverse act perpetrated to “get back” at a person because the person reported sexual misconduct, filed a complaint or participated in an investigation or proceeding (whether internally or externally by a government agency)
- Anything that would tend to discourage an individual from reporting sexual misconduct, pursuing an informal or formal complaint, or from participating in an investigation or adjudication as a party or witness.
- Person who makes a statement knowing it is false, is not acting in good faith.
- Person who acts in good faith is not engaging in retaliation

Overview of Process

- Roles in the Process
 - Title IX Coordinator, Investigators, Hearing Panel, Appeal Panel
 - “Complainant” – individual who is alleged to be the victim of conduct that could constitute sexual harassment/sexual misconduct, regardless of whether a formal complaint is filed
 - “Respondent” – the accused or individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment/sexual misconduct
- Stages of Complaint Process
 - Formal complaint – document signed by the complainant or Title IX Coordinator alleging sexual harassment against a respondent
 - Investigation, Mediation/Informal resolution, Hearing, Appeal
- Resources – The Title IX Coordinator will be a key resource



The Role of Advisors

- Advisor of choice
- May be anyone, including an attorney, friend or parent
 - Complainant and Respondent have a right to an advisor
- No requirement for impartiality
- Role is consultation & to conduct cross-examination of other party and witnesses at hearing
- Investigations/meetings need not be delayed based on advisor's availability
- Advisor can be precluded if the advisor is disruptive

The Role of Advisors

- To accompany advisee to meetings & hearing
- To “look out’ for the advisee’s interests
- To ensure the advisee’s rights are being honored pursuant to the process
- To provide advise to the advisee about the process and the advisee’s options
- To review submissions from the advisee
- College must provide advisor of College’s choice if party does not have advisor of choice at the hearing in order to ask questions of other party and witnesses – “**Institution Advisor**” has different role from “Advisor of Choice”

What is the Right Demeanor/Role for an Investigator?

- Fair
- Objective
- Concerned for both complainant and respondent
- Unrevealing of personal views
- Not leaping to conclusions
- Not promising or even suggesting a particular result



The Role of Hearing Panel

- Three-member panel, including Chair
 - Chair controls the overall hearing, determines the order of witnesses, rules on permissibility of questions and evidentiary issues, etc.
 - In any case where the Respondent is a student, the Chair of the Hearing Panel will typically be the Assistant Dean of Students.
- Hearing Panel determines whether a policy violation occurred and/or sanctions to be imposed.
 - Each panel member has a vote and majority vote rules.
- Hearing Panel members must apply objective standards, approach every case with an open mind, not act out of preconceived myths or biases in favor or against either party and focus on relevant facts and evidence.

The Role of Hearing Panel

- Do not discount testimony based on the fact that it comes from complainant or the respondent.
- Role is to obtain information, not to make commentary or express personal views on the case or any particular fact
- Be as unrevealing of your impressions as possible
- Do not engage in victim blaming/victim shaming
- Keep in mind the high stakes, for both parties involved
- Must be free from conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent
- Hearing Panel members cannot decide appeal

Hearing Panel - Conflict of Interest

- Identify any conflict or potential conflict you have
 - Just knowing who a person is or having met or interacted with the party is not a conflict
 - A conflict is a relationship with them or knowledge about them that precludes you from being impartial
 - A conflict could also be a connection to the subject matter or an interest in the outcome that precludes you from being impartial
- Consider appearances
- When in doubt, self-identify any situation that could create even the appearance of a conflict

Dynamics of Sexual Assault

- Title IX regulations do not define consent.
- NY state Enough is Enough mandates statutory definition of “affirmative consent”

Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant’s sex, sexual orientation, gender identity, or gender expression



Consent: definition mandated
by Enough is Enough:



Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression

Consent: Definition mandated by Enough is Enough Law:

- “Yes” means “Yes”
- “No” means “No”
- But absence of a verbal “Yes” does not mean “No”
 - Actions, if voluntary and clear, can express consent
 - *Consent can be given through words or actions so long as the word or action is clear regarding willingness to engage in the sexual activity.*

NYS Guidance

There is no requirement under the definition of consent that there be “verbal” consent or a specific statement of yes. To require a verbal statement would be to exclude hearing and speaking impaired students from consenting to sexual activity. Consent can be given through words or actions so long as the word or action is clear regarding willingness to engage in the sexual activity. The legislation says that silence “in and of itself” is not consent; a reporting individual failing to say no or actively resist is not a defense to a charge of sexual activity without consent.



Consent

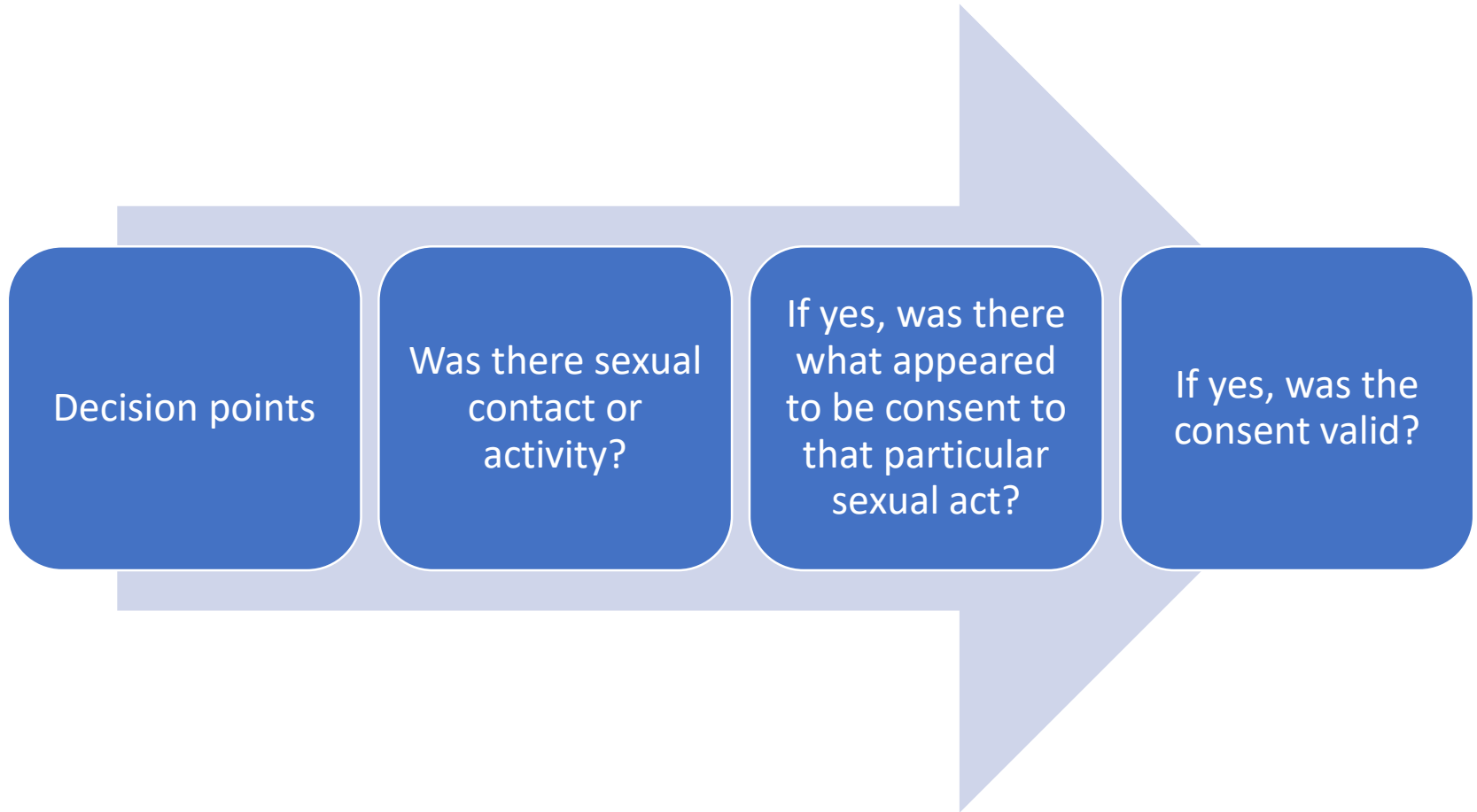
- Consent to some sexual activity is not necessarily consent to other activity
- Consent to past activity is not necessarily consent to future activity
- If consent is withdrawn, sexual activity must cease
 - Stopping at the point that consent is withdrawn or can no longer be given can be asserted as a defense to a charge of sexual activity or contact without consent.

Analyzing Affirmative Consent: Standing Romantic Relationship

- Consent to past sexual contact is not necessarily consent to future sexual contact
- BUT the parties historical interactions could be relevant to the consent analysis
 - Was there a pattern to the parties' sexual encounters?
 - Did the relationship yield non-verbal communication or understanding relevant to the consent issue?

Probably reasonable to lend non-verbal indicia of consent more weight than in a stranger encounter

Consent





Consent

Circumstances precluding consent:

- Incapacitation (mental or physical)
- Unconsciousness (sleep)
- Physical restraint
- Any form of threats or coercion
- Being a minor

Incapacitation

- Evaluating Intoxication vs. Incapacitation

Consent cannot be given when a person is incapacitated, which occurs when an individual **lacks the ability to knowingly chose** to participate in sexual activity . . . Depending on the **degree of intoxication**, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore be unable to consent.

- Intoxicated does not necessarily mean incapacitated
- The question is whether a person could make a “knowing decision” to engage in the activity
- No “legal limit” test like for driving
- Alcohol impacts individuals differently
- Focus should be on the *impact* of alcohol consumption

Incapacitation

Physical manifestations of intoxication may provide evidence tending to suggest incapacitation, but cognitive ability is the key.

- How much alcohol was consumed and how quickly? And when in relation to the incident?
 - Factors in intoxication: weight, gender, genetics, food consumption
- Did the complainant pass out or black out?
- Did the complainant vomit at any point?
- How was the complainant's speech, gait, focusing of the eyes, speaking in a way that made sense at the time of the incident?
- What was the complainant's condition when last seen by reliable third-party witnesses?



Incapacitation

Focus is on cognitive ability

- Did the complainant seem to understand where s/he was and where other people were? Was his/her thinking organized or disorganized?
- Could the complainant walk or did someone have to assist or carry her/him?
- What physical tasks did the complainant perform, and how well did s/he perform them (e.g., texting, taking photos, removing clothes, etc.)?
- Could the complainant make and maintain eye contact with others?
- Was the complainant able to remove his/her own clothes?

Coercion

- What is coercion?
- Challenge – distinguishing reluctant sex from coerced (and thus nonconsensual) sex
- Definitions in other contexts
 - NY Penal Law defines coercion as an act of convincing someone to do something through the use of threats or other force
- Broader than “force” analysis
- Keep in mind that a person can change their mind and agree to sex after having indicated reluctance
- Lacks the ability to knowingly choose?



Coercion

Elmira's Policy:

“Coercion is a threat, undue pressure or intimidation, to engage in sexual activity. Coercion is more than an effort to persuade, seduce, entice or attract another person to engage in sexual activity. A person's words or conduct are sufficient to constitute coercion if they deprive another individual of the ability to freely choose whether or not to engage in sexual activity.”

- Would repeated requests to engage in sexual activity constitute coercion?
- Does not take no for an answer – is that coercion?

Dynamics of Dating and Domestic Violence

- Rooted in the need to control this particular person
 - Absence of violent behavior toward others does not mean it did not occur
- Tends to occur repeatedly if allowed to recur; a relationship pattern
- The “why does he/she stay” question
 - Domestic/family situations may be harder to leave as a practical matter
 - Abuse followed by remorse/good times cycle
 - Cognitive dissonance: he/she loves me but he/she hurts me
 - Abuser (and usually victim) believes victim is to blame
 - Mutual minimizing of abuse
- Often attended by shame (victim and abuser)
 - Heightened by same-sex relationship and/or where female is abuser of male partner

Impact of Criminal Proceedings

- An institution's Title IX process may be undertaken before, after or at the same time as a criminal investigation
- Local law enforcement process is entirely separate from an institutional process. An institution's Title IX process is not a legal proceeding, it is an administrative one.
- Different burdens of proof
 - Standard is not Beyond a Reasonable Doubt
- There may be coordination with law enforcement, and the institution's investigation may include information from the criminal investigation

Comparison to Criminal Proceedings

- Institution is obligated to listen to both parties and reach a reasonable decision, not to 'prosecute' an alleged crime.
- A student disciplinary hearing, preceded by an investigation, is conducted for the purpose of carefully examining a complaint of sexual harassment in order to determine whether the institution's policy has been violated.
- Federal Rules of Evidence do not apply to institution's student disciplinary process.
- What if Respondent appears at the hearing and states that he is unable to answer (some or all) questions because of pending criminal matter? What do you do? Does it matter whether it is at the advice of an attorney?
 - No right to remain silent
 - Title IX regulations preclude his/her statements

Equitable Proceedings

Key concept of **equity** in the investigatory and disciplinary process

- Whatever one does for one party, one has to do for the other party
- The process must be fair (i.e., “equitable”) to both parties
- Title IX regulations require evaluation of both inculpatory and exculpatory evidence
- Title IX regulations require an emphasis on considering undue burden on other party and “mutual restrictions” on contact when implementing supportive measures throughout the process



The New Title IX Regulations, the Law and Prohibited Conduct – Questions?



The New Elmira College Process

- How does it work? How and when is a complaint filed?
 - No longer an investigatory type model
 - Investigation with opportunity to review all evidence
 - Followed by Title IX- mandated live hearing
 - Followed by appeal process



Initiation of College Process

- Upon receipt of a report of sexual harassment (which can be made by “any person”), Title IX Coordinator must contact the complainant to discuss the availability of supportive measures (which are available regardless of whether a formal complaint is filed) and explain the option to and process for filing a formal complaint, which, if submitted, will initiate an investigation and the formal adjudication/hearing process and/or the informal resolution process.
- Formal complaint is filed by the person who allegedly experienced the misconduct
 - (or in some cases by the Title IX Coordinator)

The New Elmira College Process

- Summary of Options under Elmira's process
 - Supportive Measures Only
 - Informal Resolution
 - Formal Resolution



Notification of Rights at Time of First Disclosure

New York State law provides:

Every institution shall ensure that, at a minimum, at the first instance of disclosure by a reporting individual to an institution representative, the following information shall be presented to the reporting individual:

Notification of Rights at Time of First Disclosure

“You have the right to make a report to campus security [or university police], local law enforcement, and/or state police or choose not to report; to report the incident to your institution; to be protected by the institution from retaliation for reporting an incident; and to receive assistance and resources from your institution”



Emergency Removal of Student Respondents

- Title IX regulations allow for emergency removal or suspension of a student respondent from the College on an emergency basis following a complaint of sexual misconduct.
- The College must undertake an individualized safety and risk assessment, and conclude there is an “immediate threat” to the “physical health or safety” of its community members.
- Respondent provided notice and opportunity to challenge the decision immediately following the removal.
- Not applicable to employees. Employees may be placed on administrative leave consistent with Employee Handbook and any other applicable employee policies.

Supportive Measures

- Available without a formal complaint
- Available to both parties free of charge
- Designed to restore or preserve equal access to the College's education program or activity
- Non-disciplinary and non-punitive
- May not unreasonably burden the other party
- May include measures such as mutual no-contact orders, counseling, adjustments to class/work schedules, campus escort services, leaves of absence, changes in work/housing locations, etc.
- Right to appeal denial and/or need for/terms of supportive measures – decision made by Title IX Coordinator
- The Title IX Coordinator in conjunction with the Vice President of Enrollment Management will enforce supportive measures under College policy.

Informal Resolution

- Must first file a formal complaint in order to engage in Informal Resolution process
- Title IX Coordinator will offer option of Informal Resolution to the parties after a formal complaint is filed
- Complainant, Respondent & Title IX Coordinator must consent to use the process
- May be used broadly in nearly any case
 - Not available if the respondent is a faculty or staff member of the college and complainant is student
- Any party may withdraw from the process at any time prior to reaching written resolution and resume (or commence) the investigation and hearing process

Investigation

- Process of investigation is much the same but all decisions of responsibility and credibility will rest exclusively with the hearing panel, not the investigators
- Impartial Fact-Finding process
- Evenhanded treatment of the parties
- Provide opportunity for breaks during interview
- Plan and prepare for interview (including your introduction)
- Make sure they understand your questions
- Parties and witness should be advised of process and need, upon request, to attend hearing and submit to cross-examination
 - Remind parties and witnesses of expectation to later appear at the hearing (if witnesses are called) and the consequences of not attending the hearing and submitting to cross-examination questions

Notice of Investigation & Allegations

- Prior to any investigatory interviews, the parties will receive notice of:
 - The identities of the parties involved & the conduct allegedly constituting a violation of College policy
 - The date, time, location & factual allegations of the alleged incident;
 - A statement that respondent is presumed not responsible for alleged conduct
 - Statement of the investigation and adjudication process
 - Information regarding the right to an advisor of choice, who may be, but is not required to be an attorney
 - Potential sanctions
 - Right to inspect & review evidence directly relevant to the allegations
 - Notice that the Student Code of Conduct prohibits knowingly making false statements or submitting false information in the grievance process
- Must be updated for any new allegations



The Investigation

- Assignment of team of investigators followed by opportunity for the parties to object based on conflict of interest
 - 2 days for parties to challenge investigator(s)
- Acknowledge the sensitivity of the nature of the allegations for both parties
- Assure parties and witnesses that they will not be subjected to retaliation
- Parties have right to advisor of choice
 - Quiet advice and consultation, party speaks for himself/herself

Requirements In Investigative Stage

- Both parties extended equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- The burden of gathering evidence and burden of proof remains with the school, not on the parties
- Before a party is asked or required to appear at an interview, he/she must be provided with advance notice of date, time, location, participants and purpose of the interview.

Interviews

- Ordering of interviews
 - Complainant
 - Respondent next?
 - Or a witness or two or all of them before the respondent?
- Ask thorough questions
- Ask balanced questions
- Ask follow-up questions
- Demonstrate open mind
- If you need more information, ask!

Interviewing Complainant and Respondent

- Think about location
 - Private but professional
- Recall the difficulty for the student
 - Whether complainant or respondent, this is an emotional, “scary” moment
- Start with open-ended, broad questions
 - Ask follow-up questions
 - Narrow down to the very specific allegations
 - Neglecting to ask about the very specific allegations is a common interviewing mistake



Sensitive Questioning

- Non-judgmental or minimally judgmental ways to elicit relevant information
 - “What happened next?”
 - “Did happen?” (as opposed to “why did or didn’t something happen”)
 - The “why” may be relevant, but be really sure it is relevant before asking
 - “[Complainant/Respondent] says that happened. Would you like to say anything in response to that?”
 - “Would you tell us how you were feeling or what you were thinking about when . . . happened”

Good Questioning

- Conclusory or vague statements are of little value and must be followed up on
 - “He says offensive stuff all the time”
 - “He touched me ‘down there’”
 - “This happened earlier in the night”
 - “She sent me a text and I knew from that text that she was totally wasted”
 - “I saw him, and he was drinking but he wasn’t drunk”
 - “He gets really crazy, and he was like that that night”
 - “I think she was just jealous because he had a new girlfriend”



Victim Blaming

From Enough is Enough Law, one the Students' Rights is: *Be free from any suggestion that the reporting individual is at fault when these crimes and violations are committed, or should have acted in a different manner to avoid such crimes and violations*

This is not a bar to asking questions or learning facts or even questioning the factual basis for a complaint. Nearly every question can be asked the right way.

Interviewing Witnesses

- Think about what this witness is likely to have seen/not seen or know/not know
 - If the witness has nothing to do with a particular incident or allegation, either don't ask about it, or ask about it in a vague way
 - “Were you at the Old Tavern on Friday night? Did you hear anything about what may have happened there?”
 - If the witness doesn't know about this, you move on
- Ending question: Is there anything else you think I should know?

Scope of the Investigation

- Parties are entitled to present any evidence directly related to the allegations (including parties' request for witness interviews)
 - Fact witness
 - Expert witness
 - Character witnesses
 - Any other inculpatory or exculpatory evidence
- Invite parties to suggest witness and opportunity to suggest questions
- May not access privileged records (attorney/client, doctor/patient, etc) without consent
- In person, telephone or videoconference
- Parties may not record interview

Investigative Stage – Evidence Exchange

- Under Title IX regulations parties must be provided access to all evidence obtained during the investigation that is “directly related” to the allegations, including evidence the institution does not intend to rely on in the hearing in reaching a determination on responsibility.
 - 10 day minimum
- Opportunity to respond in writing to the evidence in the 10-day period
- *“Prior to the conclusion of the investigative report, the Complainant and Respondent, and each of their advisors, will be provided a copy of the evidence subject to redaction permitted and/or required by law. The Complainant and Respondent will be provided with **at least ten days** to submit a written response, which the investigator will consider prior to completion of the investigative report.”*



The Investigation Report

- Summarize the investigation
- Compile and address all *relevant* evidence
- Investigator does not make any findings or conclusions or policy analysis nor does investigator assess credibility

- Exclusions:
 - Complainant's sexual history (with 2 exceptions)
 - Privileged records unless privilege is waived

- Respondent's sexual history offered by Complainant is not automatically excluded; determine its potential relevance
- Mental health diagnosis or treatment is not automatically excluded; determine its potential relevance

Access to the Investigation Report

- Parties have right to review the report at least 10 days before the hearing
 - Electronic or hard copy, or availability via file-sharing platform
- Time for Investigation – Prompt
 - An investigation generally should be completed within 45 calendar days of the date the formal complaint is filed.
- Keep parties informed if you need more time
- Keep parties apprised generally
- Do not compromise thoroughness for speed

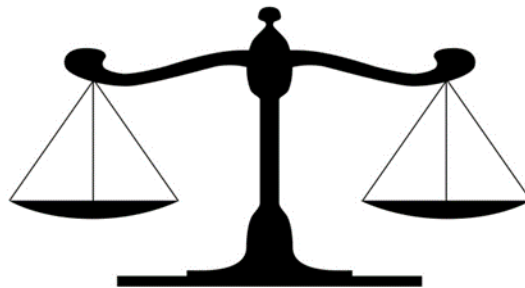
Questions?



ELMIRA COLLEGE

The Adjudication Process

- New regulations require a live hearing model
 - Investigator and hybrid models are now prohibited
 - Institutions may permit live hearing virtually, with technology enabling participants simultaneously to see and hear each other.



Live Hearing

- Hearing must be recorded (audio or video) or transcribed
 - Be sure recording equipment is on
 - Remember you are being recorded!
 - Parties have right, upon request, to review recording/transcription of the hearing
- Formal rules of evidence not applicable
- Hearing Panel is to hone in on narrower issues or places where there is a lack of clarity or a discrepancy
- Both parties have right to advisor at the hearing
- No right to support person at the hearing
 - Limited exception for necessary disability accommodations (e.g. interpreter)

Notice of Hearing

- Title IX Coordinator will issue notice of the date, time and location of the hearing
- Hearing must occur at least 10 days after investigative report is made available to the parties
- Disclosure of names of hearing panel members
 - Right to challenge participation by any hearing panel member for bias or conflict of interest



Hearing Panel – Conflict of Interest or Bias

- Identify any conflict of interest or bias you have
 - Just knowing who a person is or having met or interacted with them is not a conflict
 - A conflict is a relationship with them or knowledge about them that precludes you from being impartial
- A conflict or bias could also be a connection to the subject matter or an interest in the outcome that precludes you from being impartial
 - Title IX regulations and College policy: Bias for or against complainants or respondents generally, or for or against the specific parties
- When in doubt, self-identify any situation that even creates the appearance of conflict or bias



Hearing Participants

- Hearing Panel
- Complainant and advisor of choice
- Respondent and advisor of choice
- Investigators
- Witnesses (solely during their own testimony)

Chair: Maintaining Control of the Hearing

- Goal is to enable fair and free participation by the Complainant and Respondent, with appropriate assistance from advisors in the interest of determining what did or did not occur
- Expectations should be made clear at the start (or at a pre-hearing meeting) of the hearing to avoid misunderstandings
- Tone, demeanor and pacing, gently remind participants to slow down and wait for rulings
- Neutral
- Consider using outline to stay on track
- Clear explanation of rulings

Advisors

- Advisor of Choice
 - Right to advisor of choice throughout entire process
 - If a party does not have an advisor of choice at the hearing, the Title IX Coordinator will assign an advisor, of the College's choice, to that party free of charge, for purposes of cross-examination.
 - Planning – have parties indicate whether they intend to bring an advisor of choice to the hearing
- What is their role?
 - May support and advise the party
 - Quiet advice and support
 - Does not speak on behalf of party or answer questions
 - Does not present evidence or address the Hearing Panel
- How, if at all, can the Hearing Panel, maintain control over an advisor's conduct at the hearing?

Assigned “Institution” Advisor

- Conducts questioning on behalf of party who does not have an Advisor of Choice
- Assigned Advisor does not represent a party in the legal sense
- Party is responsible for formulating questions that will be asked by Institution Advisor.



Hearing Logistics

- Hearing may be held in a room with all participants physically present in the same room
- At the Title IX Coordinator's discretion, parties, witnesses and others may appear at the hearing virtually
 - Hearing Panel and parties must be able to simultaneously see and hear any party or witness providing information at the hearing
 - If either party requests, the hearing must be conducted with the parties located in separate rooms using virtual participation

Order of Hearing

- Chair will open the hearing and establish ground rules and expectations
- Opportunity for Opening Statement by Complainant
- Opportunity for Opening Statement by Respondent
- Questions for the investigator(s) by Hearing Panel and parties' advisors
- Questions for the Complainant by Hearing Panel and Respondent's advisor
- Questions for the Respondent by the Hearing Panel and Complainant's advisor
- Questions for Witnesses by Hearing Panel and advisors
- Opportunity for Closing Statement by the Complainant
- Opportunity for Closing Statement by the Respondent



Right to Cross-Examination

- Chair must permit each party to cross-examine the other party and any witnesses and ask **all** relevant questions, including those challenging credibility.
- Cross-examination may only be conducted by advisor, never by the parties
- Upon request, cross-examination will occur with the parties located in separate rooms with technology enabling the adjudicator and parties to simultaneously see and hear the party answering questions.

Right to Cross-Examination

- From the Preamble of Title IX regulations: *“The requirement for a party’s advisor to conduct cross-examination on a party’s behalf need not be more extensive than simply relaying the party’s desired questions to be asked of other parties and witnesses.”*
- A party cannot “fire” an assigned advisor during a hearing, but if the party raises concerns that the assigned advisor is refusing to “conduct cross-examination on the party’s behalf” there is an obligation to provide the party an advisor to perform that function. This may range from taking a break to have the Title IX Coordinator confer with the assigned advisor or assign a new advisor.

Live Hearing

- Chair of Hearing Panel must rule on whether questions are relevant or violate rape shield protections or a legally recognized privilege and provide an explanation for excluding a question



Live Hearing – Assessing Relevancy

- Must make a material fact more or less probable
- USDOE: Use “common sense meaning”
- Not everything that is interesting or surprising is relevant
- Preamble: “A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order and decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.”
- Character evidence, prior bad acts, repetitive questions or those intend to badger a party or witness may, depending on the circumstances, be barred as not relevant



Live Hearing – Assessing Relevancy

- Determination as to relevance should not be based on:
 - Who asked the question
 - Possible motives
 - Who the question is directed to
 - The sex, gender, sexual orientation, gender identity or other characteristics of the party for whom a question is asked or to whom it is asked
 - The status as complainant or respondent of the party for whom a question is asked or to whom it is asked.
- Is the question repetitive? Was it asked by the Hearing Panel?

Parameters Of Cross Examination

- **All** relevant questions must be allowed
- Exceptions:
 - Prior sexual history of Complainant -rape shield protection (with exceptions)
 - Privileged communications unless privilege is waived
 - Types: Attorney-client, Doctor-patient; Clergy-communicant
 - Evidence not previously made available during investigation, unless allowed by Chair

Implications of Failure To Submit To Cross Examination

- If a party or witness does not submit to cross examination, that individual's statement(s) may not be considered for purposes of determining responsibility.
- Applies to questions posed by parties' advisors, not to questions posed by the Hearing Panel
- Broad Application
 - Preamble: *"Police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statement of a party or witness who has not submitted to cross-examination."*



Implications of Failure To Submit To Cross Examination

- If a party or witness does not submit to cross examination, the reason for not doing so does not matter - that individual's statement(s) may not be considered.
- The rule of exclusion in this regard is broadly construed and applies to any statement, in any form, whether during the investigation or at the hearing.
 - Text messages, interview statements, social media posts, emails, etc
- Ruling of Chair of Hearing Panel controls
 - But it is a potential basis for appeal
- No adverse inference may be made
- Party that does not submit to cross-examination may still have own advisor cross examine other party

Can Past Sexual Activity be Considered? Rape Shield Protections

- Under Title IX regulations, evidence pertaining to the complainant's sexual history is deemed not relevant and must be excluded.
- Exception- Not excluded if evidence about the complainant's sexual behavior is offered to
 - 1) provide that someone other than the respondent committed the conduct alleged by the complainant or
 - 2) if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent.
- Rape shield protections not applicable to respondents

Presumption of Non-Responsibility

- Respondent is entitled by law to be presumed to be “not responsible” until the facts demonstrate he/she is responsible at the conclusion of the grievance process
- Should you presume that an accusation of sexual assault must be true because it has been said that the rate of false reporting is low and/or that rate of sexual assault is high?
 - No!
 - Query as to whether these statistics are reliable
 - You must decide a case based on facts, not statistics

Presumption of Non-Responsibility

- So what does this mean when we are looking for affirmative consent in a sexual assault case?
 - It is not the respondent's burden to "prove" affirmative consent
 - The question is whether the College's investigation and adjudication process has revealed by a preponderance of evidence that there was a lack of affirmative consent
 - If yes, there is a violation
 - If no, there is no violation



Other Presumptions

- Should you presume that an accusation of sexual assault must be true because you have heard that the rate of false reporting is low?
- Should you presume that an accusation is true because you have heard that the rate of sexual assault is high?
- Should you presume that an accusation is untrue because of a few high-profile false reports?
 - No!
 - ***You must decide a case based on the facts of THIS case.***



Determining Credibility

- Credibility is not simply about “lying” or not “lying”
 - Demeanor
 - Opportunity
 - Accuracy
 - Contradictions (slight fluctuations are expected)
 - Admissions and denials
 - Probability of information given
 - Motivation/bias
 - Corroborating statements or evidence

Determining Credibility

- Title IX regulations state that credibility determinations may not be based on a person's status as a complainant, respondent or witness.
- Not an all or nothing matter- may find certain portions of a party's testimony credible and some not.
- Look at evidence in context – credibility can be as much about how something is said or what is happening at the time



Determining Credibility

- Look for corroboration
 - Text messages
 - Increasingly, this is **the** place for proof
 - Is texting coherent or incoherent?
 - Social media
 - Incidental witnesses
 - Have no dog in the fight
 - Can be very important regarding capacity
 - Who did they bump into?
 - What did they notice – able to stand, talk, look in eye, speak coherently?
 - May be able to confirm timing or location

Standard of Proof

- Hearing Panel must apply a “preponderance of the evidence” standard.
- What is “preponderance of the evidence”?
 - “More likely than not that sexual harassment occurred”
 - “50% plus a feather”
 - No need to eliminate alternate explanations, just need more than 50%



Standard of Proof

- If the factual scales are perfectly balanced at 50/50, the respondent is not responsible because responsibility must be based on a preponderance of evidence
 - Credibility determinations can tip the scale one way or the other, but it will be critical to explain and support such credibility determinations

Determining Responsibility

- Determination must be based on
 - Evidence presented
 - All evidence presented
 - In its totality



Making a Decision

- Hearing Panel's deliberations are private
- Majority Vote
- Determine each charge separately
 - Ascertain facts (preponderance of evidence)
 - Apply policy definitions to determine if there is a policy violation
- Keep in mind required content of notice

Determining Responsibility

- What to consider in applying the standard
 - Admissions by the parties
 - Undisputed facts
 - Text messages & videos
 - Dorm entry evidence
 - Parties' recollection
 - "I don't remember"
 - Corroborating evidence
 - Witness testimony, Discussions with others & Electronic evidence
 - Credibility Determinations
 - Insufficient process/incomplete fact finding
 - Judgments as to materiality



Determining Responsibility

- Keep an open mind
- Reach a soundly reasoned decision
 - Draw reasonable inferences
 - Need to be able to articulate the reason for your conclusions; the conclusions alone are not enough
- Consider all of the evidence, but only the evidence
- Determine how much weight to give the evidence
 - Quality not quantity
- You **can** make credibility determinations
 - If you have decided to believe one person over another, explain why in your decision. Findings based on credibility alone may be difficult to sustain. It is important to be very clear and support your rationale.

Determining Responsibility

- Your role is not to pick a side or to promote an agenda
- Apply terms of what policy is, not what you believe it should be
- Your loyalty must be exclusively to the integrity of the process and reaching the warranted outcome
- Recognize any biases and actively override them

Sanctioning

- If respondent is a student, and if the decision maker has determined the respondent is responsible for a violation, under state law, both parties have the option to provide an impact statement before the Hearing Panel's determination about sanctions.
 - The parties must submit their impact statements to the Title IX Coordinator within 24 hours after the conclusion of the hearing.



Sanctioning

- Under the Title IX regulations, the disciplinary sanction rests with the discretion of the College.
- The institution must also provide remedies, as appropriate, to the complainant designed to restore or preserve the complainant's educational progress.
- Sanction should take into account the circumstances surrounding the violation and Respondent's disciplinary history.
- The sanction should be consistent with how Elmira College has handled other matters involving comparable conduct.
 - Consult the Title IX Coordinator

Sanctioning

- The more severe the violation, the more severe the penalty
- The potential sanctions should take into account the measures necessary to correct and prevent a sexually hostile environment
- The potential sanctions should take into account the impact on the Respondent as well
- The penalty should be a function of the violation established, not the strength of the proof supporting the violation

Available Sanctions - Students

- Written warning
- Disciplinary fines
- Disciplinary Probation
- Withholding degree or diploma
- Mandatory Counseling
- No contact directive
- Letter of apology
- Campus or local community service
- Restitution
- Loss, revocation or restriction of housing privileges
- Suspension
- Expulsion

Notice of Decision

- Written decision sent to both parties simultaneously
 - No set policy timeframe, must be prompt
- Notice of Decision must include:
 - Description of charges that were adjudicated
 - Description of procedural steps taken from the submission of the formal complaint through determination
 - Findings of Fact supporting the determination
 - Conclusions regarding application of policy to facts
 - Finding of Responsible or Not Responsible for each allegation with rationale
 - Sanctions (if any) with rationale
 - Remedies designed to restore or preserve Complainant's equal access (if any)
 - Appeal procedures and permissible bases for appeal

Written Decision

- The determination regarding responsibility becomes final either on the date that Elmira College provides the parties with the written decision of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely under the College's policy (i.e. 5 days after decision was issued).



The Adjudication Process & the Live Hearing – Questions?





Appeals

- Either party may appeal
- Where the accused is a student, the appeal will be considered by an appellate panel consisting of the Vice President of Enrollment Management and two other College officials appointed by the Title IX Coordinator.
- Appeal Panelist(s) cannot be investigator or hearing panel member
- May review determinations and any earlier dismissal decisions
- Time for Appeal – 5 Days
- Both parties have 3 days to submit written statement on appeal
- Sanctions generally stayed pending appeal

Appeals

- Four (4) Grounds for Appeal:
 - First 3 are mandated by Title IX
- Procedural irregularity that affected the outcome of the matter
- New evidence that could affect the outcome of the matter
- Bias/conflict of interest against complainants or respondents generally or individually
- Any sanction imposed is disproportionate to the nature or severity of the violation(s) or otherwise inappropriate.

Appeals

- “The appeal process does not rehear complaints but ensures that rights are protected, appropriate procedures are followed, and sanctions are reasonable.” (Elmira’s Policy)
- “The designated person(s) reviewing the appeal may, as part of this appeal process, speak directly with the investigatory team, the initial decision-maker(s), or otherwise directly seek additional information from the parties or witnesses, if considered necessary.”
- Original determination and sanctions presumed to be sound; burden is on the appealing party to prove otherwise
- Written decision on appeal issued within “reasonable time” and must include rationale
- Preponderance of Evidence
- Decision on appeal submitted to both parties in writing simultaneously is final



Questions?
Open Discussion





ELMIRA COLLEGE

Title IX Training
Sexual Misconduct Policy

***Introduction to New Policy & Training for
Investigators, Adjudicators and Appeal Panelists***

September 24, 2020