

Sexual Misconduct Hearings and Appeals

Presented By
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Road Map

- ▶ Title IX Overview
- ▶ Scope of Sexual Misconduct Policy
- ▶ Consent
- ▶ Mandatory Reporting vs. Responsible College Employees
- ▶ Supportive Measure
- ▶ Grievance Process Overview
- ▶ Hearing Roles and Process
- ▶ Evidentiary Issues
- ▶ Sanctions
- ▶ Written Decisions
- ▶ Appeals

Title IX Overview

- Prohibits sex-based discrimination by recipients of federal funding
 - Sexual Discrimination
 - Sexual Harassment
 - Sexual Misconduct
- Goals
 - Stop sexual violence, sexual harassment, and sex-based discrimination
 - Prevent its recurrence
 - Provide support and assistance when it occurs

Education Program and Activities

- Title IX only applies to the College’s “education program and activities.”
 - Conduct is alleged to have occurred on College property or other property owned, controlled, used, or managed by LBC
 - Occurs in any building owned or controlled by an officially recognized LBC student organization
 - Occurs in any other location, event, or circumstance over which LBC exercises substantial control over the respondent and the context in which the conduct is alleged to have occurred.
 - May include off campus or online conduct, if there is a substantial enough connection to the College’s education program and activities
 - Applies regardless of whether the conduct is directed at a member of the College community or someone outside the College community (such as a visitor, guest, vendor, or contractor)

Limits of Sexual Misconduct Policy's Scope

- Complainant must allege that harm was suffered within the territorial limits of the United States
- But nothing prevents the imposition of discipline for violation of other policies, provided that the conduct falls outside the scope of the Sexual Misconduct Policy
 - Study Abroad Program Rules
 - College Internet Usage Rules
 - Student Code of Conduct
 - Academic Program Requirements

Sexual Misconduct: Defined

Per se Sexual misconduct*:

- sexual assault
- sexual violence
- domestic or dating violence
- Stalking

*See LBC Policy for definitions

• Sexual Harassment

- Conditioning aid, benefit, or service on individual's participation in unwelcome sexual conduct
- Unwelcome conduct that a reasonable person would consider so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education programs or activities

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Sexual Harassment: Key Points

- Key: Severe and Pervasive and Objectively Offensive
 - Conduct must satisfy all three
 - If it doesn't, it still might violate another College policy
 - Judged from the complainant's perspective
 - Requirement does not apply to other forms of sexual misconduct (sexual assault, dating or domestic violence, stalking)
- Unintentional conduct may constitute sexual harassment

Retaliation

- Intimidation, threats, coercion, or discrimination
- Purpose of interfering with any right or privilege under Sexual Misconduct Policy, OR
- Because the individual has,
 - Made a report
 - Filed a formal complaint
 - Testified
 - Assisted
 - Participated or refused to participate
- Related to an investigation or proceeding alleging sexual misconduct

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Consent

- A knowing and voluntary agreement to engage in specific sexual activity at the time of the activity.
 - May be expressed verbally or non-verbally
 - Must be clear and unambiguous
 - May be withdrawn at any time (or may expire)
 - An individual may consent to certain sexual activities, but not others
 - Incapacitated individuals are incapable of consenting to sexual activity
 - All circumstances of the relationship will be considered, but past consent ≠ present or future consent

Incapacity

- A person is unable to provide effective consent due to:
 - Age
 - No one under age 14
 - If 14 or 15 years old, then no more than four years older
 - Cognitive Limitations
 - Incapacitation due to the consumption of drugs or alcohol

Drugs and Alcohol

- Key factor: whether a sober and reasonable person in the same circumstances would have known that the other party could not consent to sexual activity.

Impairment, Intoxication, and Incapacity

- Impairment=any ingestion of drugs or alcohol
- Intoxication=.08 blood alcohol content in Pennsylvania
 - Drugs are more complicated.
- Overdose=enough to cause coma or death
- Incapacity=between intoxication and overdose

Incapacitation Factors

- Different people become incapacitated at different points
 - Body Weight and Height
 - Tolerance for Alcohol or Other Substances
 - Amount Consumed
 - Whether Substances Have Been Mixed
 - Voluntariness of Consumption
 - Genetic Predisposition

Evidence of Incapacity

- Person not know how much he/she has consumed
- Slurred speech
- Bloodshot eyes
- Odor of alcohol or marijuana
- Shaky equilibrium
- Vomiting
- Outrageous behavior
- Unconsciousness (automatically incapacitated)

Final Points on Consent

- A respondent's intentional ingestion of drugs or alcohol does not excuse conduct.
- A capable complainant's unreasonable failure to communicate withdrawal of consent may be insufficient to establish a lack of consent.
- Consent may expire.

Mandatory Reporting vs. Responsible College Employees

- Act 126 and the Title carry two distinct reporting responsibilities
- All LBC employees have an obligation to report sexual misconduct of which they are aware.
- Sexual Misconduct Policy requires “Responsible College Employees” to report sexual misconduct to the Title IX Coordinator

Responsible College Employees

- Title IX Coordinator and Deputy
- Assistant Athletic Director
- Athletics Training Coach
- Associate Provost for Student Success
- Associate Dean
- Director of Student Care
- Director of Residence Life
- Public Safety Department

Title IX Coordinator

- Contact complainant and notifies respondent of allegations
- Offers supportive measures to both parties
- Typically conducts investigation
 - Steps to conduct a fair and impartial investigation
- Initiates and processes grievances

Supportive Measures

- Confidential to the extent it will not impair the College's ability to provide
- Non-punitive and designed to restore or preserve equal access
- Available to both the complainant and the respondent
- May include
 - Counseling services
 - Deadline extensions or other course-related adjustments
 - Modifications of work or class schedules
 - Campus escort services
 - Mutual restrictions on contact between the parties
 - Leaves of absence
 - Increased Security
 - Other similar measures

Grievance Process Overview

- Formal Complaint
- Investigation
- Pre-Hearing Dismissals
- Appeals of Pre-Hearing Dismissal (or non-Dismissal) Decisions
- Provision of Evidence to the Parties
- Parties' Response Period
- Issuance of Investigative Report that Fairly Summarizes the Evidence
- Notice of Hearing
- Hearing
- Appeals

Confidentiality Rules

- All LBC employees involved in any aspect of the grievance process must keep confidential the identities of:
 - Complainant
 - Alleged perpetrator
 - Any respondent
 - Any witness
- Disclosure okay if permitted under FERPA, required by law, or necessary to conduct investigation, hearing, or appeal

GRIEVANCE PROCESS

- All members of the grievance committee must serve impartially
- No prejudgment of the facts
- Must avoid conflicts of interest
- No bias
- Be familiar with technology used at hearing

Hearing Roles

- ▶ Parties
- ▶ Advisors
- ▶ Witnesses
- ▶ Title IX Coordinator
- ▶ Hearing Officer
- ▶ Sexual Conduct Hearing Board (“the Hearing Board”)

Parties

- Complainant
- Respondent
- The College/Title IX Coordinator

Witnesses

- Fact witnesses
- Expert witnesses

Advisors

- Each party has the right to assistance from an advisor of her/his choosing
 - May be, but does not have to be, an attorney
- If the complainant or the respondent does not have an advisor, the College must provide one at no cost to the student
- Complainant and Respondent must notify Title IX Coordinator about intent to use an attorney at least seven days before scheduled hearing. If they fail to provide this notice, the Hearing Officer must permit rescheduling to allow the College to retain counsel

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Advisors

- Must agree to comply with Rules of Decorum
- Must sign confidentiality agreement

Title IX Coordinator

- Oversees investigation process.
 - Coordinator: Chris McNamara, Director of People & Culture
 - Deputy: Robert Wegman, Director of Public Safety
- Makes decisions regarding whether evidence is sufficient for case to go to hearing or whether case must be dismissed
- Issues investigative report that fairly summarizes the evidence
- In charge of making arrangements for hearing and ensuring a smooth process
- Often represents college at hearing

Hearing Officer

- Trained, outside individual (often an attorney)
- Presides over hearing
- Decides procedural and evidentiary issues
- Enforces rules of decorum
- Participates in Hearing Board deliberations as non-voting member
- May compose written decision, subject to Hearing Board's review and approval

Sexual Conduct Hearing Board

- Three member board
- College officials designated by the Provost or the Director of People & Culture
- Cannot include the Executive Vice President (who acts as Appeal Officer)
- Cannot include Title IX Coordinator/Deputy
- No conflicts of interest or bias
 - Bias regarding parties in particular matter
 - Bias in favor of or against complainants or respondents generally

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Sexual Conduct Hearing Board

- Decision-makers at the hearing level
 - Responsibility/Non-Responsibility
 - Remedy or Sanctions
- Permitted to ask questions, subject to hearing officer's control
- Issues detailed written decision

What will this new process look like?

- Opening Statements
- Presentation of the College's Evidence
- Presentation of Evidence by the Complainant and Respondent
- Closing Arguments Regarding Responsibility
- Deliberations Regarding Responsibility
- Oral Decision Regarding Responsibility
- Additional Presentation of Evidence Regarding Remedy (if necessary)
- Deliberations Regarding Remedy
- Oral Decision Regarding Remedy
- Written Decision Issued

What will this process look like?

- Live-In Person Hearings, or
- Virtual Hearings
 - Either party may request
 - All parties must be able to simultaneously see and hear all parties and witnesses
 - Will be conducted via Zoom, which all Board members know how to use
 - Title IX Coordinator will serve as host
- Either way, hearing will be recorded in its entirety

Evidentiary Issues: Live Cross Examination

- Live cross examination conducted by advisors, never the parties.
 - Direct
 - Orally
 - In real time
- Only regarding relevant evidence
 - Challenges to party or witness's credibility is relevant

Uncooperative Witnesses

- Witnesses who address the Hearing Board are subject to direct cross-examination by an advisor.
- Hearing Board is permitted to question parties and witnesses.
- The Hearing Board may consider a party or witness's prior statement if that party or witness refuses to answer the Hearing Board's questions.
- Hearing Board may not rely on any statement of a party or witness who is not subject to cross-examination.

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Rules of Decorum

- Respect Required
- Sets Limits on Cross Examination
 - Relevant questions
 - Rape Shield Rule
- Hearing Officer has the right to exclude any participant for
 - Inappropriate language, volume or tone of voice
 - Intimidation, violence, or threats
- Applies to all participants

Evidentiary Issues: Witnesses

- Fact Witnesses
- Expert Witnesses
- Rules about disclosures

Evidentiary Issues: Relevant Evidence

- Only relevant evidence will be permitted.
- Evidence that has any tendency to make a fact more or less likely to have occurred than it would without the evidence; and
- The fact, if proven, would,
 - Make it more or less likely that the respondent is responsible, or
 - Demonstrates the appropriate remedy (if any) to be imposed.

Evidentiary Issues: Relevant Evidence

- Character evidence is not automatically irrelevant
- Prior bad acts evidence is not automatically irrelevant

Evidentiary Evidence: Relevant Evidence

- But Hearing Officer may instruct the Board to
 - Consider evidence only for its relevant purpose
 - Evaluate objectively whether the evidence merits a high-level or low-level of weight or credibility

Evidentiary Issues: Rape Shield Rules

- Evidence of the complainant's sexual predisposition or prior sexual behavior is irrelevant, unless:
 - Offered to prove that someone other than the respondent committed the alleged conduct; or
 - Concerns specific incidents of the complainant's prior sexual behavior with respondent and is offered to prove consent.
- Rape shield protections do not apply to the respondent.

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Evidentiary Rules: Irrelevant Evidence

- Information protected by a legal privilege, such as the attorney-client privilege.
- A party's treatment records, absent a voluntary written waiver of confidentiality by the party.

Presumption of Non-Responsibility

- “A person accused of violating the Sexual Misconduct Policy is **presumed to be not responsible** for violating the policy, unless and until the person is found responsible through the grievance process. . . .”
- “The mere fact that an **allegation** has been made or that a formal complaint has been filed **will not result in any presumption that the accused is responsible** for the alleged violations.”
- “The determination regarding responsibility is made **at the completion of the grievance process.**”

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Prohibited and Permitted Presumptions

- If a party refuses to answer **the Hearing Board's questions**, the Hearing Board **may** determine that the answer would have been adverse to the refusing party's position.
 - But decision cannot be based **solely** on refusal
- If a party or witness refuses to submit to cross examination, the Hearing Board **may not** draw an inference based solely on the absence from the live hearing or refusal to answer cross examination questions.
 - Could implicate the party or witness's privilege against self-incrimination under the Fifth Amendment to the United States Constitution.

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Burden of Proof

- Clear and Convincing Evidence
 - “Such convincing force that it demonstrates, in contrast the opposing evidence, a high probability of the truth of the act or acts that constitute violations”
 - Beware of “developmentalism”
- College bears the burden, never the complainant or the respondent

Sanctions and Remedies

- For Student Respondents
 - Written Warning
 - Loss of Privileges
 - No-Contact Directive
 - Mandatory Training
 - Mandated Counseling
 - Other Educational Sanctions
 - Disciplinary Probation
 - Suspension
 - Expulsion
 - Or Any Combination of These Sanctions

Sanctions and Remedies

- For Non-Student Employee Respondents
 - Written Reprimand
 - Final Written Warning
 - Change in Work Assignment
 - Loss of Privileges
 - No-Contact Directive
 - Mandatory Training
 - Mandatory Counseling
 - Suspension (With or Without Pay)
 - Termination of Employment
 - Or Any Combination of These Sanctions

Sanctions and Remedies

- Ultimate goal: Restore the complainant's equal access to the College's education programs and activities.
- Sanctioning may take into account prior violations of college policy.
- Sanctions may include supportive measures.

Hearing Board's Written Decision

- Must include
 - Description of the allegations constituting sexual misconduct
 - Procedural steps from receipt of formal complaint through hearing process
 - Specific factual findings
 - Application of factual findings to definition of sexual misconduct
 - Conclusions, and rationale for them, regarding responsibility or non-responsibility for each alleged violation
 - The disciplinary sanctions or other remedies, if any, to be imposed and the factual support for their imposition
 - Procedures and permissible bases for complainant and respondent to appeal
 - **Must be issued within seven days of conclusion of the hearing**, absent extenuating circumstances.

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Appeals

- Any party may file an appeal on the following basis:
 - Procedural irregularity that affected the outcome
 - New evidence not reasonably available at the time the determination was made **and** which could affect the matter's outcome
 - The Title IX Coordinator, investigator, or members of the Hearing Board had a conflict of interest or bias that affected the outcome
- Must be filed with Title IX Coordinator within three days of the Board's written decision.

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Appeals

- Within seven days of the Board's written decision, the Party appealing may submit a written statement explaining the reasons for the appeal
- All other parties may file a written statement supporting or opposing the appeal or hearing outcome no later than 14 days after the Board's written decision.
- Appeals decided by the Executive Vice President. If EVP has conflict of interest, President shall appoint another member of the Cabinet.

Appeals

- Appeal decision-maker may
 - Affirm Hearing Board determination
 - Reverse Hearing Board determination
 - Issue split decision on responsibility and sanction
 - May order new hearing due to procedural irregularity, but only if it determines that irregularity affected the matter's outcome.
- Decision-maker must issue a written decision explaining rationale **within five days** of the expiration of the period for the parties to submit appellate statements.

Decisions

- The Title IX Coordinator is responsible for:
 - Simultaneous transmission of Hearing Board's written decision to the parties
 - Simultaneous transmission of written appeal decision to the parties
 - Implementation of final decision

The End

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