- A recipient must ensure that Title IX Coordinators, investigators, adjudicators, and any person who facilitates an informal resolution process, receive training on:
- The definition of sexual harassment;
- The scope of the recipient's education program or activity;
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Investigators must receive training on issues of relevance to creato435 0.430.435 0Q EMC



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

# *Title IX Harassment – Where We Have Come From*

- Title IX became law in 1972.
- It states, in relevant part, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”
- Until 1998, if you asked someone about Title IX, the response would focus on athletics, and particularly on expanded opportunities for female athletes.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

# *GEBSER*

- In 1998, the Supreme Court decided *Gebser v. Lago Vista Independent School District.*
- Frank Waldrop, a teacher at Lago Vista, groomed Alida Gebser during her freshman year in high school, and the two began a sexual affair that spring. In January of her sophomore year, a police officer caught them engaging in sexual intercourse.
- Waldrop was arrested, and immediately fired.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

During the Obama Administration, the 2011 Dear Colleague Letter and 2014 Q&As established new requirements for Title IX compliance, including:

- Colleges must investigate any claim made by a student that they had been the victim of sex discrimination , including sexual misconduct.
- Sexual misconduct was defined as sexual assault, sexual violence, sexual exploitation, or sexual harassment.
- Sexual harassment was defined broadly as any "unwelcome conduct of a sexual nature."
- Equally important, whether sexual conduct was unwelcome was judged by a . Whether a reasonable person would consider the conduct to be unwelcome was irrelevant. What mattered was that the student believed they had been the victim of unwelcome conduct of a sexual nature.
- Except for a limited group of "confidential employees," any faculty or staff member had to report any possible sexual misconduct against a student.
- OCR asserted that preponderance of the evidence (more likely than not) was the standard by which sexual misconduct cases must be judged.
- There was no right to a formal hearing.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

*The New Title IX Regulations on Sexual Harassment & the College's Revised Title IX Policy*

- In May, 2020, the Department of Education published new Title IX regulations on sexual harassment. 34 C.F.R. Part 106. https://www2.ed.gov.about/offices/list/ocr/newsroom.html
- The regulations themselves are 7 pages in length.
- The explanatory preamble is over 500 pages!
- The effective date of the regulations was August 14, 2020.
- The 2020 regulations return the focus of Title IX response requirements by colleges to " " and " ."
- Only if a college has of in its education program or activity against a person does Title IX require it to respond promptly in a manner that is not , meaning not clearly unreasonable in light of the known circumstances.
- means notice of sexual harassment or allegations of sexual harassment to or any official who has the authority to institute corrective measures on behalf of the college.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

## *(and subject to liability via OCR investigation or civil lawsuit)*?

- Failing to treat Complainants and Respondents equitably
- Presuming a Respondent is responsible before a determination is made following a hearing.
- Failing to objectively evaluate all relevant evidence.
- Failing to ensure that any individuals involved in the grievance process (coordinators, investigators, adjudicator) have appropriate training, and do not have conflicts of interest or bias
- Failing to conclude the grievance process promptly and explain reasons for delay.
- Failing to provide notices of meetings and hearings.
- Failing to provide opportunities for parties to review and respond to relevant evidence, both favorable and unfavorable.
- Failing to provide appropriate supportive measures.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Failing to allow parties to be accompanied to any meetings or hearings by an advisor of their choice.
- Failing to give parties the opportunity to present witnesses, as well as other relevant evidence.
-



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

Copyright 2020 Drummond Woodsum. All rights expressly reserved.

# *Quid Pro Quo and Hostile Environment*

- The regulations prohibit . This term encompasses the following types of conduct on the basis of sex
- harassment



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

# *Sexual Assault, Dating Violence, Domestic Violence, Stalking*

(an offense classified as a forcible or non-forcible sex offense under the FBI's Uniform Crime Reporting System).

(except statutory rape): The carnal knowledge of a person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their temporary or mental or physical incapacity.

2) : Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent or mental incapacity.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

Unlawful, non-forcible sexual intercourse, including incest and statutory rape.

Non-



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship will be determined based on consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. Dating violence includes, but is not limited to:
  - Sexual abuse
  - Physical abuse
  - Emotional violence
  - The threat of such violence
  - Does not include acts that meet the definition of Domestic Violence



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting 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 Maine, or by any other person against an adult or youth victim who is protected from that person's acts under Maine's domestic or family violence laws, including:
  - Domestic violence assault
  - Domestic violence criminal threatening



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress. Examples of stalking may include:
  - Unwanted, intrusive, and frightening communications by phone, mail, and/or email
  - Repeatedly leaving or sending unwanted items such as gifts
  - Following or waiting for a person at places such as home, school, or work
  - Making direct or indirect threats of harm to a person, or to the person's children, relatives, friends, or pets
  - Damaging or threatening to damage property
  - Harassment through the Internet or social media
  - Posting information or spreading rumors about a person



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- The Bowdoin Title IX Policy definition of Effective Consent is as follows:

> *Words or actions that show a knowing and voluntary agreement to engage in mutually agreed-upon sexual activity. Effective Consent cannot be gained by Force, by ignoring or acting in spite of the objections of another, or by taking advantage of the Incapacitation of another, where the Respondent knows or reasonably should have know of such Incapacitation. The use of alcohol or other drugs will never function to excuse behavior that violates this Policy. Effective Consent is also absent when the activity in question exceeds the scope of Effective Consent previously given, including where consent was given to certain sexual activity under certain conditions (for example, with the use of a barrier method of birth control) and the activity in question violates any such conditions. In addition, certain states have designated a minimum age under which a person cannot give Effective Consent.*



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Under Bowdoin's Policy, Force is defined as:

  *Physical force, violence, threat, intimidation or coercion.*

  Coercion is defined as:

  *The improper use of pressure to compel another to engage in or continue sexual activity against their will, including duress, cajoling, manipulation, and blackmail. Coercion occurs when a Respondent keeps pressuring the Complainant to acquiesce to sexual activity even after the Complainant has made clear that the pressure is unwelcome.*



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Depending on the facts and circumstances, including the extent of the activity, behavior typically considered “sexual exploitation” may not, itself, amount to “sexual harassment” under Title IX (although it may be separately actionable by the College under a disciplinary policy)



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Any sexual harassment occurring out of the United States.
- Any sexual harassment occurring in the United States, but in a location over which the institution has no control, unless (i) the off-campus incident occurs as part of the college's "operations," (ii) the College exercised substantial control over the respondent at that location, or (iii) the incident occurs at an off-campus building owned or controlled by a student organization.
- Sexting or emailing or oral comments that are unwelcome and sex-based, but are not so that it effectively and objectively denies a person's access to educational programs and activities.
- Quid Pro Quo by one student on another student.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Student A, transferred from the College one year ago in his sophomore year, alleges that Student B fondled him at Student C's off-campus, private apartment in Brunswick (assuming no interest in alumni activities).
- Student D, who left the College because she claims that Student E repeatedly sent her pornographic and sexual texts and email (assuming she is hoping to return if the harassment ends).



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- The regulations prohibit discrimination and harassment, and require disciplinary



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- A of Title IX sexual harassment:
  - Initiates the Complaint Procedure.
  - Can only be filed and signed by the person who claims to be the victim ( ) who is a student or employee (Also, recall that prospective students, applicants for employment and other third parties may also be able to file a formal complaint in certain circumstances.)
  - A Title IX Coordinator can file a formal complaint in certain circumstances, but is not the Complainant.
  - The Formal Complaint must be a document or electronic filing that includes a signature and provides:
    - Basic information regarding claimed sexual harassment (what lawyers call a short and plain statement of the claim), such as date, time, location, type of incident, name(s) of individuals involved; and
    - A request for an investigation of an allegation of sexual harassment.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Formal complaints can be consolidated if they arise from the same incident/facts.
- Formal complaints may be amended (with notice to the parties).



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Under the Title IX regulations, the Title IX Coordinator must dismiss a formal complaint:
  - If the conduct alleged in the formal complaint does not constitute sexual harassment under Title IX even if proved, or did not occur in the



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- The Title IX Coordinator dismiss a formal complaint:
  - If a Complainant withdraws the formal complaint, or withdraws particular allegations within the complaint;
  - The Respondent is no longer enrolled



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

*The Formal Resolution Process under the Title IX Policy – Alternate Resolutions, Investigations, Hearings, Sanctions and Appeals*

- The Title IX regulations require that parties be allowed to have an advisor of their choice throughout the formal resolution process, who may be an attorney.
- The advisor plays an important role at a live hearing, in conducting cross examination.
- In addition, Bowdoin permits parties to have a supporter for emotional and personal support during any meetings, the alternative resolution process and the formal resolution process. Supporters are trained members of the Bowdoin community.
- Advisors and supporters cannot speak on behalf of the party (except for advisor cross examinations at hearing).



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

The investigator will:

- Interview the parties after they have received appropriate notice with sufficient time to prepare;
- Allow the parties to have their advisor at all meetings;
- Allow parties to identify witnesses, including expert witnesses and
  submit inculpatory and exculpatory evidence;
- Interview witnesses and conduct other appropriate fact-gathering activities (site visits, review of documents, etc.); and
- Consider evidence that is relevant and directly related to the allegations in the formal complaint.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- The regulations do not define relevant evidence
- Generally, relevant evidence is evidence that tends to make a fact of consequence more or less probable than it



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- The formal complaint is referred to a trained, outside investigator to conduct an investigation.
-



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Alternative Resolution is a facilitated process that does not involve an investigation or a sanction and allows the parties to attempt to reach an agreed-to resolution of the matter through an intermediary
- Any outcome agreement must be signed in writing by both parties and Title IX coordinator must approve any terms that involve the College
- If agreement is not reached, information from the Alternative Resolution process may not be used as evidence in the formal resolution process.
- The College or a party may, at any time prior to the conclusion of the Alternative Resolution process, elect to end the process and initiate the formal resolution process.
- An Alternative Resolution may be pursued at any time prior to the beginning of the hearing in the formal resolution process.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- The Title IX regulations emphasize that the burden of proof rests with the College, not the Complainant or Respondent.
- The Title IX Coordinator will issue notice of the hearing, identifying the Hearing Officer (external) and the other Decision Makers (who determine sanctions).
- Hearing Officer presides over the live hearing, and will establish rules of decorum that parties and their advisors must follow.
- At the request of a Party (or College's discretion), the hearing will be held virtually with Parties in separate rooms that allows the Parties and Hearing Officer to see and hear each other.
- The hearing is recorded (audio, video or steno) and recording is made available to parties for inspection and review.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- At the hearing, the college and the Parties have an equal opportunity to present witnesses who have pro-6(n)1w5.5.15.5.15.5.1]TJd(a)-2(n)-7(g)-8(8(f TJQ EMC /T(3PWc8(o)-6(r)



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- After Opening Statements, the Complainant presents evidence. With the assistance of their Advisor, the Complainant may testify and offer the testimony of supporting witnesses in the order of the Complainant's choosing. The Complainant may not present any Respondent as a witness, without the Respondent's consent.
- The Title IX regulations require that a Respondent's Advisor (and not the Respondent) may cross-examine the Complainant and Complainant's witnesses.
- When the Complainant has completed the presentation of evidence, the Respondent, with the assistance of the Advisor, may testify and offer the testimony of supporting witnesses in the order of the Respondent's choosing. The Respondent may not present any Complainant as a witness, without the Complainant's consent.
- The Complainant's Advisor (and not the Complainant) may cross-examine the Respondent and Respondent's witnesses.
- The Hearing Officer may ask questions of any party or witness.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- The Department of Education/OCR view the cross-examination requirement as a critical factor in providing due process to parties.
- Cross-examination is often adversarial, particularly where the credibility of a Complainant or Respondent is a critical element of the case.
- The regulations commentary provide that cross-examination may not be aggressive or abusive.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Questions and evidence about a Complainant's sexual predisposition or prior sexual behavior is not relevant, unless it:
    - is offered to prove that someone other than a Respondent committed the alleged conduct, or
    - concerns specific incidents of the Complainant's prior sexual behavior with a Respondent and is to prove consent.
- Evidence relating to a party's medical, psychological or similar records is not admissible unless the party has consented in writing to the disclosure of those records.
- Evidence that is protected from disclosure by the attorney-client privilege or other legally-recognized privilege or immunity in the State of Maine is not admissible unless the holder of the privilege has waived the privilege.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- If a party or witness does not submit to cross-examination at the live hearing, the Hearing Officer must not rely on any statement of that party or witness in reaching a determination of responsibility.
- The Hearing Officer may not draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- If the Hearing Officer finds that the Respondent is responsible, the other Decision Makers will consider the matter and determine any appropriate sanction or remedy
- The sanctioning Decision Makers are:
    - Representatives from the Student Sexual



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

*Decision-Making, Sanctions, Appeals, and Conflicts of Interest/Bias*

Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Some of the potential sanctions for Student Respondents:

  Reprimand;
  Probation
  Suspension
  Permanent Dismissal
  Withholding Diploma
  Revocation of Degree



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

Copyright 2020 Drummond Woodsum. All rights reserved.

- The Title IX regulations require that those involved in Title IX processes must not pre-judge the facts and must not be biased against or in favor of a particular class of parties in the complaint process.

  Believing that a complainant, as a victim or survivor, should be presumptively believed constitutes bias.

  Believing that all women or all men behave in a certain way constitutes bias.

  Believing that complaints generally arise from sex that someone regrets constitutes bias.

  Believing that accused parties are usually guilty constitutes bias.

Remember – The regulations require a presumption of non-responsibility on the part of a Respondent (until the point when the Hearing Officer makes a finding).



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- A conflict of interest or bias can also occur in a particular case, depending upon knowledge about or a prior relationship with individuals involved in a particular case (positive or negative).
- Conflict or bias on the part of Title IX Coordinator, investigator, or a decision maker is a basis for appeal.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

- Being a College employee.
- Past advocacy in the field of sexual violence.
- Conflict of interest and bias are judged by an objective standard - whether a reasonable person would believe bias exists.



Copyright 2020 Drummond Woodsum. All rights expressly reserved.

Copyright 2020 Drummond Woodsum. All rights expressly reserved.