Title IX Past & Present

The Classroom
“Education equality”
1970s: higher ed was 60% male students, 40% female. Males earned 8X as many advanced degrees. 1972: Nixon signs Title IX. Fast forward to today: In 2020, 60% female, 40% male. Today, 60% percent of advanced degrees are earned by women, and in 2018 and present, women make up the majority of the workforce.

The Playing Field
“Interest and Ability”
1975: Ford amends Title IX to include female athletic teams. Today, female athletic teams are designed to evolve for greater educational opportunity and experience.

The Bedroom
“Stop. Prevent. Remedy”
1997: Clinton says colleges are responsible knowing about sexual harassment, investigating and adjudicating to remove barriers for one’s education.

The Locker Room:
Trans Student/Athletes (High School)

The Classroom:
Gender ratios

The Process:
2020: New Regs, focus fundamental fairness

June 2021: “basis of sex”

Impact of Sexual Violence on those involved

Complainant (Victim)
- Time lost from class
- Poor academic performance, often withdrawing from the institution
- Mental Health Issues
  - Depression, anxiety, PTSD, suicidal, withdrawn
- Substance Use
- Ongoing physical health concerns

Respondent (Accused)
- Time lost from class
- Poor academic performance, often withdrawing from the institution
- Mental Health Issues
  - Fear, anxiety, withdrawn
- Substance Use
- Labeled at small college ‘rapist’

Peers or loved ones supporting student
### Why is this important?

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<th>Year</th>
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* *Reporting believed to be impacted by COVID-19*

### Prohibited Conduct

#### Key Terms
- **Complainant**: An individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent**: An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Advisor**: A person chosen by a party, or appointed by the College only if a party does not have an advisor at the hearing. Advisors are required to conduct live cross-examination (in the past advisors have been peers, parents, mentors, or attorneys).
- **Formal Complaint**: A signed document filed by a Complainant or Title IX Coordinator alleging sexual harassment and requesting the Luther College to investigate the allegation(s).
Sexual harassment

- Quid pro quo: a Luther employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct
- Unwelcome conduct on the basis of sex that is so severe, pervasive, AND objectively offensive that effectively denies a person equal access to the school’s education program or activity

Hostile Environment

- unwelcome conduct,
- determined to be so severe, and
- pervasive, and,
- objectively offensive,
- that it effectively denies a person equal access to the College’s educational program or activity.

Unwelcomeness is subjective and determined by the Complainant. Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar previous patterns that may be evidenced.

[Sexual exploitation has adapted to the times!]

Sexual Exploitation refers to a situation in which a person abuses sexual advantage of another person

- Harassing sexual or gender-based behaviors that become so severe or pervasive as to interfere with an individual’s ability to work, learn, or participate in the College’s programs.
- Voyeurism and invasion of sexual privacy:
  a. Observing or allowing others to observe a person undressing, using the bathroom, engaging in sexual activity, or in other private situations in which there is a reasonable expectation of privacy, without consent
  b. Taking pictures, video recording, or audio recording of a person undressing, using the bathroom, engaging in sexual activity, or in other private situations in which there is a reasonable expectation of privacy, without consent
  c. Disseminating, or threatening to disseminate pictures, video, or audio recording of a person undressing, using the bathroom, engaging in sexual activity, or in other private situations in which there is a reasonable expectation of privacy, without consent (Revenge Porn)
Sexual Exploitation refers to a situation in which a person abuses sexual advantage of another person.

- Misappropriation of another person’s identity on apps, websites, or other venues designed for dating or sexual benefit (Catfishing)
- Intentional unwanted disclosure or threats to disclose an individual’s sexual orientation, gender identity, or gender expression
- Engaging in sexual activity with another person while knowingly infected with human immunodeficiency virus (HIV) or a sexually transmitted disease (STD) or infection (STI), without informing the other person of the infection
- Causing or attempting to cause the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising the person’s ability to give consent to sexual activity, or for the purpose of making that person vulnerable to non-consensual sexual activity
- Prostituting another person or engaging in sex trafficking
- Knowingly soliciting a minor for sexual activity
- Creation, possession, or dissemination of child pornography

Rape

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant, including instances in which the Complainant is incapable of giving consent, whether due to incapacity or due to being below the statutory age of consent.

Fondling

The touching of the private body parts of another person (buttocks, groin, breasts), for the purpose of sexual gratification, without the consent of the Complainant, including instances in which the Complainant is incapable of giving consent.
Abusive relationships

Violence committed by a person who has been in a romantic or intimate relationship with another. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. Violence can occur in relationships regardless of gender.

- Dating violence
- Domestic violence

Stalking

Engaging in a course of conduct, towards another person, that would cause a reasonable person to fear bodily injury to themselves or another; or suffer substantial emotional distress.
Dismissal of “Title IX” Cases

RESPONDENT
Schools “may” dismiss the formal complaint if at any time during the investigation or hearing the respondent is no longer enrolled or employed by the school.

COMPLAINANT
At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed or the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint.

BUT...will be referred to the Code of Conduct or appropriate employee handbook.

Sexual Misconduct Code of Conduct Process (non-TIX)

- Assigned TWO trained investigators
- Review and respond to all information gathered in TIX
- Provided (2) 10 day review periods that come with an investigation report (access to materials)
- Live, direct, oral cross-examination by advisor (must answer relevant questions)
- Each party able to appeal

Different but similar!

Nonconsensual sexual activity

Consent is knowing, voluntary and clear permission by word or action by all participants to a sexual activity. Since individuals may experience the same interaction in different ways, it is the responsibility of each party to make certain that the other has consented before engaging in the specific activity. For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct.

New:
Reasonable reciprocation can be implied.

NOIA Supportive Measures

- Assigned TWO trained investigators
- Able to give a statement, suggest witnesses, submit evidence WITH advisor present
- Review and respond to all information gathered in TIX
- Provided (2) 10 day review periods that come with an investigation report (access to materials)
- Participation voluntary will proceed in absence, can still use investigation materials in decision making
- Cross-examination in writing through Chair (does not have to answer questions)
- Each party able to appeal
Consent

- Affirmative: silence, absence of resistance, or past behavior does not constitute consent
- Specific: consent to one sexual activity does not imply consent to a different sexual activity
- Knowing: an individual who is incapacitated due to sleep, alcohol, drugs, etc. cannot consent
- Voluntary: consent cannot be obtained through force, fraud, threats, intimidation, or undue coercion
- Revocable: may be withdrawn at any time

Consent Question

Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the College to determine whether its policy has been violated. The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

What clear words or actions by the Complainant gave the Respondent permission for that specific sexual activity to take place?

1. Force
2. Incapacity
3. Consent

Newer Language with Consent Policy [kink]

Consent in relationships must also be considered in context. When parties consent to BDSM (bondage, discipline/dominance, submission/sadism, masochism) or other forms of kink, non-consent may be shown by the use of a safe word. Resistance, force, violence, or even saying “no” may be part of the kink and thus consensual, so the College’s evaluation of communication in kink situations should be guided by reasonableness, rather than strict adherence to the policy that assumes non-kink relationships as a default.
Undue Coercion

- Frequency
- Duration
- Intensity
- Isolation
- Power Differential

how would a reasonable person perceive this amount of pressure?

“Acknowledges that there is a socially tolerated amount of pressure for sex.”
“Coercion pushes to and then past someone’s resistance point.”
“Did they engage in sexual activity because they wanted to or to get the pressure to stop?”
“Is the pressure seductive or attacking?”

Wallet Example

Brett Sokolow
President of ATIXA

The Preponderance of Evidence Standard

“More likely than not” 50% and a feather

Preponderance
Probative Value
Reasonable Expectation
Beyond a Reasonable Doubt
Clear and Convincing
Presumption of Innocence
Amnesty

Parties or witnesses can be hesitant to report to College officials or participate in grievance processes because they fear that they themselves may be in violation of certain policies, such as underage drinking or use of illicit drugs.

To encourage reporting and participation in the process, the College maintains a policy of offering parties and witnesses amnesty from minor policy violations.

Includes COVID-19 Amnesty

Sexual Misconduct Investigation and Adjudication

- Objective-ish standard of hypothetical person in society
- Average judgement, skill, care—Always sober!
- Used in deliberation, based on investigation and hearing testimony
“Department of Education personnel won’t second guess your responsibility determination just because they would have come to a different conclusion. Assuming you followed the required procedures, your decision is entitled to deference.”

Complaint

- A report becomes a complaint when:
  - the victim communicates desire to go through the formal grievance process and signs a Formal Complaint.

Investigation

- Both parties received advance written notice of investigation and allegation(s)
- Investigators interview witnesses and obtain other evidence (fact gathering)
- Both parties have opportunity to submit written accounts and suggest potential witnesses
- Both parties will have 10 days to review and respond to initial drafts of investigation summary and 10 days to review and respond to final summary. Code of Conduct they get roughly 2/3 weeks not 20 days
- Timeframe: 3-5 weeks

Why isn’t the college doing anything?!
Suppression Clause
July 28, 2021

106.45(b)(6)(i):
If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.

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The provision was vacated because it was not sufficiently justified by ED in the regs. That means it is illegal for ED to enforce it, but it is not illegal for colleges to have the provision in policies.

Hearing

- Before the hearing, an official charge letter is issued detailing the issue(s) to be resolved
- Luther College Hearing Board is comprised of faculty, staff, and students
- Questioning during the hearing
- (Deliberation) Board finds respondent “responsible” or “not responsible” based on the preponderance of the evidence
- (if necessary) Sanctions: up to suspension & expulsion
- (Campus Appeals Board) Both parties have right to appeal

Hearing Expectations

- Tone when questioning (no sarcasm)
- Maintain composure (no fidgeting, do not look shocked)
- Nod along with their narrative (no eye rolling or shaking head)
- Do not apologize for the situation to a party or a witness
- Keep eye contact
- Use their language in questioning (you said, “_______,” tell me more)
Credibility determinations

Is the individual's account consistent or does it have different narratives?
Is there a possibility of a hidden agenda (e.g., best friend of a party is a witness)
Did the parties rehearse statement together? Does it seem influenced?
Did the individual cooperate during the process?
Does the individual's statement make sense? Plausible?

Credibility determinations

Criminal process

- Criminal process runs entirely independent of Luther conduct process
  - More power to compel evidence
  - Higher standard of proof
  - Takes much more time
- If asked by police or prosecutor, we would put Luther investigation on hold
- Only happens if/when a victim requests the involvement of law enforcement

Criminal process

Factors considered when sanctioning

- The nature, severity of, and circumstances surrounding the violation(s)
- The Respondent’s disciplinary history (has been found responsible)
- The Respondent’s role and level of responsibility at the College
- The impact on the portion of the community affected
- Institutional precedent for how similar infractions have been addressed
- Any other information deemed relevant by the Hearing Board

Factors considered when sanctioning
### Unilateral No-Contact Directive
- Required counseling
- Imposition of performance improvement plan
- Probation
- Loss of annual pay increase
- Loss of oversight or supervisory responsibility
- Revocation or denial of tenure for a specified period of time
- Termination of employment

### Probation
- Residence Hall Suspension: Termination of a student’s right to live or be present in College-owned housing for a definite period of time.
- Suspension
- Expulsion
- Educational sanctions

### Campus Appeals Board

**Four reasons to appeal at Luther (available to both parties)**

- a. Deviations from designated procedures within the investigation or adjudication processes, which could have affected the outcome
- b. A conflict of interest or the bias of the Title IX Coordinator, investigator or member of the Hearing Board sufficient to have affected the outcome
- c. To determine whether the sanctions imposed were appropriate for the violation of the Policy which the student or employee was found to have committed
- d. To consider new information or other relevant facts not brought out in the original hearing, sufficient to alter a decision, because such information and/or facts were not known or available to the person appealing at the time of the original hearing

*Appeal upheld often result in a return to the Hearing Board*
The Campus Appeals Board does not substitute its own judgment for that of the original hearing body, nor concern itself with the possibility that others might have arrived at a different judgment. Its terms of reference extend only to investigation of the procedures by which the original judgment was reached. If any of the grounds in the Request for Appeal do not meet the grounds in this policy, that request will be denied by the Appeals Board Chair and the parties will be notified in writing of the denial and the rationale.

College Policy says: The College believes the burden is on the institution to determine based on the information available to the Board was the policy violated, and if so, what is an appropriate sanction.

Examples of Appeals:

- Deviations from designated procedures within the investigation or adjudication processes, which could have affected the outcome.

Examples of Appeals:

- A conflict of interest or the bias of the Title IX Coordinator, investigator or member of the Hearing Board sufficient to have affected the outcome.

Hearing Outcome: Board found not responsible based on overweening witness testimony for the complainant’s narrative during the incident and events following.

Appeal Claim: Respondent claims investigators told her she was responsible for gathering her own witness statements (co-workers) to support her claim that she was working at the local gas station at the time of the incident. The respondent working 30 hours per week and being a full-time student, she was not able to gather the statements to submit on her behalf.

Examples of Appeals:

- Hearing Outcome: Board found not responsible based on a sober key witness stated the Complainant consented to the sexual activity with first-hand direct observation.

Appeal Claim: Complainant claims the key witness testimony should not have been considered by the Board because the witness is a cousin of the respondent.

You are not conducting a de novo review.
Examples of Appeals:

- To consider new information or other relevant facts not brought out in the original hearing, sufficient to alter a decision, because such information and/or facts were not known or available to the person appealing at the time of the original hearing.

**Hearing Outcome**: Board found responsible for egregious sexual misconduct based on Snapchat correspondence and collaborative testimony.

**Appeal Claim**: Post hearing, respondent submits old text messages he searched for from the Complainant demonstrating his consent in writing after the alleged incident. Respondent also found a video on his laptop from that night showing the intoxication state of the complainant.

**Conflict of Interest**

- Decorah is small, Luther is smaller
- Relationship or future relationship with parties involved
- Examples: Enrolled in your Spanish class for next semester (recuse)
- Involved in the same fraternity as you and you were their pledge master (recuse)
- Once were enrolled in the same Health 100 class and you remember their presentation (remain)
- (maybe a witness would need to talk through)

Could the outcome of this case impact me?
Invested because of the athletic team, choir, research project, work-study student, fellow club officer

**Hearsay/Preconceived reputation** (think you know what happened before hearing the case)
BIAS

“It is our generations responsibility to believe women” #MeToo

“Student athletes on our campus have been entitled to get whatever they want, now we will make sure that stops.”

“One frivolous accusation can ruin a young man’s life”

“The system is broken, they are not responsible, they were only accused for the color of their skin.”

Parker Poe Adams & Bernstein LLP

Prejudgement “Assumptions”

“Classic bar fight with two drunk kids”

Replacing facts with your own personal experience that has similarities with the case

“Students always lie when they are caught”

Investigators

All investigations are thorough, reliable, impartial, prompt, and fair. Investigations involve interviews with all relevant parties and witnesses, and obtaining available relevant evidence, both inculpatory (implying guilt) and exculpatory (implying innocence). Even “minimally relevant” is NOW “relevant” but given little weight.

All parties have a full and fair opportunity, through the investigation process, to suggest witnesses and questions, to provide evidence, and to fully review and respond to all evidence on the record. It is our burden to give our best effort to gather it.
When [name] was kissing me on the neck, I said, "I don't want to do this, please stop."

When I was kissing [name] on the neck, he said, "That feels so good, don't stop."

Text messages the night of and morning after the incident between the complainant and respondent.

Photos of the room the night of the incident that verify the hard alcohol and drinking games present.

Witness testimony of two eating in the cafeteria together several hours prior to the incident and party.

Witness testimony that the complainant wanted to be in a serious relationship with the respondent.
Complainant discloses he was sexually abused as a child.

Respondent discloses this is so hard because she can’t tell her dad because he is really sick right now and her mom is already stressed.

Witness testimony saying the respondent is the most upstanding citizen they know.

Witness testimony saying the respondent is a cheater in all their romantic relationships.

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Rape Shield & Mental Health

Rape Shield: Questions and evidence about the party’s sexual predisposition or prior sexual behavior are not relevant UNLESS (deemed OK by Dept. of Education)

1. Offered to prove that someone other than respondent committed the conduct
2. Concern specific incidents of prior sexual behavior with respondent and offered to prove consent

Cannot access, disclose or consider the following:
- A party’s records from a
  - Physician
  - Psychiatrist
  - Psychologist
  - Counselor

Without voluntary written consent.

Will be made clear if submitted then the other party (and board) can address it.

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Luther Title IX Team (Not listed Hearing Board Members)

Bob Harri
Lead Investigator

Janet Hunter
Case Manager
Deputy TIX Coordinator

Nan Hibbs
Chair

Jake Dyer
Investigator

Kris Franzen
Investigator

Jessica Rupp
Prevention Coordinator
NASA Advisor

Amanda Bailey
Athletics Deputy TIX Coordinator

Erik Stoen
Investigator

Ashley Benson
Appeals Chair

Kasey Nikkel
Title IX Coordinator
Case Studies

Questions?