



**VAN DERMYDEN MAKUS**  
*Investigations Law Firm*

TCCS Policy Training | Appeal Authority

*Presented by Liz Paris*

*For The Claremont Colleges Services*

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“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[.]”

— Title IX

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## New DOE Regulations

- On August 14, 2020, new regulations (“the Rule”) went into effect
- Applicable to **conduct** occurring on/after August 14, 2020
- Changed some things and codified others
- Does not prohibit schools from addressing behavior outside of Title IX

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## Appeal Rights

- The new regulations require appeal rights be permitted at each stage
- A school must offer **both** parties an appeal on certain enumerated bases
- A school **may** offer an appeal equally to both parties on additional bases

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## Points that might be appealed

- An Institution's decision to investigate the claims under the Title IX Sexual Harassment Policy.
- An Institution's decision to **not** investigate the claims under the Title IX Sexual Harassment Policy.
- The Adjudicator's finding
- The sanctioning determination

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## Decision to proceed or not proceed under Policy

- The Institution is required to consistently evaluate if the Policy is still applicable
  - If information is discovered that the complaint no longer meets the requirements to proceed under the Policy, the school must terminate the proceedings under the Policy.
  - The school can still pursue the conduct under another policy

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## August 14, 2020

The Department of Education will only enforce the Rule as to conduct that allegedly occurred on or after August 14, 2020.

The 2020 Q&A states “the Rule governs how schools **must** respond to sexual harassment” occurring on or after August 14, 2020.

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## Before August 14, 2020?

The 2020 Q&A states:

The Rule does not preclude a[n Institution] from using a grievance process that complies with [the Rule] with respect to allegations that fall outside the scope of Title IX.

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## Policy Jurisdiction Requirements

- Definition: the conduct alleged in the Formal Complaint could constitute Sexual Harassment, as defined by the Policy.
- Location:
  - Conduct occurred in an educational program or activity controlled by TCC
  - Conduct occurred in the United States
- Complainant Status: Complainant is participating, or attempting to participate, in an education program or activity of TCC

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## Sexual Harassment: Quid Pro Quo

- An employee of TCC conditioning the provision of:
  - An aid;
  - Benefit; or
  - Service of the Institution
- On an individual's participation in
- Unwelcome sexual conduct
  - A Complainant's statement that they found the conduct to be unwelcome is sufficient to constitute "unwelcome conduct"

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## Sexual Harassment: Unwelcome Conduct

Conduct on the **basis of sex** that is determined by a **reasonable person** to be so:

- Severe;
- Pervasive; **and**
- Objectively offensive,
- That it effectively denies a person equal access

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## Sexual Harassment: Specific Acts

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

- **Sexual Assault**, as defined by Clery Act;
- **Dating Violence**, as defined by VAWA;
- **Domestic Violence**, as defined by VAWA; or
- **Stalking**, as defined by VAWA

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## Location of the Conduct

- Conduct must have occurred in an educational program or activity controlled by TCC
  - This includes buildings or properties controlled by officially recognized student organizations
- Conduct must have occurred against a person in the United States

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## Scope of TCC's Education Programs and Activities

- "Education Program or Activity" refers to all the operations of TCC, including, but not limited to:
  - in-person and online educational instruction,
  - employment,
  - research activities,
  - extracurricular activities,
  - athletics,
  - residence life,
  - dining services,
  - performances, and
  - community engagement and outreach programs
- Applies to all activity that occurs on campus or on other property owned or occupied by TCC
- Also includes off-campus locations, events, or circumstances over which TCC exercises substantial control

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## Complainant Status

- At the time of filing a Formal Complaint, the Complainant must either be:
  - Participating in an education program or activity of TCC; or
  - Attempting to participate in an education program or activity of TCC

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## Investigation/Hearing Process

- Investigation begins after the Notice of Allegations has been sent
  - Involves collecting evidence and interviewing parties and witnesses
  - This builds the record of the case that is used in the hearing
- Hearing is scheduled once the final Investigation Report is submitted
  - Involves making credibility determinations, findings of fact, and findings of policy
- Appeal Authority will look to both the Investigation Report and the Hearing Decision (among other important things) when making determinations

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## Alternative Resolution Process

- Entered into voluntarily by all parties
- Used in lieu of the Title IX Grievance Process
  - If school officials decide alternative resolution is not appropriate, the determination is not subject to appeal
- Can be through mediation, restorative justice, or another option
- Will sometimes end up back in the Title IX Grievance Process
  - If due to a decision by school officials, the determination is not subject to appeal

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## Bias

- Traditional biases:
  - Race, gender, sexual orientation, religion, etc.
- Confirmation bias:
  - A psychological phenomenon that explains how people tend to seek out information that:
    - Confirms their existing opinions, and
    - Overlooks or ignores information that refutes their beliefs
- M.A.T.E.
  - Monitor; Acknowledge; Trauma; Express

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## Appeal Process

- A Party can appeal a determination made by:
  - A Title IX Coordinator and/or the Title IX Administrator regarding proceeding under the Title IX Sexual Harassment Policy
  - The Adjudicator, finding a Respondent responsible or not responsible for a policy violation
  - The Adjudicator, issuing or not issuing a sanction for Respondent\*

*\*the decision to **not** sanction a Respondent can only be appealed if a Respondent was found to have violated Policy.*

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## Appeal Process (cont.)

- Appeals must be submitted within five (5) business days of the Notice of the Hearing Decision to the TCC Title IX Administrator
- The appeal must include:
  - Which grounds the appeal is based upon; and
  - Include any arguments the party wishes to make in support of their appeal

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## Appeal Grounds

- A party may appeal based on one or more of the following grounds:
  - **Procedural Error**
    - Procedural error(s) materially affected the outcome of the matter
  - **Conflict of Interest**
    - Appealing party must describe the alleged conflict of interest or bias held by the individual and how this altered/impacted the outcome
  - **New Evidence**
    - New evidence which was not available or known (and could not have reasonably been known) at the time of the final determination which materially affected the outcome of the process
  - **Disproportionate Sanctions**
    - Sanctions are disproportionate to the Adjudicator's findings

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## Other Party's Right to Respond

- TCC Title IX Administrator will send a written notice of the appeal to the non-appealing party and provide them with a copy of the appeal
- Non-appealing party may issue a response to the appeal
  - Limited to ten (10) pages, including attachments
  - May address only the issues raised in the appeal
- Non-appealing party will have five (5) business days to submit their appeal response after receiving the notice of the appeal

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## Appeal Authority's Responsibility

- Will not be the same person as the Adjudicator, Investigator, TCC Title IX Administrator, or the Title IX Coordinator from either parties' Home Institution
- Receive the appropriate training
- **May not communicate directly with either party**
- Appeals will not involve any additional investigation
- Draft a written report which summarizes decision regarding the appeal.
- May decide to do the following:
  - Uphold the findings and sanctions;
  - Overturn the findings and/or sanctions;
  - Modify the findings and/or sanctions; or,
  - Remand the case for a second hearing based on new evidence which could likely affect the outcome of the matter

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## Drafting the Appeal Decision

- The Appeal Decision will include:
  - A description of the ground(s) for the appeal,
  - A summary of the issues raised on appeal,
  - A statement regarding the evidence considered,
  - A statement describing the decision was made based on the preponderance of the evidence standard, and
  - The determination regarding the appeal

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