

Title IX Training

Carroll College Presentation

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Training Objectives

- Fulfill legally mandated training requirements for Title IX Coordinators, Investigators, Advisors and Informal Resolution Facilitators
- Provide guidance on conducting investigations, Title IX hearing processes, and appeals under federal regulations and Carroll College Title IX Policy and Grievance Procedures

Topics Covered

- Overview of federal law and regulations and Carroll College policies pertaining to Title IX
- Definition of Sexual Harassment and related definitions
- Carroll College Obligations under the Law
- Reporting and Formal Complaints
- Scope of Program and Activity
- Conducting Investigations
- Hearings and Appeals
- Serving Impartially, Avoiding Conflicts of Interest, Prejudgment and Bias
- Role of Advisors
- Evidentiary Matters

Federal Law

- Title IX of the Education Amendments of 1972 states: **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.**
- Federal regulations issued by the federal Department of Education implement the law
- Applies to students, faculty, staff and those participating in Carroll-sponsored events

Carroll College Title IX Policy and Grievance Procedures

- Regs require each institution of higher education receiving federal funds to adopt a Title IX Policy and Grievance Procedures consistent with federal regs
- CC Title IX Policy defines and prohibits sexual harassment, sexual assault, dating and domestic violence, and stalking as prohibited forms of sex discrimination
- Acts of sexual harassment may be committed by any person upon any other person, regardless of the sex, sexual orientation, and/or gender identity of those involved
- CC Title IX Grievance Procedures establish procedures for reporting and resolving alleged violations of CC Title IX Policy

Carroll College Title IX Policy Definitions

- Official definitions are stated in the CC Title IX Policy
- Under Title IX regs and the CC policy, definition of Sexual Harassment, includes sexual harassment, sexual assault, dating and domestic violence, and stalking
- Sexual assault, dating and domestic violence and stalking are crimes that are covered under the federal Violence Against Women Act (VAWA)

Sexual Harassment

Conduct on the basis of sex that includes:

- A CC employee conditioning provision of an educational aid, benefit or service of the college upon a person's participation in unwelcome sexual conduct (quid pro quo)
- Unwelcome conduct so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the college's education program or activity (hostile environment)

Sexual Exploitation

- Sexual Exploitation is conduct that falls within other categories of Sexual Harassment but is defined separately for clarity
- Sexual Exploitation - any instance in which a person takes non-consensual or abusive sexual advantage of another for any person's benefit other than the person being exploited

Sexual Exploitation Examples

- Prostituting another person;
- Non-consensual visual (eg., video, photograph) or audio-recording of sexual activity;
- Non-consensual distribution of photos, other images, or information of an individual's sexual activity, intimate body parts, or nakedness, with the intent to or having the effect of embarrassing an individual who is the subject of such images or information;
- Going beyond the bounds of consent (such as letting your friends hide in the closet to watch you having consensual sex);

Sexual Exploitation Examples

- Inducing incapacitation for sexual purposes;
- Engaging in non-consensual voyeurism;
- Knowingly transmitting an STI, such as HIV, to another without disclosing your STI status;
- Exposing one's genitals in non-consensual circumstances, or inducing another to expose their genitals; or
- Possessing, distributing, viewing, or forcing others to view illegal pornography

Sexual Assault

- Sexual acts, including sexual intercourse, directed against another person without that person's consent
- Includes instances in which a person is incapable of giving consent, incest, and sexual intercourse with a person under the age of 16 years old

Consent

- A conscious and voluntary agreement to engage in any type of sexual activity
- It is an informed decision made freely, actively and voluntarily by all parties

Certain
Persons
Cannot
Give
Consent

A person cannot give consent if they

- are a minor under age 16;
- have a mental disorder or developmental or physical disability that renders him or her incapable of giving consent, and this is known or reasonably should have been known to the alleged Respondent;
- are unconscious of the nature of the act, and this is known to the alleged Respondent; or
- are incapacitated from alcohol or other drugs, or other condition detailed in the Incapacitation Definition, and this is known or reasonably should have been known to the alleged Respondent.

Limits of Consent

- Affirmative consent must be ongoing throughout sexual activity and can be revoked at any time
- Lack of protest or resistance or silence does not mean consent
- Consent cannot be obtained by threat, coercion, or force
- Current or previous dating or sexual relationship between the persons involved or manner of dress cannot be assumed to be an indicator of consent
- Being intoxicated does not diminish one's responsibility to obtain consent

Consent Withdrawal

- Consent can be withdrawn at any time for any reason
- This can be in the form of verbal withdrawal, or any expression of an unwillingness to engage in any instance of sexual activity

Incapacitation

Incapacitation occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/informed consent (*e.g.*, to understand the “who, what, when, where, why, or how” of their sexual interaction)

Incapacitation (cont'd)

- It includes incapacity resulting from a physical or mental health condition, involuntary physical restraint, and/or the consumption of incapacitating drugs
- Incapacitation is determined through consideration of all relevant indicators of an individual's state and is not synonymous with intoxication, impairment, blackout, and/or being drunk

Force and Coercion

- Force - use of physical violence and/or physical imposition to gain sexual access, including threats, intimidation (implied threats), and coercion
- Coercion - unreasonable pressure for sexual activity
- Coercive conduct differs from seductive conduct based on type and/or extent of the pressure used to obtain consent
- When someone makes clear they do not want to engage in a sexual activity, they want to stop, or they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive

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
- The existence of such a relationship determined based on consideration of: (i) The length of the relationship (ii) The type of relationship (iii) The frequency of interaction between the persons involved in the relationship

Domestic Violence

Violence committed by

- current or former spouse or intimate partner of the victim,
- person with whom the victim shares a child in common,
- person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,
- person similarly situated to a spouse under the domestic or family violence laws of Montana, or
- any other person protected under the domestic or family violence laws of Montana

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety, the safety of others, or to suffer substantial emotional distress

Retaliation Prohibited

- Retaliation - Any adverse employment or educational action, including efforts to intimidate, threaten, coerce, or discriminate against any individual
 - for the purpose of interfering with any right or privilege secured by Title IX law or CC Title IX policy, or
 - because the individual participated or refused to participate in any manner in the Title IX Grievance Procedures
- The exercise of rights protected under the First Amendment does not constitute retaliation

Carroll College Obligations and Jurisdiction under Title IX

Carroll's obligation to offer supportive measures arises upon Title IX Coordinator's receiving report or notice of allegations of Sexual Harassment

Obligation to investigate under Title IX arises when

- A person who is seeking to or is participating in a college program or activity files a signed, Formal Complaint
- Must involve conduct that occurred in a college program or activity that occurs in the U.S.

Supportive and Protective Measures

Reasonable measures - designed to restore or preserve equal access to programs and activities without unreasonably burdening the other party

May include measures designed to protect the safety of the parties, the campus environment or to prevent or deter sexual harassment

- Safety measures (escort, change of housing, safety planning, no contact directives)
- Support measures (referrals to campus/community resources)
- Academic assistance (deadline extensions, additional tutoring)

Adjudicatory Jurisdiction

- CC Title IX Policy and Procedures apply to Sexual Harassment alleged to have occurred in programs and activities, on campus or on property CC owns or controls, at CC-sponsored events, or in buildings owned or controlled by recognized student organizations
- And off-campus conduct that effectively deprives someone of access to educational programs and activities or its workplaces

Adjudicatory Jurisdiction (Cont'd)

- CC may also extend jurisdiction to off-campus and/or to online conduct when a Title IX Coordinator determines that the conduct affects a substantial College interest regardless of where the conduct occurred
- Jurisdiction is determined by the Title IX Coordinator

Education Program or Activity

- Includes locations, events and circumstances over which CC exercised substantial control over both the Respondent and Complainant
- Factual determination – No bright line
- Encompasses all operations of the institution and may include computers and internet used in operations

Examples of Programs and Activities

- Academic Programs –classes, internships, etc.
- Sponsored Activities – Special events, athletics, summer programs offered by CC
- Residence hall sponsored events
- Official student club activities

Case by case determination made by Title IX Coordinator

Dismissal of Formal Complaint

- Must dismiss any Formal Complaint that does not meet the jurisdictional requirements
- If no jurisdiction under Title IX, may address allegations under student codes of conduct, nondiscrimination policy or other applicable policies

Carroll College

Title IX Grievance Procedures

- Procedures governing reporting, investigating and resolving complaints of Sexual Harassment at CC
- Unique to CC but certain elements mandated by federal regulations

Important Definitions

- **Grievance Process** - process used to resolve Formal Complaints of Sexual Harassment The Process includes the investigation, hearing and appeal processes
- **Complainant** - individual who is alleged to be the victim of conduct that could constitute Sexual Harassment
- **Respondent** - individual reported to be the perpetrator of conduct that could constitute Sexual Harassment

Important Definitions (cont'd)

- **Party or Parties** - Complainant(s) and Respondent(s) named in a Formal Complaint
- **Advisor** - person chosen by Party or appointed by CC who may be present during meetings, interviews and hearings and informal resolution process

Reports and Formal Complaints

- **Report** - information provided to Title IX Coordinator or Official with Authority that alleges conduct that may be a potential violation of the Title IX Policy. Officials with Authority are President, Title IX Coordinators, Human Resource Director, Director of Safety.
- **Formal Complaint** - document or electronic submission signed by the Complainant (or signed by a Title IX Coordinator) alleging a policy violation by a Respondent and requesting investigation of the allegation(s)

Reporting Sexual Harassment

- Anyone may report incidents of Sexual Harassment to a Title IX Coordinator
- May be anonymous but must have Formal Complaint to investigate
- No time limits but ability to resolve older complaints may be limited or impossible
- Employees, Peer Ministers and FOCUS volunteers are required to report unless exempt

What Happens When Report is Made

- Title IX Coordinator determines if there is an immediate health or safety risk to campus which would require immediate action
- If no immediate threat, Title IX Coordinator reaches out (usually via email) to the Party who was reported to have experienced the behavior
- That person can decide to proceed or not to proceed with a Formal Complaint

Complainant's Options After Reporting

Without a signed Formal Complaint:

Receive the contact from the Title IX Coordinator and take no action

Receive Supportive Measures and take no further action

With a signed Formal Complaint:

Informal Resolution (not always appropriate)

Formal Investigation

Contacting Law Enforcement

- No Complainant is required to make a police report or to participate in a criminal case unless they wish to do so
- Carroll may not contact police unless the Complainant wishes to file a police report
- Complainant's privacy is protected by FERPA except in emergency situations

Resolution of Formal Complaints

- Once Formal Complaint filed and jurisdiction established, case will be resolved using the Title IX Grievance Procedures
- Title IX Coordinator provides written Notice of Investigation and Allegations (NOIA) and appoints Investigators
- Resolution process should be completed in 90 business days, unless extended for good cause

Informal Resolution

- Requires Formal Complaint, but not investigation or hearing
- If parties and Title IX Coordinator voluntarily agree in writing, Title IX Coordinator or designee may facilitate an informal resolution process
- Process to be used determined for each case
- Either Party may withdraw and continue with an investigation before final resolution
- Not appropriate for allegations of employee/student sexual harassment/sexual assault and may not be appropriate in student/student sexual assault cases

Investigation of Formal Complaints

- Investigators will interview Parties and relevant witnesses. Parties and witnesses have right to be accompanied by Advisor
- Investigators will collect available, relevant evidence
- Investigators may identify sources of expert information, if necessary
- Parties have full and fair opportunity to suggest witnesses, questions and provide evidence during process

Investigation (cont'd)

- Upon completion of witness interviews and collection of evidence, each Party may review and respond to all evidence directly related to the allegations at least 10 days prior to completion of Final Investigative Report (FIR)
- Investigators will create FIR that fairly summarizes relevant evidence
- Parties may review and provide written response to FIR

Live Hearing in Investigation Process

- Final decision in investigation made after live hearing
- Decision maker appointed by Title IX Coordinator presides over live hearing (may be virtual or in person) and makes determination as to violation of the Title IX Policy
- One Investigator presents FIR at hearing
- All Investigators are present during hearing and may be subject to questioning by parties' Advisor

Live Hearing in Investigation Process

- Parties and witnesses present testimony and are subject to cross examination by each Party's Advisor. If Party does not have an Advisor, CC will provide one
- All questions ruled on for relevance by Decision Maker before witness may answer
- Decision Maker issues final written determination (based upon the preponderance of evidence) as to whether violation of Title IX Policy occurred - will include sanctions if violation occurred

Appeals Process

- Both parties may appeal if there are grounds for appeal
 - Procedural irregularity that affected the outcome
 - New evidence discovered that may affect the outcome
 - A Title IX Coordinator, Investigator or Decision Maker had conflict of interest or bias for or against a Party that affected the outcome
- Title IX Coordinator appoints single Appeal Decision Maker issues final written decision on the appeal

Responsibilities of Investigators, Decision Makers and Title IX Coordinators

- Conduct investigation in a manner that is thorough, reliable, impartial, prompt and fair
- Avoid prejudgment of facts
- Be free from conflicts of interest and bias in favor or against a Party
- Treat Parties in equitable manner

Avoiding Prejudgment, Conflicts of Interest and Bias

- Must objectively evaluate all relevant evidence—including both inculpatory and exculpatory evidence
- Bias according to Websters - an inclination of temperament or outlook; bent or tendency
- Investigators must not have a bias for or against Complainants or Respondents generally or an individual Complainant or Respondent

Avoiding Bias or Appearance of Bias

- Avoid inferences/assumptions based on Party status – athlete, high ranking administrator, student government president
- Avoid sex stereotypes
- Avoid making assumptions
- Avoid vocabulary that implies facts – rape victim, assailant, guilty, etc.

DOE Guidance

- Whether bias exists requires examination of particular facts
- Apply an objective (whether reasonable person would believe bias exists), common sense, approach to bias, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (*e.g.*, self-professed feminists cannot be objective, males will be insensitive to females, self-described victims of sexual assault not objective)

Conflict of Interest

- May exist when personal considerations, including financial interest or personal relationship may compromise or have the appearance of compromising the individual's ability to exercise judgment in a particular matter
- COI are to be reported to Title IX Coordinator who makes final determination
- If COI on part of Title IX Coordinator alleged, President makes final determination

When Title IX Coordinator Signs Formal Complaint

- Title IX Coordinator's signing of Formal Complaint does not place the Title IX Coordinator in a position adverse to the Respondent
- Does not prevent the Title IX Coordinator from being free from bias or conflict of interest
- Deciding that allegations warrant investigation does not show bias

What about Advisors?

Regulations impose no prohibition of conflict of interest or bias for Advisors

DOE - Advisors do not need to be unbiased or lack conflicts of interest precisely because the role is to conduct cross-examination on behalf of one Party

Advisors

- Parties may each have one Advisor of their choice with them for all meetings, interviews, and hearings
- Parties may select friend, mentor, family member, attorney or any other person
- Parties will be offered Advisor if they have not chosen one
- Must have Advisor for hearing

Advisor Role

- Meetings and interviews
 - Help Party prepare for meeting and interview
 - Advise ethically, with integrity and in good faith
 - May not speak for the Party but may consult
- Hearings
 - Parties may not question each other or witnesses
 - Only Advisor (and decision maker) may question Parties and witnesses

Advisor Responsibilities

- Advise without disruption
- May not make presentation or represent their advisee
- May not speak for advisee
- Advisor who disrupts or fails to respect limit of Advisor role will be warned once and if conduct continues the meeting, interview or hearing will be ended or other appropriate measures implemented

Investigative Steps

- Review Formal Complaint and NOIA
- Create investigation plan
 - witnesses to be interviewed
 - evidence to be collected
 - timing of interviews
- Before interviews, provide notice of date, time and location of meetings/interviews, the persons participating and the purpose (see example in handouts) in advance

Investigative Steps (Cont'd)

- Conduct interviews of Parties (Advisors may be present), witnesses, persons with relevant information
- Follow up on additional information from interviews
- Prepare summary of all interviews for review by interviewee
- Gather documentary evidence as available and relevant

Investigative Steps (cont'd)

- Work with Title IX Coordinator to provide Parties with access to witness statements and evidence
- Before preparing Final Investigative Report (FIR), review all statements and evidence
- Review any written response by Parties after evidence review
- Prepare Final Investigative Report (FIR) summarizing relevant evidence

Investigative Steps (cont'd)

- Work with Title IX Coordinator to provide Parties access to FIR for review and written response at least 10 days prior to hearing
- Prepare for presentation of FIR and testimony at hearing
- Attend hearing and provide testimony and answer questions as requested

Evidentiary Matters

- Respondent is presumed not responsible
- Must consider all evidence – evidence that tends to establish policy violation (inculpatory) and evidence that tends to establish there was no policy violation (exculpatory)
- Credibility determinations may not be based solely on status or participation in process
- Do not consider incidents not directly related to the possible violation, unless they evidence a pattern

Evidentiary Matters (cont'd)

- Do not consider evidence about Complainant's prior sexual behavior, unless offered to prove someone other than Respondent engaged in the conduct alleged or evidence of specific incidents with Respondent offered to prove consent
- Do not access or collect medical/psychological records without consultation with Title IX Coordinator and prior written consent of person in the records

Relevant Evidence

- Not defined by regulations
- DOE guidance is to apply “plain meaning” of the term
- DOE - Relevance determination may be made by layperson “applying logic and common sense”
- Not relevant – information protected by legal privilege, Complainant’s sexual history, medical records unless specific prior consent

Relevant Evidence

Montana Rules of Evidence

- Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

Interview Tips

- Determine who will ask which questions
- Assign note taker who will be primarily responsible for documenting the interview responses
- Treat all participants with dignity and respect
- Listen carefully to information provided
- Clarify inconsistencies

Interview Tips (cont'd)

- Introduce yourself and other participants – See handout for a sample introduction
- Go over role of Advisor
- Assume a relaxed and open demeanor
- Not a police interview or interrogation
- Prepare questions in advance but follow up on information as necessary

Interview Tips (cont'd)

- Request interviewee to provide any evidence in their possession and ask if interviewee is aware of other evidence
- Ask other investigators if they have questions
- Ask interviewee if they have any questions
- Provide a closing statement as to next steps

Tips for Preparing Final Report

- Feel free to use example as a guide (see handout)
- Stick to the facts - avoid judgments, opinions or comments
- Address the elements of the alleged violation of policy
- Note areas of agreement and disagreement of the parties
- Summarize! Witness Statements will be available to Decision Maker

Scenario

- John and Mary live in the same residence hall. They were casual acquaintances before the night of the incident. A few residents and nonresidents gathered in one of the rooms and a drinking game ensued with alcohol provided by one of the people in the room.
- Both John and Mary drank alcohol and played the game.
- Mary's friends left early, and John and Mary decided to go to McDonald's for a late-night snack. They return to John's room with the food and drink more alcohol.

Scenario (cont'd)

The following day, Mary tells her friends that she thinks she had sex with John against her wishes. Her friends take her to see the Title IX Coordinator and she eventually files a Formal Complaint.

What issues are presented by this scenario and what steps would you take as investigator to collect information?

What If

- Respondent denies any sexual activity
- Complainant is unable to provide details about the sexual activity
- Respondent makes the claim that they were too intoxicated to consent to any sexual activity
- Either Party refuses to attend interview
- Either Party refuses to provide text messages or emails

Questions
