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EST. 1876

Title IX

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TITLE IX

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Presentation Agenda

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- New Definitions
- Response Protocols
- Emergency Removals
- Investigations
- Procedural Requirements
- Dismissals
- Hearings
- Informal Removals
- Evidence
- Decisions
- Training
- Appeals
- Retention
- Scenarios

AUGUST 14, 2020

Mon	Tue	Wed	Thu	Fri	Sat	Sun
		01	02	03	04	05
06	07	08	09	10	11	12
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Who is Involved in the Process?

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New Terminology	
<i>Complainant:</i> Person alleged to be the victim of sexual harassment.	<i>Respondent:</i> Person alleged to be the perpetrator of sexual harassment.

A parent may act on behalf of a minor student who is a complainant or respondent.



What is Sexual Harassment?

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OLD DEFINITION

Previously, the regulations described sexual harassment as “unwelcome conduct of a sexual nature.”

Definition – Sexual Harassment

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The new Title IX regulation provides for a *narrower definition* of sexual harassment that constitutes sex discrimination. The new definition has **(3) types of sex-based conduct** which would constitute sexual harassment:

Sexual assault, dating violence, domestic violence, and stalking;

“Unwelcome conduct that is **so severe, pervasive and objectively offensive** that it effectively denies a person equal educational access; AND

An employee conditioning the aid, benefit or service on participation of unwelcomed sexual conduct (Quid pro Quo).

When is a Response Required?

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Response
Required



The College has actual knowledge of sexual harassment;



The alleged sexual harassment occurred within the College's education program or activity;
AND



The alleged sexual harassment was against a person in the United States.

When Must a College Respond?

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- **“Actual knowledge”** notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.; and
- Any person (e.g., the alleged victim or any third party) may report to a Title IX Coordinator in person or by e-mail, phone, or mail.

When Must a College Respond?

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- **“Education program or activity”** includes situations over which the College exercises substantial control.
- Substantial control over activities includes field trips, academic conferences, or other school-sponsored travel. Substantial control also applies to College-owned buildings.

The new regulations establish a first response protocol for Title IX Coordinators. Specifically, if anyone reports sexual harassment, the Title IX Coordinator must:

- Promptly contact the complainant to confidentially discuss the availability of **supportive measures**.
- Explain that supportive measures are available with or without the filing of a formal complaint.
- Explain to the complainant the process for filing a formal complaint.

What are Supportive Measures?

- Individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment.
- Can include counseling, extensions of deadlines or other course-related adjustments, changes in work locations, leaves of absence, escort services, modifications in class or work schedules, restrictions on contact between the parties and/or increased security in certain areas of the campus.
- Cannot be punitive or disciplinary.
- Completely removing a respondent from an activity would likely be considered *punitive* except in emergency removals.
- Must be provided free of charge to the complainant.



- Title IX regulations do not prohibit immediate removal of a respondent from the education program or activity on an emergency basis.
 - This is only if the College conducts an individualized safety and risk analysis and determines emergency removal is necessary in order to protect a student or other individual from an immediate threat to physical health or safety.
 - The College must provide the respondent with notice and an opportunity to challenge the decision immediately after the removal.

What is a formal complaint?

- A formal complaint is a document filed by the complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting an investigation into the allegations.



- An administrator designated as the Title IX Coordinator to coordinate efforts to comply with Title IX responsibilities.
- The Title IX Coordinator's information including title, address, email and phone number must be given to:
 - Parents and Legal Guardians of elementary and secondary school students;
 - Students;
 - Employees;
 - Applicants for admission; and
 - Applicants for employment


TITLE IX

Colleges must investigate allegations in any formal complaint and send written notice to the complainant, respondent and their parents of the allegations upon receipt of a formal complaint.




Written Notice

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- Include presumption of innocence at the onset of the grievance process;
 - Inform both parties of the College's grievance process;
 - Include if there is an opportunity for an informal resolution process;

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- Include key details of the allegations of sexual harassment including parties involved, date and location of the alleged incident (if known), and the alleged conduct that constitutes sexual harassment;
 - Include a statement that the parties are entitled to an advisor of their choice;
 - Notice that the parties can inspect and review certain evidence;

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- Include information regarding any provisions from the Code of Conduct (if one exists) regarding making false statements during the grievance process; and
 - If in the course of an investigation, the College decides to investigate allegations about the respondent or complainant that were not included in the original notice, notice of the additional allegations must be provided in writing to the parties.

- The burden of gathering evidence during the investigation remains on the Colleges.
- Colleges must provide equal opportunity for the parties to present facts, witnesses, and any other evidence.
- Colleges cannot restrict the ability of the parties to discuss the allegations or gather evidence.
- Both parties must be allowed an opportunity to select an advisor who may be, but does not need to be, an attorney.
- Colleges must send written notices of any investigative interviews, meetings, or hearings.

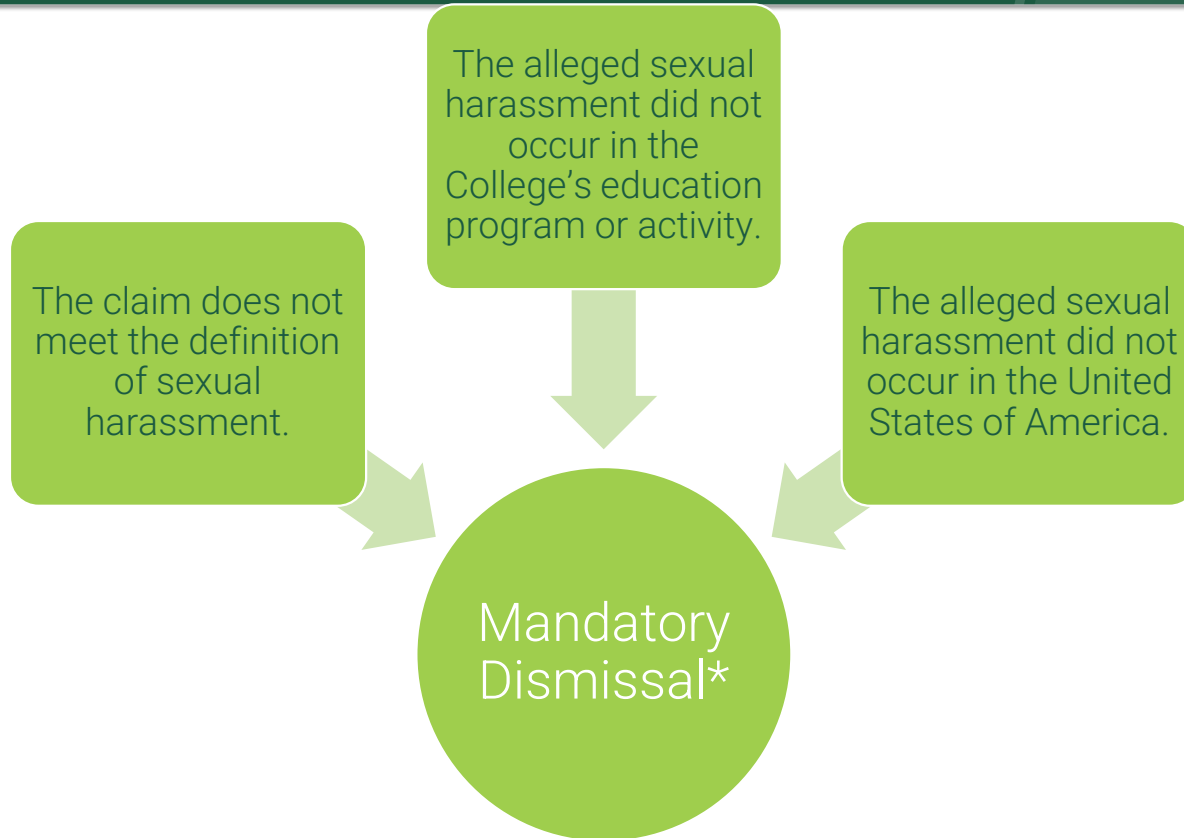


- Colleges are required to disclose to the parties and their advisors any evidence directly related to the allegations and an investigative report that summarizes relevant evidence with at least ten days for the parties to inspect, review, and respond.
- Colleges cannot access any medical, psychological, or similar treatment records without written consent.
- The investigator cannot be the Title IX coordinator and cannot be the decision-maker.

- A presumption of innocence is required throughout the process. The respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the grievance process.
- Written notice of allegations and an equal opportunity for the parties and their advisors to review the evidence is required.
- Protect any individual, including complainants, respondents, and witnesses, from retaliation for reporting sexual harassment or participating (or refusing to participate) in any Title IX grievance process.
- Provide remedies when a respondent is found responsible. The remedies must be designed to maintain the complainant's equal access to education.
- An equal opportunity must be available for parties to appeal on specified grounds.

Mandatory Dismissals

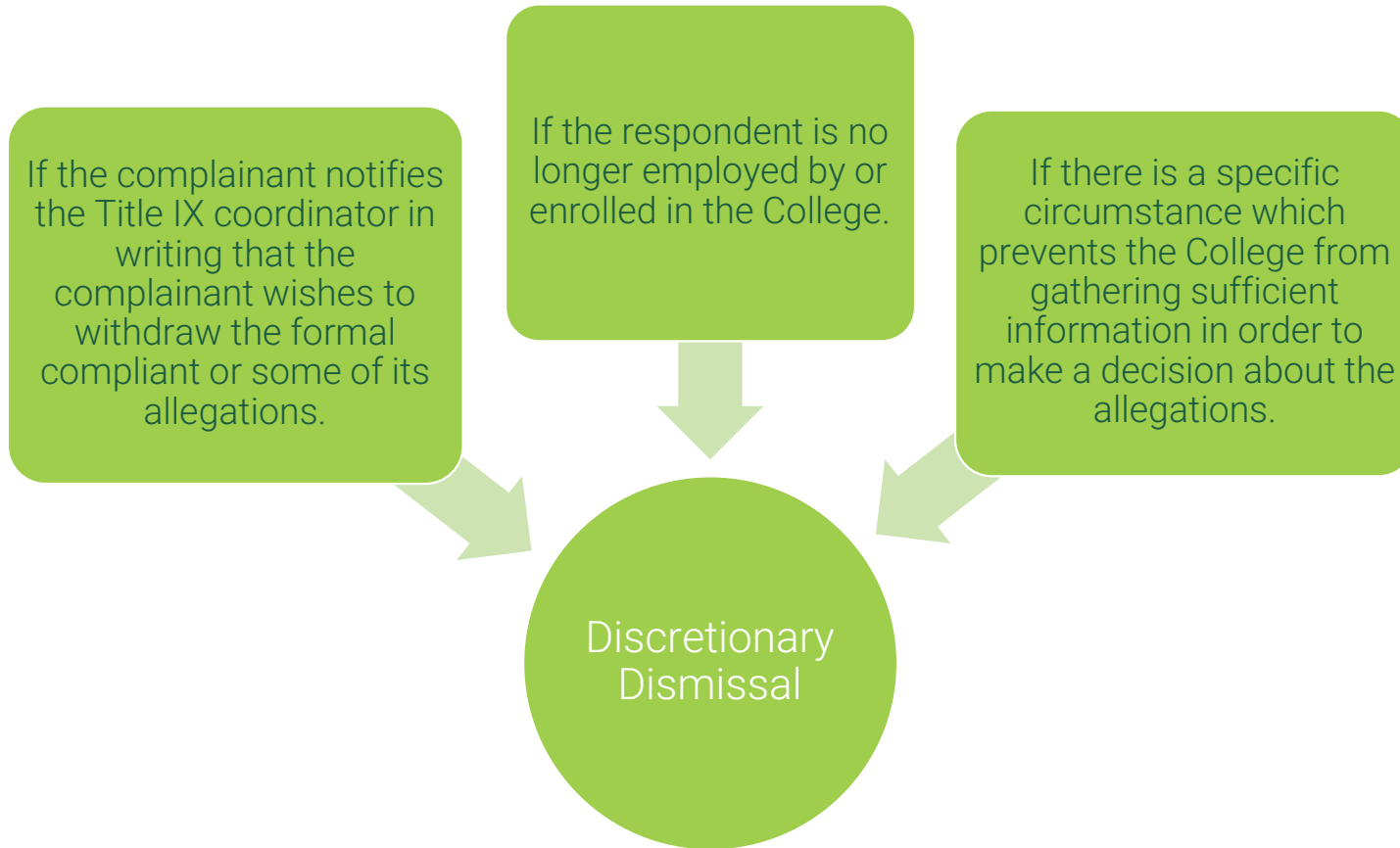
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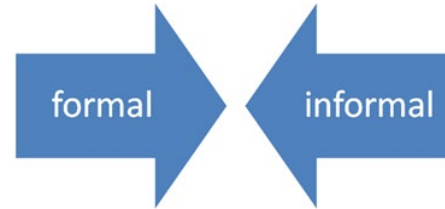
*Colleges can still investigate these claims under their Code of Conduct.

Discretionary Dismissals

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- Postsecondary institutions are required to hold hearings before a determination is reached.
- The College must send the finalized version of the investigative report to the parties so they can submit a written responses. Each party **must be allowed** to submit written questions for witnesses and must be provided with the answers. The parties should be given additional time for limited follow-up questions.
- The investigative report must be sent at least 10 days before a hearing.



- Colleges are not required to but are able to facilitate a resolution through an informal process. With the exception of one type of claim, Colleges can provide parties with written notice of the allegations, the requirements of the informal resolution process, and any consequences from participating (i.e. records that will be maintained and could be shared), and obtain voluntary written consent to use the informal resolution process.
- Informal resolutions must be before a neutral third party who is trained.



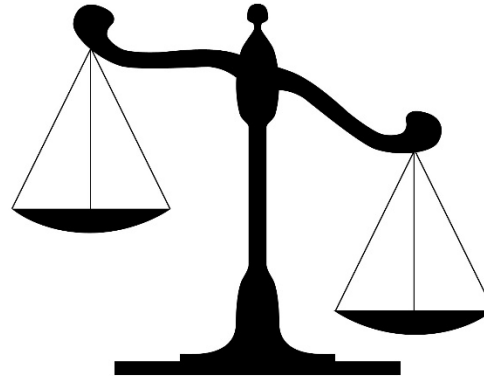
Colleges cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student. This is because of the power differentials inherent in such circumstances.

- The new Title IX legislation provides rape shield protections to complainants.
- All questions and evidence about a complainant's prior sexual behavior will be deemed irrelevant.
- It will only be allowed to prove that someone other than the respondent committed the alleged misconduct, or it can be offered to prove consent.

Colleges can choose which standard of evidence they want to use – but must use the same standard for all proceedings with students and employees.

Clear and Convincing Evidence

Preponderance of Evidence



Clear and Convincing

Higher standard of proof.

Evidence being presented must be “highly” and substantially more probable to be true rather than untrue.

Preponderance of Evidence

More likely than not, or anything above a “fifty-fifty” likelihood of guilt.

Standard under the old rule.

The decision-maker needs to objectively evaluate the evidence and reach a conclusion regarding the sexual harassment claims.

- The decision maker cannot be the same person who conducted the investigation and cannot be the same as the Title IX Coordinator.
- Decision makers must be free from conflicts of interests or bias for or against either party.
- Decision makers must receive special training on how to be impartial and how to determine what evidence is relevant.
- The decision maker must issue a written decision (even if there is no hearing).

The written decision must include the following:

- ✓ The portion of the College's policy that was violated.
- ✓ A description of all the procedural steps that were taken by the College. This includes all the interviews that were conducted.
- ✓ A findings of facts section.
- ✓ A section that draws a conclusion after the finding of facts.
- ✓ A statement or rationale for the ultimate determination.

- ✓ Any disciplinary actions the College will impose on the respondent and state if any remedies are provided to the complainant.
- ✓ A statement and rationale for any remedies provided to the complainant, and explain how that remedy will restore or preserve equal access to education.
- ✓ A statement of the procedures, the right to appeal, and permissible basis for appeal.

- The new regulations place a heavy emphasis on training. Colleges must ensure Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the following:
 - The definitions of prohibited conduct, including harassment;
 - How both the informal and formal processes work;
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias; and
 - How to apply the rape shield protections provided for complainants.



Colleges must make all materials used to train Title IX personnel publicly available on the College's website or, if the College does not maintain a website, make these materials available upon request for inspection by members of the public.

Colleges must offer both parties an appeal from a determination regarding:

- Responsibility; and
- From a College's dismissal of a formal complaint.

Both parties can appeal for the following reasons:

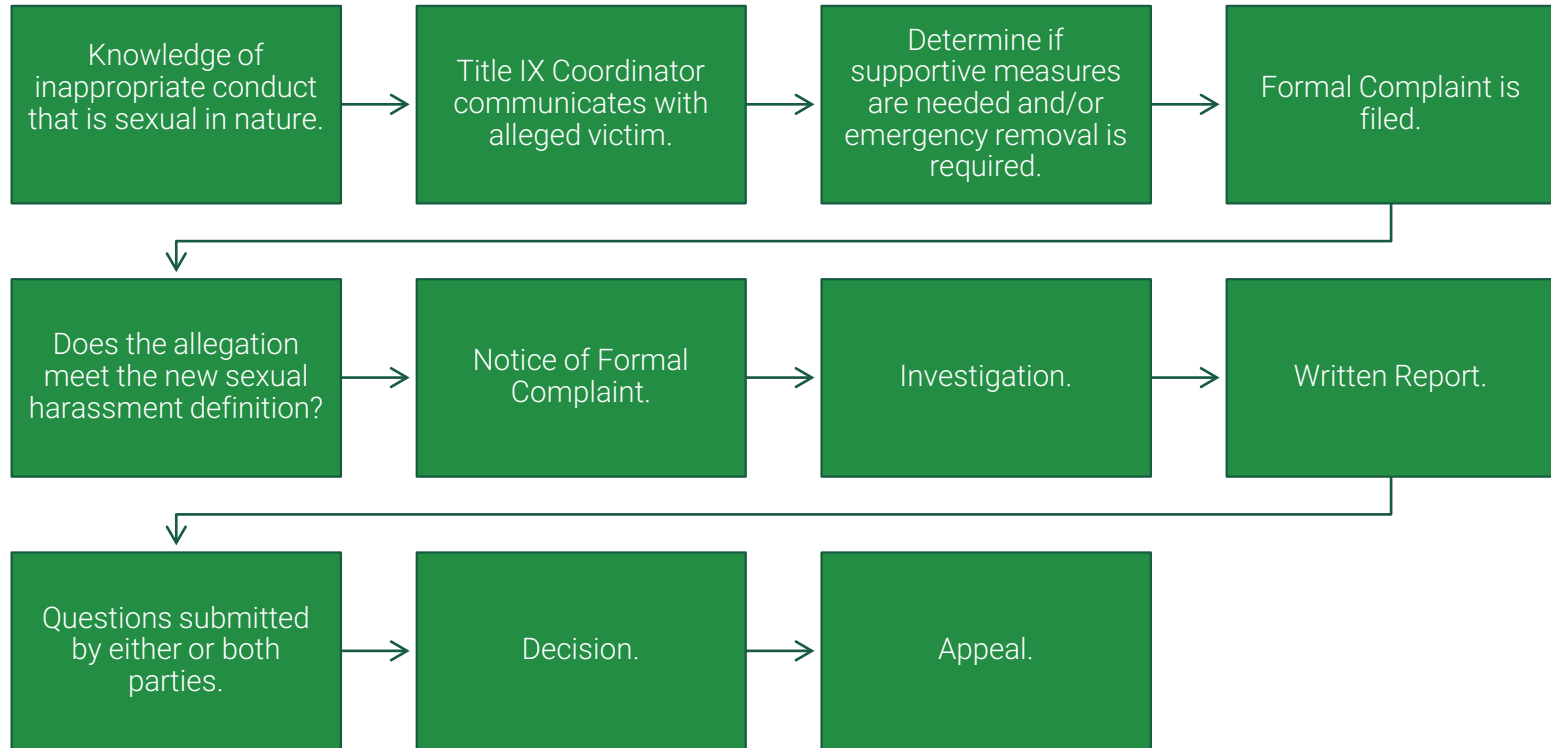
- Procedural irregularity that affected the outcome of the matter;
- Newly discovered evidence that could affect the outcome of the matter; and/or
- Conflict of interest or bias by Title IX personnel that affected the outcome of the matter.

Colleges must keep the following records for a minimum of seven (7) years:

- Records of a College's investigation;
- Records of any appeals and materials from the appeal;
- Records of any informal resolution process;
- Title IX training materials; and
 1. Title IX coordinators, investigators, decision makers, and any employee designated to facilitate an informal process.
 2. Colleges must also post the training material on their websites, or, if a College does not maintain a website, otherwise make the materials available to the public.
- Records of any supportive measures taken.
 1. If no supportive measures were taken, the Colleges should document why supportive measures were not needed.

Title IX Flow Chart

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- A college has a designated Title IX officer. This person's contact information is published on the school's website, handbooks and posters.
 - A student reports a sexual assault by another student to the librarian. The alleged incident occurred after school hours in a classroom.
-
- What are the next steps?
 - Is the librarian responsible for taking any steps?



- The student reporting the alleged incident to the librarian may **actual knowledge**, if librarian has authority to institute corrective measures on behalf of the recipient.
- If librarian has authority, then there is a duty to provide supportive measures.



The Title IX Coordinator has reached out to the alleged victim and offered supportive measures. Which one of the following is not an appropriate supportive measure?

- A. Counseling.
- B. Schedule Change.
- C. Expelling the alleged perpetrator.
- D. Allowing the alleged victim to have additional time to finish a project.



~~A. Counseling.~~

~~B. Schedule Change.~~

C. Expelling the alleged perpetrator.

~~D. Allowing the alleged victim to have additional time to finish a project.~~

The alleged victim wishes to file a formal complaint. What is needed for a formal complaint?



- Document filed by a complainant or signed by the Title IX Coordinator;
- Allegation of sexual harassment against a respondent; and
- Request that the school investigate the allegations of sexual harassment.

Now that you have a formal complaint, how many employees are potentially required for this process from start to finish (filing of the complaint to appeal)?

Scenario

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The allegations state the incident occurred after school hours in the classroom. Is the College required to dismiss the complaint because it was after hours?

NO!

“Education program or activity” includes situations over which the College exercised substantial control. The classroom is in a building owned by the College. The College is considered to have have substantial control over any building it owns.



During the course of the investigation, the complainant files a second formal complaint against the same respondent alleging an incident of sexual harassment that occurred while the students were on a group trip to Europe.

➤ What should the College do?

- The College should dismiss the claim because the incident did not occur in the United States. This would be a mandatory dismissal.
- This does not preclude the College from investigating the allegations under the College's code of conduct.



Can the College facilitate an informal resolution process in this case?



YES!

- While Colleges are not required to have an informal resolution process, they can choose to. In this example, because the allegations are not between a College employee and a student, the College can facilitate informal resolution.
- In order to have an informal resolution process, the College is required to provide both parties with the information of the informal resolution process and any consequences from participating in it. The informal resolution would be before a neutral third party, and both parties are required to provide written consent.

Questions?

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THANK YOU!

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