## Sexual Misconduct Title IX/RSA 188-H & CCSNH Policies

Community College System of New Hampshire Administrator Training July 20, 2021

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## Part One

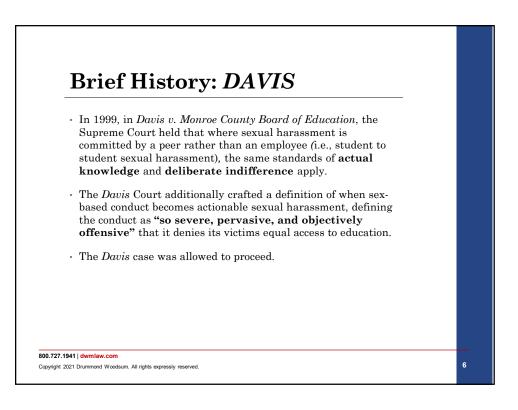
Title IX Harassment – Where We Have Come From

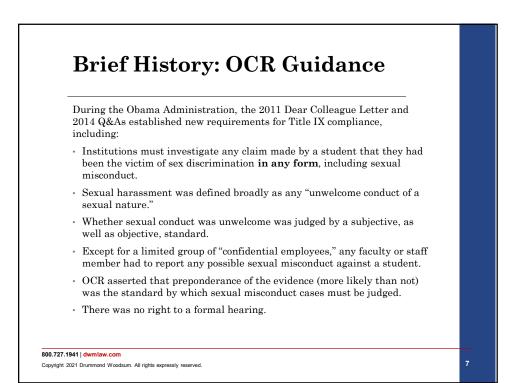


- It states, in relevant part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...."
- Until 1998, if you asked someone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

## Brief History: 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.
- · Gebser sued the school district under Title IX, seeking money damages.
- The Court held that where a school has **actual knowledge** of an employee sexually harassing a student but responds with **deliberate indifference** to such knowledge, the school itself has engaged in discrimination, subjecting the school to money damages in a private lawsuit under Title IX.
- · The Gebser case was dismissed.

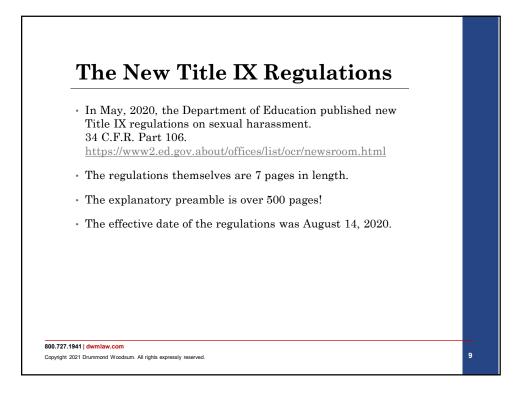


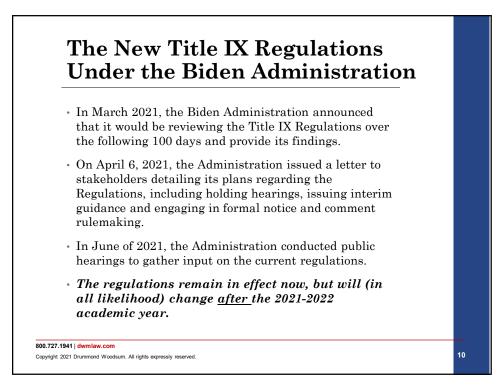


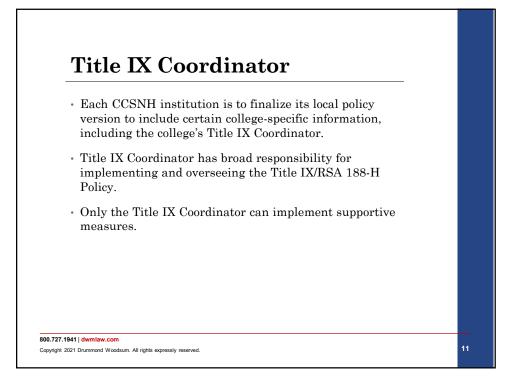
## Part Two

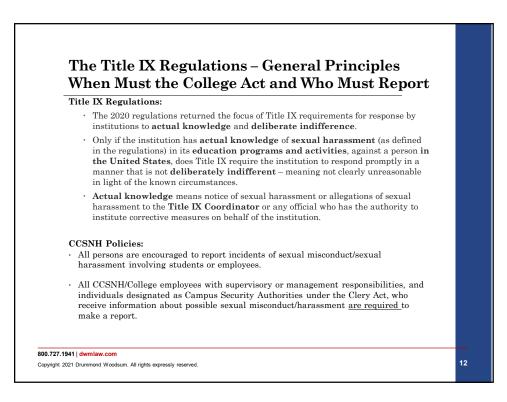
The New Title IX Regulations on Sexual Harassment & CCSNH's Revised Title IX/RSA 188-H Policy

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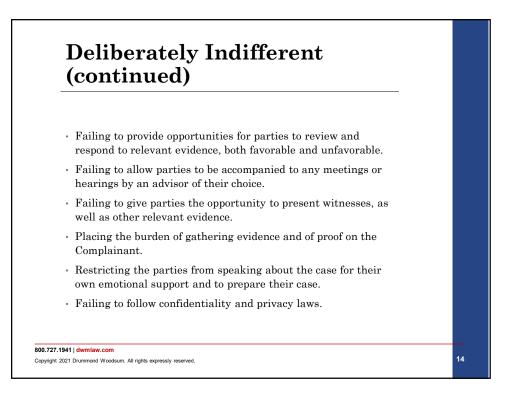


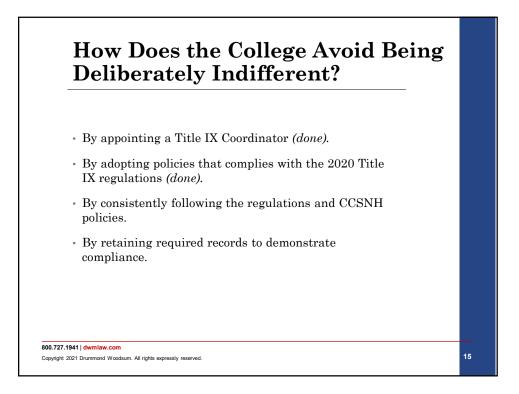
#### **How Might an Institution Be Deliberately Indifferent** (and Subject to Liability via OCR Investigation or Civil Lawsuit)?

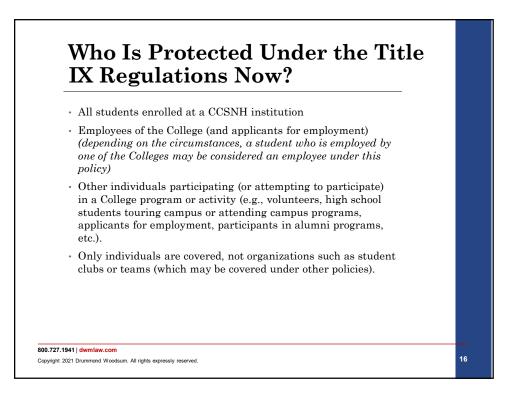
- · Failing to treat Complainants and Respondents equitably.
- Presuming a Respondent is responsible before a determination is made following a hearing.
- · Failing to objectively evaluate all relevant evidence.
- Failing to ensure that any individuals involved in the grievance process (coordinators, 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.

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· Failing to provide appropriate supportive measures.



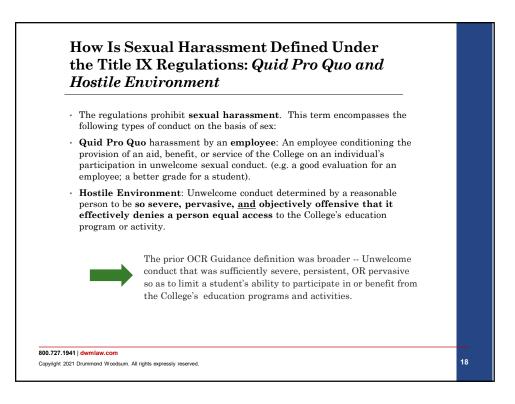


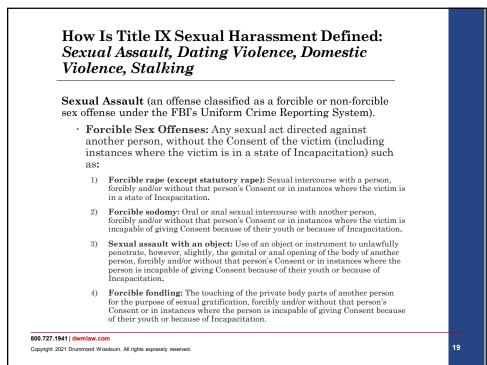


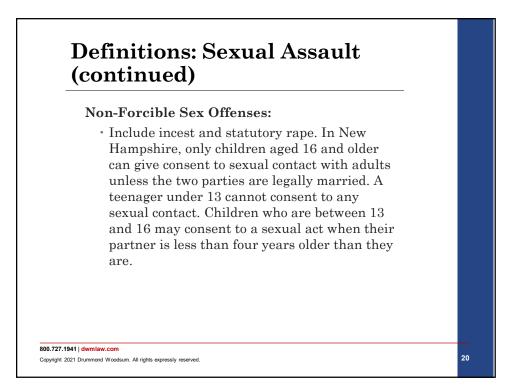
#### Where Does Title IX Apply: "Education Programs and Activities"

- Under the new regulations, institutions only have a duty to respond to sexual harassment which occurs within their "education programs and activities."
- "Education program or activity" includes locations, events, or circumstances over which <u>the College</u> <u>exercises substantial control over both the</u> <u>respondent and the context in which the sexual</u> <u>harassment occurs</u>.
- The incident must have taken place in the United States.

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#### **Definitions: Dating Violence**

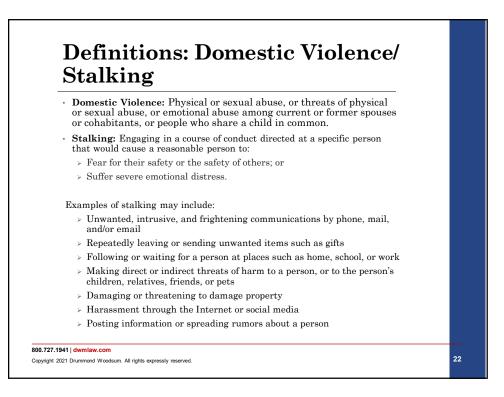
Dating Violence: Crimes of violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of such a relationship shall be determined based on a consideration of the following factors: (a) length of relationship; (b) type of relationship; (c) the frequency of interaction between persons 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

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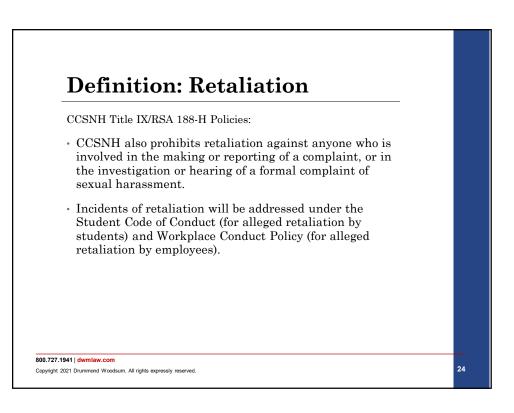


#### Other Important Definitions: Consent

• The Title IX regulations do not define "consent." The CCSNH Title IX/RSA 188-H Policy definition of Consent is as follows:

An affirmative decision to engage in mutually acceptable sexual activity given by clear actions or words. It is an informed decision made freely, willingly, and actively by all parties. Consent is knowing and voluntary. Consent is active, not passive. Accordingly, silence or absence of resistance cannot be interpreted as consent. Consent can be given by words or actions so long as those words or actions may be reasonably understood to give permission regarding sexual activity. Individuals cannot give consent if they are incapacitated due to alcohol or legal or illegal drugs, or under the age of 16.

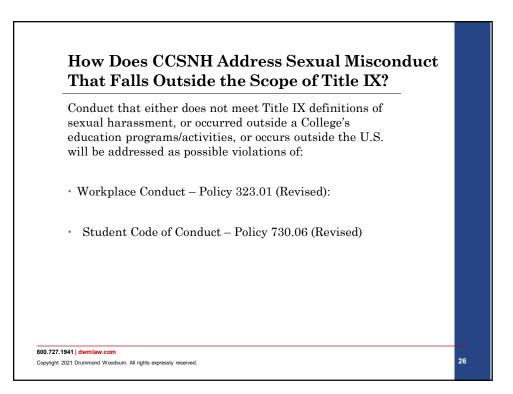
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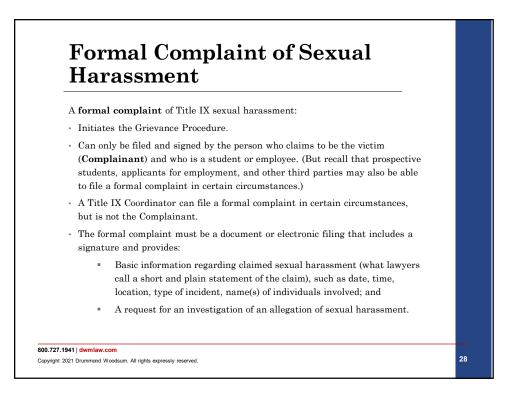
# To Summarize: What Conduct Is Prohibited Under Title IX?

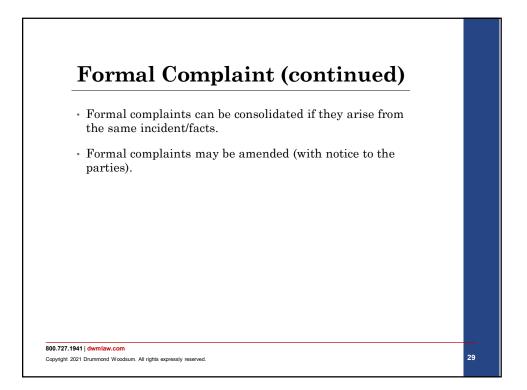
- · Quid pro quo harassment by an employee
- Unwelcome conduct based on sex that is so severe, pervasive and objectively offensive that it denies access to education programs and activities (referred to in the Title IX Regulations as hostile environment harassment).
- Sexual assault:
  - Situations where there is actual sexual contact involving penetration.
  - Touching (fondling) of genitals, breasts, or buttocks.
- Dating violence
- Domestic violence
- Stalking
- Retaliation

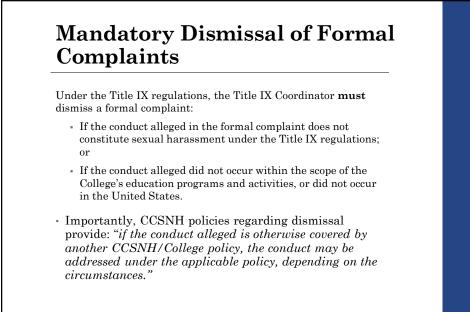
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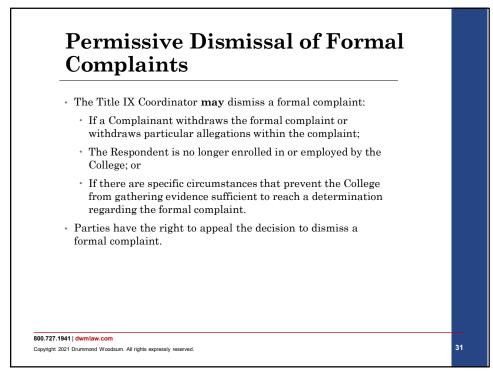






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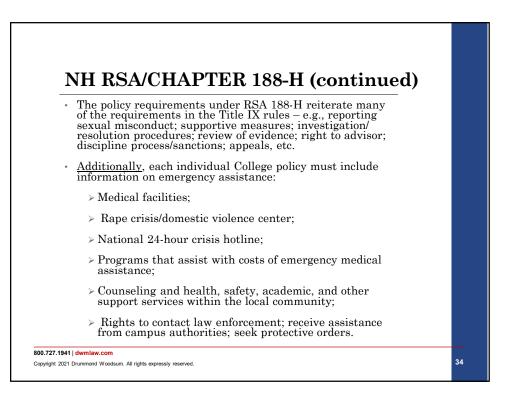
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## **Part Three**

The New State Law on Sexual Misconduct – NH RSA 188-H

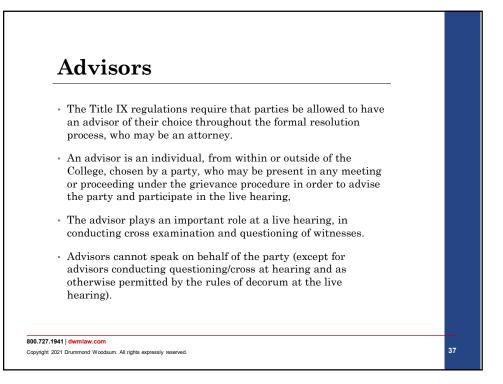
#### NH RSA/CHAPTER 188-H SEXUAL MISCONDUCT AT INSTITUTIONS OF **HIGHER EDUCATION (Jan. 2021)** Relevant portions of State law incorporated into CCSNH Title IX/RSA 188-H Policy, which provides: Scope of Policy and Jurisdiction: CCSNH and its Colleges prohibit sexual misconduct/sexual harassment against <u>any person</u> participating in or attempting to participate in education programs and activities of CCSNH/Colleges (which includes employment). The scope and definitions of sexual misconduct and sexual harassment under federal and state laws differ . . . Note that RSA 188-H includes several other requirements being addressed by CCSNH/Colleges through other initiatives - e.g., Task Force/Climate surveys/ Collaboration with law enforcement/ Prevention & awareness/Training for students and employees/ MOUs with crisis centers. 800.727.1941 | dwmlaw.com 33 Copyright 2021 Drummond Woodsum, All rights expressly reserved

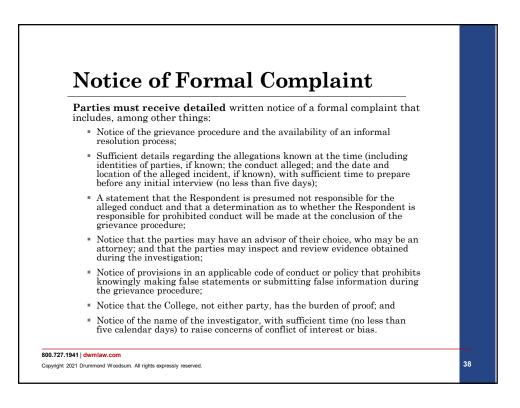


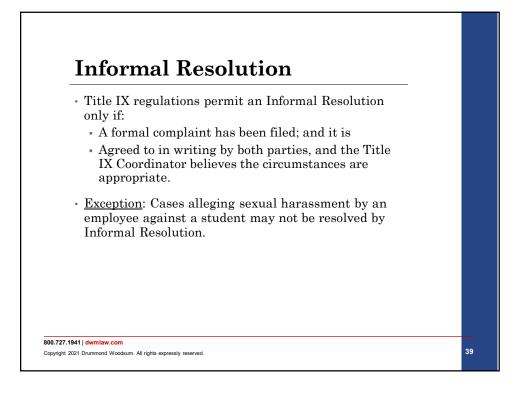
Title IX Sexual Harassment	Sexual Harassment under Title VII and the NH Law Against Discrimination	Sexual Misconduct under NH RSA 188-H
Quid pro quo/Hostile environment/ Sexual assault, dating violence, domestic violence, stalking	Defines sexual harassment similarly to Title IX in some respects, but also includes conduct of a sexual nature that unreasonably interferes with an individual's academic/work performance (hostile environment)	any other incident of sexual violence, gender-based violence, or violence based on sexual
Follow Title IX Grievance Procedure	Follow Student Code of Conduct or Workplace Conduct Policy	Specific allegations will dictate whether to follow Title IX/RSA 188-H Policy, or Student Code of Conduct or Workplace Conduct Policy

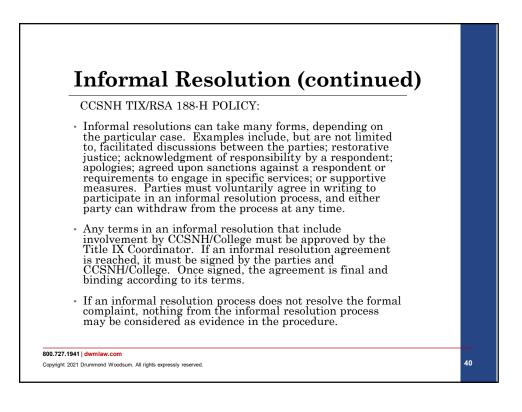
# **Part Four**

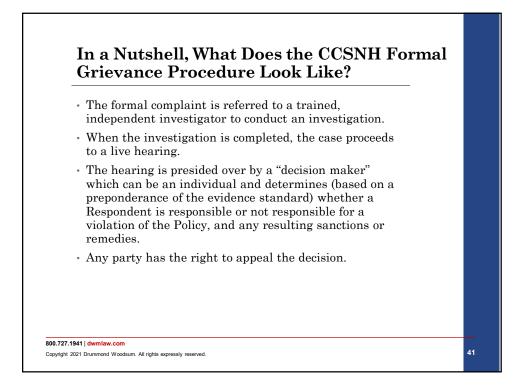
The Formal Title IX Grievance Procedure Under CCSNH Policy – Informal Resolutions, Investigations, and Hearings

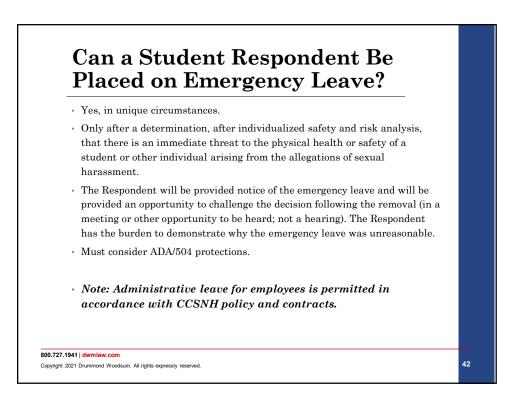












#### Investigation of Formal Complaints

The Investigator will:

- Meet with the parties after they have received appropriate notice of any meeting and its purpose, with sufficient time to prepare.
- Allow the parties to have their advisor at all meetings or proceedings. The advisor may not make any statements or otherwise advocate on behalf of the party during any meeting or proceeding, except with regard to the live hearing, as described below.
- Allow the parties to identify fact and expert witnesses, and submit inculpatory and exculpatory evidence.
- Interview witnesses and conduct such other activities that will assist in ascertaining facts (site visits, review of documents, etc.).

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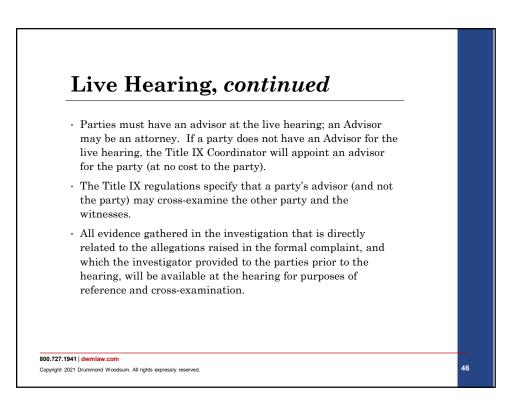
• Consider evidence that is relevant and directly related to the allegations in the formal complaint.

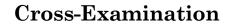


### Next - The Live Hearing

- 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 a notice of the hearing, identifying the decision maker.
- The decision maker will preside over the live hearing and will establish rules of decorum that parties and their advisors must follow.
- At the request of a Party (or at the College's discretion), the hearing will be held virtually with Parties in separate rooms that allow the Parties and decision-maker to see and hear each other.
- The hearing is recorded and the recording is made available to parties for inspection and review.

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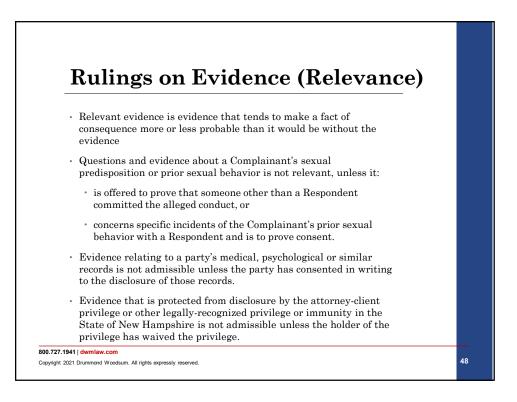


- Under the current Title IX regulations, the crossexamination requirement is viewed as a critical factor in providing due process to parties.
- Cross-examination is often adversarial, particularly where the credibility of a Complainant or Respondent is a critical element of the case.
- The TIX regulations commentary provides that crossexamination may not be aggressive or abusive.
- Cross-examination includes permission to ask the opposing party and any other witnesses in the matter all **relevant** questions, including those challenging credibility.
- The decision maker will make determinations in real time regarding the relevance of questions posed by advisors and will explain any decisions to exclude any question/evidence. The formal rules of evidence do not apply.

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## Other Evidence That May Not Be Considered

- If a party or witness does not submit to crossexamination at the live hearing, the decision maker must not rely on any statement of that party or witness in reaching a determination of responsibility.
- The decision maker 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.

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## **Part Five**

Decision-Making, Sanctions, Appeals, and Conflicts of Interest/Bias 49

## The Decision and Outcome Letter

- Following objective consideration of all the relevant evidence (including crossexaminations), the decision maker will determine whether, based on a *preponderance* of the evidence, the Respondent is responsible for the alleged sexual harassment, and, if so, appropriate sanction(s) and remedies.
- The outcome letter issued by the decision maker includes:
  - Identification of all the allegations potentially constituting sexual harassment;
     A description of the procedural steps taken from receipt of the formal complaint
  - through the determination, including notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the policy (prohibited conduct) to the facts;
  - A statement of, and rationale for, the result as to each allegation, including a
    determination regarding responsibility, any disciplinary sanctions the College
    imposes on the Respondent, and whether remedies designed to restore or preserve
    equal access to the College's education programs and activities will be provided to
    the Complainant; and

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 The College's procedure and permissible bases for the Complainant and Respondent to appeal

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**Remedies & Sanctions CCSNH** Policies: • "Remedies" are measures used to ensure that the complainant has equal access to the College's education programs and activities following a decision maker's determination. Such remedies may include supportive measures and depend upon the determination and the needs of the complainant. The Title IX Coordinator is responsible for implementing remedies and providing any needed assistance to the Complainant. Student Sanctions: · Warning; Probation; loss of privileges; no contact orders; fines; restitution; campus housing suspension/expulsion; class/College suspension/expulsion; educational/service sanctions. 800.727.1941 | dwmlaw.com 52 Copyright 2021 Drummond Woodsum. All rights expressly reserved

#### Sanctions (continued)

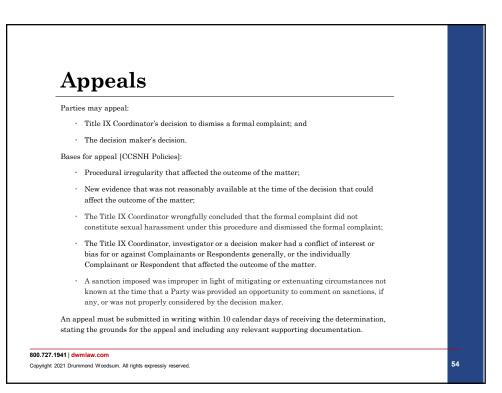
#### • Employee Sanctions:

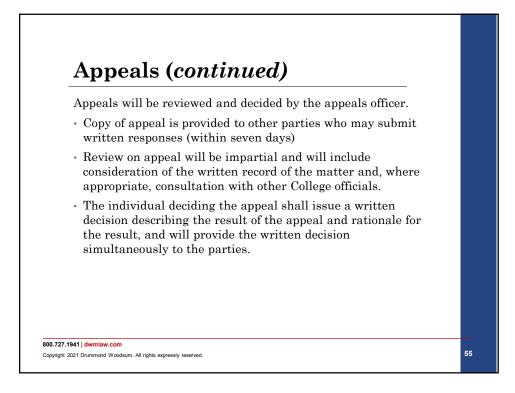
- Sanctions against employee Respondents who are found to have committed the alleged conduct and thereby violated this policy, will be based on the circumstances and seriousness of the offense. Sanctions against CCSNH faculty and staff will be handled in accordance with employment policies or collective bargaining agreements governing discipline and dismissal.
- Sanctions may include, but are not limited to: Mandated training, position reassignment, imposed workplace conditions, written warning, disciplinary suspension without pay, demotion, or dismissal.

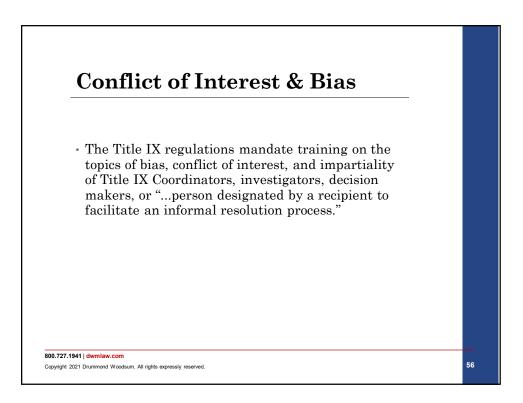
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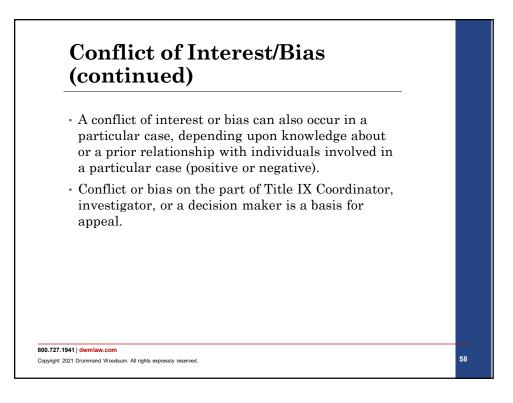
# What Is a Conflict of Interest or Bias?

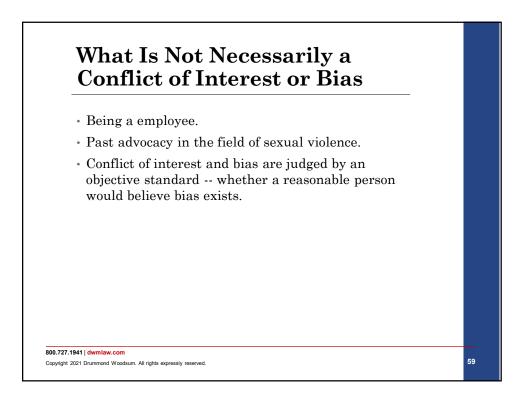
- The Title IX regulations require that those involved in Title IX processes must not pre-judge the facts and must not be biased against or in favor of a particular class of parties in the grievance procedure.
  - Believing that a Complainant, as a victim or survivor, should be presumptively believed 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.

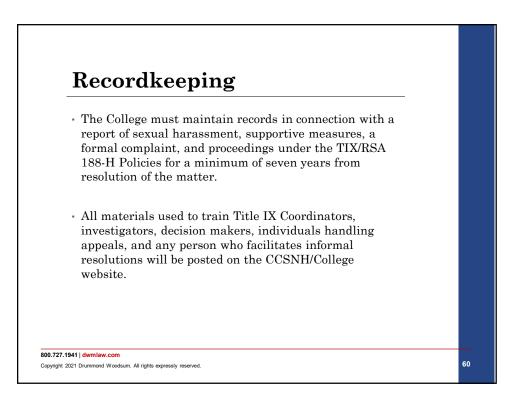


Remember – The regulations require a presumption of nonresponsibility on the part of a Respondent (until the point when the Title IX decision maker makes a finding).

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# **THANK YOU!**



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