

TITLE IX ADVISOR TRAINING

Presented by:

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Title IX of the Education Amendments of 1972

No person in the United States shall, based on 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.

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Major Title IX Decisions

- Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) – Private right of action under Title IX
- Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) – liability under Title IX where a recipient (i.e., school) has actual knowledge of sexual harassment but responds with deliberate indifference
- Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) – defining sexual harassment as unwelcome conduct on the basis of sex that is “so severe, pervasive, and objectively offensive that it can be said to deprive the victim’s access to the educational opportunities or benefits provided by the school.”



History of Title IX Implementation

- Prior to 2020, Dept. of Ed. issued a series of significant guidance documents
 - 1997 Sexual Harassment Guidance
 - 2001 Revised Sexual Harassment Guidance
 - 2011 Dear Colleague Letter
 - 2014 Q&A
- This guidance clarifies schools' responsibilities in responding to complaints of sexual harassment and advises on the implementation of a grievance process
- Much of this guidance has been superseded by the 2020 regulations



2020 Regulations Overview

- Promulgated on May 6, 2020; effective for complaints after August 14, 2020
- Codified substantive definition of “sexual harassment” under Title IX
- Outlined jurisdictional scope of institutional mandate to respond
- Imposed “actual knowledge” and “deliberate indifference” notice/response standards from *Gebser/Davis*
- Specified requirements of a grievance process, including a live hearing
- Mandated the option of an appeal



2020 Regulations – Scope of Title IX

- The Final Rule requires institutions to respond when sexual harassment occurs in the school's education program or activity, against a person in the United States
- Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house)
- School may address sexual harassment affecting its students or employees that falls outside Title IX jurisdiction in any manner the school chooses



2020 Regulations – Grievance Process

- Mandated live hearing at postsecondary institutions
- Decision-maker must be present during the hearing
- Enhanced the role of party-advisors
 - Parties must be permitted to be accompanied by the advisor of their choice
 - Institutions must appoint advisor for parties that fail to provide one themselves
- Advisors permitted to conduct cross-examination and ask all relevant questions
- Statements made by witnesses who decline to answer relevant questions shall be disregarded by decision-maker



Stages of Title IX Process

1. An Incident is Reported

- Initial Outreach to determine crisis response if needed, and providing supportive measures

2. Investigation is Initiated

- Begins upon filing of formal complaint by Complainant (or in rare cases, by Title IX Coordinator)

3. Investigation & Pre-Hearing Preparation

- collecting evidence for future hearing

4. Hearing

- advisors are tasked with conducting cross-examination

5. Appeal

- offered to both parties if formal complaint dismissed or determination regarding responsibility

6. Decision Implementation

- implement sanctions against Respondent and other remedies for Complainant, if any, and provides supportive measures as appropriate



Advisor Information

- Advisor can be anyone such as a friend or relative, or an attorney
- Advisors can be a witness, but a second advisor is needed to question that witness during hearing
- Any conflict of interest or bias
 - If uncomfortable to continue as Advisor, you can recuse yourself
 - If advisee no longer communicates, let the Title IX Office know
- Main Functions of an Advisor
 - Serve as a support person for parties & perform advising throughout the matter
 - Conduct cross examination should the matter proceed to a hearing
- Confidential resource for advisee
 - If you believe advisee is intentionally making material false statements: Remind them of policies prohibiting that and the penalties
 - keep matter confidential
- Remember the impact of trauma on those involved in sexual harassment or violence
 - Look for signs of distress and you can ask for breaks to help
 - Practice cultural competence, critical for members of marginalized communities
- Self care for yourself



Advisor as a Support Person

- Guide student/employee through each stage
- Preparing for meetings and hearings
- Accompanying student/employee to meetings and hearings
- Reviewing and inspecting all evidence that is directly related to allegations
- Reviewing Investigative Report before hearing
- Reviewing and editing any document that student/employee has prepared
- Provide emotional support by building rapport and helping student/employee navigate a situation that has consequences for all involved.
- Limits on the role include the ability to speak during interviews

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University Policy and Procedures

- University's Policy on Title IX
 - Title IX Procedures
 - Rules of Decorum



Sexual Misconduct Policy – Overview

- Revised every year, including following the 2020 Title IX Regulations
- Proscribes two sets of prohibited conduct:
 - Title IX Prohibited Conduct
 - Conduct within the scope of the 2020 Title IX Regulations
 - Non Title IX Prohibited Conduct
 - Conduct that does not meet the definition of Title IX Prohibited Conduct
- Each of those two sets of prohibited conduct is investigated and adjudicated

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**Title IX Prohibited Conduct:
SEXUAL HARASSMENT MUST OCCUR IN A
1) MARSHALL PROGRAM OR ACTIVITY,
2) IN THE UNITED STATES, AND
3) FALL INTO ONE OF THE FOLLOWING THREE BASKETS:**

3 FORMS OF SEXUAL HARASSMENT

1



2



3



1



QUID PRO QUO

An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct



2



HOSTILE ENVIRONMENT

Conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity



Hostile Environment

1. On the basis of sex
 2. That a reasonable person would determine is so
 - i. Severe;
 - ii. Pervasive;AND
 - iii. Objectively Offensive
 3. That it effectively denies a person to the University's education programs or activities.
- Includes both conduct of a sexual nature and conduct based on sex or sex stereotyping.

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Factors for Evaluating Hostile Environment

- The frequency, nature, and severity of the conduct;
- The age, disability status, and other characteristics of the parties;
- Whether the conduct was physically threatening;
- The effect of the conduct on the Complainant's mental or emotional state;
- Whether the conduct was directed at more than one person;
- Whether the conduct arose in the context of other discriminatory conduct; and
- Whether the conduct unreasonably interfered with the Complainant's educational or work performance and/or University programs or activities

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Factors for Evaluating Hostile Environment Cont.

- Does not require complete or physical exclusion from activities or a specific manifestation of trauma
- Where speech or expression is involved in allegedly unwelcome conduct, First Amendment implications arise



3



CRIMINAL OFFENSES

“Sexual assault”, “dating violence”, “domestic violence”, “stalking”, or sexual exploitation

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Sexual Assault

- Defined as a series of forcible and non-forcible sex offenses, as listed in Clery Act/VAWA:
 - Forcible Rape
 - Forcible Sodomy
 - Sexual Assault with an Object
 - Forcible Fondling
 - Incest
 - Statutory Rape
- Consent standard for all such offenses is “Affirmative Consent.”
- Note that these are similar to but not identical to criminal statutes



Sexual Assault with an Object

1. The use of an object or instrument to penetrate,
2. However slightly,
3. The genital or anal opening of the body of another person,
4. Forcibly,
5. And/or against that person's will (non-consensually)
6. Or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.



Sexual Assault – Forcible Fondling

1. The touching of the private body parts of another person (buttocks, groin, breasts),
2. For the purpose of sexual gratification,
3. Forcibly,
4. And/or against that person's will (non-consensually),
5. Or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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Sexual Assault: Incest

1. Sexual intercourse
2. Between persons who are related to each other within the degrees wherein marriage is prohibited by West Virginia law.



Sexual Assault: Statutory Rape

1. Sexual intercourse
2. With a person who is under the statutory age of consent in West Virginia, which is 16.



Sexual Assault – Affirmative Consent

- Informed (knowing)
- Voluntary (freely given)
- Active (not passive), meaning that, through the demonstration of clear words or actions, a person has indicated permission to engage in mutually agreed-upon sexual activity

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Affirmative Consent (Continued)

- Affirmative Consent cannot be obtained by force, including
 - Physical violence
 - Threats
 - Intimidation
 - Coercion

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Affirmative Consent (Continued)

- Affirmative Consent cannot be gained by taking advantage of the incapacitation of another, where the person initiating sexual activity knew or reasonably should have known that the other was incapacitated.
- Incapacitation: a person lacks the ability to make informed, rational judgment about whether or not to engage in sexual activity

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Affirmative Consent and Incapacitation

- Can arise from
 - Mental or physical helplessness
 - Sleep
 - Unconsciousness
 - Lack of awareness of sexual activity
- A person may be incapacitated
- By drug/alcohol consumption
 - Temporary or permanent mental or physical health condition

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Affirmative Consent and Incapacitation Continued

- A person who wants to engage in specific sexual activity is responsible for obtaining affirmative consent
- Lack of protest, silence, passivity, lack of resistance \neq affirmative consent
- While it can be indicated without words, non-verbal communications may be misunderstood
- Affirmative consent for one activity \neq affirmative consent for a different activity
- Affirmative consent may be withdrawn
- Will be evaluated in the context of any relationship at issue



Affirmative Consent and Incapacitation Continued

- Two questions to determine incapacitation:
 - Did the person initiating sexual activity know that the other party was incapacitated?
 - IF NOT, should a sober, reasonable person in the same situation have known that the other party was incapacitated?
- Incapacitation is a state beyond drunkenness or intoxication
- Not an expert issue
- Certain common warning signs
- Impairment ≠ defense



Dating Violence

- Violence on the basis of sex
- Committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant



Dating Violence: Was There an Intimate or Romantic Social Relationship?

The existence of such a relationship shall be determined based on a consideration of the following factors:

- Length of relationship
- Type of relationship
- Frequency of interaction between the persons involved in the relationship

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Domestic Violence

- Violence on the basis of sex
- Committed by
 - Current or former spouse
 - Co-parent
 - Co-habitation partner
 - Person situated similarly to a spouse under the domestic or family violence laws of Virginia, or
 - Any other person, where conduct is committed against an adult or youth Complainant protected by laws of West Virginia



Stalking

- On the basis of sex
- Engaging in a course of conduct
- Directed at a specific person
- That would cause a reasonable person to
 - Fear for their safety or the safety of others or
 - Suffer substantial emotional distress

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Sexual Exploitation

Taking non-consensual or abusive sexual advantage of another for one's own benefit or for the benefit of anyone other than the person being exploited when that conduct does not otherwise constitute Prohibited Conduct under this Policy.



Sexual Exploitation Examples

- Causing incapacitation for purpose of compromising affirmative consent
- Allowing third parties to observe private sexual activity
- Voyeurism
- Recording sexual activity without consent
- Prostituting another person
- Exposing another to an STI without their knowledge



Retaliation

- Any adverse action or any action likely to deter a person from engaging in future protected activity
- Taken against a person for
 - Reporting prohibited conduct in good faith
 - Participating in a proceeding under the policy
 - Acting in good faith to oppose prohibited conduct
- Can occur even in cases where “no responsibility” found on initial investigation of substantive violation
- Does not include good faith actions lawfully pursued



Title IX Procedures

- Expectations of Parties
- The Role of an Advisor
- Presumption of Non-Responsibility
- Relevance and its exceptions
- Participation of parties and Witnesses
- Investigation Process – Reports and Responses
- Hearing Process
- Appeal



Expectations of Parties

- Prompt and equitable resolution
- Privacy
- Supportive measures
- Freedom from retaliation
- Responsibility to refrain from retaliation
- Responsibility to provide truthful information
- Reasonable accommodations for disability/language
- Timely notice of complaints, meetings, or proceedings
- Opportunity to choose an advisor
- Opportunity to have an advisor appointed
- Challenge bias or conflict of interest in the investigator or decision-maker
- Offer information, present evidence, identify witnesses
- Opportunity to be heard
- Access to information to be used during resolution
- Reasonable time to prepare responses
- Written notice of extension of time frames
- Written notice of outcomes
- Opportunity to appeal

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Presumption of Non-Responsibility

- The investigation is a neutral fact-gathering process. The Respondent is presumed to be not responsible; this presumption may be overcome only where the Decision Maker concludes that there is sufficient evidence, by a Preponderance of the Evidence, to support a finding that the Respondent violated the Sexual Misconduct Policy.
- Note that this is not a burden on Complainant, but instead on University

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Informal Resolution

- Under the Title IX Final Rules, institutions may offer an “**informal resolution**” process as an alternative to the formal investigation and adjudication.
 - Informal resolution may *not* be offered in cases where the respondent is an employee.
 - For other cases, it may only be offered after a formal complaint is filed and before a determination of responsibility.
 - It may only begin upon written agreement of each party and the Title IX Coordinator.
 - Any party may withdraw from the informal resolution process at any time prior to a final resolution. If this happens, the case will move back to the formal process.
- Your role as an advisor during an informal resolution process will depend largely on the specific case. Generally, you serve an important role in helping a student understand their rights in each process, what rights and options they may waive by entering an informal process, and how their participation in the process impacts any participation in a future formal campus adjudication or court proceeding.

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The Investigation – Interview

- That the initial interview with investigators could be long.
- That “initial interview” does not mean the only interview.
- That the investigator’s questions may feel personal, private, and invasive.
- Practice the interview with advisee
 - Generate a list of questions about the case & review them before interview
 - Create a timeline
 - Create an Agenda
 - Create a Comfort Plan
 - Compile & Preserve Evidence & Create Suggested Witness List
 - Submit Documents if useful such as photographs & text messages
- At interview, you are to support advisee, not to serve as advocate or make arguments



The Investigation – Initiation to Draft Report

- Title IX Coordinator designates investigator(s)
- Investigator seeks information and statements from parties and witnesses, reviews documents and records, and collects other evidence (e.g., site visits, University records, experts, law enforcement)
- Investigator transmits draft investigation report to parties
 - Will include all information collected not protected by privilege
 - Will NOT recommend a finding
- Parties have 10 days to respond with comments, identify additional evidence, request further investigation on particular topics



Evidence Review

- Inspect and review investigative file
- Response to Draft report should clarify and expand on any details
- Determine if additional witnesses that may need to be interviewed



Investigator's Determination of Relevance

- Investigator has the discretion to determine the relevance of any proffered evidence, and to include or exclude certain types of evidence
- In general, will not consider statements of personal opinion, rather than direct observations or reasonable inferences from the facts, or statements as to any party's general reputation for a character trait
- Notwithstanding the investigator's discretion, all collected information – including irrelevant information – is shared with parties and decision maker, and may be considered at the hearing

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Prior or Subsequent Conduct

- May be considered in determining pattern, knowledge, intent, motive, or absence of mistake
- Determination during investigation made by investigator, and parties will be informed



Prior Sexual History

- Sexual history or sexual predisposition of a party will never be used to prove character or reputation
- Generally not relevant to the determination of a violation
- Only considered when offered to prove
 - Someone other than Respondent committed the conduct in question
 - Consent in light of specific incidents of prior sexual history between the parties

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The Investigation – Final Investigation Report

- Investigator reviews responses from parties and identifies additional investigative steps
- Investigator prepares final investigation report
 - WILL include recommended finding
 - Recommendation is non-binding, decision-maker will come to independent decision at hearing
- Title IX Coordinator transmits to parties
- Parties may submit response within 10 days
- Total investigation timeframe approximately 90 days



Impact/Mitigation Statements

- May be in conjunction with, in addition to, or in lieu of substantive response to Final Investigation Report
- Complainant may describe impact of prohibited conduct, express opinion on sanctions, and describe other information
- Respondent may explain factors that should mitigate or otherwise be considered
- Will be provided to decision maker at the appropriate time



Participation of Parties and Witnesses

- No one is required to participate; findings of responsibility will not be based solely on a party's decision not to participate
- Lack of or limited participation may limit the ability of the University to thoroughly investigate and resolve
- Parties are expected to speak for themselves throughout the investigation, except for cross-examination at the hearing

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Role of an Advisor - Basics

- Can be advisor of choice, but caution where advisor is also a witness
- Advisor may accompany party at any meeting or proceeding
- Advisor provides support and advice at any meeting or proceeding but cannot participate EXCEPT to conduct hearing cross- examination
- University will communicate directly with party and copy advisor on all communications



The Hearing - Basics

- Title IX Coordinator appoints a Review Panel of three from standing pool of trained/experienced individuals
- Review Panel receives Final Investigation Report and all evidence collected which is not protected by privilege
- Presumption of non-responsibility still applies until Review Panel concludes that there is sufficient evidence by a preponderance of the evidence to support a finding of a violation
- Can be conducted in a physical hearing room/rooms or virtually with real-time audio and video participation



Pre-Hearing Conference

- Parties will be provided advance written notice
- Forum for discussion of preliminary matters related to the Hearing including providing questions in advance of hearing



Participation in the Hearing

- Complainant and Respondent have the right to be present at the Hearing
- Hearing may proceed and sanctions may be imposed even if a party, upon proper notice, does not attend or participate in the Hearing
- The Review Panel or a party may request the attendance of the Investigator or any witness
 - No one is required to participate
- If no one requests a particular witness' presence, that witness' statements may still be considered without cross-examination

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Format

- Subject to the discretion of the Hearing Officer
- May include
 - Opening remarks by parties
 - Questions for Complainant
 - Questions for Respondent
 - Questions for Witnesses
 - Closing remarks by parties
- Format generally recognizes administrative nature of proceeding
- Proceeding will be held in a professional manner but will not adopt formality of civil/criminal litigation
- Will be recorded/transcribed



Prepare for Questioning

- Remind advisee that cross examination is required
- Reinforce that answering in an aggressive or uncooperative manner is not beneficial
- Prepare ways to manage stress
- Watch for signs of stress
- Remind them that if they do not understand a question, they can ask for clarification
- Prepare them for differences or inconsistencies and why they may have happened



Direct Examination

- May ask questions and elicit information to aid
 - findings of fact
 - conclusions regarding application of Policy to facts
 - Determination of responsibility
 - Sanctions



Cross Examination at the Hearing

- Parties may NOT question each other
- Cross-examination performed by party's advisor
 - Directly
 - Orally
 - In real time
- Advisor may ask all relevant questions and follow-up questions designed to test the veracity and accuracy of each party or witness' statements, including questions challenging credibility



Exclusion of Statements

- Decision Maker cannot draw an inference about the determination regarding responsibility based solely on a party's or witnesses' absence from the Hearing or refusal to answer cross-examination or other questions



Relevance of Questions

- Relevance determined by Review Panel
 - Parties submit prior to allow the hearing to be smoother
- Determined by logic and common sense, not rules of evidence
- Examples of irrelevant questions include:
 - Questions calling for privileged information
 - Questions calling for medical information without consent
 - Questions regarding sexual predisposition or behavior as described in the Procedures
 - Questions calling for one witness to testify about statements excluded due to another witness' failure to submit to cross-examination
- Where relevant, Review Panel will permit questions regarding character/prior history, but may evaluate weight or credibility

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Relevance Determination Process

- Advisor submits or asks question
- Review Panel will state whether question is relevant or irrelevant
- Review Panel may seek input from parties regarding relevance determination
- Review Panel will make a final decision regarding relevance, and state the basis for the decision to find any particular question irrelevant
- Review Panel will direct witness to answer relevant question



Guidance for Cross-Examination

- Advisor **MUST** conduct cross-examination of witnesses on behalf of party
- Cross examination must be relevant, respectful, and non-abusive
- Must use neutral and respectful tone
 - Review Panel will permit advisor to rephrase question
- Do not approach party or witness during cross-examination without permission from Review Panel
- Repetitive or cumulative questions are irrelevant

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The Determination

- Review Panel objectively evaluates all relevant non-excluded evidence
- Determines whether there is sufficient evidence to support a finding of responsibility on the part of Respondent for each allegation under investigation
- NO deference to recommended findings in Final Investigation Report
- Can order additional investigation
- If evidence is sufficient, Review Panel will determine appropriate sanction
- If evidence is insufficient, Review Panel may provide for still provide remedies, and Title IX Coordinator may ensure supportive measures



The Determination, Continued

- Review Panel will simultaneously issue a Written Determination to both parties within ten business days following the Hearing (with extensions for good cause)
- Both parties have the right to appeal, pursuant to procedures, with notice submitted to Title IX Coordinator within five business days of receipt of Written Determination

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After the Hearing

- Review the Final Outcome Letter with advisee
- Make sure they understand implementation of sanctions and any changes to supportive measures



Sanctions – Student Cases

- Expulsion
- Suspension
- Suspension in Abeyance
- Restitution
- Disciplinary Probation
- Reprimand
- Coaching
- Training
- Warning
- Withhold diploma
- Degree revocation
- Organizational Sanctions

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Sanctions – Employee Cases

- Termination
- Suspension
- Demotion
- Removal of administrative appointment
- Progressive discipline
- Coaching
- Training/Education



Remedies

- Mutual No Contact Order
- Academic/housing/employment modifications
- Monitoring, supervision, security at particular locations/activities
- Education/training
- Academic Accommodations



Considerations for Sanctioning

- Severity, persistence, pervasiveness
- Violence (if any)
- Impact on Complainant
- Impact on community
- Prior misconduct
- Acceptance of responsibility
- Maintenance of safe, nondiscriminatory, respectful environment
- Aggravating, mitigating, compelling factors



Sanctioning Information

- Impact and mitigation statements provided to Review Panel after conclusion regarding responsibility
- May also include information regarding Respondent's criminal and University disciplinary history
- Review Panel may consult with other University officials, but decision is solely and independently made by Review Panel

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Appeals

- Both parties have the right to appeal Written Determination
- Reviewed by Appeal Officer
- Adjudicated on four specific bases



Bases for Appeal

- PROCEDURAL IRREGULARITY AFFECTED THE OUTCOME OF THE FORMAL COMPLAINT
- NEW EVIDENCE NOT REASONABLY AVAILABLE
- BIAS OR ACTUAL CONFLICT OF INTEREST
- INAPPROPRIATE SANCTION

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THANK YOU

Thank you for doing your part to make our campus
a safe, inclusive place for everyone!

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Any Questions?

**Additional concerns
or requests?**

Please contact

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