



National Association of College and University Attorneys
Presents:

**Complaints and Investigations Involving
Allegations of Misconduct by Third Parties**

Webinar

April 6, 2022

12:00 PM – 2:00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

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The New School

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Complaints and Investigations Involving Allegations of Misconduct by Third Parties



Hayley Hanson, Partner, is the leader of Husch Blackwell's Education group and devotes her practice exclusively to the representation of institutions of higher education, focusing on regulatory compliance, accreditation, and litigation issues. Recognized as an industry leader in higher education law, Hayley has broad experience in a diverse range of higher education issues, including extensive involvement as outside general counsel to a number of institutions, deep experience with investigations and systems analysis, expertise in the civil rights statutes that govern higher education, as well as litigation of the range of issues impacting institutions.



Alexa Lindauer is the Associate Director of Investigations in the University of Connecticut's Office of Institutional Equity (OIE). In her role, Alexa assists in providing leadership at OIE's UConn Health office and to OIE's Case Investigations team. Alexa conducts investigations into complaints of discrimination, harassment and retaliation involving University employees, including employees of UConn Health, and prepares written decisions and recommendations based on her factual findings. She also provides training to members of the University community on policies and procedures related to preventing and responding to reports of discrimination, harassment, and retaliation. Alexa is involved with several committees and working groups at the University, including the Something's Happening Committee, the Age Act Committee, the Minor Protection Committee and a clinical employee/patient discrimination working group. Alexa serves on NACUA's Committee on Legal Education – Online Programming Subcommittee, and previously served on the Committee for Web Page Legal Resources. Prior to joining OIE, Alexa worked as an attorney at a small firm in Connecticut, focusing on employment law. Alexa earned her law degree from the University of Connecticut School of Law in 2010, and her Bachelor of Arts degree in Government with a minor in Philosophy, cum laude, from Colby College in Waterville, Maine, in 2007.



Junea Williams-Edmund is the Deputy General Counsel of The New School. She received her Bachelor of Arts from Barnard College/Columbia University and her Juris Doctor from New York University School of Law. Junea plays a principal role in representing the University and advising academic and administrative leaders on a broad range of legal issues, including labor and employment, student affairs, and immigration matters. In addition, Junea provides training to key university leaders on a range of topics, including Title IX, FERPA, performance management, accommodations, and employee discipline. She represents the Office of General Counsel in the absence of the General Counsel. She also represents the University in moderate-sized civil litigation and administrative hearings. Junea also oversees the selection of outside counsel and provides supervision and direction to outside counsel engaged to represent the University in litigation matters, while also serving a key role in witness preparations and discovery management.

Before joining The New School, Ms. Williams-Edmund held leadership roles at Montclair State University and Columbia University. Before transitioning into higher education, Ms. Williams-Edmund worked in private practice at law firms in New York City and New Jersey.

COMPLAINTS AND INVESTIGATIONS INVOLVING ALLEGATIONS OF MISCONDUCT BY THIRD PARTIES

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- J. Wesley Chancey, Josh Whitlock, & Meredith E. Green, [“Investigations 101: Setting the Stage for Success”](#) (NACUA 2019 Annual Conference) (see pages 5-7 for a discussion on workplace investigations including third party contractors and vendors)
- Ann H. Franke, [“Guess Who’s Coming to Campus? Outsiders, Invited or Not”](#) (NACUA November 2017 CLE Workshop) (see pages 2-17 for an overview of having “outsiders” on campus and legal considerations for hosting outside groups)
- Susan D. Friedfel, Seth F. Gilbertson, Scott Merrill, & Lisa A. Sinclair, [“Experience is the Best Teacher: Manging Risk in Internships, Clinical Placements, and Other Experiential Education Programs”](#) (Webinar May 27, 2021) (see pages 13-21 for a quick overview of a PowerPoint detailing circumstances to consider during a student experiential opportunity and investigating complaints during these experiences)
- Scott Bearby, Anil V. Gollahalli, Becca Gose, & Janet P. Judge, [“2020 Athletics Update: Challenges in the Covid Era”](#) (Webinar November 16, 2020) (see pages 37-41 for a brief discussion on athletic boosters and how to handle booster misconduct)

Complaints and Investigations Involving Allegations of Misconduct by Third Parties

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Presenters



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Title IX Refresher

Sexual Harassment

Where does Title IX apply?

Title IX covers conduct that occurs in the context of the University's educational programs or activities, and within the United States.

"Educational program or activity" includes locations, events, or circumstances over which the University exercised **substantial control** over both the Respondent and the context in which the sexual harassment occurs.

Also includes any building owned or controlled by an officially recognized or registered student organization.

Does not apply outside the U.S.

Conduct on the basis of sex that is:

What is “Sexual Harassment”?

Quid pro quo harassment

Hostile environment harassment

Sexual assault

Dating violence

Domestic violence

Stalking

What is hostile environment?



- Unwelcome 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.
- Conduct must also be on the basis of sex.

What is the resolution process?



Title IX Jurisdiction

What is the basic Title IX jurisdictional test?

- Title IX applies to sexual harassment that occurs:
 - On campus
 - On other property substantially controlled by the institution
 - In the house of a recognized student organization
 - Or elsewhere in the context of an institution program or activity

Example

A student worker is sexually assaulted in the kitchen of a fast-food restaurant located in the Student Union, which is on campus. The restaurant is owned by a non-profit food and beverage corporation of which the institution's president is the sole shareholder.





Example

The institution's business school has rented a local event venue for a diversity banquet. During the reception, one student is sexually harassed by an employee at the event. The local event venue is owned by a private company.



Example

A sexual assault occurs in an off-campus house owned by an LLC that is associated with a religious group that is registered and recognized by the institution as a student organization.



Is other off-campus conduct covered?



Did the conduct occur in the context of something the institution organized and administered?



Was the conduct committed by an employee or agent of the institution acting in the course and scope of their duties?



Did the conduct arise in a private setting as a result of decisions of private actors?

Example

Resident assistants in dormitory organize students to clean up litter at a local park as part of community engagement week. Students, led by the RAs, walk from the dormitory to the local park. During the event, one of the volunteers loudly and repeatedly makes jokes about another student's presumed sexual orientation.



Example

A faculty member offers to meet with a student at a local bar to discuss the student's research interests and to interview the student to serve as a research assistant. While at the bar, the faculty member offers to employ the student as a research assistant in exchange for sex.



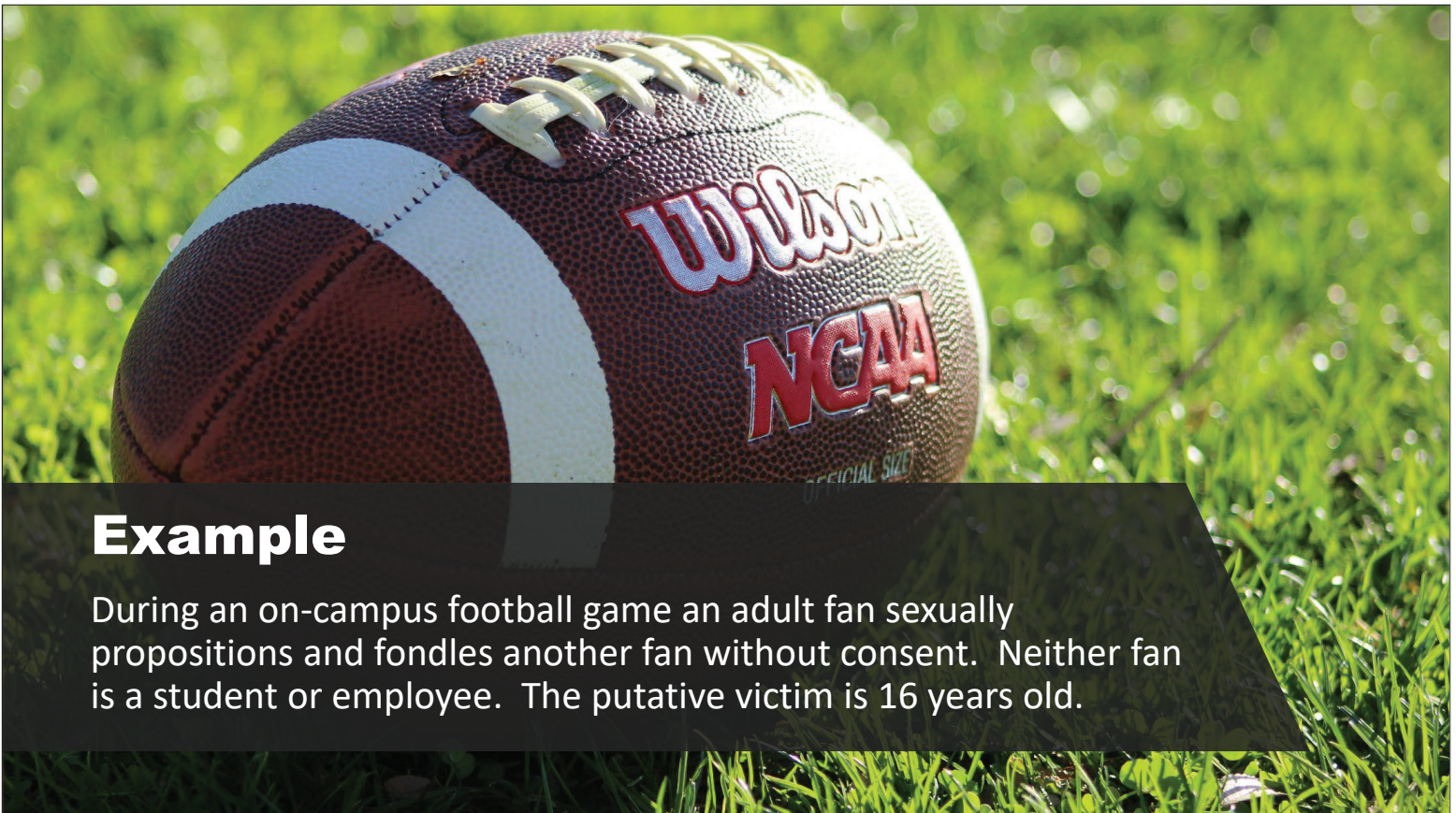
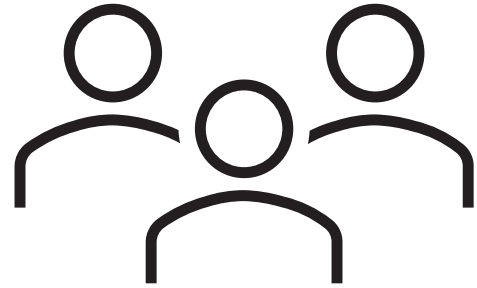
Does Title IX apply outside the United States?

- No
- Current Title IX regulation limits application to persons "in the United States"
- U.S. territories are included as "in the United States"



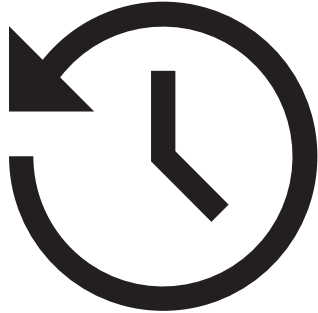
Do we need disciplinary jurisdiction “over the parties”?

- No
- Jurisdiction focuses on the *context* in which the reported harassment arose
- Ability to discipline parties may affect the *disposition*



Example

During an on-campus football game an adult fan sexually propositions and fondles another fan without consent. Neither fan is a student or employee. The putative victim is 16 years old.



How do we address jurisdiction for pre-August 2020 misconduct?

- Regulations apply to conduct occurring on or after August 14, 2020
- But pre-August 14, 2020, Title IX policies have been superseded by new ones with jurisdictional limits

Can two institutions have jurisdiction at the same time?

- Yes
- Joint programs or collaborations will often result in dual jurisdiction
- May include dual jurisdiction with non-educational entity such as a hospital



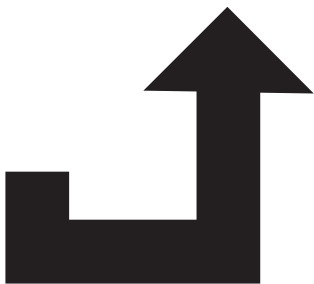
Example

Multiple schools collaborate to share classroom and dormitory space for a “semester in D.C.” program where students take classes and live while working in a government internship. One student from School A sexually harasses a student from School B in the classroom space.



What is the procedure if we don't have Title IX jurisdiction?

- If no formal complaint has been filed, refer the matter elsewhere (law enforcement, alternative process, etc.)
- If a formal complaint has been filed, dismiss the formal complaint, notify the parties, and refer the matter elsewhere



Example

Two high school seniors who have been admitted to the University make a Tik Tok video making fun of and reenacting a sexual assault. The campus community is outraged and wants the students' admission revoked.



NCAA Guiding Principles

NCAA Sexual Violence Prevention – Guiding Principles

- All people deserve to be treated with dignity, respect, and concern for their well-being regardless of ***sex, gender identity, gender expression, sexual orientation, age, race, religion, disability, socioeconomic status, ethnicity, or national origin.***
- Ensuring college environments are safe and healthy is the responsibility of every individual and department in the campus community.
- Schools have a responsibility to have healthy environments for prospective and current student-athletes both on and off campus.

Types of Acts of Sexual Violence

- **Sexual Violence:** A term used to include both forcible and nonforcible sex offenses, ranging from sexual battery to rape.
- **Interpersonal Violence:** Violence that is predominantly caused due to the relationship between the victim and the perpetrator, including dating and domestic violence.
- **Other Acts of Violence:** Crimes including murder, manslaughter, aggravated assault or any assault that employs the use of a deadly weapon or causes serious bodily injury.

NCAA Policy to Combat Campus Sexual Violence

Example

A private tennis coach (not affiliated with the institution) is providing individual coaching to a student athlete on campus. To assist the athlete with her stroke, the coach approaches the athlete from behind to guide her hands on the racket. The coach's hand grazes the athlete's breast over top of her shirt.



Example

A basketball player is in a consensual relationship with a recently graduated former student athlete. After the couple breaks up, the alumni continues to attend the basketball games even though the player requested they not. One night, the alumni sat in a car outside the player's apartment for an hour before driving away. The player reported to their coach that they felt uneasy and didn't want to walk to their car alone.



THIRD PARTY MISCONDUCT

Duty of Care for Third Party Conduct?

Restatement (Third) of Torts → No duty to protect others from the conduct of third parties **unless a special relationship** exists either between the actor and the third person or between the actor and the person injured

The existence of such a special relationship may support a duty to protect against foreseeable risks.

When does a “Special Relationship” exist?

- Restatement (Third) of the Law, Torts: Liability for Physical and Emotional Harm, 3rd Edition, § 40. Duty Based on Special Relationship with Another:
- An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.
- Special relationships giving rise to the duty provided in Subsection (a) include:
 - A common carrier with its passengers
 - An innkeeper with its guests
 - A business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises
 - An employer with its employees who, while at work, are:
 - in imminent danger; or
 - injured or ill and thereby rendered helpless,
 - **A school with its students (including universities),**
 - A landlord with its tenants, and
 - A custodian with those in its custody, if:
 - the custodian is required by law to take custody or voluntarily takes custody of the other; and
 - the custodian has a superior ability to protect the other.

What duty of care is owed by a university?

- Reasonable care varies in school environments, with substantially different supervision being appropriate in elementary schools as opposed to colleges
- Special relationships =
 - Dependency – does the party rely to some degree on the other for protection?
 - Control – does one party have superior control over the means of the protection?

What duty of care is owed by a university?

- Postsecondary schools do have a special relationship with students while they are engaged in activities that are part of the **school's curriculum or closely related to its delivery of educational services** (*Regents of Univ. of Cal. v. Superior Ct. of LA*, 4 Cal. 5th 607, 230 Cal, Rptr. 3d 415, 413 P.3d 656 (2018))
- Colleges are in a special relationship w/ their enrolled students only in the context of school-sponsored activities over which the college has some measure of control (e.g. school sponsored community service project; school supervised athletic events)

Limitations on Duty of Care

Several factors that may limit a defendant's duty of care:

- Foreseeability of harm to the plaintiff
- Degree of certainty that the plaintiff suffered injury
- Closeness of the connection btw the defendant's conduct and the injury suffered
- The moral blame attached to defendant's conduct
- Policy of preventing future harm
- Extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach
- Availability, cost, and prevalence of insurance for risk involved

Key takeaways

Colleges/universities will have more of a duty to protect its students from third party misconduct occurring on campus *or* when students are ***engaged in activities that part of the school's curriculum or closely related to its delivery of educational services***

Degree of control over the actor is also a factor to consider

We know from Title IX cases and other civil rights decisions that liability can only be imposed on a school for inaction and not based on vicarious liability

Jurisdictional Considerations

2020 amendments to the Title IX regulations apply to reports of sexual harassment in programs/activities in US and in the following settings:

Buildings/locations part of school operations (including remote learning platforms)

Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred; and

Off-campus buildings owned/controlled by student organization officially recognized by a postsecondary school

34 C.F.R. § 106.44(a)



Recommended Language in Institutional Policies

- Be clear about who your institution's anti-harassment/discrimination policies apply to, and where
 - Students participating in internships/clinics
 - Subcontractors/vendors
- Make sure your policies clearly identify when there is a duty to report third party misconduct



Insurance

What coverage does your institution's relevant insurance policies provide for claims brought because of third party conduct?

Page 2 of 3 pages

TERMS AND CONDITIONS

... apply whatever the purchaser's general purchasing conditions may be stipulated in the order, will only be considered as accepted once our... The order is considered as final only after our acknowledgement of the...

Limit of the Offer

... offer apply exclusively to the supply of services specified here... The purchaser in no case will be allowed to put forward... duly accepted by our company.

Scenario #1 – Clinical Placement

Debbie is in the second year of a social worker graduate program at your institution. Second year students are required to complete a clinical placement with a local service provider. Debbie's program advisor places Debbie at a non-profit called "Healing Hands."



Scenario #1 – Clinical Placement

About one month into the rotation, Debbie met with her advisor, Nell, who is on staff at your institution. While debriefing her experience, Debbie told Nell, “I really enjoy the clients I am getting to work with. My supervisor gives me great feedback and I am learning a lot from him. But, there is one problem. Sam, one of the psychologists who works at Healing Hands, keeps making comments that I don’t feel comfortable with. He is always complimenting me on my looks, and sometimes, I see him staring at my breast.”

Nell reported this to her dean. How should they respond to this situation?



Preliminary Considerations

- What do your written agreements with the host site say?
 - Adherence to university’s anti-discrimination/harassment policies
 - What to do in event of a complaint? Who to contact? Who will manage what?
 - Rights to terminate the agreement?
- What training took place prior to the placements?
 - For students?
 - For your institution’s staff managing the clinical program?
 - For employees of the host site supervising your students?
- Background checks?
- What policies/procedures exist at the site organization?
- Does the clinical site host students from other institutions?

How to Respond to a Complaint

- Who manages the complaint at the institution?
- Who manages it at the clinical site?
- Initial complainant intake (by Title IX Coordinator/EEO Officer/Designated Individual):
 - Resources?
 - Interim measures? (are there other students at the site? – follow up with your institution’s point of contact for the clinical program as needed)
 - Other witnesses from your institution (recommend you meet with everyone from your institution)
 - Clearly explain next steps - and that there might be a need for a second intake w/ the clinical site

Referring Complaint to Clinical Site

- Ask site how they intend to investigate it - follow agreement if it’s in there
 - Do they want to conduct a separate interview w/ complainant?
 - Consider having your institution’s point of contact (i.e. T9 investigator accompany your student at interview, or other institutional point person)
 - Discuss need for interim measures as needed
 - How will the site inform you of outcomes?
 - Continue to provide interim measures/safeguards as needed for the student
 - Will complainant have opportunity to review final report? Rebut?
 - Or does the site prefer you conduct the investigation?
- Conclusion
 - Proper notice to complainant
 - Proper notice to institution and necessary stakeholders about the final outcome
 - Did the process suggest there’s a need not to work with this particular site going forward?
 - Will there be an appeals process?

Scenario 1.5

Does your analysis change if Debbie was not placed at her site by your institution, but instead secured the placement on her own?



Scenario #2

Carl is a student at your institution. They live on campus, and have a meal plan. Your institution contracts with *Eat Well* to manage on-campus dining. *Eat Well* employees staff the dining halls, and *Eat Wells* is responsible for all dining hall-related maintenance.

Last week, Carl went to the dining hall on their way to Chemistry class. While in line waiting for their food, Carl overheard someone serving them food say, "I can't stand working with these ungrateful students. Especially the foreign ones who don't speak any English. It's so frustrating trying to help them when they don't understand you. They should just stay in their country and go to school there!"



Scenario #2

Carl saw the employee's nametag, which read, "Megan."

Carl contacted the EEO Office in Human Resources to report this incident.

How do you respond?



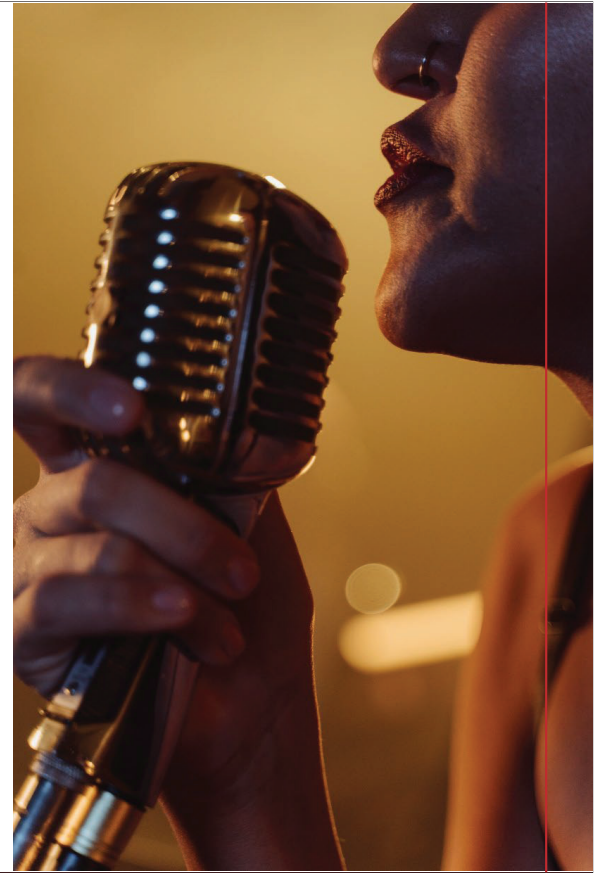
Third Party Vendor Complaints

- What does your institution's agreement with the vendor say?
 - Compliance with your anti-harassment/discrimination policies?
 - Training?
 - Ability to remove vendor's employees?
 - What to do in the event complaints are received?
- Who manages the complaint at your institution?
- Who will conduct the investigation?
- Initial intake –
 - Need for interim measures?
 - Conclusion/resolution?

Veronica, the alum and donor

Jo is an undergraduate student and member of one of your institution's a cappella groups, the Perfect Pitch. They have a performance at your institution's coffee house, and invite all Perfect Pitch alumni to attend. Veronica, a former member of Perfect Pitch, attends. Veronica has made generous financial gifts to your institution's music department.

After the concert, Veronica approaches Jo and other members of Perfect Pitch. She congratulates them on their performance and offers to buy them a round of drinks. Veronica and Jo begin talking. Veronica compliments Jo on Jo's singing and tells Jo about a number of connections she has in the music industry and to MFA programs.



Veronica, the alum and donor

As closing time of the coffee house approaches, Veronica suggests that she and Jo continue their conversation at a nearby bar. Jo agrees. At the bar, Veronica begins complimenting Jo's physical appearance and asking about Jo's romantic life. She places her hand on Jo's knee and on the small of Jo's back. Jo is becoming increasingly uncomfortable and attempts to direct the conversation back to music. Veronica is becoming intoxicated and suggests that Jo go to her condo for a nightcap. Jo declines this offer and prepares to leave. As Jo is leaving, Veronica leans over to give Jo a hug, and attempts to kiss Jo on the mouth.

The next day, Jo reports this conduct to the head of the music department.



What should the institution do?

- Offer support to Jo
 - Provide all the supports you would offer any other student, regardless of whether investigatory process is pursued with Veronica
- Comply with federal and state law – right to a learning or working environment free from discrimination or harassment
 - Response from institution once they have knowledge will be key
 - *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378 (United States Court of Appeals for the Seventh Circuit July 10, 2012, Decided)
 - Student employee brought Title VII and Title IX complaint against University based on conduct by professor emeritus/donor
 - To succeed, student would need to prove that University was negligent in discovering or remedying the harassment – University’s response was prompt and reasonable

What should the institution do?

- Review University policy and procedures
 - What policies apply, and under what circumstances?
 - Location of the incident, identities of the parties and nature of the alleged behavior will inform response
 - What information is available about Veronica’s level of activity with the institution?
 - Are there potential continuing opportunities for bad behavior?
 - If no ongoing relationship, response may be focused on providing support for the impacted student, but keep records of the incident
 - Is there relevant history with this individual?
 - Are there opportunities for a community-focused response?
 - Engage alumni relations or similar office in response?
 - Is there a process for complaints against third parties, and what would an investigation regarding a third party look like?
 - What if Veronica doesn’t participate?
 - Should Veronica’s role as a donor be considered?
 - If an investigation results in a finding of responsibility, what could the ramifications be?

Other considerations

- If an investigation was completed and Veronica was found responsible, should the University reject future donations from Veronica?
 - Should any donations be publically acknowledged?
 - Should consideration be given to re-naming any buildings, scholarship funds or professorships named in the donor's honor?
 - In 2018, University of Pennsylvania renamed a commons after a report concluded that its donor namesake, Steve Wynn, engaged in sexual misconduct
 - Also rescinded Bill Cosby's honorary degree

Misconduct by Patients or Research Subjects

- In a recent study of medical students, 54% of respondents reported experiencing microaggressions
 - Shared examples included:
 - Calling female medical students "princess," "sweetheart," "nurse" or "darling"
 - The use of a racial slur by a patient
- In a recent study of physicians, 23.3% of respondents reported that a patient had refused their care because of their race/ethnicity
 - 21.9% reported that they were unsure whether a patient's refusal for care was due to their race/ethnicity
- Females from minoritized backgrounds have been particularly targeted

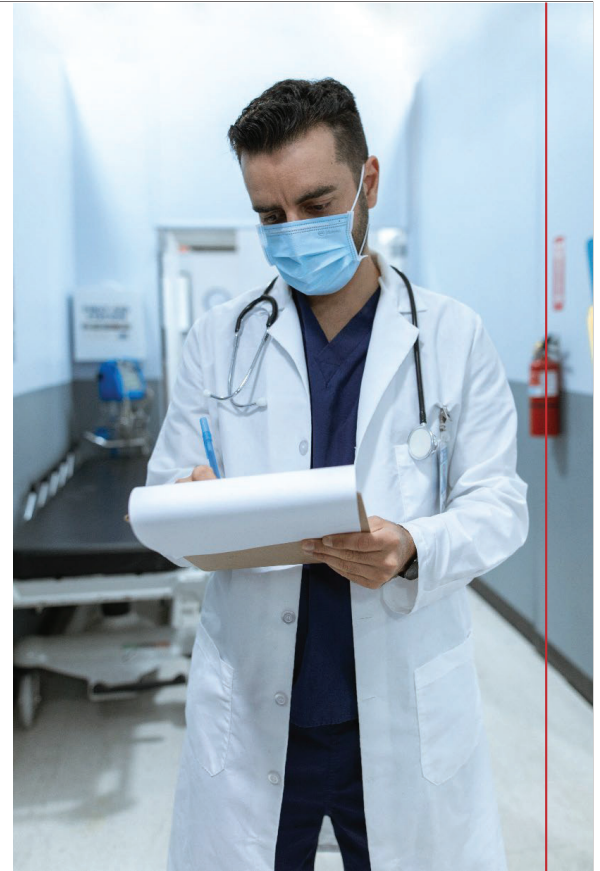
Eddie, the medical student

Eddie is a medical student who identifies as a gay man and is married to his partner. This morning he assigned a new patient, Mr. Lewis. Mr. Lewis is a 57 year old man who just had surgery for a broken femur.

“Good morning, Mr. Lewis. My name is Eddie, I am a medical student working with your surgeon, Dr. Fix. Is this an okay time for you?” Eddie asks upon entering Mr. Lewis’ room. Mr. Lewis nods.

“How are you feeling today?”

“Much better, the pain is not as bad, but it still hurts.”



Eddie, the medical student

Eddie begins his examination.

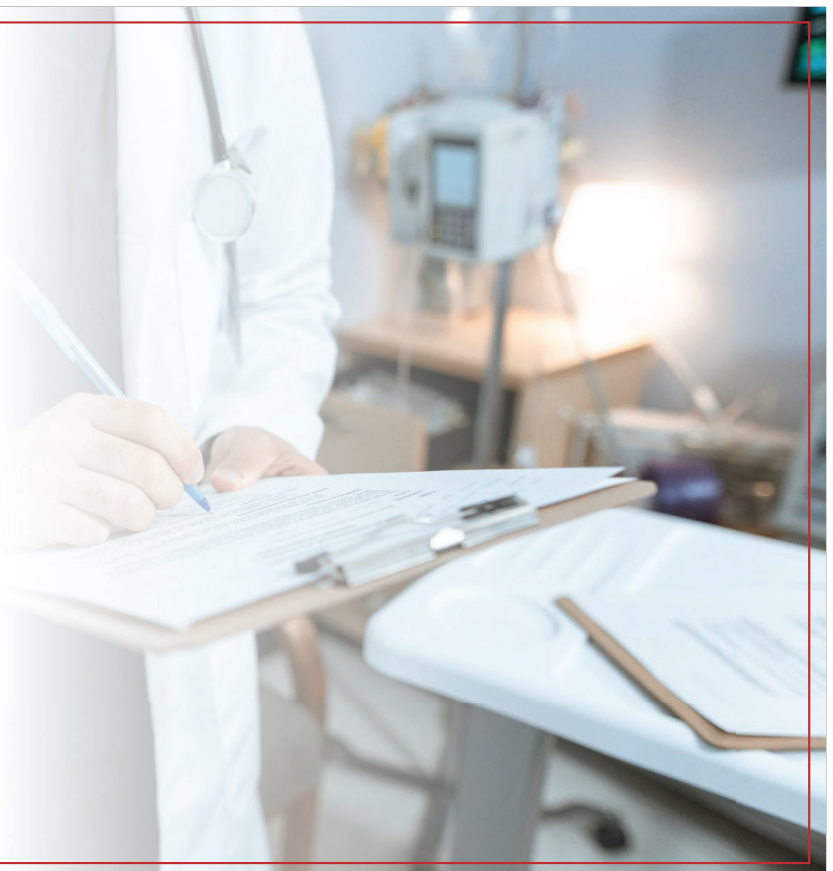
“I see you’re married, Eddie. Me and my lady have been married for 30 years this year, can you believe it? We were out on a date when we got hit by this moron in an SUV. Luckily she just had a couple bumps and bruises. How long have you been with your wife?” Mr. Lewis asks.

Eddie moves the bedsheet back slightly to evaluate the dressing on Mr. Lewis’ thigh. “Congratulations, although I am sorry to hear that the date ended that way. You will have to have a do over.”

“Yes, my wife is already making reservations! She’s a spitfire! Your wife must be pretty laid back, medicine is a very demanding career!”

“Yes, actually, my husband is very supportive, even with these long days and nights.”

“What? Your husband?” Mr. Lewis looked shocked and then disgusted. “Get off of me! I don’t want you touching me! Get out of my room.”



What is the academic medical center's duty to Eddie?

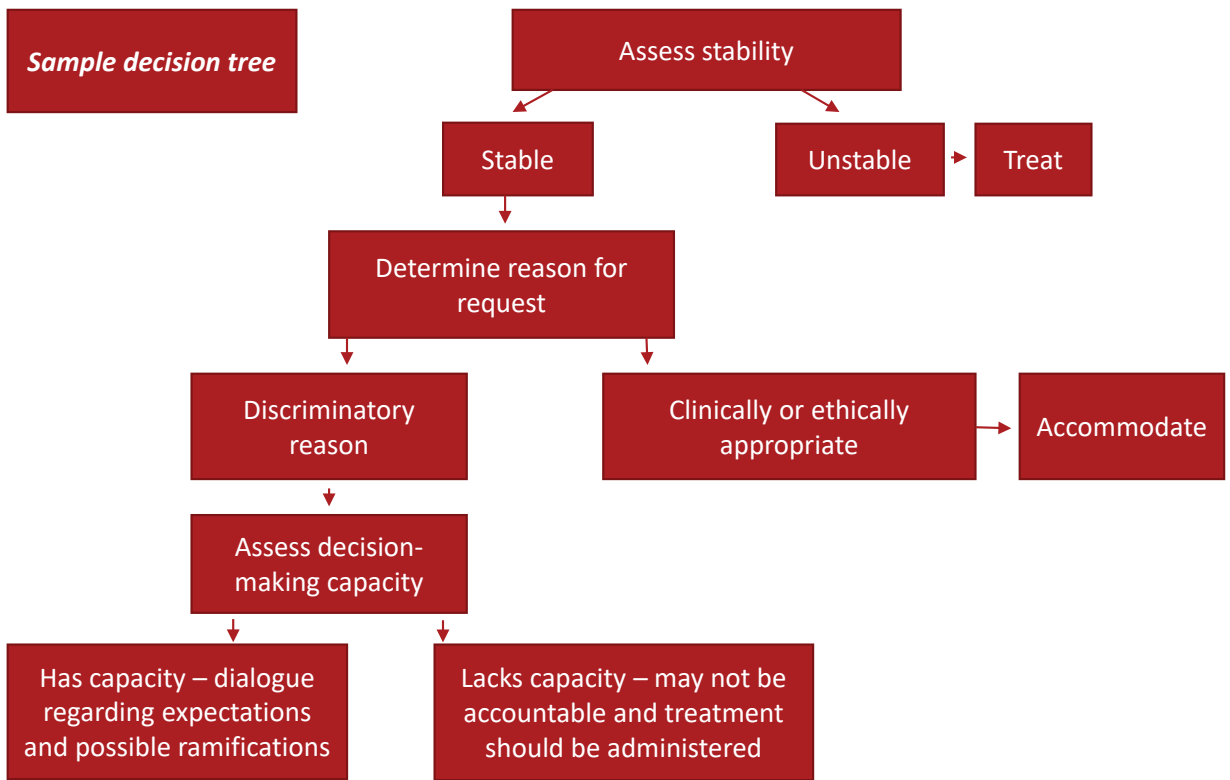
- Duties pursuant to federal law (Title IX), state law
 - Right to a learning environment/work environment free from discrimination
 - Requiring a provider to accede to a discriminatory request may violate law
 - Denial of summary judgment where nurse supervisor reassigns a patient to a white nurse after the patient said they did not want a Black nurse caring for them
 - Court concluded that a race-based employment assignment constitutes an adverse employment action
 - *Williams v. Beaumont Health Sys.*, 2019 U.S. Dist. LEXIS 144203, 2019 WL 4017187 (United States District Court for the Eastern District of Michigan, Southern Division August 26, 2019, Filed)
 - But also balancing need to protect students/employees from harassment

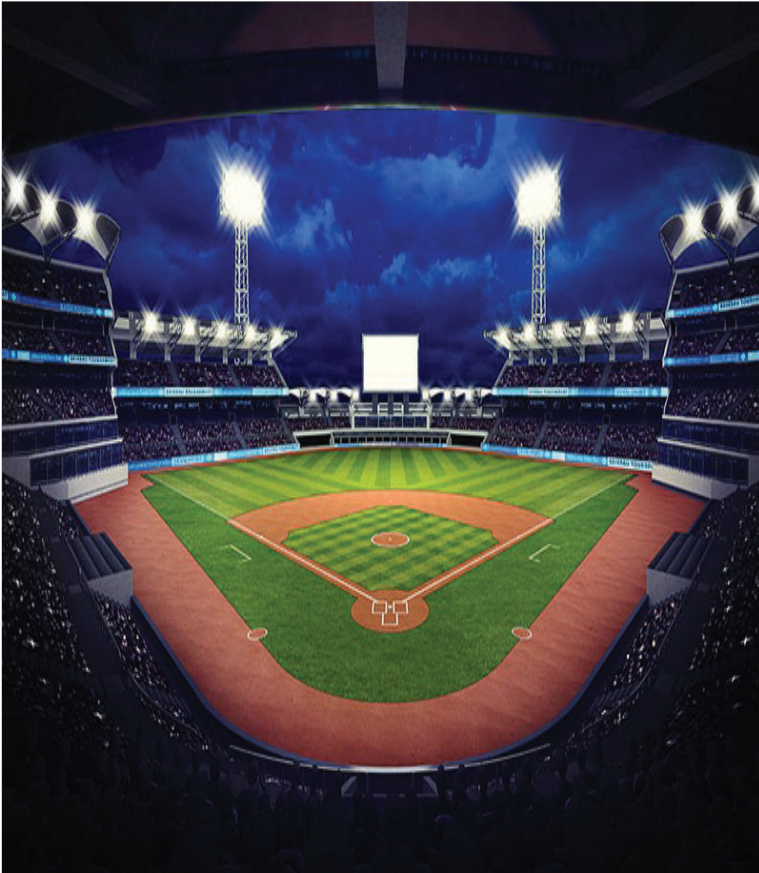
What is the academic medical center's duty to Mr. Lewis?

- Competent patients have the right to refuse medical care
- For patients with an emergency condition, the Emergency Medical Treatment and Labor Act requires stabilization of a patient before they can be discharged or transferred
- Mr. Lewis' responsibilities pursuant to institutional policy
 - Is there an applicable code of patient responsibilities?

What are institutional best practices?

- Have a policy regarding patients rights and responsibilities
 - Include patient duty to demonstrate respect and consideration while receiving care, including that requests for changes of medical staff based on a protected characteristic will not be honored
 - Exception: requests for changes based on sex considered on a case-by-case basis
- Have procedures in place when a patient acts in a discriminatory manner and train on those procedures
 - Require supervisor action when alerted to this behavior
 - Offer support to the targeted practitioner and, within clinically appropriate bounds, allow them to decide the extent of continued interaction with the patient





Scenario

Lindsay's Story.... Part one

 NACUA

Questions

- What are College University's obligations?
- Should every off-hand comment by any visitor to the campus be investigated? Every "pat"?
- If not, describe factors that tip the scales in favor of investigation (in any manner).
- How can an institution best convey appropriate steps to its supervisors and employees?

 NACUA



Scenario

Lindsay's Story... Part two

 NACUA

Questions

- Was the University's response appropriate?
- What should the next steps be?
- What could the University do for Lindsay?
- What would appropriate discipline for Fred be, if any?

 NACUA



Questions?



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