

**JacksonLewis**

# **Plenary Topics**

**Practical Considerations That Serve as the  
Foundation for Compliance**

**Academic Year 2021-22**

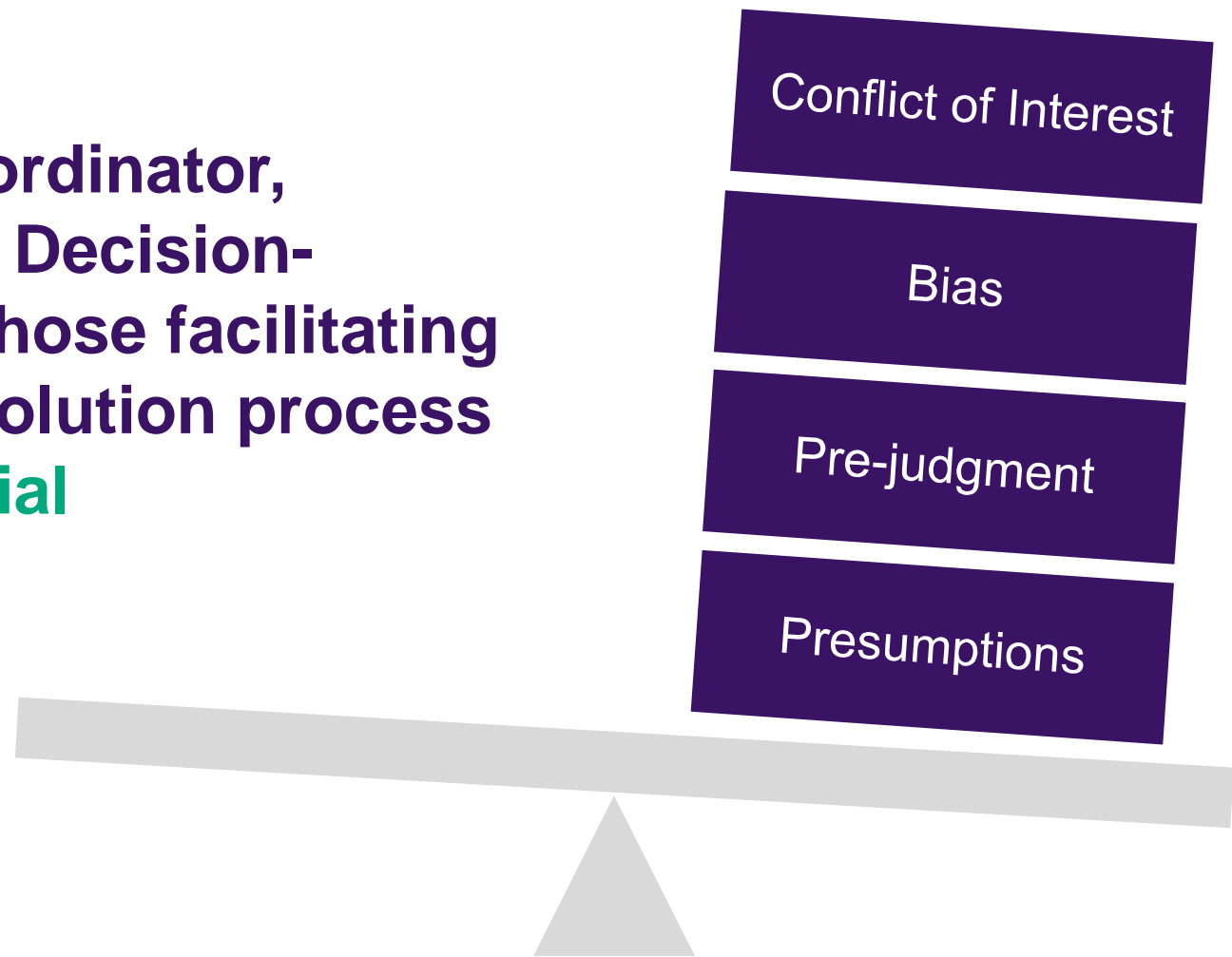


# Agenda

1. Serving with Impartiality
2. Title IX Definitions
3. Considering Trauma
4. Spotlight Issue: Consent

# Serving with Impartiality

**The Title IX Coordinator,  
Investigator(s), Decision-  
maker(s), and those facilitating  
an informal resolution process  
must be impartial**



# Conflict of Interest: Do you have a dog in the fight?

## Key Question

Could the outcome of this case impact me one way or another?

## Sources of Conflict

Relationships  
Financial interests  
Programmatic interests

## General Rule

Conflicts of interest should always be disclosed  
They may be waived, but not by the person with the conflict

## Important Point

The perception of a conflict of interest can be damaging even if your judgment is not actually compromised

# Implicit Bias: **Mental shortcuts sacrifice accuracy**

## Working Definition

Mental shortcuts used (often unconsciously) to process information and make assessments quickly

## Problem

When we rely on a bias rather than observation and analysis, we sacrifice some level of accuracy

## Reality

It's hard to eliminate bias entirely, but by becoming more aware of our biases, we can consciously guard against making decisions based on them

## Warning

Watch out for your Durham District Attorney Lacrosse case, whatever it may be

# Generational/Cultural Bias: What's wrong with kids today?

## Working Definition

Conscious or unconscious value judgments about youth culture and/or sexual expression

## Problem

Allowing personal reactions of shock, disgust, or simple incomprehension to influence investigatory or adjudicatory decisions

## Reality

Your job is to evaluate behavior relative to school policies and prescribed definitions of prohibited conduct

## Warning

Unfamiliar behavior may be less relatable and therefore feel more worthy of suspicion or condemnation

## Pre-judgment: *Keep keeping an open mind*

### Sizing up Quickly

Classic “two drunk kids” case  
“I had one almost exactly like this last year”

### Primacy Bias

Allowing the first version you hear to carry too much weight

### Confirmation Bias

Becoming invested in one theory or explanation and latching onto evidence that supports it

### The Warehouse Door

Failing to consider alternative explanations



# Presumptions

**Your Go-To  
Explanation for  
Behavior is  
Right... Some  
of the Time**

## Example 1

### **Lack of Physical Resistance on Part of Complainant**

- Consent
- Fear that resistance will result in violence
- Surprise, confusion, and/or embarrassment
- Intimidation/Sense of futility based on size and strength
- Dissociation
- “Freeze” reflex

# Presumptions

**Your Go-To  
Explanation for  
Behavior is  
Right... Some  
of the Time**

## Example 2

### **Delayed Reporting on Part of Complainant**

- Embarrassment and/or shame
- Consent followed by regret
- Fear of retaliation
- Confusion around procedure or standards
- Sense of futility
- Denial

# Presumptions

**Your Go-To  
Explanation for  
Behavior is  
Right... Some  
of the Time**

## Example 3

### **Changing/Inconsistent Details Provided by Complainant or Respondent**

- Discomfort sharing sexually explicit content
- Dishonesty
- Protecting others
- Fear of punishment for drinking, etc.
- Attempt to make account more believable/acceptable
- Dissociation/PTSD
- Evolving understanding of self and others

# Title IX Definitions

# **Critical Importance of Foundational Definitions**

**The foundational definitions are central to the Title IX grievance process**

**Relevant definitions should be referred to often and must guide Title IX team actions**

## FOUNDATIONAL DEFINITIONS

### Complainant

An individual who is alleged to be the victim of conduct that could constitute Sexual Harassment. A Complainant may be female, male, or non-binary.  
Non-neutral language: ~~Victim~~ ~~Survivor~~

### Respondent

An individual who has been reported to be the perpetrator of conduct that could constitute Sexual Harassment.  
A Respondent may be female, male, or non-binary  
Non-neutral language: ~~Perpetrator~~

### Recipient

Any institution, organization, or other entity or person to whom Federal financial assistance is extended either directly or indirectly through another recipient.

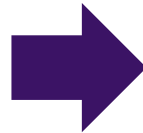
### Education Program or Activity

All the operations of a college, university, postsecondary institution, or a public system of higher education. Includes locations, events, or circumstances over which the recipient exercised substantial control over both the Respondent and the context in which the Sexual Harassment occurs and any building owned or operated by a student organization that is officially recognized by the recipient.

## FOUNDATIONAL DEFINITIONS

### Sexual Harassment

Conduct on the basis of sex that satisfies one or more of the following:



Quid Pro Quo

Unwelcome Conduct

Sexual Assault

Dating Violence

Domestic Violence

Stalking

## FOUNDATIONAL DEFINITIONS Sexual Harassment

### Quid Pro Quo

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

### Examples

Tashia visits Professor Jadi's office to discuss her final grade. Professor Jadi tells Tashia that her grade for the course can go from an 88 to a 90 if Tashia will simply agree to one date.

Chris is a senior who has waited his whole college experience to participate in a study-abroad program in Germany. Chris missed the deadline to sign up for a trip by 2 days and is distraught when he goes to the administrative employee approving students' participation in the trip. The employee tells Chris that as a special favor, his study-abroad application can be approved and he should provide a German-style nude photo as a thank-you.



## FOUNDATIONAL DEFINITIONS

### Unwelcome Conduct

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 recipient's education program or activity.

## Sexual Harassment

### Examples

#### Conduct Examples

**NO:** A stray offensive remark; cat-calling; crude and/or creepy behaviors?

**YES:** Physical and/or verbal conduct that rises to the level of abuse

#### Effective Denial Examples

Skipping class to avoid an alleged harasser

Decline in student's GPA

Difficulty concentrating in class

***\* No concrete injury is required to meet this element***

## FOUNDATIONAL DEFINITIONS Sexual Harassment

### Dating Violence

Violence committed by a person

- A. Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- B. Where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - 1. The length of the relationship
  - 2. The type of relationship
  - 3. The frequency of interaction between the persons involved in the relationship

*Threats*

*Assault*

*Battery*

## FOUNDATIONAL DEFINITIONS Sexual Harassment

### Domestic Violence

Felony or misdemeanor crimes of **violence** committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

*Threats*

*Assault*

*Battery*

## FOUNDATIONAL DEFINITIONS Sexual Harassment

### Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to

- A. Fear for his or her safety or the safety of others; or
- B. Suffer substantial emotional distress.

### Suggested Model Definition

Following or engaging in a course of conduct on the basis of sex with no legitimate purpose that puts another person reasonably in fear for their safety or would cause a reasonable person under the circumstances to be frightened, intimidated or emotionally distressed.

### Example

Seth asks Sonjay out on a date, and Sonjay declines. Subsequently, Seth sends Sonjay numerous flirtatious Instagram messages, prompting Sonjay to ask him to stop because the messages made him feel uncomfortable. Seth proceeds to show up outside Sonjay's dorm and attempts to speak with him. Seth also asks Sonjay to be his private tutor and gives him a three-page letter expressing his romantic feelings for him.

## FOUNDATIONAL DEFINITIONS Sexual Harassment

### Sexual Assault

Any forcible or non-forcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation, including:

Rape

Sodomy

Sexual Assault with an Object

Fondling

Incest

Statutory Rape

## FOUNDATIONAL DEFINITIONS Sexual Harassment

### Sexual Assault

#### Rape

The **carnal knowledge** of another person, without the consent of that person

Defining the definition

#### **Carnal knowledge**

Sexual intercourse between at least two people, where there is at least some penetration of a vagina by a penis however slight

## FOUNDATIONAL DEFINITIONS Sexual Harassment

### Sexual Assault

#### Sodomy

Oral or anal sexual intercourse with another person, forcibly and/or against the person's will OR not forcibly against the person's will in instances where the victim is incapable of giving consent because of their youth or their temporary or permanent mental or physical incapacity.

#### Defining the definition

#### Intercourse

The physical activity of sex, requiring penetration however slightly of:

- An anus with a penis
- An anus with a tongue
- A vagina with a tongue
- A mouth with a penis
- A mouth with a vagina

## FOUNDATIONAL DEFINITIONS Sexual Harassment

### Sexual Assault

#### Sexual Assault with an Object

To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will OR not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.

#### Defining the definition

#### **Object or instrument?**

Any inanimate object or any part of a person's body not covered under rape or sodomy, including digital penetration.



## FOUNDATIONAL DEFINITIONS Sexual Harassment

### Sexual Assault

#### Fondling

The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will OR not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.

#### Defining the definition

#### **Private body parts?**

Another person's breasts (male and female), buttocks, genital area, and mouth.

# Considering Trauma

# Trauma-Informed Skills for Speaking with Parties

## Before getting into deep water...

- Do your research on cultural considerations and related challenges or barriers
- Help the party feel safe and comfortable
  - Allow them to sit where they feel most comfortable
  - Let them know you have tissues, water, etc. available if needed
  - Consider whether your background is calming if in a virtual meeting
- Seek to understand what may be happening in the person's life
  - Family issues • Medical • Other recent traumatic experiences
- Ask them about their pronouns and/or how they would like you to refer to the other party
- Actively listen, which will likely make the party feel more comfortable to share their experiences

# Trauma-Informed Skills for Speaking with Parties

## When addressing core issues...

- Take the time to affirm their experiences and treat them as human
- Parties are more likely to recall information if they feel calm and relaxed
- Work towards making the party feel **supported** and **heard**
- Say affirming, un-biased human comments: “Thank you for sharing your experience with me.”
- Avoid phrasing that is likely to make the party feel defensive
- Remember that party responses may be the result of fear, confusion, or trauma as opposed to deception
- Ask clarifying questions **after** you have given the party an opportunity to get comfortable and share their experiences
- Become comfortable with silence and gaps in conversation
- Don’t rely on assumptions – ask, ask, ask



## Neurobiology of Trauma

Trauma prompts the brain to focus on survival, not peripheral details

### Sample Questions:

- What, if anything, can't you forget about this experience?
- What was going through your mind during this experience?
- What was the most difficult part of this experience for you?
- What are you able to remember about this experience from your five senses – what did you hear, smell, etc.

## Consequences of Trauma

Remain aware that individuals who have experienced trauma often engage in high-risk health behaviors:

- Suicide attempts
- Alcohol and drug use
- High-risk sexual behaviors
- Re-engaging in sex (consensually) with a perpetrator

**Be aware  
of any  
reporting  
obligations**



A graphic of a spotlight in the top-left corner, with a beam of light shining across the dark background towards the text. The background is black, and the text is centered in the lower half of the frame.

# Spotlight Issue: **Consent**

# Consent

A voluntary and knowing affirmative decision to engage in mutually acceptable sexual activity

## Coercion

Physical force, threat of harm, undue pressure, isolation, confinement

## Incapacity

Alcohol/Drugs, mental impairment, age, asleep, passed out, unconscious



# Incapacity

A state in which someone cannot make rational, reasonable decisions about sexual activity because the person cannot understand the nature or consequence of the sexual interaction, *i.e.* the “who, what, when, where, why, or how”

Incapacitation is **not** the same as being under the influence or intoxicated

## Indicators

Falling/Unable to stand  
Passing in and out  
Vomiting  
Confusion  
Heavily slurred speech

One's own intoxication/incapacitation is not a defense to failing to reasonably perceive someone else's incapacitation or consent

# Model Definitions

## Mental and/or Physical Incapacitation

### Mental Incapacitation

A person is mentally incapacitated when they are rendered substantially incapable of appraising the nature of the other person's conduct and/or resisting a sexual act.

### Physical Incapacitation

A person is physically incapacitated when they are unconscious, physically unable to resist a sexual act, or physically unable to communicate unwillingness to submit a sexual act.

# Consent

A voluntary and knowing **affirmative** decision to engage in mutually acceptable sexual activity

## Affirmative Consent

No one can initiate sexual activity with you unless/until you consent

## Implied Consent

Anyone can initiate sexual activity with you unless/until you object

## Implied Consent Environment

Anyone can initiate sexual activity with you unless/until you object

Key factor to look for is the objection, the **“NO.”**

## Affirmative Consent Environment

No one can initiate sexual activity with you unless/until you consent

Key factor to look for is the assent, the **“YES.”**

So...

## What if there is not a clear yes or no?

In an affirmative consent environment, the sexual activity would be non-consensual.

(Regardless of whether the “no” was unclear, muted, or even non-existent.)

Why? Because you need a clear “yes” for sexual activity to qualify as consensual.

Silence, passivity, or lack of active resistance does not constitute consent.

So...

## What qualifies as a **yes**?

~~Saying yes to the sexual activity on a previous occasion?~~

~~Saying yes to other sexual activity?~~

~~Saying yes initially, then having a change of heart?~~

~~Being in some kind of dating or intimate relationship?~~

~~Accepting gifts, flirting, or leading someone on?~~

~~Going to someone's room/house/apartment?~~

So...

## Really, what qualifies as a **yes**?

It is a fact-specific and policy-specific inquiry

Focuses on Respondent's perception: Did Respondent reasonably perceive consent? It is judged by a reasonable (sober) person standard: Should the Respondent have known that consent was lacking?

Respondent needs clear words or actions that say **yes**.

Both verbal and non-verbal cues count in the analysis.

**Stop.**  
**Seek clarification.**  
**Do not proceed without clear positive signal.**

## Positive Signals of Invitation

“That feels good.”

“I like that.”

“Don’t stop.”

Responsive touching

“Uh-huh”

“I want to \_\_\_\_\_.”

“Why not.”

## Negative Signals of Hesitation

“I’m not sure.”

“I don’t know.”

“Don’t. Stop.”

Pushing away, turning head away

“Huh-uh”

“I don’t want to \_\_\_\_\_.”

“Maybe we shouldn’t.”

## Ambiguous Signals ????

“Please.”

Little sounds.

Tears

Lying still.

“Huh”

Nervous laughter

“Kind of”



## SMALL GROUP DISCUSSION

# Communicating Consent

## List and Share

1. A way of saying **yes** – a positive signal of invitation
2. A way of saying **no** – a negative signal of hesitation
3. An ambiguous communication that could be a positive or negative signal

Each communication may be verbal or non-verbal

**Other Important Considerations:**  
**A Conversation about**  
**Disabilities & FERPA**

**Disability  
Intersection**  
Five  
Things to  
Know

1

Accommodations (including potentially delays) are available in connection with grievance procedures (not just in connection with classes and physical access)

2

The impact of an individual's disability may also be substantively relevant to the investigation and resolution of allegations

3

If that is the case, we strongly consider seeking additional learning while avoiding stereotyping

4

**Three critical levels:** 1. Learning about the disability generally; 2. Learning about how the disability typically impacts this individual; and 3. Learning about the specific impact, if any, in the interaction(s) in question

5

**When in doubt, ask!**

Title IX Coordinator...ask Disability Services Coordinator  
Everyone else...ask Title IX Coordinator

**FERPA  
Intersection  
Five  
Things to  
Know**

- 1** Among other things, FERPA gives students the right not to have personally identifiable information (PII) from education records disclosed without consent (subject to exceptions)
- 2** Education records and PII defined broadly
- 3** Can always disclose with student consent
- 4** “Other school officials” exception allows for sharing within the Title IX grievance process  
Subpoenas can override FERPA but are subject to highly specific notification requirements. Involve counsel
- 5** **When in doubt, ask!**  
Title IX Coordinator...ask Legal Counsel and/or Registrar  
Everyone else...ask Title IX Coordinator

# FERPA: Education Records & PII

Education Records  
& PII are  
defined broadly:

- Directly related to a student and maintained by the school
- Not sole possession records, law enforcement unit records, employment records, medical records, or post-attendance records
- PII includes (but is not limited to): name; Social Security Number; student number; other indirect identifiers (birthdate and place); information that can be used by a reasonable person in the school community to identify the student

JacksonLewis

Thank **you.**

# Your Jackson Lewis Title IX Team



**Joshua D.  
Whitlock**



**Sarah Ford  
Neorr**



**Carol R.  
Ashley**



**Susan D.  
Friedfel**



**Monica H.  
Khetarpal**



**Crystal L.  
Tyler**



**Nicholas A.  
Simpson**



**Laura A.  
Ahrens**

To get in touch with the team,  
please contact **Josh Whitlock.**

[Josh.Whitlock@JacksonLewis.com](mailto:Josh.Whitlock@JacksonLewis.com)  
(980) 465-7242

# Legal Disclaimer

Thank you for licensing our 2021-2022 Title IX Video Training Series (the “Series”). Your use of the Series is not a substitute for legal advice from an experienced attorney licensed to practice in your jurisdiction. The Series is being licensed to you as an aid to your consultation with outside legal counsel or in-house legal staff and experienced professionals. By making the Series available to you, we are not providing you with legal, accounting, or other professional advice or making recommendations regarding legal rights, duties, defenses, or strategies. Statutes, rules, regulations, administrative agency interpretations, and case law change and vary from court to court, agency to agency, state to state, and jurisdiction to jurisdiction. Understanding of the law is evolving rapidly in this area. This Series is our best attempt to summarize the current state of the law and is subject to change. If you are using the Series to develop policies or to make decisions, you should consider all appropriate facts and legal, operational, and business risks and consult with an experienced and knowledgeable attorney before taking any definitive actions. The focus of the Series is on addressing complaints of Sexual Harassment, as that term is defined under Title IX of the Education Amendments Act of 1972 and its implementing regulations (“Title IX”). Other federal, state, and local laws may apply but are outside of the scope of the Series. The examples used in the Series are fictional and any similarity to actual situations is unintentional. Title IX applies equally to all people of all genders, gender identities, and sexual orientations; any single example used in this Series is used for that purpose only. Portions of the Series may qualify as “attorney advertising” in some jurisdictions. Jackson Lewis, however, intends for it to be used only for educational and informational purposes.



# No Unauthorized Use

The Series is licensed to you on a non-exclusive basis for your use. By purchasing and/or receiving the Series you agree to accept this limited license and become a licensee of proprietary Jackson Lewis-owned materials and accept all terms and conditions of this license and agree to abide by all provisions. No other rights are provided, and all other rights are reserved. The Series is proprietary and is licensed to the licensee only for the licensee's use. This license permits the licensee to use the Series personally and/or internally to the licensee's school for training purposes only. The Series may be used to train your Title IX team and thus is subject to 34 CFR Part 106.45(b)(10), requiring all written training materials to be posted publicly on your school's website. No other public display, sharing, or publication of the Series by a licensee/purchaser is permitted. You are not authorized to copy or adapt the Series, including both the recorded video component and the full set of written slides, without explicit written permission from Jackson Lewis, and no one may remove this license language from any version of the Series materials. Licensees will receive a link to the full set of written slides from Jackson Lewis. That link, and that link only, may be posted to the licensee's website for purposes of permitting public access of the written materials for review/inspection, only. Should any licensee post or permit someone to post any portion of the Series, including both the recorded video component and the full set of written slides, to a public website outside of the authorized link to the written slides, Jackson Lewis will send a letter instructing the licensee to immediately remove the content from the public website upon penalty of copyright violation. The Series may not be used for any commercial purpose except by Jackson Lewis.