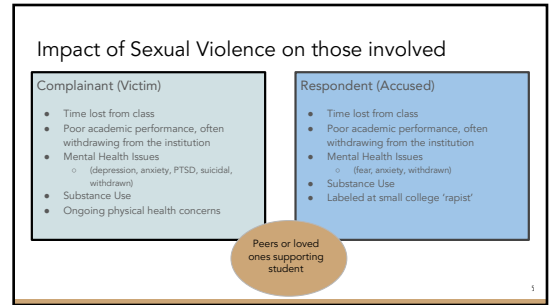
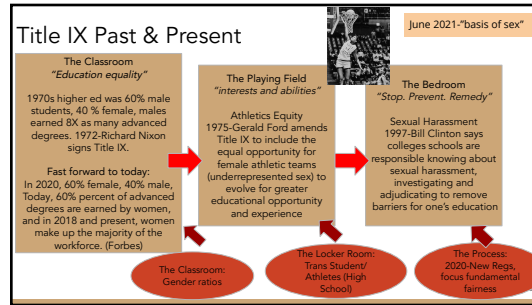


# Luther College Title IX Hearing Board Training

Fall 2021




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## Why is this important?

	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Reports	25	39	60	94	82*	37*
Complaints	6	3	11	11	7	5
Investigations	6	8	11	10	4	3
Hearings	6	3	10	4	2	3
Restorative Justice			1			2

\*Reporting believed to be impacted by COVID-19

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## Prohibited Conduct

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## Key Terms

Complainant: An individual who is alleged to be the victim of conduct that could constitute sexual harassment

Respondent: An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Advisor: a person chosen by a party, or appointed by the College only if a party does not have an advisor at the hearing, advisors are required to conduct live cross-examination (in the past advisors have been peers, parents, mentors, or attorneys)

Formal Complaint: A signed document filed by a Complainant or Title IX Coordinator alleging sexual harassment and requesting the Luther investigate the allegation(s)

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## Sexual harassment

- Quid pro quo- a Luther employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct
- Unwelcome conduct on the basis of sex that is so severe, pervasive, AND objectively offensive that effectively denies a person equal access to the school's education program or activity

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## Hostile Environment

- unwelcome conduct,
- determined to be so severe, and
- pervasive, and,
- objectively offensive,
- that it effectively denies a person equal access to the College's educational program or activity.

Unwelcomeness is subjective and determined by the Complainant. Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the **perspective of a reasonable person** in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.



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## [Sexual exploitation has adapted to the times!]

Sexual Exploitation refers to a situation in which a person abuses sexual advantage of another person

- Harassing sexual or gender-based behaviors that become so severe **or** pervasive as to interfere with an individual's ability to work, learn or participate in the College's programs.
- Voyeurism and invasion of sexual privacy:
  - Observing or allowing others to observe a person undressing, using the bathroom, engaging in sexual activity, or in other private situations in which there is a reasonable expectation of privacy, without consent
  - Taking pictures, video recording, or audio recording of a person undressing, using the bathroom, engaging in sexual activity, or in other private situations in which there is a reasonable expectation of privacy, without consent
  - Disseminating or threatening to disseminate pictures, video, or audio recording of a person undressing, using the bathroom, engaging in sexual activity, or in other private situations in which there is a reasonable expectation of privacy, without consent (**Revenge Porn**)

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## [Sexual exploitation continued!]

Sexual Exploitation refers to a situation in which a person abusive sexual advantage of another person

- Misappropriation of another person's identity on apps, websites, or other venues designed for dating or sexual benefit (**Catfishing**)
- Intentional unwanted disclosure or threats to disclose an individual's sexual orientation, gender identity, or gender expression
- Engaging in sexual activity with another person while knowingly infected with human immunodeficiency virus (HIV) or a sexually-transmitted disease (STD) or infection (STI), without informing the other person of the infection
- Causing or attempting to cause the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity, or for the purpose of making that person vulnerable to non-consensual sexual activity
- Prostituting another person or engaging in sex trafficking
- Knowingly soliciting a minor for sexual activity
- Creation, possession, or dissemination of child pornography

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## Rape

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant, including instances in which the Complainant is incapable of giving consent, whether due to incapacity or due to being below the statutory age of consent.

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## Fondling

The touching of the private body parts of another person (buttocks, groin, breasts), for the purpose of sexual gratification, without the consent of the Complainant, including instances in which the Complainant is incapable of giving consent.

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## Abusive relationships

Violence committed by a person who has been in a romantic or intimate relationship with another. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. Violence can occur in relationships regardless of gender.

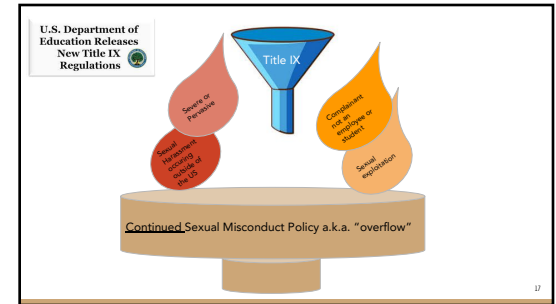
- Dating violence
- Domestic violence

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## Stalking

Engaging in a course of conduct, towards another person, that would cause a reasonable person to fear bodily injury to themselves or another; or suffer substantial emotional distress.

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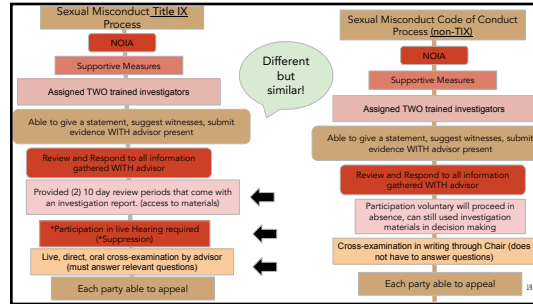
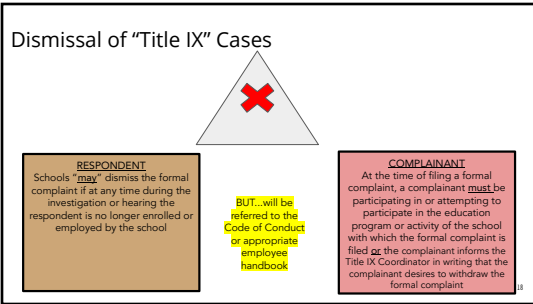
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### Nonconsensual sexual activity

Consent is knowing, voluntary and clear permission by word or action by all participants to a sexual activity. Since individuals may experience the same interaction in different ways, it is the responsibility of each party to make certain that the other has consented before engaging in the specific activity. For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct.

**New:**  
Reasonable reciprocation can be implied.

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# Consent

- *Affirmative* - silence, absence of resistance, or past behavior does not constitute consent
- *Specific* - consent to one sexual activity does not imply consent to a different sexual activity
- *Knowing* - an individual who is incapacitated due to sleep, alcohol, drugs, etc. cannot consent
- *Voluntary* - consent cannot be obtained through force, **fraud**, threats, intimidation, or undue coercion
- *Revocable* - may be withdrawn at any time

## CONSENT



Freely Given  
Reversible  
Informed  
Enthusiastic  
Specific



2 PRONG TEST!

"Reasonably should have known"

# Consent Question

Proof of consent or non-consent is not a burden placed on either party involved in an incident. **Instead, the burden remains on the College to determine whether its policy has been violated.** The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

1. Force
2. Incapacity
3. Consent

What clear words or actions by the Complainant gave the Respondent permission for that specific sexual activity to take place?



# Newer Language with Consent Policy [kink]

Consent in relationships must also be considered in context. When parties consent to BDSM (bondage, discipline/dominance, submission/sadism, masochism) or other forms of kink, non-consent may be shown by the use of a safe word. Resistance, force, violence, or even saying "no" may be part of the kink and thus consensual, so the College's evaluation of communication in kink situations should be guided by reasonableness, rather than strict adherence to the policy that assumes non-kink relationships as a default.

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## Undue Coercion

- FREQUENCY
- DURATION
- INTENSITY
- ISOLATION
- POWER DIFFERENTIAL

how would a **reasonable person** perceive this amount of pressure?

"Acknowledge that there is a socially tolerated amount of pressure for sex."

"Coercion pushes to and THEN past someone's resistance point."

"Did they engage in sexual activity because they wanted to or to get the pressure to stop?"

"Is the pressure seductive or attacking?"

Brett Sokolow  
President of ATSA



## Wallet Example

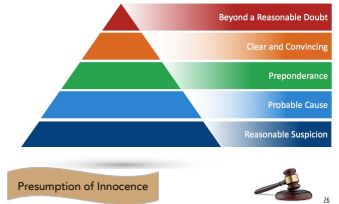


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## The Preponderance of Evidence Standard



"More likely than not"  
50% and a feather



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## Amnesty-

Parties or witnesses can be hesitant to report to College officials or participate in grievance processes because they fear that they themselves may be in violation of certain policies, such as underage drinking or use of illicit drugs.

To encourage reporting and participation in the process, the College maintains a policy of offering parties and witnesses amnesty from minor policy violations.



Includes COVID-19 Amnesty



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## Sexual Misconduct Investigation and Adjudication

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- Objective-ish standard of hypothetical person in society
- Average judgement, skill, care-Always sober!
- Used in deliberation, based on investigation and hearing testimony

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“Department of Education personnel won’t second guess your responsibility determination just because they would have come to a different conclusion. Assuming you followed the required procedures, your decision is entitled to deference.”



## Complaint

- A report becomes a complaint when:
  - the victim communicates desire to go through the formal grievance process and signs a Formal Complaint.



## Investigation

- Both parties received advance written notice of investigation and allegation(s)
- Investigators interview witnesses and obtain other evidence (fact gathering)
- Both parties have opportunity to submit written accounts and suggest potential witnesses
- Both parties will have 10 days to review and respond to initial drafts of investigation summary and 10 days to review and respond to final summary, Code of Conduct they get roughly 2/3 weeks not 20 days
- Timeframe: 3-5 weeks

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## Suppression Clause July 28, 2021

106.45(b)(6)(i):

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.



The provision was vacated because it was not sufficiently justified by ED in the regs. That means it is illegal for ED to enforce it, but it is not illegal for colleges to have the provision in policies.

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## TITLE IX Hearing

- Before the hearing, an official charge letter is issued detailing the issue(s) to be resolved
- Luther College Hearing Board is comprised of faculty, staff, and students
- Questioning during the hearing
- (Deliberation) Board finds respondent "responsible" or "not responsible" based on the preponderance of the evidence
- (if necessary) Sanctions: up to suspension & expulsion
- (Campus Appeals Board) Both parties have right to appeal



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## Hearing Expectations

NOT a neutral face



- Tone when questioning (no sarcasm)
- Maintain composure (no fidgeting, do not look shocked)
- Nod along with their narrative (no eye rolling or shaking head)
- **Do not apologize** for the situation to a party or a witness
- Keep eye contact
- Use their language in questioning (you said, " \_\_\_\_\_ " tell me more)



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## Credibility determinations

Is the individual's account consistent or does it have different narratives?

Is there a possibility of a hidden agenda (ex: best friend of a party is a witness)

Did the parties rehearse statement together? Does it seem influenced?

Did the individual cooperate during the process?

Does the individual's statement make sense? Plausible?



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## Criminal process



- Criminal process runs entirely independent of Luther conduct process
  - More power to compel evidence
  - Higher standard of proof
  - Takes much more time
- If asked by police or prosecutor, we would put Luther investigation on hold
- **Only happens if/when a victim requests the involvement of law enforcement**

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## Factors considered when sanctioning



- The nature, severity of, and circumstances surrounding the violation(s)
- The Respondent's disciplinary history (has been found responsible)
- The Respondent's role and level of responsibility at the College
- ~~The impact on the parties (eliminated impact statements for 2020-2021)~~
- Institutional precedent for how similar infractions have been addressed
- Any other information deemed relevant by the Hearing Board



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STUDENT	EMPLOYEE
<ul style="list-style-type: none"> <li>• Unilateral No Contact Directive:</li> <li>• A Mental Health or Substance Abuse Evaluation</li> <li>• Probation:</li> <li>• Residence Hall Suspension: Termination of a student's right to live or be present in College-owned housing for a definite period of time.</li> <li>• Suspension</li> <li>• Expulsion</li> <li>• Educational sanctions</li> </ul> 	<ul style="list-style-type: none"> <li>• Unilateral No-Contact Directive</li> <li>• Educational sanctions</li> <li>• Required counseling</li> <li>• Imposition of performance improvement plan</li> <li>• Probation</li> <li>• Loss of annual pay increase</li> <li>• Loss of oversight or supervisory responsibility</li> <li>• Demotion or job reassignment</li> <li>• Suspension, with or without pay</li> <li>• Revocation or denial of tenure for a specified period of time</li> <li>• Termination of employment</li> </ul>

# Campus Appeals Board

- ### Four reasons to appeal at Luther (available to both parties)
- a. Deviations from designated procedures within the investigation or adjudication processes, which could have affected the outcome
  - b. A conflict of interest or the bias of the Title IX Coordinator, investigator or member of the Hearing Board sufficient to have affected the outcome
  - c. To determine whether the sanctions imposed were appropriate for the violation of the Policy which the student or employee was found to have committed
  - d. To consider new information or other relevant facts not brought out in the original hearing, sufficient to alter a decision, because such information and/or facts were not known or available to the person appealing at the time of the original hearing
- If appeal upheld often result in a return to the Hearing Board
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The Campus Appeals Board does not substitute its own judgment for that of the original hearing body, nor concern itself with the possibility that others might have arrived at a different judgment. Its terms of reference extend only to investigation of the procedures by which the original judgment was reached. If any of the grounds in the Request for Appeal do not meet the grounds in this policy, that request will be denied by the Appeals Board Chair and the parties will be notified in writing of the denial and the rationale.



You are not conducting a *de novo* review.

Examples of Appeals:

- Deviations from designated procedures within the investigation or adjudication processes, which could have affected the outcome

College Policy says: The College believes the burden is on the institution to determine based on the information available to the Board was the policy violated, and if so, what is an appropriate sanction.

Hearing Outcome: Board found responsible based on overwhelming witness testimony for the complainant's narrative during the incident and events following.

Appeal Claim: Respondent claims investigators told her she was responsible for gathering her own witness statements (co-workers) to support her claim that she was working at the local gas station at the time of the incident. The respondent working 30 hours per work and being a full-time student, she was not able to gather the statements to submit on her behalf.

Examples of Appeals:

- A conflict of interest or the bias of the Title IX Coordinator, investigator or member of the Hearing Board sufficient to have affected the outcome

Hearing Outcome: Board found not responsible based on a sober key witness stated the Complainant consented to the sexual activity with first-hand direct observation.

Appeal Claim: Complainant claims the key witness testimony should have not been considered by the Board because the witness is a cousin of the respondent.

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Examples of Appeals:

- To consider new information or other relevant facts not brought out in the original hearing, sufficient to alter a decision, because such information and/or facts were not known or available to the person appealing at the time of the original hearing

Hearing Outcome: Board found responsible for egregious sexual misconduct based on Snapchat correspondence and collaborative testimony.

Appeal Claim: Post hearing, respondent submits old text messages he searched for from the Complainant demonstrating his consent in writing after the alleged incident.

Respondent also found a video on his laptop from that night showing the intoxication state of the complainant.

APPEAL



## Conflict of Interest Bias Prejudgement “assumptions”

## Conflict of interest

Decorah is small, Luther is smaller

Relationship or future relationship with parties involved

Examples: Enrolled in your Spanish class for next semester (recuse)

Involved in the same fraternity as you and you were their pledge master (recuse)

Once were enrolled in the same Health 100 class and you remember their presentation (remain)

(maybe a witness-would need to talk through)

Could the outcome of this case impact me?

Invested because of the athletic team, choir, research project, work-study student, fellow club officer

Hearsay/Preconceived reputation (think you know what happened before hearing the case)

## BIAS

"It is our generations responsibility to believe women" #MeToo

"Student athletes on our campus have been entitled to get whatever they want, now we will make sure that stops."

"One frivolous accusation can ruin a young man's life"

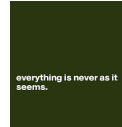
"The system is broken, they are not responsible, they were only accused for the color of their skin."

## Prejudgement "Assumptions"

"Classic bar fight with two drunk kids"

Replacing facts with your own personal experience that has similarities with the case


"Students always lie when they are caught"



## Investigators

INTERVIEW  
IN PROGRESS

All investigations are thorough, reliable, impartial, prompt, and fair. Investigations involve interviews with all relevant parties and witnesses, and obtaining available relevant evidence, both inculpatory (*implying guilt*) and exculpatory (*implying innocence*). Even "minimally relevant" is NOW "relevant" but given little weight.

All parties have a full and fair opportunity, through the investigation process, to suggest witnesses and questions, to provide evidence, and to fully review and respond to all evidence on the record.  our burden to give our best effort to gather it.

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## All information gathered



In the investigative report

Could be in the investigative report

Not in the investigative report

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## Relevant



Relevant

When [name] was kissing me on the neck, I said, "I don't want to do this, please stop."

When I was kissing [name] on the neck, he said, "that feels so good, don't stop."

Text messages the night of and morning after the incident between the complainant and respondent.

Photos of the room the night of the incident, that verify the hard alcohol and drinking games present.

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## Somewhat Relevant



Somewhat Relevant

Witness testimony of two eating at the cafeteria together several hours prior to the incident and party.

Witness testimony that the complainant wanted to be in a serious relationship with the respondent.

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## Minimally Relevant



Complainant discloses he was sexual abused as a child.

Respondent discloses this is so hard because she can't tell her dad because he is really sick right now and her mom is already stressed.

Witness testimony saying the respondent is the most upstanding citizen they know.

Witness testimony saying the respondent is a cheater in all their romantic relationships.

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## Rape Shield & Mental Health

Rape Shield: Questions and evidence about the party's sexual predisposition or prior sexual behavior are not relevant

UNLESS (deemed ok by Dept. of Education)

1. Offered to prove that someone other than respondent committed the conduct

2. Concern specific incidents of prior sexual behavior with respondent and offered to prove consent

Cannot access, disclose or consider the following

- A party's records from a
  - Physician
  - Psychiatrist
  - Psychologist
  - Counselor

Without voluntary written consent.

Will be made clear if submitted then the other party (and board) can address it

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## Luther Title IX Team (Not listed Hearing Board Members)



Bob Ham  
Lead Investigator



Janet Hunter  
Case Manager  
Deputy Title IX  
Coordinator



Nan Hibbs  
Chair



Jake Dyer  
Investigator



Kris Franzen  
Investigator



Amanda Bailey  
Athletics Deputy Title IX  
Coordinator



Matt Ellis  
Deputy Title IX Coordinator  
for employees



Jessica Rupp  
Prevention Coordinator  
NASA Advisor



Erik Stoen  
Investigator



Ashley Benson  
Appeals Chair



Kasey Nilgal  
Title IX Coordinator

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Case Studies

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Questions?

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