



Sexual Harassment and Sexual Misconduct Policy

**Introduction to New Policy and Training for
Investigators, Adjudicators and Appeals Personnel**

October 14, 2020

HOW DID WE GET HERE?

- 2011 Dear Colleague Letter – *RESCINDED*
- 2014 OCR Q&A – *RESCINDED*
- 2017 OCR Rescission and Guidance
- 2018 Proposed Title IX Regulations
- May 6, 2020 Final Title IX Regulations
(effective August 14, 2020)



TRANSITION TO NEW UC POLICY

- August 5, 2020 OCR Guidance
- UC Implementation:
[A]ny reports that are made on or after August 14, 2020, regardless of the date of the reported incident, will be adjudicated using the new regulations.



GOVERNING LAWS

- Title IX (2020 vintage)
- VAWA Amendments to Clery Act (2014)
- New York Education Law Article 129-B (“Enough is Enough”) (2015)



Basic VAWA

- Violence Against Women Act (VAWA)
- Historically, a law designed to increase criminal prosecution of crimes against women
- 2014 amendments focus on four concepts:
 - Sexual assault
 - Dating violence
 - Domestic violence
 - Stalking
- Required increase in education/training, additional amounts of notification and policy elements
- Created “**advisor of choice**”



**Basic
Enough is
Enough**

- State law that went into effect in October 2015 (Article 129-B) – Also focuses on 4 categories (sexual assault, domestic violence, dating violence and stalking))
 - Right to an appeal before a panel if the responding party/accused is a student
 - Right to seek review of interim/corrective measures imposed
 - Single statewide definition of “affirmative consent”
 - Right to written notice in advance of any investigatory or disciplinary meeting
 - Right to have prior sexual history excluded if it involves any person other than the other party to the complaint
 - Right to have mental health diagnosis or treatment excluded
 - “Student Bill of Rights” and other verbatim policy requirements



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TIX PARAMETERS

- Scope of covered offenses
- Institutional Education Program or Activity
 - Locations, events, or circumstances where the institution exercises substantial control over both the Responding Party and the context in which the conduct at issue is alleged to have occurred
 - Any building owned or controlled by a student organization that is officially recognized by the institution
- Within the United States
- Complainant must be participating or seeking to participate in educational program or activity



SCOPE OF UC POLICY

- Title IX Offenses
- VAWA/EIE Offenses
- Other Prohibited Conduct
- Same Process applies to all
 - Why??



SCOPE OF UC POLICY

- Title IX's "Must Dismiss" Provision:
- Title IX Coordinator must "dismiss" allegations for purposes of Title IX if it is apparent that the allegations are not within the scope of Title IX:
 - Would not meet USDOE's regulatory definition even if proved
 - Conduct did not occur in the College's education program or activity
 - Conduct did not occur against a person in the United States
- Institutional discretion to process pursuant to non-Title IX provisions of institutional policies



SCOPE OF UC POLICY

Title IX Violations:

- Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

College Standards Violations:

- Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking
- Sexual Exploitation



TITLE IX VIOLATIONS (Limited by Context)

The designation of conduct or allegations as either “Title IX Violations” or “College Standards Violations” is not a function of the seriousness of the alleged conduct but rather a function of the scope and coverage of Title IX versus the College’s broader obligations under New York Education Law Article 129-B and its discretion to prohibit and discipline a larger scope of inappropriate behavior.



TITLE IX VIOLATIONS (Limited by Context)

In accordance with Title IX as interpreted by the United States Department of Education, the College recognizes the following as conduct violations within the meaning of Title IX, provided that the context and circumstances of the conduct fall within the scope of Title IX, including but not limited to that the reporting party/complainant was in the United States at the time of the alleged conduct, that the reporting party/complainant is participating in or seeking to participate in the College's education program or activity at the time of the complaint, and that the conduct is alleged to have occurred in the context of the College's education program or activity:



TITLE IX VIOLATIONS

Sexual Harassment (as defined by Title IX):

- An employee conditioning provision of an aid, benefit or service on participation in unwelcome sexual conduct (i.e., quid pro quo); or
- Unwelcome conduct that a reasonable person would determine is so severe, pervasive, ***and*** objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity



TITLE IX VIOLATIONS

Sexual Assault:

- Rape: The 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 victim
- Fondling: Any intentional touching, however slight, for purposes of sexual gratification, of the private body parts (including genitalia, anus, groin, breast, inner thigh, or buttocks) of another person, forcibly and/or against that person's will; or, not forcibly or against the person's will where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity. This may include non-penetrative acts, touching directly or with an object, and/or touching the private body parts of another over clothing
- Incest: Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
- Statutory Rape: Non-forcible sexual intercourse with a person who is under the statutory age of consent



TITLE IX VIOLATIONS

Domestic Violence:

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, 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



TITLE IX VIOLATIONS

Dating Violence:

- Violence (including but not limited to sexual or physical abuse or the threat of such abuse) committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
- Does not include acts covered under the definition of domestic violence



TITLE IX VIOLATIONS

Stalking:

Engaging in a course of conduct directed at a specific person on the basis of sex (including gender, sexual orientation, gender identity or gender expression) that would cause a reasonable person to (A) fear for their safety or the safety of others; or (B) suffer substantial emotional distress

- “Course of conduct” = two or more acts
- “Substantial emotional distress” = significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling
- “Reasonable person” = reasonable person under similar circumstances and with similar identities to the person against whom the stalking was committed



COLLEGE STANDARDS VIOLATIONS

For purpose of College Standards violations, the below conduct is prohibited even if the conduct occurs off-campus, outside the United States, if the reporting party/complainant is not participating or seeking to participate in the College's education program or activity, or otherwise in circumstances over which the College does not have influence or control, including but not limited to during College academic breaks.



COLLEGE STANDARDS VIOLATIONS

Sexual Harassment:

- Unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex or gender, sexual orientation, or gender identity or expression, when such conduct has the purpose or effect of unreasonably interfering with an individual's work, academic, or extracurricular performance, or creating an intimidating, hostile, or offensive work or learning environment, even if the reporting individual is not the intended target of the sexual harassment.
- The fact that a person was personally offended by a statement or incident does not alone constitute a violation. Instead, the determination is based on a "reasonable person" standard and takes into account the totality of the circumstances.



COLLEGE STANDARDS VIOLATIONS

Sexual Harassment:

- May be verbal, physical, visual, or communications-based
- Also includes gender-based harassment or sex- or gender-stereotyping, even if those acts do not involve conduct of a sexual nature
- Sexual harassment also includes quid pro quo harassment



COLLEGE STANDARDS VIOLATIONS

Sexual Assault:

- **Non-Consensual Sexual Intercourse.** The 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, forcibly or without affirmative consent or where the victim is incapable of affirmative consent due to mental or physical incapacity.
 - Also includes non-forcible sexual intercourse with a person who is under the statutory age of consent. In New York, the statutory age of consent is 17 years old.
- **Non-Consensual Sexual Contact.** Any intentional touching, however slight, for purposes of sexual gratification or with sexual intent, of the private body parts (including genitalia, anus, groin, breast, inner thigh, or buttocks) of another person without affirmative consent. This may include non-penetrative acts, touching directly or with an object, and/or touching the private body parts of another over clothing. This may also include forcing or causing another without affirmative consent to touch one's own private body parts.



COLLEGE STANDARDS VIOLATIONS

Does not constitute sexual assault as a Title IX Category Violation because of the nature of the behavior or the context in which it occurs (for example because the reporting party/complainant was not in the United States at the time of the alleged conduct, because the reporting party/complainant was not participating in or seeking to participate in the College's education program or activity at the time of the complaint, or because the conduct did not occur in the context of the College's education program or activity).



COLLEGE STANDARDS VIOLATIONS

Domestic Violence:

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, 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

- Does not constitute domestic violence as a Title IX Category Violation because of the context in which it occurs (for example because the reporting party/complainant was not in the United States at the time of the alleged conduct, because the reporting party/complainant was not participating in or seeking to participate in the College's education program or activity at the time of the complaint, or because the conduct did not occur in the context of the College's education program or activity)



COLLEGE STANDARDS VIOLATIONS

Domestic Violence:

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
- Does not include acts covered under the definition of domestic violence

Does not constitute dating violence as a Title IX Category Violation because of the context in which it occurs (for example because the reporting party/complainant was not in the United States at the time of the alleged conduct, because the reporting party/complainant was not participating in or seeking to participate in the College's education program or activity at the time of the complaint, or because the conduct did not occur in the context of the College's education program or activity).



COLLEGE STANDARDS VIOLATIONS

Stalking:

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to-- (A) fear for their safety or the safety of others; or (B) suffer substantial emotional distress
- “Course of conduct” = two or more acts
- “Substantial emotional distress” = significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling
- “Reasonable person” = reasonable person under similar circumstances and with similar identities to the person against whom the stalking was committed



COLLEGE STANDARDS VIOLATIONS

Stalking (cont'd):

- Does not constitute stalking as a Title IX Category Violation because of basis on which it occurs or the context in which it occurs (for example because the reporting party/complainant was not in the United States at the time of the alleged conduct, because the reporting party/complainant was not participating in or seeking to participate in the College's education program or activity at the time of the complaint, or because the conduct did not occur in the context of the College's education program or activity)
 - (May include stalking other than on the basis of sex)



COLLEGE STANDARDS VIOLATIONS

Sexual Exploitation:

- Taking sexual advantage of another without consent, in a manner that does not constitute another violation under the Policy. Examples:
 - Prostituting another person
 - Observing or recording a sexual or other private activity
 - Taking or distributing intimate images without consent or beyond the boundaries of consent
 - Consensual sexual activity while knowingly infected with STI or STD, without notifying one's partner
 - Self-exposure of genitalia



COLLEGE STANDARDS VIOLATIONS

Examples (cont'd):

- Nonconsensual disrobing of another to expose private body parts
- Causing or attempting to cause incapacitation for the purpose of compromising ability to give consent or creating vulnerability to non-consensual sexual activity
- Misappropriation of identity on dating or sexual connection platforms
- Forcing a person to take an action by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity



RETALIATION

Retaliation:

- An adverse act perpetrated:
 - to “get back” at a person because the person reported misconduct, filed a complaint, or participated in an investigation or proceeding in any capacity (e.g., as a Complainant, Responding Party or witness) or declined to do so; or
 - for the purpose of interfering with any right or privilege under the policy
- Includes threatening, intimidating, harassing, coercing or any other conduct that would discourage a reasonable person from engaging in activity protected under this policy



QUESTIONS?



CONSENT:

Definition Mandated by Enough is Enough

“Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant’s sex, sexual orientation, gender identity, or gender expression”



CONSENT:

Definition Mandated by Enough is Enough

- “Yes” means “Yes”
- “No” means “No”
- But absence of a verbal “Yes” does not mean “No”
- Actions, if voluntary and clear, can express consent
- Consent can be given through words or actions so long as the word or action is clear regarding willingness to engage in the sexual activity



NYS GUIDANCE

There is no requirement under the definition of consent that there be “verbal” consent or a specific statement of yes. To require a verbal statement would be to exclude hearing and speaking impaired students from consenting to sexual activity. Consent can be given through words or actions so long as the word or action is clear regarding willingness to engage in the sexual activity. The legislation says that silence “in and of itself” is not consent; a reporting individual failing to say no or actively resist is not a defense to a charge of sexual activity without consent. Please be advised that this a departure from New York State Penal Law relating to criminal charges.



CONSENT

- Consent to some sexual activity is not necessarily consent to other activity
- Consent to past activity is not necessarily consent to future activity
- If consent is withdrawn, sexual activity must cease
- Stopping at the point that consent is withdrawn or can no longer be given can be asserted as a defense to a charge of sexual activity or contact without consent

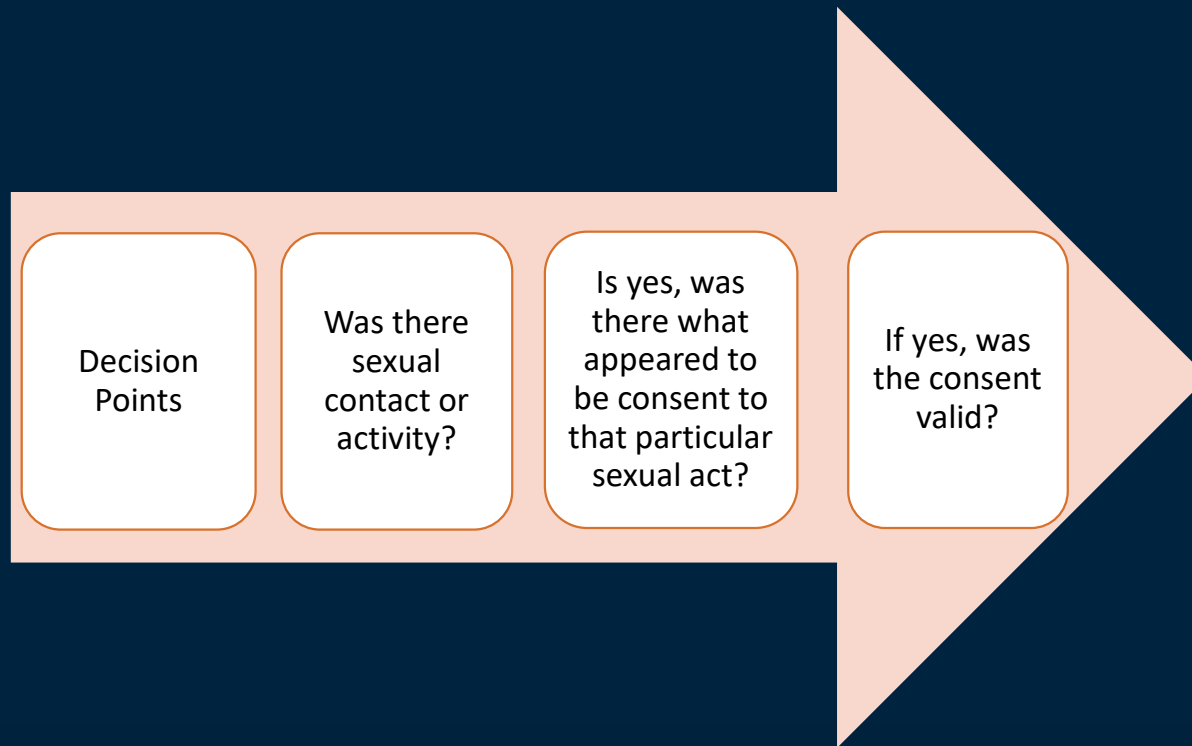


ANALYZING AFFIRMATIVE CONSENT: Standing Romantic Relationship

- Consent to past sexual contact is not necessarily consent to future sexual contact
- BUT the parties' historical interactions could be relevant to the consent analysis
 - Was there a pattern to the parties' sexual encounters?
 - Did the relationship yield non-verbal communication or understanding relevant to the consent issue?
- May be reasonable to lend non-verbal indicia of consent more weight than in a stranger encounter



CONSENT



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CONSENT

- Circumstances precluding consent:
 - Incapacitation (mental or physical)
 - Unconsciousness (sleep)
 - Physical restraint
 - Any form of threats or coercion
 - Being a minor



INCAPACITATION

- Evaluating Intoxication vs. Incapacitation

Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore be unable to consent.

- Intoxicated does not necessarily mean incapacitated
- The question is whether a person could make a “knowing decision” to engage in the activity
- No “legal limit” test like for driving
- Alcohol impacts individuals differently
- Focus should be on the impact of alcohol consumption



INCAPACITATION

- Physical manifestations of intoxication may provide evidence tending to suggest incapacitation, but cognitive ability is the key.
 - How much alcohol was consumed and how quickly? And when in relation to the incident?
 - Factors in intoxication: weight, gender, genetics, food consumption
 - Did the complainant pass out or black out?
 - Did the complainant vomit at any point?
 - How was the complainant's speech, gait, focusing of the eyes, speaking in a way that made sense at the time of the incident?
 - What was the complainant's condition when last seen by reliable third-party witnesses?



INCAPACITATION

- Did the complainant seem to understand where they were and where other people were? Was their thinking organized or disorganized?
- Could the complainant walk or did someone have to assist or carry them?
- What physical tasks did the complainant perform, and how well did they perform them (e.g., texting, taking photos, removing clothes, etc.)?
- Could the complainant make and maintain eye contact with others?
- Was the complainant able to remove their own clothes?



FORCE

- UC Policy:

Force is the use of physical violence and/or imposing on someone physically to gain sexual access. Force also includes threats, intimidation (implied threats), and coercion that overcome resistance or produce [purported (but ineffective)] consent.



COERCION

What is coercion?

- EIE Guidance states “Voluntary consent means that consent under coercion such as threat of violence is not consent”
- Challenge – distinguishing reluctant sex from coerced (and thus nonconsensual) sex
- Definitions in other contexts
 - NY Penal Law defines coercion as an act of convincing someone to do something through the use of threats or other force
 - Dictionary definitions:
 - Coercion – the act, process or power of compelling an act or choice or to achieve something by force or threat
- Lacks the ability to knowingly and voluntarily choose?



COERCION

UC Policy:

*Coercion is a threat, undue pressure, or intimidation to engage in sexual activity. Coercion is more than an effort to persuade, seduce, entice, or attract another person to engage in sexual activity. **A person's words or conduct are sufficient to constitute coercion if they deprive another individual of the ability to choose whether or not to engage in sexual activity.***



QUESTIONS?



THE NEW UC PROCESS: HOW DOES IT WORK?

- No longer an investigatory/recommendation process with determination based solely on report
 - Investigation with opportunity for review;
 - followed by TIX-mandated live hearing;
 - followed by TIX- and EIE- compliant appellate process



COMPLAINT PROCESS

- Anyone can report a concern or a violation
- A written Formal Complaint must be filed to access the formal adjudication process or the informal resolution process (but not supportive measures)
 - Filed by the person who allegedly experienced the misconduct or by the Title IX Coordinator
- Evaluation of reporting party's wishes and public safety considerations



AMNESTY

- EIE requirement

“The health and safety of every student at Utica College is of utmost importance. Utica College realizes that students who have been drinking and/or using drugs (whether such use is voluntary or involuntary) at the time that violence, including but not limited to domestic violence, dating violence, stalking, or sexual assault, occurs may be hesitant to report such incidents due to fear of potential consequences for their own conduct. Utica College strongly encourages students to report domestic violence, dating violence, stalking, or sexual assault to Utica College officials. A bystander acting in good faith or a reporting individual acting in good faith that discloses any incident of domestic violence, dating violence, stalking, or sexual assault to Utica College officials or law enforcement will not be subject to the College’s Student Code of Conduct action for violations of alcohol and/or drug use policies occurring at or near the time of the commission of the domestic violence, dating violence, stalking, or sexual assault.”



POTENTIAL DISMISSAL OF COMPLAINT OR ALLEGATIONS

- Mandatory dismissal requirement (as previously described)
- Discretionary dismissal (in whole or in part)
 - Complainant withdraws complaint or specific allegations
 - Responding Party is no longer enrolled or employed
 - Circumstances prevent the gathering of evidence sufficient to reach a determination
 - May occur at any juncture
 - Immediately appealable



SUPPORTIVE MEASURES

- Available without a formal complaint
- Available to both parties
- Designed to restore or preserve equal access to the College's education program or activity
- Non-disciplinary and non-punitive
- May not unreasonably burden the other party



SUPPORTIVE MEASURES

Examples (may not be available/appropriate in every case):

- counseling
- extensions of deadlines or other course-related adjustments
- modifications of work or class schedules
- campus escort services
- mutual restrictions, and in certain circumstances one-directional restrictions, on contact between the parties
- changes in work or housing locations
- leaves of absence
- increased security and monitoring of certain areas of the campus



SUPPORTIVE MEASURES

- Available without fee or charge
- Must be kept confidential, to the extent that maintaining confidentiality would not impair the ability to provide the supportive measures
- Implementation is coordinated by the Title IX Coordinator



SUPPORTIVE MEASURES

- If a party's request for a supportive measure is denied, the party will be afforded an opportunity to have the denial promptly reviewed to assess whether the supportive measure is reasonable under the circumstances
- A party who is directly affected by a supportive measure will be afforded an opportunity to request reconsideration of the need for and/or terms of the supportive measure
- A party will be allowed to submit evidence in support of, or in opposition to, the request to the extent the supportive measures under review affect that party
- Determination made by Title IX Coordinator



EMERGENCY REMOVAL

- Immediate threat to the physical health or safety of any student or other individual arising from the allegations
- Based on individualized safety and risk analysis
- Responding Party provided notice and an opportunity to challenge the decision immediately following the removal
 - Submitted to and decided by the Director of Campus Safety
- This is a student process
 - Employees may be placed on administrative leave (consistent with applicable employment policies)



INFORMAL RESOLUTION

- Must be preceded by formal complaint
- Available any time prior to final resolution of allegations
- Broad authorization
 - No longer a categorical prohibition in cases of sexual violence
 - May not be used to resolve allegations that an employee sexually harassed a student
- Complainant, Responding Party and Title IX Coordinator must consent to use the process
 - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume (or commence) the grievance process



THE INVESTIGATION – OVERVIEW

- Process is much the same, but role is different:
 - Old Policy: Investigators make recommendation as to responsibility
 - New Policy: Investigators compile evidence; determination made by separate Decision Maker



NOTICE OF INVESTIGATION

- The College's Sexual Harassment and Sexual Misconduct Policy
- To the extent known:
 - identities of involved parties
 - the date, time, location of the alleged incident(s)
- Factual allegations concerning the alleged violation(s), and policy provisions allegedly violated
- Description of the investigation and adjudication process
- Potential sanctions



NOTICE OF INVESTIGATION

- Presumption of non-responsibility
- Right to advisor of choice (who may be, but is not required to be, an attorney)
- Right to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint, including the evidence upon which the College does not intend to rely in reaching a determination regarding responsibility
- Prohibition on knowingly making false statements or knowingly submitting false information
- Statement about the College's policy on retaliation



THE INVESTIGATION

- Assignment of investigators
- Investigation process is largely the same
 - Timing
 - Permitted Delays
- Advisor of choice
 - Quiet advice and consultation
- Party must be provided with advance notice of date, time, location, participants and purpose of any interview



THE INVESTIGATION

What is the Right Demeanor/Role for an Investigator?

- Fair
- Objective
- Concerned for both complainant and respondent
- Unrevealing of personal views
- Not leaping to conclusions
- Not promising or even suggesting a particular result



THE INVESTIGATION

- Parties and witness should be advised during the interview of the process and expectation to later appear at hearing and submit to cross-examination, as well as the consequences of not attending the hearing and/or submitting to cross-examination questions



THE INVESTIGATION – SCOPE

- Parties entitled to present any evidence directly related to the allegations (including request for witness interviews):
 - Fact witnesses
 - Expert witnesses
 - Character witnesses
 - Other inculpatory and exculpatory evidence
- May not access privileged records without consent



THE INVESTIGATION – LOGISTICS

- In person, telephone, or videoconference
- Limitation on inclusion of others
- Parties may not record
- Opportunity for interviewee to review summary of interview and make corrections



THE INVESTIGATION – Interviewing the Complainant & Respondent

- Think about location
- Recall the difficulty for the student
 - Whether complainant or respondent, this is an emotional, “scary” moment
- Start with open-ended, broad questions
- Ask follow-up questions
- Narrow down to the very specific allegations
 - Neglecting to ask about the very specific allegations is a common interviewing mistake



THE INVESTIGATION – Sensitive Questioning

- Non-judgmental or minimally judgmental ways to elicit relevant information
 - “What happened next?”
 - “Did happen?” (as opposed to “why did or didn’t something happen)
 - “[Complainant/Respondent] says that happened. Would you like to say anything in response to that?”
 - “Would you tell us how you were feeling or what you were thinking about when . . . happened”



THE INVESTIGATION – Victim Blaming

From Enough is Enough Law, one the Students' Rights is: *Be free from any suggestion that the reporting individual is at fault when these crimes and violations are committed, or should have acted in a different manner to avoid such crimes and violations*

This is not a bar to asking questions or learning facts or even questioning the factual basis for a complaint. Nearly every question can be asked the right way.



THE INVESTIGATION – Interviewing Witnesses

- Think about what this witness is likely to have seen/not seen or know/not know
 - If the witness has nothing to do with a particular incident or allegation, either don't ask about it, or ask about it in a vague way
 - “Were you at the Old Tavern on Friday night? Did you hear anything about what may have happened there?”
 - If the witness doesn't know about this, you move on
- Ending question: Is there anything else you think I should know?



CONCLUDING THE INVESTIGATION

- Right to review evidence (10 day minimum)
 - All evidence gathered that is directly related to allegations
 - Even if won't be used or included in report
 - Electronic or hard copy, or availability via file-sharing application
 - Confidentiality obligations apply
- Opportunity to respond in writing to the evidence during 10 day period
 - Consider response in writing report
 - Need for additional steps?



WRITING THE REPORT

- Summarize the investigation
- Compile and address all relevant evidence
- No findings or conclusions, policy analysis, or recommendations
- May assess credibility
- Exclusions:
 - Complainant's sexual history or predisposition (with exceptions)
 - Privileged records unless privilege is waived
 - Responding Party's sexual history – not necessarily
 - Mental health diagnosis or treatment – not necessarily



ACCESS THE REPORT

- Right to review report at least 10 days before hearing
 - Electronic or hard copy, or availability via file-sharing application
 - Confidentiality obligations apply
- Opportunity to respond in writing to the report during 10 day period



QUESTIONS?



THE ADJUDICATION PROCESS

- New regulations require a live hearing model
 - Institutions may conduct live hearing virtually, with technology enabling participants simultaneously to see and hearing each other
- Investigator and hybrid models are now prohibited



NOTICE OF HEARING

- Date, time, and location of hearing
 - Hearing must occur at least 10 days after investigative report is made available
- Name of Decision Maker
- How to challenge participation by the Decision Maker for bias or conflict of interest



DECISION MAKER CONFLICT OF INTEREST OR BIAS

- Identify any potential conflict or bias you have
 - Just knowing who a person is or having met or interacted with them is not a conflict
 - A conflict is a relationship with them or knowledge about them that precludes you from being impartial
 - A conflict or bias could also be a connection to the subject matter or an interest in the outcome that precludes you from being impartial
 - Note TIX regulations and UC policy: Bias for or against complainants or respondents generally, or for or against the specific parties
- Consider appearances
- When in doubt, self-identify any situation that could create even the appearance of bias or a conflict



HEARING PARTICIPANTS

- Decision Maker
 - Cases involving student Responding Parties:
Director of Student Conduct and Community Standards
 - Cases involving employee Responding Parties:
Vice President for Human Resources and Personnel Development
- Complainant and their advisor
- Responding Party and their advisor
- Investigator(s)
- Witnesses (solely during their own testimony)



ADVISORS

- Advisor of Choice
- College will appoint an advisor upon request
- Roles:
 - Quiet advice and support
 - Questioning of opposing party and witnesses



INSTITUTIONALLY-APPOINTED ADVISORS

- Role: Conducting questioning on behalf of the party
 - Does not represent a party in any legal sense
- May support and advise the party



HEARING LOGISTICS

- May be conducted with all parties physically present in the same location
- At the Title IX Coordinator's discretion, parties, witnesses, and other participants may appear at the hearing virtually
 - Decision Maker and parties can simultaneously see and hear any party or witness providing information or answering questions
 - If either party requests, the hearing must be conducted with the parties located in separate rooms using virtual participation
- Audio or audiovisual recording or transcript



ORDER OF PROCEEDINGS

- Opportunity for Opening Statement by the Complainant
- Opportunity for Opening Statement by the Responding Party
- If requested by the Decisionmaker, summary of the results of investigation by the investigators
- Questions for the investigators by the Decision Maker and advisors
- Questions for the Complainant by the Decision Maker and Responding Party's advisor
- Questions for the Responding Party by the Decision Maker and Complainant's advisor
- Questions for witnesses by the Decision Maker and advisors
- Opportunity for Closing Statement by the Complainant
- Opportunity for Closing Statement by the Responding Party



RIGHT TO CROSS-EXAMINATION

- Adjudicator must permit each party to cross-examine the other party and any witnesses and ask *all* relevant questions, including those challenging credibility
- Cross-examination may only be conducted by advisor, never by the parties
- Upon request, cross-examination will occur with the parties located in separate rooms with technology enabling the adjudicator and parties to simultaneously see and hear the party answering questions



RIGHT TO CROSS-EXAMINATION

If a party desires cross-examination and does not have an advisor, the College must provide that party an advisor to conduct cross-examination



RIGHT TO CROSS-EXAMINATION

From the Preamble of Title IX regulations: *“The requirement for a party’s advisor to conduct cross-examination on a party’s behalf need not be more extensive than simply relaying the party’s desired questions to be asked of other parties and witnesses.”*

A party cannot “fire” an assigned advisor during a hearing, but if the party raises concerns that the assigned advisor is refusing to “conduct cross-examination on the party’s behalf” there is an obligation to provide the party an advisor to perform that function. This may range from taking a break to having the Title IX Coordinator confer with the assigned advisor to assigning a new advisor



QUESTIONING PROTOCOLS

- Broad authority: All relevant questions and evidence must be allowed unless prohibited by Policy
 - History and information indicating a pattern of behavior
 - Character evidence
 - Expert witness opinions
 - Questions challenging credibility
- Exceptions:
 - Prior sexual history of Complainant (with exceptions)
 - Privileged communications unless privilege waived
 - Evidence not previously made available during investigation, unless allowed by the Decision Maker



QUESTIONING PROTOCOLS

- Decision Maker must rule on whether questions are relevant or violate rape shield protections or a legally recognized privilege and provide an explanation for excluding a question
 - Before party or witness answers
 - Request for reconsideration permitted; after soliciting the other party's advisor's opinion, the Decision Maker will render a final determination



LIVE HEARING – ASSESSING RELEVANCY

- USDOE: Use “common sense meaning”
 - Must seek information making a material fact more or less likely to be true
- Things may be interesting or surprising but not be relevant
- Does the question seek information that will aid the Decision Maker in making the underlying determination?
- Determination as to relevance should not be based on:
 - who asked the question
 - possible (or clearly stated) motives
 - who the question is directed to
 - the sex, gender, sexual orientation, gender identity, gender expression or other characteristics of the party for whom a question is asked or to whom it is asked
 - the status as complainant or responding party of the party for whom a question is asked or to whom it is asked



LIVE HEARING – ASSESSING RELEVANCY

- Preamble: *“A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order and decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.”*



IMPLICATIONS OF FAILURE TO SUBMIT TO CROSS-EXAMINATION

- If a party or witness does not submit to cross examination, that individual's statement(s) may not be considered for purposes of determining responsibility
 - Broad application
 - Preamble: *"Police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statement of a party or witness who has not submitted to cross-examination."*
- Applies to questions by parties' advisors only, not to questions from the Decision Maker



RULES OF THE ROAD

- Limitations on advisor's role as described above
- Questions must be asked in a **respectful, non-intimidating and non-abusive** manner



CONSEQUENCES FOR VIOLATIONS

- Warning
- If question is otherwise permissible, opportunity to reformulate and pose in a permissible manner
 - May not be deemed irrelevant solely because of the manner it was delivered
- Second or further violation(s): Decision Maker has discretion to remove offending person
 - If advisor is removed, hearing will proceed without opportunity to obtain a replacement advisor, but College will assign an advisor of the College's choosing for the purpose of conducting questioning on behalf of the party



DECISION MAKER: CONTROL OF HEARING

- Goal is to enable full and free participation by the Complainant and the responding party, with appropriate assistance from advisors in the interest of determining what did or did not occur
- Expectations made clear at the start of (or before) the hearing to eliminate misunderstandings
- Tone, demeanor, pacing
- Clear explanation of rulings



MAKING A DECISION AS TO RESPONSIBILITY

- Deliberations are private
- Determine each charge separately
 - Ascertain facts (preponderance standard)
 - Apply policy to determine whether facts indicate a violation
- Keep in mind required content of notice; be sure to consider address these issues



SANCTION DETERMINATIONS – STUDENTS

- Decision Maker decides
- Right to submit impact statement
- Other Factors to consider:
 - Nature and severity of, and circumstances surrounding, the violation(s)
 - Responding Party's state of mind at the time of the violation(s)
 - Responding Party's previous disciplinary history
 - Need for sanctions to end and/or prevent recurrence of misconduct
 - Need to remedy the effects of misconduct conduct on the Complainant and/or the community
 - Impact of potential sanctions on the Responding Party
 - Sanctions imposed by the College in other matters involving comparable conduct
 - Any other lawful factors deemed relevant by the Decision Maker



SANCTIONS

- Students
 - Assigned in Accordance with Code of Student Conduct (points system)
- Faculty and other Bargaining Unit Members
 - Assigned in accordance with applicable CBA
- Other Staff
 - Assigned in Accordance with Employee Handbook



EIE TRANSCRIPT NOTATIONS

- Required for violations constituting Clery reportable crimes of violence
 - “Suspended after a finding of responsibility for a code of conduct violation”
 - “Expelled after a finding of responsibility for a code of conduct violation”
 - “Withdrew with conduct charges pending”
- Notations for suspensions may be removed at the College’s discretion one year following completion of suspension
- Notations for expulsion may not be removed



NOTICE OF DETERMINATION

- Description of the charges that were adjudicated
- Description of the procedural steps taken from the submission of the Formal Complaint through the determination
 - Notifications to the parties
 - Interviews with parties and witnesses
 - Site visits
 - Methods used to gather other evidence
 - Hearings held



NOTICE OF DETERMINATION

- Findings of fact supporting the determination
- Conclusions regarding the application of the Policy to the facts
- A statement of, and rationale for, the result as to each allegation
- Disciplinary sanctions to be imposed on the responding party
- Remedies provided to the Complainant
- Appeal procedures and permissible bases for appeal



QUESTIONS?



APPEALS

- Appellate Reviewers:
 - Student responding party cases: Three-member panel
 - Faculty responding party cases: Provost
 - Staff responding party cases: Applicable VP
- May review determinations and any earlier dismissal decisions
- Three business day deadline
- Sanctions remain in effect pending appeal unless Decision Maker decides otherwise



APPEALS

- Permissible grounds:
 - Procedural irregularity
 - New evidence that was not reasonably available and could affect the outcome of the matter
 - Conflict of interest or bias (TIXC, investigator(s), Decision Maker)
 - Severity of sanction



APPEALS

- Potential decisions:
 - Deny the appeal
 - Approve the appeal
 - Approve the appeal in part (which may result in a modification of the findings and/or sanction(s) (if applicable))
 - Remand the case for further investigation or other process, with guidance
- Outcome of appeal must include rationale
- Once the appeal process is concluded, no further appeals are allowed except to the extent a party seeks review of proceedings ordered on remand





Sexual Harassment and Sexual Misconduct Policy

**Introduction to New Policy and Training for
Investigators, Adjudicators and Appeals Personnel**

October 14, 2020