Gender-Based Discrimination and Sexual Misconduct Policy and Procedures

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

August 18, 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• 2011 Dear Colleague Letter – **RESCINDED**
• 2014 OCR Q&A – **RESCINDED**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 BONA’S POLICY

• August 5, 2020 OCR Guidance

• SBU Implementation:
  • This Policy will become effective on August 14, 2020, and will only apply to Formal Complaints of alleged violations under this policy brought on or after August 14, 2020
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” entitlement
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 respondent/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
TIX PARAMETERS

• Scope of covered offenses

• Institutional Education Program or Activity
  • Locations, events, or circumstances where the institution exercises substantial control over both the Respondent 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 SBU POLICY

- Title IX Offenses
- VAWA/EIE Offenses
- Other Prohibited Conduct

Same Process applies to all – Why??
SCOPE OF SBU 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 University’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 SBU POLICY

Title IX Violations:
• Sexual Harassment
• Sexual Assault
• Dating Violence
• Domestic Violence
• Stalking

University Standards Violations:
• Sexual Harassment
• Sexual Assault
• Dating Violence
• Domestic Violence
• Stalking
• Sexual Exploitation
• Retaliation
• Gender-Based Discrimination
The designation of conduct or allegations as either “Title IX Category” or “University Standards” 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 University’s broader jurisdiction to prohibit and discipline a larger scope of inappropriate behavior.
In accordance with Title IX as interpreted by the Department of Education, the University 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 Complainant was in the United States at the time of the alleged conduct, that the Complainant be participating in or seeking to participate in the University’s education program or activity at the time of the complaint, and that the conduct have occurred in the context of the University’s education program or activity:
TITLE IX VIOLATIONS

• Sexual Harassment (as defined by Title IX):
  
  • An employee conditioning educational benefits 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:
  • Any sexual act directed against 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 affirmative consent. Sexual assault consists of the following specific acts:
    • 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: 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 where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity
    • 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 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.
TITLE IX VIOLATIONS

• Dating 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
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
UNIVERSITY STANDARDS VIOLATIONS

For purpose of University Standards violations, the below conduct is prohibited even if the conduct occurs off-campus, outside the United States, the Complainant is not participating or seeking to participate in the University’s education program or activity, or otherwise in circumstances over which the University does not have influence or control, including but not limited to during University academic breaks. The University retains discretion to not respond to, investigate or adjudicate circumstances in which no University interest is implicated.
UNIVERSITY STANDARDS VIOLATIONS

• Sexual Harassment:

  • Unwelcome, offensive conduct that occurs on the basis of sex, sexual orientation, self-identified or perceived sex, gender, gender expression, gender identity, gender-stereotyping or the status of being transgender, but that does not constitute sexual harassment as a Title IX Category Violation as defined above. Sexual harassment can be verbal, written, visual, electronic or physical.

  • 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.
UNIVERSITY STANDARDS 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 affirmative consent of the victim.

• Non-Consensual Sexual Contact: Any intentional touching, however slight, for purposes of sexual gratification or with sexual intent, directly or with any object that is without affirmative consent. Acts of non-consensual sexual contact may include but are not limited to intentional contact (directly or over clothing) with another person’s breasts, buttocks, groin, genitals, or inner thigh, mouth, or touching another with any of these body parts, or making another touch oneself or themselves with or on any of these body parts, or any other intentional sexual touching with any object by a person upon another person, without consent.
UNIVERSITY STANDARDS VIOLATIONS

• Sexual Assault (cont’d):

  • 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

Does not constitute sexual assault as a Title IX Category Violation because of the context in which it occurs (for example because the Complainant was not in the United States at the time of the alleged conduct, because the Complainant was not participating in or seeking to participate in the University’s education program or activity at the time of the complaint, or because the conduct did not occur in the context of the University’s education program or activity).
UNIVERSITY 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 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.

Does not constitute domestic violence as a Title IX Category Violation because of the context in which it occurs (for example because the Complainant was not in the United States at the time of the alleged conduct, because the Complainant was not participating in or seeking to participate in the University’s education program or activity at the time of the complaint, or because the conduct did not occur in the context of the University’s education program or activity).
• Dating 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 Complainant was not in the United States at the time of the alleged conduct, because the Complainant was not participating in or seeking to participate in the University’s education program or activity at the time of the complaint, or because the conduct did not occur in the context of the University’s education program or activity).
UNIVERSITY 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
• 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 Complainant was not in the United States at the time of the alleged conduct, because the Complainant was not participating in or seeking to participate in the University’s education program or activity at the time of the complaint, or because the conduct did not occur in the context of the University’s education program or activity)

(May include stalking other than on the basis of sex)
UNIVERSITY 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
    • Distributing intimate images without consent or beyond the boundaries of consent
    • Consensual sexual activity while knowingly infected with STI or STD, without one’s partner
    • Self-exposure of genitalia
    • 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:

• 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, Respondent or witness); 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
UNIVERSITY STANDARDS VIOLATIONS

• Gender-Based Discrimination:

  • Discrimination on the basis of gender, sexual orientation, gender identity, gender expression or domestic violence victim status in any aspect of employment or access to University curricular, co-curricular or extracurricular educational programs and/or resources
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

Decision Points

Was there sexual contact or activity?

Is yes, was there what appeared to be consent to that particular sexual act?

If yes, was the consent valid?
CONSENT

• Circumstances precluding consent:
  • Incapacitation (mental or physical)
  • Unconsciousness (sleep)
  • Physical restraint
  • Any form of threats or coercion
  • Being a minor
Evaluating Intoxication vs. Incapacitation

Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly chose to participate in sexual activity. ... 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?
• 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?
INCAPACITATION

Remember: focus is on cognitive ability

• “In assessing capacity, the University will consider whether the individual had the ability to understand the nature of the act (e.g., to understand the who, what, when, where, why or how of the sexual interaction) and/or was physically helpless”

• More than instinct; a knowing decision
Bona’s Policy:

Force is the use of physical violence and/or imposing on someone physically to gain sexual access. It includes threats and/or intimidation (implied threats) that overcome resistance or produce purported (but ineffective) consent. It also includes rendering someone incapacitated by administering alcohol or any other drug. NOTE: There is no requirement that a party resists a sexual advance or request, but resistance is a clear demonstration of non-consent. Sexual activity that is forced is by definition non-consensual, but non-consensual sexual activity is not by definition forced.
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?
Bona’s Policy:

Coercion is the use of pressure to compel someone to initiate or continue sexual activity against their will. Coercion can include a wide range of behaviors, including intimidation, manipulation, threats, and blackmail. **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.**

Examples of coercion include threatening to “out” someone based on sexual orientation, gender identity or gender expression, and threatening to harm oneself if the other party does not engage in the sexual activity. Coercing an individual into engaging in sexual activity violates this Policy in the same way as physically forcing someone into engaging in sexual activity.
QUESTIONS?
THE NEW BONAS PROCESS: HOW DOES IT WORK?

• No longer an investigatory adjudication model
  • 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
EIE requirement

“The health and safety of every student at St. Bonaventure University is of utmost importance. The University recognizes that students who have been drinking and/or using drugs, (whether such use is voluntary or involuntary) at the time that violence occurs, including but not limited to Domestic Violence, Dating Violence, Stalking, or Sexual Assault, may be hesitant to report such incidents due to fear of potential consequences for their own conduct. The University strongly encourages students to report Domestic Violence, Dating Violence, Stalking or Sexual Assault to University 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 University officials or law enforcement will not be subject to the University’s 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
  • Respondent 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 University’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 University official appointed by the 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

- Respondent provided notice and an opportunity to challenge the decision immediately following the removal
  - Submitted to and decided by Title IX Coordinator

- This is a student process
  - Employees may be placed on administrative leave (consistent with applicable provisions of the Staff Handbook or Faculty Status and Welfare Handbook)
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, Respondent 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
• Result subject to approval by the Title IX Coordinator
THE INVESTIGATION – OVERVIEW

- Process is much the same, but role is different:
  - Old Policy: Investigators make finding as to responsibility
  - New Policy: Investigators compile evidence; decision made by adjudicators
NOTICE OF INVESTIGATION

- The University’s Gender-Based Discrimination 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 University 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 University’s policy on retaliation
THE INVESTIGATION

• Assignment of investigators and screening for conflict of interest
  • 3 days for parties to object
  • 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 – 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
- Impact of cross-examination requirement
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
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
  • Respondent’s sexual history – not necessarily
  • Mental health diagnosis or treatment – not necessarily
ACCESS TO 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

• Names of Hearing Panel members

• How to challenge participation by any Hearing Panel member for bias or conflict of interest
HEARING PANEL – 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 SBU 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

- Members of the Hearing Panel
  - Chair and two additional members
- Complainant and their advisor
- Respondent and their advisor
- Investigator(s)
- Witnesses (solely during their own testimony)
ADVISORS

• Advisor of Choice

• University 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
  • Party is responsible for formulating questions
• 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
  
  • Hearing Panel 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

• Hearings are audio recorded
ORDER OF PROCEEDINGS

- Chair establishes ground rules and expectations
- Opportunity for Opening Statement by the Complainant
- Opportunity for Opening Statement by the Respondent
- Questions for the investigator(s) by the Hearing Panel and advisors
- Questions for the Complainant by the Hearing Panel and Respondent’s advisor
- Questions for the Respondent by the Hearing Panel and Complainant’s advisor
- Questions for witnesses by the Hearing Panel and advisors
- Opportunity for Closing Statement by the Complainant
- Opportunity for Closing Statement by the Respondent
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, institution 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 Chair
QUESTIONING PROTOCOLS

• Chair of the Hearing Panel 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.
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 respondent 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 Hearing Panel
• SBU “Rules of Decorum” (for questioning and other conduct during hearing)
  • Questions must be conveyed in a neutral tone
  • Required use of preferred name and pronouns
  • No abusive or disrespectful conduct
  • No duty of zealous advocacy
  • Prohibition on yelling, screaming, badgering or physically “leaning in” to personal space
  • Advisors may not approach the other party or witnesses without permission from Chair
  • Prohibition on profanity or irrelevant ad hominem attacks
  • Questions may not include accusations within the text of the question
  • Prohibition on repetitive questions
  • No intimidating actions (reasonable person standard)
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): Chair has discretion to remove offending person
  • If advisor is removed, hearing will proceed without opportunity to obtain a replacement advisor, but University will assign an advisor of the University’s choosing for the purpose of conducting questioning on behalf of the party as provided below
CHAIR: CONTROL OF HEARING

• Goal is to enable full and free participation by the Complainant and the Respondent, 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
- Majority vote
- 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 address these issues
SANCTION DETERMINATIONS – STUDENTS

• Hearing Panel decides (majority vote)
• Right to submit impact statement
• Other Factors to consider:
  • Nature and severity of, and circumstances surrounding, the violation(s)
  • Respondent’s state of mind at the time of the violation(s)
  • Respondent’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 Respondent
  • Sanctions imposed by the University in other matters involving comparable conduct
  • Any other lawful factors deemed relevant by the Hearing Panel
AVAILABLE SANCTIONS – STUDENTS

- Written Warning
- Disciplinary Fines
- Community Service
- Attendant Restrictions
- Required Educational Activities
- Disciplinary Probation
- Deferred Loss of Campus Residency
- Loss of Campus Residency
- Organizational Sanctions
- Deferred Suspension
- Suspension
AVAILABLE SANCTIONS – STUDENTS

• Expulsion
• Withholding of Diploma and/or Degree Conferral
• Revocation of Degree
• Any other actions deemed appropriate, including:
  • Mandated counseling
  • “No contact” directive
  • Letter of apology
  • Campus or local community service
  • Restitution
  • Loss, revocation or restriction of housing privileges
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”

• Students withdrawing from the University during an investigation before completion of judicial procedures: “Withdrew with conduct charges pending”

• Notations for suspensions may be removed by an Appeals Panel

• Notations for expulsion may not be removed
SANCTION DETERMINATIONS – EMPLOYEES (FACULTY AND STAFF)

• Title IX Coordinator consults with CODAH Chair and appropriate executive officer(s) to review:
  • the Respondent’s personnel file
  • past informal complaints where there has been a finding of discrimination and/or harassment;
  • past findings of discrimination and/or harassment by the Respondent through the formal complaint process
  • past formal or informal complaints against the Respondent not judged to be spurious
• Title IX Coordinator and CODAH Chair recommend corrective action to the appropriate executive officer
  • If executive officer chooses not to fully implement the recommendations, must provide explanation to Title IX Coordinator and CODAH Chair
• Notice to parties of disposition and/or implementation of the corrective actions
AVAILABLE SANCTIONS – EMPLOYEES (FACULTY AND STAFF)

- Warning – written
- Performance Improvement Plan
- Required Counseling
- Written Reprimand
- Formal Apology
- Transfer or reassignment
- Disciplinary Probation
- Non-Renewal of Employment Agreement
AVAILABLE SANCTIONS – EMPLOYEES (FACULTY AND STAFF)

• No Contact Order
• Required Training/Education
• Demotion
• Loss of Annual Pay Increase
• Suspension Without Pay
• Suspension With Pay
• Termination
NOTICE OF DETERMINATION

• Within 10 business days absent extenuating circumstances

• Required content:
  • 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

- Required content (cont’d):
  - 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 Respondent
  - Remedies provided to the Complainant
  - Appeal procedures and permissible bases for appeal
APPEALS

• Appeals Panel of 3 Discrimination and Misconduct Officials

• May review determinations and any earlier dismissal decisions

• Five business day deadline

• Sanctions are stayed pending appeal
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), Hearing Panel members)
  
  • Severity of sanction
APPEALS

• Not a “re-hearing” or “re-investigation” of the case

• Original investigation and sanctions presumed to be sound; burden is on appealing party to prove otherwise

• Panel may meet with the appealing party and the non-appealing party (if requested), and may meet with anyone else deemed necessary to make their determination, including the investigators
APPEALS

• Potential decisions:
  • Finding/Sanction Stands
  • Appeal Granted
    • Remanding to original Hearing Panel or new Hearing Panel
    • Modifying sanction
    • Reinstating the Formal Complaint or specific allegations in the Formal Complaint that were dismissed
    • Other actions deemed appropriate

• 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
Gender-Based Discrimination and Sexual Misconduct
Policy and Procedures

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

August 18, 2020