



Southern
New Hampshire
University

TITLE IX AND SEXUAL MISCONDUCT

PROCESS TEAM MEMBER TRAINING

FIRST: “WHY AM I HERE?”

- Answer: with the new regulations and state law, it is important for Title IX team members (y’all) to be cross-trained, so that you have an understanding of what each role is supposed to play. This will make it easier for you to spot issues in the process. (e.g. a problematic advisor; missing evidence)



AGENDA

- Discussion
- Key points of new regulation/law
- Roles
- Policy: Title IX vs. Sexual Misconduct
- New Investigation Processes
 - Cross-examination and expanded role of advisors
- Investigation and Hearing Considerations
 - Evidence and Credibility
 - Line of questioning during interviews and hearing
 - Consent
 - Trauma
- Case Breakout Session and Debrief

DISCUSSION

- What have you heard about the new regulations and/or state law?
- What are you most worried/concerned about related to this process?
- Other burning questions?

NEW REGULATION: KEY CHANGES

- Rules and grievance process now apply to employees and students equally.
- Sexual Harassment and jurisdiction are now narrowly defined.
- Hearings and investigations include court-like process, including cross examination by **advisors**.
- Specific definitions are now mandated by regulation, replacing NH state-law definitions.
- Availability of alternative processes (mediation, restorative justice, etc.) and informal resolution options, in lieu of hearing.
- Significantly changed role for Title IX Coordinator—more of a facilitator of process and intake than direct investigator or fact finder.
- Investigator reports do not make factual findings or credibility determinations.
- One-policy; two procedures—Our policy must now cover the narrowly defined Title IX violations, but also have a separate process for other sexual misconduct or conduct falling outside Title IX jurisdiction.
- Emergency removal (pending grievance) permitted only after show-cause hearing.

ROLES

ROLES

TITLE IX COORDINATOR

- Gatekeeper
- Facilitator of process, including facilitation of interim measures, hearing and informal resolution
- Appeals officer for emergency removals
- Referral agent for all parties (e.g. campus or local resources)

INVESTIGATOR

- Fact-gatherer
- Issue spotter, including whether or not the case might be eligible for dismissal
- Hearing witness
- Writes investigation report

ROLES

ADJUDICATOR

- Single or hearing board
- Determines facts and credibility (via assessment)
- Facilitator of adjudication, including management of cross examination
- Writes outcome report, which must include credibility assessment

APPEAL OFFICER

- Hears and determines appeals after adjudication
- 3 grounds for appeals
 - Procedural defect
 - Conflict of interest/bias
 - New info not previously available

ROLE

ADVISOR

- Advises parties on the process
- Investigation: “potted plant”
- Hearing: responsible for cross-examination

SUPPORT PERSON

- Emotional support
- Does not cross-examine

POLICY

NEW POLICY

- One policy, two procedures— meant to cover both narrow Title IX conduct and all other sexual misconduct
 - We still use preponderance standard (more likely than not/ 50% and feather)
- Requirement of signed, formal complaint still necessary to pursue informal resolution options
- Sex and gender based conduct that is not sexual in nature will now fall under Discrimination Protocols
- NH Law: Requires amnesty for other misconduct revealed in the course of a report of sexual misconduct “unless a University official determines that the report was not made in good faith or that the violation was egregious”
- Initial thoughts or questions after reviewing the draft policy?

TITLE IX VS. SEXUAL MISCONDUCT

TITLE IX

- Violations fall under narrow definition of sexual harassment, with higher standard
- Jurisdiction only includes behavior in our **programs and activities**, and locations we control
 - Study abroad and most off-campus conduct do not fall under

SEXUAL MISCONDUCT

- All other sexual misconduct, including Title VII level conduct
- Jurisdiction is discretionary, similar to pre-regulation approach

SEXUAL HARASSMENT

TITLE IX

- Sexual Harassment, as an umbrella category, includes the offenses of Sexual Harassment, sexual assault, domestic violence, dating violence, and stalking*, and is defined as conduct on the basis of sex that satisfies one or more of the following:
 - I. An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct (often referred to as "quid pro quo");
 - II. Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the University's education program or activity; or
 - III. Sexual assault, as defined

OTHER (TITLE VII)

- Unwelcomed conduct that is severe **OR** pervasive, and objectively offensive

ALWAYS REFER TO THE POLICY



- Definitions of violations
- Jurisdiction

Sexual Misconduct Policy

Issuing Authority: Paul J. LeBlanc, President
Responsible Officer(s): Rebecca Lawrence, Title IX Coordinator
Effective Date: August 14, 2020
Review Period: Annually or as deemed necessary

TITLE IX OR SEXUAL MISCONDUCT?

- While in class, John asked Jane out on a date, but she declined. For the next three weeks, John texts Jane everyday. Eventually, Jane stops going to class so she can avoid John.
- Is there any additional information you need to make a decision?

PROCEDURES

ALWAYS REFER TO THE POLICY



Sexual Misconduct Policy

Issuing Authority: Paul J. LeBlanc, President
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- Intake
 - Signed, formal complaint– by complainant or T9C
 - Notification to accused
 - Interim measures
 - Confidentiality request
 - Informal Resolution– not available in staff on student
- Investigation
 - Which procedure?
 - Review of and response to investigation report (summary of relevant info, no longer credibility or fact finding)
- Removal from process or Hearing
 - Reasons for removal/dismissal
 - Hearing and cross-examination
 - Sanctions
- Appeal (3 grounds)

WHICH PROCEDURES?

- You learn from a student that a professor is making sexual advances towards students off-campus. One student reports that she knows of at least one student who has received a failing grade after rejecting the professor off-campus.
- Do you need additional information?

WHICH PROCEDURES?

- Following a department party, you see Susan (student intern) harassing James (recent graduate/office manager), who you know identifies as gay. Susan is making comments about James sexuality and how he is “just needs to have sex with a woman to cure his gayness.”
- What about now: You lose sight them as people leave the party, but later hear that Susan cornered James in the parking lot and groped him.

INVESTIGATION/HEARING CONSIDERATIONS

IMPARTIALITY

- Avoid prejudgment– assume nothing
- Conflicts of interest– please contact me if you feel there may be a conflict and/or someone in the process has raised a concern
 - Example: Respondent and Complainant are your advisees; cannot be adjudicator or advisor for either
- Do not assume gender roles or sex stereotypes dictate how someone does or does not behave
- Every case is fact-specific, therefore findings and sanctions should depend on the facts of a specific case; not on personal feelings about individuals

EVIDENCE



EVIDENCE

- *If a Party or witness chooses not to submit to cross-examination at the hearing, either because they do not attend the meeting, or they attend but refuse to participate in questioning, then the Decision-maker(s) may not rely on any prior statement made by that Party or witness at the hearing (including those contained in the investigation report) in the ultimate determination of responsibility. The Decision-maker(s) must disregard that statement. Evidence provided that is something other than a statement by the Party or witness may be considered.*
- *The Decision-maker(s) may not draw any inference solely from a Party's or witness's absence from the hearing or refusal to answer cross-examination or other questions.*

EVIDENCE AND CREDIBILITY

- In forming decisions regarding allegations of sexual misconduct, the University reviews all available, relevant evidence. When some of the evidence requires the evaluation of one person's word against another, the University is encouraged to follow guidance from the Office for Civil Rights to weigh evidence and credibility. In the absence of any first-hand, third-party witnesses to the alleged incident, the evaluation of evidence and credibility may take into account:
 - *Detail and consistency:* The accuracy of each person's account should be compared in an attempt to evaluate honesty and consistency.
 - *Demeanor:* While emotional responses vary widely, each party's reactions and behavior after the alleged incident could be evaluated as part of a decision.
 - *Action taken:* The timing of a report may be considered, although either an immediate or delayed report could be reasonably explained.
 - *Other contemporaneous evidence:* Verbal or electronic communication with friends or family (and their reactions), any other form of written details, and the timing of such communications may be factors in a decision.

LINES OF QUESTIONING

NARRATIVE

- After you matched on Tinder, tell us what you first discussed.
 - What happened after that?
 - When you settled on meeting in your room, what happened next?
- Were you with Complainant when Respondent followed him to the dining center?
 - Let's discuss what happened. How did you did come to notice Respondent?

SUPPORTING/LOGICAL

- Please explain what led you to believe Respondent was unaware that Complainant was incapacitated?
 - Tell us how Complainant acts when incapacitated.
- Tell us why you thought things had gotten out of hand at the house party?

LINES OF QUESTIONING: FACTS OR CONCLUSION

- The investigation is information gathering, and hearing board/adjudicators must determine fact and credibility. Yes or no questions would, generally, be used to confirm information in the report.
 - The first time you spoke was through Tinder on October 18, 2019, correct?
- Be aware that your questions may result in a party making a conclusion in favor of one party. Is your question open-ended and conclusory?
 - So, Respondent was kicked off the Women's Tennis team because she stalked teammates she was attracted to?
 - A: I don't know about stalking, but she sucked at tennis.
 - Instead, you may want to ask: Why was Respondent let go from the team?
 - A: Well, she wasn't great at tennis, and she was weird towards certain individuals.

LINES OF QUESTIONING: THINGS TO AVOID

- Asking or allowing questions that are not outcome determinative/asking questions out of curiosity.
 - Asking what is in a particular cocktail may get to level of intoxication. Asking why someone chose to switch from vodka to tequila is likely irrelevant.
- Assuming things that are not in the report.
 - Witness said that the parties always go out as a group. Do not assume this is because of safety. They could just prefer to split the Uber and appetizers to save money.
- Asking or allowing questions that have already been answered.

LINES OF QUESTIONING: THINGS TO AVOID

- *The investigation does not consider:*
 - 1) *incidents not directly related to the possible violation, unless they evidence a pattern;*
 - 2) *the character of the Parties; or*
 - 3) *questions and evidence about the Complainant's sexual predisposition or prior sexual behavior, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove Consent.*
 - *Example: Respondent presents evidence that Complainant always tugs on her ear when she wants to engage in sexual activity*

CONSENT

Campus Clarity Video: 2 Minutes Will Change the Way You Think About Consent

Click here to watch the video or copy and paste the following link into your web browser:
<https://youtu.be/laMtr-rUEmY>



CONSENT

Consent: *a freely given agreement to have sexual intercourse or sexual contact and is indicated by words and/or actions by a person legally and functionally competent.*

- Consent is more than just saying “yes”
- Legally and mentally competent to say “yes”
- Freely choose – yes under pressure/coercion is NOT yes
- Legal age of consent in NH: **16***
- Consider imbalance of power (Example: Teacher and student, supervisor and employee...)
- Consent to some sexual acts does not mean consent to others, nor does past consent to a given act establish present or future consent.
- Even if someone has agreed to engage sexually, that person has the right to withdraw their consent at any time.

Don't forget to take mixed signals as a no.



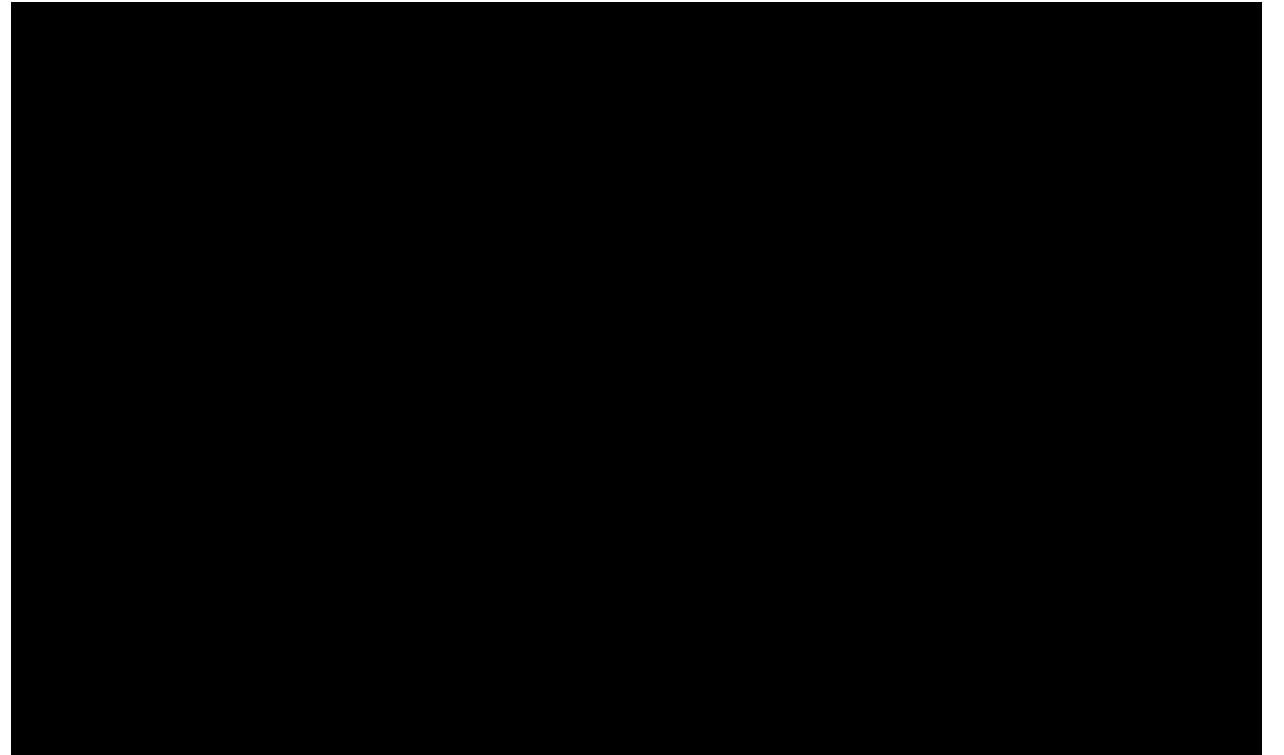
CONSENT

Planned Parenthood Video

When Someone Doesn't Want to Have Sex: What is Consent?

Click here to watch the video or copy and paste the following link into your web browser:

<https://youtu.be/QSDjSetlGiw>



TRAUMA

- Not everyone experiences the same thing in the same way or on same schedule
- Harassment and discrimination can be as traumatic as violence, especially if it impacts living, learning or work environments
- There is no “right” way to respond to being assaulted/harassed
- Being accused of or witnessing misconduct can cause trauma, and result in responses similar to those of the accuser (e.g. memory lapse about timeline)

TRAUMA

- Lack of class or work attendance/participation
- Change in attitudes or behavior
- Significant changes in academic or professional performance
- Frequently and/or easily angered or frustrated
- Strange behavior, including outbursts, threats, etc. which disrupt working or learning spaces
- Threatening emails, voicemails, or other written or expressed threats (including those in academic work)
- Concerns and complaints from other students or staff (direct or overheard) regarding concerning student's/staff member's behaviors

EMOTIONAL SUPPORT

- Attending to one's emotional health is important, especially when involved in cases of sexual misconduct. Full-time staff and faculty can contact the Employee Assistance Program for ***confidential*** support services. Instructions on how to use this free resource can be found in the online Employee Benefit Lounge, which can be accessed through Workday.

BREAKOUT

- Examine your assigned case, from intake to appeal. Consider the following:
 - On first glance, are there any areas or issues of concern?
 - How are parties classified (staff, students, faculty, third-party) and does that impact the process?
 - As gatekeeper, would you send this through the Title IX or Sexual Misconduct procedure? Why?
 - As the investigators, what are some pressing questions you have for the parties involved?
 - Do you think this case should go to hearing, or be dismissed? Why?
 - As an adjudicator, what would you want clarified at the hearing? What is the outcome and what is the reasoning for this?
 - As the appeal officer, what do you anticipate will be the appeal grounds and what is your determination?
 - Did the curve ball change the predicted outcome? Why? What will you do different?

QUESTIONS, COMMENTS AND CONCERNS?

Becca Lawrence

r.lawrence2@snhu.edu

x3188