

# Sexual Misconduct Training

SHELLEY R. SMITH, ESQUIRE

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# Title IX: Overview of the Statutory Requirements

# Title IX

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No person **in the United States** shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

- ▶ Applies to all of the institution's programs and activities within the United States
- ▶ Federal financial assistance includes governmental research grants and financial aid



# Title IX (Cont.)

- ▶ Prohibits sex-based discrimination in educational programs and activities that receive federal funds
- ▶ Sexual harassment, sexual assault, and other kinds of sexual violence are forms of prohibited discrimination
- ▶ Prohibits retaliation for making a report or filing a complaint
- ▶ Right to pursue criminal complaint and or private lawsuit

# What is Sexual Harassment?

Category 1	Category 2	Category 3
Quid pro quo: some benefit is offered to an individual in exchange for sexual conduct.	Unwelcome conduct, determined by a reasonable person to be so severe, pervasive, or objectively offensive such that it effectively denies a person equal access to the school's program or activity (Penn policy covers conduct that is objectively offensive)	Sexual assault, dating violence, domestic violence, relationship violence, stalking

# Examples of “Denying Equal Access”

- ▶ The sexual harassment causes...
  - ▶ A student to skip class to avoid a harasser
  - ▶ A decline in a student's grade point average
  - ▶ Difficulty concentrating in class
- ▶ Complainants do not need to have dropped out of school, failed a class, had a panic attack, or otherwise reached a breaking point.
- ▶ Denial is broad, no specific trauma symptoms are needed to effectively deny equal access.

# University of Pennsylvania's Definition of Sexual Violence

- ▶ **Defined as:** Range of behaviors in which an act of a sexual nature is taken against another individual without that person's consent or when the individual is unable to consent. There are various types of sexual violence, including but not limited to sexual assault and rape.

# Sexual Violence (cont.)

- ▶ **Sexual assault** (including but not limited to rape) is defined as having committed any of the following acts:
  - ▶ Any physical sexual contact that involves the use or threat of force or violence or any other form of coercion or intimidation
  - ▶ Any physical sexual contact with a person who is unable to consent due to incapacity or mental or physical impairment.
- ▶ **Rape** is defined as sexual assault involving an act of penetration
- ▶ **Non-forcible sex acts** include unlawful sex acts where consent is not relevant, such as sexual contact with an individual under the statutory age of consent as defined by Pennsylvania law.



# Consent

- ▶ Each school has the discretion to define “consent” as they wish.
- ▶ Pennsylvania Court Interpretation:
  - ▶ **Consent** is present if the complainant, at the time of the alleged incident, is willing to engage in these activities and makes their willingness known to the respondent by words or behavior.

# Consent - Penn

- ▶ **Definition:** An affirmative decision to engage in mutually agreed upon sexual activity and is given by clear words or actions.
  - ▶ Consent may not be inferred from silence, passivity or lack of resistance alone.
- ▶ Consent to one form of sexual activity does not imply consent to other forms of sexual activity
- ▶ Marital or sexual relationship is not sufficient to constitute consent to additional sexual activity.
- ▶ Determination of whether consent was given is fact-specific.

# Ability to Consent

- ▶ **Assent** shall not constitute **consent** if it is given by a person who, because of youth, disability, intoxication or other condition, is unable to lawfully give his or her consent.
- ▶ "Incapacity" or "impairment" can result from circumstances including but not limited to being under the influence of alcohol or drugs or being too young to consent.
- ▶ Impairment: the complainant's power to appraise or control his or her conduct has been impaired by the ingestion of drugs, intoxicants or other substances, or the victim has a diminishment or loss of function or ability.

# Hypothetical 1

- ▶ Clem and Randy were friends who lived in the same College House and had known each other since New Student Orientation. Clem and Randy made plans to celebrate the beginning of spring and started drinking early on Friday, March 19, 2021. Before going to Randy's room, Clem took her ADHD medication. Clem and Randy stopped at the dining hall before heading to a party at the apartment of one of the members of the student club to which they both belonged. They drank White Claws at the party and did some shots of lemon-flavored vodka. Before Clem started doing shots, she said to Randy, "I'm not sure it's a good idea for me to be doing shots- I don't think I'm supposed to drink on this medication I'm taking." Nevertheless, Clem had three shots at the party. Randy and Clem left the party together and headed back to their College House. Along the way, while they were talking, Clem tripped over a metal grate on the walkway. Randy helped her up. Randy asked Clem if she wanted to hang out in his room and Clem agreed.



# Hypothetical 1

- ▶ Once in Randy's room, they sat on the bed and talked about the party. Randy noticed that Clem was talking loudly and kept repeating herself. At one point, Clem put her head on Randy's shoulder. Randy proceeded to put his arm around Clem, kissed her and rubbed her back and legs. Randy took off his own clothes and helped Clem take off hers. Randy then digitally penetrated Clem's vagina. Randy asked Clem if she wanted to have sex and Clem said that she would if Randy used a condom.
- ▶ The next morning Clem woke up in Randy's room. She tried to remember how she got to Randy's room the night before but was having trouble putting things together. Clem opened her phone and saw she had a snapchat message from the host of the party. The message read, "I didn't know you liked lemons so much." Clem had a flash of asking Randy about a condom. Clem looked around the room but did not see any empty condom wrappers. Clem asked Randy if they had sex the night before and Randy said, "Yes." When Clem asked if he used a condom, Randy did not answer.

# What locations are covered by Title IX?

- ▶ Buildings or other locations that are part of the school's operations, including remote learning platforms;
- ▶ Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred
- ▶ Off-campus buildings owned or controlled by a student organization officially recognized by a postsecondary school, including fraternities and sorority.

# Hypothetical 2

- ▶ Charlie works in a department and is supervised by Remi, who oversees various important projects for the University. Charlie is outgoing and has many long-term, positive relationships with their colleagues. Their team worked remotely during the COVID pandemic, and they've been working in person again since September. Recently, Charlie and several of their colleagues were asked to make recommendations for one of these projects and present their ideas in a staff meeting. Remi informed the team that the person with the best ideas and presentation would be invited to join them at the annual conference in their field in Texas.
- ▶ Charlie was one of the most talented members of the team and was excited about the possibility of being selected to attend the conference. Remi sat next to Charlie in the conference room where the presentations were being held. When Remi sat down, they commented that Charlie smelled nice. A colleague presented first, then it was Charlie's turn. Charlie walked up to the front of the conference room and Remi commented, "That's a flattering outfit- it would work well in Texas." Charlie could feel their cheeks getting red as they started their presentation. They thought it was going well, then they got distracted thinking of the comments Remi made and started fidgeting with their clothes and lost their train of thought. When Charlie finished, Remi announced, "Brains AND beauty!"

## Hypothetical 2

- ▶ Charlie was surprised when Remi told them during their one-on-one meeting later in the week that they had been selected to join Remi at the conference. At the end of their meeting, Remi stood up and moved toward Charlie while reiterating their confidence in their abilities. Before Charlie could leave their office, Remi leaned in toward Charlie and gave them a hug, saying they were excited about attending the conference together.
- ▶ Charlie returned to their own office with an upset stomach and had difficulty focusing on work. Charlie had difficulty sleeping over the next week and shared with some of their trusted colleagues that they were concerned about Remi's intentions in selecting them to attend the conference. At the end of the next week, Charlie told Remi that they would not be able to attend the conference because of a personal matter that they were experiencing at home. Charlie had talked with someone at the Office of the Ombuds and knew that they had a right to report Remi's behavior toward them. The Ombuds connected Charlie with the AVP-Title IX Office and after speaking with the AVP-Title IX Officer, Charlie decided to file a complaint. Charlie was anxious about the impact this complaint would have on their career.



# Hypothetical 2

## Added facts:

- ▶ When Remi met with the AVP-Title IX Office, they shared that they had observed other members of the team interacting with Charlie in a similar manner and believed that this type of behavior was welcome by Charlie. Remi has seen Charlie smiling while hugging other members of the team since they returned to the office in the fall. Remi was upset that Charlie did not raise this concern directly with them.

# When is response required?

Must respond when notice is received by the Title IX Officer or another official who has authority to institute corrective measures on the institution's behalf.

# “Preliminary Determination”

A preliminary determination will be made as to whether the complaint falls within the Sexual Misconduct Policy and whether there is a basis to conduct a full investigation.

# Responding to Sexual Harassment Complaints



# Upon “Notice” to University

- ▶ Actual knowledge to the University, with or without formal complaint
  - ▶ Prompt response
  - ▶ Reasonable response
  - ▶ Supportive measures

# In Response to Formal Complaint

- ▶ Determine whether “informal” resolution is an option
- ▶ Provide notice to known parties of grievance process, including informal resolution process, if available
- ▶ If informal process is not an option or does not resolve, initiate “formal” investigation.

# Impartiality

- ▶ No bias or conflict of interest
- ▶ Against complainants or respondents generally
- ▶ Against a particular complainant or respondent
- ▶ Applies to Title IX coordinator, investigators, decision-makers, or any person designated to facilitate an informal resolution process (e.g. a mediator).

# What Happens to a Complaint?

- ▶ Informal Resolution
  - ▶ Requires consent of both parties
  - ▶ University discretion
  - ▶ Not available where allegation is of harassment by someone employed by the university
- ▶ Formal Grievance Process
  - ▶ Investigation
  - ▶ Hearing unless parties reach mutually agreeable resolution after investigation is complete
  - ▶ Appeal is available



# Summary of Obligations

- ▶ University's obligations upon receiving notice of a sexual harassment complaint
  - ▶ In absence of complaint, respond promptly and reasonably in relation to the circumstances
  - ▶ Offer non-disciplinary, non-punitive supportive measures to restore or preserve educational access
  - ▶ In event of complaint, determine whether informal resolution is an option
  - ▶ If not, or if it fails, initiate investigation

# Procedural Requirements

- ▶ Presumption of no violation of Title IX or University Policy
- ▶ Standard of Review must be the same for faculty, staff and student respondents; University's standard of review is preponderance of the evidence, or "more likely than not"
- ▶ Written notice of allegations and an equal opportunity for parties and their advisors to review the evidence
- ▶ An investigation report
- ▶ Live hearings with cross-examination of witnesses
- ▶ Broad anti-retaliation protections
- ▶ An equal opportunity for parties to appeal on specified grounds

# No “Gag” Orders

The University may not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

# Advisors and Investigators

- ▶ Title IX investigations involve very sensitive information on a very important topic
- ▶ To conduct the resolution of a complaint appropriately, those involved must strictly adhere to the procedural process
- ▶ Every individual involved in the process has a specific role, which begins and ends at different stages
- ▶ It is crucial that everyone involved understands the entire process, so that they have the perspective to understand the expectations and limitations of their role

# Key Points

- ▶ Goal of the investigation
  - ▶ To determine whether the respondent is responsible for the conduct alleged
- ▶ University's standard of review
  - ▶ Preponderance of the evidence
  - ▶ Proof that, "more likely than not," the alleged conduct occurred and rose to the level of a policy violation



## Key Points, cont'd

Evidence to be considered is *relevant* evidence: evidence that tends to make a fact of consequence more or less probable

# Relevance

- ▶ “Relevant” evidence and questions refer to any questions and evidence that tend to make an allegation of sexual harassment or misconduct more or less likely to be true.
- ▶ Relevant evidence includes both inculpatory and exculpatory evidence.
- ▶ Relevant evidence does NOT include:
  - ▶ Privileged information and records
  - ▶ Prior sexual history

# Prior Sexual History

- ▶ Evidence and questions about the Complainant's sexual predisposition or prior sexual behavior are not permitted unless:
  - ▶ They are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
  - ▶ They concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

# Privileged Information

- ▶ Information protected under a legally recognized privilege cannot be sought, obtained, submitted, relied upon, or asked about unless:
  - ▶ the person holding the privilege waives the privilege with voluntary, written consent
  - ▶ Examples:
    - ▶ Medical records or information
    - ▶ Mental health records or information
    - ▶ Attorney-client privileged communication and documents

# Resolutions



# Resolution Without a Hearing

- ▶ At the end of an investigation, a matter may be resolved if both parties agree to the recommendations of the Investigative Team
- ▶ Penn will not compel either the Complainant or Respondent to engage in mediation or to accept the recommendations of the investigative team.
- ▶ If the matter is not resolved, either party may request a hearing within 10 business days of transmission of the final report.

# Resolutions With a Hearing

- ▶ Goal of the Hearing
  - ▶ To determine whether the Respondent is responsible for the conduct alleged
- ▶ University's standard of review
  - ▶ Preponderance of the evidence
  - ▶ Proof that, "more likely than not," the alleged conduct occurred and rose to the level of a policy violation
- ▶ Only consider *relevant* evidence

# Process and Format of a Hearing

- ▶ Panel will consist of 3 Faculty members and the Disciplinary Hearing Officer.
- ▶ DHO is a non-voting member of the Hearing Panel
- ▶ DHO maintains order and decorum during the Hearing Process
- ▶ Like the investigative process, hearings must be prompt, fair, and impartial.

# Sanctions and Remedies

- ▶ If the Respondent is found responsible
  - ▶ Disciplinary sanction should be determined
  - ▶ Remedy considerations include:
    - ▶ Needs of the complainant
    - ▶ Needs of the community
    - ▶ Recommendations regarding changes to policies, procedures, or practices
  - ▶ Sanctions should be case-specific and be informed by precedent

# Conclusion of Hearing Process

- ▶ University will provide hearing panel's report to the parties
- ▶ University will inform the parties of the option to appeal the Panel's decision to the Disciplinary Appellate Officer
- ▶ Report must be provided to the complainant and the respondent within 10 business days.





# QUESTIONS?