

Sexual Misconduct Training

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October 9, 2020





Title IX

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

- 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 discrimination prohibited
- Prohibits retaliation for making a report or filing a complaint
- Right to pursue criminal complaint and or private lawsuit



Sexual Violence (Penn)

- 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 (defined below).
- **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.



Sexual Violence (cont.)

- **Sexual assault (cont.)** Any physical sexual contact with a person who is unable to consent due to incapacity or mental or physical impairment.
- **“Incapacity”** or **“impairment”** include but are not limited to being under the influence of alcohol or drugs or being too young to consent.



Sexual Violence (cont.)

- **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

- Pennsylvania courts have summarized the concept to explain that consent is present if the complainant at the time of the alleged crime is willing to engage in these activities and makes her willingness known to the respondent by words or behavior.



Consent - Penn

- 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. Furthermore, consent to one form of sexual activity does not imply consent to other forms of sexual activity and the existence of a current or previous dating, marital or sexual relationship is not sufficient to constitute consent to additional sexual activity. 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.



Lack of Capacity

- Consent Cannot be Given:
 - by a person who is incapacitated
 - by a person under the age of consent
- Evidence of incapacitation includes being unconscious or being conscious only intermittently, incoherence
- Determination of whether consent was given is fact-specific



Key Points

- 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
- Only consider *relevant* evidence



Role of Hearing Panelist

- Objectivity – Monitoring one’s own biases
- Demeanor – Attentive and neutral
- Ensure that the Hearing is fundamentally fair
 - (notice of allegations, underlying evidence gathered, opportunity to respond to allegations, presumption respondent is not responsible)
- Ensure that the Hearing is equitable to both parties



Questioning the Parties and Witnesses

- Treat parties and witnesses fairly and respectfully
- Ensure equal opportunities for parties to provide information and tell their stories
- Ask questions that help you to establish a fact or clarify information provided in the Investigative Report or during the Hearing
- If unsure how to answer a question or uncomfortable with a question being posed, ask for a break to discuss



Questioning Witnesses (cont.)

- Encourage the parties to explain in narrative form
 - Avoid asking leading questions
 - Avoid multi-part or complex questions
- Avoid interrupting and allow time to respond
- Ask parties and witnesses to define expressions/slang, etc. (even if you think you know what a term or acronym means – e.g. I was drunk or fwb)



Relevant Evidence

- “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 with very limited exceptions



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



Deliberations

- Determine whether the policy has been violated by a preponderance of the evidence
- Ensure that all panelists have an opportunity for input
- Majority decision, not unanimity is required (separate opinion explaining disagreement should be provided if appropriate)
- If respondent is responsible for violating University policy, determine the appropriate sanction



Sanctions and Remedies

- If the Respondent is found Responsible
 - Disciplinary sanction should be determined
 - Considerations include:
 - Remedies for the complainant
 - Remedies for the community
 - Recommendations regarding changes to policies, procedures, or practices
- Sanctions should be fact-specific and be informed by precedent



Factors to Consider for Sanctions

- Force or severity of conduct
- Nature of harm to complainant and others
- Risk of harm to the campus community
- Respondent's prior disciplinary history
- University's ability to enforce (e.g. no violations of University's alcohol policy vs. no drinking)
- Mitigating factors



Panel's Report

- Brief overview of findings of fact
- Rational for decision regarding responsibility
- If respondent is found responsible
 - Be specific regarding what is being imposed
 - Duration of sanction (if applicable) should be specified
- Cover letter from DHO will inform the parties of the option to appeal the Panel's decision to the DAO



Questions?