

Sexual Misconduct Training

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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



Comparison of Laws

- Title VII prohibits sex discrimination by employers with more than 50 employees
- Pennsylvania prohibits discrimination based on sex
- Philadelphia prohibits discrimination based on sex, sexual orientation and gender expression



New Title IX Regulations

- Define sexual harassment
- Describe what constitutes “notice” of sexual harassment
- Outline the support that must be provided to the parties to a complaint
- Describe the policies or procedures, including the designation of a Title IX coordinator
- Outline the process to be followed to find responsibility



Sexual Harassment: Quid Pro Quo

- A member of faculty or staff of the recipient conditions the provision of aid, benefits, or services from the recipient on an individual's participation in unwelcome sexual conduct -- essentially, "this for that"



Sexual Harassment: Hostile Environment

- Any *unwelcome* conduct that a *reasonable person* would find so *severe AND pervasive and objectively offensive* that it denies a person equal educational access or employment

Policy

Unwanted conduct

Based on the individual's sex, sexual orientation, gender identity, or gender expression; AND

- 1) Conditions an educational or employment benefit on participation in unwelcome sexual conduct; OR
- 2) A reasonable person would determine is so severe, pervasive, AND/OR objectively offensive that it effectively denies a person equal access to an educational or employment program or activity

Title IX

Conduct on the basis of sex and involves

- 1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; OR
- 2) Unwelcome conduct determined to be so severe, pervasive, AND objectively offense that it effectively denies a person equal access to the recipient's education program or activity

Title VII

Unwelcome conduct "because of" a person's sex, sexual orientation, or gender identity, that

- 1) Expressly or impliedly conditions the receipt of a benefit or the avoidance of a detriment on submission to unwelcome conduct; OR
- 2) Is so severe OR pervasive that a reasonable person in complainant's position would find the environment to be hostile or abusive



Unwelcomeness is Key

- Crux of sexual harassment complaints is that the behavior complained of was unwelcome
 - Parties often in unequal power or status roles (e.g. teacher/student; staff person/supervisor)
 - Whether the complainant participated is NOT determinative
 - Silence may not mean the behavior was welcomed
 - Totality of the circumstances and context in which the behavior occurred must be considered



Objective and Subjective

- Subjective: Did the complainant find the conduct offensive? How did it impact their ability to get an education or perform the duties for which they were employed?
- Objective: the “reasonable person” standard: Would a reasonable person in that situation find the conduct so offensive that it denied access to education or employment?



Examples of Possible Sexually Harassing Conduct

- Graphic sexual descriptions
- Sexual innuendos, jokes or teasing
- Comments of a sexual nature about a person's clothing or body
- Comments about a person's perceived masculinity or femininity
- Repeated unsolicited requests for dates and/or sexual contact
- Unsolicited physical contact or touching
- Gender disparaging comments



Sexual Misconduct

- Sexual harassment – defined by the regs to include quid pro quo, hostile environment, and:
 - Sexual violence
 - Relationship violence
 - Domestic Violence
 - Stalking



Sexual Violence

- Sexual Assault – A **forcible** sexual act directed against another person **without the consent** of the Complainant, **including** where the Complainant is **incapable of giving consent**
 - Rape
 - Sodomy
 - Sexual Assault with an object
 - Fondling



Domestic Violence

- violence, on the basis of sex, committed by
 - a current or former spouse or intimate partner of the Complainant,
 - a person with whom the Complainant shares a child in common, or
 - a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
 - a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Pennsylvania
 - Under PA law, “family or household members”



Dating or Relationship Violence

- An act or pattern of abuse committed by a person involved in a social, sexual or romantic relationship, past or present, with the victim
- Can encompass a broad range of behaviors that may include physical violence, sexual violence, emotional violence, and economic violence



Hypothetically . . .

Molly reports that when the office photocopier breaks down the repair person from an external vendor makes sexually suggestive comments or asks her for a date. Molly reports the behavior to her supervisor.

Is this sexual harassment?

What could/should the supervisor do?



Hypothetically . . .

John's professor frequently touches him or rests her hands on his arm or leg during lab. John tried to gently extricate himself, but doesn't say anything. John also stops attending office hours.

Is this sexual harassment?

What remedies does John have under the Policy?



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.



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



Educational Program or Activity

- Locations, events or circumstances over which Penn exercises substantial control over both the respondent and the context in which the behavior occurred
 - Academic conferences/business trips
 - Must occur in the United States, 34 C.F.R. § 106.8(d)
- Buildings owned or controlled by an officially recognized student organization, including fraternity and sorority houses
- On-campus AND off-campus education programs or activities



Marilyn and Otter

Sixteen-year-old freshman Marilyn accompanied a friend, Beau, to a fraternity house where Otter, a senior, lived. Marilyn was acquainted with Otter because they both have work-study jobs at the library. While at the frat house Marilyn and Beau went to Otter's bedroom on the second floor. Otter offered marijuana and alcohol to Marilyn. Otter encouraged Marilyn to consume marijuana, at times refusing to allow her to "pass the joint" to others. At some point, Otter began fondling Marilyn's breasts and vagina and removed her pants and proceeded to engage in sexual intercourse with her. Marilyn states that she repeatedly told Otter to stop. Marilyn reported that she was unaware of the duration of the assault and according to her Otter just stopped but she doesn't know why. Marilyn eventually dressed and left the frat house by sliding down the stairs where she sat on the sofa in the living room for awhile before leaving with her friend. Beau described Marilyn as incoherent, "not paying any attention to anything that was going on around her," and like "a vegetable." Marilyn says she has not returned to her work-study job at the library because she is embarrassed to be around Otter.



Quiz

- If Marilyn reports this incident, is the conduct she describes covered by Title IX?
- What part of Penn's policy or Title IX, if any, might Otter have violated?
- Did Marilyn have the capacity to consent? Why or why not?



New Title IX Regulations

- Accessible Reporting to Title IX Coordinator
 - Notice of Title IX Coordinator's contact information including name or title, office address, e-mail address, and telephone number must be prominently displayed on school's website and elsewhere
 - Any person may report a violation (whether or not the person reporting is the person alleged to be the victim) to the Title IX Coordinator



Upon “Notice” to University

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

34 C.F.R. § 106.44(a)



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

34 C.F.R. § 106.45



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)

34 C.F.R. § 106.45(b)(1)(iii)



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.

34 C.F.R. §106.45(b)(5)(iii)



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



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

Investigators Summary

9.

MUST:

- Understand parties' rights
- Be familiar with University policy
- Conduct a thorough, fair and impartial investigation
- Communicate with the parties
- Conduct party and witnesses interviews
- Engage in fact-finding
- Assess Credibility
- Recommend findings as to responsibility and sanctions
- Prepare a draft and final investigative report
- Participate in hearing as a witness if Panel so chooses

CAN:

- Use discretion in determining relevant witnesses to interview and evidence to consider

CANNOT:

- Allow bias to affect interviews and determinations
- Maintain or create a conflict of interest with involved parties or witnesses

Advisors Summary

MUST:

- Keep the information obtained throughout the investigation and adjudication process confidential
- Follow the rules of decorum established by the University for the grievance process

CAN:

- Provide emotional, logistical, legal and general support or advice to a complainant or respondent
- Accompany a party to any meeting or conversation related to the investigation or adjudication process
- Assist a party in understanding and navigating the process
- Ask procedural or process questions at the appropriate time
- Direct questions to the other party during the hearing subject to considerations of relevance and appropriateness
- Assist during appeals process

CANNOT:

- Provide active representation (i.e., speak on behalf of a student during meetings, interviews or hearing or stand in for a party in their absence)
- Contact a witness or other party participating in the investigation process
- Impede the investigation process or hearing in an obstructive manner
- Communicate with the other party outside of the limited permissible questioning during hearings

SHOULD:

- Understand the University's investigation process and their role within that process in order to provide accurate information and appropriate assistance and support the party
- Be aware of supportive measures offered by the University



Questions?