

Title IX Training

August 11, 2020



00.00.2015

Introductions

Employee Side

Rhonnie Jaus

Vice President for Equal Opportunity, Affirmative Action and Compliance, Title IX Coordinator

Gene Puno-DeLeon

Associate Director Title IX & Equal Opportunity

Jade Mullins

Associate Director Human Resources

Student Side

Shondrika Merritt

Senior Director Student Advocacy & Assistant Dean of Students

Cassita Charles-Bowie

Title IX Investigator, Student Success

Joe Vece

Director Student Conduct & Community Standards

Shannon Schmutz

Assistant Director Student Conduct & Community Standards

Framing the Training

Agenda Overview

- Introduction to Training
- Overview of the new Title IX Regulations
- Investigation process
- Hearing process
- Student cases specifics (Title IX and 129-B)
- Technology use
- Resources for you

Overview of the New Federal Title IX Regulations

RHONNIE JAUS , Human Resources

OVERVIEW OF THE LAW

- The Department of Education has issued new regulations for Title IX Sexual Harassment which go into effect on August 14, 2020.
- The new regulations apply to cases involving faculty, staff and students.

OVERVIEW CONTINUED

- All cases that fall under the new definition of Title IX Sexual Harassment must now be handled under a quasi judicial grievance procedure.
- The single/double investigator model that we have been using for faculty/staff cases is no longer permissible for cases falling under the new definition.

OVERVIEW CONTINUED

- The hearings that have been conducted for student sexual misconduct cases — will also have to be modified substantially to comply with the new grievance proceedings.

JURISDICTION

- The new regulations apply only to incidents which occurred within an education program or activity of the university, and in the United States.
- This includes locations, events or circumstances over which the university exercises substantial control over the respondent (the accused), as well as the context in which the sexual harassment occurred.

JURISDICTION CONTINUED

- It also includes incidents that occurred in a building owned or controlled by a recognized student organization, and
- Activities that occurred within the computer/internet/platforms owned/operated/used in university programs and activities over which the university has control.

NEW DEFINITION OF TITLE IX SEXUAL HARASSMENT

Conduct which falls under one of three areas:

- Quid pro quo sexual harassment involving allegations that an employee conditioned educational benefits or university services on participation in unwelcome sexual conduct.

DEFINITION CONTINUED

- Unwelcome conduct on the basis of sex that a reasonable person would determine is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the university's educational programs or activities

DEFINITION CONTINUED

- All allegations of sexual assault, dating violence, domestic violence or stalking as defined by the Clery Act.
- There is no requirement that the conduct be severe, pervasive and objectively offensive. One incident is sufficient.

CONDUCT NOT WITHIN THE SCOPE OF THE DEFINITION

- Conduct that does not meet the new definition of sexual harassment or fall within the prescribed jurisdiction will be handled under existing university policies and procedures.
- See University Anti-Discrimination and Harassment Policy and Student Code of Conduct.

ACTUAL NOTICE TRIGGERS DUTY TO RESPOND

- Only a receipt of actual notice of an allegation of sexual harassment—triggers the university’s duty to respond in a manner that is not deliberately indifferent.
- Actual notice is written or oral notice from any source—provided to the Title IX Coordinator or any “university official with authority to institute corrective measures.”
- The old standard was constructive notice.

OFFICIALS WITH AUTHORITY vs. RESPONSIBLE EMPLOYEES

- Notice to an “official with authority” (Deans and Department Heads) triggers actual notice to the university.

However, all employees of TNS are still “responsible employees” and required to report allegations to the Title IX Coordinator.

RESPONDING IN A MANNER THAT IS NOT DELIBERATELY INDIFFERENT

- Promptly reach out to the complainant
- Notify them of available supportive measures
- Explain Title IX grievance proceedings
- Ascertain whether they wish to proceed
- Apprise them that they are entitled to supportive measures whether they proceed or not.

FORMAL COMPLAINT INITIATES THE GRIEVANCE PROCESS

- The grievance process commences with the filing of the formal complaint.
- The complaint must be in writing and signed (can be electronically) by the complainant or Title IX Coordinator and allege conduct that constitutes Title IX Sexual Harassment –and requests that the university initiate formal grievance procedures.

FORMAL COMPLAINT INITIATES THE GRIEVANCE PROCESS cont.

- At the time of the filing of the formal complaint, the complainant must be participating in or attempting to participate in the educational programs or activities of the university.
- This includes students and employees and prospective students and employees.
-

DISMISSING THE COMPLAINT

- If the conduct alleged in the formal complaint does not meet the definition of sexual harassment it must be dismissed.
- Written notice of the dismissal must be provided to the parties.
- Dismissals are appealable.
- Dismissal of the complaint does not preclude the university from addressing the conduct under existing policies.

NOTICE REQUIREMENTS

After the formal complaint is filed written notice of the allegations must be sent to the parties and include:

- The identity of the complainant
- Where and when the conduct occurred
- A brief explanation of the alleged conduct
- The rights parties have during the proceedings

THE INVESTIGATION

The university has the burden of gathering evidence during the investigation. The parties have the following rights:

- To be interviewed with an advisor of choice—who cannot participate.
- To present evidence and request that witnesses be interviewed.
- To review all evidence directly related to the allegations for up to 10 days and submit a written response for consideration.

INVESTIGATION CONTINUED

- Both exculpatory and inculpatory materials are considered evidence directly related to the allegations.
- An investigative report that fairly summarizes the evidence must be prepared and sent to both parties for review at least 10 days prior to the hearing.

THE LIVE HEARING

- The university cannot issue any discipline or sanction in a Title IX Sexual Harassment case without holding a live/virtual hearing.
- No party can waive the hearing.
- A decision maker/panel of decision makers will render the decision in the hearing.
- All parties must be accompanied to the hearing by an advisor of choice, who can ask witnesses questions on cross examination.

LIVE HEARING CONTINUED

- The parties cannot ask questions on cross examination themselves.
- If a party comes to the hearing without an advisor of choice, the university must provide them with one.
- There is no requirement that the advisor of choice be a lawyer or someone of equal competence to the opposing advisor.

LIVE HEARING—RELEVANCY

- The advisor of choice can ask only relevant questions on cross examination.
- The decision maker will decide whether a proposed question is relevant prior to the witness answering it.
- Relevant questions are those which “tend to make the allegation more or less likely to be true.”

LIVE HEARING

- Questions about prior sexual history of the complainant are not relevant—unless they go to the issue of consent or the identity of the offender.
- Questions about privileged information from medical or psychiatric records are not relevant.
- If a witness refuses to submit to cross exam in whole or in part —the decision maker cannot rely on any prior statement they made in determining responsibility.

LIVE HEARING CONTINUED

- The decision maker also cannot draw any inference about responsibility based upon a party's refusal to answer questions on cross exam.
- The standard of proof at the hearing is preponderance of the evidence.
- The decision maker/s will issue a written decision to the parties that includes findings of fact, conclusions of policy violations, rationale and recommended sanctions.
- All parties have the right to appeal this decision.

GROUNDS TO APPEAL

Parties have the right to appeal (the complaint dismissal or hearing decision) based on one of three grounds:

- A procedural irregularity-- that affected the outcome of the case.
- New evidence nor reasonably available--that affected the outcome of the case.
- The Title IX Coordinator, investigator, decision maker or hearing officer had a conflict of interest or bias--that affected the outcome of the case.

RETALIATION

- Retaliation for making a report, refusing to make a report or for participating in the proceedings — is strictly prohibited.

INFORMAL RESOLUTION

- After the filing of a formal complaint— the parties can engage in an informal resolution of the issues, rather than formal grievance proceedings.
- Both parties must voluntarily agree in writing to informal resolution, but can change their mind at any time prior to the final resolution.
- Informal resolution is not available in cases where an employee is alleged to have sexually harassed a student.

Continuation of Legal Requirements

CASSITA CHARLES-BOWIE, Student Success

Scope of Educational Program or Activity

The term “program or activity” means “all of the operations” of a postsecondary institution or local education agency. Education program or activity constitutes:

- *Locations,*
- *Events or*
- *Circumstances*

Over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs

Scope of Educational Program or Activity

For example: did the conduct occur in context/location where the school:

- Owned premises (or officially recognized student organization that owned or controlled the premises): including fraternities
- Exercised oversight, supervision or discipline, or
- Funded, sponsored, promoted or endorsed event.

Scope of Educational Program or Activity

- The off-campus incident occurs as part of the recipient's "operations"
- The recipient exercised substantial control over the respondent and the context of the alleged sexual harassment that occurred off-campus; or
- The incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization recognized by a postsecondary institution.

Scope of Educational Program or Activity

The rules specify that an education program or activity includes online conduct where the recipient exercised substantial control over both the respondent and the context in which harassment occurred. Online conduct includes the following:

- Computer and Internet networks
- Digital platforms
- Cell phones
- Online harassment

Scope of Educational Program or Activity

When sexual harassment occurs in an off campus location *not* owned or controlled by the student organization, yet involving members of the officially recognized student organization, the recipient's Title IX obligations will depend on:

- whether the recipient exercised substantial control over the respondent and the context of the harassment, or
- whether the circumstances may otherwise be determined to have been a part of “the operations of” the recipient.

Scope of Educational Program or Activity

Study Abroad Programs:

The Title IX rules do not have extraterritorial application with respect to study abroad programs.

Nothing in the Title IX rules prevents an institution from initiating student conduct proceedings or offering supportive measures to address sexual misconduct against a person outside of the United States.

Emergency Removals of Respondents

Under §106.44(c): the recipient may remove respondent from educational program or activity if:

- Conduct an individualized safety and risk analysis,
- Determine that respondent poses an immediate [imminent] threat to the physical health or safety of **any member of the campus community** justifying removal,
- The threat arises from the allegations of sexual harassment, and
- Provide opportunity for respondent to challenge removal immediately thereafter.

Emergency Removals of Respondents cont.

- Not limited to instances of sexual assault
- Removal cannot be based on generalized, hypothetical or speculative concerns
- Recipient can determine the scope of removal
- No specific time frames, may reassess, but not required to

Acting in a Manner Not Deliberately Indifferent

A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances:

- Failure to reach out to the complainant
- Failure to conduct an investigation

No action is taken to address/redress the situation.

Supportive Measures

Supportive measures may include:

- Counseling,
- Extensions of deadlines or other course-related adjustments,
- Modifications of work or class schedules,
- Campus escort services,

Supportive Measures cont.

- **Mutual** 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, and
- Other similar measures

Informal Resolution

Recipient may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process:

- Mediation,
- Restorative justice measures

Informal Resolution cont.

Obtains the parties' voluntary, written consent to the informal resolution process; and

Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

CONDUCTING THE TITLE IX HEARING

JOE VECE, Student Success

GENE PUNO-DELEON, Human Resources

Student Side

Employee Side

Relevancy Determinations

Rules of Decorum

**Avoiding Prejudgment, Bias,
and Conflict of Interest**



TOPICS

Title IX Complaints against Students

The Live Hearing

The purpose of the hearing is to:

1. Review and assess the facts
2. Make findings of fact
3. Determine finding of responsibility
4. Determine sanction and remedy

The essential elements of all hearings is that it is a part of a fair due process that is equitable, consistent, and trauma-informed.

Who Is In the Hearing?

Respondent- the “accused student.” A respondent is responding to allegations of misconduct.

Complainant- the student who put forth a complaint. “The Reporting Party.”

Advisors- Priority role is to ask questions during cross-examination. Advisors provide emotional support and can also assist the parties prepare for the hearing.

Who Is In the Hearing?

Conduct Review Panel (Disciplinary Review Panel)- a panel of 3-5 members of The New School community will ultimately make a decision of responsibility. The panel is also known as “the decision maker.”

Panel Chair- The main “decision maker.” The chair directs the flow of the hearing. The chair is the final word on relevance.

Code Administrator-Ensures the process is being followed as outlined in the code. Controls the technology/recording of the hearing.

Who Is In the Hearing?

Witnesses- Witnesses are called by individual parties to provide information about the incident at hand. Witnesses are questioned by the Panel and advisors

**Title IX Investigator- The Investigator can be called by either party to answer questions about the report/investigation.

The Flow of the Hearing

1. Introductions and Purpose of The Hearing
2. Privacy and Decorum Expectations
3. Review of Due Process Rights and Challenge
4. Reading of Allegations and Response/Claim
5. Opening Statements (both parties)
6. Panel Questions
7. Cross Examination by Advisors
8. Witnesses (if called by parties)
9. Closing Statements (both parties)
10. Close of Hearing by Code Administrator

Title IX Complaints against Employees

- Complainant / Reporting Party
- Respondent / Responding Party
- Advisor of Choice
- Witnesses
- Hearing Officer
- Decision-Maker
- Administrative Staff

Present at the Hearing

- Hearing Officer outlines proceedings
- Responding party gives a response to individual allegations
- Each party makes opening statement
- Decision-Maker asks questions of each party
- Cross-examination conducted by Advisors of Choice for each party
- Decision-Maker may ask follow-up questions after cross-examination
- Hearing Officer calls witnesses individually for questioning
- Hearing Officer will close questioning portion and ask parties to give closing statements
- Hearing Officer ends the hearing and informs parties of written determination

The Hearing Process

RELEVANCY DETERMINATIONS

Relevance

Any question posed by the advisors must be evaluated for “relevance” in real time by the decision-maker. Institutions are encouraged to apply the “plain and ordinary meaning” of relevance in their determinations. A relevant question will ask whether the facts material to the allegations under investigation are more or less likely to be true. A question not directly related to the allegations will generally be irrelevant.

Relevance decisions:

- Made on a question-by-question basis by the decision-maker
- Seeks information to aid decision-maker
- Impartial and not based on bias for or against any party or participant
- Advisors may ask decision-maker to reconsider their relevance decision once per decision only

Questions

Relevant questions

- Generally probative questions asks whether a material fact is more or less likely to be true

Irrelevant questions

- Duplicative
- Complainant's prior sexual history [* with 2 exceptions]
- Privileged information

*** Two exceptions on prior sexual history**

- 1. The question is asked to prove that someone other than the respondent committed the conduct alleged by the complainant.**
- 2. The question concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is asked to prove consent**

RULES OF DECORUM

The Proceedings

Title IX hearings are not civil or criminal proceedings and are not designed to mimic them. They are educational in nature.

The *Rules of Decorum* requires that all parties, advisors, and university staff treat others engaged in the process with respect.

The *Rules* apply equally to all participants regardless of how they identify and what role they are serving during the hearing.

The Hearing Officer has discretion to address the participant who may be in violation of the *Rules of Decorum* and also has discretion to limit their participation in the hearing.

The Proceedings

Expectations for Participants

- No party may act abusively or disrespectfully during the hearing
- Using correct name and gender (pronoun)
- No repetitive questions
- “While an advisor may be an attorney, no duty of zealous advocacy should be inferred or enforced within this forum.”
- No screaming, shouting, badgering or “physically leaning in” (Intimidation)
- No profanity or attacks on a party.
- “Questions are meant to be interrogative statements used to test knowledge or understand a fact; they may not include accusations within the text of the question.”
- Hearing Officer or Panel Chair has final authority
- Warnings will be issued and removal from the hearing is possible

IMPARTIALITY:

Avoiding prejudgment, bias, and
Conflict of interest

Being Impartial

The resolution of an allegation must be impartial, meaning that it must be objective and unbiased.

To render an objective decision, investigators and decision makers must be sufficiently removed from the parties, witnesses, and subject matter that their relationships or experiences do not impact their investigation and decision-making.

All human beings have biases. The key is to recognize what those biases are, check them at the door, and not to let them influence the investigation.

You may have strong opinions about the issues that come up in a complaint or investigation. You should not let those beliefs and thoughts impact your evaluation of whether the responding party violated the policies of your campus.

Bias

Implicit Bias or Unconscious Bias- Attitudes or stereotypes that affect our actions, understanding of events, and decisions in an unconscious manner.

- Happens automatically in our brains
- Does not necessarily align with our declared beliefs
- Can be pervasive

Common Types of Bias

- Affinity Bias- the unconscious tendency to relate or get along with others who are like you.
- Bandwagon Effect- ideas, fads, trends, etc. that become more popular as other people accept them.
- Correspondence Bias- the tendency to believe what people do reflects who they are.
- Confirmation Bias-the tendency to search for, interpret, favor, and recall information in a way that confirms or strengthens one's personal beliefs or values

Ensuring impartial Proceedings

- Do not rely on cultural “rape myths” that essentially blame complainants
- Do not rely on stereotypes about how men or women purportedly behave
- Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases
- Recognize that anyone, regardless of age, gender, gender-identity or sexual orientation can be a victim or perpetrator of sexual assault or other violence
- Avoid any perception of bias in favor of or against complainants or respondents in general
- Presumption of non-responsibility: Investigate and resolve complaints without drawing inferences about credibility based on a party’s status as a complainant or respondent.
- Follow facts of every individual case
- Investigate in a manner that will not allow a perception of prejudgment or bias for or against any party

Avoiding Conflicts of Interest

All personnel involved in the Title IX process will be assessed for bias and conflict of interest on a case-by-case basis

Different individuals must participate in each phase of the process to foster impartiality - one individual or entity to act as Title IX coordinator, another to conduct an investigation, and a third to adjudicate or act as hearing officer

INTERSECTION OF 129-B & TITLE IX

SHONDRIKA MERRITT, Student Success

What is 129-B?

129-B is a New York State legislation intended to communicate and provide definitions, require education and training, and articulate policies and procedures aimed at addressing sexual assault, dating violence, domestic violence and stalking prevention and response. Additionally, the statute requires that higher education institutions submit annual aggregate data reports to the Department concerning incidents of domestic violence, dating violence, stalking and sexual assault during each reporting period.

Where 129-B and Title IX Collide

*When considering possible conflict between the two laws, please remember:
Preemption- Where the two laws conflict, Title IX wins!

- Generally, both laws work together with minimal conflict. However, within the new regulations there are a few areas to consider.
 - Example: Change in definitions, supportive measures
- Detailed requirements of 129-B that are not required by Title IX
 - Affirmative Consent, Amnesty, Climate Survey/SED Data Reporting, Prevention, Bill of Rights and Response for non-covered activity and Privacy in legal challenges
- Geography

TECHNOLOGY & THE HEARING

JADE MULLINS, Human Resources

Evidence & Report Review

- **Google Drive** will be used for both parties to review documents, photographs, videos, and other evidence related to the case
 - Google Drive: Download prevention, copy/paste prevention, sharing prevention, edit prevention, sharing expiration
- The link and viewing privileges will be emailed to both parties and their advisors of choice
- Neither party, nor their advisor, may copy, save or share information uploaded & shared. Violations of the rules governing transmission and review of documents through the storage account are separate conduct violations and may result in further disciplinary action and sanctions
- All meetings will be recorded & will also be available to review and inspect via the Google Drive

Hearings

- All hearings will be conducted using [Zoom](#)
 - All participants will be emailed a link to the Zoom hearing
 - Hearing will be password protected
 - Every participant will be brought into the virtual waiting room before being invited into the meeting by the host
 - Chat features will only be available between participants and the Code Administrator (host)
- All participants should have their video on
- Zoom's recording feature will be enabled
- The Code Administrator will control the technology & the recording
- Technology issues?
 - For each hearing there will be primary and secondary support person from our IT department
 - The contact information for each support person will be shared with the Code Administrator prior to each hearing
- Recordings will remain in The New School's records for at least seven years

TITLE IX TOOLKIT

SHANNON SCHMUTZ, Student Success

- Relevance Guide
- Relevance Chart
- Evidence Agreement
- Rules of Decorum Acknowledgement
- Hearing Script(s)

Tool Kit

QUESTIONS?