



Title IX Sexual Harassment & University Sexual Misconduct: Training for Investigators

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Training Overview

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- To ensure compliance, this training quotes as much as possible from the Title IX regulations and Princeton University's Title IX Sexual Harassment policy and University Sexual Misconduct policy (which both use language from the Title IX regulations).
 - <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html>
 - <https://sexualmisconduct.princeton.edu/policy>
- This training may be supplemented by additional trainings provided by other University offices, including the Office of the General Counsel, and/or external resources.

Title IX Sexual Harassment Policy

Section XIII

“The University will provide appropriate training ... such training will cover **the definition of Title IX Sexual Harassment, the scope of the University’s education program or activity, how to conduct an investigation and grievance process ... and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias ...** The University will ensure that investigators receive training on **issues of relevance** in order to create an investigative report that fairly summarizes relevant evidence.”



Background

Background

- New Title IX regulations were issued by the U.S. Department of Education on May 6, 2020.
- The new regulations limit the scope of Title IX.
- The preamble and regulations are over 2000 pages and contain detailed requirements, including regarding procedures, language, and definitions.
- Colleges and universities were required to comply with the regulations by August 2020.

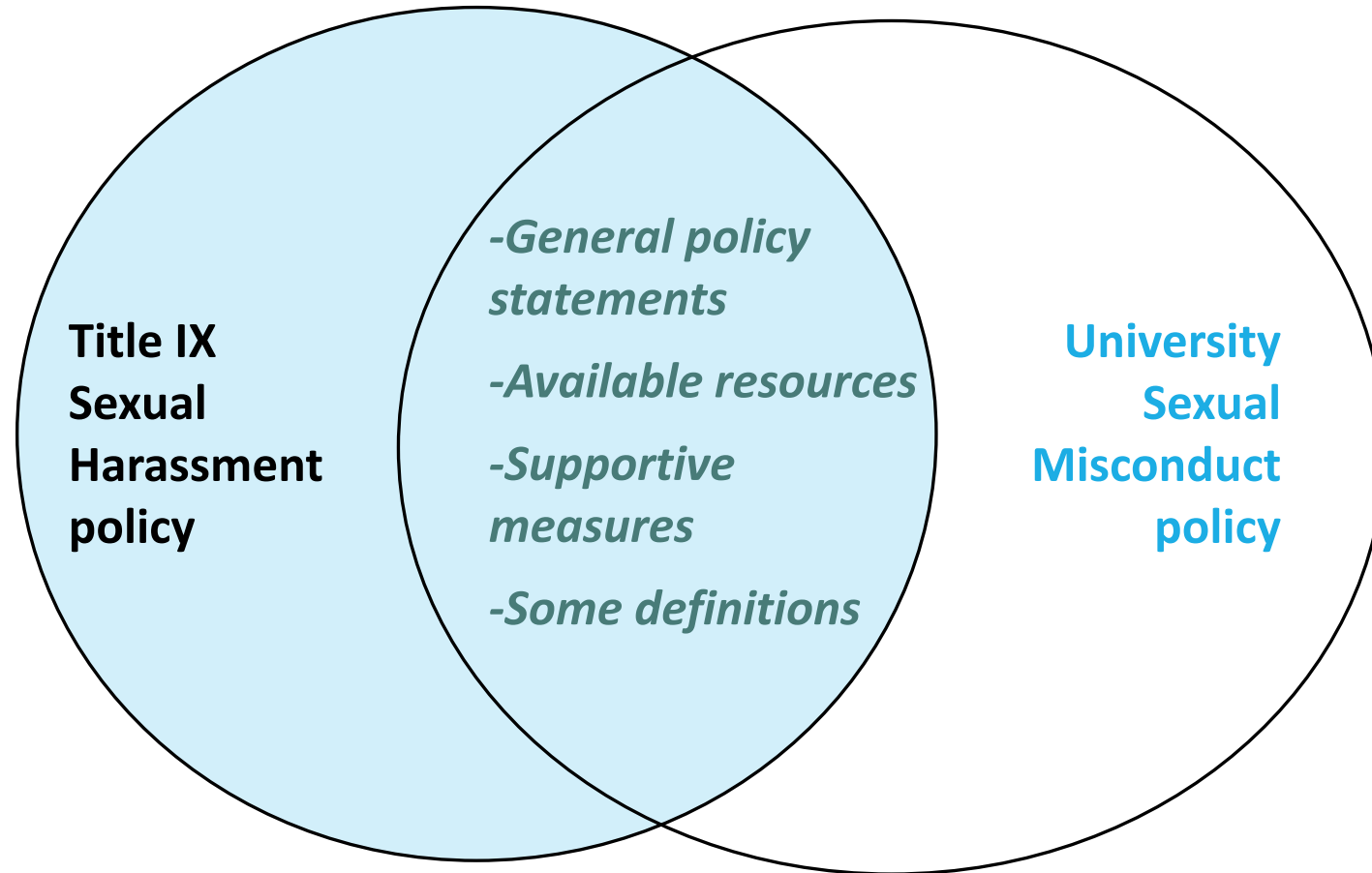
Governance/Approval Process

- Sections of policies relating to disciplinary procedures:
 - Reviewed by Faculty Advisory Committee (FACP) (faculty and administrators)
 - Recommendations by/feedback from FACP incorporated into policies
 - FACP unanimously approved policies
 - Full faculty approved policies on July 27, 2020
- Sections of policies unrelated to disciplinary procedures:
 - Reviewed by *Rights, Rules* Committee (undergraduates, graduate students, faculty, and staff)
 - Recommendations by/feedback from *Rights, Rules* Committee incorporated into policies
 - *Rights, Rules* Committee unanimously approved policies
 - CPUC approved policies on August 3, 2020

Covered Conduct

Conduct that violated University policy last year will continue to violate University policy this year but ... may be adjudicated under two different grievance procedures (the Title IX Sexual Harassment policy and the University Sexual Misconduct policy).

(1) Title IX Sexual Harassment Policy & (2) University Sexual Misconduct Policy





Definitions & Scope

Title IX Sexual Harassment: Scope

Title IX Sexual Harassment encompasses all prohibited conduct that occurs on the basis of sex and meets all of the following requirements:

- Occurs within the United States; and
- Occurs within the University's education program or activity, meaning a) **locations, events, or circumstances over which the University exercises substantial control over both the respondent and the context in which the Title IX Sexual Harassment occurs**, and b) **any building owned or controlled by a student organization that is officially recognized by the University**; and
- At the time of filing a formal complaint, a complainant is participating in or attempting to participate in the education program or activity at the University.

University Sexual Misconduct: Scope

The University Sexual Misconduct policy applies to:

- Forms of sexual misconduct that do not fall under the scope of the Title IX Sexual Harassment policy, including Sexual Exploitation, Improper Conduct related to Sex, and University Sexual Harassment; and
- Complaints alleging certain conduct that would otherwise be prohibited under the Title IX Sexual Harassment policy (e.g., Quid Pro Quo Sexual Harassment, Sexual Assault, Domestic Violence, Dating Violence, and Stalking under the Title IX Sexual Harassment policy), but which must be dismissed under the Title IX Sexual Harassment policy because they do not meet the jurisdictional requirements.

Quid Pro Quo Sexual Harassment (both policies)

Quid Pro Quo Sexual Harassment: 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.

Title IX Sexual Harassment (Title IX policy)

Title IX Sexual Harassment: Unwelcome sexual conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies an individual equal access to the University's education program or activity.

University Sexual Harassment (Univ. Sexual Misconduct policy)

University Sexual Harassment: Unwelcome verbal or physical behavior which is directed at an individual based on sex, when these behaviors are sufficiently severe or pervasive to have the effect of unreasonably interfering with an individual's educational experience, working conditions, or living conditions by creating an intimidating, hostile, or offensive environment. Examples of conduct that can constitute sexual harassment if based on an individual's sex include but are not limited to:

- Unwelcome jokes or comments (e.g., sexist jokes);
- Disparaging remarks about sex, gender identity, or gender expression (e.g., negative or offensive remarks or jokes about an individual's self-presentation);
- Displaying negative or offensive posters or pictures about sex;
- Electronic communications, such as e-mail, text messaging, and Internet use, that violate this policy.

Sexual Assault (both policies)

Sexual Assault: Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. Sexual assault can occur between individuals of the same or different sexes and/or genders. This includes the following:

- **Rape:** The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity;
- **Sodomy:** Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity;
- **Sexual Assault with an Object:** To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity;
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity;
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law; or
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.

Domestic/Dating Violence (both policies)

Domestic Violence: A felony or misdemeanor crime of violence committed: (a) by a current or former spouse or intimate partner of the victim; (b) by an individual with whom the victim shares a child in common; (c) by an individual who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner; (d) by an individual similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the felony or misdemeanor crime of violence occurred; (e) by any other individual against an adult or youth victim who is protected from that individual's acts under the domestic or family violence laws of the jurisdiction in which the felony or misdemeanor crime of violence occurred. For purposes of this policy, an **intimate partner** is defined as an individual with whom one has or had a short- or long-term relationship that provides romantic and/or physical intimacy or emotional dependence. Intimate relationships can occur between individuals of the same gender or different genders and may include (but are not limited to) marriages, civil unions, dating relationships, "hook-up" relationships, relationships in which partners are characterized as "girlfriends" or "boyfriends," and relationships between individuals with a child in common.

Dating Violence: Violence committed by an individual who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting individual's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the individuals involved in the relationship. This includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

Stalking (both policies)

Stalking: Engaging in a course of conduct directed at a specific individual that would cause a reasonable person to: (a) fear for the individual's safety or the safety of others; or (b) suffer substantial emotional distress. For the purposes of the Stalking definition: *Course of conduct* means two or more acts, including acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about an individual, or interferes with an individual's property. *Reasonable person* means a reasonable person under similar circumstances and with similar identities to the victim. *Substantial emotional distress* means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Retaliation (Title IX policy)

Retaliation under Title IX policy: No individual may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this policy or because an individual has made a report or formal complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this policy.

- The University retains the right to charge an individual for making a materially false statement in bad faith during the course of an investigation, proceeding, or hearing under this policy, but will not conclude that any individual has made a materially false statement in bad faith solely based on the determination regarding responsibility.
- Complaints alleging retaliation under this Title IX Sexual Harassment policy, including for the exercise of rights under this policy, must be filed in accordance with this policy and will be addressed promptly and equitably. Where the individual allegedly retaliating is not affiliated with the University and not otherwise subject to its policies, the University will process the complaint and take appropriate measures.
- Notwithstanding the above, the exercise of rights protected under the First Amendment does not constitute retaliation prohibited under this policy; and charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this policy does not constitute retaliation; provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

Retaliation

(Univ. Sexual Misconduct policy)

University Retaliation. The University expressly prohibits any form of retaliatory action against any member of the University community who in good faith: (1) files a report, complaint or grievance under this policy (or with an external entity); (2) opposes in a reasonable manner an action or policy believed to constitute a violation of this policy; or (3) participates in University investigations, compliance reviews, or discipline proceedings under this policy. Depending on the circumstances referenced above, retaliatory acts may include (but are not limited to): Adverse employment action; Adverse action relating to participation in an educational or working program; Unreasonably interfering with the academic or professional career of another individual; Engaging in conduct which constitutes stalking, harassment, or assault; Engaging in efforts to have others engage in retaliatory behavior on one's behalf.

- The University retains the right to charge an individual for making a materially false statement in bad faith during the course of an investigation, proceeding, or hearing under this policy, but will not conclude that any individual has made a materially false statement in bad faith solely based on the determination regarding responsibility.
- Complaints alleging retaliation under this policy, including for the exercise of rights under this policy, must be filed in accordance with this policy and will be addressed promptly and equitably. Where the individual allegedly retaliating is not affiliated with the University and not otherwise subject to its policies, the University will process the complaint and take appropriate measures.
- Notwithstanding the above, the exercise of rights protected under the First Amendment does not constitute retaliation prohibited under this policy; and charging an individual with a violation for making a materially false statement in bad faith in the course of a grievance proceeding under this policy does not constitute retaliation, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

Sexual Exploitation (Univ. Sexual Misconduct policy)

Sexual Exploitation. Any act whereby one individual violates the sexual privacy of another or takes unjust or abusive sexual advantage of another who has not provided consent, and that does not constitute non-consensual sexual penetration or non-consensual sexual contact. Examples may include: recording, photographing, transmitting, viewing, or distributing intimate or sexual images or sexual information without the knowledge and consent of all parties involved; voyeurism (i.e., spying on others who are in intimate or sexual situations).

Improper Conduct Related to Sex (Univ. Sexual Misconduct policy)

Improper Conduct Related to Sex. Unprofessional or inappropriate conduct that does not fall under other forms of Title IX Sexual Harassment or University Sexual Misconduct, but that is sexual and/or sex based in nature and has the effect of unreasonably interfering with an individual's educational experience, working conditions, or living conditions.



Conducting an Investigation

Collection of Evidence-1

“The investigators will collect information from each party. While the complainant and the respondent are not restricted from gathering and presenting relevant evidence, the investigators are responsible for gathering relevant evidence to the extent reasonably possible. However, each party will be given an equal opportunity to suggest witnesses; provide other relevant information, such as documents, communications, photographs, and other evidence; and suggest questions to be posed to the other party or witnesses. Parties and witnesses are expected to provide all available relevant evidence to the investigators during the investigation. If a party or witness fails to provide available relevant evidence during the investigation, such evidence may, at the discretion of the Presiding Hearing Panelist, be excluded from consideration at the hearing. While parties are not restricted from presenting information attesting to the parties’ character, such evidence generally is not considered relevant.” (Policies, Sections X/XI)

Collection of Evidence-2

“Parties will be interviewed separately and will be interviewed by the panel of investigators. The investigators will interview witnesses as necessary and may, at their discretion, delegate witness interviews to two investigators. The investigators will record all interviews, or notes of the interviews will be taken by the investigators. Any other recording of interviews is prohibited and violations may result in discipline.” (Policies, Sections X/XI)

Collection of Evidence-3

- “In general, a party’s medical and counseling records are confidential. The investigators will not access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the investigators obtain that party’s voluntary, written consent to do so.”
- “The investigators will not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege (e.g., attorney-client, doctor-patient), unless the individual holding such privilege has waived the privilege.” (Policies, Sections X/XI)

Case File

- “After each party has been interviewed and had the opportunity to identify witnesses and other potentially relevant information and evidence, and the investigators have completed any witness interviews and any gathering of evidence, the investigators will prepare a case file. The case file **will include all collected evidence that is directly related to the allegations raised in the formal complaint, including the evidence upon which the University does not intend to rely in reaching a determination regarding responsibility and any inculpatory or exculpatory evidence, whether obtained from a party or other source as part of the investigation.** The case file may include, as applicable, transcripts or summaries of party and witness interviews and other collected documents and evidence. The investigators will provide the case file, redacted of personally identifiable information in accordance with privacy regulations, to each party and their adviser in electronic form or hard copy. In all cases, any information relied on in adjudicating the matter will be provided to the parties and their advisers. The investigators will also provide an updated Notice of the Allegations, as appropriate.”
- “Within ten (10) business days of receiving the case file, each party may respond in writing, which may include a request that the investigators collect additional evidence. If the investigators believe that further information is needed following receipt of any responses from the parties, the investigators will pursue any additional investigative steps as needed. The parties and their advisers will be provided with each party’s written responses to the case file, if any, as well as any additional information collected by the investigators, in electronic format or hard copy.” (Policies, Sections X/XI)

Investigative Report

- “Following their review of the parties’ responses (if any) to the case file, **the investigators will create a written investigative report that summarizes all relevant evidence; the report will not contain irrelevant information.**”
- “At least ten (10) business days prior to the hearing, the investigative report will be provided to the parties and their advisers via electronic format.”
- “The parties may choose to provide a written response to the investigative report, which must be submitted at least five (5) business days prior to the start of the hearing. The response may consist of a written statement not to exceed 2500 words. At least 48 hours prior to the hearing, the parties and their advisers will be provided with the other party’s written response to the investigative report, if any, in electronic format.” (Policies, Sections X/XI)



Issues of Relevance

Relevance

“The final regulations seek to provide strong, clear procedural protections to complainants and respondents, including **apprising both parties of the evidence the investigator has determined to be relevant**, in order to adequately prepare for a hearing and to submit responses about the investigative report for the decision-maker to consider.” (Title IX Regulations Preamble)

Relevance

“... the final regulations require recipients to gather and evaluate relevant evidence, with the understanding that this includes both inculpatory and exculpatory evidence, and the final regulations deem questions and evidence about a complainant’s prior sexual behavior to be irrelevant with two exceptions* and preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).” (Title IX Regulations Preamble)

* “... rape shield protections, providing that questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, 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.” (Title IX Regulations Preamble)

Relevance

“The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.” (Title IX Regulations Preamble)

- Federal Rule of Evidence 401: Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.
- New Jersey Rule of Evidence 401: “Relevant evidence” means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.



How to Serve Impartially

Conflict of Interest/Bias

“All individuals who have responsibilities in administering the grievance process under this policy must be **free of any conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent** and will be trained as provided by federal regulations.” (Policies, Sections X/XI)

Conflict of Interest/Bias

- Investigator must self-report any **real or perceived** conflict of interest (and will be recused as appropriate - as determined by Title IX Coordinator)
- Party must report conflict of interest concerns within 48 hours of being notified of relevant identities (and will be recused as appropriate - as determined by Title IX Coordinator)

Conflict of Interest/Bias: Ground for Appeal

- Intended for situations in which investigator had conflict that affected the outcome of the matter
 - Could include (but is not limited to) having a close personal relationship with one of the parties
 - Not intended in situations in which investigator merely knows or has professionally interacted with one of the parties

Avoiding Bias, Generally

- Maintain neutrality
- Be open-minded
- Do not pre-judge
- Consider each case on its own merits

Avoiding Gender Bias

“... a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what ‘men’ or ‘women’ do or do not do.” (Title IX Regulations Preamble)

Avoiding Gender Bias

- **Focus on conduct, not gender**
- Recognize that anyone, regardless of gender, gender identity, gender expression, and/or sexual orientation can be a victim or perpetrator of sexual misconduct
- The gender, gender identity, gender expression, and/or sexual orientation of any party should have no bearing on how university will investigate
- Do not rely on cultural stereotypes about how men or women purportedly behave
- Do not rely on cultural “rape myths” that blame complainants
- Do not rely on gender-specific research data or theories to decide or make inferences of relevance in particular cases

Cite: Jeff Nolan, Esq., Holland & Knight



Questions/Comments?
