



Advisor Training

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October 12, 2021

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Introduction



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Christine is an attorney who has extensive experience working with colleges and universities, focusing on Title IX compliance, investigations and decision-making, as well as responding to discrimination complaints based on race and disability in the workplace and educational environment. She currently serves as the Interim Title IX Coordinator at Susquehanna University.

Overview

➤ **Key Take-Aways**

- Knowing the Policy and Procedures for Title IX Sexual Harassment and for Student Community Standards Sexual Misconduct and Gender Based Violence is essential
- You play an important role in establishing confidence of the parties in the grievance process and helping the process to run smoothly

➤ **Today's Objectives:**

- Introduce key Title IX/Community Standards Sexual Misconduct concepts
- Discuss Susquehanna's Policy
- Explain mechanics of the grievance process
- Focus on role of Advisor

Disclaimer

This presentation is for training purposes only. The content of this presentation is to provide news and information on legal issues and all content is provided for informational purposes only and should not be considered legal advice. The goal of the training is to familiarize attendees with the Title IX implementing regulations and Susquehanna University's Policy and Procedures for Title IX Sexual Harassment and for Student Community Standards Sexual Misconduct and Gender Based Violence.

The transmission of information in this presentation does not establish an attorney-client relationship with the attendees. The attendees should not act on the information contained in this presentation without first consulting retained legal counsel. If you desire legal advice for a particular situation, you should consult an attorney.

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TITLE IX OVERVIEW

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 students and employees
- Jurisdictional requirements apply

2020 Regulations

- Give direction on how to comply with the statute in the context of sexual harassment / assault, dating & domestic violence, and stalking
- Define sexual harassment and assault for Title IX purposes
- Create new procedures for responding to complaints relating conduct prohibited by Title IX
- Mandate a live hearing for Title IX complaints
- Mandate that parties have advisors at the hearing for the purpose of questioning the other party and witnesses
- Leave it to schools to determine how to handle non-Title IX sexual misconduct and discrimination – Susquehanna has applied the same procedures to non-Title IX Sexual Misconduct

Title IX Prohibited Conduct

Jurisdictional Requirements

- ❑ In the United States
- ❑ Within Susquehanna's education program or activity
- ❑ At time of filing the complaint, Complainant was participating or attempting to participate in the education program or activity

Types of Prohibited Conduct

- ❑ Sexual harassment
- ❑ Sexual assault (penetration, fondling, incest, statutory rape)
- ❑ Stalking
- ❑ Dating Violence
- ❑ Domestic Violence

Community Standards Sexual Misconduct & Gender Based Violence

Jurisdictional Requirements

- Not Title IX Prohibited Conduct **or**
- Complainant is not participating or attempting to participate in the education program or activity, **and**
- Continuing adverse effects on or creates a hostile environment for individuals participating in the education program or activity or otherwise has a reasonable connection to SU

Types of Prohibited Conduct

- Sex Discrimination
- Sexual harassment
- Sexual assault / rape (and attempts)
- Fondling
- Statutory rape
- Sexual Exploitation
- Stalking
- Dating Violence
- Domestic Violence

Susquehanna's Structure



Multiple policies address complaints of sexual misconduct and/or discrimination based on sex.

- Title IX Sexual Harassment and Student Community Standards Sexual Misconduct and Gender Based Violence Policy (the “Policy”)
 - Applies to **students and employees**
 - Employees may also be subject to the Anti-Harassment and Non-Discrimination Policy for concerns that fall outside of Title IX prohibited conduct (discrimination based on sex)
- Student Code of Conduct

KEY CONCEPTS

Title IX Terminology

- **Complainant** – individual who is alleged to be the victim of prohibited conduct under the Policy
Not: “victim” or “plaintiff”
- **Respondent** – individual who has been reported to have engaged in Title IX Prohibited Conduct or an organization that has been reported to have engaged in Community Standards Sexual Misconduct or Gender Based Violence.
Not: “perpetrator” or “defendant”
- **Hearing** – Procedure in which both parties have the opportunity to present a narrative, witnesses and evidence and to question each other, witnesses, and the investigator.
Not: “trial”

Title IX Terminology

- **Cross Examination** – Opportunity to question parties and witnesses to establish facts and test credibility.
- **Preponderance of the Evidence** – the standard by which the Hearing Officer will make decisions on responsibility. Preponderance of the evidence means that the outcome is more likely than not.
- **Finding of Responsibility** – the outcome of a hearing will find the Respondent either “Responsible” or “Not Responsible” for specific alleged policy violations.
Not: “guilty,” “not guilty” or “innocent”
- **Hearing Officer** – conducts the hearing and makes determination as to responsibility and assigns sanctions, if appropriate; not the Title IX Coordinator or investigator
Not: “judge” or “Madame Hearing Officer”

Understanding Prohibited Conduct Definitions

- When reviewing the notice of allegations or disciplinary charges, understand the Policy definitions for the specific type of prohibited conduct
- Break the definitions into elements or sub-parts
- Understand what elements are at issue in your matter
- Help your party make sure the record is clear on facts related to the elements
- A finding of responsibility will be made based on whether each element of the prohibited conduct has been shown by a preponderance of the evidence

Understanding Prohibited Conduct Charges

- **Remember** – jurisdictional rules determine whether the conduct is Title IX Sexual Harassment/Assault or Community Standards Sexual Harassment/Assault.
- Party may be charged with one or both depending on where conduct occurred or status of Complainant at time of alleged prohibited conduct.

Sexual Harassment



Conduct on the basis of sex, through any medium, that satisfies one or more of the following:

- An employee conditions the provision of aid, benefits, or service of the University on an individual's participation in unwelcome sexual conduct

OR

- Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person of equal access to the education program or activity

Sexual Assault



Any of the following prohibited conduct:

- **Rape** – penetration no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without consent
 - Community Standards Sexual Assault/Rape includes attempted penetration
- **Fondling** – touching of private body parts of another for the purpose of sexual gratification without consent
 - Community Standards Fondling includes causing a person to touch the harasser’s private parts, without consent; also includes kissing

Sexual Assault



Any of the following prohibited conduct:

- **Incest** – intercourse between two persons who are related to each other by blood within the degrees where marriage is prohibited by law (Title IX only)
- **Statutory Rape** – sexual intercourse with a person who is under the statutory age of consent

Consent



Knowing, active, voluntary and present agreement to engage in specific sexual or intimate contact.

- Use the “reasonable person” standard to determine whether person in Respondent’s position should have known whether Complainant was able to consent and whether consent was given
- Must be capable of giving consent (i.e., not incapacitated or coerced)
- Consent can be communicated by words or actions
- Lack of protest, passivity, silence ≠ consent
- Consent to one form of sexual contact does not imply consent to other forms of activity
- Past consent ≠ consent to future sexual contact

Consent



Person giving consent must be capable of doing so with the ability to understand what they are doing and the specific details of the sexual contact to which they are consenting

- Must understand and agree to the who, what, when, where and how of the sexual contact
- Unconscious, sleeping, and/or incapacitated person cannot consent
- Use of violence, threats, coercion, or intimidation invalidates any consent given
 - Coercion is the use of express or implied threats, intimidation, or physical force which places an individual in fear of immediate harm or physical injury or causes a person to engage in unwelcome sexual activity
- If person changes their mind, person must communicate the end of consent with words or actions

Incapacitation



The physical and/or mental inability to make a knowing and deliberate choice to engage in sexual activity

- A state beyond drunkenness or intoxication. Indicators:
 - Inability to communicate coherently, inability to dress/undress without assistance, inability to walk without assistance, slurred speech, loss of coordination, vomiting, inability to perform other physical or cognitive tasks without assistance
- Sleeping, unconscious, or unresponsive person is incapacitated
- Key Question: Would a reasonable, sober person initiating sexual activity know that the individual was incapacitated?

Stalking



Engaging in a course of conduct, through any medium, directed at a specific person that would cause a reasonable person to fear for the person's own safety or safety of others or suffer substantial emotional distress.

- **Course of conduct** means two or more acts, in which the stalker directly, indirectly or through third parties, follows, monitors, observes, surveils, threatens or communicates to or about a person or interferes with a person's property.
- **Reasonable person** means a person under similar circumstances and with similar identities to the complainant.
- **Substantial emotional distress** mean significant mental suffering or anguish.

Dating Violence



Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant

- Includes sexual or physical abuse or threat of such abuse
- Considerations include:
 - Length of parties' relationship
 - Type / nature of relationship
 - Frequency of interaction between the parties

Domestic Violence



Violence committed by:

- Current or former spouse or domestic partner
- Person with whom party shares a child
- Person with whom party cohabitates or has cohabitated as spouse or intimate partner
- Person similarly situated to a spouse under the PA DV laws, OR
- Any other person against a person who is protected from that person's acts under PA DV or family violence laws

Community Standards Sexual Exploitation



Act or omission in which individual takes non-consensual, sexual advantage of another, for the individual's own advantage or benefit of a third party.

- Memorializing sexual behavior or state of undress of another without the other's knowledge and consent
 - Pictures, movies, graphic written material, recordings, use of webcam
- Sharing such items beyond the boundaries of consent where consent was given
- Observing or facilitating observation by others of sexual behavior or state of undress of another without knowledge and consent

Community Standards Sexual Exploitation



Additional examples include:

- Engaging in sexual behavior with knowledge of an illness/disease that could be transmitted without full disclosure to the partner
- Engaging in escort or dating services that include or encourage the exchange of money
- Intentionally, knowingly, surreptitiously providing drugs or alcohol to a person for the purpose of sexual exploitation
- Exposing another to pornographic material without the person's advance knowledge or consent

GRIEVANCE PROCESS

Purpose of the Grievance Process

- Establish a process for receiving and responding to complaints of sexual harassment/assault, stalking, dating violence and domestic violence
- Stop prohibited conduct, prevent its recurrence, and remediate any adverse effects of the conduct in the University's education program and activities
- Provide **supportive measures** to the parties – these are non-disciplinary, non-punitive individualized services
- Treat parties equitably and give them equal opportunities to share information in support of their perspective

Grievance Process Overview

- 1 Formal Complaint filed (different from a report of prohibited conduct)
- 2 Notice of Allegations to Respondent / Acknowledgment to Complainant
- 3 Investigation (~90 days)
- 4 Evidence shared with parties, with opportunity to respond (10 days)
- 5 Investigation Report issued, with opportunity to respond
- 6 Responses shared with parties & advisors
- 7 TIX Coordinator will issue hearing notice, with opportunity to identify hearing witnesses and object to appointed Hearing Officer (no less than 10 days before hearing)
- 8 Hearing
- 9 Written determination of responsibility and sanctions if appropriate (7 days after hearing)
- 10 Appeal (within 10 days of determination)

Advisors in the Grievance Process

Who: Parties are entitled to “advisor of choice” – lawyer, friend, etc.

When: Advisors can be involved at any point in the grievance process, but role is generally limited to consultation with the party except during the hearing

What: All advisors have the same responsibilities:

- Support your party
- Advise on procedural points
- Cross-examine other party and question witnesses at the hearing
- Even if your party does not participate in the hearing, the advisor will still conduct questioning

Serving Without Bias

- We all have unconscious biases!
- **Implicit bias** - unconscious attitudes that influence behavior (may even be contrary to our conscious attitudes)
- Must avoid pre-judging facts and parties based on their status as complainant or respondent, gender, or other status
- No conflict or bias as to specific parties or witnesses
- Avoid generalizations and be objective

Note on the Informal Process

- Alternative to the formal grievance process
 - No finding of responsibility by the University, but an agreement between the parties
 - Informal process ~30 days and no hearing
- Not available to resolve student v. employee complaints
- Both parties must consent in writing to an informal resolution
- Investigation will be suspended during the informal process
- Memorialized in written agreement signed by both parties
- Either party can opt back into the formal process prior to agreement
- Title IX Coordinator may determine that the informal process is no longer appropriate and redirect to formal process
- Failure to comply with agreement may result in discipline
- Outcome will not be listed as a formal conduct proceeding and will not be considered in future findings of responsibility

PRE-HEARING & HEARING PROCESS

Hearing Notice



Written notice of the hearing and charges

- 10 days prior to hearing
- Will state:
 - Date, time, location of hearing
 - Specific charges of Prohibited Conduct subject to disposition and a brief description of the alleged conduct resulting in the charges
 - Identity of Hearing Officer (may object within 3 calendar days)
 - At request of either party, the Hearing will take place virtually with the parties able to simultaneously see and hear parties/witnesses (must request 5 days prior to hearing)

Pre-Hearing Steps



Confirm witnesses and advisors

- Hearing Officer will advise parties 7 days prior to hearing of witnesses who will be called
- Within 2 days, parties may request additional witnesses (in writing with brief description of why witness is relevant to responsibility finding)
- Party must inform TIX Coordinator whether they will be accompanied by an advisor 7 days prior to hearing. If no advisor is identified, SU will appoint an advisor for the sole purpose of conducting cross-examination.

Preparing For The Hearing

- ❑ Review Hearing Notice and understand policy violations charged
- ❑ Review the Investigation Report in depth
- ❑ Meet with your party early
 - Determine what questions the party wants to ask the other party, witnesses, and investigator
 - Discuss inconsistencies, missing & confusing information from the investigation report
 - Identify witnesses

Preparing For The Hearing (cont'd)

- ❑ Notify the TIX Coordinator of witnesses at least 7 days prior to hearing

- ❑ Remind party to prepare opening narrative and closing statements
 - E.g., impact statement (Complainant)
 - E.g., statement of mitigating factors (Respondent)

- ❑ Prepare relevant questions for other party, investigator, witnesses
 - Use checklist method – one list per witness
 - No need to reestablish every fact from the investigation report
 - Draft short, simple, direct questions

The Hearing



A live hearing is required.

- May be conducted in person or virtually
- Parties and advisors must be able to see and hear each other
- Hearing Officer manages the hearing and ensures questioning is relevant, respectful and non-abusive
- Hearing Officer determines if questions are relevant and, if not, explains why not relevant on the record

The Hearing



The hearing is closed to the public and confidential.

- Only parties, advisors, hearing officer, and select University administrators may attend
- Parties are not required to attend
- Witnesses are called into the hearing individually then excused
- Questioning is done directly, orally, and in real time

The Hearing – Order of Events

| | Hearing Events | Participants |
|-----|--------------------|---------------------------------------|
| I | Introductions | All |
| II | Opening Statements | Complainant |
| | | Respondent |
| III | Questioning | Hearing Officer ➔ Complainant |
| | | Respondent's Advisor ➔ Complainant |
| | | Hearing Officer ➔ Respondent |
| | | Complainant's Advisor ➔ Respondent |
| | | Hearing Officer, Advisors ➔ Witnesses |
| | | Hearing Officer ➔ All Parties |
| IV | Closing Statements | Complainant |
| | | Respondent |

The Hearing – Rules of Decorum



Rules of Decorum set the tone for the hearing.

- Advisors may only speak during cross-examination at the hearing
- Be respectful of all hearing participants
- Be mindful of non-verbal behaviors
- Use calm voices, avoid shouting or raising of voices
- Allow others to speak without interruption
- Correctly identify all parties by their identified pronouns
- Avoid badgering a party or witness by asking the same question repeatedly. Respect hearing officer's decisions regarding the relevance of questions; do not object to hearing officer

The Hearing – Rules of Decorum



Failure to follow the rules of decorum may result in the removal of the participant.

- Hearing Officer will warn the offending person of any violation
- Hearing Officer will have the discretion to remove the person
- If advisor is removed, the hearing cannot continue until a new advisor for the party is selected or appointed
- Advisors who violate the rules in one or more proceedings may be prohibited from participating in future proceedings

What is Relevant?



Relevant evidence or information is that which tends to make an alleged fact more or less likely to be true.

- Regulations direct that “relevant” is to be determined by common sense
- Examples include:
 - Statements by parties to witnesses
 - Character statements
 - Documents such as texts, social media posts, direct messages
 - Witness observations of the parties before, during and/or after the incident
 - Source and timing of witness’s knowledge of facts

What is Not Relevant?



Certain categories of information are not relevant per the regulations.

- Complainant's sexual predisposition or prior sexual behavior, unless the information is offered to:
 - ❑ Show someone other than Respondent committed the alleged conduct; or
 - ❑ Prove consent by showing prior incidents of sexual behavior between the parties
- Treatment records or other privileged information (unless party consents in writing to disclosure)
- Information from informal resolution

Hearing Outcome

- Parties will receive written determination within 7 days that includes:
 - ❑ Summary of allegations potentially constituting prohibited conduct
 - ❑ Procedural history from formal complaint through determination
 - ❑ Findings of fact and conclusions regarding application of the Policy to the facts
 - ❑ Statement of and rationale for the result as to each allegation, including determination of responsibility
 - ❑ Explanation of sanctions imposed, if any
 - ❑ Whether remedies will be implemented
 - ❑ Procedures and permissible bases for appeal

Appeal

- Either party can appeal the determination of responsibility within 10 days on the basis of: (a) procedural irregularity or substantive error that affected the outcome; (b) the existence of new evidence that was not reasonably available at the time of the hearing; (c) Title IX Coordinator, investigator, decision-maker had a conflict of interest or bias that affected the outcome.
- Must be in writing and clearly explain basis for appeal
- TIX Coordinator will notify parties of appeal and appointment of Appeal Officer
- Non-appealing party has 5 days to respond
- Parties may challenge appointment of Appeal Officer for bias or conflict of interest via written objection to TIX Coordinator within 3 days of notice

PRACTICAL GUIDANCE

Meeting the Party

- ❑ Ask the Title IX Coordinator for background information if you are being appointed
- ❑ Establish rapport with the party
- ❑ Explain your role – the party is in charge!
- ❑ Understand the party's perspective, concerns, and priorities
- ❑ Be approachable, attentive, knowledgeable and responsive

Pre-Hearing Events

Advisors may. . .

- Attend investigation interview(s) and meeting(s) with your party
- Review all evidence
 - Must keep evidence confidential
 - Party has 10 days to provide additional evidence
- Review investigation report
 - Party has 10 days to provide written response
- Attend a pre-hearing conference

How Decision Makers Assesses Credibility

Common considerations include:

- Is there corroborating evidence?
- Is there conflicting evidence?
- Has the person making the statement been consistent with their own statements over time?
- Are individuals' statements or observations consistent with other individuals' recollections?
- Is the statement inherently plausible?
- Can the individual provide details around their recollection? If not, is there a reasonable basis for the lack of detail?

How Decision Makers Weighs Evidence

Not all evidence is given equal weight:

- Parties' recollections usually afforded significant weight
- Witness observations of the parties related to the specific incident will generally be given more weight than "character evidence"
- Objective evidence is given significant weight (e.g., observations of objective behavior, documents, texts)
- Statements made close in time to the incident are often persuasive

REVIEW

THANK YOU!