



# Title IX Training

*New Regulations and Title IX Procedure*

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# Title IX Regulations, Effective 8/14/20

30 CFR § 106.45(b)(1)(iii)

Specific training requirements for Title IX coordinators, investigators, decision-makers or facilitators

- *Training on the definition of sexual harassment under § 106.30;*
- *Training on the scope of the College's education programs or activities;*
- *Training on how to conduct the investigation and grievance process;*
- *Training on how to serve impartially, including avoiding prejudgment of facts at issue, conflicts of interest, and bias;*
- *Training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.*

# Scope, Applicability & Jurisdiction

- All students, faculty, staff, affiliates, and others participating in College programs and activities in the U.S. are subject to the Title IX procedure;
  - Programs and activities
  - In the U.S.
  - Applicants for admission/employment as well
- Title IX Coordinator funnel:
  - All complaints of sexual misconduct are funneled through to the Title IX Coordinator;
  - Initial assessment about whether conduct is covered under Title IX definition and jurisdiction;
  - If not under this procedure, may be referred elsewhere as appropriate.

# University Program or Activity

- “Education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurred;
- Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution;
- Fact-specific inquiry, conjunctive test:
  - Control over respondent;
  - Control over context;
- Includes: Greek housing
- Excludes: Study abroad, overseas campuses
  - No extra-territorial application (§§ 106.8[d], 106.45[b][3][i]).

# Definitions

- *Sexual harassment* means conduct on the basis of sex that satisfies one or more of the following:
  - 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;
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
  - "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

# Definitions: Sexual Harassment

- 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;
  - Quid pro quo;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
  - Hostile environment;
  - Narrower, conjunctive.

# Definitions: Sexual Assault

- Any sexual act directed against a Complainant without the consent of the Complainant, including instances in which the Complainant is incapable of giving consent, including because of Incapacitation. The sexual acts covered by this definition include:
  - 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 the Affirmative Consent of the Complainant.
  - Sodomy. Oral or anal sexual intercourse with another person:
    - forcibly and/or against that person's will, meaning without the Affirmative Consent of the Complainant; OR
    - not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacitation.
  - Sexual Assault with an Object. To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person:
    - forcibly and/or against that person's will, meaning without the Affirmative Consent of the Complainant; OR
    - not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical Incapacitation.
  - Fondling. The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification:
    - forcibly and/or against that person's will, meaning without the Affirmative Consent of the Complainant; OR
    - not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical Incapacitation.

# Definitions: Sexual Assault

- Consent is given verbally or non-verbally, based on an active, informed, mindful, freely decided choice. Intoxication may make this legally impossible. Consent means that you cannot make assumptions about what your partner does or does not want. Absence of clear signals of consent is a signal to stop.
- Consent eliminates the need to engage in force and resistance behaviors. There is **no biological harm to either sex in stopping at any point. “NO” means “NO,” but inaction or no response can also mean “no.”** Silence and passivity do not equal permission or consent.
- SUBMISSION DOES NOT EQUAL CONSENT!
- **If a “no” is received and pressuring/continuing to interact sexually continues, this behavior is considered to be a coercive influence on the other party.** NOTE: *To be valid, consent must be given prior to or contemporaneously with sexual activity.*

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# Definitions: Non-forcible sexual violations

- Incest
  - Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Nebraska law;
- Statutory rape
  - Non-forcible sexual intercourse with a person who is under the statutory age of consent in Nebraska. The age of consent in Nebraska is 16.

# Definitions: Dating and Domestic Violence

- 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. The existence of such a relationship **is determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.**
  - Dating Violence 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
- Domestic Violence: A felony or misdemeanor crime of violence committed:
  - By a current or former spouse or intimate partner of the Complainant;
  - By a person with whom the Complainant shares a child in common;
  - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
  - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Nebraska;
  - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Nebraska.
- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship

# Definitions: Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress.
- For the purposes of this definition:
  - Course of conduct means two or more acts, including, but not limited to, 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 a person, or interferes with a person's property.
  - Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
  - Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

# Initial Report of (potential) Title IX Issue

- Supportive measures
  - Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed;
  - Such measures are designed to restore or preserve equal access to the **recipient's education program or activity without unreasonably burdening the other party**, including measures designed to protect the safety of all parties or **the recipient's educational environment, or deter sexual harassment.**  
Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, 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.
- Privacy and confidentiality
- Emergency removal

# Formal Complaint

- Complainant
  - Participating or attempting to participate in education program or activity;
- Title IX Coordinator
  - Not clearly unreasonable in light of known circumstances;
    - The status of the Respondent and whether Respondent has authority over students and/or staff;
    - Whether there have been multiple reports;
    - The seriousness of the alleged misconduct;
    - Whether there is a likelihood that the Respondent would be a danger to the Complainant or the SCC community;
    - Age of the complainant;
    - Whether conduct can be effectively addressed through another type of intervention; and
    - Ability of SCC to obtain relevant evidence.
- Notice of Formal Complaint
  - Simultaneous notice to parties
  - Must contain:
    - Description of allegations with sufficient details;
    - Statement of presumed non-responsibility;
    - Statement regarding advisors;
    - Information about SCC policy violations for making knowingly false statements.

# Initial Response

- Make initial assessment of formal complaint;
  - Dismissal/referral if not within Title IX;
  - Partial dismissal/referral or discretion to resolve together if arising out of same facts/circumstances;
- Informal resolution
  - First opportunity is after formal complaint filed, then anytime thereafter;
  - Limitations:
    - Both parties must consent;
    - Cannot be a condition of enrollment/employment;
    - Parties can withdraw and resume formal process at any time;
    - Cannot be offered if student is Complainant and employee is Respondent.

# Investigation

- Written notices
  - Parties expected to be present;
- Role of advisors
  - Process support;
  - Hearing support;
  - College-identified attorneys;

# Investigation

- Gathering evidence;
  - Burden is on College;
  - Parties must be given opportunity to present all relevant evidence;
- What is/is not relevant?
  - Not defined in regulations;
  - Past sexual history;
    - **Questions and evidence about complainant's past sexual predispositions 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 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;**
  - Medical records;
    - College cannot 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 recipient obtains that party's voluntary, written consent to do so;
  - Privileged information;
  - Expert witnesses.

# Investigation

- Review of all evidence directly related to the allegations raised in the formal complaint;
  - Including evidence on which Investigator DOES NOT intend to rely;
  - Inculpatory and exculpatory evidence;
- **Parties' response to the evidence**
  - *Before* investigative report is issued;
  - This is not the objections phase; opportunity to identify new/rebuttal evidence;
  - 10 days!!!
- Investigative report
  - **Must “fairly” summarize evidence;**
  - No pre-judgment of facts;
  - Credibility determinations.
- **Parties' response to investigative report.**

# Post-investigation

- Mandatory dismissal:
  - Conduct alleged in the Formal Complaint does not constitute Title IX Prohibited Conduct or did not occur against a person in the United States;
- Discretionary dismissal:
  - Respondent is no longer enrolled at or employed by the College;
  - Specific circumstances prevent College from gathering sufficient evidence to reach a determination; or
  - Complainant informs Title IX Coordinator in writing that Complainant desires to withdraw formal complaint.
- Referrals
- Notice of Dismissal and Right to Appeal
- Set for Hearing

# Hearing

- Creation of hearing file
  - Redactions;
  - Hearing Officer makes determinations.
- Response to hearing file:
  - **This is the parties' opportunity to submit a written statement of their position, what they believe the evidence shows;**
- Hearing schedule
  - Requires significant coordination: parties, advisors, witnesses, Hearing Officer;
  - Cannot rely on statements if party/witness does not submit to cross-examination.

# Hearing

- Format
  - Physically present or virtual;
  - Either party may request separate rooms, or College can require in its discretion;
  - Simultaneously see and hear each party/witness;
  - Recorded
- Hearing support persons
  - Conduct live, oral cross-examination;
    - Unless parties stipulate in advance to submit to written cross-examination, questions conducted by Hearing Officer
- Investigator will be available to answer any questions from Hearing Officer about investigation process during hearing.

# Hearing/Appeal

- Hearing officer

- Makes relevance determinations and weight of evidence;
- Issues written determination regarding responsibility;
- Sanctions on respondent/remedies for complainant;

- Appeals

- Bases for appeal:

- Were there any procedural irregularities that substantially affected the outcome of the matter to the detriment of the appealing party?
- Was there any substantive new evidence that was not available at the time of the decision or hearing that could not have been available based on reasonable and diligent inquiry that would substantially affect the outcome of the decision?
- Did the Title IX Coordinator/Investigator or Hearing Officer have a conflict of interest or bias for or against complainants or respondents that affected the outcome?
- For matters that proceeded to sanctioning and imposition of remedies, are the sanction and/or remedies ones that could have been issued by reasonable persons given the findings in the case?

# Bias/Conflict

- Did the Title IX Coordinator, Investigator, or Hearing Officer have a conflict of interest or bias for or against Complainants or Respondents that affected the outcome of the matter?
  - No definitions of conflict of interest or bias under regulations;
  - If you are a fact witness to the allegations at issue, or have a personal relationship with one of the parties/witnesses, that may constitute bias/conflict;
  - Avoid pre-judgment of any report, each case is unique;
  - Uphold fairness, equity, due process, remain partial and objective.

# Other requirements under regulations

- Recordkeeping

- For a period of seven (7) years, SCC must maintain records of
  - Each investigation, including any determination of responsibility
  - Transcripts of Hearings
  - Disciplinary sanctions/remedies provided
  - Appeals and results
  - Informal resolutions
  - Training materials
  - Supportive Measures offered to all Complainants, or if Supportive Measures not offered, reasons why not
  - All actions taken in response to reports or Formal Complaints and the basis for the conclusion that the response was not deliberately indifferent
  - Any measures taken to restore or preserve equal access to education programs or activities