



# TITLE IX ADVISER TRAINING

29 October 2020



VANDERBILT  
UNIVERSITY



# TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

- “[N]o 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.”

# SEXUAL HARASSMENT

- Quid Pro Quo harassment
  - Limited to employee involvement as actor
- Hostile Environment harassment
  - Reasonable person standard: severe, pervasive, AND objectively offensive
  - Fact-specific inquiry
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

# JURISDICTIONAL/SCOPE ISSUES

- In the United States
- Education Programs and Activities
  - On campus
  - Off campus but in the context of an educational program or activity
  - Off campus in a house owned or controlled by an officially-recognized student organization
- Formal Complaint may be filed by Employee, Student, or Applicant for admission/employment
  - \*Or by Title IX Coordinator

# SEXUAL MISCONDUCT

- The university's Sexual Misconduct Policy applies more broadly than the Formal Grievance Protocol, which addresses Sexual Harassment as defined by the DOE.
  - No jurisdictional limit
    - Focus is on effect on conduct on campus/community member
  - Explicit inclusion of sexual exploitation and facilitation
  - Broad definitions of other offenses
  - No express limitation on who can file a complaint

# RETALIATION

- Prohibited under both the Formal Grievance Protocol and the Sexual Misconduct Policy
  - For participation in a protected activity
  - Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, participated in or refused to participate in any manner in an investigation, proceeding, or hearing under the institution's policy.

# APPLIES TO ALL COMMUNITY MEMBERS

- Faculty, Staff, Students, Postdocs, Trainees
- Formal Grievance Protocol the same for all
  - Except with Emergency Removal/Administrative Leave
    - Emergency Removal: applicable to students and subject to immediate challenge and review
    - Administrative Leave: applicable to employees and not subject to challenge and review
    - Likely reflects, in part, the intersection of Title VII and Title IX responsibilities and rights

# REPORT AND NOTICE

- Title IX Office Receives Report
- Outreach and Informational Meeting
  - Supportive Measures, Right to Adviser of their Choice, Process, Formal Complaint, Wishes
- Please Contact the Title IX Office if a Party Would Like to Request a Supportive Measure



# INITIATION OF INVESTIGATION

- Formal Complaint
  - Required under Formal Grievance Protocol
  - May be withdrawn by the Complainant
  - May be consolidated with other FC's by TIX Office
- Assessment by Title IX Office
- Notice of Investigation (written)
  - Includes allegations and notice of right to adviser of their choice, among other information

# PROCESS

- Investigation – SMP provides 90 business days
  - Collect relevant inculpatory and exculpatory evidence
  - Must have sufficient notice to participate in any meetings

# PRELIMINARY REPORT AND REVIEW OF EVIDENCE

- At least 10 days prior to issuance of the investigation report, the parties will receive access to all inculpatory and exculpatory evidence directly related to the allegations
  - Parties may provide written responses in accordance with requirements of the policy
  - The university may determine additional investigation is required

# INVESTIGATION REPORT

- Will fairly summarize the evidence collected
- Issued at least 10 days before any hearing
- No findings if FGP OR student respondent
- Sent to party and adviser



# RESOLUTION

- Standard of Evidence: Preponderance of the Evidence
- Hearing under Formal Grievance Protocol and for all Sexual Misconduct investigations to which a student is a respondent
  - Appeal on defined grounds
  - Single officer for both
- For other matters/investigations: single investigator model
  - Appeal for matters where student is a complainant
- Faculty Manual processes relevant with faculty respondents
- Informal Resolution option

# GENERAL PRINCIPLES

- Equitable treatment of complainants and respondents
- No stereotypes based on a party's status as a complainant or a respondent
- Presumption respondent did not violate policy unless and until a determine is made after a hearing (FGP)
  - Presumption is true for both processes
- Conflict and bias-free institutional participants
  - Material connection to a dispute or involved party such that a reasonable person would question the individual's ability to be impartial – **Report to Title IX Coordinator**

# ROLE OF ADVISERS

- Assist parties in navigating the process
- Clarify for the parties their rights and responsibilities within the process
  - e.g., Parties may NOT record meetings, interviews, calls, etc. BUT parties may have access to recordings of interviews for their review in accordance with the procedures set forth by the university
- Provide non-testimonial evidence and identify potential witnesses
  - Party must waive privilege for university to access privileged records

# ROLE OF ADVISERS

- May accompany party to any investigative interview or meeting
- Passive role during investigation phase
  - Not to interrupt or respond on behalf of student during meetings and interviews
  - Can be excluded if failure to comply with request(s) to abide by expectations for participation
  - All expectations applied equally to advisers for each party
- Must conduct cross examination of other party and witnesses at hearing
  - Live and recorded



# NO GAG ORDER/RULE

- Parties are not restricted from discussing the allegations or gathering and presenting relevant evidence
- BUT parties should not engage in witness intimidation, witness manipulation, false statements, retaliation, harassment, etc.

# ROLE OF SEXUAL HISTORY

- “Rape shield” protections: Past sexual conduct of complainant is irrelevant unless used to establish:
  - Someone other than respondent engaged in alleged conduct; OR
  - Consent
    - Must be specific incidents of the complainant’s conduct with the respondent

# LIMITED IMMUNITY

- Alcohol and Other Drug (AOD) violations

# EFFECTIVE CONSENT

- Informed and freely and actively given
- Requires mutually understandable words or actions indicating a willingness to engage in mutually agreed-upon sexual activity.



# INCAPACITATION

- The lack of ability to make rational, reasonable judgments as a result of alcohol consumption, other drug use, sleep, the taking of any so-called “date-rape” drug, unconsciousness, or blackout. An incapacitated person cannot make rational, reasonable decisions because that person lacks the ability to fully understand the who, what, where, or how of their sexual interaction. Determining whether an individual is incapacitated requires an individualized assessment. Incapacitation is a state beyond drunkenness or intoxication, in which alcohol, drugs, or other factors render one unable to make fully informed judgments or have an awareness of consequences. Evaluating incapacitation also requires an assessment of whether a Respondent knew or should have known of the other individual's incapacitated state. While incapacitation may be caused by drugs or alcohol, it also includes the state of being asleep, during which time a person is unable to provide effective consent.

# PRIVATE INSTITUTION

- The university is not a state actor
- “Due Process” does not apply
  - Fair process
  - Comply with our policies
- Academic Freedom rather than “First Amendment”

# TITLE IX COORDINATOR

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