

# SEXUAL HARASSMENT UNDER TITLE IX DECISION MAKER TRAINING

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OFFICE OF  
INSTITUTIONAL EQUITY  
AND COMPLIANCE

# TRAINING OUTLINE

- Title IX Overview
- OIEC Investigations
- Supportive Measures & Emergency Removals
- Hearings
- Determinations
- Appeals

## WHAT IS TITLE IX?

- Title IX is a federal civil rights law that prohibits discrimination on the basis of sex with respect to schools that receive financial assistance from the U.S. Department of Education.
- Title IX applies to FGCU, as well as any other school that accepts federal financial assistance.
- Title IX protects against sexual harassment in the educational environment, gender based harassment, inequitable funding in Athletics based on sex, sexual harassment in the workplace, sexual assault, dating/domestic violence, stalking, pregnancy discrimination, or any other discrimination or harassment based on sex.

# TITLE IX COORDINATOR RESPONSIBILITIES

- Oversees the University's response to Title IX reports and complaints.
- Identify and address any patterns or systemic problems revealed by such reports and complaints.
- Provide supportive measures, when appropriate, to ensure equal opportunity.
- Investigate or informally resolve, when appropriate, complaints of sex discrimination, sexual harassment and sexual violence.
- Ensure a prompt, thorough, and equitable investigative process for everyone involved.
- Training and providing information for the campus community of the prohibitions and protections of Title IX.

# TITLE IX JURISDICTION

- Title IX addresses allegations of sexual harassment that...
  - Occur in the context of a University Educational Program or Activity
  - Occur against a person within the United States
  - Meet the definition of Sexual Harassment under Title IX
- Sexual Harassment Under Title IX
  - Conduct on the basis of sex that satisfies one (1) of the following:
    - An Employee conditioning the provision of a University aid, benefit, or service on an individual's participation in unwelcome sexual contact (also known as 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 University's Education Program or Activity; or
    - Sexual Assault, Dating Violence, Domestic Violence, or Stalking, as defined by VAWA.

# OIEC PROCESS

- OIEC receives a report
  - OIEC contacts Complainant to discuss supportive measures and the option to file a formal complaint.
  - Complainant offered option to bring an advisor to initial/future meetings.
- If a Complainant wishes to proceed, OIEC evaluates if the complaint falls under Policy 1.015 or Policy 1.006
  - If outside of Policy 1.015, OIEC will dismiss the complaint then initiate investigation under Policy 1.006

# POLICY 1.015 – SEXUAL HARASSMENT UNDER TITLE IX

- Complainant files a formal complaint (signed) with the OIEC
  - Title IX Coordinator may also sign a formal complaint to initiate an investigation
- Informal Procedure (No investigation)
  - Voluntary agreement between Complainant and Respondent
  - No investigation or adjudication
  - Cannot be used for allegations an employee sexually harassed a student
- Formal Resolution (Investigation)
  - OIEC provides written notice to Respondent for initial, informational meeting
  - OIEC conducts interviews
  - Both Complainant and Respondent can provide fact and expert witnesses, and inculpatory and exculpatory evidence

# POLICY 1.015

- Formal Resolution, continued
  - No party is restricted from discussing the reported conduct, or gathering/presenting relevant evidence
  - Parties and their advisors have the opportunity to review and respond to evidence
  - Parties and their advisors have the opportunity to review and respond to the draft report
  - Final investigative report considers any written responses and sent simultaneously to both the Complainant/Respondent and their advisors
  - Final report referred to the appropriate area for adjudication upon the finding of sufficient evidence
    - Hearing
    - Decision regarding Responsibility
    - Sanctions, if there is a finding of responsibility
  - Appeal, if desired

# POLICY 1.015 APPEAL

- Either party may appeal the determination regarding responsibility or dismissal of a complaint in whole or in part within 7 days of receiving the determination of responsibility or dismissal
  - Made to the Vice President and General Counsel
  - Based on
    - Procedural irregularity that affected the outcome of the matter;
    - New evidence that was not reasonably available at the time of the determination that could affect the outcome;
    - The Title IX Coordinator, designee, or Investigator had a conflict of interest or bias that affected the outcome of the matter
- **\*\*Appeals regarding responsibility are made after the hearing\*\***

## OTHER THINGS TO KNOW

- Complainant and Respondent are provided equal opportunity throughout the process
- The Respondent is presumed to be not responsible for the alleged conduct and a determination is not made until the end of the formal resolution process
- The Complainant and Respondent have equal opportunity to have an advisor of their choice in any meetings related to the process, who may be, but is not required to be an attorney.
- Amnesty is provided for alcohol/drug allegations (Student Conduct) that arise from a Title IX report
- Retaliation is strictly prohibited

# POTENTIAL DEFINITIONS IN AN OIEC INVESTIGATION

- Sex Discrimination
- Sexual Misconduct
  - Sexual assault, rape, attempted sexual assault, etc.
- Sexual Harassment
- Consent
- Sexual Exploitation
- Intimate Partner Violence
- Dating/domestic violence
- Stalking
- Retaliation
- Discrimination (any protected characteristic)
- Harassment (any protected characteristic)

# EVIDENCE

- Fact & Expert Witnesses
  - Fact-someone who has personal knowledge of the events
  - Expert-someone with special knowledge or proficiency in a subject
- Inculpatory (shows involvement) & Exculpatory (shows Respondent was not involved/exonerates) Evidence
- OIEC does not consider privileged information unless person holding the privilege waives it (i.e. CAPS, etc.)
- Interview Records (Complainant, Respondent, Witnesses, etc.)
- Police Reports
- Text Messages, social media postings, etc.
- Pictures
- Video
- Audio recordings (legally obtained)
- Rape kit (if available)

# HOW TO EVALUATE AN INVESTIGATIVE REPORT

- Report Outline
  - Introduction
  - Complainant Allegation
  - Respondent Statement
  - Witness Interviews
  - Review of Evidence
  - Additional Information
  - Investigative Determination
- Investigative Determination addresses each “test” or definition point by point
  - Sufficient findings satisfy every test.



# SUPPORTIVE MEASURES & EMERGENCY REMOVALS



# SUPPORTIVE MEASURES

- Preserve equal opportunity
  - Prevent further harassment or violence
  - NOT sanctions or decisions
  - NOT punitive
- Examples
    - Adjusted work or class schedules
    - Changes in work/housing locations
    - Class assignment adjustments/extensions
    - Referrals to resources
    - Restrictions of contact between parties

# EMERGENCY REMOVALS

- In situations where a respondent poses an immediate threat to the physical health and safety of any individual before an investigation into sexual harassment allegations conclude (or where no grievance process is pending), the University may remove the Respondent from its educational programs or activities
  - May be necessary so the University is not being “deliberately indifferent”
  - May be in addition to or separate from supportive measures
- The respondent is presumed to be not responsible regardless of emergency removals, and this is not a sanction nor indication of responsibility
- University must undertake an individualized safety and risk analysis
  - Must determine that there is an immediate threat to the physical health or safety of any student or other individual
    - Cannot rely on a person’s mental or emotional “health and safety”
  - The threat arises from or out of allegations of sexual harassment as defined in Policy 1.015
- Provide the Respondent notice and opportunity to challenge the removal decision



# SEXUAL HARASSMENT UNDER TITLE IX HEARINGS



# OIEC REFERS REPORT FOR ADJUDICATION

- Investigative reports under Policy 1.015 are referred to the appropriate area. If there is a finding of sufficient evidence, the respective area proceeds with adjudication/disposition
  - Student Respondent: FGCU Regulation 4.002 Student Code of Conduct
  - Employee Respondent: Policy 1.015
  - External Respondent (visitors, third parties, etc.): referred to the appropriate division for disposition
- Decision Makers
  - Faculty –Academic Affairs
  - Staff-Human Resources
  - Students-Student Conduct/SSEM

# OVERVIEW OF HEARING PROCESS

- Pre-hearing meeting
- Hearing
  - Cross examination by advisors
- Written decision
- Disciplinary action, if any
- Appeals

# WHO IS INVOLVED

- Complainant
- Respondent
- Witnesses (Fact and Expert)
- Advisors
  - Trained volunteer employees are available
- Hearing Officers
  - Employees-internal or external hearing officer who serves as the single decision maker
    - Both parties can challenge the hearing officer based on an actual conflict of interest, bias, or lack of impartiality
    - Request must be submitted in writing and raised no later than the date of the pre-hearing meeting. Must clearly state the grounds to support the claim.
  - Students-Administrative hearing officer or conduct board
- FERPA Waivers for Students

# ADVISORS

- Parties can have an advisor of choice, who can be but is not required to be an attorney
  - FGCU may not restrict the choice of an advisor or the advisor's presence
- Parties may or may not have used an advisor in the investigation, but **MUST** have an advisor to conduct the cross-examination for a hearing
- Advisors provide support for the Complainant/Respondent but do not speak on behalf of them, communicate on their behalf, etc.

# NOTICE

- Respondent must have sufficient notice of the charges against them
  - Allegation of sexual harassment including details:
    - Identities of involved parties;
    - Allegation of conduct that allegedly constitutes sexual harassment;
    - Date and location of alleged incident.
  - Each charge is separately identified
  - Presumption the Respondent is not responsible; determination is not made until the end of the hearing process
  - Right to an advisor of choice, who may be but is not required to be an attorney
  - Right to inspect and review relevant evidence
  - Knowingly making false statements is prohibited
  - Range of possible sanctions, if there is a finding of responsibility

# PRE HEARING MEETING

- Hearing Officer meets separately with each party
- Parties can raise challenges about the hearing panel/officer based off of bias, conflict of interest, or lack of impartiality
- Answer questions about the hearing process
  - Students-determine hearing officer or hearing board
- Review expectations for hearing participants
- Reasonable accommodations for a disability, if applicable

# HEARINGS

- Closed session
- Live, but may be conducted with parties in separate rooms with technology letting them see and hear the other party, at either party's request
- Recorded by audio or audiovisual means, and recording/transcript will be available for parties to review
- Both parties can provide a statement of their account
  - Complainant then Respondent
- Both parties can present any witnesses
  - Complainant then Respondent

# RELEVANCE

- Ask yourself: Does the answer to this question help me understand the facts about whether or not the alleged conduct took place?
  - Remember, both inculpatory and exculpatory evidence is permitted!
- Hearing officer determines if every question is relevant and explains any decision to exclude a question as not relevant before a party/witness answers the question.
  - An advisor/party's behavior/mannerisms do not determine relevance HOWEVER you have the right to manage the decorum/environment of the hearing
- If a question will help you determine credibility, and whether or not a person is giving truthful or accurate information, it is relevant.
- Repetition of the same question or duplicative evidence may be deemed irrelevant

# CREDIBILITY

- Do not make credibility determinations based on a person's status as a Complainant, Respondent, or witness
- Consider
  - Consistency of statements
  - Can you corroborate information through witnesses, evidence, etc.
  - Ask clarifying questions
- You may believe everything, part, or none of what a person states
- Objectively evaluate all relevant facts and do not jump to conclusions before everything is presented

# ASKING QUESTIONS

- The Complainant, Respondent, and Witnesses may be asked questions by the hearing officer/panel members
- Advisors may ask the other party/witnesses relevant questions or follow up questions after the initial statement, including challenging credibility
- Rape Shield Applies-a Complainant's sexual predisposition or prior sexual behavior is not relevant unless the questions/evidence are offered to prove:
  - Someone other than the Respondent committed the conduct alleged; or
  - Consent, as it relates to specific instances of sexual activity between the Complainant and Respondent

# CROSS-EXAMINATIONS

- Hearing Officers must permit each party's advisor to cross-examine the other party and any witnesses.
  - If parties did not have an advisor thus far, hearing officer must arrange for advisors to be present at the hearing for the cross examination
- Cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- Only relevant cross-examination and other questions, including those challenging credibility, may be asked of a party or witness.
- If a party or witness does not submit to cross-examination at the hearing, the hearing officer/panel may not rely on any statement of that party/witness in reaching a decisions regarding responsibility.
- Cannot draw an inference about the determination regarding responsibility based solely on a party/witness's absence from the live hearing or refusal to answer questions.

# EVIDENCE CONSIDERED IN THE HEARING

- Interviews/Statements
  - The Complainant
  - The Respondent
  - Witnesses
  - Statements to Police
  - Investigative Reports
  - Cross Examinations
  
  - Inculpatory & exculpatory
  - Objectively evaluate all relevant evidence!
- Physical Evidence
    - Pictures
    - Text Messages
    - Screenshots/Social Media Posts
    - Phone Records
    - Rape Kit
    - Video Footage
  - CANNOT consider
    - Privileged information unless privilege is waived
    - Illegally obtained evidence

# IMPARTIALITY, BIAS, & CONFLICTS OF INTEREST

- If you have a conflict of interest, bias, or lack of impartiality with anyone in the hearing, recuse yourself
- Avoid pre-judgement of facts
- Examples
  - Prior or current relationship with one of parties outside of the grievance process
  - Prior knowledge of the incident or parties
  - Personal like or dislike for one party over another
  - Personal experiences that would reduce your impartiality

# TECHNOLOGY

- If using technology for hearing, must have audio and video
- Security Considerations
  - Password
  - Waiting room
  - Locking meetings
  - Disable chat/recording settings for participants, screensharing
  - Breakout rooms
- Record meeting, save chat, etc.



# DETERMINATIONS



# MAKING A DETERMINATION

- Preponderance of the Evidence Standard
  - More likely than not
  - 51% to 49%
- Treat Complainant and Respondent equitably
- Objectively evaluate all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness
- Understand the presumption that the Respondent is not responsible for the alleged conduct until a determination is made at the end of the grievance process

# PREPONDERANCE OF THE EVIDENCE MORE LIKELY THAN NOT...



# MAKING A DETERMINATION

- Consider
  - The applicable regulation/policy definitions and process
  - What information is available to you?
    - How credible do you find it?
- Do not focus on “if only” or the missing pieces...
  - There may be evidence that you want that is not available or cannot be considered
- Remember the preponderance of the evidence standard is **NOT** beyond a reasonable doubt!

# DETERMINATIONS

- Provide a written determination to both parties simultaneously including
  - Identification of the allegations of sexual harassment
  - Description of the procedural steps taken from the receipt of the formal complaint through the determination
  - Findings of fact
  - Conclusions regarding the application of the code to the facts
  - Statement/rationale for the result as to each allegation
    - Determination regarding responsibility
    - Any disciplinary sanctions imposed on the Respondent
    - Remedies provided for the Complainant, if applicable
  - Information about the appeal processes
    - Available grounds for an appeal, timeframe, and name of the appeals officer
- Become final either on the date a written determination is provided regarding an appeal or the date on which an appeal would no longer be timely.

# SANCTIONS/DISCIPLINARY ACTIONS

- Students-Student Code of Conduct
  - In-unit Faculty-CBA
  - Employees-Disciplinary Actions
- Designed to:
    - Address the effects of the misconduct on the Complainant and University community
    - Hold the Respondent accountable
    - Eliminate sexual harassment, prevent its recurrence, and remedy its effects



# APPEALS



# APPEAL

- After the hearing has concluded, either party may appeal the determination regarding responsibility or dismissal of a complaint in whole or in part within 7 days of receiving the determination of responsibility or dismissal.
  - Made to the Vice President and General Counsel
  - Based on
    - Procedural irregularity that affected the outcome of the matter;
    - New evidence that was not reasonably available at the time of the determination that could affect the outcome;
    - The Title IX Coordinator, designee, or Investigator had a conflict of interest or bias that affected the outcome of the matter.
- Issue must be material to the finding
- Procedural appeals, not substantive

# APPEAL DECISIONS

- Appeal decision-maker **CANNOT** be the same person as the determination decision maker
- Applicable policies may have additional appeals about sanctions
- Notify parties in writing of the appeal, provide them with time to respond, provide a written decision
- Letter includes
  - Appeal grounds
  - Rationale for granting or denying appeal
  - If sanctions are modified, why

# OTHER THINGS

- Retaliation is strictly prohibited
  - Charging a student with Code violations that arise from the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation
  - Must keep the identities of Complainant, Respondent, and witnesses confidential except as permitted by FERPA, required by law, or necessary to carry out Title IX process
  - Exercise of 1st Amendment rights does not constitute retaliation
- SUNY Student Conduct Institute-accounts coming



QUESTIONS?

