

EVALUATING INFORMATION CONDUCT BOARD TRAINING



OFFICE OF
INSTITUTIONAL EQUITY
AND COMPLIANCE

OVERVIEW



- Title IX
- Other Harassment and Discrimination Complaints
- OIEC Investigations
- What is Consent
- Your Role in the Hearing Process
- Asking Questions During the Hearing
- Judging Credibility
- Preponderance of the Evidence Standard
- Reading Investigative Reports

A SNAPSHOT OF THE OIEC

- 346 Complaints filed
 - 117 employee involved
 - 189 were Title IX based
 - About 34 of total complaints were investigated or informally resolved
- OIEC-142 trainings
 - 64-Students
 - 72-Employees
 - 6-Community
- Diversity & Inclusion Certificate Program
 - 110 events
 - 1744 individuals attended at least 1 event
 - 286 new graduates
 - 243 renewals

BIASES AND MYTHS TO PUT ASIDE

- Victim blaming
 - If you hadn't invited them over, this wouldn't have happened.
- Snap decisions
 - This didn't really happen. It's a false report
 - If someone reported this, it must have happened
 - Why go to FGCU instead of the Police or why wait to report instead of calling for help right away
- First Impressions
 - How a person looks, presents, support systems (aka lawyers)
 - That person looks harmless or couldn't do this
 - They look so nice or behave in a charming manner

THE LAWS



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 applied 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, or any other discrimination or harassment based on sex.

Please note: Title IX prohibits sexual violence as a form of sexual harassment.

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.

2021 UPDATES REGARDING TITLE IX

- Sexual Orientation & Gender Identity/Expression are specifically covered by Title IX
- The prohibition of using statements that were not subjected to cross-examination was determined to be arbitrary & capricious; no longer enforced by the ED

HOW THIS SHOWS UP IN POLICIES

- Policy 1.015 Sexual Harassment under Title IX
 - 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
 - Complainant files formal complaint with OIEC

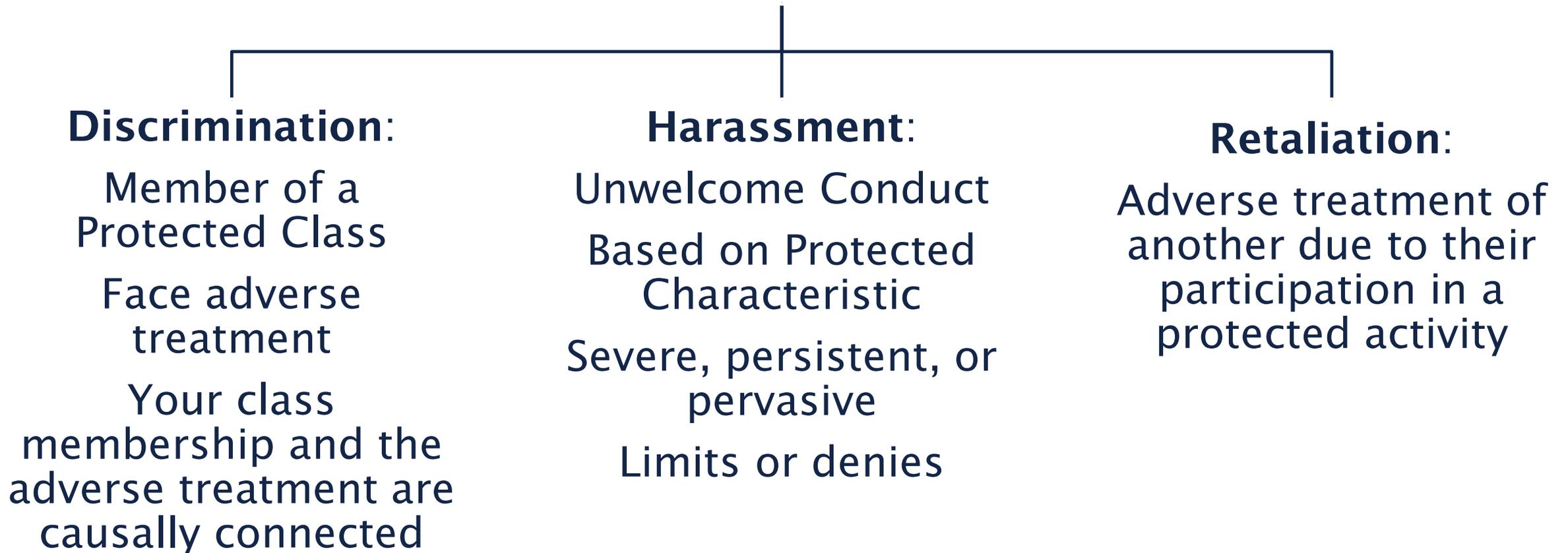
Policy 1.006 Non-discrimination, Anti-harassment, and Sexual Misconduct

- Complaints outside of 1.015 (other protected characteristics)
- Complaints dismissed from 1.015
 - Complainant can appeal dismissal

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)

Types of Discrimination



CONSENT

The mutual assent by words or actions to engage in a particular sexual activity that must be made **voluntarily and competently** by all parties.

- a) In order for consent to be given voluntarily it must be free from threat, force, intimidation, extortion, and/or undue influence.
- b) In order for consent to be given competently, all parties must have the mental ability to understand the encounter and agree to participate. If one or more of the parties is incapacitated due to drug or alcohol use, or any other circumstance, and is unable to communicate consent, which circumstance may include unconsciousness, disability, involuntary physical constraint, sleep, or other forms of helplessness, then that person lacks the necessary capacity to consent
- Consent is ONGOING and can be withdrawn at any time

CONSENT

- Sexual Intercourse
- Oral Sex
- Kissing
- Fondling/Sexual Touching
- Recording of Sexual Acts
- Use of Condoms
- Taking Illicit Photos
- Sharing Illicit Photos and/or Video/Audio Recordings

INTIMATE PARTNER VIOLENCE/STALKING

- The use of physical violence, force, threats, intimidation, isolation, stalking, or other forms of emotional, sexual, or economic abuse directed towards an Intimate Partner. This can take the form of behavior(s) that intimidates, manipulates, humiliates, isolates, frightens, terrorizes, forces, threatens, blames, hurts, injures, or wounds someone. Intimate Partner Violence can be a single act or a pattern of behavior in relationships.

INTIMATE PARTNER VIOLENCE/STALKING

- Violence can be physical, verbal, sexual, economic
- Examples
 - Any physical violence
 - Destroying property
 - Name calling, insulting
 - Location tracking
 - Isolation
 - Controlling money, friends, activities
 - Non-consensual sexual activity
 - Tracking via social media/electronic forums

INVESTIGATION PROCESS

- OIEC receives a report & contacts Complainant
- Complainant requests an investigation & OIEC determines there is sufficient information on face value to proceed
- Investigation-OIEC as neutral fact finders
 - Interviews Complainant, collects witness information and evidence
 - Notifies Respondent, Interview at a later date, collects witness information and evidence
 - Witness Interviews & Evidence Review *have to do additional check ins in 1.015
 - Follow up Interviews as necessary
 - Report written, edited, and sent

INVESTIGATION PROCESS

- After the report is sent, both parties can submit a Request for Reconsideration to the General Counsel
 - Reviewed and determination made
- Report sent to Student Conduct
- Student Conduct reviews report and initiates conduct process
 - Charges, hearing, etc.
- Marathon, not a sprint

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.

OIEC INVESTIGATION V. CONDUCT HEARING

- Crux of what is being evaluated
- OIEC investigation is a helpful tool for your process
- Support Person/ Advisor
- By the time a case comes to a hearing, they have already spoken to multiple individuals.

OIEC INVESTIGATION V. CONDUCT HEARING

- Consent: The mutual assent by words or actions to engage in a particular sexual activity that must be made voluntarily and competently by all parties. a. In order for consent to be given voluntarily, it must be free from threat, force, intimidation, extortion, and/or undue influence. b. In order for consent to be given competently, both parties must have the capacity to consent. If one of the parties is incapacitated due to, among other things, drug or alcohol use, then that person lacks the necessary capacity, and thus the competency required to consent.
- Sexual Abuse: Any sexual act, as defined in Regulation FGCU-PR1.003, Non-Discrimination, Anti-Harassment, and Sexual Misconduct, which includes rape, sexual assault, sexual battery, sexual exploitation, and other forms of nonconsensual sexual activity directed against another person, by force, threat of force, or coercion without Consent, including instances where the person is incapable of giving Consent.

ADVISORS, ADVISORS, ADVISORS!

- The new Title IX regs require each student has an advisor that cross examines other party
- Adjudicators must permit each party's advisor to cross-examine the other party and any witnesses.
- 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.
- If a party does not have an advisor, the school must provide an advisor of its choice, free of charge, to conduct cross-examination. The advisor may be, but is not required to be, an attorney.
- Only relevant cross-examination and other questions, including those challenging credibility, may be asked of a party or witness.
 - Before a party or witness answers a cross-examination or other question, the adjudicator must determine whether the question is relevant, and explain any decision to exclude a question as not relevant.
 - Note- Rape Shield Laws Apply
- Code Update: Advisors can fully participate



YOUR ROLE IN THE HEARING PROCESS



WHAT IS MY ROLE IN THE HEARING PROCESS?

- Neutral Independent Arbitrator of Fact
 - Set aside personal biases
 - No taking sides!!!
 - Set clear boundaries with both sides
- The evidentiary standard used by the University is the Preponderance of the Evidence standard.
 - More likely than not

ADDRESSING BIAS

- Bias is natural
- Strict assumptions or beliefs made about a person based on your beliefs about the group to which the person belongs.
 - Positive, negative, intentional, unintentional
- Recognize your bias and limit it from impacting your judgement
 - Do you like/dislike a certain major, organization, affiliation?
 - Do you have personal experiences that predispose you to favor one perspective over another?
 - Have you heard about the case through the student grapevine?

MAKING A DETERMINATION

- Preponderance of the Evidence Standard
- Treat complainants and respondents 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.

EVIDENCE CONSIDERED IN THE HEARING

Interviews/Statements

- The Complainant
- The Respondent
- Third Party Witnesses
- Statements to Police
- Investigative Reports
- Cross Examinations

Physical Evidence

- Pictures
- Text Messages
- Screenshots
- Phone Records
- Rape Kit
- Video Footage

EVIDENCE MISCONCEPTIONS

- Rape Kit
 - Time Frame
 - Sexual Assault Nurse Examiner (SANE)
- DNA Evidence
 - Consent or no Consent?
- Injuries/Bruises
 - External vs. Internal
- Social Media, Phone Records
- Court documents

WHAT EVIDENCE WOULD YOU WANT TO SEE?



- Provided: text messages, video
- Missing: Snapchats
- Others?

FORMULATING AND ASKING QUESTIONS

- Use of Language
- Question Phraseology
 - Avoid leading questions
- Avoid “Why” Questions if you can
 - Why did you go to his house if you didn’t want to have sex? ←—don’t ask this!!

FORMULATING AND ASKING QUESTIONS

- Identify **WHAT** you want to find out in order to make a determination
 - What is their “side of the story”
- Inquisitive not Interrogative
 - Tell me about
 - What happened
 - Information gathering, not suspicion confirmation
- Follow up questions are great!

PAIR & SHARE: WHAT QUESTIONS WOULD YOU ASK?

DO ANY NEED TO BE RE-WORDED? STUCK ON ANY OF THEM?



TRAUMA INFORMED RESPONSES

- Complainant, Respondent, and/or Witnesses
 - PTSD
 - Depression
 - Anxiety/nervousness
- Physical or Psychological Trauma
 - Memory Loss
 - Current event or subsequent and previous events
 - Memory Suppression

TRAUMA INFORMED RESPONSES

- May be physical reactions
 - Shaking
 - Crying
 - No eye contact
- Or, may be no physical reaction at all
 - Physical behavior does NOT determine if a person is truthful
- No “ideal” or “one size fits all” pattern for how a person may behave
 - Respondents are also experiencing a traumatic process

HOW TO JUDGE CREDIBILITY

- Consistency
- Contradictions
- Corroborations
- Overcome Personal Biases
 - No Judgments based on your past experiences
 - No Judgments based on sympathy for the Complainant or disdain for the Respondent
 - No Judgements based on emotion
 - No Judgment based on appearances

EVALUATING CREDIBILITY OF WITNESSES

- Reasonableness of information given by person
- Person's motivation (or lack thereof) to falsify or fabricate
- Can you corroborate the information received
- Level of consistency
- Is the Witness being dishonest?
- Witnesses are interviewed privately with the OIEC, did their story change in front of the parties?

EVALUATING CREDIBILITY OF WITNESSES

- Students are more likely to OMIT information than lie.
 - Lack of “direct answers” to “direct questions”
- Look for “text bridges” or “text gaps”
 - What do social media or other screenshots show vs. what you are being told.
- Separate facts from opinions.
 - “We all think that he rapes people. I’ve heard lots of women say that.”
- Beware of people who sensationalize conduct that appears to be routine.
 - “It was the first day of class and she was in the same hallway as her. Clearly, she’s stalking her.”
- If you suspect dishonesty in a response, press the issue (carefully).
 - Clarify apparent discrepancies



JUDGING CREDIBILITY

[HTTPS://WWW.YAHOO.COM/NEWS/BETTY-WHITE-AND-OTHER-CELEBS-GRILL-TAYLOR-SWIFTS-082123423.HTML](https://www.yahoo.com/news/betty-white-and-other-celebs-grill-taylor-swifts-082123423.html)





THE PREPONDERANCE OF THE EVIDENCE STANDARD



PREPONDERANCE OF THE EVIDENCE MORE LIKELY THAN NOT...



THE PREPONDERANCE OF THE EVIDENCE STANDARD

- The question to be asked is does the evidence show that it is **more likely than not** that the violation occurred.
 - 51% to 49%
 - This standard is lower than clear and convincing and lower than reasonable doubt.
- Although the preponderance standard is lower, it still must be met in order to make a determination that a violation occurred.
 - 50% to 50% is NOT met

THINGS TO CONSIDER ABOUT THE PREPONDERANCE OF THE EVIDENCE STANDARD

- Although the evidence reviewed is objective (i.e. witness statements, police statements, text messages), the final determination itself is a subjective one.
- It is natural to feel that your case could be seen differently by someone else reviewing the information.
- Make your decision (or recommendation), based on the evidence you have to support it and move forward.

THINGS TO CONSIDER ABOUT THE PREPONDERANCE OF THE EVIDENCE STANDARD

- The only people who “know” what happened are the individuals that were involved.
- When evaluating if the preponderance of the evidence is met, you can only look at the evidence that is available.
 - Don't fill in the blanks
- **CAN'T BE AFRAID!!**

MOST IMPORTANT THINGS TO REMEMBER AS YOU MAKE YOUR DECISION

- You have to make a decision based on the information that is available to you.
- If there is a part of the story missing, do not fill in the _____.



MOST IMPORTANT THINGS TO REMEMBER AS YOU MAKE YOUR DECISION

- DO NOT BE AFRAID TO BE WRONG!
 - A finding of NOT RESPONSIBLE is OKAY!
 - A finding of RESPONSIBLE is OKAY!
 - Although we look at objective evidence, the determination is a subjective one.
- YOUR CONCLUSION IS GOOD SO LONG AS:
 - It is not based on emotion.
 - It is not based on bias.
 - It is not based on the fear of being wrong.
 - It is based on the evidence and testimony you have reviewed, and evaluated.

FERPA

- Federal law that protects the privacy of student education records
- You will learn information about other students that is private.
- You cannot discuss or share information in a hearing with others.

SELF-CARE RESOURCES

- Student Care Services
Cohen Student Union, 2nd floor
- Counseling and Psychological Services (CAPS) (Confidential)
Student and Community Counseling Center, 3rd floor
- Precious Gunter, Title IX Coordinator
Edwards Hall, Room 114

QUESTIONS?



Question Mark

Podcast for the Aged-care Industry