



Northwestern
University

Sanctioning Panel Training

October 5, 2023

Joshua W. B. Richards

Amy L. Piccola

SAUL EWING

Jurisdiction and Scope

INTERIM POLICY ON TITLE IX SEXUAL HARASSMENT

Title IX Policy: Jurisdiction

- Policy applies to Title IX Sexual Harassment:
 - Occurring in the University's **Education Program or Activities**; *and*
 - That is committed **by** any student, faculty member, staff member, or third-party affiliate who has a formal (including contractual) relationship with the University community
- Policy does not apply to Sexual Harassment:
 - Committed by visitors or guests; or
 - That occurs outside the geographic boundaries of the United States *even if occurring within the University's Education Programs or Activities* (e.g., study abroad program)

[N.B. Complainants under the Policy must be participating in/attempting to participate in the University's Education Programs or Activity at the time the Formal Complaint is filed]

Title IX Policy: Jurisdiction

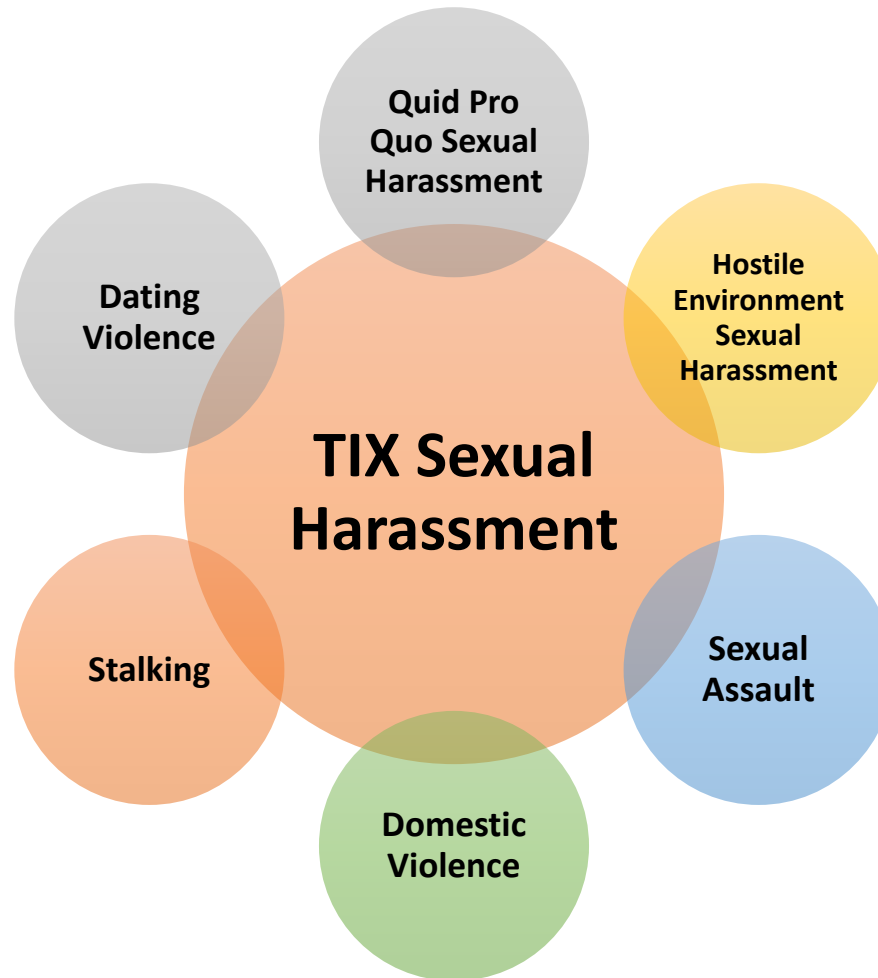
Education program or activity includes:

- ✓ Locations, events, or circumstances . . .
- ✓ whether on campus or off campus . . .
- ✓ over which the institution exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs.

Also includes:

- ✓ any building owned or controlled by an officially recognized student organization (e.g., fraternity or sorority houses).

Title IX Policy: Prohibited Conduct



Title IX Sexual Harassment

Conduct *on the basis of sex* that satisfies one or more of the following –

- (i) an **employee** of Northwestern conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct ["quid pro quo sexual harassment"];
- (ii) 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 ["hostile environment sexual harassment"]; or
- (iii) "**sexual assault**" as defined 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 1229(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)

Title IX Sexual Assault

Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object or instrument, or oral penetration by a sex organ of another person, **without the consent** of the victim or where the victim is incapable of giving consent, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity. An “object” or “instrument” is anything used by the offender other than the offender’s genitalia.

Statutory Rape: Non-forcible sexual intercourse with a person who is under the statutory age of consent.

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, **without the consent** of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.

Incest: Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Title IX Dating and Domestic Violence

Dating Violence: **Violence** committed by a person (A) who is/has been in a social relationship of a **romantic or intimate nature** with the victim; and (B) where the existence of such relationship shall be determined based on its length, type, and frequency of interaction between the persons involved.

Domestic Violence: **Felony or misdemeanor crimes of violence** committed by a (1) current/former spouse/intimate partner of the victim; (2) person who is cohabitating/has cohabitated with the victim as a spouse/intimate partner; (3) person similarly situated to a spouse under Illinois law; or (4) person against an adult or youth victim who is protected under the domestic/family violence laws of Illinois.

Title IX Stalking

Engaging in a **course of conduct** directed at a specific person [on the basis of sex] that would cause a reasonable person to—

(A) fear for their safety or the safety of others; or

(B) suffer substantial emotional distress.

What happens before a matter reaches the sanctioning panel?

PROCESS

Reports, Complaints, Notice

- **Reports** can be made by anyone
 - **All University employees** (including student employees) and graduate students with teaching or supervisory authority, are **obligated** to promptly report Title IX Sexual Harassment, discrimination, harassment, or sexual misconduct of which they become aware in the scope of their work for the University to OCR [*does not apply to confidential resources*]
 - OCR contacts the person reported to have experienced the conduct, offers **supportive measures**, explains procedural options [*required when TIXC has notice*]
- **Title IX Formal Complaints** must be filed by the Complainant who is participating in or attempting to participate in the University's Education Program or Activities
 - Requests that the University investigate and adjudicate

OCR Intake Process (Title IX)

- Initial Inquiry
 - Assessment by OCR as to whether the allegations, if substantiated, would rise to the level of a violation of University policy;
 - Determination of the specific policy(ies) implicated; and
 - Assessment of the appropriate University response.
- Possible next steps:
 - Dismissal of Formal Complaint*
 - Alternative Resolution
 - Open an investigation

Title IX Investigations: The Basics

- Trained Investigator(s)
- Written Notice of Allegations (*update if necessary*)
- Written Notice of any investigative interview(s)
- Burden on institution/investigator to collect evidence
- Both Parties = Equal Advisor Rights (*can be an attorney*)
- Both Parties = Right to Present Witnesses/Evidence (*including “experts”*)
- Voluntary, Written Consent to Access Medical/Mental Health Records**
- Both Parties = Right to Inspect & Review Any Evidence “Directly Related”
- Both Parties = Meaningful Opportunity to Respond to Evidence
- Investigative Report = Fairly Summarize Relevant Evidence**
- Both Parties = Right to Review & Respond to Investigative Report

Title IX Hearings

- Live with Cross-Examination
 - Advisors conduct cross-examination, asking relevant questions
- Decision-maker resolves outstanding issues of contested facts, assesses credibility
- Results in a determination of responsibility based on a preponderance of the evidence

Referrals to Sanctioning Panel

- Code of Conduct/PHDSM: OCS convenes a **three-member** panel of students, faculty, and staff (students are not involved in OCR matters).
- Title IX: In the event a policy violation is found, the hearing decision-maker will consult with the UHAS Sanctioning Panel comprised of **three faculty or staff members** to determine any sanctions to be imposed.

Written Decisions

- Code of Conduct & PDHSM: The Panel Coordinator provides written notice of the sanction(s) to the respondent (and complainant if under PDHSM) within 7 calendar days of the sanction decision.
 - The notice will reference findings made and will include the sanction(s), a summary of the rationale, and information about the appeal process.
- Title IX: The Decision-maker issues a written determination regarding responsibility within 7 calendar days that includes, among other things, any disciplinary sanctions imposed on the respondent and whether remedies will be provided to complainant.

Title IX Appeals

- Either party may appeal on the following grounds:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a **conflict of interest or bias** for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter; or
 - **The sanction is disproportionate with the violation.**

Serving on a Sanctioning Panel

AVOIDING CONFLICTS OF INTEREST & BIAS

Conflicts of Interest & Bias

- No investigator, panelist, or appeal reviewer will make findings or determinations in a case in which they have a **material conflict of interest** or **material bias**.
- Parties have the opportunity to raise concerns under each process.

Serving Impartially: Avoid Prejudgment of the Facts

- Cannot **pass judgment** on the allegations presented by either party or witnesses.
- Cannot **jump to any conclusions** without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved. Be objective!
- Treat parties **equally**: provide an equal opportunity to present evidence, witnesses, and their versions of the story.

Impermissible Bias

Making a decision based on the characteristics of the parties, rather than based on the facts



Bias: What does it mean?

“Treating a party differently on the basis of the party’s sex or **stereotypes about how men or women behave** with respect to sexual violence constitutes impermissible bias.”

A “recipient that ignores, blames, or punishes a student **due to stereotypes** about the student violates the final regulations[.]”

All protected classes

“The Department’s conception of bias is broad **and includes bias against** an individual’s sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, socioeconomic status, or other **characteristic.**”

What is not defined as bias?

Professional/Personal Experiences or affiliations

Not *per se* bias; exercise caution not to apply “generalizations that might unreasonably conclude that bias exists”, examine on a case-by-case basis:

- All “self-professed feminists” or “self-described survivors” as biased against men
 - A male is incapable of being sensitive to women
 - History of working in a field of sexual violence
- Prior work as a victim advocate = biased against respondents
- Prior work as a defense attorney = biased in favor of respondents
 - Solely being a male or female
 - Supporting women’s or men’s rights
- Having a personal or negative experience with men or women

Conflict of Interest: Who can serve in which function?

Title IX Coordinator

- Investigator ✓
- Informal resolution facilitator ✓
- Decision-maker or appeal decision-maker ✗

Investigator ...

- Title IX Coordinator ✓
- Informal resolution facilitator ✓
- Decision-maker or appeal decision-maker ✗

Conflict of Interest: Who can serve which function?

Hearing decision-maker...

- Investigator ✗
- Title IX Coordinator ✗
- Appeal decision-maker ✗

Appeal decision-maker ...

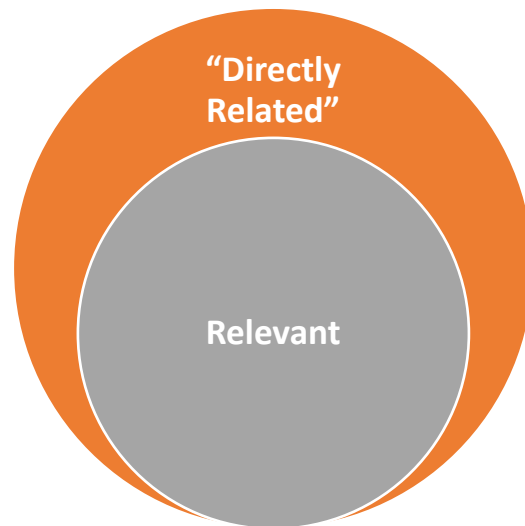
- Investigator ✗
- Title IX Coordinator ✗
- Hearing decision-maker ✗

The investigative report & file

THE RECORD

Title IX Investigative Report

- Must fairly summarize relevant evidence
- Relevant Evidence = *“evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true”*



Title IX: What is Not Relevant?

- The following is considered **per se not relevant** (or is otherwise excluded):
 - Complainant's prior sexual behavior (subject to two exceptions) or predisposition;
 - Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent; and
 - Any information protected by a legally recognized privilege unless waived.

Title IX: Rape Shield Provision

- Prohibits questions or evidence about a complainant's prior sexual behavior, with two exceptions.
- Deems all questions and evidence of a complainant's sexual predisposition irrelevant, with no exceptions.

Title IX: Rape Shield Provision

There are two exceptions where questions or evidence of past sexual behavior are allowed:

- **Exception 1:** Evidence of prior sexual behavior is permitted if offered to prove someone other than the respondent committed the alleged offense.
- **Exception 2:** Evidence of prior sexual behavior is permitted if it is specifically about the complainant and the respondent **and** is offered to prove consent.
 - Does not permit evidence of a complainant's sexual behavior with anyone other than the respondent.

SANCTIONING

Title IX: Sanctioning Objectives

- Promoting safety and protecting the University community;
- Sanctioning individuals for violating this Policy and deterring them from similar future behavior;
- Ending harmful conduct;
- Taking steps reasonably calculated to prevent the future reoccurrence of the conduct;
- Restoring the Complainant to their pre-deprivation status, to the extent practical and possible.

Title IX: Sanctions

Sanctions & corrective actions can include, but are not limited to:

- Verbal warning
- Written warning
- Advisory letter
- Conduct review
- Disciplinary hold on academic and/or financial records
- Required counseling or coaching
- Required training or education
- Campus access restrictions
- No trespass order issued by NUPD (with respect to campus locations)
- No-contact directive (with respect to an individual)
- Expulsion
- Termination of employment
- Revocation of tenure
- Degree revocation

Title IX: Remedies

- Title IX Coordinator determines whether and to what extent ongoing Supportive Measures or other remedies will be provided to Complainant
- Remedies are measures provided to a Complainant where a determination of responsibility for Title IX Sexual Harassment has been made against the Respondent.
- Provided as reasonably necessary to restore or preserve access to the University's Education Programs or Activities.

Title IX: Remedies

Remedies that may be offered or provided to a Complainant may include:

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort service
- 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
- Other changes to academic, living, dining, transportation, and working situations
- Honoring an order of protection or no contact order entered by a state civil or criminal court