



POLICY IMPLEMENTATION

SMRVS Response Team

September 14, 2020

Overview

- Effective date
- New and old definitions
- Equal access
- Title IX and Title VII
- How the grievance process works
- Investigation timeline
- Appeals
- Overview of Communications

Effective Date

- Applies to conduct that occurred on or after August 14, 2020
- If conduct occurred prior to August 14, 2020, but reported after:
 - *Use prohibited conduct definitions from the policy in effect at the time of the alleged violation*
 - *Use the procedures from this policy*

Sexual Harassment – 2020 Definition

“Sexual Harassment” is conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual’s participation in unwelcome sexual conduct;
- (2) 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
- (3) Sexual Assault, Dating Violence, Domestic Violence, and/or Stalking. For the definition of Sexual Harassment, “reasonable person” means a reasonable person under similar circumstances as and with similar identities to the complainant.

To determine whether words and/or conduct constitute Sexual Harassment, the University will consider the totality of the circumstances, including without limitation: the context in which the conduct and/or words occurred; and the frequency, nature, and severity of the words and/or conduct. In no event shall the term “Sexual Harassment” be construed to prohibit speech protected by the First Amendment to the United States Constitution (e.g., mere insulting or offensive speech).

Sexual Harassment Definition – Old Definitions

- Old standards:
 - *Employee Respondent vs. Employee Complainant: unreasonably interfering with work performance.*
 - *Employee Respondent vs. Student Complainant: unreasonably interfering with educational performance OR creates an intimidating, hostile or offensive educational environment*
 - *Student Respondent v. Student Complainant or Student Respondent v. Employee Complainant: Substantially interferes with the ability of a person to work, learn, live, etc.*

Sexual Harassment – Important Changes

- “Of a sexual nature” has been removed from the sexual harassment definition. Which means that the new definition of sexual harassment includes ALL severe, pervasive, etc. unwelcome conduct (harassment), if Complainant is targeted based on sex.
- Sexual Assault, Dating Violence, Domestic Violence, and Stalking have been added to the definition.
- Hostile environment is no longer included in sexual harassment under Title IX (If Employee-Complainant: Don’t forget about Title VII!).
- Substantially/unreasonably interferes vs. effectively denies.

Effectively denies equal access – how is this measured?

- Effectively denies
 - *DOE Question and Answer issued on September 4, 2020: Reasonable person standard. The actual Complainant does not have to resign, withdraw from school, etc.*
- Equal access – ability of the Complainant to access the education program or receive the full benefit from the work environment as compared with someone who is not being harassed
 - *Signs of unequal access: Complainant skipping a class to avoid Respondent, decline in student's GPA, Complainant having difficulty concentrating in class*

Don't forget about Title VII

- The standard under Title VII is different

- *HR0280 definition of sexual harassment:*

With respect to conduct directed at another employee, sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, which includes conduct based on gender, pregnancy, sexual orientation, and gender identity, regardless of whether those characteristics receive protected treatment under state or federal law, when

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;*
- (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual; or*
- (3) such conduct has the purpose or effect of **unreasonably interfering** with an individual's work performance or **creating an intimidating, hostile, abusive, or offensive working environment.***

Prohibited conduct definitions

- Definitions are from VAWA
- Sexual Assault
 - *Rape* – same as the old definition of sexual assault/sexual intercourse
 - *Fondling* – includes over-the-clothes sexual touching (although it does not say that in the definition)
 - *Incest*
 - *Statutory Rape*
- Dating Violence – definition is pretty much the same
- Domestic Violence – the first paragraph of the definition is the same, but it adds “primary aggressor” language and factors
- Stalking – definition is basically the same
- Sexual Exploitation – definition has changed
- Retaliation – definition has changed

Sexual Exploitation

“Sexual Exploitation” means taking sexual advantage of another person, without that person’s active agreement. An active agreement is words and/or conduct that communicate a person’s willingness to participate in an act. A person cannot actively agree to an act if:

- (1) the person is Incapacitated, if either the person claiming to have obtained the other person’s active agreement knows that the other person is Incapacitated or a reasonable person would know that the other person is Incapacitated; or
- (2) the person is Forced to act or participate in an activity

Retaliation

“Retaliation” means to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this Policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by this Policy constitutes retaliation.

- (1) The exercise of rights protected under the First Amendment does not constitute retaliation.
- (2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation.

Retaliation is a violation of this Policy regardless of whether the underlying allegation of a violation of this Policy is ultimately found to have merit. Determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

Consent

- This definition has changed quite a bit
- Obtaining consent
- Force vs. Coercion
- Incapacitation definition
- Don't forget about Appendix B (how the University determines if consent was obtained)

Mandatory reporting

- All faculty and staff (except for confidential staff in SAS, Counseling Center and UHS who receive the info. in their confidential capacity) are mandatory reporters
- Reporting is required when
 - *A student is either C or R*
 - *The MR supervises either the C or R*
 - *OR (interaction with Clery here) the incident occurred on campus and the individual is a CSA – it must be reported to Clery Compliance Officer.*
- Exceptions to mandatory reporting

Mandatory reporting violations

- Evaluated by TIXC
- TIXC may
 - *Meet with Complainant*
 - *Meet with the Mandatory Reporter*
 - *Meet with MR's supervisor, etc.*
 - *Refer the case to OEI for an investigation*
- TIXC and appropriate administrator review the findings
- TIXC may recommend remedial/corrective action

How it all comes together

1. Report
2. TIXC reach out/assessment
3. Formal complaint by Complainant
4. Formal complaint by TIXC
5. Investigation
6. Hearing
7. Appeal

Report

- A report is received from a mandatory reporter or directly from the Complainant.
- A report does NOT initiate a Title IX or non-Title IX prohibited conduct investigation by the Office of Student Conduct or the Office of Equity and Inclusion (OEI should be careful with Title VII here – remember that no formal complaint is required under Title VII and there is an affirmative duty to investigate in some cases)

TIXC outreach/assessment

- TIXC outreach

- *Offer supportive measures and resources*
- *Offer help with filing a formal complaint*
- *VAWA stuff*

- TIXC assessment

- *If formal complaint is filed, TIXC evaluates the nature/location of the alleged conduct to determine if Title IX or non-Title IX prohibited conduct*
- *TIXC will forward the formal complaint to OSC or OEI for investigation; grievance process begins.*

Supportive measures and Interim Actions

- Rules re: student-workers and student-athletes
- Supportive measures cannot unreasonably burden the Respondent
- Emergency removal of students under 106.44(c)
 - *Conduct safety and risk analysis*
 - Must find that there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment
 - *Evaluate the applicability of disability laws*
 - *Consider supportive measures in lieu of emergency removal*

Formal Complaint

- We now have an opt-in versus opt out process.
- Formal complaint by Complainant or TIXC is **required** to begin an investigation.
- Factors for TIXC/university-initiated investigation
 - *limited action request factors*

Title IX Prohibited Conduct Complaint

- If all of the following apply:
 - *Based on Sex*
 - *Occurred in U.S.*
 - *Occurred in education program or activity*
 - *Conduct meets the sexual harassment definition*
- University **must** dismiss Title IX Prohibited Conduct Complaint if:
 - *Any of the above do not apply*
- University **may** dismiss if:
 - *Complainant notifies TIXC in writing that they would like to withdraw the Complaint*
 - *The Respondent is no longer enrolled*
 - *Specific circumstances prevent the University from gathering sufficient evidence to reach a determination*

Non-Title IX Prohibited Conduct

- If any of the following apply:
 - *Not based on sex*
 - *Occurred outside education program or activity*
 - *Occurred outside the U.S.*
 - *Sexual exploitation that does not meet the sexual harassment definition*
- University **may** dismiss if:
 - *Complainant notifies TIXC in writing that they would like to withdraw the Complaint*
 - *The Respondent is no longer enrolled*
 - *Specific circumstances prevent the University from gathering sufficient evidence to reach a determination*

After Formal Complaint

- TIXC sends formal complaint to appropriate office (OEI or OSC)
- Investigator sends Notice of Receipt of Formal Complaint to Complainant and Respondent
 - *Required elements*
 - Notice of the process that applies
 - The identities of the parties involved in the incident
 - The conduct allegedly constituting the violation
 - The date and location of the conduct, if known
 - A statement that Respondent is presumed not responsible for the alleged conduct
 - A statement that a determination regarding responsibility is made at the conclusion of the process
 - The parties' right to have an advisor of their choice who may be, but is not required to be, an attorney (we also include the right to a support person)
 - The parties' right to inspect and review evidence
 - Notice that providing false information to a University official is a violation of the Code of Conduct

Right to Advisor and Support Person

■ Advisor

- *Required under the new Title IX regulations.*
- *The Complainant and the Respondent have the right to be assisted by an advisor during all stages of a disciplinary proceeding, including all meetings, investigative interviews, and hearings. The advisor may be, but is not required to be, an attorney. In a Title IX Hearing, the advisor, and not the party, must ask the other party and any witnesses all relevant questions and follow-up questions.*

■ Support person

- *Required under VAWA*
- *The Complainant and the Respondent also have the right to be assisted by a support person during all stages of a disciplinary proceeding, including all meetings, investigative interviews, and hearings. A support person may be a friend, a family member, or any individual who is not otherwise a potential witness in the Prohibited Conduct investigation.*

Investigation Timeline – 65 Business Days

- Timeline starts with the investigating office's receipt of formal complaint (TIXC to send to investigator within 3 days of receipt).
- (OEI or OSC) will send receipt of formal complaint within 5 business days to C and R.
- Start of investigation to sharing of all the evidence to parties and advisors – 45 business days.
- C and R and advisors have 10 days to respond to evidence. Investigator must consider responses before final report.
- Investigator has 5 days after receipt of responses to finalize the final report.
- Share investigative report with parties and advisors and request responses. Responses will be provided to the other parties. This must be done at least 10 days prior to hearing.

Standard of Evidence

- Preponderance of the evidence

Hearings

- TIX Prohibited Conduct

- *OEI*

- Notice of TIX hearing sent to C and R at least 10 business days prior to hearing
 - Decision by TIX Hearing Officer within 15 business days

- *OSC*

- Notice of TIX hearing sent to C and R at least 10 business days prior to hearing
 - C and R provide names to advisors to TIX hearing officer at least 5 business days prior to hearing
 - Decision within 10 business days

- Non-TIX Prohibited Conduct

- *OEI: no hearing*

- *OSC: TUAPA or SCB*

- Info sharing – SCB

- *C and R provide names of advisors, witnesses and evidence to OSC – 5 business days prior to hearing*
 - *OSC provides information to other party and SCB at least 1 business day prior to hearing*

Appeals - OSC

- Non-TIX Prohibited Conduct
 - Determination that no action will be taken
 - *Complainant appeal to VCEMSA within 7 calendar days*
 - *OSC will send copy of appeal to Respondent; Respondent can respond within 3 calendar days*
 - *VCEMSA decision within 10 calendar days*
 - Affirm
 - Reverse
 - Remand
 - After SCB hearing
 - *Notice of appeal filed within 5 business days to VCEMSA*
 - *Non-appealing party response to VCEMSA within 3 business days*
 - *VCEMSA decision within 10 business days*
 - After TUAPA hearing – governed by TUAPA

Appeals - OSC

- TIX Prohibited Conduct – after hearing
 - *Notice of appeal filed within 5 business days of decision*
 - *OSC notifies non-appealing party of appeal*
 - *Both parties may submit written statement in support of or opposition to the decision within 5 business days*
 - *VCEMSA issues decision within 5 business days*

Appeals

- OEI: Non-TIX Prohibited Conduct
 - Determination that evidence does not support the allegations.
 - *Appeal to chancellor; send appeal documents to OEI within 15 business days of issuance of report.*
 - Determination that evidence does support allegations (responsibility)
 - *Appropriate University administrator accepts recommendation*
 - Impose sanction (Respondent can appeal under HR0525; Complainant may request administrative review of sanction by chancellor)
 - *Appropriate University administrator does not accept recommendation*
 - Written explanation
 - Subject to review by the chancellor at the request of the Complainant
 - *Request to OEI in writing within 15 business days*

Appeals

OEI: TIX Prohibited Conduct: after hearing

- *Complete a form: notice of appeal*
- *Sent to OEI within 5 business days of the notice of decision*
- *No new information is allowed in the appeal*
- *Appeal will be provided to the other party*
- *Parties can file statements re: appeal within 5 business days*

■ Grounds for appeal

- *Procedural irregularity that affected the outcome of the matter;*
- *New evidence that was not reasonably available that could affect the outcome;*
- *TIXC, investigator or decision-maker had a conflict of interest or bias for C or R or for Cs or Rs in general and that affected the outcome;*
- *Disciplinary sanctions;*
- *TIX hearing officer made a clear error in dismissing the formal complaint/ determining that the Respondent is not responsible.*

■ Staff appeals go to HR; Faculty appeals go to Provost

■ Written decision issued within 5 business days after receipt of written statements

Alternative Resolution/Informal Resolution

- Either party can leave the process at any time, and then investigation continues
 - *Non-TIX prohibited conduct – alternative resolution*
 - Determined by OEI/OSC with input from TIXC
 - *TIX prohibited conduct – informal resolution*
 - Written notice with the allegations and details on how the informal resolution process works
 - Both parties must give signed, written consent to enter into informal resolution
 - Not allowed in Student vs. Employee cases

Overview of Communications

- TIX outreach
- Notice of Receipt of Formal Complaint – TIX and non-TIX prohibited conduct
- Request for Interview
- Evidence release letter
- Report release letter

Questions?