



Title IX Decision Makers Training

July 24, 2023



Serving Impartially

- The College's determination of responsibility is a neutral, fact-finding process. The College will treat Complainants and Respondents equitably such that the procedures will apply equally to both parties.
- The College's Title IX Coordinator, investigator(s), decision-maker(s), or any person designated by the College to facilitate an informal resolution process, shall not have actual bias or conflict of interest in the investigatory, hearing, sanctioning, or appeal process or bias for or against Complainants or Respondents generally.
- Actual bias is an articulated prejudice in favor of or against one party or position; it is not generalized concern about the personal or professional backgrounds, positions, beliefs, or interests of the Title IX Coordinator, investigator(s), decision maker(s) or individuals facilitating an informal resolution process.



Definition: Sexual Harassment (Title IX)

Sexual harassment is conduct based on sex that satisfies one or more of the following:

- A College employee conditions the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct (quid pro quo harassment);
- 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 College's education program or activity; or
- "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(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).

Definition: Sexual Assault

Sexual assault, includes the following:

- **Sex Offenses:** Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
- **Rape (except Statutory Rape):** The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her/their age or because of his/her/their temporary or permanent mental or physical incapacity. There is carnal knowledge if there is the slightest penetration of the genital or anal opening of the body of another person.
- **Sodomy:** Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her/their age or because of his/her/their temporary or permanent mental or physical incapacity.
- **Sexual Assault with an Object:** To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her/their age or because of his/her/their temporary or permanent mental or physical incapacity. An "object" or "instrument" is anything the offender uses other than the offender's genitalia, e.g., a finger, bottle, handgun, or stick.
- **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 his/her/their age or because of his/her/their temporary or permanent mental or physical incapacity.
- **Sex Offenses, Non-Forcible Unlawful, Non-Forcible Sexual Intercourse:**
 - **Incest.** Non-Forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
 - **Statutory Rape – Non-Forcible.** Sexual intercourse with a person who is under the statutory age of consent. There is no force or coercion used in Statutory Rape; the act is not an attack.



Definition: Dating Violence

Dating Violence: Violence against a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.



Definition: Domestic Violence

Domestic Violence: includes felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction receiving grant funding and, in the case of victim services, includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior, by:

- a current or former spouse or intimate partner of the victim;
- a person with whom the victim shares a child in common;
- a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
- a person similarly situated to a spouse of the victim under the domestic or family violence laws of California; or
- any other person against an adult or youth victim protected from that person's acts under the domestic or family violence laws of California.



Definition: Stalking

Stalking: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

Definition: Consent

Consent: an affirmative, conscious, and voluntary agreement to engage in sexual activity. Both parties must give affirmative consent to sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that they have the affirmative consent of the other or others to engage in the sexual activity. Lack of protest, lack of resistance, or silence do not indicate consent. Affirmative consent must be ongoing throughout a sexual activity and one can revoke consent at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, is not an indicator of consent. Adult sexual activity with a minor is never consensual because a minor is considered incapable of giving legal consent due to age.

The Respondent's belief that the Complainant consented will not provide a valid defense unless the belief was actual and reasonable, based on the facts and circumstances the Respondent knew, or reasonably should have known, at the time of the incident.

A Respondent's belief is not a valid defense where:

- The Respondent's belief arose from the Respondent's own intoxication or recklessness;
- The Respondent did not take reasonable steps to ascertain whether the Complainant affirmatively consented; or
- The Respondent knew or a reasonable person should have known that the Complainant was unable to consent because the Complainant was incapacitated, in that the Complainant was:
 - asleep or unconscious;
 - unable to understand the fact, nature, or extent of the sexual activity due to the influence of drugs, alcohol, or medication; or
 - unable to communicate due to a mental or physical condition.



Read Case Study

What type of sexual harassment are you looking for in this case?

What are the elements of that type of sexual harassment?



Elements of the definition for rape

Rape (except Statutory Rape):

1. The slightest penetration of the genital or anal opening of the body of another person,
2. without the **consent** of the victim

Consent

1. Was the complainant conscious?
2. Did the complainant have the capacity to consent to sexual activity?
3. Did the complainant affirmatively consent to sexual activity?
4. Did the complainant voluntarily consent to the sexual activity?
5. Did the respondent ensure they had complainant's affirmative consent to engage in each sexual activity?



Case Study: Writing Assignment

Write down one question you would ask the complainant, respondent, and witness to help you determine if the definition of rape is met?

What does consent look like?

How is consent communicated?

Verbal – (e.g. “yes,” “I like this,” “Can we...”)

- Words
- Sounds

Non-Verbal – Not all interactions will include verbal indicators, but all interactions will involve non-verbal indicators.

- Slight touches
- Body movements
- Taking off own clothing
- Gestures (e.g. nodding)

Remember policy language:

It is not anyone’s burden to say “No” or “Stop” or “I don’t want to do that.”

The burden is to **establish consent before acting.**



Coercion vs. Pressure

- People may feel pressured to engage in sexual activity –This does not necessarily mean they were coerced (policy term) to participate.
- Internal thought process (“I don’t want to do this”) versus outward actions (verbal agreement, indicating consent).



Incapacitation due to alcohol or drugs

You can be very intoxicated, and still not be incapacitated.

Analysis:

1. What is the evidence that the complainant was under the influence of an intoxicant?
2. Did the complainant's intoxication rise to the level of incapacitation?
3. Did respondent know or should have known that complainant was incapacitated?

Signs of Intoxication

Decreased inhibitions

- Doing or saying things not normally done when sober
- Boisterousness or bravado
- Argumentative or confrontational
- Obnoxious
- Hanging on to people or intruding on their personal space
- Animated or exaggerated actions
- Rapid drinking
- Acting silly or “cutesy”

Psychomotor impairment

- Slurred, mumbled, or slow speech
- Swaying while sitting, standing, or walking
- Staggering, stumbling, holding onto objects for balance
- Difficulty reaching for and picking up objects
- Inability to maintain eye contact
- Spilling food or drinks
- Falling down or loss of balance

Cognitive impairment

- Loss of concentration or train of thought
- Delayed response to questions
- Illogical comments
- Impaired short-or long- term memory
- Lighting the wrong end of a cigarette
- Excessively quiet, sullen
- Trouble counting money or doing basic math
- Difficulty following directions



Understanding the fact, nature, and extent of the sexual activity

Ask about the who, what, when, where, why or how.

- Was the complainant oriented to the time, place, and actions of their own and others?
- Was the complainant able to carry on a conversation?
- Was the complainant able to handle simple cognitive or motor tasks?
- What the complainant exhibiting risky or unusual behaviors for themselves?
- Was the complainant confused about where they were or who they were with?
- Had complainant thought about what they did or did not want to do?
- Had complainant thought about the outcome of the sexual activity?
- Did complainant stop to do things to prepare for sexual activity?



Testing the respondent's knowledge of incapacitation

If the complainant was incapacitated, decision makers must also evaluate **respondent's knowledge** of the complainant's incapacitation.

Did the respondent...

- see the complainant ingest alcohol or drugs?
- see the complainant's physical and verbal behaviors?
- hear about the amount of alcohol or drugs used by the complainant?
- assist the complainant because of the complainant's level of intoxication or consciousness?
- make comments about the complainant's level of intoxication or consciousness?

The respondent's own intoxication or reckless is not a valid excuse for failing to take reasonable steps to determine if the complainant was unable to consent to the complainant's incapacitation.



Case Study: Group Activity

What evidence contributes to finding that Complainant affirmatively consented to sexual activity?

What evidence contributes to finding that Complainant did not affirmatively consent to sexual activity?



Evidence

- The College, not the parties, has the responsibility to gather information and interview witnesses.
- The College will provide the Complainant and Respondent an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- The hearing need not be conducted according to the formal rules of evidence.
- Only relevant evidence will be admissible during the hearing. Relevant evidence means evidence, including evidence relevant to the credibility of a party or witness, having any tendency in reason to prove or disprove any disputed fact material to the allegations.
- Before a Complainant, Respondent, or witness answers an advisor's question, the Hearing Officer will determine whether the question is relevant and explain any decision to exclude a question as not relevant. The Hearing Officer need not provide a lengthy or complicated explanation in support of a relevant determination.
- The Decision-Makers cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to submit to cross-examination or to answer any questions.



Case Study: Group Activity

What evidence is not relevant?



Credibility

Finding someone's account not credible is not the same as finding the person is a "liar." Credibility assessments are to determine the extent to which the evidence is worthy of belief.

- Inherent plausibility
- Consistency
- Corroboration
- Motive to falsify information
- Verified pattern of behavior
- Demeanor



Case Study: Group Activity

What evidence enhances _____'s account?

What evidence detracts from _____'s account?

Written Determination

The Decision-Makers shall reach a decision of responsibility or non-responsibility for a policy violation by the preponderance of the evidence standard, and will issue a written determination regarding responsibility⁸⁵ no later than ten (10) business days after the date that the hearing ends.

- Allegations
- Procedural steps taken from the receipt of the formal complaint through the determination
- Findings of fact supporting the determination. In doing so, the Decision-Makers will focus on analyzing the findings of fact that support the determination of responsibility or non-responsibility
- Conclusions regarding the application of the College's Policies and Procedures or relevant rules establishing cause for discipline to the facts
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the Decision-Makers impose on the Respondent, and whether remedies designed to restore or preserve equal access to the College's education program or activity will be provided by the College to the Complainant.
- The procedures and grounds for the Complainant and/or Respondent to appeal.



Disciplinary Sanctions and Remedies

Sanctions

- Written or verbal reprimand
- Training or counseling
- Non-academic probation (Students only)
- Reduction in pay (Employees only)
- Demotion (Employees only)
- Suspension
- Expulsion (Students only)
- Discharge/Termination (Employees only)

Remedies

- Police & Campus Safety escort
- Alternate work or class schedule
- Counseling services or referral
- Medical services or referral
- Academic support services
- Exceptions for withdraw or re-taking courses
- Review of actions taken toward Complainant



Discipline Sanctioning Considerations

Discipline should contemplate a range of sanctions, where a violation that is more egregious results in more severe sanctions and a less egregious violation results in less severe sanctions. However, various factors and circumstances affect the determination of sanctions by the decision makers, including:

- Mitigating, Aggravating, and Compounding Factors
- Severity and Egregiousness
- Cumulative Violations
- Prior Misconduct History
- Behavior Patterns
- Complainant's Request for Enhanced/Lesser Sanctions
- Respondent's Acceptance of Accountability/Responsibility
- Precedent
- Conditions for Return

Case Study Scenario

Respondent's Advisor's Closing

- The respondent thanks everyone for their time and apologizes for everything he put them through.
- The respondent apologizes for any harm he might have caused the complainant and his lapse in judgement.
- The respondent reiterates that as soon as he saw Complainant's expression on her face he stopped, and he wishes he had seen it sooner.
- The respondent says he is willing to participate in therapy or education to avoid similar circumstances in the future.
- The respondent says he will avoid the complainant as to not impact her education at the College.
- The respondent says he only has only semester left; all he wants to do is graduate and he promises not to do anything like this again.

Complainant's Advisor's Closing

- The complainant thanks everyone for their time and wishes she never had to meet everyone under these circumstances.
- The complainant just wants the Respondent to know what he did was wrong and to never do anything like that to anyone ever again.
- The complainant says she was friends with Respondent and he completely violated her trust; she does not want to see him again.
- The complainant says that although she does not want to see him again, she wants the Respondent to be able to continue with his education.
- The complainant hopes that through this process Respondent learned from his mistake.



Case Study: Group Activity

What remedies and / or sanctions will you issue?



Questions?