

## **TITLE IX GRIEVANCE POLICY**

### **Introduction**

#### **A. What is the purpose of the Title IX Grievance Policy?**

Title IX of the Educational Amendments of 1972 prohibits any person in the United States from being discriminated against on the basis of sex in seeking access to any educational program or activity receiving federal financial assistance. The U.S. Department of Education, which enforces Title IX, has long defined the meaning of Title IX's prohibition on sex discrimination broadly to include various forms of sexual harassment and sexual violence that interfere with a student's ability to equally access our educational programs and opportunities.

On May 19, 2020, the U.S. Department of Education issued a Final Rule under Title IX of the Education Amendments of 1972 that:

- Defines the meaning of "sexual harassment" (including forms of sex-based violence),
- Addresses how this RSC must respond to reports of misconduct falling within that definition of sexual harassment, and
- Mandates a grievance process that this RSC must follow to comply with the law in these specific covered cases before issuing a disciplinary sanction against a person accused of sexual harassment.

The full text of the Final Rule and its extensive Preamble are available here: <http://bit.ly/TitleIXReg>.

Based on the Final Rule, Russell Sage College ("RSC") will implement the following Title IX Grievance Policy, effective August 14, 2020.

#### **B. When does this Title IX Grievance Policy apply?**

This policy ONLY applies where an individual files a Formal Complaint, as defined below, alleging conduct that:

- meets the definition of "Title IX Sexual Harassment" defined below;
- involves a complainant who is currently participating in, or attempting to participate in, the education programs or activities of RSC;
- occurred after August 14, 2020;
- occurred within the United States; and
- occurred within RSC's "education program or activity," as defined below.

#### **C. How does the Title IX Grievance Policy impact other campus disciplinary policies?**

In recent years, "Title IX" cases have become a short-hand for any campus disciplinary process involving sex discrimination, including those arising from sexual harassment and sexual assault. But under the Final Rule, RSC must narrow both the geographic scope of its authority to act

under Title IX and the types of “sexual harassment” that it must subject to its Title IX investigation and adjudication process. Only incidents falling within the Final Rule’s definition of sexual harassment will be investigated and, if appropriate, brought to a live hearing through the Title IX Grievance Policy defined below.

RSC remains committed to addressing any violations of its policies, even those not meeting the narrow standards defined under the Title IX Final Rule.

Specifically, our campus has the following policies:

- a Code of Accountability that defines certain behaviors as a violation of campus policy,
- a separate Sexual Offense Policy that addresses the types of sex-based offenses constituting a violation of campus policy, and the procedures for investigating and adjudicating those sex-based offenses, and
- a separate Discrimination and Harassment policy that addresses other types of conduct that are prohibited on campus as discrimination or harassment, and the procedures for investigating and adjudicating that conduct.

To the extent that alleged misconduct falls outside the Title IX Grievance Policy, or misconduct falling outside the Title IX Grievance Policy is discovered in the course of investigating covered Title IX misconduct, RSC retains authority to investigate and adjudicate the allegations under the policies and procedures defined within the [Code of Accountability](#), [Sexual Offense Policy](#), and/or [Discrimination and Harassment Policy](#).

The elements established in the Title IX Grievance Policy under the Final Rule have no effect and are not transferable to any other policy of the College for any violation of the Code of Accountability, employment policies, or any civil rights violation except as narrowly defined in this Policy. This Policy does not set a precedent for other policies or processes of the College and may not be cited for or against any right or aspect of any other policy or process.

#### **D. How does the Title IX Grievance Policy impact the handling of complaints?**

Our existing Title IX office and reporting structure remains in place. What has changed is the way our Title IX office will handle different types of reports arising from Title IX Sexual Harassment, as detailed in full throughout Section II.

## **Table of Contents**

<b>A.</b>	General Rules of Application...	4
<b>B.</b>	Definitions...	4
<b>C.</b>	Privacy vs. Confidentiality...	7
<b>D.</b>	Disability Accommodations...	8
<b>E.</b>	Making a Report Regarding Title IX Sexual Harassment to RSC...	8
<b>F.</b>	Initiating the Title IX Grievance Process...	12
<b>G.</b>	Investigation...	17
<b>H.</b>	Investigative Report...	19
<b>I.</b>	Hearing...	19
<b>J.</b>	Determination Regarding Responsibility...	22
<b>K.</b>	Appeals...	25
<b>L.</b>	Retaliation...	26

## **A. General Rules of Application**

### **1. Effective Date**

This Title IX Grievance Policy will become effective on August 14, 2020, and will only apply to Formal Complaints of Title IX Sexual Harassment (as defined below) brought on or after August 14, 2020. Complaints brought prior to August 14, 2020 will be investigated and adjudicated according to the Title IX Grievance Policy if a case is not complete by that date.

### **2. Revocation by Operation of Law**

Should any portion of the Title IX Final Rule, 85 Fed. Reg. 30026 (May 19, 2020), be stayed or held invalid by a court of law, or should the Title IX Final Rule be withdrawn or modified to not require the elements of this policy, this policy, or the invalidated elements of this policy, will be deemed revoked as of the publication date of the opinion or order and for all reports after that date, as well as any elements of the process that occur after that date if a case is not complete by that date of opinion or order publication.

Should the Title IX Grievance Policy be revoked in this manner, any conduct covered under the Title IX Grievance Policy shall be investigated and adjudicated under the existing Code of Accountability, Sexual Offense Policy, and/or Discrimination and Harassment Policy.

### **3. Non-Discrimination in Application**

The requirements and protections of this policy apply equally regardless of sex, sexual orientation, gender identity, gender expression, or other protected classes covered by federal or state law. All requirements and protections are equitably provided to individuals regardless of such status or status as a Complainant, Respondent, or Witness. Individuals who wish to file a complaint about RSC's policy or process may contact the Department of Education's Office for Civil Rights using contact information available at <https://ocrcas.ed.gov/contact-ocr>.

## **B. Definitions**

### **1. Title IX Sexual Harassment**

For the purposes of this Title IX Grievance Policy, "Title IX sexual harassment" includes any conduct on the basis of sex that satisfies one or more of the following:

- An employee conditioning educational benefits on participation in unwelcome sexual conduct (i.e., quid pro quo);
- Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the educational RSC's education program or activity;
- Sexual assault (as defined in the Clery Act), which includes any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent;

- Dating violence (as defined in the Violence Against Women Act (VAWA) amendments to the Clery Act), which includes any violence committed by a person: (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship; (ii) The type of relationship; (iii) The frequency of interaction between the persons involved in the relationship.
- Domestic violence (as defined in the VAWA amendments to the Clery Act), which includes any felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under New York’s domestic or family violence laws or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of New York.
- Stalking (as defined in the VAWA amendments to the Clery Act), meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to-- (A) fear for their safety or the safety of others; or (B) suffer substantial emotional distress.

Note that conduct that does not meet one or more of these criteria may still be prohibited under the Code of Accountability, Discrimination and Harassment Policy, and/or Sexual Offense Policy. Note also that conduct that constitutes sexual assault, dating violence, domestic violence, or stalking (collectively the “Sexual Offenses”), additional requirements may apply under the Sexual Offense Policy.

## 2. Consent

For the purposes of this Title IX Grievance Policy, “consent” means – a knowing, voluntary, and mutual decision among all participants to engage in “sexual activity” (as defined below). Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.

Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant’s sex, sexual orientation, gender identity, or gender expression.

- Consent to any sexual activity between or with any party does not necessarily constitute consent to any other sexual act.
  - Whether through words or actions that clearly display consent, each party must affirmatively consent to participating in each sexual activity. Consenting to one type of sexual activity is not blanket consent to any and all types of sexual activity.
- Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol.
- Consent may be initially given but withdrawn at any time.

- Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, being under the age of consent, or if an individual otherwise cannot consent.
  - Minors who cannot consent under New York’s laws covering age of consent are considered incapacitated. Under New York law, the age of consent is 17 years old. Students and employees are encouraged to review New York State Penal Law Article 130 for additional details regarding New York’s age of consent.
  - Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent. This does not mean that individuals cannot affirmatively consent to sexual activity or contact when they have been drinking or using drugs, however. Such individuals may still affirmatively consent through words or actions that clearly indicate interest in engaging in the activity.
  - Incapacitation is to be determined by an investigation process based on available evidence, acknowledging that in almost no cases will scientific evidence of alcohol or drug level (such as a breathalyzer taken at the time of the assault) be available. There is no single standard or number of drinks that leads to incapacitation. This level varies for different people, and may depend in part on their age, gender, height, weight, metabolism and whether and how much they have recently eaten.
- Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.
- When consent is withdrawn or can no longer be given, sexual activity must stop.
  - Consent can “no longer be given” when a party to a sexual act or sexual contact initially consents to the activity, but during the course of the activity falls asleep or otherwise becomes unconscious or incapacitated. At that point, the other party must stop the sexual activity or contact.

### 3. Education Program or Activity

For the purposes of this Title IX Grievance Policy, RSC’s “education program or activity” includes:

- Any on-campus premises.
- Any off-campus premises that RSC has substantial control over. This includes buildings or property owned or controlled by a recognized student organization.
- Activity occurring within computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of RSC’s programs and activities over which the RSC has substantial control.

### 4. Formal Complaint

For the purposes of this Title IX Grievance Policy, “Formal Complaint” means a document – including an electronic submission - filed by a complainant with a signature or other indication that the complainant is the person filing the Formal Complaint, or signed by the Title IX Coordinator, alleging Title IX Sexual Harassment against a respondent about conduct within RSC’s education program or activity and requesting initiation of the procedures consistent with the Title IX Grievance Policy to investigate the allegation of Title IX Sexual Harassment.

#### 5. Complainant

For the purposes of this Title IX Grievance Policy, Complainant means any individual who has reported being or is alleged to be the victim of conduct that could constitute Title IX Sexual Harassment as defined under this policy.

#### 6. Relevant evidence and questions

“Relevant” evidence and questions refer to any questions and evidence that tends to make an allegation of Title IX Sexual Harassment more or less likely to be true.

“Relevant” evidence and questions do not include the following types of evidence and questions, which are deemed “irrelevant” at all stages of the Title IX Grievance Process:

- Evidence and questions about the complainant’s sexual predisposition or prior sexual behavior unless:
  - They are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - They concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.
  - Evidence and questions that constitute, or seek disclosure of, information protected under a legally-recognized privilege. Legally-recognized privileges include, e.g., attorney-client privilege.
  - Any party’s medical, psychological, and similar records unless the party has given voluntary, written consent.

#### 7. Respondent

For the purposes of this Title IX Grievance policy, Respondent means any individual who has been reported to be the perpetrator of conduct that could constitute Title IX Sexual Harassment as defined under this policy.

### **C. Privacy vs. Confidentiality**

Consistent with the Code of Accountability and other relevant policies, references made to confidentiality refer to the ability of identified confidential resources to not report crimes and violations to law enforcement or college officials without permission, except for extreme circumstances, such as a health and/or safety emergency or child abuse. References made to

privacy mean RSC officers and employees who cannot guarantee confidentiality but will maintain privacy to the greatest extent possible, and information disclosed will be relayed only as necessary to investigate and/or seek a resolution and to notify the Title IX Coordinator or designee, who is responsible for tracking patterns and spotting systemic issues. RSC will limit the disclosure as much as practicable, even if the Title IX Coordinator determines that the request for confidentiality cannot be honored.

#### **D. Disability Accommodations**

This Policy does not alter any of RSC's obligations under federal disability laws including the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Parties may request reasonable accommodations for disclosed disabilities to the Title IX Coordinator at any point before or during the Title IX Grievance Process that do not fundamentally alter the Process. The Title IX Coordinator will not affirmatively provide disability accommodations that have not been specifically requested by the Parties, even where the Parties may be receiving accommodations in other RSC programs and activities.

#### **E. Making a Report Regarding Title IX Sexual Harassment to RSC**

Any person may report sex discrimination, including Title IX Sexual Harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

Contact Information for the Title IX Coordinator:

Name: Amanda M. Bastiani

Title: Title IX Coordinator & EEO

Specialist

Office Address: Russell Sage College, 65 1<sup>st</sup> Street, Troy, NY 12180, Plum 2<sup>nd</sup> Floor

Email Address: [bastia@sage.edu](mailto:bastia@sage.edu)

Telephone Number: (518) 244-4809

Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator.

##### **1. Confidential Reporting**

The following Officials will provide privacy, but not confidentiality, upon receiving a report of conduct prohibited under this policy:

- Title IX Coordinator:  
Amanda M. Bastiani



Title IX Coordinator & EEO Specialist

[bastia@sage.edu](mailto:bastia@sage.edu)

(518) 244-4809

- Deputy Title IX Coordinator:  
Director of Human Resources

[hr@sage.edu](mailto:hr@sage.edu)

(518) 244-2391

- “Official with Authority”:

Trish Cellemme

Vice President of Student Life

[cellep@sage.edu](mailto:cellep@sage.edu)

(518) 292-1753

Sharon Murray

Associate Vice President of Student Life

Dean of Students Albany

[murras2@sage.edu](mailto:murras2@sage.edu)

(518) 292-1930

Stacy Gonzalez

Associate Vice President of Student Life

Dean of Students Troy

[gonzas@sage.edu](mailto:gonzas@sage.edu)

(518) 244-2207

- Mandated Reporters: all employees, with the exception of confidential staff listed below.

The following Officials may provide confidentiality:

- Wellness Centers: Troy 518-244-2261  
[troywellnesscenter@sage.edu](mailto:troywellnesscenter@sage.edu)  
  
Albany 518-292-1917)  
[albanywellnesscenter@sage.edu](mailto:albanywellnesscenter@sage.edu)
- Spiritual Center: Darren Gundrum,  
Protestant Chaplain & Spiritual Advisor  
[gundrd@sage.edu](mailto:gundrd@sage.edu)

## 2. Non-Investigatory Measures Available Under the Title IX Grievance Policy

### a. Supportive Measures

Complainants and respondents (as defined above) have the right to receive supportive measures from RSC regardless of whether a Formal Complaint is filed. Supportive measures are non-disciplinary and non-punitive.

Supportive measures may include, but are not limited to:

- Counseling
- extensions of deadlines or other course-related adjustments
- modifications of work or class schedules
- campus escort services
- restrictions on contact between the parties (no contact orders)
- leaves of absence
- increased security and monitoring of certain areas of the campus
- room changes
- other support measures deemed fit for situation

RSC will maintain the confidentiality of any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair RSC's ability to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Upon request, RSC will provide both the accused or respondent and the reporting individual a prompt review, reasonable under the circumstances, of the need for and terms of any supportive measures related to an alleged Sexual Offense that directly affects him or her, in which he or she is allowed to submit evidence in support of his or her request. In the event that supportive measures granted to or against one party impacts another party, both the directly impacted party and the secondarily impacted party may request a review of the terms or totality of the supportive measure by RSC and may submit information as to the reasoning for requesting a change.

Requests to review supportive measures related to Sexual Offenses should be submitted to: Trish Cellemme, Vice President for Student Life at [cellep@sage.edu](mailto:cellep@sage.edu) (for students), or Human Resources, at [hr@sage.edu](mailto:hr@sage.edu), or (518) 244-2391 (for employees). If a request for review is received from one party, the other party will be notified of the request for review. The Vice President for Student Life or Director of Human Resources will issue a determination in response to the request, and notify both parties of the determination.

### b. Emergency Removal

RSC retains the authority to remove a respondent from RSC's program or activity on an emergency basis, where RSC (1) undertakes an individualized safety and risk analysis and (2) determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of Title IX Sexual Harassment justifies a removal.

If RSC determines such removal is necessary, the respondent will be provided notice and an opportunity to challenge the decision immediately following the removal. RSC will provide both the accused or respondent and the reporting individual a prompt review, reasonable under the circumstances, of the need for and terms of a mandatory interim suspension, including potential modification, in which they are allowed to submit evidence in support of their request. Requests to review a mandatory interim suspension should be submitted to Trish Cellemme, Vice President for Student Life at [cellep@sage.edu](mailto:cellep@sage.edu). If a request for review is received from one party, the other party will be notified of the request for review. The Vice President for Student Life will issue a determination in response to the request, and notify both parties of the determination.

*c. Administrative Leave*

RSC retains the authority to place a non-student employee respondent on administrative leave during the Title IX Grievance Process, consistent with the employee handbook, applicable collective bargaining agreement, and code of accountability.

**F. Initiating the Title IX Grievance Process**

**1. Filing a Formal Complaint**

The timeframe for the Title IX Grievance Process begins with the filing of a Formal Complaint. The Grievance Process will be concluded within a reasonably prompt manner, and no longer than ninety (90) business days after the filing of the Formal Complaint, provided that the Process may be extended for a good reason, including but not limited to the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities. The procedure for applying for extensions is described below.

To file a Formal Complaint, a complainant must provide the Title IX Coordinator a written, signed complaint describing the facts alleged. Complainants are only able to file a Formal Complaint under this Policy if they are currently participating in, or attempting to participate in, the education programs or activities of RSC, including as an employee. For complainants who do not meet this criteria, the College will utilize existing policy in the [Code of Accountability](#), [Sexual Offense Policy](#), and/or [Discrimination and Harassment Policy](#).

If a complainant does not wish to make a Formal Complaint, the Title IX Coordinator may determine a Formal Complaint is necessary. RSC will inform the complainant of this decision in writing, and the complainant need not participate in the process further but will receive all notices issued under this Policy and Process.

Nothing in the Title IX Grievance Policy or RSC's policies prevents a complainant from seeking the assistance of state or local law enforcement alongside the appropriate on-campus process.

## 2. Multi-Party Situations

RSC may consolidate Formal Complaints alleging Title IX Sexual Harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of Title IX Sexual Harassment arise out of the same facts or circumstances.

## 3. Determining Jurisdiction

The Title IX Coordinator or designee will determine if the instant Title IX Grievance Process should apply to a Formal Complaint. The Process will apply when all of the following elements are met, in the reasonable determination of the Title IX Coordinator:

- The conduct is alleged to have occurred on or after August 14, 2020;
- The conduct is alleged to have occurred in the United States;
- The conduct is alleged to have occurred in RSC's education program or activity; and
- The alleged conduct, if true, would constitute Title IX Sexual Harassment as defined in this policy.

If all of the elements are met, RSC will investigate the allegations according to the Grievance Process.

### a. Allegations Potentially Falling Under Two Policies

If the alleged conduct, if true, includes both conduct that would constitute Title IX Sexual Harassment and conduct that would not constitute Title IX Sexual Harassment but may violate the Code of Accountability, Discrimination and Harassment Policy, and/or Sexual Offense Policy, the following rules will apply:

- All allegations will be investigated by the investigator who is appointed to investigate the Title IX Sexual Harassment allegations. A second trained investigator may also be appointed to assist with the investigation and investigate the allegations that do not constitute Title IX Sexual Harassment.
- If only one investigator has been appointed to investigate the alleged conduct, the investigator will make:
  - A recommendation regarding the Title IX Sexual Harassment allegations, pursuant to the procedures set forth in this Policy, and
  - A determination regarding whether it is more likely than not that alleged conduct occurred that does not constitute Title IX Sexual Harassment but violates the Code of Accountability, Discrimination and Harassment Policy, and/or Sexual Offense Policy.
- If a second trained investigator has been appointed to investigate the alleged conduct that does not constitute Title IX Sexual Harassment, the second investigator will make a determination regarding whether it is more likely than not that alleged conduct occurred

that does not constitute Title IX Sexual Harassment but violates the Code of Accountability, Discrimination and Harassment Policy, and/or Sexual Offense Policy.

- If a determination is made that it is more likely than not that alleged conduct occurred that does not constitute Title IX Sexual Harassment, but violates the Code of Accountability, Sexual Offense, and/or Discrimination and Harassment Policy, RSC will pursue disciplinary action. Further information regarding internal disciplinary proceedings for students can be found in the Student Code of Accountability. Further information regarding internal disciplinary proceedings for employees can be found in the Employee Handbook and/or in any applicable collective bargaining agreement with RSC.

*b. Mandatory Dismissal*

If any one of the elements of the definition of Title IX Sexual Harassment are not met, the Title IX Coordinator or designee will notify the parties that the Formal Complaint is being dismissed for the purposes of the Title IX Grievance Policy. Each party may appeal this dismissal using the procedure outlined in “Appeals,” below.

*c. Discretionary Dismissal*

The Title IX Coordinator or designee may dismiss a Formal Complaint brought under the Title IX Grievance Policy, or any specific allegations raised within that Formal Complaint, at any time during the investigation or hearing, if:

- A complainant notifies the Title IX Coordinator in writing that they would like to withdraw the Formal Complaint or any allegations raised in the Formal Complaint;
- The respondent is no longer enrolled or employed by RSC; or,
- If specific circumstances prevent RSC from gathering evidence sufficient to reach a determination regarding the Formal Complaint or allegations within the Formal Complaint.

Any party may appeal a dismissal determination using the process set forth in “Appeals,” below.

*d. Notice of Dismissal*

Upon reaching a decision that the Formal Complaint will be dismissed, RSC will promptly send written notice of the dismissal of the Formal Complaint or any specific allegation within the Formal Complaint, and the reason for the dismissal, simultaneously to the parties through their RSC email accounts. It is the responsibility of parties to maintain and regularly check their email accounts.

*e. Notice of Removal*

Upon dismissal of the Formal Complaint for the purposes of Title IX, RSC retains discretion to utilize the [Code of Accountability](#), [Sexual Offense Policy](#), and/or [Discrimination and Harassment Policy](#) to determine if a violation has occurred. If so, RSC will promptly send written notice of the dismissal of the Formal Complaint under the Title IX Grievance Process and removal of the allegations to the Code of Accountability, Sexual Offense Policy, and/or Discrimination and Harassment Policy processes.

#### 4. Notice of Allegations

The Title IX Coordinator will draft and provide the Notice of Allegations to any party to the allegations of Title IX Sexual Harassment. Such notice will occur as soon as practicable after RSC receives a Formal Complaint of the allegations, if there are no extenuating circumstances.

The parties will be notified by their RSC email accounts if they are a student or employee, and by other reasonable means if they are neither.

RSC will provide sufficient time for the parties to review the Notice of Allegations and prepare a response before any initial interview.

The Title IX Coordinator or designee may determine that the Formal Complaint must be dismissed on the mandatory grounds identified above, and will issue a Notice of Dismissal. If such a determination is made, any party to the allegations of Title IX Sexual Harassment identified in the Formal Complaint will receive the Notice of Dismissal in conjunction with, or in separate correspondence after, the Notice of Allegations.

##### a. Contents of Notice

The Notice of Allegations will include the following:

- Notice of RSC's Title IX Grievance Process, including any informal resolution process, and a hyperlink to a copy of the process.
- Notice of the allegations potentially constituting Title IX Sexual Harassment, and sufficient details known at the time the Notice is issued, such as the identities of the parties involved in the incident, if known, including the complainant; the conduct allegedly constituting Title IX Sexual Harassment; and the date and location of the alleged incident, if known.
- A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- A statement that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney.
- A statement that before the conclusion of the investigation, the parties may inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint, including the evidence upon which RSC does not intend to rely in reaching a determination regarding responsibility, and evidence that

both tends to prove or disprove the allegations, whether obtained from a party or other source.

- A statement that the Code of Accountability § IX(1)(b) prohibits knowingly making false statements or knowingly submitting false information to any College official, faculty member or office, including during the grievance process.

*b. Ongoing Notice*

If, in the course of an investigation, RSC decides to investigate allegations about the complainant or respondent that are not included in the Notice of Allegations and are otherwise covered Title IX Sexual Harassment falling within the Title IX Grievance Policy, RSC will notify the parties whose identities are known of the additional allegations by their RSC email accounts or other reasonable means.

The parties will be provided sufficient time to review the additional allegations to prepare a response before any initial interview regarding those additional charges.

*c. Notice of Meetings and Interviews*

RSC will provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate.

5. Advisor of Choice and Participation of Advisor of Choice

RSC will provide the parties equal access to advisors and support persons; any restrictions on advisor participation will be applied equally.

RSC has a long-standing practice of requiring students to participate in the process directly and not through an advocate or representative. Students participating as Complainant or Respondent in this process may be accompanied by an Advisor of Choice, who may be any attorney, to any meeting or hearing to which they are required or are eligible to attend. The Advisor of Choice is not an advocate. Except where explicitly stated by this Policy, as consistent with the Final Rule, Advisors of Choice shall not participate directly in the process as per standard policy and practice of RSC.

RSC will not intentionally schedule meetings or hearings on dates where the Advisors of Choice for all parties are not available, provided that the Advisors act reasonably in providing available dates and work collegially to find dates and times that meet all schedules.

RSC's obligations to investigate and adjudicate in a prompt timeframe under Title IX and other college policies apply to matters governed under this Policy, and RSC cannot agree to extensive delays solely to accommodate the schedule of an Advisor of Choice. The determination of what is reasonable shall be made by the Title IX Coordinator or designee. RSC will not be obligated to



delay a meeting or hearing under this process more than five (5) business days due to the unavailability of an Advisor of Choice, and may offer the party the opportunity to obtain a different Advisor of Choice or utilize one provided by RSC.

#### 6. Delays

Each party may request a one-time delay in the Grievance Process of up to five (5) business days for good cause (granted or denied in the sole judgment of the Title IX Coordinator, Director of Student Conduct, or designee) provided that the requestor provides reasonable notice and the delay does not overly inconvenience other parties.

For example, a request to take a five day pause made an hour before a hearing for which multiple parties and their advisors have traveled to and prepared for shall generally not be granted, while a request for a five day pause in the middle of investigation interviews to allow a party to obtain certain documentary evidence shall generally be granted.

The Title IX Coordinator or designee shall have sole judgment to grant further pauses in the Process.

### **G. Investigation**

#### 1. General Rules of Investigations

The Title IX Coordinator and/or designee will perform an investigation under a reasonably prompt timeframe of the conduct alleged to constitute Title IX Sexual Harassment after issuing the Notice of Allegations.

RSC presumes that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. The Title IX Coordinator and/or designee will perform an objective evaluation of all relevant evidence - including both inculpatory and exculpatory evidence. Credibility determinations may not be based on a person's status as a complainant, respondent, or witness.

RSC and not the parties, has the burden of proof and the burden of gathering evidence, i.e. the responsibility of showing a violation of this Policy has occurred. This burden does not rest with either party, and either party may decide not to share their account of what occurred or may decide not to participate in an investigation or hearing. This does not shift the burden of proof away from RSC and does not indicate responsibility.

RSC cannot access, consider, or disclose medical records without a waiver from the party (or parent, if applicable) to whom the records belong or of whom the records include information. RSC will provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence, (i.e. evidence that tends to prove and disprove the allegations) as described below.

## 2. Inspection and Review of Evidence

Prior to the completion of the investigation, the parties will have an equal opportunity to inspect and review the evidence obtained through the investigation. The purpose of the inspection and review process is to allow each party the equal opportunity to meaningfully respond to the evidence prior to conclusion of the investigation.

Evidence that will be available for inspection and review by the parties will be any evidence that is directly related to the allegations raised in the Formal Complaint. It will include any:

- Evidence that is relevant, even if that evidence does not end up being relied upon by RSC in making a determination regarding responsibility; and
- inculpatory or exculpatory evidence (i.e. evidence that tends to prove or disprove the allegations) that is directly related to the allegations, whether obtained from a party or other source.

All parties must submit any evidence they would like the investigator to consider prior to when the parties' time to inspect and review evidence begins.

RSC will send the evidence made available for each party and each party's advisor, if any, to inspect and review through an electronic format or a hard copy. RSC is not under an obligation to use any specific process or technology to provide the evidence and shall have the sole discretion in terms of determining format and any restrictions or limitations on access.

The parties will have ten (10) business days to inspect and review the evidence and submit a written response by email to the investigator. The investigator will consider the parties' written responses before completing the Investigative Report.

RSC will provide copies of the parties' written responses to the investigator to all parties and their advisors, if any.

RSC may provide the parties five (5) business days after the initial inspection and review of evidence, and before the investigator completes their Investigative Report, to provide additional evidence in response to their inspection and review of the evidence, and then provide the parties five (5) business days to inspect, review, and respond to the party's additional evidence through a written response to the investigator. Those written responses may be disclosed to the parties.

RSC will provide the parties up to ten (10) business days to provide a response, after which the investigator will not be required to accept a late submission. Investigator has thirty (30) business days to generate a report or, alternatively, may provide the parties with written notice extending the investigation for thirty (30) days and explaining the reason for the extension.

Any evidence subject to inspection and review will be available at any hearing, including for purposes of cross-examination.

The parties and their advisors must sign an agreement not to disseminate any of the evidence subject to inspection and review or use such evidence for any purpose unrelated to the Title IX grievance process.

The parties and their advisors agree not to photograph or otherwise copy the evidence.

### 3. Inclusion of Evidence Not Directly Related to the Allegations

Evidence obtained in the investigation that is determined in the reasoned judgment of the investigator not to be directly related to the allegations in the Formal Complaint will be included in the appendices to the investigative report.

## **H. Investigative Report**

The Title IX Coordinator and/or designee will create an Investigative Report that fairly summarizes relevant evidence, will and provide that Report to the parties at least ten (10) business days prior the hearing in an electronic format or a hard copy for each party's review and written response.

The Investigative Report is not intended to catalog all evidence obtained by the investigator, but only to provide a fair summary of that evidence.

Only relevant evidence (including both inculpatory and exculpatory – i.e. tending to prove and disprove the allegations - relevant evidence) will be referenced in the Investigative Report.

The investigator may redact irrelevant information from the Investigative Report when that information is contained in documents or evidence that is/are otherwise relevant.

## **I. Hearing**

### 1. General Rules of Hearings

RSC will not issue a disciplinary sanction arising from an allegation of Title IX Sexual Harassment without holding a live hearing, unless otherwise resolved through an informal resolution process.

The live hearing may be conducted with all parties physically present in the same geographic location, or, at RSC's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually through video remote conferencing. Video remote conferencing will consist of using a visual screen with an online meeting platform so that a face-to-face meeting can be accomplished without having to move to a single location together. This technology will enable participants simultaneously to see and hear each other. At its discretion, RSC may delay or adjourn a hearing based on technological errors not within a party's control.

All proceedings will be recorded through audio recording. That recording will be made available to the parties for inspection and review.

Prior to obtaining access to any evidence, the parties and their advisors must sign an agreement not to disseminate any of the testimony heard or evidence obtained in the hearing or use such testimony or evidence for any purpose unrelated to the Title IX Grievance Process. Once signed, this Agreement may not be withdrawn.

## 2. Continuances or Granting Extensions

RSC may determine that multiple sessions or a continuance (i.e. a pause on the continuation of the hearing until a later date or time) is needed to complete a hearing. If so, RSC will notify all participants and endeavor to accommodate all participants' schedules and complete the hearing as promptly as practicable.

## 3. Participants in the live hearing

Live hearings are not public, and the only individuals permitted to participate in the hearing are as follows:

### a. Complainant and Respondent (The Parties)

- The parties cannot waive the right to a live hearing.
- RSC may still proceed with the live hearing in the absence of a party, and may reach a determination of responsibility in their absence, including through any evidence gathered that does not constitute a "statement" by that party.
  - For example, a verbal or written statement constituting part or all of the Title IX Sexual Harassment itself is not a "prior statement" that must be excluded if the maker of the statement does not submit to cross-examination about that statement. In other words, a prior statement would not include a document, audio recording, audiovisual reading, and digital media, including but not limited to text messages, emails, and social media postings, that constitute the conduct alleged to have been the act of Title IX Sexual Harassment under the Formal Complaint.
- RSC will not threaten, coerce, intimidate or discriminate against the party in an attempt to secure the party's participation.
- If a party does not submit to cross-examination, the decision-maker cannot rely on any prior statements made by that party in reaching a determination regarding responsibility, but may reach a determination regarding responsibility based on evidence that does not constitute a "statement" by that party.
- The decision-maker cannot draw an inference about the determination regarding responsibility based solely on a party's absence from the live hearing or refusal to answer cross examination or other questions.

### b. The Decision-maker

- The hearing body will consist of a panel of three (3) decision-makers.
- No member of the hearing body will also have served as the Title IX Coordinator, Title IX investigator, or advisor to any party in the case, nor may any member of the hearing body serve on the appeals body in the case.
- No member of the hearing body will have a conflict of interest or bias in favor of or against complainants or respondents generally, or in favor or against the parties to the particular case. See Appendix A for details on bias.
- The hearing body will be trained on topics including how to serve impartially, issues of relevance, including how to apply the rape shield protections provided for complainants, and any technology to be used at the hearing.
- The parties will have an opportunity to raise any objections regarding a decision-maker's actual or perceived conflicts of interest or bias at the commencement of the live hearing.

c. *Advisor of choice*

- The parties have the right to select an advisor of their choice, who may be, but does not have to be, an attorney.
- The advisor of choice may accompany the parties to any meeting or hearing they are permitted to attend, but may not speak for the party, except for the purpose of cross-examination.
- In addition to selecting an advisor to conduct cross-examination, the parties may select an advisor who may accompany the parties to any meeting or hearing they are permitted to attend, but may not speak for the party.
- The parties are not permitted to conduct cross-examination; it must be conducted by the advisor. As a result, if a party does not select an advisor, RSC will select an advisor to serve in this role for the limited purpose of conducting the cross-examination at no fee or charge to the party.
- The advisor is not prohibited from having a conflict of interest or bias in favor of or against complainants or respondents generally, or in favor or against the parties to the particular case.
- The advisor is not prohibited from being a witness in the matter.
- If a party does not attend the live hearing, the party's advisor may appear and conduct cross-examination on their behalf.
- If neither a party nor their advisor appear at the hearing, RSC will provide an advisor to appear on behalf of the non-appearing party.
- Advisors shall be subject to RSC's Rules of Decorum, and may be removed upon violation of those Rules. The Rules of Decorum are contained in **Appendix C**.

d. *Witnesses*

- Witnesses cannot be compelled to participate in the live hearing, and have the right not to participate in the hearing free from retaliation.

- If a witness does not submit to cross-examination, as described below, the decision-maker cannot rely on any statements made by that witness in reaching a determination regarding responsibility, including any statement relayed by the absent witness to a witness or party who testifies at the live hearing.

#### 4. Hearing Procedures

For all live hearings conducted under this Title IX Grievance Process, the procedure will be as follows:

- The Decision-maker will open and establish rules and expectations for the hearing;
- The Parties will each be given the opportunity to provide opening statements;
- The Decision-maker will ask questions of the Parties and Witnesses;
- Parties will be given the opportunity for live cross-examination after the Decision-maker conducts its initial round of questioning; During the Parties' cross-examination, the decision-maker will have the authority to pause cross-examination at any time for the purposes of asking decision-maker's own follow up questions; and any time necessary in order to enforce the established rules of decorum.
- Should a Party or the Party's Advisor choose not to cross-examine a Party or Witness, the Party shall affirmatively waive cross-examination through a written or oral statement to the Decision-maker. A Party's waiver of cross-examination does not eliminate the ability of the Decision-maker to use statements made by the Party.
- Throughout the proceedings, the Rules of Decorum, found in **Appendix C**, must be followed at all times.

#### 5. Live Cross-Examination Procedure

Each party's advisor will conduct live cross-examination of the other party or parties and witnesses. During this live-cross examination, the advisor will ask the other party or parties and witnesses relevant questions and follow-up questions, including those challenging credibility directly, orally, and in real time.

Before any cross-examination question is answered, the decision-maker will determine if the question is relevant, as set forth in the Relevance Policy, attached as **Appendix B**. Cross-examination questions that are duplicative of those already asked, including by the decision-maker, may be deemed irrelevant if they have been asked and answered.

#### 6. Review of Recording

The recording of the hearing will be available for review by the parties within five (5) business days, unless there are any extenuating circumstances. The recording of the hearing will not be provided to parties or advisors of choice.

### **J. Determination Regarding Responsibility**

## 1. Standard of Proof

RSC uses the preponderance of the evidence standard for investigations and determinations regarding responsibility of Formal Complaints covered under this Policy. This means that the investigation and hearing determine whether it is more likely than not that a violation of the Policy occurred. The same standard of evidence applies for all Formal Complaints of Title IX Sexual Harassment.

## 2. General Considerations for Evaluating Testimony and Evidence

While the opportunity for cross-examination is required in all Title IX hearings, determinations regarding responsibility may be based in part, or entirely, on documentary, audiovisual, and digital evidence, as warranted in the reasoned judgment of the Decision-maker.

Decision-makers shall not draw inferences regarding a party or witness' credibility based on the party or witness' status as a complainant, respondent, or witness, nor shall it base its judgments in stereotypes about how a party or witness would or should act under the circumstances.

Generally, credibility judgments should rest on the demeanor of the party or witness, the plausibility of their testimony, the consistency of their testimony, and its reliability in light of corroborating or conflicting testimony or evidence.

Still, credibility judgments should not rest on whether a party or witness' testimony is non-linear or incomplete, or if the party or witness is displaying stress or anxiety.

Decision makers will afford the highest weight relative to other testimony to first-hand testimony by parties and witnesses regarding their own memory of specific facts that occurred. Both inculpatory and exculpatory (i.e. tending to prove and disprove the allegations) evidence will be weighed in equal fashion.

Except where specifically barred by the Title IX Final Rule, a witness' testimony regarding third-party knowledge of the facts at issue will be allowed, but will generally be accorded lower weight than testimony regarding direct knowledge of specific facts that occurred.

RSC allows parties to call "expert witnesses" for direct and cross examination. RSC does not provide for expert witnesses in other proceedings. While the expert witness will be allowed to testify and be crossed as required by the Final Rule, the decision-maker will be instructed to afford lower weight to non-factual testimony of the expert relative to fact witnesses, and any expert testimony that is not directed to the specific facts that occurred in the case will be afforded lower weight relative to fact witnesses, regardless of whether the expert witness testimony is the subject of cross examination and regardless of whether all parties present experts as witnesses.

RSC allows parties to call character witnesses to testify. RSC does not provide for character witnesses in other proceedings. While the character witnesses will be allowed to testify and be

crossed as required by the Final Rule, the decision-maker will be instructed to afford very low weight to any non-factual character testimony of any witness.

RSC will admit and allow testimony regarding polygraph tests (“lie detector tests”) and other procedures that are outside of standard use in academic and non-academic conduct processes. While the processes and testimony about them will be allowed to testify and be crossed as required by the Final Rule, the decision-maker will be instructed to afford lower weight to such processes relative to the testimony of fact witnesses.

Where a party or witness’ conduct or statements demonstrate that the party or witness is engaging in retaliatory conduct, including but not limited to witness tampering and intimidation, the Decision-maker may draw an adverse inference as to that party or witness’ credibility.

### 3. Components of the Determination Regarding Responsibility

The written Determination Regarding Responsibility will be issued simultaneously to all parties through their RSC email account, or other reasonable means as necessary. The Determination will include:

- Identification of the allegations potentially constituting Title IX Sexual Harassment;
- A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding which section of the Code of Accountability, if any, the respondent has or has not violated.
- For each allegation:
  - A statement of, and rationale for, a determination regarding responsibility;
  - A statement of, and rationale for, any disciplinary sanctions the recipient imposes on the respondent; and
  - A statement of, and rationale for, whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and
- The recipient’s procedures and the permitted reasons for the complainant and respondent to appeal (described below in “Appeal”).

### 4. Disciplinary Penalties and Other Remedies

Discipline for Title IX Sexual Harassment may take a variety of forms, depending upon the circumstances of a particular case.

- Students: The disciplinary sanctions which may be imposed on students who have been found responsible for committing Title IX Sexual Harassment are the following: warning, disciplinary probation, loss of privileges, fines, restitution, sanctions, parental/guardian notification, residence hall suspension, residence hall expulsion, short-term college



suspension, long-term college suspension, administrative suspension, expulsion, revocation of degree, withholding degree, prohibition of professional practice, and mandatory assessment/counseling.

- Employees: The disciplinary sanctions which may be imposed on employees who have been found responsible for Title IX Sexual Harassment are the following: verbal warning, written reprimand, mandatory training session, no contact order, suspension without pay, termination, and/or termination with the issuance of a *persona non grata* letter.

RSC will also take appropriate remedial measures necessary to end such conduct, prevent any such future conduct, and correct any personnel or academic decisions made which are related to the prohibited conduct. Remedies may include, but are not limited to, continuing or commencing any of the above-listed “interim measures.” These remedies are separate from, and in addition to, any supportive measures that may have been provided prior to the conclusion of the investigation.

#### 5. Timeline of Determination Regarding Responsibility

If there are no extenuating circumstances, the determination regarding responsibility will be issued by RSC within ten (10) business days of the completion of the hearing.

#### 6. Finality

The determination regarding responsibility becomes final either on the date that RSC provides the parties with the written determination of the result of the appeal, if an appeal is filed consistent with the procedures and timeline outlined in “Appeals” below, or if an appeal is not filed, the date on which the opportunity to appeal expires.

### K. Appeals

Each party may appeal (1) the dismissal of a Formal Complaint or any included allegations and/or (2) a determination regarding responsibility. To appeal, a party must submit their written appeal with the Vice President for Student Life (for students), the Director of Human Resources (for non-faculty employees), or the Provost (for faculty employees) within two (2) business days of being notified of the decision, indicating the grounds for the appeal.

The limited grounds for appeal available are as follows:

- Procedural irregularity that affected the outcome of the matter (i.e. a failure to follow RSC’s own procedures);
- 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; and

- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter.

The submission of appeal stays any sanctions for the pendency of an appeal. Supportive measures and remote learning opportunities remain available during the pendency of the appeal.

If a party appeals, RSC will as soon as practicable notify the other party in writing of the appeal, however the time for appeal shall be offered equitably to all parties and shall not be extended for any party solely because the other party filed an appeal.

Appeals may be no longer than five (5) pages (including attachments). RSC can grant page increases at its discretion. Appeals should be submitted in electronic form using ARIAL or TIMES NEW ROMAN, 12 point font, and single-spaced. Appeals should use footnotes, not endnotes. Appeals that do not meet these standards may be returned to the party for correction, but the time for appeal will not be extended unless there is evidence that technical malfunction caused the appeal document not to meet these standards.

If the Vice President for Student Life/Director of Human Resources/Provost finds that the appeal is not timely or substantively eligible according to the grounds for appeal, the original finding and sanction will stand and the decision is final. If the Vice President for Student Life/Director of Human Resources/Provost finds that the appeal is appropriate, the documentation from the investigation is forwarded to the Appellate Board (for students) or the Peer Review Panel (for employees) for consideration.

Appeals will be decided by a three (3) panel member Appellate Board/Peer Review Panel, which will be made up of faculty and administration, who will be free of conflict of interest and bias, and will not serve as investigator, Title IX Coordinator, or hearing decisionmaker in the same matter.

The outcome of appeal will be provided in writing simultaneously to both parties, and include the rationale for the decision.

## **L. Retaliation**

RSC will keep the identity of any individual who has made a report or complaint of sex discrimination confidential, including the identity of any individual who has made a report or filed a Formal Complaint of Title IX Sexual Harassment under this Title IX Grievance Policy, any Complainant, any individual who has been reported to be the perpetrator of sex discrimination, any Respondent, and any witness, except as permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding under this Title IX Grievance Policy.

No person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX of the Education Amendments of

1972 or its implementing regulations.

No person may intimidate, threaten, coerce, or discriminate against any individual 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 under this Title IX Grievance Policy.

Any intimidation, threats, coercion, or discrimination, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations constitutes retaliation. This includes any charges filed against an individual for Code of Accountability violations that do not involve sex discrimination or Title IX Sexual Harassment, but that arise from the same facts or circumstances as a report or complaint of sex discrimination or a report or Formal Complaint of Title IX Sexual Harassment.

Complaints alleging retaliation may be filed according to the Sexual Offense Policy and/or Discrimination and Harassment Policy.



## **Appendix A**

### **Bias/Conflict of Interest**

**Is it Bias/ a Conflict of Interest (*per se* and on its own):**

Employment Status		
If the Title IX official is an employee of the recipient?	No	"[R]ecipients can comply with the final regulations by using the recipient's own employees" Title IX 85 Fed. Reg. 30,026, 30,252 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).
If the Title IX official is "affiliated" with the recipient?	No	"The Department declines to require recipients to use outside, unaffiliated Title IX personnel because the Department does not conclude that such prescription is necessary to effectuate the purposes of the final regulations" <i>Id.</i> at 30,252.
If the Title IX Official has a supervisory relationship with other Title IX personnel?	No	"[T]he Department declines to define certain employment relationships or administrative hierarchy arrangements as <i>per se</i> prohibited conflicts of interest" <i>Id.</i> at 30,252.  "The final regulations do not prescribe any particular administrative 'chain of reporting' restrictions or declare any such administrative arrangements to be <i>per se</i> conflicts of interest prohibited under § 106.45(b)(1)(iii)." <i>Id.</i> at 30,252 n.1035.  "The Department will hold a recipient accountable for the end result of using Title IX personnel free from conflicts of interest and bias, regardless of the employment or supervisory relationships among various Title IX personnel" <i>Id.</i> at 30,252.
<p>Please note: Although the Department wishes only to prescribe those measures necessary for compliance, they do recognize that recipients may adopt additional "best practices" to avoid violating the regulations. <i>See id.</i> at 30,252.</p> <p>The Department specifically names two such practices:</p> <ul style="list-style-type: none"> <li>ensuring that investigators have institutional independence</li> <li>deciding that Title IX Coordinators should have no role in the hiring or firing of investigators. <i>Id.</i></li> </ul>		
Professional Experiences or Affiliations		
A history of working in the field of sexual violence	No	"[T]he very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role." <i>Id.</i> at 30,252.
Prior work as a victim advocate	No	
Prior work as a defense attorney	No	



Other Characteristics		
Student of the recipient	No	"The Department notes that the final regulations do not preclude a recipient from allowing student leaders to serve in Title IX roles so long as the recipient can meet all requirements in § 106.45 and these final regulations, and leaves it to a recipient's judgment to decide under what circumstances, if any, a recipient wants to involve student leaders in Title IX roles." <i>Id.</i> at 30,253.
Gender	No	The Department cautions recipients not to apply generalizations when evaluating particular Title IX personnel for bias, warning that this may result in an unreasonable determination. <i>Id.</i> at 30,252.
Sexual assault survivor	No	
Self-professed feminist	No	
Supporting women's or men's rights	No	
Having had personal, negative experiences with men or women	No	
Determining whether bias exists is a fact-specific endeavor. <i>See id.</i> at 30,252. The Department encourages recipients to apply a common-sense and "objective" reasonable person standard when evaluating personnel. <i>Id.</i>		
Grievance Process Participation		
Signing a formal complaint as the Title IX Coordinator	No	"Even where the Title IX Coordinator is also the investigator, the Title IX Coordinator must be trained to serve impartially, and the Title IX Coordinator does not lose impartiality solely due to signing a formal complaint on the recipient's behalf." <i>Id.</i> at 30, 135.
Participating in an emergency removal decision	No, unless it biases the employee	"Section 106.44(c) does not preclude a recipient from using Title IX personnel trained under § 106.45(b)(1)(iii) to make the emergency removal decision or conduct a post-removal challenge proceeding, but if involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent, § 106.45(b)(1)(iii) would preclude such personnel from serving in those roles during a grievance process." <i>Id.</i> at 30,235.
Serving as a party advisor	Exempt from requirement not to have bias	"The final regulations impose no prohibition of conflict of interest or bias for such advisors, nor any training requirement for such advisors, in order to leave recipients as much flexibility as possible to comply with the requirement to provide those advisors." <i>Id.</i> at 30,254 n.1041.
Title IX coordinator serving as...		
...investigator	No	"The final regulations would not remove the expertise of Title IX Coordinators from the grievance process. Section 106.45(b)(7)(i) does not prevent the Title IX Coordinator from serving as the investigator; rather, this provision only prohibits the decision-maker from being the same person as either the Title IX Coordinator or the investigator." <i>Id.</i> at 30,370.
...informal resolution facilitator	No, but not recommended	"These final regulations do not require a recipient to provide an informal resolution process pursuant to § 106.45(b)(9) and do not preclude the Title IX Coordinator from serving as the person designated by a recipient to facilitate an informal resolution process." <i>Id.</i> at 30,558.
...decision-maker	Yes	"Separating the functions of a Title IX Coordinator from those of the decision-maker is no reflection on the ability of Title IX Coordinators to serve impartially and with expertise. Rather, requiring different individuals to serve in those roles acknowledges that the different phases of a report and formal complaint of sexual harassment serve distinct purposes." <i>Id.</i> at 30,370.



...appeal decision-maker	Yes	"§ 106.45(b)(8)(iii) makes it clear that the appeal decision-maker cannot be the same person as the decision-maker below, or as the Title IX Coordinator or investigator in the case. This ensures that the recipient's appeal decision reviews the underlying case independently." <i>Id.</i> at 30,399.
Title IX Investigator serving as...		
... Title IX coordinator	No	See above. The Title IX coordinator may also serve as investigator. <i>Id.</i> at 30,370.
...decision-maker	Yes	"Separating the roles of investigation from adjudication therefore protects both parties by making a fact-based determination regarding responsibility based on objective evaluation of relevant evidence more likely." <i>Id.</i> at 30,370.
...appeal decision-maker	Yes	
Hearing decision-maker serving as...		
... Title IX coordinator	Yes	See above. The Title IX coordinator may <b>not</b> serve as hearing decision-maker. <i>Id.</i> at 30,370.
...investigator	Yes	"[F]ormally separating the investigative and adjudicative roles in the Title IX grievance process is important to reduce the risk and perception of bias, increase the reliability of fact-finding, and promote sound bases for responsibility determinations" <i>Id.</i> at 30,368.
...appeal decision-maker	Yes	"[I]t is important for the decision-maker reviewing appeals to be a different person than the person who made the initial decision, in part, because the decision-maker on appeal is asked to review the determination reached by the original decision-maker (including based on any claim of bias or conflict of interest on the part of the decision-maker)." <i>Id.</i> at 30,563.
Hearing officer (should one be used) serving as...		
...decision-maker	No	"With respect to the roles of a hearing officer and decision-maker, the final regulations leave recipients discretion to decide whether to have a hearing officer (presumably to oversee or conduct a hearing) separate and apart from a decision-maker, and the final regulations do not prevent the same individual serving in both roles." <i>Id.</i> at 30,372.
...appeal decision-maker	Yes	"[T]he appeal decision-maker must be a different person than the Title IX Coordinator or any investigators or decision-makers that reached the initial determination of responsibility, will help to ensure that recipients' appeal processes are adequately independent and effective in curing possible unfairness or error." <i>Id.</i> at 30,399.
The Department asserts there is danger in Title IX personnel who serve in multiple roles being improperly influenced by information gleaned from one position when serving in another. See <i>id.</i> at 30,369, 30,370. Setting limitations on which roles may be doubled (primarily separating the investigative and adjudicative functions of a grievance process) protects against the possibility of these improper influences. <i>Id.</i> The Department believes that creating this separation will help to ensure that determinations are based only on the relevant evidence and therefore increase the overall reliability of those determinations. <i>Id.</i>		
Grievance Process Outcomes		
The number of particular outcomes either determining responsibility or non-responsibility	No	"the mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel" <i>Id.</i> at 30,252.
The Department cautions against presuming bias based on the outcomes of prior grievance procedures. <i>Id.</i> at 30,252. Because the regulations require each case be determined on its merits, the number of particular outcomes determining responsibility or non-responsibility, alone, do not indicate bias. <i>Id.</i>		



## **Appendix B**

### **Guide for Determining Relevance**

#### **What is the purpose of this Guide?**

On May 19, 2020, the U.S. Department of Education issued Final Rules governing the Title IX grievance process, effective August 14, 2020. The Final Rule requires that all colleges and universities hold a live hearing before making any determination regarding responsibility for covered reports of Title IX Sexual Harassment, including sexual violence. This hearing must provide for live cross-examination by the parties' advisors.

Any question posed by the advisors must be evaluated for "relevance" in real time by the hearing officer. According to Final Rule §106.45(b)(6)(i):

Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

#### **What is a relevant question?**

The Department of Education encourages institutions to apply the "plain and ordinary meaning" of relevance in their determinations. 85 Fed. Reg. 30026, 30304 (May 19, 2020). Basically, a relevant question will ask whether the facts material to the allegations under investigation are more or less likely to be true. *Id.* at 30294. A question not directly related to the allegations will generally be irrelevant.

Officials should use common sense in this understanding. Things may be interesting or surprising but not be relevant.

Relevance decisions should be made on a question-by-question basis, looking narrowly at whether the question seeks information that will aid the decision-maker in making the underlying determination. The relevance decision should not be based on who asked the question, their possible (or clearly stated) motives, who the question is directed to, or the tone or style used to ask about the fact. Relevance decisions should not be based in whole or in part upon the sex or gender of the party for whom it is asked or to whom it is asked, nor based upon their status as complainant or respondent, past status as complainant or respondent, any organizations of which they are a member, or any other protected class covered by federal or state law (e.g. race, sexual orientation, disability).

If a question is relevant but offered in an abusive or argumentative manner, the decision-maker has the discretion to ask the advisor to rephrase the question in an appropriate manner, consistent with the institution's decorum policy for hearings.

## **What if the question is “prejudicial” and concerns sensitive or embarrassing issues?**

Much of the content within these hearings may be considered sensitive and/or embarrassing by parties or advisors. However, relevant questions need to be considered even if a party or advisor believes the danger of unfair prejudice substantially outweighs their probative value. Only irrelevant questions (detailed below), including about the complainant’s prior sexual history, may be excluded.

## **What is an irrelevant question?**

### 1. Question about Complainant’s Prior Sexual Behavior or Sexual Predisposition

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless:

- such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

### 2. Question regarding Privileged Information

Questions that constitute, or seek disclosure of, information protected under a legally-recognized privilege are irrelevant. In New York, individuals with legal privilege may include attorneys, medical providers (physician, dentist, podiatrist, chiropractor, nurse), psychologists, clergy, rape crisis counselors, and social workers. New York's laws of privilege are listed within CPLR Article 45.

### 3. Questions about Undisclosed Medical Records

Questions that call for information about any party’s medical, psychological, and similar records are irrelevant unless the party has given voluntary, written consent.

### 4. Duplicative Questions

Questions that repeat, in sum or substance, questions already asked by the decision-maker prior to cross-examination, or by a party’s advisor during cross-examination (and if part of your process, during direct examination), may be ruled duplicative, and therefore irrelevant.

## **How should the decision-maker reach a relevance determination?**

If the decision-maker is a single individual, the decision-maker will be solely responsible for determining the relevance of the question before it is asked.

If the decision-maker is a panel, the panel's Chair will make all determinations of relevance.

### **What should the relevance determination consist of?**

The Department of Education explains that the Final Rule “does not require a decision-maker to give a lengthy or complicated explanation” in support of a relevance determination. Rather, “it is sufficient, for example, for a decisionmaker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.”

As such, the decision-maker need only provide a brief explanation of the determination, which will ordinarily consist of one of the following statements depending on the situation.

#### 1. Generally probative questions

- \_\_The question is relevant because it asks whether a fact material to the allegations is more or less likely to be true.
- \_\_The question is irrelevant because it asks about a detail that does not touch on whether a material fact concerning the allegations is more or less likely to be true.

#### 2. Question about Complainant's Prior Sexual Behavior or Sexual Predisposition

- \_\_The question is relevant because although it calls for prior sexual behavior information about the complainant, it meets one of the two exceptions to the rape shield protections defined in 34 C.F.R. § 106.45(b)(6)(i), and it tends to prove that a material fact at issue is more or less likely to be true [denote which exception].
  - \_\_Exception one: The question is asked to prove that someone other than the respondent committed the conduct alleged by the complainant.
  - \_\_Exception two: The question concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is asked to prove consent
- \_\_The question is irrelevant because it calls for prior sexual behavior information about the complainant without meeting one of the two exceptions to the rape shield protections defined in 34 C.F.R. § 106.45(b)(6)(i).

#### 3. Question regarding Privileged Information

- \_\_The question is irrelevant because it calls for information shielded by a legally-recognized privilege [identify the privilege].
- \_\_The question is relevant because, although it calls for information shielded by a legally-recognized privilege [identify the privilege], that privilege has been waived in writing, and the question tends to prove that a material fact at issue is more or less likely to be true.

#### 4. Questions about Undisclosed Medical Records

- \_\_The question is irrelevant because it calls for information regarding a party's medical, psychological, or similar record without that party's voluntary, written consent.
- \_\_This question is relevant because although it calls for a party's medical, psychological, or similar records, that party has given their voluntary, written consent to including this material, and it tends to prove that a material fact at issue is more or less likely to be true. 85 Fed. Reg. 30026, 30294 (May 19, 2020).

#### 5. Duplicative Questions

- \_\_The question is irrelevant because it is duplicative of a question that was asked and answered.

The decision-maker may relay a longer explanation if necessary under the circumstances.

The relevance determination will be conveyed orally, except as needed to accommodate a disclosed disability of a hearing participant, and all relevance determinations will be preserved in the record of the proceeding.

#### **May the parties and/or their advisors ask the decision-maker to reconsider their relevance decision?**

Any party or their advisor may request that the decision-maker reconsider their relevance determination.

The decision-maker may deny or grant the request to reconsider. This determination is final, but may be subject to appeal under the Title IX Grievance Process.

## **Appendix C**

### **Model Decorum Policy for Title IX Grievance Process Hearings**

#### **Purpose of the Rules of Decorum**

Title IX hearings are not civil or criminal proceedings, and are not designed to mimic formal trial proceedings. They are primarily educational in nature, and the U.S. Department of Education, writing about Title IX in the Final Rule “purposefully designed these final regulations to allow recipients to retain flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.” 85 Fed. Reg. 30026, 30319 (May 19, 2020). The Department has determined that institutions “are in a better position than the Department to craft rules of decorum best suited to their educational environment” and build a hearing process that will reassure the parties that the institution “is not throwing a party to the proverbial wolves.” *Id.*

To achieve this purpose, institutions may provide for reasonable rules of order and decorum, which may be enforced through the removal of an advisor who refuses to comply with the rules. *Id.*, at 30320. As the Department explains, the removal process “incentivizes a party to work with an advisor of choice in a manner that complies with a recipient’s rules that govern the conduct of a hearing, and incentivizes colleges and universities to appoint advisors who also will comply with such rules, so that hearings are conducted with respect for all participants.” *Id.*

At base, these Rules of Decorum require that all parties, advisors of choice, and institutional staff treat others who are engaged in the process with respect.

The rules and standards apply equally to all Parties and their Advisors regardless of sex, gender, or other protected class, and regardless of whether they are in the role of Complainant or Respondent.

#### **Rules of Decorum**

The following Rules of Decorum are to be observed in the hearing and applied equally to all parties (meaning the complainant and respondent) and advisors:

- Questions must be conveyed in a neutral tone.
- Parties and advisors will refer to other parties, witnesses, advisors, and institutional staff using the name and gender used by the person and shall not intentionally mis-name or mis-gender that person in communication or questioning.
- No party may act abusively or disrespectfully during the hearing toward any other party or to witnesses, advisors, or decision-makers.
- While an advisor may be an attorney, no duty of zealous advocacy should be inferred or enforced within this forum.

- The advisor may not yell, scream, badger, or physically “lean in” to a party or witness’s personal space. Advisors may not approach the other party or witnesses without obtaining permission from the decision-maker.
- The advisor may not use profanity or make irrelevant ad hominem attacks upon a party or witness. Questions are meant to be interrogative statements used to test knowledge or understand a fact; they may not include accusations within the text of the question.
- The advisor may not ask repetitive questions. This includes questions that have already been asked by the decision-maker, the advisor in cross-examination, or [if this is the institutional process] the party or advisor in direct testimony. When the decision-maker determines a question has been “asked and answered” or is otherwise not relevant, the advisor must move on.
- Parties and advisors may take no action at the hearing that a reasonable person in the shoes of the affected party would see as intended to intimidate that person (whether party, witness, or official) into not participating in the process or meaningfully modifying their participation in the process.

### **Warning and Removal Process**

The decision-maker shall have sole discretion to determine if the Rules of Decorum have been violated. The decision-maker will notify the offending person of any violation of the Rules.

Upon a second or further violation of the Rules, the decision-maker shall have discretion to remove the offending person or allow them to continue participating in the hearing or other part of the process.

Where the decision-maker removes a party’s advisor, the party may select a different advisor of their choice, or accept an advisor provided by the institution for the limited purpose of cross-examination at the hearing. Reasonable delays, including the temporary adjournment of the hearing, may be anticipated should an advisor be removed. A party cannot serve as their own advisor in this circumstance.

The decision-maker shall document any decision to remove an advisor in the written determination regarding responsibility.

### **Violations of this Policy**

For flagrant, multiple, or continual violations of this Rule, in one or more proceedings, advisors may be prohibited from participating in future proceedings at the institution in the advisor role on a temporary or permanent basis.

Evidence of violation(s) of this agreement will be gathered by the Title IX Coordinator, Director of Student Conduct, or a designee of either and presented to the Vice President for Student

Affairs for cases involving students/Director of Human Resources for cases involving employees/Other Appropriate Staff Member.

The Advisor accused may provide an explanation or alternative evidence in writing for consideration by the Vice President for Student Affairs for cases involving students/Director of Human Resources for cases involving employees/Other Appropriate Staff Member. Such evidence or explanation is due within fifteen (15) business days of receipt of a notice of a charge of re-disclosure or improper access to records. There shall be no right to a live hearing, oral testimony, or cross-examination.

The Vice President for Student Affairs for cases involving students/Director of Human Resources for cases involving employees/Other Appropriate Staff Member shall consider the evidence under a preponderance of the evidence standard and issue a finding in writing and, if the finding is Responsible, shall include a Sanction. The finding shall be issued in writing to all Parties and Advisors (if there is a current case pending) within thirty (30) business days unless extended for good cause.

There is no appeal of this finding. Sanctions shall be higher for intentional re-disclosure of records than for negligent re-discourse. In the event that an Advisor is barred permanently or for a term from serving in the role as Advisor in the future, they may request a review of that bar from the Vice President for Student Affairs for cases involving students/Director of Human Resources for cases involving employees/Other Appropriate Staff Member no earlier than three-hundred and sixty-five (365) days after the date of the findings letter.

### **Relevant Questions Asked in Violation of the Rules of Decorum**

Where an advisor asks a relevant question in a manner that violates the Rules, such as yelling, screaming, badgering, or leaning-in to the witness or party's personal space, the question may not be deemed irrelevant by the decision-maker simply because of the manner it was delivered. Under that circumstance, the decision-maker will notify the advisor of the violation of the Rules, and, if the question is relevant, will allow the question to be re-asked in a respectful, non-abusive manner by the advisor (or a replacement advisor, should the advisor be removed for violation of the Rules).