

2020 Title IX Training

University of Arkansas System
Office of the General Counsel

Who must be trained

- Title IX Coordinators
- Investigators
- Decision-makers (Hearing Officers/Panelists, Decision-makers on appeal)
- Any person who facilitates an informal resolution process

I. Definition of Sexual Harassment

“Sexual Harassment”

Conduct on the basis of sex constituting one of the following:

- (1) An employee of the University conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (“*quid pro quo*”);
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive **and** objectively offensive that it effectively denies a person equal access to the University's educational programs or activities; or
- (3) Any of the following:
 - (A) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v) and this policy
 - (B) “Dating violence” as defined in 34 U.S.C. 12291(a)(10) and this policy
 - (C) “Domestic violence” as defined in 34 U.S.C. 12291(a)(8) and this policy
 - (D) “Stalking” as defined in 34 U.S.C. 12291(a)(30) and this policy.



“Sexual Assault”

- **Sexual Assault:** An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI.
- **Nonforcible** sex offense:
 - Incest
 - Statutory rape
- **Forcible** sex offense:
 - Forcible rape (penetration without consent)
 - Forcible sodomy
 - Sexual assault with an object
 - Forcible fondling (touching the private body parts for sexual gratification without consent)

Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such relationship is determined based on consideration of the following factors: (1) the length of the relationship; (2) the type of relationship; and (3) the frequency of interaction between the persons involved in the relationship.

Domestic Violence

- The term includes felony or misdemeanor crimes of violence committed by a current 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 the domestic or family violence laws of Arkansas, or by any other person against an adult or youth victim who is protected from that person's acts under the laws of Arkansas.
- Under the Arkansas law on domestic abuse, “**family or household members**” means spouses, former spouses, parents and children, persons related by blood within the fourth degree of consanguinity, in-laws, any children residing in the household, persons who presently or in the past have resided or cohabitated together, persons who have or have had a child in common, and persons who are presently or in the past have been in a dating relationship together.

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.



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II. The University's "Education Program or Activity"

DEFINITION

- Complainant must be participating or attempting to participate in school's **education program or activities**

DEFINED AS:

- Locations, events, or circumstances where school had “substantial control” over respondent *and* the “context in which the sexual harassment occurred”
- Includes any building owned or controlled by an officially recognized student organization.



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III. Impartiality

- Avoiding **prejudgment** of the facts at issue
 - To pass judgment prematurely or without sufficient reflection or investigation
- **No conflicts of interest**
 - A situation in which the concerns or aims of two different parties are incompatible, such as when a person could derive a financial or personal benefit from his official actions or decisions
- **No bias**
 - Prejudice in favor of or against one thing, person, or group compared with another
 - No bias against a particular complainant or respondent
 - No bias against complainants or respondents generally

IV. Relevance

- Relevant evidence is any evidence that has:
 - Probative value – a tendency to make a fact more or less probable than it would be without the evidence; and
 - Materiality - The fact is of consequence in determining the [matter]. (Fed. R. Evid. 401)
- The standard of probability rule:
 - The evidence need not make a major impact; it must only increase the probability by a “scintilla” (of course, the fact-finder can choose to give the evidence no or minimal weight)
- The regulations do not include a balancing test that weights the probative value against other concerns

“Rape Shield” Regulation

- **Special category:** the complainant’s sexual predisposition or prior sexual behavior
- **Rule:** 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.

V. Investigation

Overarching Issues

- Focus on relevant issues – both inculpatory and exculpatory
 - Inculpatory – evidence that tends to incriminate
 - Exculpatory – evidence that tends to clear someone of guilt
- The relationship between confidentiality and Due Process
- Presumption: The respondent is *not* responsible
- "Reasonably prompt" (30 working days to gather the evidence)
- Temporary delays can be granted for good cause
- No prohibitions on discussing the allegations (no gag orders)
- Written notice of the details regarding investigative meetings, including the purpose

The University's burden

The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility shall rest on the University and not the parties.

Initial / Intake Meetings

- Overview of process
- Formal vs. Informal Resolution
- Resources and Law Enforcement
- Supportive measures
- Right to an advisor for meetings and the investigative hearing to determine responsibility
- Witness interviews



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Gathering the Evidence

Physical evidence

(video footage, text messages, social media posts, emails, medical reports, notes of site visits).

Coordination with law enforcement may be necessary.



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Medical Records / Privileged Information

Questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege will not be required, allowed, relied upon, or otherwise used. Voluntary written consent required.



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Credibility Determinations

- *Note significant credibility determinations:
 - Motive / Bias
 - Consistency – internally & other evidence
 - Plausibility

Preview of Evidence & Investigative Report

- The parties may review the evidence and submit a written response within 5 days prior to the completion of the investigative report
- Investigative report must:
 - Fairly summarizes the relevant evidence
 - Key dates (procedural dates and incident dates)
 - Allegations, what happened, date and time, location
 - Witnesses
 - Summary of interviews
 - Descriptions of physical and documentary evidence
 - The University's response (including supportive measures)
 - The parties' written statements regarding the evidence

VI. Informal Resolution

- At any time after a formal written complaint is filed but prior to reaching a determination regarding responsibility, the University may facilitate a resolution without a full investigation and adjudication.
- The complainant and respondent must give their voluntary, written consent to the informal resolution process.
- Written notice (as specified in the model policy) regarding the allegations, consequences of agreeing to a resolution, right to withdraw before agreeing to a resolution, consequences from participating (including records retention)

VII. The Hearing

Procedural Details

- Determination hearing with Hearing Officer or Hearing Panel (campus option)
- If panel, Chair selected by Chancellor or Designee
- Parties may challenge decision-maker on basis of bias or conflict
- Selection of witnesses
 - Parties provide witness lists
 - The Officer or Panel ultimately decides, bearing in mind the parties' due-process interest in examining relevant witnesses
- Prior notice to the parties and witnesses
- Recording (audio or audio/video)

Virtual Presence

Live hearings may be conducted with either all parties present in the same geographic location or, at the University's discretion, any or all parties and witnesses may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.



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Advisors

- Both parties can have an advisor – can be an attorney
- Role of advisor: 1) provide advice and 2) question opposing party and witnesses
- If a party does not have an advisor and requests it, the school must provide one at no expense
- School can determine order of proceedings and impose rules of decorum



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Evidentiary Matters and Procedures

- Formal rules of evidence do not apply.
- Hearing Officer or Hearing Panel will conduct the initial questioning of witnesses prior to the questioning by a party's advisor. Each side may then have an equal opportunity to ask questions
- Hearing Officer or Chair of the Hearing Panel (alone or in consultation with other panelists) will make all determinations regarding the order of witnesses, relevancy of questions, and the evidence to be considered or excluded during the hearing and decision-making process.
- Hearing Officer or Hearing Panel has discretion to call the Investigator for the purpose of providing an overview of the investigation and findings.

Witness Examinations

- Parties may not question each other directly, but their advisors may do so
- A party not represented by an advisor can submit list of proposed questions to Hearing Officer or Panel Chair
- Hearing Officer or Chair of Hearing Panel will make determinations regarding relevancy of questions before a party or witness answers. Questions challenging witness's credibility may be allowed
- If a determination is made to exclude the question based on relevancy, the Hearing Officer or Panel Chair will provide an explanation of why the question was deemed irrelevant and excluded.

Consequences of not submitting to cross-examination

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- The decision-maker(s) cannot draw an inference about the determination of responsibility based **solely** on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

Written Determination

A determination of responsibility must be made in writing, including:

- Identification of the allegations
- Procedural steps taken
- Findings of fact supporting the determination
- Conclusions (apply the facts to the policy) in a way that gives the rationale
- Sanctions / Remedies
- Procedures and bases for appeal



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VIII. The Appeal

Decisions that can be Appealed

- (1) the Title IX Coordinator's dismissal of a formal complaint or any allegations therein; or
- (2) the Hearing Officer or Hearing Panel's determination.

Who decides?

- The decision-makers on appeal can be:
 - In the cases where the respondent is an employee: the Chancellor or designee
 - In cases where the respondent is a student: (1) the Chancellor (or designee) or (2) an Appeal Panel

Grounds for Appeal

- (1) a procedural irregularity that affected the outcome of the decision;
- (2) there is new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made and that could affect the outcome of the matter; or
- (3) the Title IX Coordinator, Investigator(s), Hearing Officer, or Panel Member(s) had a conflict of interest or bias for or against complainants or respondents in general or against an individual complainant or respondent that affected the outcome.

The decision on appeal

- The appeal will be decided based on the written record and without deference to the decision of the Hearing Officer or Hearing Panel.
- Must issue a written decision describing the result of the appeal and the rationale for the result. The decision on appeal may uphold the decision, modify it, or remand for further factual development.

IX. Miscellaneous Topics

Responsible Employees

- Under the UA System Model Policy, all employees have a duty to report sexual harassment/assault to the Title IX Coordinator, except:
 - Licensed health-care professionals (or others prohibited by law from reporting)
 - Persons designated by the campus as victim advocates.

Notification

The Institution must provide:

(1) Title IX Coordinator's information and (2) non-discrimination policy/requirement under Title IX to:

Applicants for admission

Applicants and
employment

Students

Employees



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- Also, provide (1) the Title IX Coordinator's contact information and (2) the policy itself on:
 - Website
 - Employee handbooks
 - Student Handbooks
 - Catalogues

Recordkeeping

- For a period of at least **seven years**, the University will maintain the records of:
 - Each sexual harassment investigation, including any determination regarding responsibility, any recordings or transcripts, disciplinary sanctions, and remedies provided to the complainant
 - Any appeal and the result therefrom
 - Any informal resolution and the result therefrom

Recordkeeping (cont'd)

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. These materials will be made publicly available on the University's website.
- Records of any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment, along with documentation of the University's bases for its conclusion that its response was not deliberately indifferent.
- **Documentation pertaining to terminations, expulsions or educational sanctions may be retained indefinitely.