

Sexual Misconduct Under Procedures 1.2.3 Decision-Maker Training

Ashley Pritts

Director, Title IX Coordinator & ADA Coordinator

Office of Equal Opportunity and Access

A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:

- ▶ The definition of sexual harassment in § 106.30;
- ▶ The scope of the recipient's education program or activity
- ▶ How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable; and
- ▶ How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Sexual Harassment - University Policy 1.2(O)

Defined by federal law as the following:

- ▶ An employee of Illinois State University (including all Laboratory School employees) conditions the provision of aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct; or
- ▶ Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access or
- ▶ Any instance of sexual assault as defined in the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), and dating violence, domestic violence or stalking as defined in the Violence Against Women Act (VAWA).

University Program or Activity

- ▶ For Title IX purposes, the University will only have jurisdiction over a matter if the alleged conduct occurred as part of a University program or activity
- ▶ Program or activity is defined as the following:
 - ▶ Locations, events, or circumstances over which the University exercised substantial control over both the Respondent and the context of the harassment
 - ▶ Buildings owned or controlled by a recognized student organization, such as fraternities and sororities
- ▶ Allegations that are not a part of a University program or activity are subject to mandatory or permissive dismissal for Title IX purposes, pursuant to University Policy 1.2., **but can be handled under other University processes.**
- ▶ Respondent must be employed at the University at the time of the report

Sexual Harassment - University Policy

1.2(P)

▶ Sexual Misconduct/Violence

- ▶ Engaging in any act that is sexual in nature and which is committed without the full and informed consent of all persons involved. Examples of sexual assault/misconduct include, but are not limited to: any penetration of the mouth, vagina, or anus with any body part or other object; contact with a person's breasts, buttocks, groin, or genitals; touching another person with one's own breasts, buttocks, groin, or genitals; any other intentional bodily contact of a sexual nature, or; exposing one's intimate body parts to another person or persons.
- ▶ For purposes of this section informed consent must be freely and actively given through mutually understandable terms or actions. A person is deemed incapable of giving consent when that person is not of an age to legally give consent (i.e. juvenile, minor), mentally disabled, mentally incapacitated, physically helpless, incapacitated through the use of alcohol and/or drugs to the point of being unable to make an informed and rational decision, unconscious, or asleep. Informed consent cannot be obtained through physical force, compelling threats, intimidating behavior, or coercion. Consent cannot be derived based on: a lack of verbal or physical resistance, previous sexual relations between the same parties, consent provided to another party, previous or current sexual relations with other parties, or through the manner in which someone chooses to dress. A person always retains the right to revoke consent at any time during a sexual act. Attending an artistic or educational event or a class in which nudity occurs and for which advanced notice of nudity has been provided qualifies as informed consent.

1.2(P) Continued...

▶ Sexual Exploitation

- ▶ Engaging in any action that results in one or more persons taking nonconsensual or abusive sexual advantage of another person or persons. Examples of such behavior include, but are not limited to: invasion of sexual privacy; recording or broadcasting sexual activity, including redistribution of pictures, video, or audio; engaging in voyeurism; facilitating or allowing voyeurism without the consent of all parties; knowingly exposing another to a sexually transmitted disease; inducing another person or persons to commit an inappropriate sexual act, or; inducing incapacitation in another person with the intent to engage in sexual conduct, regardless of whether prohibited sexual conduct actually occurs.

1.2(P) Continued...

▶ 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. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of relationship, the type of the relationship, and the frequency of the interaction between the persons involved in the relationship.

▶ Domestic Violence

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

1.2(P) Continued...

▶ Stalking

- ▶ Engaging in a course of conduct directed at a specific person that would cause a reasonable person to (i) fear for the person's safety or the safety of others; or (ii) suffer substantial emotional distress.
- ▶ For the purposes of this definition (i) course of conduct means two or more acts, including, but not limited to, acts which the stalker directly, indirectly, or through third parties, by any action, method, device or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property. (ii) Substantial emotional distress means significant mental suffering or anguish that may, but may not necessarily, require medical or other professional treatment or counseling.

Retaliation - University Policy 1.2(Q)

- ▶ The University will not tolerate retaliation against students, employees, or faculty members who exercise their rights by filing a complaint with or participating in a protected investigation. Any action, or attempted action, directly or indirectly, against any person(s), who, in good faith, reports or discloses a violation of this policy, files a complaint, and/or otherwise participates under this policy. Retaliation includes, but is not limited to harassment, discrimination, threats, or negative impact on employment and/or academic progress. Actions are considered retaliatory if they have a materially adverse effect on the working, academic, or living environment of a person; or if they hinder or prevent the person from effectively engaging in University activities and programs. Any person or group within the scope of this policy who engages in retaliation is subject to a separate charge of retaliation.

University Procedure 1.2.3 - Complaint Process, Notification

- ▶ Formal complaint is received, reviewed, and assigned to investigator after it is determined the conduct was part of a University program or activity or if another provision of University policy, such as 1.2(P) Sexual Misconduct/Violence, Dating/Domestic Violence, and Stalking has been alleged.
 - ▶ Supportive measures offered
- ▶ Complainant and Respondent both notified of OEOA investigation with the following information:
 - ▶ Alleged violations of the policy
 - ▶ Supportive Measures
 - ▶ Identities of the parties
 - ▶ A summary of the conduct at issue. This includes when and where it allegedly occurred, if known
 - ▶ The potential specific violations
 - ▶ The Respondent will be informed they are presumed not responsible for the alleged conduct and that a determination regarding responsibility is not made until the conclusion of the complaint process
 - ▶ If during the investigation there is evidence obtained or disclosed that establishes additional potential violations, the Respondent will be informed in writing at the time.

University Procedure 1.2.3 - Investigation

- ▶ Complainant provided an opportunity to interview with the Investigator
- ▶ Respondent provided notice of opportunity to interview with Investigator and any additional information
- ▶ Gather evidence from both parties, and any additional evidence reasonably available to the University (inculpatory and exculpatory)
- ▶ Both parties and any witnesses interviewed are provided a draft copy of statement to review and provide relevant and appropriate feedback
- ▶ Both parties are provided an opportunity to review all evidence gathered during the investigation (10 University business days to review)
- ▶ Both parties are provided a draft investigation report and relevant evidence (10 University business days to review and provide feedback)
- ▶ Both parties are provided the final investigation report prior to formal hearing
- ▶ Both parties will be invited to attend a pre-hearing meeting with a member of the hearing panel to discuss the hearing process

University Procedure 1.2.3 - Hearing

- ▶ At the conclusion of the OEOA investigation, the information contained in the final investigation report will be forwarded to a panel of decision-makers for a determination, *by a preponderance of the evidence*, of whether a violation of the Policy 1.2 has occurred.
- ▶ A formal hearing will be convened with an OEOA representative who was not the investigator. If the employee is a faculty member, the second panel member will be a representative from the Office of the Provost. If the employee is not a faculty member (Civil Service or Administrative Professional), the second panel member will be a representative from Human Resources. For the third and an alternate fourth panel member, OEOA will work the Faculty Caucus of the Academic Senate, Administrative Professional Council, and Civil Service Council to identify individuals to serve as the third hearing panel member, dependent on the employment status of the Respondent.
 - ▶ Hear information and witnesses presented on behalf of both parties and all individuals appearing at a hearing are subject to questioning by advisors and decision-makers
 - ▶ Closed to the public and audio recorded
 - ▶ Advisor of their choosing. If a party does not have their own advisor, the University will provide an advisor, without fee or charge, to conduct cross-examination.
 - ▶ Cross-examination will be conducted directly, orally, and in real time by the advisor and never by the party personally. Before a party or witness answers a question, the decision-makers must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If deemed irrelevant, a party's advisor may challenge the decision to exclude the questions based on relevance. All questions, including those that challenge credibility, must be relevant and appropriate and must adhere to the relevancy parameters outlined on the next slide.

Relevance of Evidence

- ▶ All evidence that is used to render a decision must be relevant and appropriate.
- ▶ Relevant information can be both inculpatory and exculpatory.
- ▶ Both parties have the right to provide relevant information, including but not limited to the identification of fact and expert witnesses.
- ▶ The Investigator **MUST** gather other relevant information reasonably available to the University. This includes but is not limited to, documents, photographs, social media, communications between the parties, and other electronic records as appropriate. The relevant evidence must be fairly and accurately summarized in investigation reports.
- ▶ In general - medical and counseling records are confidential, unless they are voluntarily shared with the Investigator. Any information from medical records that is confidential and/or irrelevant must be redacted by the PARTY. The Investigator, when relevant and appropriate, will summarize the medical records in the preliminary report to be shared with both parties.
- ▶ Cross-examination in a live hearing **MUST** exclude evidence of the Complainant's sexual behavior or predisposition, unless such evidence about the Complainant's sexual behavior is offered to prove that someone other than the Respondent committed the conduct, or if the evidence concerns specific incident of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent.

Hearing Procedures Continued...

- ▶ At the request of either party, the recording of the hearing will be made available to them for their inspection and review at the Office of Equal Opportunity and Access.
- ▶ Hearing panel members (decision-makers) will deliberate and reach a decision, by majority.
 - ▶ The written determination, including the decision on the basis of whether there is a preponderance of information that the Respondent violated each cited University regulation, will include the findings of fact, conclusions if the conduct occurred, rationale for the result as to each allegation, and whether remedies will be provided to the Complainant.
- ▶ The written determination will be emailed simultaneously to the parties no later than ten (10) University business days after the hearing.
- ▶ This may be delayed if the panel needs additional time to review the information provided at the hearing. Notifications of any delay will be sent to the parties by email to their Illinois State University email account.
- ▶ This determination will be forwarded to the appropriate body for further action. (i.e. for Civil Service, Administrative Professional and Extra Help, employees and Non-Tenure Track Faculty, the determination will be forwarded to Human Resources; for students, volunteers, Graduate Assistants and TT faculty the determination will be forwarded to the Department Head or Chairperson of the academic department). Any disciplinary measures will be handled by that higher body.

Technology at Live Hearings

▶ Zoom

- ▶ Make sure Zoom is private by only allowing parties to enter the room when allowed in by the hearing panel
- ▶ Permit parties to utilize “breakout room” feature to consult with advisor
- ▶ Only allow witnesses to be present in the Zoom call when required
- ▶ Contact Technology Solutions in the event there are issues or concerns

▶ For in-person hearings

- ▶ Familiarize yourself with audio recorder functions and features prior to the hearing
- ▶ Test audio recorder to make sure adequately working
- ▶ Have back-up batteries available
- ▶ Make sure audio recorder is turned on, and actively recording when the hearing begins
- ▶ Pause audio recording only at appropriate times when matters related to the case are not being discussed between parties or witnesses (i.e., during breaks, discussions between the advisor and student)

University Procedure 1.2.3 - Appeals

- ▶ The Respondent and the Complainant can both appeal determinations of cases, except in cases where the appeal right has been waived as a result of a voluntary agreement. Only one appeal is collectively afforded to all parties involved.
- ▶ Appeals of a determination are submitted directly to the President or designee, within ten (10) University business days.
- ▶ Written findings of the appeal proceeding decision shall be communicated to all parties within ten (60) business days of the decision.

1.2.3 Appeals Continued...

- ▶ Appeals are not re-hearings and only serve to review the conditions within which a case was resolved.
- ▶ The criteria for filing an appeal
 - ▶ Procedural irregularity - the appellant contends that a substantive error was committed as a part of the investigation that affected the outcome of the case
 - ▶ Newly Discovered Information - the appellant contends that there is newly discovered information that was unavailable to the appellant at the time of the original proceeding, and that this information could affect the outcome of the proceeding. The employee must include the new information with the appeal. These criteria may not be utilized by employees who choose not to or fail to attend or participate in the original proceeding they are appealing.
 - ▶ Conflict of Interest or Bias - Title IX personnel and/or decision-makers had a conflict of interest or bias that affected the outcome of the proceedings.

How to Serve Impartially Without Prejudgment of Facts at Issue

- ▶ Make sure that you do not have a conflict of interest with any party involved (student in your class, staff member you directly work with, friend, partner, etc.)
- ▶ Remember, the Respondent is presumed not to be in violation until the end
- ▶ Be open to any and all evidence as presented
- ▶ Weigh the evidence equally, including inculpatory and exculpatory evidence
 - ▶ Inculpatory is evidence is used to show the Respondent may be responsible.
 - ▶ Exculpatory is evidence used to show the Respondent may not be responsible.
- ▶ Listen intently, without judgment, when someone is providing information related to the alleged incident
- ▶ If you believe you are not capable of serving impartially on a particular matter, notify the Title IX Coordinator immediately.

How to Avoid Bias and Conflicts of Interest

- ▶ Be aware of any preconceived notions you have about matters of sexual harassment
 - ▶ Stereotypes related to gender roles - “Males are always respondents” and “Only females can be victims of dating violence and sexual assault”
 - ▶ Educate yourself on issues of conscious and unconscious bias through internal and external sources - Health Promotion and Wellness, Student Affairs, the Multicultural Center, University Speakers
 - ▶ When you believe you may have a conflict of interest- immediately notify the Title IX Coordinator to discuss. Do not put yourself and the University in a position that leads to an unfair and biased process
 - ▶ Educate yourself on all aspects of the University process and Title IX requirements to understand the rights and responsibilities afforded to all parties. When you have questions, reach out to the Title IX Coordinator and ask.
 - ▶ Look externally and internally for opportunities related to Diversity, Equity, and Inclusion to address potential bias.

OCR Resources Shared with Staff

- ▶ <https://www.youtube.com/watch?v=TdfT5R8ibm4> OCR Webinar: Title IX Regulations Addressing Sexual Harassment (released May 8, 2020)
- ▶ <https://www.youtube.com/watch?v=i-BCnhUsJ4s> OCR Webinar on New Title IX Protections Against Sexual Assault (released July 7, 2020)
- ▶ <https://www.youtube.com/watch?v=48UwobtiKDI> OCR Webinar on Due Process Protections under the New Title IX Regulations (released July 21, 2020)
- ▶ https://www.youtube.com/watch?v=yQ4-S5_Jahw OCR Webinar on Conducting and Adjudicating Title IX Hearings (released July 23, 2020)
- ▶ https://www.youtube.com/watch?v=YA5S2_A3UAY OCR Short Webinar on How to Report Sexual Harassment under Title IX (released July 27, 2020)
- ▶ <https://www.youtube.com/watch?v=XzSJ4uNspq8> OCR Short Webinar on the First Amendment and Title IX (released July 29, 2020)