

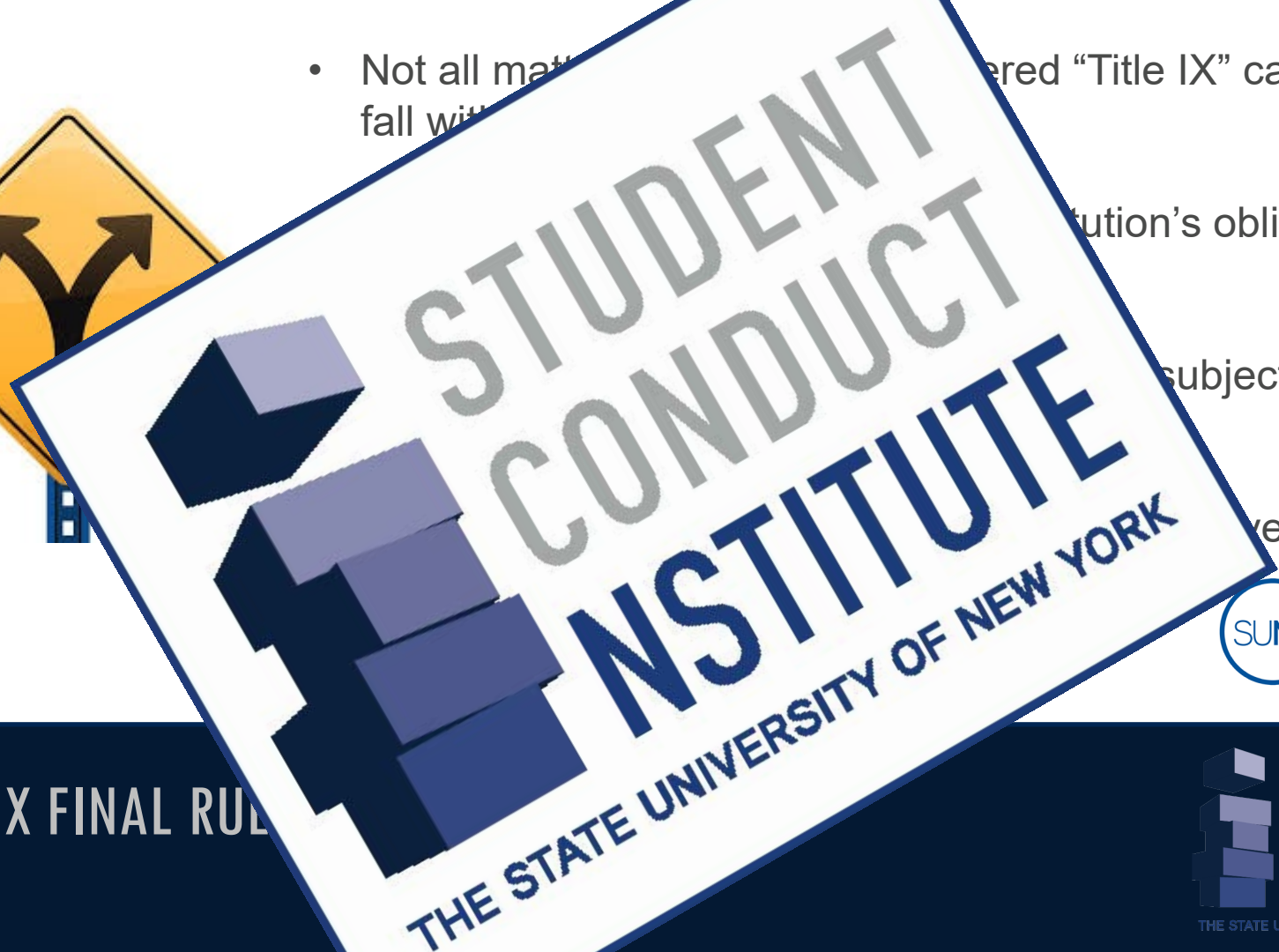


- Not all matters covered “Title IX” cases fall with...

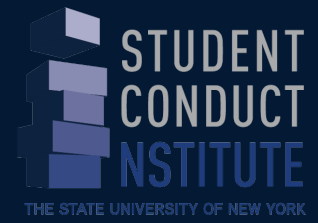
institution’s obligation

subjected to

ved



TITLE IX FINAL RULE



TITLE IX: SEXUAL HARASSMENT

2001 Revised Sexual Harassment Guidance

- Quid Pro Quo Sexual Harassment, or
- Hostile environment, which means conduct that is “**sufficiently serious** to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex.”

Title IX Final Rule

- (Employee) Quid Pro Quo, or
- 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 institution’s education program or activity, or
- Sexual assault [Clery Act definition], or dating violence, domestic violence, or stalking [VAWA definition]

DATING VIOLENCE

- The term “**dating violence**” means 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

A felony or misdemeanor crime 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 the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; 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 the jurisdiction in which the crime of violence occurred.

SEXUAL ASSAULT

An offense “classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI.” 20 U.S.C. 1092(f)(6)(A)(v).

SEX OFFENSES

Any sexual act directed against another person, without the consent of the victim (***consent NOT defined in the regulations***), including instances where the victim is incapable of giving consent.

- A. **Rape** — The “carnal knowledge of a person” without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- B. **Sodomy** — Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or
- permanent mental or physical incapacity.
- C. **Sexual Assault With an Object** — The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

SEX OFFENSES

Any sexual act directed against another person, without the consent of the victim (***consent NOT defined in the regulations***), including instances where the victim is incapable of giving consent.

- A. **FONDLING** — The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- B. **INCEST** — Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- C. **STATUTORY RAPE** — Nonforcible sexual intercourse with a person who is under the statutory age of consent.

STALKING

The term “stalking” means 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.

Which of these offenses may be considered "sexual harassment" under Title IX?

Quid pro quo sexual harassment among students

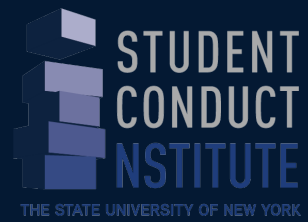
Severe or pervasive harassment

Dating violence

None of the above

TITLE IX: JURISDICTION

CODE WORD
TWO: MOUSE



- **Only** within the United States
- On-campus, or
- Off-campus, only if location is part of “operations” and institution has substantial control over the place and the respondent
 - Example: Building owned or controlled by institution and used by officially-recognized campus organization
- *Possibly*: Online harassment where network/software/hardware is part of “operations” and institution has substantial control

Astrid and Jan are university students. They engage in sexual activity at an off-campus apartment. Astrid files a Title IX complaint.

- A. Dismiss because this conduct occurred off-campus.
- B. Dismiss if the university does not exercise control over this off-campus apartment.
- C. Dismiss because the university does not exercise control over respondent.
- D. Dismiss if the Title IX Coordinator believes the activity was consensual.
- E. None of the above

2001 Revised Sexual Harassment Guidance

Title IX Final Rule

"Responsible employee" framework:

- Duty to act based on report to individual with the express authority to act, or
- "an individual who a student could reasonably believe has this authority or responsibility."

"Actual notice" is only received when person brings notifies TIXC or "official with authority" to institute corrective measures.

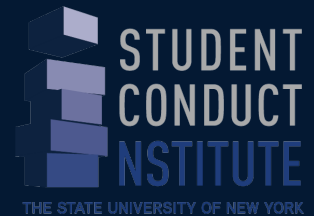
Responsible employee framework not mandated, but allowed.

Institution may designate employees as confidential.



WHEN REQUIREMENTS KICK IN

**CODE WORD
TWO: MOUSE**

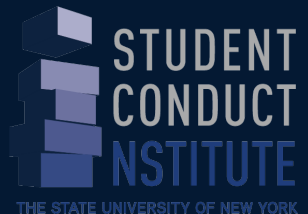


- Title IX Coordinator is responsible for “coordinating the effective implementation of supportive measures,” even where no formal complaint is filed. 34 C.F.R. § 106.30(a).
- Examples of supportive measures (See, 85 Fed. Reg. 30026, 30401)
 - counseling
 - extensions of deadlines or other course-related adjustments
 - modifications of work or class schedules and locations
 - changes in housing locations
 - No contact orders
 - leaves of absence
 - increased security & monitoring of areas of the campus



**TITLE IX: INTAKE PROCESS AND
SUPPORTIVE MEASURES**

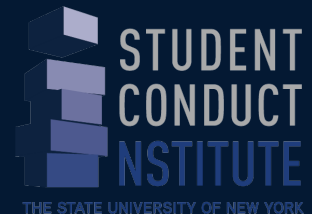
**CODE WORD
TWO: MOUSE**



- **CAUTION:** Interim suspensions are prohibited for Title IX student-respondents
 - Department of Education considers them disciplinary sanctions
- Emergency Removal may be used where:
 - Person poses threat of immediate **physical** harm
 - Threat arises from allegations of sexual harassment
 - Depends on individualized safety and risk assessment
- Must provide opportunity for “immediate” opportunity to challenge the removal (need not be a formal hearing)



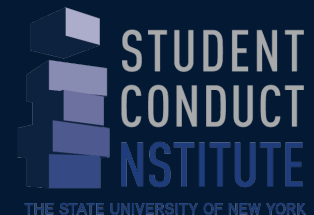
TITLE IX: EMERGENCY REMOVALS



- Institutions **must** investigate all “formal complaints” filed with the Title IX Coordinator
- Who can file a formal complaint?
 - A person who is currently participating in the education programs or activities of the institution
 - A person who is attempting to participate in those programs or activities
 - The Title IX Coordinator
- Multiple complaints arising from same incidents can be consolidated



FORMAL COMPLAINT



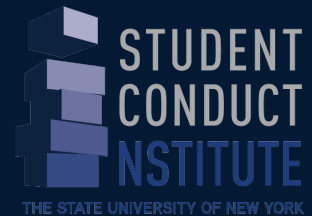
The college will protect privacy to the extent possible under the law

The Coordinator will balance confidentiality with:

- Communications necessary to fulfill legal duties
- The safety of other members of the college community.



AVAILABLE CONFIDENTIALITY



Timing

- Send to parties as soon as practicable after filing of formal complaint
- No investigative interviews until parties have sufficient time to review allegations

Contents

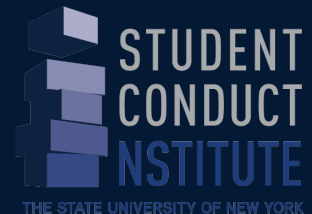
- Allegations of sexual harassment
- Identities of parties, if known, including the complainant's name
- Date, time, and location of the incident, if known
- Parties' basic procedural rights
- Presumption of non-responsibility

Advisor

- Notice must inform parties of right to advisor, who may be attorney
- School does not need to pay for attorney
- Reasonable restrictions ok...
- Unless they conflict with cross-examination role



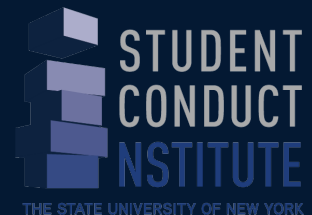
NOTICE OF ALLEGATIONS AND RIGHT TO ADVISOR



- Institutions **must** dismiss formal complaints that don't fall within the statutory criteria for the Title IX grievance process
 - Institution may still investigate through a non-Title IX process
- Institutions **may** dismiss complaints that do meet the criteria if:
 - A complainant notifies the TIXC in writing that they would like to withdraw the formal complaint or any allegations in it;
 - The respondent is not enrolled/ employed by the institution; or,
 - If specific circumstances prevent the institution from gathering evidence sufficient to reach a determination
- Any party may appeal a dismissal determination



MANDATORY AND DISCRETIONARY DISMISSAL



Evidence Collection

- Interviews of parties & witnesses after Notice of Allegations
- Both inculpatory & exculpatory evidence must be collected
- Evidence will be directly related to the allegations
- May include evidence that institution does not intend to rely on

Evidence Sharing

- Mandatory inspection process with 10-day min. review period
- Parties may review evidence with advisors present
- May set reasonable rules (e.g. confidentiality agreement)

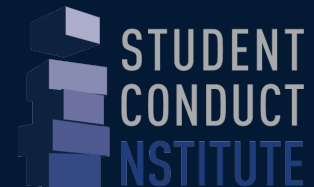
Investigative Report

- Summarizes relevant evidence directly related to allegations
- Cannot make determination regarding responsibility
- Parties have opportunity to review at least 10 days before hearing



The State University
of New York

INVESTIGATIVE PROCESS



THE STATE UNIVERSITY OF NEW YORK

- **Prompt**

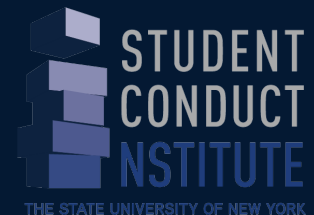
- Final Rules require publication of time frame based on a specific number of days with room for “good cause” delay
- Rules (and case law) balance prompt resolution and adequate time to prepare and respond to charges

- **Impartial**

- Must collect exculpatory and inculpatory evidence
- Must follow code
- Cannot have bias or conflict of interest



PROMPT AND IMPARTIAL INVESTIGATION



- All parties, advisors, witnesses, and decision-makers may be physically present in same location, or
- They may participate remotely via secure technology, but
- Decision-makers must be able to see and hear parties and witnesses.



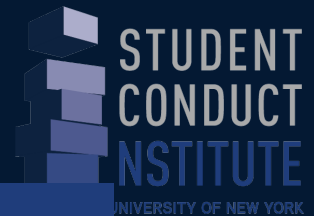
LIVE HEARING

Questioning Process

- Decision-maker asks questions of the parties and witnesses
- Advisors ask “relevant” cross-examination questions
- Decision-maker decides if questions are “relevant”



RELEVANT QUESTIONS



Relevance Determination

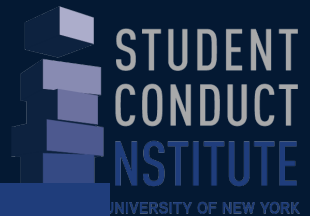
General rule: does the question make a fact at issue more or less likely to be true?

Specific exclusions governing Title IX hearings:

- **“Rape Shield”** (with two exceptions). 34 C.F.R. § 106.45(6)(i).
 - Offered to prove someone else committed alleged conduct
 - Offered to prove consent
- **Privileged** information. 34 C.F.R. § 106.45(1)(x).
- Undisclosed medical records. See, 85 Fed. Reg. 30026, 30294
- Duplicative questions. See, 85 Fed. Reg. at 30331.



RELEVANT QUESTIONS



- Opportunity for advisor to cross-examine parties and witnesses is a Title IX mandate
- Title IX “Suppression Rule” has been VACATED
 - *Victims Rights Law Center v. Cardona* (D. Mass. 2021)
 - Check out [SCItations Blog](#) for more
 - OCR Letter, August 24, 2021
 - bit.ly/LetterVRLC
- **Remember: “No Adverse Inference” Rule**
 - No inference of responsibility from decision not to testify



CROSS-EXAMINATION



- Identify the **allegations** potentially constituting sexual harassment;
- Describe the **procedural steps** taken;
- Identify **findings of fact** supporting the determination;
- Identify which **section of the Code of Conduct** respondent has/has not violated.
- **For each allegation**, provide statement of and rationale for:
 - the result, including a **determination regarding responsibility**;
 - any **disciplinary sanctions** imposed on the respondent; and
 - whether **remedies** designed to restore or preserve equal access to recipient's education program or activity will be provided to complainant; and
- Describe the recipient's **appeal** procedures



DETERMINATION REGARDING RESPONSIBILITY



- Title IX Final Rules mandate access to an appeal
- Parties can appeal dismissal of formal complaint and determination regarding responsibility
- Final Rules mandate three appeal grounds:
 - **Procedural irregularity** that affected the outcome of the matter (i.e. a failure to follow the institution'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;
 - 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.



APPEAL



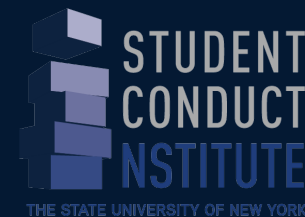
BIAS AS DUE PROCESS VIOLATION

“In the intimate setting of a college or university, prior contact between the participants is likely and does not per se indicate bias or partiality.” *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 15 (1st Cir. 1988).

- An impartial investigator and decision-maker are essential to due process
- Courts assume investigators & decision-makers are honest "unless **actual bias**, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven." *Doe v. Trustees of Boston College*, 892 F.3d 67, 84 (1st Cir. 2018).

TITLE IX FINAL RULE

CODE WORD THREE: ALO



Prohibited Conflicts of Interest and Bias

- Having a conflict of interest or bias for or against complainants and respondents generally
 - **CAUTION:** “Believe All Women” (or All Men)
- Having a conflict of interest or bias for or against the specific parties
- Overlapping investigator, decision-maker, and appeals roles

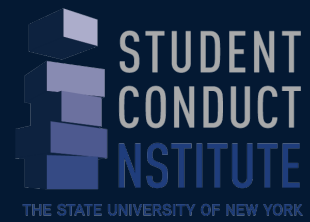
Not a *per se* conflict or bias

- Gender, research interests, work history
- Advocacy background
- Title IX Coordinator serving as Title IX Investigator
- Title IX Coordinator serving as facilitator in informal resolution process

- **Actual bias is a high *legal* standard, but perception of bias is in the eyes of the parties to the process and should be avoided**
 - **Liability** arises from truly lop-sided investigations and adjudications
 - Failing to review or preserve evidence or conduct any follow-up interviews to resolve inconsistencies
 - Helping the accuser prepare their case without assisting the respondent.
 - Or, from statements of investigator or panelist showing presumption of responsibility based on sex stereotypes
 - Or, from misapplying trauma-informed practice to explain away all inconsistencies in Reporting Individual's statements

RETALIATION

CODE WORD
THREE: ALO



Title IX prohibits retaliation against people who seek to assert their Title IX rights. Section 106.71 makes clear that no retaliation can result:

- Where the individual has made a report or complaint
- Where the individual testified, assisted, or participated in the Title IX Grievance Process
- Where the individual refused to participate in any manner in the Title IX Grievance Process

WHAT'S NEXT?





**STUDENT
CONDUCT
INSTITUTE**

THE STATE UNIVERSITY OF NEW YORK



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of New York