

California Western School of Law

Title IX Training for Coordinators, Investigators, Advisors and Adjudicators

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Definitions – Sexual Misconduct

Sexual Misconduct = Title IX Sexual Harassment and Community Standards Sexual Misconduct

Title IX Sexual Harassment:

NOTE: Definitional and jurisdictional components.

Definitional. Conduct on the basis of sex that involves an employee of CWSL conditioning the provision of an aid, benefit, or service of CWSL on an individual's participation in unwelcome sexual conduct; or an individual engaging in unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to CWSL's education program or activity. Title IX Sexual Harassment also includes:

- Title IX Sexual Assault
- Title IX Dating Violence
- Title IX Domestic Violence
- Title IX Stalking

Definitions – Sexual Misconduct

Title IX Sexual Assault: Any of the following –

- Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the alleged victim.
- The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the alleged victim.
- Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- Non-forcible sexual intercourse with a person who is under the statutory age of consent.

Definitions – Sexual Misconduct

Title IX Dating Violence: Violence, including sexual or physical abuse or the threat of such abuse, committed by a person (a) who is or has been in a social relationship of a romantic or intimate nature with the alleged 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, and (iii) the frequency of interaction between the persons involved in the relationship.

Title IX Domestic Violence: Violence committed by a current or former spouse or intimate partner of the alleged victim, by a person with whom the alleged victim shares a child in common, by a person who is cohabitating with or has cohabitated with the alleged victim as a spouse or intimate partner, by a person similarly situated to a spouse of the alleged victim under the domestic or family violence laws of California, or by 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 California.

Definitions – Sexual Misconduct

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

For purposes of this definition:

- *Course of conduct* means two or more acts, including, but not limited to, acts in which the alleged 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;
- *Reasonable person* means a reasonable person under similar circumstances and with similar identities to the victim; and
- *Substantial emotional distress* means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Definitions – Sexual Misconduct

But, must meet Title IX jurisdictional requirements:

In order to constitute Title IX Sexual Harassment, the alleged misconduct must have occurred:

- In the United States, and
- In CWSL's education program or activity, which is defined as locations, events or circumstances over which CWSL exercised substantial control over both Respondent and the context in which the misconduct occurred, or any building owned or controlled by a student organization officially recognized by CWSL.

What are CWSL's programs and activities?

Definitions – Additional Sexual Misconduct

Community Standards Sexual Harassment: includes the following acts, *unless* the conduct meets the definition of Title IX Sexual Harassment:

- Non-Title IX Rape
- Non-Title IX Sexual Assault
- Non-Title IX Sexual Battery
- Non-Title IX Sexual Exploitation
- Non-Title IX Dating Violence
- Non-Title IX Domestic Violence
- Non-Title IX Stalking
- Gender, Gender Identity or Sexual Orientation Discrimination

Consent

A person who wants to engage in a specific sexual activity is responsible for obtaining Affirmative Consent for that activity.

- Requires an affirmative, conscious and voluntary agreement to engage in mutually agreed-upon sexual activity.
- Neither the lack of protest nor resistance nor silence constitutes consent.
- Consent may be withdrawn at any time.

Consent to one form of sexual activity does not imply consent to other forms of sexual activity.

Consent to sexual activity on one occasion is not consent to engage in sexual activity on another occasion.

Consent

Consent must be given without coercion, force, threats or intimidation.

- *Coercion* is the practice of forcing another party to act in an involuntary manner by use of intimidation or threats or some other form of undue pressure or force. Coercion may include the use of emotional manipulation to effectively remove a person's free will to engage in sexual activity.
- *Force* is the use of physical violence and/or imposing on someone physically to gain sexual access. Force also includes threats, intimidation and coercion.

Consent cannot be given when a person is incapacitated.

- *Incapacitation* is the state where someone cannot make rational, reasonable decisions due to a lack of capacity to give knowing consent (e.g., to understand the “who, what, when, where, why, and how” of the sexual interaction).
- In evaluating incapacitation, the respondent will be found responsible if they knew or reasonably should have known that the complainant was incapacitated, from the perspective of a reasonably sober person. It is not a valid excuse that the respondent believed the complainant consented if the respondent's belief arises from his or her own intoxication.

Reporting Potential Sexual Misconduct

Anonymous Reporting

Reports to Authorized and Responsible Employees

A disclosure or report of Sexual Misconduct made to an Authorized Employee (regardless of whether the disclosure is made by the Complainant or a third party):

- Constitutes a report to CWSL (*i.e.*, actual knowledge), triggering a response under this Policy.
- Must be promptly reported to the Title IX Coordinator.

A disclosure or report of Prohibited Conduct made to a Responsible Employee (regardless of whether the disclosure is made by the Complainant or a third party):

- Does not constitute a report to CWSL (*i.e.*, is not “actual knowledge”) triggering a response under this Policy.
- Must be promptly reported to the Title IX Coordinator.

Supportive Measures

What are supportive measures?

Non-disciplinary, non-punitive individualized services that may be provided to Complainants or Respondents, either upon request (when deemed by the Title IX Coordinator to be appropriate and reasonably available) or at the initiative and in the sole discretion of the Title IX Coordinator.

What is the purpose of supportive measures?

To restore or preserve equal access to CWSL's educational programs and activities, without unreasonably burdening the other party.

When are supportive measures available?

Beginning at any time after the submission of a report of Sexual Misconduct.

Emergency Removals for Title IX Sexual Harassment

If at any point following the receipt of a report of Title IX Sexual Harassment, CWSL determines that the Respondent poses an immediate threat to the physical health or safety of the Complainant or any other person(s), including the Respondent, CWSL may temporarily remove the Respondent from any or all of its programs or activities.

- Before imposing an emergency removal, CWSL must undertake an individualized safety and risk analysis.
- Emergency removal will be imposed only if CWSL concludes that the threat to physical health or safety arises from the allegations of Title IX Sexual Harassment and warrants removal.
- Respondent may appeal the removal.
- Non-punitive actions taken as Supportive Measures do not constitute an emergency removal.

Formal Complaint and Resolution Process

Formal Complaint

What is a Formal Complaint?

A document submitted by a Complainant and bearing the Complainant's physical or digital signature, or otherwise indicating that the Complainant is the one filing the Formal Complaint, requesting that CWSL investigate allegations that may constitute Title IX Sexual Harassment.

- The Title IX Coordinator also may sign a Formal Complaint, but does not become the Complainant by doing so.
- In order to file a Formal Complaint for Title IX Sexual Harassment, a Complainant must be participating in or attempting to participate in the School's education program or activity at the time a Formal Complaint is filed.

Formal Complaints – Notice of Allegations

Upon the submission of a Formal Complaint, the Title IX Coordinator will provide written notice to the Parties, including the following:

- The Policy.
- Notice of the allegations of conduct that may constitute sexual misconduct, with sufficient detail for the Respondent to prepare a response before any initial interview.
- The presumption that the Respondent is not responsible for the alleged sexual misconduct unless a determination of responsibility is reached at the conclusion of the Formal Resolution Process.
- Notice of the Parties' entitlement to an Advisor of choice.
- The identity of the Investigator.
- Notice that the Parties may inspect and review evidence gathered during the investigation.
- Notice that the School's policies prohibit knowingly making false statements or knowingly submitting false information.

Update notice of allegations throughout investigation, if necessary.

Mandatory and Discretionary Dismissals

Mandatory Dismissal for purposes of Title IX Sexual Harassment:

- Even if proved, the alleged misconduct would not constitute Title IX Sexual Harassment;
- The alleged misconduct did not occur in CWSL's education program or activity; or
- The alleged misconduct did not occur in the United States.

Discretionary Dismissal for purposes of Title IX Sexual Harassment:

- Complainant notifies the Title IX Coordinator in writing that Complainant wishes to withdraw the Formal Complaint or any allegation in it;
- Respondent is no longer enrolled or employed at CWSL; or
- Specific circumstances prevent CWSL from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegation.

Dismissal is subject to appeal.

BUT, the formal complaint may proceed as possible Community Standards Sexual Misconduct and that decision is not subject to appeal.

Informal Resolution

Available only when:

- Formal Complaint has been filed (if Title IX Sexual Harassment);
- Parties agree (in writing) – and the Title IX Coordinator agrees – to use informal resolution; and
- Formal Complaint does not allege Title IX Sexual Harassment of a student by an employee.

Prior to initiating Informal Resolution, the Title IX Coordinator will provide the Parties with written notice disclosing the allegations, the requirements of the process, the right to withdraw from Informal Resolution to pursue formal resolution, the permitted use of any information exchanged in the Informal Resolution, and any consequences of participation (e.g., as it relates to any subsequent formal resolution if Informal Resolution is not achieved).

Informal Resolution can be commenced at any point prior to the conclusion of a Hearing and may be terminated by the Complainant, Respondent, Title IX Coordinator or Facilitator at any time prior to its completion. If Informal Resolution is terminated, the Formal Resolution Process will promptly commence or resume, as appropriate.

Conducting the Investigation – CWSL’s Policy

CWSL strives to resolve Formal Complaints within 90 calendar days of the Formal Complaint.

Either Party may object to the Investigator on the grounds of conflict of interest or bias.

The Investigator will conduct an investigation of the allegations in the Formal Complaint, and is responsible for interviewing the Parties and witnesses, and gathering relevant inculpatory and exculpatory evidence.

- Parties will be provided with written notice of the date, time, location, participants and purpose of all investigative interviews in which they are expected to participate.
- Parties may be accompanied by an Advisor of their choice at any investigative interview.
- All Parties will have an equal opportunity to identify witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence, for the Investigator.
- The Investigator may not access, consider or use records that are made or maintained by a physician, psychiatrist, psychologist or other recognized professional or paraprofessional in connection with the provision of treatment to a party without that party’s voluntary written consent.

Advisor of Choice v. Provided Advisor

- Party's Advisor may accompany them to all interviews, hearings, and other meetings held in connection with a Formal Complaint.
- Parties are responsible for identifying their own Advisor, if they wish to have one, **but** parties must have an Advisor for purposes of conducting cross-examination at a Hearing. If a Party has not identified an Advisor, CWSL will provide one for that limited purpose.
- Advisors may not speak aloud during any meeting, interview or hearing, but may confer with the individual whom they are advising quietly, by means of written notes or during brief recesses at the sole discretion of the CWSL representative conducting the meeting, interview or hearing.
- Advisor whose presence is deemed improperly disruptive or inconsistent with established rules of decorum will be required to leave and may be prohibited from participating in future proceedings.
- While CWSL may consider short delays in scheduling to reasonably accommodate an Advisor's availability, doing so is in the sole discretion of the CWSL representative responsible for the event.

Role of the Investigator

An investigator must:

Be objective and unbiased.

Be free of conflict of interest.

Avoid any prejudging of the parties or responsibility.

Take the lead in seeking evidence related to the allegations (inculpatory and exculpatory), because it is not the responsibility of the parties to investigate the matter.

The Initial Interviews (Complainant and Respondent)

Before the interview:

Provide sufficient notice.

Communicate the availability of supportive measures / resources.

Explain the right to an advisor.

Allow sufficient time.

At the start of the interview:

Communicate the availability of supportive measures/resources.

Discuss policy and process.

Reiterate the role of the advisor.

Invite questions.

Conducting the Interview: The Fundamentals

Develop rapport with an open and conversational style.

Demonstrate respect.

Be alert to your non-verbal communications.

Avoid stereotypes and bias.

Explore areas of inquiry that can be corroborated.

Focus on sensory details.

Ask what the other might say.

Don't shy away from the uncomfortable questions.

Be OK with breaks and stretches of silence.

Conducting the Interview: The Funnel

Start as general as possible – “tell me what happened.”

Refrain from interrupting the initial narrative with clarifying or follow up questions.

Continue to return to the narrative to get all details.

Use reflective listening.

Ask varied questions on the same topic.

Save tough or uncomfortable questions for later in the interview.

Avoid questions that imply a value judgment.

Question inconsistencies in a non-confrontational manner.

Be persistent and thorough.



Conducting the Interview: The Closing

Give the interviewee a final (for that meeting) opportunity to provide information.

“Is there anything I haven’t asked that you think I should know?”

“If you were me who would you interview? What would you want to see?”

“It’s not uncommon to think of something after you leave. If you think of something, will you please contact me?”

Ask if they have questions.

Discuss supportive measures/resources.

Thank the interviewee for their time.

The Report

To: TitleXCoordinator@cwsl.edu

From: Jenna

Date: March 15, 2021

Michael and I were in NYC with the trial moot court team last week for nationals. Michael came to my hotel room after we were all drinking at a bar a couple blocks away. He knew I was drunk. I told him I didn't want to have sex. He slept over and when I woke up the next morning, I realized he raped me. CWSL needs to do something so he doesn't do this to anyone else.

Jenna's Initial Interview Narrative

I was at bar in NYC with a bunch of students from the competition. At some point, Michael came in with some other guys. I don't know Michael that well outside of the team, but we had a class together last semester. He came over and joined the group I was hanging out with. We were all talking, drinking and dancing. At some point, Michael and I started kissing.

I was feeling pretty buzzed and decided to leave around midnight. My friend, Molly, didn't want to leave yet so Michael offered to walk me back to the hotel. We just talked about our classes while we walked. When we got there, he got out of the elevator on the same floor as me. He followed me into my room and sat down on my bed. I really just wanted to go to sleep, but I didn't want to be rude. We talked for a bit. I started to feel a little sick and told him I wanted to go to sleep. He laid down next to me on my bed.

I think I fell asleep for a bit, but woke up when Michael started kissing me. We made out for awhile but then I rolled away from him. He rolled me back over. We made out a bit longer and he unbuttoned my shirt. I let him take my shirt off. At that point, I was really uncomfortable but was scared of what he'd do if I told him to leave. I told him that I didn't want to have sex.

The rest is fuzzy for me. He left sometime really early in the morning. When I woke up around 6 a.m., I saw a condom wrapper on the floor and remembered us having sex.

Developing the (“Living”) Investigation Plan

Who should be interviewed?

What other (non-witness) evidence may be available?

Michael's Initial Interview Narrative

I got to the bar around 11 p.m. and saw Jenna dancing with a big group. She waved me over. I've known Jenna since the start of the year, because we had a crim law class together in the fall. I knew she was interested in me at the time, but I had a girlfriend. Anyway, we hung out for maybe an hour at the bar and kissed a couple times. I think we were both buzzed, but not bad. Around midnight, she said she was going back to the hotel. No one else that we knew was leaving, so I offered to walk her.

When we got to the hotel, we ran into another of our teammates, Steve, in the lobby and talked with him for a couple minutes. When we got to Jenna's room, we sat on her bed. She asked for my cell number and put it into her phone.

After a few minutes, we laid down and started kissing. At first Jenna said she didn't want to hook up, but then she took her shirt off and helped me take off my jeans. We had sex and fell asleep. I woke up and left around 4 a.m.

Jenna tried to pull me aside later that day to talk, but I avoided her. She texted me, too. I didn't respond right away because I'm trying to get back together with my ex-girlfriend and felt bad about hooking up with Jenna. Jenna and I texted a couple times over the next couple days, but then I stopped responding. Since competition is over, I pretty much steer clear of her.

Steve's Initial Interview Narrative

I was on the stairs in the hotel lobby, coming up from the hotel bar, on my way to my room at around 1 a.m., when Michael and Jenna came running through. We talked for a couple minutes. Michael and I went on a ski trip with a bunch of guys over winter break, but we've been so busy this semester with class and moot court stuff that we really haven't had the chance to catch up. So, we just talked a bit about our classes. Jenna was going on and on about this fabulous firm that she's going to be working for this summer.

The whole run-in with Jenna was kind of awkward. She and I were both at a party last fall, where everyone was pretty drunk. Jenna's roommate, Melissa, was there and we were dancing. Out of nowhere, Melissa started kissing me, pretty much right there in the middle of the room. I'm not into her and told her – I was really bothered by it. Jenna got in my face and said I was making a big deal out of nothing to embarrass Melissa. There was way too much drama, which tends to be the case with Jenna.



The Investigation Report for Title IX Sexual Harassment and CSSM Involving Students Possibly Subject to Suspension or Expulsion



Prior to completing the investigation report, the Investigator will send to the parties and their advisors all evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint, regardless of whether it is anticipated that the evidence will be used at the hearing.

- Parties will have 10 calendar days to provide a written response, including identifying additional evidence for the Investigator's consideration prior to completing the investigation report.

At least 10 calendar days before the hearing, the Investigator will provide the parties and their advisors a copy of the investigation report.

- Parties will again have the opportunity to respond.

Hearing – The Hearing Officer (Decision-maker)

How does the hearing officer get ready?

Self-identify conflict of interest and bias.

Prepare, prepare, prepare.

Read the report carefully and repeatedly.

Understand the conduct at issue and the elements of the alleged violations.

Identify the areas of agreement and disagreement.

Did the investigator explore and consider all the relevant evidence – what areas require further inquiry?

Hearing – The Hearing Officer (Decision-maker)

What is the hearing officer's role at the hearing?

- Ask relevant questions of parties and witnesses and review relevant evidence to aid in reaching an unbiased conclusion, based on available inculpatory and exculpatory evidence.
- Ensure the parties have equal opportunities to present and challenge evidence.
- Manage the hearing and enforce the rules of decorum.
- Make relevancy determinations.
- Evaluate credibility.
- Weigh the evidence.
- Make a decision on responsibility using a preponderance of the evidence standard and, if appropriate, issue sanctions.

What is the Advisor's role?

- Provide support and advice to the party.
- Understand the purpose and scope of cross-examination.
- Ask questions on cross-examination that elicit relevant information.
- Wait for relevancy determinations.
- Adhere to rules of decorum.

The Hearing – CWSL’s Policy and Procedures

Allow opening statements (5 minutes).

Hear from the Complainant, Respondent and witnesses.

Each Party will have the opportunity to provide relevant evidence to the Hearing Officer.

The Hearing Officer may ask relevant questions of each Party and witness, either before, during, or in follow-up to their testimony .

Facilitate each Party’s advisor asking relevant cross-examination questions.

- The Hearing Officer will determine whether questions are relevant prior to the Party or witness answering the question. If the question is deemed not relevant, the Hearing Officer will provide a brief explanation and the question will be precluded. The Hearing Officer’s decision is not subject to challenge or objection during the Hearing.

Allow closing statements

Is it Relevant?

Ask: Is it probative of any material fact?

Certain evidence is specifically deemed not relevant:

Questions and evidence about complainant's sexual predisposition or prior sexual behavior, unless to prove that someone other than respondent committed the conduct alleged or, if concerning specific incidents of complainant's conduct with respondent, offered to prove consent.

Records that are made or maintained by a physician, psychiatrist, psychologist or other recognized professional or paraprofessional in connection with the provision of treatment to a party, except where the party has consented to their access and use.

Statements of a party or witness, where that individual is not subject to cross-examination. If the individual does not submit to cross-examination, the Hearing Officer must not rely on any statement of that individual in reaching a determination regarding responsibility. The Hearing Officer cannot draw an inference regarding responsibility based solely on a Party's absence from the Hearing or refusal to answer questions.

Questions also may be deemed not relevant when they are duplicative of other evidence already in the record.

Is it Credible?

Even where it appears to be a “draw,” it seldom is – one person is usually more credible than the other.

Everyone’s credibility is at issue – there are no “perfect” Complainants, Respondents or witnesses

Consider the following to determine credibility:

- Is the testimony believable?
- Does it make sense?
- Is it convincing?
- Is there a level of detail and specificity?
- Does the testimony feel rehearsed/memorized?

Look to

- Demeanor
- Corroboration

Inconsistencies may or may not be important

- Is there a reasonable explanation?
- Is the point significant or trivial?
- Is the variation something that might result from memory lapse?

Standard of Evidence – Preponderance of the Evidence



Preponderance doesn't mean who has more witnesses.

It's the quality of the evidence, not the quantity.

The different standards of evidence

- Beyond a reasonable doubt
- Clear and convincing evidence
- **Preponderance of the evidence**
- Some evidence

Rules of Decorum

Questions must be conveyed in a neutral tone.

Parties and Advisors will refer to others 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 Adjudicators.

While an Advisor may be an attorney, no duty of zealous advocacy should be inferred.

The Advisor may not yell, 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 hearing officer.

The Advisor may not use profanity or make irrelevant ad hominem attacks upon a party or witness.

The Advisor may not ask repetitive questions, including if asked by others. When the hearing officer 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.

Hearing Outcome Letter

The Hearing Outcome Letter will include:

- A description of the allegations that led to the Hearing, as potentially constituting Title IX Sexual Harassment;
- A description of the procedural steps taken from the receipt of the Formal Complaint through the determination;
- A statement of factual findings supporting the determination;
- A statement of the conclusions regarding the application of the policy to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
- An explanation of the disciplinary sanctions imposed on the Respondent, if any;
- Statement of whether remedies designed to restore or preserve equal access to the School's education program or activity will be provided to the Complainant; and
- The procedures and grounds for appeal.

Appeals

Either Party may appeal a determination of responsibility (or non-responsibility) based on only one of the following:

- A procedural irregularity that affected the determination of responsibility;
- The existence of new evidence that was not reasonably available at the time of the Hearing that could affect the outcome of the matter; and
- The Title IX Coordinator, Investigator or Hearing Officer had a conflict of interest or bias for or against Complainants or Respondents generally, or the individual Complainant or Respondent, that affected the outcome of the matter.
- The sanctions imposed are substantially disproportionate to the severity of the violation.
- Dismissal of a Formal Complaint alleging Title IX Sexual Harassment.

There is no hearing on appeal.

Questions, Answers and Discussion

