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Assistant Director, SCI

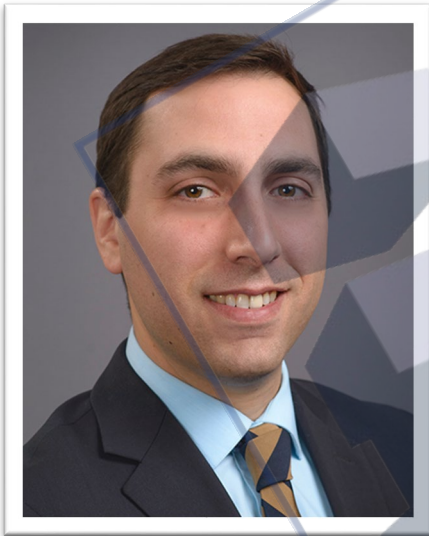
Michelly Peña, M.A.
Assistant Director, SCI

December 2021


SCI

LIVE@ DISTANCE BASIC COMPLIANCE
TRAINING, PART 1

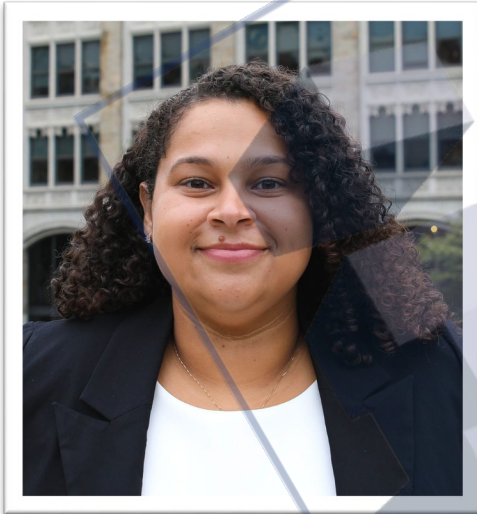
WELCOME TO DAY ONE



Adam Wolkoff, J.D., Ph.D.
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- Legal compliance
 - Model policies and templates
 - Case law and regulatory updates
 -  @SUNYSCI
 - SCItations Blog
- Online learning modules
 - scidigital.suny.edu
- SCI Casebook
- Areas of focus
 - Title IX
 - Student Affairs
 - Disability Law
 - First Amendment Rights
 - Defamation Law

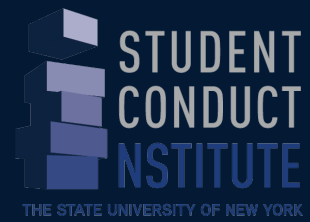
WELCOME TO DAY ONE



Michelly Peña, M.A.
Assistant Director, SCI
Michelly.Pena@suny.edu

- Compliance
 - Model policies, templates, consultation
- Online learning modules
 - scidigital.suny.edu
- Areas of focus
 - Title IX
 - Student Conduct Related Issues
 - Academic Misconduct
 - Assessment
 - Residential Housing

CREDIT AND ATTENDANCE



The goal of this training is to allow you to complete **ALL** of your annual compliance requirements through **full attendance** at this training over the course of four sessions.

Upon completion of this training, you will earn **8 hours** and fulfill all required training topics.

This credit will be listed on your **transcript** and you will be able to download your annual compliance certificate directly from your **dashboard**.

Slides will be posted at **system.suny.edu/sci/postedtraining**



CODE WORDS

Do This

Not That

Verification #1 - Live@Distance Basic Compliance #1(Day 2-4)  

Questions Responses

Verification #1 - Day 2 - Open to all

Thank you for joining us for our Live@Distance Basic Compliance Training series. To obtain SCI credit for attending this training, please fill in the code word and submit this form when prompted during the presentation. You have 15 minutes to submit your response.

Email *

Valid email


This form is collecting emails. [Change settings](#)

First Name *

Exactly as listed on your training registration

Short answer text

Chat

To: **Everyone** 

More 

Type message here...

WHAT ARE THE TRAINING TOPICS?

Title IX Training Topics

(at least one time; annually as best practice):

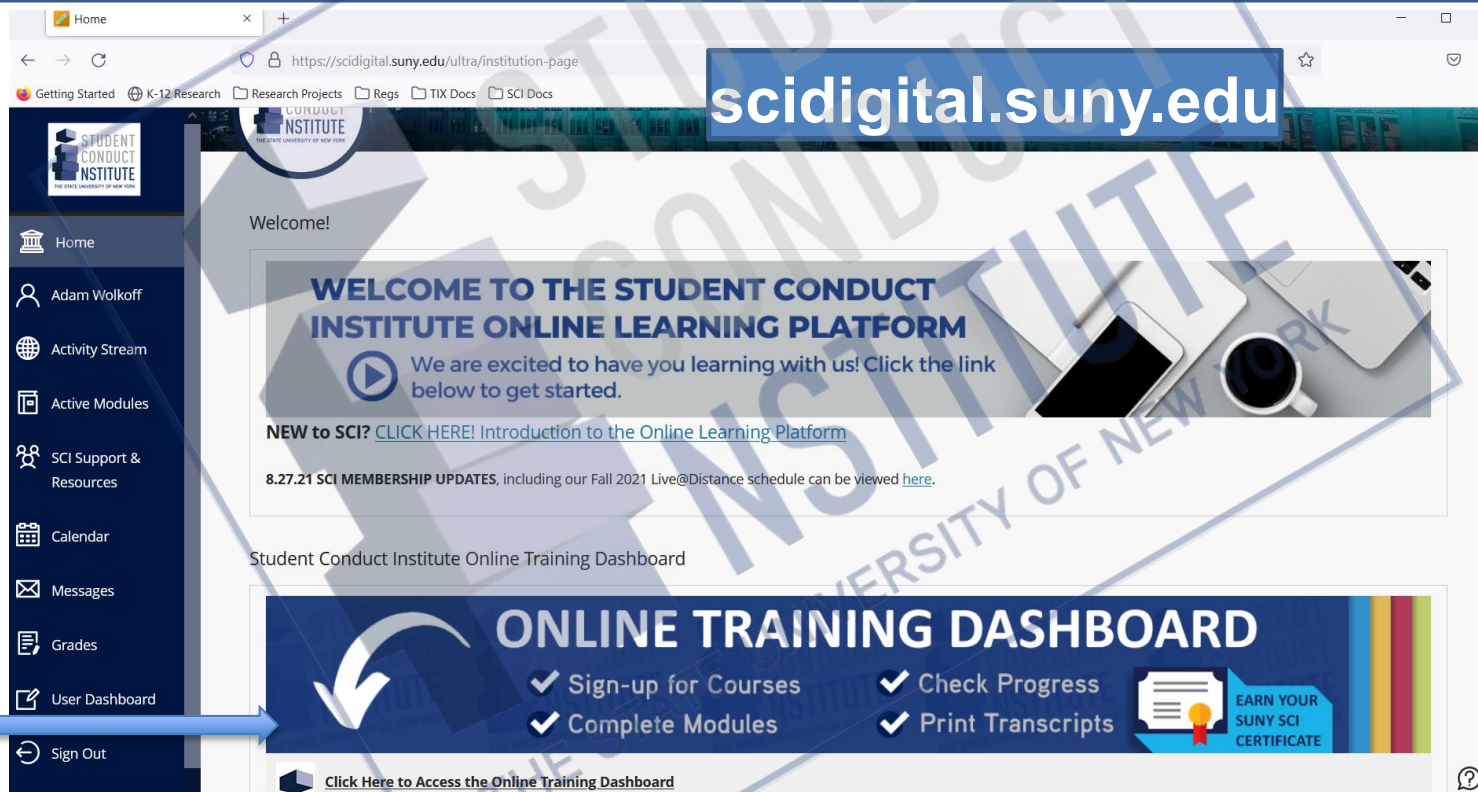
- TIX Conflicts & Bias
- TIX Investigative Reports
- TIX Relevant Evidence
- TIX Technology
- TIX Investigation & Grievance Procedures
- TIX Jurisdiction
- TIX Sexual Harassment

VAWA/Clery Training Topics

(annual):

- Understanding Sexual & Interpersonal Violence
- Investigation Process
- Adjudication Process
- Consent
- Cultural Awareness
- Understanding the Conduct Participant Experience*
- Federal Legal Requirements

ONLINE TRAINING



The screenshot shows a web browser window with the URL <https://scidigital.suny.edu/ultra/institution-page>. The page features a navigation menu on the left with items: Home, Adam Wolkoff, Activity Stream, Active Modules, SCI Support & Resources, Calendar, Messages, Grades, User Dashboard, and Sign Out. A blue arrow points to the 'User Dashboard' link. The main content area includes a 'Welcome!' message, a large banner for the 'WELCOME TO THE STUDENT CONDUCT INSTITUTE ONLINE LEARNING PLATFORM' with a play button icon and the text 'We are excited to have you learning with us! Click the link below to get started.' Below the banner are two links: 'NEW to SCI? [CLICK HERE! Introduction to the Online Learning Platform](#)' and '8.27.21 SCI MEMBERSHIP UPDATES, including our Fall 2021 Live@Distance schedule can be viewed [here](#).' The 'Student Conduct Institute Online Training Dashboard' section contains a large blue banner with the title 'ONLINE TRAINING DASHBOARD' and a list of tasks: 'Sign-up for Courses', 'Complete Modules', 'Check Progress', and 'Print Transcripts'. To the right of the list is a 'EARN YOUR SUNY SCI CERTIFICATE' badge icon. A blue arrow points to the 'Sign-up for Courses' item. At the bottom of the dashboard is a link: 'Click Here to Access the Online Training Dashboard'.

ONLINE TRAINING: TOPICS AND HOURS

Adam Wolkoff
Logged in as Learner
Learner

- Dashboard
- Sign-Up for Course
- Print Transcript

Competency Legend

- Law
- Foundations of Practice
- Conduct Theory
- Content Area Expertise

Search for Courses... **Find Course** Advanced Filters **Proceed to Enrolled Courses >>**

Title IX: Conflicts of Interest and Bias All Content Creators All Delivery Methods All locations

- All Training Topics
- Title IX: Conflicts of Interest and Bias
 - Title IX: Investigation & Grievance Procedures
 - Title IX: Investigative Reports
 - Title IX: Jurisdiction
 - Title IX: Relevant Evidence
 - Title IX: Sexual Harassment
 - Title IX: Technology
 - Adjudication Process*
 - Conflict of Interest & Bias (NY, MA)*
 - Consent*
 - Cultural Awareness*
 - Disability (MA, NH)*
 - Federal Legal Requirements*
 - Investigation Process*
 - Remedial Actions (NY, MA, OR)*
 - Reporting & Confidentiality (NY, IL, MA)*
 - State Legal Requirements*
 - Trauma-Informed Practice (NY, IL, MA, NH, CT, MN)*
 - Understanding Sexual & Interpersonal Violence*

Learning Path
Compliance Learning
Sign-up

2021-2022: Law & The Hearing Panel
Online | Jul 1, 2021
99601 seats available
Hours: 0.5
Info Sign-up

2021-2022: Legal Framework for Understanding Conflicts of Interest and Bias
Online | Jul 1, 2021
99234 seats available
Hours: 0.5
Info Sign-up

2021-2022: Title IX Final Rule Basics
Online | Jul 1, 2021
99138 seats available
Hours: 0.75
Info Sign-up

TRAINING SCHEDULE

Day One

- Hour 1: Due Process & Fair Process
- Hour 2: Federal Law

Day Two

- Incident Reported
- Conduct Process Initiated

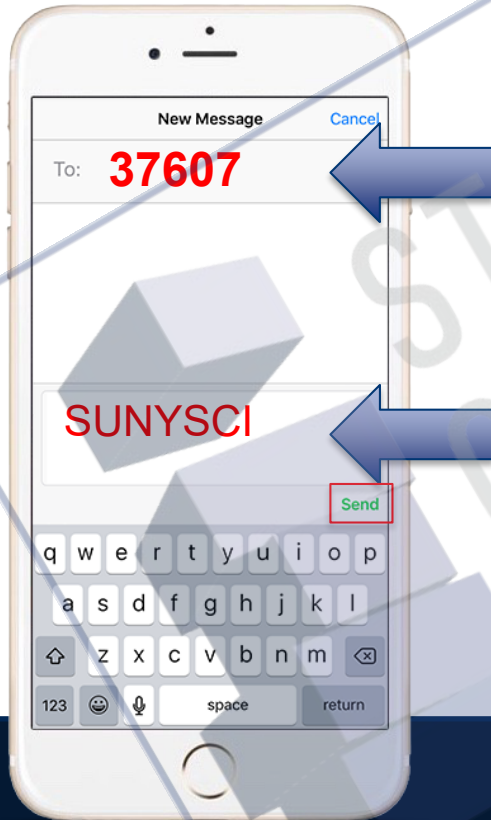
Day Three

- Investigations
- Pre-Hearing Preparations
- Hearings

Day Four

- Decisions
- Appeals
- Implementation & Wrapping Up

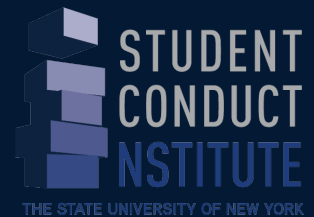
Option #1: Text Voting



Option #2: Web Voting



RESPONDING WITH POLL EVERYWHERE



Would you consider yourself

New professional

Mid-level
professional

Senior-level
professional

Have you ever seen a full student conduct hearing from beginning to end?

Yes

I have only seen a part of a hearing

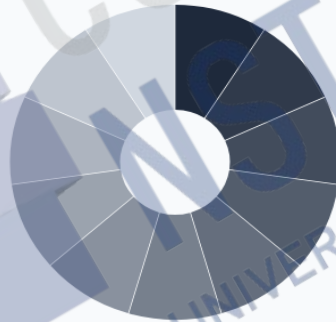
I have never seen a student conduct hearing

How many cases of sexual and interpersonal violence have you worked on?



Which of these functions best matches your role in the student conduct process?

- Title IX staff **A**
- Residence Life **B**
- Student Affairs Admin. **C**
- Hearing Board Member **D**
- Student Justice **E**
- Appeals Board Member **F**
- Human Resources Manager **G**
- Chief Diversity Officer **H**
- Police Officer **I**
- Student Advisor/Advocate **J**
- Other campus professional **K**



How prepared do you feel to handle a TIX case right now?

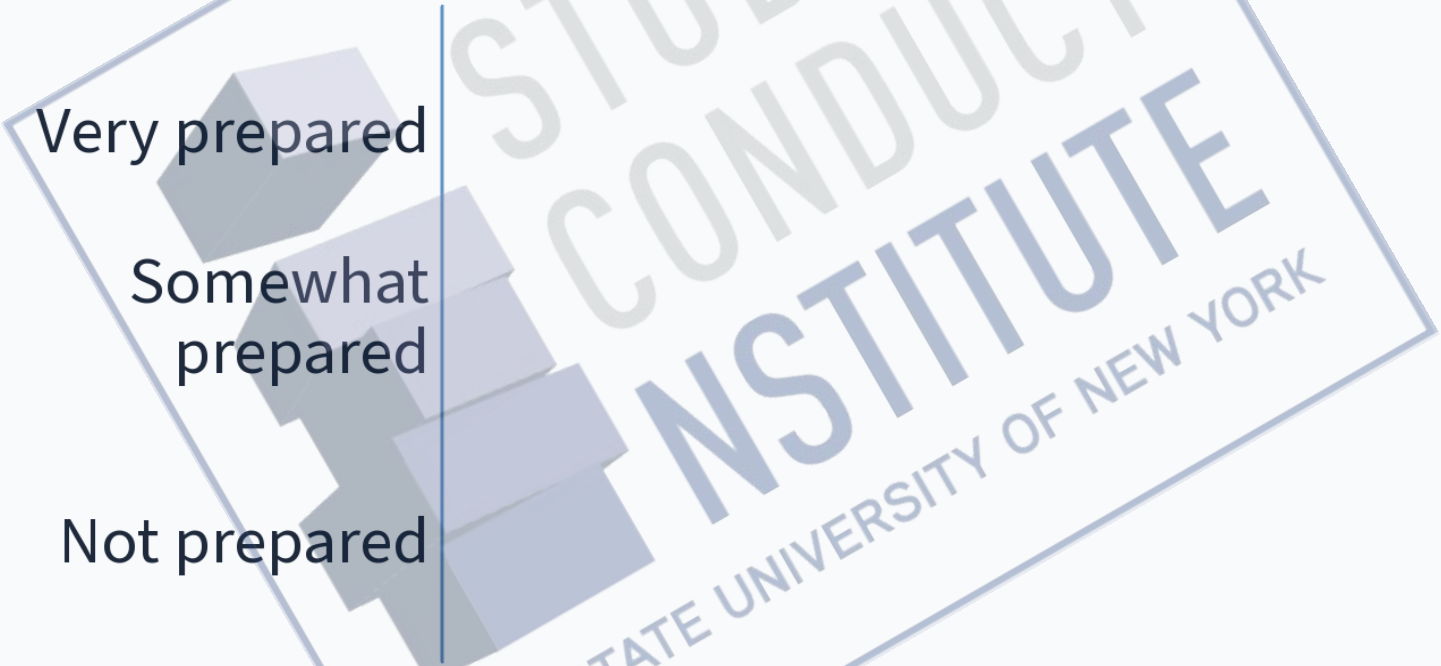
Very prepared

Somewhat prepared

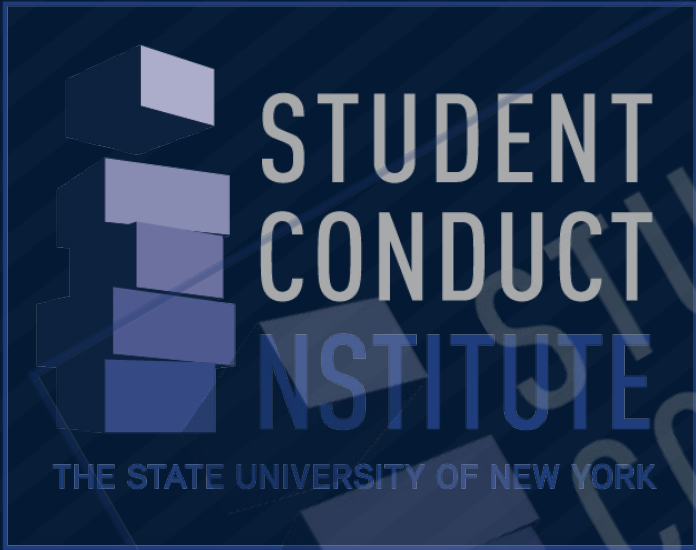
Not prepared

Contemplating other career choices

How prepared do you feel your institution is to handle a TIX case right now?



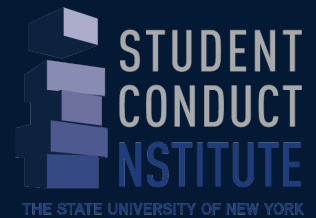
Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app



Adam Wolkoff, J.D., Ph.D.
Assistant Director
SUNY Student Conduct Institute

SCI LEGAL COMPLIANCE BASICS

DUE PROCESS BASICS



DUE PROCESS

Private College

Public College

Fair Process

**Title
IX**

Due Process

SOURCES OF DUE PROCESS

Constitution

Case law interpreting the Constitution

Statute or Regulation or Guidance

- Clery Act/VAWA
- Title IX
- State law (e.g., N.Y. Education Law 129-B)

REMEMBER: Start with your Code

Why does due process matter?

- A. It shapes how we respond to misconduct
- B. It ensures that we treat students fairly
- C. It helps us act in a consistent way
- D. All of the above

HOW MUCH PROCESS?



HOW MUCH PROCESS?

The **distribution of printed or recorded materials** of any kind is prohibited without written approval.

Folding chairs are not allowed. **Selfie sticks, flags, and banners** are prohibited.

Clothing with multiple layers is subject to search. No clothing may drag on the ground.

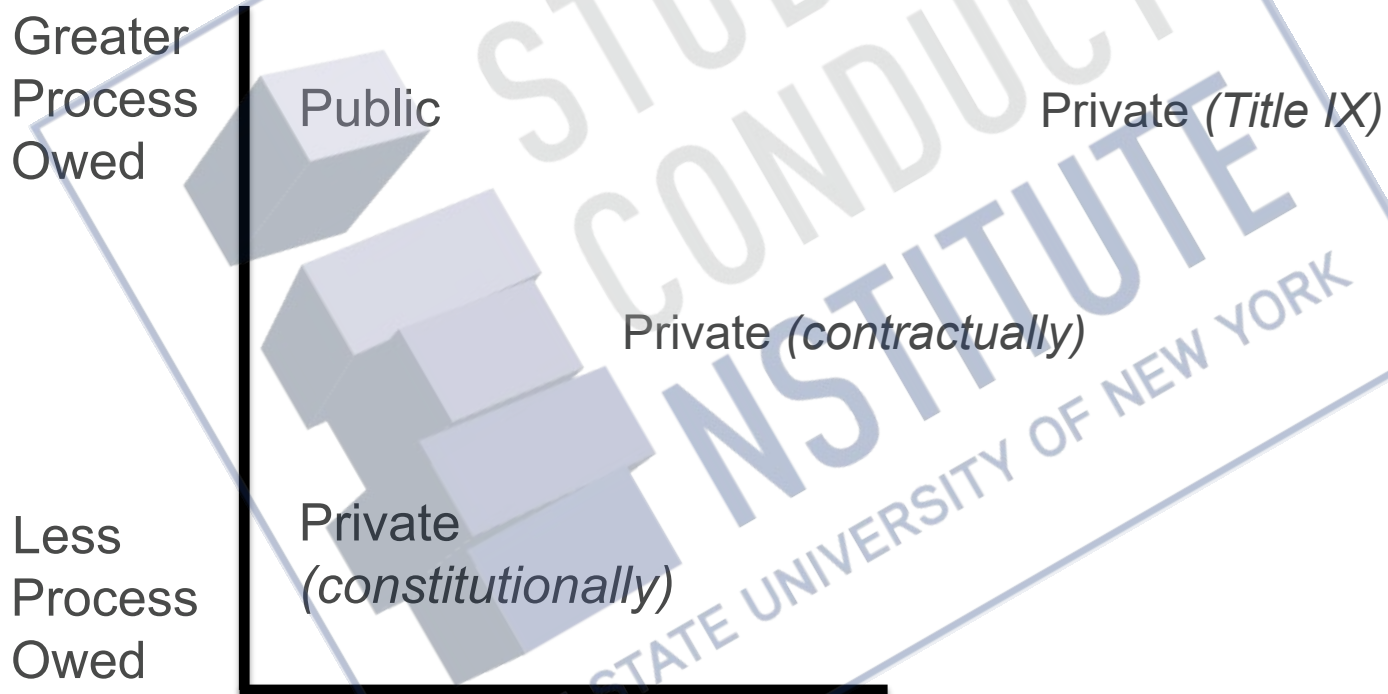
Unauthorized **solicitations of any kind** are not allowed, whether commercial, religious, or educational.

Engaging with other guests or impeding operations **while posing a character in costume** is prohibited.

We can enter any room for safety, maintenance, or other purpose even with **“Room Occupied”** sign up.

We can require a person already admitted **to leave without refund** in our sole and absolute discretion.

HOW MUCH PROCESS?



HOW MUCH PROCESS?

Greater
Process
Owed

Conduct
Charge

Academic disciplinary
charge

Less
Process
Owed

Lack of academic
progress dismissal

HOW MUCH PROCESS?

Greater
Process
Owed

Greater the deprivation
or threat to reputation



EXPELLED



Less
Process
Owed

Lesser or trivial
deprivation



DUE PROCESS: WHAT'S AT STAKE?

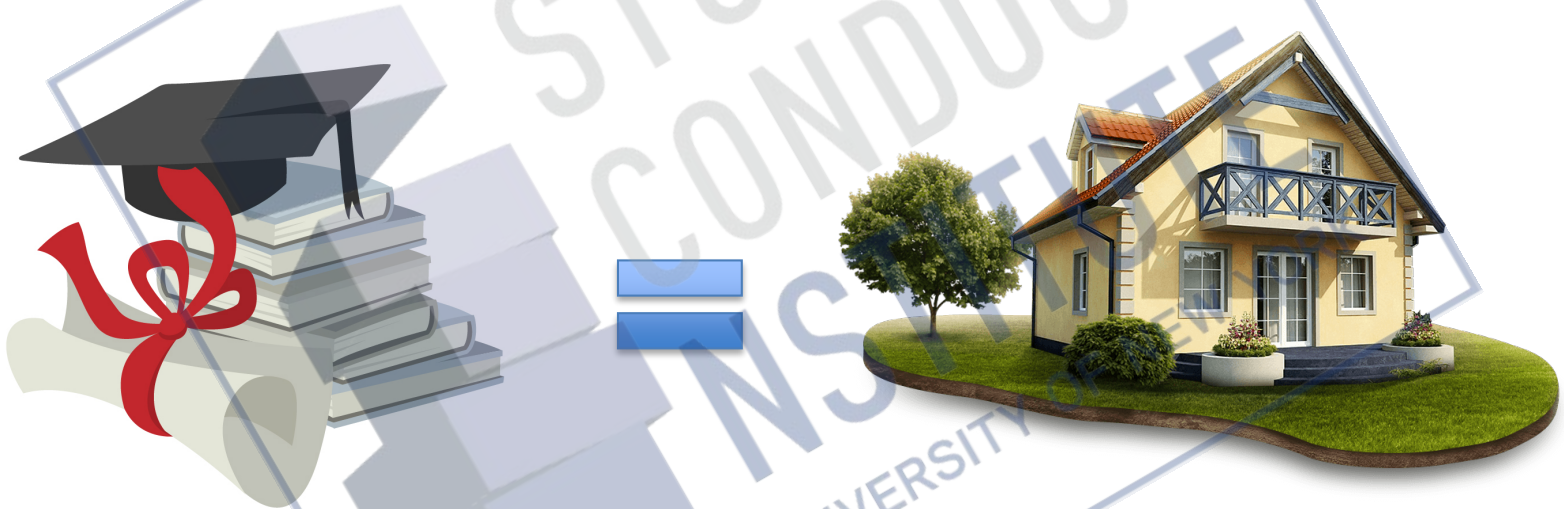


CONSTITUTIONAL STANDARD

No state shall “deprive any person of life, liberty, or property, without due process of law”

14th Amendment, Sec. 1, U.S. Constitution

DUE PROCESS THEORY



GOLDBERG V. KELLY, 397 U.S. 254 (1970)

**Due Process
Before Losing
Statutory
Entitlement
Welfare Assistance**

Yes	No
Timely and adequate notice	No right to formal trial
Hearing before impartial decision-maker	No right to an attorney
Right to present evidence	
Right to cross-examine witness	
Right to written decision	

MATHEWS V. ELDRIDGE, 424 U.S. 319 (1976)

Mathews “Balancing Test” (Social Security Disability Benefits)

Will the current procedure lead to errors, and will a different procedure lead to fewer errors?

What’s the person’s interest, and what happens if the government takes it away?

Would the additional protections be too burdensome for the government to operate effectively?



REPUTATIONAL HARM

“Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”

Hello
my name is

INFAMY

Wisconsin v. Constantineau,
400 U. S. 433 (1971)

DIXON V. ALABAMA, 293 F.2D 150 (5TH CIR. 1961)



Landmark decision outlining what due process is required before removal from public institution

Must include notice and opportunity to be heard

Goodbye (for now) in loco parentis.

GOSS V. LOPEZ, 419 U.S. 565 (1975)

Compulsory public schools must conduct a hearing before suspending students **more than** ten days.

Public education is a property and liberty interest.

But suspensions for fewer than ten days only require a notice and “hearing.”

- And suspensions issued in cases of danger don’t require immediate hearing.

The “hearing” for suspensions lasting fewer than ten days only requires an **“informal give and take.”**

This type of “hearing” does **not** require counsel, cross-examination, or ability to call own witnesses



MAJOR POINTS

- Due Process **strikes a balance** between the rights of the student and the efficient administration of the college and its programs.
- In general, students have the right to a fair hearing, but not a perfect hearing.
- Procedural due process is broad, and is not one-size-fits-all.
- Substantive due process always applies; decisions cannot be arbitrary.
- We are neutral bodies upholding our policies

What right do students have in ALL conduct proceedings, according to the U.S. Supreme Court?

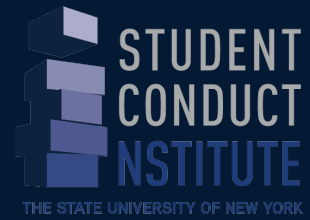
- A. The right to an attorney.
- B. The right to a courtroom trial.
- C. The right to be notified of charges.
- D. The right to cross-examine their accuser.
- E. All of the above.

- Low procedural requirements
 - Notice to the student
 - No right to a hearing (unless in your policy)
- Courts will generally defer to reasonable determinations of faculty and the college, since courts do not have the expertise.
- Decisions must be supported by substantial evidence and cannot be discriminatory based on a protected class.



ACADEMIC DISHONESTY

CODE WORD
ONE: SCOUT

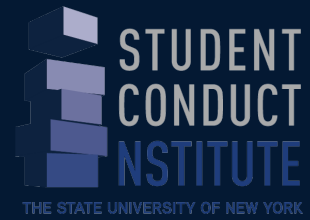


- Somewhat higher minimum process required.
- In general, notice of the charges against the student, some type of hearing or opportunity to be heard, and a written explanation of the decision reached.
- If reasonable and meets substantive due process, courts are loath to overturn.



GENERAL CONDUCT DISCIPLINE

CODE WORD
ONE: SCOUT



- Highly specific notice of charges and witnesses
- Strict adherence to deadlines and published procedures (with possibility of good cause delays)
- Impartial decision-maker
- Access to advisor
- Hearing under college's control
- Written decisions that clearly weigh evidence and describe the reasons for the determination and sanction

DON'T FORGET THE SUBSTANCE

Substantive Due Process

- Remember that we must look beyond the procedure.
- Consistency in process and outcome across cases, years, types, identities of reporting individuals and respondents.
- Sufficient evidence to support the determination.

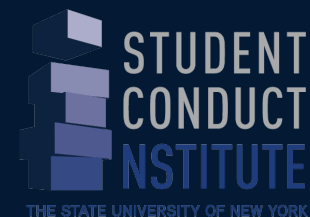
DISABILITY RIGHTS AND THE CONDUCT PROCESS

- Disability does not excuse misconduct, but cannot be basis for discipline
 - College does not need to “fundamentally” alter program to accommodate student with disability (i.e. not enforcing its own policies)
 - Students posing “direct threat” not entitled to accommodation
- Interactive process
 - Advise students about accommodations at intake or charge
 - Student requests before hearing
 - Conduct & TIX Offices have no “constructive knowledge”
 - College provides if reasonably available

A FINAL REMINDER: LITIGATION

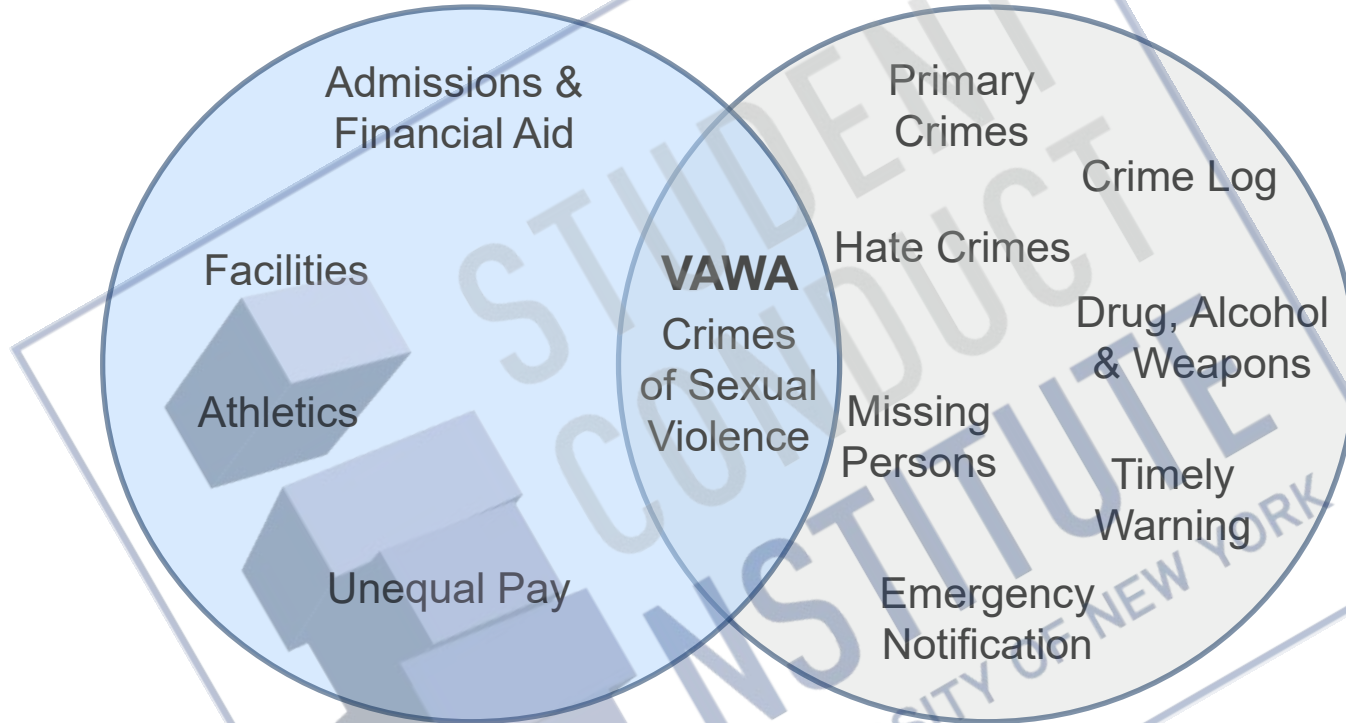
- In litigation, we will be held to the “most,” all others will hold themselves to the “least.”
- So, we do not want multiple, inconsistent policies and Codes that could potentially apply.
- Review for inconsistencies among campus departments. Review old websites.

FEDERAL LAWS AND REGULATIONS GOVERNING TITLE IX INVESTIGATIONS



Title IX

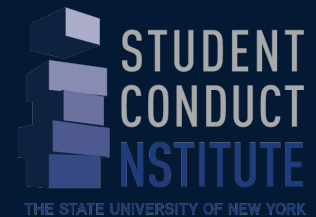
Clery



* State Law?



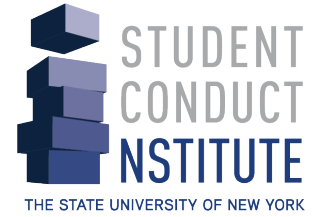
TITLE IX AND CLERY



VIOLENCE AGAINST WOMEN ACT

- **2013 Violence Against Women Act Amendments to the Clery Act**
- Broader jurisdiction than Title IX Final Rules
- Disciplinary procedures must include a fair, prompt, and impartial investigation and resolution and be conducted by “officials” who receive “annual training”
- Must publish all available sanctions for Clery crimes
- Mandatory written notifications
- Access to an advisor, who may be an attorney
- Publish a statement of the standard of evidence

CLERY ACT/ VAWA ANNUAL TRAINING MANDATE



Campus Investigators must be trained annually in:

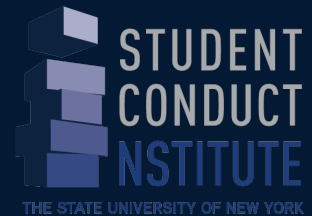
- Conducting investigations of sexual violence
- Issues involved with domestic violence, dating violence, stalking or sexual assault
- Promoting victim safety and accountability
- Impartiality and avoiding “actual” and “perceived” conflicts of interest

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

-Title IX of the Education Amendments of 1972



TITLE IX



~~1997/2001 Sexual Harassment Guidance~~

~~April 2011 Dear Colleague Letter and April 2014 Q&A~~

~~September 2017 Dear Colleague Letter~~

November 2018 Notice of Proposed Rulemaking (“NPRM”)

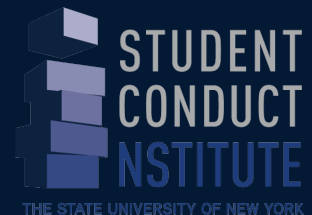
May 19, 2020: Title IX Final Rules (effective August 14, 2020)

April 6, 2021: Dear Stakeholders Letter

July 2021 Q&A + August 24, 2021 Letter to Stakeholders



RELEVANT DOCUMENTS



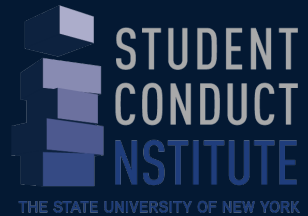
system.suny.edu/sci/news

system.suny.edu/sci/tix2020

Twitter @SUNYSCI



RELEVANT DOCUMENTS

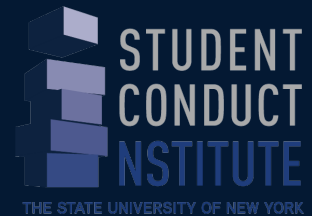




- Not all matters historically considered “Title IX” cases fall within this scope
- Narrows the geographic scope of institution’s obligation to respond
- Narrows the types of “sexual harassment” subjected to Title IX investigation and adjudication
- Conduct falling outside scope may still be resolved through a non-Title IX process



TITLE IX FINAL RULE: SCOPE



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

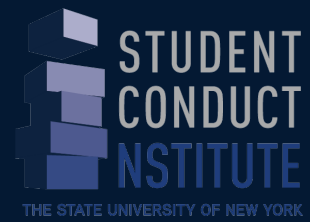
Severe or pervasive harassment

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.

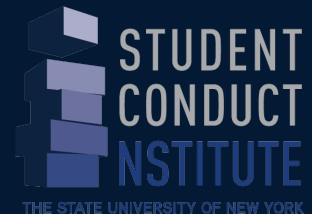
Responsible employee framework not mandated, but allowed.

Institution may designate employees as confidential.



WHEN REQUIREMENTS KICK IN

**CODE WORD
TWO: MOUSE**

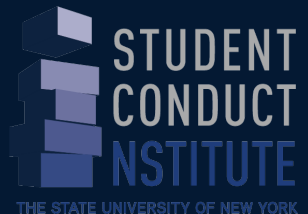


- Title IX Coordinator is responsible for “coordinating the effective implementation of supportive measures,” even where no formal complaint is filed. 34 C.F.R. § 106.30(a).
- Examples of supportive measures (See, 85 Fed. Reg. 30026, 30401)
 - counseling
 - extensions of deadlines or other course-related 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**



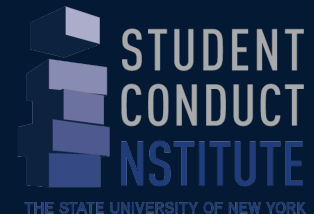
- **CAUTION:** Interim suspensions are prohibited for Title IX student-respondents
 - Department of Education considers them disciplinary sanctions
- Emergency Removal may be used where:
 - Person poses threat of immediate **physical** harm
 - Threat arises from allegations of sexual harassment
 - Depends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



- 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

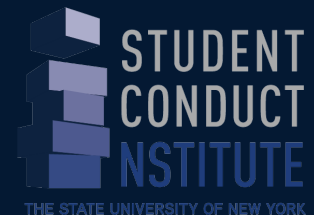
- Allegations of sexual harassment
- Identities of parties, if known, including the complainant's name
- Date, time, and location of the incident, if known
- Parties' basic procedural rights
- Presumption of non-responsibility

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)

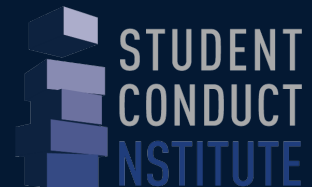
Investigative Report

- 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
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INVESTIGATIVE PROCESS



THE STATE UNIVERSITY OF NEW YORK

- **Prompt**

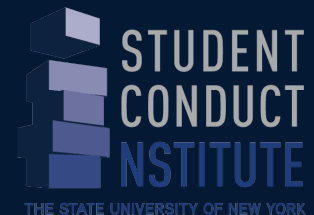
- Final Rules require publication of time frame based on a specific number of days with room for “good cause” delay
- Rules (and case law) balance prompt resolution and adequate time to prepare and respond to charges

- **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.



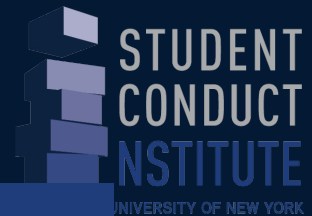
RELEVANT QUESTIONS



- 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



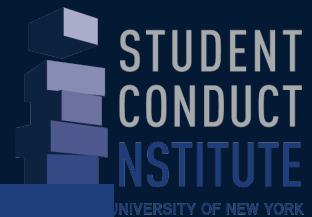
DETERMINATION REGARDING RESPONSIBILITY



- 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



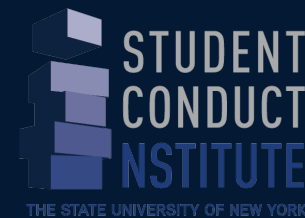
BIAS AS DUE PROCESS VIOLATION

“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

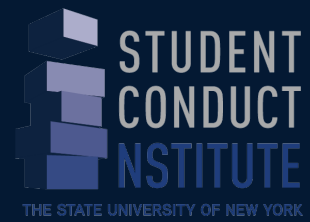
Not a *per se* conflict or bias

- 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
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