

# University of Hartford



## Title IX Sexual Harassment Policies and Procedures: Training for Coordinators, Investigators, Advisors and Adjudicators

Amy C. Foerster, Co-Chair, Higher Education Practice Group

*August 13, 2020*

# Agenda

## **Key Definitions**

Prohibited Conduct

Education Program or Activity

## **Reports**

Notice

Supportive Measures

## **Grievance Process**

Formal Complaints

Informal Resolution

Investigations, Hearings and Appeals

# Definitions – Prohibited Conduct

**Prohibited Conduct = Title IX Sexual Harassment *and* Community Standards Sexual Misconduct**

## **Title IX Sexual Harassment**

Definitional + Jurisdictional Components

Definitional: Conduct on the basis of sex that involves an employee of the University conditioning the provision of an aid, benefit, or service of the University 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 the University'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 – Prohibited Conduct

**Title IX Sexual Assault:** Any of the following Prohibited Conduct –

- 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 – Prohibited Conduct

**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 Connecticut, 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 Connecticut.

# Definitions – Prohibited Conduct

**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 – Prohibited Conduct

## **But, must meet Title IX jurisdictional requirements:**

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

- In the United States, and
- In Hartford's education program or activity, which is defined as locations, events or circumstances over which the University 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 the University.

**What are Hartford's programs and activities?**

# Definitions – Prohibited Conduct

## Community Standards Sexual Misconduct

Conduct by an individual or a recognized student organization that does not constitute Title IX Sexual Harassment, but that (a) has continuing adverse effects on or creates a hostile environment for individuals participating or attempting to participate in University of Hartford's education program or activity, or otherwise has a reasonable connection to University of Hartford; and (b) constitutes one of several enumerated violations.

# Reporting Potential Prohibited Conduct

## Anonymous Reporting

### Reports to Authorized and Responsible Employees

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

- Constitutes a report to the University (*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 the University (*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 Hartford'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 Prohibited Conduct.

# 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 the University investigate the allegations of Prohibited Conduct.

- 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 University'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 Prohibited Conduct, 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 Prohibited Conduct 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 University'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 the University'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 the University; or
- Specific circumstances prevent the University 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.**

# Informal Resolution

## Available only when:

- Formal Complaint has been filed;
- 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.

**May 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.**

- Documents and other information produced or exchanged during the Informal Resolution can be used in the Formal Process.
- The Informal Resolution Facilitator may serve as a witness at the hearing.

# Conducting the Investigation – University of Hartford’s Policy

**Investigator must be free from bias or conflict of interest.**

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

- Parties will be provided with written notice of the date, time, location, participants and purpose of their investigative interviews.
- 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.
- Parties may be accompanied by an Advisor of their choice at any investigative interview.

## 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, the University 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 University representative conducting the meeting, interview or hearing.
- An 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 the University may consider short delays in scheduling to reasonably accommodate an Advisor's availability, doing so is in the sole discretion of the Hartford 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: [dcarter@Hartford.edu](mailto:dcarter@Hartford.edu)

From: Jenna

Date: October 1, 2020

Michael came over to my suite after a party back in early September. 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. Hartford needs to do something so he doesn't do this to anyone else.

## Jenna's Initial Interview Narrative

I was at a party downtown with a group of friends in early September when I saw Michael. I don't really know him, but we had a class together last year. He came over and was hanging out with me and my friends. We were all talking, drinking and dancing in a big group. At some point, Michael and I started kissing.

I was feeling pretty buzzed and decided to leave around midnight. My roommate, Molly, didn't want to leave the party yet so Michael offered to walk me back to my suite. When we got there, he followed me into my bedroom 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 early in the morning. When I woke up around 7 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 party around 11 p.m. and saw Jenna dancing with friends. She waved me over. We had an Econ class together in the spring. I knew she was interested in me at the time, but I had a girlfriend. We hung out for maybe an hour at the party and kissed a couple times. I think we were both buzzed, but not bad. Around midnight, she said she was going home. Her friend didn't want to leave yet, so I offered to walk her.

When we got to Jenna's building, we ran into my friend Steve in the stairwell and talked with him for a couple minutes. When we got to Jenna's suite, we walked straight back to her bedroom and 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 she 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 5 a.m.

Jenna sent me a text later that day wanting to talk. 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.

## Steve's Initial Interview Narrative

I was in the stairwell of my dorm heading back down to my room at around 1 a.m., when Michael and Jenna came running through. We talked for a couple minutes. Michael and I hung out with a group of guys at the beach back in June, but I hadn't seen him yet this year. So, we just talked about how the rest of our summers went and what our schedules look like this fall. Jenna was going on and on about her summer job.

The whole run-in with Jenna was kind of awkward. She and I were both orientation advisors back in August, so I got to know her a bit. We were both at a party downtown one of the nights of orientation. Everyone was pretty drunk. Jenna's roommate, Molly, was there and we were dancing. Out of nowhere, Molly stuck her hand down my shorts, pretty much right there in the middle of the basement. I'm not into her and told her so right there – I was really bothered by it. Jenna got in my face and said I was making a big deal out of nothing. There was way too much drama.



# The Investigation Report



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 – Hartford’s Policy and Procedures

**Allow opening statements.**

**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.

- If a Party does not submit to cross-examination, the Hearing Officer must not rely on any statement of that Party 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.
- 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.

# 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.

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

## Jenna's Testimony

I saw Michael at a party downtown in early September. I was there with a group of friends. He came over and was hanging out with me and my friends. We were all talking, drinking and dancing in a big group. At some point, he started kissing me.

The party was boring. Plus, I was pretty drunk and wanted to leave. I thought I was going to throw up. My roommate, Molly, didn't want to leave the party yet so Michael offered to walk me back to my suite. He practically had to carry me back. When we got there, he followed me into my bedroom and sat down on my bed. I really just wanted to go to sleep, but he wouldn't leave. 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. I was clearly done with what was happening. I just wanted to sleep. 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 scared. I told him that I didn't want to have sex.

I don't remember anything else. He left sometime early in the morning. When I woke up around 7 a.m., I saw a condom wrapper on the floor and remembered us having sex.

## Michael's Testimony

I got to the party around 11 p.m. and saw Jenna dancing with friends. They were all drinking. Jenna waved me over. She was really flirty and started kissing me. I was sort of buzzed, but not bad. She seemed ok. Around midnight, she said she was going home. Her friend didn't want to leave yet, so I offered to walk her.

When we got to Jenna's building, we ran into my friend Steve in the stairwell. The three of us talked about our summer internships for quite awhile. Jenna said she was tired and started walking away, so we wrapped it up. When Jenna and I got to her suite, we walked straight back to her bedroom. We sat down 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 – she just wanted us to go to sleep. But then she kept kissing me, took her shirt off and helped me take off my jeans. We had sex and fell asleep. I woke up and left around 5 a.m.

Jenna sent me a text later that day wanting to talk. I didn't respond right away because I wanted 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 that was it.

# 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 other parties, witnesses, Advisors, and institutional staff using the name and gender used by the person.

No party may act abusively or disrespectfully during the hearing toward any other party or to witnesses, Advisors, or Hearing Officers.

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

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. Questions are meant to be interrogative statements used to test knowledge or understand a face; they may not include accusations within the text of the question.

The Advisor may not ask repetitive questions.

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 Prohibited Conduct;
- 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 University'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.
- Dismissal of a Formal Complaint alleging Title IX Sexual Harassment.

**Non-appealing party may respond, but no further exchange of positions is permitted.**

**The Appeal Officer will evaluate the appeal on the written record and recording of the Hearing, and may seek input from the Title IX Coordinator, Investigator and/or Hearing Officer as deemed appropriate in the Appeal Officer's sole discretion.**

