



Title IX Investigator Training

Policy 311-A

Introduction

Vermont State Colleges has several policies to address our obligations relating to specific legal challenges, including sexual misconduct and sexual harassment.

This training will provide The Title IX/Policy 311-A Investigator(s) with an overview of these policies, as well as provide specific information regarding the Investigator's role and processes.

Overview

- Current Title IX regulations effective August 14, 2020
- Policy 311-A (sexual harassment/sexual assault policy)

TITLE IX REGULATIONS

Title IX

- Prohibits discrimination on the basis of sex in any federally-funded education program or activity
- Protects ALL students
- Protects ALL employees
- Enforced by Dept. of Education's Office for Civil Rights

Title IX and Current Regulations

- The definition of Title IX sexual harassment covers:
 - A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called **quid pro quo harassment**)
 - Unwelcome conduct on the basis of sex that is so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school's education program or activity
 - **Sexual assault**, as defined under the Clery Act

Clery Act: The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act

- Requires all colleges and universities that participate in federal financial aid programs to keep and report information about crime on or near their campuses.
- Employees designated as Campus Security Authorities under the Act are required to report certain crimes to their campus Office of Public Safety to comply with the Act.
- The Offices of Public Safety for the member Colleges will include any reported incidents of **dating violence, domestic violence, sexual assault, and stalking, along with other crimes,** in the campus daily crime log and annual security report, as required by the Clery Act.
- Public Safety also responsible to issue timely warnings of crimes or threats to the VSC community or if it becomes aware of such reports made to local law enforcement.
- No personally identifying information is included in the public reports required by the Act.

Title IX and Current Regulations

Schools obligated to respond to complaints when:

1. The school has actual knowledge of sexual harassment;
2. that occurred within the school's own “education program or activity”;

This means conduct occurs in a location, at an event, or in a circumstance where VSC exercises substantial control over both the respondent and the context in which the conduct occurs

3. against a “person in the United States.”

POLICY 311-A

Title IX at VSC: Policy 311-A

VSC addresses Title IX through Policy 311-A, which has the following Policy Statement:

The VSC is committed to maintaining an educational and working environment free from all forms of sex discrimination, including sexual harassment ... and committed to maintaining an educational and working environment free from sexual exploitation, domestic violence, dating violence, sexual assault, and stalking.

Policy 311-A

- VSC Policy 311-A: *Sexual Harassment, Sexual Exploitation, Domestic Violence, Dating Violence, Sexual Assault, and Stalking*
 - Defined **scope of coverage**
 - Includes a prohibition on “retaliation”
 - Terms throughout
 - “complainant”
 - “respondent”

Policy 311-A: Scope of Coverage

- Controlling definition: **Prohibited Conduct**
 - **Title IX Sexual Harassment**
 - Within VSC “program or activity”
 - » exercises substantial control over both the respondent and the context in which the conduct occurs
 - » in any building owned or controlled by a student organization recognized by VSC
 - Within the United States
 - **Non-Title IX Sexual Misconduct**
 - Nearly identical definitions BUT can include off-campus conduct (outside “program or activity”)

Policy 311-A: Scope of Coverage

- **Non-Title IX Sexual Misconduct**
 - Same conduct as Title IX Sexual Harassment, but broader application, outside “programs or activities”

Policy 311-A: Scope of Coverage

Title IX & Non –Title IX Sexual Harassment includes:

- Quid Pro Quo Sexual Harassment
- Severe, Pervasive **and** Objectively Offensive Sexual Harassment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Sex-based Stalking

Policy 311-A Definition of Consent

- Words or actions that demonstrate to a reasonable person a knowing and voluntary agreement to engage in mutually agreed-upon sexual activity.
- Cannot be gained by threat, force, coercion or intimidation or by ignoring words or actions that indicate a lack of consent or objection to the activity.
- Consent to one form of sexual activity does not imply consent to other forms of sexual activity.
- Consent can be rescinded at any time.
- Silence, lack of protest, or lack of resistance are not sufficient standing alone to establish consent.

POLICY 311-A IMPLEMENTING PROCEDURES

Policy 311-A: Implementing Procedures

- Provides supportive measures
- Spells out the process for
 - Receiving reports and initial review of allegations
 - Sending out notice to parties
 - Investigation (interviews, gathering evidence)
 - Drafting and reviewing investigation report
 - Live hearing and adjudication of responsibility
 - Sanctions and appeals

Policy 311-A: Implementing Procedures

Two Outcomes:

- Formal Decision
- Informal Resolution
 - Only if all parties and Title IX Coordinator agree it would be appropriate
 - Could use mediation or restorative justice model

Who Makes The Formal Decision In Title IX/311-A Matters?

Policy designates the Hearing Officer to determine responsibility and the Responsible College Administrators (RCA) to determine sanctions (if appropriate), as follows:

- Complaints involving students → RCA Dean of Students/designee
- Complaints involving employees → RCA President/designee
- Complaints involving Chancellor or Trustee → RCA Board Chair

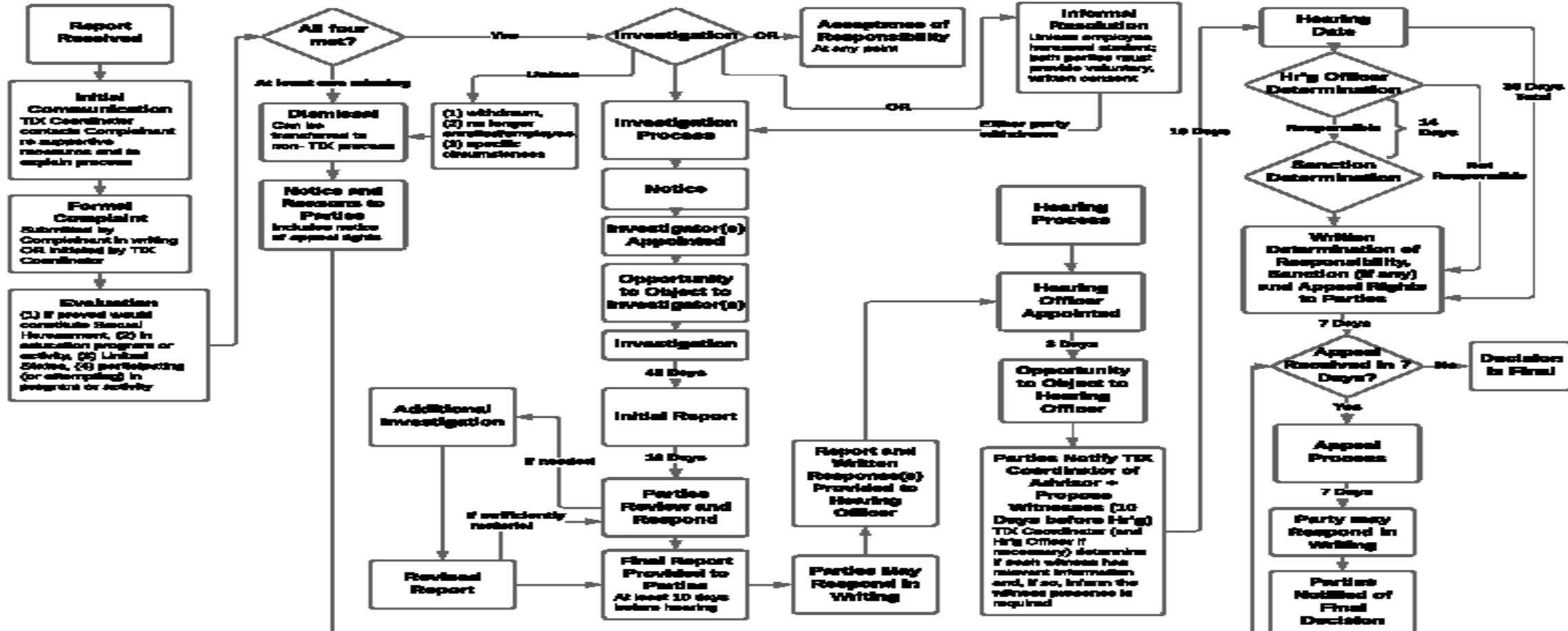
PROCESS

The Reporting Process

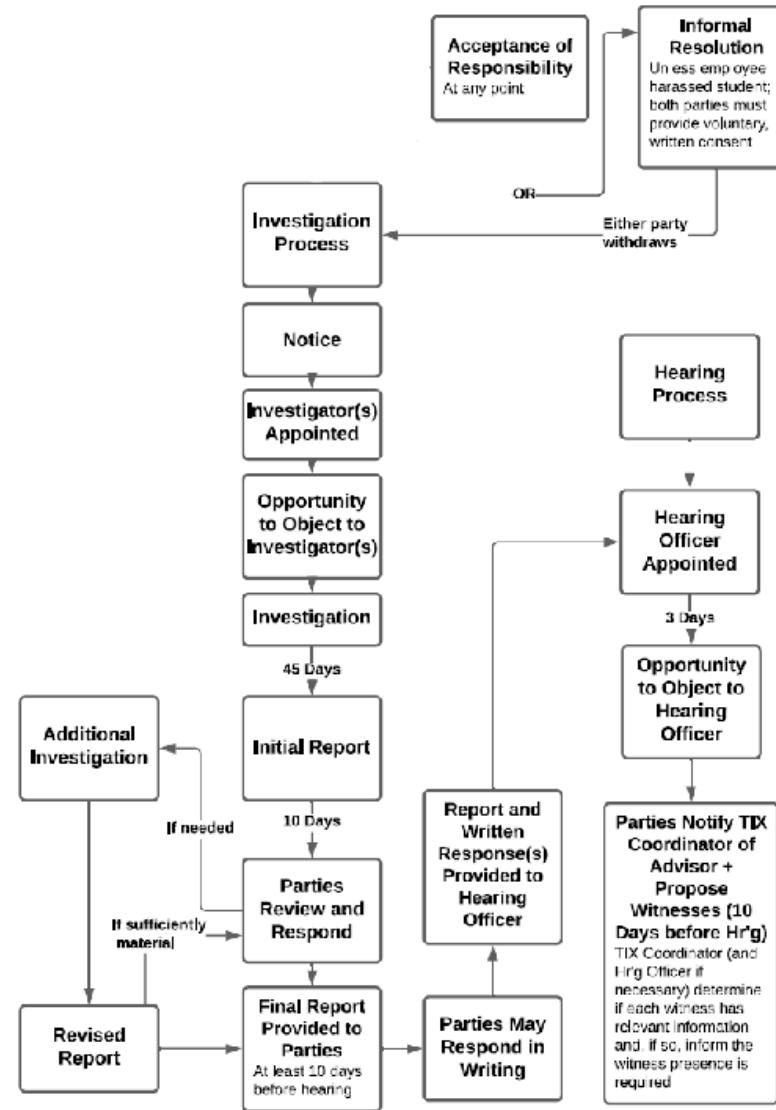
Complaints are reported to one of the following:

- College Title IX /Policy 311 Coordinators –see Appendices to Implementing Procedures
- College Dean of Students
- College President
- Director of Human Resources- if the employee works in the Office of the Chancellor

The Process



Investigation Process Focus



THE INVESTIGATION

Appointment of Investigators

- The Title IX Coordinator will appoint at its discretion an investigator or investigators who is/are impartial, qualified, and trained, to investigate complaints alleging violations of Policy 311-A.
- The complainant or respondent may raise an objection to the selection of a particular investigator if either believes there is a conflict of interest or demonstrable or reasonably perceived bias on the part of the investigator.
- Any such objections must be raised upon receipt of notice of the appointments.
- The RCA shall have final authority in the appointment of investigators

Conducting the Investigation

- Conduct an investigation that is prompt, fair, impartial, and appropriate under the circumstances.
- The nature and scope of the investigation is within the discretion of the investigator.
- Conducted as promptly as possible, without compromising thoroughness.
- Endeavor to prepare their report within 45 calendar days from their appointment to serve as investigator, excluding scheduled breaks during the fall and spring semesters and other VSC Holidays or closures.

*This timeframe may be extended for good cause with written notice to the parties of the delay and the reason(s) for the delay.

Witnesses and Evidence

Interview the complainant, respondent, and any witnesses separately.

The complainant and respondent will be asked to identify:

- (a) relevant evidence they would like the investigator to review;
- (b) witnesses they would like the investigator to interview; and
- (c) questions they would like the investigator to ask the witnesses.

Witnesses and Evidence cont'd

- Has discretion as to what evidence to pursue, which witnesses to interview, and which questions to ask, depending on their determination of what they reasonably believe to be related to the issues in dispute.
- Authorized to contact any and all individuals who may have relevant information.
- VSC recognizes, however, that individuals who are bound by legal privileges may not be able to disclose privileged information, unless an exception applies.
- The investigator is authorized to access relevant records, except those legally protected as confidential or privileged, and may collect any additional evidence relevant to the complaint. The investigator will not access, consider, disclose or otherwise use a party's privileged records without the party's voluntary, written consent to do so, and such information will not be deemed relevant to an investigation or adjudication absent the voluntary, written consent of the party

Best Practices – Pre- Investigation

- Create a pre-investigation plan:
 - Clearly identify the allegation summary and the alleged policy violation
 - Organize all materials (including submitted evidence)
 - Identify other known evidence that you wish to collect
 - Outline parties you wish to interview
 - Outline witnesses (initially known) that you wish to interview
 - Organize and send interview notices prior to interview

Best Practices – The Meeting

- Start the meeting with introductions, review of the reason for the meeting and notice on the prohibition on retaliation.
- Ask to keep the substance of the meeting as private as possible in order to protect the integrity of the investigation and inhibit allegations of retaliation.
- Communicate to the party that they are permitted to take breaks as needed.
- Document everything. Take notes during interviews (handwritten and/or typewritten), even if recording.
- Maintain an investigation file.

Best Practices – Questions

- **Begin with open ended questions.**
- Allow the party to share their full perspective first and circle back with clarifying and/or pointed (closed ended) questions.
- Gather Who, What, When, and Where.
- Do not assist parties in answering questions.
- Frame questions to obtain thorough detail of the occurrence (i.e. location hand was placed, position of hand, how long “seconds/minutes” the hand was placed)
- Gather information about smell, sight, and sound.
- Leave no question unanswered.

Best Practices - Corroborate

Corroborate the party's or witnesses' statement by using available information such as witness interviews and evidence.

Best Practices - Documentation

Request screen shots or copies of ANY relevant material referenced during the meeting (police reports, call logs, documents, text messages, emails, voicemail recordings, video recording, names and contact information for individuals mentioned).

Hypothetical

Student A reports that they were drinking last Tuesday night. While walking back to their residence hall, they stopped on the steps of the dining hall to rest and regain balance. At the dining hall, they saw an acquaintance, Student B. Student A and Student B chatted. Student A and Student B went to Student B's residence hall to hang out. Student A doesn't not recall anything further until they awoke nude in the bed of Student B. Student A reports non-consensual sexual intercourse due to incapacitation.

What questions should we ask of the parties?
What information is imperative?

Advisors

- Complainants and respondents are entitled to the same opportunity to have an advisor of their choosing present at any interview or meeting they have with an investigator.
- Any such advisor may advise the complainant or respondent privately, but cannot act as a speaking advocate.
- An investigator may terminate the meeting and proceed with the investigation based on otherwise-available information if an advisor refuses to comply with these requirements.

*Because a Policy 311-A investigation may lead to discipline, a respondent who is a bargaining unit member has the right to be accompanied to the interview by a union representative.

Additional Policy Violations

During the investigation, if other allegations against the respondent surface which could result in discipline under this policy, other VSC policies, policies of the Member Institution, any collective bargaining agreement, or personnel handbook, the investigator will inform the respondent, in writing, of such allegations and the respondent will be given an opportunity to respond to the additional allegations before the investigators submit their report.

- If the alleged additional violations are related to the allegations contained in the complaint, they will be handled through the procedures otherwise applicable to allegations in the formal complaint, as provided below.
- If the alleged additional violations are unrelated to the allegations contained in the complaint, the VSC may choose to address these separately and not as part of the ongoing investigatory and adjudicatory process.

Title IX Sexual Harassment ONLY -

Investigation

- The following general investigation-related provisions are applicable only to the investigation of matters that fall within the definition of Title IX Sexual Harassment, as required by May 2020 Title IX regulations. In such matters, the following provisions will apply:
- Parties' equal opportunity to present witnesses may include evidence from fact and expert witnesses; and
- Parties are not restricted in their ability to discuss the allegations under investigation or to gather and present relevant evidence; and
- Parties whose participation is invited or expected will receive written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

Preliminary Investigative Report

- In both Title IX Sexual Harassment matters and Non-Title IX Sexual Misconduct matters, when the investigator has completed witness interviews and the gathering of evidence as deemed appropriate by the investigator, the investigator will prepare a preliminary investigative report.
- The preliminary investigative report will summarize relevant evidence but will not contain any recommendations regarding whether the respondent violated Policy 311-A or any other VSC policy at issue.
- **A report template will be provided for assistance.**

Title IX Sexual Harassment ONLY – Preliminary Investigative Report

- VSC will provide each party with an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised, including the evidence upon which VSC does not intend to rely in reaching a determination regarding responsibility and/or which the investigator does not deem relevant, and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

Such evidence will **not include un-redacted privileged records or information that may have been gathered or received during the investigation, absent written consent from the party holding the privilege.*

- VSC will send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.
- Parties and advisors are not permitted to download, print or copy such evidence subject to inspection and review, and are not permitted to re-disclose such evidence without VSC's permission.

**Parties and advisors will be required to sign an acknowledgment form indicating that they understand these prohibitions. Violations of these prohibitions may subject parties to VSC discipline under applicable conduct codes.*

Review/Response to Preliminary Report

The complainant and the respondent will have an opportunity to review the preliminary report, and:

- provide written responses to the report. The complainant and the respondent must submit any comments, feedback, additional documents, evidence, suggested questions for individuals interviewed, requests for additional investigation, names of additional witnesses, or any other information they deem relevant to the investigator, additional documents or other evidence, within 10 calendar days after the preliminary report is sent to them for review.
- The parties' written responses will be considered by the investigator prior to completion of the final investigative report, and some or all of the responses may be attached or otherwise incorporated into the final investigative report.
- In the event that new, relevant information is provided or identified at this stage, the information will be incorporated into the preliminary report as deemed appropriate by the investigator, and, if the investigator, in consultation with the Title IX Coordinator, determine the new information is **sufficiently material to the investigation**, the complainant and the respondent will be provided a second opportunity to review and provide a written response regarding the new information within five calendar days, which the investigator will consider prior to completion of the final investigation report.
- Identification of new and relevant information after the parties' review of the preliminary report is likely to extend the time frame of the investigation.

Final Investigative Report

After considering any written response submitted by either party, or after the 10 calendar day comment period has lapsed without receiving a written response or responses:

- The investigator will address any relevant issues identified by the complainant and/or the respondent, and as appropriate, pursue any additional investigative steps as needed.
- The final investigative report may include the investigator's recommendation as to whether the respondent should be found responsible for violating the policy provisions at issue.
- The investigator's recommendation, if any, will be reached by applying the preponderance of evidence standard, i.e., whether it is more likely than not that the policy was violated.
- The final investigative report will be reviewed by the Title IX Coordinator before it is issued.
- Final investigative reports will be provided simultaneously to the parties and their advisors, if any, and a copy will also be provided to the VSC's general counsel.

Title IX Sexual Harassment ONLY – Final Investigative Report

- The final investigative report created by the investigator will fairly summarize relevant evidence and include as exhibits evidentiary materials as deemed appropriate by the investigator;
- At least 10 calendar days prior to the hearing referenced below, VSC will send to each party and the party's advisor, if any, the final investigative report and exhibits in an electronic format or a hard copy, for their review and written response;
- Any written response a party wishes to provide must be submitted to the Title IX Coordinator or designee within 10 calendar days of receiving the final investigative report and exhibits; and
- The final investigative report and the parties' written responses, if any, will be provided to the hearing officer in advance of the hearing.

The Investigator

- Serves impartially
 - Avoid prejudgment of the facts at issue, bias, and conflicts of interest

RELEVANT EVIDENCE

Relevance Determinations

- Relevance is not defined in the regulations
- Per the Regulations:
 - Ordinary meaning of relevance should be applied throughout the process
 - Fact determinations reasonable can be made by layperson recipient officials impartially applying logic and common sense
 - Relevant evidence must include inculpatory and exculpatory evidence

Relevance

- Having significant and demonstrable bearing on the matter at hand
- Affording evidence tending to prove or disprove the matter at issue or under discussion
- Relevant evidence cannot be excluded
- Relevant evidence must be considered
- Irrelevant evidence must not be considered

Inadmissible as Irrelevant

- Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent
- Any information protected by a legally recognized privilege without waiver
- Complainant's sexual predisposition or prior sexual behavior (absent two exceptions)

Rape Shield

- Prohibits questions or evidence about a Complainant's sexual behavior, except if:
 - offered to prove someone other than the Respondent committed the alleged offense
 - Except explicitly about the parties and offered to prove consent (cannot include sexual behavior with a person other than the Respondent)
- All questions and evidence of Complainant's sexual predisposition (not defined in regulations) are irrelevant
 - Sexual predisposition may include sexual orientation, sexual preferences, and a person's propensity to engage or not to engage in sexual activity of various types

Rape Shield Rationale

- To protect Complainants from harassing and irrelevant questions
- Does not apply to Respondents. Prior sexual behavior and sexual predisposition questions to Respondent are subject to the relevancy standard.

Advisor's Role

- Advisors are only permitted for Complainant(s) and Respondent(s)
- Respectful and professional conduct is expected
- Advisors may confer privately and in a non-disruptive manner with their respective party
- Advisors are not allowed to actively participate in the meetings

Investigative Report Recommendation

- Investigator(s) may make a recommendation regarding responsibility
- Preponderance of the evidence standard applied
- Prepare a written investigative report

The Investigative Report : Important Considerations

- Respondent must be presumed not responsible
- Determination is based on an objective evaluation of all relevant evidence (including inculpatory and exculpatory)
- Credibility is not determined by an individual's status as a Complainant, Respondent, or a witness.

Serve Impartially

- Avoid prejudgment of the facts at issue, conflicts of interest, and bias
- Cannot rely on stereotypes

Being Impartial

- There can be no conflicts of interest
- If there is a conflict of interest, then one can not be the Investigator
- The Investigator can not be for or against complainants or respondents generally or an individual complainant or respondent
- If a complainant is given an opportunity, then the respondent must be given the same opportunity and vice versa
- The Investigator will avoid pre-judgment of the facts at issue
- The Investigator will treat all parties the same regardless of their status as a complainant, respondent, or witness
- The Investigator must keep in mind that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the complaint process
- The Investigator will be free of bias and avoid making decisions based on stereotypes

Avoid Prejudgment

- Cannot pass judgment on the allegations presented by either party or witnesses
- Cannot jump to any conclusions without fully investigating the allegations and gathering all the relevant facts and evidence from all the parties involved
- Investigators and other personnel may not “believe” one party or the other

Avoid Prejudgment Cont'd

- Sex stereotypes prohibited
 - Decisions must be based on individualized facts, and not on stereotypical notions of what “men” and “women” do or not do
- Best Practices:
 - Leave all stereotypes about men and women at the door (including prior experiences connected to previous cases or personal matters)
 - Approach the allegations (of both parties) with neutrality at the onset
 - Treat both parties equally and provide equal opportunity to present evidence, witnesses and their perspectives of the event.

Self-Disclose Conflict of Interest

- If Title IX personnel feel that they have a conflict of interest and are incapable of acting impartially, they should step down from their role in the Title IX process immediately.

Bias and Stereotypes

- **A Investigator must be free of bias and stereotypes**
 - A bias is a feeling or preference that interferes with an impartial judgment for or against; usually considered to be unfair
 - A stereotype is a widely held, but fixed and oversimplified image or idea of a particular group of people, lacking any individuality
- **Examples of biases and sex stereotypes to refrain from:**
 - The complainant is automatically right because they're the victim
 - Determination of responsibility will only be made at the **END** of the complaint procedure and must be based upon the preponderance of the evidence
 - Only men can sexually harass others
 - One's gender, sex, sexual orientation, etc. must **NOT** be used against them when determining responsibility

Bias and Stereotypes Cont'd

- **Conscious or Explicit:**
 - In the case of explicit or conscious bias, the person is very clear about his or her feelings and attitudes, and related behaviors are conducted with intent
 - This type of bias is processed neurologically at a conscious level as declarative, semantic memory, and in words
 - Conscious bias in its extreme is characterized by overt negative behavior that can be expressed through physical and verbal harassment or through more subtle means such as exclusion
- **Unconscious or Implicit:**
 - Implicit or unconscious bias operates outside of the person's awareness.
 - It can be in direct contradiction to a person's beliefs and values.
 - Implicit bias is dangerous in that it automatically seeps into a person's affect or behavior and is outside of the full awareness of that individual.
- **Implicit bias can interfere with decision-making, and professional relationships such that the goals that are established are compromised**
 - These biases are associated with stereotyping.

Overcoming Bias and Stereotypes

To overcome biases, we must:

- **First**, recognize that we have them.
 - Be honest with yourself and admit to having the biases
- **Second**, understand why we have them.
 - Was it taught by your environment or did a negative experience cause the bias?
- **Third**, make a conscious effort not to let them control our decisions.

VSC's Title IX/Policy 311-A Website

<https://resolve.vsc.edu/>

VSC

Questions?