

# Updates to Policy on Sexual and Gender-Based Misconduct

Hearing Officer Training

October 26, 2021

# Title IX Legal Update

- **Regulations:** If a party or witness does not submit to cross-examination, the Hearing Officer cannot rely on any statement by that party/witness in reaching a determination regarding responsibility (CFR 106.45(b)(6)(i))
- **Massachusetts federal district court:** vacated that particular provision only (arbitrary and capricious) and remanded to ED for further consideration
  - *Victim Rights Law Center et. al. v. Cardona*
  - *(Note: This decision is currently on appeal)*

# Title IX Legal Update

- **Department of Ed:** 8/24/2021 guidance letter
  - Ceasing enforcement of that provision
- UM 10/1/2021 *Student Procedures* and *Employee Procedures* reflect this change
- Hearing Officer may now consider (if relevant):
  - Statements during investigation
  - Emails, texts, etc.,
  - Statements about the alleged conduct
  - Police report, SANE records, etc.,

# Changes to Employee Procedures

- Adaptable Resolution pilot
- Patient complaint procedures are the same non-patient complaint employee procedures
- Consideration of statements without cross
  - Procedures are now silent on this issue
  - You may consider statements of parties/witnesses who do not submit for cross-examination
  - Relevance and credibility/reliability still apply and may be impacted

# Changes to Student Procedures

- University Provided Advisor - expanded scope
  - Investigation through hearing
- Consideration of statements without cross
  - Procedures are now silent on this issue
  - You may consider statements of parties/witnesses who do not submit for cross-examination
  - Relevance and credibility/reliability still apply and may be impacted
  - *Doe v. Baum* still applies to student matters

# Intake: Equity Specialists

- Report comes in, is assigned to an Equity Specialist and Investigator
- Equity Specialist sends Complainant outreach, report receipt confirmation, and any other follow up with reporter
- Equity Specialist may do some initial information-gathering that is useful for responding to the concern but not investigative in nature

# Initial Complainant Meeting: Equity Specialist

- No initial action needed by Investigator
- If Complainant does not respond, Equity Specialist will be responsible for follow-up outreaches, communicating with TIXC for closure or other steps
- If Complainant responds the initial meeting will be with the Equity Specialist, ideally scheduled for a time Investigator can also be available for questions or interview

# Investigator (and possible UPA) Entry

- If Complainant has in depth questions about investigation process, or wants to pursue an investigation, the Investigator will meet with Complainant
- Interview can be first or second meeting, depending on Complainant's preference and Investigator availability
- Complainant can have a University-provided advisor as early as first meeting
  - Equity Specialist will arrange
- Equity Specialist will also be working on any supportive measure requests, connection to law enforcement, resources, etc.,
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# Formal Complaint (Investigation)

- Equity Specialist and Investigator will coordinate closely on outreach to Respondent when a Formal Complaint is filed
- Respondent can have a University-provided advisor as early as first meeting (investigation)
- Equity Specialist will talk to Respondent about resources, supportive measures, process overview and Equity Specialist role, etc.,
- Investigator will cover thorough discussion of process, allegations, and conduct interview (can be same or second meeting)

# Deputy Coordinator for Civil Rights and Title IX

## Outcomes

- Coordinating phase transitions in both Student, Employee SGBM and Employee TIXM processes
- Hearing Cases:
  - Investigator connects parties to DCCRTIXO at final report stage
  - Distribution of final report
  - Coordination/oversight of scheduling pre-hearing meetings and hearing
  - Available during hearing times as first line for hearing officer issues
  - Coordinating review of hearing outcomes, distribution for sanctioning determinations, simultaneous distribution to parties
  - Coordinating appeals process and follow-up thereafter
  - Identification of possible other remedies/interventions
  - Monitoring sanction completion in both student and employee cases

# Identifying Potential Policy Violations

- Consistent section in ECRT final report and hearing outcome
- Separately identifies each allegation and the potential policy violation(s) the allegation represents
- If a single allegation may constitute more than one potential policy violation, provides some explanation as to whether one is inclusive of the other, etc.,

# Example #1

## *Potential Policy Violation(s)*

1. **Allegation:** Complainant alleges that on September 1, 2021, Respondent, without Complainant's consent, recorded otherwise consensual sexual activity between the parties in Respondent's off-campus apartment.

**Potential Policy Violation(s):** Sexual Exploitation

*The conduct, as alleged, would constitute Sexual Exploitation.*

2. **Allegation:** Complainant alleges that on September 2, 2021, at Respondent's off-campus apartment, Respondent, without Complainant's consent, showed three other UM students the above-referenced video of the parties engaging in sexual activity.

*The conduct, as alleged, would constitute Sexual Exploitation.*

3. **Allegation:** Complainant alleges that on October 26, 2021, Respondent groped her breasts without her consent in Complainant's room in the residence hall.

**Potential Policy Violation(s):** Title IX Misconduct and/or Sexual Assault

*The conduct, as alleged, would constitute Title IX Misconduct, inclusive of Sexual Assault. If any of the Title IX Misconduct elements are not supported by the evidence, the conduct, as alleged, could otherwise constitute Sexual Assault.*

# Example #1 - Outcome

1. Possible findings on this allegation:
  - a. No violation
  - b. Sexual Exploitation
2. Possible findings on this allegation:
  - a. No violation
  - b. Sexual Exploitation
3. Possible findings on this allegation:
  - a. No violation
  - b. Sexual Assault
  - c. Sexual Assault, also constituting Title IX Misconduct

# Example #1 - Outcome Conclusion

*Sample A: The preponderance of the evidence supports the conclusion that on September 1-2, 2021, the Respondent engaged in Sexual Exploitation in violation of the Policy. The preponderance of the evidence also supports the conclusion that on October 26, 2021 the Respondent engaged in Sexual Assault, which also constituted Title IX Misconduct, in violation of the Policy.*

*Sample B: The preponderance of the evidence supports the conclusion that on September 1, 2021, the Respondent engaged in Sexual Exploitation in violation of the Policy by recording sexual activity without Complainant's consent. There is insufficient evidence, however, to conclude that the Respondent showed the recording to any third parties. The preponderance of the evidence supports the conclusion that on October 26, 2021, Respondent engaged in Sexual Assault, which also constituted Title IX Misconduct.*

# Example #2

## *Potential Policy Violation(s)*

- Allegation:** Complainant alleges that between January 1, 2021 2021 and October 26, 2021, in the Complainant's on-campus office, the Respondent made at least 17 comments about Complainant's physical appearance and asked her on a near-daily basis, "When are we going to get naked together?"

**Potential Policy Violation(s):** Title IX Misconduct and/or Sexual Harassment

*The conduct, as alleged, would constitute Title IX Misconduct, inclusive of Sexual Harassment. If any of the Title IX Misconduct elements are not supported by the evidence, the conduct, as alleged, could nonetheless constitute Sexual Harassment.*
- Allegation:** Complainant alleges that on October 26, 2021, Respondent groped her breasts without her consent at an off-campus office event

**Potential Policy Violation(s):** Title IX Misconduct and/or Sexual Assault and/or Sexual Harassment

*The conduct, as alleged, would constitute Title IX Misconduct, inclusive of Sexual Assault. If any of the Title IX Misconduct elements are not supported by the evidence, the conduct, as alleged, could nonetheless constitute Sexual Assault. If supported by the evidence, the alleged conduct may be considered as part of a pattern of behavior alongside any of Allegation 1 that is supported by the evidence for purposes of considering whether the Respondent engaged in Sexual Harassment.*

## Example #2 - Outcome

1. Possible findings on this allegation:
  - a. No violation
  - b. Sexual Harassment
  - c. Sexual Harassment, which also constituted Title IX Misconduct
2. Possible findings on this allegation:
  - a. No violation
  - b. Sexual Assault, which also constituted Title IX Misconduct
  - c. Sexual Assault
  - d. Part of a Sexual Harassment finding



## Example #2 - Outcome Conclusion

*Sample A: The preponderance of the evidence supports the conclusion that on October 26, 2021, the Respondent engaged in Sexual Assault; however, because the evidence does not support the conclusion that the off-campus gathering at which this conduct occurred was on campus or within a University Program or Activity, it is determined that this Sexual Assault does not constitute Title IX Misconduct. The preponderance of the evidence supports the conclusion that between January 1, 2021 and October 26, 2021, engaged in a series of verbal sexual advances which constituted Sexual Harassment, and also constituted Title IX Misconduct.*

*Sample B: The evidence supports the conclusion that on October 26, 2021, the Respondent engaged in Sexual Assault, which also constituted Title IX Misconduct. There is insufficient evidence to conclude that the Respondent made all of the alleged comments to the Complainant, however, the preponderance of the evidence supports the conclusion that on two occasions, Respondent told the Complainant that he found her attractive and on the second occasion, he asked her “when he we going to get naked together?”. These comments constitute Sexual Harassment in violation of the Policy and, viewed collectively with the October 26, 2021 Sexual Assault, it is determined that the Respondent’s behavior was sufficiently, severe, pervasive, and objectively offensive as to constitute Title IX Misconduct. Accordingly, the Respondent is determined to have engaged in Sexual Assault and Sexual Harassment, collectively also constituting Title IX Misconduct, in violation of the Policy.*