Balancing Fairness & Exercising Discretion in Student Conduct Policies on Sexual Assault, Dating and Domestic Violence, and Stalking
Part 2
May 2021
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Presenters

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Training Objectives

❖ Describe the federal legal framework for campus sexual misconduct

❖ Identify trauma-informed practices to incorporate into policy and procedures
Recap from last session: When You Have Discretion...

Being trauma-informed extends beyond working with individual trauma.

Every aspect of a campus’ response protocols, policy, and procedures are opportunities to incorporate trauma-informed practices.
Trauma Informed Community Approach

Serves the entire community

Dictated by Institutional Values
“What you hold sacred”

System must meet YOUR needs
Response

- Reporting Protocols
- Policy
- Implementation
Policies Create Accountability

- Clearly delineates prohibited conduct
- Reporting structure and options
- Transparency about the investigation, deliberations and sanctioning
- Accountability for students AND the campus
But What About Title IX?

✓ Narrow Definitions
✓ Narrow Jurisdiction
✓ Specific Grievance Process
✓ Specific Trainings Required
✓ Live Hearing with Cross-Examination
✓ Parties Must Have Advisor
Where Can We Exercise Discretion in Policy to Maximize Fairness?
There is a path forward!
Tell Us!

How has it been implementing grievance processes this year?

What were unexpected challenges?
Policy Issues Covered
Last Session:

1. Jurisdiction
2. Live Hearing
3. Cross-Examination
4. Advisors
Where We’re Going

1. Actual Knowledge
2. Definition of Sexual Harassment
3. Presumption of Not Responsible
4. Supportive Measures
5. Title IX Coordinator
6. Decision-Makers
Poll 1:
How well do you know your institution’s reporting structure?

A) I can easily identify required reporters.
B) I wouldn’t be able to describe it to others.
C) All I know is that I am a required reporter. Otherwise, I ask the Title IX Coordinator.
D) I do not know my institution’s reporting structure at all.
<table>
<thead>
<tr>
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<tr>
<td>§ 106.30(a): Actual knowledge means notice … to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school...</td>
<td>Maintain a policy that requires faculty/staff to report sexual misconduct to a centralized place, most likely the Title IX Coordinator.</td>
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Actual Knowledge:
Goal/Benefit of Reporting Structure

- Reporting Parties make more informed decisions
- Consider impact of discretion from untrained/biased faculty/staff
- Track systemic patterns, trends, identify safety risks
Actual Knowledge:
Consider your campus community

- Size of your campus?
- Specific barriers to reporting on your campus?
- What have reporting parties indicated as needs for safe and reliable reporting mechanisms?
Actual Knowledge: Options for Reporting Structures

Tailor a reporting structure to your campus that advances your trauma-informed goals.

→ All employees report to Title IX Coordinator?
→ Some employees report to Title IX Coordinator?
→ Reporting without personally identifying information?
Actual Knowledge

What if I share my story?

**CAs, Griffins, Ambassadors, OLS**
If you tell a student within their role as a student staff member, they must report it to Title IX either directly, or through their supervisor.

The information shared with student staff members is not confidential, however it will remain private.

**Faculty & Staff**
By law, some TCNJ faculty & staff are mandated to report information to the Title IX office. Under Title IX, these individuals are called Responsible Employees. To see a list of TCNJ’s Responsible Employees, visit: http://bit.ly/TCNJResponsibleEmployees

**Anti-Violence Initiatives**
Information you share with AVI will remain confidential, and AVI clinicians are NOT required to report to anyone*

AVI can support you in a variety of ways. They can help you explore your options, offer free confidential support and 1:1 counseling, assist you in securing campus accommodations, and provide advocacy & accompaniment during the reporting or investigative process if you choose to report.

**Mental Health & Student Health Services**
Information you share with MHS or SHS will remain confidential. The clinicians are NOT required to report to anyone*

SHS can conduct STI & pregnancy testing and can refer you to the local hospital for a SAFE kit (if the incident happened within the last 5 days), which is all free of charge.

**Campus Police**
Once a police report has been filed, Campus Police will pursue an investigation based on the circumstances and extent to which you are interested in participating. Title IX & AVI are there if you would like support throughout the process or have questions.

**Title IX**
The Title IX Office protects people from discrimination based on sex in education programs and activities that receive federal financial assistance. They provide resources & reporting options for students, faculty, and staff to address concerns related to sexual violence.

You can choose whether or not you talk to College officials and whether or not you file an official complaint.

When Title IX receives a report they will contact you to provide you with options for support and accommodations, as well as possibilities for holding the person who harmed you accountable.

Title IX can assist you in receiving campus accommodations such as: changing classes or moving residence halls, receiving academic flexibility, priority access to counseling, etc.

*Confidentiality may be limited in certain situations, such as those to which you may be deemed a threat to yourself or others.
## Definition of Sexual Harassment

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<td>§ 106.30(a) Sexual harassment:</td>
<td>Incorporate sexual exploitation as prohibited conduct in institutional policy.</td>
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<tr>
<td>(1) Quid pro quo sexual harassment;</td>
<td>Define sexual exploitation broadly.</td>
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<td>(2) Unwelcome conduct so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or</td>
<td></td>
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<td>(3) “Sexual assault”, “dating violence”, “domestic violence” or “stalking” as defined by Clery.</td>
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Prohibited Conduct: Broad, Yet Specific

Obligations under federal law?
✓ Clery
✓ Title IX

Frequent conduct on campus?
✓ Sexual Exploitation
✓ Hostile Environment SH
Policy Rules of Thumb

Notice

Reliability

Consistency
### Presumption of Not Responsible

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| § 106.45(b)(1)(iv): A recipient’s grievance process must include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. | Take-aways:  
✓ No bias should exist against a respondent just because they were accused.  
✓ No punitive measures against a respondent until responsibility finding.  
✓ Complainant does not bear the burden of proof, is not responsible for overcoming this presumption. |
Presumption of Not Responsible

*Complainant does not bear the burden of proof in a campus grievance process and is not responsible for overcoming a presumption.
## Supportive Measures

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<td>§ 106.30: Supportive Measures are:</td>
<td>1) Incorporate a safety planning framework when discussing supportive measures.</td>
</tr>
<tr>
<td>✓ Non-Disciplinary</td>
<td></td>
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<tr>
<td>✓ Non-Punitive</td>
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<tr>
<td>✓ Individualized</td>
<td></td>
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<tr>
<td>✓ Reasonably Available</td>
<td></td>
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<tr>
<td>✓ Designed to Restore or Preserve Equal Access to Education Program/Activity</td>
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<tr>
<td>✓ Cannot Unreasonably Burden Other Party</td>
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<td>✓ Confidential (with some exceptions)</td>
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Supportive Measures

Generally issued upon report of sexual misconduct and/or during the pendency of a resolution process. These measures help ensure the parties continue to access their education.

- Academic Accommodations
- No Contact Orders
- Changes to Housing and Transportation
Incorporate a Safety Planning Framework in Provision of Supportive Measures

**Tailored**
Safety planning = listening to student’s needs and priorities
- Students may not be able to make specific requests, but may be able to answer questions about what they are afraid of or are concerned about

**Ongoing**
Supportive measures can be changed
- A student’s needs may shift based on the circumstances at school or dealing with the lingering effects of the assault.

**Detailed in Policy**
Resources should be included in policy with detail
- Instead just listing contact information, include how they can help.
- Ex: how can law enforcement assist and what to request from them
DISCUSSION BREAK

What are some ways you can build in safety planning for students?
What groups make up your campus and what are their specific safety needs?
Poll 2:
Does your institution issue No Contact Orders automatically upon receipt of a report?

A) Yes, mutual NCOs are automatically issued.
B) It depends on the case/reporting party.
C) I do not know.
## Supportive Measures cnt’d

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<td>§ 106.30: Supportive Measures are:</td>
<td>2) NCOs:</td>
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<tr>
<td>✓ Non-Disciplinary</td>
<td>NCOs in general, and unilateral NCOs in specific, should be listed as a remedy</td>
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<tr>
<td>✓ Non-Punitive</td>
<td>and a supportive measure in institutional policy. They should not be listed as a</td>
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<tr>
<td>✓ Individualized</td>
<td>sanction.</td>
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No Contact Orders

Pendency of Process/No Process

Generally mutual

BUT not if there is a CPO in place

**NOTE: Avoid automatic issuance of NCOs to prevent lethality concerns.

After Outcome

Responsible

Unilateral

Not Responsible

Mutual can remain, but safety planning should continue to the extent possible
### Title IX Coordinator

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<td>§ 106.30: Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.</td>
<td>Title IX Coordinator should explain in detail to complainants the applicable policy/policies related to allegations and any considerations the complainant should take into account when deciding what avenue to pursue.</td>
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<tr>
<td>§ 106.45(b)(7)(i): Title IX Coordinator cannot be the decisionmaker.</td>
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<td>§ 106.45(b)(1)(iii). Title IX Coordinator cannot have a conflict of interest or bias.</td>
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Title IX Coordinator

• Ensure Title IX Coordinators have robust group of administrators who support coordination of supportive measures.

• If possible, prevent Title IX from having multiple jobs
Poll 3:
Who serves as your institution’s decision-maker(s) in Title IX grievance processes?

A) Retired Judge(s)  
B) External Legal Professional  
C) Internal Faculty/Staff  
D) Internal Administrators  
E) None of the Above
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<td>§ 106.45(b)(7)(i): Determination regarding responsibility. The decisionmaker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.</td>
<td>Decision-making panel of three people with one as chair.</td>
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<td></td>
<td>Since decisionmakers make decisions on the relevance of every single question and give explanations for excluding a question, more than one decision-maker is ideal.</td>
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Decision Makers

- Panel of at least three members
- One non-voting Chair
- Include Opportunity for Parties to Raise Conflict of Interest
Questions?
Thank You!

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