TITLE IX HEARING OFFICER AND DECISION-MAKER TRAINING & CERTIFICATION COURSE

SCU - September 2020 – Week 2
POLICY DEFINITIONS
• Discrimination, defined as: actions that deprive, limit, or deny other members of the community of educational or employment access, benefits, or opportunities.
• Discriminatory harassment constitutes a form of discrimination that is prohibited by University policy and defined as unwelcome conduct by any member or group of the community on the basis of actual or perceived membership in a class protected by University policy or law. The University does not tolerate discriminatory harassment of any employee, student, visitor, or guest.
• The University will act to remedy all forms of harassment when reported, whether or not the harassment rises to the level of creating a "hostile environment." A hostile environment is one that unreasonably interferes with, limits, or effectively denies an individual's educational or employment access, benefits, or opportunities. This discriminatory effect results from harassing verbal, written, graphic, or physical conduct that is severe or pervasive and objectively offensive.
SEXUAL HARASSMENT POLICY

• Title IX regulations require each recipient to have an umbrella sexual harassment policy and define sexual harassment as conduct on the basis of sex that satisfies one or more of the following:

  • **QUID PRO QUO**: An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct.

  • **SEXUAL HARASSMENT**: Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to the recipient’s education program or activity

• Education program or activity means employment, too!
“SEVERE”

“The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical.” — (2001 Guidance)

- Physical is more likely to be severe without need for repetition:
  - “attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks” (2001 Guidance).
- Non-consensual sexual intercourse or contact (e.g., physical/sexual assaults) are almost always sufficiently severe.
- Consider the circumstances: e.g. the ability for Complainant to remove themselves from the harassment.
- Accompanied by threats or violence.
“PERVASIVE”

• Widespread.
• Openly practiced.
• Well-known among students or employees — reputation of a department etc.
• Occurring in public spaces (more likely to be pervasive).
• “Harassment is pervasive when incidents of harassment occur either in concert or with regularity” (2001 Guidance – Footnote 44).
• Frequency of the conduct is often a pervasiveness variable.
  – Intensity/duration.
• Unreasonable interference.
“OBJECTIVELY OFFENSIVE”

- Reasonable person standard in context.
- “I know it when I see it…”
- Age and relationships of Complainant and Respondents.
- Number of persons involved.
- Frequency.
- Severity.
- Physically threatening.
- Humiliation.
- Intimidation.
- Ridicule.
- Abusive.
There has been an increasing issue of conflating discomfort or being offended with the higher standard of sexual harassment. There is a high bar for meeting this definition.

The circumstances to consider include:

- The nature, pervasiveness, and severity of the conduct.
- Whether the conduct was reasonably physically threatening.
- Whether the conduct was objectively and subjectively humiliating.
- The objective and subjective reasonable effect on the Complainant’s mental or emotional state.
- Was there an effective denial of education or employment access?
- If SPOO, a discriminatory effect is presumed (proven)
TOTALITY OF THE CIRCUMSTANCES

• Determine whether something is sex-based?

• Whether conduct was directed at more than one person.

• Whether a reasonable person would see/experience/determine the conduct to be SPOO?
  – What does it mean to be a reasonable person? Who is?
  – A reasonable person sits in the shoes of the Complainant.

• Whether the statement only amounts to utterance of an epithet that is offensive or offends by discourtesy or rudeness, and thus is not SPOO.

• Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment, which means it is not sexual harassment.
Define **sexual assault** as (six sub offenses now):

- **Sex Offenses, Forcible**: Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.

  - **Forcible Rape**: 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 Complainant.

  - **Forcible Sodomy**: Oral or anal sexual intercourse with another person, forcibly and/or against that person’s will (*non-consensually*) or not forcibly or against the person’s will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
• **Sexual Assault With An Object**: To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person’s will (*non-consensually*) or not forcibly or against the person’s will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

• **Forcible Fondling**: The touching of the private body parts of another person (*buttocks, groin, breasts*) for the purpose of sexual gratification, forcibly and/or against that person’s will (*non-consensually*) or not forcibly or against the person’s will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
Sex Offenses, Nonforcible: Nonforcible sexual intercourse.

- **Incest**: Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by state law.

- **Statutory Rape**: sexual intercourse with a person who is under the statutory age of consent of [age in your state].
  - This offense only applies if conduct is “consensual” with minor. If forced or against will of victim, revert to Forcible Rape definition.
CONSENT

• Consent can be defined per state law or best practices.
  – ATIXA Model Definitions found in 1P1P or The Playbook.

• Although the new regulatory definition of sexual assault is ostensibly consent based, it’s not a great analytical tool. Luckily, the wording is generic enough to permit ATIXA best practice interpretations to be fully applicable.

• Be aware that the FBI’s definition of rape (upon which the regulatory definition rests) will change again soon, likely in 2021. Your definition will have to shift then as well.
  ▪ “carnal knowledge” coming soon to a campus sexual assault policy near you!
Though not part of the Title IX “Sexual Harassment” definition, other conduct could be prohibited under a campus sexual misconduct policy, including:

**Sexual Exploitation**

- Occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute sexual harassment.
Examples of sexual exploitation include, but not limited to...

• Invasion of sexual privacy.

• Non-consensual digital, video, or audio recording of nudity or sexual activity.

• Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity.

• Engaging in voyeurism.

• Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex).
• Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person.

• Intentionally or recklessly exposing one’s genitals in non-consensual circumstances or inducing another to expose their genitals.

• Sexually-based stalking and/or bullying may also be forms of sexual exploitation.
Dating Violence is defined as

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant.

- The existence of such a relationship shall be determined based on the Complainant’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

- For the purposes of this definition,
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include acts covered under the definition of domestic violence.
DOMESTIC VIOLENCE

• Domestic Violence is defined as a felony or misdemeanor crime of violence committed:
  – By a current or former spouse or intimate partner of the Complainant;
  – By a person with whom the Complainant shares a child in common;
  – By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
  – By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
  – By any other person against an adult or youth Complainant who is protected from that person’s acts under the domestic or family violence laws of [insert your state here].
DOMESTIC VIOLENCE

• To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates.

• The people cohabitating must be current or former spouses or have an intimate relationship.
SEX BASED STALKING

• **Stalking** is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  – Fear for the person’s safety or the safety of others; or
  – Suffer substantial emotional distress.

• For the purposes of this definition—
  – Course of conduct means two or more acts, including, but not limited to, acts in which the 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 Complainant.
  – Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

Please, please, please, don’t interpret this to violate anyone’s First Amendment rights.
SCU GENERAL STALKING POLICY

• Stalking, defined as:
  – Repetitive and menacing course of conduct (pursuit, following, harassing and/or interfering with the peace and/or safety of another;
  – Directed at a specific person on the basis of actual or perceived protected status;
  – That is unwelcome; and
  – Would cause a reasonable person to fear.

• Stalking includes the concept of cyber-stalking, a particular form of stalking in which electronic media such as the internet, social networks, blogs, cell phones, texts, or other similar devices or forms of contact are used.
106.3 RETALIATION

• No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.

• The exercise of rights protected under the First Amendment does not constitute retaliation.

• Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation if it is based on more than evidence that a Respondent violated the sexual harassment policy.
• The University and any member of the University community are prohibited from taking or attempting to take materially adverse action by intimidating, threatening, coercing, harassing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by law or policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this Policy and procedure.
Hazing, defined as: any action, activity or complicity in an activity, which recklessly, intentionally, or knowingly causes or endangers the mental, emotional, and/or physical health or safety, or personal degradation to any person, or could reasonably be foreseen to result in such harm, that was committed in connection with initiation into, an affiliation with, or continued membership in a group affiliated activity, whether or not the organization or body is officially recognized by the University, and whether individually or in concert with other persons, against another person(s). An action is still considered hazing regardless of the apparent or actual consent of the involved individual or individuals. Failing to prevent, discourage, and/or report hazing may violate this Policy. Student organizations, clubs, or teams whose members participate in or encourage hazing activities will also be subject to appropriate University disciplinary action.
• Bullying / Cyber-Bullying, defined as:
  – Repeated and/or severe;
  – Aggressive behavior;
  – Likely to intimidate or intentionally hurt, control or diminish another person, physically or mentally; and
  – That is not protected speech or conduct otherwise protected.
HOSTILE ENVIRONMENT?
HOSTILE ENVIRONMENT?

No means yes, yes means anal.
SEVERE? PERVERSIVE? OBJECTIVELY OFFENSIVE?

• Student-based examples: Do these create a Hostile Environment?

  – Female student “sexts” pictures of herself to a male classmate.
  – A student draws a penis on the whiteboard at the front of the class. What if it was on the whiteboard on the student’s residence hall door?
  – Sexual images that were sent to a partner consensually and then shared with a team or club?
  – A student viewing porn on a computer in the library?
  – A student calling another a C-nt?
Faculty-Based Examples: Do these create a Hostile Environment?

- Rubbing a student’s back while assisting them in class.
- Requiring students to read *50 Shades of Grey* and then giving them an essay assignment to compare their own experiences against those from the book.
- Female faculty member repeatedly referring to male students as “penises.”
- Repeatedly telling dirty jokes in class. What about using sexualized or racially charged examples?
- Refusing to call a student by the name they ask to be called and/or by their preferred pronouns?
• Staff-Based Examples: Do these create a Hostile Environment?

– Telling dirty jokes in a common workspace area?
– Sending memes that are sexual or racially charged to a colleague?
– A supervisor repeatedly mentioning how much they like a supervisee’s outfits?
– Purposefully not including a co-worker in meetings because of their gender or race/ethnicity?
QUESTIONS?
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