

TITLE IX TRAINING FOR ADVISORS

Three Rivers College



AGENDA

- Title IX Sexual Harassment
- Advisors During Investigation
- Prior to Live Hearing
- During Live Hearing

DEFINITIONS

THREE RIVERS COLLEGE POLICY

Three Rivers College is committed to providing equal opportunity in all areas of education, recruiting, hiring, retention, promotion, and contracted service. The college further commits itself to the policy that there shall be no unlawful discrimination of race, color, religion, sexual orientation, disability, age, gender, or national origin.

THREE RIVERS COLLEGE POLICY

The College's equal opportunity policy extends to prohibitions against unlawful harassment of students or employees relating to the individual's race, color, religion, disability, age, sex, or national origin. This prohibition against harassment includes, but is not limited to, disparaging comments, written materials, physical assaults, sexual harassment, verbal threats, and offensive pranks.



New Sexual Harassment Definition

- Quid Pro Quo Harassment
- Hostile Environment
- Harassment under the Violence Against Women Act & Clery Act

QUID PRO QUO HARASSMENT

- An employee conditioning an aid, service, or benefit of the college on an individual's participation in unwelcome sexual conduct
- Does not need to be evaluated for “severity, pervasiveness, and objective offensiveness”
- Expressed or implied

HOSTILE ENVIRONMENT

- Unwelcome conduct
- Reasonable person
- So severe, pervasive, and objectively offensive
- Effectively denies a person's equal access to education program or activity

HARASSMENT UNDER VAWA & CLERY ACT

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



SEXUAL ASSAULT

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

DATING VIOLENCE

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
- Existence of relationship determined based on consideration of the length, type, and frequency of interaction
- 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

Felony or misdemeanor crimes of violence committed by:

- Current or former spouse or intimate partner of the victim
- Person with whom the victim shares a child in common
- Person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner
- Person similarly situated to a spouse of the victim under the domestic or family violence laws of Missouri
- Person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of Missouri

STALKING

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress



LOCATION

- In an educational program or activity-locations, events, or circumstances over which the college exercised substantial control over both the Respondent and the context in which the sexual harassment occurs



CONSENT

Three Rivers Definition:

- Knowing, voluntary, and clear permission by word or action to engage in sexual activity.
- “To give permission”
- Consent can be revoked at any moment.
- The absence of “no” does not mean “yes”



CONSENT

Incapacitation:

- “A state where someone cannot make a rationale, reasonable decision because they lack the capacity to give knowing consent.
- Ex: to understand the “who, what, when, where, or how” of their sexual interaction

RETALIATION

- Adverse treatment in response to seeking protection under Title IX
- May be independent basis for charge or litigation
- Examples include harassment in educational program, discipline, denial of participation

OVERVIEW AFTER FORMAL COMPLAINT

Notices

Dismissal

Consolidation

Investigative Report

Hearing

Determination Regarding Responsibility

ADVISORS DURING INVESTIGATION

- Advisor has access to the list of evidence, shared evidence of the parties, as well as the investigative report.

ACCESS TO
EVIDENCE



PARTICIPATION
IN INTERVIEW

- Advisor can attend the interview of the complainant or respondent.

ELEMENTS

EQUITABLE TREATMENT

OBJECTIVE EVALUATION OF EVIDENCE

NO CONFLICT OF INTEREST OR BIAS

PRESUMPTION OF NOT RESPONSIBLE

PROMPT TIME FRAMES

BURDEN OF PROOF ON COLLEGE

REVIEW PARTIES' RESPONSE TO INVESTIGATIVE REPORT

- The parties have an equal opportunity to review and respond to the investigator's investigative report
- Allows the parties to advocate to the decision-maker regarding the relevance of evidence and omission of relevant evidence
- Parties can provide input and make arguments about the relevance of evidence, evidence they believe was overlooked in the investigative report, and how a Decision-Maker should weigh the evidence

ADVISORS
DURING
LIVE HEARING

OVERVIEW OF HEARING

Plan & Organize

- Think through scope and order of possible relevant questions

Purpose

- To provide the parties' advisors the opportunity to probe the credibility and reliability of statements asserted by witnesses or parties

Role

- Decision-Maker rules on the relevancy of questions in live time

RULES OF DECORUM

- A college may adopt rules of order or decorum to forbid badgering a witness
- May deem repetition of the same question to be irrelevant
- Can determine the time and length of breaks



RESTRICTIONS

- Colleges may establish restrictions regarding the extent to which the advisor may participate in the proceeding, as long as the restrictions apply to both parties.
- Can limit advisor participation, but not advisor “choice” or “presence” in meeting



FLEXIBILITY

- No prohibition of conflict of interest or bias for advisors
- Do not need to be unbiased because advisor's role is to cross-examine on behalf of one party

- Provide the parties with the same opportunity to have others present during the hearing
- Provide written notice to a party who is invited or expected to participate
- Provide the parties an equal opportunity to inspect and review any evidence
- Provide the parties an equal opportunity to present witnesses



EQUITABLE
TREATMENT

- Cross-examination must be done by an advisor, not the parties themselves
- Colleges must provide a party with an advisor if the party appears at the hearing without one free of charge
- Advisor may be an attorney
- Colleges do not need to provide advisors for an informal resolution process



ADVISORS

CROSS EXAMINATION PRINCIPLES

- Must be conducted directly, orally, and in real time by the parties' advisors
- Can never be done by a party personally
- Only relevant questions may be asked

CROSS EXAMINATION VIA TECHNOLOGY

- At the request of a party, the college must allow the live hearing to occur with the parties located in separate rooms via technology
- The decision maker and parties must be able to simultaneously see and hear the party or witness answering questions
- College has discretion to allow all participants to appear at the live hearing virtually

RECORDING OR TRANSCRIPT

- Colleges must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and view



REASONABLY
PROMPT TIME
FRAME

- Exception for “good cause”
- College’s need to provide an advisor may constitute “good cause,” but college should take affirmative steps to determine whether a party will require an advisor before a hearing

- Colleges can work with witnesses regarding scheduling of a hearing and the ability to permit witnesses to testify remotely
- Colleges cannot retaliate against a party or witness for participating or not participating
- Witnesses cannot be compelled to appear at a hearing
- Parties must have an equal opportunity to present witnesses
- Both parties face the same limitations inherent in a lack of subpoena power



WITNESSES

MAJOR ROLE OF DECISION-MAKER IN HEARING

- Determine relevancy of evidence presented during hearing
- Determine relevancy of questions immediately before a party or witness answers

RELEVANCY



Parties' advisors must be permitted to ask all relevant questions and follow-up questions



Decision-Maker determines relevancy of questions



Decision-Maker provides an explanation for excluding any question deemed to be not relevant



RELEVANCY

- It has a tenancy to make a fact more or less probable than it would be without the evidence
- Fact is of consequence in determining the action or conduct
- Relevant evidence goes towards proving whether a fact of consequence to the actual allegations are more or less likely to be true



RELEVANT
QUESTIONS

- The Decision Maker is required to make relevance determination in real time during the hearing

PROHIBITED QUESTIONS

No questions or evidence on Complainant's prior sexual history or behavior unless:

- Offered to prove that someone other than the Respondent committed the conduct
- If the evidence of specific incidents of prior sexual conduct between the Respondent and Complainant is offered to prove consent

PROHIBITED EVIDENCE

- Privileged information or treatment records, without the party's prior written consent
- Information protected by legally recognized privilege: attorney-client, clergy-communicant, marital confidences, and therapist-patient

DISCRETION

- A college cannot adopt rules excluding certain types of relevant evidence (e.g., lie detector test or rape kits)
- A college cannot adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence

DETERMINATION REGARDING RESPONSIBILITY

RELIANCE ON STATEMENTS

- The Decision-Maker cannot rely on the statements of a party or witness who does not submit to cross-examination
- “Submit to Cross-Examination” means *answering* those questions that are relevant
- If a party or witness was not called by a party’s advisor to be cross-examined, or was not asked a particular question about a particular statement in the investigative report, the Decision-Maker is not precluded from relying on a statement by a party or witness who was not given the opportunity to be cross-examined



INFERENCES

- Decision-maker cannot draw an inference regarding responsibility based solely on a party or witness's absence from formal resolution process or a refusal to answer a question during an exchange of questions

RELIANCE ON EVIDENCE

- The prohibition on reliance of statements does not include evidence (such as videos) that do not constitute a person's intent to make factual assertions or do not contain a person's statements.
- But police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.

WEIGHING THE EVIDENCE

- Colleges may decide how relevant evidence must be evaluated for weight or credibility by a recipient's Decision-Maker, and colleges have discretion to adopt and apply rules in that regard.
- The rules must apply equally to both parties
- This is not the same as determining admissibility. Colleges cannot adopt their own rules on admissibility.
- Any rules adopted must be publically available in college's training material

- Three Rivers College follows the Preponderance of the Evidence Standard
- The burden of proof is met when a reasonable person would accept as “more likely than not” that a fact is true or an incident occurred



STANDARD
OF
EVIDENCE

QUESTIONS