

# Title IX Hearing Panel Training

## University of the West

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# Title IX

- ▶ Title IX of the Education Act requires gender equity for students of all genders in every educational program that receives federal funding. Specifically, the law states:
- ▶ “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

# Title IX policy

- ▶ All forms of sexual violence are considered to be serious offenses. The UWest Title IX Policy includes **sexual harassment, sexual assault & non-consensual sexual contact, dating violence, domestic violence, and stalking.**
- ▶ Sexual violence can be committed by individuals of any gender, regardless of an individual's sexual orientation, gender identity, or gender expression, and can occur between individuals of the same gender or different genders, strangers or acquaintances, as well as people involved in intimate or sexual relationships.
- ▶ Individuals alleged to have committed rape, sexual assault, and/or relationship violence may face criminal prosecution by law enforcement and may incur penalties as a result of civil litigation. In addition, students and employees may face disciplinary action at the university.

# Know the Policy

- ▶ Hearing Panel members need to be familiar with the entire Title IX policy, formally titled the Gender-Based Discrimination/Sexual Misconduct/Title IX Policy.
- ▶ Please review it at <http://www.uwest.edu/wp-content/uploads/2020/08/Gender-Based-Misconduct-TIX-Policy.pdf>

# Scope

- ▶ The Title IX policy applies to all students, faculty, supervisory and nonsupervisory staff, volunteers, interns, vendors, independent contractors, persons performing services under contract with the university, visitors, and any other individuals regularly or temporarily employed, studying, living, visiting, or otherwise participating in UWest's educational programs and activities.
- ▶ The policy applies to conduct occurring on UWest property, at university-sponsored events, in university programs, and anywhere off campus in the United States in locations over which the university exercised substantial control over both the Respondent and the context in which the sexual misconduct occurred, and where the conduct has continuing adverse effects on any member of the UWest community in any UWest employment or education program or activity.

# Definitions



# Sexual Harassment

Title IX identifies sexual harassment, including sexual assault, as unlawful sex discrimination and designates any of the following conduct on the basis of sex as constituting sexual harassment:

- ▶ A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called "quid pro quo" harassment); Revision August 2020
- ▶ Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school's education program or activity; or
- ▶ Sexual assault, dating violence, domestic violence, or stalking (as defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a))

# Includes Online Harassment

- Sexual harassment can occur remotely, for example, over a telephone, in writing, and/or over Internet platforms and social media. This type of misconduct includes materials received by a victim and materials posted about a victim.
- Examples of online sexual harassment include cyberstalking (e.g., catfishing, monitoring location check-ins, virtual visiting via Google Maps Street View, hijacking of webcam, installing stalkerware, tracking a person's location via geotags, etc.)



# Sexual Assault

**Sexual assault** is an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation (FBI) and includes

- ▶ any sexual act directed against another person;
- ▶ forcibly and/or against that person's will; OR
- ▶ not forcibly or against that person's will where the victim is incapable of giving consent.
- ▶ Sexual offenses of this type include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling.

Under this category of misconduct, **non-consensual sexual contact** is intentional contact with the intimate body parts of another (whether directly or through clothing), or disrobing or exposure of another without permission, by force or threat of force, without consent, or where the person is incapacitated. Intimate body part means sexual organ, anus, groin, breast or buttocks.

# Dating Violence

- ▶ **Dating violence** is any act of violence, or threatened act of violence, against a person who is (or has been) in a romantic or intimate relationship with the person accused of sexual violence.

# Domestic Violence

- ▶ **Domestic violence** includes felony and misdemeanor crimes of violence committed by a current or former spouse, by a person with whom the victim shares a child, who is or has cohabitated with the victim, or by a person similarly situated to a spouse (common law marriage), or by any other person against an adult or youth victim.

# Stalking

- **Stalking** is a course of conduct directed at an individual that would cause a reasonable person to fear for their or safety or the safety of others, or suffer substantial emotional distress.
- This includes cyberstalking as described earlier.

# Consent

- ▶ Consent is a crucial component of the sexual misconduct policy.
- ▶ Consent is the affirmative, conscious, voluntary, informed, and uncoerced agreement through words and/or actions, which a reasonable person would interpret as a willingness to participate in mutually agreed-upon sexual activity.
- ▶ Sexual activity should occur only when all participants willingly and affirmatively choose to engage in particular acts.
- ▶ It is the responsibility of the initiator of the sexual activity, at each stage, to obtain effective consent.
- ▶ The use of intimidation, coercion, threats, force, or violence negates any consent obtained.

# Absence of Consent

Indications that consent is not present include, but are not limited to:

- ▶ A verbal “no” (no matter how indecisive) or resistance (no matter how passive);
- ▶ When physical force is used, or when there is a reasonable belief of the threat of physical force;
- ▶ When the recipient of the sexual conduct is incapacitated due to alcohol or drugs.
- ▶ When any kind of coercion is present.



# Consent ctd.

- Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relationship between them, should never by itself be assumed to be an indicator of consent.
- Consent cannot be inferred from silence, passivity or lack of active resistance.
- Consent cannot be inferred from consent to a prior or different activity.
- If consent is revoked, the other party must immediately stop whatever sexual activity is occurring.

# Incapacitation

A person is considered to be incapacitated when that person lacks the ability to make informed, rational judgments and decisions to engage in sexual activity. A person will not be considered to have given consent if the individual is incapable of making an intentional decision to participate in a sexual activity, including:

- ▶ Being unconscious or asleep;
- ▶ Being incapacitated by drugs, alcohol, or medication so that the Complainant could not understand the fact, nature or extent of the sexual activity; or
- ▶ If they are unable to communicate due to a mental or physical condition. Where alcohol or drugs are involved, incapacitation is defined with respect to how the alcohol or other drugs consumed affect a person's decision-making capacity, awareness of consequences, and ability to make fully informed judgments.

# Determining Factors

- ▶ Being intoxicated or otherwise impaired does not diminish one's responsibility to obtain consent.
- ▶ The question is whether or not the person who initiated the sexual activity knew, or whether a sober and reasonable person in the same position should have known, whether the other person gave effective consent.

# Burden of Proof & Standard of Evidence

- The burden of proof lies with the university, not the Respondent or Complainant
- The Hearing Panel works on the presumption that the Respondent is not responsible unless proven so based on the evidence
- As in all other types of student and employee conduct procedures, also in resolving complaints pursuant to the Gender-Based Discrimination/Sexual Misconduct/Title IX Policy, the university uses a “preponderance of the evidence,” standard, which determines whether the evidence gathered and information provided during the investigation supports a finding that it is **more likely than not that the Respondent violated the policy.**

# Overview of Title IX Process

- ▶ Formal complaint is filed.
- ▶ Title IX Investigator conducts an investigation resulting in a Report of Findings.
- ▶ Hearing Panel is convened to review the Report of Findings along with all relevant documentation, including any response by the parties.
- ▶ The panel is made up of at least three members, including a trained Hearing Panel Chair and at least one faculty member and one staff/administrative member. The Title IX Coordinator contacts the Chief Academic Officer to recommend faculty member/s for the panel and the senior enrollment administrator to recommend staff/administrative member/s.
- ▶ In cases where the Respondent is an employee or contractor of the university, the senior Human Resources administrator serves as a Hearing Panel member but cannot serve as panel chair.

# Hearing Panel

- The Hearing Panel is made up of at least three members, including a trained Hearing Panel Chair and at least one faculty member and one staff/administrative member.
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# Hearing Panel ctd.

- ▶ The Hearing Panel meets to review the Title IX Investigator's Report of Findings and all pertinent documents and to adjudicate the outcome of the alleged sexual misconduct process.
- ▶ The Title IX Coordinator facilitates the review meetings and provides general information but does not attend nor participate in the deliberations nor the decision making.
- ▶ The Hearing Panel may also request to meet with the Title IX Investigator to clarify points in the Report of Findings.

# Values Inherent in the Hearing Process

- The hearing process must be fair; it must be unbiased and must protect the rights and welfare of both parties (Complainant and Respondent) and the campus community as a whole
- The Hearing Panel must treat parties and witnesses with respect, and require this of all participants in the process
- The process must hold those who violate the university's policies responsible for their actions

# Functions of a Hearing Panel

- Reflects shared responsibility of campus community (students, faculty and/or staff) for maintaining standards of conduct at the campus
- Demonstrates to students, faculty, staff, and others that the campus is concerned about and responds effectively to this and other student misconduct
- Offers a fair, consistent, and legally compliant process for dealing with such cases in the context of the educational community

# Leadership, Meeting Management & Professionalism

- The *Protocol and Script for Hearings* includes the basics of chairing or participating on a Hearing Panel, and the sequence of what happens at each step
- Importance of respect, responsibility, confidentiality, and fairness.
- Being in a position to judge others requires
  - a high level of ethical conduct
  - analytical tools and resources for making decisions about standards, facts, and ethical issues
- The essential characteristics of professionalism in a hearing are reliability, timeliness, attention, conscientiousness, active listening, an open mind (no prejudging), attitude, demeanor, and apparel

# Role of Hearing Panel Members

Serving as a member of a hearing panel requires being knowledgeable in

- The hearing process
- Questioning methods (do's and don'ts)
- Identifying issues (case studies)
- Reviewing, evaluating, and analyzing information
- Understanding sexual harassment, sexual assault, relationship violence & stalking
- Deliberating and making a decision
- Sanctioning

# Confidentiality

- Records of student conduct investigations, hearings, appeals, and communications are confidential student records under FERPA (*Federal Educational Rights and Privacy Act*)
- Hearing Panel members may not discuss cases with or identify the parties to the complaint nor the witnesses to other faculty, staff, students or any other individuals.



# Avoiding Bias & Conflicts of Interest

## ► Bias

- Don't allow personal feeling or past dealings to affect your judgment
- Don't allow any past behaviors on the part of the person you are investigating/adjudicating to affect your judgment.
- Never allow generalizations to affect your judgement, Beware of gender or other stereotypes
- Focus on the evidence

## ► Conflict of Interest

- Beware of your biases and don't let them affect your final decision
  - Don't allow the wishes of others to affect your judgment; focus on the evidence only.
  - The decision must be based on the evidence not what is perceived as best for the individual parties or the university.
- If a bias or conflict of interest is present, declare it, manage it or remove yourself from the investigation.

# Live Hearing

- ▶ The Hearing Panel is required to conduct live hearings
- ▶ The parties will be located in separate rooms while being able to see and hear anyone testifying
- ▶ Live hearings may be conducted remotely
- ▶ Live hearings shall include questioning by the Hearing Panel of both parties to the complaint as well as all witnesses.

# Questioning

- ▶ Purpose

To enable you to obtain the details you need in order to clarify and evaluate the information presented by both parties.

# Identifying Issues and Questions

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- *Using a case study or scenarios from past cases, ask the group to make a list of key issues and questions -- what do they need to know to make a decision?*
- *This exercise works particularly well if you start out with sample opening statements or a redacted original report, discuss and identify issues and questions raised by that information, and then provide additional information – such as witness statements, emails, etc., and have the group continue to identify issues and questions.*
- *Evaluate with the group how effectively they have identified issues and questions at each stage.*

# Questioning

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Distribute *handout on Questioning Techniques*, and give students 10 minutes to read it. Then provide a short scenario, having a trainee read it out loud to the group.

- Have each trainee write down examples of “good” and “bad” questions on various issues
- Reconvene and have each trainee read one of their questions aloud
- The group discusses whether each question is “good” or “bad” under the questioning guidelines provided, and why.
- Keep going until the group has discussed examples of all of the recommended and discouraged questioning techniques

# Exercise: Identifying Issues and Questions

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## **Exercise:**

Read the *scenario* out loud. Take 10 minutes to discuss and identify the key issues to be decided, what additional information you would want to know, and what questions you would like to ask of each witness.

Have a recorder keep a list of the issues and questions the group identifies.



# Advisors

- ▶ Both the Complainant and the Respondent shall have an Advisor of the party's choice present during the hearing, who may be, but need not be, an attorney.
- ▶ If either or both parties do not bring an advisor, the university will provide one to each.
- ▶ Advisors must adhere to the Hearing Guidelines.

# Cross-Examination

- ▶ The Advisors are permitted to question the other party and all witnesses directly, orally, and in real time, asking relevant questions and follow-up questions, including those challenging credibility.
- ▶ The questions must be posed by the Advisors and never the parties, must be relevant, and are subject to approval by the Hearing Panel Chair before being answered.
- ▶ The Chair must explain to the party's Advisor asking cross-examination questions any decision to exclude a question as not relevant.

# Hearing Expectations

- ▶ Any parties to the live hearing who do not conduct themselves according to the Hearing Guidelines may be excluded from the hearing as determined by the Hearing Panel Chair.

# Types of Information

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Different kinds of information that may be presented:

- Complainant, Respondent, and witness statements
- Personal observations by witnesses
- Personal opinion/experience of parties, witnesses (Note: the panel members' own opinions/experiences are not "evidence" in this hearing)
- Documents and other evidence: emails, voicemails, text messages, Facebook postings, photos, written statements, physical evidence, video

# Reviewing & Analyzing Information

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Categories of information :

- Direct (eye-witness) vs. circumstantial (must draw inference from physical or other information) -- both are equally valid and acceptable
- Hearsay is not permissible evidence
- Information is evaluated according to its
  - Relevance
  - Credibility
  - Probative value (probative facts establish the existence of other facts. They are matters of evidence that make the existence of something more probable or less probable than it would be without them)

*Example handout: Reviewing Information & Credibility*

# Common Myths

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- Direct (eye-witness) accounts are necessarily more important than circumstantial information
- You can't prove misconduct solely on circumstantial evidence
- You can't determine who's telling the truth when it is one person's word against another (Complainant says they were assaulted, Respondent says it was consensual sex)

*Exercise: Use a short scenario and a list of different types of information that may be submitted at a hearing, showing who submitted it. Have each person read one piece of information aloud, then rate it in terms of relevance, credibility, probative value and overall strength*



# Application of Rape Shield Laws

- ▶ Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

# Deliberating & Making a Decision

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- Deliberations are in closed sessions, with no parties, Advisors, Title IX Coordinator, or conduct officers present
- Hearing panelists
  - Discuss and evaluate the information presented
  - Find areas of agreement and issues to be resolved
- Each panelist should explain his/her opinion and listen to the other panelists
- Once each panelist has made up his/her mind regarding whether or not a violation is proved, the members take a vote
- The Hearing Panel Chair writes up the decision and the reasons for the decision.
- If there is a minority report, the panelist(s) in the minority write a short separate report

# Hearing Panel Decision

- ▶ Within ten (10) business days of concluding all steps in the review and adjudication, the Hearing Panel will make a determination whether the Gender-Based Discrimination/Sexual Misconduct/Title IX Policy was violated and, if so, what sanctions and/or educational measures are imposed.
- ▶ The panel provides their decision to the Title IX Coordinator in a written decision.
- ▶ The Title IX Coordinator may respond to the decision in order to request additional clarifications or request corrections to errors of fact or typographical errors. The Hearing Panel decision is otherwise final.

# Sanctioning

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If the Hearing Panel determines that the Respondent is responsible for the alleged violation/s, it must next determine the appropriate disciplinary and educational sanctions.

- Consult the Title IX policy for available sanctions
- *Explain and discuss the factors to be considered in determining sanctions, including aggravating and mitigating circumstances*
- *Summarize or provide examples of prior case decisions and sanctioning norms on your campus*
- *Sample sanctioning exercise (scenarios for discussion)*

# Writing the Hearing Decision

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- Hearing Panel's decision should be concise, does not have to be court opinion or legalistic
- Decision should state what the charge was and whether the student was found in violation
- Decision should briefly summarize the information supporting the decision (e.g., "Complainant testified that she was unconscious and found the accused assaulting her when she awoke. The accused's explanation that the sexual contact was consensual was not convincing because ... ." or "was convincing because ... .")
- If there is not a unanimous decision, the disagreeing panelist/s should write a brief statement explaining why they do not agree.
- The decision should specify recommended sanctions and reasons for those sanctions.



# Appeal Process

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- The Respondent or Complainant may request an appeal of a sexual misconduct hearing outcome.
- Appeals are not granted automatically as they must be thoughtful, well reasoned, substantive, and must demonstrate that at least one of the following criteria exists:

There was a substantive procedural error that may have prohibited the hearing from being conducted fairly in light of the charges. Deviations from designated procedures will not be a basis for sustaining an appeal unless significant prejudice results;

The outcome was influenced by bias or conflict of interest;

There is new evidence not reasonably available at the time of the determination that is potentially sufficient to alter a decision.

- For an appeal to be sustained, one or more of the above criterial must both be present and have impacted the final outcome of the complaint.



# Appeal Process ctd.

- ▶ The Title IX Coordinator appoints an appeal person or persons, hereafter “appeal body,” that does not include members of the Hearing Panel.
- ▶ The appeal body reviews the request for appeal to determine if the appeal has merit.
- ▶ A request for appeal shall be limited to review of the documentation associated with the initial hearing, supporting documents, and testimony.

# Appeal Process ctd.

- ▶ If none of the criteria for appeal is determined to have been met, the appeal body shall sustain the decision of the Hearing Panel.
- ▶ If, however, any of the conditions for appeal is found to exist, the appeals body may:
  - Hear the full appeal;
  - Hear only a circumscribed portion of the appeal;
  - Render a decision without a hearing involving the parties.

# Modifying Sanctions on Appeal

- ▶ In determining whether to modify any given sanction(s), the appeal body has the option to take any of the following actions:
  - Elect not to change any of the sanctions imposed by the original hearing body;
  - Reduce or increase the severity of the conduct status;
  - Adjust educational sanctions.

# Appeal Decision

- ▶ Within ten (10) business days of reviewing the appeal, the appeal body renders a decision in writing to the Title IX Coordinator.
- ▶ The decision includes a description of the review process undertaken by the appeal body, a list of documentation and other evidence taken into consideration, and the reasoning for the appeal decision.
- ▶ All appeal decisions are final and binding on all parties and shall be given to the party requesting the appeal in written form.

# Training Exercise

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## Sample Exercise:

Break students into 4 groups. Give all students the same brief scenario. Then give groups A and B the same additional set of facts, and groups C and D a different additional set of facts. Ask each group to decide whether the student was in violation or not, keeping track of their reasons. Reconvene and discuss each group's decision. If there are differences between the findings of groups A & B and groups C & D, have them talk about the reasons for the differences. Repeat with two more sets of additional evidence, again discussing in individual groups and then comparing any differences -- what evidence caused the groups to come to different conclusions?