

# *2020-21 Title IX Training*

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Presented to: JRMC Title IX personnel

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# Agenda

- Objectives:
  1. Identify key provisions and themes in new Sexual Misconduct Policy.
  2. Review complaint process (formal/informal complaint, interim measures, informal resolution).
  3. Learn how to conduct fair and impartial investigations.
  4. Learn how to conduct fair and impartial hearings.
  5. Review appeals procedure.
  6. Questions.

# Key Provisions/Themes in New Policy



# Scope of JRMC Responsibility

## JRMC Sexual Misconduct Policy:

### **TITLE IX NOTICE OF NONDISCRIMINATION**

“Title IX protects all people regardless of their gender or gender identity from sex discrimination, which includes sexual harassment and sexual violence.”

### **JURISDICTION**

“Title IX protects the school community from sexual harassment in a school’s educational programs and activities.”

# Scope of JRMC Responsibility

Under Title IX regulations, JRMC School of Nursing must respond to a complaint when it has:

- “Actual knowledge”
  - When “an official of the recipient who has authority to institute corrective measures” has notice
- of “sexual harassment” (as newly defined)
- that occurred within the school’s “education program or activity”
  - “includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred
  - Fact specific inquiry focused on control, sponsorship, applicable rules, etc.
  - Not simply on campus vs. off campus
- against a “person in the United States” (not in study abroad context)

# Definition of Sexual Harassment

Sexual harassment: Conduct on the basis of sex that satisfies one or more of the following:

- (i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., *quid pro quo*); or
- (ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity; or
- (iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

**\*\*\*Not the same as Title VII or state law sexual harassment definition!**

# Definition of Sexual Harassment

*(iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).*

## Sexual Assault:

- **Rape.** The 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 victim.
- **Fondling.** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- **Incest.** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape.** Sexual intercourse with a person who is under the statutory age of consent.

# Definition of Sexual Harassment

(iii) *Sexual assault (as defined in the Clery Act), **dating violence**, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).*

## DATING VIOLENCE

The term “dating violence” means violence committed by a person—

**(A)** who is or has been in a social relationship of a romantic or intimate nature with the victim; and

**(B)** where the existence of such a relationship shall be determined based on a consideration of the following factors:

**(i)** The length of the relationship.

**(ii)** The type of relationship.

**(iii)** The frequency of interaction between the persons involved in the relationship.



# Definition of Sexual Harassment

(iii) *Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).*

## DOMESTIC VIOLENCE

The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.

# Definition of Sexual Harassment

(iii) *Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).*

## STALKING

The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

**(A)** fear for his or her safety or the safety of others; or

**(B)** suffer substantial emotional distress.

# Other Conduct Prohibited by Policy

- See definitions section
  - *While a Title IX violation may not be triggered, the Policy is still triggered*
- Discrimination
- Discriminatory Harassment
- Non-Consensual Sexual Contact
- Non-Consensual Sexual Intercourse
- Sexual Exploitation
- Domestic Violence
- Dating Violence

# Avoid Sex Stereotypes

The focus should be on the conduct, not the gender

The majority of reported incidents and investigations in university context involve cisgender heterosexual women as complainants and cisgender heterosexual men as respondents, but the gender, gender identity and/or sexual orientation of any party to an investigation should have no bearing on how you investigate

From regulations: “the Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what ‘men’ or ‘women’ do or do not do.”

# Impartiality and Bias

- Regulations' "presumption of non-responsibility" requires schools to investigate and resolve complaints: "without drawing inferences about credibility based on a party's status as a complainant or respondent."
- Hearing officers and investigators must not have "bias for or against complainants or respondents generally or for an individual complainant or respondent"
- "A recipient that ignores, blames, or punishes a student due to stereotypes about the student violates the final regulations."

# Impartiality and Bias

- To ensure impartiality and lack of bias
- DO NOT:
  - Rely on cultural tendencies to blame complainants based on behavior
  - Rely on cultural tendencies to blame respondents and automatically believe complainants
  - Rely on statistics or studies that show trends in data
- DO:
  - Remember that anyone can be a victim or perpetrator of sexual misconduct
  - Consider only the facts in front of you
  - Investigate and conduct hearings in a manner that will not allow even for perception of bias

# Conflicts of Interest

A conflict of interest may exist when:

- An investigator or hearing officer's interests are at odds with a complainant or respondent
- Personal or professional interests impact your ability to be fair and impartial
  - EXAMPLE: complainant or respondent is family member, close personal friend, etc. of investigator/hearing officer

A conflict of interest does not exist just because:

- Past professional experience (victim's rights advocate, defense attorney, etc.)
- Political affiliation (liberal or feminist)

Apply a case by case, common sense approach.

# Complaint Process – Initial Steps





# What to do when a complaint is received

Ways a complaint may come in

- Directly from student
- From witness
- From faculty or staff
- From campus visitor or community member

“Except in the case of a statutory prohibition from reporting, all JRMC employees must, within 24 hours of witnessing or receiving information about a sexual discrimination allegation, report it to a Title IX Coordinator regardless of whether an informal or formal complaint has been filed. Any student, non-employee or campus visitor/guest who has witnessed or received information about sexual discrimination is strongly encouraged to report it to a Title IX Coordinator.”

# What to do when a complaint is received – formal vs. informal

**Formal Complaint:** “A document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the recipient investigate the allegation of sexual harassment. A formal complaint may be filed with the Title IX Coordinator in person, by mail, by electronic mail, or by contacting the Title IX Coordinator.”

Formal Complaint → Title IX Process

**Informal Complaint:** any other receipt or notification of a policy violation where the party reporting does not wish to file a Formal Complaint as defined by the policy.

Informal Complaint → Title IX team meets → Options

# What to do when a complaint is received – formal vs. informal

## Formal Complaint:

### 1. Initial Assessment

- “Title IX Team will meet to review the information presented and to determine the appropriate course of action.” Determine whether policy is triggered.
- Title IX Team can file Formal Complaint even if Complainant does not (rare cases)

### 2. Written Notice to Respondent

- Provide copy of complaint, instructions for reviewing policy and procedure, notify of right to advisor, etc.
- Option to accept responsibility

### 3. Meet with Complainant (if not done already)

- Discuss availability of supportive measures, outside resources, instructions for reviewing policy and procedure, notify of right to advisor, right to report to law enforcement, etc.

### 4. Institute Supportive Measures

- Available to both complainant and respondent

### 5. Informal Resolution OR Investigation Begins

- Written consent from both parties must be obtained to engage in informal resolution

# What to do when a complaint is received – formal vs. informal

## Informal Complaint:

### 1. Initial Assessment

- “Title IX Team will meet to review the information presented and to determine the appropriate course of action.” Determine whether policy is triggered.

### 2. Meet with complaining party (if not done already)

- Discuss availability of supportive measures and other resources
- Inform of right to file Formal Complaint
- Notice to other party may not be necessary

### 3. Institute Supportive Measures (if applicable)

- Fairness dictates that other party have notice of general allegations if supportive measures against them are instituted

### 4. Informal Resolution (if applicable)

- Still available for informal complaints
- Written consent from both parties must be obtained to engage in informal resolution

# What to do when a complaint is received – Supportive Measures

Supportive Measures: *Non-disciplinary, non-punitive* individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

# What to do when a complaint is received – Supportive Measures

Supportive measures may include:

- counseling,
- extensions of deadlines or other course-related adjustments,
- modifications of work or class schedules,
- campus escort services,
- mutual restrictions on contact between the parties,
- changes in work or housing locations,
- leaves of absence,
- increased security and monitoring of certain areas of the campus, and
- other similar measures.

In some cases: emergency removal from campus may be warranted!

# What to do when a complaint is received – Supportive Measures

When complaint received (formal or informal), Title IX Coordinator must:

- (1) promptly contact the Complainant to discuss the availability of supportive measures;
- (2) consider the complainant's wishes with respect to supportive measures;
- (3) inform the complainant of availability of supportive measures with or without filing a complaint; and
- (4) explain to the complainant the process for filing a Formal Complaint.

# Investigations





# Investigations – Key Principles

**“An investigation will occur in response to a Formal Complaint.”**

- Investigation simply means gathering evidence about the allegations. Investigator does not reach a determination!
- Follow JPMC Policy to the letter
- Do not promise things outside the policy to complainant or respondent (results, time frame, confidentiality, etc.)
- Confidentiality: limit who can see what in investigative file; parties must be able to review evidence directly related to allegations
- Who? Investigator may be Title IX Coordinator or other person but cannot be the Hearing Officer or anyone who may hear an appeal.

# Investigations – what the Policy says

The Investigator will:

- Identify the policies allegedly violated;
- Prepare the notice of charges based on initial investigation;
- Provide an equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence;
- Develop a strategic investigation plan which may include a witness list, an evidence list, an intended timeframe, and an order of interviews for all witnesses, including the Respondent;
- Conduct a thorough, reliable and impartial investigation. Witnesses may or may not be given notice prior to the interview;
- Send written notice of any investigative interviews, meetings, or hearings to the parties;
- Send the parties, and their Advisors, evidence directly related to the allegations, with at least 10 days for the parties to inspect, review, and respond to the evidence.
- Send the parties, and their Advisors, an investigative report that fairly summarizes relevant evidence, with at least 10 days for the parties to respond; and
- Complete the investigation promptly, and without unreasonable deviation from the intended timeline.

# Investigations – step-by-step

- ➔ Review Formal Complaint and determine how the Policy was allegedly violated
- ➔ Prepare Notice of Charges of Policy violation and send to Complainant and Respondent
- ➔ Meet with Complainant and Respondent to determine relevant witnesses, documents, and other evidence you need to gather
- ➔ Develop an investigation plan that involves a general timeline for interviewing witnesses and reviewing evidence
- ➔ Conduct investigation by interviewing witnesses and reviewing evidence
- ➔ Draft Investigative Report summarizing relevant evidence
- ➔ Send draft Investigative Report and all evidence “directly related” to the allegations to parties
- ➔ Draft final Investigative Report

# Investigations – “directly related” evidence

The new Title IX regulations require that JRMC send the parties, and their advisors, evidence *directly related* to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence...even if the Investigator does not rely on that evidence in the Investigative Report!

“Directly related” evidence could be broader than relevant evidence.

Allow for time to incorporate party feedback into Investigative Report before finalizing.

# Investigations – “relevant” evidence

Investigative Report must “summarize relevant evidence”

“RELEVANT” NOT DEFINED!

- Federal Rule of Evidence 401: Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.
- Investigators have discretion to determine what is relevant
- Parties will weigh in on “directly related” evidence that may change an investigator’s perception of relevance
- Remember, investigator is summarizing the evidence, not drawing conclusions or making a credibility determination

# Investigations – “relevant” evidence

## What evidence is not relevant:

- **Rape Shield Evidence.** Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless
  - ***Mistaken Identity.*** 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
  - ***Consent.*** 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.
- **Privileged Records.** “evidence that constitute[s], or seek[s] disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”
  - Medical records, mental health records, attorney/client communications

**\*\*\*Rules apply to hearings as well\*\*\***

# Investigations – Evidence

Title IX regulations do not expressly exclude hearsay, character evidence, prior bad acts, etc. Institutions have broad discretion to decide what evidence is “relevant.”

Witnesses	Documents
<ul style="list-style-type: none"><li>• Persons present at the time</li><li>• Persons who observed a party before or after</li><li>• Persons who communicated with party around the time of the incident</li><li>• Character witnesses</li></ul>	<ul style="list-style-type: none"><li>• Text messages</li><li>• Phone call records</li><li>• Social media activity</li><li>• Emails</li><li>• Police Reports</li><li>• Medical documents (privileged but may be waived)</li></ul>

# Investigations – Witness Interviews

- AVOID:
  - Interrupting
  - Asking leading or yes/no questions
  - Paraphrasing the witness' statement
  - Phrases like “why did you” or “why didn't you”
  - Sticking too much to an outline
  - Prejudging contents of statement based on how the witness presents it (forgets things, out of order). Complainants, respondents, and witnesses may present differently based on experiencing trauma or stress.
- AIM FOR:
  - Open-ended questions (tell what happened at the party, what happened next)
  - Narrative responses
  - Follow up for clarification on any points you did not get from narrative responses



# Investigations – Investigative Report

- Upon receipt of responses from parties regarding “directly related” evidence and draft Investigative Report, prepare final Investigative Report
- At least 10 days prior to hearing, send the parties the final Investigative Report
- Parties may provide response
- No need to change contents of Investigative Report based on response
- Investigative Report should not make a decision regarding responsibility
- No prohibition on a recommendation, but proceed with caution

# Hearings



# Live Hearing - Basics

## *Title IX requires a live hearing*

Who conducts the hearing?

The Hearing Officer (cannot be Title IX Coordinator or Investigator)

When?

At the conclusion of the investigation

Give parties ample notice

Where?

On campus, private room (maybe two rooms if parties request separation); virtual hearing permitted

# Live Hearing – Before

## 5 business days before Hearing

- The parties must provide names and contact information to Title IX Coordinator of any witnesses they wish to have the Hearing Officer call;
- The parties will notify the Title IX Coordinator of Advisor's name; and
- The parties will notify the Title IX Coordinator they need an Advisor.

## 3 business days before Hearing

- The Hearing Officer gets Investigative Report and determines witnesses;
- Claims of bias or conflict of interest must be received;
- Witnesses notified;
- Parties notified of witnesses; and
- Parties provide any additional documents for consideration.

## 2 business days before hearing

- Any participant in the hearing who requires special accommodations should notify the Title IX Coordinator; and
- Separate room requests must be made.

# Live Hearing – Witnesses

Who should be a witness?

- The Investigator
- People the parties name
- People whose statements are relied upon in the Investigative Report
- Anyone else the Hearing Officer thinks may have relevant evidence
- Character witnesses?
  - Title IX does not prohibit **relevant** character witnesses
  - Hearing Officer cannot refuse to hear **relevant** evidence

# Live Hearing – Cross Examination

Direct examination may be conducted by Hearing Officer, party, party Advisor

Cross-examination must be conducted the party's Advisor (Hearing Officer may follow up):

- Directly
- Orally
- In real time
- Never by a party personally
- Advisor may question the other party and any witnesses
- May ask follow-up questions including those challenging credibility
- Questions may not be prescreened or submitted in writing
- Parties have the right to present evidence and witnesses, including expert witnesses
- School carries the burden of proof

# Live Hearing – Credibility Determinations

The Hearing Officer = the Decision-Maker

Hearing Officer makes credibility determinations!

A credibility determination is the determination of the decision-maker as to what statements they believe and what statements they do not believe.

Often there may be little evidence other than the statements of the parties

Rely on the evidence presented. Do not rely on preconceived notions about truth and honesty.

# Live Hearing – Relevancy

Allow only relevant evidence

- Exclude irrelevant evidence (relevant not defined, remember from prior slides)
- On cross examination, Hearing Officer must explain why questions is excluded as irrelevant
- Rape Shield protections and confidential documents/statements apply (not relevant)
- If a party or witness does not submit to cross examination, that evidence must not be considered by Hearing Officer



# Live Hearing – Absence of Witness

JRMC does not have ability to compel attendance

- Party's absence from hearing cannot be used against them
- Hearing Officer cannot make any inferences about decision not to appear
- Hearing must go forward, but Hearing Officer can only rely on available relevant evidence

# Live Hearing – Technology

- ***Separate Rooms.*** At the request of either party, JRMC must provide for the entire hearing to occur with the parties located in separate room with technology enabling the parties to see and hear each other.
- ***Virtual Appearance.*** Live hearings may be conducted with all the parties physically present in the same location or, at JRMC’s discretion, any or all parties, witnesses, or other participants may appear at the live hearing virtually.
- ***Recording.*** Hearings must be recorded and the recording must be maintained by seven years; additionally, the parties have the right to inspect the recording.
- ***Training.*** Hearing Officer must be trained to use all technology for use in hearings.

# Live Hearing – Decision

After the hearing, the Hearing Officer will issue a written determination.

## STANDARD OF EVIDENCE = PREPONDERANCE OF THE EVIDENCE

Based on the evidence, is it more likely than not that a Policy violation occurred?

**Remember**: the Respondent is presumed not responsible. The burden of proof and gathering evidence is on the school, not on the Complainant.

# Live Hearing – Decision

Policy: “When an allegation of misconduct is brought to an appropriate administrator’s attention, and a Respondent is found to have violated this policy, sanctions will be used to reasonably ensure that such actions are never repeated.”

If Policy violation found → Respondent is found “**responsible**”  
→ impose sanctions

If no Policy violation found → Respondent is found “**not responsible**” → no sanctions, but supportive measures may remain in place!

# Live Hearing – Decision

## Written Decision Must Include:

- Finding of Responsible or Not Responsible for each alleged policy violation
- Findings of fact
- Conclusions about whether the alleged conduct occurred
- Rationale for the result of each allegations
- Disciplinary sanction imposed
- Information about how to appeal

Send to both parties simultaneously!

# Live Hearing – Decision

## Possible Sanctions:

- Reprimand
- Probation
- Suspension
- Expulsion
- Loss of privileges (e.g., library, gym, cafeteria, etc.)
- Mental health assessment
- Psychoeducational course (e.g., anger management, emotional control)
- No-Contact Order
- Residence hall relocation or eviction
- Limited access to campus or campus buildings
- Service hours
- Prevention education/curriculum
- Alcohol/drug assessment and/or classes
- Transcript notation

# Live Hearing – Decision

## Sanction Considerations

- Mitigating or aggravating factors
- Severity and egregiousness of conduct
- Multiple policy violations for same incident (sexual assault, harassment, stalking)
- Prior policy violations (not relevant at decision-making phase, but may be a factor in sanctioning)
- Complainant's requests
- Respondent's attitude

Not one factor is controlling

# Appeals





# Appeals - Basics

**A PARTY CANNOT APPEAL FOR ANY REASON!!**

**LIMITED GROUNDS FOR APPEAL:**

- (1) Procedural irregularity that affected the outcome of the matter;
- (2) New evidence that was not reasonably available at the time the determination was made that could affect the outcome of the matter;  
and/or
- (3) The Title IX Coordinator, Investigator(s), or Hearing Officer had a conflict of interest or bias for or against one of the parties that affected the outcome of the matter.

# Appeals - Procedure

## Appeal must be made:

- Within 5 business days of written determination
- In writing to the Title IX Coordinator

## Process:

- Title IX Compliance Team meets to determine if the appeal is eligible (meets criteria)
- If procedural or substantive error → return to Hearing Officer for correction
- If bias or conflict of interest → a new investigation or hearing may be warranted
- If new evidence → return to Hearing Officer to consider new evidence

# Appeals - Recusals

Title IX Compliance Team considers appeal, BUT

The following people CANNOT be part of the discussion:

- Hearing Officer for that case
- Title IX Coordinator for that case
- Investigator for that case

# Questions?



# Thank You!

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