

Interim Policy Update

2020-21 Training for the Grievance Process Pool
August 28, 2020 - PART ONE

Big Picture Overview

- New regulations were significant
 - We recognize the training you have done has covered a LOT
- Summer timeline was tight
 - We'll review what we updated for the Interim policy
- Interim Policy is in place
 - Need to verify full knowledge of new policy
- These discussions become very nuanced
 - We'll try to spend time reviewing things that have come up during other training

Core Title IX Regulation Changes

- Definition of Sexual Harassment
 - Use of Clery definitions
- Specific jurisdiction limitations
 - Inside the US
 - On campus or part of a college program/activity
 - “Dismissal” under Title IX
- Requirement for direct cross examination
 - Must be completed by Advisor
- Application to employees
- Change/addition of roles
- Significant focus on bias
 - Please do some self evaluation/reflection

Reminder...Title IX holds the institution accountable. Our policy holds individuals accountable.

Summer Updates

- Edited policy to be in compliance with requirements of regulations
 - One policy, two processes
 - Approved as Interim Policy
 - Will do full review this year
 - Culture of Respect Core Evaluation
 - Updated web to show their roles, posted training we are all doing, etc.
- Anything “optional” we left for further review
 - Mandatory reporting
 - “Actual knowledge” versus “mandatory reporting”
 - Evidentiary standard
 - One policy or split

Role Review

- Title IX Coordinator (Sara Dorer)
 - My job to deal with the details/the oversight and implementation of the regs
- Investigator (Jill Whitcomb)
- Grievance Process Pool (GPP) - ALL of you!
 - Advisors
 - Will still be support persons
 - Will issue direct cross
 - Potential for involvement solely in hearing
 - Decision-makers/Hearing Panel Members
 - Appeal panel members
 - *potentially investigators*
 - *Cross training for all...but not required to serve as all*

Process Review

- Upon receipt of report:
 - Sara contacts party (preferably to meet)
 - Provide understanding of supportive measures (available without filing formal complaint)
 - Can not unreasonably burden either party
 - Will be offered to both parties
 - Contact limitations offered between parties
 - Explain option to file formal complaint at that time or in the future (in writing)
- Once file formal complaint
 - Discussion about informal or formal resolution options
 - Determination about Title IX (process A or B)
- Process A same as before (more on this to come)
 - Process B diverges at report writing phase - moves to Hearing Panel

Policy Coverage

- Discrimination and Harassment based on all forms of protected class
 - Quid Pro Quo
 - Hostile Environment
 - unwelcome conduct,
 - taken against a person on the basis of a protected category, and
 - determined to be so severe, or
 - pervasive, or
 - persistent,
 - that it effectively interferes with or denies an individual's ability to participate in or benefit from Hope College's education program or activity
 - Title IX Sexual Harassment
 - Severe AND pervasive and objectively offensive
 - Sexual Assault
- Expectations regarding unethical relationships (noted, covered by HR)

Sexual Assault:

- Sex Offenses, Forcible
- Rape
 - Penetration, no matter how slight, without consent (including attempted rape)
- Sodomy
- Sexual Assault with an object
- Fondling
- Other Sex Offenses
 - Incest
 - Statutory Rape
- Dating Violence
- Domestic Violence
- Stalking
- Sexual Exploitation

Consent is:

- knowing, and
- voluntary, and
- clear permission
- by word or action
- to engage in sexual activity.

Since individuals may experience the same interaction in different ways, it is the responsibility of each party to determine that the other has consented before engaging in the activity.

If consent is not clearly provided prior to engaging in the activity, consent may be ratified by word or action at some point during the interaction or thereafter, but clear communication from the outset is strongly encouraged.

For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct. Reasonable reciprocation can be implied. For example, if someone kisses you, you can kiss them back (if you want to) without the need to explicitly obtain their consent to being kissed back.

Consent can also be withdrawn once given, as long as the withdrawal is reasonably and clearly communicated. If consent is withdrawn, that sexual activity should cease within a reasonable time.

Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). A current or previous intimate relationship is not sufficient to constitute consent.

Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on Hope College to determine whether its policy has been violated. The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

Consent in relationships must also be considered in context. When parties consent to BDSM or other forms of kink, non-consent may be shown by the use of a safe word. Resistance, force, violence, or even saying “no” may be part of the kink and thus consensual, so Hope College’s evaluation of communication in kink situations should be guided by reasonableness, rather than strict adherence to policy that assumes non-kink relationships as a default.

Incapacitation

A person cannot consent if they are unable to understand what is happening or is disoriented, helpless, asleep, or unconscious, for any reason, including by alcohol or other drugs. As stated above, a Respondent violates this policy if they engage in sexual activity with someone who is incapable of giving consent.

It is a defense to a sexual assault policy violation that the Respondent neither knew nor should have known the Complainant to be physically or mentally incapacitated. “Should have known” is an objective, reasonable person standard which assumes that a reasonable person has the capacity to and is exercising sound judgment.

Incapacitation occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/informed consent (e.g., to understand the “who, what, when, where, why, or how” of their sexual interaction).

Incapacitation is determined through consideration of all relevant indicators of an individual’s state and is not synonymous with intoxication, impairment, blackout, and/or being drunk.

This policy also covers a person whose incapacity results from a temporary or permanent physical or mental health condition, involuntary physical restraint, and/or the consumption of incapacitating drugs.

Process A

- Same as past four years
- Investigation
 - Both/all parties allowed support person, allowed to provide witnesses, submit questions to be asked of any party
 - Parties both read investigation report and review relevant evidence
 - Jill evaluates credibility, makes analysis and recommended finding
- Decision-making team
 - Now a three member panel
 - **Report will no longer be redacted**
 - Make determination (agree with Jill's recommendation?)
 - Determine sanctions
- Both parties have right to appeal
 - If appealed, three member appeal panel with one as chair
 - Typically review of report/record only

Process B

- Investigation remains the same until report writing
 - No credibility analysis, no recommended finding
 - Parties review ALL evidence submitted/collected
 - Have 10 days to respond
 - Parties receive report for review
 - Have 10 days to review before Hearing
- Hearing Panel
 - Three members, with one being the chair
 - Parties allowed Advisor AND support person (if desired)
 - Panel evaluates credibility
 - After hearing, panel deliberates and makes finding
 - If responsible, determines sanctions
 - HR and/or Provost involved in employee cases
- Same appeal option available

Hearing Process

- Sara will serve as coordinator of the space/set-up/getting people in the right places, etc.
 - Could be in person or virtual
 - Space setup will be intentional
- We will develop a hearing script
- We will utilize outside contractor to serve as chair this year
 - They will be trained to determine relevance
 - They will be responsible for managing expected behaviors
- We will call Jill as witness
- We currently plan to assign advisors from the pool
 - Will evaluate on a case by case basis
 - Will likely seek a backup/"on-call" advisor for every hearing
 - Party could have advisor and support person

Hearing Process (cont.)

- No one “right” way to do this
 - Lots of different opinions and advice currently
- Panel will ask questions before direct cross
- Currently not likely to allow for “objections”

Resources

- Barnes and Thornburg training (required)
 - 1st part is about investigator role
 - Relevant because it provides good overview of new regs AND if you are asked to hear an appeal, you should understand Jill's role
- This training (required)
- The Policy - read key sections before a case
- ATIXA Playbook - read relevant sections before a case
- Will offer training as it comes up - let us know what you complete so we can track it

A few final thoughts

- B&T training noted some of their preferences that we plan to do different
 - We will record investigation meetings
 - Hearings will be recorded audio only
- If anyone feels they need to be released from role now that they know about the new regulations OR because feel a bias (feel more like an advocate versus a neutral party) - please inform Sara or Jill

Other Questions?
