

Policy on Sexual Misconduct – Revision to Provision Not Permitting Reliance on
Statements Not Subject to Cross Examination in Title IX Hearings

As a result of a federal court ruling and subsequent update from the U.S. Department of Education, effective immediately, the portion of Section XI(E)(c)(ii)(2) of the Policy on Sexual Misconduct (PSM) relating to cross-examination at hearings for Title IX Sexual Harassment matters will no longer be in effect. This provision states: “If a party or witness does not submit to cross examination at the live hearing, the Adjudication Committee must not rely on any statement of that party or witness in reaching a determination regarding responsibility.” Accordingly, in all future Title IX Sexual Harassment hearings, members of that hearing’s Adjudication Panel may consider admissible statements made by parties or witnesses in reaching a determination regarding responsibility, even if those parties or witnesses do not participate in cross-examination at the live hearing.

The above provision regarding statements not subject to cross-examination was included in CUNY’s Policy on Sexual Misconduct because it was required by Title IX regulations that became effective in August 2020. However, on August 10, 2021, a Massachusetts federal court ruled, in *Victims Rights Law Center et al. v. Cardona*, WL 3185743 (D. Mass. July 28, 2021) that this particular requirement was arbitrary and capricious. On August 24, 2021, the U.S. Department of Education provided an update, available [here](#), stating that “[i]n accordance with the court’s order, the Department **will immediately cease** enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. **Postsecondary institutions are no longer subject to this portion of the provision.**”

Please note that all other provisions in the 2020 amendments which are incorporated into CUNY’s policy are still in effect. No other provision in the PSM has been affected by this update. Please do not hesitate to reach out to the University Title IX Director and/or the Office of the General Counsel, with any questions.