



August 26, 2020

MEMORANDUM

To: Chancellor's Cabinet
College Presidents/Deans
Secretary to the Board of Trustees
Chief Academic Officers
Chief Student Affairs Officers
Legal Affairs Designees
Human Resources Directors
Labor Designees
Directors of Public Safety
Title IX Coordinators
Student Conduct Officers

From: Derek Davis
General Counsel and Senior Vice Chancellor for Legal Affairs

Richard R. White
Vice Chancellor for Risk, Audit and Compliance

Re: Implementation of The City University of New York's 2020 Revised Sexual Misconduct Policy

On August 12, 2020, The City University of New York ("CUNY") Board of Trustees adopted a revised Policy on Sexual Misconduct ("Policy"), effective August 14, 2020.¹ This revised Policy supersedes and replaces CUNY's prior (June 2018) policy and will govern CUNY's response to allegations of Sexual Misconduct based on conduct alleged to have occurred on or after August 14, 2020. The revised Policy was necessitated by changes to the federal regulations implementing Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §§ 1681-1688. These new regulations were announced on May 6, 2020, and became effective on August 14, 2020.

Following the announcement of these changes, the Office of the General Counsel ("OGC") revised CUNY's Policy significantly to comply with the new federal regulations and to otherwise

¹ The Policy was adopted by the Board of Trustees on August 12, 2020 to ensure that CUNY was in compliance with the new Title IX regulations effective, August 14, 2020. At the next CUNY Board of Trustees meeting, Article XV of the CUNY Bylaws will be amended to provide that the procedures in the Policy, including disciplinary procedures, will apply to all allegations of Sexual Misconduct involving students.

include additional clarifications to the Policy. Before the Policy was finalized, OGC sent it to many of CUNY’s stakeholders, including college presidents and faculty and student leaders. OGC considered all comments submitted and many comments were incorporated. The Office of Risk, Audit and Compliance (“RAC”), which manages CUNY’s Title IX compliance, worked with various CUNY stakeholders, including campus Title IX Coordinators, to prepare for the implementation of the revised Policy.

Below is a summary of the significant elements of the revised Policy, information regarding Policy implementation, and the action steps required by each college/unit.

A. OVERVIEW OF CHANGES AND STRUCTURE OF THE REVISED POLICY

The new regulations significantly limit the behavior that constitutes Sexual Harassment prohibited by Title IX—this behavior is now referred to as “Title IX Sexual Harassment.” The regulations mandate a specific procedure for the investigation, resolution and adjudication of behavior that meets the definition of Title IX Sexual Harassment (“Title IX Grievance Procedure”). The regulations state that educational institutions may still prohibit sexual misconduct that falls outside of the narrow definition of Title IX Sexual Harassment and CUNY will continue to prohibit, investigate and adjudicate such conduct—now referred to as Non-Title IX Sexual Misconduct in the revised Policy.

While the regulations specify a strict and complex Title IX Grievance Procedure for Title IX Sexual Harassment matters, those procedures are not required when Sexual Misconduct falls outside the scope of Title IX and CUNY determined that it would not use the Title IX Grievance Procedure for Non-Title IX Sexual Misconduct matters. Therefore, to ensure compliance with Title IX, as now interpreted, as well as other federal, state and local laws, the revised Policy provides two different sets of procedures: Title IX Sexual Harassment matters will follow the Title IX Grievance Procedure required by the regulations and Non-Title IX Sexual Misconduct matters will follow a different process which largely mirrors the CUNY investigation and adjudication process that existed under previous versions of the Policy, with a few changes and updates.

The revised Policy uses Sexual Misconduct as an umbrella term that covers all conduct prohibited by the Policy—regardless of whether that conduct meets the Title IX Sexual Harassment definition or not. Sexual Misconduct that falls outside the scope of Title IX Sexual Harassment will be referred to as a Non-Title IX Sexual Misconduct matter.

1. IMPLEMENTATION DATE

The United States Department of Education (“USDOE”) Office of Civil Rights (“OCR”) will not enforce the new regulations retroactively. As mentioned above, the revised Policy became effective on August 14, 2020, and will apply to Sexual Misconduct that allegedly occurred on or after August 14, 2020. Sexual Misconduct that took place before the effective date of the revised Policy will be controlled by the version of the Policy that was in effect at the time the alleged behavior occurred.

2. DEFINITIONS

In general, the definitions were revised. The sections on definitions and prohibited conduct were combined. See Section III. New terms are defined, such as Title IX Sexual Harassment. Title IX Sexual Harassment must take place in CUNY’s education program or activity and against

a person in the United States. USDOE defines Title IX Sexual Harassment to include Sexual Assault, Dating Violence, Domestic Violence, Stalking, quid pro quo Sexual Harassment and harassment that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an institution’s educational program or activity. See Section III, Prohibited Conduct and Definitions.

Title IX Sexual Harassment is a subset of the broader definition of Sexual Harassment. If conduct does not meet the definition of Title IX Sexual Harassment—for example, because the behavior did not meet USDOE’s jurisdictional limitations, taking place in the United States or within a CUNY educational program or activity, the behavior may still meet the broader definition of Sexual Harassment.

Both Sexual Harassment and Title IX Sexual Harassment are defined as conduct “on the basis of sex.” The revised Policy defines, “on the basis of sex” to include sexual orientation, gender, gender expression and gender identity, including transgender status. The definition of Gender-Based Harassment was deleted from the revised Policy because Sexual Harassment now encompasses Gender-Based Harassment.

3. ACTUAL KNOWLEDGE AND EMPLOYEE REPORTING OBLIGATIONS

Under the new regulations, OCR will apply an “actual knowledge” standard to determine if an institution responded promptly and in a manner that was not deliberately indifferent to the alleged Title IX Sexual Harassment. An institution has “actual knowledge” of Title IX Sexual Harassment or an allegation of Title IX Sexual Harassment when it is known to the Title IX Coordinator or an official with the authority to institute corrective measures. USDOE recognizes that determining which officials have authority to institute corrective measures is a fact-specific inquiry. In addition to the Title IX Coordinator, CUNY believes that the following individuals may have the authority to institute corrective measures:

- Campus President;
- Public Safety;
- Chief Student Affairs Officer; and
- Director of Human Resources.

The individuals listed above are also designated as “responsible employees”—meaning that they are required to report Sexual Misconduct to the Title IX Coordinator. However, because these individuals are likely to be deemed as individuals with authority to institute corrective measures under the new “actual knowledge” standard adopted by USDOE and enforced by OCR, they must be particularly diligent to promptly report Sexual Misconduct or allegations of Sexual Misconduct to the Title IX Coordinator.

CUNY will continue to designate certain employees as “responsible employees” that are required to report Sexual Misconduct to the Title IX Coordinator. The list of responsible employees was changed and should be reviewed carefully. See Section VI. Colleges are still required to train all employees who are required to report incidents of Sexual Misconduct under the Policy, as well as those employees who have been designated as confidential employees.

4. REPORTING SEXUAL MISCONDUCT TO THE COLLEGE

Complainants are encouraged to complete the CUNY Sexual Misconduct Allegation Form. This is a revised version of the former “CUNY Sexual Misconduct Complaint form” and will be available in a fillable PDF form on CUNY’s Title IX website and every campus Title IX website. Colleges are also encouraged to provide the form in an online format that allows for confidential online submission directed to the Title IX Coordinator. The Title IX Coordinator should seek the assistance of their campus’ application and web development office to upload the form to their campus web page for easy access.

Complainants should submit the form electronically through the college’s website, by e-mail, or by bringing the form to one of the following offices:

- Title IX Coordinator;
- Office of Public Safety;
- Office of Vice President for Student Affairs or Dean of Students;
- Residence Life staff in CUNY owned or operated housing; or
- Human Resources Director.

Colleges will continue to respond to allegations made without the form, whether oral or written. As discussed below, the regulations require the submission of a Title IX Formal Complaint for the resolution of allegations that constitute Title IX Sexual Harassment. There is no separate form for this purpose. It is the Title IX Coordinator’s responsibility to determine if a complainant’s submission of the CUNY Sexual Misconduct Allegation Form—or any other method of reporting—meets the procedural and substantive requirements of a Title IX Formal Complaint.

5. EVALUATION OF INITIAL REPORTS

As discussed above, there are separate procedures for Title IX Sexual Harassment matters (Section XI) and Non-Title IX Sexual Misconduct matters (Section XII). Rights and procedures that apply to both Title IX Sexual Harassment matters and Non-Title IX Sexual Misconduct matters are discussed in Section X.

Under this new structure, Title IX Coordinators must evaluate initial allegations of Sexual Misconduct to determine whether the alleged behavior meets the definition of Title IX Sexual Harassment. This new evaluation stage is imperative to ensure that Title IX Sexual Harassment is investigated, resolved and/or adjudicated pursuant to the Title IX Grievance Procedures required by the new Title IX regulations.

Allegations that include both Title IX Sexual Harassment and Non-Title IX Sexual Misconduct are handled together under the Title IX procedures.

6. TITLE IX SEXUAL HARASSMENT MATTERS

a. Requirement of a Title IX Formal Complaint

Pursuant to the new regulations, a Title IX Formal Complaint is required to initiate and resolve a Title IX Sexual Harassment matter. USDOE defines a Title IX Formal Complaint as a document filed by a complainant or signed by the Title IX Coordinator alleging Title IX Sexual Harassment against a respondent and requesting that the college investigate the allegations.

There is no specific form or manner in which a Title IX Formal Complaint must be filed, so long as the submission meets the substantive and procedural requirements of the USDOE definition above. Substantively, a Title IX Formal Complaint must allege behavior that, if true, meets the definition of Title IX Sexual Harassment. Procedurally, the Title IX Formal Complaint must be filed by a complainant, which means that it may be a physical document, e-mail or electronic submission through a campus online form, so long as it contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the complaint.

There are also circumstances when a Title IX Coordinator may sign a Title IX Formal Complaint, with or without a complainant's desire to participate in a grievance process.

After a Title IX Coordinator determines that allegations will proceed as a Title IX Sexual Harassment matter, the Title IX Coordinator must determine whether the manner in which the initial allegations were reported meets the criteria of a Title IX Formal Complaint. If the manner in which the initial allegations were reported does not meet the criteria of a Title IX Formal Complaint, the Title IX Coordinator will contact the complainant to explain how to file a Title IX Formal Complaint and notify them that a Title IX Formal Complaint is required to resolve the allegations.

If no Title IX Formal Complaint is received within a reasonable time, the Title IX Coordinator may administratively close the matter. A complainant may file a Title IX Formal Complaint at any time thereafter.

b. Dismissal of Title IX Formal Complaint

Title IX Formal Complaints must be investigated, resolved and adjudicated subject to the specific Title IX Grievance Procedures outlined by the regulations, unless the Title IX Formal Complaint is subject to the mandatory or discretionary dismissal criteria outlined in the regulations. If a Title IX Formal Complaint is dismissed, the parties must be given a formal dismissal notice that is subject to appeal to the University Title IX Director. See Section XI-D.

c. Investigation

Under the new process for Title IX Sexual Harassment matters, the Title IX Coordinator will continue to investigate allegations and prepare an investigative report ("report"). Prior to the report being finalized, the parties have the right to review all of the evidence gathered during the investigation and to respond in writing. The Title IX Coordinator must consider the parties' written responses to the evidence before finalizing the report.

d. Investigative Report

Section XI of the Policy lists the six (6) required elements for Title IX Sexual Harassment investigative reports, which includes a summary of party and witness statements and other relevant evidence pertaining to each allegation. Title IX Sexual Harassment reports, unlike the Non-Title IX Sexual Misconduct investigative reports, will *not include* the Title IX Coordinator's analysis or factual findings. After the report is finalized, the parties have the right to review the final report and respond in writing. The final report and the parties' written responses to the final report will be forwarded to the Adjudication Committee for review prior to a hearing. As required by the regulations, all Title IX Sexual Harassment matters will proceed to a live hearing, unless the Title IX Formal Complaint is dismissed or otherwise resolved.

e. Investigation Time Frame

When possible, the investigation of a Title IX Formal Complaint must be completed within one hundred-twenty (120) days of receipt of the Title IX Formal Complaint (including the evidence review process, completion of the investigative report and report review process).

7. NON-TITLE IX SEXUAL MISCONDUCT MATTERS

In general, the investigation of Non-Title IX Sexual Misconduct matters largely mirrors the CUNY process that existed under previous versions of the Policy, with a few changes and updates.

Unlike Title IX Sexual Harassment matters, Non-Title IX Sexual Misconduct reports will continue to include the Title IX Coordinator's analysis and factual findings regarding whether in the investigator's opinion, there is a preponderance of evidence that the respondent is responsible for the allegations.

A major change is that when the complainant is a student, Non-Title IX Sexual Misconduct reports will now be shared with both parties prior to the report being sent to the campus president. This process has changed to provide student complainants the opportunity to appeal unsubstantiated findings to the Appeal Committee. The new appeals process is discussed in Section XII-D-a.

Following the appeal, if any, all reports will be forwarded to the campus president for appropriate action.

The college must make reasonable efforts to ensure that the investigation and resolution of allegations of Non-Title IX Sexual Misconduct are carried out within reasonably prompt time frames. While some allegations may require more extensive investigation, when possible, the investigation of allegations of Non-Title IX Sexual Misconduct (including completion of the investigative report) must now be completed within one hundred-twenty (120) days of the receipt of the allegations.

8. INFORMAL RESOLUTION

Informal resolution is now available in all matters, except in cases involving Title IX Sexual Harassment allegations by a student against an employee. The Title IX Coordinator must

consider every eligible case for informal resolution and, when deemed appropriate, will refer matters to a qualified staff or faculty member to facilitate the informal resolution. Each college must promptly designate employees to facilitate informal resolution. See Section X-B.

9. ADJUDICATION AND APPEAL COMMITTEES AND HEARING PROCESS

Under the revised Policy, all hearings and most appeals are heard by committees comprised of individuals drawn from a CUNY-wide Sexual Misconduct Panel (“the Panel”). This is a change from the Article XV Faculty Student Disciplinary Committee that traditionally served as the decision maker for Sexual Misconduct cases. The Panel is comprised of faculty members, Higher Education Officer series employees and students. The Adjudication Committee serves as the decision-maker at hearings and the Appeal Committee decides appeals. Each Adjudication and Appeal Committee is comprised of three members of the Panel who will serve CUNY-wide but will not serve on cases from their home campus. The Panel for the 2020-2021 academic school year has already been selected, based on criteria in the previous version of the Policy. These Panel members will be notified of the changes to the Policy and their duties as CUNY-wide Panel members. RAC will provide guidance to college presidents on selection of the 2021-2022 Panel at a future date/time.

The University Title IX Director will now facilitate the selection and scheduling of the Adjudication and Appeal Committees and determine an appropriate physical location for hearings and meetings on a case-by-case basis. Hearings and/or meetings pursuant to this section may be conducted with all parties physically present in the same geographic location or, at CUNY’s or the college’s discretion, any and all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants to see and hear each other simultaneously.

After the Adjudication Committee is selected and the hearing is scheduled, the college Office of Student Affairs or college Office of Human Resources will coordinate the hearing, including, for example, providing a location on campus (if applicable), facilitating a remote platform, recording the hearing and arranging for presenters and advisors, as needed.

Employees who are alleged to have committed Title IX Sexual Harassment are entitled to the hearing process required by the Title IX regulations, and if the employee is found responsible, the matter will be referred for discipline under applicable collective bargaining agreements, the Civil Service Law, or CUNY policies.

When possible, a hearing must be completed within sixty (60) days after completion of the investigation.

10. ADVISORS

Both complainants and respondents have the right to be accompanied by an advisor of their choice, who may assist and advise throughout the entire investigation, adjudication and resolution process. The Policy makes clear that advisors must treat all hearing participants with respect, including the Adjudication Committee, parties and witnesses. Advisors must also abide by the Rules of Decorum that are being promulgated by CUNY. If a Title IX Sexual Harassment matter proceeds to a hearing and a party does not have an advisor present at the hearing, the college must, as required by the new regulations, provide an advisor for the limited purpose of conducting cross-examination on behalf of that party.

It is up to each college/unit to identify an appropriate individual or individuals to serve in this role for Title IX Sexual Harassment hearings. Once identified and before serving as advisors in this capacity, these individuals will be trained by CUNY Central Office.

11. APPEALS

For Title IX Sexual Harassment matters, either party can appeal the mandatory or discretionary dismissal of a Title IX Formal Complaint to the University Title IX Director on limited specified grounds. The Title IX Director will provide a written decision within fifteen (15) days of receipt of the appeal or the opposing party's submission whichever is later (Section XI-D).

For Non-Title IX Sexual Misconduct matters, if the allegations are unsubstantiated, a student complainant now has the right to appeal the Title IX Coordinator's finding to an Appeal Committee, on limited specified grounds. Appeals of this type are submitted to the University Title IX Director, who will facilitate the selection and scheduling of the Appeal Committee. If the Appeal Committee grants the appeal, it may remand the matter for appropriate action, which may include, but is not limited to, the evaluation of new evidence or a new investigation (Section XII-D-a).

Parties may appeal the Adjudication Committee's determination of responsibility and/or the penalty imposed to an Appeal Committee on limited specified grounds. Parties must first submit a Notice of Appeal to the University Title IX Director, who will notify the college to provide the hearing recording to both parties. The appealing party must submit their written appeal to the University Title IX Director within fifteen (15) days of delivery of the hearing recording. The University Title IX Director will provide the non-appealing party with a copy of the appeal and the non-appealing party has fifteen (15) days to respond in writing (Section X-E).

12. EDUCATION AND TRAINING

CUNY's campuses must continue to provide comprehensive education and awareness programs for all incoming students and new employees and annual training on sexual harassment prevention for all employees.

Additionally, CUNY Central Office is responsible for providing training to Title IX Coordinators and their designees, Student Conduct Officers, Public Safety employees, Human Resource Directors, members of the CUNY-wide Sexual Misconduct Panel, and anyone that facilitates informal resolutions.

In the coming days, the University Title IX Director will provide The CUNY Sexual Misconduct Investigation Process and Procedures Manual and various templates that should be utilized by Title IX Coordinators during the course of an investigation.

13. SUMMARY OF ACTION STEPS REQUIRED BY COLLEGES

Colleges must:

- a. Upload a fillable PDF version of the CUNY Sexual Misconduct Allegation Form to their campus website by **September 8, 2020**.

- b. Identify responsible and confidential employees and provide training by **September 18, 2020**.
- c. Identify Informal Resolution facilitators for students and employees by **September 18, 2020** and submit to the University Title IX Director.
- d. Identify advisors for the limited purpose of cross-examination at Title IX Sexual Harassment hearings. Appropriate advisors should be identified for students and employees, and each campus must identify at least two advisors in the event both parties at a hearing need to have an advisor provided by CUNY. Advisors should be identified by **September 18, 2020** and submitted to the University Title IX Director.
- e. Identify hearing presenters for both student and employee respondents. Presenters should be identified by **September 18, 2020** and submitted to the University Title IX Director.

C. CUNY'S CURRENT REMOTE LEARNING ENVIRONMENT

As of the date of this implementation memo, CUNY is currently operating in an environment where a majority of learning and working is occurring in remote locations, wherever possible. The revised Policy states that at a college's discretion, any or all parties, witnesses and other participants may appear at a hearing virtually, with technology enabling participants to see and hear each other simultaneously. Updated guidance on conducting remote hearings is forthcoming.

Following the implementation of CUNY's revised Policy, RAC will re-formulate the current Title IX Working Group, which currently includes the University Title IX Director, two OGC Attorneys, the University Student Conduct Director, a Human Resources Investigator, the Director of Public Safety and a Student Affairs Advocacy Representative, to now also include four Title IX Coordinators, a Legal Affairs Designee, and a Labor Designee. The Title IX Working Group will assist with the campus-level implementation of CUNY's revised policy and practices.

If you have questions about the revised Policy or implementation, please contact Rodney Pepe-Souvenir, University Title IX Director at (646) 664-3314 or Rodney.Pepe-Souvenir@cuny.edu; or Nicole Donatich, Associate General Counsel, at (917) 902-4838 or Nicole.Donatich@cuny.edu.

cc: University Student Senate
University Faculty Senate