



CUNY POLICY ON SEXUAL MISCONDUCT INVESTIGATIONS TRAINING

Jenna Bergamo Holahan

Nicole Donatich

Jessica Morak

A photograph of a desk setup. In the foreground, a white mug with a yellow geometric pattern is filled with coffee. To its right is a silver laptop, a spiral notebook, and a blue pen. In the background, a window with white sheer curtains is softly lit, and a small potted plant sits on the desk to the right.

**WELCOME TITLE IX
COORDINATORS/INVESTIGATORS**

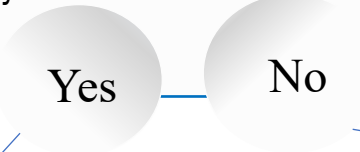
TITLE IX COORDINATOR ROLE

The Title IX Coordinator has overall responsibility for implementing the policy, which includes overseeing the investigation of allegations of both Title IX Sexual Harassment and Non-Title IX Sexual Misconduct.

**CUNY
Policy on Sexual
Misconduct**

Initial Evaluation of Allegations

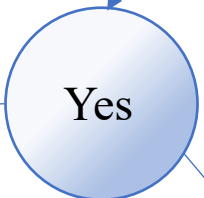
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- Alleged behavior, if true, constitutes Title IX Sexual Harassment; AND at the time the report was filed, Complainant is participating, or attempting to participate in CUNY's educational program or activity



T9 Sexual Harassment Matters

*Promptly Offer supportive measures *template**

Is there a Title IX Formal Complaint?



Informal Resolution

Formal Resolution (Investigation/Hearing)

Appeal Adjudication Committee Determination of Responsibility to Appeals Committee

Dismissal of Formal Complaint prior to Resolution *template*

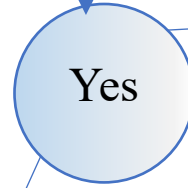
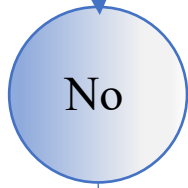
Internal close out memo after unsuccessful attempts to contact complainant, etc.

Appeal dismissal to University T9 Director

Non-T9 Sexual Misconduct Matters

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Is there a Non-Title IX Sexual Misconduct Allegation?



- Complainant refuses to cooperate
- Lack of Jurisdiction
- Insufficient Evidence

Close out memo to the file

Employee Respondent In accordance with CUNY policies, rules and CBAs

Investigation

Informal Resolution

Report sent to President

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No disciplinary action

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INITIAL EVALUATION OF ALLEGATIONS



THE POLICY PROVIDES FOR TWO DIFFERENT SETS OF PROCEDURES :

❖ Title IX Sexual Harassment

Title IX Sexual Harassment Matters must follow the Title IX Grievance Process as required by the regulations.

❖ Non-Title IX Sexual Misconduct

Non-Title IX Sexual Misconduct Matters follow the CUNY investigations procedure that existed under the previous version of this Policy, with a few changes and updates

TITLE IX SEXUAL HARASSMENT MATTERS

**WHEN DOES CUNY
HAVE “ACTUAL
KNOWLEDGE”?**

- ❖ **Title IX Coordinator**
- ❖ **College President**
- ❖ **Public Safety Officer**
- ❖ **Chief Student Affairs Officer**
- ❖ **Human Resources Director**

CUNY has identified these campus officials as individuals who likely have the authority to institute corrective measures.

INITIAL EVALUATION OF ALLEGATIONS

- ❖ Upon learning of allegations of Sexual Misconduct – the first step is for the Title IX Coordinator to evaluate: Do the allegations fall within the definition of Title IX Sexual Harassment?
 - Alleged behavior, *if true*
 - Conduct on the basis of sex that occurs in CUNY’s education program or activity against a person in the United States; and
 - Quid Pro Quo
 - Unwelcome conduct severe, pervasive, and objectively offensive; OR
 - Sexual Assault, Dating Violence, Domestic Violence, or Stalking as defined by the Policy
 - **If yes**, a Title IX Formal Complaint must be filed (by the complainant or Title IX Coordinator) before the matter can move forward.
 - **If no**, then evaluate whether the matter will proceed as a Non Title IX Sexual Misconduct Matter

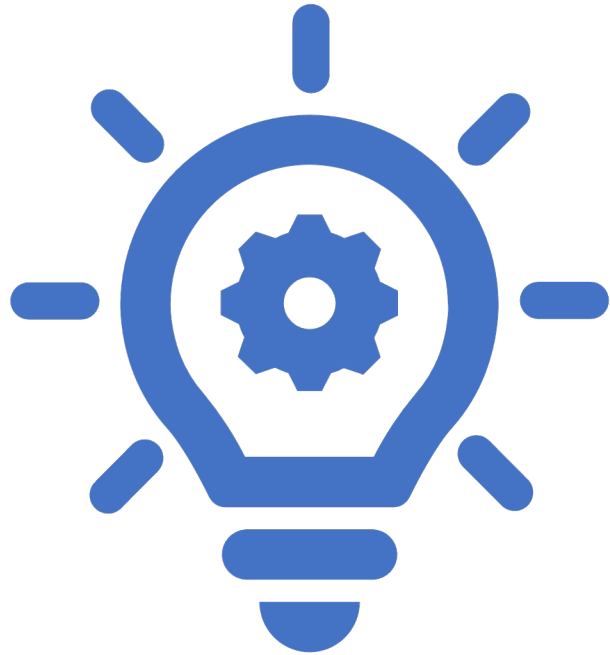


“ACTIONABLE SEXUAL HARASSMENT”

MUST BE SO “SEVERE, PERVASIVE AND OBJECTIVELY OFFENSIVE” THAT IT “EFFECTIVELY DENIES A PERSONAL EQUAL EDUCATIONAL ACCESS”



**HOW DO I DETERMINE WHAT
IS “SEVERE, PERVASIVE AND
OBJECTIVELY OFFENSIVE”
CONDUCT?**



CASELAW DISCUSSION

DAVIS V. MONROE COUNTY BD. OF EDUCATION, 526 US 629 (1999)

**RICCIO V. NEW HAVEN BD. OF EDUC., 467 F. SUPP.2D 219, 227
(D.CONN. 2006)**

**DOE V. SCHOOL DISTRICT NUMBER 1, DENVER, COLORADO, 970 F3D
1300 (10TH CIR. 2020)**

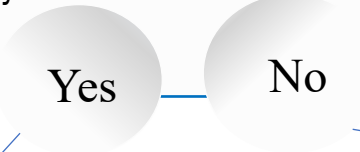
**DOE V. PRINCETON UNIVERSITY, 790 FED. APPX 379 (3RD CIRCUIT
2019)**

**R.S. V. BOARD OF EDUCATION OF HASTINGS-ON-HUDSON UNION FREE
SCHOOL DISTRICT, 2010 WL 1407359**

**CUNY
Policy on Sexual
Misconduct**

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T9 Sexual Harassment Matters

Non-T9 Sexual Misconduct Matters

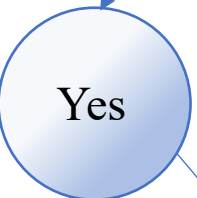
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Is there a Title IX Formal Complaint?

Is there a Non-Title IX Sexual Misconduct Allegation?

Informal Resolution



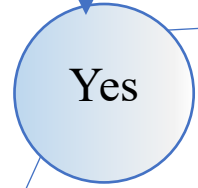
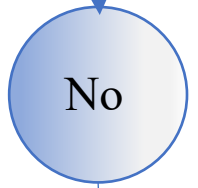
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SUPPORTIVE MEASURES & ACCOMMODATIONS

- ❖ **The Title IX Coordinator is responsible for coordinating supportive measures for affected parties.**
- **Supportive measures should be:**
 - **Non-disciplinary**
 - **Non-punitive**
 - **Designed to restore/preserve equal access to education and to ensure safety**
 - **Prevent retaliation and ongoing hostile environment**

Template – Initial Outreach to Potential Complainant (Title IX Matters)

Dear []:

I write to you as [College name] Title IX Coordinator because it has been brought to my attention that you may have experienced [alleged conduct]. I was made aware of this matter through information [you shared with a faculty member, a report filed with Public Safety, anonymous communication, third party etc.] I would like to speak with you about this incident as soon as possible.

Supportive measures and accommodations are available to you, regardless of whether you decide to move forward with an investigation and/or resolution of this matter. Supportive measures and accommodations are individualized services designed to restore or preserve equal access to education and to ensure safety, prevent retaliation and avoid an ongoing hostile environment. Section VIII of [CUNY's Policy on Sexual Misconduct discusses](#) supportive measures and accommodations in more detail, including a range of supportive measures and accommodations that may be available to you. As the [College] Title IX Coordinator, requests for supportive measures and accommodations should be directed to me.

Please let me know your availability so that we can arrange a mutually agreeable to discuss the supportive measures and accommodations available to you, as well as your rights and the options for moving forward with an investigation and/or resolution of this matter. You are entitled to be accompanied an advisor of your choice (who may be an attorney), who may assist and advise you throughout the process, including during this meeting and any subsequent meeting.

Please see below for links to the [, and resources for current students such as, the Student Bill of Rights, external resources, and to Counseling & Wellness Service/Employee Assistance Program] for your review:

Please note that CUNY **prohibits retaliation**. Retaliation includes adverse treatment of an individual as a result of that individual's reporting Sexual Misconduct, assisting someone to report Sexual Misconduct, opposing in a reasonable manner an act or policy believed to constitute Sexual Misconduct, or participating in any manner (or refusing to participate) in an investigation or resolution under this Policy. Adverse treatment includes intimidation, threats, coercion or discrimination for the purpose of interfering with any right or privilege secured by this Policy. All individuals are prohibited from engaging in retaliation, including complainants, respondents and others, such as friends or relatives of the parties

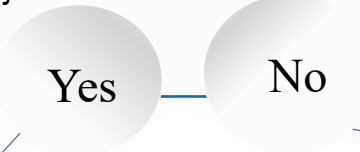
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FROM ALLEGATION TO INVESTIGATION**

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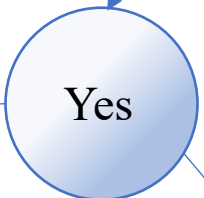
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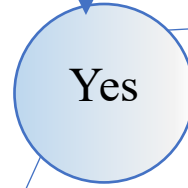
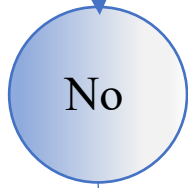
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IS THERE A TITLE IX FORMAL COMPLAINT?

REQUIREMENT OF A TITLE IX FORMAL COMPLAINT

- ❖ A Title IX Formal complaint is a document filed by the complainant alleging Title IX Sexual Harassment against a respondent requesting the college to investigate the allegations
- ❖ Title IX Coordinator may sign a Title IX Formal Complaint with or without the complainant's desire to participate in a grievance process.

WHAT MIGHT A FORMAL TITLE IX COMPLAINT LOOK LIKE?



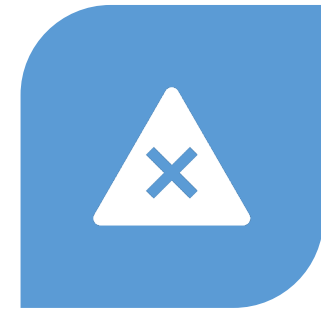
PHYSICAL DOCUMENT



EMAIL



ELECTRONIC SUBMISSION THROUGH
CAMPUS ONLINE FORM



IT MUST CONTAIN COMPLAINANT'S
PHYSICAL OR DIGITAL SIGNATURE OR
OTHERWISE INDICATE THAT THE
COMPLAINANT IS THE PERSON FILING
THE COMPLAINT.

WHEN SHOULD A TITLE IX COORDINATOR FILE A TITLE IX FORMAL COMPLAINT?

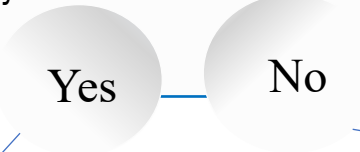
- ❖ A Title IX Coordinator may consider filing a formal complaint when the incident is serious enough to affect the college community.
- ❖ Where a Title IX Coordinator has sufficient evidence to proceed with the grievance process, the complainant's participation may not be necessary.
- ❖ A Title IX Coordinator *may* file a formal complaint, even if the complainant is not associated with the school in any way. OCR further dictated that a school *may* be in violation of Title IX if the Title IX Coordinator does not do so.



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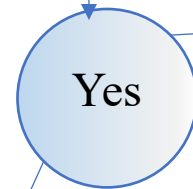
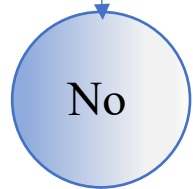
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DISMISSAL OF A TITLE IX FORMAL COMPLAINT

- ❖ **Mandatory Dismissal**
 - Allegations do not meet definition
- ❖ **Discretionary Dismissal**
 - Complainant withdraws Title IX Formal Complaint
 - Respondent no longer enrolled or employed by CUNY
 - College is prevented from gathering evidence
 - Either Party has a right to Appeal the dismissal.



Template – Notice of Dismissal for Title IX Complaint (Title IX Matters)

Name v. Name

Dear []

As you are aware, on [date], this office commenced a Title IX grievance process to address the allegation(s) raised in [your/Complainant’s] Title IX Formal Complaint.

After [further consideration/investigation, including review of the allegations and available evidence obtained to date], I have determined that the Title IX Formal Complaint is subject to [mandatory/discretionary] dismissal, because: [use one of the reasons stated in the chart below]

	Mandatory Dismissal
	The alleged conduct, if true, does not meet the definition of Title IX Sexual Harassment
	The alleged conduct did not occur in CUNY’s education program or activity
	The alleged conduct did not occur within the United States or against a person within the United States
	Discretionary Dismissal
	The complainant has withdrawn the Title IX Formal Complaint (or any allegations therein) in writing
	The respondent is no longer enrolled or employed by CUNY
	Specific circumstances exist that prevent this institution from gathering evidence sufficient to reach a determination as to the Title IX Formal Complaint or allegations therein

This section needs to be edited for what applies to the specifics of the case:

Our institution remains committed to the investigation and resolution of allegations of Sexual Misconduct. Although the allegations do not meet the definition of Title IX Sexual Harassment, and therefore must be dismissed as a Title IX Sexual Harassment matter, our office has determined that it is appropriate to continue this investigation as a Non-Title IX Sexual Misconduct matter. Pending the outcome of the appeal discussed below, if any, the investigation of this matter will continue pursuant to Section XII of the CUNY Policy. You will be contacted shortly regarding next steps.

[or] For [XYZ reasons], our office will not pursue further investigation or resolution of this allegation(s) as a Non-Title IX Sexual Misconduct matter.

You have the right to appeal dismissal of the Title IX Formal Complaint, as explained in Section XI (D) of the CUNY Policy. There are limited grounds for appeal, which include: (1) A procedural irregularity affected the outcome of the matter; (2) New evidence that was not reasonably available at the time the dismissal was made, that could affect the outcome of the matter; and/or (3) The Title IX Coordinator had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent, that affected the outcome of the matter.

If you choose to appeal, you must do so in writing within 5 days from the date this letter is emailed to you by contacting the University Title IX Director, Rodney Pepe-Souvenir (Rodney.Pepe-Souvenir@cuny.edu)

Please note that as a [student/employee] you remain eligible for support services such as [].

[List for the Title IX Coordinator to determine which one to include]:

- a. Making appropriate changes to academic programs;
- b. Making appropriate changes to residential housing situations or providing assistance in finding alternate housing;
- c. Changing an employee’s work assignment or schedule;
- d. Providing an escort to and from class or campus work location;
- e. Arranging appropriate transportation services to ensure safety;
- f. Offering counseling services through the college Counseling Center or other appropriate office, or referral to an off-campus agency;
- g. Enforcing an Order of Protection issued by court;
- h. Issuing a No Contact Order whereby continued contact would be a violation of CUNY Policy and subject to disciplinary action; and
- i. Emergency removal of a respondent when they pose an imminent threat to the physical health or safety of any person.]
- j. CUNY Work/Life Program

CUNY **prohibits retaliation**, including adverse treatment of an individual as a result of that individual’s reporting Sexual Misconduct, assisting someone to report Sexual Misconduct, opposing in a reasonable manner an act or policy believed to constitute Sexual Misconduct, or participating in any manner (or refusing to participate) in an investigation or resolution under this Policy. Adverse treatment includes intimidation, threats, coercion or discrimination for the purpose of interfering with any right or privilege secured by this Policy. All individuals are prohibited from engaging in retaliation, including complainants, respondents and others, such as friends or relatives of the parties

If you have any questions or concerns please let me know.

Template – Notice of Allegations to Parties (Title IX Matters)

Dear [redacted]

Include in Complainant’s Notice: Thank you for meeting with me/speaking with me on [date]. I am writing to confirm receipt of the written allegations submitted to my office on [date], and to confirm that my office is commencing a Title IX grievance procedure, pursuant to Section XI of CUNY’s Policy on Sexual Misconduct (“the Policy”).

The allegations submitted in writing on [date] alleged that, on [date] at [location], [Respondent] engaged in [alleged conduct]. I have determined that this alleged conduct, if true, meets the definition of Title IX Sexual Harassment and therefore must be resolved in accordance with the Title IX grievance procedure discussed in Section XI of the Policy.

Include in Respondent’s Notice:

I write to you as [school] Title IX Coordinator to inform you that my office is commencing a Title IX grievance procedure, pursuant to Section XI of CUNY’s Policy on Sexual Misconduct (“the Policy”). My office received a Title IX Formal Complaint filed by [complainant] alleging that you violated CUNY’s Policy on Sexual Misconduct (“the Policy”). Specifically, it is alleged that on [date] at [location], you engaged in [alleged conduct].

I have determined that this alleged conduct, if true, meets the definition of Title IX Sexual Harassment and therefore must be resolved in accordance with the Title IX grievance procedure discussed in Section XI of the Policy.

Supportive measures and accommodations are available to you, regardless of whether you decide to move forward with an investigation and/or resolution of this matter. Supportive measures and accommodations are individualized services designed to restore or preserve equal access to education and to ensure safety, prevent retaliation and avoid an ongoing hostile environment. Section VIII of [CUNY’s Policy on Sexual Misconduct discusses](#) supportive measures and accommodations in more detail, including a range of supportive measures and accommodations that may be available to you. As the [College] Title IX Coordinator, requests for supportive measures and accommodations should be directed to me.

I would like to schedule a meeting with you to discuss the supportive measures and accommodations available to you and the investigatory process and procedures. Please contact me immediately with your availability during the week of [redacted].

Include in all Notices:

Important information regarding CUNY’s Policy and your rights throughout the Title IX grievance process are discussed below. Please review carefully and notify me if you have any questions.

A full version of the CUNY Policy on Sexual Misconduct is available online by clicking [here](#).

Please note that [you/the respondent] [are/is] presumed not responsible for the alleged conduct and a determination regarding responsibility is made at the conclusion of the grievance process. Each party is entitled to be accompanied an advisor of their choice (who may be an attorney), who may assist and advise throughout the process, including during any meeting or hearing.

During the Title IX grievance process, parties can agree to an informal resolution to resolve the allegations. Informal Resolution is an alternative to the formal investigation and adjudication procedures outlined in Section XI of the Policy and may include administrative resolution,

mediation or other alternative dispute resolution. In some cases, informal resolution may represent a beneficial outcome for both parties by providing an alternative to the formal investigation and adjudication process. Please see Section X(B) and XI(C) of the Policy for more information about informal resolution. [Remove if allegations involve student complainant and staff respondent].

During the Title IX investigation, parties have equal opportunity to present witnesses and evidence; review evidence gathered during the investigation and respond in writing before the investigative report is finalized. However, the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the college and not on the parties. Please see Section XI(E) of the Policy for more information on the investigative process. Students may also refer to the Student Bill of Rights (found at the end of the Policy) [\[campus can enter link if the document is on their site\]](#).

Please note that CUNY **prohibits retaliation**. Retaliation includes adverse treatment of an individual as a result of that individual’s reporting Sexual Misconduct, assisting someone to report Sexual Misconduct, opposing in a reasonable manner an act or policy believed to constitute Sexual Misconduct, or participating in any manner (or refusing to participate) in an investigation or resolution under this Policy. Adverse treatment includes intimidation, threats, coercion or discrimination for the purpose of interfering with any right or privilege secured by this Policy. All individuals are prohibited from engaging in retaliation, including complainants, respondents and others, such as friends or relatives of the parties.

CUNY also **prohibits knowingly making false statements or knowingly submitting false information during the grievance process**. Anyone who knowingly makes false statements or submits false information in connection with any allegation of Sexual Misconduct (as opposed to providing information which, even if erroneous, is provided in good faith), will be subject to disciplinary action.

The allegations outlined in this notice may not be the final allegations considered by the college. If the college decides to investigate additional allegations, you will be provided notice of the additional allegations in a timely manner and with sufficient time to prepare for any hearing.

You are entitled to written notice of the date, time, location, participants and purpose of all hearings, investigative interviews, or other meetings that you are asked to attend, with sufficient time to prepare to participate in an hearing, investigative interview or meeting.

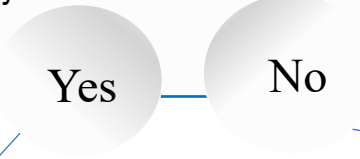
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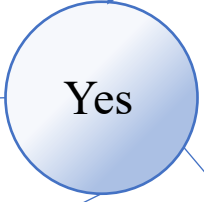
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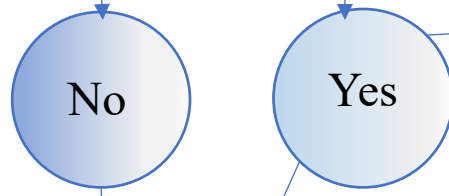
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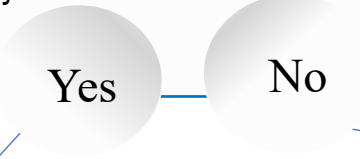
- ❖ Initial assessment of the facts conducted: do the allegations, if true, qualify as prohibited Sexual Misconduct?
- ❖ Investigation should proceed unless:
 - No jurisdiction
 - Complainant uncooperative
 - Not enough evidence to proceed

Closing Memo to file.

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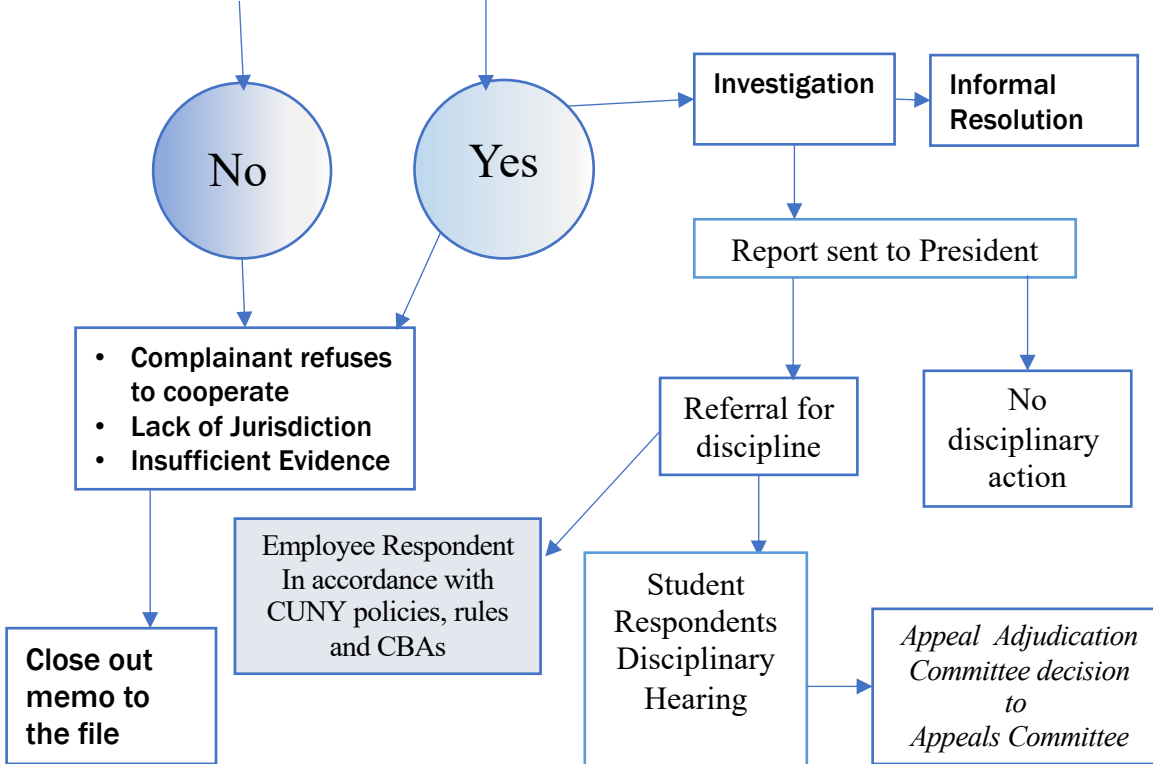
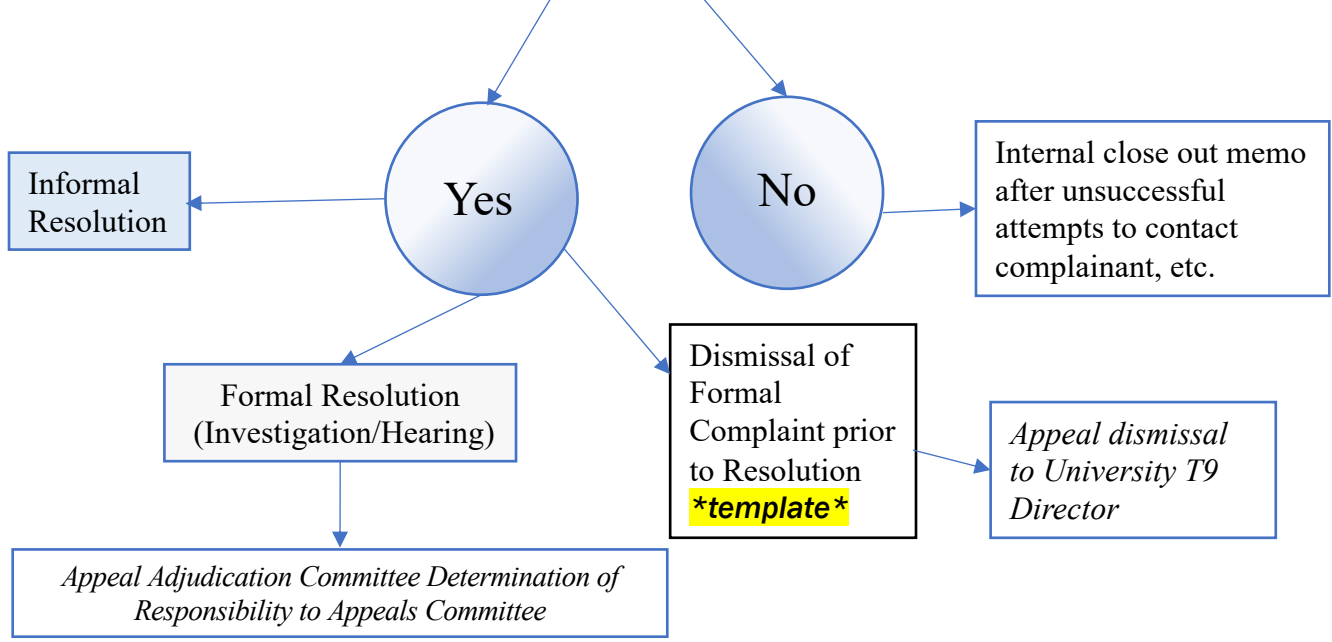
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THE INVESTIGATION

CONDUCTING THE INVESTIGATION

BOTH TITLE IX SEXUAL HARASSMENT MATTERS AND NON-TITLE IX SEXUAL MISCONDUCT MATTERS

- **Avoiding prejudgment of facts**
- **Keep an open mind**
- **Objectively evaluate inculpatory and exculpatory evidence before reaching determination regarding responsibility**
- **Avoid drawing inferences about credibility based on a party's status as a complainant or respondent**
- **Standard used for conducting an investigation: Preponderance of the Evidence**

WHAT ARE THE GOALS OF AN INVESTIGATION?

- To be prompt, thorough and effective
- To be fair and unbiased
- Providing a solid foundation for matters to proceed to resolution and/or adjudication
- Completed within 120 days

**Template –
Delay of
Investigation
Notice
(Title IX Matters)**

Name v. Name

Dear []

As you are aware, on [date], this office commenced a Title IX grievance process to address the allegation(s) raised in [your/Complainant's] Title IX Formal Complaint. This letter is to inform you of a delay in the Title IX investigation. The reason for this delay is because [for example: may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities].

Please let me know if you have any questions or concerns.

Sincerely,

PACKET

❖ What is in the Packet?

- ❖ The Policy
- ❖ Revision to Provision Not Permitting Reliance on Statements Not Subject to Cross Examination in Title IX Hearings (*the Cardona Guidance Document*)
- ❖ Rules of Decorum
- ❖ Student Bill of Rights
- ❖ Agreement Regarding the Copying and Use of Investigative and Hearing Materials (“Agreement”)*
- ❖ Distinction Between NYS Penal Law and the College Disciplinary Process

CHECKLIST

- ❖ We've also created a Checklist that you should use to make sure the party understands and acknowledges the materials and information they've been provided.
- ❖ It lists all the documents in the Packet and asks that they acknowledge they've received it.
- ❖ It includes important reminders about the Agreements.
- ❖ It has a space for the party to sign *and* their advisor of choice, if they have one.

TRAUMA INFORMED INTERVIEWING:

INTERVIEWING A COMPLAINANT

- Compassion / Have a human interaction
- Build trust
- No Judgment
- Don't talk out loud – Keep your thoughts to yourself
- Try to understand the needs and priorities of the complainant
- Determine the first and last instances of violence
- Understand the relationship
 - Living situation, length of the relationship, current status
 - Will also aid in your Clery Reporting



TRAUMA INFORMED INTERVIEWING:

COMMON REACTIONS TO SEXUAL ASSAULT

- ❖ **Sexual assault victims express a wide range of emotions in response to the assault. Victims may experience:**
 - **Mood swings**
 - **Guilt/Humiliation**
 - **Anxiety**
 - **Anger**
 - **Horror**
- **There is no standard response to trauma. Some individuals may be overwhelmed by emotions (i.e. crying) while others may have no affect or even laugh in an anxious manner when relaying what happened to them.**

TRAUMA INFORMED INTERVIEWING:

INTERACTIONS WITH THE COMPLAINANT

- ❖ **Memories will be spotty, non-sequential, sensory/emotion based**
- ❖ **Who, what, when, where, why will not work**
- ❖ **Closed-ended questions will not work**
- ❖ **Open ended questions and sensory based questions are indicated**
- ❖ **Use a calm and neutral tone**
- ❖ **Allow ample time for the person to respond**
- ❖ **Come back to a question later if clarification is needed**



TYPES OF EVIDENCE


- **Campus Video**
- **Campus swipe record - in and out campus**
- **Public Safety Incident Report**
- **Social Media Post**
- **Telephone records**
- **Photos**
- **Audio recordings**

RELEVANCE

- ❖ Irrelevant evidence must be excluded
- ❖ Does it make the allegations under investigation more or less likely to be true?
 - Title IX – Relevant, but prejudicial = Admissible
- ❖ Title IX – “...An evaluation of all relevant evidence, including both inculpatory and exculpatory evidence...”
 - Both fact and expert witnesses

IRRELEVANT EVIDENCE

- ❖ A party's medical or mental health records without voluntary written consent
- ❖ Prior Sexual History
 - Title IX Exceptions (Complainant ONLY):
 1. Prior sexual history is used to prove that someone other than the respondent committed the conduct alleged by the complainant OR;
 2. The complainant's prior sexual behavior with respect to the respondent and is offered to prove consent by the complainant.
 - Non-Title IX Exceptions (BOTH Parties):
 1. Concerning specific incidents of prior sexual behavior between the parties to prove consent.



**SPECIFIC
CONSIDERATIONS FOR
TITLE IX SEXUAL
HARASSMENT MATTERS**

TITLE IX SEXUAL HARASSMENT

TIME FRAMES TO OBSERVE

- **Pre-completion of the investigative report**
 - Prior to the completion of the investigation report, the parties have the right to review all relevant documents and materials gathered during the investigation and the right to respond in writing.
 - The parties may submit a written response after review of the evidence, due within ten (10) days after the materials are provided.
 - The parties' response will be considered by the Title IX Coordinator prior to finalizing the investigative report.

Template – Notice to Parties of Evidence Review (Title IX Matters)

Name v. Name

Dear [REDACTED]:

During the Title IX grievance process, the CUNY Policy on Sexual Misconduct provides parties with the opportunity to review all of the relevant documents and materials gathered during the investigation that are directly related to the allegations raised in the Title IX Formal Complaint. Parties may submit a written response, due within ten (10) days after the materials are provided, which will be considered by the Title IX Coordinator prior to finalizing the investigative report.

The parties and their advisors must sign an agreement not to disseminate any of the evidence subject to inspection and review or use such evidence for any purpose unrelated to the Title IX grievance process.

The Agreement on the Use of Investigative Materials and Hearing Recording is attached. Please sign and return it to me, by the end of business on [date]. The documents and materials gathered during the investigation will not be shared with you and your advisor until the signed agreement is returned.

If you have any questions or concerns please let me know.

Thank you,



Office of Student Affairs and Enrollment Management
 The City University of New York
 205 E. 42nd Street
 New York, NY, 10017
 T 646.664.8757.
www.cuny.edu/studentaffairs

**Agreement Regarding the Copying and Use of Hearing and Investigative Materials:
 Hearings Under CUNY’s Policy on Sexual Misconduct
 Title IX Sexual Harassment Matters**

The Purpose of this Agreement

Title IX Sexual Harassment hearings require open and honest testimony. The facts and conduct at issue are often of a highly sensitive nature. Although access to the investigation materials, the hearing record and the written decision is a required part of the Title IX Grievance Process, the federal Family Educational Rights and Privacy Act (“FERPA”), Enough is Enough legislation (“EIE”) and CUNY impose restrictions on access to these materials.

This Agreement governs access to and handling of the investigative report as well as any information or documentation that the College intends to use in a hearing and any information or evidence gathered during the investigation (collectively “investigative materials”) and of the hearing record and written determination of responsibility (collectively “hearing materials”) under the CUNY Policy on Sexual Misconduct (“the Policy”). The rules and standards apply equally to all parties and their advisors regardless of sex, gender, or other protected class, and regardless of whether they are in the role of complainant or respondent.

Limitations on the Copying and Use of Hearing Materials

1. In accordance with the Policy and the federal Title IX Regulations, the complainant, the respondent and/or their designated representative (hereinafter “parties”) will receive all of the relevant documents and materials gathered during the investigation that are directly related to the allegations raised in the Title IX Formal Complaint. Parties will also receive the Title IX Coordinator’s investigative report at least ten (10) days prior to any hearing. Additionally, at least five (5) days before the commencement of a hearing, each party will receive a copy of the opposing party’s written response to the investigative report. These documents may be provided in hard copy or electronic format. Parties are permitted to print documents provided in electronic format. All documents provided by the College either prior to or at the hearing, in whatever format, are confidential, may be used solely for purposes of the Title IX Sexual Harassment hearing and may not be shared with third parties. Upon conclusion of a matter, parties are required to destroy all printed or electronic copies of these materials.
2. In accordance with Section X (F) of the Policy, the College will be making a record of the hearing by a stenographic transcript, an audio recording or the equivalent. Parties may not record the proceedings and no other recording of the proceedings is permitted. Following the hearing, parties may be entitled to a copy of the hearing record. The hearing record may be provided in hard copy or electronic format. Parties are permitted to print the record if it is provided in electronic format.

The hearing record may be used solely for purposes of the appeal and may not be shared with third parties. Upon conclusion of a matter, parties are required to destroy the hearing record.

3. For purposes of this Agreement, copying includes but is not limited to: audio or video recording, streaming, photographing, scanning, transcribing, or any other form that conflicts with the spirit of this directive.
4. In accordance with Section XI (E)(d) of the Policy, the parties will receive a written determination of responsibility within fifteen (15) days of the conclusion of the hearing or, in cases involving two or more complainants or respondents, with twenty (20) days of the hearing. Any and all discussion or testimony contained within the decision is confidential and may not be shared with third parties.
5. Nothing in this Agreement should be interpreted as restricting the parties' ability to discuss the allegations under investigation or from disclosing or discussing the final outcome of a hearing. The intention of this Agreement is to respect the privacy of the parties and not to restrict the parties' ability to seek out advice and support; such as, for example, from a parent/guardian, friend, other source of emotional support or an advocacy organization.

Discipline and Sanctions for Violations of the Agreement

Penalties for violations, whether knowing or negligent, include sanctions under other CUNY policies, rules and bylaws and for advisors, ineligibility for a term or permanent ineligibility to serve as an advisor in future cases.

Waiver of Disclosure to Advisors

By default, access to investigative and hearing materials will be shared separately with parties and their advisors, if applicable. If a complainant or respondent does not want the hearing materials shared with their advisor (as allowed under the Regulations), they must indicate such request in writing to the Title IX Coordinator as soon as possible after notification that a Title IX Grievance Process has commenced.

 I agree to comply with the terms of this Agreement.

 Name (printed or typed)

 Signature (or electronic signature)

 Date

Template – Notice of Evidence Review (Title IX Matters)

Name v. Name

Dear [Name of Complainant or Respondent]:

Thank you for signing and returning the Agreement on the Use of Investigative Materials and Hearing Recording.

I have [attached] [enclosed] relevant documents and materials gathered during the investigation that are directly related to the allegations raised in the Title IX Formal Complaint. The evidence includes both inculpatory and exculpatory evidence obtained during the course of the investigation, directly related to the allegations, excluding privileged information.

You will also be provided with access to use and refer to these documents and materials during any future hearing that is scheduled to adjudicate this matter.

Please remember that you agreed to the stipulations in the Agreement on the Use of Investigative Materials and Hearing Recording (see attached copy). Violations of this agreement may be subject to disciplinary action.

Both parties may submit a written response to the investigative materials. Your written response may include or suggest additional information or evidence, the removal of evidence from consideration, or clarifications or corrections of evidence. I will consider your response prior to finalizing an investigative report summarizing all relevant evidence. If you choose to submit a written response to the investigative materials, you **must submit it by [email] [and/or regular mail] no later than [provide date], which is ten (10) calendar days** (other than a Saturday, Sunday or federal or state holiday) from the date of this communication.

Please note that CUNY **prohibits retaliation**. Retaliation includes adverse treatment of an individual as a result of that individual's reporting Sexual Misconduct, assisting someone to report Sexual Misconduct, opposing in a reasonable manner an act or policy believed to constitute Sexual Misconduct, or participating in any manner (or refusing to participate) in an investigation or resolution under this Policy. Adverse treatment includes intimidation, threats, coercion or discrimination for the purpose of interfering with any right or privilege secured by this Policy. All individuals are prohibited from engaging in retaliation, including complainants, respondents and others, such as friends or relatives of the parties.

If you have any questions or concerns please let me know.



Thank you,

INVESTIGATIVE REPORTS




SIDE BY SIDE COMPARISON OF T9 V. NON-T9 REPORT STRUCTURE

Non-Title IX Report Structure:

- Introduction
- Procedural History
- List of Allegations
- Witness List
- Exhibit List
- Factual Summary
-  Analysis
-  Findings/Conclusion
- Next Steps

Title IX Report Structure:

- Introduction
- Procedural History
- List of Allegations
- Witness List
- Exhibit List
-  Additional Documents & Materials
- Factual Summary
- Next Steps

INVESTIGATIVE REPORTS

Introduction

Procedural History

List of Allegations

- **Should match allegations provided to the parties**
- **Note where an allegation, if true, violates a section of the PSM and constitutes Title IX Sexual Harassment**

EXAMPLE OF SEXUAL ASSAULT ALLEGATION: WITHIN CUNY'S EDUCATIONAL PROGRAM OR ACTIVITY

Allegation I: On August 14, 2020 at approximately 8:00 PM inside of 123 Broadway, the Jean Valjean Campus Building, the Respondent touched the Complainant's breast with his hand, without her affirmative consent, in violation of the CUNY Policy on Sexual Misconduct's prohibition on Sexual Assault: Contact (Section III.c.) and Title IX Sexual Harassment (Section III.g.).

Sexual Assault: Contact is defined as any sexual contact, including sexual touching for the purpose of sexual gratification of either party or degrading or abusing such person, without a person's consent. See Policy III.c. p. 6.

Consent means affirmative consent. Affirmative consent is a knowing, voluntary and mutual decision among all participants to engage in sexual activity. See Policy III, p. 7.

Title IX Sexual Harassment is defined by the USDOE to mean conduct on the basis of sex that occurs in CUNY's education program or activity, against a person in the United States and satisfies one or more of the following: (1) a CUNY employee conditioning the provision of an aid, benefit, or service of CUNY on an individual's participation in unwelcome sexual conduct; (2) unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to CUNY's education program or activity; or (3) Sexual Assault, Dating Violence, Domestic Violence, or Stalking as defined in this Policy. See Policy Section III.g, p. 7.

INVESTIGATIVE REPORTS (CONT'D).

- Witness List
- Exhibit List
- Factual Summary

Example Exhibit List:

Exhibit 1: Screenshots of text message conversation from on or about and between October 26, 2021 – October 28, 2021 between Complainant and Witness 1

- Complainant and Witness #1 have both confirmed that Exhibit 1:
 - represents an accurate copy of messages they either sent or received; and
 - has no missing messages.

Exhibit 2: Photograph of Respondent, Witness #1 and Witness #2

- Respondent, Witness #1 and Witness #2 have all confirmed that they are depicted in Exhibit 2.

Factual Summary

**SUMMARIZE ALL RELEVANT EVIDENCE
GATHERED DURING THE INVESTIGATION
(THIS REFERS TO BOTH TESTIMONIAL AND
DOCUMENTARY EVIDENCE)**

**DEPENDING ON THE CASE, THERE MAY BE
DIFFERENT WAYS TO ORGANIZE THE
FACTUAL SUMMARY PORTION OF YOUR
REPORT**

A. Background Information/Relationship of the parties

B. Allegation #1

- Summary of relevant portions of the complainant's statement
- Summary of relevant portions of the respondent's statement
- Summary of relevant witness statements
- Summary of documentary evidence

A. Background Information/Relationship of the parties

B. Summary of Complainant's Narrative

- Can break down into further sub-sections based on allegations (if applicable).

C. Summary of Respondent's Narrative

D. Summary of Witness #1 Narrative, etc.

TITLE IX REPORTS & TEMPLATES

NON-TITLE IX INVESTIGATIVE REPORTS

ANALYSIS & FINDINGS

Start by:

- **Acknowledging that the burden of gathering evidence sufficient to reach a determination of responsibility remains on the College.**
- **Identify & define the preponderance of the evidence standard.**

Include:

- **Credibility Assessment**
- **Analysis of evidence (documentary and testimonial)**
 - **Preponderance standard**
- **Findings**

NON-TITLE IX REPORT TEMPLATE



NEXT STEPS

NON-TITLE IX: NEXT STEPS

- **Complainant is a Student**
 - Investigative Report to the parties within 5 days of completion
 - Agreement must be signed
 - Complainant has right to appeal unsubstantiated allegations
 - Submitted to University Title IX Director
 - Appeals Committee organized by University Title IX Director
 - Written decision distributed to the parties
- **Complainant is not a Student**
 - Report is sent directly to the President

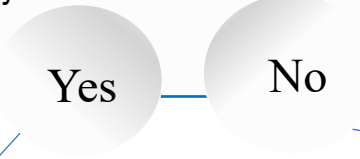
NON-TITLE IX: NEXT STEPS

- **Allegations referred for discipline**
 - **Employee respondents proceed according to Collective Bargaining Agreements**
 - **Student respondents proceed to a hearing under the PSM**

**CUNY
Policy on Sexual
Misconduct**

Initial Evaluation of Allegations

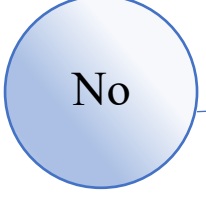
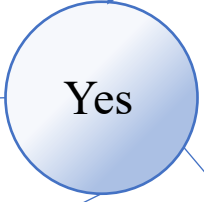
- Upon learning of allegations of Sexual Misconduct – Evaluate: Do the allegations fall within the definition of Title IX Sexual Harassment?
- Alleged behavior, if true, constitutes Title IX Sexual Harassment; AND at the time the report was filed, Complainant is participating, or attempting to participate in CUNY's educational program or activity



T9 Sexual Harassment Matters

*Promptly Offer supportive measures *template**

Is there a Title IX Formal Complaint?



Informal Resolution

Formal Resolution (Investigation/Hearing)

Appeal Adjudication Committee Determination of Responsibility to Appeals Committee

Dismissal of Formal Complaint prior to Resolution *template*

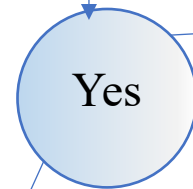
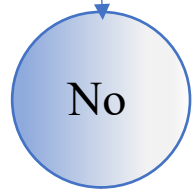
Internal close out memo after unsuccessful attempts to contact complainant, etc.

Appeal dismissal to University T9 Director

Non-T9 Sexual Misconduct Matters

*Promptly offer supportive measures *template**

Is there a Non-Title IX Sexual Misconduct Allegation?



- Complainant refuses to cooperate
- Lack of Jurisdiction
- Insufficient Evidence

Close out memo to the file

Employee Respondent In accordance with CUNY policies, rules and CBAs

Investigation

Informal Resolution

Report sent to President

Referral for discipline

No disciplinary action

Student Respondents Disciplinary Hearing

Appeal Adjudication Committee decision to Appeals Committee

TITLE IX: NEXT STEPS

➤ **Post-completion of the investigative report**

- Upon completion of the investigative report, and at least 10 days prior to any hearing, the Title IX Coordinator will provide the parties the finalized report, and their advisor.
- A party's written response to the investigative report is due within ten (10) days after the report is provided.

Procedure for Distributing Reports to The Parties

Procedure for distributing Investigative Reports to the Parties

Please find below the procedure for providing the completed Title IX investigative report (Title IX Sexual Harassment and Non-Title IX Sexual Misconduct) to the parties

Title IX Coordinators are required to distribute both Title IX Sexual Harassment and Non-Title IX Sexual Misconduct final investigative report (Report), post August 14, 2020, to the parties. The Report should be prepared and distributed with a unique watermark. The watermark should be added to the PDF of the report, and key documents before they are shared with the parties. Each campus should utilize a specific and unique watermark for complainants (i.e. "College name - C") and respondents (i.e. "College name - R").

The Report will be prepared as a de-identified document. In that, the parties and witnesses should be described in the document simply as complainant, respondent, witness 1, witness 2, et al. The Title IX Coordinator will create a key document that will identify by name all the parties named in the Report. The parties would have been asked to sign the CUNY Non-disclosure form, once done they would be provided the Report and the key document. In the event that the complainant or witness wishes to remain anonymous in a Non-Title IX Sexual Misconduct case, they would be identified as complainant or witness in the Report, and identified as "anonymous" in the key document. The report will be provided to the college President and Chief Student Affairs office in the same manner as described above.

Template – Notice to Parties of Investigation Closure (Title IX Matters)

Name v. Name

Dear []:

As you are aware, on [date], this office commenced a Title IX grievance process to address the allegation(s) raised in [your/Complainant's] Title IX Formal Complaint. This letter is to inform you that the investigation is now completed.

During the Title IX grievance process, the CUNY Policy on Sexual Misconduct provides parties with the opportunity to review the finalized investigative report. A copy of the investigative report is enclosed with this letter. Parties may submit a written response to the finalized investigative report, which will be shared with the Adjudication Committee and other party prior to a hearing. If you choose to submit a written response to the finalized investigative report, you **must submit it by [email] [and/or regular mail] no later than [provide date], which is ten (10) calendar days** (other than a Saturday, Sunday or federal or state holiday) from the date of this communication.

Please remember that you previously agreed to the stipulations in the Agreement on the Use of Investigative Materials and Hearing Recording, which also applies to the investigative report (see attached copy). Violations of this agreement may be subject to disciplinary action.

The case has now been referred to the University Title IX Director Rodney Pepe-Souvenir and [college Office of Student Affairs or college Office of Human Resources and college Labor Designee], to facilitate the hearing. You will be provided a written Notice of Hearing, including the date, time and location of the hearing. In Title IX Sexual Harassment matters, the parties have a right to a live hearing and cross examination. In addition, CUNY must provide an advisor to any party who does not have an advisor present at the hearing, for the limited purpose of conducting cross examination. The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility remains on the college and not on the parties. Please see Section XI (E) of the CUNY Policy on Sexual Misconduct, for more information on the hearing process.

CUNY **prohibits retaliation**, including adverse treatment of an individual as a result of that individual's reporting Sexual Misconduct, assisting someone to report Sexual Misconduct, opposing in a reasonable manner an act or policy believed to constitute Sexual Misconduct, or participating in any manner (or refusing to participate) in an investigation or resolution under this Policy. Adverse treatment includes intimidation, threats, coercion or discrimination for the purpose of interfering with any right or privilege secured by this Policy. All individuals are prohibited from engaging in retaliation, including complainants, respondents and others, such as friends or relatives of the parties.

[College name] takes all incidents of Sexual Misconduct and retaliation seriously. Please note the even though the investigation is now completed, you remain eligible for support services.

We want to thank you for [bringing these allegations to our attention/cooperating with the investigation].

If you have any questions please let me know.

TITLE IX: NEXT STEPS

- **Post-completion of the investigative report**
 - The Title IX Coordinator will provide the finalized investigative report, evidence, letters provided by the parties, and cover to the University Title IX Director at adjudication-titleIX@CUNY.edu

Title IX Sexual Harassment Formal Resolution

Investigation

- Written Notice that Title IX grievance procedure and investigation is being commenced **template**
- Provide parties with the TIX Packet **template**
- Interview witnesses
- Review relevant documents and evidence

Post Investigation Review of Relevant Documents and Materials

- Agreement on the use of investigative and hearing materials **template**
- Send to the parties all relevant documents and materials gathered during the investigation that are directly related to the allegations raised in the Title IX Formal Complaint **template**
- Parties may submit a written response, due within 10 days after materials are provided
- Consider parties' written responses prior to finalizing investigative report

Investigative Report

- Summarize all relevant evidence gathered during investigation
- Share finalized report and exhibits with parties **template**
- Refer case to University Title IX Director for hearing

Review of Investigative Report

- Parties may submit a written response, due within 10 days after report is provided – submitted to University Title IX Director **template**

Live Hearing

- University Title IX Director facilitates selection and scheduling of Adjudication Committee
- College Office of Student Affairs or Office of Human Resources/Labor Relations issues Notice of Hearing to both parties
- University Title IX Director gathers and distributes materials to Adjudication Committee and College
- College presenter facilitates review of evidence before hearing

Must be completed within 120 days of receipt of the Title IX Formal Complaint

If there is a delay – must notify parties in writing and indicate reason for delay

template

Must be completed within 60 days after completion of the investigation

RECORDKEEPING

- ❖ 7 years (from the last action on a matter)
- ❖ Regs – Section 106.45(b)(10)
- ❖ CUNY’s Policy – Section X-J
- ❖ Title IX Coordinators/Investigators
 - Investigation records, materials and documents
 - Any informal resolution, and the result
 - Any actions taken in response to allegations of Title IX Sexual Harassment

RECORDKEEPING (cont.)

“Any actions taken in response to allegations of Title IX Sexual Harassment...”

- ❖ “Create and maintain”
- ❖ “Document the basis for it’s conclusion that it’s response was not deliberately indifferent
- ❖ Supportive measures
 - When they are granted
 - *Any supportive measure* – document everything!
 - And when they are not
 - Why was this response not clearly unreasonable in light of known circumstances?



QUESTIONS?