

**NSU**

Florida

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NOVA SOUTHEASTERN  
UNIVERSITY

# Title IX Training: Appeals Officers

NSU University School

Fall 2022

NOVA SOUTHEASTERN  
UNIVERSITY

**NSU**  
Florida

# Definition of Title IX Sexual Harassment

- The definition of sexual harassment
- The scope of NSU's education program or activity
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution procedures
- How to serve impartially, including by avoiding any prejudgment of the facts at issue, conflicts of interest, and bias
- Decision-makers must also receive training on any technology to be used at a live hearing and on issues of relevance and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators must also receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence

# Title IX Policy Review

# Definition of Title IX Sexual Harassment

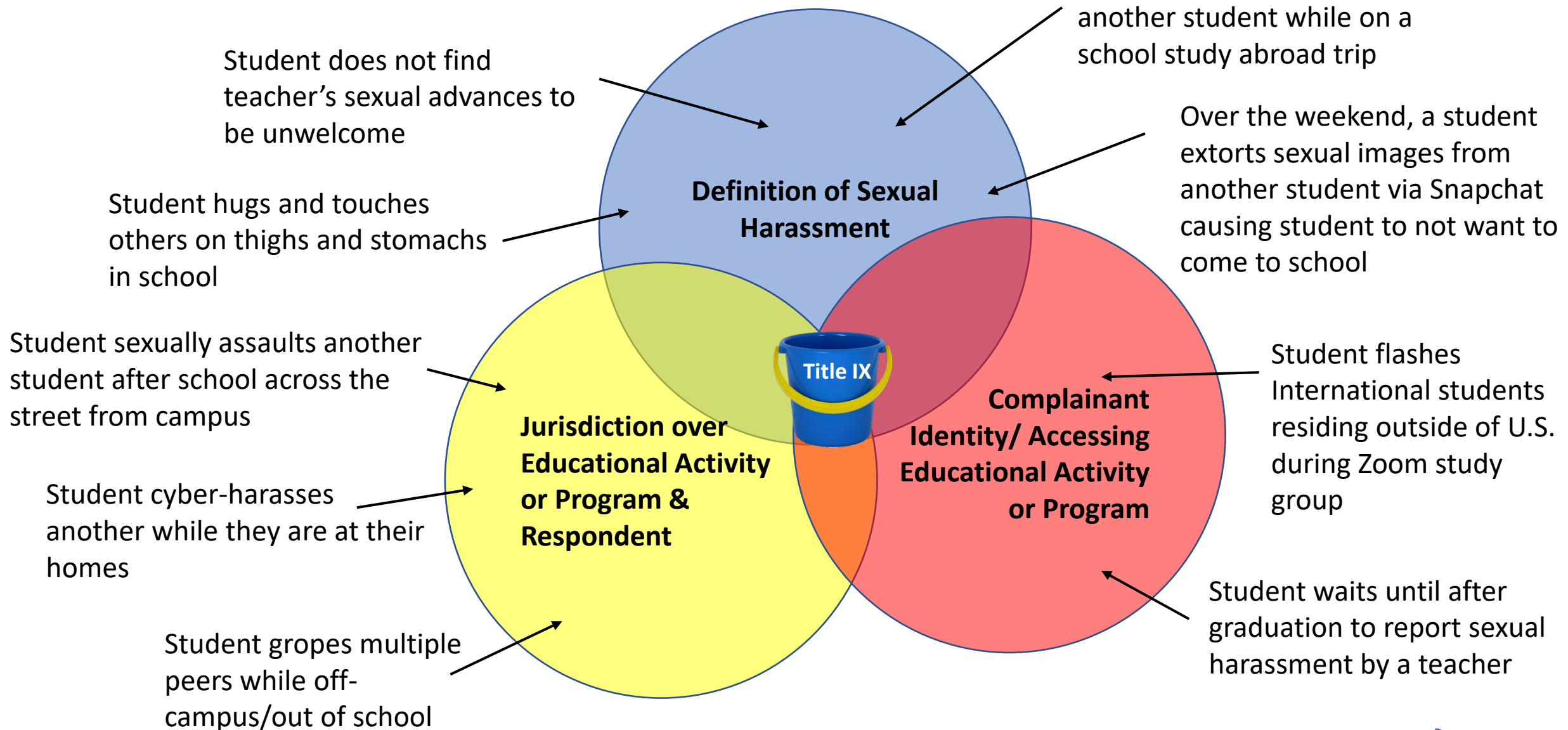
## Limited to:

- Unwelcome “**quid pro quo**” sexual harassment by a school employee against a student;
- Sexual harassment that is “so severe, pervasive, and objectively offensive that it effectively **denies a person equal access**” to educational programs; or
- Acts that meet the VAWA definition of a **sex offense** of sexual assault, dating violence, domestic violence, or stalking.
- In addition, Title IX prohibits **retaliation** against any person for pursuing their rights under Title IX.

# Jurisdiction of Title IX (i.e. where and when)

- The complainant must be a student/person accessing NSU's educational programs **in the United States**, and
- NSU must have **substantial control over the alleged perpetrator and the context of harassment**, and
- A formal complaint must be made by an affected person who is **enrolled or trying to access** an NSU program/activity
  - Parents may file a complaint on behalf of an under 18-year-old student

# Limitations of Title IX



## Title IX Jurisdiction

## Additional Sexual Misconduct

### SEX OFFENSES

sexual assault, dating violence, domestic violence & stalking

### HOSTILE ENVIRONMENT

denying access to education

limits, disrupts or adversely affects access

### SEXUAL HARASSMENT

“Quid pro quo” by NSU Employee

“unwelcome conduct of a sexual nature”

In the United States  
NSU has control over context  
NSU has control over respondent  
Complainant still part of NSU



### SEXUAL EXPLOITATION

taking sexual advantage of another person

### GENDER-BASED HARASSMENT

unwelcome conduct based on gender  
expression/identity or sexual orientation



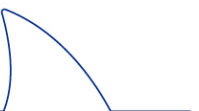
# Other Prohibited Misconduct

- **Non-Title IX Sex Offense** – Essentially a type of sexual harassment under Title IX that is outside of the jurisdiction of Title IX
- **Sexual harassment** – “unwelcome conduct of a sexual nature”
- **Gender-based harassment** – unwelcome nonsexual conduct on basis of gender, expression, stereotypes, etc.
- **Sexual exploitation** – taking advantage of another for the benefit of anyone other than that person
- **Hostile environment** – that *limits* a person’s ability to participate



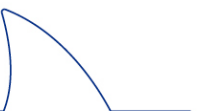
# Definition of Consent

- Consent is informed, voluntary, and mutual agreement to engage in sexual activity. Giving consent means that a person understands a specific behavior that someone wants to do with them and they voluntarily give that person permission to engage in that behavior.



# Definition of Consent

- Consent must be sought by the initiator of each act
- Consent can be withdrawn at any time.
- There is no consent when force, whether expressed or implied, is used.
- There is no consent when coercion, intimidation, threats, and/or duress is applied.
- Whether a person has taken advantage of a position of influence over another person may be a factor in determining consent.
- Silence or absence of resistance does not imply consent.
- If a person is mentally or physically incapacitated or impaired so that such person cannot understand the fact, nature, or extent of the sexual situation, there is no consent. This includes impairment due to alcohol or drug consumption that reaches the level of incapacitation, being asleep or unconscious or being under the legal age to give consent.



# Other Standards of Analysis

- Hostile environment
- Unwelcome conduct:
  - Conduct is considered unwelcome if the person did not request or invite it and considered the conduct to be undesirable or offensive. In addition, unwelcome conduct:
  - May occur through a variety of forms, including, name-calling, graphic or written statements (including the use of cell phones or the Internet), or other conduct that may be physically threatening, harmful, or humiliating.
  - Does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.
  - May involve persons of the same or different sexes or gender identities.
  - May have occurred even if an individual participated in the conduct (if they were coerced or treated into doing so, for example) or failed to report/complain about the conduct.
  - May have occurred, even if a person welcomed similar conduct previously or welcomed a portion of the conduct but not all of it.

# Reminders & Roles

## When you see/learn about a potential issue.....

1. Address immediate/in-the-moment concerns
2. Get initial information
3. Follow any mandatory reporting requirements
4. Offer supportive measures
5. Offer right to file a formal complaint
6. Contact Title IX Coordinator to discuss situation
7. Provide written summary of information (including student names) to Title IX Coordinator



# Role of Investigator(s)

- Conduct an impartial, appropriately prompt and thorough investigation, in accordance with NSU procedures
- Conduct interviews and generate interview summaries
- Collect evidence
- Determine what is relevant to the allegations
- Write a summary report

# Role of Decision-Maker(s)

- Read investigation report and review all evidence
- Determine if parties' questions are relevant and ensure questions are posed if so
- Determine a finding of responsibility for each allegation
- Provide and send written outcome letters (using template) to parties



# Role of Title IX Coordinator

- Oversees process
- Determines if a complaint meets Title IX jurisdiction
- Review/finalize/send notice of investigation/outcomes
- Provide guidance to investigators and decision-makers regarding procedural questions
- Assist with obtaining evidence or working with law enforcement
- Approves investigation report
- Assists with sanction ideas and supportive measures

# Title IX Procedures Review

# Procedural Requirements Upon Notice of Incident

- Actual notice = notice of allegations of sexual harassment to any NSU University school employee
- Must offer supportive measures to a victim/affected student
- Must explain the option to file a formal complaint under Title IX
  - *A formal complaint must come from the victim (or parent of a victim under the age of 18) or the Title IX Coordinator*
- Report of a sex crime (stalking, sexual assault, dating/domestic violence) also require notice of rights and options under VAWA, *regardless of where or when it occurred.*

# Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as available and appropriate for no cost to the parties
- Designed to preserve students' access to their educational activities without “unreasonably burdening” the respondent
  - Counseling, mutual no-contact orders, change in schedules, virtual participation, extension of class assignments, etc.
  - Does NOT include suspension from athletic team or student club

# Requirements for Emergency Removal

Limits interim removal of a student (removal from campus, suspension from program including athletic participation, etc.) **only** if it is determined that the student poses an immediate threat to health or safety of any individual. Requires:

- An individualized safety and risk analysis
- Determination that an immediate threat to the physical health or safety of any student arising from the allegations that justifies removal
- Notice and an opportunity to challenge immediately following the removal

# Notice & Investigation Process

- Detailed notice of investigation provided in writing to parties
- Student may have an advisor of their choice at any meeting
  - *Must be equitable. If you allow two parents or a parent and a separate advisor, must do that for other students.*
- All evidence must be provided to the students and their advisors
- Interview transcripts/summaries may be viewed by other party

# Procedural Requirements: Investigation

- Must investigate all complaints that fall under Title IX jurisdiction using Title IX procedures
- May address non-Title IX allegations outside of Title IX process, including invoking interim actions for any non-Title IX allegations
- Must provide written notice of investigation, allowing time for a party to prepare for any interview
- May not restrict students from talking about the allegations
- Burden of proof is on the institution, not the parties, to gather information
- Parties must be allowed to present information and witnesses

# Procedural Requirements: Investigation Report

- Must provide all evidence to the students and their advisors and allow for at least 10 days for the students to provide a response before completing the investigation report
- Report must summarize relevant evidence
- Must provide a copy of the investigation report to the parties and their advisors and allow for review and written response





# Procedural Requirements: Before Adjudication

- After providing the investigation report and before reaching a decision, the parties may submit questions they want asked of any party or witness.
- The decision-maker determines if questions are relevant or not
- May need to be go-between to ask follow up questions



# Dismissal of Complaints by Title IX Coordinator

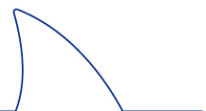
- Complaints **MUST** be dismissed under Title IX when:
  - Even if true, does not meet Title IX definition of sexual harassment, or
  - Did not occur towards person accessing NSU programs or activities in the U.S.
- Complaints **MAY** be dismissed under Title IX when:
  - Complaint provides notice in writing of withdrawing complaint, or
  - Respondent is no longer enrolled or employed by NSU, or
  - Circumstances prevent NSU from gathering enough information to reach a determination.

*Dismissal under Title IX does not preclude NSU from addressing the behavior under a different policy and/or procedure.*

# Reviewing Questions for Relevance

# Determinations on Questions

- Not relevant (must give explanation why)
- Relevant
- Or, may ask for explanation or alternate wording



## Not Allowed/Not Relevant

- A complainant's sexual predisposition or prior sexual behavior is not relevant unless sought to prove someone other than the respondent committed the act, or it relates to relevant prior behaviors between the two to prove consent.
- Illegally obtained recordings
- Medical records unless written consent was provided
- Drawing an inference about responsibility based solely on refusal to answer

# When Should You Not Be a Decision-Maker?

When any of these can affect the outcome:

- If you have a conflict of interest
- If you have a bias
- If you cannot be impartial:
  - Must be neutral, not partial to an individual complainant, respondent, or to parties in general
  - If information has been shared by investigator to the decision-maker outside of the investigation report

# Determining Responsibility

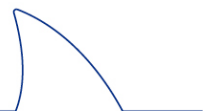
# Reminders

- Standard of proof: preponderance or >50%
- Must determine “findings of fact” and make a determination of responsibility for each allegation
- Rationale must be provided for each determination, including rationale for any sanctions
- Outcomes must be issued in writing simultaneously to the parties



# Findings & Determinations

- What are the key findings of fact?
- How do you find for each allegation?
- What is the rationale for each?
- How do any findings of responsibility relate to policy violations?



# Determining Sanctions

# Sanctioning

- Standard sanctions
- What warrants suspension/expulsion?
- Educational sanctions
- What is the rationale for the sanction(s) selected?
- Sanctions vs remedies

# Procedural Requirements: Written Determination

- Decision-maker's written determination must include:
  - Allegation(s)
  - Description of the procedural steps taken
  - Findings of fact supporting the determination
  - Conclusions regarding the application of the policy/code of conduct
  - The result of each allegation, including a determination of responsibility and rationale for each
  - Any sanctions imposed & rationale
  - Whether remedies will be provided to complainant
  - Appeal procedures and grounds

# Procedural Requirements: Informal Resolution

- Cases may be resolved informally if the parties agree.
- Informal resolution can occur until a determination of responsibility has been made.
- Informal resolution requires a document signed by the parties (and their parents, if under 18).



# Appeals

# Appeals

The parties have an opportunity to appeal the final decision and/or dismissal of any part of a complaint on the basis of:

- Procedural irregularity that affected the outcome;
- New evidence not reasonably available at the time the decision was made that could affect the outcome; or
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias that affected the outcome.

# Appeals

- Must notify the other party in writing when an appeal is filed and implement equal procedures for both parties
- Appeal must be heard by someone different than Title IX Coordinator, investigator, or original decision-maker
- Both parties need to be given a reasonable, equal opportunity to submit written statement
- Both parties must receive simultaneous written decision describing the result of appeal and rationale



# Appeals

- Was there a **procedural irregularity**? Did it affect the outcome?
- Is there **new evidence**? Was it not reasonably available at the time of decision? Could it affect the outcome?
- Did the Title IX Coordinator, investigator, or decision-maker have a **conflict of interest or bias**? Did it affect the outcome?

# Questions & Discussion