

University Hearing Board (UHB) Training

SEPTEMBER 14, 2020



What is required of me as a member of the UHB?

- Attend *all trainings* including “Just In Time” Training
 - If you are unable to attend a training, you will not be able to serve on a Hearing Board until the training is complete
- Be familiar with the Policy Prohibiting Sexual Misconduct, Standards of Student Conduct, Policy on Preventing & Responding to Discrimination and Sexual Misconduct Involving Faculty or Staff and the UHB Guidelines.
- Read the Investigative Report
 - Determine who will be called as witness at the hearing
 - Determine questions you have for the parties and any witnesses



What is the role of the UHB?

It is the role of the University Hearing Board (“UHB”) is to reach a decision regarding:

1. Whether the Respondent is or is not responsible for violation(s) of the Standards of Student Conduct or the Policy on Preventing and Responding to Discrimination and Sexual Misconduct Involving Faculty or Staff; and
2. If so, the appropriate sanction to impose for such violation(s).

The Respondent is presumed to be not responsible for the alleged conduct until a determination regarding responsibility is made at the end of the grievance process.



The UHB should make its decision based on:

1. The evidence, including oral testimony, written evidence and the investigative report
 - a) May consider reasonable inferences that arise from the testimony or evidence admitted during the hearing and the credibility of all witnesses, including the Complainant and Respondent.
2. The standards and definitions set forth in the University's Policy Prohibiting Sexual Misconduct.



The UHB should not consider:

1. Any evidence or testimony that the Hearing Officer considers inadmissible;
2. Any evidence or testimony submitted by a party or witness that does not submit to cross-examination.



Avoiding Bias and Conflicts of Interest

- The Respondent and Complainant have the right to petition that any member of the University Hearing Board be removed on the basis of conflict of interest or bias for or against Respondents or Complainants generally or the individual Respondent or Complainant.
- UHB members should recuse themselves from serving on the UHB if they have a association with the Complainant or Respondent or if their serving on the UHB will be perceived as a bias against the Complainant or Respondent.



What would a conflict of interest look like?

- Personal Relationship Conflicts of Interest
 - The Hearing Board Member is a coach of the athletic team that the Complainant plays on
 - The Appellate Officer has a mentoring relationship with the Respondent
 - The Hearing Board Member supervises the Complainant's parent

The Hearing Officer and the Appellate Officer should both consider recusing themselves from this case, as they are in a situation where they could derive a personal benefit from actions or decision made in their professional capacity.



How do I avoid bias

- Ask yourself the following question ; ***“Do I know either party and/or have a pre-existing relationship that will effect my ability to be an impartial party in this process?”***
 - If you answer yes, you must recuse yourself from serving
- **Read the investigative report with an open mind.**
 - Do not indulge in guesswork or speculation
 - What are the facts of the case?
- **Drawing inferences from testimony and evidence**
 - Is the evidence direct or circumstantial?
 - Does oral testimony match what is in the investigative report?
 - If not, how? Ask questions to clarify discrepancies in the two different accounts of the incident.

How do I avoid bias

•Credibility of Witnesses

- UHB must determine the credibility of all witnesses, including the Respondent, the Complainant, and the Title IX investigator.
- May consider the appearance and manner of the witnesses, their opportunity for knowing the truth and for having observed things about which they testified, their interest in the outcome of the case, their bias, and, if any has been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.
- In making credibility assessments, the members of the UHB should also consider the effects of trauma on a person's memory. The literature indicates that the trauma caused by sexual assault can affect a person's memory causing memories to be fragmented and the recall of the event to be slow and difficult. ¹

¹ See, e.g., <http://nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx>

As you review the case materials, you notice the Complainant/Respondent's account of the incident is incomplete or has changed. What does that mean?



What is covered under Title IX?

Actions for sexual harassment under Title IX are limited to conduct that:

- Meets the narrower definition of sexual harassment;
- Occurs within the University's education program or activity;
- The University has substantial control over both the Respondent and the context to which the sexual harassment occurs;
- Occurs in any building or property owned or controlled by the University or any building or property owned or controlled by a **student organization** officially recognized by the University; and
- Occurs within the United States.

Prohibited Conduct under Title IX

Non-Consensual Sexual Intercourse

Non-Consensual Sexual Contact

Sexual Harassment under Title IX

Sexual Exploitation

Stalking

Dating Violence

Domestic Violence

Sexual Violence



Sexual Harassment under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. Unwelcome conduct of a sexual nature as determined by a reasonable person to be so severe, pervasive **AND** objectively offensive that it effectively denies a person equal access to the University's education program or activity.
2. A University employee conditions the granting of University aid, benefit or service on an individual's participation in unwelcome sexual conduct.
3. Sexual assault, dating violence, domestic violence and stalking as defined in this policy.



What happens if the conduct doesn't fall within Title IX?

The University has created a parallel process for investigating reports of sexual misconduct that do not fall within the scope of Title IX. This would cover incidents that:

- Occur Off-Campus;
- Occur outside of the United States;
- Meet a broader definition of sexual harassment.



Prohibited Conduct under Sexual Misconduct (non-Title IX)

Sexual Harassment
(not Title IX)

Non-Consensual Sexual Intercourse

Non-Consensual Sexual Contact

Sexual Exploitation

Stalking

Dating Violence

Domestic Violence

Sexual Violence





Sexual Harassment (not Title IX)

CONDUCT ON THE BASIS OF SEX THAT SATISFIES ONE OR MORE OF THE FOLLOWING:

Unwelcome conduct of a sexual nature as determined by a reasonable person to be *sufficiently severe, persistent, OR pervasive* such that it limits or denies an individual's employment, academic performance, or ability to participate in or benefit from University programs or activities.

OR

Submission to unwanted sexual conduct is an implicit or explicit term or condition of an individual's employment, academic standing, or participation in any University programs and/ or activities, or is used as the basis for University decisions regarding the individual who is the subject of the unwanted sexual conduct.

BREAK



What is Consent?

Clear and unambiguous agreement to engage in sexual activity as evidenced by *words or actions* that demonstrate a **knowing** and **voluntary** willingness to engage in mutually-agreed-upon sexual activity.



Consent Is:

KNOWING

All individuals agree to:

WHO (partners involved)

WHAT (sexual acts)

WHERE & WHEN (same location & time)

HOW (the same way and under the same conditions)

Understanding that an individual that is incapacitated **CAN NOT CONSENT**

ACTIVE

Clear and unambiguous agreement to engage in sexual activity as evidenced by ***words or actions*** .

Silence/lack of verbal or physical resistance do not indicate consent

Consent Is:

VOLUNTARY

Consent must be freely given and cannot be obtained by:

- **Force**
- **Threats**
- **Intimidation**
- **Coercion**
- Ignoring someone's objections
- Taking advantage of someone's incapacitation

PRESENT & ONGOING

Consent to ...

- previous activity does not mean consent to future activity
- one sexual act does not imply consent to other acts
- sexual activity with one person does not constitute consent for sexual activity with others.

Consent can be withdrawn at any time during sexual activity

Consent can not be given by:

- Individuals who are mentally incapacitated at the time of the sexual contact in a manner that prevents them from understanding the nature or consequences of the sexual act involved, including incapacitation as a result of alcohol or drug use;
- Individuals who are asleep, unconscious or otherwise physically helpless; and
- Minors.



Alcohol & Sexual Violence

What is a standard drink?

1 Standard Drink = 0.6 fluid oz of 100% alcohol



Alcohol percentage and package volume will determine number of standard drinks.
Source: National Institute on Alcohol Abuse and Alcoholism

© Gordie Center for Substance Abuse Prevention

On average, it takes nearly 3 hours for most people to eliminate the alcohol in 2 drinks.

What factors affect someone's response to alcohol?

Time & Amount Drank

Height & Weight

Tolerance Level

Food

Total Body Fluid

Medications

Altitude

Caffeine

Gender

Ethnicity

- Asian decent-liver enzyme that processes alcohol not active

Family History

- First degree relative 7X greater chance alcoholism

Stress/illness/lack of sleep

Consumption of other drugs (legal or illegal)

Signs of Possible Incapacity due to Alcohol or Drug Consumption

A witness or the accused student may know how much the other party has consumed or there may be reports of:

- Slurred speech
- Bloodshot eyes
- Smell of alcohol on the breath
- Shaky equilibrium
- Vomiting
- Outrageous or unusual behavior
- Passed out, unconsciousness



What is Incapacitation?

Incapacitation is a state beyond drunkenness or intoxication.

Physical and/or mental inability to make informed, rational judgments or to understand the nature and consequences of the sexual act

Voids an individual's ability to give consent; not knowing



A person violates the sexual misconduct policy if they have sexual contact with someone they **know or should know is mentally incapacitated or has reached the degree of intoxication that results in incapacitation.**

Judged by whether a **reasonable, sober person** would know about the incapacitation.



To assess incapacitation, members of the UHB may wish to ask about:

- The amount and type of alcohol or drugs consumed by the Complainant;
- The time period over which the alcohol or drugs were consumed;
- Whether the Complainant has experience consuming alcohol;
- Whether the Complainant had passed out or was vomiting;
- Whether the Complainant was acting irrationally or in a way substantially different from the norm;
- Was the Complainant stumbling or falling down; and
- Any other question relevant to assessing the issue of incapacitation.



What are a Complainants Options after a Report is Made?

After meeting with the Title IX Coordinator about their rights, supportive measures and options, the Complainant has the option to file a formal complaint to initiate one of the following processes:

- The Title IX Grievance Process
- The Sexual Misconduct Grievance Process
- The Mediation Process



The Grievance Process & Hearing

- **Schools can choose Standard of Evidence**

- *Preponderance of the Evidence* - Requires that the evidence be “more likely than not” to prove the matter at hand.
- *Clear & Convincing* - Requires that the evidence presented must be highly and substantially more probable to be true than not.

- **Live Hearings**

- **Ability of the parties/witnesses to submit to cross examination by the other parties advisor**

- If a Complainant/Respondent does not have an advisor for cross-examination, the University will provide an advisor of their choice for purposes of cross-examination
- If a Complainant/Respondent does not submit to cross-examination, any statement they made in the investigative report or in the hearing can not be used in making a determination of responsibility



The Grievance Process & Hearing

- **Finding of Responsibility**

- UHB – for a finding of responsibility – 2 of the 3 members must find the Respondent responsible
- SHB – for a finding of responsibility – 3 of the 5 members must find the Respondent Responsible
- Hearing Officer is present for deliberations but **DOES NOT** have a vote

- **Outcome of the Hearing**

- The written outcome will include a rationale for the decision. What facts and evidence led to the finding of responsible/not responsible
- Include the rationale for any question deemed inadmissible during the hearing
- Deadline was extended for the written notice of hearing outcome

- **Right of Complainant & Respondent to appeal the outcome of the hearing**



Overview of the University Hearing Board

Appeal Process

Questions
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