# UNC Board of Trustees: Title IX and the University's Harassment and Discrimination Policy

Nov. 3, 2021

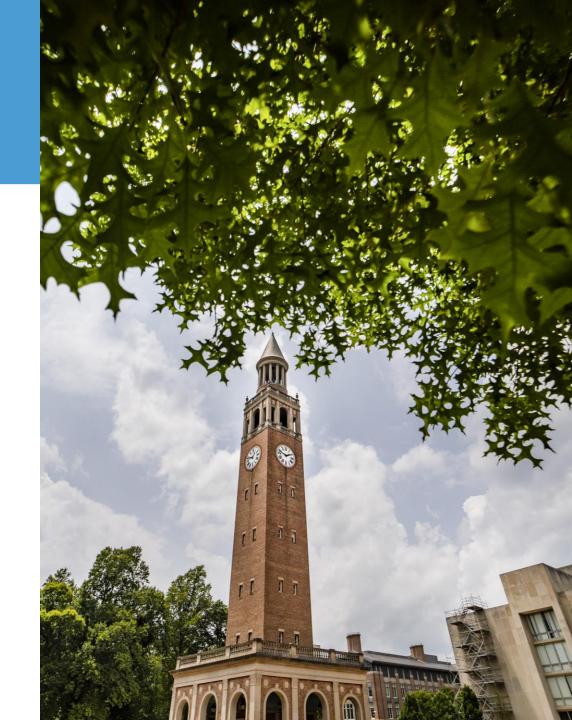


# Overview & Objectives

- Title IX and VAWA Introduction & Requirements
- Overview Policy on Prohibited Sexual Harassment under Title IX ("Title IX Policy") and Policy on Prohibited Discrimination, Harassment & Related Misconduct ("PPDHRM")
  - Background
  - Scope
  - Prohibited Conduct
- Reporting Incidents & the Investigation Process
- Important Considerations
- Appeals Processes

# Background

- UNC BOG Code, Ch. 5, Section 502: "Where the sanction is suspension or expulsion, an appeal may be made to the board of trustees." (limited grounds for appeal)
- Title IX and VAWA require that all officials who conduct any part of the resolution process must be annually trained on the institution's policy and issues related to dating violence, domestic violence, sexual assault, and stalking



## What is Title IX?

- Title IX of the Education Amendments of 1972 is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities
- All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance must comply with Title IX
- "Education programs and activities" = everything

## What is Title IX?

- Sexual harassment and sexual assault are forms of sex discrimination
- UNC Complies with Title IX under the Title IX Policy

The University process and procedures are not the same as criminal process and procedures



## What is VAWA?

- The Violence Against Women Act is a federal law intended to improve criminal justice and community-based responses to domestic violence, dating violence, sexual assault and stalking in the United States
- Despite the name, its provisions are gender-neutral
- 2013 reauthorization of VAWA expanded campus requirements for addressing and preventing domestic violence, dating violence, sexual assault and stalking
- For campus related reports, VAWA applies regardless of status as a student or employee

# Title IX and Clery

## **Title IX:**

- Remedy based
- Responsible employee
- Focused on who the parties are
- Is the Reporting Party being cared for?
- Has the Responding Party been reported before?
- Student's desire for confidentiality when possible
- Due Process

## **Clery:**

- Statistics based
- Campus Security Authority
- Where incident occurred
- When incident was reported
- Victims must have option to remain anonymous

## Policy Evolution / Regulations

- Policy Task Force was created in 2014
  - Policy on Prohibited Discrimination, Harassment and Related Misconduct (PPDHRM)
- U.S. Department of Education released new Title IX Regulations in 2020
  - Policy on Prohibited Sexual Harassment under Title IX

# Ongoing Campus Engagement

Policy Advisory
Group

AAU Climate Surveys Programs and Trainings

Prevention Advisory Group Awareness Campaigns The Coordinated
Campus
Response Team

## **EOC** Policies

Policy on Prohibited
Discrimination, Harassment
and Related Misconduct
(PPDHRM)

Policy on Prohibited Sexual Harassment Under Title IX (Title IX Policy)



## PPDHRM and Title IX Policy

#### **PPHDRM**

- Discrimination and Harassment based on:
  - Age, color, disability, gender, gender expression, gender identity, genetic information, race, national origin, religion, sex, sexual orientation, or veteran status
- Interpersonal violence, sexual violence, sexual exploitation, stalking, retaliation

#### **Title IX Policy**

- Sexual Harassment that falls under the definition and jurisdiction of Title IX sexual harassment
- Sexual Assault, dating Violence, domestic violence, and stalking



# **Reporting Process**



Person makes a Report



Response
Team
Assessment
Evaluation/Review,
Interim Measures



Informal Resolution or Investigation



Resolution

# On Campus Reporting Process

- All reports of misconduct are resolved through the University's Equal Opportunity & Compliance Office, which includes:
  - AVC/Title IX Compliance Coordinator
  - Director of Report and Response
  - Report and Response Coordinators
  - Investigators
  - Hearing Coordinator

- Other reporting options:
  - UNC Police (separate criminal process);
  - Office of the Dean of Students;
  - Office of Human Resources;
  - Academic Personnel Office; and/or
  - Any responsible employee
- All of these resources must report any information about alleged policy violations to the EOC

# Reporting Process: Why EOC?

- Independent, centralized process
- Experienced, highly trained staff
- Compliance requirements (Title IX, ADA, VAWA)
- Consistency across campus
- Knowledgeable about laws, national trends and climate issues on campus
- Maintains a central, protected database for reported information
- Assesses for patterns and trends

# Report and Response Coordinators (RRC)

- RRC is assigned to every report received.
- RRC will reach out to parties to explain resolution options and provide information on resources and supportive measures.
- RRC serves as point of contact for all parties related to that report
- In formal resolution process, RRC provides information, resources, and supportive measures to both Reporting and Responding Parties.
- Not every Reporting Party is interested in an investigation by the EOC Office

## Supportive Measures

- University No Contact Order
- Emergency Housing
- Traffic Pattern Check
- Professor Notifications
- Academic Accommodations

investigation/voluntary resolution.

• University Approved Absences
Supportive measures can be requested independent of formal EOC action, or in addition to a request for

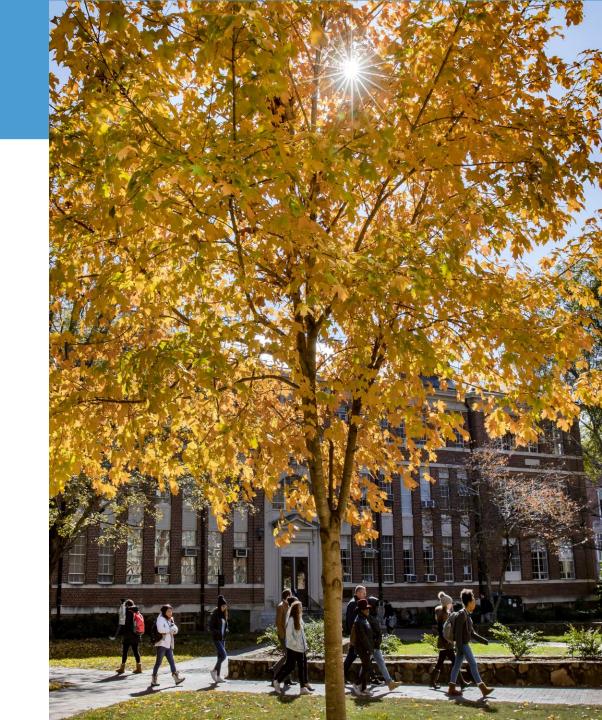
## Confidential Resources

## **University:**

- Campus Health Services
- CAPS
- Gender Violence Services Coordinator (within University proceedings)
- University Ombuds (same)
- Employee Assistance Program
- UNC Hospitals Emergency Room

## **Community:**

- Orange County Rape Crisis Center
- Compass Center



# **University Response**

#### Assessment

- Jurisdiction
- Definitions
- Supportive or Emergency Measures

Informal Resolution or

#### Formal Resolution

- Investigation
- Hearing
- Appeals

# Jurisdiction









# Title IX Policy: Jurisdiction

- What: sexual harassment, dating violence, domestic violence, and stalking.
- Who: University students, employees, and other persons
- Where and When: in the <u>United States</u> in <u>an</u> educational program or activity of the University
  - An educational program or activity includes locations, events, or circumstances for which the University exercises substantial control over both the responding party and the context in which the conduct occurred at the time of the alleged incident

## Title IX Policy: Prohibited Conduct

## **Title IX Sexual Harassment:**

Conduct on the basis of Sex that satisfies one of the following:

- Quid Pro Quo: an Employee conditioning the provision of University aid, benefits, or services on the Reporting Party's participation in unwelcome Sexual Contact;
- Hostile Environment: unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a University education program or activity; or
- Sexual Assault, Dating Violence, Domestic Violence, or Stalking.

# **PPDHRM: Jurisdiction**

- What: discrimination and harassment based on protected status
- **Who**: students, employees, visitors, program participants, contractors and other third parties under circumstances within the University's control.
- When and Where: Applies to conduct that occurs on and off campus, including on-line or electronic conduct, if:
  - the conduct occurred in the context of an employment or education program or activity,
  - had continuing adverse effects on campus, or
  - had continuing adverse effects in an off-campus employment or education program or activity of the University (e.g., study abroad, internship, research locations)

## **PPDHRM: Assessing Jurisdiction**

To assess jurisdiction over off-campus conduct that is not part of an educational program or activity of the University, EOC considers whether the alleged conduct has or is reasonably likely to have continuing adverse effects or to create a hostile environment for students, employees, or third parties while on campus or in any University employment or education program or activity.

#### Look at:

- seriousness of the alleged conduct,
- the risk of harm involved,
- whether both parties are members of the campus community, and
- whether the off-campus conduct is part of a series of actions that occurred both on and off campus.

## **PPDHRM: Prohibited Conduct**

- Discrimination
- Harassment
  - sexual exploitation
  - sexual assault
- Interpersonal Violence
- Stalking
- Complicity
- Retaliation
- Violation of Supportive Measures
- Interference with the Policy
- Failure to Comply with Sanctions



## Sexual Assault and Sexual Violence

- Forms of sexual or gender-based harassment
- Having or attempting to have sexual contact without consent
- Sexual contact:
  - Intentional touching or penetration of another
  - Clothed or unclothed
  - Intimate parts of the body
  - With any body part or object in a sexual manner
  - Also includes causing another to touch one's own body or another person's body in manner described above

## Consent

- Communication of an affirmative, conscious, freely made decision by each participant to engage in agreed upon sexual contact
- Must include outward demonstration, through understandable words or actions, that conveys clear willingness to engage in sexual contact
- Consent to one form of sexual contact does not constitute consent to any other form of sexual contact

## Consent

#### **Consent cannot:**

- Be inferred from silence, passivity, or lack of resistance
- Be obtained by force, coercion, or incapacitation
- Be assumed based on consent to another, or previous, sexual activity
- · Be assumed via a current or former dating or sexual relationship

#### Lack of resistance ≠ consent

• There is no requirement that an individual physically or verbally resist unwelcome sexual contact for there to be a violation of the policy

## Consent can be withdrawn at any time

 Withdrawal of consent requires an outward demonstration through understandable words or actions

## Incapacitation

- An individual who is incapacitated is unable to give consent
- States of incapacitation include, but is not limited to:
  - Sleep
  - Unconsciousness
  - Intermittent consciousness
  - Any other state where the individual is unaware that sexual contact is occurring
  - Mental or developmental disability that impairs the ability to consent
  - Age

## Role of Alcohol in Sexual Violence Cases

- A person who is incapacitated is unable to give consent
- Alcohol use is one of the prime causes of incapacitation
- Intoxication ≠ incapacitation
- Impact of alcohol can vary, so investigator evaluates physical helplessness and ability to make, understand, and communicate decisions
- Responding Party's intoxication is never excuse or defense
- Regardless of intoxication level, affirmative consent always required



# Request for Confidentiality

- In both TIX and PPDHRM, guided by Reporting Party's desired manner of resolution
- If Reporting Party requests confidentiality and that the University does not investigate, respect that request whenever possible
- University balances Reporting Party's request for confidentiality with the obligation to maintain a safe, inclusive, and nondiscriminatory environment on campus
- Response team uses factors to balance these interests in the initial assessment
- If either party refuses to participate, make decision based on evidence that is available

## Informal Process

- Is an option for the parties –
   University cannot require
- Does not involve investigation or disciplinary action against responding party
- Must be approved by EOC Office
- Not appropriate for all forms of prohibited conduct

- May include:
  - Interim protective measures
  - Educational programming or training
  - Increased monitoring, supervision, or security at specific locations
  - Facilitating meeting between parties (in cases that do not involve sexual assault)
  - Focus on supporting the reporting party with no participation by the responding party
  - In other forms the responding party may agree to participate
  - Depending on type of remedy, it may be possible for reporting party to maintain anonymity

# Title IX Policy

- Report/Intake/Assessment
  - Filing of formal complaint (by party or TIXC if factors require us to move forward)
  - Process for dismissing formal complaint
- Investigation (no investigative finding)
  - Review of evidence (all <u>directly related</u> information)
  - Review of investigation report (after parties review evidence, all relevant information)
- Hearing
- Appeal to University
- Appeal to BOT

# Title IX Policy: Investigation

- Notice of investigation = written notification of allegations, parties involved, estimated time frame, process, and parties' rights
- Trained, professional investigator
- Investigation will include:
  - Interviews with relevant parties, including witnesses
  - Medical evidence (if consented to by party)
  - Police reports
  - Other relevant evidence: emails, texts, prior statements
- Investigator does NOT weigh evidence or make determination

### Title IX Policy: Investigation

- After investigation, parties review all evidence collected that is "directly related" to matter, even if University doesn't intend to rely on it
- Parties can submit written responses to the evidence
- Investigators incorporate written responses into an investigation report which summarizes all "relevant" evidence

#### Title IX Policy: Hearings

- 3 trained panel members plus non-voting hearing chair made up of faculty and staff
- Parties have a pre-hearing meeting with hearing chair and can:
  - Object to panel member based on bias, conflict of interest, lack of impartiality prior to the hearing
  - Make statement about what happened
  - Present evidence/witness testimony and question witnesses
  - Be in person or via videoconference; panel and parties must be able to see and hear party/witness answering questions
  - Cross examination
    - Advocates or Hearing Advisors conduct cross examination on behalf of parties; Hearing Panel screens questions for relevance prior to answer
  - Confrontation of witnesses
    - Advocates or Hearing Advisors question witnesses (Title IX)
- Panel is advised by a member of OUC on legal questions that arise

### Title IX Policy: Hearing

- What is a hearing advisor?
- Cross-examination of the other party and any witnesses will be conducted by the party's advocate of choice.
- If a party does not have an advocate, the University will provide a hearing advisor for the limited purpose of conducting cross examination on their behalf.
- Parties write questions for hearing advisor to ask

#### Title IX Policy: Hearing

- Panel will make a finding of whether there was a policy violation (preponderance of the evidence)
  - Preponderance of evidence: it is more likely than not that the conduct occurred
- Provides a written decision with identification of conduct, findings of fact supporting determination, conclusions based on application of policy to facts, rationale for decision on each instance of conduct, sanctions, and appeal options
- If there is a finding, panel determines appropriate sanctions using factors outlined in policy
- Goals: educational (eliminate conduct and prevent recurrence), restorative (address and remedy effects of conduct), punitive (hold accountable), rehabilitative
- Written notice of hearing outcome to both parties within 5 business days of hearing conclusion

#### Title IX Policy: Appeal to University

- Either party may appeal determination of hearing panel
- Appeal must be in writing and include specific grounds:
  - Procedural irregularity that affected the outcome
  - New evidence that was not reasonably available that could affect outcome
  - Conflict of interest or bias that affected the outcome
- Appeal decided by trained Appeals Officer who reviews appeal and all underlying materials; Appeals Officer can affirm, return to panel to cure error or assess weight of new evidence, or convene a new panel

#### **PPDHRM**

- Report/Intake
  - Assessment
- Investigation (investigative finding)
  - Draft review (all evidence collected, review of draft investigation report summarizing evidence)
  - Investigation report
- Hearing
- Appeal to University
- Appeal to BOT

### **PPDHRM: Investigation**

- Same as Title IX investigation, except:
- Investigator weighs evidence makes determination based on <u>preponderance of evidence</u> and recommends sanctions
- In the event there is a finding of a policy violation:
  - Each party can accept the finding and any recommended sanction, if applicable; request a hearing on the investigative finding and sanction; or request a hearing only on the recommended sanction
- If there is a finding of no policy violation:
  - Each party can accept the finding; or request administrative review on investigative finding

### **PPDHRM:** Hearing

- Same as Title IX hearing except:
  - There has been an investigative finding. However, hearing is <u>de novo</u> panel is not bound by investigation findings; panel makes own decision which it communicates in a written decision that states whether there is a policy violation, the rationale for the result, and a summary of the evidence on which decision was based; sanctions and remedies if any, and appeal options.
- Parties may participate by phone or request a screen
- Investigator will present evidence supporting policy violation finding
  - Cross examination
    - Hearing Chair screens and asks questions the parties submit for one another (PPDHRM)
  - Confrontation of witnesses
    - Parties (or advocates) generally question witnesses (PPDHRM)

### **PPDHRM: Appeal to University**

Same as Title IX Appeal, except these are the permissible grounds:

- A violation of due process;
- Material deviation from the Minimum Substantive and Procedural Standards for Student Disciplinary Procedures adopted by the Board of Governors, University of North Carolina Policy Manual § 700.4.1;
- Newly discovered information that was not previously available through the exercise of due diligence that would substantially affect the outcome

#### Sanctions/Corrective Action

- Factors for determining sanctions:
  - Nature and violence of conduct
  - Impact on reporting party/University
  - Prior misconduct
  - Acceptance of responsibility and understanding of Policy
  - Protection of University community and learning environment
  - Some behavior is so serious and harmful as to require severe sanctions, including suspension or expulsion

- Sanctions include:
  - Expulsion\*
  - Suspension (permanent or time limited)\*
  - Probation\*
  - **Educational requirements**
  - Housing restrictions
  - No contact orders
  - \*Impacts status as a student/appears on transcript when active

#### Role of Support Person/Attorney

- Throughout investigation and adjudication, each party can have (at own expense):
  - One support person
  - Additional support person who can be attorney or non-attorney advocate
    - ✓ Attorney or non-attorney advocate can "fully participate" in process to same extent as parties
- During hearing an attorney or non-attorney advocate can:
  - Provide legal advice to the student during the hearing
  - Make opening and closing statements
  - Direct questions to the other party
  - Question the University Investigator and
  - Question witnesses (Hearing Chair determines relevance)



# Impartiality: Avoiding Conflict of Interest, Bias, and Stereotyping

- **Conflict of Interest:** actual or perceived prior or existing relationship with anyone involved in matter or resolution of matter, personal stake in outcome; or any other conflict that would prevent you from fairly reviewing
  - Should be disclosed immediately upon recognition

#### • Bias:

- Can be specific to particular party/witness
- Can be more general
- Gender, research interests, work history, or advocacy background not per se bias/conflict
- Can appear as one-sided investigations/decisions statements showing presumption of responsibility based on sex stereotypes
- Stereotyping: assumptions about responsibility or behavior based on identity
  - Cannot be basis for decision need to point to evidence

#### **Effects of Trauma**

- Neurobiological effects well-known in scientific communities
- Affects behavior and memory. Situation and person specific. May affect:
  - How one responds during the event
  - Whether someone discloses (how, to whom, what the narrative sounds like)
  - Whether someone reports/takes action
  - How one behaves in the aftermath, with friends/family, medical personnel, investigators/law enforcement, in a hearing.
  - How one remembers or recounts an event survival reflexes take over, which affects how we store and process memory -- focus on things that are necessary for survival (e.g., sounds, smells, feelings) rather than facts (e.g., time of day, sequence of events)

## Thank you! Questions?