



Wesleyan University

Training for Title IX Process Advisors

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Agenda

1. Review of How We Got Here, What Comes Next, and the Tools to Consider

2. Overview of Wesleyan's Updated Policy

- A. Phase One: Initial Steps
- B. Phase Two: The Investigation Phase
- C. Phase Three: Adjudication and, if Necessary, Sanction
- D. Phase Four: Appeals

3. Questions & Answers

None of the Policy changes dilute Wesleyan's historic commitment to equality, and its intolerance of harassment and discrimination

How Did We Get Here?

- **New Title IX regulations effective August 14, 2020**
- **Prescriptive, legalistic process: over 2000 pages; only 26 pages of actual regulations. Highlights:**
 - ✓ **Definitional changes with regard to forms of misconduct and geography of coverage**
 - ✓ **Formal written complaint required in most cases**
 - ✓ **Supportive measures available regardless of complaint; cannot substitute supportive measures for discipline and must not unreasonably burden non-moving party**
 - ✓ **Hearings with examinations by advisors for formal processes; cannot consider evidence if not subject to examination**
- **Still allows institutions to prohibit and investigate cases that fall outside the new, narrower scope of Title IX**

The Most Important Tool for You

Office for Equity & Inclusion

Discrimination, Harassment and Sexual Misconduct

Discrimination, Harassment
and Sexual Misconduct

Share a Concern

Policies & Procedures

[Affirmative Action Statement &
Equal Opportunity Statement](#)

[Non-Discriminatory Harassment](#)

[Policy Prohibiting Discriminatory
Harassment & Sexual Misconduct](#)

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Policy Prohibiting Discriminatory Harassment & Sexual Misconduct

Wesleyan is an institution devoted to learning, openness, and the life of the mind. It follows that its character can be measured in part by the kind of human relationships built and sustained within this small but complex environment. Wesleyan strives to be a community built upon mutual trust and respect for its constituent members: students, faculty, staff and those visiting or under temporary contract. A community will flourish only to the degree that the virtues of mutual respect, generosity, and concern for others are maintained. Therefore, it is vitally important that harassment and discrimination in all their forms not be tolerated. As noted in University Policy, members of the University community have the right to a safe and welcoming campus environment.

These policies and procedures apply to all College community members, and all members of the College community are responsible for being familiar with and abiding by them at all times.

Wesleyan University will not tolerate discriminatory harassment and/or [sexual misconduct](#) against students, faculty, staff, trustees, volunteers, and employees of any university contractors/agents:

Process for Addressing Student Sexual Misconduct



Process for Addressing Faculty/Staff Sexual Misconduct



Wesleyan University

Phase One: Initial Steps

1. Initial Steps Phase is not an investigation

2. Initial Contact with the Reporting Party

- A. Consideration of supportive measures and/or interim restrictions
- B. Discussion of the process
- C. Common questions could include:
 - What does the hearing process entail?
 - What does cross-examination mean?
 - Will the Responding Party be posing the questions?
 - Do I need to have an advisor? Does my advisor need to be an attorney?

Phase One: Initial Steps, cont.

3. Early Decision Points

- A. Is dismissal appropriate, *e.g.*, not alleging sexual misconduct?
- B. Does the Reporting Party wish to file a Formal Complaint?
- C. Does the Reporting Party desire some other informal resolution process other than the formal complaint process?
 - Formal Complaint still required, but process is different and the Title IX Coordinator will discuss potential informal resolution processes that would still be fair to both parties.
- D. When does the Responding Party get brought in to the process?

Many of these decisions are evolving; appropriate supportive measures may need updates. For example, a Party may not need any academic accommodations in the fall semester, but they may need them if the investigation carries into the spring and courses change

Jurisdictional Issues

1. Who is a Reporting Party

- A. At the time of complaint must be currently participating in or attempting to participate in Wesleyan's educational programs or activities
 - Educational programs or activities are locations, events, or circumstances over which Wesleyan exercises substantial control
- B. Wesleyan may exercise discretion in signing complaints for others, *e.g.*, Reporting Party's from other schools that report allegations against Wesleyan students/employees
- C. No extraterritoriality requirement, *i.e.*, no international reach

2. Conduct at Issue

- A. Sexual harassment, sexual assault, intimate partner violence, stalking, retaliation
- B. What about sexual exploitation and/or complicated forms of retaliation?
- C. Sexual harassment is used in regulations as a catch-all, but it is also a separate claim, *i.e.*, hostile environment or quid pro quo theories.

Supportive Measures

1. Available to both parties, regardless of whether a formal complaint is filed
2. Must be non-disciplinary and non-punitive
3. No fee or charge may be applied to reasonable supportive measures
4. Goal is to restore/preserve equal access without unreasonably burdening the other Party:
 - Focus is on the reasonableness of the burden.
 - Discussed as an interactive process in the Preamble.
 - If a supportive measure is not provided because of an unreasonable burden, the decision must be documented. (Should document the decision either way.)
5. Consider: needs of parties; severity of the allegations; practical concerns like shared spaces, etc.
6. Parties may be removed from campus on an emergency basis, but appeal process must be provided for emergency removals

Issues that May Arise

1. Timing and scope of notice to parties
 - Title IX Coordinator works with Reporting Party to determine interests moving forward – not a mini-investigation
2. Parties have a right to advisors even in initial phase; this becomes a requirement at hearing process
3. Title IX Coordinator has the right to consolidate cases that include Title IX and non-Title IX behavior.
 - Must be significant factual overlap
 - More extensive process will be typically be applied, unless Title IX claim is dismissed.

Phase Two: The Investigation Phase

1. Notice to Both Parties

- A. Sufficient details that are known
- B. Sufficient time to prepare a response before any interview

2. Designation of Investigator(s)

- A. At least one investigator, internal and/or external
- B. Qualified, trained on Wesleyan's process, and without conflicts (parties may raise)
- C. Must conduct a prompt, fair, and impartial investigation
- D. Interview parties/witnesses, review evidence, draft an Investigative Report

3. Right to Advisors

- A. Both parties are entitled to a single advisor of choice, and may be an attorney
- B. Advisors may be present “during any formal disciplinary proceeding, including any related meeting, interview, or hearing”
- C. Advisor role is largely consistent with prior process, but they have added importance (and are necessary) during the live hearing process in the next phase

Advisors

“A person chosen by a party, who may but need not be an attorney, who provides support and advice to the party during any stage of the process set forth in the Policy.”

- Extends only to Wesleyan’s process
- Must keep information learned confidential/private
- Should understand the process and the various steps
- Common roles: discuss the process, serve as a facilitator to ask questions about the process, assist in connecting party with related support services, *e.g.*, accommodations, etc.
- Can assist advisee in thinking about written responses and provide light editing, but not expected to write responses for advisee

Phase Two: The Investigation Phase, cont.

4. Investigation Begins

- A. Investigators interview the Reporting Party and Responding Party
- B. Investigators interview additional relevant witnesses; collect relevant information
- C. Parties “have the opportunity (and are expected) to provide” potential witnesses/documents
 - i. Note also the Duty of Honesty and the Duty of Cooperation in the Policy
- D. Culminates with Investigative Report: summary of the facts, inconsistencies, an optional section for credibility concerns, and all relevant evidence (inculpatory and exculpatory)

5. Investigative Report Review by the Parties

- A. Both Parties have the opportunity to review the Investigative Report (10 calendar days)
- B. Review strives to be highly secure: no copies, no photographs, if electronic or remote then appropriate protections put in place
- C. Advisors allowed to accompany Parties for review
- D. Both parties allowed to submit a response to correct errors, clarify statements, suggest additional information sources
- E. Investigator may investigate further, revise report, or decide neither step is necessary



Phase Two: The Investigation Phase, cont.

6. Additional Considerations

- A. Hearing process (Phase Three) is really important in the new Title IX regulations. If a Party or a witness refuses to sit for cross-examination, their evidence cannot be considered at hearing.
- B. Responding Party can voluntarily agree to Policy violation prior to hearing
- C. Informal processes can be sought any time prior to convening a Determination Hearing
 - Flexibility in options, but both parties must agree to informal process
 - Title IX Coordinator must agree to informal process. Considerations: severity of the behavior, patterns of behavior and risk to the community
 - An additional person will be asked to facilitate any informal process
 - Either party can leave informal process and go back to formal process
 - Informal processes will be discussed with the parties and process will be tailored to individual needs and specific facts

Phase Three: The Adjudication and, if Necessary, Sanctioning Phase

1. Determination Officer

- A. Qualified, trained on Wesleyan's process, and without conflicts of interest (parties can raise – University determines appropriateness)
- B. All parties and witnesses are expected to sit for examination
- C. Presides over the live hearing: controls process, controls timing, makes decisions about evidence relevance (or whether certain evidence is prohibited). Types of issues?
 - Sexual predisposition
 - Prior sexual behavior (unless offered to prove someone else at fault or to prove consent)
 - Otherwise privileged information, e.g., medical records for which there is no waiver
- D. Wesleyan has the burden of proof
- E. All decisions made using the preponderance of the evidence standard

Phase Three: The Adjudication and, if Necessary, Sanctioning Phase, cont.

2. Parties Must Have Advisors at the Live Hearing

- A. Advisors required at the live hearing to conduct witness examinations
 - May question all witnesses
 - Where you may hear the term “cross-examination.
 - If a Party does not have an advisor, Wesleyan will provide an advisor (not the Party’s choice)
- B. Advisors not otherwise allowed to participate actively
- C. Parties may consult with their advisee in a non-disruptive manner, but advisors should not be answering for their advisee

Phase Three: The Adjudication and, if Necessary, Sanctioning Phase, cont.

3. Sanctions, if Necessary

- A. Only focused upon after a Party is found responsible
- B. Determination Officer assigns sanctions
- C. Determination Officer may request information from University on prior sanctions in similar matters
- D. Purpose of requesting information is to understand sanctioning history in similar cases; may be unnecessary in cases without prior precedent

4. Notice of Outcome

- A. Notice provided after decision made on responsibility and, if necessary, sanctioning
- B. Consists of a summary of the allegations and the determinations made by Determination Officer
- C. Must include process for appeal
- D. Notice of outcome may also be shared within Wesleyan for people with legitimate education interest, e.g., administrators executing sanctions, athletic coaches, etc.

Phase Three: The Adjudication and, if Necessary, Sanctioning Phase, cont.

5. Additional Considerations

- A. Hearings will be recorded
- B. Hearings may be virtual at request of parties (or a hybrid option), in which case technology will be described prior; in person hearings may include parties physically present or separate but able to observe via technology in real time
- C. University retains discretion about Parties being in same physical space
- D. Disability-related accommodations should be considered for Parties and witnesses throughout process, as necessary

Phase Four: Appeals

1. Appellate Officer

- A. Qualified, trained on Wesleyan's process, and without conflicts (parties may raise)

2. Timing and Format

- A. Must be submitted in writing within five business days of final outcome letter
- B. Following submission of an appeal, the non-appealing party may give a limited response within three business days
- C. Extensions may be granted; if granted to one party, automatically afforded to the other Party

3. Grounds for Appeal

- A. Procedural error that materially prejudiced the outcome; and/or
- B. Newly discovered material information that was not known/available to the Investigator or the Determination Officer and which likely could have changed the finding of responsibility or sanction had it been available
- C. Bias or a conflict of interest regarding the Title IX Coordinator, the Investigator, or the Determination Officer

Relevance

1. Refers to a fact, witness, or other piece of information that a reasonable person could conclude makes a material disputed fact or event more or less likely to be true.
2. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are generally not relevant, unless such questions and evidence concern specific incidents of the complainant's prior sexual behavior *with respect to the respondent and are offered to prove consent*.
3. Relevance is broadly defined, but the decisionmaker is charged with assigning high or low level of weight or credibility, so long as the evaluation treats both parties equally, i.e., do not assume facts against either party or start from a place of believing one party over another. Assess each piece of evidence on its merits.

Preponderance of the Evidence

1. “All findings and determinations of responsibility under this Policy will be made using this preponderance of the evidence standard.”
2. Not the same as criminal culpability (beyond a reasonable doubt) or a “clear and convincing standard.” Rather, commonly referred to as “50% and a feather.”
3. Materials decision-makers are provided will include all inculpatory and exculpatory evidence found during the investigation or offered by the parties to assist the decision-makers in determining if allegations satisfy the preponderance standard.
4. Outside processes, *e.g.*, a dismissal of a criminal complaint, typically should not impact a decision unless they contain relevant information about the allegations.

The Government's Definition of Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1)** An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient 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 the recipient's education program or activity; or
- (3)** “Sexual assault,” “dating violence,” “domestic violence,” or “stalking”

University Definitions: Sexual Harassment

1. Unwelcome sexual advances, requests of sexual favors, and/or other verbal or physical contact of a sexual nature constitute sexual harassment when:
 - A. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's academic or employment success (also known as quid pro quo harassment), or
 - B. Such conduct has the purpose or effect of substantially interfering with an individual's work performance, or creating an intimidating, hostile, or offensive living, learning, or work environment (also known as the creation of a hostile environment)
2. Must be severe and pervasive
3. Must be subjectively and objectively offensive

***Note that all of these definitions are described more completely in the University's Definitions resource in Policy**

Sexual Assault

1. “Having or attempting to have sexual intercourse or sexual contact with another individual without consent.”
2. Includes “sexual intercourse or sexual contact achieved by the use or threat of force or coercion, where an individual does not consent to the sexual act, or where an individual is incapacitated.”
3. Consent and incapacitation are important concepts.
4. Nonconsensual touching is broadly defined, *e.g.*, kissing, touching, penetration, etc., in a sexual manner.

***Note that all of these definitions are described more completely in the University’s Definitions resource in Policy**

Consent

1. Must be mutual, voluntary and given without pressure, intimidation, or fear.
2. Must be freely and affirmatively communicated in order to participate in sexual activity or behavior.
3. May be expressed either by words or clear, unambiguous actions.
4. It is the responsibility of the person who wants to engage in sexual activity to ensure consent of their partner(s).
5. Consent must be obtained at each step and be present throughout the sexual activity. Can be withdrawn at any time.
6. Silence, lack of protest, or lack of resistance does not indicate consent.
7. Cannot consent if a result of physical force, threat of physical force, intimidation, coercion, or incapacitation.

***Note that all of these definitions are described more completely in the University's Definitions resource in Policy**

Incapacitation

1. Defined as the “inability, temporarily or permanently, to give consent, because an individual is mentally and/or physically helpless, unconscious, or unaware that the sexual activity is occurring. This may or may not be due to alcohol or other drugs”
2. Policy provides more detailed definitions that should be consulted if incapacitation is an issue.
3. Common issue that arises frequently in Title IX matters.

***Note that all of these definitions are described more completely in the University’s Definitions resource in Policy**

Intimate Partner Violence

1. Incorporates “dating violence, domestic violence, or relationship violence, and includes any act of violence or threatened act of violence against a person who is or has been involved in a sexual or dating relationship with that person.”
2. May involve isolated acts or a pattern of behavior
3. A broad range of behavior, including, but not limited to threats, assault, property damage, violence or threat of violence to one’s self, one’s sexual or romantic partner, or to the family members or friends of the sexual or romantic partner.
4. May impact all genders, gender identities, gender expressions, and sexual orientation.

***Note that all of these definitions are described more completely in the**

University’s Definitions resource in Policy



Stalking

1. “A course of conduct directed at a specific person that would cause a reasonable person to: fear for their safety or the safety of others; or suffer substantial emotional distress.”
2. Includes physical stalking and cyber-stalking through online mediums.
3. Stalking may involve individuals who are known to one another or have an intimate or sexual relationship, or may involve individuals not known to one another.

***Note that all of these definitions are described more completely in the University’s Definitions resource in Policy**

Retaliation

1. “Acts or attempts to retaliate or seek retribution against the reporting party, responding party, or any individual or group of individuals involved in the investigation and/or resolution of an allegation.”
2. Examples could include making an adverse employment decision, inappropriately penalizing an individual, or making an adverse educational decision.
3. Allegations may be consolidated or brought separately, depending on the facts at issue.

***Note that all of these definitions are described more completely in the University’s Definitions resource in Policy**

Putting It Into Practice

You are asked to get involved in a case (as an advisor or an investigator) involving an allegation of relationship violence. Responding Party is alleged to have “lost it” and threw Reporting Party’s phone when they rejected sexual advances after a party.

1. First of all, how does the University define “relationship violence”?
2. Where should you look for this definition?
3. What are the elements?
 - any act of violence or threatened act of violence against a person who is or has been involved in a sexual or dating relationship with that person
 - may involve one act or an ongoing pattern of behavior
 - can encompass a broad range of behavior, including, but not limited to threats, assault, property damage, violence or threat of violence to one’s self, one’s sexual or romantic partner, or to the family members or friends of the sexual or romantic partner
 - affects individuals of all genders, gender identities, gender expressions, and sexual orientation and does not discriminate by racial, social, or economic background.

Questions & Resources

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