

SEXUAL MISCONDUCT ADJUDICATOR TRAINING

Summer 2021

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Executive Director of the Office of Equal Opportunity
and Title IX Coordinator**



Agenda

- Getting to Know Each Other and the OEO Team (9:00-9:20)
- SMAP and SMAP-X Overview, Relevance, and the Standard of Review (approx. 9:20-10:20)
- Break (10:20-10:30)
- Hypothetical Exercise, Investigation and Hearing Issues, Related Discussion (10:30-11:50)
- Break (11:50-12:00)
- Outcome Drafting Considerations and General Debrief Discussion (12:00-12:55)
- Closing Comments and Thank You for Participating!

Questions Welcomed!

Some participants will have extensive experience; others will be newer to the Tufts process. Many participants are part of the Tufts community; others are external professionals retained to play a role in the process.

All of it is ok!

The training is designed to convey the key points of Tufts' Title IX process but, just as importantly, to encourage discussion and reflection.

If you leave with questions, Tufts' OEO Team can answer any questions that arise moving forward.

Ground Rules

- The training will seek to avoid graphic descriptions of sexual misconduct, but the topic is still difficult and can be emotionally charged. If you need to step out for a minute to collect yourself please feel free to do so at any time.
- The speakers will avoid using gendered pronouns. In any aspect of conversation where gender, gender identity, or sexual orientation may slip in, please understand that anyone can be in any of the positions identified in the process.
- Please be respectful of all. While there is much to discuss on the topic of sexual misconduct, the common thread is to conduct a fair, impartial process.
- Engage – based on prior feedback, we built in time for people to discuss the issues. We hope you will feel comfortable engaging.

Introductions

- Please share your preferred name (what you'd like to be called today);
- Which of Tufts' four campuses you work at (or where you work, if external), and
- A favorite book, movie, podcast, or activity you are into this summer.

We have some new faces and we may not all know each other.

Office of Equal Opportunity (OEO)

- Required compliance position.
- Respond to all reports and complaints of discrimination and harassment
- Promote safety and equity through fair and thorough investigations into allegations of discrimination and harassment
- Facilitate prevention efforts through proactive trainings for all first year students and by thoughtful, targeted in-person trainings for faculty and staff

OEO's Legal Responsibilities and Mission

- Title VI** Allegations of race, color, national origin, religion, ethnicity and language is involved (student to student)
- Title VII** Allegations of all various forms of discrimination involving employees
- Title IX** Allegations of sex/gender, identity, expression and sexual orientation involving students, employees, third parties and community members if students or their spaces are impacted)
- Other** Requests for disability and/or religious based-accommodations for students, employees and visitors

OEO Staff and Resources

Jill Zellmer, Executive Director, Title IX Coordinator

Alida Bográn-Acosta, Title IX/Title VII Investigator

Christine Colacino, OEO Coordinator

Johny Lainé, Accommodations Manager/504 Officer

Jennifer Magrone, Deputy Director/Title VII Investigator

Amin Fahimi Moghadam, Special Projects, Interim

Pamela Ring, Deputy Title IX Coordinator/Title IX Investigator

April Robbins, Resource and Support Specialist

Nadra Sultan, Compliance Specialist

+ two graduate student work study employees

+2 new positions (one each to support Accommodations and Investigations)

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THE SEXUAL MISCONDUCT ADJUDICATION PROCESS



What Happens Next with Title IX?

- Biden Administration established “comprehensive review” of Title IX regulations
 - Incorporation of Bostock
 - Listening sessions hosted by OCR
 - ED will “determine ... additional changes to the Title IX regulations and any related agency actions”
- Challenges of the regulatory process?
 - Time consuming
 - Process laden
- Challenges created by developing federal case law.
- Likelihood of injunctive relief is low/non-existent.

Title IX Prohibited Conduct

1. Sexual Harassment (umbrella term and a form of prohibited conduct)
2. Sexual Assault
3. Relationship/Dating/Domestic Violence
4. Stalking
5. Retaliation

NOTE: These forms of conduct are defined in the [Title IX Policy](#). Other forms of inappropriate behavior, *e.g.*, sexual exploitation, fall under other policies.

Sexual Harassment

1. Quid Pro Quo: “an employee of the University conditioning the provision of an aid, benefit, or service of the recipient on the individual’s participation in unwelcome sexual conduct;” OR
2. Hostile Environment: “Unwelcome (or non-consensual) conduct 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;” OR
3. A form of Prohibited Conduct discussed above

Additional Terms: Consent

“To be effective, consent must be an informed, deliberate and voluntary decision to engage in mutually acceptable sexual activity. Consent is an affirmative process. It is the responsibility of the person who wants to engage in sexual activity to make sure that they have received consent from any other person(s) involved. If an individual initiating sexual activity is not sure if they have received consent, they have an obligation to seek additional clarification. Failure to do so could violate this policy and lead to disciplinary action. Consent cannot be based on assumptions. Tufts policy always requires that individuals obtain consent before engaging in sexual activity.”

Additional Terms: Incapacity

“...a state in which someone cannot make a decision because they lack the ability to fully understand what is happening and therefore cannot consent even if they appear to be a willing participant. An individual who is intoxicated may be able to consent to sexual activity. “[W]hen an individual passes from intoxication to a state of incapacitation, they no longer have the ability to give consent under this policy. When incapacitated, an individual moves from being simply drunk and/or under the influence of drugs and/or alcohol and becomes physically and/or mentally debilitated due to their drug or alcohol consumption. Individuals can also be incapacitated because they are unconscious or asleep.”

High Level SMAP & SMA⁻ X Overview

1. Initial Assessment and Notice (including decision for formal vs. informal routes)
 - A. Supportive measures assessed here and throughout
2. Investigation and Related Review Processes
3. Adjudication: the Key Difference Point
 - A. SMAP = Decision Making Panel
 - B. SMAP-X = Title IX Adjudication Process with hearing and cross-examination
4. Sanction
5. Appeal

SMAP v SMA⁻ X

1. Parties allowed to review investigative report and provide feedback under both processes
2. Parties allowed to have advisors of choice under both processes; advisors required at SMAP-X hearing
3. Parties can suggest witnesses in both processes; in SMAP-X parties, through their advisors, can directly question witnesses
4. SMAP-X requires parties and witnesses to sit for examination; if they will not, their evidence cannot be considered

Relevance

1. Refers to a fact, witness, or other piece of information that a reasonable person could conclude makes a material fact 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 decision-maker 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.

Quick Questions

Are the following relevant facts or not? If not, what could make it relevant in a specific scenario?

1. Complainant was wearing a green shirt when they met Respondent
2. Respondent is a member of Greek life
3. Respondent admits during questioning that they were charged with sexual misconduct at a prior institution
4. Complainant and Respondent had a prior, consensual sexual relationship before the behavior in question
5. Respondent stated that Complainant enjoys and consented to “rough sex” with them
6. One of the parties comments that a key witness for the other party refused to take part in the hearing

Preponderance of the Evidence

SMAP: “Violations of the policy brought under the SMAP will be investigated and decided by the preponderance of the evidence standard (that is whether it is more likely than not that University policy has been violated by the conduct alleged).”

SMAP-X: “The Preponderance of the Evidence Standard applies to any factual issue that will need to be decided and panels will also use this standard of proof to determine a policy violation. In short, the decision of the SMAP-X Panel will be made based on whether the facts presented in the investigation report support a finding that is “more likely than not” that University Policy was violated. The SMAP-X Panel will be reached by a majority. If a majority of the SMAP-X Panel agrees that it is more likely than not, based on the facts of the case, that there was a policy violation, the SMAP-X Panel will issue a finding of responsibility with corresponding sanction/discipline.”

Unpacking the Preponderance Standard

What the “preponderance” standard is and what it is not:

1. Not the same as criminal culpability (beyond a reasonable doubt) or a “clear and convincing standard.” Commonly described as “50% and a feather.”
2. Materials decision-makers are provided with 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
3. Outside processes, *e.g.*, a dismissal of a criminal complaint or allegations at a prior school, typically should not impact a decision unless containing relevant information about the allegations at issue.

Quick Questions

Imagine you are in an adjudication role under a SMAP or SMAP-X process and a fellow adjudicator makes the following statements. How do you correct them?

1. “I watch a lot of true crime documentaries, and if one member of the Panel disagrees, it is a ‘hung panel’ and the Respondent is not responsible.”
2. “I did not see a toxicology report in the Investigative Report, so there is no way to know how intoxicated the Respondent/Complainant was...”
3. “I could totally see the Complainant’s allegations happening just as they described. I was Tufts class of 1994, so I know this place...”
4. “There are only two witnesses, Complainant and Respondent. Both are credible and I’m at 50/50 on who I believe. But sexual misconduct is a blight and must be remedied, so I’m going to vote responsible.”

SMAP: Pre-Decision Conference

- “Upon receipt of the final investigation report, the Decision-Making Panel will meet and review the report.”
- Panel determines if additional inquiry is necessary. If so, Panel Chair will ask investigator to conduct a supplemental fact-finding investigation focused on the specific inquiries posed by the Decision-Making Panel
- After reviewing the final investigation report but prior to issuing its decision, the Decision-Making Panel Chair and Title IX Coordinator will schedule separate Pre-Decision Conferences with the complainant and respondent to “share the Panel’s preliminary findings with respect to the sexual misconduct alleged in the complaint, as well as any preliminary investigative findings related to policy or code violations found beyond those noted in the original complaint.”
- The preliminary decision of the Decision-Making Panel will be reached by a majority.

SMAP: Pre-Decision Conf. Tips

- Have a script to eliminate or limit inaccurate information being shared. The Pre-Decision Conference script can be a joint endeavor of the panel.
- Make sure that outcome is tied to notice letter and investigation report, the latter of which both parties will have reviewed and commented upon. Does it:
 - Include the same charges (no more, no less) than notice letter?
 - Include the definition from the Policy?
 - Address each element of the offense in question? (Note, this is where those “and” and “or” modifiers become important.)
 - Avoid reciting inflammatory or sensitive information unless necessary/critical?

SMAP-X: Pre-Hearing Conference

- Prior to the hearing, the Panel Chair will meet with the parties and their advisors to provide an overview of the hearing and discuss at least the following topics associated with the hearing:
 - Schedule of witnesses;
 - Identification of any agreed upon facts or evidence;
 - Discussion of the handling of any prior sexual history issues;
 - Technology used in the hearing.
- Do not make decisions prior to the hearing! Why not?
 - Under updated Title IX regulations, evidence may not be considered if the witness does not sit for examination. Thus, information in the investigative report may look different if a witness won't sit for examination.
 - Decision-makers should observe and weigh credibility of the parties.
 - Advisors (or co-panelists) might ask questions that changes your opinion.

SMAP-X: Pre-Hearing Conf. Tips

- Again, a script can be helpful to ensure consistency of statements to both parties.
- Prepare for Pre-Hearing Conference Make sure you know:
 - All charges from the notice letter. If any have been resolved, understand why/how, if possible, i.e., any charges resolved through other means?
 - Make sure to know and understand the policy definitions.
 - Don't be afraid to ask questions about shared understandings, *e.g.*, how will either party use prior sexual history, if at all; what will happen if an advisor is badgering a witness, etc.
- Better to discuss these issues in advance and with collected wisdom of the community prior to the hearing date.

Hypothetical Problem

- Break up into panels of three and you will be placed in a separate Zoom room upon your return from break.
- Discuss the fact patterns you received prior to training and discuss the questions at the bottom of each section. Note that the first part is more about relevance, and the second part is more about your expectations as an adjudicator.
- You do not need to reach a result, but please select a spokesperson to discuss the prompts and what factors your group considered in applying the preponderance standard. (*Note: anyone can speak during feedback, not just appointed spokesperson.)

Outcome Drafting (for Script or Notice)

Describe allegations in clear and plain terms.

- Sample:
 - “Complainant alleged that Respondent forced them to perform non-consensual oral sex on DATE and in LOCATION. If true, this behavior could violate Tufts’ policy prohibiting sexual assault.”
- What’s wrong with these samples?
 - “Complainant accused Respondent of sexual misconduct as prohibited by Tufts policy.”
 - “Complainant, a sophomore from New Jersey, accused Respondent, a junior from California of forcing them to perform oral sex. Complainant and Respondent had a prior sexual history. Respondent claimed they were intoxicated and, alternatively, that Complainant non-verbally consented.”
 - Does this mean defenses should never be included?

Outcome Drafting

Describe Tufts' definition of prohibited conduct as it is described in the Policy and provide a page reference.

- Sample:
 - “Tufts’ August 2020 Title IX Policy (pp. 4-5, n. 1) defines sexual assault as a form of sexual harassment that includes ‘any sexual act directed against another person,’ that is ‘against that person’s will,’ or in a situation in which the person is unable to provide consent.’ Issues of consent and incapacity were both raised in this case and are defined as follows
- Why stick so closely to the Policy definitions?
- What should I do if the investigative report does not address an element of the alleged offense or a claim in its entirety?
- Respond to this statement: “Title IX requires that I be fair and impartial to both parties, thus the outcome letter should address every point made by either party in the hearing or otherwise?”

Outcome Drafting

Show your work but be judicious.

- Sample:
 - “Both parties appeared at the hearing with their advisors. Witness A and Witness B also provided statements at the hearing. Witness Z spoke with the investigator during her investigation, but refused to take part in the hearing in person or remotely. Accordingly, the Panel did not consider Witness Z’s statements, and did not otherwise draw an adverse inference on account of Witness Z’s decision not to testify.”

Outcome Drafting

Show your work but be judicious.

- Sample:
 - “The Panel credited Complainant’s statement that they had four drinks. The Panel also credited Witness A, who observed Complainant have ‘approximately 3-5 drinks.’ Witness B stated that he saw Complainant drinking a brown liquor that was refilled once, and observed Complainant leaning against Respondent by 11 pm. Given these statements from the hearing, the Panel did not credit Respondent’s statement that Complainant was not drinking at all.”

Outcome Drafting

- What's wrong with the following:
 - “Both parties appeared at the hearing with their advisors. Witness C and D provided statements at the hearing. Witness M spoke with the investigator during her investigation, but refused to take part in the hearing in person or remotely. Respondent stated that was ‘evidence’ that Witness M would ‘not take part in this charade.’ Complainant stated that Witness M was ‘just flaky’ and ‘scared.’ The Panel does not know what to do with this.”
 - “Respondent stated the following during the hearing: ‘I don’t even know what I’m doing here. This is just another example of people being canceled because of an allegation. I could give you 25 similar examples, but it wouldn’t matter, would it? I don’t know. Do whatever you want to do. I didn’t do this, but what do you care? Complainant was a willing participant, just like they probably were with every other sexual partner they have had here at Tufts.’”

Outcome Drafting

- Compare and contrast the following:
 - “The Panel determined every element of Tufts’ Policy was established with regard to whether a sexual assault occurred: (1) both parties agreed the oral sex occurred. (2) Both parties agreed that Complainant did not provide affirmative, verbal consent, but the Respondent claimed that Complainant provided non-verbal consent by moaning and placing their hands in such a location... (3) Under Tufts Policy, Respondent was initiating sexual activity, so they were required to seek ‘additional clarification’ if they were unclear. (4) Here, Respondent agreed they were unclear but they “assumed” consent was provided based, in part, on the text messages exchanged ...but under Tufts policy consent cannot be based on assumptions.”
 - “Respondent is responsible for sexually assaulting Complainant because Complainant said that they did not provide consent. Respondent did not provide any credible alternative theories. All of Respondent’s witnesses sought to provide character evidence in support of Respondent, but agreed they were not on campus during the time period in question.”

Outcome Drafting

- Additional points:
 - Cite to the record and be specific about what was said if it is critical and appropriate.
 - Use quotes judiciously, unless quoting Policy, in which case block quotes are fine.
 - Avoid compound statements.
 - Avoid general or specific statements attributed to several individuals, particularly if it is unclear of who said what.
 - Avoid overly personal or inflammatory discussions unless necessary. “Necessary” information can often be measured based on whether the information is a critical element of a claim or a defense.
 - When in doubt, ask other panelists or the Title IX Coordinator.
 - This need not be a complicated, quasi-academic discussion; sometimes it is better to use clear, direct statements.

Your Last Words...

Adjudicator's Experiences, Questions,
Comments and Discussions

What have you noticed?

What have you seen?

What do you want to know more
about or discuss in more detail?

THANK YOU!

