

Title IX – Designated Arbiter Training

May 25, 2023



**Mount
Sinai**

Scope

Training for those who may serve as Title IX Designated Arbiters (Hearing Officers) in matters involving allegations of Sexual Misconduct, as defined by the ISMMS policy in effect in June 2023 (last revised October 11, 2021)

ISMMS Policy

Icahn School of Medicine at Mount Sinai – Sexual Misconduct Policy

- Effective October 1, 2015;
- Revised October 11, 2021

Definitions: Affirmative Consent

“Affirmative Consent” is a knowing, voluntary and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant’s sex, sexual orientation, gender identity, or gender expression. The following principles are provided as guidance for the School Community regarding the concept of Affirmative Consent:

- i. Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act.
- ii. Consent is required regardless of whether the person initiating the act is under the influence of drugs or alcohol.
- iii. Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by lack of consciousness or being asleep, inebriation due to drugs or alcohol, an intellectual or other disability that prevents the person from having the capacity to give consent, involuntary restraint, or if an individual otherwise cannot consent.
- iv. Consent to engage in activity with one person does not imply consent to engage in sexual activity with another;
- v. Consent may be initially given but can be withdrawn at any time;
- vi. When consent is withdrawn or can no longer be given, sexual activity must stop.
- vii. Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.

Definitions: Sexual Assault

“Sexual Assault” means non-consensual sexual intercourse or non-consensual sexual contact as defined below:

- Non-Consensual Sexual Intercourse is having or attempting to have sexual intercourse with another individual (i) by force, threat of force, or coercive conduct; (ii) without affirmative consent; or (iii) where that individual is incapacitated. Sexual intercourse includes anal, oral or vaginal penetration, however slight, with a body part or an object.
- Non-Consensual Sexual Contact is having or attempting to have sexual contact with another individual (i) by force, threat of force, or coercive conduct; (ii) without affirmative consent; or (iii) where that individual is incapacitated. Sexual contact includes touching, fondling or other intentional contact with the breasts, buttocks, groin, or genitals (over or under an individual’s clothing) for purposes of sexual gratification or when such private body parts are otherwise touched in a sexual manner.

Definitions: Sexual Harassment

“Sexual Harassment as defined under Title IX” includes (1) an employee of the School conditioning the provision of an aid, benefit, or service of the School 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; and (3) sexual assault, domestic violence, dating violence and stalking. (Sexual harassment is defined more broadly under other laws and under other School policies, including the The Mount Sinai Health System Human Resources Policy 13.04 regarding Harassment and Sexual Harassment, Student, Faculty and House Staff Handbooks.)

Definitions: Sexual Misconduct

“Sexual Misconduct” includes sexual assault, stalking, domestic violence, dating violence, and sexual harassment. For Sexual Misconduct to fall under Title IX, it must occur in the School’s education program or activity within the United States. . . . Sexual harassment that occurs outside of the School’s education program or activities, or incidents that do not meet the definition of sexual harassment in this Policy, may fall under other School policies and will be addressed consistent with those policies.

Overview of Title IX Process:

1. Title IX Coordinator – Initial Assessment, Provides Resources
2. Investigation: Interviews, Review of Relevant Text Messages/Documents, Video
 - Report of Investigation (ROI)
 - Draft reviewed by parties (and witnesses reviewed their summaries)
 - ROI makes a finding of fact as to whether it is more likely than not that prohibited conduct occurred and a recommendation as to whether the conduct violates institutional policy
 - ROI goes to Designated Arbiters
3. Live Hearing before Designated Arbiters
4. Appeal – based on:
 - a. Procedural irregularity that affected the outcome of the matter
 - b. New evidence discovered that was not reasonably available at the time the Designated Arbiter made the determination
 - c. Conflict of interest on the part of the Title IX Coordinator, investigator(s) or Designated Arbiter(s) that affected the outcome of the matter

Policy: Live Hearing

- Complainant and Respondent will both have an advisor present. If Complainant or Respondent does not have an advisor, the School will appoint an advisor.

Policy: Live Hearing

- The Designated Arbiter will determine the order of witnesses and has the discretion to ask the witnesses questions or give the witness an opportunity to make a statement.

(Once the Report of Investigation is finalized, this group will convene to determine the order of witnesses and questions the group has for witnesses, which can be supplemented during the Hearing.)

Policy: Live Hearing

- The Complainant's and Respondent's advisors may ask questions of all witnesses at the hearing, including questions that challenge the witness's credibility.

Policy: Live Hearing

- Under no circumstances will the parties be permitted to question witnesses directly. Questions must be asked in a neutral tone.

Policy: Live Hearing

- Advisors will not be permitted to be disruptive or harassing during their questioning.

(Hold pre-hearing conference with advisors to review rules of decorum and expectations for the hearing. Punishment of last resort at a hearing would be to remove an advisor from the hearing, after expectations were made clear and warnings given.)

Policy: Live Hearing

- Questions must be relevant and must not pertain to Complainant's past sexual behavior or sexual predisposition – with two exceptions
 1. where evidence of prior sexual behavior is offered to prove someone other than the Respondent committed the alleged offense, or
 2. where prior sexual behavior evidence is specifically about the Complainant and the Respondent and is offered to prove consent.

Policy: Live Hearing

- The Designated Arbiter will determine whether or not each question is relevant before the party or witness has to answer the question.

(Provide each advisor an opportunity to object and respond to objection regarding relevancy – then make determination.)

Policy: Live Hearing

A lawyer from the School's Office of General Counsel will serve as counsel to the Designated Arbiter and may consult with the Designated Arbiter concerning such determinations.

Policy: Live Hearing

- All reasonable measures will be taken to ensure that proceedings are conducted in a manner that does not inflict additional trauma on the Complainant. When requested, arrangements will be made so that the Complainant and the Respondent do not have to be present in the same room at the same time. This can be affected through the use of closed circuit televisions or other means where a Complainant has requested sequestration. No Sexual Misconduct adjudication hearings will require a Complainant to be present at the hearing as a requirement to hold the hearing.

(Hearing can be held on Zoom)

Policy: Live Hearing

- A recording or transcript will be made of the hearing and will be made available for the Complainant and Respondent to review.

Policy: Additional Students' Rights

Students have the right to exclude from consideration by any decision makers, including but not limited to the appropriate “designated arbiter” or an appellate hearing panel:

1. Their own prior sexual history with persons other than the other party in the process (except in the limited circumstances discussed in the Policy).
2. Their own mental health diagnosis and/or treatment.
3. Past findings of domestic violence, dating violence, stalking, or sexual assault, except that such past findings can be considered in connection with determinations of discipline and sanctions after decisions regarding responsibility have already been reached.

Policy: Additional Students' Rights

Right to simultaneous (among the parties) notification (via e-mail) of the outcome of the processes, including the sanction or sanctions imposed on the Respondent (if any) based upon the outcome of the processes, and the rationale for the actual sanction imposed.

Hearing: Ground Rules

1. Presumption that Respondent is not responsible at the outset of the process – can only be found responsible after the School follows its process
2. No opening or closing statements
3. Advisors may ask questions, but may not make statements/speeches
4. Parties may not ask questions of the opposing party

Policy: Post-Hearing

The Complainant and Respondent may submit impact statements, describing the impact of the case on them and/or requested sanctions, to the Designated Arbiter before the Designated Arbiter decides on what sanctions, if any, are appropriate.

Policy: Post-Hearing

If, after holding a hearing and assessing the evidence, the Designated Arbiter determines that it is more likely than not that the Policy was violated, the Designated Arbiter is empowered to impose what he or she believes to be the appropriate sanctions/remedial actions to be taken. A list of the sanctions/remedies that can be imposed for violations of the Policy are set forth in Appendix 3.

Policy: Post-Hearing

If the Designated Arbiter determines that it is more likely than not that the Policy was not violated, the Designated Arbiter will dismiss the report. Thereafter, the matter will be referred back to the Title IX Coordinator, who will either: (1) close the matter; or (2) refer the matter to other appropriate designated School officials for further action as appropriate, to the extent the allegations may implicate other School policies and procedures.

Policy: Post-Hearing

The Complainant and Respondent will thereafter be notified simultaneously via email of the outcome of the process, including: (1) all procedural steps in the process (including notices provided, evidence gathered); (2) the Designated Arbiter's findings of fact; (3) the Designated Arbiter's decision as to whether a violation of the Policy did or did not take place (and the rationale for his or her decision); (4) the Designated Arbiter's decision regarding sanctions (and the rationale for his or her decision regarding sanctions, if any, including how the sanction will restore or preserve equal access to the School's education program or activity) and (5) whether remedies were offered to the Complainant. The School will also disclose other steps that the School has or will take to prevent recurrence.

Standard of Proof

Preponderance of the evidence standard

More likely than not

Policy: Sanctions – Appendix 3

Designated Arbiters are empowered to impose what they believe to be the appropriate sanctions and/or remedial actions following a determination that the ISMMS Sexual Misconduct Policy was violated. Such sanctions and remedies include, but are not limited to:

- a. Disciplining the Respondent, up to and including expulsion and discharge/termination;
- b. Providing counseling for Complainants, Respondents, and other parties as appropriate;
- c. Issuing “No Contact” orders;
- d. Providing effective escorts to ensure that the Complainant can move safely between classes and activities;
- e. Ensuring that the Complainant and the Respondent do not share classes, work spaces, or extracurricular activities;
- f. Moving the Complainant (if the Complainant requests to be moved) or Respondent to a different residence hall or housing assignment; and
- g. Placing notations on the Respondent’s transcript regarding the subject violations.

Policy: Time Frames

To the extent possible and consistent with a full and fair process, the School will seek to resolve complaints within approximately 100 calendar days of an initial report, not including the time for any appeal.

Privacy

Important to keep proceedings private

What Does a Designated Arbiter Do?

1. Run the live hearing – with the Chair making determinations of relevance
2. In the case of a factual dispute, determine the credibility of the witnesses
3. Perform an objective evaluation of the relevant evidence
4. Determine whether the prohibited conduct occurred, and whether it violated the ISMMS Sexual Misconduct Policy (after the Hearing - not at the Hearing itself)
5. If a Respondent is found responsible, determine and impose an appropriate sanction
6. Explain the decision/any sanction in a written document provided to the parties

What Doesn't a Designated Arbiter Do?

1. Represent or advocate for any party or any position during the Live Hearing
2. Determine a finding of responsibility under any policy other than the Sexual Misconduct Policy

Conflict of Interest

1. Everyone involved in a Title IX hearing must support an objective evaluation of the evidence
2. Objectivity includes the absence of any personal or professional interest that affects your ability to be fair and impartial to all parties in the proceeding and that affects the outcome of the proceeding
3. Before you serve as a Designated Arbiter, you must ensure that you do not have a Conflict of Interest
4. Conflicts could include: family, personal or business relationship with parties, their advisors, or witnesses in the proceeding; financial assistance to/from a party, advisor or witness; prior knowledge about a party outside of what is learned in the proceeding that bears on your decision of responsibility

Fairness

1. As an impartial decision-maker, a Designated Arbiter must approach their role impartially and without prejudgment
2. You must set aside impressions or biases you have from movies, TV, news, other cases in which you have been involved, and personal opinions

Stereotypes

Do not rely on sex stereotypes / prejudgments:

“Women are manipulative and they lie.”

“Real men are aggressive.”

“A lady wouldn’t put herself in that position.”

“I believe women in all situations – women have been ignored for too long in other cases, and we need to balance things out.”

Objectivity and Respect

1. Look at every decision you make as an objective evaluation of the facts and policies
2. Treat every participant and witness with respect

Questions?



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