

**Texas State University System
Office of General Counsel**

**FREQUENTLY ASKED QUESTIONS
TSUS SEXUAL MISCONDUCT POLICY¹**

September 1, 2020

These FAQs are offered as general guidance and are not designed to address the complexities of every fact situation that might arise. If in doubt, administrators are advised to contact the Office of General Counsel for legal advice before proceeding. Please use the usual campus channeling for communicating with OGC.

SECTION 1

- 1. When do the procedures outlined in the current Sexual Misconduct Policy (SMP) apply on my campus?**

RESPONSE: The current SMP outlines different grievance processes for two types of Sexual Misconduct: Title IX Sexual Harassment and Non-Title IX Sexual Misconduct. With the exception of incidents of Title IX Sexual Harassment, all incidents of Sexual Misconduct occurring prior to the effective date of the SMP are controlled by the SMP in effect at that time. All incidents of Title IX Sexual Harassment and Non-Title IX Sexual Misconduct occurring on or after August 14, 2020, are governed by the current SMP.² See SMP Section 1.4.

- 2. Is speech or expressive activities protected by the First Amendment a form of Sexual Misconduct prohibited by the current SMP?**

RESPONSE: No, nothing in this policy is intended to restrict or inhibit constitutionally-protected speech or expression. See SMP Section 1.7.

SECTION 2 AND GLOSSARY

- 3. What type of Sexual Misconduct is covered by the SMP?**

RESPONSE: The term “Sexual Misconduct” is a broad term encompassing a range of non-consensual sexual activity or unwelcome behavior of a sexual nature. The term includes but is not limited to Sexual Assault, Sexual Exploitation, Sexual Intimidation, Sexual

¹ Capitalized words within the Sexual Misconduct Policy and this FAQ have defined meanings and may be found in the glossary.

² The current SMP was adopted on August 14, 2020.

Harassment, Domestic Violence, Dating Violence and Stalking. See Glossary definition for “Sexual Misconduct.”

4. To whom should a Responsible Employee report an incident of suspected Sexual Misconduct?

RESPONSE: To the Title IX Coordinator. Unlike a Complainant, who may report an incident to any of the officials or individuals listed in section 4.2 of the SMP (e.g., campus police, Campus Security Authorities), a Responsible Employee must report directly to the Title IX Coordinator. See SMP Section 4.4.

5. Must an Employee who is designated as a Confidential Employee report incidents of Sexual Misconduct to the Title IX Coordinator?

RESPONSE: Yes, but Employees who are Confidential Employees need only report the type of incident to the Title IX Coordinator. The Confidential Employee may not provide any other information about the incident of Sexual Misconduct to the Title IX Coordinator. See SMP Section 4.7.

6. Does this policy apply to all forms of Stalking?

RESPONSE: This policy only applies if the Stalking conduct is based on sex. Stalking, including Cyberstalking that is not based on sex, will be addressed by another appropriate campus policy such as the student code of conduct policy or human resources policy. See Glossary definition for “Stalking.”

7. Does the SMP apply to a Complainant who was the victim of Sexual Misconduct that occurred when the Complainant was not participating in an institution’s educational program or activity?

RESPONSE: Yes. While Title IX Sexual Harassment only applies to incidents of Sexual Misconduct alleged to have occurred when the Complainant was participating in or attempting to participate in an institution’s Education Programs or Activities, the SMP addresses all instances of Sexual Misconduct affecting Students and Employees. See SMP Section 1.4.

8. What is a Formal Complaint?

RESPONSE: A Formal Complaint is the document describing the incident of Sexual Misconduct when such Sexual Misconduct contains all the elements of Sexual Harassment under the Title IX federal regulations issued May 2020. A Formal Complaint must be signed by the Complainant (alleged victim) or the Title IX Coordinator. See Glossary definition for “Formal Complaint.”

9. What is a Report of Non-Title IX Sexual Misconduct?

RESPONSE: A Report of Non-Title IX Sexual Misconduct is the verbal or written statement describing an incident of Sexual Misconduct when such Sexual Misconduct does not contain all the elements of Sexual Harassment under the Title IX federal regulations issued May 2020. See SMP Sections 4.2 and 5.3.

SECTIONS 3 AND 4

10. I have been accused of Sexual Misconduct. Will I be terminated/expelled?

RESPONSE: Sanctions for violations of the SMP do include termination/recommendation of tenure revocation (for staff and faculty) and expulsion (for Students). The sanctions also include but are not limited to relevant training, probation, leave without pay, changes in employment assignments or class schedules. See SMP Section 3.12.

These sanctions cannot be imposed until the grievance process is final unless the campus determines that an immediate threat to the physical health or safety of any Student or other individual arising from the allegations of Sexual Misconduct justifies emergency removal. The campus must undertake an individualized safety and risk analysis and provide the Respondent with Notice and an opportunity to challenge the decision immediately following the removal. See SMP Section 3.84. During the pendency of the grievance process, non-student Employees may be put on administrative leave with or without pay. See SMP Section 3.85.

11. I am the victim of a Sexual Assault. What assistance can I get from the campus?

RESPONSE: The Title IX Coordinator will facilitate the provision of Supportive Measures to victims of Sexual Misconduct, including Sexual Assault. Supportive Measures include, but are not limited to, counseling, changes in class or work schedules, changes in work or housing locations, extensions of assignment deadlines, mutual no contact orders, and campus escort or transportation services. See SMP Section 3.8.

12. I was the victim of Sexual Misconduct, but I am afraid to report it because I was drinking, and I am under 21. Will I get in trouble for underage drinking if I report the Sexual Misconduct?

RESPONSE: No, a campus will not take any disciplinary action for any violation of the campus' applicable code of conduct, provided the person (1) acts in good faith; (2) the violation of the code of conduct arises out of the same facts or circumstances as the Sexual Misconduct; (3) the violation of the code of conduct is not punishable by suspension or

expulsion; and (4) the person is not reporting that they committed or assisted in committing the Sexual Misconduct. See SMP Section 3.6.

However, any individual who knowingly makes a false Complaint or Report of Sexual Misconduct, knowingly provides false information to Campus officials, or who intentionally misleads Campus officials who are involved in the investigation or resolution of a Complaint or Report shall be subject to disciplinary action. A determination regarding responsibility, alone, is not sufficient to conclude that any Party made a materially false statement in bad faith. See SMP Section 3.7.

13. I do not want to go through a formal process to resolve my Complaint. Is there another process available?

RESPONSE: Possibly. Informal Resolution is available after a Formal Complaint has been filed in a Title IX Sexual Harassment incident or a Report has been received in a Non-Title IX Sexual Misconduct incident. In order to qualify for Informal Resolution, both Parties must agree in writing to Informal Resolution, the Title IX Coordinator must agree that Informal Resolution is appropriate, and the Parties must either both be Students or both be Employees. See SMP Section 3.9.

14. Will the names of the Complainant, the Respondent, and the individuals who participated in the grievance process be made public?

RESPONSE: Unless waived in writing, information about the Parties and individuals who are participating in the grievance process will not be released by the campus while the process is ongoing. After the process is final, the name of the Respondent may only be released if they are found in violation of the TSUS Sexual Misconduct Policy. See SMP Section 3.15.

15. Does the new policy still require Employees to report incidents of Sexual Misconduct to the Title IX Coordinator?

RESPONSE: Yes, the obligations of a Responsible Employee are to promptly report to the Title IX Coordinator all relevant details known to the Employee about the alleged Sexual Misconduct they witness, or that is shared by the Complainant or someone else. See SMP 4.4.

16. I am a victim of Sexual Misconduct but only want to talk to someone in confidence. What can I do?

RESPONSE: Confidential Employees are permitted to honor a request for anonymity and can maintain confidentiality. Each campus will identify and provide contact information for Confidential Employees in several locations, including but not limited to the campus' website and appropriate online handbooks. Confidential Employees will assist in a crisis and

provide information about possible resources, including law enforcement, medical assistance, psychological counseling, victim advocacy assistance, legal assistance, campus disciplinary procedures, and immigration services. See SMP Section 4.7.

17. I witnessed Sexual Harassment and reported it to the Title IX Coordinator. The Respondent knows this and has been sending me threatening emails. What should I do?

RESPONSE: No one may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the TSUS SMP, or because the individual has made a Complaint or Report, testified, assisted, or participated or refused to participate in any manner in the grievance process. Any person, who believes that they have been subjected to Retaliation, should immediately report this concern to the Title IX Coordinator.³ See SMP Section 3.14.

18. If I report that I am a victim of Sexual Harassment to the Title IX Coordinator or a Responsible Employee, can I request that my name be withheld, even from the Respondent?

RESPONSE: With the exception of Confidential Employees, campus personnel have mandatory reporting and response obligations, regardless of a Complainant's request for anonymity or confidentiality. See SMP Section 4.8.2. The campus will consider the request for anonymity but cannot guarantee the request will be honored. See SMP Section 4.4.3.

SECTIONS 5 AND 6

19. May a Student or Employee file a Report or Complaint of Sexual Misconduct even if the Sexual Misconduct occurred off campus or outside the United States?

RESPONSE: Yes, incidents of Sexual Misconduct occurring off campus may be reported. The Title IX Coordinator will determine and explain the process that applies to such an incident. See SMP Section 1.4 and 4.2.1.

20. If a Formal Complaint is filed but the alleged Sexual Misconduct does not meet the definition of Title IX Sexual Harassment, what happens to the Formal Complaint?

RESPONSE: Sexual Harassment under Title IX has a very specific definition⁴ and when the alleged conduct does not meet the specific definition,⁵ the Formal Complaint must be dismissed with regard to that conduct for purposes of Sexual Harassment under Title IX.

³ It is important to keep in mind that the exercise of rights protected by the First Amendment is not considered Retaliation under this policy. See SMP Section 3.14.

⁴ See definition of Title IX Sexual Harassment in the SMP Glossary.

⁵ See SMP 6.3.

However, such a mandatory dismissal will not preclude a campus from taking action, as necessary, under other provisions of the Sexual Misconduct policy.⁶ See SMP Section 5.6.2.

21. If the campus (Title IX Coordinator) dismisses my Formal Complaint as not meeting the definition of Title IX Sexual Harassment, may I appeal this decision?

RESPONSE: Yes, the campus will notify you in writing of the dismissal and the reason for the dismissal and include information regarding the procedures for appealing the dismissal. See SMP Section 7.21.

22. If I file a Formal Complaint of Sexual Misconduct, may I later withdraw the Complaint, and will the campus stop the investigation or adjudication?

RESPONSE: While you may withdraw the Complaint at any time before a determination of responsibility or non-responsibility is made, the campus may continue with the investigation or adjudication of the matter if it determines that such action is warranted. See SMP Sections 5.5 and 5.6.

23. What factors will the campus (Title IX Coordinator) consider in deciding whether to continue with an investigation or adjudication even if I, as the Complainant, have withdrawn the Complaint or Report?

RESPONSE: As each matter has a unique set of facts, the campus (Title IX Coordinator) will make an individualized assessment of the specific matter in deciding whether to continue with the investigation and adjudication and will consider the Complainant's wishes. The Title IX Coordinator's review may include such items as the seriousness of the allegations, the victim's age, pattern of behavior, risk of harm to others, and whether a weapon or violence was involved. See SMP Section 6.2.1.

24. Do I have to file a Complaint or Report of Sexual Misconduct in order to receive any assistance from the campus?

RESPONSE: No. A person who has experienced Sexual Violence or any type of Sexual Harassment does not need to file a Complaint or Report before receiving assistance. Each campus stands ready to provide a wide range of Supportive Measures to anyone who has experienced Sexual Violence or Sexual Harassment. See SMP 3.8.

⁶ Preamble to the federal regulations. "In response to commenters' concerns, the final regulations revise § 106.45(b)(3)(i) to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct. Thus, if a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clarify that a recipient may do so."

25. What happens once a Title IX Coordinator hears about an allegation of Sexual Misconduct?

RESPONSE: Once the Title IX Coordinator becomes aware of an allegation of Sexual Misconduct, the Coordinator will contact the individual (identified as having experienced Sexual Misconduct) and discuss several important matters, some of which include, the availability of Supportive Measures, the process for filing a Formal Complaint or Report, the investigatory process, the possibility of Informal Resolution, and options for reporting to campus or local law enforcement. See SMP Section 6.1.

SECTIONS 7 AND 8

26. May I have an Advisor present during any part of the grievance process?

RESPONSE: Yes. All Parties in a Sexual Misconduct grievance process are entitled to have an Advisor of their choice present throughout the entire grievance process. An Advisor may be an attorney, but is it not required to be an attorney. See SMP Sections 7.3.7 and 7.4.1.

27. I do not have an Advisor. Will the campus provide me with an Advisor throughout any part of the grievance process?

RESPONSE: If a party in a Title IX Sexual Harassment investigation does not have an Advisor, the campus will appoint a person to serve as the party's Advisor for the limited purpose of conducting cross-examination during the live hearing. The campus-assigned Advisor will not participate in any other part of the Title IX Sexual Harassment grievance process. See SMP Section 7.4.2.

28. Will the campus-assigned Advisor be an attorney?

RESPONSE: No. While Advisors may be attorneys, the campus does not require that Advisors be attorneys. See SMP Section 7.4.2.

29. At first, I did not want to agree to Informal Resolution. If I change my mind later, is it too late?

RESPONSE: No, provided a decision has not been made on whether a Respondent has violated the Sexual Misconduct policy, and the Parties are eligible for Informal Resolution (see FAQ #14). The Parties may agree to Informal Resolution at any time in the grievance process before a decision has been reached, if the Title IX Coordinator agrees that Informal Resolution is appropriate. See SMP Section 3.9.1.

30. Will I get to review the other party's evidence and statement prior to the hearing, if any?

RESPONSE: Yes. In both a Title IX case and Non-Title IX case, once the Investigator has concluded the investigation, each party will be able to review all of the evidence obtained during the investigation that is related to the allegations made in the Complaint or Report. Each party will have 10 days to review and respond to the evidence, should they choose to do so. See SMP Section 7.7.6.

31. Will I be required to be in the same room as the other party (and their Advisor) for the live hearing?

RESPONSE: No. At the request of either party, the campus can arrange for all Parties to be in separate locations and participating in the hearing virtually. Each party will be asked to submit to cross-examination in real time, but the cross-examination may be done virtually. See SMP Section 7.18.

32. Will the Parties be allowed to ask questions directly to each other (and their witnesses)?

RESPONSE: No. In a Title IX Sexual Harassment matter, all cross-examination at a live hearing will be conducted by the party's Advisor. If a party does not have an Advisor, the campus will appoint a person to conduct cross-examination. See SMP Section 7.16.

In a Non-Title IX Sexual Misconduct matter, cross-examination will be through written questions submitted to the Decision Maker before or during the hearing. The Decision Maker will ask the questions of the Parties and witnesses. See SMP Section 8.8.1.4 and 8.8.4.5.

33. If I believe the Decision Maker has made an error in a ruling (e.g., determined that a question is or is not relevant, not allowing a witness to discuss evidence), may I dispute or object to their decision?

RESPONSE: Yes, a Party may dispute a ruling by the Decision Maker, but only as a ground for appeal. The decision of the Decision Maker during the live hearing is final for hearing purposes. A party may appeal the decision of the Decision Maker on the ground of procedural irregularity, which includes a relevancy determination made at the hearing, if the ruling affected the outcome of the hearing. See SMP Section 7.15.2.

34. Can I appeal the decision in a case of Title IX Sexual Harassment?

RESPONSE: Yes, each Party to a Title IX Sexual Harassment proceeding may appeal the decision of the Decision Maker within 10 days of the decision.

Appeals may be based on (1) procedural irregularity that affected the outcome of the hearing; (2) new evidence that was not reasonably available at the time of the hearing that

could affect the outcome; (3) that a Campus Employee involved in the process had bias or a conflict of interest; or (4) the sanction is disproportionate to the decision. See SMP Section 7.21.

35. In a Non-Title IX Sexual Misconduct case, may I dispute the decision of responsibility (Finding) or the sanction?

RESPONSE: Students, staff, and faculty may dispute the Finding and sanction in a Non-Title IX Sexual Misconduct matter but only Students and tenured faculty may dispute the Finding and/or sanction through a hearing. See SMP Sections 9.1 and 9.2.

SECTIONS 9 AND 10

36. How is the appeal process outlined in Section 9 of the current SMP different from the appeal process in the prior (pre-August 2020) SMP?

RESPONSE: The process for Non-Title IX Sexual Misconduct appeals is substantially similar to the prior appeals process with the following caveats:

- In the interest of best practices and consistency, the Grounds for Appeal of a Non-Title IX Sexual Misconduct determination are now the same as those for a Title IX Sexual Harassment determination.
- Deadlines are now measured in calendar days, rather than class days. See SMP Sections 9.3 and 9.4.

37. When does my Campus's website need to be updated to reflect the changes in the SMP?

RESPONSE: As soon as possible. The Board of Regents approved the new TSUS Sexual Misconduct Policy on August 14, 2020, which is the same day that the Title IX federal regulations regarding Sexual Harassment went into effect. Please contact the Title IX Coordinator on your campus or the Office of General Counsel for assistance if you have not updated your website.

38. In Texas, Title IX Coordinators and Chief Executive Officers of institutions are required to file certain reports either annually or quarterly. Do the Department of Education federal regulations issued May 2020 affect these mandatory reporting requirements?

RESPONSE: No. The federal regulations do not overrule the reporting requirements mandated by the 86th Legislature in SB 212.

39. Are the training provisions for Students and Employees substantially similar to the prior SMP?

RESPONSE: Yes, with the additional requirement that certain training materials related to Title IX personnel must be made publicly available on the campuses' website. See SMP Section 10.2.5 for more information.

40. Did the Final Rules add a recordkeeping requirement?

RESPONSE: Yes, campuses must retain Sexual Misconduct records for a period of seven years, unless a longer retention period is required under a different state or federal law. See SMP Section 10.5 for a non-exhaustive list of the documents covered by this requirement.