

Saint Mary's College

Understanding the Policy for Addressing Formal Complaints of Sexual Harassment under Title IX Regulations

Date: 10/28/2020

Presented by:

Natasha Baker

Managing Attorney

Novus Law Firm, Inc.

Natasha@novuslawfirm.com



Agenda

- Overview of the new Sexual Misconduct Policy
 - New definitions
 - Relationship to other policies
- Overview of the new procedures
 - Reporting concerns
 - Intake and assessment
 - Supportive measures
 - Emergency removals
 - Interim actions
- Overview of process
 - Formal complaints
 - Informal resolution options
 - Formal resolution phases
- Q&A

Title IX Coordinator:

- **Laurie Panian**
Associate Vice President for Human Resources
925-631-4212
Imp10@stmarys-ca.edu

Title IX Deputy Coordinators:

- **Evette Castillo Clark, EdD (For Students)**
Dean of Students (Students)
925-631-4238
ecc4@stmarys-ca.edu
- **Stacy Vander Velde (For Students)**
Director of Community Life
925-631-4238
smv8@stmarys-ca.edu
- **Erika Roesch (for Faculty and Staff)**
Recruiting Manager, Human Resources
925-631-4212
ehr2@stmarys-ca.edu
- **Kami Gray (For Athletics)**
Senior Women's Administrator/Associate Director of Athletics
925-631-4521
kgray@stmarys-ca.edu

Introductions

- **Name**
- **Role**
- **One goal for today**

Overview of Saint Mary's Policy

- (1) Overview of New Policy
- (2) New Definitions
- (3) Relationship of the Title IX Policy to Other Saint Mary's Policies



Overview of New Changes

- Definitions
- Formal Procedures – Formal Complaint followed by an investigation phase to formal hearing with cross examination by an advisor
- Roles of those in the process



Concepts to Consider

- (1) What is the alleged conduct?
- (2) Who are the parties?
- (3) Where did the alleged conduct take place?
- (4) When did the alleged conduct take place?
- (5) Which definition covers the alleged conduct?
- (6) Relationships to other policies.



Covered Definitions

Sexual Harassment = conduct on the basis of sex that meets the Policy definition of:

- Quid Pro Quo
- Unwelcome Conduct
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking
- Sexual Exploitation.

Sexual Harassment (Quid Pro Quo)

- **Quid Pro Quo** which includes an employee conditioning employment or educational benefits on participation in unwelcome sexual conduct.

Sexual Harassment (Unwelcome Conduct)

- **Unwelcome Conduct of a Sexual Nature**
that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity

Sexual Assault

Any forcible or nonforcible sexual act directed against another person (contact with genitals, objects, however slight), i.e., rape, sodomy, sexual assault with an object, fondling, incest and statutory rape, without the consent of the victim including instances where the victim is incapable of giving consent

Dating Violence

Any violence committed by a person:

- (A) who is or has been in a social relationship of a romantic or intimate nature with the victim;
and
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship;
 - (ii) The type of relationship;
 - (iii) The frequency of interaction between the persons involved in the relationship.

Domestic Violence

Includes any felony or misdemeanor crimes of violence committed

- by a current or former spouse or intimate partner of the victim,
- by a person with whom the victim shares a child in common,
- by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,
- by a person similarly situated to a spouse of the victim under California domestic or family violence laws or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of California.

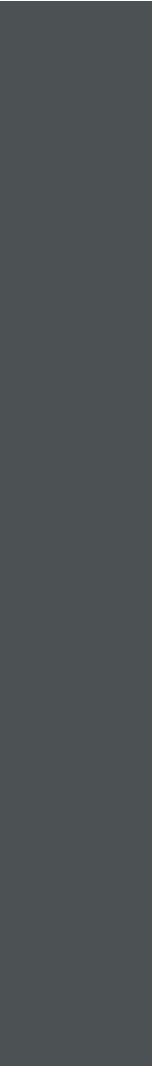
Stalking

Defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to –

(A) fear for their safety or the safety of others; or

(B) suffer substantial emotional distress.

*note that this is on the basis of sex



Sexual Exploitation

Occurs when a person takes advantage of another person for the benefit of anyone other than that person, without that person's consent. Sexual exploitation may occur regardless of whether sexual activity takes place.

Affirmative Consent

Unambiguous and willing participation or cooperation in act or attitude that is commonly understood to be consistent with the exercise of free will.

Consent means affirmative, conscious, and voluntary agreement to engage in sexual activity.

It is the responsibility of each person involved in the sexual activity to ensure that they have the affirmative consent of the other or others to engage in the sexual activity.

Affirmative Consent

Consent requires participants who are fully conscious, are equally free to act, have clearly communicated their willingness, cooperation, or permission to participate in a specific sexual activity, are positive and clear in their desires, and are able to cease ongoing consensual activity at any time.

Expression of nonconsenting does not have to be verbal; it can be communicated with gestures or body language. Silence, in and of itself, cannot be interpreted as consent.

A prior sexual history between the complainant and respondent does not constitute consent.

Affirmative Consent

If you have sexual activity with someone you know to be- or should know to be – mentally or physically incapacitated (for example, by alcohol or other drug use, unconsciousness or blackout), you are in violation of this policy.

Incapacitation is a state where one cannot make a rational, reasonable decision because they lack the ability to understand the who, what, where, why or how of their sexual interaction.

Affirmative Consent

Consent is not freely given if:

- It is obtained through the use of force, through the fear of or the threat of force, intimidation, coercion, or by kidnap; ...

Affirmative Consent

Consent is not freely given if:

- A reasonable person in the position of the alleged respondent at the time the alleged conduct occurred should have known that the other person was unable to give consent for any of the following reasons:
 - The individual is unable to make an informed decision as a result of alcohol or other drugs (including but not limited to predatory drugs or prescribed medications); or
 - The individual is unconscious, asleep, or suffering from shock; or

Affirmative Consent

Consent is not freely given if:

- A reasonable person in the position of the alleged respondent at the time the alleged conduct occurred should have known that the other person was unable to give consent for any of the following reasons:
 - The individual is under the age of eighteen and therefore legally unable to give consent; or
 - The individual has a known mental disorder or developmental or physical disability, and therefore legally unable to give consent.
 - The individual has acted or spoken in a manner which expresses they refuse to give consent.

Jurisdiction of the Policy

- Students
- Employees



Jurisdiction of the Policy

- Complainant must be participating or attempting to participate in the College's programs or activities.



Jurisdiction of the Policy

- Respondent enrolled or employed (generally).

Jurisdiction of the Policy

- Where did the alleged conduct take place?



Education Program or Activity

- Any on-campus premises.
- Any off-campus premises that Saint Mary's College of California has substantial control over. This includes buildings or property owned or controlled by a recognized student organization.
- Activity occurring within computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of Saint Mary's College of California's programs and activities over which Saint Mary's College of California has substantial control.

Relationship to Other Policies

- Student Code of Conduct
- Faculty/Staff (employee) Handbook



Overview of New Procedures

- Reporting concerns
- Intake and Assessment
- Supportive Measures
- Emergency Removals/Interim Actions



Making a Report

- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- The College will accept anonymous complaints however the College will be limited in its ability to address the concerns without identifying reporting parties to obtain supporting information.

Who Must Report

The following Officials will provide privacy, but not confidentiality, upon receiving a report of conduct prohibited under this policy:

- Title IX Coordinator
- Deputy Title IX Coordinators
- Identified Campus Security Authorities are required to report incidents as defined by the VAWA Amendments of the Clery Act.
- All members of the College Community who are employees are required by the College to report to a Title IX Officer if they observe, encounter or learn of conduct that may be subject to the Title IX Policy.

Confidentiality and Privacy

The following Officials may provide confidentiality and do NOT need to report:

- Megan Gallagher, Director of CARE Center
- Counseling and Psychological Services Counselors
- Clergy during Confession

What Happens?

The appropriate Title IX coordinator will promptly contact the Complainant to discuss the availability of supportive measures, consider the Complainant's wishes with respect to supportive measures, inform the Complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the Complainant the process for filing a formal complaint.

Supportive Measures

- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without charge to the Complainant or the Respondent before or after the filing of a Formal Complaint or where no Formal Complaint has been filed.

Supportive Measures

- Counseling
- extensions of deadlines or other course-related adjustments
- modifications of work or class schedules
- campus escort services
- restrictions on contact between the parties (no contact orders)
- changes in work or housing locations
- leaves of absence
- increased security and monitoring of certain areas of the campus
- safety planning

Emergency Suspension (Students)

- Saint Mary's retains the authority to remove a respondent from the College's program or activity on an emergency basis, where Saint Mary's (1) undertakes an individualized safety and risk analysis and (2) determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of covered sexual harassment justifies a removal.
- If Saint Mary's determines such removal is necessary, the respondent will be provided notice and an opportunity to challenge the decision immediately following the removal

Emergency Suspension (students)

- Student will receive written confirmation of the emergency suspension with the facts and circumstances warranting the emergency suspension, the conditions of the emergency suspension, that a Dean of Students (DS) hold will be placed on the student's account, and the student's review rights.
- Within three (3) calendar days, the student may petition, in writing, the DS (or designee) to review the reliability of the information concerning the alleged harm or ongoing threat, the student may also propose evidence as to why they are no longer a threat. DS may then affirm decision and proceed through investigation or lift emergency suspension.

Emergency Removals

Administrative Leave: Saint Mary's retains the authority to place a non-student employee respondent on administrative leave with pay during the Title IX Process, consistent with the Faculty/Staff Handbook.



Zoom Break
10 minutes

Overview of Process



Formal Complaints



Informal
Resolution Options



Formal Resolution
Phases



Formal Complaint

- A “formal complaint” means:
- a document – including an electronic submission - filed by a complainant with a signature or other indication that the complainant is the person filing the formal complaint, or signed by the Title IX Coordinator,
- alleging sexual harassment against a respondent
- about conduct within Saint Mary’s College of California’s education program or activity, and
- requesting initiation of the procedures consistent with the Title IX Policy to investigate the allegation of sexual harassment.

Mandatory Dismissal

Under the Title IX regulations, Saint Mary's must dismiss a formal complaint or any allegations therein if, at any time during the investigation or hearing, it is determined that any of the below elements are not met:

1. The conduct is alleged to have occurred on or after August 14, 2020;
2. The conduct is alleged to have occurred in the United States;
3. The conduct is alleged to have occurred in Saint Mary's College of California education program or activity; and
4. The alleged conduct, if true, would constitute covered sexual harassment as defined in this policy.

Discretionary Dismissal

Saint Mary's may dismiss a formal complaint or any allegations therein if, at any time during the investigation or hearing, it is determined that:

- A complainant notifies the Title IX Coordinator in writing that they would like to withdraw the Formal Complaint or any allegations raised in the Formal Complaint;
- The respondent is no longer enrolled or employed by Saint Mary's College of California; or,
- If specific circumstances prevent Saint Mary's College of California from gathering evidence sufficient to reach a determination regarding the Formal Complaint or allegations within the Formal Complaint

Impact of Dismissal

Upon dismissal for the purposes of Title IX, Saint Mary's College of California retains discretion to utilize the Code of Conduct, Faculty Handbook, or Employee Handbook to determine if a violation of the Code of Conduct, Faculty Handbook, or Employee Handbook has occurred.

If so, Saint Mary's College of California will promptly send written notice of the dismissal of the Formal Complaint under the Title IX Process and referral to the Office of Community Life or Human Resources for action in accordance with the applicable Handbook.

Which policy applies if sexual harassment (environment) on campus is reported?
What should happen when a report is received by an employee?

	Student	Faculty	Staff	Third Party
Student				
Faculty				
Staff				
Third Party				

Which policy applies if sexual assault in an international program is reported?

What factors may be important to consider?

What should happen if an employee hears of allegations?

	Student	Faculty	Staff	Third Party
Student				
Faculty				
Staff				
Third Party				

Notice of Allegations

The Title IX Coordinator or designee will draft and provide the Notice of Allegations to any party to the allegations of sexual harassment. Such notice will occur as soon as practicable, after the institution receives a Formal Complaint of the allegations, if there are no extenuating circumstances

The Title IX Coordinator or designee may determine that the Formal Complaint must be dismissed on the mandatory grounds and will issue a Notice of Formal Complaint Dismissal. If such a determination is made, any party to the allegations of sexual harassment identified in the Formal Complaint will receive the Notice of Formal Complaint Dismissal in conjunction with, or in separate correspondence after, the Notice of Allegations

Notice of Allegations: Contents

- Notice of the institution's Title IX Process and a hyperlink to a copy of the processes.
- Notice of the allegations potentially constituting covered sexual harassment, and sufficient details known at the time Notice is issued
- A statement that:
 - the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the process
 - the parties may have an advisor of their choice, who may be, but is not required to be, an attorney
 - the parties may inspect, and review evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint
 - the Student Code of Conduct and Employee Handbook prohibits students & employees from knowingly making false statements or knowingly submitting false information during the process

Investigative Phase



Fact-Gathering



Evidence Sharing



Draft Report Review
and Comment



Final Report Shared



Relevancy

The investigation does not consider:

- 1) incidents not directly related to the possible violation, unless they are considered relevant because, for example, they evidence a pattern;
- 2) evidence about the Complainant's sexual predisposition or prior sexual behavior, unless such evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

September 4, 2020 Open Center

- Guidance (not part of the Title IX Regulations)
- Cannot adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.

Evaluating Evidence (Generally)

- Relevancy
- Weight
- Credibility

Caution: the investigative phase is a fact-gathering process for conduct covered by Title IX – not a fact-finding process.

Investigative Report

- The investigator designated by the Title IX Coordinator or designee will create an Investigative Report that fairly summarizes relevant evidence, and will provide that Report to the parties at least ten (10) calendar days prior to the hearing for each party's review and written response.
- Only relevant evidence (including both inculpatory and exculpatory – i.e. tending to prove and disprove the allegations - relevant evidence) will be referenced in the Investigative Report.

Post Investigation

At the conclusion of the investigation, parties will be invited to participate in individual post investigation meetings to review and prepare for the live hearing.



Decision-Making Phase



Notice of Hearing



Hearing



Written Letter of
Determination



General Rules of Hearings

- Saint Mary's will not issue a disciplinary sanction arising from an allegation of covered sexual harassment without holding a live hearing unless otherwise resolved through an informal resolution process.
- The live hearing may be conducted with all parties physically present in the same geographic location, or, at virtually through a Video Conferencing platform.
- At its discretion, Saint Mary's College of California may delay or adjourn a hearing based on technological errors not within a party's control.
- All proceedings will be recorded through audio recording. That recording will be made available to the parties for inspection and review
- No new evidence or witnesses may be submitted during the live hearing, but if newly discovered party may ask that it be considered and decision-maker will make a determination.

Hearing Participants

- Complainant and Respondent (The Parties)
- The Decision-maker
 - The hearing body for students will consist of a panel of three (3) decision makers known as the Disciplinary Hearing Board (DHB) and one of these panelists will serve as the Chair.
 - The hearing body for employees will consist of a single Decision-Maker
 - No member of the DHB or the decision-maker will also have served as the Title IX Coordinator, investigator, or advisor to any party in the case
 - No member of the DHB or decision-maker will have a conflict of interest or bias in favor of or against complainants or respondents generally, or in favor or against the parties to the particular case
- Advisor of choice: The parties have the right to select an advisor of their choice, who may be, but does not have to be, an attorney.
- Any relevant witnesses

Hearing Procedures

- The DHB Chair or decision-maker will open and establish rules and expectations for the hearing;
- The Parties will each be given the opportunity to provide opening statements;
- DHB panelists or the decision-maker will ask questions of the Parties and Witnesses;
- Parties will be given the opportunity for live cross-examination after the DHB panel or decision-maker conducts its initial round of questioning;
- During the Parties' cross-examination, the DHB panel or decision-maker will have the authority to pause cross-examination at any time for the purposes of asking the DHB panel's or decision-maker's follow up questions; and any time necessary in order to enforce the established rules of decorum.

Determination of Responsibility

- Preponderance of the evidence
- For students, sanctions are assessed in response to the specific conduct, the disciplinary history of the Respondent as well as the impact to the community
- For employees, appropriate discipline may range from an oral reprimand up to and including termination, or any other appropriate remedial action. In making a decision regarding discipline, Saint Mary's College of California may consider properly established records of previous conduct and the seriousness of the violation.
- If there are no extenuating circumstances, the determination regarding responsibility will be issued by Saint Mary's College of California within ten (10) calendar days of the completion of the hearing.



Zoom Break
10 minutes

Discussion Topic

1. Why might a party prefer the informal resolution process?
2. If the case is not appropriate for informal resolution, why might a member of Saint Mary's community hesitate to use the formal process?
3. From your vantage point, what could help parties feel more comfortable using the formal process? What steps need to be taken?

Appeals

Grounds

Student Respondents –
Dean of Students

Employee Respondents –
Appeal Officer appointed
by HR or the Provost

Appeal Provisions

- Each party may appeal (1) the dismissal of a formal complaint or any included allegations and/or (2) a determination regarding responsibility.
- To appeal, a party must submit their written appeal within 5 calendar days of being notified of the decision via the link included in their outcome letter, indicating the grounds for the appeal

Appeal Grounds

1. A process or procedural error was made that that was significantly prejudicial to the outcome of the matter (i.e. a failure to follow the institution's own procedures);
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;

Appeal Grounds

3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter.
4. The severity of the sanction imposed was not appropriate based on the section of the Code or other College policy which the individual was found to have violated.

Q&A on Topics Covered





1450 Maria Lane, Suite 330

Walnut Creek, CA 94596

www.novuslawfirm.com

