



Title IX Grievance

Policy SS010

Responsible Administrator: Deputy to the President

Responsible Office: Affirmative Action Officer/Title IX Coordinator

Issue Date: August 2020

I. Policy Statement

Title IX of the Educational Amendments of 1972 prohibits any person in the United States from being discriminated against on the basis of sex in seeking access to any educational program or activity receiving federal financial assistance. The U.S. Department of Education, which enforces Title IX, has long defined the meaning of Title IX's prohibition on sex discrimination broadly to include various forms of sexual harassment and sexual violence that interfere with a student's ability to equally access our educational programs and opportunities.

II. Reason for the Policy

On May 19, 2020, the U.S. Department of Education issued a Final Rule under Title IX of the Education Amendments of 1972 that:

- Defines the meaning of "sexual harassment" (including forms of sex-based violence)
- Addresses how this institution **must** respond to reports of misconduct falling within that definition of sexual harassment, and
- Mandates a grievance process that this institution **must** follow to comply with the law in these specific covered cases before issuing a disciplinary sanction against a person accused of sexual harassment.

See, 85 Fed. Reg. 30026 (May 19, 2020). The full text of the Final Rule and its extensive Preamble are available here: <http://bit.ly/TitleIXReg>

Based on the Final Rule, the Fashion Institute of Technology ("FIT") will implement the following Title IX Grievance policy, effective August 14, 2020.

III. Who is Responsible for this Policy

- Affirmative Action Officer/Title IX Coordinator

IV. Who is Affected by this Policy

- All members of the FIT Community

V. Principles

A. How does the Title IX Grievance policy impact other campus disciplinary procedures?

In recent years, “Title IX” cases have become a shorthand for any campus disciplinary process involving sex discrimination, including those arising from sexual harassment and sexual assault. But under the Final Rule, FIT must narrow both the geographic scope of its authority to act under Title IX and the types of “sexual harassment” that it must subject to its Title IX investigation and adjudication process. **Only** incidents falling within the Final Rule’s definition of sexual harassment will be investigated and, if appropriate, brought to a live hearing through the Title IX Grievance policy defined below. Conduct not falling within the Final Rule’s definition of sexual harassment will be investigated and adjudicated under the [Sexual Misconduct Response policy](#) or other college policy as may be appropriate.

FIT remains committed to addressing any violations of its policies, even those not meeting the narrow standards defined under the Title IX Final Rule.

Specifically, our campus has:

[Code of Student Conduct](#) defines certain behavior as a violation of campus policy. FIT’s separate *Sexual Misconduct Response policy* addresses the types of sex-based offenses constituting a violation of state law and campus policy and the procedures for investigating and adjudicating those sex-based offenses. Both policies contain potential sanctions upon a finding of responsibility, which include but are not limited to suspension or expulsion from the college. The college’s Collective Bargaining Agreement (“CBA”) with the UCE of FIT also contains the procedures and potential sanctions for misconduct committed by employees covered by the CBA.

To the extent that alleged misconduct falls outside this Title IX Grievance policy, or misconduct falling outside this Title IX Grievance policy is discovered in the course of investigating covered Title IX misconduct, FIT retains authority to investigate and adjudicate the allegations under the policies and procedures defined within the *Code of Student Conduct*, the *Sexual Misconduct Response policy*, or other relevant college policy.

The elements established in this Title IX Grievance policy pursuant to the Final Rule have no effect and are not transferable to any other FIT policy or any civil rights violation except as narrowly defined in this policy. This policy does not set a precedent for other policies or processes of the college and may not be cited for or against any right or aspect of any other policy or process.

B. How does the Title IX Grievance policy impact the handling of complaints?

Our existing Title IX office and reporting structure remains in place. What has changed is the way our Title IX office will handle different types of reports arising from sexual misconduct, as detailed in full throughout Section 2.

C. General Rules of Application

i. Effective Date

This Title IX Grievance policy will become effective on August 14, 2020 and will only apply to formal complaints of sexual harassment as defined by this policy brought on or

after August 14, 2020 alleging conduct taking place on or after August 14, 2020. Complaints brought and/or alleging conduct prior to August 14, 2020 will be investigated and adjudicated according to the college's *Sexual Misconduct Response policy* or other relevant college policy.

ii. Revocation by Operation of Law

Should any portion of the Title IX Final Rule, 85 Fed. Reg. 30026 (May 19, 2020), be stayed or held invalid by a court of law, or should the Title IX Final Rule be withdrawn or modified to not require the elements of this policy, this policy, or the invalidated elements of this policy, will be deemed revoked as of the publication date of the opinion or order and for all reports after that date, as well as any elements of the process that occur after that date if a case is not complete by that date of opinion or order publication. Should this Title IX Grievance policy be revoked in this manner, any conduct covered under the Title IX Grievance policy shall be investigated and adjudicated under the existing *Code of Student Conduct*, the *Sexual Misconduct Response policy*, or other college policy as the college determines appropriate.

iii. Non-Discrimination in Application

The requirements and protections of this policy apply equally regardless of sex, sexual orientation, gender identity, gender expression, or other protected classes covered by federal or state law. All requirements and protections are equitably provided to individuals regardless of such status or status as a Complainant, Respondent, or Witness. Individuals who wish to file a complaint about the institution's policy or process may contact the Department of Education's Office for Civil Rights using contact information available at <https://ocrcas.ed.gov/contact-ocr>.

D. Definitions

i. Covered Sexual Harassment

For the purposes of this Title IX Grievance policy, "covered sexual harassment" includes any conduct on the basis of sex that satisfies one or more of the following:

- a) An employee conditioning educational or employment benefits on participation in unwelcome sexual conduct (i.e., quid pro quo);
- b) Unwelcome conduct 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;
- c) Sexual assault (as defined in the Clery Act), which includes any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. For example:
 1. any type of sexual contact or behavior that occurs without the affirmative consent of the recipient. Falling under the definition of sexual assault are sexual activities such as forced sexual intercourse, forcible penetration, child molestation, fondling, and attempted rape;
- d) Dating violence (as defined in the Violence Against Women Act (VAWA) amendments to the Clery Act), which includes 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;

- e) Domestic violence (as defined in the VAWA amendments to the Clery Act), which 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 New York 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 New York;
- f) Stalking (as defined in the VAWA amendments to the Clery Act), meaning 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 conduct that does not meet one or more of these criteria may still be prohibited under the college's *Code of Student Conduct* and/or the college's *Sexual Misconduct Response policy*.

ii. Consent

For the purposes of this Title IX Grievance policy, "consent" means affirmative consent as defined in the college's *Sexual Misconduct Response policy* as follows:

- a) **Affirmative Consent ("Consent")**: 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 does not, in and of itself, demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression. 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. Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol. Consent may be initially given but withdrawn at any time. Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm. When consent is withdrawn or can no longer be given, sexual activity must stop. Children under 17 years of age cannot legally consent under New York State law to having sex or sexual contact with an adult (i.e., someone who is 17 years of age or older)

iii. Education Program or Activity

For the purposes of this Title IX Grievance policy, FIT's "education program or activity" includes:

- a) Any on-campus premises;
- b) Any off-campus premises that FIT has substantial control over. This includes buildings or property owned or controlled by a recognized student organization; and

- c) Activity occurring within computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of FIT's programs and activities over which FIT has substantial control.

iv. Formal Complaint

For the purposes of this Title IX Grievance policy, "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 by a respondent regarding conduct affecting the complainant's access to the education program, including FIT's online education program, and requesting initiation of the procedures consistent with this Title IX Grievance policy to investigate the allegation of sexual harassment.

This Title IX Grievance policy only covers conduct committed against a complainant while the complainant is located in the United States.

v. Complainant

For the purposes of this Title IX Grievance policy, complainant means any individual who has reported being or is alleged to be the victim of conduct that could constitute covered sexual harassment as defined under this policy.

vi. Relevant Evidence and Questions

"Relevant" evidence and questions refer to any questions and evidence that tends to make an allegation of sexual harassment more or less likely to be true.

"Relevant" evidence and questions do not include the following types of evidence and questions, which are deemed "irrelevant" at all stages of the Title IX Grievance Process:

- a) Evidence and questions about the complainant's sexual predisposition or prior sexual behavior unless:
 1. They are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 2. They concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. 34 C.F.R. § 106.45(6)(i).

Evidence and questions that constitute, or seek disclosure of, information protected under a legally recognized privilege.

- b) Any party's medical, psychological, and similar records unless the party has given voluntary, written consent. 85 Fed. Reg. 30026, 30294 (May 19, 2020).

vii. Respondent

For the purposes of this Title IX Grievance policy, respondent means any individual who has been reported to be the perpetrator of misconduct that could constitute covered sexual harassment as defined under this policy.

Procedures

A. Privacy vs. Confidentiality

Consistent with the college's *Sexual Misconduct Response policy*, references made to *confidentiality* refer to confidential resources who have the ability to not report crimes and violations to law enforcement or college officials without the disclosing party's permission, except for extreme circumstances, such as a health and/or safety emergency or child abuse. References made to *privacy* mean FIT offices and employees who cannot guarantee confidentiality, but will maintain privacy to the greatest extent possible, such that information disclosed will be relayed only as necessary to investigate and/or seek a resolution and to notify the Title IX Coordinator or designee, who is responsible for tracking patterns and spotting systemic issues. FIT will limit the disclosure as much as practicable.

B. Disability Accommodations

This policy does not alter any institutional obligations under federal disability laws including the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Parties may request reasonable accommodations for disclosed disabilities to the Title IX Coordinator at any point before or during the Title IX Grievance Process that do not fundamentally alter the Process. The Title IX Coordinator will not affirmatively provide disability accommodations that have not been specifically requested by the Parties, even where the Parties may be receiving accommodations in other institutional programs and activities.

C. Making a Report Regarding Covered Sexual Harassment to the Institution

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, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

Contact Information for the Title IX Coordinator:

Deliwe Kekana
333 7th Avenue, 16th Floor
New York, NY 10001
titleix@fitnyc.edu
(212) 217-3365

Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator.

D. Confidential Reporting

The following officials may provide confidentiality:

On-Campus Confidential Resources:

i. For Students:

- a) FIT Counseling Center
<https://www.fitnyc.edu/counseling-services/>
(212) 217-4260
Dubinsky Student Center Room A-212B
- b) FIT Health Services
<https://www.fitnyc.edu/health-services/>
(212) 217-4190
Dubinsky Student Center Room A-402

ii. For Employees:

- a) Employee Assistance Program (EAP)
(212) 217-5600
Pomerantz Center Lower Level, Room DC35

Non-Confidential Resources:

i. Title IX Coordinator

titleix@fitnyc.edu
(212) 217-3365
333 7th Avenue, 16th Floor

ii. Dean of Students

dean_of_students@fitnyc.edu
(212) 217-3800
Business and Liberal Arts Center, Room B-22

iii. FIT Care Team¹

<http://www.fitnyc.edu/student-life/care-team/>
(212) 217-3800
Business and Liberal Arts Center, Room B-221

iv. Human Resource Management and Labor Relations

(212) 217-3650
333 7th Avenue, 16th Floor

E. Non-Investigatory Measures Available Under the Title IX Grievance Policy

i. Supportive Measures

Complainants and respondents (as defined above), who report allegations that could constitute covered sexual harassment under this policy, have the right to supportive measures regardless of whether they desire to file a complaint, which may include no contact orders, access to counseling through FIT's Counseling Center, changes in housing arrangements, changes in work locations, leaves of absence, modifications of

¹ Some individuals on the FIT Care Team are considered "Confidential Resources," as described above. Although the FIT Care Team itself is not a Confidential Resource, a report made to the individuals who otherwise sit on the FIT Care Team and who are "Confidential Resources" will be kept confidential and not reported to the FIT Care Team without the consent of the victim.

class schedules, and/or other course-related adjustments, as appropriate. Academic adjustments will be considered in consultation with the individual's professors (as may be necessary, appropriate, and with prior notice to the individual) in order to determine what, if any, course-related adjustments are possible in light of the demands and learning outcomes of the course. Supportive measures are non-disciplinary and non-punitive. Certain types of supportive measures may not be appropriate or available in all cases. The right to supportive measures does not guarantee that an individual will receive his or her ideal or preferred measure or adjustment.

ii. Emergency Removal

FIT retains the authority to remove a respondent from FIT's program or activity on an emergency basis, where FIT (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 FIT determines such removal is necessary, the respondent will be provided notice and an opportunity to challenge the decision immediately following the removal. Challenges to emergency removals must be in writing and be submitted to the Title IX Coordinator. The college's decision to remove the respondent on an emergency basis will be reviewed by a 3-person panel who will issue a written determination on whether the emergency removal will remain in effect or not. The written determination will be issued within five (5) days of receipt of the respondent's challenge.

iii. Administrative Leave

FIT retains the authority to place a non-student employee respondent on administrative leave during the Title IX Grievance Process, consistent with college policy and/or the FIT/UCE of FIT Collective Bargaining Agreement as may be appropriate.

F. The Title IX Grievance Process

i. Filing a Formal Complaint

The timeframe for the Title IX Grievance Process begins with the filing of a Formal Complaint. The Grievance Process will be concluded within a reasonably prompt manner, and no longer than ninety (90) school business days after the filing of the Formal Complaint, provided that the process may be extended for a good reason, including but not limited to the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities. The procedure for applying for extensions is described below.

To file a Formal Complaint, a complainant must provide the Title IX Coordinator a written, signed complaint describing the facts alleged. Complainants are only able to file a Formal Complaint under this policy if they are currently participating in, or attempting to participate in, the education programs or activities of FIT, including as an employee functioning as an employee of the college. For complainants who do not meet this criteria, the college will utilize existing procedures in the *Code of Student Conduct* or *Sexual Misconduct Response policy* or other relevant college policy.

If a complainant does not wish to make a Formal Complaint, the Title IX Coordinator may determine a Formal Complaint is necessary. FIT will inform the complainant of this decision in writing, and the complainant need not participate in the process further but will receive all notices issued under this policy and process herein.

Nothing in this policy, the *Code of Student Conduct*, or the *Sexual Misconduct Response policy* prevents a complainant from seeking the assistance of state or local law enforcement alongside the appropriate on-campus process.

ii. Informal Resolution

A complainant who files a Formal Complaint may elect, at any time, to address the matter through the Institution's Informal Resolution Process for conduct covered by this policy. All parties to a Formal Complaint must agree to enter the Informal Resolution Process through an informed written consent. See Informal Resolution process in Related Documents

iii. Multi-Party Situations

The college may consolidate Formal Complaints alleging covered sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of covered sexual harassment arise out of the same facts or circumstances.

iv. Determining Jurisdiction

The Title IX Coordinator will determine if the instant Title IX Grievance Process should apply to a Formal Complaint.

The procedures outlined in this policy will apply when all the following elements are met, in the reasonable determination of the Title IX Coordinator:

- a) The conduct is alleged to have occurred on or after August 14, 2020;
- b) The conduct is alleged to have occurred in the United States;
- c) The conduct is alleged to have occurred in FIT education program or activity; and
- d) The alleged conduct, if true, would constitute covered sexual harassment as defined in this policy.

v. Allegations Potentially Falling Under Two Policies

If the alleged conduct, if true, includes conduct that would constitute covered sexual harassment and conduct that would not constitute covered sexual harassment, this Title IX Grievance policy will be applied to the investigation and adjudication of only the allegations that constitute covered sexual harassment. Conduct not covered by this policy may be reviewed under other relevant college policy, including but limited to the *Sexual Misconduct Response policy*, the *Employee Code of Ethical Conduct*, the *Nondiscrimination and Anti-Harassment policy*, and/or the *Code of Student Conduct*.

vi. Mandatory Dismissal

If any one of the above four jurisdictional elements are not met, the Title IX Coordinator will notify the parties that the Formal Complaint is being dismissed for the purposes of

this Title IX Grievance policy. Each party may appeal this dismissal using the procedure outlined in “Appeals,” below.

vii. Discretionary Dismissal

The Title IX Coordinator may dismiss a Formal Complaint brought under this Title IX Grievance policy, or any specific allegations raised within that Formal Complaint, at any time during the investigation or hearing, if:

- a) 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;
- b) The respondent is no longer enrolled or employed by FIT; or
- c) If specific circumstances prevent FIT from gathering evidence sufficient to reach a determination regarding the Formal Complaint or allegations within the Formal Complaint.

Any party may appeal a dismissal determination using the process set forth in “Appeals” below.

viii. Notice of Dismissal

Upon reaching a decision that the Formal Complaint will be dismissed, the institution will promptly send written notice of the dismissal of the Formal Complaint or any specific allegation within the Formal Complaint, and the reason for the dismissal, simultaneously to the parties through their institutional email accounts. It is the responsibility of parties to maintain and regularly check their email accounts.

ix. Notice of Removal

Upon dismissal for the purposes of Title IX, FIT retains discretion to utilize the *Code of Student Conduct*, the *Sexual Misconduct Response policy* or other relevant college policy to determine if a violation of those policies has occurred. If so, FIT will promptly send written notice of the dismissal of the Formal Complaint under the Title IX Grievance Process and removal of the allegations to the conduct process under the *Student Code of Conduct* or the *Sexual Misconduct Response policy* or other relevant college policy.

x. Notice of Allegations

The Title IX Coordinator 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 parties will be notified by their institutional email accounts if they are a student or employee, and by other reasonable means if they are neither.

The institution will provide sufficient time for the parties to review the Notice of Allegations and prepare a response before any initial interview.

The Title IX Coordinator may determine that the Formal Complaint must be dismissed on the mandatory grounds identified above and will issue a Notice of 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 Dismissal in conjunction with, or in separate correspondence after, the Notice of Allegations.

xi. Contents of Notice

The Notice of Allegations will include the following:

- a) Notice of the institution's Title IX Grievance Process and optional Informal Resolution Process and a copy of the process.
- b) Notice of the allegations potentially constituting covered sexual harassment, and sufficient details known at the time the Notice is issued, such as the identities of the parties involved in the incident, if known, including the complainant; the conduct allegedly constituting covered sexual harassment; and the date and location of the alleged incident, if known.
- c) 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 grievance process.
- d) A statement that the parties may have an advisor of their choice, who may be, **but is not required to be**, an attorney, as required under 34 C.F.R. § 106.45(b)(5)(iv);
- e) A statement that before the conclusion of the investigation, 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, including the evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility, and evidence that both tends to prove or disprove the allegations, whether obtained from a party or other source, as required under 34 C.F.R. § 106.45(b)(5)(vi);
- f) The college's *Code of Student Conduct, Nondiscrimination and Anti-Harassment policy*, and *Sexual Misconduct policy, Employee Code of Ethical Conduct* prohibit knowingly making false statements or knowingly submitting false information during a college grievance process.

xii. Ongoing Notice

If, in the course of an investigation, the institution decides to investigate allegations about the complainant or respondent that are not included in the Notice of Allegations and are otherwise covered "sexual harassment" falling within the Title IX Grievance policy, the institution will notify the parties whose identities are known of the additional allegations by their institutional email accounts or other reasonable means.

The parties will be provided sufficient time to review the additional allegations to prepare a response before any initial interview regarding those additional charges.

xiii. Advisor of Choice and Participation of Advisor of Choice

FIT will provide the parties equal access to advisors and support persons; any restrictions on advisor participation will be applied equally.

FIT has a long-standing practice of requiring students to participate in the process directly and not through an advocate or representative. Students participating as a complainant or respondent in this process may be accompanied by an Advisor of Choice to any meeting or hearing to which they are required or are eligible to attend. The

Advisor of Choice is not an advocate. Except where explicitly stated in this policy, and as is consistent with the Final Rule, Advisors of Choice shall not participate directly in the process as per standard policy and practice of FIT.

FIT's obligations to investigate and adjudicate in a prompt timeframe under Title IX and other college policies apply to matters governed under this policy, and FIT cannot agree to extensive delays solely to accommodate the schedule of an Advisor of Choice. The determination of what is reasonable shall be made by the Title IX Coordinator or designee. FIT will not be obligated to delay a meeting or hearing under this process more than five (5) days due to the unavailability of an Advisor of Choice, and may offer the party the opportunity to obtain a different Advisor of Choice or utilize one provided by FIT.

xiv. Notice of Meetings and Interviews

FIT will provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate.

xv. Delays

Each party may request a one-time delay in the Grievance Process of up to five (5) days for good cause (granted or denied in the sole judgment of the Title IX Coordinator or designee) provided that the requestor provides reasonable notice and the delay does not overly inconvenience other parties.

For example, a request to take a five day pause made an hour before a hearing for which multiple parties and their advisors have traveled to and prepared for shall generally not be granted, while a request for a five day pause in the middle of investigation interviews to allow a party to obtain certain documentary evidence shall generally be granted.

The Title IX Coordinator shall have sole judgment to grant further pauses in the process.

xvi. Investigations

a) General Rules of Investigations

The Title IX Coordinator will perform an investigation under a reasonably prompt timeframe of the conduct alleged to constitute covered sexual harassment after issuing the Notice of Allegations.

FIT and not the parties, has the burden of proof and the burden of gathering evidence, i.e. the responsibility of showing a violation of this policy has occurred. This burden does not rest with either party, and either party may decide not to share their account of what occurred or may decide not to participate in an investigation or hearing. This does not shift the burden of proof away from FIT and does not indicate responsibility.

FIT cannot access, consider, or disclose medical records without a waiver from the party (or parent, if applicable) to whom the records belong or of whom the

records include information. FIT will provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence, (i.e. evidence that tends to prove and disprove the allegations) as described below.

b) Inspection and Review of Evidence

Prior to the completion of the investigation, the parties will have an equal opportunity to inspect and review the evidence obtained through the investigation. The purpose of the inspection and review process is to allow each party the equal opportunity to meaningfully respond to the evidence prior to conclusion of the investigation.

Evidence that will be available for inspection and review by the parties will be any evidence that is directly related to the allegations raised in the Formal Complaint. It will include any:

1. Evidence that is relevant, even if that evidence does not end up being relied upon by the institution in making a determination regarding responsibility;
2. Inculpatory or exculpatory evidence (i.e. evidence that tends to prove or disprove the allegations) that is directly related to the allegations, whether obtained from a party or other source.

All parties must submit any evidence they would like the investigator to consider prior to when the parties' time to inspect and review evidence begins. *See, 85 Fed. Reg. 30026, 30307 (May 19, 2020).*

The institution will provide each party and each party's advisor, if any, access to a copy of the evidence file. FIT is not under an obligation to use any specific process or technology to provide the evidence and shall have the sole discretion in terms of determining format and any restrictions or limitations on access.

The parties will have ten (10) business days to inspect and review the evidence and submit a written response by email to the investigator. The investigator will consider the parties' written responses before completing the Investigative Report.

The institution will provide access to copies of the parties' written responses to the investigator to all parties and their advisors, if any. *See, 85 Fed. Reg. 30026, 30307 (May 19, 2020).*

The institution will provide the parties up to ten (10) business days to provide a response, after which the investigator will not be required to accept a late submission.

Any evidence subject to inspection and review will be available at any hearing, including for purposes of cross-examination.

The parties and their advisors must sign an agreement not to disseminate any of the evidence subject to inspection and review or use such evidence for any purpose unrelated to the Title IX grievance process. *See*, 85 Fed. Reg. 30026, 30435 (May 19, 2020).

The parties and their advisors agree not to photograph or otherwise copy the evidence. *See*, 85 Fed. Reg. 30026, 30435 (May 19, 2020).

c) Inclusion of Evidence Not Directly Related to the Allegations

Evidence obtained in the investigation that is determined in the reasoned judgment of the investigator not to be directly related to the allegations in the Formal Complaint will not be disclosed, or may be appropriately redacted before the parties' inspection to avoid disclosure of personally identifiable information of a student. Any evidence obtained in the investigation that is kept from disclosure or appropriately redacted will be documented in a "privilege log" that may be reviewed by the parties and their advisors, if any. *See*, 85 Fed. Reg. 30026, 30438 (May 19, 2020).

xvii. Investigative Report

The Title IX Coordinator will create an Investigative Report that fairly summarizes relevant evidence, and will provide the parties with access to the Report at least ten (10) school business days prior the hearing in an electronic format or a hard copy for each party's review and written response.

The Investigative Report is not intended to catalog all evidence obtained by the investigator, but only to provide a fair summary of that evidence.

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.

The investigator may redact irrelevant information from the Investigative Report when that information is contained in documents or evidence that is/are otherwise relevant. *See*, 85 Fed. Reg. 30026, 30304 (May 19, 2020).

xviii. Hearing

a) General Rules of Hearings

FIT will not issue a disciplinary sanction arising from an allegation of covered sexual harassment pursuant to this policy without holding a live hearing unless otherwise resolved through the Informal Resolution process.

The live hearing may be conducted with all parties physically present in the same geographic location, or, at FIT's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually through a video conferencing option. This technology will enable participants simultaneously to see and hear each other. At its discretion, FIT may delay or adjourn a hearing based on technological errors not within a party's control.

All proceedings will be audio recorded. A transcript of the recording will be made available to the parties for inspection and review.

Prior to obtaining access to any evidence, including the transcript, the parties and their advisors must sign an agreement not to disseminate any of the testimony heard or evidence obtained in the hearing or use such testimony or evidence for any purpose unrelated to the Title IX Grievance Process. Once signed, this Agreement may not be withdrawn *See*, 85 Fed. Reg. 30026, 30435 (May 19, 2020).

b) Continuances or Granting Extensions

FIT may determine that multiple sessions or a continuance (i.e. a pause on the continuation of the hearing until a later date or time) is needed to complete a hearing. If so, FIT will notify all participants and endeavor to accommodate all participants' schedules and complete the hearing as promptly as practicable.

c) Newly-Discovered Evidence

As a general rule, no new evidence or witnesses may be submitted during the live hearing.

If a party identifies new evidence or witnesses that were not reasonably available prior to the live hearing and could affect the outcome of the matter, the party may request that such evidence or witnesses be considered at the live hearing.

The hearing panel will consider this request and make a determination regarding (1) whether such evidence or witness testimony was actually unavailable by reasonable effort prior to the hearing, and (2) whether such evidence or witness testimony could affect the outcome of the matter. The party offering the newly-discovered evidence or witness has the burden of establishing these questions by the preponderance of the evidence.

If the hearing panel answers in the affirmative to both questions, then the parties will be granted a reasonable pause in the hearing to review the evidence or prepare for questioning of the witness.

d) Participants in the Live Hearing

Live hearings are not public, and the only individuals permitted to participate in the hearing are as follows:

Complainant and Respondent ("the parties")

1. The parties cannot waive the right to a live hearing.
2. FIT may still proceed with the live hearing in the absence of a party, and may reach a determination of responsibility in their absence, including through any evidence gathered that does not constitute a "statement" by that party. *See*, 85 Fed. Reg. 30026, 30361 (May 19, 2020).
 - a. For example, a verbal or written statement constituting part or all of the sexual harassment itself is not a "prior statement" that

must be excluded if the maker of the statement does not submit to cross-examination about that statement. In other words, a prior statement would not include a document, audio recording, audiovisual reading, and digital media, including but not limited to text messages, emails, and social media postings, that constitute the conduct alleged to have been the act of sexual harassment under the formal complaint. *See*, OCR Blog (May 22, 2020), available at <https://www2.ed.gov/about/offices/list/ocr/blog/20200522.html>

3. FIT will not threaten, coerce, intimidate, or discriminate against any party in an attempt to secure the party's participation. *See*, 34 C.F.R. § 106.71; *see also* 85 Fed. Reg. 30026, 30216 (May 19, 2020).
4. If a party does not submit to cross-examination, the decision-maker cannot rely on any prior statements made by that party in reaching a determination regarding responsibility, but may reach a determination regarding responsibility based on evidence that does not constitute a "statement" by that party.
5. The decision-maker cannot draw an inference about the determination regarding responsibility based solely on a party's absence from the live hearing or refusal to answer cross-examination or other questions. *See*, 34 C.F.R. §106.45(b)(6)(i).
6. The parties shall be subject to FIT's Rules of Decorum.

The Decision-Maker

1. The hearing body will consist of a panel of three (3) with one panel member serving as chairperson.
2. No member of the hearing panel will also have served as the Title IX Coordinator, Title IX investigator, or advisor to any party in the case, nor may any member of the hearing panel serve on the appeals body in the case.
3. No member of the hearing panel 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.
4. The hearing panel will be trained on topics including how to serve impartially, issues of relevance, including how to apply the rape shield protections provided for complainants, and any technology to be used at the hearing.
5. The parties will have an opportunity to raise any objections regarding a panel member's actual or perceived conflicts of interest or bias at the commencement of the live hearing.

Advisor of Choice

1. The parties have the right to select an advisor of their choice, who may be, but does not have to be, an attorney.
2. The advisor of choice may accompany the parties to any meeting or hearing they are permitted to attend, but may not speak for the party, except for the purpose of cross-examination.

3. The parties are not permitted to personally conduct cross-examination; it must be conducted by the advisor. As a result, if a party does not select an advisor, the college will select an advisor to serve in this role for the limited purpose of conducting the cross-examination at no fee or charge to the party.
4. The advisor is not prohibited from having 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.
5. The advisor is not prohibited from being a witness in the matter.
6. If a party does not attend the live hearing, the party's advisor may appear and conduct cross-examination on their behalf. *See*, 85 Fed. Reg. 30026, 30340 (May 19, 2020).
7. If neither a party nor their advisor appear at the hearing, FIT will provide an advisor to appear on behalf of the non-appearing party. *See*, 85 Fed. Reg. 30026, 30339-40 (May 19, 2020).
8. Advisors shall be subject to the college's Rules of Decorum, and may be removed upon violation of those Rules.

Witnesses

1. Witnesses cannot be compelled to participate in the live hearing, and have the right not to participate in the hearing. *See*, 85 Fed. Reg. 30026, 30360 (May 19, 2020).
2. If a witness does not submit to cross-examination, as described below, the decision-maker cannot rely on any statements made by that witness in reaching a determination regarding responsibility, including any statement relayed by the absent witness to a witness or party who testifies at the live hearing. *See*, 85 Fed. Reg. 30026, 30347 (May 19, 2020).
3. Witnesses shall be subject to the college's Rules of Decorum.

xix. Hearing Procedures

For all live hearings conducted under this Title IX Grievance Process, the procedure will be as follows:

- a) The hearing panel chairperson will open and establish rules and expectations for the hearing;
- b) The parties will each be given the opportunity to provide opening statements;
- c) The hearing panel may ask relevant questions of the parties and witnesses;
- d) Parties will be given the opportunity for live cross-examination after the panel conducts its initial round of questioning; during the parties' cross-examination, the panel will have the authority to pause cross-examination at any time for the purposes of asking the panel's own follow up questions; and any time necessary in order to enforce the established rules of decorum and relevance.
- e) Should a party or the party's advisor choose not to cross-examine a party or witness, the party shall affirmatively waive cross-examination through a written or oral statement to the panel. A party's waiver of cross-examination does not eliminate the ability of the panel to consider statements made by the party.

xx. Live Cross-Examination Procedures

Each party's advisor will conduct live cross-examination of the other party or parties and witnesses. During this live-cross-examination the advisor will ask the other party or parties and witnesses relevant questions and follow-up questions, including questions that challenge credibility directly, orally, and in real time.

Before any cross-examination question is answered, the panel will determine if the question is relevant. Cross-examination questions that are duplicative of those already asked, including by the panel, may be deemed irrelevant if they have been asked and answered.

xxi. Review of Recording

A transcript of the audio recording of the hearing will be available for review by the parties within ten (10) school business days, unless there are any extenuating circumstances. The recording of the hearing will not be provided to parties or advisors of choice.

xxii. Determination Regarding Responsibility

a) Standard of Proof

FIT uses the preponderance of the evidence standard for investigations and determinations regarding responsibility of formal complaints covered under this policy. This means that the investigation and hearing determine whether it is more likely than not that a violation of this policy occurred.

b) General Considerations for Evaluating Testimony and Evidence

While the opportunity for cross-examination is required in all Title IX hearings, determinations regarding responsibility may be based in part, or entirely, on documentary, audiovisual, and digital evidence, as warranted in the reasoned judgment of the Decision-maker.

Decision-makers shall not draw inferences regarding a party or witness' credibility based on the party or witness' status as a complainant, respondent, or witness, nor shall it base its judgments in stereotypes about how a party or witness would or should act under the circumstances.

The Final Rule requires that FIT allow parties to call "expert witnesses" for direct and cross-examination. While the expert witness will be allowed to testify and be cross-examined as required by the Final Rule, the decision-maker will be instructed to afford lower weight to non-factual testimony of the expert relative to fact witnesses, and any expert testimony that is not directed to the specific facts that occurred in the case will be afforded lower weight relative to fact witnesses, regardless of whether the expert witness testimony is the subject of cross-examination and regardless of whether all parties present experts as witnesses.

The Final Rule requires that FIT allow parties to call character witnesses to testify. While the character witnesses will be allowed to testify and be crossed as required by the Final Rule, the panel will be instructed to afford very low weight to any non-factual character testimony of any witness.

The Final Rule requires that FIT admit and allow testimony regarding polygraph tests (“lie detector tests”) and other procedures that are outside of standard use in academic and non-academic conduct processes. While the processes and testimony about them will be allowed and will be cross-examined as required by the Final Rule, the panel will be instructed to afford lower weight to such processes relative to the testimony of fact witnesses.

Where a party or witness’ conduct or statements demonstrate that the party or witness is engaging in retaliatory conduct, including but not limited to witness tampering and intimidation, the panel may draw an adverse inference as to that party or witness’ credibility.

c) Components of the Determination Regarding Responsibility

The written Determination Regarding Responsibility will be issued simultaneously to all parties through their institution email account, or other reasonable means as necessary. The Determination will include:

1. Identification of the allegations potentially constituting covered sexual harassment;
2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
3. Findings of fact supporting the determination;
4. Conclusions regarding which section of this policy or other college policy, if any, the respondent has or has not violated.
5. For each allegation:
 - a. A statement of, and rationale for, a determination regarding responsibility;
 - b. A statement of, and rationale for, any disciplinary sanctions the recipient imposes on the respondent; and
 - c. A statement of, and rationale for, whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and
6. The recipient’s procedures and the permitted reasons for the complainant and respondent to appeal (described below in “Appeal”).

d) Timeline of Determination Regarding Responsibility

If there are no extenuating circumstances, the determination regarding responsibility will be issued by FIT within ten (10) school business days of the completion of the hearing.

e) Finality

The determination regarding responsibility becomes final either on the date that the institution provides the parties with the written determination of the result of the appeal, if an appeal is filed consistent with the procedures and timeline outlined in “Appeals” below, or if an appeal is not filed, the date on which the opportunity to appeal expires.

xxiii. Appeals

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 five (5) school business days of being notified of the decision, indicating the grounds for the appeal.

The limited grounds for appeal available are as follows:

- a) Procedural irregularity that affected the outcome of the matter (i.e. a failure to follow the institution’s own procedures);
- b) 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;
- c) 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.
- d) The sanction is objectively unreasonable in light of the facts and circumstances.

The submission of appeal stays any sanctions for the pendency of an appeal. Supportive measures remain available during the pendency of the appeal.

If a party appeals, the college will as soon as practicable notify the other party in writing of the appeal, however, the time for appeal shall be offered equitably to all parties and shall not be extended for any party solely because the other party filed an appeal.

Appeals should be submitted in electronic form using ARIAL or TIMES NEW ROMAN, 12-point font, and single-spaced. Appeals should use footnotes, not endnotes. Appeals that do not meet these standards may be returned to the party for correction, but the time for appeal will not be extended unless there is evidence that technical malfunction caused the appeal document not to meet these standards.

Appeals will be decided by an appeal panel, with members that are free of conflict of interest and bias, and who have not served as investigator, Title IX Coordinator, or hearing decisionmaker in the same matter.

Outcome of appeal will be provided in writing simultaneously to both parties and include rationale for the decision.

xxiv. Retaliation

FIT will keep the identity of any individual who has made a report or complaint of sex discrimination confidential, including the identity of any individual who has made a report or filed a Formal Complaint of sexual harassment under this Title IX Grievance policy, any complainant, any individual who has been reported to be the perpetrator of

sex discrimination, any respondent, and any witness, except as permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding under this Title IX Grievance policy.

No person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX of the Education Amendments of 1972 or its implementing regulations.

No person may intimidate, threaten, coerce, or discriminate against any individual because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding or hearing under this Title IX Grievance policy.

Any intimidation, threats, coercion, or discrimination, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations constitutes retaliation. This includes any charges filed against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but that arise from the same facts or circumstances as a report or complaint of sex discrimination or a report or Formal Complaint of sexual harassment.

The college has an Alcohol and/or Drug Use Amnesty policy in its *Sexual Misconduct Response policy* at page 13, which applies to cases reviewed under this policy as well. The Alcohol and/or Drug Use Amnesty policy states:

The health and safety of every student at FIT is of utmost importance. FIT recognizes that students who have been drinking and/or using drugs (whether such use is voluntary or involuntary) at the time that sexual misconduct, including but not limited to domestic violence, dating violence, stalking, or sexual assault, occurs may be hesitant to report such incidents due to fear of potential consequences for their own conduct. FIT strongly encourages students to report incidents of domestic violence, dating violence, stalking, or sexual assault to campus officials. A bystander acting in good faith or a reporting individual acting in good faith that discloses any incident of domestic violence, dating violence, stalking, or sexual assault to FIT officials or law enforcement will not be subject to FIT's conduct disciplinary action for violations of alcohol and/or drug use policies occurring at or near the time of the domestic violence, dating violence, stalking, or sexual assault.

Complaints alleging retaliation may be filed with the college's Title IX Coordinator referenced above pursuant to the college's *Employee Code of Ethical Conduct, Nondiscrimination and Anti-Harassment policy*, and/or *Sexual Misconduct Response policy*.

Related Policies

- [Code of Student Conduct](#)

- [Employee Code of Ethical Conduct](#)
- [Sexual Misconduct Response](#)
- [Nondiscrimination and Anti-Harassment](#)

Related Documents

- [FIT's Rules of Decorum](#)
- [Informal Resolution Process for Title IX Cases](#)
- [Title IX Complaint Process Form](#)

Contacts

- **Title IX Coordinator (Affirmative Action Officer)**
titleix@fitnyc.edu
 (212) 217-3360
 333 7th Avenue, 16th Floor
- **Vice President for Human Resource Management and Labor Relations**
 (212) 217-3650
 333 7th Avenue, 16th Floor
- **Dean of Students**
 Enrollment Management and Student Success
Dean_of_students@fitnyc.edu
 (212) 217-3800
 Business and Liberal Arts Center, Room B221
- **Department of Public Safety**
 (212) 217-7777
 Pomerantz Center, Room D-442
- **Counseling Center**
 (212) 217-4260
 Dubinsky Student Center, Room A-212B
- **Employee Assistance Program (EAP)**
 (212) 217-5600
 Pomerantz Center, Lower Level, Room DC35
- **FIT CARE Team**
 Health Services
 (212) 217-4190
 Dubinsky Student Center, Room A-402
- **Residential Life**
 (212) 217-3900
 210 West 27th Street

- **Student Life**
(212) 217-4130
Dubinsky Student Center, Room A-713