

MSU RVSM/TIX Policy Training

Fall 2024

2024 Policy/Regulations?

Legal Challenges/Partial Nationwide Injunction

- Enjoined in 26 states.
- Enjoined individually for hundreds of individual institutions (INCLUDING MSU).
- Applications for partial stay brought from the 5th and 6th Circuit Courts of Appeal to the Supreme Court *denied*.

Maintenance of Prior Policy/What's Next?

- MSU, per Ed. OCR guidance, will maintain 2020 regulations-compliant policy
 - MSU will continue to update policy and consider addition of non-contradictory additions/changes, so continue to suggest updates and changes
- If/when injunction is lifted, MSU will impose 2024 regulations-complaint policy

Role of Counsel/Defense & Indemnification (Internal)

Shannon Torres

Reporting/Intake

Reporting, Interim and Supportive Measures, Initial Assessment

Reporting – To?

1. Confidential Resources

- MSU Center for Survivors, (<https://centerforsurvivors.msu.edu/>)
- MSU Safe Place (<http://safeplace.msu.edu>)
- MSU Employee Assistance Program (<http://eap.msu.edu>)
- University Ombudsperson (<https://ombud.msu.edu/>)
- MSU Counseling and Psychiatric Services (CAPS) (<http://caps.msu.edu/>)
- MSU Sexual Assault Health Care Program (<https://centerforsurvivors.msu.edu/msu-sexual-assault-healthcare-program/>)

2. Police

3. MSU OCR

Reporting – Obligatory Reporting

University faculty, staff, academic staff, and volunteers, unless specifically exempted under the Mandatory Reporting for Relationship Violence, Sexual Misconduct and Stalking Policy (RVSM Mandatory Reporting Policy) , must promptly report incidents of prohibited conduct that they observe or learn about in their professional capacity or in the context of their work and that occurred at a University-sponsored event or on University property or involves a University community member (student, employee, MSU Health Care patient, or other individuals) with respect to conduct that may have occurred while they were a University community member.

The RVSM Mandatory Reporting Policy sets forth the specific reporting obligations for employees and volunteers and can be found [here](#). In accordance with University policies and applicable union collective bargaining agreements, failure to report as required may result in corrective or disciplinary action, up to and including dismissal.

Interim and Supportive Measures

Supportive Measures

- Non-disciplinary, non-punitive individualized services as appropriate, as reasonably available, and without fee or charge to a claimant or a respondent before or after the filing of a formal complaint or where no formal complaint has been filed, and regardless of whether the claimant chooses to speak with MSU DPPS or other law enforcement
- Supportive measures are designed to restore or preserve equal access to MSU's education programs or activities, including but not limited to protecting the safety of all parties or the University's educational or employment environment or to deter conduct prohibited under this policy. Supportive measures will not unreasonably burden the other party.
- Supportive measures may include referrals to counseling; extensions of deadlines or other course-related adjustments; modifications of work or class schedules; mutual no contact directives; ASMSU Safe Ride services; changes in work or housing locations; leaves of absence; increased security and monitoring of certain areas of the campus; and other similar measures.
- To the extent possible, the University will not disclose the provision of supportive measures to a claimant or respondent unless necessary to provide the supportive measures.

Interim and Supportive Measures (cont.)

- Emergency Removal of Students - The University may remove any student from its program or activity on an emergency basis if there is an immediate threat to the physical safety of any students or other individuals arising from allegations under this Policy. Prior to removal, the University must undertake an individualized safety and risk analysis, and, where such analysis determines a credible safety risk exists, provide the party with notice and an opportunity to challenge the decision immediately following the removal.

Interim and Supportive Measures (cont.)

- Administrative Leave of Employees: The University may place non-student employees on administrative leave prior to or following the filing of formal complaint and through final resolution of the formal grievance process. More information regarding administrative leave of faculty and academic staff may be found at https://hr.msu.edu/policies-procedures/faculty-academic-staff/faculty-handbook/tenure_discipline_dismissal.html. For information regarding staff, please contact the MSU Office of Employee Relations.

Interim and Supportive Measures (cont.)

- Other Interim Measures – Other interim measures may be available on a case-by-case basis. Any interim employment action will be taken consistent with the University’s rights as an employer.
- Violation of Interim Measures – Parties who fail to abide by interim measures may be subject to discipline.

Initial Assessment

1. OCR receives report
2. Outreach to claimant/determination whether Clery Reportable
 - notify the claimant in writing about the availability of supportive measures, confidential resources, and other resources with or without the filing of a formal complaint; the availability of University-provided advisors; the process for filing a formal complaint; and the opportunity to meet with OCR to discuss options
3. Preliminary Information Gathering/Review
 - Potential closure if (1) a claimant cannot be identified; (2) specific circumstances prevent gathering information sufficient to reach a determination as to whether the reported conduct is covered under this Policy, which may include a claimant's declining to file a formal complaint or not responding to OCR's outreach; or (3) the report is not covered under the criteria for a formal grievance process, described below.
 - Claimant or the Title IX Coordinator may file a formal complaint after a report has been moved to closure. At such point in time, OCR will re-open the report.
 - OCR may refer reports, including information contained in a report, to another unit on campus if appropriate for consideration under other University policies and laws. Other units include Faculty and Academic Staff Affairs, Office for Employee Relations, and the Office of Student Support and Accountability.

The Formal Grievance Process

Formal Complaint, Dismissal, Referral, Investigation, Hearing, Appeals

Formal Complaint

- Formal grievance initiated when a formal complaint is filed by a claimant or the Title IX Coordinator
 - Formal Complaint alleges prohibited conduct against the respondent(s) and requests that the University investigate the allegation(s). Claimant is not required to use the formal complaint template
 - Title IX Coordinator will consider filing a formal complaint if employee is alleged to have engaged in prohibited conduct
 - May refer the report to the respondent's unit and FASA/OER
 - More than one allegation against employee with no finding, assigned to outside investigator

Dismissal – Title IX

- a. The formal complaint must be dismissed under Title IX if the conduct alleged does not meet all of the coverage requirements in Section XII.E.2 and/or the allegations would not, even if proven, meet the definition of Title IX Sexual Harassment.
- b. The formal complaint may be dismissed if (i) the claimant requests that the complaint be withdrawn, or for Title IX Coordinator signed complaints, the Title IX Coordinator withdraws the complaint, or (ii) specific circumstances prevent gathering evidence sufficient to reach a determination.
- c. Appeal: Parties can submit an appeal to the Equity Review Officer within five (5) business days.

Dismissal – RVSM

- a. The formal complaint must be dismissed if the conduct alleged does not meet all of the coverage requirements in Section XII.E.1 and/or the allegations would not, even if proven, meet a definition of prohibited conduct.
- b. The formal complaint may be dismissed if (i) the claimant requests that the complaint be withdrawn, or for Title IX Coordinator signed complaints, the Title IX Coordinator withdraws the complaint; (ii) neither claimant nor respondent are affiliated with the University at the time of the filing of the formal complaint; or (iii) specific circumstances prevent gathering evidence sufficient to reach a determination.
- c. Appeal: Parties can submit an appeal to the Equity Review Officer within five (5) business days.

Referrals of Other Forms of Prohibited Conduct

If a report also implicates other forms of conduct prohibited by the University beyond conduct prohibited by this Policy, the conduct may be referred to the appropriate University office during or after the allegations set forth in the formal complaint are resolved, except those circumstances covered under limited immunity and as long as such referral does not constitute retaliation as prohibited by this Policy.

Investigation Overview

- Timeline – 90 days w/extension for good cause
- Equity – What we do for one, we do for the other
- Presumption of non-responsibility
 - Only overcome if preponderance of evidence supports finding of violation at conclusion of grievance process
- Preponderance of Evidence
 - respondent will be found responsible if, based upon all relevant evidence, it is “more likely true than not” that respondent is responsible for the reported conduct. If the evidence on a particular allegation is equally balanced, then that allegation is not “more likely true than not.”
- No Conflicts of Interest

Investigation Overview (cont.)

- Burden of gathering evidence is on the University
 - But cannot consider treatment records without voluntary written consent of applicable party
- Parties may propose medical or scientific experts in writing before FIR
- Parties permitted to discuss allegations with others
 - Employees cannot violate FERPA
 - All parties should consider impact of sharing on credibility

Investigation Overview (cont.)

- Prior or Subsequent Conduct – Prior or subsequent conduct of the respondent may be considered in determining pattern, knowledge, intent, motive or absence of mistake. For example, evidence of a pattern may be deemed relevant if the prior or subsequent conduct is substantially similar to the conduct under investigation.
- Prior Sexual History – Prohibited, unless:
 - offered to prove that someone other than the respondent committed the reported prohibited behavior; or
 - if the question or evidence concerns sexual behavior between the claimant and the respondent and is offered to prove consent for the reported prohibited conduct.

Investigation Process

- NOI to claimant(s) and respondent(s) within 5 days. Includes specific information from policy.
- Written notice to parties and witnesses of date, time, location, participants, and purpose of all investigative interviews, or other meetings, with sufficient time for the party to prepare to participate in a meaningful way. Generally 5 days.

Investigation Process (cont.)

- Evidence Gathering
 - investigator will gather relevant and available information including, without limitation, electronic or other records of communications between the parties or witnesses, photographs, and/or medical records (subject to the voluntary, written consent of the applicable party)
 - Both claimant(s) and respondent(s) will have an equal opportunity to identify potential witnesses and provide any evidence or other information relevant to the investigation.
- Parties to receive regular, bi-weekly status updates
- Witness statements may be considered as evidence and witnesses are provided an opportunity to review the investigator's summary of their interview

Investigation Process (cont.)

- Review of Evidence and DIR
 - Equal opportunity to review and inspect (1) all evidence (inculpatory and exculpatory) that directly relates to the allegations in the formal complaint, and (2) draft investigative report.
 - 10 business days to respond in writing to the evidence and the draft investigation report, including submitting written, relevant questions that a party wants asked of any party or witness. The investigator will consider the written responses.
- Prepare FIR
 - Fairly summarizing the investigation and relevant evidence directly related to the allegations
 - Same report sent to parties and advisors

Investigation Process (cont.)

- Investigator Finding
 1. No Title IX coverage
 2. The investigation into prohibited conduct has concluded, and
 3. Credibility is not at issue or material to the outcome of the formal complaint.
- Hearing
 - Reported conduct falls within Title IX or if credibility is at issue and material to the outcome of the formal complaint
 - Investigator forwards to RO for final determination
 - Parties and advisors have 10 business days to review and respond in writing to the final investigation report and evidence, including by providing appropriate context and correction, as well as arguments about whether all of the evidence is relevant, the investigator reached a wrong conclusion about the relevance of evidence, or whether relevant evidence has been omitted. Responses forwarded to RO.

Hearing Overview

- Live hearing by RO
 - Determines responsibility, not the same person as TIXC
 - Responsible for maintaining decorum and preventing harassment
 - Provides written notices to parties and witnesses
- Parties may request recusal for cause, conflict of interest, or bias
- Questioning/Cross-Examination
 - directly, orally, and in real time by the party's advisor of choice and never by a party personally
- Video/Audio Recording
- Evidentiary Decisions
- Advisor and Support Person
- Voluntary Participation

Hearing Decision


- Written decision regarding responsibility issued within 60 days w rationale, procedural steps, remedies and sanctions
- Simultaneous notification
- Includes appeal procedures

Appeals

- Claimant(s) and Respondent(s) may file written appeal with ERO within 10 business days of issuance of written decision.
- Bases for appeal
 1. Procedural irregularity that affected the outcome of the matter;
 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;
 3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against claimants or respondents generally or the individual claimant or respondent that affected the outcome of the matter; and/or
 4. The written decision was arbitrary and capricious.

Appeals (cont.)

- Parties have 10 business days to respond in writing
- Investigator/RO may also respond
- ERO issues written decision simultaneously to both parties and advisors within 18 business days of receiving appeal



Purpose and Application of the MSU RVSM/TIX Policy

Why?

MSU's Commitment/Ethic of Care

MSU strives to provide an academic and work environment that fosters the values of safety; mutual respect; dignity; equity; responsibility; and clear and timely communication

Compliance

- Title IX of the Higher Education Amendments of 1972, 20 U.S. C. § 1681 et seq.
- Section 1557 of the Affordable Care Act
- Title VII of the Civil Rights Act of 1964
- The Clery Act
- Other Federal/State laws

Who? (1 of 3)

- faculty
- staff
- academic staff
- students (including graduate students and professional students)
- volunteers, and
- other members of the MSU community

Who? (2 of 3)

MSU RVSM Coverage

- Claimant – individual reported to have been subjected to conduct prohibited by this Policy
- Respondent – individual who has been reported to have engaged in prohibited conduct

Title IX Coverage

- Claimant – individual reported to have been subjected to Title IX Sexual Harassment (as defined above) in the United States; (b) is a student, employee or third party (including patients); and (c) is participating in, or attempting to participate in, the institution's education program or activity at the time of filing a formal complaint...

Who? (3 of 3)

Title IX Coverage (cont.)

- Respondent – individual who has been reported to be the perpetrator of conduct that could constitute Title IX Sexual Harassment

Where?

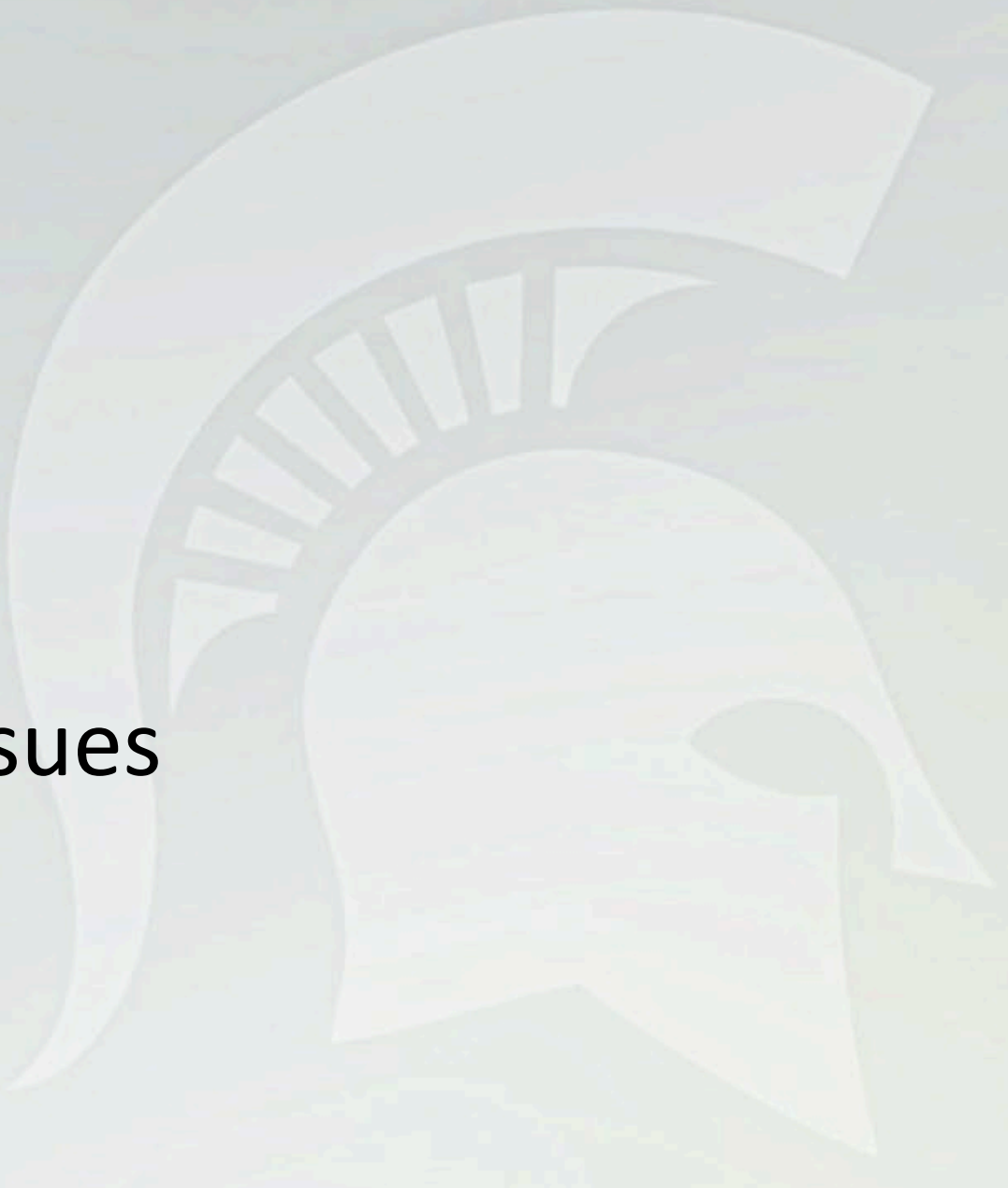
MSU RVSM Coverage

- On Campus
- Off Campus in a University-sponsored program or activity
- Locations including buildings owned or controlled by student organizations officially registered with University Student Affairs and Services
- Off-campus in a program or activity sponsored by a student governing body
- Off-campus and outside of a University-sponsored program or activity but the conduct has continuing adverse effects on the campus or on a University-sponsored program or activity

Title IX Coverage

- Locations, events, or circumstances in which the University exercises substantial control over both the respondent and the context in which the reported Title IX Sexual Harassment occurred or is occurring.
- Locations include buildings owned or controlled by student organizations officially registered with University Student Affairs and Services (officially recognized student organizations). This includes fraternities and sororities registered with University Student Affairs and Services.

Procedural Issues



Relevance

- Evidence is considered relevant if it has a tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in making a determination regarding responsibility.
 - Credibility and prior inconsistent statements
 - Be wary of blanket relevance determinations
- OCR will review and determine the relevance of any provided information and evidence and may determine in its discretion that certain witnesses or other provided information is irrelevant, duplicative or would not lead to relevant information. Evidence of a party's character will not generally be considered relevant.

Consolidation or Separation


- The University may consolidate or separate formal complaints involving more than one claimant or more than one respondent, or if evidence relevant to one incident might be relevant to the others, including where the allegations of prohibited conduct arise out of the same facts or circumstances. When consolidated, complaints proceed through the formal grievance process jointly, but determinations regarding responsibility will be made as to each party and allegation
- Includes consolidation of matters under the ADP

Anonymity

- A claimant cannot be anonymous once a formal complaint is signed.

Privacy

- The University will seek to protect the privacy of parties in compliance with applicable laws and regulations. The University will keep private the identity of any individual who has made a report or formal complaint of prohibited conduct under this Policy; the identity of any claimant; the identity of any respondent; and the identity of any witness.
- The privacy of information exceptions include disclosures that may be permitted by the Family Educational Rights and Privacy Act (FERPA) statute or regulations, are required by law, and/or are necessary to carry out the purposes of this Policy (including unit and HR notifications, providing supportive measures, interim measures, any initial assessment, investigation, hearing, and/or appeal).
- Reports, including the identities of the parties and the reported conduct, may be referred to other units for consideration under additional University policies.
- Additionally, as required by an agreement with the U.S. Department of Education, summaries of all final RVSM and Title IX investigation reports and final determinations involving employee respondents are included in the respondent's personnel file.



Prohibited Conduct

Difference between TIX and RVSM

TIX – Definitions limited to regulatory language

- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

RVSM – Definitions more expansive

- (All conduct covered by Title IX but outside of certain coverage criterion)
- Sexual Exploitation

Sexual Harassment

RVSM Sexual Harassment –

Verbal, written, or physical behavior directed at someone because of that person's sex (actual or perceived), gender, gender identity, gender expression, actual or perceived sexual orientation, sexual identity, or based on gender stereotypes, when that behavior is unwelcome AND is:

- RVSM Quid Pro Quo
- RVSM Hostile Environment

Title IX Sexual Harassment –

Conduct on the basis of sex that satisfies

- TIX Quid Pro Quo
- TIX Hostile Environment
- (Includes Clery Crimes w/
Separate Definitions)
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking

Sexual Harassment – Quid Pro Quo

RVSM

Submission or consent to the behavior is reasonably believed to carry consequences, positive or negative, for the individual's education, employment, University living environment, or participation in a University activity or program.

Title IX

An employee of the University conditioning a provision of aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct.

Sexual Harassment – Hostile Environment

RVSM

Unwelcome behavior is so severe, persistent, **or** pervasive that it causes an unreasonable interference with the individual's work or educational performance by creating an intimidating, hostile, or demeaning environment for employment, education, University living, or participation in a University activity or program. (Subjective belief alone not enough; must be objectively offensive)

Title IX

Unwelcome conduct that is so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the University's education, program, or activity as determined by a reasonable person standard.

Sexual Assault – Non-Consensual Sexual Contact/Fondling

RVSM Non-Consensual Contact

The intentional touching of intimate body parts of another person in a sexual manner without consent, causing another to touch intimate body parts without consent, or the disrobing or exposing of another without consent. Intimate body parts include but are not limited to, the mouth, neck, buttocks, anus, groin, genitalia, or breast; however, sexual contact can occur with any part of the body.

TIX Fondling

The touching of the private body parts of another person for the purpose of sexual gratification without consent

Sexual Assault – Non-Consensual Sexual Penetration

RVSM AND TIX

Non-consensual penetration or attempted penetration of a genital, anal, or oral opening of another person by use of an object, instrument, digit, or other body part. An “object” or “instrument” means anything other than a respondent’s genitalia or other body part. This includes forcing an individual to use an object, instrument, or digit to penetrate another individual as well as oral penetration by a sex organ of another person

Sexual Assault – Incest

RVSM AND TIX

Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by state law.

Sexual Assault – Statutory Rape

RVSM AND TIX

Sexual intercourse, where there is no force or coercion, with a person who is under the statutory age of consent under state law.

RVSM Sexual Exploitation

Taking or attempting to take non-consensual or abusive sexual advantage of another for one's own advantage or benefit, or to benefit or advantage anyone other than the person being exploited. Examples include:

- When legitimate expectation of privacy:
 - Surreptitiously observing or attempting to observe another individual's nudity or sexual activity or allowing another to observe consensual sexual activity without the knowledge and consent of all parties involved, or in which the person observed or induced to perform such act has not attained 18 years of age.
 - The non-consensual recording, sharing, or streaming of images, photography, video, or audio recordings of sexual activity or nudity, or distribution of such without the knowledge and consent of all parties involved, or in which the person recorded, viewed, or induced to perform such act has not attained 18 years of age.
- Exposing one's genitals or inducing another to expose their genitals in non-consensual circumstances, or in which the person induced to perform such act has not attained 18 years of age.
- Inducing incapacitation for the purpose of making another person vulnerable to non-consensual sexual activity.
- Masturbation in public, whether or not genitals are exposed.
- Arranging for others to have non-consensual sexual contact or penetration with a person.
- The recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a sex act induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.

Relationship Violence— Domestic Violence

RVSM Domestic Violence

An act of violence (actual or an attempt to cause physical injury to another) or threat to cause violence to another, committed by an individual who is:

- a current or former spouse or intimate partner of an individual,
- a person with whom the individual shares a child in common,
- a person who is cohabitating with or has cohabited with the individual as a spouse or intimate partner

TIX Domestic Violence

Assault or assault and battery to another person committed by:

- a current or former spouse or intimate partner of the victim,
- a person with whom the victim shares a child in common,
- 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 the domestic or family violence laws under state law, or
- 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 the state.

Relationship Violence— Dating Violence

RVSM Dating Violence

Violence (actual or an attempt to cause physical injury to another) or threat to cause violence committed by a person:

- (1) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- (2) 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.

TIX Dating Violence

Assault or assault and battery committed by a person:

- (1) who is or has been in a social relationship of a romantic or intimate nature with the victim, and
- (2) 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.

Stalking

RVSM Stalking

Engaging in a course of conduct that is directed at a specific person or persons that would cause a reasonable person to:

- feel fear for themselves or for the safety of others, or
- suffer substantial emotional distress.

TIX Stalking

engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- (1) fear for their safety or the safety of others, or
- (2) suffer substantial emotional distress.

Stalking (cont.)

- A “course of conduct” means two or more acts directed at a specific person or persons. In the context of stalking, this can include, but is not limited to, acts in which the respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
- “Substantial emotional distress” means significant mental suffering or anguish that may, but does not necessarily, require medical treatment or professional counseling.
- The term “reasonable person” is a legal term that the courts have generally defined as a prudent, hypothetical person with ordinary sensitivities who embodies a communal ideal of reasonable behavior.

Retaliation

RVSM Retaliation

An act or attempted act taken because of a person's participation (or expectation of participation) in a protected activity that would discourage a reasonable person from engaging in protected activity. Protected activity includes a person's good faith:

- opposition to prohibited conduct
- report of prohibited conduct to the University; or,
- participation (or reasonable expectation of participation) in any manner in an investigation, proceeding, hearing, or supportive measure under this Policy.

TIX Retaliation

Under Title IX, intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or 34 C.F.R. Part 106 constitutes retaliation.

Neither the University nor any other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this Policy, or because the individual has made a report or complaint, provided information, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this Policy.

The exercise of rights protected under the First Amendment does not constitute prohibited retaliation.

Charging an individual with a violation under a separate policy for making a materially false statement in bad faith in the course of a grievance proceeding under this Policy does not constitute prohibited retaliation, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

Consent

Voluntary, willful, and unambiguous agreement to engage in a specific sexual activity during a sexual encounter:

- Consent must be clear and communicated through mutually understandable words or actions that indicate a willingness to participate in the sexual act.
- Consent cannot be gained by ignoring or acting in spite of the objections of another.
- Consent can be withdrawn at any time and for any reason.
- Assumptions about consent or willingness to engage in sexual activity should never be made

Consent (cont.)

Consent cannot be inferred from:

- Silence, passivity, or lack of resistance alone;
- A current or previous dating or sexual relationship (or the existence of such a relationship with anyone else);
- Attire;
- The spending of money;
- Stereotypes;
- Consent given to another person (i.e., consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another person); or
- Consent previously given (i.e., consenting to one sexual act does not imply consent to another sexual act).

Consent (cont.)

- Consent cannot be obtained using physical force, violence, duress, intimidation, coercion or the threat-- expressed or implied-- of bodily injury. Whether a party used such methods to obtain consent will be determined by reference to the perception of a reasonable person found in the same or similar circumstances.
- Consent may never be given by:
 - Individuals under the state age of consent;
 - Mentally disabled persons, if their disability was reasonably knowable to a sexual partner who is not mentally disabled; or
 - Persons who are incapacitated (whether as a result of drugs, alcohol or otherwise), unconscious, asleep or otherwise physically helpless or mentally or physically unable to make informed, rational judgments.
 - The relevant inquiry in determining responsibility is whether the respondent knew or should have known that the claimant was incapacitated when viewed from the position of a sober, reasonable person.