

# **Discrimination, Harassment and Sexual Misconduct Policies and Procedures**



**Introduction to New Policies and Training for  
Investigators, Adjudicators and Appeals  
Personnel**

**October 29 and November 5, 2020**



## HOW DID WE GET HERE?

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- 2011 Dear Colleague Letter – ***RESCINDED***
- 2014 OCR Q&A – ***RESCINDED***
- 2017 OCR Rescission and Guidance
- 2018 Proposed Title IX Regulations
- May 6, 2020 Final Title IX Regulations  
(effective August 14, 2020)



## TRANSITION TO NEW COLGATE POLICIES

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- August 5, 2020 OCR Guidance
- Colgate Implementation:
  - *This Policy is effective as of August 14, 2020, and applies to complaints received on or after that date. Complaints received prior to August 14, 2020 will be addressed pursuant to the Equity Grievance Policy and Equity Grievance Process as previously in effect.*



# SCOPE OF COLGATE STUDENT POLICY AND PROCEDURES

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**Policy:** Covers all forms of discrimination, harassment and sexual misconduct

**Procedures:**

- Alleged discrimination or harassment based upon sex, gender, sexual orientation, or gender identity or expression; sexual assault; sexual exploitation; domestic violence; dating violence; stalking based on sex; or related acts of retaliation: Addressed pursuant to new *Student Sex- or Gender-Based Discrimination and Harassment and Sexual Misconduct Resources and Response Procedures*
- Alleged discrimination or harassment based only on other characteristics protected by applicable law: Addressed pursuant to new *Student Discrimination and Harassment Resources and Response Procedures*



# **NEW GENDER-BASED/ SEXUAL MISCONDUCT PROCEDURES**

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***“Student Non-discrimination, Anti-Harassment, and Sexual Misconduct Policy and Student Sex- or Gender-Based Discrimination and Harassment and Sexual Misconduct Resources and Response Procedures”***

- Apply to complaints by or against a student or student organization
- May apply in other circumstances if required by Title IX



## **SCOPE: GOVERNING LAWS**

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- Title IX (2020 vintage)
- VAWA Amendments to Clery Act (2014)
- New York Education Law Article 129-B (“Enough is Enough”) (2015)



## Basic VAWA

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- Violence Against Women Act (VAWA)
  - Historically, a law designed to increase criminal prosecution of crimes against women
  - 2014 amendments focus on four concepts:
    - Sexual assault
    - Dating violence
    - Domestic violence
    - Stalking
  - Required increase in education/training, additional amounts of notification and policy elements
  - Created “advisor of choice” entitlement



## Basic Enough is Enough

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- State law that went into effect in October 2015 (Article 129-B) – Also focuses on 4 categories (sexual assault, domestic violence, dating violence and stalking)
  - Right to an appeal before a panel if the respondent/accused is a student
  - Right to seek review of interim/corrective measures imposed
  - Single statewide definition of “affirmative consent”
  - Right to written notice in advance of any investigatory or disciplinary meeting
  - Right to have prior sexual history excluded if it involves any person other than the other party to the complaint
  - Right to have mental health diagnosis or treatment excluded
  - Advisor of choice
  - “Student Bill of Rights” and other verbatim policy requirements





## TIX PARAMETERS

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- Scope of covered offenses
- Institutional Education Program or Activity
  - Locations, events, or circumstances where the institution exercises substantial control over both the Respondent and the context in which the conduct at issue is alleged to have occurred
  - Any building owned or controlled by a student organization that is officially recognized by the institution
- Within the United States
- Complainant must be participating or seeking to participate in educational program or activity



## SCOPE OF COLGATE POLICY AND PROCEDURES

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- Title IX Offenses
- VAWA/EIE Offenses
- Other Prohibited Conduct

Same Process applies to all – ***Why??***



# SCOPE OF COLGATE POLICY AND PROCEDURES

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Title IX's "Must Dismiss" Provision:

- TIXC must "dismiss" allegations for purposes of Title IX if it is apparent that the allegations are not within the scope of Title IX:
  - Would not meet USDOE's regulatory definition even if proved
  - Conduct did not occur in the University's education program or activity
  - Conduct did not occur against a person in the United States
- Institutional discretion to process pursuant to non-Title IX provisions of institutional policies



# SCOPE OF COLGATE POLICY AND PROCEDURES

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## Title IX Violations:

- Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

## University Standards Violations:

- Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking
- Sexual Exploitation
- Prohibited Consensual Relationships
- Hate Crimes
- Retaliation

\*\* Also covers discrimination based on sex, gender, sexual orientation, or gender identity or expression



## **TITLE IX VIOLATIONS (Limited by Context)**

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*The designation of conduct or allegations as either “Title IX Violations” or “University Standards Violations” is not a function of the seriousness of the alleged conduct but rather a function of the scope and coverage of Title IX versus the university’s broader obligations under New York Education Law Article 129-B and its discretion to prohibit and discipline a larger scope of inappropriate behavior.*



## **TITLE IX VIOLATIONS (Limited by Context)**

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*In accordance with Title IX as interpreted by the United States Department of Education, the university recognizes the following as conduct violations within the meaning of Title IX, provided that the context and circumstances of the conduct fall within the scope of Title IX. Among other things, this means that the complainant was in the United States at the time of the alleged conduct, that the complainant is participating in or seeking to participate in the university's education program or activity at the time of the complaint, and that the conduct is alleged to have occurred in the context of the university's education program or activity:*



## TITLE IX VIOLATIONS

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- Sexual Harassment (as defined by Title IX)
- Sexual Assault (VAWA (and EIE) definition)
- Domestic Violence (VAWA (and EIE) definition)
- Dating Violence (VAWA (and EIE) definition)
- Stalking (VAWA (and EIE) definition *if based on sex*)

***\*\* Limited to Title IX context***



# TITLE IX VIOLATIONS

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## Sexual Harassment:

- Conduct on the basis of sex, gender, sexual orientation, or gender identity or expression, that satisfies one or more of the following:
  - An employee of the university conditioning the provision of an aid, benefit, or service of the university on an individual's participation in unwelcome sexual conduct (commonly referred to as a "quid pro quo"); or
  - Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively **denies a person equal access** to the university's education program or activity (commonly referred to as a sexually or gender-based "hostile environment")





## TITLE IX VIOLATIONS

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### Sexual Assault:

- ***Non-Consensual Sexual Intercourse:*** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the other person.
- ***Non-Consensual Sexual Contact:*** Any intentional touching, however slight, for purposes of sexual gratification, of the private body parts (including genitalia, anus, groin, breast, inner thigh, or buttocks) of another person without the consent of the other person, including instances where the other person is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity. This may include non-penetrative acts, touching directly or with an object, and/or touching the private body parts of another over clothing.



## TITLE IX VIOLATIONS

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Sexual Assault (cont'd):

- ***Incest:*** Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- ***Statutory Rape:*** Non-forcible sexual intercourse with a person who is under the statutory age of consent. The statutory age of consent in New York is 17.



## TITLE IX VIOLATIONS

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### Dating Violence

- Violence (including but not limited to sexual or physical abuse or the threat of such abuse) committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
- Can include behavior such as coercion, isolation or other forms of emotional, verbal or economic abuse if it reflects a threat of sexual or physical abuse as described above.
- Does not include acts covered under the definition of domestic violence.



# TITLE IX VIOLATIONS

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## Domestic Violence

- 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 the domestic or family violence laws of the jurisdiction where the university is located, 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 the jurisdiction.



## TITLE IX VIOLATIONS

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### Stalking

- Engaging in a course of conduct directed at a specific person *on the basis of sex* that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress
  - “Course of conduct” = two or more acts
  - “Substantial emotional distress” = significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling
  - “Reasonable person” = reasonable person under similar circumstances and with similar identities to the person against whom the stalking was committed



## UNIVERSITY STANDARDS VIOLATIONS

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*The university prohibits the following behavior under circumstances in which a university interest is implicated (such as an impact on individuals as members of the university community). For the purpose of University Standards Violations, the below conduct is prohibited even if the conduct occurs off-campus, outside the United States, if the complainant is not participating or seeking to participate in the university's education program or activity, or otherwise in circumstances over which the university does not have influence or control, including but not limited to during university academic breaks.*



## UNIVERSITY STANDARDS VIOLATIONS

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- Sexual Harassment (University definition)
- Sexual Assault (VAWA (and EIE) definition)
- Domestic Violence (VAWA (and EIE) definition)
- Dating Violence (VAWA (and EIE) definition)
- Stalking (VAWA (and EIE) definition; not necessarily based on sex)

**\*\* Not limited to Title IX context**



# UNIVERSITY STANDARDS VIOLATIONS

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- Sexual Exploitation (University definition)
  - Prohibited consensual relationships (University definition)
  - Retaliation
- \* Also covers discrimination based on sex, gender, sexual orientation, or gender identity or expression
- \*\* **Not limited to Title IX context**





# UNIVERSITY STANDARDS VIOLATIONS

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## Sexual Harassment:

- Unwelcome conduct of a sexual nature, or directed at an individual because of sex or gender, sexual orientation, or gender identity or expression, when such conduct has the purpose or effect of unreasonably interfering with an individual's work, academic, or extracurricular performance, or creating an intimidating, hostile, or offensive work or learning environment, even if the reporting individual is not the intended target of the sexual harassment



# UNIVERSITY STANDARDS VIOLATIONS

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## Sexual Harassment (cont'd):

- Reasonable person standard
- May be verbal, physical, visual, or communications-based
- Also includes gender-based harassment or sex- or gender- stereotyping, even if those acts do not involve conduct of a sexual nature
- Also includes quid pro quo harassment



# UNIVERSITY STANDARDS VIOLATIONS

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## Sexual Assault:

- ***Non-Consensual Sexual Intercourse:*** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, forcibly or without the affirmative consent of the other person or where the other person is incapable of consent due to mental or physical incapacity. Also includes non-forcible sexual intercourse with a person who is under the statutory age of consent.
- ***Non-Consensual Sexual Contact:*** Any intentional touching, however slight, for purposes of sexual gratification or with sexual intent, of the private body parts (including genitalia, anus, groin, breast, inner thigh, or buttocks) of another person without the affirmative consent of the other person, including instances where the other person is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity. This may include non-penetrative acts, touching directly or with an object, and/or touching the private body parts of another over clothing. This may also include forcing or causing another without affirmative consent to touch one's own private body parts.



# UNIVERSITY STANDARDS VIOLATIONS

---

## Dating Violence

- Violence (including but not limited to sexual or physical abuse or the threat of such abuse) committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
- Can include behavior such as coercion, isolation or other forms of emotional, verbal or economic abuse if it reflects a threat of sexual or physical abuse as described above.
- Does not include acts covered under the definition of domestic violence.



# UNIVERSITY STANDARDS VIOLATIONS

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## Domestic Violence

- 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 the domestic or family violence laws of the jurisdiction where the university is located, 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 the jurisdiction.



# UNIVERSITY STANDARDS VIOLATIONS

---

## Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress
  - “Course of conduct” = two or more acts
  - “Substantial emotional distress” = significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling
  - “Reasonable person” = reasonable person under similar circumstances and with similar identities to the person against whom the stalking was committed



# UNIVERSITY STANDARDS VIOLATIONS

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## Sexual Exploitation

- Taking non-consensual or abusive sexual advantage of another if the conduct does not otherwise constitute another offense. Examples include:
  - sexual voyeurism
  - taking images or audio of another in a sexual act, or in any other sexually-related activity when there is a reasonable expectation of privacy, without the consent of all involved in the activity, or exceeding the boundaries of consent
  - Self-exposure of genitalia or non-consensual disrobing of another person so as to expose the other person's private body parts
  - prostituting another person



# UNIVERSITY STANDARDS VIOLATIONS

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## Sexual Exploitation (cont'd)

- engaging in sexual activity with another person while knowingly infected with a STI or STD without informing the other person
- causing or attempting to cause incapacitation for the purpose of compromising ability to give consent to sexual activity, or for the purpose of making a person vulnerable to non-consensual sexual activity
- misappropriation of another person's identity on apps, websites, or other venues designed for dating or sexual connections
- forcing a person to take an action against that person's will by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity
- knowingly soliciting a minor for sexual activity





# UNIVERSITY STANDARDS VIOLATIONS

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## Prohibited Consensual Relationships

- Consensual romantic, sexual or dating relationships between University employees and students
  - Relationships that begin prior to the date on which the involved parties become student and employee are not prohibited, but reporting is required and University may take actions to address conflicts of interest



# UNIVERSITY STANDARDS VIOLATIONS

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## Retaliation

- An adverse act perpetrated:
  - to “get back” at a person because the person reported misconduct, filed a complaint, or participated in an investigation or proceeding in any capacity (e.g., as a Complainant, Respondent or witness); or
  - for the purpose of interfering with any right or privilege under the policy
- Includes threatening, intimidating, harassing, coercing or any other conduct that would discourage a reasonable person from engaging in activity protected under the policy



# UNIVERSITY STANDARDS VIOLATIONS

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## Hate Crime

- Violence to a person or damage to property (or a threat to do so) or any other criminal act motivated entirely or partly by hostility toward or intolerance of another's protected characteristics



## KEY DISTINCTIONS

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- Domestic Violence and Dating Violence
  - Difference in context/jurisdiction
- Stalking
  - Difference in context/jurisdiction
  - University Standards violation may include behavior not based on sex
- Sexual Assault
  - Difference in context/jurisdiction
  - Slight differences in scope of prohibited behavior



## KEY DISTINCTIONS

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- Sexual Harassment
  - Difference in context/jurisdiction
  - Difference in scope of prohibited behavior
- Sexual Exploitation, Prohibited Consensual Relationships, Retaliation, Hate Crimes
  - Difference in context/jurisdiction
  - No TIX counterparts

# QUESTIONS?





## THE NEW PROCESS: HOW DOES IT WORK?

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- Some changes to intake and interim actions
- Informal resolution widely available
- Investigation process largely unchanged
- Hearings required for alleged Title IX Violations
  - Cross examination requirement
- Other allegations may be resolved with or without hearings
  - Discontinuance
  - Resolution without a hearing



## OPTIONS UNDER THE NEW PROCESS

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- Confidential Resources
- Report to a Policy Administrator
  - Supportive Measures
  - Informal Resolution
    - Requires formal complaint
  - Formal Grievance Process
    - Requires formal complaint
- Report to Law Enforcement





## COMPLAINT PROCESS

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- Anyone can report a concern or a violation
- A written Formal Complaint must be filed to access the formal adjudication process or the informal resolution process (but not supportive measures)
  - Filed by the person who allegedly experienced the misconduct or by the APED/TIXC
- Evaluation of reporting party's wishes and public safety considerations



## AMNESTY

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- EIE requirement

*The health and safety of every student at Colgate is of utmost importance. Colgate recognizes that students who have been underage drinking and/or using drugs (whether such use is voluntary or involuntary), and/or engaged in other minor violations of Colgate policy, at the time that violence, including but not limited to domestic violence, dating violence, stalking, or sexual assault, or other conduct in violation of this policy, occurs may be hesitant to report such incidents due to fear of potential consequences for their own conduct. Colgate strongly encourages students to report domestic violence, dating violence, stalking, sexual assault or other violations of this policy to institution officials...*



## AMNESTY

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*... A bystander acting in good faith or a reporting individual acting in good faith that discloses any incident of domestic violence, dating violence, stalking, sexual assault or other violation of this policy to Colgate's officials or law enforcement will not be subject to Colgate's code of conduct action (including but not limited to action under this policy) for violations of alcohol and/or drug use policies, or other minor policy violations, occurring at or near the time of the commission of the domestic violence, dating violence, stalking, or sexual assault. For purposes of this provision, "other minor policy violations" do not include more serious allegations such as physical abuse, hazing, unlawful sale or distribution of drugs, or other conduct that would typically result in a sanction of suspension or expulsion if the student is found responsible.*



## **POTENTIAL DISMISSAL OF COMPLAINT OR ALLEGATIONS**

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- Mandatory dismissal requirement (as previously described)
- Discretionary dismissal (in whole or in part)
  - Complainant withdraws complaint or specific allegations
  - Respondent is no longer enrolled or employed
  - Circumstances prevent the gathering of evidence sufficient to reach a determination
- May occur at any juncture
- Immediately appealable



## SUPPORTIVE MEASURES

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- Available without a formal complaint
- Available to both parties
- Designed to restore or preserve equal access to the University's education program or activity
- Non-disciplinary and non-punitive
- May not unreasonably burden the other party
- Available without fee or charge
- Must be kept confidential, to the extent that maintaining confidentiality would not impair the ability to provide the supportive measures
- Implementation is coordinated by the APED/TIXC



## SUPPORTIVE MEASURES

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Examples (may not be available/appropriate in every case):

- Changes or adjustment in academics (e.g., deadline extensions, other course-related adjustments or allowing withdrawal without penalty)
- Changes to housing, transportation or campus working situations
- Mutual “No Contact” orders and, in certain cases, one-way no contact orders
- Campus escorts or other security or monitoring measures
- Counseling services



## SUPPORTIVE MEASURES

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- If a party's request for a supportive measure is denied, the party will be afforded an opportunity to have the denial promptly reviewed to assess whether the supportive measure is reasonable under the circumstances
- A party who is directly affected by a supportive measure will be afforded an opportunity to request reconsideration of the need for and/or terms of the supportive measure
- A party will be allowed to submit evidence in support of, or in opposition to, the request to the extent the supportive measures under review affect that party
- Determination made by APED/TIXC



## EMERGENCY REMOVAL

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- Immediate threat to the *physical* health or safety of any student or other individual arising from the allegations
- Based on individualized safety and risk analysis
- May be total (*i.e.*, the student is suspended) or partial (e.g., the student is prohibited from being on campus, or presence is limited to specified areas, times or purposes)
- Respondent provided notice and an opportunity to challenge the decision immediately following the removal
  - Submitted to and decided by APED/TIXC
- This is a student process
  - Employees may be placed on administrative leave (consistent with applicable policies or CBAs)





## INFORMAL RESOLUTION

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- Must be preceded by formal complaint
- Available any time prior to final resolution of allegations
- Broad authorization
  - No longer a categorical prohibition in cases of sexual violence
  - May not be used to resolve allegations that an employee sexually harassed a student
- Complainant, Respondent and APED/TIXC must consent to use the process
  - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume (or commence) the grievance process



# INFORMAL RESOLUTION

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## Confidentiality:

- All persons participating in the informal resolution process must sign a confidentiality agreement that provides that no information revealed by a party in the informal resolution process will be used against that party in a hearing
  - Does not apply to information learned outside the informal resolution process (but not learned through a violation of the confidentiality agreement).
- Facilitator not available as a witness if a hearing occurs
- Party may not disclose in any hearing information shared by the other party during the informal resolution process



## INFORMAL RESOLUTION

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- Result subject to approval by the APED/TIXC
- Result not appealable and not subject to further review or appeal under other University policies or procedures
- If process does not result in an agreed-upon resolution, investigation of the allegations in the complaint will commence (or resume) and the formal investigation and resolution process will proceed from there



# INVESTIGATION PROCESS

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## Notice of Investigation:

- Identities of involved parties
- the date, time, location of the alleged incident(s) (to the extent known)
- Factual allegations concerning the alleged violation(s), and policy provisions allegedly violated
- Description of the investigation and adjudication process
- Potential sanctions



## NOTICE OF INVESTIGATION

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- Presumption of non-responsibility
- Right to advisor of choice (who may be, but is not required to be, an attorney)
- Right to 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 University does not intend to rely in reaching a determination regarding responsibility
- Prohibition on knowingly making false statements or knowingly submitting false information
- Statement about the University's policy on retaliation



## THE INVESTIGATION

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- Assignment of investigator(s) and screening for conflict of interest
  - 3 days for parties to object
- Investigation process is largely the same
  - 90 day presumptive time frame
  - Permitted Delays
- Advisor of choice
  - Quiet advice and consultation
- Party must be provided with advance notice of date, time, location, participants and purpose of any interview



## THE INVESTIGATION – SCOPE

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- Parties entitled to present any evidence directly related to the allegations (including request for witness interviews):
  - Fact witnesses
  - Expert witnesses
  - Character witnesses
  - Other inculpatory and exculpatory evidence
- May not access privileged records without consent
- Impact of cross-examination requirement



## THE INVESTIGATION – LOGISTICS

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- In person, telephone, or videoconference
  - Limitation on inclusion of others
- Parties may not record
- Opportunity for interviewee to review transcript or summary of interview and make corrections





## CONCLUDING THE INVESTIGATION

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- Right to review evidence (10 day minimum)
  - All evidence gathered that is directly related to allegations
  - Even if won't be used or included in report
  - Electronic or hard copy, or availability via file-sharing application
  - Confidentiality obligations apply
- Opportunity to respond in writing to the evidence during 10 day period
  - Consider response in writing report
  - Need for additional steps?



## WRITING THE REPORT

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- Summarize the investigation
- Compile and address all **relevant** evidence
- No conclusions as to responsibility or credibility, policy analysis, or recommendations as to responsibility or sanctions
- Exclusions:
  - Complainant's sexual history or predisposition (with exceptions)
  - Privileged records unless privilege is waived
  - Respondent's sexual history – not necessarily
  - Mental health diagnosis or treatment – not necessarily



## ACCESS TO THE REPORT

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- Right to review report at least 10 days before hearing (if applicable)
  - Electronic or hard copy, or availability via file-sharing application
  - Confidentiality obligations apply
- Opportunity to respond in writing to the report during 10 day period



## **APPOINTMENT OF ADVISORS**

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Upon the request of a party, the University will appoint, without fee or charge to that party, an advisor of the University's choice who will be a licensed attorney to assist that party from and after this stage of the process (including for purposes of any subsequent hearing, resolution without a hearing and/or appeal[s])



## DETERMINATION OF NEXT STEPS

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- Cases including allegations of Title IX Violations must go to hearing
- Additional options in cases not including allegations of Title IX Violations:
  - APED/TIXC may determine that continuing with the complaint process is not warranted
    - Subject to appeal
  - Case may be referred to another applicable process if warranted
  - If alleged violations, and therefore the range of possible sanctions, are minor, may be resolved without a hearing
    - Subject to appeal

# QUESTIONS?





## THE HEARING PROCESS

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- New regulations require a live hearing model
  - Institutions may conduct live hearing virtually, with technology enabling participants simultaneously to see and hear each other
- Investigator and hybrid models are now prohibited



## NOTICE OF HEARING

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- Date, time, and location of hearing
  - Hearing must occur at least 10 days after investigative report is made available
- Names of Hearing Panel members
- How to challenge participation by any Hearing Panel member for bias or conflict of interest





## HEARING PANEL – CONFLICT OF INTEREST OR BIAS

- 
- Identify any potential conflict or bias you have
    - Just knowing who a person is or having met or interacted with them is not a conflict
    - A conflict is a relationship with them or knowledge about them that precludes you from being impartial
    - A conflict or bias could also be a connection to the subject matter or an interest in the outcome that precludes you from being impartial
      - Note TIX regulations and Colgate policy: Bias for or against complainants or respondents generally, or for or against the specific parties
    - Consider appearances
    - When in doubt, self-identify any situation that could create even the appearance of bias or a conflict



## HEARING PARTICIPANTS

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- Members of the Hearing Panel
  - External or PCRG Chair, plus two additional PCRG members
- Complainant and their advisor
- Respondent and their advisor
- Investigator(s)
- Witnesses (solely during their own testimony)



## ADVISORS

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- Advisor of Choice
  - If a party does not have an advisor present at the hearing, the University will provide an advisor of the University's choice
- Roles:
  - Quiet advice and support
  - Questioning of opposing party and witnesses



## HEARING LOGISTICS

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- May be conducted with all parties physically present in the same location
- At the APED/TIXC's discretion, parties, witnesses, and other participants may appear at the hearing virtually
  - Hearing Panel and parties can simultaneously see and hear any party or witness providing information or answering questions
  - If either party requests, the hearing **must** be conducted with the parties located in separate rooms using virtual participation
- Hearings are recorded



## ORDER OF PROCEEDINGS

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- Opportunity for Opening Statement by the Complainant
- Opportunity for Opening Statement by the Respondent
- Summary of the results of the investigation by the investigator(s), including items that are contested and those that are not
- Questions for the investigator(s) by the hearing panel and, if desired, on behalf of Complainant and the Respondent (as described below)



## ORDER OF PROCEEDINGS

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- Questions for the Complainant by the hearing panel and, if desired, on behalf of the Respondent
- Questions for the Respondent by the hearing panel and, if desired, on behalf of the Complainant
- Questions for each witness by the hearing panel and, if desired, on behalf of Complainant and the Respondent
- Opportunity for Closing Statement by the Complainant
- Opportunity for Closing Statement by the Respondent



## CHAIR'S DISCRETION

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- Chair has broad discretion
  - Questions of procedure
  - Evidentiary determinations
  - Calling breaks or temporary adjournments
  - Determining order of the proceedings
  - Recalling parties or witnesses for additional questions
  - Establishing additional ground rules



## RIGHT TO CROSS-EXAMINATION

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- Hearing Panel must permit each party to cross-examine the other party and any witnesses and ask **all** relevant questions, including those challenging credibility
- Cross-examination may only be conducted by advisor, never by the parties
- Upon request, cross-examination will occur with the parties located in separate rooms with technology enabling the adjudicator and parties to simultaneously see and hear the party answering questions





## **RIGHT TO CROSS-EXAMINATION**

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- If a party desires cross-examination and does not have an advisor, the University will provide, without fee or charge to that party, an advisor of the University's choice to conduct questioning on behalf of that party



## **RIGHT TO CROSS-EXAMINATION**

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- A party cannot “fire” an assigned advisor during a hearing, but if the party raises concerns that the assigned advisor is refusing to “conduct cross-examination on the party’s behalf” there is an obligation to provide the party an advisor to perform that function. This may range from taking a break to having the APED/TIXC confer with the assigned advisor to assigning a new advisor



# QUESTIONING PROTOCOLS

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- Broad authority: All **relevant** questions and evidence must be allowed unless prohibited by Policy
  - History and information indicating a pattern of behavior
  - Character evidence
  - Expert witness opinions
  - Questions challenging credibility
- Exceptions:
  - Prior sexual history of Complainant (with exceptions)
  - Privileged communications unless privilege waived
  - Evidence not previously made available during investigation, unless allowed by the Chair



## QUESTIONING PROTOCOLS

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- Chair must rule on whether questions are relevant or violate rape shield protections or a legally recognized privilege and provide an explanation for excluding a question
  - Before party or witness answers
  - Request for reconsideration permitted; after soliciting the other party's advisor's opinion, the Chair will render a final determination



# LIVE HEARING – ASSESSING RELEVANCY

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- USDOE: Use “common sense meaning”
    - Must seek information making a material fact more or less likely to be true
  - Things may be interesting or surprising but not be relevant
  - Does the question seek information that will aid the decision-maker in making the underlying determination?
  - Determination as to relevance should not be based on:
    - who asked the question
    - possible (or clearly stated) motives
    - who the question is directed to
    - the sex, gender, sexual orientation, gender identity, gender expression or other characteristics of the party for whom a question is asked or to whom it is asked
    - the status as complainant or respondent of the party for whom a question is asked or to whom it is asked



## **LIVE HEARING – ASSESSING RELEVANCY**

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- Preamble: “A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order and decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.”



## IMPLICATIONS OF FAILURE TO SUBMIT TO CROSS-EXAMINATION

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- If a party or witness does not submit to cross examination, that individual's statement(s) may not be considered for purposes of determining responsibility
  - Broad application
    - Preamble: *"Police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statement of a party or witness who has not submitted to cross-examination."*
  - Applies to questions by parties' advisors only, not to questions from the Hearing Panel



## **RULES OF THE ROAD**

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- Limitations on advisor's role as described above
- Chair's ability to establish ground rules
- Questions must be asked in a respectful, non-intimidating and non-abusive manner





## CONSEQUENCES FOR VIOLATIONS

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- Warning
- If question is otherwise permissible, opportunity to reformulate and pose in a permissible manner
  - May not be deemed irrelevant **solely** because of the manner it was delivered
- Chair has discretion to remove offending person
  - If advisor is removed, hearing will proceed without opportunity to obtain a replacement advisor, but University will assign an advisor of the University's choosing for the purpose of conducting questioning on behalf of the party



## **CHAIR: CONTROL OF HEARING**

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- Goal is to enable full and free participation by the Complainant and the Respondent, with appropriate assistance from advisors in the interest of determining what did or did not occur
- Expectations made clear at the start of (or before) the hearing to eliminate misunderstandings
- Tone, demeanor, pacing
- Clear explanation of rulings



## **MAKING A DECISION AS TO RESPONSIBILITY**

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- Deliberations are private
- Majority vote
- Determine each charge separately
  - Ascertain facts (preponderance standard)
  - Apply policy to determine whether facts indicate a violation
- Keep in mind required content of notice; be sure to address these issues



# **SANCTION DETERMINATIONS – STUDENTS**

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- Hearing Panel decides (majority vote)
- Right to submit impact statement
- Other factors to consider:
  - Nature and severity of, and circumstances surrounding, the violation(s)
  - Respondent's state of mind at the time of the violation(s)
  - Respondent's previous disciplinary history
  - Need for sanctions to end and/or prevent recurrence of misconduct
  - Need to remedy the effects of misconduct conduct on the Complainant and/or the community
  - Impact of potential sanctions on the Respondent
  - Sanctions imposed by the University in other matters involving comparable conduct
  - Any other lawful factors deemed relevant by the Hearing Panel



## **EIE TRANSCRIPT NOTATIONS**

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- Required for violations constituting Clery reportable crimes of violence
  - “Suspended after a finding of responsibility for a code of conduct violation”
  - “Expelled after a finding of responsibility for a code of conduct violation”
  - Students withdrawing from the University during an investigation before completion of judicial procedures: “Withdrew with conduct charges pending”
- Notations for suspensions may be removed by an Appeals Panel
- Notations for expulsion may not be removed



## NOTICE OF DETERMINATION

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- Required content:
  - Description of the charges that were adjudicated
  - Description of the procedural steps taken from the submission of the Formal Complaint through the determination
    - Notifications to the parties
    - Interviews with parties and witnesses
    - Site visits
    - Methods used to gather other evidence
    - Hearings held



# NOTICE OF DETERMINATION

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- Required content (cont'd):
  - Findings of fact supporting the determination
  - Conclusions regarding the application of the applicable policy provisions to the facts
  - A statement of, and rationale for, the result as to each allegation
  - Disciplinary sanctions to be imposed on the Respondent (if applicable)
  - Remedies provided to the Complainant (if applicable)
  - Appeal procedures and permissible bases for appeal



## APPEALS

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- Appellate Panel
  - Student respondent: Appellate panel comprised of the Dean of the College and a PCRG member designated by the APED/TIXC
  - Faculty or staff respondent: Appellate panel comprised of the Provost and a PCRG member designated by the APED/TIXC
- May review determinations and any earlier dismissal decisions
- 10-day deadline





## APPEALS

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- Permissible grounds:
  - Procedural irregularity
  - New evidence that was not reasonably available and could affect the outcome of the matter
  - Conflict of interest or bias (TIXC, investigator(s), Hearing Panel members)
  - Severity of sanction



## APPEALS

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- The other part(y)(ies) and the decision-maker are provided a reasonable opportunity to respond to the appeal in a manner determined by the appellate panel
- Because the appellate panel has not heard the evidence directly, deference must be given to the decision-maker
- The appellate panel must sustain the decision unless one of the grounds for appeal listed above has been established.



# APPEALS

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- Potential decisions:
  - Deny the appeal and sustain the decision
  - Remand the case in whole or in part to the original decision-maker or a new decision-maker
  - Modifying the sanction as appropriate
  - Other actions as appropriate
- Notice of outcome of appeal must include rationale
- Once the appeal process is concluded, no further appeals are allowed except to the extent a party seeks review of proceedings ordered on remand

# QUESTIONS?





# **NEW (NON-GENDER-BASED) DISCRIMINATION AND HARASSMENT PROCEDURES**

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## ***“Student Discrimination and Harassment Resources and Response Procedures”***

- Apply to complaints against a student or student organization
- Procedures are different than those for Gender-Based and Sexual Misconduct
- Based on former Equity Grievance Process, with modifications



# SCOPE OF COLGATE POLICY AND PROCEDURES

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Discrimination or Harassment based on:

- race
- color
- pregnancy
- religion
- creed
- national origin (including ancestry)
- citizenship status



# SCOPE OF COLGATE POLICY AND PROCEDURES

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Discrimination or Harassment based on:

- physical or mental disability
- age
- marital status
- veteran or military status (including special disabled veteran, Vietnam-era veteran, or recently separated veteran)
- predisposing genetic characteristics
- domestic violence victim status
- other characteristics protected by applicable law



## **THE NEW PROCESS: HOW DOES IT WORK?**

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- Few changes to intake and interim actions
- Informal resolution widely available
- Investigation process largely unchanged
- Allegations may be resolved via:
  - Hearing
  - Resolution without a hearing
  - Discontinuance





## **KEY CHANGES FROM EQUITY GRIEVANCE PROCESS**

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- Expanded discussion of communications-based/digital harassment
- Guidance on how to address complaints about discrimination or discriminatory impact caused by a policy, procedure or practice of the University, or a specific university department, office or operating unit
- Advisor qualifications



## **KEY CHANGES FROM EQUITY GRIEVANCE PROCESS**

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- Expanded detail regarding informal resolution process
- Investigation time frame – 90 days
- Clearer right to challenge investigator or hearing panel participation due to bias or conflict of interest
- Expanded authorization for remote or hybrid hearings

# QUESTIONS?



# **Discrimination, Harassment and Sexual Misconduct Policies and Procedures**



**Introduction to New Policies and Training for  
Investigators, Adjudicators and Appeals  
Personnel**

**October 29 and November 5, 2020**