

July 19, 2018

MEMORANDUM

To: Campus Presidents

From: Christopher Rosa, Interim Vice Chancellor for Student Affairs
Margaret Egan, Interim Vice Chancellor for Human Resources Management
Loretta Martinez, General Counsel & Vice Chancellor for Legal Affairs

Re: Implementation of Revised CUNY Sexual Misconduct Policy

As you know, in response to changes in law and guidance, on June 25, 2018, the Board of Trustees adopted a revised CUNY Policy on Sexual Misconduct ("Policy"), effective immediately. We write to provide guidance on implementation of the changes to the Policy.

Specifically, since October 2015, when the prior Policy was adopted, there have been several developments. The State Office of Campus Safety ("OCS") audited CUNY's compliance with the New York State Enough is Enough ("EIE") statute that addresses campus sexual misconduct prevention and response. In addition, the State Labor Law was recently amended to create additional training and policy requirements for employees (Sec. 201-G). Finally, there have also been changes in federal guidance, specifically the Clery Act ("Clery") and Title IX guidance from the Office for Civil Rights of the U.S. Department of Education ("OCR").

SEXUAL MISCONDUCT POLICY

I. Changes to Processes

The 2015 Policy, which covered all students and employees of the University, addressed sexual misconduct by setting forth prohibited conduct and required processes for reporting and responding to such conduct, as well as providing for education on sexual misconduct and the Policy for all new and incoming students and certain members of the University community. Processes for response included investigation and adjudication of allegations against students and employees, and rules for complainants and respondents to appeal determinations of charged violations of the Policy.

The revised Policy has been re-ordered and includes revisions that will affect campus processes and procedures, specifically: (1) changes to the definitions of specific terms; (2) the addition of new appeals processes for complainants and respondents involved in a complaint of

sexual misconduct; (3) the creation of procedures to determine if a student is a continuing threat to campus health and safety; (4) the availability of an informal resolution process; and (5) inclusion of the student disciplinary adjudication process within the Policy (rather than Article XV of the CUNY Bylaws, a separate document).

a. Changes to Policy Definitions

We have made a number of changes to definitions under the Policy that align the Policy definitions with Clery, which will facilitate accuracy in tracking and reporting data. The definition of affirmative consent now aligns with the broader statutory definition and includes clarifying examples. The definitions of manager and supervisor have been changed, and the Policy specifies that supervisors and managers who knowingly allow sexual harassment to occur may be subject to discipline.

b. Appeals Processes

In accordance with EIE, the Policy provides both students and employees (complainants or respondents) the opportunity to appeal the college's implementation of a restrictive interim or supportive measure, or to appeal on conflict of interest grounds an individual's participation in the Title IX investigation or adjudication process.

Either complainant or respondent may appeal restrictive interim measures such as a no-contact order or the removal of a student from a class or section. The Chief Student Affairs Officer will decide student appeals, and the Director of Human Resources will decide employee appeals. These officials have authority to uphold, modify or remove the interim measure.

When considering a student's appeal of a restrictive interim measure, the Chief Student Affairs Officer should examine: (1) whether an alternative section or class exists; (2) a student's need for the class in order to graduate; (3) the nature and circumstances surrounding the incident; (4) the existence of a court-issued order of protection; (5) the existence of online class alternatives; and (6) the likelihood that respondent and complainant will come in contact with one another. For such an appeal brought by an employee, the Director of Human Resources should consider whether the employee can perform tasks at a different office within the college, whether a suitable transfer exists, and if there is a court-issued order of protection. Decisions related to interim and restrictive measures for employees must be made in accordance with the employee's collective bargaining agreement, if any. All decisions on appeals of restrictive interim or supportive measures should be made as quickly as possible and, once made, either the Chief Student Affairs Officer or Director of Human Resources, as applicable, must take immediate steps to implement any changes or modifications to the interim measures.

Similarly, a student or employee complainant or respondent may request that an individual involved in the investigatory or adjudication process whom they allege has a conflict of interest be removed from the process. This request must be in writing within five (5) days of notification of the individual's involvement in the process and must include a detailed description of the conflict. Student conflict appeals are to the Chief Student Affairs Officer, and employee conflict appeals to the campus Legal or Labor Designee. The decision on the conflict must be in writing, delivered to the objecting party by either overnight mail or e-mail, and made

as quickly as possible under the circumstances, so that the investigatory or adjudication process may proceed. If the decision made by the Chief Student Affairs Officer or Legal or Labor Designee has the potential to disrupt the education or work environment of either the complainant or respondent, both parties must receive the decision simultaneously.

c. Determining a Continuing Threat and Student Interim Suspension

When deciding whether to place a respondent student on interim suspension pending an investigation for sexual misconduct, the college must first determine whether the student presents a continuing threat to the health and safety of the community. The various stakeholders at the college, including Public Safety, the Title IX Coordinator, and Chief Student Affairs Officer, must jointly consider whether the student constitutes a continuing threat to the health and safety of the community. The determination should be made based on factors including: (a) whether the respondent has a history of violent behavior or is a repeat offender; (b) if the incident represents escalation in unlawful conduct by the accused; and (c) the risk that accused will commit additional acts of violence.

An interim suspension of a student cannot last longer than 12 days. The decision to place a student on interim suspension pending an early Faculty-Student Disciplinary Committee (“FSDC”) hearing is within the discretion of the college president, and cannot be appealed. If the suspension is based on a complaint of sexual misconduct, the Title IX Coordinator must complete the Title IX investigation report before the suspension ends, and before the Office of Student Affairs conducts the FSDC Hearing. The college cannot hold a disciplinary hearing based on charges of violating the Policy if the investigation report is not complete.

Employee suspensions pending an investigation for sexual misconduct are unchanged in the new Policy, and continue to be covered by applicable collective bargaining agreements, as with other types of misconduct.

d. Informal Resolution Process

In response to new guidance from OCR, excluding allegations involving sexual assault, parties may engage in informal resolution process to resolve a dispute. After completing an investigation, the Title IX Coordinator or designee may attempt to resolve the conflict in a manner agreeable to all parties. Any resolution agreement between the complainant and respondent must be approved by the Title IX Coordinator before the agreement becomes final.

e. Disciplinary Process and Procedures

The disciplinary procedures for a student accused of violating this Policy are now located in Section XX of the Policy rather than in Article XV of the CUNY Bylaws. There has been no change to the student disciplinary procedures themselves, which continue to require that hearings be held before a specially trained Faculty-Student Disciplinary Committee. A complainant and respondent do not have the right to cross-examine each other directly in a student disciplinary hearing, but may do so through their representative or by submitting questions to the FSDC chairperson. As before, a respondent who is both a student and an employee are subject to discipline under both the student disciplinary process and applicable collective bargaining

agreement, and a respondent employee is subject to discipline under the applicable collective bargaining agreement.

II. Education and Training

As you are aware, CUNY's campuses must provide comprehensive education and awareness programs for all incoming students and new employees. While this obligation has not changed, because of Section 201-G of the amended NYS Labor Law, all employees must now receive annual training on sexual harassment prevention. Additionally, members of the special subcommittee of the Faculty Student Disciplinary Committee hearing and deciding charges of sexual misconduct against students must receive annual specialized training before they participate in a hearing.

You will be receiving additional information shortly about your campus training obligations as well as available resources including the online education module SPARC for students and an upcoming online education module being developed for employees.

III. Education Plans, Record Keeping, and Reporting

a. Education Plans and Annual Progress Reports

Beginning in academic year 2015-16, all campuses have submitted mandatory annual Education Plans for the upcoming academic year, and Annual Progress Reports for the previous year. You will receive additional guidance on 2018-19 Education Plans and Progress Reports, which will be due December 1, 2018, for the 2018-19 academic year to Rodney L. Pepe-Souvenir, Associate Director for Diversity and Compliance/University Title IX Coordinator.

b. Annual Aggregate Data Reporting to NYS Education Department

This academic year, New York State Education Department ("NYSED") issued regulations defining the requirements for college aggregate data reporting to NYSED established in EIE. NYSED performed a voluntary interim aggregate data collection in June 2018 for which all campuses submitted reports.

Beginning **October 1, 2019**, colleges must report annually to NYSED information concerning incidents of sexual assault, violence, etc. that were reported to the college during the prior calendar year. The NYSED aggregate data reporting now follows the Clery campus crime reporting schedule.

Colleges are to continue to utilize the Sexual Misconduct Log to keep track of incidents of sexual misconduct on their campus as well as any resulting adjudication.

c. Coordination in Education Plans, Record Keeping, and Reporting

In alignment with the University's protocol on responding to all incidents of sexual misconduct, the campus Title IX Coordinator, Chief Student Affairs Officer, Director of Public Safety, Human Resources Director, Legal Designee and others as appropriate, must continue to

consult and work together to provide these educational plans and progress reports, as well as to ensure that Clery reports accurately reflect allegations of reported crimes relating to sexual misconduct. Those crimes include rape, fondling, incest, statutory rape, domestic partner and dating violence, stalking and hate crimes that include crimes based on sexual orientation and gender identity.

If you have questions about any of these policies or their implementation, please contact Rodney Pepe-Souvenir, Associate Director for Diversity and Compliance/University Title IX Coordinator, at (646) 664-3314; Roberta Nord, University Director of Advocacy and Referral, at (646) 664-8753; or Dan Simonette, Associate General Counsel, at (646) 664-9215.

- c: Chancellery
- Chief Academic Officers
- Chief Student Affairs Officers
- Rodney Pepe-Souvenir, Associate Director for Diversity and Compliance/
University Title IX Coordinator
- Title IX Coordinators
- Legal Designees
- HR Directors
- Labor Designees
- Bill Barry, University Director of Public Safety
- Directors of Public Safety
- Yvette Santana-Prado, University Director of Student Conduct
- Student Conduct Officers