NYU RESOURCE GUIDE

SEXUAL MISCONDUCT

FAQs FOR ATTORNEYS INVOLVED IN TITLE IX/SEXUAL MISCONDUCT COMPLAINTS
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FAQs FOR ATTORNEYS:

This document is provided for general information and guidance only. To the extent that there is a conflict with any information contained in these FAQs, the relevant policy and procedures control.

1. I am advising a student that is involved in a Title IX/Sexual Misconduct Investigation with NYU. What is an attorney’s role in the Title IX/Sexual Misconduct process?

Under NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy (“the Policy”) all students have the right be accompanied by an advisor of choice who may assist and advise a Complainant or Respondent throughout the process, including during all meetings and hearing(s), if applicable, regardless of representation. An attorney can fill this role of advisor; however, the Title IX/Sexual Misconduct Investigation process is not comparable to a criminal or civil court proceeding, and therefore, the role of an attorney as an advisor is different in NYU’s process than it is in a court of law. NYU’s process is strictly administrative in nature and is not a legal proceeding.

An attorney advisor may lend support to the student preparing their case and attend meetings or hearings.

2. How do I communicate with NYU?

The student is NYU’s primary point of contact for all communication about Title IX/Sexual Misconduct proceedings. While in a legal proceeding, communications often occur only between counsels, and without the client’s participation, all of NYU’s communication is focused on, and directed to, the student, regardless of representation. NYU will include a student’s attorney on Title IX/Sexual Misconduct communications, at the request of the student. However, in order to protect the student’s privacy under FERPA (Family Educational Rights and Privacy Act), proper notification and verification must occur before NYU can share information with a student’s attorney.

3. How can I participate in any relevant meetings/hearings/etc.?

The attorney advisor may lend support to the student preparing their case and attend meetings or hearings. This support may come in the form of providing advice to the student, making recommendations to the student, consulting with the student, etc. Under NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy, the Complainant and the Respondent both have the right to be accompanied at the hearing and any meetings by an advisor of their choice, who is not otherwise a party or witness involved in the investigation.
While the advisor may be present, the advisor may not speak or otherwise participate in the hearing or meetings, may not address the Adjudicator or question witnesses, and must comport themselves in a manner that is not disruptive to the hearing or meetings.

4. Can you provide a brief overview of NYU’s Title IX/Sexual Misconduct Procedures?

When NYU receives a report of an incident of Prohibited Conduct, NYU will take immediate and appropriate steps to investigate or otherwise determine what happened and work to resolve the matter promptly and equitably.

Upon receipt of a report, the Title IX Coordinator will conduct an initial assessment. After that assessment, a variety of outcomes are possible including, but not limited to: (1) No action; (2) Protective Measures and Accommodations; (3) Administrative Resolution; and/or (4) Investigation and Hearing.

(1) No Title IX Action: Where a reported incident falls outside the purview of Title IX and NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy, there will be no action taken by the Office of Equal Opportunity (i.e. the Title IX Office). The matter may be referred to another University office, to the extent that violations of other University policies may be at issue. Where the Complainant requests to maintain their privacy and/or not conduct further investigation, and the Title IX Coordinator agrees, the matter will be considered resolved.

(2) Protective Measures and Accommodations: As appropriate, the Title IX Coordinator, in conjunction with other NYU Administrators, will take such protective measures or accommodations, as necessary.

(3) Administrative Resolution: Following the initial assessment, during an investigation, or at any point in the process, NYU may seek an Administrative Resolution. Participation in Administrative Resolution is voluntary. *Review Question 5 for more information.

(4) Investigation and Hearing: After the initial assessment, the Title IX Coordinator will determine whether the circumstances warrant proceeding to an investigation. An investigation will be conducted by independent fact-finders who will gather evidence and then, after careful review of the evidence, will determine whether there is sufficient evidence for the complaint to be referred to the Office of Student Conduct and Community Standards. If a hearing is held, an adjudicator will determine whether a violation of NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy has occurred based on the preponderance of the evidence standard (i.e., is it more likely than not that such a violation occurred).
See the full procedures for students here: https://www.nyu.edu/content/dam/nyu/studentAffairs/documents/studentCommunityStandards/Sexual%20Misconduct%20Procedures%20for%20Student%20Respondent%202016-10-13.pdf

5. **What is Administrative Resolution?**

Administrative Resolution is a remedy available to NYU in place of an investigation or disciplinary Process. In general, Administrative Resolution is a resolution by the agreement of all parties (Complainant, Respondent and NYU). Participation in Administrative Resolution is voluntary for all parties and NYU reserves the right to terminate an Administrative Resolution process at any time. Administrative Resolution is not appropriate for all cases of Prohibited Conduct and NYU retains the discretion to determine in which cases it may be appropriate.

Administrative Resolution may involve individual and/or community remedies that are designed to address a report of Prohibited Conduct. Interventions can include, among others: remedies designed to maximize the Complainant’s access to educational, extracurricular, and/or employment activities; providing increased monitoring, supervision, and/or security at locations or activities where the misconduct occurred or is likely to reoccur; facilitating a voluntary meeting with the Complainant and the Respondent (in cases that do not involve Sexual Assault); conducting targeted or broad-based educational programming or training for relevant individuals or groups; requiring counseling; providing housing accommodations for Student Complainants; making academic accommodations for Student Complainants or providing workplace accommodations for Employee Complainants; imposing sanctions as set forth in NYU Student Conduct Procedures, which include Warning, Censure, Disciplinary Probation, Restitution, Suspension of Privilege, Suspension from NYU, No Contact Directive, Dismissal from NYU, and Transcript Notation; and/or any other remedy that can be tailored to the involved individuals to achieve the goals of NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy. If an agreement acceptable to NYU, the Complainant, and the Respondent is reached through Administrative Resolution, the matter is considered to be resolved and the terms are implemented. If an agreement is not reached between all parties, the matter will be referred for an investigation or hearing if appropriate.

6. **How long does NYU’s Title IX/Sexual Misconduct Investigation process take?**

The Title IX/Sexual Misconduct Investigation typically will be completed within approximately thirty-five days from the date of the initiation of the investigation. This timeframe may be extended for Administrative Resolution and also may be extended for good cause as necessary to ensure the integrity
and completeness of the investigation, to comply with a request by external law enforcement, to accommodate the availability of witnesses, to account for NYU breaks or vacations, to account for complexities of a case, including the number of witnesses and volume of information provided by the parties, or for other legitimate reasons. Any extension of the timeframes, other than for Administrative Resolution, and the reason for the extension, will be shared with the parties in writing.

7. Will an attorney/non-attorney advisor be given an opportunity to present evidence on the student’s behalf?

An attorney advisor may attend all meetings with the student and may be present at the hearing. The attorney may advise the student and assist the student throughout the process of providing evidence to the Investigators. The attorney advisor may consult with the student and advise the student throughout the hearing. While the advisor may be present, the advisor may not speak or otherwise participate in the hearings or meetings, may not address the Adjudicator or question witnesses, and must comport themselves in a manner that is not disruptive to the hearing or meetings.

8. My client was not on campus when this happened. Why is NYU even involved?

NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy is in accordance with Title IX guidance and other applicable laws that protect students from sexual discrimination in educational programs and activities. As explained in OCR’s 2011 Dear Colleague Letter, when a student sexually harasses or assaults another student, that conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program. If a school knows or reasonably should know about student-on-student assault, harassment, discrimination, or other behavior that creates a hostile environment, Title IX guidance requires the school to take immediate action to eliminate the behavior, prevent its recurrence, and address its effects. Schools may have an obligation to respond even if the conduct initially occurred off school grounds, outside a school’s education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures.
9. My client is charged with a crime in State Court for the same offense. Can the NYU Hearing be delayed until after the criminal trial?

No. NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy is in accordance with the U.S. Department of Education Office of Civil Rights guidance and other applicable laws. These guidelines/laws require a “prompt” response to allegations of sexual harassment, and specifically instruct that schools may not wait for the conclusion of a parallel criminal investigation. Under the guidelines, a school may temporarily delay the fact-finding portion of an investigation while law enforcement gathers evidence. However, New York State law limits the time that a school can delay an investigation due to law enforcement activity to ten days (unless law enforcement requests and provides justification for a longer delay).

10. Can information provided during the Investigation/Hearing regarding my client be made available to law enforcement or for use in external court proceedings?

With certain exceptions, the Family Educational Rights and Privacy Act (“FERPA”) prevents NYU from disclosing non-directory information without the consent of the student to whom the information pertains. Thus, NYU will not typically, on its own, forward the information received during the course of an investigation or hearing to law enforcement; however, all students’ records are subject to lawful subpoena. Typical records that are part of NYU’s Title IX/Sexual Misconduct investigation/Hearing process include, but are not limited to: written notes of investigative meetings, draft and final reports, and audio recordings of the hearing.

11. What is the standard of proof in the disciplinary proceeding?

NYU applies the preponderance of the evidence standard when determining whether NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy has been violated.

12. Why does this process operate substantially differently from the criminal process?

NYU’s Title IX/Sexual Misconduct process is not judging criminal guilt or innocence, but rather whether a student has violated NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy. The courts have long recognized that the interests of a university community differ from those of the criminal justice process. Although there are basic concepts of fairness that apply to the student disciplinary process, this process serves administrative and educational functions relating to the mission of New York University.
Therefore, many of the rules of evidence found in a court system are not applicable to university student conduct procedures.

13. **Will I receive discovery?**

Although there is no formal discovery process, at the conclusion of the investigation, the Title IX Investigators will prepare a Draft Investigation Report that summarizes the information gathered. Both the Complainant and the Respondent will be given the opportunity to review the Draft Investigation Report, submit any additional comment or information to the Investigators, and identify any additional information or witnesses for the Investigators’ consideration. The Investigators will designate a reasonable time for review and response. In the absence of good cause, information discoverable through the exercise of due diligence that is not provided to the Investigators at this juncture will not be considered by the Adjudicator.

14. **What will happen if my client refuses to participate in NYU’s Title IX/Sexual Misconduct Investigation process?**

Students are encouraged to participate in all University disciplinary proceedings. If an investigation is opened into an incident, that investigation can proceed regardless of a student’s participation. If a student chooses not to participate in the Investigation process they will nonetheless be notified of its outcome, and if a hearing is set.

If, despite being notified of the date, time, and location of the hearing, the Respondent or Complainant is not in attendance, the hearing may proceed and sanctions may be imposed in their absence. In the event that a party is absent, the Adjudicator will consider the available testimony and evidence.

15. **What happens if my client withdraws from NYU during the Investigation or before the Hearing?**

The existence of an investigation or Hearing will not limit a student’s ability to withdraw from classes. If a Respondent withdraws from NYU with a charge of a violation of NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy pending, a notation will be made on such student’s transcript that they “Withdrawn with conduct charges pending.” If a withdrawing Respondent declines to complete the disciplinary process, the above-described notation of withdrawal will become permanent in the event that the Respondent does not return within eighteen (18) months. In some cases, NYU may elect to complete the investigation and/or disciplinary process and a hearing may occur regardless of a student’s enrollment status or participation.
16. **Who can be present with a student at a Hearing?**

Each Complainant and Respondent may choose an advisor to assist and advise the Complainant or Respondent throughout the disciplinary process, including during all meetings and hearings related to such process. This advisor may take the form of an attorney, a counselor, a parent, etc.; however, the student can have only one advisor present at the hearing. Any requests for an additional advisor to be present at the hearing must be made to the Office of Student Conduct and Community Standards (OSC) at least seven days before the scheduled hearing. It is at the discretion of the OSC, in consideration with the Adjudicator, to allow additional advisors to participate in the hearing.

17. **Who makes the decision regarding my client’s responsibility?**

The hearing will be adjudicated by an administrator designated by NYU, typically the Director of the Office of Student Conduct and Community Standards (OSC) or their designee. At the discretion of the OSC Administrator, the matter may also be referred to an external adjudicator with expertise in adjudicating cases of Prohibited Conduct. All persons serving as an Adjudicator must have trauma-informed training or experience with respect to the adjudication of Prohibited Conduct and must also be impartial and free from bias or conflict of interest.

18. **Is the Hearing recorded? Can I get a transcript?**

An audio recording will be made of the hearing. The recording will be maintained by NYU for at least five (5) years from the date of the hearing. A written transcript of the hearing will not be prepared. Requests to listen to the audio recording of a hearing should be made to Office of Student Conduct and Community Standards.

19. **I have a very busy schedule and cannot attend the hearing time that NYU has selected. How can the Hearing be rescheduled?**

Unavailability of a student’s advisor is generally not cause for postponement or delay of a hearing. Hearings are scheduled based on the academic schedules of the parties involved in the matter. NYU will attempt to schedule a hearing at a time that is convenient for the Respondent, the Complainant, the advisors (if applicable), and witnesses (if applicable). In general, the Complainant and Respondent will be given a notice of the hearing at least ten (10) days prior to the date of the hearing. This time frame may be extended for good cause at the discretion of the Office of Student Conduct and Community Standards (OSC) Administrator. Good cause may include the availability of the parties, the availability of witnesses, the timing of semester breaks, or any other extenuating circumstances.
With so many people involved, it is not always possible for all schedules to coincide. In order to resolve complaints in a timely way, advisors cannot always be directly consulted about scheduling matters. However, NYU will try to make reasonable adjustments to the schedule while communicating directly with the student. All correspondence regarding scheduling of the hearing should be directed to the OSC.

20. What are the possible student penalties?

The potential sanctions for a violation of NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy include:

- Warning;
- Censure;
- Disciplinary Probation;
- Restitution;
- Suspension of Privilege;
- Suspension from NYU;
- No Contact Directive;
- Dismissal from NYU;
- Transcript Notation, and
- Requiring the Respondent to engage in a course of counseling, education, or training.

Where the conduct found to have violated NYU’s Sexual Misconduct, Relationship Violence, and Stalking Policy also constitutes a “crime of violence” as defined under New York State Education Law § 6444(6), and where the sanction(s) imposed included either a suspension or expulsion, the transcript of the Student Respondent shall include the applicable notation on their transcript: “Suspended after a finding of responsibility for a code of conduct violation” or “Expelled after a finding of responsibility for a code of conduct violation.”

21. How are student penalties determined?

In determining the appropriate sanction(s), the Adjudicator will consider a number of factors, including:

- the nature of the conduct at issue;
- whether the conduct involved violence;
- the impact of the conduct on the Complainant;
- the impact or implications of the conduct on the NYU community;
- any previous conduct violations by the Respondent, both at NYU or elsewhere, as well as any criminal convictions;
• whether the Respondent has accepted responsibility for the conduct;
• maintenance of a safe and respectful environment conducive to learning;
• and any other mitigating, aggravating, or compelling circumstances to reach a just and appropriate resolution in each case.

The Adjudicator may also consider restorative outcomes that, taking into account the safety of the NYU community as a whole, allow a Respondent to develop insight about their responsibility for the behavior, learn about the impact of the behavior on the Complainant and the community, and identify how to prevent or change the behavior. Sanctions may be issued individually, or a combination of sanctions may be imposed.

22. **What are my client’s options if they do not agree with the decision and sanctions of the Adjudicator?**

The Complainant or Respondent may appeal the determination to the NYU Sexual Misconduct Appeal Panel within five (5) business days of the issuance of the determination. Grounds for an appeal are limited to: (1) a material procedural error; (2) previously unavailable relevant evidence that could affect the outcome; and/or, (3) the sanction being substantially disproportionate to the violation. Each party will be notified if the other party files an appeal, and will be provided the opportunity to submit a responsive appeal statement within five (5) business days of being notified of the other party’s appeal. Appeal statements should be no more than three (3) pages. The parties, however, do not appear before the Appeal Panel. The appeal will be decided by the Appeal Panel within fifteen (15) business days of the date that the responsive statement is due, regardless of whether any responsive statement is submitted, unless the circumstances of the appeal warrant an extension.