

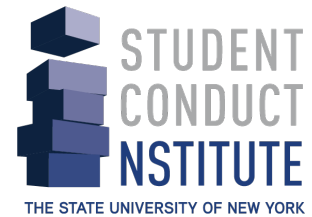
*Valerie Ayers,
SUNY Assistant Vice Chancellor for
Employee Relations*

*James Jarvis,
Chief Campus Counsel, SUNY Office of
General Counsel*

November 2022

SCI TITLE IX HUMAN
RESOURCES
INVESTIGATIONS

LEGAL GUIDANCE OVERVIEW

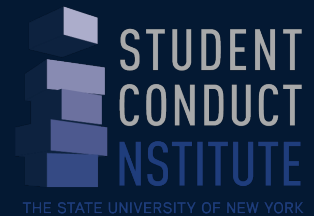


Constitutional
Requirements
and Due
Process

Title IX



DUE PROCESS BASICS FOR TITLE IX INVESTIGATIONS



SOURCES OF DUE PROCESS

Constitution: Fourteenth Amendment

Case law interpreting the Constitution

Statute or Regulation or Guidance

- Clery Act/VAWA
- Title IX
- State law

REMEMBER: Start with your Policy

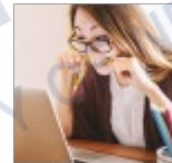
HOW MUCH PROCESS?

Greater
Process
Owed

Greater the deprivation
or threat to reputation



EXPELLED



Less
Process
Owed

Lesser or trivial
deprivation



PROPERTY RIGHTS IN EMPLOYMENT

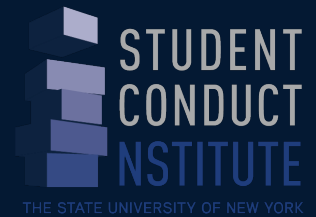
Board of Regents v. Roth (1972)

- Right to continuing employment recognized by state law (tenure, CBA, “just cause discipline,” among others) is type of property that the 14th Amendment of the Constitution protects

Cleveland Board of Education v. Loudermill (1985)

- Governmental entities owed employees who had expectation of continuing employment the right to notice and an opportunity to respond

TITLE IX

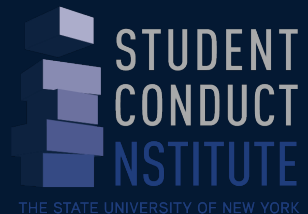


No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

-Title IX of the Education Amendments of 1972



TITLE IX



**May 19, 2020: Title IX
Final Rules** (effective
August 14, 2020)

**April 6, 2021: Dear
Stakeholders Letter**

July 2021 Q&A

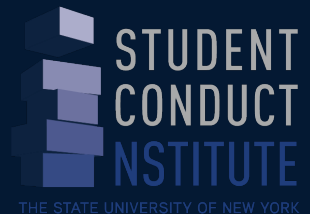
**August 24, 2021 Letter
to Stakeholders**
(*Cardona* case)

Learn more at:

- [Bit.ly/TIX2020](https://bit.ly/TIX2020)
- system.suny.edu/sci/news



RELEVANT DOCUMENTS

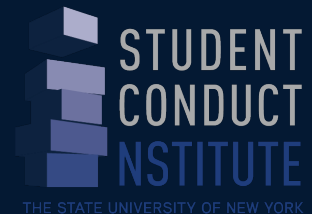


Update

- Notice of Proposed Rulemaking – July 8, 2022
- 240,000 public comments received
- Expected implementation Spring/Summer 2023



TITLE IX FINAL RULE



American Council on Education letter to OCR, June 10, 2021

“Unnecessary, costly, complex, time-consuming, and wholesale overlay of Title IX processes developed with students as the primary focus, and a redesign of campus human resources functions”

Have been successfully addressed under Title VII

Employees less likely to face corrective action when witnesses do not participate in hearing

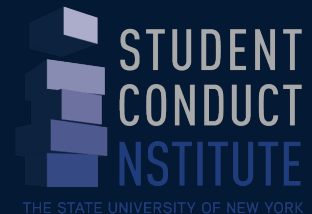
More stringent procedures even for at-will employees

Need to renegotiate CBAs, or duplicate process after Title IX process

<https://www.acenet.edu/Documents/Comments-ED-OCR-Title-IX-Hearing-061021.pdf>



TITLE IX FINAL RULE



Interaction Between Title VII and Title IX

- Title IX process may conflict with existing processes under Title VII and state anti-discrimination laws, CBAs and institutional procedures
- “Severe or pervasive” (Title VII) vs. “severe, pervasive and objectively offensive” (Title IX)
- “Knew or should have known” (Title VII) vs. “actual knowledge” (Title IX)
- Respondent could have engaged in sexual harassment under Title VII but not Title IX
- May need to use separate processes for Title IX and Title VII
- Employee can be compelled to participate in Title VII investigation, but not Title IX



TITLE IX FINAL RULE

Sexual Harassment Definition

- Quid pro quo - by employee only (*2022 NPRM – adds agents and others authorized to provide services)
- Severe, pervasive and objectively offensive (*2022 NPRM – “severe or pervasive”)
- Sexual assault (as defined by Clery Act) or “dating violence,” “domestic violence” and “stalking” (as defined by VAWA)
- June 16, 2021 Notice of Interpretation – OCR will enforce Title IX to include discrimination based on sexual orientation and gender identity (*Bostock v. Clayton County*) (*2022 NPRM – “sex-based harassment” includes sexual orientation and gender identity)



The State University
of New York

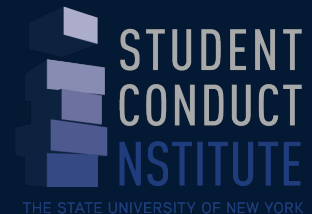
TITLE IX FINAL RULE

When is Response Required?

- “Actual Knowledge”
- “Education program or activity” within United States (*2022 NPRM – also outside the United States)
- “Deliberate Indifference” - must respond promptly in a manner that is not deliberately indifferent; clearly unreasonable in light of known circumstances
- Formal complaint (*2022 NPRM – complaint may be written or oral)



TITLE IX FINAL RULE



“Actual Knowledge”



- Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient (*2022 NPRM – “constructive knowledge” – non-confidential employees have duty to report or provide contact information for Title IX Coordinator)
- Final Rule does not include “responsible employees”
- Preamble suggests an employee’s supervisor would be an official with authority
- May be oral report by complainant or someone else, written report, personal observation, newspaper article, anonymous report (including social media)



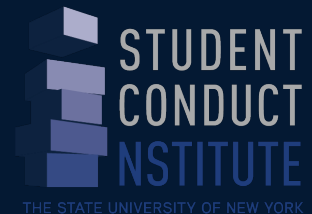
TITLE IX FINAL RULE

“Education Program or Activity”

- Locations, events, or circumstances over which the institution exercises substantial control over both the respondent and the context in which sexual harassment occurs (*2022 NPRM – includes off-campus conduct would be subject to institutional disciplinary authority, e.g., student conduct, human resources)
- “Substantial control” – factors include whether institution funded, promoted or sponsored event or circumstance
- Locations include an off-campus building owned or controlled by an officially recognized student organization



TITLE IX FINAL RULE



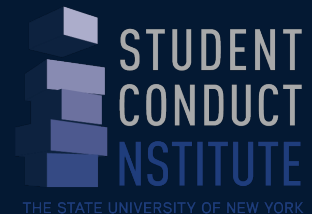
Required Responses

Supportive measures

Grievance process that
complies with Final Rule

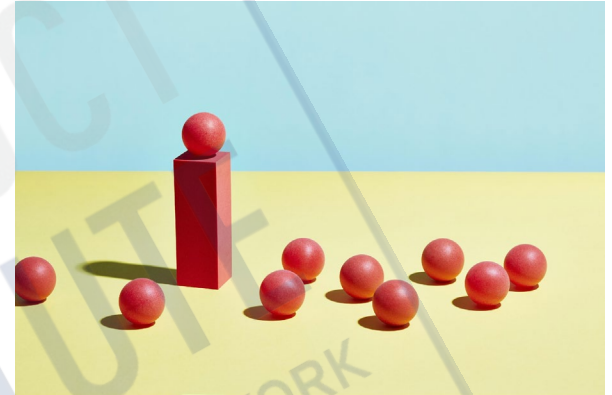


TITLE IX FINAL RULE



Supportive Measures

- Must be offered to complainant
- Non-disciplinary, non-punitive, individualized, without fee to either party
- Designed to restore or preserve equal access to education program or activity without unreasonably burdening other party (*2022 NPRM – temporary measures may burden respondent but may only be in place during pendency of complaint)
- Includes counseling, extensions of deadlines and other course-related adjustments, modifications of work or class schedules, campus escorts, restrictions on contact, changes in housing, leaves of absence, increased security and monitoring



TITLE IX FINAL RULE

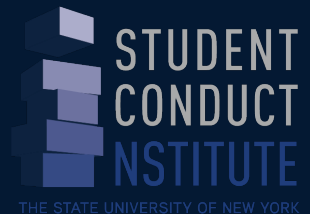
Required Communication

Title IX Coordinator must:

- Discuss availability of supportive measures with complainant
- Consider complainant's wishes with respect to supportive measures
- Inform complainant of availability of supportive measures with or without filing formal complaint
- Explain process for filing a formal complaint



TITLE IX FINAL RULE



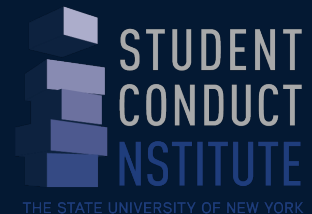
Confidentiality

Must keep identity of complainant and respondent confidential unless disclosure:

- Permitted under FERPA
- Required by law
- Necessary to carry out the purposes of Title IX, including to conduct a grievance process



TITLE IX FINAL RULE

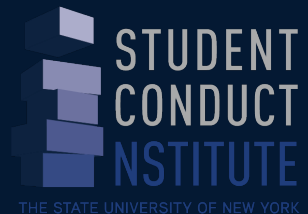


Emergency Removal

- Emergency situation “arising from” alleged conduct that could constitute “sexual harassment” as defined in Final Rule
- Risk to someone’s “physical health or safety” (*2022 NPRM – respondents may be removed to “protect the safety of the complainant or the [institution’s] environment”)
- Risks to mental health and safety should be addressed with supportive measures



TITLE IX FINAL RULE



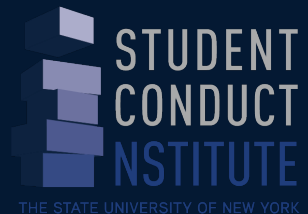
Administrative Leave

For non-student employee respondents only

May be with or without pay



TITLE IX FINAL RULE

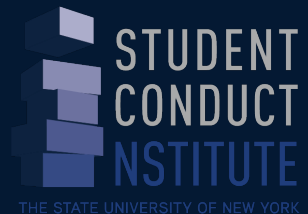


No Informal Resolution

Informal resolution may not be offered where a student alleges sexual harassment by an employee



TITLE IX FINAL RULE

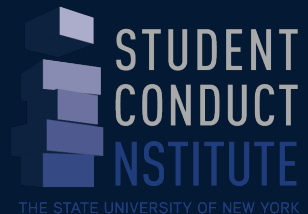


Dismissal of Complaint

- Institution *must* dismiss formal complaint when the conduct alleged in the formal complaint (1) would not constitute sexual harassment as defined in Regs even if proved, (2) did not occur within the institution's education program or activity, or (3) did not occur against a person in the United States (*2022 NPRM – mandatory dismissal removed)
- Institution *may* dismiss a formal complaint or any allegations therein if (1) the complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations, (2) the respondent is no longer enrolled or employed by the institution, or (3) specific circumstances prevent the institution from gathering sufficient evidence to reach a determination as to the formal complaint or allegations



TITLE IX FINAL RULE



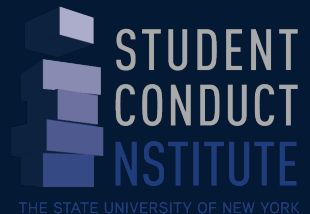
Notice of Allegations

Parties must receive notice of allegations before any initial interview occurs that includes:

- Identities of the parties involved in the incident, if known
- The conduct allegedly constituting sexual harassment, and date and location of alleged incident, if known
- Statement that respondent is presumed not responsible for the alleged conduct
- Notice that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence
- Notice of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information



TITLE IX FINAL RULE

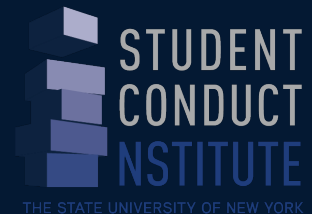


Inspection and Review of Evidence

- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- Includes evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility
- Must provide copies, not just allow review
- May “choose to share records in a manner that will prevent either party from copying, saving, or disseminating the records,” but do not have to

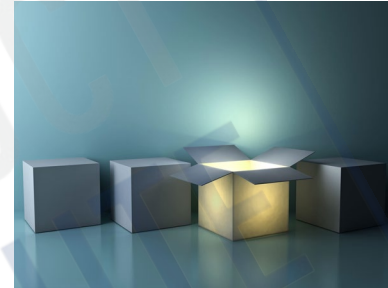


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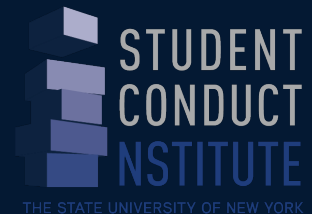


Inspection and Review of Evidence

- Must share evidence “directly related” to the allegations
- Only “relevant” information need be summarized in the investigation report; “relevant” evidence is more narrow in scope than evidence that is “directly related” to the allegations
- 10 days to review evidence and provide a response



TITLE IX FINAL RULE

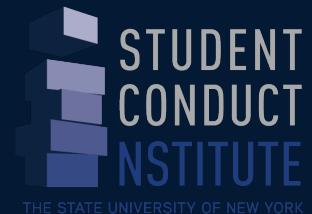


Inspection and Review of Evidence

- Investigators may redact information not directly related to the allegations or that is otherwise barred from use, such as because of a legally-recognized privilege
- Institutions may impose upon parties and their advisors requirements not to disseminate evidence or use evidence for any purpose unrelated to the Title IX grievance process
- May require parties to agree not to photograph or otherwise copy the evidence, including “sensitive” material such as nude images
- Should keep log of evidence not made available for review



TITLE IX FINAL RULE

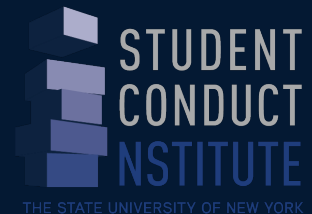


Inspection and Review of Evidence

- Although the complainant's prior sexual behavior is "irrelevant" under the Final Rule, the institution nevertheless must share prior sexual history if such evidence is directly related to the allegations because it may be "offered to prove that someone other than the respondent committed the conduct alleged by the complainant or to prove consent"



TITLE IX FINAL RULE

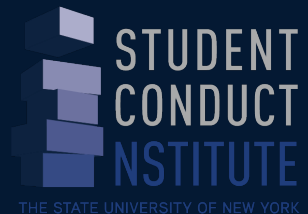


Investigative Report

- Must create investigative report that fairly summarizes relevant evidence
- Investigative report must be sent to each party and advisor for review and written response
- Electronic format or hard copy
- Questions and evidence about a complainant's sexual predisposition or prior sexual behavior "not relevant" with two limited exceptions: (1) offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or (2) concern specific incidents of the complainant's prior sexual behavior with respondent and are offered to prove consent



TITLE IX FINAL RULE

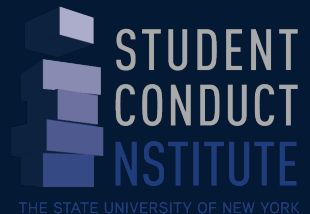


Live Hearings

- Cross-examination at live hearing conducted directly, orally, and in real time by the party's advisor of choice; and never by a party personally (*2022 NPRM – live hearings permitted but not required; may have live questioning at individual meetings)
- Only relevant cross-examination or other questions
- Testimony may be remote at request of either party
- If party does not have advisor, must be provided at no charge by institution, for purposes of cross-examination
- Title IX Coordinator or investigator cannot be decision maker



TITLE IX FINAL RULE

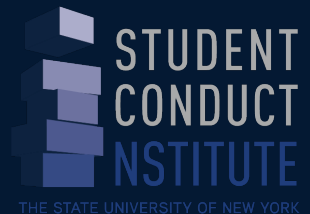


Statements By Party or Witness

- Final Rule mandated that if party or witness did not submit to cross-examination, decision makers could not rely on any statement made by them
- *Victim Rights Law Center et al. v. Cardona* (July 28, 2021) - Ordered DOE to reconsider prohibition of statements not subject to cross-examination
- “Students, Educators and Stakeholders” Letter (August 24, 2021) - DOE will no longer enforce regulation that barred consideration of statements not subject to cross-examination
- *Codified by 2022 NPRM – cross-examination not required



TITLE IX FINAL RULE



SIMILARITIES IN EMPLOYEE AND STUDENT INVESTIGATIONS

Both the student conduct and the employee discipline processes include provisions for:

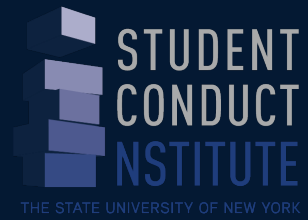
- Interim or supportive measures
- Impartial, timely and thorough investigation
- Access to an advisor
- Written notice of charge(s)
- Hearing
- Standard of proof
- Access to hearing transcript
- Appeal

***2022 NPRM - more streamlined process permissible for employee-employee cases**

Interplay between Title
IX Roles
And Human Resources,
and Considerations for
Unionized Employees:

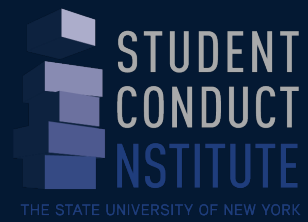
Working together to
achieve common goals

DUTIES AND AUTHORITY OF A TITLE IX COORDINATOR



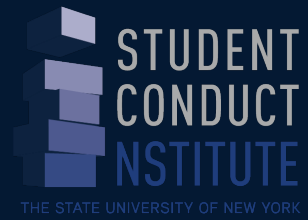
Conduct administrative investigations of reported incidents or complaints of sexual or interpersonal violence or harassment on the basis of sex or gender as prohibited in Title IX, and ultimately the preparation of a report with recommended disposition.

DUTIES AND AUTHORITY OF AN AFFIRMATIVE ACTION OFFICER/CHIEF DIVERSITY OFFICER



Administering the university's process for allegations of discrimination/harassment as prohibited by Title VII Of the Civil Rights Act of 1964 or the New York State Human Rights Law, including investigating claims and preparing a report with recommendation for disposition of internal grievance.

DUTIES AND AUTHORITY OF HUMAN RESOURCES



Conduct investigations pertaining to alleged misconduct of campus employees; serve as the President's designee for all matters pertaining to terms and conditions of employment contained in applicable collective bargaining agreements. HR is responsible for employee discipline, up to and including termination of employees.

INVESTIGATION

- Both HR and Title IX offices must investigate claims of discrimination when an employee is involved
- Work together to ensure that your common goal can be achieved



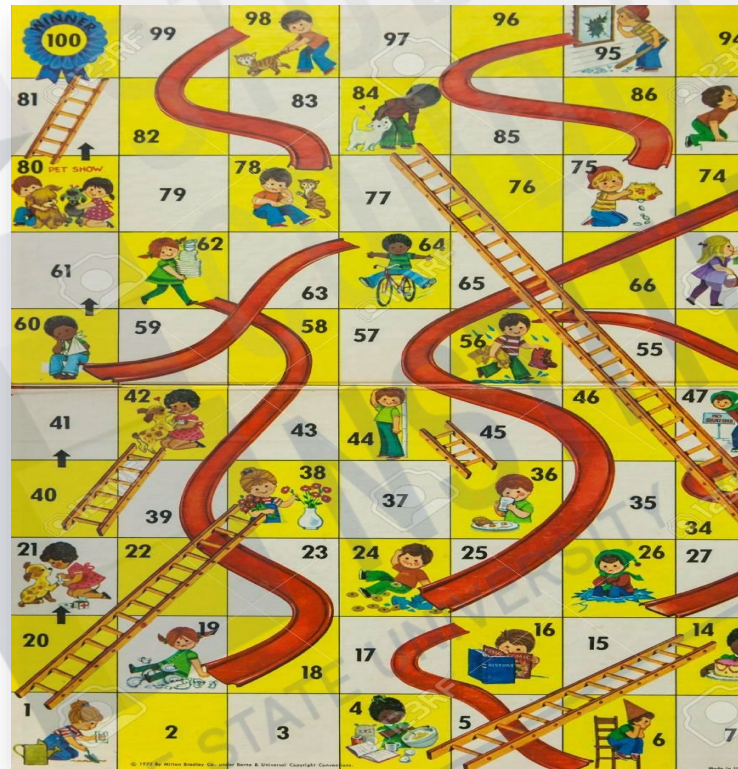


SHARED GOAL OF TITLE IX/ DIVERSITY/ HR OFFICES

- All offices are trying to work toward the same goals:
- Ensure compliance with anti-discrimination laws, including Title IX and other state and federal laws, as well as campus policies prohibiting discrimination.
- Ensure all students and employees have a campus free from discrimination

INVESTIGATION PROCESS

- The process, for both Title IX and employee misconduct investigations, requires that the campus/employer complete a full and fair investigation.
- The last step in the investigatory process involves questioning the respondent. When and how you question the target of the investigation will depend on a variety of factors, including whether Title IX applies.
- The questioning of the respondent will look different if you are working with unionized employees.



QUESTIONING THE RESPONDENT

- The employee is given written notice.
- The employee is advised of their right to representation.
- The employee must answer your questions, and can be ordered to do so (Title VII).
- The employee's representative may not answer on the employee's behalf.
- The employee does not have the right to plead the Fifth Amendment (*Garrity* warning).



RIGHT TO REPRESENTATION

In 1975 the U.S. Supreme Court, in the case of *NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975) upheld a National Labor Relations Board decision that employees have the right to union representation at investigatory interviews. These rights have become known as *Weingarten Rights*.





In 1975 the U.S. Supreme Court, in the case of *NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975) upheld a National Labor Relations Board decision that employees have the right to union representation at investigatory interviews. These rights have become known as *Weingarten Rights*.

REMOVING AN EMPLOYEE FROM CAMPUS

Since employees have a property interest in their salary, Courts have interpreted the *Loudermill* decision to apply due process protections when removing an employee from the payroll pending investigation, as well as in pre-termination suspension:

- Pending investigation, pre-questioning of employee- do not remove from payroll.
- After questioning the employee you may suspend without pay, after engaging in a “mini due-process” procedure.

SUSPENSION WITHOUT PAY

Prior to suspending an employee without pay you must provide the following due process:

1. Inform the employee of the nature of the charges and a summary of the evidence supporting the charges and the need for the suspension. This can be presented orally, in person.
1. Provide the employee an opportunity, with representation, to respond to the charges. Again, this can be done orally, in a face to face meeting with you. No formal hearing is necessary at this stage.

DISCIPLINARY PROCESS

Provide Notice:

The employee should be served with a written document (a Notice of Discipline) that outlines the charges against him/her in sufficient detail such that a reasonable person would understand the charges. All of the NYS collective bargaining agreements require references to date, place and time.

Provide the opportunity to be heard:

All of the NYS collective bargaining agreements provide employees a hearing in the form of binding arbitration. In other words, after an evidentiary hearing, an arbitrator determines what penalty to impose on the accused employee, up to and including termination. The burden of proof at an arbitration is preponderance of the evidence.

CAUTION: COUNSELING

What is Counseling?

It is ***any*** conversation or communication between an employee and a supervisor in an effort to address certain employee conduct or behavior

- It is intended to be a non-punitive means of modifying inappropriate employee behavior
- It is a way to confront problems as they occur
- An employee does not have the right to representation during a counseling session



CAUTION: COUNSELING

If you counsel...

You **CANNOT** take disciplinary action for the same conduct

- So, it is very important when questioning an employee that you do not engage in conversation that may be seen as counseling, like reviewing policies and expectations
- You may ask questions regarding their awareness and understanding of certain policies, but should avoid reviewing them with the employee



CAUTION: CRIMINAL INVESTIGATIONS

HR must conduct its own investigation into cases of sexual misconduct involving employees.

Anything the respondent tells the police, without a union representative present, may not be used in the disciplinary case against the employee.

CAUTION: INTERVIEW ALL WITNESSES

Arbitrators have invalidated suspensions and found lack of just cause in cases where all witnesses were not interviewed as part of an investigation.

JUST CAUSE

Collective bargaining agreements generally prohibit discipline without just cause

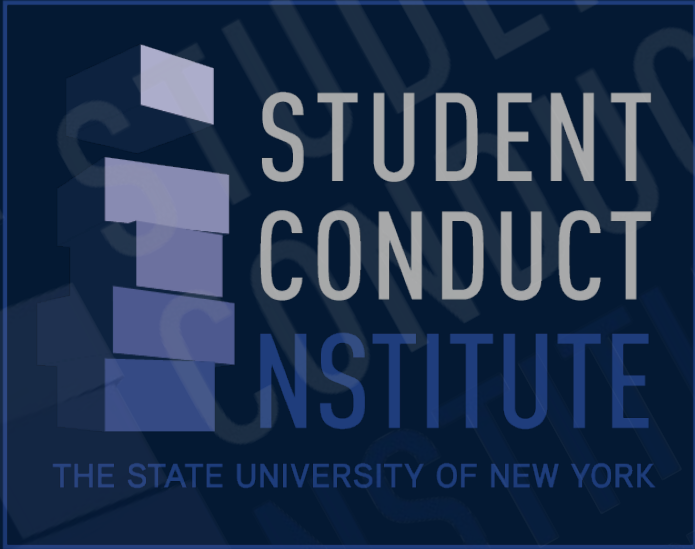
Your investigation should not only be focused on fact-seeking, but should also be informed by what you will need to establish just cause

JUST CAUSE

- Was there a rule or policy forbidding the alleged misconduct?
- Was the rule or policy communicated to the employee?
- Was the rule or policy reasonable?
- Was the rule or policy uniformly applied to all similarly situated employees?
- Did the employer conduct a complete and objective investigation before issuing the charges?
- Does the evidence, to the extent required under the collective bargaining agreement, demonstrate that the employee committed the acts or conduct specified in the disciplinary charges?
- Is the proposed penalty appropriate to the level of misconduct?

WHAT DO WE NEED TO DO NOW?

- We need to work together.
- When any complaint is received by Title IX or Affirmative Action, **and involves an employee**, Human Resources/Employee Relations needs to be immediately involved in the investigation.
- Human Resources/Employee Relations will provide the employee with proper notice of any questioning, and of their right to representation.
- If the employee is the target of the investigation, Human Resources/Employee Relations need to conduct any questioning of such employee.



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