

Being Deliberate:

A Guide for Deciding Sanctions in Cases of Gender-based Misconduct at Institutions of Higher Education



Institutions of higher education (IHEs) must have a resolution process to address incidents of gender-based misconduct, including sexual assault, stalking, and dating and domestic violence. Within a resolution process, there are typically three general areas of action once a complaint has been filed: gathering information, exploring the information, and evaluating the information. This guide focuses on one aspect of the evaluative portion of the resolution process addressing issues of student misconduct, specifically related to sanctioning.

The guide is not a substitute for training a decision-making body (DMB) on its role and responsibilities. Instead it is intended to serve as a supplement. The DMB should receive extensive training related to a variety of topics impacting their ability to effectively sanction policy violations, including but not limited to, deliberation skills, cultural competency, issues of power and identity, critical thinking, the dynamics of gender-based violence, and the role of bias.

It is important to note that some incidents of gender-based misconduct will fall under Title IX, while other forms will not. IHEs should still adjudicate non-Title IX gender-based misconduct under institutional policy. For a further discussion about approaching gender-based misconduct that falls outside of Title IX in

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policy, please refer to the Victim Rights Law Center's ***Tool for Incorporating Trauma-Informed Practices into the Final Title IX Rule Legal Framework***. For the purposes of this guide, it is important to note that under the Final Title IX Rule, the outcome following a finding of responsibility is divided into remedies and sanctions.¹ These are separate and distinct. Remedies are measures imposed to restore or preserve a complainant's equal educational access, while sanctions are disciplinary in nature.² This guide is primarily designed to support DMBs in assessing and devising a sanction.

¹ 34 CFR 106.45(b)(1)(i).

² 34 CFR 106.45(b)(1)(i).

PURPOSE OF THE GUIDE

This guide is not intended to tell IHEs *what* sanction to assign, but *how* to sanction. It is intended to spark conversation on individual campuses about how to make intentional decisions about a sanction in cases of student-on-student gender-based misconduct cases. The sanctioning decision-making process should be rooted in the mission of the IHE, its institutional policy, the articulated philosophy of the resolution process,³ and the needs of the campus community. Developing guides in this way leads to agreed-upon expectations for a DMB and an environment where a DMB knows how to operate. Otherwise, each individual involved in the decision-making process is left to decide what is important in the determination of a sanction.

The need for more discussion about sanctioning is evident. In a 2014 survey led by the University of Michigan, 384 university administrators at various IHEs reported that less than “10% of sanctioning decisions were informed by a written sanctioning guide developed for student sexual misconduct matters.”⁴ While these IHEs used various other practices to determine sanctions, 83% of survey respondents believed “their respective institution would benefit from national guidelines or model policies/practices for sanctioning students who are found responsible for sexual misconduct.”⁵ Furthermore, a majority of the

³ An articulated philosophy can identify goals of the resolution process, such as, but not limited to, education, reparation of harm, campus safety, evidence-based interventions, etc. It can also provide guidance to a DMB on the purpose of sanctions from an institutional view.

⁴ Jay Wilgus, Holly-Rider Milkovich, Kurt Bumby, Stacy Vander Velde, *National Survey of Sanctioning Practices for Student Sexual Misconduct at Institutions of Higher Education* (University of Michigan, 2014).

⁵ Wilgus, et al., National Survey 2014.

survey respondents indicated that their respective institutions need, desire, or would benefit from high levels of training, technical assistance, or support in a multitude of areas including research-informed approaches to sanctioning students found responsible for sexual misconduct.⁶

It is important to acknowledge there are two distinct parts to the evaluative portion of the resolution process: determinations of responsibility and, if applicable, determinations of sanctions and remedies. These should be separate, sequential decisions, with the latter having no influence on the former. In other words, the potential sanction resulting from a finding of responsibility should not influence whether or not a respondent is found responsible in the first place. Only after a thorough process and reasoned conclusion that a policy has been violated should there be any conversation about sanctions.

⁶ Wilgus, et al., National Survey 2014.

FUNDAMENTALS OF SANCTIONING

One of the most frequent questions coming from individuals tasked with determining a sanction is “how do I know what to do?” The foundation to answering this question comes from a clear, agreed-upon philosophy regarding the purpose of the sanctioning process, what it is designed to accomplish, and how it intends to do so. It also requires an understanding that not every case will, nor should every case, result in the same sanction, though each outcome should be the product of the same process. Engaging in the same process to determine a sanction requires an institution to remain consistent in its practice and take into consideration the particular needs of each individual situation, which is how a sanctioning guide can be useful. A sanctioning guide can be likened to the use of a rubric and can provide a repeatable, systematic process for deciding sanctions. By identifying the salient parts of the sanctioning process, prior to a deliberation, IHEs can design a system that is equitable, fair, and less prone to bias. With a sanctioning guide, the process becomes more transparent to the community. This transparency may provide clarity to individuals receiving a sanction, insight to individuals interested in filing a complaint, or aid in interpreting available data about the resolution process.

This guide offers a process that can be used to determine sanctions in an IHE resolution system. While this guide may not be applicable to every IHE, it can spark conversation for an institution to develop its own guide. A sanctioning guide should be developed prior to any complaint and should not be influenced by individual characteristics of any potential parties involved in a

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complaint, including, but not limited to, race, gender, and sexual orientation. When developing elements of a resolution process, such as a sanctioning guide, IHEs should make informed, intentional decisions.

When developing an IHE sanctioning guide, a good place to start is with what sanctions are available to the DMB.⁷ Sharing a list of available sanctions sets the parameters for the DMB and can assist a DMB when making a final determination.⁸ Once a DMB is aware of the possible sanctions, they next should be taught the intent and purpose of each sanction and how each intersects with the institution's view on the purpose of a sanction. For instance, a suspension may be viewed solely as a punitive sanction if it were issued in isolation, but when paired with conditions for return, it can serve to benefit respondents, as well as complainants and the campus community.⁹ These components can include educational elements and research-driven interventions. Below is an articulated example of intent and purpose related to suspension:

⁷ This information should be readily available as a component of the Clery Act. Remember, a comprehensive list of sanctions should not include remedies that would be implemented upon a finding of responsibility.

⁸ Sanctions may include, but are not limited to: warnings, educational sanctions, evidence-based interventions, probation without restrictions, probation with restrictions, access restrictions, registration restrictions, removal from campus housing, suspension, and expulsion.

⁹ This is in contrast to remedies, which are specifically designed “to restore or preserve equal access to the recipient’s education program or activity.” 34 CFR 106.45(b)(1)(i).

Suspension – A temporary separation from the institution for a specified amount of time (typically no shorter than [amount] and up to [amount]). During this time, an individual forfeits all rights as a student at the institution and is prohibited from being on campus unless given advance authorization in writing by [approving authority]. Imposing a suspension means there is the potential for the student to regain eligibility to return as a positive, contributing member of the institutional community. Suspensions should be paired with additional components designed specifically for the student, with a goal of maturation, development, and a reduced likelihood of engaging in similar behavior moving forward. The DMB may include conditional components for completion prior to reenrollment¹⁰ and conditions after reenrollment.¹¹

Lastly, the DMB should be taught how to decide which sanction to apply. While some institutions may use a sanctioning matrix or apply the “most severe” sanction to the “most severe” violation, this does not address the relevant variables discussed below, including issues of power and privilege traditionally rooted within resolution systems. A guide allows for flexibility and intentionality in sanctioning by addressing the specific components of individual complaints while maintaining consistency.

¹⁰ e.g. Circles of Support and Accountability

¹¹ e.g. Disciplinary probation, restricted access to campus housing, limitations on facility usage

AREAS OF INFLUENCE

The sanctioning guide includes four main areas of influence as it relates to determining a sanction. Each area is listed in order of consideration with each area receiving less weight than the previous. An institution may decide on more or fewer areas, adjust the order of consideration, and determine the weight for each area. For this guide, the four areas are:

- Nature of the Violation
- Campus Safety
- Complainant Considerations
- Respondent Considerations

It is important to note this guide describes the process for a respondent with no history of previous misconduct. Respondents with a prior record of misconduct will be addressed in the **Further Considerations** section.

Visually, the guide is represented as follows:



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Nature of Violation

Within an IHE, codes of conduct exist to outline standards of behavior and institutional expectations. Whether explicit or implicit, there is a hierarchy that exists related to policy violations at an IHE. Some violations are deemed less serious, while others are deemed more serious. This exists even within violations of the same policy. The DMB, along with key stakeholders, need to discuss and determine how the IHE considers the types of violations within the gender-based misconduct policy and where they sit on a continuum. For instance, many gender-based misconduct policies include prohibited conduct sections that cover a range of behaviors, such as touching an individual's genitals outside of their clothing and forcibly penetrating someone while they are incapacitated. While both are likely violations of an IHE's policy, the two may not be sanctioned the same. There may even be cases where students violate the same section of a policy, but the sanctions vary. For example, two individuals may be found responsible for a violation of an institution's sexual harassment definition, but the severity and frequency present in one case may be significantly greater than the other. This continuum is flexible, and the specific facts and circumstances of an incident can shift it in either direction.

Another consideration is the relationship between the respondent and the complainant. If the respondent is in a position of power and/or authority over the complainant, some institutions constitute the violation as more egregious. For example, in a case involving sexual harassment or sexual assault, the DMB may sanction a case differently if it involves two similarly situated students versus a faculty member and a Ph.D. candidate.

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Campus Safety

The second component in the guide addresses campus safety. At this point, the DMB should have an established set of facts from the investigation process. The DMB should use this information to analyze the current and ongoing potential safety concerns for the campus, related to the actions of the respondent. Areas to consider may include, but are not limited to:

- Was there violence or threat of future violence?
- Was a weapon involved?
- Was the behavior determined to be an escalation of past misconduct or behaviors?
- Are there indicators of the potential for the same act to be perpetrated again either against the complainant or against other individuals?
- Is the behavior specific to a particular location?
 - Is the location under the purview of the IHE?
 - Does there need to be a restriction on access?

Complainant Considerations

Through the determination of responsibility, there should be equal consideration for the complainant and the respondent in the process. After a finding of responsibility, DMBs should prioritize the needs of the complainant by addressing three areas: safety needs, impact of the incident, and desired outcome. Under Title IX, devising measures designed to restore or preserve the complainant's access to education may be considered a remedy, not

a sanction. Institutional policy will be instructive on the way measures are categorized.

Safety needs

There should be a review of the identified current and ongoing safety needs for the complainant, related to the respondent. This is highly relevant with all forms of gender-based misconduct, especially stalking and dating/domestic violence. Things to consider are any physical, emotional, and mental injury experienced as a result of the incident; threats made to or about the complainant; and any attempted action related to a threat. Threats made to or about the complainant may include those about the complainant themselves, their property, friends, family, or pets.

Impact of the incident

At some point in the resolution process, the IHE should provide an opportunity for the complainant to inform the DMB about the impact of the incident. While providing information about impact should be optional for the complainant, the availability of such information is critical to the DMB's ability to impose sanctions that best position the respondent to directly and effectively repair the harm their actions created. Impact information can be obtained in several ways. One way is to allow the complainant to write an impact statement, which would only be read by the DMB after a determination has been made that there was a violation of policy. Another strategy is to allow the complainant to give the information orally during a hearing or interview, or to include it in a written complaint. No matter how the information is delivered, a DMB needs to be able to separate the

information of impact from the decision of responsibility, as the impact itself is not evidence of a policy violation. This is essential to adhere to an equitable process.

Desired outcome

The final consideration pertaining to the complainant is any articulated desired outcome from the resolution process. As with impact, this should be an optional part of the process and not required from the complainant. Some complainants have clearly defined desired outcomes, while others may not. For instance, a complainant may state their desired outcome as not wanting to see the respondent on campus or in a particular building, while another may say they wanted the respondent to know what they did was wrong and are unsure of what they want the outcome to be.

When considering the complainant, the DMB should be cognizant of items within their sphere of control and make any necessary referrals for items beyond their control. For instance, if there are areas on campus the complainant may be avoiding because of fear of the respondent, the DMB should be able to reasonably restrict the respondent's access to specific places on campus. This includes, but is not limited to, residence halls, dining halls, and specific classes.¹² If the need for campus restrictions

¹²As a reminder, restricting a respondent's access to campus buildings and other physical space may be done through a No Contact Order or No Contact Directive. In institutional policy, and particularly one that covers Title IX, such measures should not be included in the list of sanctions. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30045 (May 19, 2020) ("These final regulations clarify that supportive measures cannot be punitive or disciplinary against any party and that disciplinary sanctions cannot be imposed against a respondent unless the recipient follows a grievance process that complies with § 106.45.").

becomes too great for the respondent to function as a student, the DMB should consider suspension or expulsion. While well intentioned, the DMB should be cautious about suspensions linked to the duration of time the complainant will be in school. This could send a message that committing a violation against a fourth-year student is not as serious as committing the same violation against a first-year student. If the complainant articulates concerns involving the respondent related to living or being off campus, the DMB would have little to no control. Beyond imposing restrictions on the respondent with respect to campus space, and addressing any issues of retaliation, a DMB cannot control the behavior of the respondent. This should be made clear to the complainant and appropriate referrals should be made.¹³

¹³ Ideally these conversations should occur at the beginning of and throughout the resolution process. The complainant and respondent should be aware of the scope and limitations of the process and possible outcomes. Referrals to community-based agencies and/or additional campus resources should be readily available when needs are articulated by process participants. For example, there may be situations where a complainant would benefit from a discussion with a community-based organization regarding their options for a civil protection order.

Respondent Considerations

The educational needs and capacity of a respondent must be a consideration in the sanctioning process. While IHEs sometimes focus only on respondent restrictions, this type of sanction may not reduce the likelihood of similar behavior in the future.¹⁴ Instead, IHEs should consider restrictions in conjunction with educational or evaluative sanctions. For example, the DMB should consider:

- Did the respondent accept any responsibility for their behavior?
- What was the respondent’s understanding of their behavior?
- What is necessary to prevent the recurrence of their behavior?
- What areas of growth are available?

¹⁴ A large gap exists in research related to what affects desistance in persons at IHEs found responsible for sexual violence. Presently, most research focuses on adult sex offenders who commit crimes against children and/or other adults. Due to the absence of research on this guide’s target population we look to the available research to get a general sense of the findings. In *Desisting from Sexual Offending: Findings From 21 Life History Narratives* (Harris 2014), Harris studied a sample of 21 men convicted of sexual offenses and released from custody to explore the process of desistance in sex offenders. Of those 21 men, a majority (86% of participants) identified varying degrees of personal agency and cognitive transformation in one’s life (hereinafter “cognitive transformation”) as their reason for desistance. Harris identified a continuum of cognitive transformation that started with the men recognizing the harm they had caused, moved to a desire to understand the nature of their offense, then the powerful impact of treatment, a new identity was then formed where the subject had found redemption or it seemed within reach, and finally came their desire to help others. We also reviewed another study with similar research goals but with a focus on pedophiles in *Understanding desistance from sexual offending: A thematic review of research findings* (Farmer et al. 2015). As students at IHE are studied further, we are committed to updating this guide on the effectiveness of treatment and sanctioning for persons found responsible at IHEs for sexual violence.

These elements can assist in identifying potential areas to address with the respondent as it relates to changing behavior. For instance, if the respondent accepts responsibility for their behavior and can articulate how they may have contributed to areas of harm, the DMB could implement an educational sanction that facilitates the respondent's attempt at repair of that harm. A respondent who fails to understand the impact of their behavior may require different interventions in order to continue to be a part of the campus community. This is an opportunity to connect responsible students with the appropriate professionals equipped to conduct such an assessment to identify what may lead to change. A DMB has the ability to assign an assessment and treatment and should explore the resources in the area to do so. Additionally, if a suspension is an element of a sanction, the information from these questions could influence the length of the suspension and what reentry to the IHE will look like for the respondent. When limiting the consideration to predetermined elements, a DMB can avoid sanctioning a respondent based on non-relevant factors. One such non-relevant element is the potential future impact a sanction may have on the respondent. To be clear, concerns about future employment, educational obtainment, or reputational harm are not under the purview of the DMB. The DMB has a responsibility to its institution and has no control over how other entities may or may not use the information from a complaint. While it is appropriate to empathize with an individual, it is not appropriate to let emotion dictate a sanctioning decision.

FURTHER CONSIDERATIONS

Rationale and Reasoning

After working through the guide, the DMB should arrive at well-reasoned sanctions. By following the guide and engaging in robust discussion, the DMB should be able to articulate the reasoning and rationale for each sanction. This information should be shared with the complainant and the respondent in a written decision letter. Not only is this required under the Clery Act and Title IX, it will help both parties understand the outcome, and it will be valuable information for any appellate officer.

Applicable Laws

The last part of the guide serves as a filter. After considering the needs of the institution, the DMB should filter its decision through any applicable federal, state, and/or local laws and issues of compliance needed to be considered.¹⁵

¹⁵ While this section may have little to no impact on an institution in a given situation, cases involving concurrent criminal processes or those impacted by laws mandating repercussions for responsible findings, for example, warrant consideration. IHEs must also remain informed about compliance considerations in the ever changing legal and political landscape.

There may be instances when information regarding a respondent's previous pattern of behavior is introduced during an investigation. An institution's policy should address when and under what circumstances pattern evidence will be considered prior to a decision regarding responsibility. This section is intended to address previous policy violations on the part of the respondent and the impact those violations may have on the current sanctioning decision.

Considering Past Behavior

As mentioned earlier, past misconduct on the part of the respondent has a place in the sanctioning process. While a majority of complaints will involve a first-time respondent, there will be times when the respondent has been responsible for violating institutional policy on a previous occasion. If this scenario exists, the DMB should be informed of the previous misconduct and any associated sanction after the respondent has been found responsible for violating institutional policy in the current complaint.¹⁶ Each complaint must be investigated fully, fairly, and impartially, and if previous misconduct is considered during the fact-gathering phase it may inappropriately bias decision-makers and result in a finding of responsible without sufficient information to support that outcome.

If applicable, the DMB may consider previous misconduct when determining an appropriate sanction. The existence of previous misconduct may result in a more severe sanction for an incident if the previous misconduct had not occurred. If the institutional policy is well developed, it should clearly communicate to the campus community if the resolution system is tiered and progressive.

¹⁶ There may be instances when information regarding a respondent's previous pattern of behavior is introduced during an investigation. An institution's policy should address when and under what circumstances pattern evidence will be considered prior to a decision regarding responsibility. This section is intended to address previous policy violations on the part of the respondent and the impact those violations may have on the current sanctioning decision.

Precedent

While each case should be sanctioned individually based on its specific inputs, staying in line with how similar circumstances have been sanctioned in the past is important in the process. The institution should maintain a congruent range of sanctions for a variety of reasons, including avoidance of concerns of sanctions being too harsh or too light. Notably, maintaining congruent sanctions should be a consideration only if cases involving gender-based misconduct have been sanctioned adequately and thoughtfully in the past. Otherwise, the IHE is perpetuating a problematic system and should focus on the other considerations addressed in this guide.

Assessment

IHEs should assess whether their sanctioning process is equitable. This assessment can be initiated by comparing sanctions among similar violations and circumstances. If an IHE determines that cases resulted in inconsistent sanctions, a review should be done to determine whether factors such as, but not limited to, race, gender, religion, socioeconomic status, year in school, sexual orientation, and immigration status impacted the outcomes.¹⁷

¹⁷ Notably, identities of both the respondent(s) and the complainant(s) may impact the equitability of the sanctions. Reviews of sanctions should not be limited to characteristics of the respondent, but also the case in its entirety. IHE resolution processes have the ability to address traditional issues of power and privilege, but only if they are implemented fairly and equitably.

CONCLUSION

Sound policy and procedures must exist for a resolution process to work most efficiently and effectively. By reading the policy and procedures, an individual should be able to ascertain the seriousness of each violation, know how complaints will be evaluated, and have an idea of how violations will be sanctioned. Each complaint is unique with its individual set of information and participants, and using a sanctioning guide gives an institution the flexibility to address those unique elements while maintaining consistency in its resolution system. Any information used to determine a sanction should be available to all parties.

CITATIONS

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