



Question and Answers:

Charting the Uncharted: Addressing Changes to Investigations and Adjudications During Campus Closures and Times of Social Distancing

SUNY Student Conduct Institute

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I. Communicating to Students

Q: I'm reaching out to inquire about any templates, examples, or recommendations for Title IX offices to communicate to all students that they can still report, and to communicate which reporting methods are still in place, and which are not. Also, is there best practice in the communication to all employees notifying them of their ongoing obligation to report Title IX matters and reminding them to be mindful of complaints of online sexual harassment or abuse that may come around?

We do not have templates or examples regarding Title IX Office communication to all students or employees, as these communications are specific to your institution and should speak directly to your campus policies that require modification. However, we recommend that your communication at least reiterate the content that we are required to provide by law, updated if necessary for this new environment.

For students, this update may include:

- A reminder of the Title IX Coordinator's name and updated contact information;
- A reminder of the institution's policies against sexual harassment and sexual violence, and that these policies include online harassment (if they do) and off-campus misconduct (and to what extent and under what circumstances);
- An explanation of the process for reporting incidents even from locations remote from campus;
- An explanation of updated student disciplinary procedures (including any available waivers) in this new environment including the standard of evidence and potential sanctions as required by VAWA;
- Any additional notifications required by state law or college/university policy.

For employees, this update may include:

- A reminder of the Title IX Coordinator's name and updated contact information;
- A reminder of the institution's policies against sexual harassment and sexual violence, and that these policies include online harassment (if they do) and off-campus misconduct (and to what extent and under what circumstances);

- A reminder of your existing policies regarding responsible employee duties under Title IX and any additional duties under state law;
- Notice that these reporting duties continue, and any changes to the process for reporting;
- Guidance regarding how the type and nature of harassment and abuse students face may shift in an online environment;
- A reminder that employee reporting duties may be even more important in a remote learning environment where they are their students' main contacts with the institution;
- Any additional notifications required by state law or college/university policy.

II. Risk Assessment

Q: How do we assess/re-assess individual and community safety considerations in stalking cases, particularly where a complainant no longer feels the need to participate in an investigation?

There is no specific road map here, as these assessments are going to be specific to your institution, its policies, its current operating status, and the individuals and situation involved. But here are a few considerations we would suggest to help you make your decision:

- If all students were still on campus, what would your assessment be under your existing risk assessment procedures?
- What was that risk assessment based on?
 - The reporting individual(s)' wishes?
 - Physical presence of the accused individual including proximity to the reporting individual and the campus community?
 - Accused individual's use of technology?
 - The number of individuals involved?
- Which of those facts, if any, have now changed?
- Is that change substantively meaningful in an age where individuals can use technology to conduct stalking activities?

Keep in mind that while some facts may have changed in ways that could increase safety of the reporting individual and community (for example, the parties are no longer in physical proximity to each other) others may have changed in ways that could further threaten safety. These factors include lessened campus oversight on the parties' contact, and the potential for cyberstalking as campus life moves online.

III. Waivers in SIV Cases

Q: I reviewed the sample one party waiver you provided and was wondering if you would be providing a sample for a two party case--it seems to me that one party should not be able to delay to the detriment of the other party, but am curious to see if there is any wisdom to share when the parties are not in agreement about how to proceed.

Yes, we have created a waiver for two party cases, available here: <https://system.suny.edu/sci/news/3-13-20-charting-the-uncharted/index.html>

IV. Interim Measures

Q: Any ideas of what interim supportive measures might look like in the virtual environment?

Interim supportive measures will continue to include quite a range of accommodations under the current circumstances. Campuses will continue to provide interim measures as needed; however, there will likely be a shift in what those considerations are for a virtual campus. For example, we will need to worry less about students sitting next to each other in a lab, but we should worry more about students using social media, their phones, and even our online course systems to contact each other in violation of a No Contact Order. So, academic accommodations should still be on our minds for students who have classes together, but our accommodations will focus more on assessing what student-to-student contact that class still requires, and whether measures need to be taken to prevent that contact without physical presence in a classroom. For existing cases with interim measures in place, we suggest you communicate with parties and reassess these interim measures as your institution transitions to remote learning. Any modification to an interim measure should be followed with some opportunity for the parties to respond to the change.

Colleges should provide information about other available community resources (for medical, counseling, etc.) in the area where the reporting individual currently is living. Colleges may consult state and community agencies, and search for resources on the website of a college or university close to where the student lives. New York institutions may consult the SUNY SAVR database to identify these resources in New York state: <https://www.suny.edu/violence-response/>

Also consider the needs of immigrant and international victims/survivors of violence. SUNY has prepared a free, customizable resource to those individuals. More information can be found at suny.edu/visa.

V. Investigations

Q: We received two versions of this question:

- **What is the best way to navigate through Title IX investigations when you can't meet in person and a party might have privacy concerns at home, therefore, unable to zoom/skype?**
- **I am in a K-12 setting, I'm wondering if there are any specific suggestions for interviewing students in my population where students are not able to provide statements, do virtual interviews etc., independently or may not have access to computers/laptops at home to send statements etc.**

To the extent that a party's involvement in the process is necessary as a matter of due process (for example, if they are the accused party), then the investigation may have to be delayed until they can have an adequate opportunity to respond. If the unavailable party is the reporting individual, then consider whether you can proceed with the investigation without further communication with that person. Depending on where you work, due process may or may not require the reporting individual to be available for live or remote cross-examination.

The bottom line is that you may need to postpone an investigation and/or hearing until all parties are able to participate to the extent required by due process and any operative campus policies. If there are circumstances when a party participating would be put at a clear disadvantage or otherwise prejudiced from entering a remote conduct proceeding, then you should not move forward until these issues are able to be resolved.

What platform is the best to collect evidence from parties to an investigation? Should they just email you the documents or pictures?

Whether you choose to use have parties upload evidence through a file sharing program, or to have parties submit evidence by email, that is a decision for your institution. In determining what you should use, the main consideration is control of the files. Under either approach, have students directly email you documents or create a private folder with each party that allows you to manage access, so that you can do all necessary redactions before the other party can view them. If you collect evidence by email, be sure that your email platform has appropriate security settings and sufficient capacity to handle large file types, such as videos.

However you chose to approach collecting evidence, you should ensure that you have a way of verifying the authenticity of the evidence. For example, rather than just having a student submit a text thread, have them additionally submit a screen recording or video scrolling through that thread and its timestamps. And finally, it will likely save you a headache if the method is one that easily allows you to save and organize the evidence in one virtual location. With those considerations in mind, here is a resource document developed by SCI that includes links to data storage and sharing platforms:

<https://system.suny.edu/media/suny/content-assets/documents/sci/SUNY-SCI-Tech-Guide.pdf>

VI. Hearings

Q: We received three versions of this question:

- **What recommendations do you have if you need to assess credibility but a student says they do not have video capabilities?**
- **I'm in the 6th circuit. For parties being able to judge credibility/demeanor, does that mean parties must be able to see each other over video? What about in cases where we would normally separate parties by a screen for safety purposes?**
- **A Respondent has identified that credibility will likely be a key factor and wants to have an in-person appearance before the fact finders. Our code does not explicitly state that hearings are in-person, but is it implied. The code does specifically state that all parties have "a range of options for providing testimony via alternative arrangements, including telephone/videoconferencing...". If the Respondent does not want to sign a waiver for a remote hearing, can we move forward with one anyway?**

As discussed in Part I of this webinar series, a remote hearing satisfies due process in the Sixth Circuit and other jurisdictions requiring cross-examination in "credibility" cases as long as the technology allows the

parties and panelists to assess demeanor. We have included references to those cases here: <https://system.suny.edu/sci/news/3-13-20-charting-the-uncharted/index.html>.

SCI has drafted a model waiver for two-party cases that anticipates many of these challenges. Ideally, you can work with the parties and their advisors before the hearing to ensure that all parties understand their rights and responsibilities. A link to the waiver is included here: <https://system.suny.edu/sci/news/3-13-20-charting-the-uncharted/index.html>.

Parties cannot be required to agree to the waiver. But if, as is suggested in the above question, the code of conduct provides flexibility to the institution in the options for obtaining testimony, then the parties can likely be required to give testimony by the means indicated in your institution's Code. The answer to this question is case-specific, and the institution should consult counsel in interpreting the application of its code, considering always the reasonable view of a student in understanding the plain language of the code.

It may be that we are unable to move certain cases forward because of technological limitations, complexity of the issues and testimony, or the inability or outright refusal of one or more parties to participate. The waivers are meant to be helpful where they can be helpful, but may not be a panacea in all cases. There may simply be some cases that cannot proceed (or aspects of which cannot proceed) until a return to campus.

Q: Should a hearing be held remotely, the Respondent is concerned with their ability to be advised by their advisor, considering that they cannot be in the same physical location. The Respondent believes that not being physically present with his advisor and having to simultaneously navigate participating remotely on one electronic platform and then being advised on another electronic platform would greatly hamper their ability to be advised. Thoughts on this?

As we all know, the rules of the Violence Against Women Act amendments to the Clery Act still apply, and it is institutions' duty to ensure that parties have equal access to an advisor of their choice. Moving hearings entirely online can pose challenges in this area in a number of ways, including our ability to ensure that *both* parties are able to communicate with their advisor effectively. This is an example of what might necessitate slowing down your hearing and embracing an approach that is generous in scheduling and providing significant breaks. Institutions may consider setting up meeting rooms, whether virtual or in a physical space on- or off-campus, where advisors and advisees can meet during the remote hearing.