



# Policy 6.4: Issues and Recommendations

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# Scope



- Policy 6.4 vaguely describes prohibited behavior, but says little about what is not covered. The Policy makes no attempt to formulate a bottom line, below which the harm to the complainant is too small, or the harm from suppressing or threatening to suppress the behavior is too great comparatively, to warrant coverage.
- Policy 6.4 in its long art. 2 lists nine prohibited behaviors: Aiding Prohibited Conduct; Attempting to Commit Prohibited Conduct; Dating and Domestic Violence; Retaliation; Sexual Assault; Sexual Exploitation; Sexual and Gender-Based Harassment; Stalking; and Violating an Interim Measure. It says nothing about what is not prohibited. It seems to us that a new art. 2.10 should put a limit on stretching the reach of the Policy by complainants or officials.
- But today we'll only sketch a sampling of four more technical proposals, perhaps uncontroversial but consequently suggestive of the range of real problems.



# Mediation

- Art. 21 on Alternate Resolution now provides: “**Alternate Resolution will not involve mediation, or any face-to-face meetings, between the complainant and the respondent.**”
- It must be amended to allow face-to-face mediation in appropriate cases. Moreover, Alternate Resolution should be less the plea-bargaining process it now is, and much more a cooperative process between the parties. The new spirit sweeping Title IX procedures elsewhere embraces the notion of restorative justice.
- Therefore, the Title IX office should encourage mediation, not just allow it.



# Evidence

- ▶ Art. 23.9.1 provides for the hearing: “**Formal rules of evidence will not apply.**”
- ▶ One difficulty here is that there are two kinds of evidence rules: principles that ensure reliable evidence aimed at truth-finding (like requiring evidence to be relevant to the charge, and testimony to be based on personal, first-hand knowledge), and exclusionary rules that seem technical to the lay person (like privilege, incompetency, and hearsay). Art, 23.9.1 means to avoid the latter rules, but could not conceivably mean to repeal the basic principles of truth-finding.
- ▶ Yet virtually everything found by the investigator goes into the investigative record, which then goes to the Hearing Panel. The result is that the Hearing Panel will consider reams of irrelevant information and mere rumors. The danger becomes that the Hearing Panel will decide on the basis of the parties' characters rather than on whether the charge was proven. Experience has been that investigative records can be overwhelmingly long character assassinations.



# Withholding Degrees

- Art. 26's provides: **"Degrees will not be awarded to the respondent while a Formal Complaint under these procedures is pending."**
- Some last-minute-before-graduation filings under Policy 6.4 have resulted in unjust results. The lengthy adjudication process has resulted in jobs and graduate admissions put in jeopardy, professional examinations precluded, and Alternate Resolutions accepted because the delay in getting the degree was unbearable. The provision is mandatory. Additionally, there is no way for the would-be graduate to challenge the interim measure of withholding the degree.
- A much fairer approach would follow from amending art. 26 to provide at the end of the quoted sentence: **", unless the Title IX Coordinator exercises discretion to enter into an agreement with the respondent to preserve the University's jurisdiction over the respondent for the Formal Complaint and to provide revocation of the degree as an available final sanction or remedy"**.





# Confidentiality



- Past Title IX Coordinators have interpreted the confidentiality requirement very strictly, by broadly interpreting the ban on “retaliation.” The interpretation has been that no one involved in the process can discuss anything, no matter how nonspecific, that they have learned through involvement in the process.
- Thus, the persons who alone know anything about the operation of Policy 6.4 can discuss it with no one. It is hard to imagine a more effective gag order to prevent any scrutiny of process. We can attest that the University community is in the dark.
- The Process Privacy statement should be amended to provide that:  
“But any person may freely discuss the actual operation of Policy 6.4 as a policy, as long as that person withholds any information directly or indirectly revealing the identity of a party as well as any unnecessary details of individual cases.”
- PS: Thought should be given to adopting the Campus Code’s requirement of publishing anonymized outcomes, both for transparency reasons and for collecting precedents.