



# St. Peter's Hospital College of Nursing

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ST PETER'S HEALTH PARTNERS

## **SEXUAL VIOLENCE PREVENTION AND RESPONSE, TITLE IX POLICY**

### **PURPOSE:**

This policy complies with Title IX of the Education Amendments of 1972, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, the Campus Sexual Violence Elimination Act (SaVE Act), and NYS Education Law Sections 6432 and 6439-6449.

### **POLICY STATEMENT:**

Samaritan Hospital School of Nursing (SPHCON) is committed to maintaining a healthy and safe learning, living, educational, and working environment that is free from gender discrimination and harassment and to creating an environment, that promotes responsibility, dignity, and respect in matters of sexual conduct. Title IX prohibits Discrimination, Harassment, and Retaliation of any kind on the basis of sex. Title IX also prohibits Violence Against Women Act offenses ("Sexual and Interpersonal Offences") such as sexual assault, sexual misconduct, sexual violence, domestic violence, dating violence, and stalking. Any person, regardless of gender, can be a victim/survivor of a Title IX violation. This Policy applies to on campus conduct. Samaritan Hospital School of Nursing's Campus is defined as any property owned and operated by the governing organization, St. Joseph's Health. Any Title IX violation is strictly prohibited and will not be tolerated.

### **CONTACTS:**

The Title IX Coordinator/Investigator handles matters related to Title IX violations. The Title IX Coordinator/Investigator will help students:

- Access medical and mental health treatment
- Report the Sexual or Interpersonal Offense to the Police
- Access support resources
- Assist the victim/survivor in obtaining a SPHCON no-contact order, a court-issued restraining order, or other lawful order of protection

### **Title IX Coordinator/Investigator**

Diana O'Brien

518-331-160

Diana.obrien@sphp.com

SPHCON encourages students who have been the victim/survivor of Sexual or Interpersonal Offenses to pursue criminal charges against the person or persons they believe committed the crime. A criminal charge and a SPHCON investigation or disciplinary complaint may be pursued at the same time. Students may file a disciplinary complaint with or without pursuing criminal charges. Victim/survivor support and resources are available regardless of criminal charges, or SPHCON disciplinary action.

## **I. DEFINITIONS:**

**A. Institution:** Any college or university chartered by the regents or incorporated by special act of the legislature that maintains a campus in New York

**B. Bystander:** A person who observes a crime, impending crime, conflict, potentially violent or violent behavior, or conduct that is in violation of rules or policies of an institution.

**C. Code of Conduct:** The written policies adopted by an institution governing student behavior, rights, and responsibilities while such student is matriculated in the institution.

**D. Confidentiality:** “Confidentiality” may be offered by an individual who is not required by law to report known incidents of sexual assault or other crimes to institution officials, in a manner consistent with state and federal law, including but not limited to 20 U.S.C. 1092(f) and 20 U.S.C. 1681(a). Licensed mental health counselors, medical providers and pastoral counselors are examples of institution employees who may offer confidentiality.

**E. Privacy:** “Privacy” may be offered by an individual when such individual is unable to offer confidentiality under the law but shall still not disclose information learned from a reporting individual or bystander to a crime or incident more than necessary to comply with this and other applicable laws, including informing appropriate institution officials.

**F. FERPA:** The Family Education Rights and Privacy Act (FERPA) protects students’ educational records. FERPA prohibits SPHCON from releasing these records to persons outside the institution without the student’s consent except in response to a lawful subpoena or as otherwise required by law. However, if the student-offender is found to have committed a Sexual or Interpersonal Offense, SPHCON may release the following information to anyone:

- \*Name of the student-offender (but not the identity of the victim/survivor)
- \*The violation
- \*Sanctions imposed as a result of the disciplinary proceedings

**G. Complainant:** An individual who is alleged to be the victim of conduct that could constitute sexual harassment, irrespective of whether a formal complaint has been filed.

**H. Respondent:** An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Definition does not restrict a respondent to being a person enrolled or employed by the recipient or who has any other affiliation or connection with the recipient but that an institution may in its 3

discretion dismiss a formal complaint if the respondent is no longer enrolled or employed by the institution, in recognition that an institution's general obligation to provide a complainant with a prompt, non-deliberately indifferent response might not include completing a grievance process in a situation where the recipient lacks any disciplinary authority over the respondent.

**I. Sexual activity:** The same meaning as "sexual act" and "sexual contact" as provided in 18 U.S.C. 2246(2) and 18 U.S.C. 2246(3) .

In order to determine when affirmative consent is required prior to sexual activity, this legislation first defines "sexual activity." Current definition used by the federal government. 18 U.S.C. 2246(2)-(3) states that:

**Sexual Act:**

- Contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
- Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
- The penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
- The intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

**Sexual Contact:**

- The intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Individuals must obtain affirmative consent prior to engaging in any of the activity referenced above.

**J. Domestic Violence:** Under New York law domestic violence is an act which would constitute a violation of the penal law including, but not limited to (and is committed by a family member):

- disorderly conduct
- harassment
- aggravated harassment
- sexual misconduct
- forcible touching
- sexual abuse, stalking,
- criminal mischief
- menacing
- reckless endangerment
- kidnapping
- assault
- attempted murder
- criminal obstruction or breaching of blood circulation
- strangulation

- creates a substantial risk of physical or emotional harm to a person or a person's child

The victim can be anyone over the age of sixteen, any married person, or parent accompanied by his or her minor child or children in situations in which such person or such person's child is a victim of the act.

**K. Dating Violence:** New York law does not specifically define "dating violence." However, under New York Law, intimate relationships are covered by the definition of domestic violence when the act constitutes a listed crime and is committed by a person in an "intimate relationship" with the victim.

**I. Sexual Harassment:** Conduct on the basis of sex that satisfies one or more of the following:  
(i) An employee conditioning educational benefits on participation in unwelcome sexual conduct (i.e., *quid pro quo*);  
(ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity; or  
(iii) Sexual assault (as defined in the Clery Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

**J. Sexual Assault:** The term "sexual assault" is not used in the New York State penal code. Instead, NYS law uses the terms "rape," "fondling," "incest," and "statutory rape," which meet the federal definition of sexual assault as used in the Federal Bureau of Investigation's Uniform Crime Reporting program.

**K. Rape:** Rape is nonconsensual sexual intercourse perpetrated by coercion, intimidation, or physical force either threatened or actual. Rape also occurs when the victim is incapable of giving legal consent because the victim is less than 17 years of age, mentally incapacitated or incompetent, physically helpless including by drug or alcohol consumption or due to being asleep.

**L. Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will when the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.

**M. Incest:** Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

**N. Statutory Rape:** Non-forcible sexual intercourse with a person who is under the age of consent.

**O. Stalking:** Occurs when one person engages in a course of conduct which is directed at a specific person and that course of conduct causes that person to be in fear of harm to himself or herself, property, a member of his/her immediate family, or an acquaintance. Cyber stalking is a form of stalking which can include, but is not limited to, phone, text, IM, Facebook, and other electronic means.

**P. Affirmative Consent:** Affirmative consent is a knowing, voluntary, and mutual decision between all participants to engage in sexual activity. Consent may be given by words or actions as long as those words or actions create clear permission regarding an individual's willingness to engage in sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity or gender expression.

Consent to any sexual act or prior sexual activity between or with any party does not necessarily constitute consent to any other sexual act.

Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol at the time.

Consent may be initially given and withdrawn at any time.

Consent cannot be given when a person is incapacitated such that the individual lacks the ability to choose knowingly to participate in sexual activity. Incapacitation may be caused by a lack of consciousness or by being asleep, being involuntarily restrained, or in other circumstances such as being under the influence of drugs and/or alcohol to the extent that the individual is unable to consent.

Consent cannot be given when it is the result of coercion, intimidation, force, or threat of harm.

When consent is withdrawn or can no longer be given, sexual activity must stop.

## **II. CRIME ALERTS/EMERGENCY NOTIFICATIONS**

If a report of a Sexual or Interpersonal Offense reveals there is an immediate threat to the health or safety of students or employees on campus or that an on-going serious or continuing threat to the campus community exists, an Emergency Notification or a Campus Crime Alert will be issued. The purpose of a Campus Crime Alert is to enable persons to protect themselves, heighten safety awareness, and seek information that will lead to an arrest and conviction of the perpetrator.

**The victim's/survivor's name and other personally identifying information WILL NOT be included in any Emergency Notification or Crime Alert.**

## **III. RESOURCES AND SUPPORT SERVICES (may have a fee for services)**

### **A. Medical and Counseling Resources**

#### **a. Medical Treatment**

- St. Peter's Hospital, 310 South Manning Blvd, Albany, NY 12208
- Samaritan Hospital, 2215 Burdett Ave, Troy, NY 12180
- Albany Medical Center, 43 New Scotland Ave, Albany, NY 12208

- **To best preserve evidence avoid showering, washing, change clothes, combing hair, drinking, eating, or doing anything to alter physical appearance until after a physical examination has been completed.**
- Within 96 hours of an assault, person can receive a Sexual Assault Forensic Examination (commonly referred to as a rape kit) at a hospital. While there should be no charge for a rape kit, there may be a charge for medical or counseling services off campus and, in some cases insurance may be billed for services.
- You are encouraged to let hospital personnel know if you do not want your insurance policyholder to be notified about your access to these services.

#### **b. Confidential Counseling Resources**

##### **EAP (Employee Assistance Program) services through Carebridge:**

- 1-800-437-0911
- You may also send an email to [clientservice@carebridge.com](mailto:clientservice@carebridge.com).

To receive services through Carebridge, you must be an employee or a dependent of an employee of SPHP. For students who do not qualify for Carebridge, the Behavioral Health (BH) department at Samaritan Hospital provides the same service as Carebridge, at no cost to the student. To access services through Samaritan Hospital BH department, call Roxanne Heath directly at 518-271-3473

##### **The New York State Office of Victim Services**

- May be able to assist in compensating victims/survivors for health care and counseling services, including emergency funds.
- More information may be found here:  
[http://www.ovs.ny.gov/files/ovs\\_rights\\_of\\_cv\\_booklet.pdf](http://www.ovs.ny.gov/files/ovs_rights_of_cv_booklet.pdf)
- Or by calling 1-800-247-8035. Options are explained here:  
<http://www.ovs.ny.gov/helpforcrimevictims.html>

#### **B. Supportive Measures**

The Title IX Coordinator is responsible for offering (§ 106.44(a)), and coordinating the implementation of (§ 106.30), supportive measures. § 106.30 defines “supportive measures” as non-disciplinary, non-punitive individual services offered to the complainant or respondent; such services do not need to be provided to witnesses.

- Students may, upon request, obtain interim support services by contacting the Title IX Coordinator/Investigator Diana O'Brien at 518-331-1160 or [Diana.obrien@sphp.com](mailto:Diana.obrien@sphp.com). The Title IX Coordinator/Investigator is available during regular business hours throughout the year to meet with students who need information or guidance about Title IX violations. No police report, disciplinary complaint or investigation need occur before this option is available. The Title IX Coordinator/Investigator will exercise discretion and sensitivity about sharing the identity of the victim/survivor when arranging for interim support services. A victim/survivor can access these services any time, even if the student initially declined the services.

- Services must be offered as appropriate, as reasonably available, and without fee or charge, which may include:
  - o Counseling
  - o Extensions of deadlines or other course-related adjustments
  - o Modifications of work or class schedules
  - o Campus escort services
  - o Mutual restrictions on contact between the parties
  - o Changes in work or housing locations
  - o Leaves of absence
- Increased security and monitoring of certain areas of the campus, and other similar measures § 106.30(a) requires that services be provided to either the complainant or the respondent and be kept confidential unless disclosure is necessary to provide the service
  - o A no contact order requested by one party would have to be disclosed to the other party in order to be implemented
- Interim suspension or expulsion of a respondent is not included in the list of supportive measures.

A suspension, even pending a disciplinary proceeding, is a disciplinary sanction that can only be applied after a finding of responsibility. However, where a respondent poses an immediate threat to the physical health or safety of the complainant or anyone else, § 106.44(c) allows for their emergency removal prior to the conclusion of a grievance process (or even where no grievance process is pending) and § 106.44(d) allows the school to place a non-student employee respondent on administrative leave while a grievance is pending.

### **C. Immigrants or International Student Visa Information**

There are certain legal protections available to immigrants or international students in the form of Visas, particularly the U visa and the T visa.

- The U visa provides temporary legal status and work eligibility for victim/survivors of certain crimes (including domestic violence, sexual assault, human trafficking, involuntary servitude, and other offenses).
- The T visa provides victim/survivors of human trafficking and immediate family members with temporary legal status and work eligibility.

These visas can be applied for when agreeing to assist law enforcement, unless an individual meets one of the exceptions. Additional information is available through the U.S. Department of Homeland Security U.S. Citizenship and Immigration Services: [www.uscis.gov](http://www.uscis.gov)

### **D. Legal Assistance**

#### **The New York State Office of Victim Services**

- May be able to assist in compensating victims/survivors for health care and counseling services, including emergency funds.

- More information may be found here:  
[http://www.ovs.ny.gov/files/ovs\\_rights\\_of\\_cv\\_booklet.pdf](http://www.ovs.ny.gov/files/ovs_rights_of_cv_booklet.pdf)
- Or by calling 1-800-247-8035. Options are explained here:  
<http://www.ovs.ny.gov/helpforcrimevictims.html>

### **The Legal Project**

- 24 Aviation Road, Albany, NY 12205
- 518-435-1770

### **E. Protection Orders**

Samaritan Hospital Security Department at St. Mary's, the Troy City Police Department, and the Title IX Coordinator/Investigator are all available to assist the student in obtaining a SPHCON no-contact order or a court-issued restraining order or other lawful order of protection.

After a protection order is issued, the protected party should provide a copy of the court order to the Dean of Student Services, Samaritan Hospital Security Department at St. Mary's and/or the Troy City Police Department. Any violation of the court order should be promptly reported to the police.

## **IV. MAKING A REPORT**

***You have the right to make a report to university police or campus security, local law enforcement, and/or state police or choose not to report; to report the incident to your institution; to be protected by the institution from retaliation for reporting an incident; and to receive assistance and resources from your institution (6444(2)).***

### **A. New York Consolidated Laws, Education Law - (EDN § 6443). Students' bill of rights**

Every institution shall adopt and implement the following "Students' Bill of Rights" as part of its code of conduct which shall be distributed annually to students, made available on each institution's website, posted in campus residence halls and campus centers, and shall include links or information to file a report and seek a response, pursuant to section sixty-four hundred forty-four, and the options for confidential disclosure pursuant to section sixty-four hundred forty-six:

***All students have the right to:***

- 1.** Make a report to local law enforcement and/or state police;
- 2.** Have disclosures of domestic violence, dating violence, stalking, and sexual assault treated seriously;
- 3.** Make a decision about whether or not to disclose a crime or violation and participate in the judicial or conduct process and/or criminal justice process free from pressure by the institution;
- 4.** Participate in a process that is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard;
- 5.** Be treated with dignity and to receive from the institution courteous, fair, and respectful health care and counseling services, where available;



6. Be free from any suggestion that the reporting individual is at fault when these crimes and violations are committed, or should have acted in a different manner to avoid such crimes or violations;
7. Describe the incident to as few institution representatives as practicable and not be required to unnecessarily repeat a description of the incident;
8. Be protected from retaliation by the institution, any student, the accused and/or the respondent, and/or their friends, family and acquaintances within the jurisdiction of the institution;
9. Access to at least one level of appeal of a determination;
10. Be accompanied by an advisor of choice who may assist and advise a claimant, reporting individual, accused, or respondent throughout the judicial or conduct process including during all meetings and hearings related to such process;
11. Exercise civil rights and practice of religion without interference by the investigative, criminal justice, or judicial or conduct process of the institution.”

**B. Confidential Disclosure.** In addition, there are a number of publicly available services through which a confidential report may be made, see: <https://ovs.ny.gov/locate-program>. Additional disclosure and assistance options are catalogued by the Office for the Prevention of Domestic Violence (many available in several languages).

- Safe Horizons: <http://www.safehorizon.org/>

Please note that these hotlines are for crisis intervention, resources, and referrals, and are not reporting mechanisms, meaning that disclosure on a call to a hotline does not provide any information to SPHCON. Complainants are also encouraged to contact a campus confidential or private resource so that the campus can take appropriate action in these cases.

**a. Criminal complaints:**

**To file a criminal complaint:**

- **New York State Police, Troop G**  
760 Troy Schenectady Road, Latham, NY 12210  
(518) 783-3211  
Zone 4 – Albany Address: Concourse , Empire State Plaza, Albany, NY 12242  
(518) 474-5331
- **Albany City Police Department**  
165 Henry Johnson Blvd.  
Emergencies: 9-1-1  
Non-Emergencies: (518) 438-4000  
Website: <http://www.albanyny.gov/government/departments/PoliceDepartment.aspx>
- St. Peter's Sexual Assault & Crime Victim's Assistance Program  
24 HR Crisis Hotline-271-3257  
<http://www.sphp.com/sexual-assault>

### **C. Private (Non-Confidential) Disclosure:**

To report an incident to Samaritan Hospital's Safety and Security or to a SPHCON official who can offer privacy and can assist in obtaining resources, please contact:

- Samaritan Hospital Security at St. Mary's at: 518-268-5304 OR 518-441-0514
- Title IX Coordinator/Investigator: Diana O'Brien at 518-331-1160 or [diana.obrien@psph.com](mailto:diana.obrien@psph.com)

### **D. Anonymous Reporting:**

Individuals wishing to file an anonymous report of sexual assault, domestic violence, dating violence, and/or stalking:

- 518-331-1160 to speak to the Title IX Coordinator/Investigator anonymously

### **E. Public Awareness/Advocacy Events:**

If you disclose a situation through a public awareness event such as “Take Back the Night,” candlelight vigils, protests, or other public events, SPHCON is not obligated to begin an investigation. SPHCON may use the information you provide to inform the need for additional education and prevention efforts.

### **F. Alcohol and/or Other Drug Use Amnesty in Sexual and Interpersonal Violence Cases**

The health and safety of every student at SPHCON is of utmost importance. SPHCON recognizes that students who have been drinking and/or using drugs (whether such use is voluntary or involuntary) at the time that violence, including but not limited to domestic violence, dating violence, stalking, or sexual assault occurs may be hesitant to report such incidents due to fear of potential consequences for their own conduct. SPHCON students will be afforded amnesty if they report an incident of sexual assault, domestic violence, dating violence or stalking even if they've been drinking or using drugs.

A bystander acting in good faith or a reporting individual acting in good faith that discloses any incident of domestic violence, dating violence, stalking, or sexual assault to SPHCON officials or law enforcement will not be subject to SPHCON's code of conduct action for violations of alcohol and/or drug use policies occurring at or near the time of the commission of the domestic violence, dating violence, stalking, or sexual assault.”

SPHCON strongly encourages students to report domestic violence, dating violence, stalking, or sexual assault to: **Diana O'Brien, Title IX Coordinator/Investigator, Office #2004, Phone # 518-331-1160, [diana.obrien@sphp.com](mailto:diana.obrien@sphp.com)**

### **V. Title IX Investigation and Hearing Procedures :**

**A. Formal Complaint:** Must be made by the Complainant. However, there may be instances where the Title IX Coordinator/Investigator may open an investigation on behalf of the Complainant.

**B.** A Complainant may request that charges be filed against an accused student. Conduct charges may be applied to any incident with a reasonable connection to the campus, including incidents that occur on campus.

**C.** If SPHCON determines that an investigation is required, it shall notify the Complainant and Respondent simultaneously and take immediate action as necessary to protect and assist them.

**D.** SPHCON will conduct a timely review of all complaints filed pursuant to this policy. Absent extenuating circumstances, review and resolution is expected to take place within a reasonable period of time from receipt of the complaint.

**E.** SPHCON will seek consent from Complainant prior to conducting an investigation. Declining to consent to an investigation shall be honored unless the institution determines in good faith that failure to investigate does not adequately mitigate a potential risk of harm to the Complainant or other members of the community. Honoring such a request may limit the College's ability to meaningfully investigate and pursue conduct action against an accused individual. Factors used to determine whether to honor such a request include, but are not limited to:

**a.** Whether the Respondent has a history of violent behavior or is a repeat offender,

**b.** Whether the incident represents escalation in unlawful conduct on behalf of the Respondent from previously noted behavior;

**c.** The increased risk that the Respondent will commit additional acts of violence;

**d. Whether the (Respondent) used a weapon or force;**

**e. Whether the (Complainant) is a minor**

**f.** Whether the institution possesses other means to obtain evidence such as security footage, and whether available information reveals a pattern of perpetration at a given location or by a particular group.

**F.** The standard of review in all cases arising under this policy is a "preponderance of the evidence" – whether it is "more likely than not" that a prohibited act occurred and the Respondent committed that act. If the totality of the evidence presented meets this standard, then the Respondent must be found responsible.

**G.** Provide for a live hearing. At the hearing the decision-maker must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient to otherwise restrict the extent to which advisors may participate in the proceedings.

**a.** At the request of either party, SPHCON must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to

simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness.

**b.** Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant, thus implying that a school may require that questions be submitted in advance.

**c.** If a party does not have an advisor present at the live hearing, SPHCON must provide without fee or charge to that party, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

**d.** Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

**e.** If a party or witness does not submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

**f.** Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at SPHCON's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. SPHCON will create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

***Live Hearing Participants:***

**Hearing Facilitator:** Individual who presides over the hearing or appeal and will:

- Adopt rules controlling the conduct of participants to ensure that questioning is done in a respectful manner;
- Adopt rules that instruct party advisors to conduct questioning in a respectful, non-abusive manner;
- Decide whether the parties may offer opening or closing statements;
- Specify a process for making objections to the relevance of questions and evidence;
- Place reasonable time limitations on a hearing.

**Decision-maker.** The live hearing must be overseen by a decision-maker who:

- is not the Title IX coordinator or the investigator;
- is free from conflict of interest or bias, including bias for or against complainants or respondents; and,

- has been trained on topics including how to serve impartially, issues of relevance, including how to apply the rape shield protections provided for complainants, and any technology to be used at the hearing.

**Role of the Decision-maker.** After a question is asked of a complainant, respondent, or witness, the Decision-maker must determine, before any answer is provided, whether the question is relevant *See* 34 C.F.R. §106.45(b)(6)(i). The Decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude a question as not relevant.

***Determining Relevance.*** The basic test for relevance is whether the question posed is probative of the question of responsibility. In determining whether a question is relevant, the decision-maker must focus on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true. 85 Fed. Reg. 30294.

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are "irrelevant," unless
  - (1) such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - (2) the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. 34 C.F.R. §106.45(b)(6)(i).
- §106.45 deems other forms of evidence and information not relevant or otherwise not subject to use in a grievance process: information protected by a legally recognized privilege; evidence about a *complainant's* prior sexual history, and any party's medical, psychological, and similar records unless the party has given voluntary, written consent. 85 Fed. Reg. 30294. Furthermore, questions that are duplicative or repetitive may fairly be deemed not relevant and thus excluded. *Id.* at 30361.

***Exceptions to Relevance.***

- ***Rape Shield.*** Section 106.45(b)(6)(i) contains rape shield protections, providing that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- The rape shield protections serve a critically important purpose in a Title IX sexual harassment grievance process: protecting complainants from being asked about or having evidence considered regarding sexual behavior, with two limited exceptions.
- Such questions, and evidence, are not only excluded at a hearing, but are deemed irrelevant." *Id.* at 30351.

- The questions or evidence permitted and excluded under the rape shield language in §106.45(b)(6)(i) will depend in part on the institution’s definition of consent, but adds that the decision-maker’s training will include an understanding of this definition, and thus the decision-maker will understand how to apply the rape shield language in accordance with that definition. *Id.* at 30125, 30353.

**Advisor of Choice.** The advisor may be any person of the party’s choosing. If the party does not choose an advisor, SPHCON may select an individual to serve in this role for the limited purpose of conducting the cross-examination during the hearing. There should be no prohibition of conflict of interest or bias for such advisors. All SPHCON advisors will be trained and certified to conduct cross-examination on behalf of one party.

**Role of Advisors.** Allows advisors to “ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility” and must be conducted “directly, orally, and in real time” by the advisor and *never* by the parties.

**Complainant and Respondent.** To protect every individual’s right to a live hearing, SPHCON will also “protect every individual’s right to choose whether to participate” in the hearing or answer cross-examination questions.

- Cross-examination may be emotionally difficult for parties and witnesses, especially when the facts at issue concern sensitive, distressing incidents involving sexual conduct.
- Not every party or witness will wish to participate. SPHCON has no ability to compel a party or witness to participate
- In the event that any party declines to participate, the Decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the Decision-maker cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross examination or other questions.

**Witnesses.** Like parties, witnesses are not required to participate in the live hearing process, but without their live testimony the decision-maker cannot rely on their statements. No person should coerce or intimidate any witness into participating in a Title IX proceeding, and should be able to participate in the live hearing free from retaliation.

- Witnesses do not have the right to demand to testify in a separate room, however, the Hearing Facilitator has the discretion to permit any participant to appear remotely. Witnesses also are not required to testify and may simply choose not to testify because the determination of responsibility usually does not directly impact, implicate, or affect them. With respect to a witness who claims to also have been sexually assaulted by the respondent, the institution has discretion to permit the witness to testify remotely, or to hold the entire live hearing virtually

**In-Person or Virtually.** Live hearings may be conducted with all parties physically present in the same geographic location or, at SPHCON’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants to see and

hear each other. Further, at any party's request, cross-examination may occur with the parties in separate rooms using technology that enables participants to see and hear the person answering questions.

## **VI. Informal Resolutions**

Section 106.45(b)(9) SJSON may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. SPHCON may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility SPHCON may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that SPHCON:

- (i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- (ii) Obtains the parties' voluntary, written consent to the informal resolution process; and
- (iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

SPHCON allows for either party to withdraw from any informal resolution process offered by an institution at any time and commence instead the formal grievance process

SPHCON prohibits the use of informal resolution in cases where the respondent is an employee of the institution and the complainant is a student.

§ 106.45(b)(9) Gives SPHCON the discretion to offer and facilitate informal resolution processes, such as mediation or restorative justice, subject to each party voluntarily agreeing after giving informed, written consent. Informal resolutions and potentially presenting a way to resolve sexual harassment allegations in a less adversarial manner than the investigation and adjudication procedures that comprise the § 106.45 grievance process.

Informal resolution may only be offered after a formal complaint has been filed, so that the parties understand what the grievance process entails and can decide whether to voluntarily attempt informal resolution as an alternative.

SPHCON may never require any person to participate in informal resolution, and may never condition enrollment, employment, or enjoyment of any other right or privilege upon agreeing to informal resolution. Informal resolution is never allowed as an option to resolve allegations that an employee sexually harassed a student. *See* 85 Fed. Reg. 30054 (May 19, 2020).

An informal resolution process does not require the holding of a live hearing with cross-examination. Facts about the underlying incident are not contested by the parties and thus resolution does not turn on resolving competing factual narratives. *See id.* At 30329.

☐ SPHCON's informal resolution does not require more than one person to facilitate the informal resolution process and recognizes the importance of giving recipients flexibility and discretion to satisfy their Title IX obligations in a manner consistent with their unique values and the needs of its educational community, and the wishes of the parties to each formal complaint. *See id.* At 30372.

### ***Facilitators***

§ 106.45(b)(1)(iii) requires SHSCON to ensure any individuals who facilitate an informal resolution process to receive training on:

- the definition of sexual harassment under § 106.30(a);
- the scope of the institution's education program or activity;
- how to conduct informal resolution processes; and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias.

### ***Informal Process Facilitator Serving as a Witness***

- With respect to informal resolution facilitators potentially serving as witnesses in subsequent formal grievance processes, SPHCON expects this possibility to be clearly disclosed to the parties as part of the § 106.45(b)(9)(i) requirement to provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared. *See* 85 Fed. Reg. 30400-30401.

### ***Discipline, up to and including expulsion, Permitted***

- § 106.45(b)(9), states an informal resolution may result in the parties, and SPHCON, agreeing on a resolution of the allegations of a formal complaint that involves punishing or disciplining a respondent.
- SPHCON complies under § 106.44(a) and § 106.45(b)(1)
  - (i) that SPHCON may not discipline a respondent without following a grievance process that complies with § 106.45, because § 106.45 expressly authorizes a recipient to pursue an informal resolution process (with the informed, written, voluntary consent of both parties). *See* 85 Fed. Reg. at 30401.



### ***Notice Provision***

- To ensure that the parties do not feel forced into an informal resolution by a recipient, and to ensure that the parties have the ability to make an informed decision, § 106.45(b)(9) SPHCON requires recipients to inform the parties in writing of the allegations, the requirements of the informal resolution process, any consequences resulting from participating in the informal process, and to obtain both parties' voluntary and written consent to the informal resolution process. *See* 85 Fed. Reg. at 30402.

### ***Voluntary Written Consent***

- Informal resolutions must be voluntarily agreed to by each party, forbidding recipients from requiring any party to participate in an informal process, and preventing recipients from conditioning enrollment, employment, or any other right on a party's participation in informal resolution.

### ***Prohibition on use in Employee/Student Cases***

- To ensure that mediation or other informal resolution is truly voluntary on the part of students who report being sexually harassed by a Samaritan Hospital's employee, due to the power differential and potential for undue influence or pressure exerted by an employee over a student, the Department makes clear that SPHCON cannot offer an informal resolution process to resolve formal complaints alleging that an employee sexually harassed a student.

§ 106.45(b)(9) states SPHCON cannot condition enrollment, employment, or any other right on the waiver of rights under § 106.45, nor may SPHCON ever require parties to participate in an informal resolution process. Participating in mediation, which is a form of informal resolution, should remain a decision for each party, individually, to make in a particular case, and SPHCON will not require the parties to attempt mediation. *See* 85 Fed. Reg. at 30361.

### **106.45(b)(5)(vii): Investigative Report**

SPHCON must create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

**VII. Record of Hearing.** SPHCON will maintain all recorded and transcribed case records and all training materials for seven years.

### ***Records of:***

(A) Any sexual harassment investigation, including any responsibility determination, and any required recording or transcript, as well as any sanctions imposed on the respondent, and any remedies provided to the complainant;

(B) Any appeal and its result;

(C) Any informal resolution and its results; and

(D) All materials used to train investigators, adjudicators, and Title IX coordinators with regard to sexual harassment are available on the SPHCON website or upon request for inspection by members of the public.

(E) SPHCON will create and maintain for a period of seven years any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment, as well as document the bases for its conclusions and that it has taken measures designed to preserve access to the institution's educational program or activity.

### **VIII. Prevention Education and Awareness:**

SPHCON maintains educational programs to promote prevention, intervention, and reporting of rape, acquaintance rape, dating violence, domestic violence, sexual assault, and stalking, among other topics. These education programs include primary prevention and awareness programs for all incoming students and employees designed to reduce risk, encourage reporting, and engage bystanders in prevention.

### **IX. Sexual Offenders**

Pursuant to New York State law, the State Sexual Offenders Registry may be accessed at the following link: <http://www.criminaljustice.ny.gov/nsor/>

### **X. Receive Other Intervention Services**

SPHCON recommends that reporting individuals seek the assistance of trained professionals in the aftermath of a Sexual Offense, and will assist reporting individuals to receive this assistance. To receive EAP (Employee Assistance Program) services through Carebridge, call 1-800-437-0911. You may also send an email to [clientservice@carebridge.com](mailto:clientservice@carebridge.com).

### **XI. Transcript Notation**

If a student is found responsible for conduct which constitutes a crime of violence that must be reported under the Clery Act (including aggravated assault and/or sexual violence) and is suspended or dismissed as a result, their transcript will note that they were suspended or dismissed. The transcript will note a code of conduct violation. Any student who withdraws with such charges pending and does not participate through completion in the Samaritan Hospital's School of Nursing process will have noted on their transcript that they withdrew with charges pending. The School reserves the right to process to completion a report filed against a student, and impose a sanction, notwithstanding their withdrawal. A student who has been suspended may be eligible to seek to have the notation removed, but not sooner than one year following completion of the suspension.