

COD SM Subcommittee Meeting

August 25, 2020



Agenda

- Welcome, intros, review purpose of subcommittee
- Review policies
- Update on new policies
- Review process and update on new process
- Question & Answers
- Next meeting: Thursday

Purpose of the Subcommittee

- COD members who are specially trained in issues of:
 - sexual misconduct
 - intimate partner violence
 - stalking
 - the COD procedures for sexual misconduct hearings and sanctioning panels.
- only members of the subcommittee will be permitted to participate in sexual misconduct hearings and sanctioning panels. ++ TIX Hearings

Sexual Misconduct Policy

Sexual misconduct is a broad term used to encompass a range of behaviors including:

- sexual harassment
- nonconsensual sexual contact
- nonconsensual sexual penetration
- sexual exploitation
- sexual assault (rape, fondling, incest or statutory rape)

Sexual Misconduct Policy

Sexual misconduct can occur between individuals who know each other, have an established relationship, have previously engaged in consensual sexual activity, and between individuals who do not know each other.

Sexual misconduct can be committed by persons of any gender identity, and it can occur between people of the same or different sex.

Effective consent

MIT students who engage in sexual behavior of any kind are expected to do so only with the effective consent of all parties involved. Doing otherwise constitutes sexual misconduct and is a violation of this policy.

Effective consent

The Institute recognizes that there are a wide variety of sexual interactions, that there is no single way to communicate consent, and that context matters. At all times, each party is free to choose where, when, and how they participate in sexual activity.

Accordingly, when evaluating whether sexual activity was consensual, the Institute will consider the entirety of the sexual interaction and the relevant circumstances.

Effective consent

Effective Consent is:

- informed;
- freely and voluntarily given;
- mutually understandable words or actions; which indicate willing participation in mutually agreed upon sexual activity

Effective consent

By definition, effective consent cannot be obtained by

- unreasonable pressure, which can generally be understood as conduct that pressures another person to “give in” to sexual activity rather than to choose freely to participate; factors that may be considered include
 - (1) the frequency, nature, duration, and intensity of the requests for sexual activity;
 - (2) whether and how previous requests were denied; and
 - (3) whether the person initiating the sexual activity held a position of power over the other person;

Effective consent

(cont) By definition, effective consent cannot be obtained by

- emotional intimidation, which can include (1) overtly degrading, humiliating, and shaming someone for not participating in sexual activity; (2) blackmail; and (3) threats to reputation;
- physical intimidation and threats, which can be communicated by words or conduct, and physical force.

Effective consent

Effective consent cannot be obtained from someone who is incapable of giving consent for any reason, including when:

- the person has a mental, intellectual, or physical disability that causes the person to be temporarily or permanently unable to give consent;
- the person is under the legal age to give consent;
- or the person is asleep, unconscious, physically helpless, or otherwise incapacitated, including by alcohol or other drugs.

Effective consent

An individual violates this policy if the individual initiates and engages in sexual activity with someone who is incapacitated, and:

- (1) the individual knew the other person was incapacitated, or
- (2) a sober reasonable person under similar circumstances as the person initiating the sexual activity would have known the other person was incapacitated.

Effective consent

- For purposes of this policy, silence and passivity *do not* signal consent.
- There is no requirement that a person express non-consent or that they resist a sexual advance or request. For example, someone might not consent to sexual activity even though they do not say “no” or physically resist in any way. Physical or verbal resistance is evidence that there was not effective consent.

Effective consent

Some behaviors and statements do not indicate consent, including the following:

- “I don’t know.”
- “Maybe.”
- Without more, ambiguous responses such as “uh huh” or “mm hmm,” and giggling.
- A verbal “no,” even if it may sound indecisive or insincere.
- Moving away

Effective consent

A factor that may be considered when evaluating consent is whether, under similar circumstances as the person initiating the sexual activity, a sober reasonable person would have concluded that there was effective consent.

It is important for those who initiate sexual activity to understand that:

- even though someone gave effective consent to sexual activity in the past, that does not mean they have given effective consent to sexual activity in the future;
- even though someone gives effective consent to one type of sexual activity during a sexual interaction, that does not automatically mean they have given effective consent to other types of sexual activity;
- effective consent can be withdrawn at any time, and once a person withdraws effective consent, the other person must stop.

Effective consent

Effective consent is clearest when obtained through direct communication about the decision to engage in specific sexual activity. Effective consent need not be verbal, but verbal communication is the most reliable and effective way to seek, assess, and obtain consent.

Nonverbal communication can be ambiguous. For example, heavy breathing or moaning can be a sign of arousal, but it can also be a sign of distress. Talking with sexual partners about desires, intentions, boundaries, and limits can be uncomfortable, but it serves as a strong foundation for respectful, healthy, positive, and safe intimate relationships.

Incapacitation

Incapacitation is the physical and/or mental inability to make informed, rational judgments and decisions.

- Someone is incapacitated if they are asleep or unconscious.
- Someone can also be incapacitated by alcohol or other substances.

Incapacitation

- Because the impact of alcohol and other drugs varies from person to person, one should be cautious before engaging in sexual contact or intercourse when either person has been drinking alcohol or using other drugs.
- The use of alcohol or other drugs may create ambiguity about consent. If there is any doubt about either party's level of intoxication, the safe thing to do is to forgo all sexual activity.

Incapacitation

- Where alcohol or other substances are involved, incapacitation is determined by how the substance impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments. Incapacitation is a state beyond drunkenness or intoxication, and a person is not incapacitated merely because they have been drinking or using drugs.
- Incapacitation is not determined by technical or medical definitions. The question is whether a person has the physical and/or mental ability to make informed, rational judgments and decisions.

Incapacitation

Although each individual is different, there are some common and observable signs that someone is incapacitated or approaching incapacitation, including slurred or incomprehensible speech, unsteady gait, combativeness, emotional volatility, vomiting, or incontinence. A person who is incapacitated may not be able to understand or answer coherently some or all of the following questions:

- Do you know where you are?
- Do you know how you got here?
- Do you know what is happening?
- Do you know who you are with?

Sexual Misconduct Policy:

Nonconsensual sexual contact

Nonconsensual sexual contact any physical contact with another person of a sexual nature without effective consent

- The touching of a person's intimate parts (such as genitalia, groin, breast, or buttocks, either over or under clothing covering)
- touching a person with one's own intimate parts
- or forcing a person to touch another's intimate parts

Sexual Misconduct Policy:

Nonconsensual sexual penetration

Nonconsensual sexual penetration is defined as the sexual penetration or attempted sexual penetration of any bodily opening with any object or body part without effective consent.

- Includes the Clery Act definition of **rape**: the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim
- the Clery Act definition of **incest**: sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law; and
- the Clery Act definition of **statutory rape**: sexual intercourse with a person who is under the statutory age of consent.

Sexual Misconduct: Sexual Harassment

Sexual Harassment is unwelcome conduct of a sexual nature:

unwelcome sexual advances

requests for sexual favors

other verbal, non-verbal, or physical conduct of a sexual nature

when:

- submission to such conduct is made either explicitly or implicitly a term/condition of an individual's employment or academic standing
- submission to, or rejection of, such conduct is used as the basis for employment decisions or academic decisions
- the conduct is sufficiently severe or pervasive that a reasonable person would consider it intimidating, hostile or abusive and it adversely affects an individual's educational, work, or living environment

Sexual Misconduct: Sexual Harassment

Examples of **verbal sexual harassment** include **unwelcome conduct** such as:

- sexual flirtation
- advances or propositions or requests for sexual activity or dates
- asking about someone else's sexual activities, fantasies, preferences, or history
- discussing one's own sexual activities, fantasies, preferences, or history
- verbal abuse of a sexual nature
- suggestive comments
- sexually explicit jokes
- turning discussions at work or in the academic environment to sexual topics
- making offensive sounds such “wolf whistles.”

Sexual Misconduct: Sexual Harassment

Examples of **nonverbal sexual harassment** include unwelcome conduct such as

- displaying sexual objects, pictures or other images
- invading a person's personal body space, such as standing closer than appropriate or necessary or hovering
- displaying or wearing objects or items of clothing which express sexually offensive content
- making sexual gestures with hands or body movements
- looking at a person in a sexually suggestive or intimidating manner
- delivering unwanted letters, gifts, or other items of a sexual nature.

Sexual Misconduct: Sexual exploitation

Sexual exploitation means taking sexual advantage of another person and includes:

- Providing alcohol or other drugs to someone without that person's knowledge, or unreasonably pressuring the person to consume alcohol or drugs, with the purpose of causing incapacitation in order for one to take sexual advantage of the person.
- Recording, photographing, transmitting, or allowing another to view images of private sexual activity and/or the intimate parts of another person without effective consent.

Sexual Misconduct: Sexual exploitation

(cont):

- Allowing third parties to observe private sexual acts without effective consent.
- Voyeurism, including by electronic means.
- Indecent exposure.
- Knowingly or recklessly exposing another person to a significant risk of sexually transmitted infection, including HIV, without their knowledge.

Stalking

Stalking is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others, or to suffer substantial emotional distress.

- Course of conduct = two or more acts
 - the stalker directly, indirectly, or through third parties, by any action, method, device, or means:
 - follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- Reasonable person = a reasonable person under similar circumstances and with similar identities to the victim.
- Substantial emotional distress = significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Stalking

Examples include, but are not limited to, two or more instances of the following conduct (that also meet the definition of stalking above):

- following a person
- appearing at a person's home, class or work
- continuing to contact a person after receiving requests not to
- leaving written messages, objects, or unwanted gifts
- vandalizing a person's property
- photographing a person; and other threatening, intimidating, or intrusive conduct
- may also involve the use of electronic media such as the internet, social networks, blogs, cell phones, texts, etc.
- may include, but is not limited to, non-consensual communication, telephone calls, voice messages, emails, texts, letters, notes, gifts, or any other communication that are repeated and undesired.

Intimate Partner Violence

Intimate Partner Violence is defined as actual or threatened physical violence, intimidation, or other forms of physical or sexual abuse directed toward a partner in an intimate relationship that would cause a reasonable person to fear harm to self or others.

intimate relationship = marriage, domestic partnership, engagement, casual or serious romantic involvement, and dating, whether in a current or former relationship.

Intimate Partner Violence can occur between persons of any gender identity, any sexual orientation, and it can occur in any type of intimate relationship including monogamous, non-committed, and relationships involving more than two partners.

Intimate Partner Violence

Intimate Partner Violence can be a single act or a pattern of behavior.

Examples include situations in which the following behaviors are directed toward a partner in a current or former intimate relationship:

- hitting, kicking, punching, strangling, or other violence; property damage;
- threat of violence to one's self, one's partner, or the family members, friends, pets, or personal property of the partner.

Title IX Sexual Harassment Definition

Title IX Sexual Harassment means: Conduct on the basis of sex that satisfies one or more of the following:

- An employee of MIT conditioning the provision of an aid, benefit, or service of MIT on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to MIT's education program or activity; or
- "Sexual assault," "dating violence," "domestic violence," or "stalking," as defined by federal law and set out on the Institute Discrimination and Harassment Response (IDHR) website.

Title IX Sexual Harassment (cont)

MIT must follow the specific processes cited below when it receives a formal complaint of Title IX Sexual Harassment and where all of the following apply:

- At the time of filing a formal complaint, the Complainant was/is participating in or attempting to participate in the education program or activity at MIT; and
- The alleged conduct occurred in an education program or activity controlled by MIT; and
- The alleged conduct occurred against a person in the United States.

Panel Composition

For all SM Hearings/Sanction Panels:

- The Chair or Associate Chair and
 - at least one Vice President/Vice Chancellor's representative must be on the panel;
 - the third representative can be any member of the sexual misconduct subcommittee.
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- **For Title IX Hearings:** 1 additional external professional

Overview

- All Sexual misconduct hearings & Title IX Hearings will be conducted using videoconference or other distance method so that the parties are not in the same room simultaneously at any time during the hearing.
- Both parties will be permitted to participate in the hearing (e.g., watch the testimony of others, ask questions of witnesses, etc.) remotely using technology.

SM Hearing & Sanction Panel Overview

SM Hearing & Sanction Panel follows same steps as non-SM panels:

- Complainant Opening Statements
 - Questions
 - Witnesses if relevant
- Respondent Opening Statements
 - Questions
 - Witnesses if relevant
- Closing Statements

Title IX Hearing Provisions

- Complainant, Respondent, and Witnesses must attend and participate in cross-examination.
- Hearing Panel decides responsibility.
- Finding and sanction(s) conveyed in 1 letter to both parties; but maintain current sanctions decision-makers for staff and faculty matters
- Appeal (current decision-makers, but new added grounds for appeal)
- Establish common training methods for all Hearing Panelists

TIX Hearing Provisions (cont)

- MIT provide **Attorney** for Complainant & Respondent
 - Serve as advisors for the hearing
 - Conduct cross-examination at the hearing
 - *Discussed expanding role of attorneys*
- MIT hire External Professional [EP]
 - Serve as a voting Chair/Co-Chair for Hearings
 - Makes decisions on cross-examination & evidentiary matters

Sanctioning Process: SM Hearing/Panel

After COD decides findings, OSCCS informs student of finding. THEN:

- Both parties can submit a letter for sanctioning.
- Both parties will be given three business days to submit this letter after receipt of the initial decision letter from the Chair.
- Statement is optional – if they do not submit, panel makes a determination without it.
- Both parties can participate in a limited post-hearing sanctioning panel
- The post-hearing sanctioning panel cannot be used to revisit or reargue issues that were addressed during the initial hearing.



Sanctioning Process: TIX Hearing

- Both parties can submit a letter for sanctioning BEFORE the hearing – kept in closed envelope
- COD decides responsibility and if responsible, reviews letters and decides sanctions (in one deliberation, similar to other hearings)

Questions?

