

**BALL STATE UNIVERSITY**  
**TITLE IX POLICY AND PROCEDURES**  
*Interim Policy effective August 14, 2020*

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## **1. Policy Statement**

Consistent with the [University's Notice of Nondiscrimination](#) and in accordance with the U.S. Department of Education's implementing regulations for Title IX of the Education Amendments of 1972 ("Title IX"), Ball State University prohibits sexual harassment that occurs within its education programs and activities. This prohibition extends to all applicants for admission or employment and to all students (any status) and all employees (any status). An individual who is found to have committed sexual harassment in violation of this policy is subject to the full range of University discipline, up to and including termination of employment or expulsion. The University will provide persons who have experienced sexual harassment with ongoing remedies as reasonably necessary to restore or preserve access to the University's education program and activities.

Inquiries concerning the specific application of Title IX at Ball State should be directed to Ms. Katie Slabaugh, Associate Dean of Students/Title IX Coordinator in the Frank A. Bracken Administration Building, room 238, 765-285-1545, [kslabaugh@bsu.edu](mailto:kslabaugh@bsu.edu). Persons can also contact the U.S. Department of Education Office for Civil Rights, Washington, D.C. 20202-1328, 1-800-421-3481, [ocr@ed.gov](mailto:ocr@ed.gov).

## **2. Application and Scope**

This policy applies to all students and employees (including applicants for admission and employment) when there is an allegation of sexual harassment occurring within the University's education program or activities, and it applies regardless of the parties' sex, gender, sexual orientation, gender identity, or citizenship status. For purposes of this policy, "sexual harassment" is conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct, (often referred to as quid pro quo harassment); or
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity (often referred to as hostile environment harassment as elaborated upon in Addendum – Terms and Examples below); or
3. Sexual assault, dating violence, domestic violence, or stalking (as these terms are defined in Section 3 below).

In addition, the University's "education programs and activities" refers to all the operations of the University, including, but not limited to, in-person and online educational instruction, employment, research activities, extracurricular activities, athletics, residence life, dining services, performances, and community engagement and outreach programs. The term applies to all activity that occurs on campus or on other property owned or occupied by the University. It also includes off-campus locations, events, or circumstances over which the University exercises substantial control over the respondent and the context in which the sexual harassment occurs, including sexual harassment occurring in any building owned or controlled by a student organization that is officially recognized by the University.

This policy does not apply to sexual harassment that is alleged to have occurred off-campus, in a private setting, and outside the scope of the University's education programs and activities. Such allegations may be processed under other University policies and procedures.

Further, consistent with Title IX's implementing regulations, this policy does not apply to sexual harassment that is alleged to have occurred outside the geographic boundaries of the United States, even if alleged to have occurred in the University's education program and activities, such as a study abroad program. Such allegations may be processed under other University policies and procedures.

### **3. Definitions**

**Complainant** is an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

**Respondent** is a person alleged to have been a perpetrator of conduct that could constitute sexual harassment.

**Sexual assault** any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. It specifically includes the following offenses:

1. "Rape" is the carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. There is "carnal knowledge" if there is the slightest penetration of the vagina or penis by the sexual organ of the other person. Attempted Rape is included.
2. "Sodomy" is oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
3. "Sexual Assault with an Object" is using an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. An "object" or "instrument" is anything used by the offender other than the offender's genitalia (e.g., a finger, bottle, or stick).
4. "Fondling" is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
5. "Incest" is non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

6. “Statutory Rape” is non-forcible sexual intercourse with a person who is under the statutory age of consent.

**Dating violence** means violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on consideration of the following factors: the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship.

**Domestic violence** includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state of Indiana, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the state of Indiana.

**Stalking** means engaging in a course of conduct directed at a specific person that would cause a reasonable person to (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

**Consent** is a knowing, voluntary, and clear mutual agreement to engage in sexual activity. Consent is effective when it is informed, freely and actively given, and communicated by clearly and mutually understandable words or actions to participate in each form of sexual activity. The full definition of consent can be found in Addendum – Terms and Examples.

**Grievance process** means the process outlined in Section 7 of this policy, including the investigation, hearing, and appeal.

**Chairperson** refers to the chair of the hearing panel utilized during the grievance process.

**Preponderance of the evidence** is the standard of evidence to determine if a violation of this policy has occurred. This standard of proof means people in decision-making roles must be convinced by the totality of the available, relevant evidence presented that the alleged conduct has more likely than not (greater than 50% likely) occurred in order for there to be a violation of policy.

**Inculpatory evidence** is evidence which implies or tends to establish responsibility for a violation of this policy as alleged.

**Exculpatory evidence** is evidence which implies or tends to establish a lack of responsibility for a violation of this policy as alleged.

#### **4. Reporting Sexual Harassment**

Any person may report sexual harassment to the Title IX Coordinator. Reports may be made in person, by regular mail, telephone, electronic mail, online through a portal found [here](#), or by any other means that results in the Title IX Coordinator receiving the report. In-person reports must be made during normal business hours, but reports can be made online or by regular mail, telephone, or electronic mail at any time, including outside normal business hours.

The name and contact information for the Title IX Coordinator is:

Ms. Katie Slabaugh  
Associate Dean of Students/Title IX Coordinator  
Administration Building 238  
2000 W. University Ave.  
Muncie, IN 47306  
(765) 285-1545  
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The names and contact information for the Deputy Title IX Coordinators are:

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In addition to reporting to the Title IX Coordinator, any person may report sexual harassment to any of the Reporting Officials designated by the University. These Reporting Officials include the President and designated senior management, deans, department heads, supervisors, and other designated employees. When a Reporting Official receives information about alleged sexual harassment, they are required to promptly forward all known details of the situation (including the names of the parties, and the time, date, location, and description of the alleged behavior) to the Title IX Coordinator.

University employees who are not Reporting Officials are encouraged, but are not required, to forward information regarding sexual harassment to the Title IX Coordinator.

## **5. Preliminary Matters**

### **5.1. Initial Assessment by the Title IX Coordinator**

Upon receiving a report of conduct that could fall under this policy, the Title IX Coordinator will conduct an initial assessment, which may include a preliminary interview with the complainant, to determine whether the conduct reported falls within the scope of this policy as described in Section 2 above and could constitute sexual harassment. If the Title IX Coordinator determines that the conduct reported does not fall within the scope of this policy and/or could not constitute sexual harassment, even if investigated, or there is insufficient information available to know the nature and severity of the conduct, the Title IX Coordinator will dismiss the matter as it relates to this policy. However, the Title IX Coordinator may refer the report to other University offices for review under other University policies, as appropriate.

If the Title IX Coordinator determines that the conduct reported falls within the scope of this policy and could constitute sexual harassment, if investigated, the Title IX Coordinator (or designee) will proceed to contact the complainant (if their identity is known) to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, explain the process for filing a formal complaint, and provide options for filing complaints with the local police and information about resources that are available on campus and in the community.

### **5.2. Supportive Measures**

The University will offer and make available supportive measures to the complainant regardless of whether the complainant elects to file a formal complaint. Supportive measures are non-disciplinary, non-punitive individualized services offered, as appropriate, and reasonably available, and without fee or charge, that are designed to restore or preserve equal access to the University's education programs and activities without unreasonably burdening another party, including measures designed to protect the safety of all parties implicated by a report or the University's education environment, or to deter sexual harassment. Supportive measures may include: counseling, extensions of academic or other deadlines, course-related adjustments, modifications to work or class schedules, campus escort services, changes in work or housing locations, leaves of absence (employees), increased security and monitoring of certain areas of campus, and other similar measures.

Contemporaneously with being notified of a formal complaint, as described in Section 7.1 below, the respondent will be informed of the availability of supportive measures, and the University will offer and make available supportive measures to the respondent in the same manner in which it offers and makes them available to the complainant. The University will also offer and make available supportive measures to the respondent before the respondent is notified of a formal complaint, if the respondent requests such measures.

Any parties who require accommodation relative to disability will receive appropriate accommodations allowing them equal opportunity to participate in and access provisions of this policy. A person's verified disability will be taken into account when determining supportive measures.

The University will maintain as confidential any supportive measures provided to the complainant or respondent, to the extent maintaining such confidentiality would not impair the ability of the University to provide the supportive measures in question. The Title IX Coordinator is responsible for implementing any supportive measures for the parties.

### **5.3. Advisor of Choice**

The complainant and respondent have the right to be accompanied by an advisor of their choice to all meetings, interviews, and hearings under this policy. The advisor may be, but is not required to be, an attorney.

Except for the questioning of witnesses during the hearing described in Section 7.3.5 below, the advisor will play a passive role and is not permitted to communicate on behalf of a party, insist that communication flow through the advisor, or communicate with the University about the matter without the party being included in the communication. In the event a party's advisor of choice engages in a material violation of the parameters specified in this section or Section 7.3.5 below, the University may preclude the advisor from further participation, in which case the party may select a new advisor of their choice.

In the event a party is not able to secure an advisor to attend the hearing described in Section 7.3.5 below, the University will provide the party an advisor, without fee or charge to the party, who will conduct questioning on behalf of the party at the hearing. The University will have sole discretion to select the advisor it provides. The advisor the University provides may be, but is not required to be, an attorney.

### **5.4. Emergency Removal**

At any time after receiving a report of sexual harassment, a student or employee respondent may be removed from one or more of the University's education programs and activities on a temporary basis if an individualized safety and risk analysis determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal. For student respondents, the matter will be referred to the University's Behavioral Intervention Team (BIT) for the individualized assessment and determination. For employee respondents, a designated university official will conduct the individualized assessment and make the determination.

In the event an emergency removal is imposed on a respondent, the respondent will be notified of such in writing and will have an opportunity to challenge the decision by filing a written appeal within two (2) business days with the Vice President for Student Affairs or designee (for student respondents) or Vice President for Business Affairs or designee (for employee respondents). The Vice President for Student Affairs or designee or Vice President for Business Affairs or designee, as the case may be, will make the final decision as to whether the emergency removal will stand and inform the respondent of the decision in writing.

If a complaint of sexual harassment is made against a respondent who is neither a student nor an employee, such as a contractor or guest on campus, the University retains broad discretion to prohibit such a person from entering campus and other property at any time, and for any reason, whether after receiving a report of sexual harassment or otherwise.

### **5.5. Administrative Leave**

In its discretion, the University may place a respondent who is a non-student employee on administrative leave at any time after a formal complaint, as described in Section 6.1 below, has been filed and the grievance process is pending.

## **6. Formal Complaints**

### **6.1. Filing a Formal Complaint**

A complainant may file a formal complaint of sexual harassment with the Title IX Coordinator in person, by regular mail, or by email using the contact information specified in Section 4 above, or online through a portal found [here](#). For purposes of this policy, a “formal complaint” means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the University investigate the allegation of sexual harassment in accordance with this policy. A “document filed by a complainant” means a document or electronic submission (such as an email or online form) that contains the complainant’s physical or electronic signature or otherwise indicates that the complainant is the person filing the complaint. No person may submit a formal complaint on the complainant’s behalf. In addition, at the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the University’s education programs and activities.

In a case where a complainant elects not to file a formal complaint, the Title IX Coordinator may file a formal complaint on behalf of the University if doing so is not clearly unreasonable. Such action will normally be taken in limited circumstances involving serious or repeated conduct or where the alleged perpetrator may pose a continuing threat to the University community. In such a situation, the Title IX Coordinator will not act as a complainant or otherwise as a party for purposes of the grievance process.

### **6.2. Consolidation of Formal Complaints**

The University may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where the grievance process involves more than one complainant

or more than one respondent, references in this policy to the singular “party,” “complainant,” or “respondent” include the plural, as applicable. In addition, a formal complaint of retaliation may be consolidated with a formal complaint of sexual harassment if the two formal complaints share a common nexus.

### **6.3. Dismissal of a Formal Complaint**

#### **6.3.1. Mandatory Dismissal**

Upon evaluation of a complainant’s formal complaint, or at any point during the grievance process, the Title IX Coordinator **must** dismiss the complaint if the Title IX Coordinator determines it does not fall within the scope of this policy as described in Section 2 above and/or could not constitute sexual harassment, even if proved.

#### **6.3.2. Possible Dismissal**

At any point during the grievance process, the University may dismiss a formal complaint if the Title IX Coordinator determines that any one or more of the following is true:

1. The complainant provides the Title IX Coordinator with a written notice indicating that the complainant wishes to withdraw the formal complaint (or any specific allegation(s) within the complaint, in which case the specific allegation(s) may be dismissed);
2. The respondent is no longer enrolled at or employed by the University; or
3. Specific circumstances prevent the University from gathering evidence sufficient to reach a determination as to the formal complaint (or any specific allegation(s) within the complaint, in which case the specific allegation(s) may be dismissed).

#### **6.3.3. Notification and Appeal of a Dismissal of a Formal Complaint**

Upon dismissal of a formal complaint under Section 6.3.1 or 6.3.2 above, the Title IX Coordinator will send prompt written notice of the dismissal and the reason(s) for the dismissal simultaneously to both parties. A dismissal decision may be appealed pursuant to Section 7.4 below. If a dismissal decision is upheld on appeal, or if an appeal is not timely filed, the decision is deemed final for purposes of this policy. However, the Title IX Coordinator may refer the subject matter of the formal complaint to other University offices for review under other University policies, as appropriate.

### **7. Grievance Process Utilized After a Formal Complaint Has Been Filed**

After a formal complaint has been filed, the grievance process outlined below will be utilized. This process includes notice to the parties, an investigation, a hearing process, and an opportunity for appeal, each of which is discussed in more detail in the forthcoming sections of this policy. From the time a report or formal complaint is made, a respondent is presumed not responsible for the alleged misconduct until a determination regarding responsibility is made final.

## **7.1. Notice of a Formal Complaint**

As soon as practicable, but no later than five (5) business days after receiving a formal complaint, the Title IX Coordinator will simultaneously provide a written notice to the complainant and respondent that includes the following information:

1. A physical copy of or hyperlink to this policy;
2. Sufficient details known at the time so that the parties may prepare for an initial interview with the investigator, to include the identities of the parties involved in the incident (if known), the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident (if known);
3. A statement that the respondent is presumed not responsible for the alleged sexual harassment and that a determination of responsibility will not be made until the conclusion of the grievance process, including any appeal;
4. Notification to the parties of their right to be accompanied by an advisor of their choice, as described in Section 5.3 above.
5. Notification to the parties of their right to inspect and review evidence, as specified in Section 7.2.4 below.
6. Notification to the parties of the University's prohibitions on retaliation, as described in Section 15 below, and knowingly making false statement or knowingly submitting false information, as described in Section 14 below.

If at any point during the investigation, the University decides to investigate any allegations that are materially beyond the scope of the initial written notice described above, a supplemental written notice describing the additional allegation(s) to be investigated will be simultaneously provided to both parties.

## **7.2. Investigation**

### **7.2.1. Commencement, Burden, and Timing**

After the written notice of the formal complaint is provided to the parties, an investigator designated by the Title IX Coordinator will undertake an investigation to gather evidence relevant to the alleged misconduct, including inculpatory evidence and exculpatory evidence. The burden of gathering evidence sufficient to reach a determination lies with the University and not with the parties. The investigation will culminate in a written investigation report, as described in Section 7.2.5. below, that will be submitted to the Title IX Coordinator and hearing panel. The University strives to complete each investigation in a reasonably prompt timeframe. The exact length of each investigation may vary depending on the unique circumstances of the particular case at issue.

### **7.2.2. Equal Opportunity**

During the investigation, the investigator will provide an equal opportunity for the parties to be interviewed, to present witnesses (including fact and expert witnesses), and to present other inculpatory and exculpatory evidence. However, the investigator retains discretion to limit the number of witness interviews the investigator conducts or the other evidence the investigator seeks to gather if the investigator finds that testimony or evidence would be unreasonably

redundant, if the witnesses are offered solely as character references and do not have information relevant to the allegations at issue, or if the witnesses or evidence are offered to provide information that is categorically inadmissible, such as information concerning sexual history of the complainant or respondent, as described in Section 8.3 below. The investigator will not restrict the ability of the parties to gather and present relevant evidence on their own.

The investigator may request to interview the complainant, respondent, or any witnesses more than once. The investigator's request to do so bears no correlation with the potential outcome of the matter, nor is it indicative of investigator bias or unfairness.

The investigator may identify and interview people and obtain independent, relevant evidence.

The investigation is a party's opportunity to present testimonial and other evidence that the party believes is relevant to resolution of the allegations in the formal complaint. A party that is aware of and has a reasonable opportunity to present particular evidence and/or identify particular witnesses during the investigation, and elects not to do so, will be prohibited from introducing such evidence during the hearing described in Section 7.3.5 below absent a showing of a reasonable mistake or excusable neglect.

### **7.2.3. Documentation of Investigation**

The investigator will take reasonable steps to ensure the investigation is documented. Interviews of the parties and witnesses may be documented by the investigator's notes, audio recorded, video recorded, or transcribed. The particular method utilized to document the interviews of parties and witnesses will be determined by the investigator.

### **7.2.4. Access to the Evidence**

At the conclusion of the evidence-gathering phase of the investigation, but before the completion of the investigation report, the investigator will provide each party and their advisor, in either electronic or hard copy format, all evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint, including (1) evidence on which the University may choose not to rely at any hearing and (2) inculpatory or exculpatory evidence whether obtained from a party or some other source. The parties will have ten (10) business days in which to submit to the investigator a written response, which the investigator will consider before completing the investigation report.

The parties and their advisors are permitted to review the evidence solely for the purposes of this grievance process and may not duplicate or disseminate the evidence to anyone.

### **7.2.5. Investigation Report**

After the period for the parties to provide any written response, as described in the previous subsection, has expired, the investigator will complete a written investigation report that fairly summarizes the various steps taken during the investigation, summarizes the relevant evidence collected, lists material facts on which the parties agree, and lists material facts on which the parties do not agree. When the investigation report is complete, the investigator will provide a copy to the Title IX Coordinator. The investigator will also provide the investigation report to each party and their advisor, in either electronic or hard copy format.

### **7.3. Hearing Process**

#### **7.3.1. Hearing Panel**

Upon conclusion of the investigation, the university will promptly appoint a hearing panel that will render a determination of responsibility for the allegations in the formal complaint at the conclusion of the hearing process.

The Title IX Coordinator will ensure that the chairperson and panel members are provided a copy of the investigation report and a copy of all evidence provided to the parties by the investigator as described in Section 7.2.4 above.

#### **7.3.2. Hearing Notice and Response to Investigation Report**

The hearing panel chairperson will promptly and simultaneously provide written notice to the parties notifying the parties of the hearing panel's appointment; setting a deadline for the parties to submit any written response to the investigation report; setting a date for the pre-hearing conference; and setting a date and time of the hearing. Neither the pre-hearing conference, nor the hearing itself, may be held any earlier than ten (10) business days from the date the chairperson provided the written notice to the parties as specified in this paragraph.

A party's written response to the investigation report must include the following information:

1. To the extent the party disagrees with the investigation report, any argument or commentary regarding such disagreement;
2. Any argument that evidence should be categorically excluded from consideration at the hearing based on privilege, relevancy, the prohibition on the use of sexual history as described in Section 8.3 below, or for any other reason;
3. A list of any witnesses that the party contends should be requested to attend the hearing pursuant to an attendance notice issued by the chairperson, as described in Section 7.3.4 below;
4. A list of any witnesses the party intends to bring to the hearing without an attendance notice issued by the chairperson;
5. Any request that the parties be separated physically during the pre-hearing conference and/or hearing;
6. If the party has their own advisor who will accompany the party at the pre-hearing conference and hearing, the name and contact information of this advisor; and
7. If the party does not have an advisor who will accompany the party at the hearing, an indication that this is the case. In such circumstances, the University will provide an advisor for purposes of conducting questioning, as described in Section 7.3.5 below. A University-provided advisor will be given at least ten (10) business days in advance of a hearing to familiarize themselves with the matter, including review of the investigation report, and to discuss the situation with the party they are advising.

A party's written response to the investigation report may also include:

1. Argument regarding whether any of the allegations in the formal complaint are supported by a preponderance of the evidence;

2. Argument regarding whether any of the allegations in the formal complaint constitute sexual harassment; and
3. Any objections to a hearing panel member's involvement in the hearing based on conflict of interest or bias.

### **7.3.3. Pre-Hearing Conference**

Before the hearing, the chairperson will conduct a pre-hearing conference with the parties and their advisors. The pre-hearing conference will be conducted live, with simultaneous and contemporaneous participation by the parties and their advisors. By default, the pre-hearing conference will be conducted with the chairperson, the parties, the advisors, and other necessary University personnel together in the same physical location. However, upon request of either party, the parties will be separated into different rooms with technology enabling the parties to participate simultaneously and contemporaneously by video and audio. In addition, in the chairperson's discretion, the pre-hearing conference may be conducted virtually, by use of video and audio technology, where all participants participate simultaneously and contemporaneously by use of such technology.

During the pre-hearing conference, the chairperson will discuss the mechanics of the hearing with the parties; address matters raised in the parties' written responses to the investigation report, as the chairperson deems appropriate; discuss whether any stipulations may be made to expedite the hearing; discuss the witnesses the parties have requested be served with notices of attendance and/or witnesses the parties plan to bring to the hearing without a notice of attendance; and resolve any other matters that the chairperson determines, in the chairperson's discretion, should be resolved before the hearing.

### **7.3.4. Issuance of Notices of Attendance**

After the pre-hearing conference, the chairperson will transmit notices of attendance to any University employee or student whose attendance is requested at the hearing as a witness. The notice will advise the witness of the specified date and time of the hearing and advise the witness to contact the chairperson immediately if there is a material and unavoidable conflict.

The witness is responsible for notifying any manager, faculty member, coach, or other supervisor, as necessary, if attendance at the hearing will conflict with job duties, classes, or other obligations. All such managers, faculty members, coaches, and other supervisors are required to excuse the witness of the obligation, or provide some other accommodation, so that the witness may attend the hearing as specified in the notice.

The University will not issue a notice of attendance to any witness who is not an employee or a student.

### **7.3.5. Hearing**

After the pre-hearing conference, the chairperson will convene and conduct a hearing. The hearing will be audio recorded. The audio recording will be made available to the parties for inspection and review on reasonable notice, including for use in preparing any subsequent appeal.

The hearing will be conducted live, with simultaneous and contemporaneous participation by the parties and their advisors. By default, the hearing will be conducted with the hearing panel members and chairperson, the parties, the advisors, witnesses, and other necessary University personnel together in the same physical location. However, upon request of either party, the parties will be separated into different rooms with technology enabling the parties to participate simultaneously and contemporaneously by video and audio. In addition, in the chairperson's discretion, the hearing may be conducted virtually, by use of video and audio technology, where all participants participate simultaneously and contemporaneously by use of such technology.

The chairperson will facilitate the hearing, with the following procedural elements being minimally required:

1. Opportunity for each party to address the panel directly and to respond to questions posed by the panel;
2. Opportunity for each party's advisor to ask directly, orally, and in real time, relevant questions, and follow up questions, of the other party and any witnesses, including questions that support or challenge credibility;
3. Opportunity for each party to raise contemporaneous objections to testimonial or non-testimonial evidence and to have such objections ruled on by the chairperson and a reason for the ruling provided;
4. Opportunity for each party to submit evidence that the party did not present during the investigation due to reasonable mistake or excusable neglect; and
5. Opportunity for each party to make a brief closing statement.

Subject to the minimum requirements described above the chairperson will have sole discretion to determine the manner and particulars of any given hearing, including with respect to the length of the hearing, the order of the hearing, and questions of admissibility. The chairperson will independently and contemporaneously screen questions for relevance in addition to resolving any contemporaneous objections raised by the parties and will explain the rationale for any evidentiary rulings. The hearing is not a formal judicial proceeding and strict rules of evidence do not apply.

Except as otherwise permitted by the chairperson, the hearing will be closed to all persons except the hearing panel members and chairperson, the parties, the advisors, witnesses, and other necessary University personnel. With the exception of the investigator and the parties, a witness will only participate when providing testimony and answering questions and will not otherwise be in attendance at the hearing.

During the hearing, the parties and their advisors will have access to the investigation report and evidence that was provided to them pursuant to Section 7.2.5 above.

While a party has the right to attend and participate in the hearing with an advisor, a party and/or advisor who materially and repeatedly violates the rules of the hearing in such a way as to be materially disruptive may be barred from further participation and/or have their participation limited, as the case may be, in the discretion of the chairperson.

### **7.3.6. Refusal to Attend Hearing or Submit to Questioning**

In the event that any party or witness refuses to attend the hearing, or attends but refuses to submit to questioning by the parties' advisors, the statements of that party or witness, as the case may be, whether given during the investigation or during the hearing, will not be considered by the hearing panel in reaching a determination of responsibility.

However, the hearing panel may consider the testimony of any party or witness, whether given during the investigation or during the hearing, if the parties jointly stipulate that the testimony may be considered or in the case where neither party requested attendance of the witness at the hearing.

In applying this subsection, the hearing panel will not draw an inference about the determination regarding responsibility based solely on a party or a witness's absence from the live hearing and/or refusal to submit to questioning by the parties' advisors

### **7.3.7. Deliberation and Determination**

After the hearing is complete, the hearing panel will objectively evaluate all relevant evidence collected during the investigation, including both inculpatory and exculpatory evidence, together with testimony and non-testimony evidence received at the hearing, and ensure that any credibility determinations made are not based on a person's status as a complainant, respondent, or witness. The chairperson will take care to exclude from consideration any evidence that was ruled inadmissible at the pre-hearing conference, during the hearing, or by operation of Section 7.3.6. above. The hearing panel will resolve disputed facts using a preponderance of the evidence standard and reach a determination regarding whether the facts that are supported by a preponderance of the evidence constitute one or more violations of this policy as alleged in the formal complaint.

### **7.3.8. Discipline and Remedies**

In the event the hearing panel determines that the respondent is responsible for violating this policy, the chairperson will, before issuing a written decision, consult with an appropriate University official with disciplinary authority over the respondent and such official will determine any discipline to be imposed. The full range of University discipline is available, including but not limited to, verbal reprimand; written reprimand; mandatory training, coaching, or counseling; mandatory monitoring; other educational sanctions; partial or full disciplinary probation; partial or full suspension; termination or expulsion; physical restriction from University property; and any combination of the same.

The chairperson will also, before issuing a written decision, consult with the Title IX Coordinator who will determine as best as is reasonably known at the time whether and to what extent ongoing supportive measures or other remedies designed to restore or preserve equal access to the University's education programs and activities will be provided to the complainant.

### **7.3.9. Written Decision**

After the hearing panel has made a determination and the chairperson has consulted with the appropriate University official and Title IX Coordinator as required by the previous subsection, the chairperson will prepare a written decision that will include:

1. Identification of the allegations potentially constituting sexual harassment made in the formal complaint;
2. A description of the procedural steps taken by the University upon receipt of the formal complaint, through issuance of the written decision, including notifications to the parties, interviews with the parties and witnesses, site visits, methods used to gather non-testimonial evidence, and the date, location of the hearing, and the names of the people who were present at or presented testimony at the hearing;
3. Articulate findings of fact, made under a preponderance of the evidence standard, that support the determination;
4. A statement of, and rationale for, each allegation that constitutes a separate potential incident of sexual harassment, including a determination regarding responsibility for each separate potential incident;
5. The discipline determined by the appropriate University official;
6. Whether the complainant will receive any ongoing supportive measures or other remedies as determined by the Title IX Coordinator (but not the nature of the supportive measures or other remedies unless such remedies constitute discipline of the respondent); and
7. A description of the University's process and grounds for appeal, as described in Section 7.4 below.

This written decision will be provided to the parties, and this will conclude the grievance process, subject to any appeal rights outlined Section 7.4 below. The University strives to issue the written determination within ten (10) business days of the conclusion of the hearing, though timing may vary depending on the unique circumstances of the particular case at issue.

### **7.4. Appeals**

Either party may appeal the determination of a hearing, or a dismissal of a formal complaint (or any specific allegations therein), on one or more of the following grounds:

1. A procedural irregularity affected the outcome;
2. There is new evidence that was not reasonably available at the time the determination or dismissal was made, that could have affected the outcome; and/or
3. The Title IX Coordinator, investigator, or member of the hearing panel had a conflict of interest or bias for or against complainants or respondents generally, or against the individual complainant or respondent, that affected the outcome.

No other grounds for appeal are permitted.

A party must file an appeal within five (5) business days of the date they receive notice of dismissal or determination. The appeal must be submitted in writing to the appeal officer. In a case involving a student respondent, the Vice President for Student Affairs or designee is the

appeal officer. For all other cases, the Vice President of Business Affairs or designee is the appeal officer. The written appeal must specifically identify the determination and/or dismissal that is being appealed, articulate which one or more of the three (3) grounds for appeal are being asserted, explain in detail why the appealing party believes the appeal should be granted, and articulate what specific relief the appealing party seeks.

Promptly upon receipt of an appeal, the appeal officer will conduct an initial evaluation to confirm that the appeal is timely filed and that it invokes at least one of the permitted grounds for appeal. If the appeal officer determines that the appeal is not timely, or that it fails to invoke a permitted ground for appeal, the appeal officer will dismiss the appeal and simultaneously provide written notice of the same to the parties.

If the appeal officer confirms that the appeal is timely and invokes at least one permitted ground for appeal, the appeal officer will provide written notice to the other party that an appeal has been filed and that the other party may submit a written opposition to the appeal within five (5) business days. The appeal officer shall also promptly obtain from the Title IX Coordinator any records from the investigation and hearing necessary to resolve the grounds raised in the appeal.

After receipt of any opposition filed by the non-appealing party, or after the time period for submission of an opposition has passed without one being filed, the appeal officer will promptly decide the appeal and provide a written decision simultaneously to the parties that explains the outcome of the appeal and the rationale.

The determination of a formal complaint, including any discipline, becomes final when the time for appeal has passed with no party filing an appeal or, if an appeal is filed, at the point when the appeal officer has resolved all appeals, either by dismissal or by providing a written decision to the parties.

No further review beyond the appeal is permitted.

Although the length of each appeal will vary depending on the unique circumstances of the case at issue, the University strives to issue the appeal officer's written decision within fifteen (15) business days of an appeal being filed.

## **8. Additional Matters Related to the Grievance Process**

### **8.1. Informal Resolution**

At any time after the parties are provided written notice of the formal complaint, as described in Section 7.1 above, and before the completion of any appeal described in Section 7.4 above, the parties may voluntarily consent, with the Title IX Coordinator's approval, to engage in a university-facilitated resolution the goal of which is to enter into a final resolution resolving the allegations raised in the formal complaint by agreement of the parties.

The specific process for any informal resolution will be determined by the parties and the Title IX Coordinator, in consultation together. Before commencing the informal resolution process agreed upon, the Title IX Coordinator will simultaneously provide a written notice to the parties that:

1. Describes the parameters and requirements of the informal resolution process to be utilized;
2. Identifies the individual responsible for facilitating the informal resolution (who may be the Title IX Coordinator, another University official, or a suitable third party);
3. Explains the effect of participating in informal resolution and/or reaching a final resolution will have on a party's ability to resume the grievance process; and
4. Explains any other consequence resulting from participation in the informal resolution process, including a description of records that will be generated, maintained, and/or shared.

After receiving the written notice specified above, each party must voluntarily provide written consent to participate in the informal resolution process to the Title IX Coordinator, before the informal resolution process may begin.

If the parties reach a resolution through the informal resolution process, and the Title IX Coordinator agrees that the resolution is not clearly unreasonable, the Title IX Coordinator will put the terms of the agreed resolution in writing and give them to the parties for their written signature indicating their agreement. Once both parties and the Title IX Coordinator sign the written resolution, the resolution is final; the allegations addressed by the resolution are considered resolved and will not be subject to further investigation, adjudication, remediation, or discipline by the University, unless otherwise provided in the resolution itself, absent a showing that a party induced the resolution by fraud, misrepresentation, or other misconduct or where required to avoid a manifest injustice to either party or to the University. An informal resolution agreed upon pursuant to this section is not subject to an appeal.

The following standards also apply to the informal resolution process:

1. A party may withdraw their consent to participate in informal resolution at any time before a resolution has been finalized.
2. During the informal resolution process, the grievance process that would otherwise occur is paused and all related deadlines are suspended.
3. Unless the Title IX Coordinator provides an extension, any informal resolution process must be completed within ten (10) business days from the parties agreeing to the informal resolution process. If an informal resolution process does not result in a resolution within ten (10) business days, and absent an extension by the Title IX Coordinator, the informal resolution process will be deemed terminated, and the formal complaint will be resolved via the grievance process.
4. If an informal resolution was initially agreed upon but terminated without resolution, the Title IX Coordinator may adjust any time periods or deadlines related to the grievance process that was suspended as provided in this section.

Notwithstanding anything else in this section, informal resolution will not be allowed if the respondent is a non-student employee accused of committing sexual harassment against a student.

## **8.2. Treatment Records and Other Privileged Information**

Unless the University has obtained the party's voluntary, written consent to do so, during the grievance process the investigator and hearing panel members are not permitted to access, consider, disclose, permit questioning concerning, or otherwise use:

1. A party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party; or
2. Information or records protected from disclosure by any other legally recognized privilege, such as the attorney client privilege.

Notwithstanding the foregoing, the investigator and/or hearing panel members, as the case may be, may consider any such records or information otherwise covered by this section if the party holding the privilege affirmatively discloses the records or information to support their allegation or defense.

## **8.3. Sexual History**

During the grievance process, questioning regarding a 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, 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. Notwithstanding the foregoing, there may be situations where a complainant affirmatively uses information about their own sexual history for the purpose of supporting their allegations. In such situations, questioning on the issues raised by the complainant may then be allowed if determined necessary by the University in order to ensure a fair process for both parties, even if the issues raised would have otherwise been deemed irrelevant sexual history under this section had the complainant not been the party to put them into question.

## **8.4. Concerns or Complaints about the Grievance Process**

Parties are expected to raise any concerns or complaints about the grievance process in a prompt and timely manner so that the University may evaluate the matter and address it, if appropriate.

## **9. Conflicts of Interest and Bias**

The Title IX Coordinator, investigator, chairperson, hearing panel members, appeal officer, and informal resolution facilitator will be free of any material conflicts of interest or material bias. Any party who believes one or more of these University officials has a material conflict of interest or material bias must raise the concern promptly so that the University may evaluate the concern and find a substitute, if appropriate.

## **10. Relationship with Criminal Process**

This policy sets forth the University's processes for responding to reports and formal complaints of sexual harassment. The University's processes are separate, distinct, and independent of any criminal processes. While the University may temporarily delay its processes under this policy

to avoid interfering with law enforcement efforts if requested by law enforcement, the University will otherwise apply this policy and its processes without regard to the status or outcome of any criminal process.

### **11. Resources**

Any individual affected by or accused of sexual harassment will have equal access to any support and counseling services offered through the University. The University encourages any individual who has questions or concerns to seek support of University identified resources. The Title IX Coordinator is available to provide information about the University's policy and procedure and to provide assistance. A list of University identified resources is located at the following link: [bsu.edu/titleix](http://bsu.edu/titleix)

### **12. Constitutional Rights and Academic Freedom**

The University will construe and apply this policy consistent with the U.S. Constitution and the principles of academic freedom specified in the Faculty and Professional Personnel Handbook. In no case will a respondent be found to have committed sexual harassment based on expressive conduct that is protected by the First Amendment and/or the principles of academic freedom specified in the Faculty and Professional Personnel Handbook.

### **13. Recordings**

Wherever this policy specifies that an audio or video recording will be made, the recording will be made only by the University and is considered property of the University, subject to any right of access that a party may have under this policy, the Family Educational Rights and Privacy Act ("FERPA"), and other applicable federal, state, or local laws. Only the University is permitted to make audio or video recordings under this policy. The secretive recording of any meeting, interview, hearing, or other interaction contemplated under this policy is strictly prohibited.

### **14. Bad Faith Complaints and False Information**

It is a violation of University policy for any person to submit a report or formal complaint that the person knows, at the time the report or formal complaint is submitted, to be false or frivolous. It is also a violation of University policy for any person to knowingly make a materially false statement during the course of an investigation, hearing, or appeal under this policy. Violations of this section are not subject to the grievance process in this policy; instead, they will be addressed under the Code of Student Rights and Responsibilities in the case of students and other University policies and standards, as applicable.

### **15. Retaliation**

It is a violation of this policy to engage in retaliation, which is to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual made a report or formal complaint, testified, assisted, or participated or refused to participate in any manner under this policy. Reports and formal complaints of retaliation may be made in the manner specified in Sections 4 and 6.1 above. Any report or formal complaint of retaliation will be processed under

this policy in the same manner as a report or formal complaint of sexual harassment, as the case may be. The University retains discretion to consolidate a formal complaint of retaliation with a formal complaint of sexual harassment for purposes of the grievance process if the two formal complaints share a common nexus.

## **16. Confidentiality**

The University will keep confidential the identity of any individual who has made a report or formal complaint of sexual harassment or retaliation including any complainant, the identity of any individual who has been reported to be a perpetrator of sexual harassment or retaliation including any respondent, and the identity of any witness. The University will also maintain the confidentiality of its various records generated in response to reports and formal complaints, including, but not limited to, information concerning supportive measures, notices, investigation materials, hearing records, and appeal records. Notwithstanding the foregoing, the University may reveal the identity of any person or the contents of any record if permitted by FERPA, if necessary to carry out the University's obligations under Title IX and its implementing regulations including the conduct of any investigation, hearing, or appeal under this policy or any subsequent judicial proceeding, or as otherwise required by law. Further, notwithstanding the University's general obligation to maintain confidentiality as specified in this policy, the parties to a report or formal complaint will be given access to investigation and hearing materials as provided in this policy.

While the University will maintain confidentiality as provided in this section, the University will not limit the ability of the parties to discuss the allegations at issue in a particular case. Parties are advised, however, that the manner in which they communicate about, or discuss a particular case, may constitute sexual harassment or retaliation in certain circumstances and be subject to discipline pursuant to the processes specified in this policy.

Note that certain types of sexual harassment are considered crimes for which the University must disclose crime statistics in its Annual Security Report that is provided to the campus community and available to the public. These disclosures will be made without including personally identifying information.

## **17. Deadlines, Time, Notices, and Method of Transmittal**

All deadlines and other time periods specified in this policy are subject to modification by the University where, in the University's sole discretion, good cause exists. Good cause may include, but is not limited to, the unavailability of parties or witnesses; the complexities of a given case; extended holidays or closures; sickness of the investigator, chairperson, hearing panel members, or the parties; the need to consult with the University's legal counsel; unforeseen weather events; and the like.

Any party who wishes to seek an extension of any deadline or other time period may do so by filing a request with the investigator, chairperson, appeal officer, or Title IX Coordinator, as the case may be, depending on the phase of the process. Such request must state the extension sought and explain what good cause exists for the requested extension. The University official resolving the request for extension may, but is not required to, give the other party an

opportunity to object. Whether to grant such a requested extension will be in the sole discretion of the University.

The parties will be simultaneously provided written notice of the modification of any deadline or time period specified in this policy, along with the reasons for the modification.

Where this policy refers to notice being given to parties “simultaneously,” notice will be deemed simultaneous if it is provided in relative proximity on the same day. It is not necessary that notice be provided at exactly the same hour and minute.

Unless otherwise specified in this policy, the default method of transmission for all notices, reports, responses, and other forms of communication specified in this policy will be email using University email addresses.

A party is deemed to have received notice upon transmittal of an email to their University email address. In the event notice is provided by mail or similar method of post (like FedEx, courier, etc.), a party will be deemed to have received notice three (3) business days after the notice in question is postmarked or otherwise marked as delivered by the carrier.

Any notice inviting or requiring a party or witness to attend a meeting, interview, or hearing will be provided with sufficient time for the party to prepare for the meeting, interview, or hearing as the case may be, and will include relevant details such as the date, time, location, purpose, and participants. Unless a specific number of days is specified elsewhere in this policy, the sufficient time to be provided will be determined in the sole discretion of the University, considering all the facts and circumstances, including, but not limited to, the nature of the meeting, interview, or hearing; the nature and complexity of the allegations at issue; the schedules of relevant University officials; approaching holidays or closures; and the number and length of extensions already granted.

Unless otherwise specified, all references to number of days provided for actions on the part of the University or on the parties to the complaint are understood to be business days.

### **18. Outside Appointments, Dual Appointments, and Delegations**

The University retains discretion to retain and appoint suitably qualified persons who are not University employees to fulfill any function of the University under this policy, including, but not limited to, the investigator, chairperson, hearing panel members, informal resolution facilitator, and/or appeal officer.

The University also retains discretion to appoint two or more persons to jointly fulfill the role of investigator, chairperson, informal resolution facilitator, and/or appeal officer.

The functions assigned to a given University official under this policy, including but not limited to the functions assigned to the Title IX Coordinator, investigator, chairperson, hearing panel members, informal resolution facilitator, and appeal officer, may, in the University’s discretion, be delegated by such University official to any suitably qualified individual and such delegation may be recalled by the University at any time.

## **19. Training**

The University will ensure that University officials acting under this policy, including but not limited to the Title IX Coordinator, investigators, chairperson, hearing panel members, informal resolution facilitators, University-provided advisors, and appeal officers receive training in compliance with 34 C.F.R. § 106.45(b)(1)(iii) and any other applicable federal or state law. Materials utilized for Title IX training for University officials involved in administering this policy are available at the following links: [www.bsu.edu/studentcode/sexualmisconduct](http://www.bsu.edu/studentcode/sexualmisconduct) and [www.bsu.edu/titleix](http://www.bsu.edu/titleix)

## **20. Recordkeeping**

The University will retain those records specified in 34 C.F.R. § 106.45(b)(10) for a period of seven years after which point in time they may be destroyed, or continue to be retained, in the University's sole discretion. The records specified in 34 C.F.R. § 106.45(b)(10) will be made available for inspection, and/or published, to the extent required by 34 C.F.R. § 106.45(b)(10) and consistent with any other applicable federal or state law, including FERPA.

## **21. Discretion in Application**

The University retains discretion to interpret and apply this policy in a manner that is not clearly unreasonable, even if the University's interpretation or application differs from the interpretation of the parties.

Despite the University's reasonable efforts to anticipate all potential circumstances in drafting this policy, it is possible unanticipated or extraordinary circumstances may not be specifically or reasonably addressed by the express policy language, in which case the University retains discretion to respond to the unanticipated or extraordinary circumstance in a way that is not clearly unreasonable.

The provisions of this policy are not contractual in nature, whether in their own right, or as part of any other express or implied contract. Accordingly, the University retains discretion to revise this policy at any time, and for any reason. The University may apply policy revisions to an active case provided that doing so is not clearly unreasonable.

## **Addendum - Examples and Terms**

This Addendum is intended to provide additional context for certain aspects of the Title IX Policy and Procedures through supplementary discussion and examples. In particular, it will provide further insight into the issue of consent, which is oftentimes a critical factor in determining whether a violation of the policy occurred. The concepts of coercion, force, and incapacitation are also important when understanding consent and thus are discussed in more detail below. In addition, further discussion of sexual harassment and stalking is provided.

### *Consent and Related Topics*

#### **Consent**

Consent is a knowing, voluntary, and clear mutual agreement to engage in sexual activity. Consent is effective when it is informed, freely and actively given, and communicated by clearly and mutually understandable words or actions to participate in each form of sexual activity. This includes the following concepts:

1. Consent cannot be given by someone who is incapacitated. Engaging in sexual activity with someone who one knows to be, or reasonably should know to be, incapacitated is a violation of this policy. [Incapacitation is addressed below.] Where alcohol or other drugs are involved, incapacitation is assessed with respect as to how the alcohol or other drugs consumed affects a person's ability to understand fully the "who, what, when, where, why, and/or how" of their sexual interaction with someone else. An individual accused of sexual harassment or misconduct is not excused if they were intoxicated and, therefore, did not realize the incapacity of the other person;
2. Indiana law provides that a minor (meaning a person under the age of 16 years) cannot consent to sexual activity. This means that sexual contact by an adult with a person younger than 16 years old is a crime, as well as violation of this policy, even if the minor wanted to engage in the act;
3. Consent cannot be inferred from silence, passivity, or lack of active resistance;
4. Consent to one form of sexual activity does not imply consent to other or additional forms of sexual activity;
5. Consent can be withdrawn at any time;
6. Consent does not exist when there is force, a threat of force, violence, or any other form of coercion or intimidation whether of a physical, psychological, or, financial nature. [See discussions on force and intimidation below.] A person who is the object of sexual aggression is not required to physically or otherwise resist the aggressor;
7. A current or previous dating or sexual relationship is not sufficient to constitute consent; past consent does not imply future consent; and
8. Consent to engage in sexual activity with one person does not imply or confer consent to engage in sexual activity with another person.

## **Coercion**

Coercion is the use of unreasonable and persistent pressure to compel another individual to initiate or continue sexual activity against an individual's will. Coercion can include a wide range of behaviors, including intimidation, manipulation, threats, and blackmail. Coercion may be emotional, intellectual, psychological, or moral. A person's words or conduct are sufficient to constitute coercion if they wrongfully impair another individual's freedom of will and ability to choose whether or not to engage in sexual activity. Examples of coercion include, but are not limited to, (1) threatening to disclose another individual's sexual history or private information related to sex, sexual orientation, gender identity, or gender expression and (2) threatening to harm oneself if the other party does not engage in the sexual activity. Coercing an individual into engaging in sexual activity violates this policy in the same way as physically forcing someone into engaging in sexual activity.

## **Force**

Force is the use or threat of physical violence (including but not limited to strong-arming, physical action, trapping, isolating, or intimidation) to overcome an individual's freedom of will to choose whether or not to participate in sexual activity. There is no requirement for a party to resist physically or verbally the sexual advance or other behaviors, but resistance will be viewed as a clear demonstration of non-consent.

## **Incapacitation**

Incapacitation is a state where someone cannot make informed, rational judgments and cannot consent to sexual activity. States of incapacitation can be temporary or permanent and include, but are not limited to unconsciousness, sleep, mental disability, or any other state in which a person is unaware that sexual activity is occurring.

Where alcohol or other drugs are involved, incapacitation is defined with respect to how the alcohol or other drugs consumed affected a person's decision-making capacity, awareness of consequences, ability to make fully informed judgments, the capacity to appreciate the nature and quality of the act, or level of consciousness. In other words, a person may be considered unable to give effective consent due to incapacitation if the person cannot appreciate or understand the "who, what, when, where, why, and/or how" of a sexual interaction.

Incapacitation is a state beyond "under the influence," drunkenness, or intoxication. The impact of alcohol and other drugs varies from person to person. However, warning signs that a person is approaching or has become incapacitated may include slurred speech, vomiting, walking with difficulty or with assistance, falling/stumbling, odor of alcohol, combativeness, or emotional volatility. Evaluating incapacitation also requires an assessment of whether a respondent was aware or should have been aware of the complainant's incapacitation based on objectively and reasonably apparent indications of impairment when viewed from the perspective of a sober, reasonable person in the respondent's position.

In determining whether consent has been given, the university will consider both (1) the extent to which a complainant affirmatively gives words or performs actions indicating a willingness to

engage in sexual activity, and (2) whether the respondent knew or reasonably should have known the complainant's level of alcohol consumption and/or level of impairment. A respondent is not excused from responsibility under the influence of alcohol or other drugs and, therefore, did not realize the incapacity of the other person.

An individual who engages in sexual activity with someone the individual knows or reasonably should know is incapable of making a rational, reasonable decision about whether to engage in sexual activity is in violation of this policy.

### Further Discussion of Sexual Harassment

For purposes of this policy, and as noted in Section 2, the definition of sexual harassment is conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct, (often referred to as quid pro quo harassment); or
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity (often referred to as hostile environment harassment); or
3. Sexual assault, dating violence, domestic violence, or stalking (as these terms are defined in Section 3 of the policy).

Sexually harassing behaviors differ in type and severity and can range from subtle verbal harassment to unwelcome physical contact. Conduct that constitutes sexual harassment in violation of this policy can potentially take many forms, including but not limited to:

1. May be blatant and intentional and involve an overt action, a threat, or reprisal, or may be subtle and indirect, with a coercive aspect that is unstated.
2. Does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.
3. May be committed by anyone, regardless of gender, age, position, or authority. When there is a power differential between two persons—perhaps due to differences in age or their relative positions in social, educational, or employment relationships—harassment can occur in any context. For example, a faculty member compelling a student to engage in sexual activity in order to receive a higher grade or preferred placement would be deemed sexual harassment under this policy.
4. May be committed by a stranger, an acquaintance, or someone with whom the Complainant has an intimate or sexual relationship.
5. May be committed by or against an individual or may be a result of the actions of an organization or group.
6. May occur by or against an individual of any sex, gender identity, gender expression, or sexual orientation.

7. May occur in the classroom, in the workplace, in residential settings, over electronic media (including the internet, telephone, and text), or in any other setting.
8. May be a one-time event or part of a pattern of behavior.
9. May be committed in the presence of others or when the Parties are alone.
10. May affect the Complainant and/or third Parties who witness or observe harassment
11. May take the form of unwanted sexual statements, e.g., sexual or “dirty” jokes, comments on physical attributes, spreading rumors about others, rating others as to sexual activity or performance, talking about one’s sexual activity in front of others, or displaying/distributing sexually explicit images or text, if such statements rise to the level of creating a hostile environment under this policy.
12. May be unwanted personal attention in the form of letters, calls, messaging (e.g., texts, social media) visits, or pressure for sexual favors, dates, or unnecessary personal interaction.
13. May take the form of exclusion, separation, or otherwise differential treatment on the basis of sex, gender identity/expression, transgender status, or gender transition.
14. May create a hostile environment. For purposes of this policy, a hostile environment exists when there is unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University’s education program or activity. A hostile environment can be created by another student, an employee, or a visitor to the university. Generally, a statement that is a mere utterance of an epithet which offends, or which offends by mere discourtesy or rudeness, does not create a hostile environment. The determination of whether an environment is “hostile” must be based on the totality of the circumstances, which the University will evaluate from the perspective of a reasonable person in the Complainant’s position. These circumstances could include, but are not limited to:
  - a) The frequency of the speech or conduct and the context in which it occurred;
  - b) The nature and severity of the speech or conduct;
  - c) Whether the conduct was physically threatening;
  - d) Whether the speech or conduct was humiliating;
  - e) The actual effect the speech or conduct had on the Complainant, including the Complainant’s mental and/or emotional state;
  - f) Whether the speech or conduct was directed at more than one person;
  - g) Whether the speech or conduct arose in the context of other discriminatory conduct;
  - h) The relationship between the parties (including accounting for whether one individual has power or authority over the other);
  - i) Whether the speech or conduct unreasonably interfered with the Complainant’s educational opportunities or performance, university-controlled living environment, or university-controlled work opportunities or performance;

- j) Whether the speech or conduct is constitutionally protected or deserves the protections of academic freedom.

**Sexual Exploitation** is a particular type of conduct that can be a violation of this policy if it meets the criteria for “sexual harassment” set out in Section 2. It involves taking advantage of the sexuality of another person without consent or in a manner that extends beyond the bounds of consensual activity without the knowledge of the other individual for any purpose, including sexual gratification, financial gain, personal benefit, or any other non-legitimate purpose.

Examples of sexual exploitation include, but are not limited to:

1. Exposing one’s genitals without consent;
2. Non-consensual streaming, audio- or video-recording, photographing, permitting others to view, or transmitting intimate or sexual utterances, sounds, or images without consent of all parties involved;
3. Allowing others to view sexual acts (whether in person or via a video camera or other recording device) without the consent of all parties involved;
4. Non-consensual removal of a condom or other form of birth/disease control by a sex partner, sabotage to a condom or other form of birth/disease control by a sex partner without the other’s knowledge or consent, or false representation of the use of a condom or other form of birth/disease control;
5. Engaging in any form of voyeurism (e.g., “peeping”);
6. Prostituting another individual;
7. Compelling an individual to touch their own or another person’s intimate parts without consent;
8. Knowingly exposing another individual to a sexually transmitted disease or virus without that individual’s knowledge; and
9. Inducing incapacitation for the purpose of making another person vulnerable to non-consensual sexual activity.

#### *Further Discussion of Stalking*

Stalking can be a form of sexual harassment in violation of this policy when it occurs in the University’s education programs and activities. Section 3 of the policy provides the definition of stalking, which is engaging in a course of conduct directed at a specific person that would cause a reasonable person to (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

Cyber-stalking, a particular form of stalking in which electronic media such as the internet, social networks, blogs, cell phones, texts, or other similar devices or forms of contact are used to pursue, harass, or to make unwelcome contact with another person in an unsolicited fashion, can also be deemed a violation of this policy.

Examples of stalking that may be in violation of this policy include, but are not limited to:

1. Unwelcome and repeated visual or physical proximity to a person;
2. Repeated oral or written threats;

3. Extortion of money or valuables;
4. Unwelcome/unsolicited written communication, including letters, cards, emails, instant messages, and messages on on-line bulletin boards;
5. Unwelcome/unsolicited communications about a person, their family, friends, or co-workers;
6. Sending/posting unwelcome and/or unsolicited messages with another username; or
7. Implicitly threatening physical conduct or any combination of these behaviors directed toward an individual person.