

**ADMINISTRATIVE STANDARDS FOR THE
NONDISCRIMINATION AND HARASSMENT POLICY
(Doc. T16-040)**

I. INTRODUCTION.

The University prohibits unlawful discrimination, harassment, and retaliation in education, admissions, and access to or treatment in its programs, services, benefits, activities, and all terms and conditions of employment at the University in accordance with state and federal laws as amended including Title IX, Title VII, Section 504 of the Rehabilitation Act of 1973, and the Massachusetts anti-discrimination law. Any member of the University community who engages in discrimination, harassment, or retaliation in violation of the Non-Discrimination and Harassment Policy may be subject to disciplinary or other action.

These Standards implement the Non-Discrimination and Harassment Policy (the “Policy”) by delineating those provisions which the University System Office and each campus must include in their individual policies and procedures.

The Policy applies to the members of the University community, including all employees, students, applicants for admissions and employment, contractors, volunteers, and visitors. Campus policies and procedures may be more, but not less, restrictive than these Standards.

II. DEFINITIONS.

Unlawful discrimination, harassment, sexual harassment, and retaliation are defined in the Policy. For the purposes of the Policy, the definitions in the Policy as well as the following additional definitions shall have the following meanings and must be included in appropriate campus policies and included or referenced in appropriate complaint procedures, codes of conduct and any other campus procedures.

- (1) **Coercion** is the use of an unreasonable amount of pressure to engage in sexual activity. Coercion does not begin when the initiator makes an initial sexual advance. Coercion begins when the initiator continues to pressure another, through the use of psychological/emotional pressure, alcohol, drugs, threat, intimidation, or force, to engage in sexual behavior, when a reasonable person would realize that the other does not want to engage in sexual activity.
- (2) **Consent** is permission to engage in communication and/or a specific, mutually-agreed upon sexual activity that is given freely, actively, and knowingly, using mutually understandable and unambiguous words or actions, or—in plain language—to agree to do the same thing, at the same time, in the same way, with each other.
 - Consent cannot be inferred by silence, passivity, or not resisting;

- Consent cannot be implied by a current or previous dating or sexual relationship;
- Consent to one form of sexual activity does not imply consent to other forms of sexual activity;
- Consent is not indefinite; it is revocable and may be withdrawn at any time, using words or actions such that a reasonable person would understand a lack of continued consent;
- Consent cannot be given by person who is
 - Asleep;
 - Incapacitated by drugs or alcohol;
 - Unconscious;
 - Mentally or physically incapacitated; or
 - Under duress, intimidation, threat, coercion, or force.
- Consent cannot be given by a person under the age of 16.

It is the responsibility of the person seeking to initiate the sexual activity or conduct to affirmatively obtain consent, not the intended recipient of such conduct to deny such consent.

- (3) ***Confidential Employee*** is an employee who, because of his/her position, may not reveal an individual's identity or other information without permission, even to the Title IX Coordinator(s).

The following categories of employees are confidential employees:

- Licensed sexual assault counselors, psychologists, psychotherapists, social workers, clergy, and attorneys, and those persons working under the supervision of such individuals, when acting in their professional role providing services to a patient or client;
- University employees bound by statutory privilege obligations under Massachusetts law; and
- University employees providing administrative, operational and/or related support for a confidential employee in the performance of such services.

- (4) ***Dating Violence*** is abusive behavior (including, but not limited to, physical, emotional, and/or sexual acts or conduct) committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship will be determined by factors such as the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved.

- (5) ***Domestic Violence*** is any abusive behavior (including, but not limited to, physical, emotional, and/or sexual acts or conduct) committed:

- against a person who is a current or former spouse;
 - against a person with whom the abuser shares a child in common;
 - against a person who is or has cohabitated with the abuser as a spouse;
 - against a person similarly situated to a spouse;
 - between a parent and child;
 - between members of the same household in an intimate relationship; or
 - against any other person similarly situated.
- (6) ***Gender expression*** refers to the external characteristics and behaviors that relate to a perception of gender, including but not limited to dress, mannerisms, speech patterns, social interactions, and body characteristics.
- (7) ***Gender identity*** refers to an individual's internal sense of gender, which may be male or female, man or woman, or not conforming to those binary genders. A person's gender identity may be different or the same as the person's sex assigned at birth.
- (8) ***Intrusion of Privacy*** is photographing, videotaping, filming, digitally recording, or by any other means secretly viewing, with or without a device, another person without that person's consent in any location where the person has a reasonable expectation of privacy, or in a manner that violates a reasonable expectation of privacy. Unauthorized storing, sharing, and/or distribution is also prohibited. This does not apply to lawful security or surveillance filming or recording that is authorized by law enforcement or authorized university officials. These provisions may not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly.
- (9) ***Incapacitation*** is the physical and/or mental inability, whether temporary or permanent, of an individual to make rational, reasonable decisions or judgments regarding one's well-being or welfare. States of incapacitation include, but are not limited to, unconsciousness, sleep, and blackouts. Incapacitation may result from the voluntary or involuntary consumption of alcohol and/or other drugs. 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. For purposes of this Policy a person is not incapacitated merely because the person has been drinking or using drugs. The question of incapacitation is determined on a case-by-case basis using both objective and subjective standards. In evaluating whether a person was incapacitated for purposes of evaluating effective consent, the University will consider: (1) whether the person initiating the sexual activity knew that their partner was incapacitated; and if not (2) whether a reasonable person in the same situation would have known that their partner was incapacitated; and (3) whether the person initiating the sexual activity played a role in creating the circumstances of incapacity.

- (10) **Privacy Employee** is an employee designated by the University as a “Privacy Employee.” These individuals have privacy responsibilities that supersede their obligations under Title IX. These employees should not disclose a client or patient’s confidence, even to the Title IX Coordinator(s). These individuals include:
- licensed treating physicians (and those persons working under the supervision of these individuals) when acting in his or her professional role in the provision of services to a patient who is a University student or employee and any University employee providing administrative, operational and/or related support for such treating physician in their performance of such services.

The system office and each campus shall designate Privacy Employees. The obligations of the designated Privacy Employees shall be published for the University community.

- (11) **Rape** is any penetration of any orifice, no matter how slight, by any object, including any body part without consent. This may be committed by force, threat, intimidation, coercion, or through exploitation of another’s mental or physical condition (such as incapacitation) of which the responding party knew or reasonably should have known.
- (12) **Responsible Employee** is an employee (a) who, because of his/her position, must report known or possible incidents of sexual violence or any other sexual misconduct by students or employees, including the known details of the incident and the name(s) of alleged victim(s) and respondent(s), to the Title IX Coordinator(s) or other appropriate school designee; or (b) who has the authority to take action to redress sexual harassment/misconduct; or (c) whom a student reasonably believes has this authority or duty. Campus police officers are Responsible Employees; but, see exception for public safety personnel.

At a minimum, the following categories of employees are Responsible employees:

- Designated Administrators;
- Campus police officers (but, see exception noted below);
- Resident assistants;
- Student Affairs staff (including student employees); and
- Faculty with significant responsibilities over student activities.

Exception for public safety personnel: Although campus police officers are designated as Responsible Employees, if a student or employee reporting *sexual assault* or *domestic violence* requests confidentiality, the campus police officer must not disclose the name of the reporting party to the Title IX Coordinator(s).

- (13) ***Sexual Assault*** is broadly defined as any sexual activity that is forced, coerced, or unwanted.
- (14) ***Sexual Exploitation*** is taking sexual advantage of another person without his or her consent. Sexual exploitation includes, without limitation, causing or attempting to cause the incapacitation of another person in order to gain a sexual advantage over such other person; causing the prostitution of another person; recording, photographing or transmitting identifiable images of private sexual activity and/or the intimate parts of another person; allowing third parties to observe private sexual acts; and engaging in voyeurism.
- (15) ***Sexual Violence*** is any physical sexual act or activity engaged in without the consent of the other individual, including when the other individual is unable to consent to the act or activity (*See also*, definition for *Consent*).
- (16) ***Stalking*** is any course of conduct (more than one act) directed at a specific person (directly, indirectly, through a third party or other means) that places that person in reasonable fear for his or her safety or the safety of others.
- (17) ***Undesignated Employee*** is an employee who is not designated as a Responsible Employee, a Confidential Employee, or a Privacy Employee. Undesignated employees are encouraged to practice bystander awareness and to report any incidents of abuse or sexual misconduct to the Title IX coordinator(s).

III. COMPLAINT PROCEDURES.

Each campus is responsible for developing clear and concise complaint procedures and for informing students, staff, faculty, and other campus visitors of these procedures and processes. The campus office responsible for investigating complaints must be publicized by multiple means, including but not limited to posting on campus websites, and be easily accessible in a variety of accessible formats for persons with disabilities.

Complaint procedures must include the following:

- A description of the rights and obligations of the reporting party, responding party, and witnesses.
- A description of the additional rights of the reporting party and the responding party in cases involving a claim of sexual violence or a claim under Violence Against Women Act of 1994 (“VAWA”).
- A description of the confidentiality rights available to the reporting party and the responding party.
- A description of the use and limitations of advisors during the complaint process.

- A description of the interim measures available to the reporting party and the responding party.
- A statement that any person who believes that they have been a victim of sexual violence, harassment, discrimination or retaliation as prohibited by the University's Non-Discrimination and Harassment Policy, should report the incident in accordance with the campus process. There must also be a statement encouraging any individual with knowledge of a violation of the Non-Discrimination and Harassment Policy to contact appropriate and identified University officials, offices, or campus police as soon as possible. Clearly identify University reporting obligations and certain rights and options available to the reporting party.
- A clear and concise statement describing the procedures and their application to students, employees, staff, faculty, applicants for admissions and employment, guests, contractors, volunteers, and visitors.
- A statement that the investigatory process will be timely and impartial. Include a statement that the campus will conduct a prompt investigation and seek to resolve all complaints promptly, though more complex investigations may require additional time. The investigator will notify the reporting party and responding party in writing of any undue delay in the investigation.
- Information about how a reporting party and responding party will be notified during the complaint process, investigatory, decision-making/disciplinary and (if applicable) appeal process.
- Information about how to raise an issue of potential bias or a conflict of interest.
- State the right of the University to impose interim measure(s), pending the completion of the investigation and its resolution. This statement must outline the circumstances under which interim measure(s) may be imposed, the type of interim measure(s) that may be imposed, with a description of the restriction and of the access the person will be denied; and the right of the person to a hearing or other manner in which that person may be heard regarding the application or scope of the interim measure(s) whether before the interim measure(s) is imposed, or within a reasonable time thereafter, or in accordance with any applicable bargaining agreements.
- Language that the complaint procedures do not deprive a reporting party of the right to end the University's process at any time and file with an outside enforcement agency, such as the Massachusetts Commission Against Discrimination, the Equal Employment Opportunity Commission, the Office for Civil Rights of the United States Department of Labor, or other antidiscrimination agency. The address and telephone number for these agencies should be listed. The language must also inform the reporting party that the University will continue with its investigation of the complaint.

- State the responsibilities of the University to continue with its investigation even when the reporting party files with an outside enforcement agency, or initiates litigation.
- In addition to publicizing the complaint process and the responsible office (such as the campus' Equal Opportunity Office, *etc.*), Title IX Coordinators, campus police, counseling centers and other resources must be clearly identified with contact information, and hours of service must be clearly identified. This information must be reviewed on a regular basis to ensure it is up to date.
- A statement of what happens upon the conclusion of the complaint process.
- The procedures may provide for anonymous reporting and provide the process for such reporting.

IV. **THE INVESTIGATORY PROCEDURES.**

Investigatory procedures must include the following:

- Allow the reporting party to provide a clear and concise statement of the conduct, identifying the persons involved, dates, times, location, communications, and any supporting documentation.
- Allow the responding party to provide a clear and concise statement, identifying persons, dates, times, location, communications and any supporting documentation in response to the reporting party's statement.
- A statement that the reporting party may describe their desired remedy, acknowledging that the requested remedy may or may not be sought or achieved.
- A statement identifying the standard of evidence to be used for resolving complaints. For Title IX complaints a preponderance of the evidence standard must be used; e.g. *it is more likely than not* based on the evidence presented that the University Policy was violated. A statement that pending criminal charges shall not prohibit or unduly delay the investigation or resolution of any complaint.
- A statement as to the expected timeframes in which each aspect of an investigation should be completed, and the timeframe for appeal.
- A description of the interim measures and confidentiality rights available to the reporting party and the responding party, and the rights and obligations of the reporting party, responding party, and witnesses.

V. APPEAL PROCESS.

The procedures shall include a statement as to whether there is an appeal process and to whom it applies. Appeal processes must include the following:

- For Title IX or VAWA claims, only a statement that both the reporting party and the responding party may be entitled to file an appeal;
- Description of when and how an appeal may be made; and
- Language describing the grounds for appeal.

VI. SANCTION/ADMINISTRATIVE ACTION STATEMENT.

The procedures shall include a statement as to whether sanctions or administrative action may be issued for violation of the University's policies.