


NOTES:



# Sexual Harassment & Title IX

*Bowdoin College Administrator Training*  
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Ann Chapman & Allen Kropp  
Drummond Woodsum  
dwmlaw.com | 207.772.1941

**DrummondWoodsum**  
ATTORNEYS AT LAW

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## AGENDA FOR TODAY

- Introductions
- What we will cover:
  - Brief orientation to TIX landscape and what is different now.
  - The new Title IX regulations and Bowdoin's Title IX Policy, including:
    - Where and when Title IX applies / Scope of the College's education programs and activities.
    - Conduct covered under Title IX / Definitions of sexual harassment.
    - Interplay between Title IX Policy, Student Social Code and Discrimination Policies (Student/Faculty/Staff).
    - Bowdoin's Title IX Policy and the grievance process (including investigations, hearings, appeals and alternative resolutions).
    - Relevance of questions/Evidence.
    - Impartiality, conflicts of interest and bias.

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# Part One

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## *Title IX Harassment – Where We Have Come From*

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## A BRIEF HISTORY OF TITLE IX

- Title IX became law in 1972.
- It states, in relevant part, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”
- Until 1998, if you asked someone about Title IX, the response would focus on athletics, and particularly on expanded opportunities for female athletes.

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## Brief History: *GEBSER*

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- In 1998, the Supreme Court decided *Gebser v. Lago Vista Independent School District*.
- Frank Waldrop, a teacher at Lago Vista, groomed Alida Gebser during her freshman year in high school, and the two began a sexual affair that spring. In January of her sophomore year, a police officer caught them engaging in sexual intercourse.
- Waldrop was arrested, and immediately fired.
- Gebser sued the school district under Title IX, seeking money damages.
- The Court held that where a school has **actual knowledge** of an employee sexually harassing a student but responds with **deliberate indifference** to such knowledge, the school itself has engaged in discrimination, subjecting the school to money damages in a private lawsuit under Title IX.
- The *Gebser* case was dismissed.

## Brief History: *DAVIS*

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- In 1999, in *Davis v. Monroe County Board of Education*, the Supreme Court held that where sexual harassment is committed by a peer rather than an employee (i.e., student to student sexual harassment), the same standards of **actual knowledge** and **deliberate indifference** apply.
- The *Davis* Court additionally crafted a definition of when sex-based conduct becomes actionable sexual harassment, defining the conduct as “**so severe, pervasive, and objectively offensive**” that it denies its victims equal access to education.
- The *Davis* case was allowed to proceed.

## Brief History: Prior OCR Guidance

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During the Obama Administration, the 2011 Dear Colleague Letter and 2014 Q&As established new requirements for Title IX compliance, including:

- Colleges must investigate any claim made by a student that they had been the victim of sex discrimination **in any form**, including sexual misconduct.
- Sexual misconduct was defined as sexual assault, sexual violence, sexual exploitation, or sexual harassment.
- Sexual harassment was defined broadly as any “unwelcome conduct of a sexual nature.”
- Equally important, whether sexual conduct was unwelcome was judged by a subjective, not an objective, standard. Whether a reasonable person would consider the conduct to be unwelcome was irrelevant. What mattered was that the student believed they had been the victim of unwelcome conduct of a sexual nature.
- Except for a limited group of “confidential employees,” any faculty or staff member had to report any possible sexual misconduct against a student.
- OCR asserted that preponderance of the evidence (more likely than not) was the standard by which sexual misconduct cases must be judged.
- There was no right to a formal hearing.

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## Part Two

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*The New Title IX Regulations on Sexual Harassment & Bowdoin's Revised Title IX Policy*

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## The New Title IX Regulations

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- In May, 2020, the Department of Education published new Title IX regulations on sexual harassment. 34 C.F.R. Part 106.  
<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>
- The regulations themselves are 7 pages in length.
- The explanatory preamble is over 500 pages!
- The effective date of the regulations was August 14, 2020.

## Title IX Coordinator and Deputy Coordinator

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- Bowdoin's Policy:
  - Bowdoin's Title IX Coordinator is Benje Douglas.
  - The Deputy Title IX Coordinator for Employees and Visitors is Brian Robinson.
- The Title IX Coordinator has broad responsibility for implementing and overseeing the College's Title IX Policy.
- Only the Title IX Coordinator/Deputy Coordinator can implement supportive measures.

## The Title IX Regulations – General Principles When Must the College Act and Who Must Report

- **Title IX Regulations:**
  - The 2020 regulations return the focus of Title IX requirements for response by colleges to **actual knowledge and deliberate indifference**.
  - Only if the College has **actual knowledge of sexual harassment** (as defined in the regulations) in its **education programs and activities**, against a person in the **United States**, does Title IX require the College to respond promptly in a manner that is not **deliberately indifferent** – meaning not clearly unreasonable in light of the known circumstances.
  - **Actual knowledge** means notice of sexual harassment or allegations of sexual harassment to the **Title IX Coordinator** or any official who has authority to institute corrective measures on behalf of the College.
- **Bowdoin's Policy:**
  - All College employees (including faculty, staff, security personnel, coaches, residential life student and professional staff, deans and other College administrators, etc.), except those designated as **On-Campus Confidential Resources or On-Campus Privileged Resources**, are considered **Responsible Employees and are** required to report suspected sexual harassment to the **Title IX Coordinator**.
  - The only exceptions to the reporting requirement are: **On-Campus Confidential Resources (Lisa Peterson, Director, Office of Gender Violence Prevention and Education and Rachel Reinke, Associate Director, Center for Sexuality, Women, and Gender); and On-Campus Privileged Resources (Counseling Services; Health Services; and Eduardo Pazos, Director, Rachel Lord Center for Religious and Spiritual Life).**

## How Might an Institution Be Deliberately Indifferent (*and subject to liability via OCR investigation or civil lawsuit*)?

- Failing to treat Complainants and Respondents equitably.
- Presuming a Respondent is responsible before a determination is made following a hearing.
- Failing to objectively evaluate all relevant evidence.
- Failing to ensure that any individuals involved in the grievance process (coordinators, investigators, adjudicator) have appropriate training, and do not have conflicts of interest or bias.
- Failing to conclude the grievance process promptly and explain reasons for delay.
- Failing to provide notices of meetings and hearings.
- Failing to provide opportunities for parties to review and respond to relevant evidence, both favorable and unfavorable.
- Failing to provide appropriate supportive measures.

## Deliberately Indifferent, *continued*

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- Failing to provide opportunities for parties to review and respond to relevant evidence, both favorable and unfavorable.
- Failing to allow parties to be accompanied to any meetings or hearings by an advisor of their choice.
- Failing to give parties the opportunity to present witnesses, as well as other relevant evidence.
- Placing the burden of gathering evidence and of proof on the Complainant.
- Restricting the parties from speaking about the case for their own emotional support and to prepare their case.
- Failing to follow confidentiality and privacy laws.



ALL OF THESE EXPECTATIONS ARE  
REFLECTED IN BOWDOIN'S TITLE IX POLICY

## How Does Bowdoin Avoid Being Deliberately Indifferent?

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- By appointing a Title IX Coordinator (*done*).
- By adopting a policy that complies with the 2020 Title IX regulations (*done*).
- By following the regulations and Bowdoin policy.
- By retaining required records to demonstrate compliance.

## Who is Protected Under the Title IX Regulations Now?

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- All matriculated students, including those on study away and those who are on a leave or suspension.
- Staff and faculty members employed in Bowdoin's education programs and activities (*depending on the circumstances, a student who is employed by the College may be considered an employee under this policy*).
- Other parties who are participating in or attempting to participate in a College education program or activity (e.g., volunteers, high school students touring campus or attending campus programs, applicants for employment, participants in alumni programs, etc.).
- Only individuals are covered, not organizations such as student clubs or teams (which may be covered under other policies).

## Where Does Title IX Apply: “Education Programs and Activities”

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- Under the new regulations, colleges only have a duty to respond to sexual harassment which occurs within their “education programs and activities.”
- As defined in the College's policy, this includes:  
*“locations, events or circumstances over which the College exercised substantial control over both the Respondent [alleged perpetrator] and the context in which alleged sexual harassment occurred and also includes any buildings owned or controlled by a student organization that is officially recognized by the College.”*
- The incident must have taken place in the United States.



## How is Sexual Harassment Defined under the Title IX Regulations: *Quid Pro Quo* and *Hostile Environment*

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- The regulations prohibit **sexual harassment**. This term encompasses the following types of conduct on the basis of sex (the definitions are from Bowdoin's Title IX Policy).
- **Quid Pro Quo** harassment by an **employee** (*conditioning provision of the College's aid, benefit or service on an individual's participation in unwelcome sexual conduct*) against another employee or a student (e.g. a good evaluation for an employee; a better grade for a student).
- **Hostile Environment**: *Unwelcome conduct based on sex that a reasonable person would consider so **severe, pervasive AND objectively offensive** as to deny the victim equal access to the College's education programs and activities.*



The prior OCR Guidance definition was broader -- Unwelcome conduct that was sufficiently severe, persistent, OR pervasive so as to limit a student's ability to participate in or benefit from the College's education programs and activities.

## How is Title IX Sexual Harassment Defined: *Sexual Assault, Dating Violence, Domestic Violence, Stalking*

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**Sexual Assault** (an offense classified as a forcible or non-forcible sex offense under the FBI's Uniform Crime Reporting System).

- **Forcible Sex Offenses**
  - 1) **Forcible rape** (except statutory rape): The carnal knowledge of a person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their temporary or mental or physical incapacity.
  - 2) **Forcible sodomy**: Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent or mental incapacity.

## Definitions: Sexual Assault, *continued*

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- 3) **Sexual assault with an object:** To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.
  
- 4) **Forcible fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.

## Definitions: Sexual Assault, *continued*

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- **Non-Forcible sex offenses** – Unlawful, non-forcible sexual intercourse, including incest and statutory rape.
  - 1) **Incest:** Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
  - 2) **Statutory rape:** Non-forcible sexual intercourse with a person who is under the statutory age of consent. There is no force or coercion used in statutory rape; the act is not an attack.

## Definitions: Dating Violence

- **Dating violence** is violence 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 based on consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. Dating violence includes, but is not limited to:
  - Sexual abuse
  - Physical abuse
  - Emotional violence
  - The threat of such violence
  - Does not include acts that meet the definition of Domestic Violence

## Definitions: Domestic Violence

- 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 cohabiting 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 Maine, or by any other person against an adult or youth victim who is protected from that person's acts under Maine's domestic or family violence laws, including:
  - Domestic violence assault
  - Domestic violence criminal threatening
  - Domestic violence threatening
  - Domestic violence stalking
  - Domestic violence reckless conduct

## Definition: Stalking

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- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress. Examples of stalking may include:
  - Unwanted, intrusive, and frightening communications by phone, mail, and/or email
  - Repeatedly leaving or sending unwanted items such as gifts
  - Following or waiting for a person at places such as home, school, or work
  - Making direct or indirect threats of harm to a person, or to the person's children, relatives, friends, or pets
  - Damaging or threatening to damage property
  - Harassment through the Internet or social media
  - Posting information or spreading rumors about a person

## Definition: Retaliation

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Bowdoin Policy:

- Neither the College nor any person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because the individual made a report or formal complaint, testified, assisted, participated or refused to participate in any manner in an investigation, proceeding or hearing under this Policy.

## Other Important Definitions: Consent

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- The Title IX regulations do not define “consent.” The Bowdoin Title IX Policy definition of Effective Consent is as follows:

*Words or actions that show a knowing and voluntary agreement to engage in mutually agreed-upon sexual activity. Effective Consent cannot be gained by Force, by ignoring or acting in spite of the objections of another, or by taking advantage of the Incapacitation of another, where the Respondent knows or reasonably should have know of such Incapacitation. The use of alcohol or other drugs will never function to excuse behavior that violates this Policy. Effective Consent is also absent when the activity in question exceeds the scope of Effective Consent previously given, including where consent was given to certain sexual activity under certain conditions (for example, with the use of a barrier method of birth control) and the activity in question violates any such conditions. In addition, certain states have designated a minimum age under which a person cannot give Effective Consent.*

## Other Important Definitions: Incapacitation

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- Bowdoin’s Policy defines Incapacitation as follows:

*The physical and/or mental inability to make informed, rational judgments. States of Incapacitation include, without limitation, sleep, blackouts, and flashbacks. Where alcohol [or other drug] is involved, Incapacitation is determined by how the alcohol [or other drug] consumed impacts a person’s decision-making capacity, awareness of consequences, and ability to make informed judgments.*

## Other Important Definitions: Force and Coercion

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- Under Bowdoin's Policy, Force is defined as:  
*Physical force, violence, threat, intimidation or coercion.*
- Coercion is defined as:  
*The improper use of pressure to compel another to engage in or continue sexual activity against their will, including duress, cajoling, manipulation, and blackmail. Coercion occurs when a Respondent keeps pressuring the Complainant to acquiesce to sexual activity even after the Complainant has made clear that the pressure is unwelcome.*

## To Summarize: What Conduct is Prohibited Under Bowdoin's Title IX Policy?

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- **Quid pro quo harassment** by an employee.
- Unwelcome conduct based on sex that is so severe, pervasive AND objectively offensive that it denies access to education programs and activities (referred to in the Title IX Regulations as **hostile environment harassment**).
- **Sexual assault:**
  - Situations where there is actual sexual contact involving penetration.
  - Touching (fondling) of genitals, breasts, or buttocks.
- **Dating violence.**
- **Domestic violence.**
- **Stalking.**
- **Retaliation.**

## How Will Bowdoin Address Sexual Harassment that Falls Outside of Its Education Programs and Activities?

- Conduct that would meet Title IX definitions of sexual harassment but falls outside Bowdoin’s education program/activity or occurs outside the U.S. will be addressed as possible violations of:
  - Student Social Code
  - Employee Freedom from Discrimination, Harassment, Sexual Misconduct and Gender Based Violence Policy
- Such cases will be addressed ***using the procedures set forth in the Title IX policy.***
- Conduct that would not constitute sexual harassment under Title IX policy definitions (e.g., does not meet new threshold for “*hostile environment harassment*”) will be addressed by following the procedure under the Social Code or Employee Freedom from Discrimination/Harassment Policy.

## “Report” of Sexual Harassment

- There is a difference between a **report** of sexual harassment and a **formal complaint** under the Title IX regulations.
- Upon receiving a **report**, which can come from anyone (and may be anonymous), the Title IX Coordinator must:
  - ✓ In consultation with the possible victim, offer **supportive measures**.
    - ✓ These are individualized services, previously referred to as “interim measures,” such as no contact orders, changes to class or work locations, changes in residence, etc.
    - ✓ Any such supportive measures cannot “unreasonably” interfere with a Respondent’s access to education programs and activities, and cannot be “disciplinary” before a determination of responsibility.
    - ✓ If supportive measures are not provided, the Title IX Coordinator must document why.
  - ✓ Explain the **Formal Complaint Resolution and Alternative Resolution** processes to the possible victim. (The College cannot offer an Alternative (informal) Resolution process without a formal complaint first being filed.)
- Generally, the College does not need to act beyond these steps unless it receives a **formal complaint**.

## Formal Complaint of Sexual Harassment

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- A **formal complaint** of Title IX sexual harassment:
  - Initiates the Complaint Procedure.
  - Can only be filed and signed by the person who claims to be the victim (**Complainant**) who is a student or employee (Also, recall that prospective students, applicants for employment and other third parties may also be able to file a formal complaint in certain circumstances).
  - A Title IX Coordinator can file a formal complaint in certain circumstances, but is not the Complainant.
  - The Formal Complaint must be a document or electronic filing that includes a signature and provides:
    - ✓ Basic information regarding claimed sexual harassment (what lawyers call a short and plain statement of the claim), such as date, time, location, type of incident, name(s) of individuals involved; and
    - ✓ A request for an investigation of an allegation of sexual harassment.

## Formal Complaint, *continued*

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- Formal complaints can be consolidated if they arise from the same incident/facts.
- Formal complaints may be amended (with notice to the parties).



## Mandatory Dismissal of Formal Complaints

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- Under the Title IX regulations, the Title IX Coordinator **must** dismiss a formal complaint:
  - If the conduct alleged in the formal complaint does not constitute sexual harassment under the Title IX regulations; or
  - If the conduct alleged did not occur within the scope of the College's education programs and activities, or did not occur in the United States.
- However, as noted previously, Bowdoin will assess such conduct to determine if it violates the Student Social Code or the Employee Freedom from Discrimination, Harassment, Sexual Misconduct and Gender-Based Violence Policy. *(Note: Bowdoin will use identical process if conduct would meet Title IX sexual harassment definition but did not occur in Bowdoin education program/activity or in the U.S.).*

## Permissive Dismissal of Formal Complaints

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- The Title IX Coordinator **may** dismiss a formal complaint:
  - If a Complainant withdraws the formal complaint, or withdraws particular allegations within the complaint;
  - The Respondent is no longer enrolled in or employed by the College; or
  - If there are specific circumstances that prevent the College from gathering evidence sufficient to reach a determination regarding the formal complaint.
- Parties have the right to appeal the decision to dismiss a formal complaint.

## Part Three

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### *The Formal Resolution Process under Bowdoin's Title IX Policy – Alternate Resolutions, Investigations, Hearings, Sanctions and Appeals*

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## Supporters and Advisors for Parties

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- The Title IX regulations require that parties be allowed to have an advisor of their choice throughout the formal resolution process, who may be an attorney.
- The advisor plays an important role at a live hearing, in conducting cross examination and questioning of witnesses.
- In addition, Bowdoin permits parties to have a supporter for emotional and personal support during any meetings, the alternative resolution process and the formal resolution process. Supporters are trained members of the Bowdoin community.
- Advisors and supporters cannot speak on behalf of the party (except for advisors conducting questioning/cross at hearing).

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## Notice of Formal Complaint

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**Parties must receive detailed** written notice of a formal complaint that includes, among other things:

- Sufficient details known at the time – identities of parties, conduct alleged, dates and location *with sufficient time to prepare* for initial interview (no less than five days);
- A statement that the Respondent *is presumed not responsible* for the alleged conduct unless and until determined to be responsible at the conclusion of the process;
- Notice that the parties may have an advisor of their choice, who may be an attorney;
- Notice that the College, not any party, has the burden of gathering evidence and the burden of proof; and
- The name of the investigator, with sufficient time to raise concerns of conflict of interest or bias.

## Alternative Resolution

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- Title IX regulations permit an Informal/Alternative Resolution Process if:
  - Formal complaint is filed.
  - Agreed to in writing by both parties, and the Title IX Coordinator believes the circumstances are appropriate.
- **Exception:** Cases alleging sexual harassment by an employee against a student may not be resolved by Alternative Resolution.
- **Bowdoin Policy:**
  - Facilitated process.
  - Detailed notice of allegations, process and potential outcomes, rights to withdraw; and identification of “presiding officer.”
  - Parties do not appear simultaneously or in person together. The Complainant will be given an opportunity to make statements. The Respondent will then be given the opportunity to respond at a separate meeting with the presiding officer. The presiding officer and parties may pose additional questions to the other party.

## ***Alternative Resolution, continued***

- Outcome - Presiding officer will propose a set of measures meant to resolve the matter (e.g., accommodations to living, academic, or employment situation; limitations of contact between the parties, etc.).
- Any outcome agreement must be signed in writing by both parties, and the Title IX Coordinator.
- If agreement is not reached, information from the Alternative Resolution process may not be used as evidence in the formal resolution process.
- The College or a party may, at any time prior to the conclusion of the Alternative Resolution process, elect to end the process and initiate the formal resolution process.
- An Alternative Resolution may be pursued at any time prior to the beginning of the hearing in the formal resolution process.

## ***In a Nutshell, What Does the Bowdoin Formal Complaint Procedure Look Like?***

- The formal complaint is referred to a trained, outside investigator to conduct an investigation.
- When the investigation is completed, the case proceeds to a live hearing.
- The hearing is presided over by a trained, outside Hearing Officer, who makes determinations based on a preponderance of the evidence standard, whether a Respondent is responsible or not responsible for a violation of the Policy.
- If there is a finding of responsibility, sanctions are determined by:
  - Representatives from the Student Sexual Misconduct Panel (student cases).
  - Vice President/Dean of Academic Affairs in consultation with Vice President Human Resources (faculty cases); or
  - Appropriate Senior Officer in consultation with Vice President Human Resources (staff cases).
- Any party has the right to appeal the decisions.

## Can a Student Respondent Be Placed on Emergency Leave?

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- Yes, in extraordinary circumstances.
- Only after a determination, after individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of a student or other individual arising from the allegations of sexual harassment.
- Examples of such circumstances might include a continued threat of violence against a Complainant by a Respondent, or a Respondent's threat of self-harm due to the allegations.
- The Respondent must be provided notice of the emergency leave, and be provided an opportunity to challenge the decision following the removal (opportunity to be heard, not a hearing). The Respondent has the burden to demonstrate why the emergency leave was unreasonable.
- Must consider ADA/MHRC protections.
- *Note:* Administrative leave for employees under College Policy is permitted.

## Investigation of Formal Complaints

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The investigator will:

- Interview the parties after they have received appropriate notice with sufficient time to prepare;
- Allow the parties to have their advisor and supporter at all meetings;
- Allow parties to identify witnesses, including expert witnesses and submit inculpatory and exculpatory evidence;
- Interview witnesses and conduct other appropriate fact-gathering activities (site visits, review of documents, etc.); and
- Consider evidence that is relevant and directly related to the allegations in the formal complaint.

## Investigation, *continued*

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The investigator will:

- Provide the parties with an equal opportunity to inspect and review any evidence that is obtained in the investigation, whether the investigator considers the evidence reliable or not, including favorable and unfavorable evidence.
  - Give the parties the opportunity to submit a written response to the evidence prior to the conclusion of the investigation.
- Draft investigation report and give the parties the opportunity to submit a written response to the report before it is finalized.
- Issue an investigation report that fairly summarizes relevant evidence and submit it to the Title IX Coordinator.
- The investigator is permitted to comment on the credibility of a party, witness, or documentary evidence.
- Timelines are specified in Bowdoin Policy (e.g., generally, 45 days to complete investigation/report).

## Next – The Live Hearing

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- The Title IX regulations emphasize that the burden of proof rests with the College, not the Complainant or Respondent.
- The Title IX Coordinator will issue notice of the hearing, identifying the Hearing Officer (external) and other Decision Makers (who determine sanctions).
- Hearing Officer presides over the live hearing, and will establish rules of decorum that parties and their advisors must follow.
- At the request of a Party (or College's discretion), the hearing will be held virtually with Parties in separate rooms that allows the Parties and Decision-makers to see and hear each other.
- The hearing is audio-recorded and recording is made available to parties for inspection and review.

## Live Hearing, *continued*

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- Parties must have an advisor at the live hearing; an Advisor may be an attorney. If a party does not have an Advisor for the live hearing, the Title IX Coordinator will appoint an advisor for the party (at no cost).
- Advisors will not be permitted to make opening or closing statements, but parties may, if they wish. Such statements will be directed to the Hearing Officer, and not an opposing party.
- The Title IX regulations specify that a party's advisor (and not the party) may cross-examine the other party and the witnesses.
- All evidence gathered in the investigation that is directly related to the allegations raised in the formal complaint, and which the investigator provided to the parties prior to the hearing, will be available at the hearing for purposes of reference and cross-examination.

## Cross-Examination

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- The Department of Education/OCR view the cross-examination requirement as a critical factor in providing due process to parties.
- Cross-examination is often adversarial, particularly where the credibility of a Complainant or Respondent is a critical element of the case.
- The regulations commentary provide that cross-examination may not be aggressive or abusive.
- Per Bowdoin Policy, cross-examination includes permission to ask the opposing party and any other witnesses in the matter all **relevant** questions, including those challenging credibility.
- The Hearing Officer will make determinations in real time regarding the relevance of questions posed by advisors and will explain any decisions to exclude any question/evidence. The formal rules of evidence do not apply. Advisors may object to questions posed by the other party's advisor on the grounds of **relevance only**.

## Hearing Officer Rulings On Evidence (Relevance)

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- Relevant evidence is evidence that tends to make a fact of consequence more or less probable than it would be without the evidence
- Questions and evidence about a Complainant's sexual predisposition or prior sexual behavior is not relevant, unless it:
  - is offered to prove that someone other than a Respondent committed the alleged conduct, or
  - concerns specific incidents of the Complainant's prior sexual behavior with a Respondent and is to prove consent.
- Evidence relating to a party's medical, psychological or similar records is not admissible unless the party has consented in writing to the disclosure of those records.
- Evidence that is protected from disclosure by the attorney-client privilege or other legally-recognized privilege or immunity in the State of Maine is not admissible unless the holder of the privilege has waived the privilege.

## Other Evidence That May Not Be Considered

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- If a party or witness does not submit to cross-examination at the live hearing, the Hearing Officer must not rely on any statement of that party or witness in reaching a determination of responsibility.
- The Hearing Officer may not draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.



# Part Four

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## *Decision-Making, Sanctions, Appeals, and Conflicts of Interest/Bias*

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## The Decision and Outcome Letter

- Following objective consideration of all the relevant evidence (including cross-examinations), the Hearing Officer will determine whether, based on a *preponderance of the evidence*, the Respondent is responsible for the alleged Sexual Harassment. If the Hearing Officer determines the Respondent is responsible, the other decision makers will then determine an appropriate sanction and remedies.
- The decision makers jointly issue a written determination (Final Outcome Letter), typically within seven days from hearing date.
- Final Outcome Letter includes (see Policy for full description):
  - Allegations potentially constituting sexual harassment;
  - Procedural steps (notice, investigation steps, hearings);
  - Findings of fact;
  - Conclusions regarding the application of Policy to the facts, and rationale for results;
  - Determination regarding responsibility;
  - Any disciplinary sanctions and whether remedies will be provided to the Complainant;
  - Procedure and bases for the parties to appeal.

## Sanctions

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- Some of the potential sanctions for Student Respondents: Reprimand; Social Probation; Suspension; Permanent Dismissal; Withholding Diploma; Revocation of Degree.
- For Employee Respondents, sanctions may include, but are not limited to: trainings, counseling, verbal or written warnings, probation, demotion, suspension with or without pay, job in jeopardy action, forfeiture of pay increase, loss of privileges, loss of supervisory responsibilities, or immediate termination of employment.
- **Other Sanctions and Remedies:**
  - Decision Makers may impose other appropriate sanctions.
  - The College will provide remedies to ensure that the Complainant has equal access to the College's education programs and activities (e.g., counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus)
  - Additional remedies may be disciplinary and punitive in nature for the Respondent after a finding of responsibility.

## Appeals

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- Parties may appeal:
  - Title IX Coordinator's decision to dismiss a Formal Complaint; and
  - Decision Makers' decision.
- Bases for appeal:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time of the decision that could affect the outcome of the matter; or
  - The Title IX Coordinator, investigator or a decision maker had a conflict of interest or bias for or against Complainants or Respondents generally, or the individually Complainant or Respondent that affected the outcome of the matter.
  - An appeal must be submitted in writing within five (5) calendar days of receiving the determination, stating the grounds for the appeal and including any relevant supporting documentation.

## Appeals, *continued*

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Appeals must be submitted to:

- Dean of Students for dismissal of formal complaint in cases involving Student Respondents.
- To the Student Appeals Committee, via its chair, the Dean for Student Affairs, for cases involving Student Respondents and appeals from the Decision Makers' decision.
- To the President of the College for cases involving faculty or staff Respondents.
- Copy of appeal is provided to other parties who may submit written responses (within five days)
- Review on appeal will be impartial and will include consideration of the written record of the matter and, where appropriate, consultation with other College officials.
- The Appeal Officer may:
  - 1) Deny the appeal and affirm the original decision;
  - 2) Grant the appeal and order a previously dismissed Formal Complaint to be reinstated;
  - 3) Grant the appeal and remand to the Decision Makers for further consideration;
  - 4) Grant the appeal and remand for a new live hearing before new Decision Maker(s); or
  - 5) Grant the appeal and revise the sanction.
- The Appeals Officer will issue a written decision, typically within 15 days from receipt of the appeal, which shall be provided to both parties simultaneously. The written decision will describe the result of the appeal and the rationale.

## Conflict of Interest & Bias

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- The Final Title IX Regulations mandate training on the topics of bias, conflict of interest, and impartiality of Title IX Coordinators, investigators, decision-makers, or "...person designated by a recipient to facilitate an informal resolution process."

## What is a Conflict of Interest or Bias?

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- The Title IX regulations require that those involved in Title IX processes must not pre-judge the facts and must not be biased against or in favor of a particular class of parties in the complaint process.
  - Believing that a complainant, as a victim or survivor, should be presumptively believed constitutes bias.
  - Believing that all women or all men behave in a certain way constitutes bias.
  - Believing that complaints generally arise from sex that someone regrets constitutes bias.
  - Believing that accused parties are usually guilty constitutes bias.



Remember – The regulations require a presumption of non-responsibility on the part of a Respondent (until the point when the Hearing Officer makes a finding).

## Conflict of Interest/Bias, *continued*

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- A conflict of interest or bias can also occur in a particular case, depending upon knowledge about or a prior relationship with individuals involved in a particular case (positive or negative).
- Conflict or bias on the part of Title IX Coordinator, investigator, or a decision maker is a basis for appeal.

## What Is Not Necessarily a Conflict of Interest or Bias

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- Being a Bowdoin employee.
- Past advocacy in the field of sexual violence.
- Conflict of interest and bias are judged by an objective standard - whether a reasonable person would believe bias exists.

## Recordkeeping

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- The College must maintain records in connection with a report of sexual harassment, supportive measures, a formal complaint and proceedings under this Policy for a minimum of seven years from resolution of the matter .
- All materials used to train Title IX Coordinators, Investigators, Decision Makers, individuals reviewing appeals, and any person who facilitates Alternative Resolutions will be posted on the College's website.
- See Policy for complete list of records to maintain.

NOTES:

**DrummondWoodsum**  
ATTORNEYS AT LAW

**THANK YOU!**



**Ann S. Chapman**  
*Employment, Policy & Higher  
Education Consultant*  
[achapman@dwmlaw.com](mailto:achapman@dwmlaw.com)



**Allen L. Kropp**  
*Attorney*  
[akropp@dwmlaw.com](mailto:akropp@dwmlaw.com)

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## Office of the **Dean of Students**

Moulton Union, 2nd Floor

8:30 am - 5:00 pm

(207) 725-3149

# Bowdoin College Title IX Policy

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This Policy governs reports of alleged Sexual Harassment as defined by and within the scope of the Title IX regulations issued by the United States Department of Education, 34 C.F.R. Part 106. In addition to the conduct addressed under this Policy, the College prohibits all forms of sexual misconduct as set forth in the Student Handbook, Faculty Handbook and Employee Handbook.

The College's primary concern is the health, safety, and well-being of the members of our college community. If you or someone you know may be the victim of Sexual Harassment, as defined below, or any sexual misconduct, you are strongly urged to seek immediate assistance from the appropriate community resource and to report the matter to the Title IX Coordinator.

### **Emergency Resources:**

Assistance can be obtained twenty-four hours a day, seven days a week from:

- \* Police (Town of Brunswick): 911 or (207) 725-6620
- \* Sexual Assault Support Services of Midcoast Maine (SASSMM): (800) 871-7741
- \* Through These Doors (formerly Family Crisis Services): (866) 834-4357
- \* Mid Coast Hospital: 911 or (207) 729-0181
- \* Bowdoin Office of Safety and Security: x3500 or (207) 725-3500

### **Campus Resources:**

Students are strongly urged to contact the Title IX Coordinator, **Benje Douglas**, as soon as reasonably possible to report any Sexual Harassment or sexual misconduct or to file a Formal Complaint. Benje can be reached at **(207) 721-5189** or by e-mail at [bdouglas@bowdoin.edu](mailto:bdouglas@bowdoin.edu). Benje is available to help connect students to the resources available on campus and in the community, including assistance with law enforcement, as well as explaining the processes available through this Policy.

If you or someone you know may be the victim of Sexual Harassment or sexual misconduct by a member of the College's faculty or staff, you may report such misconduct or file a Formal Complaint with the Deputy Title IX Coordinator for Employees and Visitors. Bowdoin College's Deputy Title IX Coordinator for Employees and Visitors is Associate Director of Human Resources for Talent Strategy **Brian Robinson**. Brian can be reached at **(207) 725-3491** or by email at [brobinso@bowdoin.edu](mailto:brobinso@bowdoin.edu).

### **Confidential or Privileged Campus Resources:**

The College recognizes the importance of the availability of confidential reporting and, to that end, there are several Bowdoin community members to whom reports of Sexual Harassment may be made and who will not disclose identifying details of such reports to the Title IX Coordinator. These privileged and confidential resources will not release any information shared with them except under limited circumstances that pose an imminent danger to the individual or others or as otherwise required by law. Specific legal protections apply to communications with privileged resources based on their professional role. Confidential resources are those individuals who have been selected by the College and are not required to communicate Reports to the Title IX Coordinator.

### **On-Campus Confidential Resources:**

- [Lisa Peterson, Director, Office of Gender Violence Prevention and Education](#): 207-725-3411
- [Rachel Reinke, Associate Director, Center for Sexuality, Women, and Gender](#): 207-725-3048
- [Kate Stern, Director, Center for Sexuality, Women, and Gender](#): 207-725-4223

### **On-Campus Privileged Resources:**

- [Counseling Services](#): 207-725-3145
- [Health Services](#): 207-725-3770
- [Eduardo Pazos, Director, Rachel Lord Center for Religious and Spiritual Life](#): 207-798-4196

Further information about Title IX and sex discrimination in education is available from the Office for Civil Rights, 400 Maryland Avenue, SW, Washington, DC 20202-1100 (by Customer Service Hotline: (800) 421-3481; fax: (202) 453-6012; TDD: (877) 521-2171; email: [OCR@ed.gov](mailto:OCR@ed.gov); or on the web at <http://www.ed.gov/ocr>).



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## 1. INTRODUCTION

### A. Overview of College Procedures

Sexual Harassment will not be tolerated at the College. For purposes of this Title IX Policy, “Sexual Harassment,” which is defined further below, means conduct on the basis of sex that satisfies one or more of the following: (1) quid pro quo sexual harassment by an employee; (2) unwelcome conduct that a reasonable person would consider so severe, pervasive and objectively offensive as to deny the victim equal access to the College’s Education Program or Activity; or (3) sexual assault, dating violence, domestic violence, or stalking.

As a recipient of federal funds, the College is required to and does comply with Title IX of the Education Amendments of 1972, 20 USC 1681 et seq. (“Title IX”), which prohibits discrimination on the basis of sex in education programs and activities. Sexual Harassment, as defined by Title IX, is a form of sex discrimination prohibited by Title IX.

The College offers alternative options to resolve Formal Complaints of Sexual Harassment except those reports involving a Student and an Employee. The options are designed to provide prompt, fair and impartial resolution of Formal Complaints as well as an opportunity for parties to present their versions of the incident and to understand the nature of the incident and its effects on each party and on the College community. The options differ in their procedures and potential results. In all instances, the timeline for resolution of Formal Complaints moves as expeditiously as is possible.

### B. Definitions

“**Clery Act**” means the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act, 20 U.S.C. Section 1092(f); 34 C.F.R., Part 668.46.

“**Coercion**” means the improper use of pressure to compel another to engage in or continue sexual activity against their will, including duress, cajoling, manipulation, and blackmail. Coercion occurs when a Respondent keeps pressuring the Complainant to acquiesce to sexual activity even after the Complainant has made clear that the pressure is unwelcome.

“**Complainant**” means an individual who is alleged to be the victim of conduct that could constitute Sexual Harassment. Pursuant to Title IX, a Complainant must be a Student, Employee or third party who is or is participating or is attempting to participate in a Bowdoin Education Program or Activity at the time of filing the Formal Complaint.

“**Dating Violence**” is violence 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 based on consideration of the length of the relationship, the

type of relationship, and the frequency of interaction between the persons involved in the relationship. Dating violence includes, but is not limited to, sexual abuse, physical abuse, emotional violence, or the threat of such violence and does not include acts that meet the definition of “Domestic Violence.”

**“Dean for Student Affairs”** means the Senior Vice President and Dean for Student Affairs or their designee.

**“Dean of Students”** means the Dean of Students or their designee.

**“Decision Makers”** means the Hearing Officer and the members of the Student Sexual Misconduct Panel (in Student Respondent cases) or the Senior Vice President and Dean for Academic Affairs, in consultation with the Vice President of Human Resources (in faculty Respondent cases) or the appropriate Senior Officer, in consultation with the Vice President of Human Resources (in staff Respondent cases).

**“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 Maine, 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 Maine. In Maine, this includes the following crimes: Domestic violence assault (17-A M.R.S. § 207-A), Domestic violence criminal threatening (17-A M.R.S. § 209-A), Domestic violence threatening (17-A M.R.S. § 210-B), Domestic violence stalking (17-A M.R.S. § 210-C), and Domestic violence reckless conduct (17-A M.R.S. § 211-A).

**“Education Program or Activity”** means locations, events or circumstances over which the College exercised substantial control over both the Respondent and the context in which alleged Sexual Harassment occurred and also includes any buildings owned or controlled by a student organization that is officially recognized by the College.

**“Effective Consent”** means words or actions that show a knowing and voluntary agreement to engage in mutually agreed-upon sexual activity. Effective Consent cannot be gained by Force, by ignoring or acting in spite of the objections of another, or by taking advantage of the Incapacitation of another, where the Respondent knows or reasonably should have known of such Incapacitation. The use of alcohol or other drugs will never function to excuse behavior that violates this Policy. Effective Consent is also absent when the activity in question exceeds the scope of Effective Consent previously given, including where consent was given to certain sexual activity under certain conditions (for example, with the use of a barrier method of birth control) and the activity in question violates any such conditions. In addition, certain states have designated a minimum age under which a person cannot give Effective Consent.

**“Employee”** means, for purposes of this policy, a staff or faculty member employed in the College’s Education Programs or Activities. Depending on the circumstances, a Student who is employed by the College may be considered an Employee under this policy.

**“Expert Witness”** means any individual who has expertise, training, or special knowledge that is relevant to the specific details of a Complaint of Sexual Harassment.

**“FERPA”** means the Family Educational Rights and Privacy Act, 20 U.S.C. Section 1232(g); 34 C.F.R. Part 99.

**“Final Outcome Letter”** means the letter issued by the Decision Makers stating their decision and setting forth: the name of the Respondent; the allegations potentially constituting Sexual Harassment; a description of the procedural steps taken from the filing of the Formal Complaint, including notifications to the parties, interviews with the parties and witnesses and all steps and methods used to gather evidence and hearings held; findings of fact supporting the determination, conclusions regarding the application of this policy to the facts, including a statement of, and rationale for, the result as to each allegation, and a determination regarding responsibility, any disciplinary sanctions the College imposes on the Respondent, and whether remedies designed to restore or preserve equal access to the College’s Education Programs and Activities will be provided to the Complainant; and the College’s procedure and bases for the parties to appeal.

**“Force”** means physical force, violence, threat, intimidation or coercion.

**“Formal Complaint”** means the document filed by the Complainant or signed by the Title IX Coordinator or their designee alleging Sexual Harassment against a respondent and requesting the College investigate the allegation.

**“Hearing Officer”** means the external, neutral person hired by Bowdoin to preside over and conduct the live hearing following the submission of the Investigative Report and to make a determination of responsibility.

**“Incapacitation”** means the physical and/or mental inability to make informed, rational judgments. States of Incapacitation include, without limitation, sleep, blackouts, and flashbacks. Where alcohol [or other drug] is involved, Incapacitation is determined by how the alcohol [or other drug] consumed impacts a person’s decision-making capacity, awareness of consequences, and ability to make informed judgments.

**“Investigative Report”** means the report submitted by the Investigator. The Investigative Report includes a summary of all relevant evidence.

**“Investigator”** means the external, neutral fact-finder hired by Bowdoin to investigate the allegations of the Formal Complaint.

**“Panel Chair”** means the Chair of the Student Sexual Misconduct Board. The Chair is the Dean of Students or their designee.

**“Quid Pro Quo Harassment”** means: an employee conditioning the provision of an aid, benefit, or service of the College on an individual’s participation in unwelcome sexual conduct.

**“Report of Sexual Harassment”** means communication to the Title IX Coordinator(s) or other Responsible Employee of a possible violation of this Policy.

**“Respondent”** means the individual who is reported to be the perpetrator of conduct that could constitute Sexual Harassment. Pursuant to Title IX, any individual may be a Respondent, whether they are a Student, Employee or third party, so long as the alleged activity occurred within a Bowdoin Education Program or Activity against a person in the United States.

**“Responsible Employee”** means any Bowdoin employee: who has the authority to take action to redress Sexual Harassment; who has been given the duty of reporting incidents of Sexual Harassment to the Title IX Coordinator or other appropriate College designee; or who a Student or Employee could reasonably believe has this authority or duty. This includes but is not limited to faculty, academic support staff, security personnel, coaches, residential life student and professional staff, deans and other College administrators.

**“Sexual Assault”** means an offense classified as a forcible or non-forcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation, as set forth below.

- **Sex offenses, Forcible:** Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.
- **Forcible rape** (except Statutory rape): The carnal knowledge of a person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of their temporary or mental or physical incapacity.
- **Forcible sodomy:** Oral or anal sexual intercourse with another person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.
- **Sexual assault with an object:** To use an object or instrument to unlawfully penetrate, however, slightly, the genital or anal opening of the body of another person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.
- **Forcible fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.

- **Sex offenses, Nonforcible:** Unlawful, nonforcible sexual intercourse, including incest and statutory rape.
- **Incest:** Non-Forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Non-Forcible sexual intercourse with a person who is under the statutory age of consent. There is no force or coercion used in Statutory Rape; the act is not an attack.

**“Sexual Harassment”** means: unwelcome conduct on the basis of sex that satisfies one or more of the following: (1) Quid Pro Quo Harassment by an employee; (2) unwelcome conduct that a reasonable person would consider so severe, pervasive and objectively offensive as to deny the victim equal access to the College’s Education Program or Activity; or (3) Sexual Assault, Dating Violence, Domestic Violence or Stalking.

**“Stalking”** means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress. Examples of stalking may include: unwanted, intrusive, and frightening communications by phone, mail, and/or email; repeatedly leaving or sending unwanted items such as gifts; following or waiting for a person at places such as home, school, or work; making direct or indirect threats of harm to a person, or to the person’s children, relatives, friends, or pets; damaging or threatening to damage property; harassment through the Internet or social media; and posting information or spreading rumors about a person.

**“Student Sexual Misconduct Panel”** means the panel convened by the Panel Chair to consider the appropriate sanction(s) in cases involving a Respondent who is a Student. The panel is made up of members of the Judicial Board and will typically include one student, one faculty member, and the Dean of Students, who will serve as the presiding chair. If the Dean of Students is unavailable, the Dean for Student Affairs shall select the Panel members and designate a Board member to serve as chair.

**“Student”** includes all persons who are matriculating students, including those on study away and those who are on a leave or suspension.

**“Supportive Measures”** means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent following a Report or before or after the filing of a Formal Complaint.

**“Title IX Coordinator”** means the trained administrator designated to oversee the College’s compliance with Title IX and assist the parties with the process. A Deputy Title IX Coordinator is a trained administrator or staff person designated to assist with Title IX compliance and the implementation of this Policy.

**“Witness”** means any individual who can attest firsthand to information related to a Formal Complaint of Sexual Harassment.

### **C. Title IX Jurisdiction**

This Policy applies to allegations of Sexual Harassment by a Complainant who is a Student, Employee or third party participating or attempting to participate in a Bowdoin Education Program or Activity at the time of filing a Formal Complaint against any individual, where the conduct is alleged to have occurred within a Bowdoin Education Program or Activity against a person within the United States.

Cases of sexual misconduct that are excluded from formal Title IX definitions due to where the alleged incident occurs raise potential violations of College policy, including, but not limited to, the Social Code and the Employee Freedom from Discrimination, Harassment, Sexual Misconduct and Gender Based Violence Policy. Such cases will be heard as disciplinary cases and resolved using the procedures set forth in this Title IX policy.

### **D. Filing a Formal Complaint**

A Complainant may file a Formal Complaint with the Title IX Coordinator in writing in person, by mail or electronically. The Formal Complaint must bear the Complainant's physical or digital signature (or otherwise indicate that the Complainant is the filer) and must include information, which need not be extensive, about the alleged violation(s) and a request that the College investigate.

### **E. Procedural Options**

The College has established two procedures to address cases of alleged Sexual Harassment based on the filing of a Formal Complaint: Formal and Alternative Resolution. Details of these procedures and the associated parameters regarding their use are outlined below.

### **F. Supporters and Advisors to the Parties**

Both the Complainant and the Respondent may each have a supporter present for emotional and personal support and assistance during the Intake Meeting, Investigation, Alternative Resolution, or the various stages of the Formal Resolution process. The Title IX Coordinator will work with each party to arrange for a trained supporter, who shall be a member of the Bowdoin community, but shall not be a member of the Dean of Students, Health Services, or Counseling Service staffs, or anyone on the Student Appeals Committee. The Deputy Title IX Coordinator for Employees and Visitors will work with each employee Complainant and Respondent to identify an appropriate supporter who has volunteered for the role and received training. In addition to the supporter, the parties are also entitled to have an advisor of their choice, who may be an attorney, present during any part of the process outlined in this Policy. Neither the advisor nor the supporter may participate in the process or make statements except that the advisor may participate in the hearing, as described below.

## **G. Timing of Complaints and Availability of Procedures**

If a Formal Complaint falls within the scope of this Policy, there is no time limit associated with invoking this Policy. Nevertheless, Students and Employees are encouraged to report alleged Sexual Harassment immediately in order to maximize the College's ability to obtain evidence and conduct a thorough, impartial, and reliable investigation. Failure to promptly report alleged Sexual Harassment may result in the loss of relevant evidence or the inability to obtain Witness testimony.

## **H. Retaliation**

Neither the College nor any person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because the individual has made a report or Formal Complaint, testified, assisted, participated or refused to participate in any manner in an investigation, proceeding or hearing under this Policy. To do so constitutes a violation of this policy and may result in disciplinary action. Retaliation should be reported promptly to the Title IX Coordinator.

## **I. False Reports and Statements**

College students who provide information as part of an investigation, whether as parties to the proceedings or as Witnesses, are expected to be truthful in accordance with the College's Academic Honor Code and Social Code. Making false reports or materially false statements is prohibited and may result in the initiation of a case with the Judicial Board or administrative resolution by a Dean.

## **J. Protection for Possible Incidental Conduct Violations Connected to Report of Sexual Harassment**

The College encourages reporting Sexual Harassment in all cases. Students who report Sexual Harassment or provide testimony as to an incident of Sexual Harassment will generally not be held responsible for actions connected to the reported incident, that might constitute a violation of the Social Code, as long as their actions did not put another individual or the community at risk.

## **K. Criminal Proceedings**

Because Sexual Harassment may constitute both a violation of this Policy and criminal activity, Bowdoin encourages Students and Employees to report alleged Sexual Harassment promptly to local law enforcement agencies. The filing of a Formal Complaint of Sexual Harassment under this Policy and the initiation of a criminal proceeding may be pursued simultaneously. The filing of a Formal Complaint under this Policy is independent of any criminal investigation or proceeding (except that the College's investigation may be delayed temporarily if law enforcement requests a delay to gather evidence).

## **L. Timeframes under this Policy**

The timeframes set forth in this Policy may be temporarily delayed or extended by the College for good cause with written notice and explanation to the Complainant and Respondent of the delay. Good cause may include various considerations, such as the absence of a party, a party's advisor or a witness, concurrent law enforcement activity or the need for accommodations for a participant in the process.

## **II. THE PROCESS: INITIAL STEPS**

### **A. Intake Meeting with Complainant**

Upon receipt of notice of any Report of Sexual Harassment, the Title IX Coordinator will schedule an individual Intake Meeting with the Complainant, if identified, in order to explain the procedures available under this Policy and to discuss potential Supportive Measures. The Title IX Coordinator will seek to determine how the Complainant wishes to proceed, i.e., whether the Complainant wishes to pursue Formal Resolution or Alternative Resolution, or does not wish to pursue resolution of any kind. If the Complainant wishes to proceed with either Formal or Alternative Resolution, the Complainant will prepare a Formal Complaint and file it with the Title IX Coordinator.

### **B. Notice to the Parties**

The Title IX Coordinator will provide the parties written notice of the Formal Complaint and the allegations of Sexual Harassment. The notice will include:

- Information regarding procedures available under this Policy, including the availability of Alternative Resolution.
- Sufficient details known at the time (including identities of parties, if known; the conduct alleged; and the date and location of the alleged incident, if known), with sufficient time to prepare before any initial interview (no less than five days).
- A statement that, as required by Title IX, the Respondent is presumed not responsible for the alleged conduct unless and until determined to be responsible at the conclusion of the process;
- Notice that the parties may have an advisor of their choice, who may be an attorney; and that the parties may inspect and review evidence;
- Notice of provisions in an applicable code of conduct or policy that prohibits knowingly making false statements or submitting false information during the process;
- Notice that the College, not either party, has the burden of gathering evidence and the burden of proof; and
- The name of the investigator, with sufficient time (no less than five calendar days) prior to any interview to raise concerns of conflict of interest or bias.



If additional allegations become known at a later time, and will be investigated, the Title IX Coordinator will supplement the original notice to the parties.

### **C. Intake Meeting with Respondent**

After a Formal Complaint is filed, the Title IX Coordinator will schedule an individual Intake Meeting with the Respondent in order to explain the processes under this Policy and to discuss potential Supportive Measures.

If the Complainant wishes to proceed with Alternative Resolution, and such a resolution process is otherwise permitted under this Policy, as set forth below in Section VI, the Title IX Coordinator will discuss with the Respondent whether they agree to resolve the matter by Alternative Resolution.

### **D. Complainant Does Not Wish to Pursue Resolution or Requests Confidentiality**

If the Complainant does not wish to pursue Formal or Alternative Resolution and/or requests that the Report of Sexual Harassment remain confidential, that request shall be confirmed, in writing, with the Title IX Coordinator. The College will evaluate the Complainant's request(s) for confidentiality or no action in the context of the College's commitment to provide a safe and non-discriminatory environment for all students. The Title IX Coordinator will inform the Complainant if the College must move forward with an investigation because the safety of a student or students is in question, and therefore cannot ensure confidentiality. In such instances, the Title IX Coordinator will sign a Formal Complaint to initiate an investigation pursuant to this Policy, as described below in Section II(E)

### **E. Formal Complaints Signed by the Title IX Coordinator**

In rare cases where the Title IX Coordinator determines that the specific circumstances warrant pursuing a Formal Complaint (such as when the alleged Respondent has been found responsible for previous Sexual Harassment or there may be a safety threat to the College community), the Title IX Coordinator may file a Formal Complaint on behalf of the College. In such cases, the alleged victim, if known, will receive notice, and will receive further notices of activities at various points in the process, but is not a party to the case.

### **F. Consolidation of Formal Complaints**

If the Title IX Coordinator determines the circumstances warrant it, they may consolidate Formal Complaints. Such circumstances might include, but are not limited to, situations where a Complainant has filed a formal complaint of sexual harassment against more than one Respondent in regard to the same incident; there are multiple complaints against a Respondent; or when parties each make Complaints against the other arising out of the same facts or circumstances.

## **Supportive Measures**

Following any Report of alleged Sexual Harassment, regardless of whether a Formal Complaint is filed, the College will offer, as appropriate and reasonably available, non-disciplinary, non-punitive Supportive Measures designed to restore or preserve access to the College's Education Program or Activity, including measures designed to protect the safety of all parties and the Bowdoin community, without unreasonably burdening either party. Supportive Measures may include, but are not limited to, counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus and other similar measures, and are provided without fee or charge to either party. Supportive Measures may be modified to reflect any appropriate changes at any point during the process. Violations of the College's directives may constitute policy violations and result in separate disciplinary action.

### **H. Emergency Leave**

The College, in consultation with the Title IX Coordinator, may place a Respondent on emergency leave during a Formal Resolution process if there is a determination (following an individualized safety and risk analysis) that there is an immediate threat to the physical health or safety of a student or other individual arising from the allegations of Sexual Harassment. Any such determination will be made in compliance with any applicable disability laws, including Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

The Respondent will be provided notice of the emergency leave and will be provided an opportunity to challenge the decision immediately following the removal. The Respondent has the burden to demonstrate why the emergency leave was unreasonable.

### **I. Administrative Leave**

The College may place a non-student employee Respondent on administrative leave during the pendency of a process under this Policy pursuant to the terms of the Faculty Handbook and Employee Handbook, as applicable.

## **III. DISMISSAL OF FORMAL COMPLAINT**

### **A. Mandatory Dismissal**

If the conduct alleged in the Formal Complaint would not constitute Sexual Harassment, as defined under Title IX and Section I(A), above, did not occur in Bowdoin's Education Program or Activity, or did not occur against a person in the United States, the Title IX Coordinator will dismiss the Formal Complaint with regard to that conduct.

## **B. Discretionary Dismissal**

The Title IX Coordinator may, in their discretion, dismiss the Formal Complaint, or any allegation therein, if (1) at any time during the investigation or hearing the Complainant notifies them in writing that they would like to withdraw the Formal Complaint or any allegations therein; (2) the Respondent is no longer a Student or Employee of the College; or (3) specific circumstances prevent the College from gathering evidence sufficient to reach a determination of responsibility with respect to the Formal Complaint, or allegations therein.

## **C. Separate Disciplinary Proceedings**

Although conduct may fall outside the scope of Title IX and this policy, such conduct may still constitute a violation of faculty, employee or student policies, and the College reserves the right to pursue separate disciplinary processes pursuant to such policies.

## **D. Notice of Dismissal**

The Title IX Coordinator will provide simultaneous written notice to the parties of any dismissal and will describe the grounds for the decision. If, as a result of the dismissal, the matter will transition to a separate disciplinary process under another College policy, the notice will provide that information. The notice will also inform the parties of their rights to appeal the dismissal.

## **E. Appeal of Dismissal**

Both parties will have the right to a single appeal of the dismissal of a Formal Complaint or any allegations contained therein pursuant to the appeal procedure set forth below in Section V.

# **IV. FORMAL RESOLUTION**

## **A. General Obligations to the Parties**

The College will meet the following basic obligations throughout the process:

1. Treat Complainants and Respondents equitably;
2. Objectively evaluate all relevant evidence;
3. Ensure that the Title IX Coordinator, Investigators and Decision Makers are appropriately trained, are not biased and do not have conflicts of interest;
4. Follow reasonably prompt timelines for conclusion of the process and provide reasons for delay;
5. Not presume a Respondent is responsible until and unless such a determination is made at the conclusion of the process;
6. Provide all required notices of meetings and hearings;

7. Provide opportunities for Parties to review and respond to relevant evidence, both favorable and unfavorable;
8. Ensure that credibility determinations are not be based on a person's status as a Complainant, Respondent, or Witness
9. Provide Parties with the opportunity to be accompanied to any meetings or hearings by an Advisor of their choice;
10. Provide Parties with the opportunity to present Witnesses, as well as other evidence;
11. Not restrict the parties from speaking about the case for their own emotional support and to prepare their case;
12. Assume the burden of gathering evidence and of proof (rather than such burdens resting with the parties); and
13. Comply with all applicable confidentiality and privacy laws and regulations

## **B. Investigation**

The Investigator will initiate the investigation. During the Investigation, the Investigator will:

1. Interview the parties after they have received appropriate notice with sufficient time to prepare;
2. Allow the parties to have their Advisor at all meetings;
3. Allow parties to identify Witnesses, including Expert Witnesses and submit inculpatory and exculpatory evidence;
4. Interview Witnesses and conduct such other fact-gathering activities (site visits, review of documents, etc.); and
5. Consider evidence that is relevant and directly related to the allegations in the Formal Complaint.

No medical records of any party will be accessed or reviewed without the voluntary, written consent of that party. No information that is protected under a legally recognized privilege will be required, allowed or relied upon unless the privilege is waived by the person holding the privilege.

Prior to completing the Investigative Report, the College will send to each party and their advisor, if any, in electronic format, any evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint, including evidence the Investigator does not consider relevant and including inculpatory and exculpatory evidence obtained for any source. The parties will have ten (10) calendar days from the date the evidence is made available to submit a written response to the Investigator, which the Investigator will consider prior to completing the Investigative Report.

At least ten (10) calendar days prior to the hearing described in Section IV.C below, the Investigator will issue the Investigative Report to the parties and their advisors, if any, and the

Title IX Coordinator. Typically, the Investigative Report will be issued within forty-five (45) days after the Investigator initiates the investigation. The Investigative Report will include with it all evidence the Investigator considers to be relevant to the Formal Complaint, and which will be provided to the Decision Makers for purposes of the hearing. At least five (5) calendar days prior to the hearing, the parties may provide a written response to the Investigative Report to the Title IX Coordinator for inclusion in the information to be considered at the hearing.

### **C. Hearing**

1. Following the issuance of the Investigative Report, and upon notice to all parties and their advisors a live hearing will be held. The notice of the hearing will identify the Hearing Officer, who will preside over the hearing, and the other Decision Makers, who will determine any sanctions and remedies. The live hearing is typically held within fifteen (15) calendar days from the issuance of the Investigative Report.
2. At the request of a party or at the College's discretion, this hearing may be held virtually, with the parties in separate rooms, using a platform that allows participants to simultaneously see and hear each other. In all instances the live hearing will be audio-recorded; the recording will be available to the parties for inspection and review.
3. The Hearing Officer will preside over the hearing. The parties' advisors, but not the parties themselves, will be permitted to ask the opposing party and any other witnesses in the matter all relevant questions, including those challenging credibility. Advisors will not be permitted to make opening or closing statements, but parties may, if they wish. Such statements will be directed to the Decision Makers and not the opposing party. The Hearing Officer will establish rules of decorum that advisors and parties must follow, and which will be communicated with the notice of the hearing. If a party does not have an advisor at the hearing, the College will provide an advisor, who need not be an attorney, to that party at no cost, for purposes of conducting cross-examination.
4. The Hearing Officer will make determinations in real time regarding the relevance of questions posed by advisors and will explain any decisions to exclude evidence. The formal rules of evidence will not apply. Advisors may object to questions posed by the other party's advisor on the grounds of relevance only.
5. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant unless offered to prove someone other than the Respondent committed the alleged conduct or concern specific incidents of the Complainant's prior sexual behavior with the Respondent and are offered to prove consent.
6. If a party or witness does not submit to cross-examination at the live hearing, the Hearing Officer must not rely on any statement of that party or witness in reaching a determination of responsibility and may not draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.

7. All evidence gathered in the investigation that is directly related to the allegations raised in the Formal Complaint, and which the Investigator provided to the parties prior to the hearing, will be available at the hearing for purposes of reference and cross-examination.
8. Following objective consideration of all the relevant evidence, the Hearing Officer will determine whether, based on a preponderance of the evidence, the Respondent is responsible for the alleged Sexual Harassment. If the Hearing Officer determines the Respondent is responsible, the other Decision Makers will then determine an appropriate sanction and remedies. The Final Outcome Letter is then issued simultaneously to both parties, typically within seven (7) calendar days from the date of the hearing.

#### **D. Parties Agree to Pursue Alternative Resolution**

At any time prior to the beginning of the Hearing, if agreed to in writing by both parties, the parties may transition the matter to an Alternative Resolution except that Alternative Resolution is not permitted in cases involving allegations that an Employee sexually harassed a Student.

#### **E. Potential Sanctions and Remedies**

##### **Potential Student Disciplinary Sanctions and Remedies**

The Panel may impose any sanction or remedy that it finds to be appropriate and well suited to the circumstances presented. Once the Hearing Officer has determined responsibility, in determining an appropriate sanction or remedy, the Panel may consider any record of past disciplinary violation(s), as well as the nature and severity of such past violation(s). The Panel will also consider, as part of its deliberations, what sanctions or remedies will: (a) bring an end to the violation in question; (b) reasonably prevent a recurrence of a similar violation; and (c) remedy the effects of the violation on the Complainant and the Bowdoin community. All decisions by the Panel will be made by majority vote. Although this list is not meant to be exhaustive, the following are some potential sanctions and the characteristics attributed to them. See Policy for Reporting Disciplinary Matters for information on the extent to which the Office of the Dean of Students reports disciplinary action.

**Reprimand:** Depending on the circumstances, Students who violate this Policy may receive an official written Reprimand from the College. This Reprimand will be called to the attention of a board or administrator in the event of any future policy violations. The Decision Maker will specify whether the Reprimand is with or without parental notification and in the case of the former may notify students' parents or guardians and coach (when applicable) of the violation resulting in a Reprimand.

**Social Probation:** Social Probation is a change of status and will be reflected on a student's permanent record. Students may lose certain College privileges while on Social Probation, including but not limited to: the ability to live on-campus; permission to live off-campus, including temporary or summer housing; on-campus parking privileges; eligibility to participate

in off-campus study; removal from student leadership positions (e.g., Bowdoin Student Government, organization leadership, or campus departments leadership, etc.); The Office of the Dean of Students will notify students' parents or guardians of the status change and, when appropriate, academic advisor(s) and coach will also be notified. Students who commit further violations of College policy while on Social Probation will most likely be referred to the Judicial Board, which could result in suspension or dismissal.

**Suspension:** Separation from the College for a specified period of time with recommended minimum conditions to be eligible for consideration for readmission. The Office of the Dean of Students will notify students' parents or guardians, academic advisor(s), and coach (when applicable) of any violation resulting in Suspension. When students are suspended, they are required to be away from campus and lose privileges; after the designated period, students may apply for re-enrollment to Bowdoin, which is not guaranteed. Suspended students, unless otherwise authorized by the Dean of Students, must leave the campus and may not occupy or visit College facilities or properties. In addition, suspended students are forbidden to participate in Bowdoin-sponsored activities or represent the College in any manner or forum during their suspension. Suspended students may not transfer academic credit to Bowdoin for coursework taken during Suspension, unless permission is granted by the Dean of Students.

**Permanent Dismissal:** For the most serious of violations, or for major misconduct following a prior suspension, a student may be separated from the College with no opportunity for future readmission. The Office of the Dean of Students will notify students' parents or guardians, academic advisor(s), and coach (when applicable) of any violation resulting in Permanent Dismissal.

**Withholding Diploma:** The College may withhold a Student's diploma for a specified period of time and/or prohibit participation in commencement and activities associated with commencement if the student has disciplinary charges pending, or as a sanction if the Student is found responsible for an alleged violation.

**Revocation of Degree:** In extraordinary circumstances, the College reserves the right to revoke a degree awarded by the College for Sexual Harassment committed by a Student prior to graduation if a finding of responsibility is not concluded until after graduation or in other aggravating circumstances.

### **Potential Employment Sanctions**

For Employee Respondents, sanctions may include, but are not limited to trainings, counseling, verbal or written warnings, probation, demotion, suspension with or without pay, job in jeopardy action, forfeiture of pay increase, loss of privileges, loss of supervisory responsibilities, or immediate termination of employment.

**Other Sanctions and Remedies:** In all cases, the Decision Makers may impose other appropriate sanctions in addition to, or instead of, the above-listed

sanctions. Additionally, the College will provide remedies to ensure that the Complainant has equal access to the College's Education Program and Activities. Remedies may also include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus and other similar measures. Unlike Supportive Measures, these remedies may be disciplinary and punitive in nature.

**Effective Date of Sanction:** The effective date of a sanction will be set forth in the Final Outcome Letter, but sanctions are not in effect during the pendency of any appeal.

## V. APPEALS

Both parties have the right to a single appeal of the Title IX Coordinator's decision to dismiss a Formal Complaint and the Decision Makers' decision. An appeal must be submitted in writing within five (5) calendar days of receiving the determination, stating the grounds for the appeal and including any relevant supporting documentation.

Appeals must be submitted as follows:

- To the Dean of Students for cases involving Student Respondents and dismissal of a Formal Complaint
- To the Student Appeals Committee, via its chair, the Dean for Student Affairs, for cases involving Student Respondents and appeals from the Decision Makers' decision
- To the President of the College for cases involving faculty Respondents
- To the President of the College for cases involving staff Respondents

The Dean for Student Affairs or the President of the College will provide a copy of the appeal to the non-appealing party who will have five (5) calendar days to submit a statement in response.

In order for an appeal to be granted, the appeal must demonstrate at least one of the following:

1. procedural irregularity that affected the outcome of the matter;
2. new evidence that was not reasonably available at the time of the decision that could affect the outcome of the matter; or
3. the Title IX Coordinator, Investigator or a Decision Maker had a conflict of interest or bias for or against Complainants or Respondents generally or the individually Complainant or Respondent that affected the outcome of the matter.

Review on appeal will be impartial and will include consideration of the written record of the matter and, where appropriate, consultation with other College officials. The Dean for Student Affairs, the Student Appeals Committee and the President of the College will issue a written



decision, typically within fifteen (15) calendar days from receipt of the appeal, which shall be provided to both parties simultaneously. The written decision will describe the result of the appeal and the rationale. The written decision may: 1) deny the appeal and affirm the original decision; 2) grant the appeal and order a previously dismissed Formal Complaint to be reinstated; 3) grant the appeal and remand to the Decision Makers for further consideration; 4) grant the appeal and remand for a new live hearing before new Decision Maker(s); or 5) grant the appeal and revise the sanction.

## **VI. ALTERNATIVE RESOLUTION**

If agreed to in writing by both parties, and if the Title IX Coordinator believes the circumstances are appropriate, a Formal Complaint may be resolved by Alternative Resolution, as described in this section, except that a case alleging Sexual Harassment by an Employee against a Student may not be resolved by Alternative Resolution. Alternative Resolution is a facilitated process that does not involve an investigation or a sanction and allows the parties to attempt to reach an agreed-to resolution of the matter through an intermediary.

If both parties agree in writing to resolve the matter by Alternative Resolution, the Title IX Coordinator will simultaneously send both parties a notice of Alternative Resolution setting forth the allegations, the requirements and potential outcomes of the Alternative Resolution, the circumstances under which the parties are precluded from resuming a Formal Complaint arising out of the same allegations, the rights of each party to withdraw from the Alternative Resolution prior to its conclusion and resume a Formal Resolution and a description of the records that will be maintained related to the Alternative Resolution.

### **A. Purpose of Alternative Resolution**

Alternative Resolution provides an opportunity for the parties to communicate their feelings and perceptions, including the impact of the incident of the alleged Sexual Harassment in the presence of and facilitated by a presiding officer, as described in Section VI(B) below, and to share their wishes and expectations regarding a resolution of the matter.

### **B. Presiding Officer**

The Title IX Coordinator will identify a presiding officer to conduct the Alternative Resolution. Typically, the Title IX Coordinator also attends the Alternative Resolution meeting.

### **C. Process of the Alternative Resolution**

The Alternative Resolution meeting will typically be held within thirty (30) days from the date of the Alternative Resolution notice provided to the parties by the Title IX Coordinator. Upon timely request by a party, the presiding officer may, at their discretion, accommodate concerns regarding direct contact between the parties by, for example, providing separate facilities and/or conducting the meeting using a remote platform.

The Complainant will be given an opportunity to make statements. The Respondent will then be given the opportunity to respond at a separate meeting with the presiding officer. The parties will not appear simultaneously or in person together. The presiding officer will then, if applicable, ask clarifying questions. The Complainant and the Respondent may ask the presiding officer to pose additional questions to the other party by submitting these requests to the presiding officer in writing or orally, at the discretion of the presiding officer.

#### **D. Outcomes of Alternative Resolution**

At the conclusion of the Alternative Resolution, the presiding officer will propose a set of measures meant to address the parties' concerns and resolve the matter. Measures that may be proposed by the presiding chair and agreed to by the parties include, but are not limited to accommodations to living, academic, or employment situation and; limitations of contact between the parties. If the parties agree on an outcome it must be signed in writing by both parties. Any such signed agreement is final and binding on the parties according to its terms. To the extent the measures include involvement of the College, they must be agreed to by the Title IX Coordinator.

If the Alternative Resolution does not resolve the Formal Complaint, nothing from the Alternative Resolution process may be used as evidence in a Formal Resolution.

#### **E. Confidentiality of Alternative Resolution**

In order to promote honest and direct communication, information disclosed during the Alternative Resolution must remain confidential while the Alternative Resolution is pending, except where disclosure may be required by law or authorized in connection with duties on behalf of the College. At the conclusion of Alternative Resolution, any documents prepared in anticipation of or disclosed during the Alternative Resolution may not be disclosed outside the proceeding, except as may be required or authorized by law.

#### **F. Election to End Alternative Resolution**

Except in cases where the Decision Maker has determined that there is no violation of the Policy, the College or either party may, at any time prior to the conclusion of the Alternative Resolution, elect to end such proceedings and initiate Formal Resolution instead. Formal Resolution may not be initiated, however, after the conclusion of an Alternative Resolution.

### **VII. RECORDS AND TRAINING MATERIALS**

The College will maintain records in connection with a Report of Sexual Harassment, a Formal Complaint and proceedings under this policy for a minimum of seven years from resolution of the matter (or longer pursuant to the terms of the [Records Retention Schedule](#)). Documents retained will include, but not necessarily be limited to, records of:

1. an investigation of Sexual Harassment, including a determination regarding responsibility, hearing audio recording; and any disciplinary sanctions imposed, or remedies provided;
2. any appeal and the result thereof;
3. any informal resolution and the result thereof;
4. all materials used to train Title IX Coordinators, Investigators, Decision Makers, individuals reviewing appeals, and any person who facilitates Alternative Resolutions (which materials are available by contacting the Title IX Coordinator and will be posted on the College's website); and
5. actions, including any Supportive Measures, provided in response to a Report of Sexual Harassment or a Formal Complaint, including the basis for any decisions not to provide Supportive Measures.

### **VIII. POLICY INTERPRETATION AND AMENDMENTS**

Any question of interpretation or application of this Policy shall be referred to the President for final determination. This Policy may be amended, in writing, by the President or the President's designee at any time.

**Date of last revision: September 2020**

255 Maine Street  
Brunswick, Maine 04011  
(207) 725-3000

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**PART 106—NONDISCRIMINATION ON  
THE BASIS OF SEX IN EDUCATION  
PROGRAMS OR ACTIVITIES  
RECEIVING FEDERAL FINANCIAL  
ASSISTANCE**

- 1. The authority citation for part 106 continues to read as follows:

**Authority:** 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

- 2. Section 106.3 is amended by revising paragraph (a) to read as follows:

**§ 106.3 Remedial and affirmative action and self-evaluation.**

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to

(Continued on next page.)

remedy the violation, consistent with 20 U.S.C. 1682.

\* \* \* \* \*

■ 3. Section 106.6 is amended by revising the section heading and adding paragraphs (d), (e), (f), (g), and (h) to read as follows:

**§ 106.6 Effect of other requirements and preservation of rights.**

\* \* \* \* \*

(d) *Constitutional protections.*

Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/ Family Educational Rights and Privacy Act (FERPA).* The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

(g) *Exercise of rights by parents or guardians.* Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) *Preemptive effect.* To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

\* \* \* \* \*

■ 4. Section 106.8 is revised to read as follows:

**§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.**

(a) *Designation of coordinator.* Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which

employee must be referred to as the "Title IX Coordinator." The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(b) *Dissemination of policy—(1) Notification of policy.* Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

(2) *Publications.* (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

(c) *Adoption of grievance procedures.* A recipient must adopt and publish

grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) *Application outside the United States.* The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

■ 5. Section 106.9 is revised to read as follows:

**§ 106.9 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 6. Section 106.12 is amended by revising paragraph (b) to read as follows:

**§ 106.12 Educational institutions controlled by religious organizations.**

\* \* \* \* \*

(b) *Assurance of exemption.* An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

\* \* \* \* \*

■ 7. Add § 106.18 to subpart B to read as follows:

**§ 106.18 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 8. Add § 106.24 to subpart C to read as follows:

**§ 106.24 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 9. Add § 106.30 to subpart D to read as follows:

**§ 106.30 Definitions.**

(a) As used in this part:

*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

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

*Consent.* The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

*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 recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint

may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

*Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

*Sexual harassment* means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(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 recipient's education program or activity; or

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

*Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services,

mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

(b) As used in §§ 106.44 and 106.45: *Elementary and secondary school* means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

*Postsecondary institution* means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

■ 10. Add § 106.44 to subpart D to read as follows:

**§ 106.44 Recipient's response to sexual harassment.**

(a) *General response to sexual harassment.* A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator

must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, 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, and explain to the complainant the process for filing a formal complaint. The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) *Response to a formal complaint.*

(1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes 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, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

■ 11. Add § 106.45 to subpart D to read as follows:

**§ 106.45 Grievance process for formal complaints of sexual harassment.**

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) *Grievance process.* For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

(1) *Basic requirements for grievance process.* A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance

process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;



(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) *Notice of allegations*—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) *Dismissal of a formal complaint*—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved,

did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) *Consolidation of formal complaints*. A recipient 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 a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

(5) *Investigation of a formal complaint*. When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's 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, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section

(if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an investigative report that fairly summarizes relevant evidence

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

(6) *Hearings.* (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding

responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) *Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) *Appeals.* (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

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

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

■ 12. Add § 106.46 to subpart D to read as follows:

**§ 106.46 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 13. Add § 106.62 to subpart E to read as follows:

**§ 106.62 Severability.**

If any provision of this subpart or its application to any person, act, or

practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 14. Subpart F is revised to read as follows:

**Subpart F—Retaliation**

Sec.

106.71 Retaliation.

106.72 Severability.

**Subpart F—Retaliation**

**§ 106.71 Retaliation.**

(a) *Retaliation prohibited.* No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) *Specific circumstances.* (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding

under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

**§ 106.72 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

- 15. Add subpart G to read as follows:

**Subpart G—Procedures**

Sec.  
106.81 Procedures.  
106.82 Severability.

**Subpart G—Procedures**

**§ 106.81 Procedures.**

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6–100.11 and 34 CFR part 101. The definitions in § 106.30 do not apply to 34 CFR 100.6–100.11 and 34 CFR part 101.

**§ 106.82 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

**Subject Index to Title IX Preamble and Regulation [Removed]**

- 16. Remove the Subject Index to Title IX Preamble and Regulation.
- 17. In addition to the amendments set forth above, in 34 CFR part 106, remove the parenthetical authority citation at the ends of §§ 106.1, 106.2, 106.3, 106.4, 106.5, 106.6, 106.7, 106.11, 106.12, 106.13, 106.14, 106.15, 106.16, 106.17, 106.21, 106.22, 106.23, 106.31, 106.32, 106.33, 106.34, 106.35, 106.36, 106.37, 106.38, 106.39, 106.40, 106.41, 106.42, 106.43, 106.51, 106.52, 106.53, 106.54, 106.55, 106.56, 106.57, 106.58, 106.59, 106.60, and 106.61.

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