

## **Procedure: Non-discrimination**

**Impact:** Students, Employees, Volunteers, Contractors, and Guests

**Responsibility:**

**Effective Date:** 06/22/2016

**Last Update:**

**Relates to Policy(s):** 3.03.06

**Legal Citation(s):**

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### **I. Procedure Narrative**

All reports of conduct that violate this policy are taken seriously and will be evaluated by the Title IX Coordinator. Where the coordinator determines that there is sufficient information of actual or suspected conduct in violation of the policy, the investigator will conduct an investigation in a prompt and equitable manner following the process outlined in this procedure.

All college employees (except for those who fall under the “Confidential Reporting” exemption outlined in Section II of this procedure) have a duty to promptly report actual or suspected sex or gender-based discrimination or harassment to the Title IX coordinator, a Title IX investigator, or other appropriate employee of the college, such as the director of Human Resources or the vice president for Student Services. This reporting requirement is triggered when an employee, in the exercise of reasonable care, has information that a violation or potential violation has occurred.

Students and community members who have witnessed an incident or been the victim of sex or gender-based discrimination, harassment, or misconduct are strongly encouraged to report the alleged incident in a timely manner to the Title IX coordinator, a Title IX investigator, or other appropriate employee of the college such as the director of Human Resources or the vice president for Student Services.

### **II. Definitions**

Sex or gender-based discrimination which is prohibited by college policy can occur in several different forms:

#### **A. Sex or Gender-based Discrimination**

Sex or Gender-based Discrimination is any distinction, preference, advantage for or detriment to an individual compared to others that is based upon an individual’s actual or perceived sex or

gender that is so severe, persistent or pervasive that it unreasonably interferes with or limits a person's ability to participate in or benefit from the college's educational program or activities, or an employee's ability to work at the college.

**B. Discriminatory Harassment**

Discriminatory harassment is detrimental action based on an individual's actual or perceived sex or gender that is so severe, persistent or pervasive that it unreasonably interferes with or limits a person's ability to participate in or benefit from the college's educational program or activities, or an employee's ability to work at the college.

**C. Retaliatory Harassment**

Retaliatory harassment is intentional action taken by an accused individual or allied third party, subject to the jurisdiction of the College, absent legitimate non-discriminatory purposes, that harms an individual as reprisal for filing or participating in the grievance process.

The college recognizes the right of students and employees to use the grievance process in the associated procedure without fear of or concern for retaliation. Retaliation in any manner against a person for filing a charge or initiating a report of a violation of this policy, or providing statements and information during an investigation, is expressly prohibited and subject to disciplinary action. Members of the college community who feel they are being retaliated against should contact the Title IX coordinator immediately.

**D. Complainant**

The complainant is the person who makes the report. This person may be a third party or the reported victim. In most cases, if a third party makes the initial report, but the actual reported victim participates in the investigation, the reported victim becomes the complainant. In cases where the reported victim's name is being kept private by the third party who makes the initial report, the term 'reported victim' may be used to reference the alleged victim.

**E. Respondent**

The respondent is the person who is being accused of violating this policy.

## **F. Consent**

Consent is an agreement to participate in sexual activity. Consent is only effective when it is given between equal partners and is based on clear, informed, and voluntary communication of intent.

1. “Equal partners” means people with the capacity to consent;
2. “Clear and informed” disallows agreement by inference from silence, past consent, or consent to a different form of sexual activity; and
3. “Voluntary” means subject to modification or withdrawal at any time.

Consent is active, not passive. Silence, in and of itself, cannot be interpreted as consent. Consent can be given by words or actions, as long as those words or actions create mutually understandable clear permission regarding willingness to engage in (and the conditions of) sexual activity. Consent to any one form of sexual activity cannot automatically imply consent to any other forms of sexual activity. Previous relationships or prior consent cannot imply consent to future sexual acts. Consent cannot be given by a person who is incapacitated.

## **G. Incapacitation**

Incapacitation is a state where someone cannot make rational, reasonable decisions because they lack the capacity to give knowing consent (e.g. to understand the “who, what, where, why or how” of their sexual interaction). This includes incapacity that results from mental disability, sleep, involuntary physical restraint, or from taking or being administered “rape drugs,” including alcohol or other drugs that may induce incapacitation.

Sexual activity with a person who is incapacitated or should be known to be incapacitated, based on circumstances such as known or suspected use of alcohol or drug use, or any other condition that would qualify the person as incapacitated constitutes a violation of this policy.

## **H. Coercion**

Coercion is unreasonable pressure for sexual activity such that the application of such pressure or oppression is intended to coerce or actually causes the object of the behavior to engage in unwanted sexual behavior. Coercive behavior differs from seductive behavior based on the type of pressure someone used to get consent from another. Coercive pressure may be verbal or physical, and may or may not involve physical force. When sexual activity is coerced, it is forced. Consent is not effective when it is forced.

## **I. Force**

Force is the use of physical violence and/or imposing on someone physically to gain sexual access. Force includes threats, intimidation/ implied threats, and coercive acts that overcome resistance or produce consent. Consent is not effective when it is forced.

**J. Sexual Misconduct**

Sexual misconduct is a non-legal term encompassing a variety of different behaviors. Sexual misconduct includes, but is not limited to, sexual harassment, stalking, relationship abuse or violence, non-consensual or forced sexual contact, and non-consensual or forced sexual intercourse. The college recognizes perpetrators and victims can be of any gender, and that sexual misconduct can involve two or more people of the same or different genders, people who are strangers to each other, and people who are not strangers to each other.

**K. Sexual Harassment**

Sexual harassment is unwelcome sex or gender-based verbal or physical conduct that is sufficiently severe, persistent, or pervasive that it unreasonably interferes with, denies or limits someone's ability to participate in or benefit from the colleges' educational or employment programs and/or activities, and is based on power differentials (quid pro quo), the creation of a hostile environment, or retaliation.

1. "Quid pro quo" sexual harassment exists when there are unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature, and submission to such conduct is either explicitly or implicitly a term or condition of an individual's educational status or employment; submission to or rejection of such conduct by an individual is used as the basis for educational or employment decisions affecting such individual.
2. A "hostile environment" resulting from sexual harassment occurs when unwelcome conduct of a sexual nature is sufficiently severe, persistent, or pervasive that it affects a student's ability to participate in or benefit from an education program or activity, or creates an intimidating, threatening or abusive academic or working environment. Sexual harassment that can lead to a hostile environment includes, but is not limited to, verbiage of a sexual nature, unwelcome sexual materials, or unwelcome physical contact as a regular part of the educational or work environment.

**L. Stalking**

Stalking is repeated following, harassing, threatening, or intimidating of another person by telephone, mail, email, text, social networking, or any other method, including third party contact, that would cause a reasonable person to be seriously emotionally distressed or be in fear of bodily injury or death.

**M. Relationship Abuse and Violence**

Relationship abuse and violence involves one or more of the following elements:

1. Battering that causes bodily injury;
2. Emotional abuse that would cause a reasonable person to have apprehension of bodily injury or property damage;
3. Repeated telephonic or other forms of communication - anonymously or directly - using coarse language or threats in order to intimidate, terrify, annoy, harass, threaten, or offend;
4. Sexual assault or harassment;
5. Forcible denial of use of or access to owned or shared assets, or limiting or controlling access to educational or work opportunities;
6. Coercion used to compel another to act as directed; and/or
7. Isolation used to deprive another of personal freedom of movement or access to friends, family, or support systems.

**N. Non-Consensual or Forced Sexual Contact**

Non-consensual sexual contact is any intentional sexual touching, however slight, with any object, by any person upon any other person, regardless of gender, that is without consent and/or by force.

**O. Non-Consensual Sexual or Forced Intercourse**

Non-consensual sexual intercourse is any sexual intercourse, however slight, with any object, by any person upon any other person, regardless of gender, that is without consent and/or by force.

**P. Sexual Exploitation**

Sexual exploitation occurs when a person takes non-consensual or abusive sexual advantage of another for his or her own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute one of the other sexual misconduct offenses. Examples of sexual exploitation include, but are not limited to:

1. Invasion of sexual privacy
2. Prostituting another student
3. Non-consensual video or audio recording of sexual activity
4. Going beyond the boundaries of consent (such as letting someone hide in the closet to watch two people having consensual intercourse)
5. Engaging in voyeurism
6. Knowingly transmitting a sexually transmitted infection (STI) to another person
7. Exposing one's genitals in non-consensual circumstances, or inducing another to expose their genitals

### **III. Confidential Reporting**

Employees who are hired into positions that have legal requirements to keep confidentiality, such as licensed professional counselors and licensed medical staff, are exempt from the mandatory reporting requirements when they become aware of these sorts of incidents in the course of discharging the responsibilities for which they were hired. These employees will maintain confidentiality except in extreme cases of immediate threat or danger, or the abuse of a minor. A list of positions that are exempt from the mandatory reporting requirement can be found on the college website at [www.nic.edu/security](http://www.nic.edu/security).

While the college never discourages complainants from reporting conduct violations, they may want to consider carefully whether they share personally identifiable details with non-confidential employees, as those details must be shared by the employee with the Title IX coordinator.

If a complainant does not wish for their name to be shared, does not wish for an investigation to take place, or does not want a formal resolution to be pursued, the reporting party may make such a request to the Title IX coordinator, who will evaluate that request in light of the duty to ensure the safety of the campus and comply with federal law. In cases indicating pattern, predation, threat, weapons and/or violence, the college will likely be unable to honor a request for confidentiality.

In cases where the complainant requests confidentiality and the circumstances allow the college to honor that request, the college will offer interim supports and remedies to the complainant and the community, but will not otherwise pursue formal action.

### **IV. Reporting to Police or Other Agencies**

Anyone who has experienced or witnessed sexual misconduct, sexual assault, stalking, domestic violence, or another crime may choose to report the incident to the police. The college's investigation process is separate from the criminal process and can be pursued simultaneously. In most cases, the Title IX coordinator will defer to the complainant's (or reported victim's) wishes regarding whether to contact police and/or file a criminal report; however, there are situations in which the safety of the college community or other considerations may require the Title IX coordinator to report an incident to police. The Title IX coordinator will attempt to inform the complainant of its decision when this occurs.

Under state law, the college is required to report suspected child abuse or neglect to law enforcement or to the Idaho Department of Health and Welfare – Child Protection Services.

## V. Informal Dispute Resolution Efforts

All conduct in violation of this policy must be reported to the Title IX Coordinator. However, employees, students, and volunteers benefit from both informal and formal procedures that encourage prompt resolution of conduct concerns. While the college does not require that parties use informal means to resolve conduct concerns, and a formal report can be made without attempting informal resolution, there are situations where an individual may make reasonable efforts to constructively resolve issues without utilizing the formal grievance process.

If deemed appropriate by the Title IX coordinator, the option for an informal resolution may be offered. In order to pursue an informal resolution, both parties must voluntarily agree to do so. If both parties agree to an informal resolution, the complainant will not be required to directly resolve the problem with the respondent, and the complainant will be notified of the right to end the informal process at any time and, if desired, begin the formal stage of the complaint process.

It should be noted, however, that in cases of sexual misconduct of a threatening or violent nature (e.g. stalking, relationship violence, non-consensual sexual contact or non-consensual sexual intercourse), attempts at informal resolution are not appropriate and complainants are encouraged to make a formal report to the appropriate college officials for resolution.

## VI. Formal Reporting

Formal reports regarding conduct that violates this policy should be made in a timely manner to the Title IX coordinator, a Title IX investigator, or other appropriate employee of the college. All reports are taken seriously and will be evaluated in a prompt and equitable manner using the procedure outlined in this document. Formal reports will be given to the Title IX coordinator for evaluation and determination of next steps.

Formal reporting to the Title IX coordinator still affords privacy to the reporter, and only a small group of officials who need to know will be told. Information will be shared as necessary with investigators, witnesses and the responding party. The circle of people with this knowledge will be kept as small as possible to preserve a complainant's privacy. Additionally, anonymous reports can be made by complainants and/or third parties using the online reporting form posted at [www.nic.edu/security](http://www.nic.edu/security). Note that these anonymous reports may prompt a need for the institution to investigate.

### A. Determination of a Formal Investigation

Following the receipt of a report of a suspected or actual violation of this policy, the Title IX coordinator will determine if there is sufficient information of actual or suspected conduct in violation of this policy and procedure to warrant a formal investigation. Should a formal investigation be warranted, the Title IX coordinator or his/her designee will carry out the investigation process and make a recommendation based on the evidence presented and collected.

**B. Evidentiary Standard**

Per the Office of Civil Rights (OCR) of the U.S. Department of Education, the college uses the evidentiary standard of a “preponderance of evidence” in determining if a violation of this policy has occurred.

**C. Privacy of Investigation Information**

The privacy of all parties involved in a report of sexual misconduct will be respected, except insofar as it interferes with the college’s obligation to fully investigate allegations of sexual misconduct. Where privacy is not strictly kept, it will still be tightly controlled on a need-to-know basis. Dissemination of information and/or written materials to persons not involved in the resolution process is not permitted. Violations of the privacy of the reporting party or the responding party may lead to disciplinary action by the college.

In all resolutions of sexual misconduct, the complainant and respondent will be informed of the outcome. In some instances, the administration also may choose to make a brief public announcement of the nature of the violation and the action taken, without using the name or identifiable information of the complainant. Certain college administrators are informed of the outcome subject to the limitations imposed by FERPA and other applicable privacy laws. The college also must statistically report the occurrence on campus of major violent crimes, including certain sex offenses, in an “Annual Security Report” of campus crime statistics. This statistical report does not include personally identifiable information.

**D. Rights of Due Process**

Both the complainant and respondent are to be afforded equitable rights of due process. This includes, but is not limited to the right to an investigation and appropriate resolution of all credible reports of policy violations; the right to be heard in his or her own defense; the right to an equitable method for the administrative resolution of complaints without coercion, restraint, or reprisal against any person for filing a report, or for involvement in an investigation; and the right to make use of the method for appealing a decision regarding the outcome of an investigation (per the Appeals process outlined in this procedure).

**VII. Report and Investigation Procedure**

The following procedure should be followed in order to address a report of suspected or actual violation of this policy.

**A. Report**

A person who believes they have been a victim of sex or gender-based discrimination or harassment, or sexual misconduct, should report it to the Title IX coordinator, a Title IX



investigator or other appropriate employee of the college. Any employee who becomes aware of information that causes them, in the exercise of reasonable care, to suspect that a violation or potential violation of this policy has occurred must report it to the Title IX coordinator, a Title IX investigator or other appropriate employee of the college.

## **B. Formal investigation evaluation**

Promptly upon receiving the report, the Title IX coordinator or his or her designee will initiate an initial investigation to determine whether there is a reasonable basis for engaging in a formal investigation into the alleged conduct.

1. Should it be determined that a formal investigation is not warranted, the Title IX coordinator will make recommendations to informally resolve the conduct issues.
2. Should it be determined that a formal investigation is warranted, the Title IX coordinator or his or her designee will launch a formal investigation of the report.

## **C. Formal investigation**

If a formal investigation is launched, the designated investigator(s) (who will be appointed by NIC in its sole discretion) will interview the reporting party, the complainant (if they are not the reporting party), the respondent, and any relevant witnesses to determine whether a violation of this policy occurred.

Within 60 days of receipt of the report, the investigation will be concluded and the investigator(s) will issue a findings report. Using the evidentiary standard mandated by the OCR, the finding will take into consideration all evidence submitted and gathered.

The Title IX coordinator will issue the findings report to the complainant, the respondent, and the administrator in charge of carrying out any recommended remedial or disciplinary actions.

1. If the investigation determines that there has been no conduct in violation of this policy, and no potentially problematic conduct was revealed, the process will be completed.
2. If the investigation determines that there has been no conduct in violation of this policy, but some potentially problematic conduct is revealed, remedial action may be taken.
3. If the investigation determines that a policy violation occurred, the findings report may include recommendations for specific remedial or disciplinary actions, or the specifics of those actions may be left to the administrator in charge to determine, in line with the policies of the college.

The remedial or disciplinary action will be commensurate with the severity, frequency and/or pervasiveness of the offense, up to and including expulsion from the college, termination of employment, termination of contract, and/or being trespassed from the college premises. The college administrator in charge of carrying out any remedial or disciplinary actions will depend upon the status of the person found in violation of the policy (i.e., if the person is a student, an employee, or member of the public).

## **V. Right to Appeal**

Both parties have the right to appeal the findings of the investigation and/or sanctions that resulted from the findings according to the procedure outlined below.

### **A. Grounds for appeal**

It should be understood that an appeal is not an opportunity to have the gathered evidence re-evaluated in order to reach a different outcome. Grounds for appeal are limited to the following:

1. A procedural error occurred that significantly impacted the outcome of the hearing, such as a substantiated bias or material deviation from established procedures.
2. To consider new evidence, which despite due diligence was unavailable during the original investigation, that could substantially impact the original finding or sanction. A summary of this new evidence and its potential impact must be included in the initial appeal request. New evidence shall not include a respondent's refusal to participate in the investigation.
3. The sanctions imposed are substantially disproportionate to the severity of the violation.

If the complainant or respondent refuses to participate in the investigation, they forfeit their right to appeal.

### **B. Sanctions during an appeal**

All sanctions imposed as a result of the original findings report will be in effect during the appeal process.

### **C. Appeal procedure**

The findings or the sanctions imposed as a result of the findings may be appealed by either the complainant or the respondent according to the grounds below.

1. Parties will have seven (7) business days from receipt of the investigation report or sanctioning decisions, whichever is later, to submit an appeal regarding the findings and/or sanctions.
2. Any party who files an appeal must do so in writing to the Title IX coordinator and/or investigator and cite the reason for which the appeal is being submitted. Additional documentation related to the appeal must be submitted at the time the request for appeal is made.

3. The Title IX coordinator will share the appeal with the other party (e.g., if the respondent appeals, the appeal is shared with the reporting party/ complainant). The party receiving the appeal will have five (5) business days in which to file a response to the appeal and include any additional relevant documentation in support thereof. The response must be provided to the Title IX Investigator who will share it with the appealing party. The appealing party will have three (3) business days to draft a rebuttal with the Title IX investigator (which will be shared with all parties). Within five (5) business days of receipt of the appeal documentation, the Title IX coordinator will draft a memorandum outlining the basis for the appeal and responses thereto and make a recommendation regarding whether or not such appeal should be accepted. The memorandum will also be shared with all parties. The memorandum and all appeal documents will be forwarded to the Vice President for Student Services for initial review to determine if the appeal has standing (i.e. meets the limited grounds (as listed above) and is timely).
4. Within five (5) business days of the vice president for Student Services receiving the appeal documentation, a determination will be made whether or not the appeal will be accepted for formal evaluation.
  - a. Appeals Without Standing

If an appeal is found by the appellate administrator not to have standing, the appellate administrator will notify both parties that the appeal is not being accepted, citing the reasons for the denial. The original findings and sanctions will stand and the decision is final.

Grounds for an appeal not being accepted include a late notice of appeal; lacking or missing additional documentation in support of the appeal; or an appeal made on grounds other than those indicated above.
  - b. Appeals With Standing

If the appeal is found by the appellate administrator to have standing, the appellate administrator will notify both parties and the Title IX coordinator that the appeal is being accepted for review, and will then engage in a formal evaluation of the submitted appeal documentation.

Appeals with standing will be evaluated by the vice president for Student Service in conjunction with a Title IX officer, or similarly suited individual who did not conduct the initial investigation or submit the initial findings report. The evaluation will be completed within thirty (30) days of the appeal being accepted. Any previously issued remedial or disciplinary actions will remain in place during the course of the evaluation process.

Upon completion of the evaluation of an appeal with standing, the appellate administrator will notify both parties of the determination related to the appeal.
5. The outcome of the appeal process is final.