

## SEXUAL HARASSMENT – TITLE IX

ATIXA 2020 MODEL POLICY AND PROCEDURES  
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### **1. Definitions**

- *Advisor* means a person, who may be, but is not required to be an attorney, chosen by a party or appointed by the institution to accompany the party to meetings related to the Grievance Process, to advise the party on that process, and to conduct cross-examination for the party at the hearing, if any.
- *Appeal Decision-maker* refers to those who have decision-making authority within Appeals as part of the Grievance Process.
- *Complainant* means an individual who is alleged to be the victim of conduct that could constitute sexual harassment. A Complainant must be participating in or attempting to participate in a Western Dakota Tech (WDT) education program or activity at the time of filing the Formal Complaint.
- *Day* means Monday through Friday, except for holidays and other times when WDT's administrative offices are closed.
- *Decision-maker(s)* means the Hearing Decision-maker, the Appeal Decision-maker, the Disciplinary Sanctions Decision-maker, or any combination thereof.
- *Disciplinary Sanction* means a consequence imposed by WDT on a Respondent who is found to have violated this policy<sup>1</sup>. Disciplinary sanctions are not supportive measures, and may be punitive and may burden the Respondent.
- *Disciplinary Sanction Decision-maker* refers to those who have decision-making authority in determining disciplinary sanctions as part of the Grievance Process.
- *Education program or activity* means locations, events, or circumstances within the United States where WDT exercises 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 WDT.
- *Final Determination* means a conclusion by the preponderance of the evidence standard that the alleged conduct did or did not violate policy.

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<sup>1</sup> 2001/4001 policy and procedures are tightly woven. Therefore, any reference to policy or procedure may be referring to the 2001/4001 policy and procedures as a whole.

- *Finding* means a conclusion by the preponderance of the evidence standard that the conduct did or did not occur as alleged (as in a “finding of fact”).
- *Formal Complaint* means a document submitted and signed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that WDT investigate the allegation. At the time of filing the Formal Complaint, a Complainant must be participating in or attempting to participate in the education program or activity of WDT.
- *Grievance Process* also referred to as “Process A,” means the resolution process designated by WDT to address conduct that falls within this policy, and which complies with the requirements of the Title IX regulations (34 CFR §106.45). The Grievance Process/Process A is detailed in 2001/4001.Procedure.001.
- *Grievance Process Pool* includes any Investigators, Informal Resolution Facilitators, Hearing Decision-makers, Appeal Decision-makers, and Sanctioning Decision-makers who may perform any or all of these roles (though not at the same time or with respect to the same case).
- *Hearing Decision-maker* refers to those who have decision-making authority within Hearings as part of the Grievance Process.
- *Investigator* means the person or persons charged by WDT with gathering facts about an alleged violation of this Policy, assessing relevance and credibility, synthesizing the evidence, and compiling this information into an investigation report and file of directly related evidence as part of the Grievance Process.
- *Obligated Reporter* means an employee of WDT who is obligated by policy to share knowledge, Notice, and/or reports of harassment with the Title IX Coordinator. 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 an Official with Authority.
- *Notice (actual knowledge)* means that an employee, student, or third-party informs the Title IX Coordinator or other Official with Authority of sexual harassment or allegations of sexual harassment. 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 WDT with actual knowledge is the Respondent.
- *Official with Authority (OWA)* means an employee of WDT explicitly vested with the authority to implement corrective measures for sexual harassment on behalf of WDT.
- *Parties* include the Complainant(s) and Respondent(s), collectively.
- *Preponderance of the Evidence* means more likely to have occurred than not. Under the preponderance standard, the burden of proof is met when there is a greater than a 50% chance that something occurred.

- *Process A* means the Grievance Process used with this policy.
- *Process B* means any process designated by WDT to apply only when Process A does not, as determined by the Title IX Coordinator.
- *Remedies* are post-finding actions, where a determination of responsibility of sexual harassment has been made against the Respondent in accordance with the Grievance Process, directed to the Complainant to restore or preserve equal access to WDT's education program or activity. Such remedies may include supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent.
- *Respondent* means an employee, student, or organization that has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- *Resolution* means the result of the Grievance Process.
- *Sexual Harassment* means conduct on the basis of sex that satisfies one or more of the following:
  1. An employee of WDT conditioning the provision of an aid, benefit, or service of WDT on an individual's participation in unwelcome sexual conduct (i.e. quid pro quo);
  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 WDT'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).

[See Section 16](#), for greater detail.

- *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 WDT's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or WDT's educational environment or deter sexual harassment.
- *Title IX Coordinator* is at least one official designated by WDT to ensure compliance with Title IX and WDT's Title IX program. References to the Coordinator throughout this policy may also encompass a designee of the Coordinator for specific tasks.
- *Title IX Team* refers to the Title IX Coordinator and any member of the Grievance Process Pool.

## **2. Rationale for Policy**

WDT is committed to providing a workplace and educational environment, as well as other benefits, programs, and activities, that are free from sexual harassment. To ensure compliance with federal and state civil rights laws, WDT has developed this policy and related procedures to provide a prompt, fair, and impartial process for those involved in an allegation of sexual harassment as defined by this policy. WDT values and upholds the equal dignity of all members of its community and strives to balance the rights of the parties during what is often a difficult time for all those involved.

## **3. Applicable Scope**

This policy and associated procedures apply to all allegations of sexual harassment as defined in this policy occurring in connection with WDT's education program or activity within the United States. Alleged incidents of sexual discrimination or harassment not covered by this policy may be covered under other WDT policies.

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 WDT, and the Respondent must be a member of the WDT community. This community includes, but is not limited to, students,<sup>2</sup> student organizations, faculty, administrators, staff, and third parties such as guests, visitors, volunteers, and invitees.

## **4. Title IX Coordinator**

The Director of Student Success/Registrar serves as the Title IX Coordinator and oversees implementation of this policy. The Title IX Coordinator has the primary responsibility for coordinating WDT's efforts related to the intake, the implementation of supportive measures, and the Grievance Process. The Title IX Coordinator also has the primary responsibility for the design and implementation of remedies to stop, remediate, and prevent sexual harassment prohibited under this policy.

Reports of alleged sex discrimination or sexual harassment and inquiries or concerns regarding this policy may be made internally to:

Debbie Toms  
Title IX Coordinator  
Western Dakota Tech  
800 Mickelson Drive, Office D113  
Rapid City, SD 57703  
(605) 718-2958  
Email: [Deborah.Toms@wdt.edu](mailto:Deborah.Toms@wdt.edu)

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<sup>2</sup> For the purpose of this policy, WDT defines "student" as any individual who has accepted an offer of admission, or who is registered or enrolled for credit or non-credit bearing coursework, and who maintains an ongoing relationship with WDT.

## **5. Independence and Conflict-of-Interest**

The Title IX Coordinator acts with independence and authority free from bias and conflicts of interest. The Title IX Coordinator oversees all resolutions under this policy and these procedures.

The members of the Title IX Team are vetted and trained to ensure they are not biased for or against any party in a specific case, or for or against Complainants and/or Respondents, generally.

To raise any concern involving bias or conflict of interest by the Title IX Coordinator, contact the WDT President. Concerns of bias or a potential conflict of interest by a member of the Grievance Process Pool should be raised with the Title IX Coordinator.

Reports of misconduct committed by the Title IX Coordinator should be reported to the WDT President. Reports of misconduct committed by a member of the Grievance Process Pool should be reported to the Title IX Coordinator.

## **6. Required Training of the Title IX Team<sup>3</sup>**

The Title IX Team consists of the Title IX Coordinator and the Grievance Process Pool (the Pool) who may neither have nor demonstrate a conflict of interest or bias for a party generally, or for a specific Complainant or Respondent. The Title IX Coordinator is trained annually, and Pool members will be trained in their role before participating in the Grievance Process.

All training materials for the Title IX Coordinator and the Pool must not rely on sex stereotypes and must promote impartial investigations and adjudications of Formal Complaints of sexual harassment. Training materials will be posted on the Title IX page of the WDT website.

Training for the Title IX Coordinator and the Pool will include where appropriate for the role:

- The application of WDT's Sexual Harassment – Title IX Policy and Procedures (2001/4001)
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- The definition of sexual harassment as it applies in this Policy
- The scope of WDT's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
- Issues of relevance to create an investigation report that fairly summarizes relevant evidence
- 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
- Reporting, confidentiality, and privacy requirements
- How to use any technology to be used at a live hearing

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<sup>3</sup> The Title IX Coordinator and other applicable WDT employees are trained annually as required by VAWA.

## **7. Notice and Formal Complaints of Sexual Harassment**

**Notice** - Any person may report (give Notice of) 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 WDT Title IX Coordinator, or by any other means that results in the WDT 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, electronic mail address, or by mail to the office address listed for the WDT Title IX Coordinator in section 4. Reports may also be made to an Official with Authority (see section 18). Upon Notice, WDT's Title IX Coordinator will immediately contact the Complainant, if identified, to offer supportive measures and explain the process to file a Formal Complaint.

Anonymous reports are accepted but can give rise to a need to investigate. WDT tries to provide supportive measures to all Complainants, which may be impossible with an anonymous report. Because Notice carries no obligation to a Complainant to file a Formal Complaint, and as WDT respects Complainant requests to dismiss Formal Complaints unless there is a compelling threat to health and/or safety, the Complainant is largely in control and should not fear a loss of privacy by making a report that allows WDT to discuss and/or provide supportive measures.

**Formal Complaint** - A Complainant may file a Formal Complaint with the Title IX Coordinator in person, by mail, or by electronic mail by using the contact information for the Title IX Coordinator in section 4. A Formal Complaint must contain the Complainant's physical or digital signature and requests that WDT investigate the allegations and initiate the Grievance Process. If a Formal Complaint is submitted in a form that does not meet this standard, the Title IX Coordinator will contact the Complainant to ensure that it is filed correctly. Formal Complaints may also be filed with an Official with Authority (see section 18).

The Title IX Coordinator may sign a Formal Complaint when it is deemed necessary for the safety and security of the campus. Where the Title IX Coordinator signs a Formal Complaint, the Title IX Coordinator is not a Complainant or otherwise a party.

## **8. Supportive Measures**

Upon Notice or a Formal Complaint of alleged sexual harassment, WDT's Title IX Coordinator will promptly contact the Complainant to offer and implement appropriate and reasonable supportive measures. The Title IX Coordinator will work with the Complainant to ensure that their wishes are taken into account with respect to the supportive measures that are planned and implemented and inform the Complainant that supportive measures are available with or without filing a Formal Complaint. At the time that supportive measures are offered, WDT will inform the Complainant, in writing, of the process to file a Formal Complaint with WDT either at that time or in the future, if they have not done so already. If a Complainant refuses supportive measures, the Title IX Coordinator will document the refusal.

Supportive measures may be offered to a Respondent upon the filing of a Formal Complaint.

All supportive measures offered and implemented will be documented. WDT will maintain the privacy

of the supportive measures, provided that privacy does not impair WDT's ability to provide the supportive measures. WDT will act to ensure as minimal an academic impact on the parties as possible. WDT will implement supportive measures in a way that does not unreasonably burden the other party.

These actions may include, but are not limited to:

- Referral to counseling, medical, and/or other healthcare services
- Referral to the Employee Assistance Program
- Referral to community-based service providers
- Visa and immigration assistance
- Student financial aid counseling
- Education to the institutional community or community subgroup(s)
- Altering work arrangements for employees or student-employees
- Implementing contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course/program-related adjustments
- Be-On-the-Lookout (BOLO) orders
- No contact orders
- [Timely warnings](#)
- Class schedule modifications
- Any other actions deemed appropriate by the Title IX Coordinator

Violations of no contact orders will be referred to appropriate student or employee conduct processes for enforcement.

### **9. Emergency Removal**

Nothing contained in this policy shall preclude WDT from removing a student Respondent entirely or partially from its education program or activity on an emergency basis when an individualized safety and risk analysis has determined 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. 2001/4001.Procedure.001 describes the Emergency Removal process. A Formal Complaint and Grievance Process do not need to be in place for an Emergency Removal to occur.

Where the Respondent is a non-student employee, the employee may be placed on administrative leave (with or without pay) while a Grievance Process is pending, without needing to meet the emergency removal standards.

### **10. Promptness**

All allegations are acted upon promptly by WDT once it has received Notice or a Formal Complaint. Formal Complaints can take 60-90 business days to resolve, typically. There are always exceptions and extenuating circumstances that can cause a resolution to take longer, but WDT will avoid all undue delays within its control.

Any time the general timeframes for the Grievance Process outlined in WDT procedures will be delayed, WDT will provide written notice to the parties of the delay, the cause of the delay, and an estimate of the anticipated additional time that will be needed as a result of the delay.

## **11. Privacy**

Every effort is made by WDT to preserve the privacy of reports. WDT will not share the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or Formal Complaint of sexual harassment, any Complainant, any individual who has been reported to be the perpetrator of sexual harassment, any Respondent, or any witness, except as permitted by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g; FERPA regulations, 34 CFR part 99; or as required by law; or to carry out the purposes of 34 CFR Part 106, including the conducting of any investigation, hearing, or other grievance proceeding arising under these policies and procedures.

For the purpose of this policy, privacy and confidentiality have distinct meanings.

- Privacy means that information related to Notice, a Formal Complaint, supportive measures, and the Grievance Process will be shared with a limited number of WDT employees and the Title IX Team who “need to know” in order to assist in the assessment, investigation, and resolution of the report. All employees and Title IX Team members who are involved in WDT’s response to Notice under this policy receive specific training and guidance about sharing and safeguarding private information in accordance with state and federal law. The privacy of student education records will be protected in accordance with the Family Educational Rights and Privacy Act (“FERPA”), as outlined in WDT’s FERPA Policy. The privacy of employee records will be protected in accordance with Human Resources processes.
- Confidentiality exists in the context of laws that protect certain relationships, including those who provide services related to medical and clinical care, mental health providers, counselors, and ordained clergy. The law creates a privilege between certain health care providers, mental health care providers, attorneys, clergy, and others, with their patients, clients, and parishioners.

WDT reserves the right to determine which WDT officials have a legitimate educational interest in being informed about incidents that fall within this policy, pursuant to the Family Educational Rights and Privacy Act (FERPA). Information will be shared as necessary with Investigators, Advisors, Decision-makers, witnesses, and the parties. The circle of people with this knowledge will be kept as tight as possible to preserve the parties’ rights and privacy.

WDT may contact parents/guardians to inform them of situations in which there is a significant and articulable health and/or safety risk but will usually consult with the student first before doing so.

Confidentiality and obligated reporting are addressed more specifically in section 18.

## **12. Jurisdiction of WDT**

This policy applies to locations, events, or circumstances within the United States where WDT exercises 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 WDT.

If the Respondent is unknown or is not a member of the WDT community, the Title IX Coordinator will assist the Complainant with supportive measures and, when criminal conduct is alleged, in contacting local law enforcement if the individual would like to file a police report.

All vendors serving WDT through third-party contracts are subject to the policies and procedures of their employers or to these policies and procedures to which their employer has agreed to be bound by their contracts.

### **13. Time Limits on Reporting**

There is no time limitation on providing Notice/Formal Complaints to the Title IX Coordinator. However, if the Respondent is no longer subject to WDT's jurisdiction and/or significant time has passed, the ability to investigate, respond, and provide remedies may be more limited or impossible.

Acting on Notice/Formal Complaints significantly impacted by the passage of time (including, but not limited to, the rescission or revision of policy) is at the discretion of the Title IX Coordinator, who may document allegations for future reference, offer supportive measures and/or remedies, and/or engage in informal or formal action, as appropriate.

When Notice/Formal Complaint is affected by significant time delay, WDT will typically apply the policy in place at the time of the alleged misconduct and the procedures in place at the time of Notice/Formal Complaint.

### **14. Online Sexual Harassment**

The policies of WDT are written and interpreted broadly to include online harassment, when the harassment occurs in or has an effect on WDT's education program or activity, or use WDT networks, websites, email, technology, or equipment.

Any online posting or other electronic communication occurring completely outside of the WDT's control (e.g., not occurring in an education program or activity or not on WDT networks, websites, technology, equipment, or using WDT email accounts) will only be subject to this policy when such online conduct can be shown to cause a substantial disruption to WDT's education program or activity.

Although WDT may not control websites, social media, and other venues in which harassing communications are made, when such communications are reported to WDT, it will engage in a variety of means to address and mitigate the effects, and supportive measures will be offered to the Complainant.

### **15. Policy on Nondiscrimination**

WDT will respond promptly to allegations of sexual harassment in a manner that is not deliberately indifferent. WDT will treat Complainants and Respondents equitably by offering supportive measures to every Complainant and following the Grievance Process before imposition of any disciplinary sanctions or other actions that are not supportive measures, against a Respondent. WDT will pursue every Formal Complaint filed by a Complainant or signed by a Title IX Coordinator using the Grievance Process and will

effectively implement remedies designed to restore or preserve a Complainant's equal educational access any time a Respondent is found responsible for sexual harassment.

WDT will not tolerate racism, discrimination, harassment, exploitation or victimization of students, school employees, non-employees, or any person who is an invitee of WDT for any reason, including but not limited to race, color, ethnic background, national origin, pregnancy, marital status, religion, creed, age, sex, citizenship, political affiliation, mental and/or physical challenge, disability, sexual orientation, genetic information, gender identity, gender expression, status as a veteran, or any other status protected under applicable federal, state or local law. WDT is committed to providing an environment free from harassment and other forms of discrimination for students, employees, non-employees and its invitees. The following person has been designated to handle inquiries or complaints regarding the non-discrimination policies: Director of Student Success/Registrar who serves as the Title IX Coordinator.

#### **16. Definitions of Sexual Harassment, Force, Coercing, Consent, and Incapacitation**

The Department of Education's Office for Civil Rights (OCR), the Equal Employment Opportunity Commission (EEOC), and the State of South Dakota regard sexual harassment as an unlawful discriminatory practice.

Acts of sexual harassment may be committed by any person upon any other person, regardless of the sex, sexual orientation, and/or gender identity of those involved.

#### **Sexual Harassment**

WDT has adopted the following definition of sexual harassment, as applied to this policy, in order to address the unique environment of an academic community.

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

1. An employee of WDT conditioning<sup>4</sup> the provision of an aid, benefit, or service of WDT on the individual's participation in unwelcome sexual conduct. (i.e. quid pro quo)
2. Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to WDT's education program or activity.<sup>5</sup>
3. Sexual assault meaning an offense classified as a forcible or nonforcible sex offense, attempted or actual, under the uniform crime reporting system of the Federal Bureau of Investigation.
  - a) Sex Offenses, Forcible meaning any sexual act directed against another person, without the consent of the victim.

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<sup>4</sup> Implicitly or explicitly.

<sup>5</sup> Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent). Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances ("in the shoes of the Complainant"), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

1. Rape (Except Statutory Rape) – The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their temporary or permanent mental incapacity.
  2. Fondling – The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.
- b) Sex Offenses, Non-forcible meaning unlawful, nonforcible sexual intercourse.
1. Incest – Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
  2. Statutory Rape – Sexual intercourse with a person who is under the statutory age of consent.
4. Dating Violence meaning violence committed by a person who is in or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the Complainant’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

For the purposes of this definition—

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include acts covered under the definition of domestic violence.
5. Domestic Violence meaning felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
6. Stalking meaning engaging in a course of conduct on the basis of sex directed at a specific person that would cause a reasonable person to
- a) Fear for the person’s safety or the safety of others; or
  - b) Suffer substantial emotional distress.

For the purposes of this definition—

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

WDT reserves the right to impose any level of disciplinary sanction, ranging from a reprimand up to and including suspension or expulsion/termination, for any offense under this policy.

### **Force, Coercion, Consent, and Incapacitation**<sup>6</sup>

As used in the offenses above, the following definitions and understandings apply:

**Force:** Force is the use of physical violence and/or physical imposition to gain sexual access. Force also includes threats, intimidation (implied threats), and coercion that is intended to overcome resistance or produce consent (e.g., “Have sex with me or I’ll hit you,” “Okay, don’t hit me, I’ll do what you want.”).

Sexual activity that is forced is, by definition, non-consensual, but non-consensual sexual activity is not necessarily forced. Silence or the absence of resistance alone is not consent. Consent is not demonstrated by the absence of resistance. While resistance is not required or necessary, it is a clear demonstration of non-consent.

**Coercion:** Coercion is unreasonable pressure for sexual activity. Coercive conduct differs from seductive conduct based on factors such as the type and/or extent of the pressure used to obtain consent. When someone makes clear that they do not want to engage in certain sexual activity, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive.

#### **Consent is:**

- knowing, and
- voluntary, and
- clear permission
- by word or action
- to engage in sexual activity.

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<sup>6</sup> The state definition of consent, which is applicable to criminal prosecutions for sex offenses in a state may differ from the definition used on campus to address policy violations. Included for Clery/VAWA Sec. 304 compliance purposes.

Individuals may experience the same interaction in different ways. Therefore, it is the responsibility of each party to determine that the other has consented before engaging in the activity.

If consent is not clearly provided prior to engaging in the activity, consent may be ratified by word or action at some point during the interaction or thereafter, but clear communication from the outset is strongly encouraged.

For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct. Reasonable reciprocation can be implied. For example, if someone kisses you, you can kiss them back (if you want to) without the need to explicitly obtain their consent to being kissed back.

Consent can also be withdrawn once given, as long as the withdrawal is reasonably and clearly communicated. If consent is withdrawn, that sexual activity should cease within a reasonable time.

Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). A current or previous intimate relationship is not sufficient to constitute consent.

Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on WDT to determine whether its policy has been violated. The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

Consent in relationships must also be considered in context. When parties consent to BDSM<sup>7</sup> or other forms of kink, non-consent may be shown by the use of a safe word. Resistance, force, violence, or even saying “no” may be part of the kink and thus consensual, so WDT’s evaluation of communication in kink situations should be guided by reasonableness, rather than strict adherence to policy that assumes non-kink relationships as a default.

***Incapacitation:*** A person cannot consent if they are unable to understand what is happening or is disoriented, helpless, asleep, or unconscious, for any reason, including by alcohol or other drugs. As stated above, a Respondent violates this policy if they engage in sexual activity with someone who is incapable of giving consent.

It is a defense to a sexual assault policy violation that the Respondent neither knew nor should have known the Complainant to be physically or mentally incapacitated. “Should have known” is an objective, reasonable person standard that assumes that a reasonable person is both sober and exercising sound judgment.

Incapacitation occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/informed consent (e.g., to understand the “who, what, when, where, why, or how” of their sexual interaction).

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<sup>7</sup> Bondage, discipline/dominance, submission/sadism, and masochism.

Incapacitation is determined through consideration of all relevant indicators of an individual's state and is not synonymous with intoxication, impairment, blackout, and/or being drunk.

This policy also covers a person whose incapacity results from a temporary or permanent physical or mental health condition, involuntary physical restraint, and/or the consumption of incapacitating drugs.

### **17. Retaliation**

Protected activity under this policy includes reporting an incident that may implicate this policy, participating in the grievance process, supporting a Complainant or Respondent, assisting in providing information relevant to an investigation, and/or acting in good faith to oppose conduct that constitutes a violation of this policy.

Acts of alleged retaliation should be reported immediately to the Title IX Coordinator and will be promptly investigated. WDT will take all appropriate and available steps to protect individuals who fear that they may be subjected to retaliation.

WDT and any member of WDT's community are prohibited from taking materially adverse action by intimidating, threatening, coercing, harassing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX or this policy, 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 policy.

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 policy, constitutes retaliation.

Filing a Formal Complaint within Process B could be considered retaliatory if those charges could be applicable under Process A, when the Process B charges are made for the purpose of interfering with or circumventing any right or privilege provided afforded within Process A that is not provided by Process B. Therefore, WDT vets all Formal Complaints carefully to ensure this does not happen and to assure that Formal Complaints are tracked to the appropriate process.

The exercise of rights protected under the First Amendment does not constitute retaliation.

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 policy and procedure does not constitute retaliation, provided that a determination regarding responsibility, alone, is not sufficient to conclude that any party has made a materially false statement in bad faith.

Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination under Process B if Process A is not applicable as addressed in 2001/4001.Procedure.001.

## **18. Reporting Options**

In order to make informed choices, it is important to be aware of confidentiality and reporting requirements when consulting campus resources.

### **a. Title IX Coordinator**

Any person may report (give Notice of) 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 WDT Title IX Coordinator in section 4 of this policy. Such a report may be made at any time (including during non-business hours) by using the telephone number, electronic mail address, or by mail to the office address listed for the WDT Title IX Coordinator.

### **b. Official with Authority (OWA)**

Any person may report (give Notice of) 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 to an OWA to include the following:

- WDT President
- VP for Institutional Effectiveness and Student Success
- VP for Teaching and Learning
- VP for Finance and Operations
- Director of Human Resources

### **c. Confidential Resources**

If a Complainant would like the details of an incident to be kept confidential and the incident not to be reported to the Title IX Coordinator or to an OWA to trigger action under this policy, the Complainant may do the following:

- Students may request to speak to a Licensed Professional Counselor through their Student Success Coach without revealing the alleged sexual harassment. If the student informs the Student Success Coach of the alleged sexual harassment, the Student Success Coach will be obligated to inform the Title IX Coordinator.
- Non-student employees may utilize the WDT Employee Assistance Plan.
- Complainants may also identify community resources on the Title IX page of the WDT website. Community resources may include:
  - Licensed professional counselors and other medical providers
  - Local rape crisis counselors
  - Domestic violence resources
  - Local or state assistance agencies
  - Attorneys

All of the above-listed individuals will maintain confidentiality when acting under the scope of their licensure, professional ethics, and/or professional credentials, except in extreme cases of immediacy of threat or danger or abuse of a minor/elder/individual with a disability, or when required to disclose by law or court order.

d. **Obligated Reporter**

Obligated Reporters are WDT employees who are expected to report actual or suspected sexual harassment to the Title IX Coordinator or to an OWA immediately upon knowledge. Obligated Reporters must also promptly share all details of behaviors under this policy that they observe or have knowledge of, even if not reported to them by a Complainant or third-party.

The following are designated by WDT as Obligated Reporters:

- Supervisors of WDT employees (does not include supervisors of student employees)
- Faculty
- Student Success Coordinator
- Student Success Coaches
- Library and Disability Services Coordinator
- Ombudspersons
- WDT Club Advisors

Generally, disclosures in climate surveys, classroom writing assignments or discussions, human subjects research, or at events such as “Take Back the Night” marches or speak-outs do not provide “knowledge” that must be reported to the Title IX Coordinator or an OWA by Obligated Reporters, unless the Complainant clearly indicates that they desire a report to be made or seek a specific response from WDT.

Failure of an Obligated Reporter, as described above in this section, to report an incident of sexual harassment of which they become aware is a violation of WDT policy and can be subject to disciplinary action for failure to comply. If an Obligated Reporter fails to report an incident of sexual harassment of which they become aware of to the Title IX Coordinator or an OWA, WDT is not on Notice.

Though this may seem obvious, when an Obligated Reporter is engaged in harassment or other violations of this policy, they still have a duty to report their own misconduct, though WDT is technically not on Notice when a harasser is also an Obligated Reporter unless the harasser does in fact report themselves.

Finally, it is important to clarify that an Obligated Reporter who is themselves a target of harassment or other misconduct under this policy is not required to report their own experience, though they are, of course, encouraged to do so.



## **19. When a Complainant Does Not Wish to Proceed**

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 Complaint to be pursued, they 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 to comply with state or federal law.

The Title IX Coordinator has ultimate discretion over whether WDT proceeds when the Complainant does not wish to do so, and the Title IX Coordinator may sign a Formal Complaint to initiate a grievance process. The Title IX Coordinator's decision should be based on a compelling risk to health and/or safety that requires WDT to pursue formal action to protect the community. A compelling risk to health and/or safety may result from evidence of patterns of misconduct, predatory conduct, threats, abuse of minors, use of weapons, and/or violence. WDT may also be compelled to act on alleged employee misconduct irrespective of a Complainant's wishes.

The Title IX Coordinator must also consider the effect that non-participation by the Complainant may have on the availability of evidence and WDT's ability to pursue a Formal Grievance Process fairly and effectively.

When the Title IX Coordinator executes the written Formal Complaint, they do not become the Complainant. The Complainant is the individual who is alleged to be the victim of conduct that could constitute a violation of this policy.

When WDT proceeds, the Complainant may have as much or as little involvement in the process as they wish. The Complainant retains all rights of a Complainant under this Policy irrespective of their level of participation.

Note that WDT's ability to remedy and respond to Notice may be limited if the Complainant does not want WDT to proceed with a Formal Complaint. The goal is to provide the Complainant with as much control over the process as possible, while balancing WDT's obligation to protect its community.

In cases in which the Complainant requests confidentiality/no formal action and the circumstances allow WDT to honor that request, WDT will offer supportive measures to the Complainant, but will not otherwise pursue formal action.

If the Complainant elects to take no action, they can change that decision if they decide to pursue a Formal Complaint at a later date. Upon making a Formal Complaint, a Complainant has the right, and can expect, to have allegations taken seriously by WDT, and to have the incidents investigated and properly resolved through the Grievance Process. Please consider that delays may cause limitations on access to evidence or may present issues with respect to the status of the parties.

## **20. Federal Timely Warning Obligations**

Parties reporting sexual assault, dating violence, domestic violence, and/or stalking should be aware that under the Clery Act, WDT must issue timely warnings for incidents reported to them that pose a serious or continuing threat of bodily harm or danger to members of the campus community.

WDT will ensure that a Complainant's name and other identifying information is not disclosed, while still providing enough information for community members to make safety decisions in light of the potential danger.

### **21. False Allegations and Evidence**

Deliberately false and/or malicious accusations under this policy are a serious offense and will be subject to appropriate disciplinary action. This does not include allegations that are made in good faith but are ultimately shown to be erroneous or do not result in a policy violation determination.

Additionally, witnesses and parties knowingly providing false evidence, tampering with or destroying evidence, or deliberately misleading an official conducting an investigation can be subject to discipline under WDT policy.

### **22. Amnesty for Complainants and Witnesses**

WDT community encourages the reporting of misconduct and crimes by Complainants and witnesses. Sometimes, Complainants or witnesses are hesitant to report to WDT officials or participate in grievance processes because they fear that they themselves may be in violation of certain policies, such as underage drinking or use of illicit drugs at the time of the incident. Respondents may hesitate to be forthcoming during the process for the same reasons.

It is in the best interests of WDT community that Complainants choose to report misconduct to WDT officials, that witnesses come forward to share what they know, and that all parties be forthcoming during the process.

To encourage reporting and participation in the process, WDT maintains a practice of offering parties and witnesses amnesty from minor policy violations – such as underage consumption of alcohol or the use of illicit drugs – related to the incident.

Amnesty does not apply to more serious allegations such as physical abuse of another or illicit drug distribution. The decision not to offer amnesty is based on neither sex nor gender, but on the fact that collateral misconduct is typically addressed for all students and employees within a progressive discipline system, and the rationale for amnesty – the incentive to report serious misconduct – is rarely applicable to a Respondent with respect to a Complainant.

### **23. External Administrative Contact Information**

Inquiries may be made externally to:

Office for Civil Rights (OCR)  
U.S. Department of Education  
400 Maryland Avenue, SW, Washington, D.C. 20202-1100  
Customer Service Hotline: (800) 421-3481  
Facsimile: (202) 453-6012; TDD: (877) 521-2172  
Email: [OCR@ed.gov](mailto:OCR@ed.gov)  
Web: <http://www.ed.gov/ocr>

The EEOC has jurisdiction over Title IX Employment Claims. For Title IX concerns involving employees, inquiries may be made externally to:

Minneapolis Area Office  
Towle Building  
330 South Second Avenue, Suite 720  
Minneapolis, MN 55401-2224  
Phone: 612-552-7306  
TTY: 1-800-669-6820  
ASL Video Phone: 844-234-5122

#### **24. Revision of this Policy and Related Procedures**

This Policy and related procedures supersede any previous policy(ies) addressing harassment, sexual misconduct and/or retaliation under Title IX and will be reviewed and updated annually by the Title IX Coordinator. WDT reserves the right to make changes to this document as necessary, and once those changes are posted online, they are in effect.

During the resolution process, the Title IX Coordinator may make minor modifications to procedures that do not materially jeopardize the fairness owed to any party, such as to accommodate summer schedules. The Title IX Coordinator may also vary procedures materially with notice (on the institutional website, with the appropriate effective date identified) upon determining that changes to law or regulation require policy or procedural alterations not reflected in this Policy and procedures.

If government laws or regulations change – or court decisions alter – the requirements in a way that impacts this document, this document will be construed to comply with the most recent government regulations or holdings.

This document does not create legally enforceable protections beyond the protection of the background state and federal laws which frame such policies and codes, generally.

Legal references:

Title IX of the US Education Amendments of 1972; 34 CFR Part 106; 20 U.S.C. 1092(f)(6)(A)(v); 34 U.S.C. 12291(a)(10); 34 U.S.C. 12291(a)(8); U.S.C. 12291(a)(30); Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act); Violence Against Women Act (VAWA); Family Educational Rights and Privacy Act (FERPA); 20 U.S.C. 1232g; FERPA regulations; 34 CFR part 99

Board Approved 8/12/2020; Committee Reviewed 9/25/2020

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