

**FOR PUBLIC DISTRIBUTION –**  
**NCHERM SUGGESTED REVISIONS TO THE**  
**PROPOSED UVa SEXUAL MISCONDUCT**  
**POLICY AND PROCEDURES**

UNIVERSITY OF VIRGINIA  
POLICY AND PROCEDURES  
FOR ~~CASES OF~~ STUDENT SEXUAL MISCONDUCT GRIEVANCES (OR  
COMPLAINTS)

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[www.ncherm.org](http://www.ncherm.org)

**Students Who May Be Victims of Sexual Misconduct:**

Your health, safety, and well-being are the University's primary concern. If you or someone you know may be the victim of any form of sexual misconduct, you are strongly urged to seek immediate assistance. Assistance can be obtained 24 hours a day, seven days a week, from:

- Police (U.Va., Charlottesville, Albemarle County) · 911
- [Sexual Assault Resource Agency \(SARA\)](#) · (434) 977-7273
- [Shelter for Help in Emergency \(SHE\)](#) · (434) 293-8509
- U.Va. Medical Center Emergency Department · (434) 924-2231

During business hours (8:00 a.m. to 5:00 p.m., Monday through Friday), you are also strongly urged to contact the Dean of Students (by telephone, at 434-924-7429 or 434-924-7133, by email at [DeanofStudents@virginia.edu](mailto:DeanofStudents@virginia.edu), or in person at the Office of the Dean of Students, Peabody Hall, Second Floor) as soon as reasonably possible to report any sexual misconduct you believe may have occurred.

For extensive information about the many forms of sexual misconduct and the numerous resources available at the University and in the local community, please consult the University's Sexual Violence Education & Resources website, [www.virginia.edu.sexualviolence](http://www.virginia.edu.sexualviolence).

**I. INTRODUCTION**

- A. Overview and Purpose.

**Comment [BS1]:** I think ED would want to see the Title IX Coordinator (or designee) listed here (or perhaps in the grievance section), as well as listing OCR as a resource with contact information.

Office for Civil Rights (OCR)  
400 Maryland Avenue, SW  
Washington, DC 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>

Sexual Misconduct, as defined by this Policy and Procedures for ~~Cases~~Complaints of Student Sexual Misconduct (this “Policy”), comprises a broad range of behavior that will not be tolerated in the University’s community of trust. Sexual Misconduct violates Federal civil rights law and may also be subject to criminal prosecution. The University is committed to fostering a community that promotes prompt reporting of Sexual Misconduct and timely and fair ~~adjudication~~resolution of Sexual Misconduct ~~eases~~complaints. Creating a safe and respectful environment is the responsibility of all members of the University community.

As a recipient of Federal funds, the University is required to comply with Title IX of the Higher Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (“Title IX”)<sup>1</sup>, which prohibits discrimination on the basis of sex in education programs or activities. Sexual Misconduct, as defined in this Policy, is a form of sex discrimination prohibited by Title IX. The University of Virginia is committed to providing programs, activities and an educational environment free from sex discrimination.

As a public institution, the University also must provide due process to students accused of Sexual Misconduct. This Policy is designed to provide due process ~~without restricting or unnecessarily delaying while also ensuring~~ a complainant’s protections under Title IX.

~~While some forms of sexual misconduct may include verbal harassment,~~ ~~the~~ University is also required and committed to upholding the First Amendment of the United States Constitution. Nothing in this policy is intended to abridge the rights or freedoms guaranteed by the First ~~Amendment~~.

B. Definitions.

“Coercion” is the application of unreasonable pressure for sexual access.

“Dean” means the Dean of Students and his or her designee. The University has designated the Dean as the Title IX Coordinator for purposes of this Policy.

“Dean’s Office” means the Office of the Dean of Students, located in the University’s Peabody Hall, Second Floor.

“Effective Consent” means words or actions that show an active, knowing and voluntary agreement to engage in mutually agreed-upon sexual activity. Effective Consent cannot be gained by ~~f~~Force, by ignoring or acting ~~in spite of~~without regard to the objections of another, or by taking advantage of the ~~i~~ncapacitation of another, where the ~~actor~~accused student knows or reasonably should have known of such Incapacitation. Effective Consent is also ~~lacking~~absent when the activity in question exceeds the scope of ~~e~~ffective ~~c~~onsent previously given. In

<sup>1</sup> Title IX requires that the University have a statement of policy and procedure for handling complaints of Sexual Misconduct. 20 U.S.C. 1092(f)(7) and 1681(a). This Policy constitutes that statement.

**Comment [BS2]:** Why suggest the idea of restriction or unnecessary delay at all?

**Comment [BS3]:** I think there is a key section missing here, and that section is the one that bridges the definitions to an actual statement of policy or rule:

Sexual Misconduct is actual or attempted:

1. Sexual Harassment
2. Non-Consensual Sexual Intercourse
3. Non-Consensual Sexual Contact
4. Sexual Exploitation

This multi-tiered formulation really puts UVa in a position of dramatic clarity over the previous policy.

And, it assures that in each complaint of sexual misconduct, the allegation of violation of the sexual harassment policy is implicit, though I consider it a best practice to specify an alleged violation of #1 each time allegations of violation of #'s 2-4 are made.

addition, certain states have designated a minimum age under which a person cannot give “Effective Consent.”<sup>2</sup>

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

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

“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 is involved, ~~i~~ncapacitation is a state beyond drunkenness or intoxication, and is defined with respect to how the alcohol consumed impacts a person’s decision-making capacity, awareness of consequences, and ability to make fully informed judgments.<sup>3</sup>

“Non-Consensual Sexual Contact” means Sexual Contact that occurs without Effective Consent.

“Non-Consensual Sexual Intercourse” means Sexual Intercourse that occurs without Effective Consent.

“Sexual Contact” means the deliberate touching of a person’s intimate parts (including genitalia, groin, breast or buttocks, or clothing covering any of those areas), or using ~~f~~orce to cause a person to touch his or her own or another person’s intimate parts.

“Sexual Exploitation” means taking sexual advantage of another person without Effective Consent, and includes, without limitation, causing or attempting to cause the ~~i~~ncapacitation of another person; causing the prostitution of another person; electronically recording, photographing, or transmitting intimate or sexual utterances, sounds or images of another person; allowing third parties to observe sexual acts; engaging in voyeurism; distributing intimate or sexual information about another person; and/or knowingly transmitting a sexually transmitted infection, including HIV, to another person.

“Sexual Harassment” means conduct, including physical contact, advances, and comments in person and/or via phone, text message, email, or other electronic medium, that is (1) unwelcome; (2) based on sex or gender stereotypes; and (3) is so ~~severe or pervasive~~severe, pervasive and objectively offensive that it unreasonably interferes with a person’s academic performance or equal opportunity to participate in or benefit from University programs or activities. Sexual Harassment may include, ~~depending upon the facts~~if severe, pervasive and

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<sup>2</sup> See Va. Code §18.2-63 for the age of consent under Virginia law: <http://leg1.state.va.us/000/cod/18.2-63.HTM>.

<sup>3</sup> Sokolow, Brett A., Lewis, W. Scott, Schuster, Sandra K., *NCHERM Institute on Responding to Campus Sexual Misconduct*. 2010, p. 49.

~~objectively offensive; persistent and~~unwelcome efforts to develop a romantic or sexual relationship; ~~persistent and~~unwelcome commentary about an individual's body or sexual activities; threatening to engage in the commission of an unwelcome sexual act with another person; stalking or cyberstalking; and engaging in indecent exposure. –Title IX and this pPolicy prohibit gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature.

“Sexual Intercourse” means penetration (anal, oral or vaginal) by a penis, tongue, finger, or an inanimate object.

“Sexual Misconduct” is a broad term encompassing “Sexual Exploitation,” “Sexual Harassment,” “Non-Consensual Sexual Contact,” and “Non-Consensual Sexual Intercourse,” as defined in this Policy. Sexual Misconduct can occur between strangers or acquaintances, including people involved in an intimate or sexual relationship. Sexual Misconduct can be committed by men or by women, and it can occur between people of the same or different sex.

“Sexual Misconduct Board” means the standing group of students, faculty and staff appointed by the Vice President to hear complaints of Sexual Misconduct.

“Standards of Conduct” means the University’s Standards of Conduct, as enforced by the University Judiciary Committee.

“University” means the University of Virginia.

“Vice President” means the Vice President and Chief Student Affairs Officer and his or her designee.

“Vice President’s Office” means the Office of the Vice President and Chief Student Affairs Officer.

## **II. JURISDICTION; TIMING; RETALIATION AND RELATED MISCONDUCT; CRIMINAL PROCEEDINGS**

### **A. Jurisdiction.**

1. Personal Jurisdiction. Any person may file a complaint of Sexual Misconduct against a “University student” under this pPolicy. ~~For purposes of determining personal jurisdiction, a~~ “University student” means any student who is registered or enrolled at the University (a) at the time of the alleged Sexual Misconduct (including Sexual Misconduct that is alleged to have occurred during any academic recess, provided that there is an expectation of such student’s continued enrollment at the University), *and* (b) at the time that the

Dean prepares and delivers to the Vice President's Designee a formal complaint against such student pursuant to Section III.B, below.

2. Geographic Jurisdiction. This Policy applies to any allegation of Sexual Misconduct against a University student, regardless of where the alleged Sexual Misconduct occurred. Although there is no geographical limitation to invoking this Policy, Sexual Misconduct that is alleged to have occurred at a significant distance from the University may be more difficult to investigate.

B. Timing of Complaints and Availability of Procedures. So long as there is personal jurisdiction over the accused student pursuant to Section II.A.1, above, there is no time limit to invoking this Policy in ~~cases~~ complaints of alleged Sexual Misconduct. Nevertheless, students are encouraged to report alleged Sexual Misconduct immediately in order to maximize the University's ability to ~~respond promptly and effectively obtain evidence, and conduct a thorough, impartial and reliable investigation.~~

Where the accused student is a degree candidate, it is the responsibility of the complainant to consult with the Dean's Office concerning the accused student's intended date of graduation and to file a complaint in a timely manner in ~~cases~~ complaints where personal jurisdiction over the accused student would otherwise be lost pursuant to Section II.A.1, above. In no circumstances will the University allow an impending graduation to compromise its ~~adjudicative-resolution~~ processes. The conferral of a degree may therefore be held, if necessary, until proper resolution of any Sexual Misconduct charges, provided that a hearing opportunity will be scheduled for the earliest practicable date that can accommodate the parties and their witnesses.

C. Retaliation. It is a violation of University policy to retaliate against any person making a complaint of Sexual Misconduct or against any person cooperating in the investigation of (including testifying as a witness to) any allegation of Sexual Misconduct. For these purposes, "retaliation" includes intimidation, threats ~~or~~ harassment and other adverse action against any such complainant or third party. Retaliation should be reported promptly to the Dean and may result in disciplinary action independent of the sanction or interim measures imposed in response to the underlying allegations of Sexual Misconduct.

D. Other Related Misconduct. In accordance with this Policy, the Sexual Misconduct Board is empowered to hear allegations of, and to impose sanctions for, Sexual Misconduct *and* any violations of the University's Standards of Conduct directly related to the alleged Sexual Misconduct or any alleged violations of this Policy. Such related misconduct may include, without limitation, violations of the rules of privacy as articulated

herein, violations of the Dean's directive(s) discussed in Section III.D, below, and/or violations of other Standards of Conduct that occurred in the course of the alleged Sexual Misconduct.

**Comment [BS4]:** How are you proposing to handle stalking, IPV, bullying, etc. that should be resolved with grievances procedures similar to this when they fall under Title IX?

University students who appear before the Sexual Misconduct Board, whether as parties to the proceedings or as witnesses, are expected to provide truthful testimony in accordance with the University's Honor Code.

- E. Effect of Criminal Proceedings. Because Sexual Misconduct may constitute *both* a violation of University policy *and* criminal activity, the University encourages students to report alleged Sexual Misconduct promptly to local law enforcement agencies. Criminal investigations may be useful in the gathering of relevant evidence, particularly forensic evidence. Because the standards for finding a violation of criminal law are different from the standards for finding a violation of this pPolicy, criminal investigations or reports are *not* determinative of whether Sexual Misconduct, for purposes of this pPolicy, has occurred. In other words, conduct may constitute Sexual Misconduct under this pPolicy even if law enforcement agencies lack sufficient evidence of a crime and therefore decline to prosecute. In such cases, the complainant may ~~not~~ initially ~~understand-be unfamiliar with~~ the results of the criminal investigation, the nature of criminal procedure, or the grounds for the law enforcement decision not to prosecute. The complainant in such cases may request that the Dean identify a senior member of the Dean's Office or of the Vice President's Office to assist the complainant in seeking and attending a meeting with the local prosecutor to gain an understanding of the decision to decline a prosecution.

The filing of a complaint of Sexual Misconduct under this pPolicy is independent of any criminal investigation or proceeding, and (except that the University's investigation may be delayed temporarily while the criminal investigators are gathering evidence) the University will not wait for the conclusion of any criminal investigation or proceedings to commence its own investigation and take interim measures to protect the complainant and the University community, if necessary, as described in Section III.D, below.

### III. THE PROCESS: INITIAL STEPS

- A. Intake Meeting with Complainant. Upon ~~receipt-notice~~ of any allegation of Sexual Misconduct, the Dean will first schedule an individual intake meeting with the complainant in order to provide to the complainant a general understanding of this pPolicy and to identify forms of support or immediate interventions available to the complainant (e.g., referrals to appropriate law enforcement agencies; ~~referrals for medical treatment at~~

the University's Medical Center or University Student Health; and/or referrals for counseling at Counseling and Psychological Services at University Student Health, the University's Women's Center, Charlottesville's Sexual Assault Resource Agency, and/or the Victim and Witness Assistance Programs for the City of Charlottesville and Albemarle County, among others). The intake meeting may also involve a discussion of any accommodations that may be appropriate concerning the complainant's academic, University housing, and/or University employment arrangements.

**Comment [BS5]:** Might be more useful to provide a bulleted list of common accommodations.

- B. Complainant Wishes to Pursue Formal or Informal Adjudication Resolution. At the initial intake meeting with the complainant, the Dean will seek to determine how the complainant wishes to proceed, *i.e.*, whether the complainant wishes to pursue Formal Adjudication Resolution, Informal Adjudication Resolution or does not wish to pursue adjudication resolution of any kind. If the complainant wishes to proceed with either Formal or Informal Adjudication Resolution, the Dean will determine the name of the accused student, and the date, location and nature of the alleged ~~Sexual~~ sexual Misconduct, and will schedule an individual intake meeting with the accused student in order to provide to him or her a general understanding of this Policy and to identify forms of support or immediate interventions available to him or her, as described above.

**Comment [BS6]:** I still believe you can and should reserve the option to insert at least a preliminary investigation step before you put the accused student on notice.

If the complainant wishes to proceed with Formal Adjudication Resolution, the Dean will promptly prepare and forward a formal complaint to the Vice President's Designee for investigation, in accordance with Section IV.C, below. The formal complaint will set forth the name of the accused student, and the date, location and nature of the alleged Sexual Misconduct. Concurrently with the delivery of the formal complaint to the Vice President's Designee, the Dean will cause a transcript hold to be placed on the accused student's transcript pending final resolution of the complaint.

**Comment [BS7]:** Is this cleaner for you than a policy which states instead that a student is not permitted to withdraw during the pendency of any kind of conduct action without administrative approval? Your approach seems more potentially punitive without having even investigated.

- C. Complainant Does not Wish to Pursue Adjudication Resolution or Requests Confidentiality. If the complainant does not wish to pursue Formal or Informal Adjudication Resolution and/or requests that his or her complaint remain confidential, Title IX nevertheless requires the University to investigate and take reasonable action in response to the complainant's request. The Dean will inform the complainant, however, that the University's ability to respond may be limited. In such cases, Title IX requires the University to evaluate the complainant's request(s) ~~that the complaint not be adjudicated or remain confidential~~ for no action in the context of the University's commitment to provide a reasonably safe and non-discriminatory environment for all students. In order to make such an evaluation, the Dean may conduct a preliminary investigation into

**Comment [BS8]:** Is a section needed here titled "If the complainant wished to proceed with Informal Resolution..."? Seems it should be here and is missing, or at least should refer to the section at the end of this policy.

**Comment [BS9]:** OCR misuses this word from a technical, legal perspective, and so if you are going to, I'd define it as not equivalent to the confidentiality offered by a counselor to a client, or use the words private/privacy instead.

the alleged Sexual Misconduct and may weigh the complainant's request(s) against the following factors: the seriousness of the alleged Sexual Misconduct; whether there have been other complaints of Sexual Misconduct against the same accused student; ~~and the accused student's right to receive information about the allegations if the information is maintained by the University as an "education record" under FERPA~~ how much evidence is available and can be shared under FERPA without the involvement of the complainant. The Dean will inform the complainant if the University cannot ensure confidentiality. Even if the University cannot take disciplinary action against the accused student because the complainant insists on confidentiality or that the complaint not be ~~adjudicated/resolved~~, Title IX nonetheless requires the University to take prompt and effective action to limit the effects of the alleged Sexual Misconduct and to prevent its recurrence. The Dean reserves the authority to issue a "no-contact" order and the other interim measures described in Section III.D, below.

- D. Interim Measures. In ~~all~~ eases ~~complaints~~ of alleged Sexual Misconduct, *regardless of whether the complainant wishes to pursue Formal Adjudication/Resolution, Informal Adjudication/Resolution or no adjudication/resolution of any kind,* the University will undertake an appropriate inquiry and take ~~prompt and effective~~ immediate action to support and protect the complainant, including taking appropriate interim steps before the final outcome of the investigation and hearing, if any. Accordingly, at or after the intake meeting, the Dean may impose a "no-contact" order, which typically will include a directive that the parties refrain from having contact with one another, directly or through proxies, whether in person or via electronic means, pending the investigation and, if applicable, the hearing. The Dean, as Title IX Coordinator, also may take any further protective action that he or she deems appropriate concerning the interaction of the parties pending the hearing, ~~if any, including, without limitation, which may include~~ directing appropriate University officials to alter the students' academic, University housing, and/or University employment arrangements, or other appropriate protections. Title IX requires that, when taking such steps to separate the complainant and the accused student, a school must minimize the burden on the complainant and thus should not, as a matter of course, remove the complainant from his or her classes or housing while allowing the accused student to remain. Violation(s) of the Dean's directive and/or protective actions will constitute related offenses that may lead to additional disciplinary action.

**Comment [BS10]:** I don't recommend the automatic mutuality implied here. "The accused student should not contact the accuser..."

**Comment [BS11]:** The list of remedial actions p. 16 of the DCL can/should be offered here as possibilities, and/or above in the bullet list I suggested.

#### IV. FORMAL ADJUDICATION/RESOLUTION

A complainant may elect to pursue a formal resolution, which typically includes a hearing before a panel of the Sexual Misconduct Board, as more particularly described in this Section. Such a hearing is also referred to as “Formal AdjudicationResolution.”

**Comment [BS12]:** This language will allow for the incorporation of a process by which the accused student accepts responsibility and thus the hearing is unnecessary.

A. The Sexual Misconduct Board. The Sexual Misconduct Board (or the “Board”) is a standing group composed of students, faculty and staff appointed by the Vice President, who also appoints the Board Chair. The Board Chair will ensure that all Board members receive annual training in their responsibilities that draws on professional and expert resources.

B. The Hearing Panel. Formal AdjudicationResolution involves a hearing before a panel (the “Panel”) of at least one University student, and at least two University faculty and/or staff who are members of the Board. The Board Chair will select the Panel and will either serve as the presiding chair or will appoint the presiding chair (or, if the Board Chair is unavailable or otherwise unable to serve, the Vice President will select the Panel and a presiding chair).

C. Investigation. When the complainant indicates a desire to pursue Formal AdjudicationResolution, the Dean will prepare and forward the complaint to the Vice President’s Office for an investigation by such person or persons (the “Designee”) designated by the Vice President. A typical investigation will be completed within sixty (60) days, if not sooner. The Designee will prepare a written report which will be distributed, concurrently, to both of the parties and to the Dean. If a hearing is held, the Panel will also be provided with a copy of the report.

**Comment [BS13]:** To OCR, the investigation is the most significant response to notice. Based on that, I would recommend that you embellish this description considerably to reflect the excellent investigation capacity you have developed over time. Who does it, how is it done, what is the result, how are the investigators trained, etc.

D. Granting/Denying a Hearing. The Designee will determine that a hearing should be granted if, after viewing the facts in the light most favorable to the complainant (i.e., assuming, for the purpose of this determination only, that all of the complainant’s allegations are true), the alleged conduct constituted Sexual Misconduct. If the Designee determines that a hearing should be granted, notice of that determination will be delivered, concurrently, to both parties and to the Dean. The Designee may specify which charges-alleged violations of the Sexual Misconduct policy (i.e., which type or types of Sexual Misconduct) and, if applicable, which charges-alleged violations of other, related misconduct (as described in Section II.C, above) will go forward for a hearing. A complainant whose request for a hearing is denied may appeal that decision to the Vice President, whose decision will be final.

**Comment [BS14]:** I cannot see how you are well-served by using a legalistic summary judgment standard here. The parallel and common process is to use the investigation to show there is reasonable cause to believe that a violation of the sexual misconduct policy has occurred. This is the gatekeeper function. The last sentence here implies it, but it is not explicit. Reasonable cause is forwarded to a hearing. Lack of reasonable cause ends the complaint, though it may not end institutional remedial obligations.

E. Notice of Hearing; Challenges to Panel. If a hearing is granted by the Designee (or by the Vice President, on appeal), the Board Chair will commence the Formal AdjudicationResolution process by providing written notice to both parties (the “Notice of Hearing”) stating: (1) the date, time, and place of the pre-hearing meeting at which preliminary

**Comment [BS15]:** Just as there is a step that kicks an informal resolution process over to a formal resolution, I think you would be VERY well-served by a process that permits the inverse. At the end of the investigation, if the findings indicate a violation (not just reasonable cause for a violation), the accused student should be able to accept those findings. If so, no hearing is needed, and an informal resolution proceeding could be used to determine sanctions. The finding would not then be appealable, but the sanctions would be, to the Board. My notes on the informal resolution process below tie this together coherently.

matters will be discussed, as more fully addressed in Section IV.I.1, below; and (2) the names of the Board members selected to serve as the Panel. A party wishing to challenge the participation of any Panel member must notify the Board Chair, in writing, within ten (10) calendar days of receipt of the Notice of Hearing, stating the specific reason(s) for the party's objection. The Chair will determine whether the challenge has merit and reserves discretion to make changes in the Panel composition at any time.

**Comment [BS16]:** A section just on overview of the process timeline, and reasonable timeframes for each step of the process would be useful.

F. Delivery of Notice of Hearing. The Notice of Hearing will be delivered, at the Board Chair's discretion, by email or in person, and will be considered effective immediately upon ~~receipt~~ delivery. The hearing will take place promptly following delivery of the Notice of Hearing. The parties are expected to cooperate in the scheduling of the hearing. If either party fails to appear at the scheduled hearing, the Board Chair may postpone the proceedings or direct that the Panel proceed and determine the complaint on the basis of the evidence ~~presented~~ available, provided the absent party was duly notified of the scheduled hearing date, as outlined above.

**Comment [BS17]:** I would set out a timeline goal, even if it's flexible.

G. Advisors to the Parties. Both the complainant and the accused student may have advisors present to support and assist them during the pre-hearing, hearing, and appeal stages of the Formal ~~Adjudication~~ Resolution process. The Board Chair will appoint to each party an advisor who has been formally trained; however, a student may select and arrange for a secondary advisor of his or her choosing, including another student, but such secondary advisor may not be an attorney (see Section IV.I.4, below, for a description of the role outside counsel may play during a hearing). The Board Chair may disallow a particular advisor ~~in cases~~ where such advisor might be a witness or where such advisor's presence, in the Board Chair's sole determination, would be obstructive to the process or for other good cause. An advisor may not direct questions to the Panel or witnesses at the hearing, but may suggest questions in writing to the Panel and may consult with the student that he or she is assisting. The Board Chair will not allow an advisor's presence to inhibit the parties' ~~open testimony~~ sharing of information or the conduct of the hearing.

H. Hearing Procedures:

1. Pre-Hearing Submissions; ~~Negotiated Resolution~~. The parties will provide the Board Chair (or the Panel's presiding officer, hereinafter included within the term "Chair") with a list of witnesses they ~~propose to call~~ wish the university to call, and copies of documents and a description of any other ~~evidence~~ information they propose to present at the hearing, on or before a date set by the Chair, but at least two business days prior to the hearing. The Chair will provide each party with a copy of the list of witnesses, and identification or copies of

**Comment [BS18]:** Sounds too much like a plea bargain

documents or other ~~evidence information~~ submitted by ~~the other~~ each party. In the absence of good cause, as determined by the Chair in his or her sole discretion, the parties may not introduce witnesses, documents, or other ~~evidence information~~ at the hearing that were not provided to the Chair by this deadline. The ~~parties are also~~ university is responsible for the attendance of ~~their all~~ witnesses at the hearing.

If, at any time prior to the hearing, after reviewing the Designee's investigation report and the complainant's list of witnesses and other evidence, the accused student elects to acknowledge his or her actions and take responsibility for the alleged Sexual Misconduct, he or she may request that the Chair propose a resolution to the charges and a sanction and, with the consent of the complainant, resolve the complaint without a hearing.

2. Pre-Hearing Meeting and Determination of Charges and Witnesses.

The Chair will schedule a pre-hearing meeting prior to the hearing date. At the meeting, the Chair will review hearing procedures with the parties, separately or jointly, at the discretion of the Chair. The Chair will also review the ~~charges complaint~~ of alleged Sexual Misconduct (and related misconduct, if applicable), and review the parties' respective lists of proposed witnesses to assist them in eliminating redundant ~~testimony information~~. The University reserves the right, through the Chair, (a) to add to or modify the ~~charges alleged violations~~ specified by the Vice President's Designee, pursuant to Section IV.D, above, at the prehearing meeting, and (b) to add witnesses to the witness lists at the pre-hearing meeting and/or at the hearing. The Vice President's Designee will not testify at the hearing unless the Chair determines that the Designee's testimony is necessary to a fair ~~adjudication resolution~~ of the ~~charges complaint~~.

3. Pre-Hearing Discussion.

Once a Board member has been named to a Panel, he or she may not privately or publicly discuss the the merits of the complaint with anyone not involved in the proceedings, with the parties themselves, or with anyone acting on the behalf of the parties. The Chair will provide the panelists with a copy of the Notice of Hearing, the Designee's investigation report, and the list of witnesses ~~submitted by the parties to be called by the university~~, with an instruction to avoid private and private discussion of the merits of the complaint.

4. Outside Counsel.

Outside legal counsel may be present at the hearing on behalf of either party. Such counsel may privately consult with and advise the parties during the proceeding but may not examine witnesses or otherwise directly participate on behalf of either party.

**Comment [BS19]:** I would replace this with the process I outlined in my comment 12, above. It's more efficient to provoke that decision by the accused student soon after the investigation rather than just before the hearing. And, my reversion to the informal process at that point will help in many ways, including shifting the current informal resolution from appearing to be mediation by any other name.

**Comment [BS20]:** I continue to believe that you should invert this. The investigator is often the key witness, and would typically testify unless it was determined they were not needed. This makes the hearing much less adversarial and takes a lot of pressure off of the parties. I also encourage you to make explicit in your process the step of a formal finding by the investigators, where they are able to make one.

**Comment [BS21]:** Do you want anything that addresses the Chair's right to exclude any counsel who does not respect these rules?

Do you want to clarify whether counsel substitutes for an advisor, or whether a student can have both an advisor and counsel?

5. Panel's Counsel. The Chair and Panel may seek advice from the University's Office of the General Counsel throughout the hearing process on questions of law and procedure; however, factual determinations are the domain of the Panel.

6. Conduct of the Hearing. ~~The As a non-adversarial process, the~~ hearing will not follow a courtroom model, and formal rules of evidence will not be observed. The Chair will determine the order of the witnesses and resolve any questions of procedure arising during the hearing. ~~The parties are responsible for university will have ensuring that their arranged for all proposed necessary witnesses are to be present, to be available, or to have provided written statements in lieu of attending the hearing. This may be done as necessary to accommodate a witness who cannot be present, or whom the Chair determines may remain anonymous.~~ The Panel will review in advance of the hearing all the written materials provided to them by the Chair in accordance with Section IV.H.1, above. The parties will have received or been provided the opportunity to review and copy these materials during earlier stages of the pre-hearing process. The parties will be expected not to repeat undisputed details or non-material circumstances that would merely duplicate the written materials. Only the Chair and the Panel may question the individual parties and any witnesses, unless permission is granted by the Chair to modify the questioning process. Both parties or their advisors may ask the Chair to pose additional questions or inquire further into specific matters either by submitting these requests in writing or orally, at the discretion of the Chair. If necessary, a brief ~~recess-break~~ may be granted to allow both parties an opportunity to prepare and submit such requests. The Chair is empowered to disallow or reframe any questions that are irrelevant or redundant. After all witnesses have been questioned, each party may make a closing statement and request a short recess to prepare it. If the Panel determines that unresolved issues exist that would be clarified by the presentation of additional ~~evidence~~information, the Chair may ~~recess-suspend~~ the hearing and reconvene it in a timely manner to receive such ~~evidence~~information. A ~~recess-delay~~ may not be based on the failure of witnesses to appear without good cause or on the proposed introduction of documents or other ~~evidence~~information that should have been presented at the pre-hearing meeting.

7. Testimony or Participation by the Accused Student. The accused student has the option not to testify; however, the exercise of that option will not preclude the Panel from proceeding and determining the complaint on the basis of the ~~evidence~~information presented~~available~~. In addition, as indicated in Section IV.F, above, if the accused student fails to appear at the hearing, after being duly

**Comment [BS22]:** I keep changing this because of OCR's insistence on the university's role as investigator, even though you have opted for a hearing model. Shifting responsibility to the parties to offer proof ignores the requirement that the university gather the information needed to determine whether its policies have been violated.

**Comment [BS23]:** Legally, a witness can be anonymous only if their identity is not essential to the accused student's ability to fully frame his/her defense.

**Comment [BS24]:** I see procedures here delineating a closing statement, but not an opening statement?

notified of its place and time, the Chair may postpone the proceedings or direct that the Panel proceed and determine the complaint on the basis of the ~~evidence presented~~ information available.

8. Testimony by ~~Closed Circuit Technology~~ Alternate Means. The University is able to provide for testimony by closed-circuit technology, Skype, Webex, etc., in appropriate circumstances, including ~~in cases~~ where parties or witnesses are otherwise unable to participate in the hearing. The availability of testimony by ~~closed-circuit technology~~ alternate means will be at the sole discretion of the Chair.
9. Recording. The Chair will arrange for the hearing to be recorded and may arrange for the preparation of any transcript of the recording that he or she deems appropriate or which a party requests (upon prompt payment by the requester of the transcription fee). Such recording will be arranged through the Vice President's Office.
10. Evidentiary Standard of Proof. The Department of Education's Office of Civil Rights has interpreted Title IX to require schools to evaluate evidence of alleged Sexual Misconduct under a "preponderance of the evidence" standard and that is the standard adopted by this Policy. A preponderance of the evidence means that ~~the conduct in question~~ information shows it is "more likely than not" ~~occurred that the accused student violated this policy~~. In the context of a hearing hereunder, the accused student will be found to be responsible for the alleged Sexual Misconduct if the Panel, by a majority vote, concludes that such Sexual Misconduct more likely than not occurred based upon careful review of all ~~evidence~~ information presented.
11. Impact Statement. If the Panel determines that the accused student is responsible for Sexual Misconduct, i.e., that the Sexual Misconduct more likely than not occurred, the complainant may present the Panel with a statement recommending a sanction (the "Impact Statement"). The responsible student will be provided an opportunity to respond to the Impact Statement. The Panel is not bound by these statements in determining a sanction. Witnesses other than the parties normally are not permitted at the Impact Statement phase of the hearing; however, the Chair reserves discretion to permit the presence of other persons.
12. Sanction. The Panel is required to consider suspending or expelling any student found responsible for Sexual Misconduct; however, the Panel may impose any sanction that it finds to be fair and proportionate to the violation. In determining an appropriate sanction, the Panel may consider any record of past violations of the Standards

**Comment [BS25]:** Most campuses do written impact statements now rather than live, but it's just a matter of your preference. Perhaps create the option to do it in writing at the discretion of the Chair?

of Conduct, as well as the nature and severity of such past violation(s). The Panel will consider as part of its deliberations whether the accused student poses a continuing risk to the complainant and/or the University community. The sanction decision will be made by the Panel by majority vote. Any sanction imposed will be explained or supported in the written decision of the Panel.

13. Decision. Within ten (10) calendar days from the conclusion of the hearing (or such longer time as the Chair may for good cause determine), the Chair will provide to both parties, concurrently, and to the Dean and the Vice President, a copy of the Panel's written decision.

14. Appeals. Either party may appeal the Panel's decision to the Judicial Review Board by notifying the Chair of the University's Judicial Review Board in writing within fourteen (14) calendar days of the date of the Panel's decision. All appeals will be governed by the [procedures of the Judicial Review Board](#).

15. Effective Date of Sanction. Sanctions imposed by a Panel are not effective until any timely appeal of the decision to the University's Judicial Review Board is resolved. However, if advisable to protect the welfare of the complainant or the University community, the Panel may include in its determination letter that any probation, interim suspension, suspension, or expulsion be effective immediately and continue in effect until such time as the Vice President may otherwise determine. The Vice President may suspend the determination pending exhaustion of appeal, or allow the student to attend classes or other activity on a supervised or monitored basis, or make such other modifications to the determination as may be advisable. The Vice President's decision may not be appealed.

16. Transcript Notation in Cases/Complaints of Suspension or Expulsion. If the Panel imposes a sanction of suspension or expulsion, then, following exhaustion of any appeals pursuant to Section IV.H.14, above, the Board Chair will notify the University Registrar to place a notation on the student's transcript reading "Disciplinary Suspension" or "Disciplinary Expulsion," as the case may be.

17. Privacy of the Hearing Process; Determination Letter; Memorandum Opinion. In order to comply with FERPA and to provide an orderly process for the presentation and consideration of relevant evidence information without undue intimidation or pressure, the hearing process is not open to the general public, unless the parties, student witnesses and the University agree in writing. Accordingly, documents prepared in anticipation of the hearing (including the

**Comment [BS26]:** I think this section is potentially deficient in two respects. First, Title IX requires consideration of patterns, not just with respect to sanction, but if they provide evidence of violation (the finding). Second, since OCR is completely clear that we have a three-fold duty, that should be expressed here:

1. Bring an end to the discriminatory conduct;
2. Act to reasonably prevent its recurrence;
3. Remedy the effects on the victim.

**Comment [BS27]:** I think this is way too long. 48 hours is usually enough time.

**Comment [BS28]:** This leaves the alleged victim and/or accused student in limbo for way too long. 3 days is enough time to decide if you want to appeal.

**Comment [BS29]:** I think this section is underdeveloped. You need to elaborate procedures for how the alleged victim will be joined in an appeal by the accused student, and vice versa. And, you need to elaborate how appeals will be consolidated if both students appeal. Remember that one may appeal on one ground, and one on another, so how that is addressed should also be clarified.

**Comment [BS30]:** This is potentially transformative for the field. Bravo! I hope this causes ACCRAO to deeply reconsider its historic recalcitrance on this issue. Registrars have a responsibility to assure campus safety, too.

**Comment [BS31]:** I'm not sure this flies under the Title IX confidential process requirement. It's never been addressed whether the parties can waive the confidentiality of a Title IX process, though I know that FERPA permits consent to do so.

Designee's investigation report, the Notice of Hearing, and the pre-hearing submissions referenced in Section IV.H.1, above), documents, testimony, or other ~~evidence-information~~ introduced at the hearing, and any transcript of the hearing itself may not be disclosed outside of the hearing proceedings, except as may be required or authorized by law ~~and/or university policy~~.

Following the hearing, the Panel will issue two documents to the accused student and the complainant: a determination letter and a memorandum opinion. Each such document will be issued concurrently to the accused student and the complainant.

(a) The determination letter will contain only the following information: the name of the accused student; whether the accused student has been found responsible or not responsible for ~~specific violation(s) of the Sexual Misconduct policy~~; and the sanction imposed, if any. As guaranteed by Federal law, both the accused student and the complainant have a right to this information. University policy neither encourages nor discourages further disclosure of the determination letter by either student.

(b) The memorandum opinion will contain an explanation of the Panel's reasoning for its determination. The memorandum opinion is both an education record and private record of the hearing and may not be disclosed ~~without the written consent of the parties and the University~~, except where disclosure is authorized or required by law.

## V. ~~INFORMAL ADJUDICATION~~ RESOLUTION

A complainant who wishes to file a formal complaint with the Dean's Office but who does not wish to pursue Formal ~~Adjudication~~ Resolution may request a less formal proceeding, known as "Informal ~~Adjudication~~ Resolution," as more particularly described in this Section. Although less formal than Formal ~~Adjudication~~ Resolution, Informal ~~Adjudication~~ Resolution is ~~an adjudicative~~ an appropriate resolution process; it is not mediation. ~~The accused student is expected to attend, but is not required to participate.~~

- A. Purpose of Informal ~~Adjudication~~ Resolution. Informal ~~Adjudication~~ Resolution provides an opportunity for the complainant to confront the accused student, in the presence of, and facilitated by, a presiding officer, as described in Section IV.B, below, and to communicate his or her feelings and perceptions regarding the incident, the impact of the incident, and his or her wishes and expectations regarding protection in the future. The accused student will have an opportunity to respond.

- B. Advisors; Presiding Officer. The complainant and the accused student each may bring an advisor to the Informal AdjudicationResolution. Advisors are assigned and subject to the same restrictions set forth for advisors in Formal AdjudicationResolution, outlined above. The Board Chair or a designee of the Chair will preside over the Informal AdjudicationResolution, and may elect to be assisted by another member of the Board or senior staff of the Dean’s Office.
- C. Outcome of Informal AdjudicationResolution. ~~If in the course of the informal resolution the accused student admits to violating the sexual misconduct policy, that admission will serve as a finding of responsibility that is final and cannot be appealed. The Chair will recommend a sanction which the accused student can accept or reject. If accepted, the process is concluded. If the accused student rejects the sanction recommended by the Chair, the Panel is convened on the issue of sanction, only. Procedures for Formal Resolution are followed with respect only to the imposition of an appropriate sanction. Informal Adjudication cannot result in a formal sanction involving suspension or expulsion of the accused student. Where responsibility is contested by the accused student,~~ Informal AdjudicationResolution may, ~~however nonethe~~less, result in the imposition by the Dean’s Office of protective actions agreed upon by the parties, or (with or without such agreement) based on information derived from the proceedings, taken together with any other relevant information known to the University at the time of the Informal AdjudicationResolution.
- ~~D. —~~ Election of Formal AdjudicationResolution. The University or the complainant may, at any time, ~~prior to the conclusion of the Informal Adjudication,~~ elect to end such proceedings and initiate Formal AdjudicationResolution instead. ~~In such cases, s~~Statements or disclosures made by the parties in the course of the Informal AdjudicationResolution may ~~not be used as evidence~~considered in the Formal AdjudicationResolution ~~(although nothing herein precludes any such statements or information disclosed in the Informal Adjudication from being considered by the Dean in the imposition of protective actions).~~
- D. Privacy of Informal AdjudicationResolution. In order to promote honest, direct communication, information disclosed during Informal AdjudicationResolution must remain private while the Informal AdjudicationResolution is pending, except where disclosure may be required by law or authorized in connection with duties on behalf of the University.

**Comment [BS32]:** It is at this point that a diversion to restorative justice as an option would be most intriguing, to me.

Notes from Brett Sokolow for supplemental consideration by UVA:

- I'd like to see a written amnesty policy included here;
- I'd see value in an explicit equity statement – you do it, but what about saying that all rights, privileges and opportunities in this process are extended to all parties regardless of gender, sexual orientation and/or gender identity?
- I'd like to see explicit references to the Title IX Coordinator here, and perhaps to the responsibility of the coordinator in all cases to assure prompt and effective remedial actions by the university;
- Is there value in clarifying that silence, in and of itself, cannot convey consent;
- I'd like some sort of statement that use of alcohol by the accused student cannot excuse a violation of this policy.
- Might it be of value to address the role of expert witnesses, if any?
- To comply with Clery, it might be helpful to include a statement here about the importance of the preservation of evidence and about access to campus counseling resources (for both parties);
- I'd like to see some shield protections, assuring that irrelevant past sexual history and sexual character information will not be permitted in the hearing process;
- Is there value in a section on intentional false reporting, or is that covered adequately in other sections of the code of conduct?
- I'd like to see not just discussion of the advisor process, but an advocacy process as well.

**VI. AMENDMENTS**

This Policy may be amended, in writing, by the President or the President's designee at any time.

Adopted:

\_\_\_\_\_  
Teresa A. Sullivan, President

\_\_\_\_\_  
Date

**FIND DETAILS BELOW ON THE NCHERM SEXUAL  
MISCONDUCT POLICY REVISION SERVICE**

## **NCHERM SEXUAL MISCONDUCT POLICY AND PROCEDURES REVISION SERVICE**

Since publication of the April 4<sup>th</sup>, 2011 OCR Title IX Dear Colleague Letter, colleges and universities across the country have initiated or re-energized campus efforts to revise sexual misconduct policies, procedures and practices, including figuring out who should be the campus Title IX Coordinator.

As it did with this project at UVa, NCHERM offers policy and procedure revisions to assure that your policies reflects best practices, are Title IX compliant, and legally sound. Some projects offer comments, as this does, while others go farther to offer sample language and actual revisions. Policy and procedure revisions by NCHERM range from \$3,500 to \$6,500 depending on the complexity of the policy, how much revision is needed, and how extensively we comment v. edit.

For details on engaging an NCHERM consultant to revise your policy or give you an estimate of the proposed costs, please contact NCHERM Executive Director Cori Sokolow at (610) 993-0229 or [Cori@ncherm.org](mailto:Cori@ncherm.org). Please find details on this service on the NCHERM homepage, [www.ncherm.org](http://www.ncherm.org).

Additionally, if you have figured out who will be serving as your campus Title IX Coordinator, please make sure they know about the only training and certification course for Title IX Coordinators in the country. This four-day course is being offered in early August by NCHERM.

Visit <http://www.ncherm.org/webinars.html> for event details.