

**TITLE IX MANDATED TRAINING**  
**(20 U.S.C. 20 U.S.C. §§ 1681–1688; 34 C.F. R. part 106)**

**INVESTIGATORS AND DECISION-MAKERS**

**VITERBO UNIVERSITY**

**AUGUST 12, 2020**

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**I. TITLE IX – THE LAW**

**A. Title IX Law (20 U.S.C. §§ 1681–1688)**

*No person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.*

**B. Title IX Regulations (34 C.F. R. part 106)**

- [Section 106.8:](#) Addressing the designation of a Title IX Coordinator, the adoption of grievance procedures, and notice/dissemination of policies
- [Section 106.30:](#) Important new definitions added by the Final Rule
- [Section 106.44:](#) Addressing the requirements for schools to respond to each report or complaint of sexual harassment of which the school has actual knowledge
- [Section 106.45:](#) Requiring schools to establish and administer a grievance process for formal complaints of sexual harassment; also addressing training and recordkeeping requirements
- [Section 106.71:](#) Non-retaliation and confidentiality requirements.

**C. Enforced by Office for Civil Rights (OCR), U.S. Department of Education**

## II. MANDATORY TRAINING REQUIREMENTS

Pursuant to § 106.45 (b)(1)(iii), the University will adhere to the following:

- A. The individuals designated by the University as a Title IX Coordinator, **investigator**, **decision-maker**, or any person designated by a recipient to facilitate an informal resolution process will receive training on the following:
  - The definition of sexual harassment in § 106.30;
  - The scope of the recipient's education program or activity;
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable; and
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- B. **Decision-makers** will receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.
- C. **Investigators** will receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.
- D. Materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, will not rely on sex stereotypes and will promote impartial investigations and adjudications of formal complaints of sexual harassment.
- E. The University will maintain for seven years all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
- F. The University will make these training materials publicly available on its website.

### III. OVERVIEW TITLE IX REGULATIONS

In broad terms, the new Title IX regulations, which take effect on August 14, 2020, require schools to address all of the following:

- A. **Nondiscrimination policy statements** regarding sex discrimination under Title IX, including express identification of the **Title IX Coordinator**.
- B. A **grievance procedure** for receiving and responding to complaints of **sex discrimination** under Title IX.
- C. University responses when the school has **actual knowledge** of an incident or allegation of **sexual harassment** under Title IX—regardless of whether or not a formal complaint is filed.\*\*
- D. A **grievance process** for addressing **formal complaints** of **sexual harassment** under Title IX.
- E. **Notices** related to all of the above.
- F. Employee **training**.
- G. **Recordkeeping, confidentiality, and non-retaliation** in connection with all of the above.

### IV. KEY CONCEPT IN TITLE IX REGULATIONS

- A. An institution with actual knowledge of sexual harassment in an education program or activity of the institution against a person in the U.S. must respond promptly in a manner that is not deliberately indifferent.
- B. **All individuals involved in the Title IX process, must avoid prejudgment of the facts at issue, have no conflicts of interest and no bias against the parties collectively or individually.**
- C. A report requires an immediate response from the Title IX Coordinator but does not trigger the grievance process under Title IX.
- D. Only the filing of a **formal complaint** of sexual harassment triggers the grievance process under Title IX.

- E. A formal complaint must allege sexual harassment in an education program or activity of the University against a person in the U.S. to continue the grievance process.
- F. The grievance process must be complete before the imposition of any disciplinary measure or penalties for substantiated sexual harassment, as defined under the Title IX regulations.
- G. The grievance process must treat complainants and respondents equitably by providing (1) remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and (2) by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as against a respondent.

## V. DEFINING SEXUAL HARASSMENT

- A. As defined in section 106.30(a) of the Title IX regulations, “**sexual harassment**” under means conduct on the basis of sex that satisfies one or more of the following:
  - 1. *An employee of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (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 the institution’s education program or activity; or*
  - 3. *Any of the following, as defined under the Title IX regulations by reference to other federal statutes:*
    - i. *“sexual assault,” as defined in 20 U.S.C. 1092(f)(6)(A)(v),*
    - ii. *“dating violence,” as defined in 34 U.S.C. 12291(a)(10),*
    - iii. *“domestic violence,” as defined in 34 U.S.C. 12291(a)(8), or*
    - iv. *“stalking,” as defined in 34 U.S.C. 12291(a)(30).*
- B. As is true of all allegations of sex discrimination under Title IX, an allegation of sexual harassment under Title IX must have occurred in the University’s education program or activity and in the United States.

- C. The Title IX definition of sexual harassment is generally understood to be narrower (i.e., cover less conduct) than the broader definitions of sexual harassment that apply under:
1. Section 111.32(13) of the state statutes which, for purposes of the Wisconsin Fair Employment Act, defines “sexual harassment” to mean “unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature.” “Unwelcome verbal or physical conduct of a sexual nature” includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment.
  2. Federal Title VII, also in the employment context (where, for example, conduct that is “severe **or** pervasive” can meet the applicable standard for a hostile work environment claim).
  3. The University’s code of student conduct and employee handbooks. The University generally assert an interest in intervening in certain inappropriate conduct before it reaches the level of conduct that is legally-actionable as sexual harassment.

## VI. OTHER KEY DEFINITIONS

### A. Grievance Procedure

The procedure for responding to and resolving reports or complaints of possible unlawful discrimination based on sex under Title IX, *other than formal complaints of sexual harassment under Title IX*.

1. For complaints under Title IX, the grievance procedure applies only to sex discrimination occurring in the University’s education program or activity against a person **in the United States**. (See §106.8(c) and (d))
2. An example of a Title IX complaint that would **not** be a sexual harassment complaint and that would be directed to the “grievance procedure” would be a complaint that the University provides unequal financial support and facilities in athletics based on sex.

3. Most schools will use the same “procedure” for receiving and responding to complaints of unlawful discrimination that are (1) based on protected classes other than sex, or (2) based on laws other than Title IX.
4. Most schools have an existing complaint procedure that, perhaps with some modifications, can be identified and used as the Title IX grievance procedure.
5. The Title IX regulations specify a school’s procedures must allow **any person at any time** to report sex discrimination, including sexual harassment (whether or not the person reporting is a person who is alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

#### B. Grievance Process

The highly structured process for investigating and resolving **formal complaints of sexual harassment** under Title IX.

1. Schools have either recently adopted their Title IX grievance process or are currently in the process of doing so.
2. A school is only required to utilize its Title IX “grievance process” when a formal complaint of sexual harassment under Title IX is pending. However, as a very important caveat, **use of the Title IX grievance process is also generally a pre-requisite to the imposition of any disciplinary measure or penalties for substantiated sexual harassment, as defined under the Title IX regulations.**

### C. Actual Knowledge

1. “Actual knowledge” means **notice** of sexual harassment or allegations of sexual harassment to: (1) the University’s Title IX Coordinator; or (2) any official of the University who has authority to institute corrective measures on behalf of the University.
2. Anyone (victim, friend, parent, guardian, witness, other individual) may report sexual harassment.
3. “Postsecondary institutions ultimately decide which officials to authorize to institute corrective measures on behalf of the recipient.” (Comments at 54)
4. Examples of ways that a University could obtain actual knowledge of sexual harassment include:
  - Witnessing an incident (or a perhaps a series of incidents);
  - Receiving a verbal or written report about an incident or allegation from a student or other person;
  - Receiving multiple reports that, taken together, provide a different picture of a person’s conduct than each incident standing alone; or
  - The filing of a formal complaint or any report under the University’s Title IX grievance procedure or grievance process.

### D. Education Program or Activity of the Institution

1. With respect to **all** aspects of sex discrimination under Title IX, “*Program or activity*” and “*program*” includes **all of the operations** of a recipient of federal funds, including but not limited to a local education agency (as defined in 20 U.S.C. 8801) and any entity that is established by two or more covered entities. (See 34 C.F.R. 106.2(i))
2. In connection with “sexual harassment” under the Title IX regulations and for purposes of determining when a school has an obligation to respond and when a school may (and may not) address allegations under its “grievance process,” an “**education program or activity**” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs and includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

3. A recipient's Title IX obligations extend to sexual harassment incidents that occur off campus if (1) the off-campus incident occurs as part of the recipient's "operations"; (2) if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; or (3) if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary.
4. Official recognition of a student organization brings buildings owned or controlled by the organization under the auspices of the postsecondary institution recipient and thus within the scope of the recipient's Title IX obligations.
4. In situations where there is some uncertainty whether alleged harassment occurred in the University's "education program or activity," the University May wish to examine factors such as whether the University funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred. However, no single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of "all of the operations of" a school, college, or university.
5. Examples of off-campus:

For example, in *Doe v. East Haven Board of Education*, the Second Circuit held that the plaintiff sufficiently alleged sexual harassment to which the school was deliberately indifferent where the harassment consisted of on-campus taunts and name-calling directed at the plaintiff after she had reported being raped off campus by two high school boys. The final regulations would similarly analyze whether sexual harassment (i.e., unwelcome conduct on the basis of sex so severe, pervasive, and objectively offensive that it effectively deprives a complainant of equal access to education) in the recipient's program or activity triggered a recipient's response obligations regardless of whether such sexual harassment stemmed from the complainant's allegations of having suffered sexual assault (e.g., rape) outside the recipient's program or activity. Further, whether or not the off-campus rape in that case was in, or outside, the school's education program or activity, would depend on the factual circumstances, because as explained above, not all off-campus sexual harassment is excluded from Title IX coverage. (Comments at 636)

*Lapka v. Chertoff*, 517 F.3d 974, 982-83 (7th Cir. 2008) (the Seventh Circuit reasoned that the plaintiff sufficiently alleged workplace harassment even though the alleged rape occurred while the plaintiff and assailant were socializing after



hours in a private hotel room, because the bar was part of the training facility where the plaintiff and assailant were required to attend work-related training sessions and thus were on “official duty” while at that facility, including the bar located in the facility, “so the event could be said to have grown out of the workplace environment” and the plaintiff and assailant were trainees expected to eat and drink at the facility and “return to dormitories and hotel rooms provided by” the employer such that “[e]mployees in these situations can be expected to band together for society and socialize as a matter of course” justifying the Court’s conclusion that the plaintiff had alleged sexual harassment (rape) that arose in the context of a workplace environment and to which the employer had an obligation to respond). Although Lapka was a case under Title VII, the final regulations would similarly analyze whether sexual harassment occurred in the school’s program or activity by inquiring whether the school exercised substantial control over the context of the harassment and the alleged harasser. (Comments at 636-37, n. 877)

6. The statutory and regulatory definitions of “program or activity” encompass “all of the operations of” such recipients, and such “operations” may certainly include **computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the University.**
  - a. The factual circumstances of online sexual harassment must be analyzed to determine if it occurred in an **education program or activity**, under the “substantial control” standards identified above.
  - b. For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control

#### E. Complainant

1. An individual who is alleged to be the victim of conduct that could constitute sexual harassment.
2. The complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

#### F. Respondent

An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

#### G. Formal Complaint

1. “Formal complaint” means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
  - a. A “complainant” means an individual who is alleged to be the victim of conduct that could constitute sexual harassment. (Note: A guardian who is acting on behalf of a child complainant may also file a formal complaint.)
  - b. At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the relevant education program or activity of the University.
  - c. As used in the definition, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the University) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
2. The Title IX regulations specify that an institution’s procedures must, at a minimum, allow a complainant to file a formal complaint with the University’s Title IX Coordinator by submitting the document or electronic submission in person, by mail, or by electronic mail, using the contact information that the University has established for the University’s Title IX Coordinator. (See §106.30(a))
  - a. An institution may designate other methods of filing a formal complaint of sexual harassment.
  - b. Should an institution designate additional methods of filing a formal complaint? The answer to this this question is likely to vary among schools. For example, a school with a single Title IX Coordinator may need to account for situations where the Title IX Coordinator is temporarily unavailable or is the person accused of sexual harassment. However, as a general premise, institutions will want to maintain reasonable control over how formal complaints can be filed because it is so important to be able to recognize when you have a formal complaint.

3. The existence or non-existence of a formal complaint is highly relevant for determining *how* a school responds to a particular incident or allegation of sexual harassment, but it does **not** resolve *whether* a school should or must respond.
4. The authority of the Title IX Coordinator to sign a formal complaint and trigger the University's Title IX grievance process may be used, for example, when:
  - a. The complainant is not eligible to file a formal complaint for purposes of Title IX (e.g., the complainant is a past graduate of the school and is no longer attempting to participate in a school's program or activity);
  - b. The complainant declines to file a formal complaint, but the Title IX Coordinator determines that the school's interest in the matter is substantial enough that the matter should be investigated and resolved through the grievance process without the complainant's direct cooperation.
5. Will the University establish any guidelines or standards for the Title IX Coordinator to follow in circumstances where the regulations permit the **Title IX Coordinator to sign (and thereby initiate) a formal complaint?** (See §106.30)
  - a. The preamble to the final regulations suggests that Title IX Coordinators should have a degree of autonomy to determine whether to sign a formal complaint. At the same time, the preamble suggests that it would not be improper for the Title IX Coordinator to obtain input from other school officials (or potentially from the school's legal counsel) regarding whether a formal complaint and investigation under the grievance process are warranted. (Preamble, at pp. 30134-30135)
  - b. The preamble also states that the Title IX Coordinator's evaluation of whether to sign a formal complaint in the absence of the complainant electing to file a formal complaint should be evaluated in terms of whether signing a formal complaint (or not signing a complaint) would be a "clearly unreasonable" response. (Preamble, at p. 30045)

#### H. Supportive measures

1. 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.
2. Such measures are designed to restore or preserve equal access to the University's education program or activity without unreasonably burdening the other party,

while protecting the safety of all parties and the University's educational environment; and deterring sexual harassment. Supportive measures may be provided to a respondent, but it is not required.

3. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
4. In general, the identification, offering, and monitoring of supportive measures should be an ongoing and continuous part of responding to any incident, report, or complaint of sexual harassment or alleged sexual harassment under Title IX, including but not limited to the period of time when a formal complaint is pending.
5. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

#### G. Preponderance of the Evidence

The standard applied by the decision-makers under the grievance process. Must be sufficient relevant evidence for the decision-makers to find that the Respondent has more likely than not engaged in conduct that violates Title IX sexual harassment policy.

***“Preponderance of the Evidence”** is a standard applied by the decision-maker under the grievance process in this policy and means that a finding is more likely than not or is supported by the greater weight of the evidence.*

## VII. IMMEDIATE OBLIGATION TO RESPOND

**An institution with actual knowledge of sexual harassment in an education program or activity of the institution against a person in the U.S. must respond promptly in a manner that is not deliberately indifferent.**

- A. When the Title IX Coordinator has notice, the Title IX Coordinator will promptly respond (within 5 days generally under University policy).
  - 1. Contact the Complainant (individual alleged to be the victim of sexual harassment) to:
    - (a) Discuss the availability of supportive measures;
    - (b) Consider the Complainant's wishes with respect to supportive measures and inform the Complainant of the availability of supportive measures with or without filing a Formal Complaint; and
    - (c) Explain to the Complainant the process for filing a Formal Complaint.
  - 2. Determine appropriate supportive measures and coordinate with appropriate administration to provide supportive services to the Complainant. Maintain confidentiality if possible.
  - 3. Document the provision of supportive measures or if supportive measures are not provided, document the reasons why such response was not clearly unreasonable in light of the known circumstances.
  - 4. Title IX may consider whether the allegations in the report (and any additional information gathered), if true, would potentially meet definition of sexual harassment under Title IX, occurred in the school's program or activity, and in the U.S. If not, Title IX coordinator would redirect complainant to non-Title IX response procedures.
- B. If the complainant does not wish to file a formal complaint.
  - 1. The Title IX Coordinator must decide whether to sign a complaint initiating investigation and grievance process for formal complaints despite complainant's preference.

2. Title IX Coordinator must determine whether involving the complainant in the grievance procedure against the complainant's wishes would be clearly unreasonable.
  3. Title IX Coordinator assesses whether actions limited to supportive measures are a sufficient response by the school entity to the behavior alleged, or whether a Title IX grievance process for formal complaints should be initiated in order to investigate and address the situation adequately.
  4. For example, if disciplinary action would be warranted if allegations are true, if the respondent is an employee, or if further investigation is needed to assess the extent of the behavior and impact on others, it may be clearly unreasonable not to initiate the Title IX grievance process for formal complaints.
- C. The Title IX Coordinator may decide to take these steps even **before a formal complaint is filed**:
1. The institution may remove a respondent from the education program or activity on an emergency basis.
    - a. The institution must undertake an individualized safety and risk analysis, determine that there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment that justifies removal, and provide the respondent with notice and opportunity to challenge following the removal.
    - b. This provision may not be construed to modify any rights under IDEA, Section 504, and ADA.
  2. The institution may place a non-student employee respondent on administrative leave during the pendency of a grievance process. These provisions may not be construed to modify any rights under Section 504 or the ADA.

## **VIII. FORMAL COMPLAINT FILED**

### **---Points to Remember for All Steps---**

- All written notices, reports and other materials provided to parties throughout the Title IX grievance process for formal complaints are also provided to a party's advisor if any, and normally, also to guardians, if any of a party (or parents if minor).
- No person can perform more than one role as investigator, decision-maker, appeal decision-maker or facilitator of informal resolution in the same case. Each must be free of bias or conflicts of interest. Title IX Coordinator cannot serve as decision-maker or appeal authority.
- In responding to a formal complaint, the University must treat complainants and respondents equitably by (1) following a grievance process that complies with the Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures as against a respondent, and (2) providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.

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### **A. Review complaint and determine if any basis for dismissal.**

1. **Mandatory Dismissal.** The University must dismiss a formal complaint if the conduct alleged in the complaint:
  - a. Would not constitute sexual harassment as defined under Title IX even if proved;
  - b. Did not occur within the University's education program or activity; or
  - c. Did not occur against a person in the U.S.
2. **Permissive Dismissal.** The University may dismiss if:
  - a. Complainant notifies of withdrawal of complaint or allegations;
  - b. Respondent is no longer enrolled or employed by the institution; or
  - c. Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination.

Upon dismissal, the University must promptly send written notice of the dismissal and reasons for dismissal.

3. If the complaint is not dismissed, the Title IX Coordinator should initiate the grievance process.

## **B. Initiate the Grievance Process.**

The University will provide an advisor appointed by the University to each party at the initiation of the grievance process. If a party is represented by an attorney, the advisor shall be available to assist as needed.

The University's grievance process shall include all the basic requirements under Title IX and all Title IX Coordinators, investigators, decision-makers, appeal decision-makers, and facilitators of informal resolution, and any other University employees engaged in the grievance process shall adhere to the following:

1. Engage in an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence.

***“Exculpatory Evidence”** is evidence that tends to clear or excuse a Respondent from allegations of sexual harassment.*

***“Inculpatory Evidence”** is evidence that tends to establish a Respondent's responsibility for alleged sexual harassment.*

2. Refrain from making credibility determinations based on a person's status as a Complainant, Respondent, or witness.
3. Be free from a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent, and disclose facts which are relevant to this issue prior to serving in a designated role in the grievance process.
4. Apply a presumption that the Respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
5. Adhere to the time frames herein for conclusion of the grievance process. The process may allow for the temporary delay of the grievance process or the limited extension of time frames for good cause.



6. Apply the Preponderance of the Evidence Standard for Formal Complaints against students, employees, and all other individuals.
7. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

**C. Initial Notice to the Parties.**

Upon receipt of a formal complaint, the University must provide a detailed notice to complainant and respondent.

Under the University policy, normally within ten (10) days of receiving a Formal Complaint, but no less than five (5) days before an initial interview, the Title IX Coordinator shall provide a written notice to the parties who are known. The written notice shall include:

1. Notice of the University's grievance process, including any informal resolution process;
2. Notice of the allegations potentially constituting sexual harassment, including sufficient details known at the time of the notice (identities of the parties involved in the incident, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident);
3. A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process;
4. A statement that the parties may request to inspect and review evidence that is directly related to the allegations raised in the Formal Complaint;
5. A statement that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney; and
6. Notice to the parties of any provision in the University's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Written notice must be provided with sufficient time to prepare a response before any initial interview. If other allegations are identified for investigation after the initial

written notice has been issued, notice of the additional allegations must be provided to the parties whose identities are known.

**D. Informal Resolution Processes.**

The Title IX Coordinator and other relevant University officials may consider offering an “informal resolution process.”

1. An informal resolution process is any process, such as mediation, that does not involve a full investigation and adjudication of the complaint as delineated in the local grievance process.
2. Informal resolution may never be used if the formal complaint includes allegations that an employee sexually harassed a student.
3. If permitted, informal resolution may be offered at any point after a formal complaint has been filed and prior to reaching a determination of responsibility under the full grievance process.
4. If such a process is utilized, the University must:
  - a. Provide to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or that could be shared; and
  - b. Obtain the parties’ voluntary, written consent to the informal resolution process.
5. If an informal resolution is attempted but is not successful, the University must complete a full investigation and adjudication of the complaint using the local grievance process.

## IX. INVESTIGATION

### A. Consider the Investigator.

- No conflicts of interest or bias.

*The Complainant and Respondent will be notified in writing of the individuals assigned to the process. The Complainant or Respondent may request the removal of an individual on the grounds of personal bias or other conflict of interest by submitting a written statement to the Title IX Coordinator setting forth the basis for the request no later than two (2) days after receiving the notice of the identity of the individual assigned. The Title IX Coordinator will determine whether to accept or deny the request. If the request is accepted, a replacement will be appointed and notice will be provided to the Complainant and Respondent. The decision of the Title IX Coordinator with regard to the request is final and is not appealable.*

- Received training.
- Understands presumptions (that respondent is not responsible until a determination of responsibility), credibility determinations (not based on a person's status as a party or a witness), time frames, and equitable process.
- Serves impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
  - Impartial means something unbiased, fair, and unprejudiced.
  - Avoid statements that suggest a conclusion, including statements to the complainant such as "I need to investigate to make sure that he does not do this again."
- Does not rely on sex stereotypes
- **Consider these factors in determining whether you have a conflict or a bias:**
  - Do you know either party or their families/friends?
  - Have you worked with either party?
  - Have you instructed either party?
  - Have you heard from a third party about the incident?
  - Do you have any preconceived ideas about credibility or responsibility?

- Do you have any implicit bias against alleged victims or respondents?

## **B. Conducting the Investigation**

1. First, ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the University and not on the parties.
2. Provide to the party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.
3. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
4. Do not restrict the ability of either party to discuss the allegations under investigation or gather and present relevant evidence. However, warn parties and witnesses that any retaliation is prohibited under the regulations.
5. Provide parties with the same opportunities to have others present during any grievance proceeding, including an advisor of their choice, but may establish reasonable restrictions regarding participation. *However, the University may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.*
6. Engage in an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence. “Relevant evidence” means the evidence and the testimony that directly relates to the issues disputed or discussed.
7. Do not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. Prior to the completion of the investigative report, the recipient must send to each party and the party’s advisor, the evidence subject to review and inspection in an electronic format or a hard copy.
8. **Prior to completion of the investigative report, send to each party and the party’s advisor, if any, the evidence obtained as part of the investigation that is directly related to the allegations raised in a Formal Complaint so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. The evidence shall be provided in an electronic format or a hard copy and shall include a) evidence upon which the University does not intend to rely in reaching a determination regarding responsibility, and b) inculpatory and exculpatory evidence, whether obtained from a party or other source. The parties shall have**

**at least ten (10) days to submit a written response, which the investigator will consider prior to completion of the investigative report.**

9. The parties **must have 10 days to submit a written response**, which the investigator must consider **prior** to completing the investigation report.
10. **At least 10 days prior to a hearing** or other time of determination regarding responsibility, send to each party and the party's advisor the investigation report in an electronic format or hard copy, for their review and written response.
11. The investigation report should include information to assist the decision-maker in his or her written determination, including a statement of the allegations, a description of the procedural steps taken, findings of fact, credibility determinations, and standards to be applied. However, the investigation report likely should not contain any legal conclusions or recommendations for remedies or sanctions. The investigator does not determine any responsibility by the respondent – that is the role of the decision-maker.

## **X. DECISION-MAKING**

### **A. Consider the Decision-Maker.**

- No conflicts of interest or bias (see above).
- Received training.
- Understands presumptions (that respondent is not responsible until a determination of responsibility), credibility determinations (not based on a person's status as a party or a witness), time frames, and equitable process.
- Serves impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Does not rely on sex stereotypes

### **B. Decision-making/Hearing**

1. Prior to a hearing the decision-makers should:
  - Review the investigation report, file, and if applicable, the Complainant's and Respondent's written response to the investigation report.

- Make all such evidence subject to the parties' inspection and review available at the hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross examination.

### **Hearing Procedures**

*The decision-maker will provide for a live hearing for any Formal Complaint.*

#### *1. Location*

- a. Live hearings may be conducted with all parties physically present in the same geographic location, or at the decision-maker's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.*
- b. At the request of either party, the decision-maker must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answering questions.*

#### *2. Advisor*

- a. The University will provide, without fee or charge, an advisor of the University's choice, who may be, but is not required to. Parties will have the same opportunity to have an advisor throughout the grievance process and present during the live hearing.*
- b. The decision-maker will not limit the choice or presence of an advisor, but the decision-maker may establish restrictions regarding the extent to which the advisor may participate in the hearing, as long as the restrictions apply equally to both parties.*
- c. Advisors may not unreasonably delay the grievance process in any manner including interrupting witnesses or answering questions on behalf of witnesses.*

#### *3. Hearing Procedures*

- a. *The decision-maker will conduct the hearing in a professional and orderly manner, including establishing reasonable time restrictions that will be apply equally to all parties.*
- b. *Prior to the hearing, the parties should be notified of the burden of proof and provided a copy of the hearing procedures and an opportunity to seek clarification or express concerns. The procedures shall identify the hearing officer who will be running the hearing.*
- c. *Prior to the presentation of witnesses, the decision-maker may allow each party's advisor to make an opening statement.*
- d. *The decision-maker will conduct a hearing by allowing each party to present witnesses to provide testimony related to the allegations within the Formal Complaint.*
- e. *The decision-maker may also ask witnesses to provide testimony related to the allegations within the Formal Complaint.*
- f. *The decision-maker will administer an oath for each witness before the witness is permitted to ask questions. During any witness testimony, relevant evidence may also be submitted.*
- g. *Each party's advisor will be permitted to ask any witnesses (including the other party) all relevant questions and follow-up questions, including questions challenging credibility of the witness.*
- h. *Questions, including cross-examination questions, must be conducted by directly, orally, and in real time by the party's advisor and never by a party personally.*
- i. *Each party's advisor will only be permitted to ask cross-examination questions and other questions that are relevant to the allegations. Before a witness (including the Complainant and the Respondent) answer a cross-examination or other question, the decision-maker must first determine whether the question is relevant. If a question is not relevant, the decision-maker will not allow the question and must explain any decision to exclude a question as not relevant.*
- j. *Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to*

*provide that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.*

- k. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility. However, the decision-maker cannot draw any inference about a determination regarding responsibility based solely on the party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.*
- l. After both parties have had an equal opportunity to ask relevant questions of witnesses, the decision-maker may determine that the opportunity to present witness has ended. At that time, the decision-maker may permit each party to make a closing statement. The decision-maker may then close the hearing.*

#### **4. Transcript**

*The decision-maker must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.*

### **C. Decision-making and Written Determination**

- 1. The decision-makers will use a Preponderance of the Evidence Standard in making a determination whether a violation of this policy has occurred.
- 2. The decision-makers will engage in an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence.

*The decision-maker(s) will render a decision based upon the investigation report, file, response submitted by the Complainant and/or Respondent, evidence at the hearing, and any other information the decision-maker(s) may deem appropriate (and allowable under Title IX) and which is made available to both the Complainant and Respondent. While the Title IX Coordinator is available for consultation, the Title IX Coordinator will not participate in making a decision.*

- 3. The written determination must include:



- a. Identification of the allegations potentially constituting sexual harassment;
  - b. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - c. Findings of fact supporting the determination;
  - d. Conclusions regarding the application of the University's code of conduct to the facts;
  - e. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the University imposes on the respondent, and whether remedies designed to restore or preserve equal access to the University's education program or activity will be provided by the University to the complainant; and
  - f. The University's procedures and permissible bases for the complainant and respondent to appeal.
4. If a determination is made that a non-employee respondent violated the policy, the decision-makers will determine appropriate sanctions for respondent.
  5. If a determination is made that an employee-respondent violated the policy, the matter shall be referred to the Director of Human Resources for appropriate process and decision.
  6. If a determination is made that a respondent violated the policy, the University (likely Title IX Coordinator) will provide remedies to the complainant.
    - Remedies may be a continuation of supportive services
    - May wish to identify possible remedies (they may have a disciplinary effect on respondent)

### **Sanctions for Student Respondents**

*Sanctions imposed upon students who are determined to have violated this policy may include a variety of institutional responses or requirements, including, but not limited to, the following: warning, removal from campus housing, not being allowed to represent the University in volunteer or paid*

*work, restitution, required attendance at educational programs, required assessment or counseling, restriction of privileges, probation, suspension and/or expulsion, and any other sanctions listed in the Code of Student Conduct or deemed appropriate under the circumstances.*

### **Sanctions for Employee Respondents**

*Appropriate sanctions for Viterbo faculty, staff or administrators deemed to have violated this policy include, but are not limited to a disciplinary warning, unpaid suspensions, suspension of promotion and salary increments, loss of prospective benefits, major fines, reduction in salary, suspension from service, suspension or withdrawal of privileges, demotion and/or termination of employment, or any other available sanctions as specified by the Viterbo Personnel Policies Handbook.*

*If the decision-maker(s) determines that it is more likely than not that a Viterbo employee has violated this Policy and that dismissal may be an appropriate sanction, the matter will be referred to the President, or the President's designee, for appropriate process and decision, which shall be determined and administered in a manner consistent with the Viterbo Personnel Policies Handbook.*

*In such cases, dismissal for cause may only be effectuated in accordance with Viterbo Personnel Policies Handbook, including use of the preponderance of the evidence standard. The decision-maker(s) or the decision-maker's designee may impose appropriate sanctions short of dismissal, in a manner consistent with the Viterbo Personnel Policies Handbook.*

### **Remedies to Benefit Complainants**

*If a determination was made that the Respondent was responsible for Title IX sexual harassment, the University may provide the Complainant with remedies designed to restore or preserve equal access to the University's education program or activity, including providing a safe educational or working environment. Such remedies may include the continuation or addition of "supportive measures." Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.*

## XI. APPEAL

The University shall offer both parties an appeal from a determination regarding responsibility or from a dismissal of a formal complaint.

1. Parties may request an appeal.

*The determination of the decision-maker(s) may be appealed as provided below. In the event that no appeal is filed within the time periods prescribed below, the decision will be final.*

1. *Following the communication of the decision by the decision-maker(s), the Complainant or Respondent may request an appeal of the decision.*
  2. *The request for an appeal must be submitted in writing to the Title IX Coordinator within five (5) business days of receiving the notice of outcome. If an appeal is filed, the determination regarding responsibility becomes final on the date that the University provides the parties with the written determination of the result of the appeal, if an appeal is filed. Failure to file a timely appeal constitutes a waiver of any right to an appeal. If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely.*
2. Submitted to Title IX Coordinator in writing within 5 days of receiving decision.
3. Basis for appeal is limited:
  - a. Procedural irregularity that affected the outcome of the matter;
  - b. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome of the matter; and
  - c. The Title IX Coordinator, investigators, or decision-makers have a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.
4. The appeal decision-maker will:
  - a. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

- b. Give both parties five (5) days (which may be extended for good cause) to submit a written statement in support of, or challenging, the outcome.
- c. Issue a written decision describing the result of the appeal and the rationale for the result; and

*If the appeal decision-maker determines one of the above grounds for appeal is satisfied, the matter may be returned for further review of the investigation report by a new decision-maker(s). If the grounds for appeal relate to the investigation, or warrant additional investigation, the new decision-maker(s) may refer the matter to further investigation before proceeding. Upon further review, the new decision-maker(s) shall utilize the same process as required for all Formal Complaints under this Policy.*

*If there is not adequate reason to believe that one or more grounds for appeal has been satisfied, the appeal decision-maker may dismiss the appeal. This decision is final and is not appealable.*

- d. Provide the written decision simultaneously to both parties within 10 days of the filing of the appeal.
5. The appeal decision is final and is not appealable.

## **XII. ADDITIONAL REQUIREMENTS**

### **A. Timeframe**

The conclusion of the grievance process, including any appeal, shall be done in a reasonably prompt timeframe, but no more than ninety (90) days from the date the formal complaint is received.

### **B. Additional Requirements and Considerations.**

1. Retaliation. Under the Title IX regulations, no school or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the Title IX regulations, 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 the regulations.

- a. 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 the Title IX regulations, constitutes retaliation.
  - b. The exercise of rights protected under the First Amendment does not constitute prohibited retaliation.
  - c. Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.
  - d. Complaints alleging retaliation may be filed according to the **grievance procedures** for general sex discrimination claims that the school has adopted.
2. Recordkeeping. Schools must maintain the following records for a period of seven years after the conclusion of procedures and the implementation of sanctions and/or remedies, or in the case of a complainant or respondent who is a minor, until the expiration of the longest statute of limitations for filing a civil suit applicable to any allegation:
- a. In connection with a school response to any report or formal complaint of sexual harassment, the school must create and maintain a record of any actions, including any supportive measures, which the school takes in response to the report or complaint. In each instance:
    - i. The school must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity.
    - ii. If a school does not provide a complainant with supportive measures, then the school must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
  - b. In connection with each formal complaint of sexual harassment that is filed, a school must maintain a record of:

- i. Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the school's education program or activity;
  - ii. Any audio or audiovisual recording or transcript from a hearing;
  - iii. Any appeal and the result of an appeal; and
  - iv. Any informal resolution and the result therefrom.
  - v. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. (As mentioned above, a school must also make these training materials publicly available on its website.)
- 3. Confidentiality. Under section 106.71(a) of the Title IX regulations, a school must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, **except as provided below**:
  - a. Exceptions to confidentiality:
    - i. As may be permitted by the FERPA statute, 20 U.S.C. 1232g, or the FERPA regulations, 34 CFR part 99; or
    - ii. As required by law; or
    - iii. To carry out the purposes of the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.
  - b. As mentioned above, schools must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school to provide the supportive measures. (This provision appears in the definition of "supportive measures" within section 106.30(a) of the Title IX regulations.)
  - c. A school cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other

recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party's voluntary, written consent to do so for a Title IX grievance process. If a party is not an "eligible student," as defined under FERPA (e.g., the party is a minor), then the recipient must obtain the voluntary, written consent of a parent or authorized guardian. (See section 106.45(b)(5)(i)).

4. First Amendment. In cases of alleged harassment, the First Amendment must be considered if issues of speech or expression are involved. First Amendment rights may apply to the rights of complainants, respondents, or third parties.
5. Harmonization with other laws. Consider the interplay with other laws and codes. Interaction when claims also involve other protected classes (race, disability, etc.), other state laws, interaction with overlapping federal laws (Title VII, Clery Act, VAWA), and interaction with student code of conduct.