

MARSHALL UNIVERSITY BOARD OF GOVERNORS

Rule No. GA-3

DISCRIMINATION, HARASSMENT, SEXUAL HARASSMENT, SEXUAL & DOMESTIC MISCONDUCT, STALKING, AND RETALIATION POLICY – INCLUDING TITLE IX

Section 1: General.

1.1 Scope & Purpose: Marshall University (“University”) is committed to fostering a diverse and inclusive culture by promoting diversity, inclusion, equality, intercultural and intercommunity outreach. Accordingly, the University does not discriminate on the basis of race, color, national origin, ancestry, age, physical or mental disability, marital or family status, pregnancy, veteran status, service in the uniformed services (as defined in state and federal law), religion, creed, sex, sexual orientation, genetic information, gender identity, or gender expression in the administration of any of its educational programs, activities, or with respect to admission or employment. This Policy sets forth how discrimination, harassment, sexual harassment, sexual and domestic misconduct, certain consensual relationships, stalking, and retaliation will be addressed by Marshall University.

1.2 Authority: W. Va. Code §§ 18B-1-6, 18B-2A-4; p r o n

Coordinator or any official of the University who has authority to institute corrective measures on behalf of the University. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the University with actual knowledge is the Respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has the authority to institute corrective measures on behalf of the University. “Notice” as used in this paragraph includes but is not limited to a report of sexual harassment to the Title IX Coordinator.

- 2.2 “Complainant” means, for purposes of this Policy, an individual who is alleged to be the victim of conduct that could constitute sexual harassment (under Title IX) or other prohibited conduct that is reported to the University. Provided that, where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a Complainant or otherwise a party under this part or under Grievance Procedures.
- 2.3 “Reporter” means, for purposes of this Policy, any individual that makes or files a complaint about prohibited conduct under this Policy. The Reporter may be the Complainant, any other person, or the University.
- 2.4 “Respondent” means, for purposes of this Policy, an individual who has been reported to be the perpetrator of conduct prohibited by Section 3. Any “individual” can be a Respondent, whether such individual is a student, faculty member, another employee of the University, or other person with or without any affiliation with the University.
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Section 3: Defining and Recognizing Prohibited Conduct.

3.1. General. The University prohibits Discrimination, Harassment, Sexual Harassment, Sexual Misconduct, Domestic Misconduct, Stalking, and Retaliation as defined in this Policy (collectively referred to as “prohibited conduct”) by or against any member of the University community.

3.1.1 Jurisdiction.

3.1.1.1 – Jurisdiction for Title IX Complaints.

The University will address prohibited “Sexual Harassment” in its programs and activities, including locations, events, or circumstances over which the University exercises substantial control over both the Respondent and the Complainant and the context in which the alleged sexual harassment occurs. Locations include buildings owned or controlled by officially recognized student organizations.

Jurisdiction for Title IX Complaints does not apply if:

- (1) the conduct alleged in the formal complaint would not constitute sexual harassment as defined in this policy, even if proved;
- (2) the conduct alleged did not occur in the University’s education program or activity; or

of absence, or periods of dismissal. There is no time limit on making a report or submitting a formal complaint to the Title IX Coordinator; however, if the Respondent is no longer a student or employee and/or if significant time has passed, the ability to investigate, respond, and provide remedies may be limited or not possible.

Acting on reports or formal complaints significantly impacted by the passage of time is at the discretion of the Title IX Coordinator, who may document allegations for future reference, offer supportive measures and/or remedies, and/or engage informal action as appropriate. Marshall University will typically apply the policy in place at the time of the alleged misconduct and the procedures in place at the time a formal complaint is submitted by the complainant or signed by the Title IX Coordinator.

3.1.1.2 – Jurisdiction for Non-Title IX Complaints.

This prohibition applies to other conduct for which jurisdiction under Title IX does not apply that occurs on University premises or in connection with a University education program or activity; off-campus conduct that unreasonably interferes with the educational or orderly operation of the University community, its mission, or its objectives as determined by a reasonable person; any off campus conduct that, in light of all of the facts and circumstances, would endanger the health and safety of the University community. As a result, any individual found to have committed these acts against another is subject to appropriate disciplinary action.

3.2 Discrimination.

3.2.1 “Discrimination” means conduct that is based upon an individual’s race, color, national origin, ancestry, age, physical or mental disability, marital or family status, pregnancy, veteran status, service in the uniformed services (as defined in state and federal law), religion, creed, sex, sexual orientation, genetic information, gender identity, or gender expression and excludes an individual from participation, denies the individual the benefits of, treats the individual differently or otherwise adversely affects a term or condition of an individual’s employment, education, living environment or participation in a University program or activity. This includes failing to provide reasonable accommodation, consistent with state and federal law, to persons with disabilities. It does not, however, include programs or activities specifically exempt by law. *See, e.g.*, 20 U.S.C. § 1681(a) (2015).

3.3 Harassment and Sexual Harassment.

3.3.1 “Harassment” means conduct that creates a hostile environment, as defined below, and is based upon an individual’s race, color, national origin, ancestry, age, physical or mental disability, marital or family status, pregnancy, veteran status, service in the uniformed services (as defined in state and federal law), religion, creed, sex, sexual orientation, genetic information, gender identity, or gender expression. Harassment may take various forms, including, but not limited to, name-calling, graphic or written statements (including the use of social media, text messages, e-mail, or other similar forms), or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not necessarily have to

include intent to harm, be directed at a specific target, or involve repeated incidents.

- 3.3.2 “Hostile Environment” means a situation where an individual is subjected to any conduct based on the reasons set forth in Section 3.3.1 and that conduct is sufficiently severe or pervasive, or so objectively offensive, so as to unreasonably interfere with an individual’s educational experience, work or academic performance or deny or limit the individual’s ability to participate in or benefit from the University’s programs, services, opportunities, or activities.

A hostile environment can be created by anyone involved in a University program or activity (e.g., administrators, faculty members, students, and even campus guests). Mere offensiveness is not enough to create a hostile environment. Although repeated incidents

3.3.4 “Title IX Sexual Harassment” means conduct on the basis of sex that satisfies one or more of the following:

3.3.4.1 An employee of the University conditioning the provision of aid, benefit, or service of the University on an individual’s participation in unwelcome sexual conduct (i.e., *quid pro quo*); or

3.3.4.2 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 University’s education program or activity; or

3.3.4.3 “Sexual assault” as defined in the Clery Act – 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in VAWA 34 U.S.C. 12291(a)(8), or “stalking” as defined in VAWA 34 U.S.C. 1229(a)(30).

3.3.5 Comments or communications may be verbal, written, or electronic. Behavior does not need to be directed at or to a specific individual in order to constitute sexual harassment but may consist of generalized unwelcome and inappropriate comments based on sex or gender stereotypes.

3.3.6 Determination of whether alleged conduct constitutes sexual harassment requires consideration of all the circumstances, including the context in which the alleged incidents occurred.

3.4 Sexual Misconduct.

3.4.1.1 “Sexual Misconduct” means any act of a sexual nature perpetrated against an individual without effective consent or when an individual is unable to freely give consent. Effective consent is defined in 3.4.4 of this Policy. Sexual misconduct includes, but is not limited to:

3.4.1.2 Attempted or completed intercourse or penetration (anal, oral, or vaginal), however

Reporting system. A sex offense is any act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

3.4.2.1

agreed upon sexual activity. In the absence of mutually understandable words or actions, it is the responsibility of the initiator, that is, the person who wants to engage in the specific sexual activity, to make sure that they have consent from their partner(s). Consent is mutually understandable when a reasonable person would consider the words or actions of the parties to have manifested a mutually understandable agreement between them to do the same act, in the same way, at the same time, with each other. Relying solely upon non-verbal communication can lead to miscommunication. It is important not to make assumptions. If confusion or ambiguity on the issue of consent arises at any time during the sexual interaction, it is important that the initiator stops and verbally clarifies the other individual's willingness to continue.

3.4.4.1 Consent may not be inferred from silence, passivity, or lack of active resistance alone.

3.4.4.2 A current or previous dating or sexual relationship (or the existence of such a relationship with anyone else) may not, in itself, be taken to imply consent.

3.4.4.3 Consent cannot be implied or inferred by attire or from purchases made, such as buying dinner or spending money on a date.

3.4.4.4 Consent to one type of sexual act may not, in itself, be taken to imply consent to another type of sexual act.

3.4.4.5 Consent expires. Consent lasts for a reasonable time, depending on the circumstances.

3.4.4.6 Consent to sexual activity may be withdrawn at any time as long as the withdrawal is communicated clearly; upon clear communication, all sexual activity must cease.

3.4.4.7 Consent which is obtained by use of deception, fraud, or force, whether that force is physical force, threats, intimidation, or coercion, is ineffective consent. Intimidation or coercion is determined by reference to the reasonable perception of a person found in the same or similar circumstances.

3.4.4.8 Consent may never be given by:

3.4.4.8.1 Minors under the age of 16

3.4.4.8.2 Mentally disabled persons

3.4.4.8.3 Persons who are incapacitated as a result of alcohol or other drugs or who are unconscious or otherwise physically helpless. Incapacitation means being in a state where a person lacks the capacity to appreciate the nature of giving consent to participate in sexual activity.

3.4.4.9 One may not engage in sexual activity with another whom one knows, or should reasonably have known, is incapacitated as a result of alcohol or other drugs.

3.4.4.10 The use of alcohol or other drugs can have unintended consequences. Alcohol or other drugs can lower inhibitions and create an atmosphere of confusion over whether consent is freely and effectively given. The perspective of a reasonable person will be the basis for

determining whether one should have known about the impact of the use of alcohol or drugs on another's ability to give consent. Being intoxicated or high does not diminish one's responsibility to obtain consent and is never an excuse for sexual misconduct.

3.4.5 "Forcible Compulsion" means (a) physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or (b) threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to oneself or another person or in fear that oneself or another person will be kidnapped.

3.4.6 "Sexual Exploitation" means taking non-consensual, unjust, or abusive sexual advantage of another for one's own advantage or benefit; or to benefit or advantage anyone other than the one being exploited. Sexual exploitation encompasses a wide range of behaviors which may include, but are not limited to:

3.4.6.1 Inducing incapacitation with the intent to rape or sexually assault a student or other individual;

3.4.6.2 Non-consensual video or audio-recording of sexual activity;

3.4.6.3 Allowing others to observe a personal act of consensual sex without knowledge or consent of the partner;

3.4.6.4 Engaging in voyeurism;

3.4.6.5 Knowingly transmitting a sexually transmitted disease, including HIV, to a student or other individual;

3.4.6.6 Prostituting a student or other individual (e.g., personally gaining money, privilege, or power from the sexual activities of another individual)

3.5 Domestic Misconduct.

3.5.1. "Domestic Misconduct" means "Domestic Violence" and "Dating Violence" as defined below.

3.5.2 "Domestic Violence" means a felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the alleged victim, by a person with whom the alleged victim shares a child in common, by a person who is cohabitating with or who has cohabitated with the alleged victim as a spouse, by a person similarly situated to a spouse of the alleged victim under the domestic or family laws of the State of West Virginia, by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the State of West Virginia. The term spouse or intimate partner of the victim includes a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in the relationship.

"Domestic Violence" under the laws of the State of West Virginia, which is also prohibited by this Policy, means: (i) unlawfully and intentionally making physical contact of an insulting or provoking nature with one's family or household member(s); (ii) unlawfully and intentionally causing physical harm to one's family or household member(s); (iii)

3.7 Consequences & Corrective Action.

Violators of this Policy are subject to appropriate disciplinary action that may include sanctions such as warning, suspension, or discharge of an employee, suspension, or expulsion of a student in accordance with the Student Code of Conduct, or other action depending on the particular circumstances. In addition, prohibited conduct that constitutes a criminal law violation will be referred to the appropriate authorities for prosecution.

Furthermore, although conduct may not violate this Policy, it may still be prohibited by the University under a different pol

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Section 4: Reports of Misconduct and Complaints.

4.1 Coordinator.

The President or the President's designee shall appoint an administrator to act as the University's Coordinator to handle all reports of prohibited conduct and complaints under this Policy, including acting as the University's Title IX Coordinator. The Coordinator will oversee all complaints filed under this Policy generally and identify and address any patterns or systemic problems that arise during the review of such complaints. The Coordinator is further responsible for coordination of training, education, communications, and administration of complaint procedures for faculty, staff, students, and other members

Marshall University Office of Equity Programs/Title IX Staff
Marshall University Counseling Center Staff
Marshall University Women's & Gender Center Staff
Marshall University Violence Prevention and Response Program Staff
Marshall University Psychology Clinic Staff

- 4.2.4 The U.S. Department of Education's Office for Civil Rights (OCR) enforces, among other statutes, Title IX of the Education Amendments of 1972. Title IX protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance. A Complainant may choose to make a report to the OCR at any time by contacting:

Philadelphia Office
Office of Civil Rights, U.S. Department of Education
The Wanamaker Building
100 Penn Square East, Suite 515
Philadelphia, PA 19107-3323

Telephone: 215-656-8541
FAX: 215-656-8605; TDD: 800-877-8339
Email: OCR.Philadelphia@ed.gov
<http://www2.ed.gov/about/offices/list/ocr/complaintintro.html>

4.3 Filing a Complaint.

Any member of the University community who believes one has been subject to, has witnessed, or is aware of any of the prohibited conduct set forth in Section 3 may file a complaint in any manner set forth in the applicable procedure.

4.4 Procedure for Responding to Complaints.

The President or the President's designee(s) shall formulate a complaint procedure to investigate and respond to all complaints regarding alleged misconduct in violation of this Policy. In all cases, complaints will be handled in such a manner to achieve a prompt and equitable resolution. Further, the University will take the appropriate steps to end the misconduct, prevent any further misconduct or retaliation, remedy the effects of misconduct, and eliminate any hostile environment that has been created. Any investigation resulting from a complaint will be separate from and in addition to any criminal investigation that may result.

4.5 Disclosure and Confidentiality.

The University respects the privacy of those reporting prohibited conduct and will endeavor to respect requests for confidentiality to the extent permissible by law. However, the University has certain legal obligations to address this conduct and to prevent its recurrence and, as a result, cannot guarantee confidentiality to a complainant in all cases. In determining whether, an individual's request for confidentiality that could preclude a

meaningful investigation or potential discipline of the alleged perpetrator, the University may consider a range of factors, including: whether there have been other sexual violence complaints about the same alleged perpetrator; whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence; whether the alleged perpetrator threatened further sexual violence or other violence against the complainant or others; whether the sexual violence was committed by multiple perpetrators; whether the complainant's report or allegation reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group; whether the sexual violence was perpetrated with a weapon; the age of the complainant subject to the sexual violence; and whether the University possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence). Pursuant to Title IX Regulations, the University must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. That said, as set forth in Section 4.2.3., there are places where a victim can receive confidential services, and the complaint procedure must clearly identify additional resources, if any, where a victim can go to receive such services without having to risk confidentiality.

4.6 Dishonest or Frivolous Complaints.

If a party is found to have intentionally or maliciously been dishonest, reckless, or frivolous in making allegations of a violation under this Policy, that party shall be subject to appropriate disciplinary action.

Section 5: Retaliation Prohibited.

5.1 The University or other person may not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, constitutes retaliation. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination.

5.2. The exercise of rights protected under the First Amendment does not constitute retaliation
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constitute retaliation prohibited under paragraph 5.1, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.