

RP-2.1.8 Sexual Misconduct Policy

A. Statement of Policy

1. The University of Nebraska does not discriminate based on race, color, ethnicity, national origin, sex, pregnancy, sexual orientation, gender identity, religion, disability, age, genetic information, veteran status, marital status, and/or political affiliation in the education program or activity that the University operates. The University is required by Title IX of the Education Amendments of 1972 (Title IX) and the accompanying regulations not to discriminate in such a manner. This requirement not to discriminate extends to admission and employment. Inquiries about the application of Title IX and the accompanying regulations may be referred to a University Title IX Coordinator or the Assistant Secretary for Civil Rights of the Department of Education or both.
2. Beginning with the University of Nebraska charter in 1869, Nebraska law has provided that no person shall be deprived of the privileges of this institution because of sex. Discrimination on the basis of sex is also prohibited by federal law. All members of the University community are expected to conduct themselves in a manner that maintains an environment free from sexual misconduct. Sexual misconduct, which includes domestic violence, dating violence, sexual harassment, sexual assault, sexual exploitation, and stalking, is unacceptable behavior under University of Nebraska policy and against the law. The University of Nebraska has programs to promote awareness of and to help prevent sexual misconduct, and to assist members of the university community who are affected by such behavior.
3. Sexual harassment, a type of sex discrimination, is specifically prohibited by this Policy as well as federal laws such as Title VII of the Civil Rights Act of 1964 (Title VII) and Title IX.
 - a. Under Title IX, sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
 - i. An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
 - ii. 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
 - iii. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).
 - b. Under Title VII, which applies to employees only, sexual harassment also means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment, sufficiently severe or pervasive to alter the conditions of the individual's employment and create an abusive working environment.

B. Scope of Policy

1. This Policy applies to all members of the University of Nebraska community regardless of sexual orientation or gender identity, and to all education programs and activities under the jurisdiction of the University of Nebraska.
2. For the purpose of complaints alleging discrimination under Title IX, education program or activity includes locations events, or circumstances over which the University exercises substantial control over both the Respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.
3. The President and Chancellors shall implement procedures to address the rights of all individuals involved in cases of alleged sexual misconduct.

C. Prohibited Conduct Definitions

For purposes of addressing complaints of sexual misconduct against or by University students and employees, the following uniform definitions shall be used by the University.

1. "Dating violence" means violence committed by a person
 - a. Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - b. Where the existence of such relationship shall be determined based on a consideration of the following factors:
 - i. The length of the relationship
 - ii. The type of relationship
 - iii. The frequency of interaction between the persons involved in the relationship.
2. "Domestic violence" includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse or the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Domestic violence includes domestic assault. Under Nebraska law, a person commits domestic assault if the person (i) intentionally and knowingly causes bodily injury to their intimate partner; (ii) threatens an intimate partner with imminent bodily injury; or (iii) threatens an intimate partner in a menacing manner.

Under Nebraska law an "intimate partner" means a spouse; a former spouse; persons who have a child in common whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship.

3. "Retaliation" means intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by the Policy or because the individual has made a report or complaint, testified, assisted, or participated or refused to

participate in any manner in an investigation, proceeding, or hearing under this Policy.

4. "Sexual assault" means an offense that meets the definition of rape, fondling, incest or statutory rape as used in the FBI's Uniform Crime Reporting system. A sex offense is any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
 - a. Rape: the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
 - b. Fondling: the touching of the private parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of the victim's age or because of the victim's temporary permanent mental incapacity.
 - c. Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
 - d. Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent.
5. "Sexual exploitation" includes, but is not limited to: prostituting another person; nonconsensual visual or audio recording of sexual activity; non-consensual display or distribution of photos, images or information of an individual's sexual activity or intimate body parts; non-consensual voyeurism; coercing someone against their will to engage in sexual activity, or; knowingly transmitting sexually transmitted disease (STD) without disclosing STD status.
6. "Sexual harassment" means conduct on the basis of sex that satisfies one or more of the following:
 - a. An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
 - b. 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;
 - c. Sexual assault (see definition herein);
 - d. Dating violence (see definition herein);
 - e. Domestic violence (see definition herein); or
 - f. Stalking (see definition herein)

To be considered sexual harassment for the purposes of Title IX, the conduct must meet the additional requirements of occurring in the University's education program or activity and against a person in the United States.

For employees, sexual harassment also means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment, sufficiently severe or pervasive to alter the conditions of the individual's employment and create an abusive working

environment.

7. "Sexual misconduct" includes dating violence, domestic violence, rape, sexual assault, sexual harassment, sexual exploitation, and stalking.
8. "Stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - a. fear for their safety or the safety of others; or
 - b. suffer substantial emotional distress.

D. Other Definitions

1. "Actual knowledge" means notice of sexual harassment or allegations of sexual harassment to the University's Title IX Coordinator or any official of the University who has 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. "Bodily injury" shall mean physical pain, illness, or any impairment of physical condition.
3. "Consent" is a freely and affirmatively communicated willingness to participate in particular sexual activity or behavior, expressed either by words or clear, unambiguous actions.
 - a. Consent can be withdrawn at any time, as long as the withdrawal of consent is clearly communicated by words or actions.
 - b. Consent cannot be coerced or compelled by force, threat, deception, or intimidation.
 - c. Consent cannot be given by someone who is incapacitated or does not have the legal capacity to consent, as defined below in the definition of "incapacitated."
 - d. Consent cannot be assumed based on silence, the absence of "no" or "stop," the existence of a prior or current relationship, or prior sexual activity.

There are some persons who Nebraska law presumes are incapable of consenting to sexual contact or penetration as defined by Nebraska law by an actor by reason of their age. Under Nebraska law an actor nineteen years of age or older may not subject a person under the age of sixteen years of age to sexual penetration, or a person under fifteen years of age to sexual contact.

4. "Complainant" means any individual who is alleged to be the victim of conduct that could constitute sexual misconduct. A Complainant may also be referred to as a "party."
5. "Crimes of Violence" are those offenses that involve force or threat of force, including murder and non-negligent manslaughter, rape, robbery, and aggravated assault.
6. "Force or threat of force" means (a) the use of physical force which overcomes the person's resistance or (b) the threat of physical force, express or implied, against the person or a third party that places the person in fear of death or in fear of serious personal injury to the person or a third party where the person reasonably believes that the actor has the present or future ability to execute the threat.

7. "Formal Complaint" means a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual misconduct, including sexual harassment under Title IX, against a Respondent and requesting that the University investigate the allegation of sexual misconduct. As used in this paragraph, 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. Where the Title IX Coordinator signs a Formal Complaint, the Title IX Coordinator is not a Complainant or otherwise a party under this Policy and will comply with the requirements of this Policy.
8. "Incapacitated" means an individual is unable to understand the facts, nature, extent, or implications of the situation due to drugs, alcohol, a mental disability, being asleep, unconscious or in any other state where the individual is unaware that sexual contact is occurring, or based on their age (pursuant to Nebraska law). With respect to alcohol and drugs, intoxication and/or impairment is not presumptively equivalent to incapacitation. Consent does not exist when the individual initiating sexual activity knew or should have known of the other individual's incapacitation.

There are some persons who Nebraska law presumes are incapable of consenting to sexual contact or penetration as defined by Nebraska law by an actor by reason of their age. Under Nebraska law an actor nineteen years of age or older may not subject a person under the age of sixteen years of age to sexual penetration, or a person under fifteen years of age to sexual contact.

9. "May" is used in the permissive sense.
10. "Member of the University community" includes any individual who is a student, staff or faculty member, University official, or any other individual employed by, or acting on behalf of, the University. An individual's status in a particular situation shall be determined by the Investigator of Title IX Coordinator.
11. "Official with Authority" means an official of the University who has authority to institute corrective measures on behalf of the University.
12. "Private body parts" means the genital area, groin, inner thighs, buttocks, or breasts.
13. "Preponderance of the Evidence" is the standard of evidence the University uses to determine whether the Respondent violated this Policy. A finding of responsibility by a preponderance of the evidence means that it is more likely than not, based on all the reasonable evidence and reasonable inferences from the evidence, that the Respondent violated this Policy.
14. "Remedies" are measures designed to restore or preserve equal access to the University's education program or activity. Such remedies may include the same supportive measures that are already being provided to Complainant; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent.
15. "Respondent" means an individual who has been reported to be the perpetrator of conduct that could constitute sexual misconduct. A Respondent may also be referred to as a "party."
16. "Serious personal injury" means great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.
17. "Shall" is used in the imperative sense.

18. "Supportive measures" means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a Formal Complaint or where no Formal Complaint has been filed. Such measures are designed to restore or preserve equal access to the University's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the University's educational environment, or deter sexual harassment. 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. The University will 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 University to provide the supportive measures.
19. "Title IX Coordinator" is a person designated by the University to coordinate the University's effort to comply with its responsibilities under Title IX. The Title IX Coordinator oversees the University's gender equity work to ensure compliance with Title IX, including its policies and procedures, education/prevention efforts, and training. The Title IX Coordinator reviews information about sexual misconduct to identify and address any patterns or systemic problems that arise during the review of such complaints. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment) to the Title IX Coordinator.
20. "Past sexual behavior" means a person's sexual behavior other than when the sexual misconduct is alleged to have occurred.
21. "University" means University of Nebraska.

E. Awareness, Education, Prevention, and Training Programs

1. As required by federal statutes and administrative regulations, the Office of the President and each Chancellor shall publicize and conduct ongoing programs for new students and employees and other members of the University community to promote awareness of the problems caused by sexual misconduct and to help prevent and attempt to reduce the risk of the occurrence of sexual misconduct. These programs shall include instruction on safe and positive options for bystander intervention that may be carried out by individuals to prevent harm or intervene when there is a risk of sexual misconduct being inflicted on another person. Training shall be provided to all persons designated as campus security authorities and involved in responding to reports of sexual misconduct.
2. Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution will receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.
3. In addition to the training described above, Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process will receive the following training:
 - a. Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, will receive training on
 - i. The definition of sexual harassment,
 - ii. The scope of the University's education program or activity,

- iii. How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable,
 - iv. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias, and
 - b. Decision-makers will also receive training on
 - i. Any technology to be used at a live hearing and
 - ii. 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.
- 4. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of Formal Complaints of sexual harassment.
- 5. The University will make these training materials publicly available on its website, or if the University does not maintain a website the University will make these materials available upon request for inspection by members of the public.

F. Reporting Sexual Misconduct

All individuals are expected to promptly report conduct that may violate the University's Sexual Misconduct Policy to the University. Although the University does not limit the time frame for reporting sexual misconduct to promote timely and effective review, the University strongly encourages individuals to report possible sexual misconduct within one hundred and eighty (180) calendar days of the last occurrence of the concerning conduct. A report made after one hundred and eighty (180) days may make it more difficult to gather relevant and reliable information.

In addition, all individuals are expected to report conduct that may also violate criminal law to both the Title IX Coordinator and the local law enforcement. These processes are not mutually exclusive and both may happen simultaneously or at different times.

1. Any University student, employee, or other individual who seeks to report may contact the:
 - a. Title IX Coordinator:
 - i. Any person may report sex discrimination, including sexual misconduct (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual misconduct), 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. University Police or Public Safety for assisting in filing a criminal complaint and preserving physical evidence; and/or
 - c. Local law enforcement to file a criminal complaint.
2. Additionally, reports may be made to the Department of Education's Office for Civil Rights regarding an alleged violation of Title IX by visiting www2.ed.gov/about/offices/list/ocr/complaintintro.html or calling 1-800-421-3481.

G. Confidentiality

The University shall 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 misconduct, any Complainant, any Respondent, and any witness, except as may be permitted by the Family Educational Rights and Privacy Act (FERPA) or as required by law, or to carry out the purposes of Title IX, including conducting any investigation, hearing, or judicial proceeding arising thereunder. The University may be required to share information with other individuals in accordance with FERPA, Title IX, or other applicable law, including lawfully issued subpoenas in criminal, administrative, and civil matters.

H. Resources

1. The President and Chancellors shall disseminate information about University programs and resources available to assist persons who have been subjected to sexual misconduct and about agencies outside the University located throughout the state that provide related services.
2. In addition to identifying resources available to provide counseling, advocacy, and medical treatment, University sexual misconduct programs must provide instruction on the importance of preserving evidence as proof of sexual misconduct, and on the availability of protection orders and other remedies that may be afforded to persons who have been subjected to sexual misconduct.
3. A person who has or had been involved in a dating relationship, or who has or had a marital, shared residential, or familial relationship with the actor may obtain either a harassment or domestic protection order. Persons who have not been involved in a dating relationship may qualify for a harassment protection order. Violation of harassment or domestic protection orders issued by courts of this or another state or tribal courts can result in a violator's arrest and subject the violator to criminal penalties.
4. The Protection from Domestic Abuse Act makes the Nebraska Department of Health and Human Services (DHHS) responsible to provide victims of domestic abuse emergency services, support programs, limited medical help and legal assistance in obtaining a protection order.

I. Supportive Measures

The University will offer supportive measures to Complainants whether or not a Formal Complaint is filed. Supportive measures are available for both the Complainant and Respondent.

J. Administrative Leave and Emergency Removal

The University may remove a Respondent from the University's education program or activity on an emergency basis. The University may place a non-student employee Respondent on Administrative Leave or the equivalent during the pendency of the procedures. A Respondent will be presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

K. University Disciplinary Procedures

1. Investigations of allegations against students and employees will be addressed using the procedures implemented by the President and Chancellors.
2. The University will follow procedures before imposing any disciplinary sanctions or other actions that are not supportive measures against Respondent for sexual harassment in violation of Title IX. Nothing in this Policy prevents the University from removing a Respondent from the University's education program or activity on an emergency basis. Nothing in this Policy prevents the University from placing a non-student employee Respondent on Administrative Leave or the equivalent.
3. University internal investigations and any disciplinary or remedial actions are independent of any civil, criminal or external administrative investigation. The University may pursue an investigation, take appropriate remedial action and/or impose disciplinary sanctions against a member of the university community at the same time the individual is facing criminal charges for the same incident, even if the criminal prosecution is pending, has been dismissed, or the charges have been reduced.

L. Grievance Process for Formal Complaints

1. A Complainant may file, or a Title IX Coordinator may sign, a Formal Complaint against a Respondent requesting that the University investigate an allegation of sexual misconduct. Filing a Formal Complaint is the first step of a grievance process that determines whether the Respondent is responsible for violating the Policy. Unless a Formal Complaint is dismissed or resolved during one of the steps of the grievance process, the grievance process will include a preliminary review of the Formal Complaint, an investigation, a hearing, and the opportunity to challenge certain decisions through an appeal. Additionally, an informal resolution process may be available at any time prior to reaching a University determination regarding responsibility. If applicable, the University may initiate informal resolution or either party may request informal resolution.
2. If the Respondent is no longer a student, employee, or participant in any University-related program or activity at the time of the report, or if the conduct does not fall within the scope of the Policy, the Formal Complaint may be dismissed. The University will, however, help a Complainant identify reporting options outside the University and provide supportive measures.
3. A Respondent is presumed not responsible for the alleged conduct unless a determination regarding responsibility by a preponderance of the evidence is made at the conclusion of the grievance process by the decision maker(s).
4. Where a determination of responsibility for sexual misconduct has been made against the Respondent, the University must provide or give the Complainant remedies.
5. If a Respondent is found responsible for a violation, sanctions may be imposed. Institutional sanctions that may be imposed against students for sexual misconduct range from warning to expulsion. Institutional sanctions against employees range from warning to termination. Institutional sanctions against third parties range from loss of privileges to trespass exclusion orders.

M. Retaliation

No member of the University community may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this Policy or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this Policy. Intimidation, threats, coercion, or discrimination, including charges against an individual for Student Code of Conduct violations that do not involve sex discrimination or sexual misconduct, 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 misconduct, for the purpose of interfering with any right or privilege secured by this Policy, constitutes retaliation.

N. Record Keeping

1. The University will maintain for a period of seven years records of –
 - a. Each sexual misconduct investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required by the Policy, any disciplinary sanctions imposed on the Respondent, and any remedies provided to the Complainant designed to restore or preserve equal access to the University's education program or activity;
 - b. Any appeal and the result therefrom;
 - c. Any informal resolution and the result therefrom; and
 - d. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. The University will make these training materials publicly available on its website.
2. For each response to sexual misconduct when the University has actual knowledge, as defined by federal law, the University will create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or Formal Complaint of sexual misconduct. In each instance, the University will 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 University's education program or activity.
3. If the University does not provide a Complainant with supportive measures, then the University will document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the University in the future from providing additional explanations or detailing additional measures taken.

O. Amendments

1. The Board of Regents may amend this Policy at any time, in whole or in part. There may be times when unexpected issues arise that require prompt action or that involve errors or omissions in the Policy. Examples include a change in federal, state, or local law, the adoption of a new Campus or University policy, the repeal of an existing Campus or University policy, the discovery of a drafting error, or the failure to anticipate a particular situation or type of conduct.
2. If an unexpected issue arises, the Policy may be amended pursuant to the following procedure:

- a. First, the Provost of the University of Nebraska must approve the amendment.
 - b. Second, the General Counsel of the University of Nebraska must approve the amendment.
 - c. Third, the amendment must be reported to the Board of Regents at the next regularly scheduled meeting of the Board.
- 3. The Provost and the General Counsel may approve an amendment only if each of them separately determines that:
 - a. the content of the amendment is appropriate and reasonably necessary and
 - b. the subject matter of the amendment either requires prompt action or involves minor changes that correct errors or omissions in a manner consistent with the purpose and scope of the Policy. An amendment takes effect when both the Provost and the General Counsel have approved the amendment. The Board has the authority to rescind any such amendment when the amendment is reported to the Board.

P. Periodic Review

This Sexual Misconduct Policy will be reviewed at least every two (2) years. The Provost will initiate this review.

Reference:

BRUN, Minutes, 72, p. 36 (May 30, 2014).

BRUN, Minutes, 76, p. 28 (August 14, 2020).