FAYETTEVILLE STATE UNIVERSITY

SEXUAL MISCONDUCT

Authority: Issued by the Chancellor. Changes or exceptions to administrative policies issued by the Chancellor may only be made by the Chancellor.

Category: Students

Applies to: ● Administrators ● Faculty ● Staff ● Students

History: Revised – October 13, 2015
Revised – September 16, 2015
Revised – September 1, 2015
Revised – May 1, 2013
Approved – August 8, 2012

Related Policies/Laws: ● Title IX
● Title IX Complaints
● Sexual Harassment
● Title IX, Education Amendments of 1972 [Title 20 U.S.C. Sections 1681-1688]

Contact for Information: Title IX Coordinator - (910) 672-2325
Office of Legal Affairs - (910) 672-1145

I. INTRODUCTION

Fayetteville State University (University) is committed to fostering a safe campus environment where sexual misconduct is unacceptable and is not tolerated. In keeping with this commitment, the University has implemented this Policy, the purpose of which is to protect the rights of the person making a complaint as well as the rights of the individual who has been accused.

As a recipient of federal funds, the University is required to comply with Title IX of the Higher Education Amendments of 1972 which prohibits discrimination on the basis of sex in education programs or activities. Sexual misconduct, as defined in this Policy, is a form of sex discrimination prohibited by Title IX.

This Policy is only intended to address sexual misconduct allegations made by a student against a student. Sexual misconduct reportedly committed by faculty or staff, in the context of their employment, or sexual misconduct otherwise not covered by this Policy, will be addressed in accordance with the University’s Sexual Harassment policy. Such allegations shall be reviewed, investigated and resolved in accordance with that policy. In any case involving a complaint of sexual misconduct or sexual harassment, the University will adjudicate the complaint in a prompt and equitable manner.
II. SEXUAL MISCONDUCT

Sexual misconduct is defined as any act of a sexual nature perpetrated against an individual without effective consent (see definition below of “effective consent”) or when an individual is unable to freely give consent. Sexual misconduct includes, but is not limited to:

A. Attempted or completed intercourse or penetration (anal, oral or vaginal), however slight, with any body part or any object, by a man or a woman upon a man or a woman, without effective consent. This may include, but not be limited to vaginal penetration by a penis, object, tongue or finger; anal penetration by a penis, object, tongue or finger; and oral copulation (mouth to genital contact or genital to mouth contact).

B. Sexual touching (including disrobing or exposure) by a man or a woman upon a man or a woman, without effective consent which may include, but not be limited to any contact with the breasts, buttocks, groin, or genitals, or touching another with any of these body parts, or making another touch any of these body parts, when such touching would be reasonably and objectively offensive.

C. Sexual exploitation, defined as 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:

- Non-consensual video or audio-recording of sexual activity;
- Inducing incapacitation with the intent to rape or sexually assault another student;
- Allowing others to observe a personal act of consensual sex or non-consensual without knowledge or consent of the partner;
- Engaging in peeping tommerly (voyeurism), secretly spying on others; or
- Knowingly transmitting a sexually transmitted disease, including HIV, to another student.

D. Sexual intimidation involving the following:

- threatening to commit a sexual act upon another person;
- stalking;
- cyber-stalking; or
- Engaging in indecent exposure.

Faculty and staff with knowledge of an incident of sexual misconduct committed by a University student or experienced by a University student are obligated to report the incident to the University’s Police and Public Safety Department ("University Police"), the Title IX Coordinator or the Director of Student Conduct. The employee reporting the incident is not authorized to investigate or attempt to resolve the incident without the involvement of the Title IX Coordinator. Students with knowledge of an incident of sexual misconduct committed by or experienced by a University student are encouraged to report the incident to the University Police, the Title IX Coordinator or the Director of Student Conduct.
III. EFFECTIVE CONSENT

Effective consent is informed, freely and actively given, mutually understandable words or actions, which indicate a willingness to participate in mutually 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.

The following should also be considered in determining consent:

- Consent may not be inferred from silence, passivity or lack of active resistance alone.
- 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.
- Consent cannot be implied by attire, or inferred from the buying of dinner or the spending of money on a date.
- Consent to one type of sexual act may not, in itself, be taken to imply consent to another type of sexual act.
- Consent expires. Consent lasts for a reasonable time, depending on the circumstances.
- Consent which is obtained through the use of 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.
- Consent may never be given by any of the following:
  - Minors (under the age of 16 in North Carolina)
  - Mentally disabled persons
  - Individuals 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 an individual lacks the capacity to appreciate the nature of giving consent to participate in sexual activity.
- An individual may not engage in sexual activity with another who the individual knows, or should reasonably have known, is incapacitated as a result of alcohol or other drugs. The perspective of a reasonable person will be the basis for determining whether an individual 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 an individual’s responsibility to obtain consent and is never an excuse for sexual misconduct.

IV. SEXUAL ASSAULT AMNESTY

The University will consider granting amnesty to students who may have violated the University’s prohibition against having alcohol on campus or under-age drinking at the same time of the incident when s/he became a victim of sexual misconduct. Therefore, the University will consider not filing charges against a student who reports that the student was under the influence of alcohol at the time the student became a victim of sexual misconduct.
V. REPORTING INCIDENTS OF SEXUAL MISCONDUCT

The University encourages the reporting of incidents of sexual misconduct. Reports may be made by a student who believes that s/he has been the victim of sexual misconduct or an individual who has information related to an incident of sexual misconduct.

A student who believes that s/he has been the victim of an alleged act of sexual misconduct committed by a student may file a criminal complaint with the appropriate law enforcement agency. The student may also file a complaint with the Title IX Coordinator or request a hearing before the Sexual Misconduct Hearing Panel. The student may pursue the criminal and University processes simultaneously. Regardless of the option chosen, the University will initiate an administrative investigation under Title IX.

The University encourages a student who has been the victim of sexual misconduct to seek medical assistance immediately. Students are also encouraged to preserve any evidence that may be important to an investigation of a complaint of sexual misconduct including, but not limited to, physical evidence, handwritten or electronic communications such as text messages, telephone messages and emails, videos and/or photographs of the incident.

The length of time between an incident and making a report of sexual misconduct will not affect the willingness of the University to investigate the allegations or to provide support and other services to the student who is the victim of an alleged act of sexual misconduct. However, a prompt report will significantly improve the ability of University officials to conduct a full investigation and enhance the effectiveness of any criminal and/or University investigation. Individuals are therefore strongly encouraged to report incidents of sexual misconduct immediately following the occurrence.

A. Reports Made to Law Enforcement

The University encourages students to report incidents of sexual misconduct to a law enforcement agency. If the incident occurred on University owned or leased property, the University Police is the appropriate agency with which to file a report. Incidents occurring on property not owned or leased by the University should be reported to the appropriate city or county law enforcement agency. The University Police can assist with contacting the appropriate law enforcement agency.

If incidents of sexual misconduct are reported to the University Police, the University Police shall notify the individual filing the report (“Complainant”) of the Complainant’s right to file a sexual misconduct complaint with the University in addition to filing a criminal complaint. The University Police shall also report incidents of sexual misconduct involving students to the Title IX Coordinator if the student consents.

Upon receipt of such information, the Title IX Coordinator shall conduct an administrative investigation, which shall be considered distinct from the criminal investigation conducted by a law enforcement agency. The Title IX Coordinator shall not wait for the conclusion of a criminal investigation or criminal proceeding to begin the University’s administrative investigation although the Title IX Coordinator may delay temporarily the fact-finding portion of the administrative investigation while the police are gathering evidence. Once notified that the Police Department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any
charges), the Title IX Coordinator shall promptly resume and complete the fact-finding for the administrative investigation. Information obtained through the criminal investigation may be used by the Title IX Coordinator and/or the Office of the Director of Student Conduct for consideration in the University disciplinary process.

Because the standards for finding a violation of criminal law are different from the standards for finding a violation of the Code of Student Conduct, criminal investigations or reports are not determinative of whether sexual misconduct, for purposes of this Policy, has occurred. Conduct may constitute sexual misconduct under this Policy and/or the Code of Student Conduct even if a law enforcement agency lacks sufficient evidence of a crime and therefore declines to prosecute.

B. Reports Made to the University

Because sexual misconduct may constitute a violation of University policy, the University encourages students or others to report alleged sexual misconduct promptly to University officials whether or not or even if such reports have been reported to a law enforcement agency. Such incidents should be reported to the Title IX Coordinator. The following is the contact information for the Title IX Coordinator:

Ms. Patricia Bradley
Title IX Coordinator
Barber Building, Room 242
(910) 672-2325
TitleIX@uncfsu.edu

If a student or another individual reports an incident of sexual misconduct to the University or if a law enforcement agency notifies the University of an incident of sexual misconduct involving students, the Title IX Coordinator shall promptly begin an administrative investigation into the allegations. The Title IX Coordinator will meet with the student complainant as soon as possible to explain the investigatory process and inform the student of the student’s rights. If the student has not contacted the University Police prior to meeting with the Title IX Coordinator, the Title IX Coordinator shall inform the student of the student’s right to file a criminal complaint.

When meeting with the student, the Title IX Coordinator shall seek to determine if the student wishes to file a complaint. Any complaint filed must be done so in accordance with Section VI of this Policy. If the student indicates that s/he does not wish to file a complaint, the Title IX Coordinator shall inform the student that federal law requires the University to investigate and take reasonable action in response to the complaint.

If a student requests that the complaint remain confidential, the Title IX Coordinator may consider the student’s request by conducting a preliminary investigation into the sexual misconduct allegation and weighing the student’s request against the following factors:

- the seriousness of the alleged sexual misconduct;
- whether there have been other complaints of sexual misconduct against the same accused student(s); and
the accused student's right to receive information about the allegations if the information is maintained by the University as an "education record" under the Family Educational Rights and Privacy Act ("FERPA").

After conducting the preliminary investigation, if the Title IX Coordinator determines that the student’s request can be honored, the Title IX Coordinator should take all reasonable steps to respond to the complaint consistent with the request. However, a decision to maintain confidentiality will not mean that confidentiality will be absolutely guaranteed in all circumstances, but only that all efforts will be undertaken to keep information confidential consistent with applicable law.

Even if the University cannot take disciplinary action against an accused student because of the request for confidentiality or the request to not pursue an investigation, the University will nevertheless take prompt and effective action to limit the effects of the alleged sexual misconduct and to prevent its recurrence. In so doing, the Title IX Coordinator shall be authorized to issue “no-contact” orders and to seek other appropriate interim measures (e.g., changes to class schedules) to assure student safety.

VI. COMPLAINT RESOLUTION PROCESSES

The following University processes are available for a student (“Complainant”) to resolve an allegation of sexual misconduct:

- Informal resolution
- Hearing before the Sexual Misconduct Hearing Panel (“Hearing Panel”).

A. Informal Resolution

The informal resolution process provides an alternative method of addressing complaints of sexual misconduct. Although the informal resolution process is less formal than a review before the Hearing Panel, the informal resolution process is not considered as mediation. Mediation will not be considered or used to resolve sexual misconduct complaints. If the Complainant decides that a Hearing Panel review is preferable, at any time during the informal resolution process, the Complainant may terminate this process and request a hearing before the Hearing Panel.

1. Investigation

The primary objective of the informal resolution process is to resolve a sexual misconduct complaint outside of the hearing process. Thus, if the Complainant indicates that the Complainant wishes to proceed with the informal resolution process, the Title IX Coordinator shall continue the Title IX Coordinator’s investigation of the complaint to include fully interviewing the Complainant, the alleged offender (“Accused Student”) and any other parties deemed relevant to the investigation. The investigation shall also include a review of any relevant documentary evidence.
2. **Findings and Determinations**

Following the completion of the investigation, the Title IX Coordinator shall prepare a written report consisting of a statement of the charges, evidence presented, a summary of the findings and a determination (using the preponderance of the evidence standard, *i.e.*, it is more likely than not that sexual misconduct occurred) as to whether or not there has been a violation of this Policy and/or the *Code of Student Conduct.* The Complainant and the Accused Student will receive written notification of the outcome and disposition of the complaint.

**a. Finding of a Violation**

If there is a finding that a violation occurred and the Accused Student acknowledges responsibility, the Associate Vice Chancellor for Student Affairs shall determine an appropriate sanction and notify, in writing, the Accused Student and the Complainant of the sanction. If the sanction is agreed upon by both parties, the complaint shall be considered as resolved. If the Accused Student rejects the sanction, the Hearing Panel shall be convened for the sole purpose of determining a sanction.

If there is a finding of a violation and the Accused Student does not acknowledge responsibility, the Title IX Coordinator may file formal charges against the Accused Student (via the Director of Student Conduct) for a violation of this Policy. Such charges shall be filed in accordance with Section VI. B. below.

**b. Finding of No Violation**

If there is a finding that a violation did not occur or the evidence is lacking to determine whether or not a violation occurred, the Complainant may request a review before the Hearing Panel in accordance with the procedures outlined in this Policy.

3. **Complaint Resolution**

The Title IX Coordinator shall seek to have the complaint resolved within sixty (60) calendar days from the date the Complainant indicated the Complainant’s desire to resolve the complaint using the informal review process. To the extent the parties are able to achieve a satisfactory resolution of the complaint through the informal resolution process, the complaint will be considered resolved.

The fact that a complaint of sexual misconduct may be concluded at the request of the Complainant shall not preclude the filing of a complaint by appropriate University officials.
B. **Hearing Panel Review**

1. **Filing of a Written Complaint or Formal Charges**

A Complainant may file a written complaint against an Accused Student for violating this Policy. The complaint shall be filed with the Director of Student Conduct within sixty calendar (60) days of an alleged act of sexual misconduct.

The Director of Student Conduct or Title IX Coordinator may file a formal charge against an Accused Student for violating this Policy. Such filing must occur within fifteen business (15) days of the conclusion of the Title IX Coordinator’s investigation.

Upon notification of the filing of a written complaint or formal charges, the Director of Student Conduct shall notify the Accused Student, in writing, of the complaint/charges, and thereafter notify each party of the date, time and place of the hearing. The hearing date may not be scheduled for at least ten (10) business days after the Accused Student receives notice of the complaint, unless the Accused Student agrees to an earlier hearing date. Reasonable extensions of time for either party to prepare for the hearing shall be allowed. At least five (5) business days prior to the hearing, both parties shall be given the opportunity to review any written evidence that will be used at the hearing and to obtain a list of witnesses. Scheduling of hearings shall occur with priority given to the availability of students, witnesses, Hearing Panel members and/or University administrators.

2. **Hearing Panel**

The Hearing Panel shall be responsible for conducting hearings on complaints or formal charges alleging violations of this Policy. The Hearing Panel shall be composed of three (3) University employees. Members of the Hearing Panel shall be appointed by the Vice Chancellor for Student Affairs (“Vice Chancellor”), who shall also appoint the Chair of the Panel (Chair). The Vice Chancellor shall also appoint two (2) alternate members to serve on the Hearing Panel in case a standing member is unable to serve. The Vice Chancellor shall ensure that all Hearing Panel members (including the alternates) receive special training in the handling of cases involving sexual misconduct.

3. **Participation of Attorneys or Non-Attorney Advocates**

An Accused Student has the right to be represented, at the student’s own expense, by a licensed attorney or non-attorney advocate (“Advocate”) of the student’s own choosing in a hearing before the Hearing Panel. When an Advocate will be present and participating in a hearing on behalf of an Accused Student, the Complainant shall also be permitted to have an Advocate present under the same conditions.

Despite the presence of an Advocate at a hearing, the University’s process remains non-adversarial and educational in nature. Advocates may fully
participate in these proceedings only to the extent afforded to the student that is being represented. Formal rules of evidence regarding the admissibility of evidence or testimony applicable to criminal and civil causes of action do not apply. Additionally, Advocates may not delay, disrupt, or otherwise interfere with the hearing process.

The following are requirements that must be met in order for a student to be represented by an Advocate at a hearing:

a. **Notice of Representation**

A student who plans to have an Advocate participate in the hearing must notify the Director of Student Conduct of the Advocate’s intended participation at least five (5) business days prior to the hearing. This notice must specify the following:

- The identity of the Advocate;
- Whether the Advocate is a licensed attorney or a non-attorney advocate; and
- An address, telephone number, and email address where the Advocate can be reached.

b. **Release and Certification**

A student who plans to have an Advocate participate in the hearing process must present the following documentation at least five (5) business days prior to the hearing:

i. **FERPA Release** - In order for an Advocate to represent a student at a hearing or to speak with University officials regarding the student, the student must complete and submit a written authorization that meets the requirements of a valid consent as specified by the FERPA.

Even if a student executes a valid FERPA consent authorizing the Advocate to receive information or documents regarding the student, the University will at all times correspond directly with the student. It is the student’s responsibility to communicate and share information with the Advocate.

ii. **Advocate Certification** – A student who plans to have a licensed Advocate represent the student at a hearing must submit a certification form signed by the Advocate stating that the Advocate has read in their entirety and understands the following documents:

- the University’s Code of Student Conduct;
- the University’s Sexual Misconduct policy; and
• Section 700.4.1 of the UNC Policy Manual and the associated regulation.

4. Hearing Procedures

A hearing before the Hearing Panel shall be closed and shall be attended only by the following parties:

• the Accused Student and his or her witnesses and/or Advocate;
• the Complainant and his or her witnesses and/or Advocate;
• the Hearing Panel members and any other persons called by the Chair or the Director of Student Conduct;
• the Director of Student Conduct; and
• a University attorney if an Advocate of the Complainant or Accused Student is present at the hearing.

At the hearing, any real or perceived conflicts of interest between the Hearing Panel and the parties shall be disclosed. If a conflict exists, the Hearing Panel member who is the subject of the conflict shall be replaced by an alternate member.

The Complainant and Accused Student or their Advocates may submit questions to the Chair to be asked of the witnesses testifying before the Panel. In the case of witnesses other than the Complainant and Accused Student, the parties may request permission to ask questions directly. However, the Complainant and Accused Student will not be permitted to ask questions directly of one another.

Issues regarding admission of evidence or testimony, including relevancy and the reliability of the evidence and testimony shall be determined by the Chair during the hearing. Irrelevant sexual history of either party may not be discussed during the hearing. University students/employees who appear before the Hearing Panel, whether as parties to the proceedings or as witnesses, are expected to provide truthful testimony.

At the conclusion of the hearing, the Hearing Panel shall confer and make a determination as to whether the Accused Student is responsible for the alleged sexual misconduct. Evidence shall be evaluated under a “preponderance of the evidence standard,” meaning that the Accused Student shall be found responsible if, based upon the entirety of the evidence presented during the hearing, it is determined that the Accused Student “more likely than not” committed the offense in question.

The Director of Student Conduct shall seek to have the hearing completed within forty-five (45) business days of the receipt of the written complaint.
5. Sanctions

a. **Sanctions Imposed Based upon a Hearing Panel Review**

The Hearing Panel may impose any sanction that it determines to be fair and proportionate to the violation as long as such sanction is consistent with the *Code of Student Conduct*. In determining an appropriate sanction, the Hearing Panel may consider any record of past violations and the severity of such past violations.

Pursuant to the Clery Act, the University shall notify both the Complainant and the Accused Student of the outcome of any University disciplinary proceeding involving sexual misconduct. The results of the disciplinary hearing to be provided to the parties shall include the following:

- the name of the Accused Student,
- the violation charged or committed,
- the essential findings supporting the conclusion that the violation was committed,
- the sanction if any that is imposed and the duration of the sanction, and
- the date the sanction was imposed.

b. **Sanctions Imposed Based Upon an Informal Resolution**

An Accused Student, who has acknowledged responsibility for violating this Policy but does not agree with the sanction imposed by the Associate Vice Chancellor for Student Affairs may request a hearing before the Hearing Panel for the sole purpose of determining sanctions. The process outlined in Section IV.B.1. and 2. above shall not be applicable. The Hearing Panel may, however, hear any evidence the Hearing Panel considers relevant to making a determination on sanctions. A decision by the Hearing Panel on sanctions shall be made no later than ten (10) business days following the conclusion of the hearing.

6. Appeals

Either party may appeal the Hearing Panel’s decision to the Vice Chancellor for Student Affairs (“Vice Chancellor”) within ten (10) business days of the receipt of the Hearing Panel’s decision. Grounds for appeal are limited to the following:

- demonstration of a significant procedural error;
- the availability of compelling new evidence;
- demonstration of bias on the part of a member of the Panel involved in the case; or
- demonstration that the rights of the Complainant or Accused Student were violated according to the *Code of Student Conduct* and/or this Policy.
The Vice Chancellor shall notify the parties of the Vice Chancellor’s decision within ten (10) business days of the receipt of the appeal. A decision by the Vice Chancellor shall be final, except in the case of expulsion. If the Vice Chancellor determines that a student should be expelled, the Vice Chancellor must forward a recommendation for expulsion to the Chancellor. The Chancellor shall notify the parties involved of the Chancellor’s decision regarding the expulsion within ten (10) business days of the receipt of the Vice Chancellor’s recommendation.

Both the Complainant and the Accused Student shall be provided, in writing, with the results of any appeal.

VII. CONFIDENTIALITY

The University recognizes the importance of confidentiality and University officials shall respect the confidentiality and privacy of individuals reporting or accused of sexual misconduct to the extent reasonably possible. As stated previously, confidentiality may not be able to be maintained in circumstances where the law requires disclosure of information or when disclosure required by the University outweighs protecting the rights of others.

VIII. RETALIATION

Retaliation against an individual who reports or complains of sexual misconduct or who provides information in a sexual misconduct investigation or proceeding is prohibited. Alleged retaliation shall be subject to investigation and may result in disciplinary action.

IX. FALSE CLAIMS

An individual who knowingly makes false allegations or who knowingly provides false information in a sexual misconduct investigation or proceeding, shall be subject to disciplinary action.

X. RECORDS

The Title IX Coordinator shall maintain all records related to investigations into allegations of sexual misconduct until the process has been concluded. The Director of Student Conduct shall maintain all records related to a hearing before the Hearing Panel, which may include written findings of facts, transcripts, or audio recordings.
SEXUAL MISCONDUCT COMPLAINT PROCESS

COMPLAINANT

Request for Informal Resolution
(may stop this process at any time and select formal review)

Investigation by Title IX Coordinator

Findings and Conclusions

Finding of a Violation

Finding of No Violation

Complaint Resolved or Request for Hearing

Request for Hearing

Director of Student Conduct Notifies Parties and Schedules Hearing

Hearing Held

Findings and Conclusions

Sanctions (if applicable)

Appeals

Determination of Sanction