

**WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS
POLICY 44**

**POLICY REGARDING DISCRIMINATION, HARASSMENT, SEXUAL & DOMESTIC
MISCONDUCT, STALKING, AND RETALIATION**

Section 1: General.

- 1.1 Scope & Purpose: West Virginia University is committed to fostering a diverse and inclusive culture by promoting diversity, inclusion, equality, and 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 and domestic misconduct, certain consensual relationships, stalking, and retaliation will be addressed by West Virginia University.
- 1.2 Authority: W. Va. Code §§ 18B-1-6, 18B-2A-4; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 to -20; the Campus Sexual Violence Elimination Act, 20 U.S.C. § 1092, and the Violence Against Women Act of 1994, 42 U.S.C. § 13925.
- 1.3 Effective Date: June 5, 2014
- 1.4 Revision History: Originally effective June 2, 2006 with a title of “Policy and Procedure Regarding Sexual Harassment”; amended June 7, 2012 and titled changed to “Policy Regarding Sexual Misconduct”; and amended again on June 5, 2014 and title changed to “Policy Regarding Discrimination, Harassment, Sexual & Domestic Misconduct, Stalking, and Retaliation.”

Section 2: Free Expression, Academic Freedom, and Accountability.

- 2.1 Free expression and academic freedom at West Virginia University (“University”) are necessary to enable the institution to reach its goals to engage students in a challenging academic environment; excel in research, creative activity, and innovation in all disciplines; foster diversity and inclusion; advance international activity and global engagement; and enhance the well-being and the quality of life of the people of West Virginia. Consequently, while this Policy seeks to protect members of the University community from discrimination, harassment, sexual and domestic misconduct, certain consensual relationships, stalking, and retaliation, it should be read in conjunction with Board of Governors Policies 2, 10, and 11, all related to free expression and academic freedom.

- 2.2 Under the University President, the Division of Diversity, Equity and Inclusion, in conjunction with the Deans, Vice Presidents, Office of Student Conduct, and the appropriate members of the divisional campuses, shall implement and ensure compliance with this Policy.

Section 3: General Definitions.

- 3.1 “Complainant” means, for purposes of this Policy, any individual that makes or files a complaint against another individual with the University or any individual that is the victim of prohibited conduct that is reported to the University.
- 3.2 “Respondent” means, for purposes of this Policy, an individual accused of conduct prohibited by Section 4.
- 3.3 “Member of the University community,” for purposes of this Policy only, means an individual engaged in any University activity or program, whether on or off campus, or any individual lawfully on University property, including, but not limited to, any person who is a student, staff, faculty member, other University official, or a visitor.
- 3.4 “Student” means, for purposes of this Policy, an individual subject to the West Virginia University Board of Governors Policy 31, University Student Conduct and Discipline Policy.
- 3.5 “Consensual relationship” means a mutually acceptable romantic, dating, or sexual relationship between individuals.

Section 4: Defining and Recognizing Prohibited Conduct.

4.1 General.

The University prohibits discrimination, harassment, sexual misconduct, domestic misconduct, stalking, and retaliation (collectively referred to as “prohibited conduct”) by or against any member of the University community that occurs on University premises or in connection with a University sponsored activity; off-campus conduct that unreasonably interferes with the educational or orderly operation of the University community, its mission, or its objectives determined by a reasonable person; and 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 discipline.

- 4.1.1 To further this Policy, all members of the University community are expected to engage in conduct that meets professional standards; take appropriate action to prevent prohibited conduct; and avoid behavior that a reasonable person would construe as prohibited conduct.

4.1.2 Those in supervisory positions have a special responsibility to discourage prohibited conduct as well as to implement and enforce this Policy.

4.2 Discrimination

4.2.1 “Discrimination” is 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) (2014).

4.3 Harassment

4.3.1 “Harassment” is 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, as defined above, may take various forms, including, but not limited to, name-calling, graphic or written statements (including the use of cell phones or the Internet), or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.

4.3.2 “Hostile environment” means a situation where an individual is subjected to any conduct based on the reasons set forth in Section 4.3.1 and that conduct is sufficiently severe or pervasive and 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 increase the likelihood that harassment has created a hostile environment, a serious incident, even if isolated, can be sufficient to create a hostile environment.

In determining whether harassment has created a hostile environment, consideration will be made not only as to whether the conduct was unwelcome to

the person who feels harassed, but also whether a reasonable person in a similar situation would have perceived the conduct as sufficiently severe or pervasive and objectively offensive. Also, the following factors will be considered:

- (i) The degree to which the conduct affected one or more students' education or individual's employment;
- (ii) The nature, scope, frequency, duration, and location of incident or incidents;
- (iii) The identity, number, and relationships of persons involved; and
- (iv) The nature of higher education.

4.3.3 In addition to hostile environment harassment, sex-based harassment includes sexual harassment and non-sexual harassment based on stereotypical notions of what is female/feminine versus male/masculine or a failure to conform to those gender stereotypes. "Sexual harassment" means harassment that creates a hostile environment based on sex, as defined above, and also unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature on or off campus that is sufficiently severe or pervasive when (i) submission to such conduct is made either explicitly or implicitly a condition of an individual's employment or academic performance or participation in University programs or activities; or (ii) submission to or rejection of such conduct is used as the basis for employment decisions or for academic evaluation, grades, or advancement. In determining whether alleged conduct constitutes sexual harassment, consideration shall be given to the record as a whole and to the totality of the circumstances, including the nature of sexual behavior and the context in which the alleged incident(s) occurred. Sexual harassment may occur between people of the same sex or people of different sexes.

Examples of sexual harassment may include, but are not limited to, unsolicited, deliberate, or repeated touching, sexual flirtation, advances or propositions which are not welcomed and/or desired; unwelcome jokes, stories, comments, innuendos, or other sexually oriented statements which are specifically designed to embarrass or humiliate through their sexual subject matter content; unwelcome sexual communication such as graphic or degrading comments about one's gender related to personal appearance; unwelcome display of sexually explicit materials, objects or pictures in an individual's place of work or study. Importantly, these and any other examples in this Policy, are provided only for illustration purposes and all conduct must still meet the applicable definitions in the Policy before rising to the level of prohibited conduct.

4.4 Sexual Misconduct

- 4.4.1 “Sexual misconduct” means “sexual assault” and “sexual exploitation,” as defined below. It is a broad term used to encompass unwelcome behavior of a sexual nature that is prohibited by Title IX and West Virginia University.
- 4.4.2 “Sexual Assault” means sexual intercourse or sexual contact that occurs without consent.
- 4.4.3 “Sexual Contact” means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person’s body by the actor’s sex organs.
- 4.4.4 “Sexual intercourse” is defined as anal, oral, or vaginal penetration, however slight, by an inanimate object or another’s body part, including, but not limited to a penis, tongue, or finger.
- 4.4.5 “Consent” is defined as agreement, approval, or permission as to some act or purpose that is given knowingly, willingly, and voluntarily by a competent person. A person is not competent and therefore lacks the ability to consent where there is either forcible compulsion or incapacity to consent. A person is deemed incapable of consent when that person is either less than sixteen years old, mentally incapacitated, or physically unable to resist. It is important to remember that silence, by itself, cannot constitute consent. Consent to one sexual act does not constitute or imply consent to a different sexual act. Previous consent cannot imply consent to future sexual acts. Consent is required regardless of the parties’ relationship status or sexual history together.
- 4.4.6 “Sexual exploitation” means taking sexual advantage of another person without his or her consent. Sexual advantage includes, without limitation, causing or attempting to cause the incapacitation of another person in order to gain a sexual advantage over such other person; causing the prostitution of another person; recording, photographing or transmitting identifiable images of private sexual activity and/or the intimate parts of another person; allowing third parties to observe private sexual acts; and engaging in voyeurism.

4.5 Domestic Misconduct

- 4.5.1 “Domestic misconduct” means “domestic violence” and “dating violence” as defined below.
- 4.5.2 “Domestic Violence” 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) unlawfully attempting to commit a violent

injury against one's family or household member(s); or (iv) unlawfully committing an act which places one's family or household member(s) in reasonable apprehension of immediately receiving a violent injury.

4.5.2.1 For purposes of this section, "family or household members" means persons who: (1) are or were married to each other; (2) are or were living together as spouses; (3) are or were sexual or intimate partners; (4) are or were dating: provided, that a casual acquaintance or ordinary fraternization between persons in a business or social context does not establish a dating relationship; (5) are or were residing together in the same household; (6) have a child in common regardless of whether they have ever married or lived together; (7) have the relationships described in W. Va. Code § 48-27-204.

4.5.3 "Dating Violence" means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship.

4.6 Stalking

4.6.1 "Stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to (i) fear for his or her safety or the safety of others; or (ii) suffer substantial emotional distress.

4.7 Consequences & Corrective Action.

Violators of this policy are subject to appropriate disciplinary action that may include sanctions as severe as discharge of an employee, expulsion of a student in accord 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 policy or standard of behavior. Accordingly, in such cases, the University reserves the ability to take any necessary action.

4.8 Consensual Relationships.

Although consensual relationships are within the purview of individual privacy, those engaging in such relationships that occur between persons in inherently unequal and closely related positions at the University or employees within the same reporting line, including those between supervisors and supervisees, must remain aware that such relationships could lead to circumstances that result in harassment or sexual or domestic misconduct.

In these specific cases of consensual relationships, the individuals shall notify their immediate supervisor or other appropriate administrator. The supervisor or administrator shall be responsible for making arrangements to eliminate or to mitigate any conflict of interest or other legitimate occupational interest related to employment, the consequences of which might prove detrimental to the University or to either party in the relationship. In some instances, if no suitable way to eliminate or mitigate the conflict is reasonably feasible, one or both individuals may be separated from employment at the University.

It is important to note that these types of consensual relationships also may result in a hostile or offensive environment affecting other employees or students. For example, others may perceive a person involved in the consensual relationship as receiving favorable treatment in employment or educational decisions and actions.

4.9 Teacher-Student Relationships.

A faculty member or instructor is prohibited from engaging in consensual relationship with a student whom the faculty member or instructor evaluates, supervises, instructs, or advises.

Where there is a pre-existing consensual relationship, the faculty member or instructor shall notify his or her immediate supervisor or other appropriate administrator. The supervisor or other appropriate administrator shall be responsible for making arrangements to eliminate or to mitigate any conflict, the consequences of which might prove detrimental to the University or to either party in the relationship.

Section 5: Complaints.

5.1 Coordinator.

The President or the President's designee shall appoint an administrator to act as the University's Coordinator to handle all 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 of the University community. The Coordinator may also appoint deputy coordinators to assist the University in furthering this policy.

5.2 Filing.

Any member of the University community who believes he or she has been subject to any of the prohibited conduct set forth in Section 4 may file a complaint in any manner set forth in the applicable procedure, as discussed below. If a complaint is received, it shall be forwarded to the appropriate department for investigation and disposition.

5.3 Procedure.

The President or the President's designee(s) shall formulate a complaint procedure to investigate and respond to all complaints of prohibited misconduct. In all cases, complaints will be handled in such a manner so as 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.

If a student has been accused of prohibited conduct, the complaint will be handled pursuant to West Virginia University Board of Governors Policy 31.

Any investigation resulting from a complaint will be separate from and in addition to any criminal investigation that may result.

Finally, the procedure shall also include and incorporate all of the necessary and appropriate policy requirements, statements, and guidance of the Campus Sexual Violence Act provision, Section 304, of the Violence Against Women Reauthorization Act of 2013, any amendments, as set forth in the University's Annual Campus Security and Fire Safety Report, or applicable guidance from the United States Department of Education, Office of Civil Rights and the White House Task Force to Protect Students from Sexual Assault.

5.4 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. That said, there are places where a victim can receive confidential services and the complaint procedure must identify clearly where a victim can go to receive such services without having to risk confidentiality.

5.5 Dishonest or Frivolous Complaints.

If a complainant is found to have been intentionally or maliciously dishonest, reckless, or frivolous in making the allegations, the complainant shall be subject to appropriate disciplinary action.

Section 6: Retaliation Prohibited.

- 6.1 No individual may retaliate against any complainant, any person that assists a complainant in the filing of a complaint under this policy, or a witness. Complaints of retaliation for such activities will be treated the same way as other complaints under this policy.

6.2 “Retaliate” means to take an adverse action against an individual or subject an individual to conduct that has the purpose or effect of unreasonably interfering with that individual’s educational experience, work or academic performance, or creates an educational experience or academic or work environment that a reasonable person would find intimidating or hostile because of something that individual did to further this policy, including but not limited to filing a complaint or being a witness in or supporter of or against a complaint.