

## **Resolution Process and Procedures Manual for Alleged Violations of the Title IX Policy**

### **Overview**

ENMU will act on any formal or informal notice/complaint of violation of the Title IX policy that is received by the Title IX Coordinator or trained designee or any other Official with Authority (OWA) by applying these procedures.

The System reserves the right to determine which ENMU officials have a legitimate educational interest in being informed about incidents that fall within this policy, pursuant to the Family Educational Rights and Privacy Act (FERPA).

Only a small group of officials who need to know will typically be told about the complaint, including but not limited to: area executive administrators, Human Resources, the Title IX team, Student Affairs administrators, Department of Public Safety (DPS) or branch campus equivalent department, and the Behavioral Intervention Team (BIT).

Information will be shared as necessary with Investigators, decision-makers, witnesses, and the parties. The circle of people with this knowledge will be kept as tight as possible to preserve the parties' rights and privacy.

The System may contact parents/guardians of students to inform them of situations in which there is a significant and articulable health and/or safety risk but will usually consult with the student first before doing so.

The procedures below apply to all violations of the 80-12 Title IX policy involving student and employee respondents.

The procedures below apply only to qualifying allegations of sexual harassment as defined in the policy, involving students, staff, administrators, or faculty members of the ENMU System community. If a dismissal occurs under this, please see the applicable student handbook, student code of conduct, staff or faculty handbook, or employee policies for a description of the procedures applicable to the resolution of such offenses.

The procedures below may be used to address collateral misconduct arising from the investigation of or occurring in conjunction with reported misconduct (e.g., vandalism, physical abuse of another), when alleged violations of the policy are being addressed at the same time.

### **Mandated Reporters**

All ENMU System employees (faculty, staff, administrators) are expected to report actual or suspected sexual harassment or retaliation to appropriate officials immediately. Failure of a Mandated Reporter to report an incident of sexual harassment or retaliation of which they become aware is a violation of ENMU Policy and can be subject to disciplinary action for failure to comply.

In order to make informed choices, it is important to be aware of confidentiality and mandatory reporting requirements when consulting campus resources. On campus, some resources may maintain confidentiality and are not required to report actual or suspected sexual harassment or retaliation in a way

that identifies the parties. They may offer options and resources without any obligation to inform an outside agency or campus official unless a Complainant has requested the information be shared.

If a Complainant expects formal action in response to their allegations, reporting to any Mandated Reporter can connect them with resources to report crimes and/or policy violations, and these employees will immediately pass reports to the Title IX Coordinator (and/or police, if desired by the Complainant), who will take action when an incident is reported to them.

### **Anonymous Notice to Mandated Reporters**

Anonymous notice will be investigated by the Recipient to the extent possible, both to assess the underlying allegation(s) and to determine if supportive measures or remedies can be provided. Anonymous notice typically limits the Recipient's ability to investigate, respond, and provide remedies, depending on what information is shared.

The following sections describe the reporting options at ENMU for a Complainant or third-party (including parents/guardians when appropriate):

### **Confidential Resources**

If a Complainant would like the details of an incident to be kept confidential, the Complainant may speak with:

- On-campus licensed professional counselors and staff (excluding Ruidoso)
- Health service providers and staff (excluding Ruidoso)
- Off-campus (non-employees):
  - Licensed professional counselors and other medical providers
  - Local rape crisis counselors
  - Domestic violence resources
  - Local or state assistance agencies
  - Clergy/Chaplains
  - Attorneys

All of the above-listed individuals will maintain confidentiality when acting under the scope of their licensure, professional ethics, and/or professional credentials, or official designation, except in extreme cases of immediacy of threat or danger or abuse of a minor/elder/individual with a disability, or when required to disclose by law or court order.

Campus counselors are available to help free of charge and may be consulted on an emergency basis during normal business hours.

Employees who have confidential privilege as described above, and who receive reports within the scope of their confidential roles will timely submit anonymous statistical information for Clery Act purposes unless they believe it would be harmful to their client or patient.

## **Notice/Complaint**

Upon receipt of a complaint or notice to the Title IX Coordinator of an alleged violation of the policy, the Title IX Coordinator initiates a prompt initial assessment to determine the next steps the System needs to take.

The Title IX Coordinator will initiate at least one of three responses:

- 1) Offering supportive measures because the Complainant does not want to file a formal complaint; and/or
- 2) An informal resolution (upon submission of a formal complaint); and/or
- 3) A Formal Grievance Process including an investigation and a hearing (upon submission of a formal complaint).

ENMU uses the Formal Grievance Process to determine whether or not the policy has been violated. If so, the System will promptly implement effective remedies designed to ensure that it is not deliberately indifferent to sexual harassment or retaliation, their potential recurrence, and/or their effects.

## **Initial Assessment**

Following receipt of notice or a complaint of an alleged violation of this policy, the Title IX Coordinator engages in an initial assessment, typically within one to five business days. The steps in an initial assessment can include:

- The Title IX Coordinator seeks to determine if the person impacted wishes to make a formal complaint, and will assist them to do so, if desired.
  - If they do not wish to do so, the Title IX Coordinator determines whether to initiate a complaint themselves because a violence risk assessment indicates a compelling threat to health and/or safety.
- If a formal complaint is received, the Title IX Coordinator assesses its sufficiency and works with the Complainant to make sure it is correctly completed.
- The Title IX Coordinator reaches out to the Complainant to offer supportive measures.
- The Title IX Coordinator works with the Complainant to ensure they are aware of the right to have an Advisor.
- The Title IX Coordinator works with the Complainant to determine whether the Complainant prefers a supportive and remedial response, an informal resolution option, or a formal investigation and grievance process.
  - If a supportive and remedial response is preferred, the Title IX Coordinator works with the Complainant to identify their wishes, assesses their request(s), and implements accordingly. No Formal Grievance Process is initiated, though the Complainant can elect to initiate one later, if desired.
  - If an informal resolution option is preferred, the Title IX Coordinator assesses whether the complaint is suitable for informal resolution and may seek to determine if the Respondent is also willing to engage in informal resolution.
  - If a Formal Grievance Process is preferred by the Complainant, the Title IX Coordinator determines if the misconduct alleged falls within the scope of the 2020 Title IX regulations:

- If it does, the Title IX Coordinator will initiate the formal investigation and grievance process, directing the investigation to address:
  - an incident, and/or
  - a pattern of alleged misconduct, and/or
  - a culture/climate concern, based on the nature of the complaint.
- If alleged misconduct does not fall within the scope of the 2020 Title IX regulations, the Title IX Coordinator determines that Title IX regulations do not apply (and will “dismiss” that aspect of the complaint, if any), assesses which policies may apply, which resolution process is applicable, and will refer the matter accordingly. Please note that dismissing a complaint under the 2020 Title IX regulations is solely a procedural requirement under Title IX that does not limit the System’s authority to address a complaint with an appropriate process and remedies.

**Procedures manual**

The Title IX Coordinator has ultimate discretion over whether the ENMU proceeds when the Complainant does not wish to do so, and the Title IX Coordinator may sign a formal complaint to initiate a grievance process, usually upon completion of an appropriate violence risk assessment.

The Title IX Coordinator’s decision should be based on results of the violence risk assessment that show a compelling risk to health and/or safety that requires the Recipient to pursue formal action to protect the community.

A compelling risk to health and/or safety may result from evidence of patterns of misconduct, predatory conduct, threats, abuse of minors, use of weapons, and/or violence. Recipients may be compelled to act on alleged employee misconduct irrespective of a Complainant’s wishes.

The Title IX Coordinator must also consider the effect that non-participation by the Complainant may have on the availability of evidence and the System’s ability to pursue a Formal Grievance Process fairly and effectively.

When the Title IX Coordinator executes the written complaint, they do not become the Complainant. The Complainant is the individual who is alleged to be the victim of conduct that could constitute a violation of this Policy.

When the System proceeds, the Complainant (or their Advisor) may have as much or as little involvement in the process as they wish. The Complainant retains all rights of a Complainant under this Policy irrespective of their level of participation. Typically, when the Complainant chooses not to participate, the Advisor may be appointed as proxy for the Complainant throughout the process, acting to ensure and protect the rights of the Complainant, though this does not extend to the provision of evidence or testimony.

Note that the System’s ability to remedy and respond to notice may be limited if the Complainant does not want the System to proceed with an investigation and/or grievance process. The goal is to provide the Complainant with as much control over the process as possible, while balancing the System’s obligation to protect its community.

If a formal complaint is received, the Title IX Coordinator assesses its sufficiency and works with the Complainant to make sure it is correctly completed.

The Title IX Coordinator reaches out to the Complainant to offer supportive measures.

The Title IX Coordinator works with the Complainant to ensure they are aware of the right to have an Advisor.

The Title IX Coordinator works with the Complainant to determine whether the Complainant prefers a supportive and remedial response, an informal resolution option, or a formal investigation and grievance process.

If a supportive and remedial response is preferred, the Title IX Coordinator works with the Complainant to identify their wishes, assesses their request(s), and implements accordingly. No Formal Grievance Process is initiated, though the Complainant can elect to initiate one later, if desired.

If an informal resolution option is preferred, the Title IX Coordinator assesses whether the complaint is suitable for informal resolution and may seek to determine if the Respondent is also willing to engage in informal resolution.

If a Formal Grievance Process is preferred by the Complainant, the Title IX Coordinator determines if the misconduct alleged falls within the scope of the 2020 Title IX regulations:

If it does, the Title IX Coordinator will initiate the formal investigation and grievance process, directing the investigation to address:

an incident, and/or

a pattern of alleged misconduct, and/or

a culture/climate concern, based on the nature of the complaint.

If alleged misconduct does not fall within the scope of the 2020 Title IX regulations, the Title IX Coordinator determines that Title IX regulations do not apply (and will “dismiss” that aspect of the complaint, if any), assesses which policies may apply, which resolution process is applicable, and will refer the matter accordingly. Please note that dismissing a complaint under the 2020 Title IX regulations is solely a procedural requirement under Title IX that does not limit the System’s authority to address a complaint with an appropriate process and remedies.

### **Consent**

Consent can also be withdrawn once given, as long as the withdrawal is reasonably and clearly communicated. If consent is withdrawn, that sexual activity should cease within a reasonable time. Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). A current or previous intimate relationship is not sufficient to constitute consent.

Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on ENMU to determine whether its policy has been violated. The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar and previous patterns that may be evidenced.

Consent in relationships must also be considered in context. When parties consent to Bondage, discipline/dominance, submission/sadism, and masochism or other forms of kink, non-consent may be shown by the use of a safe word. Resistance, force, violence, or even saying “no” may be part of the kink and thus consensual, so ENMU’s evaluation of communication in kink situations should be guided by reasonableness, rather than strict adherence to policy that assumes non-kink relationships as a default. It is a defense to a sexual assault policy violation that the Respondent neither knew nor should have known the Complainant to be physically or mentally incapacitated. “Should have known” is an objective, reasonable person standard that assumes that a reasonable person is both sober and exercising sound judgment.

### **Incapacitation**

Incapacitation occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/informed consent (e.g., to understand the “who, what, when, where, why, and how” of their sexual interaction).

Incapacitation is determined through consideration of all relevant indicators of an individual’s state and is not synonymous with intoxication, impairment, blackout, and/or being drunk.

This policy also covers a person whose incapacity results from a temporary or permanent physical or mental health condition, involuntary physical restraint, and/or the consumption of incapacitating drugs.

### **Violence Risk Assessment**

In some cases, the Title IX Coordinator may determine that a Violence Risk Assessment (VRA) should be conducted by the BIT as part of the initial assessment. A VRA can aid in ten critical and/or required determinations, including:

Emergency removal of a Respondent on the basis of immediate threat to an individual or the community’s physical health/safety;

This meeting is not a hearing on the merits of the allegation(s), but rather is an administrative process intended to determine solely whether the emergency removal is appropriate.

When this meeting is not requested in a timely manner, objections to the emergency removal will be deemed waived.

A Complainant and their advisor may be permitted to participate in this meeting if the Title IX coordinator determines it is equitable to do so.

This section also applies to any restrictions that a coach or athletic administrator may place on a student-athlete arising from allegations related to Title IX. There is no appeal process for emergency removal decisions. NCAA?

A Respondent may be accompanied by an advisor of their choice when meeting with the Title IX Coordinator for the show cause meeting. The Respondent will be given access to a written summary of the basis for the emergency removal prior to the meeting to allow for adequate preparation.

The Title IX Coordinator in coordination with the area executive administrator may implement or stay an emergency removal and determine the conditions and duration. Violation of an emergency removal under this policy will be grounds for discipline within the student or employee conduct disciplinary processes, which may include expulsion or termination.

The System will implement the least restrictive emergency actions possible in light of the circumstances and safety concerns. As determined by the Title IX Coordinator, these actions could include, but are not limited to: removing a student from a residence hall, temporarily re-assigning an employee, restricting a student or employee's access to or use of facilities or equipment, allowing a student to withdraw or take grades of incomplete without financial penalty, authorizing an administrative leave, suspending a student's participation in extracurricular activities, student employment, student organizational leadership, or intercollegiate/intramural athletics.

At the discretion of the Title IX Coordinator, alternative coursework options may be pursued to ensure as minimal an academic impact as possible on the parties.

When the Respondent is an employee, existing provisions procedures for interim action are applicable instead of the above emergency removal process.

Whether the Title IX Coordinator should pursue/sign a formal complaint absent a willing/able Complainant;

Whether the scope of the investigation should include an incident, and/or pattern of misconduct and/or climate of hostility/harassment;

To help identify potential predatory conduct;

To help assess/identify grooming behaviors;

Whether it is reasonable to try to resolve a complaint through informal resolution, and if so, what approach may be most successful;

Whether to permit a voluntary withdrawal by the Respondent;

Whether to impose transcript notation or communicate with a transfer institution about a Respondent;

Assessment of appropriate sanctions/remedies (to be applied post-hearing); and/or

Whether a Clery Act Timely Warning/Trespass order/Persona-non-grata is needed.

Threat assessment is the process of evaluating the actionability of violence by an individual against another person or group following the issuance of a direct or conditional threat. A VRA is a broader term used to assess any potential violence or danger, regardless of the presence of a vague, conditional, or direct threat.

VRAs require specific training and are typically conducted by psychologists, clinical counselors, social workers, case managers, law enforcement officers, student conduct officers, or BIT team members.

A VRA authorized by the Title IX Coordinator should occur in collaboration with the BIT. Where a VRA is required by the Title IX Coordinator, a Respondent refusing to cooperate may result in a charge of failure to comply within the appropriate student or employee conduct process.

A VRA is not an evaluation for an involuntary behavioral health hospitalization, nor is it a psychological or mental health assessment. A VRA assesses the risk of actionable violence, often with a focus on targeted/predatory escalations, and is supported by research from the fields of law enforcement, criminology, human resources, and psychology.

Dismissal (Mandatory and Discretionary) These dismissal requirements are mandated by the 2020 Title IX Regulations, 34 CFR §106.45.

The System must dismiss a formal complaint or any allegations therein if, at any time during the investigation or hearing, it is determined that:

The conduct alleged in the formal complaint would not constitute sexual harassment as defined above, even if proved; and/or

The conduct did not occur in an educational program or activity controlled by the System (including buildings or property controlled by recognized student organizations), and/or ENMU does not have control of the Respondent; and/or

The conduct did not occur against a person in the United States; and/or

At the time of filing a formal complaint, a Complainant is not participating in or attempting to participate in the education program or activity of the System. Such a Complainant is still entitled to supportive measures, but the formal grievance process is not applicable.

The System may dismiss a formal complaint or any allegations therein if, at any time during the investigation or hearing:

A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein; or

The Respondent is no longer enrolled in or employed by the System; or

Specific circumstances prevent the System from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

A Complainant who decides to withdraw a complaint may later request to reinstate it or refile it. Upon any dismissal, ENMU will promptly send written notice of the dismissal and the rationale for doing so simultaneously to the parties.

This dismissal decision is appealable by any party under the procedures for appeal below. The decision not to dismiss is also appealable by any party claiming that a dismissal is required or appropriate.

## **Counterclaims**



The System is obligated to ensure that the grievance process is not abused for retaliatory purposes. ENMU permits the filing of counterclaims but uses an initial assessment, described above, to assess whether the allegations in the counterclaim are made in good faith. Counterclaims by a Respondent may be made in good faith, but are, on occasion, also made for purposes of retaliation. Counterclaims made with retaliatory intent will not be permitted.

Counterclaims determined to have been reported in good faith will be processed using the grievance procedures below. Investigation of such claims may take place after resolution of the underlying initial allegation, in which case a delay may occur.

Counterclaims may also be resolved through the same investigation as the underlying allegation, at the discretion of the Title IX Coordinator. When counterclaims are not made in good faith, they will be considered retaliatory and may constitute a violation of this policy.

### **Right to an Advisor**

The parties may each have an Advisor<sup>1</sup> of their choice present with them for all meetings, interviews, and hearings within the resolution process, if they so choose. The parties may select whoever they wish to serve as their Advisor as long as the Advisor is eligible and available.<sup>2</sup>

Choosing an Advisor who is also a witness in the process creates potential for bias and conflict-of-interest. A party who chooses an Advisor who is also a witness can anticipate that issues of potential bias will be explored by the hearing Decision-maker(s).

### **Who Can Serve as an Advisor**

The Advisor may be a friend, mentor, family member, attorney, or any other individual a party chooses to advise, support, and/or consult with them throughout the resolution process. The parties may choose Advisors from inside or outside of the ENMU community.

The Title IX Coordinator will also offer to assign a trained Advisor to any party if the party so chooses. If the parties choose an Advisor from the pool available from ENMU, the Advisor will have been trained by the System and be familiar with the System's resolution process.

If the parties choose an Advisor from outside the pool of those identified by ENMU, the Advisor may not have been trained by ENMU and may not be familiar with System policies and procedures.

Parties also have the right to choose not to have an Advisor in the initial stages of the resolution process, prior to a hearing.

### **Advisor's Role in Meetings and Interviews**

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<sup>1</sup> This could include an attorney, advocate, or support person. The law permits one Advisor for each party (witnesses are not entitled to Advisors within the process, though they can be advised externally).

<sup>2</sup> "Available" means the party cannot insist on an Advisor who simply doesn't have inclination, time, or availability. Also, the Advisor cannot have institutionally conflicting roles, such as being a Title IX administrator who has an active role in the matter, or a supervisor who must monitor and implement sanctions.

The parties may be accompanied by their Advisor in all meetings and interviews at which the party is entitled to be present, including intake and interviews. Advisors should help the parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith.

ENMU cannot guarantee equal Advisory rights, meaning that if one party selects an Advisor who is an attorney, but the other party does not or cannot afford an attorney, the System is not obligated to provide an attorney.

### **Advisors in Hearings/ENMU-Appointed Advisor**

Under U.S. Department of Education regulations for Title IX a form of indirect questioning is required during the hearing but must be conducted by the parties' Advisors. The parties are not permitted to directly question each other or any witnesses. If a party does not have an Advisor for a hearing, the System will appoint a trained Advisor for the limited purpose of conducting any questioning of the other party and witnesses.

### **Pre-Interview Meetings**

Advisors and their advisees may request to meet with the investigators conducting interviews/meetings in advance of these interviews or meetings. This pre-meeting allows Advisors to clarify and understand their role and ENMU's policies and procedures.

### **Advisor Violations of ENMU Policy**

All Advisors are subject to the same ENMU policies and procedures, whether they are attorneys or not, and whether they are selected by a party or assigned by the System. Advisors are expected to advise their advisees without disrupting proceedings. Advisors should not address ENMU officials or investigators in a meeting or interview unless invited to do so (e.g., asking procedural questions). The Advisor may not make a presentation or represent their advisee during any meeting or proceeding and may not speak on behalf of the advisee to the Investigator(s) or other Decision-maker except during a hearing proceeding during questioning or expressly permitted by ENMU officials.

The parties are expected to ask and respond to questions on their own behalf throughout the investigation phase of the resolution process. Although the Advisor generally may not speak on behalf of their advisee, the Advisor may consult with their advisee, either privately as needed, or by conferring or passing notes during any resolution process meeting or interview. For longer or more involved discussions, the parties and their Advisors should ask for breaks to allow for private consultation.

Any Advisor who oversteps their role as defined by this policy will be warned only once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting/interview/hearing will be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator will determine how to address the Advisor's non-compliance and future role.

### **Sharing Information with the Advisor**

The System expects that the parties may wish to have ENMU share documentation and evidence related to the allegations with their Advisors.

The System provides a consent form that authorizes ENMU to share such information directly with a party's Advisor. The parties must either complete and submit this form to the Title IX Coordinator or provide similar documentation demonstrating consent to a release of information to the Advisor before ENMU is able to share records with an Advisor.

If a party requests that all communication be made through their attorney Advisor, ENMU will comply with that request at the discretion of the Title IX Coordinator.

Advisors appointed by the institution will not be asked to disclose details of their interactions with the advisees to institutional officials or Decision-makers.

### **Privacy of Records Shared with Advisor**

Advisors are expected to maintain the privacy of the records shared with them. These records may not be shared with third parties, disclosed publicly, or used for purposes not explicitly authorized by ENMU. Advisors will be asked to sign Non-Disclosure Agreements (NDAs). Recipient may restrict the role of any Advisor who does not respect the sensitive nature of the process or who fails to abide by the System's privacy expectations.

### **Expectations of an Advisor**

The System generally expects an Advisor to adjust their schedule to allow them to attend ENMU meetings when planned, but ENMU may change scheduled meetings to accommodate an Advisor's inability to attend, if doing so does not cause an unreasonable delay.

The System may also make reasonable provisions to allow an Advisor who cannot be present in person to attend a meeting by telephone, video conferencing, or other similar technologies as may be convenient and available.

### **Expectations of the Parties with Respect to Advisors**

A party may elect to change Advisors during the process and is not obligated to use the same Advisor throughout. The parties are expected to inform the Investigator(s) of the identity of their Advisor at least two (2) business days before the date of their first meeting with Investigators (or as soon as possible if a more expeditious meeting is necessary or desired).

The parties are expected to provide timely notice to the Title IX Coordinator if they change Advisors at any time. It is assumed that if a party changes Advisors, consent to share information with the previous Advisor is terminated, and a release for the new Advisor should be secured. Parties are expected to inform the Title IX Coordinator of the identity of their hearing Advisor at least two (2) business days before the hearing.

### **Assistance in Securing an Advisor**

**For representation, Respondents may wish to contact organizations such as:**

FACE (<http://www.facecampusequality.org>)

SAVE (<http://www.saveservices.org>).

**Complainants may wish to contact organizations such as:**

The Victim Rights Law Center (<http://www.victimrights.org>),

The National Center for Victims of Crime (<http://www.victimsofcrime.org>), which maintains the Crime Victim's Bar Association.]

The Time's Up Legal Defense Fund: <https://nwlc.org/times-up-legal-defense-fund/>

**Resolution Processes**

Resolution proceedings are private. All persons present at any time during the resolution process are expected to maintain the privacy of the proceedings in accordance with System Policy. Although there is an expectation of privacy around what Investigators share with parties during interviews, the parties have discretion to share their own knowledge and evidence with others if they so choose, with the exception of information the parties agree not to disclose as part of an Informal Resolution, discussed below. ENMU encourages parties to discuss with their Advisors any sharing of information before doing so.

The Formal Grievance Process is the System's primary resolution approach, unless Informal Resolution is elected by all parties and the System. Three options for Informal Resolution are detailed in this section, and the Formal Grievance Process is detailed starting in the next section.

In cases in which the Complainant requests confidentiality/no formal action and the circumstances allow ENMU to honor that request, ENMU may offer informal resolution options (see below), supportive measures, and remedies to the Complainant and the community, but will not otherwise pursue formal action

**Informal Resolution**

Supportive Resolution. When the Title IX Coordinator can resolve the matter informally by providing supportive measures (only) to remedy the situation.

Alternative Resolution. When the parties agree to resolve the matter through an alternative resolution mechanism as described below, usually before a formal investigation takes place; see discussion in b., below.

Accepted Responsibility. When the Respondent accepts responsibility for violating policy, and desires to accept a sanction(s) and end the resolution process (similar to above, but usually occurs post-investigation); see discussion in c., below.

To initiate Informal Resolution, a Complainant must submit a formal complaint, as defined above. A Respondent who wishes to initiate Informal Resolution should contact the Title IX Coordinator. The parties may agree as a condition of engaging in Informal Resolution that statements made or evidence shared during the Informal Resolution process will not be considered in the Formal Grievance Process unless all parties consent.

It is not necessary to pursue Informal Resolution first in order to pursue a Formal Grievance Process, and any party participating in Informal Resolution can stop the process at any time and begin or resume the Formal Grievance Process.

Prior to implementing Informal Resolution, ENMU will provide the parties with written notice of the reported misconduct and any sanctions or measures that may result from participating in such a process, including information regarding any records that will be maintained or shared by the System.

ENMU will obtain voluntary, written confirmation that all parties wish to resolve the matter through Informal Resolution before proceeding and will not pressure the parties to participate in Informal Resolution.

### **Alternative Resolution Approaches**

Alternative Resolution is an informal approach by which the parties reach a mutually agreed upon resolution of an allegation. All parties must consent to the use of an Alternative Resolution approach.

The Title IX Coordinator may look to the following factors to assess whether Alternative Resolution is appropriate, or which form of Alternative Resolution may be most successful for the parties:

The parties' amenability to Alternative Resolution;

Likelihood of potential resolution, considering any power dynamics between the parties;

The parties' motivation to participate;

Civility of the parties;

Results of a violence risk assessment/ongoing risk analysis;

Disciplinary history;

Whether an emergency removal is needed;

Skill of the Alternative Resolution facilitator with this type of allegation;

Complaint complexity;

Emotional investment/capability of the parties;

Rationality of the parties;

Goals of the parties;

Adequate resources to invest in Alternative Resolution (time, staff, etc.)

The ultimate determination of whether Alternative Resolution is available or successful is to be made by the Title IX Coordinator. The Title IX Coordinator is authorized to negotiate a resolution that is acceptable to all the parties and/or to accept a resolution that is proposed by the parties, usually through their Advisors. The Title IX Coordinator maintains records of any resolution that is reached, and failure to

abide by the resolution agreement may result in appropriate responsive/disciplinary actions. Results of complaints resolved by Informal Resolution or Alternative Resolution are not appealable.

### **Respondent Accepts Responsibility for Alleged Violations**

The Respondent may accept responsibility for all or part of the alleged policy violations at any point during the resolution process. If the Respondent indicates an intent to accept responsibility for all of the alleged misconduct, the formal process will be paused, and the Title IX Coordinator will determine whether Informal Resolution can be used according to the criteria above.

If Informal Resolution is applicable, the Title IX Coordinator will determine whether all parties and the System are able to agree on responsibility, sanctions, and/or remedies. If so, the Title IX Coordinator implements the accepted finding that the Respondent is in violation of System policy and implements agreed-upon sanctions and/or remedies, in coordination with other appropriate administrator(s), as necessary.

This result is not subject to appeal once all parties indicate their written assent to all agreed upon terms of resolution. When the parties cannot agree on all terms of resolution, the Formal Grievance Process will resume at the same point where it was paused.

When a resolution is accomplished, the appropriate sanction or responsive actions are promptly implemented in order to effectively stop the sexual harassment or retaliation, prevent its recurrence, and remedy the effects of the discriminatory conduct, both on the Complainant and the community.

### **Grievance Process**

The Formal Grievance Process relies on a pool of administrators or external resources (“the Pool”) to carry out the process.

### **Pool Member Roles**

Members of the Pool are trained annually, and can serve in the following roles, at the direction of the Title IX Coordinator:

To provide appropriate intake of and initial guidance pertaining to complaints

To act as an Advisor to the parties

To serve in a facilitation role in Informal Resolution or Alternative Resolution if trained in appropriate resolution approaches

To perform or assist with initial assessment

To investigate complaints

To serve as a hearing facilitator (process administrator, no decision-making role)

To serve as a Decision-maker regarding the complaint

To serve as an Appeal Decision-maker

### **Pool Member Appointment**

The Title IX Coordinator in consultation with the President appoints the Pool which acts with independence and impartiality. Although members of the Pool are typically trained in a variety of skill sets and can rotate amongst the different roles listed above in different cases, the System can also designate permanent roles for individuals in the Pool, using others as substitutes or to provide greater depth of experience when necessary. This process of role assignment may be the result of particular skills, aptitudes, or talents identified in members of the Pool that make them best suited to particular roles.

### **Pool Member Training**

The Pool members receive annual training based on their respective roles. This training includes, but is not limited to:

The scope of the Recipient's Sexual Harassment Policy and Procedures

How to conduct investigations and hearings that protect the safety of Complainants and Respondents, and promote accountability

Implicit bias

Disparate treatment

Reporting, confidentiality, and privacy requirements

Applicable laws, regulations, and federal regulatory guidance

How to implement appropriate and situation-specific remedies

How to investigate in a thorough, reliable, timely, and impartial manner by individuals who receive annual training in conducting investigations of sexual harassment, trauma-informed practices, and impartiality.

How to uphold fairness, equity, and due process

How to weigh evidence

How to conduct questioning

How to assess credibility

Impartiality and objectivity

How to render findings and generate clear, concise, evidence-based rationales

The definitions of all offenses

How to apply definitions used by the System with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with policy

How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes

How to serve impartially by avoiding prejudgment of the facts at issue, conflicts of interest, and bias against Respondents and/or for Complainants, and on the basis of sex, race, religion, and other protected characteristics

Any technology to be used at a live hearing

Issues of relevance of questions and evidence

Issues of relevance to create an investigation report that fairly summarizes relevant evidence

How to determine appropriate sanctions in reference to all forms of harassment and/or retaliation allegations

### **Recordkeeping**

Specific training is also provided for all Pool members. All Pool members are required to attend these trainings annually. The materials used to train all members of the Pool are publicly posted here:

Roswell- <https://www.roswell.enmu.edu/wp-content/uploads/delightful-downloads/2020/08/Title-IX-Personnel-Training-Materials.pdf>

Portales/Ruidoso- <https://www.atixa.org/2020-regulations-requirement-posting-of-training-materials/>

### **Formal Grievance Process: Notice of Investigation and Allegations**

The Title IX Coordinator will provide written notice of the investigation and allegations (the “NOIA”) to the Respondent upon commencement of the Formal Grievance Process. This facilitates the Respondent’s ability to prepare for the interview and to identify and choose an Advisor to accompany them. The NOIA is also copied to the Complainant, who will be given advance notice of when the NOIA will be delivered to the Respondent.

The NOIA will include:

A meaningful summary of all allegations,

The identity of the involved parties (if known),

The precise misconduct being alleged,

The date and location of the alleged incident(s) (if known),

The specific policies implicated,

A description of the applicable procedures,



A statement of the potential sanctions/responsive actions that could result,

A statement that the System presumes the Respondent is not responsible for the reported misconduct unless and until the evidence supports a different determination,

A statement that determinations of responsibility are made at the conclusion of the process and that the parties will be given an opportunity to inspect and review all directly related and/or relevant evidence obtained during the review and comment period,

A statement about ENMU's policy on retaliation,

Information about the confidentiality of the process,

Information on the need for each party to have an Advisor of their choosing and suggestions for ways to identify an Advisor,

A statement informing the parties that ENMU Policy prohibits knowingly making false statements, including knowingly submitting false information during the resolution process,

Detail on how the party may request disability accommodations during the interview process,

A link to the ENMU VAWA Brochure,

The name(s) of the Investigator(s), along with a process to identify to the Title IX Coordinator, in advance of the interview process, any conflict of interest that the Investigator(s) may have, and

An instruction to preserve any evidence that is directly related to the allegations.

The System may amend or update the NOIA as the investigation progresses and more information becomes available regarding the addition or dismissal of any allegations.

Notice will be made in writing and may be delivered by one or more of the following methods: in person, mailed to the local or permanent address(es) of the parties as indicated in official Recipient records, or emailed to the parties' ENMU-issued email or designated accounts. Once mailed, emailed, and/or received in-person, notice will be presumptively delivered.

### **Resolution Timeline**

The System will make a good faith effort to complete the resolution process within a sixty-to-ninety (60-90) business day time period, including appeal, if any, which can be extended as necessary for appropriate cause by the Title IX Coordinator, who will provide notice and rationale for any extensions or delays to the parties as appropriate, as well as an estimate of how much additional time will be needed to complete the process.

### **Appointment of Investigators**

Once the decision to commence a formal investigation is made, the Title IX Coordinator appoints Pool members to conduct the investigation typically using a team of two Investigators, usually within two (2) business days of determining that an investigation should proceed.

## **Ensuring Impartiality**

Any individual materially involved in the administration of the resolution process [including the Title IX Coordinator, Investigator(s), and Decision-maker(s)] may neither have nor demonstrate a conflict of interest or bias for a party generally, or for a specific Complainant or Respondent.

The Title IX Coordinator will vet the assigned Investigator(s) for impartiality by ensuring there are no actual or apparent conflicts of interest or disqualifying biases. At any time during the resolution process, the parties may raise a concern regarding bias or conflict of interest, and the Title IX Coordinator will determine whether the concern is reasonable and supportable. If so, another Pool member will be assigned and the impact of the bias or conflict, if any, will be remedied. If the source of the conflict of interest or bias is the Title IX Coordinator, concerns should be raised with the applicable campus president.

The Formal Grievance Process involves an objective evaluation of all relevant evidence obtained, including evidence that supports that the Respondent engaged in a policy violation and evidence that supports that the Respondent did not engage in a policy violation. Credibility determinations may not be based solely on an individual's status or participation as a Complainant, Respondent, or witness.

The System operates with the presumption that the Respondent is not responsible for the reported misconduct unless and until the Respondent is determined to be responsible for a policy violation by the applicable standard of proof.

## **Investigation Timeline**

Investigations are completed expeditiously. Some investigations may take weeks or even months, depending on the nature, extent, and complexity of the allegations, availability of witnesses, police involvement, etc.

The System will make a good faith effort to complete investigations as promptly as circumstances permit and will communicate regularly with the parties to update them on the progress and timing of the investigation.

## **Delays in the Investigation Process and Interactions with Law Enforcement**

The System may undertake a short delay in its investigation (several days to a few weeks) if circumstances require. Such circumstances include but are not limited to: a request from law enforcement to temporarily delay the investigation, the need for language assistance, the absence of parties and/or witnesses, and/or accommodations for disabilities or health conditions.

The System will communicate in writing the anticipated duration of the delay and reason to the parties and provide the parties with status updates if necessary. ENMU will promptly resume its investigation and resolution process as soon as feasible. During such a delay, ENMU will implement supportive measures as deemed appropriate.

System action(s) or processes are not typically altered or precluded on the grounds that civil or criminal charges involving the underlying incident(s) have been filed or that criminal charges have been dismissed or reduced.

## **Steps in the Investigation Process**

All investigations are thorough, reliable, impartial, prompt, and fair. Investigations involve interviews with all relevant parties and witnesses; obtaining available, relevant evidence; and identifying sources of expert information, as necessary.

All parties have a full and fair opportunity, through the investigation process, to suggest witnesses and questions, to provide evidence and expert witnesses, and to fully review and respond to all evidence on the record. Recordings of interviews are not provided to the parties, but the parties will have the ability to review the transcript/summary of the interview once the investigation report is compiled.

The Investigator(s) typically take(s) the following steps, if not already completed (not necessarily in this order):

Determine the identity and contact information of the Complainant

Identify all policies implicated by the alleged misconduct and notify the Complainant and Respondent of all of the specific policies implicated

Assist the Title IX Coordinator, if needed, with conducting a prompt initial assessment to determine if the allegations indicate a potential policy violation

Commence a thorough, reliable, and impartial investigation by identifying issues and developing a strategic investigation plan, including a witness list, evidence list, intended investigation timeframe, and order of interviews for all witnesses and the parties

Meet with the Complainant to finalize their interview/statement, if necessary

Work with the Title IX Coordinator, as necessary, to prepare the initial Notice of Investigation and Allegation (NOIA). The NOIA may be amended with any additional or dismissed allegations

Notice should inform the parties of their right to have the assistance of an Advisor, who could be a member of the Pool or an Advisor of their choosing present for all meetings attended by the party

Provide each interviewed party and witness an opportunity to review and verify the Investigator's summary notes (or transcript) of the relevant evidence/testimony from their respective interviews and meetings

Make good faith efforts to notify the parties of any meeting or interview involving the other party, in advance when possible

When participation of a party is expected, provide that party with written notice of the date, time, and location of the meeting, as well as the expected participants and purpose

Interview all available, relevant witnesses and conduct follow-up interviews as necessary

Allow each party the opportunity to suggest witnesses and questions they wish the Investigator(s) to ask of the other party and witnesses, and document in the report which questions were asked, with a rationale for any changes or omissions

Complete the investigation promptly and without unreasonable deviation from the intended timeline

Provide regular status updates to the parties throughout the investigation

Prior to the conclusion of the investigation, provide the parties and their respective Advisors (if so desired by the parties) with a list of witnesses whose information will be used to render a finding

Write a comprehensive investigation report fully summarizing the investigation, all witness interviews, and addressing all relevant evidence. Appendices including relevant physical or documentary evidence will be included

The Investigator(s) gather, assess, and synthesize evidence, but make no conclusions, engage in no policy analysis, and render no recommendations as part of their report

Prior to the conclusion of the investigation, provide the parties and their respective Advisors (if so desired by the parties) a secured electronic or hard copy of the draft investigation report as well as an opportunity to inspect and review all of the evidence obtained as part of the investigation that is directly related to the reported misconduct, including evidence upon which ENMU does not intend to rely in reaching a determination, for a ten (10) business day review and comment period so that each party may meaningfully respond to the evidence. The parties may elect to waive the full ten days. Each copy of the materials shared will be watermarked on each page with the role of the person receiving it (e.g., Complainant, Respondent, Complainant's Advisor, Respondent's Advisor).

The Investigator(s) may elect to respond in writing in the investigation report to the parties' submitted responses and/or to share the responses between the parties for additional responses

The Investigator(s) will incorporate relevant elements of the parties' written responses into the final investigation report, include any additional relevant evidence, make any necessary revisions, and finalize the report. The Investigator(s) should document all rationales for any changes made after the review and comment period

The Investigator(s) shares the report with the Title IX Coordinator and/or legal counsel for their review and feedback

The Investigator will incorporate any relevant feedback, and the final report is then shared with all parties and their Advisors through secure electronic transmission or hard copy at least ten (10) business days prior to a hearing. The parties and advisors are also provided with a file of any directly related evidence that was not included in the report

### **Role and Participation of Witnesses in the Investigation**

Witnesses (as distinguished from the parties) who are employees of the System are strongly encouraged to cooperate with and participate in the ENMU investigation and resolution process. Student witnesses and witnesses from outside the System community are encouraged to cooperate with Recipient investigations and to share what they know about a complaint.

Although in-person interviews for parties and all potential witnesses are ideal, circumstances (e.g., study abroad, summer break) may require individuals to be interviewed remotely. Skype, Zoom, FaceTime,

WebEx, or similar technologies may be used for interviews if the Investigator(s) determine that timeliness, efficiency, or other reasons dictate a need for remote interviewing. The Recipient will take appropriate steps to reasonably ensure the security/privacy of remote interviews.

Witnesses may also provide written statements in lieu of interviews or choose to respond to written questions, if deemed appropriate by the Investigator(s), though not preferred. If a witness submits a written statement but does not intend to be and is not present for questioning at a hearing, their written statement may not be used as evidence.

### **Recording of Interviews**

No unauthorized audio or video recording of any kind is permitted during investigation meetings. If Investigator(s) elect to audio and/or video record interviews, all involved parties should be made aware of audio and/or video recording.

### **Evidentiary Considerations in the Investigation**

The investigation does not consider: 1) incidents not directly related to the possible violation, unless they evidence a pattern; or 2) questions and evidence about the Complainant's sexual predisposition; or 3) questions and evidence about the Complainant's prior sexual behavior, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

Within the boundaries stated above, the investigation can consider character evidence generally, if offered, but that evidence is unlikely to be relevant unless it is fact evidence or relates to a pattern of conduct.

### **Referral for Hearing**

Provided that the complaint is not resolved through Informal Resolution, once the final investigation report is shared with the parties, the Title IX Coordinator will refer the matter for a hearing.

The hearing cannot be held less than ten (10) business days from the conclusion of the investigation – when the final investigation report is transmitted to the parties and the Decision-maker – unless all parties and the Decision-maker agree to an expedited timeline.

The Title IX Coordinator will select an appropriate Decision-maker from the Pool depending on whether the Respondent is an employee or a student and provide a copy of the investigation report.

### **Hearing Decision-maker Appointment**

The Recipient will designate a single Decision-maker at the discretion of the Title IX Coordinator. The single Decision-maker will also Chair the hearing.

The Decision-maker will not have had any previous involvement with the investigation. The Title IX Coordinator may elect to have an alternate from the Pool sit in throughout the hearing process in the event that a substitute is needed for any reason.

Those who have served as Investigators will be witnesses in the hearing and therefore may not serve as a Decision-maker. Those who are serving as Advisors for any party may not serve as a Decision-maker in that matter.

The Title IX Coordinator may not serve as a Decision-maker or Chair in the matter but may serve as an administrative facilitator of the hearing if their previous role(s) in the matter do not create a conflict of interest. Otherwise, a designee may fulfill this facilitator role. The hearing will convene at a time and venue determined by the Chair or designee.

### **Evidentiary Considerations in the Hearing**

Any evidence that the Decision-maker(s) determine(s) is relevant may be considered. The hearing does not consider: 1) incidents not directly related to the possible violation, unless they evidence a pattern; 2) questions and evidence about the Complainant's sexual predisposition; or 3) questions or evidence about the Complainant's prior sexual behavior, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

Previous disciplinary action of any kind involving the Respondent may be considered in determining an appropriate sanction upon a determination of responsibility, based on the System's progressive discipline system. This information is only considered at the sanction stage of the process and is not shared until then.

The parties may each submit a written impact statement prior to the hearing for the consideration of the Decision-maker at the sanction stage of the process when a determination of responsibility is reached.

After post-hearing deliberation, the Decision-maker renders a determination based on the preponderance of the evidence; whether it is more likely than not that the Respondent violated the Policy as alleged.

### **Notice of Hearing**

No less than ten (10) business days prior to the hearing, the Title IX Coordinator or the Chair will send notice of the hearing to the parties. Once mailed, emailed, and/or received in-person, notice will be presumptively delivered.

#### **The notice will contain:**

A description of the alleged violation(s), a list of all policies allegedly violated, a description of the applicable hearing procedures, and a statement of the potential sanctions/responsive actions that could result.

The time, date, and location of the hearing.

Description of any technology that will be used to facilitate the hearing.

Information about the option for the live hearing to occur with the parties located in separate rooms using technology that enables the Decision-maker(s) and parties to see and hear a party or witness answering questions. Such a request must be raised with the Title IX Coordinator at least five (5) business days prior to the hearing.

A list of all those who will attend the hearing, along with an invitation to object to any Decision-maker(s) on the basis of demonstrated bias or conflict of interest. This must be raised with the Title IX Coordinator at least two (2) business days prior to the hearing.

Information on how the hearing will be recorded and on access to the recording for the parties after the hearing.

A statement that if any party or witness does not appear at the scheduled hearing, the hearing may be held in their absence, and the party's or witness's testimony and any statements given prior to the hearing will not be considered by the Decision-maker(s). For compelling reasons, the Chair may reschedule the hearing.

Notification that the parties may have the assistance of an Advisor of their choosing at the hearing and will be required to have one present for any questions they may desire to ask. The party must notify the Title IX Coordinator if they do not have an Advisor, and ENMU will appoint one. Each party must have an Advisor present. There are no exceptions.

A copy of all the materials provided to the Decision-maker about the matter, unless they have been provided already. The final investigation report may be shared using electronic means that preclude downloading, forwarding, or otherwise sharing.

An invitation to each party to submit to the Chair an impact statement pre-hearing that the Decision-maker will review during any sanction determination.

An invitation to contact the Title IX Coordinator to arrange any disability accommodations, language assistance, and/or interpretation services that may be needed at the hearing, at least seven (7) business days prior to the hearing.

Whether parties may bring mobile phones/devices to the hearing.

Hearings for possible violations that occur near or after the end of an academic term (assuming the Respondent is still subject to this Policy) and are unable to be resolved prior to the end of term will typically be held immediately after the end of the term or during the summer, as needed, to meet the resolution timeline followed by the System and remain within the 60-90 business day goal for resolution.

### **Alternative Hearing Participation Options**

If a party or parties prefer not to attend or cannot attend the hearing in person, the party should request alternative arrangements from the Title IX Coordinator or the Chair at least five (5) business days prior to the hearing.

The Title IX Coordinator or the Chair can arrange to use technology to allow remote testimony without compromising the fairness of the hearing. Remote options may also be needed for witnesses who cannot appear in person. Any witness who cannot attend in person should let the Title IX Coordinator or the Chair know at least five (5) business days prior to the hearing so that appropriate arrangements can be made.

### **Pre-Hearing Preparation**

After any necessary consultation with the parties, the Chair will provide the names of persons who will be participating in the hearing, all pertinent documentary evidence, and the final investigation report to the parties at least ten (10) business days prior to the hearing.

Any witness scheduled to participate in the hearing must have been first interviewed by the Investigator(s) or have proffered a written statement or answered written questions, unless all parties and the Chair assent to the witness's participation in the hearing. The same holds for any evidence that is first offered at the hearing. If the parties and Chair do not assent to the admission of evidence newly offered at the hearing, the Chair may delay the hearing and/or instruct that the investigation needs to be re-opened to consider that evidence.

The parties will be given a list of the name of the Decision-maker at least five (5) business days in advance of the hearing. All objections to any Decision-maker must be raised in writing, detailing the rationale for the objection, and must be submitted to the Title IX Coordinator as soon as possible and no later than two days prior to the hearing. A Decision-maker will only be removed if the Title IX Coordinator concludes that their bias or conflict of interest precludes an impartial hearing of the allegation(s).

The Title IX Coordinator will give the Decision-maker a list of the names of all parties, witnesses, and Advisors at least five (5) business days in advance of the hearing. Any Decision-maker who cannot make an objective determination must recuse themselves from the proceedings when notified of the identity of the parties, witnesses, and Advisors in advance of the hearing. If a Decision-maker is unsure of whether a bias or conflict of interest exists, they must raise the concern to the Title IX Coordinator as soon as possible.

During the ten (10) business day period prior to the hearing, the parties have the opportunity for continued review and comment on the final investigation report and available evidence. That review and comment can be shared with the Chair at a pre-hearing meeting or at the hearing and will be exchanged between each party by the Chair.

### **Pre-Hearing Meetings**

The Chair may convene a pre-hearing meeting(s) with the parties and/or their Advisors and invite them to submit the questions or topics they (the parties and/or their Advisors) wish to ask or discuss at the hearing, so that the Chair can rule on their relevance ahead of time to avoid any improper evidentiary introduction in the hearing or to provide recommendations for more appropriate phrasing. However, this advance review opportunity does not preclude the Advisors from asking a question for the first time at the hearing or from asking for a reconsideration of a pre-hearing ruling by the Chair based on any new



information or testimony offered at the hearing. The Chair must document and share with each party their rationale for any exclusion or inclusion at a pre-hearing meeting.

The Chair, only with full agreement of the parties, may decide in advance of the hearing that certain witnesses do not need to be present if their testimony can be adequately summarized by the Investigator(s) in the investigation report or during the hearing.

At each pre-hearing meeting with a party and their Advisor, the Chair will consider arguments that evidence identified in the final investigation report as relevant is, in fact, not relevant. Similarly, evidence identified as directly related but not relevant by the Investigator(s) may be argued to be relevant.

The Chair may rule on these arguments pre-hearing and will exchange those rulings between the parties prior to the hearing to assist in preparation for the hearing. The Chair may consult with legal counsel and/or the Title IX Coordinator or ask either or both to attend pre-hearing meetings.

The pre-hearing meeting(s) may be recorded. The pre-hearing meetings may be conducted as separate meetings with each party/advisor, with all parties/advisors present at the same time, remotely, or as a paper-only exchange. The Chair will work with the parties to establish the format.

### **Hearing Procedures**

At the hearing, the Decision-maker has the authority to hear and make determinations on all allegations of sexual harassment and/or retaliation and may also hear and make determinations on any additional alleged policy violations that occurred in concert with the sexual harassment and/or retaliation, even though those collateral allegations may not specifically fall within the Policy.

Participants at the hearing will include the Chair, any additional panelists, the hearing facilitator (if any), the Investigator(s) who conducted the investigation, the parties (or up to three (3) organizational representatives when an organization is the Respondent). Advisors to the parties, any called witnesses, the Title IX Coordinator, and anyone providing authorized accommodations, interpretation, and/or assistive services.

The Chair will answer all questions of procedure. Anyone appearing at the hearing to provide information will respond to questions on their own behalf.

The Chair will allow witnesses who have relevant information to appear at a portion of the hearing in order to respond to specific questions from the Decision-maker and the parties and will then be excused.

### **Joint Hearings**

In hearings involving more than one Respondent or in which two (2) or more Complainants have accused the same individual of substantially similar conduct, the default procedure will be to hear the allegations jointly.

However, the Title IX Coordinator may permit the investigation and/or hearings pertinent to each Respondent to be conducted separately if there is a compelling reason to do so. In joint hearings, separate determinations of responsibility will be made for each Respondent with respect to each alleged policy violation.

## **The Order of the Hearing – Introductions and Explanation of Procedure**

The Chair explains the procedures and introduces the participants. This may include a final opportunity for challenge or recusal of the Decision-maker(s) on the basis of bias or conflict of interest. The Chair will rule on any such challenge unless the Chair is the individual who is the subject of the challenge, in which case the Title IX Coordinator will review and decide the challenge.

The Chair AND/OR hearing facilitator then conducts the hearing according to the hearing script. At the hearing, recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process may be managed by a non-voting hearing facilitator/case manager appointed by the Title IX Coordinator. The hearing facilitator may attend to: logistics of rooms for various parties/witnesses as they wait; flow of parties/witnesses in and out of the hearing space; ensuring recording and/or virtual conferencing technology is working as intended; copying and distributing materials to participants, as appropriate, etc.

## **Investigator Presents the Final Investigation Report**

The Investigator(s) will then present a summary of the final investigation report, including items that are contested and those that are not, and will be subject to questioning by the Decision-maker and the parties (through their Advisors). The Investigator(s) will be present during the entire hearing process, but not during deliberations.

Neither the parties nor the Decision-maker should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations, and Advisors and parties will refrain from discussion of or questions for Investigators about these assessments. If such information is introduced, the Chair will direct that it be disregarded.

## **Testimony and Questioning**

Once the Investigator(s) present(s) the report and are questioned, the parties and witnesses may provide relevant information in turn, beginning with the Complainant, and then in the order determined by the Chair. The hearing will facilitate questioning of parties and witnesses by the Decision-maker(s) and then by the parties through their Advisors.

All questions are subject to a relevance determination by the Chair. The Advisor, who will remain seated during questioning, will pose the proposed question orally, electronically, or in writing (orally is the default, but other means of submission may be permitted by the Chair upon request if agreed to by all parties and the Chair), the proceeding will pause to allow the Chair to consider the question (and state it if it has not already been stated aloud), and the Chair will determine whether the question will be permitted, disallowed, or rephrased.

The Chair may invite explanations or persuasive statements regarding relevance with the Advisors, if the Chair so chooses. The Chair will then state their decision on the question for the record and advise the party/witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.

The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive. The Chair has final say on all questions and determinations of relevance. The Chair may consult with legal counsel on any questions of admissibility. The Chair may ask Advisors to frame why a question is or is not relevant from their perspective but will not entertain argument from the Advisors on relevance once the Chair has ruled on a question.

If the parties raise an issue of bias or conflict of interest of an Investigator or Decision-maker at the hearing, the Chair may elect to address those issues, consult with legal counsel, and/or refer them to the Title IX Coordinator, and/or preserve them for appeal. If bias is not in issue at the hearing, the Chair should not permit irrelevant questions that probe for bias.

### **Refusal to Submit to Questioning; Inferences**

Cross-examination is an all or nothing proposition, meaning that if any relevant question is refused, no statements of that party or witness are admissible. Only if a party or witness is willing to submit to cross-examination, and answers all questions, will their statements prior to or at the hearing be fully admissible. If a party or witness chooses not to submit to cross-examination at the hearing, either because they do not attend the meeting, or they attend but refuse to participate in questioning, then the Decision-maker may not rely on any prior statement made by that party or witness at the hearing (including those contained in the investigation report) in the ultimate determination of responsibility. The Decision-maker must disregard all such statements. Evidence provided that is something other than a statement by the party or witness may be considered.

Whether a party or witness does or does not answer questions from the Decision-maker, their statements will be admissible as long as they are willing to submit to cross-examination questions, even if they are not asked such questions. The Decision-maker may not draw any inference solely from a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions. If collateral charges of policy violations other than sexual harassment are considered at the same hearing, the Decision-maker may consider all evidence it deems relevant, may rely on any relevant statement as long as the opportunity for questioning is afforded to all parties through their Advisors, and may draw reasonable inferences from any decision by any party or witness not to participate or respond to questions.

If a party's Advisor of choice refuses to comply with the Recipient's established rules of decorum for the hearing, the Recipient may require the party to use a different Advisor. If an ENMU-provided Advisor refuses to comply with the rules of decorum, the Recipient may provide that party with a different Advisor to conduct questioning on behalf of that party. An Advisor may not be called as a witness at a hearing to testify to what their advisee has told them during their role as an Advisor unless the party being advised consents to that information being shared. It is otherwise considered off-limits, and an Advisor who is an institutional employee is temporarily relieved from mandated reporter responsibilities related to their interaction with their advisee during the resolution process.

### **Recording Hearings**

Hearings (but not deliberations) are recorded by ENMU for purposes of review in the event of an appeal. The parties may not record the proceedings and no other unauthorized recordings are permitted.

The Decision-maker, the parties, their Advisors, and appropriate administrators of the System will be permitted to listen to the recording or review a transcript of the recording in a controlled environment determined by the Title IX Coordinator, upon request. No person will be given or be allowed to make a copy of the recording without permission of the Title IX Coordinator.

### **Deliberation, Decision-making, and Standard of Proof**

The Decision-maker will deliberate in closed session to determine whether the Respondent is responsible or not responsible for the policy violation(s) in question. If a panel is used, a simple majority vote is required to determine the finding. The preponderance of the evidence standard of proof is used. The hearing facilitator may be invited to attend the deliberation by the Chair, but is there only to facilitate procedurally, not to address the substance of the allegations.

When there is a finding of responsibility on one or more of the allegations, the Decision-maker may then consider the previously submitted party impact statements in determining appropriate sanction(s).

The Chair will ensure that each of the parties has an opportunity to review any impact statement submitted by the other party. The Decision-maker may, at their discretion, consider the statements, but they are not binding.

The Decision-maker will review the statements and any pertinent conduct history provided by appropriate administrator and will recommend the appropriate sanction(s) in consultation with other appropriate administrators, as required.

The Chair will then prepare a written deliberation statement and deliver it to the Title IX Coordinator, detailing the determination, rationale, the evidence used in support of its determination, the evidence not relied upon in its determination, credibility assessments, and any sanction recommendations.

This report is typically three (3) to five (5) pages in length and must be submitted to the Title IX Coordinator within three (3) business days of the end of deliberations, unless the Title IX Coordinator grants an extension. If an extension is granted, the Title IX Coordinator will notify the parties.

### **Notice of Outcome**

Using the deliberation statement, the Title IX Coordinator will work with the Chair to prepare a Notice of Outcome letter. The Notice of Outcome will then be reviewed by legal counsel. The Title IX Coordinator will then share the letter, including the final determination, rationale, and any applicable sanction(s) with the parties and their Advisors within seven (7) business days of receiving the Decision-makers deliberation statement.

The Notice of Outcome will be shared with the parties simultaneously. Notification will be made in writing and may be delivered by one or more of the following methods: in person, mailed to the local or permanent address of the parties as indicated in official ENMU records, or emailed to the parties' ENMU-issued email or otherwise approved account. Once mailed, emailed, and/or received in-person, notice will be presumptively delivered.

The Notice of Outcome will articulate the specific policy reported to have been violated, including the relevant policy section, and will contain a description of the procedural steps taken by the System from

the receipt of the misconduct report to the determination, including any and all notifications to the parties, interviews with parties and witnesses, site visits, methods used to obtain evidence, and hearings held.

The Notice of Outcome will specify the finding on each alleged policy violation; the findings of fact that support the determination; conclusions regarding the application of the relevant policy to the facts at issue; a statement of, and rationale for, the result of each allegation to the extent the System is permitted to share such information under state or federal law; any sanctions issued which the System is permitted to share according to state or federal law; and whether remedies will be provided to the Complainant to ensure access to the System's educational or employment program or activity.

The Notice of Outcome will also include information on when the results are considered by the System to be final, any changes that occur prior to finalization, and the relevant procedures and bases for any available appeal options.

### **Statement of the Rights of the Parties** (see Appendix 3)

#### **Sanctions**

Factors considered when determining a sanction/responsive action may include, but are not limited to:

The nature, severity of, and circumstances surrounding the violation(s)

The Respondent's disciplinary history

The need for sanctions/responsive actions to bring an end to the sexual Harassment and/or retaliation

The need for sanctions/responsive actions to prevent the future recurrence of sexual harassment and/or retaliation

The need to remedy the effects of the sexual harassment and/or retaliation on the Complainant and the community

The impact on the parties

Any other information deemed relevant by the Decision-maker(s)

The sanctions will be implemented as soon as is feasible, either upon the outcome of any appeal or the expiration of the window to appeal without an appeal being requested.

The sanctions described in this policy are not exclusive of, and may be in addition to, other actions taken or sanctions imposed by external authorities.

#### **Student Sanctions**

The following are the commonly assigned sanctions that may be imposed upon students or organizations singly or in combination and are subject to the campus policies on student organization conduct.

Warning: A formal statement that the conduct was unacceptable and a warning that further violation of any System policy, procedure, or directive will result in more severe sanctions/responsive actions.

Required Counseling: A mandate to meet with and engage in either ENMU-sponsored or external counseling to better comprehend the misconduct and its effects.

Probation: A written reprimand for violation of institutional policy, providing for more severe disciplinary sanctions in the event that the student or organization is found in violation of any institutional policy, procedure, or directive within a specified period of time. Terms of the probation will be articulated and may include denial of specified social privileges, exclusion from co-curricular activities, exclusion from designated areas of campus, no-contact orders, and/or other measures deemed appropriate.

Suspension: Termination of student status for a definite period of time not to exceed two years and/or until specific criteria are met. Students who return from suspension are automatically placed on probation through the remainder of their tenure as a student at ENMU.

Expulsion: Permanent termination of student status and revocation of rights to be on campus for any reason or to attend ENMU-sponsored events.

Withholding Diploma: The System may withhold a student's diploma for a specified period of time and/or deny a student participation in commencement activities as a sanction if the student is found responsible for an alleged violation.

Revocation of Degree: The System reserves the right to revoke a degree previously awarded from ENMU for fraud, misrepresentation, and/or other violation of ENMU policies, procedures, or directives in obtaining the degree, or for other serious violations committed by a student prior to graduation.

Organizational Sanctions: Deactivation, loss of recognition, loss of some or all privileges (including ENMU registration) for a specified period of time.

Other Actions: In addition to or in place of the above sanctions, the System may assign any other sanctions as deemed appropriate.

### **Employee Sanctions/Responsive/Corrective Actions**

Responsive actions for an employee who has engaged in harassment and/or retaliation include:

Warning – Verbal or written, performance improvement plan/management process, enhanced supervision, observation, or review, required training or education, probation, denial of pay increase/pay grade, Loss of oversight or supervisory responsibility, demotion, transfer, reassignment, assignment to new supervisor, restriction of stipends, research, and/or professional development resources, Suspension with pay, Suspension without pay, Termination.

Other Actions: In addition to or in place of the above sanctions/responsive actions, the System may assign any other responsive actions as deemed appropriate.

### **Withdrawal or Resignation While Charges Pending**

Should a Respondent decide not to participate in the resolution process, the process proceeds absent their participation to a reasonable resolution. Should a student Respondent permanently withdraw from ENMU, the resolution process ends with a dismissal, as the System no longer has disciplinary jurisdiction over the withdrawn student.

However, ENMU will continue to address and remedy any systemic issues, variables that may have contributed to the alleged violation(s), and any ongoing effects of the alleged sexual harassment and/or retaliation. The student who withdraws or leaves while the process is pending may not return to the System in any capacity. Admissions and Human Resources will be notified, accordingly. Such exclusion applies to all campuses of System.

If the student Respondent only withdraws or takes a leave for a specified period of time (e.g., one semester or term), the resolution process may continue remotely and that student is not permitted to return ENMU unless and until all sanctions, if any, have been satisfied.

### **Employees**

Should an employee Respondent resign with unresolved allegations pending, the resolution process ends with dismissal, as the System no longer has disciplinary jurisdiction over the resigned employee. The former employee would not be eligible for rehire for any position within the System.

However, ENMU will continue to address and remedy any systemic issues, variables that contributed to the alleged violation(s), and any ongoing effects of the alleged harassment or retaliation.

The employee who resigns with unresolved allegations pending is not eligible for admission or rehire with the System or any campus of ENMU, and the records retained by the Title IX Coordinator will reflect that status.

### **Appeals**

Any party may file a request for appeal (“Request for Appeal”), but it must be submitted in writing to the Title IX Coordinator within five (5) business days of the delivery of the Notice of Outcome.

A single Appeal Decision-maker will Chair the appeal. No appeal Decision-maker will have been involved in the process previously, including in any dismissal appeal that may have been heard earlier in the process.

The Request for Appeal will be forwarded to the Appeal Chair or designee for consideration to determine if the request meets the grounds for appeal (a Review for Standing).

This review is not a review of the merits of the appeal, but solely a determination as to whether the request meets the grounds and is timely filed.

### **Grounds for Appeal**

Appeals are limited to the following grounds:

Procedural irregularity that affected the outcome of the matter;

New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

The Title IX Coordinator, Investigator(s), or Decision-maker had a conflict of interest or bias for or against Complainants or Respondents generally or the specific Complainant or Respondent that affected the outcome of the matter.

If any of the grounds in the Request for Appeal do not meet the grounds in this Policy, that request will be denied by the Appeal Chair and the parties and their Advisors will be notified in writing of the denial and the rationale.

If any of the grounds in the Request for Appeal meet the grounds in this Policy, then the Appeal Chair will notify the other party and their Advisors, the Title IX Coordinator, and, when appropriate, the Investigators and/or the original Decision-maker.

The other party and their Advisors, the Title IX Coordinator, and, when appropriate, the Investigators and/or the original Decision-maker will be mailed, emailed, and/or provided a hard copy of the request for an appeal with the approved grounds and then be given five (5) business days to submit a response to the portion of the appeal that was approved and involves them. All responses, if any, will be forwarded by the Chair to all parties for review and comment.

The non-appealing party (if any) may also choose to raise a new ground for appeal at this time. If so, that will be reviewed to determine if it meets the grounds in this Policy by the Appeal Chair and either denied or approved. If approved, it will be forwarded to the party who initially requested an appeal, the Investigator(s) and/or original Decision-maker, as necessary, who will submit their responses, if any, in five (5) business days, which will be circulated for review and comment by all parties. If not approved, the parties will be notified accordingly, in writing.

Neither party may submit any new requests for appeal after this time period. The Appeal Chair will collect any additional information needed and all documentation regarding the approved grounds for appeal, and the subsequent responses will be shared with the Appeal Chair who will render a decision in no more than five (5) business days, barring exigent circumstances. All decisions apply the preponderance of the evidence standard.

A Notice of Appeal Outcome will be sent to all parties simultaneously including the decision on each approved ground and rationale for each decision. The Notice of Appeal Outcome will specify the finding on each ground for appeal, any specific instructions for remand or reconsideration, any sanctions that may result which the System is permitted to share according to state or federal law, and the rationale supporting the essential findings to the extent the System is permitted to share under state or federal law.

Notification will be made in writing and may be delivered by one or more of the following methods: in person, mailed to the local or permanent address of the parties as indicated in official institutional records, or emailed to the parties' ENMU-issued email or otherwise approved account. Once mailed, emailed and/or received in-person, notice will be presumptively delivered.

### **Sanctions Status During the Appeal**



Any sanctions imposed as a result of the hearing are stayed during the appeal process. Supportive measures may be reinstated, subject to the same supportive measure procedures above.

If any of the sanctions are to be implemented immediately post-hearing, but pre-appeal, then emergency removal procedures (detailed above) for a show cause meeting on the justification for doing so must be permitted within 48 hours of implementation.

If the original sanctions include separation in any form, the System may place a hold on official transcripts, diplomas, graduations, and course registration pending the outcome of an appeal. The Respondent may request a stay of these holds from the Title IX Coordinator within two (2) business days of the notice of the sanctions. The request will be evaluated by the Title IX Coordinator or designee, whose determination is final.

### **Appeal Considerations**

Appeals are not intended to provide for a full re-hearing (de novo) of the allegation(s). In most cases, appeals are confined to a review of the written documentation or record of the original hearing and pertinent documentation regarding the specific grounds for appeal.

Decisions on appeal are to be deferential to the original decision, making changes to the finding only when there is clear error and to the sanction(s)/responsive action(s) only if there is a compelling justification to do so.

An appeal is not an opportunity for Appeal Chair to substitute their judgment for that of the original Decision-maker merely because they disagree with the finding and/or sanction(s).

The Appeal Chair may consult with the Title IX Coordinator and/or legal counsel on questions of procedure or rationale, for clarification, if needed. Documentation of all such consultation will be maintained.

Appeals granted should normally be remanded (or partially remanded) to the original Investigator(s) and/or Decision-maker for reconsideration.

Once an appeal is decided, the outcome is final: further appeals are not permitted, even if a decision or sanction is changed on remand (except in the case of a new hearing. When appeals result in no change to the finding or sanction, that decision is final. When an appeal results in a new finding or sanction, that finding or sanction can be appealed one final time on the grounds listed above and in accordance with these procedures.

In rare cases where an error cannot be cured by the original Decision-maker) (as in cases of bias), the appeal Chair may order a new investigation with new investigators and/or a new hearing with a new Decision-maker.

The results of a new hearing can be appealed, once, on any of the three available appeal grounds.

In cases in which the appeal results in reinstatement to ENMU or resumption of privileges, all reasonable attempts will be made to restore the Respondent to their prior status, recognizing that some opportunities lost may be irreparable in the short term.

## **Long-Term Remedies/Other Actions**

Following the conclusion of the resolution process, and in addition to any sanctions implemented, the Title IX Coordinator may implement additional long-term remedies or actions with respect to the parties and/or the campus community that are intended to stop the sexual harassment and/or retaliation, remedy the effects, and prevent reoccurrence.

These remedies/actions may include, but are not limited to:

Referral to counseling and health services

Education to the individual and/or the community

Permanent alteration of housing assignments

Permanent alteration of work arrangements for employees

Provision of campus safety escorts

Climate surveys

Policy modification and/or training

Provision of transportation accommodations

Implementation of long-term contact limitations between the parties

Implementation of adjustments to academic deadlines, course schedules, etc.

At the discretion of the Title IX Coordinator, certain long-term support or measures may also be provided to the parties even if no policy violation is found.

When no policy violation is found, the Title IX Coordinator will address any remedies owed by the Recipient to the Respondent to ensure no effective denial of educational access.

The System will maintain the confidentiality of any long-term remedies/actions/measures, provided confidentiality does not impair the Recipient's ability to provide these services.

## **Failure to Comply with Sanctions and/or Responsive Actions**

All Respondents are expected to comply with the assigned sanctions, responsive actions, and/or corrective actions within the timeframe specified by the final Decision-maker (including the Appeal Chair).

Failure to abide by the sanction(s)/action(s) imposed by the date specified, whether by refusal, neglect, or any other reason, may result in additional sanction(s)/action(s), including suspension, expulsion, and/or termination from the System.

A suspension will only be lifted when compliance is achieved to the satisfaction of the Title IX Coordinator.

## **Recordkeeping**

ENMU will maintain for a period of at least seven years records of:

Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under federal regulation;

Any disciplinary sanctions imposed on the Respondent;

Any remedies provided to the Complainant designed to restore or preserve equal access to the System's education program or activity;

Any appeal and the result therefrom;

Any Informal Resolution and the result therefrom;

All materials used to train Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an Informal Resolution process. ENMU will make these training materials publicly available on the ENMU website; and

Any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment, including:

The basis for all conclusions that the response was not deliberately indifferent;

Any measures designed to restore or preserve equal access to the ENMU education program or activity; and

If no supportive measures were provided to the Complainant, document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

ENMU will also maintain any and all records in accordance with state and federal laws.

## **Accommodations in the Resolution Process**

ENMU is committed to providing reasonable accommodations and support to qualified students, employees, or others with disabilities to ensure equal access to the System's resolution process.

Anyone needing such accommodations or support should contact the Office of Accommodative Services or the Section 504 Coordinator who will review the request and, in consultation with the person requesting the accommodation and the Title IX Coordinator, determine which accommodations are appropriate and necessary for full participation in the process.

## **Revision of this Policy and Procedures**

This Policy and procedures supersede any previous policy addressing harassment, sexual misconduct and/or retaliation for incidents occurring on or after August 14, 2020, under Title IX and will be reviewed and updated annually by the Title IX Coordinator. The System reserves the right to make changes to this document as necessary, and once those changes are posted online, they are in effect.

During the resolution process, the Title IX Coordinator may make minor modifications to procedures that do not materially jeopardize the fairness owed to any party, such as to accommodate summer schedules. The Title IX Coordinator may also vary procedures materially with notice (on the institutional website, with the appropriate effective date identified) upon determining that changes to law or regulation require Policy or procedural alterations not reflected in this Policy and procedures.

If government laws or regulations change – or court decisions alter – the requirements in a way that impacts this document, this document will be construed to comply with the most recent laws, government regulations, or court holdings.

This document does not create legally enforceable protection beyond the protection of the background state and federal laws which frame such policies and codes, generally.

ATIXA 2020 INTERIM MODEL SEXUAL HARASSMENT POLICIES AND PROCEDURES  
USE AND ADAPTATION OF THIS MODEL WITH CITATION TO ATIXA IS PERMITTED  
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TO THE EASTERN NEW MEXICO UNIVERSITY SYSTEM  
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## 80-12 Appendix 1: Glossary

*Advisor* means a person chosen by a party or appointed by the institution to accompany the party to meetings related to the resolution process, to advise the party on that process, and to conduct questioning for the party at the hearing, if any.

*Alternate process* means any process designated by the System to apply only when the Process described herein does not apply, as determined by the Title IX Coordinator.

*Complainant* means an individual who is alleged to be the victim of conduct that could sexual harassment based on a protected class; or retaliation for engaging in a protected activity.

*Complaint (formal)* means a document submitted or signed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment or retaliation for engaging in a protected activity against a Respondent and requesting that the System investigate the allegation.

*Confidential Resource* means an employee who is not a Mandated Reporter of notice of harassment and/or retaliation (irrespective of Clery Act Campus Security Authority status).

*Consent* means knowing, voluntary, and clear permission by word or action to engage in sexual activity. For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct. Reasonable reciprocation can be implied. For example, if someone kisses you, you can kiss them back (if you want to) without the need to explicitly obtain *their* consent to being kissed back.

*Confidentiality* exists in the context of laws that protect certain relationships, including those who provide services related to medical and clinical care, mental health providers, and counselors. The law creates a privilege between certain health care providers, mental health care providers, attorneys, spouses, and others, with their patients, clients, and spouses. The System has designated individuals who have the ability to have privileged communications as Confidential Resources. For more information about Confidential Resources, see page 26. When information is shared by a Complainant with a Confidential Resource, the Confidential Resource cannot reveal the information to any third party except when an applicable law or a court order requires or permits disclosure of such information. For example, information may be disclosed when: (i) the individual gives written consent for its disclosure; (ii) there is a concern that the individual will likely cause serious physical harm to self or others; or (iii) the information concerns conduct involving suspected abuse or neglect of a minor under the age of 18, elders, or individuals with disabilities. Non-identifiable information may be shared by Confidential Resources for statistical tracking purposes as required by the federal Clery Act. Other information may be shared as required by law.

*Coercion* is unreasonable pressure for sexual activity. Coercive conduct differs from seductive conduct based on factors such as the type and/or extent of the pressure used to obtain consent. When someone makes clear that they do not want to engage in certain sexual activity, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive.

*Day* means a business day when the Recipient is in normal operation.

*Decision-maker* is a person who hears evidence, determines relevance, and makes the Final Determination of whether this Policy has been violated and/or assigns sanctions.

*Directly-related Evidence* is evidence connected to the complaint, but which is neither inculpatory (tending to prove a violation) nor exculpatory (tending to disprove a violation) and cannot be relied upon by the investigation report or Decision-maker. Compare to Relevant Evidence, below.

*Education program or activity* means locations, events, or circumstances where ENMU exercises substantial control over both the Respondent and the context in which the sexual harassment, discrimination, and/or retaliation occurs and also includes any building owned or controlled by a student organization that is officially recognized by the System.

*Final Determination* is a conclusion by preponderance of the evidence that the alleged conduct did or did not violate policy.

*Finding*: A conclusion by preponderance of the evidence that the conduct did or did not occur as alleged (as in a “finding of fact”).

*Force* is the use of physical violence and/or physical imposition to gain sexual access. Force also includes threats, intimidation (implied threats), and coercion that is intended to overcome resistance or produce consent (e.g., “Have sex with me or I’ll hit you,” which elicits the response, “Okay, don’t hit me, I’ll do what you want.”). Sexual activity that is forced is, by definition, non-consensual, but non-consensual sexual activity is not necessarily forced. Silence or the absence of resistance alone is not consent. Consent is not demonstrated by the absence of resistance. While resistance is not required or necessary, it is a clear demonstration of non-consent.

*Forcible Fondling* is defined as the touching of the private body parts of another person (buttock, groin, breasts), for the purpose of sexual gratification forcibly and/or against that person’s will (non-consensual) or not forcibly or against the person’s will in instances in which the complainant is incapable of giving consent because age or because of temporary or permanent mental or physical capacity.

*Forcible Rape* is defined as 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 their consent.

*Forcible Sodomy* is defined as oral or anal sexual intercourse with another person forcibly and/or against that person’s will (non-consensual) or not forcibly or against the person’s will in instances in which the complainant is incapable of giving consent because age or because of temporary or permanent mental or physical capacity.

*Formal Grievance Process* (the “Process”) a method described herein of formal resolution designated by the System to address conduct that falls within the Policy included below, and which complies with the requirements of the Title IX regulations (34 CFR §106.45).

*Grievance Process Pool* includes any investigators, hearing Decision-makers, appeal officers, and Advisors who may perform any or all of these roles (though not at the same time or with respect to the same case).

*Hearing Decision-maker* refers to those who have decision-making and sanctioning authority within the Recipient’s Formal Grievance process.

*Incapacitation* is determined through consideration of all relevant indicators of an individual’s state and is not synonymous with intoxication, impairment, blackout, and/or being drunk. A person cannot consent if

they are unable to understand what is happening or is disoriented, helpless, asleep, or unconscious, for any reason, including by alcohol or other drugs.

*Investigator* means the person or persons charged by ENMU with gathering facts about an alleged violation of this Policy, assessing relevance and credibility, synthesizing the evidence, and compiling this information into an investigation report of Relevant Evidence and a file of Directly Related Evidence.

*Mandated Reporter* means an employee of the System who is obligated by policy to share knowledge, notice, and/or reports of harassment and/or retaliation with the Title IX Coordinator.

*Notice* means that an employee, student, or third-party informs the Title IX Coordinator or other Official with Authority of the alleged occurrence of harassing, discriminatory, and/or retaliatory conduct.

*Official with Authority (OWA)* means an employee of the System explicitly vested with the responsibility to implement corrective measures for sexual harassment and/or retaliation on behalf of ENMU.

*Parties* include the Complainant(s) and Respondent(s), collectively.

*Privacy* means that information related to a complaint will be shared with a limited number of ENMU employees who “need to know” in order to assist in the assessment, investigation, and resolution of the report. All employees who are involved in the Recipient’s response to notice under this policy receive specific training and guidance about sharing and safeguarding private information in accordance with state and federal law. The privacy of student education records will be protected in accordance with the Family Educational Rights and Privacy Act (“FERPA”), as outlined in the Recipient’s Student Records Policy. The privacy of employee records will be protected in accordance with System policies.

*Relevant Evidence* is evidence that tends to prove (inculpatory) or disprove (exculpatory) an issue in the complaint.

*Remedies* are post-Finding actions directed to the Complainant and/or the community as mechanisms to address safety, prevent recurrence, and restore access to the System’s educational program.

*Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment or retaliation for engaging in a protected activity.

*Resolution* means the result of an informal or Formal Grievance Process.

*Sanction* means a consequence imposed by the System on a Respondent who is found to have violated this policy.

*Sexual Assault with an object* is defined as the use of an object or instrument to penetrate, however slightly the genital or anal opening of the body of another person forcibly and/or against that person’s will (non-consensually) or not forcibly or against the person’s will in instances in which the complainant is incapable of giving consent because age or because of temporary or permanent mental or physical capacity.

*Sexual Harassment* is the umbrella category including the offenses of sexual harassment, sexual assault, stalking, and dating violence, and domestic violence. See Section 13 in the policy for greater detail.

*Student* is defined as any individual who has accepted an offer of admission, or who is registered or enrolled for credit or non-credit bearing course work, and who maintains an ongoing relationship with the ENMU System.

*Title IX Coordinator* is at least one official designated by the System to ensure compliance with Title IX and the System's Title IX program. References to the Coordinator throughout this policy may also encompass a designee of the Coordinator for specific tasks.

*Title IX Team* refers to the Title IX Coordinator, any deputy coordinators, and any member of the Grievance Process Pool.



## **APPENDIX 2: POLICY EXAMPLES**

Some examples of possible sexual harassment include:

- A professor offers for a student to have sex or go on a date with them in exchange for a good grade. This constitutes sexual harassment regardless of whether the student accedes to the request and irrespective of whether a good grade is promised or a bad grade is threatened.
- A student repeatedly sends graphic, sexually-oriented jokes and pictures around campus via social media to hundreds of other students. Many don't find it funny and ask them to stop, but they do not. Because of these jokes, one student avoids the sender on campus and in the residence hall in which they both live, eventually asking to move to a different building and dropping a class they had together.
- A professor engages students in class in discussions about the students' past sexual experiences, yet the conversations are not in any way germane to the subject matter of the class. The professor inquires about explicit details and demands that students answer them, though the students are clearly uncomfortable and hesitant.
- An ex-partner widely spreads false stories about their sex life with their former partner to the clear discomfort and frustration of the former partner, turning the former partner into a social pariah on campus.

### Examples of Stalking

- Students A and B were "friends with benefits." Student A wanted a more serious relationship, which caused student B to break it off. Student A could not let go and pursued student B relentlessly. Student B obtained a campus no-contact order. Subsequently, Student B discovered their social media accounts were being accessed, and things were being posted and messaged as if they were from them, but they were not. Whoever accessed their account posted a picture of a penis, making it look as if Student B had sent out a picture of themselves, though it was not their penis. This caused them considerable embarrassment and social anxiety. They changed their passwords, only to have it happen again. Seeking help from the Title IX Coordinator, Student B met with the IT department, which discovered an app on their phone and a keystroke recorder on their laptop, both of which were being used to transmit their data to a third party.
- A graduate student working as an on-campus tutor received flowers and gifts delivered to their office. After learning the gifts were from a student they recently tutored, the graduate student thanked the student and stated that it was not necessary and would appreciate it if the gift deliveries stopped. The student then started leaving notes of love and gratitude on the tutor's car, both on-campus and at home. Asked again to stop, the student stated by email, "You can ask me to stop, but I'm not giving up. We are meant to be together, and I'll do anything to make you have the feelings for me that I have for you." When the tutor did not respond, the student emailed again, "You cannot escape me. I will track you to the ends of the earth. If I can't have you, no one will."

### Examples of Sexual Assault:

- Amanda and Bill meet at a party. They spend the evening dancing and getting to know each other. Bill convinces Amanda to come up to his room. From 11:00 p.m. until 3:00 a.m., Bill uses every line he can think of to convince Amanda to have sex with him, but she adamantly refuses. Despite her clear communications that she is not interested in doing anything sexual with him, Bill keeps at her, questions her religious convictions, and accuses her of being “a prude.” He brings up several rumors that he has heard about how she performed oral sex on a number of other guys. Finally, it seems to Bill that her resolve is weakening, and he convinces her to “jerk him off” (hand to genital contact). Amanda would have never done it but for Bill's incessant coercion.
- Jiang is a junior. Beth is a sophomore. Jiang comes to Beth's residence hall room with some mutual friends to watch a movie. Jiang and Beth, who have never met before, are attracted to each other. After the movie, everyone leaves, and Jiang and Beth are alone. They hit it off, soon become more intimate, and start to make out. Jiang verbally expresses his desire to have sex with Beth. Beth, who was abused by a babysitter at the age of five and avoids sexual relations as a result, is shocked at how quickly things are progressing. As Jiang takes her by the wrist over to the bed, lays her down, undresses her, and begins to have intercourse with Beth, Beth has a severe flashback to her childhood trauma. She wants to tell Jiang to stop but cannot. Beth is stiff and unresponsive during the intercourse.
- Kevin and John are at a party. Kevin is not sure how much John has been drinking, but he is pretty sure it's a lot. After the party, he walks John to his apartment, and John comes on to Kevin, initiating sexual activity. Kevin asks John if he is really up to this, and John says yes. They remove each other's clothes, and they end up in John's bed. Suddenly, John runs for the bathroom. When he returns, his face is pale, and Kevin thinks he may have thrown up. John gets back into bed, and they begin to have sexual intercourse. Kevin is having a good time, though he can't help but notice that John seems pretty groggy and passive, and he thinks John may have even passed out briefly during the sex, but he came to again. When Kevin runs into John the next day, he thanks him for the great night. John remembers nothing and decides to make a report to the Dean.

#### Examples of Retaliation:

- Student-athlete A alleges sexual harassment by a coach; the coach subsequently cuts the student-athlete's playing time without a legitimate justification.
- A student from Organization A participates in a sexual harassment investigation as a witness whose testimony is damaging to the Respondent, who is also a member of Organization A; the student is subsequently removed as a member of Organization A because of their participation in the investigation.

### **APPENDIX 3: STATEMENT OF RIGHTS OF THE PARTIES**

- The right to an equitable investigation and resolution of all credible allegations of prohibited harassment or retaliation made in good faith to ENMU officials.
- The right to timely written notice of all alleged violations, including the identity of the parties involved (if known), the precise misconduct being alleged, the date and location of the alleged misconduct (if known), the implicated policies and procedures, and possible sanctions.
- The right to timely written notice of any material adjustments to the allegations (e.g., additional incidents or allegations, additional Complainants, unsubstantiated allegations) and any attendant adjustments needed to clarify potentially implicated policy violations.
- The right to be informed in advance of any public release of information by the System regarding the allegation(s) or underlying incident(s), whenever possible.
- The right not to have any personally identifiable information released by the System to the public without consent provided, except to the extent permitted by law.
- The right to be treated with respect by ENMU officials.
- The right to have ENMU Policy and these procedures followed without material deviation.
- The right not to be pressured to mediate or otherwise informally resolve any reported misconduct involving violence, including sexual violence.
- The right not to be discouraged by ENMU officials from reporting sexual harassment or retaliation to both on-campus and off-campus authorities.
- The right to be informed by ENMU officials of options to notify proper law enforcement authorities, including on-campus and local police, and the option(s) to be assisted by the System in notifying such authorities, if the party so chooses. This also includes the right not to be pressured to report.
- The right to have allegations of violations of this Policy responded to promptly and with sensitivity by ENMU Police and Security and/or other System officials.
- The right to be informed of available supportive measures, such as counseling; advocacy; health care; student financial aid, visa, and immigration assistance; and/or other services, both on campus and in the community.
- The right to an ENMU-implemented no-contact order and/or a no-trespass order against a non-affiliated third party when a person has engaged in or threatens to engage in stalking, threatening, harassing, or other improper conduct.
- The right to be informed of available assistance in changing academic, living, and/or working situations after an alleged incident of sexual harassment and/or retaliation, if such changes are reasonably available. No formal report, or investigation, either campus or criminal, needs to occur before this option is available. Such actions may include, but are not limited to:
  - Relocating an on-campus student's housing to a different on-campus location

- Assistance from ENMU staff in completing the relocation
  - Changing an employee's work environment (e.g., reporting structure, office/workspace relocation)
  - Transportation accommodations
  - Visa/immigration assistance
  - Arranging to dissolve a housing contract and provide a pro-rated refund
  - Exam, paper, and/or assignment rescheduling or adjustment
  - Receiving an incomplete in, or a withdrawal from, a class (may be retroactive)
  - Transferring class sections
  - Temporary withdrawal/leave of absence (may be retroactive)
  - Campus safety escorts
  - Alternative course completion options.
- The right to have the System maintain such actions for as long as necessary and for supportive measures to remain confidential, provided confidentiality does not impair the System's ability to provide the supportive measures.
  - The right to receive sufficiently advanced, written notice of any meeting or interview involving the other party, when possible.
  - The right to have the Investigator(s), Advisors, and/or Decision-makers identify and question relevant available witnesses, including expert witnesses.
  - The right to provide the Investigator(s)/Decision-maker with a list of questions that, if deemed relevant by the Investigator(s)/Decision-maker, may be asked of any party or witness.
  - The right to have inadmissible prior sexual predisposition/history or irrelevant character evidence excluded by the decision-maker.
  - The right to know the relevant and directly related evidence obtained and to respond to that evidence.
  - The right to a fair opportunity to provide the Investigator(s) with their account of the alleged misconduct and have that account be on the record.
  - The right to receive a copy of all relevant and directly related evidence obtained by the investigation, subject to privacy limitations imposed by state and federal law, and a ten (10) business day period to review and comment on the evidence.
  - The right to receive a copy of the final investigation report, including all factual, policy, and/or credibility analyses performed, and have at least ten (10) business days to review and comment on the report prior to the hearing.
  - The right to be informed of the names of all witnesses whose information will be used to make a finding, in advance of that finding, when relevant.
  - The right to regular updates on the status of the investigation and/or resolution.
  - The right to have reports of alleged Policy violations addressed by Investigators, Title IX Coordinators, and Decision-makers who have received relevant annual training.
  - The right to preservation of confidentiality/privacy, to the extent possible and permitted by law.

- The right to meetings, interviews, and/or hearings that are closed to the public.
- The right to petition that any ENMU representative in the process be recused on the basis of disqualifying bias and/or conflict of interest.
- The right to have an Advisor of their choice to accompany and assist the party in all meetings and/or interviews associated with the resolution process.
- The right to the use of preponderance of the evidence to make a finding after an objective evaluation of all relevant evidence.
- The right to be present, including presence via remote technology, during all testimony given and evidence presented during any formal grievance hearing.
- The right to have an impact statement considered by the Decision-maker following a determination of responsibility for any allegation, but prior to sanctioning.
- The right to be promptly informed in a written Notice of Outcome letter of the finding(s) and sanction(s) of the resolution process (if any) and a detailed rationale of the decision (including an explanation of how credibility was assessed), delivered simultaneously (without undue delay) to the parties.
- The right to be informed in writing of when a decision by the System is considered final and any changes to the final determination or sanction(s) that occur after the Notification of Outcome is sent.
- The right to be informed of the opportunity to appeal the finding(s) and sanction(s) of the resolution process, and the procedures for doing so in accordance with the standards for appeal established by the System.
- The right to a fundamentally fair resolution as defined by these procedures.