

## SENATE ACTION FORM

No. 1192

Subject: Discrimination Complaint Procedures Revisions

Reference to Faculty Senate Executive Committee Minutes dated: 08/10/2020

Senate Action:

MOTION: It is moved to approve the revisions to the Discrimination Complaint Procedures as presented with the addition of language at the beginning of the policy to reference the revisions.

VOTE: Approved by voice vote.

Response requested:

\_\_\_\_\_ Approval for placement in University Catalog

X **Approval for placement in University Regulations**

\_\_\_\_\_ Recommendation to Board for placement in Board Policy Manual

\_\_\_\_\_ None (sent as an information item)

  X   Other action requested/comments: **Administrative review and Presidential approval requested**

Bea Tuis

Faculty Senate Chair

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08/12/2020

Date \_\_\_\_\_

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Administrative review of Senate action (unnecessary for information items):

\_\_\_\_\_ Reviewed by **VPAA/Provost**. Check \_\_\_\_\_ if comments attached

\_\_\_\_\_ Reviewed by **General Counsel**. Check \_\_\_\_\_ if comments attached

Presidential action:

\_\_\_\_\_ Approve    \_\_\_\_\_ Reject    \_\_\_\_\_ Return to Senate for discussion/modification (comments attached)

President/Designated Administrative Officer

Date \_\_\_\_\_

Date of Board approval (if applicable): not applicable

**PLEASE RETURN SIGNED ORIGINAL AND ATTACHMENT TO THE FACULTY SENATE OFFICE, CARTER 2004, BOX 75.**

Attachment to Senate Action #1192  
Approved by the Faculty Senate Executive Committee  
August 10, 2020

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**Revisions to the Discrimination Complaint Procedures found in the University Regulations**

*Add the following highlighted sentence to 3-6-125*

**3-6-125 Discrimination Complaint Procedures - Purpose and Scope.** Consistent with Board Policy 1-1-508 and applicable Federal and State law, these Discrimination Complaint Procedures of the University of Northern Colorado ("DCP") apply to all Complaints of Discrimination, Harassment and/or Retaliation, as those terms are defined below, with respect to students, faculty and/or staff. **For additional provisions applicable to "formal complaints" of "sexual harassment" alleged to have occurred on or after August 14, 2020 as described in the "Title IX Rule" referenced in Section 3-6-135, below, should the Title IX Rule be in force and effect on or after August 14, 2020, please see Sections 3-6-135 through 145.**

The DCP contains the only University processes that can be utilized by University students, faculty and/or staff for claims of Discrimination, Harassment and/or Retaliation and no other review, grievance or appeal processes of any type (including but not limited to those contained in Board Policy 2-2-106 and 2-3-1201) may be utilized unless specifically stated to the contrary in the DCP. If an allegation of Discrimination, Harassment and/or Retaliation is made during any other review, grievance or appeal process, such review, grievance or appeal will be held in abeyance pending resolution of such allegation under the DCP.

*These are new sections to be added to the existing policy following 3-6-134(10).*

**3-6-135 Additional Procedures on or After August 14, 2020 – Purpose and Scope** Should the provisions of part 106 of title 34 of the Code of Federal Regulations published by U.S. Department of Education in the Federal Register on May 6, 2020 ("Title IX Rule") be in force and effect on or after August 14, 2020, the following provisions of the DCP shall be applicable to "formal complaints" of "sexual harassment" alleged to have occurred on or after August 14, 2020 as those terms are defined in the Title IX Rule and the provisions of the DCP in Sections 3-6-136 through 145, below. To the extent any of these sections conflict with other provisions of the DCP, the provisions of Sections 3-6-136 through 145 shall supersede other provisions of the DCP only with respect to the Grievance Process for Formal Complaints of Sexual Harassment (as defined below.) In all other circumstances, the provisions of the DCP other than those in Sections 3-6-136 through 145 shall remain in force and effect.

**3-6-136 Additional Definitions**

The following additional definitions apply to the DCP under the circumstances, and to the extent provided, in Section 3-6-135, above.

- (1) "Actual Knowledge" means notice of Sexual Harassment or allegations of Sexual Harassment to the University's Title IX Coordinator or to any University official, other than the Respondent(s), who has authority to institute corrective measures on behalf of the University and does not include mere vicarious liability or mere constructive notice. For the purposes of this definition, a University official, other than the Respondent(s), who has authority to institute corrective measures on behalf of the University does not include an individual who has (a) the mere ability or obligation to report Sexual Harassment; (b) the mere ability or obligation to inform a University student about how to report Sexual harassment; or (c) was merely trained to report Sexual Harassment or to inform a University student about how to report Sexual Harassment.
- (2) "Administrative Leave" means the placement of a Respondent who is a non-student employee of the University on leave of absence during the pendency of a Grievance Process.
- (3) "Dating Partner" means a person who is or has been in a social relationship of a romantic or intimate nature with another person and where the determination of whether the two persons are Dating Partners is determined by consideration of (a) the length of the relationship; (b) the type of relationship; and (c) the frequency of interaction between the two persons.

- (4) "Dating Violence" means physical violence committed by a Dating Partner of the victim.
- (5) "Determination Regarding Responsibility" (which may be referred to below as the "Determination") means a written document issued by a Decision-Maker following a Live Hearing in which findings, conclusions, and Remedies and Disciplinary Sanctions (if a Respondent has been determined to have engaged in Sexual Harassment), are outlined, as further described in Section 3-6-143, below.
- (6) "Decision-Maker" means the person (who may not be the Title IX Coordinator or an investigator of the allegations of the Formal Complaint) who presides over the Live Hearing and issues a Determination Regarding Responsibility after the conclusion of the Live Hearing.
- (7) "Disciplinary Sanctions" means, and may include, (1) as to a University student, the Outcomes described in Section 3-2-203(8)(a) through (j) of the University Regulations and (2) as to a University employee, any action permitted by law and/or University policy, including but not limited to, placement in the employee's personnel file of the Determination Regarding Responsibility and any other information or documents compiled in the course of the Grievance Process in which the employee is a respondent, completion of required education, or of research or written materials relevant to Sexual Harassment of which the employee was found responsible, suspension (either with or without pay), demotion, or termination of or dismissal from employment with the University.
- (8) "Domestic Violence" means felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to the spouse or victim under the domestic or family violence laws of the State of Colorado, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the State of Colorado.
- (9) "Emergency Removal" means the removal of a Respondent from the University's Education Program or Activity after the University (a) undertakes an individualized safety and risk analysis, (b) determines that an immediate threat to the physical health or safety of any student or individual arising from the allegations of Sexual Harassment against the Respondent justifies removal, and (c) provides the Respondent with notice and an opportunity to challenge the removal immediately after it occurs.
- (10) "Filed," in connection with a Formal Complaint, means submitted to the Title IX Coordinator in person, by mail, or by electronic submission, using the office address, electronic mail address and/or telephone number listed for the Title IX Coordinator on the University website.
- (11) "Formal Complaint" means a document or electronic submission filed by a Complainant or signed by the Title IX Coordinator (that contains the Complainant's physical or digital signature, or otherwise indicates that the Complainant is the person who has submitted it) that alleges Sexual Harassment by a Respondent and requests that the University investigate the allegation(s) of Sexual Harassment and, at the time the Formal Complaint was filed, the Complainant was participating, or attempting to participate, in a University Education Program or Activity.
- (12) "Grievance Process" means the process of the University that addresses a Formal Complaint and complies with the requirements of 34 C.F.R. Section 106.45.
- (13) "Informal Resolution" means attempts in which the parties may engage voluntarily to attempt to resolve the allegations of the Formal Complaint prior to the issuance of a Determination Regarding Responsibility by the Decision-Maker and may result in dismissal of the Formal Complaint or a portion(s) thereof.

- (14) "Remedies" means actions of the University that are taken after the Grievance Process has been completed, and after a Determination Regarding Responsibility has been issued in which a Respondent has been determined to have engaged in Sexual Harassment and that imposes Disciplinary Sanctions on the Respondent in order to restore or preserve equal access to University Education Programs or Activities.
- (15) "Sexual Assault" means 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, or an attempt to do any of the above, without the consent of the victim.
- (16) "Sexual Harassment" means conduct on the basis of sex occurring in the United States (a) in which a University employee conditions the provision of an aid, benefit, or service of the University on a person's participation in Unwelcome Sexual Conduct; (b) that constitutes Sexual Assault (as defined in 20 U.S.C. Section 1092(f)(6)(A)(v)); (c) that constitutes Dating Violence (as defined in 34 U.S.C. Section 12291(a)(10)); (d) that constitutes Domestic Violence (as defined in 34 U.S.C. Section 12291(a)(8)); and/or (e) that constitutes Stalking (as defined in 34 U.S.C. Section 12291(a)(9)).
- (17) "Stalking" means a course of conduct directed at a specific person that would cause a reasonable person to (a) fear for their safety or the safety of others or (b) suffer substantial emotional distress.
- (18) "Supportive Measures" means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a Formal Complaint or where no Formal Complaint has been filed, which are designed to restore or preserve equal access to a University Education Program or Activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the University's educational environment, or to deter Sexual Harassment, and may include counseling, extensions of deadlines or other course-related adjustment, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the University campus, and other similar measures, and such measures must be maintained as confidential by the University to the extent that maintaining such confidentiality would not impair the ability of the University to provide such measures.
- (19) "University Education Program or Activity" means locations, events, or circumstances over which the University exercises substantial control over the respondent and the context in which Sexual Harassment occurs and includes any building owned or controlled by a Registered Student Organization as that term is defined in Section 3-2-203(12) of the University Regulations.
- (20) "Unwelcome Sexual Conduct" means behavior of a sexual nature determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a University Education Program or Activity.

### **3-6-137 Initiation of the Grievance Process**

- (1) **Notice of Allegations** Within five (5) days after a Formal Complaint is filed, the University shall provide written notice of the Formal Complaint" to each Complainant and Respondent identified.
- (2) **Contents** The written notice shall contain:
  - (a) A description of the Grievance Process, as well as the Informal Resolution Process;

- (b) A statement that the Respondent(s) is presumed not responsible for the alleged conduct and that a Determination Regarding Responsibility will be made at the conclusion of the Grievance Process;
  - (c) A statement that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney, who may inspect and review evidence obtained as part of the investigation that is directly related to the allegations of the Formal Complaint pursuant to 34 C.F.R. Section 106.45(b)(5)(i), be present during any meeting or proceeding at which the parties may be present during the Grievance Process to advise their respective party, provided however, other than at the Live Hearing, the advisor may not otherwise participate in, make any presentation during, or submit any written materials on behalf of their party;
  - (d) A statement that, pursuant to Section 3-2-204(17)(b) and (c) of the University Regulations the parties are prohibited from making knowingly false statements or submitting knowingly false information during the Grievance Process; and
  - (e) Sufficient details of the allegations of Sexual Harassment contained in the Formal Complaint including:
    - (i) The identities of the persons involved in the incident, if known;
    - (ii) The conduct alleged to constitute Sexual Harassment; and
    - (iii) The date and location of the incident during which the Sexual Harassment is alleged to have occurred, if known.
- (3) **Notice of Additional Allegations** If, in the course of an investigation, the University decides to investigate allegations about the Complainant or Respondent that are not described in the original written notice of allegations, the University shall provide notice of the additional allegations to the parties whose identities are known.

### **3-6-138 Dismissal of a Formal Complaint**

- (1) **Required Dismissal** After the University investigates the allegations of a Formal Complaint it shall dismiss the Formal Complaint, or certain of the allegations of Sexual Harassment alleged in the Formal Complaint, if the University determines the conduct alleged, even if proved:
  - (a) Would not constitute Sexual Harassment;
  - (b) Did not occur in a University Education Program or Activity; and/or
  - (c) Did not occur within the United States.
- (2) **Permitted Dismissal** After the University investigates the allegations of a Formal Complaint it may dismiss the Formal Complaint, or certain of the allegations of Sexual Harassment alleged in the Formal Complaint, if at any time prior to the issuance of the Determination Regarding Responsibility:
  - (a) The Complainant notifies the Title IX Coordinator in writing that the Complainant wishes to withdraw the Formal Complaint or any allegations in it;
  - (b) The Respondent is no longer enrolled in the University, if a student, or employed by the University, if an employee, as the case may be; and/or

- (c) Specific circumstances prevent the University from gathering evidence sufficient to reach a Determination Regarding Responsibility as to the Formal Complaint or the allegations of Sexual Harassment in it.

- (3) **Notice of Dismissal** Upon dismissal by the University as required or permitted above, the University shall send promptly written notice of the dismissal and the reasons for the dismissal to each party simultaneously.

### **3-6-139 Informal Resolution of a Formal Complaint**

- (1) **Procedure** After a Formal Complaint is filed that alleges Sexual Harassment and at any time prior to the issuance of a Determination Regarding Responsibility by the Decision-Maker, the University may offer to facilitate informal resolution between/among the parties by which the parties agree voluntarily to resolve the allegations contained in the Formal Complaint, including but not limited to allegations of Sexual Harassment, without proceeding further in the Grievance Process. The University, as part of the offer of informal resolution must:
  - (a) Provide each party with the Notice of Allegations described in Section 3-6-137, above;
  - (b) Obtain each party's voluntary written consent to engage in the informal resolution process;
  - (c) Inform each party in writing that:
    - (i) If the parties reach an informal resolution that the terms and conditions of such resolution must be in writing and will preclude the parties from resuming the Grievance Process with respect to the allegations of Sexual Harassment in the Formal Complaint; and
    - (ii) Each party has the right, at any time, to withdraw from the informal resolution process and resume the Grievance Process with respect to the Formal Complaint.
- (2) **When Informal Resolution may not be Offered or Facilitated by the University** The University shall not offer to facilitate or facilitate the informal resolution process to resolve allegations of a Formal Complaint that a University employee engaged in Sexual Harassment of a University student, provided, however, that this prohibition does not preclude the parties from engaging voluntarily in discussions between them that results in a resolution of the allegations and notification by the Complainant that they wish to withdraw the Formal Complaint or any of the allegations in it.
- (3) **Additional Time to be Provided by Decision-Maker** The Decision-Maker shall provide additional time, as necessary, to allow the parties to engage in informal resolution of the Formal Complaint pursuant to this section 3-6-139, or other voluntary discussions between/among the parties in pursuance of resolution of the Formal Complaint, when all parties agree that it is reasonable and appropriate that additional time should be provided.

### **3-6-140 Consolidation of Formal Complaints**

The University may consolidate Formal Complaints that contain allegations of Sexual Harassment against more than one Respondent, or by more than one Complainant against one or more Respondents, or by one party against another party, where the allegations of Sexual Harassment arise out of the same facts or circumstances.

### **3-6-141 Investigation of a Formal Complaint**

- (1) **Responsibility for Conducting the Investigation** The Title IX Coordinator or their designee shall investigate the allegations of Sexual Harassment in the Formal Complaint as described in Section 3-6-133(4)(a) and (c), above, and the burden of proof is on the University to gather evidence sufficient to reach a Determination Regarding Responsibility as to the Respondent(s).
- (2) **Procedures During the Investigation** During the investigation, the University may not restrict the ability of the parties to discuss the allegations under investigation or to gather and present relevant evidence and shall;
  - (a) Provide each party with the opportunity to have an advisor of their choice, who may be, but is not required to be, an attorney, who may inspect and review evidence obtained as part of the investigation that is directly related to the allegations of the Formal Complaint pursuant to 34 C.F.R. Section 106.45(b)(5)(i), be present during any hearings, investigative interviews or other meeting at which the parties may be present during the Grievance Process to advise their respective party, provided however, other than at the Live Hearing, the advisor may not otherwise participate in, make any presentation during, or submit any written materials on behalf of the party for whom they are the advisor;
  - (b) Provide each party who is expected to participate in the Grievance Process written notice of the date, time, location, participants, and purpose(s) of all hearings, investigative interviews or other meetings, with sufficient time for the parties to prepare to participate;
  - (c) Provide each party an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint including evidence upon which the University does not intend to present in the Live Hearing with respect to the Decision-Maker's issuance of their Determination Regarding Responsibility, as well as inculpatory or exculpatory evidence whether obtained from a party or other source;
  - (d) Provide each party and their respective advisor, if any, the evidence subject to inspection and review in electronic format or hard copy;
  - (e) Provide each party at least ten (10) days to submit a written response to such evidence, which the investigator will consider prior to completion of the investigation report;
  - (f) Make all such evidence available for each party's inspection and review at any hearing and give each party equal opportunity to refer to such evidence during the Live Hearing, including for the purposes of cross-examination; and
  - (g) Create an investigation report that fairly summarizes relevant evidence and, at least 10 days prior to the Live Hearing, shall provide each party and their respective advisor, if any, the investigation report in electronic format or hard copy for their review and written response, if any.

### **3-6-142 The Live Hearing**

- (1) **The Location and Method by Which the Live Hearing Will Occur** The Grievance Process shall include a Live Hearing that will be conducted virtually, with technology that enables the participants to see and hear each other simultaneously.
- (2) **Decision-Maker's Responsibilities with Respect to the Live Hearing** The Live Hearing that shall be presided over by the Decision-Maker, who shall:
  - (a) Make all decisions regarding the scheduling and conduct of the hearing, except as otherwise provided in Sections 3-6-135 through 145 or in 34 C.F.R Section 106.45(b)(6);

- (b) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, as well as inculpatory and exculpatory evidence;
  - (c) Permit each party's advisor to ask the other party and any witnesses only relevant questions and follow-up questions, including questions challenging the credibility of the parties and any witnesses as further described in Section 3-6-142(3), below;
  - (d) Permit only relevant documentary and other physical materials to be received in at the Live Hearing; and
  - (e) Not permit questions and evidence about the Complainant's sexual predisposition or 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 or lack thereof.
- (3) **Standard of Evidence** The standard of evidence used in the Live Hearing and by the Decision-Maker in their Determination Regarding Responsibility is the "preponderance of the evidence" as described in Section 3-6-126(18).
- (4) **Procedures and Requirements Regarding Cross-Examination** Cross-examination of the parties and other witnesses during the Live Hearing shall be conducted consistent with the following procedures and requirements:
- (a) Cross-examination of a party or other witness may only be conducted by a party's advisor and not by the party themselves;
  - (b) If a party does not have an advisor present at the Live Hearing, the University will provide, without fee or charge to that party, an advisor of the University's choice, who may, but is not required to, be an attorney to conduct cross-examination on behalf of that party;
  - (c) Only relevant cross-examination questions and other questions may be asked of a party or witness, as determined by the Decision-Maker;
  - (d) Before a Complainant or Respondent or a witness answers a cross-examination or other question, the Decision-Maker shall first determine whether the question is relevant to the issues in the Live Hearing and shall explain their decision to exclude a question that they determine is not relevant; and
  - (e) If a party or witness does not submit themselves to cross-examination at the Live Hearing, the Decision-Maker shall not rely on any statement of that party or witness in reaching the Determination Regarding Responsibility, provided however, that the Decision-Maker shall not draw an inference in the Determination based solely on a party's or witness's absence from the Live Hearing or refusal to answer cross-examination or other questions.
- (5) **Recording or Transcript of the Live Hearing** The University, in its discretion, will create an audio or audiovisual recording or a written transcript of the Live Hearing and make the recording or transcript available for the inspection and review of each party.

### **3-6-143 The Decision-Maker's Determination Regarding Responsibility**

- (1) **Issuance and Matters Addressed in the Determination Regarding Responsibility** After the Live Hearing has concluded, the Decision-Maker shall issue a written Determination Regarding



Responsibility (“Determination”) regarding the allegations of Sexual Harassment in the Formal Complaint, which Determination shall apply the “preponderance of the evidence” standard. The Determination must:

- (a) Describe the allegations potentially constituting Sexual Harassment;
  - (b) Describe the procedural steps taken from the Filing of the Formal Complaint through the issuance of the Determination including any:
    - (i) Notifications to each party;
    - (ii) Interview of the parties and witnesses;
    - (iii) Site visits;
    - (iv) Methods used to gather other evidence; and
  - (c) State the Decision-Maker’s findings of fact supporting the Determination;
  - (d) State the conclusions regarding the application of the relevant University policies and relevant provisions of the DCP to the facts;
  - (e) State the result as to each allegation and the rationale for such result, including the Determination regarding responsibility, any Disciplinary Sanctions the University is to impose on the Respondent, and any Remedies designed to restore or preserve equal access to the University Education Program or Activity that the University will provide to the Complainant; and
  - (f) The University procedures and permissible bases for the Complainant and Respondent to appeal the Determination, if either of them decides to do so.
- (2) **To whom the Determination is Provided** The Decision-Maker must provide the Determination to each of the parties and to the Title IX Coordinator simultaneously.
- (3) **When the Determination Becomes Final** The Determination becomes final either on the date that the University provides the parties with the Determination of the result of an appeal, if an appeal is filed, or, if an appeal is not filed, the date on which an appeal would no longer be considered timely.

### **3-6-144 Appeals**

- (1) **Who may Appeal and Under What Circumstances** Either party may appeal from (1) a written Determination Regarding Responsibility or (2) the University’s dismissal of a Formal Complaint or any of the allegations in a Formal Complaint, on the following bases only:
- (a) Procedural irregularity that affected the outcome of the matter;
  - (b) New evidence that was not reasonably available at the time the Determination Regarding Responsibility or dismissal of the Formal Complaint (or any allegations contained in the Formal Complaint was issued, that would have affected the outcome of the matter; and/or
  - (c) 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 individual Complainant or Respondent involved in the Formal Complaint, that affected the outcome of the matter.

(2) **Deadline for Filing an Appeal** The deadline for filing an appeal and the procedures followed regarding such appeals is will be as stated in Section 3-6-133(6).

(3) **The Appeal Decision-Maker** The Appeal Decision-Maker is:

- (a) The Dean of Students if the Complainant and Respondent are both University students; and
- (b) The Dean of Students and the Senior Vice President or Vice President who has supervisory authority over the Respondent if the Complainant is a University student and the Respondent is a University employee, in which case the Dean of Students and Senior Vice President or Vice President who will collaborate to prepare the Appeal Decision.

### **3-6-145 Confidentiality**

The University must maintain as confidential the identity of:

- (1) any person who has made a report of or Filed a Formal Complaint of Sexual Harassment;
- (2) any Complainant;
- (3) any Respondent;
- (4) any person who has been reported to have engaged in Sexual Harassment; and
- (5) any witness who has provided information in any portion of the Grievance Process or Live Hearing;

except as may be permitted by FERPA, required by law, and/or to carry out the purposes of 34 C.F.R. Section 106 including the conduct of any Grievance Process or judicial proceeding arising thereunder.