

Procedures for Resolution of Reports Against Faculty under V520.02 Prohibited Discrimination, Harassment, and Sexual and Related Misconduct

I. Purpose and Scope

This procedure applies to prohibited conduct as defined in V520.02 Prohibited Discrimination, Harassment, and Sexual and Related Misconduct. Prohibited conduct includes but is not limited to: aiding prohibited conduct; attempting to commit prohibited conduct; dating violence; domestic violence; retaliation; sexual assault; sexual exploitation; sexual and gender-based harassment; stalking; and violating an interim measure.

II. Definitions

These definitions apply to terms as they are used in this procedure.

- A. Advisor:** Either an attorney or non-attorney advocate who advises a party.

- B. Aiding prohibited conduct:** A person aids prohibited conduct, if with the intent to promote or facilitate such conduct, that person helps another person commit the prohibited conduct.

- C. Attempting to commit prohibited conduct:** A person attempts to commit prohibited conduct if, with the intent to commit such conduct, that person engages in conduct directly tending toward completion of the prohibited conduct.

- D. Complainant:** A person who is the subject of a report or initiates a Formal Complaint of prohibited conduct under these procedures will be designated as the “complainant.” Both the complainant and respondent are referred to as “party” or “parties” throughout this procedure.

- E. Confidential resources:** Confidential resources do not have an obligation to report prohibited conduct to the Title IX Coordinator and will not do so without the explicit consent of the complaining party. VCSU’s confidential resources are:
 - **VCSU Health and Counseling Services**
Dr. Erin Klingenberg
Director of Counseling Services; Licensed Clinical Counselor
McFarland 424
701-845-7424

erin.klingenberg@vcsu.edu

- **VCSU Health Services**

Pat Egeberg, BSN
Director of Health Services
Mythaler Hall, first floor
701-845-7212
Patricia.egeberg@vcsu.edu

- **Abused Persons Outreach Center (APOC)**

Jacob Olson
Victim Services and Prevention Coordinator
701-845-0078

- **F-M Rape and Abuse Crisis Center**

701-293-7273 (available 24 hours)
www.raccfm.com

F. **Consent:** Consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression. The standard in determining consent is whether a sober, reasonable person in the same person in the same circumstances as the respondent should have known that the complainant did not or could not consent to the sexual activity.

The following are principles that apply to the above definition of consent:

1. Consent to any sexual act or prior consensual sexual activity does not necessarily constitute consent to any other sexual act.
2. Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol.
3. Consent may be withdrawn at any time.
4. When consent is withdrawn or can no longer be given, sexual activity must stop.

5. Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.
 - a. Examples of coercion and intimidation include using physically or emotionally manipulative conduct against the complainant or expressly or implicitly threatening the complainant or a third party with negative actions that would compel or induce a reasonable person in the complainant's situation to engage in the sexual activity at issue. Examples of sexual coercion include statements such as "I will ruin your reputation," or "I will tell everyone," or "your career (or education) at VCSU will be over," or "I will post an image of you naked."
 - b. Examples of force or a threat of harm include using physical force or a threat, express or implied, that would place a reasonable person in the complainant's situation in fear of physical harm to, or kidnapping of, themselves or another person.
6. A person is incapable of consent when they are:
 - a. Less than eighteen years of age;
 - b. Mentally disabled (a person is mentally disabled when their normal cognitive, emotional, or behavioral functioning renders them incapable of appraising their conduct); or
 - c. Incapacitated.
 - i. A person is incapacitated when they lack the ability to choose knowingly to participate in sexual activity.
 - ii. A person is incapacitated when they are unconscious, asleep, involuntarily restrained, physically helpless, or otherwise unable to provide consent.
 - iii. Someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent depending on the level of intoxication.
 - iv. Consent cannot be gained by taking advantage of the incapacitation of another. In evaluating responsibility in cases of alleged incapacitation, the fact finder asks two questions:
 1. Did the respondent know that the complainant was incapacitated? If not,
 2. Should a sober, reasonable person in the respondent's situation have known that the complainant was incapacitated? If the answer to either of these questions is "yes," consent was absent.
 3. If the fact finder determines based on a preponderance of the evidence that both parties were incapacitated, the person who initiated the sexual activity alleged to be nonconsensual due to incapacity is at fault.

G. Dating violence: Any intentional act or threatened act of violence against the complainant committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. Dating violence also may take the form of behavior that seeks to

establish power and control over the complainant by causing the complainant to fear violence to themselves or another person. Such behavior may take the form of harassment, property damage, intimidation, and violence or a threat of violence to one's self (i.e. the respondent) or a third party. It may involve one act or an ongoing pattern of behavior

Consistent with the Violence Against Women Act (VAWA), for reporting purposes under the Clery Act, VCSU will evaluate the existence of an intimate relationship based on the complainant's statement, taking into consideration the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in the relationship.

- H. Domestic violence:** Domestic violence includes felony or misdemeanor crimes of violence committed by (a) a current or former spouse or intimate partner of the complainant, (b) by a person with whom the complainant shares a child in common, (c) by a person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner, (d) by a person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, (e) or by any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

Additionally, North Dakota statute provides that domestic violence includes physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members.

Domestic violence also includes behavior that seeks to establish power and control over the complainant by causing the complainant to fear violence to themselves or another person. Such behavior may take the form of harassment, property damage, intimidation, and violence or a threat of violence to one's self (i.e., the respondent) or a third party. Domestic violence may also include interference with personal liberty, intimidation of a dependent, physical abuse, or willful deprivation by a person who is or was a family or household member of the complainant. It may involve one act or an ongoing pattern of behavior.

- I. **Force or threat of force:** The use of force or violence, or the threat of force or violence, including but not limited to: (1) when the respondent threatens to use force or violence on the complainant or on any other person, and the complainant under the circumstances reasonably believes that the respondent has the ability to execute that threat; or (2) when the respondent has overcome the complainant by use of superior strength or size, physical restraint or physical confinement.

- J. **Interim measures:** Interim measures are individualized services offered as appropriate to either or both the complainant and respondent involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending. Interim measures include counseling, extension of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.

As measures needed by each student may change over time, the Title IX Coordinator will communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students' evolving needs. Interim measures may be modified, supplemented or withdrawn before, during or after the final outcome of any investigation.

- K. **Physical abuse:** Physical abuse includes sexual abuse and means any of the following: (1) the knowing or reckless use of physical force, confinement, or restraint; (2) knowing, repeated, and unnecessary sleep deprivation; and/or (3) knowing or reckless behavior that creates an immediate risk of physical harm.

Physical abuse also includes the willful, purposeful denial of medication, medical care, shelter, food, or other assistance to a person who requires such things because of age, health or disability, thereby putting that person at risk of physical, mental, or emotional harm.

- L. **Prohibited conduct:** Prohibited conduct includes, but is not limited to: aiding prohibited conduct, attempting to commit prohibited conduct, dating violence, discrimination, domestic violence, harassment, physical abuse, sexual assault, sexual exploitation, sexual and gender-based harassment, stalking, and violating an interim measure.

M. Prohibited Discrimination: Sex, race, color, religion, physical or mental disability, pregnancy, status with regard to marriage or public assistance, sexual orientation, participation in lawful activity, or genetic information are Equal Education and Employment Opportunity (EEEE) protected classes. Prohibited discrimination occurs when an employment or academic decision that results in negative and/or different treatment of an individual based upon his or her membership in an EEEE-protected class, such as denying an opportunity for which an individual is qualified, not considering a person for an opportunity that is open to others, singling a person or group for different treatment because of her, his or their EEEE-protected class status, failure to provide reasonable accommodation for a disability or religious belief or practice; reinforcing the use of stereotypes that unreasonably impacts a person's environment or opportunities.

N. Protected Status Harassment (Harassment): When an individual is targeted with verbal, written, visual, or physical conduct based on that person's EEEE-protected class status that unreasonably interferes with the individual's work or academic performance, or creates an intimidating, hostile, or offensive working, learning, living, or social environment.

Protected-status harassment, including sexual harassment, occurs when an individual is targeted with verbal, written, visual, or physical conduct based on that person's EEEE-protected status that unreasonably interferes with the individual's work or academic performance, or creates an intimidating, hostile, or offensive working, learning, living, or social environment. The conduct constitutes harassment under any of the following conditions:

1. The conduct is direct.
2. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic status.
3. Submission to, or rejection of, such conduct by an individual is used as the basis for an employment or academic decision affecting that person.
4. The conduct is sufficiently severe or pervasive to alter the conditions of the victim's employment or academic pursuits and creates a work or educational environment that a reasonable person would find abusive.

- O. Respondent:** A person accused of conduct prohibited by this policy and does not imply pre-judgment.
- P. Responsible employee:** Responsible employees are those who would reasonably be expected to have the authority or duty to report or take action to redress sexual misconduct. A responsible employee is obligated to promptly report sexual misconduct to the Title IX Coordinator or Deputy Title IX Coordinator for the University. Designated responsible employees are: administration, faculty, directors, coaches, assistant coaches, athletic trainers, and residence life staff. Confidential resources are excepted from reporting.
- Q. Retaliation:** Adverse action taken against an individual for making a good faith report of prohibited conduct or participating in any investigation or proceeding under these procedures. Retaliation may include: intimidation, threats, coercion, or adverse employment or educational actions. Retaliation may be found even when an underlying report made in good faith was not substantiated. Retaliation may be committed by the respondent, the complainant, or any other individual or group of individuals. Retaliation does not include good faith actions pursued in response to a report of prohibited conduct.
- R. Sanctions:** Penalties which may be imposed by the University upon persons who, in proper hearing processes, have been found to have committed violations of the Code of Conduct.
- S. Sexual assault:** A person knowingly has sexual contact with another person, or who causes another person to have sexual contact with that person without consent. Regardless of consent, incest (sexual intercourse between persons who are related to each other within the degrees marriage is prohibited by law) and statutory rape (sexual intercourse with a person who is under the age of eighteen) constitute sexual assault.
- T. Sexual contact:** Any touching, however slight, with any object or body part, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires.

U. Sexual exploitation: Sexual Exploitation is taking advantage of another person without consent.

Examples include, but are not limited to:

1. Observing another person when that person is nude or engaged in sexual activity without the knowledge and consent of the person observed or allowing another to observe consensual sexual activity without the knowledge and consent of all parties involved;
2. Making, sharing, posting streaming or otherwise distributing any image, photography, video, or audio recording depicting or otherwise recording another person when that person is nude or engaged in sexual activity without the knowledge and consent of the person depicted or recorded;
3. Exposing one's genitals to another person without the consent of that person;
4. Prostituting another person;
5. Exposing another person to a sexually transmitted infection without the knowledge and consent of the person exposed; and
6. Causing another person to become incapacitated with the intent of making that person vulnerable to nonconsensual sexual assault or sexual exploitation.

V. Sexual and gender-based harassment: Sexual harassment is unwelcome sexual advances, requests for sexual favors, or other unwanted conduct of a sexual nature, whether verbal, nonverbal, graphic, physical, or otherwise, when the conditions outlined in (1) or (2) are present:

1. Submission to or rejection of such conduct is made, either explicitly or implicitly, a term or condition of a person's employment, academic standing, or participation in any University programs or activities or is used as the basis for University decisions affecting the individual (often referred to as "quid pro quo" harassment); or
2. Such conduct creates a hostile environment. A hostile environment exists when the conduct is sufficiently severe, persistent, or pervasive that it unreasonably interferes with, limits or deprives an individual's participating in or benefitting from the University's education or employment programs or activities. Conduct must be deemed severe, persistent, or pervasive in a way that a reasonable person would find abusive, hostile, or offensive.

In evaluating whether a hostile environment exists, the University will consider the totality of known circumstances, including, but not limited to:

1. The frequency, nature, and severity of the conduct;
2. Whether the conduct was physically threatening;
3. The effect of the conduct on the complainant's mental or emotional state;
4. Whether the conduct was directed at more than one person;
5. Whether the conduct arose in the context of other discriminatory conduct;
6. Whether there is a power differential between the parties; and
7. Whether the conduct implicates concerns related to academic freedom or protected speech.

Because of protections afforded by academic freedom, speech and other expression occurring in the context of instruction or research will not be considered sexual or gender-based harassment unless this speech or expression also meets one or both of the following criteria:

1. It is meant to be either abusive or humiliating toward a specific person or persons, and/or
2. It persists despite the reasonable objection of the person or persons targeted by the speech.

W. Standing Committee on Faculty Rights: Standing Committee on Faculty Rights (SCFR) consists of five tenured faculty members who are elected by the faculty for staggered five-year terms.

X. Staff: An employee of Valley City State University who is not a faculty member.

The following administrative positions are considered staff for purposes of this procedure:

President, Vice-Presidents, Chief Information Officer, Director of Marketing, Athletic Director, and Director of the Foundation. Likewise, for purposes of this procedure, coaches and assistant coaches are considered staff.

Y. Stalking: A course of conduct directed at a specific person that would cause a reasonable person to (a) fear for her or his safety or the safety of a third person, or (b) to suffer emotional distress.

1. Course of conduct means two or more acts, including but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or

means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

2. Reasonable person means a reasonable person under similar circumstances and with similar identities to the complainant.
3. Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Stalking behavior includes, but is not limited to: following a person; appearing at a person's home, work, or school; making unwanted phone calls; sending unwanted emails or text messages; leaving objects for a person; vandalizing a person's property; injuring a person's pet; and monitoring or placing a person under surveillance.

- Z. Student:** The term student will be interpreted to mean any person, whether or not incidentally on the University payroll, who is currently registered with the University as a degree or non-degree-seeking candidate.

The term student will be interpreted also to mean persons not officially registered, and not faculty members or other University employees, if they are:

1. Currently enrolled in or taking classes at the University; or
2. Currently using University facilities or property, or the property of a University-related residential organization, in connection with academic activities; or
3. Currently suspended from being a student of the University.

AA. Title IX Coordinator and Title IX Deputy Coordinators

Title IX Coordinator

Pete Smithhisler

Vice President for Student Affairs

McFarland 209

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Title IX Deputy Coordinators

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Jennifer Larson

PHR; Director for Human Resources

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Jill Devries

Athletic Director

W.E. Osmon Fieldhouse 115

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BB. Violating an Interim Measure: A person violates an interim measure if the measure is an order by a University official and the person to whom the order applies knowingly violates any of the conditions of the order. One common example of an order by a University official is a “no-contact” order.

III. Application, Time Limits, and Computation of Deadlines

A. Application

These procedures will apply to prohibited conduct by faculty on any campus of the University, on any other property or facility used by it for educational purposes, or on the property of a University-related residential organization.¹

¹ Nothing in these procedures will preclude the President or the President’s designee from taking appropriate and lawful action for Grave Misconduct.

All actions by faculty that involve the use of the University computing and network resources from a remote location, including but not limited to accessing email accounts, will be deemed to have occurred on campus.

These procedures will apply regardless of the location of the conduct where the President or the Title IX Coordinator determines that either:

1. The alleged prohibited conduct has occurred in the context of a University program or activity; or
2. The conduct poses a substantial threat to the University's educational mission or to the health or safety of University community members, including potentially contributing to or creating a hostile environment on the University campus.

B. Time Limit to File Formal Complaints

To promote timely and effective review, the University strongly encourages complainants and other persons with knowledge of possible violations of this policy to make reports as soon as possible, ideally within sixty days of the alleged prohibited conduct. A delay in reporting may affect the University's ability to gather relevant and reliable information, contact witnesses, investigate thoroughly, and respond meaningfully. It may also affect the University's ability to take disciplinary action against an individual who has engaged in prohibited conduct.

Students making a complaint against faculty or staff must file the complaint within one (1) year of the alleged action.

Faculty or staff making a complaint against faculty or staff must file the complaint within six (6) months of the alleged action, with the following exception: for students bringing a complaint against faculty in the context of a subordinate-supervisory relationship between the faculty member and the student (examples: teacher assistant or research assistant), a student may file a complaint one year after no longer being under the faculty's supervision or three years from the date of the alleged behavior, even if the student is no longer affiliated with the University, whichever is earlier.

If the respondent is no longer faculty or staff at the time of the Formal Complaint, and the University is, thus, unable to pursue resolution, it will still seek to meet its Title IX obligations by providing support for the complainant and, as feasible, taking appropriate steps to end any prohibited conduct, prevent its recurrence, and address its effects.

C. Determination of Deadlines

In determining any time period specified in these procedures, the day of the event, act, or default that initiates the period will be excluded.

IV. The University's Response to a Report of Prohibited Conduct

A. Initial Assessment

Upon receipt of a report of alleged prohibited conduct by faculty, the Title IX Coordinator will make an initial assessment of the reported information and respond to any immediate health or safety concerns raised by the report. If the Title IX Coordinator is the subject of the report, the Human Resource Director will assume the role of the Title IX Coordinator.

B. Where the Complainant's Identity is Known

Where the identity of the complainant is known, the Title IX Coordinator will ensure that the complainant receives a written explanation of all available resources and options and is offered the opportunity to meet promptly with the Title IX Coordinator to discuss those resources and options. In the initial assessment and meeting or correspondence with the complainant, the Title IX Coordinator will:

- Assess the complainant's safety and well-being and offer the University's support and assistance through available resources;
- Inform the complainant that the Title IX Coordinator will maintain the complainant's privacy to the greatest extent possible and disclose information only as necessary pursuant to these procedures;
- Inform the complainant of their right to seek medical treatment (including a sexual assault forensic examination) and explain the importance of obtaining evidence and preserving forensic and other evidence;
- Inform the complainant of their right to contact law enforcement, be assisted by University officials in contacting law enforcement, or decline to contact law enforcement, and their right to seek a protective order;
- Inform the complainant about University and community resources, including counseling, health, and mental health services; victim advocacy; procedural advocacy; legal resources; visa and immigration assistance; student financial aid; and other resources both on campus and in the community, and how to request or contact such resources;
- Inform the complainant of the right to seek appropriate and available Interim Measures and how to request such measures;
- Inform the complainant of the right to file a Formal Complaint and seek resolution under these procedures; provide the complainant with an overview of these procedures; including the informal process option; and inform the complainant of the right to withdraw a Formal Complaint at any time and to decline or discontinue resolution under these procedures at any time, but that declining to participate in an investigation and/or the hearing process under these procedures may limit the University's ability to investigate meaningfully and respond to a report of prohibited conduct;
- As possible and appropriate, ascertain the complainant's preference for pursuing formal resolution, informal resolution, or neither under these procedures, and

discuss with the complainant any concerns or barriers to participating in any investigation and resolution process under these procedures;

- Explain that the University prohibits retaliation, that retaliation constitutes prohibited conduct under these procedures, and that the University will take appropriate action in response to any act of retaliation;
- Inform the complainant of their rights afforded under the Code of Student Conduct.

C. Where the Complainant's Identity is Unknown

Where a report is filed but the identity of the complainant is unknown, the Title IX Coordinator will assess the nature and circumstances of the report, including whether it provides information that identifies the potential complainant, the potential respondent, any witnesses, and/or any other third party with knowledge of the reported incident, and take reasonable and appropriate steps to respond to the report of prohibited conduct consistent with applicable federal and state laws and these procedures.

D. The University's Actions Following an Initial Assessment

Upon completion of the Initial Assessment, the Title IX Coordinator will determine the course of action under these procedures as follows:

1. Where the Complainant Seeks Resolution under these Procedures

When the complainant reports prohibited conduct and requests resolution under these procedures, a signed, written Formal Complaint will be made to the Standing Committee which will promptly initiate an investigation.

2. Where the Complainant Requests that No Formal Complaint be Pursued under these Procedures

The University supports the complainant's decision not to pursue a Formal Complaint under these procedures and desire for anonymity.

Where the complainant does not wish to pursue a Formal Complaint under these procedures, the University will honor the complainant's wishes unless doing so would impact the University's ability to provide a safe environment for all members of the University community, including the complainant.

The Title IX Coordinator may consider the following factors, among others, when determining whether to honor the complainant's wish that no resolution be pursued under these procedures: the respondent's history of misconduct; respondent's risk of reoffending; respondent's use of a weapon or force; and whether the complainant is a minor.

Regardless of whether the complainant chooses to file or participate in a Formal Complaint, the Title IX Coordinator will assist the complainant with reasonable and

available accommodations, which may include academic, housing, transportation, employment, and other accommodations. (See, “15. INTERIM MEASURES” below).

Where no Formal Complaint has been filed and an Interim Measure impacts the respondent, the respondent will be provided with written notice of the report, which includes, as known, the date, time, and location of the alleged prohibited conduct and the underlying factual allegations, including the identity of the complainant. Therefore, certain Interim Measures may not be available if the complainant wishes to maintain anonymity.

The Title IX Coordinator may also take proactive steps, such as training or awareness efforts, to address sexual and related misconduct in a general way that does not identify the complainant.

Where the complainant declines to participate in an investigation, the University’s ability to meaningfully investigate and respond to a report may be limited.

3. University Determination that the Complainant’s Request to Not Pursue a Formal Complaint Can Be Honored

Where the Title IX Coordinator determines that the University can honor the complainant’s request that no Formal Complaint be pursued under these procedures, the University may nevertheless take other appropriate steps designed to eliminate the reported prohibited conduct, prevent its recurrence, and address its effects on the complainant and the University community. Those steps may include offering the complainant reasonable and available accommodations, conducting targeted prevention and awareness training, and/or providing or imposing other remedies tailored to the circumstances.

Upon receipt of new or additional information, the Title IX Coordinator may reconsider the complainant’s request that no Formal Complaint be pursued under these procedures and initiate the resolution process, as explained directly below.

4. University Determination that the Complainant’s Request to Not File a Formal Complaint Cannot be Honored

Where the Title IX Coordinator determines that the University cannot honor the complainant’s request that no Formal Complaint be pursued under these procedures, the Title IX Coordinator will promptly initiate the resolution process under these procedures by making a signed, written Formal Complaint on behalf of the University.

The Title IX Coordinator will notify the complainant that the University intends to proceed with a Formal Complaint and will take immediate action as necessary to protect and assist the complainant.

The Title IX Coordinator will make reasonable efforts to protect the privacy of the complainant. However, typically, the complainant’s identity would have to be disclosed as part of the University’s investigation.

The complainant is not required to participate in any proceedings that follow. However, if the complainant declines to participate in an investigation and/or the hearing process under these procedures, the University's ability to investigate meaningfully and respond to a report of prohibited conduct may be limited.

5. Notice to Complainant and Respondent of University Actions

The Title IX Coordinator will promptly inform the complainant of any actions undertaken by the University that will directly impact the complainant, including the filing of a Formal Complaint.

The Title IX Coordinator will promptly inform the respondent of any actions undertaken by the University that will directly impact the respondent, including the filing of a Formal Complaint or the imposition of Interim Measures that would directly impact the respondent, and provide an opportunity for the respondent to respond to such action(s). (See "J. Interim Measures" below). Interim Measures become effective when notice of the Interim Measures is provided.

6. University's Right to Suspend a Faculty Member Who Poses an Immediate Threat to the Health or Safety of Persons on Campus

If a faculty member poses an immediate threat to the health or safety of persons on campus, the University reserves the right to suspend the faculty member immediately and remove the faculty member from campus without a hearing. A formal hearing on the matter will take place as early as possible.

E. Preservation of Information and Tangible Material

Preservation of information and tangible material relating to alleged prohibited conduct is essential for investigations under these procedures as well as law enforcement investigations. Therefore, all persons involved in these procedures, whether as the complainant, the respondent, or a witness, are encouraged to preserve all information and tangible material relating to the alleged prohibited conduct. Examples of evidence include electronic communications (e.g., email and text messages), photographs, clothing, and medical information.

In the case of medical information, prompt examinations can be crucial to the collection of forensic or other medical evidence. Individuals who believe they have experienced sexual assault or other forms of prohibited conduct are strongly encouraged to seek immediate medical attention.

F. Obligation to Provide Truthful Information

At all stages of the process, all VCSU community members are expected to provide truthful information. Furnishing false information to the University with intent to deceive is prohibited and subject to disciplinary sanctions under VCSU's Campus Code of Conduct. This provision does

not apply to reports made or information provided in good faith, even if the facts alleged are not later substantiated.

G. Interim Measures

1. Overview of Interim Measures

Following a report of prohibited conduct, the complainant and respondent will be provided information about a range of resources, support services, and measures to protect the safety and well-being of the parties and promote an accessible educational environment. Some such measures are interim measures, which are utilized pending resolution of a case under these procedures.

Interim measures might be in the form of support or accommodations for or restrictions one or both parties.

Interim measures will be designed to address a perceived risk but tailored to minimize to the extent possible the impact on the affected party or parties.

Interim Measures are designed to accomplish a number of goals:

- To support and protect the safety of the complainant, the respondent, the University's educational environment, and the University community;
- To deter retaliation; and
- To preserve the integrity of the investigation and resolution process pursuant to these procedures.

Interim Measures may be issued based upon a party's request or at the University's own initiative. In all instances, the University will, at its discretion, determine whether any given Interim Measure is reasonable and appropriate.

Interim Measures are available regardless of whether a Formal Complaint has been filed under these procedures. Likewise, Interim Measures are available regardless of whether the complainant chooses to report the prohibited conduct to law enforcement.

Interim Measures become effective when notice of the Interim Measures is provided.

Where a Formal Complaint has been filed, typically, Interim Measures will remain in place pending the resolution of the Formal Complaint.

Violations of Interim Measures that are orders by a University official constitute prohibited conduct under these procedures.

2. Examples of Interim Measures

Potential interim measures include but are not limited to:

- Assistance obtaining access to counseling, advocacy, or medical services;
- Assistance obtaining access to academic support and requesting academic accommodations;
- Changes in class schedules;
- Assistance requesting changes to on campus work schedules or job assignments;
- Changes to on campus housing;
- Providing an escort to complainant to promote safety on campus;
- “No-contact” orders (curtailing or prohibiting contact or communications between or among individuals).

3. Issuance of Interim Measures

The Title IX Coordinator is responsible for issuing Interim Measures.

Interim Measures will be designed in a fair manner and narrowly tailored to minimize to the extent possible any restrictions on those affected.

In issuing Interim Measures, the Title IX Coordinator will make reasonable efforts to communicate with any impacted party to address safety and emotional and physical well-being concerns.

Where no Formal Complaint has been filed and an Interim Measure impacts the respondent, the respondent will be provided with written notice of the report, which includes, as known, the date, time, and location of the alleged prohibited conduct and the underlying factual allegations, including the identity of the complainant. Therefore, certain Interim Measures may not be available if the complainant wishes to maintain anonymity.

Interim Measures are not, in and of themselves, permanent resolutions under these procedures. Rather, they are actions taken by the University based on information known at the time that the Interim Measures are issued. Accordingly, the Title IX Coordinator has the discretion to issue, modify, or remove any Interim Measure at any time additional information is gathered or circumstances change.

4. Requested Review of Title IX Coordinator’s Decisions Regarding Interim Measures

Both parties may at any time request that the Title IX Coordinator issue, modify, or remove Interim Measures based upon a change in circumstance or new information that would affect the necessity of any Interim Measures.

H. Pending Criminal Investigations

In cases where there is a criminal investigation, the University process will run concurrently with such investigation. The University may grant temporary delays reasonably requested by law enforcement for evidence gathering.

V. Informal Resolution

Complainants may choose to pursue informal resolution of their complaint. The Title IX Coordinator shall assign a School Official with the authority to remedy the alleged violation (e.g. Vice President for Student Affairs, etc.) to oversee the informal resolution process.

Both parties must agree to informal resolution. Informal resolution is entirely voluntary and either party may end informal resolution at any time.

Informal resolution is a flexible process. The School Official will consult with both parties and make suggestions for resolution. Both parties must agree on the suggested course of resolution.

Unlike the formal hearing process that requires the parties to be separated during the hearing, informal resolution does not require the parties to be separated. However, either party may choose to be separated during the process.

Informal resolution provides the parties with a forum to discuss the complaint and seek resolution.

In cases where the respondent acknowledges involvement in the sexual misconduct, the School Official shall impose an appropriate sanction for the misconduct. If the sanction is agreeable to the parties, the informal resolution is complete, and the sanction is imposed.

In cases where the respondent does not acknowledge responsibility, the formal hearing process will apply.

VI. Formal Hearing Process

The formal hearing process begins when a formal complaint is filed with the Standing Committee on Faculty Rights (SCFR) chair or senior member of the SCFR and the University president.

SCFR shall appoint and delegate authority to a Hearing Officer who is trained in Title IX issues to conduct pre-hearing meetings, supervise exchange or collection of information, advise SCFR or preside over the hearing.

A. Notice to Parties upon the Issuance of a Formal Complaint

At the issuance of a Formal Complaint, the Hearing Officer on behalf of SCFR will notify the complainant, respondent, SCFR, and the University president in writing, of the commencement of an investigation and provide both parties with a copy of the Formal Complaint, V520.02 Prohibited Discrimination, Harassment, and Sexual and Related Misconduct, and these procedures. Such notice will:

- Identify the complainant and the respondent;

- Specify the alleged prohibited conduct and its date, time, and location, to the extent known;
- Specify the factual allegations pertaining to the prohibited conduct;
- Specify any sanctions that may be imposed;
- Identify the Hearing Officer;
- Identify the members of SCFR;
- Include information about the parties' respective rights and obligations under V520.02 Prohibited Discrimination, Harassment, and Sexual and Related Misconduct and these procedures;
- Inform the parties of their right to seek the assistance of an advisor and a support person for emotional support;
- Inform the parties of the range of available resources, including mental health and academic support resources;
- Explain the prohibition against retaliation; and
- Instruct the parties to preserve any potentially relevant evidence, whatever its form.

The notice requirement may be waived if the respondent consents to a short notice period or for the initiation of interim measures or emergency actions.

B. Advisors and Support Persons

Both the complainant and respondent have the right to be represented by an advisor of their choice and at their own expense.

During the proceedings, the faculty member is entitled to have an administrative or academic advisor and counsel of their own choice and at their own expense.

Both the complainant and respondent have the right to a support person of their choice to provide emotional support to the party.

Advisors and support persons may be any person, including an attorney, who is not a party or witness or otherwise involved in the case. Advisors are advocates who advise a party during the conduct proceedings.

Advisors and support persons may attend their own advisees' meetings, such as investigative interviews, and proceedings.

Advisors may fully participate in the hearing. Fully participating includes the opportunity to make opening and closing statements, to examine and cross-examine witnesses, and to provide support, guidance, and advice. Unlike advisors, support persons may not fully participate in the hearing.

By accepting the role of advisor or support person, all advisors and support persons agree to comply with the rules and processes set forth in V520.02 and these procedures, including rules regarding process privacy.

The University will not interfere with the parties' rights to have an advisor and support person of their choice and fully expects advisors and support persons to adhere voluntarily to V520.02. In extreme cases, where the Hearing Officer determines that an advisor's or support person's conduct undermines the integrity of policy or these procedures, the advisor or support person will be prohibited from continuing to serve as advisor or support person in that case. The affected party will be permitted to obtain a substitute advisor or support person.

If the Hearing Officer determines that an advisor or support person has a conflict of interest, the advisor or support person will be prohibited from continuing in their role. The affected party will be permitted to obtain a substitute advisor or support person.

C. The Parties' Participation in the Investigation and Hearing

Both the complainant and the respondent may decline to participate in the investigation and/or hearing. However, the University may continue without a party's participation, reaching findings and issuing sanctions. Additionally, a party's decision not to participate in the investigation will limit the party's ability to participate in the hearing.

D. Consolidation of Reports, Formal Complaints, and Hearings under these Procedures

The Hearing Officer has discretion to consolidate reports and complaints that are factually related into one investigation. Likewise, the Hearing Officer may conduct one hearing to address the factually related issues.

E. Investigations of a Formal Complaint

1. Overview of Investigations of a Formal Complaint

The investigation is designed to be timely, thorough, and impartial and to provide for a fair and reliable gathering of the facts. All individuals involved in the investigation, including the complainant, the respondent, and any third-party witnesses, will be treated with sensitivity and respect.

The investigation will generally include individual interviews of the complainant, the respondent, and relevant witnesses. Upon completion of the investigation, the Hearing Officer will prepare a final investigative record and an investigative report. The investigative record is a compilation of statements by the parties and witnesses as well as other evidence gathered by the Hearing Officer.

The complainant and the respondent will have an equal opportunity to participate in the investigation, including an equal opportunity to be heard, submit evidence, and suggest witnesses who may have relevant information.

2. Time Frame of and Time Limitations During the Investigation

The investigation will be completed in a timely manner.

Throughout the investigation, both parties will receive reasonable notice of any meetings at which their attendance is requested and the parties will be updated at regular intervals on the status of the investigation.

The Hearing Officer will establish reasonable time limits for the various stages of the investigation, including meetings and deadlines for any submissions or responses, and the parties must adhere to these time limits. The parties may request extensions for good cause.

If a party declines or fails to participate in a meeting or interview, provide evidence, or suggest witnesses, the party will have waived their right to do so upon the issuance of the final investigative record and report.

3. Investigative Interview Process

The Hearing Officer will gather information from the complainant, the respondent, and other individuals who have relevant information. As part of the investigation, the parties will have the opportunity to request in writing witnesses they would like the Hearing Officer to interview.

The Hearing Officer has the discretion to determine the relevance of any proffered witnesses, and, accordingly, the Hearing Officer will determine which witnesses to interview.

All persons being interviewed, including the parties, are prohibited from recording interviews.

4. Evidentiary Materials

The Hearing Officer will gather relevant available evidentiary materials, including physical evidence, documents, communications between the parties, and electronic records and media as appropriate.

The parties will have the opportunity to request in writing the evidentiary materials they would like the Hearing Officer to seek to obtain.

The Hearing Officer has the discretion to determine the relevance of any requested evidentiary materials, and, accordingly the Hearing Officer will determine what evidentiary materials to seek to obtain.

Discovery is informal. Formal discovery processes such as depositions and interrogatories are not permitted unless both parties agree.

5. The Investigation

The Hearing Officer will be guided, but not limited to, the following procedure:

- Identify the respondent.
- Identify the facts of the incident by separately interviewing the complainant and respondent.
- How did the complainant respond to the alleged prohibited conduct?
- What efforts, if any, were made to resolve the issue informally. (ex. Were requests made for the behavior to stop? Were requests made to separate the individuals?)
- Are there any witnesses or evidence the complainant wants to include in the investigation? Witness and evidence requests must be in writing.
- Did the complainant inform others or the supervisor of the situation? If so, what was the response?
- What was the frequency and type of alleged prohibited conduct? If known, what were the dates and locations?
- What was the professional or personal relationship, degree of control, and amount of interaction between the two parties?
- Does the complainant know or suspects that the respondent has engaged in prohibited conduct with other individuals?
- During the first interview with the respondent, the Investigator will inform the respondent of all the charges being made, along with supporting evidence.
- What is the respondent's explanation of the alleged behavior?
- Are there any witnesses or evidence the respondent wants to include in the investigation? Witness and evidence requests must be in writing.
- Remind the respondent of the University's policy against retaliation.
- Thoroughly examine and evaluate the responses made by the respondent.
- Provide the complainant additional information from the investigation that would be significant to the outcome of the investigation.
- Interview, as appropriate, witnesses identified by complainant or respondent or those who observed, or were told about, the alleged prohibited conduct.
- Remind all parties and witnesses of the need for privacy.
- Review, as appropriate, personnel files maintained by departments; previously concluded mediation agreements; previous records of findings for the allegation of prohibited conduct; and public records. Some instances might require giving the individual who is the subject of the file or record notice and the opportunity to object. The Vice President of Academic Affairs will rule upon any objection.

As each complaint is unique, the Hearing Officer has discretion to determine what additional information is necessary to make a thorough investigation.

6. Dismissal of Case by Hearing Officer

The Hearing Officer may dismiss a complaint and close the case where the complaint:

- a. Is not reported or filed in a timely manner.

- b. Is not supported by sufficient facts, lacks merit based upon the available evidence, or does not fall within the jurisdiction of the Investigator. Similarly, the Investigator may dismiss a complaint and close the case under any of the following circumstances:
- c. The complainant fails or refuses to appear or to be available for interviews or conferences as necessary.
- d. The complainant cannot be located after reasonable efforts have been made and has not responded for at least ten (10) calendar days to a notice sent by the Hearing Officer to his or her last known residence, office, or email address.
- e. The complainant fails to provide requested, necessary information.
- f. The complainant fails or refuses to cooperate with the investigation to the extent that the Investigator is unable to reasonably resolve the charge.

The Hearing Officer determines that a complaint should be dismissed, the complainant will be informed of that decision, and given an opportunity to submit a written response within ten (10) working days.

When a complaint is dismissed, where appropriate, the University will attempt to restore the reputation of the respondent. To the extent permissible by law and University policy, the University may take such steps as deleting records and, unless the respondent prefers otherwise, notifying persons who participated in the proceedings of the dismissal and/or making a public announcement of the outcome.

F. Formal Hearings

1. Overview of Hearing Process

SCFR conducts the hearing and provides findings of fact, conclusions and recommendations to the President. The President makes and issues the final decision.

The hearing is intended to provide the parties with a fair opportunity to present relevant information to SCFR who will make informed decisions regarding responsibility, sanctions, and/or remedies.

The parties are entitled to provide opening statements, testimony, cross-examination, and closing statements.

Throughout the hearing, the parties will be separated.

The Hearing Officer conducts all questioning.

2. Presumption of Non-Responsibility

The respondent will be presumed “not responsible” unless and until the President determines the respondent is responsible.

3. Notice of Hearing

At the completion of an investigation, a determination will be made if a hearing is required. If a hearing is required, a written Notice of Hearing will be sent to the parties at least twenty (20) calendar days prior to the hearing. The notice will include the charges at issue; a brief summary of the alleged prohibited conduct; the date, time, and place of the hearing; the name of the Hearing Officer.

Written Notice of Hearing will be provided to both parties at least three (3) days prior to the hearing.

4. Newly Discovered Evidence

If after the completion of the investigation, a party seeks to present a witness or introduce evidence not previously introduced, the Hearing Officer may grant such request upon a showing that the witness or evidence is relevant, material, newly discovered, and could not have been discovered during the investigation with due diligence.

Where a Hearing Officer permits a party to introduce a newly discovered witness or evidence, to prevent surprise to the other party, the Hearing Officer will reschedule or adjourn the hearing to investigate the newly discovered witness or evidence. The Hearing Officer will also allow the parties time to respond to the new information.

5. Standard of Proof

SCFR will determine whether the respondent is responsible by using a clear and convincing evidence standard. This means that to find the respondent responsible for any prohibited conduct, SCFR must decide, based upon the record as a whole, that it is highly and substantially more likely to be true than untrue that the respondent committed the alleged prohibited conduct.

If SCFR does not find the respondent responsible for any prohibited conduct under V520.02 or any supplemental jurisdiction, it will dismiss the case. If SCFR finds that the respondent is responsible under V520.02 or supplemental jurisdiction, it will consider appropriate sanctions and remedies.

6. Stipulation Based on Written Statements

The parties may agree to stipulate to a decision based on the written statements; thereby foregoing the formal hearing. Based on the stipulation, SCFR will make its decision on that basis.

G. Hearing Process and Format

As termination is a potential sanction, the hearing will be closed to the public. (NDUS 605.4(6). The only persons present will be the parties, their advisor(s) and support person, witnesses (when testifying), the Hearing Officer, SCFR, and any staff necessary for the hearing.

The parties and their support person will not have direct contact with each other.

Witnesses may be present only for their own testimony.

SCFR may establish reasonable time limits, rules, and format, providing the parties with equal opportunities to participate.

The trained, appointed Hearing Officer will coordinate the hearing.

Formal rules of evidence will not apply.

As required by policy, the hearing will be recorded. Personal recordings are prohibited.

Typically, the format of the hearing will be as follows:

- Introduction of SCFR
- The Hearing Officer will explain the hearing process, address any necessary procedural issues, and answer questions.
- Testimony by the complainant.
- Testimony by the respondent.
- Testimony by any witnesses.
- Cross examination by the complainant.
- Cross examination by the respondent.
- Closing statements by the complainant followed by the respondent.
- SCFR will take the matter under advisement to make its determination.

2. Evidence

SCFR may admit any evidence which is of probative value in determining the issues or if the interests of justice will best be served by admitting the evidence. Every reasonable effort shall be made to obtain the most reliable evidence available. SCFR shall grant adjournments to enable either party to investigate evidence to which a valid claim of surprise is made.

3. Testimony

Testimony is conducted through a question-and-answer format.

Both parties will have the right to confront and cross-examine all witnesses. Since the Office of Civil Rights requires the parties be separated throughout the investigation and hearing process, the right to confront and cross-examine will be conducted in a way that preserves the parties' interest in separation. The parties may choose to wave their interest in separation.

Testimony may be taken by deposition, including deposition by telephone, or witnesses may testify by telephone, facsimile, video or other electronic means upon agreement of the parties or, absent an agreement, upon request of a party and determination by SCFR or Hearing Officer that such uses does not substantially prejudice the rights of any party. Affidavits may be received into evidence upon stipulation of the parties.

The Hearing Officer will ask persons being questioned to affirm that they will testify truthfully.

Both the complainant and the respondent may testify or decline to testify and may decide whether to testify when their turn to testify arises.

4. Closing Statements

The parties may make closing statements.

This is the opportunity for the parties to suggest inferences and conclusions.

The parties may not add or address information not contained in the hearing record, as SCFR will not consider new information. Nor may the parties address issues that pertain to sanctions and remedies. SCFR does not consider these issues when determining responsibility.

SCFR will establish a time limit for brief oral closing statements, typically around five (5) minutes.

5. Determination on Sanctions and Remedies

If SCFR finds the respondent responsible, it will make recommendations for appropriate sanctions and remedies.

In determining sanctions and remedies, SCFR may consider:

- a. The severity of the prohibited conduct;
- b. The circumstances of the prohibited conduct;
- c. The impact of the prohibited conduct and sanctions and remedies on the complainant;
- d. The impact of the prohibited conduct and sanctions and remedies on the community;
- e. The impact of the prohibited conduct and sanctions and remedies on the respondent;
- f. Prior misconduct by the respondent; and
- g. Any other mitigating, aggravating, or compelling factors.

SCFR may recommend one or more of the following sanctions and remedies:

- a. Measures similar to the Interim Measures specified under these procedures;
- b. Appropriate educational steps (such as counseling, evaluation, restitution, community service, compensation for theft and damage to person or property, alcohol or drug education, reflection papers, or directed study);
- c. Improvement plan, performance action plan;
- d. Negative comments in a performance review;
- e. Reprimand delivered either verbally or in writing;
- f. Document placed in personnel file (A document may only be placed in a personnel file after the faculty member has had an opportunity to read the material and has signed that he or she has read it. If the faculty refuses to sign the copy, a University representative shall indicate on the copy that the faculty member was shown the material, was requested to sign the copy, and that the faculty member refused to sign the copy to be filed);
- g. Demotion;
- h. Suspension;
- i. Salary reduction or loss of salary;
- j. Restriction or loss of privileges;
- k. Dismissal.

SCFR may also recommend that the University take measures on campus to remedy the effect or prevent the reoccurrence of such prohibited conduct.

6. Transcript and Record Available

Upon request, a verbatim transcript of the hearing(s) and copy of the record is available at no cost to both parties.

7. Findings of Fact, Conclusions, and the Decision

The findings of fact, conclusions, and the decision shall be based solely on the evidence received by SCFR.

SCFR's findings of fact, conclusions and recommendations, with supporting reasons, shall be reported simultaneously in writing, to the VCSU President, the complainant, and the faculty member or their representatives.

The President shall provide written notice of the decision, including findings of fact and reasons or conclusions based on the hearing record, to SCFR, the complainant, and the faculty member within twenty (20) calendar days of receiving the report.

The decision will include: the specific prohibited conduct for which the respondent was found responsible and not responsible; the findings of fact; and the rationale for SCFR's determinations regarding both responsibility and sanctions.

The decision will also inform the complainant, faculty member, and SCFR of the option of submitting within ten (10) calendar days of the decision a written response to the decision, to which the President may reply. The decision of the President is final.

Both the complainant and the respondent will be informed simultaneously of any sanctions and remedies, the date by which the requirements must be satisfied (if applicable), and the consequences of failure to satisfy the requirements.

8. Restoring Respondent's Reputation upon a Dismissal of a Formal Complaint

Upon completion of all proceedings, if a Formal Complaint has been dismissed, where appropriate, SFCR will attempt to restore the reputation of the faculty member. To the extent permissible by law and University policy, SFCR may take such steps as deleting records and, unless the faculty member prefers otherwise, notifying persons who participated in the proceedings of the dismissal and/or making a public announcement of the outcome.

VII. References/Related Resources

A. Federal

U.S. Department of Labor: Title IX, Education Amendments 1972

20 U.S. Code §1092 (f): Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act

34 U.S. Code §12291: Definitions and grant provisions

485(f) of the Higher Educational Act of 2008

Titles VI and VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991
Violence Against Women Act

Violence Against Women Reauthorization Act (VAWA)

Civil Rights Act of 1991

Family Education Rights and Privacy Act (FERPA)

Age Discrimination in Employment Act of 1967

Rehabilitation Act of 1973 §504

Americans with Disabilities Act of 1990

34 CFR Parts 100, 106, 104 Department of Education regulations

B. State

North Dakota Human Rights Act 1983

NDCC §12.1-17-07.1 Stalking

NDCC §12.1-17-08 Consent as a Defense

NDCC § 12.1-20-02 Definitions related to Sex Offenses

NDCC §14-03-03 Void Marriages

NDCC § 14-07.1-01 Definitions related to Domestic Violence

NDCC § 15-10-56 Disciplinary proceedings—Right to counsel for students and organizations—
Appeals

NDCC § 54-06-21 Public employee personnel records—Administration—Access.

NDUS Human Resource Policy Manual 25: Job Discipline/Dismissal

NDUS Human Resource Policy Manual 27: Appeals Procedures

C. Related University Policy

NDUS 308.1 Officer and Employee Code of Conduct

NDUS 514 Due Process Requirements for Student Conduct that May Result in Suspension or
Expulsion

NDUS 603.1 Harassment

NDUS 603.2 Equal Employment Opportunity

NDUS 603.3 Nepotism

NDUS 605.1 Academic Freedom and Tenure; Academic Appointments

NDUS 605.2 Standing Committee on Faculty Rights

NDUS 605.3 Non-Renewal, Termination or Dismissal of Faculty

NDUS 605.4 Hearing and Appeals

NDUS 605.5 Mediation

NDUS 608.2 NDUS Employees—Non-Renewals and Dismissals

NDUS 611.4 Employee Responsibility and Activities: Conflict of Interest

NDUS 612 Faculty Grievances

V308.01 VCSU Employee Code of Conduct

V520.01 Code of Student Conduct

V530.04 University Hearings and Appeals Board

V603.01.02 Hostile Work Environment

V603.01.03 Workplace Violence

V603.02 VCSU Equal Opportunity Employment Plan

V603.03 Nepotism

V605.02 VCSU Standing Committee on Faculty Rights

V605.03 Non-Renewal, Termination or Dismissal and Sanction of Faculty Members

V605.05 Mediation

V605.09 Faculty Responsibilities

V612 Faculty Grievance Policies and Procedures