

**Sexual Misconduct Policy
for
Birmingham-Southern College
("College")**

Effective Date: August 14, 2020 ("Effective Date")

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1. Introduction

The College prohibits the exclusion of any person, on the basis of sex, from participation in, to be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by the College.¹ If not addressed by the College, sexual harassment and other forms of sexual misconduct as defined below constitute a form of discrimination on the basis of sex.² The purpose of this policy is to set forth the prompt and effective steps which the College will take to end sexual misconduct, prevent its recurrence, and, as appropriate, remedy its effects.³ This policy applies to sexual misconduct involving the College's students, faculty, staff, and visitors and which occur against a person in the United States.⁴ Any provision of any College policy or handbook which deals with sexual discrimination in any fashion is hereby superseded as of the Effective Date by this Sexual Misconduct Policy so that all forms of sexual misconduct involving the education programs of the College will be subjected to the remedial steps set forth in this policy.

Appendix "A" contains a list of names, physical addresses, email addresses, telephone numbers, and certain other information which may change from time to time. Appendix "A" may be updated from time to time by the Title IX Coordinators without College approval so as to maintain current information for use by the campus community.

Nothing contained in this Sexual Misconduct Policy shall be deemed to have created a contract between the College and any student, faculty member, or staff member. The College reserves the right to unilaterally change any provision of this policy without the consent of any other party.

2. Notification Requirements

The College hereby notifies applicants for admission and employment, students, and employees that the names of the employees designated as the Title IX Coordinators are set forth in Appendix "A."⁵

The College hereby notifies such persons that (a) the College does not discriminate on the basis of sex in the education programs or activities that the College operates, (b) the College is

¹ 34 CFR §106.31

² 2001 Guidance, p. 2.

³ 2001 Guidance, p. iii.

⁴ 34 CFR §106.8(c).and (d); 34 CFR §106.31(b); 2001 Guidance, p. 13.

⁵ 34 CFR §106.8(a)

required by Title IX not to discriminate in such a manner, and (c) the requirement of the College not to discriminate in the education programs or activities extends to employment and admission.⁶

Inquiries about the application of Title IX to the College may be referred to the employee(s) designated by the College as its Title IX Coordinator(s) or to the Assistant Secretary of the Office of Civil Rights at the United States Department of Education, or both.⁷

A notice of the College's policy of nondiscrimination shall be widely disseminated on the College's campus and the College will prominently display a statement of this policy on its website and in each handbook or catalog that it makes available to applicants for admission and employment, students, and employees with the College.⁸ The notice of nondiscrimination shall also state the contact information for the Title IX Coordinator(s).⁹ The College shall use or distribute a publication stating that the College does not treat applicants, students, or employees differently on the basis of sex.¹⁰

The College has adopted and published grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that is prohibited by Title IX. Additionally, the College's grievance process complies with Title IX §106.45 for formal complaints.¹¹ The College hereby provides notice of the College's grievance procedures and processes to applicants for admission and employment, students, and employees including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the College will respond in such cases, all of which is set forth in Sections 5 through 9 below .¹²

3. Definitions

As used in this policy, the phrases and words listed shall have the meanings set forth below:

Actual knowledge - Notice of sexual harassment or allegations of sexual harassment to the College's Title IX Coordinator(s) or any official of the College who has authority to institute corrective measures on behalf of the College. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the College with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the College. "Notice" as used in this paragraph

⁶ 34 CFR §106.8(b)(1)

⁷ 34 CFR §106.8(b)(1)

⁸ 34 CFR §106.8(b)(2)(i)

⁹ 34 CFR §106.8(b)(2)(i)

¹⁰34 CFR §106.8(b)(2)(ii)

¹¹ 34 CFR §106.8(c)

¹² 34 CFR §106.8(c)

includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator(s) as described in the Notification section of this policy.¹³

Campus - Any building or property owned or controlled by the College within the same reasonably contiguous geographic area and used by the College in direct support of, or in a manner related to, the College's educational purposes, including residence halls. Any building or property that is within or reasonably contiguous to any building or property owned or controlled by the College within the same reasonably contiguous geographic area and used by the College in direct support of, or in a manner related to, College's educational purposes, that is owned by the College but controlled by another person, is frequently used by students, and supports College purposes such as a food or other retail vendor.¹⁴

Complainant - An individual who is alleged to be the victim of conduct that could constitute sexual harassment.¹⁵

Consent - Consent is clear, knowing, and voluntary. Consent is active, not passive. Silence, in and of itself, cannot be interpreted as consent. Consent can be given verbally or non-verbally, as long as those words or actions create mutually understandable, clear permission regarding willingness to engage in (and the conditions of) sexual activity. Consent to one form of sexual activity does not imply consent to other forms of sexual activity. Previous relationships or prior consent does not imply consent to future sexual acts. Consent can be revoked at any time during a sexual interaction. Consent cannot be obtained through force and or coercion. A person who is incapacitated cannot give consent.¹⁶

Deliberately indifferent - A response to sexual harassment or other sexual misconduct that is clearly unreasonable in light of the known circumstances.¹⁷

Dating violence - Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. "Dating violence" includes, but is not limited to, sexual or physical abuse or the threat of such abuse. "Dating violence" does not include acts covered under the definition of domestic violence. Any incident meeting this definition is considered a crime for the purposes of Clery Act reporting.¹⁸

¹³ 34 CFR §106.30(a)

¹⁴ 34 CFR § 668.46(a)

¹⁵ 34 CFR §106.30(a)

¹⁶ 34 CFR §106.30(a) The Assistant Secretary will not require Colleges to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

¹⁷34 CFR §106.44(a)

¹⁸ 34 CFR §668.46

Domestic violence - A felony or misdemeanor crime of violence committed by: (a) a current or former spouse or intimate partner of the victim¹⁹, (b) a person with whom the victim shares a child in common, (c) a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner, (d) a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or (e) 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 jurisdiction in which the crime of violence occurred.²⁰

Education Program or Activity of a College – Locations, events, or circumstances over which the College exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.²¹

Formal complaint - A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the College investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the College with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator in Appendix "A", and by any additional method designated by the College. As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the College) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under 34 CFR 106 or under 34 CFR 106.45, and must comply with the requirements of 34 CFR 106, including 34 CFR 106.45(b)(1)(iii).²²

Hostile Environment – An environment where the conduct of one or more individuals is sufficiently serious that it denies or limits a student's, faculty member's, or staff member's ability to participate in or benefit from the College's program based on sex. In determining whether a hostile environment exists, the College shall consider all relevant circumstances, including the following factors: (a) the degree to which the conduct affected the College's educational programs, (b) the type, frequency and duration of the conduct, (c) the age and sex of the alleged harasser and the subject or subjects of the harassment, (d) the location of the incidents and the context in which they occurred, (e) other incidents at the College, and (f) incidents of gender-based, but nonsexual harassment.

Incapacitation – Any situation in which a person is incapable of giving consent due to the student's age, state of consciousness, use of drugs or alcohol, or an intellectual or other disability.

¹⁹ The use of the word "victim" in this policy stems from the use of that word in 34 CFR §668.46 and is not intended to infer the guilt or innocence of any party with respect to any crime or any violation of this policy.

²⁰ 34 CFR §668.46

²¹ 34 CFR §106.44(a)

²² 34 CFR §106.30(a)

Intimidation – The intentional act of coercing or frightening someone to engage or not engage in conduct of a sexual nature against the person’s will.

Non-consensual sexual contact - Any physical touching of a sexual nature which is not preceded by consent or which continues after a previous consent is withdrawn.

Non-consensual sexual intercourse - Any sexual intercourse which is not preceded by consent or which continues after previous consent is withdrawn.

Respondent - Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.²³

Retaliation- The act of seeking revenge upon another person.²⁴

Sexual Assault²⁵ - An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program.²⁶

Sexual harassment- Conduct on the basis of sex that satisfies one or more of the following:
(1) An employee of the College conditioning the provision of an aid, benefit, or service of the College on an individual’s participation in unwelcome sexual conduct;
(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College’s education program or activity; or
(3) “Sexual assault”, “dating violence”, “domestic violence”, or “stalking” as defined herein.²⁷

Sexual intercourse - Vaginal or anal penetration by a penis, object, tongue or finger and oral copulation.

Sexual misconduct – Any act of sexual harassment, sexual violence, non-consensual sexual contact, non-consensual sexual intercourse, sexual exploitation, quid pro quo, intimidation, or any act that creates a hostile environment or any act of retaliation against a complainant or anyone involved in a grievance procedure under this policy.

Sexual violence - Physical sexual acts perpetrated against a person's will or with a person who suffers from incapacitation. It also means same-sex conduct that violates the College's prohibition on sexual violence.

²³ 34 CFR §106.30(a)

²⁴ <https://definitions.uslegal.com/r/retaliation/> (July 19, 2019).

²⁵ 34 CFR § 668.46(a)

²⁶ 34 CFR § 668.46(a)

²⁷ 34 CFR § 106.30(a)

Stalking²⁸ - Engaging in a course of conduct directed at a specific person that would cause a reasonable person to (a) fear for the person's safety or the safety of others or (b) suffer substantial emotional distress.²⁹ 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.³⁰

Standard of evidence – The standard of evidence that shall be used is the preponderance of the evidence standard where the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.

Supportive measures - 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. Such measures are designed to restore or preserve equal access to the College's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the College's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, 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 campus, and other similar measures. The College must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the College to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.³¹

Title IX Coordinator – The person designated as such by the College's President or the person temporarily designated by the Title IX Coordinator to serve in that capacity during the Title IX Coordinator's incapacity or absence from the College's campus.

Unwelcome conduct - Conduct is unwelcome if an individual did not request or invite it and regarded the conduct as undesirable or offensive. Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.³²

4. Title IX Coordinator

The College's current lead Title IX Coordinator and any deputy Title IX Coordinator(s) are the individuals specified in Appendix "A".³³ The names and current contact information for these individuals, including the office address, electronic mail address, and telephone number can

²⁸ 34 CFR § 668.46(a)

²⁹ 34 CFR § 668.46(a)

³⁰ 34 CFR § 668.46(a)

³¹ 34 CFR § 106.30(a)

³² 2001 Revised Sexual Harassment Guidance, pp. 7-8.

³³ 34 CFR § 106.8(a)

be found in Appendix “A”, and on the College’s website at: <https://www.bsc.edu/titleix/pdfs/Sexual-and-Gender-Based-Misconduct-Policy.pdf>.³⁴ All of the College’s Title IX Coordinators shall work together to ensure consistent enforcement of its policies and Title IX.³⁵ The lead and deputy Title IX Coordinator(s) shall coordinate the College’s efforts to comply with its responsibilities under this policy, guidance from the United States Department of Education, and federal statutes and regulations governing sexual misconduct.³⁶ Further, when designating a Title IX coordinator, the College will make efforts to designate a coordinator whose other job responsibilities will not create a conflict of interest.³⁷

The Title IX Coordinator will assist the College in complying with Title IX and promoting gender equity in education.³⁸

The College must inform the Title IX Coordinator(s) of all reports and complaints raising Title IX issues, even if the complaint was initially filed with another individual or office or the investigation will be conducted by another individual or office.

The College will ensure that the Title IX Coordinator(s) are/is appropriately trained and possess comprehensive knowledge in all areas over which the Title IX Coordinator(s) has/have responsibility in order to effectively carry out those responsibilities, including College policies and procedures on sex discrimination and all complaints raising Title IX issues throughout the College.

5. College’s Response to Sexual Harassment

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator(s), or by any other means that results in the Title IX Coordinator(s) receiving the person’s verbal or written report.³⁹ Such report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator(s).⁴⁰

a. Response to Sexual Harassment in General

When the College has actual knowledge of sexual harassment occurring in any of the College’s education programs or activities against a person in the United States, the College shall respond promptly in a manner that is not deliberately indifferent.⁴¹ The College shall treat

³⁴ 34 CFR §106.8(a)

³⁵ OCR Guidance on Title IX Coordinators (April 24, 2015), pp. 2-3

³⁶ 34 CFR §106.8(a)

³⁷ OCR Guidance on Title IX Coordinators (April 24, 2015), p. 3

³⁸ OCR Guidance on Title IX Coordinators (April 24, 2015), p. 4

³⁹ 34 CFR §106.8(a)

⁴⁰ 34 CFR §106.8(a)

⁴¹ 34 CFR §106.44(a)

complainants and respondents equitably by offering supportive measures to a complainant, and by following the College's grievance policy before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.⁴² Additionally, the Title IX Coordinator will promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.⁴³ The College will provide written notification of complainant's⁴⁴ options for, and available assistance in, changing academic, living, transportation, and working situations, if so requested by the complainant and if such accommodations are reasonably available, regardless of whether the complainant chooses to report the crime to campus police or local law enforcement.⁴⁵ The College will respond in the manner described in this section with or without a formal complaint.⁴⁶

b. College's Response to a Formal Complaint

When a formal complaint has been filed, the College shall follow all procedures consistent with Title IX and the College's grievance policy.⁴⁷

The College may remove a respondent from the College's education program or activity on an emergency basis, after the College undertakes an individualized safety and risk analysis, determines that the respondent poses an immediate threat to the physical health or safety of any student or individual arising from the allegations of sexual harassment and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.⁴⁸ The College may also place a non-student employee respondent on administrative leave during the pendency of a grievance process.⁴⁹

c. Confidentiality and Privilege

The College will provide information, in writing, about how the College will protect the confidentiality of complainants⁵⁰, including how publicly-available recordkeeping will be accomplished without the inclusion of identifying information about the complainant⁵¹, to the extent permissible by law.⁵² The College shall keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a

⁴² 34 CFR §106.44(a)

⁴³ 34 CFR §106.44(a)

⁴⁴ Although 34 CFR §668.46 and 20 U.S.C. §1092 refer to "victim", this policy utilizes the word "complainant" because "complainant" means an individual who is alleged to be the victim of conduct that could constitute sexual harassment under 34 CFR§106.30(a). See Section III for the definition of "complainant."

⁴⁵ 34 CFR §668.46(b)(11)(v)

⁴⁶ 34 CFR §106.44(b)(1)

⁴⁷ 34 CFR §106.44(b)(1)

⁴⁸ 34 CFR § 106.44(c)

⁴⁹ 34 CFR §106.44(d)

⁵⁰ See Note 46 above.

⁵¹ See Note 46 above.

⁵² 34 CFR §668.46(b)(11)(A)

report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.⁵³ The College shall maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the College to provide the supportive measures.⁵⁴

The College does not require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.⁵⁵

6. Grievance Procedures for Formal Complaints of Sexual Harassment

For purposes of addressing formal complaints of sexual harassment, the College will comply with the grievance procedures of this section. The College's grievance procedures treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.⁵⁶ Remedies are designed to restore or preserve equal access to the College's education program or activity.⁵⁷

a. Basic Requirements for Grievance Procedures

Grievance proceedings shall be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.⁵⁸ Proceedings shall provide a prompt, fair, and impartial investigation and resolution.⁵⁹

The College's grievance procedures shall use an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence.⁶⁰ During the grievance process, credibility determinations may not be based on a person's status as a complainant, respondent, or witness.⁶¹

⁵³ 34 CFR §106.71(a)

⁵⁴ 34 CFR §106.30(a)

⁵⁵ 34 CFR 106.45(b)(1)(x)

⁵⁶ 34 CFR §106.45(b)(1)(i)

⁵⁷ 34 CFR §106.45(b)(1)(i)

⁵⁸ 34 CFR §668.46(k)(2)(ii)

⁵⁹ 34 CFR §668.46(k)(2)(i)

⁶⁰ 34 CFR §106.45(b)(1)(ii)

⁶¹ 34 CFR §106.45(b)(1)(ii)

Any individual designated by the College who is to be involved in the College’s grievance procedures, such as a coordinator, investigator, or decision-maker, shall not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.⁶² It is presumed that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process⁶³

The College’s grievance procedure includes reasonably prompt time frames for the conclusion of the grievance process. This includes reasonably prompt timeframes for filing and resolving appeals and informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent for the delay or extension and the reasons for the action.⁶⁴ “Good cause” may include consideration such as the absence of a party, a party’s advisor, or a witness, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities.⁶⁵

The College’s grievance procedures describe the range of possible sanctions and remedies that the College may implement following any determination of responsibility.⁶⁶ The grievance procedures also describe the standard of evidence to be used to determine responsibility. This standard of evidence is applied for formal complaints against students as well as formal complaints against employees, including faculty.⁶⁷ It shall be applied to all formal complaints of sexual harassment.⁶⁸

b. Supportive Measures

The College must provide written notification to students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available for victims both on-campus and in the community.⁶⁹ The College provides such written notification in Appendix “A”. There are a range of supportive measures available to complainants and respondents.⁷⁰ Such supportive measures may include but are not limited to, counseling, extensions of deadlines or other course-related adjustments, 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 campus, and other similar measures.

c. Notice of Allegations

⁶² 34 CFR §106.45(b)(1)(iii)

⁶³ 34 CFR §106.45(b)(1)(iv)

⁶⁴ 34 CFR §106.45(b)(1)(v)

⁶⁵ 34 CFR §106.45(b)(1)(v)

⁶⁶ 34 CFR §106.45(b)(1)(vi)

⁶⁷ 34 CFR §106.45(b)(1)(vii)

⁶⁸ 34 CFR §106.45(b)(1)(vii)

⁶⁹ 34 CFR §668.46 (b)(1)(iv)

⁷⁰ 34 CFR §106.45(b)(1)(ix)

Upon receipt of a formal complaint from a student or employee or upon the initiation of a formal complaint by the Title IX Coordinator on behalf of the College, the College must provide the following written notice to the parties who are known: notice of the College's grievance procedures, including any information resolution process, notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.⁷¹

The College's written notice must also include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.⁷²

The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney and may inspect and review evidence. In addition, the written notice must inform the parties that "lying in official matters" is a violation of the College's Honor Code. "Lying in official matters" means the statement of an untruth or the falsification of "official material" with intent to mislead administration, faculty, residence life staff, Campus Police officers, or Honor Council or Social Conduct Council members when acting in their official capacities. "Official material" means material having to do with course work, College administration, faculty, residence life staff, Campus Police, the Council, or the Social Conduct Council.⁷³

If, in the course of investigation, the College decides to investigate allegations about the complainant or respondent that are not included in the notice requirements above, then the College will provide notice of the additional allegations to the parties whose identities are known.⁷⁴

d. Investigations of a Formal Complaint

The College must investigate the allegations in a formal complaint.⁷⁵ If the conduct alleged in the formal complaint would not constitute sexual harassment even if proved, did not occur in the College's education program or activity, or did not occur against a person in the United States, then the College must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX.⁷⁶ However, such a dismissal does not preclude action under another provision of the College's code of conduct.⁷⁷

⁷¹ 34 CFR §106.45(b)(2)(i)(A)-(B)

⁷² 34 CFR §106.45(b)(2)(i)(B)

⁷³ 34 CFR §106.45(b)(2)(i)(B)

⁷⁴ 34 CFR §106.45(b)(2)(ii)

⁷⁵ 34 CFR §106.45(b)(3)(i)

⁷⁶ 34 CFR §106.45(b)(3)(i)

⁷⁷ 34 CFR §106.45(b)(3)(i)

As soon after the initiation of the investigation as possible, the Title IX Coordinator or the designated investigator shall notify all College employees or students who are believed to have documentary, electronic, or tangible evidence to preserve such evidence for the investigation.⁷⁸ The College must also notify the complainant⁷⁹ of: (a) the importance of preserving evidence as may be necessary to the proof of criminal domestic violence, dating violence, sexual assault, or stalking, or in obtaining a protection order, (b) the agencies to whom the alleged offense should be reported, (c) options regarding law enforcement and campus authorities, including notification of the complainant's⁸⁰ option to (i) notify proper law enforcement authorities, including on-campus and local police, (ii) be assisted by campus authorities in notifying law enforcement authorities if the complainant⁸¹ so chooses, and (iii) decline to notify such authorities.⁸²

When investigating a formal complaint, the College must ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the College and not on the parties, provided that the College cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the College obtains that party's voluntary, written consent to do.⁸³

The College must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the College does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.⁸⁴

The College must also provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.⁸⁵ In addition, the College may not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.⁸⁶

The College must provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.⁸⁷ The College may not limit the choice of

⁷⁸ 34 CFR §668.46((b)11)(ii)(A)

⁷⁹ See Note 46 above.

⁸⁰ See Note 46 above.

⁸¹ See Note 46 above.

⁸² 34 CFR §668.46((b)11)(ii)(A)

⁸³ 34 CFR §106.45(b)(5)(i)

⁸⁴ 34 CFR §106.45(b)(5)(vi)

⁸⁵ 34 CFR §106.45(b)(5)(ii)

⁸⁶ 34 CFR §106.45(b)(5)(iii)

⁸⁷ 34 CFR §106.45(b)(5)(iv)

advisor or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding.⁸⁸ Advisors are not required to be attorneys.⁸⁹ Additionally, the College may not limit the choice or presence of an advisor for either the complainant or respondent in any meeting or grievance proceeding.⁹⁰ However, the College may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.⁹¹

The College must also provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interview, or other meetings with a party, with sufficient time for the party to prepare to participate.⁹²

e. Investigative Report

The College is required to create an investigative report that fairly summarizes relevant evidence.⁹³ Prior to completion of an investigative report, the College must send each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.⁹⁴ The College must also provide a copy of the investigative report at least 10 days prior to a hearing or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.⁹⁵

f. Live Hearing

The College is required under Title IX to have a live hearing as part of the College's grievance procedures.⁹⁶

During a live hearing, the College and the College's decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.⁹⁷ Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the parties' advisor of choice and never by a party personally, notwithstanding the discretion of the College to otherwise restrict the extent to which advisors may participate in the proceedings.⁹⁸ If a party does not have an advisor present at

⁸⁸ 34 CFR §106.45(b)(5)(iv)

⁸⁹ 34 CFR §105.45(b)(5)(iv)

⁹⁰ 34 CFR §106.45(b)(5)(iv)

⁹¹ 34 CFR §106.45(b)(5)(iv)

⁹² 34 CFR §106.45(b)(5)(v)

⁹³ 34 CFR §106.45(b)(5)(vii)

⁹⁴ 34 CFR §106.45(b)(5)(vi)

⁹⁵ 34 CFR §106.45(b)(5)(vii)

⁹⁶ 34 CFR §106.45(b)(6)(i)

⁹⁷ 34 CFR §106.45(b)(6)(i)

⁹⁸ 34 CFR §106.45(b)(6)(i)

the live hearing, the College will provide without fee or charge to that party, an advisor of the College's choice, who may be, but is not required to be, an attorney, to conduct cross examination on behalf of that party.⁹⁹

The College must also make all evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examinations.¹⁰⁰

Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.¹⁰¹ Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, 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.¹⁰²

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.¹⁰³

Live hearings may be conducted with all parties physically present in the same geographic location or, at the College's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.¹⁰⁴ Colleges must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.¹⁰⁵ At the request of either party, the College must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.¹⁰⁶

7. Determination Regarding Responsibility

For the purpose of making a determination regarding responsibility, the College must

⁹⁹ 34 CFR §106.45(b)(6)(i)

¹⁰⁰ 34 CFR §106.45(b)(5)(vi)

¹⁰¹ 34 CFR §106.45(b)(6)(i)

¹⁰² 34 CFR §106.45(b)(6)(i)

¹⁰³ 34 CFR §106.45(b)(6)(i)

¹⁰⁴ 34 CFR §106.45(b)(6)(i)

¹⁰⁵ 34 CFR §106.45(b)(6)(i)

¹⁰⁶ 34 CFR §106.45(b)(6)(i)

appoint decision-maker(s) who cannot be the same person(s) as the Title IX Coordinator(s) or the investigator(s) for the College's grievance procedures.¹⁰⁷ When making a determination regarding responsibility, the College must apply the standard of evidence as defined above.¹⁰⁸

The College's decision-maker(s) must issue a written determination regarding responsibility.¹⁰⁹ The College must provide the written determination to the parties simultaneously.¹¹⁰ The College's written determination must include:

- (a) identification of the allegations potentially constituting sexual harassment;
- (b) a description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- (c) findings of fact supporting the determination;
- (d) conclusions regarding the application of the College's code of conduct to the facts;
- (e) a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the College imposes on the respondent, and whether remedies designed to restore or preserve equal access to the College's education program or activity will be provided by the College to the complainant; and
- (f) the College's procedures and permissible bases for the complainant and respondent to appeal.¹¹¹

The College must list all of the possible sanctions or supportive measures that the College may impose following the results of any College disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking in its annual security report, all of which are listed in Appendix "B".¹¹² In cases of alleged violence, sexual harassment, dating violence, sexual assault, or stalking, both the complainant and the respondent shall be simultaneously informed in writing of the outcome of any institutional disciplinary proceeding, the institution's procedures for the accused and the complainant¹¹³ to appeal the results of the institutional disciplinary proceeding, any change to the results that occurs prior to the time that such results become final, and when such results become final.¹¹⁴

¹⁰⁷ 34 CFR §106.45(b)(7)(i)

¹⁰⁸ 34 CFR §106.45(b)(7)(i)

¹⁰⁹ 34 CFR §106.45(b)(7)(i)

¹¹⁰ 34 CFR §106.45(b)(7)(iii)

¹¹¹ 34 CFR §106.45(b)(7)(ii)(A)-(F)

¹¹² 34 CFR §668.46(k)(1)(k)(iii)

¹¹³ See Note 46 above.

¹¹⁴ 20 U.S.C. § 1092(f)(8)(B)(iv)(III)

The determination regarding responsibility becomes final either on the date that the College provides the parties with the written determination of the result of the 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.¹¹⁵

The Title IX Coordinator is responsible for effective implementation of any remedies.¹¹⁶

8. Appeals

The College must offer both parties an appeal from a determination regarding responsibility, and from a College's dismissal of a formal complaint or any allegations therein, on the following bases: (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 was made, that could affect the outcome of the matter; and/or (c) the Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.¹¹⁷ Either party may appeal a determination regarding responsibility or a dismissal of a formal complaint or any allegations therein by filing appeal with the Title IX Coordinator within seven (7) days from the date of which the action subject to appeal was taken. The appeal shall be heard by _____.

As to all appeals, the College must (a) notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties; (b) ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator; (c) ensure that the decision-maker(s) for the appeal complies with the standards set forth in this policy and Title IX; (d) give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome; (e) issue a written decision describing the result of the appeal and the rationale for the result; and (f) provide the written decision simultaneously to both parties.¹¹⁸

9. Informal Resolution Process

A College may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.¹¹⁹ Similarly, a College may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.¹²⁰ However, at any time prior to reaching a determination regarding responsibility the College may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the College (a) provides to the

¹¹⁵ 34 CFR §106.45(b)(7)(iii)

¹¹⁶ 34 CFR §106.45(b)(7)(iv)

¹¹⁷ 34 CFR §106.45(b)(8)(i)

¹¹⁸ 34 CFR §106.45(b)(8)(iii)

¹¹⁹ 34 CFR §106.45(b)(9).

¹²⁰ 34 CFR §106.45(b)(9)

parties a written notice disclosing: (i) the allegations, (ii) the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and (iii) any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; (b) obtains the parties' voluntary, written consent to the informal resolution process; and (c) does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.¹²¹

10. Record Keeping

A College must maintain for a period of seven years records of each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the College's education program or activity; any appeal and the result therefrom; any informal resolution and the result therefrom; and all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.¹²² Materials used to train Title IX Coordinators, investigators, decision-makers, and any persons who facilitates an informal resolution process will be publicly available on the College's website.¹²³

The College shall create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.¹²⁴ In each instance, the College shall document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the College's education program or activity.¹²⁵ If the College does not provide a complainant with supportive measures, then the College must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.¹²⁶ The documentation of certain bases or measures does not limit the College in the future from providing additional explanations or detailing additional measures taken.¹²⁷

11. Prevention and Education

The College shall provide education programs to promote the awareness of rape, acquaintance rape, domestic violence, sexual assault, sexual harassment, and stalking, which shall include:

¹²¹ 34 CFR §106.45(b)(9)(i)-(iii)

¹²² 34 CFR §106.45(b)(10)(i)(A)-(D)

¹²³ 34 CFR §106.45(b)(10)(i)(A)-(D)

¹²⁴ 34 CFR §106.45(b)(10)(ii)

¹²⁵ 34 CFR §106.45(b)(10)(ii)

¹²⁶ 34 CFR §106.45(b)(10)(ii)

¹²⁷ 34 CFR §106.45(b)(10)(ii)

1. Primary prevention and awareness programs for all incoming students and new employees, which shall include:
 - a. A statement that the College prohibits the offenses of domestic violence, dating violence, sexual assault, sexual harassment, and stalking;
 - b. The definition of domestic violence, dating violence, sexual assault and stalking in the state of Alabama;
 - c. The definition of consent, in reference to sexual activity, in the state of Alabama;
 - d. Safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, sexual assault, sexual harassment, or stalking against a person other than such individual;
 - e. Information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks.
 - f. Information described in 20 U.S.C. 1092(f)(8)(B)(ii) through (vii) (which may be found at <https://www.law.cornell.edu/uscode/text/20/1092>); and
2. Ongoing prevention and awareness campaigns for students and faculty including the information described in clauses (a) through (f) of subparagraph 1 above.¹²⁸

12. Training

The College ensures that Title IX coordinators, investigators, and decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment, the scope of the College's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.¹²⁹ Coordinator(s) should be knowledgeable about other applicable Federal and State laws, regulations, and policies that overlap with Title IX.¹³⁰ Additionally, the College ensures that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.¹³¹ Furthermore, the College ensures that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.¹³²

The College uses training materials that do not rely on sex stereotypes to train coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.¹³³ The College also uses materials that promote impartial investigations and adjudications of formal

¹²⁸ 34 CFR §668.46(j)

¹²⁹ 34 CFR §106.45(b)(1)(iii)

¹³⁰ OCR Guidance on Title IX Coordinators (April 24, 2015), p. 6.

¹³¹ 34 CFR §106.45(b)(1)(iii)

¹³² 34 CFR §106.45(b)(1)(iii)

¹³³ 34 CFR §106.45(b)(1)(iii)

complaints of sexual harassment to train coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.¹³⁴

13. Retaliation Prohibited

The College or any other person may not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.¹³⁵ Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.¹³⁶ Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination.¹³⁷ The exercise of rights protected under the First Amendment does not constitute retaliation.¹³⁸ Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation.¹³⁹ However, a determination regarding responsibility alone will not be sufficient to conclude that any party made a materially false statement in bad faith.¹⁴⁰

¹³⁴ 34 CFR §106.45(b)(1)(iii)

¹³⁵ 34 CFR §106.71(a)

¹³⁶ 34 CFR §106.71(a)

¹³⁷ 34 CFR §106.71(a)

¹³⁸ 34 CFR §106.71(b)(1)

¹³⁹ 34 CFR §106.71(b)(2)

¹⁴⁰ 34 CFR §106.71(b)(2)

Appendix “A”

Contact Information for Title IX Coordinator and Supporting Services Date: August 14, 2020

Title IX Coordinator’s Name and Contact Information	David M. Eberhardt, Jr. Ed.D. Title IX Coordinator (Lead) Norton Campus Center 230B Birmingham-Southern College Box 549014, Birmingham, AL 35254 deberhar@bsc.edu 205-226-4722 (office), 205-218-4377 (cell); https://www.bsc.edu/titleix/Report.html
On-Campus Counseling Services	Cara Blakes Norton Campus Center 252 cblakes@bsc.edu 205-226-4717
Off-Campus Counseling Services	For Sexual Violence Crisis Center 3600 8th Ave South, Suite 501 Birmingham, AL 35222 205-323-7273 For Dating/Domestic Violence YWCA of Central Alabama 309 23rd St North Birmingham, AL 35203 205-322-9922
On-Campus Healthcare Services	Ms. Yvette Spencer, RN Director, Health Services Norton Campus Center 250 yspencer@bsc.edu 205-226-7720 Cahaba Medical Care @ BSC Norton Campus Center 240 205-226-4717
Off-Campus Healthcare Services	Sexual Assault Nurse Examiner Crisis Center 3600 8th Ave South, Suite 501

		<p>Birmingham, AL 35222 205-323-7273</p> <p>Any local emergency room for immediate needs, and numerous urgent care clinics (i.e., American Family Care, Cahaba Medical Care) in the Birmingham area.</p>
On-Campus Health Services	Mental	<p>Cara Blakes Norton Campus Center 252 ciblakes@bsc.edu 205-226-4717</p>
Off-Campus Health Services	Mental	<p>Grayson & Associates 2200 Lakeshore Dr #150 Birmingham, AL 35209 205-871-6926</p> <p>Numerous other mental health support resources in the local area are available for referral from the Birmingham-Southern College Counseling Office (without the need to see a BSC counselor regarding concerns).</p>
On-Campus Advocacy Services	Victim	<p>There is an emerging on-campus victim advocacy service program for 2020-2021. Information will be updated when available.</p>
Off-Campus Advocacy Services	Victim	<p>For Sexual Violence – Crisis Center, 3600 8th Ave South, Suite 501 Birmingham, AL 35222 205-323-7273</p> <p>For Dating/Domestic Violence – YWCA of Central Alabama 309 23rd St North Birmingham, AL 35203 205-322-9922</p>
Legal Services		<p>One Place Justice Center 1135 14th Ave South Birmingham, AL 35205; oneplacebham1@outlook.com 205-453-7261</p>
Emergency Services	Medical	<p>On-Campus – 205-226-4700</p> <p>Off-Campus – 911 (When possible, after calling 911, please call the BSC number above to allow the opportunity for Campus Police to assist EMS)</p>
Campus Security/Police Department		<p>BSC Campus Police Student Services 270</p>

	campuspolice@bsc.edu (emails all officers including any on-duty officers), or jharris@bsc.edu (Chief Harris' email) 205-226-4700
Local Police Department	Birmingham Police Department, West Precinct (for on campus incidents) 2236 47th Street Ensley Birmingham, AL 35208 205-254-2683 Note: There are other nearby police departments connected to municipalities beyond campus and the immediate Birmingham area.
Local Sheriff's Office	Jefferson County Sherriff's Office 2200 Reverend Abraham Woods Jr Boulevard Birmingham, AL 35203 205-325-5700
State Police	Alabama Law Enforcement Agency, Birmingham Post 908 Bankhead Hwy W Birmingham, AL 35204 205-252-7445

Appendix “B”

Possible Sanctions or Supportive Measures That College May Impose Following the Results of Any College Disciplinary Proceeding under this Policy

The possible sanctions that College may impose include general probation, residential probation, conduct probation, conduct probation without representation, disciplinary suspension, residential suspension, social suspension, explosion, and residential suspension.

The possible supportive measures that College may impose include counseling, training and tutorials (in-person and/or online) directly related to the circumstances involved in the violation, research and written assignments, engagement/attendance at relevant activity within the local community, and other educational sanctions.