

FSU Policy 2-2a

Title of Policy:	Title IX Compliance
Responsible Executive:	University President
Approving Official:	University President
Effective Date:	On Final Approval
Revision History:	New August 14, 2020 <u>Revised _____, 2021</u>

I. INTRODUCTION

Florida State University (FSU or University) is committed to eliminating sexual harassment in all forms on its campus and in the University community, while ensuring compliance with federal law and fairness in its investigative and disciplinary processes. To that end, the University adopts this policy that addresses the significant changes to the federal government's 2020 interpretation of Title IX of the Education Amendments of 1972, commonly known as "Title IX," found at 34 C.F.R. §106.

The University's Sex Discrimination and Sexual Misconduct Policy (Policy 2-2) continues to operate as the University's comprehensive statement on and mechanism to address alleged violations of Title IX (other than that of actual athletics participation). This policy supplements Policy 2-2 ~~in providing ensuring~~ compliance with new requirements under The Rule and will apply and provide controlling definitions and procedures to address allegations that constitute sexual harassment, as that term is defined by the Final Rule, alleged to have occurred within the jurisdiction described by the Final Rule to the extent that Policy 2-2 is not in compliance. Policy 2-2 will be later updated to incorporate those changes. This policy ~~also~~ yields to any applicable regulatory changes made by the Florida Board of Governors that implement The Rule.

Through this policy it is the intent of the University to 1) ensure compliance with federal law, 2) provide fair and equitable processes that are impartial and free of bias to address, resolve, and prevent incidents of sexual harassment, 3) preserve and respect the autonomy (i.e., voluntary nature) of complainants, and 4) treat complainants and respondents fairly and safeguard their due process rights. It is further the intent of the University to implement this policy in a way that does not infringe on the First Amendment rights of any participant.

To the extent that The Rule conflicts with any provision of one or more of the University's agreements with its bargaining units, The Rule, as a statement of controlling Federal Law, will govern^[AW1], with an expectation that changes to the relevant collective bargaining agreement(s) will be negotiated at a later date.

II. SCOPE

This policy prohibits sexual harassment in all educational programs or activities of FSU within the United States, including:

- A. Locations, events, and circumstances in which FSU exercises substantial control over:
 - 1. The respondent; and
 - 2. The context in which the sexual harassment occurs;
- B. Buildings owned or controlled by recognized student organizations; or
- C. On FSU Campuses

Within FSU's educational programs and activities, this policy applies to the following individuals:

- A. University employees, including faculty, full-time staff and part-time staff
- B. Students
- C. Vendors
- D. Third-party contractors
- E. Visitors/guests

III. POLICY

- A. Authority and Delegations. The Title IX Coordinator/Director is the University authority responsible for ensuring compliance with this policy. At the discretion of the Title IX Director/Coordinator and in a manner not inconsistent with this policy, any of the duties or responsibilities described herein as belonging to the Title IX Director/Coordinator may be delegated or assigned.
- B. Computation of Time. Unless specifically indicated otherwise, timelines in this policy will be calculated using University business days (i.e., non-holiday weekdays on which the University is open and operating, whether or not classes are in session).
- C. Definitions
 - a. Sexual Harassment
 - i. Quid Pro Quo. An employee conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct.
 - ii. Hostile Environment. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person the ability to

perform their job functions or denies a person equal access to the relevant education program or activity.

iii. Sexual Assault^[AW2]

1. Forcible Rape. Penetration or attempted penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without consent of the complainant.
 2. Forcible Sodomy. Oral or anal sexual intercourse or attempted intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
 3. Sexual Assault With An Object. To use or attempt to use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
 4. Forcible Fondling. The touching or attempted touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
 5. Incest. Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by state law.
 6. Statutory Rape. Nonforcible sexual intercourse with a person who is under the statutory age of consent.
- iv. Dating Violence. Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. The existence of such a relationship shall be determined based on the complainant'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.
For the purposes of this definition:

1. Dating Violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
 2. Dating Violence does not include acts covered under the definition of Domestic Violence.
- v. Domestic Violence. A felony or misdemeanor crime of violence, including those listed in section 741.28, Florida Statutes, committed:
1. By a current or former spouse or intimate partner of the complainant;
 2. By a person with whom the complainant shares a child in common;
 3. By a person who is cohabitating with, or who has cohabitated with, the complainant as a spouse or intimate partner;
 4. By a person similarly situated to a spouse of the complainant under the domestic or family violence laws of the state; or
 5. 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 state.
- vi. Stalking. Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
1. Fear for the person's safety or the safety of others; or
 2. Suffer substantial emotional distress.

For the purposes of this definition,

“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.

“Reasonable person” means a reasonable person under similar circumstances and with similar identities to the complainant.

“Substantial emotional distress” means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

b. Actual Knowledge

- i. Postsecondary Standard. The University has actual knowledge of, and is required to respond to, allegations of sexual harassment when [notice]^{AW3} is provided to the Title IX Coordinator or an official with authority to institute corrective measures on behalf of FSU.

Whether an employee is an official with authority to institute corrective measures will depend largely on the circumstances of the allegation. Therefore, complainants are encouraged to file complaints directly with the Title IX Coordinator/Director, a Deputy Title IX Coordinator, or through one of the University's online reporting systems.

- ii. K-12 Standard. The school has actual knowledge of, and is required to respond to, allegations of sexual harassment when notice is provided to any employee.

Nothing in this definition or standards is intended to interfere with FSU's current practices of reporting child abuse, defining mandatory reporters, or providing confidential services.

- c. Complainant. An individual who is alleged to be the victim of conduct that could constitute sexual harassment
- d. Respondent. An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
- e. Formal Complaint
 - i. A document that alleges sexual harassment against a respondent and requests an investigation of the allegation that is either:
 - 1. Filed by a complainant, or
 - 2. Signed by the Title IX Coordinator/Director or designee; and
 - ii. Is filed at the time the complainant is participating or attempting to participate in the educational program or activity of the University.
- f. Supportive Measures. Individualized services reasonably and equitably available to complainants and respondents that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party, while designed to ensure equal educational access, protect safety, or deter sexual harassment. See Policy 2-2, Appendix F and section IX.D sections X.C. and X.D (interim measures).

D. The Grievance Process

- a. Equitable Treatment. Throughout the grievance process, complainants and respondents shall be treated equitably, including access to supportive measures, notices and opportunities to be heard as

described in this policy, and imposition of disciplinary sanctions only after completion of the grievance process.

- b. Grounds for Mandatory Dismissal of a Complaint. If, upon examination, the formal complaint does not allege facts which, if true, would meet the definition of sexual harassment or are not alleged to have occurred within the scope of this policy, the formal complaint shall be dismissed.
 - i. Both parties shall be notified in writing within five days of a dismissal under this section, and the reasons for the dismissal.
 - ii. Nothing in this section, specifically including dismissal on any basis, prohibits the University from utilizing other processes or policies to address the alleged conduct, including other policies prohibiting harassing or inappropriate behavior by students, employees or others.
 - iii. A decision to proceed with an alternate investigative or disciplinary process after a mandatory dismissal, standing alone, does not constitute retaliation against a respondent or violate double jeopardy principles.
 - iv. For cases in which the allegations of sexual harassment could also constitute violations of Title VII and/or University policies implementing Title VII, including Policy 2-2, the University may utilize the process described in this policy to address all allegations and rely on the outcome for disciplinary purposes. The University shall give reasonable notice to the respondent if it intends to utilize this policy to engage in fact-finding or adjudication of a Title VII matter in a particular case.
- c. Grounds for Discretionary Dismissal
 - i. The [University]^[AW4] may dismiss a formal complaint in ~~whole or in part~~ in entirety or by allegation if at any time during the investigation or hearing process:
 1. The complainant notifies the Title IX Office in writing that the complainant wishes to withdraw the formal complaint or any allegations therein;
 2. The respondent is no longer enrolled at or employed by the University; or
 3. Other specific circumstances prevent the University from gathering evidence sufficient to reach a determination as to the formal complaint or any allegation therein.
 - ii. Both parties shall be notified in writing simultaneously within five days of a dismissal under this section, and the reasons for the dismissal.
 - iii. A decision to proceed with an alternate investigative or disciplinary process after a discretionary dismissal, standing

alone, does not constitute retaliation against a respondent or run afoul of double jeopardy principles.

- d. Grounds for Proceeding Contrary to a Complainant's Request for Dismissal
 - i. The University may decline to dismiss a formal complaint or any allegation therein after receiving notification from a complainant of a wish to withdraw the complaint, in whole or in part. The University will utilize the following factors in determining whether to move forward with the complaint:
 1. Whether the ~~former~~-complainant is willing to appear at a live hearing as a witness;
 2. The seriousness of the alleged offense (including, but not limited to, whether the allegation involved use of a weapon or included severe physical injury to the complainant);
 3. The risk that the respondent will commit additional acts of sexual harassment, such as whether:
 - a. There have been other disclosures or reports against the respondent;
 - b. The respondent has a history of arrests or records from a prior school/employer indicating a history of sexual harassment or a history of violence;
 - c. The respondent threatened further sexual harassment or violence against the complainant or others; or
 - d. The offense was committed by multiple individuals.
 4. Whether the report or formal complaint reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group or person;
 5. Whether the complainant is a minor;
 6. The level of fear for safety expressed by the complainant;
 7. Whether the University possesses other means to obtain relevant evidence; or
 8. The level of threat posed by the respondent to the complainant or to the University community at large.
 - ii. Both parties shall be notified of a decision to proceed with a formal complaint despite a request for dismissal and the specific grounds on which the decision to proceed is based.

- e. Remedies, Disciplinary Outcomes. At the conclusion of a process that finds the respondent responsible for, or substantiates allegations of conduct prohibited by, this policy, it shall be the goal of the hearing officer to design or choose sanctions that preserve equal access to the education program or activity for the complainant and others affected by the respondent's actions. The hearing officer shall refer to existing disciplinary policies or codes for guidance on outcomes, with the discretion to impose tailored disciplinary or educational outcomes, including ones that have a punitive effect on the respondent, if appropriate.

E. The Live Hearing Process

- a. Application. The live hearing process shall be used to resolve formal complaints at the University level that are not resolved via the informal resolution process. The live hearing process shall not apply to ~~any complaints involving a K-12 students, or K-12 employee as~~ is a complainant or respondent
- b. Standard of Proof. All hearings held pursuant to this policy shall utilize the preponderance of evidence standard when determining responsibility for violations or deciding whether allegations are substantiated.
- c. Administration. Live hearings shall be held before a single hearing officer.
- d. Virtual Participation. At the discretion of the hearing officer, or upon request of either party, virtual participation via videoconference or other technology of parties, witnesses, advisors, or others is permitted, provided participants can simultaneously see and hear each other and confidentiality of the proceedings is not compromised.
- e. Questioning of the Parties and Witnesses.
 - i. Relevance. Only relevant questions may be asked of a party or witness. Relevancy determinations shall be made by the hearing officer. The hearing officer shall give a reason for the decision as to relevance at the time the decision is made.
 - 1. The hearing officer must provide an explanation to exclude a question as not relevant.
 - 2. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant and shall be excluded, unless such questions 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.

- ii. Testimony of the Complainant and Respondent. Each party is entitled to present their own testimony.
- iii. Examination of Witnesses. The party's advisor of choice shall conduct examination of the other party and any witnesses. The parties are not permitted to examine each other.
 - 1. University-Provided Advisors. If a party does not have an advisor present at the live hearing, the University will provide, upon request and without fee or charge, an advisor of the University's choice, to conduct examination on behalf of that party.
 - 2. Refusal to Submit to Examination. If a party or witness does not submit to examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination of responsibility or substantiation. However, a party's absence from the live hearing or refusal to submit to examination alone may not form the basis for a finding of responsibility or substantiation.
- iv. Additional Examination. The parties shall be allowed reasonable opportunity to follow up on examination of parties and witnesses via additional examination, to be conducted in the same manner as the initial examination. A party's advisor may conduct additional examination of the party the advisor is serving.
- f. Determination of Responsibility or Substantiation of Allegations. The determination of responsibility or whether allegations are substantiated shall be in writing, provided simultaneously to the parties, and include the following elements:
 - i. Identification of the allegations potentially constituting sexual harassment.
 - ii. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including notifications to parties, interviews, gathering of evidence, and hearings held.
 - iii. Findings of fact.
 - iv. Conclusions regarding the application of the relevant policy or regulation to the facts.
 - v. As to each allegation, a statement of, and rationale for, the determination of responsibility or substantiation.
 - vi. A description of any disciplinary sanctions imposed upon the respondent.
 - vii. A description of any remedies designed to restore or preserve equal access that will be provided to the complainant.

- viii. A statement of procedures and bases for appeal of the decision.
- g. Records. The University shall create and maintain an audio recording of the hearing, which shall constitute the official record of the proceedings. The parties shall be permitted to inspect and review the recording, subject to reasonable conditions to ensure confidentiality.

F. Appeals

- a. Decisions Subject To Appeal. Either party may appeal the following decisions, within five days of notification of the decision:
 - i. To dismiss a formal complaint or any allegation therein
 - ii. A finding of responsibility or substantiation
- b. Appellate Officers. A single appellate officer shall be appointed to hear an appeal as soon as practicable after the appeal is received.
- c. Grounds for Appeal. The appeal must state one or more of the following grounds:
 - i. Procedural irregularity that affected the outcome.
 - ii. Newly discovered evidence that could affect the outcome.
 - iii. Actual conflict of interest or actual bias by an administrator or decisionmaker that affected the outcome.
- d. Dismissal of Appeal. If, upon review of the appeal, the appellate officer determines that the appeal fails to state proper grounds or was not timely filed, the appeal shall be dismissed, and the parties notified of the outcome.
- e. Appellate Review.
 - i. A timely appeal that states proper grounds shall be provided to all parties and their advisors, with the non-appealing party given five days to provide a written response to the appellate officer.
 - ii. A party that did not initially appeal may be given an opportunity to appeal, based on the information in the initial appeal, in the same manner as the initial appeal.
- f. Appellate Standard of Review. Deference is given to the original findings of fact and decision on responsibility or substantiation and/or any outcomes; therefore, the burden is on the individual filing an appeal request to sufficiently demonstrate cause to alter the challenged decision or any outcomes. An appellate review will generally be limited to a review of the record of the hearing and supporting documents for one or more of the bases of appeal listed below, provided however, that under extraordinary circumstances the appellate officer may request additional information or clarification from the University, investigator(s), hearing officer, complainant, respondent, or witnesses for purposes of this review.
- g. Appellate Decisions. Upon review of a timely appeal that states proper grounds, the appellate officer may choose one of the following

outcomes, which shall be communicated in writing to the parties and their advisors. The decision shall include a statement of the materials reviewed and the reasoning for the appellate officer's decision on each of the raised grounds for appeal:

- i. Affirmation of the original decision of responsibility or substantiation and/or disciplinary outcome.
 - ii. Vacation of the original decision of responsibility or substantiation or disciplinary outcome, with instruction to hold a new appropriate proceeding or review on remand.
 - iii. Modification of disciplinary outcome. For cases involving University employee respondents, the appellate officer shall consult with the Office of Human Resources prior to the modification.
- h. Stays Pending Appeal. Any disciplinary sanctions imposed as a result of a hearing are stayed during the internal appellate process. Disciplinary sanctions shall be implemented as soon as practicable after the internal appellate process has completed (i.e., upon expiration of the window for external appeal, or upon notice that an external appeal has been initiated).
- i. For purposes of this section, disciplinary sanctions do not include registration or diploma holds, which may be placed to ensure continuation of supportive measures or no-contact orders.
 - ii. If it is determined by the hearing officer that sanctions should be immediately implemented, the student respondent is entitled to an expedited hearing, utilizing the procedures outlined in ~~section VIII.F.1.~~ of the Student Conduct Code related to interim health and safety actions. If the respondent is an employee, the respondent may be placed on administrative leave, in accordance with existing University policies.
- i. Nothing in this section prevents the University from continuing to offer or implement supportive measures, including no-contact orders, during or after an appellate review process.

G. Informal Resolutions

- a. Definition. "Informal resolution" refers to a process by which a formal complaint of sexual harassment is resolved without a full investigation and adjudication.
- b. Scope. Informal resolution may be used in all cases under this policy except those in which the complaint alleges employee-on-student sexual harassment.
- c. Notice. For all cases in which informal resolution is available, the parties shall be provided written notice disclosing the following:
 - i. A brief recitation of the allegations.

- ii. The requirements of the informal resolution process.
- iii. The right of each party to withdraw from the informal resolution process at any time prior to agreeing to a final resolution and proceed to a live hearing or other applicable process.
- d. Consent. All parties must provide voluntary, written consent to participation in the informal resolution process.

IV. LEGAL SUPPORT, JUSTIFICATION, AND REVIEW OF THIS POLICY

The Board of Trustees has authority granted by the Board of Governors in BOG 1.001 over student and personnel conduct.

The President holds delegated authority from the Board of Trustees to establish University policies. Constitutional authority, federal statutes, state statutes, Florida Board of Governors, and University regulations authorize the policy:

The Federal Civil Rights Act of 1964

The Education Amendments of 1972, Title IX

The Campus Sexual Violence Elimination Act of 2013

The Jeanne Clery Act, 20 U.S.C. section 1092(f)

The Violence Against Women Act of 1994, 42 U.S.C. sections 12701-14040
34 U.S.C. section 106

Executive Order 11246

Florida Constitution, Article IX, Section 7

Florida Statutes Section 760.10, Florida Civil Rights Act of 1992

Florida Statutes Section 39.201

Florida Statutes Sections 119.071, 1000.05, and 1012.91

Board of Governors Regulation 6.0105

FSU Regulations FSU-4.013 and FSU-6.013

Signature of Approving Authority, Date