

# TITLE IX SEXUAL HARASSMENT POLICY

Merrimack College is a community in the Augustinian tradition and we strive to maintain an environment that is consistent with our mission and respectful of the rights of all individuals within the College community. The College affirms that all members of this community are freely united by this agreement in the pursuit of scholarship and intellectual growth. The College and the students accept responsibility toward each other within this community.

Sexual misconduct, including sexual harassment, violates the sacredness of the human body and spirit and will not be tolerated within our community. Campus sanctions, up to and including expulsion, may result from a responsible finding determined through the Title IX Sexual Harassment Process. Sexual misconduct, including sexual harassment, is considered one of the most serious violations of the Community Standards of Merrimack College.

This Title IX Sexual Harassment Policy is based on definitions set forth in regulations promulgated by the U.S. Department of Education under Title IX of the Education Amendments Act of 1972, which also limit the scope of Title IX to, among other things, conduct that occurs within the United States and conduct that occurs within the College's education program or activity.

In order to address incidents of sexual misconduct that do not fall within the definition of Title IX Sexual Harassment, the College has two policies that address sexual misconduct: (1) this Title IX Sexual Harassment Policy ("Title IX Policy") and (2) the Sexual Misconduct, Relationship Violence and Stalking Policy ("Sexual Misconduct Policy") ([http://catalog.merrimack.edu/content.php?catoid=5&navoid=99#Sexual\\_Misconduct](http://catalog.merrimack.edu/content.php?catoid=5&navoid=99#Sexual_Misconduct)). These policies are interrelated and must be read together.

The Sexual Misconduct Policy applies only to certain conduct, as defined under that policy. Specifically, the Sexual Misconduct Policy applies to forms of sexual misconduct that do not fall under the scope of the Title IX Policy, including Sexual Exploitation and Non-Title IX Sexual Harassment. The Sexual Misconduct Policy also applies to certain conduct that would otherwise be prohibited under the Title IX Policy (e.g., Sexual Assault, Relationship Violence, and Stalking under the Title IX Policy), but which must be dismissed under the Title IX Policy because they do not meet the jurisdictional requirements.

## I. DEFINITIONS

The following definitions clarify key terminology as used in this Policy.

**Actual Knowledge or Notice:** The College has actual notice of alleged Title IX prohibited conduct only if a report concerning the conduct is made to the College's Title IX Coordinator, a Deputy Title IX Coordinator, or to one of the following College officials who have authority to institute corrective measures on the College's behalf: the Director of Human Resources and the Dean of Students.

**Advisor** is a person chosen by a party, who may but need not be an attorney, who provides support and advice to the party during any stage of the process set forth in the Policy. Any person serving as a party's advisor is prohibited from publicly disclosing private information learned during this process, including information protected under the Family Educational Rights and Privacy Act ("FERPA") or other state or federal laws. Parties and advisors are expected to maintain the privacy and respect the privacy concerns of all parties and witnesses to the greatest extent possible. If any advisor is concerned about violating this assurance of privacy to gather evidence, they should raise such concerns with the Title IX Coordinator immediately so that it can be appropriately addressed to protect the sensitivity of the information without limiting the ability of either party to find and present relevant evidence.

**Coercion** is the use or attempted use of pressure and/or oppressive behavior, including express or implied threats, intimidation, or physical force, which places a person in fear of immediate harm or physical injury or causes a person to engage in unwelcome sexual activity. A person's words or conduct cannot amount to coercion unless they wrongfully impair the other's freedom of will and ability to choose whether or not to engage in sexual activity. Coercion also includes administering or pressuring another to consume a drug, intoxicant, or similar substance with the intent to impair that person's ability to consent prior to engaging in sexual activity.

**Educational Program or Activity:** Locations, events, or circumstances in which the College exercises substantial control, as well as in any building owned or controlled by a student organization that is officially recognized by the College.

**Formal complaint** refers to a document filed by a Reporting Party (meaning a document or electronic submission such as by electronic mail) that contains the Reporting Party's physical or digital signature, or otherwise indicates that the Reporting Party is the individual filing the formal complaint alleging that a Responding Party committed some form of prohibited conduct under this Policy. At the time of filing a formal complaint, a Reporting Party must be participating in or attempting to participate in the education program or activity of the College. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail.

In limited circumstances where a Reporting Party is reluctant to file a complaint, the Title IX Coordinator may submit and sign a formal complaint if the circumstances warrant it, but neither the College nor the Title IX Coordinator are a party to the process and both the Reporting Party and the Responding Party will be provided notice of the allegations, as set forth below.

**Incapacitation** is defined as the inability, temporarily or permanently, to give consent, because an individual is mentally and/or physically helpless, unconscious, or unaware that the sexual activity is occurring. This may or may not be due to alcohol or other drugs.

**Party or parties** refer to the Reporting Party and the Responding Party.

**Preponderance of the Evidence:** The College uses the preponderance of the evidence standard (*i.e.*, it is more likely than not that the reported incident and/or behavior violated College

policies). Therefore, all findings and determinations of responsibility under this Policy will be made using this preponderance of the evidence standard. Please note:

- The preponderance of the evidence standard is not the standard used for criminal culpability in most jurisdictions and a determination of responsibility under the Policy does not equate with a finding of a violation of criminal laws;
- Conversely, lack of a prosecution, dismissal, or lack of a criminal conviction does not necessarily imply that the College's Policy was not violated. The two procedures are significantly different and utilize different standards for determining violations.

**Relevant:** As used in these procedures, "relevant" refers to a fact, witness, or other piece of information that a reasonable person could conclude makes a material disputed fact or event more or less likely to be true. Information about an individual's sexual predisposition or prior sexual behavior is generally not considered relevant and will not be considered in the grievance process. An example where information about past sexual behavior may be considered relevant is if offered to prove that someone other than the Responding Party committed the conduct.

**Report** refers to information brought to the Title IX Coordinator alleging conduct prohibited under this Policy. A report is not considered to be a formal complaint. A party may bring a report and then subsequently file a formal complaint.

**Reporting Party** refers to the individual(s) who, at the time they file a formal complaint, is currently participating in, or attempting to participate in, the College's domestic educational programs or activities and who alleges they experienced prohibited conduct, as defined below. If an individual is a student or employee at another institution and makes an allegation against an individual who is a student or employee at the College, the Title IX Coordinator may exercise discretion in signing a complaint for the aggrieved party. In such situations, the parties will be duly noticed in accord with the Policy and the College will not be considered a party to the matter, though it will maintain the burden of proving that any individual violated a College Policy.

**Responding Party** refers to the individual(s) who has been alleged to be the perpetrator of conduct that could constitute Title IX Sexual Harassment.

**Sanctions:** Punitive or educational measures imposed by the College in response to a determination that a respondent has violated this or another College policy. Sanctions may include, but are not limited to: expulsion, termination, suspension, probation, reprimand, warning, restitution, education/counseling requirement; restrictions on participation in a program or activity; loss of privileges; loss of leadership opportunities or positions; housing restriction; and/or restrictions on employment by the College. If a Responding Party is found to have violated this Policy, a determination of appropriate sanctions will include consideration of the nature and circumstances of the misconduct; the impact of the misconduct on the Reporting Party and/or on others in the College community; the disciplinary history of the Responding Party; and any other mitigating or aggravating circumstances.

**Supportive Measures:** Non-disciplinary, non-punitive individualized services, offered as appropriate, as reasonably available, and without fee or charge to either the Reporting Party or the Responding Party before or after the filing of a formal complaint or where no formal complaint has been filed. Supportive measures are designed to restore or preserve equal access to the College's educational programs or activities, and they will be designed so as not to unreasonably burden the other party. Supportive measures may include but are not limited to: counseling; academic accommodations, such as extensions of deadlines or other course-related adjustments; course changes or drops; modifications of work or class schedules; campus escort services; mutual restrictions on contact between the parties; residential accommodations, including but not limited to arranging for new housing, or providing temporary housing options, as appropriate; changes in work locations; leaves of absence; increased security and monitoring of certain areas of the campus; and no trespass notices, among others. Factors to be considered in determining reasonable supportive measure may include the following:

- the specific need expressed by the party;
- the severity and/or pervasiveness of the allegations;
- any continuing effects on the party;
- whether the parties share the same residence hall, dining hall, class, extracurricular activities, transportation and/or job location; and
- whether other judicial measures have been taken to protect a party or the parties.

## **II. PROHIBITED CONDUCT**

This policy addresses Title IX Sexual Harassment, which encompasses all of the prohibited conduct described below that occurs on the basis of sex and meets all of the following requirements:

- Occurs within the United States; and
- Occurs within the College's education program or activity, meaning (a) locations, events, or circumstances over which the College exercises substantial control over both the Responding Party and the context in which the Title IX Sexual Harassment occurs, and (b) any building owned or controlled by a student organization that is officially recognized by the College; and
- At the time of filing a formal complaint, the Reporting Party is participating in or attempting to participate in the education program or activity at the College.

Allegations of sexual misconduct that do not fall under this Policy because they do not constitute prohibited conduct as defined in this section may constitute violations of the Sexual Misconduct Policy.

Any of the prohibited conduct defined in this Policy can be committed by individuals of any gender and/or sexual orientation, and it can occur between individuals of the same gender or sexual orientation or different genders and sexual orientation. It can occur between strangers or acquaintances, as well as people involved in intimate or sexual relationships.

Prohibited behaviors under this Policy are as follows:

## **Rape**

- Any sexual penetration (anal, oral or vaginal), however slight, with any object or sexual intercourse by a person upon another person without effective consent, by force or by threat of bodily injury. Sexual penetration includes vaginal or anal penetration by a penis, object, tongue or finger and oral copulation by mouth to genital contact or genital to mouth contact.

## **Sexual Assault**

- Any intentional sexual touching, however slight, with any object by a person upon another person without effective consent. Sexual touching includes any bodily contact with the breasts, groin, genitals, mouth or other bodily orifice of another or any other bodily contact in a sexual manner.
- Any disrobing of another or exposure to another by a person without effective consent.

## **Title IX Sexual Harassment**

- Sexual harassment is any unwelcomed verbal or physical conduct of a sexual nature determined by a reasonable person to be so severe, pervasive, and objectively offense that it effectively denies an individual equal access to the College's education program or activity.
- A form of sexual harassment exists when submission to or rejection of unwelcomed sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature results in adverse educational or employment action, or the threat of such adverse action, or when submission is made a condition of educational or employment advancement.

## **Intimate Partner Violence**

- Intimate partner violence incorporates dating violence, domestic violence, or relationship violence, and includes any act of violence or threatened act of violence against a person who is or has been involved in a sexual or dating relationship with that person. It may involve one act or an ongoing pattern of behavior. Intimate partner violence can encompass a broad range of behavior, including, but not limited to threats, assault, property damage, violence or threat of violence to one's self, one's sexual or romantic partner, or to the family members or friends of the sexual or romantic partner. Intimate partner violence affects individuals of all genders, gender identities, gender expressions, and sexual orientation and does not discriminate by racial, social, or economic background.
- The College will not tolerate intimate partner violence of any form. The College also recognizes that certain forms of sexual harassment, sexual assault, sexual exploitation, stalking, harm to others, emotional and psychological abuse, harassing conduct, and retaliation may all be forms of intimate partner violence when committed by a person who is or has been involved in a sexual, dating, or other similar relationship of a romantic or intimate nature with the Reporting Party. In such situations, all potential charges may be included.

In Massachusetts, domestic violence is defined as abuse, assault, or threats against one or more of the following:

- A spouse or former spouse
- A dating partner or a former dating partner
- Someone you live with or have lived with
- A relative by blood or marriage
- The parent of your child
- A person with whom you have or have had a substantial relationship

Abuse is defined by actual or attempted physical abuse, psychological harm, placing another in fear of serious physical harm, causing another to engage in sexual relations by force, and/or threat of force or duress. Confidential counseling, support and referral services are available through the Hamel Health and Counseling Center. Students can also seek information and help through the National Domestic Violence Hotline at 1-800-799-SAFE (7233) or [www.thehotline.org](http://www.thehotline.org).

### **Stalking**

- Stalking is defined as any behavior or pattern of behavior occurring on more than one occasion that instills fear in one or more other people and/or threatens their safety, mental or physical health. Such behaviors or activities may include, but are not limited to, non-consensual communication (face to face, telephone, e-mail, texting, and social media), threatening or obscene gestures, surveillance, pursuit, following, visiting outside an individual's classroom or residence, sending gifts or making threats.

### **Effective Consent**

Effective consent is defined as informed, freely and actively given mutually understandable words or actions which indicate a willingness to participate in each form of sexual activity. Consent is mutually understandable when a reasonable person would consider the words or actions of the parties to have demonstrated agreement between them to participate in the sexual activity. In the absence of mutually understandable words or actions, neither party should assume that it is permissible to engage in the sexual activity. Consent to some form(s) of sexual activity does not necessarily mean consent to other forms of sexual activity. Consent to sexual activity may be withdrawn at any time at which point all sexual activity for which consent has been withdrawn must cease.

Consent can NEVER be given by the following:

- Minors (in Massachusetts, those not yet sixteen (16) years of age);
- Mentally disabled persons;
- Individuals who are incapacitated as a result of alcohol or other drug consumption (voluntary or involuntary);
- Individuals who are unconscious, unaware or otherwise physically helpless;
- Individuals who are forced, coerced, intimidated or threatened.

### **Retaliation Under this Policy**

No individual may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this Policy or because an individual

has made a report or formal complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this Policy.

Retaliation allegations may be consolidated with other forms of prohibited conduct under this Policy if the facts and circumstances significantly overlap. If the facts and circumstances do not significantly overlap, then the College retains discretion to adjudicate the allegation under a different but appropriate policy. For example, if a Responding Party retaliates against a Reporting Party with regard to the filing of a complaint, that behavior could be consolidated with the other prohibited conduct alleged, provided appropriate notice is afforded. On the other hand, if the retaliatory conduct is committed by one of the parties' friend group who are not otherwise subject to a grievance under this Policy, that behavior could be adjudicated under another student or employee conduct policy which prohibits such behavior.

### **III. TITLE IX SEXUAL HARASSMENT PROCEEDINGS**

This process describes how the College will investigate a report that an individual has engaged in conduct that could violate the Title IX Policy. Within this section, you will find the process to request safety or supportive measures, the way to determine what process is appropriate for you, and in situations involving formal complaints, the process of investigation, adjudication, and sanctioning. Many of the terms in this Policy have specific technical meanings that are defined in Sections I and II, above. Please feel free to contact the Title IX Coordinator with any questions about how this Policy operates.

#### **A. Initial Steps**

After receiving a report of conduct that could fall under the Title IX Policy, the Title IX Coordinator (or their designee)<sup>1</sup> will take a number of initial steps; these initial steps are not an investigation. Rather, these initial steps will enable the College to assess the need to take any immediate action to address the safety and health needs of the parties involved in a matter, to help the parties determine the next appropriate steps, whether under this Policy or a referral to another policy.

These initial steps may include, but are not limited to, the following:

1. **Initial Meeting.** The Title IX Coordinator will contact the party making the initial allegation (the Reporting Party) and encourage them to meet virtually or in person to discuss the nature and circumstances of the reported conduct, review relevant documentation that is available, and describe the various options available to them.
2. **Supportive Measures.** Regardless of whether a Reporting Party decides to participate in an adjudication process, they may be entitled to supportive measures, as appropriate, which may be considered at this point. The decision to impose interim restrictions will be communicated by the Title IX Coordinator in writing. The College will seek to be transparent with regard to the supportive measures provided to the parties and which

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<sup>1</sup> Where the Title IX Coordinator is listed as the point of contact for any role in the Title IX Policy, they may designate a Deputy Title IX Coordinator or another qualified member of the College community to assume the role, as necessary and appropriate.

impact both parties. The College may be limited in certain situations when student or employee privacy issues prevent disclosures.

3. **Discussion of Policy.** The Title IX Coordinator will explain the Title IX Policy and the different options and protections available to the parties. The Title IX Coordinator will also explain the right to report and the right to delay or decline to report the matter to the College. The parties may choose to report such conduct to local law enforcement if the conduct is potentially criminal in nature. Such a report will not change the College's obligation to potentially investigate the matter, but it may briefly delay the timing of the investigation if a law enforcement agency requests that the College delay its process for a reasonable amount of time to allow it to gather evidence of criminal conduct. The College will typically not consider a criminal proceeding on the same facts in its process because the College does not use the same process or standard of proof as a criminal process. Typically, the College will only inquire about criminal processes if they impact an individual's ability to access or utilize the College's process. In no instance will a concurrent criminal proceeding, by itself, lead to an adverse inference against the Responding Party.
4. **Formal Complaint.** The Title IX Coordinator will also discuss the next steps in terms of formal reporting. If the Reporting Party wishes to move forward with a Formal Complaint under this Policy, the Reporting Party must provide a statement in writing. If, at this time, the Reporting Party requests that the process not move forward or move forward under a different policy, the College will weigh that request against the obligation to address any risk of harm to the reporting party or other individuals in the community given the nature of the incident. The College reserves the right to move forward with a Formal Complaint process unilaterally by signing a complaint or statement of allegations against another party. This will be utilized in limited situations in which the College has a concern related to the safety of the broader community. In this situation, the College will not be a party to the action and both the Reporting and Responding Parties will be provided notice as set forth in Section II.
5. **Initial Decisions and Choice of Policy.** Upon reviewing any written complaint materials, if the Title IX Coordinator determines that the conduct would, if proven, be prohibited by this Policy, it will move to the next phase of this process. If the conduct, if proven, would not implicate this Policy, the Title IX Coordinator may dismiss the matter without limiting the individual's ability to provide additional information, or the Title IX Coordinator may refer the matter directly to the staff that is charged with executing any other relevant policy that may be implicated. For example, a claim of harassment that is based on race or disability status, even if proven, may not violate the Title IX Policy. The College could, in that circumstance, refer the matter directly to the process prohibiting general discrimination and harassment. The Title IX Coordinator also has sole discretion to include behavior that may fall outside of the range of behavior prohibited in this Policy, however, any behavior that is included within the formal complaint process must have certain factual overlap and will be entitled to the process set forth below even if the behavior would be subject to a lower review process through



another policy. If lesser conduct is included and then the Title IX Sexual Harassment prohibited conduct is dismissed for any reason, the Title IX Coordinator has the discretion to refer any remaining matters back to the original process that they would have fallen under if not for the consolidation with the Title IX Sexual Harassment matter.

## **B. The Investigation Phase**

- 1. Notice of an Investigation.** If it is determined that an investigation will begin, the Title IX Coordinator will prepare a written notice to both parties that will include a description of the allegations as they are understood at the time, the name(s) of the parties, the date and location of the conduct in question, the portions of the policy that are alleged to have been violated, any interim measures in place that either party must be made aware, and a statement that the Responding Party is presumed not responsible for the alleged conduct. This written notice does not constitute a finding or a determination of responsibility. Further, the written notice will be updated or amended if new allegations are raised by either party and accepted for investigation.
- 2. Information about Advisors in Connection with this Policy.** In connection with an allegation of prohibited conduct as defined in the *Definitions* section of this Policy, each party may have a single advisor of their choice present during any formal disciplinary proceeding, including any related meeting, interview, or hearing, held pursuant to this Policy. Except to the extent expressly permitted in the hearing process outlined below, the advisor may advise their respective party privately, but cannot act as a speaking advocate at a meeting. College staff and internal/external Investigators may delay or terminate meetings, remove or dismiss advisors, and/or proceed with the investigation if an advisor is disruptive or otherwise refuses to comply with the requirements of this policy. An advisor is subject to the same confidentiality expectations applicable to others in attendance as outlined in the Student Handbook. Accommodations, including scheduling of interviews or reviews, generally will not be made for any advisors if they unduly delay the process. The advisor is not permitted to attend a meeting or proceeding without the party they are advising being present without the prior approval of the Title IX Coordinator, at their discretion. The College reserves the right to take appropriate action regarding any advisor who disrupts the process, or who does not abide by the restrictions on their participation.
- 3. Designation of Investigator.** The Title IX Coordinator will designate at least one Investigator to conduct a prompt, fair, and impartial investigation of the reported conduct and prepare a report of investigative findings (the “Investigative Report”). All Investigators will be selected from a group of qualified and trained individuals employed by or engaged by the College for the purpose of conducting investigations under the Title IX Policy or retained by the College for that express purpose. The Title IX Coordinator will provide the parties with the name of the person(s) assigned to investigate the reported conduct. As soon as possible, but no later than three (3) calendar days after delivery of the identity of the Investigator(s), the parties shall inform the Title IX Coordinator (in writing) of any conflicts of interest with regard to the selected Investigator(s). The Title IX Coordinator will consider the nature of the conflict and

determine if different individuals should be assigned as Investigator(s). The Title IX Coordinator's decision regarding any conflicts is final. The Title IX Coordinator may consult with other College personnel to discuss any conflicts of interest.

4. **Nature of the Investigation.** The investigation provides an opportunity for fact-finding and will include separate interviews with the Reporting Party, the Responding Party, and any relevant witnesses. The Investigator(s) will provide the parties with advance notice of meetings at which their presence is required and with sufficient time to prepare. Typically, this will be at least three (3) days-notice.
5. **The Parties' Identification of Potential Witnesses and Documentation.** The parties have the opportunity (and are expected) to provide the Investigator(s) with the identification of potential witnesses who have specific information about the reported conduct and with whom they would like the Investigator(s) to speak. The parties also have the opportunity (and are expected) to provide the Investigator(s) any documentation or other items or questions they would like to be considered. All information described in this section must be presented to the Investigator(s) in writing and include a brief description as to how the persons, documents, and/or items are relevant to the reported conduct. This information must be provided to the Investigator(s) during the Investigation Phase and without delay upon becoming aware of it. The Investigator(s) will exercise discretion in their determination of what information to consider and which potential witnesses can provide relevant information to the investigation. Furthermore, the Investigator(s) reserve the right to interview any member of the College community or any other persons that may have specific information about the incident that has been reported.
6. **Investigation Prohibitions.** At no point will the investigation require both parties to be in the same room. At no point will either party be permitted to question or cross-examine the other party or any witness directly during the investigation, determination or appeal process. The parties may ask questions of the other party and/or witnesses at the Determination Hearing, described below, but all such questions must be asked through the party's advisor. Additionally, the Investigator(s) will not consider information related to either party's sexual history unless deemed relevant to the incident in question.
7. **Other Informal Processes.** At any time prior to convening a Determination Hearing, either party may request an informal resolution of a complaint rather than an investigation and/or hearing by contacting the Title IX Coordinator. In such instances, the parties will still receive written notice of the allegations. The Title IX Coordinator will assess the request for informal resolution against the severity of the alleged violation and the potential risks to campus community members. All parties and the Title IX Coordinator must agree in writing to informal resolution for this option to be used. The Title IX Coordinator will designate a College representative or outside service provider to facilitate a dialogue with the parties in an attempt to reach a resolution. The Title IX Coordinator can end such a process if it becomes unproductive and/or abusive. The allegation will only be deemed resolved when the parties expressly agree to an outcome that is acceptable to them which is approved by the Title IX Coordinator in consultation

with other appropriate College administrators. Either party may withdraw from the informal resolution process at any time. The informal resolution process will be conducted in accordance with procedures specified by the Title IX Coordinator, as determined in his/her sole discretion. The College will not allow informal processes to be used when the allegations involve an employee allegedly violating the Policy with regard to a student.

### **C. Investigative Report and Determination of Responsibility by Determination Hearing**

1. **Content of the Investigative Report.** At the conclusion of the Investigation Phase, the Investigator(s) will prepare an Investigative Report, which should include a summary of the factual information presented during the Investigation Phase and a separate section where the Investigator(s) point out relevant consistencies or inconsistencies (if any) between all sources of information. The Investigator(s) may also provide an optional and separate section describing their assessment of the credibility of parties and witnesses during the interviews the Investigator(s) conduct. Attached to the Investigative Report or made available with the Investigative Report, the Investigator will provide any relevant evidence gathered, whether inculpatory (i.e., proving the responsibility of a party) or exculpatory (i.e., proving that a party did not commit the conduct alleged). The Investigative Report will not include a determination as to whether a party has violated the Title IX Sexual Harassment Policy or what sanctions may be appropriate. These determinations will be made by the Determination Officer, as described below.
2. **Review by the Parties.** Both parties will be informed of their opportunity to review the entire Investigative Report and that they may submit written comments and/or questions about the content of the Investigative Report to the Investigator(s) within ten (10) calendar days of the date they are notified that the Investigative Report is available for review. This review will take place at a secure location and in a secure manner determined by the College. The time to submit written comments can be extended for a brief period if the Title IX Coordinator concludes, in their sole discretion, that the additional time is warranted. In circumstances where an extension is provided to one party, it will be provided to the other party, as well. Each party may have their advisor present as they review the Investigative Report, but the College reserves the right to create appropriate procedures to protect the privacy and sensitivity of the materials in question.
  - a. Photographs or any other copies of the Investigative Report are not allowed by either party or advisor. The comments submitted by the parties may not exceed ten (10) double spaced pages unless a higher page limit is otherwise determined to be necessary and appropriate in the sole discretion of the Title IX Coordinator. After reviewing the submissions, if any, from the parties, the Investigator(s) may determine that either additional investigation is required or no further investigation is needed. The Investigator(s) have the sole discretion to determine if any information or questions submitted are irrelevant and therefore not to be considered, and/or would be contrary to the current guidance from the U.S. Department of Education or controlling federal

case law. In either case, the Investigator(s) reserves the right to redact certain information in the response or the Investigative Report to ensure that both parties are provided a fair process in compliance with federal guidance and law applicable at the time of the hearing. If further investigation is conducted, the Investigator(s) will include any additional relevant information in the Investigative Report.

- b. The Investigative Report will then be submitted to the Title IX Coordinator. Any submissions made by either party pursuant to this section, as well as any other documentation deemed relevant by the Investigator(s), will be attached to the Investigative Report.

3. **The Determination Hearing: Conflicts and Provision of Investigative Report.** The Title IX Coordinator will inform the parties of the identity of the Determination Officer(s). No later than three (3) calendar days after delivery of the identity of the assigned Determination Officer(s), the parties should inform the Title IX Coordinator (in writing) of any conflicts of interest in regard to the selected Determination Officer(s). If a conflict of interest is raised regarding the individual(s) assigned, the Title IX Coordinator will consider the nature of the conflict and determine if different individual(s) should be assigned to hear the matter. This decision regarding any conflicts is final. The Title IX Coordinator will then provide the Determination Officer(s) with the Investigative Report and set a subsequent date for the Determination Hearing to meet to determine responsibility.
4. **Review and Determination by the Determination Officer.** The Determination Officer will make a determination as to whether or not the Responding Party is responsible for violating the Title IX Sexual Harassment Policy by having engaged in some or all of the reported conduct. The Determination Officer has the authority to accept the Investigative Report without seeking additional investigation, or to ask the Investigator(s) to conduct additional investigation on specific points.
5. **Hearing Process.** Any formal complaints filed under this Policy are adjudicated through live hearings that can be conducted in person or virtually, as required by federal mandate. The following are the roles and processes to be followed during the hearing.
  - a. The Determination Officer(s) will preside over the hearings and make the decision by a preponderance of the evidence as to whether or not the Responding Party violated the policy provisions at issue. The Determination Officer(s) have broad authority to determine the process, timing and conduct of a hearing. For example, the Determination Officer(s) will determine the order of presentation and timing of the hearing. They will also determine what information and evidence is relevant and what cross-examination questions will or will not be permitted prior to the answers being provided at a hearing.
  - b. Each party may have an advisor of their choice present at a hearing for the limited purpose of conducting cross-examination on behalf of that party.

Advisors may be, but are not required to be, attorneys. If a party does not have an advisor of their choice present at a hearing, the College will, without fee or charge, provide an advisor to the party. No later than ten (10) calendar days before the hearing, parties should inform the Title IX Coordinator of the identity of the advisor who will accompany them to the hearing, so that the College will know whether or not it needs to arrange for the presence of a College-provided advisor.

- c. At a time and manner deemed appropriate by the Determination Officer(s), the advisor for each party will be permitted to ask the other party and any witnesses all relevant cross-examination questions and follow-up questions, including those challenging credibility. Except for that limited role, advisors may not participate actively in the hearing and may not speak or otherwise communicate on the part of the party that the advisor is advising. However, the advisor may consult privately in a non-disruptive manner with their advisee during and/or at a recess in the hearing. Scheduling accommodations generally will not be made for advisors if they delay the process. The College reserves the right to take appropriate action regarding any advisor who disrupts the process, or who does not abide by the restrictions on their participation as determined in the sole discretion of the hearing officer, which may include exclusion of the advisor from the hearing and the appointment of an alternate College-provided advisor.
- d. Questions and evidence about the Reporting Party's sexual predisposition or prior sexual behavior are typically not relevant, unless such questions and evidence about the Reporting Party's prior sexual behavior are offered to prove that someone other than the Responding Party committed the conduct alleged by the Reporting Party, or if the questions and evidence concern specific incidents of the Reporting Party's prior sexual behavior with respect to the Responding Party and are offered to prove consent.
- e. Information protected under a legally recognized privilege (e.g., privileged communications between a party and their physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in a treatment capacity, or privileged communications between a party and their attorney), are not relevant unless the person holding the privilege has waived the privilege in writing.
- f. At the request of either party, College will provide for the hearing to occur with the parties located in separate rooms with technology enabling the hearing officer and parties to simultaneously see and hear the party or the witness answering questions. Live hearings may be conducted with all parties physically present in the same geographic location or, at 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.

- g. If a party or witness does not submit to examination at the live hearing, the Determination Officer will consider whether and how to weigh the information provided by that party or that witness in reaching a determination regarding responsibility. The Determination Officer will strive to comply with current federal guidance or controlling case law applicable at the time of the hearing in making this evidentiary decision.
  - h. If the Determination Officer determines that a party is responsible for violating this Policy, he or she may request from the College information on prior sanctioning decisions so that the Determination Officer can apply a consistent sanction in the matter at hand.
  - i. College will create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review. It will not be provided for distribution and College will provide the same protective measures as used in Section III.C.2.a regarding Investigative Reports.
6. **Notification of Investigation Outcome.** The Title IX Coordinator will inform the parties simultaneously and in writing of (i) the outcome of the disciplinary proceeding; and (ii) the procedures for either party to appeal the result of the disciplinary proceeding.

#### **D. Appeals**

1. **Grounds for Appeal.** The following process applies to all appeals. Within five (5) calendar days of the delivery of the decision, either party may appeal the decision by submitting to the Title IX Coordinator a letter stating why they believe the decision was inappropriate. A party may only appeal on the following grounds:
  - a. Procedural error that materially prejudiced the findings/outcome.
  - b. Newly discovered material information that was not known/available and which likely could have changed the finding of responsibility or the sanction imposed had it been available.
  - c. Bias or a conflict of interest with regard to the Title IX Coordinator, Investigator(s), or Determination Officer(s) that materially impacted the outcome or the sanction.
2. **Materials Submitted.** The party submitting the appeal must set forth in detail the grounds for review and must attach all materials that they wish to have considered in the appeal process. The Title IX Coordinator will provide a copy of the appeal to the other party, at which time they may provide a written response if they choose.
3. **Appellate Officer.** The Appellate Officer(s): In the instance of an appeal, the Dean of Students (or designee) will be the Appellate Officer. The Title IX Coordinator will provide both parties with the names of the Appellate Officer for their case. As soon as

possible, but no later than three (3) calendar days after delivery of the identity of the Appellate Officer, the parties should inform the Title IX Coordinator in writing of any conflicts of interest in regard to the assigned. The Title IX Coordinator will consider the nature of the conflict and determine if different individual(s) should be assigned to review the appeal.

4. **Sanctions During Appeals.** Sanctions of all types may be imposed while an appeal is pending at the sole discretion of the College.

#### **IV. ADDITIONAL ISSUES**

1. **Duty of Honesty.** All parties and witnesses are obligated to be completely honest during the course of the entire process set forth under this Policy. Any person who knowingly makes a false statement – either explicitly or by omission – in connection with any part of the process may be subject to separate disciplinary action. A report made in good faith, however, is not considered false merely because the evidence does not ultimately support the allegation of a violation of the Policy.
2. **Duty of Cooperation.** All parties and witnesses are obligated to cooperate with the Title IX Coordinator and any persons charged with implementing the Policy. Any person who knowingly interferes with the actions taken to implement the reporting, investigation, or resolution of matters under the Policy may be subject to separate and/or additional disciplinary action. Please note that the Duty of Cooperation will not be utilized to undermine an individual’s decision not to take part in this process if it would force them to forfeit any constitutional rights in a criminal investigation involving the same or similar facts and circumstances.
4. **Special Situations.** The College retains the right to determine, in its sole discretion, if it will address a report of conduct under this Policy administratively and outside of the process described herein when the safety of the College community is at risk, if there are extenuating circumstances involving either of the parties, or if the Title IX Coordinator, in consultation with appropriate administrators, determines it is in the best interest of the College and/or the College community to do so. If the College utilizes this provision to alter the process set forth in this Policy, it will clearly communicate the change to the parties in a reasonable and timely manner.

#### **V. CONFIDENTIALITY & COLLEGE REPORTING REQUIREMENTS**

Each member of the Merrimack College community may have different reporting requirements and different abilities to maintain confidentiality depending on their roles at the College. When considering campus resources, victims should be aware of confidentiality and reporting requirements in order to make informed choices. Some resources on campus may maintain complete confidentiality, while others are available to assist reporting crimes/violations and

taking appropriate action through criminal and/or Title IX Sexual Harassment or Sexual Misconduct proceedings.

### **Reporting to Merrimack College Police Department**

Alleged violations of this Policy can also be reported to the Merrimack College Police Department. When the campus Police Department is contacted, an officer will assist the victim in obtaining medical care and counseling and will conduct a preliminary investigation and gather physical evidence. Any investigation will be conducted by an officer trained and certified by the Massachusetts Criminal Justice Training Council in sexual assault investigation, who will discuss the results of the investigation with the victim and explain to the victim his or her rights and options. Reports of suspected violations of this Policy made to the Merrimack College Police Department will be reported to the Title IX Coordinator.

### **Confidential Reporting**

If a victim wishes to keep the details of the incident confidential, they should speak with on-campus counselors or health providers at the Hamel Health and Counseling Center at 978-837-5441. They may also speak to an off-campus crisis center such as the National Sexual Assault Hotline at 1-800-656-HOPE, the Boston Area Rape Crisis Center 1-800-841-8371 or the YWCA of Greater Lawrence 1-877-509-9922

### **Employees' Responsibility to Report**

In emergency situations, if there is a suspected crime in progress or imminent or serious threats to the safety of anyone, employees must immediately contact the Merrimack College Police Department by dialing 978-837-5911.

In non-emergency situations, employees (other than those formally designated as confidential resources under this Policy) must promptly report suspected violations of this Policy to the Title IX Coordinator.

### **Federal Statistical Reporting Obligations**

Other than the counselors at the Hamel Counseling Center, all employees made aware of an alleged incident are required by federal law to file a personally unidentifiable statistical report to the Merrimack College Police Department. The only information that will be released is that an incident was reported, the type of incident and the general location of the incident (i.e. on or off campus; no address will be given). *The names of the alleged victim and perpetrator remain confidential unless the survivor specifically authorizes the release of this information.*

Counselors at the Hamel Counseling Center will cooperate with the Merrimack College Police Department to report Clery Act crimes. Campus police officers are required to submit an unidentifiable report that a sexual assault or rape incident has occurred to the Dean of Students. Statistics given to the Merrimack College Police Department can be found in the Annual Campus Security Report.

### **Federal Timely Warning Reporting Obligations**

Victims should be aware that College officials must issue timely warnings for incidents reported to them that pose a substantial threat of bodily harm or danger to members of the campus community. The College will not provide the victim's name or identifying information, but will



provide enough information for community members to make safe decisions in light of the danger.

## **VI. AMNESTY**

Any victim that may have been in violation of any policy (other than the Title IX Sexual Harassment Policy or Sexual Misconduct Policy) at the time of the alleged sexual misconduct may not be subject to the College disciplinary process for these violations unless not made in good faith or the underlying violation was so reckless and egregious that it may jeopardize the health or safety of the College community. Additionally, any bystander that provides assistance to a victim of sexual assault at the time of the incident may not be subject to the College disciplinary process (assuming the bystander did not otherwise contribute to the sexual misconduct).

## **VII. TRAINING**

The College will provide appropriate training to College officials with responsibilities under this policy, including the Title IX Coordinator, Deputy Title IX Coordinators, Dean of Students, Assistant Dean of Students, Director of Community Standards, Investigators, Determination Officers, Appellate Officers, the Director of Human Resources, and any individual who facilitates the informal resolution process. Such training will cover the definition of Title IX 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 under this Policy, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

The College will ensure that Determination Officers receive training on any technology to be used at a hearing and on issues of relevance of questions and evidence, including questions and evidence about the irrelevance of complainant's sexual predisposition or prior sexual behavior.

The College will ensure that Investigators receive training on issues of relevance in order to create an investigative report that fairly summarizes relevant evidence. These training materials are publicly available on the College's Title IX website and will be made available for in-person review upon request.

## **VIII. MODIFICATION AND REVIEW OF POLICY**

Merrimack College reserves the right to modify this Policy to take into account applicable legal requirements.

At regular intervals, the College will review this Policy to determine whether modifications should be made.