

## **Sex and Gender-Based Misconduct Policy 2020**

- I. Policy Overview**
  - II. Statement of Non-Discrimination**
  - III. Scope**
  - IV. Prohibited Sex and gender-based misconduct**
  - V. Other Definitions**
  - VI. Reporting Prohibited Sex and gender-based misconduct**
  - VII. Procedures for Resolving Complaints of Prohibited Sex and gender-based misconduct**
  - VIII. Hearings for Formal Complaints of Sex and gender-based misconduct**
  - IX. Appeals**
  - X. Remedies & Sanctions**
  - XI. Retaliation**
  - XII. Confidentiality**
  - XIII. Training**
  - XIV. Record-Keeping**
  - XV. Effective Date; Policy Revisions**
- 
- I. Overview of Dakota Wesleyan University's Sex and Gender-Based Misconduct Policy**

This policy sets forth Dakota Wesleyan's obligations under the 2020 Title IX Regulations. This policy also includes Dakota Wesleyan's obligations under the 2013 Clery Amendments pertaining to sexual assault, dating violence, domestic violence, and stalking.

The University's Title IX Coordinator is:  
John Kippes, Director of Student Life  
John.Kippes@dwu.edu  
(605) 995-2160  
Rollins Campus Center, Main Floor

Questions about Title IX may be referred to the Title IX Coordinator, the Director of the University's Office of Civil Rights and Investigations, or a Deputy Title IX Coordinator:

Deputy Title IX Coordinator  
Thomas Hoek, Associate Athletic Director, Director of Golf  
Tom.Hoek@dwu.edu

605-995-2179

Main Athletic Office, Christen Family Athletic Center

Deputy Title IX Coordinator

Janet Hayen, Director of Human Resources

Janet.Hayen@dwu.edu

605-995-2648

Rollins Campus Center, Basement

Deputy Title IX Coordinator

Joseph Roidt, Provost

Joseph.Roidt@dwu.edu

605-995-2625

205 Smith Hall

Any person may report conduct prohibited by this policy to the Title IX Coordinator, Deputy Coordinator, Director of the Office of Civil Rights and Investigations, or to any university employee. A complaint about the Title IX Coordinator should be made to the Office of the President.

## **II. Statement of Non-Discrimination**

Dakota Wesleyan does not discriminate on the basis of sex in its educational programs and activities, including employment and admission. Complaints of discrimination based on sex will be handled under the university's non-discrimination policy.

## **III. Scope**

This policy applies to all students, faculty, and staff who experience prohibited sex and gender-based misconduct in Dakota Wesleyan's education programs or activities. This includes locations, events, or circumstances over which Dakota Wesleyan exercised substantial control over both the Complainant and the Respondent as well as the context in which the sex and gender-based misconduct occurs, and also includes any building owned or controlled by a student organization that is officially recognized by Dakota Wesleyan. Dakota Wesleyan has other policies and procedures that may be applicable if the conduct does not meet the definition of prohibited sex and gender-based misconduct under this policy or otherwise fall within the scope of this policy. These policies include the university's non-discrimination policy, the student code of conduct, and code of ethics and conduct for employees.

In some cases, the same incident may involve misconduct covered under separate university policies (e.g. an incident involving both alleged sex or gender-based misconduct—which would fall under the university’s sex or gender-based misconduct policy—and alleged hostile discrimination focusing on race—which would fall under the university’s anti-discrimination policy). If both forms of misconduct result in investigations being conducted by the university, the same investigator may conduct both investigations simultaneously, although the university may use different adjudicatory process to determine responsibility and sanctions (if appropriate).

#### **IV. Prohibited Forms of Sex and Gender-Based Misconduct**

In accordance with its obligations under the Title IX Regulations of 2020, Dakota Wesleyan prohibits sex and gender-based misconduct, which is conduct based on sex, including gender identity, gender expression, or sexual orientation, that satisfies one or more of the following definitions:

1. **Quid Pro Quo Conduct.** An individual conditions the provision of an aid, benefit, or service on another individual’s participation in unwelcome sexual conduct;
2. **Unwelcome Conduct.** Unwelcome conduct that is determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to Dakota Wesleyan’s education program or activity; or
3. **Sexual assault.** This category of prohibited conduct includes the following:
  - i. **Sex Offenses**—Any sexual act directed against another person, without the affirmative consent of the victim including instances where the victim is incapable of giving affirmative consent. Sexual Act is defined as conduct between persons consisting of:
    - i. Contact between the penis and the vulva.
    - ii. Contact between the penis and the anus.
    - iii. Contact between the mouth and the penis.
    - iv. Contact between the mouth and the vulva.
  - ii. **Non-Consensual Penetration** Actual 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 the affirmative consent of the victim. This includes penetration forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving affirmative consent because of their temporary or permanent mental or physical incapacity.

- iii. **Fondling**—The non-consensual touching of the private body parts of another person for the purpose of sexual gratification, without affirmative consent, whether forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving affirmative consent because of their youth or because of their temporary or permanent mental or physical incapacity.
- iv. **Other Lawfully Prohibited Forms of Sex and Gender-Based Misconduct**

This category includes conduct constituting sexual assault that does not meet the definition of Non-Consensual Penetration or Fondling:

- i. Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law, regardless of affirmative consent.
- ii. Nonforcible sexual intercourse with a person who is under the statutory age of consent, regardless of affirmative consent.

**4. Dating violence.** Violence committed by a person— (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship.

**5. Domestic violence.** A felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state of South Dakota or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the state of South Dakota.

**6. Stalking.** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to— (A) fear for their safety or the safety of others; or (B) suffer substantial emotional distress.

**7. Sexual Exploitation** occurs when one person takes sexual advantage of another person for the benefit of anyone other than the person being taken advantage of, without that person’s consent. Examples of behavior that could constitute sexual exploitation include but are not limited to: prostituting another person; making

recordings (e.g., video, photographic, or audio) of another person’s sexual activity, intimate body parts, or nakedness without that person’s consent; distributing such images or recordings (e.g., video, photograph, or audio) of another person’s sexual activity, intimate body parts, or nakedness if the individual distributing the images or audio knows, or should have known, that the person depicted in the images or audio did not (or would likely not) consent to such disclosure and objects (or would likely object) to such disclosure. Viewing another person’s sexual activity, intimate body parts, or nakedness in a place where that person would have a reasonable expectation of privacy, without that person’s consent (e.g. for the purpose of arousing or gratifying sexual desire) also represents an example of sexual exploitation. If alleged sexual exploitation involves the sharing of materials, those materials need not involve sexual activity in order to constitute sexual exploitation.

## V. Definitions

**1. Affirmative consent** means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that they have the affirmative consent of the other or others to engage in the sexual activity. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time.

- Lack of protest or resistance does not mean consent.
- Silence does not mean consent.
- The existence of a domestic, romantic, intimate, or dating relationship between the persons involved, or the fact of past sexual relations between them, should never, by itself, be assumed to be an indicator of consent.

It shall not be a valid excuse that the Respondent believed that the Complainant affirmatively consented to the sexual activity if the Respondent knew, or reasonably should have known, that the Complainant was unable to consent to the sexual activity due to any of the following circumstances:

- The Complainant was asleep or unconscious.
- The Complainant was incapacitated due to the influence of drugs, alcohol, or medication, so that the Complainant could not understand the fact, nature, or extent of the sexual activity.
- The Complainant was unable to communicate due to a mental or physical condition.

In addition, it shall not be a valid excuse to alleged lack of affirmative consent that the Respondent believed that the Complainant consented to the sexual activity under either of the following circumstances:

- The Respondent’s belief in affirmative consent arose from the intoxication or recklessness of the Respondent.
  - The Respondent did not take reasonable steps, in the circumstances known to the Respondent at the time, to ascertain whether the Complainant affirmatively consented.
2. **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sex and gender-based misconduct under this policy.
  3. **Confidential Resource:** A University employee who is available to offer victims of alleged sex or gender-based misconduct support and guidance in a confidential environment. Confidential resources can provide individuals with both immediate and long-term assistance and options for obtaining additional support but are typically not required to disclose the Reporting Party’s identity to the Title IX Coordinator or Deputy Title IX Coordinator. The University’s confidential sources will preserve an individual’s privacy to the extent possible by the law. Dakota Wesleyan’s confidential resources are the Campus Counselor, the Campus Nurse, the Campus Pastors, and the university’s prevention education and training coordinator.
  4. **Day.** A “Day” is a business day, unless otherwise specified.
  5. **Employee.** For purposes of this policy, an employee is any member of the faculty or staff (senior staff, administrative staff, professional/non-faculty staff and non-administrative staff) employed by Dakota Wesleyan University on either a full, part-time, or volunteer basis. Solely for purposes of this definition, the term employee does not include students who are employed by the University through a work-study or similar program.
  6. **Formal complaint** means a document filed by a Complainant or signed by the Title IX Coordinator alleging sex and gender-based misconduct against a Respondent and requesting that Dakota Wesleyan investigate the allegation of sex and gender-based misconduct. The incident or incidents that serve as the basis for the Formal Complaint should have occurred while the Complainant was participating in or attempting to participate an education program or activity of Dakota Wesleyan.
  7. **Grievance Process** means the fact-finding process from the time of the filing of the Formal Complaint through the final determination of an appeal (if any).

- 8. Hearing Administrator.** The Hearing Administrator oversees live hearings to adjudicate questions of responsibility in Formal Complaints of sex and gender-based misconduct.
- 9. Intimidation** is defined as threats or acts, whether implied or explicit, that are intended to cause someone to reasonably believe that he, she, or they is about to be touched in a harmful or offensive manner or to coerce someone to commit or omit an act.
- 10. Investigator** means the person tasked with investigating a Formal Complaint. All Investigators shall receive annual training regarding such issues as the laws governing discrimination, harassment and retaliation; Title IX and VAWA/Campus SaVE Act (as defined below); as well as other related state and federal laws prohibiting discrimination, harassment and retaliation based on gender or sex, including sex discrimination, sexual harassment, sexual violence, domestic violence, dating violence and stalking; Student and witness privacy rights; and the Family Educational Rights and Privacy Act of 1974 (FERPA). The Investigator assigned to a case shall not be within the administrative control or authority of any employee Respondent.
- 11. Live Hearing.** A Live Hearing is the adjudicatory mechanism mandated by the federal government to determine responsibility in formal complaints of sex and gender-based misconduct. At the request of the Complainant or Respondent, Dakota Wesleyan can conduct Live Hearings remotely with the use of technology.
- 12. Preponderance of the Evidence.** Preponderance of the Evidence means the greater weight of the evidence. Preponderance of the Evidence is the burden of proof used to evaluate alleged violations of this policy. The Preponderance of the Evidence standard is met when the evidence, when considered as a whole, makes it more likely than not that the alleged violation of this policy actually happened.
- 13. Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sex and gender-based misconduct under this policy.
- 14. Retaliation** is defined as taking adverse action against an individual making a complaint under this policy or against any person cooperating or participating in the investigation of a complaint or the enforcement of any supportive measures or sanctions under this policy. Retaliation includes intimidation, threats, harassment, and other adverse actions (whether taken in the realm of employment, academics, athletics, or other co-curricular activities) taken against

a Complainant, Respondent, Witness, university employee, or other individual involved in a Grievance Process.

- 15. Responsible Employee.** A Responsible Employee is any employee who has the authority to take action to redress violations of this policy or is someone a student could reasonably believe has this authority or responsibility. All Dakota Wesleyan employees (aside from students employed by the university outside of the role of resident assistants) are considered responsible employees.
- 16. Review Panel.** A review panel is a panel of three individuals comprised of deputy Title IX coordinators and/or the Title IX coordinator. The coordinator or deputy coordinator who is serving as the primary liaison with a Complainant and Respondent will not serve on the review panel for that case.
- 17. Student.** Any individual who is not an employee of the University and who, at the time of the alleged sexual or gender-based misconduct and the filing of a Formal Report or submission of complaint to the University, is either: (1) admitted as a student to the University and has been moved to deposited status (note: at the conclusion of every drop-add period, students who have been admitted and who have deposited but who have not enrolled, or deferred their enrollment, forfeit their student status); (2) an enrolled student; (3) a DWU student between academic terms or on a leave of absence (regarding whom the University has a reasonable expectation of their return); (4) a graduate awaiting a degree (note: students are classified as such until they receive their degree; students who petition the University to complete their degree via distance or some other arrangement forfeit their student status if they do not complete their degree during the period of time specified in their agreement with the University); or (5) a DWU student who withdraws from the University while a disciplinary matter (including an investigation) is pending. A student ceases to be a student upon graduation, expulsion, or in the event that the student formally withdraws from the University and there is no pending disciplinary investigation. Solely for purposes of this definition, the term Employee does not include students who are employed by the University through a work-study or similar program.
- 18. Supportive Measures** means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant and/or the Respondent before, or after, the filing of a Formal Complaint or, in some cases, when no Formal Complaint has been filed. Such measures are designed to restore or preserve equal access to Dakota Wesleyan's education programs and activities without unreasonably burdening either the Complainant or the Respondent, including measures designed to protect the safety of all parties or Dakota Wesleyan's educational environment,



or deter sex and gender-based misconduct. 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. Supportive measures may also include written notification about available services both within the institution and the community and options for available assistance as required by the Clery Act. Supportive measures are not disciplinary measures.

**19. Third Party.** A “Third Party” is any person who is not a Dakota Wesleyan University student, faculty member, staff, or other Employee. A Third Party may or may not be a member of the Dakota Wesleyan University community.

**20. Title IX.** Title IX means Title IX of the Education Amendments of 1972, which is a federal law that prohibits discrimination on the basis of sex in federally funded education programs and activities.

**21. Title IX Coordinator and Deputy Title IX Coordinator.** The Title IX Coordinator means the DWU employee assigned by the President to coordinate the University’s compliance with Title IX; VAWA/Campus SaVE Act; and other related state and federal laws prohibiting discrimination, harassment and retaliation based on gender or sex, including sex discrimination, sexual harassment, sexual violence, domestic violence, dating violence, and stalking. The Deputy Title IX Coordinators work under the oversight of the Title IX Coordinator to assist with the handling of gender-based discrimination, harassment and sexual misconduct Complaints. The Title IX Coordinator may, at his or her discretion, designate the Deputy Title IX Coordinator as the Assigned Title IX Coordinator in connection with a given complaint.

**22. University.** University refers to Dakota Wesleyan University.

## **VI. Reporting Prohibited Sex and gender-based misconduct**

**1. Notice of Allegations.** Dakota Wesleyan has notice of sex and gender-based misconduct or allegations of sex and gender-based misconduct under this policy when such conduct is reported to the Title IX Coordinator or any official of Dakota Wesleyan who has authority to institute corrective measures on behalf of Dakota Wesleyan. However, all employees (with the exception of those employees designated as confidential resources) are required to report sex and gender-based misconduct, as defined and prohibited by this policy, to the Title IX Coordinator, Deputy Coordinator, or Director of the Office of Civil Rights and Investigations consistent with the requests of the Complainant.

2. **Response to a Report.** With or without a Formal Complaint, upon a report of sex or gender-based misconduct, the Title IX Coordinator will promptly contact the Complainant to discuss the availability of Supportive Measures whether the Complainant wishes to file a Formal Complaint or not, consider the Complainant's wishes with respect to Supportive Measures, and explain to the Complainant the process for filing a Formal Complaint.
3. **Information Packet.** Upon a receipt of a report of any of the following:
  - sexual assault,
  - dating violence,
  - domestic violence,
  - stalking,
  - or sexual exploitation

Dakota Wesleyan University shall provide an information packet that contains procedures to follow if a sex offense (i.e. an incident of domestic violence, dating violence, sexual assault, stalking, or sexual exploitation) has occurred, including information in writing about—

- i. 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 and the identification and location of witnesses;
- ii. How and to whom the alleged offense should be reported;
- iii. Options regarding law enforcement and campus authorities, including notification of the option to:
  - a. notify proper law enforcement authorities, including on-campus and local police;
  - b. be assisted by campus authorities in voluntarily notifying law enforcement authorities; and
  - c. decline to notify such authorities;
- iv. Where applicable, their rights and the institution's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court;
- v. Information about appropriate and available services both at the institution and in the community including information about the availability of, and contact information for, on- and off-campus resources

and services, and coordination with law enforcement, as appropriate;  
and

- vi. Options for, available reasonably available assistance and accommodations and how to request them; and
- vii. Information about the participation of victim advocates and other supporting people.

Dakota Wesleyan’s information packet for victims of sexual assault, dating violence, domestic violence and stalking is located [link will be added upon approval] and is also available from the Title IX Coordinator.

4. **Implementation of Supportive Measures.** Dakota Wesleyan shall treat parties equitably by offering Supportive Measures to the Complainant, and by following a grievance process that complies with this policy before the imposition of any disciplinary sanctions or other actions that are not Supportive Measures against the Respondent. Dakota Wesleyan will 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 Dakota Wesleyan to provide the Supportive Measures. The Title IX Coordinator is responsible for coordinating the effective implementation of Supportive Measures. The Title IX Coordinator should record and retain records regarding requests and provision of Supportive Measures in accordance with the requirements set out at XIV (as set forth in the section on record-keeping below).
5. **Emergency removal.** Nothing precludes Dakota Wesleyan from removing a Respondent from Dakota Wesleyan’s education program or activity on an emergency basis, provided that Dakota Wesleyan undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sex and gender-based misconduct justifies removal, and provides the Respondent with notice and an opportunity to challenge the decision immediately following the removal.
6. **Administrative Leave.** Dakota Wesleyan reserves the right to place a non-student employee Respondent on administrative leave during the pendency of a grievance process.
7. **Amnesty for Student Code of Conduct Violations.**

Sometimes, individuals are reluctant to come forward to report perceived violations of this policy out of fear that they may be charged with violations of

other policies. To ensure that all perceived violations of this policy are reported so that those affected can receive the support and resources needed, Dakota Wesleyan may choose not to charge students who report violations of this policy with violations of other policies (e.g. drug and alcohol use policy violations, visiting hours, etc.).

## **VII. Procedures for Resolving Complaints of Prohibited Sex and gender-based misconduct**

### **1. Informal Resolution**

Consistent with the requirements of this section, at any time prior to reaching a determination regarding responsibility, Dakota Wesleyan may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that Dakota Wesleyan:

- i. Provides to the parties a written notice disclosing:
  - a. The allegations,
  - b. The requirements of the informal resolution process including the circumstances under which the process precludes the parties from resuming a Formal Complaint arising from the same allegations, so long as at any time prior to agreeing to a resolution, any or either party has the right to withdraw from the informal resolution process and resume the grievance process with respect to registering a Formal Complaint, and
  - c. Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
- ii. Obtains the parties' voluntary, written consent to the informal resolution process; and
- iii. Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.
- iv. Completes the informal resolution process within 60 days of receiving the Formal Complaint, unless unusual or complex circumstances exist.

Dakota Wesleyan does 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 sex and gender-based misconduct under this policy. Dakota Wesleyan shall not require the parties to participate in an informal resolution process and will not offer an informal resolution process unless a Formal Complaint is filed.

## 2. Formal Complaint and the Grievance Process

- i. **Filing a Formal Complaint.** A Formal Complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information listed for the Title IX Coordinator above. (A formal complaint may be initiated via phone conversation but will require the complainant's signature or equivalent.) A "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 Dakota Wesleyan) 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. A Formal Complaint shall trigger an investigation except as specified below. The Formal Complaint should include the date(s) of the alleged incident(s), the name (or names) of the Respondent(s), and should describe the circumstances of the incident(s), when known and/or to the extent possible.
- ii. **Dismissal of a Formal Complaint.** Dakota Wesleyan shall investigate the allegations in a Formal Complaint, except as follows:
  - a. **Mandatory Dismissal.** Dakota Wesleyan shall dismiss the Formal Complaint if the conduct alleged in the Formal Complaint
    - i. would not constitute sex and gender-based misconduct as defined by this policy, even if proved,
    - ii. Occurred wholly and entirely outside of the university environment, its educational programs, and activities
    - iii. A mandatory dismissal does not preclude Dakota Wesleyan from taking action under another university policy or procedure.
  - b. **Discretionary Dismissal.** Dakota Wesleyan may dismiss the Formal Complaint or any allegations therein, if at any time during the investigation or hearing:
    - i. A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the Formal Complaint or any allegations therein;
    - ii. The Respondent is no longer enrolled in or employed by Dakota Wesleyan; or
    - iii. Specific circumstances prevent Dakota Wesleyan from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein.
    - iv. The incident (or incidents) forming the basis of the complaint occurred prior to August 14, 2020, in which case, Dakota

Wesleyan’s Sex and Gender-Based Misconduct policy in place at that time shall be used.

Dakota Wesleyan may dismiss a Formal Complaint at any time in the process if it becomes known that one of the foregoing reasons for dismissal applies.

Upon a dismissal required or permitted under this section, Dakota Wesleyan will promptly send written notice of the dismissal and reason(s) therefore simultaneously to all relevant parties. Dakota Wesleyan may also refer the matter to the appropriate department for resolution under the university’s anti-discrimination policy, student code of conduct, or employee code of conduct and ethics.

- iii. **Consolidation of Formal Complaints.** Dakota Wesleyan may consolidate Formal Complaints as to allegations of sex and gender-based misconduct against more than one Respondent, or by more than one Complainant against one or more Respondents, or by one party against the other party, where the allegations of sex and gender-based misconduct arise out of the same facts or circumstances. Where a grievance process involves more than one Complainant or more than one Respondent, references in this section to the singular “party,” “Complainant,” or “Respondent” include the plural, as applicable.
- v. **Disaggregation of Formal Complaints.** Dakota Wesleyan may disaggregate Formal Complaints as to allegations involving both discriminatory misconduct and sex and gender-based conduct with respect to the same incident or incidents. In such instances, a single investigator may create two parallel reports stemming from the same incident, one involving discriminatory misconduct, and the other involving sex and-gender based misconduct, with the two complaints being adjudicated separately.
- vi. **Notice of Charges**
  - a. **Initial Notice of Charges.** Upon receipt of a Formal Complaint, and prior to commencing an investigation, Dakota Wesleyan shall provide the following written notice to all known, relevant parties. This notice shall include:
    - i. This policy (in the form of a link and/or an attachment).
    - ii. Notice of the allegations potentially constituting sex and gender-based misconduct as defined in this policy, including sufficient details known at the time and providing 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 sex or gender-based misconduct under this policy, and the date and location of the alleged incident, if known.

- iii. 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.
  - iv. Notification to the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney.
  - v. Notification to the parties that they may inspect and review evidence, as set forth in this policy.
  - vi. Any provision in Dakota Wesleyan’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
  - vii. The standard of evidence (i.e. the preponderance of the evidence standard) used in the adjudication process.
  - viii. A link to and/or list of all possible sanctions the institution may impose.
- vii. **Amended Notice of Charges.** If, in the course of an investigation, Dakota Wesleyan decides to investigate allegations about the Complainant or Respondent that are not included in the initial notice of charge, Dakota Wesleyan must provide notice of the additional allegations to the parties whose identities are known.

**viii. Principles for the Grievance Process**

Under this grievance process, Dakota Wesleyan shall:

- a. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on Dakota Wesleyan and not on the parties (assuming and provided that Dakota Wesleyan 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 Dakota Wesleyan obtains that party’s voluntary, written consent to do so for a grievance process under this section). (If a party is not an “eligible student,” as defined in 34 CFR 99.3,

then Dakota Wesleyan must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR 99.3).

- b. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- c. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- d. 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, who may be, but is not required to be, an attorney, and to not limit the choice or presence of advisor for either the Complainant or Respondent in any meeting or grievance proceeding. Dakota Wesleyan reserves the right to screen advisors for conflicts of interest and to reject an advisor’s participation in grievance proceedings if such a conflict of interest is identified. Dakota Wesleyan may also establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties. For the purposes of this policy, the role of the advisor is limited to the following: the advisor may attend any interview or meeting connected with the grievance process, but may not actively participate in interviews nor provide testimony or argument on behalf of the party. The advisor may attend the live hearing, but the advisor’s participation in the hearing is limited strictly to conducting cross-examination of the other party and any witness at the hearing (in accordance with specified university protocols).
- e. Allow each party to be accompanied by a support person if they do not wish to have an advisor. Each party may be accompanied by only one other person unless there is good cause, such as a disability-related accommodation.
- f. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.
- g. Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence— and provide that credibility determinations may not be based on a person’s status as a Complainant, Respondent, or witness.



- h. Require that any individual designated as a Title IX Coordinator, investigator, decisionmaker, or any person to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual Complainant or Respondent. Dakota Wesleyan may use internal personnel or external parties in the informal resolution process or the grievance process, provided that they meet this requirement.
- i. Include a presumption that the Respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- j. Use the following standard of evidence to determine responsibility for allegations in a Formal Complaint of sex and gender-based misconduct: the preponderance of the evidence standard. The standard of evidence shall be the same for Formal Complaints against students as well as for Formal Complaints against faculty and staff.
- k. 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.

**ix. Extensions of the Grievance Process**

The Title IX Coordinator may grant or deny requests from either party to temporarily delay the grievance process. The Title IX Coordinator may issue a limited extension of time frames for good cause with written notice to the Complainant and the Respondent regarding the delay or extension and the reasons for the action.

Good cause may include (but is not necessarily limited to) considerations 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.

In all cases the university will seek a timely resolution of all grievances and is unlikely to grant a single party multiple extensions.

**x. Investigation of Formal Complaints**

If not serving as the Investigator, the Title IX Coordinator will appoint an Investigator, who may be an employee or official of Dakota Wesleyan or may be an external investigator with appropriate experience or expertise. The parties will

be provided with notice of the identity of the appointed Investigator, and will be informed that any objections to the service of the appointed Investigator on grounds of conflict of interest or a lack of impartiality should be submitted in writing to the Title IX Coordinator within three days of notice of the appointment. If one of the parties objects to the appointment of the investigator, the Title IX Coordinator will decide promptly whether the grounds for objection have merit and, if so, will appoint a new investigator (notifying the parties of the new appointment and inquiring as to whether any party objects to this new appointment on the grounds identified above). If the Title IX Coordinator decides that objections lodged against the appointment of an investigator do not have merit, they will inform the parties the objections were found not to have merit and that the investigation will proceed with the originally assigned investigator. In instances in which a new investigator is appointed, any materials collected, or notes prepared, by the original investigator during the initial investigatory period will be turned over to any replacement Investigator. The replacement Investigator and the Title IX Coordinator will decide whether to use such materials or not.

When investigating a Formal Complaint Dakota Wesleyan shall, within 60 days of receiving the Formal Complaint, unless unusual or complex circumstances exist:

- a. Engage in fact-gathering of all relevant facts. Credibility resolutions and fact-finding shall be conducted in the live hearing phase of the grievance process.
- b. 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 Dakota Wesleyan 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.
- c. Prior to completion of the investigative report, send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy. All parties have 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- d. Make all such 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-examination; and

- e. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing or other time of determination regarding responsibility, the Title IX Coordinator shall 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. Upon finalization of the investigative report, the Title IX Coordinator shall provide it to the hearing administrator and review panel.

## **VIII. Live Hearings Under the Grievance Process**

### **1. Requirement of a Live Hearing for Fact-Finding and Determining Responsibility.**

- i. Following the investigation, within 30 days of sending the final investigative report to the parties, unless unusual or complex circumstances exist, Dakota Wesleyan shall conduct a live hearing presided over by a hearing administrator and in front of the three member Review Panel, for the purposes of determining responsibility for allegations of sex and gender-based misconduct in the Formal Complaint. Neither the Title IX Coordinator nor the investigator of the allegation(s) that are the subject of the hearing in question shall serve as either the hearing administrator or as a member of the Review Panel. The Hearing Administrator and the members of the Hearing Panel may include internal employees or external third parties contracted by Dakota Wesleyan. If using a Review Panel, the Title IX Coordinator will choose three Review Panel members from its pool to attend the hearing and make determinations. All potential Review Panel members will receive annual training as specified by this policy. Upon being notified of the identity of the hearing administrator and the three members of the Review Panel, the parties each may challenge the participation of the hearing administrator and/or any member of the Review Panel for conflict of interest or other good cause. Upon receiving a challenge from one or more parties, the Title IX Coordinator will make the final decision as to whether to select an alternate hearing administrator and/or review panel member (or members). The Title IX Coordinator will appoint a member of the Review Panel to serve as Chair of the Review Panel. The Chair of the Review Panel will be responsible for writing and submitting the written decision of the panel as outlined below.
- ii. The live hearing will be closed. The only individuals permitted to participate in the hearing are as follows: the Hearing Administrator, the Complainant, the Respondent, the three members of the Review Panel, the advisor for each party, any witnesses (who participate only for the duration of their questioning), and any individual providing authorized accommodations or

assistive services.

- iii. If a party does not have an advisor present at the live hearing, Dakota Wesleyan shall provide, without fee or charge to that party, an advisor of Dakota Wesleyan's choice, who may be, but is not required to be, an attorney, to conduct cross examination on behalf of that party. Dakota Wesleyan is obligated to ensure each party has an advisor, either of the party's or Dakota Wesleyan's choice, regardless of whether or not the party is present at the hearing. To ensure timely proceedings, a party shall alert the Title IX Coordinator as soon as practical if the party requires the university to furnish them with an advisor. If a party's selected advisor is unavailable for a hearing date, the live hearing date may be postponed for good cause.
- iv. Live hearings may be conducted with all parties physically present in the same geographic location or, at Dakota Wesleyan'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.
- v. At the request of either party, Dakota Wesleyan shall 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.
- vi. Dakota Wesleyan shall create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review. Hearing participants are prohibited from making their own recordings of the hearing, and violations of this rule may be subject to disciplinary action.
- vii. The parties shall participate, separately, in a pre-hearing meeting with the either the hearing administrator and/or the Title IX Coordinator to go over the process and administration of the live hearing. Prior to, or during, this meeting, the hearing administrator or the Title IX Coordinator will specify deadlines for submitting and exchanging names of witnesses, evidence, and pre-hearing questions. (The parties will also be permitted to submit questions during the live hearing.) Participation in this pre-hearing meeting is required in order to facilitate the efficient and fair administration of the live hearing process.

## **2. Questioning at the Live Hearing**

- a. At the live hearing, the hearing administrator 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 (although all questions must be submitted to the hearing administrator for approval).
- b. Only relevant cross examination and other questions may be asked of a party or witness. The hearing administrator serves as the sole and final arbiter regarding what constitutes a relevant question.
- c. Review Panel members also have the right to question a party or witness (with all questions being submitted to the hearing administrator for approval).
- d. Cross examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding Dakota Wesleyan's ability to otherwise restrict the extent to which advisors may participate in the proceedings.
- e. Before the Complainant, Respondent, or witness answers a cross-examination or other question, the Hearing Administrator must first determine whether the question is relevant. It is incumbent upon the Hearing Administrator to offer a short explanation to any party proposing questions (whether the complainant's advisor, the respondent's advisor, or members of the hearing panel) their decision to exclude a question on the basis of lack of relevance.
- f. 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.

### **3. Use of Witness Statements**

- i. Parties or witnesses at the live hearing are free to decline to answer questions and/or to participate in cross examination. If a party or witness does not submit to cross examination at the live hearing (i.e. they either do not attend the hearing or attend the hearing and refuse to answer questions), the Review Panel shall not rely on any statement(s) of that party or witness (e.g. contained in the investigator's report) in reaching a determination regarding responsibility. However, the decision of a party or witness not to submit to

cross examination does not preclude the Review Panel from reaching a determination based on evidence provided by the party or witness who refuses to participate in cross examination (e.g. physical evidence, video, etc.) that does not constitute a statement.

- ii. The decision-maker(s) shall not draw an inference about a 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.

#### **4. Written Determination of the Decision-Maker**

- i. The Review Panel shall issue a written determination regarding responsibility. A majority of the Review Panel members must find that a policy violation occurred for a finding of responsibility and a majority of the Panel members must assent to the sanction(s) imposed, if any.

To reach this determination, the decision-maker must apply and meet the preponderance of the evidence standard as required by this policy. The written determination must include:

- a. Identification of the allegations potentially constituting sex or gender-based misconduct as defined by this policy;
- 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 Dakota Wesleyan's policy to the facts;
- e. A statement of, and rationale for, the result regarding each allegation, including a determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and whether remedies designed to restore or preserve equal access to Dakota Wesleyan's education program or activity will be provided to the complainant; and
- f. The procedures and permissible bases for the Complainant and Respondent to appeal, as set forth in this policy.

- ii. Dakota Wesleyan shall provide the written determination to the parties simultaneously.
- iii. If neither party files an appeal, the determination regarding responsibility becomes final on the day following the last day designated by Dakota Wesleyan for filing an appeal. If one party, or both parties, file/files an appeal, the determination regarding responsibility becomes final on the day the parties receive a final determination regarding the appeal or appeals.

## **IX. Appeals**

### **1. Grounds**

Within 10 days of receiving the written determination, either party may appeal a determination regarding responsibility or Dakota Wesleyan's dismissal of a Formal Complaint or any allegations therein, on the following grounds:

- Ground 1:** Procedural irregularity that affected the outcome of the matter;
- Ground 2:** 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
- Ground 3:** 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.

Appeals must be sent to the Title IX Coordinator in writing.

### **2. Response to Appeals**

As to all appeals, the Title IX Coordinator (or designee) shall:

- i. Notify the other party in writing immediately when an appeal is filed and implement appeal procedures equally for both parties;
- ii. Ensure, as appropriate, that the decision-maker(s) for the appeal is/are 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;

- iii. Ensure that the decision-maker(s) for the appeal complies with the standards set forth in this policy;
- iv. Give the non-appealing party an opportunity to submit a written statement in response to the appeal within 10 days of receiving the appeal, which shall be transmitted within 2 business days to the Appeal decision-maker(s).

### **3. Decision on Appeal**

Within 20 days of receiving the appeal and the response from the non-appealing party (if applicable), the Appeal decision-maker(s) shall issue a written decision, simultaneously to both parties, describing the result of the appeal and the rationale for the result. If the appeal fails to adequately meet one or more of the grounds for appeal, the decision-maker(s) may simply deny the appeal, explaining why the appeal fails to adequately meet one or more of the grounds identified for appeal. If the appeal does adequately meet one or more of the grounds for appeal, the appeal decision-maker(s) may return the case to the initial decision-maker(s) for reconsideration, convene a new hearing or, if necessary and appropriate, open a new investigation. If a case is returned to the initial decision-maker(s), the Appeal decision-maker(s) shall identify which aspects merit further review.

## **X. Remedies and Sanctions**

Remedies must be designed to restore or preserve equal access to Dakota Wesleyan's education program or activity. A list of possible disciplinary sanctions and remedies that the university may implement following a determination of responsibility are included as an appendix to this document.

A student found responsible for a violation of this policy will be subject to sanction(s) regardless of whether legal proceedings involving the same incident are underway or anticipated. An employee found responsible for a violation of this policy will be subject to sanction(s) up to and including termination of employment.

Possible sanctions and remedies that Dakota Wesleyan may implement following any determination of responsibility include: expulsion, withdrawal of an awarded degree, a no contact order, written warning, suspension, a fine, restitution, community service, probation, reference to counseling, termination of employment, and notation in the Respondent's official student or personnel file of the fact of a violation and the sanction.

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



## **XI. Retaliation Prohibited**

No student, faculty or staff member may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right established by this policy 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 policy.

Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sex and gender-based misconduct, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or Formal Complaint of sex and gender-based misconduct, for the purpose of interfering with any right under this Policy constitutes retaliation.

The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under this section.

Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination outlined in the university's antidiscrimination policy.

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 policy does not constitute retaliation prohibited under of this section, provided that a determination regarding responsibility does not, in and of itself, represent the sole reason for concluding that any party made a materially false statement in bad faith.

## **XII. Confidentiality**

Consistent with the requirements of this policy, Dakota Wesleyan 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 report or filed a Formal Complaint of sex and gender-based misconduct, 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. This means that Dakota Wesleyan will protect the party's privacy consistent with this Policy but may disclose information to those who have a legitimate need to know and in order to process complaints under this policy.

Confidentiality is not absolute, however. Where criminal conduct has occurred, or where the health and/or safety of others in the community may be in danger, it may

be necessary for Dakota Wesleyan to take appropriate steps to protect the safety of its students and employees, including the person who has reported the misconduct.

At Dakota Wesleyan University, the following positions serve as Confidential Resources with respect to the University's Sex and Gender-Based Misconduct Policy:

- Campus Counselor
- Campus Pastors
- Campus Nurse
- Prevention Education and Training Coordinator

In most cases, Confidential Resources at Dakota Wesleyan will not share the substance of any communications regarding sex or gender-based misconduct and / or that such communications occurred without consent of the party sharing the information. Individuals who wish to talk about issues related to sex and gender-based misconduct confidentially, with the understanding that Dakota Wesleyan will not take any action based on such confidential communications, are encouraged to contact one of these Confidential Resources.

Confidential resources may, however, have an obligation to disclose otherwise-privileged information where they perceive an immediate and/or serious threat to a person and/or property. This is a limited exception to the privileged nature of communications with Confidential Resources. Reports or records maintained by Dakota Wesleyan (including Counseling Service records), and other confidential, non-privileged records may, however, be subject to a subpoena if civil or criminal charges are filed in court.

In accordance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Confidential Resources will not report Clery crimes they learn about through confidential communications for purposes of Dakota Wesleyan's compilation of campus crime statistics. In addition, when appropriate and legally permissible, Dakota Wesleyan shall conduct record-keeping on reports of dating violence, domestic violence, stalking and sexual assault, such as that collected for legally required disclosures, that excludes personally-identifiable information of any complainants.

### **XIII. Required Trainings**

The Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process (whether internal or external) shall receive training on the definition of sex and gender-based misconduct under this policy, the scope of Dakota Wesleyan's education programs or activities, 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 prejudice of the facts at issue, conflicts of interest, and bias. These individuals shall 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.

Decision-makers shall 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.

Investigators shall receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, will not rely on sex stereotypes and will promote impartial investigations and adjudications of Formal Complaints of sex and gender-based misconduct.

#### **XIV. Recordkeeping.**

Dakota Wesleyan shall maintain for a period of seven years records of:

1. Each sex and gender-based misconduct investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under this policy, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to Dakota Wesleyan's education programs or activities;
2. Any appeals and the results thereof;
3. Any informal resolutions and the results thereof; and
4. All materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process. Dakota Wesleyan shall make these training materials publicly available on its website.
5. Records of any actions, including any Supportive Measures, taken in response to a report or Formal Complaint of sex or gender-based misconduct. In each instance, Dakota Wesleyan will 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 Dakota Wesleyan's education program or activity. If Dakota Wesleyan does not provide a complainant with Supportive Measures, then Dakota Wesleyan must document

Dakota Wesleyan University—Sex and Gender-Based Misconduct Policy 2020

the reasons why its decision not to do so clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit Dakota Wesleyan in the future from providing additional explanations or detailing additional measures taken.

**XV. Effective Date; Revisions**

This policy is effective as of August 14, 2020 and was approved by the Dakota Wesleyan Board of Trustees on [SPECIFY DATE].

**END**