

SECTION 162

SEXUAL AND GENDER-BASED HARASSMENT AND SEXUAL MISCONDUCT POLICY

SOURCE: NDSU President

1. INTRODUCTION

- 1.1 North Dakota State University (NDSU) is committed to providing a safe, healthy, and non-discriminatory learning, living, and working environment for all members of its university community that is free from sex discrimination of any kind. Specifically, NDSU is committed to:
- 1) Defining conduct that constitutes prohibited sexual harassment, gender-based harassment and sexual misconduct;
 - 2) Providing clear guidelines for students, employees and third parties on how to report incidents of sexual harassment, gender-based harassment and sexual misconduct and a commitment that any complaints will be handled respectfully;
 - 3) Promptly responding to and investigating allegations of sexual harassment, gender-based harassment and sexual misconduct, pursuing disciplinary action when appropriate, referring the incident to local law enforcement when appropriate, and taking action to investigate and address any allegations of complicity and retaliation;
 - 4) Providing ongoing assistance and support to students and employees who make allegations of sexual harassment, gender-based harassment and sexual misconduct;
 - 5) Providing awareness and prevention information on sexual harassment, gender-based harassment and sexual misconduct, including widely disseminating this policy, and implementing training and educational programs on sexual harassment, gender-based harassment and sexual misconduct to university constituencies; and
 - 6) Gathering and analyzing information and data that will be reviewed in order to improve gender equity and safety, reporting, responsiveness and the resolution of incidents.
- 1.2 Title IX of the Education Amendments of 1972 – No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

It is the policy of NDSU to fully comply with all aspects of Title IX of the Education Amendments of 1972 and the regulations promulgated under its authority. NDSU has adopted procedures to address Formal Complaints of Sexual Harassment occurring in its Educational Program or Activities within the United States. These procedures may be found at [Policy 156.1: Title IX Complaint Procedures](#) and are based off North Dakota University System Policy 520.

- 1.3 In accordance with Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Violence Against Women Reauthorization Act of 2013 (VAWA), the Campus Sexual Violence Elimination Act (SaVE), the Jeanne Clery

Disclosure of Campus Security Policy and Campus Crime Statistics Act and other federal and state laws, NDSU prohibits discrimination based on sex or gender and other types of sexual misconduct in its employment decisions and educational programs and activities. Title IX protects any person from sex based discrimination, regardless of their real or perceived sex, gender identity, and/or gender expression. Female, male and gender non-conforming students and employees are protected from any sex-based discrimination, harassment, or violence.

- 1.4 NDSU prohibits all forms of sexual harassment, gender-based harassment, and sexual misconduct, including but not limited to, intimate partner violence, sexual assault, sexual exploitation, stalking, complicity in the commission of any act prohibited by this policy, and retaliation against a person for the good faith reporting of any forms of misconduct or participation in any investigation or proceeding under this policy.
- 1.5 Examples of the types of sex discrimination that are covered under this policy include but are not limited to: the failure to provide equal opportunity in athletics; discrimination in any course or program, notably in science, technology, engineering, and math (STEM); and discrimination based on pregnancy or parental status.
- 1.6 Formal Complaints of Sexual Harassment occurring in NDSU Educational Programs or Activities within the United States (“Title IX Complaints”) shall be resolved by [Policy 156.1: Title IX Complaint Procedures](#). All other complaints of Sexual Harassment shall be resolved by [NDSU Policy 156, or other applicable policy](#).
- 1.7 Informal resolution (mediation) will not be used to resolve complaints of sexual harassment or sexual violence between an employee and a student. Participation in the informal resolution process is strictly voluntary – NDSU will not require the Parties to participate in an informal resolution process.

Informal resolution is not available for Title IX Complaints, unless a Formal Complaint has been filed.

For Title IX Formal Complaints, and all other complaints of Sexual Harassment, NDSU may facilitate an informal resolution process, that does not involve a full investigation and adjudication, provided that NDSU:

- a. Provides the Parties a written notice disclosing the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the Parties from resuming a Formal Complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any Party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the Formal Complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- b. Obtains the Parties voluntary, written consent to the informal resolution process; and
- c. The informal resolution process will follow the process as outlined in Policy 156, Section 7, including the option that NDSU reserves the right to deny the Parties the option of using the informal resolution process if it is deemed to be inappropriate or inadequate.

- 1.8 This policy shall not be construed to restrict academic freedom, nor shall it be used to restrict constitutionally protected freedom of expression.
- 1.9 Violations of this policy may result in sanction against an employee (faculty and staff), up to and including termination. Violations of this policy may result in sanction against a student up to and including suspension and expulsion.

2. PROHIBITED CONDUCT

- 2.1 **Sexual Harassment, Gender-Based Harassment and Sexual Misconduct.** This policy prohibits sexual harassment, gender-based harassment and sexual misconduct by or against any student, employee or third party. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, or other unwanted conduct of a sexual nature, whether verbal, written, graphic, physical or otherwise, that is sufficiently severe, persistent, or pervasive that it unreasonably interferes with, limits, or deprives an individual from participating in or benefitting from the University's education or employment programs and/or activities.

Gender-based harassment is verbal, nonverbal, graphic, or physical aggression, intimidation, or hostile conduct based on sex, sex-stereotyping, sexual orientation or gender identity, when such conduct is sufficiently severe, persistent, or pervasive that it interferes with or limits a person's ability to participate in or benefit from the University's education or work programs or activities. Gender-based harassment does not necessarily involve conduct of a sexual nature,

Sexual misconduct is a broad term encompassing all forms of gender-based harassment or discrimination and unwelcome behavior of a sexual nature. The term includes sexual harassment, nonconsensual sexual contact, nonconsensual sexual intercourse, sexual assault, sexual exploitation, stalking, public indecency, intimate partner violence, sexual violence, and other misconduct based on sex.

The complete definitions of these terms, as well as other key terms used in this policy, are set forth in 12.1-12.21 below.

- 2.2 **Retaliation** – This policy prohibits any adverse action taken against a person for making a good faith report of sexual harassment, gender-based harassment, or sexual misconduct, assisting someone making such a report, or participating in any proceeding under this policy.
- 2.3 **Complicity** – This policy prohibits any act taken with the purpose of aiding, facilitating, promoting or encouraging sexual harassment, gender-based harassment, or sexual misconduct by another person.
- 2.4 **Certain intimate relationships** – NDSU also prohibits certain intimate relationships when they occur between an employee and any student for whom they have a professional responsibility as set forth in [Policy 162.1](#).
- 2.5 **Interference with an investigation** – Any person who knowingly and intentionally interferes with an investigation conducted under this policy is subject to disciplinary action up to and including dismissal or separation from the University. Interference with an investigation may include, but is not limited to:
 - 1) Attempting to coerce, compel, influence, or prevent an individual from providing testimony or relevant information;
 - 2) Divulging confidential information;
 - 3) Removing, destroying, or altering documentation relevant to the investigation; or

- 4) Providing false or misleading information to the investigator, or encouraging others to do so.
- 2.6 Violations of law – Behavior that violates this policy may also constitute a crime under the laws of the jurisdiction in which the incident occurred. For example, the North Dakota Century Code criminalizes and punishes some forms of sexual assault, domestic violence, stalking, and physical assault, which may subject a person to criminal prosecution and punishment in addition to any sanctions under this policy.
- 2.7 Obligation to provide truthful information – All University community members are expected to provide truthful information in any report or proceeding under this policy. Submitting or providing false or misleading information in bad faith or with a view to personal gain or intentional harm to another in connection with an incident of prohibited conduct is prohibited and subject to disciplinary action and sanctions under the appropriate disciplinary policy. This provision does not apply to reports made or information provided in good faith, even if the facts alleged in the report are not later substantiated.
- 2.8 Amnesty for drug and alcohol use – NDSU strongly encourages all University community members to report instances of sexual harassment, gender-based harassment or sexual misconduct as soon as possible. The University recognizes that an individual who has been drinking or using drugs at the time of the incident may be hesitant to report due to potential policy violations. To minimize hesitancy, an individual who reports sexual harassment, gender-based harassment or sexual misconduct, either as a complainant or as a witness, will not be subject to disciplinary action for any violation of NDSU’s [Policy 155](#) against alcohol and other drugs in connection with the reported incident.

3. TO WHOM THIS POLICY APPLIES

- 3.1 This policy applies to all University students who are registered or enrolled for credit or non-credit courses (“Students”); employees consisting of all full-time and part-time faculty, regular staff employees, and nonbanded, nonacademic staff (“Employees”); and visitors, guests, applicants for admission to or employment with the University, contractors, vendors, university affiliates and others conducting business on campus (“Third Parties”).
- 3.2 This policy applies to conduct by or against students, employees, and third parties of which the University is made aware, wherever the misconduct occurs:
 - 3.2.1. On property owned or controlled by NDSU;
 - 3.2.2. Off NDSU property, if
 - 1) The misconduct was in the context of a University employment or education program or activity, including, but not limited to, NDSU-sponsored study abroad, research, on-line, or internship programs; or
 - Outside the context of a University employment or education program or activity, but has continuing adverse effects on or creates a hostile environment for students, employees or third parties while on campus or other property owned or controlled by NDSU or in any University employment or education program or activity.
- 3.3 Conduct under this policy is prohibited regardless of the sex, sexual orientation and/or gender identity/expression (real or perceived) of the Reporting Party or Responding Party.

4. TITLE IX COORDINATOR

- 4.1 The Title IX Coordinator oversees NDSU's compliance with Title IX; ensures appropriate education and training; coordinates the University's investigation, response, and resolution of all reports under this policy; and ensures appropriate actions to eliminate prohibited conduct, prevent its recurrence, and remedy its effects. The name and contact information for the Title IX Coordinator can be found on the University's [Title IX website](#).
- 4.2 Concerns about NDSU's application of Title IX, VAWA, Title VII, or the Clery Act may be addressed to the Title IX Coordinator; the United States Department of Education, Clery Act Compliance Division (at clery@ed.gov); the United States Department of Education, Office for Civil Rights (at <http://www2.ed.gov/about/offices/list/ocr/addresses.html>, OCR@ed.gov or (800) 421-3481); and/or the Equal Employment Opportunity Commission (at <https://www.eeoc.gov/contact/>, info@eeoc.gov or (800) 669-4000).

5. IMMEDIATE ASSISTANCE IN CASES OF SEXUAL MISCONDUCT AND SUPPORT RESOURCES

- 5.1 Reporting to law enforcement – Students or employees who experience or observe any form of sexual assault or intimate partner violence on or off campus and third parties who experience sexual assault or intimate partner violence on NDSU grounds are strongly encouraged to report the incident immediately by:
- 1) calling 911,
 - 2) contacting the Fargo Police (701-235-4493),
 - 3) their local police precinct, or
 - 4) University Police (701-231-8998), who are available 24 hours a day, 7 days a week. University Police and safety officers can also assist the Reporting Party with filing a complaint both on and off campus, and in obtaining immediate medical attention, counseling and other services.
- 5.2 Obtaining immediate medical attention and emotional support – An individual who experiences any form of sexual assault or intimate partner violence is encouraged to seek immediate medical care to treat injuries, obtain preventive treatment for sexually transmitted diseases, and preserve evidence. In addition, individuals who have experienced or witnessed sexual violence are encouraged to seek emotional support as soon as possible, either on or off-campus. On-campus resources include:
- 1) Nurses and/or nurse practitioners at the [Student Health Service](#) (701-231-7331; hours of operation: Monday-Friday 8:00 a.m.-5:00 p.m. during the academic year and Monday-Friday 7:30 a.m. – 4:00 p.m. during breaks.
 - 2) Counselors at the [NDSU Counseling Center](#) (701-231-7671; Monday-Friday 8:00 a.m. – 5:00 p.m. during the academic year and Monday-Friday 7:30 a.m. – 4:00 p.m. during breaks. Counselors are trained to provide crisis intervention and provide referrals for longer-term care as necessary. 24-hour on call service at 701-231-7671; and
 - 3) Sexual Assault Prevention and Advocacy Coordinator at the Student Health Service (701-231-5733; Monday-Friday 8:00 a.m.-5:00 pm during the academic year and Monday-Friday 7:30 a.m. – 4:00 p.m. during breaks.

5.3 On campus resources, counselors, and health care providers:

Contact	Phone	Address
Title IX Coordinator	701-231-7708	Old Main 103
Student Affairs and Enrollment Management Office	701-231-7701	Old Main 100
Equal Opportunity and Title IX Compliance Office	701-231-7708	Old Main 201
NDSU Counseling Center*	701-231-7671	Ceres Hall 212
Sexual Assault Prevention & Advocacy*	701-231-7331	Wallman Wellness Center 102
NDSU Student Health Service*	701-231-7331	Wallman Wellness Center 102
Ombudsperson*	701-231-5114	Main Library, Lower Level, 20C
University Police	701-231-8998	1523 12th Avenue N., Fargo

*Confidential resources

5.4 Off-campus resources, counselors, and health care providers:

Contact	Phone	Address
F-M Rape & Abuse Crisis Center	701-293-7273	317 8th Street N, Fargo
Sanford Medical Center Fargo	701-234-2000	5225 23 rd Avenue S, Fargo
Essentia Health Emergency Center	701- 364-8000	32nd Avenue S, Fargo
Planned Parenthood	281-236-7145	803 Belsey Boulevard, Moorhead, MN
Southeast Human Services	701-298-4500	2624 9th Avenue S., Fargo
Fargo Police Department	701-235-4493	222 4th Street N, Fargo
Cass County Public Health	701-241-1360	1240 25 th Street S, Fargo

6. REPORTING SEXUAL HARASSMENT, GENDER-BASED HARASSMENT OR SEXUAL MISCONDUCT

- 6.1 All students, employees, and third parties are strongly encouraged to promptly report any incidents of sexual harassment, gender-based harassment, or sexual misconduct that they experience and/or observe to the Equal Opportunity and Title IX Compliance Office.
- 6.2 Any person (student, employee, or third party) having a complaint under this policy (NDSU Policy 162) should submit a completed complaint form available online at https://ndstate.co1.qualtrics.com/jfe/form/SV_cYXm01BTRKZi8HY or by contacting the Equal Opportunity and Title IX Compliance Office in Suite 201, Old Main, NDSU Main Campus, 701-231-7708, ndsu.eoaa@ndsu.edu. The Equal Opportunity and Title IX Compliance Office is available to assist with completing the Complaint Form as needed.
- 6.3 Anyone who would like to file a sexual harassment, gender-based harassment, or

sexual misconduct complaint against a student or student organization also has the option of filing the complaint with the Student Affairs and Enrollment Management Office, Old Main 100, NDSU Main Campus, 701-231- 7701. Complaints filed against a student or student organization will be resolved in coordination with the Student Affairs and Enrollment Management Office. If a complaint against a student or student organization will be resolved through formal resolution, a hearing, and any appeal, will be administered by the Student Affairs and Enrollment Management Office, in coordination with the Equal Opportunity and Title IX Compliance Office under the procedures found in Policy 601: Rights and Responsibilities of Community: A Code of Student Conduct.

- 6.4 All students, employees, and third parties may also report incidents of sexual misconduct to law enforcement, including on-campus and local police. Reporting parties who choose to notify law enforcement will be provided the assistance of the Equal Opportunity and Title IX Compliance Office in contacting these authorities if the individual wishes. Reporting Parties may also decline to notify law enforcement of incidents of sexual misconduct.
- 6.5 Reports of sexual misconduct made to University Police will automatically be reported to the Equal Opportunity and Title IX Compliance Office regardless of whether the individual who experienced the sexual misconduct chooses to pursue criminal charges.
- 6.6 Disclosures to licensed clinical and/or mental health professionals acting in their professional role in the provision of services are not subject to the mandatory reporting requirements stated in 7.1-7.3. These employees include physicians, psychologists, nurses, counselors, and those performing services under their supervision. These individuals are encouraged to provide students or employees with information and guidance regarding university reporting options and available resources but will not report or otherwise refer instances of sexual harassment/misconduct to university administrators without the student or employee's express permission. This does not preclude these individuals from their reporting responsibilities under the Clery Act.
- 6.7 Anonymous reporting - NDSU students and employees may report incidents of sexual harassment, gender-based harassment, or sexual misconduct anonymously. NDSU may be limited in its ability to respond to a report if it is submitted anonymously. Additionally, in very limited circumstances, NDSU may need to take action to learn the identity of an individual who submitted an anonymous report.

7. NOTICE OF MANDATORY REPORTING RESPONSIBILITIES

- 7.1 It is the responsibility of the entire university community to foster a safe, healthy, and non-discriminatory learning, living, and working environment that is free from sex discrimination of any kind. NDSU employees have specific responsibilities when they observe discrimination or receive a report of discrimination. NDSU employees must not dissuade an individual (or group) from providing them with a report of discrimination but should inform the individual (or group) of their mandatory reporting responsibilities as described below.

- 7.1.1. Observance of sexual misconduct – All NDSU employees who observe any form of sexual misconduct must notify the Equal Opportunity and Title IX Compliance Office.

- 7.1.2. Report of sexual misconduct – All NDSU employees who receive a report

of sexual misconduct *involving a student* must contact the Equal Opportunity and Title IX Compliance Office. NDSU supervisors, managers, department heads, deans, directors, or administrators who receive a report of discrimination *involving employees* must document the report and contact the Equal Opportunity and Title IX Compliance Office. The provisions of 11.1.1 do not apply to confidential support resources providing services as described in 9.3.

- 7.2 To comply with 7.1.1. or 7.1.2, NDSU employees must within three business days notify the Equal Opportunity and Title IX Compliance Office. Employees are encouraged to complete and submit an NDSU Sexual Misconduct Report Form (Report Form) to the Equal Opportunity and Title IX Compliance Office. The Report Form is available online at https://ndstate.co1.qualtrics.com/jfe/form/SV_cYXmO1BTRKZi8HY or by contacting the Equal Opportunity and Title IX Compliance Office in Suite 201, Old Main, NDSU Main Campus, 701-231-7708, ndsu.eoaa@ndsu.edu. The Equal Opportunity and Title IX Compliance Office can assist with completing the Report Form as needed. The Equal Opportunity and Title IX Compliance Office is the official university record holder for documentation under this policy.
- 7.3 Upon receipt of a report of a violation, NDSU will initiate its complaint procedures under either Policy 156 or Policy 156.1.

8. INTERIM MEASURES

- 8.1 Upon receipt of a complaint or as otherwise informed of sexual harassment, gender-based sexual harassment, or sexual misconduct NDSU will, where appropriate, take interim measures to stop, prevent, and remedy the harm to those affected by the prohibited conduct. Interim measures are intended to be protective and/or remedial for one or both parties, and may be temporary or permanent and may be modified by the University as circumstances change.

Interim measures may include, but are not limited to, a no contact directive, a safety plan, residence modifications, academic modifications and support, work schedule and/or location modifications, parking modifications, referral to counseling or other health services, administrative leave, temporary suspension, or any other measure deemed appropriate by NDSU.

- 8.2 Interim measures may be kept in place through the conclusion of any review, investigation, or appeal process.
- 8.3 Interim measures can be implemented regardless of whether or not the reporting party pursues formal university or criminal action.

9. PRIVACY AND CONFIDENTIALITY

- 9.1 Confidentiality will be maintained to the extent possible - NDSU will keep the complaint and its investigation confidential to the extent that it is possible without compromising NDSU's commitment and obligation to investigate allegations of sexual misconduct, to protect the university community, and to the extent allowed by law. As NDSU has an obligation to maintain an environment free of sex discrimination and sexual misconduct, most employees have mandatory reporting and response

obligations and may not be able to honor a reporting party's request for confidentiality. The Equal Opportunity and Title IX Compliance Director will evaluate requests for confidentiality. However, confidentiality cannot be guaranteed as NDSU may have an obligation to take specific actions once aware of alleged conduct.

- 9.2 NDSU is committed to protecting the privacy of all individuals involved in the investigation and resolution of a report under this policy. Information related to a report of prohibited conduct will be shared with a limited circle of NDSU employees who "need to know" in order to assist in the assessment, investigation, and resolution of the report. All employees who are involved in NDSU's response to reports of prohibited conduct receive specific training and guidance about sharing and safeguarding private information in accordance with state and federal law.
- 9.3 Confidential support resources - If seeking a confidential resource, NDSU students may contact the [NDSU Counseling Center](#) (212 Ceres Hall, NDSU Main Campus, 701-231-7671), the [Student Health Service](#) (Wallman Wellness Center, NDSU Main Campus, 701-231-7331), and the Sexual Assault Prevention and Advocacy Coordinator (Wallman Wellness Center, NDSU Main Campus, 701-231-7331). The Employee Assistance Program, as described in NDSU Section 134, is a confidential resource for NDSU employees. Additionally, graduate students and faculty may also contact the Office of the Ombudsperson (Library Room 20C, NDSU Main Campus, 701-231-5114).

10. TRAINING AND EDUCATION

- 10.1 This policy is published on the university's website and information on this policy and related policies is included in mandatory training for new students and employees.
- 10.2 **Mandatory training** - All new NDSU employees must complete in-person equal opportunity and non-discrimination training within 60 days of their employment start date. Additionally, all fulltime employees must complete in-person equal opportunity and non-discrimination training every three years.
- 10.3 Employees are encouraged to contact the Equal Opportunity and Title IX Compliance Office with any questions they may have related to sexual harassment, gender-based sexual harassment, or sexual misconduct at NDSU, including inquiries regarding their mandatory reporting responsibilities.
- 10.4 University employees and administrators responsible for implementing this policy, including the Title IX Coordinator, deputy coordinators, supervisors, managers, department heads, deans, directors, investigators, review committee members, and hearing officers, must receive annual training about offenses, investigatory procedures, due process requirements, and university policies related to or described in this policy.

11. FREE EXPRESSION AND ACADEMIC FREEDOM

NDSU is committed to free expression and principles of academic freedom. Vigorous discussion and debate, as well as free inquiry and free expression, are essential to NDSU's educational mission and are critical to diversity and intellectual life. NDSU is equally committed to providing a safe, healthy, and non-discriminatory learning, living, and working environment for all members of its university community. Discrimination, harassment, and retaliation against members of the University community are not protected expression or the

proper exercise of academic freedom. When resolving violations of this policy, NDSU will respond appropriately while respecting the principles of free expression and academic freedom.

12. DEFINITIONS

The terms and definitions used here are important components of University policy. The definitions are intended to give meaning to these terms in the context of the University community. Criminal and other applicable state laws may use different definitions. Section 13 provides North Dakota criminal law terms and definitions. For definitions specifically related to Title IX Complaints, please see [Policy 156.1: Title IX Complaint Procedures](#) and [State Board Higher Education Policy 520: Title IX - Sexual Harassment](#).

- 12.1 Complicity - Complicity is any act taken with the purpose of aiding, facilitating, promoting or encouraging the commission of an act of Prohibited Conduct by another person.
- 12.2 Consent – Mutually understandable words or actions, actively communicated both knowingly and voluntarily, that clearly conveys permission for a specific activity.

Consent must be all of the following:

- 1) **Knowing:** Consent must demonstrate that all individuals understand, are aware of, and agree to the “who” (same partners), “what” (same acts), “where” (same location), “when” (same time), and “how” (the same way and under the same conditions) of the sexual activity.
- 2) **Active:** Consent must take the form of “clearly understandable words or actions” that reveal one’s expectations and agreement to engage in specific sexual activity. This means that silence, passivity, submission, or the lack of verbal or physical resistance (including the lack of a “no”) should not – in and of themselves – be understood as consent. Consent cannot be inferred by an individual’s manner of dress, the giving or acceptance of gifts, the extension or acceptance of an invitation to go to a private room or location, or going on a date.
- 3) **Voluntary:** Consent must be freely given and cannot be the result of force (violence, physical restraint, or the presence of a weapon), threats (indications of intent to harm, whether direct or indirect), intimidation (extortion, menacing behavior, bullying), coercion (undue pressure) or fraud (misrepresentation or material omission about oneself or the present situation in order to gain permission for sexual or intimate activity).
- 4) **Present and ongoing:** Consent must exist at the time of the sexual activity. Consent to previous sexual activity does not imply consent to later sexual acts; similarly, consent to one type of sexual activity does not imply consent to other sexual acts. Consent may also be withdrawn at any time – provided the person withdrawing consent makes that known in clearly understandable words or actions.

Consent is not present when an individual does not have the capacity to give consent, voluntarily or involuntarily, due to age, physical condition, or disability that impairs the individual’s ability to give consent. Reasons why one could lack capacity to give consent due to a physical condition include, but are not limited to, incapacitation due to consumption of drugs or alcohol (voluntarily or involuntarily) or being in a state of unconsciousness, sleep, or other state in which the person is unaware that sexual activity is occurring. Consent is not effective if it results from: (a) the use of physical violence, (b) threats, (c)

intimidation, (d) coercion, (e) incapacitation, or (f) any other factor that would eliminate an individual's ability to exercise their own free will to choose whether or not to engage in sexual activity. When determining whether consent was present, the University will consider whether a reasonable person in the same position should have known whether the other party could or could not consent to the sexual activity.

- 12.2.1. Physical violence means that a person is exerting control over another person through the use of physical force. Examples of physical violence include hitting, punching, slapping, kicking, restraining, choking, and brandishing or using any weapon.
- 12.2.2. Threats are words or actions that would compel a reasonable person to engage in unwanted sexual activity. Examples include threats to harm a person physically, to reveal private information to harm a person's reputation, or to cause a person academic or economic harm.
- 12.2.3. Intimidation is an implied threat that menaces or causes reasonable fear in another person. A person's size, alone, does not constitute intimidation; however, a person's size may be used in a way that constitutes intimidation (e.g., blocking access to an exit).
- 12.2.4. Coercion is the use of an unreasonable amount of pressure to gain sexual access. Coercion is more than an effort to persuade, entice, or attract another person to have sex. When a person makes clear a decision not to participate in a particular form of sexual contact or sexual intercourse, a decision to stop, or a decision not to go beyond a certain sexual interaction, continued pressure can be coercive. In evaluating whether coercion was used, the University will consider: (i) the frequency of the application of the pressure, (ii) the intensity of the pressure, (iii) the degree of isolation of the person being pressured, and (iv) the duration of the pressure.
- 12.2.5. Incapacitation is a state of being that prevents an individual from having capacity to give consent. Incapacitation means that a person lacks the ability to make informed, rational judgments about whether or not to engage in sexual activity. A person who is incapacitated is unable, temporarily or permanently, to give consent because of mental or physical helplessness, sleep, unconsciousness, or lack of awareness that sexual activity is taking place. A person may be incapacitated as a result of the consumption of alcohol or other drugs, or due to a temporary or permanent physical or mental health condition. Consent cannot be gained by taking advantage of the incapacitation of another, where the person initiating sexual activity knew or reasonably should have known that the other was incapacitated.
- 12.3 Discrimination Based on Pregnancy or Parental Status - Excluding persons from, denying them the benefit of, or discriminating against them due to their pregnancy or status as a parent. To ensure a pregnant student's access to their education, faculty and staff must make modifications that are reasonable and responsive to the student's temporary pregnancy status. Faculty that have their own policies about class attendance and make-up work must make sure their policies are not discriminatory.
- 12.4 Gender-Based Harassment – Verbal, nonverbal, graphic, or physical aggression, intimidation, or hostile conduct based on sex, sex-stereotyping, sexual orientation or gender identity, but not involving conduct of a sexual nature, when such conduct is sufficiently severe, persistent, or pervasive that it interferes with or limits a person's ability to participate in or benefit from the University's education or work programs or activities. For example, persistent disparagement of a person based on a perceived

lack of stereotypical masculinity or femininity or exclusion from an activity based on sexual orientation or gender identity also may violate this Policy.

- 12.5 Intimate Partner Violence – Any act of violence or threatened act of violence that occurs between individuals who are involved or have been involved in a sexual, dating, spousal, domestic, or other intimate relationship. Intimate Partner Violence is an offense that meets the definition of domestic violence or dating violence:
- 12.5.1. Domestic Violence – Abuse or violence committed by a current or former spouse or intimate partner of the Reporting Party, by a person with whom the Reporting Party shares a child in common or by a person with whom the Reporting Party is cohabiting (or has cohabited) with a spouse or intimate partner.
 - 12.5.2. Dating Violence – Abuse or violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Reporting Party. The existence of such a relationship will be determined based on the Reporting Party’s statement and with consideration of the type and length of the relationship and the frequency of interaction between the persons involved in the relationship. Two people may be in a romantic or intimate relationship regardless of whether the relationship is sexual in nature; however, neither a casual acquaintance nor ordinary fraternization between two individuals in a business or social context shall constitute a romantic or intimate relationship. This definition does not include acts covered under domestic violence.
 - 12.5.3. Intimate Partner Violence may include any form of Prohibited Conduct under this policy, including Sexual Assault, Stalking, and Physical Assault (as defined below).
 - 12.5.4. Physical Assault is threatening or causing physical harm or engaging in other conduct that threatens or endangers the health or safety of any person. Physical Assault will be addressed under this policy if it involves Sexual or Gender-Based Harassment, Intimate Partner Violence, or is part of a course of conduct under the Stalking definition.
- 12.6 Public Indecency – Engaging in private or sexual acts in a publicly viewable location, such that it is offensive to accepted standards of decency including, but not limited to: 1) Exposing one’s genitals or private areas; 2) Public urination; 3) Defecation; and/or 4) Public sex acts.
- 12.7 Reporting Party – A person or entity (in the case of the university) who submits a complaint alleging a violation of this policy.
- 12.8 Responding Party – Generally, the Responding Party is the person who is alleged to be responsible for the Prohibited Conduct alleged in a complaint.
- 12.9 Retaliation – Any adverse action taken against a person for making a good faith report of Prohibited Conduct, assisting someone making such a report, or participating in any proceeding under this policy. Retaliation includes threatening, intimidating, harassing, coercing or any other conduct that would discourage a reasonable person from engaging in activity protected under this policy. Retaliation may be present even where there is a finding of “no responsibility” on the allegations of Prohibited Conduct. Retaliation does not

include good faith actions lawfully pursued in response to a report of Prohibited Conduct.

12.10 Sexual Assault – Any type of sexual contact or behavior that occurs without the explicit consent of the recipient. Sexual assault includes nonconsensual sexual contact and nonconsensual sexual intercourse.

12.10.1. Nonconsensual Sexual Contact – Any intentional sexual touching, however slight, with any object or body part without consent. Sexual Contact includes:

- 1) Intentional contact with the breasts, buttock, groin, or genitals whether clothed or unclothed;
- 2) Touching another with any of these body parts;
- 3) Making another touch you or themselves with or on any of these body parts; or
- 4) Any other intentional bodily contact in a sexual manner.

12.10.2. Nonconsensual Sexual Intercourse – Any sexual penetration or intercourse, however slight, with any object or body part, by a person upon another person that is without consent and/or is effectuated by force. Sexual intercourse includes

- 1) Vaginal or anal penetration by a penis, tongue, finger, or object; or
- 2) Any contact, no matter how slight, between the mouth of one person and the genitalia of another person.

12.10.3. The following offenses are examples of sexual assault: rape, incest, fondling, and statutory rape.

- 1) Rape – The 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 consent of the Reporting Party.
- 2) Incest – Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- 3) Fondling – The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the Reporting Party, including instances where the Reporting Party is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.
- 4) Statutory Rape – Non-forcible sexual intercourse with a person who is under the statutory age of consent.

12.10.4. Sexual violence, including rape, sexual assault, and domestic and dating violence, is a form of sexual harassment.

12.11 Sex Discrimination – An act that deprives a member of the university community of their rights of access to campuses and facilities and of participation in education, services, programs, operations, employment, benefits, or opportunities with the university on the basis of the person's sex (including pregnancy, sexual orientation, and gender identity/expression) or having a policy or practice that has a disproportionately adverse impact on protected class members.

12.12 Sexual Exploitation - Taking nonconsensual or abusive sexual advantage of another for the benefit of oneself or a third party, and that behavior does not otherwise fall within the definitions of Sexual Harassment, Non-Consensual Sexual Intercourse or Non-Consensual Sexual Contact. Sexual Exploitation includes, but is not limited to:

- 1) Recording, distribution, or dissemination of sexual or intimate images or recordings of another person without that person's consent;
- 2) Allowing third parties to observe private sexual activity from a hidden location (e.g., closet) or through electronic means (e.g., Skype or livestreaming of images);
- 3) Engaging in voyeurism (watching private sexual activity without the consent of the participants or viewing another person's intimate parts, including genitalia, groin, breasts or buttocks, in a place where that person would have a reasonable expectation of privacy);
- 4) Causing the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity;
- 5) Exposing one's genitals in non-consensual circumstances; inducing another to expose their genitals or private areas;
- 6) Prostituting or trafficking another person; or
- 7) Exposing another person to a sexually transmitted disease (STD), infection (STI), or virus (HIV) without the other's knowledge.

12.13 Sexual Harassment – Unwelcome sexual advances, requests for sexual favors, or other unwanted conduct of a sexual nature, whether verbal, written, graphic, physical or otherwise, when:

- 1) Submission to such conduct is made, either explicitly or implicitly, a term or condition of a person's employment, academic standing, or participation in any University programs and/or activities or is used as the basis for University decisions affecting the individual (quid pro quo harassment); or
- 2) Such conduct is sufficiently severe, persistent, or pervasive that it unreasonably interferes with, limits, or deprives an individual from participating in or benefitting from the University's education or employment programs and/or activities (hostile environment).

12.13.1. Quid pro quo sexual harassment can occur whether a person resists and suffers the threatened harm, or the person submits and avoids the threatened harm. Both situations could constitute sexual harassment.

12.13.2. A hostile environment can be created by persistent or pervasive conduct or by a single severe episode. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment. A single incident of Sexual Assault, for example, may be sufficiently severe to constitute a hostile environment. In contrast, the perceived offensiveness of a single verbal or written expression, standing alone, is typically not sufficient to constitute a hostile environment.

12.14 Sexual Misconduct – A broad term encompassing all forms of gender-based harassment or discrimination and unwelcome behavior of a sexual nature. The term includes sexual harassment, gender-based harassment, nonconsensual sexual contact, nonconsensual sexual intercourse, sexual assault, sexual exploitation, stalking, public indecency, intimate partner violence, sexual violence, and other misconduct based on sex.

12.15 Stalking – A course of unwelcome conduct directed at a specific person that would cause a reasonable person to fear for their own safety or the safety of others or would cause that person to suffer substantial emotional distress. Course of conduct means two or more acts, including but not limited to acts in which a person directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person or interferes with a person's property. Reasonable person means a reasonable person under similar circumstances and similarly

situated to the Reporting Party. Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

12.15.1. Stalking includes “Cyber-Stalking,” a particular form of stalking in which a person uses electronic media, such as the internet, social networks, blogs, cell phones, texts, or other similar devices or forms of contact.

12.16 Examples of inappropriate behavior that may constitute Sexual Harassment or Sexual Misconduct include, but are not limited to the following, when a part of conduct that meets the standard set forth above:

- 1) Sexual teasing, jokes, remarks, or questions;
- 2) Sexual looks and gestures;
- 3) Sexual innuendoes, humor, or stories;
- 4) Communicating in a manner with sexual overtones;
- 5) Inappropriate comments about dress or physical appearance;
- 6) Inappropriate discussion of private sexual behavior;
- 7) Gifts, letters, calls, emails, online posts, or materials of a sexual nature;
- 8) Sexually explicit visual material (calendars, posters, cards, software, internet, or other multimedia materials);
- 9) Sexual favoritism;
- 10) Pressure for dates or sexual favors or forced sexual activity;
- 11) Unwelcome sexual advances;
- 12) Unwelcome physical contact (touching, patting, stroking, rubbing);
- 13) Nonconsensual video or audio-taping of sexual activity;
- 14) Exposing one’s genitals in non-consensual circumstances; inducing another to expose their genitals or private areas;
- 15) Obscene gestures;
- 16) Sexual graffiti, pictures, or posters;
- 17) Sexually explicit profanity;
- 18) Domestic or dating violence;
- 19) E-mail, texting ("sexting") and Internet use that violates this policy;
- 20) Nonconsensual sexual intercourse, sexual assault, or rape; or
- 21) Other gender-based threats, discrimination, intimidation, hazing, bullying, stalking, or violence.

13. RESOURCE OF RELEVANT TERMS AND DEFINITIONS IN NORTH DAKOTA

Because some of the offenses in this Policy are also crimes under State law, the University provides this summary of relevant North Dakota terms and definitions as a resource. Community members who are involved in legal action related to a sexual crime or offense under North Dakota law should consider speaking with an attorney for specific information about relevant State law and legal advice.

13.1 The North Dakota Human Rights Act prohibits discrimination in employment on the basis of sex, including pregnancy, childbirth and related medical conditions (ND Cent. Code Sec. 14-02.4-01 et seq.). Sexual harassment is expressly included in the Act's definition of discrimination based on sex. The Act applies to all employers in the state. It is also unlawful under the state law to retaliate or threaten to retaliate against a person who files a complaint of sexual harassment, or testifies or assists in a proceeding or investigation.

13.2 Consent is defined in North Dakota as follows ([NDCC 12.1-17-08](#)):

1. When conduct is an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury by all persons injured or threatened by the conduct is a defense if:
 - (a) Neither the injury inflicted nor the injury threatened is such as to jeopardize life or seriously impair health;
 - (b) The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport; or
 - (c) The conduct and the injury are reasonably foreseeable hazards of an occupation or profession or of medical or scientific experimentation conducted by recognized methods, and the persons subjected to such conduct or injury, having been made aware of the risks involved, consent to the performance of the conduct or the infliction of the injury.

2. Assent does not constitute consent, within the meaning of this section, if:
 - (a) It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense and such incompetence is manifest or known to the actor;
 - (b) It is given by a person who by reason of youth, mental disease or defect, or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or
 - (c) It is induced by force, duress, or deception.

13.3 Domestic violence is defined in North Dakota ([NDCC 14-07.1-01](#)) as physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members. The code defines family or household member as a spouse, family member, former spouse, parent, child, persons related by blood or marriage, persons who are in a dating relationship, persons who are presently residing together or who have resided together in the past, persons who have a child in common regardless of whether they are or have been married or have lived together at any time, and, for the purpose of the issuance of a domestic violence protection order, any other person with a sufficient relationship to the abusing person as determined by the court. As the State of North Dakota includes persons who are in a dating relationship under the state's domestic violence laws, any violence committed by dating parties would fall under domestic violence.

13.4 [NDCC 12.1-17-07.1](#) states that no person may intentionally stalk another person. The state defines "stalk" as engaging in an intentional course of conduct directed at a specific person which frightens, intimidates, or harasses that person, and that serves no legitimate purpose. The course of conduct may be directed toward that person or a member of that person's immediate family and must cause a reasonable person to experience fear, intimidation or harassment. The state defines course of conduct as a pattern of conduct consisting of two or more acts evidencing a continuity of purpose. The term does not include constitutionally protected activity. The state defines immediate family as a spouse, parent, child, or sibling. The term also includes any other individual who regularly resides in the household or who within the prior six months regularly resided in the household.

New	September 29, 1980
Amended	October 7, 1987
Amended	June 28, 1991
Amended	April 1992
Amended	October 1997
Amended	August 1999
Amended	September 2000
Amended	September 2007
Amended	January 2008
Amended	February 2009
Housekeeping	April 14, 2016
Amended	January 16, 2017
Housekeeping	June 22, 2017
Housekeeping	November 9, 2017
Housekeeping	April 26, 2019
Amended	August 14, 2020
Amended	December 14, 2020
Amended	March 29, 2022
Housekeeping	February 2, 2023