

PROCEDURES FOR SEXUAL MISCONDUCT ALLEGATIONS THAT ALLEGEDLY OCCURRED BEFORE AUGUST 14, 2020 (NEW TITLE IX REGULATIONS)

Intent of this Standard Operating Procedure: Regardless of when they are reported to the University, allegations of Sexual Misconduct that are alleged to have occurred prior to August 14, 2020 will be assessed using the substantive definitions and jurisdiction of USU Policies 305 and 339 that were in effect prior to August 13, 2020 (outlined below). In general terms, with the exception of definitions and jurisdictional provisions, such allegations will be addressed under the grievance process outlined in USU Policy 339 (effective August 14, 2020) and the Sexual Misconduct Procedures that are in effect on the date the report is made to the Title IX Coordinator.

Standard Operating Procedure: Certain core concepts and provisions are listed below. These concepts and provisions apply to allegations of Sexual Misconduct that are alleged to have occurred prior to August 14, 2020, and provisions from Policies 339, 339A, and 339B that are inconsistent with the below concepts and provisions do not apply. Additionally, all non-inconsistent concepts and provisions from Policies 339, do not apply to allegations of sexual misconduct that are alleged to have occurred prior to August 14, 2020. The University's response to allegations of sexual misconduct that are alleged to have occurred prior to August 14, 2020 must comply with the law and regulations in effect prior to August 14, 2020, and nothing in this Standard Operating Procedure shall require a non-compliant response.

Applicable Portions of Policy 339: Sexual Misconduct (Effective May 6, 2016 – August 13, 2020)

339.1 POLICY

Utah State University is committed to providing an environment free from gender-based discrimination and harassment. Utah State University has an established policy to address sexual harassment in the workplace and academic setting.

Sexual harassment of any employee, student, or recipient of the services of this University is prohibited. Anyone who feels that he/she is the victim of sexual harassment or any supervisor or manager who is made aware of an alleged incident of sexual harassment must take immediate action to resolve the matter. Any individual may contact the University's Affirmative Action/Equal Opportunity (AA/EO) Office for available options and resources or clarification, leading to an informal resolution of the matter. Sexual misconduct complaints may not be resolved using informal methods of compromise or settlement. If an informal resolution is not accomplished or is not possible, further action, including the filing of a complaint and undertaking a formal inquiry/investigation, may be taken to facilitate a resolution pursuant to this policy.

339.2 REFERENCES

- Titles VI and VII of the Civil Rights of 1964
- Title IX of the Higher Education Amendments of 1972

- Campus Sexual Violence Elimination Act (SaVE) – reauthorization of Violence Against Women Act of 2013
- Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act and others as applicable.

339.3 DEFINITIONS

3.1 Definitions of Sexual Harassment:

Preponderance of Evidence: Means that it is more likely than not that a policy violation occurred and it is the standard of evidence used in investigations of discrimination and harassment at Utah State University.

Complainant: A person making allegations of discrimination or harassment.

Respondent: A person alleged to have committed discrimination or harassment.

Appropriate Administrator: The administrator at the dean/vice presidential level with direct line responsibility over the college, department, office, agency or other operational unit of the university in which the claimed discrimination or harassment occurred.

Sexual Harassment: No member of the Utah State University community shall engage in sexual harassment.

For the purposes of this policy sexual harassment is defined as unwelcome sexual advances, requests for sexual favors or other verbal, written or physical conduct of a sexual nature, when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or status as a student in a course, program or activity;
- Submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions affecting an individual; or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance, or of creating an intimidating, hostile or offensive environment for working or learning. Sexual harassment encompasses any sexual attention that is unwanted. Examples of the verbal, non-verbal and physical conduct prohibited by the section above include, but are not limited to:
 - Unwelcome comments about a person's clothing or body;
 - Coercion for a date or a romantic or intimate relationship;
 - Unwelcome touching, kissing, hugging or massaging;
 - A course of unwanted attention that is repeated or obsessive;
 - Giving letters, personal gifts, and/or materials of a sexual nature;
 - Use of unwanted force in connection with sexual activity or attempted sexual activity;
 - Subtle pressure for sexual activity;
 - Unwelcome remarks about a person's gender or sexual orientation based on gender stereotypes;
 - Videotaping or photographing of activity of a sexual or private nature without the consent of the person(s) being videotaped or photographed;

- Displaying sexually suggestive visuals;
- Use of e-mail, the Internet or other forms of digital media to facilitate any of the conduct listed above.

Consent: Consent must be informed, freely given and mutual among all participants involved. If coercion, intimidation, threats, and/or physical force is used, there is no consent. A person cannot give consent if he or she lacks the ability to understand the decision because of disability, is sleeping and/or unconscious, consumption of alcohol or drugs or if he or she is unwillingly restrained. The use of alcohol or drugs does not justify or excuse sexual harassment/misconduct and never makes someone at fault for experiencing sexual harassment/misconduct. Consent must be ongoing, throughout each instance of sexual activity, and for each form of sexual contact. Consent to one form of sexual contact does not constitute consent to all forms of sexual contact. For example, an individual may agree to kiss but choose not to engage in touching of the intimate parts or sexual intercourse. Consent may be withdrawn at any time. An individual who seeks to withdraw consent must communicate through clear words or actions a decision to cease the sexual activity. Once consent is withdrawn, the sexual activity must cease immediately. In the state of Utah, a 16 or 17 year-old cannot consent to sexual activity if the other person is ten (10) or more years older than the minor. The University offers the following guidance on assessing consent and incapacitation:

- Consent consists of an outward demonstration indicating that an individual has freely chosen to engage in sexual activity. Consent is demonstrated through mutually understandable words and/or actions that clearly indicate a willingness to engage freely in sexual activity. Relying on non-verbal communication can lead to misunderstandings. Consent may not be inferred from silence, passivity, lack of resistance or lack of active response alone. In the absence of an outward demonstration, consent does not exist. If at any time it is reasonably apparent that either party is hesitant, confused or uncertain, both parties should stop and obtain mutual verbal consent before continuing sexual activity.
- A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be mutually understandable communication that clearly indicates willingness to engage in sexual activity each time such activity occurs.
- Consent does not exist if it results from the use or threat of physical force, intimidation, or coercion, or any other factor that would eliminate an individual's ability to exercise their own free will to choose whether or not to have sexual contact.
- A person who is incapacitated is not able to make informed decisions or be aware of their consequences and therefore is incapable of giving consent. Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless due to drug or alcohol consumption, either voluntarily or involuntarily, or the individual is unconscious, asleep or otherwise unaware that the sexual activity is occurring. In addition, individuals are incapacitated if they demonstrate that they are unaware of where they are, how they got there, or why or how they became engaged in a sexual interaction. Some indicators of incapacitation may include, but are not limited to, lack of control over physical movements, lack of awareness of

circumstances or surroundings, or the inability to communicate for any reason. An individual may experience a blackout state in which they appear to be giving consent, but do not actually have conscious awareness or the ability to consent. It is especially important, therefore, that anyone engaging in sexual activity be aware of the other person's level of intoxication or impairment. Being intoxicated or impaired by drugs or alcohol is never an excuse for sexual misconduct and does not excuse one from the responsibility to obtain consent. It is not an excuse that the party initiating sexual contact was intoxicated and therefore did not realize the incapacity of the other.

- Inducing incapacitation for sexual purposes includes the use of drugs, alcohol or other means with the intent to affect or having an actual effect on the ability of an individual to consent or refuse to consent to sexual contact. A person who is incapacitated is not able to make informed decisions or be aware of his/her consequences and therefore is incapable of giving consent. Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless due to drug or alcohol consumption, either voluntarily or involuntarily, or the individual is unconscious, asleep or otherwise unaware that the sexual activity is occurring. In addition, individuals are incapacitated if they demonstrate that they are unaware of where they are, how they got there or why or how they became engaged in a sexual interaction. Some indicators of incapacitation may include, but are not limited to, lack of control over physical movements, lack of awareness of circumstances or surroundings, or the inability to communicate for any reason. An individual may experience a blackout state in which they appear to be giving consent, but do not actually have conscious awareness or the ability to consent. It is especially important, therefore, that anyone engaging in sexual activity be aware of the other person's level of intoxication or impairment. Being intoxicated or impaired by drugs or alcohol is never an excuse for sexual misconduct and does not excuse one from the responsibility to obtain consent. In evaluating consent cases of alleged incapacitation, the University considers information around two questions: (1) Did the person initiating sexual activity know that the other party was incapacitated? and if not, (2) Should a sober, reasonable person in the same situation have known that the other party was incapacitated? If the answer to either of these questions is YES, consent was absent and the conduct is likely a violation of policy. Incapacitation is a state beyond drunkenness or intoxication. A person is not necessarily incapacitated merely as a result of drinking or using drugs. The impact of alcohol and other drugs varies from person to person. One is not expected to be a medical expert in assessing incapacitation. One must look for the common and obvious warning signs (see above) that show that a person may be incapacitated or approaching incapacitation. One should be cautious before engaging in sexual activity when either party has been drinking alcohol or using other drugs. The introduction of alcohol or other drugs may create ambiguity for either party as to whether consent has been sought or given. If one has doubt about either party's level of intoxication, the safe thing to do is to forego all sexual activity.

Sexual Assault (Intercourse): Any form of vaginal, anal, or oral penetration, however slight, by a penis, object, tongue, or finger without a person's consent; and oral copulation (mouth to genital contact or genital to mouth contact) without a person's consent.

Sexual Assault (Contact): Any intentional sexual touching, without a person's consent (intentional sexual touching may include contact, under or over the clothing, with the breasts, buttocks or groin touching another with any of these body parts; making another person touch any of these body parts under or over clothing; and/or the emission of ejaculate on the clothing or body of another person without that person's consent.

Dating Violence: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant; and where the existence of such a relationship shall be determined based on a consideration of the following factors: a) the length of the relationship, b) the type of relationship and c) the frequency of interaction between the persons involved in the relationship.

Domestic Violence: Violence committed by a) a current or former spouse or intimate partner of the complainant, b) a person with whom the complainant shares a child in common, c) a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, d) a person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction receiving grant monies or e) any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction receiving grant monies.

Stalking: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or to suffer substantial emotional distress. Stalking includes repeatedly following, harassing, threatening, or intimidating another by telephone, mail, electronic communication, social media or any other action, device or method that purposely or knowingly causes substantial emotional distress or reasonable fear of bodily injury or death.

Retaliation: An action taken by an accused individual or an action taken by a third party against any person because that person has opposed any practices forbidden under this policy or because that person has filed a complaint, assisted or participated in any manner in an investigation or proceeding under discrimination/harassment policies. This includes action taken against a bystander who intervened to stop or attempt to stop discrimination and/or harassment. Retaliation includes intimidating, threatening, coercing or in any way discriminating against an individual because of the individual's complaint or participation. An action is generally deemed retaliatory if it would deter a reasonable person in the same circumstances from opposing practices prohibited by the University. USU will take immediate and responsive action to any report of retaliation and may pursue disciplinary action as appropriate.

Confidentiality: Information about incidents of sexual harassment/misconduct may need to be shared with relevant administrators if the University needs to take action for reasons of community safety. In all cases, the wishes of the person initiating the conversation are given full consideration.

- Strictly Confidential Reporting (these conversations are confidential and do not trigger a university action and/or investigation; except in rare, extreme circumstances, nothing will be shared without your permission). You may report to the following campus resources in a strictly confidential setting – for students: Counseling & Psychological Services (CAPS); 435-797-1012; Sexual Assault and Anti-Violence Information Center (SAAVI); 435-797-1510 or 435-797-7273 – for employees: Employee Assistance Program (Ability Assist; 1-800-964-3577 or www.guidanceresources.com) or CAPSA (435-753-2500)
- Mostly Confidential Reporting (these conversations are kept as confidential as possible, but information about incidents of sexual misconduct must be shared with the AA/EO Director/Title IX Coordinator and in some cases with relevant administrators and law enforcement so that action can be taken if necessary for reasons of safety. In planning any response, the wishes of the complainant are given full consideration. Reporting to campus authorities is not the same as reporting to the police; the university process is an administrative procedure, not a criminal/legal procedure.
- Confidential According to State Law (these conversations and the information shared will be treated as confidentially as possible (according to state law). Police reports with personally identifiable information removed may be available to the public upon request. Reporting to law enforcement is not the same as reporting to campus authorities; reporting to law enforcement is a criminal/legal procedure, not an administrative one.

Formal Complaint: Bringing a formal complaint will lead to an investigation. Filing a complaint is often the best way to seek protection from future harm. The student bringing the complaint retains considerable control, although not total, as the process unfolds. Investigations are prompt, objective and thorough. If you file a complaint or are the person the allegations have been made against, you will have an opportunity to participate fully in the investigative process. The timing, components and outcome of any particular investigation will depend upon the facts of the case. Interim Measure(s) The University may implement interim measures as may be appropriate for the individual(s) involved. Even when an individual does not specifically request that protective action be taken, the University may choose to impose interim measures at its discretion to ensure the safety of any individual or to ensure that an investigation can move forward.

3.2 Preponderance of evidence: (<http://aaeo.usu.edu/files/uploads/Definitions.pdf>) – it is more likely than not that a policy violation occurred. This is the standard of evidence used in investigations of discrimination and harassment at Utah State University.

3.3 Administrator: The administrator at the dean/vice president or the department head/director level with direct line responsibility over the college, department, office, agency or other operational unit of the university in which the claimed discrimination or harassment occurred

339.4 PROVISIONS

No member of the Utah State University community shall engage in sexual harassment. For the purposes of this policy sexual harassment is defined as unwelcome sexual advances, requests for sexual favors or other verbal, written or physical conduct of a sexual nature, when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or status as a student in a course, program or activity;
- Submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions affecting an individual; or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance, or of creating an intimidating, hostile or offensive environment for working or learning.

4.1 Examples of Sexual Harassment

Sexual harassment encompasses any sexual attention that is unwanted. Examples of the verbal, non-verbal and physical conduct prohibited by the section above include, but are not limited to:

- Unwelcome comments about a person's clothing or body;
- Coercion for a date or a romantic or intimate relationship;
- Unwelcome touching, kissing, hugging or massaging;
- A course of unwanted attention that is repeated or obsessive;
- Giving letters, personal gifts, and/or materials of a sexual nature;
- Use of unwanted force in connection with sexual activity or attempted sexual activity;
- Subtle pressure for sexual activity;
- Dating Violence;
- Domestic Violence;
- Stalking;
- Sexual Assault;
- Videotaping or photographing of activity of a sexual or private nature without the consent of the person(s) being videotaped or photographed;
- Use of e-mail, the Internet or other forms of digital media to facilitate any of the conduct listed above;

4.2 Awareness and Prevention

Utah State University is committed to the prevention of sexual harassment. Toward this goal, this policy is available to all faculty, staff and students. In addition, the AA/EEO Office shall conduct on-going training in the prevention of sexual harassment for employees and will provide additional training, with specialized focus or to specific groups upon request. Incoming first year students are offered prevention and awareness training through student services.

4.7 Consensual Relationships

Amorous relationships between a faculty member and a student shall be governed by Utah State University Policy 407.1. Amorous relationships between a supervisor and an employee are discouraged due to the imbalance of power that exists. The party with lesser authority or power may fear reprisal or retaliation if he/she rejects the amorous or sexual requests. Should a complaint of sexual harassment be filed, the party with the greater authority may not be able to use perceived mutual consent as the sole defense if the relationship is considered "unwelcome" by the party filing the complaint.

Policy 305: Discrimination Complaints (February 10, 2019 – August 13, 2020)

305.1 POLICY

Utah State University is committed to providing an environment free from harassment and other forms of discrimination based on race, color, religion, sex, gender identity or expression, sexual orientation, national origin, age (40 and older), disability, or status as a protected veteran. Consistent with its prohibition against sex discrimination, Utah State University prohibits and is committed to addressing and preventing sexual violence.

Utah State University employees and students cannot, because of race, color, religion, sex, gender identity or expression, sexual orientation, national origin, age, disability, status as a protected veteran, refuse to hire; discharge; promote; demote; terminate; discriminate in compensation; or discriminate regarding terms, privileges, or conditions of employment, against any person otherwise qualified Employees and students also cannot discriminate in the classroom, residential halls, or in on/off-campus University-sponsored events and activities.

305.2 REFERENCES

- Titles VI and VII of the Civil Rights of 1964
- Title IX of the Higher Education Amendments of 1972
- Sections 503 and 504 of the Rehabilitation Act of 1973
- Americans with Disabilities Act;
- Vietnam Era Veterans' Readjustment Assistance Act of 1974;
- Executive Order 11246 (as amended)
- Campus Sexual Violence Elimination Act (SaVE) – reauthorization of Violence Against Women Act of 2013
- Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act
- Utah Anti-Discrimination Act and others as applicable.

305.3 DEFINITIONS

3.1 Administrator:

The administrator at the dean/vice president or the department head/director level with direct line responsibility over the college, department, office, agency or other operational unit of the university in which the claimed discrimination or harassment occurred.

3.2 Complaint:
An allegation of discrimination/harassment.

3.3 Preponderance of evidence:
(Policy 339) –whether it is more likely than not that a policy violation occurred. This is the standard of evidence used in investigations of discrimination and harassment at Utah State University.

305.4 PROVISIONS

4.1 Complaints

4.1.1

A Complaint is an allegation of discrimination/harassment. Any Utah State University employee, job applicant, or student who feels he or she may have been the victim of discrimination in employment and/or academic-related practices and decisions, unfair employment practice, or sexual harassment may file a Complaint with the Equity Office within 180 calendar days of the last alleged occurrence.

4.1.2

Utah State University employees, students, and third parties may report sexual misconduct to the Equity Office or Utah State University faculty or staff. In order to ensure that Utah State University can do everything possible to provide assistance to students and stop sexual harassment, University employees are required to report information they receive about allegations of sexual misconduct to the Title IX Coordinator.

4.1.3

Alleged incidences of harassment or discrimination occurring outside the complaint timeline also should be brought to the attention of the AA/EO Office for review.

4.1.4

Complaints may also be filed with the Utah Anti-Discrimination Labor Division (UALD) in Salt Lake City, or the Equal Employment Opportunity Commission (EEOC) with regional offices in Phoenix, Arizona. Statutory time limitations will be provided by these organizations.

4.1.5

The Complaint is discussed by the Complainant (employee, student, job applicant) and an employee of the Equity Office. If the information provided by the Complainant is

sufficient to establish that a potential violation of the law has occurred, the Equity Office will explain what options are available to address the alleged violation. The Complainant will then fill out, sign, and date a written complaint form outlining the issues, facts, and circumstances surrounding the alleged discrimination/harassment.

305.5 RETALIATION

Retaliation against an individual who has made a Complaint or has in any way participated in an inquiry/investigation is prohibited.