

04/23/2019

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

JOHN DOE,

Plaintiff,

v.

WASHINGTON AND LEE
UNIVERSITY,

Defendants.

Civil Action No. 6:19CV00023

COMPLAINT

Plaintiff John Doe¹ (“John” or “Plaintiff”), by his attorneys, files this complaint against Defendant Washington and Lee University (“W&L” or “the University”), and alleges as follows:

THE NATURE OF THIS ACTION

1. John has filed this lawsuit against W&L for unlawful gender discrimination and retaliation in violation of federal law, breach of implied contract, and negligence resulting from the University’s grievous mishandling of a false accusation of sexual misconduct brought against John by a female W&L student (referred to herein as “Jane Roe” or “Jane”) in John’s sophomore year at W&L. W&L wrongly found John responsible for the alleged misconduct after a flawed and discriminatory investigation, hearing, and appeal process. W&L sanctioned John with a one-term suspension effective May 21, 2017, after which he would be eligible to return to W&L.

¹ Contemporaneously with the filing of this complaint, John has filed a Motion for Permission to Proceed Under Pseudonym. As set forth in the Motion, John is entitled to proceed anonymously because of the highly sensitive nature of the disciplinary proceeding against him that forms the basis for his Complaint, and the fact that W&L is fully aware of his identity and will not be prejudiced in any way. John also seeks to maintain the privacy rights of his accuser and other student-witnesses by requesting permission to identify them anonymously.

2. But, by late June 2017, W&L was aware that John was intent on asserting his rights under Title IX. W&L has retaliated against John in violation of Title IX by denying him reinstatement.

3. In the nearly two years since then, spanning six academic terms, W&L has refused to accept John back on campus as a student in good standing, even though John fulfilled all the requirements that the University initially set forth for his reinstatement, including participating in substance and sexual abuse counseling and providing the University with an evaluation from his treating psychologist, a Ph.D. trained professional with over 30 years of experience and practice in the areas of substance abuse and relationship issues.

4. Based on multiple weekly sessions with John and several assessment questionnaires, the psychologist concluded that John posed no danger of sexual or alcohol abuse (*i.e.*, “he does not present as a sexual predator and poses no danger to the other students,” his “alcohol consumption is consistent with his peers,” he is aware of “the importance of setting limits and situations that could be fraught with risk after drinking”), and that John “is able to comply with the requirements of his re-instatement.”

5. John also provided W&L with his own reinstatement essays, as well as letters of recommendation in support of his reinstatement from the priest who supervised John’s volunteer activities with a local parish and from his direct supervisor at his former high school where John organized fund drives for the school’s food pantry and worked with freshmen groups on volunteer service activities.

6. Finally, John provided W&L with information concerning his five-year employment history with a summer camp, his work with a realty company assisting with rental property listings, and more recently, his employment with a national department store chain.

7. All to no avail. W&L has denied reinstatement for the past two years, continually adding new, previously undisclosed “requirements” to justify its denials.

8. As a result of W&L’s wrongful conduct in the disciplinary proceeding and the unconscionably prolonged reinstatement period, John, though innocent of any wrongdoing, has lost his reputation, his ability to complete his undergraduate degree, his post-graduate opportunities, and his employment and career prospects.

9. The motivation behind W&L’s finding against John and its refusal to reinstate him after he clearly demonstrated his fitness to return is in plain view. As alleged in detail below, W&L faced a complaint and investigation by the Department of Education, Office for Civil Rights (“OCR”), into W&L’s alleged systemic mishandling of sexual assault complaints brought by female students. The OCR investigation placed the University under intense pressure to treat male students accused of sexual assault by female students less favorably than their accusers and to find them responsible.

10. In John’s case, he was subjected to less favorable treatment in crucial ways in every phase of the proceeding.

11. Jane Roe’s complaint alleged that, on the night in question, she and John (who were sophomores and had been friends during their time at W&L) engaged for the first time in consensual sexual activity, including mutual kissing and touching, and oral sex which she performed briefly on John. Although the two then engaged in consensual sexual intercourse, Jane claimed the next day that she had not consented to the intercourse, because she fell asleep and had no memory of it.

12. She also claimed she would only consent to sexual intercourse with a partner with whom she wanted a relationship, and John did not fit that criterion. She acknowledged she had consented to all the sexual activity before intercourse.

13. Jane's claim to have fallen asleep and her alleged lack of memory raised obvious evidentiary questions about incapacitation: Had she consumed too much alcohol, so that she lacked capacity to give consent? Or, had she consumed only a moderate amount of alcohol (as she herself claimed), but because she had also taken her prescribed antidepressant medication, had that combination caused her to experience a medical condition known as "black out," during which she would appear to be normal and functioning to John and others observing her, but as to which she had no memory? If that were the case, John would have reasonably believed Jane had consented to the activity.

14. But, if neither excess alcohol consumption nor alcohol-and-drug interaction caused Jane's memory loss, then Jane's story that she simply "fell asleep" and had no memory of the intercourse would not be credible. How could she possibly explain why she did not wake up from her sleep at the time the intercourse occurred?

15. W&L's lead investigator on the case, Title IX Coordinator Lauren Kozak, and co-investigator Jason Rodocker, Associate Dean of Students, raised the incapacitation question with the parties and two witnesses who had personally observed Jane Roe at different times on the night in question.

16. These witnesses told the investigators Jane Roe did not appear drunk, incapacitated, or unable to function or to know her whereabouts. One of the witnesses, identified as Witness A in the Investigative Report, had engaged in consensual sexual intercourse with Jane Roe earlier that same evening. He told the investigators Jane seemed fine. The other witness

was the driver who took Jane back to her room after her time with Witness A. He told the investigators Jane appeared sober.

17. The investigators found no evidence that Jane had been illicitly drugged at any time by anyone that evening. Jane herself told the investigators she was not drunk or incapacitated. John told the investigators that Jane and he discussed having sex, the two agreed he should get a condom, and Jane was fully aware of and an active participant in the sexual intercourse.

18. Despite this cumulative, independent evidence that Jane was neither drunk nor otherwise incapacitated, unable to give consent, or incapable of awakening from sleep upon sexual penetration, a University Counseling Center psychologist, Dr. Janet Boller, met with Jane Roe approximately 12 days before the hearing in the case. Based solely on that one meeting, Boller prepared an expert report in which she concluded that Jane Roe exhibited symptoms of Acute Stress Disorder. The clear implication of the report was that Jane's Acute Stress Disorder was the result of the alleged sexual assault.

19. The investigators accepted the Boller expert report as "medical evidence" relevant to Jane's allegations and sent it to the Hearing Panel for its consideration.

20. It was not until the day before the hearing, when the investigators provided John with a revised hearing packet, that John saw for the first time the Boller expert report. With so little time before the hearing, John had no meaningful opportunity to object to the expert report, or to engage his own rebuttal expert for the hearing.

21. Upon information and belief, subject to discovery in this matter, Jane Roe had been referred to Boller by the investigators.

22. The investigators subjected John to a “surprise” expert report – an expert report by ambush – the effect of which was to bolster Jane’s credibility and counteract the exculpatory evidence on the issue of incapacitation. By so doing, the investigators violated their obligation to remain neutral, objective, and fair to both parties. They accepted “medical evidence” on behalf of one party over the other, and then apparently withheld the evidence from the other party until the eve of the hearing, when it was too late to do anything about it. Such an action indicates that the investigators intentionally treated Jane more favorably than John to his severe detriment.

23. As set forth in this complaint, the investigators not only crossed the line from neutral fact finders into advocates, their advocacy was motivated by gender bias and was fraught with conflicts of interest.

24. Boller was not a neutral, independent expert, and the investigators knew it. As a therapist in the University Counseling Center, she was employed by W&L, an affiliation which could influence her to act in her employer’s best interest. Beyond that, Boller was the University’s designated contact person for the University-sponsored Student Sexual Assault Survivor Support Group. W&L’s Counseling Center web site states that, “[t]his support group is open to students who have experienced a sexual assault and are seeking support in their recovery. Contact Dr. Janet Boller at jboller@wlu.edu for more information.”

25. Thus, Boller’s professional duties at W&L included supporting students who identify themselves as “survivors” of sexual assault, who are overwhelmingly female.

26. In contrast to their conduct in accepting evidence favorable to Jane, the investigators failed to gather potentially exculpatory evidence or seek expert opinion into the possible “memory black out” effect of Jane’s consumption of alcohol in combination with

Lexapro – even though Jane professed to have no memory of the evening after a certain point, but John and other witnesses agreed she did not appear to be intoxicated, incapacitated, or unaware of her surroundings.

27. The investigators also failed to interview other students who had partied with Jane that evening and who might have provided further corroboration of Jane’s lucidity.

28. The three-member Hearing Panel in John’s case relied on gender biased stereotypes and on factually unsupported conclusions to find John responsible for nonconsensual sexual penetration.

29. The Hearing Panel acknowledged it had no objective or factual basis for believing Jane’s story that she did not consent to sexual intercourse because she fell asleep and had no memory of it. Instead, the Panel based its finding of responsibility against John on credibility determinations that exhibited gender bias.

30. For example, the Panel “had trouble” with John’s claim that receiving oral sex from a friend felt “weird,” but that John would proceed to have sexual intercourse with Jane. Based on this flimsy, irrelevant quibble with John’s sexual preferences, the Panel discredited John’s credibility and his version of events.

31. By contrast, the Hearing Panel credited Jane’s story that she would not have consented to sexual intercourse with John because she had a “personal rule” that “she only has full sexual intercourse with partners if she is interested in a relationship,” and “she has never been interested in that type of relationship with the Respondent.”

32. The Hearing Panel accepted Jane Roe’s subjective, unsubstantiated “personal rule” testimony as “consistent and credible.” They accepted *her* testimony on *her* sexual preferences at face value as a sign of *her* “credibility.” Yet, a red flag on Jane’s credibility

regarding her “personal rule” was in the record before the Hearing Panel. The Panel knew from the Investigative Report that Jane Roe had engaged in consensual sexual intercourse earlier that same evening with Witness A.

33. Even though Jane had put her sexual history at issue by claiming she would not have consented to sexual intercourse with John because of her “personal rule” limiting sexual intercourse, the Hearing Panel did not question Jane about Witness A. Nor did the Panel call Witness A to question him about whether Jane had expressed to him an interest in having a relationship.

34. Finally, the Hearing Panel’s ultimate finding that Jane “was not capable of providing consent because she was either asleep or nearly asleep” has no basis in the Policy. The Policy defines the inability to provide consent as follows: “An individual who is physically incapacitated from alcohol or other drug consumption (voluntarily or involuntarily) or is asleep, unconscious, unaware, or otherwise physically helpless is considered unable to give consent.”

35. The fact that a person was “nearly asleep” or that a person was “*either* asleep or nearly asleep” are *not* a basis in the Policy for finding that the person was unable to give consent. The Hearing Panel’s finding is contrary to the plain terms of the Policy.

36. Furthermore, the Hearing Panel did *not* find that Jane Roe was “physically incapacitated from alcohol or other drug consumption” or that she was “unconscious, unaware, or otherwise physically helpless.” The testimony of the parties and witnesses established that Jane had none of these incapacities. Jane herself claimed only that she fell asleep. If that were truly the case, she would have awakened upon sexual penetration. The Hearing Panel’s decision did not mention, much less consider, how it was possible for Jane to simply fall asleep, but to not awaken when John penetrated her.

37. The Appeal Panel's denial of John's appeal is equally unsupportable and inexcusable. The Appeal Panel should have but failed to reverse the Hearing Panel's finding based on the Panel's reliance on a non-existent definition of inability to give consent.

38. Because of W&L's discriminatory actions and omissions during the proceedings, and its arbitrary and retaliatory conduct during the reinstatement period, John has sustained damages to his future education and employment prospects.

39. John brings this action to obtain relief for violations of Title IX of the Education Amendments of 1972, breach of implied contract, and negligence.

THE PARTIES AND JURISDICTION

40. Plaintiff John Doe is, and at all times relevant to this Complaint has been, a natural person, citizen of the United States, and resident of the state of New Jersey. John was a student at W&L from Fall 2015 until Spring 2017.

41. Defendant W&L is a private liberal arts college located in the city of Lexington, Virginia, with its principal place of business located in the Commonwealth of Virginia.

42. This Court has federal question and diversity jurisdiction pursuant to 28 U.S.C. § 1331 and § 1332 because (i) the federal law claim arises under a statute of the United States, and (ii) John and W&L are citizens of different states.

43. This Court has personal jurisdiction over W&L because it is conducting business within the Commonwealth of Virginia.

44. Venue for this action properly lies in this district pursuant to 28 U.S.C. § 1391 because W&L is located in this judicial district and all of the events or omissions giving rise to the claims occurred in this judicial district.

FACTUAL ALLEGATIONS

I. The Standards Under Title IX for Investigating and Adjudicating Allegations of Sexual Misconduct

A. Title IX and its Implementing Regulations Require a Prompt, Equitable, Fair, and Impartial Process for Resolving Sexual Misconduct Complaints

45. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, states that “[n]o 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.”

46. Under U.S. Supreme Court precedent, the meaning of “discrimination” under Title IX is “differential treatment” or “less favorable treatment,” and “covers a wide range of intentional unequal treatment.”

47. Title IX applies to all public and private educational institutions that receive federal funds, including colleges and universities. W&L is a recipient of federal funds and, therefore, is bound by Title IX and its regulations.

48. The Department of Education has issued regulations that require colleges and universities receiving federal funds to establish policies and procedures to address sexual assault, including student-on-student complaints. *See* 62 Fed. Reg. 12034. The guiding principle established by federal regulations is that grievance procedures to resolve such student complaints must be “prompt and equitable.” 34 C.F.R. § 106.8(b).

49. A proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking must “[i]nclude a prompt, fair and impartial process from the initial investigation to the final result.” 34 C.F.R. § 668.46(k)(2)(i).

50. A federally-funded educational institution violates Title IX if it retaliates against a student by taking adverse action against the student in response to the student’s exercise of a

protected right under Title IX.

B. OCR’s 2001 Guidance Instructs Schools That Compliance with Title IX Requires an “Adequate, Reliable, and Impartial Investigation” of Sexual Misconduct Complaints and “Due Process to Both Parties”

51. In 2001, the Education Department’s Office for Civil Rights (“OCR”) issued guidance in a document entitled “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties” (66 Fed. Reg. 5512, Jan. 19, 2001, <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>). The 2001 Guidance identified “a number of elements in evaluating whether a school’s grievance procedures are prompt and equitable,” including whether the procedures provide for:

- “Notice to students . . . of the [school’s] procedure”;
- “Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence”;
- “Designated and reasonably prompt timeframes for the major stages of the complaint process.”

(*Id.* at 20).

52. OCR’s 2001 Guidance further provides that, “[a]ccording due process to both parties involved, will lead to sound and supportable decisions.” (*Id.* at 22) (emphasis added).

53. Complementing Title IX, the Clery Act, as amended in 2013, requires that school disciplinary procedures for alleged sexual misconduct must “provide a prompt, fair, and impartial investigation and resolution.” 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(aa).

54. Regulations implementing the Clery Act provide that campus Title IX proceedings must be “[c]onducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused,” and must give “timely and equal access to the accuser, the

accused, and appropriate officials to any information that will be used during informal or formal disciplinary meetings and hearings.” 34 C.F.R. § 668.46(k).

C. OCR’s 2011 Dear Colleague Letter and 2014 Questions and Answers Pressure Colleges and Universities to Protect and Favor Female Complainants Alleging Sexual Misconduct

55. Starting in 2011, the federal government, including OCR, began to take aggressive steps to combat what it viewed as an epidemic of sexual assault on the nation’s college campuses.

56. On April 4, 2011, without public notice and comment, OCR issued a “significant guidance document” commonly referred to as the 2011 Dear Colleague Letter. (See “2011 Dear Colleague Letter,” Apr. 4, 2011, <http://www.2ed.gov/about/offices/list/ocr/letters/colleagues-201104.pdf>.)

57. The 2011 Dear Colleague Letter reaffirmed OCR’s 2001 Guidance and identified certain procedures “that are critical to achieve compliance with Title IX,” including that schools must ensure “[a]dequate, reliable, and impartial investigation of complaints,” and that both parties “must have an equal opportunity to present relevant witnesses and other evidence.” (*Id.* at 9, 11).

58. The 2011 Dear Colleague Letter, however, instructed that schools “must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred),” and not the “clear and convincing standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred.)” (*Id.* at 11).

59. Given the fact that campus disciplinary proceedings (including W&L’s proceedings) lack key procedural protections provided in court litigation (*e.g.*, discovery, the right to active representation by counsel, rules of evidence, and independent judges and juries), the preponderance standard does not adequately protect accused students’ rights.

60. The 2011 Dear Colleague Letter contained an explicit funding threat to colleges and universities: “When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.” (*Id.* at 16).

61. This portion of the 2011 Dear Colleague Letter has been described as the “first warning shot” that OCR intended to punish any school that failed to handle sexual assault proceedings as OCR wanted. (*See* NPR, “How Sexual Assaults Came to Command New Attention,” Aug. 13, 2014, <http://www.npr.org.2014/08/12/339822696/how-campus-sexual-assaults-came-to-command-new-attention>).

62. The 2011 Dear Colleague Letter focused on protection of women, claiming that “about 1 in 5 women are victims of completed or attempted sexual assault while in college,” and that “the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol.” (2011 Dear Colleague Letter at 2 & n.3).

63. The press release announcing the 2011 Dear Colleague Letter repeated the “1 in 5” statistic and described the “new steps” that OCR was undertaking “to help our nation’s schools, universities and colleges end the cycle of sexual violence on campus.”

64. The overriding purpose of the 2011 Dear Colleague Letter was “to make it easier for victims of sexual assault to make and prove their claims and for the schools to adopt punitive measures in response,” and OCR “demand[ed] that universities do so or face a loss of federal funding.” *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 572 (D. Mass. 2016).

65. In January 2014, the White House put further pressure on colleges and universities to prevent and police sexual violence on their campuses by creating a task force of senior administration officials to coordinate federal enforcement efforts. The task force made

clear that its priority was to protect women's rights over those of men because women were by far the majority of victims of sexual assault and men were the perpetrators of those assaults.

66. The task force's first report, dated April 2014, focused on protection of women, starting with the repeated claim that “[o]ne in five women is sexually assaulted in college.” The task force pressed colleges and universities to provide “[t]rauma-informed training” for their officials, stating that “when survivors are treated with care and wisdom, they start trusting the system, and the strength of their accounts can better hold offenders accountable.” (Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault, <https://www.justice.gov/ovw/page/file/905942/download> (emphasis added)).

67. In April 2014, OCR issued further guidance in the form of *Questions and Answers on Title IX and Sexual Violence* (the “2014 Questions and Answers”). (See <https://www2.ed.gov/about/offices/list/ocr/.../qa-201404-title-ix.pdf>).

68. The 2014 Questions and Answers strongly implied that allowing an accused student to cross-examine his accuser could create a “hostile environment” and put a college or university in violation of Title IX. (*Id.* at 31).

69. Since cases involving alleged sexual misconduct on college campuses overwhelmingly arise from a woman accusing a man, measures that are put in place to protect alleged victims and punish alleged perpetrators necessarily intend a harsher treatment of men.

70. Ultimately, the Justice Department funded a “Start by Believing” campaign under which college and university investigators were trained to investigate cases from an initial presumption of guilt and to write reports “that successfully support the prosecution of sexual assault cases.” (End Violence Against Women International, *Effective Report Writing: Using the Language of Non-Consensual Sex*, at 5,

<https://www.evawintl.org/library/DocumentLibraryHandler.ashx?id=43>; see also Campus Action Kit, Start by Believing, <https://www.startbybelieving.org/wp-content/uploads/2018/08/Campus-Action-Kit.pdf>.

71. On May 1, 2014, as part of its aggressive enforcement, OCR published a list of 55 higher education institutions nationwide that were then under investigation for possible Title IX violations. (<https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>).

72. According to the Chronicle of Higher Education, that number eventually grew to over 500 – and as alleged below, included Washington and Lee. (*Title IX, Tracking Sexual Assault Allegations*, <https://projects.chronicle.com/titleix/>.)

73. The majority of OCR’s investigations and findings have involved alleged violations of the rights of complaining students, who are overwhelmingly female.

74. Numerous rights organizations have spoken out against the legal and financial pressure exerted by OCR to force colleges and universities to adopt inequitable procedures that favored the female complainants and that made it much more likely the accused male students would be found responsible. (*See, e.g.*, prominent Harvard and University of Pennsylvania Law School faculty members asserting that OCR’s new rules violate the due process rights of the accused; Foundation for Individual Freedom in Higher Education (FIRE); and Families Advocating for Campus Equality (FACE).)

D. In September 2017, OCR Withdraws the 2011 Dear Colleague Letter and 2014 Questions and Answers and Reaffirms Title IX’s Implementing Regulations and 2001 Guidance

75. On September 22, 2017, the Department of Education withdrew the 2011 Dear Colleague Letter and 2014 Questions and Answers and put in place OCR interim guidance to redress the lack of “fundamental fairness” that those earlier statements of policy and guidance

had fostered, explaining that “many schools have established procedures for resolving allegations that ‘lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.’” (See *September 22, 2017 Dear Colleague Letter*, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>, at 1).

76. The interim guidance reaffirmed the 2001 Guidance requiring colleges and universities to adopt grievance procedures that provide for “a prompt and equitable resolution of complaints of sexual discrimination, including sexual misconduct.” (See *September 2017 Q&A on Campus Sexual Misconduct*, <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>, at 3).

77. The interim guidance confirmed that, “[i]n every investigation conducted under the school’s grievance procedures, the burden is on the school – not on the parties – to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred,” and that “[a]ny right or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.” (*Id.* at 4).

78. The interim guidance cautioned that schools must avoid discriminatory practices against accused students (who are overwhelmingly male) that had become commonplace at colleges and universities nationwide after the issuance of the 2011 Dear Colleague Letter – *i.e.*, schools (i) must not “restrict[] the ability of either party to discuss the investigation (e.g., through ‘gag orders’),” (ii) must not use “training materials or investigative techniques and approaches” or “[d]ecision-making techniques or approaches” that “apply sex stereotypes or generalizations,” (iii) must “avoid conflicts of interest and biases for or against any party” by investigators or

adjudicators, and (iv) must “prevent institutional interests from interfering with the impartiality of the adjudication.” (*Id.* at 4-5).

79. “An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence – including both inculpatory and exculpatory evidence – and take into account the unique and complex circumstances of each case.” (*Id.* at 4).

80. On November 16, 2018, the Department of Education issued a proposed new regulation for Title IX sexual misconduct proceedings. (*See* <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>). The Department published the proposed regulation in the Federal Register on November 29, 2018, followed by a 63-day comment period.

81. Key provisions of the proposed regulation require colleges and universities to adhere to the following procedures:

- “Apply basic due process protections for students, including a presumption of innocence throughout the grievance process; written notice of allegations and an equal opportunity to review all evidence collected; and the right to cross-examination, subject to ‘rape shield’ protections.”
- “Hold a live hearing where cross-examination would be conducted through the parties’ advisors.”
- Allow continued use of the preponderance of evidence standard only if the school “uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary action.”

82. Over 100,000 comments to the proposed regulations have been filed with a common theme that the Department’s efforts to restore fair processes in campus disciplinary proceedings were motivated by bias against women and disproportionately impact women, since the overwhelming majority of complainants are female.

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II. OCR's Broad Investigation Into W&L's Handling of Female Complaints of Sexual Misconduct and the 2014 Lawsuit Against W&L

83. On February 18, 2015, OCR notified W&L President Ken Ruscio that OCR had opened an investigation of W&L in response to a Title IX complaint filed by a W&L female student, who alleged that the University mishandled her report of sexual assault in 2014.

84. With the commencement of that investigation, W&L joined the published list of more than 100 colleges and universities facing federal investigations into allegations that they had mishandled sexual misconduct complaints, overwhelmingly brought by female students, with the concomitant possible loss of federal funding.

85. President Ruscio announced that the University had “pledged our full cooperation with OCR” and was committed to “responding to the federal and state guidelines and directives.”

86. President Ruscio explained that OCR would investigate the University’s handling of sexual misconduct complaints broadly, in addition to reviewing the complainant’s specific grievance.

87. OCR’s investigation was not the only challenge to W&L’s handling of sexual misconduct complaints. In 2014, a male student sued W&L in federal court asserting that the University wrongly expelled him based on a false complaint of sexual assault brought against him by a female student (“the 2014 complainant”). The male student alleged that W&L had subjected him to a gender biased disciplinary proceeding.

88. Kozak and Rodocker learned during their investigation of this current case that Jane Roe and the 2014 complainant were friends and partied together on the evening of Jane Roe’s alleged assault. Jane Roe chose the 2014 complainant as her “Advisor of Choice” in the disciplinary proceeding.

89. At no point did the investigators or any W&L administrator question the propriety of Jane Roe's selection of the 2014 complainant as her Advisor of Choice.

90. W&L settled the male student's 2014 lawsuit in February 2016. OCR's investigation into W&L remained open for three years until it was "resolved" on February 13, 2018. OCR has not disclosed the terms of the resolution.

III. W&L's 2016-17 Sexual Discrimination and Misconduct Policy

91. In response to OCR's investigation and scrutiny by the national media on the purported nationwide college rape culture crisis, W&L revised its sexual misconduct policies and procedures.

92. On December 1, 2014, W&L President Ruscio wrote in a Message to the Community in response to the allegations disclosed in a Rolling Stone article about an alleged gang rape at a fraternity at the University of Virginia, "I have asked Vice President for Student Affairs Sidney Evans to build upon our past efforts and continue to work directly with student leaders in the weeks ahead to have them address candidly the painful but important questions raised by the events reported in the Rolling Stone article. It is an opportunity, a difficult and sad one to be sure, to examine our own commitments and to affirm them more strongly than ever."

93. On August 3, 2016, President Ruscio announced a new Sexual Discrimination and Misconduct Policy (the "Policy") which remained in effect at the time of the alleged incident involving John and the investigation of Jane Roe's allegations during March and April 2017. (A true and correct copy of the August 2016 Policy is attached hereto as Exhibit 1.)

94. President Ruscio stated in his August 3 message to the W&L community that a revised Policy was necessary because there had been "a tendency to focus on legalities, on compliance and mandates, on the mechanics of the adjudicatory hearings, on the steps in the investigations, and on so many other guidelines and directives."

95. At the outset, the Policy stated that “the University, as an educational community, will promptly and equitably respond to reports of ... sexual assault,” and that “[a]ll University proceedings are to be conducted in compliance with the requirements of Title IX”

96. Consistent with Title IX’s “prompt and equitable” mandate, the Policy promised “complainants and respondents” that they can expect a “prompt and equitable resolution of allegations of sexual misconduct,” as well as the opportunity “to articulate concerns or issues about proceedings under the policy,” to have “advisors, including the right to an Advisor of Choice,” and “to challenge any member of the Harassment and Sexual Misconduct Board (HSMB) or an Investigation or Review Panel for bias or conflict of interest.”

97. The Policy also promised the parties “[t]he opportunity to offer information, present evidence, and identify witnesses during an investigation,” and “[e]qual access to information that will be used during the resolution proceedings.”

98. The Policy stated that “[t]he University supports victims of sexual misconduct and encourages all individuals or third-party witnesses to report any incident to the University.”

99. The Policy promised students that “[t]he University is committed to treating all members of the community with dignity, care, and respect. Any individual affected by sexual misconduct, whether as a complainant, a respondent, or a third party, will have equal access to support consistent with their needs and available University resources.”

100. The University’s support resources specifically identified in the Policy included counseling provided by “medical, psychiatric, and psychological professionals” with the University Student Health and Counselling Center. These “trained professionals ... are bound by separate laws of confidentiality,” and “provide counseling, information, and support under legally protected confidentiality.”

101. The Policy identified Lauren E. Kozak as the University's Title IX Coordinator, who "will oversee the University's review, investigation, and resolution of those reports to ensure the University's compliance with Title IX." Kozak was responsible for "conducting or overseeing investigations of complaints against students."

102. The goal of the investigation was "to gather all relevant facts and determine if there is sufficient information to support a charge against a respondent," guided by "principles of fairness and respect for all parties."

103. Pursuant to the Policy, the University typically used a team of two investigators, one of whom may be the Title IX Coordinator, and required that "[a]ny investigator must be impartial and free of any conflict of interest."

104. The investigators were expected to "coordinate the gathering of information from the complainant, the respondent, and any other individuals who may have information relevant to the determination."

105. During the investigation, "[t]he complainant and respondent will have an equal opportunity to be heard, to submit information, and to identify witnesses who may have relevant information."

106. The Policy stated the "[t]he investigation is designed to provide a fair and reliable gathering of the facts. It will be thorough, impartial, and fair, and all individuals will be treated with sensitivity and respect. The investigation is a neutral fact-gathering process. The respondent is presumed to be not responsible; this presumption may be overcome only where a Harassment and Sexual Misconduct Board hearing Panel concludes that there is sufficient evidence, by a preponderance of the evidence, to support a finding that the respondent violated the policy."

107. At the conclusion of the investigation, “the investigation team will prepare a written report that summarizes the information gathered and synthesizes the areas of agreement and disagreement between the parties and any supporting information.” Before the team finalizes the report, “it will give the complainant and respondent the opportunity to review the investigation report,” and to “submit any additional comments, request changes, or request further investigation”

108. The team “will then submit the report to the designated Chair of the Harassment and Sexual Misconduct Board for the specific matter.”

109. After reviewing the Investigative Report, the Chair of the particular HSMB Hearing Panel for the case determined whether to formally charge the respondent and notified the parties. A charge would be issued “if it is plausible and more than a sheer possibility that the complainant’s factual allegations could constitute a violation of this policy.”

110. The Policy created the new Harassment and Sexual Misconduct Board (“HSMB”) to hear and decide cases and, if warranted, to administer sanctions. Each HSMB Hearing Panel consisted of three members selected by the Panel Chair to hear the case and to make a finding by a preponderance of the evidence as to whether the respondent was responsible for a conduct violation.

111. Under the Policy, “[e]ach member of the HSMB Panel must be impartial and free of any conflict of interest.” HSMB members “who have reason to believe they cannot make an objective determination must recuse themselves from the process.”

112. The Policy also provided the complainant and respondent with one or two Hearing Advisors, who “are law and undergraduate students who have been trained to provide support and advice to complainants and respondents.” Advisors were not permitted “to present

evidence, question witnesses, or otherwise participate.”

113. In addition, both parties had the right to obtain assistance, at their own expense, from an Advisor of Choice, who could be “a friend, mentor, family member, attorney, or any other supporter.” Advisors of Choice were “not trained by the University and are not University resources.”

114. All hearings were “closed to the public” and could not be audio or video-recorded. The Hearing Panel “will review the investigation report prior to the hearing,” and during the hearing “may question the complainant, the respondent, any witnesses called, and/or the investigators, and examine related information and evidence.”

115. The parties were not permitted to verbally pose questions to each other or to witnesses but could “submit written questions to the Chair of the HSMB to ask on their behalf to the relevant party or witness.” The Chair was permitted to “screen the questions” and had “discretion to change the wording of the question.”

116. In cases where the respondent was found responsible, the Hearing Panel “will impose a sanction” ranging from dismissal, to suspension, probation, community service, educational and counseling consultation, and loss of privileges.

117. The Policy imposed mandatory expulsion for any student found responsible beyond a reasonable doubt for nonconsensual sexual penetration.

118. Under Virginia law, for a student who has been dismissed or suspended, the University must make a “prominent notation on the academic transcript, which will read: [Suspended or Dismissed] for a violation of W&L’s set of standards.” Va. Code Ann. § 23.1-900.A.

119. The Policy permitted a student to appeal a decision within 72 hours of the

decision to an Appeal Panel comprised of three members of W&L's administration. Grounds for appeal included no reasonable basis for the sanction, new relevant information, procedural defect or error, or extraordinary circumstances.

120. The Policy defined nonconsensual sexual penetration as “[s]exual penetration with another individual without consent.”

121. The Policy stated that individuals who choose to engage in sexual activity of any type “must first obtain the consent of the other party. Consent is demonstrated through mutually understandable words and/or actions that clearly indicate a willingness to engage freely in sexual activity.”

122. The Policy provided that, “[e]ither party may withdraw consent at any time. Withdrawal of consent should be outwardly demonstrated by words or actions that clearly indicate a desire to end sexual activity. Once withdrawal of consent has been expressed, sexual activity must cease.”

123. The Policy further stated that, “[a]n individual who is physically incapacitated from alcohol or other drug consumption (voluntarily or involuntarily) or is asleep, unconscious, unaware, or otherwise physically helpless is considered unable to give consent.”

124. The Policy defined “incapacitation” as “the inability, temporarily or permanently, to give consent because an individual is mentally and/or physically helpless, asleep, unconscious, or unaware that sexual activity is occurring.”

125. “In other words, a person may be considered unable to give valid consent due to incapacitation if the person is not able to understand the who, what, where, when, why, and/or how of a sexual interaction.”

126. The Policy listed three “questions” that the University must ask and determine “in

cases of alleged incapacitation”: “(1) Was complainant incapacitated? (2) If so, did the respondent know that the complainant was incapacitated? and (3) If not, would a sober, reasonable person in the same situation have known that the complainant was incapacitated based on objectively and reasonably apparent indications of impairment.”

127. Under the Policy, “[w]here alcohol or other drugs are involved, incapacitation is a state beyond drunkenness or intoxication.” The “common warning signs” that a person “may be incapacitated or approaching incapacitation as a result of alcohol or drug use or consumption may include slurred speech, vomiting, unsteady gait, odor of alcohol, incontinence, combativeness, or emotional volatility.”

128. The Policy noted that, “[i]t is especially important, therefore, that anyone engaging in sexual activity be aware of the other person’s level of intoxication.”

129. The Policy as a general matter prohibited the parties’ prior sexual history to be admitted as evidence during an investigation and/or hearing on the basis that prior sexual history “is not relevant.”

IV. W&L Treated John Less Favorably Than Jane Roe in Every Phase of the Disciplinary Proceeding Motivated at Least in Part by Gender Bias

A. The Incident

130. John enrolled as an undergraduate student at W&L and matriculated in the Fall of 2015. Beginning at that time and continuing through the events giving rise to this action, John paid full tuition to attend the University.

131. John expected to graduate in the Spring of 2019.

132. John and Jane Roe had been friends since their freshman year. On the day of the alleged incident, both were second term sophomores.

133. Jane Roe falsely accused John of sexually assaulting her in the early morning

hours of March 12, 2017.

134. John had spent the evening of Saturday, March 11, 2017, with his fraternity brothers at an off-campus house where they hung out and drank some wine. Jane had begun sending Snapchat messages to John and they made plans to meet later in the evening.

135. At approximately midnight, John returned to his room at the fraternity house. He and Jane again exchanged text messages about hanging out together.

136. John agreed to meet Jane halfway between her dorm and his fraternity house, approximately one-half mile. When they met, they both agreed to walk back to John's house. Jane appeared sober. She did not have any trouble walking or talking as the two walked back to John's house.

137. Upon entering John's room, Jane sat on his bed and they began to watch a show on John's laptop computer. They were both reclining on the bed. Jane told John she was not interested in watching the show, so he closed the laptop and put it on the floor. The two then got under the duvet on John's bed.

138. Jane had been wearing a sweatshirt, a bralette, and a skirt. She told John that she had left her underwear at Witness A's house. Jane removed her bralette because she had nipple barbells inserted and they made her uncomfortable when wearing the bralette.

139. Jane began kissing John and the two continued to kiss for a while. They stopped for moment and Jane asked for a drink. John retrieved a can of coconut seltzer from the mini-refrigerator in his room. Jane drank approximately one third of the can.

140. As they resumed kissing, Jane asked John "if it would be weird for our friendship if we have sex." John replied that it would only be weird if she made it seem weird.

141. Jane asked John if he would like to receive oral sex and he agreed. After a few

minutes of receiving oral sex from Jane, John asked her to stop because it “felt weird” and was not pleasurable for him. The two then proceeded to make small talk.

142. Jane asked John who he was taking to the formal event hosted by his fraternity the following week. John replied that he was still looking for a date. Jane stated that he “should take someone cool.”

143. The fraternity event was offsite and members were renting hotel rooms. Jane asked John if he had booked a single room or was he sharing a double room. She suggested that he should get a single room. John replied that he preferred a double. John sensed that Jane wanted him to ask her to the formal.

144. Jane next asked John about the upcoming University Fancy Dress event. John told Jane who he was taking as his date and she replied that he should take someone else.

145. Jane had recently broken up with her boyfriend and told John that she missed being in a relationship, but she said a relationship between the two of them would not work, while rubbing her head against his chest.

146. Several times throughout their ongoing conversation, Jane asked if it would “be weird for our friendship” to have sex; however, when John asked if she wanted him to get a condom, she nodded and said, “yes.”

147. John and Jane proceeded to have sexual intercourse. Jane was fully engaged in the sexual act, so much so that John asked her to be quieter so she wouldn’t wake anyone up.

148. Afterwards, the two fell asleep. The following morning, Jane woke John and asked John to check if anyone was in the house who might see her leave. John replied no, there was not, and Jane left. John drank the rest of the seltzer from the can and went back to sleep.

149. Jane sent John a text asking at what time they had sex the previous night. When

John awoke, he responded that he “honestly had no idea.” However, it was evident that Jane knew the two had sexual intercourse the previous evening.

150. Later that same day, John received a letter from W&L Title IX Coordinator Lauren Kozak informing him that she required him to meet with her.

B. The Investigation

151. On March 14, 2017, Jane Roe met with Title IX Coordinator Lauren Kozak, who took her complaint and appointed herself as lead investigator. Kozak enlisted Associate Dean Jason Rodocker as the second investigator.

152. John met with Kozak and Rodocker the week following the alleged incident.

153. Witness interviews were held throughout March 2017. In late March, John met with the investigators to review his interview statement, as well as interview statements of Jane Roe and witnesses in the draft Investigative Report prepared by Kozak and Rodocker. John reviewed the final Investigative Report a day or two before the hearing. John was not allowed to take notes or have a copy of the Investigative Report, and thus, his account below of the contents of the Report is based on his best recollection.

154. Jane stated in her interview that she did not think she was intoxicated during the night of the alleged incident. Witnesses described that Jane did not appear intoxicated.

155. Jane stated that she had been taking Lexapro, an antidepressant, and believed that she had taken a dosage that night sometime between 7 p.m. and 8 p.m.

156. Prior to meeting up with John, Jane stated that she had been at the home of a female friend, a senior at W&L, and had consumed approximately four glasses of wine from approximately 8 p.m. to 10 p.m.

157. Jane’s female friend was the “2014 complainant” – *i.e.*, she was the W&L female student who in 2014 accused a W&L male student of sexually assaulting her. After W&L found

the male student responsible and expelled him, he sued W&L claiming he had been falsely accused and the University had subjected him to a gender biased disciplinary proceeding.

158. The 2014 complainant became Jane Roe's Advisor of Choice for Jane's complaint against John.

159. Jane told the investigators she left her friend's house at approximately 10 p.m. and attended an off-campus party at a fraternity where "jungle juice" was served. She did not know how the juice was made, but knew it contained alcohol. Jane stated her last alcoholic drink was the juice at approximately 10:30 p.m. Jane had continued to send flirty, suggestive Snapchat messages to John throughout the evening.

160. Jane later met up with Witness A, a male W&L student, with whom she had consensual sexual intercourse that night.

161. When asked about Jane's intoxication level, Witness A told the investigators Jane seemed fine. After having consensual sexual intercourse with Jane, Witness A stated that he called for a ride back to campus for Jane at around midnight. The driver was later interviewed and stated he thought Jane appeared sober. Witness A asked the investigators that he not be identified in the Investigative Report or otherwise, and they complied with his request. John was never informed of Witness A's identity. Jane Roe of course knew who Witness A was. Witness A was the only witness whose name was not disclosed in the Investigative Report.

162. After arriving back to her dormitory, Jane continued to message John to meet up, and they agreed to each walk halfway from their locations to meet.

163. They walked to John's fraternity and entered his room. Jane's account of her time with John in his room was consistent with John's account up until the sexual intercourse, although her recollection differed from John's in some relatively minor respects, *e.g.*, she

recalled that John initiated the kissing.

164. During her interview with the investigators, and later at the hearing, Jane claimed that, after drinking the seltzer that John gave her, she fell asleep and does not remember what happened next. Jane claimed that all of her sexual activity with John – the making out, the touching, and the oral sex – was consensual, but the sexual intercourse was not. She also claimed she would not have consented to intercourse with John because he was not somebody with whom she wanted a relationship.

165. She claimed that, when she awoke in John's room that morning, she saw a condom in the trash can, and only then realized that she and John had engaged in sexual intercourse.

166. On or about April 13, 2017, W&L clinical psychologist Janet Boller from the University Counseling Center met with Jane. According to Boller's expert report, it was the only time she met with Jane; *i.e.*, she was not Jane's treating therapist.

167. Upon information and belief, subject to discovery in this matter, Jane Roe had been referred to Boller by the investigators.

168. On or about April 17, 2017, investigators Kozak and Rodocker met with Boller to conduct an interview. Thereafter, Boller prepared an expert report and submitted it to the investigators.

169. Approximately one day before the hearing, on or about April 24, 2017, Kozak and Rodocker forwarded a revised hearing packet to the Hearing Panel and John. The revised hearing packet included the Boller expert report, which the investigators characterized as "medical evidence."

170. This was the first time John knew about and saw the Boller expert report.

Boller's expert report had not been included in the original hearing packet provided to him. The Boller expert report was submitted to the Hearing Panel unilaterally by the investigators on the eve of the hearing, without according John an opportunity to object to it, to have a medical professional review it, or to submit a rebuttal expert report.

171. In effect, it was presented to the Hearing Panel as an unchallenged expert opinion.

C. The Hearing, Decision, and Sanction

172. On April 25, 2017, a hearing by a Panel of the Harassment and Sexual Misconduct Board was held on April 25, 2017.

173. Assistant Dean of Career Strategy, Cliff Jarrett, selected the Hearing Panel, comprised of three members from W&L's administration: Mary Main, Assistant Title IX Coordinator and Executive Director of Human Resources; Steve McAllister, Treasurer and Vice President for Finance and Administration and Member of the Emergency Management Executive Team; and Lindsey Nair, Director of Content Development, Office of Communications and Public Affairs.

174. Both John and Jane were present at the hearing along with their two Honor Advisors assigned by the University. Kozak and Rodocker also attended.

175. Other than Jane and John, the Hearing Panel called no witnesses to testify. The Hearing Panel made no recording or written transcript of the hearing and made no record of the parties' questions which were submitted, rejected, asked or answered at the hearing.

176. At the conclusion of the hearing, the Panel voted unanimously to find John responsible by a preponderance of the evidence for nonconsensual sexual penetration. The Panel did not find John responsible "beyond a reasonable doubt," which would have imposed a mandatory sanction of expulsion.

177. The Hearing Panel explained that, "the decision in this case came down to the

credibility of the Complainant and the Respondent.” The Panel inexplicably concluded that it “had trouble with the Respondent’s claim that receiving oral sex from a friend felt ‘weird’, but that he would proceed to have sexual intercourse with her. His answer to this question, as well as others, lacked detail and conviction.”

178. Here, the Hearing Panel imposed its own sexual mores and judgment in rejecting John’s honest disclosure regarding his sexual preferences. For unexplained reasons, the Panel members could not accept the notion that a male student at W&L could prefer sexual intercourse over oral sex. Even more to the point, John’s sexual preferences had no bearing on his credibility concerning what happened that evening. In fact, John provided a detailed (and convincing) account of his interaction with Jane to the investigators and to the Hearing Panel.

179. The Hearing Panel also found credible Jane Roe’s testimony that, “she would never consent to sex with Respondent,” given her “personal rule that she only has full sexual intercourse with partners if she is interested in a relationship,” and “she has never been interested in that type of relationship with the Respondent.”

180. The Hearing Panel accepted Jane Roe’s subjective, unsubstantiated “personal rule” testimony as “consistent and credible” – without putting it to the test.

181. Yet, a red flag on Jane’s credibility regarding her “sexual preferences” was in the record before the Hearing Panel. The Panel knew from the Investigative Report that Jane Roe had engaged in consensual sexual intercourse earlier that same evening with Witness A.

182. The Hearing Panel chose not to ask Jane Roe about Witness A. Nor did the Panel call Witness A to testify about his interaction with Jane Roe that evening, specifically about whether Jane Roe had expressed to him in actions or in words an interest in having a relationship. That testimony might have called into question the credibility and truthfulness of

Jane's adherence to her "personal rule."

183. Ordinarily, a party's sexual history would be deemed irrelevant and inadmissible under the Policy, but here, Jane Roe put her sexual history and sexual preferences squarely at issue by claiming that her "personal rule" necessarily meant she would never have consented to intercourse with John.

184. Without any factual basis, the Hearing Panel found John's sexual preference testimony not credible, but Jane's sexual preference testimony credible (*i.e.*, John was not credible in expressing a preference for sexual intercourse over oral sex, but Jane was credible in expressing her personal rule limiting sexual intercourse to potential relationship partners). The Hearing Panel's use of a double standard strongly suggests that gender bias in favor of the female complainant motivated its credibility determination.

185. The Hearing Panel's credibility assessment regarding the effect of alcohol and drug consumption exhibited the same lack of factual basis and the same gender-biased, one-sided favoritism.

186. Even though both parties acknowledged alcohol and drug consumption, the Panel only considered that issue with respect to John's credibility. The Panel disbelieved John's testimony that "his memory of the night in question was not impacted" by his intake of wine and marijuana. The Panel faulted John's memory of the "sequence of conversations, general timing of events and how his pants got back on." The Panel critiqued John for his strong recall of "details that would exonerate him" but "fuzzy" memory "on other details." By contrast, the Panel found nothing questionable at all about Jane's alleged complete loss of memory of certain, selected events that evening.

187. The Hearing Panel also arbitrarily discounted John's testimony that Jane's eyes

were open during intercourse. The Panel concluded that John could not have seen that Jane's eyes were open because the room was too dark. But, the investigators had not made an on-site visit of John's room to assess the nighttime illumination from the outdoor lights, nor had they asked John about the light level in his room from sources other than the room lights. Thus, the Panel's finding about the darkness of the room had no evidentiary basis at all.

188. Finally, the Hearing Panel determined that Jane "was not capable of providing consent because she was either asleep or nearly asleep."

189. This finding has no basis in the Policy. The Policy defines the inability to provide consent as follows: "An individual who is physically incapacitated from alcohol or other drug consumption (voluntarily or involuntarily) or is asleep, unconscious, unaware, or otherwise physically helpless is considered unable to give consent."

190. The fact that a person was "nearly asleep" is *not* a basis in the Policy for a finding that the person was unable to give consent. The Hearing Panel's finding is so contrary to the plain terms of the Policy as to elude explanation.

191. Further, the Hearing Panel never determined if Jane Roe was in fact "asleep." The Panel only found that she was *either* "asleep" or "nearly asleep." With no factual basis to find that Jane was in fact asleep, the Panel chose to concoct a new definition of consent by which the Panel could make an "either or" or "maybe" determination. But "maybe" is not a sufficient factual basis to make a finding of responsibility for sexual assault under the Policy's preponderance of the evidence standard.

192. To the extent the Hearing Panel did decide that Jane Roe was in fact "asleep," that finding defies common sense and physical reality. The Panel did not find that Jane Roe was "physically incapacitated from alcohol or other drug consumption" or that she was

“unconscious, unaware, or otherwise physically helpless.” Jane herself did not claim any of these incapacities, and John and the witnesses testified she appeared to be fine and in control of her faculties. Jane claimed only that she fell asleep. If that were truly the case, she would have awakened upon sexual penetration. The Hearing Panel’s decision does not even mention, much less consider, how it was possible for Jane to simply fall asleep, but to not awaken when John penetrated her.

193. Jane’s story is not credible. The Hearing Panel’s finding cannot be reconciled with the standard of consent in the Policy, the consistent testimony of the parties and witnesses with respect to incapacitation, and physical reality.

194. The Panel’s finding that Jane was “either asleep or nearly asleep” was not supported by even a scintilla of evidence, much less by a preponderance of the evidence, as required under the Policy. Not only did the Panel fail to ask the three “questions” that the Policy required “in cases of alleged incapacitation” (was complainant incapacitated? If so, did the respondent know? If not, would a reasonable person in the same situation have known complainant was incapacitated?), it failed in any way to wrestle with or answer those questions in support of its decision.

195. In addition to these substantive and procedural defects in the hearing process, there were conflicts of interest or the appearance of conflicts of interest among the Panel members who, upon information and belief, either reported to one another in their official capacities or represented institutional interests and by the nature of their positions had a duty to protect the liability of the University. These conflicts could affect the Panel’s ability to serve as neutral and independent arbiters.

196. For example, Mary Main, in her role as Assistant Title IX Coordinator, supported

Title IX Coordinator Lauren Kozak. Kozak in turn also served as the lead investigator in the case. Since Main's Title IX job required her to "support" Kozak, she had an inherent conflict of interest as a Hearing Panel member tasked with examining the Investigative Report critically and independently.

197. Further, as Executive Director of Human Resources, Main worked within the Office of Finance and Administration and reported to co-Panelist Steve McAllister, Treasurer and Vice President of Finance and Administration. These additional employment affiliations created a conflict of interest as to Main's ability to exercise independent judgment that might place her in conflict with her two bosses – *i.e.*, investigator Kozak and co-panelist McAllister.

198. Throughout the hearing, the Panel's bias was palpable to John, both in the questions the Panel members asked John but failed to ask Jane Roe, and in the tone of deference Panel members accorded Jane but the tone of disapproval accorded to John.

199. The Hearing Panel imposed a sanction of (i) a one term suspension through the Fall 2017 term; (ii) successful completion of counseling for both sexual and substance abuse; (iii) probation beginning immediately, to be extended if readmitted through the end of the academic year 2017-18; and (iv) while on campus a no contact order with Jane requiring John to make every effort to avoid and remove himself from her presence. The sanction permitted John to apply for reinstatement for the Winter 2018 term.

200. John was allowed to remain at W&L to complete the Spring 2017 semester. The sanction of suspension went into effect on May 21, 2017.

201. The sanction also resulted in a mandatory transcript notation on John's education transcript, as follows: "Suspended for a violation of W&L's set of standards."

D. The Appeal

202. John appealed the finding of responsibility and the sanction. Jane Roe appealed

the sanction. The three-member Appeal Panel consisted of Trenya Mason, Assistant Dean of Law Student Affairs; Keith Davis, Assistant Director for Advancement Operations; and Sally Stone Richmond, Vice President for Admissions and Financial Aid.

203. Both parties' appeals were denied in early May 2017.

204. John argued on appeal that the Hearing Panel did not have a reasonable factual basis to question his memory of events based on his alcohol and marijuana consumption. John pointed out in his appeal that Jane Roe told the investigators John did not seem drunk. John argued the investigators never questioned him about his memory and, had they done so, he would have identified witnesses who would have corroborated Jane's testimony that he did not seem drunk. John argued he should be accorded the opportunity to present new, relevant evidence to rebut the Panel's credibility finding.

205. John also argued against the Hearing Panel's conclusion that he was not credible when he told the Panel he could see Jane's eyes were open during intercourse. John pointed out in his appeal that Jane was able to describe John's room in detail to the investigators, and John had described to the Panel the outside lighting sources that illuminated his room.

206. Beyond these plain errors, the Appeal Panel should have reversed the Panel's decision based on the Panel's fundamental procedural error on the definition of inability to give consent. As previously alleged, the Hearing Panel used an incorrect definition in finding that Jane could not give consent because she was "either asleep or nearly asleep." This finding by the Hearing Panel was procedurally defective on its face.

207. The Appeal Panel's failure to reverse the Hearing Panel's decision and to order a new hearing free from conflicts of interest, gender biased judgments on credibility, reliance on incorrect Policy definitions, and factually unsupported conclusions cannot be rationalized.

208. Like the Hearing Panel, the Appeal Panel consisted of W&L administrators whose affiliations with the University created inherent conflicts of interest and called into question their ability to be neutral arbiters. Their members represented institutional interests and by the nature of their positions they each had a duty to protect the liability of the University.

V. John's Applications for Reinstatement and W&L's Arbitrary Denials

209. On November 15, 2017, John timely submitted his application for reinstatement for the Winter Term 2018 following completion of his suspension. As required by the application for reinstatement and the sanctions determined by the Hearing Panel, John provided proof of his counseling for substance and sexual abuse; an evaluation from his treating health care provider concerning his readiness to return to the University; proof of his engagement in volunteer activities and employment during his suspension; and his personal essay.

210. These requirements had been set forth by the University in a May 31, 2017 letter to John from W&L's Vice President for Student Affairs and Dean of Students, Sidney Evans. The letter also stated that John must be "fully engaged" for "approximately forty hours per week in constructive undertakings. These efforts can include any combination of course work at an accredited four-year college or university, employment, volunteer/community service, or similarly enriching opportunities"

211. John's reinstatement application more than adequately complied with these requirements. His application included a sexual assault and alcohol abuse evaluation by John's treating psychologist, a Ph.D. trained professional with more than 30 years of experience and practice focusing on substance abuse and relationship issues.

212. Based on multiple weekly counseling sessions with John and several assessment questionnaires, the psychologist concluded that John "does not present as a sexual predator," he

“poses no danger to the other students,” his alcohol consumption is “consistent with that of his peers,” and he is aware of sexual situations “that could be fraught with risk after drinking.”

213. The psychologist observed that John “is eager to continue his education at W&L,” and that, in his professional opinion, John “is able to comply with the requirements of his re-instatement.”

214. John also provided W&L with a letter of recommendation in support of his reinstatement from the priest who supervised John’s volunteer activities with a local parish, which included renovating a floor of the parish center so that a Venezuelan refugee family could move in. John provided W&L with information concerning his employment history with a summer camp and his work with a realty company assisting with rental property listings.

215. On November 30, 2017, John received a letter from W&L denying his reinstatement. The letter stated that John’s personal essay “did not demonstrate your readiness to return” to W&L, and that a future application would be strengthened by “full-time coursework, in person, at a college or university accredited by one of the six regional accrediting agencies.” The letter also stated that any future reinstatement application should reflect volunteer work “surrounding alcohol abuse and/or sexual abuse.”

216. The requirement for “full-time coursework, in person,” at an accredited college or university was a new, additional stipulation for reinstatement that had not been listed on the original sanction form by the Hearing Board, in the May 31, 2017 Evans letter, or in the application for reinstatement.

217. Moreover, requiring John to attend, in person, classes at an accredited college or university meant that any institution to which he would apply for full time courses would want proof that he was in good standing with a disciplinary report from his former institution. Given

that John's report would state that he was suspended, he would be required to respond truthfully to questions as to the reason for the suspension, *i.e.*, that the suspension was due to a finding of responsibility for sexual assault.

218. Thus, while W&L had forbidden John to step foot upon its campus, the University was now requiring him to somehow gain admittance to an institution of similar standing to complete full-time course work in person, even though his disciplinary record from W&L made admittance at another school highly improbable, if not impossible.

219. The additional, previously undisclosed requirement of volunteer work surrounding substance or sexual abuse was equally unattainable. John would have to disclose to any prospective supervisor that he had been suspended from W&L due to a finding of sexual assault with a sanction that also included mandatory counseling sessions for substance and sexual abuse. That truthful disclosure would almost certainly foreclose his acceptance for this category of volunteer work.

220. On July 29, 2018, John timely submitted his second application to W&L for reinstatement for the Fall 2018 Term.

221. In his four-page reinstatement essay, John attempted to address the Committee's criticism that his first personal essay "did not demonstrate your readiness to return to Washington and Lee."

222. In his second essay, John described more fully the content and impact of his counseling sessions with his treating psychologist. He explained that the counseling focused on "substance abuse and sexual abuse" and "the Harassment and Sexual Misconduct Board decision," and that he and his counselor discussed "behaviors that contribute to these types of situations and remedial actions which include limiting alcohol consumption ... and striking a

balance between academic and social activities.”

223. John also described counseling sessions he had on a regular basis with a Licensed Clinical Social Worker, during which they discussed the trauma and emotions he experienced surrounding the sexual misconduct allegation and proceeding, and how different people process stressful events based on their backgrounds and beliefs.

224. He explained that his therapy sessions with both counselors “were educational and enlightening,” and that he has “gained a great appreciation for differing perspectives from both.”

225. He reiterated and more fully described his volunteer work at the local parish, including his work in resettling a refugee family. He stated that he had been grateful to be “able to help a family in need resettle and move forward with their lives.”

226. He more fully described his 5-year history of employment at the summer camp as camp leader, athletic coach, and mentor, and his full-time employment at his former high school, where he organized major fund drives for the school’s food pantry, worked with freshman groups on volunteer service activities, and communicated with students, parents, and teachers in preparing for retreats, service experiences, and on-campus activities.

227. John provided W&L with a letter of recommendation in support of his reinstatement application from his direct supervisor at the high school. The supervisor praised John, stating that “[i]n all of these roles, [John] displayed responsibility and professionalism. He was organized, positive, and always willing to help where he was needed To conclude, we were very happy to have [John] work with us this past year.”

228. Finally, John reflected on his efforts while he was at W&L to work with an academic coach to improve his academic performance. He described his commitment to

continue those better study habits and his goal to graduate and to contribute to society.

229. Collectively, these “constructive undertakings” fully satisfied the requirements for reinstatement in the sanctions determined by the Hearing Panel, the May 31, 2017 Evans letter, and the reinstatement application.

230. On August 14, 2018, John received a letter from W&L denying his second reinstatement application. The letter stated that, “the Committee based its decision on the fact that you have not demonstrated successful coursework in a rigorous academic environment and that your application for reinstatement revealed no clear evidence of reflection and readiness to return to Washington and Lee.”

231. Despite the near impossibility of even being accepted for coursework in a rigorous academic environment in light of John’s suspension from W&L for sexual misconduct, and the near impossibility of actually “completing” such coursework, W&L persisted in making this unattainable requirement a condition of reinstatement.

232. Ironically, after his second reinstatement rejection from W&L, John applied to prospective transfer schools, and in all his applications he truthfully disclosed his disciplinary record from W&L. He was rejected by all four colleges and universities to which he applied, including his application as a non-matriculating student.

233. His W&L disciplinary record almost certainly was a major factor, if not the deciding factor, in all four rejections.

234. The imposition of next to impossible conditions for reinstatement has effectively resulted in John’s permanent exclusion from W&L. By this post-discipline device, W&L in effect has converted the Hearing Panel’s one-term suspension into an expulsion.

235. Upon information and belief, W&L’s arbitrary, “bait and switch” conduct toward

John, in which the University twice imposed new, essentially unattainable requirements as justification for denial of reinstatement, was motivated at least in part by gender bias against male students like John who have been accused of and sanctioned for alleged sexual misconduct.

236. Upon information and belief, W&L's arbitrary conduct toward John in the reinstatement process was also motivated by a desire to retaliate against him for asserting his Title IX rights. In June 2017, W&L became aware that John had retained an attorney who specialized in Title IX litigation when that attorney wrote to the University on John's behalf seeking the investigation report in John's case and his complete student conduct file after John's direct efforts with the University for those records were unavailing.

237. In September 2017, John brought a state court action under Virginia Supreme Court Rule 4.2 seeking those same records and information.

238. The University's first reinstatement denial in November 2017 quickly followed that records dispute.

VI. Plaintiff's Entire Future is Severely Damaged by W&L's Actions

239. As a result of W&L's actions, John's entire academic career has been halted. Without a college education, his economic and employment future is completely compromised.

240. John's education is at a standstill. John is unable to continue his education at W&L, or any other institution, due to W&L's wrongful finding against him and the stigma that he has suffered by being labeled a sexual predator.

241. John's academic and disciplinary record is irrevocably and irreversibly tarnished and will not allow him to transfer to any other educational institution to complete his undergraduate degree, let alone pursue post-graduate studies.

242. As a result of W&L's actions, John's parents' financial resources used to provide

him with a good education have been squandered.

243. Any attempt to move on with his future in the face of W&L's arbitrary and capricious outcome and reinstatement denials will be met with resistance and little likelihood of success.

244. Without appropriate redress, the unjustified outcome of the hearing will continue to cause irreversible damage to John, with no end in sight. John seeks redress from this Court to undo the wrongs occasioned by W&L on his education and future.

COUNT I
Discrimination in Violation of Title IX of the Education Amendments of 1972,
20 U.S.C. § 1681 et seq.

245. John repeats and incorporates the foregoing allegations as if fully set forth herein.

246. Title IX of the Education Amendments of 1972 provides that: "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."

247. Title IX applies to all public and private educational institutions that receive federal funding.

248. W&L is a recipient of federal funds and is therefore bound by Title IX and its regulations.

249. Title IX prohibits the imposition of University discipline where (as here) gender bias was a motivating factor in the decision to discipline.

250. Consistent with Title IX, W&L's Policy promised accused students that they could expect a "prompt and equitable resolution" of sexual misconduct allegations against

them, and that W&L's sexual misconduct proceedings would be guided by "principles of fairness and respect for all parties."

251. Thus, the Policy facially complied with Title IX.

252. But, under pressure from OCR's long-running investigation of W&L's alleged mishandling of sexual misconduct complaints (overwhelmingly brought by female students) and faced with the threat of loss of federal funding, the University's Title IX personnel in John's case failed in crucial ways in each phase of the disciplinary proceeding to adhere to Title IX's requirement of a fair and impartial proceeding free from gender bias.

253. W&L reached an adverse, erroneous outcome in John's case. John was innocent and wrongly found to have committed a sexual assault, and gender bias was a motivating factor behind the erroneous finding.

254. As set forth in detail in the foregoing Nature of the Action and Sections IV and V, the investigators engaged in certain intentional acts and omissions with respect to the gathering of evidence that favored Jane Roe to John's detriment; the Hearing Panel's finding was not supported by even a scintilla of evidence, let alone the required preponderance of the evidence standard; in the absence of an objective, evidentiary basis for its finding, the Hearing Board relied on gender stereotypes in making credibility determinations in favor of Jane and against John; the Hearing Panel failed to call Witness A or to question Jane about her alleged "personal rule" on limiting sexual intercourse to potential relationship partners; the Hearing Panel used a definition of inability to consent that did not exist in the Policy; the Appeal Panel failed to reverse the Hearing Panel's decision, which was based on its erroneous application of a non-existent definition of inability to consent and was procedurally defective on its face.

255. In summary, the following non-exclusive facts and circumstances in John's case

establish an erroneous outcome motivated at least in part by gender bias:

- The Title IX investigators accepted as “medical evidence” an expert report prepared by Janet Boller, a University Counseling Center psychologist, offering her opinion that Jane suffered from Acute Stress Disorder. The report was patently unfair because the investigators disclosed its existence to John one day before the hearing, which left John with no time to object to the report or to engage an expert of his own to prepare a rebuttal. Boller was far from being an independent, neutral medical expert. Not only was she an employee of the University, she was the University’s designated contact person for the University-sponsored Student Sexual Assault Survivor Support Group. Her professional duties included supporting students who identify themselves as “survivors” of sexual assault, who are overwhelmingly female.
- Upon information and belief, subject to discovery in this matter, the investigators referred Jane Roe to Boller – not for treatment with a neutral, non-partisan therapist – but for purposes of preparing a medical report that would have the effect of bolstering the female complainant’s story.
- The Hearing Panel based its finding of responsibility on a definition of inability to provide consent that does not exist in the Policy, *i.e.*, the Panel found that Jane Roe was “either asleep or nearly asleep.”
- The Hearing Panel did not determine, by *any* standard of evidence, that Jane Roe had in fact been “asleep” during sexual intercourse with John. “Nearly asleep” is not included in the Policy’s list of incapacitating physical or mental conditions.

- Even if Jane Roe had fallen asleep (as she claimed), she certainly would have awakened upon sexual penetration. The Hearing Panel did *not* find that Jane was intoxicated or was physically incapacitated from alcohol or drug consumption, and Jane herself never claimed otherwise. Witnesses reported that she seemed fine. The Panel’s finding of a sexual assault during sleep defies physical reality, and no reasonable fact finder could have found John responsible by a preponderance of the evidence.
- The Hearing Panel accepted at face value Jane Roe’s “personal rule” testimony, in which she claimed she would not have consented to sexual intercourse with John because of her “personal rule” limiting sexual intercourse to potential relationship parties. Yet, the Panel did not question Jane Roe about her sexual encounter with Witness A that same evening, which included sexual intercourse, nor did the Panel call Witness A to testify about whether Jane discussed her “personal rule” with him that evening before engaging in consensual sexual intercourse.
- There were conflicts of interest among the Hearing Panel members, all of whom were high-ranking W&L administrators, which caused them not to be neutral fact finders in the disciplinary proceeding.
- One of the Panel members, Mary Main, reported to another Hearing Panel member (Steve McAllister, who served as W&L’s Treasurer and Vice President for Finance and Administration). In her role as Assistant Title IX Coordinator, Main was also tasked with “supporting” W&L’s Title IX Coordinator, Lauren Kozak, who in turn appointed herself as the lead investigator in John’s case. By

the nature of their positions with the University, Panel members had a duty to protect the liability of the University.

- The Appeal Panel should have reversed the Hearing Panel's finding, which was based on a patently incorrect definition of inability to give consent and was not supported by even a scintilla of evidence, let alone the required preponderance of the evidence.
- In every phase of the disciplinary proceeding, W&L's Title IX personnel failed to consider evidence that supported John's innocence and refuted Jane's implausible accusation.
- The University's requirements for John's reinstatement were revised and increased arbitrarily with new requirements that had not been listed on the original sanction form prepared by the Hearing Panel, in the May 31, 2017 Evans letter, which set forth the terms and conditions of reinstatement, or in the application for reinstatement.
- W&L's conduct with respect to John's reinstatement was a continuation of the University's pattern throughout the disciplinary proceeding of bias against John due to gender, and constituted impermissible retaliation against John by the University.

256. Upon information and belief, W&L's lack of fairness in its handling of the disciplinary proceeding in John's case was intentional and was motivated by institutional gender bias created by the long-running OCR investigation into W&L's alleged mishandling of female complaints of sexual misconduct, with the threat of withdrawal of federal funds, and by a campus climate that supported student "survivors" of sexual assault, who are overwhelmingly

female, and who are presumed to be victims based on their accusation before an investigation and adjudication even begins.

257. W&L's student group SPEAK personified the "survivor" approach to campus sexual assault. Its mission was to "support survivors" and to "spread awareness about sexual misconduct." Those can be laudable goals, but they are impermissible under Title IX when accompanied (as was the case in the proceeding against John) by institutionalized pressure to presume that accused students (who are overwhelmingly male) are perpetrators and their accusers (who are overwhelmingly female) are "survivors" and "victims."

258. In 2015, SPEAK applauded the University's then-recent hiring of Title IX coordinator Lauren Kozak for her activism on behalf of female complainants, noting that Kozak "is doing much more education about the policy, consent, reporting options and how to file a report," and that "sexual assault is one of the most important and common problems affecting college students."

259. SPEAK's Facebook pages described its activities in promoting "campus climate activism" in support of "survivors" of sexual assault. Some of those events included the participation of University administrators, including "University Psychologist Dr. Janet Boller and Title IX Coordinator Lauren Kozak," who were featured panelists on the topics of "handling cases of sexual assault, and how incidents have changed over time."

260. W&L's Title IX personnel in John's case were influenced, at least in part, by institutional pressures to find John responsible as a male student accused of sexual assault, including OCR's long-running three-year investigation of W&L prompted by a female student's complaint against it, OCR's 2011 Dear Colleague Letter with its explicit threat of loss of federal funding, OCR's 2014 Questions and Answers, and the White House's sexual assault task force

with its emphasis on training investigators to support “survivors,” as well as a campus climate which fostered the notion that sexual assault accusers are to be believed and supported based on the accuser’s word.

261. Based on the foregoing intentional acts and omissions, John was subjected to a gender biased, prejudicial, and explicitly unfair process in violation of Title IX.

262. W&L was on notice of, and was deliberately indifferent to, the serious flaws in the investigation of Jane Roe’s complaint and the bias demonstrated by the investigators, the Hearing Panel, and the Appeal Panel in favor of Jane and against John. W&L did nothing to address or remedy the harm to John.

263. The University selectively enforced its Title IX policies by treating John as a male student accused of sexual misconduct less favorably than it would treat a similarly situated female student.

264. W&L’s conduct was so severe, pervasive, and objectively offensive that it denied John equal access to education that Title IX is designed to protect.

265. This unlawful discrimination in violation of Title IX proximately caused John to sustain substantial injury, damage, and loss, including without limitation, emotional distress, psychological damages, loss of educational and career opportunities, reputational damages, economic injuries and other direct and consequential damages.

266. As a result, John is entitled to injunctive relief, specific performance, and damages in an amount to be determined at trial, plus prejudgment interest, attorneys’ fees, expenses, costs and disbursements.

COUNT II
Retaliation in Violation of Title IX of the Education Amendments of 1972,
20 U.S.C. § 1681 et seq.

267. John repeats and incorporates the foregoing allegations as if fully set forth herein.

268. A federally-funded educational institution violates Title IX if it retaliates against a student by taking adverse action against the student in response to the student's exercise of a protected right under Title IX.

269. As set forth in detail in Section V herein, W&L retaliated against John in violation of Title IX by refusing to reinstate him as a student in good standing, in spite of John's fulfillment of W&L's required suspension activities, once the University became aware that John had retained an attorney nationally known for his Title IX work to assert John's rights under Title IX.

270. This unlawful retaliation in violation of Title IX proximately caused John to sustain substantial injury, damage, and loss, including without limitation, emotional distress, psychological damages, loss of educational and career opportunities, reputational damages, economic injuries and other direct and consequential damages.

271. As a result, John is entitled to injunctive relief, specific performance, and damages in an amount to be determined at trial, plus prejudgment interest, attorneys' fees, expenses, costs and disbursements.

COUNT III
Breach of Implied Contract

272. John repeats and incorporates the foregoing allegations as if fully set forth herein.

273. John paid the University sums of money for his education, and in return, the

University was to provide John with access to its undergraduate degree program.

274. John's enrollment in, and attendance of, classes at W&L created in John an expectation that he would be allowed to continue his course of study until he earned his degree from the University, provided that he maintained satisfactory grades and complied with University rules and policies.

275. Accordingly, an implied contractual relationship exists between John and the University, under which each party owes the other certain duties.

276. Under the implied contract between John and W&L, W&L had a duty not to suspend John for disciplinary misconduct arbitrarily, capriciously, maliciously, discriminatorily, or otherwise in bad faith.

277. The University breached these contractual obligations by suspending John for sexual misconduct through an investigative and adjudicative process that in the ways, and for the reasons, set forth above were arbitrary, capricious, malicious, discriminatory, and conducted in bad faith.

278. The University has compounded its arbitrary and capricious conduct by punishing John far beyond the one-term suspension that the Hearing Panel imposed.

279. In the nearly two years since the Hearing Panel sanctioned John, spanning six academic terms, W&L has refused to reinstate him as a student in good standing, even though John fulfilled all the requirements that the University initially set forth for his reinstatement in three separate documents, including the Hearing Panel's sanction form, the May 31, 2017 Evans letter, and the reinstatement application. These documents constituted contracts or implied contracts between John and W&L.

280. In fulfillment of these contractual (or implied contractual) requirements, John

participated in substance and sexual abuse counseling, provided the University with an evaluation in support of his reinstatement from his treating psychologist, a Ph.D. trained professional with over 30 years of experience and practice in the areas of substance abuse and relationship issues, and engaged in constructive activities with volunteer organizations and through sustained, gainful employment.

281. W&L has denied reinstatement for the past two years, continually adding new, previously undisclosed “requirements” to justify its denials.

282. As a result of W&L’s wrongful conduct in the disciplinary proceeding and the unconscionably prolonged reinstatement period, John, though innocent of any wrongdoing, has lost his reputation, his ability to complete his undergraduate degree, his post-graduate opportunities, and his employment and career prospects.

283. As a direct and proximate result of this breach, an erroneous finding that John committed sexual assault has been made part of John’s educational record, which may be released to educational institutions and prospective employers to whom John applies, substantially limiting his ability to gain acceptance to transfer schools to complete his undergraduate education, to graduate school, or to secure future employment.

284. As a direct and proximate result of the above conduct, John has sustained damages, including without limitation, emotional distress, loss of educational and career opportunities, economic injuries and other direct and consequential damages. John’s interest in the results of the disciplinary process are significant.

285. As a result of the foregoing, John is entitled to damages in an amount to be determined at trial, plus prejudgment interest, attorneys’ fees, expenses, costs and disbursements as a result of W&L’s breach of an implied contract in the process of

investigating and adjudicating Jane Roe's sexual misconduct complaint against John, and in subjecting John to an unfair and unconscionably prolonged reinstatement process.

COUNT IV
Negligence

286. John repeats and incorporates the foregoing allegations as if fully set forth herein.

287. In order to state a negligence claim under Virginia law, a plaintiff must show that the defendant owed the plaintiff a duty; that the defendant breached such a duty; and a showing that the breach was the proximate cause of the injury.

288. Plaintiff must establish each element, including the presence of a duty arising under Virginia tort law.

289. Here, W&L formed a university-student relationship with John and had a duty to him to conduct the disciplinary process with due care, to perform an investigation free from bias or conflicts of interest, to have proper training in investigating and evaluating the alleged conduct under W&L's policies, and to ensuring a fair and impartial hearing.

290. The foregoing duties were breached when John was subjected to a biased and prejudicial disciplinary process, to his severe detriment.

291. John's injury was caused by W&L's breach of its duties owed to him as a student of the University. He suffered immeasurable harm in the form of delayed or permanently impaired educational opportunities, lost or postponed career opportunities and wages, emotional and psychological damage, and reputational harm.

292. As a direct and proximate result of the above conduct, John has sustained damages, including without limitation, emotional distress, loss of educational and career opportunities, economic injuries and other direct and consequential damages. John's interests

in the results of the disciplinary process are significant.

293. As a result of the foregoing, John is entitled to damages in an amount to be determined at trial, plus prejudgment interest, attorneys' fees, expenses, costs and disbursements as a result of W&L's negligence in the process of investigating and adjudicating Jane Roe's sexual misconduct complaint against him.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, John demands judgment against W&L as follows:

- (i) on the first cause of action for discrimination in violation of Title IX, a judgment against W&L awarding John damages in an amount to be determined at trial, including without limitation, damages to physical well-being, emotional and psychological damages, damages to reputation, past and future economic losses, loss of educational opportunities, and loss of future career prospects, plus punitive damages, prejudgment interest, attorneys' fees, expenses, costs and disbursements; and an injunction against W&L ordering W&L to expunge John's educational and disciplinary record of any notation regarding the finding and sanction, requiring W&L to destroy all records concerning the disciplinary proceeding; and reinstating John to the University as a student in good standing to complete his undergraduate degree;
- (ii) on the second cause of action for retaliation in violation of Title IX, a judgment against W&L awarding John damages in an amount to be determined at trial, including without limitation, damages to physical well-being, emotional and psychological damages, damages to reputation, past and future economic losses, loss of educational opportunities, and loss of future career prospects, plus punitive damages, prejudgment interest, attorneys' fees, expenses, costs and disbursements; and an injunction against W&L ordering W&L to expunge John's educational and disciplinary record of any notation regarding the finding and sanction, requiring W&L to destroy all records concerning the disciplinary proceeding; and reinstating John to the University as a student in good standing to complete his undergraduate degree;
- (iii) on the third cause of action for breach of an implied contract, a judgment awarding John damages in an amount to be determined at trial, including without limitation, damages to physical well-being, emotional and psychological damages, damages to reputation, past and future economic losses, loss of educational opportunities, and loss of future career prospects, exemplary damages, plus prejudgment interest, attorneys' fees, expenses, costs and disbursements;

- (iv) on the fourth cause of action for negligence, a judgment awarding John damages in an amount to be determined at trial, including without limitation, damages to physical well-being, emotional and psychological damages, damages to reputation, past and future economic losses, loss of educational opportunities, and loss of future career prospects, exemplary damages, plus prejudgment interest, attorneys' fees, expenses, costs and disbursements.

JURY DEMAND

Plaintiff John Doe demands a trial by jury of all issues presented herein that are capable of being tried by a jury.

Dated: April 23, 2019

Respectfully submitted,

By:

s/ David G. Harrison
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EXHIBIT 1

I. Purpose and Statement of Intent

All forms of sexual discrimination, including sexual harassment, sexual assault, sexual exploitation, domestic and dating violence, stalking, and retaliation of any form are an affront to human dignity and fundamentally at odds with the values of Washington and Lee University. The University community has a responsibility to maintain an environment free from all forms of sexual discrimination and misconduct. It is committed to taking all appropriate steps to eliminate prohibited conduct, prevent its recurrence, and address its effects.

The University is committed to fostering a climate free from sexual discrimination and misconduct through clear and effective policies, a coordinated education and prevention program, and prompt and equitable procedures for resolution of complaints that are accessible to all. The University encourages all members of its community to participate in creating a safe, welcoming, and respectful environment on campus. Ultimately, all members of the community are expected to assume responsibility for their conduct, to report behaviors that may violate this policy, and to take reasonable and prudent actions to prevent acts of sexual misconduct.

This policy prohibits a broad continuum of behaviors, all of which constitute a form of sexual or gender-based harassment or discrimination, sexual assault, or dating or domestic violence. Prohibited conduct that may violate this policy includes sexual discrimination, sexual harassment, sexual assault, sexual exploitation, domestic and dating violence, stalking, and retaliation. This document may use the term "sexual misconduct" to refer to any or all of those prohibited behaviors.

The University will respond according to the severity or pervasiveness of the offense and the threat it poses to an individual and the community. Individuals who are found responsible for violating this policy may face disciplinary sanctions up to and including dismissal and/or termination of employment.

The University will not tolerate retaliation against any individual who makes a report, participates in a resolution process, or assists as a bystander to prevent sexual

misconduct. Retaliation destroys the sense of community and trust that is central to a respectful environment. Community members engaging in retaliation will be subject to disciplinary action, whether such acts are implicit or explicit, or committed directly or indirectly.

This policy provides community members with the structure, tools, and guidance to assist those who have experienced or been affected by sexual misconduct, whether as a complainant, a respondent, or a third party.¹

II. Scope of Policy

This policy addresses all forms of sexual discrimination, including sexual harassment, sexual exploitation, sexual assault, dating or domestic violence, stalking, and retaliation. It prohibits these behaviors against W&L community members of any gender, gender identity, gender expression, or sexual orientation. This policy also prohibits failure to provide equal opportunity in admissions, employment, or athletics; reports of these types of discrimination should also be brought to the attention of a Title IX Coordinator and will be addressed as appropriate.

This policy applies to all members of the Washington and Lee community, including students, faculty, and staff, as well as consultants, volunteers, vendors, and others engaged in business with the University. Visitors to and guests of Washington and Lee University are both protected by this policy and subject to its prohibitions. Visitors and guests may report violations of this policy committed against them by members of the W&L community. Visitors and guests may also be permanently forbidden from entering any part of the campus or attending any W&L sponsored events.

This policy may be applied to conduct that takes place from the time a person enrolls at the University or accepts employment or volunteer duties (including academic term breaks and periods between terms and semesters) and continues until the student withdraws or graduates, the employee ceases employment, or the volunteer ceases to provide services for the University.

This policy pertains to acts of sexual misconduct committed by or against students, employees, and third parties when:

1. The conduct occurs on the campus or other property owned or controlled by the University;
2. The conduct occurs in the course of University-related travel or off-campus programs, such as (but not limited to) domestic or international academic programs, field trips, spring term coursework, study-abroad programs, internship programs, work-related conferences, etc.; or
3. The conduct has a continuing adverse effect for a complainant while on campus or other property owned or controlled by the University or in any University employment or education program or activity.

The University will process all Title IX complaints regardless of where the conduct occurred to determine whether the conduct occurred in the context of its educational program or has continuing adverse effects on campus or in an off-campus program or activity.

This policy also applies to behavior conducted online, including via e-mail. Postings on blogs, web page entries, social media sites, and other similar online postings can subject an individual or group to allegations of violations of this policy. The University does not regularly search for this information, but action may be taken by the University if and when such information is brought to the attention of the University.

Where the date of the reported sexual misconduct precedes the effective date of this policy, the definitions of sexual misconduct in existence at the time of the alleged incident(s) will be used. However, the procedures set forth in this policy will be used to investigate and resolve all reports made on or after the effective date of this policy, regardless of when the incident(s) occurred.

III. Notice of Non-Discrimination and Statement of Compliance with Relevant Laws

A. Notice of Non-Discrimination

In compliance with Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and all other applicable non-discrimination laws, Washington and Lee University does not discriminate on the basis of race, color, religion, national or ethnic origin, sex, gender identity, gender expression, sexual orientation, age, disability, veteran's status, or genetic information in its educational programs and activities, admissions, and with regard to employment. Inquiries may be directed to Lauren E. Kozak, Title IX Coordinator, Elrod University Commons 212, (540) 458-4055, kozakl@wlu.edu, who is designated by the University to coordinate compliance efforts and carry out its responsibilities under Title IX, as well as those under Section 504 and other applicable non-discrimination laws.

The University, as an educational community, will promptly and equitably respond to reports of sexual discrimination, sexual harassment, sexual exploitation, sexual assault, domestic and dating violence, stalking, and retaliation in order to eliminate the misconduct, prevent its recurrence, and address its effects on any individual or the community.

All University proceedings are to be conducted in compliance with the requirements of Title IX, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act); the Family Educational Rights and Privacy Act (FERPA); and all other applicable federal and state laws, regulations, and guidance.

In addition to contacting the complaint resources specified in this policy, any person with concerns concerning the University's response to his/her complaint may contact the following:

U.S. Department of Education

Washington DC (Metro)

Office for Civil Rights

U.S. Department of Education

400 Maryland Avenue, SW

Washington, D.C. 20202-1475

Telephone: 202-453-6020

FAX: 202-453-6021; TDD: 800-877-8339

Email: OCR.DC@ed.gov

B. The Role of the Title IX Coordinator

Lauren E. Kozak serves as the University's Title IX Coordinator. She is to be informed of all reports of sexual misconduct and will oversee the University's review, investigation, and resolution of those reports to ensure the University's compliance with Title IX and other applicable laws, and the effective implementation of this policy.

The Title IX Coordinator is:

- Responsible for the oversight of the resolution of all reports of sexual misconduct involving students, staff, and faculty as well as volunteers and third parties;
- Knowledgeable and trained in University policies and procedures and relevant state and federal laws;
- Available to advise any individual, including a complainant, a respondent, or a third party, about the courses of action available at the University, both informally and formally, as well as in the community;
- Available to provide assistance to any University employee regarding how to respond appropriately to a report of sexual misconduct;
- Responsible for monitoring compliance with all procedural requirements, record keeping and time frames outlined in this policy;

- Responsible for overseeing training, prevention and education efforts, and reviews of climate and culture and patterns of sexual misconduct; and
- Responsible for conducting or overseeing investigations of complaints against students.

The Title IX Coordinator is supported by Mary E. Main, the Executive Director of Human Resources, who serves as the Assistant Title IX Coordinator for Employment, and Elizabeth Knapp, the Associate Provost, who serves as the Assistant Title IX Coordinator for Gender Equity in Athletics. Other individuals or offices that may be involved in addressing complaints may include the Director of Public Safety; the Vice President for Student Affairs and Dean of Students or a professional staff member of Student Affairs; Human Resources; the Provost's Office; and the Vice President for Finance and Administration and Treasurer. The individuals who will address complaints will be limited to a small circle of individuals who need to know in order to implement this policy.

IV. Privacy and Confidentiality

The University is committed to protecting the privacy of all individuals involved in a report of sexual misconduct. In any report, the University will make every effort to protect the privacy of all individuals involved in a manner consistent with the need for a careful assessment of the allegation and any necessary steps to eliminate the misconduct, prevent its recurrence, and address its effects.

Privacy and confidentiality have distinct meanings under this policy.

Privacy means that information related to a report of sexual misconduct will be shared only with a limited circle of individuals—those University employees who have a legitimate need to know in order to assist in the active review, investigation, or resolution of the report pursuant to the Family Education Rights and Privacy Act (FERPA) and applicable federal and state laws. While not bound by confidentiality, these individuals will be discreet and respect the privacy of all individuals involved in the process.

Confidentiality means that information shared by an individual with designated campus or community professionals cannot be revealed to any other person without express permission of the individual. Those professionals include medical providers, mental health care providers, ordained clergy, and off-campus rape crisis counselors, all of whom have privileged confidentiality recognized by law. These individuals are prohibited from breaking confidentiality unless there is an imminent threat of harm to self or others, the conduct involves suspected abuse of a minor under the age of 18, or as otherwise authorized by state and federal law.

Community members wishing to seek confidential assistance may speak with counselors in the Counseling Center, health service providers in the Student Health Center, local health providers, off-campus rape crisis resources, counseling resources available to employees through the Employee Assistance Program, or members of the clergy, all of whom will maintain confidentiality. More information about confidential resources can be found in Section VIII (B).

Reporting on Campus: It is important to understand that any University employee who is not designated as a confidential resource cannot maintain the confidentiality of a report or information concerning an alleged violation of this policy and all employees are expected to share any report of sexual misconduct with a Title IX Coordinator. More information about how to report to campus authorities can be found in Section IX (B).

Release of Information: No information shall be released from proceedings under this policy except as required or permitted by law and by University policy.

Pursuant to and as required by the Clery Act, if a report of misconduct indicates a serious and immediate threat to the campus community, the University will issue a timely notification to the community to protect its health or safety.

Pursuant to and as required by the Clery Act, anonymous statistical information must be shared with Public Safety. Annual Clery reporting to the U.S. Department of Education is required of educational institutions for certain offenses that have been reported at campus locations or certain off-campus locations controlled by the

institution. The information contained in the Clery report tracks the number of Clery-reportable offenses occurring at such locations and does not include the names or any other identifying information about the persons involved in the incident. The University may also share non-personally identifying information about reports received in aggregate form, including data about outcomes and sanctions.

Additionally, pursuant to and as required by Virginia law, the University must disclose information regarding a report of sexual misconduct to law enforcement if (1) it is a report of sexual violence, which means physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent; (2) the sexual violence is alleged to have been committed against a student attending the University, or may have occurred on certain locations as defined under Virginia law; (3) disclosure of the information is deemed necessary to protect the health or safety of the student or other individuals by the three-person University Review Committee (the Review Committee is composed of the Title IX Coordinator, a representative from Student Affairs, and a representative from Public Safety). If the alleged act of sexual violence is a felony crime of sexual violence under Virginia law, disclosure will also be made to the Commonwealth's Attorney without the release of any personally identifiable information (unless such information was deemed necessary by the Review Committee to be disclosed to law enforcement in accordance with the applicable law). See [Va. Code § 23-9.2:15](#). In the event of a disclosure, complainants retain the right to decline to participate in any investigation or to request that a criminal investigation not proceed.

Only as permitted by the Family Educational Rights and Privacy Act (FERPA) and/or other applicable law and University Policy will Washington and Lee notify the parents or guardians of students regarding any conduct situation, including disciplinary probation, loss of housing, suspension, and dismissal.

V. Prohibited Conduct

W&L prohibits and will not tolerate sexual misconduct in any form. Such violations are subject to any combination of sanctions, including suspension, dismissal, or

termination of employment. Sexual misconduct affects individuals of all genders, gender identities, gender expressions, and sexual orientation, and does not discriminate by racial, social, or economic background.

The following behaviors fall under the broad definition of sexual misconduct and are prohibited.

- Sexual Discrimination
- Sexual Harassment
- Non-Consensual Sexual Penetration
- Non-Consensual Sexual Contact
- Sexual Exploitation
- Domestic and Dating Violence
- Stalking
- Retaliation

A. Sexual Discrimination

Unequal treatment based on an individual's sex, sexual orientation, gender identity or gender expression that is sufficiently serious to unreasonably interfere with or limit the individual's opportunity to participate in or benefit from a University program or activity or that otherwise adversely affects a term or condition of an individual's education or living environment.

B. Sexual Harassment

Any unwelcome conduct of a sexual nature (sexual advances, request for sexual favors, or other unwanted verbal or physical conduct of a sexual nature) or unwelcome conduct based on sex, sexual orientation, gender identity, or gender expression, when one or more of the following conditions are present:

- Submission to the unwelcome conduct is an expressed or implied condition of an individual's employment, evaluation of academic work, or any aspect of a University program or activity;

- Refusal to submit to unwelcome conduct resulted in a tangible academic or employment detriment; or
- The unwelcome conduct unreasonably interferes with an individual's work or academic performance, or creates an intimidating or hostile academic or work environment under both an objective (a reasonable person's view) and subjective (the complainant's view) standard.

Sexually harassing behaviors differ in type and severity and can range from verbal harassment to unwelcome physical contact. A wide range of behaviors may fall within the general definition of sexual harassment depending on the circumstances.

A single, isolated incident of sexual harassment alone may create a hostile environment if the incident is sufficiently severe. The more severe the conduct, the less need there is to show a repetitive series of incidents to create a hostile environment, particularly if the harassment is physical. The determination of whether an environment is hostile must be based on all the circumstances. These circumstances could include, but are not limited to:

- The frequency of the conduct;
- The nature and severity of the conduct;
- Whether the conduct was physically threatening;
- Whether the conduct was directed at more than one person;
- Whether the conduct arose in the context of other discriminatory conduct;
- Whether a statement is a mere utterance of an epithet that engenders offense in an employee or a student or offends by mere discourtesy or rudeness; and/or
- Whether the conduct deserves the protections of academic freedom.

Sexual harassment:

- May be blatant and intentional and involve an overt action, a threat, or a reprisal, or may be subtle and indirect, with a coercive aspect that is unstated;

- Does NOT have to include intent to harm, be directed at a specific target, or involve repeated incidents;
- May be committed by anyone, regardless of gender, age, position, or authority. While there is often a power differential between two persons, perhaps due to differences in age, social, educational, or employment relationships, harassment can occur in any context;
- May be committed by a stranger, an acquaintance, or someone with whom the complainant has an intimate or sexual relationship;
- May be committed by or against an individual or may be a result of the actions of an organization or group;
- May occur in the classroom, in the workplace, in residential settings, over electronic or social media (including the Internet, telephone, and text), or in any other setting.

Examples of conduct that may constitute sexual harassment as defined above may include, but are not limited to, a severe, persistent, or pervasive pattern of unwelcome conduct that includes one or more of the following:

- Physical conduct:
 - Unwelcome touching, sexual/physical assault, impeding, restraining, or blocking movements.
 - Unwanted sexual advances.
- Verbal conduct:
 - Making or using derogatory comments, epithets, slurs, or humor
 - Verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body; sexually degrading words used to describe an individual; suggestive or obscene letters, notes, or invitations.
 - Offensive comments of a sexual nature, including sexually explicit statements, questions, jokes, or anecdotes.
- Visual conduct:

- Leering; making sexual gestures; displaying suggestive objects or pictures, cartoons, or posters in a public space or forum.
 - Visual displays of suggestive, erotic, or degrading, sexually oriented images that are not pedagogically appropriate.
- Written conduct: letters, notes or electronic communications, including social media, containing comments, words, or images described above.
- Quid pro quo conduct:
 - Offering employment or academic benefits in exchange for sexual favors.
 - Making submission to sexual advances an actual or implied condition of employment, work status, promotion, grades or letters of recommendation, including subtle pressure for sexual activity, an element of which may be repeated requests for private meetings with no academic or work purpose.
 - Making or threatening reprisals after a negative response to sexual advances.

C. Non-Consensual Sexual Penetration

Sexual penetration with another individual without consent.

Sexual penetration includes vaginal or anal penetration, however slight, with a body part (*e.g.*, penis, tongue, finger, hand) or object, or oral penetration involving mouth-to-genital contact.

D. Non-Consensual Sexual Contact

Sexual contact with another individual without consent.

Sexual contact includes any intentional, and non-accidental touching of the intimate parts of another, causing another to touch one's intimate parts, or disrobing or exposure of another without permission. Intimate parts may include the breasts, genitals, buttocks, groin, mouth, or any other part of the body that is touched in a sexual manner.

E. Sexual Exploitation

Taking advantage of the sexuality of another person without consent or in a manner that extends the bounds of consensual activity for any non-legitimate purpose.

Examples of sexual exploitation include, but are not limited to, the following:

- Observing another individual's nudity or sexual activity or allowing another to observe nudity or sexual activity without the consent of all parties involved in a place where the individual being observed would have a reasonable expectation of privacy;
- Recording, streaming, or photographing private sexual activity and/or a person's nudity, or distribution of such without the consent of all parties involved;
- Prostituting another individual; and/or
- Inducing incapacitation for the purpose of making another person vulnerable to non-consensual sexual activity.

F. Domestic and Dating Violence

Domestic violence means violence committed by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner;
- Any other person against a complainant who is protected from that person's acts under the domestic or family violence laws of Virginia (18.2-572, 18.2-61 et seq.), which includes parents, stepparents, children, stepchildren, brothers, sisters, half-brothers, half-sisters, grandparents, grandchildren, and in-laws.

Dating violence means 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 (1) the length of the relationship; (2) the type of relationship; and (3) the frequency of interaction between the persons involved in the relationship.

Domestic and/or dating violence includes sexual or physical abuse or the threat of that abuse.

Domestic and/or dating violence may involve one act or an ongoing pattern of behavior.

The University will not tolerate domestic or dating violence. The University recognizes that sexual harassment, sexual assault, stalking, and retaliation all may be forms of domestic or dating violence when committed by a person who is or has been involved in a sexual, dating, or other social relationship of a romantic or intimate nature with the complainant.

G. Stalking

Stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

"Course of conduct" means two or more acts.

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

Examples of stalking may include, but are not limited to:

- Unwelcome/unsolicited communication including in-person communication, telephone calls, voice messages, text messages, e-mail messages, social networking site postings, instant messages, postings, written letters, gifts or other communications;

- Following, pursuing, waiting or showing up uninvited at a workplace, place of residence, classroom, or other locations frequented by a complainant;
- Surveillance and other types of observation, whether by physical proximity or electronic means;
- Trespassing;
- Vandalism;
- Non-consensual touching;
- Direct physical and/or verbal threats against a complainant or someone close to the complainant;
- Gathering of information about a complainant from family, friends, or co-workers and/or classmates;
- Manipulative and controlling behaviors such as threats to harm oneself;
- Defamation or slander against the victim; or
- Using a third party or parties to accomplish any of the above.

H. Retaliation

Retaliation includes intimidating, threatening, coercing, or in any way discriminating against any person or group for exercising rights under this policy.

Actions are considered retaliatory if they (1) are in response to a good faith disclosure of real or perceived University-related misconduct, participation in an investigation of University-related misconduct, or engaging in bystander intervention of sexual misconduct, and (2) would deter a reasonable person in the same circumstances from opposing practices prohibited by this policy or participating in the complaint processes under this policy.

Retaliation may be present even where there is a finding of "Not Responsible" on the allegations of misconduct prohibited by this policy. Community members engaging in retaliation will be subject to disciplinary action, whether such retaliatory acts are implicit or explicit, or committed directly or indirectly. The University will make every reasonable effort to stop retaliation immediately, to provide remedies to victims of retaliation, and to sanction the perpetrators of retaliation as appropriate.

For employees, discipline for retaliation will be handled by the Executive Director of Human Resources, the Provost's office, or a department head. For students, the Vice President for Student Affairs and Dean of Students has the discretion to address retaliation by taking administrative actions, disciplinary or otherwise, or referring the matter for a formal conduct charge. Notwithstanding the foregoing, and regardless of the manner in which any alleged retaliation is addressed, before any discipline is imposed, the person accused of retaliation will receive notice and an opportunity to be heard, as appropriate under the circumstances.

VI. Understanding Consent: Force, Coercion, Incapacitation, and Alcohol

A. Consent

Individuals who choose to engage in sexual activity of any type must first obtain the consent of the other party. Consent is demonstrated through mutually understandable words and/or actions that clearly indicate a willingness to engage freely in sexual activity.

Additional Guidance about Consent:

- Consent to one form of sexual activity does not, by itself, constitute consent to engage in all forms of sexual activity.
- Consent consists of an outward demonstration indicating that an individual has freely chosen to engage in sexual activity. Consent may not be inferred from silence, passivity, lack of resistance, or lack of an active response alone. A person who does not physically resist or verbally refuse sexual activity is not necessarily giving consent.
- A verbal "no" is a clear demonstration of the lack of consent.
- Individuals with a previous or current intimate relationship do not automatically give either initial or continued consent to sexual activity. Even in

the context of a relationship, there must be mutually understandable communication that clearly indicates a willingness to engage in sexual activity.

- Either party may withdraw consent at any time. Withdrawal of consent should be outwardly demonstrated by words or actions that clearly indicate a desire to end sexual activity. Once withdrawal of consent has been expressed, sexual activity must cease.
- Consent is not effective 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 free will to choose whether or not to have sexual contact. See Paragraphs (B) and (C) of this Section for further discussion.
- An individual who is physically incapacitated from alcohol or other drug consumption (voluntarily or involuntarily) or is asleep, unconscious, unaware, or otherwise physically helpless is considered unable to give consent. See Paragraph (D) of this Section for further discussion.

B. Force

Force is the use or threat of physical violence or intimidation to overcome an individual's freedom of will to choose whether or not to participate in sexual activity. There is no requirement that a party resists a sexual advance or request, but resistance will be viewed as a clear demonstration of non-consent.

C. Coercion

Coercion is the use of unreasonable and persistent pressure to compel another individual to initiate or continue sexual activity against an individual's will. Coercion can include a wide range of behaviors, including intimidation, manipulation, threats, and blackmail. Coercion may be emotional, intellectual, psychological, or moral. A person's words or conduct are sufficient to constitute coercion if they wrongfully impair another individual's freedom of will and ability to choose whether or not to engage in sexual activity. In evaluating coercion, the University will consider: (1) frequency of the application of pressure; (2) intensity of the pressure, (3) isolation of

the person being pressured; and (4) duration of the pressure. Coercing an individual into engaging in sexual activity violates this policy in the same way as physically forcing someone into engaging in sexual activity.

D. Incapacitation

An individual who is incapacitated cannot consent to sexual activity. Incapacitation is defined as the inability, temporarily or permanently, to give consent because an individual is mentally and/or physically helpless, asleep, unconscious, or unaware that sexual activity is occurring.

In other words, a person may be considered unable to give valid consent due to incapacitation if the person is not able to understand the who, what, where, when, why, and/or how of a sexual interaction.

In evaluating whether consent was present in cases of alleged incapacitation, the University asks three questions: (1) Was complainant incapacitated?, (2) If so, did the respondent know that the complainant was incapacitated?, and (3) If not, would a sober, reasonable person in the same situation have known that the complainant was incapacitated based on objectively and reasonably apparent indications of impairment.

An individual who engages in sexual activity with someone the individual knows or reasonably should know is incapable of giving consent is in violation of this policy.

1. Alcohol or Other Drugs

Where alcohol or other drugs are involved, incapacitation is a state beyond drunkenness or intoxication. The impact of alcohol and other drugs varies from person to person; however, common warning signs that a person may be incapacitated or approaching incapacitation as a result of alcohol or drug use or consumption may include slurred speech, vomiting, unsteady gait, odor of alcohol, incontinence, combativeness, or emotional volatility.

Alcohol and drugs impair a person's decision-making capacity, awareness of consequences, and ability to make informed judgments. It is especially important,

therefore, that anyone engaging in sexual activity be aware of the other person's level of intoxication. If there is any doubt as to the level or extent of the other individual's intoxication or impairment, the prudent course of action is to forgo or cease any sexual contact or activity.

Being intoxicated or impaired by drugs or alcohol is never an excuse for sexual misconduct, and does not diminish one's responsibility to obtain consent.

VII. Prohibited Relationships by Persons in Authority

The faculty-student relationship is one of trust in the institution and the faculty member, who has the professional responsibility for being a mentor, educator, and evaluator. Faculty-student and employee-student romantic and/or sexual attention, interaction, or relationships, even mutually consenting ones, interfere with a student's unfettered pursuit of learning and the integrity of the academic and workplace environment.

Consensual relationships (defined in the [Consensual Relationship Policy](#) as a romantic and/or sexual relationship to which both parties have given their consent) between University employees and undergraduate students are prohibited.

Consensual relationships between law students and all employees within the Law School are prohibited.

Consensual relationships between law students and non-Law School employees of the University who have the potential to directly impact the student's academic or professional status or development now or in the future are prohibited.

Consensual relationships between law students and University employees who believe they are exempted by the preceding sentence are strongly discouraged. Such employees who nevertheless choose to engage in a consensual relationship with a law student may not be defended or indemnified by the University if difficulties in

the relationship arise (including, but not limited to, student claims of sexual harassment against the University or employee).

If an ongoing consensual relationship began while both parties were undergraduate or law students and one of the parties thereafter becomes an employee of the University, such a consensual relationship should be disclosed by the employee at the time of hire, but is not prohibited unless the employee has the potential to directly impact the student's academic or professional status or development currently or in the future. Such an employee may not be defended or indemnified by the University if difficulties in the relationship arise (including, but not limited to, student claims of sexual misconduct against the University or employee).

Consensual relationships are addressed separately under the University's [Consensual Relationship Policy](#). Failure to fully comply with the University's Consensual Relationship Policy could subject the person in authority to disciplinary action, up to and including dismissal from employment by the University. Questions about the Consensual Relationship Policy, its application, and/or its enforcement should be directed to the Provost for faculty, or to the Executive Director of Human Resources for other employees or those under contract or assignment by W&L.

VIII. Resources for Complainants and Respondents

A first step for any complainant or third-party witness may be choosing how to proceed following an incident of sexual misconduct. The University provides two distinct institutional resources:

Confidential Resources do not involve notifying the University of the incident unless the complainant requests such action.

Reporting Resources notify the University of the incident and begin the Title IX assessment and ultimate resolution of the report through remedies-based resolution or investigation and potential disciplinary proceedings.

It is also important to note that emergency medical, W&L Public Safety, and/or local law enforcement assistance are available both on and off-campus. All individuals are encouraged to contact law enforcement and seek medical treatment immediately following an incident when such assistance is desired or necessary under the circumstances.

The University is committed to treating all members of the community with dignity, care, and respect. Any individual affected by sexual misconduct, whether as a complainant, a respondent, or a third party, will have equal access to support consistent with their needs and available University resources.

The University recognizes that deciding whether to make a report and choosing how to proceed can be difficult decisions. The University encourages any individual who has questions or concerns to seek the support of campus and community resources. These professionals can provide information about available resources and procedural options and other assistance to either party in the event that a report and/or disciplinary proceedings are pursued. Individuals are encouraged to use all available resources, regardless of when or where the incident occurred.

A. Emergency and Community Resources

The first priority for any individual should be personal safety and well-being. The University encourages all individuals who have experienced sexual misconduct to seek assistance by contacting W&L Public Safety, calling 911, contacting local law enforcement, and/or visiting a medical facility immediately after an incident when such assistance is desired or necessary under the circumstances.

All individuals are encouraged to make a prompt report to law enforcement and/or to seek immediate medical treatment in response to an incident when such assistance is desired or necessary under the circumstances in order to address immediate safety concerns and to allow for the preservation of evidence and an immediate investigative response. The University will assist in these reporting options by arranging for or providing transportation to the hospital, coordinating with local law enforcement (including assisting with filing a police report and

obtaining a protective order), and informing a complainant about the University's resources and complaint processes.

24-Hour Support Services:

- **911**
- **Lexington Police Department: (540) 462-3705**
- **Rockbridge County Sheriff's Office: (540) 463-7328**
- **W&L Public Safety (540) 458-8999**
- **W&L Student Health (540) 458-8401**
- **Carillion Stonewall Jackson Hospital: (540) 458-3300**
- **Dean of Students Office (540) 458-8754**
- **Dean on Call 24/7 by calling Campus Public Safety: (540) 458-8999**
- **Project Horizon: (540) 463-2594**
(Dating and Domestic Violence and Sexual Assault)
- **Augusta Health (Fishersville): (800) 932-0262**
(This is the closest hospital that can conduct a forensic exam by a Sexual Assault Nurse Examiner. The purpose of a forensic exam is to document and collect evidence of sexual contact and/or physical trauma. When there is suspicion or concern that an assault may have been facilitated by the use of drugs, the forensic exam may also include the collection of urine and blood samples for toxicology testing. Individuals are not required to report an incident to law enforcement or the University in order to receive medical attention or a forensic exam. Both Project Horizon and W&L Public Safety can assist with transportation. An individual can coordinate transport from Public Safety through the Student Health Center.)

B. Confidential Resources and Support

For individuals who are seeking confidential consultation, several resources provide confidential support, both on campus and in the local community. The trained professionals designated below can provide counseling, information, and support under legally protected confidentiality. They may, however, submit non-identifying

information about the incident for purposes of making a statistical report under the Clery Act.

Students wishing to obtain confidential support or resources on campus are encouraged to contact the University Student Health and Counseling. This center is staffed by medical, psychiatric, and psychological professionals who are bound by separate laws of confidentiality and will not share the report with other members of the University. These individuals are prohibited from breaking confidentiality unless there is an imminent threat of harm to self or others, the conduct involves suspected abuse of a minor under the age of 18, or as otherwise authorized by state and federal law.

Confidential Resources include any of the following:

- **W&L Student Health Center:**
Counseling Services: (540) 458-8590
Health Services: (540) 458-8401
- **Project Horizon: (540) 463-2594**
(Dating and Domestic Violence and Sexual Assault)

Confidential Resources for Employees:

In addition to Project Horizon, employees wishing to make a confidential report are encouraged to contact the Employee Assistance Program, which is staffed by individuals who are bound by the same rules of confidentiality.

- **Employee Assistance Program (EAP): (800) 992-1931**

Other Confidential Resources:

Virginia State Domestic & Sexual Violence Hotline (VSDS)

(800) 838-8238 (24-hour hotline)

The Virginia State Domestic & Sexual Violence Hotline can provide resources for

survivors.

<http://www.dss.virginia.gov/community/dv/>

National Domestic Violence Hotline (NDV)

(800) 799-7233 (SAFE)

The National Domestic Violence Hotline can provide advocacy, resources, referral, and legal assistance to victims of dating or domestic violence.

www.thehotline.org

Rape, Abuse and Incest National Network (RAINN)

(800) 656-4673

A confidential, anonymous national sexual assault hotline.

www.rainn.org

IX. Reporting

The University encourages all individuals to seek assistance from a medical provider and law enforcement immediately after an incident of sexual misconduct when such assistance is desired or necessary under the circumstances, regardless of whether or not the individual plans to pursue criminal action. This is the best option to ensure preservation of evidence and to begin a timely response by law enforcement and/or the University. Complainants are strongly encouraged to take immediate steps to preserve all evidence that might support a future report to the University, a protective order, or an investigation by law enforcement.

The University supports victims of sexual misconduct and encourages all individuals or third-party witnesses to report any incident to the University, and to law enforcement if it involves potential criminal conduct.

Making a report means telling a Reporting Resource (someone in authority, see Section IX (B)) what happened-in person, by telephone, in writing, or by e-mail. At the time a report is made, a complainant does not have to decide whether or not to request any particular course of action, nor does a complainant need to know how to label what happened. The University provides support to each individual in

making these important decisions, and to the extent legally possible, will respect an individual's autonomy in deciding how or whether to proceed. In this process, the University will balance the individual's interest with its obligation to provide a safe and non-discriminatory environment for all members of the University community.

Any individual who reports sexual misconduct can be assured that the University will assess each report and resolve it in a fair and impartial manner, as appropriate under the circumstances. All individuals involved can expect to be treated with dignity and respect. In every report, the University will make an immediate assessment of any risk of harm to the University or to the broader campus community and will address those risks, including taking interim measures to provide for the safety of the individual and the campus community.

A. Reporting to Law Enforcement

The University encourages complainants to pursue criminal action for incidents of sexual misconduct that may also be crimes under state criminal statutes.

Complainants have the right to notify or decline to notify law enforcement authorities. The University will assist a complainant, at the complainant's request, in contacting local law enforcement; filing a report; or obtaining a protective order. The University will cooperate with law enforcement agencies if a complainant decides to pursue the criminal process. Complainants have the right to participate or decline to participate in any investigation to the extent permitted under state or federal law.

Local law enforcement information:

- **Lexington Police Department: (540) 462-3705**
- **Rockbridge County Sheriff's Office: (540) 463-7328**
- **Virginia State Police: (804) 674-2000**

Project Horizon can provide legal information to complainants about criminal reporting, investigations, as well as civil and criminal court proceedings. Project Horizon Advocates may accompany complainants to court dates and appointments with law enforcement officers, the Commonwealth's Attorney, Court Services Unit,

and other legal proceedings and answer questions about these processes. To speak with Project Horizon's legal advocate, call (540) 463-8761.

The University's policy, definitions, and burden of proof may differ from Virginia criminal law. A complainant may seek resolution through the University's complaint process, may pursue criminal action, may choose one but not the other, or may choose both. Neither law enforcement's determination whether or not to prosecute a respondent nor the outcome of any criminal prosecution determine whether sexual misconduct has occurred under this policy. Proceedings under this policy may be carried out prior to, simultaneously with, or following civil or criminal proceedings off-campus.

Pursuant to and as required by Virginia law, the University must disclose information regarding a report of sexual misconduct to law enforcement if (1) it is a report of sexual violence, which means physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent; (2) the sexual violence is alleged to have been committed against a student attending the University, or may have occurred on certain locations as defined by Virginia law; (3) disclosure of the information is deemed necessary to protect the health or safety of the student or other individuals by the three-person University Review Committee (the Review Committee is composed of the Title IX Coordinator, a representative from Student Affairs, and a representative from Public Safety). If the alleged act of sexual violence is a felony crime of sexual violence under Virginia law, disclosure must, under applicable law, also be made to the Commonwealth's Attorney without the release of any personally identifiable information (unless such information was deemed necessary by the Review Committee to be disclosed to law enforcement in accordance with the applicable law). See [Va. Code § 23-9.2:15](#). In the event of a disclosure, complainants retain the right to decline to participate in any investigation or to request that a criminal investigation not proceed.

In making the determination as to whether disclosure is necessary to protect the health or safety of the student or other individuals, the Review Committee will make

this determination based upon the totality of the known circumstances and will be guided by a consideration of the following factors:

- Whether the respondent has prior arrests, is the subject of prior reports and/or complaints related to any form of sexual misconduct;
- Whether the respondent has any history of violent behavior;
- Whether the respondent has a history of failing to comply with any University No-Contact Directives, other University protective measures and/or judicial protective order;
- Whether the respondent has threatened to commit further violence;
- Whether the alleged sexual violence involved multiple respondents;
- Whether the alleged sexual violence involved physical force;
- Whether the alleged sexual violence may have been facilitated through the use of "date-rape" or similar drugs or intoxicants;
- Whether the complainant is a minor (under 18);
- Whether any other aggravating circumstances are present.

B. Campus Reporting Resources

All W&L community members should report all incidents of sexual misconduct or retaliation directly to the Title IX Coordinator or Assistant Title IX Coordinator for Employment.

The University recognizes that a student or employee may choose to report to any employee of the University. For example, a student may choose to confide in an associate dean, a resident adviser, a faculty member, a director, or a coach. Similarly, an employee may choose to confide in a supervisor or a colleague. No W&L employee may promise confidentiality (except in Student Health and Counseling), and all W&L employees are expected to share such information with the Title IX Coordinator or Assistant Title IX Coordinator for Employment.

W&L has identified certain groups of employees as "Responsible Employees" for purposes of complaints of sexual misconduct. A Responsible Employee is required to

report to a Title IX Coordinator all relevant details (obtained directly or indirectly) about an incident of sexual misconduct, including dates, times, locations, and names of parties and witnesses. Information brought to the attention of a Responsible Employee is not confidential. All Responsible Employees will be trained on how to identify sexual misconduct and on their duties.

The following Responsible Employees have the authority to redress complaints of sexual violence or sexual misconduct:

- Title IX Coordinator and Assistant Title IX Coordinator(s)
- Student Resources: Identified at go.wlu.edu/OGC/ResourcesContactInfo
- Employee Resources: Identified at go.wlu.edu/OGC/ResourcesContactInfo
- Director and Officers of Public Safety

The following additional Responsible Employees must report complaints of sexual misconduct to a Title IX Coordinator (*Note: The positions listed below are identified as Responsible Employees because students may reasonably believe them to have the authority to redress or the duty to report such complaints*):

- Athletic Director, Associate and Assistant Athletic Directors
- Athletic Team Coaches, Assistant Coaches, and Athletic Trainers
- Director of Sustainability Initiatives and Education
- Directors of Legal Clinics
- Faculty and staff accompanying students on off-campus programs or other University-related trips, within and outside the United States
- Undergraduate Faculty Department Chairs and Program Chairs
- Law School Director of Academic Success
- Resident Advisers and Community Assistants
- Shepherd Program-Coordinator for Student Service Leadership and Research, Associate Director of Community-Based Learning, and Co-Curricular Service Coordinator

Students and all other employees should report information about any incident of sexual misconduct to any of the Responsible Employees or to the reporting resources listed below:

All Campus Reporting Resources

Lauren E. Kozak, Title IX Coordinator

Elrod University Commons 212

Phone: 540.458.4055

Email: kozakl@wlu.edu

Mary E. Main, Assistant Title IX Coordinator for Employment

Office of Human Resources

Two South Main 109

Phone: 540.458.8920

Email: mmain@wlu.edu

Elizabeth Knapp, Assistant Title IX Coordinator for Gender Equity in Athletics

Washington Hall 217

Phone: 540.458.8705

Email: knappe@wlu.edu

For complaints about gender equity in W&L athletic programs.

Office of Student Affairs

Elrod Commons 242

Phone: 540.458.8754

Students can report incidents directly to the Vice President for Student Affairs and Dean of Students or to a member of the professional staff.

Department of Public Safety

Public Safety Dispatch on E. Denny Circle

Phone: 540.458.8999

Available 24 hours a day/7 days a week/365 days a year

Available to receive reports of incidents of sexual misconduct. Also available to arrange or provide transportation to the hospital or local law enforcement, and can reach the Student Affairs Dean on Call at any time.

C. Anonymous Reporting

Any individual may make an anonymous report concerning incidents of sexual misconduct. An individual may report the incident without disclosing his or her name, identifying the respondent, or requesting any action. Depending on the extent of information available about the incident or the individuals involved, however, the University's ability to respond to an anonymous report may be limited. The Anonymous Sexual Misconduct Reporting Form can be found at:

go.wlu.edu/sexualmisconductreport.

The Title IX Coordinator or the Assistant Title IX Coordinator will receive the anonymous report and will determine any appropriate steps, including individual or community remedies as appropriate and in compliance with all federal and state legal obligations.

D. Bystanders

The University encourages all community members to take reasonable and prudent actions to prevent an act of sexual misconduct. Taking action may include direct intervention when safe to do so, enlisting the assistance of friends, contacting law enforcement, or seeking assistance from a person in authority. Community members who choose to assist under these circumstances will be supported by the University and protected from retaliation. The University provides mandatory bystander training for all entering students. Anyone interested in additional training should contact the Director of Health Promotion, Jan Kaufman at jkaufman@wlu.edu.

E. Reporting Considerations

1. Timeliness of Report, Location of Incident

Complainants and third-party witnesses are encouraged to report incidents of sexual misconduct as soon as possible in order to maximize the University's ability to respond promptly and effectively. However, there is no time limit on reporting violations of this policy. If the respondent is no longer a student or employee, the University may not be able to take disciplinary action against the respondent, but it will still seek to comply with its Title IX obligation by providing support for a complainant and taking steps to end the harassment, prevent its recurrence, and remedy its effects.

An incident does not have to occur on campus to be reported to the University. Off-campus conduct that occurs in connection with University programs or events may also be covered, as may off-campus conduct that may have a continuing adverse effect on the complainant while on campus or other property owned or controlled by the University or in any University employment or education program or activity. The University will process all Title IX complaints regardless of where the conduct occurred to determine whether the conduct occurred in the context of its educational program or has continuing adverse effects on campus or in an off-campus program or activity.

2. Amnesty for Personal Use of Alcohol or Other Drugs

The University seeks to remove any barriers to reporting. It is in the best interest of this community that all individuals who have been the subject of sexual misconduct report the behavior to the University, and that witnesses share what they know. To encourage reporting, complainants, third-party witnesses, or respondents will not be subject to disciplinary action by the University for their own personal consumption of alcohol or drugs at or near the time of the incident, provided that any such violations did not and do not place the health or safety of any other person at risk.

3. Statement Against Retaliation

Retaliation is a violation of University policy and will result in disciplinary action. See Section V(G) above for more information.

4. False Reporting

The University takes the validity of information very seriously, as a charge of sexual misconduct may have severe consequences.

A complainant who makes a report that is later found to have been intentionally false or made maliciously without regard for truth, or anyone proven to have intentionally given false information during the course of an investigation or disciplinary proceeding may be subject to disciplinary action under the University's Honor System or disciplinary action under the appropriate employee disciplinary policy and may also violate state criminal statutes and civil defamation laws. This provision does not apply to reports made in good faith, even if the facts alleged in the report are not substantiated by an investigation and/or hearing decision. An allegation of false reporting cannot be investigated or heard until the underlying allegations have been resolved by the relevant conduct body.

5. Protection of Minors and Mandatory Reporting of Suspected Child Abuse

Under Virginia law, any persons employed by the University who, in their professional or official capacity, have reason to suspect that a child is an abused or neglected child, are required to report the matter immediately to child protective services. Under this policy and [W&L's Protocol for Mandatory Reporting of Suspected Child Abuse/Neglect](#), the University also requires that the information be immediately shared with the Office of Public Safety so that the University can ensure timely compliance with this law and enhance the protection of children.

The University will report all suspected child abuse and neglect, including sexual assault, to law enforcement and/or to the Virginia Department of Social Services. The toll-free child abuse and neglect hotline: (800) 522-7096.

The University intends to act quickly regarding all suspected child abuse. For the purposes of this reporting obligation, a child is any individual under the age of 18, and the suspected abuse may involve physical, sexual, or other forms of abuse or neglect, regardless of the identity of the suspected perpetrator. The duty to report is triggered by reasonable suspicion or belief. There is no requirement that you have actual evidence of abuse, nor is it the responsibility of any employee, student, or volunteer to investigate suspected child abuse. This is the role of the Department of Social Services and/or law enforcement authorities, who are best positioned to do so.

A report should be made as follows:

- If a child is in immediate danger, call the police (911).
- If there is no immediate danger, call W&L Office of Public Safety: (540) 458-8999.
- If an employee is unable to reach the Office of Public Safety, he or she may alternatively report the suspected abuse to one of the following:
 - The local department of Social Services in the city where the child lives or the city where the abuse/neglect is believed to have occurred;
 - Rockbridge - Buena Vista - Lexington Area Social Services
Susan Adcock, Director
20 E. Preston St.
Lexington, VA 24450
Phone: (540) 463-7143
Fax: (540) 464-9110
 - The Virginia Department of Social Services' toll-free child abuse/neglect hotline: 1-800-552-7096.

If an employee reports to the State or Local Department of Social Services, he or she must also provide the same information to Public Safety as soon as possible.

X. Title IX Review, Complainant Request Not to Proceed, and Interim Measures

Although a report may arrive through many sources, the University is committed to ensuring that all reports are referred to the Title IX Coordinator or Assistant Title IX Coordinator for Employment, who will ensure consistent application of the policy to all individuals and allow the University to respond promptly and equitably to eliminate the harassment, prevent its recurrence, and remedy its effects.

Complainants and respondents can expect the following under these procedures:

- Prompt and equitable resolution of allegations of sexual misconduct;
- Privacy in accordance with the policy and any legal requirements;
- Reasonably available interim measures as described in section B below;
- Freedom from retaliation for making a good faith report of sexual misconduct or participating in any proceeding under this policy;
- The responsibility to refrain from retaliation directed against any person for making a good faith report of sexual misconduct or participating in any proceeding under this policy;
- The responsibility to provide truthful information in connection with any report, investigation, or resolution of sexual misconduct under the policy;
- The opportunity to articulate concerns or issues about proceedings under the policy;
- Notice of any meeting or proceeding that the party may attend;
- The opportunity to have advisors, including the right to an Advisor of Choice;
- Written notice of an investigation, including notice of potential policy violations;
- The opportunity to challenge any member of the Harassment and Sexual Misconduct Board (HSMB) or an Investigation and Review Panel for bias or conflict of interest;

- The opportunity to offer information, present evidence, and identify witnesses during an Investigation;
- The right to participate or decline to participate in the complaint resolution process, with the acknowledgement that not participating, either totally or in part, may not prevent the process from proceeding with the information available;
- Equal access to information that will be used during resolution proceedings;
- Written notice of any extension of timeframes; and
- Written notice of the outcome of any disciplinary proceeding.

A. Title IX Assessment

Upon receipt of a report of sexual misconduct, the University will conduct an initial Title IX assessment. The goal of this assessment is to provide an integrated and coordinated response to reports of sexual misconduct. The assessment will consider the nature of the report, the safety of the individual and of the campus community, the complainant's expressed preference for resolution, and the necessity for any interim remedies or measures.

As part of the initial assessment of the facts the University will:

- Assess the nature and circumstances of the allegation;
- Address immediate physical safety and emotional well-being;
- If applicable, notify the complainant of the right to contact law enforcement and seek medical treatment;
- Notify the complainant of the importance of preservation of evidence;
- Communicate with appropriate University officials to assess whether the reported conduct triggers any Clery Act obligations, including the need for a timely warning under the Clery Act and entry of the report in daily crime log;
- Provide the complainant with information about on- and off-campus resources;
- Notify the complainant of the range of interim measures and remedies;

- Provide the complainant with an explanation of the procedural options, including remedies-based/informal resolution and disciplinary resolution/formal complaint;
- Assess for pattern evidence or other similar conduct by respondent;
- Discuss the complainant's expressed preference for manner of resolution and any barriers to proceeding;
- Explain the University's policy prohibiting retaliation; and
- Determine whether the allegation is one of "sexual violence" and may have been committed against a student attending the University or may have occurred on certain locations defined in Va. Code § 23-9.2:15. If so, the Title IX Coordinator will convene the three-person University Review Committee (which includes the Title IX Coordinator, a representative from public safety and a representative from student affairs) to meet to determine whether disclosure must be made to law enforcement to protect the health and safety of the student or other individuals pursuant to Va. Code § 23-9.2:15. This committee will meet within 72 hours of the initial report to the Title IX Coordinator to make this determination.

The initial assessment will proceed to where a reasonable assessment of the safety of the individual and of the campus community can be made. During the initial assessment, the University will ensure that the Complainant receives a written explanation of available resources and options. At the conclusion of the initial assessment, if the complainant has expressed a desire to proceed with an investigation or a formal complaint (in a case against a nonstudent), the University will begin the investigation or formal complaint process and potential disciplinary action. If the complainant has requested not to proceed with an investigation or formal complaint, the Title IX Coordinator or Assistant Title IX Coordinator for Employment, in coordination with others as necessary, will determine the appropriate manner of resolution for the particular report following the guidelines in Paragraph C of this section, which may include remedies-based or informal actions or the initiation of an investigation or formal complaint.

B. Interim Measures

1. Overview

Upon receipt of a report of sexual misconduct, the University will impose reasonable and appropriate interim measures designed to eliminate the reported hostile environment, prevent its recurrence, and remedy its effects. Interim measures may be imposed regardless of whether formal disciplinary action is sought by the complainant or the University, and regardless of whether or not the complainant chooses to report to local law enforcement in order to ensure the preservation of the complainant's educational, work or volunteer experience and the overall University environment.

A complainant or respondent may request separation or other protection, or the University may choose to impose interim measures at its discretion to ensure the safety of all parties, the broader University community, and/or the integrity of the investigative and/or resolution process. The imposition of an interim measure assumes no determination of responsibility and is not a form of discipline.

When implementing interim measures, the University will seek to minimize the burden on the party seeking the measures. For example, if the parties share the same residence hall, the University will not, as a matter of course, remove the party seeking the protective measure from the class or residence hall while allowing the other party to remain, without carefully considering all options and circumstances. The University will maintain as private any interim measures provided, to the extent that maintaining such privacy would not impair the ability of the University to provide those measures.

All individuals are encouraged to report concerns about the failure of another individual to abide by the terms of any imposed interim measure. The University will take immediate action to enforce a previously implemented measure. The University can impose disciplinary sanctions for failing to abide by a University-imposed measure. For employees or volunteers, discipline will be handled by the Executive Director of Human Resources, the Provost's office, or a department head. For

students, the Vice President for Student Affairs and Dean of Students has the discretion to address retaliation by taking administrative actions, disciplinary or otherwise, or referring the matter for a formal conduct charge.

2. Range of Measures

The University, at its discretion, will implement interim measures. 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. Potential measures, which may be applied to the complainant and/or the respondent to the extent reasonably available and warranted by the circumstances, include but are not limited to:

- Access to counseling services and assistance in setting up initial appointment, both on and off-campus;
- Imposition of a no-contact directive;
- Rescheduling of exams and assignments;
- Providing alternative course-completion options;
- Change in class schedule, including the ability to transfer course sections or withdraw from a course without penalty;
- Change in work schedule or job assignment;
- Change in student's University-sponsored or University-controlled housing;
- Assistance from University support staff in completing housing relocation;
- Limit of an individual's or organization's access to certain University facilities or activities pending resolution of the matter;
- Voluntary leave of absence;
- Providing an escort to ensure safe movement between classes and activities;
- Arranging a meeting with law enforcement or W&L Public Safety;
- Providing medical services;
- Providing academic support services, such as tutoring;
- Working in conjunction with student affairs to impose a behavioral agreement with the respondent;

- Any other remedy that can be tailored to the involved individuals to achieve the goals of this policy.

3. University-Imposed Interim Administrative Leave of Absence

If the Title IX Coordinator, after consultation with the Vice President of Student Affairs and Dean of Students, Director of Public Safety, and/or others, as advisable, decides at any point that the health and safety of a student or of the community is at stake, an interim administrative leave of absence may be imposed on a student who is suspected of violating this policy. In addition, interim administrative leave of absence may be used to preserve University property; pursue an investigation and/or disciplinary proceeding; and prevent disruption of, or interference with, the normal operations of the University. Interim administrative leave of absence will be used for short periods of time pending resolution of a report, and assumes no determination of responsibility.

During an interim administrative leave of absence, a student may be denied access to University housing, which includes Residence Halls, Theme Houses, and Greek Housing, and/or the University's campus or programs. As determined appropriate by the Title IX Coordinator (or designee), this restriction includes classes and/or all other University activities or privileges for which the student might otherwise be eligible.

At the discretion of the Title IX Coordinator, and with the approval of, and in collaboration with, the appropriate Dean(s), alternative coursework options may be pursued to ensure as minimal an impact as possible on the respondent.

Similarly, if at any point in a complaint process, the Co-Chair for the Investigation and Review Officers believes that an employee who is suspected of violating this policy represents a danger to individuals or disruption to campus operations, the employee may be placed on administrative leave with pay pending the outcome of

the complaint and appeals. Such leave will be structured at the University's discretion.

C. Complainant Autonomy and Request to *Not Proceed*

The University will seek action consistent with a complainant's request where possible. If, during the initial assessment, a complainant wishes to proceed with an investigation or formal complaint, the University will take action consistent with the complainant's request. Where a complainant makes a report but requests that a name or other identifiable information not be shared with the respondent, or that no formal action be taken, the University will balance this request with its dual obligation to provide a safe and non-discriminatory environment for all W&L University community members and to remain true to principles of fundamental fairness that require notice and an opportunity to respond before action is taken against a respondent.

In the event that a complainant does not wish to proceed with an investigation or formal complaint and/or a hearing of the appropriate conduct body, the Title IX Coordinator or Assistant Title IX Coordinator for Employment will determine, based on the available information, whether the investigation or formal complaint and/or hearing should nonetheless go forward. The Title IX Coordinator or Assistant Title IX Coordinator for Employment will assess any barriers to proceeding, including retaliation, and will inform the complainant that Title IX prohibits retaliation and that the University will take strong responsive action to protect the complainant.

In determining whether the University can comply with a complainant's request not to proceed, the Title IX Coordinator or Assistant Title IX Coordinator for Employment will consider a range of factors, including:

- The severity and impact of the conduct, including whether a weapon was used;
- Whether the complainant is a minor under the age of 18;

- Whether prior reports of sexual misconduct have been made against the respondent;
- Whether the respondent threatened further violence or other violence against the complainant or others;
- Whether the university possesses other means to obtain relevant evidence of the alleged sexual misconduct (security cameras, video recordings, photographs or other evidence); and,
- The extent of prior remedial methods taken with the respondent.

The presence of one or more factors could lead the Title IX Coordinator or Assistant Title IX Coordinator for Employment to determine that the University should investigate the incident, and if appropriate, pursue disciplinary action against the respondent despite the complainant's request.

After evaluating the appropriate factors, if the complainant's request not to proceed is granted, the University will take all reasonable steps to respond to the complaint consistent with the request, but its ability to do so may be limited based on the nature of the request by the complainant. Examples of potential non-disciplinary responses are provided in paragraph B above. Other potential responses include targeted or broad-based educational programming or training; in cases involving nonstudents, informal resolution as described in Section XII(B) below; and/or indirect action by the Title IX Coordinator, Assistant Title IX Coordinator for Employment, or other individuals brought in to handle indirect action with consent of the complainant.

Where the University is unable to take action consistent with the request of the complainant, the Title IX Coordinator or Assistant Title IX Coordinator for Employment will tell the complainant about the University's chosen course of action, which may include the University choosing to pursue action against a respondent on its own behalf. The University will not require a complainant to participate in any investigation or disciplinary proceeding. The course of action may also include steps to limit the effects of the alleged misconduct and prevent its recurrence that do not

involve disciplinary action against a respondent or revealing the identity of the complainant.

A complainant who initially requests that the University not proceed with an investigation or disciplinary action may later request that an investigation be conducted. Additionally, the Title IX Coordinator, after granting a request not to proceed, may proceed with an investigation or disciplinary action if any new or additional information becomes available.

XI. Investigation and Resolution for Complaints Against Students

The following procedures will be used if the respondent is a student. If the respondent is both a student and an employee:

- The student resolution procedures will apply if the respondent is a full-time student but not a full-time employee;
- The employee resolution procedures will apply if the respondent is a full-time employee but not a full-time student; or
- If there is a question as to the predominant role of the respondent, the Title IX Coordinator will determine which of the procedures applies based on the facts and circumstances (such as which role predominates in the context of the conduct).

A. Overview of Procedural Options

Following the Title IX assessment, the University may (1) seek a remedies-based resolution that does not involve disciplinary action against a respondent; or (2) initiate an investigation to determine if a charge should be issued. The goal of the investigation is to gather all relevant facts and determine if there is sufficient information to support a charge against a respondent.

Each resolution process is guided by the same principles of fairness and respect for all parties.

B. Remedies-Based Resolution

Remedies-based resolution is a non-disciplinary approach designed to eliminate a reported hostile environment without initiating potential disciplinary action against a respondent. Where the Title IX assessment concludes that remedies-based resolution is appropriate, the University will take immediate and corrective action through the imposition of individual and community remedies designed to maintain the complainant's access to the educational, extracurricular, employment or volunteer activities at the University. Examples of protective, non-disciplinary remedies are provided in Interim Measures, Section X(B). Other potential remedies include targeted or broad-based educational programming or training, supported direct confrontation of the respondent, mediation, and/or indirect action by the Title IX Coordinator or the University. Depending on the form of remedies-based resolution used, it may be possible to maintain anonymity.

The University will offer mediation or direct confrontation for appropriate cases, but it will not compel a complainant to engage in mediation or to directly confront the respondent. Mediation and direct confrontation, even if voluntary, may not be used in cases involving sexual assault.

Participation in remedies-based resolution is voluntary, and a complainant can request to end remedies-based resolution at any time and proceed with an investigation and potential disciplinary action. Likewise, a complainant may request remedies-based resolution at any time prior to a hearing of the Harassment and Sexual Misconduct Board, provided that the University determines that the complainant's request is consistent with the University's obligations under Title IX (pursuant to the factors in Section X(C)).

The Title IX Coordinator will maintain records of all reports and conduct resolved by remedies-based resolution. If mediation or direct confrontation is used, it will

typically be completed within forty-five (45) business days of the initial report, absent extraordinary circumstances.

C. Investigation

To conduct an investigation, the University will designate an investigation team that has ongoing, specific training and experience investigating allegations of sexual misconduct. The University will typically use a team of two investigators. Any investigator must be impartial and free of any conflict of interest. One of the investigators may be the Title IX Coordinator.

The investigation will begin twenty-four (24) hours after the respondent is notified of the complaint and that the allegations will be investigated.

During the pendency of an investigation and disciplinary proceeding, a complainant and respondent will be provided with a Hearing Advisor and, in addition, may have an Advisor of Choice (see paragraph G(3) of this section) present at any meeting or proceeding related to the investigative or disciplinary process.

The investigation team will conduct the investigation in a manner appropriate in light of the circumstances of the case. It will coordinate the gathering of information from the complainant, the respondent, and any other individuals who may have information relevant to the determination. It will also gather any available physical evidence, including documents, communications between the parties, and other electronic records as appropriate. The complainant and respondent will have an equal opportunity to be heard, to submit information, and to identify witnesses who may have relevant information. Witnesses must have observed the acts in question or have information relevant to the incident; they cannot be participating solely to speak about an individual's character.

The investigation is designed to provide a fair and reliable gathering of the facts. It will be thorough, impartial, and fair, and all individuals will be treated with sensitivity and respect. The investigation is a neutral fact-gathering process. The respondent is presumed to be not responsible; this presumption may be overcome only where a

Harassment and Sexual Misconduct Board hearing panel concludes that there is sufficient evidence, by a preponderance of the evidence, to support a finding that the respondent violated the policy. As described in Section IV, the investigation will be conducted in a manner that respects individual privacy concerns to the extent permitted by applicable law and University policy.

The University will seek to complete the investigation within thirty (30) calendar days from the start of the investigation, but this time frame may be extended depending on the complexity of the circumstances of each case. At the request of law enforcement, the University may agree to defer its Title IX fact gathering until after the initial stages of a criminal investigation. The University will nevertheless communicate with the complainant and the respondent, regarding Title IX rights, procedural options, and the implementation of necessary interim measures to assure the safety and well-being of all affected individuals. If applicable, the University will promptly resume its Title IX fact gathering as soon as law enforcement has released the case for review following the initial criminal investigation.

Information the University gathers during the review or investigation will be used to evaluate the responsibility of the respondent, to provide for the safety of the complainant and the University community, and to take appropriate measures to end any misconduct, prevent its recurrence, and address its effects.

The Title IX Coordinator will retain copies of all reports generated as a result of investigations. The University will keep these records private to the extent permitted by law.

Although all witnesses, the complainant, and the respondent are expected to participate in the investigative process, neither party is required to participate in the investigation or any form of resolution under these procedures. If a party chooses not to participate in an investigation, the investigation and potential disciplinary proceedings may still proceed.

In order to protect the integrity of the investigation, none of the parties involved in the investigation should discuss what they shared with investigators to any witness or potential witness while proceedings are pending.

1. Review of Investigation Report

At the conclusion of the investigation, the investigation team will prepare a written report that summarizes the information gathered and synthesizes the areas of agreement and disagreement between the parties and any supporting information. The investigation team may redact information that is immaterial. The team may also delete statements of personal opinion, rather than direct observations or reasonable inferences from the facts, and statements as to general reputation for any character trait, including honesty.

Before the team finalizes the report, it will give the complainant and respondent the opportunity to review the investigation report. The complainant and respondent may submit any additional comments, request changes, or request further investigation from the investigation team.

After giving the parties the opportunity to comment on the report orally or in writing, the team will make changes to the investigation report based on those comments at the discretion of the investigation team. The team will then submit the report to the designated Chair of the Harassment and Sexual Misconduct Board for the specific matter.

D. Harassment and Sexual Misconduct Board (HSMB)

1. Composition of the HSMB

The Harassment and Sexual Misconduct Board (HSMB) is the body that determines responsibility and, if warranted, administers sanctions and/or discipline against a respondent. The HSMB is made up of ten (10) individuals, three (3) individuals who may serve in the role of Chair of a HSMB hearing panel and seven (7) administrators who may serve as members of a HSMB hearing panel. Each of these administrators

is appointed by the President and is specially trained to adjudicate cases of sexual misconduct.

2. Role of the Chair of the HSMB

From the pool of three (3) administrators appointed to serve as Chairs of the HSMB, one of them will be designated by the Vice President for Student Affairs and Dean of Students to serve as the Chair for a particular HSMB panel. Any Chair designated to serve as Chair in a case must be impartial and free of any conflict of interest. The Chair issues the formal charge, selects and convenes a hearing panel of the HSMB, and oversees the Pre-Hearing Conference and the hearing.

3. Composition and Roles of the HSMB Hearing Panel

If a charge is issued against a respondent, the designated Chair of the HSMB for that particular matter shall select and convene a three-member HSMB hearing panel from the pool of seven (7) specially trained administrators appointed by the President. Each member of the HSMB panel must be impartial and free of any conflict of interest. HSMB members who have reason to believe they cannot make an objective determination must recuse themselves from the process. The HSMB hearing panel will hear the case and make a finding, by a majority vote, as to whether the respondent is responsible for conduct in violation of this policy.

4. Determination to Proceed to a HSMB Hearing

Based on the investigation report, the Chair of the HSMB will determine whether to formally charge the respondent and will notify the parties. A charge will be issued if it is plausible and more than a sheer possibility that the complainant's factual allegations could constitute a violation of this policy. Absent extenuating circumstances, the decision whether to formally charge the respondent will be made within two (2) calendar days after the Chair receives the investigation report.

The formal charge(s) will state the subject matter of the complaint, the name of the complainant, and the approximate date and/or timeframe for the alleged conduct.

Additionally, a charge of "Conduct Unbecoming of a Washington and Lee Student" may accompany any charge.

The Chair of the HSMB may deliver notice of the charge by one or more of the following methods:

- In person by the Chair of the HSMB or designated University administrator;
- Mailed to the local or permanent address of the individual as indicated in official University records; or
- Emailed to the individual's University-issued email account.

Once a formal charge has been issued, the respondent will answer the charge as "Responsible," "No Contest," or "Not Responsible." If the respondent answers "Responsible" or "No Contest," the charge goes to a HSMB hearing panel to determine an appropriate sanction. The respondent must answer the charge before or during the Pre-Hearing Conference, which is held, absent extraordinary circumstances, within seven (7) calendar days after the issuance of the formal charge document.

Upon the issuance of a formal charge, the investigation report and related appendices will be made available to the parties for their review.

5. Pre-Hearing Conference

The Chair of the HSMB will hold separate Pre-Hearing Conferences with the parties and their Advisors to address evidentiary or other matters before the investigation report is presented to the HSMB hearing panel.

At the Pre-Hearing Conference, the parties may submit a written request outlining any additional investigation steps they believe are necessary, including but not limited to:

- Requests for follow-up interview(s) with existing witnesses to clarify or provide additional information, including offering questions to the investigators to pose to witnesses, the complainant or the respondent;

- Requesting a follow-up interview with the investigators to clarify or provide any additional information that such party believes is relevant to the investigation or to seek clarification from the investigators on aspects of the investigation report.
- Identifying any new witnesses who should be interviewed (including a description of what topics/issues the witness should be asked to address); and/or
- Explaining any additional evidentiary materials that should be collected and reviewed to the extent that such items are reasonably available.

At the Pre-Hearing Conference, the parties may also request in writing that portions of any witness notes be redacted or changes be made to the investigation report. The Chair, in consultation with the investigators, will make the final determination on what changes will be made to the investigation report.

Additionally, parties will be informed of the composition of the proposed HSMB hearing panel and be allowed to object to the appointment of any of the HSMB panel members by providing, articulable grounds of suspected bias, conflict of interest, or an inability to be fair and impartial. The objection should be directed to the Chair of the HSMB at the Pre-Hearing Conference. The Chair will make the final determination on a member's ability to serve on a HSMB hearing panel.

If either party wishes to call witnesses at the hearing, the following must be submitted to the Chair of the HSMB in writing at the Pre-Hearing Conference:

- The names of any witness the party intends to call; and
- A summary of why the witness' physical presence at the hearing is relevant to making a decision about responsibility at the hearing.

The Chair of the HSMB will determine whether there is sufficient justification for asking a witness to attend in person or whether the information can be adequately summarized by the witness statement.

Absent extenuating circumstances, the Pre-Hearing Conferences will be held within seven (7) calendar days of issuance of the charge document.

6. Hearing Procedures

A hearing will be held in a timely manner; assuming no extraordinary circumstances, within fourteen (14) calendar days of issuance of the formal charge.

All hearings are closed to the public and may not be audio or video-recorded. The complainant and the respondent have the right to be present during the hearing. Although both the complainant and respondent are entitled to be present throughout the hearing, if either party would prefer not to be physically present during the hearing, the party can participate through electronic means. A privacy screen will be erected unless both parties request otherwise. Neither party is required to participate in the hearing in order for the hearing to proceed. If either party is not in attendance, the hearing may still proceed, findings may still be made, and sanctions may still be imposed.

The HSMB hearing panel will review the investigation report prior to the hearing. During the hearing, the HSMB hearing panel may question the complainant, the respondent, any witnesses called, and/or the investigators, and examine related information and evidence. The HSMB hearing panel shall restrict their questions to matters that the Chair deems relevant to the specific case.

The parties cannot verbally pose questions to each other or to witnesses. However, the parties may submit written questions to the Chair of the HSMB to ask on their behalf to the relevant party or witness. The Chair of the HSMB will screen the questions and will not ask questions that violate University policy and prior evidentiary decisions made by the Chair, or questions that are irrelevant or repetitive. Additionally, the Chair has discretion to change the wording of the question, provided that the substance of the question remains the same.

Both a complainant and respondent have the right to provide relevant information during the hearing. However, parties cannot call witnesses or present information at

the hearing that could reasonably have been provided during an investigation or during the Pre-Hearing Conference. If information produced during the hearing discloses additional tangible evidence or witnesses with relevant information that could not have reasonably been provided during an investigation or Pre-Hearing Conference, the Chair, in his or her sole discretion, may obtain that evidence or call those witnesses to testify.

The hearing is private to protect the privacy interests of all involved. Any HSMB hearing panel member, the Chair, Investigators, and Advisors are expected to maintain the privacy of the proceedings except where disclosure may be authorized or mandated by law or authorized in connection with duties on behalf of the University.

After considering all of the relevant information, the HSMB hearing panel members will deliberate and make a finding by a preponderance of the evidence as to whether the respondent is responsible for conduct in violation of this policy. At least two (2) members must vote "responsible" for a finding of responsibility.

At any time during the hearing process, the respondent may choose to agree to a finding of responsibility relating to some or all of the charged conduct.

7. Imposition of Sanction

If the respondent is found "Responsible" or agrees to a finding of responsibility, the HSMB hearing panel will impose a sanction designed to eliminate the misconduct, prevent its recurrence, and remedy its effects, while supporting the University's educational mission and complying with the University's Title IX obligations.

The complainant and respondent, and other affected parties, as appropriate, will each have the opportunity to present a statement about the impact of the violation and/or requested sanctions. The HSMB hearing panel will review these statements only if the HSMB hearing panel finds, or the respondent had accepted, that the respondent responsible for one or more violations.

The HSMB hearing panel shall determine the appropriate sanction (or combination of sanctions) in accordance with the Sanction Guideline Matrix. At least two panel members must vote in favor of the imposition of each sanction or combination of sanctions.

In cases involving Nonconsensual Sexual Penetration there is a mandatory sanction of dismissal if the HSMB hearing panel determines responsibility beyond a reasonable doubt. If the HSMB hearing panel determines responsibility by preponderance of the evidence standard of proof, the HSMB hearing panel may, but is not required to, dismiss after considering the factors set forth in Section XI(D)(8)(a) below.

a. Sanction Guideline Matrix

Prohibited Behavior	Range of Sanctions
Prohibited Behavior Non-Consensual Sexual Penetration (if found responsible beyond a reasonable doubt)	Range of Sanctions Dismissal (Mandatory)
Prohibited Behavior Nonconsensual Sexual Penetration (if found responsible by preponderance of the evidence); Non-Consensual Sexual Contact; Non-Physical Sexual Harassment; Sexual Discrimination; Sexual Exploitation; Stalking; Dating Violence; Domestic Violence; Retaliation	Range of Sanctions Dismissal; Suspension; Probation; Community Service; Educational/Counseling Consultation; Loss of Privileges (denial of the use of certain University facilities or the right to participate in certain activities or to exercise certain privileges for a designated period of time); On Campus Residential Relocation; Changing Academic Schedule

In considering the appropriate sanction, the HSMB hearing panel will consider the following factors:

- The respondent's prior discipline history;
- How the University has sanctioned similar incidents in the past;
- The nature and violence of the conduct at issue;

- The impact of the conduct on the complainant;
- The impact of the conduct on the community, its members, or its property;
- Whether the respondent has accepted responsibility;
- Whether the respondent is reasonably likely to engage in the conduct in the future;
- The need to prevent similar conduct by this respondent; and
- Any other mitigating or aggravating circumstances, including the University's values.

8. Notice of Outcome

Within two (2) calendar days of the decision, the Chair of the HSMB shall provide to the parties a copy of the written report of the HSMB hearing panel decision.

If applicable, the Chair will inform the respondent of any sanctions, the date by which the requirements must be satisfied, and the consequences of failure to satisfy the requirements. The Chair also will inform the complainant of any sanctions that directly relate to the complainant or are required by federal law to be disclosed to the complainant in the case of certain sexual offenses, including sexual assault, domestic/dating violence, and stalking.

The Chair will also provide each party with an outcome letter containing their appeal options.

The University may also notify appropriate University employees, as necessary to implement the outcome and/or sanctions.

A public notice will be posted that includes the nature of the conduct and each charge for which the party was found "Responsible" or "Not Responsible." If there is a finding of responsibility, the public notice will include the sanction imposed for the charge. The Public Notice will not include names or any other personally identifiable information. The Office of the Vice President for Student Affairs will maintain copies of all public notices for 10 years.

9. Additional Remedies

Upon a finding of responsibility, additional remedies, in addition to the HSMB's issued sanction, may be available to a complainant. Examples of potential remedies are provided in Section X(B). Other potential remedies include targeted or broad-based educational programming and/or training. The Title IX Coordinator, in consultation with others as necessary, will determine any appropriate additional remedies.

E. Mandatory Transcript Notations

Pursuant to and as required by Virginia law, for each student who has been suspended for, permanently dismissed for, or withdraws from the University while under investigation for an offense involving sexual violence (defined as physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent), the University will make or cause to be made a prominent notation on the academic transcript of each student. In cases of suspension and dismissal this transcript notation will read: "[Suspended or Dismissed] for a violation of W&L's set of standards." In cases of withdrawal, the notation will read: "Withdrew while under investigation for a violation of W&L's set of standards. This withdrawal as noted does not constitute a finding or admission of responsibility on the part of the student."

The University shall remove from a student's academic transcript any notation placed on such transcript due to a student's suspension if the student (1) completed the term of the suspension and any conditions thereof and (2) has been determined by the institution to be eligible to return to the University.

F. Appeal

Either party may appeal the finding of a policy violation/non-violation and/or a sanction within seventy-two (72) hours of receipt of the written HSMB hearing report. Appeals must be in writing, specifying in detail the basis for the appeal. An Appeal Panel will be appointed by the Chair of the Appeal Panel to review the matter. The Chair of the Appeal Panel will be a Chair of the HSMB who was not involved in the original hearing. The Appeal Panel will be comprised of three (3)

members of a pool of seven (7) administrators specially trained to adjudicate appeals of cases of sexual misconduct who do not have a conflict of interest in the case.

Appeals, if granted, do not constitute a re-hearing of the case and the Appeal Panel will defer to decisions of the HSMB hearing panel unless one or more of the reasons for granting the appeal are satisfied. The Appeal Panel will review the entire written record of the HSMB hearing, the written appeal and other documents it deems relevant. Upon completion of this review, the Appeal Panel may grant or reject a request for appeal based on one or more of the following grounds if it reasonably determines the ground(s) would more likely than not impact the underlying decision:

- No reasonable basis/reasonable basis for sanction;
- New relevant information/no new relevant information (this does not apply in cases of deliberate omission of information by the appellant);
- Procedural defect or error/no procedural defect or error; or
- Extraordinary circumstances/no extraordinary circumstances.

If the Appeal Panel decides to grant an appeal, it may decide the case based solely upon the record of the HSMB, the written appeal, and other documents it deems relevant, or the Appeal Panel may determine to hold a hearing and seek additional information from: (1) any person who provided first-hand information to the HSMB hearing panel; (2) any person who may have new, relevant information; and/or (3) the original Chair of the HSMB, before reaching its final decision.

The Appeal Panel has the option to affirm the decision of the HSMB hearing panel or remand the case to the original HSMB hearing panel in cases in which there is new information presented, where there has been a procedural defect or error, or where there were extraordinary circumstances, provided that the Appeal Panel has reasonably determined that the grounds(s) would more likely than not have impacted the underlying HSMB hearing panel decision. Moreover, the Appeal Panel may remand the case to the original HSMB hearing panel in cases where the Appeal Panel determines that the sanction lacked a reasonable basis.

The Chair of the Appeal Panel will determine the proper composition of the panel for any appeal and oversee the process. The Chair has discretion to accommodate any conflicts that may arise with members constituting the panel.

For an appeal to be granted, at least two (2) members of the Appeal Panel must vote to grant appeal.

G. Additional Considerations for Complaints against Students

1. Time Frames for Resolution

Washington and Lee will make every effort to successfully resolve all reports within sixty (60) calendar days from the date that the investigation begins. The sixty (60) day timeframe refers to the investigation process, hearing, and imposing sanctions and/or remedies. It does not include appeals. All time frames expressed in this policy are meant to be guidelines rather than rigid requirements. Circumstances may arise that require the extension of time frames, including extension beyond sixty (60) days. Such circumstances may include, but are not limited to, the complexity of the allegations, the number of witnesses involved, the availability of the parties or witnesses, the effect of a concurrent criminal investigation, any intervening school break or vacation, or other unforeseen circumstances.

In general, a complainant and respondent can expect that the process will proceed according to these time frames.

- Once the investigation begins, it will be completed within thirty (30) calendar days
- The Chair of the HSMB will decide whether to charge the respondent within two (2) calendar days after receiving the investigation report.
- The Pre-Hearing Conference will be held within seven (7) calendar days after formal charge.
- The HSMB hearing will be held within fourteen (14) calendar days after the formal charge.

- Notice of outcome will be provided within two (2) calendar days of the HSMB hearing panel decision.
- If there is a request for appeal, the decision whether to grant or reject the request for appeal will be resolved within five (5) calendar days after the receipt of the request for an appeal.
- If a request for appeal is granted, the appeal will be resolved within ten (10) calendar days from the time the appeal was granted.

If the investigation and resolution exceed this time frame, the University will notify all parties in writing of the reason for the delay and the expected adjustment in time frames. The University will use its best efforts to complete the process in a timely manner by balancing principles of thoroughness and fundamental fairness with promptness. All parties involved are entitled to periodic status updates on the progress of the complaint.

2. Group Infractions

When members of a student group, an organization, a team, or individuals acting collusively act in concert in violation of this policy, they may be charged as a group or as individuals, and an investigation may proceed against the group as joint respondents or against one or more involved individuals as appropriate given the available information and the circumstances.

A student group, an organization, or a team's officers and membership may be held collectively and individually responsible when violations of this policy by the organization or its members take place at organization-sponsored events, have received the consent or encouragement of the organization or of the organization's leaders or officers, or were known or reasonably should have been known to the membership or its officers.

In any such action, individual determinations as to responsibility will be made and sanctions may be assigned collectively and individually in proportion to the involvement of each individual.

3. Advisors

The term "Advisors" refer to both Hearing Advisors and Advisors of Choice.

If an investigation of prohibited conduct is initiated, the complainant and respondent will be provided with one (1) or two (2) Hearing Advisors. Hearing Advisors are law and undergraduate students who have been trained to provide support and advice to complainants and respondents.

In addition to the Hearing Advisor(s), both parties also have the right to obtain assistance, at their own expense, from an Advisor of Choice. An Advisor of Choice can be a friend, mentor, family member, attorney, or any other supporter parties choose to advise them. Advisors of Choice are not trained by the University and are not University resources.

The role of Advisors is to advise the complainant or respondent of applicable procedures, including the appeal process, if applicable. Advisors are also available to offer support and to provide information on additional resources. While Advisors may accompany the complainant and respondent at meetings, they may not present evidence, question witnesses, or otherwise participate. Parties may request a brief recess to consult with their Advisors, which will be granted at the discretion of the investigators or the Chair of HSMB or Appeal Panel, as applicable.

Any Advisor who does not follow the University's policies, procedures, or practices relating to the Advisor's role in the resolution process will be warned once. If the Advisor continues to disregard the University's policies, procedures, and/or practices or disrupts or otherwise fails to respect the limits of the role, such Advisor will be asked to leave the meeting, hearing, or other proceeding at the discretion of the investigators or the Chair of the HSMB or Appeal Panel, as applicable. When an Advisor is removed from a meeting, hearing, or other proceeding, it will continue without the Advisor's presence.

Parties may choose to share the investigation report and other information with their Advisor. All Advisors are expected to maintain the privacy of any records

shared with them. These records may not be shared with third parties, disclosed publicly, or used for purposes not explicitly authorized by the University or by the applicable law. The University may seek to restrict the role of any Advisor who does not respect the sensitive nature of the process or who fails to abide by the University's privacy expectations.

The University expects all Advisors to adjust their schedule to allow them to attend University meetings when scheduled. The University does not typically change scheduled meetings to accommodate an Advisor's inability to attend. The University will, however, make provisions to allow an Advisor who cannot attend in person to attend a meeting by telephone, video and/or virtual meeting technologies as may be convenient and available.

The University will not recognize or enforce agreements between the parties reached outside of these procedures.

4: Student Advisory Group

The Student Advisory Group is made up of six (6) student advisors (four (4) undergraduate students and two (2) law students) who are appointed by the Executive Committee to serve one year terms. In appointing the members of the Student Advisory Group, the Executive Committee will make every effort to create diverse representation.

The role of the Student Advisory Group is to aid the Title IX Coordinator and HSMB in understanding issues of student social dynamics. It will assist in training the HSMB and Appeal Panel by advising on student social dynamics and by advising the Title IX Coordinator on issues related to sexual misconduct, including policy training and campus climate. The Student Advisory Group will also participate in a working group that will annually review the Sexual Discrimination and Misconduct Policy and will have an opportunity to recommend changes.

5. Prior Sexual History

In general, the prior sexual history of either party is not relevant and will not be admitted as evidence during an investigation and/or hearing. However, where there is a current or ongoing relationship between the complainant and the respondent, and the respondent alleges consent, the prior sexual history between the parties may be relevant to assess the manner and nature of communications between the parties. As noted in other sections of this policy, however, the mere fact of a current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Any prior sexual history of the complainant or respondent with other individuals is generally not relevant and will not be permitted.

6. Pattern Evidence

Where there is evidence of a pattern or conduct similar in nature by either party, either prior to or subsequent to the conduct in question, regardless of whether there has been a finding of responsibility, this information may be deemed relevant and probative to the HSMB hearing panel's determination of responsibility. The determination of relevance will be based on an assessment of whether (1) the previous incident was substantially similar to the present allegation; and (2) indicates a pattern of behavior and substantial conformity with that pattern by a respondent. Where there is a prior finding of responsibility for a similar act of sexual misconduct, there is a presumption of relevance. The Chair of the HSMB will make the determination as to whether or not the HSMB hearing panel will consider the pattern evidence and in doing so will carefully review the relevancy and reliability of the alleged similar conduct.

7. Consolidation of Investigation

The Title IX Coordinator may consolidate multiple reports against a single respondent or group of respondents into one investigation if the evidence related to each incident would be relevant and probative in reaching a determination on the other incident(s).

8. Records

The Title IX Coordinator will retain records of all reports, allegations, and complaints. Complaints resolved by remedies-based resolution are not part of a student's conduct file or academic record.

Pursuant to Virginia law, the Title IX Coordinator and the Public Safety representative of the University's Review Committee will also retain independent records related to the Review Committee's considerations upon a report of sexual violence.

Affirmative findings of responsibility in matters resolved through a HSMB hearing are part of a student's conduct record. Such records will be used in reviewing any further conduct or in developing sanctions and will remain a part of a student's conduct record. In general, the University will maintain records for the duration of the respondent's relationship with the University, and may retain them for no less than seven (7) years following the respondent's departure from the University. In allegations involving child abuse, the University may keep the records indefinitely.

If the HSMB hearing panel does not find the respondent responsible, the student's conduct file or academic record will reflect the finding.

XII. Investigation and Resolution for Complaints against Faculty, Staff, and Other Non-Students

Because the relationship of students, staff, and faculty to the University differ in nature, the procedures that apply when seeking disciplinary action necessarily differ in some respects. Each of the procedures, however, is guided by the same principles of fundamental fairness and respect for all parties, which require notice, an equitable opportunity to be heard, and an equitable opportunity to respond to a report.

The procedures set forth below will be applied when the respondent is a member of the faculty, staff, or other non- student. If the Respondent is both a student and an employee:

- The student resolution procedures will apply if the Respondent is a full-time student but not a full-time employee
- The employee resolution procedures will apply if the Respondent is a full-time employee but not a full-time student; or
- If there is a question as to the predominant role of the Respondent, the Title IX Coordinator will determine which of the procedures applies based on the facts and circumstances (such as which role predominates in the context of the conduct).

A. Definitions of Terms and Acronyms

1. Co-Chairs

The Treasurer/Vice-President for Finance and Administration and the Provost will serve as Co-Chairs of the Investigation and Review Officers ("IROs"). As described fully below, the Co-Chairs, who are specially trained to carry out these procedures, receive formal complaints, appoint the Investigator(s), Review Panel, and Appeal Panel (as needed), communicate with the parties at various stages in a complaint proceeding, and determine the sanction when a policy violation is found. The Co-Chairs serve as advisors to the IROs on procedural matters.

2. Advisors: Discrimination Policy Advisers and Advisors of Choice

Discrimination Policy Advisors: Discrimination Policy Advisors ("DPAs") are a group of 15-20 specially trained faculty and staff representing a cross-section of the University community. DPAs are peer-nominated, selected by the Co-Chairs, and then invited to serve by the President for three-year staggered terms. DPAs may be invited to serve additional terms without a lapse, but are subject to removal by the President at the request of either Co-Chair. The role of the DPAs is to provide procedural information and options to complainants and respondents regarding complaints against faculty, staff, or other non-students. DPAs can also work informally to resolve matters themselves or bring in others to assist with informal resolution, where appropriate.

Advisor of Choice: In addition to a DPA, when a formal complaint of sexual assault, domestic or dating violence, or stalking has been filed, both the complainant and the respondent have the right to select an Advisor of Choice, who may be an attorney. Advisors of Choice are authorized to be present with either party in University-related proceedings under this policy only when a formal complaint of sexual assault, domestic/dating violence, or stalking has been filed. These Advisors of Choice are not trained by the University and are not University resources.

Complainants and respondents looking for legal counsel may wish to contact the Virginia State Bar lawyer referral service by calling the VLRS toll-free number, 1-800-552-7977. More information about the service can be found here:

<http://www.vsb.org/vlrs/>

Role of DPAs and Advisor of Choice: The role of the Advisors is to advise the complainant or respondent of applicable procedures, and to advise the complainant or respondent on the specifics of a written appeal, if applicable. Advisors are also available to offer support and to provide information on additional resources. While Advisors may accompany the complainant and respondent at meetings, they may not present evidence, question witnesses, or otherwise participate. Either party may request a brief recess to consult with their Advisor, which will be granted at the discretion of the Investigator(s) or the appropriate Co-Chair.

Advisors who do not follow the University's policies, procedures, and practices relating to their role in the resolution process will be warned once. If the Advisor continues to disregard the University's policies, procedures, and practices or disrupts or otherwise fails to respect the limits of the role, such Advisor will be asked to leave the meeting, hearing, or other proceeding at the discretion of the Co-Chair or the Investigator(s). When an Advisor is removed from a meeting, hearing, or other proceeding, it will continue without the Advisor's presence.

The University expects all Advisors to adjust their schedules to allow them to attend University meetings when scheduled. The University does not typically change scheduled meetings to accommodate an Advisor's inability to attend. The University

will, however, make provisions to allow an Advisor who cannot attend in person to attend a meeting by telephone, video and/or virtual meeting technologies as may be convenient and available.

The University will not recognize or enforce agreements between the parties reached outside of these procedures.

3. DPA Coordinator

At the beginning of each academic year, the Co-Chairs will appoint one of the DPAs who has served as a DPA for at least two (2) years to serve as the DPA Coordinator. The DPA Coordinator may serve multiple consecutive years in this capacity if agreed to by the DPA Coordinator and the Co-Chairs. The DPA Coordinator is responsible for coordinating training and meetings of all DPAs and serves as an adviser to the DPAs on procedural matters related to complaints of sexual misconduct against faculty, staff, and other non-students. The DPA Coordinator is also responsible for collecting and submitting summary reports to the Title IX Coordinator on all matters referred to any DPA. In order for the DPA Coordinator to remain available to advise any DPA on the resolution process and procedural matters, the DPA Coordinator may not serve as a DPA for any party to a formal complaint.

4. Investigation and Review Officers

Investigation and Review Officers (IROs") are a group of University administrators who are specially trained to investigate and review complaints of sexual misconduct against members of the faculty, staff, and other non-students. When a formal complaint of sexual misconduct is filed against a member of the faculty, staff, or other non-student under this policy, the Co-Chairs select the investigator(s), an Investigation and Review Panel ("IRP"), and (if needed) an Appeal Panel from the pool of the available IROs. The IROs consist of the following administrators:

- Vice President for Student Affairs and Dean of Students
- Associate Provost
- Dean of the College

- Dean of the Williams School
- Dean of the School of Law
- Associate Deans of the College
- Associate Dean of the Williams School
- Assistant Dean of the Williams School
- Professor of Law and Associate Dean of the Law School
- Associate Dean for Administration and Student Affairs (Law)
- Clinical Professor of Law and Director of Academic Success s (Law)
- Assistant Dean of Office of Career Strategy (Law)
- Executive Director of Human Resources (Assistant Title IX Coordinator for Employment)
- Chief Technology Officer
- Director of Athletics

B. Informal Resolution

Where the Title IX assessment concludes that informal resolution is appropriate (see Section X(C), the University will take immediate and corrective action through the imposition of individual and community remedies designed to maximize the complainant's access to the educational, extracurricular, employment or volunteer activities at the University.

DPA's, a Human Resources staff member (including the Assistant Title IX Coordinator for Employment), a staff supervisor or Dean (in his/her role as faculty supervisor), and/or the Title IX Coordinator may informally resolve concerns themselves or may bring in others (with the consent of the parties), as appropriate, to assist with resolution. Any of the individuals listed above may also refer the matter for informal resolution to another individual given authority to assist with informal resolution. Once a matter has been informally resolved, referred, or the complainant decides to pursue a formal complaint, the individual involved with the informal resolution will submit a written summary report to the Title IX Coordinator for review.

C. Formal Complaint

(Note: all time frames referenced in these formal complaint procedures are subject to extension by the appropriate Co-Chair for good reason.)

1. Initiation of Formal Complaint

A formal complaint against a member of the faculty, staff, or other non-student should be initiated through a DPA or the Title IX Coordinator. A complainant or any other concerned individual wishing to bring a formal complaint may contact a DPA or Title IX Coordinator directly, or may be referred to a DPA or the Title IX Coordinator by another resource. The complaint should be brought by bringing information or submitting a signed writing to a DPA or the Title IX Coordinator. If a complaint is initiated through a DPA, the DPA will then contact the DPA Coordinator to advise that the complaint is being initiated formally. The DPA Coordinator should notify the Title IX Coordinator that a formal complaint is being initiated.

In cases where a formal complaint has been initiated alleging sexual assault, domestic or dating violence, or stalking, the DPA or Title IX Coordinator through whom the formal complaint has been initiated should advise the complainant of the right to be supported by an Advisor of Choice in addition to a DPA, at all meetings at which a DPA otherwise would be present. If the complainant elects to use an Advisor of Choice the complainant will advise the DPA or Title IX Coordinator of the identity and contact information for such Advisor of Choice, and the DPA or Title IX Coordinator will provide that information to the DPA Coordinator, the Assistant Title IX Coordinator and/or Title IX Coordinator, and the appropriate IRO Co-Chair.

2. Submission of Complaint / Notification to Respondent

The DPA or Title IX Coordinator will submit the formal complaint to the appropriate IRO Co-Chair (Provost if the respondent is a faculty member; Treasurer/Vice President for Finance and Administration if the respondent is a staff member or other non-employee, subject to the exceptions set forth in paragraphs C(4) and C(5) below). The DPA Coordinator or Title IX Coordinator should submit a copy of the

summary report, if any, outlining prior handling of the complaint through informal channels, to the appropriate Co-Chair, to be included with the record.

The appropriate Co-Chair will then promptly (within two (2) business days after being provided the complaint, if practicable) notify the respondent that a formal complaint has been initiated and make arrangements to meet with the respondent to provide the respondent with a verbal summary of the complaint and outline the complaint process. The Co-Chair will advise the respondent of the University's non-retaliation policy, and will inform the respondent of his/her right to choose a DPA (or, in cases alleging sexual assault, domestic or dating violence, or stalking, an Advisor of Choice) and to submit to the Investigator(s), if desired, a written statement regarding the complaint to be included in the record. If the respondent chooses to submit a written statement, the respondent should do so within three (3) business days after being given a verbal summary of the complaint.

3. Preliminary Actions by Co-Chair

The appropriate Co-Chair will promptly appoint an IRO to serve as the Investigator. In some cases, the Co-Chair may appoint a team of two Investigators as the Co-Chair deems appropriate. The Co-Chair will then make a preliminary selection of three (3) IROs to serve as the members of the three-person Investigation and Review Panel. If an IRO is the respondent or the complainant, the process operates as otherwise set forth in this policy, except that the IRO who is the respondent will not be involved in any capacity other than as a party.

4. Complaint by or against an IRO Co-Chair

If one of the Co-Chairs is the respondent or complainant, the President will serve in the role of that Co-Chair and the process will operate as otherwise set forth in this policy. In this situation, any appeal would go to the Chair of the Audit Subcommittee of the Finance Committee of the Board of Trustees ("Audit Subcommittee").

5. Complaint against the President and/or a Trustee

If the respondent is the President or a member of the Board of Trustees, a complaint must be filed directly with the Audit Subcommittee by delivery of a sealed written complaint to the Secretary of the University, Washington Hall 203, labeled "Complaint to the Audit Subcommittee under the Sexual Discrimination and Misconduct Policy." The Secretary of the University will deliver the sealed written complaint intact to the Chair of the Audit Subcommittee and the Audit Subcommittee will handle or direct all further proceedings.

6. Involvement of Assistant Title IX Coordinator for Employment in Formal Complaints

The Assistant Title IX Coordinator for Employment will be available to serve as a resource for the Co-Chairs, the investigator(s), the DPAs, and/or the parties to a formal complaint, in order to address issues that arise during the complaint process. In the event that the Assistant Title IX Coordinator for Employment has had a substantive role in informal complaint resolution efforts prior to the initiation of the formal complaint, or acts as a resource beyond the resolution of purely procedural questions during the formal complaint process, the Assistant Title IX Coordinator will be disqualified from serving on any Investigation Review Panel or Appeal Panel in that case thereafter.

D. Investigation

The investigation is conducted solely by the appointed investigator(s), who will interview the parties and other witnesses as necessary. The complainant and respondent will have an equal opportunity to be heard, to submit information, and to identify witnesses who may have relevant information. A party's DPA (and/or Advisor of Choice in cases alleging sexual assault, domestic or dating violence, or stalking) may accompany the party during an interview if requested by the party as a support resource, but may not participate in the interview. The investigator(s) will inform the parties and witnesses of the University's prohibition of retaliation against any person involved in a complaint process. In most cases, absent unusual

circumstances, the investigation should be completed within twenty (20) business days after the investigator receives the complaint.

The investigation is a neutral fact-gathering process. The respondent is presumed to be not responsible; this presumption may be overcome only where the Investigation and Review Panel conclude that there is sufficient evidence, by a preponderance of the evidence, to support a finding that the respondent violated the policy.

E. Withdrawal of Complaint; Review of Parties' Proposed Resolution

1. Withdrawal of Complaint

At any time during the formal complaint process, the complainant may request of the Co-Chair to withdraw his/her formal complaint. Before approving a withdrawal of the complaint, the Co-Chair will meet with the complainant and his/her DPA and/or Advisor of Choice, if desired, to discuss the request. The Co-Chair retains the discretion to reject the request for withdrawal and to proceed with the formal process, with or without the further participation of the complainant, if the Co-Chair believes it prudent and appropriate to do so in the best interest of the University community, based on all relevant information. The Co-Chair will consider factors including: the severity and impact of the conduct, including whether a weapon was used; whether the complainant is a minor under the age of 18; whether the respondent has a pattern of similar conduct; whether the respondent threatened further violence or other violence against the victim or others; whether the university possesses other means to obtain relevant evidence of the alleged sexual misconduct (security cameras, video recordings, photographs or other evidence); and the extent of prior remedial methods taken with the respondent. Regardless of the Co-Chair's decision a complainant is not required to participate in an investigation or hearing.

2. Review of Parties' Proposed Resolution

If, after the initiation of a formal complaint but before the issuance of the investigative report, the respondent acknowledges inappropriate conduct and

proposes a resolution/sanction agreeable to the complainant, an IRP will be appointed to review the conduct acknowledged and the proposed resolution/sanction. If the IRP finds the resolution/ sanction reasonable, it will be recommended and sent to the appropriate Co-Chair for implementation. If the IRP finds the proposed resolution/sanction unreasonable given the nature and circumstances of the conduct acknowledged or alleged, it may reject the proposed resolution/sanction and conduct a normal IRP review after issuance of the investigation report.

F. Investigation Report; Party Responses; IRP Appointment

1. Investigation Report

Upon conclusion of the investigation, the investigator(s) will prepare and submit to the appropriate Co-Chair a written investigation report, reaching an assessment on whether the facts present conduct that would constitute a violation of this policy by a preponderance of the evidence, or other University policies. The complainant and respondent will each be provided with a version of the report (the University reserves the right to redact witness names and personally identifiable witness statements), not to be copied or distributed, but which the party may share with his/her DPA (and/or Advisor of Choice in a case alleging sexual assault, domestic or dating violence, or stalking).

2. Party Responses to Investigation Report

The parties will each have three (3) business days from the day of their receipt of the investigation report to prepare and submit a written response to the appropriate Co-Chair for the record.

3. IRP Appointment

The appropriate Co-Chair will then promptly notify the parties of which IROs have been selected to make up the Investigation and Review Panel (IRP) and will designate one of them as IRP Chair. The parties must submit any concerns about the

IRP composition to the Co-Chair in writing within one (1) business day of receipt of notice. The Co-Chair may follow-up with the parties and/or IRP members regarding any stated concerns, as needed. The Co-Chair will notify the parties and IRP members of any change to the composition of the IRP if the Co-Chair concludes that one or more of the designated IRP members should not serve on that panel.

Note: see section C(6) above regarding participation of Executive Director of Human Resources/Assistant Title IX Coordinator for Employment when s/he has had any substantive role in efforts to informally resolve the complaint or the formal complaint process.

G. IRP Review

The IRP will review the investigation report and the related record regardless of whether the Investigator(s) concluded a violation occurred. In most cases, absent unusual circumstances, the IRP review should be completed within seven (7) business days of the date the IRP members receive the record from the Co-Chair.

The IRP may decide the case based on a thorough review of the entire record of the case including the investigation report and any written comments provided by either party. If the IRP has any questions, it may meet with the investigator(s) in person and/or may request that the parties separately meet with the IRP (in which case, the parties' DPAs and/or Advisors of Choice in a case alleging sexual assault, domestic or dating violence, or stalking, if any, may be present but may not participate). If the IRP finds that any other follow-up is needed with witnesses, the investigator(s) will conduct the follow-up and submit an addendum to the written investigation report, which will be sent to the IRP. In such instances, the parties will be given an opportunity to review the addendum, consistent with the parties' opportunity to review the original investigation report.

Once the IRP has determined that it has sufficient information to make a decision, it will discuss the matter outside the presence of the investigator(s) and the parties. The IRP will then reach a decision on whether this policy was violated by a preponderance of the evidence, and (if so) will make a written recommendation of

sanctions to the appropriate Co-Chair. The IRP may also make recommendations to the Co-Chair for appropriate follow-up actions (including training, counseling, or other educational opportunities) in the absence of a finding of a violation of this policy.

H. Co-Chair's Notice to Parties of Final Decision, Sanction, and Remedies

The IRP's decision about whether this policy was violated is binding on the Co-Chair, but subject to appeal by either party. However, the Co-Chair has the discretion to determine the final sanction if the IRP has found a violation of this policy or to impose follow up actions in the absence of such a violation. The potential sanctions include:

- Verbal or written warning;
- Referral to the Employee Assistance Program or other mandatory conditions, which may include training, or some other professional development;
- A no contact directive;
- Modified employment duties;
- Suspension with pay;
- Suspension without pay;
- Nonrenewal or non-reappointment;
- Demotion in rank or pay;
- Loss of rank;
- Denial of salary increase;
- Transfer to another position;
- Relocation of office;
- Dismissal from academic course if respondent is taking a course at the University;
- Termination; and
- Trespassing respondent from the University.

If the respondent is a non-employee, sanctions include:

- Verbal or written warning;
- Trespassing the respondent from the University;
- Dismissal from academic course if respondent is taking a course at the University; or
- Modification or termination of the non-employee's relationship with the University.

Sanctions may be imposed in combination with one another. If the individual found to have violated this policy is a faculty member and the Co-Chair concurs with an IRP sanction recommendation of termination, the case will proceed in accordance with the "for cause" dismissal proceedings set forth in the Faculty Handbook where applicable. In such a case, the Co-Chair (Provost) is ineligible to serve as the President's designee under the "for cause" dismissal process.

Upon a finding of responsibility, additional remedies, in addition to the issued sanction, may be available to a complainant. Examples of potential remedies are provided in Interim Measures, Section X(B). Other potential remedies include targeted or broad-based educational programming or training. The Title IX Coordinator, in consultation with others as necessary, will determine any appropriate additional remedies.

Within two (2) calendar days of the decision, the Co-Chair will provide simultaneous notification to the parties of the two page IRP report in the following manner: the first page (which contains the findings on the allegations of a policy violation) will be provided to each party; the second page (which contains the IRP-recommended sanction(s) or follow up actions and the Co-Chair's decision on sanction(s) or follow up actions) will be provided solely to the respondent, unless the sanctions or follow up actions are such that they directly involve the complainant (e.g. a "no contact" directive) or where required by federal law to be disclosed to the complainant in the case of certain criminal sexual offenses covered by the Campus Security Act, including sexual assault, domestic or dating violence, and stalking. Additionally, the

Co-Chair will provide each party with an outcome letter. The outcome letter will review the prohibition against retaliation and the appeal process.

If, through informal resolution or Co-Chair decision upon a finding of no violation, a respondent has been advised to receive training, counseling, or some other professional development, or to take some other follow up action(s), the Co-Chair will oversee fulfillment of this obligation, though the Co-Chair may delegate coordination of the details to respondent's supervisor. If a respondent has been sanctioned for a violation of this policy, the appropriate Co-Chair will oversee fulfillment of the sanction.

If the respondent is taking courses at the University and part of the sanction mandates suspension or permanent dismissal, or where the respondent withdraws from taking courses while under investigation for a violation of this policy, a mandatory transcript notation law may apply. Pursuant to and as required by Virginia law, a prominent transcript notation will be included for any respondent who is taking or has taken a course at the University and has been suspended for, has been permanently dismissed for, or withdrawn from the course while under investigation for an offense involving sexual violence. Sexual violence is defined as physical sexual acts perpetrated against a person's will or where the person is incapable of giving consent. In cases of suspension and dismissal this transcript notation will read: "[Suspended or Dismissed] for a violation of W&L's set of standards." In cases of withdrawal, the notation will read: "Withdrew while under investigation for a violation of W&L's set of standards. This withdrawal as noted does not constitute a finding or admission of responsibility on the part of the student."

I. Appeals Process

Either the complainant or respondent may appeal a finding of a violation or no violation of this policy and/or a sanction/follow up action of which they have been informed. Appeals must be in writing, specifying in detail why the IRP's decision on the appealed aspect(s) of the decision lack a reasonable basis, and must be filed

with the Co-Chair who issued the original decision within three (3) business days of receipt of that decision. An Appeal Panel (comprised of three IROs who were not involved in the original investigation or panel) will be appointed by the other Co-Chair (who was not involved in the original review or sanctioning process). The appeal review will then be conducted as soon as possible. In most cases, absent unusual circumstances, the Appeal Panel review should be completed within seven (7) business days of the date the panel members receive the record from the Co-Chair.

The Appeal Panel will not substitute its judgment for the IRP or Co-Chair if it finds there was a reasonable basis for the appealed aspect(s) of the decision. In making such a determination, the Appeal Panel may speak with the Investigator(s), the appropriate Co-Chair, or the parties as the Appeal Panel deems necessary (in which case, the parties' DPAs and/or Advisors of Choice in cases of sexual assault, domestic or dating violence, or stalking, may be present, but may not participate).

If the Appeal Panel fully affirms a "no-violation" finding made by the IRP with or without recommended follow up actions, or affirms a finding of a violation and/or the sanction, the Appeal Panel will issue a brief written decision to that effect using part one of the Appeal Panel Report and will submit it to the Co-Chair who issued the original decision, who will then promptly advise the parties of the Appeal Panel's decision, which is final.

If the Appeal Panel affirms a "no-violation" finding made by the IRP, but does not affirm recommended follow up actions (or absence of such actions), the Appeal Panel will explain the facts and analysis supporting its findings and recommendations in part two of the Appeal Panel Report. The Co-Chair issuing the original decision will then review the recommendations regarding any follow up actions and issue the final decision on such measures. The Co-Chair will then promptly advise the parties of the Appeal Panel's decision, which is final. The Co-Chair will advise only the respondent of any decision regarding follow up action(s) and will share part two of the Appeal Panel Report only with the respondent, except

for any part of such action(s) that directly involve(s) the complainant or unless required by federal law to be disclosed to the complainant in the case of certain criminal sexual offenses covered by the Campus Security Act, including sexual assault, domestic or dating violence, and stalking. The Co-Chair's decision on such follow up actions is final.

If the Appeal Panel overturns a "no-violation" finding, the matter is sent back to the appropriate Co-Chair for the original review proceeding, who will then make a decision on the sanction and promptly advise the parties and share the two-part Appeal Panel Report. The first part (which contains the basis for the overturning of the "no-violation" finding) will be provided to both parties; the second part (which contains the Co-Chair's decision on sanction) will be provided only to the respondent, unless some part of the sanction directly involves the complainant or unless required by federal law to be disclosed to the complainant in the case of certain criminal sexual offenses covered by the Campus Security Act, including sexual assault, domestic or dating violence, and stalking. The Co-Chair's decision on sanction is appealable by respondent and complainant (if complainant was made aware of the sanction because it directly involved the complainant or required to be disclosed to the complainant in cases of certain sexual offenses) within three (3) business days of receipt of the sanction decision. Such an appeal must be in writing, filed with the Co-Chair who issued the decision, and must specify in detail the basis for the appeal.

If the Appeal Panel concurs with a violation finding but finds a sanction is without reasonable basis, the Appeal Panel should first consult the appropriate Co-Chair to review the sanction. If no consensus decision can be reached, both the Appeal Panel and the appropriate Co-Chair will submit their separate recommendations in writing to the President, who will make the final determination by accepting one of the two recommendations and signing off on that recommended sanction. Thereafter, the Co-Chair will promptly advise the respondent of the President's decision on the sanction(s) and will also advise the complainant when the sanction involves the complainant or when required by federal law in the case of certain criminal sexual

offenses covered by the Campus Security Act, including sexual assault, domestic or dating violence, and stalking. The President's decision on the sanction(s) is final.

If the Appeal Panel overturns a violation finding, the matter is sent back to the appropriate Co-Chair for the original review proceeding, who will then remove the sanction(s) issued, decide any appropriate follow up action(s), and promptly share the two-part Appeal Panel decision with the parties. The first part (which contains the basis for the overturning of the violation finding) will be provided to both parties; the second part (which contains the Co-Chair's removal of sanction and decision on any follow up actions) will be provided only to the respondent, unless some part of the sanction directly involves the complainant or unless required by federal law to be disclosed to the Complainant in the case of certain criminal sexual offenses covered by the Campus Security Act, including sexual assault, domestic or dating violence, and stalking.

J. Privacy and Recordkeeping

The facts about individual cases and their dispositions are to remain private to the extent possible. In order to protect the integrity of the investigation, anyone involved in the investigation should not discuss what they shared with the Investigator(s) to any witness or potential witness during the pendency of the proceedings. Additionally, in order to protect the privacy of all involved, no one involved in a complaint process, besides the complainant and respondent, should discuss any information regarding the case except with those who have a legitimate need to know. Any member of the campus community who violates the privacy provisions of these procedures, and/or the privacy directives of the administrators handling complaints, will be subject to discipline.

The Title IX Coordinator will maintain the official written records of formal and informal complaints and resolutions under these procedures in accordance with applicable University record retention schedules.

XIII. Policy Review

The University, through a working group that will include the Title IX Coordinator, members of the Office of General Counsel, members of the Student Advisory Group, and the Vice President of Student Affairs and Dean of Students, will review and update this policy, as appropriate, by October 31 of each year. The University will evaluate, among other things, any changes in legal requirements and existing University resources. The President will certify to the State Council of Higher Education for Virginia that this policy has been reviewed and updated, as appropriate, in accordance with all applicable federal and state laws.

¹When used in this policy, a complainant refers to the individual(s) who has been the subject of sexual misconduct, regardless of whether that individual makes a report or seeks formal disciplinary action. A respondent refers to the individual(s) who has been accused of sexual misconduct.

EXHIBIT 2

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

John Doe

(b) County of Residence of First Listed Plaintiff Essex County, New Jersey (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) David G. Harrison, Esq., The Harrison Firm, PC 5305 Medmont Cir SW Roanoke, VA 24018-1120 Tel 540-777-7100

DEFENDANTS

Washington and Lee University

County of Residence of First Listed Defendant Rockbridge County, VA (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known) R. Craig Wood, Esq., McGuireWoods, LLP PO Box 1288 Charlottesville, VA 22902-1288

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 20 U.S.C. 1681 et seq. Brief description of cause: Title IX Gender Discrimination

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ JURY DEMAND: X Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 04/23/2019 SIGNATURE OF ATTORNEY OF RECORD David G. Harrison