

**Mercyhurst University**  
**Sexual and Gender Based Misconduct Policy**  
**for Addressing Formal Complaints of Sexual Harassment**  
**2020 - 2021**

**1. Introduction**

Mercyhurst University defines the

## **Non-Discrimination in Application**

The requirements and protections of this policy apply equally regardless of sex, sexual orientation, gender identity, gender expression, or other protected classes covered by federal or state law. All requirements and protections are equitably provided to individuals regardless of such status or status as a Complainant, Respondent, or Witness. Individuals who wish to file a

Office for Civil Rights using their [available contact information](#).

## **Determining Jurisdiction**

The Sexual and Gender Based Misconduct Coordinator, or designee, will determine if the Sexual and Gender Based Misconduct Policy should apply to a Formal Complaint. The Process will apply when all of the following elements are met, in the reasonable determination of the Coordinator or designee:

1. The conduct is alleged to have occurred on or after August 14, 2020;
2. The alleged conduct, if true, would constitute sexual harassment by a student as defined in this policy.

If all of the elements are met, Mercyhurst will investigate the allegations according to the Grievance Process defined herein.

## **Definitions**

### **Sexual Harassment**

For the purposes of this Sexual and Gender Based Misconduct Policy, sexual harassment includes any conduct on the basis of sex that satisfies one or more of the following:

1. Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the edu
2. Sexual assault (as defined in the Clery Act), which includes any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent;
3. Dating violence (as defined in the Violence Against Women Act (VAWA) amendments to the Clery Act), which includes any violence committed by a person: (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship; (ii) The type of relationship; (iii) The frequency of interaction between the persons involved in the relationship.

4. Domestic violence (as defined in the VAWA amendments to the Clery Act), which includes any felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under Pennsylvania domestic or family violence laws or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of Pennsylvania.
5. Stalking (as defined in the VAWA amendments to the Clery Act), meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to-- (A) fear for their safety or the safety of others; or (B) suffer substantial emotional distress.

### **Consent**

For the purposes of this Sexual and Gender Based Misconduct Policy, consent is an informed decision made freely and actively through words or actions that demonstrates an affirmative, knowing, and voluntary agreement to engage in a sexual act. The need to obtain consent does not vary by sexual orientation, gender identity, or gender expression.

Because sexual misconduct is defined as sexual activity that is undertaken without consent, each participant must obtain and give consent to each sexual act. Students are strongly encouraged to talk with each other before and during any sexual interaction. Relying solely on non-verbal communication can lead to miscommunication. Students are strongly advised to avoid any ambiguity in obtaining and giving consent.

Although all parties must give their consent to any sexual act and it is the best practice for both parties to be responsible for the responsibility of the person initiating the sexual act to obtain consent from the other.

### **Formal Complaint**

For the purposes of this Sexual and Gender Based Misconduct Policy, a formal complaint is a document including an electronic submission - filed by a complainant with a signature or other indication that the complainant is the person filing the formal complaint, or signed by the Sexual and Gender Based Misconduct Coordinator, alleging sexual harassment against a respondent about conduct by a Mercyhurst student and requesting initiation of the procedures consistent with the Sexual and Gender Based Misconduct Policy to investigate the allegation of sexual harassment.

## Complainant

For the purposes of this Sexual and Gender Based Misconduct Policy, Complainant means any individual who has reported being or is alleged to be the victim of conduct that could constitute sexual harassment as defined under this policy.

## Respondent

For the purposes of this Sexual and Gender Based Misconduct Policy, Respondent means any individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment as defined under this policy.

## Relevant evidence and questions

evidence that tends to make an allegation of sexual harassment more or less likely to be true.

### Sexual and Gender Based Misconduct Process:

- < behavior unless:
  - They are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - respect to the respondent and are offered to prove consent.
  
- < Evidence and questions that constitute, or seek disclosure of, information protected under a legally-recognized privilege.
  
- < voluntary, written consent.

## Privacy vs. Confidentiality

Consistent with Mercyhurst Code of Conduct, references made to *confidentiality* refer to the ability of identified confidential resources to not report crimes and violations to law enforcement or University officials without permission, except for extreme circumstances, such as a health and/or safety emergency or child abuse. References made to *privacy* mean Mercyhurst offices and employees who cannot guarantee confidentiality but will maintain privacy to the greatest

extent possible, and information disclosed will be relayed only as necessary to investigate and/or seek a resolution and to notify the Sexual and Gender Based Misconduct Coordinator or designee, who is responsible for tracking patterns and spotting systemic issues. Mercyhurst will limit the disclosure as much as practicable, even if the Sexual and Gender Based Misconduct Coordinator determines that the request for confidentiality cannot be honored.

The following Officials may provide confidentiality:

- < Mercyhurst University Health and Counseling Staff
- < Mercyhurst clergy

## **Non-Investigatory Measures Available Under the Sexual and Gender Based Misconduct Policy**

### **Supportive Measures**

Complainants who report allegations that could constitute sexual harassment under this policy, have the right to receive supportive measures from Mercyhurst regardless of whether they desire to file a complaint, which may include the following, as appropriate. Supportive measures are non-disciplinary and non-punitive.

- < *counseling*
- < *extensions of deadlines or other course-related adjustments*
- < *modifications of work or class schedules*
- < *restrictions on contact between the parties (no contact orders)*
- < *changes in work or housing locations*
- < *increased security and monitoring of certain areas of the campus*

### **Emergency Removal**

Mercyhurst retains the authority to remove a respondent from \_\_\_\_\_ program or activity on an emergency basis, where Mercyhurst (1) undertakes an individualized safety and risk analysis and (2) determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies a removal.

If Mercyhurst determines such removal is necessary, the respondent will be provided notice and an opportunity to challenge the decision immediately following the removal. The emergency removal committee consists of the Sexual and Gender Based Misconduct Coordinator, member of Police & Safety, member of the Cohen Health Center, or designees. The committee will review all relevant documentation and known facts to determine safety risk or immediate threat. The emergency removal will be effective immediately. A respondent can file an appeal that will be heard within two (2) business days by a designated Vice President.

## **Sexual and Gender Based Misconduct Process**

### **Filing a Formal Complaint**

The timeframe for the Sexual and Gender Based Misconduct Process begins with the filing of a Formal Complaint. The Process will be concluded within a reasonably prompt manner, and no longer than ninety (90) business days after the filing of the Formal Complaint, provided that the Process may be extended for a good reason, including but not limited to the absence of a party, a

assistance or accommodation of disabilities. The procedure for applying for extensions is described below.

To file a Formal Complaint, a complainant must provide the Sexual and Gender Based Misconduct Coordinator a written, signed complaint describing the facts alleged. If a complainant does not wish to make a Formal Complaint, the Sexual and Gender Based Misconduct Coordinator may determine a Formal Complaint is necessary. Mercyhurst will inform the complainant of this decision in writing, and the complainant need not participate in the process further but will receive all notices issued under this Policy and Process.

Nothing in the Sexual and Gender Based Misconduct Policy or other University policies prevents a complainant from seeking the assistance of state or local law enforcement alongside the appropriate on-campus process.

**Multi-**

allegations raised within that Formal Complaint, at any time during the investigation or hearing, if:

- < A complainant notifies the Sexual and Gender Based Misconduct Coordinator in writing that they would like to withdraw the Formal Complaint or any allegations raised in the Formal Complaint;
- < The respondent is no longer enrolled; or,
- < If specific circumstances prevent Mercyhurst from gathering evidence sufficient to reach a determination regarding the Formal Complaint or allegations within the Formal Complaint.

Any party may ap

### **Notice of Dismissal**

Upon reaching a decision that the Formal Complaint will be dismissed, the institution will promptly send written notice of the dismissal of the Formal Complaint or any specific allegation within the Formal Complaint, and the reason for the dismissal, simultaneously to the parties through their institutional email accounts. It is the responsibility of parties to maintain and regularly check their email accounts.

### **Notice of Allegations**

The Sexual and Gender Based Misconduct Coordinator will draft and provide the Notice of Allegations to any party to the allegations of sexual harassment. Such notice will occur as soon as practicable, after the institution receives a Formal Complaint of the allegations, if there are no extenuating circumstances.

The parties will be notified by their institutional email accounts or other reasonable means.

The institution will provide sufficient time for the parties to review the Notice of Allegations and prepare a response before any initial interview.

### **Contents of Notice**

The Notice of Allegations will include the following:

- < Sexual and Gender Based Misconduct Process and a hyperlink to a copy of the process.
- < Notice of the allegations potentially constituting sexual harassment, and sufficient details known at the time the Notice is issued, such as the identities of the parties involved in the incident, if known, including the complainant; the conduct allegedly constituting sexual harassment; and the date and location of the alleged incident, if known.



- ◁ A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- ◁ A statement that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney;
- ◁ A statement that before the conclusion of the investigation, the parties may inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint, including the evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility, and evidence that both tends to prove or disprove the allegations, whether obtained from a party or other source.

### **Ongoing Notice**

If, in the course of an investigation, the institution decides to investigate allegations about the complainant or respondent that are not included in the Notice of Allegations and are otherwise  
Sexual and Gender Based Misconduct Policy, the institution will notify the parties whose identities are known of the additional allegations by their institutional email accounts or other reasonable means.

The parties will be provided sufficient time to review the additional allegations to prepare a response before any initial interview regarding those additional charges.

### **Advisor of Choice and Participation of Advisor of Choice**

Mercyhurst will provide the parties equal access to advisors and support persons; any restrictions on advisor participation will be applied equally.

Mercyhurst has a long-standing practice of requiring students to participate in the process directly and not through an advocate or representative. Students participating as Complainant or Respondent in this process may be accompanied by an Advisor of Choice to any meeting or hearing to which they are required or are eligible to attend. The Advisor of Choice is not an advocate. Except where explicitly stated by this Policy, Advisors of Choice shall not participate directly in the process.

Mercyhurst will not intentionally schedule meetings or hearings on dates where the Advisors of Choice for all parties are not available, provided that the Advisors act reasonably in providing available dates and work collegially to find dates and times that meet all schedules.



Mercyhurst and not the parties, has the burden of proof and the burden of gathering evidence, i.e. the responsibility of showing a violation of this Policy has occurred. This burden does not rest with either party, and either party may decide not to share their account of what occurred or may decide not to participate in an investigation or hearing. This does not shift the burden of proof away from Mercyhurst and does not indicate responsibility.

Mercyhurst cannot access, consider, or disclose medical records without a waiver from the party (or parent, if applicable) to whom the records belong or of whom the records include information. Mercyhurst will provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence, (i.e.

parties and their advisors, if any.

The institution may provide the parties five (5) business days after the initial inspection and review of evidence, and before the investigator completes their Investigative Report, to provide additional evidence in response to their inspection and review of the evidence, and then provide the parties five (5) business days to inspect, review evidence through a written response to the investigator. Those written responses will be disclosed to the parties.

Any evidence subject to inspection and review will be available at any hearing, including for purposes of cross-examination.

The parties and their advisors agree not to disseminate any of the evidence subject to inspection and review or use such evidence for any purpose unrelated to the grievance process.

**Inclusion of Evidence Not Directly Related to the Allegations:**

Evidence obtained in the investigation that is determined in the reasoned judgment of the investigator not to be directly related to the allegations in the Formal Complaint will be included in the appendices to the investigative report.

**Investigative Report**

The Sexual and Gender Based Misconduct Coordinator and/or an investigator designated by the Sexual and Gender Based Misconduct Coordinator will create an Investigative Report that fairly

## **Hearing**

### **General Rules of Hearings**

The live hearing may be conducted with all parties physically present in the same geographic location, or, at discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually. This technology will enable participants simultaneously to see and hear each other. At its discretion, Mercyhurst may delay or adjourn a hearing based on

All proceedings will be recorded through audio recording. That recording will be made available to the parties for inspection and review.

Prior to obtaining access to any evidence, the parties and their advisors must agree not to disseminate any of the testimony heard or evidence obtained in the hearing or use such testimony or evidence for any purpose unrelated to the Sexual and Gender Based Misconduct Policy.

### **Continuances or Granting Extensions**

Mercyhurst may determine that multiple sessions or a continuance (i.e. a pause on the continuation of the hearing until a later date or time) is needed to complete a hearing. If so, Mercyhurst schedules and complete the hearing as promptly as practicable.

### **Newly-discovered Evidence**

As a general rule, no new evidence or witnesses may be submitted during the live hearing.

If a party identifies new evidence or witnesses that were not reasonably available prior to the live hearing and could affect the outcome of the matter, the party may request that such evidence or witnesses be considered at the live hearing.

The Hearing Board Chair will consider this request and make a determination regarding (1) whether such evidence or witness testimony was actually unavailable by reasonable effort prior

If the Hearing Board Chair

- < The hearing body will be trained on topics including how to serve impartially, issues of relevance, including how to apply the rape shield protections provided for complainants, and any technology to be used at the hearing.
- < The parties will have an opportunity to raise any objections regarding a decision-actual or perceived conflicts of interest or bias at the commencement of the live hearing.

*Advisor of choice*

- < The parties have the right to select an advisor of their choice, who may be, but does not have to be, an attorney.
- < The advisor of choice may accompany the parties to any meeting or hearing they are permitted to attend, but may not speak for the party, except for the purpose of cross-examination.
- < The parties are not permitted to conduct cross-examination; it must be conducted by the advisor. As a result, if a party does not select an advisor, the institution will select an advisor to serve in this role for the limited purpose of conducting the cross-examination at no fee or charge to the party.
- < The advisor is not prohibited from having a conflict of interest or bias in favor of or against complainants or respondents generally, or in favor or against the parties to the particular case.
- < The advisor is not prohibited from being a witness in the matter.
- < -  
examination on their behalf.
- < If neither a party nor their advisor appear at the hearing, Mercyhurst will provide an advisor to appear on behalf of the non-appearing party.
- < violation of those Rules.

*Witnesses*

- < Witnesses cannot be compelled to participate in the live hearing, and have the right not to participate in the hearing free from retaliation.
- < If a witness does not submit to cross-examination, as described below, the decision-maker cannot rely on any statements made by that witness in reaching a determination regarding res







3. Findings of fact supporting the determination;
4. Conclusions regarding which section of the Conduct Code if any, the respondent has or has not violated.
5. For each allegation:
  - a. A statement of, and rationale for, a determination regarding responsibility;
  - b. A statement of, and rationale for, any disciplinary sanctions the institution imposes on the respondent; and
  - c. A statement of, and rationale for, whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the recipient to the complainant; and
6. The procedures and the permitted reasons for the complainant and

### **Timeline of Determination Regarding Responsibility**

If there are no extenuating circumstances, the determination regarding responsibility will be issued by Mercyhurst within ten (10) business days.

The submission of appeal stays any sanctions for the pendency of an appeal. Supportive measures and remote learning opportunities remain available during the pendency of the appeal.

If a party appeals, Sexual and Gender Based Misconduct Coordinator will as soon as practicable notify the other party in writing of the appeal, however the time for appeal shall be offered equitably to all parties and shall not be extended for any party solely because the other party filed an appeal.

Appeals should not exceed 1500 words. Appeals that do not meet this standard may be returned to the party for correction, but the time for appeal will not be extended unless there is evidence that technical malfunction caused the appeal document not to meet these standards.

Appeals will be decided by an Appeals Officer who will be free of conflict of interest and bias, and will not serve as investigator, Sexual and Gender based Misconduct Coordinator, or hearing decision maker in the same matter.

Outcome of appeal will be provided in writing simultaneously to both parties and include rationale for the decision.

### **Retaliation**

No person may intimidate, threaten, coerce, or discriminate against any individual because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding or hearing under this Sexual and Gender Based Misconduct Policy.

Any intimidation, threats, coercion, or discrimination, for the purpose of interfering with any right or privilege secured by this policy constitutes retaliation. This includes any charges filed against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but that arise from the same facts or circumstances as a report or complaint of sex discrimination or a report or Formal Complaint of sexual harassment

### **Good Samaritan Statement**

Mercyhurst University views student safety as paramount. Student health and safety are the primary concerns of the Mercyhurst community. Students are expected to contact Police & Safety or the AD on duty when they believe that assistance for an intoxicated/impaired student is needed. Students and/or organizations that seek assistance from these sources, the individual assisted, and others involved may have applicable alcohol sanctions waived. In incidents of crisis

or medical emergency, Mercyhurst students are expected to care for themselves and for others in the University community by getting help from appropriate officials even when violations of the Conduct Code have occurred. In crisis situations involving alcohol, drugs and/or sexual misconduct, the University strongly considers the positive impact of taking responsible action when determining the appropriate response for alleged policy violations relating to the incident. The granting of any form of amnesty remains a matter of discretion with the adjudicator. This policy does not preclude taking disciplinary action for violations associated with vandalism, theft, hazing, physical assault, sexual assault, or other policy violations. Amnesty under this policy is a matter of compassion, not a right. It is not to be abused by those who violate the Conduct Code repeatedly.

Complaints alleging retaliation may be filed according to the [Mercyhurst Grievance policy](#).

### **Violation of Agreements**

Parties who violate agreements made under this policy may be subject to conduct proceedings.