

**Berry Sexual Misconduct Policy**  
**Effective August 14, 2020**

**I. Opening Statement and Purpose**

*Berry College is a residential academic community that is grounded in relationships built on trust and respect. The College seeks to provide a learning and working environment conducive to thought, creativity, and growth, where individuals are free to realize their full potential. Sexual harassment, assault and other forms of sexual misconduct are fundamentally at odds with these goals and an affront to human dignity. In both obvious and subtle ways, sexual misconduct harms students, faculty, and staff, as well as the academic community as a whole.*

*Berry College will not tolerate sexual misconduct and will work diligently to prevent and eliminate sexual misconduct at the College.*

*Berry prohibits sexual misconduct by faculty, staff, students and those who use Berry facilities. The prohibition applies regardless of the gender of the reporter or of the respondent and includes sexual relationships involving a status differential and those between peers, colleagues, and co-workers. This policy applies to all members of the Berry community as they interact with one another in both on- and off-campus settings. Acts of sexual assault by or against students, employees, visitors to the campus, or other persons who use Berry facilities will not be tolerated and will be pursued under Berry's sexual misconduct policy without regard to whether they are pursued separately by law enforcement.*

This Sexual Misconduct Policy serves as Berry's overarching policy against sexual misconduct and gender- or sex-based discrimination in all of its forms. The accompanying Formal Grievance Policy, which is linked [here](#) and is found below as Appendix A to this Sexual Misconduct Policy, covers a narrower sub-set of sexual harassment that must be addressed pursuant to a defined formal grievance process as required by the U.S. Department of Education under new Title IX Regulations, effective August 14, 2020. When sexual misconduct meets the criteria specified in the Title IX Regulations, it must be addressed under the Formal Grievance Policy, and not this overarching Sexual Misconduct Policy, to the extent the processes differ between the two policies. See 34 C.F.R. § 106.44-.45; see Sections I-II of each policy. Otherwise, this overarching Sexual Misconduct Policy will apply (e.g., the definitions in this Policy apply to the Formal Grievance Policy). Combined, Berry's policies and procedures are intended to ensure that all students impacted by an incident or complaint of sexual misconduct receive appropriate support and fair treatment, and that allegations of sexual misconduct are handled in a prompt, thorough and equitable manner.

Relevant terms are defined in **Sections II** below and **XIII** at the end of this Policy.

*Nothing in this policy is to be construed to limit academic freedom and appropriately exercised free expression within the College (see statement on Academic Freedom in the Faculty/Staff Handbook located on VikingWeb (Employee Tab, Employee Handbook))*

*Written, auditory, or visual course materials which are used for educational purposes or which are part of academic or cultural programs, do not necessarily constitute sexual misconduct, regardless of their sexual, erotic, suggestive, or vulgar content and regardless of whether they may be offensive to some individuals.*

Berry will review, evaluate, and make any revisions or amendments to its policies on an ongoing and as-needed basis. This Policy and the accompanying Formal Grievance Policy shall apply to all Reports and Complaints of sexual misconduct received by Berry's Title IX Coordinator on or after August 14, 2020, regardless of the date of the alleged incident. These policies will not be applied retroactively. The prior iteration of this policy shall apply to Reports and Complaints received by the Title IX Coordinator prior to August 14, 2020.

Inquiries about the application of this policy should be directed to Berry's Title IX Coordinator:

*Lindsay Norman*  
*Ladd Center 11 and Hermann Hall 206*  
*P.O. Box 495009*  
*Mount Berry, Georgia 30149-5009*  
[\*lnorman@berry.edu\*](mailto:lnorman@berry.edu)  
*(706) 236-2207 or (706) 236-2209*

## **II. Scope of Policy**

### A. Scope

This Policy, its supplemental procedural guidance, and the Formal Grievance Policy are intended to protect and guide individuals who have been affected by sex/gender discrimination and sexual misconduct, whether as a Complainant, a Respondent, or as a witness, and to provide fair and equitable procedures for investigation and resolution of Reports and Complaints.

As noted above, when sexual misconduct meets the criteria specified in new Title IX Regulations, effective August 14, 2020, it must be addressed under the Formal Grievance Policy, and not this overarching Sexual Misconduct Policy, to the extent the processes differ between the two policies. The Formal Grievance Policy applies to “sexual harassment” in a Berry “education program or activity” against a person in the United States. 34 C.F.R. § 106.44(a). “Sexual harassment” is defined in the Regulations (§ 106.30) to be conduct on the basis of sex that satisfies one or more of the following:

1. A Berry employee conditioning the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct (“quid pro quo”);
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to Berry’s education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking. (These terms are defined in the Definitions section below, Section XIII.)

“Sexual misconduct,” which is addressed in this overarching Sexual Misconduct Policy, is a broader term that covers sex-based conduct beyond the Title IX Regulations’ “sexual harassment” definition. Examples may include sexual exploitation and many forms of verbal harassment that may not meet the Regulations’ definition of “sexual harassment.”

Additionally, the Title IX Regulations’ jurisdictional criteria is narrower than this overarching Sexual Misconduct Policy. The Formal Grievance Policy applies to a Berry “education program or activity,” which is defined by the Regulations to include locations, events or circumstances over which Berry exercises substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by Berry. Pursuant to the Regulations, it excludes any “education program or activity” that does not occur in the United States. (§ 106.44(a).)

If sexual misconduct is alleged to have occurred that does not satisfy the Title IX Regulations’ jurisdictional criteria, such as off-campus sexual misconduct (including sexual harassment) alleged to have an on-campus effect or occurring during a study abroad program, then it may be addressed pursuant to this overarching Sexual Misconduct Policy.

Berry retains the right to utilize different processes for certain Title IX cases. For example, cases meeting the criteria of the new Title IX Regulations will be governed by the accompanying Formal Grievance Policy. Cases that are reported during the non-academic year or that extend into the non-academic year may proceed under different processes in the discretion of the Title IX Coordinator as long as they do not conflict with Berry’s policies. While the Formal Grievance Policy applies to alleged employee sexual harassment per the Title IX Regulations, this overarching Sexual Misconduct

Policy does not apply to alleged employee sexual misconduct or discrimination that falls outside of the new Title IX Regulations; such alleged misconduct between employees or between an employee and a non-student are governed by the *Employee Handbook*, and Berry retains the right to apply modified processes for cases involving such alleged misconduct in which a student is a party if an employee or faculty member is also a party to the case.

#### B. Overview of Policy and Certain Key Definitions

Berry will investigate all reports received by the Title IX Coordinator of sex/gender discrimination and sexual misconduct (“Reports”). Berry is authorized under this Sexual Misconduct Policy and its accompanying Formal Grievance Policy to take certain actions to address or remedy sex/gender discrimination and sexual misconduct after receiving a Report, during an investigation, and after an investigation even if the matter does not proceed to a hearing or an informal resolution.

Anyone can report an incident of sex/gender discrimination and sexual misconduct to Berry under the procedure described in **Section VIII** of this Policy. For example, a “Reporter” can be any individual who reports to Berry that they are a victim or survivor of sex/gender discrimination or sexual misconduct or that they have been affected by sex/gender discrimination or sexual misconduct (sometimes referred to as a “First-Party Reporter”) or that they have knowledge of sex/gender discrimination or sexual misconduct happening to or affecting someone else (sometimes referred to as a “Third-Party Reporter”).

A Report will become a “Complaint” if a First-Party Reporter files a written document with the Title IX Coordinator describing an incident of sex/gender discrimination or sexual misconduct and indicating that they want Berry to take further steps, such as a full investigation and possibly holding an adjudication to resolve the alleged issue. Berry can also convert a Report to a “Complaint” if Berry determines that, in order to meet its Title IX obligations to provide a safe and nondiscriminatory environment for the broader Berry Community, it must take further steps to address and resolve the matter. A Formal Complaint under the Formal Grievance Policy is a type of Complaint. See Formal Grievance Policy, Section IV.A., regarding Formal Complaints.

A “Complainant” refers to an individual who is alleged to have been subjected to an incident of sex/gender discrimination or sexual misconduct (i.e., a First-Party Reporter or a victim or person who has otherwise been affected by sex/gender discrimination or sexual misconduct, or under the Formal Grievance Policy governing sexual harassment, an individual who is alleged to be the victim of conduct that could constitute sexual harassment). A Complainant has certain rights under this Policy, as discussed below. A Reporter who reports witnessing sex/gender discrimination or sexual misconduct happening to or affecting *someone else* (i.e., a Third-Party Reporter) can file a Report and request that it be treated as a Complaint, but that does not make them a Complainant. Similarly, the fact that the Title IX Coordinator may elevate a Report to a Complaint does not make the Title IX Coordinator a Complainant.

A “Respondent” refers to an individual who has been accused of conduct that could constitute sexual misconduct prohibited under this Policy (or, under the Formal Grievance Policy governing sexual harassment, an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment). A student Respondent has certain rights under this Policy, as discussed below, and under the Formal Grievance Policy when that policy is applicable.

A “third party” refers to any other participant in the process, including a witness to the incident or an individual who makes a Report on behalf of someone else.

As used throughout this Policy, references to the “Title IX Coordinator” shall include any Deputy Title IX Coordinator and any other person expressly designated by the Title IX Coordinator to act on their behalf.

Additional definitions are contained in **Section XIII** at the end of this Policy.

### **III. Title IX and Nondiscrimination**

Title IX is a comprehensive federal law that prohibits discrimination on the basis of sex in any federally funded education program or activity. Title IX prohibits use of federal money to support sex discrimination in education programs and provides individuals effective protection against such practices. Title IX applies, with a few specific exceptions, to all aspects of federally funded education programs and activities. In addition to traditional education institutions such as colleges, universities, and elementary and secondary schools, Title IX also applies to any education or training program operated by a recipient of federal financial assistance.

Consistent with Title IX, as well as Title VII of the Civil Rights Act of 1964 and any related federal, state, and local laws, Berry prohibits all unlawful discrimination, harassment and retaliation on the basis of sex, gender, gender identity, gender expression, or sexual orientation in any employment decision, education program or educational activity. This policy applies to all members of the Berry Community. *As required by Title IX of the Education Amendments of 1972, Berry does not discriminate on the basis of sex or gender in its educational, extracurricular, athletic or other programs and activities, or in the context of admissions or employment at the College.*

As part of its commitment to maintaining a community free of discrimination, and in compliance with Title IX's mandate, Berry will address allegations of sexual misconduct or harassment in a timely and effective way, provide resources as needed for affected persons (Reporters, Complainants, Respondents and third parties within the Berry Community), and not tolerate retaliation against any person who reports sex/gender discrimination or sexual misconduct. Any individual designated by Berry to have the duty to report alleged sex/gender-based discrimination, sexual harassment and/or retaliation (known as a "Mandatory Reporter") and who fails to report such conduct may be subjected to sanctions by Berry.

Inquiries about the application of Title IX should be directed to Berry's Title IX Coordinator. Additional information can be found on Berry's website: <https://berry.edu/student-life/dean-of-students/title-ix/>. Inquiries about the application of Title IX also can be directed to the U.S. Department of Education's Office for Civil Rights.

### **IV. Retaliation, Misuse of Confidential Information, and False Accusations**

Berry expressly prohibits retaliation against anyone who: 1) in good faith, reports what they believe is discrimination or sexual misconduct, 2) participates in any investigation or proceeding under this Policy, or 3) opposes conduct that they believe to violate this Policy. Retaliation includes intimidation, harassment, threats, or other adverse action or speech against the person who reported the misconduct, the parties, and their witnesses.

Consistent with FERPA's prohibition on re-disclosure of confidential information, any person who receives another person's confidential information solely as a result of participation in any investigation or proceeding under this Policy, is prohibited from using or disclosing such confidential information outside of such forums without express consent or for any improper purpose. This provision only applies to other people's confidential information, as a party is never restricted from discussing their own experience. This provision does not apply to any information learned outside of an investigation or proceeding under this Policy.

Berry will not only take steps to prevent retaliation, but it will also take strong corrective action if it occurs. Anyone who believes they have been the victim of retaliation should immediately report it to the Title IX Coordinator, who shall treat it as a Report. Any individual found to have retaliated against another individual will be in violation of this Policy and will be subject to disciplinary action, up to and potentially including termination for employees and expulsion for students.

Anyone who knowingly makes a false accusation of unlawful discrimination, harassment, or retaliation of any form will be subject to an investigation for a potential violation of this Policy and may be subject to disciplinary action, up to and potentially including termination for employees and expulsion for students.

**V. Time Considerations for Reporting and Filing Title IX Complaints of Sex/Gender Discrimination and Sexual Misconduct**

There is no time limit for reporting incidents of Sex/Gender Discrimination or Sexual Misconduct under this Policy, although Berry encourages reports to be made as soon as possible. Any individual who has been subjected to, or who knows of or has witnessed, an incident of Sex/Gender Discrimination or Sexual Misconduct is encouraged to report the incident or file a Complaint immediately in order to maximize Berry’s ability to obtain information and conduct an adequate, thorough, prompt, and impartial investigation into the incident. A delayed Report of alleged Sex/Gender Discrimination or Sexual Misconduct may result in the loss of relevant information, evidence, and reliable witness testimony, and may impair Berry’s ability to fully investigate the incident.

**VI. Medical Assistance Policy for Alcohol and Illegal Drug Use Violations for Individuals Who Report Incidents of Sexual Misconduct**

Berry strongly encourages individuals who have been involved in, or who know of, or have witnessed, incidents of Sex/Gender Discrimination or Sexual Misconduct to report such incidents as soon as possible. Berry recognizes that students involved (e.g. as witnesses, bystanders, third parties, or Complainants) who may have violated drug and alcohol laws or policies may be hesitant to report out of fear of sanction. Therefore, in order to encourage reporting in all situations, anyone who reports or experiences Sex/Gender Discrimination or Sexual Misconduct may be granted reprieve for any violation of Berry’s drug and alcohol policies that occurred in connection with the reported incident. Berry intends to grant such amnesty for all but the most egregious violations of its drug and alcohol policies; however, individuals may be provided with resources on drug and alcohol counseling and/or education, as appropriate.

Other Viking Code policy violations discovered during a Title IX process may be referred to the appropriate Berry office(s).

**VII. Available Resources and Recommended Immediate Steps Following An Incident of Sex/Gender Discrimination and/or Sexual Misconduct**

<b>LAW ENFORCEMENT</b>	<b>LOCAL HOSPITALS</b>
<i>Berry College Police Department</i>  <i>706-236-2262</i>	Emergency Assistance:  <i>706-236-2262</i>
<i>City of Rome Police Department:</i>  <i>706-238-5111</i>	<i>Floyd Medical Center</i>  <i>304 Turner McCall Blvd.</i>  <i>706-509-5000</i>
<i>Floyd County Police Department</i>  <i>706-235-7766</i>	<i>Redmond Regional Hospital</i>  <i>501 Redmond Rd.</i>  <i>706-291-0291</i>

For additional off-campus support services, contact the Sexual Assault Center of Northwest Georgia at (706) 292-9024.

Berry is aware that an individual who has been subjected to, or who knows of or who has witnessed a sex offense may experience physical, mental and emotional trauma as a result of the incident. A victim of sexual violence (e.g., sexual assault, dating violence, domestic violence, stalking) is encouraged to follow these procedures immediately following the occurrence, when possible:

1. Get to a safe place immediately and call someone you trust.
2. If sexual contact and/or penetration occurred, do not wash, shower, bathe, use the toilet or change clothing or bedding. Preserve any evidence. Examples of such evidence include:
  - Clothing worn during the incident, including but not limited to undergarments;
  - Sheets, bedding, and condoms, if used;
  - A list of witnesses with contact information;
  - Text messages, emails, call history, and social media posts; and
  - Pictures of any injuries.
3. You are encouraged, but not required, to call the appropriate law enforcement agency. To contact the City of Rome Police Department, call (706) 2238-5111. Berry College Police Department, (706) 236-2262, can assist any student with reporting a crime to the City of Rome Police Department. Even if you do not intend to pursue a criminal investigation immediately, you may wish to speak with law enforcement resources or sex assault counsellors about preserving evidence. This may allow you to proceed at a later time with a criminal complaint, if you later decide to do so.
4. Get medical attention. Berry College Police will assist you in calling Emergency Medical Services (911) if you ask them to. Berry also encourages you to go, or have someone else take you, directly to a medical facility or medical provider of your choice. Any medical provider should be instructed to collect and preserve relevant evidence, or if they are not experienced in doing so themselves, to contact the Sexual Assault Center of Northwest Georgia at (706) 292-9024. For additional off-campus support services, contact the Sexual Assault Center of Northwest Georgia at (706) 292-9024. The Center has individuals who will provide support and, if desired, will accompany victims of sexual assault to Floyd Medical Center or Redmond Regional Hospital and will stay with them while they receive medical treatment.
5. Berry will assist an individual who has been subjected to, who knows of, or who has witnessed an incident of sexual misconduct in obtaining the services of counseling professionals, if requested. Berry encourages you to seek support services. For on-campus student counseling services, contact the Counseling Center at (706) 236-2259. For off-campus counseling and advocacy services, contact the Sexual Assault Center of Northwest Georgia at (706) 292-9024. Berry will provide as much assistance as possible but cannot assume financial responsibility for such services.
6. All members of the campus community are encouraged to seek resources and support related to sex/gender discrimination and sexual misconduct proceedings, including Respondents, witnesses and bystanders. For more information, see Berry's Title IX website at <https://berry.edu/student-life/dean-of-students/title-ix/>

## **VIII. Options and Procedures for Reporting or Disclosing Title IX Incidents of Sex/Gender Discrimination or Sexual Misconduct**

### **A. Options for Reporting to Berry Under This Policy**

Anyone can report an incident of sex/gender discrimination or sexual misconduct to Berry (a "Report"). A Report can be made by any individual who is a victim or survivor of sex/gender discrimination or sexual misconduct, who has been affected by sex/gender discrimination or sexual misconduct, or who has knowledge of sex/gender discrimination or sexual misconduct happening to or affecting someone else. A Report may be made anonymously.

**Berry strongly encourages all individuals to report incidents of sexual misconduct and sex/gender discrimination even if the individual does not intend to pursue a Complaint.** Even if Berry does not have jurisdiction over the Respondent, Berry may take prompt action to provide supportive measures for the safety and well-being of any affected person and the broader Berry community. No person should assume that an incident has already been reported by someone else or that Berry already knows about a particular situation.

In order to make a Report to Berry, a reporting individual may do **one or more** of the following:

Report the incident to the Title IX Coordinator via email to [ltaylor@Berry.edu](mailto:ltaylor@Berry.edu), in person, by mail, or by phone. See Section I for the Title IX Coordinator's contact information. Reporters are encouraged, but not required, to direct their Reports to the Title IX Coordinator. Reports may also be made to the Deputy Title IX officers listed below:

Meredith Johnson, Assistant Dean of Students, [mjohnson@berry.edu](mailto:mjohnson@berry.edu)

Wayne Phipps, Human Resource Director, [wphipps@berry.edu](mailto:wphipps@berry.edu)

Report the incident to any faculty or staff member. It is important to know that, with the exception of the "confidential resources" staff listed below in **Section VIII.B.**, all Berry faculty and staff are Mandatory Reporters and are required by Berry to report any knowledge they receive of possible violations of this Policy to the Title IX Coordinator. Mandatory Reporters must relay all known information about any reported policy violation, including but not limited to: the names of involved individuals, the nature of the incident, and the time and location of the incident.

*All Resident Assistants are Campus Security Authorities under the Clery Act and are required to report any knowledge of possible violations of the policy for Clery purposes. No other students are obligated to report knowledge they may have of sexual misconduct, including student employees of Berry who are considered students and not staff for purposes of this Policy and are not Mandatory Reporters.*

Once the Title IX Coordinator learns of any Report of alleged sex/gender discrimination or sexual misconduct, whether from a direct Report or from a Mandatory Reporter, they will implement supportive measures as needed and initiate an investigation into the alleged incident. The form of the investigation may vary, particularly if the conduct alleged is governed by the U.S. Department of Education's Title IX Regulations, in which case Berry's Formal Grievance Policy at Appendix A will apply. Following an investigation, the Title IX Coordinator has authority to resolve a Report, including the implementation of any supportive measures, and close the case if the Report does not constitute or become a Complaint.

After making a Report, an individual may choose to file or request a Complaint and pursue resolution (under this policy or the Formal Grievance Policy, as applicable) or, if applicable, an Informal Resolution involving the Respondent; may choose to be involved or not be involved in Berry's investigation and any related proceedings; or may choose to end involvement in the process.

#### B. Options Utilizing Confidential Resources

Rather than making a Report, individuals can confidentially discuss incidents of sex/gender discrimination and sexual misconduct with one of the following Berry "confidential resources":

- *Health Center staff - Ladd Center – (706) 236-2267*
- *Counseling Center staff – Ladd Center – (706) 236-2259*
- *College Chaplains- Krannert Center – (706)236-2217*
- *Michael McElveen – Cage Center- (706) 365-5633*
- *Ashley Demonbreun-Chapman – Ladd Center – (706) 238-7957*

Disclosures made to these confidential resources will be held in strict confidence, and will not constitute a Report to Berry under this Policy. These confidential resources may assist individuals with making Reports or filing Complaints if, and only if, the Complainant requests that they do so or if there is an emergency in which the Complainant cannot report the alleged sexual misconduct.

Additionally, in order to assist Berry in collecting data and identifying potential patterns or systemic problems related to sexual violence on and off campus, the “confidential resources” staff will convey general and non-personally-identifiable information about the incident (i.e. nature, time and location of the incident) to the Title IX Coordinator. Because such communications will necessarily lack any personally-identifying information, they will not constitute Reports and generally will not be investigated unless a pattern or systemic problem is discovered. Again, Berry strongly encourages all individuals to report incidents of sexual misconduct to the Title IX office, including with the assistance of confidential resources, if they wish for the incident to be investigated; otherwise, Berry fully respects the confidential resources’ strict confidence when the Reporter chooses not to report.

#### C. Options for Notifying Off-Campus Law Enforcement Authorities

Individuals can, but are not required to, notify off-campus law enforcement authorities about any incident of alleged sex/gender discrimination and sexual misconduct, including by dialing (911), calling the City of Rome Police Department at (706) 238-5111, and/or calling the Sexual Assault Center of Northwest Georgia at (706) 292-9024. Individuals can also contact other law enforcement agencies, depending on the location of the incident. Notifying off-campus law enforcement authorities will not constitute a Report to Berry under this Policy, but it may or may not result in such authorities reporting relevant information back to Berry which Berry will investigate.

Individuals can request assistance from Berry faculty and staff in notifying appropriate law enforcement authorities, which Berry will encourage them to provide. Requesting such assistance from a Mandatory Reporter will constitute a Report as described above.

#### D. Option to Not Report

Individuals can choose not to notify Berry or any law enforcement authorities about an alleged incident of sex/gender discrimination or sexual misconduct.

### **IX. Filing a Complaint of Title IX Sex/Gender Discrimination or Sexual Misconduct**

If an individual wishes to pursue an incident of Title IX sexual misconduct or sex/gender discrimination beyond simply reporting it, they may file a Complaint. The filing of a Complaint means that the individual is asking Berry to take further steps, such as a full investigation and possibly holding an adjudication to resolve the alleged issue. Any Complainant (i.e., an alleged victim or survivor or someone who has otherwise been directly affected by sex/gender discrimination or sexual misconduct) may file a Complaint, and Berry will treat it as such. Any Third-Party Reporter may request that Berry treat their Report as a Complaint, but that would not make the Third-Party Reporter into a Complainant, and Berry shall have discretion on whether to treat the Third-Party Report as a Complaint.

In order to meet its Title IX obligations to provide a safe and nondiscriminatory environment for the broader Berry Community, Berry may convert a Report into a Complaint if Berry determines that it must take additional steps to protect the Berry Community.

Depending on the conduct alleged and the location of the incident, a Complaint will be governed by either this Policy or the accompanying Formal Grievance Policy. A Formal Complaint under the Formal Grievance Policy is a type of Complaint. (See Formal Grievance Policy, Section IV.A., regarding Formal Complaints, and Sections I-II of each policy for descriptions of the scope of each respective policy.)

#### A. Filing a Complaint



Anyone seeking to file a Complaint of individual or institutional Sex/Gender Discrimination or Sexual Misconduct may do so with the Title IX Coordinator. Complaints must be in writing and include all information that the filer believes to be relevant (e.g., time, location and nature of incident, names of individuals involved in or witnesses to the incident, names of other persons affected by the incident, etc.). Alternatively, an individual can also file a Complaint by meeting with the Title IX Coordinator and providing a verbal description of the Sex/Gender Discrimination or Sexual Misconduct, which the Title IX Coordinator will use to draft a written document that the individual will review, verify and sign to constitute a Complaint.

#### B. Action Following the Filing of a Complaint

Berry will investigate all Complaints of Sex/Gender Discrimination or Sexual Misconduct. A Complaint meeting the criteria of the Formal Grievance Policy (a "Formal" Complaint) will proceed according to that Policy instead of the provisions below.

For a Complaint that does not meet the criteria of the Formal Grievance Policy, Berry's process will typically involve an investigation phase and then proceed to a Resolution Hearing before a Sexual Misconduct Hearing Board to determine whether the Respondent is responsible or not responsible for having violated this Policy, *except* in the circumstances described below. In some instances, an Informal Resolution also may be an option for resolving a Complaint.

C. The Title IX Coordinator shall have discretion to resolve a Complaint without a Resolution Hearing in the following circumstances:

1. if Berry lacks jurisdiction;
2. if a case involves a Berry employee (faculty, staff member or contract services employee), the Title IX Coordinator shall coordinate with the Chief Human Resources Officer about appropriate processes and/or resolution;
3. if the allegations could not constitute a Policy violation under any alleged circumstances;
4. if the Complaint is eligible for the Informal Resolution process;
5. if the Complaint was requested by a Third-Party Reporter who reported witnessing sex/gender discrimination or sexual misconduct happening to or affecting someone else, the Title IX Coordinator shall have discretion to resolve the Complaint or to provide modified hearing procedures, particularly to account for the alleged victim's wishes (e.g., if they do not wish to pursue the Complaint as a first-party Complainant);
6. if the Complainant and Respondent both consent to an alternative resolution, with such consent obtained independently from each person by the Title IX Coordinator to avoid a risk of coercion;
7. for matters that do not involve Berry employees (faculty, staff member or contract services employee), if either Complainant or Respondent, or both, are not Berry students, or cease to be Berry students prior to final resolution of the Complaint (e.g., a student withdrawal), the Title IX Coordinator shall have discretion to resolve the Complaint or to provide modified hearing procedures;
8. or, if the Respondent admits responsibility for a violation, the Title IX Coordinator shall have discretion to resolve the Complaint or to provide modified hearing procedures to help the Hearing Board decide appropriate sanctions.

In all circumstances, the Title IX Coordinator shall have authority to impose supportive measures and make accommodations consistent with **Section XI** below and take other measures consistent the Berry Student Handbook; and for employee matters, the Director of Human Resources shall have authority to take action consistent with the Berry Employee Handbook.

D. A person may withdraw a Complaint. If a Complaint is withdrawn, Berry will treat the withdrawn Complaint as a Report and proceed accordingly.

## **X. Confidential and Anonymous Reporting**

As discussed above in **Section VIII.B.**, individuals can confidentially discuss incidents of sex/gender discrimination and sexual misconduct with Berry's "confidential resources" staff. Those discussions will remain confidential and not be considered a Report to Berry.

Anonymous reports may also be made to the Title IX Coordinator. Berry will attempt to investigate anonymous reports but often will be inhibited without being able to collect evidence from and ask follow up questions to a complainant; thus, supportive measures and the potential for resolution may be diminished.

A Reporter can make a Report disclosing their name but requesting confidentiality. An affected person who is the subject of a Third-Party Report can also request confidentiality. In such instances, if they also request that no investigation or disciplinary action be pursued, the Title IX Coordinator will respect the request for confidentiality as long as only personal supportive measures are requested and grounds do not exist to convert the Report into a Complaint. A request for confidentiality cannot be fulfilled in the case of a Complaint. Further, in some instances, Berry may deny or modify a request for confidentiality when weighed against Berry's obligation to provide a safe, non-discriminatory environment for all students, considering many factors, including:

- The seriousness of the alleged misconduct;
- Whether there have been other reports of Sex/Gender Discrimination or Sexual Misconduct against the Respondent known by Berry;
- Whether the Respondent has allegedly threatened further misconduct or violence;
- Whether the alleged misconduct was committed by multiple perpetrators;
- Whether the alleged misconduct involved use of a weapon;
- The age of the individual subjected to the alleged misconduct;
- Whether Berry possesses other means to obtain relevant evidence of the alleged misconduct;
- Whether the Report reveals a pattern of misconduct at a particular location or by a particular individual or group of individuals; and
- The accused individual's right to receive information about the allegations if the information is maintained by Berry as an "education record" under the Family Educational Rights and Privacy Act (FERPA), if applicable.

In an instance where Berry determines it must deny or modify a request for confidentiality, the Title IX Coordinator will inform the requesting individual prior to making the disclosure to anyone beyond necessary school officials. Any such disclosure will be limited to only individuals with a need to know such information. Consistent with FERPA's prohibition on re-disclosure of confidential information, any recipient is prohibited from using or disclosing other people's confidential information, learned as a result of participation in any investigation or proceeding under this Policy, outside of such forums without express consent or for any improper purpose. In all instances, members of the Berry Community should understand that Title IX prohibits retaliation against anyone reporting a potential Title IX incident, and that Berry officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

In all cases of alleged gender/sex discrimination or misconduct under this Policy reported to the Title IX Coordinator, Berry will investigate and implement supportive measures. *Please note that Berry's ability to investigate and respond fully to an incident may be limited because of requests for confidentiality or to not proceed with disciplinary action.*

## **XI. Supportive Measures**

In cases of reported alleged Sex/Gender Discrimination or Sexual Misconduct involving students, Berry may implement supportive measures immediately or at any time that Berry determines such measures are necessary. The Title IX

Coordinator shall have responsibility for determining such supportive measures. Some of these supportive measures also may continue in effect after an investigation is closed or as post-hearing sanctions or accommodations, depending on the outcome of the investigation and hearing. Examples of supportive measures that Berry may consider and elect to implement include, but are not limited to:

- facilitating leaves of absence for impacted parties, to the extent practicable;
- implementing a mutual “no contact” order to govern, and attempt to avoid, interaction between affected individuals;
- providing a campus safety escort to ensure a Complainant can move safely between buildings, classes, dining halls, and activities on campus;
- ensuring that the Complainant and the Respondent do not attend the same classes, seminars, functions, meetings, etc.;
- offering to provide or facilitate the provision of medical, counseling and mental health services, but not necessarily covering the cost of such services;
- providing education regarding gender discrimination, sexual misconduct, alcohol and drug use, incapacitation and consent, etc.;
- reviewing any academic challenges or any disciplinary actions taken against the Complainant to see if there is a causal connection between the events that may have impacted the Complainant;
- changing on-campus living arrangements, when reasonable;
- providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred;
- limiting the access of the individual accused of the misconduct to certain Berry facilities until the matter is resolved, including the possibility of an interim suspension if warranted;
- Berry may also, upon request, arrange for the re-taking, changing, or withdrawing from classes, and in such instances, Berry will make every reasonable effort to mitigate any academic or financial penalty for providing such arrangements; and
- Berry may also request for the extension of deadlines or other course-related adjustments through the Provost’s Office.

Supportive measures shall be balanced based on the facts collected, seriousness of the allegations, and the potential safety risks posed to the Berry Community. Supportive measures are designed to restore or preserve equal access to Berry’s education program and activities without unreasonably burdening the other party, including measures designed to protect the safety of all parties or Berry’s educational environment, or deter sexual misconduct. Berry will maintain as confidential any personal supportive measures provided to only the Complainant or only to the Respondent, to the extent that maintaining such confidentiality would not impair its ability to provide the supportive measures (e.g., not applicable to mutual no contact orders).

Berry may also consider and take supportive measures that affect the broader Berry Community and which are aimed to eliminate occurrences of Sex/Gender Discrimination or Sexual Misconduct and to promote academic and employment environments free of such conduct.

If a Respondent student withdraws from Berry while a Complaint is pending, supportive measures may be continued. The Respondent may be required to notify the Title IX Coordinator if they intend to visit any building owned or controlled by Berry or a student organization that is officially recognized by Berry, or if they otherwise seek to attend any Berry education program or activity or event, so that the Complainant may be given an opportunity to receive supportive measures if needed. The Respondent’s student records also may be marked to indicate their departure during a disciplinary process (which may resume if they return to Berry), but shall not indicate that such Respondent was found or assumed responsible for any alleged misconduct pending at the time of departure.

## **XII. Investigation and Resolution Processes For Cases In Which Both Parties Are Students**

**This Section describes Berry's investigation and resolution processes for cases in which both parties are students and in which the conduct alleged does not trigger the Berry Formal Grievance Policy.**

### **A. Investigation**

Berry will investigate all Reports of sex/gender discrimination and sexual misconduct reported to the Title IX Coordinator regardless of whether the Report becomes a Complaint. The investigation and adjudication procedures (if needed) shall be prompt, fair, and impartial. The process typically will begin with intake meetings conducted by the Title IX Coordinator. The investigation phase may include interviewing the Complainant/ First-Party Reporter, the Respondent, and any witnesses; reviewing law enforcement investigation documents if applicable; reviewing relevant student files; and gathering and examining other relevant documents and evidence.

For Reports, the Title IX Coordinator or their designee will conduct an initial investigation. If that initial investigation demonstrates that the case may implicate Berry's Title IX obligations to provide a safe and nondiscriminatory environment for the broader Berry Community, the Title IX Coordinator will/may treat the Report as a Complaint and follow the Complaint processes outlined. If the Title IX Coordinator determines that the Report does not implicate Berry's Title IX obligations, then after the Title IX Coordinator's investigation, implementation of any supportive measures, and finalization of any investigation memo, the Title IX Coordinator will be authorized to close the matter.

For Complaints, the Title IX Coordinator will appoint an investigator to handle the investigation. This Investigator will be a different person than the Title IX Coordinator. Following the investigation, the Investigator will draft an investigation report succinctly describing all collected information. The report will be delivered to the Title IX Coordinator, who will analyze the report to ensure that the investigation was prompt, fair, impartial, thorough, and consistent with this policy. The Investigator will not make any recommendation as to whether a policy violation has occurred or potential sanctions. Depending on how the Complaint proceeds, the investigation report and other materials related to the investigation may be presented at a Resolution Hearing and/or may be presented during an Informal Resolution process.

Berry will make reasonable efforts to balance and protect the rights of the parties during any investigation commenced under this Policy. Berry will respect the privacy of the parties and any witnesses in a manner consistent with Berry's obligations to investigate the alleged incident, and take appropriate interim and/or corrective action. The Title IX Coordinator will keep the parties reasonably informed of the status of the investigation.

Both Complainants and Respondents may utilize Advisors and Supporters throughout the investigation process, including to accompany them to any hearing, meetings, or related disciplinary proceeding. Neither Advisors nor Supporters are permitted to directly participate in Resolution Hearings or Informal Resolution meetings; they may be present solely to advise or support the party and are prohibited from speaking directly to the Investigator, the Hearing Board, other parties, or witnesses.

### **B. Informal Resolution**

For Complaints with a student Respondent, at the discretion of the Title IX Coordinator, the parties may opt to pursue an Informal Resolution as an alternative to a Resolution Hearing. An Informal Resolution involves a remedies-based, non-judicial process designed to eliminate or address potential sexual misconduct. This process aims to assure fairness, to facilitate communication, and to maintain an equitable balance of power between the parties. Berry will not compel face-to-face confrontation between the parties or participation in any particular form of Informal Resolution.

The Title IX Coordinator will make an initial decision about whether a case qualifies for an Informal Resolution, and if both parties then agree to pursue that path, Berry will halt any investigation or scheduled Resolution Hearing so that the parties can explore the possibility of informal resolution. Participation in an Informal Resolution is voluntary, and either

party can request to end the Informal Resolution process at any time and return the investigation or proceeding to a resolution hearing. Agreements reached in an Informal Resolution are final and not subject to appeal.

### C. Resolution Hearing

A Resolution Hearing is Berry's disciplinary proceeding through which a Sexual Misconduct Hearing Board evaluates evidence related to a Complaint to determine whether a student Respondent is responsible or not responsible for a violation of this Policy, based on the criteria of "a preponderance of evidence." Under this standard, the burden of proof is met and a Respondent may be found responsible for a Policy violation if the Sexual Misconduct Hearing Board determines that it is more likely than not that the Respondent committed the violation. If the Respondent is found in violation of the Policy, the Respondent may be subjected to disciplinary action.

The Sexual Misconduct Hearing Board will consist of three trained faculty and/or staff members. None of the members of the Sexual Misconduct Hearing Board will be the same as either the Title IX Coordinator or the Investigator.

The parties will be provided notice of the date, time and location of the hearing. At least ten (10) business days prior to a hearing, both parties and the Sexual Misconduct Hearing Board will be provided access to a hearing packet containing the investigation report and other information pertinent to the hearing. The hearing may consist of testimony by the parties, witnesses and the Investigator, and may include the presentation of other evidence. Hearings, including those that occur during the non-academic year, may be conducted via video conference and/or teleconference, as needed. The Sexual Misconduct Hearing Board will be allowed to question each witness who appears, and the parties will be allowed to ask questions through the Sexual Misconduct Hearing Board. Live, verbal, and direct cross-examination of a party or witness is not permitted under this Policy by a party or that party's Advisor (unlike in the Formal Grievance Process required for addressing defined sexual harassment). The parties will be provided notice of the outcome of the Board's deliberations, including the determination of whether the Respondent was found responsible or not responsible for the alleged violation(s) and applicable sanction(s). Decisions made in a Resolution Hearing may be appealed. The Title IX Coordinator will be authorized to delay sanctions pending appeal and/or make further accommodations that are consistent with the Sexual Misconduct Hearing Board's decision.

### D. Appeals

Either Complainant or Respondent may appeal any Sexual Misconduct Hearing Board decision within five (5) business days of delivery of the Hearing Board's determination. Appeals can only be raised on one or more of the following grounds: (1) a procedural irregularity that affected the outcome of the matter; (2) to consider new facts or information that were not known or knowable to the appealing party before or during the time of the hearing and that were sufficient to alter the decision; (3) the Title IX Coordinator, Investigator, or adjudicator(s) had a conflict of interest or bias based on gender or against the appealing party that affected the outcome of the matter; (4) that the decision reached was not supported by a preponderance of evidence; or (5) the sanctions were disproportionate to the findings. The appeal will be reviewed and determined by an Appeals Board, based on the grounds contained in the appeal statement. Appeals decisions are final and not subject to further review.

## XIII. Definitions

**Please also refer to Section II.B. for more information about certain key definitions.**

**Advisor:** Refers to an attorney or a non-attorney advisor who can provide assistance to the Complainant or the Respondent during Resolution Hearings, Informal Resolution conferences, and any other stage of the processes covered by this Policy, although they are not permitted to directly participate. Berry will provide a list of faculty and staff who have received training to serve as Advisors, but parties retain the right to select their own Advisor if they so choose.

**Affirmative Consent:** Means an affirmative, conscious decision by each participant to engage in mutually agreed-upon sexual activity. The presence or absence of consent is determined by evaluating the relevant facts and circumstances. All five of the following elements are essential in order to have affirmative consent. If one or more of the following is absent, there is no affirmative consent.

- A. *Consists of Mutually Understandable Communication:* Communication regarding consent consists of mutually understandable words and/or actions that indicate an unambiguous willingness to engage in sexual activity. In the absence of clear communication or outward demonstration, there is no consent. Consent may not be inferred from silence, passivity, lack of resistance or lack of active response. An individual who does not physically resist or verbally refuse sexual activity is not necessarily giving consent. Relying solely upon non-verbal communication can lead to an erroneous conclusion as to whether consent was sought or given. Verbal communication is the best way to ensure all individuals are willing and consenting to the sexual activity.
- B. *Informed and Reciprocal:* All parties must demonstrate a clear and mutual understanding of the nature and scope of the act to which they are consenting and a willingness to do the same thing, at the same time, in the same way.
- C. *Freely and Actively Given:* Consent cannot be obtained through the use of force, coercion, threats, or intimidation, or by taking advantage of the incapacitation of another individual.
- D. *Not Unlimited:* Consent to one form of sexual contact does not constitute consent to all forms of sexual contact, nor does consent to sexual activity with one person constitute consent to activity with any other person. Each participant in a sexual encounter must consent to each form of sexual contact with each participant. Even in the context of a current or previous intimate relationship, each party must consent to each instance of sexual contact each time. The consent must be based on mutually understandable communication that clearly indicates a willingness to engage in sexual activity. The mere fact that there has been prior intimacy or sexual activity does not, by itself, imply consent to future acts.
- E. *Not Indefinite:* Consent may be withdrawn by any party at any time. Recognizing the dynamic nature of sexual activity, individuals choosing to engage in sexual activity must evaluate consent in an ongoing manner and communicate clearly throughout all stages of sexual activity. Withdrawal of consent can be an expressed “no” or can be based on an outward demonstration that conveys that an individual is confused, uncertain or is no longer a mutual participant. Once consent is withdrawn, the sexual activity must cease immediately and all parties must obtain mutually expressed or clearly stated consent before continuing further sexual activity.

Berry prohibits romantic, sexual, and exploitative relationships between college employees and students. (See *Berry Handbook - Fraternalization Policy For Faculty and Staff.*)

**Appeals Board:** Refers to a group of trained Berry faculty and staff members that hears and decides appeals of findings and sanctions imposed by the Sexual Misconduct Hearing Board (defined below). The Appeals Board will consist of three members (one of whom will be designated as the board’s chairperson), selected from a pool of trained faculty and staff who have had no prior involvement in the case. This Appeals Board is authorized to affirm, alter, or reverse the original findings and/or sanctions recommended by the Sexual Misconduct Hearing Board. Once issued, the Appeals Board’s decision is final.

**Coercion:** Means the use of pressure to compel another individual to initiate or continue activity against their will, including psychological or emotional pressure, physical or emotional threats, intimidation, manipulation, or blackmail. 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. Examples of coercion include, but are not limited to threatening to “out” someone based on sexual orientation, gender identity, or gender expression; threatening to

harm oneself if the other party does not engage in the sexual activity; and threatening to expose someone's prior sexual activity to another person and/or through digital media.

**Complaint:** Refers to a written complaint filed with the Title IX Coordinator alleging any action, policy, procedure or practice that would be prohibited by Title IX, such as Sex/Gender Discrimination or Sexual Misconduct, and indicating that they want Berry to take further steps, such as a full investigation and possibly holding an adjudication to resolve the alleged issue. A Complaint may be filed by a Complainant. A third-party who knows of or witnessed an incident of Sex/Gender Discrimination or Sexual Misconduct but who did not suffer such misconduct themselves may request that Berry treat their third-party Report as a Complaint. Berry can convert a Report to a Complaint if Berry determines that, in order to meet its Title IX obligations to provide a safe and nondiscriminatory environment for the broader Berry Community, it must take further steps to address and resolve the matter. A Formal Complaint under the Formal Grievance Policy is a type of Complaint. See Formal Grievance Policy, Section IV.A., regarding Formal Complaints.

**Complainant:** Refers to an individual who is alleged to have been subjected to an incident of Sex/Gender Discrimination or Sexual Misconduct (i.e., a First-Party Reporter or a victim or person who has otherwise been affected by sex/gender discrimination or sexual misconduct, or under the Formal Grievance Policy governing sexual harassment, an individual who is alleged to be the victim of conduct that could constitute sexual harassment). A Reporter who reports witnessing sex/gender discrimination or sexual misconduct happening to or affecting *someone else* (i.e., a Third-Party Reporter) can file a Report and request that it be treated as a Complaint, but that does not make them a Complainant. Similarly, the fact that the Title IX Coordinator may elevate a Report to a Complaint does not make the Title IX Coordinator a Complainant.

**Consent:** See *Affirmative Consent* above.

**Dating Violence:** See *Sexual Harassment* below, Subsection B.

**Domestic Violence:** See *Sexual Harassment* below, Subsection C.

**Formal Complaint:** See *Complaint* above. See also Formal Grievance Policy, Section IV.A.

**Formal Grievance Process:** The process described in the Formal Grievance Policy for addressing and resolving a Formal Complaint, as required by the new Title IX Regulations, effective August 14, 2020.

**Incapacitation:** Means the lack of ability to make rational, reasonable judgments as a result of alcohol consumption, other drug use, sleep, the taking of any so-called "date-rape" drug, unconsciousness, or blackout. An incapacitated person cannot make rational, reasonable decisions because that person lacks the ability to fully understand the who, what, where, or how of their sexual interaction. Incapacitation is a state beyond drunkenness or intoxication, in which alcohol, drugs, or other factors render one unable to make fully informed judgments or have an awareness of consequences. While incapacitation may be caused by drugs or alcohol, it also includes the state of being asleep, during which time a person is unable to provide affirmative consent.

**Informal Resolution:** A process intended to allow the Complainant and the Respondent to provide information about the alleged incident(s) of discrimination or harassment, and to reach a mutually agreeable resolution. An Informal Resolution process may take many forms upon the agreement of the parties and the Title IX Coordinator. This process aims to assure fairness, to facilitate communication, and to maintain an equitable balance of power between the parties.

**Investigator:** Refers to an official(s) designated by the Title IX Coordinator to conduct an investigation of alleged Sex/Gender Discrimination or Sexual Misconduct. The Investigator will be a trained individual who objectively collects

and examines the facts and circumstances of potential violations of this Policy and documents them for review. The Investigator will be neutral and will not have a conflict of interest or bias based on gender or against the Complainant or Respondent. The Investigator may act as a witness in the event of a Resolution Hearing.

**Mandatory Reporter:** Refers to an individual who is obligated to report any knowledge they may have of Sex/Gender Discrimination and Sexual Misconduct. If a Mandatory Reporter observes, is informed of, or otherwise learns of an act of sexual misconduct, they must report it to the Title IX Coordinator. Berry defines all faculty and staff as mandatory reporters except certain “confidential resources” staff. (See **Section VIII** above.)

**Non-Consensual Sexual Contact:** See **Sexual Misconduct** below, Subsection A.

**Non-Consensual Sexual Penetration:** See **Sexual Misconduct** below, Subsection B.

**Preponderance of Evidence:** Refers to the standard by which it is determined at a hearing whether or not a violation of this Policy has occurred, and means that an act of sex discrimination is “more likely than not” to have occurred. This standard applies for all claims of sex discrimination, including sexual harassment and other sexual misconduct.

**Report:** Refers to any communication that puts Berry on notice of an allegation that sex/gender discrimination or sexual misconduct occurred or may have occurred. Anyone can report an incident of sex/gender discrimination and sexual misconduct to Berry under the procedure described in **Section VIII** of this Policy. Notice may be given directly to the Title IX Coordinator (“actual notice”) or to any Mandatory Reporter who has a duty to report such information to the Title IX Coordinator. Once the Title IX Coordinator learns of any Report of alleged sex/gender discrimination or sexual misconduct, whether from a direct Report or from a Mandatory Reporter, they will implement supportive measures as needed and initiate an investigation into the alleged incident. The form of the investigation may vary, particularly if the conduct alleged is governed by the U.S. Department of Education’s Title IX Regulations, in which case Berry’s Formal Grievance Policy at Appendix A will apply. Following an investigation, the Title IX Coordinator has authority to resolve a Report, including the implementation of any supportive measures, and close the case if the Report does not constitute or become a Complaint.

After making a Report, an individual may choose to end their involvement in the process; may choose to be involved or not be involved in Berry’s investigation and related proceedings; or may choose to file or request a Complaint and pursue resolution (under this policy or the Formal Grievance Policy, as applicable) or, if applicable, an Informal Resolution involving the Respondent.

Berry strongly encourages all individuals to report incidents of sexual misconduct and sex/gender discrimination even if the individual does not intend to pursue a Complaint.

**Reporter:** Refers to an individual who notifies the Title IX Coordinator or a Mandatory Reporter of an alleged violation of this Policy. A Reporter can be any individual who reports to Berry that they are a victim or survivor of sex/gender discrimination or sexual misconduct; that they have been affected by sex/gender discrimination or sexual misconduct; or that they have knowledge of sex/gender discrimination and sexual misconduct happening to or affecting someone else.

**Resolution Hearing:** Refers to Berry’s disciplinary proceeding through which the Sexual Misconduct Hearing Board evaluates evidence related to a Complaint to determine whether a Respondent is in violation of this Policy, based on the criteria of a preponderance of evidence. This process differs from the Formal Grievance Process for sexual harassment required by the new Title IX Regulations, effective August 14, 2020.



**Respondent:** Refers to an individual who has been accused in a Report or Complaint of conduct that could constitute sexual misconduct prohibited under this Policy (or, under the Formal Grievance Policy governing sexual harassment, an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment).

**Sex/Gender Discrimination:** Refers to the unequal treatment of an individual based on their sex, gender or sexual orientation in any employment decision, education program or educational activity receiving Federal financial assistance. Such programs or activities include, but are not limited to, admission, hiring and recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing and employment. The prohibition on sex discrimination also covers unlawful discrimination based on gender identity, sexual orientation, pregnancy, termination of pregnancy, childbirth or related conditions. Also prohibited as sex discrimination is any act which is based on parental, family, or marital status and which is applied differently based on sex.

**Sexual Assault:** See **Sexual Harassment** below, Subsection A.

**Sexual Exploitation:** See **Sexual Misconduct** below, Subsection C.

**Sexual Harassment:** “Sexual harassment” is defined in the new Title IX Regulations (34 C.F.R. § 106.30), effective August 14, 2020, to be conduct on the basis of sex that satisfies one or more of the following:

1. A Berry employee conditioning the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct (“quid pro quo”);
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to Berry’s education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking.
  - A. **Sexual Assault:** An act of sexually-motivated physical contact directed towards another person when the other person does not consent or is incapable of giving consent. This includes but is not limited to rape, sodomy, sexual battery, fondling, incest, and statutory rape. See Title IX Regulations, which cite to 20 U.S.C. § 1092(f)(6)(A)(v).
  - B. **Dating Violence:** The term “dating violence” is defined in the new Title IX Regulations by reference to federal statute 34 U.S.C. § 12291(a)(10), which defines the term as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim; and 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, and (iii) the frequency of interaction between the persons involved in the relationship.
  - C. **Domestic Violence:** The term “domestic violence” is defined in the new Title IX Regulations by reference to federal statute 34 U.S.C. § 12291(a)(8), which defines the term as felony or misdemeanor crimes of violence committed between:
    1. individuals who are current or former spouses or intimate partners,
    2. persons who share a child in common,
    3. persons who currently live together or have formerly lived together as spouses or intimate partners,
    4. a person similarly situated to a spouse of the victim under the domestic or family violence laws of the school’s jurisdiction, or
    5. any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the school’s jurisdiction.

- D. **Stalking:** The term “stalking” is defined in the new Title IX Regulations by reference to federal statute 34 U.S.C. § 12291(a)(30), which defines the term as engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others, or suffer substantial emotional distress.

Types of stalking could include, but are not limited to:

- Following the targeted person;
- Approaching or confronting that person in a public place or on private property;
- Persistent and unwelcome attempts to contact the person by phone, electronic communication (including via the internet and cellphones), or regular mail, either anonymously or non-anonymously;
- Vandalizing the person’s property or leaving unwanted items for the person;
- Persistently appearing at the person’s classroom, residence, or workplace without that person's permission or other lawful purpose;
- Cyber-stalking, in which a person follows, observes, monitors, or surveils another person through the use of electronic media such as the Internet, digital media networks, blogs, cell phones, texts or other similar devices; and
- Using visual or audio recording devices or hidden or remote cameras used without the subject’s consent.

It is important to note that the Title IX Regulations’ use of federal definitions of sexual assault, dating violence, domestic violence, and stalking may differ from state law. Accordingly, any criminal proceeding brought by state or local law enforcement authorities may use different definitions.

**Sexual Misconduct:** Is a broad term that includes “sexual harassment” defined by the Title IX Regulations and also encompasses other sexually-motivated or gender-biased misconduct beyond sexual harassment. Examples may include sexual exploitation and many forms of verbal harassment that may not meet the Regulations’ definition of “sexual harassment.”

Additionally, if sexual misconduct is alleged to have occurred that does not satisfy the Title IX Regulations’ jurisdictional criteria, such as off-campus sexual misconduct (including sexual harassment) alleged to have an on-campus effect or occurring during a study abroad program, then it may be addressed pursuant to this overarching Sexual Misconduct Policy. Such off-campus sexual harassment may be referred to as Non-Consensual Sexual Contact (“NCSC”) or Non-Consensual Sexual Penetration (“NCSP”) (defined below) to avoid confusion between charges brought under this Policy and its procedures as compared to the Title IX Regulations’ “sexual harassment” definitions and requirements, which are governed by Berry’s Formal Grievance Policy (following this policy).

Sexual misconduct is conduct that is unwanted or unwelcome and is sexual in nature. Experiencing sexual misconduct may interfere with a Berry community member’s ability to perform a job, participate in activities, and/or participate fully in Berry’s education programs. Sexual misconduct is demeaning to others and undermines the integrity of the employment relationship and/or learning environment by creating an intimidating, hostile or offensive working or academic environment through verbal or physical conduct of a sexual nature. Sexual misconduct is prohibited regardless of whether it occurs between or among members of any sex. Sexual misconduct may also consist of inappropriate gender-based comments and gender stereotyping, even if the acts do not involve conduct of an overtly sexual nature.

- A. **Non-Consensual Sexual Contact:** “Sexual contact” includes the intentional touching of another person's intimate parts, or the intentional touching of the clothing covering the other person's intimate parts, for the purpose of sexual arousal or gratification. Such contact is non-consensual if done without the other person's affirmative consent (see definition above).

- B. **Non-Consensual Sexual Penetration:** “Sexual penetration” includes sexual intercourse, oral-genital contact, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of any other person’s body. Such contact is non-consensual if done without the other person's affirmative consent (see definition above).
- C. **Sexual Exploitation:** Occurs when a person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or the benefit of anyone other than the one being exploited. Examples of sexual exploitation include, but are not limited to:
- Non-consensual video or audio-taping of sexual activity or other private activity, even if that activity occurs in a public or semi-public place;
  - Non-consensual dissemination of video, photographs, or audio of sexual activity or other private activity, including dissemination by a third party or a person not involved in the original conduct;
  - Exceeding the boundaries of consent (such as, permitting others to hide in a closet and observe consensual sexual activity, videotaping of a person using a bathroom or engaging in other private activities);
  - Engaging in voyeurism, exposing one’s breasts, buttocks, or genitals in a non-consensual circumstance or inducing another to expose their breasts, buttocks, or genitals without affirmative consent;
  - Prostituting another person;
  - Engaging in consensual sexual activity with another person while knowingly infected with human immunodeficiency virus (HIV) or other sexually transmitted disease or infection (STD or STI) and without informing the other person of such disease or infection; and
  - Sexually-based stalking and/or bullying.

**Sexual Misconduct Hearing Board:** Refers to the three-member decision-making body, composed of trained Berry faculty and/or staff, which considers cases brought under this Policy. One of the three Board members will be designated as the chairperson. The Hearing Board hears the facts and circumstances of an alleged policy violation as presented by the Investigator, a Complainant, a Respondent and/or witnesses at a Resolution Hearing. This body is responsible for determining if a policy violation has occurred and whether/what sanctions are appropriate.

**Stalking:** See **Sexual Harassment** above, Subsection D.

**Supporter:** Refers to any person, regardless of their association with Berry, who a Reporter, Complainant, or Respondent may want to support them through a portion of or the entire process. A Supporter is not required, but is encouraged to help the party with emotional and personal support. When present during interviews, hearings, and appeals, the Supporter cannot take an active role. A supporter can be a friend, family member, or any trusted person who can provide needed care to a party.

**Title IX:** Refers to a comprehensive federal law that prohibits discrimination on the basis of sex in any federally funded education program or activity. Title IX prohibits the use of federal money to support sex discrimination in education programs and provides individual citizens effective protection against those practices. Title IX applies, with a few specific exceptions, to all aspects of federally funded education programs or activities. In addition to traditional educational institutions such as colleges, universities, and elementary and secondary schools, Title IX also applies to any education or training program operated by a recipient of federal financial assistance.

**Formal Grievance Policy**  
**As Required by the U.S. Department of Education, 34 C.F.R. § 106.45,**  
**Effective August 14, 2020**

**I. INTRODUCTION**

This Policy addresses certain types of sexual misconduct via a process required by the U.S. Department of Education's new Title IX Regulations, effective August 14, 2020. The scope of this Policy is set forth in Section II, below. This Policy follows the requirements of the Regulations, and contains citations to the applicable Title IX Regulations throughout. Many of the citations are "links" which will take you directly to the actual text of the Regulations. See 34 C.F.R. Part 106.

The Formal Grievance Policy, along with the comprehensive Berry Sexual Misconduct Policy, are intended to define, address and remedy sexual misconduct for Berry students and employees.

Berry prohibits sexual misconduct by faculty, staff, students and those who use Berry facilities. The prohibition applies regardless of the gender of the individuals involved and includes sexual relationships involving a status differential and those between peers, colleagues, and co-workers. This Policy applies to all members of the Berry community, including students, faculty and staff.

This Formal Grievance Policy proceeds in four additional sections, summarized here. If you have questions regarding how the comprehensive Policy and this Formal Grievance Policy work, or need assistance regarding any of the defined terms or processes, please contact the Title IX Coordinator.

**Section II** defines what is covered by this Formal Grievance Policy. Under the new Title IX Regulations, sexual harassment (a subset of sexual misconduct) must be investigated and addressed according to the procedures set forth in this policy. Although the Regulations narrowly define sexual harassment, Berry remains committed to providing a higher education environment that is free from sexual discrimination, sexual misconduct, and gendered violence. Sexual misconduct that does not rise to the level of sexual harassment as defined by the U.S. Department of Education, or that does not meet Title IX's jurisdictional requirements, will still be investigated and addressed under the Berry Sexual Misconduct Policy.

**Section III** contains Berry's Formal Grievance Process. This section contains information on filing a Formal Complaint of sexual harassment, the investigation process, the role of the Title IX Coordinator, the live hearing requirements, the appeals process, and other topics. Students, faculty, and staff should consult this section to learn about the process Berry will use to investigate and address allegations of sexual harassment.

**Section IV** contains the U.S. Department of Education's statements regarding equitable treatment under the Title IX Regulations, which are required to appear in this Formal Policy. The concepts of equitable treatment include the provision of supportive measures and waiting until the grievance process concludes to make conclusions.

**Section V** explains that Berry does not allow or condone retaliation against any person based on that person's involvement in the Title IX process.

Berry has designated a Title IX Coordinator to oversee the investigation and resolution of reports of sexual misconduct and Berry's compliance with Title IX. Any questions about this policy, Berry's processes under Title IX, or reports of alleged sexual misconduct should be directed to the Title IX Coordinator:

*Lindsay Norman*  
*Ladd Center 11 and Hermann Hall 206*  
*P.O. Box 495009*  
*Mount Berry, Georgia 30149-5009*  
[Lnorman@berry.edu](mailto:Lnorman@berry.edu)  
*(706) 236-2207 or (706) 236-2209*

The Title IX Coordinator, in conjunction with the Director of Human Resources, Deputy Title IX Coordinator for faculty and staff matters, will oversee all Berry matters relating to sex discrimination (including sexual harassment), including distribution of policies, investigations, educational programs, policy enforcement, and follow-up with complainants and respondents in investigations.

## II. SCOPE OF POLICY

This Formal Grievance Policy will apply to “sexual harassment” alleged to have occurred in a Berry “education program or activity” against a person in the United States, per USDOE Regulations, effective August 14, 2020. 34 C.F.R. § 106.44(a).

### A. Definitions

“Sexual harassment” is defined by USDOE to be conduct on the basis of sex that satisfies one or more of the following:

1. A Berry employee conditioning the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct (“quid pro quo”);
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to Berry’s education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking. (These terms are defined in the Berry Sexual Misconduct Policy.)

“Sexual misconduct” is a broader term that covers other sex-based conduct beyond the USDOE’s “sexual harassment” definition. If alleged sexual misconduct does not satisfy the USDOE’s definitional requirement, then it may be addressed under the Berry Sexual Misconduct Policy instead of this Policy.

The terms “Complainant” and “Respondent” are used throughout this Policy and the comprehensive Berry Sexual Misconduct Policy.

**Complainant:** an individual who is alleged to be the victim of conduct that could constitute sexual harassment for purposes of this Formal Grievance Policy.

**Respondent:** an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment for purposes of this Policy. (§ 106.30.)

Other terms, like Supportive Measures and Formal Complaint, are defined below.

All relevant terms, including Consent and Incapacitation, are defined in a separate attachment to the comprehensive Berry Sexual Misconduct Policy.

### B. Reports to Which This Formal Policy Applies

For any allegation of sexual harassment to come within the scope of this Formal Grievance Policy, it must fall within the scope of USDOE’s rules, as stated above.

An “education program or activity” includes locations, events, or circumstances that Berry exercises substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by Berry. USDOE’s Regulations exclude any “education program or activity” that does not occur in the United States. (§ 106.44(a).)

If a reported sexual misconduct does not satisfy the jurisdiction requirement, such as off-campus behavior alleged to have an on-campus effect, then it may be addressed under the comprehensive Berry Sexual Misconduct Policy instead of this Policy

### III. FORMAL GRIEVANCE PROCEDURE

This portion of the Policy outlines the steps taken to initiate a grievance, as well as USDOE's procedural requirements for investigation and adjudication of Formal Complaints.

#### A. Formal Complaint

The submission of a Formal Complaint triggers the Formal Grievance Process described in this section when received by the Title IX Coordinator.

A Formal Complaint is defined as "a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment [as defined by the Title IX Regulations] against a respondent and requesting that [Berry] investigate the allegation of sexual harassment."

At the time a Formal Complaint is filed, "a complainant must be participating in or attempting to participate in the education program or activity." A Formal Complaint must be in writing and may be filed with the Title IX Coordinator in person, by mail, or by email. The Formal Complaint must contain the complainant's physical or digital signature, or some other indication that the complainant is the person filing it. (106.30.)

**Berry strongly encourages complainants to file Formal Complaints to initiate the required Formal Grievance Process described in this Policy. If the alleged conduct meets the Regulations' definitional and jurisdictional requirements, the law now requires a Formal Complaint before Berry can pursue a full investigation or explore the possibility of an informal or early resolution, which occur before holding a disciplinary hearing or issuing sanctions.**

**If Berry receives a report of sexual misconduct that falls within this Formal Grievance Policy's scope (see Section II) but no Formal Complaint is filed, then the new Title IX Regulations prevent Berry from administering a formal grievance process that may impose disciplinary sanctions or other actions against a respondent. Supportive measures, however, may still be given. According to USDOE, the purpose of the Formal Complaint is to clarify that the complainant (or the Title IX Coordinator) believes that the school should investigate the allegations of sexual harassment against the respondent. 34 C.F.R. § 106.44(a); 34 C.F.R. § 106.45(b)(1)(i); see also 34 C.F.R. § 106.8(c).**

- i. After filing a Formal Complaint, a complainant may withdraw their Formal Complaint at any time by providing written notice to the Title IX Coordinator. That withdrawal will result in dismissal of the Formal Grievance Process unless the Title IX Coordinator elects to continue the process by signing a Formal Complaint.
- ii. A Title IX Coordinator may sign a Formal Complaint to initiate or continue the Formal Grievance Process if necessary to fulfill the school's responsibility to not be deliberately indifferent to actual knowledge of sexual misconduct. Signing a Formal Complaint does not make a Title IX Coordinator a complainant or otherwise a party.
- iii. Berry may, but is not required to, consolidate Formal Complaints arising out of the same factual circumstances:
  - a. Where there is more than one complainant or respondent;
  - b. Where a complaint has also been filed by the respondent against the complainant. In such cases, the Formal Grievance Process for a later-filed complaint may be consolidated into an earlier-filed process rather than re-start from the beginning (e.g., the new charges may be considered in the course of a pre-existing investigation).  
(106.45(b)(4).)
- iv. **Mandatory Dismissal (106.45(b)(3)(i, iii).)**  
If a Formal Complaint is filed, Berry will investigate its allegations. If the conduct reported does not meet the Formal Grievance Policy scope requirements for "sexual harassment", Berry **MUST** dismiss the Formal Complaint under this Policy. In such circumstance, the complaint will be transferred into the Berry Sexual Misconduct Policy for review and possible investigation and resolution. In such circumstance, Berry will

promptly and simultaneously send written notice to each party of the dismissal of the Formal Complaint, the reasoning, and the transfer.

#### B. Responsibility of the Title IX Coordinator (106.44(a).)

Upon receipt of any report of alleged sexual misconduct, the Title IX Coordinator will promptly contact the complainant to discuss the availability of supportive measures and explain the process involved in filing a Formal Complaint. The Title IX Coordinator will inform the complainant of the availability of supportive measures with or without the filing of a Formal Complaint, and will consider the complainant's wishes with respect to supportive measures.

Supportive measures will be assessed and may be offered as needed to complainants, respondents and other members of the Berry community who may have been affected by the alleged conduct. Supportive measures are discussed in Section XI of the comprehensive policy.

The Title IX Coordinator may conduct a limited, threshold investigation prior to the Formal process:

1. to determine if the alleged conduct meets the Formal Grievance Policy scope requirements;
2. to determine whether the college's Title IX obligations require the Title IX Coordinator to "sign" a Formal Complaint if the Complainant does not file one; and
3. for other limited purposes provided that if a Formal Complaint is filed or signed, the Title IX Coordinator will fulfill the terms of this Formal Grievance Process, including the notice provisions immediately below and the more thorough investigation process described below even if it is somewhat duplicative of the threshold investigation.

The Title IX Coordinator may remove a respondent from the education program or activity on an emergency basis if the Title IX Coordinator conducts an individualized safety and risk analysis and determines that there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifying removal. The respondent must receive notice and an opportunity to challenge the decision immediately following such removal. (106.44(c).)

The Title IX Coordinator, or the Director for Human Resources for faculty and staff matters, may place a non-student employee respondent on administrative leave during the pendency of a Formal Grievance Process. (106.44(d).)

#### C. Communication of Complaint (106.45(b)(2))

Upon receipt of a Formal Complaint, Berry will provide written notice to known parties of Berry's Formal Grievance Process by providing access to this policy. The notice must be given as soon as practicable and with sufficient time to prepare a response before any initial investigation interview. The notice will also include the allegations potentially constituting sexual harassment, including sufficient details known at the time.

Sufficient details are defined in the Title IX Regulations to include:

- The identities of the parties involved in the incident, if known;
- The conduct allegedly constituting sexual harassment; and
- The date and location of the alleged incident, if known.

The following statements are also required to be included in the written notice:

- The respondent is presumed not responsible for the alleged conduct.
- A determination regarding responsibility is made at the conclusion of the grievance process.
- The parties may have an advisor of their choice who may be, but is not required to be, an attorney.
- The parties may inspect and review evidence.
- The parties are prohibited from knowingly making false statements or knowingly submitting false information during the grievance process.

If, at any point during the course of the investigation, Berry determines it is necessary to investigate additional conduct allegations not included in the original notice, it will provide supplemental notice of any additional allegations to the parties.

#### D. Investigation Procedures

The Title IX Coordinator will appoint an Investigator, who will promptly investigate the allegations subject to the Formal Grievance Process. The investigation may include, among other steps, interviewing the complainant, the respondent, and any witnesses; reviewing law enforcement investigation documents if applicable; reviewing relevant student or employment files; and gathering and examining other relevant documents, social media and evidence.

The Investigator will attempt to collect all information and evidence relevant to the allegations. While the Investigator will have the burden of gathering evidence, it is crucial that the parties present evidence and identify witnesses to the Investigator so that they may be considered during the investigation. As described below in Section III.E.ii., while all evidence presented at a hearing by the parties will be considered, the hearing panel may, in their discretion, grant lesser weight to last-minute information or evidence introduced at the hearing that was not previously presented for investigation by the Investigator.

The investigation file should contain all information gathered during the investigation that is potentially relevant to the alleged misconduct; the Investigator should not filter or exclude evidence or decide the weight or credibility of evidence, unless the evidence is clearly irrelevant.

When investigating a Formal Complaint and throughout the grievance process, Berry will:

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the college and not on the parties. This means that the college's decision-makers will use the preponderance standard. See also Subsection E below.
2. Provide an equal opportunity for the parties to present witnesses and relevant evidence.
3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
  - a. Berry expects the parties to respect the sensitive nature of allegations of sexual misconduct and to respect other parties' sense of confidentiality.
  - b. While Berry cannot prevent a party from discussing the allegations under investigation, the Title IX Regulations and this Policy prohibit retaliation against any person because they participate or refuse to participate in any part of the school's sexual misconduct processes.
  - c. FERPA is a federal law that protects the confidentiality of student educational records. Records generated under this Policy, including those shared with the parties, are educational records covered by FERPA. Consistent with FERPA's prohibition on re-disclosure of confidential information, any person who receives another person's confidential information solely as a result of participation in any investigation or proceeding under this Policy, is prohibited from using or disclosing such information outside of such forums without express consent or for any improper purpose. This provision only applies to other people's confidential information, as a party is never restricted from discussing their own experience. This provision does not apply to any information learned outside of an investigation or proceeding under this Policy.
4. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to bring an advisor of choice (who may be, but is not required to be, an attorney) to any related meeting or proceeding. Berry will not limit the choice or presence of an advisor for either the complainant or respondent in any meeting or grievance proceeding; however, Berry will restrict the extent to which the advisor may actively participate in the proceedings, which will apply equally to both parties' advisors.

Advisors are not permitted to directly participate in any proceeding, except as specified in Section III.E.iii. below related to hearings. Advisors may be present solely to advise or support the party and are prohibited from speaking directly to the investigator, hearing panel members, other parties, or witnesses in such proceedings.



5. Provide written notice to each party of the date, time, location, participants, and purposes of each Formal Grievance Process meeting at which they are invited to participate, with sufficient time for the party to prepare to participate:
  - a. For all hearings, Berry will provide 10 days' notice;
  - b. For all non-hearing investigative interviews or meetings to which a party is invited or expected at Berry's discretion, Berry will provide 5 days' notice.

Following the investigation, the Investigator will draft an investigation report succinctly describing all collected information. The Investigator will not make any recommendation as to whether a Policy violation has occurred or potential sanctions.

#### E. Evidentiary Considerations

While investigating the allegations of any Formal Complaint of sexual harassment, the Investigator will conduct an objective evaluation of all relevant evidence. Relevant evidence is any evidence that may tend to make the allegations at issue more or less likely to be true.

1. Standard of evidence

In assessing allegations of sexual harassment and conducting its Formal Grievance Process, Berry will use a preponderance of the evidence standard. This standard means determining whether the alleged sexual misconduct is "more likely than not" to have occurred. This standard will apply to all Formal Complaints of sexual harassment, regardless of whether the Formal Complaint is against a student or any employee, including faculty. (106.45(b)(1)(vii).)

2. Provide both parties an equal opportunity to inspect and review any evidence Berry obtained as part of the investigation, whether obtained from a party or other source that is directly related to the allegations raised in a Formal Complaint. The provision of such evidence is intended to help each party meaningfully respond to the evidence before the investigation concludes.

Parties may elect to submit certain records of medical examinations, treatment, or mental health services. Berry will not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, *unless* the party voluntarily consents in writing to their use in a Formal Grievance Process. (106.45(b)(5)(i).)

#### E. Investigative Report (106.45(b)(5)(vi-vii).)

Prior to completion of the investigative report, Berry will send to each party, and the party's advisor if any, a draft investigative report and any relevant evidence. Such evidence will be available at any hearing, to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

Berry retains discretion to elect to send such materials in an electronic format or a hard copy. The provision of such evidence may include data security safeguards that prevent it from being downloaded, printed or forwarded.

The parties will have 10 calendar days to submit a written response. The investigator will consider any such response prior to completion of the final investigative report. The investigator will then create a final investigative report that fairly summarizes the relevant evidence. The final investigative report will not make any recommendation as to whether a policy violation has occurred or potential sanctions.

At least 10 days prior to a hearing, Berry will send the final investigative report to each party, and the party's advisor if any, for their review and written response. Any such response must be received by the Title IX Coordinator within five days of when the final investigative report was delivered to the party, so that the party's response may be available for

consideration by the hearing panel. If warranted, the investigator may choose to update the final investigative report to take a party's response into account, in which case the hearing date may be postponed.

#### F. Permissive Dismissal

At any time during the investigation or hearing, Berry may dismiss the Formal Complaint or any of its allegations if:

- a. A complainant notifies the Title IX Coordinator in writing that he or she would like to withdraw the Formal Complaint in whole or in part;
- b. The respondent is no longer enrolled in or employed by the school; or
- c. Specific circumstances prevent Berry from gathering evidence sufficient to reach a determination as to the Formal Complaint, in whole or in part.  
(106.45(b)(3)(ii).)

If a Formal Complaint is withdrawn, the Title IX Coordinator may choose in his or her discretion to sign the Formal Complaint to continue the Formal Grievance Process.

If the respondent is no longer enrolled or employed at the school, Berry may take such action it deems necessary to appropriately mark student or employment records regarding the departure during a disciplinary process without a determination as to responsibility, or reasonably restrict a respondent's access to campus.

If permissive dismissal is granted under this section, the Formal Grievance Process will cease. Per the Title IX Regulations, no further investigation will occur, and no disciplinary sanctions or actions can be imposed against the respondent.

In all such circumstances, supportive measures may be continued.

#### E. Resolution Procedures

Berry's Formal Grievance Process will then proceed to a live hearing before one or more hearing panel members, who will consider all evidence presented (subject to the terms below) and determine whether a respondent is or is not responsible for a violation of this Policy, based on the standard of a preponderance of evidence. Under that standard, the burden of proof is met, and a respondent may be found responsible for a policy violation, if the hearing panel determine that the evidence proves it is more likely than not that the respondent committed the conduct alleged. If the respondent is found responsible for a violation of this Policy, the respondent may be subjected to disciplinary action.  
(106.45(b)(6)(i).)

1. The hearing panel members will be selected by the Title IX Coordinator and may vary based on the enrollment or employment status of the respondent.
  - a. Student-respondent cases typically will be adjudicated by a three-member hearing panel of trained Berry faculty and/or staff. One of the three panel members will be designated as the chairperson. A separate hearing officer who is not a member of the three-member panel is also permitted to preside as a hearing officer and make evidentiary rulings at the hearing. Any such hearing officer will not play any active role in deliberations by the hearing panel, or the determination as to whether the Respondent is responsible for the conduct alleged.
  - b. Faculty-respondent cases typically will be resolved by the Provost.
  - c. Employee-respondent cases typically will be resolved by the Vice President for Finance.

The hearing panel members will not be the same person as the Title IX Coordinator or the Investigator.

2. At the request of either party, Berry will conduct the live hearing with the parties located in separate physical locations. Technology will be used to enable the hearing panel and parties to simultaneously see and hear the party or witness answering questions.

3. Berry will transcribe or record (audio or audiovisual) any adjudicative hearing. It will be available to the parties for inspection and review in compliance with FERPA.

i. Pre-hearing Procedures

1. The Title IX Coordinator will identify the hearing panel to the parties ten days in advance of the hearing. Either party may recuse a named hearing panel member if believed to have a conflict of interest or bias. A recusal must be delivered in writing to the Title IX Coordinator at least seven days in advance of the hearing, specifying the reasons for such belief. The Title IX Coordinator has sole discretion to keep or replace the challenged hearing panel member, and if replaced, may postpone the hearing to allow for a replacement.
2. Five days in advance of the hearing, the parties will identify their expected attendees (including any advisor), their expected witnesses (including themselves), and the witnesses' expected sequence, via writing to the Title IX Coordinator, who will supply the disclosure to the other party so that they can be prepared. The parties will not be strictly bound to their disclosures, but they should be submitted in good faith.
3. Generally, parties will be in charge of choosing and supplying their own witnesses at the hearing. When necessary for fair resolution and to gather evidence sufficient to reach a determination, the hearing panel will have discretion to ask the Title IX Coordinator to request additional witnesses after receipt of the parties' witness lists; recognizing, however, that the school has no ability to compel any witness to attend. Any such requested witness will be disclosed to the parties.

ii. Evidence

At the hearing, all relevant evidence will be objectively evaluated. Credibility determinations will not be based on a person's status as a complainant, respondent, or witness. (106.45(b)(1)(ii).)

The Title IX Regulations (34 C.F.R. § 106.45(b)(6)(i)) state that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:

- a. "offered to prove that someone other than the respondent committed the conduct alleged" or
- b. "if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent."

While all relevant evidence presented at a hearing by the parties will be considered, the hearing panel have discretion to grant lesser weight to last-minute information or evidence introduced at the hearing that were not previously presented for investigation by the Investigator.

iii. Cross-examination

Each party may be accompanied to the hearing by the advisor of their choice who may be, but is not required to be, an attorney. Advisors may be present solely to advise or support the party and are prohibited from speaking directly to the investigator, hearing panel, other parties, or witnesses during the hearing, except for conducting cross examination.

At the hearing, each party's advisor is permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross examination at the live hearing must be conducted directly, verbally, and in real time by the party's advisor of choice, and **never by a party personally**. (106.45(b)(6)(i).) The hearing panel will typically ask questions before either advisor.

If a party does not have an advisor present at the live hearing, Berry will provide one without fee or charge to conduct cross-examination on behalf of that party. The advisor provided may be, but is not required to be, an attorney. (106.45(b)(6)(i).)

The hearing panel may consider and rely on, as appropriate, statements of any party or witness in reaching a decision on responsibility, even if that party or witness does not appear or submit to cross-examination. The

members of the hearing panel have complete discretion in determining the credibility and reliability of such statements, and what weight to give such evidence in reaching a final determination. However, the hearing panel cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing, refusal to submit to cross-examination, or respond to any questions.

Only relevant cross-examination and other questions may be asked of a party or witness. Before a party or witness answers a cross-examination or other question, the hearing panel or hearing officer must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

If a party or witness does not submit to cross-examination at the live hearing, the hearing panel must not rely on any statement of that party or witness in reaching a determination regarding responsibility. However, the hearing panel cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. (106.45(b)(6)(i).)

#### iv. Resolution Procedures

The hearing panel will issue a written determination following the hearing. Based on the preponderance of the evidence standard, the hearing panel will decide if the respondent is responsible for engaging in the conduct alleged, and if so, what disciplinary action may be appropriate.

The written determination will include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding the application of this Policy to the facts;
- A statement of, and rationale for, the findings for each allegation, including:
  - a. A determination regarding responsibility;
  - b. Any disciplinary sanctions the hearing panel imposes on the respondent; and
  - c. Whether remedies designed to restore or preserve equal access to Berry's education program or activity will be provided to the complainant; and
  - d. Procedures and permissible grounds upon which the parties may appeal the determination. (106.45(b)(7)(ii).)

The written determination will be provided to the parties simultaneously.

Supportive measures also may be provided to the complainant that are designed to restore or preserve equal access to Berry's education program or activity, even if they are not listed in the written determination. Remedies and supportive measures that do not impact the respondent should not be disclosed in the written determination; rather, the determination should simply indicate that "remedies will be provided to the complainant." The Title IX Coordinator is responsible for effective implementation of any remedies and supportive measures. (106.45(b)(7)(iv)

#### v. Range of Sanctions and Remedies (106.45(b)(1)(vi))

Sanctions and discipline upon a finding of responsibility may include any and all actions as outlined in the Viking Code, up to and including, disciplinary probation, suspension or expulsion. A list of those actions can be found in [here](#).

#### vi. Finality

The determination regarding responsibility becomes final either:

1. if an appeal is filed, on the date that Berry provides the parties with the written determination of the result of the appeal, or
2. if an appeal is not filed, the date on which an appeal would no longer be considered timely.  
(106.45(b)(7)(iii).)

#### F. Appeal of Resolution

Both parties may appeal from a determination regarding responsibility, or from a dismissal of a Formal Complaint or any allegations therein, only on the following grounds: In order to be considered, appeals must meet one of four conditions:

1. The respondent's right to a fair hearing was violated. Procedural or process errors must be significant enough to have affected the outcome of the case in order for the fair hearing standard to have been violated a procedural irregularity, meaning an alleged failure to follow the process outlined in this Formal Policy, that affected the outcome of the matter;
2. New and significant information can be introduced that was not reasonably available at the time of the hearing or dismissal and could have affected the outcome of the case;
3. The Title IX Coordinator, Investigator, or hearing panel had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter. The notice of appeal must describe specifically the basis upon which such conflict of interest or bias is alleged and how it allegedly affected the outcome.
4. Berry reserves the right to offer an appeal equally to both parties on additional grounds in its discretion.  
(106.45(b)(8)(i-ii).)

Appeals must be submitted in writing to the Title IX Coordinator within 10 days of the date that the written adjudication determination is provided to the parties. The written appeal must state the grounds for the appeal, include the name of the appealing party, and establish that it is submitted by the appealing party. The appeal statement must contain a sufficient description supporting the grounds for appeal. If the grounds for appeal is to consider new evidence that could affect the outcome of the matter that was not reasonably available to the appealing party before or during the time of the hearing or the dismissal, then the written appeal must include such evidence and the reasons why it was not available. The Title IX Coordinator retains discretion to verify and/or waive minor procedural variations in the timing and content of the appeal submission.

Upon receipt of an appeal, Berry will

1. Notify the other party in writing when the appeal is filed and implement appeal procedures equally for both parties;
2. Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the original determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
3. Ensure that the decision-maker(s) for the appeal does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent, and that the decision-maker(s) for the appeal has received the appropriate and necessary training;
4. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

Berry will provide a copy of the appeal to the non-appealing party. The non-appealing party may submit a written statement within 10 days that may seek to affirm the initial decision and/or respond to the appeal statement. The Title IX Coordinator has discretion to impose or withhold any applicable sanctions or supportive measures prior to the deadline for submitting an appeal or the resolution of any appeal.

The appeals panel will issue a written decision describing the result of the appeal and the rationale for the result within a reasonably prompt time frame following receipt of all appeals materials. The appeal will determine whether the hearing panel made an error on the grounds alleged in the appeal statement. The appeal is typically determined based on the existing record, but appeals panel will have discretion to convene a limited or full hearing if needed.

The appeal decision will be given simultaneously to both parties. (106.45(b)(8)(iii)(E-F).)

#### G. Informal Resolution

At any time prior to reaching a determination regarding responsibility, Berry may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication. Berry may not offer an informal resolution process unless a Formal Complaint is filed. Both parties must agree to participate in an informal resolution process, and if they do, the Formal Grievance Process stops. Either party may withdraw from the informal process and re-start the Formal Grievance Process at any time before an informal resolution is reached. Berry will not require the parties to participate in an informal resolution process, and will not require them to waive their rights to a Formal Grievance Process. (106.45(b)(9).)

Berry will not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student. (106.45)(b)(9)(iii).)

Prior to facilitating an informal resolution process, Berry will:

1. Provide written notice to the parties disclosing the following:
  - a. The allegations;
  - b. The requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a Formal Complaint arising from the same allegations;
  - c. The fact that, at any time prior to agreeing to an informal resolution, any party may withdraw from the informal resolution process and resume the Formal Grievance Process; and
  - d. Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
2. Obtain the parties' voluntary, written consent to the informal resolution process.  
(106.45(b)(9)(i-ii).)

If the parties agree to a resolution during an informal resolution process, the Formal Complaint will be deemed withdrawn and the Formal Grievance Process will be terminated. However, the informal resolution will be considered final.

#### IV. USDOE STATEMENTS OF EQUITABLE TREATMENT

As required by USDOE's Regulations, Berry's Formal Grievance Process will "treat complainants and respondents equitably by [1] offering supportive measures ... to a complainant, and [2] by following a grievance process that complies with [the new Title IX Regulations] before the imposition of any disciplinary sanctions or other actions that are not supportive measures ... against a respondent." (106.44(a); 106.45(b)(1)(i).) Supportive measures also may be offered as needed to respondents and other members of the Berry community who may be affected by sexual misconduct.

The Title IX Regulations define "supportive measures" as "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent." These measures are offered to support Complainants and Respondents, where appropriate, as a way to assist affected persons in dealing with the conduct alleged and to continue participating in the educational program (if possible), while proceeding through the process outlined in this Policy. They may be sought or provided before or after a Formal Complaint is filed, or where no Formal Complaint has been filed. "Such measures are designed to restore or preserve equal access to the [school's] education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the [school's] educational environment, or deter sexual harassment."

Supportive measures may include: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties,

changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

Berry will keep any supportive measures provided to the complainant or respondent confidential, to the extent possible. However, supportive measures that impact other members of the Berry community (e.g. mutual no-contact orders, where the other party must be informed of the order and its implications) may be disclosed in order to enforce them. The Title IX Coordinator will coordinate the implementation of supportive measures.

An individual's status as a respondent will not be considered a negative factor during investigation and consideration of the grievance. Respondents are entitled to, and will receive the benefit of, a presumption that they are not responsible for the alleged conduct unless and until the grievance process concludes and a determination regarding responsibility is issued. Similarly, a person's status as a complainant, respondent, or witness will not determine whether or not they are deemed credible.

Berry's Formal Grievance Process will provide remedies to a complainant only if the grievance process described in this Policy results in a determination that the respondent is responsible for sexual harassment. Remedies are designed to restore or preserve equal access to the school's education program or activity, and they may include the same individualized services as supportive measures. Remedies may be disciplinary and punitive.

Title IX Coordinators, investigators, hearing panel members or decision-makers, and any person who facilitates an informal resolution process (Title IX administrators) will not have a conflict of interest or bias in favor of or against complainants or respondents generally, or an individual complainant or respondent in the grievance process. Berry will provide necessary and appropriate training to each administrator involved in the Title IX process. Training materials will not rely on sex stereotypes and will promote impartial investigations and adjudications of Formal Complaints of sexual harassment. (106.45(b)(1)(iii).)

#### **V. PROHIBITION OF RETALIATION (34 C.F.R. § 106.71.)**

No person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, its regulation, or this Policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing. "Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this [Policy], constitutes retaliation."

Berry will "keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted" by Title IX, FERPA, or as otherwise required by law, or to carry out Berry's Title IX procedures.

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

Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a sexual misconduct grievance proceeding does not constitute retaliation. A determination regarding responsibility alone, however, is not sufficient to conclude that any party made a materially false statement in bad faith. Complaints alleging retaliation may be filed with the Title IX Coordinator and will follow grievance procedures either under this Policy or under the Berry Sexual Misconduct Policy.

In the event an individual alleges that the Title IX Coordinator retaliated against them, the individual may file a complaint with the Human Resources Director, who will follow the grievance procedures either under this Policy or under the Berry Sexual Misconduct Policy. The Title IX Coordinator will not oversee the investigation or adjudication of a complaint alleging that they engaged in retaliation.