

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

1. Introduction

Mercyhurst University defines the prohibition on sex discrimination broadly to include various forms of sexual harassment and sexual violence.

How does this Policy impact other campus disciplinary policies such as Title IX?

In recent years, “Title IX” cases have become a short-hand for any campus disciplinary process involving sex discrimination, including those arising from sexual harassment and sexual assault. But under the Final Rule, Mercyhurst must narrow both the geographic scope of its authority to act under Title IX and the types of “sexual harassment” that it must subject to its Title IX investigation and adjudication process. ***Only*** incidents falling within the Final Rule’s definition of sexual harassment will be investigated and, if appropriate, brought to a live hearing through the Title IX Grievance Policy.

Mercyhurst remains committed to addressing any violations of its policies, even those not meeting the narrow standards defined under the Title IX Final Rule.

Specifically, our campus has a Code of Conduct that defines certain behavior as a violation of campus policy, and a separate Sexual and Gender Based Misconduct Policy that addresses the types of sex-based offenses constituting a violation of campus policy, and the procedures for investigating and adjudicating those sex-based offenses.

To the extent that alleged misconduct falls outside the Title IX Grievance Policy, or misconduct falling outside the Title IX Grievance Policy is discovered in the course of investigating covered Title IX misconduct, the institution retains authority to investigate and adjudicate the allegations under the policies and procedures defined within Sexual and Gender Based Misconduct Policy through a separate grievance proceeding.

The elements established in the Title IX Grievance Policy under the Final Rule have no effect and are not transferable to any other policy of the University for any violation of the Code of Conduct, employment policies, or any civil rights violation except as narrowly defined in this Policy. This Policy does not set a precedent for other policies or processes of the University and may not be cited for or against any right or aspect of any other policy or process.

Non-Discrimination in Application

The requirements and protections of this policy apply equally regardless of sex, sexual orientation, gender identity, gender expression, or other protected classes covered by federal or state law. All requirements and protections are equitably provided to individuals regardless of such status or status as a Complainant, Respondent, or Witness. Individuals who wish to file a complaint about the institution's policy or process may contact the Department of Education's Office for Civil Rights using their [available contact information](#).

Determining Jurisdiction

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

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

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

Definitions

Sexual Harassment

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

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

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

Consent

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

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

Although all parties must give their consent to any sexual act and it is the best practice for both partners to be responsible for confirming that they have obtained the other's consent, it is the responsibility of the person initiating the sexual act to obtain consent from the other.

Formal Complaint

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

Complainant

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

Respondent

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

Relevant evidence and questions

“Relevant” evidence and questions refer to any questions and evidence that tends to make an allegation of sexual harassment more or less likely to be true.

“Relevant” evidence and questions do not include the following types of evidence and questions, which are deemed “irrelevant” at all stages of the Sexual and Gender Based Misconduct Process:

- Evidence and questions about the complainant’s sexual predisposition or prior sexual behavior unless:
 - They are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - They concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.
- Evidence and questions that constitute, or seek disclosure of, information protected under a legally-recognized privilege.
- Any party’s medical, psychological, and similar records unless the party has given voluntary, written consent.

Privacy vs. Confidentiality

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

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

Disability Accommodations

This Policy does not alter any institutional obligations under federal disability laws including the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Parties may request reasonable accommodations for disclosed disabilities to the Sexual and Gender Based Misconduct Coordinator at any point before or during the Sexual and Gender Based Misconduct Process that do not fundamentally alter the Process. The Sexual and Gender Based Misconduct Coordinator will not affirmatively provide disability accommodations that have not been specifically requested by the Parties, even where the Parties may be receiving accommodations in other institutional programs and activities.

Making a Report Regarding Sexual Harassment to the Institution

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Sexual and Gender Based Misconduct Coordinator, or by any other means that results in the Sexual and Gender Based Misconduct Coordinator receiving the person's verbal or written report.

Contact Information for the Sexual and Gender Based Misconduct Coordinator:

Available online on [Student Consumer Information page](#) under Title IX and Sexual and Gender Based Misconduct

Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address listed for the Sexual and Gender Based Misconduct Coordinator.

Confidential Reporting

The following Officials will provide privacy, but not confidentiality, upon receiving a report of conduct prohibited under this policy:

- Sexual and Gender Based Misconduct Coordinator or designee

The following Officials may provide confidentiality:

- Mercyhurst University Health and Counseling Staff
- Mercyhurst clergy

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

Supportive Measures

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

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

Emergency Removal

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

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

Sexual and Gender Based Misconduct Process

Filing a Formal Complaint

The timeframe for the Sexual and Gender Based Misconduct Process begins with the filing of a Formal Complaint. The Process will be concluded within a reasonably prompt manner, and no longer than ninety (90) business days after the filing of the Formal Complaint, provided that the Process may be extended for a good reason, including but not limited to the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities. The procedure for applying for extensions is described below.

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

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

Multi-Party Situations

Mercyhurst may consolidate Formal Complaints alleging sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.

Allegations Potentially Falling Under Two Policies:

If the alleged conduct, if true, includes conduct that would constitute covered sexual harassment and conduct that would not constitute covered sexual harassment, the Sexual and Gender Based Misconduct process will be applied in the investigation and adjudication of all the allegations.

Discretionary Dismissal

The Sexual and Gender Based Misconduct Coordinator, or designee, may dismiss a Formal Complaint brought under the Sexual and Gender Based Misconduct Policy, or any specific

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

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

Any party may appeal a dismissal determination using the process set forth in “Appeals,” below.

Notice of Dismissal

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

Notice of Allegations

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

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

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

Contents of Notice

The Notice of Allegations will include the following:

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

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

Ongoing Notice

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

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

Advisor of Choice and Participation of Advisor of Choice

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

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

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

Mercyhurst's obligations to investigate and adjudicate in a prompt timeframe under the Sexual and Gender Based Misconduct Policy and other University policies apply to matters governed under this Policy, and Mercyhurst cannot agree to extensive delays solely to accommodate the schedule of an Advisor of Choice. The determination of what is reasonable shall be made by the Sexual and Gender Based Misconduct Coordinator or designee. Mercyhurst will not be obligated to delay a meeting or hearing under this process more than five (5) days due to the unavailability of an Advisor of Choice, and may offer the party the opportunity to obtain a different Advisor of Choice or utilize one provided by Mercyhurst.

Notice of Meetings and Interviews

Mercyhurst will provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate.

Delays

Each party may request a one-time delay in the Sexual and Gender Based Misconduct Process of up to five (5) days for good cause (granted or denied in the sole judgment of the Sexual and Gender Based Misconduct Coordinator, Director of Student Conduct, or designee) provided that the requestor provides reasonable notice and the delay does not overly inconvenience other parties.

For example, a request to take a five day pause made an hour before a hearing for which multiple parties and their advisors have traveled to and prepared for shall generally not be granted, while a request for a five day pause in the middle of investigation interviews to allow a party to obtain certain documentary evidence shall generally be granted.

The Sexual and Gender Based Misconduct Coordinator, Director of Student Conduct, or designee shall have sole judgment to grant further pauses in the Process.

Investigation

General Rules of Investigations

The Sexual and Gender Based Misconduct Coordinator and/or an investigator designated by the Sexual and Gender Based Misconduct Coordinator will perform an investigation under a reasonably prompt timeframe of the conduct alleged to constitute sexual harassment after issuing the Notice of Allegations.

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

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

Inspection and Review of Evidence

Prior to the completion of the investigation, the parties will have an equal opportunity to inspect and review the evidence obtained through the investigation. The purpose of the inspection and review process is to allow each party the equal opportunity to meaningfully respond to the evidence prior to conclusion of the investigation.

Evidence that will be available for inspection and review by the parties will be any evidence that is directly related to the allegations raised in the Formal Complaint. It will include any:

1. Evidence that is relevant, even if that evidence does not end up being relied upon by the institution in making a determination regarding responsibility;
2. inculpatory or exculpatory evidence (i.e. evidence that tends to prove or disprove the allegations) that is directly related to the allegations, whether obtained from a party or other source.

All parties must submit any evidence they would like the investigator to consider prior to when the parties' time to inspect and review evidence begins.

The institution will send the evidence made available for each party and each party's advisor, if any, to inspect and review. The Institution is not under an obligation to use any specific process or technology to provide the evidence and shall have the sole discretion in terms of determining format and any restrictions or limitations on access.

The parties will have ten (10) business days to inspect and review the evidence and submit a written response by email to the investigator. The investigator will consider the parties' written responses before completing the Investigative Report. Parties may request a reasonable extension as their designated extension request.

The institution will provide copies of the parties' written responses to the investigator to all parties and their advisors, if any.

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

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

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

Inclusion of Evidence Not Directly Related to the Allegations:

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

Investigative Report

The Sexual and Gender Based Misconduct Coordinator and/or an investigator designated by the Sexual and Gender Based Misconduct Coordinator will create an Investigative Report that fairly summarizes relevant evidence, and provide that Report to the parties at least ten (10) business days prior the hearing for each party's review and written response.

The Investigative Report is not intended to catalog all evidence obtained by the investigator, but only to provide a fair summary of that evidence.

Only relevant evidence (including both inculpatory and exculpatory – i.e. tending to prove and disprove the allegations - relevant evidence) will be referenced in the Investigative Report.

The investigator may redact irrelevant information from the Investigative Report when that information is contained in documents or evidence that is/are otherwise relevant.

Hearing

General Rules of Hearings

The live hearing may be conducted with all parties physically present in the same geographic location, or, at Mercyhurst's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually. This technology will enable participants simultaneously to see and hear each other. At its discretion, Mercyhurst may delay or adjourn a hearing based on technological errors not within a party's control.

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

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

Continuances or Granting Extensions

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

Newly-discovered Evidence

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

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

The Hearing Board Chair will consider this request and make a determination regarding (1) whether such evidence or witness testimony was actually unavailable by reasonable effort prior to the hearing, and (2) whether such evidence or witness testimony could affect the outcome of the matter. The party offering the newly-discovered evidence or witness has the burden of establishing these questions by the preponderance of the evidence.

If the Hearing Board Chair answers in the affirmative to both questions, then the parties will be granted a reasonable pause in the hearing to review the evidence or prepare for questioning of the witness.

Participants in the live hearing

Live hearings are not public, and the only individuals permitted to participate in the hearing are as follows:

Complainant and Respondent (The Parties)

- The parties cannot waive the right to a live hearing.
- The institution may still proceed with the live hearing in the absence of a party, and may reach a determination of responsibility in their absence, including through any evidence gathered that does not constitute a “statement” by that party.
 - For example, a verbal or written statement constituting part or all of the sexual harassment itself is not a “prior statement” that must be excluded if the maker of the statement does not submit to cross-examination about that statement. In other words, a prior statement would not include a document, audio recording, audiovisual reading, and digital media, including but not limited to text messages, emails, and social media postings, that constitute the conduct alleged to have been the act of sexual harassment under the formal complaint.
- Mercyhurst will not threaten, coerce, intimidate or discriminate against the party in an attempt to secure the party’s participation.
- If a party does not submit to cross-examination, the decision-maker cannot rely on any prior statements made by that party in reaching a determination regarding responsibility, but may reach a determination regarding responsibility based on evidence that does not constitute a “statement” by that party.
- The decision-maker cannot draw an inference about the determination regarding responsibility based solely on a party’s absence from the live hearing or refusal to answer cross examination or other questions.
- The parties shall be subject to the institution’s Rules of Decorum.

The Decision-maker

- The hearing body will consist of a three-person panel of decision-makers.
- No member of the hearing body will also have served as the Sexual and Gender Based Misconduct Coordinator, Sexual and Gender Based Misconduct investigator, or advisor to any party in the case, nor may any member of the hearing body serve on the appeals body in the case.
- No member of the hearing body will have a conflict of interest or bias in favor of or against complainants or respondents generally, or in favor or against the parties to the particular case.

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

Advisor of choice

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

Witnesses

- Witnesses cannot be compelled to participate in the live hearing, and have the right not to participate in the hearing free from retaliation.
- If a witness does not submit to cross-examination, as described below, the decision-maker cannot rely on any statements made by that witness in reaching a determination regarding responsibility, including any statement relayed by the absent witness to a witness or party who testifies at the live hearing.
- Witnesses shall be subject to the institution's Rules of Decorum.

Hearing Procedures

For all live hearings conducted under this Sexual and Gender Based Misconduct Process, the procedure will be as follows:

- Hearing Board Chair will open and establish rules and expectations for the hearing;

- The Parties will each be given the opportunity to provide opening statements;
- Members of the Hearing Board will ask questions of the Parties and Witnesses;
- Parties will be given the opportunity for live cross-examination after the Hearing Board conducts its initial round of questioning; During the Parties' cross-examination, the Hearing Board Chair will have the authority to pause cross-examination at any time for the purposes of asking their own follow up questions; and any time necessary in order to enforce the established rules of decorum.
- Should a Party or the Party's Advisor choose not to cross-examine a Party or Witness, the Party shall affirmatively waive cross-examination through a written or oral statement to the Hearing Board Chair. A Party's waiver of cross-examination does not eliminate the ability of the Hearing Board to use statements made by the Party.

Live Cross-Examination Procedure

Each party's advisor will conduct live cross-examination of the other party or parties and witnesses. During this live-cross examination the advisor will ask the other party or parties and witnesses relevant questions and follow-up questions, including those challenging credibility directly, orally, and in real time.

Before any cross-examination question is answered, Hearing Board Chair will determine if the question is relevant. Cross-examination questions that are duplicative of those already asked, including by Hearing Board may be deemed irrelevant if they have been asked and answered.

Review of Recording

The recording of the hearing will be available for review by the parties within five (5) business days, unless there are any extenuating circumstances. The recording of the hearing will not be provided to parties or advisors of choice.

Determination Regarding Responsibility

Standard of Proof

Mercyhurst uses the preponderance of the evidence standard for investigations and determinations regarding responsibility of formal complaints under this Policy. This means that the investigation and hearing determines whether it is more likely than not that a violation of the Policy occurred.

General Considerations for Evaluating Testimony and Evidence

While the opportunity for cross-examination is required in all Sexual and Gender Based Misconduct hearings, determinations regarding responsibility may be based in part, or entirely, on documentary, audiovisual, and digital evidence, as warranted in the reasoned judgment of the Decision-maker.

Decision-makers shall not draw inferences regarding a party or witness' credibility based on the party or witness' status as a complainant, respondent, or witness, nor shall it base its judgments in stereotypes about how a party or witness would or should act under the circumstances.

Generally, credibility judgments should rest on the demeanor of the party or witness, the plausibility of their testimony, the consistency of their testimony, and its reliability in light of corroborating or conflicting testimony or evidence.

Still, credibility judgments should not rest on whether a party or witness' testimony is non-linear or incomplete, or if the party or witness is displaying stress or anxiety.

Decision makers will afford the highest weight relative to other testimony to first-hand testimony by parties and witnesses regarding their own memory of specific facts that occurred. Both inculpatory and exculpatory (i.e. tending to prove and disprove the allegations) evidence will be weighed in equal fashion.

Except where specifically barred by the Sexual and Gender Based Misconduct Policy, a witness' testimony regarding third-party knowledge of the facts at issue will be allowed, but will generally be accorded lower weight than testimony regarding direct knowledge of specific facts that occurred.

Where a party or witness' conduct or statements demonstrate that the party or witness is engaging in retaliatory conduct, including but not limited to witness tampering and intimidation, the Hearing Board may draw an adverse inference as to that party or witness' credibility.

Components of the Determination Regarding Responsibility

The written Determination Regarding Responsibility will be issued simultaneously to all parties through their institution email account, or other reasonable means as necessary. The Determination will include:

1. Identification of the allegations potentially constituting sexual harassment;
2. 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 other evidence, and hearings held;

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

Timeline of Determination Regarding Responsibility

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

Finality

The determination regarding responsibility becomes final either on the date that the institution provides the parties with the written determination of the result of the appeal, if an appeal is filed consistent with the procedures and timeline outlined in "Appeals" below, or if an appeal is not filed, the date on which the opportunity to appeal expires.

Appeals

Each party may appeal (1) the dismissal of a formal complaint or any included allegations and/or (2) a determination regarding responsibility. To appeal, a party must submit their written appeal within five (5) business days of being notified of the decision, indicating the grounds for the appeal.

The limited grounds for appeal available are as follows:

- Procedural irregularity that affected the outcome of the matter (i.e. a failure to follow the institution's own procedures);
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- The Sexual and Gender Based Misconduct Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter.

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

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

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

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

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

Retaliation

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

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

Good Samaritan Statement

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

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

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

Violation of Agreements

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