

MARSHALL UNIVERSITY BOARD OF GOVERNORS

Policy No. GA-16

STUDENT SEXUAL MISCONDUCT POLICY

1 General Information.

- 1.1 Scope: This policy defines and explains procedures for handling complaints of sexual misconduct in which a student is a victim.
- 1.2 Authority: W. Va. Code §18B-1-6
- 1.3 Passage Date: August 14, 2012
- 1.4 Effective Date: August 14, 2012
- 1.5 History: This is a new policy

2 POLICY

- 2.1 Section “I. Introduction” through section “IX. General Principles and Protocols” on the following pages shall constitute the policy on student sexual misconduct.
- 2.2 The entire document after this introductory page (including the list of resources, which may be updated as necessary without action by the Board of Governors), shall be published in the student handbook and on the University’s web site in a place or places to be determined by the Title IX Coordinator and the Dean of Students.

MARSHALL UNIVERSITY
STUDENT SEXUAL MISCONDUCT POLICY
2011-2012

IMPORTANT INFORMATION FOR STUDENTS WHO MAY BE VICTIMS OF SEXUAL MISCONDUCT:

If you or someone you know may have been a victim of sexual assault or any other type of sexual misconduct prohibited under this policy, you are strongly encouraged to seek immediate assistance. Assistance can be obtained 24 hours a day, 7 days a week, from: (304) 696.HELP (4357)

I. Introduction

Marshall University expects all members of its community to act in respectful and responsible ways towards each other. Marshall University is committed to providing programs, activities and an educational environment free from sex discrimination. This Student Sexual Misconduct Policy sets forth resources available to students, describes prohibited conduct, and establishes procedures for responding to reports of sexual misconduct (including sexual assault, sexual harassment, and other unwelcome sexual behavior).

As a recipient of Federal funds, Marshall University is required to comply with Title IX of the Higher Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"), which prohibits discrimination on the basis of sex in education programs or activities. Sexual misconduct, as defined in this policy, is a form of sex discrimination prohibited by Title IX.

This policy addresses complaints of sexual misconduct where the accused is a student of Marshall University. Complaints relating to sexual misconduct by a member of the University faculty or staff may be reported to the University's Title IX Coordinator. Details regarding Marshall University's policy directed at sexual harassment by employees may be found at www.marshall.edu/EEOAA/Sexual.

The University makes this policy and educational opportunities readily available to all students and other members of the University community. Please refer to the last page of this policy for important contact information.

II. GENERAL STATEMENT OF POLICY

Any act of sexual misconduct as defined under this Policy constitutes a violation of University policy. Sexual misconduct can be committed by men or women, and it can occur between people of the same or different sex. The University is committed to fostering a campus environment that both promotes and expedites prompt reporting of sexual misconduct and timely and fair adjudication of sexual misconduct cases. Creating a respectful, safe, and non-threatening environment is the responsibility of all members of the University community. The University's procedures are designed to protect the rights, needs, and privacy of the person making a complaint to the University, as well as the rights of students accused of sexual misconduct.

Anyone wishing to **make a complaint** of sexual misconduct by a University student should contact the University's Title IX Coordinator, the University Police, and/or the Office of the Dean of Student Affairs. (A list of resources and relevant contact information is included on the last page of this policy.) A faculty or staff member with knowledge about a known or suspected incident of sexual misconduct must report the incident to the University Police, the University's Title IX Coordinator or the Office of the Dean of Student Affairs. The University Police and/or Dean of Student Affairs should notify the Title IX Coordinator within a reasonable timeframe of any complaints or investigations of student complaints.

Allegations of sexual misconduct made by a student against a University employee should be reported to the University's Title IX Coordinator or in accordance with the University's Sexual Harassment Policy.

Such allegations will be reviewed, investigated and resolved in accordance with that policy and in consultation with the Title IX Coordinator.

In addition to violating University policy, sexual misconduct might also constitute criminal activity. **Students are strongly encouraged to inform law enforcement authorities about instances of sexual misconduct. The chances of a successful criminal investigation are greatly enhanced if evidence is collected and maintained immediately by law enforcement officers.** Students may inform law enforcement authorities about sexual misconduct and discuss the matter with a law enforcement officer without making a formal criminal complaint or a formal University complaint. Students who make a formal criminal complaint may simultaneously pursue a formal University complaint.

Assistance in reporting any form of sexual misconduct to the proper law enforcement authorities is available to any student upon request from the University Police, the University's Title IX Coordinator, and the Office of the Dean of Student Affairs.

Jurisdiction. This policy applies to any allegation of sexual misconduct against a University student, regardless of where the alleged sexual misconduct occurred. A university student is any student registered or enrolled at the University (a) at the time of the alleged sexual misconduct *and* (b) at the time the complaint is made. Although there is no geographical limitation to invoking this policy, sexual misconduct that is alleged to have occurred at a significant distance from the University may be more difficult to investigate. For this reason, victims of sexual misconduct far from Marshall University's campus are especially encouraged to notify local authorities to assist in the investigation.

Period of Limitation. The University encourages individuals to file complaints as soon as possible. However, there is no period of limitations provided that the accused is a university student, as defined above. A complaint of sexual misconduct may be filed at any time while the accused is enrolled as a student at Marshall University, regardless of the length of time between the alleged misconduct and the decision to file the complaint.

III. PROHIBITED CONDUCT

◇ **Sexual Misconduct:**

Sexual Misconduct is defined as any act of a sexual nature perpetrated against an individual without effective consent or when an individual is unable to freely give consent. Effective consent is defined in Part IV of this Policy. Sexual misconduct includes, but it not limited to:

- (1) Attempted or completed intercourse or penetration (anal, oral or vaginal), however slight, with any body part or any object, by a man or a woman upon a man or a woman, without effective consent. This includes vaginal penetration by a penis, object, tongue or finger; anal penetration by a penis, object, tongue or finger; and oral copulation (mouth to genital contact or genital to mouth contact).
- (2) Sexual touching (including disrobing or exposure), however slight, with any body part or any object, by a man or a woman upon a man or a woman, without effective consent. Sexual touching includes any contact with the breasts, buttocks, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts, when such touching would be reasonably and objectively offensive.
- (3) Sexual exploitation, defined as taking non-consensual, unjust or abusive sexual advantage of another, for one's own advantage or benefit; or to benefit or advantage anyone other than the one being exploited. Sexual exploitation encompasses a wide range of behaviors which may include, but are not limited to:
 - Inducing incapacitation with the intent to rape or sexually assault another student;
 - Non-consensual video or audio-recording of sexual activity;

- Allowing others to observe a personal act of consensual sex without knowledge or consent of the partner;
- Engaging in Peeping Tommery (voyeurism);
- Knowingly transmitting a sexually transmitted disease, including HIV, to another student;
- Prostituting another student (e.g.-personally gaining money, privilege, or power from the sexual activities of another students)

◇ **Sexual Harassment:**

Sexual harassment is a form of discrimination that includes verbal, written, or physical behavior of a sexual nature, directed at someone, or against a particular group, because of that person's or group's sex, or based on gender stereotypes, when that behavior is unwelcome and meets either of the following criteria:

- (1) Submission or consent to the behavior is reasonably believed to carry consequences for the student's education, employment, on-campus living environment, or participation in a University activity. Examples of this type of sexual harassment include:
 - (a) pressuring a student to engage in sexual behavior for some educational or employment benefits, or
 - (b) making a real or perceived threat that rejecting sexual behavior will carry a negative consequence for the student.

- (2) The behavior has the purpose or effect of substantially interfering with the student's work or educational performance by creating an intimidating, hostile, or demeaning environment for employment, education, on-campus living, or participation in a University activity. Examples of this type of sexual harassment can include:
 - (a) persistent unwelcome efforts to develop a romantic or sexual relationship;
 - (b) unwelcome sexual advances or requests for sexual favors;
 - (c) unwelcome commentary about an individual's body or sexual activities;
 - (d) repeated and unwelcome sexually-oriented teasing, joking, or flirting; and
 - (e) verbal abuse of a sexual nature.

Comments or communications may be verbal, written, or electronic. Behavior does not need to be directed at or to a specific student in order to constitute sexual harassment, but may consist of generalized unwelcome and inappropriate comments based on sex or gender stereotypes.

Determination of whether alleged conduct constitutes sexual harassment requires consideration of all the circumstances, including the context in which the alleged incidents occurred.

◇ **Sexual Intimidation:**

Sexual intimidation involves:

- (1) threatening to commit a sexual act upon another person
- (2) stalking,
- (3) cyber-stalking, or
- (4) engaging in indecent exposure.

IV. Effective Consent

Effective consent is informed, freely and actively given, mutually understandable words or actions, which indicate a willingness to participate in mutually agreed upon sexual activity. In the absence of mutually understandable words or actions it is the responsibility of the initiator, that is, the person who wants to engage in the specific sexual activity, to make sure that they have consent from their partner(s). Consent is mutually understandable when a reasonable person would consider the words or actions of the parties to have manifested a mutually understandable agreement between them to do the same act, in the same

way, at the same time, with each other. **Relying solely upon non-verbal communication can lead to miscommunication. It is important not to make assumptions. If confusion or ambiguity on the issue of consent arises anytime during the sexual interaction, the initiator should stop and verbally clarify the other individual's willingness to continue.**

- Consent may not be inferred from silence, passivity or lack of active resistance alone.
- A current or previous dating or sexual relationship (or the existence of such a relationship with anyone else) may not, in itself, be taken to imply consent.
- Consent cannot be implied by attire, or inferred from the buying of dinner or the spending of money on a date.
- Consent to one type of sexual act may not, in itself, be taken to imply consent to another type of sexual act.
- Consent expires. Consent lasts for a reasonable time, depending on the circumstances.
- Consent to sexual activity may be withdrawn at any time, as long as the withdrawal is communicated clearly; upon clear communication, all sexual activity must cease.
- Consent which is obtained through the use of fraud or force, whether that force is physical force, threats, intimidation, or coercion, is ineffective consent. Intimidation or coercion is determined by reference to the reasonable perception of a person found in the same or similar circumstances.
- Consent may never be given by:
 - Minors
 - Mentally disabled persons
 - Persons who are incapacitated as a result of alcohol or other drugs or who are unconscious or otherwise physically helpless. Incapacitation means being in a state where a person lacks the capacity to appreciate the nature of given consent to participate in sexual activity.

- One may not engage in sexual activity with another whom one knows, or should reasonably have known, is incapacitated as a result of alcohol or other drugs.

- The use of alcohol or other drugs can have unintended consequences. Alcohol or other drugs can lower inhibitions and create an atmosphere of confusion over whether consent is freely and effectively given. The perspective of a reasonable person will be the basis for determining whether one should have known about the impact of the use of alcohol or drugs on another's ability to give consent. Being intoxicated or high does not diminish one's responsibility to obtain consent and is never an excuse for sexual misconduct.

V. Reporting Prohibited Conduct

Victims are strongly encouraged to report incidents of sexual misconduct. Because Sexual Misconduct may constitute *both* a violation of University policy *and* criminal activity, and because the University Judicial System is not a substitute for instituting criminal or civil action, the University encourages students to report alleged Sexual Misconduct promptly to campus officials and to local law enforcement agencies.

A victim may always contact the appropriate police authorities directly. In addition, the University Police are available to assist students in making reports to the police and in pursuing such charges.

To report sexual misconduct to the University, victims can report sexual misconduct to the University law enforcement, the University's Office of Equity Programs, and the University's Office of Student Conduct. A list of resources and contact information, including the Huntington Police Department, is included on the last page of this Policy.

If a criminal complaint is filed in addition to a complaint with the University, the University will not wait for the conclusion of any criminal investigation or proceedings before commencing its own investigation; however, the University's investigation may be delayed temporarily while the criminal investigators are

gathering evidence. In the event of such a delay, the University may take interim measures when necessary to protect the complainant and the University community.

The University considers the reporting and adjudication of sexual misconduct cases on campus to be of paramount importance. While the University does not condone underage drinking, the University may extend limited immunity from punitive sanctioning in the case of illegal alcohol use to victims, witnesses and to those reporting incidents and/or assisting the victims of sexual misconduct.

VI. Confidentiality

The University will take all precautions feasible to preserve the confidentiality of both the complainant and the accuser. However, students should understand that under conditions of imminent harm to the community, the University is required by federal law to inform the community of the occurrence for the protection of all members of the community. In addition, the University cannot control confidentiality violations by other students who may be involved as witnesses in the judicial hearing.

If the complainant does not wish to pursue a hearing and/or requests that his or her complaint remain confidential, Title IX nevertheless requires the University to investigate and take reasonable action in response to the complaint. The University's Title IX Coordinator will inform the complainant, however, that the University's ability to respond in such a case may be limited. In such cases, Title IX requires the University to evaluate the complainant's request(s) that the complaint not be adjudicated or remain confidential in the context of the University's commitment to provide a reasonably safe and non-discriminatory environment for all students. In order to make such an evaluation, the Title IX Coordinator may conduct a preliminary investigation into the alleged Sexual Misconduct and may weigh the complainant's request(s) against the following factors: the seriousness of the alleged Sexual Misconduct; whether there have been other complaints of Sexual Misconduct against the same accused student; and the accused student's right to receive information about the allegations if the information is maintained by the University as an "education record" under FERPA, the federal law that protects the privacy of students' education records. The University's Title IX Coordinator will inform the complainant if the University cannot ensure confidentiality. Even if the University cannot take disciplinary action against the student because of the request for confidentiality or the request to not pursue an investigation, the University will nevertheless take prompt and effective action to limit the effects of the alleged Sexual Misconduct and to prevent its recurrence. For instance, the University may issue a "no-contact" order or take other appropriate interim measures to assure student safety even in the absence of a formal proceeding.

If, prior to a hearing, the accused student elects to acknowledge his or her actions and take responsibility for the alleged sexual misconduct, the hearing will be canceled and the General Counsel will make a determination regarding sanctions. If both the complainant and the accused student agree to such proposed sanctions, the complaint will be resolved without any further rights of appeal by either party. If either the complainant or the accused student objects to such proposed sanction(s), a hearing will be convened for the exclusive purpose of determining a sanction.

VII. Judicial Hearings

Shall be governed by the Student Code of Conduct - www.marshall.edu/student-affairs

VIII. Appeals

Complainants and accused students may file a written appeal with the University's Title IX Coordinator within 10 calendar days from the date of the decision. Grounds for an appeal include:

- Sufficiency of the evidence to support the decision;
- Appropriateness of the sanction;

- Germane new evidence not available at the time of the hearing that could significantly impact the outcome; and/or
- Procedural errors that significantly impact the outcome.

IX. General Principles and Protocols

Consistent with the policy as outlined above, the following are the general principles and protocols that are central to the University's Sexual Misconduct Policy:

1. Individuals will not be discouraged by any member of the University community from reporting alleged incidents of sexual misconduct. All reports of alleged violations of this policy must be made based upon a good faith belief that a violation has occurred.
2. Complainants will be notified in a timely manner of their options to notify proper law enforcement authorities including on-campus and local police, and of the option to be assisted by campus authorities in such notification, if the student so chooses.
3. University officials will respond quickly and with sensitivity to complaints of sexual misconduct.
4. Complainants will be notified of and made aware of options for, and provided assistance in changing academic and living situations after an alleged sexual assault (if the situation so warrants).
5. Complainants will be able to seek, and if warranted, receive a campus restraining order against another student or students who are alleged to have engaged in conduct in violation of this policy.
6. Complainants and accused students will be notified of available resources for medical, counseling and other services, both on campus and in the community.
7. Campus officials will not address complaints of sexual misconduct through an informal process alone. Unless the complainant refuses to cooperate, it is presumed that all complaints of sexual misconduct will be adjudicated at a campus hearing.
8. Complainants, accused students, and all others participating in sexual misconduct hearings will be treated with respect by Marshall University.
9. Complainants and accused students may have a trained student advisor to accompany and assist them in the campus hearing process.
10. Complainants and accused students may have a support person (a Marshall University student, faculty or staff member) present during the campus hearing.
11. As a general rule, the prior sexual history of complainants or accused students is not relevant to the issues adjudicated in sexual misconduct hearings.. Any attempt to introduce evidence of any student's prior sexual history or reputation must be accompanied by good cause and approved by the hearing officer.
12. The accused student may refuse to answer some or all questions with the understanding that that silence should not be used against him or her.
13. Complainants and accused students may present witnesses and submit relevant supporting documentation during a hearing (subject to the reasonable discretion of the hearing officer to limit such witnesses and documentation for relevancy and redundancy). Complainants and accused students may question other witnesses at the hearing, but may not directly question

- one another. However, a complainant or accused student may submit questions to the hearing officer to be asked of the other party. The hearing officer may decide whether or not to ask questions submitted in this manner.
14. Complainants will be permitted to make an impact statement prior to the conclusion of the hearing.
 15. Complainants and accused students should be notified concurrently and in writing of the outcome of the hearing. If the accused student is found responsible, the accused student will be notified of the sanction(s) and the complainant will be notified of any sanction(s) that directly relate to him or her.
 16. Complainants and accused students have the right to appeal the finding of the panel, as well as the sanction imposed if the accused is found responsible. Appeals should be filed with the Title IX Coordinator within ten (10) days of the announcement of the decision. The non-appealing party may choose to be present at the hearing or to submit a written statement for consideration upon an appeal.
 17. It is a violation of University policy to retaliate against any person making a complaint of Sexual Misconduct or against any person cooperating in the investigation (including testifying as a witness to) of any allegation of Sexual Misconduct. For these purposes, "retaliation" includes intimidation, threats, harassment and other adverse action against any such complainant or third party. Retaliation should be reported promptly to the Title IX Coordinator and/or Office of the Dean of Student Affairs and may result in disciplinary action independent of the sanction or interim measures imposed in response to the underlying allegations of Sexual Misconduct.

**Marshall University
Sexual Misconduct Resources**

EMERGENCY

Marshall University Police 304 696-4357
Local Police, Fire and Ambulance 911

UNIVERSITY RESOURCES

Counseling Center 304 696-3111
Women's Center 304 696-3112
Student Conduct Office 304 696-2495
Director of Equity Programs and Title IX Coordinator .. 304 696-2597
Dean of Student Affairs Office 304 696-6422
Residence Services 304 696-6208
First Year Residence Halls 304 696-3409
MU Police 304 696-4357

COMMUNITY RESOURCES

Contact Rape Crisis Center 304 399-1111 or
866-399-7273
Police, Ambulance, Fire 911
Cabell Huntington Health Department 304 523-6483
Cabell County Pros. Attorney Victim Assistance..... 304 526-9872