

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION**

ALEXIS SEAY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 3:18-cv-00147-RLY-MPB
	)	
THE UNIVERSITY OF EVANSVILLE,	)	
et. al.	)	
	)	
Defendants.		

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PARTIALLY DISMISS,  
PURSUANT TO F.R.C.P. 12(b)(6), OF DEFENDANTS THE UNIVERSITY OF  
EVANSVILLE, DR. THOMAS KAZEE, AND DR. TRACEY FOLDEN**

Come now Defendants, The University of Evansville (the “University”), Dr. Thomas Kazee (“Dr. Kazee”), and Dr. Tracey Folden (“Dr. Folden”),<sup>1</sup> by counsel, and for their Memorandum of Law in Support of their Motion to Partially Dismiss, state:

**INTRODUCTION**

Plaintiff, Alexis Seay (“Plaintiff”), brings this lawsuit against the University of Evansville, and its President Emeritus, Dr. Kazee, and its Title IX Director, Dr. Folden, in their individual capacities, alleging they violated the law and/or were negligent in the way they responded to: (1) Plaintiff’s claim she was assaulted by a fellow student; and (2) her claim that she was discriminated against and harassed by Defendant R. Scott Lank (“Lank”), one of her professors.<sup>2</sup>

Plaintiff’s Complaint does not allege any facts from which the Court could plausibly infer that the Defendants responded inappropriately to the alleged sexual assault, or that the University deprived her of educational benefits in the way

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<sup>1</sup> The University, Dr. Kazee, and Dr. Folden may be collectively referred to herein as “Defendants.”

<sup>2</sup> Lank is represented by separate counsel in this lawsuit. (Appearance, Docket No. 13).

contemplated by federal law or United States Supreme Court precedent. In addition, as a matter of law, Defendants Kazee and Folden are not personally liable to Plaintiff. Therefore, as more fully discussed below, portions of Plaintiff's Complaint should be dismissed for failure to state a claim pursuant to F.R.C.P. 12(b)(6).

### **STATEMENT OF FACTS**

The University is a private institution in Evansville, Indiana, and a "recipient" of federal funding as defined in Title IX of the Education Amendments of 1972 ("Title IX"), and Title VI of the Civil Rights Act ("Title VI") (Complaint Docket No. 1 ("Doc.1") ¶3, 7). Plaintiff was a theatre student at the University beginning the Fall semester of 2016, until she elected to withdraw from the University on February 28, 2018. (Doc.1 ¶19, 79). Dr. Kazee is the President Emeritus of the University. (Doc.1 ¶4). Dr. Folden is Assistant Vice President of Academic Affairs at the University, and serves as its Title IX Director. (Doc.1 ¶5). At all relevant times Lank served as a professor in the University's Theatre Department. (Doc.1 ¶6). Lank was one of Plaintiff's professors, and she alleges that while she was his student, he harassed her because of her race and sex. (Doc. 1 ¶20-61).

Plaintiff also alleges that, in February 2017, she was sexually assaulted by fellow student, John Doe ("Doe"). (Doc.1 ¶63). In her Complaint, Plaintiff does not provide any details regarding either the nature or severity of Doe's alleged sexual assault, and for the purposes of their motion to partially dismiss Plaintiff's Complaint, Defendants may not discuss any other facts regarding the alleged sexual assault. However, as discussed below, even if the Court assumes Plaintiff experienced a single incident of severe sexual assault, which, it is important to note, she does not specifically allege, the

dismissal of her claims is still appropriate because her allegations simply do not state a claim upon which relief may be granted.

Shortly after Doe's alleged assault, Plaintiff reported the incident to the University by notifying Dr. Folden, who advised Plaintiff that she could press criminal charges, notify campus security, or pursue a school trial. (Doc.1 ¶¶63-64). Plaintiff did not elect any of these options because she said she "did not want to have this issue attached to her name but wanted to report it." (Doc.1 ¶¶64).

The University's Sexual Misconduct Policy, which is a part of the Student Handbook, describes the rights and responsibilities of students and the University under Title IX, including but not limited to, investigative steps and administrative remedies in matters of sexual misconduct. (Attached as Exhibit 1 are the Sexual Misconduct Policies in effect for the 2016-17 and 2017-18 school years.).<sup>3</sup> The Introduction to the University's Sexual Misconduct Policy states, in pertinent part, the following:

The University strongly supports an individual's desire for confidentiality in cases involving sexual misconduct. An individual has the option of requesting that a report of sexual misconduct be kept confidential, that his or her name not be disclosed to the other student, and that no investigation or disciplinary action be taken against the other student. In such cases, the University will make a careful assessment to determine if such request can be honored while still providing a safe environment for all students and other members of the University community. Included in this policy is specific information about the levels of confidentiality provided by law.

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<sup>3</sup> Plaintiff claims that the University Sexual Misconduct Policy and the Student Handbook are parts of an alleged contract between her and the University. (Doc.1 ¶104-12). Although Plaintiff specifically referenced these documents in her Complaint, Plaintiff failed to attach them to her Complaint. Nevertheless, if a document is specifically referenced by the complaint and central to the plaintiff's claim the Court may consider that document as part of the pleadings if it is attached to a defendant's motion attacking the sufficiency of the complaint. *Hirata Corp. v. J.B. Oxford & Co.*, 193 F.R.D. 589, 592-93, (S.D.Ind. 2000).

(Exhibit 1, p. 53)(emphasis added).<sup>4</sup>

The Sexual Misconduct Policy describes at least four ways a student may report alleged sexual misconduct, including reporting to a “responsible employee” of the University.<sup>5</sup> The Sexual Misconduct Policy states, in pertinent part, the following:

When a Complainant tells a responsible employee about an incident of sexual misconduct, the University will take prompt and appropriate steps to investigate what happened and to resolve the matter promptly and equitably. . .

To the extent possible, information reported to a responsible employee will be shared only with people responsible for handling the University’s response to a report of sexual misconduct.

(Exhibit 1, p. 55).

The Sexual Misconduct Policy also describes how a complainant’s request for confidentiality is evaluated and how it may affect the University’s investigation. The Policy explains, in pertinent part, the following:

If the University honors the request for confidentiality, a Complainant must understand that the University’s ability to meaningfully investigate the incident and pursue disciplinary action against the Respondent may be limited.

(Exhibit 1, p. 56).

Although the University honored Plaintiff’s request not to “have this issue attached to her name,” Plaintiff admits she learned that the University interviewed Doe and took disciplinary action against him. (Doc.1 ¶¶65; 70). Dr. Folden also allegedly informed Plaintiff that she and Doe “would rarely cross paths.” (Doc.1 ¶¶66). Plaintiff does not allege that she “crossed paths” with Doe during the remainder of the semester

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<sup>4</sup> For ease of reference, Defendants cite only to the 2016-17 Sexual Misconduct Policy because the policy excerpts discussed in this Memorandum are identical to those in the 2017-18 Sexual Misconduct Policy.

<sup>5</sup> For the purposes of this Motion, the University concedes that Dr. Folden was a “responsible employee.”

in which she reported Doe, or that Doe engaged in any further inappropriate conduct after she reported the sexual assault.

In January 2018, approximately one year after reporting Doe, Plaintiff returned to the University's Evansville campus after studying abroad for a semester. (Doc.1 ¶68). Upon her return, Plaintiff assumed a position with the University as a Resident Advisor ("RA") and saw Doe, also an RA, at an RA training session. (*Id.*). Plaintiff alleges she was frustrated because she claims she had been informed that she and Doe would not have to be near each other. (Doc.1 ¶¶66, 68). Plaintiff does not allege Doe engaged in any inappropriate conduct at the training session, or at any time thereafter.

Nevertheless, Plaintiff met with Dr. Folden, who advised her that Doe had been required to "take a few classes on sexual harassment." (Doc.1 ¶70). Plaintiff requested that she not be required to work with Doe, and Dr. Folden informed Plaintiff's supervisor that she and Doe were not to work together. (Doc.1 ¶71). Plaintiff does not allege that she and Doe worked together after Dr. Folden spoke with Plaintiff's supervisor.

A few days after Plaintiff requested that she not work with Doe, the University's Dean of Students gave a presentation to Plaintiff and other students about sexual assault and harassment. (Doc.1 ¶72). During her presentation, the Dean specifically stated that "Sexual assault is not tolerated on this campus and anyone who does so will be punished appropriately." (*Id.*). Despite the Dean's statement, Plaintiff informed Dr. Folden she felt the University was not doing enough to ensure her safety. (Doc.1 ¶73). Dr. Folden advised Plaintiff she could always change her mind about pursuing formal charges and that further action against Doe was possible. (Doc.1 ¶73). Nonetheless, Plaintiff again chose to take no further action against Doe, and she does not allege Doe

engaged in any inappropriate or threatening behavior toward her at any time after Plaintiff returned from studying abroad.

After the Spring 2018 semester began, Plaintiff learned she had a class with Doe and alleges, but does not explain why, she felt “failed by Title IX.” (Doc. 1 ¶74). On February 12, 2018, Plaintiff was invited by the University to travel to a conference in Miami, Florida to learn how to promote diversity in study abroad programs. (Doc.1 ¶75). Plaintiff alleges Doe was also invited to attend the conference, and that she was informed they would have to travel together and perhaps even lodge together. (Doc. 1, ¶75-76). Plaintiff requested that she and Doe not travel together. (Doc.1 ¶77). Plaintiff claims that she never heard from the University after she made this request, but also admits she withdrew from the University shortly thereafter, on February 28, 2018. (Doc.1 ¶77, 79). Plaintiff does not allege that the University official who made the decision to invite her to the Miami conference was aware of either the alleged sexual assault or any of the other issues Plaintiff discussed with Dr. Folden.

### **STANDARD OF REVIEW**

Although a court should assume well-pleaded factual allegations to be true, allegations in the form of legal conclusions are insufficient to survive a Rule 12(b)(6) motion. *Killingsworth v. HSBC Bank*, 507 F.3d 614, 618 (7th Cir. 2007); *McReynolds v. Merrill Lynch and Co.*, 694 F.3d 873, 885 (7th Cir. 2012). Conclusory statements of law, and their unwarranted inferences, are not sufficient to defeat a motion to dismiss for failure to state a claim. See *Nelson v. Monroe Regional Med. Ctr.*, 925 F.2d 1555, 1559 (7th Cir. 1991), cert denied, 502 U.S. 903 (1991). And, mere unsupported conclusions

of fact, or mixed fact and law, are not admissible. *Tamari v. Bache & Co., (Lebanon) S.A.L.*, 565 F.2d 1194, 1198-99 (7<sup>th</sup> Cir. 1977), cert. denied, 435 U.S. 905 (1978).

Even though a “Complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl., Corp v. Twombly*, 550 U.S. 544, 555 (2007). “Instead, the plaintiff’s [f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the Complaint are true (even if doubtful in fact).” *Id.* A claim becomes plausible “when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “Only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 679.

Factual allegations must plausibly state an entitlement to relief “to a degree that rises above the speculative level.” *Munson v. Gaetz*, 673 F.3d 630, 633 (7<sup>th</sup> Cir. 2012). This plausibility determination is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

## **ARGUMENT**

### **A. Count I of the Complaint Should Be Dismissed - Plaintiff’s Allegations Do Not Sustain Her Claim that the University’s Response to John Doe’s Alleged Assault was “Clearly Unreasonable” Under Title IX.**

In Count I of her Complaint, Plaintiff claims the University violated Title IX because it was “deliberately indifferent” to Doe’s sexual assault, and Lank’s alleged sexual harassment, to the extent that she was deprived of equal educational

opportunities.<sup>6</sup> (Doc.1 ¶¶87-89). While the University denies that it was deliberately indifferent to Lank's alleged harassment, the University's instant motion addresses only Plaintiff's claims regarding Doe's sexual assault.

Title IX provides that no person shall, on the basis of sex, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any education or program or activity receiving federal financial assistance. 20 U.S.C. § 1681(a). The United States Supreme Court "has set a high bar for plaintiffs seeking to hold schools and school officials liable for student-on-student harassment" under Title IX. *Doe v. Evergreen Park Elementary School District 124*, 2017 W.L. 6731867 at \*3 (N.D.Ill. Dec.29, 2017), *quoting Doe v. Galster*, 768 F.3d. 611, 617 (7<sup>th</sup> Cir. 2014).

First, because "a recipient of federal funds may be liable in damages under Title IX only for its own misconduct," *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999), schools can only be liable for "*deliberate indifference* to known acts of peer sexual harassment." *Id.* at 648 (emphasis added). Deliberate indifference means that "the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id.* The Court in *Davis* emphasized that this is no "mere 'reasonableness' standard"—making every case an exercise in fact-finding appropriate for juries—but a heightened standard that courts in appropriate cases should decide "as a matter of law." *Id.* at 648-49.

Second, the Court in *Davis* also held that "funding recipients are properly held liable . . . only where they are deliberately indifferent to sexual harassment . . . that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id.* at 650.

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<sup>6</sup> Plaintiff does not bring Count I against Dr. Kazee or Dr. Folden.

Peer harassment, the Court explained, is not as likely as teacher-student harassment to have the “systemic effect” on educational access necessary to create liability, especially if there is only one incident of harassment. *Id.* at 652-53.

In sum, a school can be liable under Title IX for peer sexual harassment, but only if it “acts with deliberate indifference to known . . . harassment in its programs or activities . . . so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Id.* at 633. Courts are to rigorously police this line, including on motions to dismiss, when a school’s response does not violate the legal standard. *Id.* at 649. School officials are given broad latitude to resolve peer harassment and are liable only in “certain limited circumstances.” *Davis* at 643. In *Davis*, the Court made clear “courts should refrain from second-guessing the disciplinary decisions made by school administrators.” *Id.* at 648.

In this case, Plaintiff accuses the University of being deliberately indifferent by failing to provide her with “safety measures and accommodations” and “safeguards” relating to Doe. (Doc.1 ¶87). In order to state a cause of action, Plaintiff must demonstrate that (1) the harassment was discriminatory; (2) the University had actual knowledge of the harassment; (3) the harassment was so severe, pervasive, and objectively offensive that it deprived her of access to educational opportunities; and (4) University officials were “deliberately indifferent” to the harassment.

Plaintiff’s Title IX claim should be dismissed because Plaintiff has failed to sufficiently allege facts demonstrating that it was deliberately indifferent to Doe’s sexual assault, or that its actions deprived her of access to educational opportunities.

**1. The University Was Not Deliberately Indifferent.**

“Deliberate indifference means shutting one’s eyes to a risk one knows about but would prefer to ignore.” *Delgado v. Stegall*, 367 F.3d.668, 671 (7th Cir. 2004). In *Doe vs. Tippecanoe School Corp.* 2017 WL 6395633 \*10 (N.D.Ind. Dec.14, 2017), the court noted that the “high bar” for showing deliberate indifference can be met when school officials made no effort whatsoever either to investigate or to put an end to the harassment. This Court also explained a plaintiff’s burden in *McGinnis v. Muncie Community*, 2013 WL 2456067 at \*13 (S.D. Ind. June 5, 2013):

Once school officials have actual notice of sexual harassment, *Davis* imposes a duty to act. But as long as the school's response is not “clearly unreasonable,” it cannot have acted with the requisite deliberate indifference to incur Title IX liability.” [*Gabrielle M. v. Park Forest–Chicago Heights, Ill. Sch. Dist. 163*, 315 F.3d 817, 821 (7th Cir.2003)]. To establish deliberate indifference, the plaintiff must show an official decision not to remedy the violation. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). Whether a given response is not “clearly unreasonable” is an inquiry that may be, “in an appropriate case,” determined by the court as a matter of law. *Gabrielle M.*, 315 F.3d at 817.

In *McGinnis v. Muncie Community School Corp.*, 2013 WL 2456067 (S.D. Ind. June 5, 2013), the plaintiff alleged the school was deliberately indifferent after Smith, the school official investigating a rape of a student by another student, informed the suspect that he had “nothing to worry about.” *McGinnis* at \*13. The school suspended the suspect for only ten days, although he ultimately pled guilty to a felony sex offense. *Id.* at \*4. The Court found the school was not deliberately indifferent because, despite Smith’s statement, the record established “that Smith’s investigation, although by no means ideal, was not ‘clearly unreasonable’ as a matter of law.” *Id.* at \*13. See also

*Doe v. Tippecanoe School Corp.*, 2017 WL 6395633 at \*11 (S.D. Ind. December 14, 2017) (finding no deliberate indifference even though reasonable persons could differ as to how matter was handled).

In *Hendrichsen v. Ball State Univ.*, 2003 WL 1145474 \*1 (S.D. Ind. March 12, 2003), the plaintiff was harassed by a professor who left notes and flowers at her residence. The university investigated the plaintiff's claim, and although it did not find any sexual harassment, the school warned the professor not to contact the plaintiff. *Id.* at \*4. This Court found that the university was not deliberately indifferent to the plaintiff's claims, a finding bolstered by the fact that the professor never contacted her again. *Id.*

A recent decision from the District Court for the District of Columbia, with facts similar to those in the instant case, is also instructive. In *Raihan vs. George Washington University*, 324 F.Supp.3d 102, 105 (D.D.C. 2018),<sup>7</sup> the plaintiff alleged that Favorito, a fellow student, engaged in unspecified non-consensual sexual activity with her. The plaintiff and her friends were drinking in her dorm room. *Raihan* at 105. Favorito later invited the plaintiff to his room where she began to feel dizzy. *Id.* The plaintiff began going in and out of consciousness and then blacked out. *Id.* Before blacking out, the plaintiff remembered Favorito engaging in sexual activity with her without her consent. *Id.*

In *Raihan*, the plaintiff met with the school's Title IX director shortly after the assault, but did not file a formal complaint with the school until two years later. *Id.* Despite her delay in filing a complaint, the school quickly investigated, and after a formal hearing, the hearing panel recommended that Favorito be suspended. *Id.* at 106.

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<sup>7</sup> An appeal of this decision was filed on September 28, 2018.

Plaintiff was later informed Favorito received only a deferred suspension because he was graduating at the end of the semester. *Id.* at 107. The school never issued a no-contact order to Favorito. *Id.*

After the formal hearing, the plaintiff encountered Favorito once at the school gym but reported nothing particularly notable about the encounter. *Id.* at 107. Even so, the plaintiff complained to the school, and in response the school imposed certain unspecified restrictions on Favorito. *Id.* Plaintiff claimed Favorito violated those restrictions, although not by engaging in any conduct directed at her. *Id.*

In her lawsuit against the school, the plaintiff claimed the school's response to her assault was deliberately indifferent because the school failed to provide a prompt and equitable resolution to her complaint, which exposed her to the risk of continued sexual harassment. *Id.* at 111-12. The plaintiff also alleged she was deprived of educational opportunities because Favorito's employment at the gym "effectively denied [her] access" to that facility, although she only encountered him there once. *Id.*

In *Raihan*, the district court granted the school's motion to dismiss. The district court stated "[w]ithout specific evidence beyond the school's failure to implement fully its own policy, and its conduct in Ms. Raihan's case, this case amounts to one of alleged official negligence, not intent. That is insufficient for Title IX liability." *Id.* at 111, *citing Davis*, 526 U.S. at 642. The district court found that the school's response was not deliberately indifferent because it promptly investigated and processed the plaintiff's claim even though it learned of it over two years after the incident. *Id.*

The district court in *Raihan* also found that the alleged harassment suffered by the plaintiff was not severe, pervasive, and objectively offensive enough to violate Title

IX. Given the time that passed between the alleged assault and the gym encounter, the lack of any allegations of misconduct during that encounter, and the fact the school restricted Favorito's activities at the gym, the court found the plaintiff did not suffer the kind of severe, pervasive or and objectively offensive harassment necessary to show she was deprived of an educational opportunity. *Id.* at 112. In so finding, the Court stated: "Under *Davis*, a single instance of sexual assault cannot suffice for Title IX liability without evidence of a systematic effect on equal access. And the university context is relevant here, since '[a] university might not . . . be expected to exercise the same degree of control over its students that a grade school would enjoy.'" *Id.* at 112-13 *citing Davis* at 649. The court in *Raihan* concluded that seeing one's abuser in a campus gym is not "pervasive" harassment or a "systemic" denial of educational benefits. *Id.* at 113.

In the instant case, as in the cases discussed above, the University was not deliberately indifferent. The University did not shut its eyes to Plaintiff's report of Doe's alleged sexual assault – it timely investigated Plaintiff's complaint about Doe and took reasonable steps to address Plaintiff's concerns. Plaintiff's own allegations, taken step-by-step, establish that the University was far from deliberately indifferent:

1. Plaintiff reported the single incident of sexual assault against Doe in February 2017, near the beginning of the Spring semester. The University advised Plaintiff that she could take formal action against Doe. (Doc.1 ¶¶63-64).
2. Although Plaintiff chose not to pursue any formal action against Doe, the University promptly investigated her report. (Doc.1 ¶65).
3. Plaintiff learned the University interviewed and disciplined Doe. (Doc.1 ¶¶65, 70).
4. The University informed Plaintiff she would "rarely cross paths" with Doe, and she does not allege that she felt unsafe due to Doe's presence on campus for the remainder of the 2017 Spring semester. (Doc.1 ¶66).

5. Plaintiff does not allege that Doe engaged in any further contact or inappropriate behavior for the remainder of the 2017 Spring semester, or indeed at any time thereafter.
6. Plaintiff does not allege that her grades declined, or that she suffered any other negative consequence as result of her complaint against Doe for the remainder of the 2017 Spring semester. Indeed, she took advantage of the opportunity to study abroad the following semester. (Doc.1 ¶68).
7. One year later, Plaintiff felt “extremely frustrated” when she saw Doe at the training session for RA’s, but again, Plaintiff does not allege he contacted her or engaged in any inappropriate conduct toward her. (Doc.1 ¶68).
8. Dr. Folden advised Plaintiff that the University required Doe to undergo sexual harassment training. (Doc.1 ¶70).
9. At Plaintiff’s request, Dr. Folden informed Plaintiff’s supervisor that Plaintiff was not to work with Doe, a request honored by the University. (Doc.1 ¶71).
10. Plaintiff attended a training session with other students about prohibited sexual harassment on campus, yet claimed, without elaboration, she felt “let down” and that nothing was being done to ensure her safety. (Doc. 1¶72-73).
11. Dr. Folden advised Plaintiff if she wished to further pursue the matter against Doe, “more can be done.” (Doc.1 ¶73). Plaintiff again chose not to pursue any formal action.
12. Plaintiff alleges, again without further elaboration, that she felt “failed by Title IX” after learning she had a class with Doe. (Doc.1 ¶74). Plaintiff fails to allege she did not attend the class, and once again she does not allege Doe engaged in any contact or inappropriate behavior with her.
13. After learning that she and Doe were selected to attend a conference in Miami, Plaintiff requested that they not travel together, but she did not request that Doe be prohibited from attending the conference. Plaintiff claims that the University did not respond to this request, but admits she left the University shortly thereafter. (Doc.1 ¶75-79).

Plaintiff’s allegations do not overcome the “high bar” necessary to show the University was deliberately indifferent. The University’s response to Plaintiff’s report of Doe’s alleged assault, as well as its response to her subjective feelings of frustration and not feeling safe one year after the alleged assault, were clearly reasonable. As in

*Raihan*, Plaintiff has not plausibly asserted that official University policy, or any alleged violation of policy by the University, caused her alleged feelings of frustration and not feeling safe on campus.

While Plaintiff perhaps wished that the University would have more severely punished Doe, the Supreme Court in *Davis* made clear that a school need not engage in any particular disciplinary action, and that students do not have the right to make particular remedial demands. The Supreme Court in *Davis* also cautioned that courts should not second-guess disciplinary decisions made by administrators. The Seventh Circuit has recognized that “[j]udges must be sensitive to the effects on education of heavy-handed judicial intrusion into school disciplinary issues.” *Doe v. St. Francis School Dist.*, 694 F.3d 869, 873 (7<sup>th</sup> Cir. 2012). Despite the caution advised by the Supreme Court and the Seventh Circuit, Plaintiff wants this Court to act as a “super-administrator” and second-guess the University’s decisions. There is no reason for this Court to engage in such second-guessing, but even if it did so, it would find that: (1) the University investigated Plaintiff’s complaint against Doe, even though she chose not to pursue Doe through University procedures or with the local authorities; (2) the University disciplined Doe; (3) the University continued to address Plaintiff’s concerns and accommodate her requests one year after her report of Doe’s alleged assault; and (4) the University never received any other report from Plaintiff that Doe contacted her or engaged in any further inappropriate behavior towards her.

Plaintiff’s brief encounters with Doe at the RA training session, and in the class she shared with him, does not establish the University’s deliberate indifference, that she experienced further harassment, or that she was unsafe. See *Raihan* at 324 F.Supp.3d.

at 112. (granting the defendant's motion to dismiss and rejecting the argument that a brief sighting of the alleged assailant supported a Title IX claim); *Moore v. Murray State Univ.* 2013 WL 960320 at \*4 (W.D.Ky. Mar.12, 2013); (granting the defendant's motion to dismiss and noting "the complaint contains no allegations that any further harassment occurred after the assault."); *Yoona Ha v. Northwestern Univ.* 2014 WL 5893292 at \*2 (N.D. Ill. Nov. 13, 2014)(rejecting the argument that an occasional glimpse of the alleged assailant and knowledge of his presence on campus without further acts of harassment was sufficient to support Title IX claim); *Oden v. N. Marianas College*, 440 F.3d. 1085, 1087-90 (9<sup>th</sup> Cir. 2006); (upholding dismissal of deliberate indifference claim despite the fact that plaintiff twice crossed paths with alleged assailant on campus).

In this case, the University's response was appropriate, effective and far from the deliberate indifference necessary to show a violation of Title IX. Even under the liberal standard the Court must use in considering the University's Motion to Partially Dismiss, Plaintiff's allegations demonstrate her Title IX sexual assault claim should be dismissed.

## **2. The University Did Not Deprive Plaintiff of Any Educational Opportunity.**

Plaintiff's allegations also do not support a claim that she was denied any educational opportunity as a result of the University's response to Doe's alleged assault. With the exception of the trip to Miami to attend a study abroad meeting, Plaintiff does not specifically describe the educational opportunities she was allegedly denied, other than to allege the University failed to provide her with "safety measures and accommodations." (Doc. 1 ¶87(a)-(d)).

After Doe's alleged assault, Plaintiff does not allege she felt unsafe during the remainder of the semester in which she claims the assault occurred, or that her grades

suffered, or that she suffered any other negative consequence. Plaintiff also fails to allege a denial of any educational opportunity after she returned to the University's Evansville campus one year after reporting the alleged assault. The University further discusses Plaintiff's failure to state a claim for deprivation of education opportunities in the discussion immediately below regarding her hostile educational environment claim, and it incorporates that discussion herein by reference. (*See infra* p. 18-20).

**B. Count II of the Complaint Should Be Dismissed - Plaintiff's Allegations Do Not Sustain Her Claim that the University Created a Hostile Educational Environment**

While Title IX provides a sexual harassment claim for a hostile environment, Plaintiff's allegations do not sustain such a claim.<sup>8</sup> A *prima facie* case of hostile environment sexual harassment is very similar to one for peer-to-peer harassment. Plaintiff must prove: "(1) she belongs to a protected class; (2) she was subjected to harassment; (3) the harassment was based on sex; (4) the harassment was so pervasive and severe that it altered the conditions of her education," and (5) some basis for liability. *Hendrichsen*, 2003 WL 1145474 at \*3. Plaintiff must also show the University failed to address the harassment in a manner that amounts to deliberate indifference. *Id.*

Plaintiff claims that the University became a sexually hostile environment, in part, because "John Doe roamed free and could turn up at any moment." (Doc. 1 ¶92).<sup>9</sup> Plaintiff alleges the University was deliberately indifferent because it failed to exclude Doe from campus and failed to provide her assistance in ensuring Doe was not present in extracurricular settings, such as the conference in Miami. (Doc.1 ¶93). In addition to

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<sup>8</sup> Plaintiff does not bring Count II against Dr. Kazee or Dr. Folden.

<sup>9</sup> Plaintiff also claims that Lank's conduct also contributed to the sexually hostile environment. For the purposes of this Motion, the University is only addressing Plaintiff's claims regarding Doe.

the discussion below, the University incorporates its discussion *supra* demonstrating that the University was not deliberately indifferent to her situation, and that Plaintiff was not denied any educational opportunity.

The crux of Plaintiff's hostile environment claim revolves around events that occurred after she returned to the Evansville campus in January 2018 after studying abroad. Again, after reporting the alleged assault, Plaintiff does not complain about Doe roaming freely about the campus or that she ever felt unsafe during the remainder of that semester. In fact, she makes no claim he engaged in inappropriate conduct ever again. It was only after Plaintiff returned from studying abroad, approximately one year after Doe's alleged assault, that she allegedly began to feel unsafe because she saw him once at a training session and discovered she had a class with him. However, even then, Plaintiff never alleged Doe contacted her or engaged in any inappropriate behavior toward her.

Nevertheless, in response to Plaintiff's alleged concern about working with Doe, Dr. Folden instructed Plaintiff's supervisor that she was not to work with Doe, and Plaintiff does not allege that she ever had to work with him. Dr. Folden also informed Plaintiff that she could pursue further action against Doe, but she chose not to do so. (Doc. 1 ¶73).

Plaintiff also alleges the invitation she and Doe received from the University's "Office of Study Abroad" to attend the Miami conference contributed to her fear of being alone with him. (Doc. 1 ¶75-77). First, Plaintiff does not allege that the "Office of Study Abroad" had any notice of either her report of Doe's sexual assault, or any of her other alleged concerns about Doe. Based on the allegations in Plaintiff's Complaint, the

University was certainly not deliberately indifferent by merely extending an invitation to attend a conference to either Plaintiff or Doe. Second, even after she learned Doe had also been invited to the Miami conference, Plaintiff did not ask the University to rescind his invitation, she only asked that they not be required to travel together. Finally, she was never required by the University to travel alone with Doe, and therefore was not denied an educational opportunity. Plaintiff left the University shortly after she received the invitation and before the University had the opportunity to address her concern. Based on the University's previous responses to her concerns, it is reasonable to infer that the University would have also properly accommodated Plaintiff's request not to travel alone with Doe.

Plaintiff may have wished the University had excluded Doe from campus, and/or terminated his employment as an RA, but the University's decision to engage in other discipline of Doe was not clearly unreasonable and should not be second-guessed by the Court. Again, school officials are given broad latitude to resolve peer harassment. *Davis* at 643. Under the facts as alleged by Plaintiff, the University's investigation and discipline of Doe, and the measures it took against Doe on Plaintiff's behalf, show that the University was not deliberately indifferent.

In summary, Plaintiff has failed to allege facts necessary to sustain her claim that the University created a hostile educational environment, and her claim should be dismissed to the extent it is based on the alleged sexual assault.

**C. Plaintiff's Claims for Negligent Hiring, Training, Retention and Supervision (Count VI) Against the University, and Against Dr. Kazee and Dr. Folden In Their Individual Capacities, Should be Dismissed.**

**(1) Introduction to Discussion of Employment-Related Negligence Claims.**

Plaintiff brings a variety of employment-related negligence claims against not only the University, but also Dr. Kazee, in an attempt to hold him personally liable.

It is unclear from her Complaint whether Plaintiff also brings Count VI against Dr. Folden in her individual capacity. Plaintiff first alleges "it is believed [the University, Dr. Kazee, and Dr. Folden] had supervisory authority over Defendant Lank." (Doc.1 ¶119). But she then alleges only that the University and Dr. Kazee, *not Dr. Folden*, "had supervisory authority over Defendants Folden and Lank and negligently hired, trained supervised, and retained them due to Defendants Folden and Lank's failure to comply" with federal law and University policy. (Doc. 1 ¶123). In any event, for the purposes of their Motion, Defendants assume Plaintiff intended to bring Count VI against Dr. Folden, as well as Dr. Kazee, and therefore also move to dismiss Count VI against Dr. Folden.

Plaintiff's allegations are not factual, but instead are unsupported conclusory statements, and as applied to Dr. Kazee are especially egregious. The first 83 paragraphs of Plaintiff's Complaint recount the alleged facts supporting her claims. Dr. Kazee is the subject of only one of those paragraphs, and that paragraph merely references his employment status with the University. (Doc.1 ¶4). It appears the primary purpose of Plaintiff naming Dr. Kazee as a defendant is to embarrass and harass him.

Defendants deny they were negligent in any way. And, as discussed in detail below, Plaintiff's allegations do not support a claim for negligence against any of them for several reasons. However, regarding Dr. Kazee and Dr. Folden individually, there is

at least one overriding reason why dismissal of Plaintiff's negligence claims is appropriate. Plaintiff's allegations against Dr. Kazee and Dr. Folden in their individual capacities involve alleged negligent acts committed in the scope and course of their employment with the University. Assuming, for the purposes of argument only, that Dr. Kazee and Dr. Folden were negligent, they would not be personally liable. Instead, the University would be vicariously liable for any alleged negligence they committed in the performance of their duties.

Indiana recognizes, under certain circumstances, a cause of action against employers for the negligent hiring, training, supervision, or retention of an employee. Indiana has adopted the Restatement (Second) of Torts § 317 as the standard for reviewing such a claim. See *e.g.*, *Hudgins v. Bemish*, 64 N.E.3d 923, 933 (Ind.Ct.App. 2016). Section 317 provides that "[a] master [*in this case, the University*] is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment [.]" Restatement (Second) of Torts § 317 (Am. Law Inst. 1965)(emphasis added). This rule is applicable only when the servant [in this case, Dr. Kazee and/or Dr. Folden] is acting outside the scope of his employment. If the servant is acting within the scope of his employment, the master may be vicariously liable under the principles of the law of agency." *Sedam v. 2JR Pizza Enterprises, LLC*, 84 N.E.3d 1174, 1179 (Ind. 2017).

Plaintiff admits the University, not Dr. Kazee, employed Dr. Folden and Lank. (Doc. 1 ¶¶5-6, 120-21). The Restatement (Second) places responsibility, if any, on the employer, not on an employee personally. Also, Plaintiff does not allege that Dr. Kazee or Dr. Folden ever acted outside the scope of their employment. In fact, she alleges the

opposite. For example, Plaintiff claims Dr. Kazee and Dr. Folden had “supervisory authority” over Lank. (Doc.1 ¶119). She also alleges that Dr. Kazee had “supervisory authority” over both Dr. Folden and Lank, and that he and the University negligently hired, trained, retained, and supervised them. (*Id.* at ¶ 123). If Plaintiff’s allegations are taken as true, then Dr. Kazee and Dr. Folden acted within the scope of their employment, and therefore any liability inures to the University, not to Dr. Kazee or Dr. Folden personally. See *Perron v. JP Morgan Chase Bank, N.A.*, 2014 WL 931897 at \*5 (S.D. Ind. March 10, 2014) citing *Tindall v. Enderle*, 320 N.E.2d 764, 768 (Ind.Ct.App. 1974). For this reason alone, Plaintiff’s claims of negligence against Dr. Kazee and Dr. Folden should be dismissed as a matter of law.

There is also another necessary element that Plaintiff has failed to establish in her employment-related negligence claims against the Defendants – their prior knowledge of the alleged misconduct or harm that Plaintiff alleges occurred. Indiana courts require plaintiffs to show that the employer (again, in this case, the University), knew about the employee’s misconduct and that it was reasonably foreseeable that the employee would injure the victim with that reasonably foreseeable harm. *Clark v. Aris. Inc.*, 890 N.E.2d 760, 764 (Ind.Ct.App. 2008). A plaintiff must show: (1) a duty of care owed by an employer to a third person; (2) breach of that duty; and (3) injury to a third person proximately caused by the employer’s breach. *Scott v. Retz*, 916 N.E.2d 252, 257 (Ind. Ct. App. 2009). “In other words, an employer is not liable simply because an employee did something wrong; the employer must have known (or should have known) that there was a need to prevent the harm from occurring in the first place.” *Sims vs.*

*Humane Soc. of St. Joseph County Indiana Inc.*, 758 F.Supp.2d 737, 750 (N.D. Ind. 2010).

As discussed below, Plaintiff's own allegations fail to establish that Defendants knew or should have known of the alleged misconduct of either Lank or Dr. Folden.

**(2) The Claims for Negligent Hiring Against the University and Dr. Kazee Should Be Dismissed.**

Plaintiff does not properly allege that Dr. Kazee had any role whatsoever in the decision by the University to hire either Dr. Folden or Lank. Plaintiff alleges Lank was employed by the University for years (Doc.1 ¶61) and was a faculty member with tenure (Doc.1 ¶20). An award of tenure typically denotes a long period of service to an educational institution. Plaintiff fails to allege whether Dr. Kazee was the University's president at the time Lank was hired, which makes it impossible even to speculate about Dr. Kazee's alleged role in hiring Lank. Plaintiff also does not allege when Dr. Folden was hired by the University, or what role, if any, Dr. Kazee played in the University's decision to hire her. With regard to any role Dr. Folden played in Lank's hiring, Plaintiff's allegations are similarly deficient.

Plaintiff also fails to allege sufficient facts showing that either the University or Dr. Kazee (assuming for the sake of argument he had any involvement) were actually negligent in hiring Dr. Folden or Lank. Although Plaintiff accuses both Dr. Folden and Lank of lacking "the requisite credentials and training" to perform their respective jobs at the University, she fails to allege any actual facts to support these conclusory allegations, or specify the credentials and training Dr. Folden and Lank allegedly failed to possess. (Doc. 1 ¶120-21). Plaintiff also does not allege that the University or Dr. Kazee knew or should have known that either Dr. Folden or Lank lacked the "requisite

credentials” to perform their jobs at the time they were hired. In the case of Lank, Plaintiff directly attributes Lank’s alleged lack of credentials and training to the University’s alleged negligence, not to Dr. Kazee or Dr. Folden’s. (“Lank did not have the requisite credentials and training . . . and . . . this was the result of [the University’s] negligent hiring, training, supervision and retention of Defendant Lank). (Doc.1 ¶121). These same arguments apply to any alleged involvement of Dr. Folden in Lank’s hiring.

Plaintiff also fails to sufficiently allege facts showing that any of the Defendants had any notice Lank ever engaged in any discriminatory or harassing behavior prior to the time he was hired by the University. Therefore, Plaintiff’s claims of negligent hiring against the University, and especially against Dr. Kazee and Dr. Folden, should be dismissed.

**(3) The Negligent Training Claims Should Be Dismissed.**

Plaintiff’s negligent training claim, especially against Dr. Kazee and Dr. Folden, is supported only by conclusory and contradictory statements, not facts. As discussed above, Plaintiff first alleges that Dr. Folden and Lank lacked the proper credentials and training because of the *University’s* alleged negligence, not Dr. Kazee’s. (Doc.1 ¶120-21). Then Plaintiff claims that the University and Dr. Kazee negligently trained Dr. Folden and Lank “due to [Dr.] Folden and Lank’s failure to comply with the requirements of Title IX and Title VI and UE policies and procedures . . .” (Doc. #1 ¶123). Although Plaintiff concludes that Dr. Folden and Lank’s alleged failure to comply with federal law and University policy was the result of negligent training, she fails to allege any facts supporting her conclusion that any of the Defendants were negligent in this regard.

Plaintiff also fails to allege any facts demonstrating how any training, or lack of training, by any of the Defendants resulted in either Dr. Folden or Lank allegedly violating federal law or the University's policies and procedures. As discussed above, Plaintiff has not alleged sufficient facts showing that Dr. Folden's response to Plaintiff's complaints about Doe were violative of Title IX or Title VI, especially with respect to Doe's alleged assault.

**(4) The Negligent Supervision and Retention Claims Should Be Dismissed.**

Plaintiff fails to plead facts showing that Dr. Kazee had a duty to directly supervise either Dr. Folden as Title IX Director, or Lank as a professor in the Theatre Department. She also fails to plead facts showing that Dr. Folden had a duty to supervise Lank. In fact, Plaintiff alleges that the chair of the Theatre Department was Eric Renschler, not Dr. Kazee or Dr. Folden. (Doc. 1 ¶41). Plaintiff fails to allege that either Dr. Kazee or Dr. Folden had any involvement at all in the Theatre Department.

Even more significant is Plaintiff's failure to allege any facts showing Dr. Kazee had any notice of the alleged conduct of Dr. Folden or Lank. After reporting Doe's alleged assault, Plaintiff requested not to "have this issue attached to her name." (Doc. 1 ¶64). Pursuant to the University's Sexual Misconduct Policy, information is "shared only with people responsible for handling the University's response to a report of sexual misconduct." (Exhibit 1, p. 55). Plaintiff does not allege that Dr. Kazee was responsible for handling the University's response to her report of Doe, or that any information about her report was shared with Dr. Kazee. Plaintiff does not allege that she informed Dr. Kazee about the alleged actions or inactions of either Dr. Folden or Lank. She did not allege she called or emailed Dr. Kazee, or try to make an appointment to see him. She

does not allege that Dr. Folden or any other faculty or member of the administration reported anything to Dr. Kazee about the issues Plaintiff allegedly experienced. She does not allege that any of the students who allegedly witnessed Lank's behavior reported anything to Dr. Kazee. Plaintiff also fails to allege that either she or anyone else informed Dr. Kazee about the issues she had with the manner in which Dr. Folden addressed Plaintiff's complaints about either Lank's behavior or Doe's sexual assault. This lack of notice is fatal to Plaintiff's claims of negligent supervision and retention, especially those asserted against Dr. Kazee.

The only attempt Plaintiff makes at alleging any kind of prior notice of misconduct is an unsubstantiated conclusion. Plaintiff states, in pertinent part, "It is clear the [University] was negligent in their [sic] hiring, training, retention and supervision of Professor Lank, as it is believed other students had concerns relating to professor Lank that may have spanned years back." (Doc.1 ¶61). In *Chivers v. Central Noble Community Schools*, 423 F.Supp.2d 835, 856 (N.D.Ind. 2006), the court stated that "[t]he Plaintiff's allegation of an unsubstantiated rumor of previous misconduct and her argument of an inadequate response to her own Complaint did not support a claim for negligent retention and supervision . . ."

Likewise, in the instant case, Plaintiff's allegation of an unsubstantiated rumor is insufficient to support her negligence claims against the Defendants. Plaintiff fails to allege when "other students had concerns," or that these concerns were reported to any of the Defendants. Even if true, this conclusory allegation at the most refers to the University's knowledge and not to the knowledge of Dr. Kazee or Dr. Folden.

**(5) Plaintiff's Negligent Hiring, Training, Retention and Supervision Claims Are Predicated On Duties Owed Under Federal Law and the Alleged Contract.**

In support of her negligent hiring, training, retention and supervision claims, Plaintiff alleges that Dr. Kazee and Dr. Folden “failed to comply with the policies and procedures required of Title IX and Title VI as well as [the University’s] policies and procedures relating to sexual misconduct, assault and harassment and race discrimination.” (Doc.1 ¶122). In addition to the University’s other arguments, Dr. Kazee and Dr. Folden cannot be liable personally under this theory.

It is well settled that individual liability does not exist under either Title IX or Title VI. *Hansen v. Board of Trustees of Hamilton Southeastern School Corp.*, 551 F.3d 599, 605 (7<sup>th</sup> Cir. 2008). Therefore, if there was a failure by either Dr. Kazee or Dr. Folden to comply with these federal laws, then any liability rests with the University and not them personally. Plaintiff is attempting to avoid the constraints of Title IX by pursuing Dr. Kazee and Dr. Folden for actions or inactions they may have committed, if at all, in their individual capacities as employees of the University, and which are violations of federal law for which only the University may be held liable.

Similarly, with regard to Plaintiff’s allegation that Dr. Kazee and Dr. Folden failed to comply with University policies and procedures, Plaintiff claims these same policies and procedures are part of the alleged contract between the University and Plaintiff, the breach of which Plaintiff asserts solely against the University. (Doc.1 ¶104-¶112). Indeed, if there is a contract, then it is between the University and Plaintiff, not Dr. Kazee or Dr. Folden and Plaintiff. See *Bissessur v. Indiana University Bd. of Trustees*, 581 F.3d 599, 602 (7<sup>th</sup> Cir. 2009); and *Bd. of Trustees of Purdue Univ. v. Eisenstein*, 87

N.E.3d 481, 502 (Ind. Ct. App. 2017) (only a party to a contract can be held liable for its breach).

Plaintiff is seeking to hold Dr. Kazee and Dr. Folden personally liable in negligence for an alleged breach of a contract to which they are not parties. But simply alleging a duty of care does not transform a breach of contract claim into a tort claim. See *Faiaz v. Colgate University*, 64 F.Supp.3d 336, 362 (N.D. N.Y 2014) (school's motion for judgment on the pleadings granted on student's claim that school negligently supervised and controlled investigation and disciplinary process).

Furthermore, as discussed above, assuming for the sake of argument that either Dr. Kazee or Dr. Folden failed to comply with University policies and procedures, any such failure would have been committed in the scope of their employment, and therefore possible evidence of either a breach of contract, or an act of negligence, by the University, but not by them personally.

**D. The Claims for General Negligence (Count V) Against the Defendants Should be Dismissed.**

In addition to the employment-related negligence claims discussed above, Plaintiff also alleges that the University, and Dr. Kazee and Dr. Folden personally, were also negligent for what is best summarized as failing to ensure Plaintiff could safely continue her education.

Plaintiff does not allege the specific duties that the University, or Dr. Kazee and Dr. Folden in their individual capacities, allegedly breached, but she claims they: (1) failed to "immediately began an investigation as well as put reasonable safeguards in place to protect Plaintiff's interest;" (2) "failed to take reasonable steps to ensure Plaintiff could safely continue her education;" and (3) "failed to ensure that throughout the

process Plaintiff was not further traumatized and revictimized.” (Doc.1 ¶¶114-16). The “process” Plaintiff presumably refers to is the process of investigating and taking steps to ensure Plaintiff could safely continue her studies.

First, as discussed above, Plaintiff’s allegations against Dr. Kazee and Dr Folden in their individual capacities involve alleged negligence committed in the scope and course of their employment with the University. The University denies that either Dr. Kazee or Dr. Folden were negligent in any way, but assuming for the purposes of argument only that they were negligent, the University would be vicariously liable for their negligence. Under the doctrine of *respondeat superior*, an “employer is vicariously liable for the wrongful or tortious acts of its employees that are committed within the scope of their employment.” *Hansen v. Board of Trustees of Hamilton Southeastern School*, 551 F.3d. 599, 612 (7<sup>th</sup> Cir. 2008). An employee acts within the scope of employment when an injurious act is incidental to the conduct authorized, or when it furthers the employer’s business. *Id.* (citations omitted). Plaintiff’s allegations of negligence against Dr. Kazee and Dr. Folden undoubtedly relate to the performance of their duties as the University’s President and the University’s Title IX Director. Therefore, it is the University, not Dr. Kazee or Dr. Folden personally, who would be liable for any such negligence.

Second, Plaintiff’s negligence claims against Defendants should be dismissed because her own allegations show that they did not breach any duty with respect to their response to Plaintiff’s report of the alleged assault by Doe.

Finally, dismissal of Count V is proper because Plaintiff’s claims of negligence are preempted by her other causes of action. Plaintiff’s negligence allegations in Count

V are essentially the same as her allegations under Counts I and II for violations of Title IX; under Count III for violations of Title VI; under Count IV for breach of contract; and under Count VI for negligent supervision and retention.

For example, the claim that Defendants “knew of the wrongful conduct of the [sic] John Doe,” and “should have immediately begun an investigation as well as put reasonable safeguards in place to protect Plaintiff’s interests,” are the same as her Title IX allegations. (Doc.1 ¶114). Plaintiff essentially alleges Defendants failed to safeguard her interest in continuing her education free of race and sex discrimination, but these interests fall under the protection of Title IX and Title VI. As discussed above, only the University as a recipient of federal funds can be found liable for violations of Title IX, or for violations of Title VI, and only then for *intentional* violations, not mere negligence. See *Parker v. Franklin Cty. Community School Corp.*, 667 F.3d 910, 917 (7<sup>th</sup> Cir. 2012). To the extent Plaintiff is attempting to hold any of the Defendants liable for violations of Title IX or Title VI under a negligence theory, then these claims should be dismissed. Plaintiff’s burden is to prove the University intentionally violated those laws.

Similarly, as discussed above, simply alleging a duty of care does not transform a breach of contract claim into a tort claim. See *Faiaz v. Colgate University*, 64 F.Supp.3d 336, 362 (N.D. N.Y 2014) (school’s motion for judgment on the pleadings granted on student’s claim that school negligently supervised and controlled investigation and disciplinary process). To the extent Plaintiff is seeking to hold any of the Defendants, but especially Dr. Kazee and Dr. Folden, liable in negligence for what is properly an alleged breach of a contract, then Plaintiff’s claim should be dismissed.

Furthermore, to the extent Plaintiff alleges that the University, Dr. Kazeem and Dr. Folden negligently failed to supervise Lank, then that claim is already encompassed in her claim for negligent supervision in Count VI, which should also be dismissed as the University discusses above.

**E. Plaintiff's Breach of Contract Claim (Count IV) Against the University Should be Dismissed.**

Plaintiff alleges that an express contract, or in the alternative, an implied contract, existed between her and the University, the terms of which are contained in the University's Student Handbook and its Non-discrimination Statement. (Doc. 1 ¶106). In her Complaint, Plaintiff recites two excerpts from the Student Handbook and the Non-discrimination Statement, which she describes as "guarantees," but which, in fact, merely articulate the University's general prohibitions against discrimination and harassment based on race and sex and other protected categories. (Doc. 1 ¶ 107-09). Plaintiff alleges the University breached these "guarantees" by failing to reasonably respond, and by failing to take immediate action, after she reported sexual and racial harassment. (Doc. 1 ¶109-10).

To state a claim for breach of contract, Plaintiff must "point to an identifiable contractual promise that the [University] failed to honor." *See Ross v. Creighton Univ.*, 957 F.2d 410, 417 (7th Cir. 1992) ("courts should not take on the job of supervising the relationship between colleges and students ... or creating in effect a new relationship between them."); *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision ... they should show great respect for the faculty's professional judgment.").

In this case, Plaintiff does not point to an identifiable contract or promise that the University failed to honor. Plaintiff merely recites the University's policy statements of its general commitment to anti-discrimination laws, which in and of themselves do not create separate and independent contractual commitments. See e.g. *Okoh v. Sullivan*, 2011 WL 672420 at \*4 (S.D.N.Y. Feb. 24, 2011) (school's published policy of providing "fair and equal treatment" to its students is "a general statement of [its] adherence to existing anti-discrimination laws. It does not create a separate and independent contractual obligation."); *Knelman v. Middlebury College*, 898 F.Supp.2d 697, 709 (D.Vt.2012) (language in a college handbook or other official statement that is merely aspirational in nature or that articulates a general statement of a school's "ideals," "goals," or "mission," is not enforceable-including general promises about ethical standards); *Tiu-Malabanan v. University of Rochester*, 2008 WL 788637 at \*5 (W.D.N.Y. Mar. 21, 2008) (general statements of policy do not create separate causes of action); *Gally v. Columbia Univ.*, 22 F.Supp.2d 199, 208 (S.D.N.Y. 1998) (anti-discrimination policy does not give rise to contractual liability).

Assuming *arguendo* that the policy statements Plaintiff recites in her Complaint are enforceable contractual obligations, Plaintiff has still failed to allege sufficient facts to show that the University breached its contract with her. Plaintiff alleges the University breached its contract with her by "failing to reasonably respond to," and by "failing to take immediate action after" her complaints of sexual and racial harassment and discrimination. (Doc. 1 ¶¶109-10). In other words, Plaintiff is asking the Court to second-guess the University's response to Doe's alleged assault.

In such cases, a plaintiff must show that a university has breached the contract “illegally, arbitrarily, capriciously, or in bad faith.” See *Doe v. Univ. of Notre Dame*, 2017 WL 1836939 at \*9 (N.D. Ind. May 8, 2017); *King v. Depauw Univ.*, 2014 WL 4197507 at \*11 (S.D. Ind. August 22, 2014). In *Doe* and *King*, the plaintiffs were students disciplined for alleged sexual misconduct. *Id.* In each case, the plaintiff claimed their school breached its contract by failing to properly follow disciplinary procedures. *Id.* In granting both of the plaintiffs’ motions for injunctive relief, the courts discussed the bad faith standard that plaintiffs must show when attacking a university’s disciplinary decision in a breach of contract action. *Id.* For example, this Court stated in *King*:

University disciplinary determinations in most cases are premised upon the subjective professional judgment of trained educators, and therefore our courts have quite properly exercised the utmost restraint in applying traditional legal rules to disputes within the academic community. As a result, in the area of academic services, our approach has been akin to the one used in the case of contracts conditioned upon the satisfaction of one party. The university requires that a student’s academic performance be satisfactory in the university’s honest judgment. Absent a showing of bad faith on the part of the university or a professor, the court will not interfere. The good faith judgment model both maximizes academic freedom and provides an acceptable approximation of the education expectations of the parties. Bad faith in this context is not simply bad judgment or negligence, rather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. Literal adherence by a university to its internal rules will not be required when the dismissal of a student rests upon expert judgments as to academic or professional standards and such judgments are fairly and nonarbitrarily arrived at. *Our sole function when reviewing disciplinary actions such as in the present case is to determine whether the educational institution acted illegally, arbitrarily, capriciously, or in bad faith.*

*King* at \*11 citing *Chang v. Purdue Univ.*, 985 N.E.2d 35, 46–47 (Ind.Ct.App. 2013)

(emphasis added).

Plaintiff has failed to allege any facts demonstrating the University breached the alleged contract illegally, arbitrarily, capriciously, or in bad faith, and therefore her breach of contract claim should be dismissed in its entirety.

If Plaintiff's breach of contract claim is not dismissed in its entirety, then it should certainly be dismissed to the extent Plaintiff's claim is based on the University's response to her report against Doe.<sup>10</sup> Plaintiff's own allegations demonstrate the University reasonably responded to Plaintiff's complaint about Doe. (See, for example, *supra* at p. 8-20). And, if Plaintiff has failed to meet the "high bar" necessary to show the University violated Title IX, then it follows she has also failed to properly allege facts demonstrating the University illegally, arbitrarily, or in bad faith breached any contractual duty to protect Plaintiff from discrimination or harassment from Doe.

### **CONCLUSION**

Therefore, for the reasons stated above, and for any other reason the Court deems sufficient, Defendants respectfully request that the Court grant its Motion to Partially Dismiss pursuant to F.R.C.P. 12(b)(6), and for all other just and proper relief.

Respectfully submitted,

**KAHN, DEES, DONOVAN & KAHN, LLP**

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<sup>10</sup> Again, the University denies any liability to Plaintiff based on her claims against Lank.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of October, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following party by operation of the Court's CM/ECF system.

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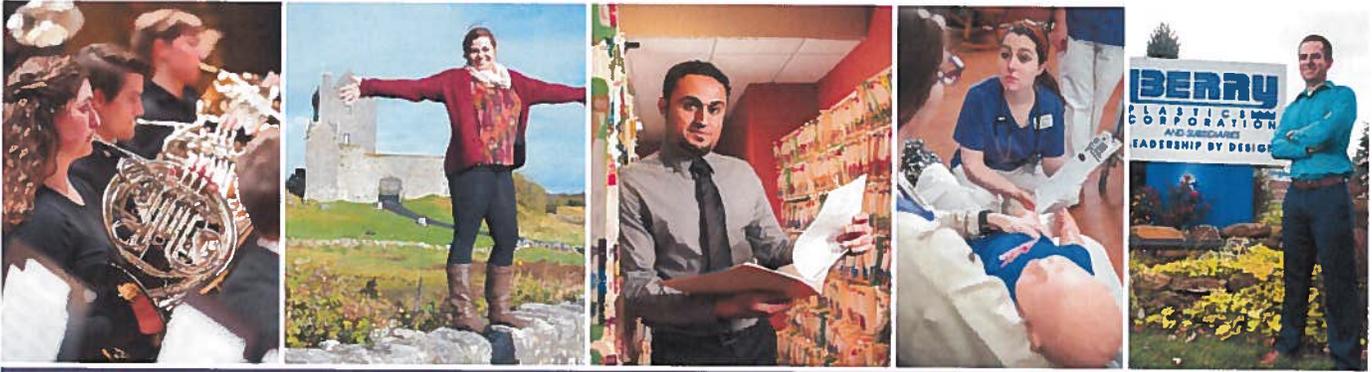
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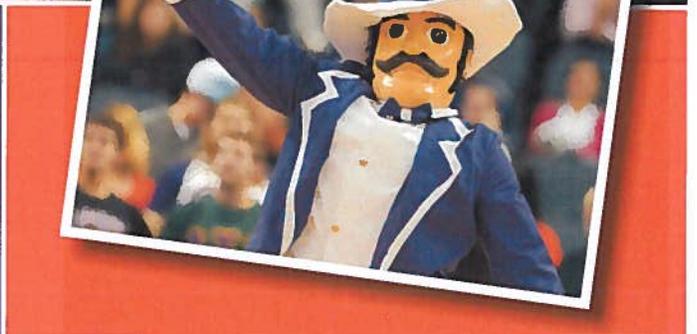
# EXHIBIT 1



## Student Handbook 2016-2017



UNIVERSITY OF EVANSVILLE  
EST 185+



# Sexual Misconduct

## Introduction

The University is committed to fostering an atmosphere free from sexual harassment, sexual violence, and other sexual misconduct (all referred to in this policy as “sexual misconduct”). This commitment includes identifying problems that may lead to sexual misconduct, creating an atmosphere in which the entire University community is sensitive to preventing sexual misconduct and effectively responding when a student, visitor, guest, or program participant believes they may have been the victim of sexual misconduct. An important part of fostering an atmosphere free from sexual misconduct is stating clearly that retaliating (getting back) against a person who reports sexual misconduct or who is involved in an investigation or proceeding concerning sexual misconduct is prohibited. The University strongly encourages any student, visitor, guest, or program participant who feels he or she has been a victim of sexual misconduct to report the sexual misconduct. Included in this policy is specific information about reporting options.

The University strongly supports an individual’s desire for confidentiality in cases involving sexual misconduct. An individual has the option of requesting that a report of sexual misconduct be kept confidential, that his or her name not be disclosed to the other student, and that no investigation or disciplinary action be taken against the other student. In such cases, the University will make a careful assessment to determine if such requests can be honored while still providing a safe environment for all students and other members of the University community. Included in this policy is specific information about the levels of confidentiality provided by law.

Human sexuality involves our whole being as persons. It includes powerful emotions and extreme intimacy with profound psychological, physical, and spiritual implications. Ill-advised intimacy can leave one feeling guilty and lonely. In addition, sexually active individuals should be conscious of the threat of sexually transmitted diseases and should make themselves aware of the various ways to prevent transmission of sexually transmitted diseases.

It is the responsibility of all members of the University community to be familiar with this Sexual Misconduct Policy in order to determine appropriate or inappropriate sexual behavior and to engage in the appropriate processes for reporting and resolving a violation of this policy. This policy applies regardless of sexual orientation or gender identity. Questions about this policy may be directed to the Title IX coordinator, Office of the Dean of Students, Office of Safety and Security, Office of Counseling Services, Office of Human Resources, or the residence life staff.

## Important Definitions

### 1. Definition of Consent

Consent is the basis for an appropriate sexual encounter. Consent must be present before an individual initiates a sexual encounter or moves on to a different kind of sexual activity during a sexual encounter. Individuals should speak openly and clearly to each other about their expectations and actions before engaging in sexual activity.

Consent is defined in this policy as the voluntary, unambiguous, and affirmative agreement to engage in a specific sexual activity during a sexual encounter. An individual who is asleep, or mentally or physically incapacitated, either because of the effects of alcohol or drugs, or for any other reason, is unable to give consent. In addition, an individual who participates in sexual activity because of force, the threat of force, duress, intimidation, or coercion is unable to give consent.

Consent may not be taken for granted because of the existence of a prior or current relationship or because of prior sexual activity.

Consent must take the form of clearly understandable words or actions. These words or actions must state the individual’s agreement to engage in a specific sexual activity. While an individual may consent to one level of sexual activity (e.g., kissing), consent must also be present to take this sexual activity to a more intimate level (e.g., the touching or stroking of a partner’s genitals).

Consent should not be implied because of the way a person dresses, because someone has agreed to go on a date, or because of an invitation to return to a residence hall or fraternity/sorority sleeping room.

Alcohol may impair an individual’s ability to make voluntary and clearly understood choices. It is very important that before engaging in any form of sexual activity, a partner’s intoxication level be taken into account. It is always the responsibility of the person initiating the sexual activity to ensure consent has been effectively communicated, and the participating individual retains the ability to provide consent before and during the sexual activity. Engaging in sexual activity while under the influence of alcohol or with a partner who is under the influence of alcohol may lead to bad things happening: things that may ruin an individual’s college experience or career plans.

### 2. Definition of Complainant

Complainant is defined as a student, visitor, guest, or program participant who reports they have been the victim of sexual misconduct.

### 3. Definition of Respondent

The Respondent is defined as a student who is alleged by the Complainant to have committed an act or acts of sexual misconduct.

### 4. Definition of Sexual Misconduct

Sexual misconduct is a broad term that includes sexual violence, sexual harassment, creating a hostile environment, sexual exploitation, domestic violence, dating violence, stalking, retaliation, and intimidation. Sexual misconduct is of a nonconsensual nature if the Complainant objected or clearly attempted to object to the conduct, or if his or her capacity to consent was substantially impaired by reason of physical force, threat, or intimidation, lack of opportunity to object, physical or mental disability, drug or alcohol consumption, or other voluntary or involuntary cause.

### 5. Definition of Sexual Assault

Sexual assault refers to any actual, attempted, or threatened form of nonconsensual sexual intercourse or other sexual conduct of a forcible, threatening, or otherwise nonconsensual nature. This includes rape, attempted rape, deviant sexual conduct, sexual battery or forcible fondling, deviant sexual behavior, incest, and statutory rape.

### 6. Definition of Sexual Harassment

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment creates a hostile, intimidating, or offensive environment. It can include, but is not limited to, unwelcome sexual advances, requesting, offering, or suggesting a trade of sex for a desired result. Sexual harassment also includes verbal, nonverbal, or physical conduct of a sexual nature if the con-

## SEXUAL MISCONDUCT

duct is sufficiently severe, persistent, or pervasive to interfere with or limit a student or a member of the University communities' ability to participate in or benefit from the academic, educational, extra-curricular, athletic, or other programs of the University.

Some examples of sexual harassment include:

- Sexually explicit profanity
- Sexual humor or sexually suggestive language
- Unnecessary remarks about parts of the body
- Obscene gestures
- Cyberbullying that is based on gender or sexual activity
- Unwelcome touching
- Sexual assault or violence
- Inappropriate remarks about a person's gender or sexual orientation
- The display of sexual pictures or images
- Forced sexual activity
- The use of electronic media (like e-mail or text messaging) to send sexually charged words, images, or messages

All forms of sexual misconduct identified in this policy are also prohibited forms of sexual harassment.

#### 7. Definition of Sexual Exploitation

Sexual exploitation refers to any situation in which sexual advantage of another person is taken without that individual's consent. This includes voyeurism and recordings (photo, audio, or video) of sexual activity (sometime referred to as "revenge porn"), administering alcohol or drugs without consent, exposure of one's genitals, buttocks, or breasts, and providing opportunities for others to view consensual sexual activity without the knowledge and consent of all parties to the consensual sexual activity.

#### 8. Definition of Domestic Violence

Domestic violence is defined as student-on-student violence committed by a current or former spouse or intimate partner of the complainant, by a person with whom the complainant shares a child in common, by a person who is cohabitating with or has cohabitated with the complainant as a spouse, by a person similarly situated to a spouse of the complainant under the domestic or family violence laws of Indiana.

#### 9. Definition of Dating Violence

Dating violence is defined as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. The existence of such a relationship is determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition, dating violence would include, but would not be limited to, sexual or physical abuse or the threat of such abuse.

#### 10. Definition of Stalking

Stalking is defined as a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the complainant to feel terrorized, frightened, intimidated, or threatened. The term does not include statutorily or constitutionally protected activity.

#### 11. Definition of Intimidation

Intimidation occurs when a person communicates in any manner a threat to another person with the intent that the other person engage in sexual conduct against the other person's will.

#### 12. Definition of Retaliation

Retaliation occurs when an effort is made to get back at any person because he or she reports sexual misconduct or opposes sexual misconduct or who is involved in an investigation of reported sexual misconduct. Retaliation is also prohibited against any member of the investigative team, witnesses, or individuals involved with the investigation or adjudication of a report or complaint of sexual misconduct. Retaliation includes intimidating, threatening, coercing, or in any way discriminating against a person because of their complaint or involvement in the complaint process. The University will take prompt and appropriate action to investigate retaliation, and it will take strong responsive action against anyone who engages in retaliation. This prohibition against retaliation should be seriously considered by the respondent and the friends and family of the respondent.

#### 13. Definition and Identity of the Title IX Coordinator

Tracey Folden, assistant vice president for academic affairs, is responsible for overseeing Title IX compliance and she is the Title IX coordinator. Her office is located in Room 204 of Olmsted Hall. Her telephone number is 812-488-2509. Her e-mail address is tf91@evansville.edu. It is the responsibility of the Title IX coordinator to ensure that the University's Policy is followed with respect to reporting, investigating, and responding to allegations of sexual misconduct. The Title IX coordinator will enlist the assistance of other university employees to facilitate the appropriate response to any allegation of sexual misconduct. Questions regarding Title IX should be directed to Austin. In addition, questions regarding Title IX may also be addressed to the Office of Civil Rights, United States Department of Education, at 500 W. Madison Street, Suite 1427, Chicago, Illinois 60661.

#### 14. Definition of Responsible Employee

A responsible employee must report incidents of sexual misconduct to the Title IX coordinator or other appropriate school designee. This includes information about incidents a responsible employee knows or reasonably should have known about. For the purposes of this policy, a responsible employee is defined as a University employee who has the authority to redress sexual misconduct, who has the duty to report incidents of sexual misconduct or other student misconduct, or who a student could reasonably believe has this authority or duty. The following employees are considered responsible employees: **all full-time, part-time, visiting, and volunteer faculty, administrators, staff, coaches, and resident assistants.**

A responsible employee must report the incident, including all relevant details. This includes the names of the Respondent (if known), the name of the student, visitor, guest or program participant who experienced the sexual misconduct, other students involved in the alleged sexual misconduct, as well as relevant facts, including the date, time and location of the alleged misconduct to the Title IX coordinator, Michael Austin, executive vice president for academic affairs or his designee; the Office of Safety and Security; the Human Resources Department; the Dean of Students office; or the residence life staff. To the extent practicable, information reported to a responsible employee will be shared only with the university officials responsible for responding to the report.

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**Scope of Policy**

This policy applies to prohibited conduct both on campus and away from campus, regardless of where sexual misconduct takes place, if the conduct occurs in the context of a University-sponsored or sanctioned education program or activity. This policy also applies if the conduct has continuing effects on campus or in an off-campus education program or activity. This policy applies to all students regardless of sexual orientation or gender identity. If the University believes there is reasonable cause that prohibited conduct has occurred; the University reserves the right to initiate an investigation regardless of whether or not the case is reported to law enforcement agencies. The University may impose sanctions if the prohibited conduct occurs on University-owned or leased property, in other locations (such as off-campus houses), at University functions (including off-campus functions) or in connection with a University-sponsored organization, program, or activity if the conduct had continuing effects on campus or in an off-campus education program or activity. The University reserves the right to contact law enforcement authorities for action separate from or in addition to University disciplinary action.

**Scope of Confidentiality When Reporting Sexual Misconduct**

The University encourages all students who believe they have experienced some form of sexual misconduct (hereinafter called the "complainant") to talk to somebody about what happened. This allows the complainant to get the support they need and the University to respond appropriately. Different employees on campus have different abilities to maintain a victim's confidentiality.

A complainant has the following options to choose from when reporting sexual misconduct:

**Reporting Option One:****Professional and Pastoral Counselors**

The University's professional, licensed counselor(s) (including those who act in that role under the supervision of a licensed counselor) and pastoral counselors who provide mental-health counseling to members of the University community are not required to report **any** information about an incident to the Title IX coordinator without the complainant's permission. The following is the contact information for these individuals:

1. Sylvia Buck, LCSW, director of counseling services,  
University Counseling Center  
Room 200, Ridgway University Center  
812-488-2663, sb79@evansville.edu  
  
Karen Stenstrom, LCSW, counselor,  
University Counseling Center  
Room 200, Ridgway University Center  
812-488-2663, ks96@evansville.edu
2. Reverend Tamara Gieselman, University Chaplain,  
Neu Chapel  
812-488-2240, tg85@evansville.edu

While these professional counselors may maintain a complainant's confidentiality as it relates to the University, they are required by Indiana law to report:

- a. If they believe there is imminent danger of self-harm.
- b. If there is reason to believe that child, elder, or dependent abuse has occurred.
- c. If the alleged sexual assault has occurred to an individual under the age of 18.

- d. If threats of violence toward another person have been expressed.
- e. If federal law enforcement officials request information under the United States Patriot Act.
- f. Under court order, subpoena, or as otherwise required by law.

**Reporting Option Two:****Non-Professional Counselors and University Health Center Employees**

Individuals who work or volunteer in the University's Crayton E. and Ellen Mann Health Center, including non-professional unlicensed counselors, front desk employees, and students who work in the health center, can generally talk to a victim without revealing to the University any personally identifying information about an incident. A complainant can seek assistance and support from these individuals without triggering a University investigation that could reveal the complainant's identity or that the complainant has disclosed the incident.

However, while maintaining a complainant's confidentiality, these individuals or their office will report the nature, date, time, and general location of an incident to the Title IX coordinator. This limited report – which includes no information that would directly or indirectly identify the complainant – helps keep the Title IX coordinator informed of the general extent and nature of sexual violence on and off campus so the coordinator can track patterns, evaluate the scope of the problem, and formulate appropriate campus-wide responses. Before reporting any information to the Title IX coordinator, these individuals will consult with the complainant to ensure that no personally identifying details are shared with the Title IX coordinator.

While these non-professional counselors, employees, and volunteers may maintain a victim's confidentiality as it relates to the University, they are required by Indiana law to report:

- a. If they believe there is imminent danger of self-harm.
- b. If there is reason to believe that child, elder, or dependent abuse has occurred.
- c. If the alleged sexual assault has occurred to an individual under the age of 18.
- d. If threats of violence toward another person have been expressed.
- e. If federal law enforcement officials request your information under the United States Patriot Act.
- f. Under court order, subpoena, or as otherwise required by law.

**Reporting Option Three:****Reporting to Responsible Employees**

A responsible employee is a University employee who has the authority to redress sexual misconduct, who has the duty to report incidents of sexual misconduct or other student misconduct, or who a student could reasonably believe has this authority or duty.

When a complainant tells a responsible employee about an incident of sexual misconduct, the University will take prompt and appropriate steps to investigate what happened and to resolve the matter promptly and equitably.

A responsible employee must report to the Title IX coordinator or his designee all relevant details about the alleged sexual misconduct that is provided by the complainant – including the name of the complainant and respondent, any witnesses, and other relevant facts, including the date, time, and specific location of the alleged misconduct. To the extent possible, information reported to a responsible employee will be shared only with people responsible for handling the University's response to a report of sexual misconduct.

## SEXUAL MISCONDUCT

The following employees (or categories of employees) are the University's responsible employees: **all full-time, part-time, visiting, and volunteer faculty, administrators, staff, coaches, and resident assistants (RAs)**. Contact information for these employees is found at the following link: [acelink.evansville.edu/directory](http://acelink.evansville.edu/directory).

Before a complainant reveals any information to a responsible employee, the employee will advise him or her of the employee's reporting obligations – and, if the complainant wants to maintain confidentiality, direct the complainant to the confidential resources described in Reporting Option One above.

If the complainant wants to tell the responsible employee what happened but also maintain confidentiality, the responsible employee will tell the victim that the University will consider the request, but cannot guarantee that the University will be able to honor it. In reporting the details of the incident to the Title IX coordinator, the responsible employee will also inform the Title IX coordinator of the complainant's request for confidentiality.

#### Reporting Option Four:

##### Reporting to Local Community Support Organizations

The complainant may wish to report sexual misconduct to either of the following local community support organizations:

Albion Fellows Bacon Center  
Domestic Violence Hotline: 812-422-5622  
Sexual Assault Hotline: 812-424-7273

Holly's House  
750 N. Park Drive  
Evansville, Indiana 47710  
812-437-7233

These organizations are not connected with or part of the University. The complainant should be sure to ask each organization about its policy concerning confidentiality and the provision of personally identifying information to law enforcement and other authorities before providing personally identifying information.

## How the University Will Evaluate a Request for Confidentiality

If a complainant discloses an incident to a responsible employee but wishes to maintain confidentiality or requests that no investigation into a particular incident be conducted or disciplinary action taken, the University must weigh that request against the University's obligation to provide a safe, non-discriminatory environment for all students and members of the University community, including the complainant. A complainant should understand that if they want to maintain confidentiality, the University will be unable to conduct an investigation into the particular incident or pursue disciplinary action against the respondent.

If the University honors the request for confidentiality, a complainant must understand that the University's ability to meaningfully investigate the incident and pursue disciplinary action against the respondent may be limited. Although perhaps rare, there are times when the University may not be able to honor a victim's request in order to provide a safe, non-discriminatory environment for all students and members of the University community.

The University has designated the following individual(s) to evaluate a request for confidentiality once a responsible employee is on notice of alleged sexual misconduct: Tracey Folden, assistant vice president for academic affairs and Title IX officer; Dana Clayton, vice president/dean of students; and Harold Matthews, director of safety and security.

When weighing a complainant's request for confidentiality or that no investigation or discipline be pursued, these individuals will consider a range of factors, including the following:

- a. whether there have been other sexual misconduct complaints about the same respondent;
- b. whether the respondent has a history of arrests or records from a prior school indicating a history of sexual misconduct;
- c. whether the respondent threatened further sexual misconduct against the victim or others;
- d. whether the sexual misconduct was committed by multiple respondents;
- e. whether the sexual misconduct was perpetrated with a weapon;
- f. whether the complainant is a minor;
- g. whether the University possesses other means to obtain relevant evidence of the sexual misconduct (e.g., security cameras or personnel, physical evidence);
- h. whether the complainant's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group.

The presence of one or more of these factors may lead the University to investigate and, if appropriate, pursue disciplinary action. If none of these factors are present, the University will more likely be able to respect the complainant's request for confidentiality.

If the University determines that it cannot maintain a complainant's confidentiality, the University will inform the complainant prior to starting an investigation and will, to the extent possible, only share information with people responsible for handling the University's response.

The University will also:

- a. assist the complainant in accessing other available sexual misconduct advocacy, academic support, counseling, health or mental health services, and legal assistance both on and off campus;
- b. consider other security and support, which may include issuing a no-contact order, helping arrange a change of living or working arrangements or class schedule (including for the respondent pending the outcome of an investigation) or making adjustments for completing assignments or tests; and
- c. tell the complainant about the right to report a crime to campus or local law enforcement agencies, and provide the complainant with assistance if he or she wishes to make such a report.

## General Provisions

**Rights of Alleged Student Perpetrators (Respondent) under the Family Education Rights and Privacy Act.** An alleged respondent has a right under the Family Educational Rights and Privacy Act ("FERPA") to request to inspect and review information about the Complainant's allegations if the information directly relates to the Respondent and the information is maintained by the University as an education record. In such a case, the University must either redact the Complainant's name and all identifying information before allowing the Respondent to inspect and review the sections of the complaint that relate to him or her, or must inform the Respondent of the specific information in the complaint that is about him or her. The University will make students, visitors, guests and program participants who file complaints aware of this right and explain how it might affect the University's ability to maintain complete confidentiality.

## SEXUAL MISCONDUCT

**Amnesty for Complainants and Witnesses of Sexual Misconduct.** Reporting sexual misconduct is important. The University recognizes that an individual who reports sexual misconduct may be engaged in under-age drinking or drug use **or other prohibited conduct** at or near the time of the incident complained of. To encourage reporting under these circumstances, the University will not take disciplinary action against a complainant or against witnesses for their personal use of alcohol or drugs or for other prohibited conduct at or near the time of the incident complained of if such violations do not or did not subject other people to harm or result in destruction of property.

**Public Awareness Events.** Students may disclose their experiences with sexual misconduct at public awareness events like “Take Back the Night” without triggering a reportable event to the University. However, when such events occur on campus or in the context of a University-sponsored or sanctioned off-campus program or activity, the University will provide information at such events, programs, or activities on Title IX and how to file a Title IX complaint with the University or with area law enforcement agencies.

**When a Complainant of Sexual Assault Confides in a Friend.** Many times, a complainant of sexual misconduct will confide in a friend that they believe they have been victimized. This is particularly true on a residential campus like the University of Evansville given the close-knit community of students. Students can provide direct support to a complainant by assisting them through the various steps listed under “What to do if you have been sexually assaulted.” Direct support may also be provided to the friend of the complainant from the University counseling office.

**Right to File Criminal Complaint.** You have the right to file a criminal complaint against the Respondent. You may do so before, during, or after the University’s internal investigation. You may file a criminal complaint and a Title IX with the University at the same time. The University is available to assist a student, visitor, guest or program participant who wishes to file such a complaint. In addition, the University will advise a student, visitor, guest, or program participant about his or her right to ask a court to issue a no contact order.

**Bystander Assistance.** Sometimes a student or other person (bystander) may be in a situation, particularly a social situation, where they observe sexual misconduct either taking place or likely to take place. If a bystander may do so safely and positively, they may be in a position to prevent instances of sexual misconduct or likely sexual misconduct. In such circumstances, a bystander should carefully evaluate the situation and if they feel it is safe to do so, lend assistance to the person who is or may be subjected to sexual misconduct. If a bystander does not believe assistance may be safely rendered, the bystander is strongly encouraged to contact the Office of Safety and Security 812-488-6911 or 812-488-2051 and/or local law enforcement at 911 as soon as possible.

**Title IX Statement.** The University of Evansville has obligations under federal law to comply with Title IX of the Education Amendments of 1972, which prohibits discrimination (including sexual harassment and sexual violence) based on sex in the University’s educational programs and activities. Title IX also prohibits retaliation for asserting or otherwise participating in claims of sex discrimination. The University has designated Title IX coordinators to coordinate its compliance with and response to inquiries concerning Title IX. A person may also file a complaint with the Department of Education’s Office for Civil Rights regarding an alleged violation of Title IX by visiting [www2.ed.gov/about/offices/list/ocr/complaintintro.html](http://www2.ed.gov/about/offices/list/ocr/complaintintro.html) or calling 800-421-3481.

**Clery Act Statement.** The University of Evansville has obligations under federal law to provide the Department of Education with information about crimes that take place on University property and in federally defined zones not on University property. Under most circumstances, reports of sexual misconduct are covered by the University’s Clery Act reporting obligations. If the University determines that a crime poses a serious and immediate threat to the University community, the Clery Act may require the Office of Safety and Security to issue a timely warning to the University community. Any such warning will not include personally identifiable information about the complainant.

**Violence Against Women Act Statement.** The University of Evansville has obligations under the Violence Against Women Act (VAWA). VAWA seeks to reduce domestic violence and improve the treatment of rape victims. VAWA extends protection to Native American women and members of the LGBTQ community.

## What to Do if You Have Been Sexually Assaulted

**Seek Refuge.** If you are assaulted, get to a safe place as soon as you can. The University has resources available to you for emotional and physical support. The Office of Safety and Security, 812-488-6911 or 812-488-2051, can provide assistance to you by telling you how you can reach a counselor, contact law enforcement authorities, obtain hospital transportation, and the like.

**Preserve Evidence.** Resist the urge to bathe, use the toilet, change clothing, or apply soaps or lotions. If you must change clothes, put them in a paper bag or wrap them in a clean sheet. Do not place these items in a plastic bag as the bag may distort evidence. It is also important not to disturb any evidence that may be present in the location where the offense occurred or destroy or delete any correspondence relative to the offense.

**Get medical attention as soon as possible.** It is important to seek medical attention in the case of sexual assault in order to check for injuries, effectively preserve evidence, and test for sexually transmitted diseases. You can contact the Office of Safety and Security 812-488-2051 for assistance. Medical attention can also be obtained directly from one of these locations:

Crayton E. and Ellen Mann Health Center	812-488-2033
St. Mary’s Hospital	812-485-4491
Deaconess Hospital	812-450-3405

**Personal Support.** A University counselor is available 24 hours a day to provide personal support and guidance after an assault. The office phone number is 812-488-2663. After normal business hours, you can reach the counselor on call by contacting the Office of Safety and Security 812-488-2051 and requesting a counselor.

## Investigation of Sexual Misconduct Investigations

The Title IX coordinator and investigators designated by the Title IX coordinator will promptly conduct an investigation of sexual misconduct. The University will treat all parties with appropriate respect. The University will not wait for the conclusion of a criminal investigation to begin its Title IX investigation. When appropriate, the University reserves the right to take interim measures to protect the complainant. The University will not permit retaliation against any party or participant in an investigation or hearing.

## SEXUAL MISCONDUCT

**Rights of Students**

When a student makes a complaint about sexual misconduct, or is accused of sexual misconduct, the following rights shall be respected as the University investigates and resolves the complaint:

1. The right to be informed of disciplinary procedures and the extent of all alleged violations that are noted in the investigative report.
2. The right to request that any Sexual Misconduct Hearing Board (as described in section D below) member be removed and replaced if there is evidence of a conflict of interest or demonstrated bias toward the complainant or Respondent. The Title IX coordinator will consider the request and make any necessary changes if deemed necessary.
3. The right to be present, if desired, for all testimony given and evidence presented before the Hearing Board.
4. The right to make an impact statement at a disciplinary hearing and to have that statement considered by the Hearing Board making its determination.
5. The right to appeal the disciplinary hearing outcome.
6. The right, subject to the law, not to have any personal information released by the University to the public without prior consent.
7. The right of the respondent to receive written notice at least 48 hours in advance of the Hearing Board meeting.
8. The right to consult with the student ombudsman.
9. While both parties may have an advisor of their choice, the advisor may not actively participate in the investigative or disciplinary process.

The University will strive to investigate a complaint about sexual misconduct, if appropriate, hold a hearing before a Sexual Misconduct Hearing Board (Hearing Board) and issue its post-hearing determination within a period of time no longer than 60 calendar days from the date of the complaint. This 60-day period does not include the time it takes to appeal an initial determination.

**Interim Measures**

Depending on the severity of the alleged sexual misconduct, the University may take interim measures before the completion of the investigation, hearing, and decision-making process. Such interim measures may include, but are not limited to:

1. A change in academic and extracurricular activity schedules so the complainant and respondent avoid contact.
2. A change in living and dining arrangements.
3. The offer of counseling to both the complainant and respondent.
4. Alternative testing arrangements, seeking incompletes, alternatives for course completion, and similar measures.
5. Increased monitoring, supervision, or security at locations or activities where the alleged misconduct occurred.
6. The opportunity to obtain health, mental health, academic support, and counseling services.

Pre-determination disciplinary or other action against a respondent will only be taken where, because of the severity and extent of the alleged conduct, such extraordinary action is appropriate.

**Administrative Hearing Before Dean of Students**

An administrative hearing may be conducted by the dean of students or her appointee in her absence. An administrative hearing is appropriate under certain limited circumstances such as where the respondent has accepted responsibility for the misconduct and the proposed sanctions, cases involving the violation of the sexual misconduct policy by a student organization, or cases where the

circumstances are extremely sensitive in nature and both the complainant and respondent voluntarily and without coercion, request the case not be heard by the Sexual Misconduct Hearing Board. Whether an administrative hearing is appropriate will be determined by the Title IX coordinator. Administrative action by the dean of students in an administrative hearing will conclude complaints of sexual misconduct without further hearing(s).

**Sexual Misconduct Hearing Board**

If the Title IX coordinator determines that, based on the outcome of the investigation, a hearing on the allegations should be held, the hearing will be conducted by the Sexual Misconduct Hearing Board.

Five faculty members and five administrators will be appointed by the president to serve as a pool of members for the Sexual Misconduct Hearing Board. From the pool of members, the dean of students will select a total of three individuals from this pool to serve on the Sexual Misconduct Hearing Board (Hearing Board). The "Preponderance of Evidence" standard, (i.e., "more likely than not") will be used by the Hearing Board. The Title IX coordinator will appoint one of these individuals to be presiding Hearing Board member. The dean of students will serve as an advisor to the Hearing Board. The presiding Hearing Board member will, in consultation with the dean of students or her designee, determine the outcome of all procedural and evidentiary issues raised at the hearing.

No individual may attend the Hearing Board hearing unless they serve as an advisor to the complainant or respondent or are otherwise permitted to do so by the presiding Hearing Board member. All Hearing Board witnesses will be separated, and no witnesses other than the complainant and respondent may be present in the hearing room during witness testimony.

The order of a Hearing Board hearing will be as follows:

1. The person initiating the complaint (complainant) will give his or her evidence of the sexual misconduct alleged. The complainant may choose not to participate in the hearing but does so with the understanding that it may impact the Hearing Board's decision regarding whether or not sexual misconduct occurred and what the appropriate actions should be if it did occur. In place of the complainant, this evidence may be provided by the party responsible for the investigation of the allegations, such as the director of security.
2. The Hearing Board will ask questions of the complainant or the party responsible for the investigation.
3. The respondent will give his or her evidence of the sexual misconduct alleged.
4. The Hearing Board will ask questions of the respondent.
5. Any witnesses for either party may appear individually before the Hearing Board. The number of such witnesses will be pre-determined by the dean of students in consultation with the Title IX coordinator. Both parties will have the opportunity to present the same number of witnesses.
6. While both parties will have the opportunity to question each witness, the respondent will not be permitted to question the complainant directly.
7. The complainant may make a closing statement, including an impact statement and a description of the desired outcome from the hearing.
8. The respondent may make a closing statement.
9. The parties will leave the hearing at the same time in such a way to avoid contact with each other.

## SEXUAL MISCONDUCT

**Hearing Procedures**

1. The University will determine if the complainant needs to be present for the entire Hearing Board hearing.
2. If the University allows one party to be present during the entire Hearing Board hearing, it will do so equally for both parties.
3. When requested, the University will make arrangements so that during the Hearing Board hearing the complainant and the respondent do not have to be present in the same room at the same time.
4. The University will not require the complainant to be present at the Hearing Board hearing for the hearing to take place.
5. The University will not permit the parties to cross-examine each other. However, each party may submit written questions to the Hearing Board, and the Hearing Board will ask these questions on their behalf. These questions must be submitted to the Title IX coordinator, for transmittal to the Hearing Board at least 24 hours before the time the hearing starts. The Hearing Board shall determine if each question submitted is appropriate to ask.
6. Questions about the complainant's sexual history with anyone other than the respondent will not be permitted.
7. The University will allow both parties to be accompanied to any University disciplinary proceedings and any related meetings by the advisor of their choice.

**Notice of Outcome of Hearing Board Hearing**

Both parties will be notified concurrently in writing (sent by e-mail and first class mail) about the outcome of the complaint and appeal rights. The notification to the complainant, the University will provide: (i) a conclusion as to whether or not the alleged conduct occurred; (ii) any individual remedies provided to the complainant; (iii) any sanctions imposed on the respondent that directly relate to the complainant, and other steps the University takes or has taken to eliminate a hostile environment, if the University finds one to exist and the steps taken and to be taken to eliminate the hostile environment.

**Determination and Possible Sanctions**

At the conclusion of the hearing, the Hearing Board will adjourn to evaluate the record of the proceedings. Thereafter the Hearing Board will render its written decision on the complainant's complaint. As a result, the Hearing Board may either dismiss the complaint without further action or recommend one or more of the following sanctions:

1. Warning. The respondent is warned that his or her behavior is unacceptable to the University community. The respondent may also be warned that further violations will result in more severe disciplinary action.
2. Restitution. The respondent may be assessed charges for any damages or losses that may have resulted from the sexual misconduct.
3. Fines. The respondent may be assessed fines as appropriate in addition to charges for restitution.
4. Disciplinary Probation. Disciplinary probation may be accompanied by additional sanctions or by special conditions including, but not limited to, required counseling.
5. Counseling. The respondent may be required to attend counseling.
6. Restricted access on campus, at University events, University housing, etc.

7. Restricted communication with other party or witnesses associated with the case.
8. Suspension. The Hearing Board will determine the appropriate length of time for the suspension.
9. Expulsion. Permanent separation of the respondent from the University and the University community.

The Hearing Board's written decision will be sent by e-mail and first class mail concurrently to the complainant and the respondent.

**Appeals from Determination of Hearing Board**

Following the determination of the Hearing Board, both parties have the right to appeal the determination, but only for the following reasons:

1. There is evidence that the hearing procedures outlined in the Sexual Misconduct Policy were not adequately followed.
2. There is new evidence that will materially impact the Hearing Board's decision, and this evidence was not presented at the Hearing Board hearing for good cause shown as determined by the Title IX coordinator.
3. The sanctions imposed by the Hearing Board are believed to be either too severe or too lenient for the violation that the person was found to be responsible.

A request for an appeal must be made in writing and submitted by e-mail to the Title IX coordinator (tf91@evansville.edu) within five (5) business days (Monday – Friday) after the date the Hearing Board's written decision is received by the appealing party. The Title IX coordinator will determine if an appeal may be taken. If a decision is made to hear the appeal, the non-requesting party will receive a copy of the appeal letter and notification that the appeal has been granted.

For an appeal hearing, the following process will followed:

The Sexual Misconduct Appeals Hearing Board will comprise a total of three faculty members and administrators, selected by the dean of students from the pool of Hearing Board members. None of the Appeals Board members may have served on the original hearing board. The appeals board will make every effort to decide each appeal as quickly as possible, preferably within two weeks of the time the request for appeal was granted by the Title IX coordinator. The sanctions from the original hearing will be upheld, if applicable, until the appeal is heard.

The Appeals Board will be provided copies of all evidence received by the Hearing Board, including a transcript of the initial hearing. The Hearing Board will consider new evidence if permitted by the Title IX coordinator.

The Appeals Board will meet, with all members present to review the transcript of the Hearing Board hearing and all evidence submitted to and accepted by the Hearing Board. After considering this material, the Appeals Board may:

1. Affirm the findings and sanctions determined by the Hearing Board;
2. Affirm the findings but adjust the severity of the sanction to a greater or lesser degree;
3. Reverse the finding and as such make a determination that, based on the "preponderance of evidence" standard, there was insufficient evidence to find the respondent committed the offense(s) complained of;
4. Reverse the Hearing Board's decision and order a new hearing.

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The Appeals Board's written decision will be sent by e-mail and first class mail to both parties concurrently. No further appeal may be taken from a decision of the Appeals Hearing Board.

The University reserves the right to modify the hearing and appeal procedures to provide for what in its sole opinion, is equitable treatment of the complainant and respondent.

*This policy was drafted upon review of published sexual misconduct policies and guidelines from Depauw University, Northwestern University, Texas Women's University, Washington University, Colorado State University Pueblo, Notalone.gov, ATIXA, Indiana Criminal Code, and the Department of Education.*



# Student Handbook 2017-2018



UNIVERSITY OF  
EVANSVILLE



# Sexual Misconduct

## Introduction

The University is committed to fostering an atmosphere free from sexual harassment, sexual violence, gender-based harassment, and other sexual misconduct (all referred to in this policy as “sexual misconduct”) and to creating an inclusive campus for students regardless of their sex, sexual orientation, or gender identity. These commitments include identifying problems that may lead to sexual misconduct, creating an atmosphere in which the entire University community is sensitive to preventing sexual misconduct and effectively responding when a student, visitor, guest, or program participant believes they may have been the victim of sexual misconduct. An important part of fostering an atmosphere free from sexual misconduct is stating clearly that retaliating [getting back] against a person who reports sexual misconduct or who is involved in an investigation or proceeding concerning sexual misconduct is prohibited. The University strongly encourages any student, visitor, guest or program participant who feels he or she has been a victim of sexual misconduct to report the sexual misconduct. Included in this policy is specific information about reporting options.

The University strongly supports an individual’s desire for confidentiality in cases involving sexual misconduct. An individual has the option of requesting that a report of sexual misconduct be kept confidential, that his or her name not be disclosed to the other student, and that no investigation or disciplinary action be taken against the other student. In such cases, the University will make a careful assessment to determine if such requests can be honored while still providing a safe environment for all students and other members of the University community. Included in this policy is specific information about the levels of confidentiality provided by law.

Human sexuality involves our whole being as persons. It includes powerful emotions and extreme intimacy with profound psychological, physical, and spiritual implications. Ill-advised intimacy can leave one feeling guilty and lonely. In addition, sexually active individuals should be conscious of the threat of sexually transmitted diseases and should make themselves aware of the various ways to prevent transmission of sexually transmitted diseases.

It is the responsibility of all members of the University community to be familiar with this Sexual Misconduct Policy in order to determine appropriate or inappropriate sexual behavior and to engage in the appropriate processes for reporting and resolving a violation of this policy. This policy applies regardless of sexual orientation or gender identity. Questions about this policy may be directed to the Title IX Director, the Office of the Dean of Students or Office of Counseling Services.

## Important Definitions

### 1. Consent: Definition of Consent

Consent is the basis for an appropriate sexual encounter. Consent must be present before an individual initiates a sexual encounter or moves on to a different kind of sexual activity during a sexual encounter. Individuals should speak openly and clearly to each other about their expectations and actions before engaging in sexual activity.

Consent is defined in this policy as the voluntary, unambiguous and affirmative agreement to engage in a specific sexual activity during a sexual encounter. An individual who is asleep, or mentally or physically incapacitated, either because of the effects of alcohol or drugs, or for any other reason, is unable to give consent. In addition, an individual who par-

ticipates in sexual activity because of force, the threat of force, duress, intimidation, or coercion is unable to give consent.

Consent may not be taken for granted because of the existence of a prior or current relationship or because of prior sexual activity.

Consent must take the form of clearly understandable words or actions. These words or actions must state the individual’s agreement to engage in a specific sexual activity. While an individual may consent to one level of sexual activity, like kissing – consent must also be present to take this sexual activity to a more intimate level – for example, the touching or stroking of a partner’s genitals.

Consent should not be implied because of the way a person dresses, because someone has agreed to go on a date or because of an invitation to return to a dorm or fraternity/sorority sleeping room.

Alcohol may impair an individual’s ability to make voluntary and clearly understood choices. It is very important that before engaging in any form of sexual activity a partner’s intoxication level be taken into account. It is always the responsibility of the person initiating the sexual activity to ensure consent has been effectively communicated and the participating individual retains the ability to provide consent before and during the sexual activity. Engaging in sexual activity while under the influence of alcohol or with a partner who is under the influence of alcohol may lead to bad things happening: things that may ruin your college experience or career plans.

### 2. Reporting Party: Definition of Reporting Party

A reporting party is a person who reports an incident of sexual misconduct to a responsible employee. A responsible employee who reports any incident of sexual misconduct is both a reporting party and a responsible employee. If the reporting party is the same person who reports they have been the victim of sexual misconduct they will then be referred to as the Complainant (see below).

### 3. Complainant: Definition of Complainant

The Complainant is defined as a student, visitor, guest or program participant who reports they have been the victim of sexual misconduct.

### 4. Respondent: Definition of Respondent

The Respondent is defined as a student who is alleged by the Complainant to have committed an act or acts of sexual misconduct.

### 5. Sex and Gender: Definitions of Sex and Gender

For the purpose of this policy, “sex,” when applied to an individual, refers to the biological and physiological characteristics that define men and women. Sex is assigned at birth and recorded on a birth certificate and can be re-assigned and recorded on an amended birth certificate. “Gender” is a more fluid concept. It includes the cultural roles, attitudes, and expectations that a society associates with the different sexes. It also includes an individual’s internal sense of how they identify within those roles and expectations and their individual decisions about how to express that identity. An individual’s gender identity may be the same or different from the same person’s sex assigned at birth.

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**6. Sexual Misconduct: Definition of Sexual Misconduct**

Sexual misconduct is a broad term that includes sexual violence, sexual harassment, creating a hostile environment, sexual exploitation, domestic violence, dating violence, stalking, retaliation, and intimidation. Sexual misconduct is of a nonconsensual nature if the Complainant objected or clearly attempted to object to the conduct, or if his or her capacity to consent was substantially impaired by reason of physical force, threat or intimidation, lack of opportunity to object, physical or mental disability, drug or alcohol consumption, or other voluntary or involuntary cause.

**7. Sexual Assault: Definition of Sexual Assault**

Sexual assault refers to any actual, attempted, or threatened form of nonconsensual sexual intercourse or other sexual conduct of a forcible, threatening, or otherwise nonconsensual nature. This includes rape, attempted rape, deviant sexual conduct, sexual battery or forcible fondling, deviant sexual behavior, incest and statutory rape.

**8. Sexual Harassment and Gender-based Harassment: Definitions of Sexual Harassment and Gender-based Harassment**

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment creates a hostile, intimidating, or offensive environment. It can include, but is not limited to, unwelcome sexual advances, requesting, offering, or suggesting a trade of sex for a desired result. Sexual harassment also includes verbal, nonverbal, or physical conduct of a sexual nature if the conduct is sufficiently severe, persistent, or pervasive to interfere with or limit a student or a member of the University communities' ability to participate in or benefit from the academic, educational, extra-curricular, athletic, or other programs of the University. Gender-based harassment includes acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, gender, gender identity, or gender expression, whether or not the conduct is sexual in nature. Both sexual harassment and gender-based harassment can occur in any communication format, including, but not limited to face-to-face, telephone, written, and electronic interactions.

Some examples of sexual or gender-based harassment include:

- Sexually explicit profanity
- Sexual humor or sexually suggestive language
- Unnecessary remarks about parts of the body
- Obscene gestures
- Cyberbullying that is based on gender or sexual activity
- Unwelcome touching
- Sexual assault or violence
- Inappropriate remarks about a person's sex, gender identity or sexual orientation
- The display of sexual pictures or images
- Forced sexual activity
- The use of electronic media (like e-mail or text messaging) to send sexually charged words, images, or messages

All forms of sexual misconduct identified in this policy are also prohibited forms of sexual harassment.

**9. Sexual Exploitation: Definition of Sexual Exploitation**

Sexual exploitation refers to any situation in which sexual advantage of another person is taken without that individual's consent. This includes voyeurism and recordings (photo,

audio, or video) of sexual activity (sometime referred to as "revenge porn"), administering alcohol or drugs without consent, exposure of one's genitals, buttocks, or breasts, and providing opportunities for others to view consensual sexual activity without the knowledge and consent of all parties to the consensual sexual activity.

**10. Domestic Violence: Definition of Domestic Violence**

Domestic violence is defined as student-on-student violence committed by a current or former spouse or intimate partner of the Complainant, by a person with whom the Complainant shares a child in common, by a person who is cohabitating with or has cohabitated with the Complainant as a spouse, by a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Indiana.

**11. Dating Violence: Definition of Dating Violence**

Dating violence is defined as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship is determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition, dating violence would include, but would not be limited to, sexual or physical abuse or the threat of such abuse.

**12. Stalking: Definition of Stalking**

Stalking is defined as a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the Complainant to feel terrorized, frightened, intimidated, or threatened. The term does not include statutorily or constitutionally protected activity.

**13. Intimidation: Definition of Intimidation**

Intimidation occurs when a person communicates in any manner a threat to another person with the intent that the other person engage in sexual conduct against the other person's will.

**14. Retaliation: Definition of Retaliation**

Retaliation occurs when an effort is made to get back at any person because he or she reports sexual misconduct or opposes sexual misconduct or who is involved in an investigation of reported sexual misconduct. Retaliation is also prohibited against any member of the investigative team, witnesses, or individuals involved with the investigation or adjudication of a report or complaint of sexual misconduct. Retaliation includes intimidating, threatening, coercing, or in any way discriminating against a person because of their complaint or involvement in the complaint process. The University will take prompt and appropriate action to investigate retaliation and it will take strong responsive action against anyone who engages in retaliation. This prohibition against retaliation covers a wide range of participants and interested parties including, but not limited to, the Complainant, Respondent and the family and friends of the Complainant and Respondent.

**15. Title IX Director: Definition and Identity of the Title IX Director**  
Title IX of the 1972 Education Amendments forbids institutions receiving federal funds from discriminating against students on the basis of sex or gender identity. All forms of

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sexual misconduct described in this policy are prohibited by Title IX, and the University has the responsibility to investigate all Title IX complaints. Tracey Folden, assistant vice president for academic affairs, is responsible for overseeing Title IX. Folden's office is located in Room 204 of Olmsted Hall. Her telephone number is 812-488-2509. Her e-mail address is [tf91@evansville.edu](mailto:tf91@evansville.edu). It is the responsibility of the Title IX Director to ensure that the University's Policy is followed with respect to reporting, investigating, and responding to allegations of sexual misconduct. The Title IX Director will enlist the assistance of other University employees to facilitate the appropriate response to any allegation of sexual misconduct. Questions regarding Title IX should be directed to Folden. In addition, questions regarding Title IX may also be addressed to the Office of Civil Rights, United States Department of Education, at 500 W. Madison Street, Suite 1427, Chicago, Illinois 60661.

#### 16. Definition of Responsible Employee

A "responsible employee" must report incidents of sexual misconduct to the Title IX Director or other appropriate school designee. This includes information about incidents a responsible employee knows or reasonably should have known about. For the purposes of this policy, a responsible employee is defined as a University employee who has the authority to redress sexual misconduct, who has the duty to report incidents of sexual misconduct or other student misconduct, or who a student could reasonably believe has this authority or duty. The following employees are considered responsible employees: **all full-time, part-time, visiting, and volunteer faculty, administrators, staff, coaches, and resident assistants.**

A responsible employee must report the incident, including all relevant details. This includes the names of the Respondent (if known), the name of the student, visitor, guest or program participant who experienced the sexual misconduct, other students involved in the alleged sexual misconduct, as well as relevant facts, including the date, time and location of the alleged misconduct to the Title IX Director, Tracey Folden, Assistant Vice President for Academic Affairs; the Human Resources Department; the Dean of Students office; the Office of Residence Life; or the Office of Safety and Security. To the extent practicable, information reported to a responsible employee will be shared only with the University officials responsible for responding to the report.

### Scope of Policy

This policy applies to prohibited conduct both on campus and away from campus, regardless of where sexual misconduct takes place, if the conduct occurs in the context of a University sponsored or sanctioned education program or activity. This policy also applies if the conduct has continuing effects on campus or in an off-campus education program or activity. This policy applies to all students regardless of sexual orientation or gender identity. If the University believes there is reasonable cause that prohibited conduct has occurred; the University reserves the right to initiate an investigation regardless of whether or not the case is reported to law enforcement agencies. The University may impose sanctions if the prohibited conduct occurs on University owned or leased property, in other locations (such as off-campus houses), at University functions (including off-campus functions) or in connection with a University-sponsored organization, program, or activity if the conduct had continuing effects on campus or in an off campus

education program or activity.

The University reserves the right to contact law enforcement authorities for action separate from or in addition to University disciplinary action.

### Scope of Confidentiality When Reporting Sexual Misconduct

The University encourages all students who believe they have experienced some form of sexual misconduct [hereinafter called the "Complainant"] to talk to somebody about what happened - so they can get the support they need and the University can respond appropriately. Different employees on campus have different abilities to maintain a Complainant's confidentiality.

A student who believes they have experienced sexual misconduct (Complainant) has the following options to choose from when reporting sexual misconduct:

#### Reporting Option One:

##### Professional and Pastoral Counselors

The University's professional, licensed counselor(s) [including those who act in that role under the supervision of a licensed counselor] and pastoral counselors who provide mental-health counseling to members of the University community are not required to report *any* information about an incident to the Title IX Director without a Complainant's permission. The following is the contact information for these individuals:

1. Sylvia Buck, LCSW, *director of counseling services*  
University Counseling Center  
Room 200, Ridgway University Center  
812-488-2663, [sb79@evansville.edu](mailto:sb79@evansville.edu)
- Karen Stenstrom, LCSW, *counselor*  
University Counseling Center  
Room 200, Ridgway University Center  
812-488-2663, [ks96@evansville.edu](mailto:ks96@evansville.edu)
- Liz McCormick, LSW, *Counselor*  
University Counseling Center  
Room 200, Ridgway University Center  
812-488-2663, [em232@evansville.edu](mailto:em232@evansville.edu)
2. Reverend Tamara Gieselman, University Chaplain,  
Neu Chapel  
812-488-2240, [tg85@evansville.edu](mailto:tg85@evansville.edu)

While these professional counselors may maintain a Complainant's confidentiality as it relates to the University, they are required by Indiana law to report:

- a. If they believe there is imminent danger of self-harm.
- b. If there is reason to believe that child, elder, or dependent abuse has occurred.
- c. If you report being sexually assaulted and are under the age of 18.
- d. If you express threats of violence towards another person.
- e. If federal law enforcement officials request your information under the United States Patriot Act.
- f. Under court order, subpoena or as otherwise required by law.

#### Reporting Option Two:

##### Non-Professional Counselors and University Health Center Employees

Individuals who work or volunteer in the University's health center, including non-professional unlicensed counselors, front

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desk employees and students who work in the health center, can generally talk to a Complainant without revealing to the University any personally identifying information about an incident. A Complainant can seek assistance and support from these individuals without triggering a University investigation that could reveal the Complainant's identity or that the Complainant has disclosed the incident.

However, while maintaining a Complainant's confidentiality, these individuals or their office will report the nature, date, time, and general location of an incident to the Title IX Director. This limited report – which includes no information that would directly or indirectly identify the Complainant – helps keep the Title IX Director informed of the general extent and nature of sexual violence on and off campus so the coordinator can track patterns, evaluate the scope of the problem, and formulate appropriate campus-wide responses. Before reporting any information to the Title IX Director, these individuals will consult with the Complainant to ensure that no personally identifying details are shared with the Title IX Director.

While these non-professional counselors, employees and volunteers may maintain a Complainant's confidentiality as it relates to the University, they are required by Indiana law to report:

- a. If they believe you are in imminent danger of self-harm.
- b. If there is reason to believe that child, elder, or dependent abuse has occurred.
- c. If you report being sexually assaulted and are under the age of 18.
- d. If you express threats of violence towards another person.
- e. If federal law enforcement officials request your information under the United States Patriot Act.
- f. Under court order, subpoena or as otherwise required by law.

#### Reporting Option Three:

##### Reporting to “Responsible Employees” at the University

A responsible employee is a University employee who has the authority to redress sexual misconduct, who has the duty to report incidents of sexual misconduct or other student misconduct, or who a student could reasonably believe has this authority or duty.

When a Complainant tells a responsible employee about an incident of sexual misconduct, the University will take prompt and appropriate steps to investigate what happened and to resolve the matter promptly and equitably.

A responsible employee must report to the Title IX Director or his designee all relevant details about the alleged sexual misconduct that is provided by the Complainant – including the name of the Complainant and Respondent, any witnesses, and other relevant facts, including the date, time and specific location of the alleged misconduct. To the extent possible, information reported to a responsible employee will be shared only with people responsible for handling the University's response to a report of sexual misconduct.

The following employees (or categories of employees) are the University's responsible employees: **all full-time, part-time, visiting and volunteer faculty, administrators, staff, coaches, and resident assistants (“RAs”)**. Contact information for these employees is found at the following link: <https://acelink.evansville.edu/Directory>.

Before a Complainant reveals any information to a responsible employee, the employee will advise him or her of the employee's reporting obligations – and, if the Complainant wants to maintain confidentiality, direct the Complainant to the confidential resources described in Reporting Option One above.

If the Complainant wants to tell the responsible employee what

happened but also maintain confidentiality, the responsible employee will tell the Complainant that the University will consider the request, but cannot guarantee that the University will be able to honor it. In reporting the details of the incident to the Title IX Director, the responsible employee will also inform the Title IX Director of the Complainant's request for confidentiality.

#### Reporting Option Four:

##### Reporting to Law Enforcement

The Complainant has the right to choose to report their complaint to law enforcement at any time throughout the sexual misconduct investigation or hearing process. The University disciplinary process is separate from the legal process.

If you wish to contact local law enforcement directly you may call the

**Evansville Police Department**  
at **812-436-7896** or **911**.

The University will assist a Complainant in contacting law enforcement or the Complainant may contact law enforcement directly.

#### Reporting Option Five:

##### Reporting Anonymously to Local Law Enforcement

The Complainant has the right to make an anonymous report to local law enforcement by contacting:

WE TIP Crime Hotline  
1-800-78-CRIME  
1-800-782-7463.

The University will assist a Complainant in contacting WE TIP or the Complainant may contact WE TIP directly.

#### Reporting Option Six:

##### Reporting to Local Community Support Organizations

The Complainant may wish to report sexual misconduct to either of the following local community support organizations:

Albion Fellows Bacon Center  
Domestic Violence Hotline: 812-422-5622  
Sexual Assault Hotline: 812-424-7273

Holly's House  
750 N. Park Drive  
Evansville, Indiana 47710  
812-437-7233

These organizations are not connected with or part of the University. The Complainant should be sure to ask each organization about its policy concerning confidentiality and the provision of personally identifying information to law enforcement and other authorities before providing personally identifying information.

## How the University Will Evaluate a Request for Confidentiality

If a Complainant discloses an incident to a responsible employee but wishes to maintain confidentiality or requests that no investigation into a particular incident be conducted or disciplinary action taken, the University must weigh that request against the University's obligation to provide a safe, non-discriminatory environment for all students and member of the University community, including the Complainant. A Complainant should understand that, if they want to maintain confidentiality, the University will be unable to conduct a meaningful investigation into the particular incident or pursue disciplinary action against the Respondent.

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If the University honors the request for confidentiality, a Complainant must understand that the University's ability to meaningfully investigate the incident and pursue disciplinary action against the Respondent may be limited. Although perhaps rare, there are times when the University may not be able to honor a Complainant's request in order to provide a safe, non-discriminatory environment for all students and members of the University community.

The Title IX Director, the Executive Vice President of Academic Affairs, the Assistant Vice President of Students Affairs and the Director-Office of Safety and Security, will evaluate all requests for confidentiality once the Title IX Director's Office is put on notice of alleged sexual misconduct:

When weighing a Complainant's request for confidentiality or that no investigation or discipline be pursued, a range of factors will be considered, including the following:

- a. whether there have been other sexual misconduct complaints about the same Respondent;
- b. whether the Respondent has a history of arrests or records from a prior school indicating a history of sexual misconduct;
- c. whether the Respondent threatened further sexual misconduct against the Complainant or others;
- d. whether the sexual misconduct was committed by multiple Respondents;
- e. whether the sexual misconduct was perpetrated with a weapon;
- f. whether the Complainant is a minor;
- g. whether the University possesses other means to obtain relevant evidence of the sexual misconduct (e.g., security cameras or personnel, physical evidence);
- h. whether the Complainant's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group.

The presence of one or more of these factors may impact the scope of the University's investigation as well as the University's determination concerning confidentiality. If none of these factors are present, the University will more likely be able to respect the Complainant's request for confidentiality.

If the University determines that it cannot maintain a Complainant's confidentiality, the University will inform the Complainant prior to identifying the Complainant's name to the Respondent and will, to the extent possible, only share information with people responsible for handling the University's response.

The University will also:

- a. assist the Complainant in accessing other available sexual misconduct victim advocacy organizations, academic support, counseling, health or mental health services, and legal assistance both on and off campus;
- b. consider other security and support, which may include issuing a no-contact order, helping arrange a change of living or working arrangements or class schedule (including for the Respondent pending the outcome of an investigation) or making adjustments for completing assignments or tests; and
- c. tell the Complainant about the right to report a crime to campus or local law enforcement agencies, and provide the Complainant with assistance if the he or she wishes to make such a report

## General Provisions

**Right to File Criminal Complaint.** Students have the unrestricted right to file a criminal complaint against the Respondent. This

may be done before, during or after the University's internal investigation. A criminal complaint made to area law enforcement and a Title IX complaint made to the University can be filed at the same time. The University is available to assist a student, visitor, guest or program participant who wishes to file a criminal complaint. In addition, the University will advise a student, visitor, guest or program participant about his or her right to ask a court to issue a no contact order.

**Rights of Alleged Student Perpetrators (Respondent) under the Family Education Rights and Privacy Act.** An alleged Respondent has a right under the Family Educational Rights and Privacy Act ("FERPA") to request to inspect and review information about the Complainant's allegations if the information directly relates to the Respondent and the information is maintained by the University as an education record. In such a case, the University must either redact the Complainant's name and all identifying information before allowing the Respondent to inspect and review the sections of the complaint that relate to him or her, or must inform the Respondent of the specific information in the complaint that is about him or her. The University will make students, visitors, guests and program participants who file complaints aware of this right and explain how it might affect the University's ability to maintain complete confidentiality.

**Amnesty for Complainants and Witnesses of Sexual Misconduct.** Reporting sexual misconduct is important. The University recognizes that an individual who reports sexual misconduct may be engaged in under-age drinking or drug use *or other prohibited conduct* at or near the time of the incident complained of. To encourage reporting under these circumstances, the University will not take disciplinary action against a Complainant or against witnesses for their personal use of alcohol or drugs or for other prohibited conduct at or near the time of the incident complained of if such violations do not or did not subject other people to harm or result in destruction of property.

**Public Awareness Events.** Students may disclose their experiences with sexual misconduct at public awareness events like "Take Back the Night" without triggering a reportable event to the University. However, when such events occur on campus or in the context of a University sponsored or sanctioned off-campus program or activity, the University will provide information at such event, programs or activities on Title IX and how to file a Title IX complaint with the University or with area law enforcement agencies.

**When a Complainant confides in a Friend.** Many times, a Complainant of sexual misconduct will confide in a friend that they believe they have been victimized. This is particularly true on a residential campus like the University of Evansville given the close-knit community of students. Students can provide direct support to a Complainant by assisting them through the various steps listed in the "**What to Do if You Have Been Sexually Assaulted**" section of this handbook. Direct support may also be provided to the friend of the Complainant from the University Counseling office.

**Bystander Assistance.** Sometime a student or other person (a "Bystander") may be in a situation, particularly a social situation, where they observe sexual misconduct either taking place or likely to take place. If a Bystander may do so safely and positively they may be in a position to prevent instances of sexual misconduct or likely sexual misconduct. In such circumstances, a Bystander should carefully evaluate the situation and if they feel it is safe to do so, lend assistance to the person who is or may be subjected to sexual misconduct. If a Bystander does not believe assistance may be safely rendered, the Bystander is strongly encouraged to contact the Office of Safety and Security (812) 488-6911 or (812) 488-

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2500 and/or local law enforcement at 911 as soon as possible. An anonymous report can also be made by calling the WeTip hotline at 1-800-78-CRIME (1-800-782-7463)

**Title IX Statement.** The University of Evansville has obligations under federal law to comply with Title IX of the Education Amendments of 1972, which prohibits discrimination (including sexual harassment and sexual violence) based on sex in the University's educational programs and activities. Title IX also prohibits retaliation for asserting or otherwise participating in claims of sex discrimination. The University has designated Title IX Directors to coordinate its compliance with and response to inquiries concerning Title IX. A person may also file a complaint with the Department of Education's Office for Civil Rights regarding an alleged violation of Title IX by visiting [www2.ed.gov/about/offices/list/ocr/complaintintro.html](http://www2.ed.gov/about/offices/list/ocr/complaintintro.html) or calling 1-800-421-3481.

**Clery Act Statement.** The University of Evansville has obligations under federal law to provide the Department of Education with information about crimes that take place on University property and in federally defined zones not on University property. Under most circumstances, reports of sexual misconduct are covered by the University's Clery Act reporting obligations. If the University determines that a crime poses a serious and immediate threat to the University community, the Clery Act may require the Campus Security Department to issue a timely warning to the University community. Any such warning will not include personally identifiable information about the Complainant.

**Violence Against Women Act Statement.** The University of Evansville has obligations under the Violence Against Women Act ("VAWA"). VAWA seeks to reduce domestic violence and improve the treatment of rape victims. VAWA extends protection to Native American women and members of the LGBTQ community.

## What to Do if You Have Been Sexually Assaulted

**Seek Refuge.** If you are assaulted, get to a safe place as soon as you can. The University has resources available to you for emotional and physical support. The Office of Safety and Security, 812-488-6911 or 812-488-2500, can provide assistance to you by telling you how you can reach a counselor, contact law enforcement authorities, obtain hospital transportation and the like.

**Right to File and Anonymous Crime Report.** An anonymous report can also be made by calling the WeTip hotline at 1-800-78-CRIME (1-800-782-7463)

**Preserve Evidence.** Resist the urge to bathe, use the toilet, change clothing or apply soaps or lotions. If you must change clothes, put them in a paper bag or wrap them in a clean sheet. Do not place these items in a plastic bag as the bag may distort evidence. It is also important not to disturb any evidence that may be present in the location where the offense occurred or destroy or delete any correspondence relative to the offense.

**Get medical attention as soon as possible.** It is important to seek medical attention in the case of sexual assault in order to check for injuries, effectively preserve evidence, and test for sexually transmitted diseases. Medical attention can also be obtained directly from one of these locations:

Crayton E. and Ellen Mann Health Center	812-488-2033
St. Mary's Hospital	812-485-4491
Deaconess Hospital	812-450-3405

**Personal Support.** A University counselor is available 24 hours a day to provide personal support and guidance after an assault. The

office phone number is 812-488-2663. After normal business hours, you can reach the counselor on call by contacting the Office of Safety and Security (812) 488-2051 and requesting a counselor.

## Rights of Students

When a student makes a complaint about sexual misconduct, or is accused of sexual misconduct, the following rights shall be respected as the University investigates and resolves the complaint:

1. The right to be informed of disciplinary procedures and the extent of all alleged violations that are noted in the investigative report.
2. The right to request that any Sexual Misconduct Hearing Board (as described in section E. below) member be removed and replaced if there is evidence of a conflict of interest or demonstrated bias toward the Complainant or Respondent. The Title IX Director will consider the request and make any changes deemed necessary.
3. The right to be present, if desired, for all testimony given and evidence presented before the Hearing Board.
4. The right to make an impact statement at a disciplinary hearing and to have that statement considered by the Hearing Board making its determination.
5. The right to appeal the disciplinary hearing outcome
6. The right, subject to the law, not to have any personal information released by the University to the public without prior consent.
7. The right of the Respondent to receive written notice of the date, time and place of the hearing at least 48 hours before the Hearing Board meets.
8. The right to consult with the student ombudsman.
9. Both parties may have an adviser of their choice. However, the advisor may not actively participate in the investigative or disciplinary process.
10. The right to be informed of disciplinary procedures and the extent of all alleged violations that are noted in the investigative report.
11. The right to request that any Sexual Misconduct Hearing Board (as described in section E. below) member be removed and replaced if there is evidence of a conflict of interest or demonstrated bias toward the Complainant or Respondent. The Title IX Director will consider the request and make any changes deemed necessary.
12. The right to be present, if desired, for all testimony given and evidence presented before the Hearing Board.
13. The right to make an impact statement at a disciplinary hearing and to have that statement considered by the Hearing Board making its determination.
14. The right to appeal the disciplinary hearing outcome
15. The right, subject to the law, not to have any personal information released by the University to the public without prior consent.
16. The right of the Respondent to receive written notice of the date, time and place of the hearing at least 48 hours before the Hearing Board meets.
17. The right to consult with the student ombudsman.
18. Both parties may have an adviser of their choice. However, the advisor may not actively participate in the investigative or disciplinary process.

## Intake of Report, Interim Measures and Investigation of Sexual Misconduct

When possible the University will strive to investigate a com-

## SEXUAL MISCONDUCT

plaint about sexual misconduct, and if appropriate, hold a hearing before a Sexual Misconduct Hearing Board (“Hearing Board”) and issue its post-hearing determination within a 60 calendar day period from the date of the complaint. This 60 day target does not include the time it takes to appeal an initial determination. However, depending upon the circumstances, including the complexity of the facts and the number and availability of witnesses, there may be occasions when the process will take more than 60 calendar days. In such instances, the Title IX Director will advise the Complainant and Respondent that additional time will be required.

## Intake

### Title IX Intake Process

Generally, the intake process is as follows: Once the Title IX Director’s Office is put on notice of a complaint, the Title IX Director will email and/or call the Complainant to conduct a preliminary investigation. Absent unusual circumstances, a face to face meeting will be held. If the reporting party is the Complainant, they will complete Sexual Misconduct Information Check List. The Complainant will also be made aware of on and off campus support resources. Interim measures may also be discussed if appropriate (see section B.). The Complainant will also be provided assistance if they wish to meet with a counselor, seek medical attention, or notify law enforcement.

After the Complainant, meets with the Title IX Director, the Title IX Director will email and/or call the Respondent to conduct a preliminary investigation. Absent unusual circumstances, a face to face meeting will be held. The Respondent will also be made aware of on and off campus support resources. If appropriate, interim measures will be discussed.

Based on the information gathered during the preliminary investigation, the Title IX Director will determine the extent of the fact-finding investigation required.

If the Complainant chooses not to file a complaint, the information provided by the Complainant will remain on file in the Title IX Office. The Title IX Director will nonetheless determine to what extent a fact-finding investigation or other action is required. The University reserves the right to contact law enforcement authorities regardless of the Complainant’s request if it believes there exists a threat to the health or safety of students and employees.

### Interim Measures

Depending on the severity of the alleged sexual misconduct, the University reserves the right to take interim measures at any point throughout the process to protect the Complainant and the Respondent. Such interim measures may include, but are not limited to:

- a. A change in academic and extracurricular activity schedules so the Complainant and Respondent avoid contact.
- b. A change in living and dining arrangements.
- c. The offer of counseling to both the Complainant and Respondent.
- d. Alternative testing arrangements, seeking incompletes, alternatives for course completion and similar measures.
- e. Increased monitoring, supervision or security at locations or activities where the alleged misconduct occurred.
- f. The opportunity to obtain health, mental health, academic support and counseling services.

Pre-determination disciplinary or other action against a Respondent will only be taken where, because of the severity and extent of the alleged conduct, such extraordinary action is appropriate. The Dean of Students may suspend or expel a student and provide that student with notice as soon as practicable. A suspension or expul-

sion may be appealed in writing to the President from off campus. Such an appeal must be received in the President’s office no later than five days after the day the notice of suspension is provided to the student by the University. The written request to appeal must identify with specificity the facts upon which the appeal is based and why the decision of the Dean of Student is clearly in error.

### Investigation and Outcome of Investigation

Investigations of alleged sexual misconduct are the responsibility of the Title IX Director and investigators designated by the Title IX Director. An investigation will begin promptly and the University will not wait for the conclusion of a criminal investigation. The University prohibits retaliation against any party or participant in an investigation or hearing.

After the investigation, the Title IX Director will determine whether the case will be presented to a Hearing Board. The Title IX Director will notify the Complainant and Respondent of the decision in writing.

If the Title IX Director determines that a case will be presented to a hearing board, the Title IX Director will request the Dean of Students to convene that board. The Title IX Director will provide the Dean of Students with the documents comprising the investigative file.

Once the case is received, the Dean of Students will notify the Complainant and Respondent as such in writing.

### Administrative Hearing before Dean of Students

An administrative hearing may be conducted by the Dean of Students or her appointee in her absence. An administrative hearing is appropriate under certain limited circumstances such as where the Respondent has accepted responsibility for both the misconduct and the proposed sanctions, cases involving the violation of the sexual misconduct policy by a student organization, or cases where the circumstances are extremely sensitive in nature and both the Complainant and Respondent voluntarily and without coercion, request the case not be heard by the sexual misconduct Hearing Board. Whether an administrative hearing is appropriate will be determined by the Title IX Director. Administrative action by the Dean of Students in an administrative hearing will conclude complaints of sexual misconduct without any further hearing(s).

### Sexual Misconduct Hearing Board

If the Title IX Director determines that, based on the outcome of the investigation, a hearing on the allegations should be held, the hearing will be conducted by the Sexual Misconduct Hearing Board.

Five faculty members and five administrators will be appointed by the President to serve as a pool of members for the Sexual Misconduct Hearing Board. From the pool of members, the Dean of Students will select a total of three individuals from this pool to serve on the Sexual Misconduct Hearing Board (“Hearing Board”). The “Preponderance of Evidence” standard, (i.e. “more likely than not”) will be used by the Hearing Board. The Title IX Director will appoint one of these individuals to be Presiding Hearing Board Member. The Dean of Students will serve as an advisor to the Hearing Board. The Presiding Hearing Board Member will, in consultation with the Dean of Students or her designee, determine the outcome of all procedural and evidentiary issues raised at the hearing.

No individual may attend the Hearing Board hearing unless they serve as an advisor to the Complainant or Respondent or are otherwise permitted to do so by the Presiding Hearing Board Member. All Hearing Board witnesses will be separated and no witnesses other than the Complainant and Respondent may be present in the hearing room during witness testimony.

## SEXUAL MISCONDUCT

Hearing Board members may meet prior to the hearing to discuss logistics and review evidence that has been provided to both the Complainant and Respondent. Prior to the hearing, the Hearing Board is empowered to request that additional information from the investigators be made available to it. Once the hearing is convened, the Hearing Board is also empowered to call witnesses of its choosing.

The order of a Hearing Board hearing will be as follows:

1. The person initiating the complaint (Complainant) will give his or her evidence of the sexual misconduct alleged. The Complainant may choose not to participate in the hearing but does so with the understanding that it may impact the Hearing Board's decision regarding whether or not sexual misconduct occurred and what the appropriate actions should be if it did occur. In place of the Complainant, this evidence may be provided by the party responsible for the investigation of the allegations.
2. The Hearing Board may ask questions of the Complainant or the party responsible for the investigation.
3. The Respondent may give his or her evidence of the sexual misconduct alleged.
4. The Hearing Board may ask questions of the Respondent.
5. Any witnesses for either party may appear individually before the Hearing Board. The number of such witnesses will be pre-determined by the Dean of Students in consultation with the Title IX Director. Both parties will have the opportunity to present the same number of witnesses.
6. While both parties will have the opportunity to question each witness, the Respondent will not be permitted to question the Complainant directly.
7. The Complainant may make a closing statement, including an impact statement and a description of the desired outcome from the hearing.
8. The Respondent may make a closing statement, including an impact statement and a description of the desired outcome from the hearing.
9. The parties will leave the hearing at the same time in such a way to avoid contact with each other.

### Hearing Procedures

1. The University will determine if the Complainant needs to be present for the entire Hearing Board hearing.
2. If the University allows one party to be present during the entire Hearing Board hearing, it will do so equally for both parties.
3. When requested, the University will make arrangements so that during the Hearing Board hearing the Complainant and the Respondent do not have to be present in the same room at the same time.
4. The University will not require the Complainant to be present at the Hearing Board hearing for the hearing to take place.
 

If the Respondent chooses not to participate in the hearing, it will nonetheless be held and the Hearing Board will render its decision based on the information that is presented to it.
5. The University will not permit the parties to cross-examine each other. However, each party may submit written questions to the Hearing Board and the Hearing Board may, in its discretion ask these questions on their behalf. These questions

must be submitted to the Title IX Director, for transmittal to the Hearing Board at least twenty-four hours before the time the hearing starts.

6. Questions about the Complainant's sexual history with anyone other than the Respondent will not be permitted. The same restriction applies to the Respondent's sexual history with anyone other than the Complainant.
7. While they may not ask questions of each other, the Complainant and the Respondent will both be provided the opportunity to question all other witness directly. The Presiding Officer or the Dean of Students, acting as advisor to the hearing process, may not allow certain questions if the question is perceived as irrelevant to the case or inappropriate.
8. The University will allow both parties to be accompanied to any University disciplinary proceedings and any related meetings by the advisor of their choice. However, the advisor may not actively participate in the investigative or disciplinary process.

### Notice of Outcome of Hearing Board Hearing

Both parties will be notified concurrently in writing [sent by e-mail and first class mail] about the outcome of the complaint and appeal rights. In the notification to the Complainant, the University will provide: (i) a conclusion as to whether or not, based upon a preponderance of the evidence, the alleged conduct occurred; (ii) any individual remedies provided to the Complainant; (iii) any sanctions imposed on the Respondent that directly relate to the Complainant, and other steps the University took or will take to eliminate a hostile environment, if the University finds one to exist and the steps taken and/or to be taken to eliminate the hostile environment.

### Determination and Possible Sanctions

At the conclusion of the hearing, the Hearing Board will adjourn to evaluate the record of the proceedings. Thereafter the Hearing Board will render its written decision on the Complainant's complaint. As a result, the Hearing Board may either dismiss the complaint without further action or recommend one or more of the following sanctions:

1. Warning. The Respondent is warned that his or her behavior is unacceptable to the University community. The Respondent may also be warned that further violations will result in more severe disciplinary action.
2. Restitution. The Respondent may be assessed charges for any damages or losses which may have resulted from the sexual misconduct.
3. Fines. The Respondent may be assessed fines as appropriate in addition to charges for restitution.
4. Disciplinary Probation. Disciplinary probation may be accompanied by additional sanctions or by special conditions including, but not limited to, required counseling.
5. Counseling. The Respondent may be required to attend counseling.
6. Restricted access on campus, at University events, University housing, etc.
7. Restricted communication with other party or witnesses associated with the case.
8. Suspension. The Hearing Board will determine the appropriate length of time for the suspension.

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9. Expulsion. Permanent separation of the Respondent from the University and the University community.

The Hearing Board's written decision will be sent by e-mail and first class mail concurrently to the Complainant and the Respondent.

## Appeals from Determination of Hearing Board

Following the determination of the Hearing Board, both parties have the right to appeal the determination but solely for the following reasons:

1. There is evidence that the hearing procedures outlined in the Sexual Misconduct Policy were not adequately followed.
2. There is new evidence that will materially impact the Hearing Board's decision and this evidence was not presented at the Hearing Board hearing for good cause shown as determined by the Title IX Director.
3. The sanctions imposed by the Hearing Board are believed to be either too severe or too lenient for the violation which the person was found to be responsible.

A request for an appeal must be made in writing and submitted by e-mail to the Title IX Director [tf91@evansville.edu] within five (5) business days [Monday – Friday] after the date the Hearing Board's written decision is received by the appealing party. The Hearing Board's written decision will be sent to both parties by email and certified mail and the five day period will be counted using the date the first method of delivery was received by the appealing party. The Title IX Director, Executive Vice President and the Assistant Vice President for Student Affairs will determine if an appeal may be taken. If a decision is made to hear the appeal, the non-requesting party will receive a copy of the appeal letter and notification that the appeal has been granted.

For an appeal hearing, the following process will be followed:

The Sexual Misconduct Appeals Hearing Board will be comprised of a total of three faculty and administrators, selected by the Dean of Students from the pool of Hearing Board members. None of the Appeals Board members may have served on the original hearing board. The appeals board will make every effort to decide each appeal as quickly as possible, preferably within two weeks of the time the request for appeal was granted by the Title IX Director. The sanctions from the original hearing will be upheld, if applicable, until the appeal is heard.

The Appeals Board will be provided copies of all evidence received by the Hearing Board, including a transcript of the initial hearing. The Hearing Board will consider new evidence if permitted by the Title IX Director.

The Appeals Board will meet, with all members present to review the transcript of the Hearing Board hearing and all evidence submitted to and accepted by the Hearing Board. After considering this material, the Appeals Board may:

1. Affirm the findings and sanctions determined by the Hearing Board;
2. Affirm the findings but adjust the severity of the sanction to a greater or lesser degree;
3. Reverse the finding and as such make a determination that, based on the "preponderance of evidence" standard, there was insufficient evidence to find the Respondent committed the offense(s) complained of;
4. Reverse the Hearing Board's decision and order a new hearing. The Appeals Board's written decision will be sent by e-mail and first class mail to both parties concurrently. No further appeal may be taken from a decision of the Appeals Hearing Board.

The University reserves the right to modify the hearing and appeal procedures to provide for what in its sole opinion, is equitable treatment of the Complainant and Respondent.

*This policy was drafted upon review of published sexual misconduct policies and guidelines from DePauw University, Northwestern University, Texas Women's University, Washington University, Colorado State University Pueblo, Notalone.gov, ATIXA, Indiana Criminal Code, and the United States Department of Education.*

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION**

ALEXIS SEAY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 3:18-cv-00147-RLY-MPB
	)	
THE UNIVERSITY OF EVANSVILLE,	)	
et. al.	)	
	)	
Defendants.	)	

**ORDER GRANTING MOTION TO PARTIALLY DISMISS PLAINTIFF’S COMPLAINT  
OF DEFENDANTS THE UNIVERSITY OF EVANSVILLE, AND DR. THOMAS KAZEE  
AND TRACEY FOLDEN**

This matter comes before the Court upon the Motion to Partially Dismiss Plaintiff’s Complaint, filed by Defendants the University of Evansville, and Dr. Thomas Kazee and Tracey Folden in their individual capacities, pursuant to F.R.C.P. 12(b)(6). The Court, having considered Defendants’ Motion and their Memorandum of Law in support thereof, and being duly advised in the premises, **GRANTS** Defendants’ Motion as follows:

The Court **DISMISSES** Count I against the University of Evansville;

The Court **DISMISSES** Count II against the University of Evansville;

The Court **DISMISSES** Count VI against the University of Evansville, and Dr. Thomas Kazee and Dr. Tracey Folden in their individual capacities;

The Court **DISMISSES** Count V against the University of Evansville, and Dr. Thomas Kazee and Dr. Tracey Folden in their individual capacities;

The Court **DISMISSES** Count IV against the University of Evansville, and Dr. Thomas Kazee and Dr. Tracey Folden in their individual capacities;

DATED \_\_\_\_\_, 2018.

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Hon. Judge Richard L. Young  
United States District Court  
Southern District of Indiana, Evansville Division

**Distribution List**

All counsel of record.

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