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Notice of Rulemaking Hearing

Hearings will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, T.C.A. § 4-5-204. For questions and copies of the notice, contact the person listed below.

Agency/Board/Commission:	Tennessee Board of Regents
Division:	
Contact Person:	Brian A. Lapps, Jr. General Counsel
Address:	1 Bridgestone Park, 3 rd Floor Nashville, TN 37214
Phone:	615-366-4438
Email:	Brian.lapps@tbr.edu

Any Individuals with disabilities who wish to participate in these proceedings (to review these filings) and may require aid to facilitate such participation should contact the following at least 10 days prior to the hearing:

ADA Contact:	Sonja Mason, Secretary of the Board
Address:	1 Bridgestone Park, 3 rd Floor Nashville, TN 37214
Phone:	615-366-3927
Email:	Sonja.Mason@tbr.edu

Hearing Location(s) (for additional locations, copy and paste table)

Address 1:	Tennessee Board of Regents		
Address 2:	1 Bridgestone Park, First Floor		
City:	Nashville, Tennessee		
Zip:	37214		
Hearing Date:	06/15/2021		
Hearing Time:	3:00 p.m.	<input checked="" type="checkbox"/> X CST/CDT	
		<input type="checkbox"/> EST/EDT	

Additional Hearing Information:

Oral and written comments on the proposed rulemaking will be received at the public hearing on June 15, 2021 at 3:00 p.m. CDT. Those wishing to participate electronically should contact Sonja Mason at Sonja.Mason@tbr.edu or 615-366-3927 by 4:30 p.m. on June 14, 2021. In addition, interested parties may submit written comments on or before 5:00 p.m. CDT Monday, June 14, 2021 by mail or email to:

Brian A. Lapps, Jr., General Counsel
 Tennessee Board of Regents
 1 Bridgestone Park, 3rd Floor
 Nashville, TN 37214
 615-366-4438
Brian.lapps@tbr.edu

Revision Type (check all that apply):

Amendment
 New
 Repeal

Rule(s) (ALL chapters and rules contained in filing must be listed. If needed, copy and paste additional tables to accommodate more than one chapter. Please enter only **ONE** Rule Number/Rule Title per row.)

Chapter Number	Chapter Title
0240-02-10	Title IX Compliance
Rule Number	Rule Title
0240-02-10-.01	Statement of Nondiscrimination on the Basis of Sex
0240-02-10-.02	Definitions
0240-02-10-.03	Equitable Treatment
0240-02-10-.04	Reporting Sexual Harassment
0240-02-10-.05	Investigations and Outcome
0240-02-10-.06	Severability

Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to <https://sos.tn.gov/products/division-publications/rulemaking-guidelines>.

**RULES
 OF
 THE TENNESSEE BOARD OF REGENTS**

**CHAPTER 0240-02-10
 TITLE IX COMPLIANCE**

New Chapter

Table of Contents is added to Chapter 0240-02-10 and shall read as follows:

Table of Contents

0240-02-10-.01 Statement of Nondiscrimination on the Basis of Sex
 0240-02-10-.02 Definitions
 0240-02-10-.03 Equitable Treatment
 0240-02-10-.04 Reporting Sexual Harassment
 0240-02-10-.05 Investigations and Outcome
 0240-02-10-.06 Severability

0240-02-10.01 Statement of Nondiscrimination on the Basis of Sex is added to Chapter 0240-02-10 and shall read as follows:

0240-02-10-.01 Statement of Nondiscrimination on the Basis of Sex. The Tennessee Board of Regents (the TBR) and institutions under its jurisdiction, as explained in institutional restatements of these rules, will comply with Title IX of the Education Amendments of 1972, § 485(f) of the Higher Education Act, as amended by § 304 of the Violence Against Women Reauthorization Act of 2013, the regulations implementing these Acts found at 34 CFR § 668.41, § 668.46, and Appendix A to Subpart D of Part 668. Unless explicitly provided otherwise, the terms “institution” and “TBR institution” include the TBR for any complaints, investigations, adjudications, and other proceedings under this rule that involve the TBR System Office.

Authority: T.C.A. §§ 4-5-101 et seq. and 49-8-203.

0240-02-10-.02 Definitions is added to Chapter 0240-02-10 and shall read as follows:

0240-02-10-.02 Definitions
 SS-7037 (March 2020)

- (1) Complainant – a person who is alleged to be the victim of conduct that could constitute Sexual Harassment. A complainant may also be referred to as a Party.
- (2) Consent - an active agreement to participate in a sexual act. An active agreement is words and/or actions that indicate a willingness to participate in a sexual act. Consent cannot be given by an individual who is asleep; unconscious; or mentally or physically incapacitated, either through the effect of drugs or alcohol or for any other reason; or is under duress, threat, coercion, or force. Past consent does not imply future consent. Silence or an absence of resistance does not imply consent. Consent can be withdrawn at any time.
- (3) Education program or activity - education programs and/or activities include locations, events, or circumstances over which the TBR or a TBR institution exercises substantial control over both the respondent and the context in which the alleged sexual harassment occurred. Relevant factors include whether the alleged conduct took place (i) on or off premises owned or controlled by TBR or a TBR institution, (ii) during school or work hours, (iii) as part of an institution-sponsored social activity, and (iv) as part of an activity that advances an educational purpose. Education programs or activities also include any building owned or controlled by an officially-recognized student organization. Whether the respondent is TBR or TBR institutional employee, and if so, the nature of the respondent's employment may be relevant. No single factor is determinative, including whether the alleged harassment took place on premises owned or controlled by the TBR or a TBR institution. The Title IX Coordinator will make a fact-specific decision whether, if proven, the allegations arise out of an education program or activity.
- (4) Force/Forced - words and/or conduct that, viewed from the perspective of a reasonable person, substantially impair(s) a person's ability to voluntarily choose whether to take an action or participate in an activity. Examples of force include, without limitation: physical force (e.g., hitting, punching, slapping, kicking, restraining, choking, kidnapping, using a weapon, blocking access to an exit);
 - (a) Words and/or conduct that would cause a reasonable person to fear:
 1. Physical force or other harm to the person's health, safety, or property, or a third person's health, safety, or property;
 2. Loss or impairment of an academic benefit, employment benefit, or money;
 3. Disclosure of sensitive personal information or information that would harm a person's reputation;
 4. Disclosure of video, audio, or an image that depicts the person's nudity or depicts the person engaging in a sexual act(s); or
 5. Other immediate or future physical, emotional, reputational, financial, or other harm to the person or a third person.
- (5) Formal Complaint - a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the TBR or the TBR institution investigate the allegation. At the time of filing a formal complaint, a complainant either must be participating in or attempting to participate in the TBR or TBR institution's education program or activity implicated by the formal complaint.
- (6) "Incapacitation" means that a person lacks the ability to actively agree to a sexual act because the person is asleep, unconscious, under the influence of an anesthetizing or intoxicating substance such that the person does not have control over their body, is otherwise unaware that a sexual act is occurring, or their mental, physical, or developmental abilities renders them incapable of making a rational informed judgment. Incapacitation is not the same as legal intoxication.
- (7) Respondent - a person who has been alleged to be a perpetrator of conduct that could constitute sexual harassment. A respondent may also be referred to as a party.
- (8) "Retaliation" for purposes of these rules means to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by these rules or by Title

IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing. Intimidation, threats, coercion, or discrimination, including charges against an individual that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by these rules constitutes retaliation. Retaliation is a violation of these rules regardless of whether the underlying allegation is ultimately found to have merit.

- (a) The exercise of rights protected under the First Amendment and other provisions of the United States Constitution does not constitute retaliation.
 - (b) Charging an individual with a violation of these rules or other rules for making a materially false statement in bad faith in the course of a grievance proceeding under these rules does not constitute retaliation.
- (9) Sexual Harassment - conduct on the basis of sex that satisfies one (1) or more of the following:
- (a) An employee of TBR or a TBR institution conditioning provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct (quid pro quo);
 - (b) Unwelcome conduct of a sexual nature determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the institution's education program or activity. "Reasonable person" means a reasonable person under similar circumstances as and with similar identities to the Complainant. A TBR institution will consider the totality of the circumstances, including without limitation, the context in which the conduct and/or words occurred, and the frequency, nature, and severity of the words and/or conduct. In no event shall sexual harassment be construed to prohibit speech protected by the First Amendment to the United States Constitution (e.g., merely offensive or insulting speech); or
 - (c) Sexual assault as defined by federal law, dating violence as defined by federal law, domestic violence as defined by state or federal law, or stalking as defined by federal law.

Authority: T.C.A. §§ 4-5-101 et seq. and 49-8-203.

0240-02-10-.03 Equitable Treatment is added to Chapter 0240-02-10 and shall read as follows:

0240-02-10-.03 Equitable Treatment

- (1) No Title IX Coordinator, investigator, decision-maker, person designated to facilitate an informal resolution process, or anyone deciding an appeal shall have a conflict of interest or bias for or against complainants or respondents generally, or against an individual complainant or respondent.
- (2) The Title IX Coordinator is responsible for appointing investigators, decision-makers, and appellate reviewers, and may appoint someone from another TBR institution or someone not employed by a TBR institution in order to avoid potential bias, a potential conflict of interest, or for other reasons. In the event of a conflict of interest or potential bias of the Title IX Coordinator, or if the Title IX Coordinator believes that another person should serve in that role for other reasons, the TBR Central Office shall be responsible for appointing someone to serve the functions of the Title IX Coordinator. A deputy Title IX Coordinator has the same authority as the Title IX Coordinator.
- (3) Each institution will provide a prompt, fair, and impartial investigation, adjudication, and, if applicable, disciplinary process. Institutions will treat complainants and respondents equitably, which includes an objective evaluation of all relevant evidence, including both evidence that tends to prove or disprove the allegations.
- (4) Credibility determinations will not be based on a person's status as a Complainant, Respondent, or witness.
- (5) The investigation shall proceed with a presumption that a respondent is not responsible for the alleged conduct unless and until a determination of responsibility for a violation is made at the conclusion of the decision-making process. The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility for sexual harassment rests with the institution. The parties do

not carry the burden of proof.

- (6) The institution or TBR shall provide simultaneous written notification to the parties of:
 - (a) Any initial, interim, or final decision by an official authorized to resolve disciplinary matters;
 - (b) Any available appeal procedures for that decision;
 - (c) Any change to that decision; and
 - (d) When that decision becomes final.
- (7) The parties will receive timely and equal access to information.
- (8) Neither TBR nor a TBR institution will restrict any rights protected by the First Amendment to the U.S. Constitution, deprive a person of any rights that would otherwise be protected under the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, or restrict any other rights guaranteed by the U.S. Constitution or State of Tennessee Constitution.

Authority: T.C.A. §§ 4-5-101 et seq. and 49-8-203.

0240-02-10-.04 Reporting Sexual Harassment is added to Chapter 0240-02-10 and shall read as follows:

0240-02-10-.04 Reporting Sexual Harassment

- (1) Applicability
 - (a) Allegations of sexual discrimination or harassment that do not meet the definition of sexual harassment in these rules or otherwise do not meet the criteria for filing a formal complaint will be handled in accordance with TBR's Rules for Student Conduct and Disciplinary Sanctions, Chapter 0240-02-03.
 - (b) Upon receiving and assessing a report of sexual harassment and/or other sexual discrimination or harassment, the Title IX Coordinator will decide whether the criteria for proceeding under these rules, procedures, and processes are met and whether additional rules, procedures and processes may apply.
 - (c) These rules apply not only to conduct by students, faculty, and staff, but also to conduct by third parties, such as vendors with whom the institution contracts to provide services, and campus visitors.
- (2) Reporting to Title IX Coordinator
 - (a) Any person may report sexual harassment to the Title IX Coordinator at any time, including but not limited to, during non-business hours, by using the telephone number or electronic mail address, or office mail address listed for the Title IX Coordinator.
 - (b) Although reports and complaints of sexual harassment may be made at any time, reports should be made as soon as possible so that the institution is best able to address the allegation.
 - (c) An institution shall publish its Title IX Coordinator's name and contact information (mailing address, phone number, email address, etc.) in institutional materials and on its website.
- (3) Supportive and Interim Measures
 - (a) After receiving a report of potential sexual harassment, whether or not the report is a formal complaint, the Title IX Coordinator will contact the complainant to discuss the availability of interim/supportive measures, inform the complainant of their availability, and consider the complainant's wishes with respect to potential interim/supportive measures. The Title IX Coordinator will also explain the process for filing a formal complaint.

- (b) The Title IX Coordinator, in conjunction with the appropriate department, may implement interim, supportive, or protective measures while assessing, investigating, and resolving the report. These interim/supportive measures are non-disciplinary, non-punitive, individualized services and are offered without fee or charge to the complainant and/or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
 - (c) Interim/supportive measures are designed to restore or preserve equal access to the institution's programs or activities without unreasonably burdening the other party and may include measures designed to protect the safety of all parties or the institution's educational environment or deter sexual harassment.
 - (d) These measures may include, but are not limited to: mutual no-contact directives; access to counseling services and assistance in setting up an initial appointment; changing schedules, assignments, or job/study locations to lessen or minimize contact; extensions of deadlines and course-related adjustments; limiting or barring an individual's or organization's access to certain institutional facilities or activities; providing an escort to ensure safe movement on campus; providing academic support services, such as tutoring; arranging for a party to re-take a course or withdraw from a class without penalty; administrative leave; leave of absence; institution-imposed leave or physical separation from individuals or locations.
 - (e) The institution will attempt to maintain the confidentiality of such interim/supportive measures, to the extent that it can do so without impairing its ability to effectuate the interim/supportive measures or to investigate and adjudicate the complaint.
- (4) Formal Complaint
- (a) Any person alleging to be a victim of sexual harassment that took place within an education program or activity of TBR or a TBR institution in the United States may file a formal complaint.
 - (b) A complainant who wants TBR or a TBR institution to conduct an investigation and take action in accordance with these rules must file a formal complaint alleging sexual harassment. The Title IX Coordinator may also file a formal complaint.
 - (c) A complainant must submit a written formal complaint in person, by mail, or via electronic mail to the Title IX Coordinator. The document must contain the complainant's physical signature or a "digital signature." (A digital signature is information transmitted electronically that enables the Title IX Coordinator to determine that the complainant is the person submitting the complaint, including, but not limited to, an email from a TBR institutional account or a typed version of the complainant's name. A digital signature need not reproduce a written signature.) A formal complaint cannot be submitted anonymously. Only the Title IX Coordinator can submit a formal complaint on behalf of another person.
 - (d) Although TBR institutions will attempt to consider the wishes of complainants, including that no investigation be conducted, TBR institutions will also consider their obligations under TBR rules and applicable law. Thus, when the Title IX Coordinator receives a report of sexual harassment, the Title IX Coordinator may decide to investigate the matter, even if the complainant does not want the report investigated. If the Title IX Coordinator decides to file a formal complaint, the Title IX Coordinator is not a "party" to any investigation, determination or hearing process.
 - (e) Complainants should provide as much of the following information as possible: what happened, where, and when; names of all people involved, including witnesses (if any); supporting documentation (if any); and contact information. TBR encourages reporting of sexual harassment even if some or all information is unavailable or cannot be provided. The Title IX Coordinator will explain their role, the options for reporting an incident, potential available interim/supportive measures, and the available resources for assistance.
- (5) Confidential Resources (who will not share information with Title IX Coordinator)
- (a) TBR encourages students who have experienced sexual harassment to talk to someone about what happened, whether they want their report to be investigated or not. Institutions should offer complainants someone to talk to confidentially so that they can get the support they need. Institutions shall explain that some resources are confidential and should be considered if the

complainant does not want the institution to investigate the matter.

- (b) If the institution employs or contracts with such individuals, confidential resources include licensed professional counselors/mental health providers when acting in that role; pastoral counselors acting in that capacity; and medical professionals when acting in a clinical role. These resources do not report any information about an incident to the Title IX Coordinator without a complainant's permission. Institutions shall identify and provide contact information for any confidential reporting options within the institution.
- (c) Counselors and health care providers not affiliated with the institution will generally maintain confidentiality and not share information with the institution unless the complainant requests the disclosure and signs a consent or waiver form. However, these resources may have reporting obligations under state or federal law. For example, healthcare providers and certain other individuals are required to notify law enforcement when a person seeks treatment for injuries related to a violent crime, including injuries resulting from sexual harassment or abuse of a minor.

(6) No Retaliation

- (a) Retaliating against a person who makes a report or files a complaint, participates or assists in an investigation, encourages another to file a complaint, or opposes sexual harassment (or any other form of unlawful discrimination or harassment) is prohibited. Neither students nor anyone acting on a student's behalf is permitted to interfere with an investigation. Retaliation or interference will result in disciplinary sanctions consistent with these rules and other rules.
- (b) In order to help prevent retaliation, institutions should keep confidential the identity of anyone who has made a report or complaint of sex discrimination, including anyone who has filed a formal complaint of sexual harassment, any complainant, any respondent, and any witness except as is required to carry out an institution's responsibilities under these rules and other rules, as required or permitted by state or federal law.

(7) Complainant Services

- (a) Each institution shall provide notice of available assistance and services to complainants. The statement shall include, at a minimum, the following:
 1. The identity and contact information for trained on- and off-campus advocates and counselors who can provide an immediate confidential response in a crisis situation;
 2. Emergency number for on- and off-campus safety, law enforcement, and other first responders, including the Title IX Coordinator;
 3. A list of health care options, both on- and off-campus, including options to seek treatment for injuries, preventative treatment for sexually transmitted diseases, and where and how to get a rape kit or find a Sexual Assault Nurse Examiner (SANE);
 4. A statement that it is very important for the complainant to be screened for sexually transmitted diseases/pregnancy/drugs that may have been used to incapacitate, obtain emergency contraception, and receive treatment for any injuries. Valuable physical evidence can be obtained from the complainant and the complainant's clothing. Even those who are unsure whether to make a police report or take action may wish to have a forensic examination, which will facilitate the identification and preservation and of physical evidence;
 5. A statement that to help preserve evidence in the event of a sexual assault, it is important for the complainant not to change clothes or bedding and not take a shower, douche, use the toilet, brush their teeth or clean up until police have had a chance to gather evidence. However, if a complainant has already changed clothes or cleaned up/showered, evidence may still be collected. The complainant should leave any clothes or bedding unfolded and undisturbed, if possible. If clothing or bedding must

be moved, items should be kept separate to prevent transfer of body fluids or other trace evidence. Parties should not delete or destroy any text messages, social media, emails, voicemails, written notes, or any other documents that may be relevant;

6. A list of locations, including contact information, for any available advocate (e.g. a local rape crisis center, on-campus advocacy program) who can accompany a person to the hospital or health provider; and
7. A statement that these services are available whether or not a complainant chooses to make an official report, file a formal complaint, or participate in the institutional disciplinary or applicable criminal process.

(8) Reporting Pursuant to Nottingham Act

- (a) Unless the victim of a rape does not consent to the reporting of an offense, the chief security officer or chief law enforcement officer of the institution (if applicable), shall immediately notify the local law enforcement agency with territorial jurisdiction over the institution if the officer is in receipt of a report from victim alleging that any degree of rape has occurred on the property of the institution. The chief security officer or chief law enforcement officer shall designate one (1) or more persons who shall have the authority and duty to notify the appropriate law enforcement officer. In the case of an alleged rape, the institution's law enforcement agency shall lead the investigation. After notifying the local law enforcement agency, the institution shall cooperate in every respect with the investigation conducted by the law enforcement agency.
- (b) If the victim does not consent to the reporting, the chief security officer or chief law enforcement office of each institution shall not report the offense to the local law enforcement agency.

Authority: T.C.A. §§ 4-5-101 et seq.;49-8-203; 49-7-2207; and 49-7-129.

0240-02-10-.05 Investigations and Outcomes is added to Chapter 0240-02-10 and shall read as follows:

0240-02-10-.05 Investigations and Outcomes

(1) Intake and Assessment of Formal Complaints

- (a) The Title IX Coordinator will assess the nature of reports and formal complaints, including whether one (1) or more allegations meet the criteria for the filing of a formal complaint. Formal complaints that include some allegations that, if proved, constitute sexual harassment and some that do not meet that definition will be investigated pursuant to these and other applicable rules, procedures, and processes and adjudicated in accordance with these and other applicable rules, procedures, and processes. As appropriate, the Title IX Coordinator may initiate proceedings under these rules, refer the matter to another department, and/or inform the complainant about the availability of other methods to address the allegations.
- (b) As part of the assessment, the Title IX Coordinator or designee may contact the complainant and ask for information about the allegations. Supporting documents, such as emails, photos, text messages, and any other evidence should be preserved. If witnesses were present or have relevant knowledge, it is important to identify them, state what they may know, and inform the investigator how they can be contacted.
- (c) Where formal complaints involving more than one (1) complainant and/or more than one (1) respondent arise out of the same facts and circumstances, the Title IX Coordinator may consolidate formal complaints.
- (d) If it appears, based on an allegation of sexual harassment, that a student may constitute an immediate and direct threat to the physical health or safety of another individual, the institution will conduct an individualized inquiry and risk analysis and may place the student on interim suspension on an emergency basis. If the institution implements an interim suspension, the

student shall be given the opportunity at the time of the decision, or as soon thereafter as reasonably possible, to contest the interim suspension. Institutions shall follow the procedures set forth in TBR's Rules for Student Conduct and Disciplinary Sanctions, Chapter 0240-02-03, related to interim suspensions.

- (e) Participation in the formal complaint process by a complainant, respondent, institution, or other person does not waive applicable privileges, including attorney-client privilege, doctor-patient privilege, the peer review/quality improvement privilege, etc. The holder of a privilege may waive it in certain circumstances.
- (f) There shall be no separate procedure for investigating and resolving complaints of sexual harassment involving student-athletes or any other subgroup of students.

(2) Notice of Allegations

- (a) Upon receipt of a formal complaint, the Title IX Coordinator will provide written notice to known parties. A notice of allegations will be provided even if the formal complaint is dismissed at the same time or shortly after the notice of allegations issues (e.g., the allegations if proven do not meet the definition of sexual harassment). The notice of allegations will enable both parties to appeal the dismissal or to proceed under another rule. The notice of allegations shall contain:
 - 1. An explanation of the investigation and grievance process;
 - 2. The availability of an informal resolution process;
 - 3. Explanation of the allegations potentially constituting sexual harassment in sufficient detail and with sufficient time to prepare a response before any initial interview. A respondent will have at least three (3) business days after issuance of a notice of allegations prior to an initial interview, but depending on the nature of the allegations, additional time may be offered or requested;
 - 4. The identity of the parties involved in the incident, if known, and the date and location of the alleged incident;
 - 5. A statement that the respondent is presumed not responsible for the alleged conduct unless and until a determination of responsibility has been issued;
 - 6. A statement that the parties may have an advisor of their choice at meetings they are permitted to attend. The advisor may be, but is not required to be, an attorney. (Parties may hire their own attorneys. At a live hearing only, TBR institutions will provide advisors to parties who do not have their own advisor);
 - 7. Any prohibitions against knowingly making false statements or knowingly submitting false information; and
 - 8. A statement that retaliation against a person who makes a report or files a complaint, participates or assists in an investigation, encourages another to file a complaint, or opposes sexual harassment is prohibited and will result in disciplinary sanctions, up to and including dismissal.
- (b) If, during the course of an investigation, the institution decides to investigate allegations about the complainant or respondent that are not included in the notice of allegations, the institution will provide additional written notice of allegations to known parties.

(3) Dismissal of Formal Complaints

- (a) If the Title IX Coordinator concludes that the Complainant was not participating in or attempting to participate in an institutional education program or activity at the time of the formal complaint or that the conduct alleged in a formal complaint would not constitute sexual harassment even if proved, did not occur in an institution's education program or activity, or did not occur against a person while in the United States, the Title IX Coordinator shall dismiss the formal complaint.
- (b) The Title IX Coordinator has discretion to dismiss a formal complaint or any allegations in it, if at any time during the investigation or hearing a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations in it;

the respondent is no longer enrolled by, employed by, or associated with a TBR institution; or specific circumstances prevent the TBR institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

- (c) The Title IX Coordinator may decide to dismiss a formal complaint of sexual harassment and refer the matter for disposition pursuant to a different rule when an allegation of sexual harassment is dismissed or when a formal complaint ceases to include an allegation of sexual harassment.
- (d) Upon dismissal of a formal complaint for any reason, the Title IX Coordinator will promptly send written notice explaining the reasons for dismissal to the parties. The dismissal notice will also explain whether the TBR institution will investigate or respond to the allegations under another rule.

(4) Informal Resolutions

- (a) Because a full investigation and adjudication process may not be in the best interests of all concerned, the Title IX Coordinator may decide to offer an informal resolution process. The informal resolution process is designed to provide flexibility in creating a resolution to a formal complaint that meets the needs of the parties and the institution. Informal resolutions may include meetings facilitated by the TBR institution or third parties, resolutions facilitated by the Title IX Coordinator without formal meetings, mediations, and/or restorative justice concepts. Disciplinary action may or may not be part of any informal resolution. The parties must agree in writing to participate in any informal resolution process that the Title IX Coordinator may offer.
- (b) An informal resolution process is only available after the filing of a formal complaint and prior to a determination regarding responsibility. If the Title IX Coordinator believes an informal resolution may be appropriate, the Title IX Coordinator will propose an informal resolution process in either the initial notice of allegations or a subsequent written document. The Title IX Coordinator may discuss with the parties the details of how the process will work. The written notice will contain the allegations or refer to the notice of allegations, set out the informal resolution process, explain that at any time prior to agreeing to a resolution, the complainant, respondent, or the institution may withdraw from the informal resolution process and resume the investigation and adjudication process, and identify any records that will be maintained or shared related to the process.
- (c) The Title IX Coordinator shall not offer or facilitate an informal resolution process to resolve allegations that an institution employee engaged in sexual harassment against a student.

(5) Investigation of Formal Complaints

- (a) The TBR institution will investigate all formal complaints, unless dismissed or resolved.
 - 1. The institution will not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional acting in the professional's capacity and made or maintained in connection with the treatment to the party, unless the party voluntarily consents in writing.
 - 2. The investigator will conduct an investigation that is appropriate under the circumstances. The investigation will include a review of documents and physical evidence, as well as interviews with the parties and other witnesses, unless they decline to be interviewed. The investigator may request access to premises, records, and documents deemed relevant. As the investigation progresses, the investigator may seek clarification, including during a subsequent interview, from any person participating in the investigation regarding the incident or their statement. A party who learns or remembers any additional information should notify the investigator immediately. The parties will have an equal opportunity to provide evidence and to identify witnesses, including fact and expert witnesses. Parties are encouraged to provide, as soon as possible, any evidence that the party believes to be relevant and wants the investigator to consider. If at all possible, a party should provide evidence in

time for the investigator to make that evidence available for inspection and review in accordance with these rules.

3. Although the parties are encouraged to provide the institution with information and evidence related to the allegations, the institution is ultimately responsible for gathering evidence sufficient to reach a determination regarding responsibility.
4. Neither TBR nor the institution will restrict the parties from discussing the allegations under investigation or from gathering and presenting relevant evidence. Any restrictions on the ability of the parties to discuss matters related to the proceeding but which are not under investigation will be explained in the notice of allegations.
5. Each party will have the opportunity to obtain and to be accompanied to a meeting or proceeding by an advisor of their choice, who may, but is not required to be, an attorney.
6. When a party is invited or expected to participate in a meeting, the institution will provide written notice of the date, time, location, participants, and purpose of the meeting, interview, or hearing, with sufficient time for the party to prepare to participate.
7. Both parties will have an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence that is directly related to the allegations but upon which the institution does not intend to rely in reaching a determination regarding responsibility. The institution will include both evidence that tends to prove and disprove the allegations, whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation.
8. Prior to the completion of an investigation report, the institution will send to each party the evidence subject to inspection and review. Unless a party requests that the institution not do so, the institution will also send the evidence to each party's advisor who has been identified. An institution may decide to provide access to evidence through electronic means that is not available for download. In such case, the parties and their advisors are prohibited from, directly or indirectly, photographing or reproducing such evidence (unless the party has access to the evidence independent of the portal, e.g., documents submitted by the party or publicly available information).
9. The institution will provide at least ten (10) calendar days for the parties to respond to the evidence provided for inspection and review. The investigator will share any written response with the other party and will consider any written response prior to completing the investigative report.

(6) Written Report

- (a) At the conclusion of the investigation, the investigator will prepare a written report. The report shall:
 1. Identify the allegations;
 2. Identify relevant rules;
 3. Explain the procedural steps taken between receipt of the formal complaint and the conclusion of the investigation, including all notifications to the parties, interviews with the parties, interviews with other witnesses, dates of all interviews, any site visits, and the methods used to gather evidence; and
 4. Fairly summarize the relevant evidence.
- (b) The written report shall not make findings of fact or conclusions regarding the application of facts to these rules.
- (c) At least ten (10) calendar days prior to a hearing, the investigator will send to each party the

investigation report for review and written response. Unless a party requests that the institution not do so, the institution will also send the investigation report to an advisor whom the party has been identified.

- (d) The parties should provide any written response as soon as possible. The investigator may issue an amended investigation report if the investigator deems appropriate and if a party provides comments in sufficient time for the investigator to do so. The parties' written responses and any amended investigation report will be sent to the decision-maker.

(7) Advisors

- (a) Both the complainant and the respondent will be permitted to have an advisor of their choosing present during meetings where their attendance is permitted or expected. Nothing in these rules shall be read to require that an institution allow a party to attend an interview of the other party or of a witness.
- (b) The advisor may accompany and confer privately with a party, but the advisor may not interrupt, speak on behalf of a party, or otherwise actively participate in any meeting, except for conducting cross-examination at a live hearing.
- (c) An advisor's failure to comply may result in the termination of the meeting or the advisor no longer being permitted to be present.
- (d) TBR and institutional personnel employed in the offices responsible for the disciplinary proceedings described in these rules, along with those in the chain of command, personnel employed by the Office of General Counsel, and others whose participation could create a conflict of interest with their duties are not eligible to serve as advisors. The institution shall not otherwise limit the choice of an advisor.
- (e) If there is a question or concern about a possible advisor, the Title IX Coordinator should be consulted. A party choosing to have an attorney present as an advisor must provide advance notice.

(8) Recordings

- (a) Parties are not permitted to record any meeting conducted pursuant to these rules.
- (b) When a live hearing is conducted, the institution will create an audio recording, audiovisual recording, or transcript and make it available to the parties for inspection and review.

(9) Past Relationships and Conduct

- (a) Previous sexual relationships of the complainant and respondent with third parties generally are irrelevant.
- (b) A past sexual relationship between the complainant and respondent may or may not be relevant. For example, past sexual encounters may provide insight on communication patterns for purposes of determining whether consent was present.
- (c) Questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to respondent and are offered to prove consent.

(10) Standard of Evidence

- (a) In evaluating whether sexual harassment occurred, institutions shall use the preponderance of the evidence standard. A "preponderance of the evidence" means the greater weight of the evidence or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion.
- (b) The burden of proof will remain with the institution through the determination.

(11) Timeline

- (a) Formal complaints typically will be resolved (exclusive of any appeals) within ninety (90) calendar days of filing.
- (b) Appeals will be resolved within fifteen (15) calendar days of the filing of an appeal.
- (c) Given the many variables and factors that may arise in such cases, additional time may be needed in some cases. Any departure from these time frames will be for good cause and communicated in writing or by email to both the complainant and the respondent simultaneously, along with a new timeline and explanation of the reasons. Good cause to extend the deadlines includes, but is not limited to, the absence of a party, a party's advisor, or witness; concurrent law enforcement activity; or the need for language assistance or the accommodation of disabilities.
- (d) Incompletion of the process within such time frames is not cause for dismissal of a formal complaint.

(12) Parallel Investigations with Law Enforcement

- (a) The filing of a police report or the pendency of civil or criminal proceedings does not preclude the institution from proceeding with its investigation and determination.
- (b) The investigation and determination may be delayed until law enforcement has finished gathering evidence and indicated that the institution may proceed with an investigation, but the institution generally will not wait for the conclusion of any criminal proceeding.
- (c) Civil or criminal proceedings are separate and distinct from internal institutional proceedings, and they may or may not run parallel to each other. However, the institution may be required by law to provide information in civil or criminal proceedings.

(13) Live Hearings

- (a) The institution will conduct a live hearing of formal complaints not dismissed in order to make a determination whether these rules have been violated. The decision-maker appointed by the Title IX Coordinator has the authority to maintain order at the hearing and make all decisions necessary for the fair, orderly, and expeditious conduct of the hearing. The decision-maker shall be the final decider concerning all aspects of the hearing, including prehearing matters and at the hearing, how evidence is examined and the order of witnesses.
- (b) At the request of either party, the institution will provide for the live hearing to be conducted with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answering questions.
- (c) In cases involving more than one (1) respondent, any party may request separate hearings by submitting a request at least five (5) business days before the hearing. The Title IX Coordinator will decide whether to grant the request.
- (d) Live hearings may be conducted with all parties physically present in the same geographic location or, at the institution's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- (e) At least ten (10) business days prior to a live hearing, the institution will provide both parties with written notice of the following:
 - 1. The time, place, date of the hearing, and electronic access information, if applicable;
 - 2. The name of each witness the institution expects to present or be present at the hearing and those the institution may present if the need arises;
 - 3. The right to request a copy of the investigative file (other than portions that are protected by law or privilege), which includes all of the evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint;
 - 4. The right to request copies of all documents, copies of electronically stored information,

- and access to tangible evidence that the institution has in its possession, custody, or control and may use to support claims or defenses;
5. The right to have an advisor of the party's choice, who may be, but is not required to be an attorney, and that if the party does not have an advisor present at the hearing, the institution will provide an advisor of the institution's choice, without fee or charge, to ask the other party and any witnesses all relevant questions and follow-up questions on behalf of that party;
 6. Any party in need of an institution-provided advisor must inform the Title IX Coordinator at least five (5) business days before the hearing;
 7. Any cross-examination of any other party or witness must be conducted by the advisor; and
 8. Additional information may be included in the notice of hearing.
- (f) When notice is sent by U.S. mail or courier service, the notice is effective on the date the notice is mailed or delivered to the courier service. When notice is hand delivered by the institution, notice is effective on the date that the notice is delivered to a party. When notice is sent by email, the notice is effective on the date that the email is sent to the parties' institution-provided email account.
 - (g) The decision-maker may conduct a pre-hearing meeting or conference with the parties and their advisors to discuss pre-hearing issues, including any technology to be used at the hearing and the general rules governing the hearing.
 - (h) The decision-maker may allow a temporary delay of the process or the limited extension of time frames for good cause with written notice to the parties of the delay or extension and the reasons for the action. Good cause may include, but is not limited to, considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.
 - (i) If a party fails to attend a hearing, the decision-maker may proceed without that party's participation.
 - (j) During the hearing, the decision-maker will make evidence subject to review and inspection during the investigation phase available to give each party equal opportunity to refer to that evidence, including for purposes of cross-examination.
 - (k) Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
 - (l) Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination question or a question from someone other than the decision-maker, the decision-maker will first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
 - (m) The decision-maker will not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding the privilege has waived the privilege.
 - (n) The decision-maker will permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing will be conducted directly, orally, and in real time by the party's advisor and never by a party personally. Conducting cross-examination will be the advisor's only opportunity to speak. Advisors will not engage in other presentation of arguments or evidence, including opening statements, closing arguments, or direct examinations.
 - (o) If a party does not have an advisor at the live hearing, the institution will provide without fee or

charge to that party an advisor. The institution will choose the advisor.

- (p) If a party or witness does not submit to cross-examination at the live hearing, the decision-maker will not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided however, that the decision-maker cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross examination or other questions.
 - (q) For good cause shown, a decision-maker may permit the participation of witnesses who were not identified by the party to the investigator, or the inclusion of evidence not provided by the party to the investigator.
 - (r) The institution will create an audio or audiovisual recording, or transcript, of a live hearing and make it available to the parties for inspection and review.
 - (s) The decision-maker may dismiss the formal complaint or any allegations therein, if at any time during the hearing a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw a formal complaint or any allegations therein, the respondent is no longer enrolled or employed by the institution, or specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
 - (t) If the decision maker dismisses the formal complaint during the grievance process, the decision-maker will promptly notify the Title IX Coordinator, who will promptly send written notice of the dismissal and reasons therefor simultaneously to the parties.
- (14) Written Determination
- (a) Within fifteen (15) business days of the hearing, the decision-maker will issue a written determination that will be provided to the parties simultaneously.
 - (b) The determination becomes final either on the date that the institution provides the parties with a written result of an appeal, or if an appeal is available but not filed, the day after the deadline to appeal.
 - (c) The determination will include:
 - 1. Identification of the allegations potentially constituting sexual harassment, as well as identification of any additional allegations that are being resolved but which do not constitute sexual harassment;
 - 2. A description of the procedural steps taken between receipt of the formal complaint and the determination, including all notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and any hearings held;
 - 3. Findings of fact supporting the determination;
 - 4. Conclusions regarding the application of these rules, as well as any other relevant rules, procedures, or processes to the facts;
 - 5. A statement of, and rationale for, the result as to each allegation before the decision-maker, including a determination regarding responsibility;
 - 6. Any disciplinary action that the decision-maker imposes on the respondent, including referral to another process;
 - 7. Any remedies that the institution will provide designed to restore or preserve equal access to education programs and/or activities to the complainant; and
 - 8. The permissible bases and procedures, including timelines, for appeals by the parties.
- (15) Remedies and Disciplinary Action Following Determination of Violation
- (a) The institution will provide remedies where a determination of responsibility for sexual harassment has been made. The institution will follow these and other applicable rules before

the imposition of any disciplinary sanctions for sexual harassment that are not supportive/interim measures.

- (b) Remedies will be designed to restore or preserve equal access to education programs and activities and will include one (1) or more sanctions identified in TBR's Rules for Student Conduct and Disciplinary Sanctions, Chapter 0240-02-03.
 - (c) Remedies may also consider improvements to the campus-wide environment. Institutions should consider the impact of an incident of sexual harassment on the campus as a whole or specific groups or areas of campus. For example, specific training may be needed for a student group.
 - (d) The Title IX Coordinator is responsible for ensuring effective implementation of the remedies.
- (16) Appeals/Post-Determination Procedures
- (a) Parties are permitted to appeal to the institution's President (or other person appointed by the Title IX Coordinator) from a determination regarding responsibility (or no responsibility) and from a dismissal of a formal complaint or of any allegations in a formal complaint on the basis of:
 - 1. Procedural irregularity that affected the outcome of the matter;
 - 2. New evidence that was not reasonably available at the time the determination or dismissal was made, but only if that new evidence could affect the outcome of the matter; or
 - 3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome.
 - (b) A party wishing to appeal a determination regarding responsibility or the dismissal of a formal complaint or any allegations therein must file a written appeal with the Title IX Coordinator within seven (7) business days of the date of the determination or the dismissal. The written appeal must identify the reasons for the appeal.
 - (c) As to all appeals, the Title IX Coordinator will:
 - 1. Notify the other party in writing when an appeal is filed;
 - 2. Implement appeal procedures equally for both parties;
 - 3. Ensure that the decision-maker(s) for the appeal is not the same person as the investigator, the decision-maker, or Title IX Coordinator; and
 - 4. Provide each party five (5) business days from the date of notice from the Title IX Coordinator to provide a written statement in support of, or challenging, the determination.
 - (d) The decider of the appeal will issue a written decision describing the result of the appeal and the rationale for the result, and will provide the written decision simultaneously to the parties.

Authority: T.C.A. §§ 4-5-101 et seq. and 49-8-203.

0240-02-10-.06 Severability is added to Chapter 0240-02-10 and shall read as follows:

0240-02-10-.06 Severability

- (1) If any provision of the Title IX regulations on which these rules are based is enjoined or held invalid as it applies to the TBR institution or the Title IX regulations' application to any person, act, or practice is enjoined or held invalid as it applies to the TBR institution, the remainder of these rules or the application of its provisions to any person, act, or practice shall not be affected thereby.
- (2) For conduct that occurs across revisions of these rules or other standards, complaints of sexual harassment will be addressed utilizing the procedures outlined in the rules in effect as of the date of the

notice of allegations. The "Definitions" in effect as of the date of the alleged incident will be used. Complaints and reports of conduct spanning revisions of rules will be addressed using the "Definitions" in the rules in effect at the time of the most recent alleged incident.

Authority: T.C.A. §§ 4-5-101 et seq. and 49-8-203.

I certify that the information included in this filing is an accurate and complete representation of the intent and scope of rulemaking proposed by the agency.

Date: April 21, 2021

Signature: Brian A. Lapps, Jr.

Name of Officer: Brian A. Lapps, Jr.

Title of Officer: General Counsel

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Tre Hargett
Secretary of State

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