

## **BERKELEY COLLEGE Equal Opportunity Policy**

### **Purpose**

Recognizing that its diversity greatly enhances the workplace and opportunities for learning, Berkeley is firmly committed to providing all associates, including faculty, and students equal access to its programs, services, activities, opportunities, and facilities.

### **Scope**

This Policy applies to all Berkeley College students, trustees, associates and third parties.<sup>1</sup> For purposes of this Policy, and any procedures promulgated in connection with it, the term “College” shall include Berkeley College and BES Inc., the associates of which shall be collectively referred to as “associates.”

### **A. Prohibited Conduct**

Berkeley College prohibits (a) discrimination on the basis of sex, gender, gender identity or expression, sexual orientation, pregnancy and the status of being transgender – such sex discrimination includes sexual and gender based harassment; sexual assault; and sexual exploitation, all prohibited under this Policy; (b) domestic violence and dating violence (collectively referred to in this Policy as “intimate partner violence”); (c) stalking; (d) discrimination or harassment on the basis of race, color, creed, religion, national origin, age, genetic characteristics, ancestry, disability, veteran status, marital status, civil union or partnership status, alienage or citizenship status; and (e) bullying of students by other students, including but not limited to cyber-bullying.

Such discrimination and harassment, including sexual and gender-based harassment, is also prohibited by various federal, state and local laws including, but not limited to: Title VII of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Americans with Disabilities Amendments Act of 2008, Title IX of the Education Amendments of 1972 (“Title IX”), the New York State Human Rights Law, the New York City Human Rights Law and the New Jersey Law against Discrimination. Sexual assault, dating violence, domestic violence and stalking are prohibited by various federal and state laws, including, but not limited to, the Violence Against Women Reauthorization Act of 2013, which amended the Clery Act (“VAWA”) and New York Education Law Article 129-B.

Retaliation is also prohibited under the Policy. No person covered by this Policy shall be subject to an adverse action (employment or educational) because that person, in good faith, reports an incident, complains, provides information or testimony, or otherwise assists in any investigation connected with this Equal Opportunity Policy or with a complaint or investigation/adjudication in an external administrative or judicial forum.

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<sup>1</sup> Third parties can include, for example, paid or unpaid interns, independent contractors, vendors, guests, applicants for admission and employment and other non-employees.

This Policy governs prohibited conduct that occurs:

- on campus/at the physical workplace/from virtual employees, regardless of location;
- off campus/away from the physical workplace if in the context of any College or business related or sponsored program, activity or event, including travel for same;
- off campus/away from the physical workplace when the conduct has continuing adverse effects or creates or continues a hostile environment on campus/at the physical workplace;
- off campus when the conduct has a significant impact on the educational mission and well-being of the College community;
- through the use of College-owned or provided technology resources, regardless of location; or
- through the use of social media, regardless of location.

Violations of this Policy, including the violation of retaliation, are considered misconduct (associate or student, respectively) and may result in disciplinary action, including, but not limited to, termination of employment (associates) or dismissal from the College (students).

This Policy declares the College's goal to achieve zero-tolerance with regard to such prohibited conduct; but it is not designed or intended to limit the authority or discretion of College officials with regard to decisions about discipline, discharge, or other corrective action concerning conduct that the College deems unacceptable.

## B. Definitions

For purposes of this Policy and related procedures, the following definitions apply:

### 1. Discrimination

Discrimination involves the unequal treatment of an individual - for example, granting or denying admission, opportunities, benefits, or services in or to the College, the workplace, educational programs of study or academic pursuits, or College-sponsored activities - because of one or more of the protected characteristics listed under the "Prohibited Conduct" section of this Policy.

### 2. Sexual and Gender-Based Harassment

Sexual/Gender-Based Harassment is a form of sex discrimination and involves a broad range of conduct, as follows:

**Sexual Harassment** is any unwelcome sexual advance, request for sexual favors, or other verbal or physical conduct of a sexual nature plus one of the conditions outlined in (1) or (2), below.

**Gender-Based Harassment** includes harassment based on gender, sexual orientation, gender identity, or gender expression, transgender status, which may include acts of

aggression, intimidation, or hostility, whether verbal or non-verbal, graphic, physical, or otherwise, even if the acts do not involve contact of a sexual nature, **plus** one of the conditions outlined in (1) or (2), below.

- (1) The conduct amounts to **quid pro quo harassment**. Submission to, or rejection of, such conduct by an individual a) is used (by someone in a position of power) as a basis for making academic or employment decisions or evaluations about that individual or b) is made (by someone in a position of power) a term or condition of that individual's academic standing, employment, or ability to participate in any College program, activity opportunity or benefit.

For example, quid pro quo harassment can occur when an employer or College administrator implicitly or explicitly attempts to make submission to sexual demands or gender based harassment a condition of employment or a condition of an academic program or activity. Thus, an employee or student may perceive that he or she must tolerate sexual advances or engage in a sexual relationship in order to continue employment or instruction, to achieve advancement or a good grade, or to avoid adverse employment or educational consequences such as poor evaluations or demotions. Similarly, it is unlawful for an employer or College administrator to condition favorable treatment such as promotions, salary increases, preferred assignments, or good grades, on an employee's or student's acceptance of sexual advances or relations.

- (2) The conduct creates a **hostile environment**. A hostile environment can involve, for example, unwelcome verbal, physical or expressive behavior of a sexual nature or directed at an individual because of that individual's sex or gender, including, but not limited to: graphic verbal commentary about a person's body; sexually degrading words to describe an individual; the display of sexually suggestive objects or pictures; repeated and unwelcome flirtation or requests for "dates"; sexual slurs and jokes; inquiries about a person's sexual habits; sex stereotyping and unwelcome touching<sup>2</sup>. A hostile environment only exists when such conduct is sufficiently severe, persistent, or pervasive such that it unreasonably interferes with, limits, or deprives an individual from participating in or benefiting from the College's educational or employment experience, when viewed through both a subjective and objective standard.

A hostile environment can be created by persistent or pervasive conduct or by a single or isolated incident, if sufficiently severe. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. A single incident of sexual assault, for example, may be sufficiently severe to constitute a hostile environment. In contrast, the perceived offensiveness of a single verbal or written expression, standing alone, is typically not sufficient to constitute a hostile environment.

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<sup>2</sup> Sexual harassment that constitutes "sexual assault" is (superseded and) governed by the College policy and procedures relating to sexual assault/VAWA/NY 129-B.

### 3. Sexual Exploitation

Sexual exploitation, which is a form of discrimination on the basis of sex, means taking sexual advantage of another person and includes, without limitation: recording, photographing and/or transmitting images of private sexual activity and/or the intimate parts of another person(s) via web-cam, camera, cell phone, Internet, etc., without the knowledge and consent of all persons; allowing third persons to observe private sexual acts or nudity without the knowledge and consent of all persons; and indecent exposure.

### 4. Sexual Assault

Sexual assault is a crime prohibited by state law, and is also considered a form of sexual harassment prohibited by Title IX of the Education Amendments of 1972 (Title 20 U.S.C. Sections 1681-1688) and the VAWA<sup>3</sup>. Sexual assault includes any sexual act directed against another person involving the use of force; against that person's will; in violation of law; or under circumstances where the victim is deemed physically, mentally, or legally incapable of giving affirmative consent.

### 5. Affirmative Consent

Consent to a sexual act requires a clear, affirmative, current, and mutual agreement to take or permit such action. Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon an individual's sex, sexual orientation, gender identity, or gender expression. Although consent need not be verbal, verbal communication is often the most reliable means of ensuring consent to sexual activity.

Consent to any one or prior sexual act does not constitute consent to any other or future sexual act. Consent to sexual activity may be withdrawn at any time, in which case the activity must cease immediately. Consent cannot be obtained by physical force, threats, or intimidation. Consent is required regardless of whether the person *initiating* the act is under the influence of drugs and/or alcohol.

Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by a lack of consciousness or being asleep, being involuntarily restrained, or can exist if an individual's ability to make decisions is otherwise compromised. Depending on the

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<sup>3</sup> References to "VAWA" herein include NY 129-B incidents as well because NY 129-B, like VAWA, relates to the prevention, investigation and adjudication of sexual assault, intimate partner violence and stalking complaints in the college community.

degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent.

Consent cannot be given by a person who is under the legal age of consent. In addition, consent cannot be given by an individual with a mental, intellectual, physical or other disability that renders him/her incapable of giving consent.

## **6. Intimate Partner Violence**

Intimate partner violence, which is also referred to as dating violence, domestic violence and relationship violence, can be a state law crime and is prohibited by the VAWA. It includes any act of violence or threatened violence against an individual by a person who is, or has been, involved in a sexual, dating, domestic or other intimate relationship with that individual. Intimate partner violence can encompass a broad range of behavior, including but not limited to physical violence, sexual violence, emotional violence and economic abuse. It may take the form of threats, assault, property damage, and violence or threat of violence to one's self, one's sexual or romantic partner or to the family members or friends of the sexual or romantic partner. The offending act need not be sexual in nature to be considered "intimate partner violence" if it occurs within or in connection with a past or present sexual or romantic relationship.

## **7. Stalking**

Stalking, which can be a state law crime and is prohibited by the VAWA, is generally a pattern of repeated and unwanted attention, harassment, communications, contact or any other course of conduct directed at a specific person that would cause a reasonable person to become alarmed or be in fear of harm or injury, including physical, psychological, or emotional harm. Stalking may include repeatedly telephoning or following someone in a way that causes them alarm or discomfort or cyber-stalking, a particular form of stalking in which electronic media such as the Internet, social networks, blogs, cell phones, texts or other similar devices or forms of contact are used to pursue, harass, intimidate, threaten or make unwelcome contact with another person. Stalking generally involves one person's obsessive and unwanted behavior toward another person.

## **8. Bullying**

Bullying generally includes any gesture, any oral, written, or electronic communications, or any physical act by a student of the College against another student or group of students of the College, whether it be a single incident or a series of incidents, that is reasonably perceived as being intended to maliciously harass, insult, defame, intimidate, or embarrass such student or group of students in a way that could disrupt or interfere with the orderly operation of the College.

## 9. Disability<sup>4</sup>

A physical, medical, psychological or mental impairment that substantially limits one or more major life activities or which is demonstrable by medically accepted clinical or laboratory diagnostic techniques. A person is considered to have a disability if he or she (1) has such an impairment, (2) has a record or history of such an impairment, or (3) is perceived by others as having such an impairment. "Disability" under this Policy includes a temporary disability.

## 10. Retaliation

Retaliation occurs when an adverse action is taken against an individual (student or associate) for engaging in legally protected activity, such as making a good faith complaint or participating in an investigation under this Policy or in other forums (administrative or judicial). An adverse action can include any negative job action, such as demotion, discipline, firing, salary reduction, or job or shift reassignment or any negative school/education related action affecting a student's academic standing or ability to participate in, or benefit from, an educational program, activity or opportunity. If the adverse action would deter a reasonable person in the situation from making a complaint or participating in the investigation process, it can constitute prohibited retaliation.

## C. Supervisory Responsibilities

All supervisors and managers who **receive** a complaint or information about suspected prohibited conduct under this Policy, **observe** what may be prohibited behavior under this Policy or **reasonably suspect** that prohibited conduct is occurring, **are required** to report such suspected activity pursuant to the Procedures promulgated in connection with this Policy (See Section "E" herein.)

In addition to being subject to discipline if they engage in prohibited conduct under this Policy themselves (including retaliation), supervisors and managers may be subject to discipline for **failing to report** prohibited conduct under this Policy or otherwise knowingly **allowing the prohibited conduct to continue**.

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<sup>4</sup> See also the College *Disability Services Accommodations Policy for Students* and the *Disability Services Accommodations Policy for Associates*, and related policies and documents referenced therein, regarding College policy and procedures for reasonably accommodating disabilities.

#### **D. Registered Sex Offenders**

Federal regulations require the College to inform you that registered sex offenders are listed on the Internet at <https://www.njsp.org/sex-offender-registry/index.shtml> (New Jersey) and <http://www.criminaljustice.ny.gov/nsor/> (New York).

#### **E. Equal Opportunity Procedures**

The College has adopted procedures to implement this Policy, containing, among other things: provisions on reporting; how to file a complaint internally or externally; interim measures and investigating and adjudicating internal complaints. Equal Opportunity Complaint Procedures for both associates and students, respectively, are available at <https://berkeleycollege.edu/pdf/equal-opportunity-complaint-procedures-for-associates.pdf> and <https://berkeleycollege.edu/pdf/equal-opportunity-complaint-procedures-for-students.pdf>

In the event that a Title IX, VAWA or NY 129-B related complaint arising under this Policy involves both a student and an associate, the Equal Opportunity Complaint Procedures for Students shall be followed. In such instances, the Deputy Title IX Coordinator for Associates (or her delegee) and the Deputy Title IX Coordinator for Students shall work together in the investigation and disposition of the complaint.

In addition to the above-referenced Procedures, for more information regarding Title IX, VAWA and/or NY 129-B, please see the College Title IX page [http://berkeleycollege.edu/berkeley\\_bc/title-ix.htm](http://berkeleycollege.edu/berkeley_bc/title-ix.htm) and the Resource Brochure <https://berkeleycollege.edu/pdf/vawa-brochure.pdf>