Resolving Discrimination, Harassment, and Title IX Complaints: Workshop for Chairs, Heads, Directors, Academic Leaders

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Presentation Agenda

1. Why Am I Here? (Legal Background)
2. Discrimination, Harassment, Retaliation, and Title IX Overview
3. Hot Topics
4. NDSU Policy - Complaint Resolution Process
5. Mandatory Reporting Obligations
Why Am I Here?
(Legal Background)
What is Title IX?

• Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §§ 1681 et seq. prohibits different treatment on the basis of sex in all aspects of a school’s education programs or activities.

• Title IX also sometimes prohibits policies and procedures that disproportionately affect women or girls in an adverse way.
What is Title IX?

• Title IX prohibits retaliation against an individual for opposing or reporting discrimination, complaining about discrimination, or participating in a discrimination investigation.

• Title IX requires schools to adopt policies and procedures that are important for the prevention and correction of sex discrimination.

**Title IX additionally places strict requirements regarding the investigation of sexual harassment and sexual misconduct**, as explained in greater detail below.
Federal Funding Tied to “Assurances”

**Title VI**

*(implements Title VII in the entities receiving financial funds)*

Every application for Federal financial assistance . . . shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all [non-discrimination] requirements imposed by or pursuant to this subpart.

Title IX has the same “assurance” requirement.
What Does Title IX Cover?

- Title IX prohibits sex discrimination in the following areas:
  - Admissions;
  - Recruitment and Retention;
  - Scholarships and Fellowships;
  - Counseling and Appraisal Materials;
  - Administration of Courses;
  - Marital/Parental Status and Pregnancy;
  - Harassment; and
  - Employment.
- Title IX also prohibits retaliation.
Legal Incentives to Report Misconduct

Title VII - (Sex Discrimination Guidelines/ Employee)

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

Reporting and investigation help an employer demonstrate “immediate and appropriate action.”
Legal Obligation to Conduct Investigations

Title IX (34 C.F.R. Part 106.8(a))

Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part.

REPORTING is the first step in an investigation.
Legal Obligations to Conduct Training

**Clery Act**
(and Amendments: Violence Against Women Act & Campus SaVe Act)

Requires universities to adopt certain institutional policies to address and prevent campus sexual violence, such as to **train personnel**.

**Title IX**

Dear Colleague Letter (April 4, 2011) “schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly.”
NDSU’s Commitment to Prevent Misconduct

*NDSU Policy Manual, Section 156, Discrimination, Harassment, and Retaliation Complaint Procedures 1.2:*

“NDSU is committed to providing a safe and non-discriminatory learning, living, and working environment for all members of its university community.” Reporting and correcting misconduct that detracts from mission helps maintain a high-quality learning environment.
Discrimination, Harassment, Retaliation and Title IX Overview
1. INTRODUCTION

1.1 North Dakota State University (NDSU) prohibits discrimination in its employment decisions and educational programs and activities on the basis of age, color, gender expression/identity, genetic information, marital status, national origin, physical or mental disability, pregnancy, public assistance status, race, religion, sex, sexual orientation, spousal relationship to current employee per SBHE Section 603.2, status as a U.S. veteran, or participation in lawful activity off NDSU’s premises during nonworking hours which is not in direct conflict with the essential business-related interests of NDSU. (See NDSU Section 100, Equal Opportunity and Non-Discrimination Policy).

1.2 NDSU is committed to providing a safe and non-discriminatory learning, living, and working environment for all members of its university community. Specifically, NDSU is committed to taking action to:
Key Definitions – Protected Classes

- Age
- Color
- Gender Expression/Identity
- Genetic Information
- Marital Status
- National Origin
- Physical Or Mental Disability
- Pregnancy
- Public Assistance Status
- Race
- Religion
- Sex
- Sexual Orientation
- Spousal Relationship to Current Employee per SBHE Section 603.2
- Status as a U.S. Veteran
- Participation in lawful activity off premises during nonworking hours that is not in direct conflict with the essential business-related interests of NDSU
Key Definitions – Discrimination

Different or unequal treatment of an individual (or group), based on one or more of the protected classes of the individual (or group), except as where permitted or required by law, that negatively affects their education, employment, or other participation in educational programs and activities.
Examples of Discrimination

- Negative personnel action (e.g., hiring, firing, discipline, evaluations) or academic action (e.g., grades, awards, recommendations, evaluations).
- Treating someone different because of a serious medical condition/disability.
- Denying grant funding due to a protected class.
- Grading harder because of a test accommodation.
- Failing to provide a reasonable accommodation for disability or religious beliefs.
Key Definitions – Harassment

A **form of discrimination**; unwelcome oral, written, graphic, or physical conduct, based on one or more of the protected classes of an individual (or group), that is:

1. sufficiently severe, persistent, or pervasive so as to **unreasonably interfere** with their education, employment, or other participation in educational programs and activities; OR

2. that creates a working, learning, or educational program and activity environment that **a reasonable person would find hostile, intimidating, or abusive**.
Examples of Harassment

Harassment may include, but is not limited to, threats, physical contact or violence, offensive jokes, insults or put-downs, slurs or name calling, vandalism/graffiti, or offensive objects or pictures.

Petty slights, annoyances, and isolated incidents (unless very serious) typically do not rise to the level of harassment.
Key Definitions – Retaliation

Any individual (or group) reporting discrimination or otherwise participating in these procedures is entitled to protection from retaliation as a result of their activity under these procedures. Retaliation may include, but is not limited to, intimidation, harassment, reprisal, or other negative changes in education or employment.
Protected Conduct

- Any activity under Policy 156, e.g.:
  - Making a Complaint under Policy 156.
  - Participating in an investigation.
  - Participating on a review committee.
Identifying Retaliation - Employment

Retaliation affects an individual’s terms and conditions of employment, including:

- Significant benefit changes;
- Reduced compensation;
- Reassignment;
- Changes in work assignment (decreased responsibility or opportunity);
- Failure to promote;
- Failure to hire;
- Demotion; and
- Termination.
Identifying Retaliation - Education

Retaliation affects a student’s educational experiences and opportunities, including:

• Assigning poor or lower-than-earned grades;
• Assigning unreasonable or unfair assignments;
• Discrediting academic or other achievements;
• Unreasonable blame based on student’s work/research;
• Removal from clubs, sports, officer positions; and
• Withholding recommendations or grades.
- Religious Discrimination
- Disability Discrimination
- Sexual Harassment
- Sexual Misconduct
- Gender Expression/Identity Discrimination
Religious Discrimination

Typically, under federal law, discrimination includes refusing to reasonably accommodate an individual’s sincerely held religious beliefs or practices unless the accommodation would impose an undue hardship.
Disability Discrimination

- Definition of “Disability”
  - A physical or mental impairment that substantially limits one or more major life activities (an “actual disability”);
  - A record of a physical or mental impairment that substantially limited a major life activity (“record of”); or
  - An actual or perceived impairment that is not both transitory and minor (“regarded as”).
Disability Accommodation

- Failure to accommodate is discrimination.
- Accommodations must be “REASONABLE.”
- Students who request accommodations should be referred to Disability Services.
- Staff members seeking accommodations should work with the supervisor as a starting point.
Examples of Accommodations (Students)

- Extended testing time
- Alternate test location
- Preferential seating
- Permission to record lectures
- Consideration for absences
- Taped texts
- Note takers
- Interpreters
- Readers

- Videotext displays
- Braille calculators, printers, or typewriters
- Voice synthesizers
- Calculators or keyboards with large buttons
- Reaching device for library use
- Assistive listening devices/systems
- Telecommunications devices for deaf persons.
Examples of Accommodations (Employees)

- Making facilities readily accessible and usable.
- Job restructuring (altering when or how an essential job function is performed).
- Modified work schedules.
- Obtaining or modifying equipment or devices.
- Modifying examinations, training materials or policies.
- Providing qualified readers and interpreters.
- Allowing an employee to provide equipment or devices that an employer is not required to provide.
- Providing a leave of absence.
- Additional time off.
Sexual Harassment

• **Quid Pro Quo** – Unwelcome sexual advances or requests for sexual favors or other verbal or physical conduct of a sexual nature that conditions the receipt of a benefit upon sex, or punishes a person for not accepting sexual advances.

• **Hostile Environment** – Creation of an intimidating, hostile, or offensive working/academic environment or otherwise substantially interfering with an individual’s employment/education by such conduct.
Sexual Harassment Configurations

• Not limited to harassment by the opposite sex, i.e., males can sexually harass other males.

• Focus on the conduct – not the identities of the victim and the accused.
Examples of Hostile Environment

- Sexual flirtations, unwelcome invitations to social events;
- Offensive physical contact or physical closeness (e.g., back/neck massages);
- Sexual discussions, jokes, and innuendos;
- Discussion of sexual desires or exploits (real/imagined);
- Display of sexually suggestive pictures or objects;
- Unwanted personal gifts or attention; or
- Sabotaging an individual’s character, reputation, work effects, or property because of sex;
Examples of Hostile Environment

• Cornering or blocking an individual’s exit;
• Stalking or following an individual (in-person or electronically); or
• Attempted or actual sexual assault.
<table>
<thead>
<tr>
<th>Sexual Harassment</th>
<th>Flirting</th>
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<tbody>
<tr>
<td>Unwelcomed attention.</td>
<td>Welcomed attention.</td>
</tr>
<tr>
<td>Makes the recipient feel uncomfortable, powerless, or</td>
<td>Makes the recipient feel comfortable, flattered, liked and in control of situation.</td>
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<tr>
<td>degraded.</td>
<td></td>
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<tr>
<td>One-sided advance.</td>
<td>Goes both ways.</td>
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<td>Attention due to sex</td>
<td>Attention due to interest in person as a whole</td>
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<tr>
<td>Fails to acknowledge other’s lack of interest or boundaries</td>
<td>Respects boundaries.</td>
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Sexual Misconduct

• Sexual violence is a form of sexual harassment

• Dear Colleague Letter (Apr. 4, 2011):
  • Withdrawn last week

“Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol. . . . A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion.” See also NDSU Policy 162 (Sexual Misconduct).
Sexual Misconduct (cont.)

• Title IX protects **everyone** from sexual harassment, which includes sexual violence, in an institution’s education programs and activities, including:
  • All academic, educational, extracurricular, athletic, and other programs of the institution.
    • This applies regardless if the harassment occurs on-campus or off-campus during the program.
  • Even if the harassment occurred off-campus and not in the course of a program, the on-campus continue effects of the harassment (e.g., on-campus retaliation by the perpetrator of friends) must be considered. **The victim is key, NOT the location.**
Sexual Misconduct (cont.)

- Title IX protects third parties from sexual harassment or violation in an institution’s education programs and activities (e.g., high school student participating in a recruitment program, a visiting student athlete).
Sexual Misconduct (cont.)

- NDSU Policy 162 additionally defines the following as sexual misconduct as:
  - Recording, distribution, or dissemination of sexual or intimate images or recordings of another person without that person's consent;
  - Allowing third parties to observe private sexual activity from a hidden location (e.g., closet) or through electronic means (e.g., Skype or livestreaming of images);
  - Engaging in voyeurism (watching private sexual activity without the consent of the participants or viewing another person's intimate parts, including genitalia, groin, breasts or buttocks, in a place where that person would have a reasonable expectation of privacy);
  - Causing the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity;
  - Exposing one's genitals in non-consensual circumstances; inducing another to expose their genitals or private areas;
  - Prostituting another person; or
  - Exposing another person to a sexually transmitted disease (STD), infection (STI), or virus (HIV) without the other's knowledge
How does Harassment Make Students Feel?

- How harassment makes students feel varies greatly by gender.
  - Self conscious or embarrassed (Female 57% and Male 34%)
  - Angry (Female 55% and Male 32%)
  - Less confident (Female 35% and Male 16%)
  - Afraid or scared (Female 32% and Male 9%)

- Impact on Education: How do students react?
  - Avoid the person (Female 48% and Male 26%)
  - Avoid a place (Female 27% and Male 11%)
  - Found it hard to study or concentrate in class (Female 16% and Male 8%)
  - Got someone to protect them (Female 16% and Male 4%)
  - Did not participate as much in class (Female 10% and Male 6%)

(Mus, 2011)
Gender Identity/Expression Discrimination

Singling out individuals who are transgender or gender nonconforming for differential treatment.
Language Overview

- Sex
- Sexual Orientation
- Gender Identity
- Gender Expression
- Transgender
- Cisgender
- Gender Nonconforming
- Gender Dysphoria
Gender Identity/Expression Discrimination

Discriminatory/harassing actions may include:

- Continued refusal to use an individual’s preferred pronoun.

- Continued refusal to use an individual’s preferred name.

- Inappropriate remarks about changing appearance.

- Asking excessively personal questions that would be inappropriate if asked of non-transgender individuals.

- Enforcing a dress code not aligned with preferred gender.
Restrooms/Gender-Specific Services/Facilities

Discriminatory/harassing actions also include:

- Preventing a transgender individual from using the restroom/locker room that fits with their gender.

- Denying access to services and programs based on gender, e.g., participation in women’s leadership programs, healthcare services, counseling services.

- Housing – Refer to NDSU policies on housing and gender identity/expression concerns.
Principles for Preventing Discrimination

**Recognize self-identity, regardless of surgery/documentation**
Is an individual’s gender identity and expression being accepted as described by the individual?

**Provide reasonable accommodation (if required)**
Are policies or procedures resulting in a transgender person having to unfairly endure difficult or different conditions?

**Biases are not a valid reason for discrimination**
Is the entity trying to accommodate another individual’s bias against transgender individuals?
NDSU’s Complaint Resolution Process
Overview of Policy 156

- Introduction/definitions (discrimination, harassment, protected classes).
- Procedure for filing a Complaint/Retaliation prohibited.
- Remedial measures (pre-final determination).
- Preliminary review of the Complaint.
- Informal resolution procedures.
- Formal resolution procedures.
- Intersection with other relevant policies.
- Notice of mandatory reporting responsibilities and training.
- Discretionary investigations/Filing with an external agency.
Goals of Policy 156

Specifically, NDSU is committed to taking action to:

1) Stop discrimination;

2) Remedy the effects of discrimination;

3) Prevent the recurrence of discrimination; and

4) Educate the university community about their rights and responsibilities regarding discrimination.
Who Can File a Complaint?

“Current or former NDSU students or employees, applicants for admission or employment, or any other participants in NDSU’s educational programs and activities, or any group thereof…”
How to File a Complaint

• A discrimination complaint is initiated by completing a NDSU Discrimination/Harassment/Retaliation Complaint Form (Complaint Form).

• The form must be filed with the Equity Office.
  – Online at https://www.ndsu.edu/forms/; or
  – Contact Equity Office for a copy.
Other Filing Options

- Complaints against **students or student groups**.
  - May be filed with the Student Affairs Office.
  - Resolution in coordination with the Student Affairs Office.
  - Any formal resolutions will follow procedures found in Rights and Responsibilities of Community: A Code of Student Conduct.

- Complaints alleging **Title IX violations**, including gender discrimination, sexual harassment, or sexual assault, may be filed with the Title IX Coordinator.
  - Procedures: NDSU Section 162, Sexual Misconduct and Title IX Compliance.
Anonymous Reporting

- May submit anonymous reports, **BUT**

- NDSU may be limited in its response.
  - In some circumstances, NDSU may need to take action to learn the identity of an individual who submitted an anonymous report.
Deadline for Filing

‘NDSU encourages those who believe they have been discriminated against to file a discrimination complaint as soon as possible.’

Unless the Equity Office agrees otherwise in writing, the Complaint Form must be submitted within 180 calendar days of the most recent incident of discrimination.
Confidentiality NOT Guaranteed

- NDSU will keep the complaint and its investigation confidential to the extent that it is possible.

- NO GUARANTEE OF CONFIDENTIALITY.

- NDSU may have an obligation to take specific actions under Policy 156 once aware of alleged discriminatory conduct.
Remedial Measures

• After receiving a report (but before any investigation/final determination), NDSU may have an obligation to take immediate measures to remedy harm of discriminatory conduct.

• E.g, no contact directive, a safety plan, residence modifications, academic modifications/support, work schedule or location modifications, parking modifications, referral to counseling/health services, administrative leave, temporary suspension.
NDSU POLICY 156 EO/Title IX Investigation Process Chart for Student Cases (modeled after ATIXA)

Excluding any appeal, the formal resolution process will be completed within 80 calendar days of the date the discrimination complaint was filed unless there are extenuating circumstances. Any reason for an extension to the 80 calendar day deadline will be communicated in writing to the Parties.

Must use a preponderance of the evidence standard in any Title IX proceedings, including any fact-finding and hearings.
https://www2.ed.gov/about/offices/list/ocr/docs/ga-201404-title-ix.pdf

Both parties must be notified, in writing, of the outcome of both the complaint and any appeal.

https://www.ndsu.edu/equity/
NDSU POLICY 156 EO/Title IX Investigation Process Chart (modeled after ATIXA)

1. Incident Report/Notice — Day 0 (May or may not come from a formal complaint)
   - Remedial Measures (both parties)
     - Preliminary Evaluation Determination — Day 2 (Equity Office determines whether there is reasonable cause to believe policies are violated and evidence may be found to substantiate allegations of policy violation)
       - Dismiss
       - Pursue Further Action
         - Notice of Action — Day 6 (to both parties)
           - Formal Resolution
             - Investigation (apply preponderance of the evidence standard)
               - Submission of Preliminary Investigation Report to Review Committees and Parties — Day 24 (parties may dispute findings in writing)
                 - No Violation Found
                 - Potential Violation Found / Recommended Sanctions
                   - Share Outcome with Parties
                     - Either party may Appeal
                       - (If recommended sanction disproportionate to potential violation, procedural error, and/or new evidence)
                         - If Appeal
                           - Share Final Outcome with Parties (supervision to impose recommended sanctions)
                             - If sanctioned, both parties retain rights to pre-disciplinary action review and/or an appeal
                             - Enforce sanctions and prevent recurrence
                             - Remediate effects on parties and community

Excluding any appeal, the formal resolution process will be completed within 60 calendar days of the date the discrimination complaint was filed unless there are extenuating circumstances. Any reason for an extension to the 60 calendar day deadline will be communicated in writing to the Parties.

Must use a preponderance of the evidence standard in any Title IX proceedings, including any fact-finding and hearings.

Both parties must be notified, in writing, of the outcome of both the complaint and any appeal.

https://www.ndsu.edu/equity/

September 8, 2017
Investigation Objectives

- Ascertain witnesses/involved individuals
- Collect facts and relevant evidence
- Determine who, what, when, where, why, and how
- Evaluate credibility
- Identify and eliminate extraneous information
- Make recommendation
The Investigator

- Investigators must be:
  - **Analytical** (detail oriented, able to gather and organize facts and make recommendations);
  - **Credible** (fair, trusted, skilled in investigative role);
  - **Knowledgeable about discrimination/harassment** (understand legal implications, able to identify discrimination in context of work/school environment);
  - **Impartial** (not connected to parties/outside the “chain of command”);
  - **Able to handle confidential/sensitive information**; and
  - **Self Reflective** (what are your own biases, what may affect your objectivity).
Standard of Proof

The Level of Certainty and the Degree of Evidence Necessary to Establish Proof

Policy 156 states the standard of proof is a:

PREPONDERANCE OF THE EVIDENCE.
Preponderance of the Evidence

In other words . . .

“[I]n order for an individual (or group) against whom a discrimination complaint was filed to be held responsibility for discrimination, it must be determined that it is more likely than not that the individual (or group) violated NDSU’s Equal Opportunity and Non-Discrimination Policy.”

- You may have heard that U.S. Secretary of Education announced last week a new interim Q&A for schools on how to investigate and adjudicate allegations of sexual misconduct under federal law.
  - Withdrawing the 4-4-11 Dear Colleague Letter
  - Schools have discretion to apply either preponderance of evidence or clear and convincing evidence standard
    - Should be consistent with standard applied in other student misconduct cases.
Overview of Formal Process – Appeals

• 5 days after final determination; filed with Equity Office.
• Grounds for an appeal include:
  – The recommended disciplinary action is substantially disproportionate to the findings;
  – Procedural error led to an improper final determination; and/or
  – New evidence that was previously unavailable should be considered as it could have had a significant impact on the final determination.
• Appeals process completed in 10 days from submission of appeals form.
Disciplinary Action

• Students: subject to disciplinary action, up to and including expulsion.

• Employees: subject to disciplinary action, up to and including termination.

• The disciplinary action recommended by the review committee will depend on the severity of the discriminatory conduct and whether the individual (or group) was previously found responsible for discrimination.
Discretionary Investigation Policy

“The Equity Office reserves the right to initiate an investigation under these procedures at its discretion in the absence of a discrimination complaint or report of discrimination in order to fulfill NDSU’s commitment to taking action to stop discrimination, remedy its effects, and prevent its recurrence.”
Mandatory Reporting Obligations
Employee Obligations

**All** NDSU employees who observe discrimination, including harassment or retaliation of a student, **must** document the discrimination and contact the Equity Office (filing a complaint).
Employee Obligations

**Student Reports of Discrimination/Harassment:**

1. Document the report.
2. Contact the Equity Office in accordance with 10.2 (how to file a compliant).

**Employee Reports of Discrimination/Harassment:**

*For NDSU supervisors, managers, department heads, deans, directors, or administrators*

1. Document the report.
2. Contact the Equity Office in accordance with 10.2 (how to file a compliant).
Employee Obligations

To comply with [Policy 156], NDSU employees **must promptly** complete and submit an NDSU Discrimination Report Form (Report Form) to the Equity Office.

Regardless of how you heard about it or where it happened, if you find out about a Title IX violation involving a student, employee, or visitor…

**REPORT IT!!!**
Thank You for Participating.

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