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To: Heather Higgins-Dochtermann
From: Matthew Hammer, Assistant Attorney General *mm*
Date: 01.11.2019
Re: Policy 156: Discrimination, Harassment, and Retaliation Complaint Procedures

There does not appear to be any mandate regarding these proposed changes. If NDSU wishes to show compliance with the new NSF term and condition by changing policy that is certainly allowed. The changes, however, should reflect the language and requirements of the term and condition. Additionally, the term and condition will only be applicable to new grants and amended grants – the term and condition is not retroactive.

Please see additional comments and changes in the redlined policy.

Policy Change Cover Sheet

This form must be attached to each policy presented. All areas in **red**, including the header, must be completed; if not, it will be sent back to you for completion.



If the changes you are requesting include housekeeping, please submit those changes to nds.policy.manual@nds.edu first so that a clean policy can be presented to the committees.

SECTION: **156: Discrimination, Harassment, and Retaliation Complaint Procedures**

1. Effect of policy addition or change (explain the important changes in the policy or effect of this policy). Briefly describe the changes that are being made to the policy and the reasoning behind the requested change(s). *Changes to existing policy to incorporate the most thorough procedures when reviewing and investigating complaints. Most changes are included in an effort to clarify the policy. Explanation of the most pertinent changes/additions/deletions found below (grammatical changes not included). Addition of federally mandated reporting requirements regarding NSF Pls and co-Pls included.*

Title Change: to reflect correct policy title – for clarification

2.2: To reflect correct policy title and to include all categories of complaints throughout policy - for clarification.

2.3: "Equity Director" is not correct title. Throughout policy this has been changed to reflect Equity Office - for clarification

2.5: Definition added to emulate Policy 162 - for clarification

2.6: Definition added to emulate Policy 162 - for clarification

3.1.1: To reflect correct policy title, clarify investigative process, process of complaints when Responding Party is both a student and an employee, and add specific procedures regarding complaints against Equity Office - for clarification

3.1.2: Remove 180 day time limit - for clarification

3.1.4: Additional confidential resources - for clarification

5.1: Clarify No Contact Order - for clarification

7.2: Additional informal resolution process options - for clarification

8.5: Addition of Title IX Policy (162) and inclusion of all categories of complaints - for clarification

8.10: Clarification in supervisor imposition of disciplinary action, and addition of mandatory reporting of findings against NSF Pls or co-Pls. (see Federal Register Notice released September 21, 2018) - for clarification and federal mandate

8.13: Addition of investigation interference consequences (as outlined in Policy 162, Section 2.5) - for clarification

8.14: Addition of False Reports consequences (as outlined in Policy 162, Section 2.7) - for clarification

10.1 - 10.4: Expansion and clarification of mandatory reporting obligations - for clarification

12.1: Addition of NSF contact information in reference to section 8.10 – federal mandate

- Is this a federal or state mandate? ☒ Yes ☐ No

- Describe change:

2. This policy change was originated by (individual, office or committee/organization):

The Equity Office annually reviews Policy 156. The last updates were made effective August 22, 2017. The procedures delineated in Policy 156 are executed by the Equity Office regarding all discrimination, harassment, retaliation, and sexual misconduct complaints involving both students and employees.

*Contact: Canan Bilen-Green, Vice Provost for Faculty and Equity, Old Main, Suite 201
canan.bilen.green@nds.edu.*

This portion will be completed by SCC Secretary (Kelly Hoyt).

Note: Items routed as information by SCC will have date that policy was routed listed below.

3. This policy has been reviewed/passed by the following (include dates of official action):

Legal Review:

Responsible Office:

Senate Coordinating Committee:

Faculty Senate:

Staff Senate:

Student Government:

Provost:

President:

The formatting of this policy will be updated on the website once the content has final approval. Please do not make formatting changes on this copy. If you have suggestions on formatting, please route them to nds.policy.manual@nds.edu. All suggestions will be considered, however due to policy format guidelines, they may not be possible. Thank you for your understanding!

SCC://SCC_cover_sheet.doc Revised 11/09/2017

North Dakota State University

Policy Manual

SECTION 156

DISCRIMINATION, HARASSMENT, ~~AND RETALIATION~~, AND SEXUAL MISCONDUCT COMPLAINT PROCEDURES

SOURCE: NDSU President

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, 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, or other protected classes as defined by federal, state, or local law. (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:
 - 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.
- 1.3 NDSU has committed itself to the establishment and adoption of procedures to resolve complaints of discrimination in violation of NDSU's Equal Opportunity and Non-Discrimination Policy, including complaints of harassment or retaliation. A central purpose of these complaint procedures is to provide a system at NDSU to conduct adequate, reliable, and impartial investigations of complaints of discrimination. NDSU's primary concern is to enact and implement complaint procedures that encourage reporting of discrimination and that ensure the rights of NDSU students, employees, and all other participants in its educational programs and activities are protected.

2. DEFINITIONS

- 2.1 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 or activities.

2.1.1 Protected classes for purposes of these procedures are: 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, 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](#)).

2.2 ~~Discrimination e~~Complaint – A complaint alleging ~~discrimination in~~ violation of NDSU's Equal Opportunity and Non-Discrimination Policy ~~and/or NDSU's Sexual and Gender-Based Harassment, Sexual Misconduct, and Title IX Policy~~, including complaints of ~~discrimination, harassment, or retaliation, or sexual misconduct (hereafter referred to as a discrimination complaint)~~.

~~2.3 Equity Director – For purposes of these procedures, the Equity Director is NDSU's Vice-Provost and Title IX/ADA Coordinator.~~

~~2.4~~2.3 Equity Office – For purposes of these procedures, the Equity Office is NDSU's Office of the Vice Provost for Faculty [Affairs](#) and Equity.

~~2.4~~ Harassment – A form of discrimination; unwelcome oral, written, graphic, or physical conduct, based on one or more of the protected classes (see 2.1.1) of an individual (or group), that is sufficiently severe, persistent, or pervasive so as to unreasonably interfere with their education, employment, or other participation in educational programs or activities or that creates a working, learning, or educational program or activity environment that a reasonable person would find hostile, intimidating, or abusive. 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.

~~2.5 Sexual Misconduct – A broad term encompassing all forms of gender-based harassment or discrimination and unwelcome behavior of a sexual nature. The term includes sexual harassment, nonconsensual sexual contact, nonconsensual sexual intercourse, sexual assault, sexual exploitation, stalking, public indecency, intimate partner violence, sexual violence, and other misconduct based on sex. All are prohibited by or against any student, employee, or third party. For more specific information, please refer to Policy 162: Sexual and Gender-Based Harassment, Sexual Misconduct, and Title IX.~~

~~2.5~~2.6 ~~Retaliation - Intimidation, harassment, reprisal, or other adverse/unfavorable action taken against an individual (or group) in response to their protected activity, which could include, but is not limited to, filing a discrimination and/or harassment complaint, reporting discrimination and/or harassment, or participating in a discrimination and/or harassment investigation. Subject to the limitations imposed by the First Amendment, any material adverse action taken against an individual due to their reporting or opposing discrimination or any participation in the investigatory process.~~

Commented [MEM1]: If you are going to refer to these as Discrimination Complaints, it seems that should just be what the defined term is since this is a definition section.

Commented [MEM2]: Retaliation is a legal term of art – protected activity is limited to specific conduct.

3. FILING A DISCRIMINATION COMPLAINT

3.1 Current or former NDSU students or employees, applicants for admission or employment, or any other participants in NDSU's educational programs or activities, or any group thereof, are encouraged to file a complaint if they believe they have been discriminated against in violation of NDSU's Equal Opportunity and Non-Discrimination Policy, which may include a complaint of harassment or retaliation. A complaint may be filed concerning alleged discriminatory conduct that occurred on NDSU's premises or off campus.

3.1.1 How to file a discrimination complaint - A discrimination complaint is initiated by completing a NDSU Discrimination/Harassment/Retaliation/~~Sexual Misconduct~~ Complaint Form (Complaint Form) and filing it with the Equity ~~Director~~Office. The Complaint Form is available online at <https://www.ndsu.edu/equity/forms/> or by contacting the Equity Office in Suite 201, Old Main, NDSU Main Campus, 701-231-7708, ndsu.eoaa@ndsu.edu. The Complaint Form is also available in the Student Affairs Office, Memorial Union 250, NDSU Main Campus, 701-231-8240. The Complaint Form can be submitted via email at ndsu.eoaa@ndsu.edu or by bringing it to the Equity Office. The Equity Office is available to assist with completing the Complaint Form as needed.

The Equity Office will investigate all discrimination, harassment, retaliation, and sexual misconduct complaints involving employees utilizing the procedures set forth in this policy and will coordinate the resolution of those complaints.

The Equity Office will investigate all discrimination, harassment, retaliation, and sexual misconduct complaints utilizing Sections 1 through 8.8 of this policy if the complaint identifies an alleged violation by a student. The resolution of ~~a the~~

formal complaint, including pre-hearing, hearing and appeals, will be conducted by the Student Affairs Office, in coordination with the Equity Office, pursuant to NDSU Policy 601. ~~The informal resolution of a complaint will be conducted by the Equity Office, pursuant to Section 7 of this policy.~~

If the Responding Party is a student and an employee, the Equity Office will determine which role predominates in the context of the discriminatory conduct based upon the facts and circumstances, including the role of the Responding Party at the time of the conduct and the location of the incident.

Any allegations brought forth against the Equity Office, or any of its employees, will be investigated by the President, or designee, using procedures as outlined in this policy.

- 3.1.2 Deadline for filing a discrimination complaint - NDSU encourages those who believe they have been discriminated against to file a discrimination complaint as soon as possible. ~~If too much time has passed since the most recent incident occurred, the delay in reporting may result in loss of relevant evidence and witness testimony, limiting NDSU's ability to take appropriate action. Unless the Equity Director agrees otherwise in writing, the Complaint Form must be submitted within 180 calendar days of the most recent incident of discrimination.~~

- 3.1.3 Confidentiality cannot be guaranteed - Depending on the nature of the discrimination complaint, NDSU will keep the complaint and its investigation confidential to the extent that it is possible. However, confidentiality cannot be guaranteed under these procedures as NDSU may have an obligation to take specific actions once aware of alleged discriminatory conduct.

- 3.1.4 Confidential support resources - If seeking a confidential resource, NDSU students may contact the NDSU Counseling Center at 212 Ceres Hall, NDSU Main Campus, 701-231-7671, ~~and the Student Health Service at (Wallman Wellness Center 102, NDSU Main Campus, 701-231-7331), or the Sexual Assault Prevention and Advocacy (SAPA) Coordinator at Wallman Wellness Center 102, NDSU Main Campus, 701-231-5733.~~ The Faculty/Staff Assistance Program, as described in NDSU Section 134, is a confidential resource for NDSU employees. ~~Faculty and staff may also contact the Ombudsperson at Library Room 20C, NDSU Main Campus, 701-231-5114 as an additional confidential resource.~~

- 3.1.5 Anonymous reporting - NDSU students, faculty, and staff may submit an anonymous form to report acts of bias, bigotry, or hate at NDSU. NDSU may be limited in its ability to respond to a report if it is submitted anonymously. Additionally, in very limited circumstances, NDSU may need to take action to learn the identity of an individual who submitted an anonymous report. For more information, see <https://www.ndsu.edu/biasreport/>.

Commented [MEM3]: The justification given for this was the recent Title IX NPRM. The NPRM is not the same as regulations, this should await the finalized regulations flowing from the NPRM. OCR's guidance from 2017 allows for informal resolution, but the Equity Office has declined to alter policy based on that guidance. The appropriateness of any informal resolution should include consultation with Student Affairs (and/or other appropriate offices), and must not involve suspension/expulsion cases.

Commented [MEM4]: If student sanctions (e.g. suspension, expulsion, etc.) are being pursued, the student process must be utilized. This would also require consultation with Student Affairs.

Commented [MEM5]: Under the current reporting structure, I don't think this individual can qualify as a confidential resource. That may change after the regulations from the NPRM are finalized, but with the current policy of imputed notice, this cannot be a confidential resource.

4. RETALIATION PROHIBITED

- 4.1 NDSU encourages reporting of discrimination and will not discipline any individual (or group) who makes a good faith report of discrimination. 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. Anyone who believes they have been retaliated against for their participation

under these procedures is encouraged to file a Complaint Form, which will be processed under these procedures as a separate matter from the originally filed discrimination complaint, if any. Anyone found responsible for retaliation will be subject to disciplinary action, up to and including termination or expulsion.

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5. REMEDIAL SUPPORTIVE MEASURES

- 5.1 Upon receipt of a discrimination complaint or as otherwise informed of alleged discrimination under these procedures, NDSU will, where appropriate, take reasonable steps to remedy the harm to those affected by discriminatory conduct. Remedial measures may include, but are not limited to, a ~~No Contact Order directive~~, a safety plan, residence modifications, academic modifications and support, work schedule and/or location modifications, parking modifications, referral to counseling or other health services, administrative leave, temporary suspension, or any other measure deemed appropriate by NDSU.

6. PRELIMINARY EVALUATION OF DISCRIMINATION COMPLAINT

- 6.1 Preliminary ~~e~~Evaluation ~~d~~Determination - The Equity ~~Office~~~~Director~~ will evaluate the discrimination complaint and decide to either: (1) pursue further action; or (2) dismiss the discrimination complaint. A discrimination complaint may be dismissed if: (1) it fails to allege any facts that suggest discrimination, harassment, ~~or~~ retaliation, ~~or sexual misconduct~~; or (2) an appropriate resolution or remedy has already been achieved. NDSU will not dismiss a complaint because it alleges discriminatory conduct that took place off campus. Rather, in the course of its investigation of the complaint, NDSU will determine whether the alleged off-campus conduct: (1) occurred within the context of an educational program or activity; and/or (2) has created or reasonably may create a hostile educational or work environment.

Unless there are extenuating circumstances, the ~~p~~Preliminary ~~e~~Evaluation ~~D~~Determination will be completed within ~~three~~3 business days of receipt of the discrimination complaint and the decision will be provided in writing to the individual (or group) who filed the complaint. If the Equity ~~Director~~~~Office~~ requires further information from the individual (or group) who filed the discrimination complaint before making a decision, the decision will be made within ~~three~~3 business days of receipt of the additional information requested. In the case of a dismissal, the Equity ~~Office~~~~Director~~ may provide information or guidance regarding other avenues for support or resolution of the complaint, if appropriate and available.

If the complaint is dismissed, the Reporting Party may submit a request for reconsideration of the complaint within ~~three~~3 business days of receipt of the ~~p~~Preliminary ~~e~~Evaluation ~~d~~Determination. The Reporting Party may submit additional documentation or information that supplements the original complaint. This may include, but is not limited to, additional evidence or names of witnesses. Complaints resubmitted with no additional information will not be reviewed for reconsideration. Submit all reconsiderations to ~~the Equity Director or by~~ ~~contacting~~ the Equity Office, ~~in Suite 201~~, Old Main ~~201~~, NDSU Main Campus, 701-231-7708, ndsuoaa@ndsuo.edu. As needed, the Equity Office is available to facilitate finding a resource to assist the ~~p~~Party with completing a request for reconsideration.

- 6.2 Notice of ~~a~~Action - If the Equity ~~Office~~ ~~Director~~ determines that further action on a discrimination complaint is warranted, the Equity Office will provide written notice to the individual (or group) who filed the discrimination complaint and the individual (or group) against whom the complaint was filed (collectively, the Parties) within ~~three~~3 business days of the determination made pursuant to ~~Section~~ 6.1 unless there are extenuating circumstances that delay the proposed timeline. The written notice will include, at a minimum: (1) the names of the Parties; (2) the basis for the discrimination complaint; (3) a statement that retaliation is prohibited; (4) a statement that requested responses or documentation must be provided in a timely manner; and (5) a description of the resolution process, including a copy of the relevant procedures. A modified ~~a~~Notice of ~~a~~Action may also be provided to an administrator, supervisor, or the Student Affairs Office who has control over the environment in which the alleged discriminatory conduct took place. The intent of the modified ~~a~~Notice of ~~a~~Action is to preserve confidentiality to the extent possible while also putting the administrator, supervisor, or Student Affairs Office on notice of their responsibility to monitor for retaliation or further discrimination.

7. INFORMAL RESOLUTION

- ~~7.1~~ Informal resolution defined - Informal resolution is a process in which the Parties attempt to agree upon the resolution of a discrimination complaint without a comprehensive

investigation~~onery~~ and determination process. Unless there are extenuating circumstances, the entire informal resolution process will be completed within 30 calendar days of its initiation.

~~7.27.1~~ Informal resolution is optional - When providing the ~~a~~Notice of ~~a~~Action to the Parties, the Equity Office may inquire if the Parties are interested in attempting to resolve the discrimination complaint through informal resolution. The Parties will have ~~three~~ 3 business days to individually decide if they would like to use informal resolution and should inform the Equity Office of their decisions in writing. The informal resolution process will only be used upon mutual agreement of the Parties. Either ~~p~~Party may inform the Equity Office at any time that they want to discontinue their participation in the informal resolution process and the formal resolution process will commence. The Equity ~~Office Director~~ reserves the right to deny the Parties the option of using the informal resolution process if it is deemed to be inappropriate or inadequate as applied to a particular discrimination complaint.

~~7.37.2~~ Informal resolution process - Informal resolution may involve the Equity Office, the Student Affairs Office, administrators, supervisors, ~~Ombudsperson~~, and/or external moderators working with the Parties to arrive at an appropriate and mutually agreeable resolution of the discrimination complaint. The informal resolution process will not require that the Parties meet face-to-face to resolve the discrimination complaint but may allow it, depending on the nature of the complaint and the power differential between the Parties.

~~7.47.3~~ Informal ~~r~~Resolution ~~a~~Agreement - If the Parties resolve the discrimination complaint through the informal resolution process, the Equity Office will draft an ~~i~~nformal ~~r~~Resolution ~~a~~Agreement, which the Parties will sign. A signed copy of the ~~i~~nformal ~~r~~Resolution ~~a~~Agreement will be provided to the Parties, as well as to any administrator, supervisor, or Student Affairs Office provided with a modified ~~a~~Notice of ~~a~~Action as described in 6.2. There is no available appeal of a signed ~~i~~nformal ~~r~~Resolution ~~a~~Agreement.

8. FORMAL RESOLUTION

8.1 Formal resolution applicability - The formal resolution process will commence if: (1) either ~~p~~Party elects to use the formal resolution process instead of the informal resolution process; (2) the Parties are unable to mutually agree upon a resolution under the informal resolution process; or (3) the Equity ~~Office Director~~ determines the informal resolution process is inappropriate or inadequate as applied to a particular discrimination complaint.

8.2 Comprehensive ~~investigation~~ investigation - A properly trained investigator(~~s~~) will conduct a comprehensive investigation under the formal resolution process in an adequate, reliable, and impartial manner. Unless there are extenuating circumstances, including when the Parties are unable to mutually agree upon a resolution under the informal resolution process, a comprehensive investigation will commence within ~~five~~ 5 business days of providing the ~~a~~Notice of ~~a~~Action to the Parties as described in 6.2. A comprehensive investigation will include the following steps, as relevant and available:

- (1) An interview with each of the Parties;
- (2) Interviews with witnesses identified by the Parties or determined otherwise;
- (3) A review of evidence provided by the Parties or collected otherwise; and
- (4) An opportunity for the ~~p~~Parties to submit questions of each other and/or the witnesses. Upon receipt of any such questions, the investigator~~s~~ will determine which questions, if any are relevant, and present them to the intended recipient for a response.

Equal opportunity will be given to the Parties to access and present evidence during the investigation. The Parties will be provided with periodic status updates throughout the course of the investigation.

8.3 Investigator~~(s)~~ – A staff member~~(s)~~ in the Equity Office may conduct the comprehensive investigation of the ~~discrimination-Discrimination complaint-Complaint~~ or ~~an~~ the Equity Office designee-Director may delegate investigative duties to another properly trained investigator~~(s)~~. Within ~~three 3~~ business days of notice of the identity of an investigator~~(s)~~, either ~~pParty~~ may provide the Equity Office Director with a written request asking that another investigator~~(s)~~ be assigned if the ~~pParty~~ believes there is a conflict of interest with the investigator~~(s)~~. Where appropriate, a new investigator~~(s)~~ will be assigned and the Equity Office Director will provide the Parties with written notice of the newly assigned investigator~~(s)~~.

8.4 Responsibilities of the Parties – Deadlines for completing actions under these procedures will be communicated in writing to the Parties, who must make every effort to comply with the deadlines communicated to them. Timeliness is particularly important under the formal resolution process as determinations may be made based on available information if a ~~pParty~~ fails to respond in a timely manner to action requested by an investigator~~(s)~~. In extenuating circumstances, an extension to a deadline may be granted by the Equity Office Director and will be communicated in writing to the Parties.

8.5 Standard of proof –In all cases, the applicable standard of proof for determining responsibility for an alleged violation is “preponderance of the evidence” – meaning, in order for an individual (or group) against whom a discrimination complaint was filed to be held responsible 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 and/or NDSU’s Sexual and Gender-Based Harassment, Sexual Misconduct, and Title IX Policy, which may include discrimination, harassment, or retaliation, or sexual misconduct.

In cases involving an alleged violation by an employee, the determination of responsibility shall be made by the investigator~~(s)~~.

In cases involving an alleged violation by a student, the determination of responsibility shall be made by the Hearing Officer, consistent with the procedures detailed in NDSU Policy 601.

8.6 Preliminary ~~i~~nvestigative ~~R~~eport – After an investigator~~(s)~~ has finished the comprehensive investigation of a ~~discrimination_-complaint~~, the investigator~~(s)~~ will draft a ~~p~~reliminary ~~i~~nvestigative ~~R~~eport.

For complaints involving an alleged violation by a student, the report shall include the findings of the investigation along with a recommendation for dismissal of the complaint or a recommendation of pursuing charges. If there is reasonable cause to believe that a violation has occurred, the recommendation shall be to pursue charges; if such reasonable cause is not present, the complaint shall be dismissed. Reasonable cause is a lower standard than preponderance of the evidence, and shall mean that there are just or legitimate grounds to believe that a violation has occurred.

For all other complaints, the report shall include the findings of the investigation along with a determination whether the individual (or group) against whom the discrimination complaint was filed is responsible for discrimination, including harassment or retaliation.

The report will also include, at a minimum, a summary of the relevant information gathered during interviews and otherwise that informed the preliminary investigation. Unless there are extenuating circumstances, the report will be drafted within 30 calendar days of initiation of the comprehensive investigation. The report will be provided to the Parties and, if applicable, a Review Committee as determined by the Equity Office (see 8.7). The Parties will have ~~five~~ business days from receipt of the report to respond to the ~~pP~~ Preliminary ~~iI~~ Investigative ~~R~~ Report and/or any information found in the report in writing. As needed, the Equity Office is available to facilitate finding a resource to assist a ~~pP~~ Party with putting its response in writing.

- 8.7 Review Committee – A Review Committee, at the discretion of the Equity Office, may be utilized to provide feedback on the ~~pP~~ Preliminary ~~iI~~ Investigative ~~R~~ Report. Unless there are extenuating circumstances, a Review Committee will meet within 10 calendar days of issuance of the ~~pP~~ Preliminary ~~iI~~ Investigative ~~R~~ Report in order to finalize the ~~investigative report~~ Investigative Report. The Review Committee will be comprised of no fewer than ~~three~~ properly trained NDSU faculty or staff members (no students) that do not have a conflict of interest with the Parties. If a ~~pP~~ Party believes there is a conflict of interest with a member(s) of the Review Committee, the ~~pP~~ Party should follow the procedures and deadline established in 8.3 to dispute the member(s). Prior to meeting, Review Committee members will review the ~~pP~~ Preliminary ~~iI~~ Investigative ~~R~~ Report and any written response to the report made by the Parties. The Review Committee may ask the investigator(s) who issued the ~~pP~~ Preliminary ~~iI~~ Investigative ~~R~~ Report to be available during their meeting in order to answer questions related to the investigation and to provide access to documentation in the investigative file as needed. In limited circumstances, the Review Committee may request that the investigator(s) gather additional information if the committee decides it cannot make a recommendation without the additional information. In that case, each ~~pP~~ Party will be provided with the additional information gathered and will have the opportunity to respond to it in writing.

- 8.8 Final ~~iI~~ Investigative ~~R~~ Report – Upon completion of any feedback provided by a Review Committee, the ~~pP~~ Preliminary ~~iI~~ Investigative ~~R~~ Report will become the ~~F~~ Final ~~iI~~ Investigative ~~R~~ Report. For complaints involving an alleged violation by a student, the final report shall be provided to the Student Affairs Office along with a recommendation for dismissal of the complaint or a recommendation of pursuing charges. If there is *reasonable cause* to believe that a violation has occurred, the recommendation shall be to pursue charges; if such *reasonable cause* is not present, the complaint shall be dismissed.

The ~~F~~ Final ~~iI~~ Investigative ~~R~~ Report for employees will include recommended disciplinary action, if any, in addition to a finding as to whether, discriminatory conduct, including harassment, ~~or~~ retaliation, or sexual misconduct occurred. The ~~F~~ Final ~~iI~~ Investigative ~~R~~ Report as well as notice of the right to appeal for employees as afforded in 8.12, will be provided in writing to the Parties.

- 8.9 Disciplinary action for discriminatory conduct – NDSU does not tolerate discrimination, ~~including~~ harassment, ~~or~~ retaliation, or sexual misconduct and will take appropriate disciplinary action against anyone found responsible for ~~such actions~~ the aforementioned discrimination. Students found responsible for discrimination, harassment, retaliation, or sexual misconduct under the procedures in Section 601: Rights and Responsibilities of Community: A Code of Student Conduct (~~Section 604~~) will be subject to disciplinary action, up to and including expulsion. Employees found responsible for discrimination, harassment, retaliation, or sexual misconduct under these procedures will be 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, harassment, retaliation, or sexual misconduct.

~~8.98.10~~ Imposition of disciplinary action – If neither ~~pParty~~ exercises the right to appeal as afforded in 8.12, the Equity ~~Office Director~~ will either: (1) notify any administrator or supervisor provided with a modified ~~aNotice of aAction~~ as described in 6.2 that the matter has been resolved without recommended disciplinary action; or (2) provide the ~~fFinal iInvestigative~~ ~~RReport~~ to the appropriate administrator, supervisor, whether previously provided a modified ~~aNotice of aAction~~ as described in 6.2 or otherwise, and consult with the administrator or, supervisor regarding imposition of the recommended disciplinary action. If either ~~pParty~~ exercises the right to appeal, (1) or (2) will be conducted by the Equity ~~Office Director~~ once the appeal process has concluded.

Disciplinary action ~~for employees~~ will be imposed ~~for employees~~ by the appropriate administrator or supervisor on behalf of NDSU. ~~The administrator or supervisor has three business days to confirm in writing to the Equity Office that the disciplinary action has been implemented. If the administrator or supervisor disagrees with the recommended disciplinary action, the administrator or supervisor must provide a basis for disagreement in writing to the Equity Director within 3 business days of receipt of the final investigative report.~~

~~Findings/determinations of sexual harassment, other forms of harassment, or sexual assault regarding an NDSU employee that is a National Science Foundation (NSF) Principal Investigator, co-Principal Investigator, or any other grant personnel will, per Federal Register Notice released September 21, 2018, be reported to the NSF Office of Diversity and Inclusion. The reporting requirement is effective beginning October 21, 2018. <https://www.nsf.gov/od/odi/harassment.jsp>~~

~~For employees who have funding as NSF Principal Investigator or co-Principal Investigator, NDSU is required to notify NSF of: (1) Any finding/determination regarding the PI or any co-PI that demonstrates a violation of awardee policies or codes of conduct, statutes, regulations, or executive orders relating to sexual harassment, or other forms of harassment, or sexual assault; and/or (2) if the PI or any co-PI is placed on administrative leave or if any administrative action has been imposed on the PI or any co-PI by the awardee relating to any finding/determination or an investigation of an alleged violation of awardee policies or codes of conduct, statutes, regulations, or executive orders relating to sexual harassment, or other forms of harassment, or sexual assault.~~

~~8.108.11~~ Conclusion of formal resolution – 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.

~~8.118.12~~ Appeal of ~~investigative report~~ Investigative Report – Within ~~five 5~~ business days of receipt of the ~~investigative report~~ Investigative Report, either ~~pParty~~ may appeal the report by completing a NDSU Discrimination Appeal Form (Appeal Form) and filing it with the Equity ~~Office Director~~. The Appeal Form is available online at <https://www.ndsu.edu/equity/forms/> or by contacting the Equity Office, ~~in Suite 201~~, Old Main 201, NDSU Main Campus, 701-231-7708, ndsu.eoaa@ndsu.edu. The Appeal Form can be submitted via email at ndsu.eoaa@ndsu.edu or by bringing it to the Equity Office. As needed, the Equity Office is available to facilitate finding a resource to assist a ~~pParty~~ with completing the Appeal Form.

The grounds upon which a ~~pParty~~ can request an appeal are: (1) the recommended

Commented [MEM6]: This is based off the new NSF term and condition. As a term and condition, any reporting must be conditioned on whether or not the PI/co-PI has the term and condition incorporated into his/her grant. The term and condition is not retroactive and will only be in new grants and amended grants. Additionally, the proposed language is not broad enough to cover the language of the new term and condition – the language below incorporates the language of the term and condition. I would also suggest moving this to its own section regarding notification, since NDSU's obligation applies to more than findings/determinations.

disciplinary action is substantially disproportionate to the findings; (2) procedural error led to an improper ~~investigative report~~Investigative Report; and/or (3) new evidence that was previously unavailable should be considered as it could have had a significant impact on the ~~investigative report~~Investigative Report; and/or (4) The finding is not substantiated by the evidence. If an appeal is granted under (3), the Equity ~~Office Director~~ will require that the Review Committee meet again to determine if the ~~investigative report~~Investigative Report - should be altered in light of the new evidence. The ~~p~~Party who did not provide the new evidence will have the opportunity to respond to the evidence in writing. If the ~~investigative report~~Investigative Report - is altered under (3), the Parties will be afforded the opportunity to appeal again under (1) and/or (2) within ~~five~~ 5 business days of receipt of the altered ~~investigative report~~Investigative Report. If an appeal is granted under (1) or (2), the Equity ~~Office Director~~ will evaluate the ~~investigative report~~Investigative Report in an impartial manner in light of the information found in the Appeal Form and will alter or reaffirm the ~~investigative report~~Investigative Report accordingly. Unless there are extenuating circumstances, the appeal process will be completed within 10 business days of submission of the Appeal Form and the results will be provided in writing to the Parties. ~~In cases in which there is a conflict of interest, such as when the grounds for appeal involve action taken by the Equity Office Director~~, the Provost will conduct the appeal process.

Commented [MEM7]: I'd suggest adding a fourth ground. Students are afforded this ground, and many schools offer such a ground to serve as a check on the process. Appeals are seldom successful so this bolsters the investigation as a whole and assists with subsequent judicial review.

8.13 Interference with an investigation – Any person who knowingly and intentionally interferes with an investigation conducted under this policy is subject to disciplinary action up to and including termination or expulsion. Interference with an investigation may include, but is not limited to:

- 1) Attempting to coerce, compel, influence, or prevent an individual from providing testimony or relevant information;
- 2) Divulging confidential information;
- 3) Removing, destroying, or altering documentation relevant to the investigation; or
- 4) Providing false or misleading information to the Investigator, or encouraging others to do so.

8.14 False Reports - In cases where complaints are found to be baseless or frivolous, and where the Responding Party consents, the university will take affirmative steps to restore the reputation of the person or persons believed to be wrongly accused. False reports where there is non-factual information offered should not be confused with unsubstantiated allegations where there is insufficient information to determine if a person is responsible or not.

9. INTERSECTION WITH OTHER RELEVANT NDSU POLICIES

- 9.1 The procedures described above do not eliminate the rights of a party to participate subsequently in pre-disciplinary action review and/or an appeal as afforded elsewhere under NDSU policy. Furthermore, for purposes of these procedures, an appeal process available to the individual (or group) against whom a discrimination complaint was filed must be available to the individual (or group) who filed the discrimination complaint.
- 9.2 Nonbanded, nonacademic staff – The applicable policy for nonbanded, nonacademic staff regarding subsequent pre-disciplinary action review and/or an appeal is NDSU [Section 183, Nonrenewal and Dismissal of Nonbanded, Nonacademic Staff](#).
- 9.3 Regular staff employees – The applicable policies for regular staff employees regarding subsequent pre-disciplinary action review and/or an appeal are NDSU [Section 220, Staff Job Discipline/Dismissal](#) and NDSU [Section 231, Appeal Procedure for Disciplinary and Reduction in Force Actions](#).
- 9.4 Faculty – The applicable policies for faculty regarding subsequent pre-disciplinary action review and/or an appeal are NDSU [Section 350.3, Board Regulations on Nonrenewal, Termination or Dismissal of Faculty](#) and NDSU [Section 350.4, Board Regulations on Hearings and Appeals](#).

10. NOTICE OF MANDATORY REPORTING RESPONSIBILITIES AND TRAINING

[10.1](#) It is the responsibility of the entire university community to foster a safe and non-discriminatory learning, living, and working environment. NDSU employees have specific responsibilities when they observe ~~or receive a report of~~ discrimination, ~~harassment, retaliation, or sexual misconduct or receive a report of discrimination~~. NDSU employees must not dissuade an individual (or group) from providing them with a report of discrimination, ~~harassment, retaliation, or sexual misconduct~~ but should inform the individual (or group) of their mandatory reporting responsibilities as described below.

[10.1.1](#) Observance of discrimination, harassment, retaliation, or sexual misconduct – All NDSU employees who observe discrimination, harassment, retaliation, or sexual misconduct must document the discrimination, harassment, retaliation, or sexual misconduct and contact the Equity Office in accordance with 10.2.

[10.1.2](#) Report of discrimination, harassment, retaliation, or sexual misconduct – All NDSU employees who receive a report of discrimination, harassment, retaliation, or sexual misconduct involving a student must document the report and contact the Equity Office in accordance with 10.2. NDSU supervisors, managers, department heads, deans, directors, or administrators who receive a report of discrimination, harassment, retaliation, or sexual misconduct involving employees must document the report and contact the Equity Office in accordance with 10.2. The provisions of 10.1.2 do not apply to confidential support resources providing services as described in 3.1.4.

[10.2](#) To comply with 10.1.1 or 10.1.2, NDSU employees must promptly complete and submit an NDSU Discrimination/Harassment/Retaliation/Sexual Misconduct Report Form (Report Form) to the Equity Office. The Report Form is available online at <https://www.ndsu.edu/equity/forms/> or by contacting the Equity Office, Old Main 201, NDSU Main Campus, 701-231-7708, ndsu.eoaa@ndsu.edu. The Report Form can be submitted via email at ndsu.eoaa@ndsu.edu or by bringing it to the Equity Office. The

Equity Office can assist with completing the Report Form as needed. The Equity Office is the official university record holder for documentation under these procedures.

10.3 Upon receipt of a Report Form, NDSU will initiate its discrimination complaint procedures.

10.4 Mandatory training - All NDSU employees must complete equal opportunity and non-discrimination training on an annual basis. In addition to mandatory training, employees are encouraged to contact the Equity Office with any questions they may have related to equal opportunity and non-discrimination at NDSU, including inquiries regarding their responsibilities as mandatory reporters.

10.1.1 Observance of discrimination, harassment, retaliation, or sexual misconduct — All NDSU employees who observe discrimination, including harassment, or retaliation, or sexual misconduct must document the discrimination, harassment, retaliation, or sexual misconduct and contact the Equity Office in accordance with 10.2.

10.1.2 Report of discrimination, harassment, retaliation, or sexual misconduct — All NDSU employees who receive a report of discrimination, harassment, retaliation, or sexual misconduct involving a student, including harassment or retaliation, must document the report and contact the Equity Office in accordance with 10.2. NDSU supervisors, managers, department heads, deans, directors, or administrators who receive a report of discrimination, harassment, retaliation, or sexual misconduct involving employees, including harassment or retaliation, must document the report and contact the Equity Office in accordance with 10.2. The provisions of 10.1.2 do not apply to confidential support resources providing services as described in 3.1.4.

10.2 To comply with 10.1.1 or 10.1.2, NDSU employees must promptly complete and submit an NDSU Discrimination/Harassment/Retaliation/Sexual Misconduct Report Form (Report Form) to the Equity Office Director. The Report Form is available online at <https://www.ndsu.edu/equity/forms/> or by contacting the Equity Office Office in Suite 201, Old Main 201, NDSU Main Campus, 701-231-7708, ndsu.eoaa@ndsu.edu. The Report Form can be submitted via email at ndsu.eoaa@ndsu.edu or by bringing it to the Equity Office. The Equity Office can assist with completing the Report Form as needed. The Equity Office is the official university record holder for documentation under these procedures.

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10.3 Mandatory training—All NDSU employees must complete equal opportunity and non-discrimination training on an annual basis. In addition to mandatory training, employees are encouraged to contact the Equity Office with any questions they may have related to equal opportunity and non-discrimination at NDSU, including inquiries regarding their responsibilities as mandatory reporters.

11. DISCRETIONARY INVESTIGATION

- 11.1 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, harassment, retaliation, or sexual misconduct, remedy its effects, and prevent its recurrence.

12. FILING WITH AN EXTERNAL AGENCY

- 12.1 An individual (or group) also has the right to file a discrimination complaint with one or more of the following external agencies. Please note that these agencies have their own deadlines for filing a discrimination complaints. Please contact the agencies directly for more information about applicable deadlines.

North Dakota Department of Labor and Human Rights
Phone: 1-800-582-8032
TTY: 1-800-366-6888
humanrights@nd.gov www.nd.gov/labor

U.S. Department of Education Office for Civil Rights
Phone: 1-800-421-3481
TDD: 1-800-877-8339
OCR@ed.gov www2.ed.gov/ocr

U.S. Equal Employment Opportunity Commission
Phone: 1-800-669-4000
TTY: 1-800-669-6820
info@eeoc.gov www.eeoc.gov

[National Science Foundation](http://www.nsf.gov)
[Office of the Director](http://www.nsf.gov)
[Alexandria, VA 22314](http://www.nsf.gov)
[NSF.gov/harassment](http://www.nsf.gov)
programcomplaints@nsf.gov

HISTORY:

New	December 20, 1977
Amended	September 1993
Amended	January 1996
Amended	June 2000
Amended	October 2007
Housekeeping	September 2009

Amended March 16, 2010
Housekeeping February 14, 2011
Amended April 25, 2016
Housekeeping May 20, 2016
Amended August 22, 2017

Higgins-Dochtermann, Heather

From: ndsu eoaa
Sent: Monday, February 4, 2019 3:34 PM
To: Hammer, Matthew
Cc: ndsu eoaa
Subject: Policy 156
Attachments: 156 Memo.pdf; 156 V1 10 04 18_AG Edits.docx

Dear Matt,

Please see the attached response to your memo dated January 11, 2019.

It is requested that legal counsel make its legal review of the attached *Policy 156* based on state and federal laws and regulations of the policy changes and then put forth remarks that assist in the continuance of this policy through the NDSU policy approval process consistent with *Policy 714*.

It is requested that legal counsel submit its legal review back to the Equity Office by end of business February 11, 2019. This will ensure the policy is not further delayed and could be on the February 21, 2019 SCC meeting for approval.

Please contact Heather Higgins-Dochtermann, Institutional Equity Investigator and Deputy Title IX Coordinator or Canan Bilen-Green, Vice Provost and Title IX/ADA Coordinator, with any questions or concerns.

Respectfully,

The Equity Office

To: Matt Hammer

From: Equity Office

Date: February 4, 2019

Re: Legal Counsel Memo Dated January 11, 2019 Re: Submitted Changes to *Policy 156*

Section 2.2

The word *discrimination* will be removed from the last line of the section.

Section 2.6

Retaliation is part of this policy's title and therefore requires a definition. Legal counsel did not recommend retaliation be omitted from *Policy 601: Code of Student Conduct*. In fact, *Policy 601, Section 3.40* is entitled "*Discrimination, Harassment, and Retaliation*" and states, in part, "*For complete information regarding discrimination, harassment, and retaliation please see NDSU Policy 100, Equal Opportunity and Non-Discrimination and NDSU Policy 156, Discrimination, Harassment, and Retaliation Complaint Procedures. Students are encouraged to report incidents or information related to discrimination, harassment, and retaliation as soon as possible. Any NDSU employee who becomes aware of a violation of NDSU Policy 100 involving students shall report the complaint or policy violation (see Complaint Form) either to the Title IX Coordinator/Equity Office or to the Student Affairs Office.*" Legal counsel approved and signed off on the most recent version of *Policy 601*, which includes the above, on August 23, 2018. Any allegation of retaliation, whether against a student or employee, would be investigated by the Equity Office. What has occurred since August 2018 to substantiate the removal of retaliation from *Policy 156*? Has legal counsel submitted a request to remove retaliation from *Policy 601*? Additionally, the First Amendment is not cited in *Policy 601*. As both are NDSU process policies, there should be consistency between the two. As it is not cited in *Policy 601*, there would be no reason to cite in this policy.

Legal counsel for NDSU is also legal counsel for NDSCS (which are both in the NDUS system). In NDSCS' *Sexual Misconduct and Title IX Compliance Policy*, the *Introduction* section includes, in part, "*In light of these commitments and in the best interest of the college, NDSCS has adopted this policy, which includes investigation and disciplinary procedures that will be followed in response to allegations of sexual misconduct, such as sexual harassment and sexual assault, intimate partner violence, stalking, and related retaliation*". Additionally, under the *Prohibited Conduct* section, *part g: Retaliation*, it states, "*Retaliation is any adverse action taken against a person because of their participation in a protected activity, alleging sexual misconduct, supporting a complainant or for assisting in providing information relevant to a claim of sexual misconduct. Retaliation can take many forms, including abuse or violence, threats, and intimidation. Actions in response to a good faith report or response under this policy are considered retaliatory if they have a materially adverse effect on the working, academic or College-controlled living environment of an individual; or if they hinder or prevent the individual from effectively carrying out their College responsibilities. Any individual or group of individuals can engage in retaliation and will be held accountable under this policy. Reports of retaliation shall be communicated to the Title IX Coordinator.*" Again, why is retaliation defined in NDSCS' policy? What has occurred since August 2018 to substantiate the removal of retaliation from *Policy 156*? Has legal counsel submitted a request to remove retaliation from NDSCS' policy? Additionally, the First Amendment is not cited in NDSCS' policy. Why does legal counsel wish to include this in the NDSU policy and not the NDSCS policy?

Additionally, NDSU's Resolution Agreement with OCR mandates that retaliation be defined in *Policy 156*. In a letter dated October 23, 2018 to NDSU from OCR, it states, in part, *"Paragraph 2 of the Agreement required the University to adopt, implement and publish its revised policies and procedures referenced in Paragraph 1 of the Agreement (referred hereinafter as NDSU Policy 156) "within 30 business days of receipt of notice of OCR's approval of the policies and procedures." The University reported that it adopted, implemented and published its revised NDSU Policy 156 by April 25, 2016, within 30 days from March 23, 2016, which is the date OCR informed the University that it approved its revised policies and procedures. In its report, the University provided OCR with links to its new equity website, to its the revised NDSU Policy 156, to its new complaint form to file discrimination, harassment, and retaliation complaints, to its updated bias reporting system, and to an informational poster that includes notice of the University's nondiscrimination policy and information on what action employees and students can take if they believe they have been subjected to discrimination, harassment, and retaliation at NDSU. OCR reviewed all these links and confirmed that they are active and easily accessible online. Accordingly, OCR finds that the University has fulfilled the terms of Paragraph 2 of the Agreement and has closed its monitoring of this Paragraph effective the date of this letter."*

On OCR's website, <https://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt>, there is a statement that reads, *"A recipient of federal financial assistance may not retaliate against any person who has made a complaint, testified, assisted or participated in any manner in an OCR matter or to interfere with any right or privilege protected by the laws enforced by OCR. If you believe that you have been retaliated against for any of these reasons, you also may file a complaint with OCR."*

This indicates retaliation necessitates being defined in policy. It also clearly delineates the definition of a protected activity. If necessary, the Equity Office can add Protected Activity as a definition to *Policy 156*, immediately following *Section 2.1.1* (protected classes' definition).

The comment regarding this section stating, *"Retaliation is a legal term of art-protected activity is limited to specific conduct"* seems unnecessary and sounds potentially condescending. Is legal counsel insinuating that only lawyers may use the term and/or know the meaning of retaliation? For reasons previously stated, both retaliation and protected activity are necessary for this policy and should be defined as such.

The Equity Office does not support removing retaliation from *Policy 156* in accordance with OCR's determination, and in fact, vehemently disagrees with legal counsel. Additionally, removal of retaliation would be in violation of our Resolution Agreement with OCR.

Section 3.1.1

The statement that *"the Equity Office has declined to alter policy based on that guidance [of the 2017 Dear Colleague letter]"* is completely baseless. Most higher education institutions have not implemented any changes to their policies based upon the issuance of the 2017 letter. Furthermore, the guidance outlined in the 2017 document was only guidance and was not required for implementation. If legal counsel surmised that changes pursuant to the 2017 document were required for NDSU, legal counsel had opportunity in 2018 to suggest those changes. However, no such changes were suggested.

The Equity Office, per *Policy 156*, determines how a complaint and/or investigation proceeds. Only after a formal investigation is completed a case is handed off to Student Affairs for conduct process

resolution. It would be inappropriate to involve Student Affairs, or any other office, regarding how a complaint should be handled during the pre-investigative period.

The Equity Office questions why legal counsel is concerned with whom and how the Equity Office interacts with other departments. Does legal counsel attempt to dictate with whom and how every department interacts with one another at NDSU and NDSCS? The comment *"If student sanctions (e.g. suspension, expulsion, etc.) are being pursued, the student process must be utilized. This would also require consultation with Student Affairs."* Nowhere in Policy 156 does it state that the Equity Office must consult with Student Affairs. The language states in Section 3.1.1, *"The Equity Office will investigate all discrimination, harassment, retaliation, and sexual misconduct complaints utilizing Sections 1 through 8.8 of this policy if the complaint identifies an alleged violation by a student. The resolution of the complaint, including pre-hearing, hearing and appeals, will be conducted by the Student Affairs Office, in coordination with the Equity Office, pursuant to NDSU Policy 601."* Consultation is not part of any process. In fact, Student Affairs is only mentioned twice in this policy, both in Section 3.1.1: that Complaint Forms are available in the Student Affairs office and the aforementioned delineation of the investigative process.

"Consulting" Student Affairs would undermine the authority of the Equity Office. OCR requires that discrimination, harassment, and retaliation complaints are handled by those who are trained investigators and Title IX Coordinators. While Student Conduct staff have completed various trainings, discrimination, harassment, and retaliation is not their core job responsibility nor their area of expertise. Student Affairs is unable to statutorily investigate complaints regarding discrimination, harassment, retaliation, or sexual misconduct based upon a protected class. Furthermore, it should not be the intent of NDSU to predetermine if a student has or has not violated a policy prior to the investigation. An impartial investigation determines if there is a violation or violations. It is then determined what the sanction or sanctions may be. Adequate, reliable, and impartial investigations do not first determine what the punishment will be and then determine how an investigation shall be conducted.

Equity Office staff meet regularly with Student Conduct staff about issues involving students. Additionally, the Equity Office includes Student Affairs in a variety of campus wide initiatives, such as the creation of the *Sexual and Gender-Based Harassment and Sexual Misconduct Resource Guide*.

Section 3.1.4

Pursuant to the Ombuds' website, https://www.ndsu.edu/ombud/tenets_ethics/, under the Section *Standards of Practice & Code of Ethics*, *"Conversations with the Ombud endeavor to be confidential by agreement and the Ombud works as an impartial neutral. The primary scope of services is limited to informal means of dispute resolution. The Ombud is a member of [International Ombudsman Association] IOA, and will attend IOA conferences and trainings as they are available. The IOA Standards, Code, and Best Practices are minimum standards, and the Office will also strive to operate to best practices in a way that serves the interests of the University community. The Office will publicize the confidential, independent, neutral, and informal nature of its services and will explain these ethical standards to each visitor."*

Confidentiality is a tenet of the Ombudsperson position. This policy identifies that this position is a confidential support resource for faculty and staff. Students are not identified in this section of the policy. The Ombudsperson is a resource for employees not students, hence there would be no reporting requirements regarding students. Pursuant to Policy 156, Section 10.1.2, *"All NDSU employees who*

receive a report of discrimination involving a student, including harassment or retaliation, must document the report and contact the Equity Office in accordance with 10.2. NDSU supervisors, managers, department heads, deans, directors, or administrators who receive a report of discrimination involving employees, including harassment or retaliation, must document the report and contact the Equity Office in accordance with 10.2. The provisions of 10.1.2 do not apply to confidential support resources providing services as described in 3.1.4.” The Ombudsperson would not receive student reports and is not considered a supervisor, manager, department head, dean, director, or administrator of employees. Additionally, the reporting structure of a position does not indicate if a person is or is not a mandated (confidential) reporter. Further, the institution through the Equity Office determines confidential reporters consistent with regulations and best practices.

Section 8.10

Please see policy for slight changes and additions to your suggested wording.

Section 8.12

The suggested addition to the policy, *“the finding is not substantiated by the evidence”* is not necessary. The Equity Office does not operate a One Investigator model and act as judge, jury, and executioner. The Equity Office investigators conduct an investigation and then either a Review Committee or Student Affairs determines if a policy violation has occurred. Therefore, the standard of proof has been reviewed by several persons and has undergone the checks and balances needed to identify any questions regarding if the standard of proof has or has not been met.

“The finding is not substantiated by the evidence” is a broad term that would allow anyone to allege that the finding was inaccurate. The statement that *“Students are afforded this ground”* is baseless as this section of the policy does not apply to students. Under *Policy 156, Section 3.1.1* it states, *“The Equity Office will investigate all discrimination, harassment, retaliation, and sexual misconduct complaints utilizing Sections 1 through 8.8 of this policy if the complaint identifies an alleged violation by a student. The resolution of the complaint, including pre-hearing, hearing and appeals, will be conducted by the Student Affairs Office, in coordination with the Equity Office, pursuant to NDSU Policy 601.”* Section 8.12 is not applicable to students because at this point in the investigative process, Student Affairs would be handling the case. As the *“finding is not substantiated by the evidence”* is in *Policy 601* regarding students, which is stated as a reason for adding it to this policy, this is a non-issue.

The statement that the addition of *the finding is not substantiated by the evidence “bolsters the investigation as a whole and assists with subsequent judicial review”* insinuates that the Equity Office investigators conduct subpar investigations. This is inappropriate language for legal counsel to use in a public memo. Investigative reports produced by the Equity Office were reviewed by two separate experts on two separate occasions and were both complementary with no major deficiencies identified. Further, no such deficiencies have been identified in annual Equity Office surveys. The additional language does not change the content of an investigative report and therefore would not bolster anything. Furthermore, if additional information is necessary for the investigative report to be more comprehensive, Student Affairs has the responsibility to indicate this to the Equity Office when they initially receive the report so that any issues may be addressed. The same would be true regarding a Review Committee involving employee cases.

The removal of *“In cases in which there is a conflict of interest, such as when the grounds for appeal involve action taken by the Equity Office”* is not necessary. Further, the Equity Office does not take any

action. If a conflict of interest is identified during the investigative process, the Equity Office would not conduct the investigation. The investigation would either be conducted by another department or contracted to a third party.

It is requested that legal counsel make its legal review of the attached Policy 156 based on state and federal laws and regulations of the policy changes and then put forth remarks that assist in the continuance of this policy through the NDSU policy approval process consistent with Policy 714. It is requested that legal counsel submit its legal review back to the Equity Office by end of business February 11, 2019. This will ensure the policy is not further delayed and could be on the February 21, 2019 SCC meeting for approval.

Higgins-Dochtermann, Heather

From: Hammer, Matthew <mhammer@nd.gov>
Sent: Thursday, February 14, 2019 11:17 AM
To: ndsu eoaa
Subject: RE: Policy 162

Good morning,

I have briefly reviewed the memos submitted in response to my review of these policies and there is nothing contained in those memos that changes my review. It appears that instead of collegially working through what are rather minor changes and comments, your office has instead read some level of malicious intent into the changes, taking them personally and as a perceived indictment on the work done by your office. My review speaks for itself and there is no motivation or intention beyond the review itself.

In any event, I have no objection to you forwarding along these policies without my signature.

Thanks.
mgh

From: ndsu eoaa <ndsu.eoaa@ndsu.edu>
Sent: Monday, February 4, 2019 3:38 PM
To: Hammer, Matthew <mhammer@nd.gov>
Cc: ndsu eoaa <ndsu.eoaa@ndsu.edu>
Subject: Policy 162

<p>CAUTION: This email originated from an outside source. Do not click links or open attachments unless you know they are safe.</p>
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Dear Matt,

Please see the attached response to your memo dated January 11, 2019.

As your memo does not contain a legal review, as required per the Senate Coordinating Council Process document, we will ask the SCC to process the initially submitted changes for *Policy 162*. We will request the policy move through the process without further delay.

If you wish to provide additional comments to supplement your memo, please submit this information no later than end of business February 11, 2019 so that we may provide any additional comments you have to SCC for their next meeting.

Please contact Heather Higgins-Dochtermann, Institutional Equity Investigator and Deputy Title IX Coordinator or Canan Bilen-Green, Vice Provost and Title IX/ADA Coordinator, with any questions or concerns.

Respectfully,

The Equity Office

From: [ndsu eoaa](#)
To: ["Hammer, Matthew"](#)
Cc: [ndsu eoaa](#)
Subject: RE: Policy 162
Date: Thursday, February 14, 2019 4:41:00 PM

Dear Matt,

Thank you for your email.

The intent of the policy review process is to ensure that our policies are compliant with federal and state laws as well as to ensure that our students, staff, and faculty learn, work, and live in a safe and non-discriminatory environment.

As you stated no objection to forwarding along the policies without your signature, both *Policy 156* and *Policy 162* will be submitted to SCC to continue the policy approval process.

We would like nothing more than to be able to work with you in a collegial environment and hope that we are able to do so in the future. The intent of our response was to clarify and correct the information in your January 11, 2019 memos.

If you would like to discuss any of this further, please feel free to contact us.

Respectfully,

The Equity Office
