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To: Heather Higgins-Dochtermann  
From: Matthew Hammer, Assistant Attorney General *my*  
Date: 01.11.2019  
Re: Policy 162: Sexual and Gender-Based Harassment, Sexual Misconduct and Title IX

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There does not appear to be any mandate regarding these proposed changes. The NPRM is still in the required 60-day public comment period. This will likely be followed by a similar time frame for OCR to respond to the comments and finalize the regulations, therefore, it is premature to modify this policy based on the NPRM.

If finalized in its current form, or something similar, significant changes to this policy will be required. These changes will require collaboration with a number of offices, as the regulations will bring a variety of substantive changes.

Informal resolution has been available to NDSU since the 2017 guidance was released, but the Equity Office has declined to entertain any changes based on this guidance. If NDSU wishes to adopt this guidance, it should incorporate the conditions of the guidance, noting that cases involving suspension/expulsion will be inappropriate for any such resolution due to board policy and state law. Any decision to incorporate this guidance should be done in collaboration with Student Affairs.

## Higgins-Dochtermann, Heather

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**From:** ndsu eoaa  
**Sent:** Monday, February 4, 2019 3:38 PM  
**To:** Hammer, Matthew  
**Cc:** ndsu eoaa  
**Subject:** Policy 162  
**Attachments:** 162 Memo.pdf

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

To: Matt Hammer

From: Equity Office

Date: February 4, 2019

Re: Legal Counsel Memo Dated January 11, 2019 Re: Submitted Changes to *Policy 162*

The Equity Office submitted changes to *Policy 162* on October 18, 2018. The policy was submitted to the responsible office on October 22, 2018. The SCC Secretary forwarded the changes to legal counsel on November 26, 2018. Legal counsel submitted a memo that was received by the SCC Secretary on the afternoon of January 11, 2019. The SCC Secretary sent changes regarding the policy for legal review pursuant to the steps as outlined in the Senate Coordinating Council (SCC) Process. The next step should have been for legal counsel to provide a legal review. However, legal counsel did not provide a legal review based on federal and state laws or regulations, but only provided a very broad personal opinion on why the change to *Section 1.6* (although never identified by legal counsel in his memo) should not be made. This does not align with the steps of the aforementioned policy process. Legal counsel writes his opinion on how the Equity Office should interact and communicate with the Student Conduct office instead of providing a legal review. The Equity Office communicates and collaborates with Student Affairs and other units on a frequent basis. This should not be of concern to legal counsel. Further, the policy change process at NDSU allows for collaboration and communication between units regarding policy changes.

*Policy 162* is not a process document. The process that NDSU utilizes is outlined in *Policy 156*. It is inappropriate for legal counsel to not only circumvent the current process in *Policy 156* by suggesting that we add process steps in *Policy 162* but also attempt to dictate organizational communication, rules, and responsibilities. Additionally, the Equity Office removed the language in *Section 1.6* regarding informal resolution as it refers to the investigative process, which as previously mentioned, process language should not be in *Policy 162*. The Equity Office is perplexed as to why legal counsel does not appear to understand what is and what is not process language or the differences between the purpose and content of *Policies 156* and *162*.

The suggestion that NDSU wait for the outcome of the notice of proposed rulemaking (NPRM) is not prudent. Public comment was due January 30, 2019. The Department of Education (DOE) received over 104,000 comments on the proposed changes. The DOE must respond to all comments. Furthermore, due to the recent government shutdown, there is no indication of if or when the NPRM will become a final rule. It would be disingenuous to the students, staff, and faculty of NDSU to wait until that unknown date to submit changes to this policy. We do not believe that it is "premature" to modify this policy as submitted.

*Policy 156* delineates that "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." 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. Additionally, this would undermine the authority of the Equity Office. 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.

The statement that “*the Equity Office has declined to entertain any changes based on this guidance [of the 2017 guidance]*” 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. As legal counsel is aware, the Equity Office reviews *Policy 162* and submits changes on an annual basis. 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 following are the other changes submitted by the Equity Office. None of these changes were addressed by legal counsel.

#### Section 2.8

This aligns with *Policy 601: Rights and Responsibilities of Community: A Code of Student Conduct, Section 2.2*.

#### Section 5.1

Corrects the incorrect usage of NDSU Police to University Police.

#### Section 5.2

Adds important information regarding the Counseling Center and the Sexual Assault Prevention and Advocacy (SAPA) Coordinator.

#### Section 6.5

Corrects the incorrect usage of NDSU Police to University Police.

#### Section 8-8.4

Corrects the incorrect usage of remedial measures to interim measures. The measures NDSU takes are temporary or provisional, therefore interim should be used. Remedial measures are those that may be put in place if a violation is determined.

#### Section 8.2

Corrects contact directive to contact order.

#### Section 8.4

Adds administrative action to clarify distinction between administrative and criminal processes.

#### Section 9.3

Adds important information regarding the Counseling Center and the Sexual Assault Prevention and Advocacy (SAPA) Coordinator.

#### Section 12.16

Deletes a duplicate entry.

## Higgins-Dochtermann, Heather

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**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

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**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><b>CAUTION:</b> 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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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

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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

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