

Title IX Compliance Policy

Source: NDSCS President

Applies to: All Employees and Students

Purpose: This policy is to fulfill all aspects of Title IX of the Education Amendments of 1972 and aligns with the North Dakota University System Policy 520.

1. Introduction

This policy is required by federal law and implementation of this policy is guided by the U.S. Department of Education, Office of Civil Rights. This policy applies to formal complaints of sexual harassment occurring in NDSCS Educational Programs or Activities within the United States ("Title IX Complaints"). All other complaints of Sexual Harassment shall be resolved by the NDSCS Sexual Misconduct policy, or other applicable policy.

2. Definitions. For the purposes of NDSCS Title IX Compliance Policy, the listed terms shall have the following definitions pertaining to the 2020 Title IX regulations and NDUS Policy 520:

- a. *Actual Knowledge.* Notice of sexual harassment or allegations of sexual harassment to NDSCS's Title IX Coordinator or employee with the ability to implement corrective measures; including but not limited to supervisors, Vice Presidents, Department Chairs.
- b. *Complainant.* An individual who is alleged to be the victim of conduct which could, after investigation, constitute sexual harassment.
- c. *Dating Violence.* Violence committed by the Respondent:
 - i. Who is or has been in a romantic or intimate relationship with the Complainant; and;
 - ii. Where the existence of such a relationship shall be determined by considering the length of the relationship, the type of relationship, and the frequency of interactions between the Complainant and Respondent.
- d. *Deliberate Indifference.* When NDSCS's response to sexual harassment is clearly unreasonable considering the information known to NDSCS at the time.
- e. *Domestic Violence.* Includes felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the Complainant under the family or domestic violence laws of the jurisdiction including the use or attempted use of physical abuse or sexual abuse who is:
 - i. a current or former spouse or intimate partner of the Complainant, or person similarly situated to a spouse of the Complainant;
 - ii. cohabitating, or has cohabitated, with the Complainant as a spouse or intimate partner;
 - iii. shares a child in common with the Complainant; or
 - iv. commits acts against a youth or adult victim who is protected by N.D.C.C. ch. 14-07.1.

- f. *Educational program or activity.* Includes locations, events, or circumstances over which NDSCS exercises substantial control over both the Respondent and the context in which the sexual harassment occurs, as well as in any building owned or controlled by a student organization that is officially recognized by NDSCS.
- g. *Fondling.* The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- h. *Formal Complaint.* A document filed by a Complainant (which either contains the Complainant's signature or indicates that the Complainant is the one filing the complaint) or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that NDSCS investigates.
- i. *Incest.* Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- j. *Rape.* Penetration, no matter how slight, of the vagina or anus of the complainant with any body part or object by the Respondent, or oral penetration of the Complainant by a sex organ of the Respondent, without the consent of the Complainant.
- k. *Respondent.* An individual who has been reported to be responsible for the conduct that could constitute sexual harassment.
- l. *Sexual Assault.* Either rape, fondling, incest, statutory rape, or any of the sexual offenses listed in N.D.C.C. ch. 12.1-20 or by the FBI's Uniform Crime Reporting system.
- m. *Sexual Harassment.* Conduct, on the basis of sex, constituting one (or more) of the following:
 - i. An employee of NDSCS conditioning the provision of an aid, benefit, or service of NDSCS on an individual's participation in unwelcome sexual conduct;
 - ii. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to NDSCS's educational program or activity; or
 - iii. Sexual assault, dating violence, domestic violence, or stalking, as defined in this section.
- n. *Stalking.* Engaging in a course of conduct directed at a specific person that would cause a reasonable person to (a) fear for their safety or the safety of others; or (b) suffer substantial emotional distress.
- o. *Statutory Rape.* Sexual intercourse with a person who is under the statutory age of consent.
- p. *Supportive Measures.* Non-disciplinary, non-punitive individualized services offered as appropriate (as reasonably available) and without fee or charge to the Complainant or Respondent.

3. Pre-Grievance Process.

- a. **Timing.** This grievance process shall be carried out using reasonably prompt time frames,

including time frames for filing and resolving appeals, and for informal resolution processes if offered. Notwithstanding, temporary delays or extensions of the time frames must be offered for good cause, with written notice to the parties setting forth the cause for the action.

- i. *Good cause.* May include considerations such as the absence of a Party, a Party's advisor, or a witness; concurrent law enforcement activity; or the need for accommodations for language or disability.

b. Actual Knowledge of Sexual Harassment. With or without the filing of a formal complaint, once NDSCS has actual knowledge of sexual harassment within its educational program or activity in the United States, NDSCS must respond promptly and without deliberate indifference pursuant to these Procedures and any applicable NDSCS policies.

- i. Once NDSCS has actual knowledge of sexual harassment, the Title IX Coordinator must contact the Complainant and:
 - Discuss the availability of supportive measures;
 - Consider the Complainant's wishes regarding supportive measures;
 - Inform the Complainant that supportive measures are available with or without the filing of a formal complaint; and
 - Explain the process of filing a formal complaint.
- ii. No disciplinary sanctions or other actions which are not supportive measures may be imposed against any Party prior to the conclusion of the grievance process. Exceptions are Emergency Removal (section 1d) and Administrative Leave (section 1e).

c. Supportive Measures. NDSCS shall offer supportive measures designed to restore or preserve equal access to the educational program or activity without unreasonably burdening the Parties, including measures designed to protect the health and safety of all Parties or the educational environment, or to deter further sexual harassment.

- i. Supportive Measures may include but are not limited to:

- Counseling;
- Extensions of deadlines or other course-related adjustments;
- Modifications of work or class schedules;
- Campus escort services;
- Mutual restrictions on contact between the Parties;
- Changes in work or housing locations;
- Leaves of absence; and
- Increased security or monitoring of certain areas of campus.

- ii. NDSCS must maintain confidentiality with respect to supportive measures unless disclosure is required to implement the supportive measures.
- iii. The Title IX Coordinator shall coordinate the effective implementation of supportive measures.
- iv. Supportive measures may not restrict any Party's rights under the United States Constitution.

d. Emergency Removal. NDSCS may remove a Party from the educational program or activity on an emergency basis, provided that NDSCS determines, based on an individualized safety and risk analysis, that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal.

- ii. NDSCS will provide the Respondent with notice and an opportunity to challenge the

Emergency Removal decision immediately following the removal. In challenging the Emergency Removal decision, the Respondent shall have the burden to show why removal should not be implemented or be modified. While this challenge process may produce facts and evidence relevant to the grievance process, this challenge process need not follow all of the requirements of the grievance process. As such, this meeting is not a hearing on the merits of the allegation(s) but rather is an administrative process intended to determine solely whether the emergency removal is justified.

- e. **Administrative Leave.** NDSCS may place a non-student employee on administrative leave during the pendency of a grievance process.

4. Grievance Process.

a. Formal Complaint and Notice of Allegations.

- i. Once a formal complaint is received by NDSCS, NDSCS must provide the following written notice to the known Parties:
 - Notice of the grievance process;
 - Notice of the allegations of sexual harassment, including:
 - Sufficient details known at the time and with enough time to prepare a response, including, but not limited to, the names of the Parties, the conduct allegedly constituting sexual harassment, as defined by Title IX, and the date and location of the alleged conduct.
 - A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
 - A statement that the Parties may have an Advisor of their choice, who may be an attorney, and may inspect and review evidence. The statement should also indicate that if the Party does not have an Advisor of choice, NDSCS will appoint a trained, impartial Advisor to assist with cross-examination for the live hearing.
 - Notice of any provisions in NDSCS's Code of Conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- ii. If during the grievance process, additional allegations are added to the investigation which were not included in the initial notice, NDSCS must provide notice of the additional allegations to the Parties.

b. Advisors.

- i. Parties to a grievance proceeding must be afforded the opportunity to select the Advisor of their choice to assist them during the proceeding, including during the live hearing.
- ii. If a Party does not choose an Advisor, NDSCS shall provide the Party with an Advisor free of charge. At minimum, NDSCS shall provide an Advisor to conduct the Party's cross-examination at the hearing. However, nothing in this policy or the Title IX regulations should be read to prohibit NDSCS from providing an Advisor for the full duration of the grievance process, provided that the Parties are treated equally as to timing if NDSCS appoints Advisors for all Parties.
- iii. NDSCS is not required to provide attorneys to Parties to act as Advisors, but appointed Advisors should be provided with access to appropriate training to ensure an

understanding of the grievance process, though the same training provided to Title IX Coordinators, decision-makers, and Investigators is not required.

- iv. NDSCS is not required to attempt to create equality of Advisors between the Parties, particularly where one Party selects an outside Advisor, but will endeavor to seek parity of Advisors where NDSCS provides Advisors to all Parties.

c. Investigation.

- i. NDSCS is required to investigate every filed formal complaint unless the complaint is subject to dismissal, as outlined in Section D.
- ii. At all times, the burden of proof and the burden of gathering evidence sufficient to make a determination regarding responsibility rests on NDSCS, and NDSCS may not seek to shift that burden to the Parties.
 - Notwithstanding, NDSCS may not restrict the Parties' ability to discuss the allegations or to gather or present relevant evidence.
- iii. At all times, the institution shall observe a presumption that respondent is not responsible for the alleged conduct until and unless there is a determination of responsibility at the conclusion of the grievance process.
- iv. NDSCS may not access, consider, disclose, or otherwise use a Party's medical records made or maintained in connection with the provision of treatment to the Party, unless voluntary, written consent to do so is provided by the Party (or the Party's parent, if the Party is not eligible to provide consent).
- v. NDSCS may not require, allow, rely upon, or otherwise use evidence that constitutes, or questions that seek disclosure of, information protected under a legally recognized privilege, unless that privilege is waived.
- vi. NDSCS must provide to the Parties written notice of the date, time, location, participation, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the Party to prepare.
- vii. The Parties will be allowed up to two people, one person that is able to fully participate, in the hearing process. NDSCS must provide an advisor for each party in the event they do not have one during the hearing process.
- viii. All Parties must have an equal opportunity to inspect and review any evidence obtained as part of the investigation related to the allegations raised in a formal complaint, including any evidence upon which NDSCS does not intend to rely in reaching a determination of responsibility and any inculpatory or exculpatory evidence, from whatever source.
- ix. At least 10 calendar days prior to the preparation of the Preliminary Investigative Report, NDSCS must provide each Party and the Party's Advisor the evidence obtained in the investigation in an electronic format or hard copy. The Parties may submit a written response to the evidence, which the Investigator shall consider prior to completion of the Preliminary Investigative Report.
- x. At the conclusion of the investigation, the Investigator must create a Preliminary Investigative Report that summarizes the relevant evidence in an adequate, impartial, and

reliable manner. At least 10 calendar days prior to the hearing, the Investigator must send a copy of the Preliminary Investigative Report to each Party and the Party's Advisor, if any, for review and written response.

d. Dismissal of the Complaint under Title IX.

i. Mandatory Dismissal

- NDSCS must dismiss the Formal Complaint if, at any time during the investigation or hearing:
 - The alleged conduct would not constitute sexual harassment or sexual violence as defined in these procedures;
 - The alleged conduct did not occur in an Educational Program or Activity; or
 - The conduct alleged did not occur against a person in the United States.
- If the formal complaint is subject to mandatory dismissal, NDSCS may act under another policy, including but not limited to NDSCS Sexual Misconduct Policy, without that action constituting retaliation under this Policy.

ii. Permissive Dismissal.

- NDSCS may dismiss the formal complaint if, at any time during the investigation or hearing:
 - A Complainant notifies the Title IX Coordinator, in writing, that the Complainant would like to withdraw the formal complaint, or any allegations contained in the formal complaint;
 - The Respondent is no longer enrolled or employed by NDSCS; or
 - Circumstances prevent NDSCS from gathering evidence sufficient to reach a determination as to the formal complaint or allegations in the formal complaint.
- If a formal complaint is permissively dismissed, NDSCS may consult with its legal counsel prior to acting under another policy to avoid taking actions constituting retaliation.

iii. Notice of Dismissal. Upon a dismissal pursuant to this section, NDSCS must promptly send written notice of the dismissal under Title IX and reason for the dismissal to all Parties simultaneously.

e. Consolidation of Formal Complaints. NDSCS may consolidate formal complaints against more than one Respondent, by more than one Complainant against one or more Respondents, or by one Party against the other Party, where the allegations of sexual harassment or sexual violence arise out of the same facts or circumstances.

f. Live Hearing.

- i. The grievance process must provide for a live hearing after the completion of the Preliminary Investigative Report. All evidence obtained by the Investigator as part of the investigative process must be made available to the Parties and the decision-maker at the live hearing.

- ii. The live hearing will be presided over by the decision-maker, who will be free of all conflicts of interest, and who may not be the Investigator or the Title IX Coordinator.
 - Notwithstanding the foregoing, if the need arises, NDSCS reserves the right to contract or utilize the services of a properly trained third party to perform the role decision-maker. The need for such a third-party shall be in the sole discretion of NDSCS.
- iii. At the request of either Party, the hearing must be conducted with the Parties located in separate rooms with technology enabling the decision-maker and Parties to simultaneously see and hear the Party or witness answering questions. Hearings may be conducted with all Parties physically present in the same geographic location, or, any Parties, witnesses, and other participants may appear at the live hearing virtually, so long as the participants are able to simultaneously see and hear each other.
- iv. At the live hearing, the decision-maker must permit each Party's Advisor to ask the other Party and any witnesses all relevant questions and follow-up questions, including those regarding credibility. This cross-examination must be conducted directly (the questions may not be asked by the decision-maker), orally, and in real time by the Party's Advisor and never by a Party personally.
 - Prior to a Party or witness answering a question, the decision-maker must rule on the relevance of the question and explain any decision to exclude a question as not relevant.
 - Decision-makers may request, but may not require, that questions by the Parties be submitted in advance, to permit the decision-maker to rule on the relevance of questions.
 - NDSCS may otherwise limit the extent to which the Party's Advisor may participate in the hearing.
- v. *Rape Shield*. Questions and evidence about the Complainant's sexual predisposition or sexual history are not relevant, unless such questions are offered to prove that someone other than the Respondent committed the alleged conduct, or regard specific incidents of the prior sexual behavior with respect to the Respondent, and are offered to prove consent.
- vi. *Cross-Examination*. If deemed reliable and relevant by the decision-maker, and not otherwise subject to exclusion under the Policy, the decision-maker may consider the statements of persons who were not present at the hearing, or persons who were present at the hearing but refused to answer a cross-examination question. This includes, but is not limited to, opinions and statements in police reports or other official reports, medical records, court records and filings, investigation notes of interviews, emails, written statements, affidavits, text messages and social media posting. The decision-maker shall determine the appropriate weight to afford the statements under the circumstances and will do so in a fair and equitable manner. Decision-makers may not draw an inference about the determination regarding responsibility based solely on a party's or witness's absence or refusal to answer cross-examination or other questions.
- vii. *Hearing Decorum*. Decision-makers may enforce rules to ensure hearing decorum, such as requiring respectful treatment, specifying any objection process, governing timing of hearing and length of breaks, etc.
- viii. NDSCS must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the Parties for inspection and review.

g. Determination Regarding Responsibility.

- i. In all cases, the applicable standard of proof for determining responsibility for an alleged violation is “*preponderance of the evidence*” meaning, in order for Respondent(s) to be held responsible, it must be determined that it is more likely than not that the Respondent(s) violated these procedures.
- ii. After the conclusion of the live hearing, the decision-maker must issue a written determination regarding responsibility, which must include:
 - Identification of the allegations potentially constituting sexual harassment under these procedures;
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the Parties, interviews with Parties and witnesses, site visits, methods used to gather evidence, and hearings held;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of any other institution’s policy;
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions to be imposed on the Respondent, and whether remedies will be provided to the Complainant; and;
 - The procedures, timelines, and permissible bases for the Complainant and Respondent to appeal.
- iii. The written determination must be provided to the Parties simultaneously. The determination regarding responsibility becomes final either on the date that notice of the result of any appeal is provided to the Parties, if an appeal is filed; or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- iv. The Title IX Coordinator shall be responsible to implement any remedies provided by the written determination.

5. Disciplinary Sanctions. Disciplinary sanctions imposed after the conclusion of the grievance process shall be assessed pursuant to [NDSCS Student Rights and Responsibilities: A code of conduct](#), and/or NDUS Human Resources and North Dakota State Board of Higher Education Policies or any similar documents or procedures which set possible disciplinary sanctions for violations of Title IX and shall be proportional to the determination of responsibility.

6. Remedies. Remedies offered after the conclusion of the grievance process on a finding of responsibility must be designed to restore or preserve equal access to the educational program or activity. Remedies may be disciplinary or punitive and may create a burden for the Respondent.

7. Appeals.

- a. Regardless of the finding (responsible, not responsible, dismissal) all Parties have the right to file an appeal. The following may form the basis for an appeal:
 - i. Procedural irregularity that affected the outcome of the grievance process;
 - ii. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could have affected the outcome of the matter; or
 - iii. The Title IX Coordinator, Investigator(s), or decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or for or against the

- individual Complainant or Respondent, that affected the outcome of the grievance process.
- iv. Other basis set forth in the campus-level processes, but which must be offered equally to all Parties (for example, an appeal based on the severity of the sanctions).
- b. Upon filing of an appeal, NDSCS must:
- i. Notify the non-appealing Party in writing when an appeal is filed and implement appeal procedures equally for all Parties.
 - ii. Ensure that the appeal's decision-maker is not: the same person as the decision-maker that reached the determination regarding responsibility or dismissal, the Investigator, or the Title IX Coordinator.
 - iii. Give all Parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 - iv. Issue a written decision describing the result of the appeal and the rationale for the result; and
 - v. Provide the written decision simultaneously to all Parties.
- c. If a disciplinary sanction of suspension or expulsion for students or termination for employees is imposed by the decision-maker, NDSCS shall provide a method of reviewing an appeal from a determination regarding responsibility or dismissal for a period of at least one year following the original decision. Such appeals may only be filed based on new information, contradictory information, and information indicating that the student or student organization was not afforded due process, and such appeal may not be based on grounds previously raised during the Title IX appeal process. For sanctions other than suspension, expulsion, or termination, an appeal must be submitted within 5 business days of receipt of the sanctions.

8. Training.

- a. All persons involved in the grievance process, including, but not necessarily limited to, Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must receive training on the following areas:
- i. The definition of sexual harassment;
 - ii. The scope of the educational program or activity;
 - iii. How to conduct an investigation and understanding of the grievance process, including hearings, appeals, and informal resolution processes, as applicable;
 - iv. How to serve impartially, including by avoiding prejudgment of the facts at issue; conflicts of interest, and bias.
- b. Additionally, decision-makers must receive training on the following areas:
- i. Any technology to be used at a live hearing; and
 - ii. Issues of relevance or questions and evidence, including when questions about the Complainant's sexual predisposition or prior sexual behavior are not relevant;
- c. Investigators must also be trained on issues of relevance to create an investigative report that fairly summarizes relevant evidence.
- d. All materials used to train the foregoing individuals must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints.
- e. All training materials used to train the foregoing individuals must be made available to the public by posting on NDSCS's website.

9. Recordkeeping.

- a.** NDSCS shall retain, for a period of seven years, records of:
 - i. Each sexual harassment investigation, including any determination regarding responsibility; any audio or audiovisual recording or transcript; any disciplinary sanctions imposed on the Respondent, and any remedies provided to the Complainant;
 - ii. Any appeal and the result therefrom;
 - iii. Any informal resolution and the result therefrom;
 - iv. All materials used to train Title IX coordinators, investigators, and decision-makers;
- b.** NDSCS must create and maintain for seven years, records of any actions, including records of supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, NDSCS must document the basis for its response was not deliberately indifferent, and document that it took supportive measures, or, if supportive measures were not provided, an explanation of why such a response was not clearly unreasonable considering the known circumstances.

10. Confidentiality. Notwithstanding Chapter 44-04 of the North Dakota Century Code, the identity of any individual who has made a report or complaint of sex discrimination or sexual harassment, any Complainant, any Respondent, and any witness, including the conduct of any investigation, hearing or judicial proceeding arising thereunder, shall be confidential.

11. Retaliation.

- a.** NDSCS or any other person may not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.
- b.** Intimidation, threats, coercion, or discrimination, including charges against an individual for Code of Conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.
- c.** The exercise of rights protected under the First Amendment does not constitute retaliation.
- d.** Charging an individual with a Code of Conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation, although a determination regarding responsibility, alone, is not sufficient to conclude that any Party made a materially false statement in bad faith.
- e.** Complaints alleging retaliation may be filed pursuant to the grievance procedures for sex discrimination under Title IX.

12. Shared Services. NDSCS may work collaboratively with other institutions, the NDUS Office, legal counsel, and other resources and seek uniformity in processes and procedures. NDSCS may enter into agreements with other institutions or entities to arrange for the availability of investigators, advisors.

13. Effective Date. This Policy shall take effect on August 14, 2020. If the Final Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, published at 85 Fed. Reg. 30,026 *et seq.*, is enjoined, delayed, or invalidated, this Policy shall not take effect until such a time as the Final Rule goes into effect.

Where to obtain additional information:

Any questions regarding Title IX may be referred to:

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Approved by:

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9/27/22

Date

