

A large, irregular blue ink splatter or blotch serves as the background for the text. The splatter is centered and has a textured, painterly appearance with various shades of blue and white. The text is white and positioned within the central part of the splatter.

# Introduction to Title IX and Equal Opportunity

SDSU Training

October 2021

# Agenda

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Policies, Laws and Legal Guidance

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Institutional Responsibilities

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Investigations

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Interviews

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Report Writing

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Post-Investigation

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Case Studies

# Acronyms

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DCL – Dear Colleague Letter

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EEO – Equal Employment Opportunity

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EO – Equal Opportunity

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EEOC – Equal Employment Opportunity Commission

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FERPA – Family Educational Rights and Privacy Act

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OCR – Office of Civil Rights

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SDBOR – South Dakota Board of Regents

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TIXC – Title IX Coordinator

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\* Victim is used synonymously for survivor

A large, solid blue circle is positioned on the left side of the image. It has a rough, splattered edge, with some blue ink-like marks extending outwards onto the white background. The text "Policies, Laws and Legal Guidance" is written in white, sans-serif font inside the circle.

# Policies, Laws and Legal Guidance

# Title IX of the Education Amendments Act of 1972

*“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”*

## Aspects of Title IX

- Sexual harassment
- Quid pro quo
- Sexual assault
- Dating violence
- Domestic violence
- Stalking
- Gender harassment
- Pregnancy
- Gender discrimination

## Recent Publications and Executive Orders

- Executive Order on Preventing and Combating Discrimination... (January 2021)
- Executive Order on Guaranteeing an Education Environment Free from Discrimination on the Basis of Sex... (March 2021)
- Questions and Answers on Title IX Regulations – July 21, 2021
- July 2021 Court Ruling

# Questions and Answers on TIX Regulations (July 20, 2021)

Highlights



# General Information

- Protect against “discrimination based on sex, including *discrimination in the form of sexual harassment and discrimination based on sexual orientation or gender identity...*”
- Definitions –
  - Complainant
  - Respondent
  - Reporter
  - Actual Knowledge

# General Obligations

- 2020 amendments are legally binding – not merely guidance
- Schools may go above and beyond steps required by Title IX – actions may not conflict with Title IX
- Schools must respond to, and should endeavor to prevent, sexual harassment – Prevention efforts
- Postsecondary schools must provide for a live hearing with the opportunity for cross-examination

# Definition of Sexual Harassment

Sexual Harassment Defined – “...sexual harassment to include certain types of unwelcome sexual conduct, sexual assault, dating violence, domestic violence, and stalking.”

*“Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:*

- (1) An employee of the [school] conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- (2) Unwelcome conduct, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or
- (3) ‘Sexual assault’ as defined in 20 U.S.C. 1092(f)(6)(A)(v), ‘dating violence’ as defined in 34 U.S.C. 12291(a)(10), ‘domestic violence’ as defined in 34 U.S.C. 12291(a)(8), or ‘stalking’ as defined in 34 U.S.C. 12291(a)(30).

# Definition of Sexual Harassment, Cont.

- (1) Refers to “quid pro quo”
- (2) General hostile environment harassment, but based on sex
- (3) As defined by the Clery Act and the Violence Against Women’s Act

Note – Stalking not based on sex falls outside of Title IX

# Definition of Sexual Harassment, Cont.

- *“A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.”*
  - *“OCR encourages schools to develop and enforce their codes as an additional tool for ensuring safe and supportive educational environments for all students.”*
  - SDBOR Policy

# Definition of Sexual Harassment, Cont.

*“Effectively denies a person’s right to equal access” – i.e., skipping class to avoid respondent, decline in GPA, quitting a sport or activity*

- *“A complainant does not need to have already suffered loss of education before being able to report sexual harassment.”*
- *“does not require that a person’s total or entire educational access has been denied.”*
- *“no concrete injury is required to prove an effective denial of equal access.”*
- *“School officials turning away a complainant by deciding the complainant was not traumatized enough would be impermissible.”*

# Where Sexual Harassment Occurs

- Geography – Property owned or controlled by school, off-campus settings in which school has substantial control, Officially recognized off-campus buildings owned or controlled by student organizations.
  - Must occur within the US
- Electronic Harassment – *“The factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity.”*

# Where Sexual Harassment Occurs, Cont.

Schools must have substantial control over respondent and context

- *“Whether the [school] funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred”*
- No distinction between in person or online



# When Harassment Occurred

*“The 2020 amendments took effect on August 14, 2020, and are not retroactive. This means that a school must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident; **the 2020 amendments do not apply to alleged sexual harassment occurring before August 14, 2020.**”*

- SDBOR practice

# Notice of Sexual Harassment

- Notice – Any *“official who has authority to institute corrective measures on the institution’s behalf”* – Not limited by DOE
  - Notice may be made via various means
  - Notice is referred to as *“actual knowledge”* – *“conduct that could constitute sexual harassment”*
- Any person may report sexual harassment

# Response to Sexual Harassment

- Schools must “respond promptly in a manner that is not deliberately indifferent.”
- TIXC “*must promptly contact the complainant to discuss the availability of supportive measures, regardless of whether a formal complaint is filed, and to explain the process of filing a formal complaint.*”
  - If formal complaint is filed, supportive measures must be offered to respondent.

# Response to Sexual Harassment, Cont.

- When a respondent is found responsible, “*the school must provide remedies to the complainant that are ‘designed to restore or preserve equal access to the [school’s] education program or activity’.”*
- Remedies can be punitive
- “*Schools are required to ‘describe the range of possible disciplinary sanctions or list the possible disciplinary sanctions and remedies’.”*

# Formal Complaints

- *“a document filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.”*
- May be any format, but *“must contain the complainant’s physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint.”*
- Complainant must be participating or attempting to participate in a school’s education program or activity at the time of the complaint, to file a formal complaint – Otherwise revert to Student Code or TIXC can file the complaint

# Formal Complaints, Cont.

- TIXC may file a formal complaint regardless of the complainant's association with the school.
- A school may be deliberately indifferent if it *“has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority,”* and does not file a formal complaint.
- *“the school has a Title IX obligation to provide all students, not just the complainant, with an educational environment that does not discriminate based on sex.”*

# Formal Complaints, Cont.

- All formal complaints must be responded to regardless of whether the respondent is currently affiliated with the school.
  - Offer supportive measures to complainant
- Formal complaint may be dismissed if respondent is no longer affiliated with the school
  - *“Proceeding with the grievance process could potentially allow a school to determine the scope of the harassment, whether school employees knew about it but failed to respond, whether there is a pattern of harassment in particular programs or activities, whether multiple complainants experienced harassment by the same respondent, and what appropriate remedial actions are necessary.”*
- SDBOR Policy 1:17

# Party or Witness Unable to Participate

- Temporarily due to disability or illness – *“A school has ‘discretion to apply limited extensions of time frames during the grievance process for good cause...’.”*
- *“a school must balance the interests of promptness, fairness to the parties, and accuracy of adjudications. The school also must promptly notify all parties of the reason for the delay and the estimated length of the delay, in addition to important updates about the investigation.”*
- *“a school must not delay investigations or hearings solely because in-person interviews or hearings are not feasible. Instead, a school must use technology...”*
  - May attend live hearing virtually – participants must be able to hear and see each other.



# Supportive Measures

- *“are designed to restore or preserve equal access to the [school’s] education program or activity.”*
- *Include “measures designed to protect the safety of all parties or the [school’s] educational environment, or deter sexual harassment. A school also must consider the complainant’s wishes in determining which supportive measures to provide and may not provide supportive measures that ‘unreasonably burden’ the other party.”*
- *“A school must consider ‘each set of unique circumstances’ to determine what individualized services would be appropriate based on the ‘facts and circumstances of that situation’.”*
- Supportive measures must remain confidential unless a person is required to be told in order to implement the measures. Supportive measures should not be described or listed in the investigative report.

# Supportive Measures, Cont.

- *“a school may remove a respondent from its education program or activity on an emergency basis. The school must ‘undertake an individualized safety and risk analysis, determine 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, and provide the respondent with notice and an opportunity to challenge the decision immediately following the removal’.”*
- *“A school may also place non-student employee respondents on administrative leave while a Title IX grievance process is pending.”*
- See SDBOR Policy 1:17 for examples

# Presumption of No Responsibility

- Does not equal a presumption that complainant is unsound or not credible
- “...*does not imply that the alleged harassment did not occur.*”
- Impartial

# Time Frames

- *“reasonably prompt”*
- *“...evaluated in the context of the [school’s] operation of an education program or activity.”*
- *“...because victims of sexual harassment are entitled to remedies to restore or preserve equal access to education,...prompt resolution of a formal complaint of sexual harassment is necessary to further Title IX’s nondiscrimination mandate.”*
- *“according to time frames the school has committed to in its grievance process”*
  - *Follow SDBOR Policy 1:17*

# Live Hearings and Cross-Examination

- Hearings must be live
- May occur virtually with technology that allows both parties to see, hear and communicate
- *“each party’s advisor [must be permitted to] ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”*
- Parties may not directly cross-examine each other
- Schools are required to provide advisors, free of charge, to any party who does not designate their own advisor
- Parties are not required to participate in a hearing
- Schools may develop rules for the hearing process, along with *“rules of decorum”*

# Live Hearings and Cross-Examination, Cont.

- Parties are not required to be physically present in the same room.
- Schools may limit or restrict questions asked – “*...only relevant cross-examination questions and other questions may be asked of a party or witness’ and the decision maker must determine the relevance of a question before a party or a witness answers.*”
- “*...questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence...are offered to prove that someone other than the respondent committed the conduct alleged.*”
  - “*...‘prior sexual behavior’ refers to ‘sexual behavior that is unrelated’ to the alleged conduct.*”
  - “*...the regulations do not imply that these [questions about sexual behavior after an alleged incident] kinds of questions are relevant.*”

# Live Hearings and Cross-Examination, Cont.

- *“Questions that seek information about any party’s medical, psychological, and similar records are not permitted unless the party has given written consent.” – **These protections also apply during investigations***
- *“...the 2020 amendments require a pause in the cross-examination process each time before a party or witness answers a cross-examination question in order for the decision-maker to determine if the question is relevant...and [to ensure] that the pace of the cross-examination does not place undue pressure on the party or witness to answer immediately.”*
- *Answers to cross-examination are not required to “‘be in linear or sequential formats’ or that any party ‘must recall details with certain levels of specificity’.”*



# Live Hearings and Cross-Examination, Cont.

- *“...the school’s decision-makers may not rely on any statements from that individual [a person unable to participate in the hearing] in their decision-making about whether the respondent has committed sexual harassment in violation of school policy.”*
  - Court Ruling – *“Decision makers may now consider evidence including police reports, medical reports, text messages between the parties leading up to the alleged misconduct and statements made by the parties and witnesses during the investigation.”*
    - SDBOR will continue as is written in BOR Policy 1:17



# Live Hearings and Cross-Examination, Cont.

- Standard of Proof – schools may choose to use either preponderance of the evidence or clear and convincing, but must use such standard for every formal complaint

# Informal Resolution

- Schools *“may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions. A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.”*
- Parties are not required to *“interact directly with each other as part of an informal resolution process; mediations are often conducted with the parties in separate rooms and the mediator conversing with each party separately.”*
- *“...require[s] that the school obtains the complainant’s and the respondent’s voluntary, written consent before using any kind of ‘informal resolution’ process...either party may withdraw from the informal resolution process...at any time prior to agreeing to a resolution.”*
- Must be facilitated by a person free from bias and *“trained to serve impartially...”*

# Retaliation and Amnesty

*“Retaliation is defined as ‘[i]ntimidation, 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 [the] Title IX [statute or regulations]’.”*

Prohibits “collateral conduct” – *“Charges against an individual for [unrelated] code of conduct violations...arise out of the same facts or circumstances as a report...of sexual harassment...for the purpose of interfering with any right...secured by Title IX...”*

Grievance processes must treat both parties equitably

# Forms of Sex Discrimination other than Sexual Harassment

*“...grievance process required for formal sexual harassment complaints does not apply to complaints alleging discrimination based on pregnancy, different treatment based on sex, or other forms of sex discrimination.”*

*“...schools must respond to these complaints using the “prompt and equitable” grievance procedures that schools have been required to adopt and publish since 1975, when the original Title IX regulations were issued.”*

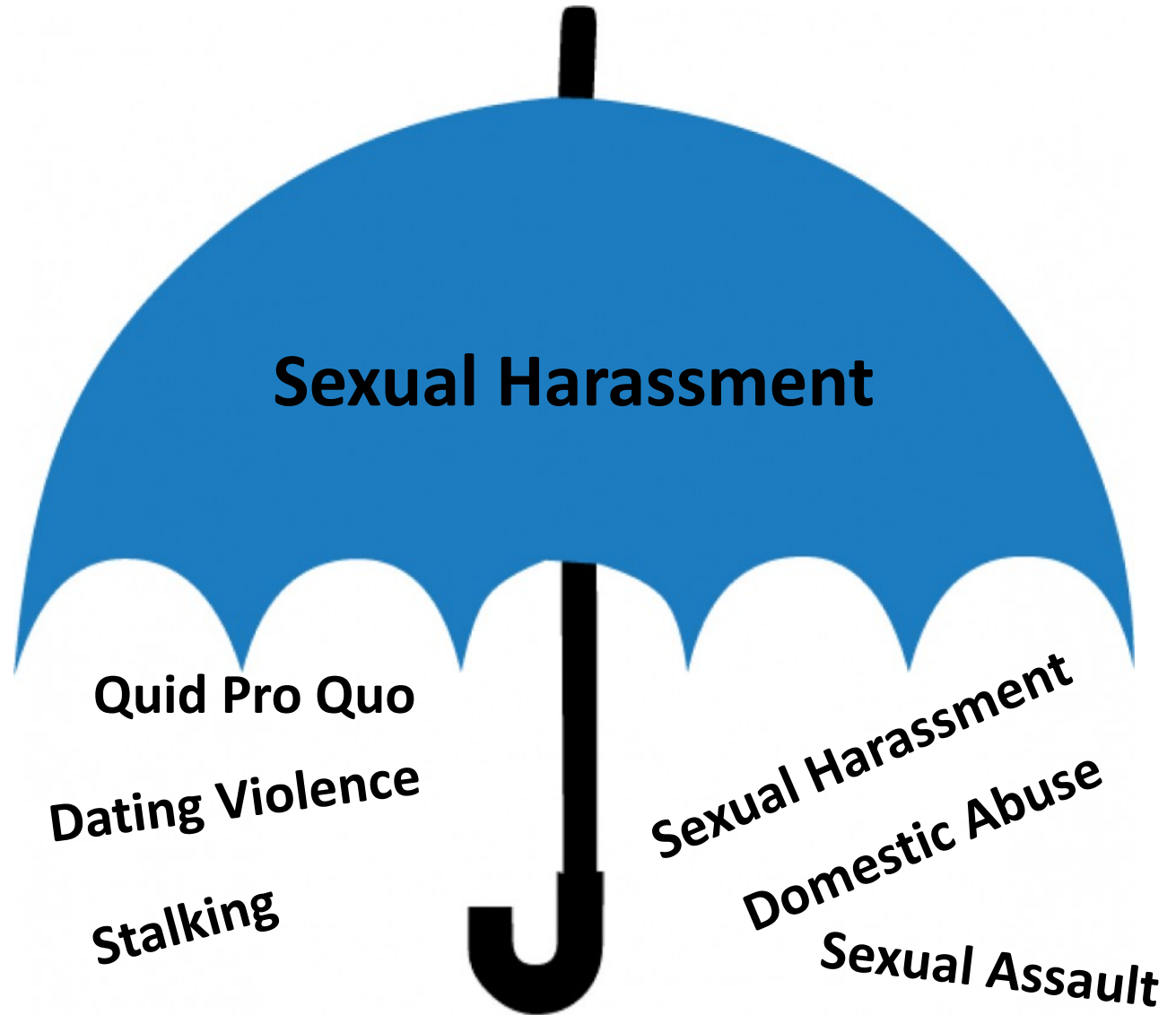
# What Constitutes Prompt and Equitable Procedures

*“...a grievance procedure cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school’s students, easily understood, and widely disseminated.”*



# Anti Discrimination Laws and Related Policies

**VAWA and  
Clery Act**  
SDBOR 1:17 and  
1:17.1



# The Clery Act and VAWA

[https://www.sdstate.edu/sites/default/files/file-archive/2021-09/2021-Annual-Security-and-Fire-Safety-Reports\\_1.pdf](https://www.sdstate.edu/sites/default/files/file-archive/2021-09/2021-Annual-Security-and-Fire-Safety-Reports_1.pdf)

SDSU Policy 10:11



# Laws

Civil Rights Act  
Title VII

Civil Rights Act  
Title VI

Americans with  
Disabilities Act

Age Discrimination  
in Employment Act

Equal Pay Act

Fair Labor  
Standards Act

Family Medical  
Leave Act

Genetic  
Information  
Nondiscrimination  
Act

Pregnancy  
Discrimination Act

Uniformed Services  
Employment and  
Reemployment  
Rights Act

Section 504 of the  
Rehabilitation Act  
of 1973

Vietnam Era  
Veterans'  
Readjustment  
Assistance Act

Lilly Ledbetter Fair  
Pay Act

Title IX

Violence Against  
Women's Act

# Related Policies

SDBOR Policy 1:17 –  
Sexual Harassment

SDBOR Policy 1:18 –  
Human Rights Complaint  
Procedures

SDBOR Policy 1:17.1 –  
Prevention of Dating  
Violence, Domestic  
Violence, Sexual Assault  
and Stalking

SDBOR Policy 1:19 –  
Equal Opportunity, Non-  
Discrimination and  
Affirmative Action

SDBOR Policy 1:11 –  
Academic Freedom and  
Responsibility

SDBOR Policy 1:23 –  
Employee-Employee and  
Faculty-Student  
Consensual  
Relationships

SDBOR Policy 1:31 –  
Exclusion of Members of  
the Public for Disruption  
of Institutional  
Activities...

SDBOR Policy 1:32 –  
Commitment to  
Freedom of Expression

SDBOR Policy 3:4 –  
Student Code of Conduct

SDBOR Policy 4:16 –  
Military Service and  
Veterans Rights

SDBOR Policy 4:22 –  
Nepotism

SDSU Policy 4:13 –  
Americans with  
Disabilities Act  
Compliance

SDSU Policy 3:6 –  
Reasonable  
Accommodation  
Involving Animals

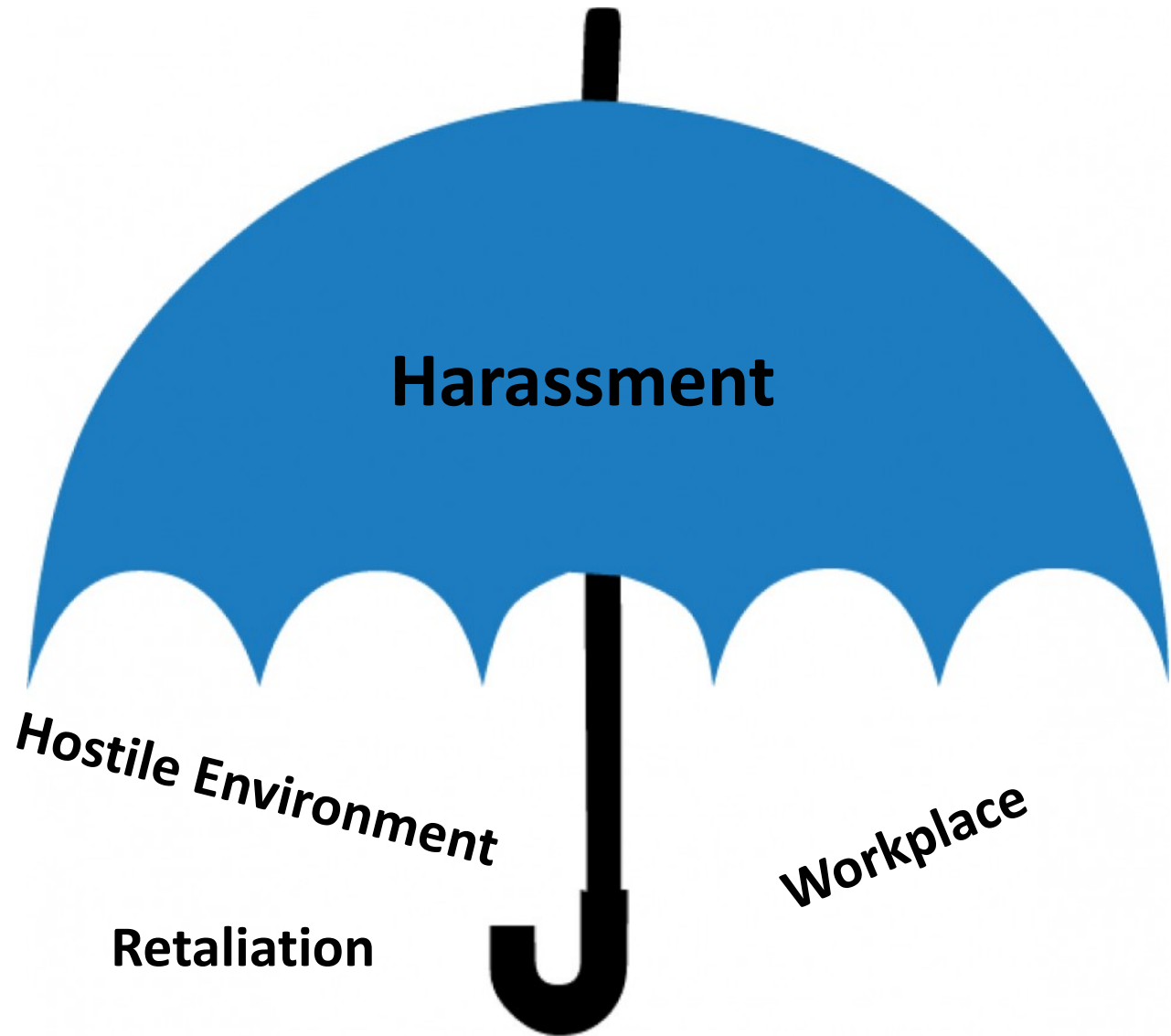


SDSU/SDBOR Policies 4:4/1:17 &  
4:5/1:17.1

# Harassment

# Harassment

SDBOR 1:18



# Maintaining a Harassment Free Environment

- All inquiries, allegations, reports, or complaints relating to discriminatory conduct, will be forwarded to the EEO Coordinator for response or investigation.
- If you have knowledge of harassment or discrimination and fail to take prompt and appropriate corrective action, the University is almost certainly liable for any additional or ongoing allegations.

“Any campus employee informed of an allegation of sexual abuse, domestic violence or stalking with a clear connection to institutional programs, personnel or students must promptly notify the EEO Coordinator.

-SDBOR Policy 1:18

# Harassment

SDBOR Policy 1:17

- “An employee of an institutional conditioning the provision of education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo); or
- Unwelcome conduct [based on a protected category] that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution’s education program or activity; or

*“Reasonable directions and admonitions by duly authorized institutional agents as to time, place and manner in which employees or volunteers perform assigned responsibilities, students carry out educational assignments or program participants engage in sponsored activities do not constitute prima facie evidence of discrimination.”*

*SDBOR Policy 1:18*

Free Speech  
Vs Hostile  
Environment  
Harassment

SDBOR Policies 1:32



# Examples of Free Speech

- Confederate flags
- Swastikas
- Banners against a certain political party that do not contain threats
- Posters that contain foul language that is not threatening
- Flags from other countries
- Hanging a US flag upside down
- Fliers advertising white supremacy events
- A student painting their face black

# Retaliation

## Criteria –

- 1) A person engaged in a protected activity;
- 2) The person's superior was aware of this activity;
- 3) The person's superior took adverse action against the person; and
- 4) A causal connection exists between the adverse action and the protected activity.

# Retaliation

- ❑ ANY ACTION THAT MAY PREVENT OR DETER A REASONABLE PERSON FROM REPORTING A COMPLAINT OR PARTICIPATING IN THE INVESTIGATION PROCESS.
- ❑ IT IS ILLEGAL TO PUNISH OR TAKE A NEGATIVE ACTION AGAINST A PERSON FOR FILING A REASONABLE (NOT DELIBERATELY FALSE) COMPLAINT.
- ❑ SCHOOLS ARE REQUIRED TO HAVE POLICIES AND PROCEDURES IN PLACE TO PROTECT STUDENTS AND STAFF AGAINST RETALIATION.
- ❑ SCHOOLS MUST ENSURE THAT THE MEASURES THEY TAKE TO PREVENT HARASSMENT DO NOT INADVERTENTLY RESULT IN RETALIATION.

**CHILLING EFFECT**

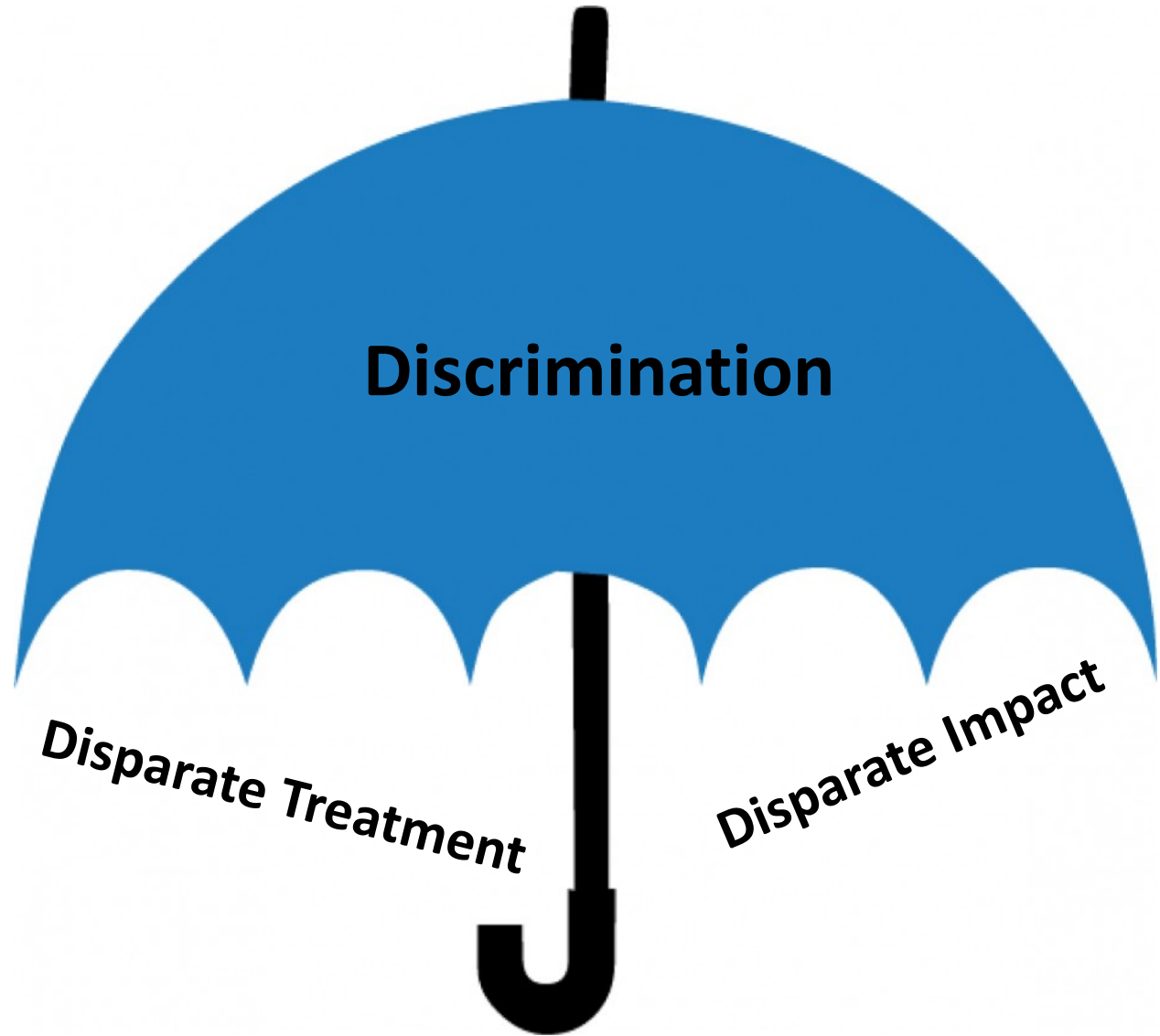


SDSU/SDBOR Policies 4:6/1:18 &  
4:5/1:17

# Discrimination

# Discrimination

SDBOR Policies  
1:17 & 1:18



Actions that deprive members of the campus community of educational, employment, athletic or other activity opportunities on the basis of sex, race, color, creed, national origin, ancestry, citizenship, gender, gender identification, transgender, sexual orientation, religion, age, disability, genetic information, or veteran status.

PROTECTED CATEGORIES

**DISCRIMINATION**

A word cloud of protected categories. The words are arranged in a roughly rectangular shape, with some words appearing vertically. The colors are primarily shades of red, orange, and yellow. The words included are: race, status, color, citizenship, ancestry, transgender, creed, disability, veteran, national origin, age, gender, gender identification, sex, sexual orientation, and religion.

# Criteria of Disparate Treatment

**Person is a member of a protected category**



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graph TD; A[Person is a member of a protected category] --> B[Person is qualified for their position]; B --> C[Person was subjected to negative action  
Actions that change the terms and conditions of employment.  
What about social harm?]; C --> D[Causal connection exists between the person's protected category and the negative action];
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**Person is qualified for their position**

**Person was subjected to negative action**

Actions that change the terms and conditions of employment.  
What about social harm?

**Causal connection exists between the person's protected category and the negative action**

## Disparate Impact

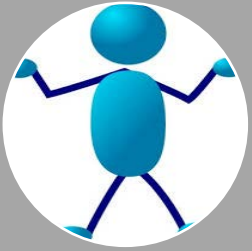
- Person must be a member of a protected category
- Person must have suffered an adverse employment action
- Unfavorable action gives rise to an inference of discrimination





# Institutional Responsibilities

# Institution's Obligation to Respond



**Protect Complainant  
and Respondent**



**Protect Community**



**Track  
Patterns**



# Actual Knowledge

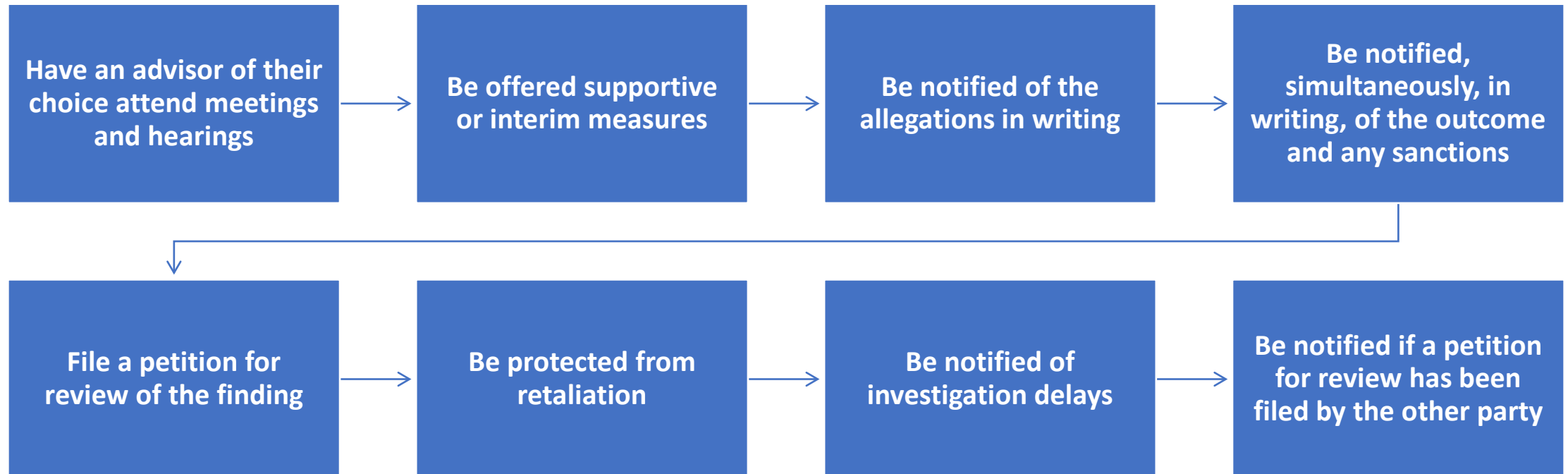
- “Notice of sexual harassment or allegations of sexual harassment to a Title IX Coordinator, any employee of the institution who has authority to institute corrective measures on behalf of the institution...”
- “An institution with actual knowledge of sexual harassment in connection with an education program or activity must respond promptly in a manner that is not clearly unreasonable in light of the known circumstances.”

-- SDBOR Policy 1:17 (Emphasis added)

# When to Conduct an Investigation

- Receive Notice
  - What does that mean – informal, formal, inquiries, in writing, verbal?
  - Once “Notice” is established, investigation or response must occur
    - Type of complaint – Title IX or EO?
- Levels of Investigations
  - Response
  - Little “i” – Brief or preliminary
  - Big “I” – Full comprehensive investigation

# Complainant & Respondent Rights



# Working with Law Enforcement

*"22-11-12. Misprision of felony--Misdemeanor. Any person who, having knowledge, which is not privileged, of the commission of a felony, conceals the felony, or does not immediately disclose the felony, including the name of the perpetrator, if known, and all of the other relevant known facts, to the proper authorities, is guilty of misprision of a felony. Misprision of a felony is a Class 1 misdemeanor. There is no misprision of misdemeanors, petty offenses, or any violation of § 22-42-5.1."*

## Working with Law Enforcement, Continued

- Allow time for law enforcement investigations [5-10 business days]
- Communicate frequently to maintain open relationship
- Don't forget FERPA
- Document case-related conversations
- Report all felony-level crimes involving minors immediately

# Working with EEOC or OCR



Don't panic



Consult SDBOR Legal Counsel and/or University  
Legal Counsel



Do not miss a deadline



Provide all information requested



If interviewed, answer in a truthful manner – it is  
alright to respond that you are not sure



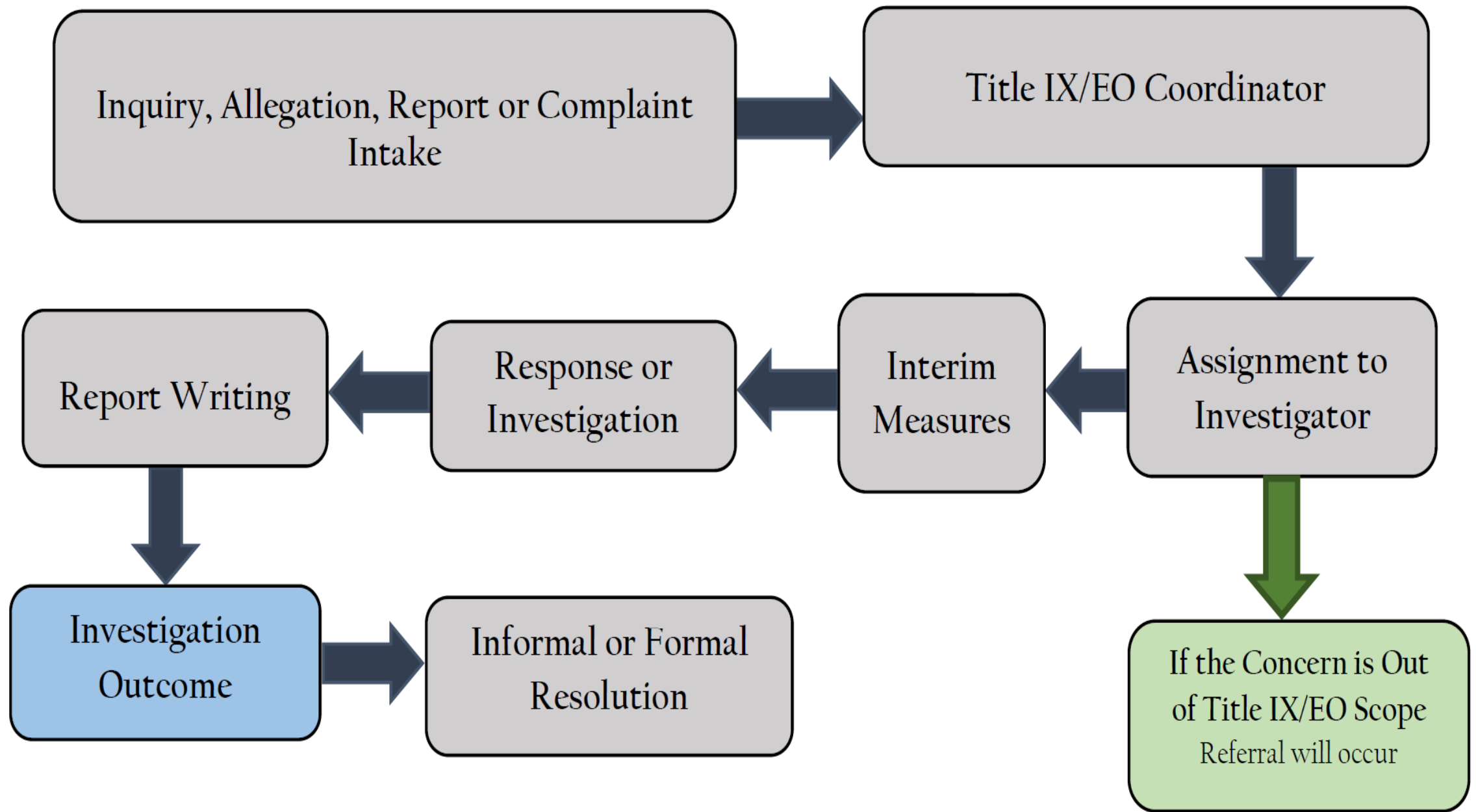


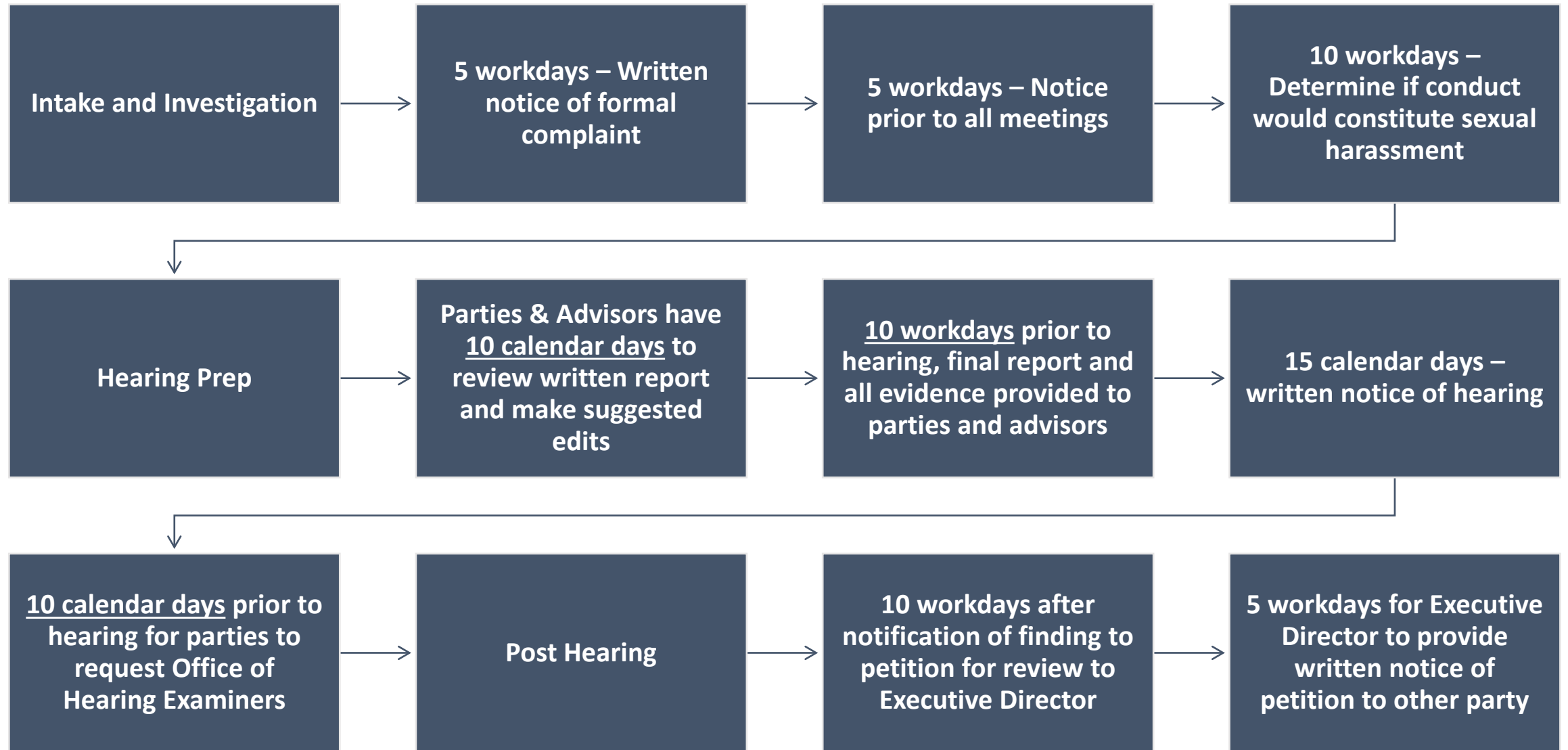
# Investigations

Steps and Models

# Investigation Steps

- Intake
- **Prepare, prepare, prepare**
- Determining elements of review
- Determine process of investigation – order of interviews, depth of investigation
- Gather evidence – inculpatory (supporting) and exculpatory (negating)
- Review for credibility – establish motives for deception (1:18 only)
- Analyze information





# Intake of Complaints

- Institutions must maintain a system to manage complaints
- Institutions must post methods to file complaints
- Third party reporters
- Anonymous Vs identified complainants
- Gather preliminary information about involved parties
- Begin to determine scope of complaint

# Intake of Complaints – Ask Yourself

- Do the allegations involve a protected category?
- Does the university have authority over the responding party?
- Did the allegations occur on university owned/controlled property or during a university event?
- Would the allegations, if taken as true, meet the criteria for harassment or discrimination?
- What is the role of the parties involved?

## Supportive or Interim Measures

- **Academic** (excused absences from class, extended time to complete assignments, incomplete grades, withdrawal from courses....)
- **Housing** (option to move to another location, mandatory move for accused...)
- **Financial Aid** (assistance with changes in financial aid/scholarships due to reduced credit load or other purposes....)
- **International Affairs** (assistance with Visas, contacting government agencies.....)
- **Work Adjustments** (change in shifts, time off, change in work locations....)
- **Parking**



## Protective Measures (use with caution)

- **Academic** (change in class schedules, assigned seating)
- **Bans** (ban from campus, ban from public areas, ban from residence halls, “come and go access”)
- **No Contact/ Protection Order** (University no contact order, assistance with obtaining legal protection order)
- **Interim Suspension**
- **Parking/Traffic** (assistance with parking in a different lot, parking in UPD lot)
- **Work Adjustments** (change in work location/shifts, paid administrative leave...)



# Investigation Models

## One Person

- Easier to schedule
- May be more comfortable for involved parties
- Feasible with sparse resources
- Limits disruptions

# Investigation Models, Continued

## Two Person

- Lead investigator and note taker
- Observing body language
- Accountability
- Assists with neutrality
- Balance conflicts
- Question & meeting flow assistance
- Takes more resources
- More difficult to schedule meetings

# Determining Investigators

- Impartial, reliable and thorough
- Observant
- People-centered
- Has the time
- Human Resources Vs Student Affairs
- Conflicts of interest
- Analytical thinking skills
- Ability to maintain confidentiality & privacy

# Investigation Locations

- Neutral space with neutral décor
- Circular seating
- Positions of power
- Meeting area in a room that is easy to access and not obvious
- Meet in location of involved parties or in your space?
  - Can be helpful to see the “scene of the crime”

# Investigation Guidelines

- Advocates and potted plants
  - friends, family, attorneys
- Recording?
- Retaliation
- Discuss Process – very briefly
- Privacy vs confidentiality



# Levels of Secure Information

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- Privileged
  - Can not be inquired into in any way; not subject to disclosure- Attorneys, Clergy, Medical
- Confidential
  - Nonpublic information that may only be shared with certain individuals under certain situations- Reports aggregate data- Counselors, Advocates
- Private
  - Restricted information that would cause undesirable effects if it was made publically available. Private information may be shared only on a need to know basis- Bankers, Law Enforcement
- Public
  - Open for anyone's knowledge

# Target Timeline

Intake.....Complaint or Inquiry Received  
Day 1.....Assignment  
Day 3.....Assessment Discussion  
Day 3.....Response or Investigation begins  
Day 3.....Determine Interim/Protective Measures  
Day 15.....Review Discussion  
Day 20.....Investigative Report Complete & Outcome Notifications Sent

# Prior Notice

*“Within 5 working days of receiving a formal complaint, the institution must provide written notice to the parties who are known. The written notice shall include:*

- Notice of allegations..., including sufficient details [names, specific allegations, date and location] known at the time and with sufficient time to prepare a response before any initial interviews...”*
- 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 informing the parties that they may have an advisor of their choice, [can be an attorney, can come to related meetings/hearings, can review evidence]...*
- A statement of the maximum disciplinary sanction(s) that may be imposed on respondent...*
- A statement informing the parties of any applicable provision in policy that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.*



When is the  
investigation  
Completed

When is enough, enough?

# Managing Expectations

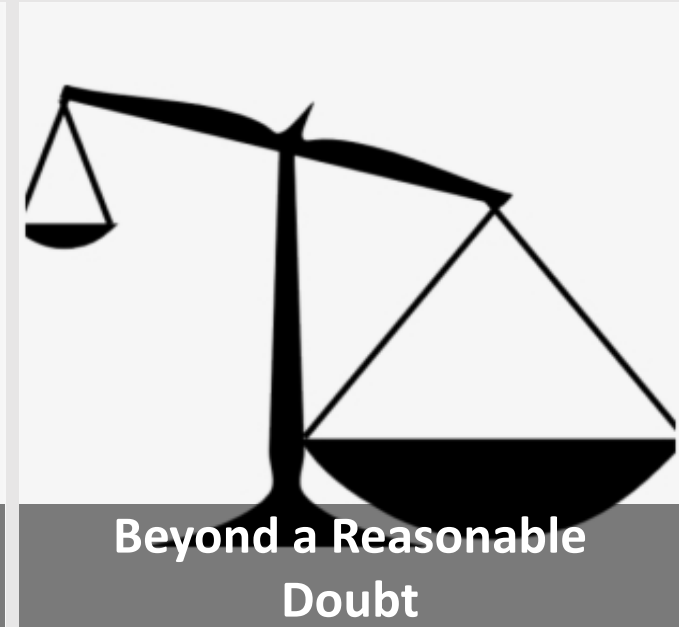
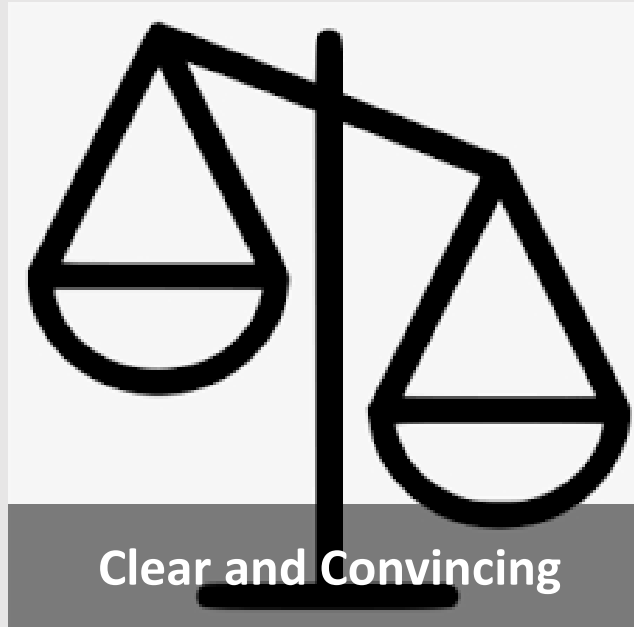
- Unhappy endings
- Define policy and limits to policy
- Encourage questions
- Be prepared to assist in other areas
- Treat everyone in a fair and neutral manner



# Conclusion and Investigation Outcomes

# SDBOR Policy 1:17 vs SDBOR Policy 1:18

# Standard of Evidence



## Making a Determination SDBOR Policy 1:18

- Criteria and element(s) of review
- Uncontested facts and inculpatory and exculpatory evidence
- Objectivity— keep emotions out of decision

## Factors To Consider

- Credibility
  - Plausibility,
  - Corroboration,
  - Motive to falsify, and
  - Demeanor
- Reluctance
- Consistency
- What is not said

## Rely on Policies

- Elements of Review
- Reasonable Person Standard
- Reasonable Directions and Admonitions



## Reasonable Directions and Admonitions

“Reasonable directions and admonitions by duly authorized University agents as to time, place and manner in which employees or volunteers perform assigned responsibilities, students carry out educational assignments, or program participants engage in sponsored activities do not constitute prima facie evidence of harassment.”

-SDBOR Policy 1:17

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# Interviewing Techniques

## Interview Process

- Develop a rapport
- Explain the investigation process and next steps
- Avoid interrupting
- Discuss interim actions/supportive measures- both parties
- Refer to law enforcement if needed
- Provide resources
- No “chilling effect” – alcohol and other policy violations
- Preponderance of Evidence

# Questioning Guidelines

- Prepare and come to meeting with basic questioning framework
  - Be flexible – this is only a framework
- What are the facts and what do you need to know
- What are the allegations – ensure that the respondent has an opportunity to respond
- Acknowledge uncomfortableness
- Determine what is relevant and what isn't
- Be open to perceptions

# Questioning Guidelines

- Open Vs closed ended questions
- Rephrasing
- Summarizing
- Repeated questions asked different ways
- Engage senses
- Become comfortable with silence

## Questioning Guidelines, Cont.

- Move from more general to more specific questions- Less intrusive to more intrusive – Less challenging to more challenging
- Mirror their language
- Avoid asking “Why”
- Never promise or suggest an outcome

## MVQ – Most Valuable Question

What would you like to tell me about...?

**And then what happened? And then what happened?**

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Let's Practice



## Interviewing the Complainant

- Notify them of the process before they tell their account
- Show empathy
- Let them tell their account
- May take several meetings to get complete account
- Account may vary, and be non-sequential, if trauma was involved

# Interviewing the Respondent

- Advance notice
- Remember neutrality, keep an open mind
- Let them tell their story
- Show genuine empathy
- Develop rapport
- Avoid "grilling" them
- Offer interim and/or supportive measures if needed
- Inform them of all allegations – they have the right to respond



Let's Practice

# Interviewing Witnesses

- Tell them only what they need to know
- Ensure they understand they are "not in trouble"
- They may not have witnessed the event in question, but may have been told immediately after
- Ask who else you should talk to
- Back-to-back meetings?
- Character witnesses?

# Note Taking

- Handwritten Vs typing
- Audio record
- Video record
- Share notes or not
  - Sign notes?
- Noting non-verbal communication
- Side notes and doodles
- Colored ink

# Note Taking

- What records to maintain?
- Document all work done on case – phone calls, e-mails, research, meetings...
- Take notes throughout the entire interview
- Take time after meetings to fill in any missed information
- Don't forget small details
- Document quotes if possible – adds credence and note of importance

## Note Taking, Cont.

- Objective and subjective
  - Document objectively
  - Also include any hints of deception, perceptions of credibility...
- Note resistance or hesitancy to meeting or questions
- Date and page number all documents
- Be willing to conduct follow-up interviews
- Document review of process, rights and options
- Inquire about text messages, social media, e-mails... and obtain copies

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# Report Writing



# Components of an Investigation Report

- Introduction
- Background
- History (if needed)
- Allegations
- Scope of investigation
- Statements regarding allegations
- Element(s) of review
- Credibility assessment (1:18 only)
- Uncontested facts
- Inculpatory and exculpatory evidence
- Analysis (1:18) / Summary (1:17)

# Possible Outcomes

SDBOR Policy 1:18

- Sufficient basis to proceed
  - AKA – Finding
- Insufficient basis to proceed
  - AKA – No Finding
- Inconclusive



# Post- Investigation Process

## Closing the Investigation

- Outcome letters
- Options to petition for review
- Communication with complainants when there is a No Finding

## What next?

- Process after a decision is rendered if there is a finding
  - Who is contacted? Where do the reports go? Is this a personnel record? What are the next steps?
- Process after a decision is rendered if there is no finding
  - How is the concern resolved? What happens to the report?
- Dealing with unrelated allegations

Role in  
Student  
Conduct  
Process

Documentation

## Role in Employee Discipline Process

- CSA
- NFE
- Faculty

## Petition for Review – No Finding

(SDBOR Policy 1:18)

*“If the complainant believes that the Title IX/EEO Coordinator erred in concluding that the complaint did not have a reasonable basis, the complainant may petition the institutional chief executive officer for a review of that determination. The petition must be received within fifteen working days after the complainant has been notified that the Title IX/EEO Coordinator has determined that there is no reasonable basis to believe that the complainant was subjected to discrimination.”*



## Petition for Review – No Finding, Continued

*“The institutional chief executive officer, either personally or through a delegatee, will review the investigation file to determine whether the conclusions of the Title IX/EEO Coordinator are based upon substantial evidence. The chief executive officer will respond in writing to the complainant and the accused at the conclusion of this review.”*

Petition for  
Review –  
Finding  
(SDBOR Policy 1:18)

*No option to petition for  
review of investigation  
outcome – Appeal rights  
follow disciplinary process*

## Petition for Review — (SDBOR Policy 1:17)

*“...petitioning in writing to Executive Director of the Board of Regents no later than ten (10) working days after notice of the institution’s decision is deemed received.”*

Bases —

- Procedural irregularity affecting outcome
- New evidence not previously available
- TIXC or investigator bias



# Thank you for coming!

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