



Equal Opportunity & Nondiscrimination

Investigation Foundations

Offices of Equity and Inclusion, General Counsel & Labor Relations

November 12-13, 2024

Outline of Today's Presentation

- » Purpose or “why”
- » Board Policies and System Procedures
- » Key elements of 1B.1 and 1B.3
- » Other system policies and procedures
- » Roles in the process
- » Investigation reports and decision-making
- » Questions/Discussion

Purpose or “why”

- » Safe and inclusive campus communities
- » Nondiscrimination and Bias Incidents
- » Confidence in the process
- » Inquiry vs. investigation



Minnesota State Policy and Procedure

Adopting Board Policies and System Procedures

- » Board Policy 1B.1 Equal Opportunity and Nondiscrimination in Employment and Education
- » Board Policy 1B.3 Sexual Violence
- » System Procedure 1B.1.1 Investigation and Resolution
- » System Procedure 1B.3.1 Response to Sexual Violence and Title IX Harassment

Understanding Board Policies

Board Policy 1B.1

Equal opportunity and nondiscrimination in employment and education

- » Equal opportunity for students and staff
- » Nondiscrimination
- » Protected Classes
- » Discrimination
- » Harassment
 - Discriminatory harassment
 - Sexual harassment
- » Consensual relationships
- » Retaliation



Protected Classes

Harassment and discrimination are prohibited based on:

- » Race
- » Creed
- » Age
- » Disability
- » Sexual Orientation
- » Gender Expression
- » Familial Status
- » Sex (including pregnancy, child birth, and related medical conditions)
- » Status with regard to Public Assistance
- » Membership or activity in a local human rights commission
- » Color
- » Religion
- » National Origin
- » Marital Status
- » Gender Identity
- » Veteran Status
- » Genetic Information (employees)

Protected Classes: Full Scope

- » Actual or perceived protected class
- » May include traits or characteristics linked to the protected class
- » May include stereotyping of a protected class



Protected Classes & Intersectionality

- » Different forms of inequality operate together and exacerbate each other (Dr. Kimberle' Crenshaw)
- » Personal identities and characteristics do not exist in isolation
- » Some characteristics often fuse inextricably, made flesh in a person; they indivisibly intermingle.
- » The combination of identities of any given person is endless and should be considered in context of the scope of the investigation.



Policy Application

- » This policy applies to all individuals affiliated with Minnesota State, including but not limited to, its students, employees, applicants, volunteers, agents, the Board of Trustees, and others as appropriate and protects the rights and privacy of all involved individuals, as well as prevents retaliation.
- » On property; off property, including online
- » 1B.1 Policy implemented through 1B.1.1 Procedure



Discrimination

The elements of discrimination include:

- » Someone was treated differently;
- » The different treatment was based on the individual's protected status or perceived protected class status; and
 - Interfered with or limited the ability of that person to participate in, or benefit from, the services, activities or privileges provided by Minnesota State or
 - Otherwise adversely affected that person's employment or educational experience of the college/university



Discriminatory Harassment

The elements of discriminatory harassment include:

- » Unwelcome conduct or communication;
- » Based on actual or perceived membership in a protected class;
- » That has a negative effect or is likely to have a negative effect on the complainant or the workplace or education environment.



Discriminatory Harassment, cont.

The examples of discriminatory harassment include:

- » Oral or written conduct such as jokes, innuendo, slurs, name calling, negative comments about cultural norms, circulating rumors;
- » Physical conduct, battery, blocking movement;
- » Non-verbal derogatory gestures, stalking, interference with work performance;
- » Visual displays.



Sexual Harassment

The elements of sexual harassment include:

- » Unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct, and other verbal or physical conduct of a sexual nature and;
- » The conduct has a negative or is likely to have a negative effect on the complainant or the workplace or the educational environment.



Sexual Harassment Investigation Considerations

- » The subject of the harassment and harasser may be woman, man, or nonbinary; they do not have to be different sexes.
- » The harasser may be a supervisor of the person, a supervisor in a different area, a co-worker, a student, etc.
- » The reporting party does not have to be the subject of the harassment to be affected by the offensive conduct.



Sexual Harassment, cont.

The examples of sexual harassment include:

- » Unwelcome conduct
 - Verbal, ex. sexual innuendos, suggestive comments, sounds, or propositions
 - Physical, ex. suggestive objects or pictures, obscene gestures
 - Physical contact, defined by Board Policy 1B.3 Sexual Violence
- » Preferential treatment or promises
- » Negative treatment or threats
- » Sexual exploitation, ex. transmitting or threatening to share images or video of graphic nudity or messages without consent



Retaliation

Retaliation is prohibited at Minnesota State.

Retaliations includes, but is not limited to, engaging in any form of intimidation, reprisal or harassment against an individual because the person:

- Made a complaint or other communication under 1B.1 or 1B.3; or
- Assisted or participated in an investigation or process under these policies, regardless of whether a claim of discrimination or harassment was substantiated (or other applicable laws and policies); or
- Associated with a person or group of persons who are members of a protected class; or
- Made a complaint or assisted or participated in any manner in an investigation or process with the EEOC, the U.S. Department of Education (OCR), the MN Dept of Human Rights or other enforcement agencies, under any federal or state nondiscrimination law.



Consensual Relationships

An employee of Minnesota State **shall not** enter into a consensual relationship with a student or an employee over whom the person exercises direct or otherwise significant academic, administrative, supervisory, evaluative, counseling, or extracurricular authority or influence.



System Procedure 1B.1.1

Investigation and Resolution

Reporting Discrimination/Harassment

- Encourage report as soon as possible
- Administrators and supervisors **must** report incidents of discrimination/harassment
- Students, faculty and employees are strongly encouraged to report incidents of discrimination/harassment



Special Cases

- » Complaints against a president
 - Complaints should be filed with the system office's designated officer. The case will be investigated by an investigator appointed by the Chancellor.
 - Campus investigation - If president's role in the incident was limited to a decision on a recommendation made by another administrator, such as tenure, promotion or non-renewal and the president had no other involvement in the matter
- » Complaints against system office employees or the Board of Trustees.
 - Complaints that involve allegations against the chancellor or a member of the Board of Trustees must be referred to the board chair or vice chair for processing. Such complaints may be assigned to a Minnesota State investigator or outside investigatory assistance may be designated
- » Complaints against college or university vice presidents, deans or provosts are filed at the campus level with the president as decisionmaker



Sexual Harassment & Violence as Sexual Abuse

Mandatory reporting of abuse or neglect of children or vulnerable adults

Minnesota law provides special protection for children under 18 and vulnerable adults. These laws, Minnesota Statutes sections 626.556 and 626.557, identify those who are mandated to report neglect or abuse of children under 18 and maltreatment of vulnerable adults. Faculty, student teachers or clinical participants, day care personnel, and others involved in education or services to children or vulnerable adults may be considered mandated reporters under both of these laws. Reports of abuse or neglect of a child or vulnerable adult, must be made to law enforcement or state or county social service agencies.



Board Policy 1B.3

Sexual Violence Policy

The 1B.3 Policy addresses:

- » Affirmative Consent
- » Sexual Violence
- » Sexual Assault
- » Dating, intimate partner, and relationship violence
- » Stalking
- » Non-forcible sex acts
- » Retaliation



Affirmative Consent

Consent is **informed, freely given, and mutually understood** willingness to participate in sexual activity that is expressed by **clear, unambiguous, and affirmative words or actions**. A lack of protest, absence of resistance, or silence alone does not constitute consent, and past consent to sexual activities does not imply ongoing future consent. The existence of a dating relationship between the people involved or the existence of a past sexual relationship does not prove the presence of, or otherwise provide the basis for, an assumption of consent. Whether the respondent has taken advantage of a position of influence over the complainant may be a factor in determining consent.



Sexual Assault

An actual, attempted, or threatened sexual act with another person without that person's affirmative consent. Sexual assault includes but is not limited to:

1. Involvement without consent in any sexual act in which there is force, expressed or implied, or use of duress or deception upon the victim.
2. Involvement in any sexual act when the victim is unable to give consent.
3. Intentional and unwelcome touching of a person's intimate parts (defined as primary genital area, groin, inner thigh, buttocks, or breast); or coercing, forcing, or attempting to coerce or force another to touch a person's intimate parts.
4. Offensive sexual behavior directed at another, such as indecent exposure or voyeurism.



Dating, intimate partner, and relationship violence

Dating, intimate partner, and relationship violence (DIRV)

- » Physical harm or abuse
- » Threats of physical harm or abuse
- » Arising out of a personal intimate relationship



Stalking

Conduct directed at a specific person that is unwanted, unwelcome, or unreciprocated and that would cause reasonable people to fear for their safety or the safety of others or to suffer substantial emotional distress

Some examples:

- » Unwanted Phone Calls
- » Unwanted Voicemails
- » Unwanted Text Messages
- » Spying
- » Sending unwanted gifts
- » Letters
- » E-mails
- » Social media use
- » Showing up at a location

Non-forcible sex acts

Unlawful sexual acts where consent is not relevant, such as sexual contact with an individual under the statutory age of consent, as defined by Minnesota law, or between persons who are related to each other within degrees wherein marriage is prohibited by law.



Retaliation Prohibition

Retaliation is prohibited at Minnesota State.

Actions by a student or employee intended as retaliation, reprisal, or intimidation against an individual for making a complaint or participating in any way in a report or investigation under the 1B.3 policy



System Procedure 1B.3.1

Response to Sexual Violence and Title IX Sexual Harassment

» Reporting Sexual Violence

- Prompt reporting is encouraged
- Assistance in reporting: law enforcement, local services, campus Title IX Coordinator
- Campus security authorities, supervisors, advisors **must** report incidents



Jurisdiction

- » All **students** (applied, admitted, or enrolled; has a continued relationship with the institution; or lives on campus)
- » And **employees** (including student workers)
- » On **campus property*** (owned, leased, or under the primary control of the institution)
- » Within **educational programs and activities** (substantial control by institution: courses, housing, dining areas, bookstore, events, activities, etc.)
- » *Locations other than campus property are covered by policy but may be resolved through an alternative procedure (e.g. 1B.1.1, student conduct, Human Resources).



Title IX Sex-based Harassment

- » For purposes of Title IX, sexual harassment means conduct on the basis of sex that occurs in a college or university's program or activity in the United States that satisfies one or more of the following:
 - Quid pro quo. An employee of the college or university conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.
 - Hostile environment. 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 college or university's education program or activity; or
 - Sexual assault; dating, intimate partner, and relationship violence; and stalking as defined in Policy 1B.3



Informal Resolution (1B.3.1)

Subpart A. Informal resolution. A college or university may offer an informal resolution process if a formal complaint is filed and after providing both parties a notice of allegations. The parties must **voluntarily consent, in writing, to the informal resolution process.** At any time before agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the process with respect to the formal complaint. This procedure neither prevents nor requires the use of informal resolution by individuals who believe they have been subject to conduct in violation of Board Policy 1B.3. Informal resolution shall not be used to resolve allegations that an employee sexually harassed a student.



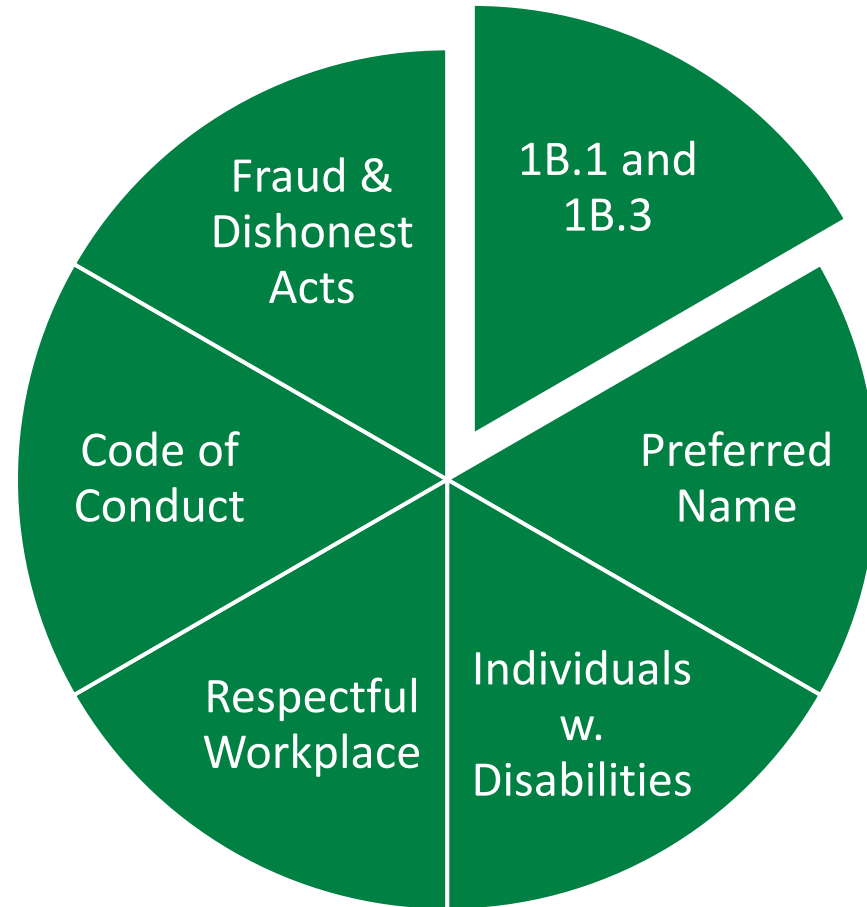
Informal Resolution (cont.)

Examples of Possible Educational and Restorative Activities

- » Mutual no contact
- » Mutual agreement to change classes or lab schedules
- » Agreements on occupying shared spaces
- » Residence community room reassignments and future assignments
- » Agreements on what to do off campus if the parties cross paths
- » Impact Statement
- » Education



Other Policies and Procedures



Preferred Name

SYSTEM 1.B.1.2 PROCEDURE

- » Chosen name that is different, in whole or in part, from legal name
- » Each college, university shall have a procedure
 - Registrar: responsible for students and alumni
 - Human resources: responsible for employees
- » Used when and where technically and legally possible



Access & Accommodations for Individuals w. Disabilities

BOARD 1.B.4 POLICY

- » Programs, services, and activities shall be accessible to individuals with disabilities, in compliance with state and federal laws
- » Individuals with disabilities may need accommodations to have equally effective opportunities
- » Reasonable accommodations will be made to ensure access (with some noted limitations), including modifications to rules, policies, and practices
- » Provide qualified student with a disability access to services and activities
- » College, University must have process to request an accommodation



Respectful Workplace

SYSTEM 1.C.0.2 PROCEDURE

- » Objectively respectful and professional workplace
- » **Professionalism:** Displaying the good judgment and proper behavior that is reasonably expected in the workplace
- » **Respect:** Behavior or communication that demonstrates positive consideration and treats individuals in a manner that a reasonable person would find appropriate
- » **Prohibitions:** aggressive behaviors; deliberately destroying, damaging, or obstructing work performance; knowingly making a false complaint; retaliation



Code of Conduct and Ethics

SYSTEM 1.C.0.1 PROCEDURE

- » All employees of Minnesota State must meet public expectations for excellence
- » Ethics
 - Conflicts of interest
 - Compensation, benefits or gifts
 - Personal advantage
 - Use of Minnesota State property
 - Political activities and influence
 - Purchasing and contracting
- » Employees must comply with all board policies and system procedures (including 9 noted areas)



Fraud or Other Dishonest Acts

SYSTEM 1.C.2 POLICY

- » Fraudulent and other dishonest acts
 - Ex. Theft or misuses of college or university assets, time, property
 - Conflicts of interest
 - Double employment, where employee is working two jobs at the same time
- » State of Minnesota Code of Ethics
- » Fraud inquiries and investigations
- » Remedial actions
- » Whistleblower protections



Federal and State Laws and policies

Violence Against Women Act

Reauthorized and effective Oct. 2014:

- » Prompt, fair, and impartial process: initial investigation to final result
- » Process must be consistent with institution's policies and transparent to both parties
- » Both parties shall have:
 - Equal opportunities to have others present, including advisor of choice
 - Timely notice of meetings and who will be present
 - Timely and equal access to information used during disciplinary meetings and hearings

VAWA, continued

- » Officials shall be **trained annually**, including having no conflict of interest or bias for or against either party
- » **Reasonably prompt timeframe**, which may be extended for good cause with written notice to both parties, stating the delay and the reason
- » Both parties shall receive **simultaneous notification**, in writing, of the result of the proceeding, including rationale, sanctions, available appeal, and any changes to the results, and when the results become final

Clery Act, amended

Amended by VAWA, Campus SaVE Act, effective July 1, 2015

- » Inclusion in crime report of the following: sexual assault, domestic violence, dating violence, and stalking
 - Required updates to policy and procedure
 - Required documentation maintenance of these matters
- » Requires reporting of crime stats: daily crime log, annual security report
- » Includes a duty to warn/timely warnings
- » Primary prevention and awareness programs for all incoming students and new employees
- » Campus brochure (VAWA § 304): info for victims, shared with mandated reporters and OWAs

Sexual Harassment & Violence Policy

Minnesota State Statute 135A.15

- » Required policy, including sexual assault definition, victims' rights, and uniform amnesty
- » Coordination with local law enforcement
- » Online reporting system, including anonymous reports
- » Data collection and reporting to OHE (due Oct 1)

Minnesota Policy 135A.15, continued

- » Comprehensive training
 - For new, incoming students: 10-day deadline
 - Requires **annual training** for campus administrators responsible for investigating or adjudicating complaints on sexual assault or persons responsible for responding to reports of sexual assault—including investigators and decisionmakers
 - Individuals responding to reports of sexual assault
- » Student health services screening; counseling designated staff



Roles in the Investigation Process

Designated Officer | Investigator | Decision-maker | President

Designated Officer

- » Completed training provided by the system office within the past three years.
- » Is designated by the president or chancellor to be primarily responsible for conducting an initial inquiry,
- » Determines whether to offer informal resolution,
- » Determines whether to proceed with an investigation under 1B.1 procedure, and
- » Investigates or coordinates the investigation of reports/complaints of discrimination, harassment and retaliation as defined by Board Policy 1B.1.



Designated Officer, cont.

- » Jurisdiction and scope
- » Conflicts of interest
- » Interim actions re: health, safety concerns
- » Primary person to ensure process moves forward through each relevant step of the procedure
- » Release of information requests



Investigator's Role

- » Has completed training by the system office within the past three years for 1B.1.1 and past 12 months for 1B.3.1,
- » Is designated by the designated officer to conduct an inquiry, investigate or coordinate the investigation of reports/complaints of discrimination, harassment, and retaliation as defined by Board Policy in accordance with the procedure,
- » Determines or recommends whether to proceed with an investigation under this procedure,
- » Prepares investigation reports, and
- » May be the Designated Officer or Title IX Coordinator.



Investigator's Role, cont.

- » Conducts a fact-finding inquiry or investigation of the complaint, including appropriate interviews and meetings or delegate this responsibility to a trained investigator.
- » Informs individuals that they are permitted to have a union representative or support person to accompany them during investigative interviews as appropriate;
- » Informs the witnesses and other involved individuals of the prohibition against retaliation;
- » Creates, gathers, and maintains investigative documents as appropriate.



Investigator

- » Writes investigation report with organized attachments
- » Outlines facts in the investigative report based on information collected through the interview process and review of gathered documents
- » Primary person to ensure process moves forward through the investigation steps
- » Handles all data in accordance with applicable federal and state privacy laws, consulting with the campus Data Practices Officer when necessary
- » Provides all investigation materials to the Designated Officer or Title IX Coordinator for recordkeeping



Role of the Process Advisor (Title IX)

- » Provide information by helping students understand their rights and responsibilities under the policy, procedure, and student code of conduct.
- » Provide assistance by aiding students in organizing their information to be used during an investigation and reviewing materials shared through the investigation process.
- » Provide support by helping students find resources and counseling services that may benefit them and by being present/sitting with the student when they participate in the investigation and resolution process if the student wants them to be there.



The Investigation

- » Provides enough information for the decision-maker to make a reasoned decision about whether policy has been violated
- » Maintains integrity of process
 - Timely
 - Fair to both parties
 - Provide confidentiality as required by law
 - Thorough
 - Tailored to individual circumstances



Decision-Making Authority

- » Completed decisionmaker training provided by the system office within the past three years and past 12 months for 1B.3.1,
- » Is designated by the president or chancellor to review investigation reports,
- » Determines whether Board Policy 1B.1 or 1B.3 has been violated based upon the investigation, and
- » Determines or recommends the appropriate action for the college, university, or system office to take based upon the findings.



Role of the Decision-maker

- » Determines whether there is any real or perceived conflict of interest
- » Makes sure the investigator has complied with Minnesota State procedures
- » Receives and reviews the investigation report
- » Decides whether policy has been violated based on information provided in report



Decision-maker, cont.

- » May meet with parties or request additional information from the investigator
- » Writes reasoned decision based on facts, guidance, and policies
- » Written notification to complainant, respondent and Designated Officer of their findings of whether a policy violation
- » Provides all related report materials to the Designated Officer for recordkeeping



Deciding if Misconduct Occurred

- » Standard of proof in determining a 1B.1 violation
 - Preponderance of evidence; i.e. more likely than not to have occurred
 - Secondary information has value
 - Reasonable inferences also are used

The scales of justice:

Preponderance= > than 50%

Clear and convincing= 75% vs. 25%

Beyond a reasonable doubt= 99.9% vs. .1%



Decision Factors

- » Weigh evidence and evaluate credibility
- » Consider the totality of circumstances
 - History of complaints/grievances
 - Treatment of others (those who are different and those who are similarly situated)
 - Skills/competencies of supervisors demonstrated by past actions
- » What is more convincing, more credible, and has greater probability



Policy Violation

- » Decisionmaker recommends discipline for a policy violation finding
- » For students: Decisionmaker may consult with student conduct folks on campus to recommend sanctions or outcomes
- » For employees: Decisionmaker informs Human Resources of finding; relevant CBA followed



Discipline

- » Prompt
- » Equitable
- » Stop (as well as prevent and remedy – might be more global and less-case specific pieces for the college or university to consider)



Appeal Process

- » Complainant and Respondent have right to appeal decision
- » Appeal timeframe: 10 business days
- » Grounds for appeal
 - Procedural irregularity, affected decision
 - New evidence, not reasonably available before
 - Conflict of interest or bias
 - Insufficient evidence for decision



Appeal Process, cont.

- » Appeal decision timeframe
- » Decision notification
- » The decision on appeal is final under 1B.1.1 Procedure
- » Disciplinary action imposed on a member of a collective bargaining unit is processed in accordance with that agreement
- » Filing an appeal concerning a report against a college/university president



President

- » **Removed** from initial investigation and decision-making
- » Serves as the final decisionmaker (appeal) for the Minnesota State



Role of President on Appeal

- » Review of investigation report
- » Review of any new evidence
- » Quality review - consults with:
 - Minnesota State General Counsel and/or AGO
 - Minnesota State Human Resources/Labor Relations
- » Notify complainant, respondent and Designated Officer of decision within a reasonable time





Serving impartially

Recognizing Implicit Bias

- » What is it?
 - Attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner
- » Who has it?
 - Implicit biases are pervasive. Everyone possess them
 - The implicit associations a person has do not necessarily align with their declared beliefs or even reflect stances they would explicitly endorse
 - A person generally tends to hold implicit biases that favor their own “in” group (although research shows that people can hold biases against their own “in” group too)

Kirwan Institute for the Study of Race and Ethnicity



MINNESOTA STATE

Types of Bias

- » Protected Category Biases (non-exhaustive list)
 - Race
 - Gender
 - Sexual Orientation
 - Gender Identity
 - Religion
 - Class
 - Age
 - National Origin
 - Disability
- » Investigator-Specific Biases
- » Title IX-Specific Biases



Sexual Violence Case Specific Biases

- » The subject matter of these cases is often personal and very intimate
- » Most of us hold our own conscious beliefs and practices when it comes to this content area and it is important not to intentionally or unintentionally cast your lens on the matters you investigate
 - Your own sexual experiences
 - Moral or religious views about sex
 - Comfort level in using terms – subject matter



Alcohol and Drug Use Biases

- » You may have your own views on and experiences with:
 - Alcohol use
 - Drug use
- » These things may have impacted your life



Biased Investigations Dangers

- » Selective gathering of information
- » Misinterpretation of behavior or conduct
- » Confirmation of stereotypes
- » Inadequate interventions
- » Inconsistent application of policies
- » Retaliation risks
- » Missed opportunities for prevention

(Source: L Crockett)



Counteracting Bias

- » What can we do to counteract it?
 - Implicit biases are malleable and can be unlearned
 - Be conscious of the reality of implicit bias
 - Be aware of our own implicit bias
 - Educate yourself – Consider taking the Implicit Association Test (IAT) at implicit.harvard.edu
 - Check ourselves in our work – Be accountable
 - When confronted with bias, take the time to examine your action or beliefs. Think of how you would explicitly justify them to other people.
 - Consider perspective taking—how a situation appears to another person



Avoid Prejudgment

- » Passing judgment prematurely or without sufficiently gathering of available information or consideration
 - Prominent when alcohol or other drugs are involved
 - Social ideas or norms, such as sex stereotypes
- » Must avoid for both the Complainant and the Respondent
- » Keep an open mind throughout the entire process
- » Investigators: seek out additional facts or witnesses to avoid jumping to conclusions
- » Check assumptions, use of language and phrases



Conflicts of Interest

- » Personal or private interest may compromise one's judgement, decisions, or actions (friendships, relationships, social factors)
- » Conflicts can be actual, perceived, or potential
 - Actual
 - Perceived
 - Potential
- » Self-check
 - Personal gain or lose from the outcome?
 - How might the parties feel about it? If you were a party?





Investigation Reports

Final Investigation Report Structure

- » Transmittal letter: notice to the decision-maker from the investigator
- » Disclosure Notice
- » Investigation report cover page
 - Date, Report for, Report by, Nature of investigation, Complainant(s), Respondent(s)
- » Table of Contents (If lengthy report or many exhibits)
- » Rationale or basis for investigation: synopsis of reported matter
- » Methodology for the investigation: description of the procedural steps taken from the receipt of the (formal) complaint through the conclusion of the report writing



Report Structure, cont.

- » Summary of complainant(s) allegation(s) & evidence gathered
- » Summary of witness statement(s) & evidence gathered
- » Summary of respondent(s) statement(s) & evidence gathered
- » Assessments of credibility
- » Investigative analysis: findings of fact & matters of dispute within the application of policy/procedure
- » Conclusion: decision-maker is under an independent obligation to objectively evaluate the evidence



Value of Investigation Reports

- » Relevant available information gathered together
- » Official documentation
- » Audiences





MinnState.edu

Overview of Data Practices

For Minnesota State Investigators System Procedures 1.B.1.1

Office of General Counsel

Data Practices Laws

- » Minnesota Government Data Practices Act (MGDPA)
- » Family Educational Rights and Privacy Act (FERPA)
- » HIPAA, GDPR, etc.
- » Investigation Records are Government Data under MGDPA (Sometimes FERPA).

Public Data

- » Default rule under MGDPA – Government Data is Public
- » Available to inspect upon request
- » Examples include contracts, invoices, policies, and most business correspondence

Private Data

- » Certain data sets are private under the MGDPA/FERPA
- » Private means accessible only:
 - to data subject
 - for work related purposes
 - to third parties (who are not the data requestor themselves) if:
 - Subject gives consent or;
 - Appropriate legal authority, such as a court order

Personnel Data

- » Section 13.43 sets forth what is Public Data on Employees
 - Only data listed in 13.43 is public data
 - The list includes salary, job title, job description, name, office contact information, existence and status of complaints, etc.
 - If an employee asks for data on themselves, they receive that data whether it is public or private in most circumstances
 - **Otherwise, Personnel Data is Private**

Student Data

- » "Educational Data" means (almost) all data relating to a student.
- » Educational Data is generally private data. This means that it cannot be disclosed without the student's written consent unless an exception applies.
- » Educational Data remains private after a student is no longer enrolled due to graduation, transfer, etc.
- » Educational Data does not include data collected after a student leaves the College (e.g. alumni data).
- » "Directory Data" is public, unless a student asks that it remain private.

Who is the Data Subject?

- » The Respondent is the subject of the investigation.
- » Data from a witness statement can be about the speaker, about whom they are speaking about, or both.
- » It can even be data on you, the investigator.
- » We must balance the interests of the data subjects.

The Complaint

- » Existence and status of the complaints are public.
- » Statuses include Open, Under Investigation, and Closed.
- » We notify a respondent about the existence of an investigation and inform them of the charges.
- » The nature of the complaint is not public.

Active Investigation Data

- » You may share redacted copies of the respondent's statement with the respondent.
- » You may share redacted copies of the complainant's statement and the complaint with the complainant.
- » May share with other school officials who have legitimate business "need-to-know" about specific information.
- » May NOT share with third parties (including union reps) unless
 - Specifically legally authorized.
 - Always seek assistance before disclosing!

After Investigation

- » If no discipline, the respondent does not receive anything other than redacted statement.
- » If discipline, the complainant and respondent receive adequate data to make an appeal.
- » We redact witness data to maintain confidentiality and prevent harassment.

Employee Discipline

- » If employee retains appeal or grievance rights, discipline is not final.
- » If there is a no contact order, we can share data for enforcement reasons.
- » 1B3 complainants are entitled to certain remedial action information.
- » Public employee (usually only presidents and chancellor) investigation data becomes public once the investigation is final.
- » Once employee discipline is final (grievance/appeal closed), the disciplinary letter and data supporting the decision become public.

Student Discipline

- » Student discipline is private data.
- » The only exception is for crimes of violence:
 - If 1B.1.1 investigation includes a charge of assault, intimidation or forcible sex offense (not a complete list) certain information becomes available to:
 - The victim regardless of the result,
 - The public upon request if the charge is sustained.
 - Consultation is required before releasing student discipline information.

Avoiding Mistakes

- » Don't disclose private data to others during investigation interviews or correspondence;
- » Employee administrative leave during investigation is not "suspension"
 - Implies discipline
- » Refer media requests to campus communications or public affairs.
- » Get consent for others to be present during interview.
- » Don't permit unauthorized viewing of paper or electronic records;
- » Label report as "Private;"
- » Store investigation records securely;
- » Follow IT procedures about maintaining electronic security when storing or transmitting data; watch that laptop! (device/phone/etc.)
- » Dispose of not public data securely;
- » Use email carefully.

Data Breaches

The MGDPA requires notice to affected individuals of a breach of security (unauthorized access) for

- any private or confidential data (not just SSN or financial information)
- in any medium (not just computerized).

E.g., lost or stolen laptop containing student program data.

Contact your supervisor or campus DPCO if you believe you have a possible security breach situation.

- OGC will assist in determining whether notice is required, how it must be done and other details.

Data Collection: Tennessean Warning Notice

- » The reason government is collecting the data,
- » How government plans to use the data,
- » Whether the person is legally required to provide the data or may refuse to do so,
- » Consequences if the person provides the data,
- » Consequences if the person does not provide the data, and

Data Collection (continued)

- » The identities of people and entities that have access to the data by law. (For example, all notices should include that data may be shared upon court order or provided to the state or legislative auditor.
- » Note regarding private data on minors: Entities must provide minors with notice that they have the right to request that parental access to private data be denied. Entities may consider including this notice in the Tennessee Warning notice when collecting the data (See Minnesota Rules 1205.0500).

Consequences of Violations

- » A violation of the Data Practices Act could result in:
 - Court order for corrective action
 - Damages paid to the data subject
 - A violation of FERPA could also result in sanctions by the Department of Education
 - Failure to comply with job requirements
 - Reputational damage to the College

Know Your Resources

- » Campus Data Practices Compliance Official (first responder for questions or receipt of any legal process request);
- » Campus policies on referring requests
 - Public
 - Subjects
 - Employees
 - Students
 - Copy costs
- <http://www.minnstate.edu/system/ogc/index.html>
- System Office personnel



Title IX & Sexual Violence Investigations

Office of General Counsel

What Is Title IX?

- » Title IX is a federal civil rights law prohibiting sex discrimination in all facets of the educational setting
- » By accepting federal funds, institutions agree not to discriminate on the basis of sex or allow the separation of the sexes in curriculum and extracurricular activities, unless permitted by the statute
- » Failure to comply may result in liability on the part of the institution



Title IX

» 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.

▪ *20 U.S.C. §1681 (1972)*



Timeline

- » November 16, 2018 US Department Of Education (DOE) Notice of Proposed Rule-making.
- » Final Rule published on May 6, 2020 -- effective on August 14, 2020.
- » Revised System Procedure 1B.3.1 finalized on August 14, 2020.
- » Biden administration releases proposed new regulations on June 23, 2022.
- » Comment period closed on September 12, 2022 (approximately 240,000 comments).
- » Revised regulations released on April 29, 2024 – effective August 1, 2024. Task force readied necessary revisions. BUT – litigation and injunctions.



Overall Process Map

- » Former 1B.3.1 Procedure
 - Complaint, Investigation, Decision-maker, internal appeal, Ch. 14 if serious student sanction.
- » Current 1B.3.1 Procedure
 - Formal Complaint, Investigation (with enhanced requirements), Ch. 14 hearing, Decision-maker, internal appeal.
- » Also consider Policy 1B.1 and student conduct processes for non-Title IX sexual harassment and jurisdiction.
- » Basic legal responsibility = deliberately indifferent standard.



Required Notices

- » Notice of Title IX Coordinator.
- » Notice of Non-Discrimination.



Notice of Title IX Coordinator

- » Each college and university must notify applicants for admission and employment, students, employees, and all unions holding collective bargaining agreements with the college or university of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated at the Title IX Coordinator.



Notice of Non-Discrimination

- » Each college and university must notify applicants for admission and employment, students, employees and all unions holding collective bargaining agreements with the college and university that the college or university does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner. Inquiries about the application of Title IX may be referred to the Title IX Coordinator and/or the United States Department of Education.



Key Elements of the Current Procedure



Definition of Title IX Sexual Harassment

- » Conduct based on sex that occurs in a college or university's program or activity in the United States that satisfies on or more of the following:
 - An employee of the college or university conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - 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 college or university's education program or activity; or
 - Sexual assault, dating, intimate partner, and relationship violence; and stalking as defined in Board Policy 1B.3.



Formal Complaint

- » Defined as
 - Document filed by a complainant or signed by the Title IX Coordinator alleging Title IX sexual harassment against a respondent and requesting investigation.
 - At the time of filing a formal complaint of Title IX sexual harassment, a complainant must be participating in or attempting to participate in the education program or activity of the college or university with which the formal complaint is filed.
- » See template.



Educational Program or Activity

Includes locations, events, or circumstances over which the college or university exercised substantial control over both the respondent and the context in which the Title IX sexual harassment occurred, and also includes any building owned or controlled by any officially recognized student organization of the college or university.



Title IX Coordinator

- » Employee designated by the president to coordinate the college or university's efforts to comply with its Title IX responsibilities and Board Policies 1B.1 and 1B.3.
- » This does not have to be one person – can have deputy Title IX Coordinators, Investigators, etc.



Supportive Measures

- » Designed to preserve or restore a student's access to the education program or activity, with or without a formal complaint (“non-disciplinary, non-punitive individualized services” available to both complainant and respondent).
- » Examples
 - Academic course adjustments.
 - Counseling.
 - No-contact orders.
 - Dorm room reassignments.
 - Leaves of absences.
 - Class Schedule changes.



Reporting

- » Internal Reporting = Current Procedure is the same as Old Procedure (3 buckets).
 - Required Reporters.
 - Confidential Resources (not required to internally report).
 - Encouraged Reporters.
- » Clarifies that reporting is to Title IX Coordinator.
- » New Information on External Mandatory Reporting.



Investigation and Resolution

» Title IX Coordinator.

- Discuss options with complainant – supportive measures, referral to law enforcement, filing a formal complaint, pursuing other policy processes (1B1, student conduct, etc.)
- If formal complaint.
 - Determines Jurisdiction.
 - Conflicts.
 - Information to complainant and respondent (see form notice of allegations).



Conflict of Interest

- » Title IX Coordinator to identify any real or perceived conflict of interest in proceeding as the Title IX Coordinator, for the decision-maker, and/or for any person designated to facilitate an informal resolution.
- » Assign new person.



Informal Resolution

- » School may facilitate an informal resolution process at any time before reaching a determination regarding responsibility provided that each party provides their voluntary, written consent to the process.
- » Any party may withdraw from informal resolution process and return to formal complaint process.
- » Informal resolution shall not be used to resolve allegations that an employee sexually harassed or assaulted a student.



Interim Actions

- » Employee reassignment or administrative leave.
 - Discuss with HR/LR.
- » Student summary suspension.
- » No real change to prior practice = note that the regulations use the term “emergency removal.”



No Basis to Proceed Determinations: Title IX Sexual Harassment

- » Must dismiss formal complaint if:
 - The conduct would not constitute Title IX Sexual Harassment, even if proved;
 - The conduct alleged did not occur in the college or university's educational program or activity;
 - The conduct did not occur against a person in the United States

- » May dismiss formal complaint if:
 - The complainant, at any time, notifies the Title IX Coordinator that they would like to withdraw the formal complaint;
 - The respondent is no longer enrolled or employed by the institution; or
 - Specific circumstances prevent the college or university from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

- » And Remember -- At the time of filing a formal complaint of Title IX sexual harassment, a complainant must be participating in or attempting to participate in the education program or activity of the college or university with which the formal complaint is filed.



Dismissals, continued

- » Must promptly notify both the complainant and the respondent of any dismissal.
- » May consider other policy avenues (1B.1, student conduct, etc.).



Investigatory Process

- » Essentially the same as the 1B.1.1 investigatory process. **BUT**
 - Required presumption of innocence notice in notice of allegations (see template).
 - Consider both inculpatory and exculpatory evidence.
 - Not use questions or evidence that involve a legally recognized privilege.
 - Before completing investigation report – send to both the complainant and respondent and their advisors, if any, the evidence subject for inspection and review. Both parties must have at least 10 calendar days to submit a written response to the evidence, which must be considered before completing the report.



Timely Completion

- » Timely completion after a complaint = no strict timeline.
- » Reasonable cause for delay includes considerations such as
 - Absence of a party, an advisor, or a witness;
 - Concurrent law enforcement activity;
 - The need for language assistance or accommodation of disabilities.



Formal Hearing

- » If complaint not resolved then:
 - Prepare investigation report; and
 - Refer the matter for a formal hearing.
 - At least ten (10) days prior to formal hearing, parties and advisors, receive the investigation report for their review and response (consult AAG as this should be done through the Ch. 14 process).

- » Formal Hearings for Title IX sexual harassment complaints conducted by the Office of Administrative Hearings.
 - Notify assigned Assistant Attorney General or OGC that Ch. 14 required.
 - Assigned Assistant Attorney General will initiate and arrange for the Ch. 14.
 - See information sheet on Ch. 14 hearings.
 - Costs.



Standard of Evidence

- » Remains preponderance of the evidence.



Decision-maker

- » ALJ prepares report and recommendation.
- » Decision-maker receives report and recommendation and decides
 - Whether the policy has been violated; and
 - On appropriate sanctions if the policy has been violated.
 - Issues a written determination that includes:
 - Identification of allegations;
 - Description of procedural steps;
 - Findings of fact supporting the determination;
 - Conclusions as to responsibility and any sanctions
 - Procedures for appeal.
 - The required elements may be satisfied by adopting all or portions of the report and recommendation.



Appeals

- » Within ten (10) calendar days.
- » Both parties may appeal final decision and an appeal of a dismissal of a formal complaint.
- » Grounds for appeal
 - Procedural irregularity;
 - New evidence;
 - Conflict of interest.



When Student Discipline Final

- » Either
 - Date of written determination on appeal; or
 - If no appeal, the date on which the appeal would no longer be timely.



Advisors

» Process Advisors

- Both complainant and respondent may have an advisor of their choice;
- Campus will provide if either party does not have their own.

» Advisors at the Ch. 14 Hearing.

- Both complainant and respondent may have an advisor of their choice.
- Campus will provide if either party does not have their own.



Education and Training

- » Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must be made publicly available on the college or university's website.
- » OCR complaints on this issue.



Document Retention

» 7 years.





MinnState.edu

Implementing the 1B.1 Decision

For Employee Respondents

Labor Relations

Decision-maker's Responsibilities

- Reviews investigative report
- Decides if misconduct occurred
- Determines appropriate action (in some cases)
- Implements appropriate action (in some cases)
- Participates in appeal and/or grievance process

Who Makes the Disciplinary Decision?

Someone who:

- Has the authority (direct or delegated)
- Accepts the responsibility
- Will be able to testify and is a good witness
- Lacks bias or ill-will



Analyzing the Investigation Report, 1

- Read the allegations or complaint to see what the report should cover
- Review the elements of the offense
- Read the report thoroughly to identify gaps or unanswered questions
- Do the facts in the report completely address each element of the offense? (If not, send it back)



Analyzing the Investigation Report, 2

- Is there anything missing? E.g., relevant information (If yes, send it back)
- Are there inappropriate conclusions in the report (If yes, send it back)
- If applicable, was the subject offered a union representative?



Analyzing the Investigation Report, 3

Scrutinize the disruptive conduct

- What was the cause of the behavior?
- Was the behavior unknowingly disruptive?
- Were there factors beyond the employee's control that contributed to the behavior?
- Does the employee have the skills and training to refrain from the behavior?
- Is the employee willing and likely to change?
- What objective steps need to happen to help the employee change the behavior?



Analyzing the Investigation Report, 4

- Are the witnesses, complainant, and the accused credible? Is there corroborating evidence for their accounts?
- How did they react or behave after the incident?
- Did they talk to others or write about the conduct soon after it occurred?
- Has the accused been found to have engaged in similar behavior?



Reviewing the Investigative Report

Determine if additional steps should be taken before making a decision

- Additional investigative measures
- Request additional information, e.g., written response from complainant and/or respondent
- Meeting complainant, respondent or other involved individuals



Meeting Complainant, Respondent or Others

- » Data Practices Act Notice (Tennessen Notice)
- » Non-Bargaining Unit Employee Representation Rights
- » Bargaining Unit Employee Representation Rights (Weingarten Rights)
- Is the bargaining unit employee being questioned in connection with an investigation which could lead to discipline of that employee?
- If so, the employee has a right to union representation



Deciding if Misconduct Occurred,

- Did the discrimination or harassment occur in violation of Policy 1B.1?
- Did a violation of Policy 1B.3 occur?
- Did other misconduct occur?



Deciding if Misconduct Occurred Standard

Burden of Proof

- 99% beyond a reasonable doubt (criminal court matters)
 - 75% clear and convincing evidence (civil court matters)
 - 51% preponderance of evidence; e.g., more likely than not (most public institutions)
 - <51% good faith in investigation/reasonable conclusion (most private employers)
- » *Check the relevant CBA



Deciding if Misconduct Occurred, cont.

- » Gather all information and highlight the important points
- » What do the important points show or prove?
 - If not relevant, put it aside.
 - If relevant, is it credible?



Determining Appropriate Action, 1

- Take corrective action for 1B.1 and 1B.3 violations
- Refer non-1B work problems or student misconduct to appropriate resource
- Complainant's preference is informative but not controlling



Determining Appropriate Action, 2

- Action must be sufficient to:
 - Ensure harassment/discrimination will stop and not recur
 - Send clear messages that policy is meaningful and applies to everyone
- Factors
 - Severity of conduct
 - Degree of harm to complainant and others
 - Has the conduct potentially created a class of complainants?
 - Does Subject have a history of the alleged behavior?



Determining Appropriate Action, 3

- Progressive (or corrective) discipline is designed to correct an employee's behavior so that the misconduct does not occur or is not repeated
- For egregious acts of misconduct, progressive discipline need not be strictly followed
- Review CBA disciplinary provisions



Determining Appropriate Action, 4

Just Cause

- Did the employee know and understand there would be consequences for violating the rule or standard?
- Was the violated rule or standard reasonable?
- Was the pre-disciplinary investigation fair and objective?
- Did the investigation result in sufficient proof of violation of the rule or standard?
- Was employee treated consistently with similarly situated employees?
- Was the penalty appropriate for the offense?



Determining Appropriate Action, 5

Penalty Assessment

- Aggravating Circumstances
- Mitigating Circumstances



Risk Assessment Prior to Taking Disciplinary Action

- Has the employee engaged in protected or concerted activity?
- Is the employee on (or recently taken) a job protected leave?
- Did any aspect of the subject's identity appear to influence investigative/disciplinary outcomes?
- Has the decision maker made inappropriate statements about the employee?
- Is the employee alleging illegal conduct by others?



Determine Appropriate Action Employee

Non-disciplinary options

- Informal process (supervisory coaching, training, letter of expectation, alternative dispute resolution)
- Reassignment?

Types of progressive discipline*

- Oral reprimand
 - Written reprimand
 - Suspension (with or without pay)
 - Vacation reduction per CBA (e.g., MAPE, MMA, MSUAASF)
 - Demotion
 - Discharge
- » *Check the relevant CBA



Implement Appropriate Action, 1

Components of Disciplinary Letter

- Level of discipline
- Reason(s) for discipline
- Past warnings and/or discipline the employee has received
- Opportunity for Loudermill meeting, when appropriate



Implement Appropriate Action, 2

Components of Disciplinary Letter – cont'd

- Corrective action required of employee
- Referral to EAP, if your practice
- Consequences of failure to measurably improve
- Employee's appeal rights



Implement Appropriate Action, 3

- » Distribution of disciplinary letter
 - Employee
 - Personnel file
 - Union? Check CBA
- » Service of disciplinary letter in person or via mail
 - Check CBA if certified mail required
 - Move It Securely with the delivery receipt box checked



Implement Appropriate Action, 4

Follow up to Discipline (by supervisor or designated officer)

- Work with employee to correct deficiencies
- Give employee a written plan of correction? It should be specific and include a timetable for improvement.
- Monitor employee's progress
- Document changes or continued problems
- Follow up with EAP referral, if your practice



Available Appeal Processes

- » Procedure 1B.1.1 Part 7 Subpart C
and/or
- » Collective Bargaining Agreement
and/or
- » Veteran's Preference Hearing (classified discharge and demotion only)





Decision-Making in Student Respondent Cases

Office of General Counsel

Duty

If a school knows or reasonably should know about student-on-student discrimination or harassment that creates a hostile environment, the school must take action to eliminate the discrimination or harassment, prevent its recurrence, and address its effects.



Board Policy 1B.1 and System Procedure 1B.1.1

- » One system-wide Policy and Procedure.
 - Students and employees.
- » Investigator/Decision-Maker Model.
 - Investigator.
 - Decision-Maker.
 - Appeal.
 - Ch. 14 or CBA.



Thoughts for Decision-Makers

- » Analytical Order.
 1. Policy Violation.
 2. If yes to 1, then sanction.
- » Look for corroborating information.
- » Articulate a succinct statement of the facts supporting the decision and the rationale for the sanction.



Sanctions

- » Remember Basic Duty.
 - Eliminate discrimination/harassment, prevent its recurrence, and address its effects.
- » All possible conduct code sanctions available (Dean of Students can be a resource).
- » Factors
 - Seriousness of Behavior.
 - Previous Disciplinary History.
 - On-going threat?
 - Remorse.
 - Similarity to past discipline.
 - Other factors?



Examples of Typical Student Conduct Sanctions

(see your conduct policy; Dean of Students)

- » Warning.
- » Probation.
- » Loss of Privileges (for example, removal from residence life; restriction from campus other than for class).
- » Required training.
- » No contact.
- » Suspension.
- » Expulsion.

More than one sanction available in any scenario (for example, probation and required training).



Decision Letters

- » Process map at your campus.
 - Each letter sets up the next letter (i.e., decision letter sets up internal appeal; appeal decision sets up Ch. 14 if applicable).
- » Some rationale for:
 - Finding on policy violation.
 - Sanction.
- » No retaliation; appeal.
- » Refer to services available to parties?



Board Policy 1B.3 and System Procedure 1B.3.1

- » One system-wide Policy and Procedure.
 - Students and employees.
- » Previously the same as 1B.1.1 but now modified because of 2020 Title IX regulations.
- » Modified Investigator/Decision-Maker Model.
 - Investigator.
 - Ch. 14 Hearing and then report and recommendation to Decision-Maker.
 - Decision-Maker.
 - Appeal or CBA.



1B.3.1 Decision-Maker Responsibilities

See System Procedure 1B.3.1, Part 7, Subpart D, 3.

- » Receive and review ALJ report and recommendation.
- » Consult with assigned AAG representative.
- » Issue written determination with 6 required elements.
- » KEY – Written determination may satisfy these elements by ADOPTING the report and recommendation.



Final Thoughts

- » Think about how your campus can support decision-makers especially on sanctions.
- » Good faith disagreements about disability accommodations can be handled as an appeal (1B.4).
- » Student complainants with a complaint that involves a grade or academic issue (typically this is a 1B.1).
 - Coordinate with grade appeal or other academic process.
- » OGC Assistance.



Thank you.



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