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Office of Equity & Inclusion

1B.1 Investigator Training

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Minnesota State

OUTLINE OF TODAY'S PRESENTATION

- Review Board Policy 1B.1 and System Procedure 1B.1.1
- Investigative Techniques
- Data Privacy

Overview of 1B.1 Policy and Procedure

MINNESOTA STATE BOARD POLICY 1B.1

EQUAL OPPORTUNITY AND NONDISCRIMINATION IN EMPLOYMENT AND EDUCATION

The 1B.1 Policy addresses:

- Equal opportunity for students and staff
- Nondiscrimination
- Harassment
- Discrimination
- Protected Class
- Sexual harassment
- 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)

1B.1 POLICY IMPLEMENTED THROUGH

1B.1.1 PROCEDURE

- 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.

1B.1 PROHIBITS 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;
- 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 non discrimination law.

SEXUAL VIOLENCE

The **1B.3 Sexual Violence Policy** addresses:

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

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.

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

- **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 educational environment.

DISCRIMINATORY HARASSMENT, CONTINUED

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

- 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, CONTINUED

The examples of sexual harassment include:

- Unwelcome conduct;
- Preferential treatment;
- Negative treatment or threats;
- Sexual exploitation.

HOSTILE ENVIRONMENT

- The verbal or physical contact was unwelcome
- The alleged hostile action occurred because of the complainant's protected class or perceived protected class
- The conduct has a negative effect or is likely to have a negative effect on the complainant or the workplace or the educational environment.

1.B.1.1 PROCEDURE: 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

RESPONSIBILITY FOR MANAGING/ ADMINISTERING PROCESS

Designated
Officer

Investigator

President

Decision-making
Authority

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.

DECISION-MAKING AUTHORITY

- Completed decisionmaker training provided by the system office within the past three years,
- Is designated by the president or chancellor to review investigation reports,
- Determines whether Board Policy 1B.1 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.

PRESIDENT

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

INVESTIGATOR'S ROLE

- Has completed training by the system office within the past three years,
- 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 1B.1 in accordance with this procedure,
- Determines or recommends whether to proceed with an investigation under this procedure,
- Prepares investigative reports, and
- May be the Designated Officer.

INVESTIGATOR TASKS

- Conduct a fact-finding inquiry or investigation of the complaint , including appropriate interviews and meetings or delegate this responsibility to a trained investigator.
- Inform individuals that they are permitted to have a union representative or support person to accompany them during investigative interviews as appropriate;
- Inform the witnesses and other involved individuals of the prohibition against retaliation;
- Create, gather, and maintain investigative documents as appropriate; and
- Handle all data in accordance with applicable federal and state privacy laws.

INVESTIGATOR TASKS, CONTINUED

- Writes investigation report as necessary
- Outlines facts in the case report as a result of information collected through the interview process and review of additional documents received
- Primary actor in ensuring process moves forward through the investigation and appeal steps
- Handles all data in accordance with applicable federal and state privacy laws

THE INVESTIGATION

- Provides enough information for the decisionmaker 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

INFORMAL RESOLUTION

The designated officer may consider, but is not limited to, use one or more of the following methods to resolve the report/complaint:

1. Conduct or coordinate education and training.
2. Facilitate voluntary meetings, if requested by the complainant, between the parties;
3. Recommend separation of the parties, after consultation with appropriate college, university, or system office personnel.
4. Other possible outcomes may include recommending changes in workplace assignments, enrollment in a different course or program, or other appropriate action.
5. A college or university may offer mediation and other alternative dispute resolutions to the complainant and respondent. The parties must voluntarily consent, in writing, to participate in processes that include mediation and other alternative dispute resolutions. At any time before agreeing to a resolution, any party has the right to withdraw from the process and resume the formal complaint process.

INFORMAL RESOLUTION continued

Examples of Possible Educational and Restorative Activities

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

ROLE OF THE DECISIONMAKER

- Determine whether there is any real or perceived conflict of interest
- Make 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

ROLE OF DECISIONMAKER, CONTINUED

- May meet with parties or request additional information from the investigator
- Writes reasoned decision based on facts, guidance, and policies
- Decides on discipline (if violation established)
- Written notification to complainant, respondent and investigator of his/her findings of whether a policy violation
- Report to the complainant shall be within 60 days after a complaint is made unless reasonable cause for delay exists

DECIDING IF MISCONDUCT OCCURS

- Standard of proof in determining a 1.B.1 violation
 - Preponderance of evidence; i.e. more likely to have occurred than not.

DECISION FACTORS

- Weigh evidence and judge 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

POLICY VIOLATION

- Decisionmaker determines what, if any, discipline is required.
- Decisionmaker may consult with Minnesota State Labor Relations and review personnel record for previous disciplinary action
- Discipline should be progressive and appropriate.

APPROPRIATE ACTION CONSIDERATIONS

- Factors:
 - Severity of conduct
 - Degree of harm to complainant and others
 - Has the conduct potentially created a class of complainants?
 - Does the respondent have a history of discipline for same/similar behavior?

DETERMINE APPROPRIATE ACTION

- Take corrective action for 1.B.1 violations
- Refer non-1.B.1 work problems or student misconduct to appropriate resource
- Complainant's preference is relevant but not controlling
- Action must be sufficient to:
 - End the inappropriate conduct
 - Send a clear message that policy is meaningful and applies to everyone

APPEAL PROCESS

- Goal of the appeal
- Complainant and Respondent have the right to appeal the decision of the Decisionmaker
- Appeal timeframe
- Content of the appeal
- Filing an appeal concerning a report against a college/university vice president, provost, or dean
- Filing an appeal concerning a report against a college/university president

APPEAL PROCESS, CONTINUED

- Additional information
- Appeal decision timeframe
- Decision notification
- The decision on appeal is final under 1.B.1.1 Procedure
- Disciplinary action imposed on a member of a collective bargaining unit is processed in accordance with that agreement

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 investigator of decision within a reasonable time

Investigation Techniques

Andrea Rooney

Investigation Specialist & Lead Deputy Title IX
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OUTLINING THE INVESTIGATION

- Scope of Investigation
 - What are the allegations?
 - 1B.1, 1B.3, RWP, Code of conduct, etc.
 - What are sub-elements
 - Who are the involved parties?
 - Multiple respondents; multiple complainants – may consider splitting
 - Large witness pool
 - Do the allegations arise out of same set of facts
 - If not, consider splitting or referring non 1B.1/1B.3 matters
 - Why is scope important?
 - Prevents Scope creep i.e., getting lost/sidetracked
 - Can help structure interviews

WHO TO INTERVIEW

- Complainant & Respondent
- Witnesses
 - Those present in incident(s)
 - Outcry witnesses – administrators, friends, family complainant/respondent shared with about incident(s)
 - Those involved in documenting incident or process/response - security, other administrators, etc.
 - Focus on witnesses that have knowledge of the incident rather than the character of the individual
- Document interview decisions

OUTLINE INTERVIEW QUESTIONS

- Interview structure consistent for all parties
 - "speeches" - overview of meeting, about role/office, policy, procedure, flowchart; advisory notice, waiver of union, privacy of interview' recording/note taking timing of interview
 - Background – name, title/year, start date, major, involvement in extracurriculars/committees, explanation of role, where they live on campus
 - Resources
 - Next steps
 - Reminder about retaliation

DETERMINE GOALS OF QUESTIONS

- Who, what, where, when, why, how
- Intake meeting vs. Investigatory interview
- Determine scope
- What information are you missing or have questions
 - Read through reports/complaints and note any questions
- Policy elements

POLICY ELEMENT EXERCISE



HOW TO STRUCTURE QUESTIONS

- Start with broad/open ended questions
- Allow to tell their story/experience however they choose
 - Where they start/end their story and what they emphasize can be very telling and important for you to have.
- Clarifying questions
 - Funnel approach
- Additional questions/things left unanswered
- Closing questions
 - Is there anything else you think I should know?
 - Anything I didn't ask that you thought I would ask about?
 - Is there anyone that you think I should talk to? Why?

INTERVIEW QUESTIONS

- Interview questions for all parties
 - Allow them chance to share their story/experience
 - "Tell me about your experience" - "this is your opportunity to respond to allegations" - "do you know why I asked to meet with you"
 - Prepare what information willing/able to share
 - Ask the who/what/where/when/how questions
 - Policy elements
 - Effect/impact

INTERVIEW QUESTIONS, CONTINUED

- Interviewee specific questions
 - Respondent – make sure to review allegations before questions
 - Complainant – clarify protected class and identity
 - What they observed/their perspective of incident(s)
 - Inconsistencies with other parties/witnesses
 - Evidence specific questions – what they have, might have seen/been part of, etc.

SCHEDULING INTERVIEWS

- Order of interviews
 - Strategy – different order for different situations
- Timing
 - Set aside enough time: prep, interview, notes/reflection time
 - Consider past interactions with party
 - Consult interview outline
- Flexibility – timing and location
 - Provide location options but be sensitive to different needs.
 - i.e., - Zoom requires technology, internet, etc.
- Accommodations
 - Know who/what departments to partner

CONDUCTING INTERVIEWS



EACH INTERVIEW MIGHT LOOK DIFFERENT

- Emotion – crying, anger, indifference, being conflicted, trauma, etc.
- Timing – short answers, decisions to make, communication styles, etc.
- How you ask questions
- Credibility concerns
- Effort needed to structure interview – redirect, diffuse conversation, etc.

MAINTAINING CONTROL OF INTERVIEW

- Safety – Think about how you have arranged the room, security, etc.
- Union reps/ support persons/parents/lawyers
 - Be clear about what their role is [I.e., don't ask interview questions and don't answer questions) from the very beginning (include in letters; share in speech)
 - Communicate to party and support person (if appropriate)
 - Allow for time and space for them to meet away from investigator (separate room; breakout room, etc.)
 - Give reminders/warnings if necessary
- Don't be afraid to end a meeting
- Difference between control and parties not cooperating

TRAUMA INFORMED TECHNIQUES

- Forming questions in a way that does not assign responsibility, blame, or guilt
- Creating safe and comfortable interview environment/setting
- Understand the effects trauma can have
- Check your bias especially when assessing credibility
- Ask questions that speak to the senses

PROVIDING EMPATHY AND VALIDATION

- Focus on treating the individual as a whole person.
- As an investigator, remain neutral
- Practice using sample language that validates a person's experience but remains impartial
- Remember allow space for decisions

NOTE TAKING

- Handwritten, typed, Zoom transcript
- Some of this is a personal preference – be consistent
- Have outline of meeting/interview
- Consider a notetaker for support
- Model notes after investigation report
- Make notations where you still have questions for follow up or for other parties

COMMON CHALLENGES & TIPS

- Common challenges
 - parties talk fast or talk in circles/share repetitive information
 - interviews are long
 - prioritizing typing notes after interview
 - Self-care
- Tips
 - type notes/update as soon as possible after interview
 - document thoughts for follow up
 - have a notetaker
 - encourage all to submit a written statement

RECORDING INTERVIEWS

- Allows the investigator to focus on content/information and being present during the interview
- Recordings can ensure that all data and information is accurate.
 - Provides for use of direct quotes
 - Allows for investigator to review/reflect to determine what gaps still exist
 - Provides investigator an opportunity to refine investigation skills
- Recordings can be taken in multiple ways
 - Zoom, teams, handheld, etc.
- Record ALL the interview - including opening information, data privacy review (ask for verbal acceptance), all "housekeeping" information

RECORDING INTERVIEW CONTINUED...

- There are additional nuances of recording that are different from standard interviewing.
 - Open recording stating date, time, and introduction of parties (including spelling of names). End recording with time.
 - Audio recordings do not pick up on non-verbal (head nods, etc.)
 - prepare parties at beginning of interview and clarify during interview if needed.
- Develop a plan for your recording - send for transcription, etc.
 - This provides a typed/hard copy of the interview.
- Transcription review
 - Determine if you want to add this as a part of your process
 - Who can attend to complete the review

RECORDING CONSIDERATIONS

- Contracts for transcription
 - REV.com, other transcription services.
- Access to transcripts
 - Who, when, why
- Storage of recordings and transcripts
- Data retention policies

Case Studies



BIAS RELATED INCIDENT ADVISORY TEAMS

- For use when there are campus wide issues requiring immediate response.
- Can be used along with Behavioral Incident Team (BIT)
- Allows for cross functions to come together for planning response

Overview of Data Practices

Daniel McCabe

Office of General Counsel



PLANNING THE INVESTIGATION

Minnesota Statutes Chapter 13

Minnesota Rules Chapter 1205

- MGDPA: primary state law on privacy and handling of all government data.
- Government data is defined as: all data created, collected, received or disseminated by government in any physical form.
- Includes investigation data!

1B.1.1 Investigation Records are *Government Data*

- Records that you collect, create and maintain for an investigation – in any tangible form – are *government data* under the Minnesota Government Data Practices Act (MGDPA).
- Records on individual students are also subject to the federal Family Educational Rights and Privacy Act (FERPA), including as part of employee investigation.

Data About Individuals

- Data about individual students and employees are presumed *private*.
 - Personally identifiable data collected from employee/student witnesses can be “about” the speaker, others or both.

Private Data Access

- Private data are available to:
 - Subject (if more than one may withhold);
 - C/U officials, others working on behalf of C/U if “need-to-know”;
 - Others authorized in writing by subject;
 - Others as permitted by law.

Treat Active Investigational Data as *Confidential*

- May share with other school officials who have legitimate business “need-to-know” about specific information;
- **Not available to subject employee** (may be available to student subject);
- May NOT share with third parties (including union reps) unless
 - Specifically legally authorized.

Always seek assistance before disclosing!

Caveat: Due Process

- Respondent must be informed about charges in order to defend BUT
 - Not the same as access to active investigation data
- Complainants/respondents must receive sufficient information to be able to appeal initial 1B.1.1 decision.

Employee Issues Under MGDPA

- ID of harassment complainant or other witnesses NOT available to employee respondent if
 - Access would threaten their safety or subject them to further harassment
- Existence and status of a complaint are always PUBLIC, i.e., “there is a complaint and it is under investigation”
 - NOT the nature of the complaint!
 - *The context of a question matters . . .*

Discipline

- **Default rule:** treat decision as “private” unless/until applicable law permits disclosure.
- Disclosure rules for employee and student discipline are different.
- Notice of a no-contact order must be provided to affected individuals for enforcement.

Discipline: Employees

(see chart in materials)

- FINAL discipline (action taken and basis) is PUBLIC
 - After all CBA process exhausted; or
 - Employee with no CBA rights has been notified.
- If no discipline: all remains private.
 - But sex harassment victims entitled to certain remedial action information.
- Investigation of *public official* (president and other high level administrators) is public regardless of disciplinary decision.

Student *Crimes of Violence*

- Discipline and investigation data about students almost always remains private. Exceptions for *crimes of violence*:
 - If 1B.1.1 investigation includes a charge of **assault, intimidation or forcible sex offense*** 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.

* Not a complete list of *crimes of violence*.

Avoid Inadvertent 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.

Use Good Privacy and Security Practices, e.g.:

- 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.

Provide Data Privacy Notice*

- When interviewing individuals that includes private data “about” themselves, must inform:
 - How information will be used; who will have access; whether individual may legally refuse; consequences of providing or refusing to provide requested information.

(*This is sometimes referred to as the “Tennessen Warning.”)

Tip: If Notice is given orally, retain a copy for records. Use template notices. Don’t promise “confidentiality” or access; just reinforce we follow the law.

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

Education Data

- Also subject to federal law: Family Educational Rights and Privacy Act (FERPA)
- Many FERPA provisions incorporated into Minn. Stat. 13.32, but state law provides broader rights in some cases, e.g. applicants.
- Private unless specifically public, i.e.:
 - **Directory information** (unless student objects). Institution defines.
- Private educational data accessible to “school officials” with “legitimate educational interest,” as those terms defined by each school’s policy.

What is Status of Investigative Data on Students?

- Unlike employee discipline, student disciplinary actions generally remain private, along with all investigative materials.
- Exception: Under very limited circumstances, the victim of a “crime of violence”* may obtain data about the discipline of a perpetrator who is a student.
- *“Crime of violence” is defined in privacy laws. Seek legal assistance in determining application of this exception.

Data Collection Notice (“Tennessee Warning”)

When?	Individual asked for private or confidential data about self
What?	Why collected; how used; legally required to provide; consequences of not providing; ID of others authorized to access.
How?	Oral or written Department of Administration position: Data may only be used in accordance with notice, or subsequent consent.

MINNESOTA STATE CONTACT INFORMATION

Office of Equity and Inclusion (OEI)

<http://www.minnstate.edu/system/equity/>

Office of General Counsel (OGC)

<http://www.minnstate.edu/system/ogc/>