

CSU REVISED TITLE IX & DHR POLICY AND PROCEDURES

SYSTEMWIDE TITLE IX & DHR COMPLIANCE AND THE OFFICE OF GENERAL COUNSEL

JANUARY 21, 2022



OVERVIEW OF CHANGES

Restructure and Re-name

- Policy and Procedure Titles
- Structure
- Introducing the Tracks

New Provisions

- Sexual Exploitation
- No-Contact Directives
- Discretionary Dismissal
- Acceptance of Responsibility

Revisions

- Law enforcement and information sharing
- Caste
- Gender, Gender Identity, Sexual Orientation
- Marital Status – domestic partnerships
- Requirements for outreach and notice of investigation
- Appeals

RESTRUCTURE AND RENAME

Interim CSU Policy prohibiting
Discrimination, Harassment, Sexual
Misconduct, Sexual Exploitation,
Dating Violence, Stalking and
Retaliation

E.O. 1097= Interim Procedures for
Complaints of Discrimination,
Harassment, Sexual Misconduct,
Sexual Exploitation, Dating Violence,
Domestic Violence, Stalking, and
Retaliation **Made Against a Student**

E.O. 1096= Interim Procedures for
Complaints of Discrimination,
Harassment, Sexual Misconduct,
Sexual Exploitation, Dating Violence,
Domestic Violence, Stalking, and
Retaliation **Made Against an
Employee or Third-Party**

IMPLEMENTING REVISED POLICY AND PROCEDURES

- Interim policy and procedures
- Policy and procedures apply to Title IX and DHR complaints; Article III.B.iii. a., Article IV.B, and Article VI.E apply to sex discrimination complaints only
- The policy (prohibited conduct and definitions) in place on the date of the allegations applies
- The revised procedures apply to complaints received on and after January 1, 2022
 - No-Contact Directives
- Applicable procedure is based on **Respondent's** status
- Addendums and Track System
 - Addendum B =Track 1 (largely unchanged)
 - Addendum A=Track 2
 - Single investigator model=Track 3

"SCOPE" PROVISIONS

Procedures for Complaints Against Students (from Article 1.A. Scope)

The campus will investigate or otherwise respond to reports of alleged misconduct **committed by a Student** in accordance with these procedures if the alleged misconduct violates the Policy and:

1. occurred on campus; **or**
2. involved or impacted a campus program or activity (including campus employment); **or**
3. affected a Student's or Employee's ability to participate in a program, activity, or employment; **AND**
4. The alleged misconduct was **committed by** a person who at the time of the alleged misconduct was a Student.

Procedures for Complaints Against Employees and Third Parties (from Article I.A. Scope)

The campus will investigate or otherwise respond to reports of alleged misconduct **committed by an Employee or Third-Party** in accordance with these procedures if the alleged misconduct violates the Policy and:

1. occurred on campus; **or**
2. involved or impacted a campus program or activity (including campus employment); **or**
3. affected a Student's or Employee's ability to participate in a program, activity, or employment; **AND**
4. The alleged misconduct was **committed against** a person who at the time of the alleged misconduct was a Student, **or** the alleged misconduct was **committed by or against** an Employee.

With both Procedures: "Depending on the circumstances, the campus response may or may not include a formal investigation."

INTRODUCING TRACKS 1, 2, AND 3

Track 1 – Federal Mandated Hearing Process

- Formerly Addendum B
- Applies when the alleged conduct:
 - Meets the definition of Sexual Harassment under Article VII.C of the Policy; **and**
 - Occurred in the United States; **and**
 - Occurred in an education program or activity at the university, as defined in Track 1.

Track 2 – State Mandated Hearing Process

- Formerly Addendum A
- Applies when:
 - The complaint is against a **student; and**
 - The complaint is one of Sexual Misconduct, Dating Violence, or Domestic Violence; **and**
 - The credibility of one (or both) of the Complainant and the Respondent ("the Parties") , or any witness is central to the determination as to whether the Student violated the policy; **and**
 - The Student is facing a severe disciplinary sanction (expulsion or suspension) if found to be in violation of university Policy.

Track 3 – Non-Hearing Process

- Applies to all other complaints that allege a Policy violation (Title IX **and** DHR)
- No hearing involved
- Investigator determines whether a violation of Policy occurred

NEW PROVISIONS

SEXUAL EXPLOITATION AS A FORM OF PROHIBITED CONDUCT (REQUIRED BY SB-493)

- Sexual Exploitation means a person taking sexual advantage of another person for the benefit of anyone other than that person without that person's consent, including, but not limited to, any of the following acts:
- The prostituting of another person.
- The trafficking of another person, defined as the inducement of a person to perform a commercial sex act, or labor of services, through force, fraud, or coercion.
- The recording of images, including video or photograph, or audio of another person's sexual activity or intimate parts, without that person's consent.
- The distribution of images, including video or photographs, or audio of another person's sexual activity or intimate parts, if the individual distributing the images or audio knows or should have known that the person depicted in the images or audio did not consent to the disclosure.
- The viewing of another person's sexual activity or intimate parts, in a place where that other person would have a reasonable expectation of privacy, without that person's consent, for the purpose of arousing or gratifying sexual desire.

NO-CONTACT DIRECTIVES (REQUIRED BY SB-493)

- New section explicitly discusses No-Contact (Article IV.C.v of both Procedures)
- No-Contact "Order" => No-Contact "Directive" (term used in SB 493)
- Can be Supportive Measure, Remedy or part of Informal Resolution, with or without investigation
- First question is always: **Is a No-Contact Directive necessary?**
- Unilateral vs. Mutual: Make determination whether mutual or unilateral is most appropriate
 - One incident vs. ongoing, proximity (in same dorm, same floor, same classes), nature of allegations
 - Safety/well-being considerations (either Party)
 - Concerns about interference with an investigation (either Party)
 - ***Mutual No-Contact Directive should not be issued automatically***
- No-Contact Directive must include written explanation and consequences for violation
- Violations addressed by Student Conduct Administrator
- No-Contact Directives are **intended to be temporary** and should be **revisited** during and at conclusion of investigation (Finding of Policy Violation => Mutual converts to Unilateral)

DISCRETIONARY DISMISSAL

Article V (Student Respondent Procedures and Employee/Third Party Respondent Procedures)

- New for Tracks 2 and 3
- Available **AFTER** Complaint has been accepted for investigation
- Discretionary dismissal bases:
 - the Complainant notifies the Title IX Coordinator/DHR Administrator in writing that they would like to withdraw the Complaint or any part of it: **or**
 - if the specific circumstances prevent the campus from gathering evidence necessary to reach a determination as to the Complaint or part of the Complaint
- Appeal after discretionary dismissal – submitted to CO Appeals Unit (Dismissal Appeals under Track 1 still submitted to Systemwide Title IX Unit)

DISCRETIONARY DISMISSAL (CONT'D)

Article V (Student Respondent Procedures and Employee/Third Party Respondent Procedures)

- Appeal bases (one or more of the following):
 - Procedural errors that resulted in the incorrect dismissal of the Complaint
 - New evidence exists that was not reasonably available at the time of the dismissal and that would affect the decision to dismiss the Complaint
 - The decision to dismiss the Complaint was objectively unreasonable or arbitrary
 - The Title IX Coordinator/DHR Administrator (or designee) who dismissed the Complaint demonstrated a conflict of interest or bias for or against a Party in this case or Complainants or Respondents in general that affected the outcome of the matter

ACCEPTANCE OF RESPONSIBILITY

Article VII.A.x (Student Respondent Procedures), Article VII.A.ix (Employee/Third Party Respondent Procedures)

- New procedures under Tracks 2 and 3
- Respondent may accept responsibility at any time prior to Investigator or Hearing Officer making their determination
- Title IX Coordinator/DHR Administrator discussion with Respondent prior to their written acceptance of responsibility
- Respondent to accept responsibility by signing a written document prepared by the Title IX Coordinator/DHR Administrator that describes the range of disciplinary sanctions that the president or designee will consider in reaching a decision about discipline/sanctions
- Title IX/DHR office will issue a brief written summary of the allegations and a statement that the Respondent has accepted responsibility – sent to both Complainant and Respondent

ACCEPTANCE OF RESPONSIBILITY (CONT'D)

Article VII.A.x (Student Respondent Procedures), Article VII.A.ix (Employee/Third Party Respondent Procedures)

- Opportunity to submit impact statements – Complainant and Respondent
- Statement opportunity for Title IX Coordinator/DHR Administrator, Student Conduct Administrator, appropriate human resources/faculty affairs administrator
- Student Respondent cases only: the parties may appeal the sanction only on the grounds that the sanction(s) imposed was objectively unreasonable, or arbitrary based on the conduct for which the Respondent accepted responsibility
- Acceptance of responsibility regarding some but not all the alleged conduct – investigation/hearing process continue to completion (unless informally resolved)

REVISED PROVISIONS

LAW ENFORCEMENT INFORMATION SHARING

- Contained in Policy, Article V.C
- Makes even more explicit what was already stated – University Police are mandatory reporters
- Summarizes categories of information to be reported by University Police to Title IX, *even when victim requests confidentiality*
- Clarifies that victim of certain sex crimes has a right to "request from University Police, after being informed of their options, that the victim's identity remain confidential" but University Police should "specifically ask" if the victim wants their name provided to Title IX so that they can contact them to discuss supportive measures
- University Police encouraged to meet with Title IX to discuss strategies to ensure victims are fully apprised of rights

CASTE

- Added subcategory of "caste" to definition of "Protected Status" and in prohibitions stated in Article II of Policy (also in new CFA CBA)
- Clarifies what was already the practice – that prohibited Discrimination on the basis of Race or Ethnicity includes caste, as well as color and ancestry
- If presented with claim of Caste-based Discrimination or Harassment, analyze it as you would other claims based on **Race, Ethnicity or National Origin**
- Typical focus in investigation will likely be on causation, which may require comparing treatment between groups
- We encourage you to consult with one of us or campus counsel

GENDER, GENDER IDENTITY, SEXUAL ORIENTATION

- Added non-binary under Gender Identity (Article I, Statement of Values)
- Added a stand-alone definition of Nonbinary (Article VII, B, Policy Definitions)
 - **Nonbinary** is a general term for people whose gender identities fall outside of the binary conception of male or female. Nonbinary people may or may not identify as transgender.
- Added a stand-alone definition of Transgender (Article VII, B, Policy Definitions)
 - **Transgender** is a general term that refers to a person whose gender identity differs from their sex assigned at birth. A transgender person may or may not medically transition and may identify as male, female, or nonbinary
- Updated definition of Sexual Orientation (Article VII, B, Policy Definitions)
 - **Sexual Orientation** means a person's identity in relation to the gender or genders to which they are sexually or romantically attracted and includes but is not limited to heterosexuality, gay, lesbian, bisexuality, and queer.

MARITAL STATUS: ADDITION OF DOMESTIC PARTNERSHIPS

- Updated definition of Marital Status (Article VII, B, Policy Definitions)
 - **Marital Status** means an individual's state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state, **including domestic partnership.**

REQUIREMENTS FOR OUTREACH

Outreach to Complainant after receiving a report is **now required in both Title IX and DHR cases** and must include the following:

- A statement that the campus has received a report alleging a Title IX/DHR violation; Description of the role of the Title IX Coordinator/DHR Administrator; Information about counseling and support services; A statement regarding the importance of preserving evidence; A statement that the Complainant may, but is not required to, report to law enforcement any allegations that could constitute criminal behavior; A request for the Complainant to meet with the Title IX Coordinator/DHR Administrator, or other designated employee, to discuss Complainant's options; A statement that the Complainant may be accompanied by an Advisor during any meeting related to the report or Complaint process; Information regarding potential Supportive Measures, where applicable; A summary of the investigation procedures; An explanation of how the campus responds to reports of Policy violations and a description of potential disciplinary consequences; A statement that retaliation for making a Complaint or participating in a Complaint process is prohibited.

NOTICES OF INVESTIGATION

- A notice of investigation **must be given to both Parties simultaneously at the beginning of the investigation.** Previously the policy didn't specifically require an NOI to be sent to the Parties simultaneously and didn't specifically state what the contents had to be. (Article IV, E)
- At the **onset of the investigation**, the Title IX Coordinator/DHR Administrator **will simultaneously provide both Parties a notice of investigation** that includes the following:
 - A summary of the Complaint allegations; A copy of the procedures and the Policy; A summary of the alleged Policy violations; a description of the investigation and resolution procedure; the estimated timeline for completion of the investigation; a description of the Policy against Retaliation; information about the Parties' right to an Advisor; information regarding counseling and other support resources; a statement that the Parties will have equal opportunities to identify relevant witnesses and evidence; a statement that any evidence available, but not disclosed during the investigation might not be considered in any findings; a statement that the Parties will be provided with periodic status updates; a statement regarding the possible range of disciplinary outcomes.

APPEALS

- Used simpler language to describe the bases for appeal and made bases consistent for Track 2 & 3 cases:
(Article XI, B – applies to Tracks 2 & 3)
 - There was no reasonable basis for the findings or conclusions that resulted in the investigation or hearing outcome
 - Procedural errors occurred that would have likely changed the outcome of the investigation or hearing
 - New evidence that was not reasonably available at the time of the investigation or hearing and would have likely affected the investigation outcome or hearing officer's decision about whether the Respondent violated the Policy.
 - The sanction(s) imposed was objectively unreasonable, or arbitrary based on substantiated conduct (for Track 2 cases only)

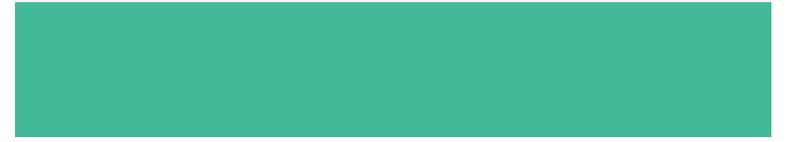


APPEALS (CONT'D)

- Added 3,500 word limit (not including exhibits) on appeal submissions
- Increased transparency by allowing the Parties in all tracks to have a copy of the appeal and opportunity to respond.

REMINDER: DECISION-MAKERS FOR DISCIPLINE – TRACK 1 OR ADDENDUM B

- Track 1 (Article X) and Addendum B require decision by President or designee
- That decision-maker must be trained
- We are conducting trainings for decision-makers at campuses that have Track 1 / Addendum B hearings scheduled in near future
- We need your help to identify decision-makers, especially in cases involving employee respondents (and decision-maker might be different for faculty vs. staff)



QUESTIONS

