

CSU Nondiscrimination Policy Updates

August 9, 2024

- **Hayley Schwartzkopf**, Associate Vice Chancellor for Civil Rights Programming & Services
- **Lele Yutzy**, Systemwide Senior Director, Civil Rights



Injunction update



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Objectives

Refresher on the CSU's duty to address sex discrimination

Discussion of updates to CSU's Nondiscrimination Policy

Practical Application and Hypotheticals

Questions and Discussion

Impacts of Discrimination on our Campus Community

- Jeopardizes academic achievement
- Impacts job performance
- Lack of engagement
- Campus culture and morale
- Physical and emotional harm



The Basics

- “Interim”
- New names and separate documents
 - *CSU Nondiscrimination Policy*
 - *CSU Nondiscrimination Policy – Student Procedures*
 - *CSU Nondiscrimination Policy – Employee and Third-Party Procedures*
- Student Procedures
- Employee Procedures
- **No tracks!!**

Effective date: **August 1, 2024**

- Governs conduct that occurs on or after August 1, 2024
- **NOT** retroactive
- What about conduct *before* August 1?
 - Definitions = based on policy definitions at time of alleged conduct
 - Procedures = January 1, 2023
- What about conduct that began *before* August 1 and is continuing to occur today?
 - Definitions = based on policy definitions at time of alleged conduct
 - Procedures = August 1, 2024



Special Note: Campuses Impacted by Injunction

Campuses impacted:*

- Bakersfield
- Chico
- Fresno
- Fullerton
- Los Angeles
- Northridge
- San Bernardino
- Stanislaus
- San José
- San Luis Obispo.

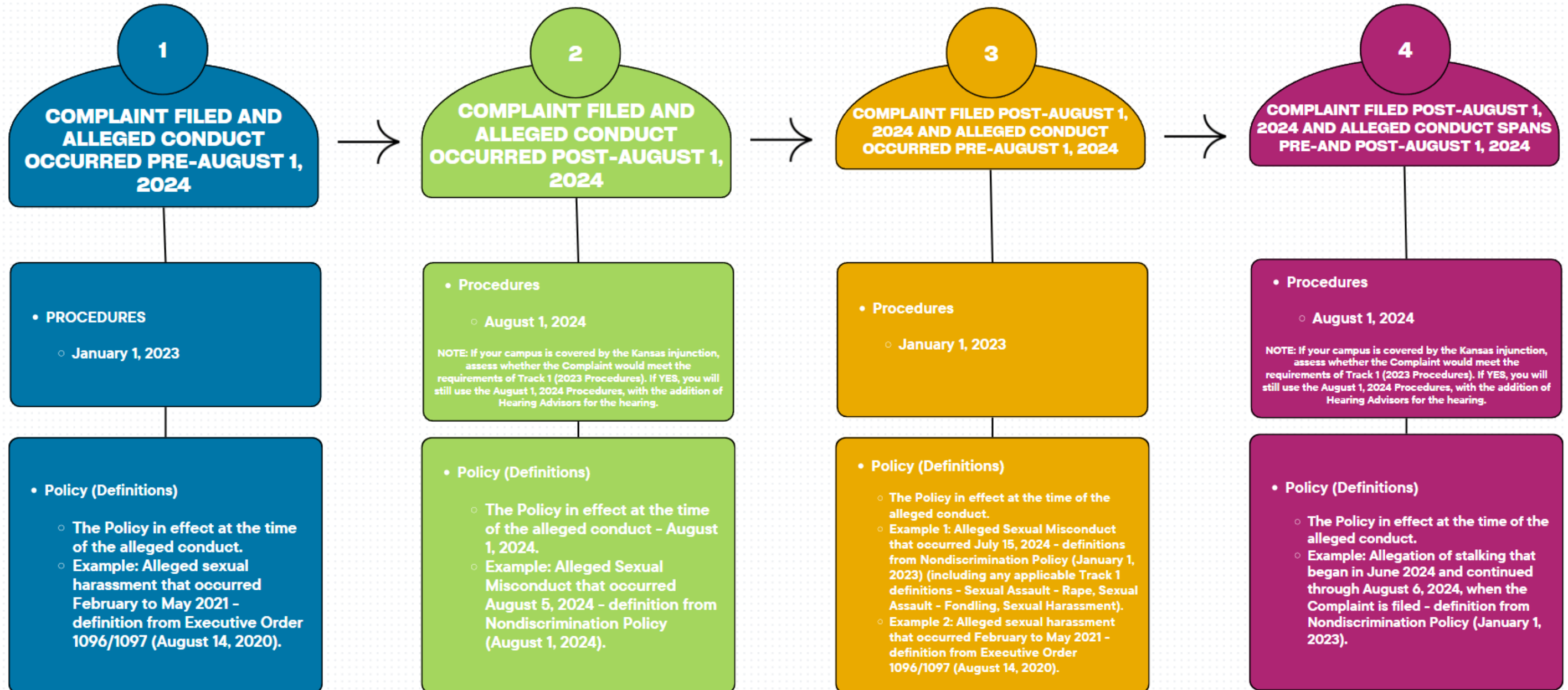
** Subject to change.*

Additional Hearing Requirement:

- If case meets the Track 1 definition of Sexual Harassment from 2023 Policy, must allow cross examination by hearing advisor and provide advisor to parties who require one.

Nondiscrimination Policy

Which Procedures and Policy Apply?



Duty to Address Discrimination



CSU campuses must respond to known instances of discrimination promptly and effectively and take steps to end the discrimination and prevent its recurrence.

Prompt Response

Complainant accepted or not accepted for investigation	Within 10 Working Days of the date of the intake or receipt of a written request for investigation (whichever is later)
Investigation – Review of Evidence Response Submission	10 Working Days from date Preliminary Investigation Report sent to Parties
Investigation – Final Investigation Report	100 Working Days from the date the Notice of Investigation is sent to Parties
Notice of Hearing (for hearing cases)	At least 20 Working Days prior to date of hearing
Hearing Officer’s Decision Report (for hearing cases)	15 Working Days from end of hearing

Good Cause for Timeline Extensions & Status Updates

- **Good Cause must exist**
 - *Party, investigator, or Hearing Officer may request*
 - *Title IX Coordinator / DHR Administrator may also initiate*
 - *Subject to approval by Title IX Coordinator / DHR Administrator*
 - ***Parties must receive written notice that extension is necessary, provide an explanation for the delay, and updated timeframe for completion***
- **Written Status Updates**
 - *Every 30 days*
 - *Can be more often if already part of practice*



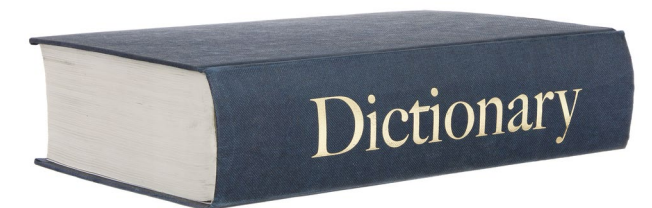
Updated Definitions in the Nondiscrimination Policy (NDP)

Inclusive Definition of Protected Status

- “Discrimination based on any Protected Status, including Age, Disability (physical and mental), Gender, Gender Identity (including Nonbinary or Transgender), Gender Expression, Genetic Information, Marital Status, Medical Condition, Nationality, Pregnancy or related conditions, Race or Ethnicity (including color, caste, or ancestry), Religion or Religious Creed, Sex (including Sex Stereotyping or Sex Characteristics), Sexual Orientation, and Veteran or Military Status.”

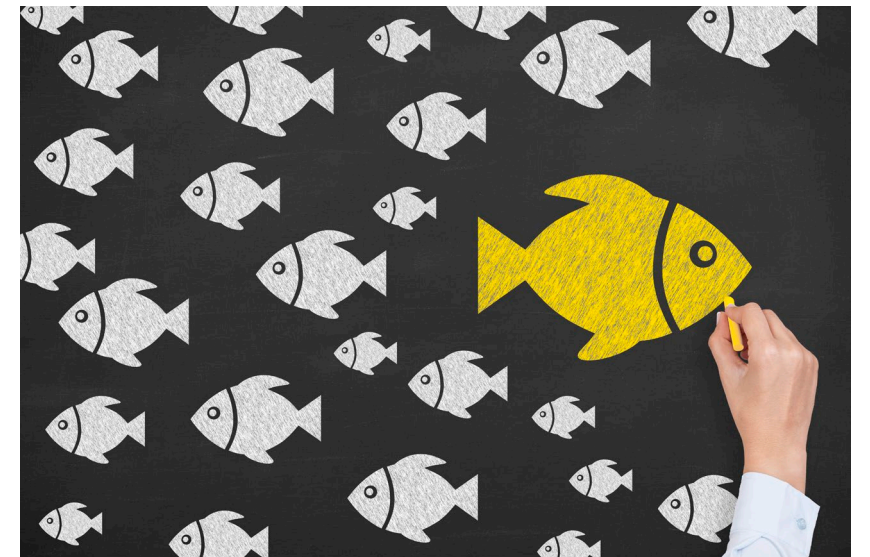
Definition of Discrimination

- Under the 2023 policy “Discrimination” required:
 - *Adverse Act because of Protected Status*
- Updated definition of “Discrimination”:
 - *Conduct that causes harm;*
 - *Based on actual or perceived Protected Status; and*
 - *Within the CSU’s educational programs, activities, or employment that results in denial or limitation of services, benefits, or opportunities offered by the CSU.*
 - ✓ De minimis harm protected



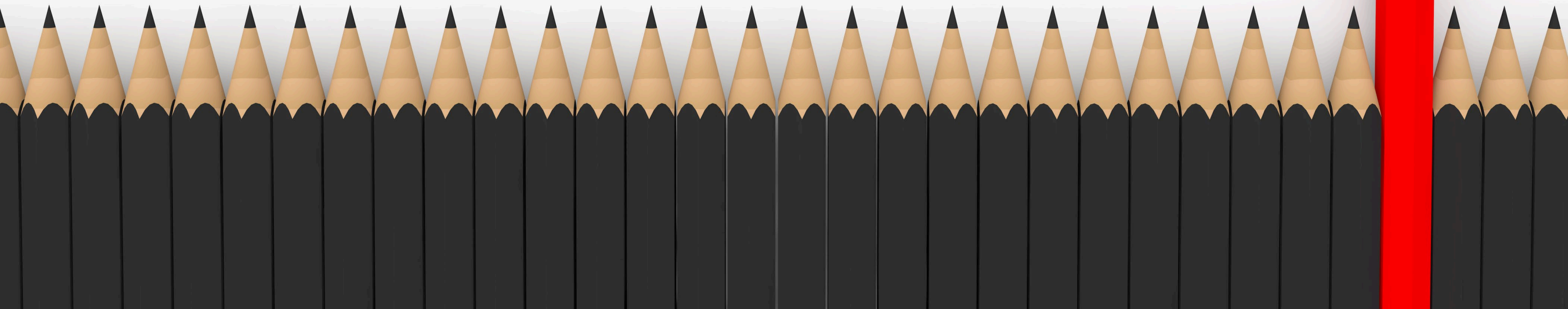
Forms of Discrimination

- Disparate Impact
- Different Treatment



Disparate Impact

- Disparate Impact Discrimination occurs when a policy or practice that is neutral on its face has a disproportionate, adverse effect on individuals of a particular Protected Status.



Different Treatment

- Different Treatment Discrimination occurs when the Complainant is:
 1. *Treated less favorably*
 2. *Than other similarly situated individuals under similar circumstances*
 3. *Because of their actual or perceived Protected Status, and*
 4. *Not for a legitimate, nondiscriminatory reason.*

Different Treatment Hypothetical

- **Consider you learn of the following allegations during intake:**

Scenario 1

Complainant alleges that they did not receive the grade they deserved because they are a male student, and the professor favors female students.

Scenario 2

Complainant alleges that they did not receive the grade they deserved because they are a male student, and the professor favors female students. Complainant alleges that the professor gave all female students A's and all male students C's on a test. And the professors stated on multiple occasions that "guys do not take their studies seriously," and "boys will be boys."

Clarification: Definition of Retaliation

- Includes threats, intimidation, coercion, reprisals, discrimination, and adverse employment or educational actions.
- Peer Retaliation
- Clarifies that actions responding to Complaint are **not** Retaliation:
 - *Gathering evidence*
 - *Providing Supportive Measures*
 - *Disciplining Students or Employees who violate Policy*



Sex-Based Harassment

Sex-Based harassment includes the following:

- Hostile environment OR Quid pro quo Harassment
- Specific offenses
 - *Including: sexual exploitation, dating violence, domestic violence, stalking.*
- Sexual Misconduct



When is it Covered?

- Conduct that violates the Policy, AND:
 - Occurred on Campus; or
 - Involved or impacted a University program or activity, including University employment;
 - A University program or activity includes, but is not limited to, conduct that occurs in any building owned or controlled by a student organization that is officially recognized by the CSU and conduct that is subject to the University's disciplinary authority.
 - Affected a Student's or Employee's ability to participate in a program, activity, or employment.

Hostile Environment Harassment

- “Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and so severe, persistent, or pervasive that it limits or denies the Complainant’s ability to participate in or benefit from the CSU’s educational programs, activities, or employment.”

Severe or Pervasive

- Based on the **totality of the circumstances**
- **Consider these factors:**
 - The frequency, nature, and duration of the conduct;
 - Whether the conduct was physically threatening;
 - Whether the conduct arose in the context of other discriminatory conduct or other misconduct;
 - The degree to which the conduct affected the Complainant's ability to access the CSU's educational programs, activities or employment;
 - The Parties' ages, roles within the CSU's educational programs or activities, previous interactions, and other factors about each Party that may be relevant to evaluating the effects of the conduct; and
 - Other Sex-based Harassment in the CSU's educational programs, activities, or employment.

Clarifications: Sexual Misconduct and Exploitation

- **Sexual Misconduct**

- *Clarification of the standard for incapacitation*
- *Indicators of incapacitation*
- *Evaluation of incapacitation based on totality of available information to determine whether Respondent knew or reasonably should have known of Complainant's incapacitation*

- **Sexual Exploitation**

- *"This includes distribution of digitally altered or artificial-intelligence-generated images, video, and audio."*

Conduct that is based on sex

- Sexual advances and assault
- Comments about sexual activity or attractiveness
- Sex based slurs, epithets or degrading descriptions
- Obscene graffiti
- Spreading sexual rumors
- Touching leering, gestures, sounds, comments or displays
- Sexually motivated talking including written or social media posts

Protections for Pregnant Students

- Policy prohibits discrimination based on pregnancy or related-conditions
- 2024 Title IX Regulations require:
 - Reasonable modifications to policies, practices, procedures
 - May include breaks, excused absences, more time to complete work.
 - Must be in consultation with student and based on their needs.
 - Fundamental alterations are **not** reasonable.



Protections for Pregnant Students (continued)

- Employees must provide students with Title IX Coordinator's contact information when informed of pregnancy or related-condition
- Upcoming training from Chancellor's Office
- Toolkit for campuses to use

Notice

- Responsible employees must notify Title IX Coordinator / DHR Administrator when aware of conduct that could violate Nondiscrimination Policy
 - *Staff*
 - *Faculty*
 - *Supervisors and managers*
 - *Administrators*
 - ***Athletic trainers***
 - ***Campus ombuds***
- Note re confidential employees
 - *Provide contact information of Title IX Coordinator / DHR Administrator and information on how to make a complaint.*



Does the Campus have a Duty to Respond?

- A Student tells an RA that a professor placed his hand on their knee during office hours which made the Student feel uncomfortable?
- Student leaves a message at student services indicating that an employee at a campus café has been stalking her?
- Student files a report alleging sexual misconduct with campus police department?

Complaint Resolution Process:

A Hearing and Non-hearing Model



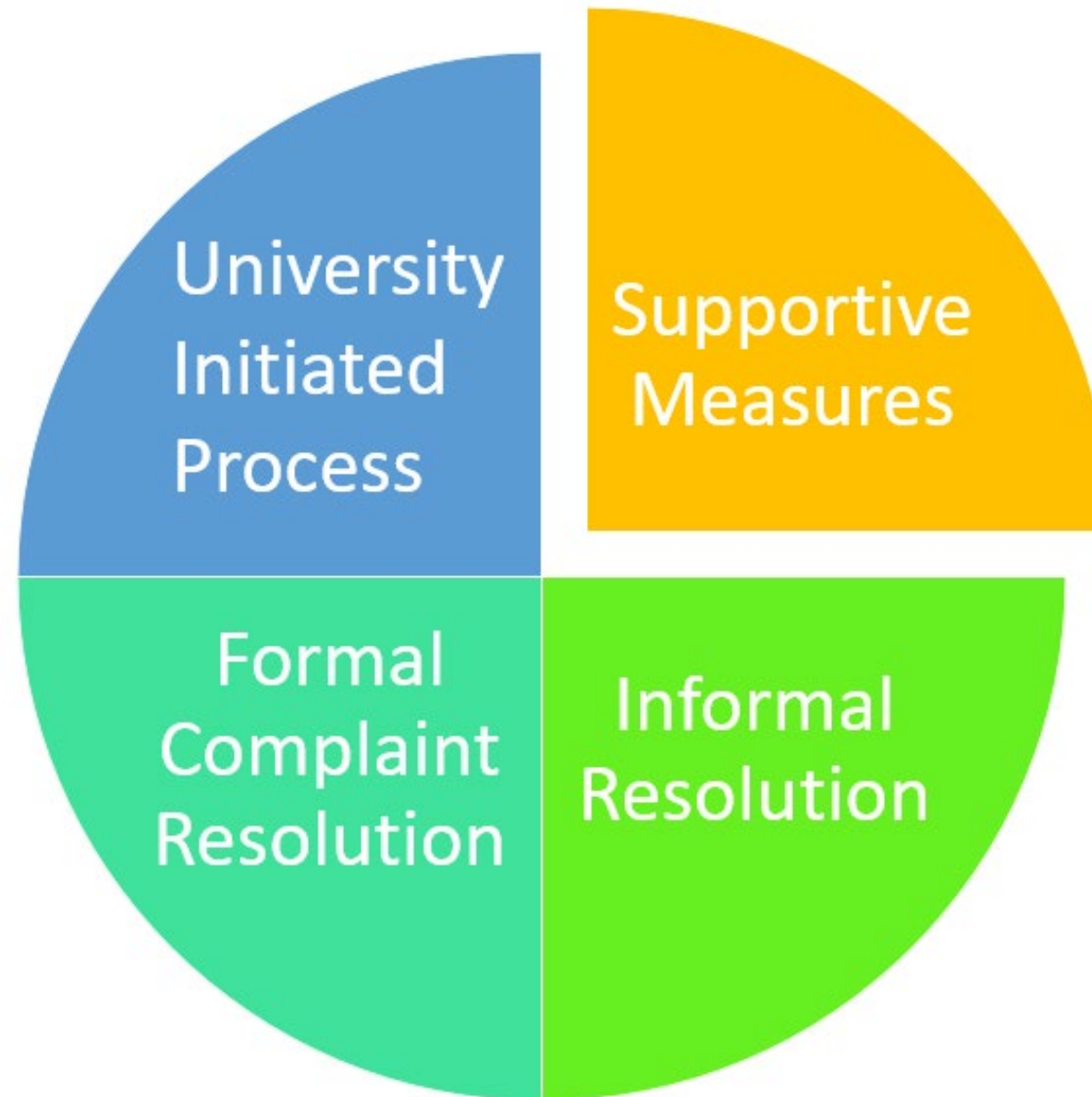
Remove Barriers for Reporting Discrimination



Reports / Complaints & Outreach

- **Reporting Party**
 - *A person who files a report of possible violation of NDP*
 - *Does not assume role of Complainant in process when Complainant does not participate*
 - *Use of term “Impacted Party”*
- **Complaints**
 - *Written or verbal complaint*
 - *“objectively can be understood as a request for an investigation and determination about an alleged violation of this Nondiscrimination Policy”*
- **Outreach**
 - *Language easy to read and understand*
 - *Use attachments where possible*
 - *Be sure to cover all items in Policy*
 - *Highlight availability of supportive measures, even in absence of complaint*

Outline the Menu of Options



Supportive Measures:

- Must be offered.
- Only need to be provided when reasonably available.
- Cannot unreasonably burden either party.
- Cannot inform others about the Supportive Measures
 - *Includes the other party*
 - *Unless necessary to provide the supportive measure.*
- Either party may seek **modification, reversal, or challenge the denial** of supportive measures.

Request to Modify or Terminate Supportive Measures:

- Must be reviewed by someone who did not implement the Supportive Measures.
- Intended to be a quick administrative review.
- **Analysis:** are the Supportive Measures consistent with the Nondiscrimination Policy's requirements, expectations, or standards? In evaluating whether to modify, reverse, or grant a Supportive Measure, the reviewer should consider:
 - *Do the Supportive Measures unreasonably burden a Complainant or Respondent?*
 - *Are the Supportive Measures punitive?*
 - *Are the Supportive Measures reasonably available and restore access to the CSU's programs, activities, or employment?*
 - *Are the Supportive Measures being offered or provided during the informal resolution process or formal complaint resolution process?*

Considerations Absent a Formal Complaint

- In the absence of a complaint or request to withdraw allegations, the Title IX Coordinator / DHR Administrator **must** consider the following:
 - Complainant's request not to proceed;
 - Complainant's reasonable safety concerns;
 - The risk that additional acts of Discrimination, Harassment, or Retaliation would occur if a Complaint is not initiated;
 - The severity of the alleged conduct;
 - Whether Respondent poses an imminent threat to the campus community;
 - The age and relationship of the Parties, including power imbalance and whether the Respondent is an Employee of the University;
 - The scope of the alleged conduct, including information suggesting a pattern;
 - Whether the University is able to conduct a thorough investigation and obtain relevant evidence without the Complainant's cooperation;
 - The availability of evidence to assist a decisionmaker;
 - Whether the University could stop, prevent, and remedy the conduct without initiating the formal complaint resolution process; and
 - For **Employee** Complainants, the University's obligation to maintain a safe work.

Document the Decision!

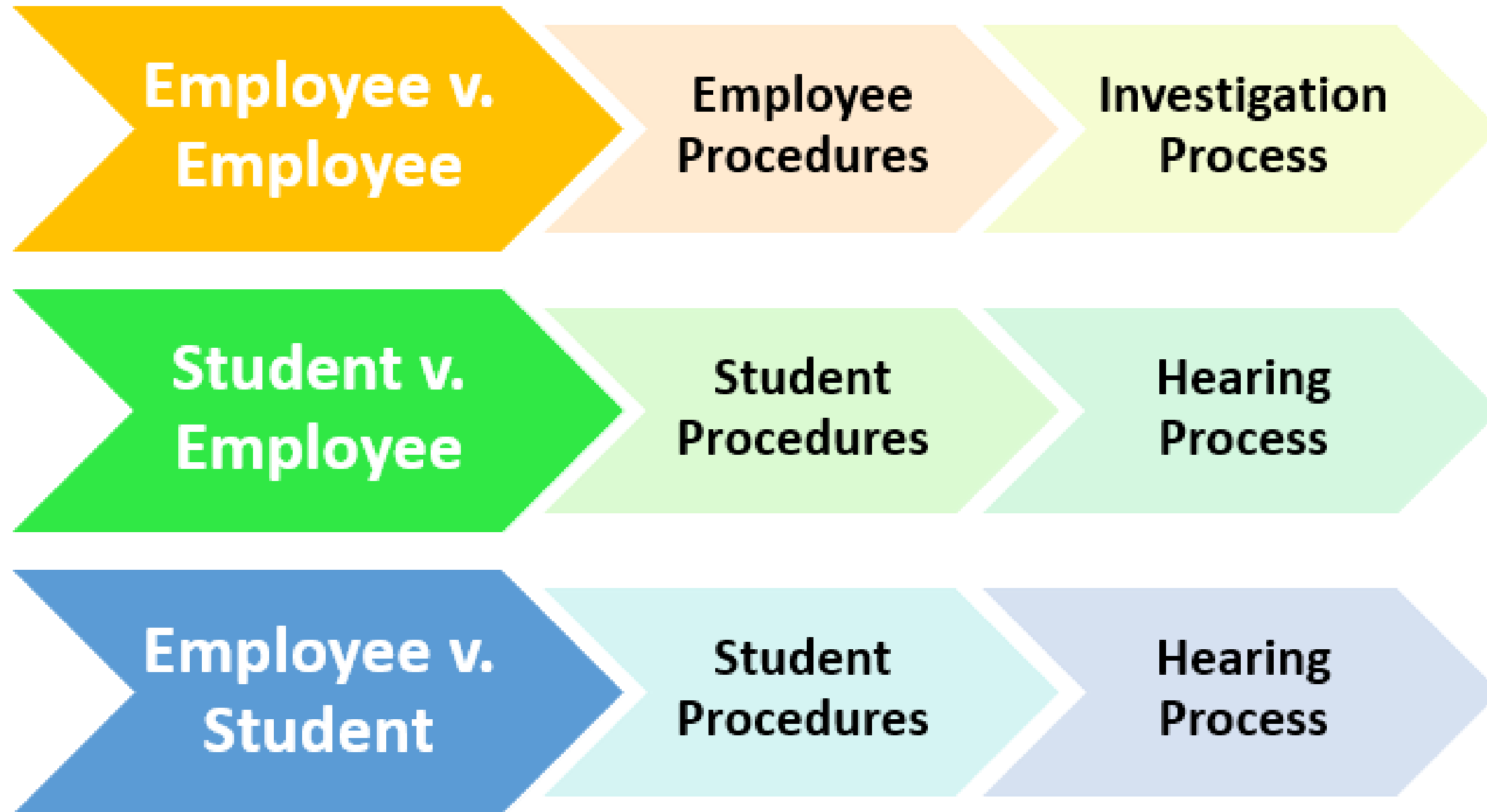
Discretion to Offer Informal Resolution

- Formal Complaint is not required
- Facilitator cannot also serve as investigator for case
- Student / Employee Cases = generally discouraged
 - *May be permitted with the approval of the Systemwide Director*
 - *Informal resolution agreement must be reviewed by the assigned Systemwide Director prior to being finalized.*

Discretion to Offer Informal Resolution (continued)

- Title IX Coordinator / DHR Administrator *may* facilitate
 - *Best practices*
 - *Support Systemwide Director*
- Remedies do not include exchange of money
- Requirement to take prompt and effective steps to ensure that discrimination, harassment, or retaliation does not continue or recur.

Sex-based Harassment: Hearing versus Non-hearing

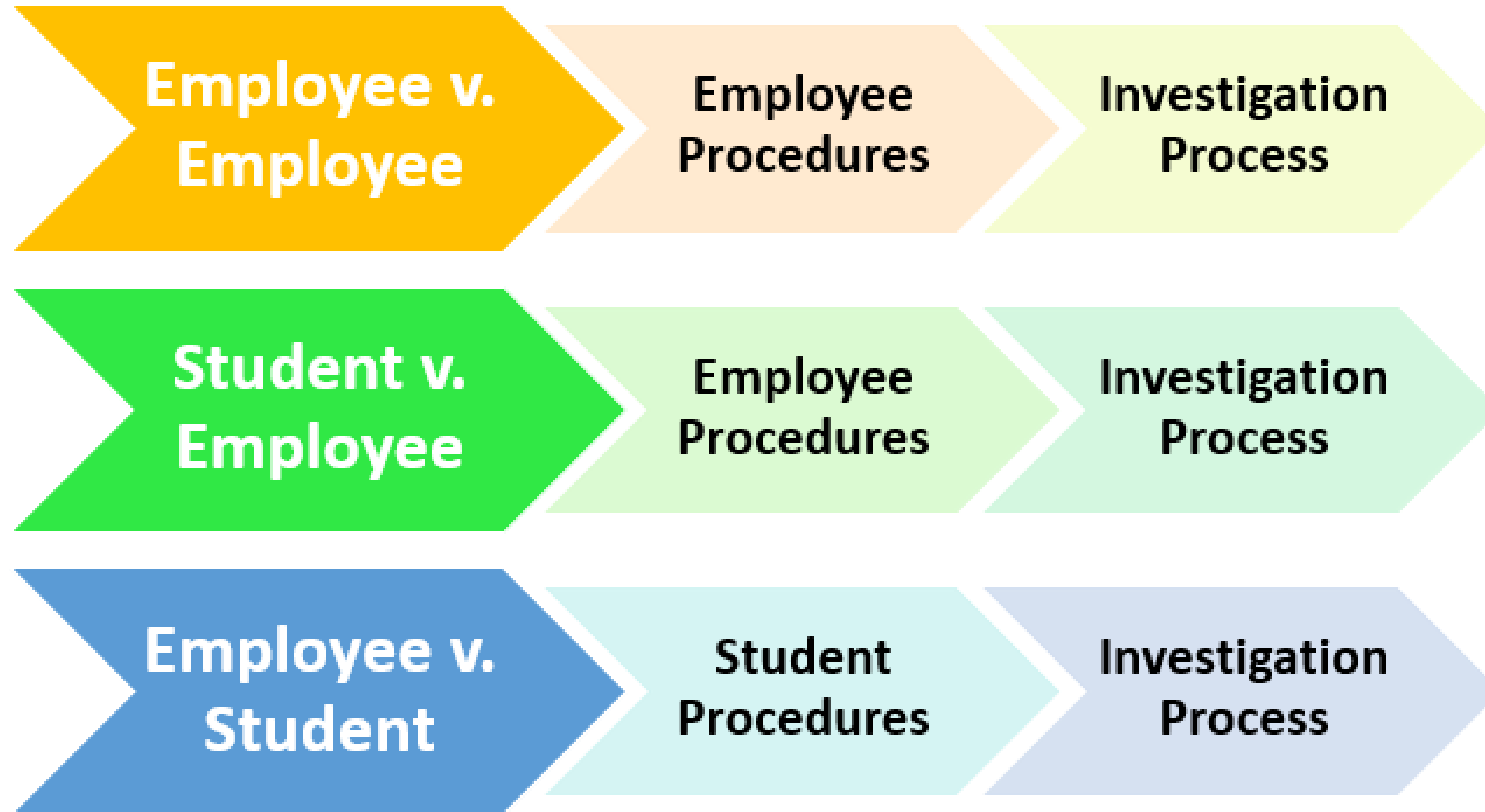


**Note re
Student
Employees**

Hearing Procedures: Sex-Based Harassment Involving a Student Party

- Hearing process outlined in Addendum A to Student Procedures
- Apply when either party is a student
- Non-university provided advisors
- Safety concerns
- “Relevant and not impermissible evidence”
- Expert witness testimony
- **Note re campuses impacted by injunction**

Other discrimination, harassment, retaliation cases:



**Note re
Student
Employees**

Understanding the Appropriate Process: Hearing or No?

- 1) Employee complainant alleges that their supervisor has made inappropriate comments regarding their appearance on at least three occasions in the last month and touched the employee's chest inappropriately.
- 2) Student alleges that they were sexually assaulted in their dorm by another student.
- 3) An applicant alleges that a campus admissions policy favors female students, and that male applicants are less likely to be admitted than female applicants with similar qualifications.
- 4) A transgender student Complainant alleges that they are not allowed to use the locker room that aligns with their gender identity and has been repeatedly misgendered.
- 5) A Student complainant alleges that a peer has repeatedly made negative race-based posts about the Complainant's national origin.

Non-Hearing Procedures

- The decisionmaker may be the investigator or Title IX Coordinator / DHR Administrator
- Clarification on requirements for investigation report

Preliminary Investigation Report

1. Describe the allegations.
2. Describe the investigative process.
3. Set forth the relevant policy language and the Preponderance of Evidence Standard.
4. Describe the evidence presented and considered.
5. Identify the material facts – disputed and undisputed – with explanations as to why any material fact is disputed.

Final Investigation Report

1. A summary of the allegations,
2. The investigation process,
3. The Preponderance of the Evidence standard,
4. A detailed description of the evidence considered,
5. Analysis of the evidence including relevant credibility evaluations,
6. Appropriate findings, and
7. Relevant exhibits and documents attached to the written report.

Privacy Protections

- University must take reasonable steps to protect the parties' privacy during complaint resolution process
- Cannot restrict the parties in:
 - *Gathering evidence*
 - *Consulting with family, advocates, or advisors, or*
 - *Limit participation in the formal complaint resolution process.*



Discretionary Dismissals (all complaints)

- At any time after a Complaint has been accepted for investigation, it is within the discretion of the Title IX Coordinator/DHR Administrator to dismiss a Complaint, or any part of a Complaint, if:
 - *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 University from reasonably gathering evidence necessary to reach a determination as to the Complaint or part of the Complaint.*

Dismissals for Complaints of Sex-based Harassment

- Unable to identify the Respondent after taking reasonable steps to do so.
- Respondent is not participating in a CSU educational program or activity and is not employed by the University.
- The Complainant voluntarily withdraws the allegations in the complaint and the Title IX Coordinator declines to initiate a complaint.
- The Title IX Coordinator determines the conduct alleged in the complaint, even if proven, would not constitute Sex-based Harassment under the Nondiscrimination Policy or Title IX.

Appeals

- For Complaints alleging Sex-based Harassment, **either** Party may file an appeal.
- For Complaints involving allegations of Discrimination, Harassment, Prohibited Consensual Relationships, or Retaliation only the **non-prevailing** Party may appeal.

Other Practical Considerations

- No longer required to **post** trainings on website
 - *Still required to make training materials available upon request*
- Consider where links to Policy and Procedures need to be updated
- Website updates?
- Email addresses in Policy and Procedures updated!

Questions?

