

**NON-DISCRIMINATION POLICY**

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## **I. Statement of Values**

The San Diego State University Research Foundation (SDSU Research Foundation, or SDSURF) is committed to an inclusive and equitable community that values diversity and fosters mutual respect. We embrace our community differences in 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. All employees have the right to participate fully in SDSURF programs, activities, and employment free from Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation.

## **II. Purpose**

The purpose of this policy is to: (1) familiarize SDSURF employees with the definitions of unlawful harassment and discrimination and the forms it can take; (2) confirm that unlawful harassment and discrimination will not be tolerated and is contrary to the standards of conduct expected and required of SDSURF employees; (3) alert employees to their rights under applicable laws and provide information on options for raising concerns or making a complaint; and (4) make clear that employees who engage in unlawful harassment and discrimination are subject to possible disciplinary action which may include discharge.

## **III. Scope**

The SDSU Research Foundation's *Non-Discrimination Policy* applies to all persons involved in the operation of the SDSU Research Foundation. In keeping with this commitment, this policy prohibits all such unlawful conduct directed at SDSURF employees, applicants, individuals providing services in the workplace (or anyplace where business is conducted through SDSURF, including off site locations and anywhere SDSURF research is being conducted) pursuant to a contract, unpaid interns, volunteers, and others involved in its operations by managers, supervisors, co-workers, or others. It also prohibits unlawful harassment of students by individuals associated with SDSURF. Visitors to and workers employed by the San Diego State University, by other auxiliaries, or by other public or private organizations engaged in business with SDSURF are expected to comply with this policy.

#### **IV. Prohibited Conduct**

The SDSURF prohibits the following conduct, as defined in [Appendix C](#) and Appendix D.

- A. **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.
- B. **Harassment** based on any Protected Status.
- C. **Sex-based Harassment**, which includes Sexual Harassment and other Harassment based on Sex or Gender, including:
  - 1. Hostile environment or Quid Pro Quo Harassment;
  - 2. Dating Violence, Domestic Violence, Sexual Exploitation, and Stalking; and/or
  - 3. Sexual Misconduct.
- D. **Prohibited Consensual Relationships.**
- E. **Retaliation.**

#### **V. Reporting and Complaint Procedures**

Complainants are encouraged to report incidents of inappropriate or unwelcome conduct whenever it occurs during business, including at conferences and workshops offsite, and during activities at all SDSURF facilities and field sites where SDSURF work and research is being conducted. Employees, applicants, interns, volunteers, and students who believe that they have been harassed, discriminated against, or subjected to retaliation in violation of this Nondiscrimination Policy, or who are aware of such behavior against others, should report all incidents. Complainants are not required to wait for the conduct to be repeated or to worsen.

Any incident of harassment, discrimination, retaliation, or conduct defined in this policy by any SDSURF employee or any other person, should be reported promptly to the employee's supervisor or manager and/or to the Chief Human Resources Officer or their designee. Managers who receive complaints or reports or who observe harassing or discriminatory conduct are required to immediately inform the Chief Human Resources Officer (or their designee).

Individuals may contact Human Resources directly and are not required to report to their supervisor.

The Complaint Form in [Appendix A](#) may also be used to file a complaint.

All complaints of unlawful harassment and discrimination are taken seriously. SDSURF HR will respond promptly and in an appropriate manner to all Complaints and will take prompt, appropriate action to prevent continuation of, and correct, Nondiscrimination Policy violations.

Depending on the circumstances, the Foundation's response may or may not include a formal investigation. Investigations may include interviews of individuals who might have information pertaining to the alleged harassment or discrimination. If SDSURF begins an investigation, an effort will be made to keep the investigation, including the names of complaining individuals and witnesses, confidential to the extent possible. In the same way, anyone involved in an investigation of harassment, discrimination, or prohibited conduct outlined in this policy, has an obligation to keep all information about the investigation confidential. Failure to keep information about an investigation confidential may result in disciplinary action. SDSURF will only share information about a complaint of harassment or discrimination with those who need to know and in accordance with the reporting requirements in [Appendix B](#).

The standard of proof for investigations under these Procedures is the Preponderance of the Evidence. Preponderance of the Evidence is a standard of proof that determines whether alleged conduct more likely than not occurred based on the evidence presented or facts available at the time of the decision. The responsibility is not on the Parties, but on SDSURF to conduct an investigation that gathers sufficient evidence to determine whether discrimination, harassment, retaliation, or prohibited conduct occurred. The Complainant does not have the burden to prove, nor does the Respondent have the burden to disprove, the underlying allegation or allegations of misconduct. SDSURF presumes that the Respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the formal complaint process.

When the investigation is completed, SDSURF will normally communicate the investigation findings or determination to the complaining individual, the respondent and, if appropriate, to others directly involved including any reporting requirements in [Appendix B](#).

## **VI. Supportive Measures**

In some situations, interim supportive measures may be put in place during the course of an investigation to ensure the immediate safety for all involved

in the complaint. Measures include steps that will enable everyone involved to find a mutually agreeable solution that stops harassing or discriminatory behavior or prohibited conduct. Both the rights of the respondent and the complainant will be considered in any investigation and subsequent action.

SDSURF will offer and coordinate supportive measures as appropriate for the Complainant and/or Respondent to restore or preserve that person's access to SDSURF's programs, activities, employment, or to provide support during the complaint process. Supportive Measures may include but are not limited to: extensions of deadlines and other work-related adjustments; changes to employee reporting line; escort services; increased security and monitoring of certain areas of the campus; restrictions on contact applied to one or more Parties; leaves of absence; changes in work or any other work-related activity; and training and education programs related to Discrimination, Harassment, and Retaliation.

There are many support services available to employees who feel they have been, or are being, unlawfully harassed. At SDSURF, such support services for non-student employees may include the Employee Assistance Program (EAP), or Campus Police. Students at SDSU, who are also employees of SDSURF, may also seek assistance from the University's Center for the Prevention of Harassment and Discrimination. SDSURF also provides training programs aimed at preventing unlawful harassment and discrimination through proper education of its employees and supervisors.

## **VII. Disciplinary Sanctions and Remedies**

If unlawful harassment or discrimination is established, SDSURF will take reasonable action to stop the harassment or discrimination. Employees who are found to have violated the Nondiscrimination Policy will be subject to discipline that is appropriate for the violation and in accordance with state and federal requirements and other SDSURF policies. The possible sanctions for Employees determined to have violated the Nondiscrimination Policy are mandatory training, counseling, reprimand, unpaid suspension of varying lengths, demotion, and/or termination.

In cases in which the Respondent is not an employee, SDSURF will take action to minimize the recurrence of any unlawful behavior. Unlawful conduct by non-employees may result in restricting the individual's access to SDSURF work sites.

## **VIII. Responsibilities**

All SDSURF employees are required to complete training on how to prevent discrimination, harassment, retaliation, sexual misconduct, dating and domestic violence, and stalking and are encouraged to report such conduct.

Supervisory employees are required to take two hours of interactive sexual harassment training within six months of their assignment to a supervisory position and every two years thereafter as required by California law.

All other employees are required to take one hour of interactive sexual harassment training within six months of their start date and every two years thereafter as required by California law.

## **IX. Duty to Report**

Any Employee who knows or has reason to know of incidents that may violate this Nondiscrimination Policy has a duty to promptly report to the SDSURF Chief Human Resources Officer or their designee or by completing the Complaint Form in [Appendix A](#).

SDSURF will comply with all applicable institutional reporting requirements under sponsor agency and third-party awards, including but not limited to Federal awards, such as those of the National Institutes of Health (NIH) and National Science Foundation (NSF) as defined in [Appendix B](#).

## **X. Bystander Intervention**

There are five standard methods of bystander intervention that can be used when anyone witnesses harassment or discrimination and wants to help.

- A. A bystander can interrupt the harassment by engaging with the individual being harassed and distracting them from the harassing behavior.
- B. A bystander who feels unsafe interrupting on their own can ask a third party to help intervene in the harassment.
- C. A bystander can document the harassment incident to benefit a future investigation.
- D. A bystander might check in with the person who has been harassed after the incident, see how they are feeling and let them know the behavior was not ok; and

- E. If a bystander feels safe, they can confront the harassers and name the behavior as inappropriate. When confronting harassment, physically assaulting an individual is never an appropriate response.

Though not exhaustive, and dependent on the circumstances, the guidelines above can serve as a brief guide of how to react when witnessing harassment in the workplace. Any employee witnessing harassment as a bystander is encouraged to report it as described in Section V. Reporting and Complaint Procedures. A supervisor or manager that is a bystander to harassment must report it.

## **XI. No Retaliation**

It is the obligation of all employees to cooperate fully in the investigation process. In addition, disciplinary action may be taken against any employee who is uncooperative or who attempts to discourage or prevent an employee from using SDSURF's complaint procedure to report unlawful harassment or discrimination. Retaliation by a SDSURF employee against any individual who makes a complaint of unlawful harassment or discrimination is strictly prohibited. Similarly, no retaliation will occur to any person who participates or cooperates in any manner in an investigation, or any other aspect of the process described herein.

Retaliation is itself a violation of this policy and is a serious offense. Complaints regarding allegations of reprisal should be immediately brought to the attention of the Chief Human Resources Officer or their designee or by completing the Complaint Form in [Appendix A](#).

## **XII. References and Related Information**

In addition to the SDSU Research Foundation's internal complaint procedure, employees may also contact either the Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH) to report unlawful discrimination, harassment, and retaliation. The EEOC and the DFEH serve as neutral factfinders and will attempt to assist the parties to voluntarily resolve their disputes. These agencies will accept and investigate charges of unlawful discrimination or harassment. For more information, please go to:

- Equal Employment Opportunity Commission (EEOC)  
<https://www.eeoc.gov/>
- California Department of Fair Employment & Housing (DFEH)  
<http://www.dfeh.ca.gov/>

- If CSU employees are involved, CSU Executive Order 1096 may apply.  
<https://calstate.policystat.com/policy/16328404/latest/>

Any individual who is a recipient of funds from the **US Department of Energy (DOE)**, who believes that discrimination on the basis of sex may have occurred, may file a [complaint](#) with DOE's External Civil Rights Compliance and Enforcement Division.

If you have any questions concerning this Policy, please contact SDSURF Human Resources.



## **Appendix A – Complaint Form**

To access the SDSURF Complaint Adobe Sign Form paste the following URL in your browsers address field or click on this link: [SDSURF Complaint Adobe Sign Form](https://sandiegostate.na1.documents.adobe.com/public/esignWidget?wid=CBFCIBAA3AAABLbqZhA69LiIKT1WxjbckD4aoX6EGINv872CEAhw-zX4i_OaPLzPiU7IDQV-jxO1qtN7-ac*)

URL: [https://sandiegostate.na1.documents.adobe.com/public/esignWidget?wid=CBFCIBAA3AAABLbqZhA69LiIKT1WxjbckD4aoX6EGINv872CEAhw-zX4i\\_OaPLzPiU7IDQV-jxO1qtN7-ac\\*](https://sandiegostate.na1.documents.adobe.com/public/esignWidget?wid=CBFCIBAA3AAABLbqZhA69LiIKT1WxjbckD4aoX6EGINv872CEAhw-zX4i_OaPLzPiU7IDQV-jxO1qtN7-ac*)

## **Appendix B – Sponsored Program Reporting Requirements**

The SDSU Research Foundation is a recipient of research funding from the leading government agencies such as the National Science Foundation (NSF) and the National Institutes of Health (NIH), as well as third party contractors. The SDSU Research Foundation is committed to compliance with a policy to foster safe and harassment-free environments within the sponsors' expectations and requirements while also flowing down these requirements to sub award partners. These prime sponsors require that the SDSU Research Foundation inform them when an individual's ability to perform work on the project has been impacted. To ensure compliance, the SDSU Research Foundation has instated the following procedures.

### **National Science Foundation (NSF)**

In accordance with NSF policy (see Chapter XI.A.1.g.), this section applies to all persons involved in NSF-funded off-campus or off-site research activities and applies to all SDSURF employees, individuals providing services in the workplace pursuant to a contract, unpaid interns, volunteers, and others involved in its operations.

NSF Principal Investigators (PI's) conducting off-campus or off-site research will be required to establish a communication plan within the team and to SDSURF in partnership with the Authorized Organization Representative (AOR) (*as assigned in Appendix D*) and define reporting roles and responsibilities. All Principal Investigators are expected to review this plan with all individuals conducting NSF-funded research off-campus or off-site, including non-SDSU or SDSU Research Foundation personnel that are present off-campus or off-site, and provide such individuals with this policy.

Any violation by any involved party should be reported promptly to the employee's supervisor/manager and to Human Resources. The same complaint procedure should be followed as mentioned in Section V. Complaints and Reporting Procedures. When the investigation has been completed, SDSURF will communicate the summary of the investigation as outlined in the sponsoring agency requirements.

SDSURF will ensure the PI has communicated our Code of Ethics Policy and includes clear and accessible means of reporting violation in accordance with NSF policies.

SDSURF is required to notify National Science Foundation (NSF) as set forth in [NSF Term & Condition 83 FR 47940](#) when:

- A. Any finding/determination that a Principal Investigator (PI) or any co-PI has been found to have violated SDSURF policies or codes of conduct, statutes, regulations, or executive orders relating to sexual harassment, other forms of harassment, or sexual assault; AND/OR
- B. If the PI or any co-PI is placed on administrative leave or the imposition of any administrative action on the PI or co-PI by the awardee relating to any finding/determination or an investigation of an alleged violation of SDSURF policies or codes of conduct, statutes, regulations, or executive orders relating to sexual harassment, other forms of harassment, or sexual assault.
- C. Such notifications will be submitted by SDSURF to the NSF's Office of Equity and Civil Rights website within ten business days from the date of the finding/determination, or the date of the placement of a PI or co-PI by SDSURF on administrative leave or the imposition of an administrative action, whichever is sooner.

Each notification will include the following information:

- 1. NSF Award Number; and
- 2. Name of PI or co-PI being reported; and
- 3. Type of Notification:
  - a. Finding/Determination that the reported individual has been found to have violated SDSURF policies or codes of conduct, statutes, regulations, or executive orders relating to sexual harassment, other forms of harassment, or sexual assault; AND/OR
  - b. Placement by SDSURF of the reported individual on administrative leave or the imposition of any administrative action on the PI or any co-PI by the SDSURF relating to any finding/determination or an investigation of an alleged violation of SDSURF policies or codes of conduct, statutes, regulations, or executive orders relating to sexual harassment, other forms of harassment, or sexual assault; and
- 4. Description of the finding/determination and action(s) taken, if any; and

5. Reason(s) for, and conditions of, placement of the PI or any co-PI on administrative leave or imposition of administrative action. SDSURF, at any time, may propose a substitute investigator if it determines the PI or any co-PI may not be able to carry out the funded project or activity and/or abide by the award terms and conditions.

When the investigation has been completed, SDSURF will communicate the summary of the investigation to the complainant, to the respondent, and, if appropriate, to others who are involved (up to and including the National Science Foundation).

### **National Institutes of Health (NIH)**

SDSURF is required to notify the National Institutes of Health (NIH) when individuals identified as Project Director/Principal Investigator or other Senior/Key personnel in an NIH notice of award are removed from their position or are otherwise disciplined by SDSURF due to concerns about harassment, bullying, retaliation, or hostile working condition. SDSURF will notify NIH within 30 days of the removal or disciplinary action.

1. Notification must be submitted to NIH using the [NIH's dedicated online form](#)
2. All required notifications must include, at a minimum:
  - a. name of the Authorized Organization Representative submitting the notification
  - b. name of the individual of concern
  - c. description of the concern(s)
  - d. action(s) taken
  - e. any anticipated impact on the NIH-funded award(s)

For NIH-sponsored conference grant (R13 or U13) awards, SDSURF will ensure the PI has communicated the SDSURF Code of Ethics Policy and includes clear and accessible means of reporting violation in accordance with NIH policies.

## **Appendix C – Definitions of Prohibited Conduct**

### **Policy Definitions**

The Policy Definitions are not intended to be identical to legal requirements, and in some cases, conduct may be determined to violate this Policy even though it does not necessarily violate federal or state law.

References to the singular in the policy definitions include the plural, as applicable.

### **Prohibited Conduct**

This Nondiscrimination Policy prohibits Discrimination, Harassment, Sex-based Harassment, Sexual Misconduct, Sexual Harassment, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, Prohibited Consensual Relationships, and Retaliation as defined below.

A. **Discrimination** is conduct that causes harm to a Complainant based on their actual or perceived Protected Status within the SDSURF's educational programs, activities, or employment which results in the denial or limitation of services, benefits, or opportunities provided by the SDSURF. Under this Nondiscrimination Policy, the definition of Discrimination includes:

1. Different Treatment Discrimination: Different Treatment Discrimination occurs when the Complainant is: 1) treated less favorably; 2) than other similarly situated individuals under similar circumstances; 3) because of the Complainant's actual or perceived Protected Status; and 4) not for a legitimate, nondiscriminatory reason. Insignificant or trivial actions or conduct not likely to do more than anger or upset a Complainant do not constitute "Different Treatment Discrimination."
  - a. Under this Nondiscrimination Policy, discrimination in employment includes any adverse employment action or conduct that is reasonably likely to impair the Employee's job performance or prospects for advancement or promotion.
  - b. An allegation that an Employee is receiving unequal pay because of their Protected Status (for example, under the California Equal Pay Act) constitutes a Discrimination Complaint under this Nondiscrimination Policy.

2. Disparate Impact Discrimination: 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.

B. **Harassment** means unwelcome verbal, nonverbal or physical conduct engaged in because of an individual Complainant's Protected Status. Harassment includes, but is not limited to, verbal harassment (e.g., epithets, derogatory comments, or slurs), physical harassment (e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement), and visual forms of harassment (e.g., derogatory posters, cartoons, drawings, symbols, or gestures.). Single, isolated incidents will typically be insufficient to rise to the level of Harassment.

Harassment may occur when:

1. Submitting to, or rejecting, the verbal, nonverbal or physical conduct is explicitly or implicitly a basis for:
  - a. Any decision affecting a term or condition of the Complainant's employment; or
  - b. Any decision affecting a Complainant's academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the University.

OR

2. The conduct is sufficiently severe or pervasive so that its effect, whether intended or not, could be considered by a reasonable person under similar circumstances and with similar identities, and is in fact considered by the Complainant, as creating an intimidating, hostile, or offensive work or educational environment that denies or substantially limits an individual's ability to participate in or benefit from employment and/or educational, services, activities, or other privileges provided by the SDSURF.

Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

- a. The frequency, nature, and duration of the conduct.
- b. Whether the conduct was physically threatening.

- c. Whether the conduct arose in the context of other discriminatory conduct or other misconduct.
- d. The degree to which the conduct affected the Complainant's ability to access SDSURF's educational programs, activities, or employment.
- e. The Parties' ages, roles within the SDSURF'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
- f. Other Harassment in the SDSURF's educational programs, activities, or employment.

C. **Sex-based Harassment** is a form of sex discrimination and means Sexual Harassment and other Harassment based on Sex or Gender, including Gender Expression, Gender Identity, Pregnancy or related conditions, Sex Stereotypes, Sex Characteristics, or Sexual Orientation, including:

1. Hostile environment or Quid Pro Quo Harassment (e.g., when an Employee conditions a benefit on a Complainant's participation in unwelcome sexual conduct);
2. Specific offenses (e.g., Dating Violence, Domestic Violence, Sexual Exploitation, and Stalking); and/or
3. Sexual Misconduct.

D. **Sexual Misconduct** means engaging in any sexual activity without first obtaining Affirmative Consent to the specific activity, whether or not the conduct violates any civil or criminal law. All sexual activity between members of the SDSURF community must be based on Affirmative Consent.

1. Sexual Misconduct includes, but is not limited to, the following conduct:
  - a. **Sexual Assault**, which includes:
    - **Rape** is the penetration, or attempted penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the Affirmative Consent of

the Complainant. Rape also includes the attempted penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the Affirmative Consent of the Complainant, with the present ability and the intent to commit Rape.

- **Fondling** is the touching of the private body parts of another person for the purpose of sexual gratification, without the Affirmative Consent of the victim, including instances where the Complainant is incapable of giving Affirmative Consent because of their age or because of their temporary or permanent mental incapacity.
  - **Incest** is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
  - **Statutory Rape** is sexual intercourse with a person who is under the age of 18 years, the California statutory age of consent.
- b. an attempt, coupled with the ability, to commit a violent injury on the person of another because of that person's Gender or Sex,
  - c. the intentional touching of another person's private body parts without Affirmative Consent,
  - d. intentionally causing a person to touch the private body parts of another without Affirmative Consent,
  - e. using a person's own private body part to intentionally touch another person's body without Affirmative Consent,
  - f. any unwelcome physical sexual acts, such as unwelcome sexual touching,
  - g. using physical force, violence, threat, or intimidation to engage in sexual activity,
  - h. ignoring the objections of the other person to engage in sexual activity,



- i. causing the other person's incapacitation through the use of drugs or alcohol to engage in sexual activity,
- j. taking advantage of the other person's incapacitation to engage in sexual activity
  - Private body part means the sexual organ, anus, groin, buttocks, or breasts of any person.
  - Sexual activity between a Minor and a person who is at least 18 and two years older than the Minor always constitutes Sexual Misconduct, even if there is Affirmative Consent to all sexual activity. The existence of Affirmative Consent and/or the type of sexual activity may be relevant to the determination of an appropriate Disciplinary Sanction.
  - Persons of all Genders, Gender Identities, Gender Expressions, and Sexual Orientations can be victims of these forms of Sexual Misconduct.

2. Sexual activity includes, but is not limited to:

- a. kissing,
- b. touching private body parts,
- c. fondling,
- d. intercourse,
- e. penetration, no matter how slight, of the vagina or anus with any part or object,
- f. oral copulation of a sex organ by another person.

3. **Affirmative Consent** means an agreement to engage in sexual activity that is informed, affirmative, conscious, voluntary, and mutual. Affirmative Consent must be given freely and without coercion, force, threats, intimidation, or by taking advantage of another person's incapacitation. It is the responsibility of each person involved in the sexual activity to ensure Affirmative Consent has been obtained from the other participant(s) prior to engaging in the sexual activity.

- a. Affirmative consent is given by clear words or actions. Affirmative consent includes knowledge and agreement to engage in the specific sexual activity.
  - b. Affirmative Consent must be ongoing throughout a sexual activity and can be withdrawn or revoked at any time, including after sexual activity begins. Once consent is withdrawn or revoked and clearly communicated, the sexual activity must stop immediately.
  - c. Consent to one form of sexual activity or one sexual act does not constitute consent to other forms of sexual activity. Consent given to sexual activity on one occasion does not constitute consent on another occasion.
  - d. Affirmative Consent cannot be inferred from an existing or previous dating, social, or sexual relationship between the Parties.
  - e. Silence does not mean there is Affirmative Consent.
  - f. Lack of protest or resistance does not mean there is Affirmative Consent.
  - g. A request for someone to use a condom or birth control does not, in and of itself, mean there is Affirmative Consent.
  - h. Affirmative Consent cannot be given by a person who is incapacitated. A person is unable to consent when asleep, unconscious, or incapacitated due to the influence of drugs, alcohol, or medication.
4. **Incapacitation:** A person is incapacitated if they lack the physical and/or mental ability to make informed, rational decisions about whether or not to engage in sexual activity. A person with a medical or mental disability may also lack the capacity to give consent. Incapacitation exists when a person cannot understand the fact, nature, or extent of the sexual activity.
- a. It shall not be a valid excuse that a person affirmatively consented to the sexual activity if the Respondent knew or reasonably should have known that the person was unable to consent to the sexual activity under any of the following circumstances:

- The person was asleep or unconscious;
  - The person was incapacitated due to the influence of drugs, alcohol, or medication, so that the person could not understand the fact, nature, or extent of the sexual activity; or
  - The person was unable to communicate due to a physical or mental condition.
- b. It shall not be a valid excuse that the Respondent believed that the person consented to the sexual activity under either of the following circumstances:
- The Respondent's belief in Affirmative Consent arose from the intoxication or recklessness of the Respondent;
  - The Respondent did not take reasonable steps, in the circumstances known to the Respondent at the time, to ascertain whether the person affirmatively consented.
- c. Whether an intoxicated person (as a result of using alcohol, drugs, or medication) is incapacitated will require an individualized determination about the extent to which the alcohol or other drugs impact the person's decision-making ability, awareness of consequences, and ability to make informed judgments. The level of intoxication may change over a period of time based on a variety of individual factors, including the amount of substance consumed, speed of intake, body mass, height, weight, tolerance, food consumption, drinking patterns, and metabolism. A person's own intoxication or incapacitation from drugs or alcohol does not diminish that person's responsibility to obtain Affirmative Consent before engaging in sexual activity.
- d. Incapacitation due to alcohol, drugs or medication is a state of intoxication that is so severe that it interferes with a person's capacity to make informed and knowing decisions. A person who is incapacitated may not be able to understand where they are, whom they are with, how they got there, or what is happening. Signs that a person may be incapacitated due to the influence of drugs, alcohol, or medication include, but are not limited to, the following:

- slurred speech or difficulty communicating clearly;
  - clumsiness or lack of physical coordination (e.g., difficulty standing or walking without assistance);
  - impaired motor skills (e.g., eating, drinking, texting);
  - disorientation regarding time and place;
  - difficulty concentrating;
  - vomiting;
  - combativeness or emotional volatility; or
  - sleeping, unconsciousness, or going in and out of consciousness.
- e. Incapacitation may also include memory impairment or an inability to recall entire or partial events (sometimes referred to as “black-out” or “brown-out”). A person may experience this symptom while appearing to be functioning “normally,” including communicating through actions or words that can reasonably and objectively be interpreted as communicating consent to engage in sexual activity. Total or partial loss of memory alone may not be sufficient, without additional evidence, to prove that an individual was incapacitated under this Policy. Whether sexual activity under these circumstances constitutes Prohibited Conduct depends on the presence or absence of the outwardly observable factors indicating that an individual is incapacitated, as described above.
- f. In evaluating Affirmative Consent in cases involving incapacitation, the SDSURF considers the totality of available information in determining whether a Respondent knew or reasonably should have known that the Complainant was incapacitated.

E. **Sexual Harassment** means unwelcome verbal, nonverbal or physical conduct of a sexual nature that includes, but is not limited to, sexual advances, requests for sexual favors, offering employment benefits or giving preferential treatment in exchange for sexual favors, or any other conduct of a sexual nature.

There are two kinds of Sexual Harassment:

1. **Quid pro quo:** Quid pro quo is Latin for “this for that” and occurs when an Employee, agent, or other person in a position of power conditions an employment or educational benefit or service on submission to sexual advances or other conduct based on sex.

Quid pro quo harassment exists when submitting to, or rejecting, the verbal, nonverbal or physical conduct is explicitly or implicitly a basis for:

- a. Any decision affecting a term or condition of the Complainant's employment; or
- b. Any decision affecting a Complainant's academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the University.

OR

2. **Hostile environment harassment** is 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 SDSURF's educational programs, activities, or employment. Hostile environment harassment must either:

- a. Create an intimidating, hostile or offensive work environment; or
- b. Limit an employee's ability to participate in or benefit from the services, activities, or opportunities offered by SDSURF. Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
  - 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 SDSURF's educational programs, activities or employment;
  - The Parties' ages, roles within the SDSURF'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 SDSURF's educational programs, activities, or employment. Sexual Harassment could include being forced to engage in unwanted sexual contact as a condition of membership in a student organization or in exchange for a raise or promotion; being subjected to video exploitation or a campaign of sexually explicit content; or frequently being exposed to unwanted images of a sexual nature in a work environment where claiming that the conduct was not motivated by sexual desire is not a defense to a Complaint of Sexual Harassment.

F. **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:

1. The prostituting of another person.
2. 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.
3. The recording of images, including video or photograph, or audio of another person's sexual activity or intimate parts, without that person's consent.
4. The distribution of images, including video or photographs, or audio of another person's sexual activity or private body 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. This includes distribution of digitally altered or artificial-intelligence-generated images, video, and audio.
5. The viewing of another person's sexual activity or private body 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.

G. **Bullying** means the repetitive, intentional hurting of one person or group by another person or group, where the relationship involves an imbalance of power.

H. **Dating Violence** means Physical Violence or threat of Physical Violence committed by a person:

1. who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and
2. where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - a. The length of the relationship.
  - b. The type of relationship.
  - c. The frequency of interaction between the individuals involved in the relationship.

I. **Domestic Violence** means Physical Violence or threat of Physical Violence committed by a current or former spouse or intimate partner of the Complainant, by a person with whom the Complainant shares a child in common, by a person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner, or by a person similarly situated to a spouse of the Complainant. Domestic violence also includes acts against a Minor or adult victim who is protected from those acts under the family or domestic laws of the state.

J. **Stalking** means engaging in a Course of Conduct directed at a specific person that would cause a reasonable person to fear for the safety of self or others' safety or to suffer Substantial Emotional Distress. For purposes of this definition:

1. Course of Conduct means two or more acts, including but not limited to, acts in which one party directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about the other party, or interferes with the other party's property.
2. Substantial Emotional Distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

K. **Physical Violence** means physical conduct that intentionally or recklessly threatens the health and safety of the recipient of the behavior, including assault.

L. **Prohibited Consensual Relationships** include consensual sexual or romantic relationships between an Employee and any Student or Employee over whom they exercise direct or otherwise significant academic, administrative, supervisory, evaluative, counseling, or extracurricular authority.

1. A consensual relationship means a sexual or romantic relationship between two individuals who voluntarily enter such a relationship.
2. While sexual and/or romantic relationships between members of the University community may begin as consensual, they may evolve into situations that lead to Discrimination, Harassment, Retaliation, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, or Stalking subject to this Nondiscrimination Policy.
3. It is a violation of this Nondiscrimination Policy for an Employee to enter a Prohibited Consensual Relationship.
4. Examples of Prohibited Consensual Relationships include, but are not limited to, a supervisor and an employee in their chain of command; a faculty member and a student enrolled in their class; a counselor and a student they are advising; a resident advisor and a student in their building; a club advisor and club member.

M. **Retaliation** is intimidation, coercion, or discrimination against any individual for the purpose of interfering with their exercise of any rights under this Nondiscrimination Policy by:

1. Reporting or filing a Complaint;
2. Participating or refusing to participate in any manner in any Policy-related investigation or proceeding, including a hearing;
3. Opposing conduct which was reasonably and in good faith believed to be in violation of this Nondiscrimination Policy;
4. Assisting or participating in an investigation or proceeding under this Nondiscrimination Policy, regardless of whether the Complaint was substantiated; or
5. Assisting someone else in reporting or opposing a violation of this Nondiscrimination Policy or assisting someone else in reporting or opposing Retaliation under this Nondiscrimination Policy.



- a. For purposes of this definition, Retaliation includes conduct that would discourage a reasonable person from reporting or participating in a process provided for in this Policy, including threats, intimidation, coercion, reprisals, discrimination, and adverse employment or educational actions.
- b. Peer Retaliation, which is defined as Retaliation by one Student against another Student, is also prohibited.
- c. Retaliation may occur even when there is not a power or authority differential between the individuals involved.
- d. The exercise of rights protected under the First Amendment does not constitute Retaliation prohibited under this definition.
- e. Good faith actions lawfully pursued in response to a Complaint, such as gathering evidence, providing or disciplining Employees found to be in violation of this Nondiscrimination Policy, without more, are not considered Retaliation.

## Appendix D – Definitions of Terms

- A. **Administrative Leave / Administrative Action:** Any temporary/ interim suspension or permanent removal of an employee, a Principal Investigator (PI), or co-PI, or any administrative action imposed on the employee, PI, or co-PI by the SDSU Research Foundation or awardee under organization policies or codes of conduct, statutes, regulations, or executive orders, relating to employment activities, including but not limited to the following: teaching, advising, mentoring, research, management/administrative duties, or presence on SDSURF property.
- B. **Age:** With respect to Discrimination or Harassment, Age refers to the chronological age of any individual who is 40 years old or older. Age Discrimination in employment may include hiring, promotion, job assignments, training opportunities, compensation, layoffs, or termination decisions. Age Discrimination in non-employment programs and activities may include access to programs and activities, treatment in the workplace, or disciplinary action. Age based stereotypes refer to generalized opinions about matters including the qualifications, job performance, health, work habits, and productivity of individuals over 40. With respect to discrimination in non-employment programs and activities, Age means how old a person is, or the number of years from the date of a person's birth.

### **Age is a Protected Status.**

- C. **Authorized Organization Representative (AOR):** Administrative official who is authorized to make certifications and assurances on behalf of a proposing organization. SDSURF officials are the Sponsored Research Administration Director and/or Assistant Vice President of Research Support Services.
- D. **Complainant** means a person alleged to have been subjected to conduct that could constitute a violation of this Nondiscrimination Policy, if they have a legal right to act on behalf of such person, or if the SDSURF Chief Human Resources Officer or their designee initiates a Complaint consistent with the requirements of this Nondiscrimination Policy. It also includes any person who is reported to have been impacted by a violation of this Nondiscrimination Policy in cases where some other person has made a report on that person's behalf (this person may be referred to as the "Impacted Party"). A Complainant may also be called a Party to the Complaint.

- E. **Complaint** means an oral or written report to the SDSURF Chief Human Resources Officer or their designee that objectively can be understood as a request for an investigation and determination about an alleged violation of this Nondiscrimination Policy. SDSURF Human Resources will respond to the Complaint in accordance with the Procedures accompanying this Nondiscrimination Policy.
- F. **Consolidation** means the joining or combining the investigation and hearing process for Complaints against more than one Respondent, or by more than one Complainant against one or more Respondents, or by one Party against another Party, when the allegations arise out of the same facts or circumstances.
- G. **Disability** means:
- a. Having a physical or mental condition that limits a major life activity. "Limits" means making the achievement of a major life activity difficult without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. A "major life activity" is broadly construed and includes physical, mental, and social activities (such as walking, talking, seeing, hearing, thinking) and working; or
  - b. Having a known history of a qualifying impairment; or
  - c. Being regarded or treated as having or having had a qualifying impairment; or
  - d. Being regarded or treated as having or having had such an impairment that has no presently disabling effects but may become a qualifying impairment in the future.

**Disability** includes both visible and invisible disabilities, temporary or permanent disabilities, and disabilities that are apparent at birth or develop later in life. Disability includes HIV and AIDS.

**Disability is a Protected Status.**

- H. **Disciplinary Action** means consequences imposed on a Respondent following a determination that they violated this Nondiscrimination Policy.

- I. **Employee** means a person legally holding a position in the SDSU Research Foundation. This term includes full-time, part-time, temporary, intermittent, contract, student, and per-diem positions. Employee also includes individuals who were employed by the SDSURF at the time the Complaint was filed and have since left the employ of the SDSURF. This term does not include SDSU Employees or other Third Parties.
- J. **Finding/Determination:** the final disposition of a matter involving discrimination, harassment, sexual harassment, or other form of prohibited conduct as outlined in this policy, which includes the exhaustion of permissible appeals exercised by the employee, PI, or co-PI, or a conviction of a sexual offense in a criminal court of law.
- K. **Gender** encompasses the social and cultural attributes, roles, behaviors, and identities associated with individuals based on their perceived or assigned sex. Important aspects of Gender include Gender Identity and Gender Expression.
- a. **Gender Identity** refers to a person's innate, deeply felt psychological identification of Gender, which may or may not correspond to the person's sex assigned at birth (the sex originally listed on a person's birth certificate).
- i. **Nonbinary** is a Gender Identity which falls outside of the Gender binary, meaning an individual does not identify as strictly male or female. A nonbinary person can identify as both or neither male and female, or sometimes one or the other. There are several other terms used to describe Gender Identities outside of the male and female binary such as genderqueer, gender non-conforming, agender, and bigender. Though these terms have slightly different meanings, they refer to an experience of Gender outside of the binary.
- ii. **Transgender** (sometimes shortened to Trans or TG) people are those whose Gender Identity differs from the sex they were assigned at birth. A Transgender person may or may not medically transition and may identify as male, female, nonbinary, or another Gender.
- b. **Gender Expression** refers to external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, grooming, mannerisms, speech patterns, and social interactions. Social or cultural norms can vary widely

and some characteristics that may be accepted as masculine, feminine, or neutral in one culture may not be assessed similarly in another.

**Gender is a Protected Status.**

- L. **Genetic Information** means:
- a. The person's genetic tests.
  - b. The genetic tests of the person's family members.
  - c. The manifestation of a disease or disorder in the person's family members.
  - d. Any request for, or receipt of genetic services, or participation in clinical research that includes genetic services, by a person or any person's family member.

Genetic Information does not include information about the sex or age of any person.

**Genetic Information is a Protected Status.**

- M. **Investigator** means the person tasked by the Research Foundation with investigating a Complaint. An investigator interviews the Parties and relevant witnesses, reviews documents and physical evidence, analyzes information, makes credibility determinations in appropriate cases, and prepares reports summarizing their findings and conclusions. The Investigator may be the SDSURF Chief Human Resources Officer or their designee, or an external consultant. An investigator shall not have any conflicts of interest in the matter under investigation.
- N. **Marital Status** means an individual's state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state, including domestic partnership.

**Marital Status is a Protected Status.**

- O. **Medical Condition** means either of the following:
- a. Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer; or

b. Genetic characteristics. For purposes of this section, "genetic characteristics" means either of the following:

- Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder; or
- Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

**Medical Condition is a Protected Status.**

P. **Minor** means a person younger than 18 years old.

Q. **Nationality** includes citizenship, country of origin, and national origin. It also includes language use restrictions and holding or presenting a driver's license issued under section 12801.9 of the Vehicle Code.

**Nationality is a Protected Status.**

R. **National Institute of Health (NIH):** A part of the U.S. Department of Health and Human Services, is the nation's medical research agency funding important discoveries that improve health, lengthen life, and reduce illness and disability.

S. **National Science Foundation (NSF):** An independent agency of the United States federal government that supports fundamental research and education in all the non-medical field of science and engineering. Its medical counterpart is the National Institute of Health (NIH).

T. **Party** means a Complainant or Respondent.

U. **Pregnancy** or related conditions mean:

- a. Pregnancy, childbirth, termination of pregnancy, or lactation.

- b. Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- c. Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

**Pregnancy is a Protected Status.**

- V. **Preponderance of the Evidence** is a standard of proof that determines whether alleged conduct more likely than not occurred based on the evidence presented or facts available at the time of the decision. It means that the evidence presented by one Party is more convincing or has greater weight than the evidence presented by the other Party.
- W. **Protected Status** includes Age, Disability (physical or 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.
- X. **Race or Ethnicity** includes shared ancestry, color, caste, ethnic group identification or characteristics, ethnic background, and citizenship or residency in a country.

**Race or Ethnicity is a Protected Status.**

- Y. **Reasonable Accommodation:** SDSURF will provide reasonable accommodation to qualified individuals with a disability in accordance with federal and state guidelines, unless doing so would cause undue business hardship. Reasonable accommodation will be determined by SDSURF Human Resources following an interactive process with those involved to identify the nature and extent of the restrictions and the appropriate accommodation.
- Z. **Religion or Religious Creed** includes all aspects of religious belief, observance, and practice, including religious dress and grooming practices (such as wearing religious clothing, head or face covering, jewelry, and artifacts), and includes agnosticism and atheism.

**Religion or Religious Creed is a Protected Status.**

- AA. **Reporting Party** means any individual, whether they are mandated or not, who files a report of a possible violation of the Nondiscrimination Policy on behalf of a Complainant. A Reporting Party is not entitled to information about the complaint resolution process. A Reporting Party does not assume the role of the Complainant when the Complainant elects not to participate in the complaint resolution process.
- BB. **Respondent** means a person who is alleged to have violated this Nondiscrimination Policy. A Respondent may include an SDSURF Employee, Student, or Third Party.
- CC. **SDSURF Chief Human Resources Officer (CHRO)** means who is responsible for administering this Nondiscrimination Policy and coordinating compliance with related state and federal laws prohibiting Discrimination, Harassment and Retaliation. The SDSURF CHRO may delegate tasks to one or more **designees**, provided that any designee shall be an HR Representative, or an external consultant, and the SDSURF CHRO or their designee retains overall responsibility and authority.
- DD. **Sex** refers to the biological category (male, female, intersex) a person is assigned at birth based on a combination of factors. Sex includes, but is not limited to pregnancy, childbirth, termination of pregnancy, lactation, any related medical conditions, or recovery.
- a. **Sex Characteristics** refer to the outward and inward biological traits and attributes that are typically associated with being male, female, or intersex. These characteristics are determined by a combination of genetic, hormonal, and anatomical factors, such as reproductive or sexual functions.
  - b. **Sex Stereotype** means an assumption about a person's appearance or behavior or about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual's sex.

**Sex is a Protected Status.**

- EE. **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.

**Sexual Orientation is a Protected Status.**



FF. **Supportive Measures** are designed to restore or preserve equal access to SDSURF programs and activities in the workplace without unreasonably burdening the other Party, including to protect the safety of all Parties or the work environment. Supportive Measures may include extensions of deadlines or other work-related adjustments, modifications of work schedules, no-contact directives (unilateral or mutual, depending on the circumstances) or restrictions on contact with the other Party, changes in work locations, leaves of absence, and other similar measures when appropriate.

GG. **Third-Party** means a person other than an SDSURF Employee. Examples include employees of SDSU, students of SDSU, unpaid interns, volunteers, applicants for employment, independent contractors, vendors, and their employees, and visitors.

HH. **Title IX** means Title IX of the Education Amendments of 1972. The Title IX Regulations prohibit discrimination on the basis of sex in any term, condition, or privilege of employment, including recruitment, hiring, promotion, and consideration for tenure in any covered education program or activity.

II. **Training:** All SDSURF employees receive training on how to prevent discrimination, harassment, retaliation, sexual misconduct, dating and domestic violence, and stalking and to encourage reporting of such conduct. Supervisory employees will go through two hours of interactive sexual harassment training within six months of the employee's assignment to a supervisory position and every two years thereafter as required by California law.

Students of SDSU are provided training on discrimination and harassment during orientation and must complete post-orientation modules that contain information on SDSU's policies. Additionally, all incoming students are required to complete Mandatory Sexual Violence Prevention and Awareness training, which provides information on the University's mechanisms for reporting to the University's Center for the Prevention of Harassment and Discrimination (CPHD).

JJ. **Veteran or Military Status** means service in the armed forces.

**Veteran or Military Status is a Protected Status.**

- KK. **Working Days** are defined as Monday through Friday, excluding all SDSURF recognized holidays or closures where the Complaint originated.
- LL. **Workplaces** include anyplace where business is conducted through SDSURF, and any agency and project supported and funded through SDSURF inclusive but not limited to off-campus and off-site locations, conferences, in the field, and other areas where data/information/samples are being collected, or research activities are conducted.

## Appendix E – Acknowledgement and Agreement



### **NON-DISCRIMINATION POLICY ACKNOWLEDGMENT AND AGREEMENT**

I acknowledge that I have received a copy of the Non-Discrimination Policy. I understand that this policy reflects important legal rights and obligations with respect to conduct in the workplace and in all work-related settings. I agree to carefully review the policy and abide by it.

I am funded partially or in full by \_\_\_\_\_NSF or \_\_\_\_\_NIH (checkmark)

I have reviewed the specific agency requirements and policies and procedures for reporting harassment.

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Date**

**Printed Name:** \_\_\_\_\_