



TITLE IX AT NMCC

BRETT HARVEY, MISSISSIPPI STATE UNIVERSITY

SEPTEMBER 2023



TITLE IX IN A NUTSHELL

- Title IX of the Education Amendments of 1972 forbids sex discrimination in connection with federally funded educational institutions.
- For a long time, it was popularly understood to be about sports.
- In reality, it has always encompassed everything we do as educational institutions: admissions, employment, housing, athletics, etc.
- In the late 1990's and early 2000's, a series of Supreme Court cases made it clear that Title IX imposes duties on institutions to respond to alleged sexual harassment.
- By the 2010's, it was clear that the law required reasonable efforts to investigate and respond to other forms of **sexual misconduct**, including rape/sexual assault, dating or domestic violence, and stalking.
- Because the regulatory requirements for responding to sexual misconduct are by far the most complex, this training focuses mainly on them. **But questions on any aspect of Title IX or gender equity are welcome!**

THE BASIC STRUCTURE OF FEDERAL SEXUAL MISCONDUCT LAWS IN HIGHER ED, 2023

← LESS SPECIFIC

MORE SPECIFIC →



STATUTES

TITLE IX (1972)

CAMPUS SAVE ACT/VAWA

CLERY ACT



CASE LAW

GEBSER (1998) and *DAVIS* (1999)



GUIDANCE

TRUMP DOE REGS

PENDING BIDEN DOE REGS

34 CFR 106

NOTABLE CHANGES IN PENDING DOE/BIDEN ADMINISTRATION REVISIONS TO TITLE IX REGULATIONS

- Permits return to single investigator model.
- Expansion of duty to investigate to respond to, e.g., off-campus houses owned by student organizations, and to university-related impacts of non-connected violations (e.g., harassment based on totally unrelated assault).
- Clarifies protection from harassment/discrimination based on sexual orientation or gender identity.
- Requires investigation of complaints even where no formal complaint is filed.
- Requires training on “relevance” of evidence. **We will train on this today.**

WHAT DOES TITLE IX REQUIRE IN RESPONDING TO SEXUAL MISCONDUCT?

- A clear written policy.
- At least one clearly identified channel for reporting violations.
- Due process protections, like advance notice of interviews and hearings.
- An impartial and reasonably thorough investigation.
- An opportunity to review the evidence.
- Opportunity to have an advisor/attorney present.
- An appointed advisor if a party does not have one.
- Currently, a live hearing before any sanction is implemented.
- An appeal process.
- A written notification of the outcome and other procedural points.
- Training of your team.

TRAINING REQUIREMENTS

106.45(b)(1)(iii): A recipient must ensure that *Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process*, receive training on:

- The definition of sexual harassment in § 106.30
- The scope of the recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

A recipient must ensure that *decision-makers* receive training on:

- Any technology to be used at a live hearing
- Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

A recipient also must ensure that *investigators* receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.

Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

TRAINING REQUIREMENTS

It is essential that every participant in NMCC's Title IX process carefully review the college's policies on sexual misconduct and harassment, as they provide the authoritative statement of standards, policy, and procedure.

If you have questions about the contents of the policy, please contact the Title IX Coordinator.

IN PRACTICAL TERMS, TITLE IX REQUIRES:

- A properly trained, dedicated Title IX officer with sufficient autonomy and authority
- A clearly written policy, regularly updated, distinct from other HR/student policies
- Clear differentiation of roles to avoid any appearance of conflict
- Well-trained, impartial investigators
- Adequate time and resources
- An impartial, reliable adjudicator
- Excellent documentation
- Strong, fair moment-to-moment decisionmaking



TITLE IX PROCESS OVERVIEW

**BRETT HARVEY
SEPTEMBER 2023**

TITLE IX COMPLIANCE PERSONNEL, PART 1

- **Title IX Coordinator:** “Coordinates [institution’s] efforts to comply with [...] responsibilities” under Title IX and regulations.
 - **Must** contact complainant, receive formal complaints, and authorize any investigations where the complainant does not participate.
 - **Must** ensure procedural requirements for investigation/adjudication (e.g., proper notice, sufficient time) are followed.
 - **Must** coordinate supportive measures.
 - **May or may not** serve as investigator, oversee investigation process, and/or prepare mandatory investigative report.
 - **May not** serve as adjudicator or fact-finder in hearing, or make ultimate decisions on responsibility/non-responsibility.
- **Officials With Authority To Institute Corrective Measures (OWA’s):** Any official, other than the Title IX Coordinator, who has authority under your institution’s policies to institute corrective measures (such as discipline, no-contact orders, or other interim measures) in response to harassment.
 - **Must** relay information suggesting sexual harassment to the Title IX coordinator, as the OWA’s knowledge is imputed to the institution.
- **Investigators:** Responsible for interviewing witnesses, collecting evidence, and preparing investigation report before hearing.
 - **May or may not** also function as Title IX Coordinator.
 - **May not** serve as an adjudicator.

TITLE IX COMPLIANCE PERSONNEL, PART 2

- **Advocates:** Institutions are required to make available to the complainant and respondent an advisor *at the live hearing*.
 - **Must** conduct cross-examination of the opposing party.
 - **May or may not** be made available prior to hearing.
 - **May or may not** be an attorney.
- **“Decision-Makers”:** Responsible for deciding the ultimate question of responsibility or non-responsibility at a live, recorded hearing, and for determining disciplinary sanctions.
 - **Must** make determinations as to the permissibility of cross-examination questions, and explain rationale for excluding any question.
 - **Must** make final determination, with assistance from investigation memorandum, on admissibility of evidence.
 - **Must** prepare a written determination explaining result of hearing, including responsibility/non-responsibility, procedural steps in investigation, findings of fact, application of fact to institution policies, disciplinary sanctions, and appeal procedures.
 - **May be** a single individual or a panel.
 - **Must not** be the same person as Title IX Coordinator or investigator.
- **Appellate Decision-Makers**
 - **Must** review appeals by complainants or respondents for procedural errors or new evidence that could not have previously been presented.
 - **May not** be the same person as Title IX Coordinator, investigator, or original decision maker.

TITLE IX SEXUAL HARASSMENT

TITLE IX SEXUAL HARASSMENT: Conduct on the basis of sex that falls within one or more of three categories:

- **Quid Pro Quo Harassment:** When an employee of HCC conditions the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct
- **Hostile Environment Harassment:** When conduct on the basis of sex is sufficiently severe, pervasive, and objectively offensive, as determined by a reasonable person, that it effectively denies a person equal access to NMCC programs or activities.
 - **Objective and Subjective Requirements:** The complainant must actually be subjectively offended AND the conduct must be judged by an objective "reasonable person" standard to be offensive.
 - **Severe or Pervasive:** Another objective standard. Some actions, such as groping or direct insults or threats, may be harassment despite happening only one time, if a reasonable person could determine that one instance is "pervasive enough" to deny equal access. NOTE that this requirement only applies to Hostile Environment Harassment. Offenses like sexual assault and domestic violence need not meet the "severe and pervasive" requirement.
- **Sexual Violence:** Sexual assault, domestic violence, dating violence, or stalking, as defined by policy.

SEXUAL VIOLENCE

- **Sexual Assault:** Any sexual act directed against another person, forcibly and/or against that person's will (or not forcibly/against will where the victim is incapable of giving consent).
 - “Sexual conduct is considered to be against a person's will where that person has not given **consent** as defined in this policy.”
 - “Sexual conduct is considered forcible where it occurs by means of **physical force or coercion** as defined in this policy.”
- **Domestic Violence:** Any felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim, co-parent of a child, cohabiting person, or similarly situated person.
 - In Mississippi, Simple Domestic Assault applies to anyone in the above groups who “**attempts to cause or purposely, knowingly or recklessly causes bodily injury to another**; or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (c) attempts by **physical menace to put another in fear of imminent serious bodily harm**.” So it's pretty broad.
- **Dating Violence:** Physical violence against a person who does not meet the Domestic Violence definition, but is or has been in a romantic or intimate relationship with the victim, as determined by (1) length of relationship; (2) type of relationship; and (3) frequency of interaction.
- **Stalking:** A course of conduct (based on sex) directed at a specific person that would cause a reasonable person to fear for his or her safety, or the safety of others, or suffer substantial emotional distress.

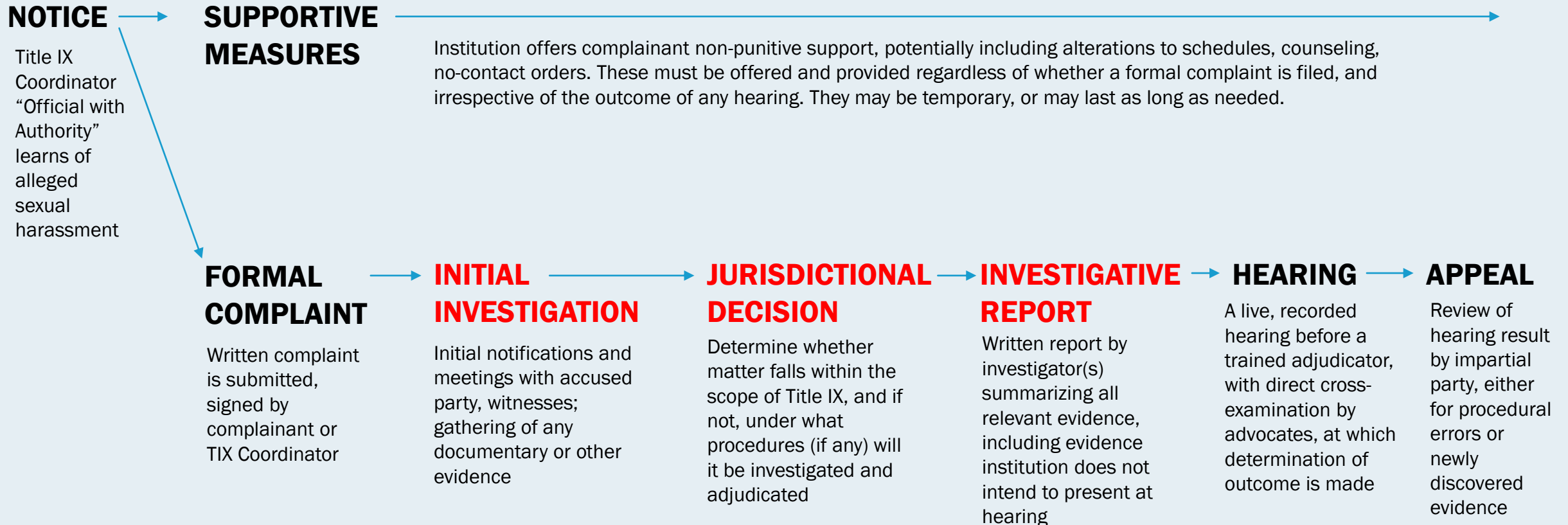
SEXUAL MISCONDUCT

- **Sexual Harassment** is unwelcome conduct of a sexual nature that is sufficiently severe, pervasive, or persistent that it denies or limits or is likely to deny or limit a reasonable person's ability to participate in or benefit from university programs, services, opportunities or activities. Does not include First Amendment protected expression.
- **Sexual Assault** refers to rape or other intentional physical sexual acts perpetrated against a person without their consent. Sexual assault includes sexual penetration or intercourse or any other physical contact of a sexual nature that occurs without consent. This includes but is not limited to deliberate physical touching as well as contact of a sexual nature with an object. Sexual assault also includes attempts to induce sexual activity via direct threats of physical violence, even where no physical contact ultimately occurs.
- **Sexual Exploitation** refers to taking sexual advantage of another person in a way that deliberately infringes on his or her reasonable expectation of privacy and/or security, but does not involve actual or attempted physical contact.
- **Dating/Domestic Violence** refers to acts of physical violence, or threats of physical violence, committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- **Stalking** refers to engaging in a course of conduct (based on sex) directed at a specific person that would cause a reasonable person to fear for their safety or suffer substantial emotional distress.

CONSENT, FORCE & COERCION

- **CONSENT** refers to words or actions that clearly show an active, knowing, and voluntary agreement to engage in a particular sexual activity.
 - **Determined objectively:** Would a reasonable person observing the encounter interpret words/actions as agreement?
 - **May be withdrawn** at any time by clear words or actions.
 - **Silence or the absence of resistance** by themselves are not consent.
 - **Consent with one person** is not consent to sexual activity with another.
 - **Incapacity** prevents a person from giving effective consent, but mere **impairment** does not.
 - **A person under the age of consent** cannot give effective consent, no matter what.
- **PHYSICAL FORCE** refers to physical contact with any person, by means of one's own body or an object, for the purpose of causing bodily harm or injury, or of forcibly constraining movement.
 - **Blocking exit** is a form of physical force, even if no actual contact is made.
 - **Verbal threats of physical force** can also preclude consent.
- **COERCION** is threatening an adverse consequence that is not physical force, but is nonetheless severe enough as to prevent a reasonable person from exercising free will in the decision whether to consent.

BASIC STEPS FOR AN INVESTIGATION



BONUS: TITLE IX AND PREGNANCY

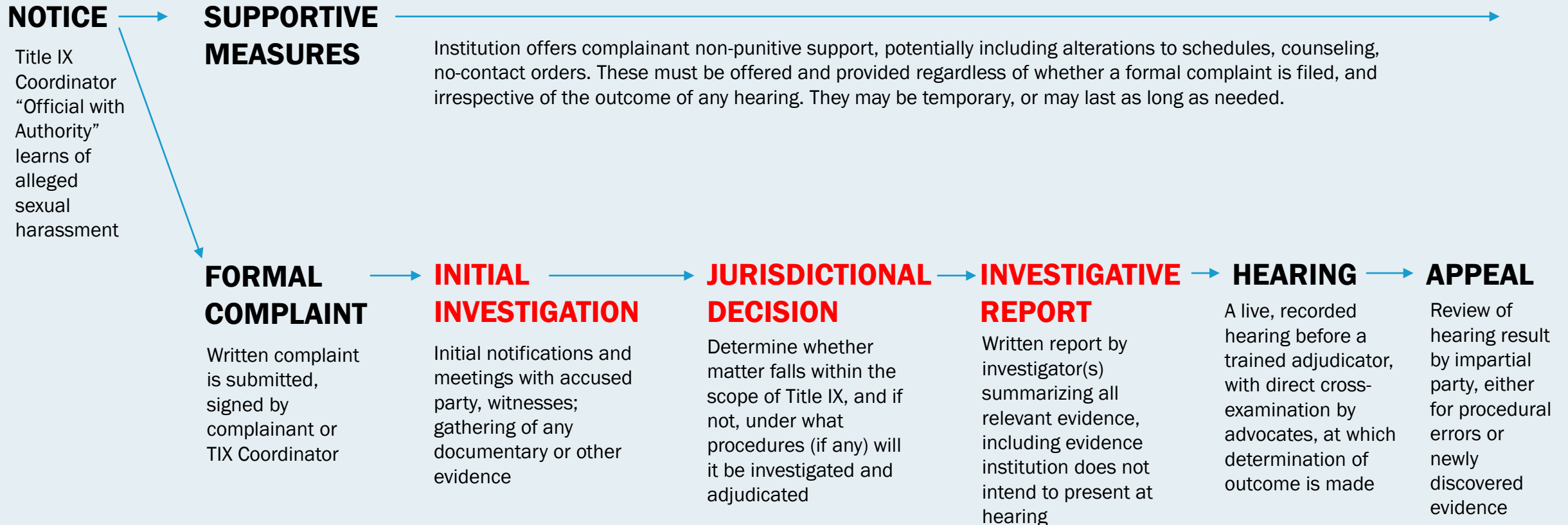
- Broadly speaking, Title IX protects against discrimination based on sex, which includes discrimination based on **pregnancy, childbirth, or related conditions**.
 - This means institutions generally may not prohibit participation in classes or extracurricular activities based on pregnancy.
- Institutions also must make **reasonable adjustments/accommodations** for pregnant students.
 - These may include larger desks, more frequent restroom breaks, excused absences for medical visits.
 - Accommodations may not be reasonable if they involve an undue financial burden (a demanding standard) or involve a fundamental alteration to the course or program.
 - While not all pregnancy related accommodations are disabilities within the meaning of ADA/504, broadly speaking they are handled similarly.
 - While these can be handled by any personnel, your Title IX Coordinator is responsible for, at minimum, directing accommodations to the correct person.
- Note that all of this applies to employees as much as to students under the Pregnancy Discrimination Act and the new Pregnant Workers Fairness Act (PWFA).



TITLE IX INVESTIGATIONS

**BRETT HARVEY
SEPTEMBER 2023**

BASIC STEPS FOR AN INVESTIGATION



STEP 1: BECOMING AWARE

- The Title IX process begins when your institution has “actual knowledge of sexual harassment in an education program or activity of the recipient.”
 - This happens when your Title IX Coordinator or an OWA learns about allegations that could constitute sexual harassment if proven.
 - If your policy mandates other employees report allegations, that does not trigger “actual knowledge” under these regulations, but you should nonetheless train these employees to understand that their reporting to the Title IX Coordinator is strictly required.
- **Initial Contact:** The Title IX Coordinator must “promptly contact the complainant” and do the following:
 - Discuss **supportive measures**, inform complainant that they are available with or without a formal complaint, and “consider the complainant’s wishes” with respect to the same; and
 - Explain the process for filing a **formal complaint**.
- **“Complainant”** in the regulations refers to the individual who is the alleged victim of harassment, not necessarily to the person who initially brought the matter to your attention. We will refer to the latter, if different, as the “Initial Reporter.”

STEP 1A: SUPPORTIVE MEASURES

- **“Supportive Measures”** are “non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.” (106.30(a))
- They are best thought of as a wholly separate and independent response track from the investigation/adjudication function.
 - They may be implemented without a formal complaint, which may mean that the respondent is not even aware that an allegation has been made.
 - They may continue after an investigation or adjudication has concluded, regardless of the outcome.
- **Non-Punitive:** Supportive measures may not “unreasonably burden the other party.”

STEP 1A: SUPPORTIVE MEASURES

- **Examples:** “Counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar measures.”
- **Sort of confidential:** “The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability to provide the supportive measures.”
 - A good rule of thumb is that, while you can and must share some information internally to implement these measures, information should be shared on a strict “need to know” basis, and except in the most unusual circumstances, never outside the institution.
- **Who implements them?** It can be the Title IX Coordinator or someone else, such as the Dean of Students office, provided they keep the TIXC apprised. It **cannot** be an advocate, adjudicator, or appellate adjudicator.

STEP 2: FORMAL COMPLAINT

- While supportive measures and notification start when the institution becomes aware of an allegation, the formal investigation and adjudication process does not start until a **formal complaint** is filed by the complainant with the Title IX Coordinator.
- The formal complaint must be a **written document** that contains the complainant's "physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint."
- There are **no strict requirements** as to the form of a formal complaint, provided the Title IX Coordinator is able to determine the basic nature of the issue being complained of.
- A formal complaint can be something as simple as an email saying "I would like to proceed with an investigation of the incident you spoke with me about yesterday."

STEP 2: FORMAL COMPLAINT

- **Notice to Accused Party:** Upon receipt of a formal complaint, and prior to any initial interview, the TIXC must provide the accused party/parties:
 - Notice of the grievance process—i.e., a copy of the institution’s Title IX policy.
 - Notice of the allegations of sexual harassment, “including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.”
 - Rule of thumb would be at least 48 hours prior to initial meeting.
 - Notification that the parties may have an advisor of their choice, who may be an attorney.
 - Notification if the institution’s code of conduct prohibits submitting false information or statements.
 - Details must include identities of the parties if known, the conduct allegedly constituting harassment, the date and location of the alleged incident, if known.
 - A written statement that the respondent is presumed not responsible for the alleged conduct, and that a determination on responsibility is made at the end of the grievance process.

STEP 3: INITIAL INVESTIGATION

- At this point, you initiate the investigation of the merits of the complaint.
- **Burden on Institution:** “The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties.” (106.45(b)(5)(i))
 - You cannot simply ask the parties to provide all relevant evidence, as they may not know what that means.
 - Ask more specific questions: Texts, social media messages, emails, names of people who were there shortly beforehand, shortly after, etc.
 - Ask more specific questions. For example:
 - *Are there texts, social media messages, emails?*
 - *Are there names of witnesses? People who were there shortly beforehand or shortly after? People to whom the parties described the events very shortly after they happened?*
 - Also, you should independently follow up on leads—e.g., locations that might have security footage, records of card swipes to enter buildings, etc.
 - You are not required to be perfect, or be law enforcement, but you must make a good faith effort.

YOUR ROLE AS AN INVESTIGATOR

- Your job as an investigator is to conduct an impartial investigation, collect the relevant facts—whether they support guilt or innocence—and summarize what you have found fairly and objectively for the Title IX Coordinator.
- You **may not** serve either as an advocate for a party or as an adjudicator. That would constitute a conflict of interest.
- **You must strive to be unbiased.** If you feel you have a bias for or against an individual, a group, or a general side (complainants/respondents), you must let the Title IX Coordinator know and recuse yourself.
- Being unbiased doesn't mean you don't draw conclusions. While the ultimate outcome is decided by an adjudicator, you may be asked to draw conclusions about relevance, credibility, and other issues in some situations—for example, in helping the Coordinator prepare the Investigative Report. Your conclusions must be based on a fair and objective assessment of the evidence.

INVESTIGATION OVERVIEW

- **Burden on Institution:** “The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties.” (106.45(b)(5)(i))
- You cannot simply ask the parties to provide all relevant evidence, as they may not know what that means. However, you generally cannot compel cooperation, which means the parties bear the responsibility of providing information that they are in the best position to know or provide.
- Try to ask more specific questions:
 - Are there texts, social media messages, emails?
 - Are there names of witnesses? People who were there shortly beforehand or shortly after? People to whom the parties described the events very shortly after they happened?
- Where relevant, you should independently follow up on leads—e.g., locations that might have security footage if there is reason to believe it may reveal pertinent information.
- You are not required to be perfect, or be law enforcement, but you must make a good faith effort.

INVESTIGATION PROCEDURE

- **Advance notice:** Parties must be informed in writing of all meetings of any kind related to the investigation, including investigative interviews. This means “date, time, location, and purpose.” Notice must be sufficiently early to allow “sufficient time for the party to prepare.” Under new regulations, this means at least 24 hours in advance.
- **Advisors:** Parties must be informed in writing of their right to be accompanied to all meetings by an advisor of their choice.
- **You may not impose “gag orders.”**
 - Students and employees are free to discuss matters and seek relevant information or evidence from others.
 - However, intimidation, threats or any other action that would deter a reasonable person from participating in an investigation is retaliation, and can be sanctioned.
 - One obvious exception is communication between the complainant and respondent. If the institution has implemented a no-contact order, which is common, this must be followed.
- **Parties must be permitted to view the evidence collected.** This normally occurs through the pre-hearing report, but they may also request to review it sooner via written request to the Title IX Coordinator. The general rule is, try to be as evenhanded as possible given the particular facts of the case.
- **Basic Rule of Thumb:** If you are at all in doubt, call the Title IX Coordinator.

INVESTIGATION TIPS

- The default order for investigation usually looks something like:
 - Receive formal complaint and provide written notices.
 - Interview complainant.
 - Interview respondent.
 - Based on initial interviews (1) gather any documentary evidence; (2) identify and schedule interviews of potential witnesses.
 - Interview potential witnesses.
 - After reviewing documentary evidence and witness interviews, re-interview complainant and then respondent. This interview should focus on identifying any inconsistencies or potential weaknesses and giving parties an opportunity to address them.
- The timeline for investigation and adjudication is now “reasonably prompt”, which provides some flexibility. But a good rule of thumb is no more than 45 days from the initial interview to sitting down to the initial draft of the investigation report.
- Where possible, interviews should *either* be witnessed by an additional institution employee *or* be recorded. Parties do change their stories, and you need to be able to verify what was said. There may be some exceptions, such as follow-up interviews to clear up minor details.
- Strong note-taking is important. Notes should be accurate and fair. Pause the interview as needed to make sure you are getting all relevant information.
- Be transparent with the parties. In some cases, an investigator may need to convey the opposing party’s strongest position will be, and give the interviewee an opportunity to respond. This will help you uncover red herring issues and focus on the points and evidence that matter.

INVESTIGATION TIPS

- As an investigator, your role is neither prosecutor nor defense counsel. You are an objective and impartial fact-gatherer.
- Personal experiences, biases, or empathy cannot change the way you approach an investigation.
- It is possible to balance compassion and investigative rigor. During initial interviews, the best approach is to allow each party to tell their story in the manner they see fit, then to follow up with specific questions to fill in details.
- Interviews generally should not be games of “gotcha,” in which investigators try to catch parties in contradictions.
- If a statement seems inconsistent or contradicted by evidence, the best practice is to tell the interviewee your concern and give them an opportunity to provide an explanation. If a story doesn’t hold together, that will become clear in time without the need for aggressive interrogation.
- Understand that both parties likely are under great stress. Provide ample time for them to answer, and understand that brief confusion or lack of recollection is not, in itself, evidence of fabrication.
- However, the mere fact that a party cannot recall information or has trouble recounting events should not be viewed as evidence of trauma suggesting that sexual violence occurred.

STEP 4: “JURISDICTIONAL” DETERMINATION

- The 2020 Regulations require the institution to make a determination whether (1) the allegations investigated in a formal complaint would constitute sexual harassment as defined by 106.30 if proven, and if they would; (2) whether the alleged conduct occurred within the recipient’s program or activity (or outside the United States).
- If the conduct does not meet the definition in 106.30, or occurred off campus and unconnected to the program or activity, the institution **“must dismiss the formal complaint [...] for purposes of sexual harassment under Title IX”**.
- This effectively means that, if at any point in the initial investigation these “jurisdictional requirements” are not met, the Title IX Coordinator must dismiss the charge on their own initiative, and must notify the parties in writing of this decision.
- Dismissal for purposes of Title IX does not preclude the institution from investigating and sanctioning conduct under other university policies.
 - For example, harassment that occurs only once and thus is not “pervasive” may nonetheless be punished under the university’s sexual harassment rules.

STEP 5: INVESTIGATIVE REPORT

- The institution must “create an investigative report that fairly summarizes relevant evidence.” (106.45(b)(5)(vii))
- The report must be sent to each party and the party’s advisor, if any, at least **ten days** prior to a hearing, for their review and written response.
- The institution must also send to each party, in an electronic format or hard copy, “any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, *including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility.*”
 - It’s not clear what “intend to rely” means, since the institution is not required to act as a prosecutor, and does not necessarily introduce evidence at the hearing. That can be, and usually is, left to the parties themselves.
 - The safe bet is to produce all evidence obtained in the investigation unless it is clearly irrelevant to any aspect of the determination. In the memorandum itself, the institution can clarify which information is relevant and which is not.
- The parties must be given an opportunity to respond in writing to the draft report, and the institution must consider their responses before finalizing the report.
- Aside from giving the parties the opportunity to review, the regulations are not clear on what should be done with the investigation report. Specifically, they do not specify whether it must be provided to the decision maker(s) for reference at the hearing.
 - However, nothing in the regulations prohibits this, and the comments do make reference to the report potentially making recommendations as to the outcome, so it seems both permissible and logical to do so.

THE ADVISOR'S ROLE

- An appointed advisor's role is to advise the party—complainant or respondent—on issues related to NMCC policy and procedure, as well as assisting the party in identifying potentially relevant evidence or issues and presenting them to the investigator or adjudicator.
- An advisor may be present for any meeting, interview, or hearing in the process, at the discretion of the party. It is the responsibility of the party to ensure their advisor's availability.
- An advisor may raise procedural questions or objections at any point to the Title IX Coordinator.
- The ultimate responsibility for presenting arguments and positions lies with the party; the advisor's role is to suggest possible alternatives, but they have neither the power nor the responsibility to compel a party to take any particular approach.
- An advisor is not expected to be impartial—their duty is to advocate for the party they are assigned to. However, the advisor is expected to behave professionally at all times and to adhere to all rules and procedures.

ADVISING CONSIDERATIONS

- Taking inventory of relevant evidence. Texts, emails, social media messages, possible security camera footage or card swipes.
- Taking inventory of potential witnesses. Witnesses to the actual event, individuals present shortly before or after the event, witnesses to admissions by the opposing party.
- Preparing the party to state their position clearly to investigators.
- Considering possible informal resolution. This is never required, but parties may wish to explore it as an option.
- Considering the ramifications of possible parallel criminal or civil proceedings.
- When to consider admission of responsibility or voluntary withdrawal of complaint.

HEARING ADVISORS

- The hearing advisor is responsible for cross-examination of opposing parties and witnesses at the hearing and should prepare accordingly.
- The hearing advisor also may raise procedural issues or objections at the hearing.
- The advisor does not present testimony. Generally, it is the duty of the party to speak on factual issues, although the adjudicator does have discretion to consider explanations from the advisor when he or she determines they may be helpful.
- The hearing advisor will assist a party receiving an adverse outcome in any internal appeal process.



TITLE IX ADJUDICATION

**BRETT HARVEY
SEPTEMBER 2023**

THE ADJUDICATOR'S ROLE

- The adjudicator oversees the live hearing and renders the university's decision as to responsibility or non-responsibility.
- The adjudicator is assisted by the Title IX Coordinator, who may offer opinions and advice on procedural questions or explanations of the contents of the Investigation Report, but may not offer opinions on the ultimate merits of the matter.
- The adjudicator may not serve as an investigator or advocate, and may not serve as an appellate adjudicator in the same matter he or she heard in the first instance.
- The investigator must be impartial and fair, and weigh all relevant evidence, both inculpatory and exculpatory. If an investigator has a bias toward any individual, group, or type of party (e.g., complainants or respondents) they must disclose this immediately and recuse.
- The adjudicator has discretion to conduct the live hearing as he or she deems fit, but must provide both parties equal and fair opportunity to present relevant evidence.
- Finally, the adjudicator is responsible for writing an opinion explaining the basis for the outcome of the hearing.

THE INVESTIGATIVE REPORT

- The investigative report is prepared by the Title IX Coordinator in conjunction with the investigator.
- It summarizes all relevant evidence, both inculpatory and exculpatory, and is provided to the parties and the adjudicator(s).
- What is “relevant evidence”?
 - Federal regulations say the word “relevant” should be defined consistent with its “ordinary meaning.” (p. 811, n.1018)
 - This does not permit exclusion based on other factors like undue prejudice or cumulative evidence, which would be considered by a court evaluating whether to admit evidence.
 - Evidence of prior sexual conduct normally is irrelevant per se, unless offered to show that another person committed an assault or address prior sexual behavior between the parties and are introduced to establish an understanding of consent.
 - The simplest approach may be to ask: **“Does this evidence make any fact material to the ultimate outcome more or less likely to be true?”** If so, it should be included in the investigative report, even if the report ultimately suggests that its impact on the ultimate decision is low.
- The report may or may not include recommended findings or conclusions, but the decision-maker is obliged to make an independent, objective determination based on relevant evidence.

THE LIVE HEARING

- Regulations require a “live hearing”.
 - At this hearing, the “decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.” (106.46(b)(6))
 - **Direct Cross-Examination:** “Cross-examination must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally.”
 - **Remote Option:** “At the request of either party, the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.”
 - Must be recorded, either audiovisual or audio, or transcribed.
- **Advisors Required:** “If a party does not have an advisor present at the live hearing, the recipient must provide without charge or fee to that party, an advisor of the recipient’s choice, who may be but is not required to be an attorney, to conduct cross-examination on behalf of that party.”



THE LIVE HEARING

The order of the hearing is flexible, but typically runs as follows:

- Reading of the charge and respondent's plea
- Parties' opening statements
- Complainant's Testimony and Cross
- Respondent's Testimony and Cross
- Witness Testimony and Cross
- Any further questions from Adjudicator
- Parties' closing statements
- Recess for determination of responsibility/non-responsibility
- Announcement of determination
- If responsible, parties' statements on sanction
- Adjourn to determine sanction and prepare Written Determination.

RELEVANCE OF QUESTIONS AND EVIDENCE

- **Questions:** “Only relevant cross-examination and other questions may be asked of a party or witness.” (106.45(b)(6)(i))
- “Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”
 - We suggest the following approach: (1) The question is asked; (2) the decision maker considers it; (3) the decision maker tells the witness they may or may not respond; and (4) if not, the decision maker briefly explains the rationale for excluding the question.
 - **Rape Shield Provision:** “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with the respect to the respondent and are offered to prove consent.”
- **Evidence:** While the investigation report can make recommendations as to the relevance of evidence (including exhibits and witnesses) the regulations strongly suggest that the decision maker must make final determinations as to what evidence is admissible.
 - The simplest approach may be to ask: “Does this evidence make any fact material to the ultimate outcome more or less likely to be true?”
 - An adjudicator may admit evidence but assign it little or no weight in a determination.
- These real-time decisions are another reason why individual adjudicators, as opposed to panels, may be preferable.

WRITTEN DETERMINATION

The adjudicator's written determination must include:

- A statement of the allegations considered
- A descriptions of the procedural steps from the receipt of the formal complaint (which will be provided in the Investigative Report)
- Findings of relevant fact
- Conclusions applying relevant institution's policies to facts
- A statement of the result for each separate allegation, including any sanction or other remedy and the rational for the same, and
- A statement of possible grounds and procedures for appeal.

APPEAL PROCEDURE

- An appeal may be made by any party from (1) any pre-hearing dismissal; or (2) the outcome of a hearing.
- There are three grounds for appeal: (1) a procedural error that likely affected the outcome of the matter; (2) new evidence that was not reasonably available at the time of the determination or dismissal that likely would affect the outcome of the matter; or (3) evidence or an impermissible conflict of interest or bias on the part of the Title IX Coordinator, investigator, or adjudicator.
- A party may appeal by submitting a written notice of appeal to the Title IX Coordinator within seven days of any decision.
- The Title IX Coordinator will inform parties of how to submit written statements on appeal.
- Appeals involving status as a student are referred to the VPSA. Appeals involving status as an employee are referred to the Provost.
- The appellate adjudicator may not have served in any other capacity in connection with the investigation in question.

APPELLATE ADJUDICATION

- The appellate adjudicator will receive a packet of materials directly from the Title IX Coordinator. This normally will include:
 - The Investigation Report
 - The Notice of Outcome
 - A recording of the hearing, if applicable
 - Any hearing evidence or exhibits
 - In cases of pre-hearing dismissal, all relevant materials from the OCRC file.
- In appeals from a hearing, the appellate adjudicator will consider ONLY the hearing record, the parties' written statements, and applicable policies. He or she may not conduct a new hearing or hear new testimony.
- In cases of new evidence, the party will make an evidentiary proffer as part of their statement on appeal—i.e., either provide the new evidence or submit a written summary of the new testimony that would be offered.
- Except in very rare cases, the appellate adjudicator should not communicate directly with the parties, investigators, or hearing adjudicator.
 - One exception might be in cases where there is a factual dispute about the actions of a party or investigator outside of a hearing, such as where there is an allegation of investigator bias. Even in these cases, however, communication should almost always be in writing, via written statements from the appellant and written follow-up questions.

APPELLATE DECISION

- The appellate adjudicator may (1) affirm the outcome; (2) reverse the outcome and remand to the hearing adjudicator for further proceedings to determine remaining questions; or (3) if the case leaves no remaining material questions, reverse the outcome and render a new, final outcome.
- The appellate adjudicator will issue a written decision explaining the outcome of the appeal and the rationale, which is transmitted to the Title IX Coordinator, who informs the parties simultaneously.
- The decision of the appellate adjudicator is final and not subject to further appeal.



TITLE IX COORDINATORS

**BRETT HARVEY
SEPTEMBER 2023**

RECORD KEEPING: YOUR FILE

**REMEMBER:
RETENTION TIME IS
SEVEN YEARS**

- Initial correspondence that alerted you to matter
- Intake/initial meeting documentation (for both parties where Formal Complaint is filed)
- Formal complaint
- All correspondence scheduling meetings, hearings, etc.
- Any notice of dismissal and/or transfer to other procedural posture
- Investigation memorandum
- Party responses, and all other correspondence related to investigation memorandum
- Recording of hearing
- Written statement on outcome
- Any appeal notice
- Any appeal position statement
- Notice of outcome of appeal

COORDINATION WITH OTHER FUNCTIONS

- Title IX Coordinators have historically been asked to serve as general advocates against sexual misconduct.
- This is fine, but you need to take care in making public statements or taking public positions.
- Fine: Promoting or attending sexual assault awareness events, speaking on general awareness issues
- Probably Not Fine: Taking public positions on controversial issues relating to specific sexual assault matters, speaking as a political advocate on controversial policy questions
- Be Careful: Media inquiries. Nuanced statements can be taken out of context.
- Do not become paranoid, but also do not underestimate the lengths some parties will go to in order to suggest bias on the part of Title IX personnel.



QUESTIONS?