2025 TITLE IX REFRESHER

NORTHWEST MISSISSIPPI COMMUNITY COLLEGE

AUGUST 2025

BRETT HARVEY



THE BASIC STRUCTURE OF THE LAW

MORE GENERAL ← → **MORE SPECIFIC**



STATUTES

TITLE IX (1972)

CAMPUS SAVE ACT/VAWA

CLERY ACT



CASE LAW

GEBSER (1998) and *DAVIS* (1999)



REGULATIONS

2020 Trump DOE Regulations

They're back! The 2020 Title IX Rule was effectively reinstated by DOE's February 4, 2025 Dear Colleague Letter.

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

It is essential that every participant in NWCC's Title IX process carefully review the policies set forth in the Sexual Misconduct Policy, as that document provides the authoritative statement of standards, policy, and procedure. If you have questions, contact your 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

NWCC'S TITLE IX POLICY

- Applies broadly to all members of the college community, including without limitation, students, faculty, staff, applicants for admission or employment, and those participating in college programs or activities.
- Defines **Sexual Misconduct** as including harassment, sexual assault, dating/domestic violence, sexual exploitation (privacy violations) and stalking.
- Defines consent as "active, knowing, and voluntary" participation in sexual activity, with exceptions for force, coercion. Determines consent objectively.
- Establishes **all employees of NWCC** as mandatory reporters and outlines their obligations.
- Establishes detailed procedures for investigation, hearing, adjudication, and appeal.

OTHER REQUIREMENTS OF TITLE IX

- Non-Discrimination: With a small number of exceptions (like single-sex athletic teams, fraternities, and sororities) Title IX requires that the programs of the institution be made equally available without regard to sex.
  - Note that sex currently is interpreted by the Department of Education to refer exclusively to biological sex at birth, as opposed to gender identity. Several district courts have upheld this interpretation.
  - However, the Supreme Court's decision in *Bostock* still prohibits discrimination based on gender identity in the employment context.
  - How do we reconcile these principles with respect to students? For example, a trans student who asks to be assigned to a dorm room with a person of the opposite biological sex?
  - SCOTUS has agreed to hear *BPJ v. West Virginia State Board of Education*, which addresses participation by trans students in athletics teams and may provide clues as to broader questions on gender identity.

OTHER REQUIREMENTS OF TITLE IX

- Pregnancy Accommodations: Title IX and other federal laws, like the Pregnant Workers Fairness Act (PWFA), require reasonable accommodations for both students and employees who are limited in their ability to participated in educational or employment activities due to pregnancy-related conditions.
  - **"Pregnancy or related conditions"** typically refers to pregnancy, childbirth, termination of pregnancy, or lactation; medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.
  - The Trump Administration's recission of the 2024 Biden Title IX regulations seems to also rescind provisions of that rule that specifically address pregnancy accommodations.
    - These would have included, e.g., mandatory referral of pregnant students to the Title IX Coordinator, required leaves of absence, and a list of presumably reasonable accommodations.
  - While these specific provisions are no longer in place, Title IX still prohibits pregnancy discrimination and still requires reasonable accommodations of pregnant students.
    - This probably includes things like a reasonable number of excused absences for events like medical appointments, changes to course schedules, and changes to physical spaces, among other things.

COMMON AREAS OF CONCERN



Poor or nonexistent training of students



Poor or nonexistent training of mandatory reporters



Biased or ineffective personnel



Biased training materials



Conflating or combining multiple roles or “getting outside your lane”



Informal attempts to “do the right thing” outside policy



Failure to check boxes/keep track of details



Hasty decision making



TITLE IX INVESTIGATIONS

AUGUST 2025

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 NWCC 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 NWCC programs or activities.
  - **Objective and Subjective Requirements:** The complainant must actually be subjectively offended AND the conduct must by 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 college 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, voluntary, present and ongoing** 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 is 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

NOTICE → **SUPPORTIVE MEASURES**

Title IX Coordinator "Official with Authority" learns of alleged sexual harassment

Institution offers complainant non-punitive support, potentially including alterations to schedules, counseling, no-contact orders. These must be offered and provided regardless of whether a formal complaint is filed, and irrespective of the outcome of any hearing. They may be temporary, or may last as long as needed.

FORMAL COMPLAINT → **INITIAL INVESTIGATION** → **JURISDICTIONAL DECISION** → **INVESTIGATIVE REPORT** → **HEARING** → **APPEAL**

Written complaint is submitted, signed by complainant or TIX Coordinator

Initial notifications and meetings with accused party, witnesses; gathering of any documentary or other evidence

Determine whether matter falls within the scope of Title IX, and if not, under what procedures (if any) will it be investigated and adjudicated

Written report by investigator(s) summarizing all relevant evidence, including evidence institution does not intend to present at hearing

A live, recorded hearing before a trained adjudicator, with direct cross-examination by advocates, at which determination of outcome is made

Review of hearing result by impartial party, either for procedural errors or newly discovered evidence

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 current 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.

QUESTIONS?

(LET'S TAKE A QUICK BREAK!)



TITLE IX ADJUDICATION

AUGUST 2025

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 consider 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 ADJUDICATOR'S ROLE

- The adjudicator oversees the live hearing and renders the college'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 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
- Adjourn
- Within 72 hours: Written notification to all parties of outcome and appeal rights

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 he 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 NWCC 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.

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