



# TITLE IX AT CO-LIN


BRETT HARVEY,  
MISSISSIPPI STATE UNIVERSITY  
SEPTEMBER 2021



A blurred background image of a modern office. In the foreground, a table holds a bar chart with multiple colored bars (blue, green, purple) and a black pen. In the background, three people in business attire are silhouetted against large windows, appearing to be in a meeting.

# OVERVIEW

BRETT HARVEY  
MISSISSIPPI STATE UNIVERSITY  
SEPTEMBER 2021



**This seminar is for educational purposes and does not create an attorney-client relationship. The best practices for your institution depend on your particular circumstances.**

**In other words, always carefully consult your institution's attorneys and/or compliance personnel on matters related to Title IX compliance.**

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# REMINDER

It is essential that every participant in Co-Lin's Title IX process carefully review the Colleges Sexual Harassment Policy, as that document provides the authoritative statement of standards, policy, and procedure.

If you have questions about the contents of the policy, please contact the Title IX Coordinator, Tiffany Perryman, at (601) 643-8411 or [Tiffany.Perryman@colin.edu](mailto:Tiffany.Perryman@colin.edu).

# THE BASIC STRUCTURE OF FEDERAL SEXUAL MISCONDUCT LAWS IN HIGHER ED, 2011-2019

← LESS SPECIFIC

→ MORE SPECIFIC



## STATUTES

TITLE IX (1972)  
CAMPUS SAVE ACT/VAWA  
CLERY ACT



## CASE LAW

*GEBSER* (1998) and *DAVIS* (1999)



## GUIDANCE

2011 DEAR COLLEAGUE LETTER  
2014 DEAR COLLEAGUE LETTER  
RESOLUTION AGREEMENTS

# THE BASIC STRUCTURE OF FEDERAL SEXUAL MISCONDUCT LAWS IN HIGHER ED, 2020

← LESS SPECIFIC

MORE SPECIFIC →



## STATUTES

TITLE IX (1972)  
CAMPUS SAVE ACT/VAWA  
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## CASE LAW

*GEBSER* (1998) and *DAVIS* (1999)



## REGULATIONS

2020 DOE REGULATIONS  
(34 C.F.R. 106)

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# 2020 DOE REGULATIONS

## SUMMARY OF MAJOR PROVISIONS

- New definition of “Sexual Harassment” (106.30)
- Designation of coordinator and adoption of policy (106.8)
- General response requirements, including formal complaints and jurisdictional determinations (106.44)
- Much more elaborate grievance process, including mandatory investigation reports and live cross-examination (106.45)
- Rules on conflicts of interest in investigation/adjudication process (106.45.b.7)
- Recordkeeping and publication of training materials (106.45.b.10)
- Non-retaliation rules, which bar retaliation for refusal to participate in investigation (106.71)

# 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; ✓



# DEFINING SEXUAL HARASSMENT

- “Sexual Harassment” is the new umbrella term for Title IX violations. (106.30)
  - It replaces “sexual misconduct” from the 2011 and 2014 Dear Colleague Letters.
- There is a three-prong definition:
  - Quid Pro Quo Harassment
  - Severe, Pervasive, and Objectively Offensive
  - Sexual Assault, Dating or Domestic Violence, or Stalking as defined by VAWA/Clery
- So when we say “sexual harassment” for the rest of this presentation, we’re talking about the overarching term that refers to what was traditionally called hostile environment harassment (comments, grabbing, groping), **plus** quid pro quo harassment, **plus** sexual violence like sexual assault and dating violence.
- Notice that “severe, pervasive, **and** objectively offensive” is a more demanding standard than the old “severe, pervasive, **or** persistent.” But don’t worry too much about this difference right now, for two reasons:
  - First, **only** the hostile environment form of harassment (prong 2) must be severe, pervasive, and objectively offensive. Sexual assault or quid pro quo, for example, are violations in themselves, regardless of severity or pervasiveness.
  - Second, as we will see later, this definition **does not** prevent you from investigating or adjudicating other forms of less severe harassment. This definition just defines which violations **must** be handled under the policies in the 2020 Regulations.

# TITLE IX COORDINATOR AND POLICY

## ■ Designate at least one Title IX Coordinator

- Notify all students, employees, applicants for admission or employment, and unions or collective bargaining units of who this person is and how to contact them. (106.8a)
- TIX Coordinators are the *only* employees whose knowledge of sexual harassment will *always* trigger institutional responsibility.
- This person can no longer be both investigator and adjudicator. Conflict of interest rules will play a role in how duties are assigned.

## ■ Notification of Title IX Policy

- The same people entitled to notification above must be notified “that the recipient does not discriminate on the basis of sex in [its] education programs or activities, and that it is required by Title IX not to discriminate in such a manner” and that this extends to “admission and employment” and that inquiries may be referred to the Title IX Coordinator, DOE, or both. (106.8b)
- These people also are entitled to notification that the university has adopted grievance procedures, including how to file complaints of sexual harassment or discrimination, and how the institution will respond. (106.8c)

# 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 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.
  - **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.



# TRAINING MANDATORY REPORTERS

Your OWA's and anyone else you decide to make a mandatory reporter must be trained on the definition of sexual harassment, how to report to the Title IX coordinator, and confidentiality issues, at minimum.

- Ideally, you would also offer them training on how to receive reports in a sensitive yet clear manner.
- This typically involves explaining your reporting duties up front, and listening without criticism, then explaining what will happen next.
- In addition to our mandatory Title IX syllabus statement, we offer faculty a template for how to inform students in advance of their reporting duties. We also instruct RA's on how to do the same.



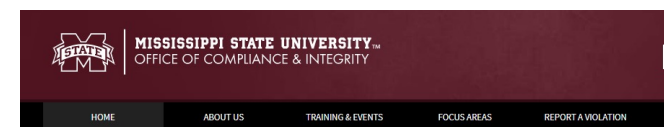
# Syllabus Statements

All course syllabi should contain the university's standardized statement on Title IX and sexual misconduct. The statement is:

MSU is committed to complying with Title IX, a federal law that prohibits discrimination, including violence and harassment, based on sex. This means that MSU's educational programs and activities must be free from sex discrimination, sexual harassment, and other forms of sexual misconduct. If you or someone you know has experienced sex discrimination, sexual violence and/or harassment by any member of the university community, you are encouraged to report the conduct to MSU's Director of Title IX/EEO Programs at 662-325-8124 or by e-mail to [titleix@msstate.edu](mailto:titleix@msstate.edu). Additional resources are available at [www.oci.msstate.edu/focus-areas/title-ix-sexual-misconduct](http://www.oci.msstate.edu/focus-areas/title-ix-sexual-misconduct).

Additionally, faculty may choose to notify students of their mandatory reporter status via a statement in the course syllabus. Including this statement is optional. OCI recommends the following language:

As the instructor for this course, I have a mandatory duty to report to the university any information I receive about possible sexual misconduct. This includes information shared in class discussions or assignments, as well as information shared in conversations outside class. The purpose of reporting is to allow MSU to take steps to ensure a safe learning environment for all. The university also has confidential resources available, who can provide assistance to those who have experienced sexual misconduct without triggering a mandatory reporting duty. More information about confidential resources is available at [www.oci.msstate.edu/focus-areas/title-ix-sexual-misconduct](http://www.oci.msstate.edu/focus-areas/title-ix-sexual-misconduct).

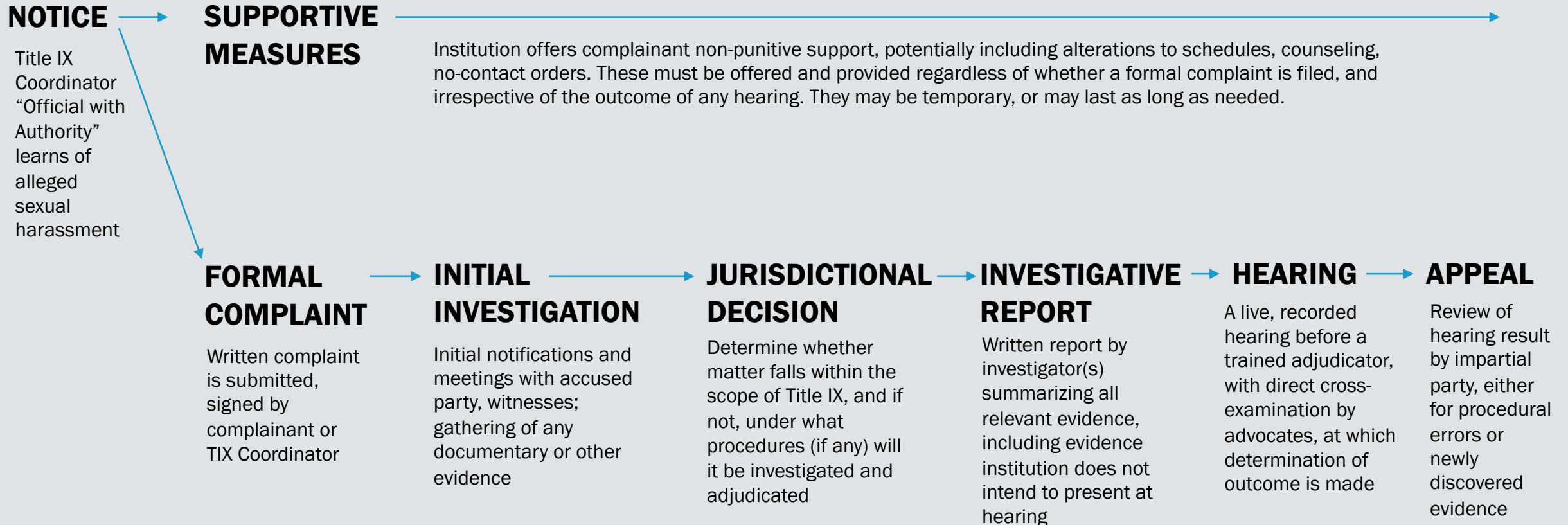


*Students enjoy MSU's walkable campus.*

**Welcome to the Office of Compliance & Integrity**

# BASIC STEPS FOR AN INVESTIGATION

## UNDER THE 2020 REGULATIONS



# MAJOR RISK FACTORS

- **General Level of Care:** The regulations adopt a more lenient “deliberate indifference” standard for DOE action.
  - DOE will not second-guess decisions that it might have made differently.
  - Instead, the question is whether the response was “clearly unreasonable in light of known circumstances.”
  - This comes from SCOTUS cases *Gebser* and *Davis* and requires actual institutional knowledge and a failure to respond reasonably.
- **Specific Procedural Requirements:** The regulations are MUCH more demanding with respect to procedural steps in the investigation and adjudication process.
  - Technical errors, conflicts of interest, perceived bias, and procedural/evidentiary rulings are likely to form the basis for civil litigation far more often than enforcement actions by DOE itself.
- **Common Liability Theories:** Beyond the regulations themselves, common theories include (1) Due Process; (2) Title IX “reverse” sex bias; and (3) Breach of Implied Contract.
- **Good Decision-Making is Essential:** You cannot “policy” your way out of liability concerns. Your Title IX Coordinator, investigators, and adjudicators all will have to make substantive judgement calls.
  - You MUST put capable, well-trained people in these positions, or you policy is an empty gesture.

# 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



**QUESTIONS?**



A person in a dark suit and striped tie is holding a magnifying glass over a tablet computer. The person's hands are visible, and they are looking at the tablet. The background is a plain, light-colored wall.

# TITLE IX INVESTIGATIONS

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# 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 Co-Lin 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 Co-Lin 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.

**Co-Lin's "Program or Activity":** Sexual Harassment meets this definition if it "occurs at any campus or facility operated by the College, or in connection with any program or activity of the College."

# 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.

# 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.

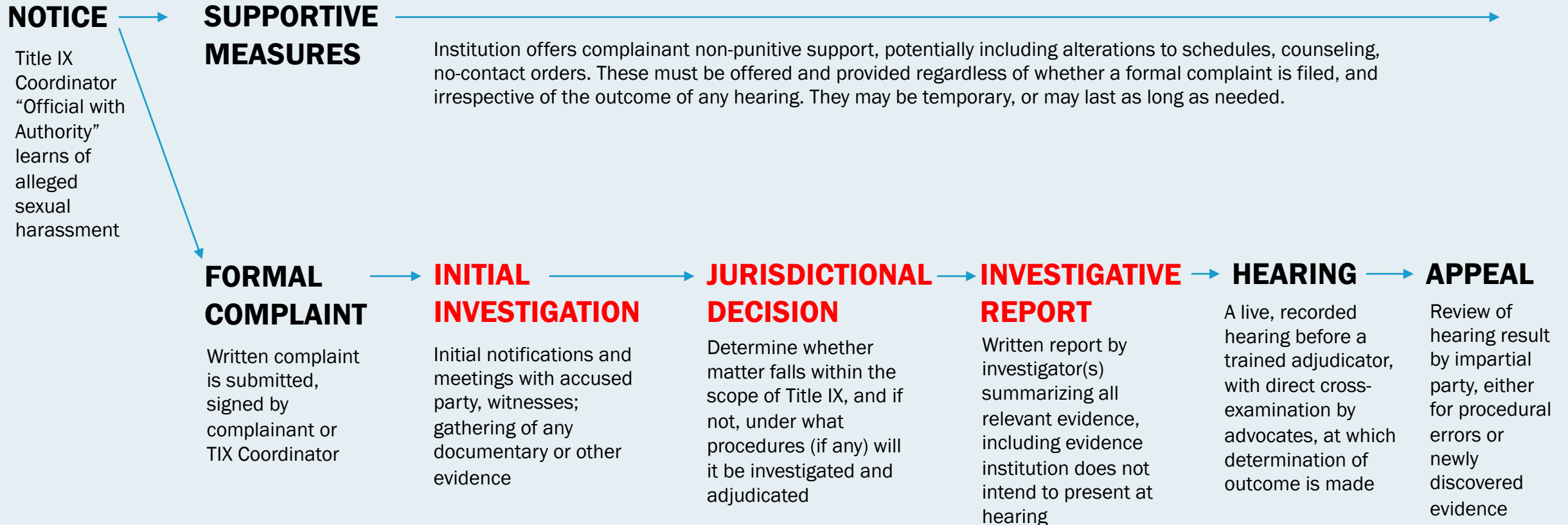




# YOUR ROLE AS AN INVESTIGATOR

- 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 up to the 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.

# 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.”

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# 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.

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## 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.

# 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, err on the side of conspicuous symmetry in how investigations are carried out.
- **Basic Rule of Thumb:** If you are at all in doubt, call the Title IX Coordinator.

# 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.

# 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.
- Whether to record meetings should be decided in consultation with the Title IX Coordinator. Parties sometimes change their stories, and you may 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.



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# 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?**

A photograph of two women sitting at a desk in an office. The woman on the left has long, curly red hair and is wearing a grey t-shirt. The woman on the right has short brown hair, wears glasses, and a blue blazer. They are both looking at each other and talking. The desk has papers, a pen holder, and a globe in the background.

# TITLE IX ADVISING

BRETT HARVEY  
MISSISSIPPI STATE UNIVERSITY  
SEPTEMBER 2021

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# THE ADVISOR'S ROLE

- At Co-Lin, an appointed advisor's role is to advise the party—complainant or respondent—on issues related to Co-Lin 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 Co-Lin's 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's communications with a party are confidential with respect to Co-Lin's process, but Co-Lin cannot guarantee that communications will be privileged against external discovery. You should advise the party of this at the outset.
- 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 outlined in Co-Lin's policy.
- An advisor/advisee relationship is confidential with respect to Co-Lin. But it is not an attorney-client relationship, and you should advise the party of this at the outset.

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# 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.
- Try to be candid with the party about your appraisal of the case.
- 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 charge.



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# THE ADVISOR'S ROLE IN HEARINGS

- The 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.



**QUESTIONS?**

A modern conference room with a long, dark wooden table surrounded by beige office chairs. The room features large windows on the right side, offering a view of a city and mountains. A dark blue cushioned bench runs along the window. On the left, there are glass-walled offices and a whiteboard. The floor is covered in a grey carpet.

# TITLE IX ADJUDICATION

BRETT HARVEY  
MISSISSIPPI STATE UNIVERSITY  
SEPTEMBER 2021

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# REMINDER

It is essential that every participant in Co-Lin's Title IX process carefully review the Colleges Sexual Harassment Policy, as that document provides the authoritative statement of standards, policy, and procedure.

If you have questions about the contents of the policy, please contact the Title IX Coordinator, Tiffany Perryman, at (601) 643-8411 or [Tiffany.Perryman@colin.edu](mailto:Tiffany.Perryman@colin.edu).

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# 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 are somewhat evasive on this point, saying 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.
  - 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
- Adjourn 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.

# LIVE TESTIMONY REQUIRED

- *“If a party or witness does not submit to cross-examination at the live hearing, the decision maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision maker cannot draw an inference about the determination regarding responsibility based solely on the party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” (106.45(b)(6))*
- DOE has repeatedly confirms that this allows parties to keep out *any* factual statement, including a direct recorded confession by refusing to testify.
- Per DOE regulations, refusal to testify or answer ANY relevant question must result in the entirety of the party or witness’s statement(s) being disregarded, and the matter being decided based on any remaining evidence.
- Documents such as police reports likely will need live witnesses to authenticate them.

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# 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 Co-Lin 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.

# STEP 7: THE APPEAL

- Must be offered to both parties, from any determination on responsibility *and* from any prior dismissal.
  - This includes dismissal for not being within the scope of the institution’s program or activity, and based on a finding that the allegations would not violate Title IX if proven.
- **Three mandatory grounds for appeal:**
  - “Procedural irregularity that affected the outcome of the matter” and
  - “New evidence that was not reasonably available at the time the determination regarding responsibility was made, that could affect the outcome of the matter.
  - Conflict of interest or bias on the part of the Title IX Coordinator, decision maker, or investigator.
- **The institution may offer other grounds for appeal.**
  - For example, “contrary to the overwhelming weight of evidence.”
  - Must be offered equally to both parties, and for all outcomes.

# STEP 7: THE APPEAL

- The opposing party must receive written notice when an appeal is filed.
- Regulations do not specify a time limit, but five to seven days is not uncommon.
- Once an appeal is submitted, both parties must be given “a reasonable, equal opportunity” to submit a written statement on their position.
- The decision maker cannot be the initial decision maker, the Title IX Coordinator, or the investigator.
  - The appellate decision maker must “issue a written decision describing the result of the appeal and the rationale for the result.”
  - The decision must be provided simultaneously to both parties.
  - Because the appeal may occur “on the papers,” upper level administrators may be more suited to this role than they would be as initial decision makers.





# TITLE IX COORDINATORS

BRETT HARVEY  
MISSISSIPPI STATE UNIVERSITY  
June 2020

## **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

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# 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?**