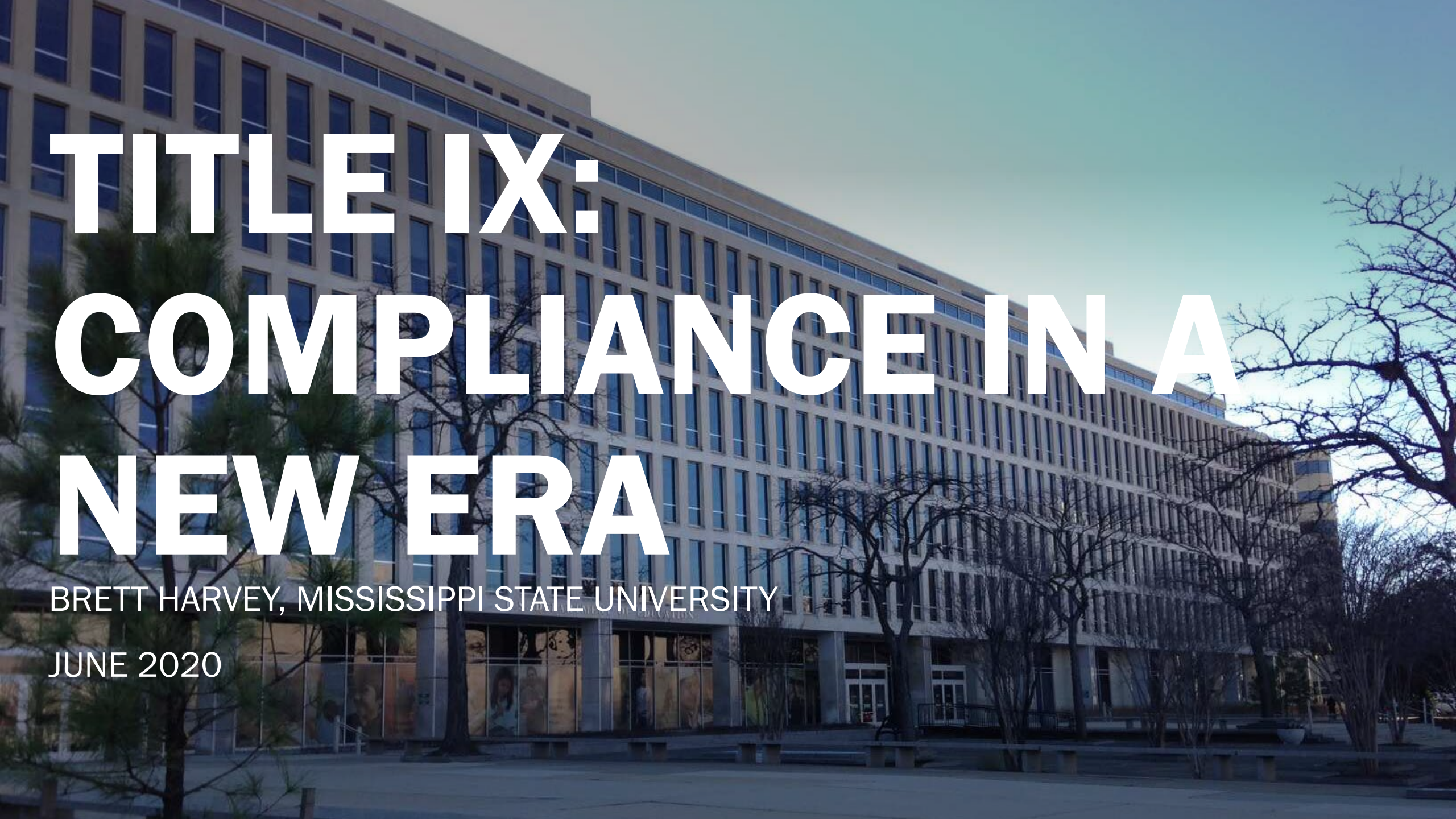

TITLE IX: COMPLIANCE IN A NEW ERA

BRETT HARVEY, MISSISSIPPI STATE UNIVERSITY

JUNE 2020

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, you would be absolutely crazy to implement Title IX policies or procedures without carefully consulting your institution's attorneys and/or compliance personnel.

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

MOST AUTHORITATIVE ⟷ **LESS AUTHORITATIVE**

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

LESS SPECIFIC ⟷ **MORE SPECIFIC**

STATUTES

TITLE IX (1972)

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CASE LAW

GEBSER (1998) and *DAVIS* (1999)

REGULATIONS

2020 DOE REGULATIONS

(34 C.F.R. 106)

MOST AUTHORITATIVE ⟷ ***ONLY SLIGHTLY*** **LESS AUTHORITATIVE**

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)

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 COORDINATOR AND POLICY

- How to Meet Notification Requirements
  - TIX Coordinator name and contact information must at minimum be published *on your website*, and in *any student or employee handbooks or catalogs*.
  - Policy Statement should also be included in *standard civil rights statements* in institutional policies, as well as on *student and employee application materials*.
  - Information about grievance procedures, reporting, and response should be *on your website* and part of *standard Title IX training* for all new employees and students. They do not need to be included in other publications or applications.

YOUR 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.

YOUR 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 or may not review for other errors, per institution's policy.
  - May not be the same person as Title IX Coordinator, investigator, or original decision maker.

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; ✓

IN-HOUSE TRAINING

- Everyone must do at least some in-house training.
- External training cannot inform investigators, adjudicators, etc. of the particulars of how your process works.
- Plus, regular in-house training is the most effective way to allow personnel to raise questions and concerns they have. You will be surprised at how many they have.

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.

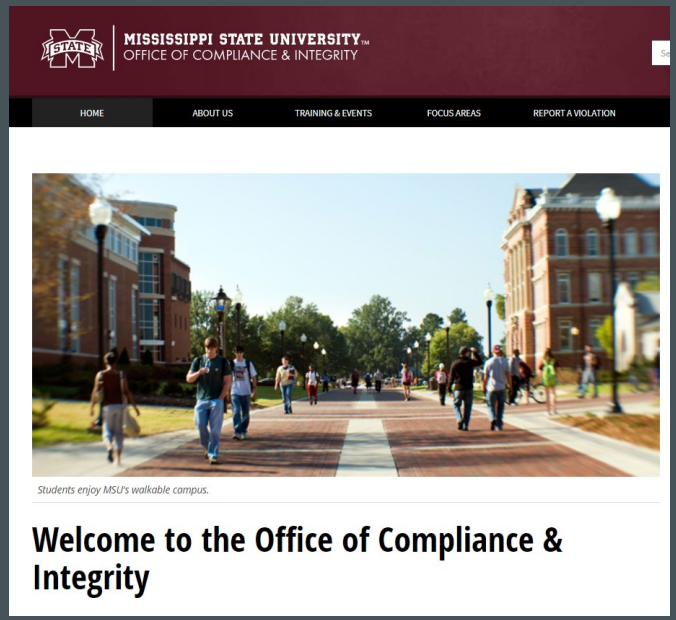
Syllabus Statements

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. Additional resources are available at 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.



BASIC STEPS FOR AN INVESTIGATION

UNDER THE 2020 REGULATIONS

NOTICE

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

SUPPORTIVE MEASURES

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

Written complaint is submitted, signed by complainant or TIX Coordinator

INITIAL INVESTIGATION

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

JURISDICTIONAL DECISION

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

INVESTIGATIVE REPORT

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

HEARING

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

APPEAL

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

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

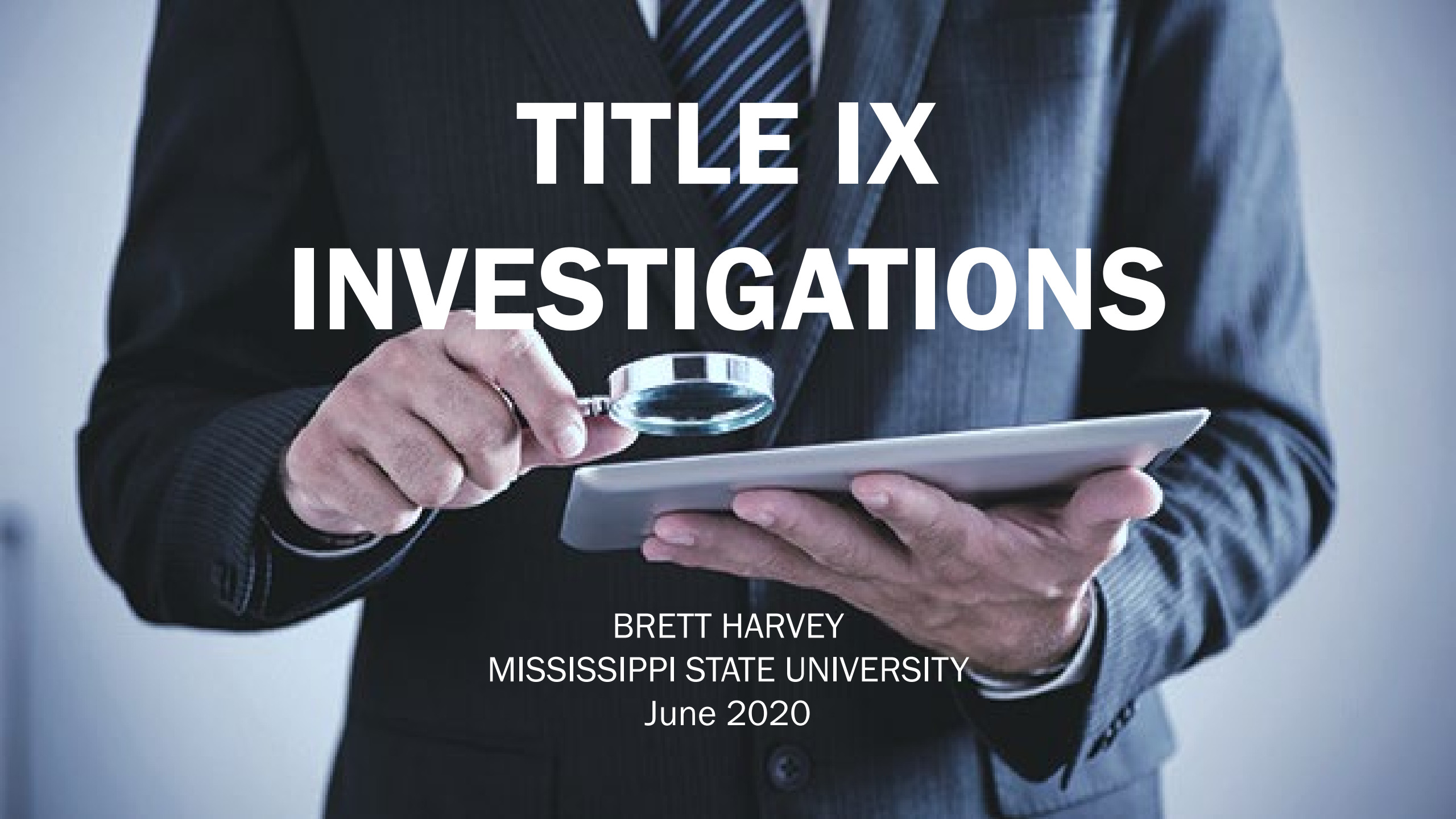
Conflating or combining multiple roles or “getting outside your lane”

Informal attempts to “do the right thing” outside policy

Failure to check boxes/keep track of details

Hasty decision making

QUESTIONS?



TITLE IX INVESTIGATIONS

BRETT HARVEY
MISSISSIPPI STATE UNIVERSITY
June 2020

BASIC STEPS FOR AN INVESTIGATION

UNDER THE 2020 REGULATIONS

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

WHAT YOU DEFINITELY CAN'T DO

- **The Single Investigator Model:** A system in which a single individual or team serves as both the investigator and initial adjudicator of a sexual harassment charge. Typically, this was done without a live adversarial hearing.
- This was a popular model shortly after the release of the 2014 DCL, but has declined in usage due to due process and conflict of interest concerns.
- At minimum, under the 2020 Regulations, the investigation functions must be carried out by one person/team, and the adjudication functions by a separate person/team.
- Investigators may or may not make recommendations as to specific issues, or even the ultimate outcome, but the result must be reached via a live hearing before the adjudicator(s).

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.

INFORMAL RESOLUTION

- **Unlike prior guidance,** which expressly forbade informal mediation or resolution of misconduct claims involving sexual assault or other violence, these regulations permit—but do not require—institutions to make this option available. (106.45(b)(9))
- "At any time prior to reaching a determination regarding responsibility [the institution] may facilitate an informal resolution process such as mediation," provided:
  - The institution provides the parties written notice disclosing the allegations, the requirements of any informal resolution process including whether and how it may preclude resuming a formal complaint.
  - The parties are informed that, at any time prior to reaching a resolution, any party may withdraw and resume the formal process.
  - The parties are informed of any other consequences of participating in the process, such as records that may be maintained.
  - Voluntary written agreement of both parties is obtained.
- **Informal resolution may not be required of any party.** If any party does not wish to proceed, the formal investigation must continue.
- Informal resolution may not occur in matters where an employee is accused of harassing a student.
- **An informal resolution facilitator cannot be a potential decision maker.** And really should not be a Title IX Coordinator or anyone else directly involved in the formal process. Mediators typically must offer their opinions on the merits of positions, which can create the appearance of a conflict of interest coming from a person involved in the formal adjudication process.

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.
  - 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.

STEP 3: INITIAL INVESTIGATION

- 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."
- Parties must be informed in writing of their right to be accompanied to all meetings by an advisor of their choice.
- While you may (and must) prohibit retaliation, 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. Presumably, no contact orders between other specific parties for good cause also can be implemented, but blanket "do not talk to anyone about this" rules are not permitted.
- Any opportunities (such as reviewing evidence) or limitations (such as advance notice) must apply equally to both parties. The general rule is, err on the side of conspicuous symmetry in how investigations are carried out.

STEP 3: INITIAL INVESTIGATION - TIPS

- The default order for investigation usually looks something like:
  - 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 one month from the initial interview to sitting down to the initial draft of the investigation report.
- 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.
- Strong note-taking is important. Notes can be discovered in litigation, and should be accurate and fair. Pause the interview as needed to make sure you are getting all relevant information.
- Be transparent with the parties. Tell them what you believe the opposite party's strongest position will be, and give them an opportunity to respond. This will help you ferret out red herring issues and focus on the points and evidence that matter.

STEP 3: INITIAL INVESTIGATION - TIPS

- As an investigator, your role is neither prosecutor nor defense counsel. You are an objective and impartial fact-gatherer.
- There is anecdotal evidence that investigators have tended to show greater empathy for a complainant, and more scrutiny toward respondents. This is not a fair way to approach investigations.
- 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 them 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.
  - You might be wondering, does this require us to draft two sets of policies: one for harassment/discrimination that falls under Title IX and one for harassment/discrimination that doesn't?

YES, YOU REALLY NEED TWO POLICIES.

SORRY.

- Your Non-Title IX policy will need to cover everything that doesn't fall under the definitions in the 2020 Regulations.
- This includes off-campus sexual assaults, domestic violence, etc.; one-time or less severe sexual harassment, and sexual exploitation/invasion of privacy that does not rise to the level of severe harassment.
- You can make your Non-Title IX policy identical to, similar to, or very different from your Title IX policy in terms of procedures.
- You might very well decide that your Non-Title IX policy will say, "Sexual assault matters not falling under Title IX will nonetheless be investigated and adjudicated using the procedures set forth in the institution's Title IX Policy." Many institutions will take this approach.
- But how far will you extend these more demanding procedures? To all sexual harassment? To all racial harassment? To all discrimination and harassment, including workplace harassment?

ONE POSSIBILITY IS A SINGLE POLICY WITH BRANCHING PATHS.

OVERALL POLICY ON CIVIL RIGHTS

Make initial determination of Title IX/Not Title IX

Title IX

a. This section applies to matters meeting the definition in 106.30.

b. For all such matters, the following procedures apply.

Not Title IX

a. This section applies to all matters not under Title IX

b. Certain matters, like off-campus sexual assault, will follow the procedures in the Title IX section.

c. Other matters, like one time verbal harassment, will follow the following procedures …

STEP 4: "JURISDICTIONAL" DETERMINATION

- Your policy will need to incorporate the definitions of sexual assault, dating/domestic violence, and stalking specified in the 2020 Regulations. These come from VAWA and the Clery Act.
  - **Sexual Assault:** "Any sexual act directed against another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent." **20 U.S.C. 1092(f)(6)(A)(v) (Clery Act)**
  - **Domestic Violence:** "Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner [...]". **34 U.S.C. 12291(a)(8) (VAWA)**
  - **Dating Violence: "**Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, and where the existence of such relationship shall be determined base on a consideration of the following factors: the length of relationship, the type of relationship, the frequency of interaction." **34 U.S.C. 12291(a)(10) (VAWA)**
  - **Stalking:** "Engaging in a course of conduct directed at a specific person that would cause a reasonable person to— (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress." **34 U.S.C. 12291(a)(30) (VAWA)**

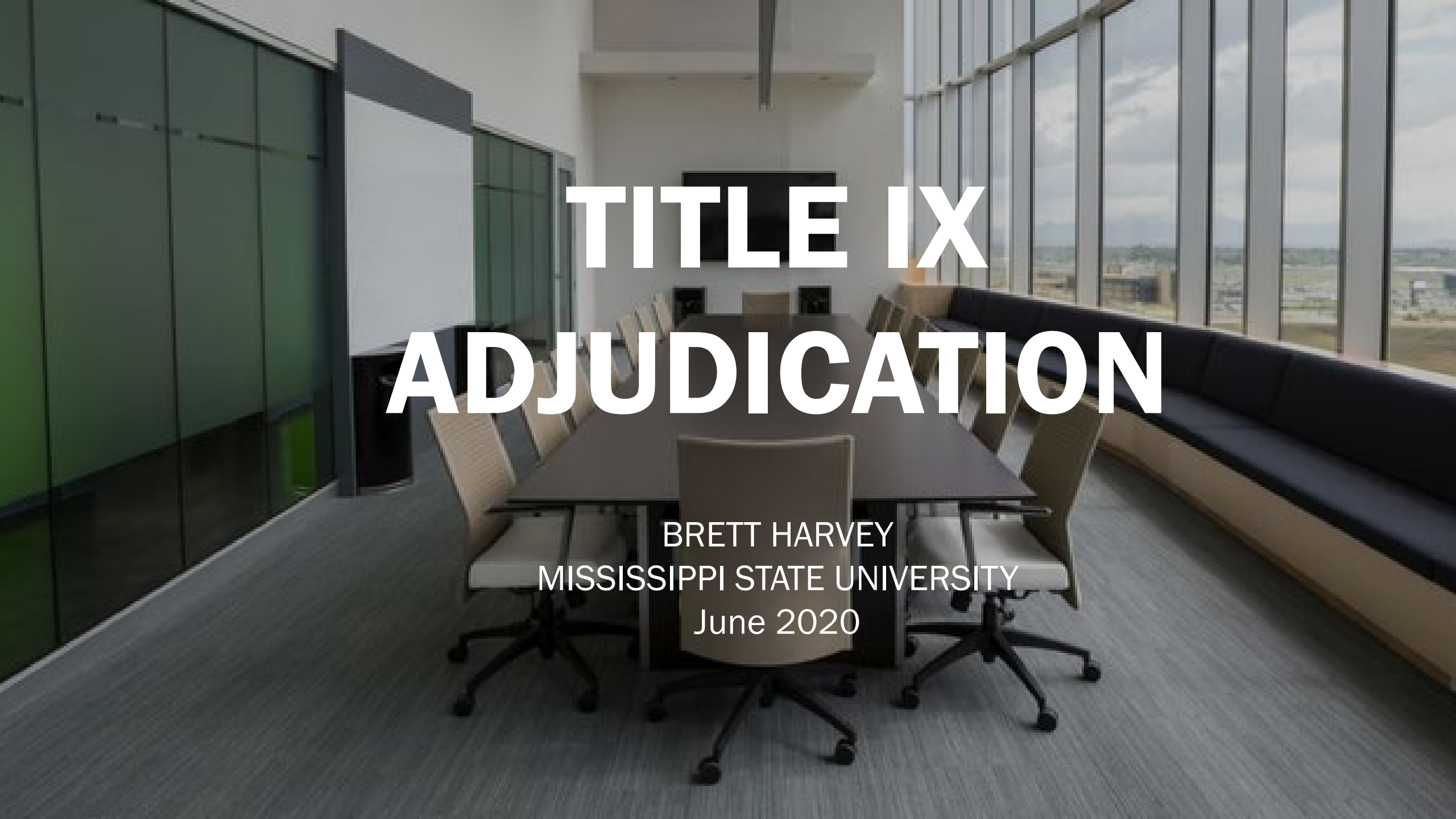
STEP 4: "JURISDICTIONAL" DETERMINATION

- Whether you include it in the policy or not, you'll need to think about where the boundaries of your institution's **educational programs or activities** are.
  - The regulations make it clear that any sexual harassment that occurs on-campus meets this definition.
  - Any harassment occurring during a school-sponsored activity or trip also clearly meets this definition.
  - What about cases that are closer to the line, such as off-campus activities sponsored by student organizations but not authorized by the institution?
  - The safest course in these cases—especially serious matters like sexual assault-- likely is to "dismiss for purposes of Title IX" but have them nonetheless follow the same procedural steps as Title IX matter would.
- Lastly, it appears that if the complainant is not currently a student/employee or an applicant for admission or employment, the matter also must be dismissed for purposes of Title IX. (106.30(a))
  - This is not crystal clear in the Regulations, but it is the most plausible reading.

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 bother permissible and logical to do so.

QUESTIONS?



TITLE IX ADJUDICATION

BRETT HARVEY
MISSISSIPPI STATE UNIVERSITY
June 2020

STEP 5: INVESTIGATIVE REPORT

- What is “relevant evidence”?
  - The 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 consider 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.
  - Assuming your decision maker can be trusted to understand relevant standards of proof, the safer course (to avoid possible conflicts of interest) may be to avoid recommending final outcomes in the memorandum.
  - Recommendations as to, e.g., the relevance of certain evidence may strongly suggest an outcome, but the decision maker should be capable of inferring that on their own.

STEP 6: 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 just 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."
  - What in the world does it mean to "provide without charge or fee [...] and advisor **of the recipient's choice"**? Presumably, the institution has the ability to limit the pool, perhaps with some ability to opt out due to conflict of interest or other good cause.
  - Consider informing parties in writing, possibly along with the hearing memorandum, that they must inform the institution in writing X days in advance if they wish to have an advisor appointed.

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."
  - This seems to imply that the institution not only may, but arguably must, take a slower and more deliberate approach in which (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 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?"
  - Assuming you trust your decision maker to understand the issues, the safest course is to err on the side of letting evidence and witnesses be presented, as the DM is free to assign them low or no weight in the decision.
- 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, simply by refusing to testify.
- Documents such as police reports likely will need live witnesses to authenticate them.

YOUR ADJUDICATORS: THE BASICS

- **Must be unbiased and impartial:** People with ideological commitments or apparent biases as a result of their position are not ideal choices.
- **Must not be conflicted in the Title IX process itself:** Title IX coordinators and investigators are expressly prohibited.
- **Must conduct an "objective evaluation of all relevant evidence"**: This includes both inculpatory and exculpatory evidence.
- **Must make credibility determinations fairly:** May not draw inferences from a person's status as complainant, respondent, or witness; male or female, etc.

YOUR ADJUDICATORS: THE ADVANCED STUFF

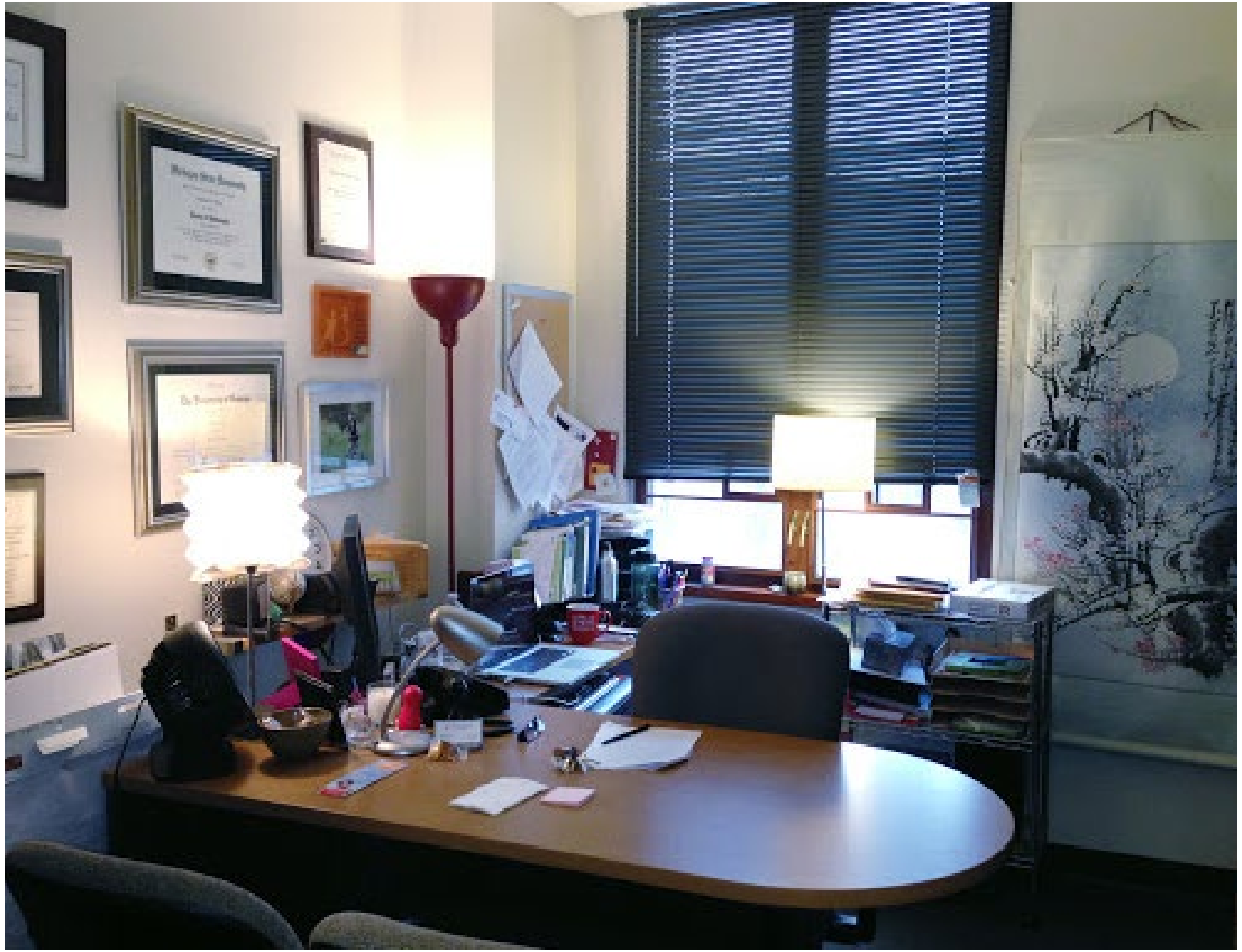
- **Must make real-time rulings on the relevance and admissibility of evidence.**
- **Must make real-time rulings on the permissibility of cross-examination questions.** And must provide explanations on the record for any decision not to permit a question.
- **Must draft a written determination of the outcome.** (106.45(b)(7)) This must include:
  - The allegations raised
  - A "description of the procedurals steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held." (This likely should be provided in the investigation report.)
  - Findings of fact supporting the determination.
  - Conclusions regarding the application of the recipient's code of conduct to the facts.
  - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, and disciplinary sanctions, whether other remedies will be provided.
  - Procedures and grounds for appeal.
- **IMPORTANT:** These requirements make it extremely difficult for non-lawyers, or multi-person panels, to carry out the function of adjudication. Many institutions are considering retaining or contracting with individual adjudicators, such as practicing attorneys or retired judges for these functions.

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

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 (e.g., Brett Kavanaugh), 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