

Office of Institutional Equity
Standard Operating Procedures
Process for Resolving Complaints of Discriminations

(Referenced in ARP 3.25, Part 7, Revised August 14, 2020.)

PART 1: COMPLAINT RESOLUTION PROCESS

A. Initiating a Complaint

1. Reports and formal complaints of discriminatory conduct are taken seriously.
2. Reports and formal complaints of discriminatory conduct will be dealt with promptly, impartially and equitably and resolved in a reasonably prompt time frame.
3. Reports may be submitted by any person through the OIE website, online, or in person to OIE. *(See Part 1(B) of this policy for location information.)*

B. Treatment of the Parties

1. Processes will apply equally to the parties.
2. While parties are encouraged to limit their communication with others about the scope and extent of the investigation, no provision of this rule should be interpreted as preventing parties from discussing the allegations being investigated or gathering and presenting inculpatory and exculpatory evidence. (Note: This does not include instances when parties are issued orders of No Contact.)

C. Timely Reporting

1. Employees and students who witness, suspect, are told about or experience potentially discriminatory conduct are encouraged to make a report or file a formal complaint with OIE immediately.
2. Reports/Complainants should be timely, as the passage of time may limit steps that may be taken; however, all reports, regardless of temporal proximity, should be submitted to OIE.

D. Evidence

1. All relevant evidence – both exculpatory and inculpatory – will be evaluated to determine credibility, regardless of whether the evidence was produced by the Complainant, Respondent, witness or obtained by OIE.
2. Parties will have the right to provide the names of witnesses to be interviewed as part of the investigation of the complaint. OIE will contact relevant witnesses.

E. Presumption

1. A Respondent is presumed not responsible for the conduct alleged until a determination of responsibility is made at the conclusion of the investigation process.

2. Investigations will be conducted using the preponderance of the evidence standard.

F. Supportive Measures Offered

1. After receipt of a Report/Formal Complaint, OIE will promptly contact the Reporting Party/Complainant, and Respondent when appropriate, to discuss the availability of supportive measures.
 - a. Supportive Measures are available, whether or not a Formal Complaint is filed with OIE.
 - b. OIE will explain the process of filing a Formal Complaint, and the investigation process, to the parties.

G. Interim Suspension/Removal of Respondent

1. A student Respondent will be removed from the education program or activity, during the pendency of an investigation, only after:
 - a. An individualized safety and risk analysis are conducted by a team assembled by OIE; and
 - b. A determination is made about any immediate threat to the physical health or safety of any individual arising from the allegations, which justifies removal; and
 - c. The Respondent is provided with notice and an opportunity to challenge the decision immediately following the removal.
 1. A Respondent may challenge the interim suspension/removal.
 2. Challenges must be stated in writing and directed to the OIE Executive Director within 48-hours of receipt of notice of removal.
 3. The interim suspension/removal will be enforced until a decision is made on the challenge.
 4. Decisions on a challenge to interim suspension/removal will be made by the President or designee.
 5. A decision will be issued in writing by the President within 48-hours of receipt.
 6. The President's decision is final.
 - d. An employee may be placed on administrative leave during the pendency of an OIE investigation when it is determined that the employee will impede the investigation or is determined to be an immediate threat.
 1. A decision to place an employee on administrative leave will be decided by OIE in conjunction with ELR and the employee's supervisor.

H. Informal and Formal Resolution of Complaints

1. Informal resolution of complaints includes, but is not limited to the following options:
 - a. Resolution sessions/mediation,

- b. assistance in communication between parties, and
 - c. adjustments to the academic/work environment.
2. Formal resolution of complaints may include:
 - a. Preliminary inquiry,
 - b. investigation of the allegations,
 - c. findings of fact, and
 - d. a determination of responsibility, and
 - e. sanctions, and
 - f. remedies, where appropriate.

I. Formal Resolution

1. If allegations in a Report/Complaint are accepted for investigation, parties will be notified in writing of the allegations to be investigated.
 - a. Should interviews be required, sufficient time will be given for the parties to prepare for their interviews.
 - b. Each party is entitled to have a support person with them during an interview/meeting/proceeding falling under this policy.
 - c. Respondent will be afforded the opportunity to respond in writing to the allegations, should they choose to do so.
 1. Respondents must submit written responses to the allegations within five working (5) days of receipt.
2. OIE investigations will use the preponderance of evidence standard and standard investigation techniques.
3. NMSU students, employees and affiliates are required to cooperate with OIE investigations.
4. While each Report/Complaint is taken seriously, OIE will assess each case to determine priority for investigation.

J. Investigation Report

1. At the conclusion of an investigation, a Report will be written by the investigator(s) involved.
 - a. If, after an investigation has begun, the parties agree to and successfully engage in informal resolution, a Report will not be written.
 - b. If the matter will be decided in a hearing, a Title IX Investigation Report will be sent to the hearing officer.
2. Prior to the Investigation Report being finalized, a draft of the report will be sent to the parties for review along with relevant evidence gathered during the investigation.
3. Parties may submit a written response, along with any additional information/documentation, to the draft Investigation Report within ten (10) days of receipt.
4. Any written response submitted will, at minimum, be included as an exhibit to the Investigation Report.

K. Delay in Resolving Complaints

1. Where there is good cause for a delay of the resolution of a complaint, written notice will be given to the parties.
2. Good cause for delay may include, but is not limited to:
 - a. The absence of a party, a party's advisor or a witness;
 - b. The need to wait for the resolution of a concurrent law enforcement activity;
 - c. The need for language translation or accommodation of disabilities.

L. Complaint Dismissal

1. A complaint will likely be dismissed if any of the following elements are not met:
 - a. The conduct alleged would not constitute discriminatory conduct as defined in this policy; or
 - b. The conduct did not occur in NMSU's education program, property or activity; or
 - c. The conduct did not occur in the United States; or
 - d. The conduct did not occur at a time when the complainant was participating in or attempting to participate in an education program or activity of NMSU.
2. A complaint may be dismissed after the investigation is commenced if:
 - a. A complainant notified OIE in writing that they would like to withdraw the complaint; or
 - b. The Respondent is no longer enrolled or employed by NMSU; or
 - c. Circumstances exist preventing OIE from gathering evidence sufficient to reach a determination as to the allegations.
3. If/when a complaint is dismissed, written notice will be sent simultaneously to the parties notifying them of the dismissal.
 - a. Upon dismissal, a complainant may resubmit their complaint to OIE with additional allegations, or
 - b. Appeal the dismissal of their complaint.
 - i. Review authority for student appeals will be to the Chancellor or Designee for review.
 - ii. Review authority for employees appeals will be to the Chancellor or Designee.
 - c. When appealing dismissal of a complaint for investigation, the complainant must state a reason, with specificity, as to why OIE has erred in dismissing the complaint.
 - d. A written decision on an appeal of a dismissal will be rendered within ten (10) working days of receipt by the review authority.
 - e. The denial of an appeal by the review authority is final.
 - f. If the review authority determines that an investigation should be conducted, the decision will be returned to OIE and an investigation will commence.

PART 2: DETERMINATION OF RESPONSIBILITY FOR NON-TITLE IX INVESTIGATIONS

A. Non-Title IX Investigations

1. At the conclusion of investigations of alleged discriminatory conduct, **not falling under Title IX**, OIE will issue a written determination.
2. The written determination along with relevant evidence gathered during the investigation will be sent out to the parties simultaneously.
3. Determinations of a violation of policy for students on main campus will be sent to the Dean of Students, or designee, for review and sanctions.
 - a. After the window for appeal has expired, determinations of a violation of policy for students on community college campuses will be sent to the individual in charge of Student Services/Affairs, or designee, of the relevant campus.
 - b. The individual in charge of Student Affairs/Affairs, or designee, will conduct a review of the Report and issue sanctions.
4. Determinations of violation of policy for employees will be sent to Employee and Labor Relations for review and sanctions.

B. Appeal of Determination

1. OIE's determination of responsibility may be appealed by either party.
2. To appeal, a party must submit a written appeal to OIE within five working (5) days of receipt of determination.
3. Basis for Appeal:
 - a. The Appellant provides evidence that new facts and evidence have surfaced, which were not reasonably available at the time of the determination, which may impact the outcome of the investigation.
 - b. The Appellant alleges and presents evidence that OIE had a conflict of interest or bias for, or against a party, which affected the outcome of the investigation.
 - c. The Appellant provides evidence that investigation procedures, as specified in ARP 3.25, were not followed during the course of the investigation.

C. Appeals Process

1. Within five working (5) days of receipt of written appeal, the OIE Executive Director will forward the written appeal, along with a copy of the Investigation Report and accompanying exhibits, to the Appeal Authority.
 - a. The Appeal Authority for appeals of non-Title IX determinations will be the Chancellor or Designee.

2. A written decision on the appeal will be issued by the Appeal Authority within ten working (10) days of receipt of written appeal.
 - a. OIE will process the Appeal Authority's written decision to the parties.
 - b. If denied, the written decision will provide specific reasons as to why the appeal is being denied.
 - c. The Appeal Authority's denial of an appeal is final.
3. If the appeal is granted by the Appeal Authority, due to allegations of failure to follow policy, the matter will be assigned to a third-party investigator for review and determination of:
 - a. Whether a procedural error occurred; and
 - b. Whether or not such procedural error impacted the determination of the case.
 - c. If the third-party investigator determines that a procedural error occurred, which negatively impacted the outcome of the case, a determination of appropriate next steps will be issued by the third-party investigator.
4. Even in cases where an appeal of the determination is granted, OIE may refer the matter to ELR or the Dean of Students/Student Affairs office for review of other policy violations and sanctions.
5. The investigation report and subsequent determinations will remain on file with OIE.
6. The decision of the Appeal Authority shall be final.

PART 3: HEARINGS FOR TITLE IX CASES

A. For cases determined by OIE to fall under Title IX, parties have the right to a live hearing on the merits.

1. At the conclusion of the OIE Title IX investigation, a Title IX Investigation Report, will be drafted and sent electronically to the parties, and their advisors, accompanied by relevant evidence.
2. The parties have ten working days (10) to respond to the Report in writing, and provide additional evidence, should they choose to do so.
3. The final report and evidence will be submitted to the parties and the hearing officer no later than (ten) 10 days prior to hearing.
4. A live hearing will be conducted by a hearing officer appointed by the Title IX Coordinator to hear the evidence in the case.
5. The hearing officer may review, and the parties may present, the Title IX Investigation Report as evidence at the hearing, but the hearing officer must hear evidence, and make determinations, based solely on evidence presented at the hearing.
6. The hearing will commence between ten days (10) and thirty (30) days of the submission of the Report to the hearing officer, unless extenuating circumstances or just cause requires further delay.

- a. The hearing officer will determine when just cause exists to delay a hearing.
7. Parties are entitled to Advisors.
 - a. If a party does not have an advisor to conduct cross-examination at hearing, one will be appointed by NMSU to assist in the questioning of witnesses at hearing.
 - b. Parties shall not examine/question each other or any witness.
8. Hearings may be conducted with parties in the same room, different/separate rooms or virtually.
 - a. Parties and their advisors must consult with the hearing officer on logistics of the hearing.
 - b. The hearing officer is the final decision-maker on hearing procedures.
 - c. A recording of the hearing shall be taken and made available to the parties for inspection and review upon request.
9. The hearing officer will determine the relevance of witnesses and evidence to be allowed at hearing.
 - a. The hearing officer will recuse themselves if they determine that they are unable to make an impartial decision on the evidence presented.
 - b. The hearing officer must explain any decision to exclude a question or evidence as not relevant.
 - c. The hearing officer may issue subpoena to compel witnesses to appear at hearing pursuant to N.M. R. Civ. P. Dist. Ct. 1-045.
 - d. The sexual history of the parties may not be allowed at hearing, unless such sexual history is determined by the hearing officer to be relevant to the sexual relationship between the parties and offered as proof of consent, or offered as proof that someone other than the Respondent committed the conduct alleged by Complainant.
 - e. If a party does not submit to cross-examination at hearing, the hearing officer's decision shall be solely based on the evidence presented at hearing.
 - i. The hearing officer may not draw an inference about the determination of responsibility based solely on a party or witness' absence from the hearing or refusal to answer questions in cross-examination.
 - f. The hearing officer will receive training specific to conducting Title IX hearings.
 - g. For student Respondents, the office of the Dean of Students will provide the hearing officer with documentation of the Respondent's conduct history, prior to the hearing officer issuing a decision.

- h. For Employee Respondents, Employee and Labor Relations will provide the hearing officer with documentation of the Respondent's conduct history, prior to the hearing officer issuing a decision.
- i. The hearing officer will issue a written decision within fourteen (14) days of the hearing.
 - 1. The hearing officer's written decision will include:
 - a. A determination that a violation of policy has or has not occurred; and
 - b. A list of the allegations; and
 - c. A description of the procedural steps taken from the receipt of the formal complaint through determination; and
 - d. Findings of fact supporting the determination; and
 - e. Conclusions regarding application of policies to the facts; and
 - f. A statement of and rationale for the results of each allegations, including:
 - 1) Sanctions to be imposed on Respondent; and
 - 2) Any remedies afforded to the Complainant, and
 - g. Notice of the right to appeal the determination.
 - 2. The hearing officer's written decision will be delivered to the Title IX Coordinator for distribution to the parties.
 - 3. The parties will receive the decision simultaneously.
 - 4. The Title IX Coordinator is responsible for overseeing the administration of sanctions resulting from the hearing.
 - 5. Appeals from the decision of the Hearing Officer may be submitted by either party.
 - a. Appeals from the decision of the Hearing Officer must be submitted within five (5) working days of issuance of the decision.
 - b. Appeals must be in writing and submitted to the OIE Executive Director.
 - c. Appeals must state the reason for appeal with specificity and consistent with Part 2 (B)(3)(A-C) of these procedures.
 - 6. The decision of the hearing officer becomes final, either on the date that the Appeal Authority provides the parties with written determination supporting the decision of the hearing officer, or the date on which an appeal would no longer be considered timely.
 - a. Appeals from a Title IX hearing will follow the same process as noted in Part 2 of this rule.

PART 4: CONFIDENTIALITY, REMEDIES AND RECORD RETENTION

A. Confidentiality

1. The identity of any individual who has made a report of sexual harassment under this policy will remain confidential to the extent possible.
2. The identity of any witness or Respondent will remain confidential to the extent possible.

B. Remedies

1. In cases where a determination of responsibility for unlawful and prohibited discriminatory conduct have been found against the Respondent:
 - a. Remedies will be designed to restore or preserve the Complainant's equal access to NMSU's educational programs.
 - b. Remedies may include individualized services previously offered or delivered as supportive measures to Complainant.
 - c. Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent.
 - d. Remedies will be imposed as deemed appropriate to the individual facts and circumstances of each case.

C. Sanctions

1. Student sanctions will be decided by the hearing officer in a Title IX case or the Dean of Students in a non-Title IX case.
2. Employee sanctions will be decided by the hearing officer in a Title IX case or Employee and Labor Relations in a non-Title IX case.

D. Record Retention

1. All records created under this policy and procedure shall be maintained for a minimum of seven (7) years.

PART 5: DEFINITIONS

A. Complainant is an individual who is alleged to be the complainant of conduct that could constitute sexual harassment.

B. Consent is clear, knowing, and voluntary words and/or actions, which give permission for specific sexual activity.

1. Consent is active, not passive.
2. Consent should be requested with words and cannot be assumed.
3. Silence cannot be interpreted as consent.
4. Consent to one form of sexual activity does not imply consent to any other forms of present or future sexual activity.
5. Consent may be withdrawn once given; such withdrawal must be clearly communicated.
6. Consent cannot be given if any of the following are involved:
 - a. Incapacitation; or
 - b. Coercion or force; or

- c. A person below the legal age of consent¹; or
 - d. A person incapable of giving consent.
- C. Coercion** includes elements of pressure, duress, cajoling, and compulsion. In a sexual context coercion is an unreasonable amount of pressure to engage in sexual activity.
- D. Dating Violence** is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant; and where the existence of such relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, frequency of interaction between the persons involved in the relationship.
- E. Domestic Violence** is violence committed
- 1. By a current or former spouse or intimate partner of the complainant;
 - 2. By a person with whom complainant shares a child in common;
 - 3. By a person who is or has cohabitating with complainant, as a spouse or intimate partner;
 - 4. By a person similarly situated to a spouse of complainant under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
 - 5. By any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

NOTE: (UJI 14-370 NMRA: "Household member" means a spouse, former spouse, parent, present or former stepparent, present or former parent in-law, grandparent, grandparent-in-law, a co-parent of a child or a person with whom the person has or had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member. "Continuing personal relationship" means a dating or intimate relationship)

- F. Education program or activity** means locations, events or circumstances over which NMSU exercises substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by NMSU.
- G. Formal Complaint** is a document filed by a complainant or signed by the Title IX Coordinator alleging discriminatory conduct against a respondent and requesting that NMSU investigate the allegation(s).
- 1. Complaints may be filed in person, by mail, by electronic mail, by electronic submission (online portal).
 - 2. Complaints must contain the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

¹ New Mexico Statutes §30-9-11 defines the age of consent as seventeen (17) years old.

3. The Title IX Coordinator may sign a formal complaint; however, the Title IX Coordinator is not a complainant.

- H. Hostile Environment** is created by unwelcome conduct determined by a reasonable person, placed in a substantially similar situation, to be so severe, pervasive, *and/or*² objectively offensive that it effectively denies a person equal access to NMSU's education program or activity.
- I. Incapacitation** is a state in which individuals are unable to make rational, reasonable decisions because they lack the capacity to understand the "who, what, when, where or how" of a situation or interaction.
- J. NMSU System**
1. The NMSU system is referred to as "NMSU" in this policy.
 2. NMSU includes all branch colleges.
 3. NMSU includes all programs functioning under the NMSU umbrella; including, but not limited to 4-H, Cooperative Extension, NMDA, research sites, etc.
- K. No Contact Order** is an order requiring the parties to avoid contact with each other during the time period in which the Order is in place. The Order is not a restraining order issued by a court. Rather, the Order is issued by OIE and enforceable in all NMSU programs and activities.
- L. Reasonable Person** is a hypothetical individual who approaches any situation with the appropriate amount of caution and then takes sensible action. It is an objective test used in deciding whether a person's actions are appropriate under the circumstances.
- M. Respondent** is an individual who has been reported to be the perpetrator of conduct that could constitute discriminatory conduct.
- N. Sexual Assault** is any attempted or actual sexual act directed against another person, without consent of the complainant, including instances where the complainant is incapable of giving consent.
1. Any attempted or actual sexual act directed against another person, without consent of the complainant, including instances where the complainant is incapable of giving consent.
 2. Rape is the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the complainant. This offense includes both males and females.
 3. Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will (without the consent of the complainant), including instances where the complainant is incapable of giving consent because of the complainant's age or youth or because of the complainant's permanent or temporary mental incapacity.

² Title IX requires that the conduct meet all three factors – severe, pervasive and persistent – in order to be considered discriminatory conduct.

4. Incest is sexual intercourse between person who are related to each other within the degrees wherein marriage is prohibited by law.

5. Statutory Rape is sexual intercourse with a person who is under the statutory age of consent.

O. Sexual Exploitation is an act or acts committed through non-consensual abuse or exploitation of another person's sexuality for the purpose of sexual gratification, financial gain, personal benefit or advantage, or any other non-legitimate purpose.

P. Sexual Harassment Any instance of *quid pro quo* harassment by an NMSU employee; any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

Q. Stalking is a course of conduct directed at a specific person that would cause a reasonable person to:

1. Fear for the person's safety or the safety of others; or

2. Suffer substantial emotional distress.

3. For the purposes of this definition:

a. Course of conduct means two or more acts.

b. Reasonable person means a reasonable person under similar circumstances and with similar identities to the complainant.

c. Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling.

R. Supportive Measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent once the matter has been reported to OIE.

1. Supportive Measures are designed to restore or preserve equal access to educational programming, employment or activity without unreasonably burdening the other party.

2. Parties will be treated equitably in the offering of Supportive Measures.

3. Supportive Measures may include, but are not limited to:

a. Counseling available through the NMSU system;

b. Extensions on deadlines for course-work;

c. Modifications of work or class schedules;

d. Campus escort services;

e. Mutual no contact orders;

f. Changes in work or housing locations;

g. Leave of absence;

h. Retroactive withdrawal; and

- i. Increased security and monitoring of certain areas on campus.
 - j. Any individualized service as deemed appropriate by OIE.
4. Supportive Measures must be confidential, to the extent possible, in carrying out the measures
5. The Title IX Coordinator is responsible for coordinating the effective implementation and review of supportive measures.