



Office of the Provost

MSC 3445
New Mexico State University
P. O. Box 30001
Las Cruces, NM 88003-8001
575-646-2594, fax: 575-646-6334
provost@nmsu.edu

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To: Chancellor Dan Arvizu
President John Floros

From: Provost Carol Parker, Task Force Chair

RE: Report and Recommendations based on Holistic Review of Investigations and Reporting Protocols on Campus

INTRODUCTION

The New Mexico State University (NMSU) Task Force for Holistic Investigation and Reporting Protocols convened at your direction in September 2019 to examine the range of NMSU's investigatory and related reporting practices, policies, and obligations; conduct a gap analysis; research best practices; and make recommendations to the university's senior leadership. The members of the Task Force are listed below. I served as chair of the Task Force, and was assisted by an outside consultant, Libby Washburn, who was hired to facilitate and expedite this project.¹

Carol Parker, Provost (Chair)
Becky Corran, Faculty Senate
Ann Goodman, Dean of Students (DOS)
Gena Jones, Human Resource Services (HRS)
Ermelinda Quintela, Audit Services
John Roberts, ICT
Braun Cartwright, Athletics
Manal Hamzeh Al Smadi, Faculty Grievance Review Board (FGRB)
Laura Castille, Office of Institutional Equity (OIE)
Alisha Giron, Research Administration
Ruth Johnston, Chancellor's Office

Carlos Lobato, IT Compliance Officer/Chief Privacy Officer
Susan Ceppi-Bussmann, Distance Education
Stephen Lopez, NMSU Police Department
Roy Collins, University General Counsel's Office
Lisa Warren, University General Counsel's Office
Teresa Keller, Academic Conduct Officer
Susan Wood, DACC Representative
Hiranya Roychowdhury, FGRB
Katrina Doolittle, Environmental Health Safety and Risk Management (EHS&RM)

¹ Libby Washburn is an attorney and higher education compliance specialist, with significant experience assisting with and directing internal investigations.

“Investigation” as used in this report refers a variety of informal and formal fact-finding processes that NMSU employees perform as part of their day-to-day operations, which may include their role in performing an administrative hearing function pursuant to policy requiring the issuance of written findings of fact, based on adequate evidence, and in support of recommendations or administrative decisions.

Consultant Washburn coordinated between myself and the other members of the Task Force to obtain input regarding current practices. Twenty interviews were conducted with current and former leaders on campus. The university’s policies and procedures were reviewed to inventory current types of investigations and related business practices. The consultant also conducted some best practice reviews of NMSU’s peer institutions. The Task Force’s findings are summarized below. Based on these findings, the Task Force also submits recommendations for consideration and possible future action.

SUMMARY OF CURRENT PRACTICES

Investigative Entities: The NMSU units assembled for this Task Force reported that they conduct a variety of internal investigations, with approximately 48 employees conducting formal investigations at any given time.² These internal investigations were reported to be conducted by different units across the university system. In addition, an indeterminate number of supervisors and other individuals conduct internal investigations each year as needed. *See Appendix 1*

The survey also gathered information on other individuals supporting internal investigations or conducting grievance processes on the campus. More than 100 individuals on the campus play an informal role in supporting investigations and hearing grievances. *See Appendix 2*

NMSU Policies Involving Investigations: There are approximately 30 NMSU policies that specifically mention, describe, or require investigative and grievance processes in a given context. For example, pursuant to ARP 3.25, the Office of Institutional Equity (OIE) is the authorized entity to investigate all claims of prohibited discrimination, and pursuant to ARP 17.20, the Department of Athletic Compliance investigates alleged violations of NCAA (National Association of Intercollegiate Athletics) rules and regulations. Some of the NMSU investigative entities on campus have broader authority to investigate a range of types of misconduct, including any alleged violation of policy or law (e.g. Human Resource Services, Dean of Students Office, Audit Services). *See Appendix 3*

Types of NMSU Investigations

² This number reflects what was reported to the consultant.

As noted above and in Appendix 3, a variety of incidents or allegations result in the need for timely fact-finding, to learn and document what happened and all attendant details. This fact-finding is generally referred to as an “internal investigation.”³ In some policies, “investigate” or “investigation” is referenced in the context of a dispute resolution process; these are included in this report for now, due to the holistic nature of this review project.

Investigative reports are relied upon in a variety of different proceedings affecting the institution (financially, reputationally, etc.). A few examples include:

- Facts proving or disproving a malfunction of equipment, operator error or other work safety issue.
- Facts proving or disproving that an employee or student violated university policy or other applicable law.
- Facts proving or disproving the university’s compliance with applicable state or federal regulations or grant/contract terms.

The holistic investigations review revealed three distinct types of fact-finding occurring regularly on the NMSU campus.

1. Incident Review Investigations

This type of internal investigation is not usually triggered by a complaint filed against someone, but rather by the fact that an accident or incident has happened, which may be observed and reported by anyone. Depending upon the nature of the incident or the reluctance to become involved on the part of the reporter, these may also be initiated as a result of a report received anonymously through the university’s confidential reporting line, EthicsPoint.

A supervisor who was not involved in the incident or a member of another unit with authority (e.g. EHS&RM, Lab supervisor) investigates the matter to document, in report format, the essential facts relating to the incident. The report documents facts of the incident which attempt to describe the cause and contributing factors, as well as directs corrective and remedial action(s) to prevent a similar recurrence. The serious work-related injuries and damages may warrant coordination with the Police and Fire Department for inclusive documentation. The serious work-related injuries such as hospital admittance requires reporting to an external agency. The office of University General Counsel is notified and involved when incidents involve serious injuries, formal complaints, and claims for damages. The State of New Mexico’s Risk Management Division provides insurance coverage on behalf of NMSU, and thus is responsible to assign the adjustor to perform an investigation as it deems necessary for the defense or resolution of a claim.

³ This fact-finding is also used for a variety of other actions also known as reviews, investigations, examinations, inspections, probes, assessments, inquiries, reports, etc. All of these terms are used to describe “internal investigations” on the NMSU campus.

If an incident or accident becomes the basis for student or employee discipline involving loss of job or pay, then due process will be provided as part of the disciplinary process. Typically, the internal investigative report is used to provide the employee with notice of the charges made against the employee, policy violations found provides the basis for the disciplinary action taken. Additionally, incidents and accidents may result in a third-party filing a complaint (e.g. tort of negligence) against NMSU, or in an employee receiving workers compensation. The results of these types of internal investigations conducted by NMSU often require reporting to an external agency, to State Risk Management, or both.

NMSU Policies Relating to Incident Review Investigations Include⁴

- ARP 5.40 – Access to Student Educational Records – FERPA Compliance
- ARP 8.72 – Workers’ Compensation Benefits and Other Assistance (Part 4 G)
- ARP 15.60 – Management of Health Information – HIPAA Compliance
- ARP 15.62 – Protection of Federal Information: FISMA Compliance
- ARP 15.63 – Protection of Customer Information: GLBA Compliance
- ARP 15.91 – Identify Theft Protection
- ARP 16.30 – Authorization of Health and Safety Programs
- ARP 16.31 – Reporting of Work-Related Accidents
- ARP 17.20 – NCAA and Conference Participation and Compliance
- BPM 400 – Claims Management

2. Investigations into Alleged Misconduct by Employee, Student or Visitor

Multiple offices conduct investigations of alleged misconduct by employees, students and visitors. Complaints and information about alleged misconduct are received in a variety of forms and are handled in different manners depending on the underlying facts.⁵

With these type of investigations, due process must be provided when an employee, student, or member of the public will potentially be deprived of a protected liberty or property right. The term “due process” is a legal term found in the Fifth Amendment to the U.S. Constitution. Employers have flexibility to set parameters for due process but can face liability for an inadequate investigation. Because the results of the internal investigation can result in a loss of job, demotion or loss of pay, disenrollment or restriction from access to the campus, due process (notice and a meaningful opportunity to be heard) is required before such action may be taken.

⁴ This is not an exhaustive list of the policies that fall under the Incident Review category.

⁵ For employees, a supervisor not involved in the allegations coordinates with HRS-ELR (Employee and Labor Relations) to conduct internal investigation. If an investigation originates via the EthicsPoint reporting system, Audit Services is involved in the investigative process or refers the matter to the appropriate unit. If the misconduct is also a crime, there may be parallel criminal and administrative investigations. If a visitor is accused of serious misconduct, the individual’s right to access campus may be restricted. If a student is accused, the Office of the Dean of Students (or VPSS at the community colleges) investigates. If the misconduct involves discrimination, OIE conducts the internal investigation.

Some policies provide the right to be heard during the internal investigation, in addition to the right to be heard during the proceeding involving the proposed disciplinary or other action.

The results of this type of investigation occasionally require reporting to an external agency. They also often become the focal point of a personnel proceeding and/or subsequent lawsuit.

NMSU Policies Relating to Investigations into Alleged Misconduct include⁶

- ARP 3.00 – Ethical Conduct Required in all NMSU Operations
- ARP 3.25 – Discrimination, Harassment and Sexual Misconduct on Campus
- ARP 3.80 – Prohibition of Bullying, Hazing and Hostile Misconduct (Non-Discriminatory)
- ARP 5.10 – 5.11 – Student Academic Code of Conduct
- ARP 5.15 – Degree Revocation and Expulsion from University
- ARP 5.20 – SSCC – Overview of Student Social Code of Conduct
- ARP 10.10 – Staff Disciplinary Action/Involuntary Termination (broad authority)
- ARP 10.50 – Faculty Alleged Misconduct Investigation, Discipline, and Appeals Processes (broad authority)
- ARP 11.30 –Addressing Allegations of Misconduct in Research
- ARP 16.01 – Authority of the Police Department (broad authority)
- ARP 16.21 – No Trespass Directive – Restricted Campus Access
- ARP 16.46 – Audit Services (broad authority)
- ARP 16.63 – Smoking and Tobacco Use Restrictions (*this is but one example of many policies that might be investigated by a supervisor per 10.10 or 10.50, and in coordination with HRS-ELR*)
- ARP 17.20 - NCAA and Conference Participation and Compliance

3. Fact-Finding in Response to Personnel Conflicts and Grievances

This type of fact finding is not generally considered an “investigation” because the evidence is limited to what the parties to an employment dispute present to the hearing official or body (e.g. student grievance, staff grievance, faculty grievance, or other conflict about rights and authority encountered on campus). This type of fact-finding, required to be supported by a requisite amount of evidence, is included in this report due to the holistic nature of this project.

Unless there is a protected property right at issue (potentially under ARPs 5.13, 5.14 or 11.05), the process due to individuals is substantial compliance with the applicable policies and procedures, in contrast with federal constitutionally required due process.⁷

⁶ This is not an exhaustive list of the policies that fall under the Alleged Misconduct category.

⁷ There may be some overlap between the different categories and the subject matter of dispute may also affect a property right that would require due process. There should be coordination with the General Counsel’s Office on these types of issues.

Although the results of this type of investigation do not require reporting to an external agency, the “findings of fact,” recommendations, and administrative decisions issued in grievance hearings can become evidence in a subsequent lawsuit.

NMSU Policies Relating to Fact Finding Conducted during Conflict Resolution⁸

- ARP 3.45 – Assistive, Service, and Companion Animals on University Premises
- ARP 5.05 – Part 4, Student Non-Academic Grievance Procedure (applies only when no other specific process exists for resolution of the type of complaint asserted)
- ARP 5.13 – Undergraduate Student Academic Grievances (includes grade appeals)
- ARP 5.14 – Graduate Student Academic Grievances (includes grade appeals)
- ARP 5.20 – SSCC – Overview of Student Social Code of Conduct
- ARP 10.60 – Review of Faculty Grievances (this policy excludes many types of issues – e.g. merits of P&T decisions that do not involved an alleged policy violation)
- ARP 10.20 – Staff Grievances/ Disciplinary Appeals (only the staff grievance portion of this policy is in this category)
- ARP 11.05 – Resolution of Disputes over Intellectual Property (IP) rights or ownership

Internal Investigation Training: The table in Appendix 4 reflects the type, frequency and nature of the training reported to be provided to NMSU employees, officials, and hearing bodies charged with conducting the various types of internal investigations on campus. There is wide variation, and no regular schedule for training. It appears that the departments decide what training they need and when they need it, and budget determines the extent to which they are able to obtain it. Many receive no formal training. *See Appendix 4*

Investigative Data Storage: The table in Appendix 5 reflects how the various NMSU units that conduct investigations store the data collected during their investigations. It is apparent that there is no consistent method of data storage on the campus. The variance in time frames for retention of the investigative records is likely based on the state’s records retention laws are based on subject matter. *See Appendix 5*

Recommendations⁹

1. Encourage a Culture of Reporting

⁸ This is not an exhaustive list of policies falling under this category.

⁹ NMSU will soon embark upon an Enterprise Risk Management Review. Some of these recommendations can be incorporated into this process.

Every NMSU employee shares the university's responsibility to comply with laws, regulations, and policies governing a variety of activities. At NMSU, there is a strong "tone at the top" that supports an ethical atmosphere, created by the university's senior leadership.¹⁰

NMSU senior leadership can continue to strengthen the tone at the top the following ways:

- Beginning in 2020, the Chancellor and President can make a formal announcement encouraging people to read the annual message to the campus urging prompt reporting of suspected or known violations of law or policy to immediate supervisors, department chairs or deans, or other leaders.
 - Encourage more self-reporting.
 - Reinforce that all employees are required by policy to cooperate with requests related to investigations.
 - Make a strong statement that failure to comply with the law and universities policies will result in disciplinary action up to and including termination.
- Review the anti-retaliation policies and possibly consolidate the current policies to protect employees against retaliation. Include in any messages reinforcement that retaliation is prohibited against anyone reporting concerns or cooperating with an investigation.
- Contemplate implementing a formal annual policy notification schedule to provide the campus community with regular reminders about important policies that impact faculty, staff, and students at NMSU. NMSU is already sending out policy reminders on certain topics; this would formalize and broaden the practice.
 - Policy notifications can be distributed as mass emails and audiences and senders can vary by policy.
 - Suggested schedule for 2020: January 2020 – Political Activities; February 2020 – EthicsPoint System reporting for fraud, waste, abuse, etc.; April 2020 – Sponsored Youth Program; August 2020 - Sexual Misconduct. September 2020 - IT security.
 - Annual policy notifications can also be used to remind PIs and others about the NMSU research policy and other requirements.
- Increase awareness and actively encourage employees, students, guests, and other interested parties to file confidential reports¹¹ regarding practices or conduct that does not meet the ethical and professional standard of NMSU by reporting through the online EthicsPoint hotline system. This system is staffed by operators 24 hours a day, 7 days a week.

¹⁰ Additional focus on encouraging an ethical culture might prevent the need for some internal investigations in the future. It may increase the number of investigations if individuals are willing to report and if accountability is effective.

¹¹ There are certain types of reports that can not be anonymous, i.e. those required by "mandatory reporters."

- Consider increasing the campus-wide advertisement of the EthicsPoint hotline system. This includes advertising on the NMSU website and through printed posters, brochures, and other materials.
- The conflict of interest policies are in need of review, coordination, and update.
- The conflict of commitment policies should be reviewed and updated, based on best practices identified during export control assessment conducted in 2019.
- NMSU leadership might consider the creation of an ombuds office designated as a “safe space” for community members to identify difficult workplace situations and seek neutral advice and guidance about how they might approach conflict resolution regarding a range of issues. This service is currently being provided by the Faculty Grievance Review Board (FGRB) because there is not an entity on the campus filling this need. However, this is not FGRB’s role and there is no clear delegation of authority for FGRB to carry out this role. A review of NMSU’s Peer Institutions shows that 13 of the 15 universities currently have varying levels of ombuds services.¹² Additional review is needed.

2. Standardized Investigation Processes

Consider creating general guidance for the three types of internal investigations and fact-finding administrative hearings conducted at NMSU. The aim should be to have a standardized investigation process template, so that similarly purposed investigations can follow the same basic process as appropriate. Otherwise, NMSU will continue to see wide variation in how investigations are processed, evidence weighed, conclusions made, and reports written. Without a standardized investigation process with clear investigation protocols, NMSU investigative reports may not stand up to scrutiny in contested proceedings, including lawsuits. A consistent template process will also make NMSU investigations more efficient and effective.

Suggestions for common investigative procedural guidance (“a repeatable process”) include plans to:

- Develop a policy statement on investigations to give standardized guidance to all those across campus who could be called upon to conduct an investigation. (Regents Policy Manual (RPM)).
- Define and identify roles and develop a triage process for the three types of investigations.
- Develop basic internal investigation rules and procedures or protocols.
 - Follow pre-existing examples. The NMSU Police Department has provided proscribed standards for conducting administrative investigations against police officers, which can be used as a template. In addition, Audit Services has several protocol templates from other universities.

¹² A review of peer institutions included: Colorado State University; Iowa State University; Kansas State University; Montana State University; Oklahoma State University; Oregon State University; Texas Tech University; University of Arizona; University of Idaho; University of Nevada – Reno; University of New Mexico; University of Texas – El Paso; University of Wyoming; Utah State University; and Washington State University.

- Create an abbreviated checklist for investigators.
- Create standardized forms and templates for topics such as witness interviews, issuance of warnings, confidentiality, etc.
 - Some NMSU units already have standardized forms for conducting investigations. These can be tailored for use by other units.
- Provide scripts for individuals to follow when conducting investigations.
- Create a standardized investigative report template.¹³ This could include a core set of sections:
 - The allegations or reason the investigation was initiated, including the timing.
 - Background Procedural Information – defines and identifies the office responsible for investigation, how investigator selected (if not dictated by policy), etc.
 - Overview of Investigation (explains the governing policy, and describes what is done when – e.g. how many witnesses interviewed, what documents reviewed, other evidence reviewed, any logistical issues encountered, etc.)
 - Factual Findings (first explains burden of proof required by the governing policy and that the facts listed in the report were substantiated by this requisite amount of evidence; if applicable, analyzes relevance and credibility of witness testimony and explains why believed or not believed).
 - Outline of the policies, laws, and regulations at issue.
- Require the involved individuals in their own units and across departmental lines to assemble in a timely manner to review lessons learned after an investigation and related disciplinary processes. Discussion amongst the involved individuals and units over time should improve interdepartmental communications and cooperation, build mutual understanding and trust, and assist with improving processes and outcomes.

3. Formalized Training Program

Training, using agreed upon content, is the cornerstone of creating a strong internal investigation process. NMSU needs well trained investigators, and comprehensive training should extend to all units conducting investigations on the campus, working in conjunction with the office of the University General Counsel.¹⁴

NMSU should think about offering various interactive training options, from live in-person trainings and simulations to webinars and online training modules. Suggestions for training options include:

- Conduct a formal internal investigator training program (one full-day) with a professional trainer for the investigators on the campus.
 - Invite key campus administrators to attend this intensive training session.

¹³ This template language can vary if more is needed (e.g. for a Title IX case).

¹⁴ The Center for Learning and Professional Development within Human Resource Services could be in charge of developing and monitoring an internal investigation training program.

- Invite key administrators and staff members from the community colleges to attend this intensive training and use a “train the trainer” model on the community college campuses to push this training out to a wider audience.
- Create an internal investigator training program, offering 3-4 training opportunities annually.
 - This could include training sessions by the General Counsel’s office on differences between the standard of review for investigations, determining the credibility of witnesses, etc.
 - Storing investigative data. Failure to preserve relevant documents after an investigation could result in jeopardizing the integrity of the investigation. Formalized training is needed regarding the storage of investigative data.
 - Scheduling additional training sessions with outside trainers as needed.
 - Coordinating the joint viewing of internal investigator webinars.
- Consider purchasing a general online training module that can be accessed through the central training system. All supervisors could view the training module when needed (prior to an investigation).

4. Communications Strategy

Internal Communications – Consider focusing on ways to increase the sharing of information regarding internal investigations. This can include implementing team meetings to discuss pending investigations. Another option is conducting triage intake meeting when a matter arises to get all the interested parties on the same page.

External Communications – Contemplate establishing a protocol around external communications during an internal investigation. This can include communications planning regarding public, media, and employee communications.

The Faculty Grievance Review Board (FGRB) would like more internal communications with Human Resource Services, perhaps through a quarterly meeting between the two entities.

5. Prioritization of Continuing Reviews of Current Rules and Procedures and Development of Standards for New Policies

NMSU leadership should consider implementing standards for development of new policies and schedules for policy revision. This could be done through a standing policy review committee. Policies that might benefit from revision include:

- ARP 10.10 - This policy needs to provide or make reference to the internal investigation process; clarify the standard of proof by which violations will be found; clarify that disciplinary corrective action is not required to follow progressive discipline when a violation is serious – and clarify what that means (e.g. bad behavior including violence, discrimination, or retaliation, dishonesty causing loss of public trust, causing excessive damage, or creation of excessive risk of harm); and this policy needs to revamp the appeal process within this

policy (not within the grievance policy at ARP 10.20 as it is now, which adds confusion to both policies) to provide a prompt method for an independent review by a neutral official or hearing body.

- With the creation of the IT Compliance and Privacy Office, some of the investigation lines have changed. The corresponding policies do not reflect these changes. In particular, numerous policies say that ICT will conduct investigations. However, based on the input received, it is the IT Compliance and Privacy Officer who now conducts the investigations. The policies should be revised to correspond with the new role and responsibilities and reflect the current practice. This encompasses 15.60, 15.62, 15.63, 15.91, 5.40. Of these only ARP 5.40 contains some detail on the process relating to the manner in which alleged privacy breaches will be investigated. Also, job titles and reporting functions have changed and these policies and others need to be updated “holistically” for consistency.
- ARP 11.30 appears to conflict with ARP 10.50 regarding due process and notification. The potential exists for situation where a faculty member is assured certain due process rights via ARP 10.50, but they are not provided during an investigation conducted pursuant to ARP 11.30 relating to alleged research misconduct.
 - Also need to coordinate closely with HR on any internal investigation into faculty or personnel misconduct of any kind.
- Consider revising the “fact finding” and decision process described in the undergraduate and graduate student academic grievance procedures (ARP 5.13 and ARP 5.14) from a tiered appeal process to provide a truly objective neutral decision maker on review.
- ARP 5.15 regarding degree revocation is outdated and needs to be updated.
- ARP 8.72 and 16.31 are duplicative. 16.31 should reference 8.72 Part 4 for work related accidents procedure. Remove material from the Business Procedures Manual related to claims and establish an ARP which describes risk claims processing.

6. Condense and Strengthen the Internal Investigative Processes

Eliminate repetitive or duplicative language within each policy on the steps for an internal investigation, and instead cross-reference to an ARP that establishes the rules and procedures for each type of internal investigation, or process for fact-finding relating to a conflict. When feasible, maintain flexibility in the content of the ARP by referencing the specific requirements in federal or state regulations or grant agreements, without putting them into the ARP, requiring an update to the ARP each time the regulation or grant agreement is amended.

Also, consider whether or how to address serial, duplicative investigations on the campus when different offices are investigating the same person or issue. Instead strive for concurrent investigations to avoid requiring victims or respondents from being compelled to repeat the same information for different offices within the university. During the information gathering phase, several individuals raised concern regarding multiple investigations and the need to implement better coordination. This was not contemplated at the creation of the Task Force.

- Consider conducting a Best Practices Review to determine how other universities are combining investigation efforts.

7. Review the Differing Standards of Proof – Can they be made more consistent?

Internal investigation reports document facts that are supported by the relevant standard of proof.¹⁵ At NMSU, the standard of proof required varies by the type of case. For example, in staff misconduct cases, wrongdoing must be proven by a preponderance of the evidence, whereas for faculty misconduct, wrongdoing must be proven by the higher standard of clear and convincing evidence, except when the alleged misconduct involves alleged discrimination based on a protected class, when it is evaluated based on the preponderance of the evidence standard.

The amount of evidence required to prove a violation of policy (“standard, or “burden, of proof”) varies amongst the policies listed in Appendix 3 between clear and convincing and preponderance of the evidence. The most immediate example is the fact that the standards are different for faculty and staff investigations. The recommendation is to review these as part of the exercise to condense the number of policies with their own investigative process as well to gain consistency amongst the distinct policies for similar violations.

Students are also subject to varying standards of proof, depending upon the alleged misconduct. For example, academic integrity violations are subject to a clear and convincing evidence requirement, whereas other infractions such as alcohol and drug violation, sexual misconduct, and other policy violations are subject to the preponderance of the evidence standard.

Even if no revisions are made to the standard of evidence required to prove a violation, it is vital to train the investigators of these policies about the above definitions and how to apply them, so that when they issue their findings of fact, each finding is indeed supported by the proper amount of evidence.¹⁶

8. Innovative Ideas

¹⁵ *Standards of Review - Summary*

- Preponderance of the evidence - Preponderance of the evidence, also known as balance of probabilities, is the standard required in most civil cases. The standard is met if the proposition is more likely to be true than not true. The standard is satisfied if there is greater than fifty percent chance that the proposition is true.
- Clear and convincing evidence - Clear and convincing evidence is a higher level of burden of persuasion than "preponderance of the evidence". Clear and convincing proof means that the evidence presented by a party must be highly and substantially more probable to be true than not and the trier of fact must have a firm belief or conviction in its factuality
- Beyond reasonable doubt - This is the highest standard used as the burden of proof and typically only applies in criminal proceedings.

¹⁶ There is a general perception that if two witnesses testify and their testimony is conflicting (e.g. “he said/she said”), that the lower preponderance of evidence standard cannot be met (because “they cancel each other out” and perception is that this means 50/50 balance and therefore not even the preponderance of evidence standard met). This is not true and a credibility analysis must be conducted, and then the proper standard of evidence applied.

Consider having one unit or a common pool of investigators on the campus conduct all the personnel investigations.

- All investigators would need to have training in the variety of types of cases that are typically investigated.

Consider training additional ad hoc investigators on the campus to use when neutral, trained investigators are needed (lawyers, individuals with criminal justice backgrounds).

Contemplate creating a judicial hearing officer panel with attorneys or other trained individuals to conduct required hearings consistent with due process.

- This could be cost prohibitive unless retired professionals willing to donate time or charge a lesser rate were utilized.

9. Unit Specific Suggestions

The following recommendations were provided during the information gathering phase. Both the Office of Institutional Equity (OIE) and the Dean of Students Office perform important investigative work on the campus that ensures compliance with federal and state laws and regulations. Serious consideration should be provided to these suggestions.

Office of Institutional Equity

OIE needs support from executive administration and HRS on its authority to hold accountable individuals who do not cooperate in an OIE investigation per ARP 3.25 Part 10 C.

OIE needs support to strengthen the coordination, collaboration, and sharing of documentation across departmental lines. Consider drafting clear guidelines on the sharing of information between units. This should be rectified with the revision of the policy (due to be finalized in early 2020).

Currently, there is no appeal of fact finding in OIE investigations. This should be rectified with the revision of the policy (due to be finalized in early 2020).

Currently OIE does not have access to student disciplinary records. Depending on the outcome of the Department of Education's final Title IX proposed reg changes, some processes and procedures may need to be revamped.

The new National Science Foundation (NSF) Sexual Harassment Guidance has been in place for approximately one year. Office of the Vice President for Research (OVPR) is working closely with OIE on a process for handling NSF issues. A formalized process has been drafted.

Dean of Students (DOS) Office

The staff in the Dean of Students Office both investigates and issues disciplinary sanctions. This has the potential to create a perception at a minimum that DOS hearing officers are not impartial. Consider using a common pool of students who are not DOS staff trained to conduct administrative hearings for formal appeals.

The Dean of Students Office needs to review staffing levels; reorganize office; and conduct training for DOS staff on particular subject matter areas.

The Dean of Students Office should adopt a central investigation training process and assignment model for student conduct issues.

The Dean of Students Office needs to better publicize the student conduct policy.

IT Compliance and Privacy Office

NMSU is lacking a System-wide Privacy Policy. The Privacy Office should review best practices from other Universities and create a Privacy Policy. Privacy violations should be investigated appropriately to comply with any applicable privacy regulatory requirements.

NMSU Sponsored Youth Program Monitoring

NMSU leadership can audit Youth Program compliance and implement a monitoring program as part of a preventative measure.

- This could include notifying people on an annual basis regarding the requirements under the NMSU Sponsored Youth Program policy.
- Require supervisors, deans, and department chairs to certify policy compliance within their respective youth programs.
- Review dual credit programs.
- Spot check programs to ensure compliance with background checks, training, etc.
- Explore creating guidelines for interviewing minors during an administrative investigation.
- Implement safeguards to ensure that if there is an indication that a minor has been of the victim of a crime, the investigators should immediately notify the relevant law enforcement agency.

NMSU Entity Performing Investigative Work	# of NMSU Employees Performing Investigative Work, Per Unit	Policy Authority
Human Resources	4 HR employees Supervisors from affected unit	ARP 10.10
Audit Services	5 Audit Services employees (includes the Chief Audit Executive)	ARP 16.46 Part 5 F.
Investigations into alleged/suspected faculty misconduct (not teaching performance related)	Deans, associate deans, dept. heads (in coordination with HRS-ELR)	ARP 10.50
Dean of Students	1 assistant dean to investigate alleged student misconduct 1 associate dean to hear cases/issue decision	ARP 5.20-5.26
Student Academic Misconduct	1 supporting official (ACO) (per campus) faculty in coordination with department head, associate deans and others	ARP 5.10-5.11
Office of Institutional Equity (OIE)	4 investigators (may include the Exec Director)	ARP 3.25
Athletics	3 in Athletics Department 2 in the Athletics Compliance Office (reports through the General Counsel) 1 Faculty Athletics Rep (reports to Chancellor)	ARP 7.20
Police Department	3 dedicated investigators	ARP 16.01
ICT (NMSU's CIO and CISO) - IT Compliance and Privacy Office (formerly IT Compliance Officer within NMSU ICT)	3 1	ARP 15.25 ARP 15.60 ARP 15.62 ARP 15.63 ARP 15.91 RPM 15.50

Community Colleges	<p>DACC – Carlsbad – Alamogordo - Grants</p> <p>(4) Each CC has a VPSS that will investigate student alleged misconduct</p> <p>(4) Each CC has an ACO that supports investigations into student alleged academic misconduct</p> <p>(4) Each CC has an HR liaison who coordinates with the supervisor of the employee accused of misconduct and with HRS-ELR</p>	<p>ARP 5.10 – 5.11</p> <p>ARP 10.10</p> <p>ARP 10.50</p> <p>Note: DACC may have their own IT inv also who liaison to NMSU IT for investigations under the policies cited in row immediately above</p>
OVPR	2 (includes the VPR)	ARP 11.30
Environmental Health and Safety & Risk Management	5	ARP 16.30
Total:	48+	

Appendix 2 to Report on Holistic Review of Investigation and Reporting Protocols on Campus

NMSU Dept or Official Hearing Body	Individuals with Information-Gathering, Supportive or Grievance Hearing Role
Faculty Grievance Review Board	13 Members (multi-year term) from which 3-member hearing panels are convened to hear grievances
Human Resources Board	The Board is convened when needed
[Undergraduate Student] Academic Appeals Board	Each college appoints members to serve as needed to hear/resolve undergraduate student academic grievances (grade appeals or other academic issues)
Graduate Student Appeal Board	5 Members (3 faculty; 2 grad students; 1-year term) convened as needed to hear graduate student academic grievances (grade appeals or other academic issues)
Academic Integrity Appeals Board	3 members are selected from the 14 member Student Academic Conduct Board to serve as a hearing panel to hear case involving an undergraduate or graduate student charged with an academic integrity violation
Ad Hoc Committee convened by the OVPR	Committee convened as needed in event ethical misconduct in research and scholarship is alleged (<i>Note: needs to be coordinated with HRS-ELR and UGC and coordinated with process in ARP 10.50</i>)
Institutional Review Board	2 IRB chair and vice chair
Office of Institutional Equity	1 administrative staff member
Office of Distance Education	2 informal investigators
ICT InfoSec	3 Staff members provide technical assistance
Environmental Health Safety & Risk Management	4 Staff members assist with investigations
NMSU Police	67 Police Department employees are trained and expected to conduct some level of investigation. Of these 67, 23 are full-time Certified Officers and 3 are dedicated Criminal Investigators.

	NMSU Policy Mentioning Investigations	Who Investigates/Hears Grievances (per the policy)
1.	ARP 3.25 – Discrimination, Harassment and Sexual Misconduct on Campus	Office of Institutional Equity (investigates) Provost (issues findings)
2.	ARP 3.45 – Assistive, Service, and Companion Animals on University Premises	Companion and Assistive Animals Committee (informal fact finding and complaint resolution)
3.	ARP 3.80 – Prohibition of Bullying, Hazing and Hostile Misconduct (Non-Discriminatory)	HRS-ELR in coordination with Supervisor of affected unit; HR liaison if applicable
4.	ARP 15.25 – IT Investigation	NMSU ICT (See Part 1 B.; ICT’s CIO is policy administrator)
5.	ARP 15.55 - Payment Card Industry Data Security Standards	PCE DSS Compliance Steering Committee SVPAF is policy administrator IT Compliance and Privacy Office <i>(website refers to IT Compliance Officer)</i>
6.	ARP 15.60 – Management of Health Information – HIPAA Compliance	IT Compliance and Privacy Office (policy refers to HIPAA Privacy and HIPAA Security Officers)
7.	ARP 15.62 - Protection of Federal Information: FISMA Compliance	Chief Privacy Officer (IT Compliance and Privacy Office) ICT’s CISO is policy administrator and “. responsible for ...investigation of security violations...”
8.	ARP 15.63 - Protection of Customer Information: GLBA Compliance	Chief Privacy Officer (IT Compliance and Privacy Office) ICT’s CISO is policy administrator and “...responsible for ... investigation of technical security violations...”
9.	ARP 15.91 - Identify Theft Protection	Highest authority within operation or department (Part 5 A.) IT Compliance and Privacy Office ICT’s CISO is policy administrator
10.	ARP 16.01 – Authority of the Police Department (broad authority)	Police Department
11.	ARP 16.21 – No Trespass Directive – Restricted Campus Access	Authorized officials (campus presidents or designees, Police, OIE, DOS, HRS) decide if facts presented justify restricting someone’s access to campus
12.	ARP 16.31 – Reporting of Work-Related Accidents/Incidents	Environmental Health Safety & Risk Management

	NMSU Policy Mentioning Investigations	Who Investigates/Hears Grievances (per the policy)
13.	ARP 16.63 – Smoking and Tobacco Use Restrictions	Environmental Health Safety & Risk Management investigates formal complaints in coordination with supervisor. Otherwise, if employee is accused, the supervisor investigates. If student is accused, DOS investigates.
14.	ARP 16.46 – Audit Services (broad authority)	Audit Services’ general function is to evaluate and improve the effectiveness of risk management, control and governance processes which it does in part through investigation. The auditors additionally investigate complaints which are received through NMSU’s Confidential Reporting system.
15.	ARP 17.20 - NCAA and Conference Participation and Compliance	NCAA Compliance Office
16.	ARP 16.30 links to https://safety.nmsu.edu/campus-safety/loss-prevention-and-loss-ctrl/safety-incident-reporting/ Safety Incidents or Concerns	Environmental Health Safety & Risk Management
17.	ARP 16.31 – Work-Related Accidents/Incidents place events under NM state law – NMSU Business Procedures Manual	Environmental Health Safety & Risk Management
18.	BMP 400 Claims Management – reviews all notices of claims that are not work related	Environmental Health Safety & Risk Management
FACULTY and STAFF		
19.	ARP 10.50 – Faculty Alleged Misconduct Investigation, Discipline, and Appeals Processes	HRS-ELR in coordination with appropriate academic administrator
20.	ARP 10.60 – Review of Faculty Grievances	FGRB hearing panel hears evidence presented by the parties and renders factual findings
21.	ARP 8.72 – Workers’ Compensation Benefits and Other Assistance (Part	Affected employee’s supervisor Environmental Health Safety & Risk Management
22.	ARP 10.10 – Staff Disciplinary Action/Involuntary Termination	HRS-ELRL in coordination with appropriate supervisor

	NMSU Policy Mentioning Investigations	Who Investigates/Hears Grievances (per the policy)
23.	ARP 10.20 – Staff Grievances/ Disciplinary Appeals	HRS-ELR investigates (staff grievances) Also, under this policy, employees may appeal from discipline imposed pursuant to ARP 10.10. Only suspensions w/o pay and terminations may be appealed to the Human Resources Board.
24.	ARP 11.05 Part 8 – Resolution of Disputes over Intellectual property rights or ownership	The IPAC (Intellectual Property and Commercialization Board) hears evidence from the parties to an IP dispute, and renders factual findings and recommendations to the VPR, who issues a decision.
RESEARCH		
25.	ARP 11.30 –Addressing Allegations of Misconduct in Research	Preliminary internal investigation (to determine if full, formal inv nec) is done by oversight committee or the OVPR will refer to the college dean, associate dean for research or others. If formal investigation warranted by prelim inv, Ad Hoc committee convened by OVPR performs it and issues findings.
STUDENTS		
26.	ARP 5.05 Student Grievance Procedures (Clarifies the general principles applicable in all student grievance procedures; cross references all types of student grievances, including NM’s online student complaint process available through the SARA portal; and Part 4 provides a general student grievance process for non-academic matters, when no other specific resolution process is available.)	Part 4’s general student non-academic grievance provides that the unit or dept director decides facts and issues decision. If appealed, the campus president or designee decides facts and issues final decision.
27.	ARP 5.10 and ARP 5.11- – Student Academic Code of Conduct	Instructor or Department Head, in coordination with the campus’ Academic Conduct Officer
28.	ARP 5.13 – Undergraduate Student Academic Grievances	Step 1: faculty member, Step 2: department head, Step 3: associate dean, Step 4: dean.
29.	ARP 5.14 – Graduate Student Academic Grievances	Step 1: the course instructor or advisor, Step 2: the department head, or Step 3: the dean of the Graduate School.

	NMSU Policy Mentioning Investigations	Who Investigates/Hears Grievances (per the policy)
30.	ARP 5.15 – Degree Revocation and Expulsion from University	Dean – preliminary investigation If prelim inv warrants formal charges, accused has right to hearing by Ad Hoc Committee. Ad Hoc Committee issues findings and recs to Dean, who submits to provost, who submits to chancellor, who issues decision. Accused has right to appeal to BOR.
31.	ARP 5.20-26 - Student Social Code of Conduct (SSCC)	Asst DOS (Case Administrator) opens a case if facts alleged would violate SSCC. If not resolved in the Educational Conference, the Case Administrator assesses whether or not a violation of the SSCC is supported by a Preponderance of the Evidence and if a formal Charge will be made. Assoc DOS or DOS (Hearing Officer) conducts fact-finding hearing and decides sanctions as appropriate. Student may appeal to VPSS.
32.	ARP 5.40 – Access to Student Educational Records – FERPA Compliance	Provost Office representative – serves as hearing officer to determine facts when a student challenges contents of their educational records – hears evidence – renders factual findings and decision. For alleged breaches of FERPA protected information, both NMSU ICT (Part 8 C.3.) and IT Compliance Officer (Part 8 C. 1.) have responsibility to investigate and report as required NOTE IT Compliance Officer is now “IT Compliance and Privacy Office”)

Unit	Current Practices Relating to Training on Investigative Function
HR	Webinars, employment law workshops. No other formal training for staff. HR has experienced staff at this time. They also provide guidance to supervisors in conducting investigations.
Audit Services	The auditors are trained/being trained. Audit Services would like to participate in training opportunities.
Faculty	No formal training. In the past HRS-ELR and UGC have provided in house training and scripts for mediators and hearing panel members.
Dean of Students	Current investigators are very experienced. They are also provided with regular professional development training.
Student Academic Misconduct	No formal training but very experienced and acquainted with the policy. Conducts training for faculty members and others.
OIE	The OIE investigators are well trained. OIE has an ATIXA membership and utilizes ongoing training and best practices from ATIXA. Open to additional training opportunities.
Athletics	No formal training processes. Current Deputy AD is very experienced. Welcomes all training opportunities.
Police Department	All of the police department staff are fully trained. They are also available to provide trainings.
IT Compliance and Privacy Office	Current investigator is fully trained. Ongoing training is welcome and requested.
ICT InfoSec (CISO)	Fully trained on IT issues; not formal investigations. Interested in participating in any training programs offered on the campus.
Office of Distance Education (ODE)	No formal training. Interested in participating in training opportunities.
Community Colleges	No formal training. Receptive to training opportunities.
OVPR	No formal training. Interested in training opportunities. Current staff is experienced and provides training to committees.
Environmental Health Safety and Risk Management	Staff have all been trained by the State of New Mexico regarding environmental health and safety.

Unit	Investigation Records Storage and Retention
HR	Investigation data is all in paper format, stored in locked file cabinets. HR follows the university's document retention policy.
Audit Services	Audit Services follow the State of NM document retention laws as well as the NMSU document retention policy. However, the office acknowledges there is work to be done in this area. Acknowledged group training on this subject could be helpful. Files also stored in EthicsPoint.
Faculty	Varies depending on the unit that conducts the investigation.
Dean of Students	Maxient software platform for storage of student behavior case records.
Student Conduct	Paper documents are stored in the Academic Conduct Officers office in a locked area. Cases also entered in the Maxient system.
OIE	Currently, OIE has a database dating back to 1972. It is used to assist staff in searching for the paper file. The physical files have been moved into a larger storage room on campus. This academic year, OIE will be operating in a new case management system (Simplicity/Advocate) and transferring files into electronic format.
Athletics	Follows the NMSU Document Retention policy. Files are stored in office. Can do more in this area.
Police Department	All evidence from investigations is stored in the police department in the records vault. It is fully secured. They have all paper files going back to 1957 and electronic files since 1991. The computer storage is part of a multi-agency system.
IT Compliance and Privacy Office	Stores data on encrypted laptops. Whole disc encrypted. Work with NMSU records retention office. Keep records for five years or longer depending on the types of records.
ICT InfoSec (CISO)	Electronic data stored within the office. Also store hardware devices when needed. CISO keeps the data until the general counsel's office tells them it is allowed to destroy the files/devices.
Office of Distance Education (ODE)	The Office of Distance Education would store the information used in investigations in the Dropbox system. Students are directed to the appropriate entity. After review of an incident, ProctorU incident reports are directed to the faculty if needed. Email correspondence is deleted after the situation has been communicated to the appropriate entity.
Community Colleges	Some key individuals store official records of investigations (HR, Student Services and VPAA).
OVPR	Hard Copy data is stored securely within OVPR. Electronically collected data is closely monitored and distributed on a need to know basis. Coordinate with the general counsel's office regarding destroying documentation. They follow the NMSU document retention policy.
Environmental Health Safety & Risk Management	Follows the NMSU Document Retention policy. Files are stored on computers in secure locations. Limited people have access to the information.

NMSU Org Chart – Investigations Reporting Lines (BANNER) December 6, 2019

