

TITLE IX

Grievance Process & Investigation Training

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Recap – When are Response Obligations Triggered?

- A recipient has **actual knowledge of alleged sexual harassment**
 - Within the knowledge of Title IX Coordinator or official with authority to institute corrective measures.
- Directed against a person in the U.S.
- Within the recipient's educational program or activity.

Recap – Response Obligations

Once a recipient has actual knowledge, the Title IX Coordinator must:

1. Promptly contact the complainant to discuss the availability of supportive measures;
2. Consider the complainant's wishes with respect to the supportive measures;
3. Inform the complainant of the availability of supportive measures with or without filing a Formal Complaint; and,
4. Explain to the complainant the process for filing a formal complaint.

THE GRIEVANCE PROCESS

Formal Complaint

A Formal Complaint of Title IX sexual harassment means a **document** filed by a complainant **or** signed by the Title IX Coordinator **alleging sexual harassment against a respondent** and **requesting that the recipient investigate the allegation of sexual harassment.**

For the purpose of addressing formal complaints of sexual harassment, a recipient's formal Title IX complaint policy and process **must comply with the specific requirements set out in the new rule.**

Formal Complaint Signed by Title IX Coordinator

- If the Title IX Coordinator signs the Formal Complaint:
 - The Title IX Coordinator is **not** a complainant or otherwise a party.
 - Complainant **remains** the party to the Formal Complaint.
 - Complainant **has the right to refuse to participate** in the grievance process under § 106.71.

No Anonymous Filings

“A complainant...**cannot file a formal complaint anonymously** because § 106.30 defines a formal complaint to mean a document or electronic submission that contains the complainant’s physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint.”

Filing a Formal Complaint

“A formal complaint may be filed with the Title IX Coordinator **in person, by mail, or by electronic mail**, by using the contact information required to be listed for the Title IX Coordinator under Section 106.8(a), **and by any additional method designated by the recipient.**”

Filing a Formal Complaint

Where to file:

“A formal complaint may be filed with the Title IX Coordinator”

- At the Title IX Office
- Via an online submission system
- Via email or mail to the Title IX Coordinator’s contact address/email.

Must consist of a written document.

Timeline for Filing

- There is no set time limit from the date of the allegations to filing (no statute of limitations).
- “[The Department] decline[s] to impose a requirement that formal complaints be filed ‘without undue delay’”
 - The Department believes that doing so would be “unfair to complainants” because complainant’s sometimes wait various periods of time before desiring to pursue a grievance process in the aftermath of sexual harassment.
- However, the complainant must be participating or attempting to participate in the recipient’s education program or activity at the time the complaint is filed.

Consolidation of Formal Complaints

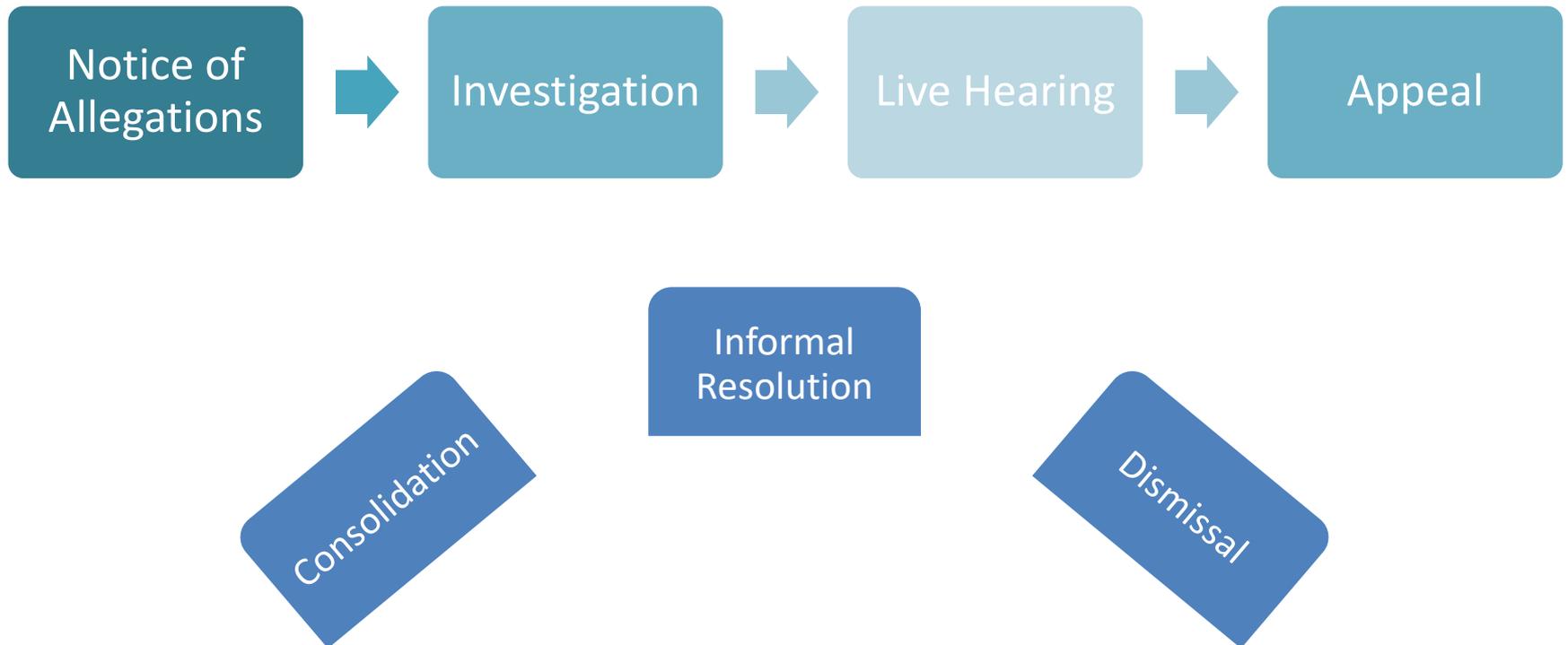
- Provided the allegations of sexual harassment arise out of the same facts or circumstances, schools are permitted to consolidate formal complaints that are:
 - Against more than one respondent
 - By more than one complainant against one or more respondents
 - By one party against the other party

§ 106.45(b)(4)

Response Obligations to Formal Complaint

Recipients' obligation to respond promptly in a way that is not clearly unreasonable in light of known circumstances extends to recipients' processing of a formal complaint, or document or communication that purports to be a formal complaint.

Overview of the Process



Basic Requirements of Grievance Process

- Equitable treatment of the parties
- Objective evaluation of all relevant evidence
- No conflicts of interest or bias
- Presumption of innocence
- Reasonably prompt timeframes
- Describe range of supportive measures
- Describe possible sanctions/remedies
- Standard of evidence (applies to all)
- Procedures for appeal
- Legally recognized privileges

Written Notice

After a Formal Complaint is signed, the recipient must simultaneously send both parties **written notice of the allegations.**

The written notice should contain the following:

- Notice that the informal and formal resolution processes comply with the requirements of Title IX.
- Notice of the allegations potentially constituting sexual harassment, providing **sufficient detail** for a response to be prepared before any initial interview, including:
 - (1) The identity of the parties, if known;
 - (2) The conduct allegedly constituting sexual harassment; and
 - (3) The date and location of the alleged incident, if known;

§ 106.45(b)(2)(i)(A), (B)

Written Notice

- (4) A statement that the respondent is presumed not responsible for the allegations and a determination regarding responsibility is made at the conclusion of the grievance process;
- (5) Notice that each party may have an advisor of their choice who may be, but is not required to be, an attorney and who may inspect and review evidence;
- (6) Warning about false statements if the recipient's code of conduct prohibits students from making false statements or submitting false statements during a disciplinary proceeding;
- (7) Notice that punishing a party for making a false statement is permitted when the recipient has concluded that the party made a materially false statement in bad faith. The institution may not conclude that a complainant made a false statement solely because there was a determination of no responsibility.

§ 106.45(b)(2)(i)(A), (B)

Confidentiality

Recipients must keep confidential the identity of any individual who has made a report or complaint of any form of prohibited sex discrimination, including any reporter, complainant, respondent, or witness, except:

- As may be permitted by FERPA;
- As required by law; or
- To carry out the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

DISMISSAL OF FORMAL COMPLAINTS

Required Dismissal

Recipients must dismiss a formal complaint of sexual harassment “for purposes of sexual harassment under Title IX” if the alleged conduct:

- would not constitute sexual harassment even if proved;
- did not occur in the recipient’s education program or activity; or
- did not occur against a person in the United States.
- Such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

Optional Dismissal

- Recipients may dismiss a formal complaint of sexual harassment if, at any time:
 - a complainant notifies the Title IX Coordinator in writing that he or she would like to withdraw;
 - the respondent is no longer enrolled or employed by the recipient; or,
 - specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination.
- **Upon a required or optional dismissal, recipients must promptly and simultaneously send written notice to the parties.**

Dismissal of Complaints

“The §106.45 grievance process obligates recipients to investigate and adjudicate allegations of sexual harassment for Title IX purposes; the Department does not have authority to require recipients to investigate and adjudicate misconduct that is not covered under Title IX, **nor to preclude a recipient from handling misconduct that does not implicate Title IX in the manner the recipient deems fit.** In response to commenters’ concerns, the final regulations clarify that dismissal is mandatory where the allegations, if true, would not meet the Title IX jurisdictional conditions...”

INVESTIGATIONS

Investigation

A recipient **must investigate** allegations in a formal complaint.

Formal complaints contain a request that the “recipient investigate the allegation of sexual harassment.”

Notice of Meetings

Parties must be given **written notice** of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings where the party's participation in such meetings is invited or expected.

The written notice to the parties of such meetings must be provided with **sufficient time for the party to prepare to participate.**

Right to Discuss Investigation

The recipient **may not restrict** either party's ability to (1) discuss the allegations under investigation or (2) gather and present relevant evidence.

Advisors

Both parties must have the same opportunity to be **accompanied** by the advisor of their choice to any meeting or proceeding during the investigation process.

The recipient may not limit the presence or choice of an advisor at any meeting.

Advisors

The recipient **may** establish restrictions regarding the extent to which the parties' advisors may **participate** in the meetings or other parts of the proceeding, so long as any restrictions apply equally to both parties. **However, the institution may not restrict the advisor's role in cross-examination.**

Overview of the Investigation Process



Gathering Evidence

The **burden of proof and the burden of gathering evidence** sufficient to reach a determination regarding responsibility **rests on the recipient**, not on the parties.

Gathering Evidence

- The investigator must gather all evidence sufficient to reach a determination regarding responsibility.
- **The investigator should:**
 - undertake a thorough search
 - for relevant facts and evidence
 - while operating under the constraints of completing the investigation under designated, reasonably prompt timeframes
 - and without powers of subpoena.

Gathering Evidence

- Each party must have an equal opportunity to present witnesses, which includes both fact witnesses and expert witnesses.
- Similarly, each party must have an equal opportunity to present **inculpatory and exculpatory** evidence.

Gathering Evidence

“Cannot require, allow, rely upon, other use...Evidence that constitute[s] or seek[s] disclosure of, information protected under a **legally recognized privilege**, unless the person holding such privilege has waived the privilege.”

Gathering Evidence

- **Cannot** access, consider, disclose, or otherwise use a party's records made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party...
- **Unless the party provides voluntary, written consent.**

Review of and Response to Relevant Evidence

- Both parties must be given equal opportunity to **inspect and review** any evidence obtained during the investigation that is **directly related to the allegations in the formal complaint**.
- This includes evidence upon which the recipient does not intend to rely in reaching a determination, and inculpatory or exculpatory evidence, whether obtained from a party or other source.
- Evidence must be sent to each party, and their advisors (if any), in an electronic format or hard copy.

Review of and Response to Relevant Evidence

- Parties must have at least 10 days to respond in writing to the directly related evidence (if they choose to do so).
- In the parties' written responses, the parties can:
 - Clarify ambiguities or correct where the party believes the investigator didn't understand.
 - Assert which evidence is relevant and should therefore be included in the final investigative report.
- The investigator must consider any written responses before finalizing the investigative report.

The Investigative Report

After the parties have had the opportunity to inspect, review, and respond to the evidence, the Investigator then must:

- Create an investigative report that fairly summarizes relevant evidence, and
- At least 10 days prior to a hearing, sent the report to each party and their advisor (if any) for their review and written responses.
 - The report may be sent as a hard copy or in electronic format.

The Investigative Report

An investigative report that “fairly summarizes relevant evidence” does not mean that the investigator needs to make credibility determinations or recommend an outcome.

“[T]hese final regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence.” 85 FR 30310.

The Investigative Report

All evidence gathered

- Everything that is gathered by the investigators as part of the investigation

Evidence directly related to the allegations in the formal complaint

- Evidence sent to parties/advisors

Relevant evidence

- Evidence included in the investigative report

Relevant Evidence

“[A] recipient may not...”

“adopt evidentiary rules of admissibility that contravene [the] evidentiary requirements prescribed under 106.45”
85 FR 30294.

“adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice.” 85 FR 30294.

“adopt a rule excluding relevant evidence because such evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.” 85 FR 30248.

Relevant Evidence

“**[A] recipient may not adopt** rules excluding certain types of relevant evidence (*e.g.* lie detector test results, or rape kits) where the type of evidence is not either deemed ‘not relevant’ (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred from use under 106.45 (as is, for instance, information protected by a legally recognized privilege.”

What is Relevant Evidence?

“The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied” 85 FR 30247 n. 1018

“The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially **applying logic and common sense.**” 85 FR 30343

What is Relevant Evidence?

“The requirement for recipients to summarize and evaluate relevant evidence,...appropriately directs recipients to focus investigations and adjudications on evidence pertinent to proving whether **facts material to the allegations under investigation are more or less likely to be true** (i.e., on what is relevant).” 85 FR 30294

“Evidence may be relevant whether it is inculpatory or exculpatory.” 85 FR 30307

What is Not Relevant?

- An institution may deem **duplicative** evidence irrelevant. 85 FR 30337
- The following is considered per se not relevant (or otherwise excluded):
 - Complainant's prior sexual behavior (subject to certain exceptions) or predisposition;
 - Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent; and,
 - Any information protected by a legally recognized privilege unless waived. 85 FR 30293 n. 1147

“Rape Shield” Protections

Questions and evidence concerning a complainant’s sexual predisposition or prior sexual behavior are not relevant, ***unless such questions and evidence...***

1. Are offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or
2. Concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove.

“Rape Shield” Protections

The regulation requires review and inspection of the evidence directly related to the allegations. This evidence is not screened for relevancy; however, the investigative report must summarize relevant evidence, thus, **at that point the rape shield protections would apply to preclude inclusion in the investigative report of the irrelevant evidence.** 85 FR 30353.

Challenging Relevancy of Evidence

“A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party’s response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant[.]”

Bias and Conflict of Interest

Remember...investigators must serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.