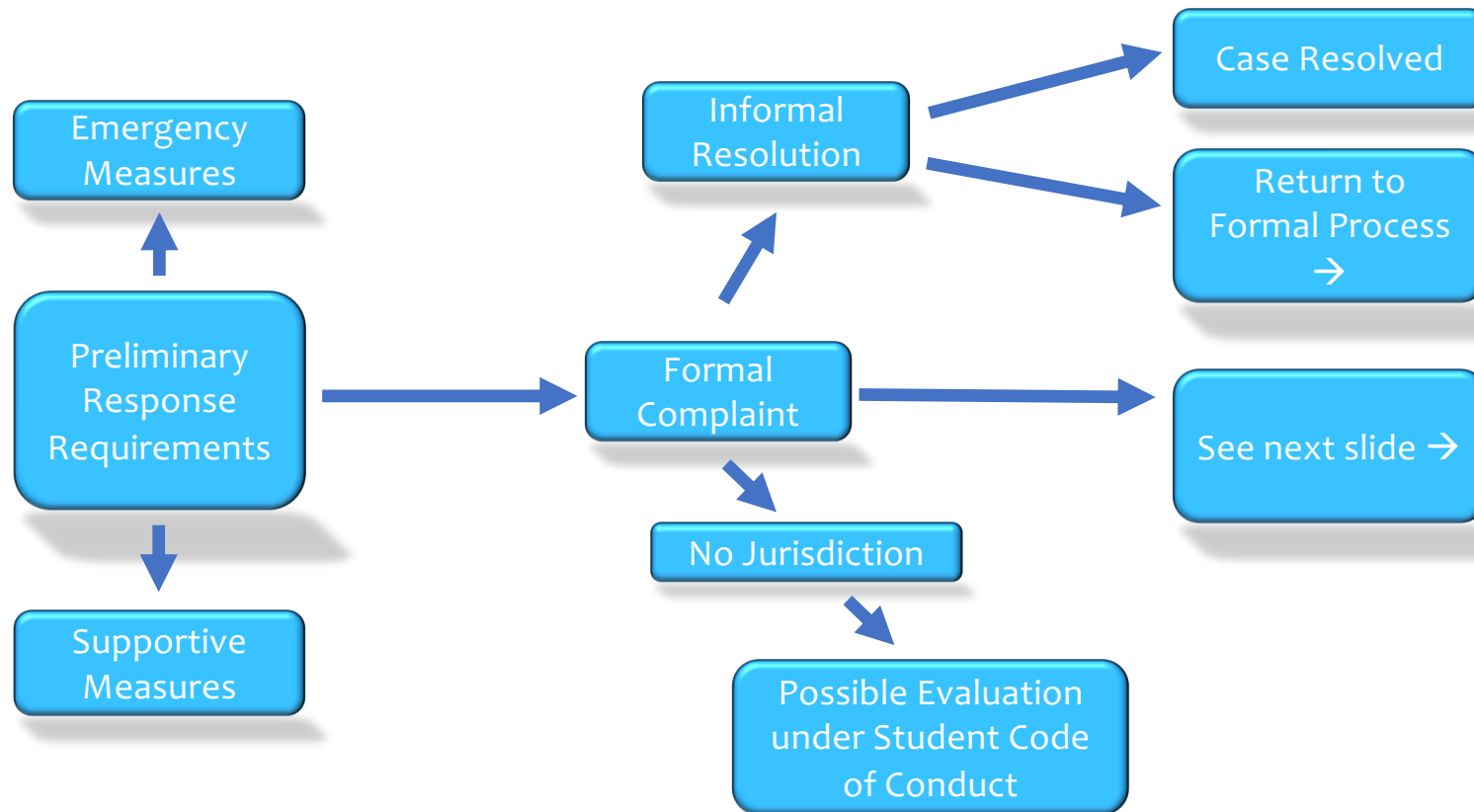


**THE NEW TITLE IX REGULATIONS:  
HOW NOT TO GET SUED –  
BEST PRACTICES AND LESSONS  
TO APPLY FROM TITLE IX  
RESPONDENT LITIGATION**

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# Initial Steps & Gatekeeping



# Formal Process



# Preliminary Responses: Requirements for Emergency Removal and Supportive Measures

## *Emergency Removal*

- School is not prevented from removing a respondent on an emergency basis, as long as school conducts **individualized safety/risk assessment**; determines there is an “immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment”; and provides respondent with notice and an immediate opportunity to challenge the removal. 34 C.F.R. § 106.44(c)

## *Supportive Measures*

- “Non-disciplinary, non-punitive individualized services offered” “to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.” And “designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party.” 34 C.F.R. § 106.30(a)

# The Formal Complaint

- A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.
- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during a grievance process, and must comply with requirements for all Title IX personnel to be free from conflicts and bias.

34 C.F.R. § 106.30(a)

# EVALUATING JURISDICTION OVER THE COMPLAINT

## (1) Does the Alleged Conduct Fit the Definition of Sexual Harassment?

Sexual harassment (for Title IX purposes) means conduct on the basis of sex that satisfies one or more of the following:

- (i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., *quid pro quo*); or
- (ii) Unwelcome conduct that a **reasonable person** would determine is so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school's education program or activity; or
- (iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

34 C.F.R. § 106.30 (Definitions)

## (2) Did the Alleged Sexual Harassment Occur in the School's "Education Program or Activity"?

- Schools must respond when sexual harassment occurs in the school's education program or activity... 34 C.F.R. § 106.44(a).
- "Education program or activity" includes:
  - locations, events, or circumstances over which the school exercised substantial control over both the respondent **and** the context in which the sexual harassment occurs, and
  - includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution

34 C.F.R. §§ 106.30, and 106.45



### (3) Did the Alleged Sexual Harassment Occur against a person in the United States?

Schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States.

34 C.F.R. § 106.44(a)

## Should/Can the Complaint be Dismissed?

- Must dismiss formal complaint if alleged conduct would not constitute sexual harassment or did not occur in the recipient's education program or activity, or did not occur within the United States.
- May dismiss formal complaint (or allegations therein) if:
  - Complainant provides written notice of wish to withdraw, or
  - Respondent no longer enrolled or employed, or
  - Specific circumstances prevent school from gathering evidence sufficient to make a determination.

34 C.F.R. § 106.45(b)(3)(i)-(iii)

## Potential Evaluation under Another School Policy

- Possibility of addressing alleged conduct under another school policy, e.g. Student Code of Conduct.
- Cannot use another school policy to circumvent the required Title IX grievance process for alleged conduct that meets the definition of sexual harassment in § 106.30.
- Schools have the option to use a Title IX grievance process that complies with § 106.45 to address allegations of misconduct that do not constitute sexual harassment under § 106.30.

## Initial & Supplemental Notice of Allegations under Title IX

- With a formal complaint, school must provide written notice to the parties regarding grievance process and notice of the allegations including “including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.”
- Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment . . . and the date and location of the alleged incident, if known.”
- Must supplement notice if additional allegations come to light.

34 C.F.R. § 106.45(b)(2)(i)–(ii)

# THE GRIEVANCE PROCESS: PATHS TO RESOLUTION

## Informal Resolution

IR (such as mediation) is Optional for the Parties

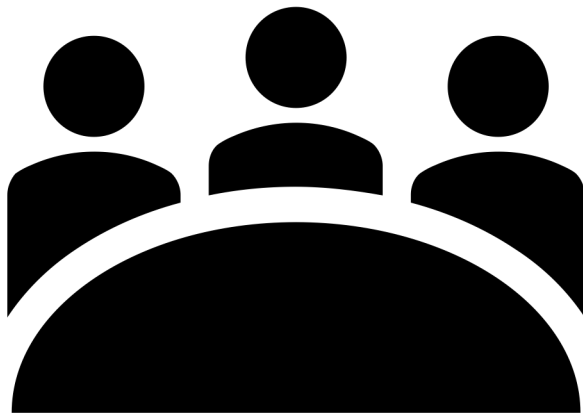
Cannot condition IR on enrollment or employment or any other right on waiver of a right to an investigation or adjudication of a formal complaint.

Formal complaint must have been filed

- IR available at any time before determination of responsibility.

Parties must be fully informed – in writing – of allegations, how the informal process works, are notified of the circumstances under which the process precludes presumption of formal complaint related to the same allegations, when formal process would be foreclosed and that either party may withdraw prior to reaching a resolution including when it might preclude a party from resuming the grievance process for a formal complaint.

34 C.F.R. §106.45(b)(9)



# Investigations – Features

- **Burden of both proof and making the record is on the school**  
34 C.F.R. § 106.45(b)(5)(i).
- **Parties have equal opportunity to present evidence and witnesses, including experts**  
34 C.F.R. § 106.45(b)(5)(ii).
- **No gag rules**  
34 C.F.R. § 106.45 (b)(5)(iii):
- **Right to accompaniment by advisor of choice**  
34 C.F.R. § 106.45(b)(5)(iv)

# Draft Investigation Report & Final Investigation Report

- Equal access to any evidence gathered as part of investigation “that is directly related to the allegations... including the evidence upon which the recipient does not intend to rely.”

34 C.F.R. § 106.45(b)(5)(vi).

- Prior to finalizing report, school must send ito party and advisor the evidence with a 10-day response period

34 C.F.R. § 106.45(b)(5)(vi)

- Final report available at least 10 days prior to hearing

34 C.F.R. § 106.45 (b)(5)(vii)



# Prohibition on Gag Rules

Ban on gag rules responds to concerns about First Amendment rights of participants in investigation:

- “[E]xercise of rights protected by the First Amendment is not retaliation.”
- “[A] recipient should not, under the guise of confidentiality concerns, impose prior restraints on students’ and employees’ ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.”
- “Nor should a party face prior restraint on the party’s ability to discuss the allegations under investigation where the party intends to, for example, criticize the recipient’s handling of the investigation or approach to Title IX generally.”
- Parties may also need to discuss allegations in order to “gather and present evidence.”

# Basic Requirements of Grievance Process

**Objective evaluation of  
“all relevant evidence – including both  
inculpatory and exculpatory”**

34 C.F.R. § 106.45(b)(1)(ii)

**Presumption of  
Not Responsible**

34 C.F.R. § 106.45(b)(1)(iv)



**“Reasonably prompt time frame”;  
limited extensions for “good cause.”**

34 C.F.R. § 106.45(b)(1)(v)

**Same standard of evidence  
for students and faculty  
(a preponderance or  
clear and convincing)**

34 C.F.R. § 106.45(b)(1)(vii)

## Colleges and Universities: Live Hearings & Cross-Examination

- “[E]ach party’s advisor” is permitted “to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be **conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally....**”
- Decision-maker will decide relevance of questions – and must be trained on assessing relevance.
- If a party does not have an advisor for a live hearing, one must be provided, at no charge, by the school.
- Audio or audiovisual recording or transcript must be made AND be made available to the parties for inspection and review.

34 C.F.R. § 106.45(b)(6)(i)

## Failure to Submit to Cross-Examination & Availability of Adverse Inferences

“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”

34 C.F.R. § 106.45(b)(6)(i)

## Rape Shield Rule & Exceptions

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, **unless** such questions and evidence about the complainant's prior sexual behavior are:

- (1) offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- (2) if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

34 C.F.R. § 106.45(b)(6)(i)

## Determination Regarding Responsibility

- Must be in writing and contain:
  - Standard of proof used,
  - Identification of allegations,
  - Procedural history (including methods used to gather evidence),
  - Findings of fact,
  - Application of school's policy to facts,
  - Statement of, and rationale for, the result as to each allegation.
- Finding is final only after written determination on appeal, or if no appeal filed, on the date on which appeal would no longer be considered timely.

34 C.F.R. § 106.45(b)(7)(i)-(iv)

# Appeals

- Avenue must be provided to both parties and also in connection with dismissal of a formal complaint or any allegations in the complaint.
- Bases for Appeal:
  - (1) New evidence
  - (2) Procedural irregularity
  - (3) Bias or conflict of interest by Coordinator, investigator (s) or decision-maker(s)
  - (4) Additional bases as determined by school
- Notice to party of the other party's appeal.
- Written decision on appeal with rationale.

34 C.F.R. § 106.45(b)(8)(i)-(iii)

# TRAINING



# Training of Individuals Involved in Grievance Process

- Requires that Coordinator, investigator, decision-maker (including appeals officer), or any person designated to facilitate an informal resolution process be free from conflict of interest or bias.
- Mandates training on:
  - Definition of sexual harassment
    - Scope of education program/activity
    - How to conduct an investigation and grievance process
    - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
  - Requires training of decision-makers for hearings on issues of relevance of questions and evidence
  - Requires training of investigators on issues of relevance to create an investigative report “that fairly summarizes relevant evidence.”

34 C.F.R. § 106.45(b)(1)(iii)

# Training Materials: Impartial and Readily Available

- Must be impartial
- Must not “rely on sex stereotypes”
- “[R]esearch and data concerning sexual violence dynamics may be valuable and useful, but cannot be relied on to apply generalizations to particular allegations of sexual harassment.”
- Must post training materials on website “so that a recipient’s approach to training Title IX personnel may be transparently viewed by the recipient’s educational community and the public, including for the purpose of holding a recipient accountable for using training materials that comply with these final regulations.”

# Relevant Dept. of Education Links & Resources from Presenters

- Final Title IX Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 FR 30026, 34 CFR 106  
<https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>
- DOE Title IX Final Overview Document – Guiding Principles:  
<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>
- DOE Questions & Answers Regarding the Department’s Final Title IX Rule (September 4, 2020):  
<https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf>
- Conrad O’Brien Statement on New Title IX Regulations:  
<https://conradobrien.com/news-insights/the-department-of-education-s-new-title-ix-regulations-rooted-in-fundamental-due-process-guarantees>
- Patricia Hamill’s opening statement testifying before the US Senate Committee on Health, Education, Labor & Pension (HELP) at the full committee hearing on “Reauthorizing HEA: Addressing Campus Sexual Assault and Ensuring Student Safety and Rights”:  
[https://www.youtube.com/watch?v=To5TVhZ\\_azE&feature=youtu.be](https://www.youtube.com/watch?v=To5TVhZ_azE&feature=youtu.be)
- Patricia Hamill’s written testimony before the US Senate Committee on Health, Education, Labor & Pension (HELP) at the full committee hearing on “Reauthorizing HEA: Addressing Campus Sexual Assault and Ensuring Student Safety and Rights”:  
<https://conradobrien.com/uploads/attachments/cjulethe0h40viiwl94a14m7-patricia-hamill-written-testimony-to-us-senate-help-committee-2019-04-03.pdf>