

Align Your Title IX Policy and Procedures to the New Law

Welcome & Faculty Introductions



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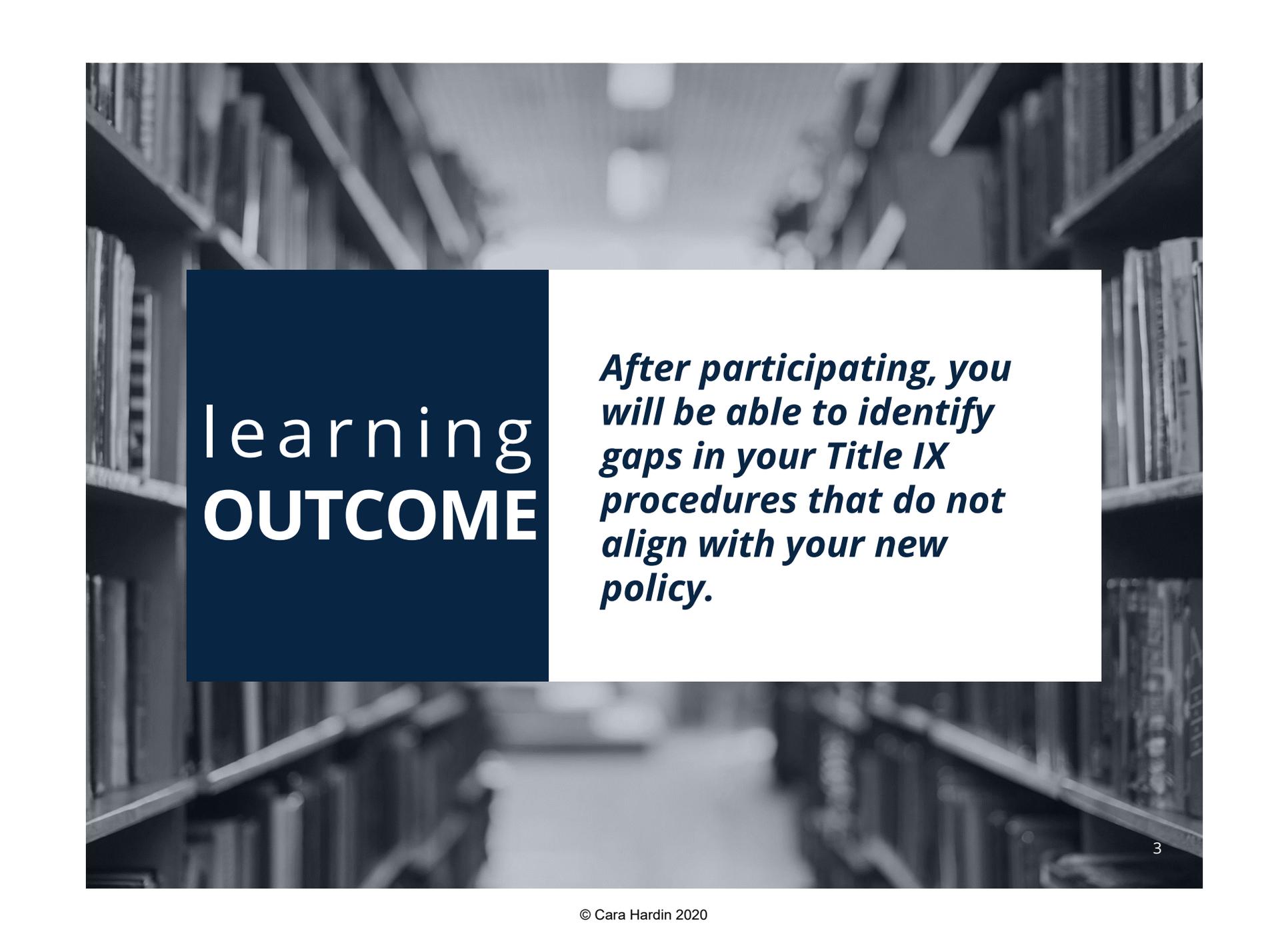
Academic Impressions

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September 29 – 30, 2020

The Big Why!





learning
OUTCOME

After participating, you will be able to identify gaps in your Title IX procedures that do not align with your new policy.

RESOURCES



Welcome to Zoom and its features:

- A. Mics (keep muted please)
- B. Camera (option to keep on or off)
- C. Gallery vs. Speaker View
- D. Participant List with Emoji's
- E. Chat Box
 - Use whenever you need it to ask questions or respond
 - Look here for downloadable files during the presentation
 - Option to send private messages to each other or host
 - Chats will be transcribed (not private ones)
- F. Close windows (e.g., polls)
- G. Recording (except during breaks or in small groups)
- H. Changing your name option (hover over your name, select "more" then "rename" to change your name)

Let's Meet You!

Start in Alpha Order by First Name

- Name
- Title
- Institution
- What are you hoping to learn from this virtual conference?

Meet Your Expert Faculty



Cara Hardin, J.D.

Title IX Deputy Coordinator

Marquette University

cara.hardin@marquette.edu

Introduction of the Seven Stages and Fact Pattern





AGENDA

September 29, 2020

1. Introduction of the Seven Stages and Fact Pattern
2. Stage 1: Actual Knowledge and the Institutional Response
3. Stage 2 & 3: The Formal Complaint and The Informal Resolution Process
4. Stage 4: The Investigative Process
5. Networking Reception



AGENDA

September 30, 2020

1. Working Groups:
Application of Stages 1-4
2. Stage 5: The Hearing
Process
3. Stages 6 & 7: The Appeal
Process and
Implementing Sanctions
& Remedies
4. Working Groups:
Application of Stages 5-7
5. Final Q&A

ACTIVITY



Review the Sample
Report of Sexual
Harassment Email

****Please look in the Chat
Box for document.***

QUESTIONS?



#1

Actual Knowledge and the Institutional Response

Stage 1: What is Actual Knowledge and the Institutional Response mean?

- “Actual knowledge” = Notice to an institution of sexual harassment, or allegations thereof, occurring *within an education program or activity* and *against a person in the U.S.*
- "Actual knowledge" is attributed to an institution when the notice is received by the:
 - Title IX Coordinator, or
 - An official with authority to institute corrective measures on behalf of the institution.

§106.30(a)

Stage 1: When does Actual Knowledge occur?

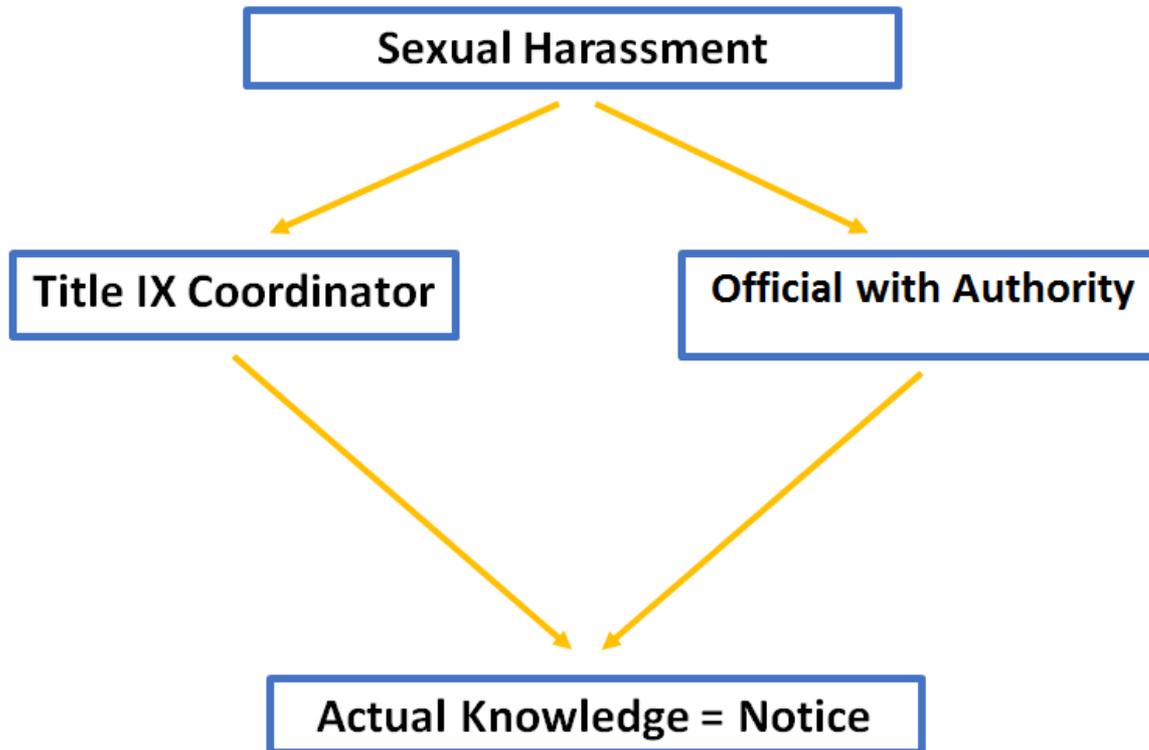
- “Actual Knowledge” occurs when the Title IX Coordinator or an Official with Authority (“OWA”):
 - Witnesses sexual harassment,
 - Learns about it from a complainant or third party,
 - Receives a written or verbal complaint about it, or
 - Learns about it by any other means.

Stage 1: What does having Actual Knowledge mean for your institution?

- “Actual Knowledge” triggers the institution's duty to respond to sexual harassment in accordance with the Title IX Final Regulations.
 - The institution must respond promptly in a manner that is not *deliberately indifferent*.

§106.44(a)

Stage 1: When does Actual Knowledge mean Notice?



RESOURCE



Sample communication
informing university leaders
of their designation as an
OWA

****Please look in the Chat Box
for document.***

QUESTIONS?

ACTIVITY



Does Charlie's email to the Title IX Coordinator constitute "Actual Knowledge?"

ACTIVITY

Part 1: Perform a Title IX jurisdictional analysis:

- a. Would the alleged conduct constitute sexual harassment, if proved?
- b. Did the alleged conduct occur within an education program or activity?
- c. Did the conduct occur against a person in the United States?

Hostile Environment Sexual Harassment Definition

1. Hostile environment sexual harassment is:

“Unwelcome conduct, based on sex, that is determined by a reasonable person in the complainant’s position to be so severe, pervasive, and objectively offensive that it effectively denies a complainant equal access to the institution’s education program or activity.”

§106.30(a)

Formula for Hostile Environment Sexual Harassment

- *Unwelcome...*
- *Conduct “on the basis of sex” that is...*
- *Determined by a reasonable person in the complainant’s position to be...*
- *So severe, pervasive, and objectively offensive that it effectively denies a complainant equal access to the institution's education program or activity.*

§106.30(a)

Education Program or Activity

2. Education program or activity:

Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.

Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

§106.44(a)

Conduct against person in the U.S.

3. Was the complaint in the United States when they experienced the alleged conduct?

§106.45(b)(3)

ACTIVITY

Part 2: Based on your determination on jurisdiction, communicate the institutional response set forth in your policy.

- a. If Title IX jurisdiction exists, proceed with response required under §106.44.
- b. If no Title IX jurisdiction, what does your policy say to do?

QUESTIONS?

Stage 1: Actual Knowledge Triggers an Institutional Response

If jurisdiction appears to exist, the Title IX Coordinator must promptly contact the complainant to discuss (§106.44(a)):

- The availability of supportive measures as defined in §106.30
 - Consider the complainant's wishes with respect to supportive measures
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a formal complaint.

RESOURCE



Sample email from a Title IX Coordinator to a complainant upon “Actual Knowledge.”

****Please look in the Chat Box for document.***

QUESTIONS?



#2

The Formal Complaint

Stage 2: Filing a Formal Complaint

The procedures relating to a formal complaint are as follows:

1. The Filing of a Formal Complaint. A formal complaint is a document:
 1. Filed by a complainant, or
 2. Signed by the Title IX Coordinator...

Alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.

§106.30

Stage 2: Signing the Formal Complaint

- *“Filed by a complainant.”* 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. §106.30.
- *“Signed by the Title IX Coordinator.”* Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party. §106.30.
 - Title IX Coordinator files a formal complaint when not “clearly unreasonable.”

Stage 2: Written Notice of Formal Complaint

2. Written Notice of Formal Complaint. Upon receipt of a formal complaint, the institution must provide written notice to BOTH parties. §106.45(b)(2).
 - “Notice of Allegations.” Provides notice of the allegations potentially constituting sexual harassment, including sufficient details known at the time (i.e., time and location) to allow the respondent to prepare a response to the allegations before an initial interview. §106.45(b)(2)(B)

Stage 2: Mandatory Dismissals

3. Mandatory Dismissal of Formal Complaints. The University must dismiss formal complaints alleging Title IX sexual harassment in the following circumstances (§106.45(b)(3)(i)):
- The allegations raised in the formal complaint (or certain allegations within the formal complaint), even if proved, do not fall under the definition of sexual harassment,
 - The alleged sexual harassment did not take place in the United States,
 - The alleged sexual harassment did not take place within an education program or activity, or
 - The complainant was not participating or attempting to participate in an education program or activity at the time the formal complaint was filed (§106.30).

Stage 2: Notice and Appeal of Dismissals

- *Notice of Dismissal.* The Title IX Coordinator will promptly notify the parties in writing of a dismissal decision and the reasons for the dismissal.
- *Appeal of Dismissal.* Any Party may appeal a dismissal of part or all of a formal complaint. Appeals must be filed within [1-3] days of receiving the dismissal notice.

QUESTIONS?

Complaint - Message (HTML)

File Message Help Tell me what you want to do

Delete Archive Reply Reply All Forward Respond Cardeneas, U To Manager Team Email Quick Steps Move Move Assign Mark Unread Categorize Follow Up Policy Tags Editing Speech Zoom Share to Teams Insights

Complaint

 Jordan James <jordan.james@fictitiousstate.edu>
To TitleIX <TitleIX@fictitiousstate.edu>

Reply Reply All Forward ...
Tue 9/1/2020 9:18 PM

Dear Title IX,

I want Quinn Thomas to stop sending me inappropriate messages and for the university to kick Quinn off campus for this behavior. It's disgusting.

Jordan James
Fictitious State University
Communications '22

ACTIVITY



In response to the Title IX Coordinator's outreach to Jordan Jones, Jordan responded. Does Jordan's response constitute a formal complaint?

ACTIVITY

Consideration #1: Does Jordan's email satisfy the requirements for a formal complaint? *If no, how would you proceed?*

Consideration #2: Does Jordan's email provide enough information to issue a Notice of Allegations? *If no, how would you proceed?*

Consideration #3: What supportive measures may be available in this situation and how do you communicate them to Jordan?



POLL



How should the Title IX Coordinator proceed given the foregoing information?

Stage 2: The Title IX Coordinator's Role processing a Formal Complaint

The Title IX Coordinator has the authority to:

- File supplemental or amend formal complaints.
- Consolidate formal complaints. §106.45(b)(4)
 - Consolidation may occur when the formal complaint is:
 - Against more than one respondent,
 - By more than one complainant against one or more respondents, or
 - By one party against the other party,
 - Where the allegations of sexual harassment arise out of the same facts or circumstances.

CHAT



**Are the allegations raised
by the complainants
amenable for
consolidation?**

Stage 2: Procedure for Consolidation

- Three formal complaints = three separate Notices of Allegations.
- The Title IX Coordinator informs the parties, in writing, that all three Notice of Allegations are hereby consolidated pursuant to the policy.
 - *Sample language: “Based on the similarity of the allegations raised against you by each complainant, all three formal complaints are hereby consolidated. Accordingly, the three formal complaints will be investigated and adjudicated contemporaneously.”*

QUESTIONS?

Stage 2: Emergency Removals

- In every case, and throughout each case, the Title IX Coordinator must determine whether an emergency removal of a respondent from any program or activity is necessary.
- An emergency removal can occur before the filing of a formal complaint or at anytime during the grievance process.

(§106.44(c))

Stage 2: Assessing Risk and Emergency Removal

- *Risk assessment.* For an emergency removal to occur, there must be an individualized safety and risk analysis assessment to determine whether there is an immediate threat to the physical health or safety of anyone within the community.
- *Notice to the Respondent.* Prior to the emergency removal or as soon thereafter as reasonably possible, the Title IX Coordinator will provide to the respondent written notice of the emergency removal.
- *Challenging an Emergency Removal.* Students must have an opportunity to challenge an emergency removal.

Stage 2: Emergency Removal Considerations

- A challenge of the emergency removal is not a hearing on the merits of the allegation(s) but rather is an administrative process intended to determine solely whether the emergency removal is appropriate.
- The opportunity for a respondent to challenge an emergency removal does not prescribe cross-examination as a necessary procedure within the challenge.
- There is no appeal process for emergency removal decisions.

CHAT



**Do the facts of the case
warrant exploration of
an emergency removal?
Why, or why not?**

QUESTIONS?



#3

The Informal Resolution Process

Stage 3: The Informal Resolution Process

The Final Regulations provide for informal resolution in lieu of the investigatory and/or hearing process after a formal complaint is filed. §106.45(b)(9).

- Informal resolution is a voluntary option that allows parties to resolve disputes in a forum that is separate and distinct from the institution's live-hearing process.
- Discretionary whether to offer informal resolution at all or only in certain cases.
- Both parties must voluntarily agree in writing to participate in an informal resolution process.

RESOURCE



**Informal Resolution Mock
Conversation with a
Complainant and Title IX
Coordinator**

Stage 3: Informal Resolution Mandates

- Parties can withdraw from the informal resolution process and resume the §106.45 grievance (investigation and/or hearing) process at any time.
- Informal resolution can be facilitated any time prior to reaching a determination regarding responsibility.
- Informal resolution processes are not permitted to resolve allegations that an employee sexually harassed a student.
- Informal resolution is facilitated by a neutral and objective individual (can't be the investigator or decision-maker).

Stage 3: Types of Informal Resolutions

- Facilitators of information resolution must be free of bias and conflict of interest and trained in how to conduct an informal resolution process.

- Types of informal resolution processes include, but are not limited to:
 - Remedies-based resolution

 - Respondent accepts responsibility

 - Alternative dispute resolution: mediation or restorative justice

RESOURCE



Mediation in the Context of Title IX: Building the skills to successfully mediate Title IX sexual harassment cases

AI Virtual Conference

November 18-19, 2020

Expert Faculty: Cara Hardin, J.D. and
Sandy Brook, J.D.

**free for members*

Stage 3: Purpose of Informal Resolution

- The desired end to an informal resolution is to have the parties agree to a resolution, which may or may not include a respondent's admission of harm or responsibility, that concludes the grievance process without a hearing.
 - Terms of the resolution are negotiable, including non-disparagement and non-disclosure of the case by either party, educational outcomes, etc.
 - Outcome should be enforceable by the institution.
 - Party-imposed sanctions can be agreed upon, but no university-imposed disciplinary sanctions.
 - Any outcome arising from the informal resolution cannot be appealed.

TAKEAWAYS

How you describe and proceed in your informal resolution process will be specific to your policy.

Acknowledge/discuss informal resolution option in:

- Policy
- Notice of Allegations
- Notice of Hearing
- Diagrams explaining the grievance process

The background of the slide is a dense, monochromatic collection of various keys, including standard house keys, skeleton keys, and specialized keys, all rendered in shades of gray. The keys are scattered across the entire frame, creating a textured, busy background.

TAKEAWAYS



How you describe and facilitate your informal resolution process will be specific to your policy.

CHAT



**What types of
informal resolution
options are you
offering on your
campus?**

QUESTIONS?



#4

The Investigative Process

Stage 4: The Investigative Process

After a formal complaint is filed, we move into the "notice" and investigative process.

Coordination of the notice and investigative process will proceed as follows:

1. Assignment of Investigator. The Title IX Coordinator will assign an investigator from within or outside of the institution to investigate the allegations in the formal complaint.
 - a. *Challenging Investigator for Perceived Bias or Conflict of Interest.*
 - b. *Title IX Coordinator can be the Investigator.*

Stage 4: Notice of Allegations

2. The Title IX Coordinator will provide written notice of the allegations to the parties that provides:
 - Sufficient detail about the allegations and the applicable policy provisions to allow the parties to prepare before an interview, and
 - An explanation about the scope of and their rights within the grievance process.

§ 106.45(b)(2)

RESOURCE



Sample Letters: Notice of Allegations and Rights of the Parties

**Please also download these documents from the Chat Box.*

QUESTIONS?

ACTIVITY

Investigator Challenge by Respondent

Twenty-four hours after receiving the Notice of Allegations, that included the identity of the assigned investigator, the respondent sends an email to the Title IX Coordinator challenging the investigator's appointment.

1. In small groups, discuss how you proceed under your policy and/or the Title IX Final Regulations.

****Please look in the Chat Box for the respondent's email challenging the appointment of investigator.***

Stage 4: Interviews

4. The investigator will attempt to interview the complainant, the respondent, and witnesses.
 - *Written Notice of Interviews.* The investigator will provide advance written notice to the parties prior to investigative interviews.
 - The written notice will include the date, time, location, participants in, and purpose of the investigative interview or other meeting. 106.45(b)(5)(vi).

Stage 4: Interview Considerations

- *Interview may be virtual.* Interviews may be conducted virtually.
- *Audio Recording of interviews.* The investigator will audio record all interviews and will prepare an interview transcript or summary.
- *Advisors welcome.* The complainant and the respondent may have their advisor present during their interview(s).

RESOURCE



Sample: Notice of Interview

**Please also download this document from the Chat Box.*

QUESTIONS?

Stage 4: The Investigative File

5. When the Investigator finishes gathering the available evidence, the investigator will compile in the investigative file all the evidence *directly related* to the allegations raised in the formal complaint.
6. Investigative File Review and Response Period. Provide the parties and their advisors at least 10 [business] days to inspect the investigative file and to provide a written response.
 - *Written responses*. Each party's written response will be provided to the other party and appended to the investigative file.

Stage 4: The Investigative Report

7. After the investigator closes the evidence-gathering phase of the investigation, the investigator will draft an investigative report summarizing the relevant evidence.
 - The relevant evidence summarized in the investigative report is the evidence intended to be relied upon in reaching a determination on responsibility.

Reminder: Investigator will essentially have three piles of information at the conclusion of the investigation



Evidence “directly related” to the allegations



Relevant evidence



Other evidence

Stage 4: Contents of the Investigative Report

Contents of the investigative report will generally include:

- i. A jurisdictional statement relating to the applicability of the Policy,
- ii. An explanation of the alleged conduct,
- iii. The applicable offenses,
- iv. A description of procedural steps taken during the investigative process,
- v. The evidence obtained by the investigator and the witnesses interviewed,
- vi. Whether supportive measures were provided, and
- vii. A summary of the relevant evidence.

Stage 4: Investigative Report Review and Response Period

8. Provide the parties and their advisors at least 10 [business] days prior to the hearing to review the investigative report and to provide a written response.
 - *Written responses.* Each party's written response will be provided to the other party and appended to the investigative report.

Stage 4: Title IX Coordinator Review of Investigative Report

9. After the parties have reviewed and responded to the investigative report, the Title IX Coordinator will review the investigative report and written responses and determine next steps.

- Following the investigative process, formal complaints of sexual harassment may:
 - Be dismissed (§106.45(b)(3)(i, ii)),
 - Be resolved through the informal resolution process, or
 - Proceed to the hearing process.

QUESTIONS?

ACTIVITY



NETWORKING RECEPTION

We invite you to turn on your cameras and mics to ask any remaining questions and to network with each other.