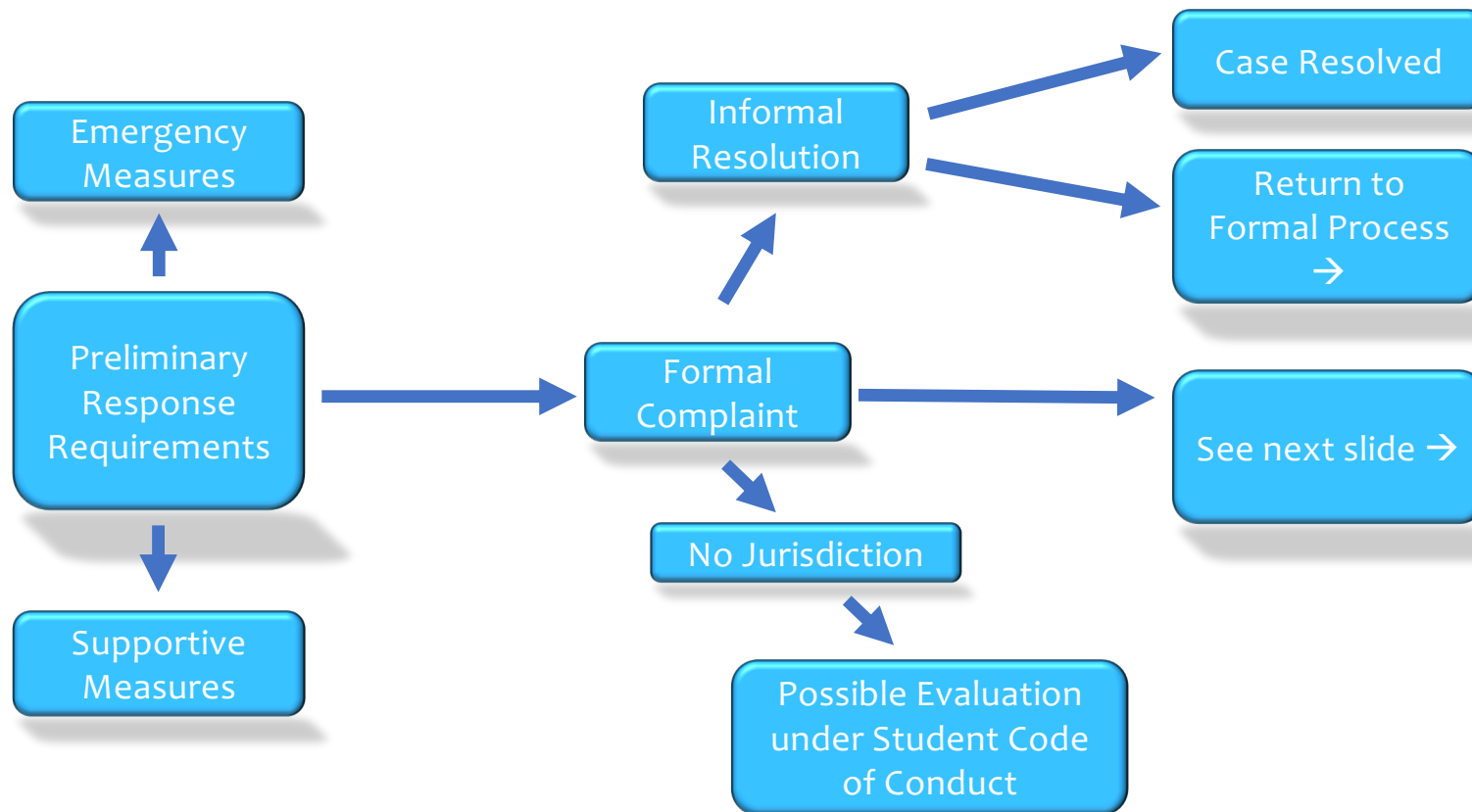


KEY PROVISIONS IN THE NEW TITLE IX REGULATIONS

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Initial Steps & Gatekeeping



Formal Process



THE GRIEVANCE PROCESS

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)

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)

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)

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)

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)

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.”

DISMISSAL – MANDATORY OR DISCRETIONARY

(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?

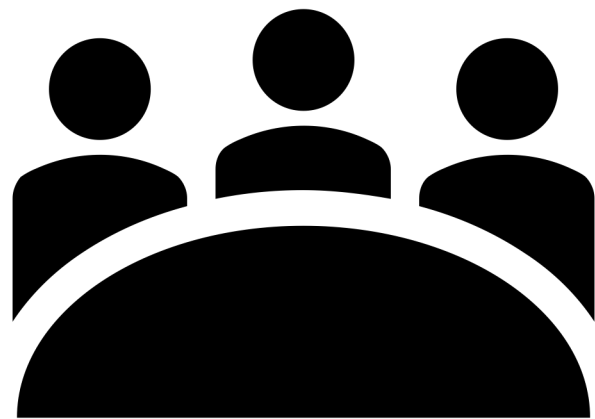
- Must dismiss formal complaint if alleged conduct would not constitute sexual harassment or did not occur in the recipient's education program or activity, or did not occur within the United States.
- May dismiss formal complaint (or allegations therein) if:
 - Complainant provides written notice of 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.

INFORMAL 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)

ARE THE NEW REGULATIONS RETROACTIVE?

OCR Guidance on Retroactivity

September 4, 2020, Questions and Answers Regarding the Department's Final Title IX Rule

Question 1: Can you please clarify whether the new Title IX rules that went into effect on August 14, 2020, will be applied retroactively?

Answer 1: The Title IX Rule will not be enforced retroactively. In the Preamble to the Rule at page 127, the Department states unambiguously that the Department will not enforce these final regulations retroactively....

The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school's Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred. In other words, the Rule governs how schools must respond to sexual harassment that allegedly occurs on or after August 14, 2020.

[See also August 5, 2020 OCR Blog 20200803:](https://www2.ed.gov/about/offices/list/ocr/blog/20200803)

<https://www2.ed.gov/about/offices/list/ocr/blog/20200805.html>

Doe v. RPI, 2020 WL 6118492 (N.D. NY) (October 16, 2020)

Court granted preliminary injunction staying proceeding involving a complaint from January 2020 where RPI had indicated they would apply previous procedures and not the procedures with more robust due process rights put in place as of August 14, 2020.

- * Court found that the Preamble language re non-retroactivity and the OCR Blog post re same was “largely irrelevant.” “[W]hether the Department of Education would have penalized RPI for not complying with the new rules or not, it could have easily implemented the 2020 policy for Doe’s hearing because it must implement that policy for all future Title IX complaints.”
- * “[A school’s conscious and voluntary choice to afford a plaintiff, over his objection, a lesser standard of due process protections when that school has in place a process which affords greater protections, qualifies as an adverse action.”

A FEW RESOURCES

Relevant Dept. of Education Links

- 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>

Other Resources

<https://conradobrien.com/news-insights/the-department-of-education-s-new-title-ix-regulations-rooted-in-fundamental-due-process-guarantees>

<https://www.kaiserdillon.com/kaiserdillons-guide-to-the-new-title-ix-regulations/>