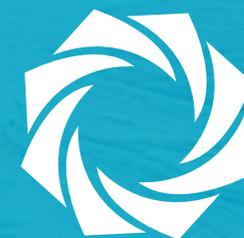


# FORMAL COMPLAINTS, JURISDICTION, AND ASSOCIATED PROCEDURES UNDER TITLE IX

Alison Adams-Perlac, General Counsel

August 9, 2022



UTAH  
SYSTEM OF  
HIGHER  
EDUCATION

# THIS SESSION'S TOPICS

- Reports of Sexual Harassment
- Formal Complaints
- Jurisdiction/Dismissal
- Grievance Procedure Standards
- Resolution Paths

# REPORTS OF SEXUAL HARASSMENT

# REPORTS

A report is **information provided to a Title IX Coordinator or responsible employee alleging sexual harassment** committed a student, employee, or third party. A report can be made **by any person** in person, by mail, telephone, email, or any means by which the Title IX Coordinator would receive the oral or written report (such as an online form on your website).

# REPORTS

An institution has **actual knowledge** when the Title IX Coordinator or a responsible employee receives a report of sexual harassment.

Once an institution has actual knowledge of sexual harassment that is within its jurisdiction, **it must respond “promptly in a manner that is not deliberately indifferent.”**

# REPORTS

“A formal complaint is *not* required in order for a recipient to have actual knowledge of sexual harassment, or allegations of sexual harassment, that activates the recipient’s legal obligation to respond promptly, including by offering supportive measures to a complainant.”

# SAFETY ASSESSMENT

Assess safety urgently to determine whether there is an **immediate threat to the physical health or safety of the complainant or campus community** necessitating emergency removal or leave.

Does the report allege circumstances that need to be assessed for Clery Act reporting and/or a timely warning?

# SUPPORTIVE MEASURES

Assess for supportive measures, with or without a formal complaint.

# FORMAL COMPLAINTS

# FORMAL COMPLAINTS

A formal complaint is a **document filed against a respondent by a complainant or signed by the Title IX Coordinator** alleging sexual harassment. To be a party, a complainant must be **participating in or attempting to participate** in your institution's education program or activity at the time of filing. "No similar condition exists with respect to *reporting* sexual harassment."

# NO STATUTE OF LIMITATIONS

The regulations do not impose a statute of limitations for filing a formal complaint of sexual harassment under Title IX.

# FORMAL COMPLAINT

Must include:

- Complainant's or Title IX Coordinator's signature;
- A written notice of the allegations including who engaged in the alleged misconduct and when and where it occurred;
- Why the complainant or Title IX Coordinator believes it violates institutional policy; and
- A proposed resolution.

# FORMAL COMPLAINTS

The institution cannot engage in either the formal investigation process or the informal resolution process without a formal complaint.

However, you do not need a formal complaint to provide supportive measures.

# FORMAL COMPLAINTS

After you receive a formal complaint, you should instruct the complainant to provide and preserve potentially relevant evidence and to provide a list of witness names.

An institution can consolidate formal complaints **arising out of the same facts.**

# INSTITUTION-DRIVEN FORMAL COMPLAINTS

Regulations affirm that a complainant's wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is **not clearly unreasonable in light of the known circumstances.**

Consider **safety risks, patterns, and preventing recurrence** of sexual harassment.

# INSTITUTION-DRIVEN FORMAL COMPLAINTS

Ex. An allegation of a hostile environment created by a student in the cafeteria

What if there were prior reports against the same respondent?

Ex. A fondling by a student in an on-campus dorm.

What if respondent was unknown, but there was another allegation of fondling in the same dorm area recently?

# INSTITUTION-DRIVEN FORMAL COMPLAINTS

“The Department does not view a Title IX Coordinator[’s] decision to sign a formal complaint as being adverse to the respondent. A Title IX Coordinator’s decision to sign a formal complaint is made on behalf of the recipient, not in support of the complainant or in opposition to the respondent as an indication of whether the allegations are credible, have merit, or whether there is evidence sufficient to determine responsibility.”

*85 Fed. Reg. 30,026, at 30,134*

# INSTITUTION-DRIVEN FORMAL COMPLAINTS

- Signed by the Title IX Coordinator
- Complainant is not a party, but may be a witness and provide evidence
- For notice to be adequate, it must include Complainant's name, if known

Without a participating complainant, you may get to point in which there are grounds for dismissal prior to hearing, e.g., specific circumstances prevent the institution from gathering evidence sufficient to reach a determination, but you should gather as much information as you can gather and reassess.

# JURISDICTION AND DISMISSAL

# JURISDICTION

To proceed with the Title IX grievance process, the institution must have jurisdiction over:

- **Conduct** – if proven as true, it must meet a definition of sexual harassment
- **Circumstances** – must be within an education program or activity within the United States
- **People** – Respondent must be an employee, student, or third party

# JURISDICTION

BUT even if these jurisdictional requirements are not met, another institutional policy or state or federal law may require the institution to take action to address the conduct outside of Title IX.

“[A] mandatory dismissal of allegations in a formal complaint of sexual harassment because the allegations concern sexual harassment that occurred outside the United States is a dismissal only for Title IX purposes and does not preclude action under another provision of the recipient’s code of conduct.”

*34 C.F.R. § 106.45(b)(3)(i)*

# EDUCATION PROGRAM OR ACTIVITY

Education programs or activities are “locations, events, or circumstances” in which the institution “exercised **substantial control over both the respondent and the context** in which the sexual harassment occurs, and also includes **any building owned or controlled by a student organization that is officially recognized by**” your institution.

This is a fact specific inquiry and education programs and activities may include locations, events, and circumstances that are “off campus” or take place online.

# JURISDICTION

A person who does not have a current connection to the institution as an employee, student, job applicant, student applicant, etc. may report sexual harassment in an education program or activity but is not entitled to party status and FERPA may prevent them from obtaining information about the case.

Such a report can proceed with an institution-driven complaint if appropriate (when necessitated by safety, pattern, etc.).

# DISMISSAL

The regulations provide for both mandatory and permissive dismissal of a formal complaint.

# MANDATORY DISMISSAL

An institution must dismiss a formal complaint if the conduct alleged in the formal complaint:

- Would not constitute sexual harassment even if proved;
- Did not occur in the recipient's education program or activity;  
and/or
- Did not occur within the United States.

# DISCRETIONARY DISMISSAL

An institution may dismiss the formal complaint if at any time during the investigation or the hearing:

- A complainant notifies the Title IX Coordinator in writing that they want to withdraw the formal complaint or any allegations therein,
- The Respondent is no longer enrolled in or employed by the institution, or
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination.

# NOTICE OF DISMISSAL

- The Title IX Coordinator must promptly send written notice of a dismissal (whether mandatory or permissive) and the underlying reason(s) to the parties simultaneously.
- Any party may appeal the dismissal of a formal complaint.
- If the formal complaint has been dismissed before a Respondent has been sent the notice of allegations, the Respondent is not a party.

# GRIEVANCE PROCEDURE STANDARDS

# NOTICE OF ALLEGATIONS

Must include:

- The formal complaint (including the allegations of sexual harassment, the identities of the parties involved, the conduct alleged, and the date and location of the alleged incident);
- Notice of your institution's grievance process, including the informal resolution process if there is one; and
- A statement that the respondent is presumed not responsible and that a determination regarding responsibility will be made at the conclusion of the grievance process

# NOTICE OF ALLEGATIONS

Must inform the parties:

- They may have an advisor of their choice (who may be, but does not have to be, an attorney);
- They may inspect and review evidence; and
- Of provisions in your institution's code of conduct that prohibit knowingly making false statements or submitting false information during the grievance process

Must be sent to parties simultaneously.

# GRIEVANCE PROCEDURE STANDARDS

Regardless of the grievance path chosen, grievance procedures must:

- Treat complainants, respondents, and witnesses equitably and with respect;
- Provide for the objective evaluation of all relevant evidence, whether inculpatory or exculpatory;
- Implement credibility determinations without respect to a person's status as complainant, respondent, or witness;
- Establish relevant and reasonable deadlines and timeframes (although those may be extended for good cause with written notice to the parties);

# GRIEVANCE PROCEDURE STANDARDS

- Require that Title IX Coordinator(s), investigator(s), and decision maker(s) be free of bias or conflicts of interest for or against complainants or respondents collectively or individually; and
- Allow for the provision of supportive measures to complainants and respondents, giving the parties the opportunity to request modifications necessary for physical and/or emotional safety.

# RESOLUTION PATHS

# RESOLUTION PATHS

- Informal Resolution
- Formal Investigation/Adjudication

# INFORMAL RESOLUTION

Resolves the formal complaint without an investigation and adjudication.

# INFORMAL RESOLUTION

Institutions are permitted, but not required to provide an informal resolution path if it is inappropriate, undesirable, or infeasible to use it to address sexual harassment.

Informal resolutions can be useful in “provid[ing] greater choice and control for complainants” and respondents alike.

*Id. at 30,089*

# INFORMAL RESOLUTION

IS NOT permitted when:

- Respondent is an employee and Complainant is a student;
- One or both parties do not voluntarily consent in writing to proceed with IR; or
- Formal complaint is institution driven (not explicit, but creates a power imbalance)

# INFORMAL RESOLUTION

IS permitted when:

- There is an active formal complaint;
- Parties both voluntarily consent in writing to proceed with IR;  
and
- Title IX Coordinator agrees informal resolution is appropriate

# INFORMAL RESOLUTION

The regulations do not detail what a Title IX Coordinator should consider when determining whether informal resolution is appropriate.

“Where a recipient believes that parties may benefit from mediation or other informal resolution process as an alternative to the formal grievance process, the decision to attempt mediation or other form of informal resolution should remain with each party.”

*85 Fed. Reg. 30,026, at 30,100 (May 19, 2020)*

# INFORMAL RESOLUTION

If informal resolution is available, the parties can agree to proceed with an informal resolution at any time prior to the decision-maker's determination on the allegations.

When a party makes a request for informal resolution to the Title IX Coordinator, the Title IX Coordinator should communicate that request to the other party if informal resolution is still an option.

# FORMAL INVESTIGATION/ADJUDICATION

The “default” process for addressing and resolving a formal complaint is through a formal investigation and adjudication.



# QUESTIONS?

Alison Adams-Perlac

[alison.adams@ushe.edu](mailto:alison.adams@ushe.edu)