



2020 TITLE IX REGULATIONS TRAINING REQUIREMENTS

January 13-14, 2021

PRESENTED BY KIRSTEN DOOLITTLE





Kirsten Lea Doolittle

Admitted to the Florida Bar, 2004
Admitted to the D.C. & Virginia Bar, 2000
JD, Univ. of Southern California, 2000
BA, Dartmouth College, 1996



- ❖ Certified investigator, decision maker and hearing officer
- ❖ Practiced law for over 20 years
- ❖ Board certified in labor and employment law
- ❖ Florida Supreme Court Circuit Civil Mediator
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- ❖ Founder of Aequitas Counsel
- ❖ Mom to two middle schoolers
- ❖ Spouse of a surf shop owner
- ❖ Dedicated but hack level cross fitter and surfer
- ❖ Currently reading Untangled and Heavy
- ❖ Pronouns: she, her and hers

DAY ONE

9:00 – 10:30 am

Introductions
Objective & Required Topics
Legal Context

10:30 am Break

10:45 – 12:00 pm

Overview of Complaint Process
Supportive Measures
Initial Assessment
Informal Resolution
Overview of Formal Grievance Process

12:00 pm Break

12:15 – 1:30 pm

Formal Complaint
Assess Sufficiency of Complaint
Jurisdiction Determinations
Education Program or Activity
Off-Campus Conduct
Permissive Dismissal





COMPLY WITH TRAINING REQUIREMENTS

Quiz 1: Who are “Title IX personnel”?

On May 6, 2020, the Department of Education released a 2033 page document that introduced material changes to the implementing regulations for Title IX, effective August 14, 2020.*

These regulations **mandate** that Title IX personnel **receive training** on specific topics covered by the 2020 Title IX Regulations.

The purpose of this training is to comply with that mandate.

*The original document that was sent to the Federal Register for publication was released on May 6, 2020. The official version was published on May 19, 2020. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 FR 30026 (May 19, 2020). References to “p. xxxx” refers to the original document that was released on May 6, 2020, and that can be found at

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>; p. 825, n. 1034



REQUIRED TRAINING TOPICS

- Title IX’s definition of “**sexual harassment**”
- The scope of the school’s **education program or activity**
- How to **conduct an investigation** and grievance process
- How to serve **impartially** & avoid prejudice of the facts
- How to avoid **conflicts of interest and bias**
- Evaluating **relevance** of evidence
- Understanding what evidence must be **excluded**
- Preparing an investigative report that **fairly summarizes evidence**
- **Informal resolution**

Office for Civil Rights Blog - 20200518; 34 CFR § 106.45(b) (1)(iii) & § 106.45(b)(10)(i)(D); This blog post can be found at:

https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term



LEGAL CONTEXT

- 37 words passed in 1972
- Long thought to apply only to athletics
- First used to address faculty inequity
- Required to follow because of federal financial assistance, also CARES Act

TITLE IX

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

TITLE IX of the Education Amendments of 1972, 20 U.S.C. § 1681

LEGAL CONTEXT

2020 TITLE IX REGULATIONS

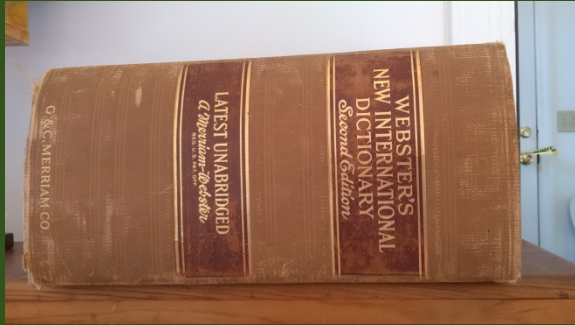
FOCUS ON COMPLIANCE:

“[The] final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, rather than best practices, recommendations, or guidance . . . [and] focus on **precise legal compliance requirements governing recipients.**”

p. 18 (emphasis added)

MATERIAL CHANGES:

- Complaint process
- Jurisdiction limitations
- Investigation requirements
- Live hearings
- Relevancy determinations
- Required cross examination by advisors



TITLE IX'S DEFINITION OF SEXUAL HARASSMENT

1. Quid Pro Quo Sexual Harassment
2. Severe and Pervasive Sexual Harassment
3. Rape*
4. Sodomy
5. Sexual Assault with an Object
6. Fondling
7. Incest
8. Statutory Rape
9. Dating Violence
10. Domestic Violence
11. Stalking

* Section 106.30 (defining “sexual harassment” to include sexual assault, dating violence, domestic violence or stalking as defined in the Clery Act and VAWA statutes). See 34 U.S.C. § 12291 (a)(29) (May 29, 2020); 79 Fed. Reg. 62, 752 (2013 reauthorization of VAWA amending section 485(f) of the Clery Act).

QUID PRO QUO SEXUAL HARASSMENT

Hypo: Justin is Mia's Calculus Professor

Justin: Your grade could improve if you spent more time on the class.

Mia: I really need a better grade to stay on the team. I am attending all of the tutorial sessions and classes. And I have a study group. What else can I do?

Justin: Why don't you come to dinner with me and we can talk about some options to improve your grade?

Quiz 2: Is this sexual harassment?

- an employee of the University,
- conditions the provision of an aid, benefit, or service of the University,*
- on an individual's participation in unwelcome sexual conduct.**

* Implicitly or explicitly.

** Unwelcomeness is subjective and determined by the complainant.

SEVERE & PERVASIVE SEXUAL HARASSMENT

Hypo: Bobby is a third-year student who participates in the Spanish club with Annie who is a first-year student.

Bobby repeatedly sends graphic, sexually-oriented jokes and pictures around campus via social media to hundreds of other students. Many students don't find it funny and ask Bobby to stop, but he does not. Because of these jokes, Annie avoids Bobby on campus and stops going to Spanish club, eventually dropping the club all together.

Quiz 3: Does this constitute sexual harassment?

- unwelcome conduct,
- determined by a reasonable person,
- to be so severe, **and**
- pervasive, **and**
- objectively offensive,*
- that it effectively denies a person equal access to the school's/district's education program or activity.

* Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances including the context in which the alleged incident occurred, and any similar, previous patterns.

SEXUAL OFFENSES

Hypo:

Min is a junior. Rebecca is a sophomore. Min comes to Rebecca 's dorm with mutual friends to watch a movie. Min and Rebecca, who have never met, are attracted to each other. After the movie, everyone leaves, and Min and Rebecca are alone. They hit it off, become more intimate, and begin kissing one another. Min verbally expresses his desire to have sex with Rebecca. Rebecca, who was abused by a babysitter at the age of five and avoids sexual relations as a result, is shocked at how quickly things are progressing. As Min takes her by the wrist over to the bed, lays her down, undresses Rebecca, and begins to have vaginal intercourse with her, Rebecca has a severe flashback to her childhood trauma. She wants to tell Min to stop but cannot. Rebecca is stiff and unresponsive during intercourse.

Quiz 4: Does this constitute a sexual offense ?

RAPE

- penetration,
- no matter how slight,
- of the vagina or anus with any body part or object, or
- oral penetration by a sex organ of another person,
- without the consent of the complainant.

SODOMY

- oral or anal sexual intercourse with another person,
- forcibly,
- and/or against that person's will (non-consensually), or
- not forcibly or against the person's will in instances in which the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

SEXUAL ASSAULT WITH AN OBJECT

- the use of an object or instrument to penetrate,
- however slightly,
- the genital or anal opening of the body of another person,
- forcibly,
- and/or against that person's will (non-consensually),
- or not forcibly or against the person's will in instances in which the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

HOW DO THE REGULATIONS DEFINE CONSENT?

They do not.

“The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient’s educational community is a matter **best left to the discretion of recipients**, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.”

p. 363





WHAT IS CONSENT?

FAMU POLICY
FR 1.022 8(f)

Consent to sexual activity must be **knowing, intelligent, unambiguous, and voluntary**. Consent is active, not passive. This means there must be **clear and willing participation, through words or actions**, for each sexual act. Submission to sexual activity that is the result of force, coercion, or threats is not valid consent.

1. Consent to one type of sexual activity does not imply consent to other types of sexual contact. There must be consent at every stage of the sexual encounter.
2. Past consent to sexual activity does not imply consent to future activity.
3. Consent can be withdrawn at any time, including in the middle of a sexual encounter, if the withdrawal of consent is clearly indicated by words or actions.

Persons who are incapacitated by voluntary or involuntary alcohol or drug use (legal, illegal, or prescription), asleep, unconscious, mentally impaired by disease or illness, or under 18 years old cannot give consent to sexual conduct (no matter what they say or do). If there is any question regarding whether a person may be incapacitated, do not engage in any type of sexual activity with that person.

FONDLING, INCEST & STATUATORY RAPE

Hypo:

Marcus and Wendy are first year students and play on the school's men and women's soccer teams. The teams often travel together to away games. After an evening game in Tampa, the teams load onto the bus to head home. Marcus asks to sit next to Wendy and they talk about their games and how they both played. Its late and Wendy nods off. Wendy wakes up and feels Marcus' hand on her inner, upper thigh. He is smiling at her. Wendy quickly removes his hand and moves to another seat.

Quiz 5: Does this constitute fondling?

FONDLING

- the touching of the private body parts of another person,
- for the purpose of sexual gratification,
- forcibly,
- and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances in which the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

INCEST

- non-forcible sexual intercourse,
- between persons who are related to each other,
- within the degrees wherein marriage is prohibited by Florida law.

STATUATORY RAPE

- non-forcible sexual intercourse,
- with a person who is under the statutory age of consent of 18.

DATING VIOLENCE & DOMESTIC VIOLENCE

Hypo:

Terrance and Sam have been hanging out for about 3 weeks. They have hooked up twice in that time, during which they kissed and touched one another's genitals (consensually). After their second hook up, Terrance decides that Sam is too needy and breaks its off.

Six weeks later, Terrance is at a small party and sees Sam. Sam gives Terrance the cold shoulder. They both have a few beers with friends and Terrance asks Sam if he wants to walk back to his dorm room. Sam agrees. On the walk, they get into an argument about their break-up.

Terrance calls Sam a needy idiot, Sam punches Terrance in the stomach and walks away, leaving Terrance on the ground, gasping for air.

Quiz 6: Does this constitute dating or domestic violence?

DATING VIOLENCE

- violence
- on the basis of sex
- committed by a person who is in or has been in a social relationship of a romantic or intimate nature with the complainant.
 - i. The existence of such a relationship shall be determined based on the complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition—
 - ii. Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
 - iii. Dating violence does not include acts covered under the definition of domestic violence.

DOMESTIC VIOLENCE

- violence
- on the basis of sex
- committed by
 - i. a current or former spouse or intimate partner of the complainant,
 - ii. a person with whom the Complainant shares a child in common,
 - iii. a person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner, or
 - iv. a person similarly situated to a spouse of the complainant under the domestic or family violence laws of Florida, or
 - v. any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of Florida.

STALKING

Hypo: Erin's pronouns are they, their, them

Erin and Dominique were friends with benefits. Dominique wanted a more serious relationship, which caused Erin to break it off. Dominique could not move on and texted Erin every morning and evening asking her to come back. Erin obtained a no-contact order.

Subsequently, Erin discovered that their Insta account was being accessed, with posts written as if they were from Erin, but they were not.

Whoever accessed Erin's Insta account posted a picture of a woman's breasts, making it look as if Erin had posted a picture of herself, which was not the case. This caused Erin considerable embarrassment and social anxiety.

They changed their password, only to have it happen again. Seeking help from the Title IX Coordinator, Erin met with the IT department, which discovered an app on Erin's phone, which was being used to transmit Erin's data to a third party.

Quiz 7: Does this constitute stalking?

STALKING

- engaging in a course of conduct,
- on the basis of sex,
- directed at a specific person, that
 - i. would cause a reasonable person to fear for the person's safety, or
 - ii. the safety of others; or
 - iii. suffer substantial emotional distress.

For the purposes of this definition –

Course of conduct means **two or more acts**, including, but not limited to,

- acts in which the respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- Reasonable person means a reasonable person under similar circumstances and with similar identities to the complainant.
- Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

BREAK

You made it! A couple of things:

Don't forget to mute yourself on break.

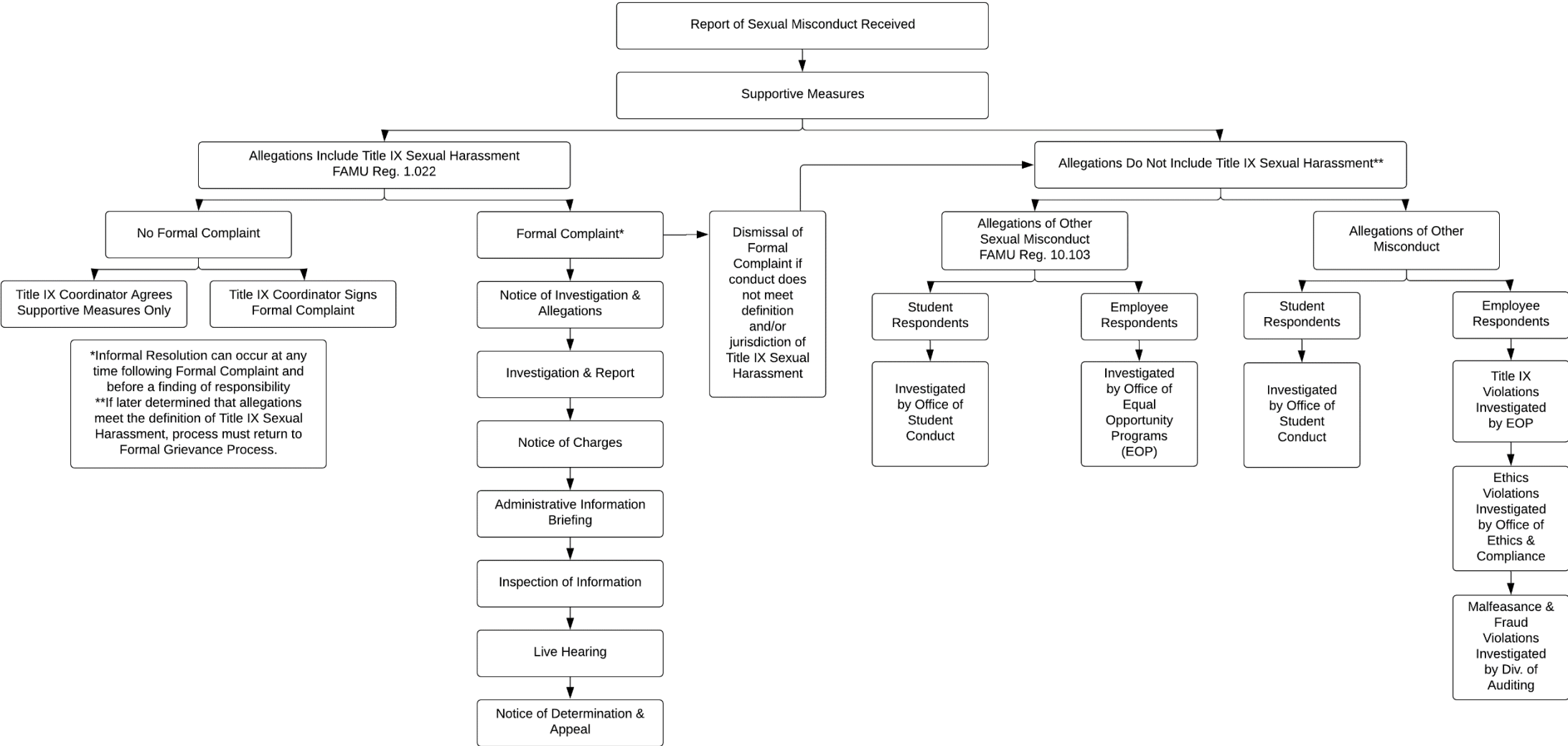
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Be right back!



Overview of Process





FIRST
THINGS
FIRST

OFFER SUPPORTIVE MEASURES

- Prompt
- Non-disciplinary
- Restore or preserve access

What are supportive measures?

Supportive measures are non-disciplinary, non-punitive **individualized services** offered as appropriate, as reasonably available, and without fee or charge to the parties **to restore or preserve access** to the school's education program or activity, including measures designed to **protect the safety** of all parties, and/or **deter** harassment, discrimination, and/or retaliation.

Upon receipt of complaint:

- TIX Coordinator promptly contacts complainant
- Discusses supportive measures
- Considers complainant's wishes
- Explains the option of filing a formal complaint.

34 CFR § 106.30; 34 CFR § 106.44(a)



EXAMPLES OF SUPPORTIVE MEASURES

Quiz 8: Can a student athlete be removed from a sports team as a supportive measure?

p. 570-71

- Referral to counseling, medical, and/or healthcare services
- Referral to Employee Assistance Program
- Referral to community-based service providers
- Visa and immigration assistance
- Student financial aid counseling
- Education to the community or community subgroup(s)
- Altering work arrangements
- Safety planning
- Implementing contact limitations between the parties
- Academic support, extensions of deadlines, course adjustments
- Class schedule modifications, withdrawals, or leaves of absence
- Any other actions deemed appropriate by the TIX Coordinator



MAKE INITIAL ASSESSMENT

- Supportive Measures
- Informal Resolution
- Formal Grievance Process

Supportive Measures

privacy
prompt
restorative

Informal Resolution

party driven
less adversarial
not all contexts

Formal Grievance Process

notice & process
more adversarial
more information

WHAT IS INFORMAL RESOLUTION?

Factors to Consider:

- Parties preference
- Likelihood of resolution
- Civility of the parties
- Violence risk assessment
- Skill of facilitator with issues
- Capacity of the parties
- Goals of the parties

“Informal resolution may encompass a broad range of **conflict resolution strategies**, including, but not limited to, arbitration, mediation, or restorative justice. Defining this concept may have the unintended effect of limiting parties’ freedom to choose the resolution option that is best for them, and recipient flexibility to craft **resolution processes** that serve the unique educational needs of their communities.”

34 CFR § 106.45(b)(9); p. 1370



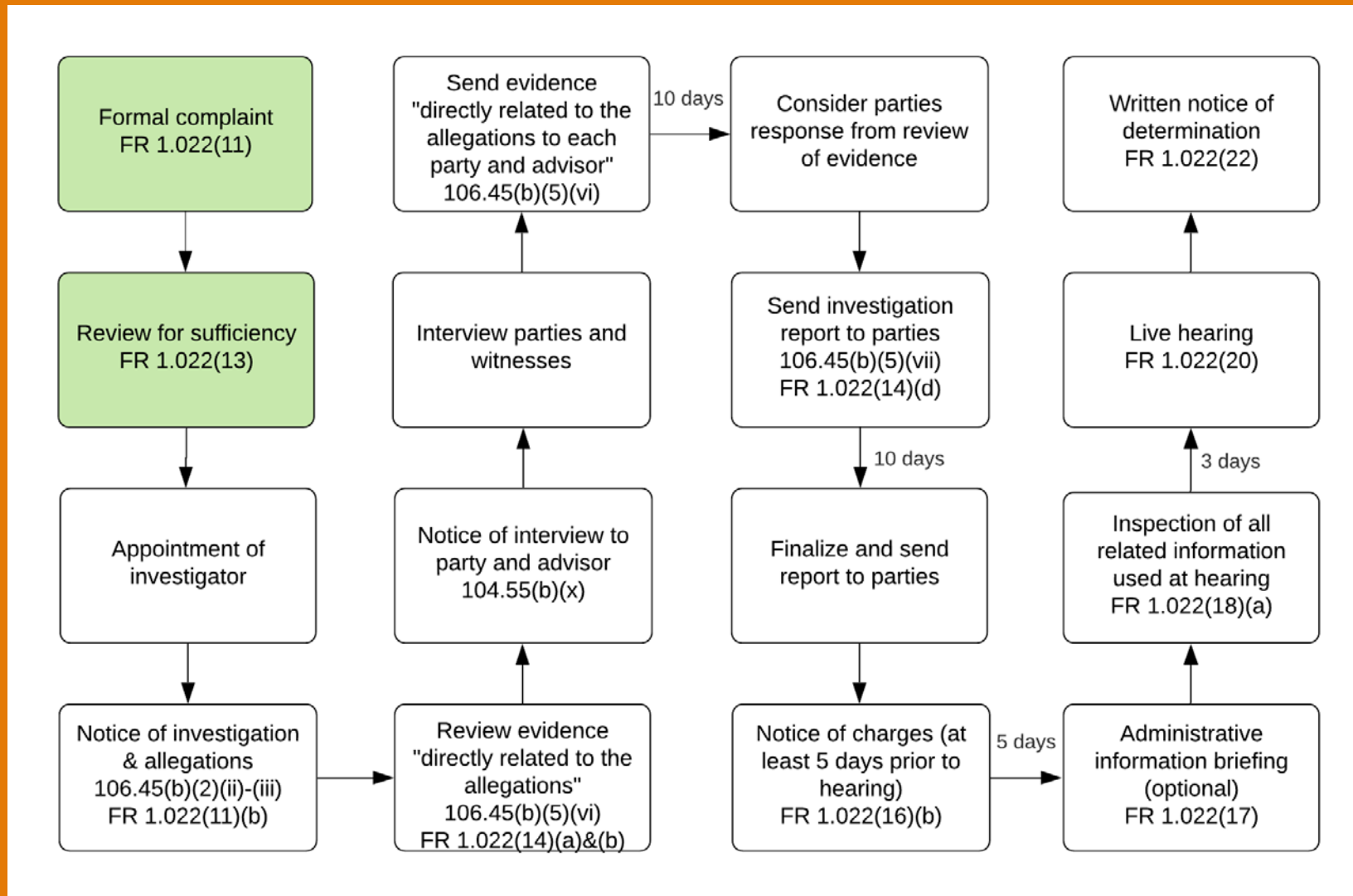
INFORMAL RESOLUTION REQUIREMENTS

Quiz 9: Who has the ultimate say on an outcome/sanction from an informal resolution process?

- Must file a formal complaint
- Written notice of allegations, requirements of informal resolution process, and consequences of informal resolution process must be issued before informal resolution
- Resolutions are not appealable and may include a confidentiality component
- May begin informal resolution any time after formal complaint and before written determination
- May withdraw and resume formal grievance process any time
- Both parties must provide written consent to participate
- TIX Coordinator must approve mechanism
- Facilitators must be well trained, free from bias and conflict of interest
- Under FR 1.022(16), must be completed within 15 days
- May not be used in student complainant/employee respondent

34 CFR §§ 106.45(b)(1)(iii); 106.45(b)(9)(i)

Overview Formal Grievance Process



BREAK

You made it! A couple of things:

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WHAT IS A FORMAL COMPLAINT ?

A formal complaint “means a document filed by the complainant or signed by the TIX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.”

- Email, online portal
- Digital or physical signature

Quiz 10: Can a student athlete recruit file a formal complaint?

Quiz 11: How long does a complainant have to file a formal complaint?

34 CFR §§ 106.30; 34 CFR §106.6(g); p. 383, n. 571; p. 385

WHO MAY FILE?

Complainant

- participating in, or attempting to participate in, the school’s education program or activity

TIX Coordinator

- with or without the complainant’s desire to participate
- conditions necessitating a response to those allegations to prevent “deliberate indifference”
- threat assessment
- allegation against faculty member

Parent or Guardian

- If has the legal right to act on the complainant’s behalf

Mandatory Dismissal.

Schools must dismiss a formal complaint if the conduct alleged:

- Would not constitute sexual harassment even if proved; and/or
- Did not occur against a person in the United States; and/or
- Did not occur in the **University's education program or activity.**

34 CFR § 106.45(b)(3)(i)

ASSESS
FORMAL
COMPLAINT
FOR
SUFFICIENCY

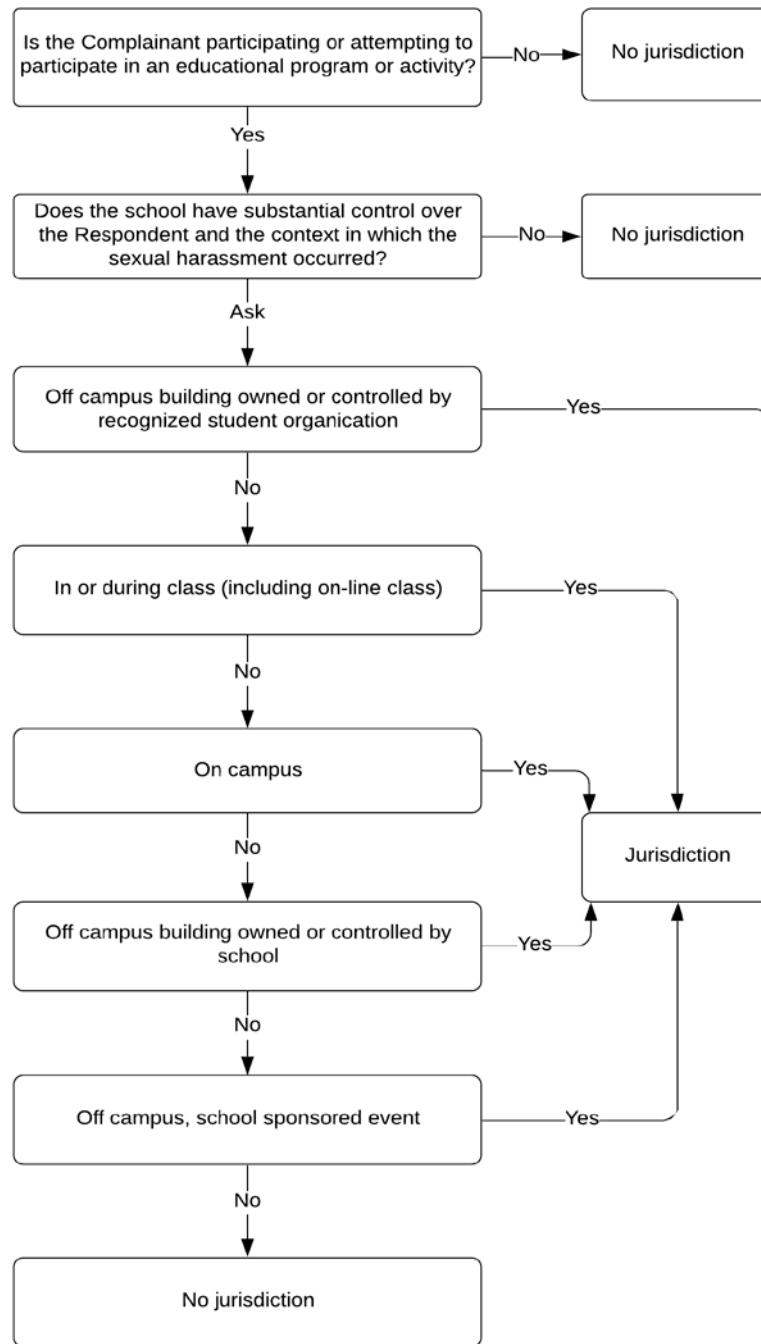


EDUCATION PROGRAM OR ACTIVITY

Preamble mentions several factors to consider:

- ownership of the premises
- endorsement
- oversight
- supervision
- disciplinary power

34 CFR § 106



EPA?

- Sexual assault occurs in a hotel room by a student athlete against a student athlete travelling to an away game.

EPA?

- Sexual assault by student against student at an off-campus party.

EPA?

- Student from another school stalking student, by following student around campus and sending sexually graphic emails to student's school email account.

EPA?

- Faculty member sending unwelcome, sexually graphic text messages to department administrator's cell phone.

EPA?

- University contractor employee harassing student employees working on campus.



OFF CAMPUS CONDUCT QUERY:

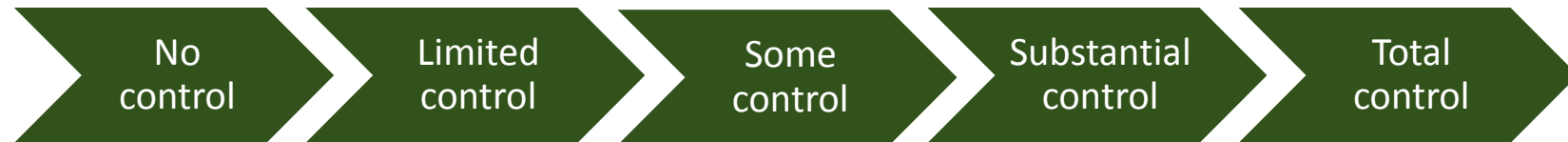
Is there substantial
control?

HYPOTHESIS: Club sports coach is texting messages with overt sexual innuendos to one of their athletes via their personal cell phone

- off campus
- not during practice/game

How does/doesn't the University exercise substantial control over the context of these text messages?

- Add that the phone was a school provided device = limited control
- Add that it was connected to the school's network = some control
- Add that the coach was within the source and scope of employment = substantial control
- Add that the texts took place during a club sports event on campus = total control





GROUNDS FOR PERMISSIVE DISMISSAL

Quiz 12: What if the Complainant stops returning calls? Who decides?

Permissive Dismissal:

Schools may dismiss a formal complaint in the following circumstances:

- Complainant notifies the TIX Coordinator in writing that the complainant would like to withdraw the Formal Complaint or any allegations therein;
- Respondent is no longer enrolled or employed by the school; or
- Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

The TIX Coordinator will evaluate whether dismissal would be clearly unreasonable in light of the known circumstances.

34 CFR § 106.45(b)(3)(ii)-(iii)

DAY TWO

9:00 – 10:15 am

Investigations
Guiding Principles
Equal Notice and Opportunity
Objective Evaluation of the Evidence
Impartiality, Conflicts of Interest and Bias
Implicit Bias

10:15 am Break

10:30 – 12:00 pm

Formal Grievance Process
Technical Requirements of Investigations
NOIA
Advisors
Interviews
Opening the Interview
Asking Questions
Evidentiary Issues
Investigation Report

12:00 pm Break

12:15 – 1:30 pm

Live Hearings
Decision Makers
Relevancy
Cross Examination
Preponderance of the Evidence
Notice of Determination
Appeals





Pro Tip: Investigate As If You Will Be Investigated

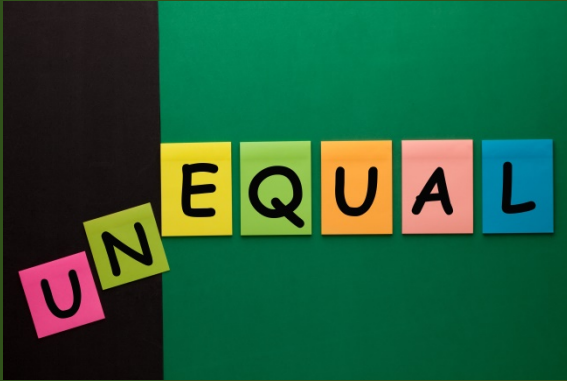


GUIDING PRINCIPLES OF INVESTIGATIONS

Quiz 13: What happens if a C or R accuses investigator of bias during the investigation?

- Treat parties equally
- Objectively evaluate all relevant evidence
- Maintain impartiality and eliminate bias and conflict
- Keep burden of gathering evidence on the school
- Keep burden of proof (of violations) on the school
- Maintain presumption that R is not responsible
- Give equal opportunity to present & review evidence
- Adhere to reasonably prompt time frames

34 CFR 106.45(b)(5)(i); 34 CFR 106.45(b)(1)(iv); p. 1123



EQUAL NOTICE & EQUAL OPPORTUNITY

- Keep parties informed at every step
 - simultaneous communication
 - same comment
- Provide equal opportunity
 - to present fact and expert witnesses
 - to review evidence
 - to respond to evidence
 - to appeal



OBJECTIVE EVALUATION OF THE EVIDENCE

Quiz 14: Can you use information that you find on social media or the internet?

- Review evidence “directly related to the allegations” **including** evidence on which the school does not intend to rely in reaching a determination
- Review exculpatory and inculpatory evidence whether obtained from a party or other source
- Regulations do not define relevance: “these terms should be interpreted using their plain and ordinary meaning.”
- Ask: Does the evidence tend to make the allegation more or less true?

34 CFR 106.45(b)(5)(ii); 34 CFR 106.45(b)(5)(vi); p. 1017



IMPARTIALITY, AVOIDING CONFLICTS OF INTEREST & BIAS

Impartiality

- Tone
- Notices
- Flexibility
- Requests
- Evidence collection
- Rescheduling
- Inferences
- Conversation

Conflicts

- Appearance
- Prior cases
- Relationships
- Reporting structures
- Prejudgment

Bias

- Confirmation
- Conclusion
- Priming
- Implicit



- Does this person remind you of yourself?
- Does this person remind you of someone you know?
- Are there things about this person that influence your impression?
- What assessments have you already made about the person?

“Specifically, implicit bias refers to attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious way, making them difficult to control.”

(Greenwald & Banaji, 1995)

<https://implicit.harvard.edu/implicit/aboutus.html>

BREAK

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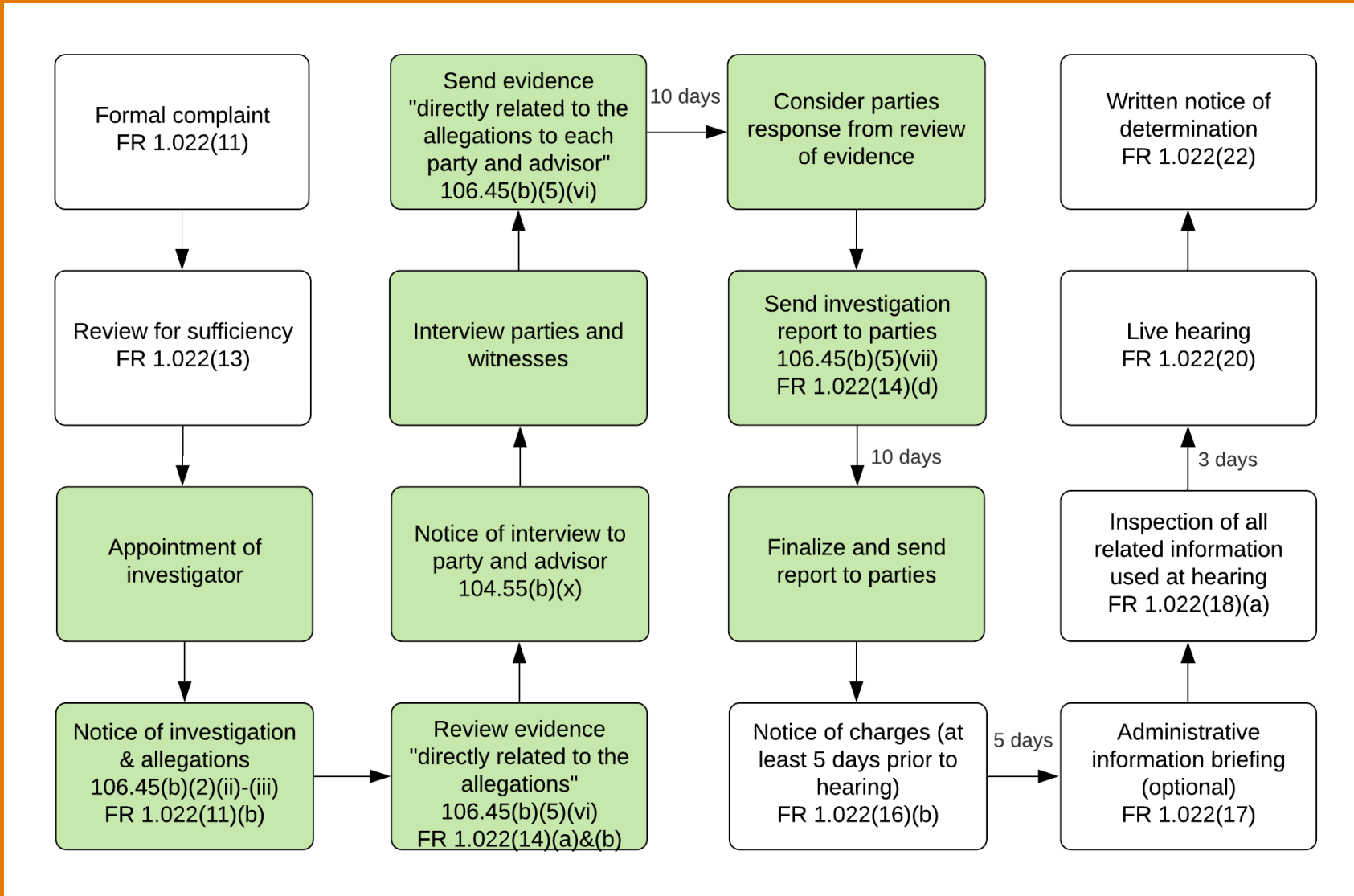
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Overview Formal Grievance Process





TECHNICAL REQUIREMENTS OF INVESTIGATIONS

- Notice of Investigation and Allegations
- Recognizing advisors
- Planning and noticing interviews
- Evidence that may not be obtained or relied upon
- Restrictions on use of certain evidence
- Conducting interviews
- Reviewing evidence
- Drafting the report
- Reviewing the report

ASSIGNMENT OF INVESTIGATOR & NOTICE OF INVESTIGATION AND ALLEGATIONS

- Opportunity to introduce investigator
- Set up initial interview
- Form document
- Advisor policy
- Statement of rights

Quiz 15: When is the NOIA sent out?

- A meaningful summary of all of allegations
- The identity of the parties (if known)
- The precise misconduct alleged
- The date and location of the alleged incident(s) (if known)
- The specific policies implicated
- A description of applicable procedures
- A statement of the potential sanctions/responsive actions
- A statement that the school presumes the respondent is not responsible for the reported misconduct unless and until the evidence supports a different determination
- A statement that determinations of responsibility are made at the conclusion of the process and that the parties will be given an opportunity to inspect and review all directly related and/or relevant evidence obtained during the review and comment period
- A statement about the school's policy on retaliation
- Information about the privacy of the process
- Information on the need for each party to have an advisor of their choosing and suggestions for ways to identify an advisor
- A statement informing the parties that the school's policy prohibits knowingly making false statements, including knowingly submitting false information during the resolution process
- Detail on how the party may request disability accommodations during the resolution process
- The name(s) of the investigator(s), along with a process to identify, in advance of the interview process, to the TIX Coordinator any conflict of interest that the investigator(s) may have
- An instruction to preserve any evidence that is directly related to the allegations

34 CFR § 106.45(b)(2)(ii)-(iii)



WHO CAN BE A PARTY ADVISOR?

Quiz 16: Can an attorney serve as an advisor and expressly reject having an attorney-client relationship with the party?

Schools **must provide** all parties with the same opportunities to have advisors present in Title IX proceedings and to have them participate, subject to equal restrictions on participation, at the school's discretion.

Who can be an advisor? party's choice

- May be an attorney (but not required)
- May be friends, family members or trusted individuals
- May be union advisors
- May be a witness in the hearing

34 CFR 106.45(b)(5)(iv); 34 CFR 106.45(b)(5)(vii); p. 994, 999



PARTICIPATION OF ADVISORS

- Schools may require advisors not to disclose information outside the grievance process
- Schools must permit a party's advisor to conduct cross-examination on behalf of the party (later)
- Schools may require the parties to make opening or closing statements
- “[T]he final regulations do not require training for advisors of choice.”

34 CFR 106.45(b)(5)(iv); 34 CFR 106.45(b)(5)(vii); p. 997, 1123

PLANNING INTERVIEWS

- Complainant
- Witnesses identified by the complainant
- Witnesses with whom the complainant discussed allegations
- Respondent
- Witnesses identified by the respondent
- Witnesses with whom the respondent discussed allegations
- Follow up with complainant
- Follow up with respondent





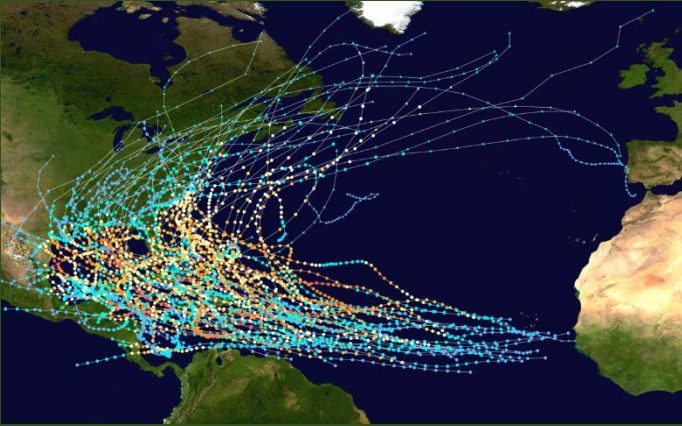
NOTICE REQUIREMENT FOR INTERVIEWS

Quiz 17: Do you have to copy the advisor on your emails to the party?

- Written notice
- Date, time and nature of interview (meetings and hearing)
- Time to prepare for interview
- May also convey notice in person or by telephone

Note: _____ have to copy advisors on the notice of interview. OCR stated that this flexibility is “to preserve a [school’s] discretion to limit the participation of party advisors, and to preserve a party’s right to decide whether or not, for what purposes, and at what times, the party wishes for an advisor of choice to participate with the party.”

34 CFR 106.45(b)(5)(v); p. 1005



OPENING THE INTERVIEW

Quiz 18: Can you prohibit interviewees from discussing their interview with others?

- **Establish Rapport**
 - Introduce yourself
 - My name is Kirsten Doolittle. I have practiced labor and employment law for 20 years. For the last five years, I've also worked as a Title IX investigator and hearing officer.
- **Promote Transparency**
 - Explain your role and process
 - Your school has hired me to conduct an independent investigation into a complaint by Susie.
 - I will be conducting interviews, gathering evidence and writing a report that summarizes that evidence for the school.
- **Develop Trust**
 - Identify school and Title IX's anti-retaliation protections and your goal of providing an unbiased investigation.
 - My priority is to make sure that both parties feel they got a fair shake from me. I have no interest in the final outcome other than that the process is fair.



ASKING QUESTIONS

Quiz 19: Do you acknowledge when an interviewee is emotional or crying? If so, how?

- Beginning: Tell me what happened.
- Cover the 5 “Ws”: Who, what, when, where, why?
- Open ended: Can you tell me more about that?
- Clarify: Who else was there? What do you mean by “hooking up?”
- Closing questions: Anything else?
- End: Make a plan.

EXCLUSION OF PRIOR SEXUAL BEHAVIOR & MEDICAL RECORDS

HYPO:

Ann alleged that Michael sexually assaulted her at an on-campus party after she blacked out from drinking alcohol. Michael states that he did not have sex with Ann and that he was saw Ann walk into a bedroom with Frank. Michael also states that Ann has sex with people at parties almost every weekend after she has been drinking.

Quiz 20: Does Michael's comment about Frank come in?

Quiz 21: Does Michael's comment about Ann having sex every weekend come in?

Prior Sexual Behavior:

Complainant's sexual predisposition or prior sexual behavior may not be offered unless they are offered to prove:

- that someone other than the respondent committed the sexual harassment, or
- if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with the respondent and are offered to prove consent.

Medical Information:

Cannot use any party's medical records without obtaining written consent to do so for use in the grievance process.

34 CFR 106.45(b)(6)(i)-(ii); (P. 2022-23)



PROVIDE PARTIES 10 DAYS TO REVIEW EVIDENCE

Quiz 22: What is everything “directly related to the allegations” that you have received during the investigation?

- Send parties and advisors by electronic copy or hard copy (with an NDA)
- All evidence “directly related to the allegations” that is considered and provide feedback
 - Must include “inculpatory or exculpatory evidence whether obtained from a party or other source.”
 - Includes evidence that investigator is not relying upon
- With a 10-day review period
- May continue interviews and drafting report during this time
- May not complete report until expiration of 10-day period

34 CFR 106.45(b)(5)(vi)



INVESTIGATION REPORT

Quiz 23: What must be included?

Quiz 24: Factual findings?

Quiz 25: Credibility determinations?

- Brief introduction of parties and nature of the complaint
- Timeline of investigation
 - Initial complaint
 - Formal complaint
 - Appointment of investigator
 - Notice of Investigation and Allegations
 - Interviews conducted and evidence gathered
 - Site visits
 - First 10-day review of evidence by parties
 - Draft investigation report provided to parties
 - Second 10-day review and comment period by parties
 - Submission of investigation report to TIX Coordinator
 - Any delays (i.e., spring break, exam period) and notice provided
- School policy provisions
- Statement of jurisdiction
- Timeline of allegations
- Information from parties and witnesses
- Information not included or witnesses not interviewed (and why)
- “Summary of relevant evidence” (only requirement in regs)

34 CFR 106.45(b)(5)(vii)

BREAK

You made it! A couple of things:

Don't forget to mute yourself on break.

Feel free to post comments or questions publically or privately in the chat. I will try and answer them before we start back.

If there are technical problems, please let me know so we can fix them.

Be right back!



A long time ago in a galaxy far,
far away...

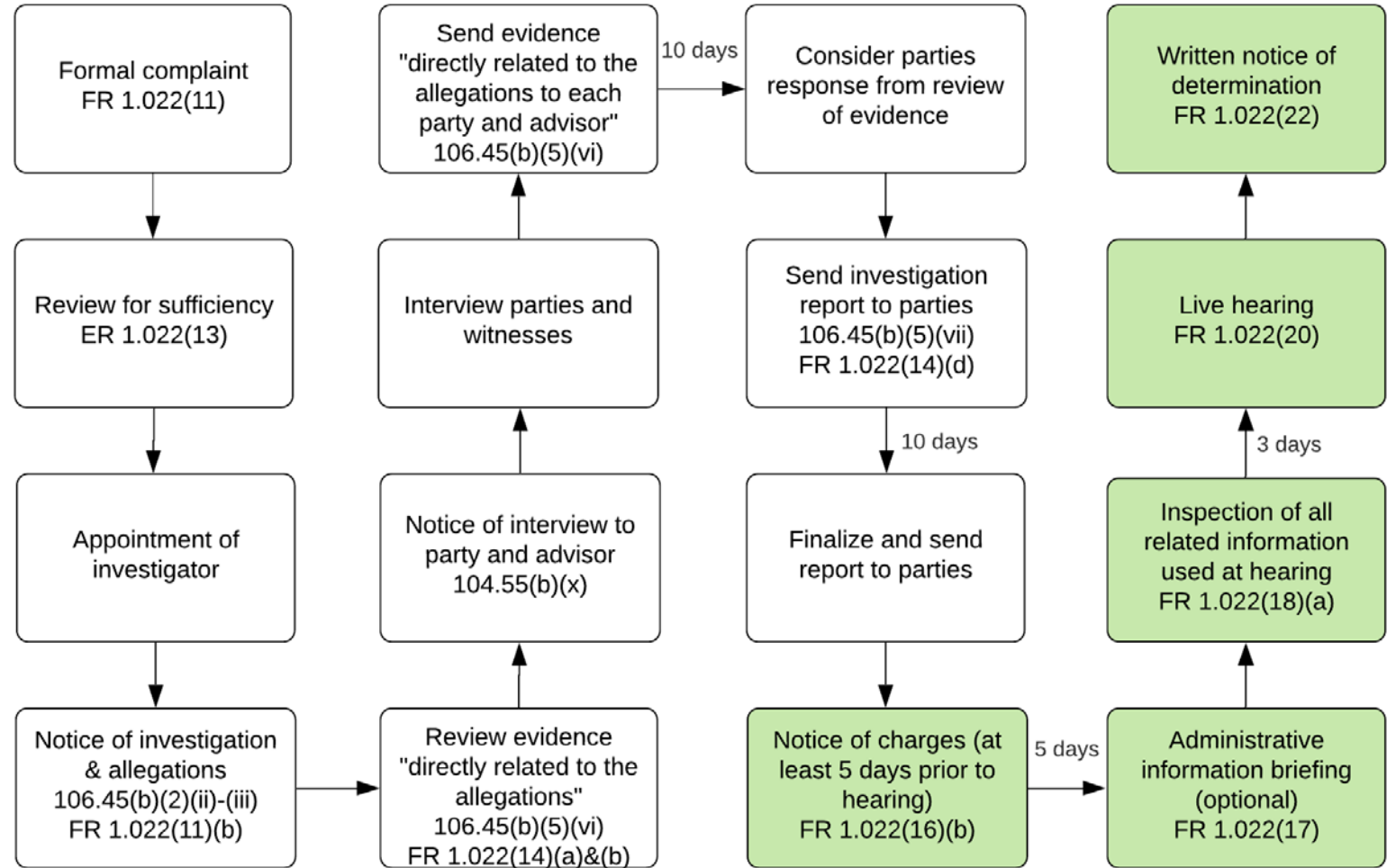
**STAR
WARS**

Episode IV

A NEW HOPE

*It is a period of civil war.
Rebel spaceships, striking
from a hidden base, have won*

WHERE ARE WE?





Live Hearings: What it's NOT like.



LIVE HEARINGS

Probably a little more like this....

Quiz 26: What if an advisor does not show up?

- Must have a decision maker
- Must provide advisors to the parties at hearing
- Advisors must be willing to cross examine
- Hearings must be live; virtual is allowed
 - At any party's request: separate rooms
 - Participants must be able "to see and hear each other"
- May (and should) adopt rules of decorum

34 CFR 106.45(b)(6)(i); p. 1066



WHO CAN BE A DECISION- MAKER?

Quiz 27: Does the DM have to be an attorney?

- Trained under the 2020 Title IX regulations
- Free from bias and conflict of interest
- Cannot be the TIX Coordinator or investigator
- May be an external provider
- May have both a decision maker and a hearing administrator in the hearing
- Must be able to carry out certain responsibilities



WHAT ARE DECISION- MAKER'S RESPONSIBILITIES?

- **Make** rulings on relevancy as questions are asked
- **Understand** what evidence must be excluded
- **Ask** questions of parties and witnesses
- **Track** a party's refusal to answer on cross-exam
- **Understand** impact of party's refusal to answer
- **Enforce** rules of decorum (or HA)
- **Facilitate** openings, evidence and closings (or HA)
- **Draft** notice of determination



RULINGS ON RELEVANCY

And what's up with the kitten?

- Determine relevance **prior to** party/witness answer.
 - Explain basis for decision to exclude a question as not relevant.
 - “The question calls for prior sexual behavior information without meeting one of the two exceptions.”
 - The question calls for medical information for which there is no written consent.
 - “The question asks for detail/information that is not probative of any material fact concerning the allegations.”
 - No questions of sexual history or predisposition unless:
 - relevant to someone other than the respondent committed the sexual harassment, or
 - if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with the respondent and are offered to prove consent.
 - No questions about medical information unless there is written consent.
 - “The final regulations revise §106.45(b)(5) to ensure that recipients **do not access or use** any party’s treatment records without obtaining the party’s written consent, thus limiting the type of sensitive, private information that becomes part of a §106.45 grievance process without a party’s consent.”
 - What about new information?
- 34 CFR 106.45(b)(6)(i)-(ii); p. 1161; p. 1053; p. 1065



CROSS EXAMINATION

- Advisor must be willing to cross-examine the other party
 - If unwilling, advisor is excused and school provides an alternative advisor
- Must occur “directly, orally and in real-time” by advisor
 - Even if party does not appear to the hearing
- Only relevant questions must be answered
 - Does the question seek information that makes the allegation more or less likely to be true?
- May stop cross-examination that is “aggressive, abusive questioning of any party of witness.”
- If party refuses to answer a **single** question on cross-examination, none of the party’s prior statements or hearing testimony may be considered..... HUH?

34 CFR 106.45(b)(6)(i); p. 1053-54

IMPACT OF REFUSAL TO ANSWER

Party/Witness	Advisor or Panel/Decision-Maker	Statements (IN/OUT)
Party/Witness	Refuses to answer any cross-examination question from advisor	All statements out
Party/Witness	Refuses to answer panel questions, but answers advisor's cross examination questions	Prior statements in
Party/Witness	Answers panel questions, no cross is asked (but was willing to answer)	All statements in
Party/Witness	Answers panel questions, but refuse any cross-examination questions	All statements out
Party/Witness	Answers cross examination questions and later answers panel questions	All statements in
Party/Witness	Answers cross examination questions and there are no panel questions	All statements in
Party/Witness	Answers cross examination questions and refuses to answer panel questions	All statements in
Party/Witness	Refuses to answer cross examination questions but later answers panel questions	All statements out
Party/Witness	Refuses to answer cross examination questions and later refuses panel questions	All statements out

Key: Any refusal to answer a question on cross-examination: all statements (prior and during hearing) are no longer allowed to be considered.

34 CFR 106.45(b)(6)(i)



PREPONDERANCE OF THE EVIDENCE:

It is more likely than not that the alleged conduct occurred.

- Keisha and Dan go to a party.
- Keisha drinks 3 beers and does two shots of vodka.
- Dan drinks 6 beers and does two vodka shots with Keisha.
- Keisha walks upstairs.
- Five minutes later, Dan goes upstairs.
- 30 minutes later, Keisha comes downstairs and is crying.
- 10 minutes later, Dan comes downstairs.
- The next morning, Keisha files a complaint of sexual assault against Dan.
- Preponderance of the evidence (POE) based on the above?
- Keisha provides written consent and discloses that she went to the hospital the night of the alleged assault and obtained a SANE exam.



PREPONDERANCE OF THE EVIDENCE:

It is more likely than not that the alleged conduct occurred.

- Keisha provides a text from Dan the next morning that says, “I’m really sorry.” POE?
- Dan provides a text from Keisha from that night that says, “Thanks for a really good time tonight.” POE?
- Keisha’s roommate says that Keisha came home and was very upset and asked her to take her to the hospital. POE?
- The SANE report shows evidence of sexual intercourse and bruising on Keisha’s inner thigh. POE?
- Dan states that they had sexual intercourse and that it was consensual. POE?
- Keisha states that Dan walked in on her in the bathroom, locked the door, and forced himself on her, bruising her leg in the process. POE?
- There were two bathrooms downstairs. POE?
- Dan shows a photo of he and Keisha in the bathroom, smiling and embracing. POE?



NOTICE OF DETERMINATION

- Identification of the allegations
- Description of the procedural steps taken
 - Notification to the parties
 - Interviews with parties and witnesses
 - Site visits
 - Methods used to gather other evidence
 - Hearings held
- Findings of fact supporting determination
- Conclusions regarding application of the code of conduct to the facts
- Result of each allegation including rationale
 - Determination regarding responsibility
 - Disciplinary sanctions
 - Whether remedies designed to restore or preserve equal access to education program or activity provided to the complainant
- Procedures and permissible bases for appeal

34 CFR 106.45(b)(7)(ii)



APPEALS

- Equal opportunity to both parties to appeal
- May appeal mandatory and permissive dismissals
- Three bases for appeal
 - Procedural irregularity that affected the outcome (including relevancy determinations)
 - Newly discovered evidence that was not reasonably available and that could affect the outcome (does not include evidence offered by the parties after the two 10 day review periods)
 - Bias or conflict of interest of the TIX Coordinator, Investigator or Decision-Maker
 - Schools have discretion as to whether to allow parties to appeal about severity or proportionality of sanctions

34 CFR 106.45(b)(8); p. 1350



WE DID IT!

Let's test what you know.

Last chance to earn points.

Way to finish strong everyone.