



# Investigations 2020 Title IX Regulations

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## Presenters



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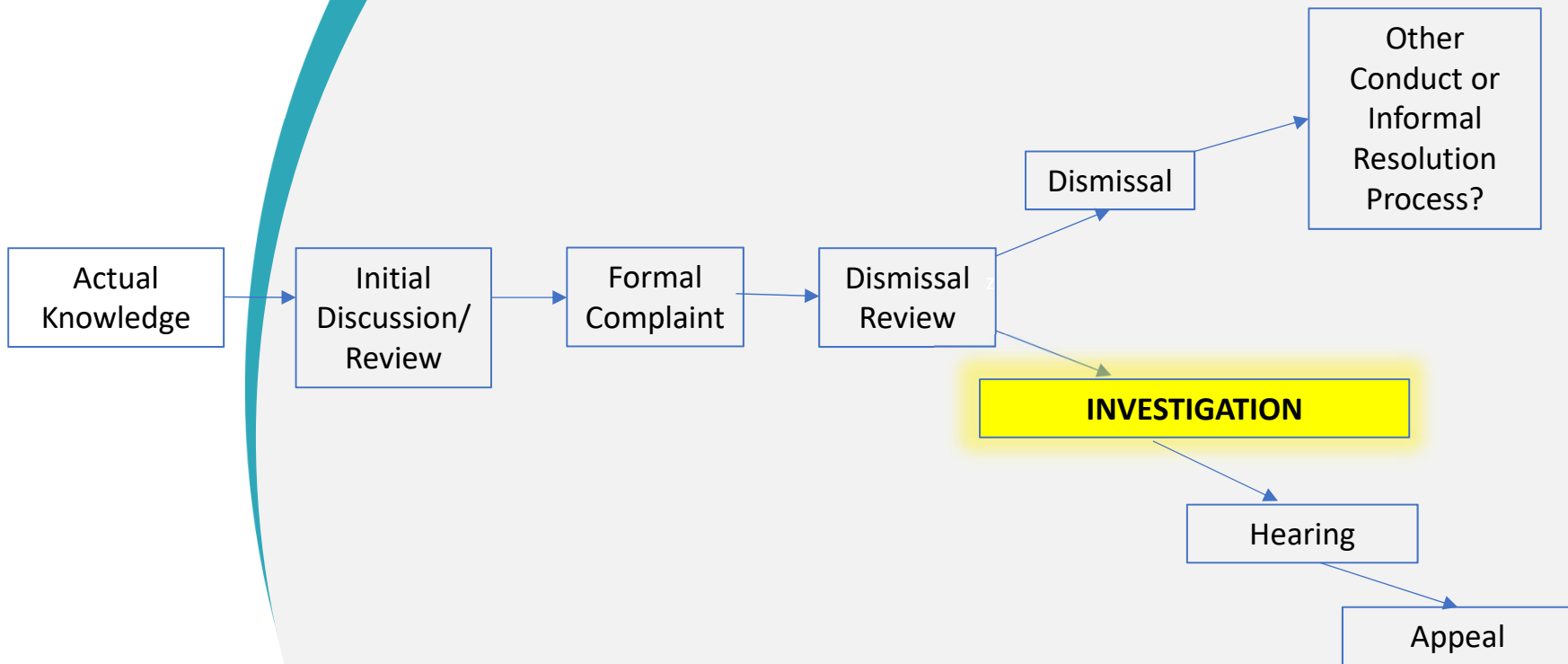


THIS IS PRESENTATION IS INTENDED TO BE  
INFORMATIONAL AND IS NOT LEGAL ADVICE

THIS PRESENTATION PROVIDES A GENERAL OVERVIEW  
OF A PORTION OF THE NEW TITLE IX REGULATIONS AND  
RELATED DEPARTMENT OF EDUCATION GUIDANCE TO  
DATE. IT IS NOT INTENDED TO MEET ANY REGULATORY  
TRAINING REQUIREMENTS.

- Pre-Investigation Requirements
- Investigations Under New Regulations
- Investigation Best Practices
- Key Post-Investigation Requirements

# Title IX Process Overview





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What about the new regulations related to investigations causes you the greatest concern?



# Pre-Investigation Requirements

## Regulatory Definitions

- Sexual Harassment
  - Quid Pro Quo
  - Clery Act/VAWA
  - Unwelcome Conduct
    - Severe + Pervasive + Objectively offensive  
= denial to equal access to educational program



## Definitions

- Actual Knowledge
  - **Notice to the Title IX Coordinator** or school official who has **authority** to institute corrective measures
- Formal Complaint
  - A document (hard copy or electronic)
  - Signed by complainant or Title IX Coordinator
  - **Requests an investigation** by the institution

## Definitions

- Deliberate Indifference
  - If response is **clearly unreasonable** in light of the **known circumstances**
- Supportive Measures
  - Non-disciplinary and non-punitive services offered to a complainant or respondent that are designed to **restore or preserve equal access** to the education program or activity

## When School Must Act

- Within Education Program or Activity
- Substantial Control of Respondent and Context

## Emergency Removal

- **May** remove respondent if an individualized safety and risk analysis determines there is an **immediate threat** to the **physical** health or safety of any student or other individual
  - **Must** arise from sexual harassment allegations
- **Must** provide respondent with notice and **opportunity to challenge** the decision immediately following removal
- Does not modify any Section 504 or ADA rights

## Administrative Leave

- **Non-student employees** may be placed on leave while the grievance process is pending.
  - **With or without pay**
- **Student employees** may be placed on administrative leave **so long as** doing so doesn't violate the other regulatory requirements

## What Triggers an Obligation to Initiate Formal Grievance Process?

- A Formal Complaint
- By a Complainant
- By the Title IX Coordinator

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## Requirements for Formal Grievance Process

- **Equitable** treatment and reasonably **prompt** resolution
- Sanctions only after determination of responsibility
- Gather and **objectively evaluate** evidence
- **Eliminate conflicts** of interest and bias
- Provide **training**
- **Presume** respondent is **not responsible**
- Allow **advisors**
- **Notice** of procedures and supportive measures
- All parties must have right to **inspect, review, and respond** to evidence (including cross examination)
- **Privilege** protections

## Notice Requirement

- Written notice of formal complaint required:
  - Grievance **process** (investigation and hearing)
  - **Allegations** including sufficient detail known at the time with **sufficient time to prepare before an initial interview**
  - Statement regarding **right to advisor and right to inspect/review** evidence
  - Statement that respondent is **presumed not responsible**
  - Any provision in code of conduct that prohibits making false statements or submitting false information during grievance process
  - **Date, time, location, participants, and purpose** of all hearings, interviews, and meetings (with **sufficient time for party to prepare to participate**)



## School Must Assess Dismissal Before a Formal Grievance Process

- Mandatory
- Discretionary

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## What are the Grounds for Mandatory Dismissal?

### MUST DISMISS IF:

- Conduct alleged would not constitute sexual harassment even if true
- Conduct did not occur in education program/activity
- Conduct did not occur against person in the U.S.

## When May an Institution Dismiss a Formal Complaint?

### MAY DISMISS IF:

- Complainant notifies Title IX coordinator in writing of a desire to withdraw formal complaint or any allegations
- Respondent no longer enrolled in or employed by institution
- Circumstances prevent institution from gathering evidence sufficient to reach a determination

## Title IX Dismissal Does Not Prevent Other Action

- Student/Community Code of Conduct
- Employment policies
- Other institutional policies/expectations
- Honor Codes/Lifestyle Expectations

## Consolidation of Formal Complaints

- Institutions may consolidate formal complaints:
  - against more than one respondent or by more than one complainant;
  - by one party against the other party; or
  - where the allegations arise out of the same facts or circumstances.



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# Investigations Under New Regulations



Who on campus conducts  
your investigations?



Is your institution considering  
“outsourcing” Title IX  
process? Why or why not?



## Burden to Gather Evidence Is on Institution

- The burden of gathering evidence (and burden of proof) **necessary to make a determination** regarding responsibility is **on the institution**, not the parties.
- **No express restriction on trauma-informed techniques**, practices, or approaches **during investigation**.
- Even though the institution is not a party to the grievance process, the **institution may present evidence to the decision-maker** as well.

## Institutions May Not Use Treatment Records Without Consent

- Can NOT:
  - consider
  - disclose or
  - use
- **Treatment records** from physician, psychiatrist, psychologist, or other **recognized** profession or paraprofessional
- Without party's voluntary **written consent**

## Institution May Not Use “Gag Orders”

- May not restrict the ability of parties to:
  - discuss allegations under investigation
  - gather evidence and present relevant evidence

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## **“Witness Tampering” and Retaliation are Prohibited**

- “Witness tampering” (attempting to alter or prevent a witness’s testimony) and retaliation are prohibited under Sec. 106.71.

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## Institution Has an Ongoing Duty to Supplement Notice

- Must supplement notice if **new** allegations come to light during investigation that the institution **will investigate**

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## Parties Have a Right to an Advisor of Choice

- **Must** provide parties with the same opportunities to have advisors present during **any** part of the grievance process

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## Parties Have a Right to an Advisor of Choice

- **May not** limit the choice or presence of an advisor for their party in any meeting or grievance proceeding
- **May** establish restrictions regarding the extent of an advisor's participation in proceedings, if applied equally to both parties

## Parties Have a Right to an Advisor of Choice

- Only required to provide during hearing stage! (But may provide at other stages.)

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## Advisors Must Follow Code of Conduct or Decorum

- **May** develop code of conduct or **rules of decorum** to ensure advisors (and parties) conduct themselves in respectful and non-abusive manner
- **Should not forbid conferral**, but can restrict timing/length of breaks
- **Can require party to use a different advisor** if advisor refuses to abide by rules of decorum

## Parties Have Equal Opportunity to Inspect and Review Evidence

- **Must** provide **equal opportunity to inspect and review** any evidence obtained during the investigation that is **directly related** to the allegations

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## Relevance Is Not a Determining Factor

- **Inculpatory and exculpatory evidence**  
whether obtained by a party or other source
- Including **evidence that the institution does not intend to rely on** in reaching a responsibility determination

## Non-Disclosure Agreements Are Permitted

- Institutions may impose on parties and advisors restrictions or require a non-disclosure agreement not to disseminate any of the evidence subject to inspection and review.

## Illegally or Unlawfully Obtained Evidence Need Not Be Disclosed

- If the institution knows a recording was unlawfully created under state law, then institution should **not share** a copy of such unlawful recording.
- ORS 165.540

## Parties Have a Right to Respond to Evidence

- **Before the investigative report is completed**
- Copy of evidence (hard copy or electronic)
- **10 days to submit written response**
- Written response should be considered before completing report

## Parties Have a Right to Respond to Evidence

- Parties may:
  - make corrections,
  - provide context,
  - prepare responses and defenses before a *decision-maker* reaches a determination regarding responsibility, and
  - point out if relevant evidence appears missing

## Parties Have Right to Review Final Report Before Hearing

- Must create an investigative report and must send to party and advisor for review and written response **at least 10 days before a hearing or other time of determination regarding responsibility.**



## Elements of an Investigative Report

- Final Report **must** include:
  - Summary of relevant evidence
- Final Report **may** include:
  - Allegations
  - Notice to parties
  - Log of evidence collected and reviewed
  - Interview statements
  - Credibility findings (if allowed)
  - Recommended findings/conclusions
  - Consideration of parties' review/written response, and any changes made

## Final Report Should Focus on Relevant Evidence

- Only relevant evidence should be summarized
- Institution may permit/require the investigator to redact irrelevant information

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## Credibility Assessments May Not Be Determinations

- May include credibility assessment, but not a determination

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# Investigation Best Practices

## What Makes a Good Investigator?

- **Fair and impartial, with actual and perceived independence**

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- **Strong communication skills, both verbal and written**



## What Makes a Good Investigator?

- Fair and impartial, with actual and perceived independence
- Able to discuss difficult allegations with compassion
- Trained and has a working knowledge of law and institution policy, as well as institutional services available
- Strong communication skills, both verbal and written
- **Able to testify competently if necessary**

## Investigation Best Practices

- Allow Ample Time
- Review Complaint and Prepare
- Location
- Discuss Confidentiality and Provide Assurances
- BE PROMPT!

## Investigation Best Practices Continued

- **Ask open-ended questions and ask “anything else” multiple times**

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- **Dig deeper if answers are vague/ambiguous**

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- Ask for documents and for suggestions of other helpful documents
- **Take good notes, and review notes with witness during interview**

## Investigation Best Practices Continued

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- Dig deeper if answers are vague/ambiguous
- Ask for names of witnesses
- Ask for documents and for suggestions of other helpful documents
- Take good notes, and review notes with witness during interview
- **Think of process as iterative**



## Considerations for Interviewing Complainant

- Interview with complainant defines initial scope
- Ask what action complainant is seeking
- Ask how complainant knows respondent and ask about other interactions with respondent
- Ask about how event has impacted complainant
- Discuss supportive measures (again)
- Have a frank discussion about retaliation

## Considerations for Interviewing Respondent

- Fair and unbiased approach is key, no matter the allegations
- Be clear there is no assumption of guilt
- Allow respondent to fully tell their side of story, and to respond to all allegations
- Have a frank discussion about retaliation
- Discuss supportive measures (again)
- Acknowledge stressors of being accused

## Other Investigation Issues

- **Represented Employees**

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- **Interviewing Outsiders**

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- **Refusal to Participate**

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## Other Investigation Issues

- Represented Employees
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- **Gossip and Hearsay from Witnesses**

## Other Investigation Issues

- Represented Employees
- Interviewing Outsiders
- Refusal to Participate
- Gossip and Hearsay from Witnesses
- **Accommodations**

## Investigation Report Best Practices

- Review all notes and evidence before starting to draft
- Outline before drafting
- Be detailed and clear
- Show your work through analysis
- Continually compare report with complaint to ensure all allegations covered
- Re-interview as necessary
- Let evidence lead to factual conclusion, rather than other way around
- Proofread!





# Key Post-Investigation Requirements

## Live Hearing

- Must provide a live hearing, but hearing may be virtual
- Must create audio or audio-visual recording, **or transcript** of live hearing, and make it available to parties
- Advisor must be permitted to ask the other party and witnesses relevant questions, follow-up questions, and to challenge credibility
- Can, and should, create rules of proceeding and decorum

## Live Hearing

- Lots of discretion about what process can look like
- Cross examination
  - Must be conducted directly, orally, and in real time
  - Never by the party (if party does not have advisor, institution must provide one without cost)
  - Only relevant questions

## Live Hearing: Gathering and Presenting Evidence

- Parties must have an equal opportunity to present witnesses, including fact and expert witnesses, and other evidence.
- Parties to a Title IX grievance process are not granted the right to depose parties or witnesses, or invoke any subpoena powers to compel parties or witnesses to appear at hearings.

- Grounds for Appeal
  - Procedural error that affected outcome
  - New evidence not reasonably available at time that could affect outcome of matter
  - Conflict of interest or bias
- Additional grounds may be offered, so long as offered equally to both parties.

## Record Keeping

- Must maintain records for 7 years from date of creation
  - Investigation documents
  - Recording and/or transcript of proceeding
  - Disciplinary sanctions and remedies
  - Appeal and result of appeal
  - Informal resolution and result
  - All training materials used
  - Supportive measures offered

- Must provide training to Title IX coordinators, investigators, decision-makers, and any person involved in informal resolution:
  - Definition of sexual harassment
  - Scope of “education program or activity”
  - How to conduct an investigation
  - How to conduct grievance process including hearings, appeals, and informal resolution
  - How to serve impartially, and how to avoid conflicts/bias
  - How to determine relevance (for investigators and decision-makers)

## Effective Date

- August 14, 2020 is only 47 working days away!
- If you haven't already:
  - Form a working group
  - Create implementation calendar
  - Gather all relevant policies and procedures
  - Involve public affairs
  - Consider staffing/budgeting concerns that may arise, and start conversations with stakeholders



## Resources

- [Title IX Regulations](#)
- [2019 Oregon Revised Statutes](#)
- [OCR Reading Room](#)
- [OCR FAQs](#)
- [OCR Blog](#)
- [Stoel Rives Education Homepage](#)



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# Perspective



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