



**HUSCH BLACKWELL**

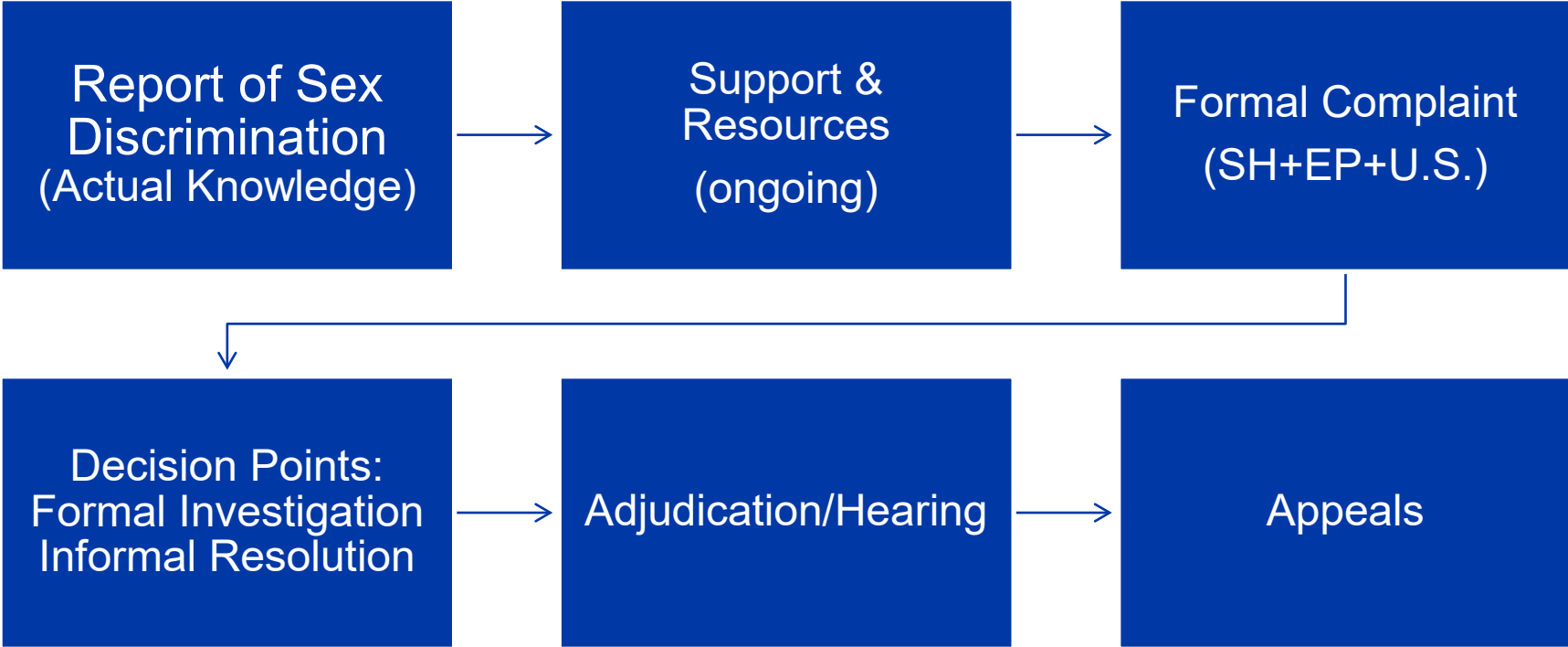
# **Investigation of Formal Complaints**

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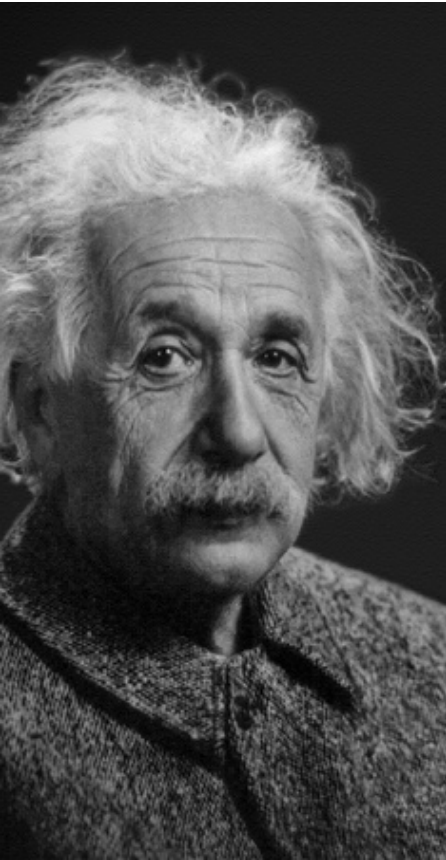
# What Do You Want Us To Cover?



# Perspective



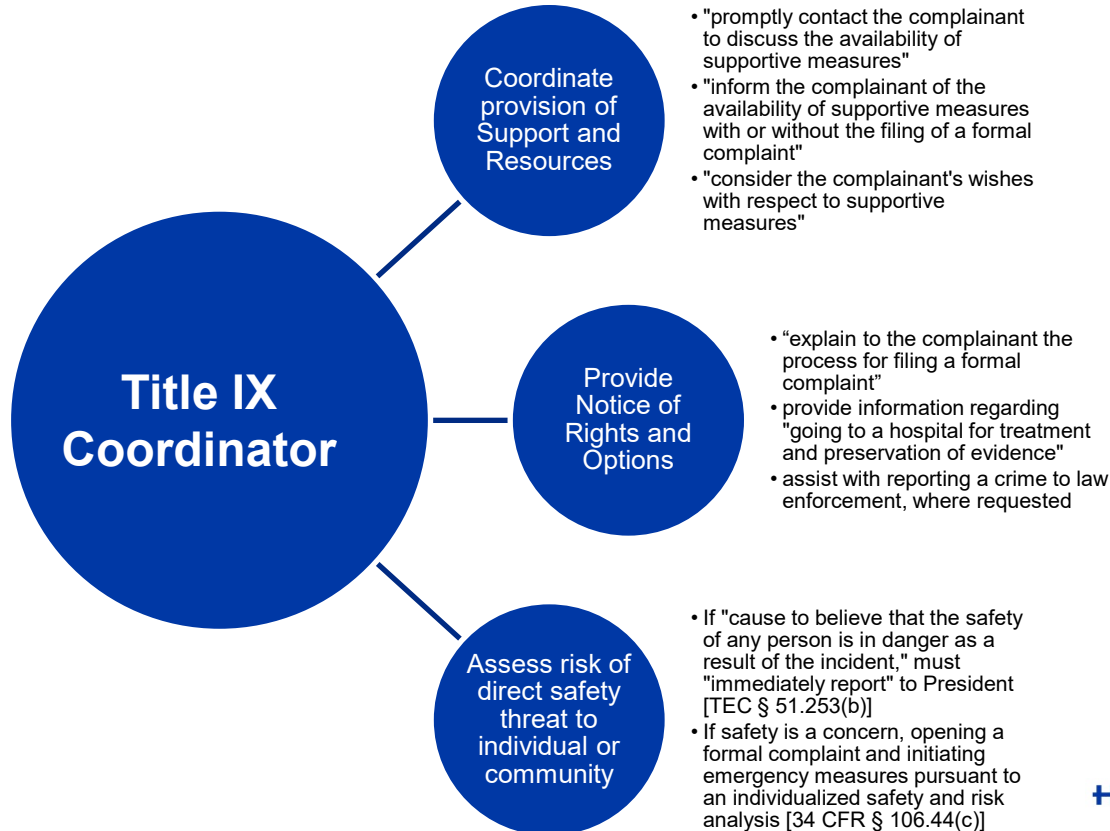
# Title IX Regs “Jurisdiction”



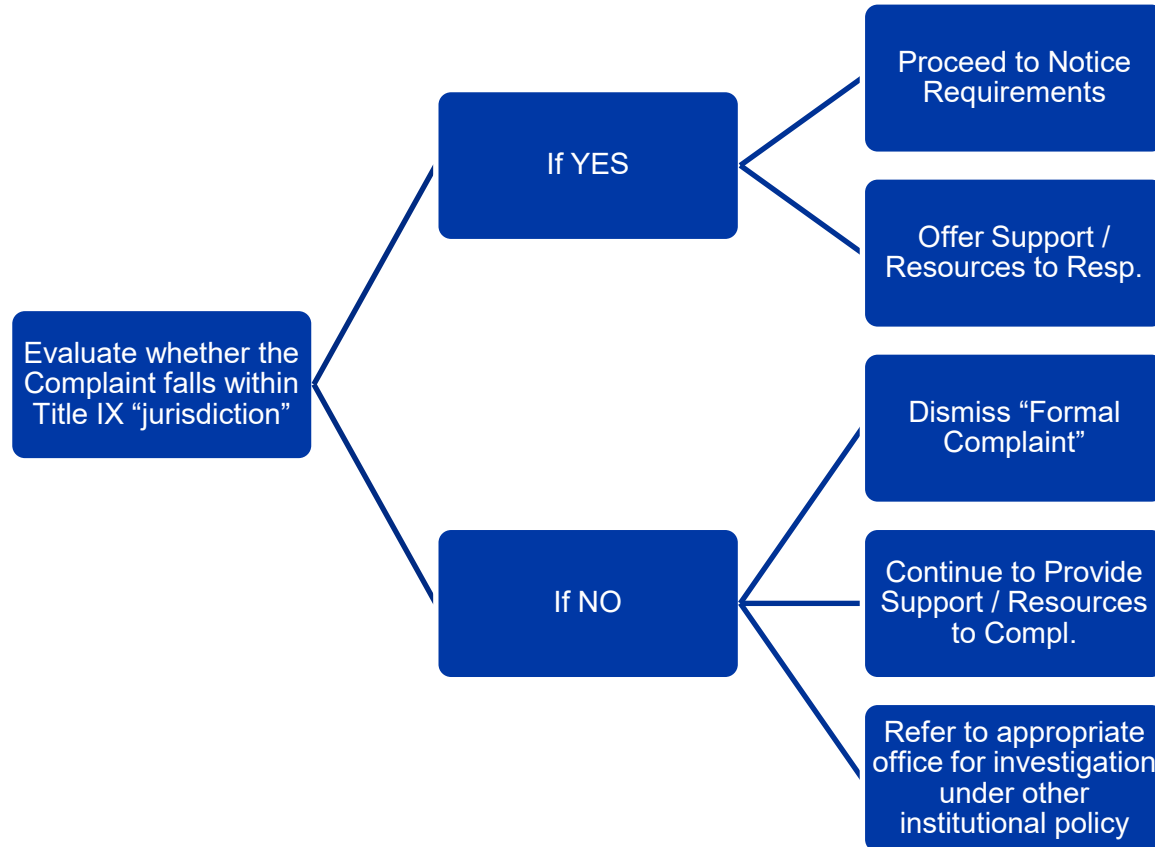
## Institutional obligations to investigate when:

- ✓ “Formal complaint” (FC)
  - “signed” by complainant or Title IX Coordinator
  - “a complainant must be participating in or attempting to participate in the education program or activity” **“[a]t the time of filing a formal complaint”**
- ✓ “Sexual harassment” (SH)
  - Quid Pro Quo
  - Hostile Environment + (severe, persistent and pervasive)
  - Sexual Assault, Domestic/Dating Violence, Stalking
- ✓ “Education program or activity” (EP)
  - “sex discrimination occurring against a person in the U.S.” (U.S.)
  - “includes locations, events, or circumstances over which the recipient exercised *substantial control* over both the *respondent* and the *context* in which the SH occurs”
  - expressly includes “any building owned or controlled” by an “officially recognized” student organization

# Rewind: Title IX Coord. Responsibilities Upon Receipt of Report (not FC)



# Rewind: Title IX Coordinator Responsibilities Upon Receipt of “Formal Complaint”



# Appeal of FC Dismissal

“A recipient must offer both parties an appeal . . . **from a recipient’s dismissal of a formal complaint or any allegations** therein, on the following bases:

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.”

# Special Intake Considerations for Crimes

- Notice of rights and assistance with obtaining medical assistance and preservation of evidence
- VAWA statement of rights and options
- Clery Act Obligations
- Minors involved?
- Threat Assessment/ BIT/Other safety concerns?





# If The Formal Complaint Is Not Dismissed . . .

- “The recipient must investigate the allegations in a formal complaint.”
- What is the purpose of the investigation under the Title IX regulations? Organizing for the hearing?



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## The Seven Rules of Title IX Investigations (Nine Would Have Been Cooler)

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# Regs Rule 1 of Investigations

“When investigating a formal complaint and throughout the grievance process, a recipient must . . . Ensure that the **burden of proof** and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.”

- What does “burden of proof” refer to here?
- Example of what not to do: “Get your friends and witnesses to write statements and send them to me”
- What is still permissible?

# Regs Rule 1 Practical

- Checklist for common sources of evidence
- Identify relevant information and witnesses in an investigation plan – to the extent it is within our control, get it
- Ask for it in interviews & in writing
- Meticulously document efforts to obtain (especially when you fail)

# Common Sources of Physical Evidence

1. Text messages
2. Social media posts
3. Card swipes
4. On and off-campus video
5. Police reports
6. Medical reports
7. Teaching evaluations
8. Internal reports
9. Call logs
10. Other disciplinary records

# Regs Rule 1A of Investigations

“Provided that the recipient cannot **access, consider, disclose, or otherwise use** a party’s records that are made or maintained by a **physician, psychiatrist, psychologist, or other recognized professional or paraprofessional** acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that **party’s voluntary, written consent** to do so for a grievance process under this section.”



#News #Students And Violence

## Staying Confidential

Months after U of Oregon's actions exposed the ability of colleges to seek mental health records of alleged rape victims, the outrage hasn't led to action to prevent others from doing the same thing.

By [Jake New](#) // August 3, 2015

# Regs Rule 2 of Investigations

“Provide an equal opportunity for the parties to present witnesses, including fact and **expert witnesses**, and other inculpatory and exculpatory evidence”

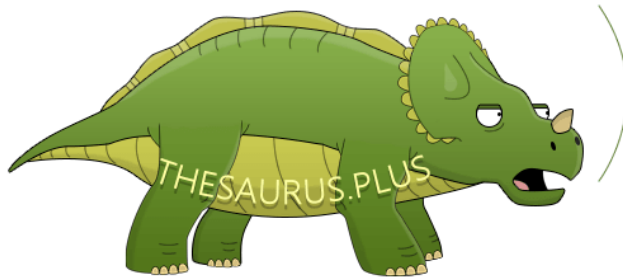
- “106.45 deems certain evidence and information not relevant or otherwise not subject to use in a grievance process: information protected by a legally recognized privilege; evidence about a complainant’s prior sexual history; any party’s medical, psychological, and similar records unless the party has given voluntary, written consent; and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross-examination at a live hearing.”
- **Practical Point 1:** Err on side of allowing it & give it the weight its due
- **Practical Question:** How do we ensure that we have provided the parties this equal opportunity?

# Regs Rule 3 of Investigations

“Not restrict the ability of either party **to discuss the allegations under investigation** or to gather and present relevant evidence”

synonyms for inartful:

inexpert, unskilful, unpractised, unartful, artless, inapt, scratchy, unaccomplished, unpracticed, unversed



- “This provision does not, therefore, apply to discussion of information that does not consist of ‘the allegations under investigation’ (**for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation . . . or the investigative report summarizing relevant evidence sent to the parties and their advisors . . . .**)”
- “Where ‘disparaging communications’ are unprotected under the Constitution and violate tort laws or constitute retaliation, such communications may be prohibited without violating this provision.”
- “This provision applies to discussion of “the allegations under investigation” and not to the evidence subject to the parties’ inspection and review under § 106.45(b)(5)(vi).”
- **Remember:** applies to employment



# Regs Rule 4 of Investigations

“Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and **not limit the choice or presence of advisor** for either the complainant or respondent in any meeting or grievance proceeding; **however**, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”



# Regs Rule 5 of Investigations

“Provide, to a party whose participation is invited or expected, **written notice** of the **date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time** for the party to prepare to participate.”

- **Practical 1:** How do we demonstrate we complied with this?
- **Practical 2:** What is “sufficient time”?

# Regs Rule 6(a) of Investigations

“Provide both parties an equal opportunity to inspect and review **any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source**, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.”



# Regs Rule 6(b) of Investigations

**“Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.”**



# Memorializing Witness Statements

## ➤ **Option: Recording**

- Ensures accuracy, allows you to concentrate on conversation, logistically simpler, allows for meaningful feedback
- Transcript must be provided to all parties

## ➤ **Option: Written Statement**

- A. Convey all information relayed in narrative form
- B. Use quotes when appropriate (significant statements, jargon)
- C. Allow parties opportunity to review for accuracy but not make substantive revisions without notations
- D. Consider “multiple witnesses” to statement

# Regs Rule 7 of Investigations

- “Create an investigative report that **fairly summarizes relevant evidence** and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, **for their review and written response.**”
- Fair to note undisputed material facts
- Disputed material facts are for hearing



# Credibility: 7 Factors to Consider

1. Compare verifiable facts to witness statements.
2. Are there major inconsistencies in testimony?
3. Do neutral witnesses corroborate or contradict?
4. Are there documents such as diaries, calendar entries, journals, notes or letters describing the incidents?
5. What have witnesses told others?
6. Have there been similar complaints against the respondent? \*\*\*
7. Do any of the witnesses have a motivation to lie, exaggerate or distort information?

# Rewind: Dismissal

- If no SH + EP + US then “**must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX ....”
- “The recipient **may** dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator **in writing** that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; **or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.**”
- Upon a dismissal “the recipient **must** promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.”

“The Department wishes to emphasize that this provision is not the equivalent of a recipient deciding that the evidence gathered has not met a probable or reasonable cause threshold or other measure of the quality or weight of the evidence, but rather is intended to apply narrowly to situations where specific circumstances prevent the recipient from meeting its burden in § 106.45(b)(5)(i) to gather sufficient evidence to reach a determination.”



# Hypothetical

- Professor A is accused of sex assault by a student. The student points out that Professor B witnessed the assault.
- You ask Professor B to sit for an interview. Professor B refuses.
- What options do you have under IX?

# Retaliation

“No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated **or refused to participate in any manner in an investigation, proceeding, or hearing under this part.**”

# Practical Questions

- Who should conduct the investigation?
- How/when should we communicate to parties about information sharing requirements?
- What are practical steps we can take to ensure investigation is prompt?
- Is it worth re-thinking role of advisers?
- Recordkeeping Requirements (“Each sexual harassment investigation . . . .”

*“(7) Determination regarding responsibility. (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.”*

The word "QUESTIONS?" is centered on the page. It is surrounded by decorative dashed lines: a red horizontal line at the top left, a blue vertical line on the left side, a blue vertical line on the right side, and a red horizontal line at the bottom right. Each of these four lines ends with a small solid dot of the same color.

**QUESTIONS?**