

Session 3: Assessment of Mandatory and Discretionary Dismissals

Training for Title IX Coordinators and Investigators

The U.S. Department of Education's New Title IX Rules
Office of the Chancellor
The California State University

Steps in the Complaint Assessment Process

1. Is there a Report or a Formal Complaint?
2. If there is a Formal Complaint, must the Formal Complaint be dismissed from the Addendum B process?
3. If there is a mandatory dismissal from Addendum B, should the complaint be processed under 1096/1097 (investigator model) or Addendum A (student respondents)? Is discretionary dismissal appropriate?
4. If the complaint will not be processed under a different procedure, is any other follow up necessary e.g. support services, education?

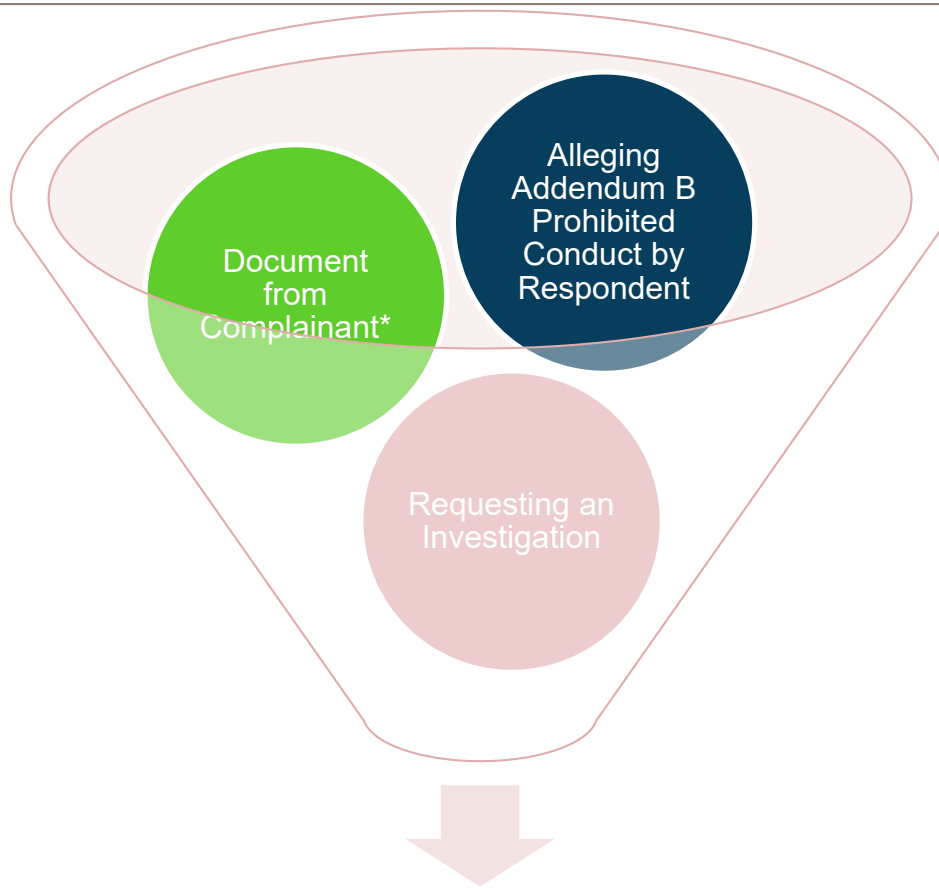
Report vs. Formal Complaint

Report (either directly from Complainant or someone else)

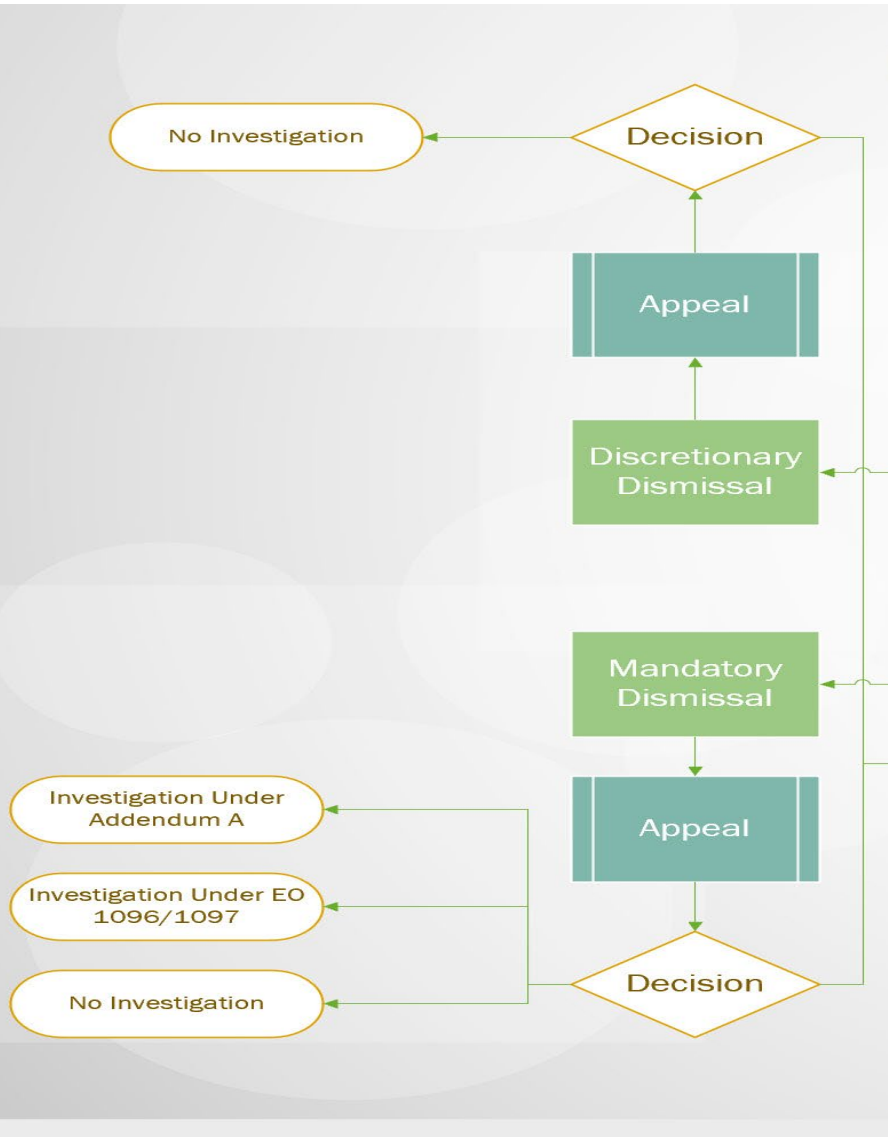
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graph TD; A[Report (either directly from Complainant or someone else)] --> B[Supportive Measures (regardless of whether a Formal Complaint is filed)]; B --> C[Formal Complaint (document signed by Complainant or Title IX Coordinator)];
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Supportive Measures (regardless of whether a Formal Complaint is filed)

Formal Complaint (document signed by Complainant or Title IX Coordinator)



Formal Complaint



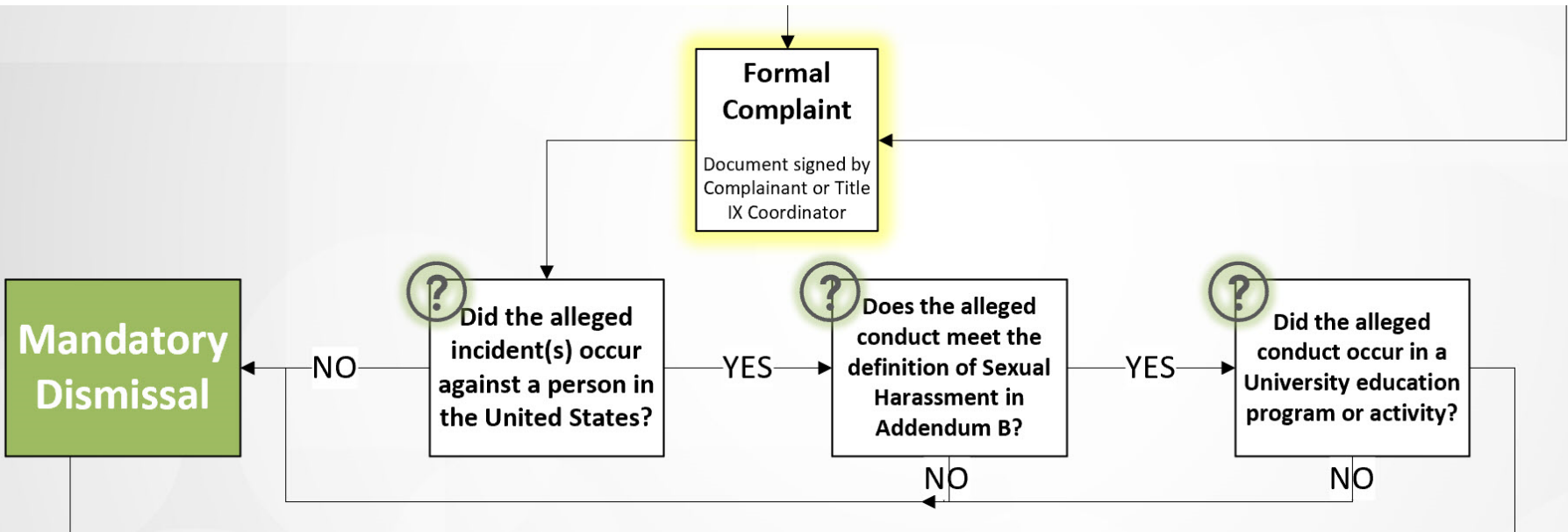
The Assessment

- Does the Formal Complaint continue with the Addendum B process?
 - If not, is it a mandatory dismissal or discretionary dismissal?
 - If a mandatory dismissal, what is the next step?

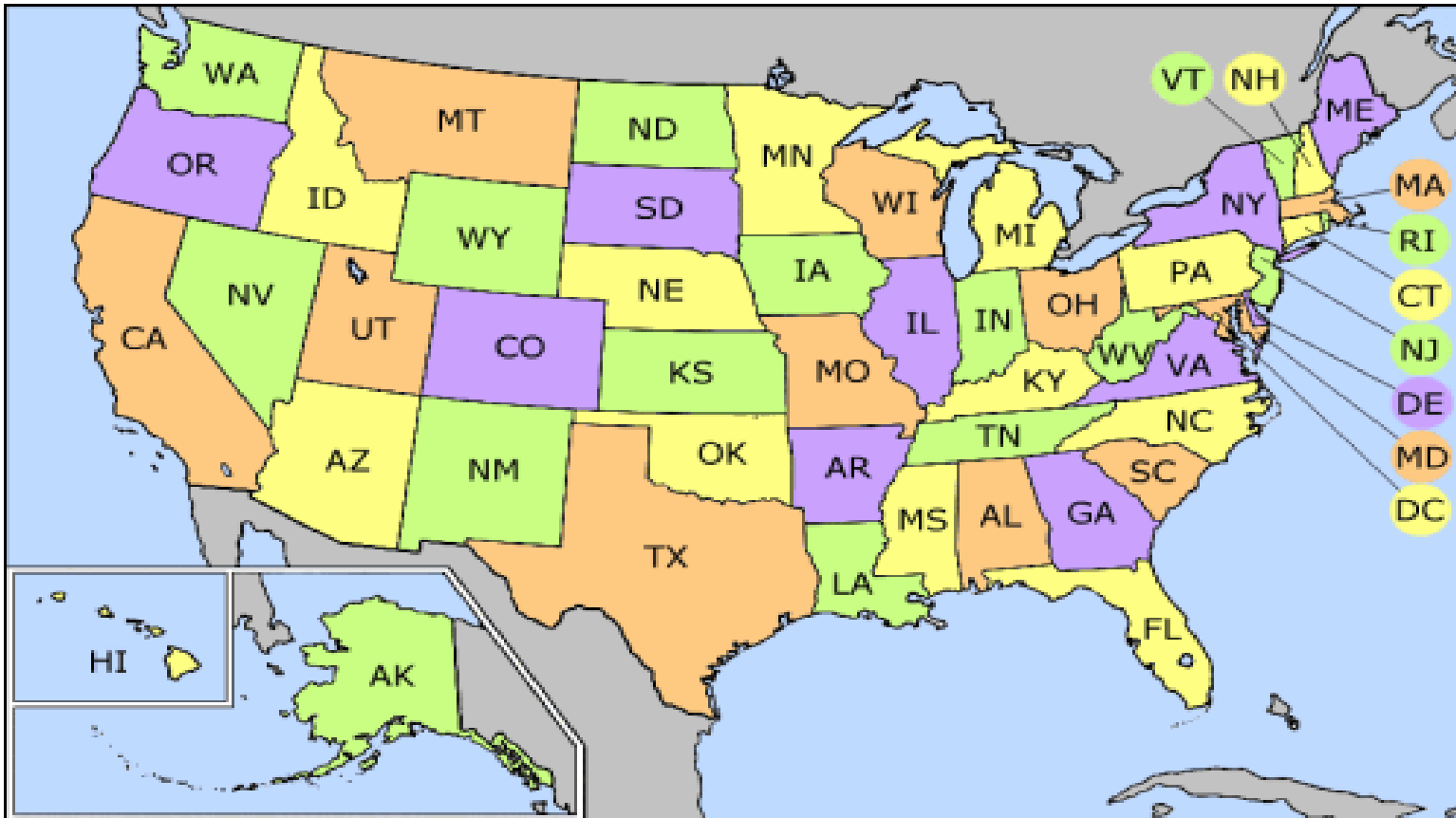
Mandatory Dismissal

Mandatory Dismissal

- If conduct alleged in a Formal Complaint would not constitute Addendum B Prohibited Conduct even if proved, did not occur in an Education Program or Activity, or did not occur in the United States, it **must** be dismissed “**with regard to that conduct**” per the Title IX Rules.
- The Title IX Coordinator will make this determination.
- Respondent must be notified of allegations.
- The parties may appeal this decision.
- The complaint may be referred under the processes detailed in EO 1096 or 1097, including Addendum A.
- **A mandatory dismissal under Addendum B is not necessarily a dismissal from all processes.**



Did the conduct occur in the United States?



Example 1:

A CSU student reports to the Title IX Coordinator that they were sexually assaulted by another CSU student while on a study-abroad program in Spain.

X This matter does not fall under the scope of the Title IX Rules because the alleged incident was not against a person inside the U.S.

- The formal complaint process under Addendum B is therefore unavailable as this must be dismissed.
- Depending on the specifics of the case, it could either be addressed under Addendum A or the single investigator process under EO 1097.
- Regardless of which process is used, the student will be offered supportive measures and information regarding resources.

Does the conduct as alleged meet the definition of Addendum B Prohibited Conduct (Sexual Harassment)?

- Quid pro quo harassment;
- Unwelcome conduct determined “by a reasonable person to be so severe, pervasive, **and** objectively offensive” as to deny a person equal access to the institution’s education program or activity; or

Does the conduct as alleged meet the definition? (cont.)

- Sexual Assault
 - Rape
 - Fondling
 - Statutory Rape
 - Incest
- Dating and Domestic Violence
- Stalking

Example 2:

A CSU faculty member reports to the Title IX Coordinator that they have experienced sexual harassment from a CSU staff member. Following an intake interview, the Title IX Coordinator determines that the conduct as described, even if proven, was not severe and pervasive, and objectively offensive.




This matter does not fall under the scope of the Title IX Rules because the alleged conduct, even if proven, would not meet the definition of Sexual Harassment under the Title IX Rules.

- The formal complaint process under Addendum B is therefore unavailable and the matter must be dismissed.
- The allegations could still be investigated under the single investigator process in EO 1096.
- Regardless of which process is used, the faculty member will be offered supportive measures and information regarding resources.

Example 3:

A female-identifying CSU staff member reports to the Title IX Coordinator that their supervisor regularly asks them questions that they feel constitute sex-stereotyping and that they were recently passed over for a promotion, which was instead given to a male-identifying employee. The female employee believes that this decision constituted gender-based discrimination.

 This matter does not fall under the scope of the Title IX Rules because the alleged conduct, even if proven, would not meet the definition of Sexual Harassment under the Title IX Rules.

- The formal complaint process under Addendum B is therefore unavailable and must be dismissed.
- The allegations could still be investigated under the single investigator process in EO 1096.
- Regardless of which process is used, the faculty member will be offered supportive measures and information regarding resources.

Scope and Jurisdiction Issues

➤ Education program or activity

Locations, events, or circumstances (operations) over which the institution exercised substantial control over both the respondent AND the context in which the sexual harassment occurs.

Includes any building owned or controlled by student organization that is OFFICIALLY RECOGNIZED by the institution.

Example 4:

A CSU graduate student reports to the Title IX Coordinator that their spouse, who is also a CSU student, returned from a night out, was clearly intoxicated and hit them. The two students live in a private off-campus apartment. The reporting student tells the Title IX Coordinator that their spouse is only violent toward them when they are at home in the apartment.



This matter does not fall under the scope of the Title IX Rules because the alleged conduct is occurring off-campus, outside a CSU education program or activity.

- The formal complaint process under Addendum B is therefore unavailable.
- Depending on the specifics of the case, it could either be addressed under Addendum A or the single investigator process under EO 1097.
- Regardless of which process is used, the student will be offered supportive measures and information regarding resources.

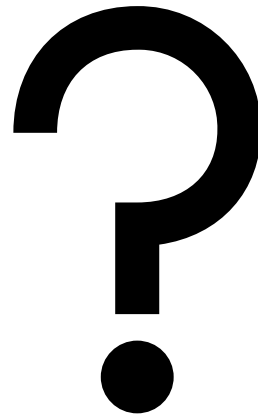
Scenario #1

Complainant (CP) files a Formal Complaint:

Allegation #1 - One year ago, while studying abroad, the Respondent (RP) engaged in sexual activity with CP while the CP was incapacitated. The two were on a date but did not associate after the incident.

Allegation #2 – On August 15, 2020, CP was at a party. The event occurred off campus at a fraternity house. RP is a member of the fraternity. While CP was at the party, the RP grabbed an intimate body part of the CP. RP winked at CP and said, “hey baby, so nice to feel you.”

**LET'S PAUSE
FOR QUESTIONS**



Discretionary Dismissal

Discretionary Dismissal

- It is within the discretion of the Title IX Coordinator, after careful consideration of all the relevant factors, to dismiss matters where:
 - 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; or
 - if specific circumstances prevent the University from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- Respondent must be notified of allegations.
- The parties may appeal this decision.

Complainant requests withdrawal

- Must be in writing
- Factors to be considered

Respondent is no longer enrolled or employed

- Factors to be considered
- When a Student withdraws while investigation is pending
- When employee leaves

Insufficient Evidence

- Factors to be considered
 - Is it truly insufficient?
 - What are the specific circumstances that prevent you from gathering sufficient evidence?

Informing Parties of the Allegations/Dismissal

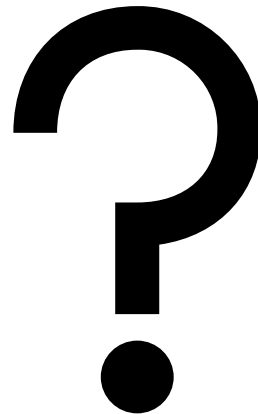
Written Notice of Dismissal

- Can be combined with Notice of Allegation*.
- Must be sent **promptly** and **simultaneously** to the parties
- Must include reasons for dismissal
 - Please be descriptive
- Must contain information regarding:
 - appeal right,
 - whether the matter will be referred to another process, and
 - the process for submitting an appeal.

Written Notice of Allegations

- Notice of Allegations must be provided, when a Formal Complaint is received, whether or not the Formal Complaint will be dismissed.
- Preamble, pg. 913: “Concurrent law enforcement activity is not good cause to delay sending the written notice itself.”
- Can be good cause for temporary delay of the Formal Complaint process itself or limited extension of timeframes.
- **Written notice of meetings, interviews and hearings:** If the Notice of Allegations also serves as notice of a Respondent’s expected attendance at an interview, it should include details of the date, time, location, participants, and purpose of that interview.
- “With sufficient time to prepare” - The Notice of Allegations must be provided to a Respondent at least **5 Working Days** prior to the interview. Can waive.
- If new allegations are raised during the investigation that were not included in the Notice of Allegations, a revised Notice of Allegations will be issued simultaneously to the Parties.

LET'S PAUSE FOR QUESTIONS



Appeal

Appeal from Dismissal

- Either party may appeal a dismissal for the for following bases:
 - Procedural irregularity
 - New evidence not reasonably available at the time of the dismissal determination
 - Conflict of interest or bias of the Title IX Coordinator
- Appeal Outcome determines the next steps and the investigation process should be paused pending the appeal outcome.

What is Bias?

- Requires examination of the particular facts of a situation
- Should apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased,
- Not examples of bias:
 - Assuming that all self professed feminists, or self-described survivors, are biased against men,
 - Assuming that a male is incapable of being sensitive to women,
 - Assuming that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents. **(30252)**

What is Conflict of Interest?

- Although the decision-maker must be different from any individual serving as a Title IX Coordinator or investigator, pursuant to § 106.45(b)(7)(i), the final regulations do not preclude a Title IX Coordinator from also serving as the investigator, and the final regulations do not prescribe any particular administrative “chain of reporting” restrictions or declare any such administrative arrangements to be *per se* conflicts of interest prohibited under § 106.45(b)(1)(iii).

QUESTIONS ?



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