

## Title IX Coordinator Initial Assessment Decision Guide

- Has a formal complaint been filed? If yes, proceed.
- If not, is the recipient on notice? If yes, proceed.
- Should the Title IX Coordinator sign/initiate a formal complaint? If yes, proceed.
- Who has authority to conduct an individualized assessment of immediate physical health or safety threats, and determined whether to invoke emergency removal? Once complete, then proceed (regardless of emergency removal outcome).
  - Assess with legal counsel whether the Title IX Coordinator has authority under Montana law to suspend students.
  - What about when the coordinator is not an administrator? Must keep an eye on how not to implicate any conflict of interest or bias. Does the behavior meet the definition of sexual harassment, sexual assault, domestic violence, dating violence, or stalking within 34 C.F.R. § 106.30? If no, dismiss.
  - Consult with legal counsel. This step may require mini investigation/further inquiry.
  - Make sure you have the information you need to make a fair determination as to this threshold question.
- Did the behavior occur within an education program or activity, including locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurred, including any building owned or controlled by a recognized student organization? If no, dismiss.
- Did the behavior occur in the United States? If no, dismiss.
- At the time of the complaint, was the Complainant participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed? If no, dismiss.
- With or without dismissal, is this a matter that can/should be referred for informal resolution?
- If not subject to mandatory dismissal on the four grounds, are any of the grounds for discretionary dismissal met?
  - Is the Respondent is no longer enrolled or employed by the recipient?
  - Are there specific circumstances that prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein?
  - Did the Complainant notify the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein?
  - If yes to any one of the above, determine if you must dismiss or will voluntarily dismiss the complaint.
- If dismissed for any of the above seven reasons, should an alternate policy/process be reinstated?
  - If dismissed as above, respond to any appeals of dismissal, as necessary.
    - The coordinator needs to notify the administrator to start the alternative policy/process as the coordinator is likely not the person responsible for addressing such conduct.
- If proceeding under Title IX, assess context/history to determine if a potential pattern or threat may exist, or if a climate/culture investigation is needed.
  - The Title IX Coordinator should be clear as to whether the investigation will be based on incident, pattern, and/or climate/culture.

- Is there collateral misconduct that can/should be referred elsewhere, assuming that in doing so, there is no intent to interfere with any right or privilege secured by Title IX?

### **Guide for deciding whether or not to sign formal complaint**

- ⇒ The rules limit the ways in which a formal complaint can be initiated. Specifically, only an alleged victim of sexual harassment (a “complainant”) can “file” a formal complaint, which must be written. But a Title IX Coordinator also has the authority to “sign” a formal, written complaint. Either path initiates the formal complaint process required by the rules.
- ⇒ Under Section 106.44(b) of the final Title IX rules, a school is only required to investigate and adjudicate a Title IX sexual harassment matter if there is a written, formal complaint on file. Section 106.30 of the rules defines a “formal complaint” as a document either “filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.” The rules note that where a Title IX Coordinator signs a formal complaint, the Coordinator does not become a complainant or other party to the dispute, but the rules provide little further as far as guidance on when a Title IX Coordinator might exercise the authority to sign a complaint.

### **What circumstances might justify Title IX Coordinators taking this step?**

- The institution has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority
- The institution wishes to investigate allegations in order to determine whether it has probable cause of employee sexual misconduct that affect the recipient’s ESSA obligations, and
- A Title IX Coordinator receives multiple reports of sexual harassment against the same respondent.
- Even in these situations, the commentary to the rules makes clear that a response that is not deliberately indifferent or clearly unreasonable *may* require the recipient’s Title IX Coordinator to sign a formal complaint obligating the recipient to investigate in accordance with § 106.45. The commentary states that a Title IX Coordinator may consider a variety of factors, including a pattern of alleged conduct and the involvement of violence, weapons, and similar factors in a complainant’s allegations, in deciding whether to sign a formal complaint.

\*\*\* the situations in which a Title IX Coordinator will need to sign a formal complaint to commence the formal complaint processes under the new rules are not clearly fleshed out in the regulations. We will continue to recommend that Title IX Coordinators take seriously and work closely with counsel knowledgeable about the nuances of the new rules when a complainant is not willing or able to file a formal complaint.\*\*\*