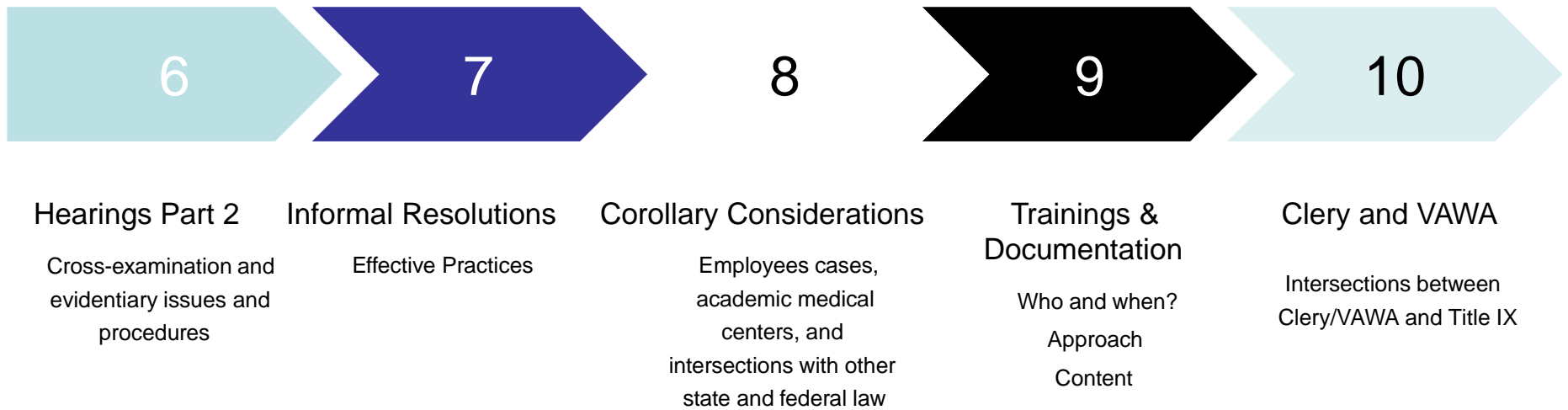


Today's Webinar

- Following an introductory webinar,

Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



Institutional Response Group



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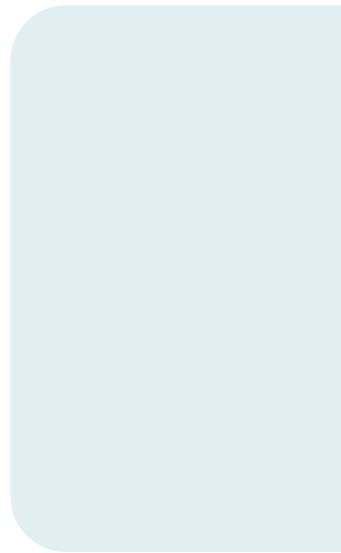
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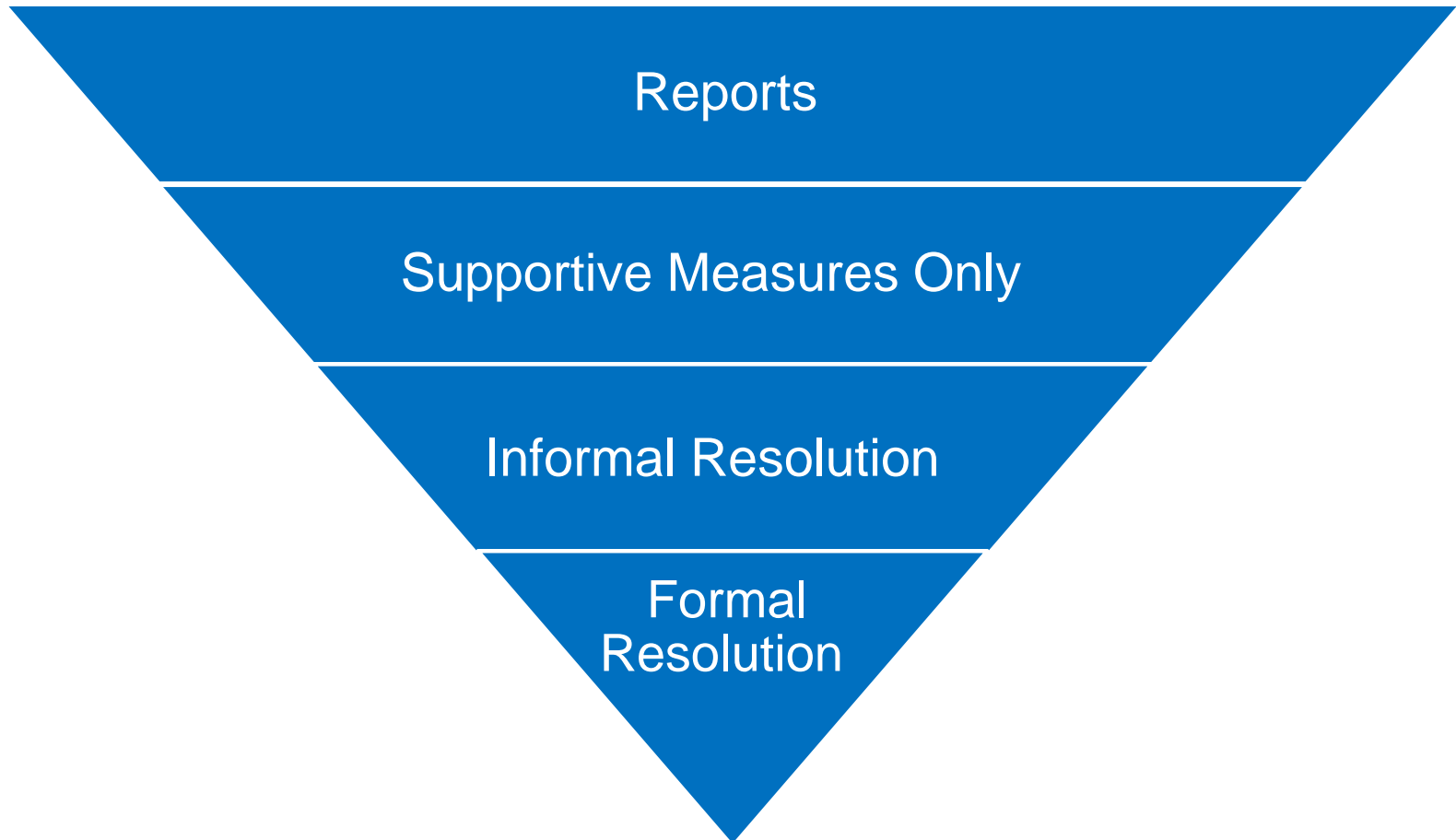
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Institutional Response Group Paralegal and Administration Team:

Understanding Two Key Provisions



The Importance of Intake and Outreach



Intake and Outreach

- Opportunity to re-envision this critical step in the process
 - Foster increased reporting
 - Respond in a compassionate and effective manner
 - Engender trust in personnel and processes
 - Assess effectiveness of current intake functions
 - Conduct gap assessment
- Aspire to ready accessible information about resources and policies
- Increase accessibility of and participation in investigation and resolution processes

The Importance of Intake and Outreach

- The Department's adaptations of the three-part Gebser/Davis framework achieve important policy objectives that arise in the context of a school's response to reports, allegations, or incidents of sexual harassment in a school's education program or activity, including respect freedom of speech and academic freedom, respect for complainants' autonomy, protection of complainants' equal educational access while respecting the decisions of...educators to determine appropriate supportive measures, remedies , and disciplinary sanctions, consistency with constitutional due process and fundamental fairness, and clear legal obligations that enable robust administrative enforcement of Title IX violations.

Title IX Regulations issued May 6, 2020, Preamble p. 61; Final Regulations May 19, 2020, 85 F.R. 30035 (footnotes omitted)

Integration and Coordination

Intake and Initial Assessment

- Assess immediate safety and well-being
- Gather basic facts
- Advise of right to notify or decline to notify law enforcement and seek medical treatment
- Notify of importance of preservation of evidence
- Tend to Clery responsibilities:
 - Enter into daily crime log
 - Assess for timely warning
- Assess and implement supportive measures
- Provide policies, process options, resources and supports
- Assess for pattern
- Ascertain complainant's wishes
- Discuss barriers to proceeding
- Evaluate individual vs. campus safety

Importance of Getting Everything Central

- Allow for real-time triage and safety assessment
- Provide consistent access to supportive measures
- Provide accurate information about resolution options
- Track and assess for pattern among individuals, groups, programs, locations
- Ensure informed and sensitive information-gathering
- Ensure legal compliance with Title IX regulations
- Fulfill institutional values to reduce sexual and gender-based harassment and violence

Centralized Review Process

- Coordinate personnel and processes
 - Clearly delineated roles and responsibilities
 - Build in regular and open lines of communication
 - Sequence events in advance
- Remove conflict of interest and reduce bias
- Separate support and advocacy from investigation and adjudication
- Develop and use template communications
- Central tracking for patterns
- Documentation/records
- Ensure consistent implementation of:
 - Supportive measures
 - Investigation protocols
 - Sanctioning & remedies
- Reinforce neutrality and impartiality

Fostering Increased Reporting

- Understand general and specific barriers to reporting
- Provide clear and accessible information to ensure complainants and others understand the decisions involved in reporting
 - Privacy vs. confidentiality
 - Reporting options vs. confidential resources
 - What happens when a report is made
 - Respecting complainant agency and autonomy
- Set clear guidelines for employee reporting obligations

Fostering Increased Reporting

- Demystify the process
- Provide multiple pathways for reporting including online, phone, appointment, walk-in
- Consider location and accessibility of office
 - Centrally-located
 - Private
- Offer to meet where and when the complainant is most comfortable
- Be a visibly invested member of the community
 - Attending non-Title IX functions
 - Speaking and training opportunities

VAWA Requirements

- Statement of policy re: procedures victims should follow if a crime of dating violence, domestic violence, sexual assault, or stalking has occurred, including written information about:
 - the importance of preserving evidence
 - how and to whom the alleged offense should be reported
 - options regarding notifying law enforcement and campus authorities about alleged offenses, including the option to be assisted by campus authorities in notifying law enforcement authorities or to decline to notify authorities
 - information on individual rights and the school's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil or tribal court.

20 U.S.C. § 1092 (f)(8)(B)(iii); 34 C.F.R. § 668.46(b)(11)(ii); 34 C.F.R. § 668.46(b)11.

VAWA Requirements

- Notify individuals in writing of resources and rights:
 - the range of interim measures available that are available regardless of whether an individual chooses to report an alleged

Separating Support from Investigations

- Separate support/advocacy/intake functions from investigative/adjudicative functions to reduce potential for conflict of interest or perception of bias
- Reinforce neutrality in language and communications
- Ensure sufficient resources for timely response

Separating Support from Investigations

- “Section 106.44(c) does not preclude a recipient from using Title IX personnel trained under §106.45(b)(1)(iii) to make the emergency removal decision or conduct a post-removal challenge proceeding, but if involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent, §106.45(b)(1)(iii) would preclude such personnel from serving in those roles during a grievance process.”

Complainant Agency & Autonomy

- Balancing competing considerations
 - Agency and autonomy of an adult

Complainant Agency & Autonomy

- “The final regulations promote clarity as to recipient’s legal obligations, and promote respect for each complainant’s autonomy , by distinguishing between a complainant’s report of sexual harassment, on the one hand, and the filing of a formal complaint that has initiated a grievance process against a respondent, on the other hand.”
- “The Department acknowledges that a recipient should respect the complainant’s autonomy and wishes with respect to a formal complaint and grievance process to the extent possible .”

Assessing for Pattern

- People
 - Are the complainant or respondent parties in another current or prior matter?
 - Are the complainant or respondent involved in an organization, department, or team that is part of a current or prior matter?
- Locations
 - Has the location of the incident come up in a prior matter?
- Conduct
 - Does the conduct itself suggest a need for further training or education on a specific topic?
- Potential Sources of Information:
 - Title IX
 - Student Conduct
 - Campus Police
 - Human Resources
 - Threat Assessment
 - Supervisor
 - Personnel File
 - Provost
 - External Law Enforcement
 - Other
- Document All Results
 - Including no records found

Importance of Training

- Regulations require training for Title IX Coordinator, Investigator, Decision-Maker, Facilitator of Informal Resolution Process:
 - The definition of Sexual Harassment under § 106.30
 - The scope of the University's education program or activity
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- For Decision-Makers
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- For Investigators
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence

Importance of Coordination

- Multi-disciplinary perspectives

Title IX Multi-Disciplinary Team

- Core stakeholders
 - Title IX Coordinator
 - Student conduct
 - Campus safety/police
 - Human resources
 - Provost
- Additional campus stakeholders
 - Counseling
 - Health center
 - Advocacy
- Additional campus partners
 - Residence Life
 - Greek life
 - Athletics
- Community partners
 - Law enforcement
 - Prosecutor
 - Hospital/Medical Providers
 - Community crisis or advocacy centers
 - Rape Crisis Counselors
 - Domestic Violence Counselors

Importance of Documentation

- Checklists for consistency
- Intake and initial assessment forms
- Opening and closing case management checklists, forms and templates
- Template communications/memory markers
- Texts, telephone calls, and in person/Zoom meetings
- Customizing existing data and case management systems

Importance of Documentation

- “Tyranny of temporal compression”

Importance of Documentation

- Final regulations require seven-year retention period for:
 - For each response required under § 106.44 (includes supportive measures, formal complaint, emergency removal, and administrative leave), records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
 - Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity.
 - If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

Case Management and Documentation

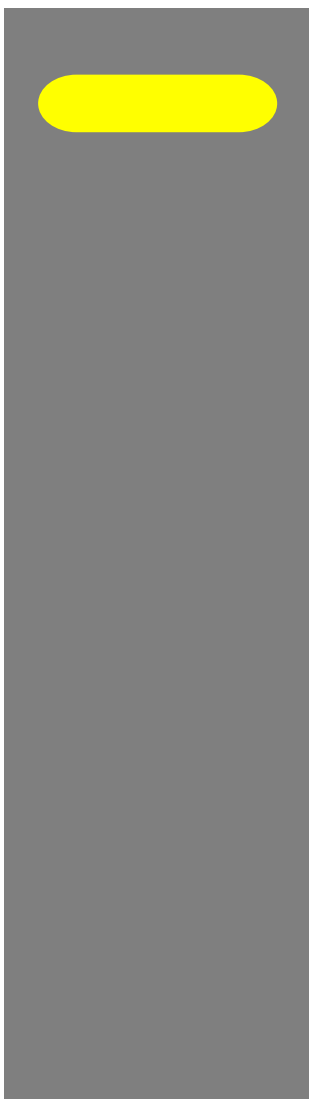
- Efforts to contact complainant
- Supportive measures
- Reasonableness of measures designed to restore or preserve equal access to education program or activity
- Jurisdiction
- Decision to move forward with formal complaint
- Pattern assessment
- Core elements for each critical determination:
 - Identify decision-maker(s)
 - Outline key factors
 - Outline steps taken
 - Communicate to parties
- Documentation must capture:
 - Emails
 - Telephone calls
 - In person meetings
 - Text messages

- Tend to the individual through:
 - Implementing appropriate supportive measures and revisiting effectiveness of measures periodically
 - Practices and communications informed by an understanding of the impacts of trauma and the dynamics of

Communications

- Identify contact person for the parties to avoid the need to coordinate with multiple departments
- Ensure regular and timely communications re: next steps, expectations, timing and delays
- Check in!!
- Follow up in person meetings and telephone calls with written memory markers
- Use sensitive and informed tone and content
- Teach and use common and consistent language among team members

NOTICE



Notice

- Notice to the **Title IX Coordinator** or any official of the recipient who has **authority to institute corrective measures** on behalf of the recipient, or to any employee of an elementary or secondary school

Notice

- **Actual knowledge** , not constructive notice or vicarious liability
 - Can come from personal observation, hearing about it from a complainant or third-party, receiving a written or oral complaint, or by any other means
- The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.

Notice: Institutional Response

When a school has **notice** , the Title IX Coordinator must:

1. Promptly contact the complainant to discuss the availability of supportive measures
2. Consider the complainant's wishes with respect to supportive measures
3. Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint

Practical Considerations & Challenges

- Who are your officials with authority to institute corrective measures?
 - Title IX Coordinator and Deputy Title IX Coordinators
 - Those who generally have authority to institute any corrective measures for anyone in the institution (supervisors, dean of students, HR administrators, etc.)
 - Those individuals that have particular authority over a program or activity of students (coach, etc.)
- Responsible employee considerations

Practical Considerations & Challenges

- Responsible Employee
 - Higher education institutions have the option to continue to designate responsible employees and require reporting
 - How should an institution decide whether to maintain or move away from responsible employee reporting?
- Centralized Reporting
 - Because responsible employee reporting is no longer required, how can institutions ensure they have necessary information to assess for repeat instances of sexual harassment by a person or within a group?
- Training and Resetting Expectations

JURISDICTION AND SCOPE



Jurisdiction: Framing Principle

2

“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.”

Title IX Regulations issued May 6, 2020; § 106.45(a)

Jurisdiction: Education Program or Activity

- “**Education program or activity**” includes:
 - Locations, events, or circumstances over which the recipient exercised **substantial control** over both
 - the respondent and
 - the context in which the sexual harassment occurs, and
 - Any building **owned or controlled by a student organization that is officially recognized** by a postsecondary institution

Title IX Regulations issued May 6, 2020; § 106.44(a)

Jurisdiction: Who

- Title IX statute applies to **any person**

Jurisdiction: On Campus

- “[A]ll of the operations’ of a recipient (per existing statutory and regulatory provisions), and the additional ‘substantial control’ language in these final regulations, clearly include all incidents of sexual harassment occurring on a recipient’s campus.”

Jurisdiction: Off Campus

- “[T]he statutory and regulatory definitions of program or activity along with the revised language in § 106.44(a) clarify that a recipient’s Title IX obligations extend to sexual harassment incidents that occur off campus if any of three conditions are met:
 - if the off-campus incident occurs as part of the recipient’s ‘operations’ pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
 - if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
 - if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).”

Jurisdiction: Course of Conduct

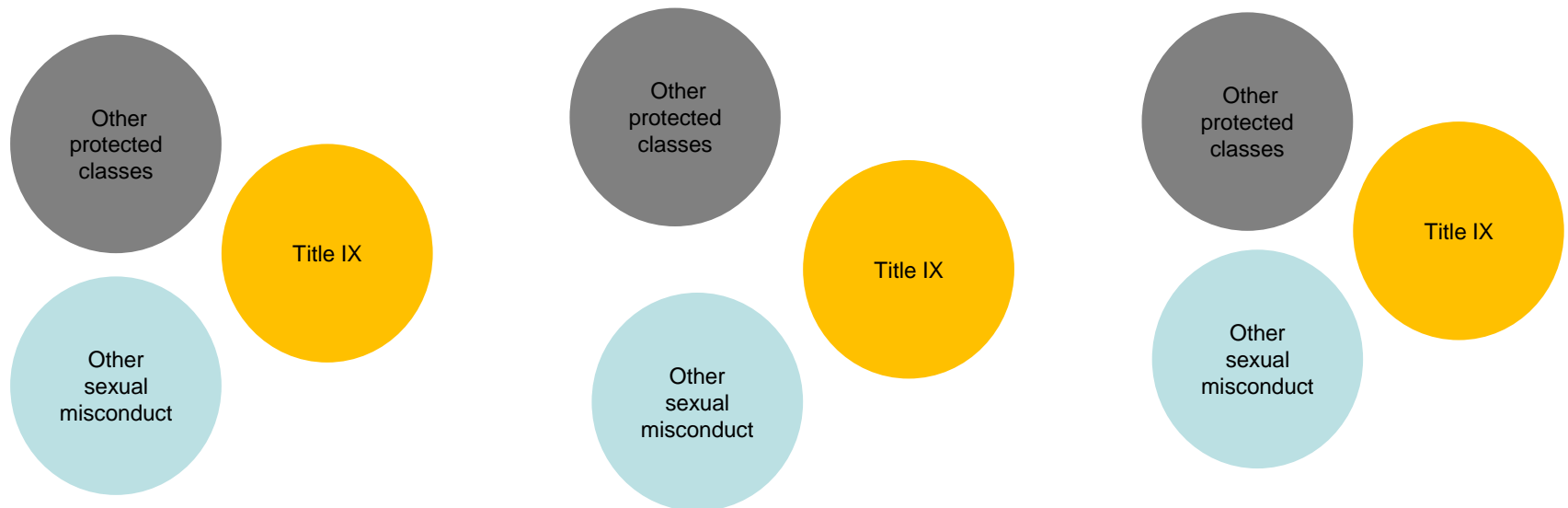
- “In situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not, the recipient

Jurisdiction: What

- Narrowed & expanded definition of sexual harassment
 - Quid pro quo
 - Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively** offensive that it **effectively denies** a person equal access to the recipient's education program or activity
 - Inclusion of sexual assault, dating violence, domestic violence, and stalking as a form of sexual harassment

Title IX Regulations issued May 6, 2020; § 106.30(a)

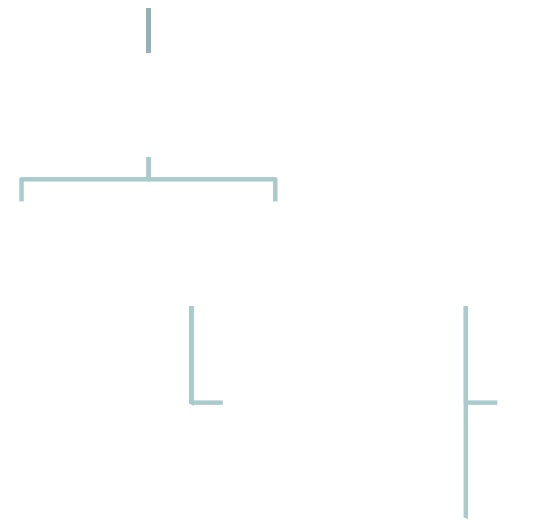
Policy Framework Options



Procedural Framework

ed Classes

tion;
or



SUPPORTIVE MEASURES



Framing Principles

3

“A recipient’s response must treat complainants and respondents equitably by **offering supportive measures** as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.”

Offering Supportive Measures

- The Title IX Coordinator must promptly contact the complainant to:
 - Discuss the **availability** of supportive measures as defined in § 106.30,
 - Consider the **complainant's wishes** with respect to supportive measures,
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
 - Explain to the complainant the process for filing a formal complaint.

Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent

Supportive Measures

Supportive Measures

- Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Title IX Regulations issued May 6, 2020; § 106.30(a)

Supportive Measures

- The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a person accused of sexual harassment.
- Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties.
- Further, supportive measures may be offered to complainants and respondents . . . and §106.45(b)(5)(iv) requires recipients to provide both parties the same opportunity to select an advisor of the party's choice.
- These provisions recognize that the stress of participating in a grievance process affects both complainants and respondents and may necessitate support and assistance for both parties.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30103 footnote 477.

Supportive Measures

- “Whether an action “

Documentation

Emergency Removal for Students

- Must undertake an individualized safety and risk analysis and determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide the respondent with notice and an

Emergency Removal

- Where a respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else), § 106.44(c) allows emergency removals of respondents prior to the conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exist.

Emergency Removal

- “Supportive measures are intended to address restoration and preservation of equal educational access, while § 106.44(c) is intended to apply to genuine emergencies that justify essentially punishing a respondent (by separating the respondent from educational opportunities and benefits) arising out of sexual harassment allegations without having fairly, reliably determined whether the respondent is responsible for the alleged sexual harassment.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30225.

Emergency Removal

- “We appreciate the opportunity to clarify that, where the standards for emergency removal are met under § 106.44(c), the recipient has discretion whether to remove the respondent from all the recipient’s education programs and activities , or to narrow the removal to certain classes, teams, clubs, organizations, or activities .”

Emergency Removal

- The Department notes that the final regulations expressly allow a recipient to remove a respondent on an emergency basis and do not prescribe cross-examination as a necessary procedure during the post-removal opportunity to challenge the removal.
- Recipients may also implement supportive measures that restrict students' or employees' contact or communication with others.
- Recipients thus have avenues for addressing serial predator situations even where no victim chooses to participate in a grievance process.

Title IX Regulations issued May 6, 2020; Preamble at 1176-1177

Emergency Removal

- “The Department declines to put any temporal limitation on the length of a valid emergency removal, although nothing in the final regulations precludes a recipient from periodically assessing whether an immediate threat to physical health or safety is ongoing or has dissipated.”

Emergency Removal

- “We acknowledge that a recipient could remove a respondent under § 106.44(c) without a formal complaint having triggered the § 106.45 grievance process; in such situations, the requirements in § 106.44(c) giving the respondent notice and opportunity to be heard post-removal suffice to protect a respondent from a removal without a fair process for challenging that outcome, and the Department does not believe it is necessary to require periodic review of the removal decision.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R 30226.

Emergency Removal

- “Emergency removal under § 106.44(c) is not a substitute for reaching a determination as to a respondent’s responsibility for the sexual harassment allegations; rather, emergency removal is for the purpose of addressing imminent threats posed to any person’s physical health or safety, which might arise out of the sexual harassment allegations.”

Administrative Leave

- Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.
- This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

Practical Considerations & Challenges

- Limited scope allowable for emergency removal
 - Can you remove under code of conduct for lesser standard?
- Understanding core concepts
 - “Appropriate, as reasonably available”

FORMAL COMPLAINTS

Notice



Formal Complaint

- Document filed by a complainant or signed by the Title IX Coordinator
- At the time of filing a formal complaint, a complainant **must be participating in or attempting to participate in** the education program or activity of the recipient with which the formal complaint is filed

Formal Complaint: Program or Activity

- The following may constitute “attempting to participate” in the recipient’s education program or activity:
 - Applying (or intending to apply) for admission
 - Indicating a desire to re-enroll if the recipient appropriately responds to sexual harassment allegations
 - Intending to remain involved in alumni programs
- “[The ‘education program or activity’ requirement] prevents recipients from being legally obligated to investigate allegations made by complainants who have no relationship with the recipient, yet still protects those complainants by requiring the recipient to respond promptly in a non-deliberately indifferent manner.”

Title IX Regulations issued May 6, 2020; Preamble, see pp. 225, 411, 629

Formal Complaint: Institutional Response

Upon receipt of a **formal complaint** , the institution:

1. Must complete the actions required upon receiving notice, if not already completed,
2. Must evaluate jurisdiction and required/discretionary dismissal,
3. Should assess appropriate supportive measures for both parties,
4. Should evaluate the need for any other measures, including emergency removal/administrative leave,
5. Must initiate a grievance process that complies with § 106.45

Formal Complaint: Discretionary Dismissal

- May dismiss the formal complaint or any allegations therein if:
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations,
 - The respondent is no longer enrolled or employed by the recipient, or

Dismissal of Formal Complaint

- Upon a dismissal required or permitted, the recipient must promptly send **written notice** of the dismissal and reason(s) therefor simultaneously to the parties
- Must offer both parties an **appeal** from a recipient's dismissal of a formal complaint or any allegations therein

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(3) and 106.45(b)(8)

Practical Considerations & Challenges

- Do you expand the concept of formal complaint to non-Title IX sexual misconduct?
- How to remove the barrier of the formal complaint
- Can the Title IX Coordinator file a formal complaint on behalf of a non-student, non-employee who is not seeking to participate in the educational program or activity?

Obligation to Third Parties

- “Like the ‘no person’ language in the Title IX statute, the final regulations place no restriction on the identity of a complainant (§106.30 defines complainant to mean “an individual who is alleged to be the victim of conduct that could constitute sexual harassment”), obligating a recipient to respond to such a complainant regardless of the complainant’s relationship to the recipient .”

Obligations to Third Parties

- “We have, however, revised the § 106.30 definition of formal complaint to state that at the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the recipient’s education program or activity .”
- “This ensures that a recipient is not required to expend resources investigating allegations in circumstances

Obligations to Third Parties

- “The Department believes these provisions help address commenters’ concerns about being forced to expend resources investigating situations where one or both parties have no affiliation with the recipient , without arbitrarily or unreasonably imposing a deadline on complainants, in recognition that complainants sometimes do not report or desire to pursue a formal process in the immediate aftermath of a sexual harassment incident.”

When Might a Title IX Coordinator

Traditional OCR Approach

When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the respondent, a school should consider a range of factors:

- Seriousness
- Pattern or other harassment complaints
- Respective ages of the parties
- The alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under FERPA
- Weapon
- Threats to repeat
- One or more prior sexual assaults committed by respondent
- Pattern of perpetration (e.g., via illicit use of drugs or alcohol, at a given location, or by a particular group)
- History of arrests or records indicating a history of violence
- Multiple respondents
- Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence)

Practical Considerations & Challenges

- Impacts of mandatory and discretionary dismissal
- Checkpoints in process for evaluating dismissal

Use of Slides

- This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.
- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
- All rights are reserved to Cozen O'Connor.

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Scenario # 1

An RA was doing rounds and passed by one of their resident's whiteboards outside their room. They noticed that someone wrote, "You're a B----" on the whiteboard in permanent marker. When the RA asked the resident about it, they said, "Oh, that was my ex. It's whatever."

- ✓ Sexual Harassment (as defined by the regulation)
- 9 Directed against a person in the U.S.
- 9 Within the education program or activity

Scenario # 2

A student reports that a professor routinely gives lower grades to men based on gender. The reporting student says she has been the professor's TA for the last 2 years and cannot be silent anymore.

- ' Sexual Harassment (as defined by the regulation)
- 9 Directed against a person in the U.S.
- 9 Within the education program or activity

Scenario # 3

At a university soccer game, a number of soccer players smacked one another's buttocks when running on and off the field.

- ' Sexual Harassment (as defined by the regulation)
- 9 Directed against a person in the U.S.
- 9 Within the education program or activity

Scenario # 4

Zoe and Rachel are both PhD students and are married. They live off-campus in a private apartment. Zoe report that, sometimes when Rachel gets drunk, she hits Zoe. Zoe says it has only ever happened at their apartment.

- 9 Sexual Harassment (as defined by the regulation)
- 9 Directed against a person in the U.S.
- ✓ Within the education program or activity

Scenario # 5

A student, Nikole, works out at the café on campus. It is open to the public. Simon is a local who often patronizes the café. Simon has made it clear that he has a crush on Nikole. Somehow, Simon got Nikole's phone number and has been sending her incessant text messages. Simon also pieced together

Scenario # 6

Garrett and Stefan are both undergrad students at your school and are part of the same study abroad program in Madrid. Not only does your school

Scenario # 7

A former faculty member, Jill, reported that, during her time at your institution three years ago, she was subjected to repeated unwelcome hugs and flirtatious comments from Rob—a fellow faculty member who still works at your school. Jill has no current affiliation with your institution. For the last three years, she has worked at another school.

- 9 Sexual Harassment (as defined by the regulation)
- 9 Directed against a person in the U.S.
- 9 Within the education program or activity

BUT... at the time of making the formal complaint, Jill is not participating in or attempting to participate in the education program or activity of your school.

Scenario # 8