

Title IX Coordinator Training

Part 1 of 3

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Title IX Coordinator Training

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Organization & Content

01

- History & Context
- Conflicts of Interest, Bias & Impartiality
- Title IX Personnel
- Key Terms
- Record-keeping

02

- Sexual Harassment
- Mandatory Response Obligations
- What to do When You Receive a Report/Complaint

03

- Investigation
- Hearing
- Dismissals
- Appeals
- Sanctions & Remedies



Part 1

History & Evolution of Title IX

Underlying Principles

Supreme Court Framework

Overview of Major Provisions & Procedural Protections

Training Requirements

Bias, Conflict of Interest & Impartiality

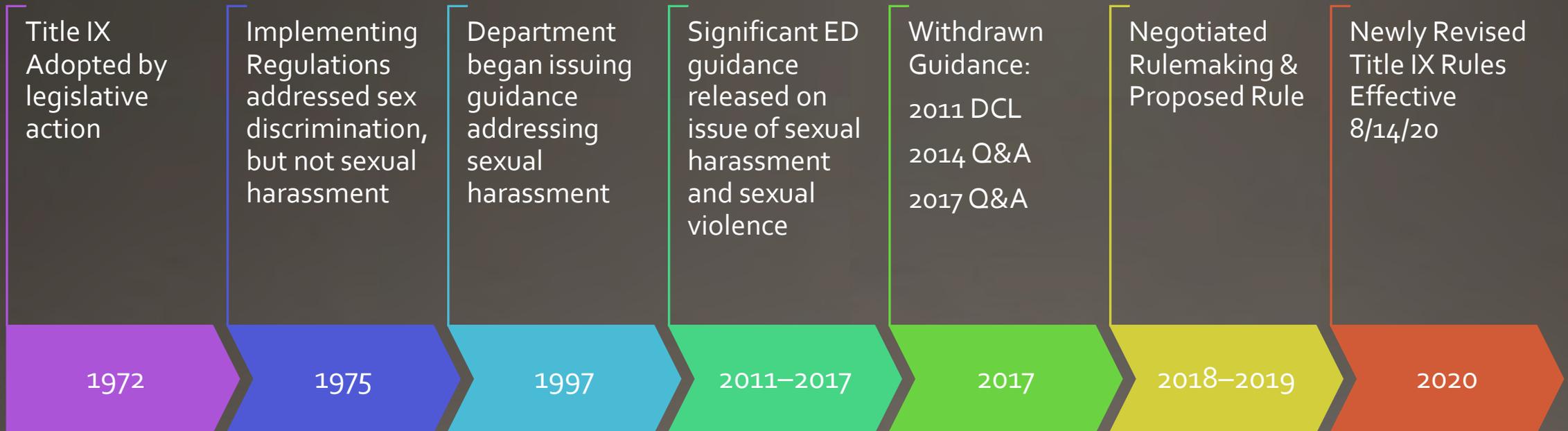
Title IX Personnel

Key Terms & Definitions

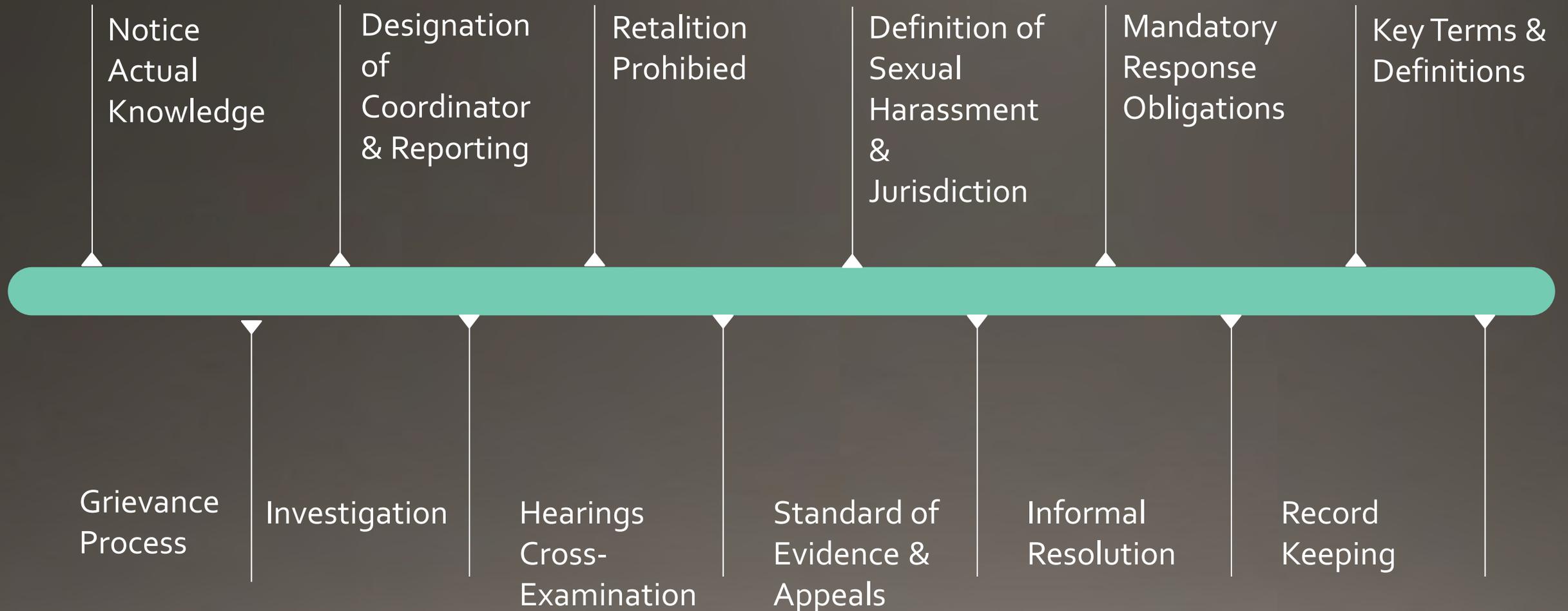
Record Keeping



History & Evolution



FINAL TITLE IX RULE MAJOR PROVISIONS



Principles Underlying the New Rules

Protect	Protect Due Process & Fundamental Fairness
Improve	Improve Integrity of the Grievance Process
Effectuate	Effectuate Purpose of the Law in Preventing Sex Discrimination





Supreme Court Framework

Gebser v. Lago Vista Independent School District (1998 524 U.S. 274)

Davis v. Monroe County Board of Education (1999 526 U.S. 629)



Supreme Court Framework

1. Sexual Harassment
2. Actual Knowledge
3. Deliberate Indifference



Three-Pronged Definition of Sexual Harassment

1. Unwelcome sexual conduct that is so severe and pervasive and objectively offensive it effectively denies a person equal educational access
2. Quid Pro Quo
3. Clery/VAWA Sex Offenses

**Quid Pro Quo and Clery prongs do not have to be severe, pervasive and objectively offensive; a single incident falling within the scope of either could constitute prohibited sexual harassment*



Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment
- Made to the Title IX Coordinator
- Or to any school official who has the authority to institute corrective measures on behalf of the school



Deliberate Indifference

- Was the school's response clearly unreasonable in light of the known circumstances?
- Did the school respond meaningfully to every report of alleged sexual harassment whether or not it triggered the formal grievance process?



Deliberate Indifference

The school's response:

- **Must be Prompt**
- **Must Include offering supportive measures to complainant**
- **Ensures the Title IX Coordinator contact each complainant to discuss supportive measures**
- **Considers complainant's wishes regarding supportive measures**
- **Informs the complainant of the availability of supportive measures with or without filing a formal complaint**
- **Explains the process for filing a formal complaint**
- **Treat the parties equitably (*i.e. not identically, but equitably*)**
- **Follows the grievance process before imposing any disciplinary sanctions on respondent**
- **Effectively implements remedies designed to restore or preserve educational access**



Procedural Protections 106.45

CITATION	SUMMARY
106.45(a)	School's treatment of parties may constitute discrimination
106.45(b)(1)(i)-(x)	Grievance Process Requirements
106.45(b)(2)	Written Notice of Allegations to Both Parties
106.45(b)(3)-(b)(4)	Formal Complaints Must be Investigated, Dismissals, Consolidation
106.45(b)(5)(i)-(vii)	Investigation Requirements
106.45(b)(6)	Cross Examination Conducted by Advisor
106.45(b)(7)	Independent/Neutral Decision-maker, Standard of Evidence Same, Written Determination
106.45(b)(8)	Appeals: Procedural Irregularities, New Evidence, Bias or Conflict of Interest
106.45(b)(9)	Informal Resolution: Voluntary, Written Consent. Not Allowed for Employee Respondent
106.45(b)(10)	Record Keeping, Publication of Training Material



Mandatory Training Requirements 106.45(b)

- ✓ *On Title IX's definition of "sexual harassment"*
- ✓ *On the scope of the school's education program or activity*
- ✓ *On how to serve impartially, including by avoiding prejudgment of the facts at issue*
- ✓ *On how to avoid conflicts of interest and bias*
- ✓ *Any materials used to train must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.*
- ✓ *On how to conduct an investigation and grievance process*
- ✓ *Decision-makers must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant*
- ✓ *Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence*

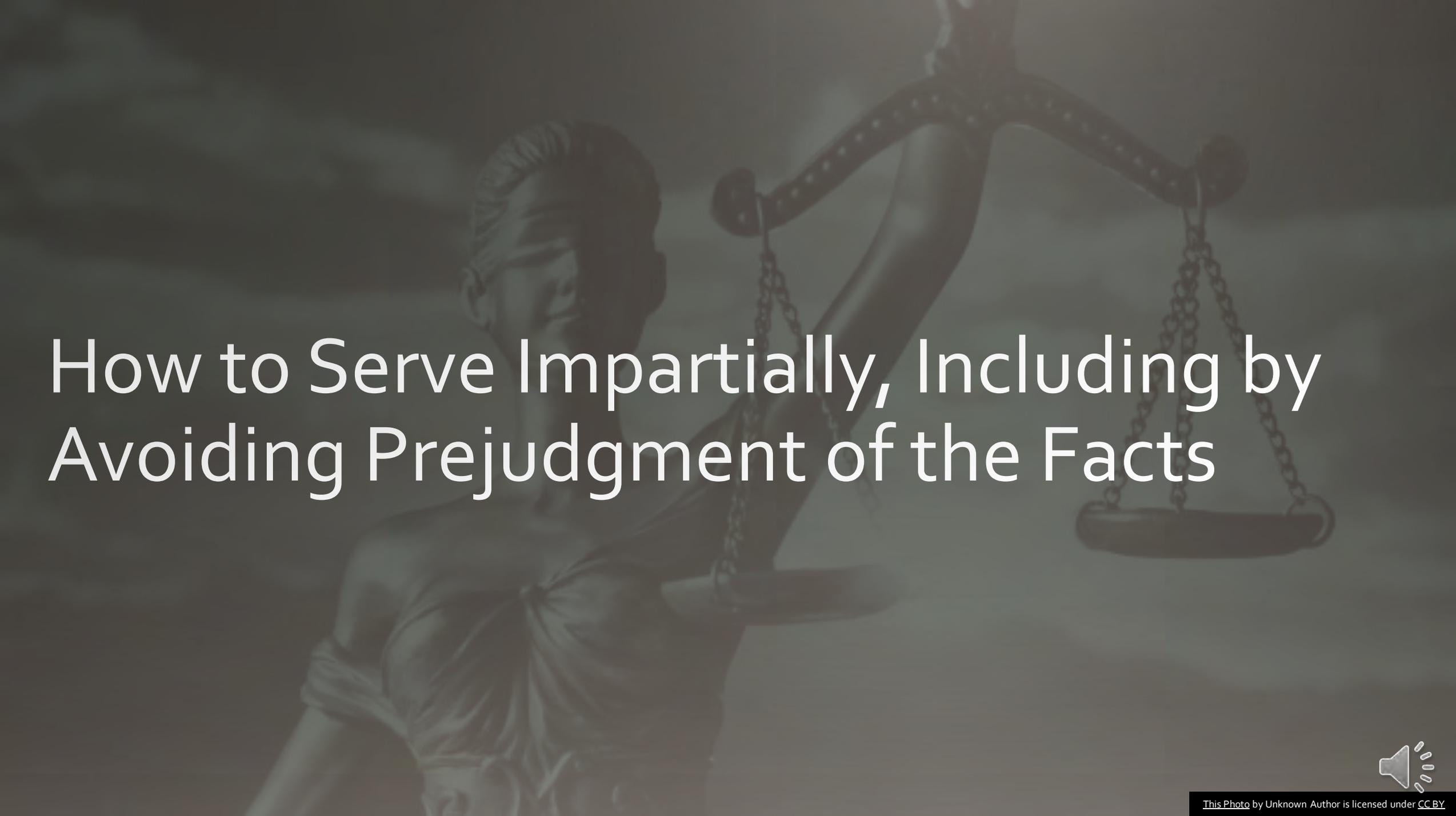


Mandatory Training Requirements 106.45(b)

**ALL training materials must be made publicly available on school's website.*

**Training materials must be maintained for seven years.*





How to Serve Impartially, Including by Avoiding Prejudgment of the Facts



How to Avoid Conflicts of Interest and Bias





Avoiding Sex Stereotypes

Any materials used to train must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment



Title IX Personnel

Title	Responsibilities	Training	Status
Title IX Coordinator (multiple &/or deputies)	Coordinate, Intake Reports & Complaints, T9 analysis, Initiate Formal Complaint, Implement Supportive Measures	Sexual Harassment, Investigation & Grievance Procedure, Hearings, Appeals & Informal Resolution (as applicable); Impartiality, Relevance, Privilege	Must be Employee May Not Serve as Decision-Maker
Investigator	Conduct Fair, Objective and Impartial Investigation, Differentiate b/w Related & Relevant Evidence & Privilege	Sexual Harassment; How to Conduct an Investigation, Impartiality, Relevance, Privilege, Report-Writing	Staff or External May Not Serve as Decision-Maker
Decision Makers	Evaluate Evidence, Make & Write Decision, "Rule" on Relevancy during Cross-Examination	Sexual Harassment, Hearing Process, Technology, Evidence/Relevancy	Staff or External Cannot Serve in Any Other Capacity
Advisor(s)	Question Opposing Party & Witnesses	None required	Party provided Staff or External
Informal Resolution Facilitator	Informal Resolution Processes	Informal Resolution Processes	Staff or External



Title IX Personnel: Official with Authority(OWA)

- Described in 34 CFR 106.30
- Notice to OWA is Actual Knowledge
- OWA determination is fact specific, depending on circumstances unique to each school
- Training, ability or obligation to report does not equal OWA
- School may designate OWA



School “must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities” under Title IX

Intake reports and complaints

Threat & Tg Applicability Assessments

Offer & coordinate supportive measures

- “The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures”

May investigate if can do so objectively & without bias

- *ED cautions against conflict of interest*

“Responsible for effective implementation of any remedies”

What Does the Title IX Coordinator Do?



Title IX Coordinator Role 106.8

- Must be an employee with the specific job title “Title IX Coordinator”
- Must publish and disseminate this employees contact information with your policy
- Must have the requisite authority to fulfill their responsibilities in compliance with the law



Investigators, Decision-makers & Facilitators

- Rule prohibits “single-investigator model”
- Coordinator *may* serve as investigator as long as can do so conflict and bias-free * *note the Department cautions on this*
- Schools may structure T9 team as best suits their needs otherwise, as long as they ensure objectivity and impartiality



Complainant
& Respondent

Formal
Complaint

Supportive
Measures

Actual
Knowledge

Consent

Sexual
Harassment

Key Terms & Definitions 34 CFR 106.30



Complainant & Respondent 106.30

- Parties to the complaint: alleged victim and alleged perpetrator of conduct that could constitute sexual harassment.
- Complainant: participating or attempting to participate in program or activity
- Respondent: enrolled or under recipient's control



Formal Complaint 106.30

- A document 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.
- May be filed in person, by mail, by electronic mail, or by other methods identified by school.
- “document filed by a complainant” is either a document or electronic submission that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the one filing the 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 respondent before or after the filing of a formal complaint or where no complaint has been filed.



Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party.



Obligated to offer (with or without a formal complaint) and to engage in an interactive discussion with complainant regarding their wishes.



Must be kept confidential to the extent possible to allow implementation.



Supportive Measures 106.30

- Non-disciplinary, non-punitive
- Individualized services that may be offered to the complainant *or respondent* free of charge
- That do not **unreasonably** burden the other party
- May include services to protect the safety of all parties as well as the school's educational environment or to deter sexual harassment
- Must be kept confidential to the extent possible
- Schools must document the facts and circumstances that render the supportive measures they have implemented appropriate *and* must also document rationale if they do not implement supportive measures explaining how this decision was not *deliberately indifferent*



Supportive Measures 106.30

- Must promptly contact the complainant to discuss the availability of supportive measures
- Must consider complainant's wishes
- Must inform complainant of the availability of supportive measures with or without filing a complaint



Actual Knowledge 106.30(a)

- “Notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient”
- “Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge”
- “the mere ability or obligation” to report “or having been trained to do so” does not equal actual knowledge



Consent

- Not Defined in Regulations
- Critical Contested Issue in Many Cases
- Affirmative Consent Required in Some States
- California “Yes Means Yes”
- New York “Enough is Enough”



Consent

- Must clearly define and consistently apply your definition
- The school carries the burden of collecting sufficient evidence to reach a final determination, not the parties
- Especially when using an affirmative consent standard, be mindful that you do not misuse it by requiring the respondent to prove the existence of consent or likewise shift the burden to a complainant to prove the absence of consent



Record Keeping



Recordkeeping 106.45(b)(10)

- Seven Year Retention Period
- Reports & Complaints
- Any Action Taken in Response
- Basis for Conclusions that Response Was Not Deliberately Indifferent
- Supportive Measures
- Rationale If No Supportive Measures
- Other Measures to Restore or Preserve Equal Access
- Dismissal Records
- Investigation Records, Determinations, Recording of Hearing
- Record of Sanctions/Discipline or Remedies
- Appeals & Decision
- Training Material
- Informal Resolution & Outcome



Record Keeping 106.45(b)(10)(ii)

- Schools need to create a record to demonstrate why and how their response and actions were not deliberately indifferent.
- Documentation of emergency removals and administrative leaves for employee respondents must also be maintained.



Re-Cap & Key Takeaways

- Definition of sexual harassment and scope of rule is significantly narrowed
- Supportive measures are emphasized and always required
- Due process and fundamental fairness must be preserved
- Record keeping requirements include documentation that school's response was not deliberately indifferent



Part 2 Preview

- Sexual Harassment Defined
- Mandatory Response Obligations
- What to do When You Receive a Report/Complaint



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- Scope & Jurisdiction
- What to do When You Receive a Report/Complaint
- Dismissals
- Grievance Process Timeframe

03

- Investigation
- Hearing
- Dismissals
- Appeals
- Sanctions & Remedies



Part 2

- Definition of Sexual Harassment
- Reports & Complaints
- Does Title IX Apply? Scope & Jurisdiction
- What to Do When You Receive a Report of Sexual Harassment
- Dismissals
- Reasonably Prompt Timeframe



Definition of Sexual Harassment 3-Prongs

Quid Pro Quo	<i>Employee</i> Conditions Something of Value for Sexual Favor
<i>Davis</i> Standard	So Severe, Pervasive and Objectively Offensive
VAWA Crimes	Sexual Assault, Stalking, Dating & Domestic Violence



Sexual harassment 106.30

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. 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; or
3. "sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)



Sexual harassment: Quid Pro Quo

- Applies solely to an employee respondent
- Involves an abuse of authority by an employee
- Doesn't require a showing of severity, pervasiveness or offensiveness
- Need not be explicit, could be implied



Sexual harassment: Severe, Pervasive, Offensive (*Davis*)

- ***“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”***
- ***directed at verbal or expressive conduct***
- ***evaluated under the “reasonable person standard” taking into consideration the characteristics of the alleged victim***



Sexual harassment: Clery/VAWA Crimes

- “sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v),
- “dating violence” as defined in 34 U.S.C. 12291(a)(10),
- “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or
- “stalking” as defined in 34 U.S.C. 12291(a)(30).



Sexual Assault

- Sexual assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation
- Includes any sexual act directed against another person without their consent, including rape, sodomy, sexual assault with an object, fondling, incest and statutory rape



Sexual Assault & Consent

- What is key with sexual assault is CONSENT, or the lack thereof
- The new regs DO NOT DEFINE CONSENT; this is left up to institutions
- Some states do have laws that mandate a specific definition of CONSENT
- Must clearly define and consistently apply your definition
- The school carries the burden of collecting sufficient evidence to reach a final determination, not the parties
- Especially when using an affirmative consent standard, be mindful that you do not misuse it by requiring the respondent to prove the existence of consent or likewise shift the burden to a complainant to prove the absence of consent



Dating Violence

- **(10) DATING VIOLENCE** The term “[dating violence](#)” means violence committed by a person—
- **(A)** who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- **(B)** where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - **(i)** The length of the relationship.
 - **(ii)** The type of relationship.
 - **(iii)** The frequency of interaction between the persons involved in the relationship.



Domestic Violence

8) DOMESTIC VIOLENCE THE term “[domestic violence](#)” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or [youth](#) victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.



Stalking

- **(30)STALKING** THE term “[stalking](#)” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
(A)fear for his or her safety or the safety of others; or
- **(B)**suffer substantial emotional distress.



Retaliation Prohibited 106.71

“No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner.”



Jurisdiction & Scope

Who? What? When? Where? Why?



Jurisdiction & Scope

Who?

Any person may report; Complainant must be actively attempting to participate in educational program or activity; Respondent must be enrolled or under recipient's control

What?

Conduct that meets the definition of sexual harassment

When?

No SOL/time limit as long as other conditions met

Where?

In the U.S. & within the school's educational program or activity

Why?

“on the basis of sex”

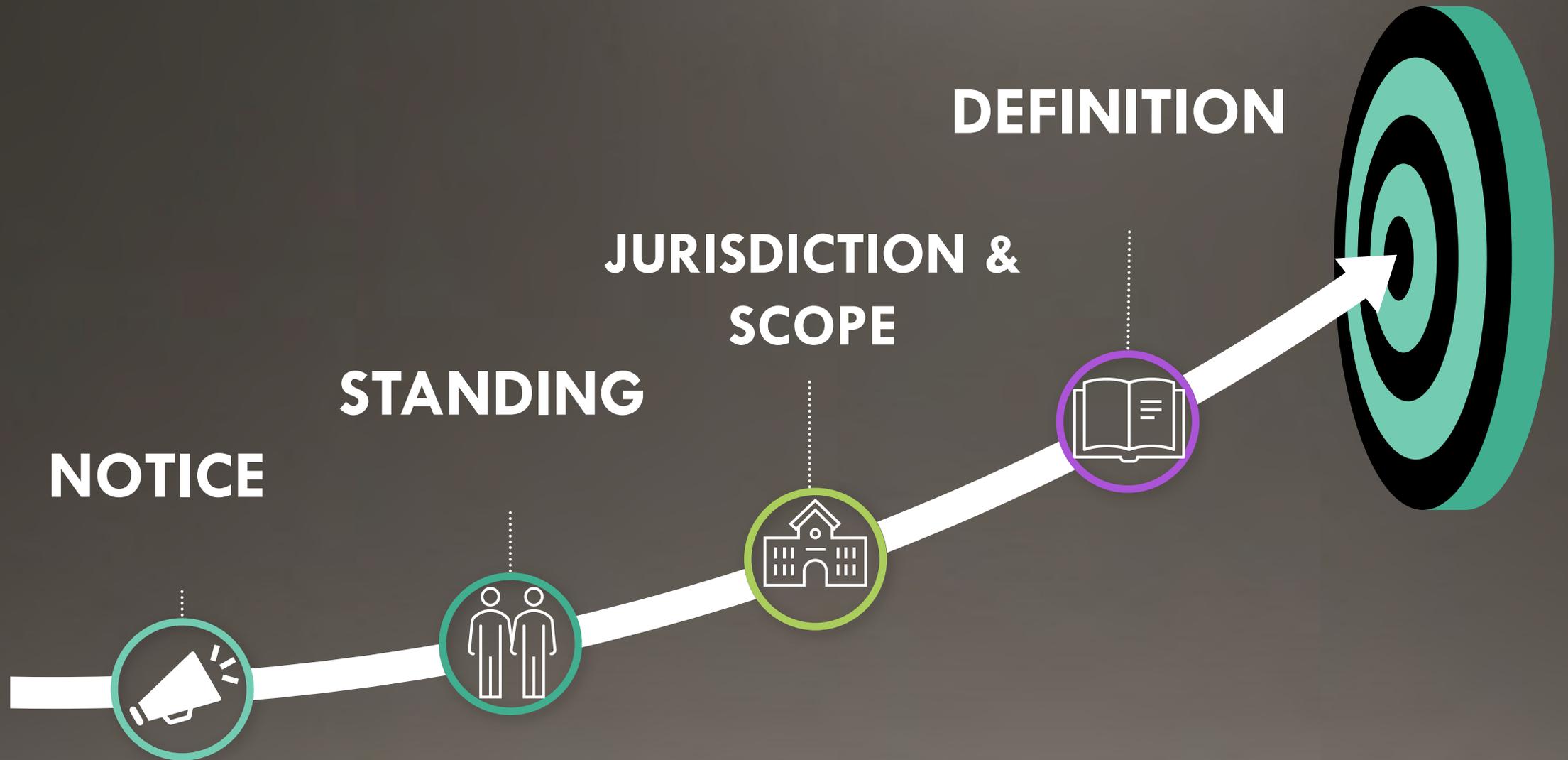


Educational Program or Activity 106.44

- Locations, events, or circumstances where the school exercises substantial control over both:
 - the Respondent
 - the context in which the alleged sexual harassment or discrimination occurs
 - includes any building owned or controlled by the school or by a student organization that is officially recognized by the school.



TITLE IX ASSESSMENT



Formal Complaint 106.30

- A formal complaint is a *“document filed by complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting recipient investigate the allegation of sexual harassment”*
- Schools should not take the requirement of a written formal complaint to create “bureaucratic loopholes” or technicalities to avoid initiating the grievance process



Filing a Formal Complaint

- goal is to make filing a complaint “as accessible as possible”
- may be filed with the Title IX Coordinator in person, by mail or by electronic mail
- schools may identify “any additional method”
- formal complaint can’t be filed by phone; schools could use an online submission portal
- rules do not restrict the method in which a REPORT may be received
- schools must disclose the contact information for the Title IX Coordinator **PROMINENTLY** on their website and in any catalog or handbook
- Complaints may be consolidated if involve multiple complainants or respondents and allegations arise out of the same set of circumstances



Formal Complaint Signed by a Title IX Coordinator

- only the Title IX Coordinator may initiate a complaint if the complainant does not want to
- the decision to move forward is made on behalf of the school, not the complainant
- school has an obligation to uphold and comply with Title IX and an obligation not to act with deliberate indifference
- if the allegations would warrant disciplinary action, the school cannot institute punitive or disciplinary action without first going through the grievance process

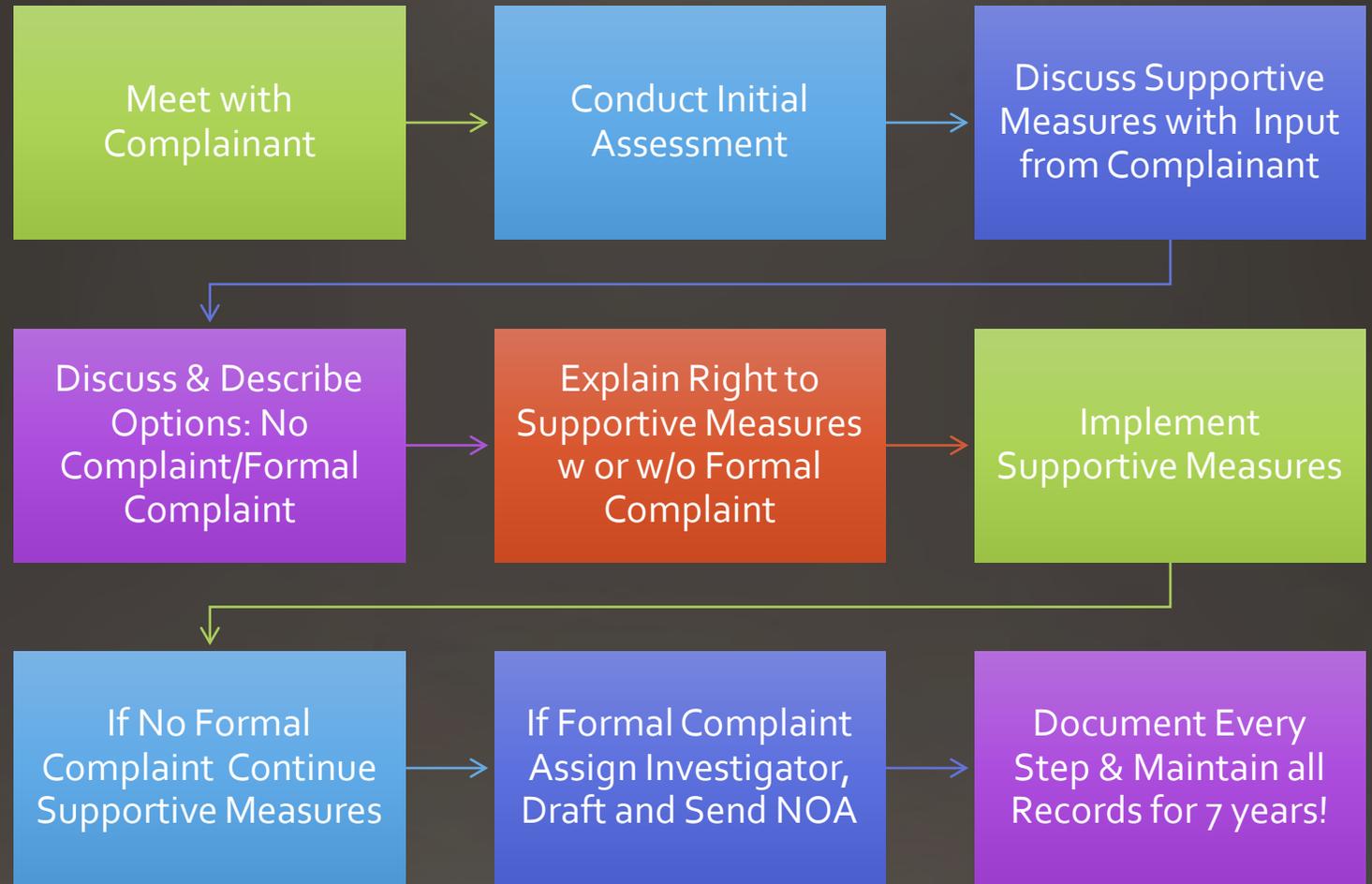


Anonymous Reports & Complaints

- regulations do not prohibit schools from implementing anonymous reporting
- the school has actual knowledge when such a report goes to the Title IX Coordinator or OWA
- school is under an obligation to respond in a manner that is not deliberately indifferent
- coordinator may initiate a formal complaint even if complainant's identity is unknown



What to Do When You Receive a Report



Emergency Removal 106.44(c)

- Emergency: Immediate Threat to Physical Health or Safety
- Arising out of the Allegations of Sexual Harassment
- Based on an Individualized Risk and Safety Assessment
- Must Allow for Immediate Challenge
- 106.44(d) Authorizes Administrative Leave for Employees



Assessing a Report or Complaint

Actual Knowledge?

- Report to Tg Coordinator?
- Report to Official with Authority?

Jurisdiction
&
Scope?

- Over the Parties?
- Education Program or activity?
- In the U.S.?

Sexual Harassment?

- Quid Pro Quo or Clery Crime?
- Severe and Pervasive and Objectively Offensive?



If Allegation Does Not Trigger Title IX Response

- implement supportive measures
- refer to non-Title IX misconduct process
- adjust code of conduct process for non-T9 sexual misconduct



Title IX Sexual Harassment or Code of Conduct Violation?



Supportive Measures

- Referral to counseling, medical/health services
- Referral to employee assistance program
- Mutual no-contact orders
- Student financial aid counseling
- Altering campus housing
- Altering work arrangements
- Safety planning
- Providing campus escorts
- Providing academic accommodations
- Increased campus security
- Timely warnings
- Visa and immigration services
- LOAs/ scheduling modifications



Dismissals 106.45(b)(3)

Doesn't meet definition or jurisdictional requirements

Complainant wants to withdraw complaint

Respondent is no longer enrolled or employed

Specific circumstances prevent school from gathering evidence sufficient to reach a determination



Mandatory Dismissals 106.45 (b)(3)(i)

- 1. would not constitute sexual harassment as defined in 106.30, even if proved,*
- 2. did not occur in the recipient's educational program or activity,*
- 3. or against a person in the United States*



Discretionary Dismissals 106.45 (b)(3)(ii)

1. Complainant notifies the Coordinator in writing that they would like to withdraw the complaint, or any allegation therein
2. The respondent is no longer enrolled or employed by the school
3. Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint



Dismissals 106.45 (b)(3)

- apply to individual allegations or to an entire complaint
- the parties must receive written notification and reasons for any dismissal
- mandatory dismissals are appealable



Informal Resolution 106.45(b)(9)

- Can only be offered after a formal complaint is filed
- Must provide written notice disclosing allegations, details and consequences of the process
- Both parties must voluntarily consent in writing to the informal process
- Cannot be used in cases where respondent is an employee
- Either party may withdraw from the informal process, which would trigger the formal grievance process
- Facilitators must be trained and impartial, free from conflicts & bias
- School may not pressure/condition informal resolution on enrollment or employment



Reasonably Prompt Timeframes

106.45(b)(1)(v)

- School determines timeframe as long as it is reasonably prompt
- Must balance due process and fundamental fairness with prompt resolution
- Includes appeals and informal resolution processes
- Administrative delay is not sufficient “good cause”



Reasonably Prompt Timeframes

106.45(b)(1)(v)

Delays & Extensions

- Must be Temporary, Limited & for Good Cause
- Must provide written notice to parties



Reasonably Prompt Timeframes

106.45(b)(1)(v)

- Administrative Delay
 - *School's inefficiency not good cause*
- Availability of Parties & Witnesses
- Law Enforcement Activity
- Accommodations for Disabilities
- Language Assistance



Reasonably Prompt Timeframes

106.45(b)(1)(v)

Concurrent Law Enforcement Activity

- distinct, separate and independent processes
- obligated to respond to T9 allegations irrespective of criminal matter
- law enforcement investigation could justify a delay or extension
- delay cannot be protracted or open-ended

Availability of Parties & Witnesses

- must try to accommodate individuals' schedules to allow their meaningful participation
- parties may participate remotely
- a party or witness cannot indefinitely delay the grievance process by refusing to cooperate
- the process can proceed even in the absence of a party or witness
- must keep nonparticipating party informed



Part 2 Re-cap & Key Takeaways

- 1. A school must respond if the allegations meet the definition of sexual harassment, the conduct occurred in the scope of the school's educational program or activity, in the US, and both the respondent and complainant are enrolled/engaged or under the school's control*
- 2. Once triggered the school must respond with supportive measures that ensure complainant's continued access to the educational program or activity, whether or not, a formal complaint is filed; the Coordinator will conduct an assessment to determine next steps*
- 3. If a case doesn't fall within the scope of T9 it must be dismissed and may be handled under the school's other policies*
- 4. Informal resolution is an option for schools if the parties agree after a formal complaint is filed and must adhere to the informal resolution requirements*
- 5. The entire process must be resolved within reasonably prompt timeframes that allows for reasonable delay or extensions for good cause*



Part 3 Preview

The Grievance Process

- *Investigation*
- *Hearing & Cross-examination*
- *Appeal*
- *Sanctions & Remedies*



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Part 2 Review

- Definition of Sexual Harassment
- Reports & Complaints
- Does Title IX Apply? Scope & Jurisdiction
- What to Do When You Receive a Report of Sexual Harassment
- Dismissals
- Reasonably Prompt Timeframe



Part 3

- Grievance Process
- Due Process & Fundamental Fairness
- Investigation
- Evidentiary Considerations
- Hearing
- Cross-Examination
- Appeals
- Sanctions & Remedies



Mandatory Training Requirements 106.45(b)

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- ✓ *On how to serve impartially, including by avoiding prejudgment of the facts at issue*
- ✓ *On how to avoid conflicts of interest and bias*
- ✓ *Any materials used to train must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.*
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Grievance Process: Basic Requirements

- (i) Treat parties equitably
- (ii) Require objective evaluation of all relevant evidence
- (iii) Train Title IX personnel & post all training on web-site
- (iv) Include a presumption that respondent is not responsible
- (v) Include reasonably prompt time frames
- (vi) Describe the range of, or list, possible disciplinary sanctions and remedies
- (vii) State standard of evidence: preponderance or clear and convincing
- (viii) Include process and bases for appeals
- (ix) Exclude privileged evidence



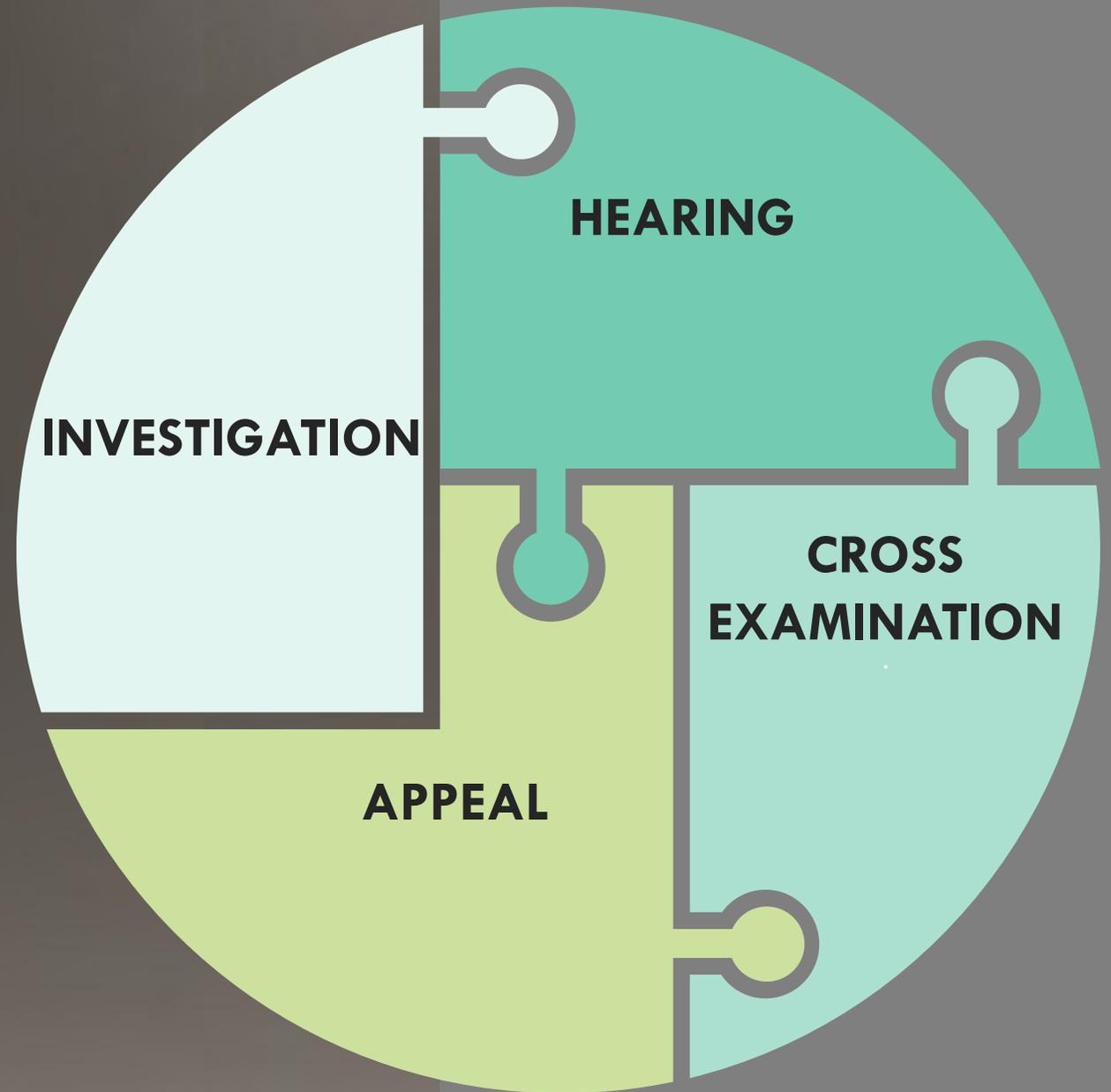
School's treatment of parties may constitute discrimination
106.45(a)

(a) A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination...

(b)...Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment...apply equally to both parties.



FORMAL GRIEVANCE PROCESS: MAJOR COMPONENTS



Treat parties equitably 106.45(b)(1)(i)

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;



Require objective evaluation of all relevant evidence 106.45(b)(1)(ii) Title IX personnel must be conflict & bias free

(ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity....



Presumption of Non-Responsibility 106.45(b)(1)(iv) Reasonably Prompt Timeframes

- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility at the conclusion of the grievance process.
- Include reasonably prompt timeframes for the conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-terms, good cause delays or extensions of timeframes



Describe the range of, or list, possible disciplinary sanctions and remedies 106.45(b)(1)(vi)

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

Title IX Coordinator responsible for effective implementation of remedies: addressed under § 106.45(b)(7)(iii)

- *Sanctions/discipline are punitive, the intent is to punish and prevent future recurrence; Focus is on the respondent
- *Remedies and are provided ensure equal access; Focus is on the victim, or on the campus community at large
- *Both sanctions and remedies are imposed after a finding of responsibility
- *Remedies are similar to supportive measures, but they differ in that supportive measures are offered prior to any grievance process (or without a grievance process) and may not be punitive or unreasonably burden the respondent
- *Remedies, however, are implemented after a finding of responsibility and they may place a burden on respondent and may be punitive
- *Remedies MUST be implemented upon a finding of responsibility



State standard of evidence: preponderance or clear and convincing 106.45(b)(1)(vii)

State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

- *Standard must be used consistently across all cases
- *Same standard must apply to both student and employee cases
- *Preponderance: 51% or more likely that conduct did or did not occur
- *Clear and Convincing: higher bar, evidence is more than 51% but less than beyond a reasonable doubt



Include process and bases for appeals 106.45(b)(1)(viii) and Range of Supportive Measures 106.45(b)(1)(ix)

- ✓ Describe the procedures and permissible bases for the complainant and respondent to appeal;
- ✓ Describe the range of supportive measures available to complainants and respondents



Privileged Evidence Inadmissible 106.45(b)(1)(x)

Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege in writing.

- ✓ medical records
- ✓ psychological records
- ✓ attorney-client communications
- ✓ spousal privilege
- ✓ school remains subject to any other applicable privacy laws



Notice of Allegations (NOA) 106.45(b)(2)

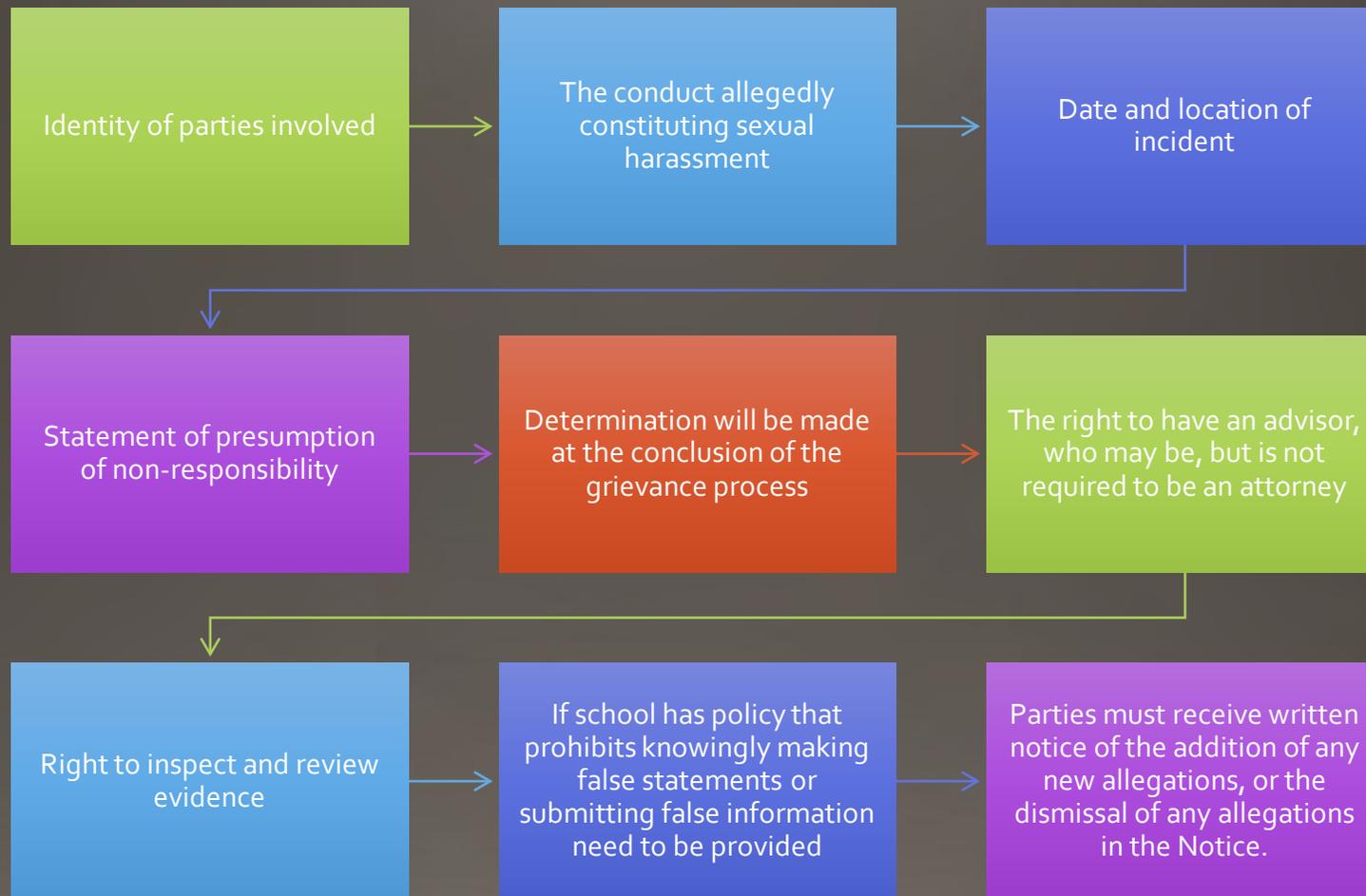
Notice of allegations—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.



Notice of Allegations



Sufficient Details of NOA 106.45(b)(2)(B)

- ✓ Identities of the parties involved in the incident, if known,
 - ✓ Conduct allegedly constituting sexual harassment
 - ✓ Date and location of the alleged incident, if known
 - ✓ Statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
 - ✓ Right to an advisor of their choice, who may be, but is not required to be, an attorney
 - ✓ Right to inspect and review evidence
 - ✓ Include any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- *Protect PII (SS#, homes address, phone numbers, etc) to extent possible*



Formal Complaints Must be Investigated

Dismissals & Consolidation 106.45(b)(3)-(5)

Formal Complaints Must be Investigated

- must undertake an investigation in all cases where a formal complaint is filed
- concurrent law enforcement activity or investigation could justify delay *but* any such delay would only apply *after* the NOA is provided
- investigative techniques used in criminal setting would not necessarily apply; no delay in NOA or investigation; parties must have notice and opportunity to prepare

Mandatory Dismissal

- if allegations do not meet the definition, scope and jurisdictional requirements of Title IX they must be dismissed

Consolidation

- may (but are not required to) consolidate complaints





Investigation: Rights of the Parties



Investigator

Preamble: “Final regulations leave recipients..... flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform these functions free from conflict of interest and bias”

- Single investigator model prohibited (Investigator cannot be decision-maker)
- May have more than one investigator on a case
- Title IX Coordinator may serve as Investigator, although this could raise issues in terms of potential conflict of interest or bias
- Conflict & bias of Title IX personnel is a basis for appeal
- Schools must have process to ensure no conflict/bias and *may* provide a process for parties to assert claims of conflict/bias during the investigation



Burden of Proof 106.45(b)(5)(i)

**The burden of gathering evidence and the burden of proof must remain on schools not the parties*

- Both parties have the right to provide evidence and witnesses, but it is not their responsibility
- It is the school's job to conduct the investigation, track down and gather all of the evidence possibly and interview witnesses...
- The school is neutral during this process, they are not focusing on gathering evidence to prove respondent "guilty" or to prove respondent is not responsible; they are not "building a case"
- The goal is a truth-seeking mission; gather everything so that a neutral decision maker can reach an accurate determination based on the facts



Opportunity to Present Evidence 106.45(b)(5)(ii)

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

*note witnesses may be “expert” witnesses although what constitutes an expert witness, and who qualifies as an expert, is not defined

*same rules/evidentiary considerations would apply, i.e. evidence concerning complainant’s prior sexual behavior is not relevant (with limited exceptions), privileged evidence is inadmissible unless waived, etc.



Right to Discuss the Allegations & Gather Evidence

106.45(b)(5)(iii)

- ✓ Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (no gag orders)
- ✓ Parties have the right to discuss the allegations with anyone they choose with limited exceptions:
 - ✓ no-contact directive
 - ✓ retaliatory manner



Right to an Advisor 106.45(b)(5)(iv)

Parties must have the same ability to select an advisor of choice, who may be, but need not be an attorney

- ✓ Parties can choose anyone to be their advisor
 - ✓ friend, parent, classmate, attorney
- ✓ Role of advisors
 - ✓ provide support, accompany party to meetings/interviews
 - ✓ adversarial with respect to their role in the hearing and in conducting cross examination
- ✓ School may limit to advisor's role with respect to their participation
- ✓ Any rules around the role of advisors must apply equally to both parties
- ✓ If a party does not have an advisor, the school must provide one at no cost to the party for the limited purpose of conducting cross exam during the hearing
- ✓ Advisor does not have to match the qualifications of the other party's, so if the other party has an attorney, the school is not obligated to provide an attorney



Written Notice 106.45(b)(5)(v)

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;

*School must balance promptness with procedural protections/due process



Opportunity to Review Evidence & Investigative Report

Prior to completion of investigative report, school must send to parties and their advisors, all evidence gathered that is directly related to the allegations, inculpatory & exculpatory, and provide at least 10 days to review and respond in writing

Final investigation report must fairly summarize relevant evidence and be provided to party and the party's advisor at least 10 days prior to a hearing with an opportunity to review and respond in writing



Investigation Requirements 106.45(b)(5)(vi) Right to Inspect Evidence

Schools must send the parties *and their advisors*:

- ✓ **ALL** evidence directly related to the allegations
 - **will include relevant **and irrelevant evidence** including that which would otherwise be excluded under the rape shield protections*
- ✓ includes evidence the school will not use/rely in making a decision
- ✓ includes inculpatory or exculpatory evidence whether obtained from a party or other source
- ✓ electronic format or a hard copy, otherwise, method and format of delivery up to school
- ✓ parties must have *at least 10 days* to submit a written response
 - *consider when determining reasonable timeframes
- ✓ the investigator will consider parties input prior to completion of the investigative report
- ✓ evidence *must be made available at hearing*



Investigation Requirements 106.45(b)(5)(vii) Right to the Investigative Report & Evidence

AFTER the initial review period which includes all evidence:

- ✓ the investigator will finalize the investigative report incorporating feedback received from the parties as appropriate.
- ✓ The final report will summarize RELEVANT evidence
 - * will exclude evidence about complainant's prior sexual history with two limited exceptions
- ✓ The final report must be provided to the parties and their advisors in electronic or hard copy, at least ten (10) days prior to the hearing, with an opportunity to respond in writing.



Dismissals 106.45(b)(3)

Doesn't meet definition or jurisdictional requirements

Complainant wants to withdraw complaint

Respondent is no longer enrolled or employed

Specific circumstances prevent school from gathering evidence sufficient to reach a determination



Evidentiary Considerations

Burden of Proof: school carries the burden to collect evidence

Related-to: all evidence that is related to the allegations; includes relevant and irrelevant evidence

Relevant: all evidence directly related to the allegations EXCEPT evidence related to the complainant's prior sexual behavior unless it is offered to provide identity or consent

Privileged: evidence subject to a legally recognized privilege, attorney-client, physician-patient, spousal, clergy, medical/health or psychological records

Statements of non-cooperating party or witness: the statements of a party or witness that does not submit to cross examination may not be considered by the decision-maker in rendering a decision

Appeal: appeal based on procedural irregularity could include appeal of a decision to include or not include evidence based on categorization as relevant or not, or on school's failure to objectively evaluate all relevant evidence



Independent/Neutral Decision-maker 106.45(b)(7)

- ✓ *Decision-maker must be independent*
- ✓ *Appeal decision-maker must also be independent, they must be different from the hearing decision-maker, so you will need to have two trained decision-makers available for every case in the event a party appeals*
- ✓ *Schools may utilize multiple decision-makers in a case, such as a panel, within their discretion*
- ✓ *Decision-maker makes relevancy determinations during the hearing, after each question, and prior to each answer during cross, will need to provide the rationale for any determination that evidence is not relevant*



Live Hearing

Cross-examination must be conducted the party's advisor of choice (or school provided if party does not have one):

- ✓ directly
- ✓ orally
- ✓ in real time
- ✓ never by a party personally

*At the request of either party, the recipient must provide for the entire hearing to occur with the parties located in separate room with technology enabling the parties to see and hear each other

*Live hearings may be conducted with all the parties physically present in the same location or, at the school's discretion, any or all parties, witnesses or other participants may appear at the live hearing virtually.



Relevancy & Rape Shield Protections

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.



Non-Cooperating Party or Witness

- If a party or witness does not submit to cross examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;
- However, the decision-maker cannot draw an inference based solely on that party's or witness's absence or refusal to answer questions
- School has no ability to compel either parties or witnesses to cooperate, appear at the hearing, provide testimony or otherwise participate in the process



Record of Hearing

Schools must create an audio or audiovisual recording, or transcript of the hearing

- ✓ Must maintain for seven-years
- ✓ Parties have the right to inspect



Written Determination 106.45(b)(7)

The written determination must include:

- Allegations potentially constituting sexual harassment
- Procedural steps taken
- Findings of fact
- Conclusions regarding the application of code of conduct to the facts
- Statement and rationale for each allegation
 - Including determination of responsibility
 - Any disciplinary sanctions & applicable remedies
- Bases & procedure for Appeal



Appeals

Appeals of final determination or dismissal MUST be offered to both parties on the following bases:

Procedural irregularity that effecting outcome

New evidence, not reasonably available at the time of determination, that could affect the outcome

Title IX Coordinator, Investigator or Decision-maker had a conflict of interest or bias



Part 3 Re-cap & Key Takeaways

- Formal Grievance Process requires that respondent must be presumed not responsible, and must incorporate the principles of due process & fundamental fairness
- The school carries the burden of proof and must conduct an impartial investigation, allowing the parties to provide evidence and witnesses and an opportunity to inspect and meaningfully respond to ALL evidence prior to completion of a final investigative report
- The school must provide a live hearing with cross examination conducted by advisors; only relevant and non-privileged evidence may be considered
- Both parties have a right to appeal under four different bases
- Sanctions may only be imposed after a finding of responsibility and Remedies must be afforded to complainant after a finding of responsibility



Supplemental Training Materials/Suggestions, and updates to the Rules will be posted at www.T9Now.com or you may contact me directly at Christine@T9Now.com with any questions.

Thank you!



Title IX Coordinator Training

Part 3 of 3

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Title IX Today: Where We've Been Where We're Going

January 27, 2022
Christine Galdston, JD, LLM
www.T9Now.com

\$1.00

Shakespeare

HAMLET

NOTES

Cliff's Notes
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What We'll Cover
.....What We Won't

2021 Updates & Developments

- FBI phase-out of SRS; use NIRBS definition of Sexual Assault
- Administration announces review & amendment of revised rule
- Supreme Court holding in Bostock applied to Title IX
- Cardona finds §106.45 “exclusionary rule” arbitrary & capricious
- Cardona upholds validity of all other challenged aspects of rule
- OCR publishes Q&A on Sexual Harassment
- OCR emphasizes commitment to protecting LGBTQ+/trans/intersex students

Definition of Sexual Assault: January 1, 2021

- Sexual Assault as defined in 20 USC 1092(f)(6)(A)(v): “an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting (UCR) system of the FBI.
- FBI UCR consists of two crime reporting systems: SRS and NIBRS; FBI retired SRS effective January 1, 2021
- NIBRS defines “sex offenses”: any sexual act including rape sodomy, sexual assault with an object, or fondling directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent, as well as the nonforcible sex offenses of incest and statutory rape.

NIBRS Definitions

- Rape (except statutory rape): The carnal knowledge of a person, without the consent of the victim,
- Sodomy: oral or anal sexual intercourse with another person...
- Sexual Assault w/an Object: to use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person....
- Fondling: the touching of the private body parts of another person for the purpose of sexual gratification.....
 - without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or permanent or temporary mental or physical incapacity.

Administration Announces Review & Amendment of Revised Rule

- Jan. 2021: Biden Exec Order *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*
- March 2021: Biden Exec Order...*Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
- Public Hearings held in June
- December announcement anticipating proposed rules in April 2022

Bostock

- Supreme Court case on Title VII holding that employers may not discriminate based on sexual orientation or gender identity. Court held that discrimination based on “sex” includes gender identity and orientation
- Holding: An employer who fires an employee merely for being gay or transgender, violates Title VII



Bostock

- OCR extends interpretation of “sex” in Bostock to Title IX
 - June 22, 2021, ED issues official interpretation in Federal Register

Cardona

- §106.45(b)(6)(i) “exclusionary rule” arbitrary & capricious
- Statements not subject to cross-examination *MAY* be relied on
 - SANE Reports
 - Police report
 - Medical reports (with consent)
 - Party statements
 - Witness statements
 - Emails, texts, etc.

- Court upholds validity of all other challenged aspects of rule

July 2021 Q&A on Sexual Harassment

- Most “substantial” guidance released by current admin focused specifically on sexual harassment and revised regs
- Significant as much for what it doesn’t say as for what it does
- OCR clarifies the Q&A represents its interpretation of the Regs as enforced by OCR

OCR reinforces commitment to protecting LGBTQ+/trans/intersex students

- Jan. Exec Order *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*
- March 8 Exec Order *Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
- April 6, 2021 OCR letter: reiterates commitments; emphasizes discrimination based on sexual orientation/gender identity; notes such students more vulnerable and experience multiple forms of discrimination at once;
- October 2021 Intersex Students; Reiterates prior guidance/position; Provides “tips” for supporting intersex students

Built Rite **United States Map Puzzle** *INLAID*



But Wait!....

.....There's More!

Key Take-Aways

1. Updated Definition of Sexual Assault
2. OCR reiterates concern for LGBTQ+ harassment; sexual orientation and gender identity fall under Title IX as protected classes
3. Cardona vacates portion of rule disallowing consideration of statements not subject to cross

Bottom-Line: Where We Stand Today

- All other aspect of the Rule remain in full force and effect until we have new rules
- Update policies and procedures to reflect changes over last year
- Ensure you understand and are compliant with any applicable state rules
 - Federal rules preempt when there's a conflict, but many state requirements are additive
- OCR is reviewing recipient websites for compliance with training mandate/disclosure
- Consider that court decisions also shape legal requirements and obligations and generally courts uphold due process protections
- Proposed rules anticipated in April, final rule unlikely until Fall of 2022 at earliest

Questions?

- Christine@T9Now.com
- www.T9Now.com

