

A First Look at the New Title IX Regulations

Summary of Key Provisions and Practical Implementation Considerations

Presented By:

The Institutional Response Group | Cozen O'Connor

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Today's Webinar

- This is the first in a series of webinars hosted by Cozen O'Connor's Institutional Response Group (IRG).
- Today's session will focus, at a high level, on the significant changes required — and challenges posed — by the new Title IX regulations.
- This session will frame the “musts,” the “shoulds,” and the “mays” and help educational institutions develop a plan for revising policies and procedures to incorporate required elements while still embodying institutional values.

Introducing the Webinar Series

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

1

Policy & Scope

Frameworks
jurisdiction, scope and
notice

2

K-12

3

Initial Assessment

Including, supportive
measures, emergency
removals, and formal
complaints

4

Investigations

Adopting new protocols

5

Hearings Part 1

Adjudication procedures:
structure and format

Introducing the Webinar Series

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

6

Hearings Part 2

Cross-examination and
evidentiary issues and
procedures

7

Informal Resolutions

Effective Practices

8

Corollary Considerations

Employees cases,
academic medical
centers, and
intersections with other
state and federal law

9

Trainings & Documentation

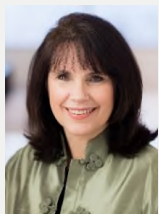
Who and when?
Approach
Content

10

Clery and VAWA

Intersections between
Clery/VAWA and Title IX

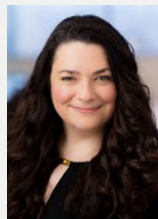
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Agenda

- Background and Frameworks
- Key Provisions
- Practical Considerations and Challenges
- Implementation and Considerations

FRAMING THE CONVERSATION

Now What?



Silver Lining

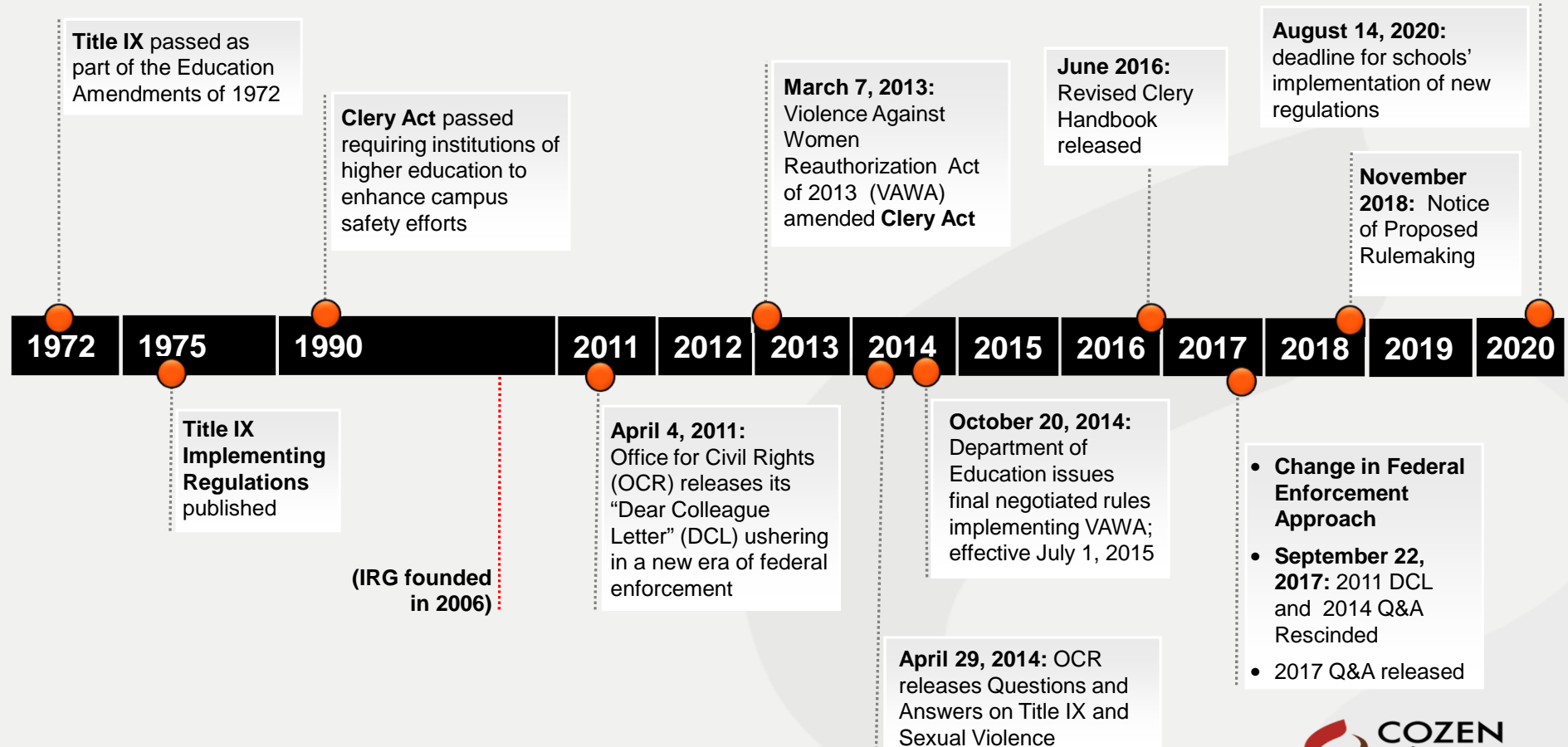


Maintaining Calm



Getty Images

Evolution of Federal Legislation and Guidance



Approach to Mastery

- Legal
 - New definitions
 - Analysis and synthesis
- Procedural Requirements
 - Required elements
 - Attendant legal issues
- Practical Implementation
 - Communication
 - Customized considerations



Approach to Implementation

Crafting

- Gather key stakeholders and current policies and procedures
- Form working group for planning and implementation
- Review new legal requirements and compare with current practices

Drafting

- Update written policies, procedures, templates and forms
- Prepare communications plan and draft communications to constituent groups
- Review web and print materials to ensure consistent messaging

Staffing

- Realign current roles or recruit/hire to fulfill all required functions
- Ensure all staff members receive training; maintain training materials for publication online
- Reinforce partnerships with key units and ensure consistent protocols for case referrals

Grafting

- Roll out training and education on new policies, procedures, and protocols
- Develop awareness campaign to educate community about resources, supports, and reporting options
- Create mechanism to gather feedback about gaps in process, questions or concerns

Implementation Rubric

- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values



New Title IX Regulations

- 2033 page document issued by the U.S. Department of Education, Office for Civil Rights (OCR) on May 6, 2020
- Includes significant resource materials: a preamble, executive summary, overview of public comments, discussion of directed questions, regulatory impact analysis and other content
- Final regulations are located at page 2008-2033
- Official version (2082 pages) were released May 19, 2020
- Regulations must be implemented by **August 14, 2020**

Regulations Represent a Shift in Approach

- Since 1975, Title IX obligations related to **sexual harassment as a form of sex discrimination** have not formally been addressed in the regulations
- Guidance has come through case law, guidance documents released between 1997 and 2017, and regulatory enforcement
- “These final regulations impose, for the first time, **legally binding rules** on recipients with respect to responding to sexual harassment.”

Title IX Regulations issued May 6, 2020; Executive Summary, pp. 15-16

Regulations Represent a Shift in Approach

- “Because these final regulations represent **the Department’s interpretation** of a recipient’s legally binding obligations, rather than best practices, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”
- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources.”

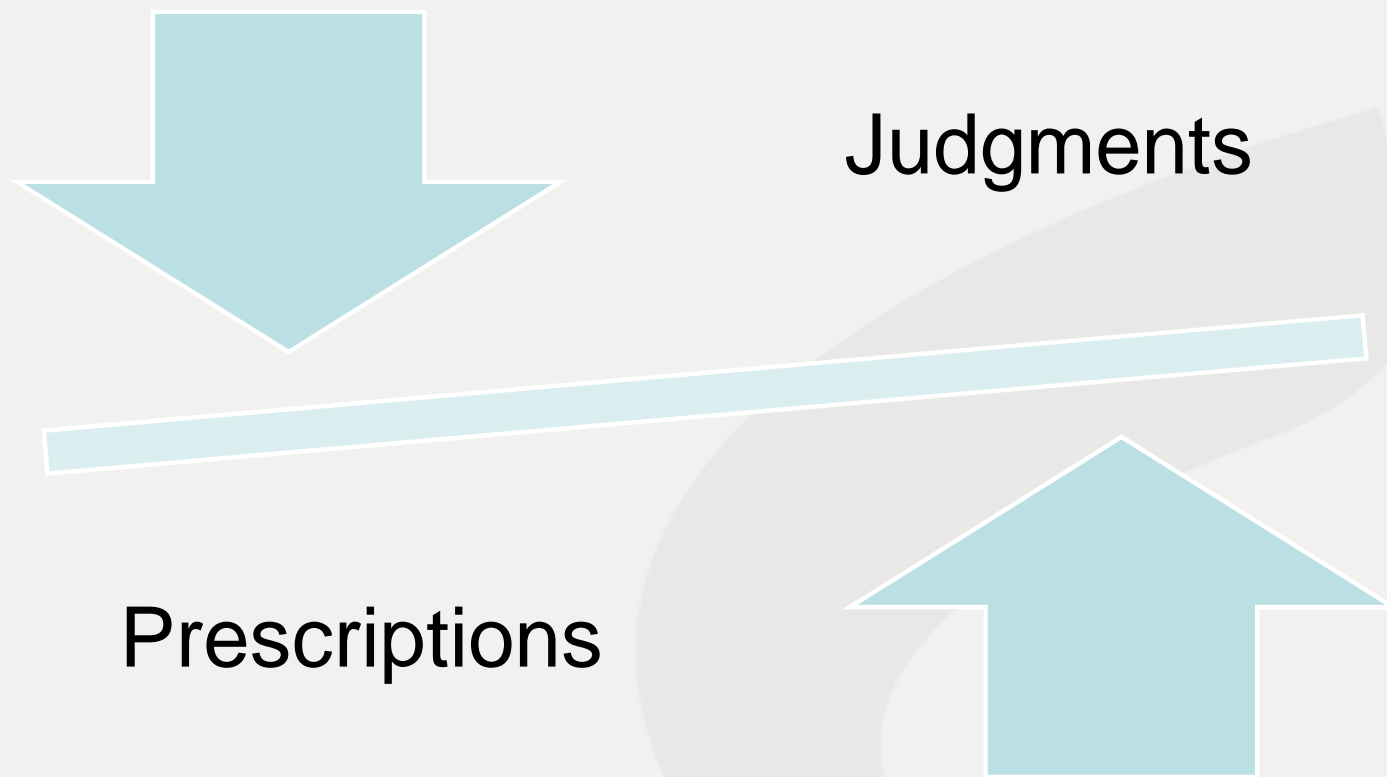
Title IX Regulations issued May 6, 2020; Executive Summary, p. 18

Guidance

- Preamble
 - Explains the basis and purpose for the final rule
 - Serves a guidance function
- Preamble on Prior Guidance
 - “The 2017 Q&A along with the 2001 Guidance, and not the withdrawn 2011 Dear Colleague Letter, remain the baseline against which these final regulations make further changes to enforcement of Title IX obligations.”
 - “Title IX policies and procedures that recipients have in place due to following the 2001 Guidance and the withdrawn 2011 Dear Colleague Letter remain viable policies and procedures for recipients to adopt while complying with these final regulations.”

Title IX Regulations issued May 6, 2020; Preamble at 17, 18

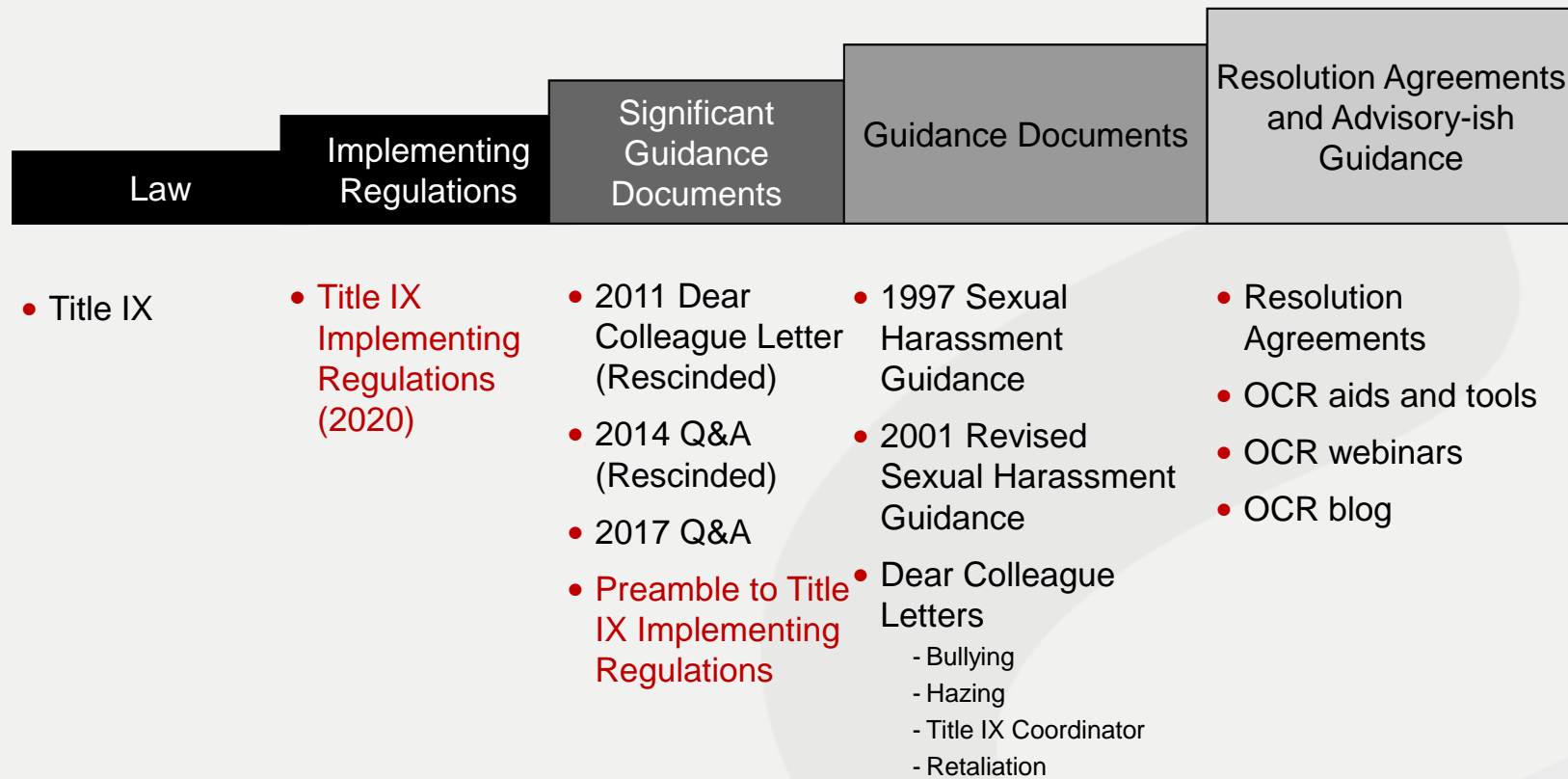
Balancing



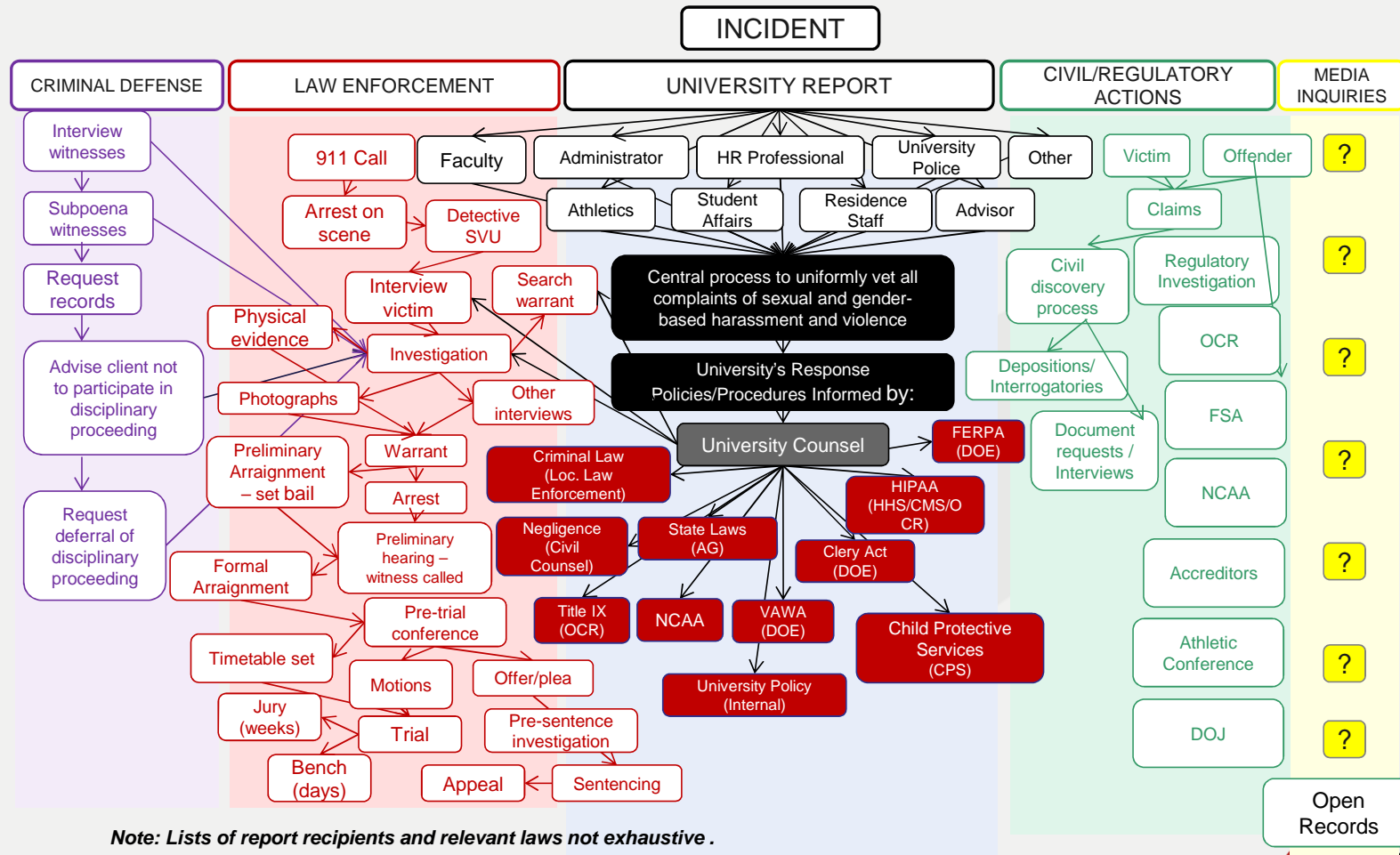
Prescriptions

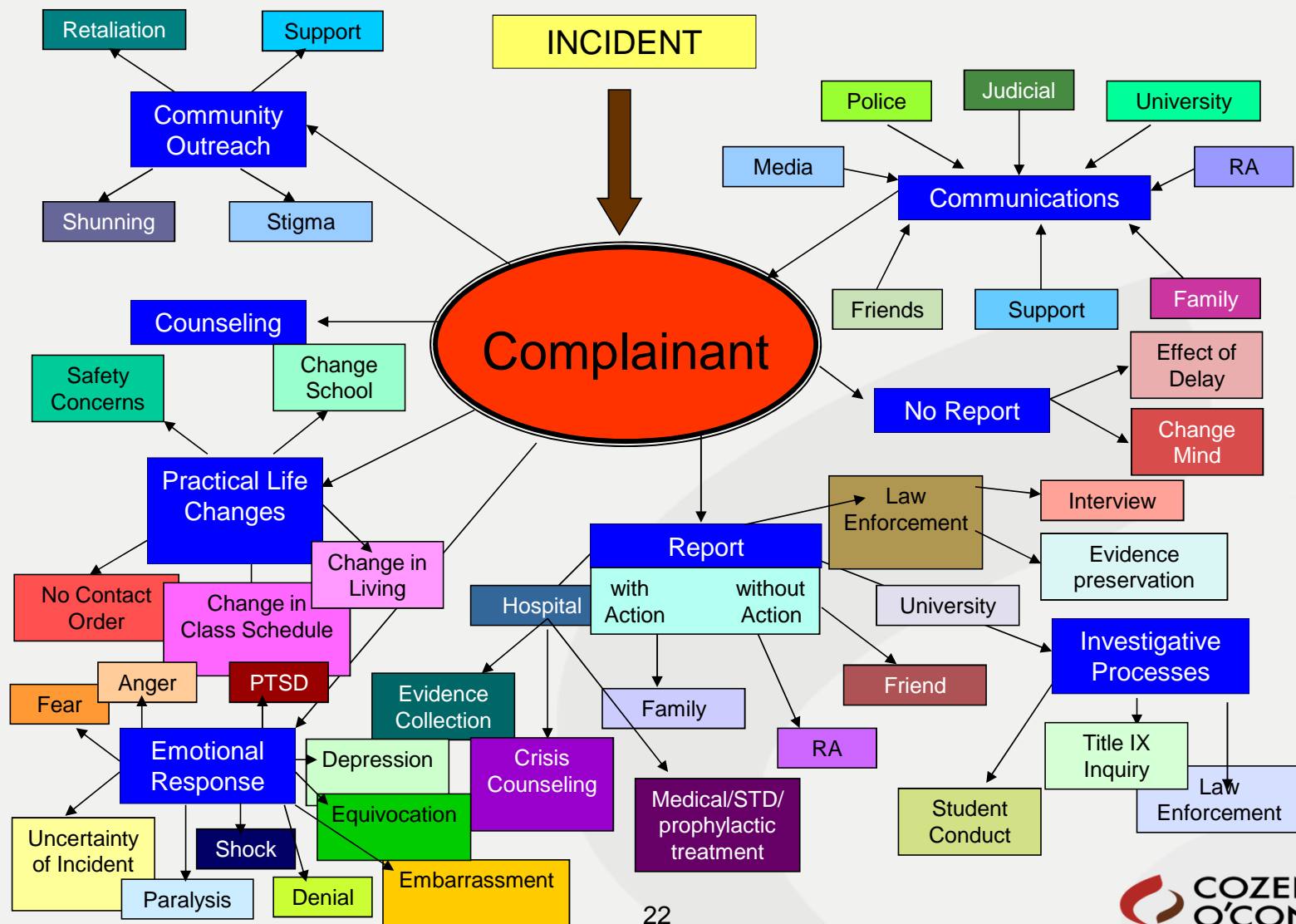
Judgments

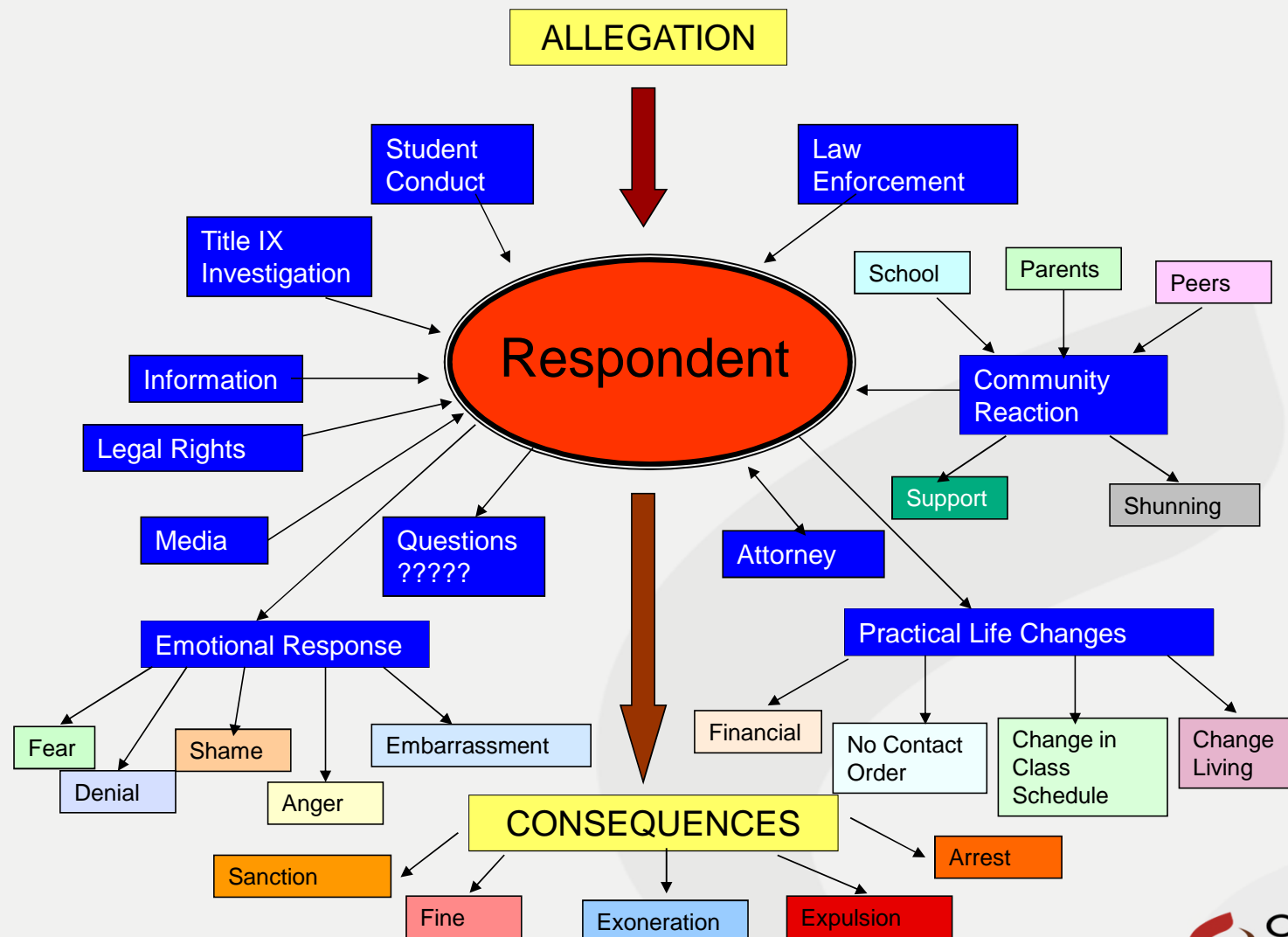
The Hierarchy

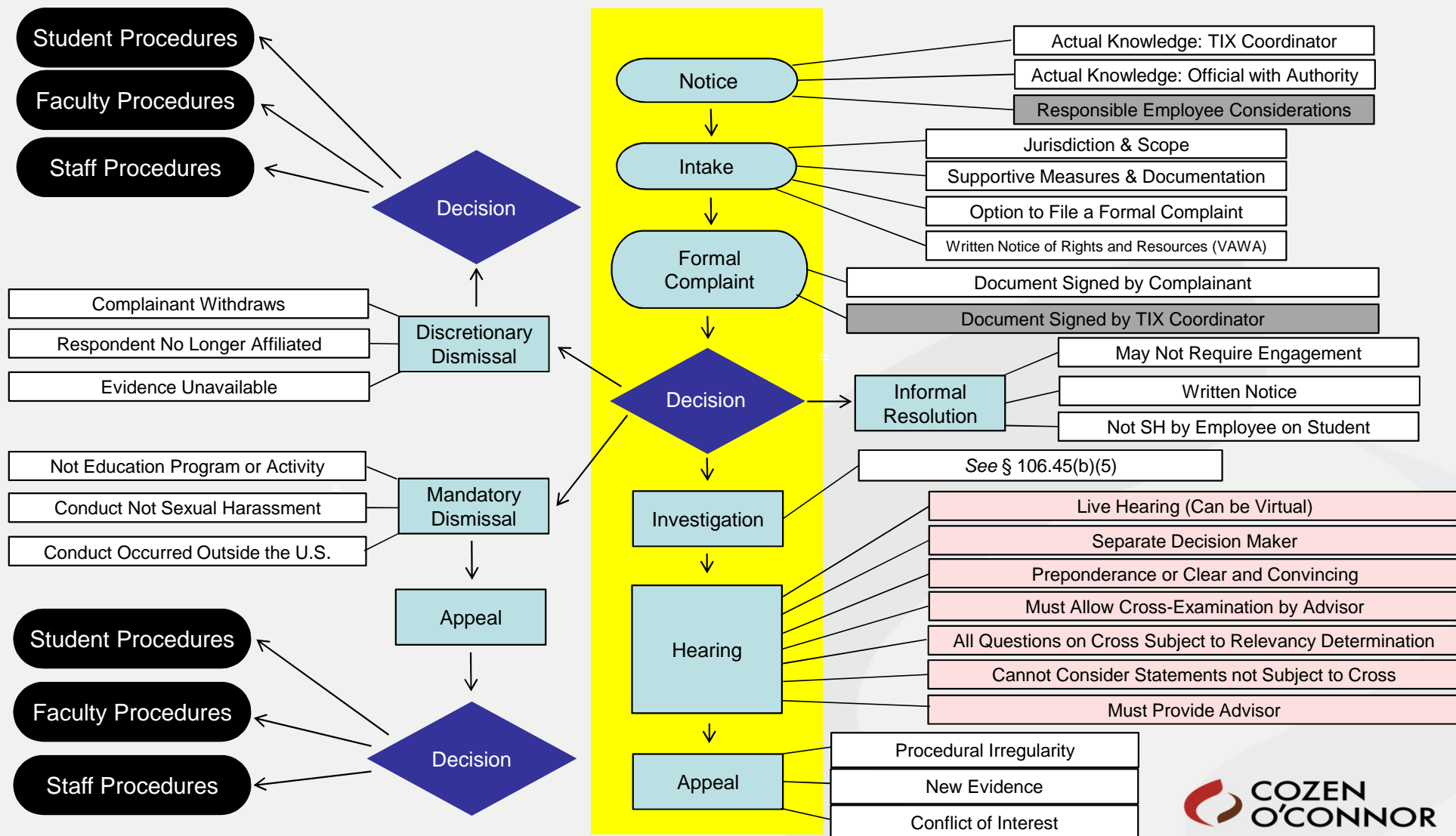


The Challenge of the Context









Key Provisions of Title IX Regulations issued May 6, 2020;

Overview of Significant Provisions

- Jurisdiction & Scope
- Notice
- Formal Complaint & Dismissal
- Supportive Measures
- Emergency Removal
- Basic Requirements of Grievance Process
- Written Notice to Parties
- Consolidation
- Investigations
- Hearings
- Determination of Responsibility
- Appeals
- Informal Resolution
- Documentation
- Retaliation
- Training

Impact of Final Regulations

What is (or Should be) the Same

- Intake and outreach process
- Supportive measures
- Neutral, impartial and trained implementers
- Investigative protocols
 - Notice
 - Opportunity to be heard
- Documentation

What is Significantly Different

- Jurisdiction/scope
- Live hearing
- Cross examination by the advisor
- Proponent of a statement must be subject to cross-examination
- Recipient must provide advisor

THE BIG THREE

Implementing Regulations

Regulations Promulgated in 1975

- Designation of responsible employee
- Complaint procedure of recipient
- Notification of policy

2020 Final Regulations

- Designation of coordinator
- Adoption of grievance procedures
- Dissemination of policy

Relevant Regulations Sections:

Title IX Coordinator: §§ 106.8(a) and 106.8(b)(2)(i)

Notice of Non-Discrimination: § 106.8(b)

Grievance Procedures: § 106.8(c)

Designation of Coordinator

- Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.”
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment) . . .

Title IX Regulations issued May 6, 2020; § 106.8(a)

Dissemination of Policy

- Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner.
- Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, or to the Assistant Secretary, or both.

Title IX Regulations issued May 6, 2020; § 106.8(b)

Adopt Grievance Procedures

- . A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.
- A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

SHIFT IN APPROACH & FRAMING PRINCIPLES

Framing Principles

1

“A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”

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.”

3

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

4

“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

5

“If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation.”

Framing Principles

1

“A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”

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

Framing Principles

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)

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.”

Framing Principles

4

“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

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

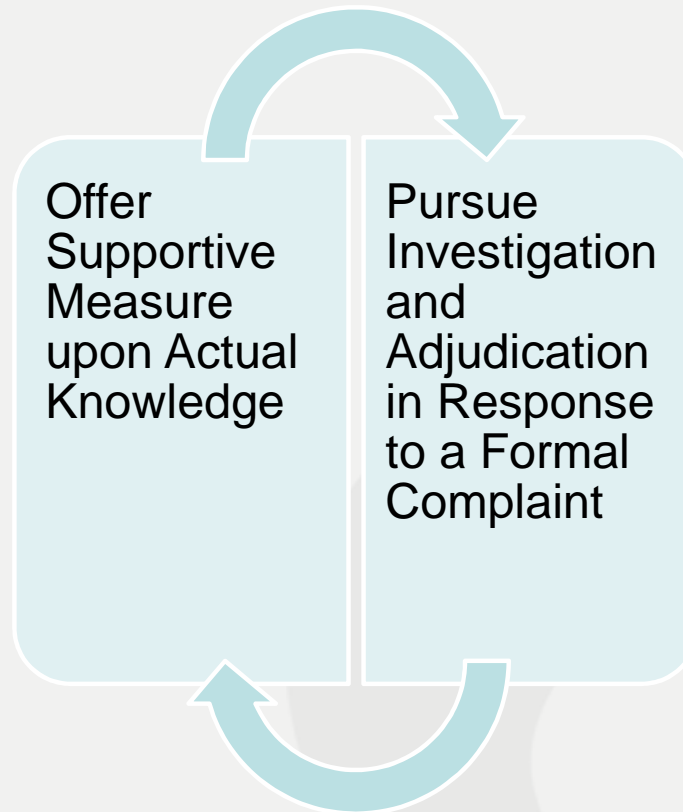
Framing Principles

5

“If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation.”

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

Understanding Two Key Provisions



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**, in the United States, on the basis of sex, who is excluded from participation in, denied the benefits of, or is subjected to discrimination **under any education program or activity** receiving federal financial assistance.
- **Program** or **activity and program** means all of the operations of—
 - A college, university, or other postsecondary institution, or a public system of higher education; or
 - A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

Title IX of the Education Amendments of 1972; § 20 U.S.C. 1681;
Title IX Implementing Regulations; § 106.2(h)

Jurisdiction: Where

- Applies only to sex discrimination occurring **against a person in the United States** in an education program or activity
 - “The Department reiterates that the ‘education program or activity’ limitation in the final regulations
 - does not create or apply a geographic test
 - does not draw a line between ‘off campus’ and ‘on campus,’ and
 - does not create a distinction between sexual harassment occurring in person versus online.”

Title IX Regulations issued May 6, 2020; § 106.8(d); Preamble at 649

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.”



Title IX Regulations issued May 6, 2020; Preamble at 624

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 **must investigate the allegations of conduct that occurred in the recipient’s education program or activity**, and nothing in the final regulations precludes the recipient from choosing to **also address allegations of conduct outside the recipient’s education program or activity**. ”
- For example, if a student is sexually assaulted outside of an education program or activity but subsequently suffers Title IX sexual harassment in an education program or activity, then these final regulations apply to the latter act of sexual harassment, and the **recipient may choose to address the prior assault through its own code of conduct.**”

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)

Proceeding under a Conduct Code

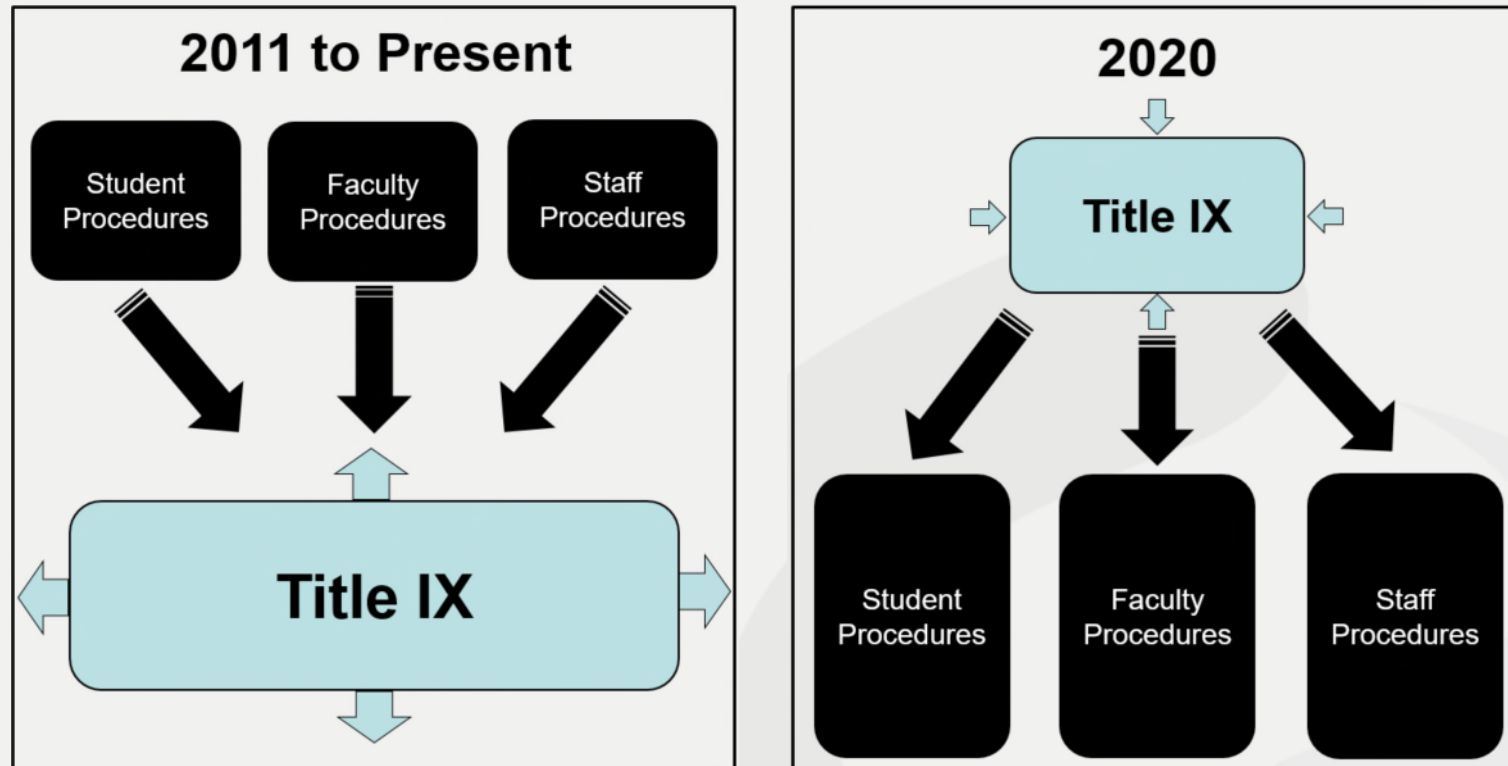
- Retaliation includes:
 - Charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, **for the purpose of interfering with any right or privilege** secured by title IX or this part, constitutes retaliation.

Title IX Regulations issued May 6, 2020; § 106.71(a)

Practical Considerations & Challenges

- Policy frameworks
 - How to incorporate non-Title IX conduct
 - How to address other forms of discrimination and harassment
- Coordinating with other conduct codes
 - When can you proceed under another code?
 - When is the jurisdiction determination made?
 - Threshold during initial assessment?
 - Charging decision following investigation
- What about retaliation?

Impact of Jurisdictional Requirements



“We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding [for sexual harassment no longer covered by Title IX].”

Title IX Regulations issued May 6, 2020; § 106.45(b)(3)(i). See also Preamble, at 46, 237, 241, 251, 258, 457, 472, 481, 482, 485, 496, 631, 636, 642, 645, 660, 681, 730, 907, 939, 962, 963, 964, 1302, 1333, 1516, 1518, 1524, 1558, 1572, 1575, 1578, 1591, 1595, 1689, 1764, 1796, 1826.

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

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

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.

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

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
4. Explain to the complainant the process for filing a formal complaint.

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

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

FORMAL COMPLAINTS

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

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

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

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

Formal Complaint: Required Dismissal

- **Must** dismiss if:
 - Conduct would not constitute sexual harassment even if proved,
 - Conduct did not occur in the recipient's education program or activity, or
 - Conduct did not occur against a person in the United States.
- Such a dismissal does not preclude action under another provision of the recipient's code of conduct

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

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
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

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

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

- Criteria for when the Title IX Coordinator files the formal complaint
- Process for evaluating dismissal
- Appeal from dismissal
- Proceeding under other policies
 - Policy frameworks
 - When is charging under a code of conduct retaliation?

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 before or after the filing of a formal complaint or where no formal 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, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

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

Supportive Measures

- May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

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

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)

Documentation

- Must maintain 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

Title IX Regulations issued May 6, 2020; § § 106.45(b)(10)(i) (ii)

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 opportunity to challenge the decision immediately following the removal

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

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.

Title IX Regulations issued May 6, 2020; Preamble at 566

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

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.

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

Practical Considerations & Challenges

- Limited scope allowable for emergency removal
 - Can you remove under code of conduct for lesser standard?
- What are the criteria for appropriate and reasonably available?
- What are measures to protect safety or deter sexual harassment?
- What supportive measures do you have to offer to a non-student/non-employee?
- Ensuring accurate documentation

BASIC REQUIREMENTS OF GRIEVANCE PROCESSES

Basic Requirements

- **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 as defined in § 106.30, against a respondent.

Relevant Regulations Sections:

Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)

Basic Requirements

- Require an objective evaluation of all relevant evidence
 - Including both inculpatory and exculpatory evidence
 - Credibility determinations may not be based on a person's status
- Implementers must be trained and free from conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Relevant Regulations Sections:

Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)

Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)

Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)

Basic Requirements

- **Presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Include reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause
- Describe the range (or list) of possible disciplinary sanctions and remedies

Relevant Regulations Sections:

Presumption of Non-Responsibility: §§ 106.45(b)(1)(iv) and 106.45(b)(2)(i)(B)

Reasonably Prompt Time Frames: § 106.45(b)(1)(v)

Range/List of Disciplinary Sanctions and Remedies: § 106.45(b)(1)(vi)

Basic Requirements

- 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
 - Apply the same standard of evidence to all formal complaints of sexual harassment

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(1)(vii) and 106.45(b)(7)(i)

Basic Requirements

- Include the procedures and permissible bases for the complainant and respondent to appeal
- Describe the range of supportive measures available
- 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

Relevant Regulations Sections:

Appeal: §§ 106.45(b)(1)(viii) and 106.45(b)(7)(ii)(F)

Range of Supportive Measures: § 106.45(b)(1)(ix)

Waiver of Privilege: § 106.45(b)(1)(x)

Practical Considerations & Challenges

- How does the standard of evidence alignment impact:
 - Faculty codes
 - Staff procedures
 - Collective bargaining agreements
- Creating an evidentiary code

INVESTIGATIONS

Obligation to Investigate

- Separation of the recipient's obligation to respond to a report of sexual harassment from the recipient's obligation to investigate formal complaints of sexual harassment.
 - See discussion in Preamble at 598-599.
- The recipient **must** investigate the allegations in a formal complaint.

Title IX Regulations issued May 6, 2020; Preamble at 598-599;
§ 106.45(b)(3) .

Written Notice to Parties

- Must provide written notice of the recipient's grievance process, including any informal resolution process.
- Must provide written notice of the allegations.
 - Sufficient time to prepare a response before any initial interview
 - Sufficient details known at the time
 - identities of the parties, if known;
 - the conduct alleged to constitute sexual harassment; and
 - the date and location of the alleged incident, if known.

Title IX Regulations issued May 6, 2020; § 106.45(b)(2)

Written Notice to Parties

- Must state that:
 - the respondent is presumed not responsible for the alleged conduct
 - a determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties:
 - they may have an advisor of their choice
 - they may inspect and review evidence gathered
 - of a prohibition against knowingly making false statements or knowingly submitting false information
- Provide supplemental notice of additional allegations.

Title IX Regulations issued May 6, 2020; § 106.45(b)(2)

Consolidation

- May consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment **arise out of the same facts or circumstances.**
 - Intended to give “discretion” to consolidate formal complaints that arise “out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other.”
 - The requirement for the same facts and circumstances means that the multiple complainants’ allegations are so intertwined that their allegations directly relate to all the parties.

Title IX Regulations issued May 6, 2020; § 106.45(b)(4); Preamble at 968-969; 1498

Investigations

- Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.

Title IX Regulations issued May 6, 2020; § 106.45(b)(5)

Investigations

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

Title IX Regulations issued May 6, 2020; § 106.45(b)(5)(i)

Investigations

- 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.

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6)

Investigations

- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(5)(ii)-(iv)

Investigations

- Provide 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.

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(5)(v)

Investigations

- Provide both parties an **equal opportunity to inspect and review any evidence** obtained as part of the investigation that is **directly related to the allegations** raised in a formal complaint so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
 - Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”
 - Allowing parties the opportunity to inspect this broader universe of evidence will further each party’s own interests by identifying evidence either overlooked by the investigator or erroneously deemed relevant or irrelevant.

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(5)(vi); Preamble at 1041, 1015

Investigations

- Recipient must send to each party and the party's advisor, if any, **the evidence subject to inspection and review** in an electronic format or a hard copy, and the parties must have at least **10 days to submit a written response**, which the investigator will consider prior to completion of the investigative report.

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(5)(vi)

Investigations

- Create an **investigative report** that fairly summarizes relevant evidence and
- Send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response, **at least 10 days prior** to the determination of responsibility (hearing)
 - This opportunity allows the parties to “effectively provide context to the evidence included in the report” and to “advance their own interests for consideration by the decision-maker.”

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(5)(vii); Preamble at 1037

Practical Considerations and Challenges

- Will require revisions to written language of policies and procedures
- What information has to be shared?
 - Access to evidence, not just report
 - Inculpatory and exculpatory
- How is information shared?
- Will it require investment in infrastructure/systems for electronic dissemination?
- Impacts on resources – adequate personnel and staffing?

LIVE HEARINGS

Hearings

- For institutions of higher education, the recipient's grievance process must provide for a live hearing
- Decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility
- Cross-examination must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally

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

Hearings

- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

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

Hearings

- Only relevant cross-examination and other questions may be asked of a party or witness.
- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

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

Cross-Examination by Advisor

- [A] party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear.
- Similarly, where one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor **must still cross-examine the other, appearing party “on behalf of” the non-appearing party**, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance).

Title IX Regulations issued May 6, 2020; Preamble at 1171

Hearings

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) **must not rely on any statement** of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions

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

Tested for Credibility

- Probing the **credibility and reliability** of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.
- Where a Title IX sexual harassment allegation does not turn on the credibility of the parties or witnesses, this provision allows the other evidence to be considered even though a party's statements are not relied on due to the party's or witness's non-appearance or refusal to submit to cross-examination.

Title IX Regulations issued May 6, 2020; Preamble at 1181, 1168

Statements

- [I]n the postsecondary context, only statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility.
- The prohibition on reliance on “statements” applies not only to statements made during the hearing, but also to *any* statement of the party or witness who does not submit to cross-examination.

Title IX Regulations issued May 6, 2020; Preamble at 1168, 1181

Bright-Line Rule

- Absent importing comprehensive rules of evidence, the alternative is to apply a bright-line rule that instructs a decision-maker to either consider, or not consider, statements made by a person who does not submit to cross-examination.
- The Department believes that in the context of sexual harassment allegations under Title IX, a rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.
- If statements untested by cross-examination may still be considered and relied on, the benefits of cross-examination as a truth-seeking device will largely be lost in the Title IX grievance process.

Title IX Regulations issued May 6, 2020; Preamble at 1174

Fairness and Accuracy

- Reliance on party and witness statements that have not been tested for credibility via cross-examination undermines party and public confidence in the fairness and accuracy of the determinations reached by postsecondary institutions.
- This provision need not result in failure to consider relevant evidence because parties and witnesses retain the opportunity to have their own statements considered, by submitting to cross-examination.

Title IX Regulations issued May 6, 2020; Preamble at 1175

Submit to Cross-Examination

- The Department appreciates the opportunity to clarify here that to “submit to cross-examination” means answering those cross-examination questions that are relevant
- This provision requires a party or witness to “submit to cross-examination” to avoid exclusion of their statements; the same exclusion of statements does not apply to a party or witness’s refusal to answer questions posed by the decision-maker.
- If a party or witness refuses to respond to a decision-maker’s questions, the decision-maker is not precluded from relying on that party or witness’s statements.

Title IX Regulations issued May 6, 2020; Preamble at 1182

Hobson's Choice

- Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process remains under no obligation to then participate in the grievance process, and the Department does not believe that exclusion of the complainant's statements in such a scenario is unfair to the complainant, who did not wish to file a formal complaint in the first place yet remains eligible to receive supportive measures protecting the complainant's equal access to education.

Title IX Regulations issued May 6, 2020; Preamble at 1172

Hearings

- For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing.
- With or without a hearing, after the recipient has sent the investigative report to the parties ... and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions.

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

Determination of Responsibility

- Decision-maker(s), cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
- Must issue a simultaneous written determination regarding responsibility, including
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the recipient's code of conduct to the facts
 - Rationale
 - Appeal procedures

Title IX Regulations issued May 6, 2020; § 106.45(b)(7)

Practical Considerations & Challenges

- Resources, staffing and training
- Securing cooperation of parties and witnesses through investigation and hearing
- Evidentiary considerations
- Technology considerations
- Provision of advisor if party does not have one

INFORMAL RESOLUTION

Informal Resolution



Informal Resolution

- May not require waiver of right to investigation and adjudication of formal complaints
- May not require parties to participate in an informal resolution process
- May not offer an informal resolution process unless a formal complaint is filed
- Must obtain the parties' voluntary, written consent to the informal resolution process
- Cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student

Title IX Regulations issued May 6, 2020; § 106.45(b)(9)

Informal Resolution

- At any time prior to reaching a determination of responsibility the recipient may facilitate an informal resolution process, such as mediation, provided:
- Provides to the parties a written notice disclosing
 - Allegations
 - Requirements of the informal resolution process
 - Circumstances under which it precludes formal complaint
 - Can withdraw and resume formal complaint prior to agreeing to resolution
 - Consequences

Title IX Regulations issued May 6, 2020; § 106.45(b)(9)

Practical Considerations & Challenges

- Deferring offering an informal resolution until after a formal complaint is filed
- Ensuring implementers who conduct mediation have appropriate training and competencies
- Documenting of the available information and factors considered

OTHER CONSIDERATIONS

Appeals

- Recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on specified bases
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
 - A recipient may offer an appeal equally to both parties on additional bases.

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

Appeals

- As to all appeals, the recipient must
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
 - Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 - Issue a written decision describing the result of the appeal and the rationale for the result; and
 - Provide the written decision simultaneously to both parties.

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

Training

- 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
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- A recipient must ensure that **decision-makers** receive training on:
 - Any technology to be used at a live hearing
 - 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, as set forth in paragraph (b)(6) of this section.

Training

- A recipient also must ensure that investigators receive training on:
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

Retaliation

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

Title IX Regulations issued May 6, 2020; § 106.71(a)

Retaliation

- The exercise of rights protected under the First Amendment does not constitute retaliation
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation

Title IX Regulations issued May 6, 2020; § 106.71(b)

Documentation

- Must maintain records for 7 years
- Must make training materials publicly available on website
- Must maintain records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment

Title IX Regulations issued May 6, 2020; § 106.45(b)(10)(i)

Documentation

- 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

Title IX Regulations issued May 6, 2020; § 106.45(b)(10)(ii)

NEXT STEPS: UPDATING CAMPUS POLICIES AND PROCEDURES

Putting the Pieces Together



§ 106.1 Purpose and effective date.

§ 106.2 Definitions.

§ 106.3 Remedial and affirmative action and self-evaluation.

Remedial action.

Affirmative action.

Self-evaluation.

Availability of self-evaluation and related

§ 106.4 Assurance required.

General

Duration of obligation.

Form.

§ 106.5 Transfers of property.

§ 106.6 Effect of other requirements and preservation of rights.

Effect of other Federal provisions.

Effect of State or local law or other requirements.

Effect of rules or regulations of private organizations.

Constitutional protections.

Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA).

Title VII of the Civil Rights Act of 1964.

Exercise of rights by parents or guardians.

Preemptive effect.

§ 106.7 Effect of employment opportunities.

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures

Designation of coordinator.

Dissemination of policy

Notification of policy.

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Adoption of grievance procedures.

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§ 106.9 Severability.

§ 106.11 Application.

§ 106.12 Educational institutions controlled by religious organizations.

Application.

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§ 106.13 Military and merchant marine educational institutions.

§ 106.14 Membership practices of certain organizations.

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YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.

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§ 106.15 Admissions.

Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

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Educational institutions.

Public institutions of undergraduate higher education.

§ 106.16 Educational institutions eligible to submit transition plans.

(a) Application.

(b) Provision for transition plans.

§ 106.17 Transition plans.

Submission of plans.

Content of plans.

Nondiscrimination.

Effects of past exclusion.

§ 106.18 Severability.

§ 106.21 Admission.

General.

Specific prohibitions.

Prohibitions relating to marital or parental status.

§ 106.22 Preference in admission.

§ 106.23 Recruitment.

Nondiscriminatory recruitment.

Recruitment at certain institutions.

§ 106.24 Severability

§ 106.30 Definitions. As used in this part:

Actual knowledge ;Complainant ;Consent ;Formal complaint;
Respondent ;Sexual harassment; Supportive measures

As used in §§ 106.44 and 106.45:

Elementary and secondary school

Succeeds Act

Postsecondary institution

§ 106.31 Education programs or activities.

General; Specific prohibitions.

§ 106.32 Housing.

Generally. Housing provided by recipient.Other housing.

§ 106.33 Comparable facilities.

§ 106.34 Access to classes and schools.

General standard. Classes and extracurricular activities.

Schools.

§ 106.35 Access to institutions of vocational education.

§ 106.36 Counseling and use of appraisal and counseling materials.

Counseling. Use of appraisal and counseling materials.

Disproportion in classes.

§ 106.37 Financial assistance.

General. Financial aid established by certain legal instruments.

Athletic scholarships.

§ 106.38 Employment assistance to students.

Assistance by recipient in making available outside employment.

Employment of students by recipients.

§ 106.39 Health and insurance benefits and services.

§ 106.40 Marital or parental status.
Status generally; Pregnancy and related conditions.

§ 106.41 Athletics.
General. Separate teams Equal opportunity.
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§ 106.42 Textbooks and curricular material.

§ 106.43 Standards for measuring skill or progress in physical education classes.

§ 106.44 Recipient's response to sexual harassment.
General response to sexual harassment.
Response to a formal complaint.
Emergency removal. with Disabilities Act.
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§ 106.45 Grievance process for formal complaints of sexual harassment. Discrimination on the basis of sex. Grievance process.
Basic requirements for grievance process.
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Dismissal of a formal complaint
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Investigation of a formal complaint.
Hearings.
Determination regarding responsibility.
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§ 106.46 Severability.

§ 106.51 Employment.

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§ 106.52 Employment criteria.

§ 106.53 Recruitment.

§ 106.54 Compensation.

§ 106.55 Job classification and structure.

§ 106.56 Fringe benefits.

Fringe benefits defined. Prohibitions.

§ 106.57 Marital or parental status.

General. Pregnancy. Pregnancy as a temporary disability.
Pregnancy leave.

§ 106.58 Effect of State or local law or other requirements.

Prohibitory requirements. Benefits.

§ 106.59 Advertising.

§ 106.60 Pre-employment inquiries.

Marital status.

Sex.

§ 106.61 Sex as a bona-fide occupational qualification.

§ 106.62 Severability.

§ 106.71 Retaliation.

Retaliation prohibited.

Specific circumstances.

§ 106.72 Severability.

§ 106.81 Procedures.

§ 106.82 Severability.

Effective Preparation: Mapping Current State

- Policies and Procedures
 - Students
 - Faculty
 - Staff
- Current institutional Issues
- Implementers
- Training/Education
 - Students
 - Faculty
 - Staff
- Website
- Infrastructure/Systems
- Resources

Effective Preparation: Identify Delta

- Identify delta between current state of operation and new regulations
- Identify delta between current state of operation and effective, informed practices
- Design future state
- Map implementation plan based on evidence, culture, and available resources.

Effective Preparation: Designing Future State

- Policies and Procedures
 - Document delta for project planning and measurable implementation
 - Appoint point person/team
 - Philosophical decision-making
 - Practical implementation
- Current institutional Issues
 - Coordination team
 - Communications – messaging
 - Audiences
- Implementers
 - Current staff
 - Future staffing needs

Effective Preparation: Designing Future State

- Training
 - Audiences
 - Frequency
 - Platforms
- Website
 - Consider centralized landing page
 - Remove outdated material
- Infrastructure and Systems
- Resources
 - Pan-institutional responsibilities
 - Sharing of costs
 - Creative funding and support

Rollout Considerations

- Implementation and Response Team
- Internal and External Communications
- Campus Education and Awareness Efforts
- Task force, Steering Committee, Advisory Team
 - Customize based on issue, needs, appropriateness
 - Students, faculty, staff
- Website Considerations

Rollout Considerations

- Communicate core messages and changes to campus constituents
- Ensure that changes are specifically tasked to individuals with trackable targets and reasonable deadlines for implementation

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.
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