



Title IX Training
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**Lincoln
Educational
Services**

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Before we begin . . .

1. The contents of this presentation and the related discussion are for informational purposes only and do not constitute legal or regulatory advice.
2. No party should act or refrain from acting on the basis of any statements made today without seeking individualized, professional counsel as appropriate.

U.S. Department of Education Title IX Training Requirements

Goal: To promote impartial investigations and adjudications of formal complaints of sexual harassment

Who must be trained:

- Title IX Coordinators
- Investigators
- Decision-makers
- Any person who facilitates an informal resolution process

Recordkeeping: Training materials be must retained for 7 years and posted on the institution's website.

U.S. Department of Education Title IX Training Requirements -- Content

The Title IX training

- Must not rely on sex stereotypes
- Must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- Must address:
 - the definition of sexual harassment
 - the scope of the school'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
 - 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,
 - issues of relevance to create an investigative report that fairly summarizes relevant evidence

Training Agenda

1. Overview of the Title IX Legal Landscape
2. The definition of sexual harassment
3. The scope of the institution's education programs and activities
4. How to conduct an investigation and grievance process, including hearings, appeals, and informal resolutions, as applicable
5. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
6. Issues of relevance of questions and evidence, including:
 - Addressing information about a complainant's sexual predisposition and prior sexual behavior
 - How to create an investigative report that fairly summarizes relevant issues
7. Technology that may be used at a live hearing
8. Record-keeping

Part I

Overview of the Title IX Legal Landscape

Title IX of the Education Amendments of 1972

20 U.S.C. § 1681(a)

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Regulations at 34 C.F.R. Part 106:

- Nondiscrimination Notice
- Title IX Coordinator
- “Prompt and Equitable” Grievance Procedures
- Prohibition on Sex Discrimination
- Retaliation

What are we talking about when we talk about Title IX?

- Statute
- Regulations
- Federal guidance documents
 - Issued by U.S. Department of Education's Office of Civil Rights ("OCR")
- Federal court cases
- Individual resolution agreements between federal government and institutions



Civil Litigation

Increased federal and state court action concerning the process and outcome of Title IX grievance procedures:

- Cases filed by complainants *and* respondents
- Possible injunctions and monetary damage awards
- Court decisions generally issued early in the case
- Most cases concern suspensions or expulsions

Court Challenges by Complainants



- Title IX: Deliberate indifference
- Tort Law: Negligence/duty of care
- Other Claims: Breach of contract, intentional infliction of emotional distress, and more

Court Challenges by Respondents

- Title IX (gender bias)

Do the alleged facts, if true, raise a plausible inference that the university discriminated against the respondent “on the basis of sex”?

- Erroneous outcome: flawed due to sex of a party

- Selective enforcement: similarly situated individuals of different sexes treated differently

- Due Process

- Other Claims: Breach of contract, intentional infliction of emotional distress, defamation and more

2020 Title IX Regulations

- Announced May 6, 2020
- Effective August 14, 2020
- Ongoing federal litigation
- Regulations are not retroactive



<p>Liability Standard: Deliberate Indifference</p> <p>34 C.F.R. § 106.44(a) and 106.44(b)(2)</p>	<p>A school with actual knowledge of sexual harassment in an education program or activity of the school against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.</p>
<p>Updated Procedural Requirements</p> <p>34 C.F.R. § 106.8 and 106.71</p>	<ul style="list-style-type: none"> • Title IX Coordinator • Notice of Nondiscrimination • Grievance Procedures • Retaliation
<p>New Requirements for “Sexual Harassment”</p> <p>34 C.F.R. § 106.45</p>	<p>Specific new requirements for sexual harassment as defined by regulations:</p> <ul style="list-style-type: none"> • Grievance process • Investigation and Adjudication
<p>Outside the Scope of Title IX</p>	<ul style="list-style-type: none"> • Title IX regulations and requirements do not apply • Schools have discretion as to how they handle these matters

NEW TITLE IX REGULATIONS – KEY CONCEPTS

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

A school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. This section further states that a school'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.

In response to a formal complaint, a school must follow a grievance process that complies with § 106.45.

With or without a formal complaint, a school must comply with § 106.44(a).

NEW TITLE IX REGULATIONS – SCHOOL'S RESPONSE AND THE DELIBERATE INDIFFERENCE STANDARD

**Actual
Knowledge
34 C.F.R. §
106.30(a)**

“Actual knowledge” defined as notice of sexual harassment or allegations of sexual harassment to a school’s Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the school with actual knowledge is the respondent. 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 school.

“Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

**NEW TITLE IX
REGULATIONS –
SCHOOL’S RESPONSE
AND THE DELIBERATE
INDIFFERENCE
STANDARD**

**Nondiscrimination
Notice
34 C.F.R. §
106.8(b)**

Each school must notify persons entitled to a notification under Section 106.8(a) that:

1. The school does not discriminate on the basis of sex in the education program or activity that it operates;
2. The school is required by Title IX and this part not to discriminate in such a manner;
3. 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
4. Inquiries about the application of Title IX and this part to such school may be referred to the school's Title IX Coordinator, to the OCR Assistant Secretary, or both.

Each school must prominently display the contact information required to be listed for the Title IX Coordinator under Section 106.8(a) and the nondiscrimination policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under Section 106.8(a). The section further states that a school must not use or distribute a publication stating that the school treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX or this part of the Title IX regulations.

NEW TITLE IX REGULATIONS – UPDATED GENERAL PROCEDURAL REQUIREMENTS

**Title IX
Coordinator
34 C.F.R.
§§
106.8(a)**

Each school must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part of the Title IX regulations, and that the employee must be referred to as the “Title IX Coordinator.” The school must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. 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), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

The Title IX Coordinator(s) cannot be the same as the Decision-maker(s) in formal complaints of sexual harassment. This section also states that the Title IX Coordinator(s) are responsible for effective implementation of any remedies.

The Title IX Coordinator(s) cannot be the same as the Decision-maker(s) in appeals of a determination regarding responsibility or from a school's dismissal of a formal complaint or any allegations therein.

NEW TITLE IX REGULATIONS – UPDATED GENERAL PROCEDURAL REQUIREMENTS

Grievance
Procedure
34 C.F.R. §
106.8(c)

Each school 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 Title IX.

For formal complainants of sexual harassment as defined by the 2020 Title IX regulations, the grievance process must comply with new specific requirements.

A school must provide notice of its 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.

NEW TITLE IX
REGULATIONS –
UPDATED GENERAL
PROCEDURAL
REQUIREMENTS

Retaliation
34 C.F.R. §
106.71

No school 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. Intimidation, threats, coercion, or discrimination, including 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.

The school must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

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 prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

NEW TITLE IX REGULATIONS – UPDATED GENERAL PROCEDURAL REQUIREMENTS

Part 2

The Definition of Sexual Harassment

Section 106.30 -- Sexual Harassment

Means conduct on the basis of sex that satisfies one or more of the following:

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct or
- 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 school's education program or activity or
- "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).

<p>Sexual Assault</p>	<p>“Sexual assault”, as defined in the Clery Act at 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation (FBI). The FBI uniform crime reporting system defines “forcible rape” as “the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” The FBI uniform crime reporting system defines “forcible fondling” as “the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.”</p>
<p>Dating Violence</p>	<p>“Domestic violence,” as defined by VAWA at 34 U.S.C. §12291(a)(10), means violence committed by a person—</p> <ul style="list-style-type: none"> (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: <ul style="list-style-type: none"> (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship.
<p>Domestic Violence</p>	<p>“Domestic violence,” as defined by VAWA at 34 U.S.C. §12291(a)(8), 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.</p>
<p>Stalking</p>	<p>“Stalking,” as defined by VAWA at 34 U.S.C. §12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—</p> <ul style="list-style-type: none"> A. fear for his or her safety or the safety of others; or B. suffer substantial emotional distress.

NEW TITLE IX REGULATIONS – KEY DEFINITIONS

Related requirements

- Actual notice (knowledge) – allegation made to Title IX Coordinator or person with authority to take corrective measures
- Must be against a person in the U.S.
- In an education program or activity

Part 3

The Scope of the Institution's Education Program and Activities

Education Program or Activity includes:

- Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs
- Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Part 4

How to Serve Impartially

How to Serve Impartially:

- Avoid prejudgment of the facts at issue
- No bias or conflicts of interest
 - For the individual complainant
 - For the individual respondent
 - For complainants or respondents generally
- Apply the relevant facts to the appropriate policy

The Players in a Title IX Investigation and Grievance Process

- The Parties
- Employees: Title IX requirements apply even to at-will employees.
- Title IX Coordinator
- “Official with authority to take corrective action” and “Responsible Employees”
- Investigator(s)
- Decision-maker(s)
 1. Hearing officer or hearing panel that makes determinations of responsibility and sanctions, if applicable
 2. Appeals Decision-maker
- Advisors

The Parties

Complainant

- An individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- The school *must dismiss* the complaint if, at the time of filing a formal complaint, the complainant was not participating in or attempting to participate in the education program or activity of the school.

Respondent

- An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- The school *may dismiss* a formal complaint if the respondent is no longer enrolled or employed by the school.

Title IX Coordinator

Responsible for the overall coordination of Title IX compliance by the institution.

- Receives reports and formal complaints of Title IX Sexual Harassment
- Provides information to the Complainant and/or Respondent about the process
- Cannot be a Decision-maker
- Evaluates requests for confidentiality and/or to not to proceed with an investigation
- May request an investigation without a formal complaint
- Oversees determination as to whether an allegation or complaint should be dismissed prior to investigation
- Initiates and ensures that all formal complaints are investigated and adjudicated
- Offers the Complainant and the Respondent the possibility of an informal resolution process
- Responsible for the effective implementation of supportive measures and remedies
- Determines if emergency removal or administrative leave is appropriate
- Ensures that the required written notifications are sent to the Complainant and the Respondent
- Provides Advisors for the hearing if the Complainant or the Respondent does not have one.
- Must receive Title IX training and ensure that Investigators, Decision-makers, and Facilitators of Informal Resolution receive Title IX training
- Retains all the records

“Official with Authority to Take Corrective Action” and “Responsible Employees”

Official with Authority (OWA)

- An employee explicitly vested with the responsibility to implement corrective measures for sexual harassment on behalf of the school.

Responsible Employee

- An employee who is required by school policy to report any sexual harassment that they observe or learn about.

Investigator

- The Investigator is the person that conducts the investigation once a formal complaint is filed.
- Conducts interviews of the complainant, respondent, witnesses and other interested parties.
- Collects evidence such as, but not limited to, statements, documents, text messages, chats, video, audio and photographs.
- Prior to completion of the investigative report, sends to the Complainant, the Respondents and the Advisors the evidence collected so that they can inspect, review and provide comments; the parties must have at least 10 days to submit a written response.
- Prepares a written investigative report fairly summarizing the relevant evidence.
- Sends the investigative report to the Complainant, Respondent and the Advisors prior to the hearing.

Hearing Officer (or Hearing Panel Member)

The Hearing Officer is the person that conducts the hearing once the investigation is completed and the Investigator has delivered his/her investigative report and after the parties have had an opportunity to respond.

- Determines if the complaint should be dismissed.
- Presides over the hearing (in person or using synchronous virtual methods).
- Determines if questions are relevant, during the hearing.
- Enforces the rules of order and decorum in the hearings.
- Maintains a record (audio, audiovisual or transcript) of hearing.
- Prepares a written determination.
- Sends the written determination simultaneously to the Complainant and the Respondent.

Advisor

- The Advisor is the person that assists the Complainant and the Respondent during the hearing.
- May or may not be an attorney.
- Must abide by institution's procedural requirements relating to participation.
- Conducts cross-examination of the opposing party and witnesses at the hearing.
- If a party does not have an advisor for the hearing, the institution will provide a qualified Advisor free of charge

Appeal Officer

The Appeal Officer (or Appeal Decision-maker) is the person that decides on an appeal filed by either party from the Hearing Officer's resolution and adjudication report.

- If an appeal is filed, the other party is notified in writing.
- Provides a reasonable time from the date in the notice for the Complainant and the Respondent to submit their arguments in writing in support of or against the Hearing Officer's resolution and adjudication report.
- Prepares a written appeal determination.
- Sends the written appeal decision determination simultaneously to the Complainant and the Respondent.

Facilitator of Informal Resolution

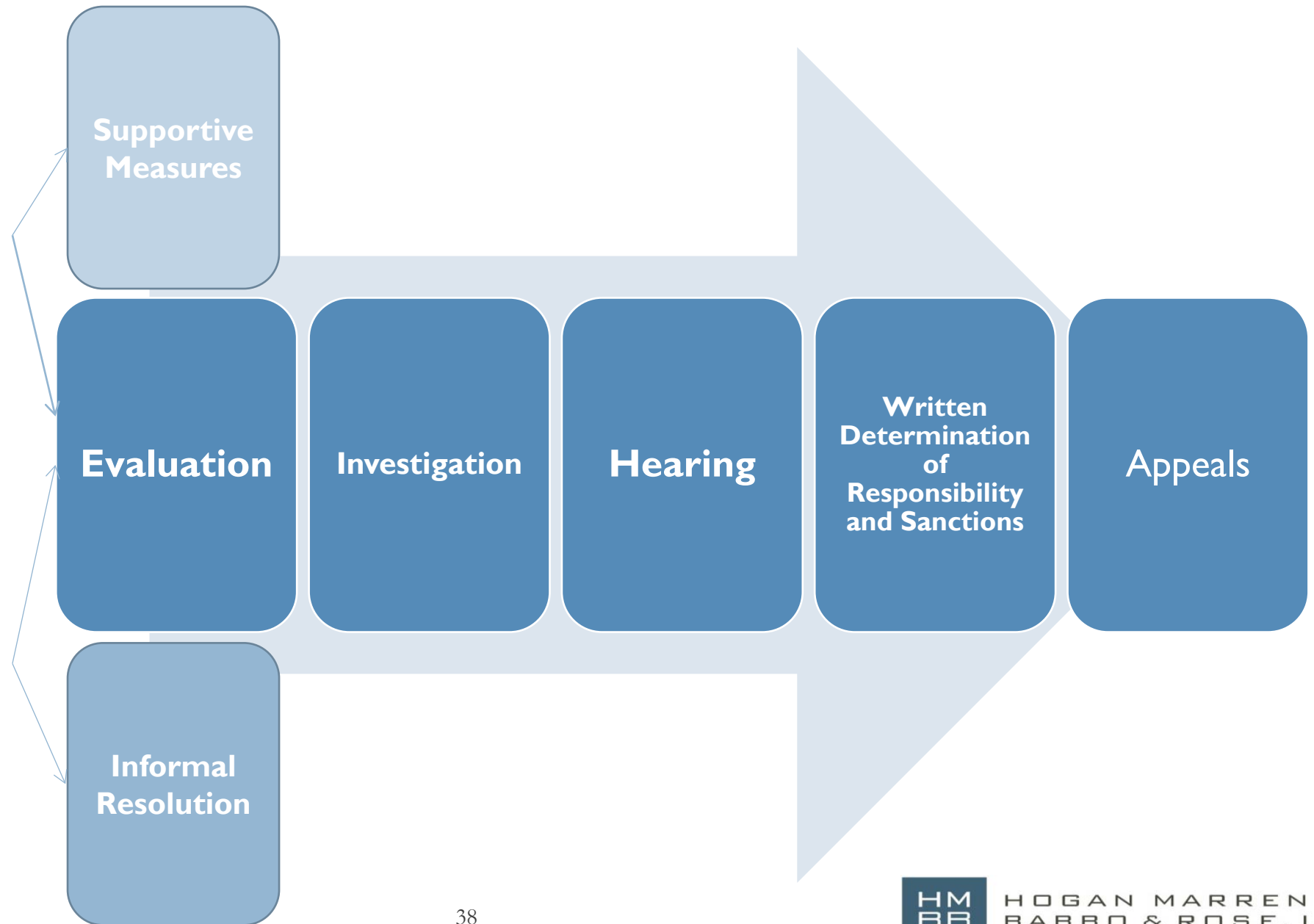
The Facilitator is the person that conducts the informal resolution process if and when the Complainant and the Respondent voluntarily consent to participate.

- Explains the informal resolution process to the Complainant and the Respondent.
- Obtains the voluntary, written consent from the Complainant and the Respondent agreeing the informal resolution process.
- Conducts the informal resolution process with the Complainant and the Respondent.
- Prepares a written informal resolution agreement if needed.

Part 5

How to Conduct a Title IX Investigation and Grievance Process

Steps in the Title IX Investigation and Grievance Process





Evaluation

Evaluation

Is the conduct within the scope of Title IX?

1. If no, the Title IX regulations do not apply and the school can dismiss the complaint.
2. If yes, the school must respond in a manner that is not deliberately indifferent.
 - By providing supportive measures in all cases.
 - And, if a formal complaint was filed, by following the specific grievance process requirements.

Is the alleged misconduct within the scope of Title IX?

YES

- In **all cases**,
 - *Must* not respond with deliberate indifference
 - *Must* offer supportive measures
- Was a **formal complaint** filed?
 - If yes, *must* also comply with Section 106.45 requirements
 - If no, *must* offer supportive measures

NO

- *Must* dismiss formal complaint *as Title IX matter*
- *May* address as a non-Title IX matter

Addressing Sexual Misconduct Outside the Scope of Title IX

- The 2020 Title IX regulations are a floor, not a ceiling, for addressing sexual misconduct.
- Schools may go *beyond* the Title IX requirements.



Dismissals

Mandatory – must dismiss if the conduct alleged in the formal complaint:

1. Would not constitute sexual harassment as defined even if proved,
2. Did not occur in the school's education program or activity, or
3. Did not occur against a person in the United States

Permissive – may dismiss: at any time if:

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

Upon dismissal, school must promptly and simultaneously send written notice of the dismissal and reason(s) for the dismissal to the parties.

Formal Complaint

- Formal complaints must be signed and filed by a complainant who is participating (or attempting to participate) in the educational or employment program or activity
- May also be filed by Title IX Coordinator
- school may dismiss complaint against a respondent who is no enrolled or employed
- Make clear if and how sexual misconduct that occurs outside the scope of Title IX will be addressed (e.g., codes of conduct)

Supportive Measures

Must provide supportive measures – without or without a formal complaint of sexual harassment

- Required when the sexual harassment is within the scope of Title IX
- Non-disciplinary, non-punitive individualized services
- Designed to restore or preserve equal access without unreasonably burdening the other party
- To be provided to both parties
- Use interactive process to determine supportive measures – consider “wishes” of the complainant
- Document decisions relating to supportive measures
- Offer internal grievance process for challenging adequacy or burden of supportive measures



Investigation

“Basic Requirements” in the Grievance Process

- Treat complainants and respondents equitably
- Objective evaluation of all relevant evidence
- No bias or conflict of interest
- Training for Title IX Coordinator(s), Investigator(s), and Decision-maker(s), and informal resolution facilitator(s)
- Presumption that the respondent is not responsible
- Reasonably prompt timeframes, extensions for good cause
- Standard of evidence: *Preponderance* (more likely than not) or *Clear and Convincing* (highly probable)
- Possible disciplinary sanctions and remedies
- Appeal procedures (newly mandatory)
- Supportive measures available to both parties
- Restrictions relating to privilege

Specific Requirements Relating to the Investigation

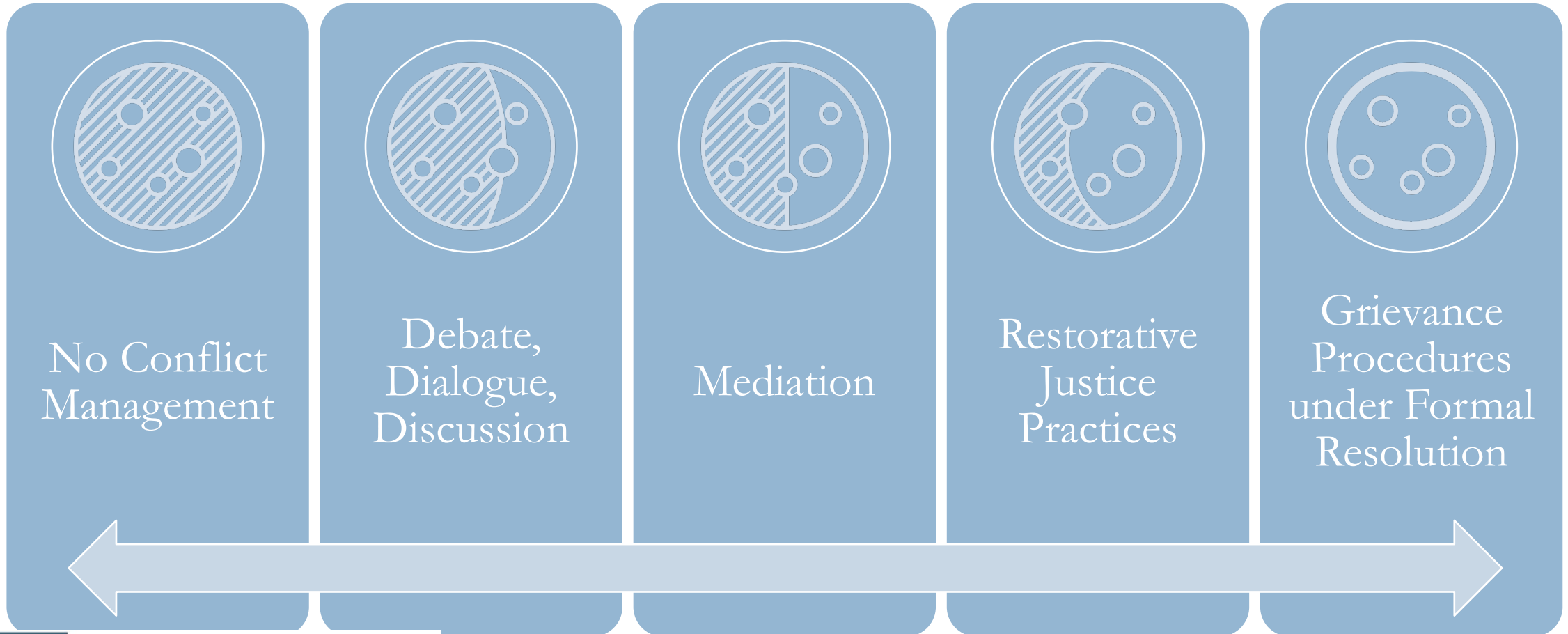
- Initial and continuing written notice to parties
- Burdens of proof and of gathering evidence rest on school
- Equal opportunity for parties to present witnesses, including fact and expert witnesses
- No gag orders
- No single-investigator model
- Advisor of choice
- Written notice of hearings, interviews and other meetings
- Opportunity to inspect and review evidence
- Draft investigation report given to the parties for review and response

Informal Resolution

Informal Resolution, 34 C.F.R. § 106.45(b)(9)

- Not available for allegations that an employee sexually harassed a student
- May not require the parties to participate in an informal resolution process.
- May not offer an informal resolution process unless a formal complaint is filed.
- May facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, provided that the school –
 - Provides to the parties a written notice disclosing: (1) the allegations, (2) the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and (3) any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
 - Obtains the parties' voluntary, written consent to the informal resolution process

Spectrum of Conflict Resolution



Hearing

Hearing Requirements

- Live hearing with opportunity for cross-examination required
- To be conducted by the Decision-maker, who may be a hearing officer or hearing panel
- The Decision-maker cannot be the same as the Title IX Coordinator(s) or Investigator(s)
- Must provide access to evidence during hearing
- May be held in the same geographic location or virtually
- Specific location to be determined by school
- Technology must allow the parties (and their advisors) to see and hear one another and any witnesses
- Recording or transcript of hearing required

Hearing Requirements – Cross-Examination

- Must allow Advisors to cross-examine parties and witnesses
- Cross-examination must be conducted directly, orally, and in real time
- The School must provide free advisor for a party at a hearing if the party does not have an advisor for the hearing.
- If a party or witness does not submit to cross examination at the live hearing, the hearing officer or hearing panel must not rely upon any statement in reaching a determination regarding responsibility.

Written Determination

Written Determination

- Determination must include:
 - Allegations potentially constituting sexual harassment
 - Procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the policy to the facts;
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the school imposes on the respondent, and whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided by the school to the complainant; and
 - Appeal procedures and permissible bases for the complainant and respondent to appeal.
- Must provide the written determination to the parties simultaneously.
- The determination regarding responsibility becomes final either on the date that the school provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

Appeals

Appeals

Mandatory appeals from a determination regarding responsibility and from a school's dismissal of a formal complaint or any allegations

Three bases:

1. Procedural irregularity that affected the outcome of the matter;
2. 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
3. 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.

Appeals

Requirements:

- Notify the other party in writing when an appeal is filed
- Ensure that the Appeal Decision-maker(s) 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
- 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
- Provide the written decision simultaneously to both parties

Part 6

Issues of Relevancy of Questions and Evidence

Issues of Relevancy of Questions and Evidence

1. The Investigation Report must fairly summarize the relevant information.
2. At the Hearing:
 - Only relevant cross-examination and other questions may be asked of a party or witness.
 - The Hearing Officer or Hearing Panel must decide if a question is relevant before it is answered at the hearing and explain any decision to exclude a question.
3. 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

Part 7

Technology for Hearings

Technology for Hearings

- No specific technology required but must enable the Decision-maker, the parties and the advisor to see and hear one another, and the witnesses, in real time
- Examples: Zoom; Microsoft Teams meetings
- Ensure that technology has the necessary security protections
- Must provide accommodations for individuals with disabilities
- School must train Decision-makers how to use the specific technology that will be used for the hearing

Part 8

Recordkeeping

Recordkeeping
34 C.F.R. §
106.45(b)(10)

A school must maintain for a period of seven years records of –

- (A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the school's education program or activity;
- (B) Any appeal and the result therefrom;
- (C) Any informal resolution and the result therefrom; and
- (D) All materials used to train Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process. A school must make these training materials publicly available on its website, or if the school does not maintain a website the school must make these materials available upon request for inspection by members of the public.

For each response required under § 106.44, a school must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the school 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 school's education program or activity. If a school does not provide a complainant with supportive measures, then the school must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the school in the future from providing additional explanations or detailing additional measures taken.

RECORDKEEPING

Questions and Answers



Presenter's Contact Information



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- Partner, *Hogan Marren Babbo & Rose, Ltd.*, Chicago, Illinois
- Title IX Compliance Services
 - External Investigator
 - Hearing Officer
 - Appeal Decision-maker
 - Policies and procedures review
 - Compliance assessments and recommendations
 - Training
 - General Title IX advice and consultation
- OCR senior manager in Headquarters and OCR Chicago (for 25 years)