



## Title IX Training Webinar

June 24, 2020

### New Title IX Rules: Higher Education Supportive Measures and Informal Resolution

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#### Topic #1: Defining Supportive Measures

##### Definition of Supportive Measures

- When are they provided?
  - Offered before or after the filing of a formal complaint or where no formal complaint is filed
  - Continue through the conclusion of the grievance process when applicable
  - Can be continued even after a finding of non-responsibility
- What are they?
  - Non-Disciplinary, non-punitive individualized services
  - Offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent
  - IHE must maintain confidentiality of supportive measures to the extent possible so as to not impair the ability to provide them
- Designed to restore or preserve equal access to the recipient's education program or activity
- Do not unreasonably burden the other party
- Measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment
- Common Supportive Measures:

- Counseling
- Extension of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Leaves of absence
- Increased security and monitoring
- Other similar measures

### **What is “Unreasonably Burdensome”?**

- No specific definition – consider fact-based circumstances
- Does not depend solely on continued access to academic programs – meaning removal from an extracurricular activity could apply
- Take into account:
  - Nature of the educational programs, activities, opportunities, and benefits
  - Timing/length
  - Consent/ability to negotiate

### **Caution!**

- An IHE’s identified disciplinary sanctions should NOT be used as supportive measures
  - Must go through grievance process
- Example: If removal from student activities is a potential sanction, you cannot remove a Complainant or Respondent from student activities as an interim, supportive measure
- Suspension, expulsion, and termination of employment are inherently disciplinary
- Emergency Removal (Student)
- May remove a Respondent from an education program or activity after:
  - Undertaking an individualized safety and risk analysis
  - Determining an immediate threat to physical health or safety of any student or individual arising from the allegations justifies removal

- Must provide Respondent with notice and an opportunity to challenge the decision immediately following the removal

### **Administrative Leave (Employee)**

- Non-student employee may be placed on administrative leave during pendency of grievance process
- “Generally understood as temporary separation from a person’s job, often with pay and benefits intact.”
- However, comments state administrative leave may be “with or without pay”

### **Removing the Respondent**

- When considering removal or administrative leave, be aware of:
  - Separate student conduct, contract, faculty governance, or other applicable rights and procedures; and
  - Respondents with disabilities – removals must be consistent with any applicable rights under Section 504 or the ADA.

## **Topic #2: Title IX Coordinator Responsibilities**

### **Responsibility for Supportive Measures**

- Title IX Coordinator responsible for coordinating the effective implementation of supportive measures
- Burden of arranging and enforcing measures must remain on the IHE, not on any party
- Coordinate implementation of measures with appropriate staff
- Serve as point of contact for students to ensure implementation occurs
- Needs to promptly contact the parties to discuss the availability of supportive measures
- Supportive measures must be offered and explored; an IHE does not wait for a request to respond

### **Documentation**

- Maintain complete records of each matter (required to be maintained for seven years)
- Must document the facts or circumstances that render certain supportive measures appropriate or inappropriate

- If a Complainant-requested measure was not implemented, document why the response to the Complainant was not clearly unreasonable in light of the known circumstances

### Topic #3: Informal Resolution

#### Informal Resolution

- Prohibitions with informal resolution:
  - Cannot be used upon allegations an employee sexually harassed a student
  - Cannot require a student or employee to waive their right to a hearing as a condition of enrollment, employment, etc.

#### Informal Resolution - When

- May occur after the filing of a formal complaint and prior to reaching a determination regarding responsibility
  - No formal complaint = no informal resolution
- Must be completed within “reasonably prompt timeframes”
- Cannot require parties to participate in informal resolution
- Either party can withdraw and resume a formal investigation/complaint process at any time

#### Informal Resolution - What

- Requires written notice:
  - Allegations
  - Describe informal Resolution process, including preclusion of further formal process once final
  - Right to withdraw from formal resolution
  - Potential consequences (e.g., records)
  - Need written, voluntary consent
- Facilitator: Title IX Coordinator or other trained individual
  - If IHE plans to allow an informal resolution facilitator to be a witness in subsequent formal grievance processes, that fact must be disclosed to parties

- May “encompass a broad range of conflict resolution strategies”:
  - Mediation
  - Arbitration
  - Restorative Justice
  - Informal negotiation

### **Informal Resolution Examples**

- Informal Resolution allows for solutions tailored to parties’ interests:
  - Admission of responsibility
  - Disciplinary sanctions, including expulsion
  - Apologies or facilitated conversations
  - Victim impact statements
  - Training, counseling
  - Confidentiality

### **Conflict of Interest, Bias, and Impartiality**

- Informal Resolution facilitators must be free from conflicts of interest, bias, and serve impartially
  - Conflict of Interest:
    - Do I know the parties?
    - Do I have a stake in the outcome?
    - Am I aligned with any student organizations, curriculum, positions, etc. pertinent to this process?
- If yes – step aside, or articulate why you can still serve on an impartial basis
- Informal Resolution facilitators must be free from conflicts of interest, bias, and serve impartially
  - Be Neutral:
    - Do not pre-judge either party based on written complaint;
    - Do not make judgments based on what you know about student or employee;

- Do not assume false reports or guilt
- Do not be an advocate – do not align with one party “against” the other, consciously or subconsciously

### **Confidentiality**

- Recipient determines the confidentiality of informal resolutions
  - May be influenced by the type of informal resolution offered
  - Must inform parties about the nature and consequences of any confidentiality provisions