

Supportive Measures, Mandatory Dismissals, Informal Resolution & Training Requirements



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Topics Covered Today



- Supportive measures
- Dismissals
- Informal Resolution
- Employee-specific provisions
- Training Requirements

Supportive Measures



- Department intends to be deferential
- Definition
 - 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. Such measures are 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.

Supportive Measures



- New emphasis on equitable treatment clarifies:
 - Respondents may also receive supportive measures
 - § 106.45: Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties
 - Are not only required in the interim period before the conclusion of a hearing
 - There is no requirement that supportive measures must continue after a finding of non-responsibility

Mandatory Triggers



- Mandatory trigger
 - Must offer to every complainant, irrespective of whether the complainant files a formal complaint
 - Third-parties who make complaint are not entitled to supportive measures
 - Title IX Coordinators must proactively reach out to the complainant “reasonably promptly”
 - Interactive process requires you to consider complainant’s wishes

Supportive Measures



- 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
 - No-contact order with witnesses must be carefully circumscribed

Supportive Measures



- Supportive measures may not unreasonably burden respondent or be punitive
 - Administrative leave for student-employees may be but is not always appropriate for student-employees
 - No requirement that the supportive measures be the least burdensome
- Actions listed as disciplinary in nature in grievance procedures may not be instituted as supportive measures
 - Removing from sports team v. suspension
 - One-way no-contact order *may* be appropriate

Supportive Measures



- Be mindful of anti-retaliation provisions intended to protect complainant
- Title IX Coordinator ultimately responsible for ensuring the measures are effective, even when other employees provide assistance
- Confidentiality provisions

Emergency Removal Proceedings



- An emergency removal proceeding must:
 - Include an individualized safety and risk analysis;
 - Determine an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal;
 - Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal; and
 - Result in the removal during the pendency of an investigation.
- No prohibition on a pre-removal hearing

Emergency Removal Proceedings



- Schools may place non-student employees on administrative leave during the pendency of a grievance process, with or without pay, without following ordinary emergency removal process and concluding there is an immediate threat
 - No back pay is required to an employee when the pending investigation results in a determination that the employee was not responsible
 - No respondent who is an employee may be kept on administrative leave indefinitely
 - § 106.44(d) does not authorize administrative leave unless a § 106.45 grievance process has been initiated

No Safe Harbor



- Proposed Rules provided post-secondary institutions would enjoy a safe harbor from a finding of deliberate indifference when:
 - The complainant opts not to file a formal complaint and
 - The school offers supportive measures
- The Department has withdrawn the proposed safe harbor
 - The Department opted to require more specific obligations to provide supportive measures in all instances so as to avoid the need for a safe harbor
 - The Department also received some criticism that such a safe harbor was not available to primary or secondary educational institutions

Mandatory Dismissals



- Schools must dismiss formal complaints if the conduct alleged in the formal complaint:
 - Would not constitute sexual harassment as defined in § 106.30, even if proved
 - Did not occur in the recipient's education program or activity
 - Did not occur against a person in the United States

Insufficient Allegations



- Methodology for determining whether the allegations constitute sexual harassment:
 - Look at the four corners of the formal complaint
 - Assume all factual allegations are true
 - Assume all reasonable inferences resulting from the factual allegations are true
 - Do not entertain factual disputes that the respondent may make
 - Meritless of the allegations is no basis for dismissal
- Due to complainant's right to appeal, it may be beneficial to avoid taking an overly technical approach and instead make this determination after an interview with the complainant to see if amendments can cure any technical deficiency
 - Courts are extremely liberal in allowing parties to amend complaints and cure any technical deficiency

Jurisdictional Limits



- The alleged misconduct must occur within the context of an 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 harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution
 - Comes from *Davis* case which held sporting activities, afterschool programs, or field trips occur within an education program or activity
 - Title IX obligations are triggered when sexual harassment occurs in an off-campus location not owned by the postsecondary institution but that is in use by a student organization that the institution chooses to officially recognize such as a fraternity or sorority

Jurisdictional Limits



- In sum, any one of the following must be 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).

Jurisdictional Limits



- Closely consider the relationship between on-campus and off-campus conduct
 - *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007): sexual assault at off-campus apartment was found to be the basis of a Title IX claim when school policy encouraged female students to show football recruits “a good time”
- Online sexual harassment
 - May be actionable if conducted through networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the school
 - *Feminist Majority Found. v. Hurley*, 911 F.3d 674 (4th Cir. 2018): anonymous Yik Yak posts could establish a Title IX claim because the messages were sent over wireless network and the messages were created on or near campus
 - Importantly, the Court also considered prior discipline for off-campus misconduct that suggests the school can control off-campus conduct

Geographic Limitations



- Conduct that occurs outside of the United States falls outside of the Title IX process
- *Harbi v M.I.T.*, Civil Action No. 16-12394-FDS, (D. Mass., Sep. 1, 2017): A professor allegedly engaged in sexual harassment to a student using a MOOC from abroad.
 - “Under the plain language of § 1681, the protections of Title IX extend only to ‘person[s] in the United States.’ The statute is not directed to the place where the discriminatory conduct occurred, or the place where the person who engaged in the discriminatory conduct was located; it is directed to the location of the person who is protected by the statute.”

Discretionary Dismissals



- Discretionary dismissals are authorized but not required:
 - Where a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - Where the respondent is no longer enrolled or employed by the recipient; or
 - Where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the allegations contained in the formal complaint.
 - This is to be narrowly construed and not allow a school to decide that the evidence gathered has not met a probable or reasonable cause threshold or other measure of the quality or weight of the evidence
 - These discretionary dismissals may be made “at any time during the investigation or hearing”

Notice of Dismissal



- Notice of dismissal, whether mandatory or discretionary, is required
 - Issue promptly
 - Include basis for reasoning
- Provide equal rights to appeal decision
- No prohibition in allowing a complainant to amend their formal complaint

Informal Resolution



- Schools may offer informal resolution under certain parameters
 - A formal complaint has been filed
 - Informal resolution must be initiated at any time prior to a determination of responsibility
- Both parties provide voluntary, informed, and written consent
 - Individuals may not be required or coerced into waiving a right to an investigation or a formal resolution
 - Both parties receive the notice of allegations, including the requirements of the informal resolution process
 - Individuals have the right to withdraw at any time prior to agreeing to the resolution

Informal Resolution



- Informal resolution must offer procedural protections to ensure a fair process
 - Informal resolution must occur reasonably promptly after agreement is reached
 - The facilitator must be free from bias and not have a conflict of interest
 - The resolution must be agreed upon

Confidentiality of Informal Resolution



- Disclosure requirements
- Record maintenance

Employee-Specific Provisions



- Informal resolution is not available where an employee is alleged to have sexually harassed a student
- Title IX is not limited to students
- Absent a particular provision of the rules indicating otherwise, all provisions apply to both students and employees
 - Evidentiary standard for determining responsibility is one example
- Complaints regarding other employment matters than sexual harassment are handled outside the context of a formal grievance process governed by Title IX

Training



- The new Title IX Rules require additional training for Title IX Coordinators, investigators, arbiters of formal hearings, and facilitators of an informal resolution process
 - 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

Training



- The new Title IX Rules require additional training for arbiters of formal hearings
 - On any technology to be used at a live hearing
 - On 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

Training



- The new Title IX Rules require additional training for investigators
 - Receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- All trainings must not rely on sex stereotypes and must promote impartial investigations and adjudications
- All trainings must be:
 - Kept for 7 years; and
 - Remain 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.

Any Questions?



Thank You!



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