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Sex Discrimination in Employment: Title IX, Title VII, State Law, and Practical Considerations

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SEX DISCRIMINATION IN EMPLOYMENT:
TITLE IX, TITLE VII, STATE LAW AND PRACTICAL CONSIDERATIONS

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I. Introduction

Sex discrimination involves discrimination against an individual on the basis of their sex, gender, gender identity or sexual orientation. Sex discrimination includes sexual and gender-based harassment and violence. When sex discrimination occurs in the workplace, the conditions and privileges of an individual's employment can be negatively impacted, and, in certain instances, subject an employer to liability.

Sex discrimination remains prevalent in the workplace despite being prohibited by a number of federal, state and local laws and regulations. During fiscal year 2020, 11,497 charges alleging sex-based harassment were filed with the U.S. Equal Employment Opportunity Commission ("EEOC").[1] During this same time period, 6,587 charges alleging sexual harassment, to include harassment of a sexual nature, were filed.[2] The U.S. Department of Education, Office for Civil Rights ("OCR") does not provide similar information regarding its cases; however, a searchable database of pending cases is included on OCR's website.[3] In addition, recent years have seen an uptick in investigations by the U.S. Department of Health and Human Services, Office for Civil Rights ("HHS-OCR"), the U.S. Department of Justice ("DOJ"), and the U.S. Department of Education, Clery Compliance Division.[4] At the same time, educational institutions continue to see extensive civil litigation – filed by employees who have been harassed, as well as those who have been sanctioned under institutional policies. In short, the institutional response to sexual harassment remains an area of high risk for educational institutions.

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[1] *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2020*, U.S. Equal Employment Opportunity Commission www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020 (last visited March 4, 2022)
[2] The EEOC data does not include charges filed with state or local Fair Employment Practices agencies.
[3] *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of February 25, 2022 7:30am Search,* U.S. Department of Education, Office for Civil Rights https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html (last visited March 4, 2022).
[4] As described in greater detail below, under the May 2020 Title IX regulations, sexual harassment is defined to include the Clery Act crimes of sexual assault, dating violence, domestic violence, and stalking.

In this context, legal practitioners must be familiar with the existing legal framework regarding sex discrimination in order to identify such conduct and to properly advise institutional clients. During the past decade, educational institutions have navigated significant changes in the legal and regulatory framework that governs the institutional response to sexual and gender-based harassment and violence, sexual assault, dating violence, domestic violence and stalking. The changes have included new federal and state legislation, evolving regulatory and sub-regulatory guidance, increased civil litigation, and shifts in regulatory enforcement approaches and considerations. As of the date of this manuscript, higher education is awaiting the release of yet another new set proposed regulations from OCR – regulations that are expected to again require a shift in institutional responses.

This manuscript will review existing laws and provide practical advice that will be helpful to legal practitioners who must navigate the steadily evolving legal landscape that impacts how sex discrimination cases in the workplace must be addressed. It will also set forth guideposts that may serve as stable moorings in navigating changes to legal requirements for the institutional response. The practices identified within are consistent with current federal law and guidance, reinforce procedural fairness, and reflect effective and promising practices.

II. Definitions: What is Sex Discrimination?

A. Federal Laws and Regulations

At the federal level, there are a number of laws and regulations that prohibit sex discrimination in the workplace. Sex discrimination includes treating an applicant or employee unfavorably because of that person's sex.[5] Sex discrimination also includes sex-based harassment, which includes sexual harassment, sexual violence and gender-based harassment.[6] The scope of this outline is limited to federal laws and regulations that address the prohibition against sexual harassment in the workplace, and does not address sex discrimination concerning issues involving equal pay, pregnancy discrimination or any other form of sex discrimination.

1. *Title VII of the Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, national origin and sex in the workplace.[7] Title VII protections apply when the discriminatory conduct impacts an individual's compensation, terms, conditions and/or privileges of employment.[8] Title VII also prohibits retaliation against an individual who engages in protected activity at their workplace, which includes filing a complaint or grievance, or participation in an investigation.[9] Title VII generally applies to all employers with fifteen (15) or more employees.[10]

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[5] *Sex-Based Discrimination*, U.S. Equal Employment Opportunity Commission https://www.eeoc.gov/sex-based-discrimination (last visited March 4, 2022).
[6] *Sex-Based Harassment*, HHS.gov (Oct. 4, 2019), https://www.hhs.gov/civil-rights/for-individuals/special-topics/harassment/index.html (last visited March 4, 2022).
[7] 42 U.S.C. §2000e, et seq.
[8] 42 U.S.C. §2000e-2.
[9] 42 U.S.C. §2000e-3(a).
[10] 42 U.S.C. §2000e(b).

Under Title VII, unwelcome sexual advances, requests for sexual favors and other verbal or physical harassment of a sexual nature constitutes sexual harassment when:

a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;[11]

b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual;[12] or

c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[13]

Further, in order to violate Title VII, the harassment must be sufficiently severe or pervasive to alter the conditions of the individual's employment and create an abusive working environment.[14] Thus, not all inappropriate or undesirable conduct will rise to the level of sexual harassment in the workplace.[15] As discussed below, however, institutional practices should still encompass meaningful responses to conduct that may not constitute a policy violation, but still negatively impacts individuals and the work environment.

In determining whether alleged conduct constitutes sexual harassment, the EEOC, "[W]ill look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."[16] As a result, whether or not the conduct constitutes sexual harassment is based on the facts of each case and will be determined on a case-by-case basis.[17]

Until recently, there was a federal circuit court split regarding whether or not sex discrimination included discrimination against an individual on the basis of their gender identity or sexual orientation. However, in the landmark case *Bostock v. Clayton County, Georgia*, on June 15, 2020, the U.S. Supreme Court, in a 6-3 ruling, held that Title VII's prohibition against sex-based discrimination in employment necessarily, and by its plain language, includes claims of sexual orientation and gender identity-based discrimination.[18] As a result of the Supreme Court's decision, individuals who are harassed on the basis of their sexual orientation or gender identity may seek legal redress by alleging that they have been discriminated against on the basis of their sex.

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[11] According to the EEOC, this type of harassment is referred to as "quid quo pro" sexual harassment.
[12] This type of harassment is referred to as "hostile environment" sexual harassment.
[13] 29 CFR §1604.11.
[14] Meritor Savings Bank, FSB v. Vinson, 106 S.Ct. 2399 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)).
[15] As noted by the EEOC, "Petty slights, annoyances and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile or offensive to reasonable people." (*Harassment*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/harassment (last visited March 4, 2022)).
[16] 29 CFR §1604.11(e).
[17] Id.
[18] Bostock v. Clayton County, Georgia, 140 S.Ct. 1731, 207 L.Ed 2d 218 (2020).

Finally, an employer can be held responsible for sexual harassment that an individual is subjected to in the workplace. When one employee harasses another employee, "[A]n employer is responsible for acts of sexual harassment where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."[19] Moreover, an employer may also be held liable for inappropriate behavior exhibited by a non-employee on the same basis.[20] However, the extent of control or any other legal responsibility which the employer may have had with respect to the conduct of the non-employee is critical to the EEOC's analysis and determination of whether an employer should be held liable for non-employee conduct.[21] When a supervisor takes a "tangible employment action" against an employee, the employer can be held liable for the supervisor's actions.[22] A tangible employment action is a "significant change in employment status" and includes actions such hiring and firing, promotion and failure to promote, demotion and an undesirable reassignment.[23] However, if no tangible employment action has been taken against an employee, then an employer can defend itself against a sexual harassment claim by showing that the employer exercised reasonable care to prevent and correct harassing behavior, and that the employee unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided.[24]

2. *Title IX of the Education Amendments of 1972*

Title IX of the Education Amendments of 1972 is a federal civil rights law which prohibits sex discrimination in an educational program or activity that receives financial assistance from the federal government.[25] Under Title IX, sex discrimination includes all forms of discrimination based on sex, including sex-based harassment. The May 2020 Title IX regulations represent the first time the regulations have formally addressed sexual harassment as a form of sex discrimination: "These final regulations impose, for the first time, legally binding rules on recipients with respect to responding to sexual harassment."[26] The final regulations also represent the first time the sexual harassment definition has been aligned with Clery Act crimes of sexual assault, dating violence, domestic violence, and stalking.[27]

Pursuant to the current Title IX regulations,

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[19] 29 CFR 1604.11(d).
[20] Id.
[21] Id.
[22] *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, U.S. Equal Employment Opportunity Commission (June 18, 1999), https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors (last visited March 4, 2022).
[23] Id.
[24] Id.
[25] 20 U.S.C. §1681 et seq., 34 CFR Part 106 (1972).
[26] Executive Summary, 85 FR 30029.
[27] The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), as amended by Section 304 of the Violence Against Women Reauthorization Act of 2013 ("VAWA"), 20 U.S.C. § 1092(f), governs the institutional response to sexual assault, dating violence, domestic violence, and stalking in post-secondary institutions that receive federal funding. The Clery Act requires that campuses provide students, employees and their families with accurate complete and timely information about campus safety to better inform future decisions. Historically, Title IX and Clery Act responsibilities overlapped in some areas, but differed in others. The final regulations have closed the gap significantly, easing implementation for colleges and universities, although there are still distinct responsibilities under each federal framework.

Sexual harassment includes conduct on the basis of sex that satisfies one or more of the following:

a. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;[28]

b. 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;[29] or

c. Sexual assault,[30] dating violence,[31] domestic violence[32] or stalking.[33, 34]

"When unwelcome conduct on the basis of sex meets one or more of these three categories, the conduct is considered to be sexual harassment under the 2020 amendments."[35]

Notably, the Title IX definition of sexual harassment has been viewed as more stringent than the longstanding Title VII definition. This is because Title IX now requires the conduct to be "so severe, pervasive, **and** objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity."[36] In contrast, the Title VII definition includes an "**or**" in place of an "**and"** – the harassment must be sufficiently severe **or** pervasive to alter the conditions of the individual's employment, not severe **and** pervasive.[37] In addition, the conduct must only have the "purpose or effect of **unreasonably interfering** with an individual's work performance or creating an intimidating, hostile or offensive working environment,"[38] which is generally viewed as a lesser standard than "effectively denies." This difference in definition, as discussed below, significantly impacts the design of grievance procedures and whether or not the heightened process under 34 CFR §106.45 of the 2020 final regulations (discussed, *infra*) is required.

As with Title VII, sex discrimination under Title IX also includes discrimination against an individual on the basis of their gender identity or sexual orientation. On June 22, 2021, the U.S. Department of Education issued a Notice of Interpretation regarding how OCR will enforce Title IX with respect to discrimination based on sexual orientation and gender identity in light of the *Bostock v. Clayton County* case.[39] In accordance with the guidance, "The Department interprets

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[28] This type of conduct is commonly referred to as "quid quo pro" sexual harassment. (See Question 5, *Questions and Answers on the Title IX Regulations on Sexual Harassment*, U.S. Department of Education (July 20, 2021))
[29] This type of conduct is referred to as "hostile environment" sexual harassment.
[30] As defined in the Clery Act, 20 U.S.C. 1092(f)(6)(A)(v).
[31] As defined in the VAWA amendments to the Clery Act, 34 U.S.C. 12291(a)(10).
[32] As defined in VAWA, 34 U.S.C. 12291(a)(8)
[33] As defined in VAWA, 34 U.S.C. 12291(a)(30).
[34] 34 C.F.R. §106.30(a).
[35] *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July 20, 2021), U.S. Department of Education, Office for Civil Rights..
[36] 34 CFR 106.30(a).
[37] *Harassment*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/harassment (last visited March 4, 2022)).
[38] Id.
[39] 34 CFR Chapter 1, 86 Fed. Reg. 32637.

Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity."[40] The guidance further states that, "Addressing discrimination based on sexual orientation and gender identity fits squarely within OCR's responsibility to enforce Title IX's prohibition on sex discrimination."[41]

With respect to sexual harassment that occurs in the workplace, the 2020 amendments to the Title IX regulations imposed new, detailed requirements regarding how educational institutions should address such conduct. Prior to the new regulations, Title VII, state and local law, as supplemented by the evolving Title IX guidance documents between 1997 and 2017, established the legal framework for determining whether or not an individual's conduct constituted sexual harassment.[42] However, the new regulations established a new standard for what constitutes sexual harassment,[43] and also created a new grievance process that must be followed by educational institutions in determining whether sexual harassment occurred in the workplace.[44] While Title IX requires prompt and equitable "grievance procedures" for all forms of sex discrimination, the heightened "grievance process" required in 34 CFR §106.45 of the 2020 final regulations is only required for sexual harassment.

An educational institution with "actual knowledge" of sexual harassment that occurs in an educational program or activity must promptly respond to reports of sexual harassment in a way that is not deliberately indifferent,[45] and must follow the grievance process prescribed by the Title IX regulations in order to address formal complaints of sexual harassment.[46] Employees who are alleged to have engaged in sexual harassment may be placed on administrative leave during a pending grievance process.[47] As discussed below, the "actual knowledge" notice provision represents a departure from the "constructive notice" standard applied under prior guidance.

The ultimate penalty for an institution who fails to comply with the requirements of Title IX is the withdrawal of funding from the federal government,[48] including monies earmarked for student loans.[49] The more likely outcome of an OCR investigation that finds the institution in violation of Title IX is a resolution agreement which requires the institution to comply with

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[40] Id.
[41] Id.
[42] In addition to the implementing regulations, OCR has issued guidance documents that provide policy guidance to assist educational institutions in meeting their Title IX obligations. Early guidance documents include the *1997 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (1997 Guidance), 62 Fed. Reg. 12,034 (Mar. 13, 1997), and the *2001 Revised Sexual Harassment Guidance,* 62 Fed. Reg. 66092 (Nov. 2, 2000). In April 2011, OCR designated its April 4, 2011 Dear Colleague Letter (2011 DCL) as a significant guidance document. In response to questions about implementation of the 2011 DCL, on April 29, 2014, OCR released its Questions and Answers on Title IX and Sexual Violence (2014 Q&A), also designated as a significant guidance document. On September 22, 2017, OCR issued a Dear Colleague Letter (2017 DCL) rescinding the 2011 DCL and the 2014 Q&A and expressing its intent to implement a policy, through a rulemaking process, that considers public comment. OCR concurrently issued interim guidance in the form of a Questions & Answers on Campus Sexual Misconduct (2017 Q&A). Following the May 2020 Title IX regulations, the 2001 Guidance was also rescinded.
[43] See 34 CFR §106.30(a)
[44] See 34 CFR §106.44(a) and 34 CFR §106.45.
[45] See 34 CFR 106.44(a).
[46] See 34 CFR 106.45(b).
[47] 34 CFR §106.44 (c)-(d).
[48] 20 U.S.C. §1682.
[49] Grove City Coll. v. Bell, 465 U.S. 555, 104 S. Ct. 1211, 79 L.Ed. 2d 516 (1984) (*rev'd on other grounds*).

required actions during a period of monitoring by OCR.[50] While these actions have typically required revisions to policies, expanded training, and other non-monetary provisions, recent OCR resolutions have included more traditional civil remedies, including the provision of financial remedies to complainants that would typically be the subject of private civil action.

B. State Laws

In addition to the protections afforded to individuals who experience sex discrimination in the workplace by Title VII and Title IX, many states offer legal protections against sexual harassment in the workplace. States have done so by enacting state legislation, relying on common law or via regulations governing public employees.[51] Since Title VII only applies to employers who have fifteen or more employees, many state laws provide legal protection to employees who may not have otherwise had such protection. As an example, as discussed below, New York and California have both enacted robust state protections regarding sexual harassment.

The New York State Human Rights Law applies to all employers, including employers who have less than fifteen (15) employees, in the State of New York and prohibits employers from engaging in "unlawful employment practices", including discrimination based on protected classes and harassment of an individual based on a protected category.[52] Further, all New York employers are required to adopt a sexual harassment prevention policy and to provide annual anti-harassment training to their employees.[53] Employers may choose to either adopt a Model Sexual Harassment Policy developed by the New York Department of Labor and Division of Human Rights, or create their own policy, as long as the employer's policy meets or exceeds certain minimum standards.[54] Individuals have up to three years from the date of the harassment to file a claim based on the New York State Human Rights Law, a time period that is significantly longer than the time period afforded by Title VII.[55]

The California Fair Employment and Housing Act ("FEHA") provides that, "Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct."[56] FEHA further requires employers to develop and distribute a harassment, discrimination and retaliation prevention policy that includes certain information.[57] FEHA's anti-harassment provisions apply to all California employers, regardless of size, and prohibits harassment based on a protected category against employees and applicants, as well as

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[50] See Case Processing Manual ("CPM"), U.S. Department of Education, Office for Civil Rights (August 26, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf (last accessed March 7, 2022). Resolution options in lieu of an investigation are set forth at Article II: Facilitated Resolution Between the Parties. Resolution options following an investigation are set forth in Article III: Case Planning, Investigation, and Resolution.
[51] James Bishop, Emma D'Arpino, Gabriela Garcia-Bou, Kelsey Henderson, et. al., *Sex Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, Vol. XXII:369, Geo. L.J. 369 (2021)
[52] N.Y. Executive Law, Art. 15 §296.
[53] *Combatting Sexual Harassment in the Workplace*, New York State, https://www.ny.gov/combating-sexual-harassment-workplace/employers (last visited March 4, 2022).
[54] Id.
[55] A Title VII claim of sexual harassment must be filed with the EEOC within 180 calendar days from the date of the alleged harassment. (*Sexual Harassment*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/sexual-harassment (last visited February 25, 2022)).
[56] Cal. Code Regs Tit. 2, §11023(a), CA Gov't Code §12940(k).
[57] Id. at §11023(b).

unpaid interns and volunteers, and contractors.[58] Harassment, per FEHA, includes sexual harassment, though sexually harassing conduct need not be motivated by sexual desire.[59] Nevertheless, employers with five or more employees, with the exception of religious associations and non-profit corporations, are required to provide sexual harassment and abusive conduct prevention training to both supervisory and non-supervisory employees once every two (2) years.[60] As with New York's State Human Rights Law, individuals have up to three years from the date of the alleged harassment to file a sexual harassment claim.[61]

There are many other states that have laws regarding sexual harassment.[62] As demonstrated by the state laws in place in New York and California,[63] state laws often provide greater legal protections to individuals than the legal protections provided by Title VII and Title IX.

III. What Are an Employee's Reporting Obligations Regarding Sexual Harassment?

Employee reporting obligations under Title VII have remained consistent; as with the definition of sexual harassment, employee reporting obligations under Title IX have evolved over time. Additional complications in implementation arise given the overlay of the Clery Act, state reporting requirements related to sexual harassment or sexual violence, and state law child abuse reporting obligations.

Under Title VII, supervisors are required to report sexual harassment. As noted in EEOC guidance, "[A]n employer's duty to exercise due care includes instructing all of its supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether they are officially designated to take complaints and regardless of whether a complaint was framed in a way that confirms to the organization's particular complaint procedures."[64] In addition, "[D]ue care requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome."[65] Employers must ensure that supervisors and managers understand their responsibilities to report conduct which may violate the employer's policies, and should periodically train supervisors and managers to ensure that this is the case.[66]

Under OCR guidance, an institution's Title IX obligations with respect to sexual harassment by an employee were triggered by the institution receiving notice of the harassment.

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[58] CA Gov't Code §12940(a).
[59] CA Gov't Code §12940(j)(4)(C)
[60] Id.
[61] Id.
[62] See *Sexual Harassment in the Workplace*, National Conference of State Legislatures (August 12, 2021), https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx (last visited March 6, 2022).
[63] In addition to FEHA, California also has an Equity in Higher Education Act ("Act") which recognizes sexual harassment as a form of sex discrimination, is applicable to all postsecondary institutions of the state with limited exception, and is focused on student safety. Additional information regarding the Act is included in Section III of this manuscript.
[64] *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, U.S. Equal Employment Opportunity Commission (June 18, 1999), https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors (last visited March 4, 2022.
[65] Id.
[66] Id.

From 2001 to 2020, "notice" was not construed as actual notice; rather, an institution was deemed to have notice of sexual harassment if a "responsible employee" knew or, in the exercise of reasonable care, should have known, about the harassment.[67] A responsible employee included any employee who: (1) has the authority to take action to redress the harassment; (2) has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees; or (3) a student could reasonably believe has the authority or responsibility to take action.[68] To facilitate the institution's compliance with Title IX, responsible employees were required to share all relevant details about the reported incident, including identifying information about the complainant, respondent, other witnesses, and relevant facts, including the date, time, and location, according to prior guidance.[69] Exceptions to reporting requirements were made for individuals who provided or supported the provision of confidential services such as counselors, clergy and volunteers at rape crisis centers, again according to prior guidance.[70]

Under the prior guidance, the notice provisions were expansive: notice could come from a direct report or complaint by a student, employee or third party complainant, or a responsible employee could observe or witness prohibited conduct. Notice could also come from indirect sources such as a parent, friend or third party witness; social networking sites; the media; an open, pervasive or widespread pattern; or other facts and circumstances that should cause an institution, in the exercise of reasonable care, to initiate an investigation that would lead to the discovery of additional incidents.[71] Notably, the institution's Title IX obligations existed regardless of whether the individual who was harassed made a complaint or asked the institution to take action.[72]

In stark contrast to this framework, the May 2020 final regulations only impute knowledge to the educational institution when the institution has *actual knowledge* – which occurs in higher education when the institution's Title IX Coordinator or "any official of the recipient who has authority to institute corrective measures on behalf of the recipient" receives notice of sexual harassment or allegations of sexual harassment.[73] According to the Title IX regulations, "Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge."[74] Moreover, "[t]he 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."[75]

This shift in the law has resulted in a shift in practice at some institutions – rolling back employee reporting responsibilities to supervisors only (under Title VII) and relying on the benefits that the stricter *actual knowledge* standard – and formal complaint requirement – to limit

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[67] 2001 Guidance at 13.

[68] 2001 Guidance at 13; 2014 Q &A at 15-16. . The only discussion of responsible employee in the 2017 Q&A is the statement that, "Other employees [in addition to the Title IX Coordinator] may be considered 'responsible employees' and will help the student to connect to the Title IX Coordinator." 2017 Q&A at 2.

[69] 2014 Q&A at 16.

[70] Id. at 22-24.

[71] 2001 Guidance at 13-14; 2014 Q&A at 2.

[72] 1997 Guidance.

[73] See 34 CFR 106.30(a). In the elementary and secondary school context, the school is on notice when *any* employee receives notice of sexual harassment or potential sexual harassment.

[74] Id.

[75] Id.

legal liability. Most educational institutions, however, have maintained the more expansive *responsible employee* reporting framework, recognizing the cultural commitment to centralized reporting and recordkeeping, connecting complainants and other impacted parties to supportive measures and information about procedural options, and creating the opportunity to identify persistent, pervasive or pattern behavior.

In fact, some states have enacted reporting responsibilities that seek to restore the prior *responsible employee* reporting framework. For example, the California Equity in Higher Education Act prohibits discrimination against individuals on a number of bases, including their gender, gender identity, gender expression and sexual orientation, in the postsecondary educational institutions.[76] California law also recognizes sexual harassment as a form of sex discrimination and requires all postsecondary educational institutions to have a written policy on sexual harassment.[77] Most recently, Senate Bill 493 ("SB 493") expanded definitions of sexual harassment (to include sexual battery, sexual violence, and sexual exploitation) and clarified the process for adjudicating complaints of sexual or gender-based violence, including dating or domestic violence. Effective January 1, 2022, SB 493 ties the provision of state funds to compliance with this new law. SB 493 also reintroduced the responsible employee concept. Under Cal. Educ. Code § 66281.8, certain employees are designated as responsible employees, defined as an employee who has the authority to take action to redress sexual harassment or provide supportive measures to students, or who has the duty to report sexual harassment to an appropriate school official who has that authority. Responsible employees include the Title IX Coordinator; residential advisors, housing directors, coordinators, or deans; student life directors, coordinators, or deans; athletic directors, coordinators, or deans; coaches of any student athletic or academic team or activity; faculty and associate faculty, teachers, instructors, or lecturers; graduate student instructors; laboratory directors, coordinators, or principal investigators; internship or externship directors or coordinators; and, study abroad program directors or coordinators.[78]

In addition to Title IX (and any state laws expanding Title IX) reporting responsibilities, certain employees, known as campus security authorities ("CSA"), are required to report Clery Act crimes, including sexual assault, dating violence, domestic violence, and stalking. These crimes, as detailed above, now constitute sexual harassment under Title IX. CSAs include four groups of individuals and organizations:

1) Individuals who work within a campus police or security department;[79]

2) Individuals who have responsibility for campus security but are not a part of a campus police or security department (e.g., individuals who provide security at campus parking kiosks, monitor access into campus facilities, provide event security, or escort students around campus after dark (including other students));

[76] CA Gov't Code §66270.
[77] CA Gov't Code §66281.5.
[78] CA Gov't Code §66281.8.
[79] 34 C.F.R. §668.46(a); Campus police or security departments include institutionally staffed security departments, private companies contracted to provide security, and municipal, county, or state law enforcement agencies contracted to provide security.

3) Individuals who are named in an institution's policy as persons to whom students and employees should report; and

4) Individuals who have significant responsibility for student and campus activities.[80]

A CSA is required to report any Clery Act crime allegations that the CSA believes was made in good faith to the individual or office designated by the institution to collect crime report information (such as the campus police or security department).[81] A CSA is not responsible for investigating or reporting an incident that they learn about in an indirect manner, such as overhearing students talking in the hallway or in class, that is discussed during an in-class discussion, or that is mentioned during a speech, workshop, or a group presentation. CSAs are responsible for reporting allegations of Clery Crimes that are reported to them in their capacity as a CSA. It is not necessary for the crime to have been investigated by the police or a CSA, nor must a finding of guilt or responsibility be made to constitute a reportable crime: as long as there is a reasonable basis for believing the information is not rumor or hearsay, the crime should be reported.

To complicate matters further, every state has a mandated reporter framework related to suspected abuse or neglect of a minor. Where the potential sexual harassment (in its expanded definition to include VAWA crimes) involves a minor, additional external reporting responsibilities ensue. The same is often true for individuals in a medical context – required reporting of injuries caused by sexual or interpersonal violence must be reported to law enforcement.

In short, employee reporting responsibilities are complex – and come from multiple, different points of authority. Effective practices regarding employee reporting responsibilities include streamlined and integrated reporting systems that will facilitate reporting by employees and continue to promote trust with the community. These systems are most effective when accompanied by tailored, in-person training and education that allows individuals the opportunity to ask questions, to model discussions around receiving disclosures, and to build relationships of trust with implementers.

IV. How Can Institutions Address Misconduct That Does Not Constitute Sexual Harassment?

In Section II of this manuscript, we carefully reviewed the elements of sexual harassment under both Title VII and Title IX. Because of the overlap in the definitions, which are aligned in some aspects, but distinct in others, the specific form of sexual harassment at issue will drive important differences in nature of the institutional response. In addition to what is perceived as a more stringent Title IX definition of sexual harassment, the jurisdictional requirements for Title IX sexual harassment established in the 2020 Title IX regulations narrow the scope of an institution's Title IX jurisdiction. Under the new regulations, educational institutions are now

[80] 34 C.F.R. §668.46(a). These individuals may be people who have significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline and campus judicial proceedings.
[81] 34 C.F.R. §668.46(b)(2)(iii).

prohibited from finding that conduct constitutes Title IX sexual harassment if the conduct occurred outside of the United States or outside of an institution's educational program or activity. There are also limits on standing to file a formal complaint; for example, a complainant who is no longer participating in or attempting to participate in an institution's education program or activity. While there is an exception for alumni, who OCR recognizes may have an ongoing relationship with the institution, there is no such exception articulated for a former employee. Given the barriers that exist with respect to reporting by current employees, a number of reports do arise from former or departing employees. Institutions should be alert to reports in this context, and evaluate the ability of the Title IX Coordinator to file a formal complaint and pursue an investigation, if appropriate, even where the complainant may be unable to do so.

As a result, institutional human resources and Title IX professionals who investigate allegations of sexual harassment often learn about behavior during the course of an investigation that does not rise to the level of a Title VII or Title IX institutional policy violation. When this happens, what options are available to institutions in order to address this type of conduct?

The initial approach is to identify all possible policies that might apply, to compare the policy definitions, and to map the respective processes under diverse policies. Given the nature of an initial assessment process, however, it can be challenging at this early juncture to parse the definitions, which may result in proceeding with a more heightened Title IX process in the event the conduct could potentially meet the hostile environment criteria.

In the event that the reported conduct, if proven, would not constitute a policy violation under Title IX, educational institutions have a number of options.

First, institutions can determine whether or not the alleged conduct violates institutional policies other than the policies governing sexual harassment based on Title VII or Title IX. Many institutions have codes of professional conduct, faculty and staff handbooks, or other policies that require employees to treat other employees with respect or which prohibit bullying or harassment generally in the workplace. Following an investigation, based on the facts gathered, an employee may be found responsible for violating these policies rather than a Title VII or Title IX institutional policy.

Second, institutions can address non-Title IX sexual misconduct pursuant to other institutional policies. The July 2021 *Questions and Answers on the Title IX Regulations on Sexual Harassment* ("Q&As") provides that institutions may respond to reports of sexual misconduct that does not fit within the scope of conduct covered by the Title IX grievance process.[82] As noted in the Q&As, "[N]othing in the final regulations precludes [a school] from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma."[83]

Though OCR's guidance is directed towards student conduct, the guidance is also applicable to employees in the workplace. The 2020 final Title IX regulations make clear that the

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[82] *Questions and Answers on the Title IX Regulations on Sexual Harassment*, July 20, 2021, U.S. Department of Education, Office for Civil Rights.
[83] Id.

heightened Title IX grievance process must be followed in order to address all conduct which constitutes Title IX sexual harassment, including conduct by students, faculty and staff. However, when the conduct does not constitute Title IX sexual harassment, an institution may conduct an investigation in accordance with its non-Title IX harassment policies and discipline an employee pursuant to that policy if the investigation results in a finding that the employee violated that policy. Many institutions have chosen to use the broader Title VII definition of sexual harassment under sexual misconduct policies or non-Title IX grievance procedures.

If an employee's conduct does not rise to the level of violating institutional policy under Title IX or Title VII, an institution should, nonetheless, provide reasonably available supportive measures to an individual who reported that they were the subject of sexual harassment. Notably, the current Title IX framework distinguishes between a report and a formal complaint, providing that the institution must offer reasonably available supportive measures in response to a report of sexual harassment, regardless of whether a formal complaint is later filed. At this initial triage stage, the appropriateness of supportive measures is based on the information known at the time, which is more limited than what may be known after a formal complaint, investigation and hearing. Supportive measures could include consideration of any requests from the complainant for a modified work schedule, transfer or reassignment to another position, or consideration of a request for temporary leave. Supportive measures of this nature should be based upon a request by the employee, as requiring that the complainant modify their working hours or be moved to a different position could be viewed as a form of retaliation.

Lastly, an institution can require an employee who engages in conduct that doesn't constitute sexual harassment under institutional policies but which constitutes a violation of other policies to participate in training designed to address the improper conduct. If the conduct exhibited by the employee is a larger institutional problem, then an institution may decide to provide training to an ene school, department or unit within the institution. Any employee who is found to have engaged in improper behavior should also be told not to retaliate against the complaining employee and that doing so will constitute a violation of institutional policies.

A recent trend on campuses is to more closely tie the campus Title IX or civil rights office (often referred to as an Office of Institutional Equity or similar title) to bias incident response teams when evaluating how to respond to comments or acts that may not rise to the level of Title IX sexual harassment, but are nonetheless disruptive to students and/or coworkers. Responding to less egregious, although still damaging, statements or conduct requires a broader inquiry than just a policy violation lens. Providing supportive measures is a meaningful response that can help to remedy harm – and working with a bias incident response team can help to provide both individual and community remedies to those harmed by another's words or actions. Both pieces must go hand in hand – accountability for one's actions and remedies to repair harm caused, even when the conduct does not rise to the level of a policy violation.

V. Resolution Considerations

A. Jurisdictional Considerations

Institutions have an obligation to respond when a report or complaint of sexual harassment is filed by an employee who has been subjected to sexual harassment.[84] As noted above, under the final regulations, when an institution is on notice of sexual harassment in its education program or activity against a person in the United States, the Title IX Coordinator must: 1) promptly contact the complainant to discuss the availability of supportive measures,[85] 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, and 4) explain to the complainant the process for filing a formal complaint.[86]

However, the threshold question that an institution will have to address upon receiving such a report or complaint is whether or not the conduct constitutes sexual harassment under Title VII or Title IX. In most cases, an institution will not be in a position to make such a determination upon the initial receipt of the report or complaint due to not having enough information regarding the circumstances involved to determine whether the allegations involve conduct that is "sufficiently severe or pervasive", and thus invoking an institution's Title VII process, or whether the allegations involve conduct that is "severe, pervasive and objectively offensive", thus invoking an institution's Title IX process.

For Title VII sexual harassment, notice to the institution may be provided in a number of ways, including via: (1) a verbal or written complaint from the employee who was allegedly harassed; (2) a verbal or written complaint from the employee's supervisor or co-worker; or (3) an anonymous complaint. Regardless of the manner in which the institution receives notice, upon receiving a report containing such information, the institution must act.

In contrast, in order to invoke the Title IX process for conduct constituting Title IX sexual harassment, following the prescribed process in response to a report, a formal complaint[87] must either be filed by the individual complaining of the harassing behavior or, the complaint must be signed by the Title IX Coordinator. If an institution does not receive a formal complaint, the institution is required to respond "promptly in a manner that is not deliberately indifferent" and to treat the complaining party and the responding party equitably by offering supportive measures to both.[88] Where a complainant does not have standing to file a formal complaint, as described above, or where the complainant declines to file a formal complaint, the Title IX Coordinator may sign a formal complaint initiating an investigation. The final regulations provide no guidance about the factors or criteria that should be used to guide this determination – many institutions continue to rely upon a risk analysis framework, such as that set forth in the now rescinded 2014 Q&A.[89]

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[84] The focus of this manuscript is on institutional obligations concerning matters involving employees. An institution also has a duty to respond upon receiving information regarding sexual harassment involving students.

[85] 34 C.F.R. §106.30(a). Supportive measures are defined as non-disciplinary, non-punitive individualized services offered as appropriate and as reasonably available and without fee or charge to the Claimant or Respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Supportive 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.

[86] 34 C.F.R. §106.44(a).

[87] See 34 CFR §106.30(a)

[88] 34 CFR §106.44.

[89] In making this determination, we recommend that educational institutions consider whether circumstances suggest there is an increased risk of the respondent committing additional acts of sexual violence or other violence, such as the following: there have

When making this determination, it is important for the Title IX Coordinator to document the factors considered and the judgement relied upon in reaching the decision to move forward – or not move forward, as the institution may need to establish in a regulatory enforcement action or civil proceeding that its efforts were not deliberately indifferent.

Some institutions have attempted to solve the dilemma of determining jurisdiction and policy resources by conducting an initial assessment of the information received regarding the alleged sexual harassment. During the initial assessment phase, the institution can gather information about where the conduct took place, such as within the United States or at an off-campus location that is owned or controlled by a recognized student organization, whether or not the complaining party is participating or attempting to participate in its programs and activities, or whether the institution has substantial control over the responding party and the context in which the alleged sexual harassment occurred. Answers to these inquiries are critical in determining whether or not Title IX applies. If during the initial assessment phase, the institution learns that the reported conduct did not meet the criteria for Title IX jurisdiction, the institution can conduct an investigation pursuant to its Title VII or other sexual misconduct process as the conduct would not constitute Title IX sexual harassment under the 2020 Title IX regulations. This jurisdictional analysis is binary for geographic location (e.g., within the United States), but can be more complex when evaluating whether the conduct, if true, would be sufficient to meet the Title IX sexual harassment definition or whether the conduct occurred in the context of the institution's education program or activity. If, however, the conduct occurred within the Title IX framework, then following a formal complaint, the institution must conduct an investigation into whether or not Title IX sexual harassment occurred in accordance with 34 CR §106.45.

This initial assessment is a critical checkpoint given the mandatory dismissal provisions in the Title IX regulations.[90] An educational institution is required to dismiss a formal complaint when the conduct alleged, if proven would not constitute sexual harassment, did not occur in the institution's education program or activity, or did not occur against a person in the United States, then the recipient.[91] As noted above, such a dismissal does not preclude action under another

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been other complaints or reports of harassment or misconduct against the respondent; the respondent has a history of arrests or records from a prior school indicating a history of violence; respondent threatened further sexual violence or other violence against the student or others; the complainant's report reveals a pattern of perpetration, such as via the illicit use of drugs or alcohol; certain elements indicating the seriousness of the conduct, including whether the sexual violence was committed by multiple perpetrators and whether the sexual violence was perpetrated with a weapon; the respective ages and roles of the complainant and respondent; the rights of the respondent to receive notice and relevant information before disciplinary action is sought; and, whether the institution possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence). 2014 Q&A, pp; 19-22.

[90] There are many benefits to conducting an initial assessment. The initial assessment is designed to evaluate known facts and circumstances, assess and impose supportive measures to protect the complainant and the campus community, facilitate compliance with Title IX and Clery responsibilities, and identify the appropriate institutional response after triaging available and relevant information. During the intake assessment, the Title IX Coordinator should take steps to respond to any immediate health or safety concerns raised by the report, including through the imposition of supportive measures or emergency removal/administrative leave of the respondent. The Title IX Coordinator should also assess the nature and circumstances of the report to determine whether the reported conduct raises a potential policy violation, whether the reported conduct is within the scope of Title IX, and the appropriate manner of resolution under the educational institution's Title IX policy.

While the Title IX Coordinator has the ultimate oversight authority for the implementation of Title IX, the appropriateness of supportive measures, and the steps necessary to comply with the Title IX regulations, initial assessment processes work best when supported by a multi-disciplinary team led by the Title IX Coordinator.

[91] 34 CFR §106.45(b)(3)(i).

institutional policy or code of conduct.[92] Although not jurisdictional in nature, the institution may choose to dismiss a formal complaint any time during the investigation or hearing if a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the institution; or specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.[93]

Some institutions have established checkpoints during the investigation process that will allow the investigator to shift the type of investigation that is being conducted from a Title IX investigation to a Title VII investigation at different phases in the process. For example, an institution may provide notice of allegations regarding a Title IX investigation to both parties. However, at the conclusion of the complaining party's interview, the institution may realize that the conduct, even if true, would not meet the requirements of Title IX sexual harassment. The institution would then continue its investigation under the institution's Title VII procedures rather than its Title IX procedures.[94] Additional checkpoints under this model may include at the conclusion of the fact gathering stage, at evidence review, and again, at the time of the written investigation report.[95] At any time that the institution determines that the alleged conduct, if true, could not constitute sexual harassment as per 34 CFR §104.30 based on the information gathered, then the institution must dismiss the Title IX complaint, but may continue the investigation under its Title VII or other applicable institutional processes.

B. Investigation Considerations

Title VII investigation processes have typically been less prescriptive in nature. Institutions have had great flexibility in determining how to conduct the investigation. While collective bargaining agreements or state law may dictate notice, investigation, or hearing provisions, there is no prescribed federal framework for Title VII investigations. Many trainings and practice aids are available, but these are based on effective practices, rather than a detailed regulatory framework. This led to great variation in institutional responses, including in the amount of information shared with the complainant or respondent – as to the identities of the complainant and the witnesses, the facts, or the outcome, as well as the comprehensiveness of the investigation and the nature of the documentation. Notably, in this framework, many institutions

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[92] *Id.*
[93] 34 CFR §106.45(b)(3)(ii).
[94] The institution would be required to dismiss the Title IX allegations in the formal complaint in accordance with 34 CFR §106.45(b)(3)(i) and allow the appeal process to unfold.
[95] For example, the *Dartmouth College Process for Resolving Reports against Faculty* includes checkpoints as part of the initial assessment, as well as at the conclusion of the investigation. The Process provides: "The investigation report will include a determination by the investigator whether the conduct alleged in the Formal Complaint falls within the scope of the Policy and the definitions of Prohibited Conduct. In particular, the investigator will determine whether the conduct alleged, if substantiated, would constitute Prohibited Conduct. This is not a determination of responsibility, nor does it involve a determination about the credibility of the information gathered; those decisions are reserved for the AHHC. Rather, this evaluation regards as true all facts as presented by the Complainant simply in order to determine the format of the hearing and the potential policy violations that will be the subject of the hearing." Following this determination by the investigator, "[t]he Title IX Coordinator will review the investigator's determination as to whether the conduct alleged in the Formal Complaint falls within the scope of the Policy and the definitions of Prohibited Conduct." See https://policies.dartmouth.edu/policy/dartmouth-college-process-resolving-reports-against-faculty (last accessed March 7, 2022). The same provisions are contained in largely parallel processes for resolving reports against staff and students.

have been slow to apply the ever more rigorous Title IX framework to employment issues, leading to disparities in process and approach.

The current Title IX regulations represent a sea change for many institutions. The practice of a written notice of allegations, sharing the complainant's or witnesses' names with the respondent, conducting an evidence review, sharing a written investigation report, and sharing the outcome with the complainants has significantly changed investigative practices across higher ed. These procedural steps, while improvements in many ways, also have challenges in the employment realm. Because of the requirement to "[p]rovide 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,"[96] and the requirement that the written investigation report summarize all relevant evidence,[97] it can be more difficult to investigate employee matters because of employee reluctance to participate in investigations due to concerns about privacy or retaliation.

The requirements of the formal complaint, notice of allegations, investigation, evidence review and live hearing also significantly impact an institution's ability to take speedy action with respect to an at will employee.

C. Hearing Considerations

If at the conclusion of an institution's Title VII investigation the institution finds that the information gathered supports a finding that an employee is responsible for sexual harassment, no hearing is required under federal law in order for the individual to be disciplined. Unless there are state law or collective bargaining agreement implications, the institution need only follow its institutional policies in order to discipline the employee.

In contrast, at the conclusion of a Title IX investigation, the 2020 Title IX regulations require post-secondary institutions to conduct a live hearing. [98] "At the live hearing, the decision-makers(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."[99] When first released, the regulations required decision-makers to disregard statements of a party or witness who chooses not to submit to cross-examination. Fortunately, the exclusion of statements under 34 CFR §106.45(b)(6)(i) is no longer required in light of the holding in the *Victim Rights Law Center, et al. v. Cardona* case.[100] As noted by OCR in its August 24, 2021 Dear Colleague Letter, "A decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process."[101] While this represents a vast improvement in the Title IX regulations, relying upon statements which have not been subject to cross examination

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[96] 34 CFR §106.45(b)(5)(vi).
[97] 34 CFR §106.45(b)(5)(vii).
[98] 34 CFR §106.45.
[99] Id.
[100] Victim Rights Law Center et al v. Cardona, 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021)
[101] *Letter to Students, Educators and other Stakeholders re* Victim Rights Law Center et al. v. Cardona, August 24, 2021, U.S. Department of Education, Office for Civil Rights.

may pose risk in states and federal circuits who have a body of case law requiring a hearing that sufficiently tests the credibility of the parties.[102] As a result, institutions who choose to permit consideration of statements not subject to cross-examination should consider developing evidentiary frameworks that assess whether such statements have a sufficient indicia of reliability to be considered substantively, even in the absence of cross-examination.

Due to the impact of the coronavirus pandemic on in-person operations, many institutions have not yet had a chance to hold an in-person hearing on their campuses and are only now in the position of preparing for their first in-person hearings. The overwhelming majority of hearings have occurred via Zoom or an alternative contemporaneous videoconferencing system. This format has worked surprisingly well across the country – when supported by appropriate preparation and technical assistance to help the hearing run smoothly. How can institutions make sure that the in-person hearing goes as smoothly as possible? In short, by being as prepared as possible.

Effective practices that institutions can employ in order to prepare for in-person Title IX hearings include:

1. Making sure the decision-maker and all members of the hearing panel are appropriately trained, not only on the definition of harassment, what constitutes an institution's educational programs or activities, and how to conduct an investigation and the grievance process, including hearings, appeals and informal resolution processes,[103] but also regarding the technology to be used at the hearing.[104]

2. Appropriately training individuals who will serve as hearings officers so that they have a very good understanding not only of issues of relevance of questions and evidence, as required by the Title IX regulations, but also of other institutional policies that may be implicated, such as collective bargaining agreements, professional codes of conduct, and tenure regulations.

3. Developing written hearing procedures and rules of decorum that the parties and their advisors must follow throughout the hearing. Though not required, the positive benefit

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[102] For example, in Doe v. Baum, 903 F.3d 575 (6th Cir. 2018), the Court held that, in cases involving suspension or expulsion and when credibility is at issue, "the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination." Under Baum, if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder. Similar principles are continuing to emerge in other federal and state courts. See Doe v. Allee, 242 Cal. Rptr. 3d 109, 136 (Cal. Ct. App. 2019) (When a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross–examine those witnesses.); Boermeester v Carry, 263 Cal. Rptr. 3d 261 (Cal. Ct. App. 2020) (In a domestic violence case, the state court ruled, "…procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing."); and, Doe v. Univ. of the Sciences, 961 F.3d 203 (3d Cir. 2020) ("[N]otions of fairness in Pennsylvania law include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her.") While these cases involve student respondents, we anticipate similar findings with respect to employee cases.
[103] 34 CFR §106.45(b)(1)(iii).
[104] Id.

that these documents – and rigorous adherence to the rules of decorum – can have on the hearing cannot be overstated.

4. Preparing and providing a written hearing script to the hearing officer. The hearing script should provide a brief overview of the hearing process to the parties; time limits that the parties should adhere to; the order in which testimony and questioning of parties and witnesses by the hearing panel will take place; the role of the hearing officer; how issues of relevancy will be determined; the process for raising objections; the timing of deliberations by the hearing panel; when the parties will receive the outcome of the hearing panel's deliberations, and other key considerations. If the parties agreed to any stipulations in advance of the hearing, the hearing officer should review those stipulations with the parties. The parties should be reminded that the hearing is either being recorded or transcribed, which can be made available to the parties for inspection and review upon request, but that no party of witnesses is permitted to record the proceedings.

5. Establishing a list of individuals, either internal or external to the institution, who are available to serve as hearing officers, hearing advisors and hearing panelists. Institutions must appropriately train these individuals in accordance with the Title IX regulations.

6. Making sure that sufficient space has been reserved in advance for in-person hearings so the institution can honor any requests by a party to participate in the hearing in a location separate from the other party.

7. Determining in advance how a party or witness' failure to appear at the hearing will be handled. In what instances should the hearing be postponed? As a reminder, the 2020 regulations do not require participation in the hearing by either party or witnesses and no adverse inference regarding responsibility can be made based on their absence.[105] If a party and their advisor do not appear, however, the institution must still provide an advisor, free of charge, to conduct cross-examination on the party's behalf.

8. Prior to the hearing, deciding whether the decision-makers who participate in the hearing will be the same individuals who decide what sanctions are appropriate for a party who is found responsible for engaging in sexual harassment.

Lastly, in addition to addressing and deciding the above practical decisions in advance, institutions must also determine how hearings that involve faculty members or union employees will be conducted. Unless faculty handbooks have been revised in accordance with the Clery Act and Title IX, faculty professional misconduct proceedings often do not meet the requirements of 34 CFR §106.45. What are the best ways for an institution to ensure that the professional misconduct policy is followed as well as the Title IX grievance procedures? Institutions will likely have to create a Title IX process, separate from the professional misconduct process, to address allegations of sexual harassment against a faculty member in order to meet the requirements of 34

[105] 34 CFR §106.45(b)(6)(i).

CFR §106.45. The other alternative is to revise the professional misconduct process to comport with the key requirements, including the equal right by the complainant to participate, equal access to all information, and appropriate training for faculty participants and decision-makers. With respect to union employees, contracts with the union may need to be renegotiated in order to provide the grievance process required to a union employee who is alleged to have engaged in sexual harassment.

D. Informal Resolution Considerations

Often referred to as voluntary, informal or remedies-based resolution, an alternative form of resolution can sometimes provide an effective means to respond to a report in a manner consistent with a complainant's expressed preference *and* the educational institution's Title IX obligation. For example, the inclusion of an alternative form of resolution may aid complainants or third parties who are seeking anonymity or for whom being required to pursue formal disciplinary action may be a barrier to reporting. It may also provide an educational institution with additional mechanisms to address conduct that might not rise to the level of creating a hostile environment, or to tailor a response to the unique facts and circumstances of a particular incident, especially where there is not a broader threat to individual or campus safety.

The final Title IX regulations purport to expand the availability of informal resolution as an alternative to a full investigation and live hearing. They lift the restrictions in place under prior OCR guidance that prohibited certain forms of informal resolutions or certain conduct (e.g., sexual violence).[106] The current regulations allow for informal resolution under the following circumstances: 1) the institution may not require waiver of the right to an investigation and adjudication of formal complaints of sexual harassment or require parties to participate in an informal resolution process; 2) informal resolution may only be offered after a formal complaint is filed; 3) the institution must provide both parties with written notice disclosing the allegations, the requirements of the informal resolution process, the right to withdraw from the informal resolution process, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and, 4) the parties must provide voluntary, written consent to the informal resolution process.[107] Notably, an institution may not "offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student."[108]

[106] While OCR previously provided that mediation should not be used in cases involving sexual assault, and that an educational institution should not compel a complainant to engage in mediation, to directly confront the respondent, or to participate in any particular form of alternative resolution, current guidance suggests that the prohibition on mediation in cases of sexual assault has been lifted. 2017 Q&A at 8; 2011 DCL at 8. In the 2017 Q&A, OCR provided that "the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution." Id. For example, the 2017 Q&A expressly permitted a less-formal mechanism for resolution of sexual and gender-based harassment and violence for complaints than that established by its standard grievance procedures. In its 2017 Q&A, OCR clarified that informal resolution may be appropriate if: (1) all parties voluntarily agree to participate, (2) after receiving full disclosure of the allegations and their options for formal resolution, and (3) the school determines the particular complaint is appropriate for informal resolution. 2017 Q&A at 4.

[107] 34 CFR §106.45(b)(9).

[108] Id.

This last provision precluding using an informal resolution process with respect to reports of sexual harassment by an employee against a student severely limits the institution's ability to seek timely, meaningful responses, especially to conduct that may, on its face present sufficient information to warrant an investigation as Title IX sexual harassment, but will subsequently be deemed insufficient for a policy violation. This prohibition against informal resolution, while ostensibly in place to protect complainants from the impacts of an imbalance in power and authority, may actually inhibit the opportunity to reach outcomes sometimes requested by a complaint – outcomes tied to acceptance of responsibility, awareness, apology, and action to remedy or address the harm (for example, through education and training).

The regulations also fail to provide guidance as to when an informal resolution may be appropriate, either with respect to student cases, or with respect to cases between employees. However, the VAWA provisions are somewhat instructive. VAWA requires an educational institution to include in its annual security report a description of each type of disciplinary proceeding used by the institution (i.e., informal or formal resolution), which shall include the steps of each, the anticipated timeliness and decision-making process for each, how to file a disciplinary complaint (including contact information for the person with whom it is to be filed), and how the institution determines which type of proceeding to use based on the circumstances of an allegation (e.g., risk factors, whether the respondent or complainant is an employee or student).[109]

In keeping with the VAWA provision that the educational institution must include a description of how the institution determines which type of proceeding to use (e.g., is "appropriate"), we recommend that educational institutions take a number of steps to develop a system for evaluating the appropriateness of alternative resolution and safeguard the institutional decision-making process. To develop a consistent decision-making framework that seeks to make determinations aligned with Title IX's prohibition against sex discrimination, key steps include:

1) Defining the types of alternative resolution that may be used by the educational institution;
2) Ensuring that the individuals who may facilitate alternative resolution have sufficient training and competencies;
3) Outlining the factors the educational institution will consider in evaluating whether alternative resolution is appropriate (which may be similar to, or the same, risk assessment factors considered in evaluating a complainant's request for anonymity);
4) Clear written communication with the parties regarding alternative resolution, and whether such a resolution is considered a final resolution; and,
5) Careful documentation of the available information and factors considered.

The educational institution should maintain records of all reports and conduct referred for alternative resolution, and ensure that the resolution is completed within an appropriate timeframe following the initial report.

[109] 34 C.F.R. §668.46(k).

VI. Conclusion

This manuscript endeavors to highlight the legal framework, challenges, and effective practices in responding to reports and formal complaints of sexual discrimination in employment. The law and guidance regarding these responses has evolved significantly in the past ten years – and will continue to do so in the coming years. Most imminently, OCR has initiated a new rulemaking process regarding the Title IX regulations, which we expect to be released later this spring. As institutions prepare for and respond to potential changes in the regulations, we encourage continued focus on the ecosystem of care, support and resources, comprehensive prevention and education programming, robust reporting mechanisms, and coordinated policies and processes.

Spring 2022 CLE Workshop · March 29-31, 2022

The Great Recalibration: Adjusting to the Workplace of the Future

Sex Discrimination in Employment:
Title IX, Title VII, State Law and Practical Considerations

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Disclaimer

- This PowerPoint presentation uses humor to exaggerate and tease out difficult concepts in implementing the federal and state regulatory frameworks.
- It is not intended to make light of the very real impacts of sexual harassment, the rights of the accused, nor the awesome responsibility institutions have to implement policy and process in a way that is sensitive, informed, and fair to all parties.
- To the contrary, the goal is to center us all on the need to carefully balance the nuanced multitude of considerations that Title IX implementers and counsel balance every day.

Scope of Today's Presentation

- Sex discrimination can arise from unequal pay, pregnancy discrimination or any other type of discrimination that is based on an individual's sex or gender
- Sex discrimination can also arise from **sexual and gender-based harassment**
- Today's discussion focuses on the unique issues arising in institutional response to sexual and gender-based harassment

Roadmap of Today's Presentation

- Title VII vs. Title IX
  - Sexual harassment definitions
  - Jurisdiction
  - Investigations and hearings
  - Informal resolutions
- Addressing misconduct that does not constitute sexual harassment
- Effective hearing practices

What is Sex Discrimination?

- Discrimination against an individual on the basis of their sex, gender, gender identity or sexual orientation
- Sexual and gender-based harassment and violence
- Federal, state and local laws and regulations establish the legal framework for determining what constitutes sexual discrimination

Enforcement by Federal Agencies

- U.S. Equal Employment Opportunity Commission
- U.S. Department of Education, Office for Civil Rights
- U.S. Department of Health and Human Services, Office for Civil Rights
- U.S. Department of Justice
- U.S. Department of Education, Clery Compliance Division

Sexual Harassment: Title VII vs. Title IX

Title VII	Title IX
Sexual advances, requests for sexual favors and other verbal or physical harassment of a sexual nature when:	Conduct on the basis of sex that involves:
Submission to conduct is an explicit or implicit term or condition of employment; Submission to/rejection of conduct used as basis of employment decisions affecting an individual; or	An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
The conduct **unreasonably interferes** with an individual's work performance or creates an intimidating, hostile or offensive working environment, where the harassment is sufficiently severe **or** pervasive to alter the conditions of the individual's employment and create an abusive working environment.	Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity; or
	Sexual assault, dating violence, domestic violence or stalking.

Hostile Environment Sexual Harassment Title VII vs. Title IX

Title VII - The conduct **unreasonably interferes** with work environment, where the conduct is sufficiently *severe* **or** *pervasive* to alter the conditions of an individual's employment and create an abusive working environment

Title IX - The conduct must be so *severe, pervasive*, **and** *objectively offensive* that it **effectively denies** a person equal access to the recipient's education program or activity.

Continuum of Conduct

Determining Jurisdiction

- Does the conduct constitute Title IX sexual harassment?
- Does the conduct constitute non-Title IX sexual harassment?
- Does the conduct violate any other institutional policies?
  - Code of Professional Conduct
  - Faculty and Staff Handbooks
  - Civility Codes

Determining Jurisdiction

When – and how – do you make the determination?

- Conduct a robust initial assessment process
- Assume all inferences in favor of the complainant
- Use multi-disciplinary team-based approach

Determining Jurisdiction under Title IX

Does the reported conduct constitute sexual harassment under Title IX?

- Where did the conduct take place?
  - In the United States?
  - On campus?
  - At an off-campus location owned/controlled by a recognized student organization?
  - Substantial institutional control over the respondent/context where conduct took place?
- Who is the complainant?
  - A current employee or student?
  - A former university affiliate?
  - A non-affiliate of the University?

Adjusting Jurisdiction

When might it be appropriate to shift from a Title IX investigation to a Title VII investigation?

- ➢At the conclusion of the complainant's interview
- ➢At the conclusion of the fact-gathering phase
- ➢At the conclusion of the evidence review phase
- ➢At the written investigation report

Responding Outside of Sexual Misconduct Policies

- Provide supportive measures to the complainant
- Align with bias incident or identity-harm responses that seek to acknowledge and address community harm
- Review policies and procedures that may have contributed to the environment where the conduct occurred
- Strengthen personnel evaluation and documentation processes
- Require training
  - For the accused individual
  - For an entire school, department, or unit

Embracing Employee Reporting Responsibilities

- Legal frameworks:
  - Title IX: "officials with authority to impose corrective action"
  - Title VII: supervisors and managers
  - Clery Act: campus security authorities
  - State child protective services laws: mandated reporters
  - State laws governing medical providers: "knife and gun" laws, domestic violence
- Confidential resources vs. reporting options
  - Ombuds
  - Rape crisis counselor
  - Women's and other identity-based centers

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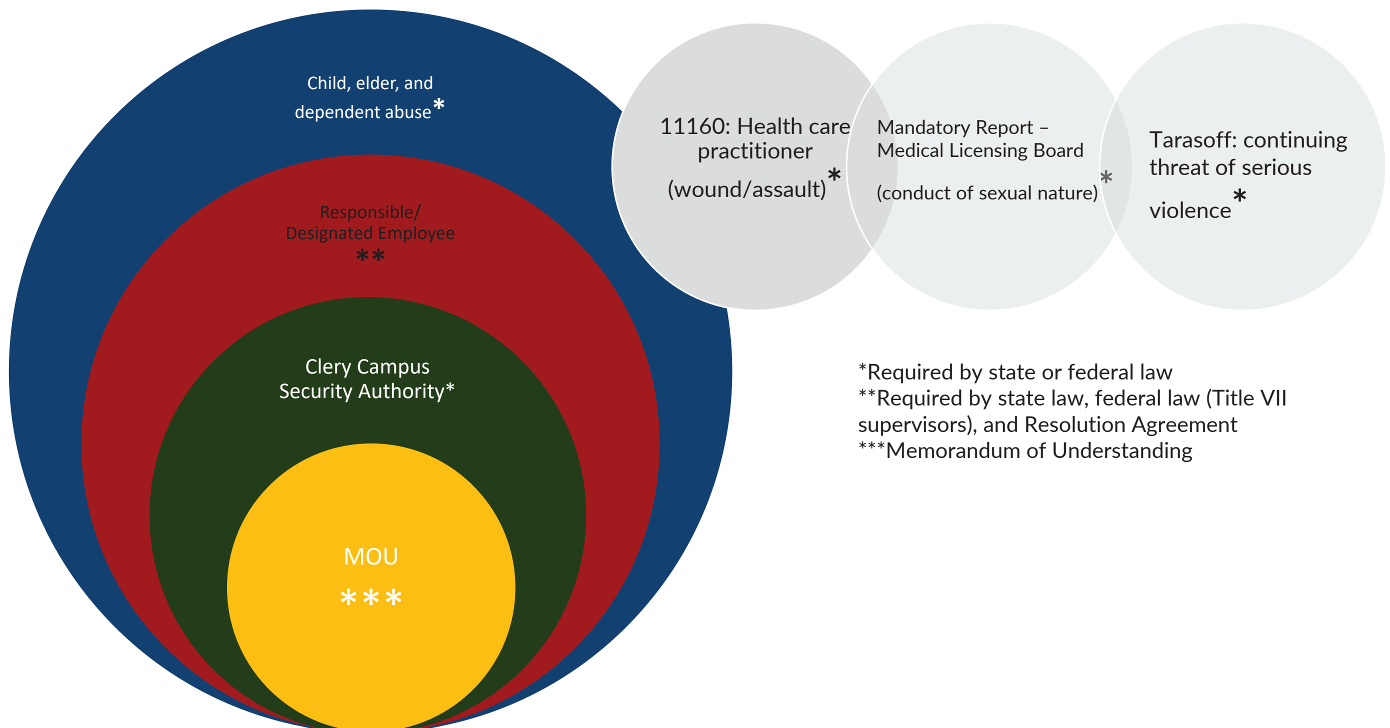

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Whisper Down the Lane

POLLING QUESTION

Does your institution continue to designate most or all of your employees as “responsible employees” under former Title IX guidance?

- Yes
- No

Implementation Rubric

- Law
- Regulations
- Guidance
- Policy
- Higher education experience
- Institutional values
- Available facts and information
- *What is the right thing to do?*

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Choose Your Own Adventure

POLLING QUESTION

Does Professor Coolz's behavior constitute sexual harassment?

- Yes
- No
- Maybe

Choose Your Own Adventure

POLLING QUESTION

If Professor Coolz's behavior constitutes sexual harassment, should the case be investigated under Title IX or Title VII or both?

- Title IX
- Title VII
- Both

Proceed at Your Own Peril

POLLING QUESTION

Does the professor's behavior involving Graduate Student Jess constitute sexual harassment?

- Yes
- No
- Maybe

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Proceed at Your Own Peril

POLLING QUESTION

Should this case be investigated under Title IX or Title VII?

- Title IX
- Title VII
- Both

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Watch Your Step

POLLING QUESTION

Do former employees have standing to bring a formal complaint under Title IX?

- Yes
- No

Show Me Your Cards

Polling Question

In a Title IX investigation process, do you have to include the names of the **witnesses** in the evidence review and investigation report?

- Yes
- No

Show Me Your Cards

Polling Question

In a Title VII investigation process, do you have to share the name of the **complainant** with the respondent?

- Yes
- No

Show Me Your Cards

Polling Question

In a Title VII investigation process, do you have to include the names of the **witnesses** in any documents shared with the parties?

- Yes
- No

A Case Study, The End

POLLING QUESTION

Do you recommend that the University complete the investigation?

- Yes
- No

A Case Study, The End

POLLING QUESTION

Do you publicly announce the basis for Professor Coolz's separation from the University?

- Yes
- No

A Recap on the Law: Informal Resolution

- Under the Title IX regulations, an educational institution may not "offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student"
- There are no restrictions regarding informal resolution under Title VII
  - Traditionally, workplace sexual harassment policies have encouraged informal resolution **before** an individual files a formal complaint
  - Historical practices involving employee harassment of a student have also leaned heavily towards informal resolution

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A Recap on the Law: Investigations and Hearings

Title VII	Title IX
Wide discretion in developing investigative procedures	Tightly prescribed investigative procedures, including written notice of investigation, evidence review, and investigation report
Discretion in the nature and amount of information shared with the parties	Must share all information
Can be the same decision-maker	Separate decision-maker
No hearing required	Live hearing
Encourages the use of informal resolution	No informal resolution with employee respondent/student complainant

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Effective Practices for Title IX Hearings

- Training of all decision-makers and members of the hearing panel
- Use of written hearing procedures, rules of decorum and a written hearing script by the hearing officer
- Develop a list of individuals who can serve as hearing officers, hearing advisors and hearing panelists
- Reserve sufficient space for the hearing in advance of the hearing
- Determine what circumstances will result in the postponement of a hearing
- Decide whether the decision-makers for the hearing will also serve as the decision-makers for any sanctions that may be appropriate should a party be found responsible for engaging in sexual harassment
- Determine how hearings involving faculty and union employees will be handled

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