Title IX Training Webinar
June 24, 2020

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

Topic #1: Defining Supportive Measures

Definition of Supportive Measures

- When are they provided?
  - Offered before or after the filing of a formal complaint or where no formal complaint is filed
  - Continue through the conclusion of the grievance process when applicable
  - Can be continued even after a finding of non-responsibility

- What are they?
  - Non-Disciplinary, non-punitive individualized services
  - Offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent
  - IHE must maintain confidentiality of supportive measures to the extent possible so as to not impair the ability to provide them

- Designed to restore or preserve equal access to the recipient’s education program or activity
- Do not unreasonably burden the other party
- Measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment
- Common Supportive Measures:
Counseling

Extension of deadlines or other course-related adjustments

Modifications of work or class schedules

Campus escort services

Mutual restrictions on contact between the parties

Leaves of absence

Increased security and monitoring

Other similar measures

What is “Unreasonably Burdensome”?

• No specific definition – consider fact-based circumstances

• Does not depend solely on continued access to academic programs – meaning removal from an extracurricular activity could apply

• Take into account:
  o Nature of the educational programs, activities, opportunities, and benefits
  o Timing/length
  o Consent/ability to negotiate

Caution!

• An IHE’s identified disciplinary sanctions should NOT be used as supportive measures
  o Must go through grievance process

• Example: If removal from student activities is a potential sanction, you cannot remove a Complainant or Respondent from student activities as an interim, supportive measure

• Suspension, expulsion, and termination of employment are inherently disciplinary

• Emergency Removal (Student)

• May remove a Respondent from an education program or activity after:
  o Undertaking an individualized safety and risk analysis
  o Determining an immediate threat to physical health or safety of any student or individual arising from the allegations justifies removal
• Must provide Respondent with notice and an opportunity to challenge the decision immediately following the removal

**Administrative Leave (Employee)**

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

**Removing the Respondent**

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

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

**Responsibility for Supportive Measures**

• Title IX Coordinator responsible for coordinating the effective implementation of supportive measures

• Burden of arranging and enforcing measures must remain on the IHE, not on any party

• Coordinate implementation of measures with appropriate staff

• Serve as point of contact for students to ensure implementation occurs

• Needs to promptly contact the parties to discuss the availability of supportive measures

• Supportive measures must be offered and explored; an IHE does not wait for a request to respond

**Documentation**

• Maintain complete records of each matter (required to be maintained for seven years)

• Must document the facts or circumstances that render certain supportive measures appropriate or inappropriate
• If a Complainant-requested measure was not implemented, document why the response to the Complainant was not clearly unreasonable in light of the known circumstances

**Topic #3: Informal Resolution**

**Informal Resolution**

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

**Informal Resolution - When**

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

**Informal Resolution - What**

• Requires written notice:
  - Allegations
  - Describe informal Resolution process, including preclusion of further formal process once final
  - Right to withdraw from formal resolution
  - Potential consequences (e.g., records)
  - Need written, voluntary consent
• Facilitator: Title IX Coordinator or other trained individual
  - If IHE plans to allow an informal resolution facilitator to be a witness in subsequent formal grievance processes, that fact must be disclosed to parties
• May “encompass a broad range of conflict resolution strategies”:
  o Mediation
  o Arbitration
  o Restorative Justice
  o Informal negotiation

Informal Resolution Examples

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

Conflict of Interest, Bias, and Impartiality

• Informal Resolution facilitators must be free from conflicts of interest, bias, and serve impartially
  o Conflict of Interest:
    • Do I know the parties?
    • Do I have a stake in the outcome?
    • Am I aligned with any student organizations, curriculum, positions, etc. pertinent to this process?

• If yes – step aside, or articulate why you can still serve on an impartial basis

• Informal Resolution facilitators must be free from conflicts of interest, bias, and serve impartially
  o Be Neutral:
    • Do not pre-judge either party based on written complaint;
    • Do not make judgments based on what you know about student or employee;
• Do not assume false reports or guilt
  o Do not be an advocate – do not align with one party “against” the other, consciously or subconsciously

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