Title IX Coordinator Training
Part 2 of 3

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Part 2

- Definition of Sexual Harassment
- Reports & Complaints
- Does Title IX Apply? Scope & Jurisdiction
- What to Do When You Receive a Report of Sexual Harassment
- Dismissals
- Reasonably Prompt Timeframe

Definition of Sexual Harassment 3-Prongs

Quid Pro Quo	*Employee* Conditions Something of Value for Sexual Favor
Davis Standard	So Severe, Pervasive and Objectively Offensive
VAWA Crimes	Sexual Assault, Stalking, Dating & Domestic Violence

Sexual harassment 106.30

1. 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;
2. 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
3. "sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291)a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)

Sexual harassment: Quid Pro Quo

- Applies solely to an employee respondent
- Involves an abuse of authority by an employee
- Doesn’t require a showing of severity, pervasiveness or offensiveness
- Need not be explicit, could be implied

Sexual harassment: Severe, Pervasive, Offensive (*Davis)*

- ***"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"***
- *directed at* ***verbal or expressive conduct***
- *evaluated under the* ***"reasonable person standard"*** *taking into consideration the characteristics of the alleged victim*

Sexual harassment: Clery/VAWA Crimes

- “sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v),
- “dating violence” as defined in 34 U.S.C. 12291(a)(10),
- “domestic violence” as defined in 34 U.S.C. 12291)a)(8),or
- “stalking” as defined in 34 U.S.C. 12291(a)(30).

Sexual Assault

- Sexual assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation
- Includes any sexual act directed against another person without their consent, including rape, sodomy, sexual assault with an object, fondling, incest and statutory rape

Sexual Assault & Consent

- What is key with sexual assault is CONSENT, or the lack thereof
- The new regs DO NOT DEFINE CONSENT; this is left up to institutions
- Some states do have laws that mandate a specific definition of CONSENT
- Must clearly define and consistently apply your definition
- The school carries the burden of collecting sufficient evidence to reach a final determination, not the parties
- Especially when using an affirmative consent standard, be mindful that you do not misuse it by requiring the respondent to prove the existence of consent or likewise shift the burden to a complainant to prove the absence of consent

Dating Violence

- **(10)DATING VIOLENCE** The term "dating violence" means violence committed by a person—
- **(A)**who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- **(B)**where the existence of such a relationship shall be determined based on a consideration of the following factors:
- **(i)**The length of the relationship.
- **(ii)**The type of relationship.
- **(iii)**The frequency of interaction between the persons involved in the relationship.

Domestic Violence

8)DOMESTIC VIOLENCE THE term "domestic violence" includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Stalking

- **(30)STALKING** THE term "stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
(A)fear for his or her safety or the safety of others; or

- **(B)**suffer substantial emotional distress.

Retaliation Prohibited 106.71

"No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner."

Jurisdiction & Scope

Who? What? When? Where? Why?

Jurisdiction & Scope

Who?

Any person may report; Complainant must be actively attempting to participate in educational program or activity; Respondent must be enrolled or under recipient's control

What?

Conduct that meets the definition of sexual harassment

When?

No SOL/time limit as long as other conditions met

Where?

In the U.S. & within the school's educational program or activity

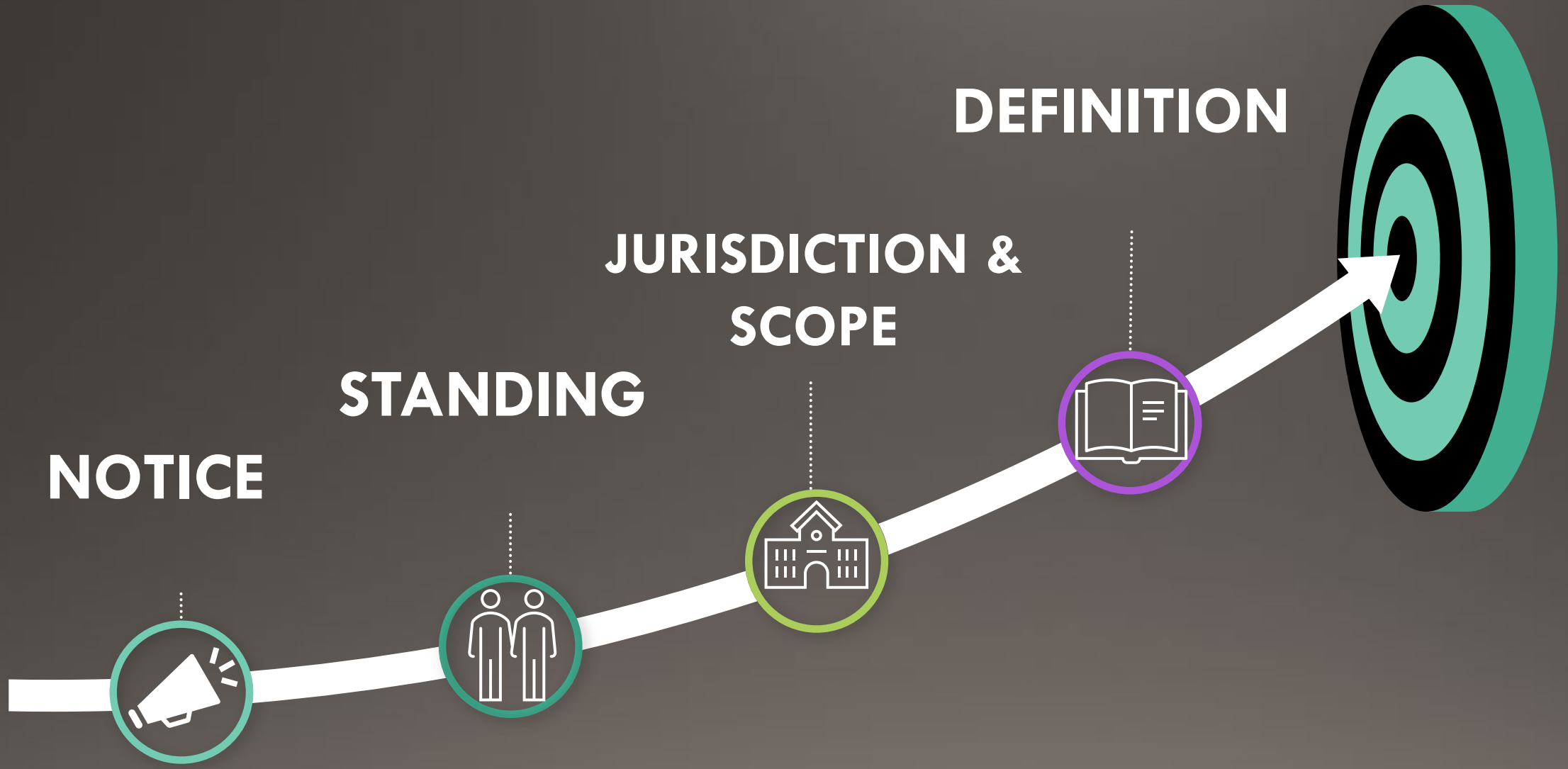
Why?

"on the basis of sex"

Educational Program or Activity 106.44

- Locations, events, or circumstances where the school exercises substantial control over both:
  - the Respondent
  - the context in which the alleged sexual harassment or discrimination occurs
    - includes any building owned or controlled by the school or by a student organization that is officially recognized by the school.

TITLE IX ASSESSMENT



Formal Complaint 106.30

- A formal complaint is a "*document filed by complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting recipient investigate the allegation of sexual harassment*"

- Schools should not take the requirement of a written formal complaint to create "bureaucratic loopholes" or technicalities to avoid initiating the grievance process

Filing a Formal Complaint

- goal is to make filing a complaint “as accessible as possible”
- may be filed with the Title IX Coordinator in person, by mail or by electronic mail
- schools may identify “any additional method”
- formal complaint can’t be filed by phone; schools could use an online submission portal
- rules do not restrict the method in which a REPORT may be received
- schools must disclose the contact information for the Title IX Coordinator PROMINENTLY on their website and in any catalog or handbook
- Complaints may be consolidated if involve multiple complainants or respondents and allegations arise out of the same set of circumstances

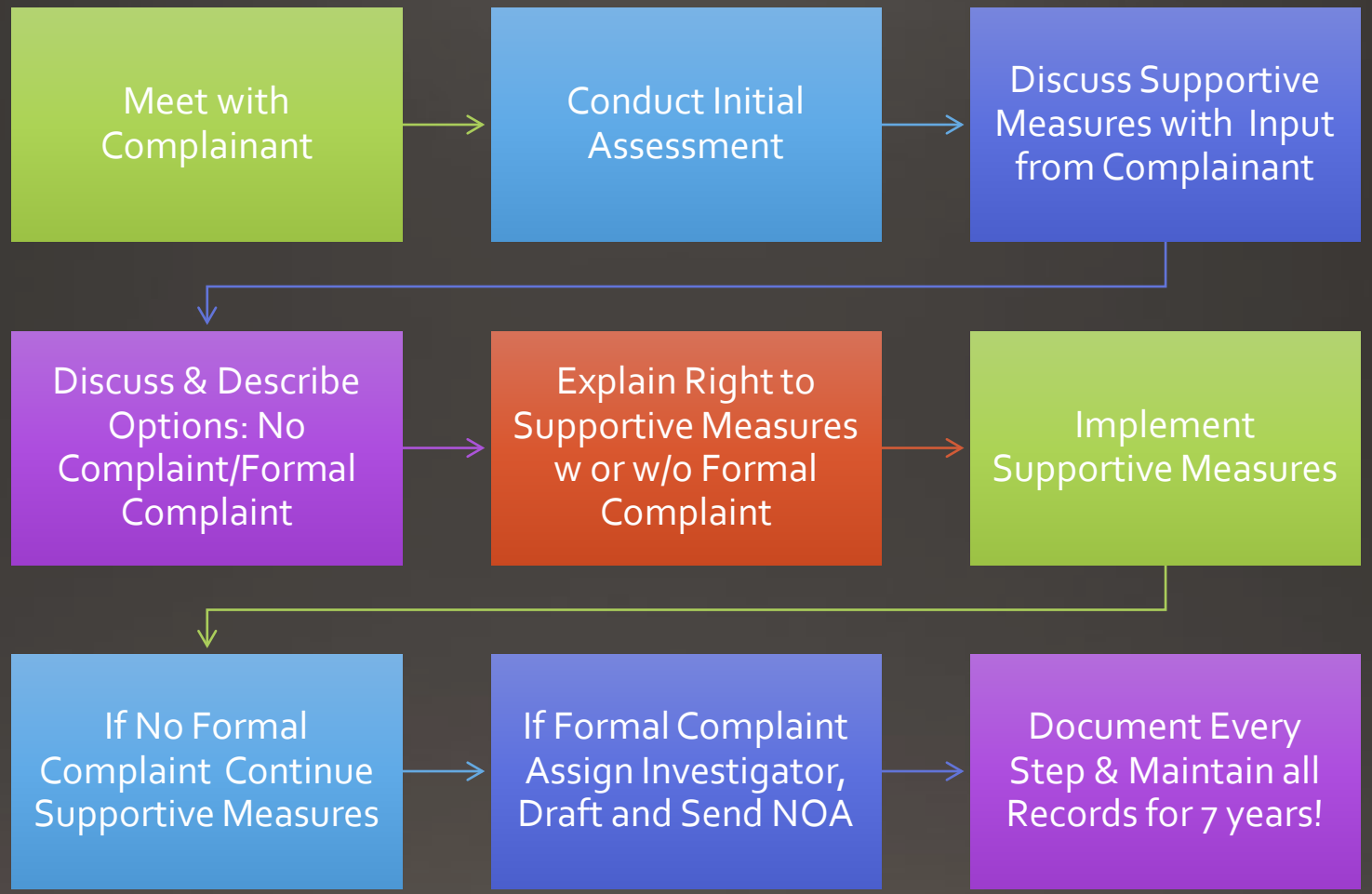
Formal Complaint Signed by a Title IX Coordinator

- only the Title IX Coordinator may initiate a complaint if the complainant does not want to
- the decision to move forward is made on behalf of the school, not the complainant
- school has an obligation to uphold and comply with Title IX and an obligation not to act with deliberate indifference
- if the allegations would warrant disciplinary action, the school cannot institute punitive or disciplinary action without first going through the grievance process

Anonymous Reports & Complaints

- regulations do not prohibit schools from implementing anonymous reporting
- the school has actual knowledge when such a report goes to the Title IX Coordinator or OWA
- school is under an obligation to respond in a manner that is not deliberately indifferent
- coordinator may initiate a formal complaint even if complainant's identity is unknown

What to Do When You Receive a Report



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Emergency Removal 106.44(c)

- Emergency: Immediate Threat to Physical Health or Safety
- Arising out of the Allegations of Sexual Harassment
- Based on an Individualized Risk and Safety Assessment
- Must Allow for Immediate Challenge
- 106.44(d) Authorizes Administrative Leave for Employees

Assessing a Report or Complaint

Actual Knowledge?

- Report to T9 Coordinator?
- Report to Official with Authority?

Jurisdiction & Scope?

- Over the Parties?
- Education Program or activity?
- In the U.S.?

Sexual Harassment?

- Quid Pro Quo or Clery Crime?
- Severe and Pervasive and Objectively Offensive?

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If Allegation Does Not Trigger Title IX Response

- implement supportive measures
- refer to non-Title IX misconduct process
- adjust code of conduct process for non-T9 sexual misconduct

Title IX Sexual Harassment or Code of Conduct Violation?

Supportive Measures

- Referral to counseling, medical/health services
- Referral to employee assistance program
- Mutual no-contact orders
- Student financial aid counseling
- Altering campus housing
- Altering work arrangements
- Safety planning
- Providing campus escorts
- Providing academic accommodations
- Increased campus security
- Timely warnings
- Visa and immigration services
- LOAs/ scheduling modifications

Dismissals 106.45(b)(3)

- Doesn't meet definition or jurisdictional requirements
- Complainant wants to withdraw complaint
- Respondent is no longer enrolled or employed
- Specific circumstances prevent school from gathering evidence sufficient to reach a determination

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Mandatory Dismissals 106.45 (b)(3)(i)

1. *would not constitute sexual harassment as defined in 106.30, even if proved,*
2. *did not occur in the recipient's educational program or activity,*
3. *or against a person in the United States*

Discretionary Dismissals 106.45 (b)(3)(ii)

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

Dismissals 106.45 (b)(3)

- apply to individual allegations or to an entire complaint
- the parties must receive written notification and reasons for any dismissal
- mandatory dismissals are appealable

Informal Resolution 106.45(b)(9)

- Can only be offered after a formal complaint is filed
- Must provide written notice disclosing allegations, details and consequences of the process
- Both parties must voluntarily consent in writing to the informal process
- Cannot be used in cases where respondent is an employee
- Either party may withdraw from the informal process, which would trigger the formal grievance process
- Facilitators must be trained and impartial, free from conflicts & bias
- School may not pressure/condition informal resolution on enrollment or employment

Reasonably Prompt Timeframes 106.45(b)(1)(v)

- School determines timeframe as long as it is reasonably prompt
- Must balance due process and fundamental fairness with prompt resolution
- Includes appeals and informal resolution processes
- Administrative delay is not sufficient “good cause”

Reasonably Prompt Timeframes 106.45(b)(1)(v)

<u>Delays & Extensions</u>

- Must be Temporary, Limited & for Good Cause
- Must provide written notice to parties

Reasonably Prompt Timeframes 106.45(b)(1)(v)

- Administrative Delay
  - *School's inefficiency not good cause*
- Availability of Parties & Witnesses
- Law Enforcement Activity
- Accommodations for Disabilities
- Language Assistance

Reasonably Prompt Timeframes 106.45(b)(1)(v)

Concurrent Law Enforcement Activity

- distinct, separate and independent processes
- obligated to respond to T9 allegations irrespective of criminal matter
- law enforcement investigation could justify a delay or extension
- delay cannot be protracted or open-ended

Availability of Parties & Witnesses

- must try to accommodate individuals' schedules to allow their meaningful participation
- parties may participate remotely
- a party or witness cannot indefinitely delay the grievance process by refusing to cooperate
- the process can proceed even in the absence of a party or witness
- must keep nonparticipating party informed

Part 2 Re-cap & Key Takeaways

1. *A school must respond if the allegations meet the definition of sexual harassment, the conduct occurred in the scope of the school's educational program or activity, in the US, and both the respondent and complainant are enrolled/engaged or under the school's control*
2. *Once triggered the school must respond with supportive measures that ensure complainant's continued access to the educational program or activity, whether or not, a formal complaint is filed; the Coordinator will conduct an assessment to determine next steps*
3. *If a case doesn't fall within the scope of T9 it must be dismissed and may be handled under the school's other policies*
4. *Informal resolution is an option for schools if the parties agree after a formal complaint is filed and must adhere to the informal resolution requirements*
5. *The entire process must be resolved within reasonably prompt timeframes that allows for reasonable delay or extensions for good cause*

Part 3 Preview

<u>The Grievance Process</u>

- *Investigation*
- *Hearing & Cross-examination*
- *Appeal*
- *Sanctions & Remedies*