



The Clery Act, VAWA and Title IX: Implications for Sexual Misconduct Response and Investigations

Wednesday, May 3, 2023 | 2:00 p.m. ET

Sponsored by



CUPA-HR Webinar

Presenter



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Vice President,
Equity Compliance & Civil
Rights Services



D. STAFFORD
& ASSOCIATES



D. Stafford & Associates & NACCOP

D. Stafford & Associates is a professional consulting firm specializing in campus safety and security, compliance, sexual misconduct response and investigation, and law enforcement issues on college and university campuses in both the United States and Canada.

DSA conducts independent audits of Clery Act and Drug-Free Schools and Communities Act compliance, Sexual Misconduct/Title IX policy development and reviews, and independent, trauma-informed investigations of sexual harassment, misconduct and interpersonal violence.

We also house the *Procedural Justice Training Institute*.

NACCOP is the *National Association of Clery Compliance Officers and Professionals*. It is a national association dedicated to training practitioners of the many and nuanced requirements of the Clery Act.



2023 Title IX Regs 4 Hour Course

(INCLUDES COMPLYING WITH CLERY-VAWA)

June 12, 2023

12:00 pm – 4:00 pm Eastern Time

June 15, 2023

11:00 am – 3:00 pm Eastern Time

June 20, 2023

11:00 am – 3:00 pm Eastern Time

June 21, 2023 (Focused on 2-year institutions)

12:00 pm – 4:00 pm Eastern Time

Register now to save your space!

LINK: [NACCOP Title IX Classes – NACCOP](https://www.naccop.org/naccop-title-ix-classes)

(<https://www.naccop.org/naccop-title-ix-classes>)

NACCOP Member = \$290 / Non-Member = \$340



Objectives

- Understand the major requirements of the Clery Act (VAWA) and Title IX as they relate to the VAWA offenses;
- Discuss implications of requirements on institutional response; and
- Discuss readiness for new draft regs as well as preparing for impact/change/shift to institutional responsibilities.

Poll Question

Is your institutional Title IX Policy and associated procedure(s) also compliant with the VAWA Amendments (2013) to the Clery Act?

- Yes
- No
- I'm not sure

Poll Question

Is your institutional NON-Title IX Policy and associated procedure(s) also compliant with the VAWA Amendments (2013) to the Clery Act?

(This is the policy and procedure you use to resolve all forms of sex-harassment that don't meet the threshold for Title IX. This includes, for most of you, student conduct (for students) and EEO/Title VII policy for employees.)

- Yes
- No
- I'm not sure

Have a Question?



Submit questions to our presenters
using the Chat.

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act




Consumer Reporting Law

Title IX of the Education Amendments of 1972



Anti-Discrimination in Education Law



“Sexual
Harassment”

Fondling

Domestic Violence

Dating Violence

Stalking

Rape

QPQ Sex Harassment

Statutory Rape

Incest

Hostile Environment Sex
Harassment



By embracing both the spirit of the law as well as the letter of the law, we can create safer campuses AND avoid costly fines and reputational damage.

Title IX of the Education Amendment of 1972

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”

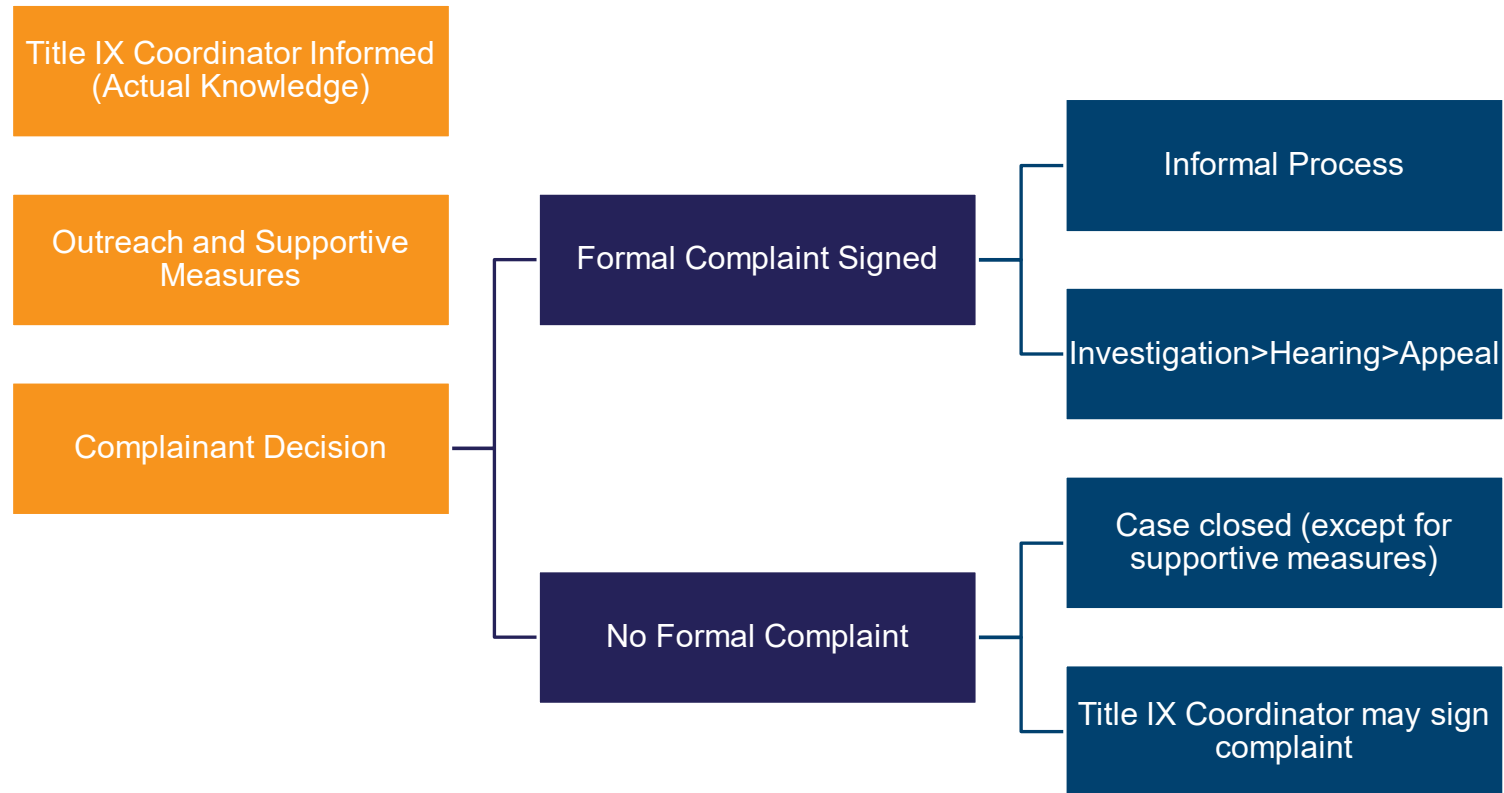
2020 Title IX Regulations (Discrimination on the Basis of Sex)

The goal of the 2020 Title IX Regulations is to require Title IV funded institutions to “promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures; follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation, or a Title IX Coordinator decides on the recipient's behalf that an investigation is necessary; and provide remedies to victims of sexual harassment.”

(Summary of the Major Provisions of This Regulatory Action; Federal Register)



2020 Title IX Case Flowchart-Where we are now...





NEW! APRIL 2023

ATHLETIC NPRM



The four key takeaways from the Athletics NPRM are:

1. Any blanket ban on transgender athlete participation in sports consistent with their gender identity will be considered a violation of Title IX.
2. Any criteria adopted to limit or deny a student's eligibility to participate based on their gender identity will have to be substantially related to the achievement of an important educational objective, such as preventing sports-related injuries or fairness in athletic competition.
3. Few, if any, sex-related eligibility criteria for elementary or middle school athletics participation will comply with Title IX.
4. Any exclusionary policies will have to be carefully crafted to address the particular concerns of the sport, grade and education level, and level of competition at issue. No one-size-fits-all policies will be permissible.

Sources: <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams#:~:text=Today%2C%20the%20U.S.%20Department%20of%20Education%20is%20releasing, longstanding%20goal%20of%20ensuring%20equal%20opportunity%20in%20athletics.>

<https://www.bclplaw.com/en-US/events-insights-news/departments-of-educations-new-proposed-rule-for-transgender-participation-in-athletics.html>

2023 PROPOSED Major Changes to 2020 Regs (anticipated May 2023)

Jurisdiction

Definitions

“Responsible employees”

Duty to respond

Complaint vs “signed formal complaints”

Role of advisor of choice

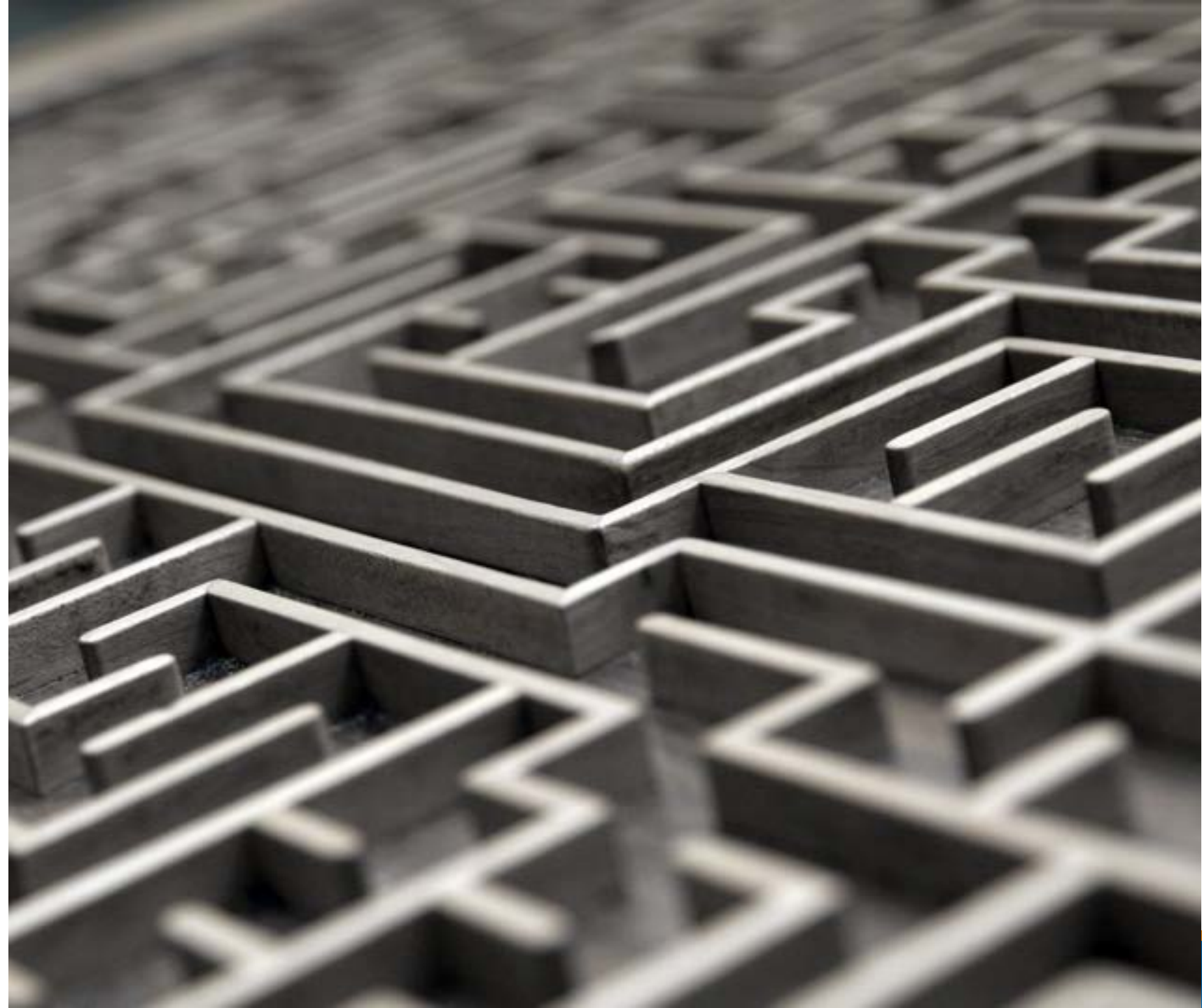
Supportive measures

Separation of duties

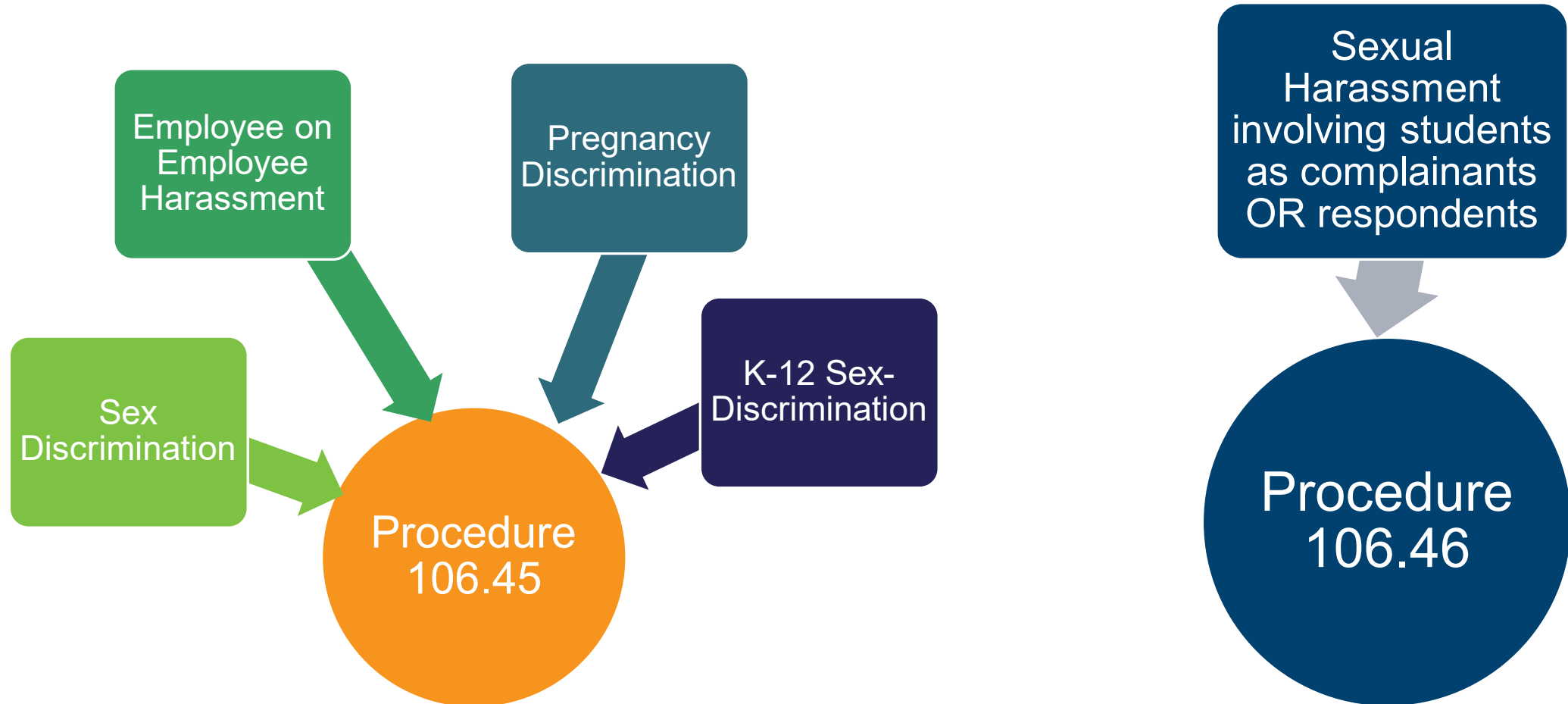
Live hearings

Notice requirements

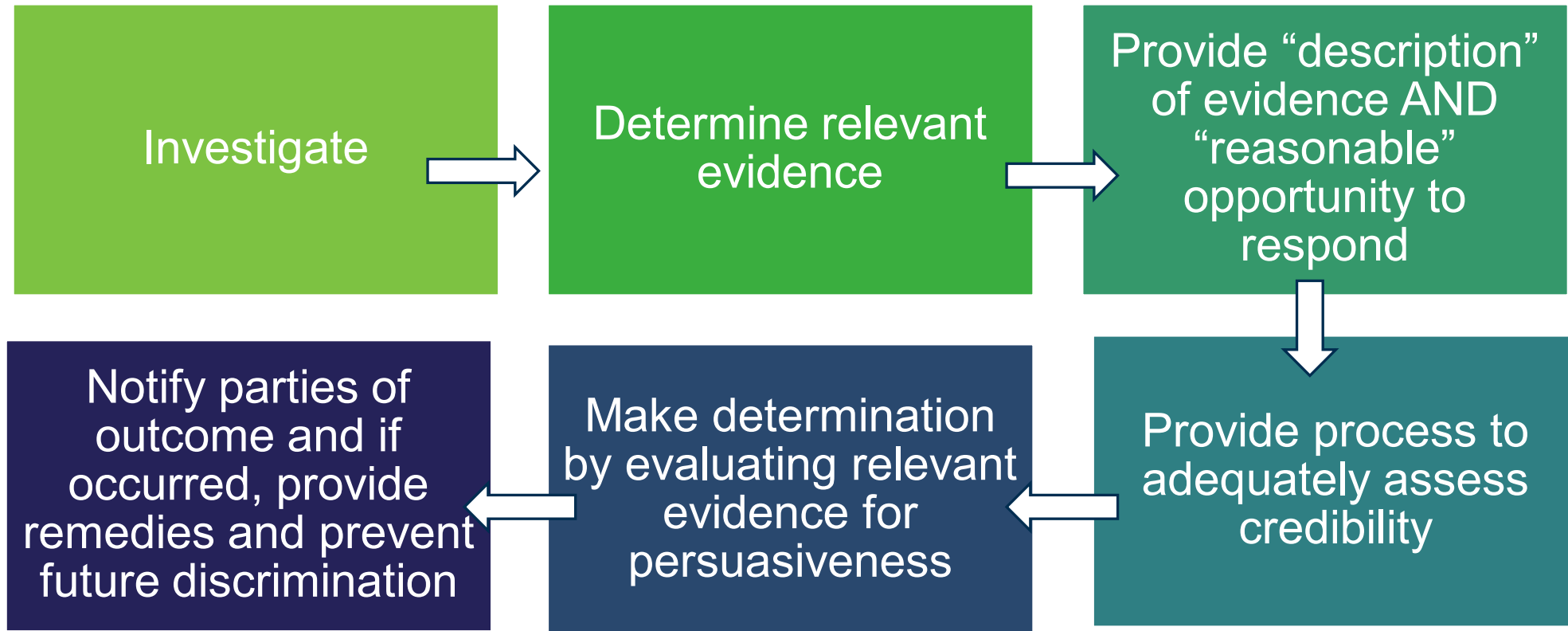
Pregnancy, Parenting, Associated Medical Conditions



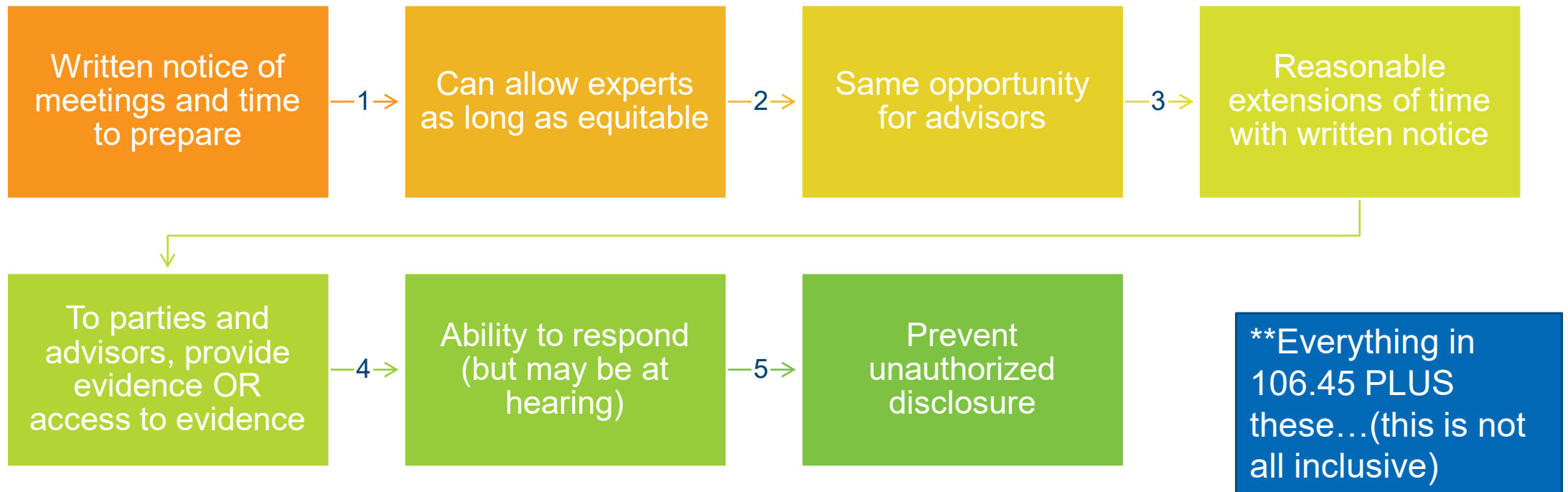
Key Anticipated Changes 2023: Two Grievance Procedures



New Proposed 2023 106.45-Sex Discrimination Grievance Procedures



New Proposed 2023 106.46-Sex-based Harassment Grievance Procedures





Jurisdiction of Title IX

A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

Pregnancy and Parental Status Discrimination 2023 Draft: Intent

“The Department describes its proposed revisions to the Title IX regulations related to pregnancy or related conditions as well as sex discrimination related to marital, parental, and family status, to provide clarity to recipients about their obligation not to discriminate against students or employees who are pregnant or experiencing pregnancy-related conditions.

Parental Status

“Parental status, as used in §§ 106.21(c)(2)(i), 106.37(a)(3), 106.40(a), and 106.57(a)(1), means the status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:

- (1) A biological parent;
- (2) An adoptive parent;
- (3) A foster parent;
- (4) A stepparent;
- (5) A legal custodian or guardian;
- (6) In loco parentis with respect to such a person; or
- (7) Actively seeking legal custody, guardianship, visitation, or adoption of such a person.”



Parental, family, or marital status; pregnancy or related conditions means...



Pregnancy or related conditions means:

- (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
- (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.



Pregnancy Leave

“In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.” (Proposed 106.57)



Lactation

Institutions must provide reasonable break time for an employee to express breast milk or breastfeed as needed.

Employees will continue being paid.

Institutions must ensure the availability of a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing.



And, reconciling all of these with requirements found in the Pregnant Workers Fairness Act (in effect June 27, 2023) and the FLSA as extended by the PUMP Act...

And, training,
training, and
more employee
training!





How do your institutional policies, procedures, and practices align with the CURRENT requirements?

Remember, even with NEW Title IX Regs, the VAWA Amendments to Clery are unchanged at this time...

Key Requirements of the Clery Act



Collect, classify, and count crime reports/statistics



Public disclosures-Timely Warning Notices and Emergency Notifications



Publish Annual Security Report



Submit crime statistics to the Department



COUNTING CRIME STATISTICS



Three Part Test

1. Was the crime reported to a Campus Security Authority?
2. Is the crime a Clery Act crime?
3. Did the crime occur on or within the institution's reportable Clery geography?

Campus Security Authorities (CSA)

Campus police/security

Security responsibility

Individual or organization where crimes should be reported

An official with responsibility for student and campus activities

Who is never a CSA?



Professional Counselors



Pastoral Counselors

REPORT



A CSA'S FUNCTION IS TO
REPORT ALLEGATIONS OF
CLERY ACT CRIMES MADE IN
GOOD FAITH.

Clery Act: Employee Reporting Considerations



Clery Act--CSAs

Campus police department

Those responsible for security

Individuals to whom crimes should be reported

“Officials with significant responsibility for student and campus activities”

Local law enforcement



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I am a “Super CSA!” That means that my institution can expect most, if not all, reports of sexual misconduct will be reported to me instead of police.

TITLE IX AS SUPER CSA

- *Where do most reports of sexual assault, dating violence, domestic violence and stalking get reported?
- *When they are reported to EEO/Equity/Conduct/HR/Title IX, how are those reports reported to the institution’s CCO?
- *Are they reported in a timely way?
- *Did your institution have the opportunity to fulfill it’s federal Clery Act reporting requirement?

Reporting Considerations



Title IX - “Officials with authority”

Title IX Coordinator

Official(s) who can institute corrective measures on behalf of the school

Any other person who is designated by the institution as a person who shall report

Clery Act - CSAs

Campus police department

Responsible for security

Individuals to whom crimes should be reported

“Officials with significant responsibility for student and campus activities”

Local law enforcement

Calendar Years (CY) 2016 – 2018

Criminal Offenses or Primary Crimes (Crimes Reported By Hierarchy)	Calendar Year	On Campus (Including Residential)	Non-Campus	Public Property	Totals	On Campus (Residential Only)
Murder & Non -Negligent Manslaughter	2018	0	0	0	0	0
	2017	0	0	0	0	0
	2016	0	0	0	0	0
Manslaughter by Negligence	2018	0	0	0	0	0
	2017	0	0	0	0	0
	2016	0	0	0	0	0
Rape	2018	11	2	0	13	11
	2017	25	2	0	27	18
	2016	14	2	0	16	10
Fondling	2018	11	1	0	12	9
	2017	4	1	0	5	4
	2016	0	3	0	3	0
Incest	2018	0	0	0	0	0
	2017	0	0	0	0	0
	2016	0	0	0	0	0
Statutory Rape	2018	0	0	0	0	0
	2017	0	0	0	0	0
	2016	0	0	0	0	0
Robbery	2018	0	0	0	0	0
	2017	0	0	0	0	0
	2016	0	0	1	1	0
Aggravated Assault	2018	3	0	2	5	1
	2017	4	0	0	4	4
	2016	3	1	0	4	3
Burglary	2018	32	9	0	41*	31
	2017	7	1	0	8	6
	2016	3	1	0	4	1
Motor Vehicle Theft	2018	0	0	0	0	0
	2017	0	0	0	0	0
	2016	0	0	0	0	0

COUNTING CRIME STATISTICS: CLERY CRIMES

Three Part Test

1. Was the crime reported to a Campus Security Authority?
2. Is the crime a Clery Act crime?
3. Did the crime occur on or within the institution's reportable Clery geography?



Primary Crimes



Hate Crimes



Arrests and Referrals for Drug, Liquor, and Weapon Violations



Dating Violence, Domestic Violence, and Stalking Incidents (VAWA Offenses)

Clery Crime Categories

Clery Reportable Crime Categories

Murder/Non-negligent Manslaughter*

Manslaughter by Negligence*

Sex Assault*

- Rape
- Fondling
- Incest
- Statutory Rape

Robbery*

Aggravated Assault*

Burglary*

Motor Vehicle Theft*

Arson*

Arrests and Disciplinary Referrals for:

- Liquor
- Drugs
- Weapons

Domestic Violence

Dating Violence

Stalking

Hate Crimes for *, plus

- Larceny-Theft
- Simple Assault
- Intimidation
- Destruction/Damage/Vandalism of Property

Counting Clergy Crimes

If a crime is reported (and otherwise meets the three-part test) it is counted.

- Includes attempts
- Includes cases a DA would reject
- Includes cases of “not responsible”
- Does NOT include every conduct code violation

It is not the word used but the facts of the case that determine how it gets counted



COUNTING
CRIME
STATISTICS:

CLERY
GEOGRAPHY

Three Part Test

01

Was the crime reported to a Campus Security Authority?

02

Is the crime a Clery Act crime?

03

Did the crime occur on or within the institution's reportable Clery geography?

CLERY GEOGRAPHY

On Campus (& On-Campus Residential)

Public Property

Non-campus building or property

Geography (Clery) versus Jurisdiction (Title IX)

Geography is the defined physical area in which the Clery Act attaches. A crime **MUST** occur within the institution's physical Clery geography to be captured.

Jurisdiction generally describes authority to apply law to a certain area and/or to certain persons. For example, under Title IX, an act may not physically occur on campus, but if it occurs within certain programs between certain people, Title IX attaches.

CLERY REPORTING: PUBLIC DISCLOSURES

Public Disclosures



Daily Crime Log



Annual Security Report (ASR)



Emergency Notifications/Timely Warning Notices

Timely Warning/Emergency Notification

	TIMELY WARNING (TWN)	EMERGENCY NOTIFICATION (EN)
Legal Standard:	Serious or continuing threat	Immediate threat to health and safety
Circumstance:	Clery-reportable crimes that have been reported (occurred in past)	Clery-reportable crimes as well as other types of emergencies (happening right now or about to happen)
Audience:	Community-wide	Can send to a segment of the community, if appropriate
When Issued:	As soon as pertinent information is available	Upon confirmation of emergency (when possible)
Follow-Up:	Not Required	Required



Amended Notice

When you amend your Notice of Investigation to include new allegations, are you ensuring prompt reporting to your institution's Police/Public Safety unit for inclusion of newly reported Clery crimes?

Timely Warning Decisions

It DOES NOT
negate ongoing
risk just
because the
victim knew
their abuser...

EVERY Clery-reported crime must be assessed on a case by case basis for timely warning purposes

The nature and type of the crime

The continuing danger to the campus community

Confidentiality

VAWA REQUIREMENT: TW reports shall be provided to students and employees in a manner that is timely, that withholds the names of victims as confidential.

There is no requirement to withhold the perpetrator's identity.



PROCESS INTERSECTIONS



Clery-VAWA-Written Explanation of Student or Employee's Rights

(b)(11)(vii) “When a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student’s or employee’s rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section. . . .”

Written Explanation of Rights and Options



- 1. The importance of preserving evidence** that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order
 - Not required but recommended: Where to obtain forensic exams, contact info, does not require police report and can have exam now, decide later
- 2. How and to whom the alleged offense should be reported**
 - List any person or organization that can assist the victim
 - Recommended: Also include community organizations

Written Explanation of Rights and Options

3. **Notification of the victim's option to**
 - n Notify proper law enforcement authorities, including on-campus and local police
 - n Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses
 - n Decline to notify such authorities
4. **The rights of victims and the institution's responsibilities for**
 - n Orders of protection
 - n "No contact" orders
 - n Restraining orders
 - n Similar lawful orders issued by a criminal, civil, tribal, or institutional



Written Explanation of Rights and Options

5. **To students AND employees about existing:**
 - Counseling, health, mental health services
 - Victim Advocacy
 - Legal Assistance
 - Visa and Immigration Assistance
 - Student Financial Aid
 - Other services available for victims

6. **Options for, available assistance in, and how to request changes to (if requested and reasonably available)**
 - Academic, living, transportation, working

Written Explanation of Rights and Options

7. Confidentiality

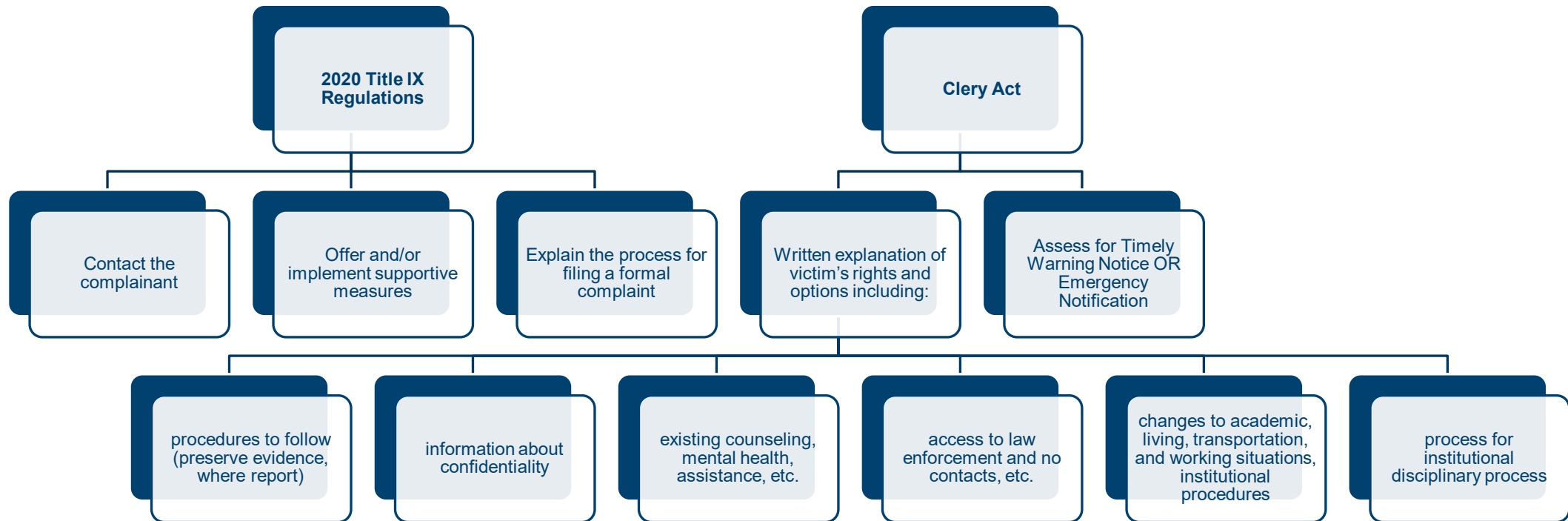
- Publicly available recordkeeping has no personally identifying information about the victim (not required for respondent but best practice in most cases)
- Accommodations and protective measures are confidential (to the extent they can be without impairing the ability to provide them)

8. Disciplinary Procedures

- An explanation of the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as required



Response to “Actual Knowledge”



Clery Requirements for Disciplinary Proceedings

Anticipated timelines (“reasonably prompt”)

Decision-making process

How to and options for filing a school complaint (with contact info)

How school determines which process to use

Who makes decisions

Include employee procedures

Use procedures regardless of Clery geography



Advisors Per the Clery Act

- *Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice
- *Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties



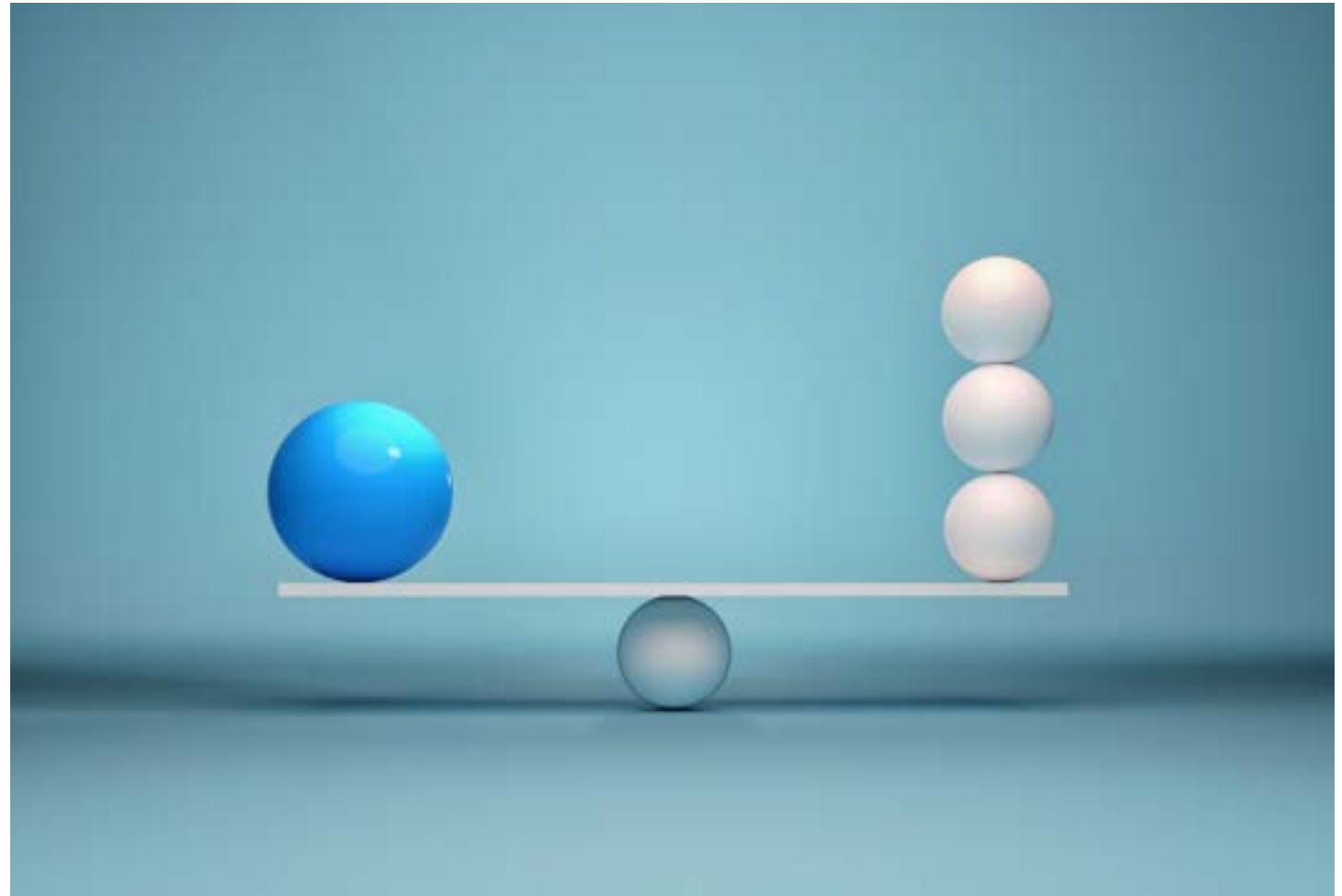
STANDARD OF EVIDENCE

2020 Title IX Regulations

- Either the preponderance of the evidence standard or the clear and convincing standard
- Must be the same for all sexual misconduct

Clery Act

- Any standard of evidence ... must include in policy
- Would not prohibit using different standards for different groups



Informal Resolutions

2020 Title IX Regulations

- Can offer, but may not require
- Not allowed for “employee on student” sexual harassment
- Party may withdraw up to a point

Clery Act

- Written information about procedures the institution will follow for VAWA offenses (does not differentiate between formal vs informal)

Formal Complaint Rights

2020 Title IX Regulations

- Treat equitably with goal to restore/preserve access to education; due process for respondent
 - Include presumption of not responsible
 - Include any discipline for false statements
- Reasonably prompt time-frames*
 - Describe the range of sanctions
 - Describe range of supportive measures

Clery Act

- Prompt, fair and impartial investigation and resolution
 - Anticipated timeframes
 - List all possible sanctions for each offense (employees and students)
 - Consistent with policy and transparent
 - Not required to list all protective measures

Formal (Live
Hearing)

2020 Title IX Regulations

- Requires live hearing with cross examination by advisor
- 2022 Proposed-Live hearing made available but not required

Clery Act

- Clery is silent regarding live hearing

2020 Written Determination



Title IX

Identification of the allegations

Procedural steps taken from receipt through determination

Findings of fact supporting the determination

Conclusions regarding the application of code of conduct to the facts

Result (responsibility, rationale, sanctions, remedies for each allegation)

Appeals procedures

When results become final (post appeal)

Clery Act

Result (include any sanctions and rationale for results and sanction)

Appeals procedures

Any change to the result

When such results become final

CLERY-VAWA-BIAS
FREE AND TRAINING
FOR “OFFICIALS”
(INCLUDING
CAMPUS POLICE, T9,
HR, ETC...)

- Annual training on the issues related to dating violence, domestic violence, sexual assault and stalking and on how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability



CLERY REQUIREMENTS FOR OFFICIALS

Training must be described in ASR

***Annual

Should include (at a minimum):

- Relevant evidence and how it should be used
- Proper interview techniques
- Basic procedural rules for conducting a proceeding
- Avoiding actual/perceived conflicts

Can be in person or electronic (webinar or video)



Appeals

2020 Title IX Regulations

- Must offer both parties an appeal
- Based on specific grounds

Clery Act

- Not required (but must provide notice if allowed along with appeal procedures)
- Simultaneous written decision describing result, sanction, any changes to the result, when it becomes final

Recordkeeping

2020 Title IX Regulations

- 7 years

Clery Act

- Retain all records used in compiling ASR for three years from the latest publication of the report to which they apply (in effect 7 years)

What do I do now?

1. Do you have a Clery Compliance Committee? If so, are you a member? (If not, why not?)
2. Ensure all Title IX and non-Title IX (but sex) policies and procedures comply with the Clery Act.
3. Ensure Title IX team members understand their obligations as CSAs to report Clery reportable offenses to the reporting structure of the institution.
4. Ensure HR, Title IX, Student Conduct, Campus Police, etc. are ALL providing victim's of VAWA offenses with their Written Explanation of Rights and Options (*) (and, how is this being documented?) This document is IN ADDITION to Title IX rights or state criminal justice system rights....
5. Ensure when you update policies/procedures this summer in compliance with new regs, that you are working with your Clery Compliance Officer to ensure compliance in your institution's Annual Security Report, webpages, and with key groups on campus.
6. Come to zoom or in-person summer training! Stay tuned for classes specific to key topics pertinent to HR and Title IX! Register at www.naccop.org and www.dstaffordandassociates.com

Visit <https://www.naccop.org/general-resources> and look at “NACCOP Whitepaper and Resources” for info on Clery Compliance Committees, VAWA compliance, and more.

*This resource is provided to NACCOP members only via the Annual Journal. For membership, visit [Join – NACCOP](#). (NACCOP provides a free webinar series on key topics as part of annual membership.)



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