The following information was presented to members of the Northeast Alabama Community College Hearing Panel and other administrators, staff, and faculty who are assigned to participate in the Title IX process. The presentation was made by Mr. Allen Dodd, Attorney at Scruggs, Dodd, and Brisendine Attorneys, P.A., located in Fort Payne, Alabama. Use of the content of this presentation outline is prohibited without the expressed written consent of Mr. Dodd (207 Alabama Avenue, SW, Fort Payne AL 35968; Phone: 256-845-5932).

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Title IX Fall 2020 Update

I. Definitions of Newly Applicable Terms

A. Gebser/Davis standard: a school can be held responsible for sexual harassment if these criteria are met:

1. The sexual harassment is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"
2. The school exercises "substantial control" over the harasser and the context of harassment;
3. The school has "actual knowledge" of the sexual harassment.
4. The school is not "deliberately indifferent" to sexual harassment

B. Actual knowledge: A school has actual knowledge of sexual harassment when the Title IX Coordinator becomes aware of the sexual harassment, or when any other employee whom the school has designated with such authority becomes aware of sexual harassment. At NACC this includes any division director, dean, director, supervisor, advisor, or campus security authority.

1. This replaces the previous constructive knowledge standard, which held schools liable if they "should have known" about sexual harassment.
2. According to some courts, actual knowledge does not require absolute certainty that harassment has occurred, but there must be something more than an awareness of a mere possibility of harassment.
3. Other court have found that if a school knows of an employee's propensity or proclivity to sexually harass children, that may constitute actual knowledge for a later victim's Title IX claim.
4. The words used in a report may matter. One court, for instance, held that plaintiff's two complaints of boys "bothering her" did not constitute actual notice of sexual harassment.
5. If the only employee who knows about the misconduct is the employee who engaged in the conduct, that knowledge will not be imputed to the school.

C. Deliberate indifference: A school district is only deliberately indifferent to acts of student-on-student harassment if its response to the harassment, or lack thereof, is clearly unreasonable considering the known circumstances.

D. Sexual harassment: unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access.

The definition also includes any instance of

1. Quid pro quo harassment by an institution's employee
2. "The Big Four"
   a) Sexual Assault (as defined in the Clery Act)

b) Dating Violence (as defined in the Violence Against Women Act (VAWA)

c) Domestic Violence (as defined in VAWA)

d) Stalking (as defined in VAWA)

E. Clery Act Definitions

1. Sexual Assault (Sex Offenses). Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.

a) Rape

b) Fondling

c) Incest

d) Statutory Rape

F. VAWA Definitions

1. Dating violence: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

a) The existence of such a relationship shall be based upon the reporting party's statement with consideration of the following factors:

b) The length of the relationship

c) The type of relationship

d) The frequency of interaction between the persons involved in the relationship.

2. Domestic violence: A felony or misdemeanor crime of violence committed

a) By a current or former spouse or intimate partner of the victim;

b) By a person with whom the victim shares a child in common;

c) By a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner;

d) By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or

e) 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 in which the crime of violence occurred.

(1) Domestic violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

3. Stalking: : Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

a) Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property.

b) Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling. Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim

G. Consent: According to the Department of Education, the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies. NACC adopts the statutory definition, which reads as follows:

Ala.Code 1975 § 13A-6-70. Lack of Consent

(a) Unless otherwise stated, an element of every offense defined in this article is that the sexual act was committed without the consent of the victim.

(b) Lack of consent results from either of the following:

(1) Forcible compulsion.

(2) Being incapable of consent.

(c) A person is deemed incapable of consent if he or she is either:

(1) Less than 16 years old.

(2) Incapacitated.

(d) Consent to engage in sexual intercourse, sodomy, sexual acts, or sexual contact may be communicated by words or actions. The existence of a current or previous marital, dating, social, or sexual relationship with the defendant is not sufficient to constitute consent. Evidence that the victim suggested, requested, or otherwise communicated to the defendant that the defendant use a condom or other birth control device or sexually transmitted disease protection, without additional evidence of consent, is not sufficient to constitute consent.

H. Credibility The commentary implicitly warns schools not to use the word "credible" when making a decision about whether to open a formal complaint

1. In the commentary to the rules, the Department rejected a suggestion to require schools to open a formal complaint in certain cases in which a Title IX Coordinator deems a complainant's report credible but the complainant does not wish to proceed.

2. In the commentary, the Department highlighted its focus in the new rules on ensuring that no determination on the merits of a claim is made until after the complaint process has been completed.

3. Deeming a report of sexual harassment "credible" at such an early stage in the process "would defeat the goal of following a grievance process to reach reliable outcomes."

I. Terms for Parties:

1. Complainant/respondent – DOE says "reporting party" could be used instead of complainant

2. 3rd party "reporter" has no role in investigation or resolution\

3. Victim, Survivor, Perpetrator: these terms are only used after adjudication.

J. Sex Discrimination: treatment of a complainant or respondent may constitute sex discrimination in violation of Title IX

II. Grievance Procedure Requirements

A. Treat complainants and respondents equitably; an equitable resolution must include remedies for the complainant where a finding of responsibility against the respondent has been made, with such remedies designed to restore or preserve access to the recipient's education program or activity, and due process protections for the respondent before any disciplinary sanctions are imposed.

B. Require an investigation of the allegations and an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

C. Require that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent; and that a recipient ensure that coordinators, investigators, and decision-makers receive training on the definition of sexual harassment and how to conduct an investigation and grievance process—including hearings, if applicable—that protect the safety of students, ensure due process protections for all parties, and promote accountability; and that any materials used to train coordinators, investigators, or decision-makers not rely on sex stereotypes and instead promote impartial investigations and adjudications of sexual harassment;

D. Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

E. Include reasonably prompt timeframes for completion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal, and including a process that allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension, and the reasons for the action; good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities;

F. Describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility;

G. Describe the standard of evidence to be used to determine responsibility;

H. Include the procedures and permissible bases for the complainant and respondent to appeal if the recipient offers an appeal; and\

I. Describe the range of supportive measures available to complainants and respondents.

III. Investigation Requirments:

A. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties;

B. Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;

C. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

D. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient 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;

E. Provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate;

F. For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient under § 106.45(b)(3)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination. All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant. If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;

G. Provide both parties an equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

H. Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under § 106.45) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response.

I. Written notice required upon filing of formal complaint

IV. Formal Complaints

1. A formal complaint may be initiated in one of two ways:

a) filed by a complainant

b) signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.

2. When might a Title IX Coordinator sign to initiate a formal investigation? The Title IX Coordinator may consider a variety of factors, including a pattern of alleged conduct and the involvement of violence, weapons, and similar factors in a complainant's allegations, in deciding whether to sign a formal complaint. The Coordinator may also consider the seriousness of the alleged harassment, the age of the student harassed, and whether there have been other complaints or reports of harassment against the alleged harasser.

a) The institution wishes to investigate allegations in order to determine whether it has probable cause of employee sexual misconduct that affect the recipient's ESSA obligations, and

b) A Title IX Coordinator receives multiple reports of sexual harassment against the same respondent.

3. Upon receipt of a formal complaint, a recipient must provide written notice to the parties of the recipient's grievance procedures and of the allegations. Such notice must include sufficient details (such as the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of the alleged incident, if known) and provide sufficient time to prepare a response before any initial interview. The written notice must also include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The notice must inform the parties that they may request to inspect and review evidence under § 106.45(b)(3)(viii). Additionally, the notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process. Also, if the recipient decides later to investigate allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B), the recipient must provide notice of the additional allegations to known parties. SECTION 106.45(B)(2)

B. Right to Records: All investigation materials must be provided to both parties.

C. Equal Protections Exceptions: The Final Rule notes that §106.45 contains procedural protections that apply equally to both parties with three exceptions:

1. "one provision that treats complainants and respondents equitably instead of equally (by recognizing a complainant's interest in recipient-provided remedies, and a respondent's interest in disciplinary sanctions imposed only after a recipient follows a fair process);

2. one provision that applies only to respondents (a presumption of non-responsibility until conclusion of a fair process);

3. one provision that applies only to complainants (protection from questions and evidence regarding sexual history). I

D. Advisors:

1. The DOE acknowledges that a party's choice of advisor may be limited by whether the party can afford to hire an advisor or must rely on an advisor to assist the party without fee or charge.

2. The status of any party's advisor (i.e., whether a party's advisor is an attorney or not), the financial resources of any party, and the potential of any party to yield financial benefits to a recipient, must not affect the recipient's compliance with the new rules.

3. While the final regulations do not require the recipient to pay for parties' advisors, nothing the in the final regulations precludes a recipient from choosing to do so.

V. Informal Resolution

A. New rules forbid informal resolution of sexual harassment complaints by students against employees.

B. The same requirements that apply to Title IX Coordinators, investigators, and decision-makers now also apply to any individuals who facilitate informal resolution processes.

C. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.

D. Waiver of rights is now forbidden as a condition of informal resolution

E. At any time prior to reaching a determination regarding responsibility, the College may initiate and facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. A school may not require the parties to participate in informal resolution, and may not offer informal resolution unless a formal complaint is filed. A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints.

F. If the College determines that informal resolution may be appropriate, it will provide written notice to both parties which includes the following:

1. The allegations;

2. The requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations;

3. Any consequences resulting from the informal resolution process, including the records that will be maintained or could be shared;

4. The range of possible sanctions that may be imposed on the respondent as part of an informal resolution, which may include expulsion.

G. Initiation of informal resolution proceedings will require the written consent of each party. Informal resolutions, including sanctions, must be voluntarily agreed to by each party.

H. At any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution and resume the grievance process with respect to the formal complaint.

I. Review of NACC Specific Rules

End.