

# **The New Title IX Regulations: Policies, Procedures, and Practical Implementation**

*Putting the Pieces Together by August 14, 2020*

Presented By:

**The Institutional Response Group | Cozen O'Connor**

**Gina Maisto Smith, Chair**

**Leslie Gomez, Vice Chair**

**June 8, 2020**

## A Message from Cozen O'Connor

We are living in unprecedented times. The words "I can't breathe" resonate over and over in our minds as we think about the tragic and heartbreaking events that have unfolded in the last several

months. We are all grieving for the lives lost and the families who have been left behind. We are all trying to make sense of what has happened and how we can move forward. We are all looking for ways to help and support one another. We are all looking for hope.

At Cozen O'Connor, we are committed to providing the highest quality legal services to our clients. We are committed to integrity, honesty, and transparency. We are committed to being a force for good in the world. We are committed to being a part of the solution.

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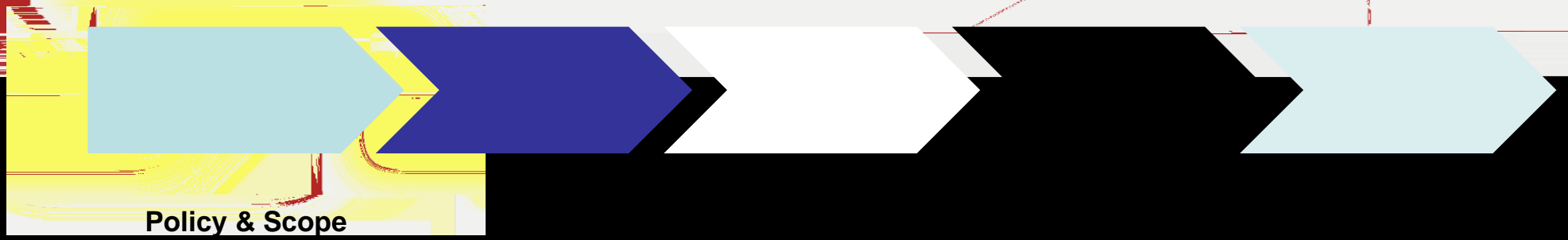


# Today's Webinar

Following an introductory webinar, *A First Look at the New Title IX Regulations*, this is the first in a series of webinars focusing on implementation hosted by Cozen O'Connor's Institutional Response Group (IRG). This webinar will:

- Explore **decision making frameworks** to implement the prescriptive and discretionary aspects of the regulations;
- Outline **policy frameworks** to effectively navigate the myriad policy components of the new regulations;

# Introducing the Webinar Series



# **Introducing the Webinar Series**

# **Institutional Response Group**

**Leslie Gomez**

**Maureen P. Holland**

**Michael Stackow**



**Now What?**



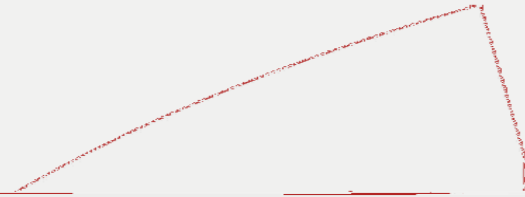
# Silver Lining

# Maintaining Calm

# Decision-Making Considerations



# Approach to Implementation



# Effective Preparation: Mapping Current State

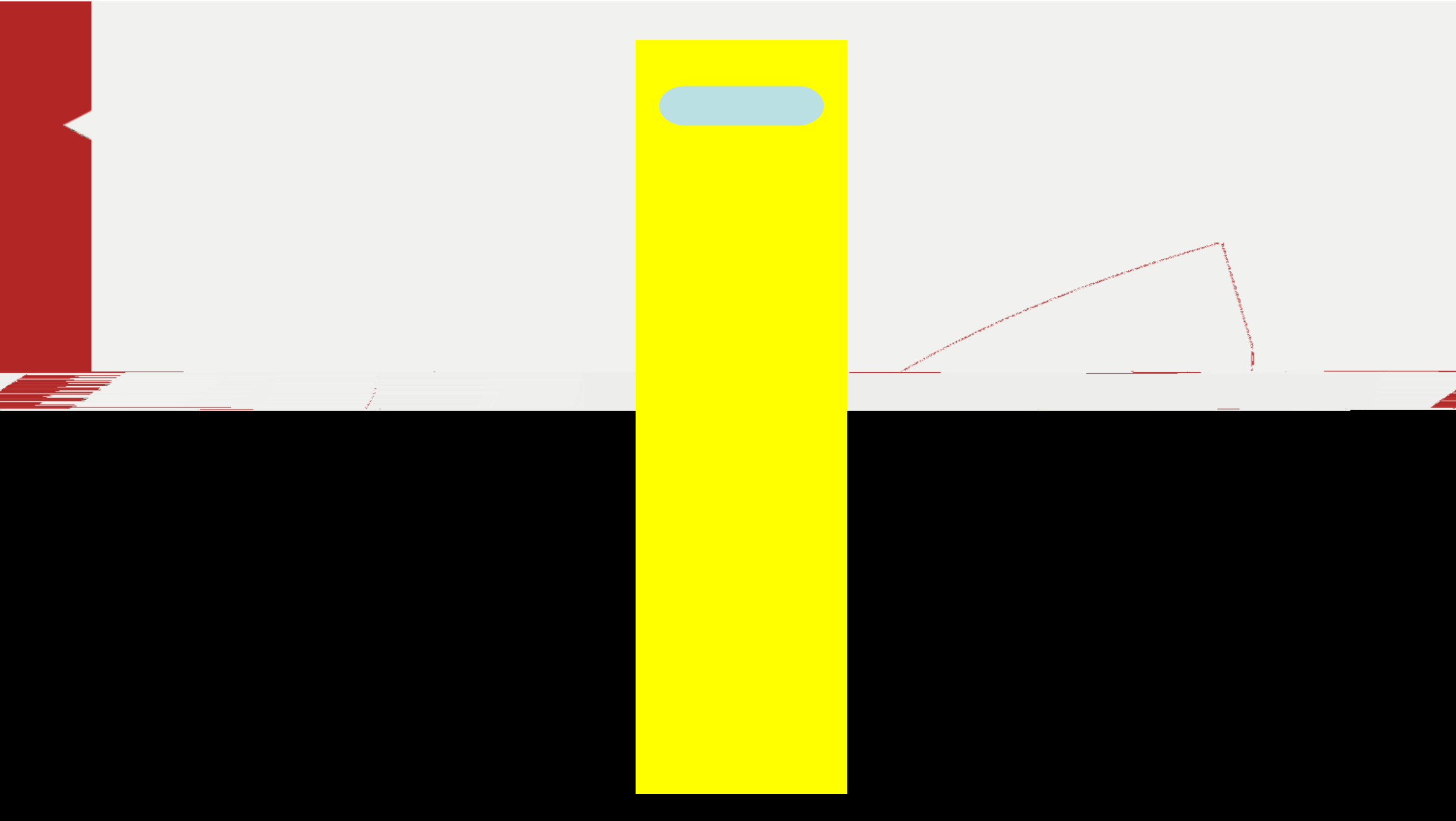
- Policies and Procedures
  - Students
  - Faculty
  - Staff
- Training and Education
  - Students
  - Faculty
  - Staff
- Current institutional Issues
- Website
- Implementers
- Infrastructure/Systems
- Resources

# Effective Preparation: Identify Delta

- Review new legal requirements
- Identify delta between current state of operation and new regulations
- Identify delta between current state of operation and effective, informed practices
- Identify key elements to inform design of future state
- Map implementation plan based on evidence, culture, and available resources

# Implementation Rubric

- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values







# Regulations: “Best Practices”



# Framing Principles

1

“A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”

2

“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.”

3

“A recipient’s response must treat complainants and respondents equitably by offering supportive measures . . . to a complainant, and by following a grievance process . . . before the imposition of any disciplinary sanctions or other actions that are not supportive measures . . . against a respondent.”

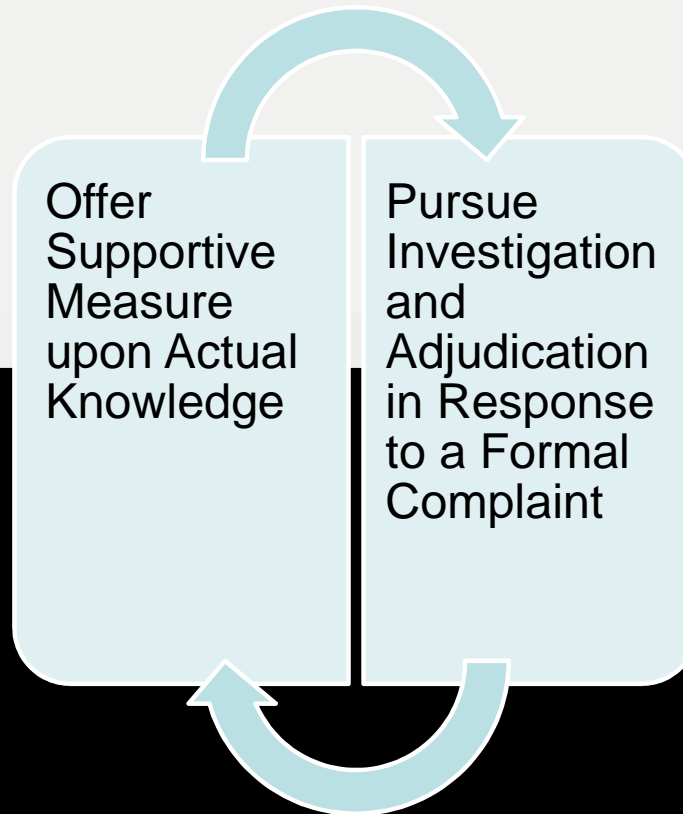
4

“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

5

“If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sexb1a9.96 Tf 1 0 0 1

# Understanding Two Key Provisions



# Impact of Jurisdictional Requirements

Title IX Regulations issued May 6, 2020; § 106.45(b)(3)(i). See also Preamble, at 46, 237, 241, 251, 258, 457, 472, 481, 482, 485, 496, 631, 636, 642, 645, 660, 681, 730, 907, 939, 962, 963, 964, 1302, 1333, 1516, 1518, 1524, 1558, 1572, 1575, 1578, 1591, 1595, 1689, 1764, 1796, 1826.

# Balancing



# Decision-Making Framework

## Prescriptive Elements

- Required language of the regulations

## Discretionary Elements

- Many details regarding implementation are left to the discretion of the institution



# **Key\* Prescriptive/Required Elements**

- Respond promptly in a manner that is not deliberately indifferent
- Treat complainants and respondents equitably
- Promptly contact Complainant to discuss supportive measures

# **Key\* Prescriptive/Required Elements**

- Must provide written notice upon receipt of a formal complaint

# Key\* Prescriptive/Required Elements

- Provide for a live hearing
- Permit each party's advisor to ask the other party and any witnesses all relevant questions
- Allow cross-examination to be conducted directly, orally, and in real time by the party's advisor
- Provide advisor without fee or charge to conduct cross-examination at the hearing
- Not rely on any statement of a party or witness who does not submit to cross-examination

# **Key\* Prescriptive/Required Elements**

- Issue a written determination regarding responsibility

# Key Discretionary Elements

- Policy and procedural framework
- Scope of conduct to be prohibited and addressed
  - Conduct beyond Title IX jurisdiction
    - Title VII sexual harassment
    - Outside of the United States
    - Outside of the education program or activity
  - How to adjudicate after mandatory dismissal
  - Accepting a formal complaint from Complainant not participating or seeking to participate in education program or activity
- Supportive measures
  - Process for challenging emergency removal
  - Factual predicate for use of more restrictive supportive measures

# Key Discretionary Elements

- Employee reporting responsibilities
  - Officials with authority to impose corrective measures
  - Responsible employees
- Process considerations
  - Extend formal complaint to all complaints?
  - Provide advisor at all stages?
  - Permit cross-examination at all hearing types?
- When should the Title IX Coordinator file a formal complaint
  - Outline factors to be considered
  - Process for evaluating

# Key Discretionary Elements

- Standard of evidence
  - Preponderance of the evidence or clear and convincing
- Decision-maker for hearing
  - Administrator
  - Panel
  - External professional
- Structure of the institutional response
- Personnel and staffing
- Designation of reasonably prompt timeframes
- Systems for documentation





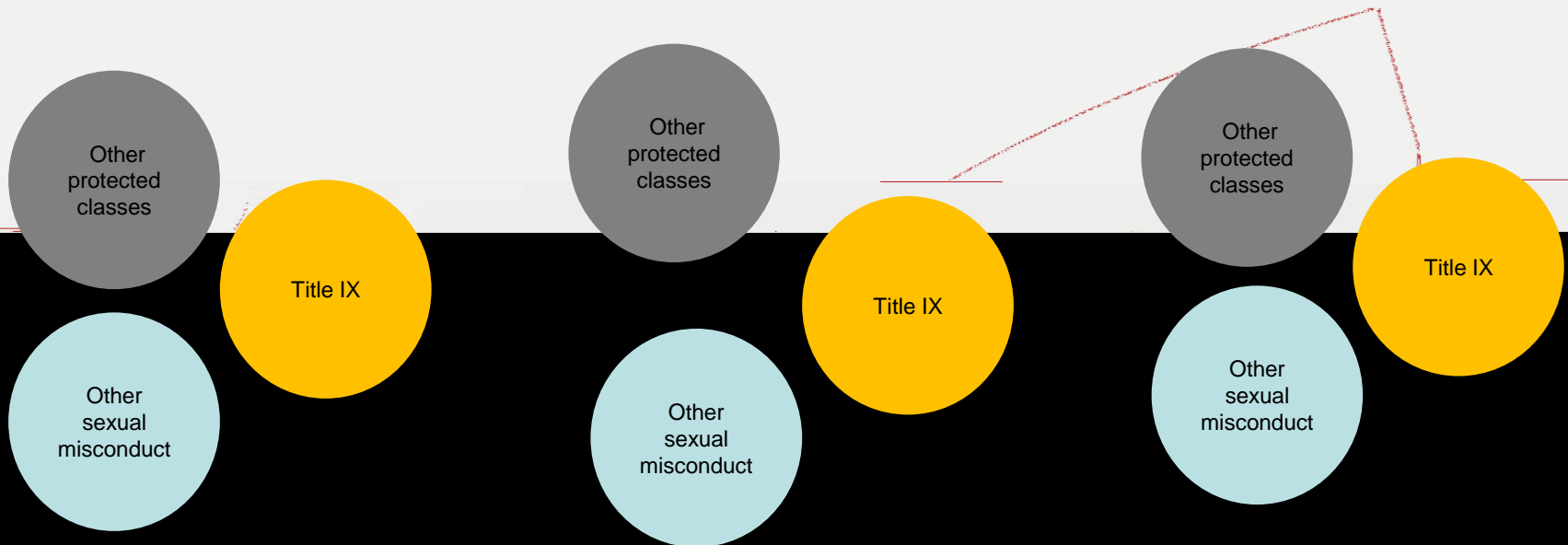
# Model Policy Elements

- Statement of Institutional Values
- Scope & Jurisdiction
- Notice of Non-discrimination
- Role of the Title IX Coordinator
- Definitions of Prohibited Conduct
- Privacy vs. Confidentiality
- Reporting Options
- Confidential Resources
- Supportive Measures
- Education and Prevention

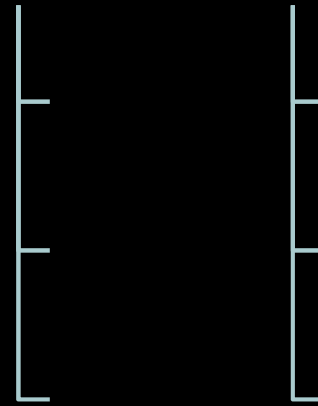


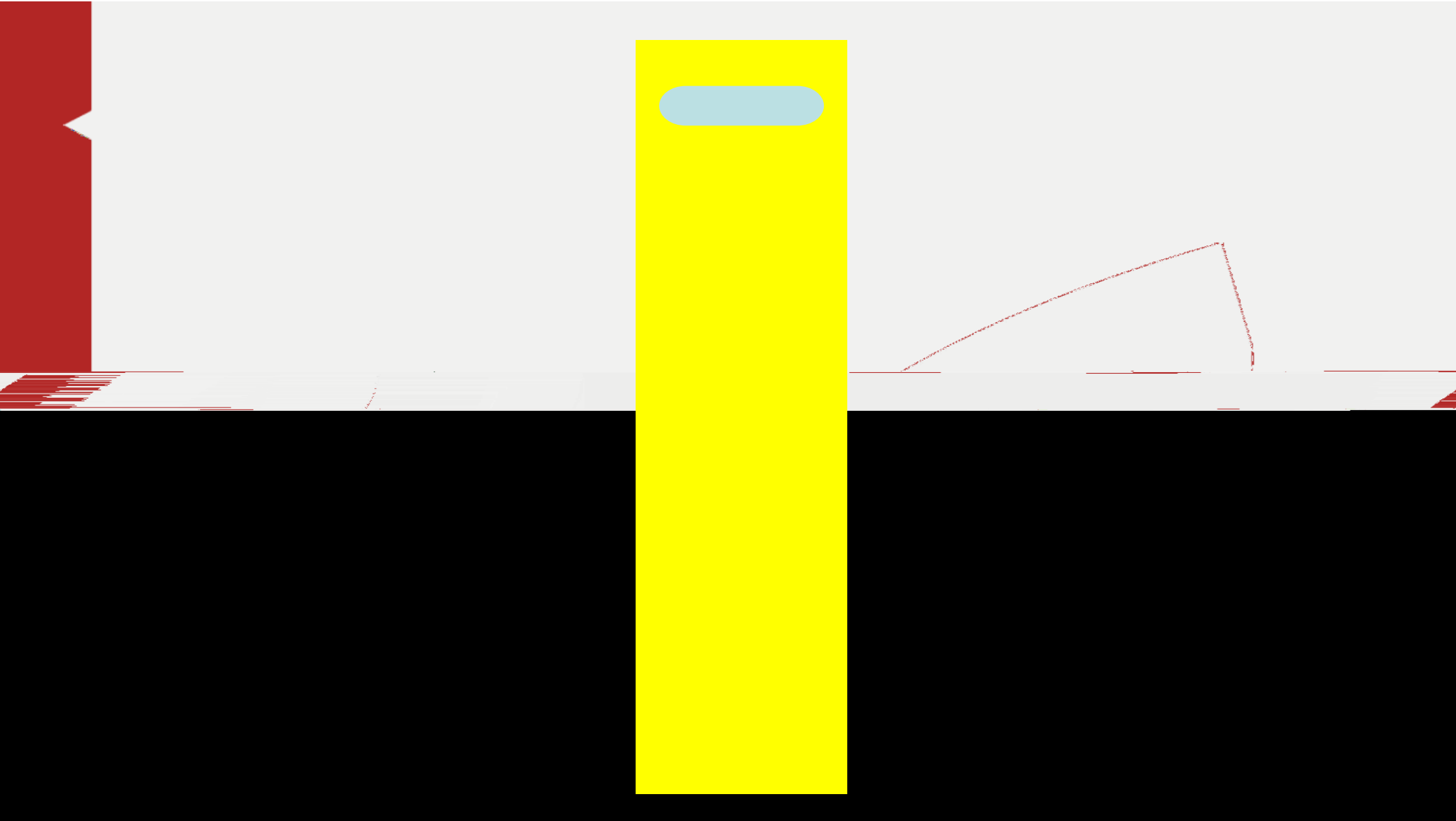


# Policy Framework Options



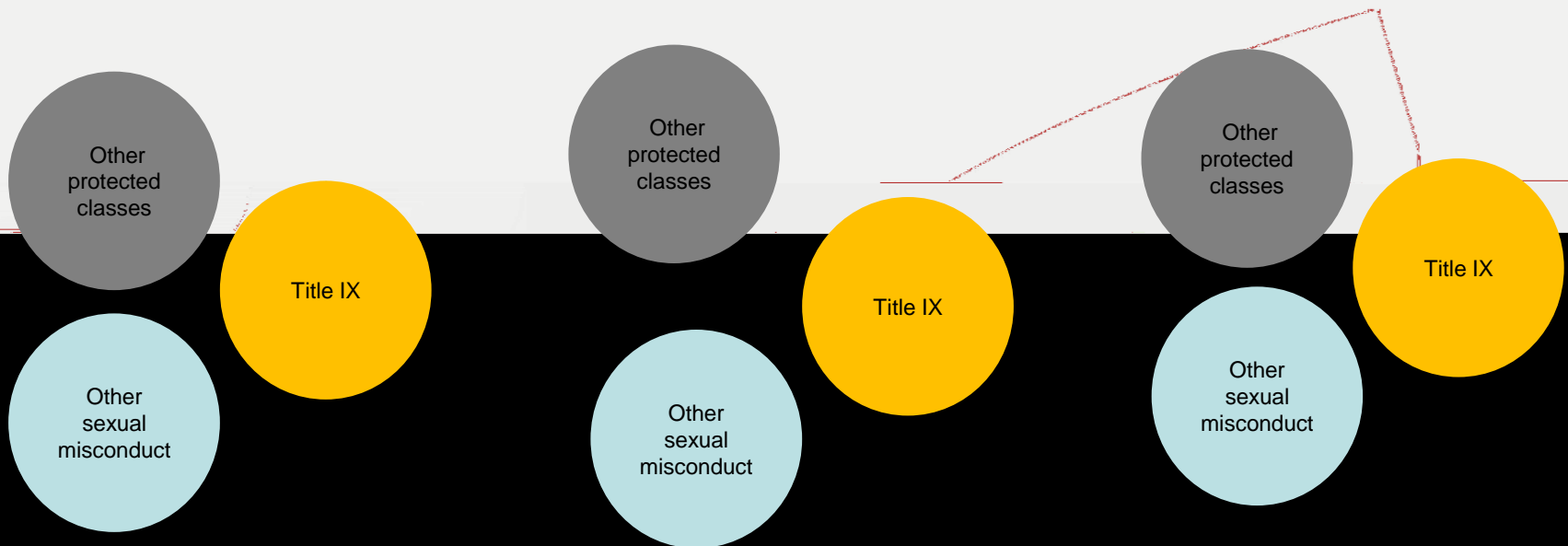
# Procedural Framework







# Policy Framework Options





# All Protected Class Misconduct

Challenges	Benefits
Additional process in cases where not legally required	

# All Sexual Misconduct\*

Challenges	Benefits
Additional process in cases where not legally required	Uniform approach to resolution for all instances of sexual misconduct
Additional resources (e.g. advisors, hearing officers, appeal officers, time)	Message to community about equal importance of all forms of sexual misconduct
Implications of expanded scope in terms of personnel (e.g. broader and more complex apparatus, timeliness of resolutions)	More streamlined process: fewer decision points
Community perception that school is applying Title IX prescriptive regulations too broadly (extends to cover additional conduct than is required under the law)	Parity between Title IX sexual harassment and other sexual misconduct, regardless of jurisdiction; accessible and user-friendly
Distinguishes sexual harassment from other protected classes	

# Only Title IX Sexual Harassment

Challenges	Benefits
Hyper-technical application of regulations that is inconsistent with value of treating all sexual misconduct equally	Ease of policy drafting
Less alignment with other processes; complex and discretionary decision-making throughout	Does only what is required under the law; narrowly tailored
Schools will need to determine how to regulate conduct beyond Title IX jurisdiction; continuing effects analysis	Narrows scope of changes needed; requires additional resources in the fewest number of cases
Still need to consider Title VII for employee conduct, necessitating parallel or tiered processes	Easier to explain changes to the community because changes are tied strictly to legal requirements



# Consistent Elements Across All Matters

- Intake and outreach process
- Supportive measures
- Neutral, impartial and trained implementers
- Investigative protocols
  - Notice
  - Opportunity to be heard
- Documentation

# Pressure Test

- What

# Scenario # 1

An RA was doing rounds and passed by one of their resident's whiteboards

## **Scenario # 2**

A student reports that a professor routinely gives lower grades to men based on gender. The reporting student says she has been the professor's TA for the last 2 years and cannot be silent anymore.



# Scenario # 3

## Scenario # 4

Zoe and Rachel are both PhD students and are married. They live off-campus in a private apartment. Zoe report that, sometimes when Rachel gets drunk, she hits Zoe. Zoe says it has only ever happened at their apartment.

## Scenario # 5

A student, Nikole, works out at the café on campus. It is open to the public. Simon is a local who often patronizes the café. Simon has made it clear that he has a crush on Nikole. Somehow, Simon got Nikole's phone number and has been sending her incessant text messages. Simon also pieced together Nikole's schedule and has started to show up outside of buildings when she's leaving class. One time, she even saw him waiting for her outside her



## Scenario # 7

A former faculty member, Jill, reported that, during her time at your institution three years ago, she was subjected to repeated unwelcome hugs and flirtatious comments from Rob—a fellow faculty member who still works at your school. Jill has no current affiliation with your institution. For the last three years, she has worked at another school.

Sexual Harassment (as defined by the regulation)

## **Scenario # 8**

An employee, Alan, reported that his supervisor, Elyse, openly and graphically discussed her sex life in the workplace including showing explicit photos and videos



# Putting the Pieces Together



# Effective Preparation: Designing Future State

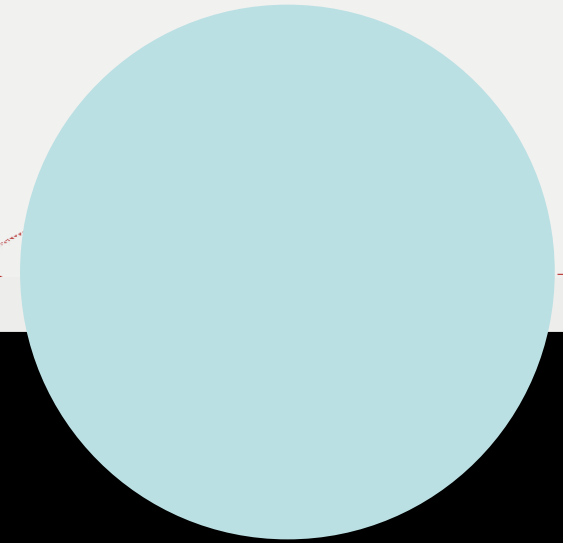
- Policies and Procedures
  - Document delta for project planning and measurable implementation
  - Appoint point person/team
  - Philosophical decision-making
  - Practical implementation
- Current institutional Issues
  - Coordination team
  - Communications – messaging
  - Audiences
- Implementers
  - Current staff
  - Future staffing needs

# Effective Preparation: Designing Future State

- Training
  - Audiences
  - Frequency
  - Platforms
- Website
  - Consider centralized landing page
  - Remove outdated material
- Infrastructure and Systems
- Resources
  - Pan-institutional responsibilities
  - Sharing of costs
  - Creative funding and support

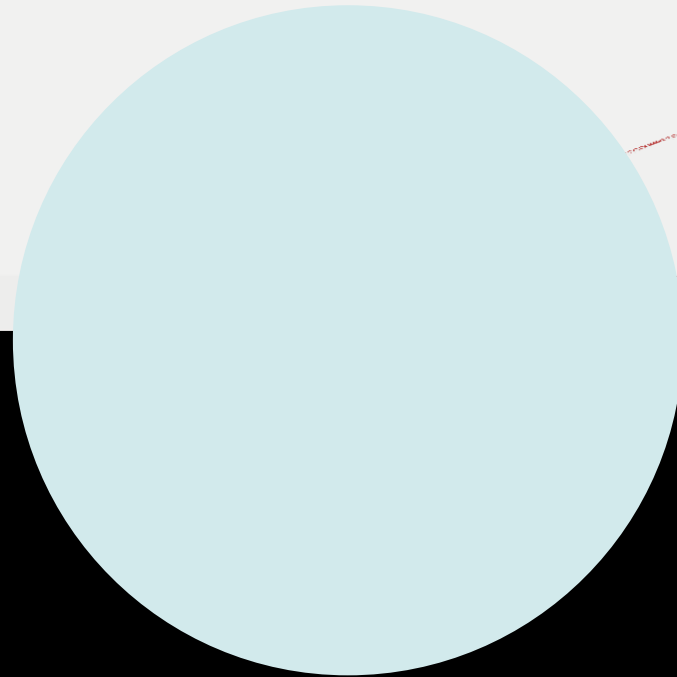


# Designing Future State





# People



# Process: Considerations

- Charge
- Remote Engagement
- Culture of Institution
- Levels of Community Engagement
- Facilitation/Chair
- Decision-Making (consensus, voting)
- Operational Ground Rules/Guidelines
- Continuing Work

# Process: Getting Started

The slide features a light gray background with a white banner at the top. On the left, there is a solid red vertical bar with a white, jagged, arrow-like shape pointing right. On the right, there is a red-outlined triangle pointing left. At the bottom, there is a solid black horizontal bar. The text 'Process: Getting Started' is centered in the white banner in a bold, black, serif font.



# Products: Communications

## Internal: Team

- **What** process plan is
- **Who** will be involved
- **What** the timeline is
- **Who** is communicating with media/community
- **Where** questions should be directed
- **What** can be shared

## External: Community

- **What** they can expect
- **Who** is running point
- **What** the timeline is
- **Where** they can go for more information
- **How** they can give feedback

# Messages

- Communicate core messages and changes to campus and community constituents, including what is not changing
- Frequency
- Method
- Expectations
- Any feedback loops

## **Products: Campus Education and Awareness Efforts**

- Orientation
- Trainings (in person and online)
- Other policies
- Prevention efforts
- Advocacy groups
- Written materials
- Emissaries

# Products: Websites and Online Presence

- Social media
- ALL webpages (double check links)
- Identify a communications subcommittee
- Need a webmaster: SEO functions
- Other connections (community, etc.)



# Weekly Project Management Plan

## 10 Weeks To Go:

Attend webinars from subject matter experts

Form working group for planning and implementation

Gather all current policies/procedures

Identify where requirements in the new regulations differ from current practices

Gather key stakeholder group and present key components of new regulations

Assess resource needs, identify gaps and personnel re-alignment options

Map key decisions to be made (e.g. responsible employees, evidentiary standard, non-Title IX cases)

Plan key decision-making process with working group; incorporate stakeholder feedback

# Weekly Project Management Plan

## 9 Weeks To Go:

Gather info about training options, share options with working group, book/reserve training  
Inform IT/IS about records retention policy, technology needs, web publication requirement

# Weekly Project Management Plan

## 7 Weeks To Go:

- Review available template/model policies
- Draft new written policies and procedures
- Share draft policies and procedures with working group

## 6 Weeks To Go:

- Incorporate working group feedback into draft of policies and procedures
- Share draft policies and procedures with key stakeholder group for feedback
- Gather all templates, forms, handouts, signs, print materials and assess for accuracy/consistency



# Weekly Project Management Plan

## 5 Weeks To Go:

Incorporate stakeholder feedback into policies and procedures and finalize  
Update all templates, forms, handouts, and web and print materials, arrange printing  
Training – TIXC, investigators, decision-makers, appeals officers, informal resolution  
facilitators

## 4 Weeks To Go:

Draft internal training and education for campus partners – residence life, student conduct,

# Weekly Project Management Plan

3 Weeks To Go:

# Use of Slides

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- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
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# The Institutional Response Group

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