

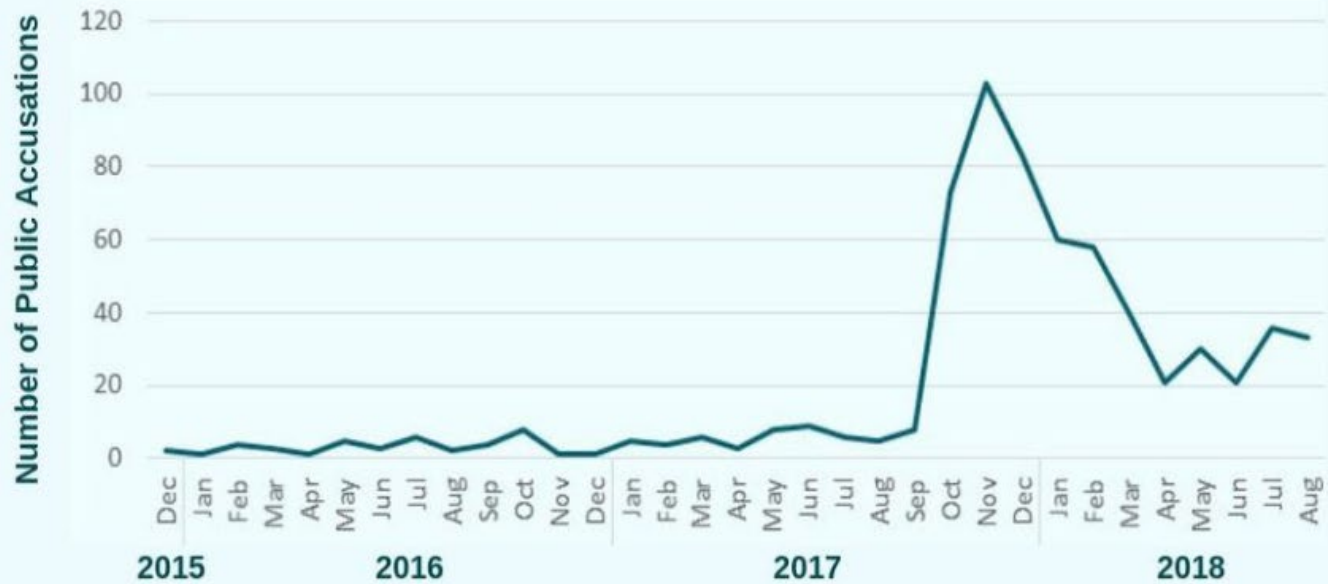
#METOO – WHAT TO DO WHEN YOU RECEIVE REPORTS OF SEXUAL ASSAULT

March 7, 2019

**D. Jean Demchak, Managing Director
Global Education Leader**

#MeToo Index

Temin's #MeToo Index Public Accusations of Sexual Misconduct



© Temin and Company

#MeToo Accusations by Month TEMIN AND COMPANY

The Weinstein Effect

- Tone and tenor of coverage has changed.
 - 24/7 news media cycle.
 - Facebook and Twitter.
- In 2017, 70% of Americans described sexual harassment as a “very serious problem”.
 - In 1998 – at the height of the Clinton impeachment scandal – only 36% did.
- Women are believed.
 - High profile women come forward.
 - Media coverage.
 - Across industries.



Statistics are Mixed

- Prevalence of sexual harassment in the workplace:
 - Almost **half** of U.S. women say they have been sexually, verbally, or physically harassed at work.
 - But a 2016 EEOC study found that **70%** of victims never come forward (some studies as high as 90%).
- Frequency
 - EEOC saw a **fourfold** increase in visitors to the “sexual harassment” portion of its website after the Weinstein allegations broke
 - EEOC filed 66 harassment lawsuits, including 41 that included sexual harassment allegations
 - more than a **50% increase** from 2017.
- Severity
 - EEOC recovered almost **\$70M** for victims of sexual harassment in FY 2018, up from only \$47.5M in FY 2017.
 - Consider indirect costs as well – decreased productivity, increased turnover and reputational damage

How Has #MeToo Impacted Mediation?

| Pre-#MeToo | Post #MeToo |
|--|---|
| <ul style="list-style-type: none"> Assumed confidential | <ul style="list-style-type: none"> Confidentiality paid for or agreed upon in advance |
| <ul style="list-style-type: none"> Liquidated damages for breach of confidentiality | <ul style="list-style-type: none"> Happy if you can get confidentiality |
| <ul style="list-style-type: none"> Plaintiff did not demand discipline of the accused harasser | <ul style="list-style-type: none"> Demanding termination of alleged harassers |
| <ul style="list-style-type: none"> A “high” demand was \$350,000 | <ul style="list-style-type: none"> Regularly receiving demands in excess of policy limits- \$1 Million or more |
| <ul style="list-style-type: none"> High degree of confidence that a case would settle at the end of a long day of mediation | <ul style="list-style-type: none"> Cases not settled through mediation; mediators charging extra for additional time spent |

Retaliation

- Even if the underlying harassment claim fails, a retaliation claim may prevail.
- Standard – show protected activity, an adverse employment action, and a causal connection between the two.
- It is the most frequently alleged basis of discrimination.
- Can take many forms – reprimand, termination, transfer to a less desirable position or schedule or demotion.
- Claimants are not limited to employees who allege harassment, but also include employees who have reported the harassment of others (bystanders).

Coverage and Claims Issues

- Coverage implications:
 - Rape/sexual assault (BI exclusion)
 - Conduct exclusion
 - Beware newer “sexual misconduct” exclusions
 - Covered/uncovered loss – stock options, severance, etc.
- Claims begetting more Claims:
 - Does the new environment lead to a rush to judgment against alleged harassers? Beware the wrongful termination/defamation backlash.
 - Overcorrection” leading to gender discrimination.
- Will juries be less tolerant of employers in this area given the national discussion? Most likely, yes.
- Other insurance lines potentially at issue:
 - Directors & Officers, Trustees & Officers, Educators Legal Liability
 - `General liability
 - Sexual misconduct liability

Risk Mitigation in the #MeToo Era

- Updated policies, procedures and training – “check the box” no longer good enough.
 - In-person, interactive.
 - Bystander training.
 - Concrete “real life” examples of prohibited conduct.
 - Establish a record of publication and training.
 - Implement multiple, anonymous reporting channels.
 - Emphasize anti-retaliation policy.
- Proportional discipline (reconsider “zero tolerance”).
- Hotlines and other ways to report incidents.
- Robust investigation
 - Human Resources
 - Legal in-house and outside counsel
- Leadership succession plans.

Positioning for Success

- Underwriting basics
 - What info is needed? How far back do underwriters look?
 - Tone at the top – executive/management sponsorship of initiatives.
 - In-person underwriter meetings of greater importance.
- Organization culture (and past practice in effectively addressing claims) will be an important factor in defending claims, and in EPL and D&O underwriting.
- Timely notification to EPL and other carriers.

Higher Education: In the Throes of SAM

News to bring it Home...

- The Clergy Abuse Crisis has cost the Catholic Church over \$3 billion.
- PSU has paid out more than \$90 million to settle more than 30 civil claims that involved Sandusky.
- In 2018, more than 300 women and girls reached a \$500 million settlement with Michigan State University
- In 2018, more than 463 former patients/students filed lawsuits accusing former USC gynecologist of sexual misconduct during their exams.

Reasons for Increased Costs...

1. Public awareness/#MeToo Movement
2. Plaintiff lawyers have adopted new trial techniques
3. SAM cases have become an easier target
4. Defense counsel strategies are outdated
5. An erosion of traditional defenses

Unprecedented Increase in Settlements & Verdicts?

- Public Awareness
- Plaintiff Attorneys Have Improved Trial Techniques
- Financial Gain.
- Traditional Defenses No Longer Effective
- Defense Attorneys Playing Catch-Up

MEDICAL PROFESSIONAL MISCONDUCT

Recent High Profile Incidents

Johns Hopkins Hospital: 2014

- Gynecologist secretly photographed and videotaped women's bodies in the examining room with a pen-like camera he wore around his neck.
- Investigators discovered roughly 1,200 videos and 140 images stored on a series of memory devices in his home.
- Over 8,000 patients, maybe more.
- Class action settled, \$190 Million.

Recent High Profile Incidents in Higher Education: 2018

University of Southern California

- Allegation
 - Sexual misconduct by a gynecologist (Student Health Services physician)
- USC admits failure to act on complaints.
- Two class action lawsuits with over 500 claims filed and growing daily.
 - Treated tens of thousands of women over 27 years at USC.
- Two insurance coverages affected thus far
 - Medical Professional Liability
 - General Liability
- Resignations Forced – President and others

Recent High Profile Incidents in Higher Education: 2018

Ohio State University

- Allegations:
 - Sexual misconduct by a faculty member and athletic department physician.
 - A hostile locker room, voyeurs.
 - Coaches and athletic department failed to act on complaints.
- Under investigation by hired law firm.
- Class action lawsuit filed +100 student athletes
- Two insurance coverages affected thus far
 - Medical Professional Liability
 - General Liability

Recent High Profile Incidents in Higher Education

2018 coaching contract includes clause that requires Title IX and University misconduct policy compliance.

- 2018 Coaching contract clause

(p) Failure by Coach to promptly report to Ohio State's Deputy Title IX Coordinator – Athletics or Ohio State's Title IX Coordinator any known violations of Ohio State's Sexual Misconduct Policy (including, but not limited to, sexual harassment, sexual assault, sexual exploitation, intimate violence and stalking) that involve any student, faculty, or staff or that is in connection with a university sponsored activity or event. For purposes of this Section 5.1(p), a "known violation" shall mean a violation or an allegation of a violation of Title IX that Coach is aware of or has reasonable cause to believe is taking place or may have taken place.

It is recognized that this sub-section (5.1(a)-(p)) encompasses findings or determinations of violations during employment of Coach at Ohio State or any other institution of higher learning.

Failure to report incidents while at prior institutions.

REGULATORY CONSIDERATIONS

Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017

- Any organization involved in youth sports will likely be held to an increased “standard of care” regarding reporting, training, policies and procedures, and periodic safety system reviews.
- Expands the list of individuals required to report child sexual abuse.
- Additional requirement to report suspicions to the US Center for Safe Sport if the organization is governed by a “National Governing Body” or “Paralympic Sports Organization”.
 - USA Basketball, USA Gymnastics, USA Swimming, Amateur Athletic Union organizations, etc.

Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017

- All youth sport organizations are likely required to offer and provide consistent training in “abuse prevention.”
- Requires sports organizations to establish reasonable procedures to limit one-on-one interactions between an adult and an amateur athlete who is a minor...without being in an observable and interruptible distance from another adult.
- Medical care and treatment must be in the presence of a second adult.

Title IX Overview and VAWA

Title IX. In the broadest sense, **Title IX** is a civil rights law that sought to end discrimination on the basis of gender in educational institutions. This includes sexual violence on college and university campuses. ... While the **Clery Act** is only **relevant** in higher education, **Title IX** also applies in K-12 settings.

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

—Title IX of the Education Amendments of 1972 to the Higher Education Act of 1965

The Secretary amends the Student Assistance General Provisions regulations issued under the Higher Education Act of 1965, as amended (HEA), to implement the changes made to the Clery Act by the Violence Against Women Reauthorization Act of 2013 (VAWA). These regulations are intended to update, clarify, and improve the current regulations.

Title IX Proposed Regulations

- Rulemaking Process
- Greater Clarity
- Increased Control for Complainants
- Fair Process
- Nature of a School's response to sexual harassment & assault
- Due Process protections and reliable outcomes

Title IX

- Student-on-Student Sexual Assault
 - Title IX activity predates 2011 Obama “Dear Colleague Letter”
 - Pendulum swing to “reverse” Title IX and state law claims
 - Trump Administration proposed regulations under review
- Sexual Abuse and Serial Predators
 - Media spotlight
 - Growing consciousness post-Sandusky
 - #metoo fueling outrage
 - Scared cows
 - New challenge: abuse of college students in higher education setting

Defining Sexual Harassment

- Definition broad to mean a wide variety of things in common parlance.
- Proposed regulations defines sexual harassment *actionable under Title IX* to mean any of three types of behavior:
 - A school employee conditioning an educational benefit or service upon a person quid pro quo harassment
 - Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school's education program or activity or,
 - Sexual assault as that crime is defined in the Clery Act regulations

What Triggers a School's Obligation to Respond?

- 1. Actual knowledge** of sexual harassment (or allegations) –reporting to a Title IX Coordinator constitutes knowledge
 - “an official with authority to take corrective action”
2. Alleged harassment must **involve conduct that occurred with the school's own program or activity** as Title IX's own wording applies to discrimination occurring “under any education program or activity” receiving federal funds.
 - **does not create an artificial bright-line between harassment occurring “on campus” vs “off campus”**
3. The alleged harassment must have been perpetrated against a person “in the United States” (i.e., study abroad programs) a necessary condition because the text of the Title IX statute limits protections to “person(s) in the United States.”

How Must a School Respond?

- Treat ALL reports of sexual harassment (as defined) whether or not the complainant files a formal complaint
 - Adopts rationale to hold schools liable when a school is “deliberately indifferent” which means “clearly unreasonable in light of the known circumstances”
 - “Respond meaningfully” to every report of sexual harassment which school has knowledge of
 - Activate grievance process to potentially punish perpetrator
- “Safe harbor” against findings of “deliberate indifference”
- If no formal complaint file, must offer complainant “supportive measures”

Serial Sexual Abuse and Serial Predators

- Serial sexual abuse defined:
 - Sexual abuse of more than one victim (either minors or adults)
 - Committed by **non-student** perpetrators
- Drive behaviors to prevent serial abuse from taking root
- No sacred cows – policies/procedures must apply uniformly
- Create culture of reporting and responding to incidents

2019 Changes: Motivation

- Leverage Compliance with Existing or Proposed Regulations
 - Minors – all states have laws to report suspected molestation to police/protective services
 - Adults– proposed Title IX regulations require institution with actual knowledge of **harassment** (includes sexual assault) to investigate and meaningfully respond

What to Do? Mitigation

Governance: Title IX Coordinator

The Title IX Program Officer is responsible for ensuring compliance with Title IX, overseeing training and education, and gathering and reporting information to the campus community. The Title IX Program Officer and Deputy Title IX Coordinators are available to answer any questions related to the Policy, Complaint Process, available resources and reporting options, and remedial and safety measures

Governance and Process

- Title IX Program Officer
- Deputy Title IX Coordinators include:
 - For Faculty
 - Undergraduate Students
 - Graduate Students
 - Medical Students
 - Staff and Administration
- Campus Hotline for anonymous reporting:
 - Call the Sexual Assault Response Line at 401-863-6000 for confidential crisis support and information
- Statement from President on Proposed Title IX Regulations
- Annual Outcome Report

Step To Consider to Mitigate Incidents

- Cannot ignore the first complaint, each must be investigated.
- Assure all staff and students have been educated on reporting procedures
- Leverage existing reporting and investigation procedures for all misconduct allegations.
 - Title IX Coordinator
 - Campus Police
 - Municipal Authorities
- Medical professional misconduct is extremely difficult to prove without evidence.
 - Many of the incidents alleged in all four cases occurred with a second medical professional in the room
- Hire an independent expert supported by other medical professionals for allegations of medical professional misconduct.

Ways Institutions Can Reduce the Risk of Immense Verdicts

1. Retain qualified defense counsel.
2. Secure plaintiff's deposition and an independent medical examination of the plaintiff.
3. Consider the potential application of a "lack of notice" defense. Keep in mind that some level of notice (generally actual or constructive) is necessary to hold a public institution liable for a SAM case.
4. Evaluate dispositive motions for summary judgment based on lack of notice, statute of limitations and/or causes of action that are not supported by the facts.
5. Consider early mediation.
6. If the case proceeds to trial, accept responsibility (without admitting liability) when applicable.
 - Have a theme, tell a story, personalize the defendants and provide a reasonable number (in the event you lose) rather than leave it up to the plaintiff counsel and the jury.
 - If plaintiff has yet to seek any psychological treatment, carefully weave this into your defense to mitigate the damages.

Governance – What a College President or Trustee should ask?*

*"Safeguarding Our communities From Sexual Predators:
What College Presidents and Trustees Should Ask"
United Educators, February 2019

Become Informed About Policies and Procedures

- What are the parameters of our sexual abuse policies?
- Do the Institution's sexual abuse standards and policies apply equally to employees at all levels?
- What are our Institution's options for reporting sexual abuse?
- What are the processes through which reports of sexual abuse are handled?
- What is our policy regarding background checks?

Be Intentional with Words and Actions

- Have we established clear expectations for receiving updates on sexual misconduct reports and investigations, both on a routine schedule and an emergent basis for certain inquiries?
- Have we articulated our expectation that policies are followed?
- Am I speaking out to foster a safe and inclusive environment on campus?

Understand the Campus Culture

- What trainings are offered for students, employees, and faculty?
- Which staff members are addressing issues of sexual abuse on campus?
- What resources do we have for victims?
- When did we conduct our last climate survey measuring sexual violence attitudes and prevalence on campus, and what were the results?

“Smart Steps to Take Now to Avoid
Title IX Litigation”

Step To Take as Prevention

- Reaffirm Your Commitment to Title IX Compliance and to Fairness
- Avoid Bias
- Manage Expectations
- Pay Attention to the Title IX Fundamentals and Share Lessons Learned
- Conduct a “Due Process Scan”
- Prepare for Change

*“Meeting challenges gives rise
to opportunities.”*

QUESTIONS?

Jean Demchak,
Managing Director,
Global Education Leader, Marsh
jean.demchak@marsh.com

860-938-1075

Frank D Cella
Managing Director,
Education Leader Central Zone, Marsh
frank.d.cella@marsh.com

847-644-5143

References and Resources

- **Counting the Cost of Child Sexual Abuse**, October 2018 , Kevin Williams, Division Manager, Genesis
- www.genesisinsurance.com
- **2019 Large Loss Report**, United Educators, www.ue.org
- Changing Business Models, Jim Hundreiser, PhD, Association of Governing Boards Institutional Strategies (AGB-IS)
- 2019 Global Risk Report, World Economic Forum, Davos Switzerland, 2019
- #MeToo Marsh Education Practice, 2019
- Complexities of Claims – Not for the Faint of Heart, Marsh Education Practice
- "Safeguarding Our communities From Sexual Predators: What College Presidents and Trustees Should Ask", United Educators, February 2019
- "Smart Steps to Take Now to Avoid Title IX Litigation", Debbie Osgood, www.higherlawblog.com

Title IX Background – Miscellaneous Excerpts

- **Title IX prohibits discrimination on the basis of sex in education programs and activities that receive federal financial assistance. See 20 U.S.C. 1681(a). Existing Title IX regulations contain specific provisions regarding (i) the Assistant Secretary's authority to determine remedies necessary to overcome effects of discrimination (34 CFR 106.3), (ii) the effect of other requirements (34 CFR 106.6), (iii) designation of a responsible employee (34 CFR 106.8(a)), (iv) adoption of grievance procedures (34 CFR 106.8(b)), (v) dissemination of policy (34 CFR 106.9), and (vi) exemption for religious schools (34 CFR 106.12). For reasons described in this preamble, the Secretary proposes to amend the Title IX regulations at 34 CFR 106.3, 106.6, 106.8, 106.9, and 106.12, as well as add new §§ 106.30, 106.44, and 106.45.**

Title IX Proposed Regulations– Miscellaneous Excerpts continued

- **While implementing regulations under Title IX since 1975 have required schools to provide for a “prompt and equitable” grievance process to resolve complaints of sex discrimination by the school, the Department's guidance (both the guidance documents rescinded in 2017 and the ones remaining) fails to provide the clarity, permanence, and prudence of regulation properly informed by public participation in the full rulemaking process. Under the system created by the Department's guidance, hundreds of students have filed complaints with OCR alleging their school failed to provide a prompt or equitable process in response to a report of sexual harassment, ⁽¹²⁾ and over 200 students have filed lawsuits against colleges and universities alleging their school disciplined them for sexual misconduct without providing due process protections.**
- **The Department recognizes that despite well-intentioned efforts by school districts, colleges and universities, advocacy organizations, and the Department itself, sexual harassment continues to present serious problems across the nation's campuses. The lack of clear regulatory standards has contributed to processes that have not been fair to all parties involved, that have lacked appropriate procedural protections, and that have undermined confidence in the reliability of the outcomes of investigations of sexual harassment allegations. Such deficiencies harm complainants, respondents, and recipients alike.**

Title IX Proposed Regulations--Miscellaneous Excerpts continued

- **The proposed regulations also seek to clarify existing Title IX regulations in other areas beyond sexual harassment. Specifically, we state that OCR shall not deem necessary the payment of money damages to remedy violations under part 106 (proposed § 106.3(a)). We address the intersection among Title IX regulations, constitutional rights, student privacy rights, and Title VII of the Civil Rights Act of 1964 (proposed § 106.6). We clarify the provisions governing the designation of a Title IX Coordinator (proposed § 106.8). And we clarify that a recipient that qualifies for the religious exemption under Title IX can claim its exemption without seeking written assurance of the exemption from the Department (proposed § 106.12).**

Title IX Proposed Regulations – Miscellaneous Excerpts continued

- **I. Recipient's Response to Sexual Harassment**
- **(Proposed § 106.44)**
- ***Statute:*** Title IX states generally that 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 education program or activity receiving federal financial assistance, 20 U.S.C. 1681(a), but does not specifically mention sexual harassment
- ***Current Regulations:*** None.

Title IX Proposed Regulations – Miscellaneous Excerpts continued

- **A. Adoption of Supreme Court Standards for Sexual Harassment**
- **Section 106.44(a) General; Section 106.30**
- ***Proposed Regulations:* We propose adding a new § 106.44 covering a recipient's response to sexual harassment. Proposed § 106.44(a) would state that 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 in a manner that is not deliberately indifferent. Proposed § 106.44(a) would also state that a recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.**
- **We propose definitions for “sexual harassment” and “actual knowledge” in § 106.30. The Department defines “sexual harassment” to mean either 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; or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act). We define “actual knowledge” as notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment. The proposed definition of “actual knowledge” also states that imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge, that the standard is not met when the only official of the recipient with actual knowledge is also the respondent, and that the mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient.**

Title IX Proposed Regulations – Miscellaneous Excerpts continued

- **Reasons:** The Department believes that the administrative standards governing recipients' responses to sexual harassment should be generally aligned with the standards developed by the Supreme Court in cases assessing liability under Title IX for money damages in private litigation. The Department believes that students and institutions would benefit from the clarity of an essentially uniform standard. More importantly, the Department believes that the Supreme Court's foundational decisions in this area, *Gebser* and *Davis*, are based on a textual interpretation of Title IX and on policy rationales that the Department finds persuasive for the administrative context. The Department's proposed regulations significantly reflect legal precedent because, while we could have chosen to regulate in a somewhat different manner, we believe that the standards articulated by the Court in these areas are the best interpretation of Title IX and that a consistent body of law will facilitate appropriate implementation.

Title IX Proposed Regulations – Miscellaneous Excerpts continued

- **B. Responding to Formal Complaints of Sexual Harassment; Safe Harbors**
- **Section 106.44(b) Specific Circumstances; Section 106.30**
- ***Proposed Regulations:* We propose adding § 106.44(b) to address specific circumstances under which a recipient will respond to sexual harassment. We propose adding paragraph (b)(1) stating that a recipient must follow procedures (including implementing any appropriate remedy as required) consistent with § 106.45 in response to a formal complaint as to allegations of conduct within its education program or activity, and that if the recipient follows procedures consistent with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute sex discrimination under Title IX. Proposed § 106.30 defines “formal complaint” as a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity, and requesting initiation of the recipient's grievance procedures consistent with § 106.45**

Title IX Proposed Regulations – Miscellaneous Excerpts continued

- **Proposed § 106.30 defines “supportive measures” as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge, to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Section 106.30 goes on to explain that such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. Section 106.30 also states that the recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. Furthermore, § 106.30 clarifies that the Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures**



MARSH & McLENNAN
COMPANIES