

**The Four Corners of Title IX
Regulatory Compliance**

Virginia Department of Criminal Justice Services
July 14 – 16, 2020

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Nothing presented in this training is, or should be considered, legal advice!

Know when to consult legal counsel.

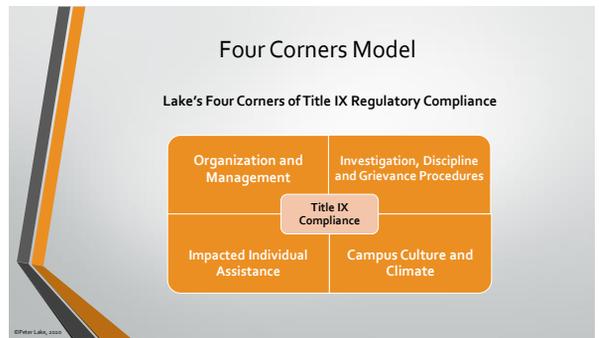
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Introduction

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A Few Initial Thoughts on the New Regulations

- First new regulations in a very long time.
- Institutional response requirement—Supportive measures, sanctions, remedies
- Potentially unfamiliar dynamics with the Department of Education—Guidance, commentary, blogs
- Status of preexisting guidance and resolutions
- Expect enforcement if regulations survive legal challenges in court

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Some Key Features of the New Regulations

- Title IX redefines sexual harassment and creates special grievance procedures for sexual harassment.
 - What does this mean for your existing policies and Title IX compliance more generally?
- Term "hostile environment" disappears/"balancing test" with it.
- Allows for recipients to offer informal resolution (mediation). Can be used in most instances if parties (complainant and respondent) consent voluntarily when a formal complaint is filed.
 - Informal resolution cannot be used when a student alleges sexual harassment by an employee
- "Formal complaints" and "allegations"
- Live hearing with cross-examination by advisors

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Some Key Features of the New Regulations

- Choice in evidentiary standard preserved
 - "Preponderance of the evidence" or "clear and convincing"
- "Mandated reporters" supplants "responsible employees"
- Changes in jurisdiction and scope of Title IX
 - Off campus; study abroad
- Emphasis on "impartial" processes free from bias and conflicts of interest
- "Supportive measures" supplants "interim measures"
- Separation of the decision-maker from other tasks
 - No more single-investigator model, but single decision-maker permitted.
- Appeals required
- Training mandates
- "Not a court"/"Not a criminal justice system"

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Training Mandates Specific to the New Regulations

"Schools must ensure that **Title IX personnel** (Title IX Coordinator, any investigator, any decision-maker, and any person who facilitates an informal resolution (such as mediation)) receive training as follows:

- On Title IX's definition of "sexual harassment"
- On the scope of the school's education program or activity
- On how to conduct an investigation and grievance process
- On how to serve impartially, including by avoiding prejudgment of the facts at issue
- On how to avoid conflicts of interest and bias
- Decision-makers must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence"

U.S. Dept. of Educ. Office for Civil Rights, Blog (May 18, 2020), <https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html> (emphasis added).

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Posting Training Materials to Your Website

"All materials used to train Title IX personnel:

- Must not rely on sex stereotypes.
- Must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- Must be maintained by the school for at least 7 years.
- Must be publicly available on the school's website; if the school does not maintain a website the school must make the training materials available upon request for inspection by members of the public.

"Schools must publish training materials that are up to date and reflect the latest training provided to Title IX personnel."

"If a school's current training materials are copyrighted or otherwise protected as proprietary business information (for example, by an outside consultant), the school still must comply with the Title IX Rule. This may mean that the school has to secure permission from the copyright holder to publish the training materials on the school's website."

U.S. Dept. of Educ. Office for Civil Rights, Blog (May 18, 2020), <https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html> (emphasis added).

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TRAINING MATERIALS

Each institution will be given permission to post training materials (PowerPoint slide handouts) to their website. We will provide the exact version of the slides that may be posted via email.

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Further training required...

- Training specific to your institution's policies.
 - There is not one universal policy for sex discrimination; differences exist in procedures, definitions, etc. from campus to campus.
 - Your campus policies may be in transit now.
 - Scope, definitions, procedures, etc.
- Training on technology usage for live hearings on your campus.
 - Especially important for decision-makers.
- Additional and continued training on bias.
- Additional investigator and decision-maker training.
- Training on informal resolution for those implementing that process.
- Continuing education at regular intervals.
- REMEMBER—it's always good to hear from multiple voices!

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Training Time Estimated by the Department

We assume all recipients will need to take time to review and understand these final regulations. . . . At the IHE level, we assume eight hours for the Title IX Coordinator and 16 hours for an attorney.

We assume that all recipients will need to revise their grievance procedures. . . . At the IHE level, we assume this will take 12 hours for the Title IX Coordinator and 28 hours for an attorney with an additional four hours for an administrator to review and approve them.

We assume that all recipients will need to train their Title IX Coordinators, an investigator, any person designated by a recipient to facilitate an informal resolution process (e.g., a mediator), and two decision-makers (assuming an additional decision-maker for appeals). . . . We assume this training will take approximately eight hours for all staff at the . . . IHE level.

Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Requiring Federal Financial Assistance, 35 Fed. Reg. 30401 (May 15, 2020) (Final rule issued at www.govinfo.gov/contest/ED-2018-07-19/2020-05-15-1052.pdf at 3050).

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Our Mission Has Not Changed...

Enacted by Congress, Title IX seeks to **reduce or eliminate barriers to educational opportunity caused by sex discrimination** in institutions that receive federal funding.

This is the unchanged mission of Title IX!

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Title IX: FINAL RULE

34 CFR Part 106 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims.

Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 84 Fed. Reg. 39043 (July 29, 2019) (Final rule) (url: www.govinfo.gov/content/pkg/FR-2019-07-29/page/39043.pdf) at 39043.

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Prevalence Data

See generally Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (final rule) at 39075-83.

Postsecondary Institutions

One in five college women experience attempted or completed sexual assault in college; some studies state one in four. One in 16 men are sexually assaulted while in college. One poll reported that 20 percent of women, and five percent of men, are sexually assaulted in college. (1) (general citation omitted).

62 percent of women and 61 percent of men experience sexual harassment during college. (2) (general citation omitted).

Among undergraduate students, 23.1 percent of females and 5.4 percent of males experience rape or sexual assault; among graduate and undergraduate students 11.2 percent experience rape or sexual assault through physical force, violence, or incapacitation; 4.2 percent have experienced stalking since entering college. (3) (general citation omitted).

A study showed that 63.3 percent of men at one university who self-reported acts qualifying as rape or attempted rape admitted to committing repeat rapes. (4) (general citation omitted).

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Prevalence Data – Postsecondary Institutions Cont'd

More than 50 percent of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college; 84 percent of the women who reported sexually coercive experiences experienced the incident during their first four semesters on campus. (5) (general citation omitted).

Seven out of ten rapes are committed by someone known to the victim; for most women victimized by attempted or completed rape, the perpetrator was a boyfriend, ex-boyfriend, classmate, friend, acquaintance, or coworker. (6) (general citation omitted).

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Prevalence Data – Postsecondary Institutions Cont'd

Of college students in fraternity and sorority life, 48.1 percent of females and 23.6 percent of males have experienced nonconsensual sexual contact, compared with 33.1 percent of females and 7.9 percent of males not in fraternity and sorority life. (7) (general citation omitted).

Fifty-eight percent of female academic faculty and staff experienced sexual harassment across all U.S. colleges and universities, and one in ten female graduate students at most major research universities reports being sexually harassed by a faculty member. (8) (general citation omitted).

Twenty-one to 38 percent of college students experience faculty/staff-perpetrated sexual harassment and 39 to 64.5 percent experience student-perpetrated sexual harassment during their time at their university. (9) (general citation omitted).

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The Controversial Science of Sexual Predation

- Lisak D, Miller PM. Repeat rape and multiple offending among undetected rapists. *Violence Vict.* 2002;17(1):73-84. doi:10.1891/1541-1717.1.73.33638
- Swartout KM, Koss MP, White JW, Thompson MP, Abbey A, Bellis AL. Trajectory Analysis of the Campus Serial Rapist Assumption. *JAMA Pediatr.* 2015;169(12):1148-1154. doi:10.1001/jamapediatrics.2015.0707
- Johnson & Taylor, *The Campus Rape Frenzy: The Attack on Due Process at America's Universities* (Encounter Books, 2017).
- Foubert, J.D., Clark-Taylor, A., & Wall, A. (2019). "Is campus rape primarily a serial or single time problem? Evidence from a multi-campus study." *Violence Against Women*. DOI: 10.1177/1077801219833820.

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Trauma-Based Approaches

Avoid or Use?

- Some schools and training entities have moved away from using trauma-informed techniques for fear of appearing victim-leaning.
- Trauma can impact anyone in a grievance process or seeking supportive measures: Use research without stereotypes or gender bias.
- Credibility v. Reliability
- Read DOE's thoughts on trauma carefully...

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Trauma

*The Department is sensitive to the effects of **trauma on sexual harassment victims** and appreciates that choosing to make a report, file a formal complaint, communicate with a Title IX Coordinator to arrange supportive measures, or participate in a grievance process are often difficult steps to navigate in the wake of victimization.*

Department of Education, Memorandum on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 30542 (May 13, 2018) (final rule) (online at www.govinfo.gov/content/pkg/FR-2018-05-13/page/seq1.pdf) (emphasis added).

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Trauma Cont'd

The Department understands from anecdotal evidence and research studies that sexual violence is a traumatic experience for survivors. The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings. The final regulations require impartiality in investigations and emphasize the truth-seeking function of a grievance process. The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking.

Id. at 30069 (internal citation omitted).

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Trauma Cont'd

Further, the final regulations contain provisions specifically intended to take into account that complainants may be suffering results of trauma; for instance, § 106.44(a) has been revised to require that recipients promptly offer supportive measures in response to each complainant and inform each complainant of the availability of supportive measures with or without filing a formal complaint. To protect traumatized complainants from facing the respondent in person, cross-examination in live hearings held by postsecondary institutions must never involve parties personally questioning each other, and at a party's request, the live hearing must occur with the parties in separate rooms with technology enabling participants to see and hear each other.

Id. (internal citation omitted).

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"Victim"/"Survivor" or "Perpetrator"

*When the Department uses the term "victim" (or "survivor") or "perpetrator" to discuss these final regulations, the Department assumes that a reliable process, namely the grievance process described in § 106.45, **has resulted in a determination of responsibility**, meaning the recipient has found a respondent responsible for perpetrating sexual harassment against a complainant.*

Id. at 30031 (emphasis added).

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Timing

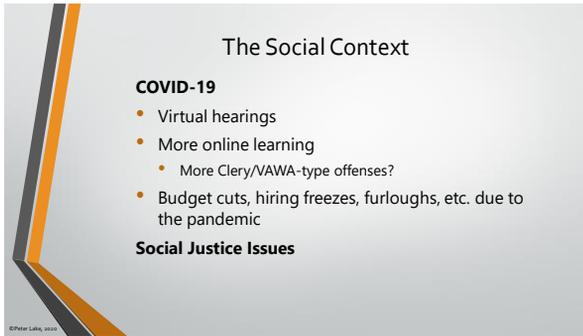
The new regulations are slated to go into effect on **August 14, 2020**. This date is potentially subject to modification. Consult your attorneys.

The Dept. of Education has stated they **will not** enforce these regulations retroactively.



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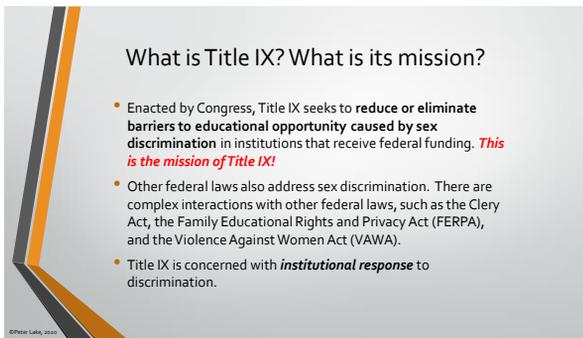


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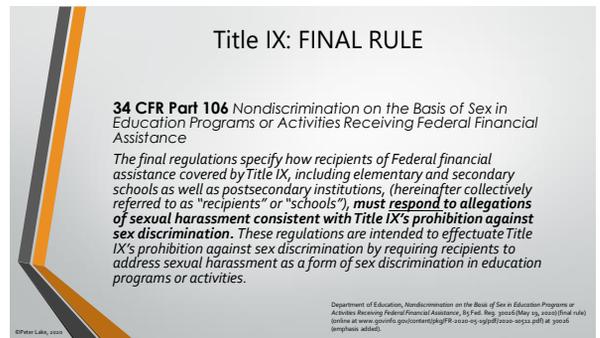


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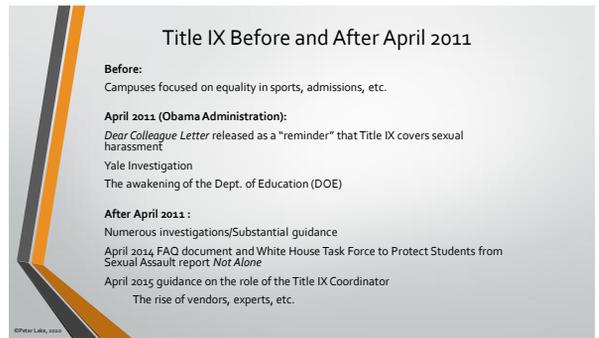


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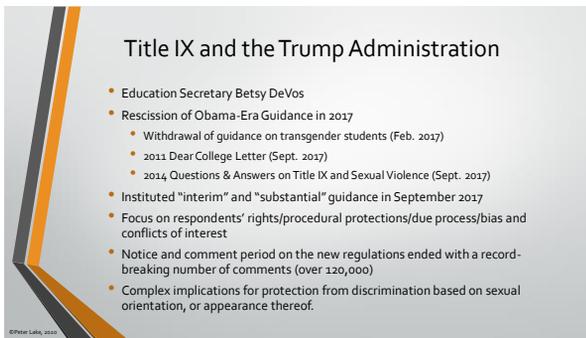


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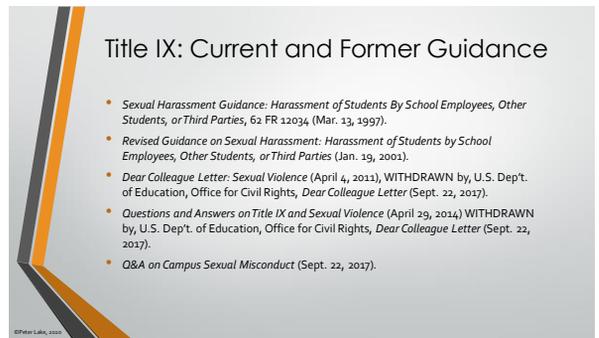


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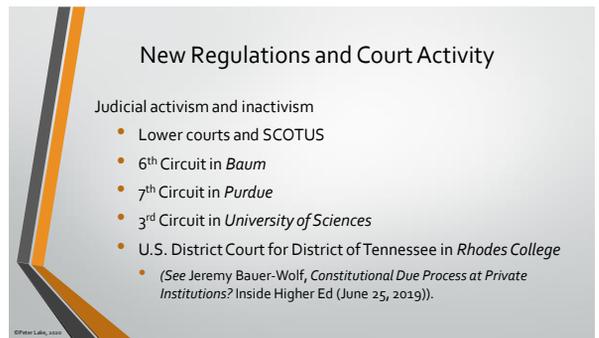
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Litigation Risk

- Will the new regulations cause an increased risk of litigation?
- The Department doesn't think so. For example: "[I]f recipients comply with these final regulations, these final regulations may have the effect of decreasing litigation because recipients with actual knowledge would be able to demonstrate that they were not deliberately indifferent in responding to a report of sexual harassment." *Id.* at 30115.
- Actual cases are rising in number even before the regulations. Courts are referring to the new regulations already.
- Fee shifting? Will colleges have to pay for attorney's fees of plaintiffs?

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Challenges to the New Regulations

- **Congress**
 - *The Department acknowledges that Congress could address Title IX sexual harassment through legislation, but Congress has not yet done so.* *Id.* at 113.
 - House of Representatives Committee on Oversight Reform, *Letter to DeVos-DoED re: Title IX* (June 22, 2020).
- **Pending Litigation**
 - James Walker, *Betsy DeVos Sued by Organizations Representing Student Victims of Sexual Violence*, Newsweek (Jun. 11, 2020) (online at www.newsweek.com/betsy-devos-lawsuit-title-ix-rule-changes-sexual-harassment-1540147).
 - ACLU/NWLC
 - State Attorneys General
- **2020 General Election**

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Legal Mandates, Etc. Under Title IX — Where Is the Law?

- Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*
- Implementing Regulations, 34 C.F.R. Part 106
- Notice and Comment
- Rule-making/Negotiated rule-making
- Commentary/Blogs from the Dept. of Education
- Guidance
- Resolution Letters and Agreements
- Other Sources—Speeches, Website, Participation with the Field
- State Law Mandates—Virginia Laws

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Virginia State Laws

- VA Code § 23.1-805. Violence prevention committee; threat assessment team.
 - Requires campuses to establish these two groups
- VA Code § 23.1-806. Reporting of acts of sexual violence.
 - Requires responsible employees to report
 - Requires a "Review Committee" and mandates certain functions of this committee
- VA Code § 23.1-807. Sexual assault; memoranda of understanding; policies.
 - MOUs with local sexual assault crisis centers and law enforcement
- VA Code § 23.1-808. Sexual violence; policy review; disciplinary immunity for certain individuals who make reports.
 - Requires institutions to review sexual violence policies and updated it as appropriate
 - Requires institutions to have an "amnesty policy" for reporters

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HB 103 Higher educational institutions, certain; transcript notations, expungement.

Certain institutions of higher education; transcript notations; expungement. Requires each institution of higher education that is required by law to include a prominent notation on the academic transcript of each student who has been suspended for, has been permanently dismissed for, or withdraws from the institution while under investigation for an offense involving sexual violence under the institution's code, rules, or set of standards governing student conduct to adopt a policy for the expungement of such notation for good cause shown and after a period of three years.

<https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=HB103&submit=GO>

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HB 104 Higher educational institutions, public; non-academic student codes of conduct.

Public institutions of higher education; non-academic student codes of conduct. Requires each public institution of higher education, with the exception of the Virginia Military Institute, to adopt non-academic student codes of conduct. The bill mandates that students and student organizations that participate in the non-academic student codes of conduct process as a complainant or respondent shall have the responsibilities and rights afforded to them by the institution's codes of conduct and related policies and procedures. The bill states that the codes of conduct shall describe and define the responsibilities and rights of all enrolled students and student organizations and outline each step in the institution's procedures for responding to and resolving allegations of violations. The bill outlines procedures that the codes of conduct shall include when an accused student or student organization faces the potential sanctions of suspension or expulsion.

<https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=HB104&submit=GO>

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SB 373 Virginia sexual assault forensic examiner coordination program; established, report.

Virginia sexual assault forensic examiner coordination program. Establishes the Virginia sexual assault forensic examiner coordination program within the Department of Criminal Justice Services. The bill provides that the coordinator of the program shall create and coordinate an annual statewide sexual assault forensic nurse examiner training program; coordinate the development and enhancement of sexual assault forensic examiner programs across the Commonwealth; participate in the development of hospital protocols and guidelines for treatment of survivors of sexual assault; coordinate and strengthen communications among sexual assault nurse examiner medical directors, sexual assault response teams, and hospitals for existing and developing sexual assault nurse examiner programs; provide technical assistance for existing and developing sexual assault forensic examiner programs; create and maintain a statewide list, updated biannually, that includes pertinent information regarding sexual assault forensic examiners and nurse examiners; create sexual assault nurse examiner recruitment materials for universities and colleges with nursing programs; and support and coordinate community education and public outreach, when appropriate, relating to sexual assault nurse examiner issues for the Commonwealth.

<https://is.virginia.gov/cgi-bin/legp604.exe?ses=2018&typ=bi&val=SB373&submit=GO>

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**Federal Regulators:
Two Key Players**

Department of Education
Enforcement through Office for Civil Rights (regional offices)
Historical K-12 focus

Department of Justice
Largely dormant in higher ed for years
"Crime fighters" dealing with violence, drugs, weapons, etc.
[DOJ does not seem to have played a large role in the new Title IX regulations.]

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The Courts v. The Regulators

The Courts—Civil Action Under Title IX

- The US Supreme Court allows actions in court to pursue damages for Title IX (but with many limitations).
 - Gebser v. Lago Vista Independent School District*, 118 S. Ct. 3989, 141 L. Ed. 2d 277 (1998).
 - Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999).
- Victims as "plaintiffs" face tough standards
 - Knowledge (Reporting)
 - Pattern
 - Objective
 - Deliberate indifference
- The Supreme Court has hesitated to:
 - Apply Title IX to a "single act"
 - Broadly protect LGBTQ rights, but see the recent *Bostock* Title VII decision (more to come on this...)

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Important Note!

Litigation in the lower courts has multiplied. Institutions must seek advice of counsel on the implications for Title IX compliance on their campuses.

Know when to talk with counsel.

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The Courts v. The Regulators

The Regulators

- Threat of loss of federal funding
- An act of violence is a crime, is against campus policy, and is a form of discrimination.

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Whose View of Title IX Wins in the End?

Showdowns are coming!

CONGRESS

COURTS REGULATORS

→ Court cases are already testing some issues

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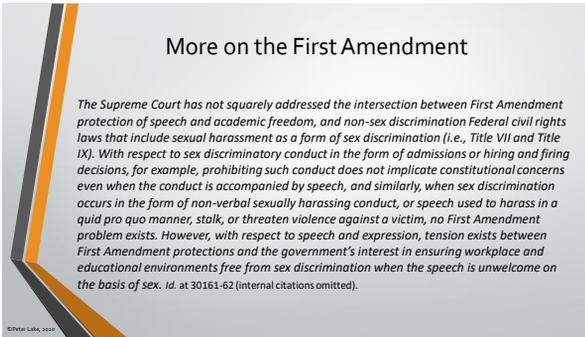


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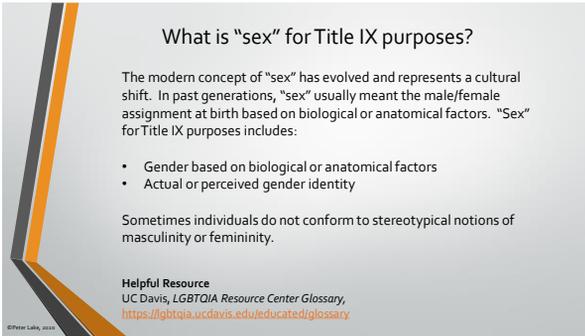
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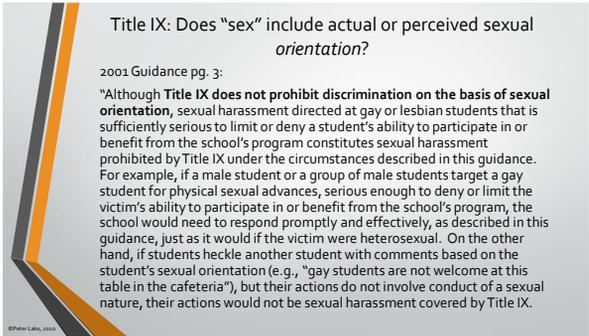
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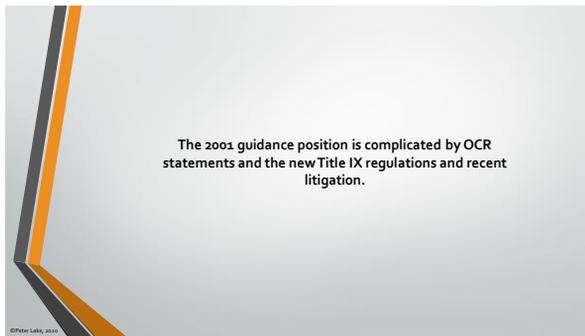
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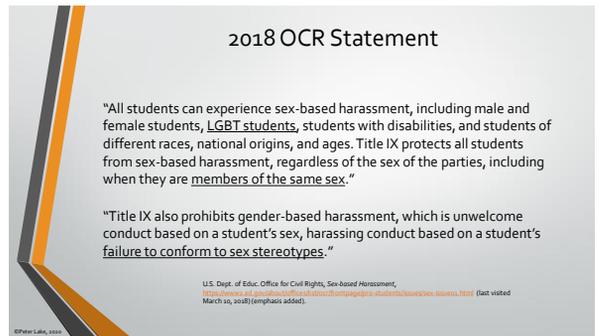


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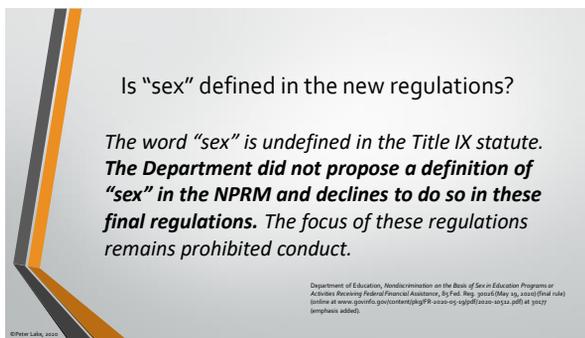


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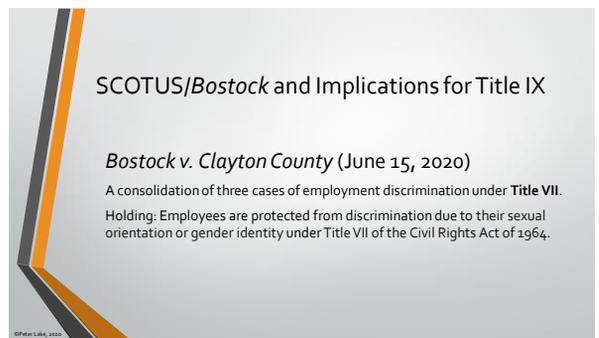
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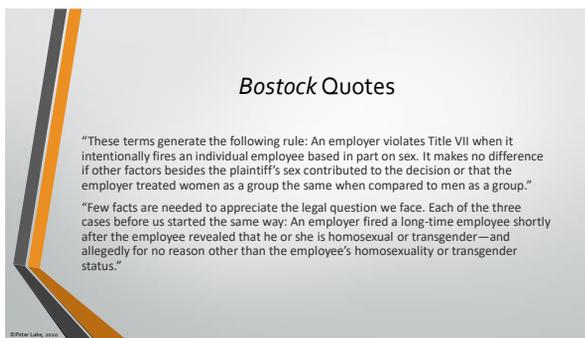


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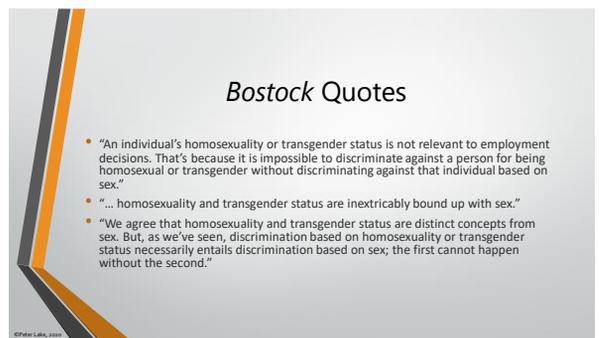


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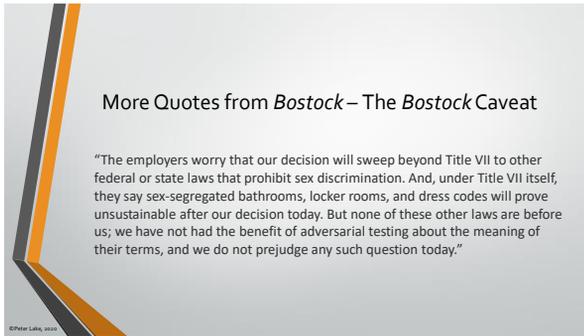
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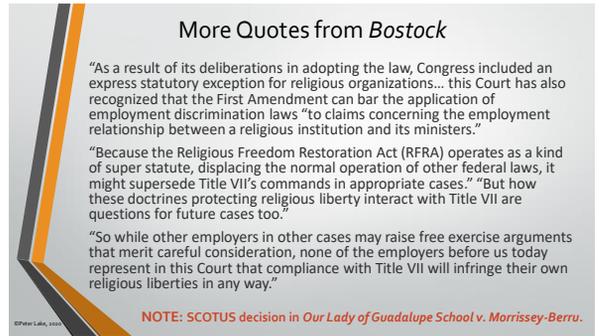


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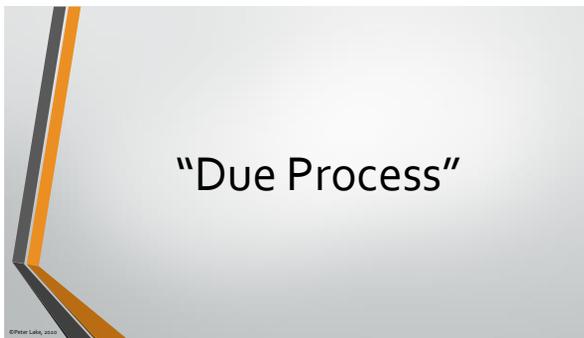


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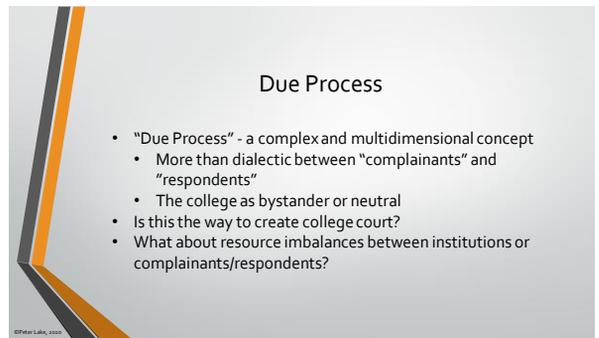


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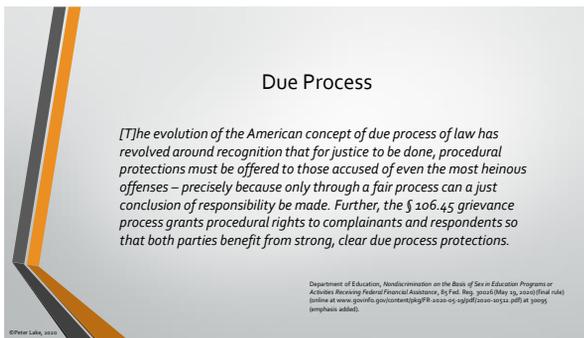


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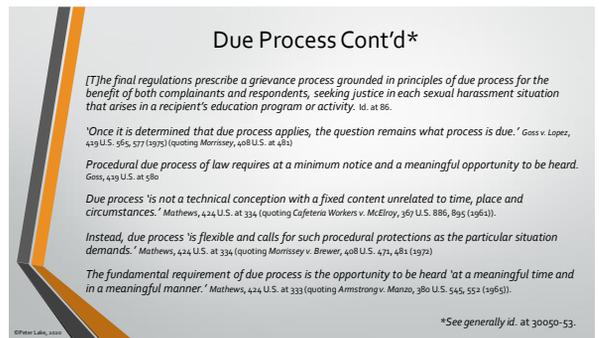
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“Deliberate Indifference” Cont’d

[T]he final regulations apply a deliberate indifference standard for evaluating a recipient’s decisions with respect to selection of supportive measures and remedies, and these final regulations do not mandate or scrutinize a recipient’s decisions with respect to disciplinary sanctions imposed on a respondent after a respondent has been found responsible for sexual harassment.

Id. at 30034, n.60.

[T]he Department will not deem a recipient not deliberately indifferent based on the recipient’s restriction of rights protected under the U.S. Constitution, including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment.

Id. at 30091.

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A Review of the New Regulations

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§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

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§106.8(a) Designation of coordinator.

Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

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§106.8(b) Dissemination of policy.

1) Notification of policy.

Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient’s Title IX Coordinator, to the Assistant Secretary, or both.

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§106.8(b) Dissemination of policy.

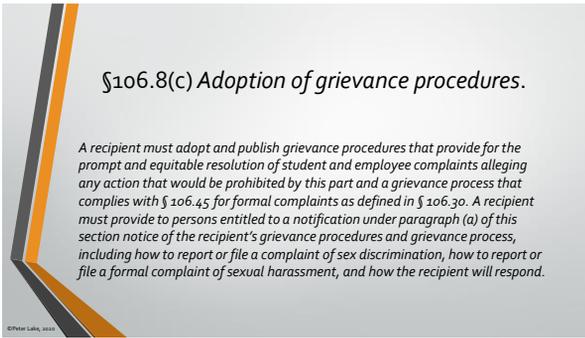
(2) Publications.

(i) *Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.*

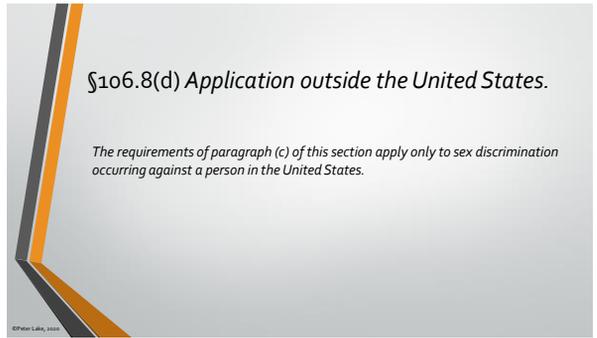
(ii) *A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.*

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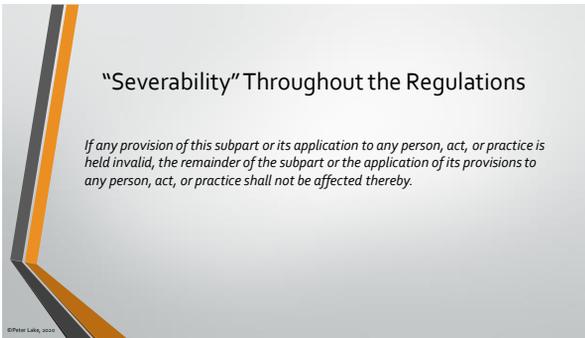


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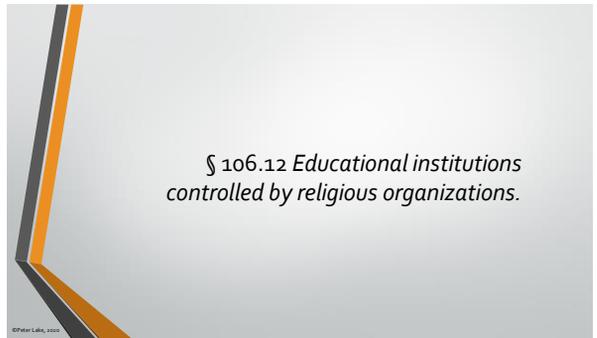


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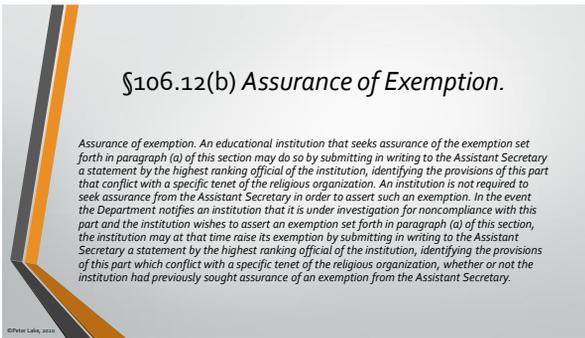


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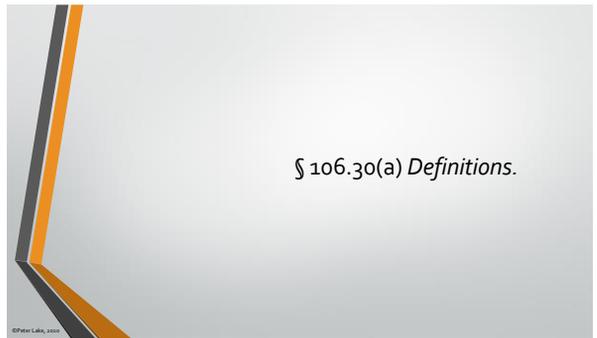


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"Actual Knowledge"

Actual knowledge means 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 any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

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"Complainant"

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

What is "alleged?"

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"Respondent"

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Allege = "report?"

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More on Complainants/Respondents

- A person may be a complainant, or a respondent, even where no formal complaint has been filed and no grievance process is pending. Id. at 30030.
- References . . . to a complainant, respondent, or other individual with respect to exercise of rights under Title IX should be understood to include situations in which a parent or guardian has the legal right to act on behalf of the individual. Id.
- **[T]he definitions of "complainant" and "respondent" do not restrict either party to being a student or employee, and, therefore, the final regulations do apply to allegations that an employee was sexually harassed by a student.** Id. at 30071-72 (internal citations omitted).

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"Consent"

The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

This has been a central issue in fairness/consistency.

How does "consent" fit into the new framework for "sexual harassment?"

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"Formal Complaint"

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.

(emphasis added)

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"Formal Complaint" Cont'd

As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

91

"Sexual Harassment" [Three-Prong Test]

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;*
- (2) Unwelcome conduct determined by a **reasonable person** to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or*
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).*

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First Amendment and the Second Prong

[P]rotection of free speech and academic freedom was weakened by the Department's use of wording that differed from the Davis definition of what constitutes actionable sexual harassment under Title IX . . . these final regulations return to the Davis definition verbatim, while also protecting against even single instances of quid pro quo harassment and Clery/ VAWA offenses, which are not entitled to First Amendment protection. Id. at 30155 n.680.

93

"Supportive Measures"

Supportive measures means 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. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

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"Supportive Measures" Cont'd

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. 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 recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

95

§ 106.44 Recipient's response to sexual harassment.

96

§106.44(a) General response to sexual harassment.

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. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

97

§106.44(a) Cont'd

A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

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§106.44(a) Cont'd

The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

99

§106.44(b) Response to a formal complaint.

- (1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).*
- (2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.*

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§106.44(c) Emergency removal.

Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

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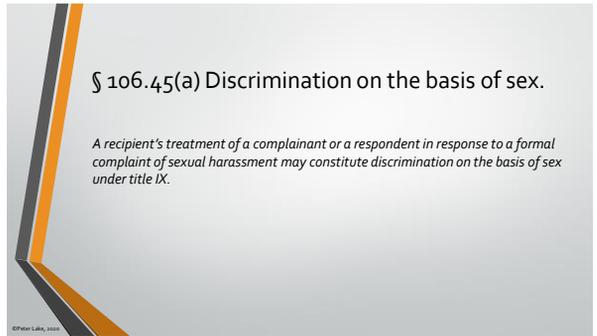
§106.44(d) Administrative leave.

Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

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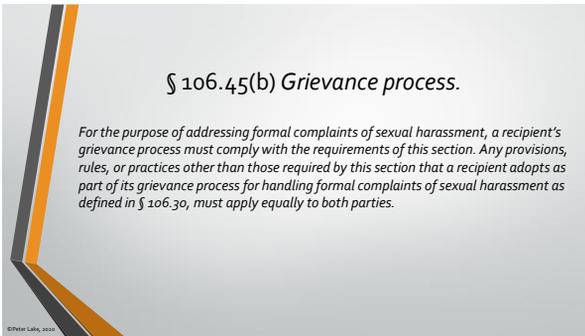


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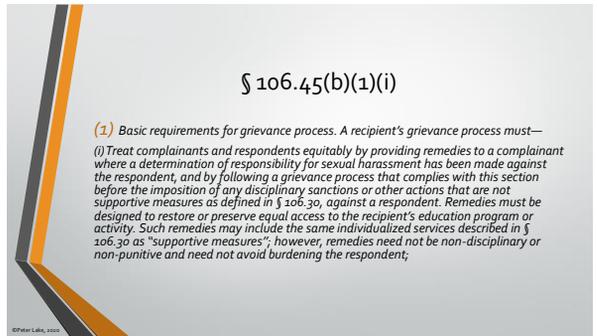


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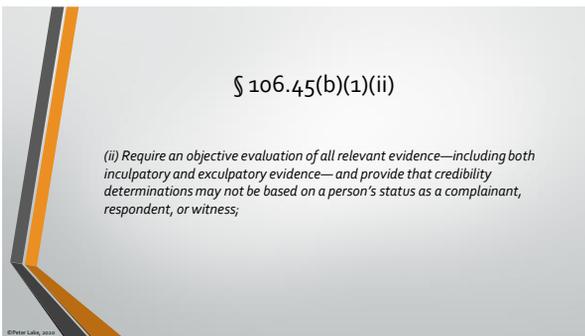


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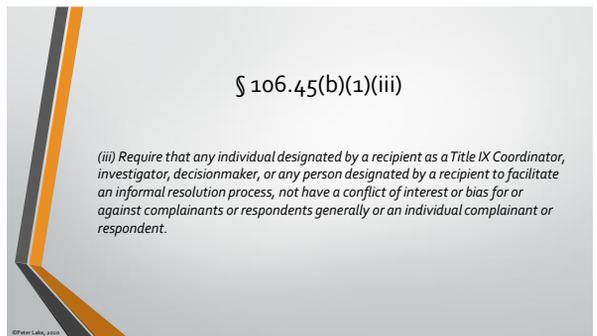


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108

§ 106.45(b)(1)(iii) Cont'd

A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on

- the definition of sexual harassment in § 106.30,
- the scope of the recipient's education program or activity,
- how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. . . .

(bullets added)

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§ 106.45 (b)(1)(iii) Cont'd

A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.

Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

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§ 106.45(b)(1)(iv)

(iv) 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;

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§ 106.45(b)(1)(v)

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames 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 a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

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§ 106.45(b)(1)(vi)

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

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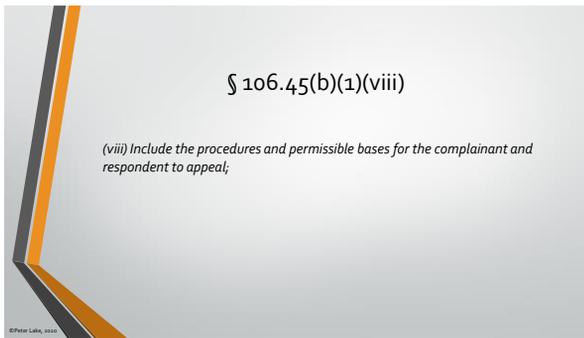
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§ 106.45(b)(1)(vii)

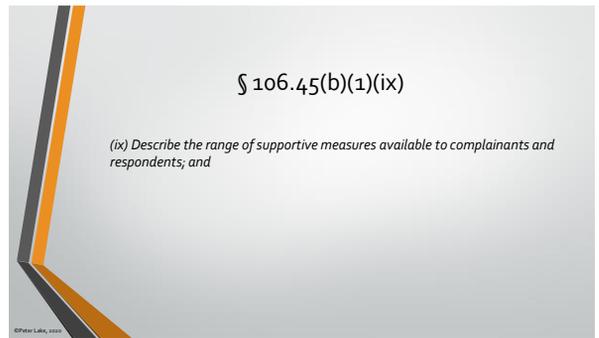
(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

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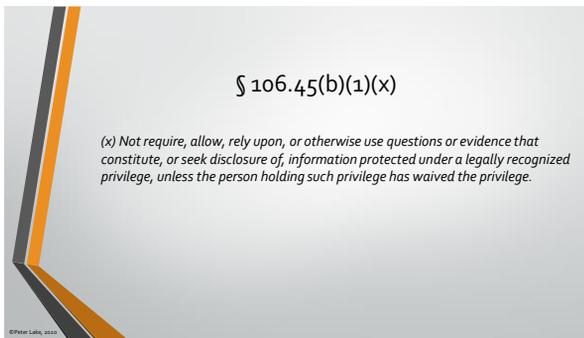


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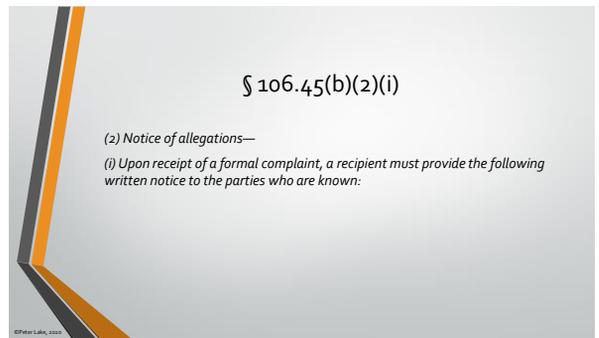


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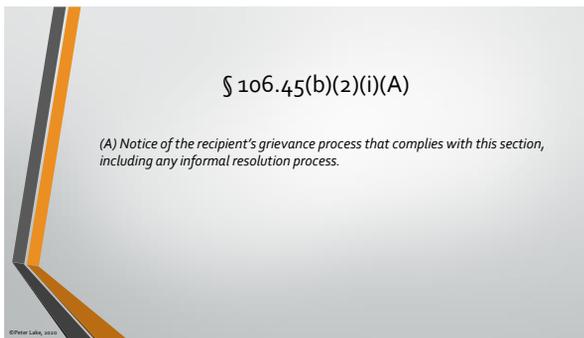


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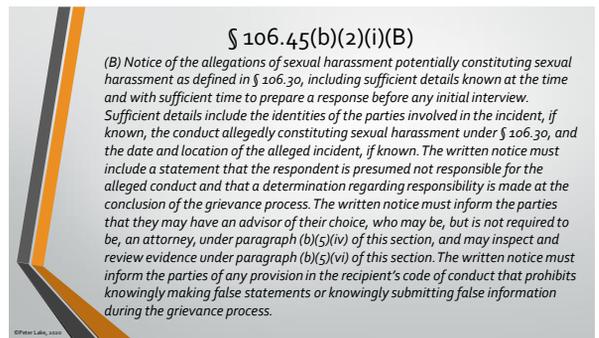


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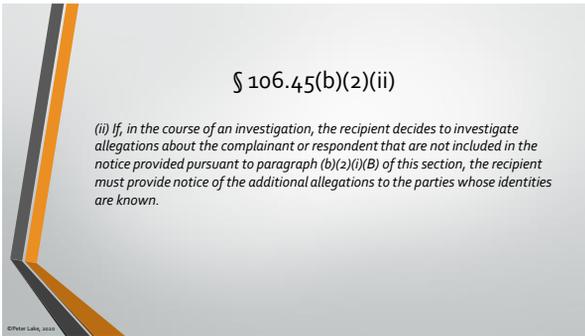
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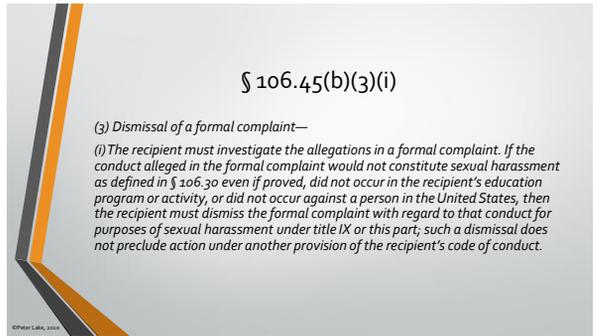
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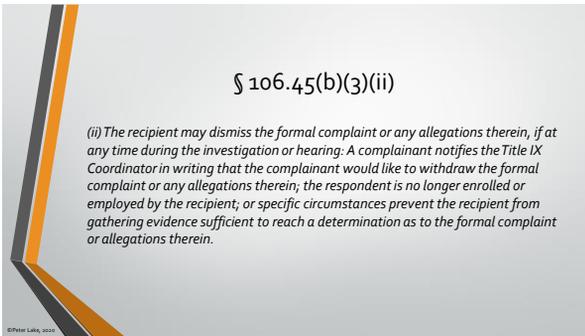


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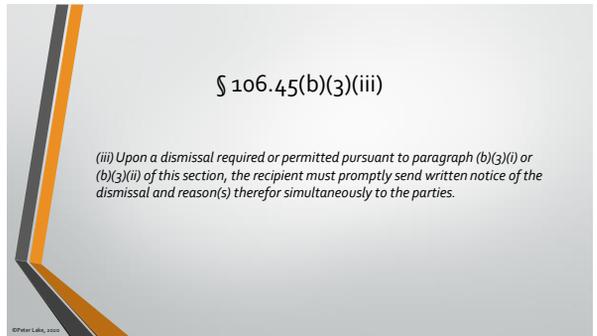


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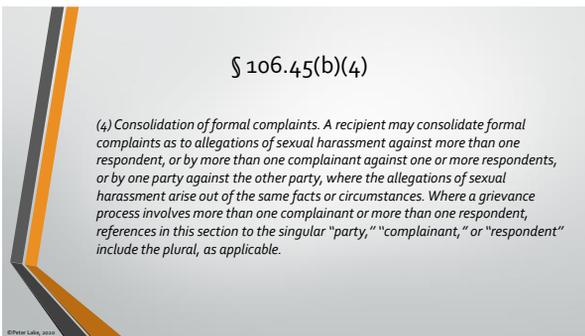


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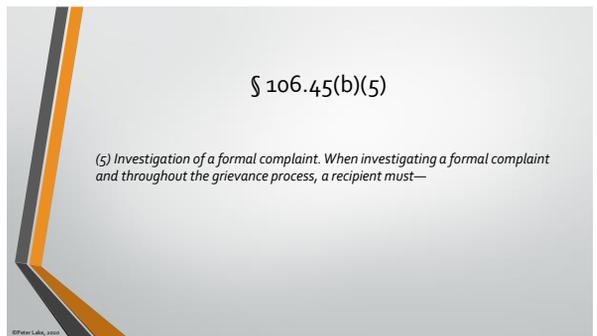


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§ 106.45(b)(5)(i)

(i) 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 provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3);

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§ 106.45(b)(5)(ii)

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

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§ 106.45(b)(5)(iii)

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

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§ 106.45(b)(5)(iv)

(iv) 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, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor 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;

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§ 106.45(b)(5)(v)

(v) Provide, to a 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 sufficient time for the party to prepare to participate;

131

§ 106.45(b)(5)(vi)

(vi) Provide both parties an equal opportunity to inspect and review any 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 and inculpatory or exculpatory evidence whether obtained from a party or other source, 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 or a hard copy, and the parties must have at least 10 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 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

132

§ 106.45(b)(5)(vii)

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

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§ 106.45(b)(6)(i)

(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

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§ 106.45(b)(6)(i) Cont'd

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

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§ 106.45(b)(6)(i) Cont'd

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

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§ 106.45(b)(6)(i) Cont'd

Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

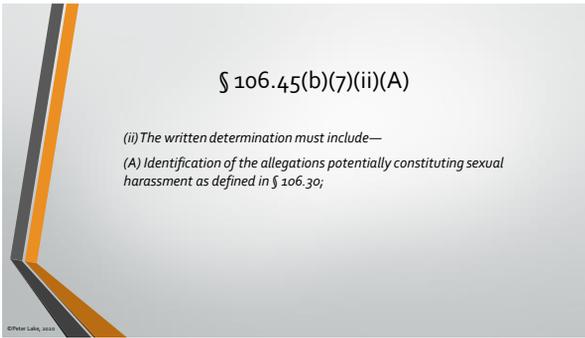
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§ 106.45(b)(7)(i)

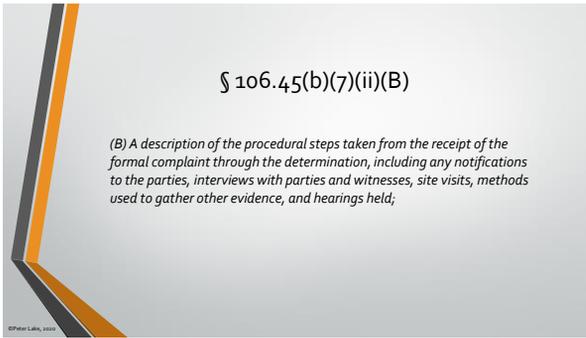
(7) Determination regarding responsibility.

(i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

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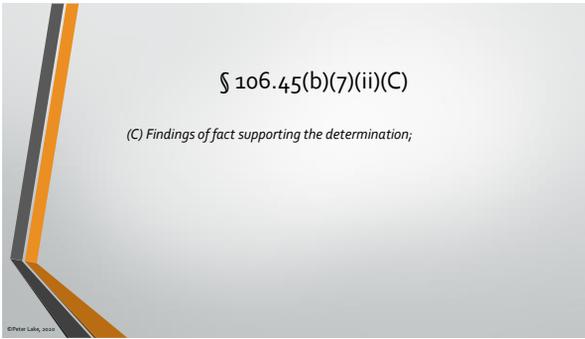


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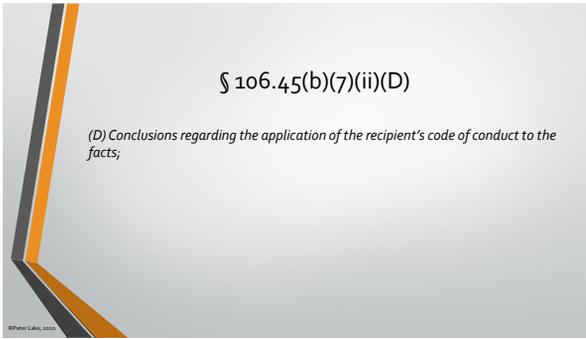


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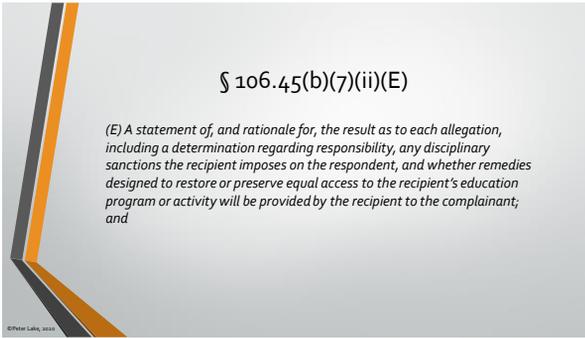


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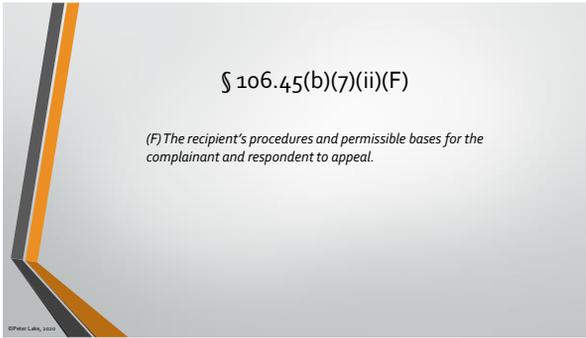


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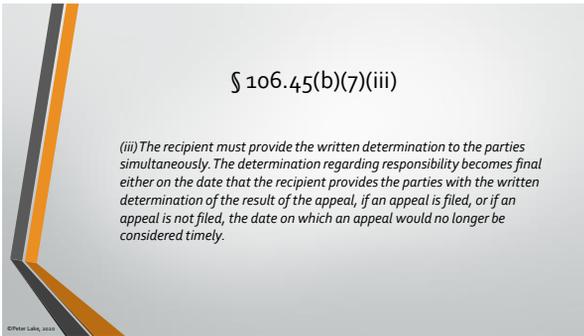
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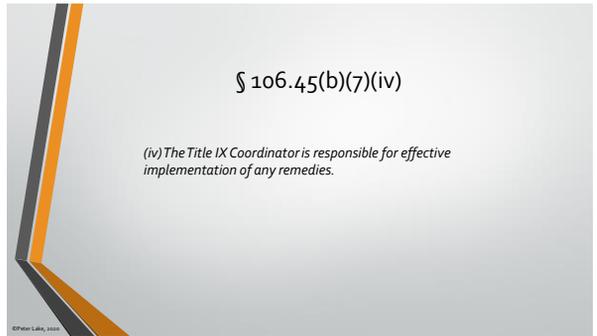
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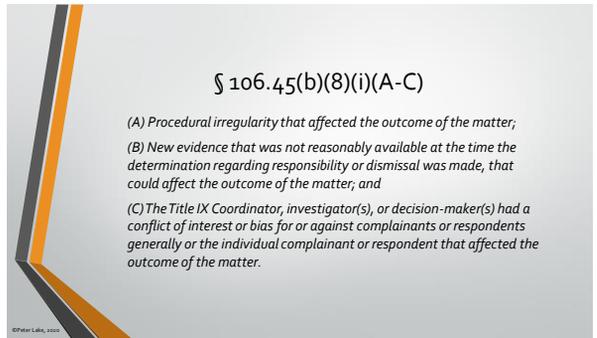


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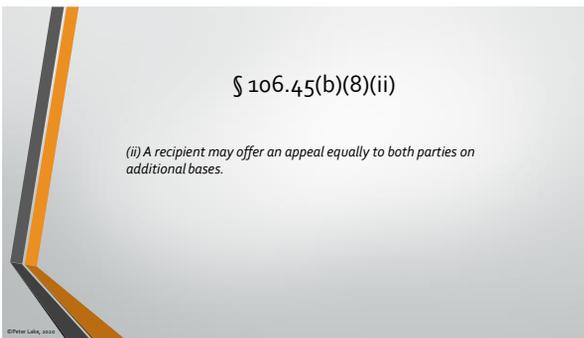


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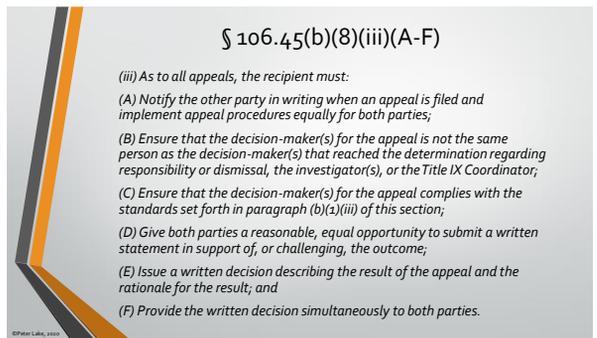


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§ 106.45(b)(9)

(g) Informal resolution. A recipient 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 of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—

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§ 106.45(b)(9)(i)

(i) Provides to the parties a written notice disclosing: The allegations, 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, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

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§ 106.45(b)(9)(ii-iii)

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and
(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

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§ 106.45(b)(10)(i)(A)

(10) Recordkeeping.
(i) A recipient must maintain for a period of seven years records of—
(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

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§ 106.45(b)(10)(i)(B-D)

(B) Any appeal and the result therefrom;
(C) Any informal resolution and the result therefrom; and
(D) All materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

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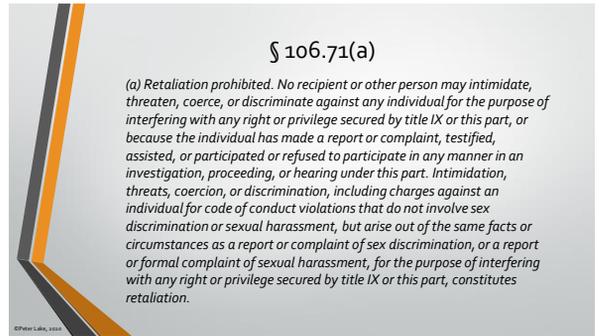
§ 106.45(b)(10)(ii)

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

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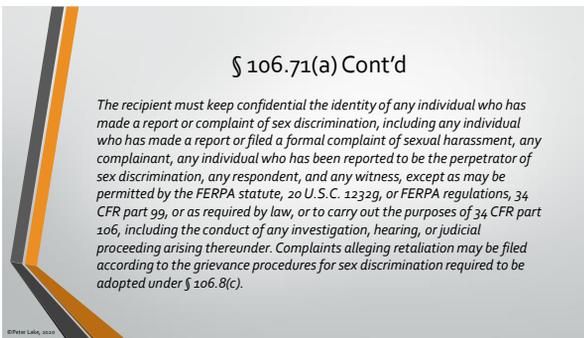


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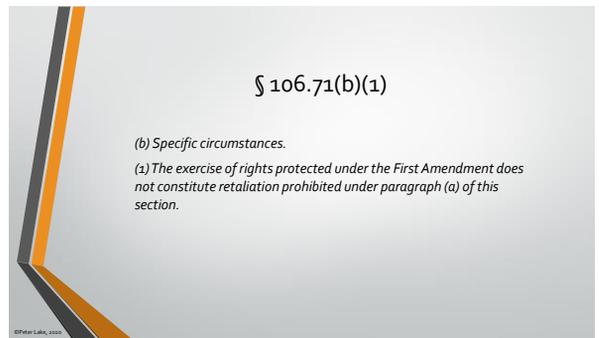


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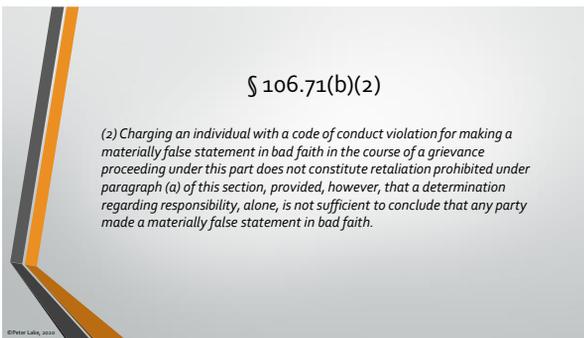


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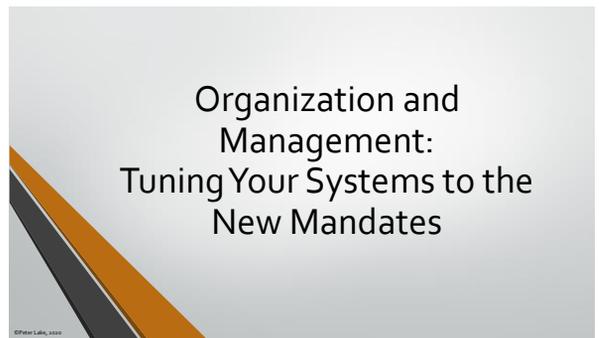


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Title IX Personnel

- Title IX coordinator
 - Every institution must designate one
- Title IX investigator
 - Can be the Title IX coordinator, cannot be a decision-maker or appellate officer (thus no single-investigator model)
- Title IX decision-maker
 - Cannot be the investigator (thus no single-investigator model) or Title IX coordinator
- Appellate officer
 - Cannot be the decision-maker or investigator
- Anyone implementing an informal process such as mediation
- What about case management, records management, etc.?



Budgetary and operational concerns?

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Outsourcing/Requiring Legally Trained Title IX Operatives

The Department notes that nothing in the final regulations precludes a recipient from carrying out its responsibilities under § 106.45 by outsourcing such responsibilities to professionally trained investigators and adjudicators outside the recipient's own operations. The Department declines to impose a requirement that Title IX Coordinators, investigators, or decision-makers be licensed attorneys (or otherwise to specify the qualifications or experience needed for a recipient to fill such positions), because leaving recipients as much flexibility as possible to fulfill the obligations that must be performed by such individuals will make it more likely that all recipients reasonably can meet their Title IX responsibilities.

Id. at 30105.

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Personnel Decisions

- Should we appoint deputy Title IX coordinators?
 - *[T]he recipient may need to or wish to designate multiple employees as Title IX Coordinators or designate a Title IX Coordinator and additional staff to serve as deputy Title IX Coordinators. Id. at 30127.*
- Should the Title IX coordinator take on the role of investigator, as permitted in the new regulations? (See *id.* 30135 n. 596.)
- How many decision makers? (New regulations suggest training at least two so one can be the appellate officer.)
- Single decision-maker or a panel?
- What should we outsource? Advantages/disadvantages?
- Budgetary concerns/limited staff on very small campuses
- Bias
- Conflicts of interest?
- Appropriate relationships between Title IX coordinator and other functions.
- Role of counsel?

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Training

- "Best practices"/"Experts"/Certification
- Impartiality of Title IX operatives
- No bias
- No conflicts of interest
- No sexual stereotypes in training materials
- Training on the institution's specific policies, procedures and processes
- Training on "relevance" of evidence for investigations and hearings
- Training on technology used in hearings
- *We assume that all recipients will need to train their Title IX Coordinators, an investigator, any person designated by a recipient to facilitate an informal resolution process (e.g., a mediator), and two decision-makers (assuming an additional decision-maker for appeals). We assume this training will take approximately eight hours for all staff at the . . . IHE level. Id. at 3056f.*

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"Actual Knowledge," Notice, "Mandatory Reporters"

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"Actual Knowledge" §106.30(a)

Actual knowledge means 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 any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

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"Officials with Authority"

- Who is an official with authority—authority to redress?
 - Title IX coordinator
 - CSAs?
 - Who else?

Determining whether an individual is an "official with authority" is a legal determination that depends on the specific facts relating to a recipient's administrative structure and the roles and duties held by officials in the recipient's own operations. The Supreme Court viewed this category of officials as the equivalent of what 20 U.S.C. 1682a calls an "appropriate person" for purposes of the Department's resolution of Title IX violations with a recipient. Id. at 30039.

Postsecondary institutions ultimately decide which officials to authorize to institute corrective measures on behalf of the recipient. The Title IX Coordinator and officials with authority to institute corrective measures on behalf of the recipient fall into the same category as employees whom guidance described as having "authority to redress the sexual harassment." Id. (emphasis added).

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Actual Knowledge/Employees

For all recipients, notice to the recipient's Title IX Coordinator or to "any official of the recipient who has authority to institute corrective measures on behalf of the recipient" (referred to herein as "officials with authority") conveys actual knowledge to the recipient and triggers the recipient's response obligations. Id. at 30039 (emphasis added).

NOTE: The Department of Education has discontinued use of the term and previous structure of "responsible employees," i.e. "mandated reporters."

Rather than using the phrase "responsible employees," these final regulations describe the pool of employees to whom notice triggers the recipient's response obligations. Id.

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Limiting Mandatory Reporters A Rejection of "Responsible Employees"

Triggering a recipient's response obligations only when the Title IX Coordinator or an official with authority has notice respects the autonomy of a complainant in a postsecondary institution better than the responsible employee rubric in guidance. . . . Id. at 30040 (emphasis added).

[T]he approach in these final regulations allows postsecondary institutions to decide which of their employees must, may, or must only with a student's consent, report sexual harassment to the recipient's Title IX Coordinator (a report to whom always triggers the recipient's response obligations, no matter who makes the report). Id. (emphasis added).

We believe that the best way to avoid reports "falling through the cracks" or successfully being "swept under the rug" by postsecondary institutions, is not to continue (as Department guidance did) to insist that all postsecondary institutions must have universal or near-universal mandatory reporting. . . . whether universal mandatory reporting for postsecondary institutions benefits victims or harms victims is a complicated issue as to which research is conflicting. Id. at 30106 n.482 (emphasis added).

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"Universal mandatory reporting"

[N]othing in the proposed or final regulations prevents recipients (including postsecondary institutions) from instituting their own policies to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment [i.e. a "universal mandatory reporting policy"]. Id. at 30107 (emphasis added).

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"Mandatory Reporters"

- Should IHE's designate a large cadre of "mandatory reporters" even if they are permitted to?
- Pros/cons?
- Conflicts in research?
- How much time to you have to notify folks of the change?
- Does it make sense to stay the course – for this first year, and wait and see if a change is needed?

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"Notice"

Notice results whenever . . . Title IX Coordinator, or any official with authority: witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant's parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means. These final regulations emphasize that any person may always trigger a recipient's response obligations by reporting sexual harassment to the Title IX Coordinator using contact information that the recipient must post on the recipient's website. The person who reports does not need to be the complainant (i.e., the person alleged to be the victim); a report may be made by "any person" who believes that sexual harassment may have occurred and requires a recipient's response. Id. at 30040 (emphasis added, internal citations omitted).

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Actual Knowledge Can Be Triggered By...

- Report from the complainant
- Third party report ("bystander" reporting)
- Anonymous report (by the complainant or by a third party)

See id. at 30087.

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Anonymous Reports

[T]he Department does not take a position in the NPRM or these final regulations on whether recipients should encourage anonymous reports of sexual harassment . . .

Id. at 30087.

[I]f a recipient cannot identify any of the parties involved in the alleged sexual harassment based on the anonymous report, then a response that is not clearly unreasonable under light of these known circumstances will differ from a response under circumstances where the recipient knows the identity of the parties involved in the alleged harassment, and the recipient may not be able to meet its obligation to, for instance, offer supportive measures to the unknown complainant.

Id. at 30087.

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Notice Cont'd

[N]otice of sexual harassment or allegations of sexual harassment to the recipient's Title IX Coordinator or to an official with authority to institute corrective measures on behalf of the recipient (herein, "officials with authority") will trigger the recipient's obligation to respond. Postsecondary institution students have a clear channel through the Title IX Coordinator to report sexual harassment, and § 106.8(a) requires recipients to notify all students and employees (and others) of the Title IX Coordinator's contact information, so that "any person" may report sexual harassment in person, by mail, telephone, or e-mail (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), and specifies that a report may be made at any time (including during non-business hours) by mail to the Title IX Coordinator's office address or by using the listed telephone number or e-mail address.

Id. at 30106 (emphasis added).

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Title IX Grievance, Discipline and Mediation

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A Word on Accountability...

Recipients cannot be guarantors that sexual harassment will never occur in education programs or activities, but recipients can and will, under these final regulations, be held accountable for responding to sexual harassment in ways designed to ensure complainants' equal access to education without depriving any party of educational access without due process or fundamental fairness.

Id. at 30046 (internal citations omitted, emphasis added).

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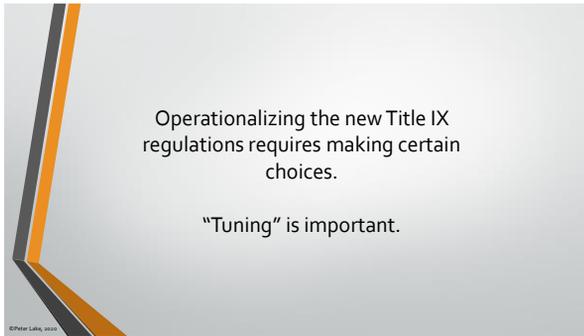
Not Merely "Checking Off Boxes"

Recipients, including universities, will not be able to simply check off boxes without doing anything. Recipients will need to engage in the detailed and thoughtful work of informing a complainant of options, offering supportive measures to complainants through an interactive process described in revised § 106.44(a), and providing a formal complaint process with robust due process protections beneficial to both parties as described in § 106.45.

Id. at 30091.

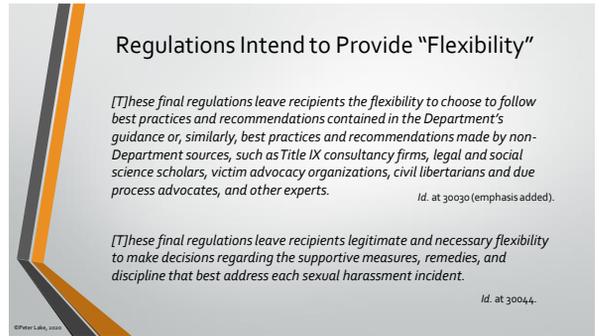
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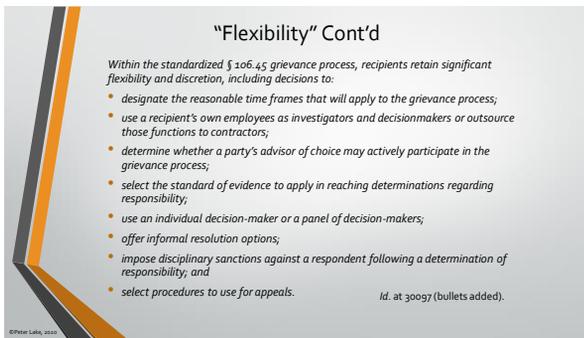


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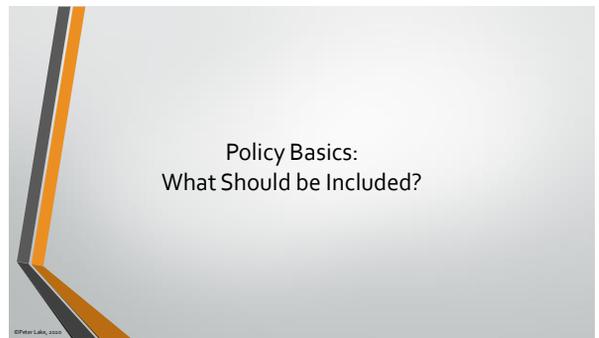
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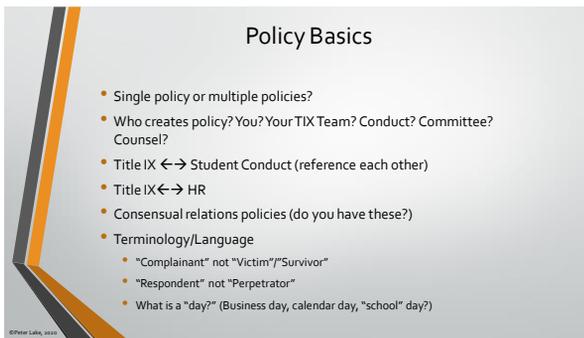


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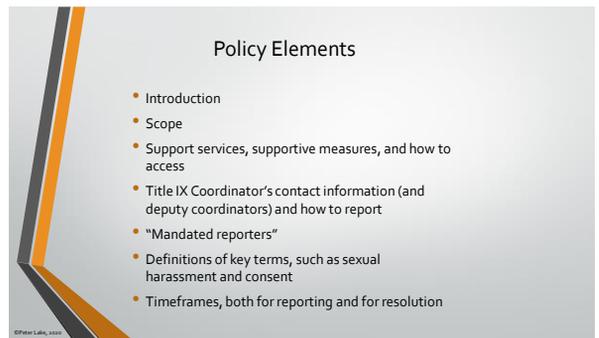


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Policy Elements Cont'd

- Confidentiality of information generally
- Requests for confidentiality
- Opportunity to provide/access to information
- Prohibition against retaliation
- Sanction and remedies, and how they will be determined
- Formal complaints*
- Grievance process
- Evidentiary standard
- Notification of outcome
- Appeal process

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Definitions of Offenses to Be Included in Policies

- Sexual harassment
- Sexual assault
 - Non-consensual sexual contact, and
 - Non-consensual sexual intercourse
- Domestic violence
- Dating violence
- Sexual exploitation*
- Stalking
- Retaliation*
- Intimidation*
- Actual Knowledge

State law considerations!

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"Sexual Harassment" [Three-Prong Test]

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a **reasonable person** to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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"Consent"—Not Defined in New Regulations

- What will your definition be?
 - Affirmative consent?
 - Will distribute across multiple offenses
- Elements
 - consent is a voluntary agreement to engage in sexual activity;
 - someone who is incapacitated cannot consent;
 - (such as due to the use of drugs or alcohol, when a person is asleep or unconscious, or because of an intellectual or other disability that prevents the student from having the capacity to give consent)
 - past consent does not imply future consent;
 - silence or an absence of resistance does not imply consent;
 - consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
 - consent can be withdrawn at any time; and
 - coercion, force, or threat of either invalidates consent.

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"Stalking" (Clery Act Definition)

Stalking. (i) Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

(ii) For the purposes of this definition—

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

34 C.F.R. § 668.46(a)

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"Domestic Violence" (Clery Act Definition)

Domestic violence. (i) A felony or misdemeanor crime of violence committed—

- By a current or former spouse or intimate partner of the victim;
- By a person with whom the victim shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
- By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
- By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

34 C.F.R. § 668.46(a)

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"Dating Violence" (Clery Act Definition)

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.

(i) The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(ii) For the purposes of this definition—

(A) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

(B) Dating violence does not include acts covered under the definition of domestic violence.

34 C.F.R. § 668.46(a)

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Title IX Coordinator Information (§106.8)

Recipients must notify....

- Applicants for admission and employment
- Students
- Employees
- All unions or professional organizations holding collective bargaining or professional agreements with the recipient

...of the contact information for the Title IX Coordinator(s):

- Name or Title
- Office address
- Email address
- Telephone number

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Dissemination of Information §106.8(b)

Notice of Non-Discrimination and Title IX Coordinator Information on:

- Website
- Handbooks
- Catalogs

For

- Applicants for admission and employment
- Students
- Employees
- All unions or professional organizations holding collective bargaining or professional agreements with the recipient

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Scope

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Tuning

- Recipients may continue to address harassing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to § 106.45(b)(3)(i) to clarify that **dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's own code of conduct.** *Id.* at 46 (emphasis added).
- Similarly, **nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient's education program or activity, or occurring against a person who is not located in the United States.** *Id.* at 46 n.108 (emphasis added).

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"Staying in Your Lane"

§ 106.45 may not be circumvented...

... by processing sexual harassment complaints under non-Title IX provisions of a recipient's code of conduct. The definition of "sexual harassment" in § 106.30 constitutes the conduct that these final regulations, implementing Title IX, address. . . . [W]here a formal complaint alleges conduct that meets the Title IX definition of "sexual harassment," a recipient must comply with § 106.45.

Id. at 30095.

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Program or activity: §106.44(a) *General response to sexual harassment.*

... For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

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§106.8(d) *Application outside the United States.*

The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

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Addressing Sexual Assaults Outside of a University's Obligations Under Title IX

Nothing in the final regulations precludes a recipient from applying the § 106.45 grievance process to address sexual assaults that the recipient is not required to address under Title IX. *Id.* at 30065 (emphasis added).

[A] recipient may choose to address conduct outside of or not in its "education program or activity," even though Title IX does not require a recipient to do so. *Id.* at 30093 (emphasis added).

[E]ven if alleged sexual harassment did not occur in the recipient's education program or activity, dismissal of a formal complaint for Title IX purposes does not preclude the recipient from addressing that alleged sexual harassment under the recipient's own code of conduct. Recipients may also choose to provide supportive measures to any complainant, regardless of whether the alleged sexual harassment is covered under Title IX. *Id.* at 30093 (emphasis added).

Tuning? Traps?

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"Non-sexual Harassment Sex Discrimination"

... § 106.45 applies to formal complaints alleging sexual harassment under Title IX, but not to complaints alleging sex discrimination that does not constitute sexual harassment ("non-sexual harassment sex discrimination"). Complaints of non-sexual harassment sex discrimination may be filed with a recipient's Title IX Coordinator for handling under the "prompt and equitable" grievance procedures that recipients must adopt and publish pursuant to § 106.8(c). *Id.* at 30095.

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Conduct That Does Not Meet Sexual Harassment Definition

Allegations of conduct that do not meet the definition of "sexual harassment" in § 106.30 may be addressed by the recipient under other provisions of the recipient's code of conduct. . . . *Id.* at 30095.

Recipients may continue to address harassing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to § 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's own code of conduct. *Id.* at 30037-38 (emphasis added).

Similarly, nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient's education program or activity, or occurring against a person who is not located in the United States. *Id.* at 30038 n.108 (emphasis added).

Tuning? Traps?

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Scope/Off-Campus Jurisdiction

While such situations may be fact specific, recipients must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment (i.e., not a dorm room provided by the recipient) is a situation over which the recipient exercised substantial control; if so, the recipient must respond to notice of sexual harassment that occurred there. *Id.* at 30093.

Will colleges eliminate RSO recognition?
Will RSO's choose to leave?
Relationship Agreements
Study Abroad?

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"Involvement in an education program or activity"

... [A] complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed as provided in the revised definition of "formal complaint" in § 106.30; this provision tethers a recipient's obligation to investigate a complainant's formal complaint to the complainant's involvement (or desire to be involved) in the recipient's education program or activity so that recipients are not required to investigate and adjudicate allegations where the complainant no longer has any involvement with the recipient while recognizing that complainants may be affiliated with a recipient over the course of many years and sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident. . . .

Id. at 30086-87.

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"Statute of Limitations"

The Department does not wish to impose a statute of limitations for filing a formal complaint of sexual harassment under Title IX. . . .

... [A] complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed as provided in the revised definition of "formal complaint" in § 106.30; this provision tethers a recipient's obligation to investigate a complainant's formal complaint to the complainant's involvement (or desire to be involved) in the recipient's education program or activity so that recipients are not required to investigate and adjudicate allegations where the complainant no longer has any involvement with the recipient while recognizing that complainants may be affiliated with a recipient over the course of many years and sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident. The Department believes that applying a statute of limitations may result in arbitrarily denying remedies to sexual harassment victims.

Id. at 30086-87 (emphasis added).

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"Statute of Limitations" and Dismissal of Complaint

[T]he § 106.45 grievance process contains procedures designed to take into account the effect of passage of time on a recipient's ability to resolve allegations of sexual harassment. For example, if a formal complaint of sexual harassment is made several years after the sexual harassment allegedly occurred, § 106.45(b)(3)(ii) provides that . . .

- *if the respondent is no longer enrolled or employed by the recipient, or*
- *if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein,*

. . . then the recipient has the discretion to dismiss the formal complaint or any allegations therein.

Id. at 30087 (bullets added).

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RSO's/Greek Life

[T]here is no exemption from Title IX coverage for fraternities and sororities, and in fact these final regulations specify in § 106.44(a) that the education program or activity of a postsecondary institution includes any building owned or controlled by a student organization officially recognized by the postsecondary institution.

Id. at 30061 (emphasis added).

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Organizational Responsibility Under Title IX

The § 106.45 grievance process. . . . contemplates a proceeding against an individual respondent to determine responsibility for sexual harassment. The Department declines to require recipients to apply § 106.45 to groups or organizations against whom a recipient wishes to impose sanctions arising from a group member being accused of sexual harassment because such potential sanctions by the recipient against the group do not involve determining responsibility for perpetrating Title IX sexual harassment but rather involve determination of whether the group violated the recipient's code of conduct.

Id. at 30096 (emphasis added).

209

No Reasonable Cause Threshold

The Department declines to add a reasonable cause threshold into § 106.45. The very purpose of the § 106.45 grievance process is to ensure that accurate determinations regarding responsibility are reached, impartially and based on objective evaluation of relevant evidence; the Department believes that goal could be impeded if a recipient's administrators were to pass judgment on the sufficiency of evidence to decide if reasonable or probable cause justifies completing an investigation.

Id. at 30105.

210

Title IX Coordinator/Gatekeeping

Title IX Coordinators have always had to consider whether a report satisfies the criteria in the recipient's policy, and these final regulations are not creating new obstacles in that regard. The criteria that the Title IX Coordinator must consider are statutory criteria under Title IX or criteria under case law interpreting Title IX's non-discrimination mandate with respect to discrimination on the basis of sex in the recipient's education program or activity against a person in the United States, tailored for administrative enforcement. Additionally, these final regulations do not preclude action under another provision of the recipient's code of conduct, as clearly stated in revised § 106.45(b)(3)(i), if the conduct alleged does not meet the definition of Title IX sexual harassment.

Id. at 30090 (internal citation omitted, emphasis added).

211

Classroom Behavior

Nothing in the final regulations reduces or limits the ability of a teacher to respond to classroom behavior. If the in-class behavior constitutes Title IX sexual harassment, the school is responsible for responding promptly without deliberate indifference, including offering appropriate supportive measures to the complainant, which may include separating the complainant from the respondent, counseling the respondent about appropriate behavior, and taking other actions that meet the § 106.30 definition of "supportive measures" while a grievance process resolves any factual issues about the sexual harassment incident. If the in-class behavior does not constitute Title IX sexual harassment (for example, because the conduct is not severe, or is not pervasive), then the final regulations do not apply and do not affect a decision made by the teacher as to how best to discipline the offending student or keep order in the classroom.

Id. at 30069 (emphasis added).

*Who is a "teacher" and what is a "classroom?"
Are teachers prohibited from addressing serious violations at the time they are occurring?*

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Chilling effect?

The Department does not believe that evaluating verbal harassment situations for severity, pervasiveness, and objective offensiveness will chill reporting of unwelcome conduct, because recipients retain discretion to respond to reported situations not covered under Title IX. Thus, recipients may encourage students (and employees) to report any unwanted conduct and determine whether a recipient must respond under Title IX, or chooses to respond under a non-Title IX policy.

Id. at 30154 (emphasis added).

213

Trigger Warnings?

These final regulations neither require nor prohibit a recipient from providing a trigger warning prior to a classroom discussion about sexual harassment including sexual assault; § 106.6(d)(1) does assure students, employees (including teachers and professors), and recipients that ensuring non-discrimination on the basis of sex under Title IX does not require restricting rights of speech, expression, and academic freedom guaranteed by the First Amendment. Whether the recipient would like to provide such a trigger warning and offer alternate opportunities for those students fearing renewed trauma from participating in such a classroom discussion is within the recipient's discretion.

Id. at 30419 (emphasis added).

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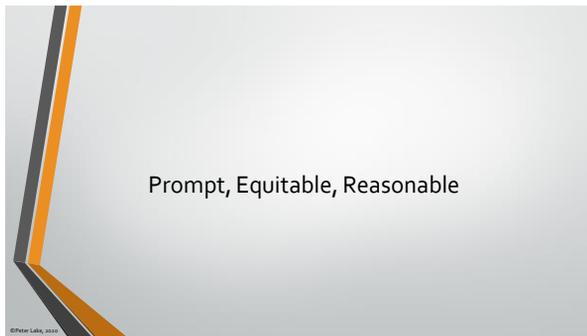
Tuning with Other Policies and Campus Functions

- Student and Organizational Conduct
- Employment Conduct
- Disability Services
- Equity
- Security
- Threat Assessment
- Bias Incident Reporting
- Care Team Reports

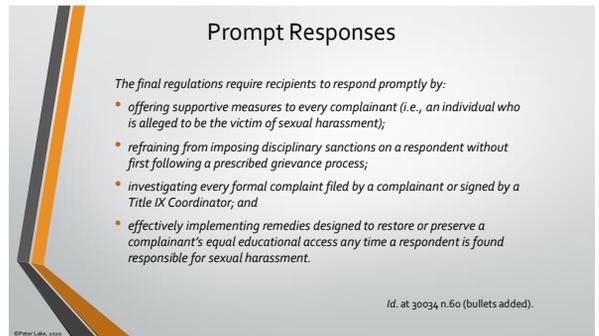
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Policy should reflect practice and practice should reflect policy.

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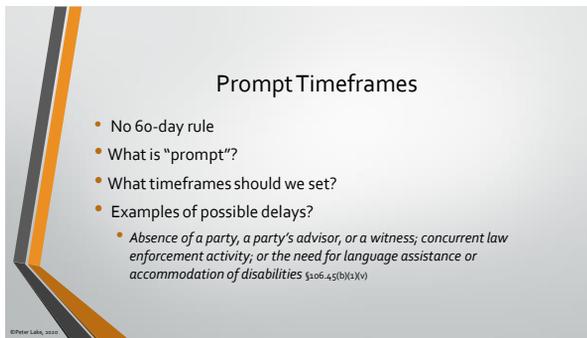


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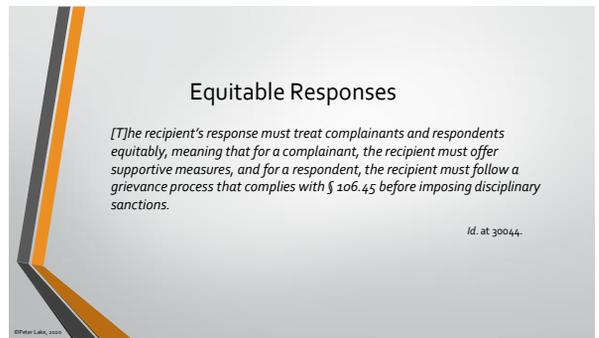


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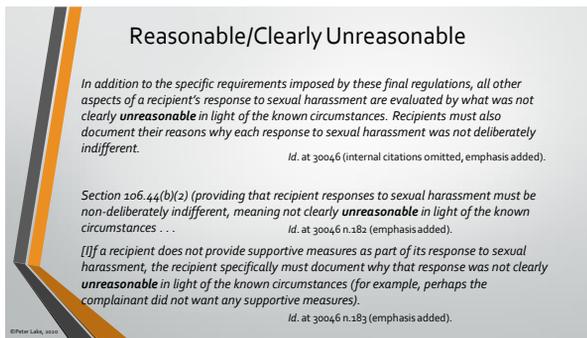


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Concurrent Law Enforcement Activity

Section 106.45(b)(3)(v) provides that the recipient's designated *reasonably prompt time frame for completion of a grievance process is subject to temporary delay or limited extension for good cause, which may include concurrent law enforcement activity.* Section 106.45(b)(6)(i) provides that the decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party's failure to appear or answer cross-examination questions at a hearing; this provision applies to situations where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to avoid self-incrimination that could be used against the respondent in the criminal proceeding. Further, subject to the requirements in § 106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inculpatory and exculpatory, **nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process.** § 106.45(b)(5)(vi) (specifying that the evidence directly related to the allegations may have been gathered by the recipient "from a party or other source" which could include evidence obtained by the recipient from law enforcement) (emphasis added), § 106.45(b)(3)(ii).

©Peter Lake, 2020. Id. at 30099 n.435 (emphasis added).

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Law Enforcement Cannot Be Used to Skirt Title IX Process

[A] recipient cannot discharge its legal obligation to provide education programs or activities free from sex discrimination by referring Title IX sexual harassment allegations to law enforcement (or requiring or advising complainants to do so), because the purpose of law enforcement differs from the purpose of a recipient offering education programs or activities free from sex discrimination. Whether or not particular allegations of Title IX sexual harassment also meet definitions of criminal offenses, the recipient's obligation is to respond supportively to the complainant and provide remedies where appropriate, to ensure that sex discrimination does not deny any person equal access to educational opportunities. Nothing in the final regulations prohibits or discourages a complainant from pursuing criminal charges in addition to a § 106.45 grievance process.

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Police Investigations

The 2001 Guidance takes a similar position: "In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively."

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Confidentiality

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Confidentiality and FERPA Protections

Section 106.72(a) requires recipients to **keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness** (unless permitted by FERPA, or required under law, or as necessary to conduct proceedings under Title IX), and § 106.72(b) states that exercise of rights protected by the First Amendment is not retaliation. Section 106.30 defining "supportive measures" instructs recipients to **keep confidential the provision of supportive measures except as necessary to provide the supportive measures.** These provisions are intended to protect the confidentiality of complainants, respondents, and witnesses during a Title IX process, subject to the recipient's ability to meet its Title IX obligations consistent with constitutional protections.

©Peter Lake, 2020. Id. at 30071 (emphasis added).

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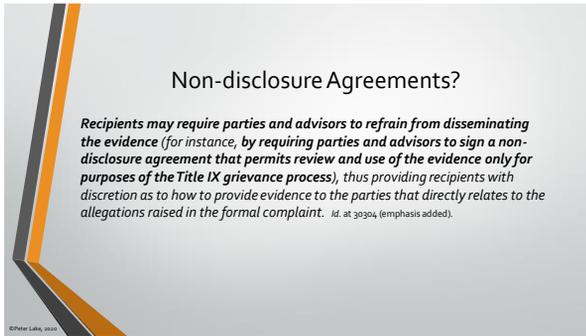
"Gag orders" are not permitted, but

... abuses of a party's ability to discuss the allegations can be addressed through tort law and retaliation prohibitions. *Id.* at 30296.

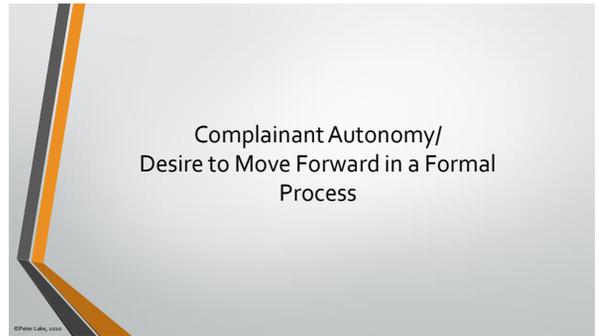
[§106.45(b)(5)(iii)] applies only to discussion of "the allegations under investigation," which means that where a complainant reports sexual harassment but no formal complaint is filed, § 106.45(b)(5)(iii) does not apply, leaving recipients discretion to impose non-disclosure or confidentiality requirements on complainants and respondents. *Id.*

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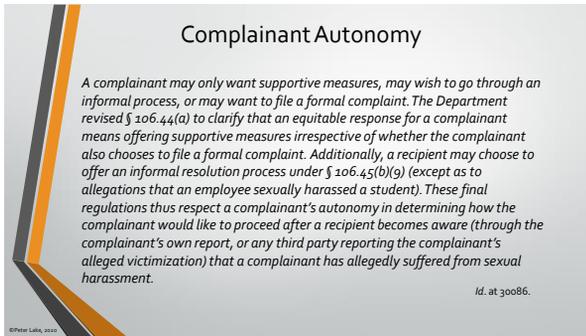


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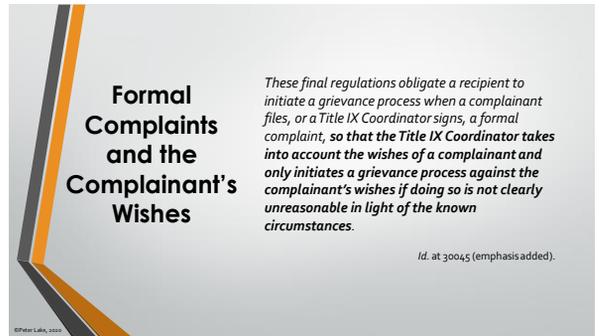


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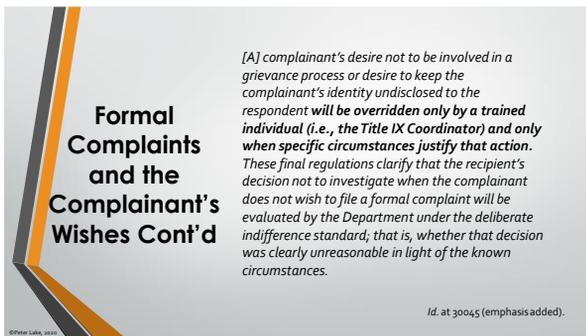


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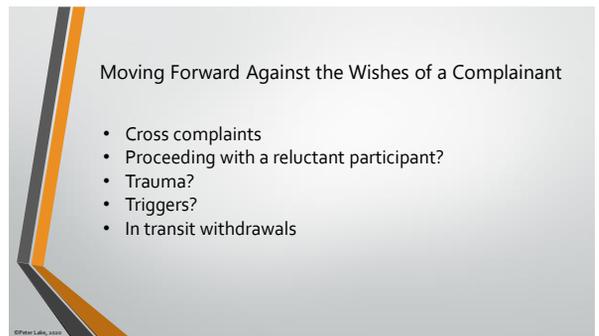


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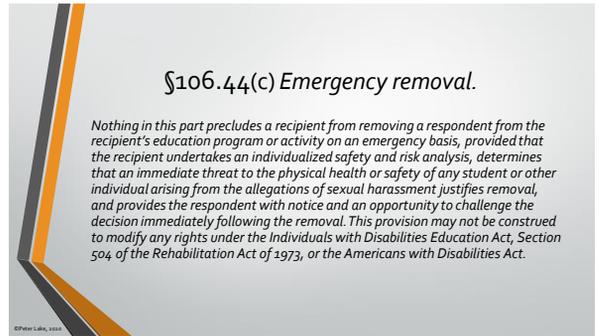


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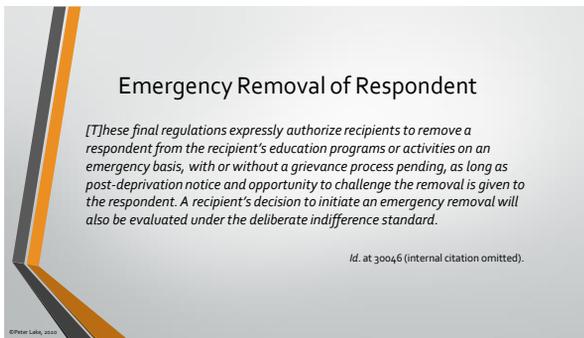


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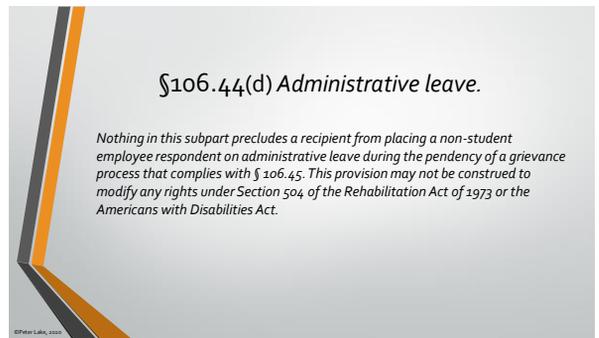


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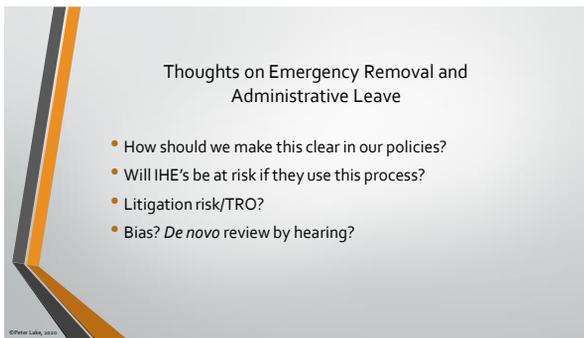


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§ 106.30(a) "Formal Complaint"

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.

(emphasis added)

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"Formal Complaint" Cont'd

As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

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"Formal Complaint" Cont'd

A "formal complaint" is a document that initiates a recipient's grievance process, but a formal complaint is not required in order for a recipient to have actual knowledge of sexual harassment, or allegations of sexual harassment, that activates the recipient's legal obligation to respond promptly, including by offering supportive measures to a complainant.

Id. at 3030 (emphasis added).

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§ 106.45(b)(3)(i)

(3) Dismissal of a formal complaint—

(i) *The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part, such a dismissal does not preclude action under another provision of the recipient's code of conduct.*

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§ 106.45(b)(3)(ii)

(ii) *The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.*

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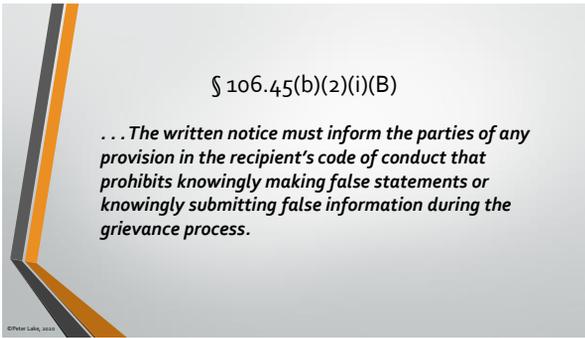
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§ 106.45(b)(3)(iii)

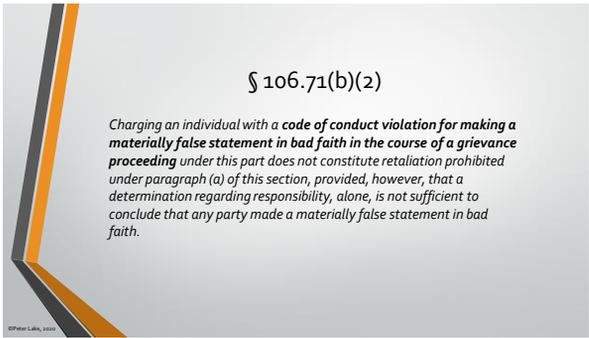
(iii) *Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.*

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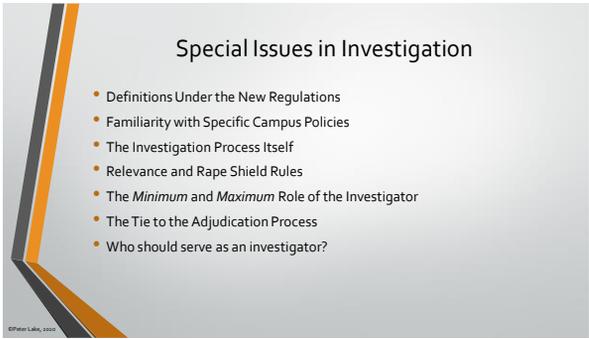


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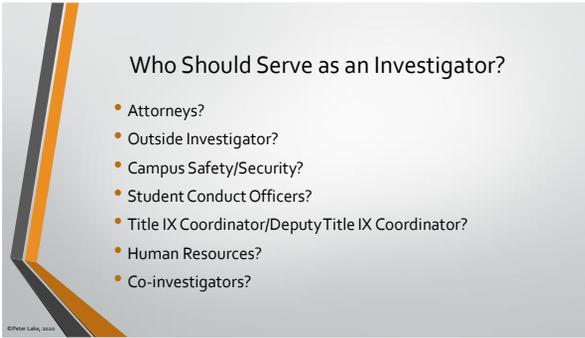


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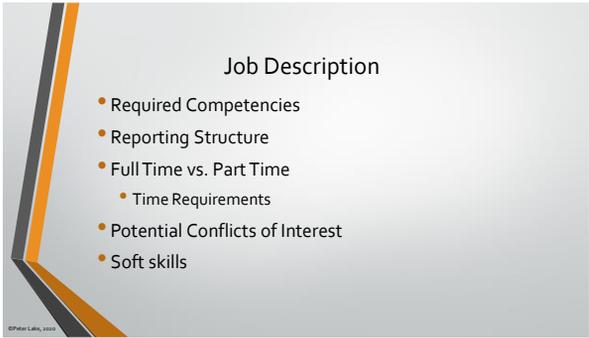


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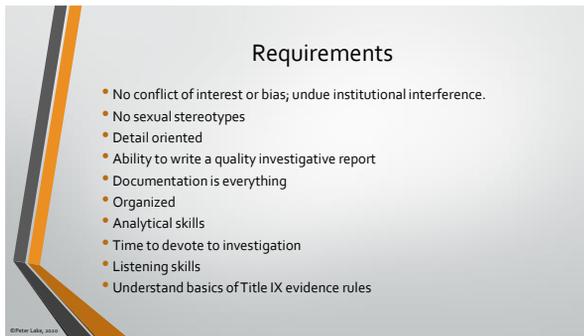
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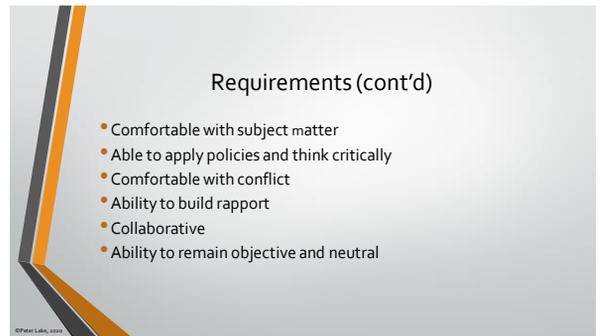
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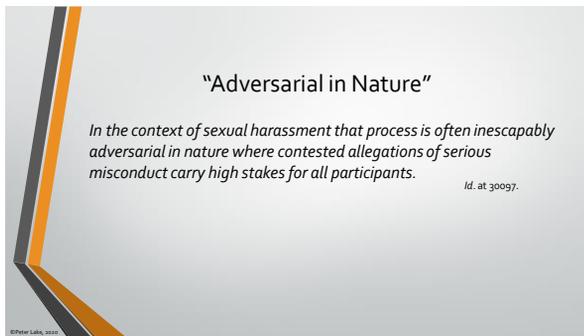


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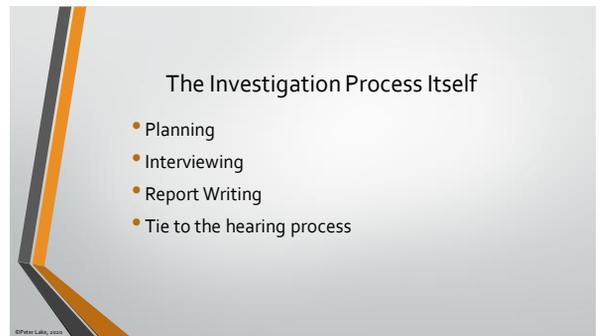


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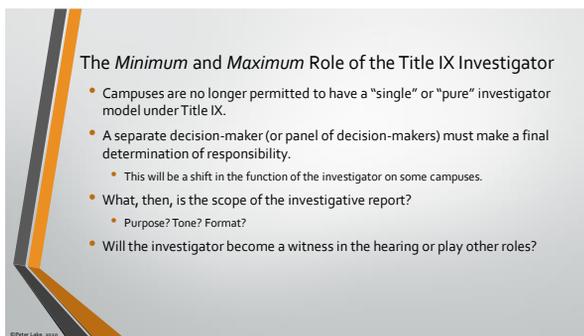


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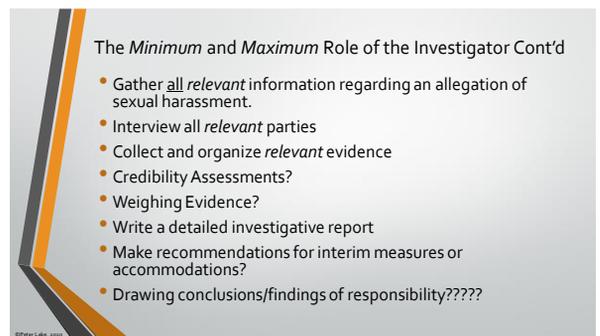


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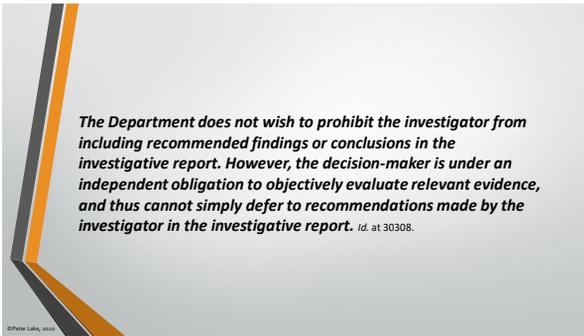
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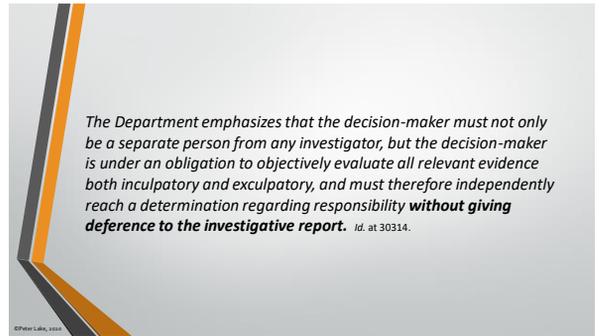


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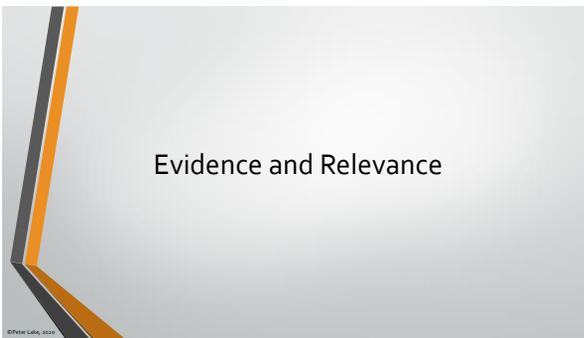


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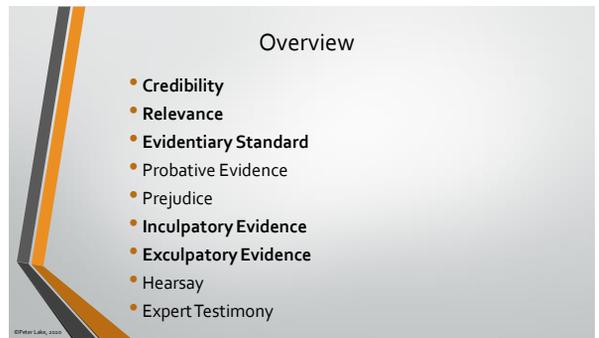
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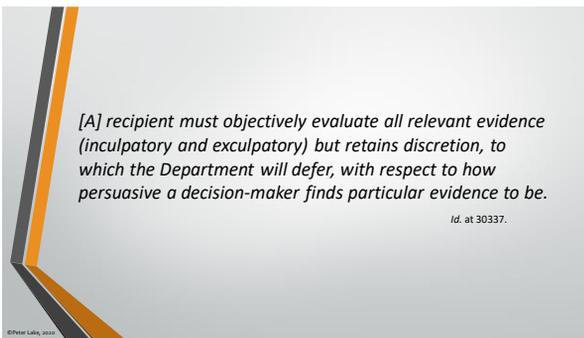


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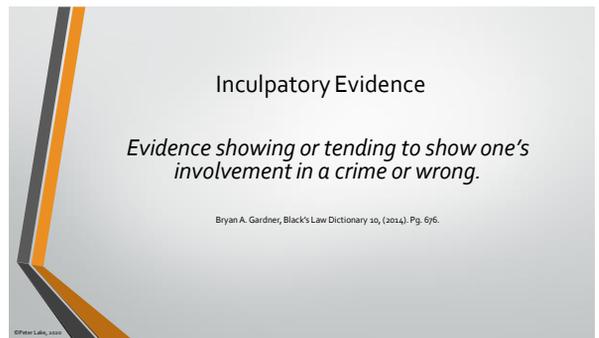


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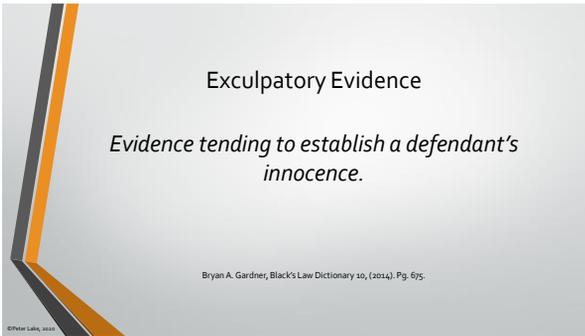
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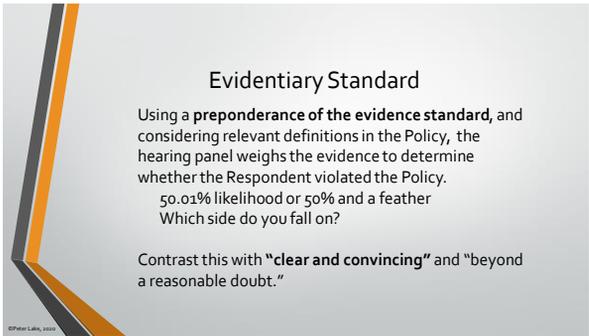
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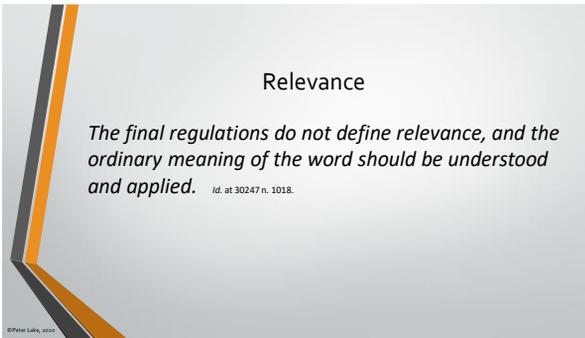


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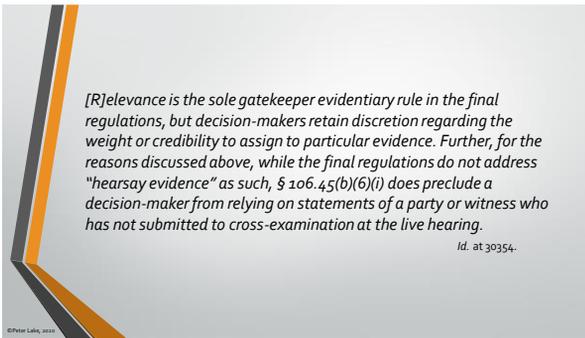


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Prior Sexual History/Sexual Predisposition

Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from **questions or evidence about the complainant's prior sexual behavior or sexual predisposition**, mirroring rape shield protections applied in Federal courts.

Id. at 30303 (emphasis added).

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Rape Shield Language

[T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant's sexual predisposition (with no exceptions) and about a complainant's prior sexual behavior subject to two exceptions:

- 1) if offered to **prove that someone other than the respondent committed the alleged sexual harassment**, or
- 2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to **prove consent**.

Id. at 30336 n. 1308 (emphasis added).

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Consent and Rape Shield Language

[A] recipient selecting its own definition of consent must apply such definition consistently both in terms of not varying a definition from one grievance process to the next and as between a complainant and respondent in the same grievance process. The scope of the questions or evidence permitted and excluded under the rape shield language in § 106.45(b)(6)(i)-(ii) will depend in part on the recipient's definition of consent, but, whatever that definition is, the recipient must apply it consistently and equally to both parties, thereby avoiding the ambiguity feared by the commenter. *Id.* at 30125.

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Rape Shield Language

[T]he rape shield language in this provision:

- **considers all questions and evidence of a complainant's sexual predisposition irrelevant, with no exceptions;**
- **questions and evidence about a complainant's prior sexual behavior are irrelevant unless they meet one of the two exceptions;**
- **and questions and evidence about a respondent's sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.**

Id. at 30352 (emphasis added).

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Rape Shield Protections and the Investigative Report

[T]he investigative report must summarize "relevant" evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence. *Id.* at 30353-54.

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Credibility Determinations

- Credibility vs. Reliability
- Often these cases are "word against word," so what exists to corroborate claims?
- Reports to law enforcement, medical assistance, contemporaneous reports or conversations, journal entries, witness accounts, etc. can be viewed as corroborating (if medical or mental health reports exist you can ask the alleged victim for access to those records)
- In cases where medical or mental health records exist and panel members gain access, it's a good idea to enlist the help of medical/mental health experts to interpret.
- Avoid expectations or assumptions about behaviors or responses by either complainant or respondent. Avoid stereotypes; prevent bias, implicit or otherwise

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Credibility Determinations Cont'd

- Assess demeanor: Does the person appear credible? Look at body language, eye contact, level of nervousness, defensiveness, evasiveness, etc.
- Is the person's account inherently believable? Plausible? What is his or her potential bias?
- Does the person have a motive to be untruthful?
- Are there past acts that could be relevant (although past acts are not determinative of the issue before you they can be relevant for some purposes).
- Pay attention to inconsistencies, but remember that in cases of trauma, inconsistencies can be normal. Inconsistencies alone should not determine credibility or lack thereof.
- Look out for attempts to derail the hearing, deflect away from questions, and/or bog down the hearing with irrelevant information or minutia.
- Check your own bias at the door. Do not pre-judge your findings until all relevant information is heard. Working with "theories of the case" are not bias, but remain open to revising those theories based on fact. Do not be lured towards confirmations bias.

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Advisors and Hearings

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§ 106.45(b)(5)(iv)

(iv) 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, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor 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;

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Must You Allow a Complainant to Bring a Support Person to the Initial Meeting with the Title IX Coordinator?

Although these final regulations do not expressly require recipients to allow complainants to bring a supportive friend to an initial meeting with the Title IX Coordinator, nothing in these final regulations prohibits complainants from doing so. Indeed, many people bring a friend or family member to doctors' visits for extra support, whether to assist a person with a disability or for emotional support, and the same would be true for a complainant reporting to a Title IX Coordinator. Once a grievance process has been initiated, these final regulations require recipients to provide the parties with written notice of each party's right to select an advisor of choice, and nothing precludes a party from choosing a friend to serve as that advisor of choice.

See id. at 30293 (emphasis added).

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"Advisors"

- Complainants and respondents can have any advisor of their choosing.
- Some will choose a lawyer as an advisor. Some will want a lawyer but will not be able to afford one. Equitable treatment issues?
- Some may have a family member, a friend, or another trusted person serve as their advisor.
- If a party does not have an advisor, the school must provide one.
 - *[W]hile the final regulations do not require the recipient to pay for parties' advisors, nothing in the final regulations precludes a recipient from choosing to do so. Id. at 30297.*
- Effective representation?
 - *[P]roviding parties the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation. Id. at 30297.*
 - *Should not be viewed as practicing law, but rather "as providing advocacy services to a complainant or respondent." Id. at 30299.*

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"Witnesses" as "Advisors"

The Department acknowledges commenters' concerns that advisors may also serve as witnesses in Title IX proceedings, or may not wish to conduct cross-examination for a party whom the advisor would otherwise be willing to advise, or may be unavailable to attend all hearings and meetings. Notwithstanding these potential complications that could arise in particular cases, the Department believes it would be inappropriate to restrict the parties' selection of advisors by requiring advisors to be chosen by the recipient, or by precluding a party from selecting an advisor who may also be a witness.

Id. at 30299.

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“Witnesses” as “Advisors” Cont’d

The Department notes that the § 106.45(b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias does not apply to party advisors (including advisors provided to a party by a postsecondary institution as required under § 106.45(b)(6)(i)), and thus, the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statement as a witness does not violate the final regulations. Rather, the perceived “conflict of interest” created under that situation would be taken into account by the decision-maker in weighing the credibility and persuasiveness of the advisor-witness’s testimony. *Id.* at 30299.

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“Advisors” Cont’d

How can/should advisors participate in the process?

Section 106.45(b)(5)(vi) (evidence subject to inspection and review must be sent electronically or in hard copy to each party and the party’s advisor of choice). *Id.* at 30298 n. 1168.

Section 106.45(b)(5)(vii) (a copy of the investigative report must be sent electronically or in hard copy to each party and the party’s advisor of choice). *Id.* at 30298 n. 1169.

[T]he final regulations make one exception to the provision in § 106.45(b)(5)(iv) that recipients have discretion to restrict the extent to which party advisors may actively participate in the grievance process: Where a postsecondary institution must hold a live hearing with cross-examination, such cross-examination must be conducted by party advisors. *Id.* at 30298 n. 1167.

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§ 106.45(b)(6)(i)

(6) Hearings.

(i) For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. **At the live hearing, the decisionmaker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.**

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§ 106.45(b)(6)(i) Cont’d

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. **If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.**

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Hearings

- What is a “hearing”?
- Single decision-maker vs. a panel of decision makers?
- Rules of evidence?
- Should all hearings be online (currently)?
- What are the differences?
- Online hearings
 - Platforms?
 - Security?
 - Do you record?
- Cross-examination
- Hearing rules?

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Adopting Rules Outside of § 106.45(b)

§ 106.45(b) expressly allows recipients to adopt rules that apply to the recipient’s grievance process, other than those required under § 106.45, so long as such additional rules apply equally to both parties. For example, a postsecondary institution recipient may adopt reasonable rules of order and decorum to govern the conduct of live hearings. *Id.* at 30293 n. 1148.

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More on § 106.45

§ 106.45 would, for example, permit a recipient to require parties personally to answer questions posed by an investigator during an interview, or personally to make any opening or closing statements the recipient allows at a live hearing, so long as such rules apply equally to both parties. *Id.* at 30298.

While nothing in the final regulations discourages parties from speaking for themselves during the proceedings, the Department believes it is important that each party have the right to receive advice and assistance navigating the grievance process. *Id.* at 30298.

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Recipients may not...

- ... adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45 . . .
- ... adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice . . .
- ... adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege) . . .

Id. at 30294 (internal citations omitted).

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Rules for Evaluating Evidence

... the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties. *Id.* at 30294 (emphasis added).

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Rules Regarding Weight and Credibility

A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents. Because a recipient's investigators and decision-makers must be trained specifically with respect to "issues of relevance," any rules adopted by a recipient in this regard should be reflected in the recipient's training materials, which must be publicly available.

Id. at 30294 (emphasis added).

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Statements Not Subject to Cross Examination

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility, provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Section 106.45(b)(6)(i)

One question that a postsecondary institution may have is whether not relying on a party's statement—because that party has not submitted to cross-examination—means not relying on a description of the words allegedly used by a respondent if those words constitute part of the alleged sexual harassment at issue.

The answer to that question is "no."

For example, where a complainant alleges that the respondent said to the complainant: "If you go on a date with me, I'll give you a higher grade in my class," and at the postsecondary institution's live hearing, the respondent does not submit to cross-examination, then § 106.45(b)(6)(i) does not preclude the decision-maker from relying on the complainant's testimony that the respondent said those words to the complainant. The words described by the complainant, allegedly attributed to the respondent, are themselves the misconduct that constitutes sexual harassment under § 106.30 (i.e., a recipient's employee conditioning an educational benefit on participation in unwelcome sexual conduct, often referred to as *quid pro quo* harassment) and are not the respondent's "statement" (i.e., the respondent's intent to make a factual assertion).

U.S. Dept. of Educ. Office for Civil Rights, Blog (May 22, 2020), <https://www2.ed.gov/about/offices/list/ocr/blog/20200522.html>.

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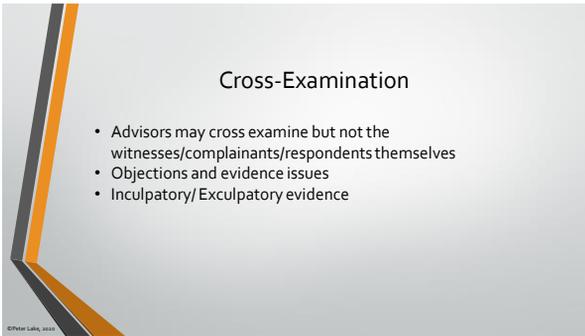
Prior Sexual History

Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal courts.

Id. at 30103 (emphasis added).

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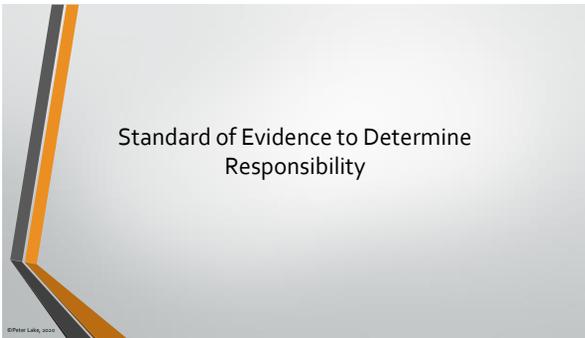


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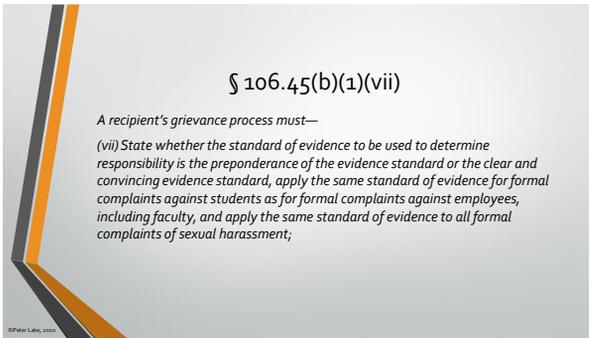


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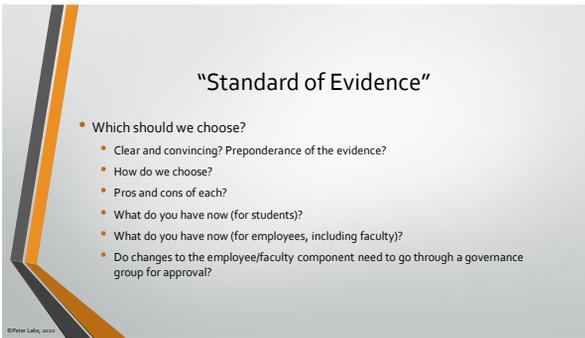


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Sanctions

The Department **does not require particular sanctions** – or therapeutic interventions – for respondents who are found responsible for sexual harassment, and leaves those decisions in the sound discretion of State and local educators. Id. at 30063 (emphasis added).

The Department **does not require disciplinary sanctions after a determination of responsibility**, and does not prescribe any particular form of sanctions. Id. at 30096 (emphasis added).

The Department acknowledges that this approach departs from the 2001 Guidance, which stated that where a school has determined that sexual harassment occurred, **effective corrective action “tailored to the specific situation” may include particular sanctions against the respondent**, such as counseling, warning, disciplinary action, or escalating consequences. . . . For reasons described throughout this preamble, the final regulations modify this approach to focus on remedies for the complainant who was victimized rather than on second guessing the recipient’s disciplinary sanction decisions with respect to the respondent. However, the final regulations are consistent with the 2001 Guidance’s approach inasmuch as § 106.45(b)(3)(i) clarifies that “remedies” may consist of individualized services similar to those described in § 106.30 as “supportive measures” except that remedies need not avoid disciplining or burdening the respondent. Id. at 30096-97 (emphasis added).

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Disciplinary Decisions/Sanctions Must Themselves Not Be Discriminatory

The Department notes that while Title IX does not give the Department a basis to impose a Federal standard of fairness or proportionality onto disciplinary decisions, Title IX does, of course, require that actions taken by a recipient must not constitute sex discrimination; Title IX’s non-discrimination mandate applies as much to a recipient’s disciplinary actions as to any other action taken by a recipient with respect to its education programs or activities. Id. at 30104.

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Sanctions

- If a respondent is found responsible in a grievance process for sexual harassment what is an appropriate sanction?
 - Is anything less than expulsion okay?
- Schools maintain discretion and flexibility in imposing sanctions AFTER a respondent has been found responsible.
- Make sure to outline the possible RANGE of sanctions clearly in your policy.
- Can include a continuation of supportive measures.

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§ 106.45(b)(1)(i)

(1) Basic requirements for grievance process. A recipient’s grievance process must—

(i) Treat complainants and respondents equitably by **providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent**, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. **Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;**

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Remedies

Where a respondent is found responsible for sexual harassment as defined in § 106.30, **the recipient must provide remedies to the complainant designed to restore or preserve the complainant’s equal access to education.** Id. at 30083 (emphasis added).

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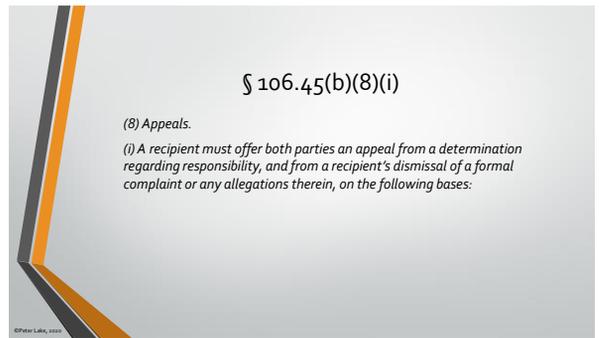
Remedies

- Examples of remedies for an individual complainant
 - Can be a continuation of supportive measures (such as a no-contact order)
 - Academic accommodations/academic support services
 - Counseling services
 - Residence accommodations
- What about remedies for the broader community?
- Again, issuing sanctions after a respondent is found responsible is not enough. The new regulations turn on “remedies for the complainant” not just sanctions against the respondent.
- Are there academic remedies based on the impact the event had?

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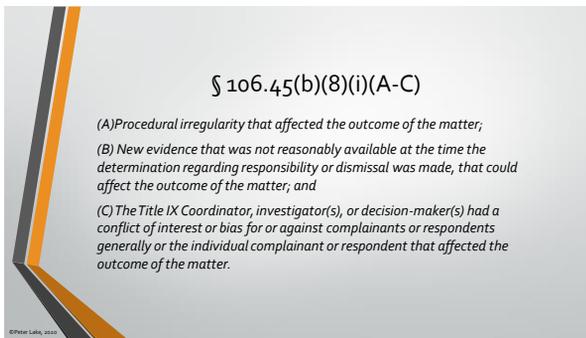


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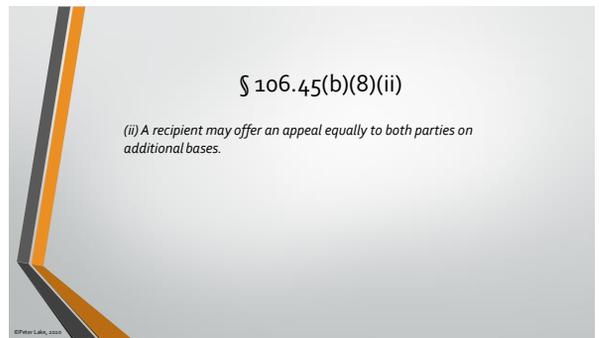


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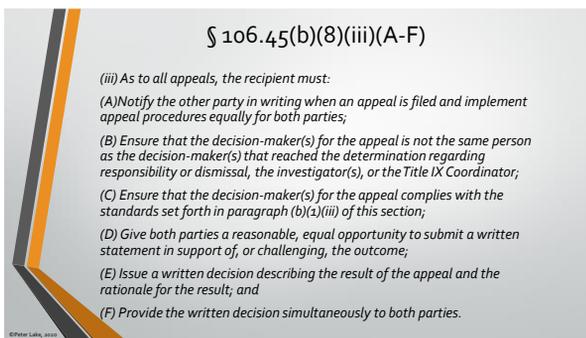


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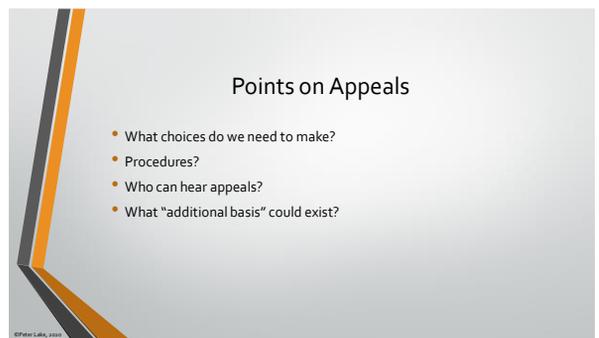


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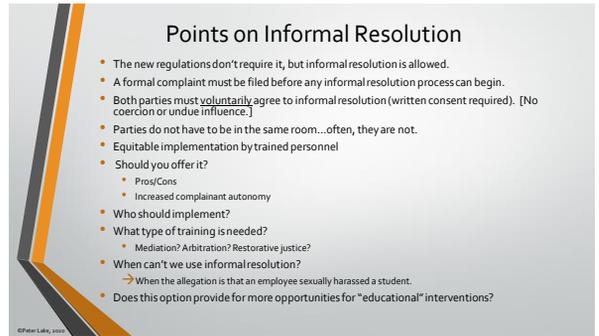
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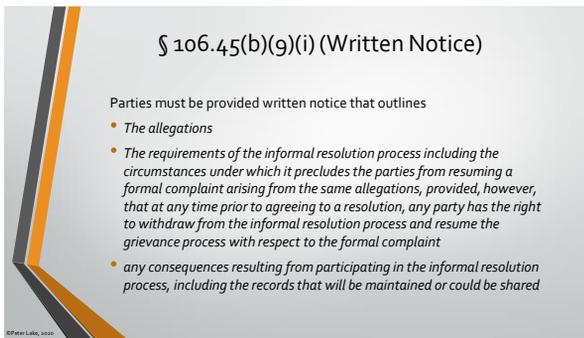


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What is mediation? Cont'd

Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training. As the practice gained popularity, training programs, certifications, and licensing followed, which produced trained and professional mediators committed to the discipline.

- JAMS
- American Arbitration Association (AAA)
- American Bar Association, ADR Section
- Association for Conflict Resolution (ACR)
- CPR Institute for Dispute Resolution
- National Association for Community Mediation

<https://en.wikipedia.org/wiki/Mediation>

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Ending an Informal Process

[A]n informal resolution process, in which the parties voluntarily participate, may end in an agreement under which the respondent agrees to a disciplinary sanction or other adverse consequence, without the recipient completing a grievance process, under § 106.45(b)(9).

Id. at 30059 n.286.

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A Closer Look at Retaliation

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§ 106.71(a)

(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.

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§ 106.71(a) Cont'd

The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

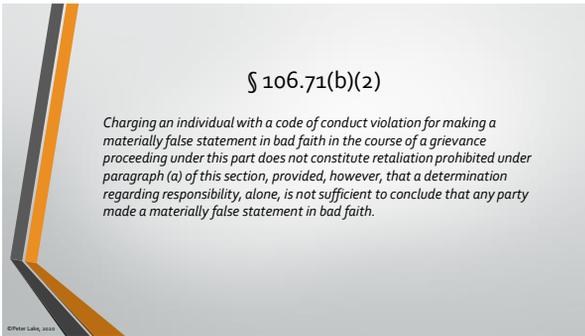
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§ 106.71(b)(1)

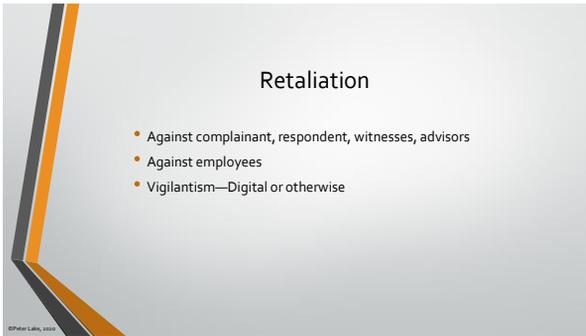
(b) Specific circumstances.

(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

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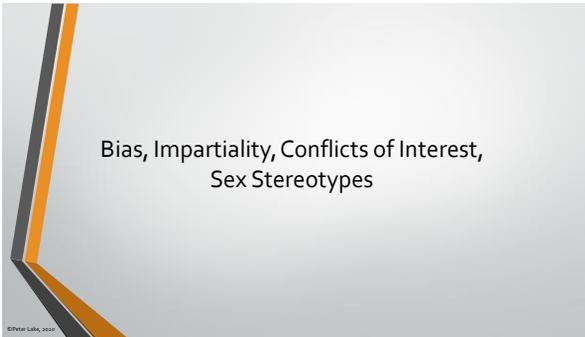


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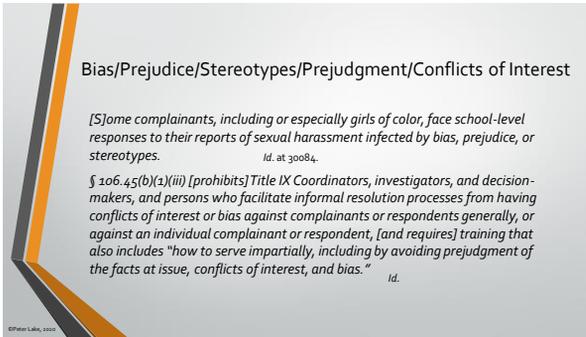


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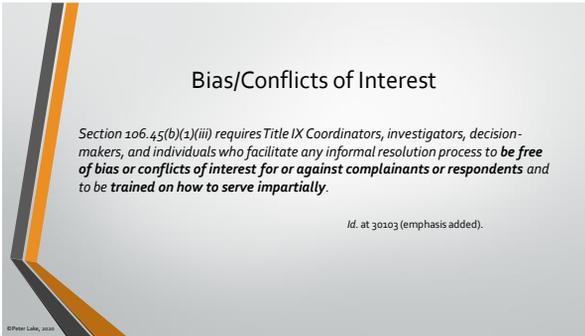


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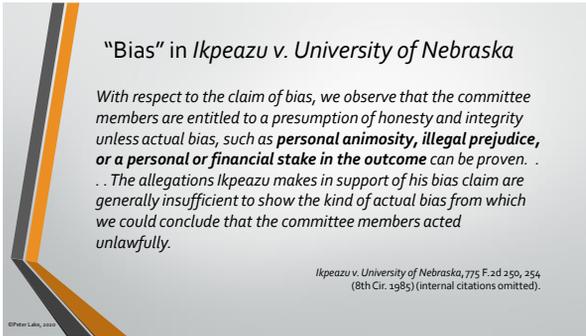


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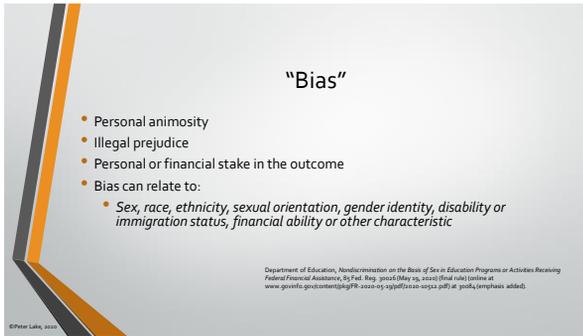
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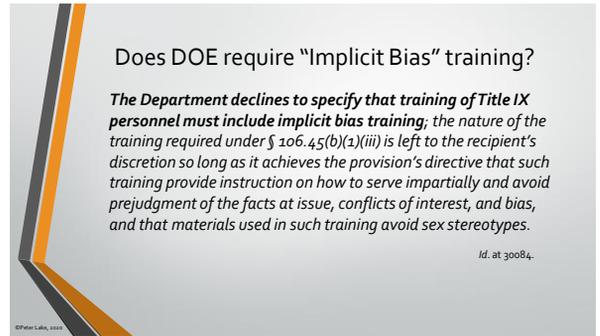
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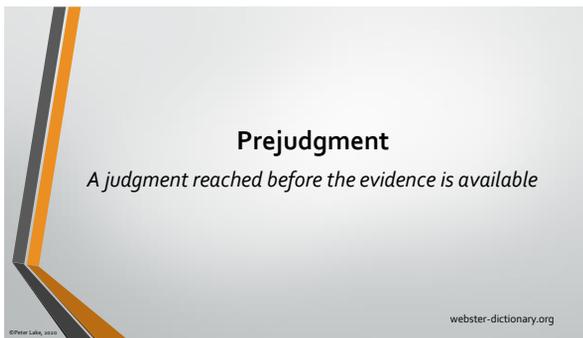


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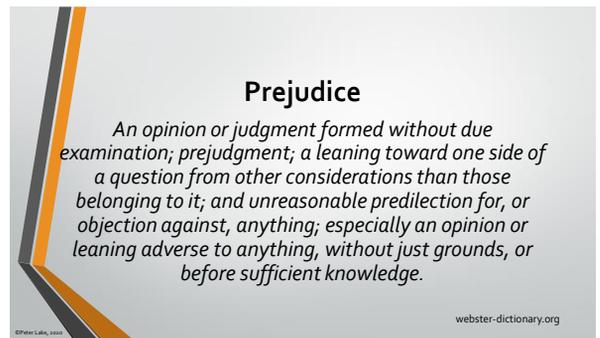


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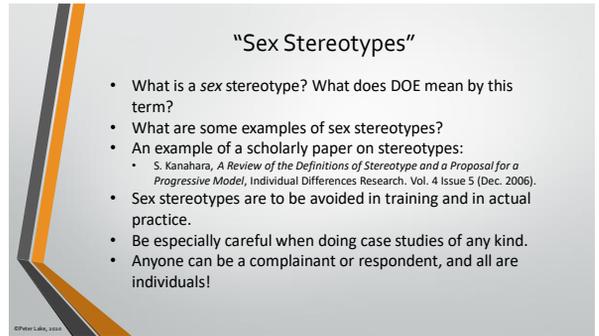


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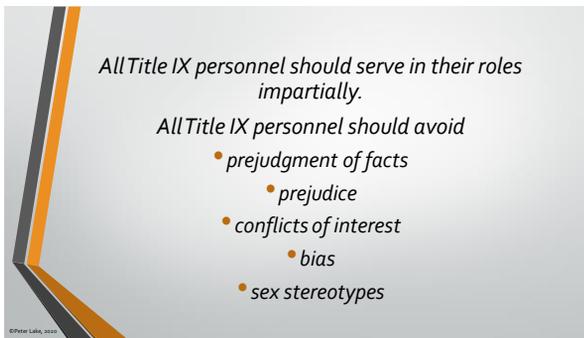


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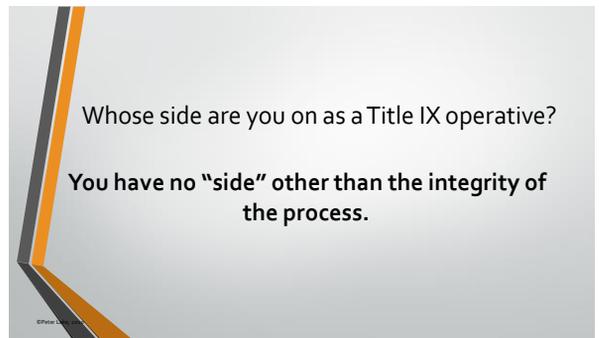


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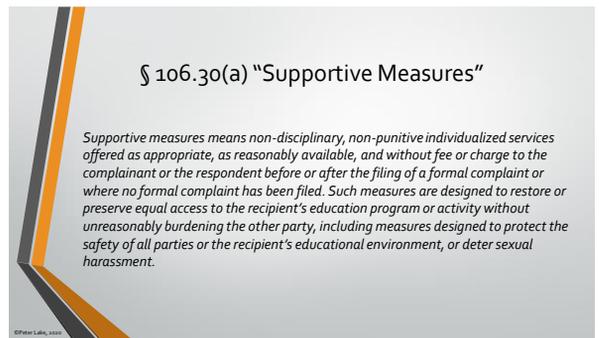
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§ 106.30(a) "Supportive Measures" Cont'd

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. 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 recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

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§106.44(a) Cont'd

... The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint ...

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More on Supportive Measures...

[A] recipient must offer supportive measures to a complainant, regardless of whether the complainant decides to file, or the Title IX Coordinator decides to sign, a formal complaint.

Id. at 30046 (emphasis added).

[S]upportive measures must be offered not only in an "interim" period during an investigation, but regardless of whether an investigation is pending or ever occurs.

Id. (emphasis added).

Complainants must be offered supportive measures, and respondents may receive supportive measures, whether or not a formal complaint has been filed or a determination regarding responsibility has been made.

Id. at 30064 (emphasis added).

[A] recipient must offer supportive measures to any person alleged to be the victim, even if the complainant is not the person who made the report of sexual harassment.

Id. at 30069-70 (emphasis added).

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Supportive Measures and Respondents

*The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a perpetrator of sexual harassment or the experience of a person accused of sexual harassment. Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties. Further, supportive measures may be offered to complainants and respondents (see § 106.30 defining "supportive measures"), and §106.45(b)(5)(iv) requires recipients to provide both parties the same opportunity to select an advisor of the party's choice. These provisions recognize that the stress of participating in a grievance process affects both complainants and respondents and may necessitate support and assistance for both parties. *Id. at 30103 n.477.**

*Under § 106.30, a supportive measure must not be punitive or disciplinary, but may burden a respondent as long as the burden is not unreasonable. *Id. at 30231.**

*The Department does not intend, and the final regulations do not require, to impose a requirement of equality or parity with respect to supportive measures provided to complainants and respondents. *Id. at 30277.**

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Thoughts on Supportive Measures

- Moving classes?
- Housing changes?
- Two students in the same student organization, club, or team?
- Burden on one party but not the other?
- No-contact orders
- *[T]hese final regulations allow for mutual restrictions on contact between the parties as stated in § 106.30, and § 106.30 does not expressly prohibit other types of no-contact orders such as a one-way no-contact order.*

Id. at 30521.

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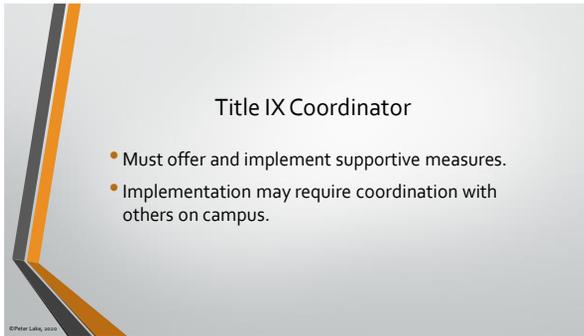
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One-Way No-Contact Orders

*A fact-specific inquiry is required into whether a carefully crafted no-contact order restricting the actions of only one party would meet the § 106.30 definition of supportive measures. For example, if a recipient issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or if a one-way no-contact order does not unreasonably burden the other party, then a one-way no-contact order may be appropriate. *Id. at 30184.**

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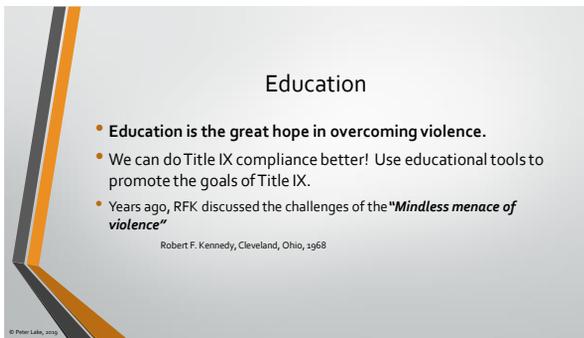


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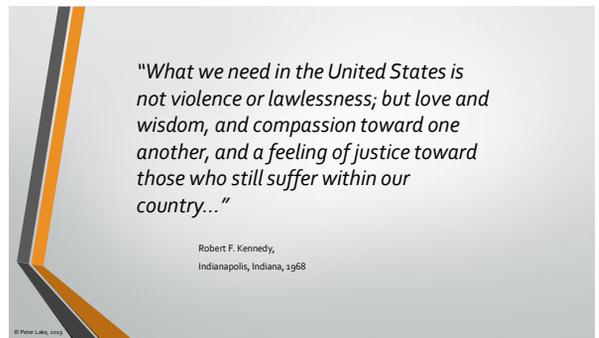


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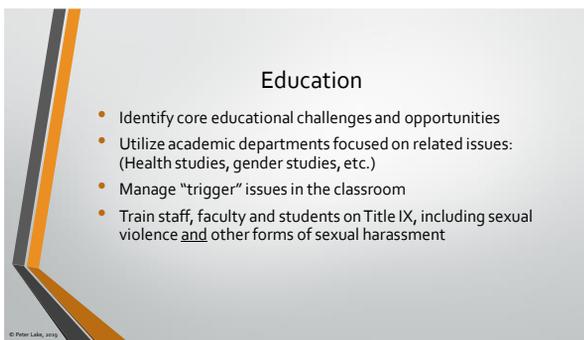


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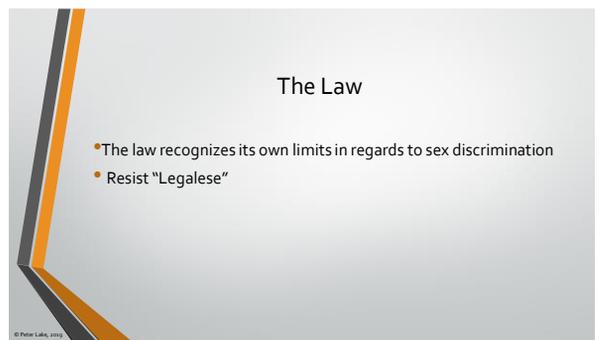
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The Title IX System Itself

- Make your Title IX efforts known to the community
- Look to schools that have been through an investigation for clues
- Utilize the wisdom and experience of campus constituencies to help assess systems
- Effective response to Title IX incidents helps to foster a healthy culture!

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Integration

- Integrate Title IX with other public health and wellness initiatives, such as alcohol and other drug prevention
- Interface Title IX into your institution's mission statement and enterprise risk management (ERM) system

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Sensitivity

- Sonar
- Multicultural Initiatives
- LGBTQIA
- Choose your words

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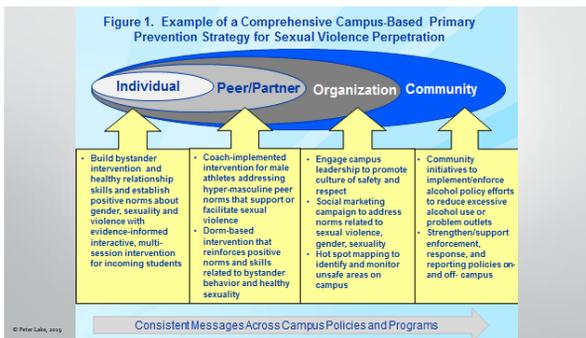
Prevention

- Sexual assault prevention and awareness programs are **required** under the Clery Act
- Use **evidence-based strategies** (still developing) – Centers for Disease Control and Prevention, Division of Violence Prevention, *Preventing Sexual Violence on College Campuses: Lessons from Research and Practice* (April 2014)
- Use a **comprehensive strategy**
Consider the following model from the CDC, *Preventing Sexual Violence on College Campuses: Lessons from Research and Practice* (April 2014)

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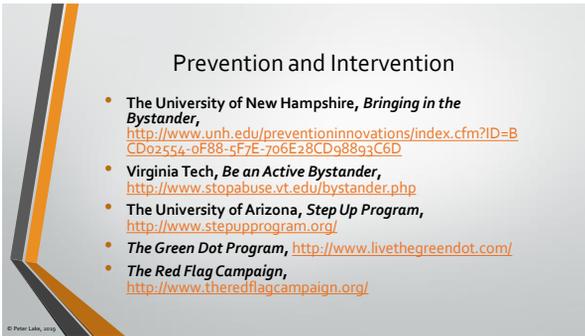
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Prevention

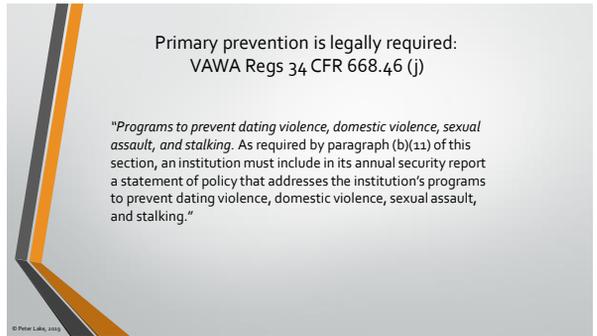
- Alcohol and drug prevention
- Social norming on violence
- Enlist everyone in prevention efforts → Men Can Stop Rape, No More Campaign
- Community efficacy work (Chicago Project, Dr. Felton Earls)
- Bystander intervention training:
 - NotAlone.gov – Bystander intervention factsheet: *Bystander-Focused Prevention of Sexual Violence*

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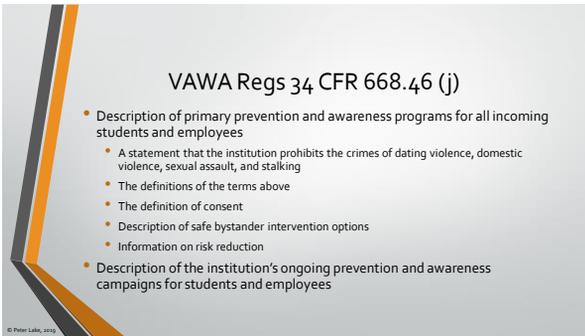


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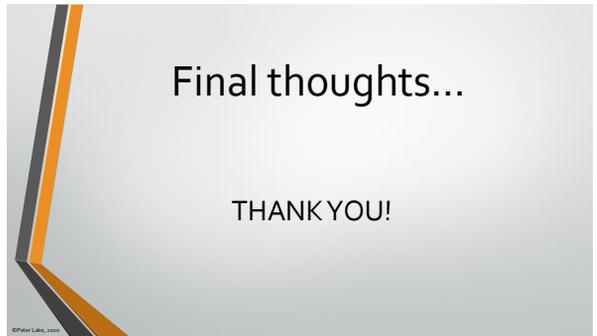


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