

The Four Corners of Title IX Regulatory Compliance

Virginia Department of Criminal Justice Services
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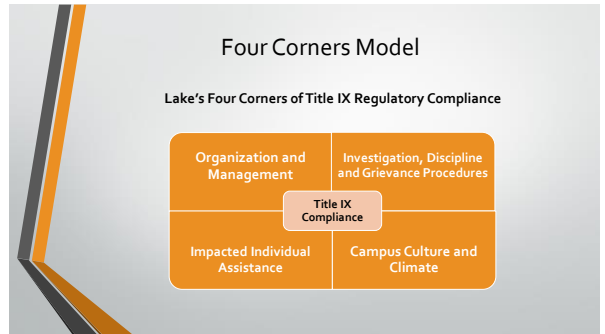
Nothing presented in this training is, or should be considered, legal advice!

Know when to consult legal counsel.

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Introduction

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A Few Initial Thoughts on the 2020 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, YouTube videos
- Status of preexisting guidance and resolutions
 - Withdrawals of previous guidance
- Legal challenges in court

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Some Key Features of the 2020 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 2020 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 2020 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, 34 Fed. Reg. 30401 (May 18, 2020) (Final rule issued at www.govinfo.gov/constitution/FR-2020-10-19/2020-10-19-10124.html at 30401).

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Watch YouTube for Videos from OCR

- The First Amendment and Title IX: An OCR Short Webinar (July 29, 2020)*
- OCR Short Webinar on How to Report Sexual Harassment under Title IX (July 27, 2020)*
- Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar (July 23, 2020)*
- OCR Webinar on Due Process Protections under the New Title IX Regulations (July 21, 2020)*
- OCR Webinar on New Title IX Protections Against Sexual Assault (July 7, 2020)*
- OCR Webinar: Title IX Regulations Addressing Sexual Harassment (May 8, 2020)*

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, 34 Fed. Reg. 30024 (May 19, 1969)(Final rule) (online at www.gpo.gov/conten/gp/FR-2020-05-19/2020-10514.pdf)at 30024.

Prevalence Data See generally Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Final rule) at 30075-83.

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. (i) Internal citation omitted.

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

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. (i) Internal 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. (i) Internal 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. (i) Internal 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/vivi.17.1.73-33638
- 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 Fr 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.

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, Nondiscrimination on the Basis of Sex in Education Programs or Activities Requiring Federal Financial Assistance, 34 Fed. Reg. 30261 (May 19, 1969) (final rule) (cited as *www.gpo.gov/records/34FR-30261-19*) (emphasis added).

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).

"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 went into effect on **August 14, 2020**.

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



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Current State of Title IX—Where are we?

Biden Administration

- New Education Secretary Miguel Cardona
- Deputy Assistant Secretary Suzanne Goldberg (Columbia) will oversee Title IX policy
- Catherine Lhamon has been nominated for Assistant Secretary for Civil Rights
- Executive Order on *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
 - 100-day review at Department of Education
 - Biden gave all clear to issue new guidance and revise, rescind or suspend the Title IX regulations.
 - "The Secretary of Education shall consider taking additional enforcement actions, as appropriate and consistent with applicable law, to enforce the policy set forth in section 1 of this order as well as legal prohibitions on sex discrimination in the form of sexual harassment, which encompasses sexual violence, to the fullest extent permissible under law, to account for intersecting forms of prohibited discrimination that can affect the availability of resources and support for students who have experienced sex discrimination, including discrimination on the basis of race, disability, and national origin; to account for the significant rates at which students who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+) are subject to sexual harassment, which encompasses sexual violence; to ensure that educational institutions are providing appropriate support for students who have experienced sex discrimination; and to ensure that their school procedures are fair and equitable for all."
 - Rep. Foxx and Sen. Burr wrote letters to Secretary Cardona urging him not to change 2020 Title IX regulations
- Another Biden executive order created a White House Gender Policy Council
- LSU under Title IX-related DOE investigation (already under investigation for Clery Act)

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Dept. of Education, *Letter to Students, Educators, and other Stakeholders re Executive Order 14021 Notice of Language Assistance* (April 6, 2021)

A comprehensive review of Title IX regulations will include:

- Public Hearings [OCCURRED IN JUNE 2021]
 - OCR seeks to hear from as many interested parties as possible. We recognize that many students, parents, teachers, faculty members, school staff, administrators, and other members of the public have important insights to share on the issue of sexual harassment in school environments, including sexual violence, and discrimination based on sexual orientation and gender identity. To facilitate this sharing of views, the Department plans to hold a public hearing in which students, educators, and others with interest and expertise in Title IX will be able to participate by offering oral comments and written submissions. OCR expects to announce the dates and times for this hearing in the coming weeks. More information regarding this public hearing, including dates, times, and how to register to participate and speak, will be published on the News Room section of OCR's website (<https://www.ed.gov/ocr/newsroom.html>) and in a forthcoming Federal Register notice.

Letter to Students, Educators, and other Stakeholders re Executive Order 14021 Notice of Language Assistance Cont'd

- Forthcoming Q&A
 - At this time, the Department's Title IX regulations, as amended in 2020, remain in effect. To assist schools, students, and others, OCR plans to issue a question-and-answer document in the coming months. The purpose of this Q&A document will be to provide additional clarity about how OCR interprets schools' existing obligations under the 2020 amendments, including the areas in which schools have discretion in their procedures for responding to reports of sexual harassment.
- Notice of Proposed Rulemaking (Anticipated)
 - After hearing from the public and completing its review of the Department's current Title IX regulations and other agency actions, OCR anticipates publishing in the Federal Register a notice of proposed rulemaking to amend the Department's Title IX regulations. This notice will provide individuals, organizations, schools, and other members of the public with an additional opportunity to share insights and views through a formal notice-and-comment period.

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Current State of Title IX—Where are we?

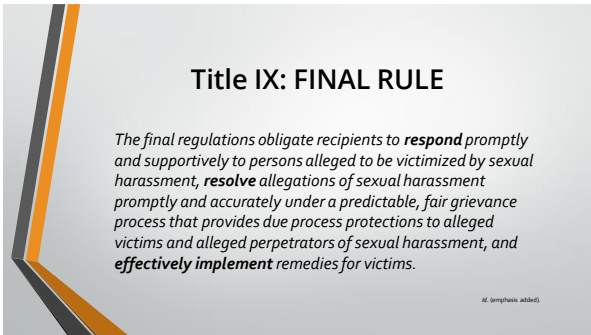
- Revision of Clery Handbook in October 2020
 - Trump administration viewed some parts as overreach
 - Look to the actual regulations for guidance
 - Revision impact on campus Title IX obligations
- VAWA Reauthorization
 - Especially important since domestic violence has increased 8% during the pandemic
 - CCJ, Impact Report: COVID-19 and Domestic Violence Trends (Feb. 2021).
 - Cleared the House, may face obstacles in the senate
 - Strengthen(s) enforcement of court orders that require convicted abusers to relinquish their firearms,
 - Extend(s) protections to immigrant women and transgender women,
 - Ensure(s) Indigenous tribes' jurisdiction over non-Navio perpetrators of sexual assault and domestic violence on tribal lands,
 - Clos(e)s the "boyfriend loophole" by prohibiting anyone convicted of dating violence from purchasing a firearm. Source: <https://www.fbi.gov/newsroom/press-releases/2021/02/18/fbi-advances-anti-domestic-violence-legislation>
- Equal Rights Amendment
 - Efforts to pass have been renewed in the House
- SCOTUS
 - Justice Conroy Barrett now sits on the High Court
 - Her opinion in *Purdue* in 2019—focus on due process

Current State of Title IX—Where are we?

- In June 2021, DOJ issued a statement of interest against the University of Nebraska stating the university adopted inappropriate definitions of discrimination and harassment in alleged sexual misconduct against male athletes
- House passed the Equality Act
 - Sweeping protections for LGBTQ individuals in many areas, such as education, employment, housing, etc.
 - Currently in Senate committee
- Gender Pay Equity
 - Megan Rapinoe, U.S. Women's Soccer star, recently appeared before a congressional committee to testify
- Diversity Training
 - Trump restricted diversity training for federal agencies
 - Biden reversed this in his first days in office
 - Chris Quintana, Trump's controversial diversity training order is dead—or is it? Colleges are still feeling its effects, USA Today (Feb. 6, 2021).
- Post-Covid
 - "Roaring 20s" phenomenon?
- Activism on all sides
 - New report from Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* (March 2021).

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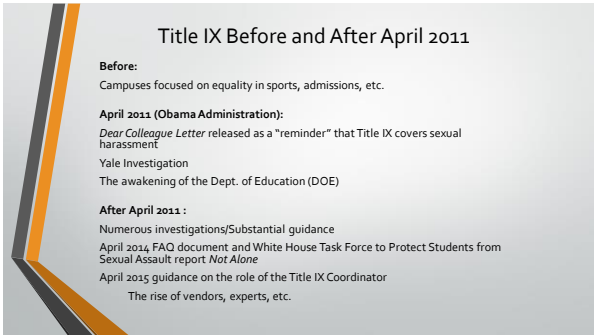


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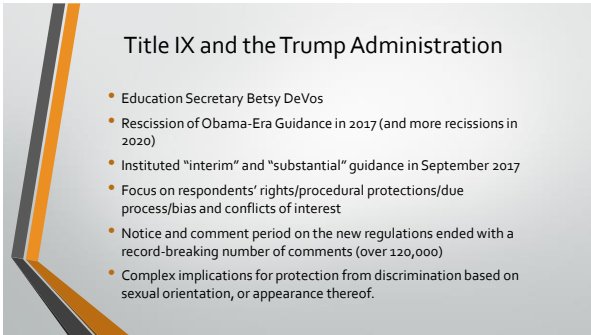


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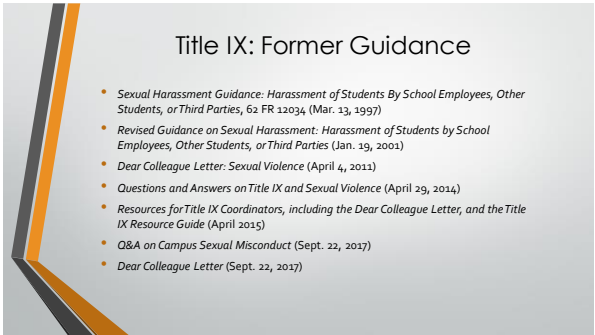
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The New Regulations and Previous Guidance

- Uncertain features of pre-existing guidance and status of "commentary" and blog posts.
 - New regulatory dynamics....
- What about "straddle" cases?
- DOE has said they will not enforce new regulations retroactively.

Court Activity

- Judicial activism and inactivism
 - Lower courts and SCOTUS
 - 6th Circuit in *Baum*
 - 7th Circuit in *Purdue*
 - 3rd Circuit in *University of Sciences*
 - Univ. of Southern California will pay \$852 million as a result of a settlement in case regarding abuse by campus gynecologist
 - *Bostock*
 - *Lady of Guadalupe*
 - *NCAA v. Alston et al*

(See Jeremy Bauer-Wolf, *Constitutional Due Process at Private Institutions?* Inside Higher Ed (June 25, 2019).

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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?

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

Virginia State Laws Cont'd

- VA Code § 23.1-900. Academic transcripts; suspension, permanent dismissal, or withdrawal from institution.
 - Requires a transcript notation for a 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 and requires institutions to adopt policies for the expungement of such notation.
- VA Code § 23.1-412. Non-academic student codes of conduct.
 - Requires each public institution of higher education to adopt non-academic student codes of conduct. 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.
- VA Code § 9.1-191. Virginia sexual assault forensic examiner coordination program.
 - Establishes the Virginia sexual assault forensic examiner coordination program within the Department of Criminal Justice Services.

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

Virginia sexual assault forensic examiner coordination program. 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://lis.virginia.gov/cgi-bin/legp604.exe?se=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. 1989, 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!

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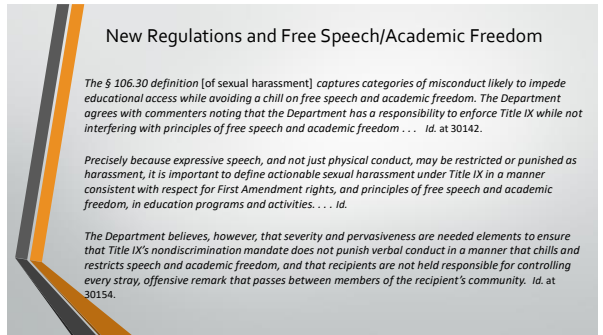
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→ Court cases are already testing some issues

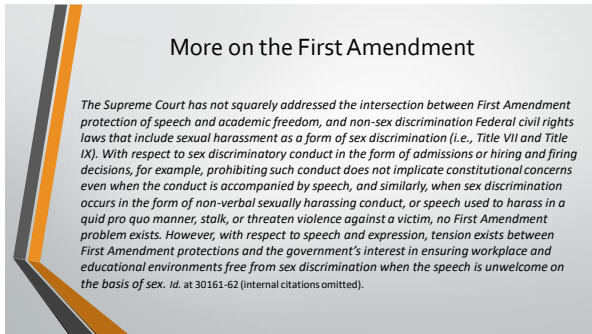
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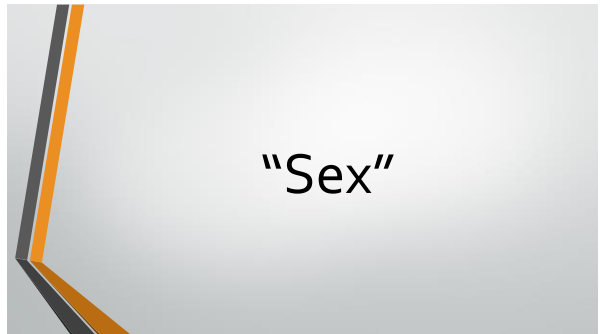
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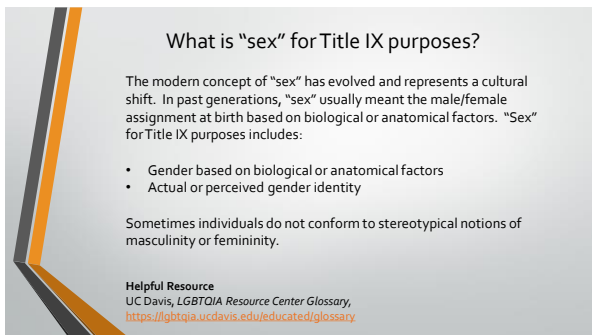
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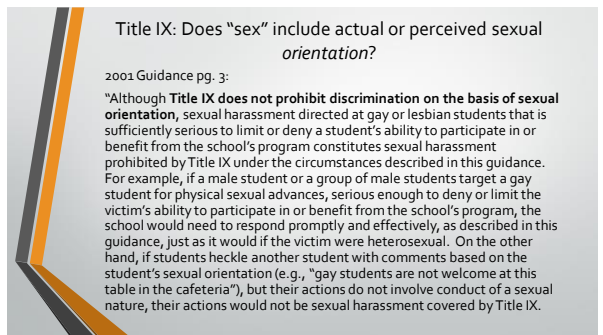
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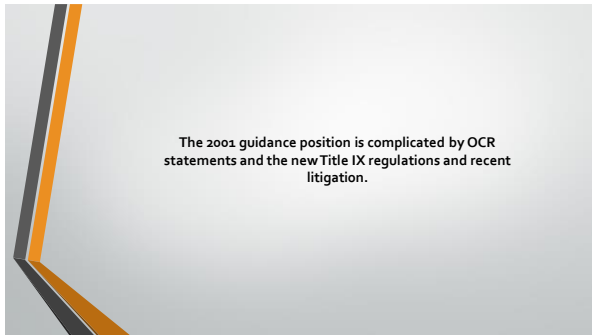
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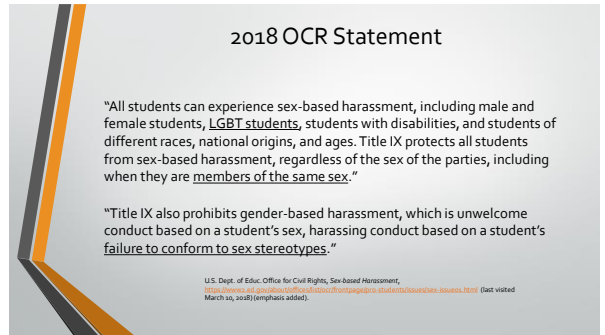
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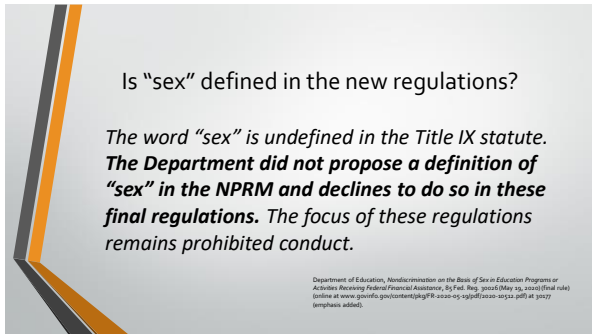
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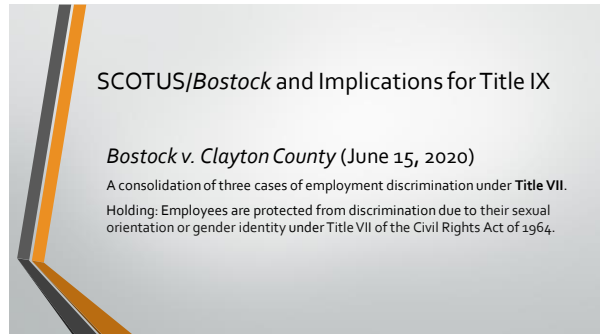
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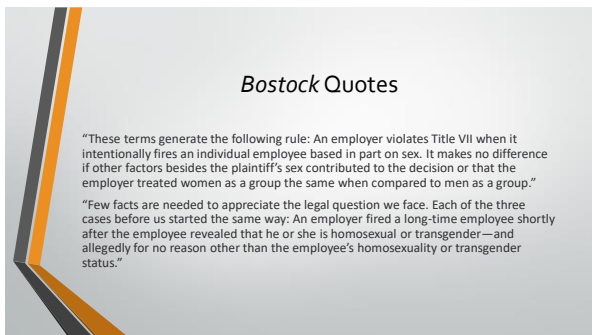
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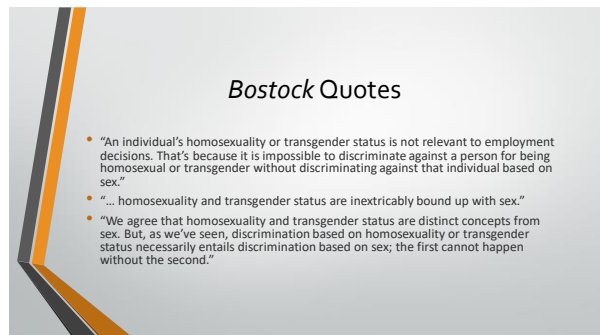
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More Quotes from *Bostock* – The *Bostock* Caveat

“The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudice any such question today.”

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More Quotes from *Bostock*

“As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations... this Court has also recognized that the First Amendment can bar the application of employment discrimination laws “to claims concerning the employment relationship between a religious institution and its ministers.”

“Because the Religious Freedom Restoration Act (RFRA) operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases.” “But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too.”

“So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.”

NOTE: SCOTUS decision in *Our Lady of Guadalupe School v. Morrissey-Berru*.

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SCOTUS/*Bostock* and Implications for Title IX

Bostock v. Clayton County (June 15, 2020)

A consolidation of three cases of employment discrimination under Title VII.

Holding: An employer who fires an individual merely for being homosexual or transgender violates Title VII of the Civil Rights Act of 1964.

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Bostock and the New Dept. of Education Position on LGBTQ Protections

“The Supreme Court has upheld the right for LGBTQ+ people to live and work without fear of harassment, exclusion, and discrimination – and our LGBTQ+ students have the same rights and deserve the same protections. I’m proud to have directed the Office for Civil Rights to enforce Title IX to protect all students from all forms of sex discrimination.

Today, the Department makes clear that all students—including LGBTQ+ students—deserve the opportunity to learn and thrive in schools that are free from discrimination.”

U.S. Secretary of Education Miguel Cardona
 U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity [Press release]
 JUNE 16, 2021

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Bostock and the New Dept. of Education Position on LGBTQ Protections Cont'd

“OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination. OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity. But OCR at times has stated that Title IX’s prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity. To ensure clarity, the Department issues this Notice of Interpretation addressing Title IX’s coverage of discrimination based on sexual orientation and gender identity in light of the Supreme Court decision discussed below.

In 2020, the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 3731, 596 U.S. ____ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

The Department issues this Notice of Interpretation to make clear that the Department interprets Title IX’s prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity”

U.S. Dept. of Education, Office for Civil Rights, The Department’s Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, June 2021

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Implications of Bostock for Title IX?

- Why did the Department of Education not define “sex” in the new Title IX regulations?
- Title VII = Title IX?
- LGBTQIA rights and *Bostock* ...note the Court’s emphasis on the specific issues raised. “On the basis of sex” / “Because of... sex”
- Spending v. Commerce clause...the “notice issue”
- How is Title IX different from Title VII—Primacy?
- Title IX regulations and DOE enforcement in light of *Bostock*?
- How will campuses define “sex” going forward?
- How are religious institutions impacted? Consider Title IX’s “not be consistent with religious tenets” exception... More on this on the next slide...
- A good article to read:
 - Michael T. Raupp, *Is Change Ahead for Title IX? Inside Higher Ed* (April 20, 2021).

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SCOTUS decision in *Our Lady of Guadalupe School v. Morrissey-Berru* (July 8, 2020)

- “Ministerial exception”: application to Title VII and Title IX.
- Employees vs. Students
- “When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independence in a way that the First Amendment does not allow.”
- Nonsectarian “tenets” or “teachers”? Viewpoint discrimination?

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“Due Process”

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Due Process

- “Due Process” - a complex and multidimensional concept
 - More than dialectic between “complainants” and “respondents”
 - The college as bystander or neutral
 - Is this the way to create college court?
 - What about resource imbalances between institutions or complainants/respondents?

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Due Process

[T]he evolution of the American concept of due process of law has revolved around recognition that for justice to be done, procedural protections must be offered to those accused of even the most heinous offenses – precisely because only through a fair process can a just conclusion of responsibility be made. Further, the § 106.45 grievance process grants procedural rights to complainants and respondents so that both parties benefit from strong, clear due process protections.

Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 Fed. Reg. 30242 (May 19, 1969) (final rule) codified at www.gpo.gov/intercontent/dfp/2010-10-09/2010-10-09-1.pdf at 3093 (emphasis added).

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Due Process Cont'd*

[T]he final regulations prescribe a grievance process grounded in principles of due process for the benefit of both complainants and respondents, seeking justice in each sexual harassment situation that arises in a recipient’s education program or activity. id. at 86.

‘Once it is determined that due process applies, the question remains what process is due.’ Goss v. Lopez, 419 U.S. 166, 171 (1975) (quoting Memphis, 408 U.S. at 403).

Procedural due process of law requires at a minimum notice and a meaningful opportunity to be heard. Goss, 419 U.S. at 380.

Due process ‘is not a technical conception with a fixed content unrelated to time, place and circumstances.’ Mathews, 424 U.S. at 334 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

Instead, due process ‘is flexible and calls for such procedural protections as the particular situation demands.’ Mathews, 424 U.S. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’ Mathews, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

*See generally id. at 30050-53.

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More Due Process

- Chevron/Article II
- State Farm
- Protected Interests
- Mathews Balancing Test
- Citizens United → Associational Rights
- Originalism/Textualism
- Efficacy/Fairness to those not represented in a “hearing”
- New Fairness Issues Created by “College Court”
- Horowitz/Ewing and Academic Freedom
- Substantive Due Process
- Slippery Slope
 - Tenure for Students
 - Ghost of Hugo Black in Tinker

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The Department of Education reiterates that colleges are not courts prosecuting crimes.

[S]chools, colleges, and universities are educational institutions and not courts of law. The § 106.45 grievance process does not attempt to transform schools into courts; rather, the prescribed framework provides a structure by which schools reach the factual determinations needed to discern when victims of sexual harassment are entitled to remedies. The Department declines to import into § 106.45 comprehensive rules of evidence, rules of civil or criminal procedure, or constitutional protections available to criminal defendants. The Department recognizes that schools are neither civil nor criminal courts, and acknowledges that the purpose of the § 106.45 grievance process is to resolve formal complaints of sexual harassment in an education program or activity, which is a different purpose carried out in a different forum from private lawsuits in civil courts or criminal charges prosecuted by the government in criminal courts. Id. at 30097.

The Department is not regulating sex crimes, per se, but rather is addressing a type of discrimination based on sex. Id. at 30099.

What is a "court?"
 A court is any person or institution, often as a government institution, with the authority to adjudicate legal disputes between parties and carry out the administration of justice in civil, criminal, and administrative matters in accordance with the rule of law. David Walker, *The Oxford Companion to Law*, Oxford University Press (1980), at 301.

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"Deliberate Indifference"

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"Gebser/Davis Framework" for Evaluating Institutional Compliance (with Some Twists)

3-Part Framework

1. A definition of actionable sexual harassment
2. The school's actual knowledge
3. The school's deliberate indifference

4. Promptness

5. Equitableness

6. Reasonableness

- New grievance procedures well beyond Gebser
- Roadmap for litigation?
- Risk of DOE enforcement?
- Doug Lederman, *A New Day at OCR Inside Higher Ed* (June 28, 2017).

Department of Education, *Non-Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 54 Fed. Reg. 30240 (May 19, 1989) (final rule) available at www.govinfo.gov/sequence?pub=1025-19-19jfrf1025-1989-1025-1989 (iteration and emphasis added).

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The Department believes that the Davis definition in § 106.30 provides a definition for non-*quid pro quo*, non-Clergy Act/VAWA offense sexual harassment better aligned with the purpose of Title IX than the definition of hostile environment harassment in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter.

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"Deliberate Indifference"

As the Supreme Court reasoned in Davis, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances."

Id. at 30091 (internal citation omitted).

[U]nless the recipient's response to sexual harassment is clearly unreasonable in light of the known circumstances, the Department will not second guess such decisions.

Id. at 30092 (internal citation omitted).

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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

§ 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.

§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.*

§106.8(c) Adoption of grievance procedures.

A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

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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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"Severability" Throughout the Regulations

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

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§ 106.12 *Educational institutions controlled by religious organizations.*

Assurance of exemption. An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

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§ 106.30(a) *Definitions.*

"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).

99

“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?”

100

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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)

101

“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).

102

"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.

104

"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.

106

§ 106.44 Recipient's response to sexual harassment.

§ 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.

107

108

§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.

§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.

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§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.*

§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.

§ 106.45 Grievance process for formal complaints of sexual harassment.

113

114

§ 106.45(a) Discrimination on the basis of sex.

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

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§ 106.45(b) *Grievance process.*

For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

116

§ 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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§ 106.45(b)(1)(ii)

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

118

§ 106.45(b)(1)(iii)

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decisionmaker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

119

§ 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)

120

§ 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;

§ 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;

§ 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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§ 106.45(b)(1)(vii)

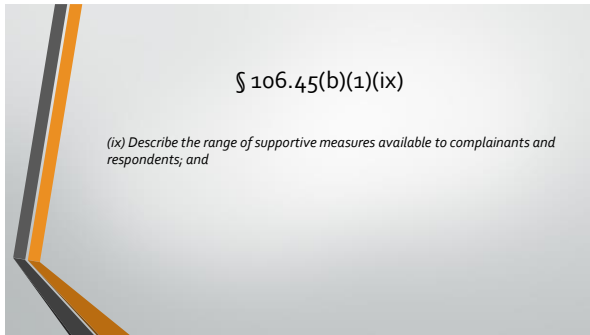
(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including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

§ 106.45(b)(1)(viii)

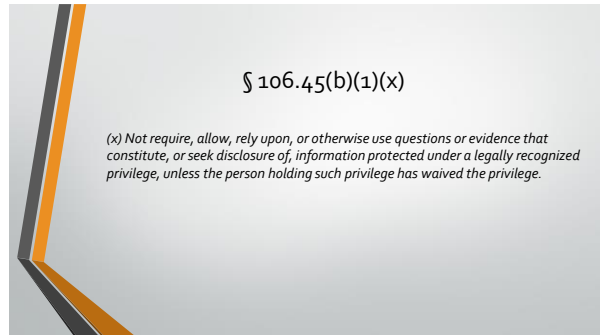
(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

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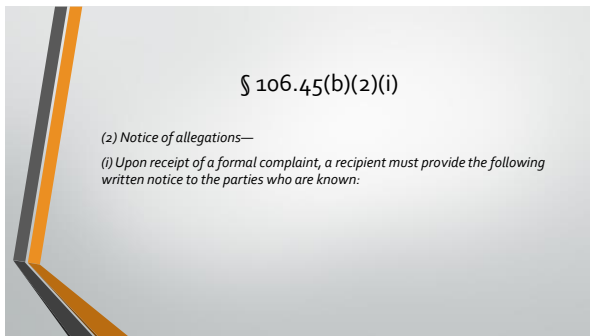


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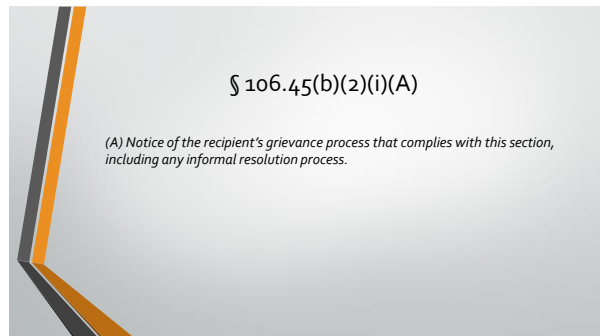


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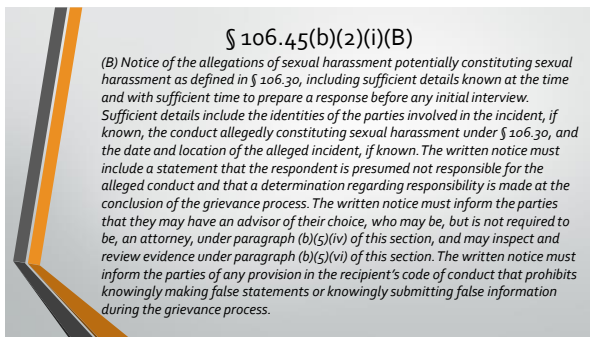


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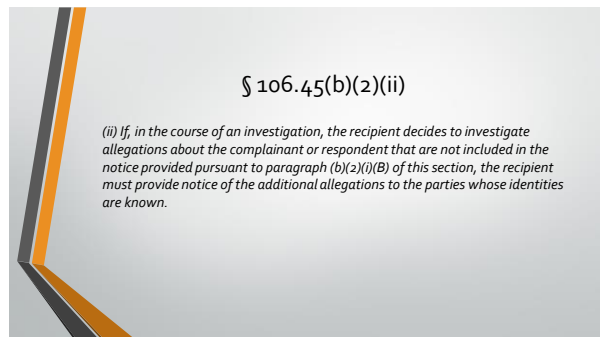


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§ 106.45(b)(3)(i)

(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.

§ 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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§ 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.

§ 106.45(b)(4)

(4) Consolidation of formal complaints. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

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§ 106.45(b)(5)

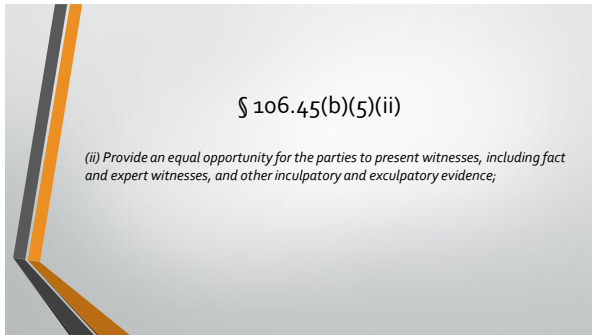
(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

§ 106.45(b)(5)(i)

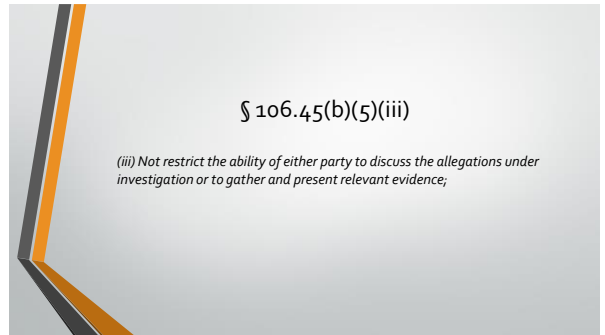
(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained 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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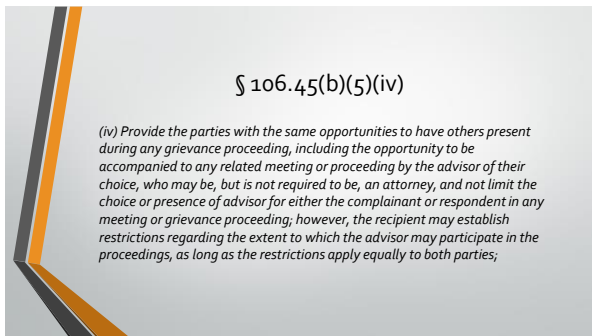


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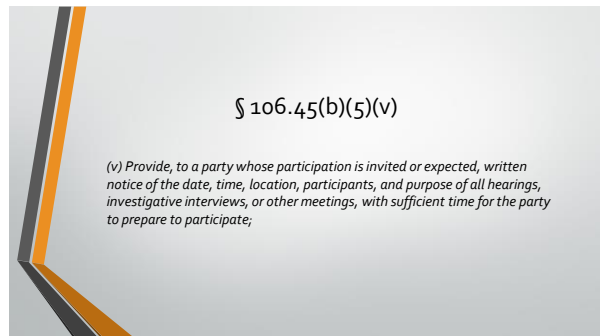


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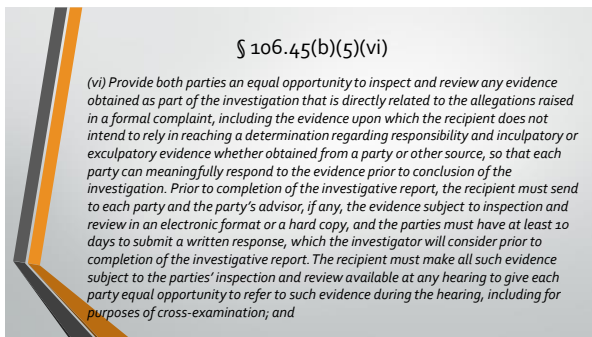


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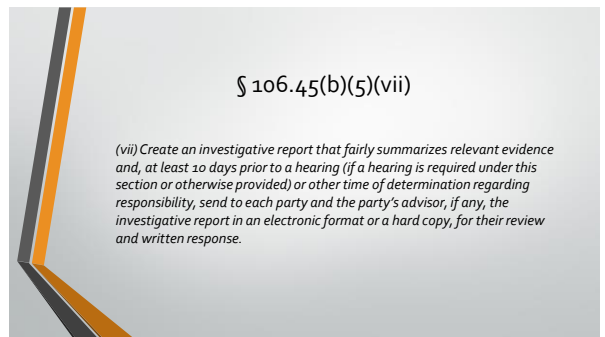


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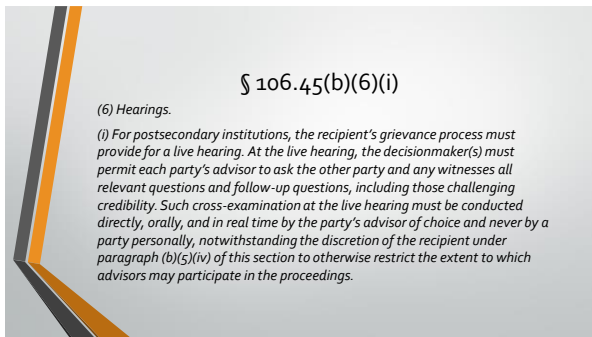


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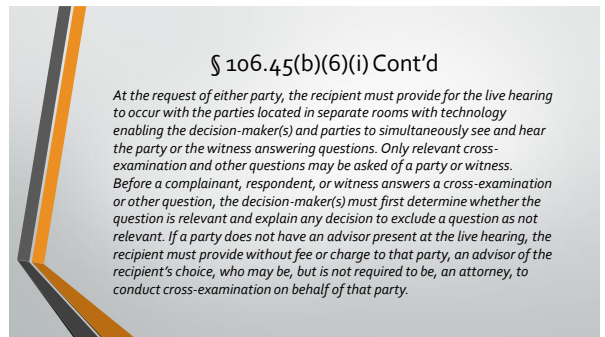


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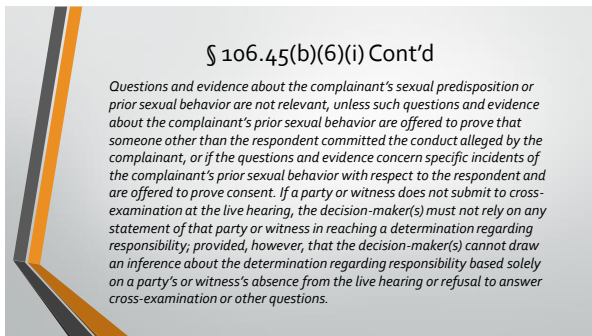


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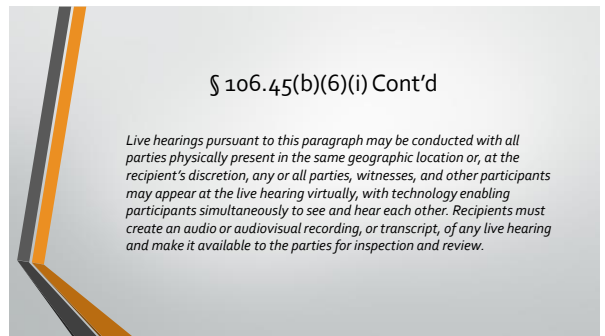


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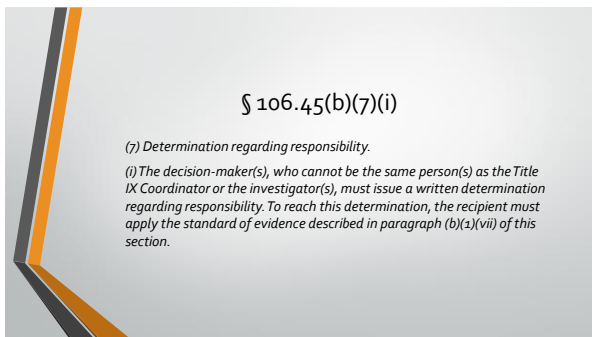


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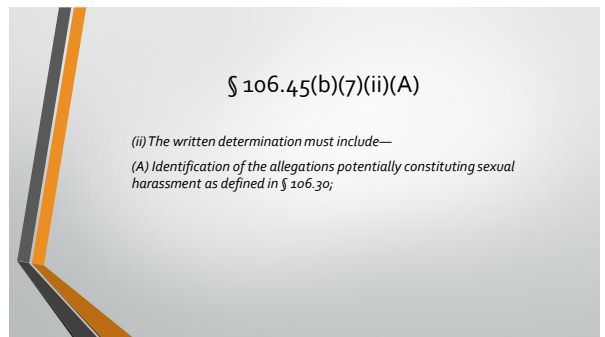


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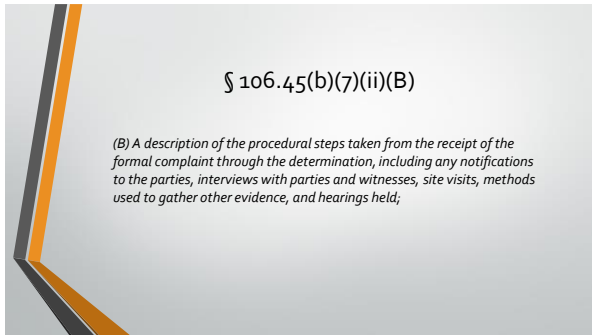
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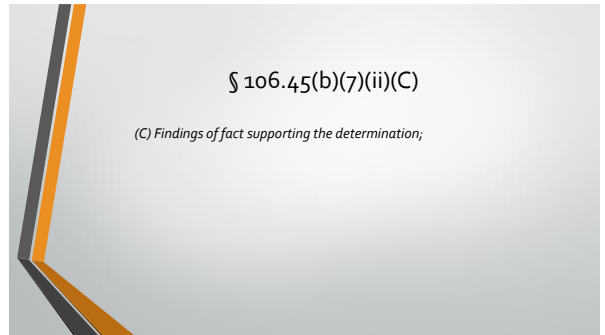


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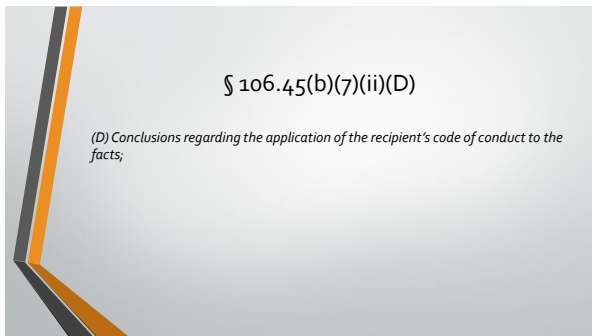


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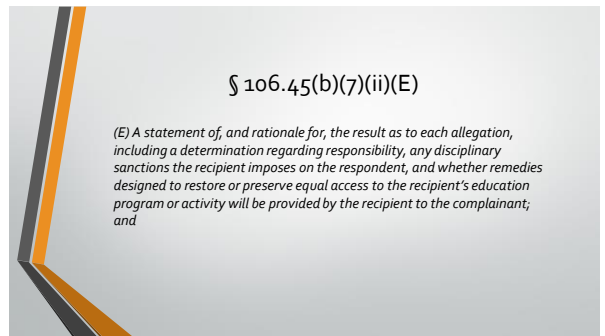


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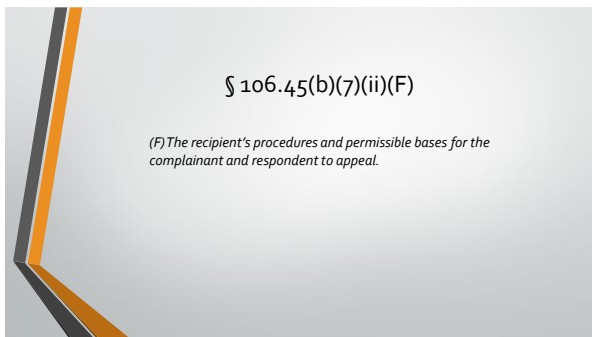


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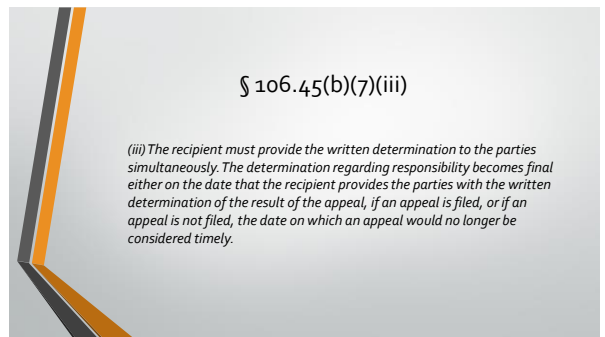
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§ 106.45(b)(7)(iv)

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

§ 106.45(b)(8)(i)

(8) Appeals.

(i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

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§ 106.45(b)(8)(i)(A-C)

(A) Procedural irregularity that affected the outcome of the matter;
(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

§ 106.45(b)(8)(ii)

(ii) A recipient may offer an appeal equally to both parties on additional bases.

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§ 106.45(b)(8)(iii)(A-F)

(iii) As to all appeals, the recipient must:
(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
(E) Issue a written decision describing the result of the appeal and the rationale for the result; and
(F) Provide the written decision simultaneously to both parties.

§ 106.45(b)(9)

(9) 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;

§ 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;

§ 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.

§ 106.71 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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§ 106.71(b)(2)

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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**Organization and Management:
Tuning Your Systems to the
New Mandates**

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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 30117.
- 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 30567.

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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. 1682 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).

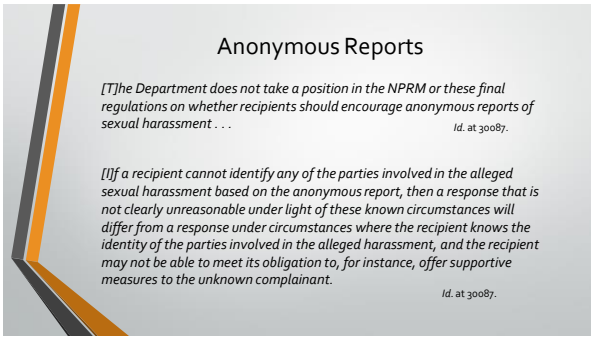
185

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)

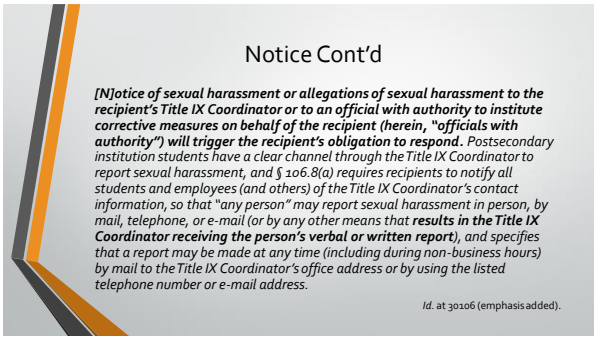
See id. at 30087.

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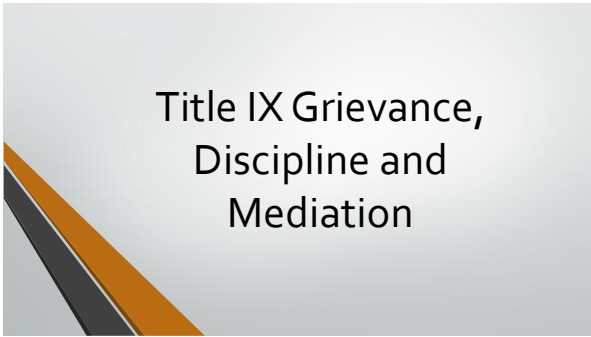


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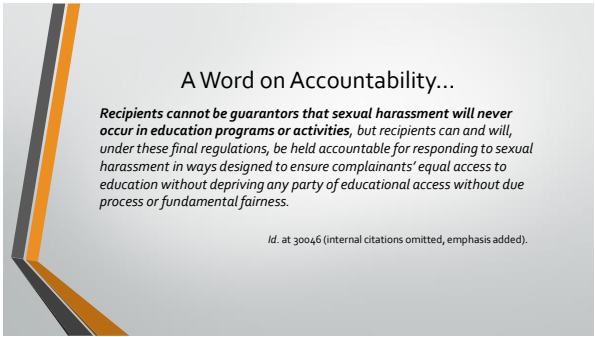


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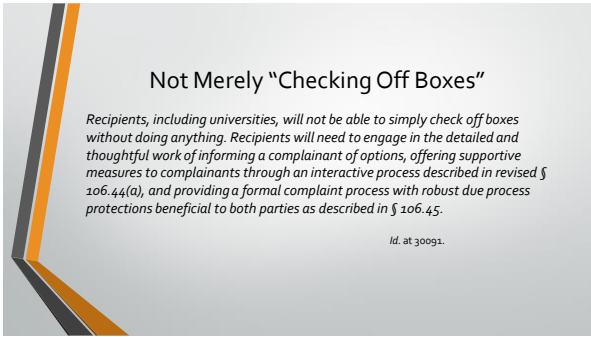


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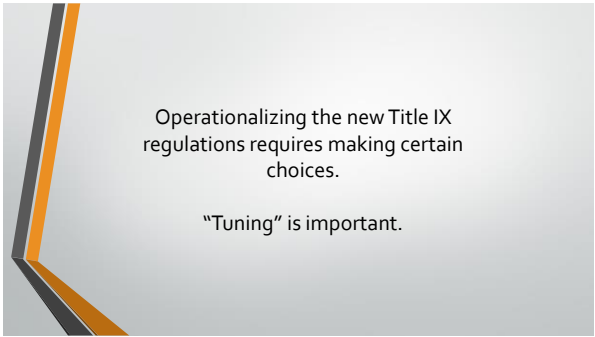
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Regulations Intend to Provide "Flexibility"

[T]hese final regulations leave recipients the flexibility to choose to follow best practices and recommendations contained in the Department's guidance or, similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social science scholars, victim advocacy organizations, civil libertarians and due process advocates, and other experts.
Id. at 30030 (emphasis added).

[T]hese final regulations leave recipients legitimate and necessary flexibility to make decisions regarding the supportive measures, remedies, and discipline that best address each sexual harassment incident.
Id. at 30044.

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"Flexibility" Cont'd

Within the standardized § 106.45 grievance process, recipients retain significant flexibility and discretion, including decisions to:

- designate the reasonable time frames that will apply to the grievance process;
- use a recipient's own employees as investigators and decisionmakers or outsource those functions to contractors;
- determine whether a party's advisor of choice may actively participate in the grievance process;
- select the standard of evidence to apply in reaching determinations regarding responsibility;
- use an individual decision-maker or a panel of decision-makers;
- offer informal resolution options;
- impose disciplinary sanctions against a respondent following a determination of responsibility; and
- select procedures to use for appeals.

Id. at 30057 (bullets added).

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Policy Basics: What Should be Included?

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Policy Basics

- Single policy or multiple policies?
- Who creates policy? You? Your TIX Team? Conduct? Committee? Counsel?
- Title IX ↔ Student Conduct (reference each other)
- Title IX ↔ HR
- Consensual relations policies (do you have these?)
- Terminology/Language
 - "Complainant" not "Victim"/"Survivor"
 - "Respondent" not "Perpetrator"
 - What is a "day?" (Business day, calendar day, "school" day?)

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Policy Elements

- Introduction
- Scope
- Support services, supportive measures, and how to access
- Title IX Coordinator's contact information (and deputy coordinators) and how to report
- "Mandated reporters"
- Definitions of key terms, such as sexual harassment and consent
- Timeframes, both for reporting and for resolution

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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

- i. Sexual harassment
- ii. Sexual assault
 - 1. Non-consensual sexual contact, and
 - 2. Non-consensual sexual intercourse
- iii. Domestic violence
- iv. Dating violence
- v. Sexual exploitation*
- vi. Stalking
- vii. Retaliation*
- viii. Intimidation*
- ix. 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—

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

(ii) For the purposes of this definition—

- (A) *Course of conduct* means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- (B) *Reasonable person* means a reasonable person under similar circumstances and with similar identities to the victim.
- (C) *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—

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

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 30091 (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)(i) 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).

220

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.

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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).

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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).

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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(a)(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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Prompt, Equitable, Reasonable

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Prompt Responses

The final regulations require recipients to respond promptly by:

- offering supportive measures to every complainant (i.e., an individual who is alleged to be the victim of sexual harassment);
- refraining from imposing disciplinary sanctions on a respondent without first following a prescribed grievance process;
- investigating every formal complaint filed by a complainant or signed by a Title IX Coordinator; and
- effectively implementing remedies designed to restore or preserve a complainant's equal educational access any time a respondent is found responsible for sexual harassment.

Id. at 30034 n.60 (bullets added).

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Prompt Timeframes

- No 60-day rule
- What is "prompt"?
- What timeframes should we set?
- Examples of possible delays?
 - 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 §106.45(b)(1)(v)

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Equitable Responses

[T]he recipient's response must treat complainants and respondents equitably, meaning that for a complainant, the recipient must offer supportive measures, and for a respondent, the recipient must follow a grievance process that complies with § 106.45 before imposing disciplinary sanctions.

Id. at 30044.

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Reasonable/Clearly Unreasonable

In addition to the specific requirements imposed by these final regulations, all other aspects of a recipient's response to sexual harassment are evaluated by what was not clearly **unreasonable** in light of the known circumstances. Recipients must also document their reasons why each response to sexual harassment was not deliberately indifferent.

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

Section 106.44(b)(2) (providing that recipient responses to sexual harassment must be non-deliberately indifferent, meaning not clearly **unreasonable** in light of the known circumstances . . .)

Id. at 30046 n.182 (emphasis added).

[I]f a recipient does not provide supportive measures as part of its response to sexual harassment, the recipient specifically must document why that response was not clearly **unreasonable** in light of the known circumstances (for example, perhaps the complainant did not want any supportive measures).

Id. at 30046 n.183 (emphasis added).

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Law Enforcement Activity/ Criminal Proceedings

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Concurrent Law Enforcement Activity

Section 106.45(b)(1)(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)(1)(vi).

Id. at 30034 n.60 (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.

Id. at 30099 (internal citation omitted).

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."

Id. at 30099 n. 467.

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Confidentiality

Confidentiality and FERPA Protections

Section 106.71(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 § 106.71(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.

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.**

Non-disclosure Agreements?

*Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint. *Id.* at 30304 (emphasis added).*

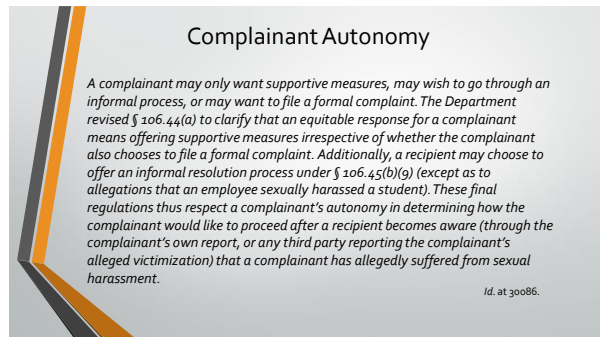
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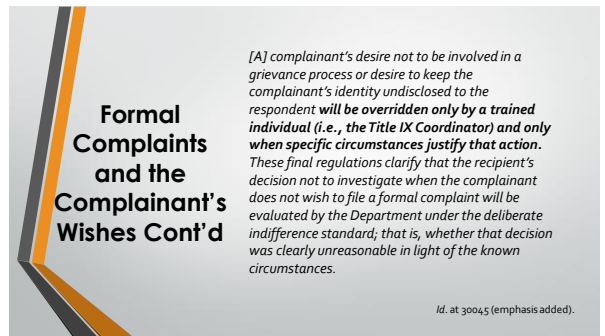


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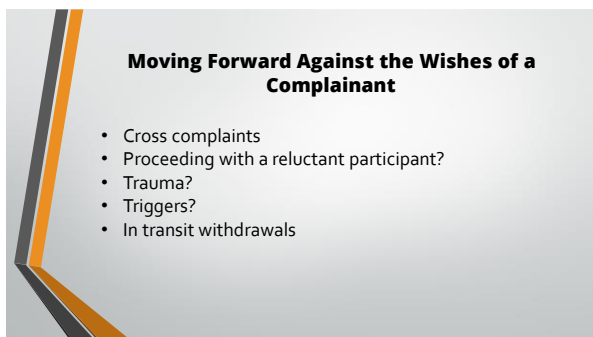


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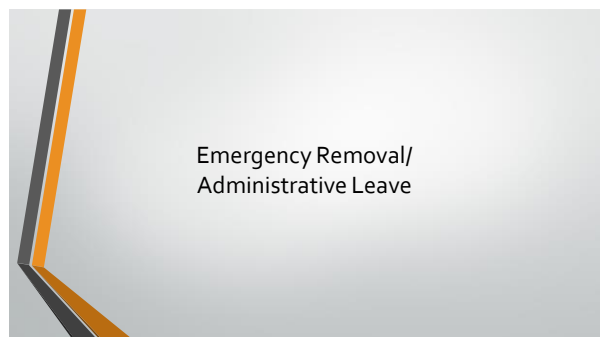
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§106.44(c) Emergency removal.

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.

Emergency Removal of Respondent

[T]hese final regulations expressly authorize recipients to remove a respondent from the recipient's education programs or activities on an emergency basis, with or without a grievance process pending, as long as post-deprivation notice and opportunity to challenge the removal is given to the respondent. A recipient's decision to initiate an emergency removal will also be evaluated under the deliberate indifference standard.

Id. at 30046 (internal citation omitted).

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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.

Thoughts on Emergency Removal and Administrative Leave

- How should we make this clear in our policies?
- Will IHE's be at risk if they use this process?
- Litigation risk/TRO?
- Bias? *De novo* review by hearing?

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A Closer Look at Formal Complaints

§ 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).

"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 30030 (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 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.

§ 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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§ 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.

Dismissal of Complaint

[I]f a respondent is no longer enrolled or employed by a 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 may dismiss the formal complaint or any allegations therein.

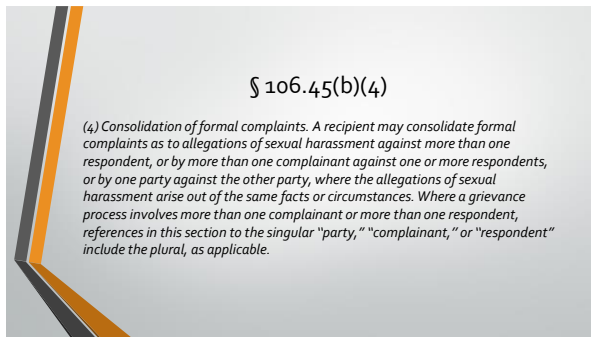
Id. at 30087.

[I]f a recipient dismisses a formal complaint or any allegations in the formal complaint, the complainant should know why any of the complainant's allegations were dismissed and should also be able to challenge such a dismissal by appealing on certain grounds.

Id. at 30053.

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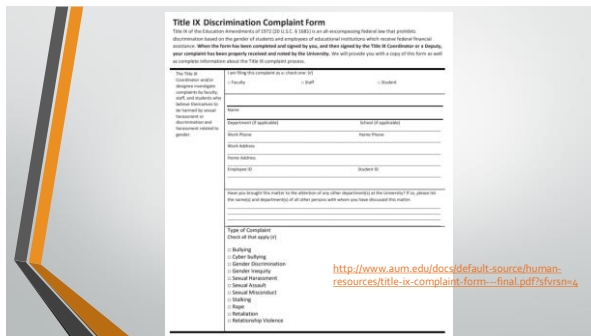


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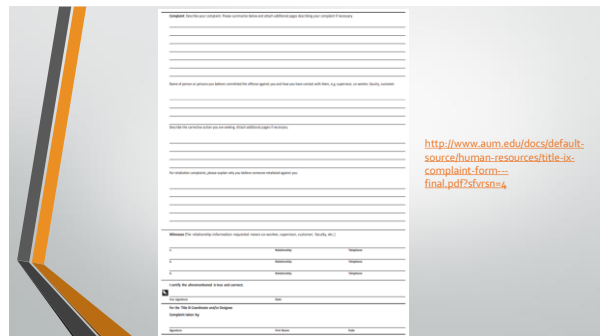


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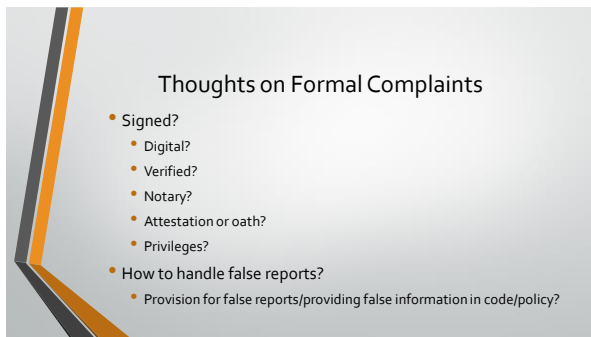


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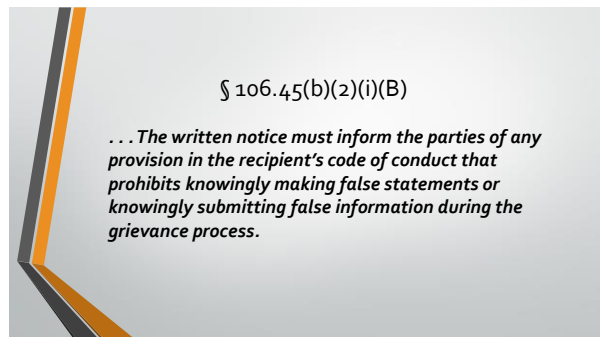


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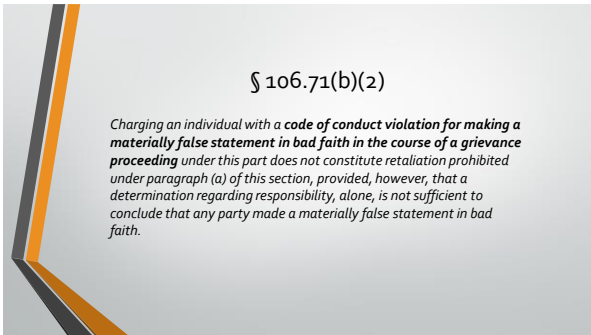
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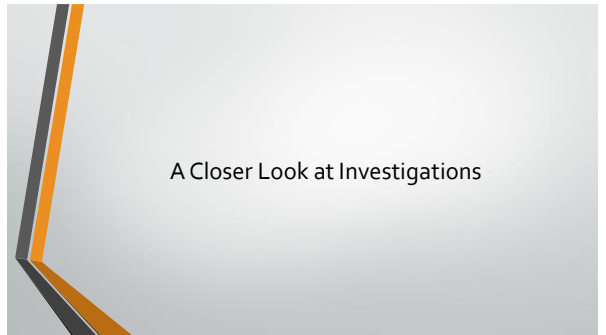


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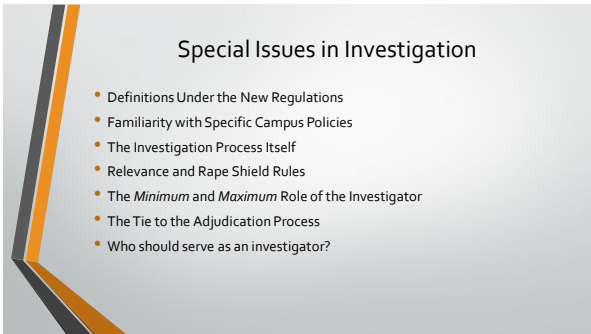


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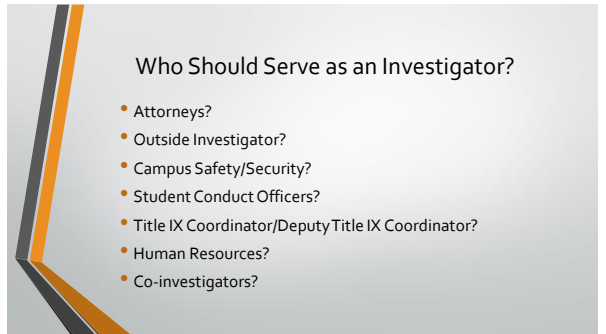


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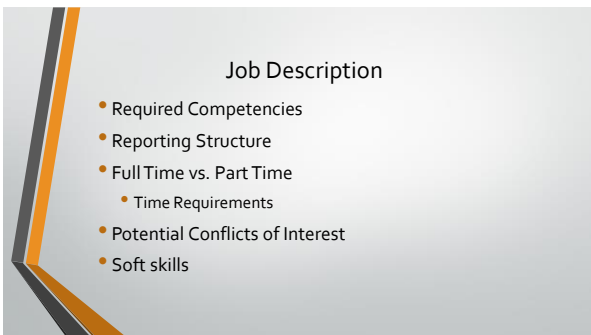


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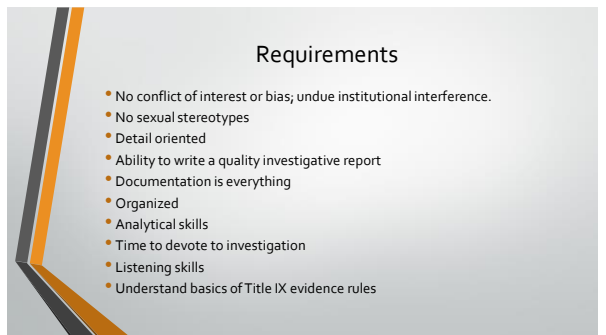
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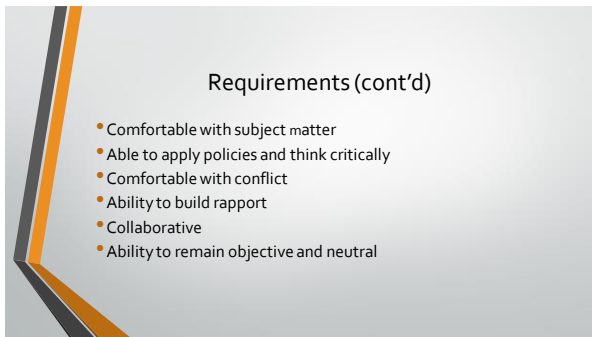
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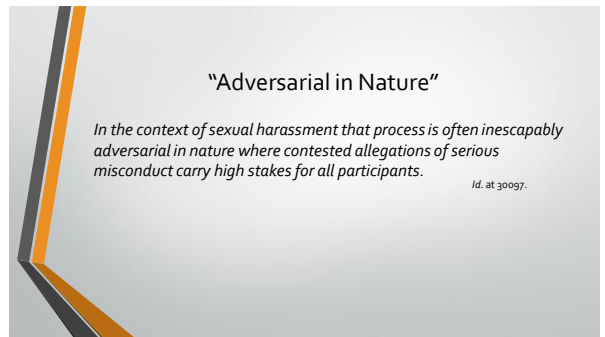
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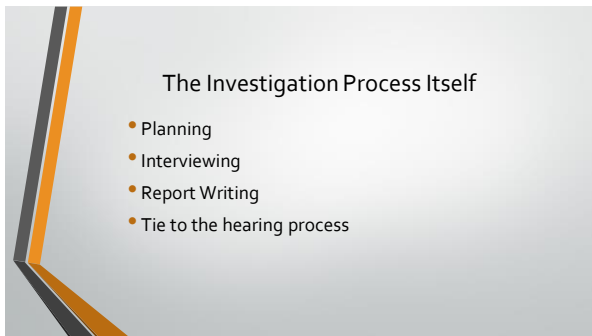


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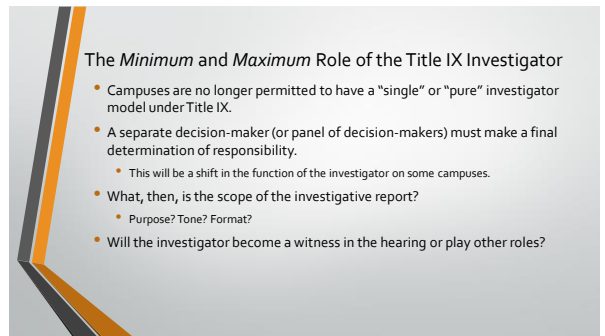


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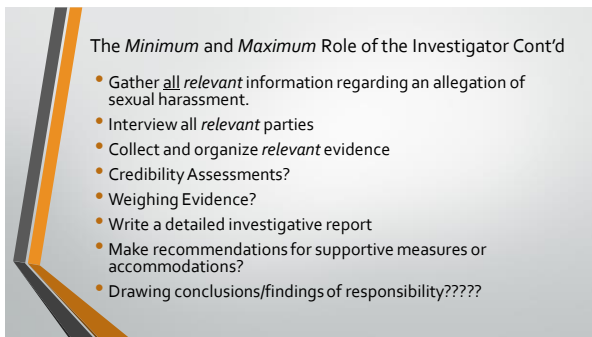


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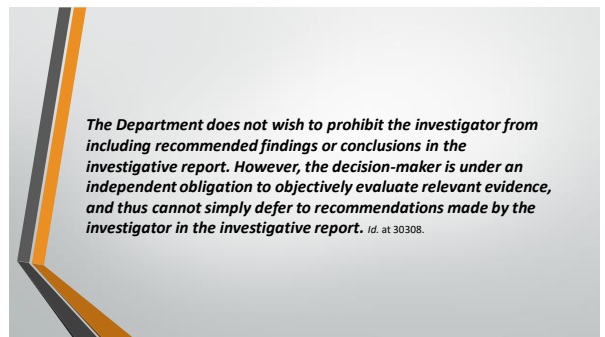


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The Department emphasizes that the decision-maker must not only be a separate person from any investigator, but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility **without giving deference to the investigative report.** *Id.* at 30314.

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Evidence and Relevance

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- Overview
- Credibility
 - Relevance
 - Evidentiary Standard
 - Probative Evidence
 - Prejudice
 - Inculpatory Evidence
 - Exculpatory Evidence
 - Hearsay
 - Expert Testimony

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[A] recipient must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be. *Id.* at 30337.

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Inculpatory Evidence

Evidence showing or tending to show one's involvement in a crime or wrong.

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 676.

281

Exculpatory Evidence

Evidence tending to establish a defendant's innocence.

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 675.

282

Evidentiary Standard

Using a **preponderance of the evidence standard**, and considering relevant definitions in the Policy, the hearing panel weighs the evidence to determine whether the Respondent violated the Policy.
 50.01% likelihood or 50% and a feather
 Which side do you fall on?

Contrast this with “**clear and convincing**” and “beyond a reasonable doubt.”

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Relevance

The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied. Id. at 30247 n. 1018.

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Definition of “Relevant”

Having significant and demonstrable bearing on the matter at hand.

Affording evidence tending to prove or disprove the matter at issue or under discussion.

meriam-webster.com

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[R]elevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons discussed above, while the final regulations do not address “hearsay evidence” as such, § 106.45(b)(6)(i) does preclude a decision-maker from relying on statements of a party or witness who has not submitted to cross-examination at the live hearing.

Id. at 30354.

286

Relevance Cont’d

The new Title IX regulations specifically . . .

. . . require **investigators and decision-makers to be trained on issues of relevance, including how to apply the rape shield provisions** (which deem questions and evidence about a complainant’s prior sexual history to be irrelevant with two limited exceptions). Id. at 30125 (emphasis added).

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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 30103 (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

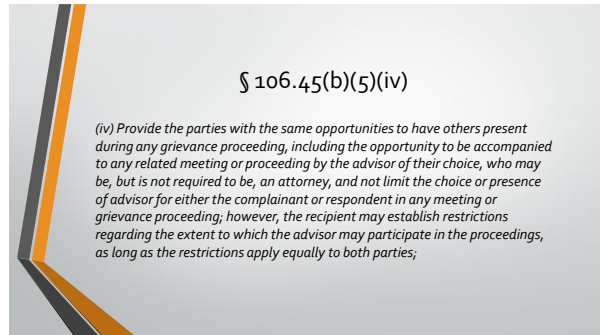
- Assess demeanor: Does the person appear credible? Look at body language, eye contact, level of nervousness, defensiveness, evasiveness, etc.
- Is the person's account inherently believable? Plausible? What is his or her potential bias?
- Does the person have a motive to be untruthful?
- Are there past 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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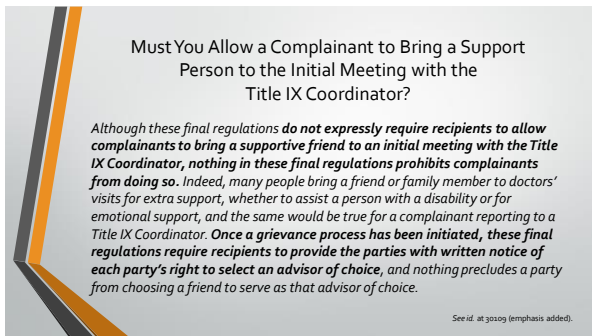


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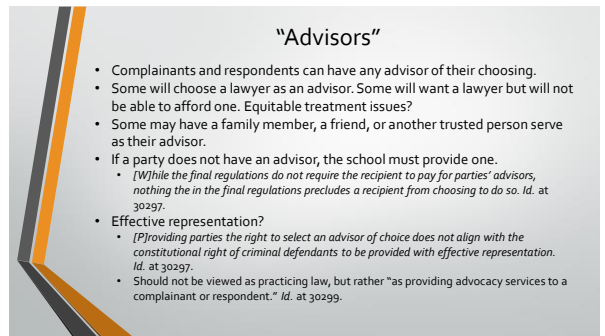


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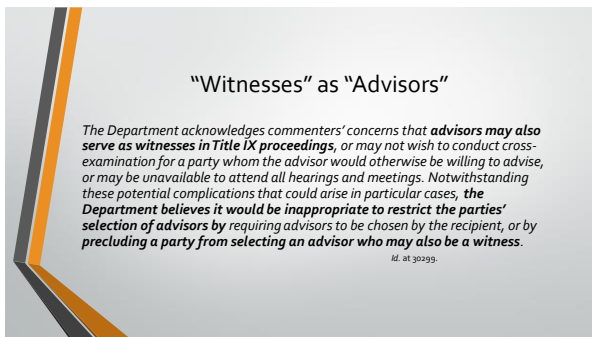


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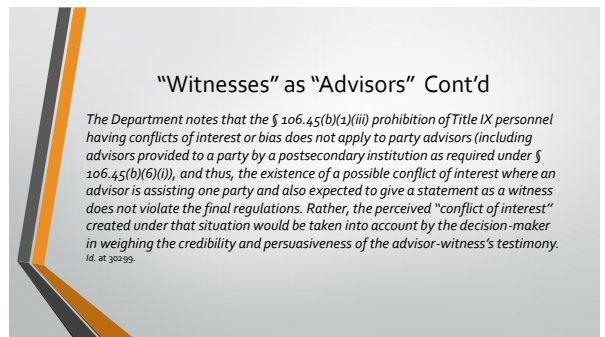
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"Advisors" Cont'd

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.

§ 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.

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.

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).

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).

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://www.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.

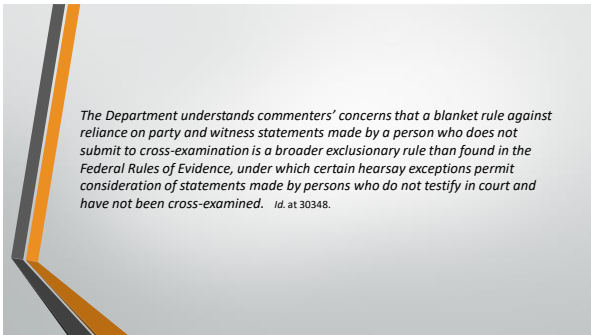
Id. at 30103 (emphasis added).

Cross-Examination

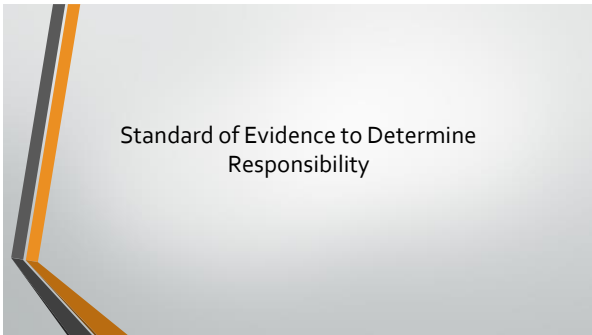
- Advisors may cross examine but not the witnesses/complainants/respondents themselves
- Objections and evidence issues
- Inculpatory/Exculpatory evidence

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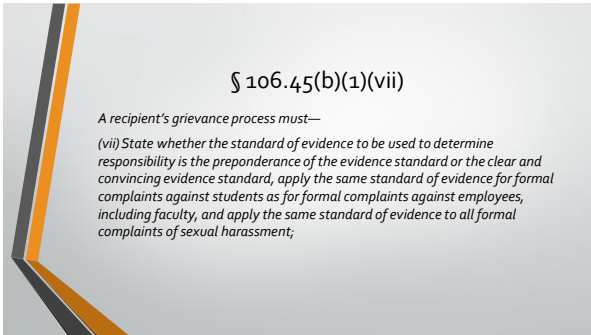
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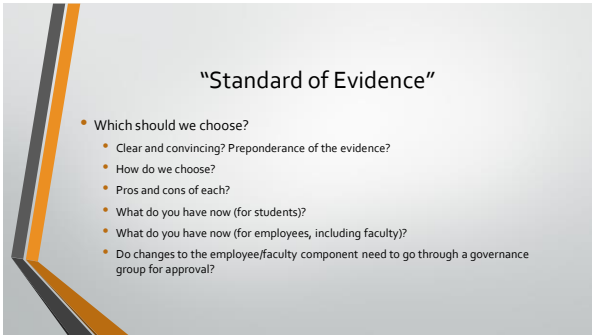
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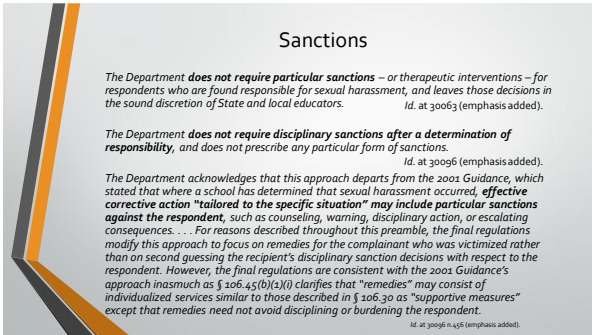
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Disciplinary Decisions/Sanctions Must Themselves Not Be Discriminatory

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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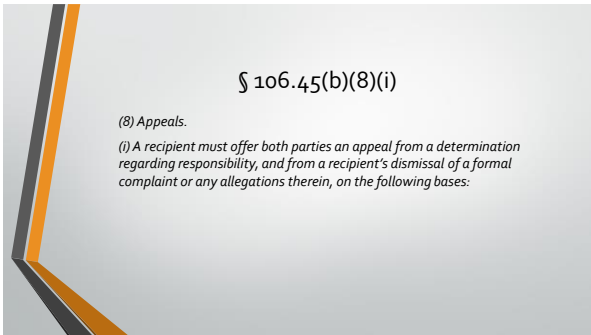
Remedies

- 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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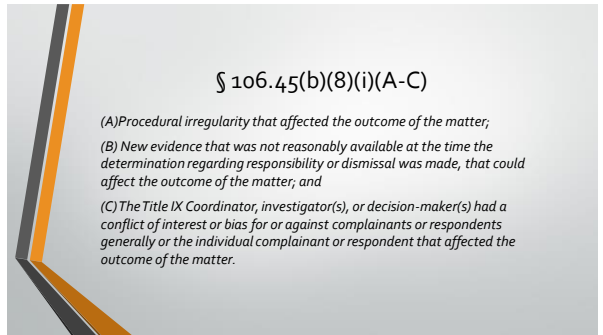
Appeals

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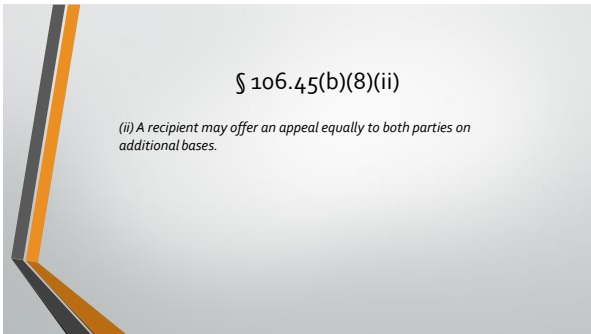


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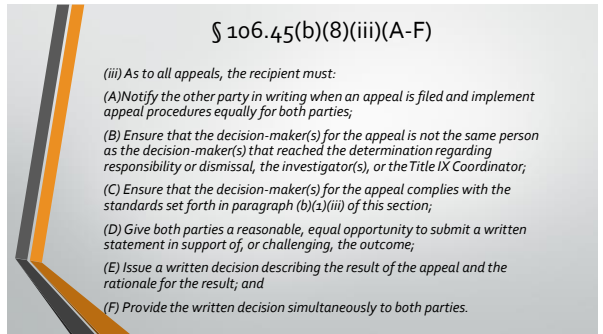


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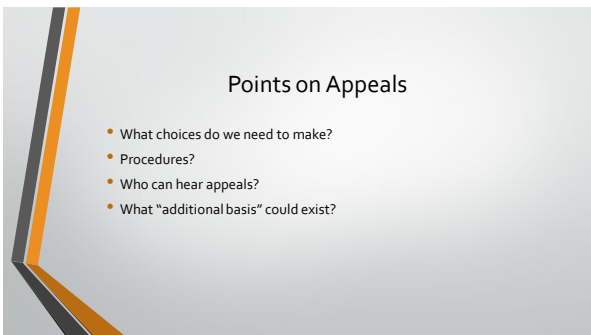


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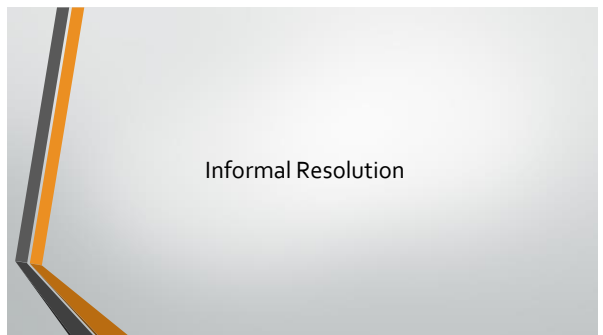
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Points on Informal Resolution

- The new regulations don't require it, but informal resolution is allowed.
- A formal complaint must be filed before any informal resolution process can begin.
- Both parties must voluntarily agree to informal resolution (written consent required). [No coercion or undue influence.]
- Parties do not have to be in the same room...often, they are not.
- Equitable implementation by trained personnel
- Should you offer it?
 - Pros/Cons
 - Increased complainant autonomy
- Who should implement?
- What type of training is needed?
 - Mediation? Arbitration? Restorative justice?
- When can't we use informal resolution?
 - When the allegation is that an employee sexually harassed a student.
- Does this option provide for more opportunities for "educational" interventions?

§ 106.45(b)(9)(i) (Written Notice)

Parties must be provided written notice that outlines

- *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*
- *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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What is mediation?

Mediation is a dynamic, structured, interactive process where an impartial third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques. All participants in mediation are encouraged to actively participate in the process. Mediation is a "party-centered" process in that it is focused primarily upon the needs, rights, and interests of the parties. The mediator uses a wide variety of techniques to guide the process in a constructive direction and to help the parties find their optimal solution. A mediator is facilitative in that she/he manages the interaction between parties and facilitates open communication. Mediation is also evaluative in that the mediator analyzes issues and relevant norms ("reality-testing"), while refraining from providing prescriptive advice to the parties (e.g., "You should do...").

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

What is mediation?

Mediation, as used in law, is a form of alternative dispute resolution resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community, and family matters.

"Neutrals"

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

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What is mediation? Cont'd

The term "mediation" broadly refers to any instance in which a third party helps others reach an agreement. More specifically, mediation has a structure, timetable, and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. Mediation is becoming a more peaceful and internationally accepted solution to end the conflict. Mediation can be used to resolve disputes of any magnitude.

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

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 30099 n.286.

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.

§ 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)

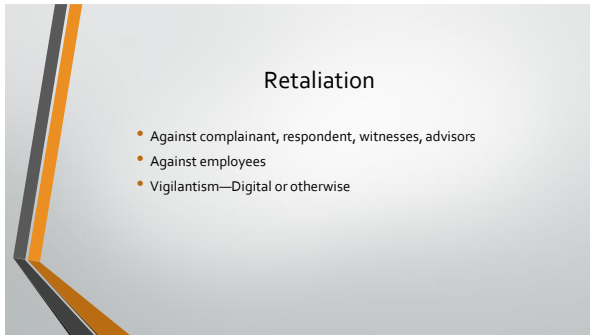
*(b) Specific circumstances.
(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.*

§ 106.71(b)(2)

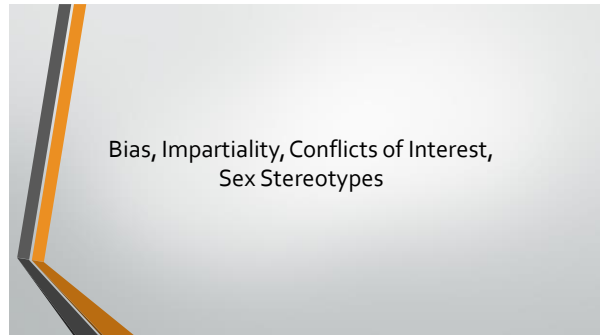
Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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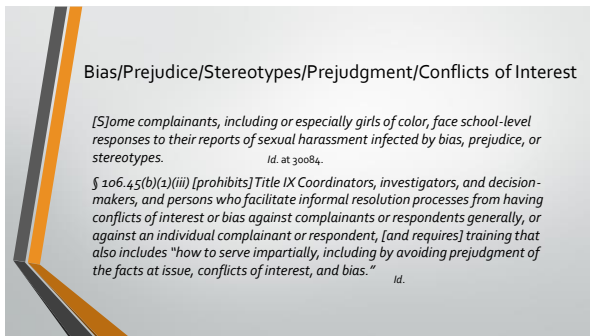


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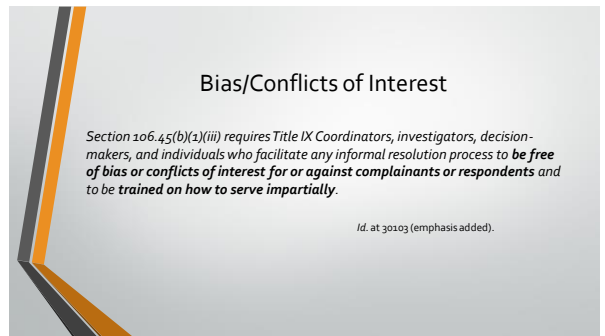


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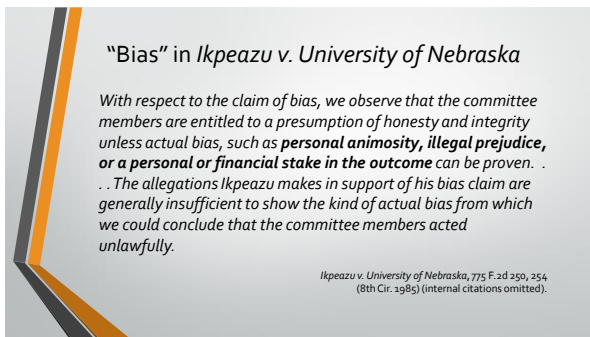


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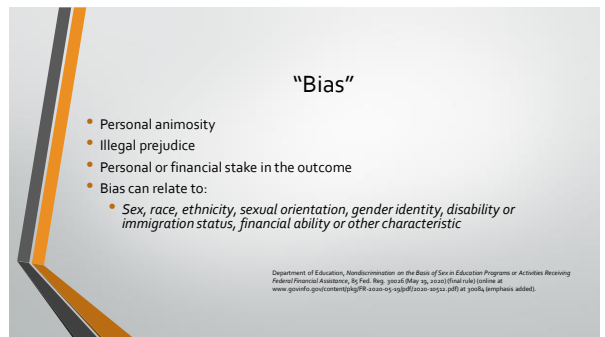


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Does DOE require "Implicit Bias" training?

The Department declines to specify that training of Title IX personnel must include implicit bias training; the nature of the training required under § 106.45(b)(1)(iii) is left to the recipient's discretion so long as it achieves the provision's directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes.

Id. at 30084.

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Conflict of Interest

A conflict between the private interests and the official responsibilities of a person in a position of trust.

merriam-webster.com

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Impartial

Not partial or biased: treating or affecting all equally

merriam-webster.com

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Prejudgment

A judgment reached before the evidence is available

webster-dictionary.org

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Prejudice

An opinion or judgment formed without due examination; prejudgment; a leaning toward one side of a question from other considerations than those belonging to it; and unreasonable predilection for, or objection against, anything; especially an opinion or leaning adverse to anything, without just grounds, or before sufficient knowledge.

webster-dictionary.org

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Stereotype

something conforming to a fixed or general pattern; a standardized mental picture that is held in common by members of a group and that represents an oversimplified opinion, prejudiced attitude, or uncritical judgment.

merriam-webster.com

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"Sex Stereotypes"

- What is a sex stereotype? What does DOE mean by this term?
- What are some examples of sex stereotypes?
- An example of a scholarly paper on stereotypes:
 - S. Kanahara, *A Review of the Definitions of Stereotype and a Proposal for a Progressive Model*, *Individual Differences Research*, Vol. 4 Issue 5 (Dec. 2006).
- Sex stereotypes are to be avoided in training and in actual practice.
- Be especially careful when doing case studies of any kind.
- Anyone can be a complainant or respondent, and all are individuals!

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All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

- *prejudgment of facts*
 - *prejudice*
- *conflicts of interest*
 - *bias*
- *sex stereotypes*

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Whose side are you on as a Title IX operative?

You have no "side" other than the integrity of the process.

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Supportive Services

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

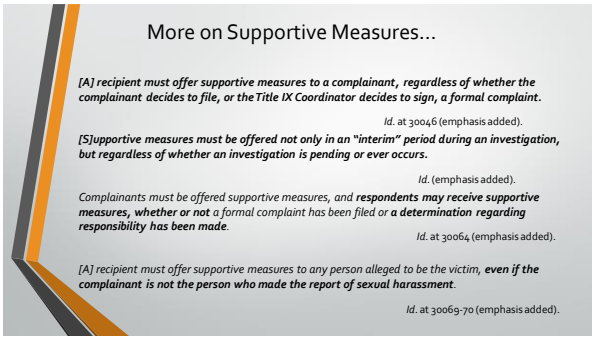
Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and 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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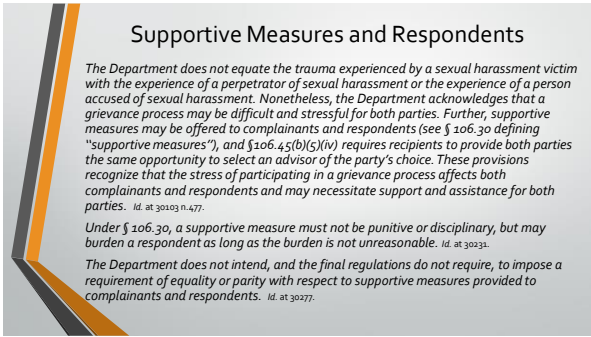


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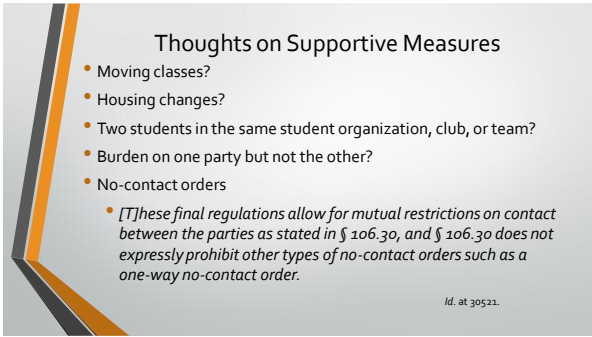


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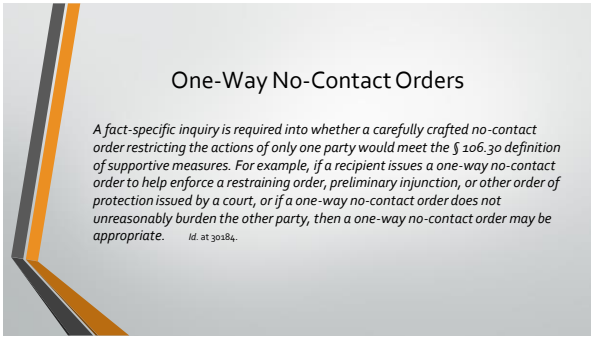


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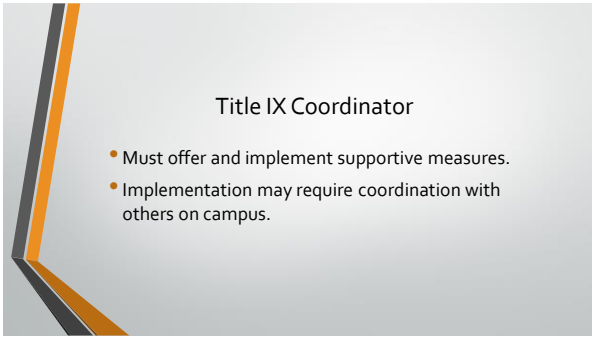
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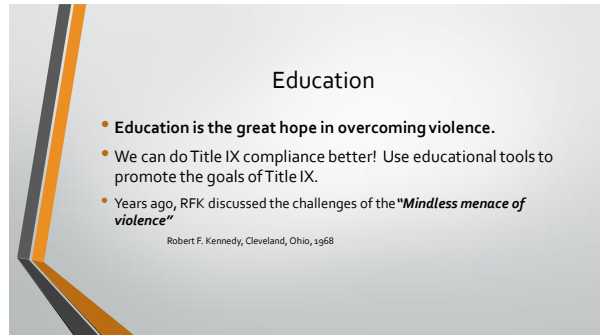


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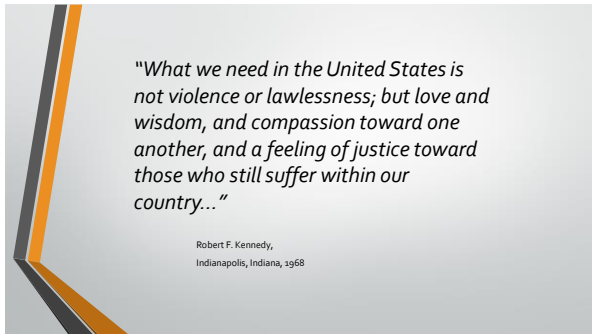


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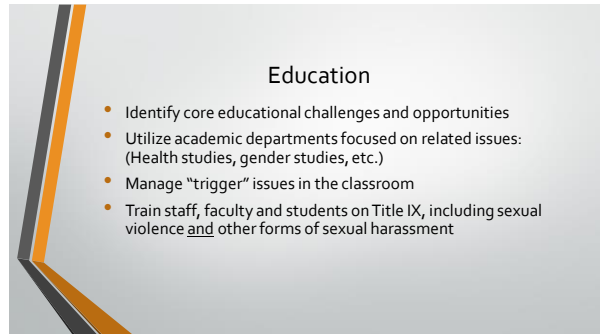


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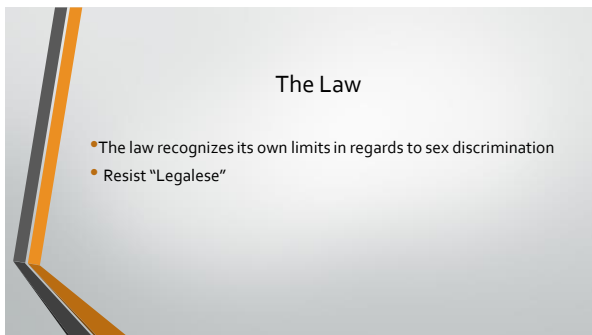


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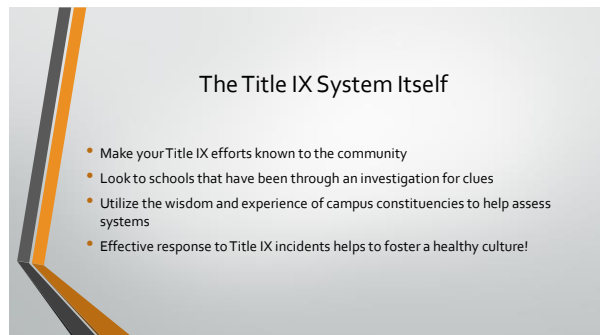
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Integration

- 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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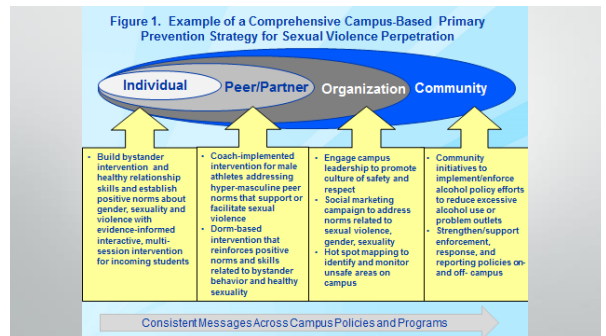
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Prevention

- 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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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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Prevention and Intervention

- **The University of New Hampshire, *Bringing in the Bystander***, <http://www.unh.edu/preventioninnovations/index.cfm?ID=BCD02554-0F88-5F7E-706E28CD98893C6D>
- **Virginia Tech, *Be an Active Bystander***, <http://www.stopabuse.vt.edu/bystander.php>
- **The University of Arizona, *Step Up Program***, <http://www.stepupprogram.org/>
- **The Green Dot Program**, <http://www.livethegreendot.com/>
- **The Red Flag Campaign**, <http://www.theredflagcampaign.org/>

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Primary prevention is legally required:
VAWA Regs 34 CFR 668.46 (j)

"Programs to prevent dating violence, domestic violence, sexual assault, and stalking. As required by paragraph (b)(11) of this section, an institution must include in its annual security report a statement of policy that addresses the institution's programs to prevent dating violence, domestic violence, sexual assault, and stalking."

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VAWA Regs 34 CFR 668.46 (j)

- Description of primary prevention and awareness programs for all incoming students and employees
 - A statement that the institution prohibits the crimes of dating violence, domestic violence, sexual assault, and stalking
 - The definitions of the terms above
 - The definition of consent
 - Description of safe bystander intervention options
 - Information on risk reduction
- Description of the institution's ongoing prevention and awareness campaigns for students and employees

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What the future holds for Title IX...

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What does the future hold for Title IX?

- Changes to the regulations?
 - Definition of sexual harassment
 - Informal process
 - Cross-examination
 - Role of advisors
 - Jurisdiction
 - "Mandatory" reporters/"responsible employees"
 - Single investigator model?

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What does the future hold for Title IX?

- Broader LGBTQ protections: transgender athletes' rights issues
 - State bills in Florida, Alabama, Arkansas, Idaho, Mississippi, Tennessee and West Virginia prevent transgender females from playing on female sports teams
 - Executive orders in South Dakota prohibit same
- Social justice issues and Title IX intersections
 - March 2021, class action lawsuit filed against the Dept. of Education in Oregon federal court by 33 LGBTQ plaintiffs from 30 institutions.
 - Is the religious exemption in Title IX unconstitutional?
- SCOTUS?
 - State law pushbacks
 - Rewrite Codes...again? And when?

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Final thoughts...

THANK YOU!

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