

Title IX Personnel Training

University of Louisville
August 3, 2020

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

Know when to consult legal counsel.

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What I’ll be referring to today...

- U.S. Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf).
- Univ. of Louisville [DRAFT as of 7/31] *Title IX Student Sexual Misconduct Policy*
 - To be utilized when the respondent is a student and the jurisdiction requirements of Title IX are met.
- Univ. of Louisville [DRAFT as of 7/31] *Title IX Employee Sexual Misconduct Policy*
 - This policy applies to all members of the University of Louisville community (including employees, students, non-University employees participating in University related activities or programs, third party contractors and vendors, and visitors) when the Respondent is an employee and the jurisdiction requirements of Title IX are met.

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I. Introduction

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Four Corners Model

Lake’s Four Corners of Title IX Regulatory Compliance

Organization and Management	Investigation, Discipline and Grievance Procedures
Impacted Individual Assistance	Campus Culture and Climate
Title IX Compliance	

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A Few Initial Thoughts on the New Regulations

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

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Some Key Features of the New Regulations

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

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Some Key Features of the New Regulations

- Choice in evidentiary standard
 - "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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The Social Context

COVID-19

- Virtual hearings
- More online learning
 - More Clery/VAWA-type offenses?
- Budget cuts, hiring freezes, furloughs, etc. due to the pandemic

Social Justice Issues

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Timing

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

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



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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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Training Mandates

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Training Mandates Specific to the New Regulations

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

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

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

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Posting Training Materials to Your Website

"**All materials used to train Title IX personnel:**

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

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

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

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

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Further training for Title IX personnel required...

- Further training specific to your institution's policies.
 - Your campus policies are in transit now.
- Training on technology usage for live hearings.
 - Especially important for decision-makers/hearing officers.
- Additional and continued training on bias.
- Additional investigator and decision-maker training.
 - Even if outsourced, they should be trained.
- 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 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, Memorandum on the Basis of Sex in Education Programs or Activities Requiring Federal Financial Assistance, 34 Fed. Reg. 39201 (May 23, 1969) (final rule) (online at www.govinfo.gov/constitution/FR-1969-05-23/1969-05-23.pdf) (p. 3926) (emphasis added).

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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)*

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Sexual Predation and Trauma

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II. Legal Foundations of Title IX and Related Legal Cases

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What is Title IX? What is its mission?

- 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 mission of Title IX!**
- Other federal laws also address sex discrimination. There are complex interactions with other federal laws, such as the Clergy Act, the Family Educational Rights and Privacy Act (FERPA), and the Violence Against Women Act (VAWA).
- Title IX is concerned with **institutional response** to discrimination.

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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 specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, (hereinafter collectively referred to as "recipients" or "schools"), must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination. These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities.

Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 30025 (May 19, 2002)(final rule) (online at www.gpo.gov/content/pkg/FR-2002-05-19/pdf/02-10154.pdf) at 30026 (emphasis added).

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Title IX: FINAL RULE

*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.*

id (emphasis added).

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Legal Foundations: How did we get here?

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Title IX: Current and Former Guidance

- *Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties*, 62 FR 12034 (Mar. 13, 1997).
- *Revised Guidance on Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001).
- *Dear Colleague Letter: Sexual Violence* (April 4, 2011), WITHDRAWN by U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017).
- *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014) WITHDRAWN by U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017).
- *Q&A on Campus Sexual Misconduct* (Sept. 22, 2017).

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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.

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New Regulations and Court Activity

Judicial activism and inactivism

- Lower courts and SCOTUS
- 6th Circuit in *Baum*, Eastern Michigan & bias response
- 7th Circuit in *Purdue*
- 3rd Circuit in *University of Sciences*
- U.S. District Court for District of Tennessee in *Rhodes College*
 - (See Jeremy Bauer-Wolf, *Constitutional Due Process at Private Institutions? Inside Higher Ed* (June 25, 2019)).

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Challenges to the New Regulations

- **Congress**
 - *The Department acknowledges that Congress could address Title IX sexual harassment through legislation, but Congress has not yet done so.* *Id.* at 30060.
 - House of Representatives Committee on Oversight Reform, *Letter to DeVos-DoED re: Title IX* (June 22, 2020).
- **Pending Litigation**
 - James Walker, *Betsy DeVos Sued by Organizations Representing Student Victims of Sexual Violence*, *Newsweek* (Jun. 11, 2020) (online at www.newsweek.com/betsy-devos-lawsuit-title-ix-rule-changes-sexual-harassment-1510142).
 - ACLU/NWLC
 - State Attorneys General
- **2020 General Election**

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

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

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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.”

Department of Education, Memorandum on the Status of the Educator Program in October: Warning Parties/Personal Assistants, 10/19/2020. See <https://www.ed.gov/media/101920memorandum-on-the-status-of-the-educator-program-in-october-warning-parties-personal-assistants-10192020>.
- 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 risk for Title IX operatives?

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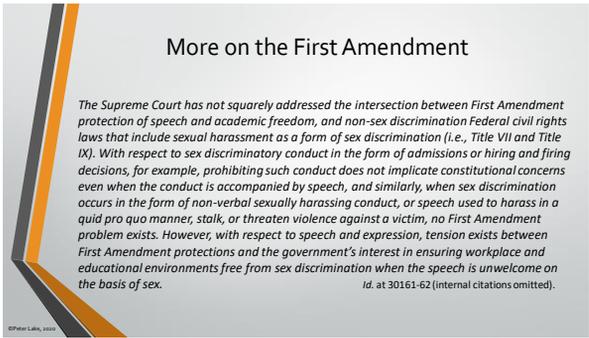
Free Speech and Academic Freedom in the New Regulations

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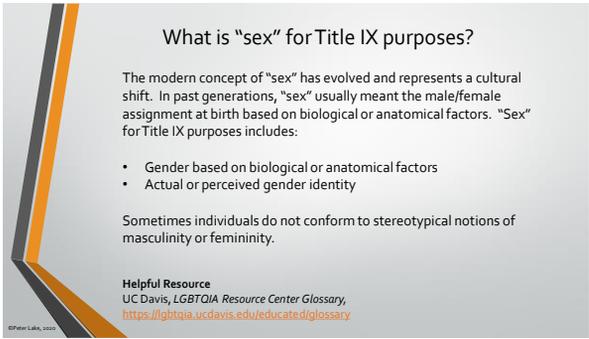
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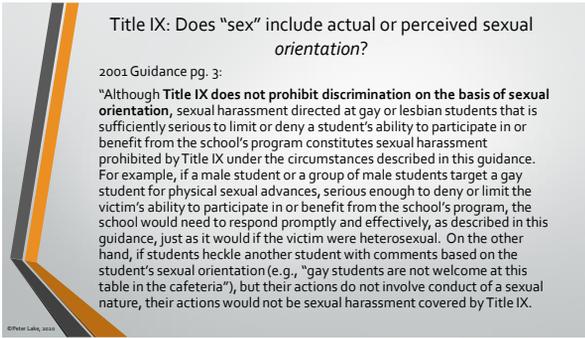
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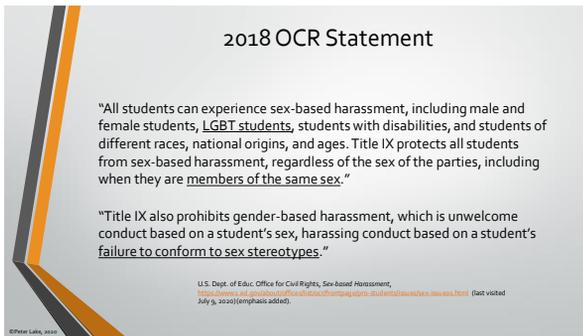
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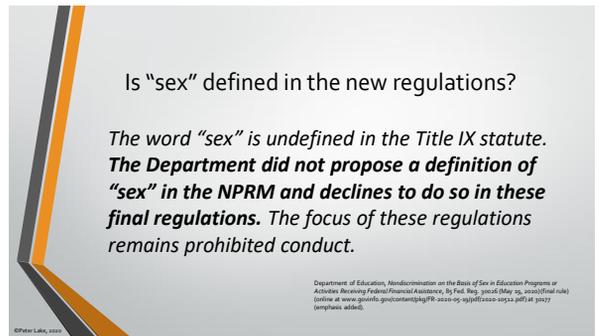
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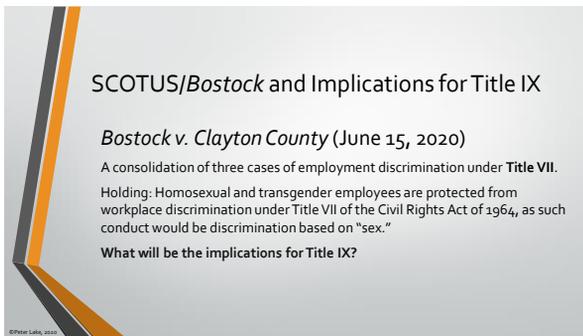
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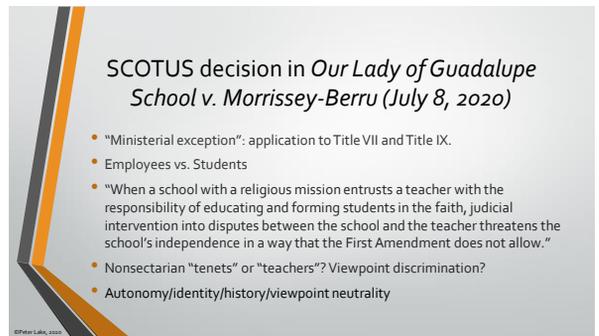
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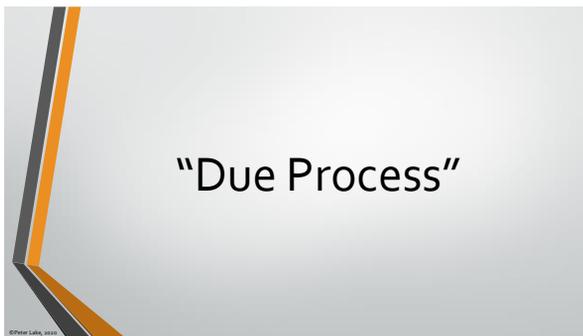
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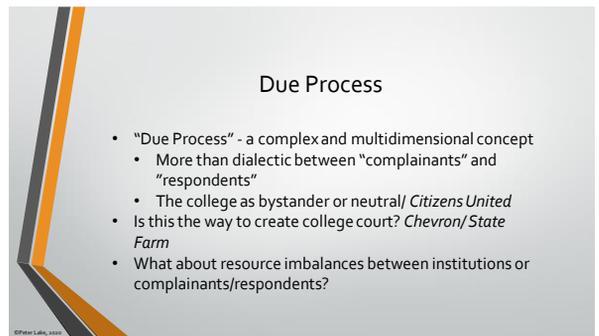
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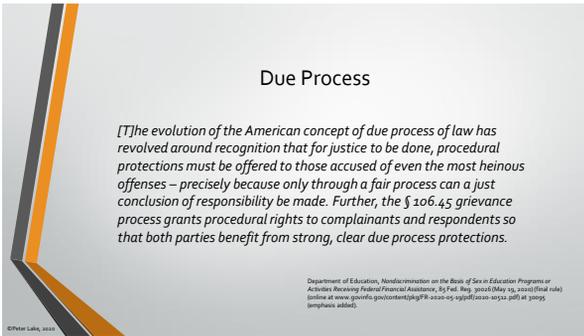
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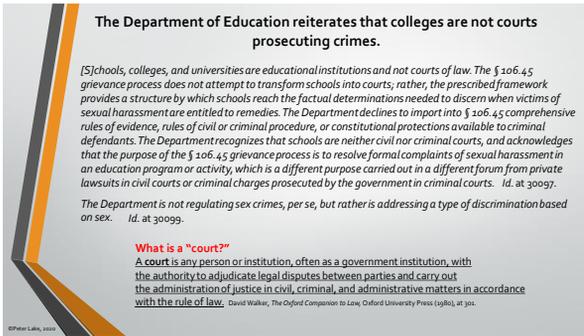
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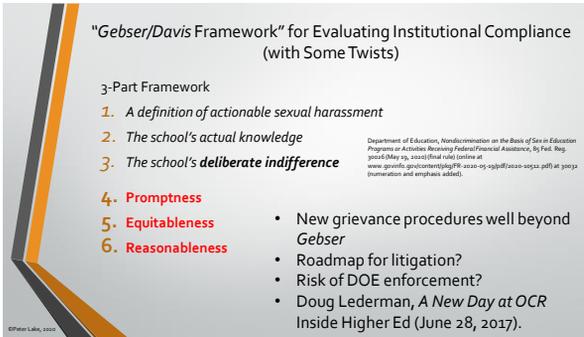
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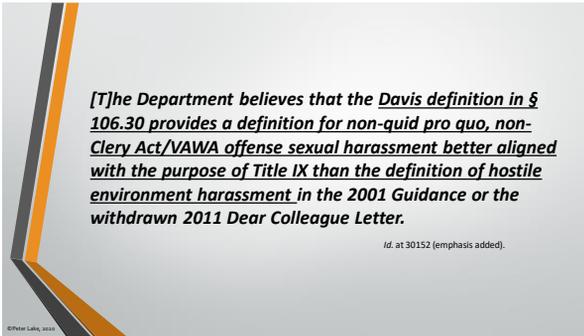
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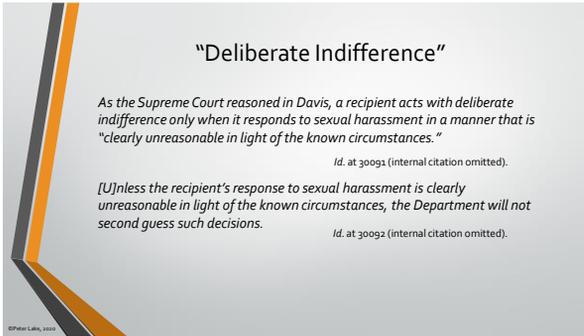
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III. Organization and Management: Tuning Your Systems to the New Mandates

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 Title IX coordinator, decision-maker or investigator
- Anyone implementing an informal process such as a mediation
- Advisors*
- What about case management, records management, etc.?



**Budgetary and operational concerns?
*Kentucky law specifics?**

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Title IX Personnel at Univ. of Louisville

- Dr. David W. Parrott, Title IX Coordinator
- Dr. Angela B. Taylor, Deputy Title IX Coordinator
Assistant Provost and Assistant Dean of Students
Director of Student Rights and Responsibilities
- Donna Ernst, Deputy Title IX Coordinator
Employee Relations Manager, Human Resources
- Oscar Chavez, Deputy Title IX Coordinator
Lieutenant, Compliance/External Support
UofL Police Department

Title IX Personnel at Univ. of Louisville Cont'd

- Investigators (In-House)
 - Student Conduct (students)
 - HR (employees)
- Advisors
 - Required to accompany the Complainant and Respondent for the purpose of cross-examining the opposing party and opposing party’s witnesses at the hearing. *An Advisor must have a current license to practice law in Kentucky.*
 - If a party doesn’t have an advisor, one will be provided by the institution.

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Title IX Personnel at Univ. of Louisville Cont'd

[Respondent is an Employee]

- Hearing Officer** (Outsourced) A third party hired to preside over a hearing conducted pursuant to this policy. The Hearing Officer will make all determinations of relevancy, serve as the decision maker, evaluate the evidence presented, control the tone and tenor of the hearing and make findings of fact and conclusions as to whether Sexual Misconduct or violations of University policy occurred.
- Hearing Officers** are retired judges or experienced attorneys who have contracted with the University to preside over Title IX hearings. Parties may not communicate with the Hearing Officer outside the presence of the other party.

Title IX Personnel at Univ. of Louisville Cont'd

[Respondent is a Student]

- CHAIR OF THE HEARING BOARD** is an individual who will convene and preside over all facets of the hearing.
- HEARING BOARD** is a panel made up of three members who will decide whether the Respondent is responsible for the alleged Sexual Misconduct. The Hearing Board is comprised of a Chair, and two members chosen from a pool of trained students, faculty, and staff who serve as members of the student conduct hearing council.
- HEARING OFFICIAL** is an individual who will facilitate the hearing logistics.

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Personnel

- Budgetary concerns
 - Cost of outsourcing decision-making function and providing advisor attorneys.
- Bias/Conflicts of interest?
- Appropriate relationships between Title IX coordinator and other functions.
 - Investigator?
 - Decision-Maker?
- Role of counsel?

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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).

(emphasis added)

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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.

Department of Education, *Northwestern v. Board of Education*, 579 U.S. 206 (2016), available at <https://www.supremecourt.gov/opinions/16-0018>.

Univ. of Louisville policies state: UNIVERSITY OFFICIAL is either the Title IX Coordinator or Deputy Title IX Coordinators as listed in the Reporting Sexual Misconduct section of this policy.

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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.

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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Univ. of Louisville Policy States...

ACTUAL KNOWLEDGE (pursuant to Title IX) means notice of Sexual Misconduct or allegations of Sexual Misconduct to the University’s Title IX Coordinator or any University Official who has authority to institute corrective measures on behalf of the University. The Actual Knowledge standard is **not** met when the only University Official with Actual Knowledge is the Respondent.

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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”].

Department of Education, Memorandum on the Role of the Title IX Coordinator in Postsecondary Institutions, 34 C.F.R. § 106.45(b)(10)(i)(D) (2017) (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?

**UNIV. OF LOUISVILLE APPROACH
TITLE IX MANDATORY REPORTERS INCLUDE THE FOLLOWING:**

- Vice Presidents, Deans, Department Chairs, Directors, and Coaches
- Assistant or Associate Vice Presidents, Deans, and Provosts
- Any employee in a supervisory or management role
- All Faculty
- University of Louisville Police Officers and any contracted security personnel

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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.

Department of Education, Memorandum on the Role of the Title IX Coordinator in Postsecondary Institutions, 34 C.F.R. § 106.45(b)(10)(i)(D) (2017) (emphasis added).

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Actual Knowledge Can Be Triggered By...

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

See *id.* at 30087.

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Anonymous Reports

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

Id. at 30087.

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

Id. at 30087.

How does Univ. of Louisville plan to approach anonymous reports?

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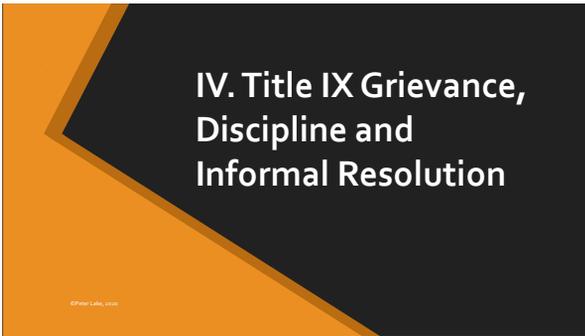
Notice Cont’d

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

Id. at 30106 (emphasis added).

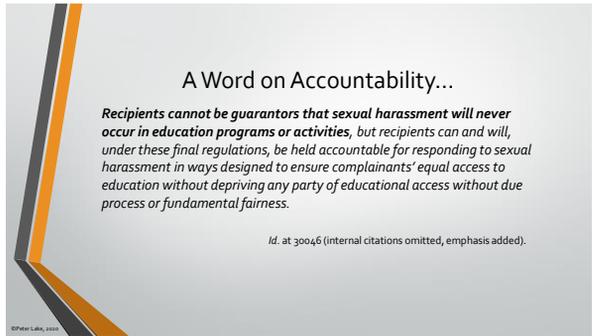
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IV. Title IX Grievance, Discipline and Informal Resolution

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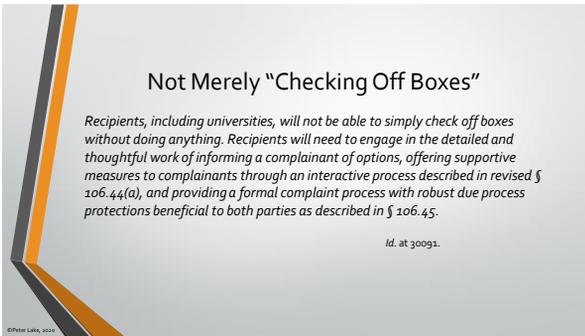


A Word on Accountability...

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

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

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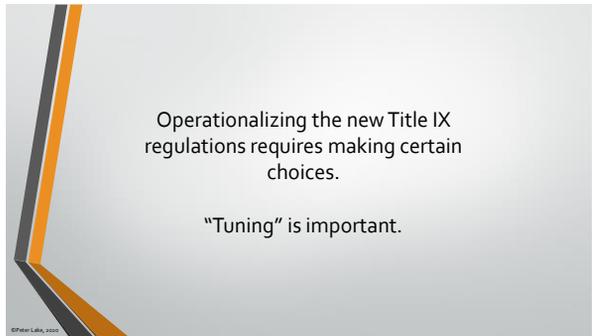


Not Merely “Checking Off Boxes”

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

Id. at 30091.

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Operationalizing the new Title IX regulations requires making certain choices.

“Tuning” is important.

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Regulations Intend to Provide “Flexibility”

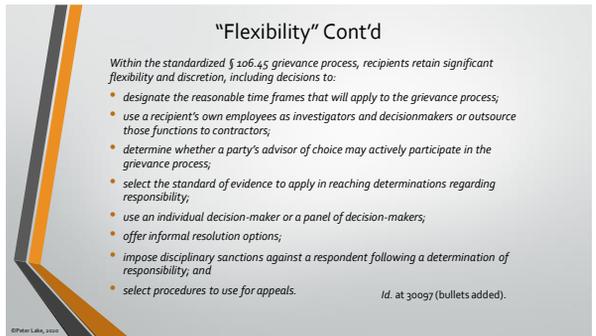
[T]hese final regulations leave recipients the flexibility to choose to follow best practices and recommendations contained in the Department’s guidance or, similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social science scholars,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

Id. at 30030.

[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 30097 (bullets added).

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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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Policy Basics: Definitions

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Univ. of Louisville “Complainant,” “Respondent” and “Party”/“Parties”

COMPLAINANT is an individual who is alleged to be the victim of conduct that could constitute Sexual Misconduct.

RESPONDENT is an individual who has been reported to be the perpetrator of conduct that could constitute Sexual Misconduct.

PARTY OR PARTIES means Complainant or Respondent and is signified by the singular “Party,” and both are signified by the plural “Parties.”

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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).

(emphasis added)

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Univ. of Louisville “Sexual Harassment” & “Sexual Misconduct” Definitions

SEXUAL HARASSMENT means conduct on the basis of sex that satisfies one or more of the following:

- An employee of the University conditioning the provision of an aid, benefit or service of the University on an individual’s participation in unwelcome sexual conduct (often referred to as quid pro quo);
- 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 University’s education program or activity; or
- Sexual Assault, Dating Violence, Domestic Violence or Stalking (otherwise defined herein)

SEXUAL MISCONDUCT is an omnibus term that applies to all misconduct covered by this policy. Sexual Misconduct includes Sexual Harassment (includes quid pro quo and hostile environment); Sexual Assault; Domestic Violence; Dating Violence; and Stalking.

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Consent

The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient’s educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.

Department of Education, nondiscrimination in the Area of the Education Programs or Activities Requiring Intergovernmental Assistance, 34 CFR, Part 106, and Title IX, which shall not apply unless it is specifically incorporated by reference into the applicable regulations. 10/17/2016

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Univ. of Louisville "Consent" Definition

CONSENT means freely given agreement by a person with capacity to engage in the sexual activity at issue. A person who is incapacitated (as defined below), lacks capacity and cannot give effective Consent. In order for individuals to engage in sexual activity of any type, all involved individuals must Consent to such activity prior to and throughout any sexual encounter. Consent to one sexual act does not constitute Consent to any other such acts; Parties to a sexual encounter must ensure that they have the affirmative Consent of the other individual(s) involved for each sexual act. Affirmative Consent may manifest itself differently depending on the context. "No" always means "no." Words or perceptible actions other than an explicit "yes" may be sufficient to indicate Consent, depending on the totality of the circumstances of each case. Regardless of the circumstances, Consent to any form of sexual activity can be withdrawn at any time, by any Party to a sexual encounter, at any point during the encounter. This is true regardless of what sexual acts (or with whom) the individual(s) in question may have engaged in or agreed to previously, and regardless of the nature of the relationship between the Parties.

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Univ. of Louisville "Incapacitation" Definition

INCAPACITATION is a state in which a person cannot make rational decisions as to whether or not to engage in sexual activity because the person lacks the ability to give knowing Consent (i.e., to understand the "who, what, when, where, why, or how" of the sexual interaction). A person may be incapacitated due to mental disability, being asleep, unconsciousness, involuntary physical restraint, from the effects of alcohol or other drugs, or because they are below the minimum age of Consent in the state where the sexual activity occurred. It is important to note that while a person can be incapacitated by intoxication, intoxication (in which case a person is under the influence of alcohol or drugs) does not constitute Incapacitation unless it renders the person unable to Consent as described herein. In every case, the facts are evaluated to assess whether the person in question was capable of providing Consent, and whether a reasonable person in the Parties' positions would perceive the person as being capable or incapable of providing Consent.

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Univ. of Louisville "Sexual Assault" Definition

SEXUAL ASSAULT means any forcible and non-forcible sex offenses from the Federal Bureau of Investigation's classification system, to include rape, sodomy, Sexual Assault with an object, fondling, incest and statutory rape.

- **Rape** is the carnal knowledge of a person, without the Consent of the victim, including instances where the victim is incapable of giving Consent because of age or because of temporary or permanent mental or physical incapacity. There is "carnal knowledge" if there is the slightest penetration of the vagina or penis by the sex organ of the other person. Attempted Rape is included.
- **Sodomy** is oral or anal sexual intercourse with another person, without the Consent of the victim, including instances where the victim is incapable of giving Consent because of age or because of temporary or permanent mental or physical incapacity.
- **Sexual Assault with an Object** is using an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the Consent of the victim, including instances where the victim is incapable of giving Consent because of age or because of temporary or permanent mental or physical incapacity. An "object" or "instrument" is anything used by the offender other than the offender's genitalia.
- **Fondling** is the touching of the private body parts of another person for the purpose of sexual gratification, without the Consent of the victim, including instances where the victim is incapable of giving Consent because of age or because of temporary or permanent mental or physical incapacity.
- **Incest** is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by the law of the jurisdiction.
- **Statutory Rape** is sexual intercourse with a person who is under the statutory age of Consent as defined by the law of the jurisdiction.

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Univ. of Louisville "Stalking" Definition

STALKING is engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress. Stalking behaviors may include persistent patterns of leaving or sending the person(s) unwanted items or gifts ranging from seemingly romantic to bizarre, following the person(s), or lying in wait for the person(s), harassing the person(s) via the internet or other forms of online and/or electronic communications (i.e., cyberstalking), or interferes with a person's property.

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Univ. of Louisville "Dating Violence" Definition

DATING VIOLENCE means violence committed by a person: (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

- Whether or not a dating relationship exists is determined (1) by the length of the relationship, (2) the type of relationship, and (3) the frequency of interaction between the persons involved in the relationship.
- This includes threats, assault, property damage, and violence or threat of violence to one's self or to pets of the romantic or intimate partner when used as a method of coercion, control, punishment, intimidation, or revenge.

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Univ. of Louisville "Domestic Violence" Definition

DOMESTIC VIOLENCE is defined as crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

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Univ. of Louisville "Formal Complaint" Definition

FORMAL COMPLAINT is a document filed by a Complainant or signed by the Title IX Coordinator alleging Sexual Misconduct against a Respondent and requesting that the recipient investigate the allegation of Sexual Misconduct. 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 University with which the Formal Complaint is filed.

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Univ. of Louisville "Supportive Measures" Definition

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. 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 Misconduct. 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.

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Scope/Jurisdiction and "Tuning"

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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.

(emphasis added)

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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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"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. . . .

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Univ. of Louisville "Jurisdiction"

Once the University has Actual Knowledge of an alleged violation, jurisdiction under Title IX requires that any act prohibited occur:

- Against a person within the United States, and
- Within the University's education programs or activities including locations, events, or circumstances over which the University exercises substantial control over both the Respondent and the context in which the Sexual Misconduct occurs. This includes any building(s) owned or controlled by a student organization that is officially recognized by the University

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Whether sexual harassment occurs in a recipient's education program or activity **is a fact-specific inquiry**. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred.

Department of Education, Memorandum on the Role of Sex in Education Programs or Activities, 75 Fed. Reg. 60,000 (2010), available at www.gpo.gov/GOVERNMENT/DOCS/2010-09-01.html.

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

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

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

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

Tuning? Traps?

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"Non-sexual Harassment Sex Discrimination"

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

Id. at 30095.

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Conduct That Does Not Meet Sexual Harassment Definition

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

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

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

Tuning? Traps?

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"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 (emphasis added).

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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.

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

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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).

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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

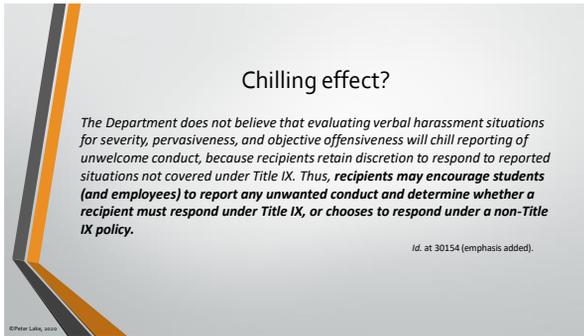
Nothing in the final regulations reduces or limits the ability of a teacher to respond to classroom behavior. If the in-class behavior constitutes Title IX sexual harassment, the school is responsible for responding promptly without deliberate indifference, including offering appropriate supportive measures 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?

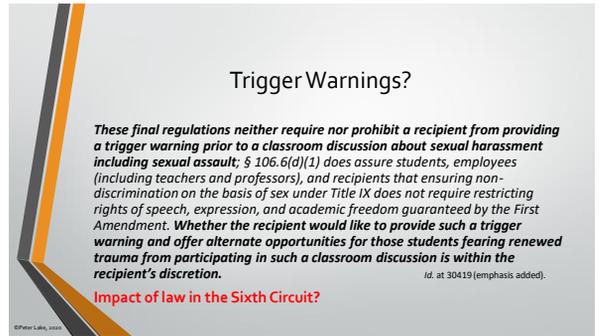
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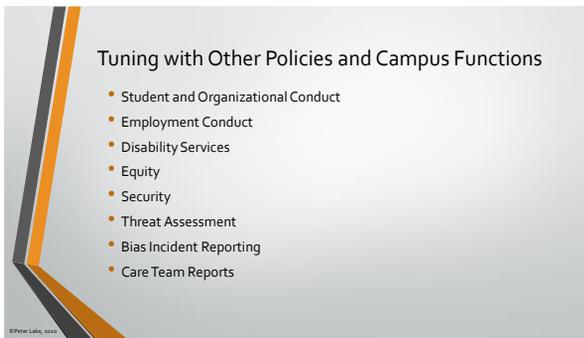


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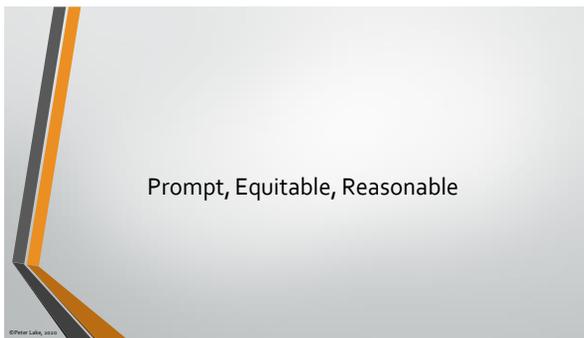


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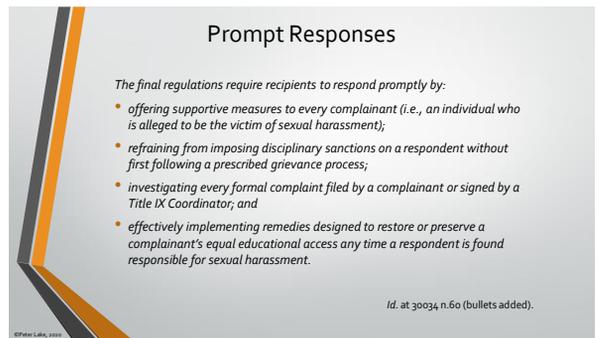


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Prompt Timeframes

- 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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Confidentiality

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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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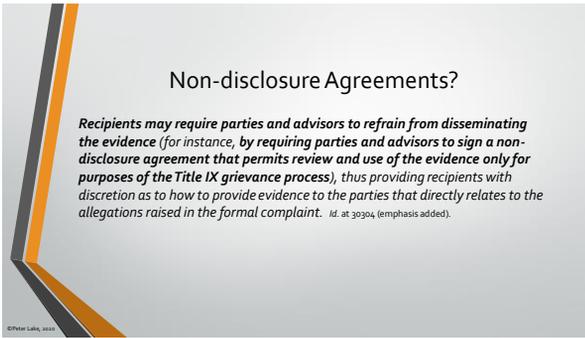
"Gag orders" are not permitted, but

. . . 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.

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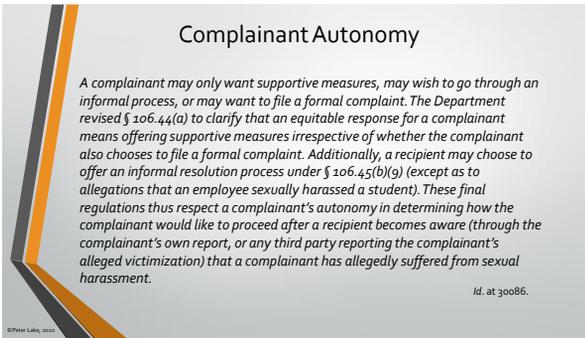


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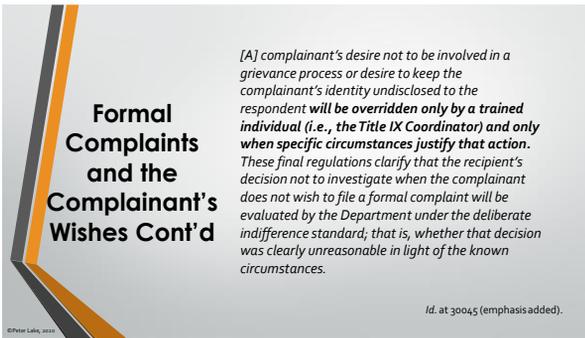


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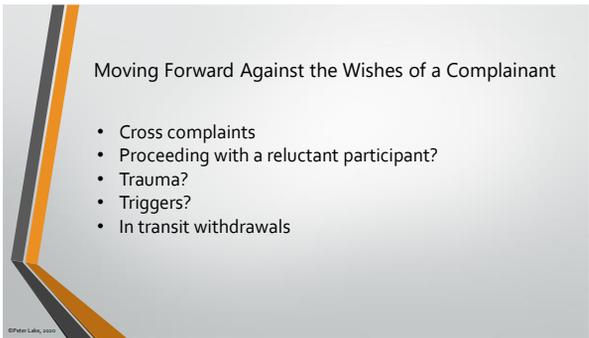


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- Cross complaints
- Proceeding with a reluctant participant?
- Trauma?
- Triggers?
- In transit withdrawals

§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.

§106.44(d) Administrative leave.

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

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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 and Dismissals/Consolidation

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§ 106.30(a) "Formal Complaint"

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

(emphasis added)

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"Formal Complaint" Cont'd

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

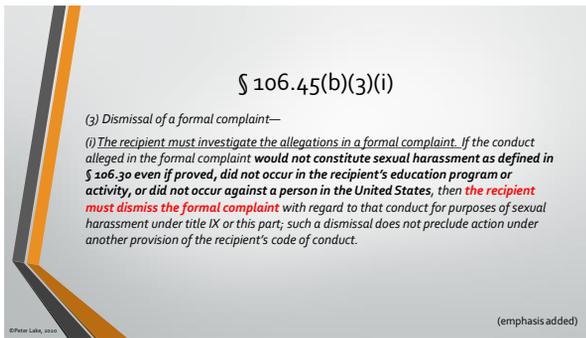
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"Formal Complaint" Cont'd

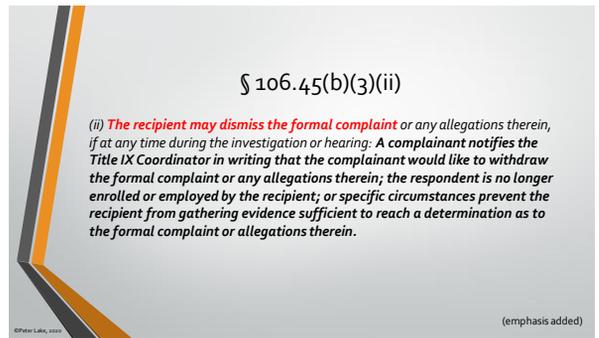
A "formal complaint" is a document that initiates a recipient's grievance process, but a formal complaint is not required in order for a recipient to have actual knowledge of sexual harassment, or allegations of sexual harassment, that activates the recipient's legal obligation to respond promptly, including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

Id. at 30030 (emphasis added).

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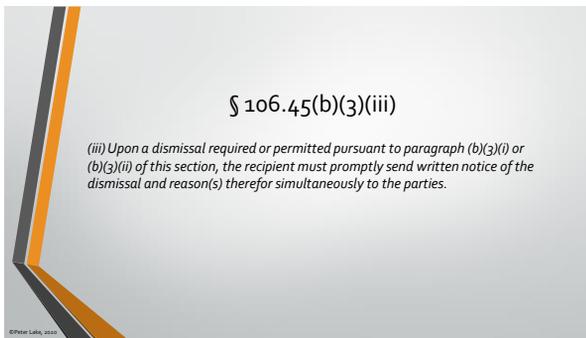


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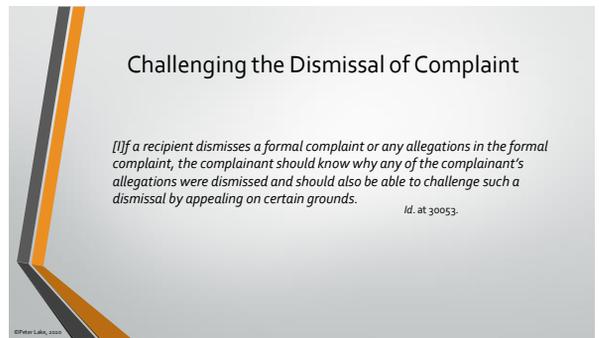


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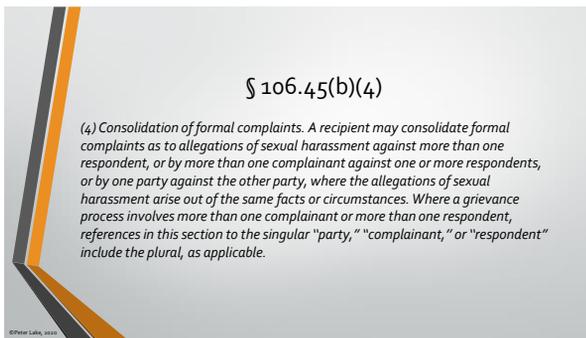


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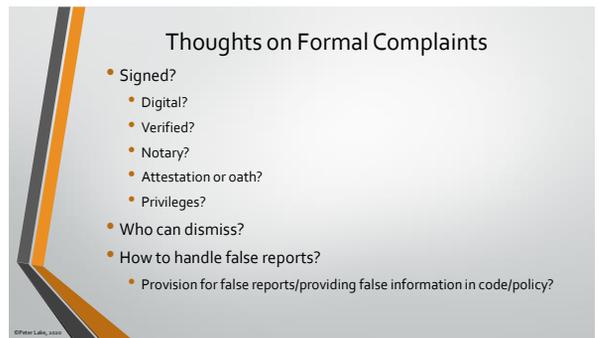


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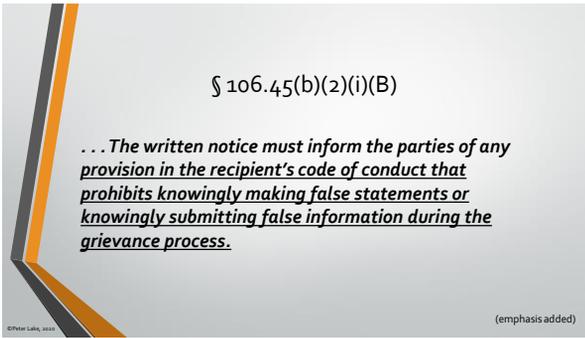
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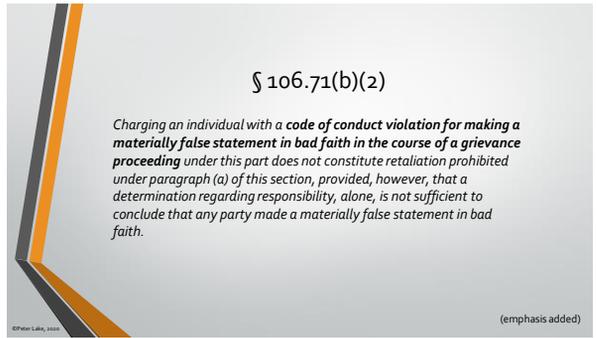


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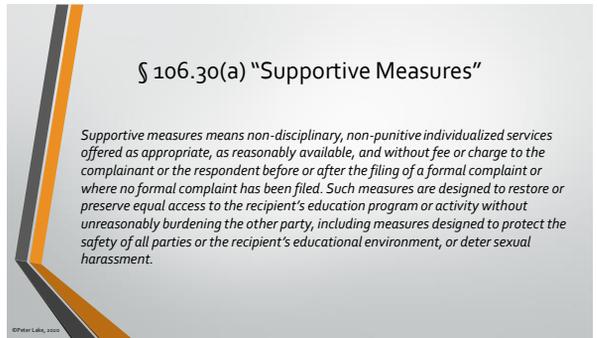


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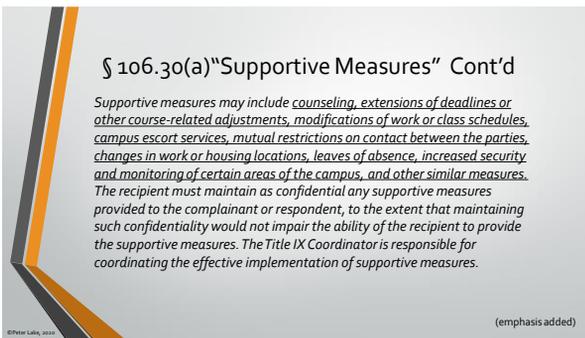


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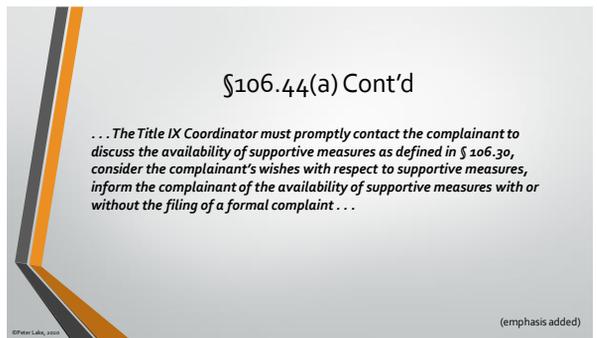
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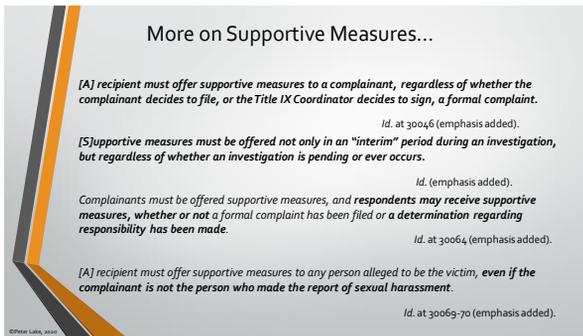
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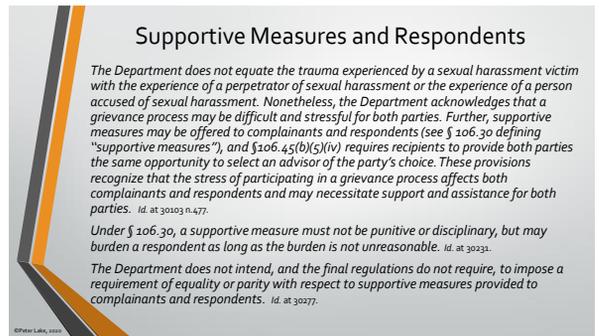
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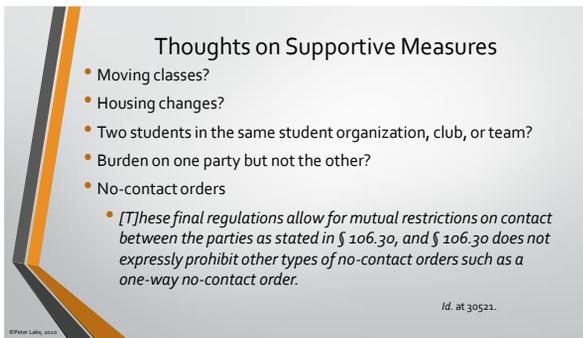


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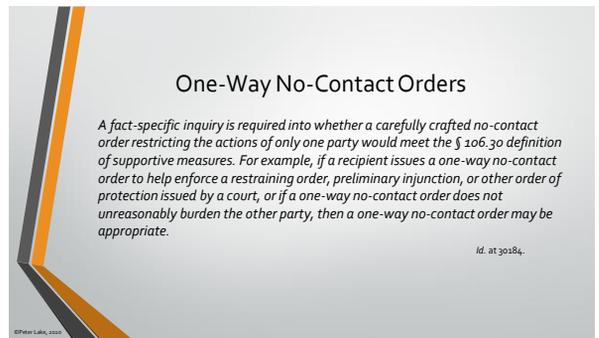


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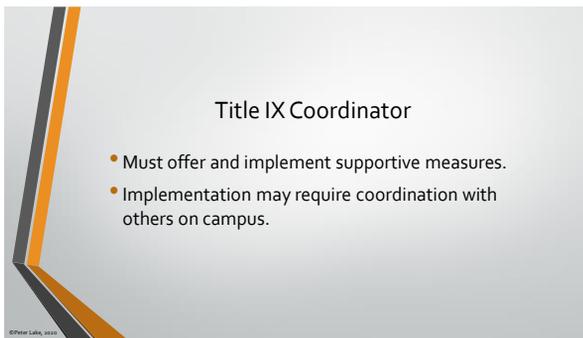


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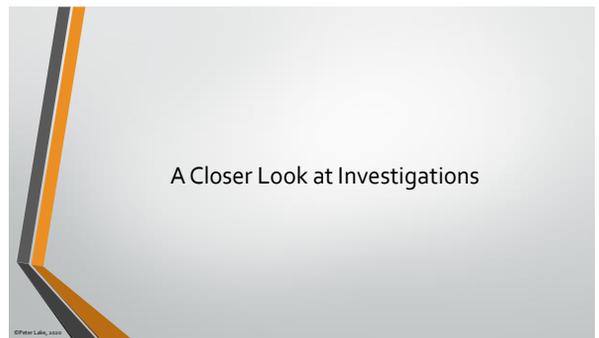


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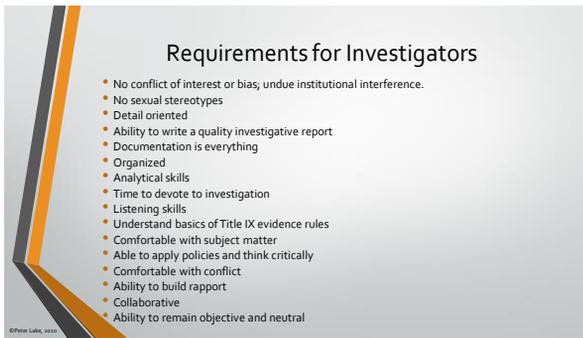
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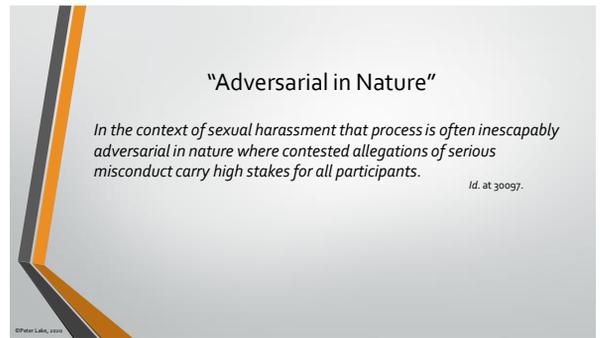


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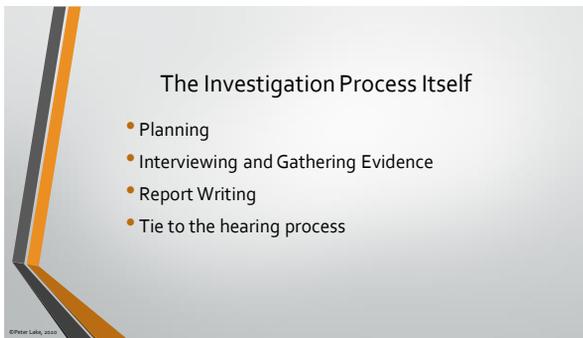


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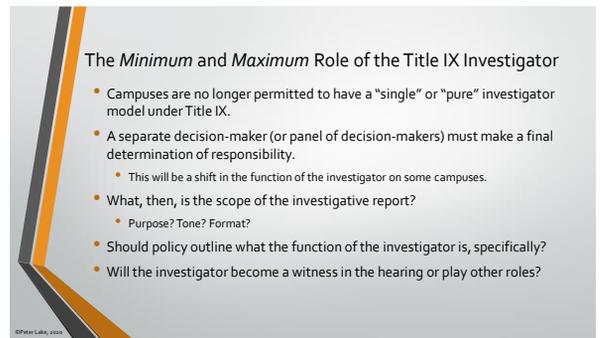
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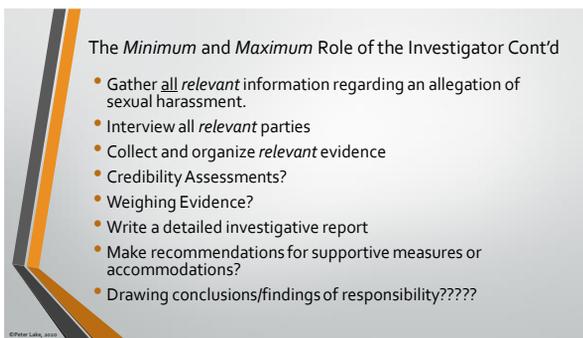


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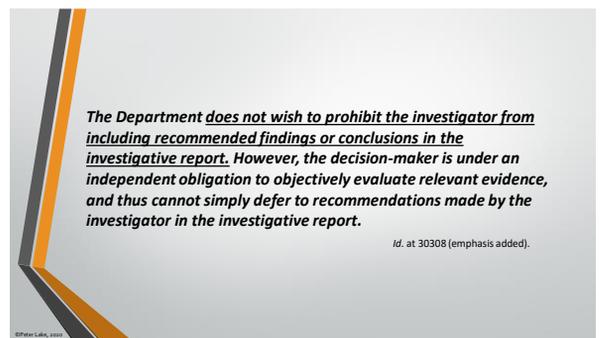


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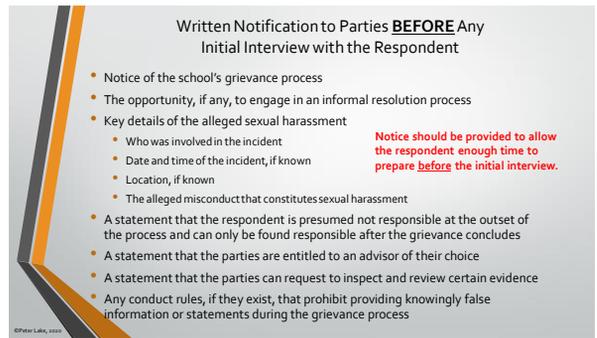


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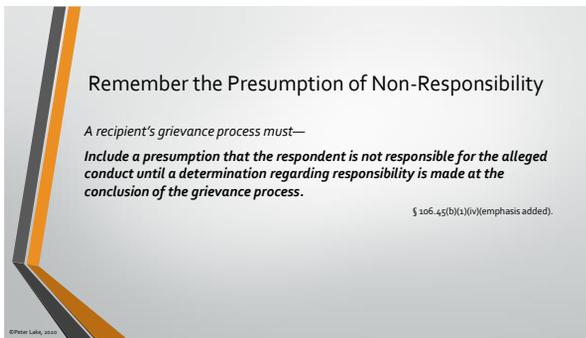


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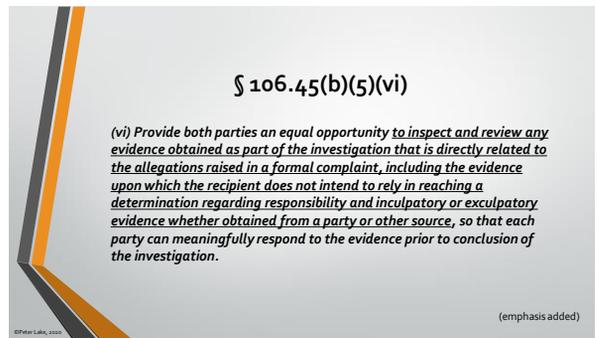


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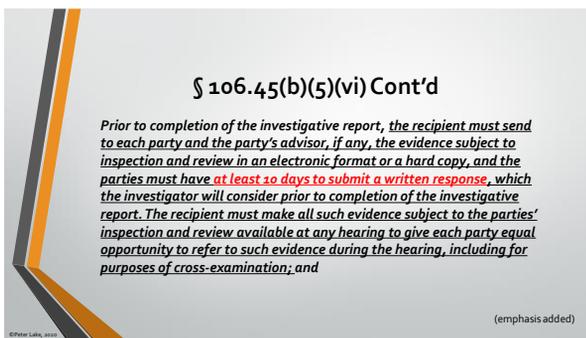


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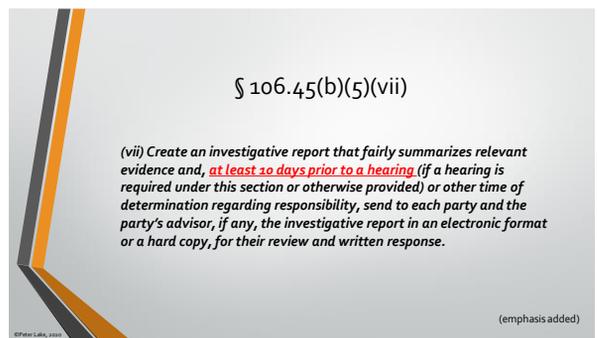


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"Universe of Evidence"

[T]he universe of evidence given to the parties for inspection and review under § 106.45(b)(5)(vi) must consist of all evidence directly related to the allegations; determinations as to whether evidence is "relevant" are made when finalizing the investigative report, pursuant to § 106.45(b)(5)(vii) (requiring creation of an investigative report that "fairly summarizes all relevant evidence").

Id. at 30248 n.1021 (emphasis added).

Is this essentially a "mini notice-and-comment" process?

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Submission of Evidence and Sharing of Responses

A recipient may require all parties to submit any evidence that they would like the investigator to consider prior to when the parties' time to inspect and review evidence begins. Alternatively, a recipient may choose to allow both parties to provide additional evidence in response to their inspection and review of the evidence under § 106.45(b)(5)(vi) and also an opportunity to respond to the other party's additional evidence. Similarly, a recipient has discretion to choose whether to provide a copy of each party's written response to the other party to ensure a fair and transparent process and to allow the parties to adequately prepare for any hearing that is required or provided under the grievance process.

Id. at 30307 (emphasis added).

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Paring Down the "Universe" to "Relevant"

"[D]irectly related" may sometimes encompass a broader universe of evidence than evidence that is "relevant."

Id. at 30304.

Non-treatment records and information, such as a party's financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party under § 106.45(b)(5)(vi), and all evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be "relevant" such that evidence about a complainant's sexual predisposition would never be included in the investigative report and evidence about a complainant's prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) . . .

Id. at 30304.

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Evidence and Relevance

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Overview

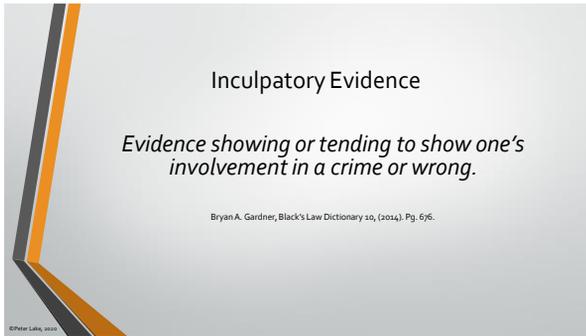
- Credibility
- Relevance
- Evidentiary Standard
- Probative Evidence
- Prejudice
- Inculpatory Evidence
- Exculpatory Evidence
- Hearsay
- Expert Testimony

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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.

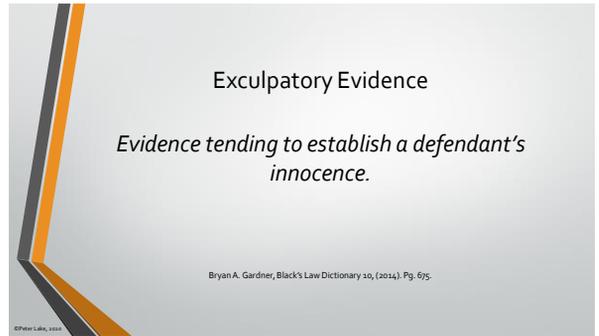
Id. at 30337.

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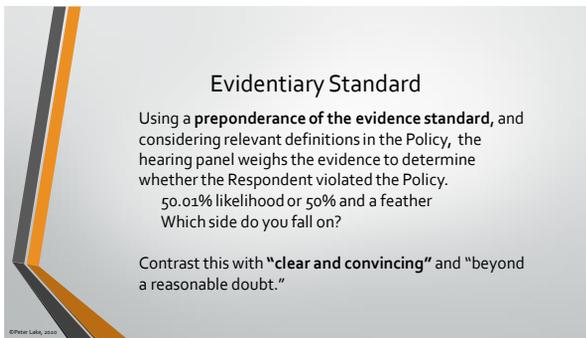


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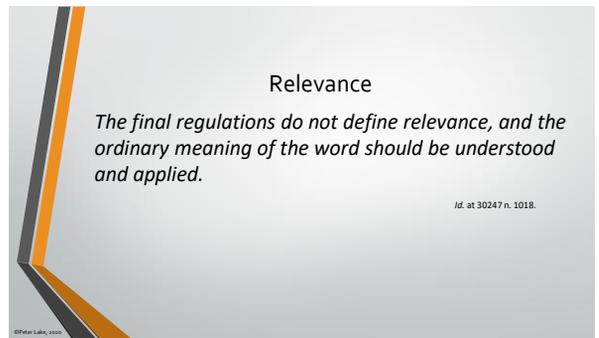


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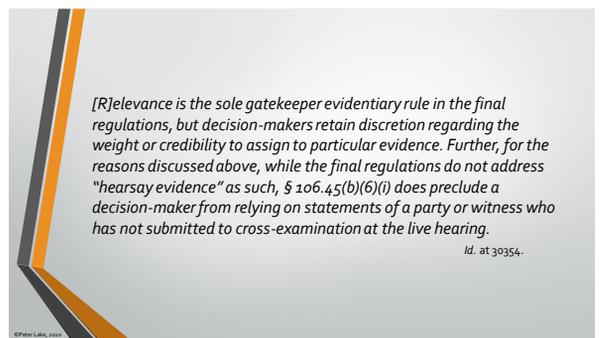
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Relevance Cont'd

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 (emphasis added).

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Credibility Determinations

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

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Credibility Determinations Cont'd

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

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Advisors and Hearings

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§ 106.45(b)(5)(iv)

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

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"Advisors"

- Complainants and respondents can have an advisor of their choosing.
- Advisor in Kentucky must be an attorney licensed to practice in the state.
- If a party does not have an advisor, the school must provide one.
 - *[W]hile the final regulations do not require the recipient to pay for parties' advisors, nothing in the final regulations precludes a recipient from choosing to do so. Id. at 30297.*
- Effective representation?
 - *[P]roviding parties the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation. Id. at 30297.*
 - Should not be viewed as practicing law, but rather "as providing advocacy services to a complainant or respondent." *Id.* at 30299.
 - **How might this be different in Kentucky?**

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"Advisors" Cont'd

How can/should advisors participate in the process?

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

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

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

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"Advisors" Cont'd

- What resources can/should advisors be given?
 - Copy of policies that address their participation in investigation interviews and hearings?
 - Copy of rules of decorum for a hearing?
 - FERPA waiver?
 - Non-disclosure agreement?

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§ 106.45(b)(6)(i)

(6) Hearings.

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

(emphasis added)

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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.

(emphasis added)

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Hearings

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

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Adopting Rules Outside of § 106.45(b)

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

Id. at 30293 n. 1148 (emphasis added).

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More on § 106.45

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

Id. at 30298 (emphasis added).

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 (emphasis added).

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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) . . .

©Peter Lake, 2020 *Id.* at 30294 (internal citations omitted).

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Rules for Evaluating Evidence

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

©Peter Lake, 2020 *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.

©Peter Lake, 2020 *Id.* at 30294 (emphasis added).

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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.

©Peter Lake, 2020 *Id.* at 30293 (emphasis added).

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Statements Not Subject to Cross Examination

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

Section 106.45(b)(6)(i)

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

The answer to that question is "no."

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

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

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The Department understands commenters' concerns that a blanket rule against reliance on party and witness statements made by a person who does not submit to cross-examination is a broader exclusionary rule than found in the Federal Rules of Evidence, under which certain hearsay exceptions permit consideration of statements made by persons who do not testify in court and have not been cross-examined.

©Peter Lake, 2020 Department of Education, Implementation of the Title IX Sexual Harassment Prevention, Adjudication, Remediation, and Enforcement Regulations, 34 Fed. Reg. 24042-24043, 24043 (1969) (emphasis added).

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Cross-Examination

- Advisors may cross examine but not the witnesses/complainants/respondents themselves
- Objections and evidence issues
- Inculpatory/ Exculpatory evidence
- The Department styles this as “asking questions” in commentary to the final regulations to allow for any advisor of choice. What will cross-examination look like when both advisors are attorneys under KY rules?

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Standard of Evidence to Determine Responsibility

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§ 106.45(b)(1)(vii)

A recipient’s grievance process must—

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

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Univ. of Louisville “Standard of Proof”

STANDARD OF PROOF

*The standard of proof for incidents of non-academic misconduct is a **preponderance of evidence**. Preponderance of evidence means that the evidence supports that a given allegation is more likely to be true than not true. The technical rules of evidence applicable to civil and criminal cases shall not apply when resolving incidents as outlined in this policy.*

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Sanctions and Remedies

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Sanctions

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

*The Department **does not require disciplinary sanctions after a determination of responsibility**, and does not prescribe any particular form of sanctions.*

Id. at 30096 (emphasis added).

*The Department acknowledges that this approach departs from the 2001 Guidance, which stated that where a school has determined that sexual harassment occurred, **effective corrective action “tailored to the specific situation” may include particular sanctions against the respondent**, such as counseling, warning, disciplinary action, or escalating consequences. . . . For reasons described throughout this preamble, the final regulations modify this approach to focus on remedies for the complainant who was victimized rather than on second guessing the recipient’s disciplinary sanction decisions with respect to the respondent. However, the final regulations are consistent with the 2001 Guidance’s approach inasmuch as § 106.45(b)(13)(i) clarifies that “remedies” may consist of individualized services similar to those described in § 106.30 as “supportive measures” except that remedies need not avoid disciplining or burdening the respondent.*

Id. at 30096 n.455 (emphasis added).

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Disciplinary Decisions/Sanctions Must Themselves Not Be Discriminatory

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

Id. at 30104.

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Sanctions

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

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§ 106.45(b)(1)(i)

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

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

(emphasis added)

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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
 - Sanctions against the respondent
- 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?
- The Title IX coordinator is responsible for implementing remedies.

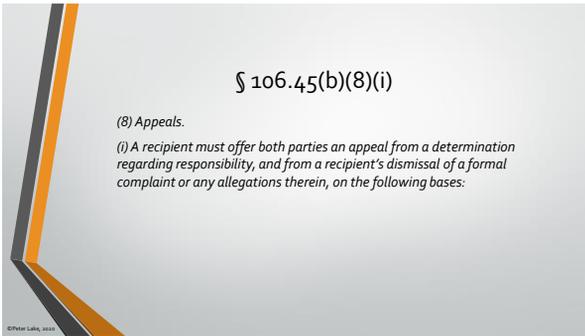
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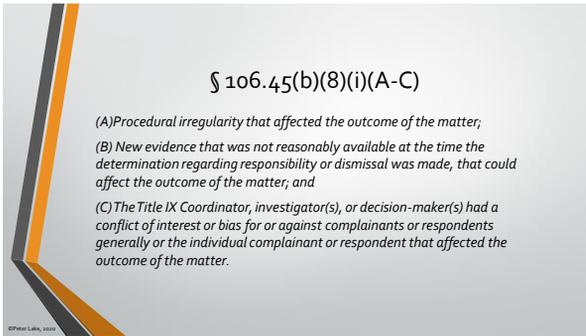
Appeals

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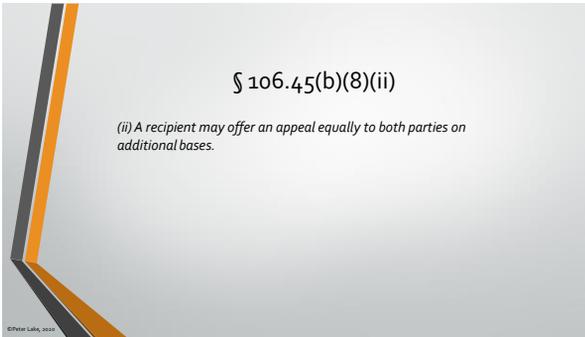


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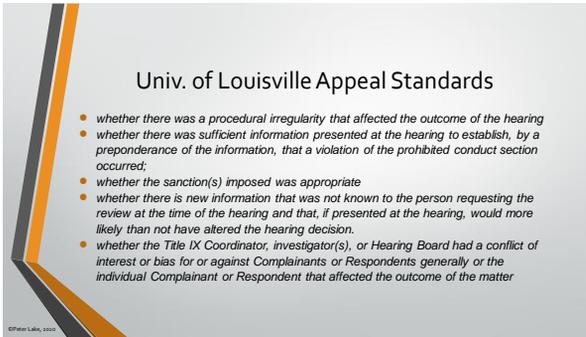


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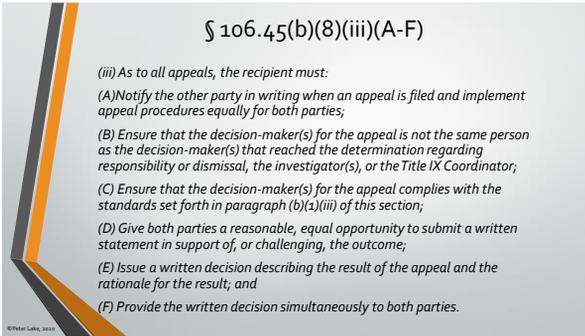


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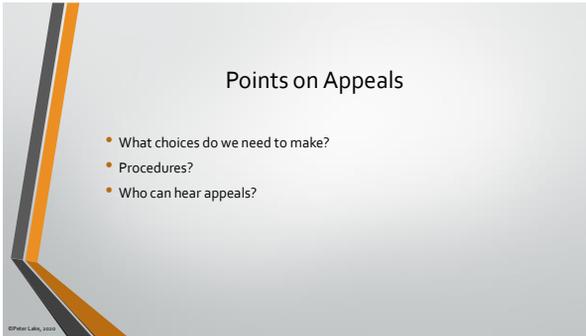


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§ 106.71(a)

(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)

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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Univ. of Louisville "Retaliation" Statement

RETALIATION

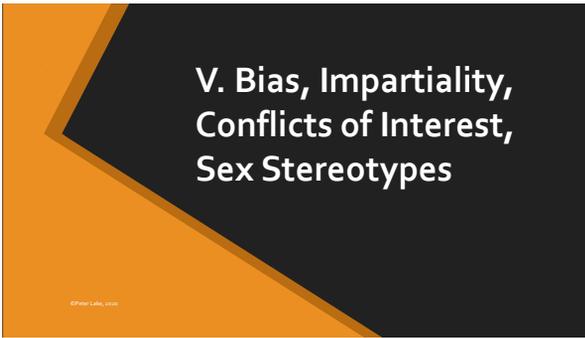
The University prohibits retaliation. Retaliation is any act taken against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this policy.

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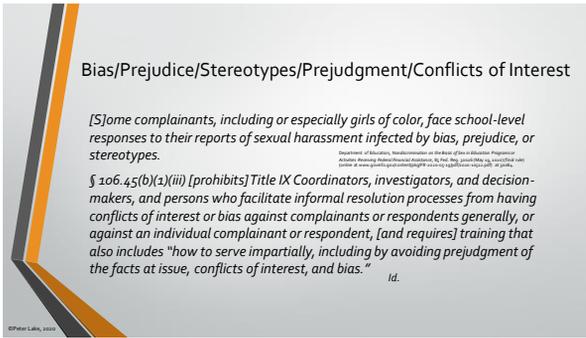
Retaliation

- Against complainant, respondent, witnesses, advisors
- Against employees
- Vigilantism—Digital or otherwise

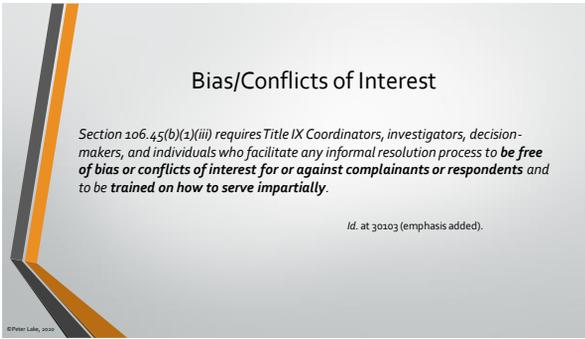
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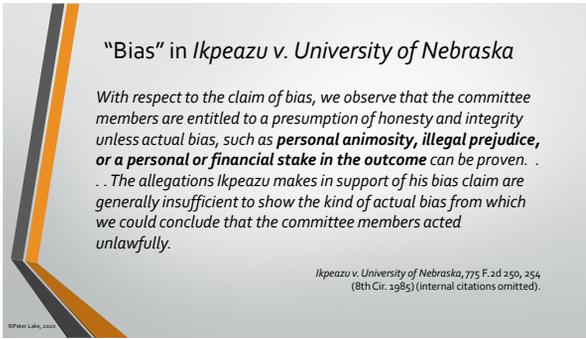
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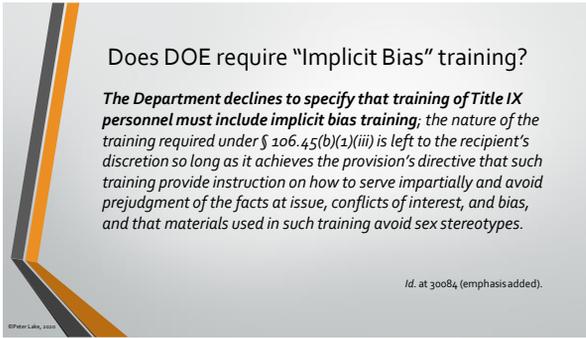
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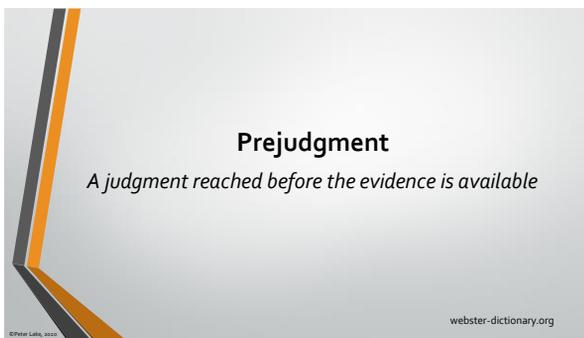


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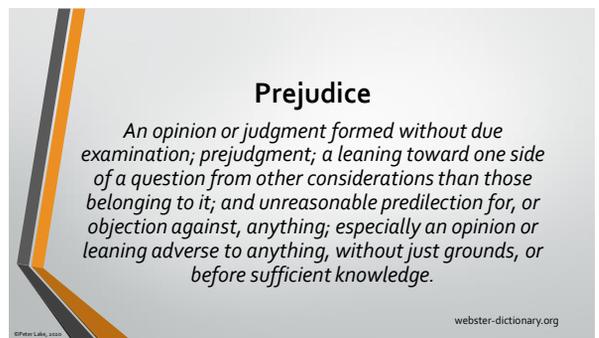


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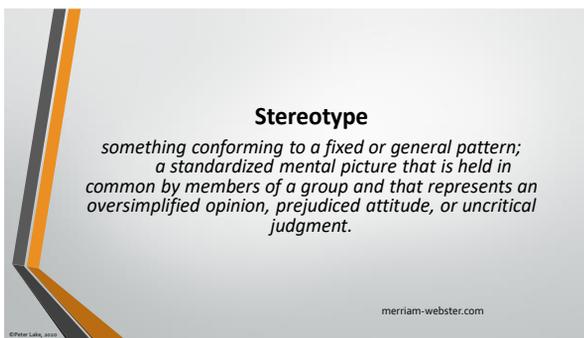


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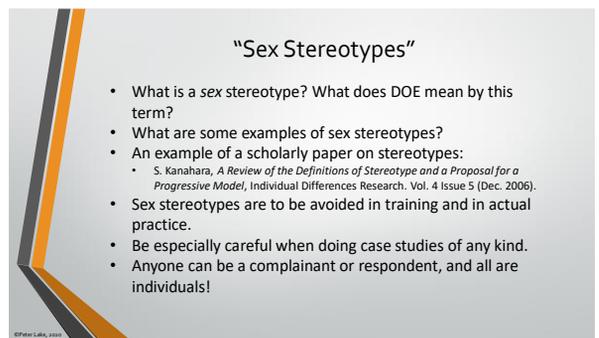
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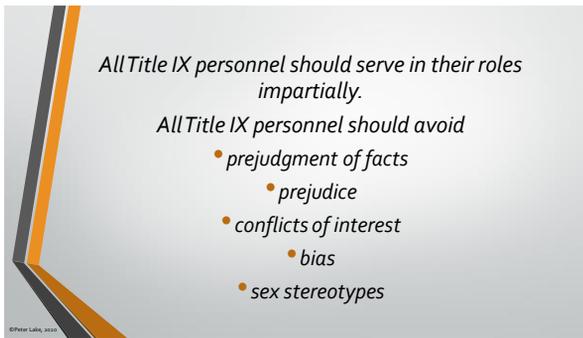
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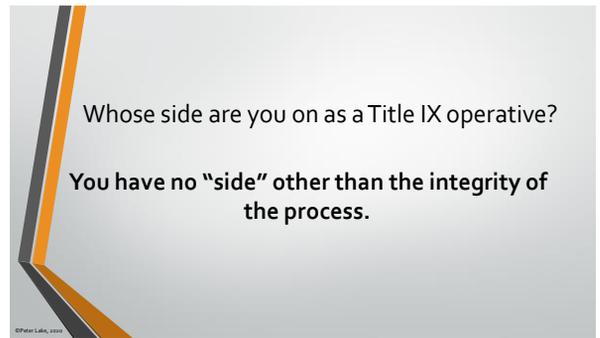


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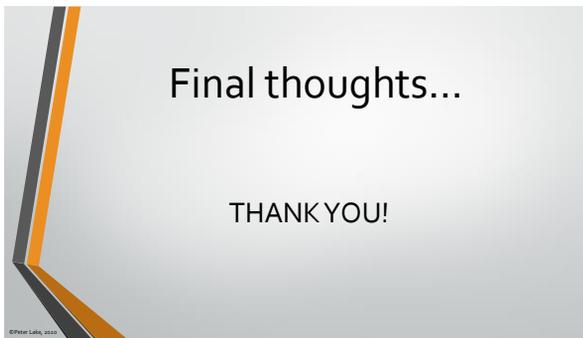


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