What I’ll be referring to today...

- 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.

I. Introduction

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
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.

• 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”

Some Key Features of the New Regulations

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

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.

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!
**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”

[https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html](https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html)

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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 training, by an outside consultant, the school must make the materials available upon request for inspection by members of the public as a condition of receipt of federal financial assistance.

“Title IX personnel must have access to training materials ensuring they are up to date.”

[https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html](https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html)

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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.

**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!
The Controversial Science of Sexual Predation


Trauma-Based Approaches

Avoid or Use?

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

Trauma

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

Trauma Cont’d

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

“Victim”/“Survivor” or “Perpetrator”

When the Department uses the term “victim” (or “survivor”) or “perpetrator” to discuss these final regulations, the Department assumes that a reliable process, namely the grievance process described in § 106.45, has resulted in a determination of responsibility, meaning the recipient has found a respondent responsible for perpetrating sexual harassment against a complainant.
II. Legal Foundations of Title IX and Related Legal Cases

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 Clery 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.

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!

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.

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.

Legal Foundations: How did we get here?

Title IX: Current and Former Guidance

- Revised Guidance on Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 19, 2012).
- Q&A on Campus Sexual Misconduct (Sept. 22, 2017).
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.

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 3006.
  - House of Representatives Committee on Oversight Reform, Letter to DeVos-DOL-re Title IX (June 23, 2019).
- Pending Litigation
  - ACLU/NWLC
  - State Attorneys General

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

Litigation Risk

- Will the new regulations cause an increased risk of litigation?
- The Department doesn’t think so. For example: “[T]he 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.”
- 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?

Free Speech and Academic Freedom in the New Regulations
The § 106.30 definition of sexual harassment captures categories of misconduct likely to impede educational access while avoiding a chill on free speech and academic freedom. The Department agrees with commenters noting that the Department has a responsibility to enforce Title IX while not interfering with principles of free speech and academic freedom. Specifically because expressive speech, and not just physical conduct, may be restricted or punished as harassment, it is important to define actionable sexual harassment under Title IX in a manner consistent with respect for First Amendment rights, and principles of free speech and academic freedom, in education programs and activities.

The Department believes, however, that severity and pervasiveness are needed elements to ensure that Title IX’s nondiscrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient’s community.

New Regulations and Free Speech/Academic Freedom

The Supreme Court has not squarely addressed the intersection between First Amendment protection of speech and academic freedom, and non-sex discrimination Federal civil rights laws that include sexual harassment as a form of sex discrimination (i.e., Title VII and Title IX). With respect to sex discriminatory conduct in the form of admissions or hiring and firing decisions, for example, prohibiting such conduct does not implicate constitutional concerns even when the conduct is accompanied by speech, and similarly, when sex discrimination occurs in the form of non-verbal sexually harassing conduct, or speech used to harass in a quid pro quo manner, stalk, or threaten violence against a victim, no First Amendment problem exists. However, with respect to speech and expression, tension exists between First Amendment protections and the government’s interest in ensuring workplace and educational environments free from sex discrimination when the speech is unwelcome on the basis of sex.

More on the First Amendment

What is “sex” for Title IX purposes?

The modern concept of “sex” has evolved and represents a cultural shift. In past generations, “sex” usually meant the male/female assignment at birth based on biological or anatomical factors. “Sex” for Title IX purposes includes:

- Gender based on biological or anatomical factors
- Actual or perceived gender identity

Sometimes individuals do not conform to stereotypical notions of masculinity or femininity.

Helpful Resource

UC Davis, LGBTQIA Resource Center Glossary, https://lgbtqia.ucdavis.edu/educated/glossary

Title IX: Does “sex” include actual or perceived sexual orientation?

2001 Guidance pg. 3:

“Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim’s ability to participate in or benefit from the school’s program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student’s sexual orientation (e.g., “gay students are not welcome at this table in the cafeteria”), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.

2001 guidance position is complicated by OCR statements and the new Title IX regulations and recent litigation.

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“Due Process”

**2018 OCR Statement**

“All students can experience sex-based harassment, including male and female students, LGBT students, students with disabilities, and students of different races, national origins, and ages. Title IX protects all students from sex-based harassment, regardless of the sex of the parties, including when they are members of the same sex.”

“Title IX also prohibits gender-based harassment, which is unwelcome conduct based on a student’s sex, harassing conduct based on a student’s failure to conform to sex stereotypes.”

**Is “sex” defined in the new regulations?**

The word “sex” is undefined in the Title IX statute. The Department did not propose a definition of “sex” in the NPRM and declines to do so in these final regulations. The focus of these regulations remains prohibited conduct.

**SCOTUS/Bostock and Implications for Title IX**

*Bostock v. Clayton County* (June 15, 2020)

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

Holding: Homosexual and transgender employees are protected from workplace discrimination under Title VII of the Civil Rights Act of 1964, as such conduct would be discrimination based on “sex.”

What will be the implications for Title IX?

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

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

**Due Process**

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

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

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

M. at 30052 (emphasis added).

“Deliberate Indifference”

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

M. at 30056 (internal citation omitted).

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

M. at 30056 (internal citation omitted).
III. Organization and Management: Tuning Your Systems to the New Mandates

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.

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.
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?

"Actual Knowledge," Notice, "Mandatory Reporters"

- 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?

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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How much time do you have to notify folks of the change?

Anonymous report (by the complainant or by a third party)

Should IHE’s designate a large cadre of “mandatory reporters” even if they are—(i.e., the person Conflicts in research?

Report from the complainant

Does it make sense to stay the course—All Faculty—85 Fed. Reg. 30026 (May 19, 2020) (final rule)

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”).

Mandatory Reporters

* Should IHE’s designate a large cadre of “mandatory reporters” even if they are permitted to?
* Provisions?
* How much time to you have to notify folks of the change?
* Does it make sense to stay the course—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 in Associate Vice Presidents, Deans, and Provosts
* Any employee in a supervisory or management role
* AF, Faculty
* University of Louisville Police Officers and any contracted security personnel

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IV. Title IX Grievance, Discipline and Informal Resolution

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).

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.

Operationalizing the new Title IX regulations requires making certain choices.

“Tuning” is important.

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.

[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.

“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 30092 (bullets added).
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

Policy Basics:
Definitions

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.”

“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; or
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

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 proquo);
- Unwelcome conduct determined to be 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.

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

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.
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.

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.

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.

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 unconscious or giving Consent because of intoxication or physical or mental incapacity, or engaging in any sexual activity with a person having the legal capacity to give effective Consent, but without the intent to have such activity
• Sodomy is oral sex with another person without the Consent of the victim, including instances where the victim is incapable of giving Consent because of intoxication or physical incapacity
• Sexual Assault with an Object is using an object or instrument to violently penetrate, however slightly, the genital or anal opening of a person, where the Consent of the victim, including instances where the victim is incapable of giving Consent because of intoxication or physical incapacity
• Statutory Rape is sexual intercourse with a person who is under the statutory age of Consent as defined by the law of the jurisdiction

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.

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.

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.
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.

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.

... 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.

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

... [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 tether[s] 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...
Against a person within the United States, and within the University’s education programs or activities.
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.

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.

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

Id. at 30154 (emphasis added).

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

Impact of law in the Sixth Circuit?

Tuning with Other Policies and Campus Functions

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

Policy should reflect practice and policy should reflect policy.

Prompt Responses
The final regulations require recipients to respond promptly by:

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

Id. at 30419 (emphasis added).
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)(3)(v)

Equitable Responses

(1) The 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.

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.

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 . . .

Confidentiality

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 §106.71(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.

“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.

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.

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Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint. \textit{id. at 30045 (emphasis added).}

Complainant Autonomy

A complainant may only want supportive measures, may wish to go through an informal process, or may want to file a formal complaint. The Department revised § 106.44(a) to clarify that an equitable response for a complainant means offering supportive measures irrespective of whether the complainant also chooses to file a formal complaint. Additionally, a recipient may choose to offer an informal resolution process under § 106.45(b)(9) (except as to allegations that an employee sexually harassed a student). These final regulations thus respect a complainant’s autonomy in determining how the complainant would like to proceed after a recipient becomes aware (through the complainant’s own report, or any third party reporting the complainant’s alleged victimization) that a complainant has allegedly suffered from sexual harassment. \textit{id. at 30086.}

Formal Complaints and the Complainant’s Wishes

These final regulations obligate a recipient to initiate a grievance process when a complainant files, or a Title IX Coordinator signs, a formal complaint, so that the Title IX Coordinator takes into account the wishes of a complainant and only initiates a grievance process against the complainant’s wishes if doing so is not clearly unreasonable in light of the known circumstances. \textit{id. at 30045 (emphasis added).}

[A] complainant’s desire not to be involved in a grievance process, or to keep the complainant’s identity undisclosed to the respondent will be overridden only by a trained individual (i.e., the Title IX Coordinator) and only when specific circumstances justify that action. These final regulations clarify that the recipient’s decision not to investigate when the complainant does not wish to file a formal complaint will be evaluated by the Department under the deliberate indifference standard, that is, whether that decision was clearly unreasonable in light of the known circumstances. \textit{id. at 30055 (emphasis added).}

Moving Forward Against the Wishes of a Complainant

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

§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.

A Closer Look at Formal Complaints and Dismissals/Consolidation

§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.

“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).
§ 106.45(b)(3)(i)

(i) Dismissal of a formal complaint—

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

§ 106.45(b)(3)(ii)

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

§ 106.45(b)(3)(iii)

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

Challenging the Dismissal of Complaint

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

§ 106.45(b)(4)

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

Thoughts on Formal Complaints

• Signed?
• Digital?
• Verified?
• Notary?
• Attestation or oath?
• Privileges?
• Who can dismiss?
• How to handle false reports?
• Provision for false reports/providing false information in code/policy?
§ 106.45(b)(10)(i)(D)

... The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process. (emphasis added)

§ 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. (emphasis added)

Supportive Services

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.

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

Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. (emphasis added)

§106.44(a) Cont’d

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

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

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

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

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

The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a perpetrator of sexual harassment or the experience of a person accused of sexual harassment. Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties. Further, supportive measures may be offered to complainants and respondents (see § 106.30 defining “supportive measures”), and §106.45(b)(iv) requires recipients to provide both parties the same opportunity to select an advisor of the party’s choice. These provisions recognize that the stress of participating in a grievance process affects both complainants and respondents and may necessitate support and assistance for both parties. Id. at 30064 (emphasis added). Under § 106.30, a supportive measure must not be punitive or disciplinary, but may burden a respondent as long as the burden is not unreasonable. Id. at 30231.

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

Thoughts on Supportive Measures

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

Supportive Measures and Respondents

The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a perpetrator of sexual harassment or the experience of a person accused of sexual harassment. Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties. Further, supportive measures may be offered to complainants and respondents (see § 106.30 defining “supportive measures”), and §106.45(b)(iv) requires recipients to provide both parties the same opportunity to select an advisor of the party’s choice. These provisions recognize that the stress of participating in a grievance process affects both complainants and respondents and may necessitate support and assistance for both parties. Id. at 30064 (emphasis added). Under § 106.30, a supportive measure must not be punitive or disciplinary, but may burden a respondent as long as the burden is not unreasonable. Id. at 30231.

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

One-Way No-Contact Orders

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

Title IX Coordinator

- Must offer and implement supportive measures.
- Implementation may require coordination with others on campus.

A Closer Look at Investigations

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Requirements for Investigators

- No conflict of interest or bias; undue institutional interference.
- No sexual stereotypes
- Detail-oriented
- Ability to write a quality investigative report
- Documentation is everything
- Organized
- Analytical skills
- Time to devote to investigation
- Listening skills
- Understand basics of Title IX evidence rules
- Comfortable with subject matter
- Able to apply policies and think critically
- Comfortable with conflict
- Ability to build rapport
- Collaborative
- Ability to remain objective and neutral

"Adversarial in Nature"

In the context of sexual harassment, the process is often inescapably adversarial in nature where contested allegations of serious misconduct carry high stakes for all participants.

The Investigation Process Itself

- Planning
- Interviewing and Gathering Evidence
- Report Writing
- Tie to the hearing process

The Minimum and Maximum Role of the Title IX Investigator

- Campuses are no longer permitted to have a "single" or "pure" investigator model under Title IX.
- A separate decision-maker (or panel of decision-makers) must make a final determination of responsibility.
- This will be a shift in the function of the investigator on some campuses.
- What, then, is the scope of the investigative report?
- Purpose? Tone? Format?
- Should policy outline what the function of the investigator is, specifically?
- Will the investigator become a witness in the hearing or play other roles?

The Minimum and Maximum Role of the Investigator Cont’d

- Gather all relevant information regarding an allegation of sexual harassment.
- Interview all relevant parties
- Collect and organize relevant evidence
- Credibility Assessments?
- Weighing Evidence?
- Write a detailed investigative report
- Make recommendations for supportive measures or accommodations?
- Drawing conclusions/findings of responsibility?????

The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.

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

Id. at 30314 (emphasis added).

Written Notification to Parties BEFORE Any Initial Interview with the Respondent

- Notice of the school’s grievance process
- The opportunity, if any, to engage in an informal resolution process
- Key details of the alleged sexual harassment
  - Who was involved in the incident
  - Date and time of the incident, if known
  - Location, if known
  - The alleged misconduct that constitutes sexual harassment
- A statement that the respondent is presumed not responsible at the outset of the process and can only be found responsible after the grievance concludes
- A statement that the parties are entitled to an advisor of their choice
- A statement that the parties can request to inspect and review certain evidence
- Any conduct rules, if they exist, that prohibit providing knowingly false information or statements during the grievance process

Notice should be provided to allow the respondent enough time to prepare before the initial interview.

Remember the Presumption of Non-Responsibility

A recipient’s grievance process must—
Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

§ 106.45(b)(10)(i)(D) (emphasis added).

§ 106.45(b)(5)(vi)

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and incriminating or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

§ 106.45(b)(5)(vi) Cont’d

Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination and

§ 106.45(b)(5)(vii)

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

The 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)(vi) (requiring creation of an investigative report that “fairly summarizes all relevant evidence”).

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

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.

Evidence and Relevance

Paring Down the “Universe” to “Relevant”

“Directly related” may sometimes encompass a broader universe of evidence than evidence that is “relevant.”

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). . . .

Overview

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

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

Exculpatory Evidence
Evidence tending to establish a defendant's innocence.

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

Contrast this with "clear and convincing" and "beyond a reasonable doubt."

Relevance
The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.

Definition of "Relevant"
Having significant and demonstrable bearing on the matter at hand. Affording evidence tending to prove or disprove the matter at issue or under discussion.
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).

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 30125 (emphasis added).

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 30356 n. 1308 (emphasis added).

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.

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).
Credibility vs. Reliability

In cases where medical or mental health records exist and panel members need to assess demeanor, eg, are they defensive, evasive, etc. Effective representation?

Should not be viewed as practicing law, but rather “as providing advocacy services to a party.”

While the final regulations do not require the recipient to pay for parties’ advisors, §106.45(b)(5)(iv) that provisions 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. §30297.

Advisors and Hearings

(1) The 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. §30298 n. 1169.

(c) The 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. §30298 n. 1169.

How might this be different in Kentucky?

Five factors to consider:

1. Credibility vs. Reliability

2. Assess demeanor: Does the person appear credible? Look at body language, eye contact, level of nervousness, defensiveness, evasiveness, etc.

3. Is the person’s account inherently believable? Plausible? What is his or her potential bias?

4. Does the person have a motive to be untruthful?

5. 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.

Credibility Determinations Cont’d

Advisors “Cont’d”

How can/should advisors participate in the process?

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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?

§ 106.45(b)(6)(i)

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.

§ 106.45(b)(6)(i) Cont’d

• 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?

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.

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. 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.
must preclude the decision 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.”

One question that a postsecondary institution may have is whether a recipient's decision-maker(s) cannot draw an inference against reliance on party and witness statements made by a person who does not testify in court and refuses to answer cross-examination questions or provide other evidence about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examinations or other questions.

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.

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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?

Standard of Evidence to Determine Responsibility

§ 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.

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.

Sanctions and Remedies

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.

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)(1) 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 (emphasis added).

Id. at 30096 n.456 (emphasis added).

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, 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.

§ 106.45(b)(1)(i)

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

(ii) 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)

Appeals

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

§ 106.45(b)(8)(i)

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

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

§ 106.45(b)(8)(ii)

Univ. of Louisville Appeal Standards
• whether there was a procedural irregularity that affected the outcome of the hearing;
• whether there was sufficient information presented at the hearing to establish, by a preponderance of the information, that a violation of the prohibited conduct section occurred;
• whether the sanction(s) imposed was appropriate;
• whether there was new information that was not known to the person requesting the review at the time of the hearing and that, if presented at the hearing, would more likely than not have altered the hearing decision;
• whether the Title IX Coordinator, investigator(s), or Hearing Board had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.

(iii) As to all appeals, the recipient must:
(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(9)(iii) of this section;
(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
(E) Issue a written decision describing the result of the appeal and the rationale for the result; and
(F) Provide the written decision simultaneously to both parties.

§ 106.45(b)(8)(iii)(A-F)

Points on Appeals
* What choices do we need to make?
* Procedures?
* Who can hear appeals?
Informal Resolution

The new regulations don't require it, but informal resolution is allowed.

- A formal complaint must be filed before any informal resolution process can begin.
- Both parties must voluntarily agree to informal resolution (written consent required).
- Parties do not have to be in the same room...often, they are not.
- Equitable implementation by trained personnel
- Who should implement?
  - Mediation? Arbitration? Restorative justice?
  - When can’t we use informal resolution?
  - When a party is coerced or subjected to undue influence.
- Does this option provide for more opportunities for "educational" interventions?

Points on Informal Resolution

Univ. of Louisville “Informal Process”

The primary objective of the informal resolution process is to resolve the conflict between the Parties and prevent any future Sexual Misconduct from occurring. The informal resolution process is generally not an appropriate option for cases involving a complaint of Sexual Assault or Domestic Violence or other forms of Sexual Misconduct. The Deputy Title IX Coordinator or designee will have discretion to determine whether or not informal resolution is appropriate to the circumstances.

Informal resolutions are voluntary and generally pursued when both Parties, having been fully informed of all available options, have both voluntarily and in writing explicitly requested an informal resolution. The University, in its sole discretion, will take the Parties’ request to utilize the informal resolution process under advisement and make the final determination as to the use of the informal resolution process.

Informal resolutions are generally not appropriate when the underlying complaint involves a specific form of Sexual Misconduct, including Sexual Assault or Domestic Violence. In these cases, the University’s Investigative Process is generally the appropriate forum for addressing the underlying complaint. The Deputy Title IX Coordinator or designee will serve as the facilitator of the informal resolution process. If at any time the Deputy Title IX Coordinator or designee finds the informal resolution process is not beneficial or advancing resolution, the case can be referred back to the Investigative Process. Similarly, either Party can ask to end the process at any time before its completion and proceed to the Investigative Process. If an informal resolution process is ended without resolution, any information obtained or statements made during the informal resolution process may be used in a subsequent formal resolution process and hearing, but may not be used to prove responsibility. Once a complaint has been resolved through an informal resolution process, the matter will be closed.

Ending an Informal Process

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

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

§ 106.71(a) Cont’d

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

§ 106.71(b)(1)

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

§ 106.71(b)(2)

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

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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V. Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

Bias/Prejudice/Stereotypes/Prejudgment/Conflicts of Interest

Some complainants, including or especially girls of color, face school-level responses to their reports of sexual harassment infected by bias, prejudice, or stereotypes.

§ 106.45(b)(1)(iii) [prohibits] Title IX Coordinators, investigators, and decision-makers, and persons who facilitate informal resolution processes from having conflicts of interest or bias against complainants or respondents generally, or against an individual complainant or respondent, [and requires] training that also includes “how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.”


Bias/Conflicts of Interest

Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators, decision-makers, and individuals who facilitate any informal resolution process to be free of bias or conflicts of interest for or against complainants or respondents and to be trained on how to serve impartially.

Id. at 30103 (emphasis added).

“Bias” in Ikpeazu v. University of Nebraska

With respect to the claim of bias, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven.

... . The allegations Ikpeazu makes in support of his bias claim are generally insufficient to show the kind of actual bias from which we could conclude that the committee members acted unlawfully.

Ikpeazu v. University of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985) (internal citations omitted).

“Bias”

- Personal animosity
- Illegal prejudice
- Personal or financial stake in the outcome
- Bias can relate to:
  - Sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability or other characteristic

Does DOE require “Implicit Bias” training?

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

Id. at 30184 (emphasis added).
Conflict of Interest
A conflict between the private interests and the official responsibilities of a person in a position of trust.

Impartial
Not partial or biased: treating or affecting all equally

Prejudgment
A judgment reached before the evidence is available

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

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

“Sex Stereotypes”
- What is a sex stereotype? What does DOE mean by this term?
- What are some examples of sex stereotypes?
- An example of a scholarly paper on stereotypes:
- Sex stereotypes are to be avoided in training and in actual practice.
- Be especially careful when doing case studies of any kind.
- Anyone can be a complainant or respondent, and all are individuals!
All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

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

Whose side are you on as a Title IX operative?

You have no “side” other than the integrity of the process.

Final thoughts...

THANK YOU!