

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

Know when to consult legal counsel.

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This Four Comers of Title IX training program focuses on the 2020 Title IX regulations, which are currently in effect.

Proposed new Title IX regulations were released in June 2022 and are currently in the final stages of promulgation.

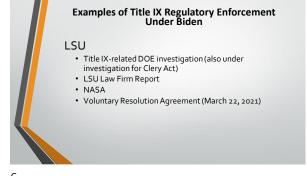
There is indication that the final regulations may be published in May 2023. The date of implementation for campuses is not yet known.

We will examine some of the language in the proposed new regulations at the end of this training. Remember that the proposed language will change, (potentially in major or minor ways), in the final version.

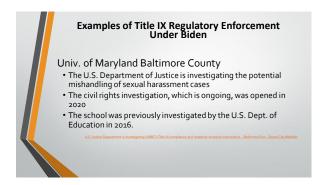


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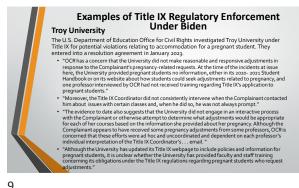






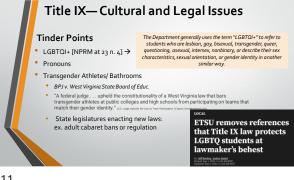


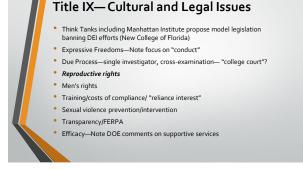
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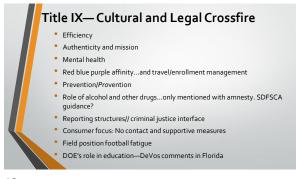


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Title IX: Some Observations on Related Litigation and Legal Issues

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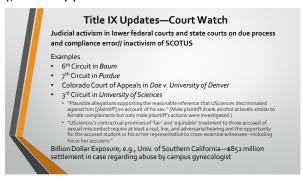




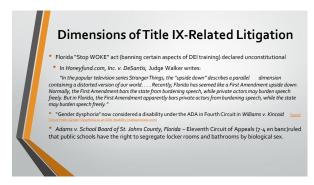
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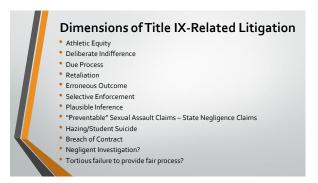
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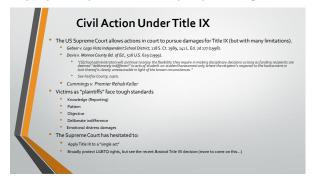
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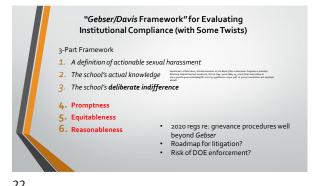




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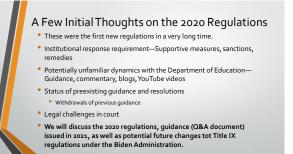
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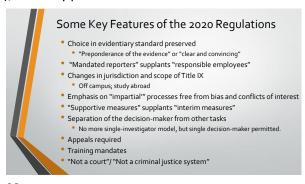
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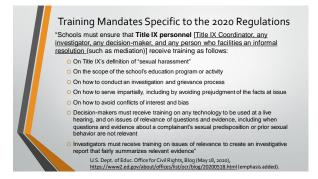
Title IX: FINAL RULE

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

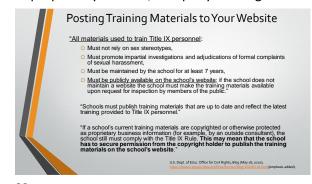
The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims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

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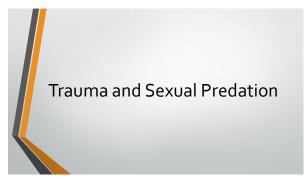


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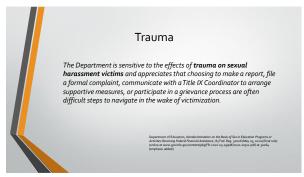
The Controversial Science of Sexual Predation • Lisak D, Miller PM. Repeat rape and multiple offending among undetected rapists. Violence Vict. 2002;17(1):73-84. doi:10.1891/vivi.17.1.73.33638 • Swartout KM, Koss MP, White JW, Thompson MP, Abbey A, Bellis AL. Trajectory Analysis of the Campus Serial Rapist Assumption. JAMA Pediatr. 2015;169(12):1148-1154. doi:10.1001/jamapediatrics.2015.0707 • Johnson & Taylor, The Campus Rape Frenzy: The Attack on Due Process at America's Universities (Encounter Books, 2017). • Foubert, J.D., Clark-Taylor, A., & Wall, A. (2019). "Is campus rape primarily a serial or single time problem? Evidence from a multi-campus

study." Violence Against Women. DOI: 10.1177/1077801219833820.

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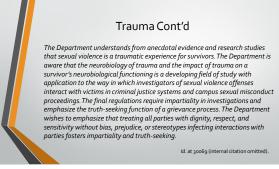
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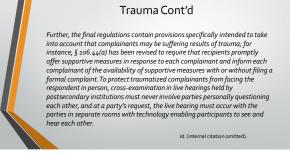
Avoid or Use? • Some schools and training entities have moved away from using trauma-informed techniques for fear of appearing victim-leaning. • Trauma can impact anyone in a grievance process or seeking supportive measures: Use research without stereotypes or gender bias. • Credibility v. Reliability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



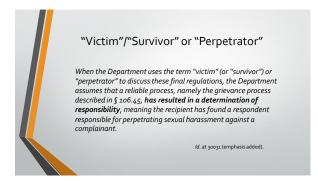
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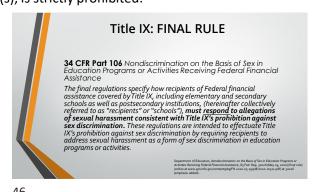
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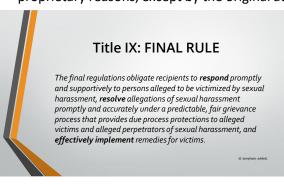


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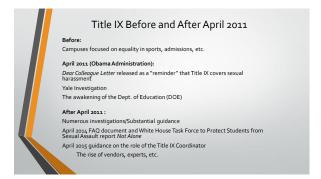
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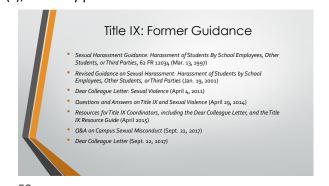
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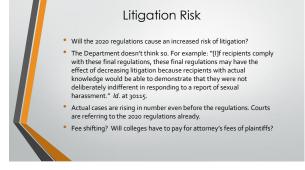
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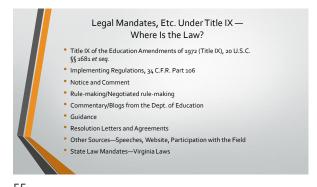


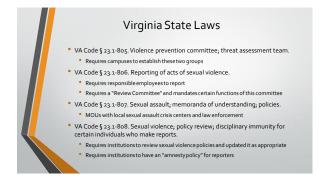


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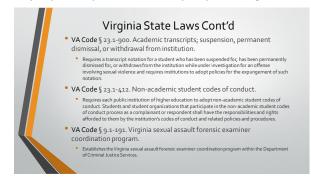








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SB 373 Virginia sexual assault forensic examiner coordination program; established, report.

Virginia sexual assault forensic examiner coordination program. The bill provides that the coordinate of the program shall create and coordinate an annual statewide sexual assault forensic nurse examiner training program, coordinate the coordinate the coordinate of the program shall create and coordinate the coordinate and the coordinate and sexual sasult coordinate and sexual sasult coordinate and strengthen communications among sexual assault nurse examiner medical directors, sexual assault response teams, and hospitals for evisiting and developing sexual assault nurse examiner programs; provide technical assistance for existing and developing sexual assault forensic examiner programs; create and maintain a statewide list, updated biannually, that includes perinent information regarding sexual assault forensic examiners and nurse examiners create sexual essault rurse examiner recruitment materials for universities and colleges with nursing programs; and appropriate, relating to sexual assault nurse examiner issues for the Commonwealth.

https://lis.virginia.gov/cgi-bin/legp6o4.exe?ses=201&typ=bil&val=58:73&submit=60

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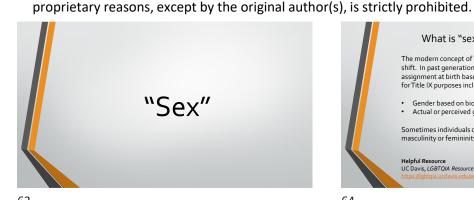


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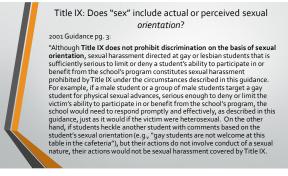


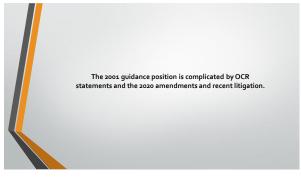
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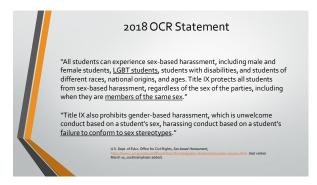


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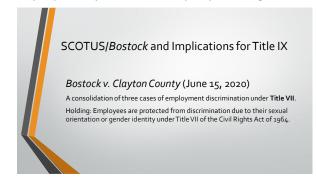


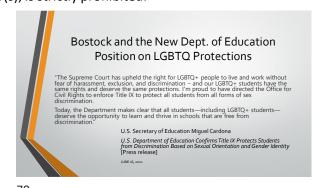
Is "sex" defined in the 2020 regulations?

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.

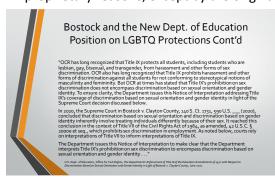
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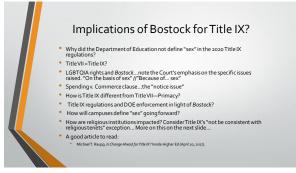


SCOTUS decision in Our Lady of Guadalupe School v. Morrissey-Berru (July 8, 2020)

"Ministerial exception": application to Title VII and Title IX.
Employees vs. Students
"When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."

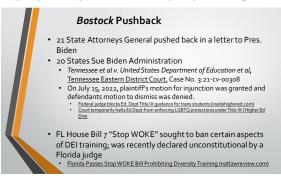
Nonsectarian "tenets" or "teachers"? Viewpoint discrimination?
What may be next for students?

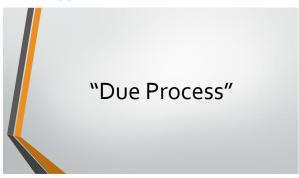
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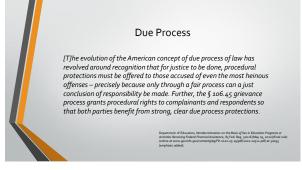
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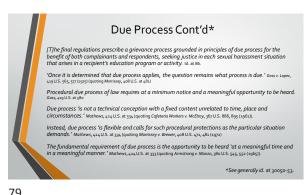


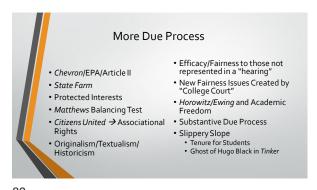
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Due Process
"Due Process" - a complex and multidimensional concept
More than dialectic between "complainants" and "respondents"
The college as bystander or neutral
Is this the way to create college court?
What about resource imbalances between institutions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

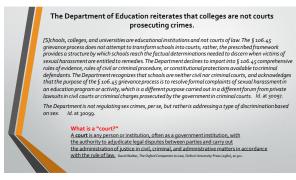


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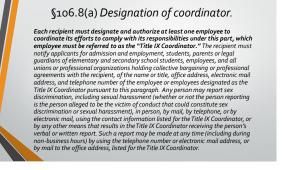
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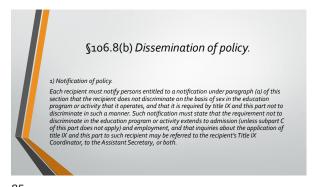


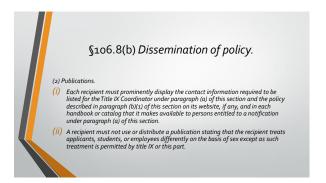
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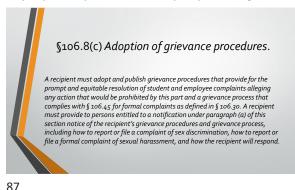


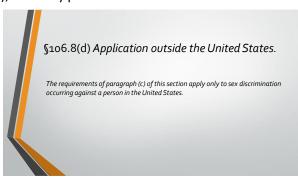
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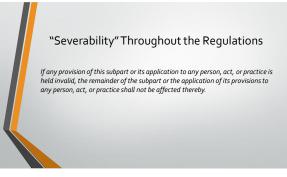


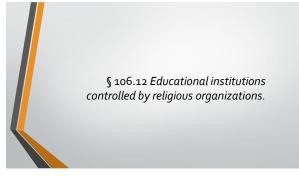
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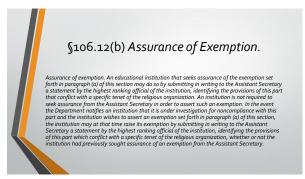


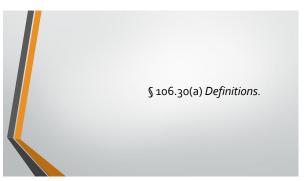
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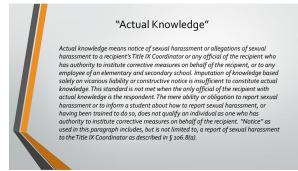


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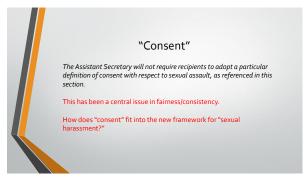
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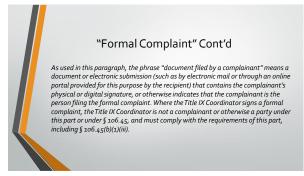


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"Sexual Harassment" [Three-Prong Test]

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

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity, or

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(3). "domestic violence" as defined in 34 U.S.C. 12291(a)(3).

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\$106.44(a) General response to sexual harassment.

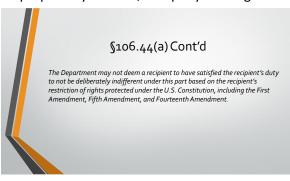
A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, \$\infty\$ 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.

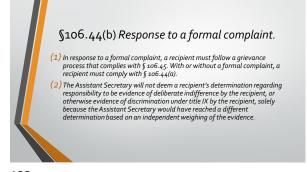
\$106.44(a) Cont'd

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

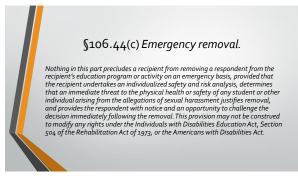
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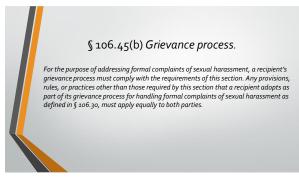


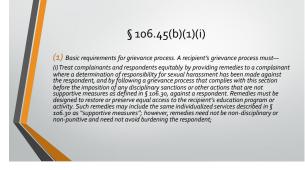
§ 106.45(a) Discrimination on the basis of sex.

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

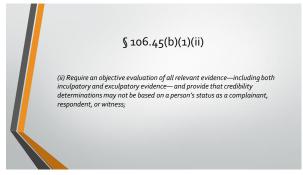
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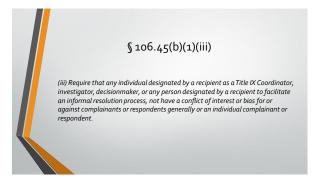
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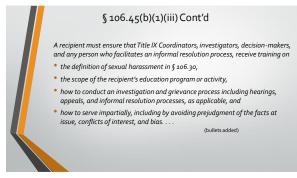


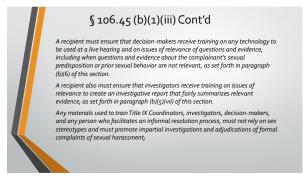
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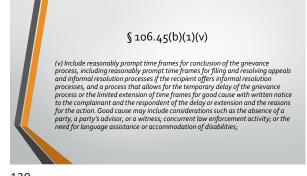
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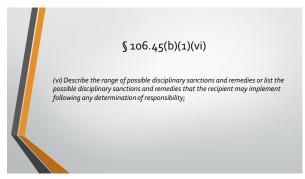


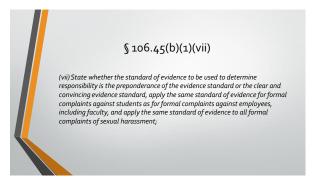
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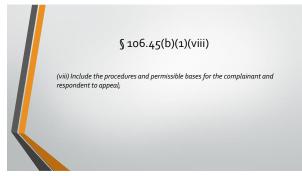


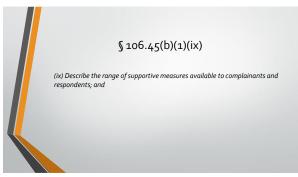
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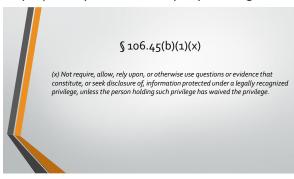
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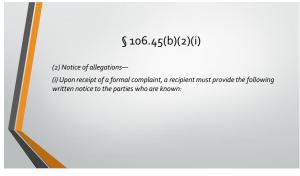




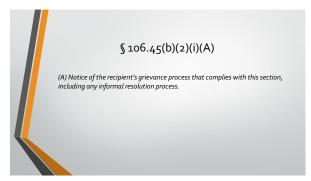
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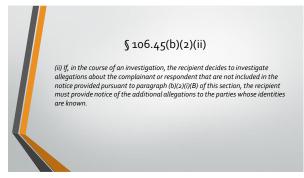
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§ 106.45(b)(2)(i)(B) (B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. 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.

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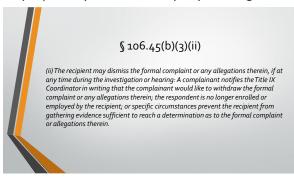
§ 106.45(b)(3)(i)

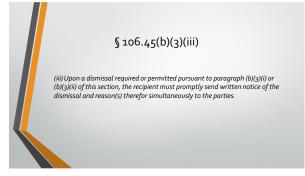
(3) Dismissal of a formal complaint—

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

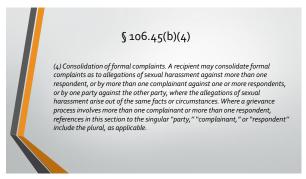
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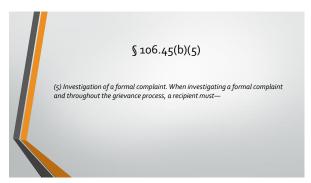
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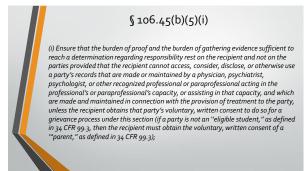


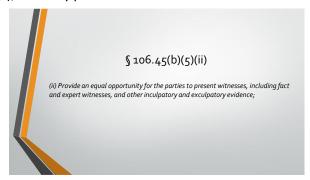
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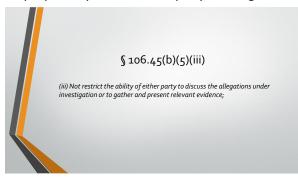
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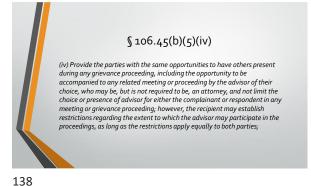




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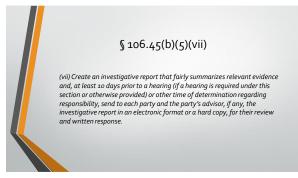


§ 106.45(b)(5)(vi)

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for Purposes of cross-examination; and

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§ 106.45(b)(6)(i)—partially vacated

(6) Hearing

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

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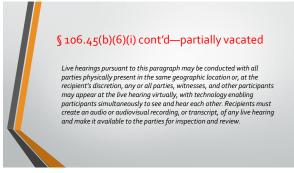
§ 106.45(b)(6)(i) cont'd—partially vacated

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—partially vacated

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

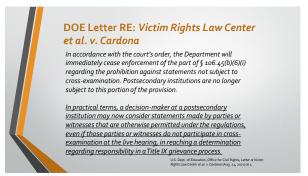
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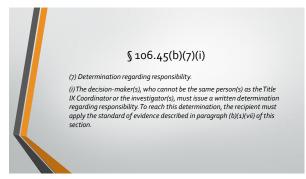
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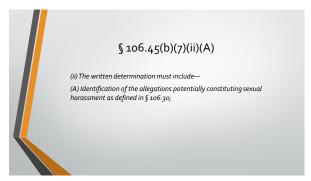
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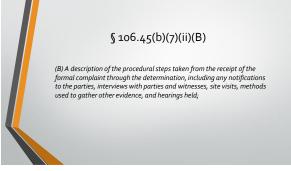


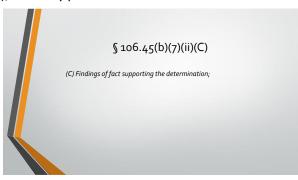
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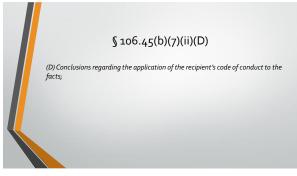
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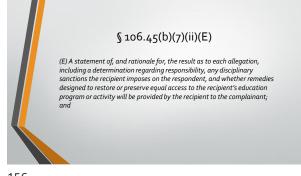




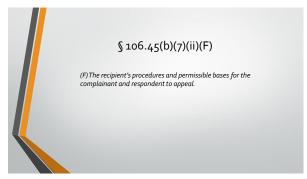
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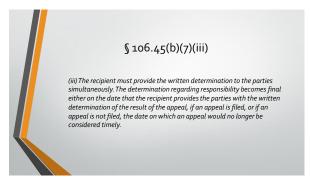
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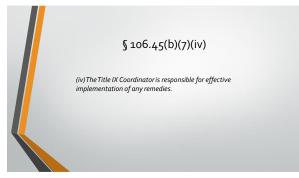


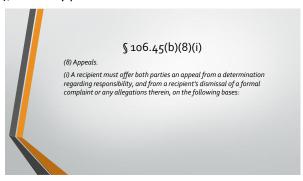
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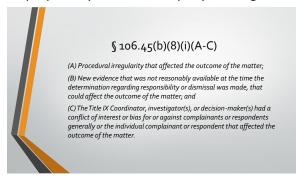
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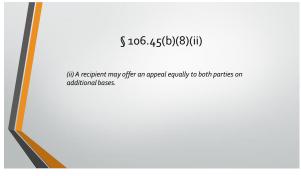




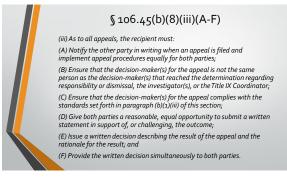
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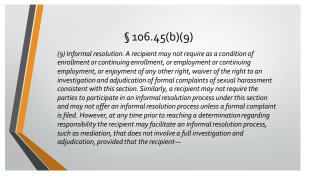
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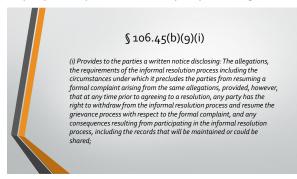


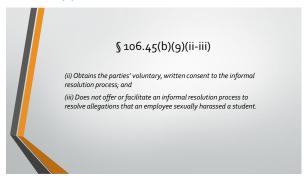
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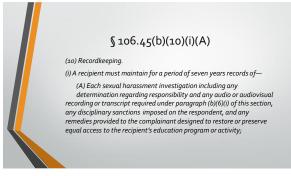
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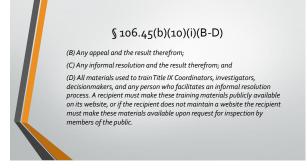




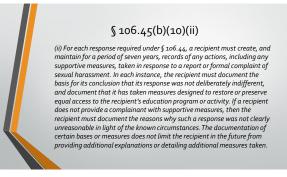
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\$ 106.71(a) (a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the 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.

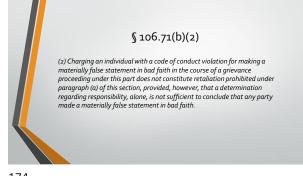
\$ 106.71(a) Cont'd

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. 12329, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under \$106.8(c).

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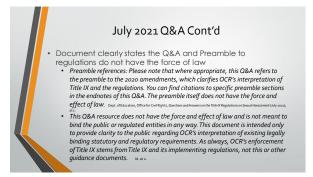
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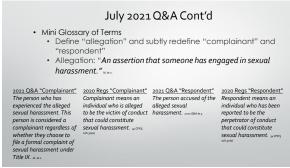


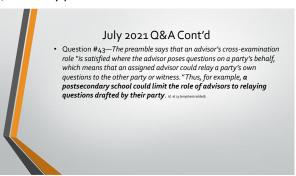
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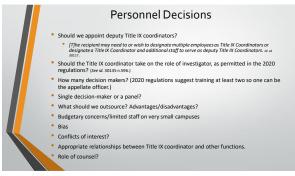
Outsourcing/Requiring Legally Trained Title IX Operatives

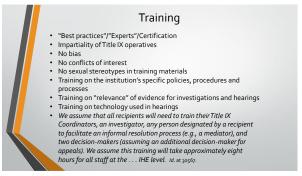
The Department notes that nothing in the final regulations precludes a recipient from carrying out its responsibilities under § 106.45 by outsourcing such responsibilities to professionally trained investigators and adjudicators outside the recipient's own operations. The Department declines to impose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

Id. at 30105.

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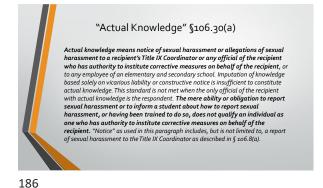


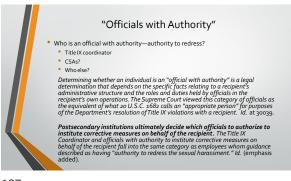


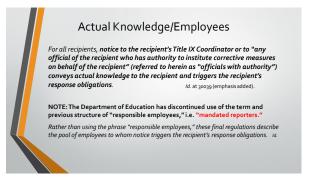
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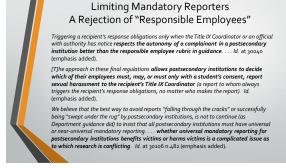








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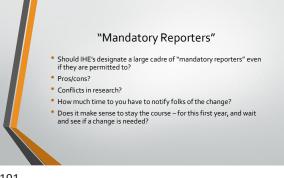


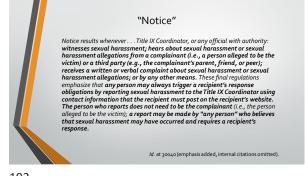
"Universal mandatory reporting"

[Nothing in the proposed or final regulations prevents recipients (including postsecondary institutions) from instituting their own policies to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment [i.e. a "universal mandatory reporting policy"]. Id. at 30007 (emphasis added).

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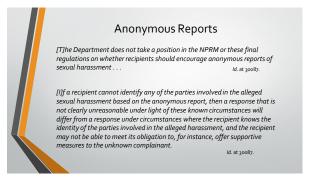
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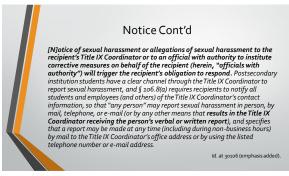


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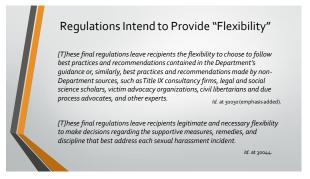
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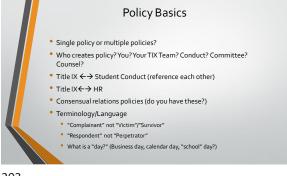
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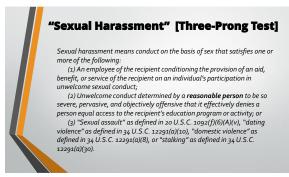


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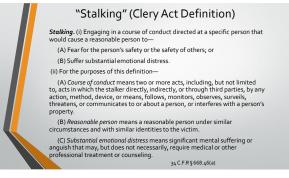


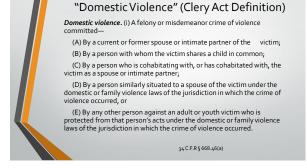
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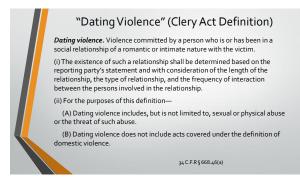


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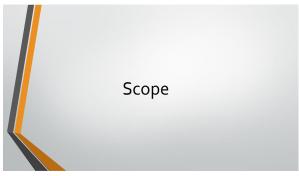
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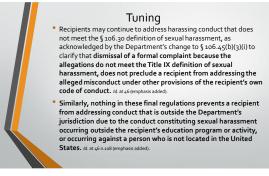
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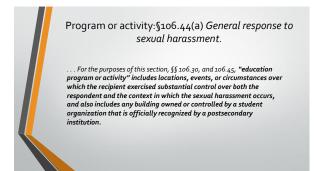
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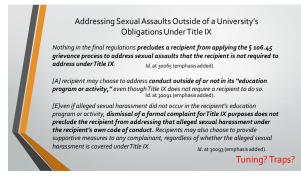


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"Non-sexual Harassment Sex Discrimination"

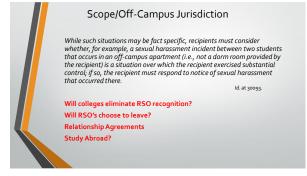
... § 106.45 applies to formal complaints alleging sexual harassment under Title UX, but not to complaints alleging sex discrimination that does not constitute sexual harassment "non-sexual harassment sex discrimination"). Complaints of non-sexual harassment sex discrimination may be filed with a recipient's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

Id. at 30095.

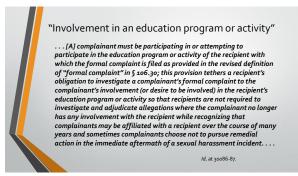
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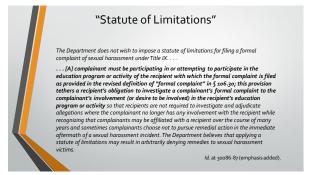
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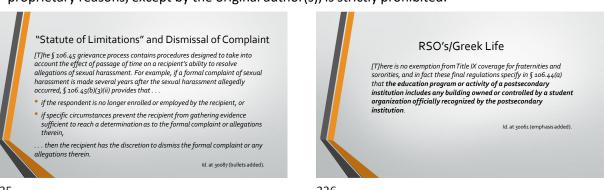


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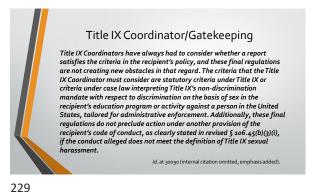
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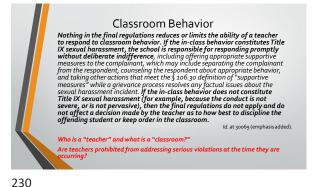


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Section 106.45(b)(1)(v) provides that the recipient's designated reasonably prompt time frame for completion of a grievance process is subject to temporary delay or limited extension for good cause, which may include concurrent law enforcement activity. Section 106.45(b)(6)(i) provides that the decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party's failure to appear or answer cross-examination questions at a hearing; this provision applies to situations where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to avoid self-incrimination that could be used against the respondent in the criminal proceeding. Further, subject to the requirements in § 10.4, § such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, includory and exculpationy, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 10.6.45(b)(1)(ii) (specifying that the evidence directly related to the allegations may have been gathered by the recipient "from a party or other source" which could include evidence obtained by the recipient from law enforcement) (emphasis added); § 10.6.45(b)(1)(ii).

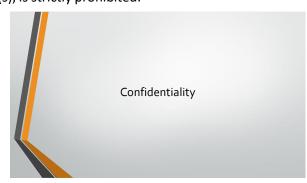
Law Enforcement Cannot Be Used to Skirt Title IX Process

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

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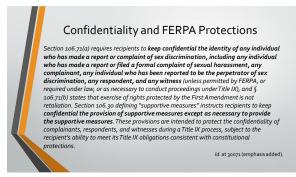
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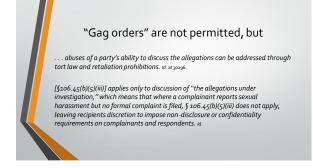




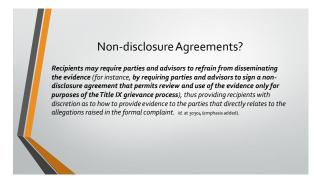
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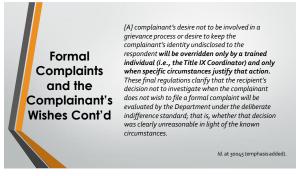
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A complainant may only want supportive measures, may wish to go through an informal process, or may want to file a formal complaint. The Department revised § 106.44(a) to clarify that an equitable response for a complainant means offering supportive 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)(g) (except as to allegations that an employee sexually harassed a student). These final regulations thus respect a complainant suonomy 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.



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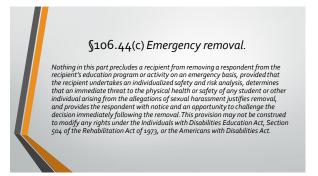
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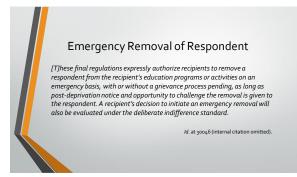


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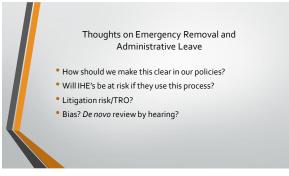
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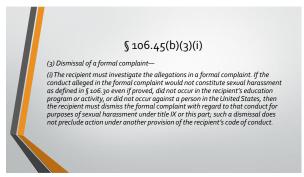




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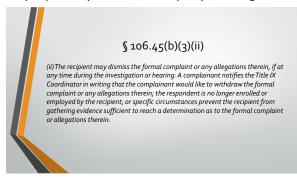
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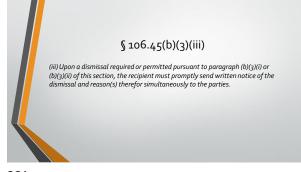




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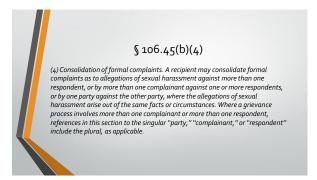
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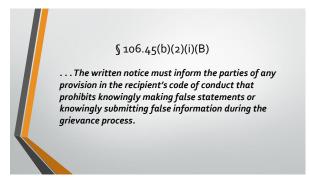
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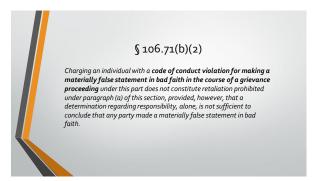
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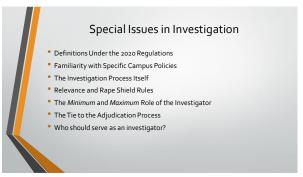
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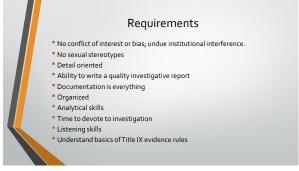
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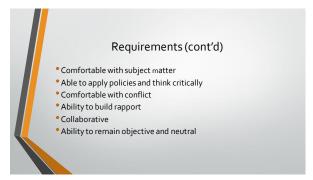
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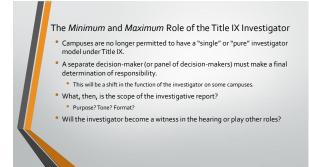
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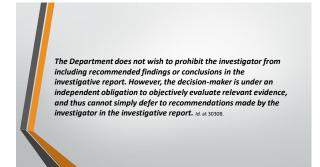


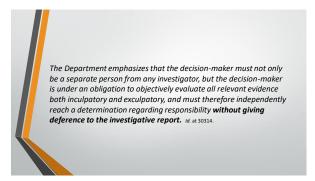
The Minimum and Maximum Role of the Investigator Cont'd

Gather all relevant information regarding an allegation of sexual harassment.

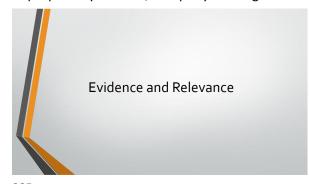
Interview all relevant parties
Collect and organize relevant evidence
Credibility Assessments?
Weighing Evidence?
Write a detailed investigative report
Make recommendations for supportive measures or accommodations?
Drawing conclusions/findings of responsibility?????

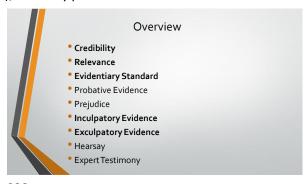
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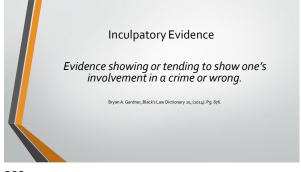




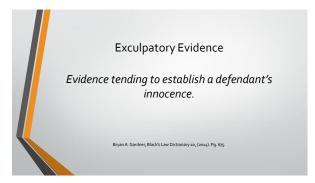
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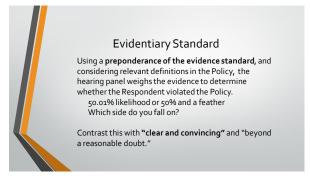
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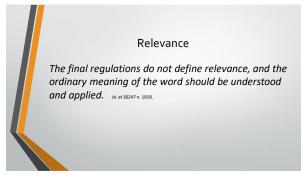


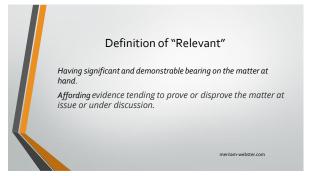
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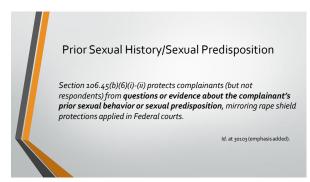
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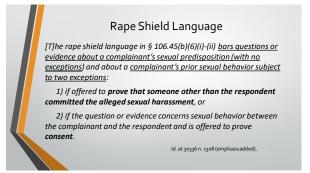
[R]elevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons discussed above, while the final regulations do not address "hearsay evidence" as such, §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

Id. at 30354-



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Consent and Rape Shield Language [A] recipient selecting its own definition of consent must apply such definition consistently both in terms of not varying a definition from one grievance process to the next and as between a complainant and respondent in the same grievance process. The scope of the questions or evidence permitted and excluded under the rape shield language in § 106.45(b)(6)(i)-(ii) will depend in part on the recipient's definition of consent, but, whatever that definition is, the recipient must apply it consistently and equally to both parties, thereby avoiding the ambiguity feared by the commenter. 164. 81 30125.

[T]he rape shield language in this provision: considers all questions and evidence of a complainant's sexual predisposition irrelevant, with no exceptions: questions and evidence about a complainant's prior sexual behavior are irrelevant unless they meet one of the two

exceptions;
and questions and evidence about a respondent's sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.

Rape Shield Language

Id. at 30352 (emphasis added).

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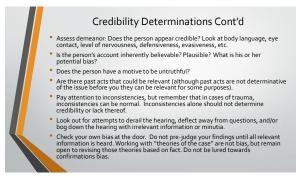
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Credibility Determinations

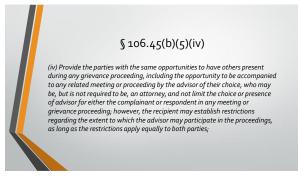
- Credibility vs. Reliability
- Often these cases are "word against word," so what exists to corroborate claims?
- Reports to law enforcement, medical assistance, contemporaneous reports
 or conversations, journal entries, witness accounts, etc. can be viewed as
 corroborating (if medical or mental health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

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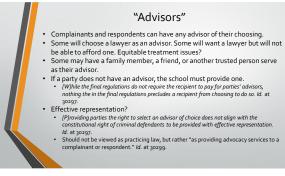


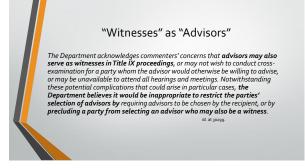
Must You Allow a Complainant to Bring a Support Person to the Initial Meeting with the Title IX Coordinator?

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

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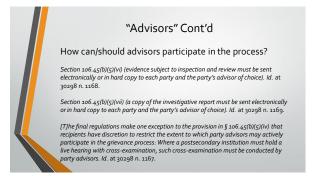
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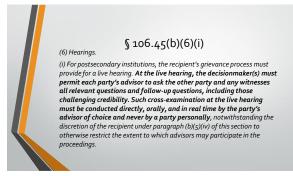
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"Witnesses" as "Advisors" Cont'd The Department notes that the § 106.45(b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias does not apply to party advisors (including advisors provided to a party by a postsecondary institution as required under § 106.45(b)(6)(ii), and thus, the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statement as a witness does not violate the final regulations. Rather, the perceived "conflict of interest" created under that situation would be taken into account by the decision—maker in weighing the credibility and persuasiveness of the advisor-witness's testimony. Id at 30199.



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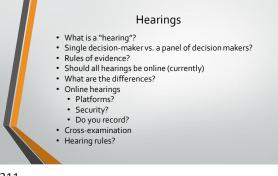


§ 106.45(b)(6)(i) Cont'd

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

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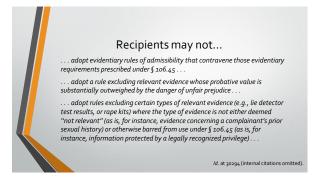
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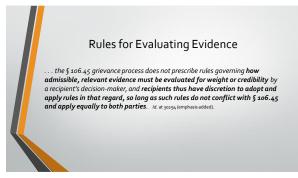


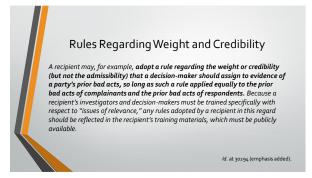
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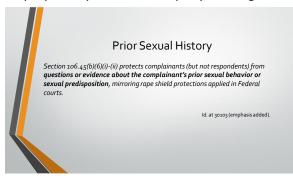
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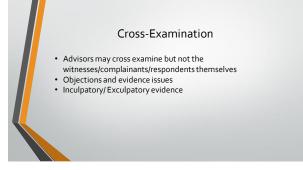




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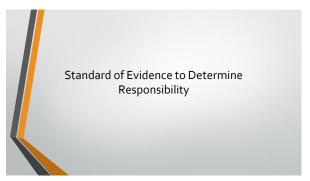
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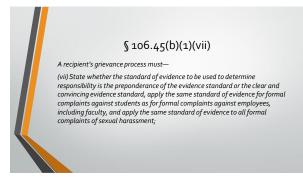


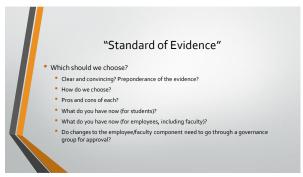
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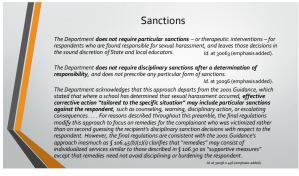




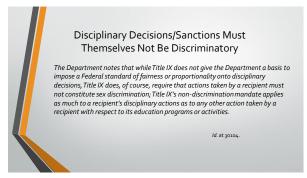
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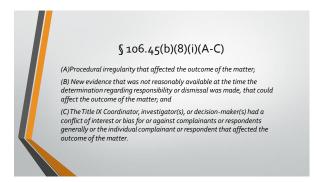
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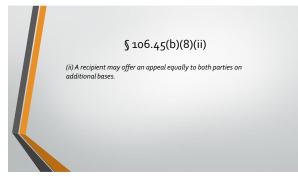
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\$ 106.45(b)(8)(iii)(A-F)

(iii) As to all appeals, the recipient must:

(A)Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(a)(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

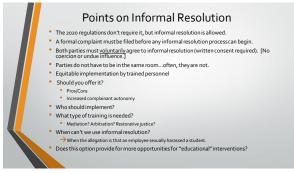
(F) Provide the written decision simultaneously to both parties.

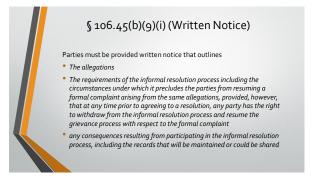
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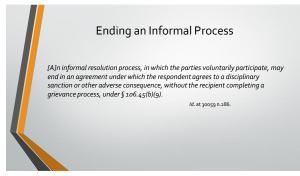


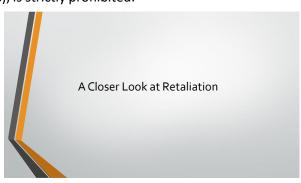
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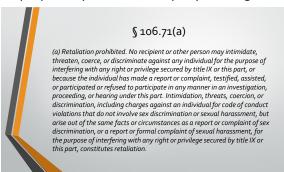
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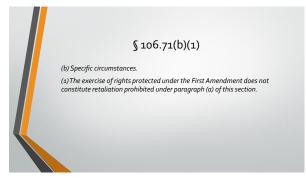
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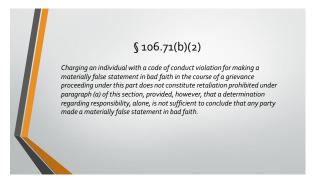
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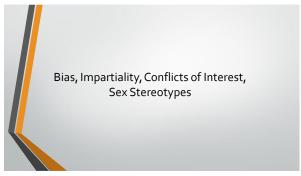
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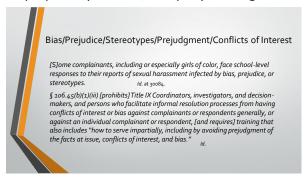
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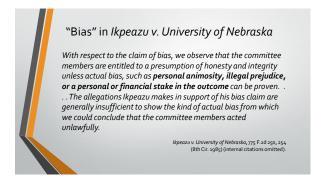
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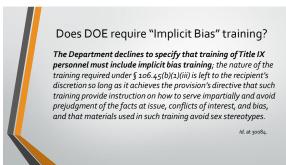
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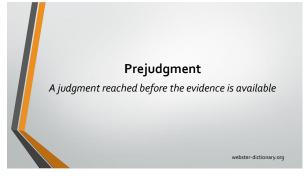




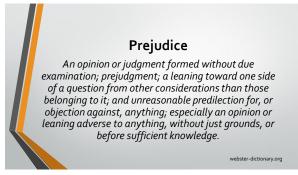
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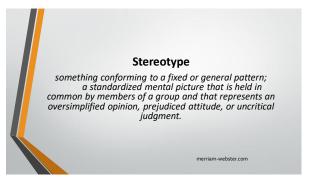
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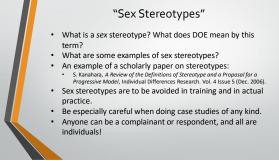


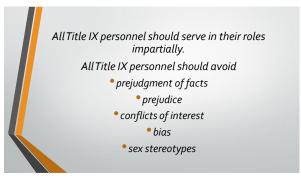
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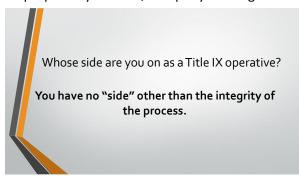
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§ 106.30(a) "Supportive Measures"

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

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\$106.44(a) Cont'd ...The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in \$106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint . . .

More on Supportive Measures... [A] recipient must offer supportive measures to a complainant, regardless of whether the complainant decides to file, or the Title IX Coordinator decides to sign, a formal complaint. Id. at 300.6 (emphasis added). [S] upportive measures must be offered not only in an "interim" period during an investigation, but regardless of whether an investigation is pending or ever occurs. Id. (emphasis added). Complainants must be offered supportive measures, and respondents may receive supportive measures, whether or not a formal complaint has been filed or a determination regarding responsibility has been made. Id. at 3006 (emphasis added). [A] recipient must offer supportive measures to any person alleged to be the victim, even if the complainant is not the person who made the report of sexual harassment. Id. at 30069-70 (emphasis added).

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Supportive Measures and Respondents

The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a perpetrator of sexual harassment or the experience of a person accused of sexual harassment. Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties. Further, supportive measures may be offered to complainants and respondents (see § 10.6 a defining "supportive measures"), and §106.45(b)(5)(iv) requires recipients to provide both parties the same apportunity 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.

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 pairly with respect to supportive measures provided to complainants and respondents. Mat 39377.

Thoughts on Supportive Measures

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

ld. at 30521.

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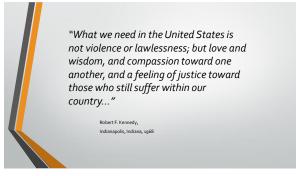
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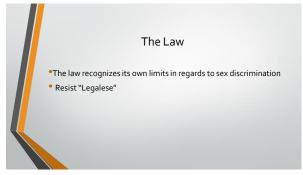
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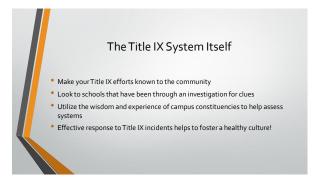
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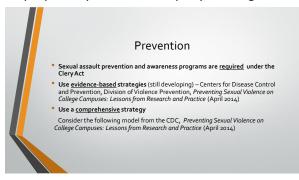
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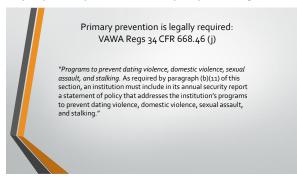


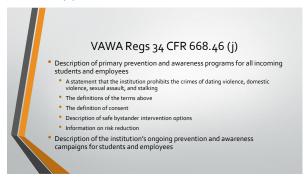
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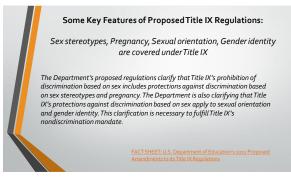
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June 10, 2021 Letter to Dept. of Education Quotes * ...the Regulations are antithetical to the fundamental educational nature and objectives of campus student disciplinary processes. * ...colleges and universities are not courts, nor should they be. They do not convict people of crimes, impose criminal sanctions, or award damages. * ... the Regulations force campuses to turn their disciplinary proceedings into legal tribunals with highly prescriptive, court-like processes. * The Regulations mandate that every campus must provide a "live hearing" with direct cross-examination by the party's advisor of choice or an advisor supplied by the institution. A "live hearing" with direct cross-examination is not necessary in order to provide a thorough and fair process for determining the facts of a matter and a means for the parties to test the credibility of the other party and other witnesses. * The Regulations inappropriately extend these court-like and prescriptive processes to sexual harassment allegations involving employees.

June 10, 2021 Letter to Dept. of Education Quotes Cont'd * The Regulations fail to recognize the myrind other federal, state and local laws, judicial precedent, institutional commitments and values regarding the handling of sexual harassment with which campuses must also comply. * The Regulations also provide insufficient flexibility to allow campuses to choose between using a "prepanderance of evidence" or "clear and convincing" evidentary standard. * We appreciate that the Regulations allow campuses to use informal resolution processes when both parties are fully informed of this option and voluntarily consent. * ... the Regulations require colleges and universites to adopt a new Title V. Specific definition of "seval harassment" that is inconsistent with Title VII's definition, and also with definitions contained in campus seval misconduct policies. The Regulations also raise questions about precisely what conduct will be considered to have occurred within a "program or activity." * The Regulations have driven up the costs and burden of compliance . . . * When considering revising the Regulations, we urge OCR to keep the "long game" in mind, and look for solutions that are broadly supported by stakeholders.

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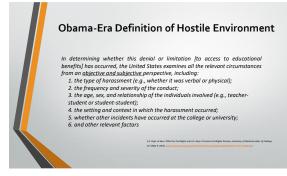
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Trump-Era Definition
"Sexual Harassment" [Three-Prong Test]

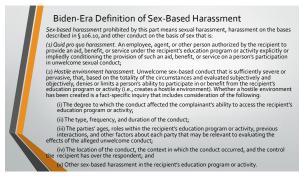
Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 1291(a)(3), "or "stalking" as defined in 34 U.S.C. 12291(a)(3)).

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A Note on "Unwelcome Conduct"

The Department proposes retaining the requirement that the conduct in categories one and two of the definition of "sex-based harassment" must be unwelcome. Although the Department does not propose revising this requirement, the Department understands it is important to provide recipients with additional clarity on how to analyze whether conduct is unwelcome under the proposed regulations. Conduct would be unwelcome of a person off and request or rimited it and regarded the conduct as understands or conduct was understanding to the conduct of the foliate to complain, resist, or object when the conduct was understanding to the conduct of the foliate to complain, resist, or object when the conduct was understanding to the conduct of the foliate to complain, resist, or object when the conduct was understanding to the conduct of the foliate to complain resist, or object when the conduct was understanding to the conduct of the conduct on a student may not object to a pattern of sexually harassing comments directed at the student by a group of fellow students out of concern that objections might cause the harassers to make more comments. On the other hand, if a student actively participates in sexual observations and gives no indication that they object, then that would generally support a conclusion that the conduct was not unwelcoment that the conduct was not unwelcoment of the conduct on one occasion does not prevent that same conduct from being unwelcome on a subsequent occasion. Specific issues related to welcomeness may also arise if the person who engages in harassments in a position of authority. For example, because a teacher has authority over the operation of their classroom, a student may decide not to object to a teacher's sexually harassing comments during dass, however, this does not meant that the conduct was welcome because, for example, the student may believe that any objections would be ineffective in stopping the harassment of the conduct on an activity of the conduc

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NOTABLE

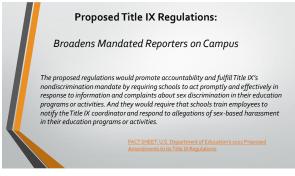
U.S. Department of Education's Office for Civil Rights Announces Resolution of Pregnancy Discrimination Investigation of Salt Lake Community College

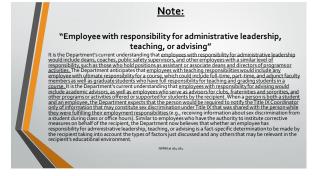
OCR determined that the college violated both Title IX of the Education Amendments of 1972 (Title IX) and Section 504 of the Rehabilitation Act of 1973 (Section 504) after investigating allegations that Salt Lake Community College encouraged a pregnant student to drop a course because she was pregnant, did not engage in an interactive process to provide her with academic adjustments or necessary services during her pregnancy, and ald not excuse her pregnancy-related absences or allow her later to submit work following those obsences.

OCR found that the college violated Title IX and its implementing regulations by failing: (1) to respond promptly and equitably to the student to determine the appropriate special services and/or academic adjustments to provide in light of her pregnancy, and (3) to excuse her absences related to pregnancy, provide her the opportunity to make up work missed due to these pregnancy-related absences, or provide he with alternatives to making up missed work at a later date.

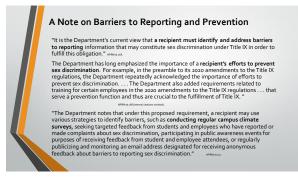
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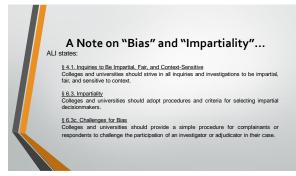


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- "One sense of impartiality is structural, the idea that the judge of a case should not be chosen for the case because of his or her likely views on the outcome."
- "Another aspect of impartiality is the avoidance of financial or other forms of self-interest in the adjudication: an impartial adjudicator is one who does not have a financial interest in the outcome."

- "A third sense of impartiality means that the person has not prejudged the facts and is not likely to have difficulty maintaining an open mind and deciding based on the evidence presented."

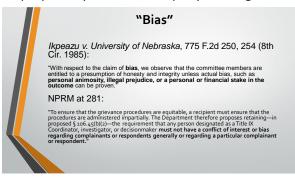
- "Prior involvement in or knowledge of the facts at issue may create the appearance or reality of bias."

- "Still another sense of impartiality is decisionmakers' freedom to decide without fearing repercussions from the influence of 'mob' passions."

- "One source of potential bias may arise when a decisionmaker has a preexisting relationship with one or more parties."

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Proposed Title IX Regulations:

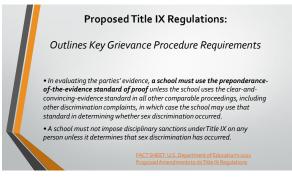
Outlines Key Grievance Procedure Requirements

• The proposed regulations would not require a live hearing for evaluating evidence, meaning that if a school determines that its fair and reliable process will be best accomplished with a single-investigator model, it can use that model.

• A school must have a process for a decisionmaker to assess the credibility of parties and witnesses through live questions by the decisionmaker. The proposed regulations would not require cross-examination by the parties for this purpose but would permit a postsecondary institution to use cross-examination if it so chooses or is required to by law.

FACT SHEET. U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

401 402



NOTE: Standard of Proof Alignment with ALI

"The Department notes that the American Law Institute (ALI) membership, at its May 2022
Annual Meeting, approved the following principle as part of its project on procedural
frameworks for resolving campus sexual misconduct cases in postsecondary institutions:

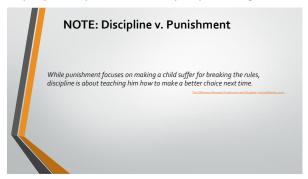
§ 6.8. Standard of Proof

Colleges and universities should adopt the same standard of proof for resolving
disciplinary claims of sexual misconduct by students as they use in resolving other
comparably serious disciplinary complaints against students. Standards that require
proof either by a "preponderance of the evidence" or by "clear and convincing evidence"
can satisfy the requirements of procedural due process and fair treatment. Whatever
standard of proof is adopted, decisions that the standard of proof is met should always rest
on a sound evidentiary basis.

The Department's proposed regulations would align with the ALI position, providing that
for sex discrimination complaints a recipient can use either the preponderance of evidence
or the clear and convincing evidence standard of proof but must not use a higher standard
of proof for evaluating evidence of sex discrimination than for other forms of discrimination
or other comparable proceedings." "MEMERS postment meme."

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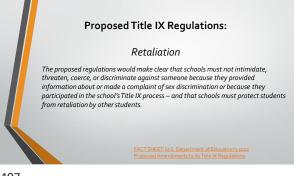
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Proposed Title IX Regulations: Supportive Measures for Any Sex Discrimination Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment. Under the proposed regulations, schools would be required to offer supportive measures, as appropriate, to restore or preserve a party's access to the school's education program or activity. The current regulations require this support only when sexual harassment, rather than any form of sex discrimination, might have occurred. PACT SHEET. U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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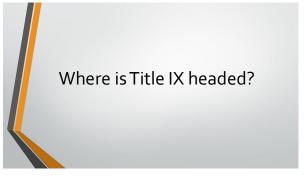
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What's next for the proposed regulations?

6 of day notice and comment period has ended.
Last notice and comment period garnered nearly 125,000 comments.
This go around the proposed regs garnered 235,000.
It is possible the new regulations will be released in May 2023 and will go into effect later in 2023 or 2024.
There will be a separate process for student athletes/transgender issues. Expect more on informal resolutions, Clery and FERPA interpretation to come?

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What does the future hold for Title IX? Take-aways.... LGBTQI+ protections: transgender athletes' rights issues Several states have laws that prevent transgender individuals from playing on female sports teams March 2021, class action lawsuit filed against the Dept. of Education in Oregon federal court by 33 LGBTQI+ plaintiffs from 30 institutions. Is the religious exemption in Title IX constitutional? Speech First, Inc. vs. Fenves; Speech First, Inc. vs. Cartwright State law pushbacks Rewrite Codes....again? And when? Notice and comment likely to change Apply Title IX practices to other conduct codes? Time for preventative audits: lessons from LSU, USC. Nuclear weapons??? and Reproductive Rights—Title IX makes significant pivot...

SCOTUS overturns *Roe v. Wade* in *Dobbs*

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What does the future hold for Title IX? Take-aways.... Political landscape 2024 ::: SCOTUS End game for Title IX and detailed grievance regulation...what is ultimately sustainable? Will what we know of Title IX today devolve to state variances, subject to federal court oversight? Reporting and reporters...do we want this much flexibility? Training means assessment, especially on reporting and definitions. Culture intervention—rise , or return, of "remedies" New Clery manual?—prevention and reporting on it. Let's get Constitutional...What about *Citizens United*? Even *Gebser/Davis*?

- Mathews v Eldridge? Textualism, Originalism, and the Title IV trojan horse. ALI and "mission sensitivity."
- SCOTUS → limits of federal regulatory power

What does the future hold for Title IX? Take-aways....

- Does education culture have better solutions? Can we be, must we be, impartial in relation to our own mission? What are the limits of rooting out bias? Are the legal rules themselves a Title IX problem? Fenves ::: NPRM on bias/// "Defamation by Litigation":::FERPA restrictions
- Budgets and industry challenges. DOE cost estimates are perhaps "aspirational."
- College court becomes more like family court—supportive services and
- Protections for Title IX operatives....2015 guidance.
- Lawyers and legalisms....Student conduct dominated by law, lawyers and legalisms? Law as competitor?
- The Transparency Dilemma:: a)revise FERPA or b)create more detailed nearing and notice procedures....(DOE goes with b.)

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