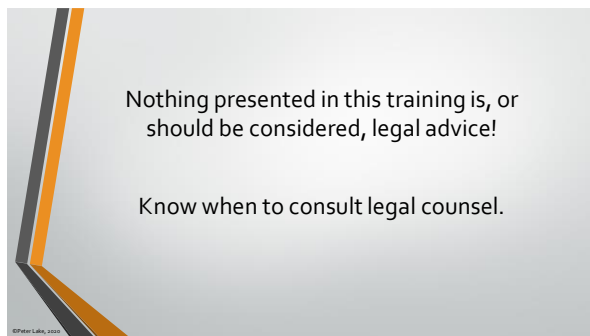


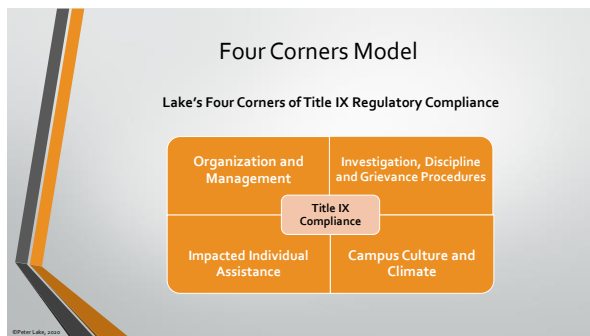
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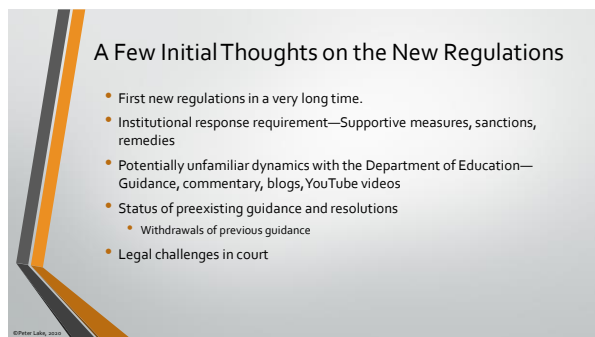
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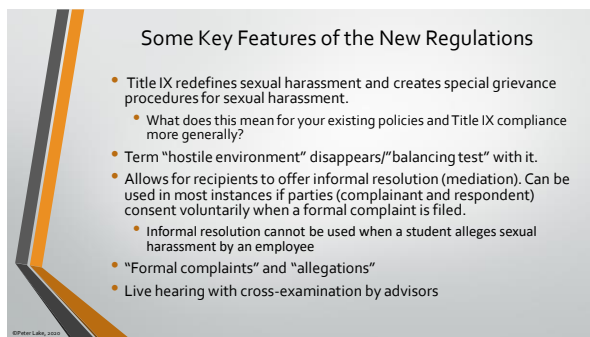
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6

## Some Key Features of the New Regulations

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

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## Training Mandates Specific to the New Regulations

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

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

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

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## Posting Training Materials to Your Website

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

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

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

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

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

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## TRAINING MATERIALS

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

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## Further training required...

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

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11

## Training Time Estimated by the Department

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

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

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

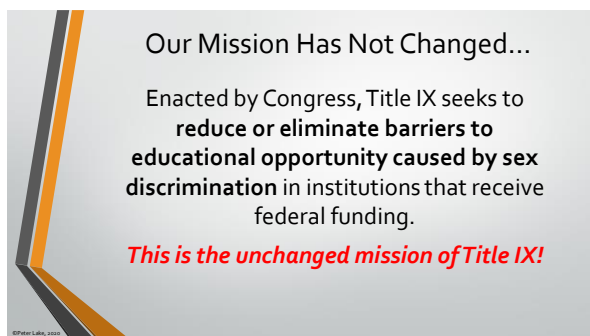
Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Requiring Federal Financial Assistance, 34 Fed. Reg. 30401 (May 18, 2020) (final rule) (<https://www.gpo.gov/ed/pubs/2020/20200518.html>).

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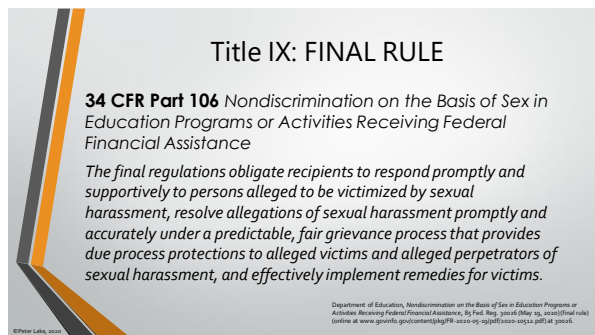
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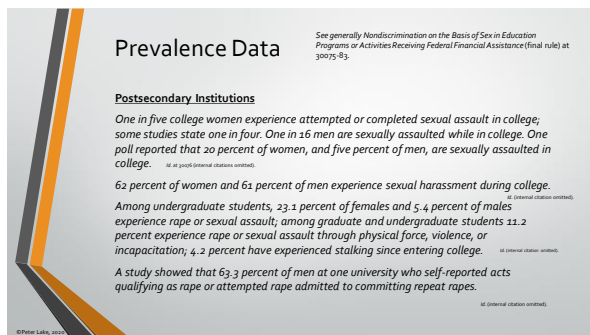
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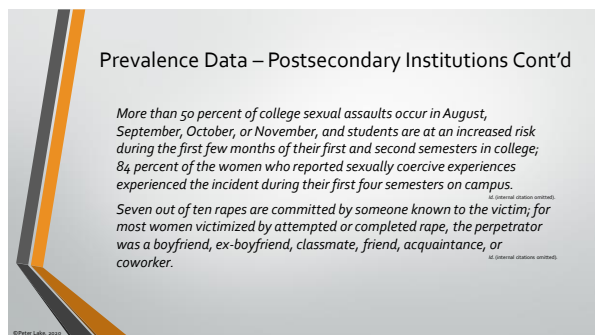
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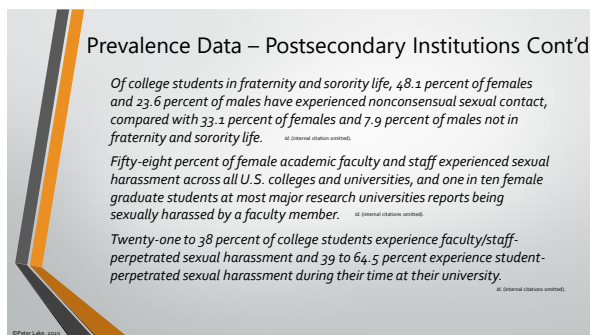
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## The Controversial Science of Sexual Predation

- 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.

## Trauma-Based Approaches

### Avoid or Use?

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

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## Trauma

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

Department of Education, *Non-discrimination on the Basis of Sex in Education Programs or Activities Requiring Federal Financial Assistance*, 34 Fed. Reg. 30461 (May 19, 1969) (final rule) (cited as *www.gpo.gov/edpolicies/34fr-30461-1969-05-19.pdf* at 30461 (emphasis added)).

## Trauma Cont'd

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

Id. at 30069 (internal citation omitted).

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## Trauma Cont'd

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

Id. (internal citation omitted).

## "Victim"/"Survivor" or "Perpetrator"

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

Id. at 30031 (emphasis added).

## Timing

The new regulations went into effect on **August 14, 2020**.  
The Dept. of Education has stated they **will not** enforce these regulations retroactively.



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## The Social Context

**COVID-19**

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

**Social Justice Issues**

**2020 General Election**

- Biden Administration pick for Secretary of Education
- Congress

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## What is Title IX? What is its mission?

- Enacted by Congress, Title IX seeks to **reduce or eliminate barriers to educational opportunity caused by sex discrimination** in institutions that receive federal funding. ***This is the mission of Title IX!***
- Other federal laws also address sex discrimination. There are complex interactions with other federal laws, such as the Clery Act, the Family Educational Rights and Privacy Act (FERPA), and the Violence Against Women Act (VAWA).
- Title IX is concerned with **institutional response** to discrimination.

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## Title IX: FINAL RULE

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

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

Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30031 (May 19, 2020) (final rule) (<https://www.gpo.gov/edpolicies/pdfs/2020-05-19-30031-2020-05-19-30031.pdf>) at 30031 (emphasis added).

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## Title IX: FINAL RULE

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

Id. (emphasis added).

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## Title IX: FINAL RULE

*The final regulations also clarify and modify Title IX regulatory requirements regarding remedies the Department may impose on recipients for Title IX violations, the intersection between Title IX, Constitutional protections, and other laws, the designation by each recipient of a Title IX Coordinator to address sex discrimination including sexual harassment, the dissemination of a recipient's non-discrimination policy and contact information for a Title IX Coordinator, the adoption by recipients of grievance procedures and a grievance process, how a recipient may claim a religious exemption, and prohibition of retaliation for exercise of rights under Title IX.*

## Legal Foundations: How did we get here?

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### Title IX Before and After April 2011

#### Before:

Campuses focused on equality in sports, admissions, etc.

#### April 2011 (Obama Administration):

*Dear Colleague Letter* released as a "reminder" that Title IX covers sexual harassment

Yale Investigation

The awakening of the Dept. of Education (DOE)

#### After April 2011 :

Numerous investigations/Substantial guidance

April 2014 FAQ document and White House Task Force to Protect Students from Sexual Assault report *Not Alone*

April 2015 guidance on the role of the Title IX Coordinator

The rise of vendors, experts, etc.

### Title IX and the Trump Administration

- Education Secretary Betsy DeVos
- Rescission of Obama-Era Guidance in 2017 (and more rescissions in 2020)
- Instituted "interim" and "substantial" guidance in September 2017
- Focus on respondents' rights/procedural protections/due process/bias and conflicts of interest
- Notice and comment period on the new regulations ended with a record-breaking number of comments (over 120,000)
- Complex implications for protection from discrimination based on sexual orientation, or appearance thereof.

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### Title IX: Former Guidance

- *Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties*, 62 FR 12034 (Mar. 13, 1997)
- *Revised Guidance on Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001)
- *Dear Colleague Letter: Sexual Violence* (April 4, 2011)
- *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014)
- *Resources for Title IX Coordinators, including the Dear Colleague Letter, and the Title IX Resource Guide* (April 2015)
- *Q&A on Campus Sexual Misconduct* (Sept. 22, 2017)
- *Dear Colleague Letter* (Sept. 22, 2017)

### The New Regulations and Previous Guidance

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



## New Regulations and Court Activity

### Judicial activism and inactivism

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

## Litigation Risk

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

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## Challenges to the New Regulations

- **Congress**
  - The Department acknowledges that Congress could address Title IX sexual harassment through legislation, but Congress has not yet done so. *Id.* at 123.
  - House of Representatives Committee on Oversight Reform, *Letter to DeVos-DoED re: Title IX* (June 22, 2020).
- **Pending Litigation**
  - James Walker, *Betsy DeVos Sued by Organizations Representing Student Victims of Sexual Violence*, *Newsweek* (Jun. 21, 2020) (online at [www.newsweek.com/betsy-devos-lawsuit-title-ix-rule-changes-sexual-harassment-1519142](http://www.newsweek.com/betsy-devos-lawsuit-title-ix-rule-changes-sexual-harassment-1519142)).
  - ACLU/NWLC
  - State Attorneys General
- **2020 General Election**

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

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

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## Virginia State Laws

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

## Virginia State Laws Cont'd

- VA Code § 23.1-900. Academic transcripts; suspension, permanent dismissal, or withdrawal from institution.
  - Requires a transcript notation for a student who has been suspended for, has been permanently dismissed for, or withdraws from the institution while under investigation for an offense involving sexual violence and requires institutions to adopt policies for the expungement of such notation.
- VA Code § 23.1-412. Non-academic student codes of conduct.
  - Requires each public institution of higher education to adopt non-academic student codes of conduct. Students and student organizations that participate in the non-academic student codes of conduct process as a complainant or respondent shall have the responsibilities and rights afforded to them by the institution's codes of conduct and related policies and procedures.
- VA Code § 9.1-191. Virginia sexual assault forensic examiner coordination program.
  - Establishes the Virginia sexual assault forensic examiner coordination program within the Department of Criminal Justice Services.

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

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

<https://lis.virginia.gov/cgi-bin/legp604.exe?se=2018&typ=bi&val=SB373&submit=GQ>

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**Federal Regulators:  
Two Key Players**

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

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

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**The Courts v. The Regulators**

**The Courts—Civil Action Under Title IX**

- The US Supreme Court allows actions in court to pursue damages for Title IX (but with many limitations).
  - Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998).
  - Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999).
- Victims as "plaintiffs" face tough standards
  - Knowledge (Reporting)
  - Pattern
  - Objective
  - Deliberate indifference
- The Supreme Court has hesitated to:
  - Apply Title IX to a "single act"
  - Broadly protect LGBTQ rights, but see the recent *Bostock* Title VII decision (more to come on this...)

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**Important Note!**

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

**Know when to talk with counsel.**

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**The Courts v. The Regulators**

**The Regulators**

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

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**Whose View of Title IX Wins in the End?**

Showdowns are coming!

CONGRESS

COURTS      REGULATORS

→ Court cases are already testing some issues

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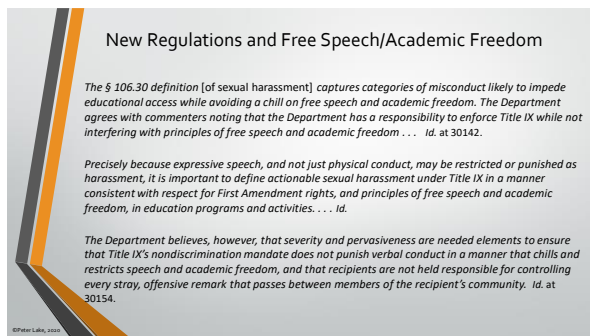
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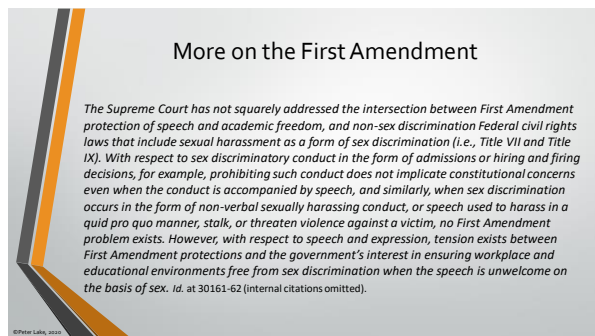




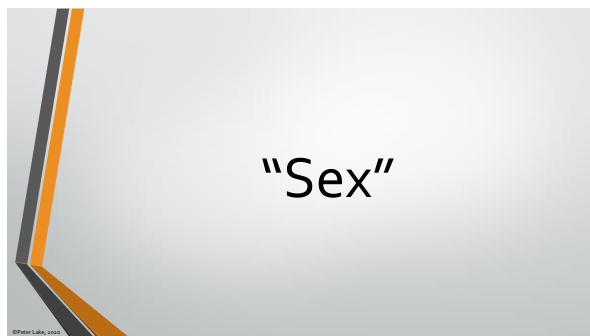
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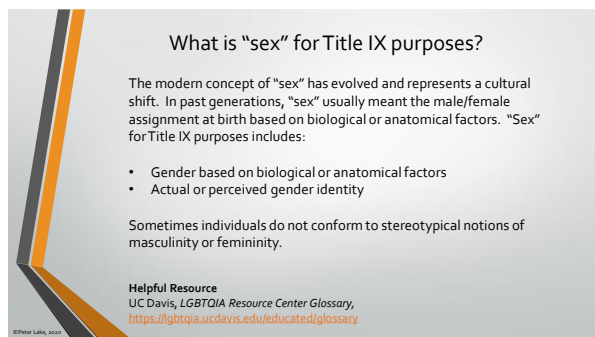
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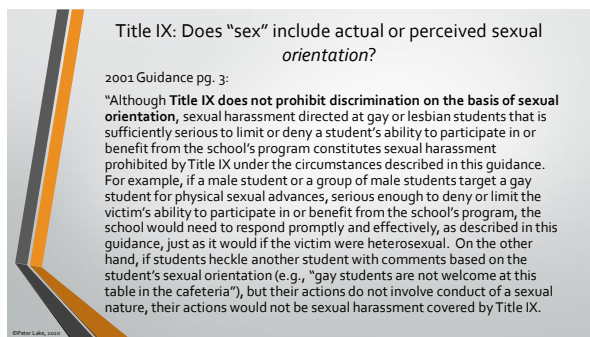
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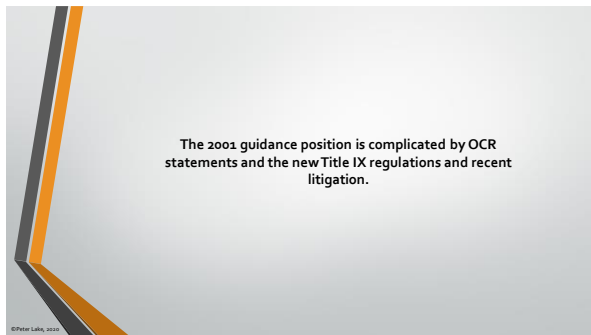
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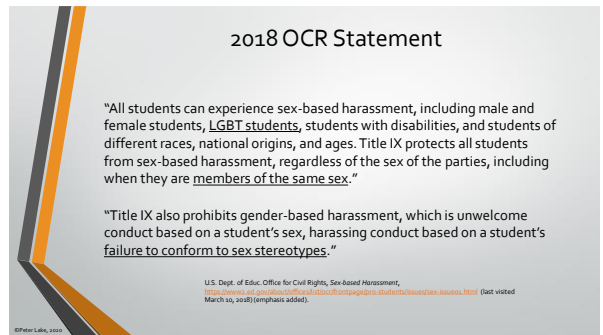
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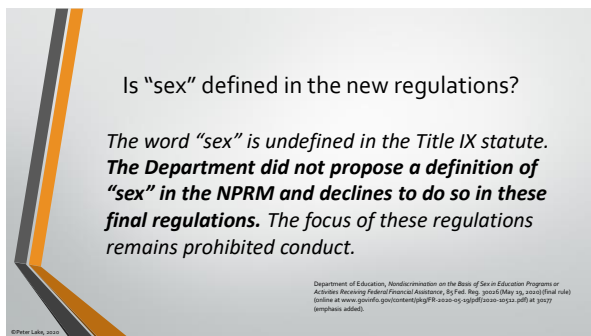
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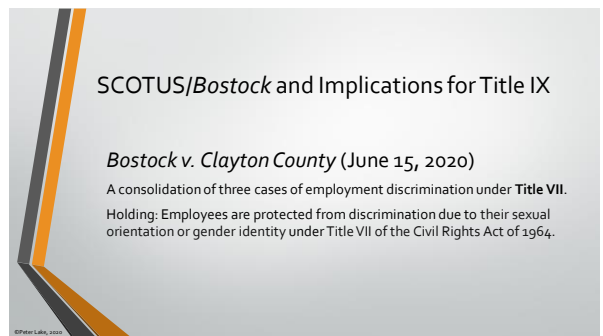
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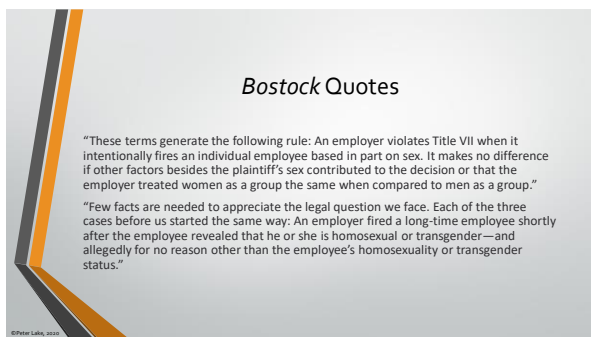
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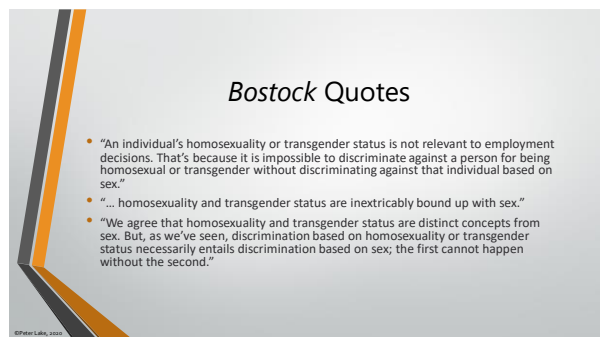
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## More Quotes from *Bostock* – The *Bostock* Caveat

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

## More Quotes from *Bostock*

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

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

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

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

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## "Due Process"

## Due Process

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

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## Due Process

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

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 34 Fed. Reg. 30401 (May 13, 1969) (final rule) (cited as *gender.gov/interim/gfr-2020-05-13/gfr2020-05-13.pdf* at 2009; (emphasis added).

## Due Process Cont'd\*

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

"Once it is determined that due process applies, the question remains what process is due." *Goss v. Lopez*, 419 U.S. 565, 577 (1975) (quoting *Morrissey*, 408 U.S. at 481).

Procedural due process of law requires at a minimum notice and a meaningful opportunity to be heard. *Goss*, 419 U.S. at 580.

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

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

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 557 (1965)).

\*See generally *id.* at 30050-53.

65 66

## More Due Process

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

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

*[S]chools, colleges, and universities are educational institutions and not courts of law. The § 106.45 grievance process does not attempt to transform schools into courts, rather, the prescribed framework provides a structure by which schools reach the factual determinations needed to discern when victims of sexual harassment are entitled to remedies. The Department declines to import into § 106.45 comprehensive rules of evidence, rules of civil or criminal procedure, or constitutional protections available to criminal defendants. The Department recognizes that schools are neither civil nor criminal courts, and acknowledges that the purpose of the § 106.45 grievance process is to resolve formal complaints of sexual harassment in an education program or activity, which is a different purpose carried out in a different forum from private lawsuits in civil courts or criminal charges prosecuted by the government in criminal courts. Id. at 30097. The Department is not regulating sex crimes, per se, but rather is addressing a type of discrimination based on sex. Id. at 30099.*

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

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

3-Part Framework

1. A definition of actionable sexual harassment
2. The school's actual knowledge
3. The school's deliberate indifference
4. Promptness
5. Equitableness
6. Reasonableness

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

Department of Education, *Non-discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 34 Fed. Reg. 30431 (May 19, 1969) (final rule) (cited at [www.gpo.gov/interloc/docs/1969-05-19/1969-05-19.pdf](http://www.gpo.gov/interloc/docs/1969-05-19/1969-05-19.pdf)) at 30092 (formatting and emphasis added).

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## "Deliberate Indifference"

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

Id. at 30091 (internal citation omitted).

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

Id. at 30092 (internal citation omitted).

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

71 72

### "Deliberate Indifference" Cont'd

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

*Id.* at 30034, n.60.

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

*Id.* at 30093.

## A Review of the New Regulations

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

#### §106.8(a) Designation of coordinator.

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

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#### §106.8(b) Dissemination of policy.

##### 1) Notification of policy.

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

#### §106.8(b) Dissemination of policy.

##### (2) Publications.

- (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.*
- (ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.*

### §106.8(c) Adoption of grievance procedures.

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

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

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

80

### "Severability" Throughout the Regulations

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

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### § 106.12 Educational institutions controlled by religious organizations.

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### §106.12(b) Assurance of Exemption.

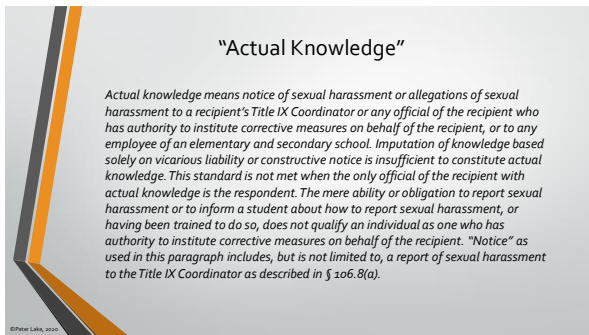
Assurance of exemption. An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that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

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### § 106.30(a) Definitions.

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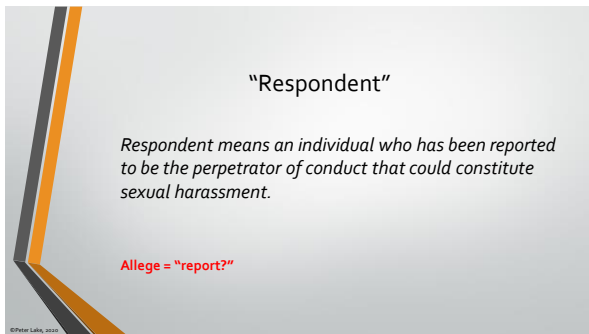




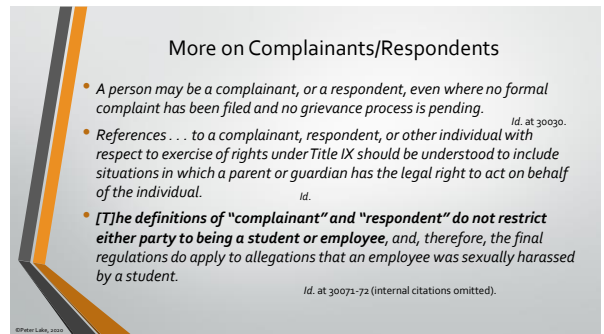
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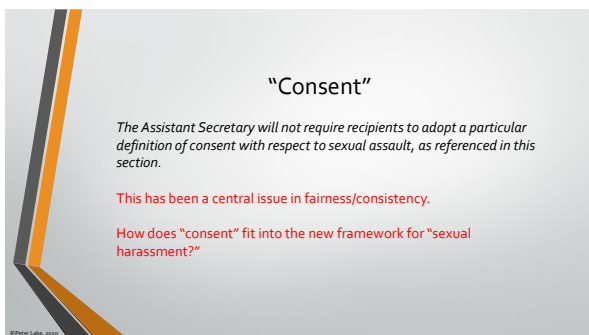
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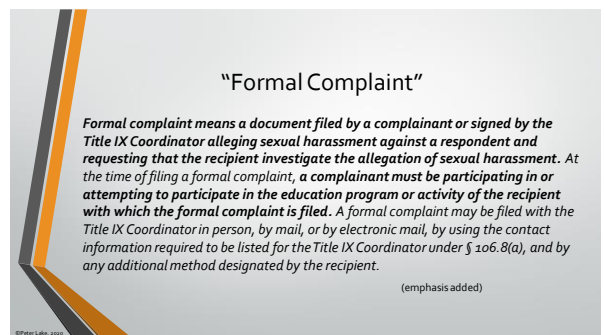
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## "Formal Complaint" Cont'd

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

91

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## "Sexual Harassment" [Three-Prong Test]

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

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

92

## First Amendment and the Second Prong

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

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## "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.*

94

## "Supportive Measures" Cont'd

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

95

## § 106.44 Recipient's response to sexual harassment.

96

#### §106.44(a) General response to sexual harassment.

*A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.*

#### §106.44(a) Cont'd

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

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#### §106.44(a) Cont'd

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

#### §106.44(b) Response to a formal complaint.

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

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#### §106.44(c) Emergency removal.

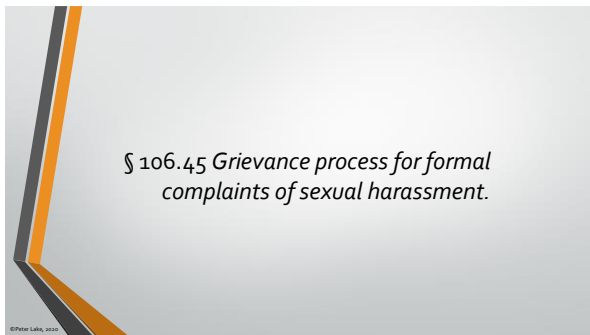
*Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any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

#### §106.44(d) Administrative leave.

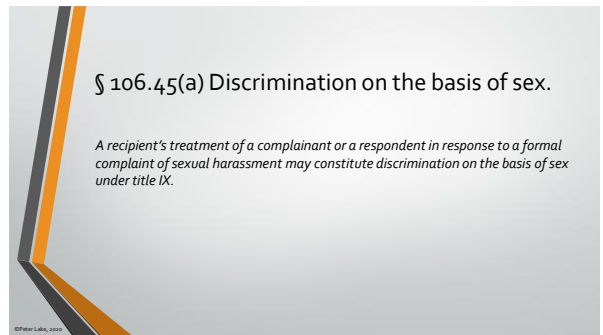
*Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or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

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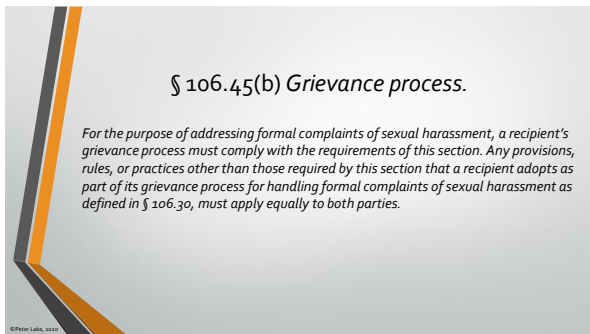
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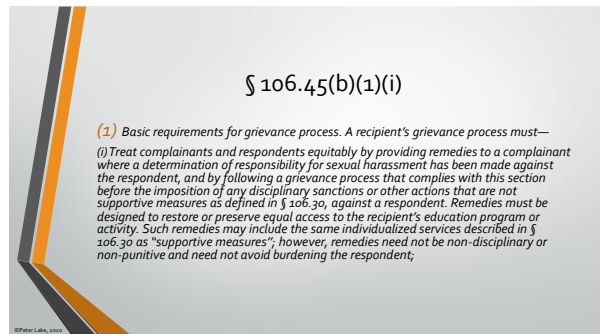
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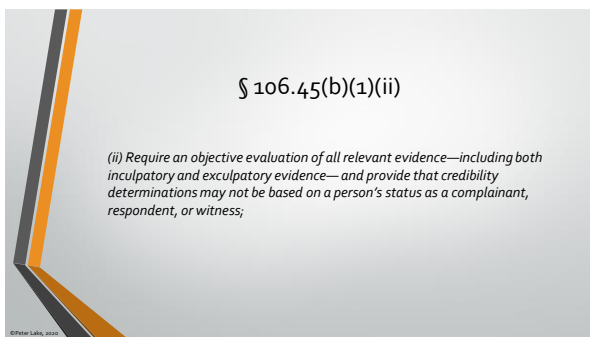
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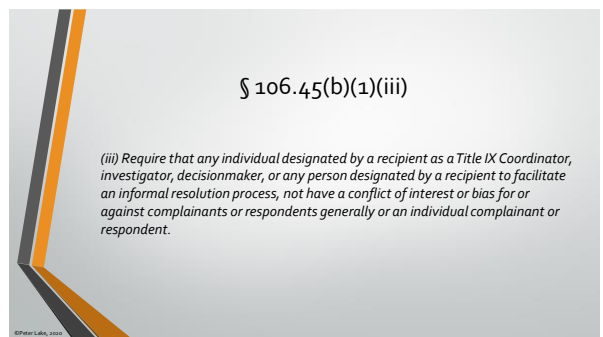
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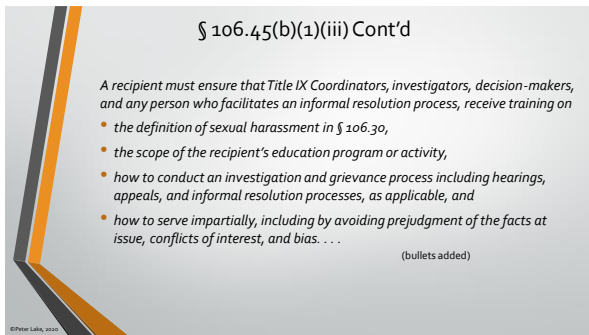
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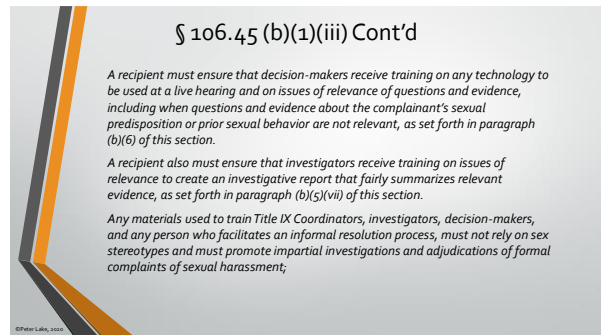
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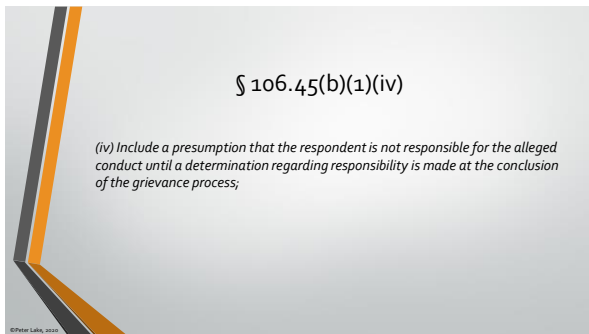
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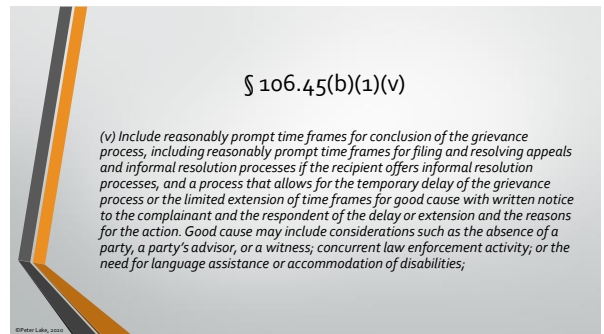
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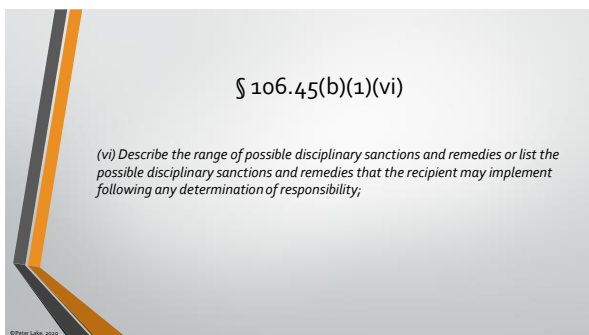
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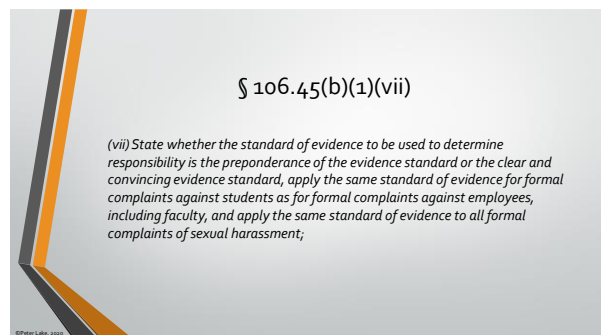
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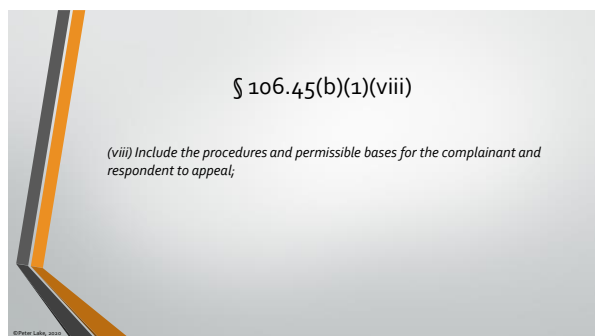
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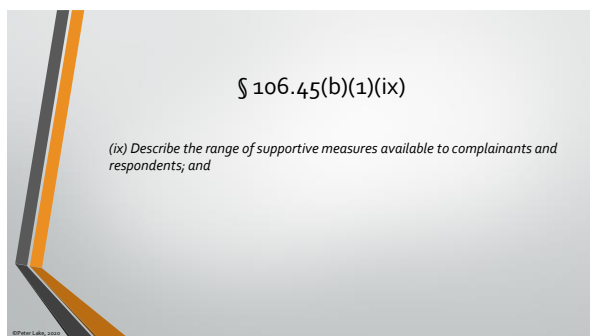
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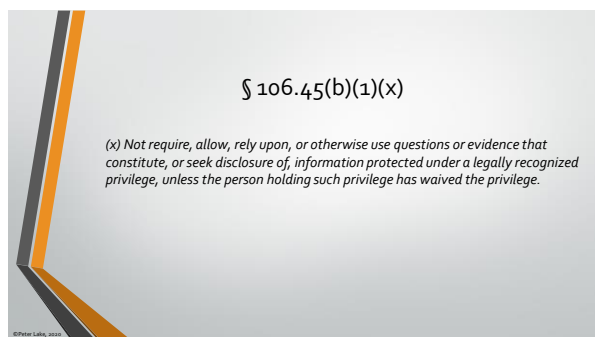
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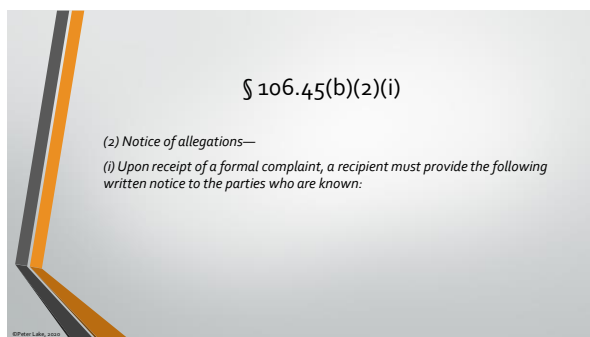
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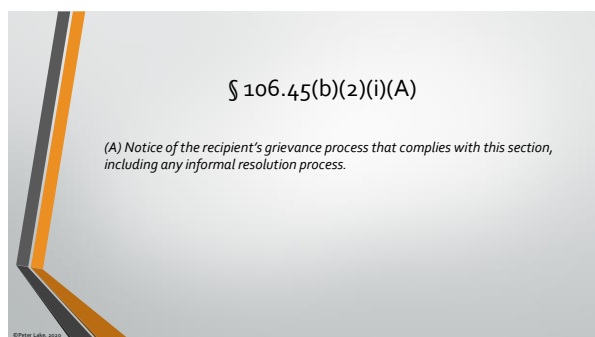
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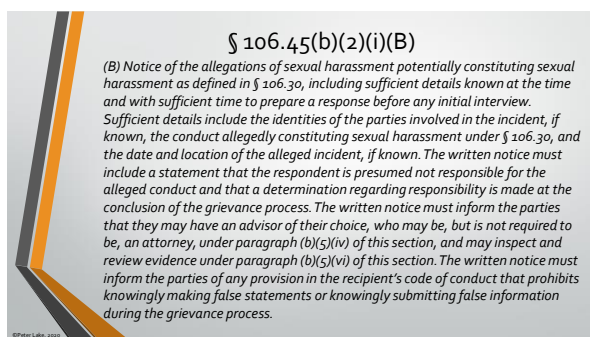
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### § 106.45(b)(2)(ii)

*(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.*

### § 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.*

121

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### § 106.45(b)(3)(ii)

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

### § 106.45(b)(3)(iii)

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

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### § 106.45(b)(4)

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

### § 106.45(b)(5)

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

125

126

§ 106.45(b)(5)(i)

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

§ 106.45(b)(5)(ii)

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

127

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128

§ 106.45(b)(5)(iii)

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

§ 106.45(b)(5)(iv)

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

129

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§ 106.45(b)(5)(v)

*(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;*

§ 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*

131

132

### § 106.45(b)(5)(vii)

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

133

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### § 106.45(b)(6)(i)

#### *(6) Hearings.*

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

134

### § 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.*

135

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### § 106.45(b)(6)(i) Cont'd

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

136

### § 106.45(b)(6)(i) Cont'd

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

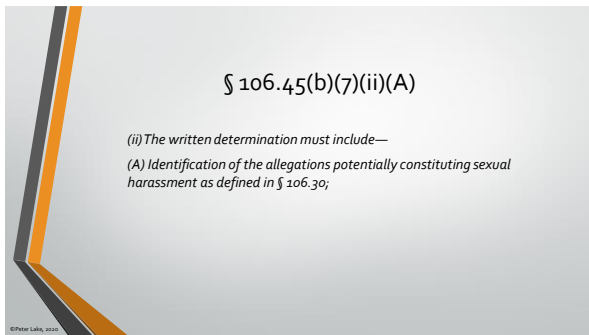
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### § 106.45(b)(7)(i)

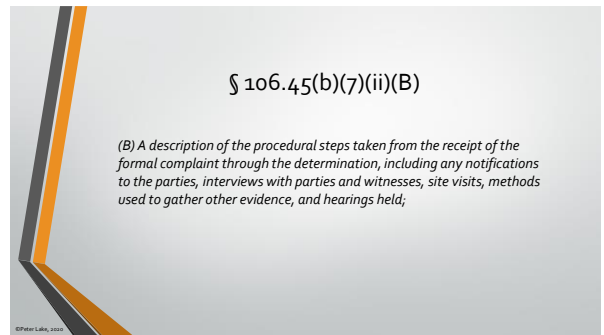
#### *(7) Determination regarding responsibility.*

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

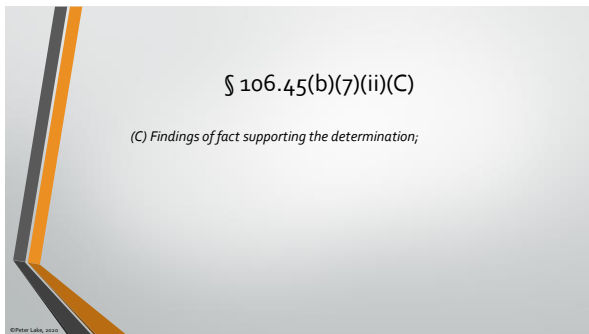
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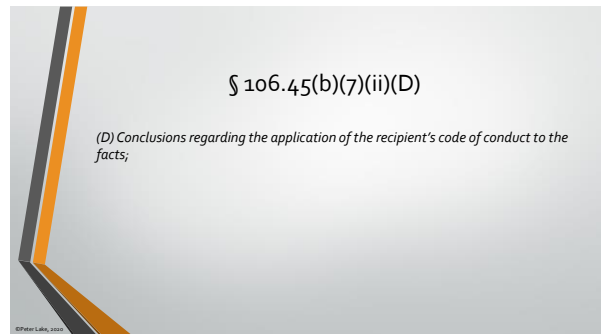
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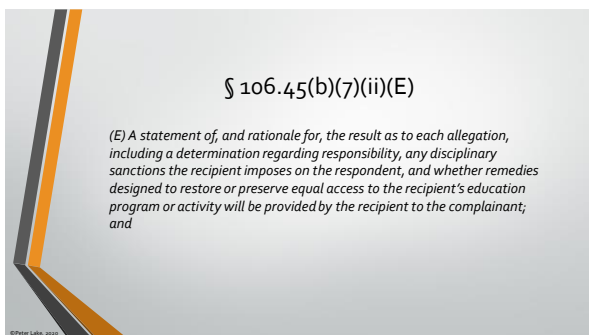
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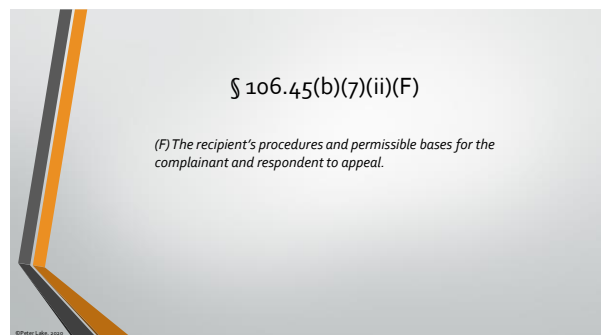
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§ 106.45(b)(7)(iii)

*(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.*

145

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§ 106.45(b)(7)(iv)

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

146

§ 106.45(b)(8)(i)

*(8) Appeals.*

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

147

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§ 106.45(b)(8)(i)(A-C)

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

148

§ 106.45(b)(8)(ii)

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

149

§ 106.45(b)(8)(iii)(A-F)

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

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

150

### § 106.45(b)(9)

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

### § 106.45(b)(9)(i)

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

151

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152

### § 106.45(b)(9)(ii-iii)

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

### § 106.45(b)(10)(i)(A)

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

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### § 106.45(b)(10)(i)(B-D)

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

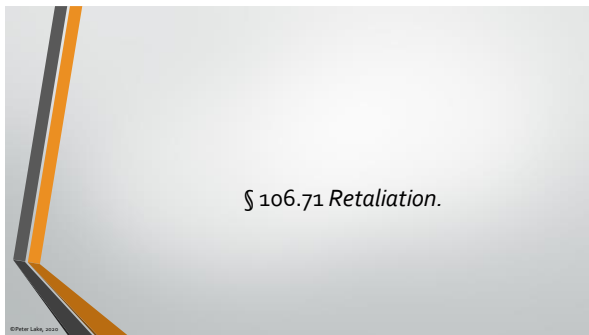
### § 106.45(b)(10)(ii)

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

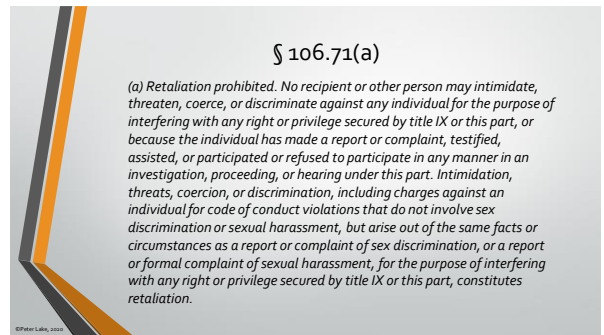
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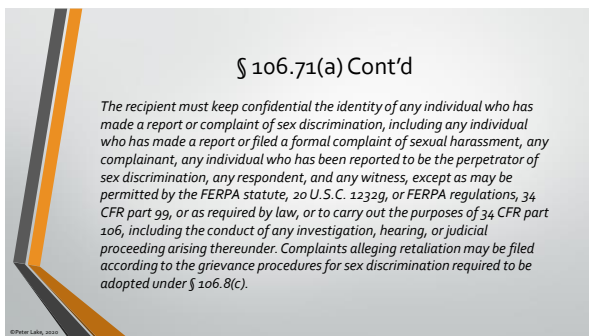




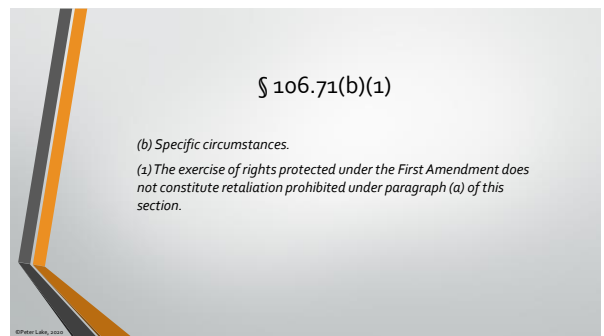
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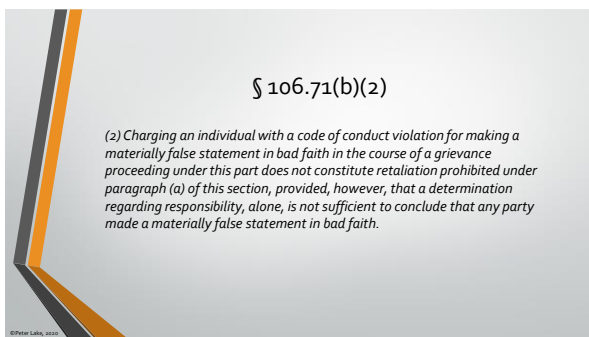
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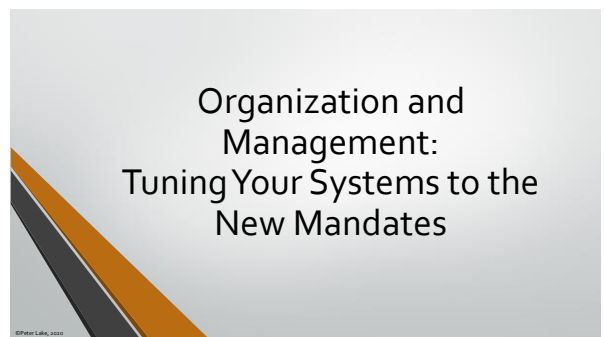
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160




161



162

### Title IX Personnel

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



**Budgetary and operational concerns?**

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### Outsourcing/Requiring Legally Trained Title IX Operatives

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

*Id.* at 30105.

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### Training

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

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### Personnel Decisions

- Should we appoint deputy Title IX coordinators?
  - [T]he recipient may need to or wish to designate multiple employees as Title IX Coordinators or designate a Title IX Coordinator and additional staff to serve as deputy Title IX Coordinators. *Id.* at 3015j.
- Should the Title IX coordinator take on the role of investigator, as permitted in the new regulations? (See *id.* 30135 n. 596.)
- How many decision makers? (New regulations suggest training at least two so one can be the appellate officer.)
- Single decision-maker or a panel?
- What should we outsource? Advantages/disadvantages?
- Budgetary concerns/limited staff on very small campuses
- Bias
- Conflicts of interest?
- Appropriate relationships between Title IX coordinator and other functions.
- Role of counsel?

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### "Actual Knowledge," Notice, "Mandatory Reporters"

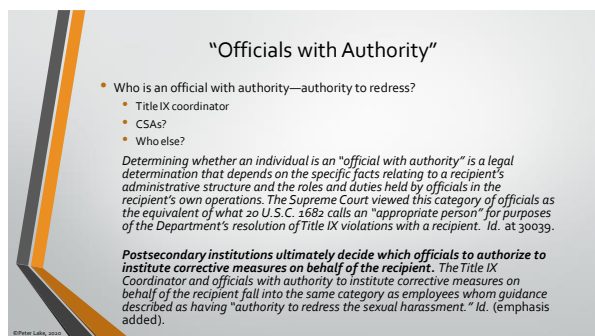
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### "Actual Knowledge" §106.30(a)

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

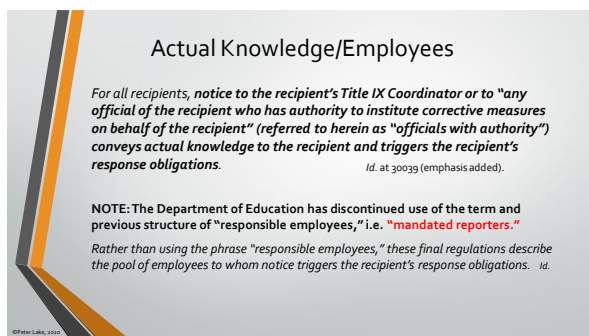
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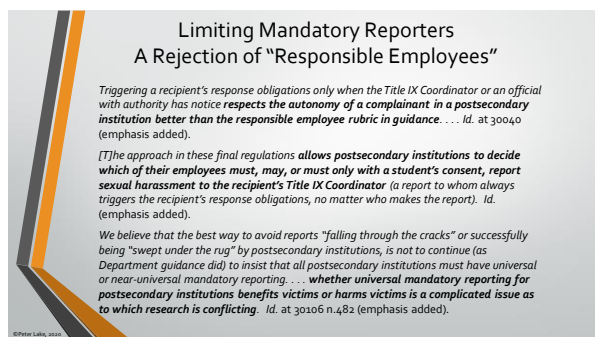


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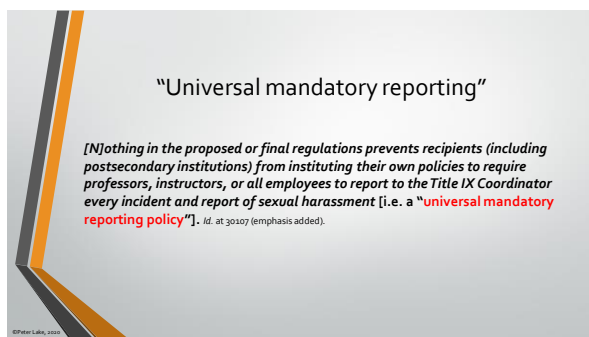


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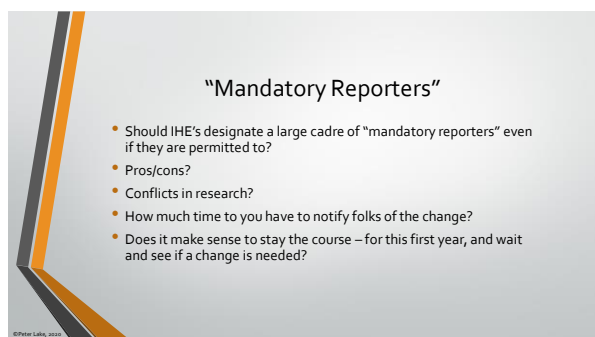


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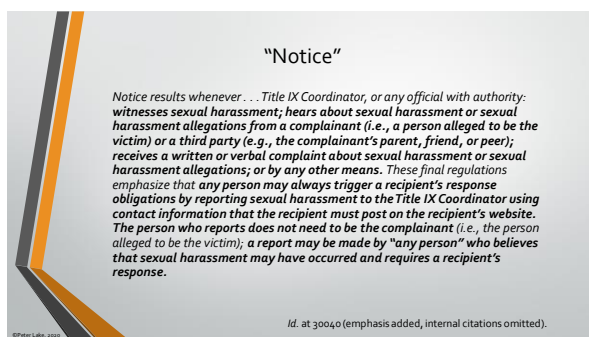
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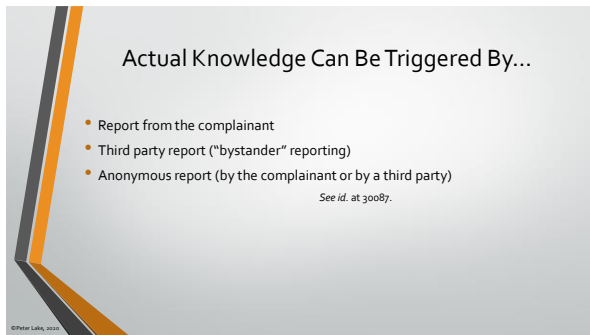
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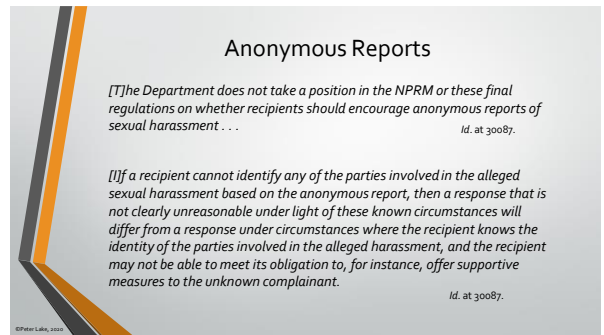
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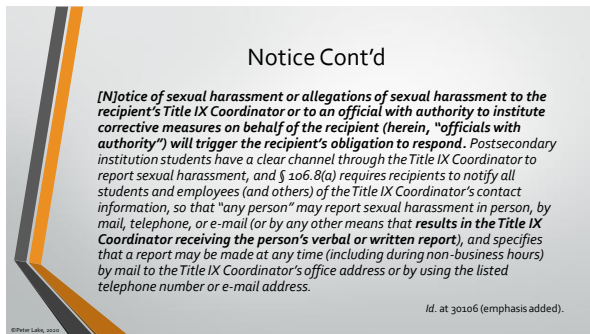
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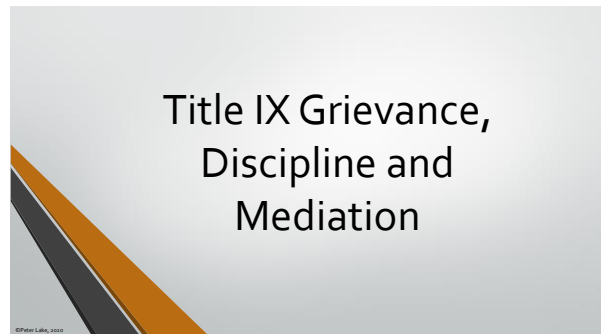
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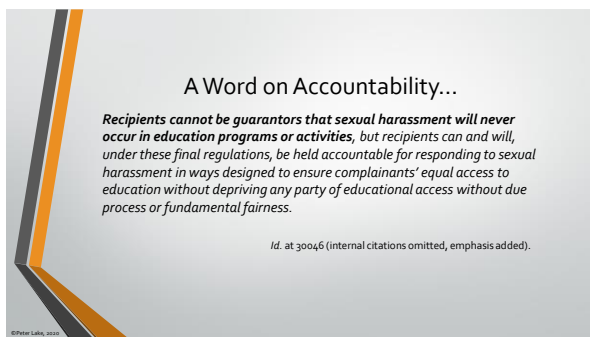
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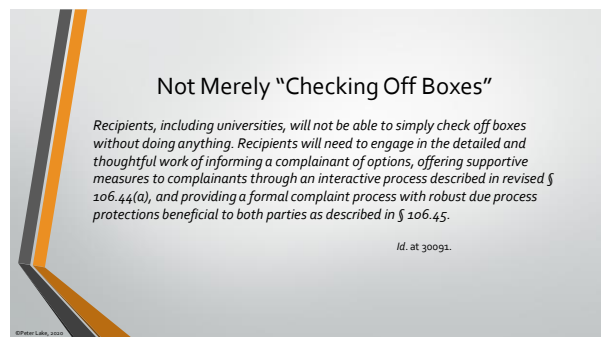
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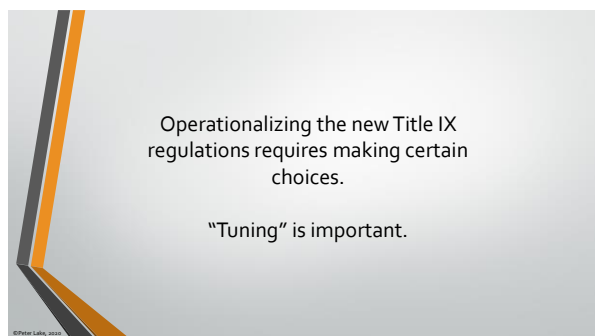
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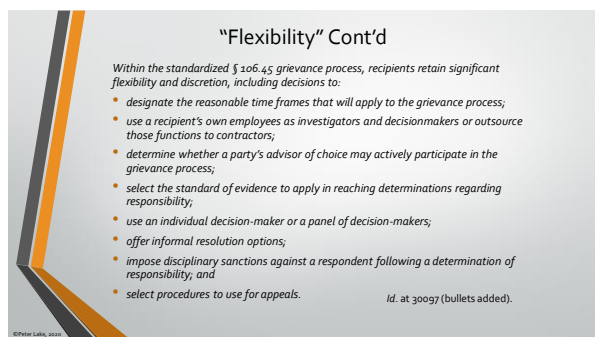
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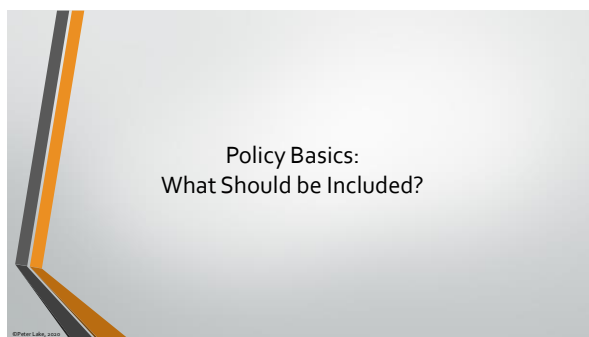
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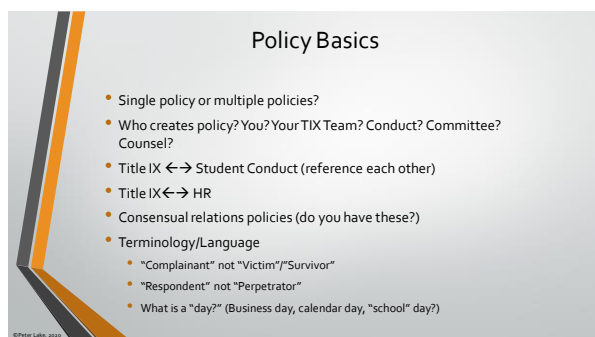
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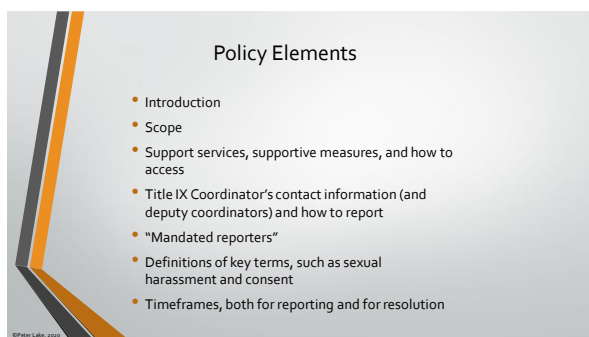
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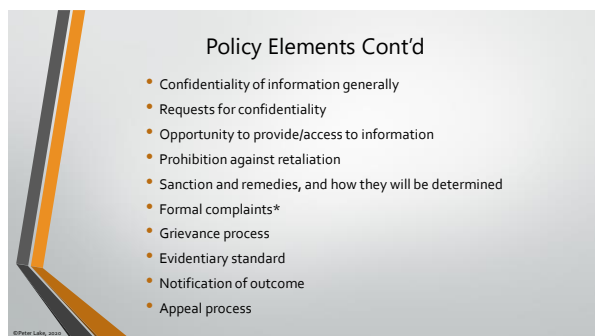
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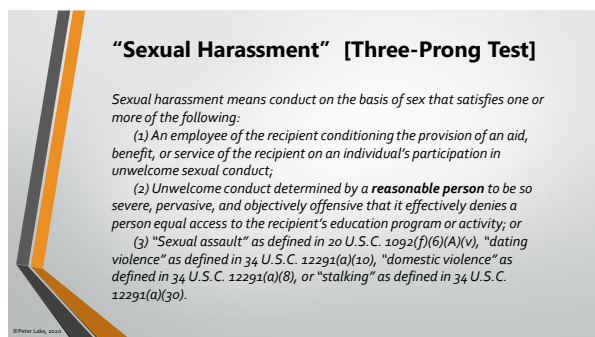


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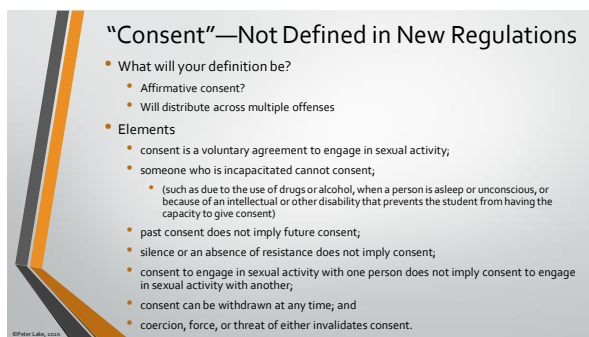


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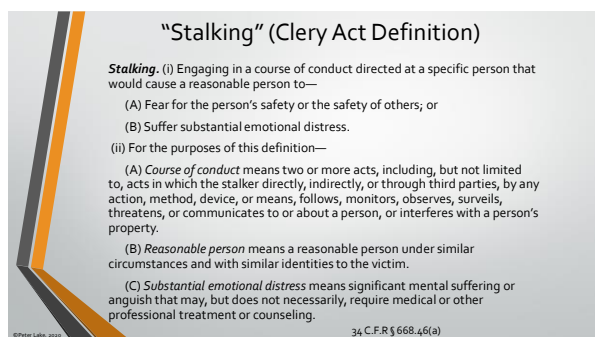


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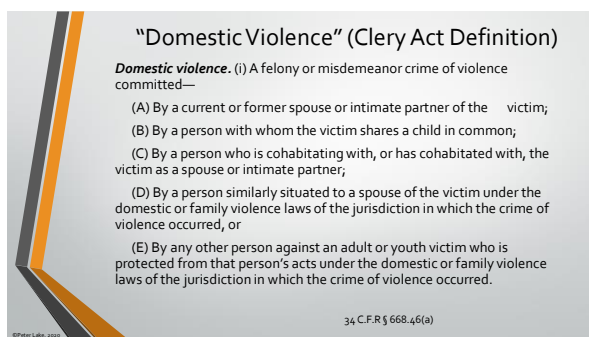
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190



191



192



### "Dating Violence" (Clery Act Definition)

**Dating violence.** Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

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

(ii) For the purposes of this definition—

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

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

34 C.F.R. § 668.46(a)

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### Title IX Coordinator Information (§106.8)

Recipients must notify....

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

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

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

194

### Dissemination of Information §106.8(b)

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

- Website
- Handbooks
- Catalogs

For

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

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### Scope

196

### Tuning

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

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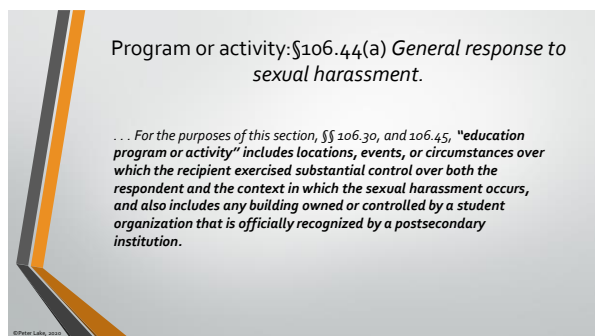
### "Staying in Your Lane"

#### § 106.45 may not be circumvented...

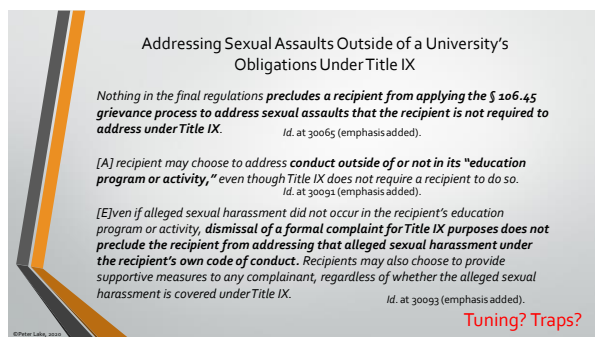
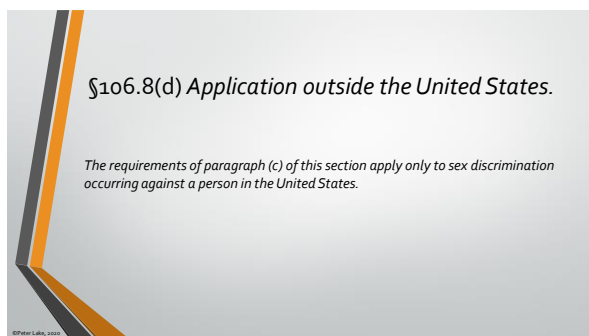
... by processing sexual harassment complaints under non-Title IX provisions of a recipient's code of conduct. The definition of "sexual harassment" in § 106.30 constitutes the conduct that these final regulations, implementing Title IX, address. . . . [W]here a formal complaint alleges conduct that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

*Id.* at 30095.

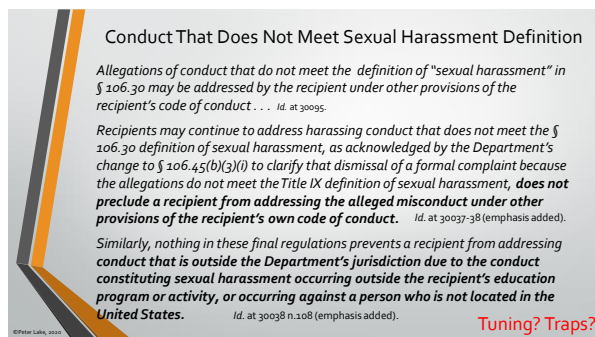
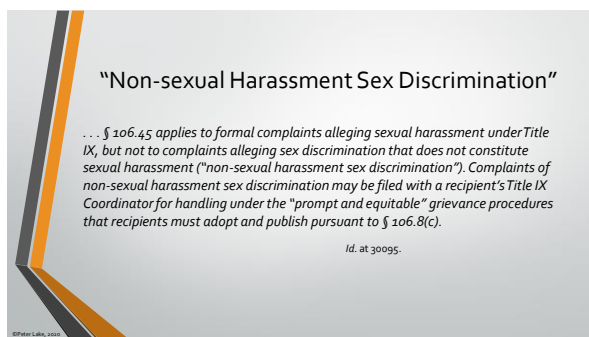
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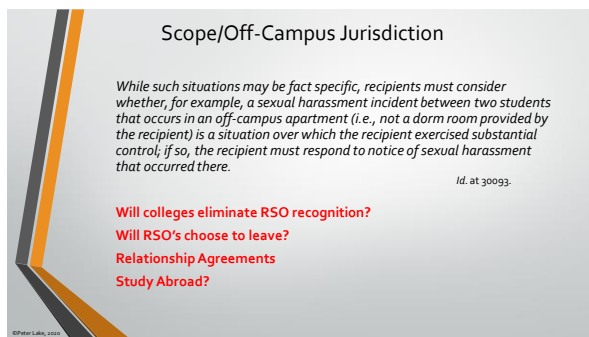
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### "Involvement in an education program or activity"

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

Id. at 30086-87.

### "Statute of Limitations"

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

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

Id. at 30086-87 (emphasis added).

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### "Statute of Limitations" and Dismissal of Complaint

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

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

Id. at 30087 (bullets added).

### RSO's/Greek Life

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

Id. at 30061 (emphasis added).

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### Organizational Responsibility Under Title IX

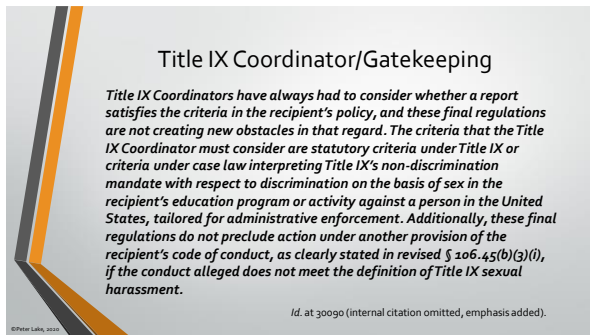
The § 106.45 grievance process . . . contemplates a proceeding against an individual respondent to determine responsibility for sexual harassment. The Department declines to require recipients to apply § 106.45 to groups or organizations against whom a recipient wishes to impose sanctions arising from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

Id. at 30096 (emphasis added).

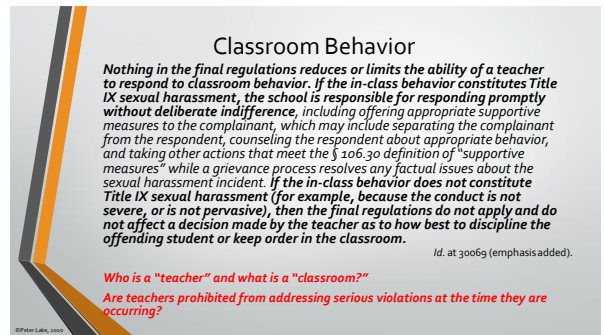
### No Reasonable Cause Threshold

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

Id. at 30105.

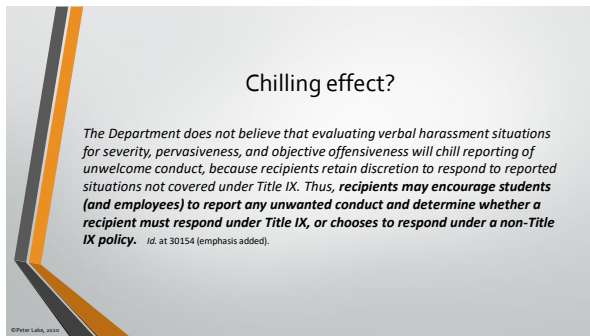


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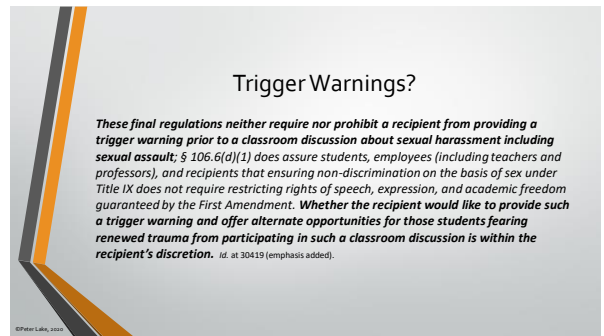


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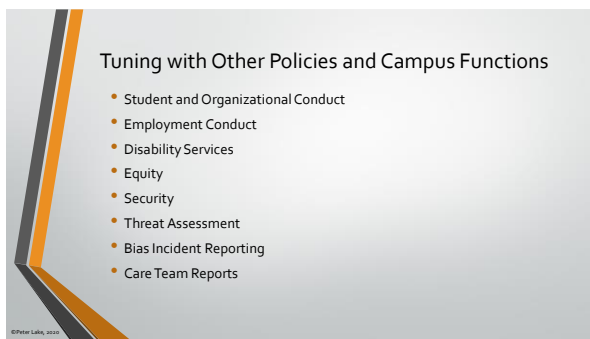


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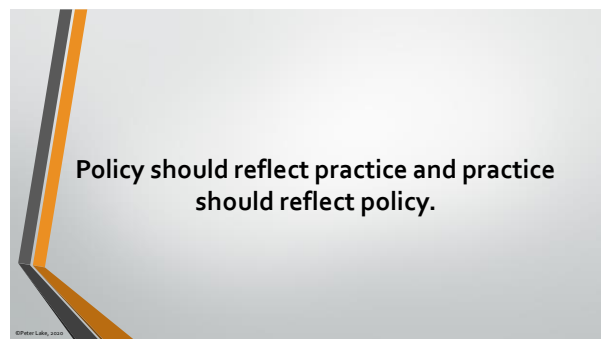
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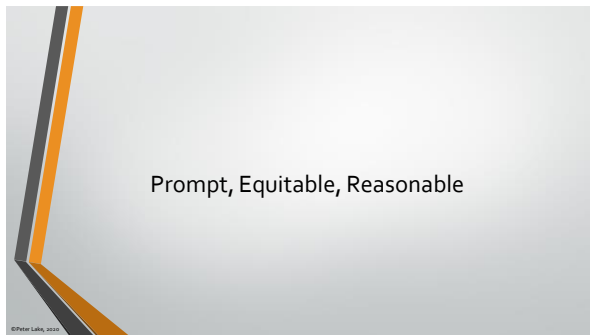
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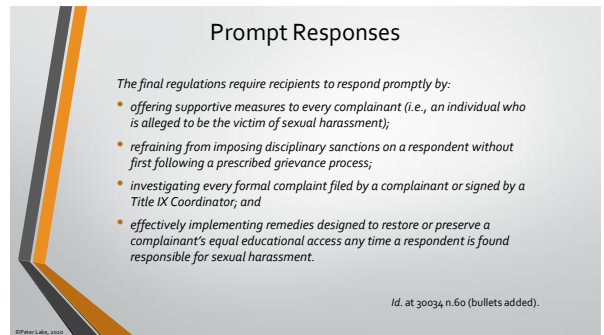


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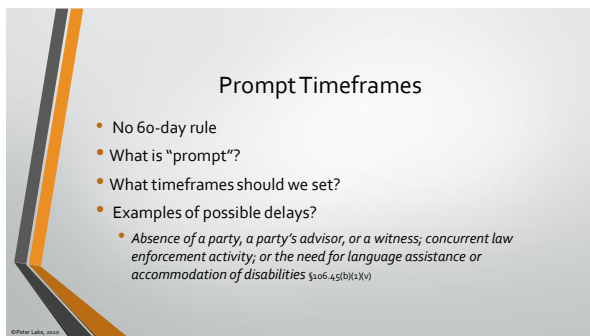
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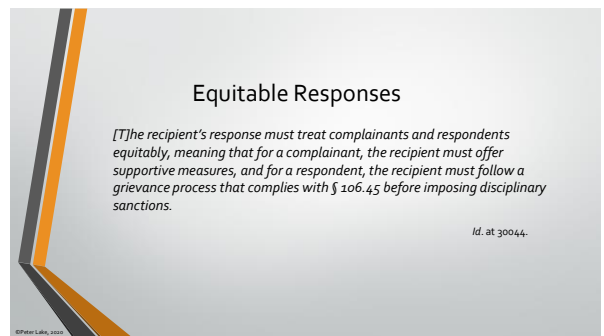
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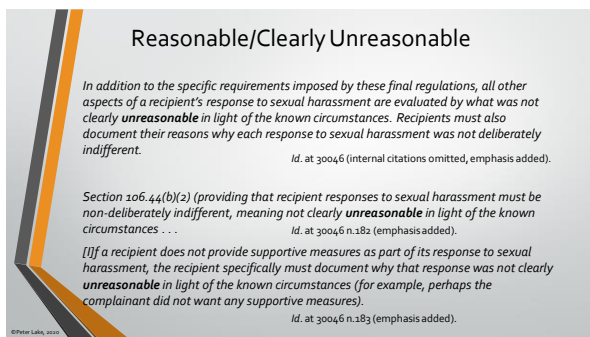
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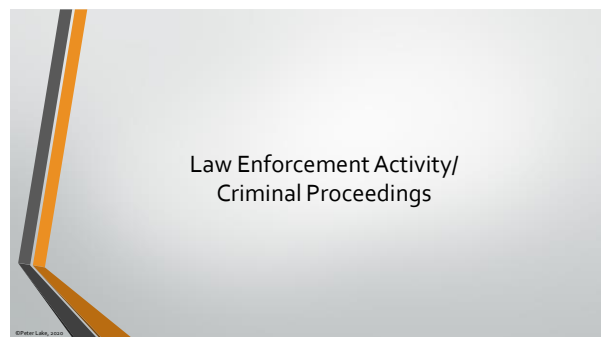
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220



221



222



## Concurrent Law Enforcement Activity

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

## Law Enforcement Cannot Be Used to Skirt Title IX Process

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

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## Police Investigations

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

*Id.* at 30099 n. 467.

## Confidentiality

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## Confidentiality and FERPA Protections

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

*Id.* at 30073 (emphasis added).

## "Gag orders" are not permitted, but

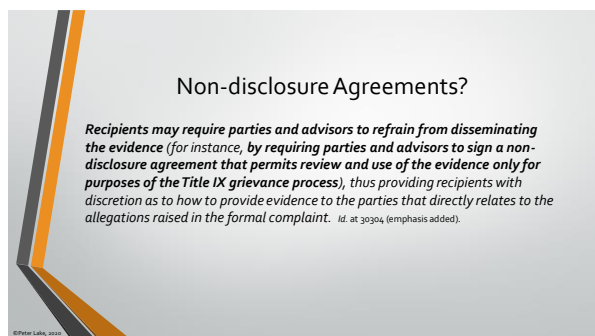
... abuses of a party's ability to discuss the allegations can be addressed through tort law and retaliation prohibitions. *Id.* at 30296.

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

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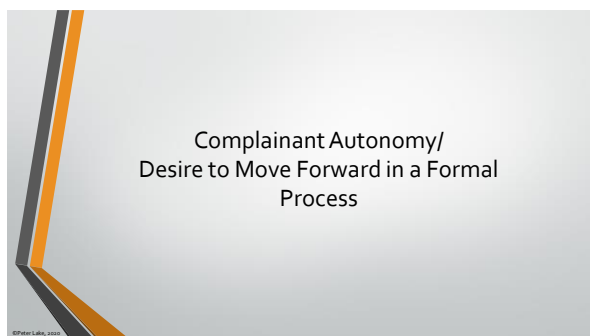
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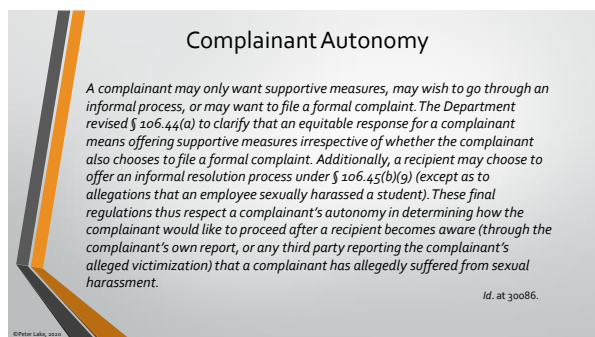


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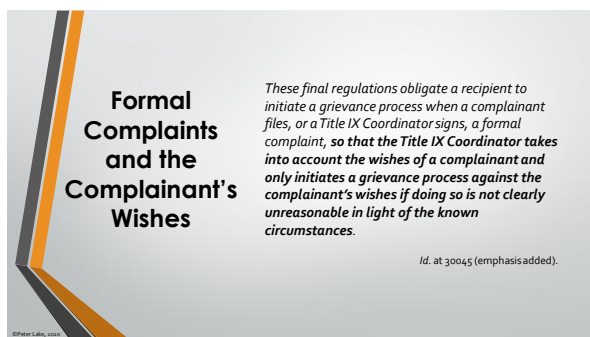


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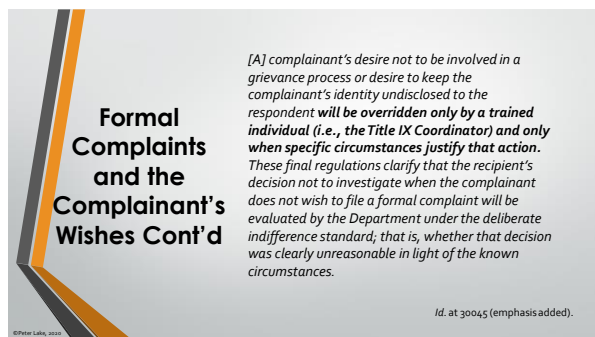


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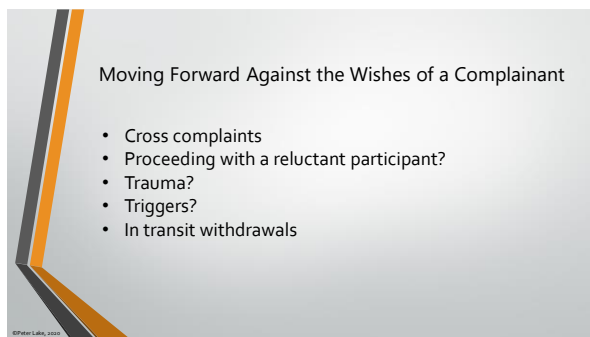
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232



233



234

## Emergency Removal/ Administrative Leave

### §106.44(c) Emergency removal.

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

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### Emergency Removal of Respondent

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

*Id.* at 30046 (internal citation omitted).

### §106.44(d) Administrative leave.

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

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### Thoughts on Emergency Removal and Administrative Leave

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

### A Closer Look at Formal Complaints

239

240

### § 106.30(a) "Formal Complaint"

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

(emphasis added)

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### "Formal Complaint" Cont'd

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

242

### "Formal Complaint" Cont'd

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

Id. at 30030 (emphasis added).

243

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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.*

244

### § 106.45(b)(3)(ii)

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

245

### § 106.45(b)(3)(iii)

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

246

## Dismissal of Complaint

*[If a respondent is no longer enrolled or employed by a recipient, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein, then the recipient may dismiss the formal complaint or any allegations therein.*

*Id.* at 30087.

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

*Id.* at 30053.

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**§ 106.45(b)(4)**

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

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# Formal Complaint Examples



You may file your formal complaint by emailing it to [ODR@harvard.edu](mailto:ODR@harvard.edu).

**Please remember that your formal complaint must be in writing. In addition:**

- It should state the name of the alleged harasser (if known)
- It should describe with reasonable specificity the incident(s) of alleged harassment, including the date and place of such incident(s)
- It must be in the Complainant's or Reporter's own words, and may not be authored by others, including family members, advisors, or attorneys
- It should have an attached list of any sources of information (for example, witnesses, correspondence, records, etc.) that the Complainant or Reporter believes may be relevant to the investigation. However, a complaint should not be delayed if such sources of information are unknown or unavailable.

<https://flowchart.odr.harvard.edu/>

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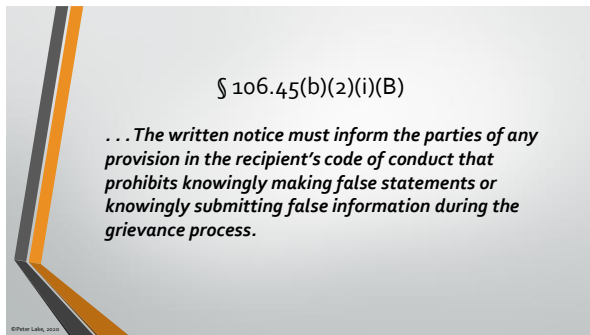
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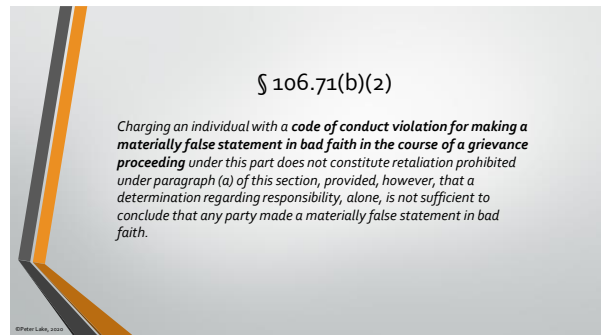
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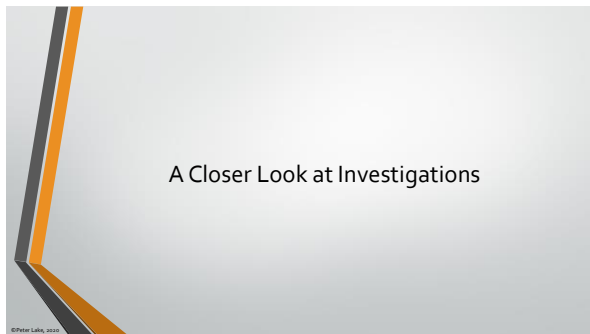
- # Thoughts on Formal Complaints
- Signed?
    - Digital?
    - Verified?
    - Notary?
    - Attestation or oath?
    - Privileges?
  - How to handle false reports?
    - Provision for false reports/providing false information in code/policy?
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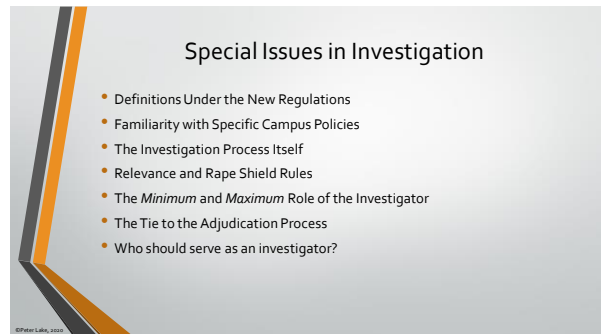
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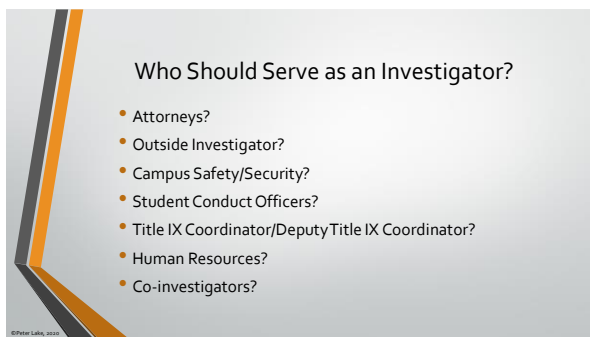
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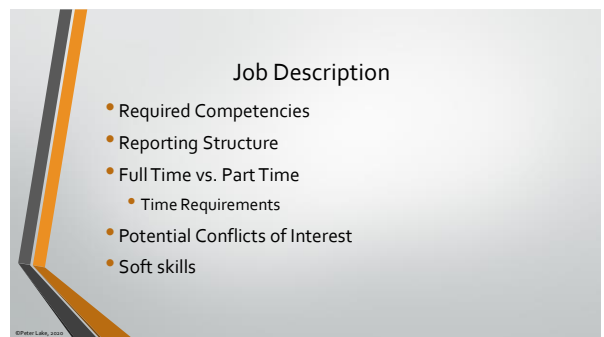
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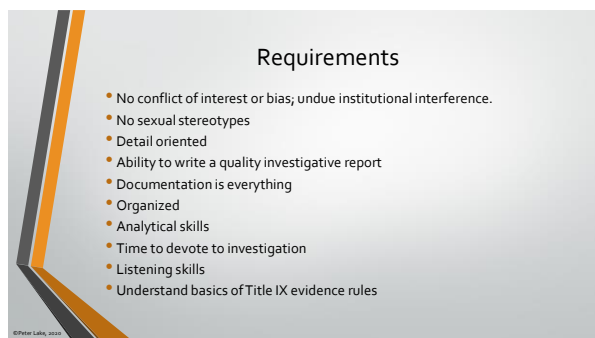
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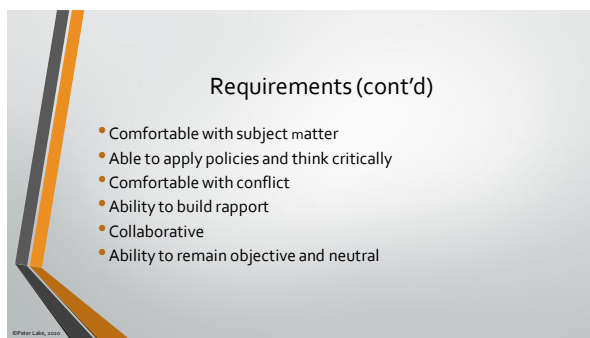


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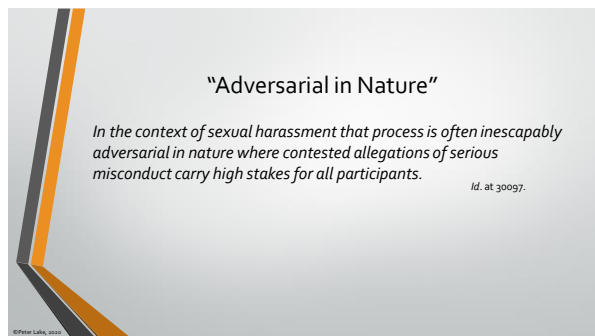


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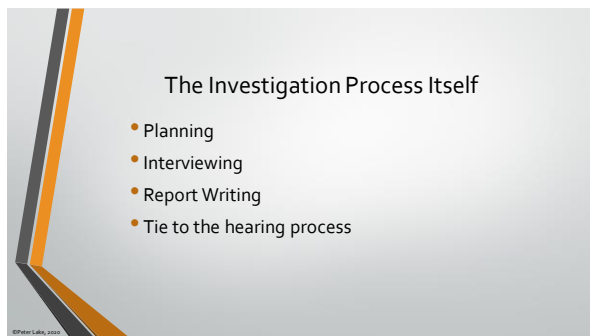


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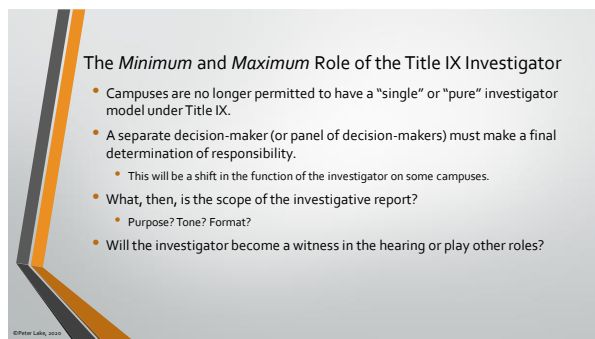


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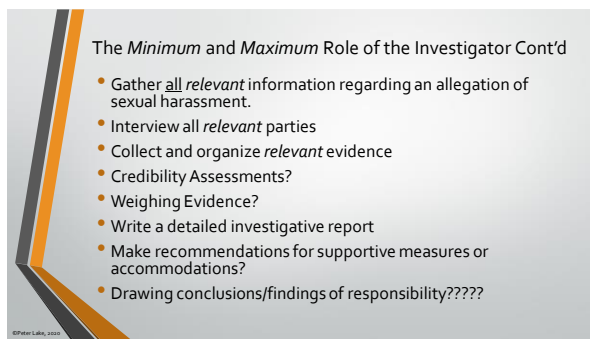
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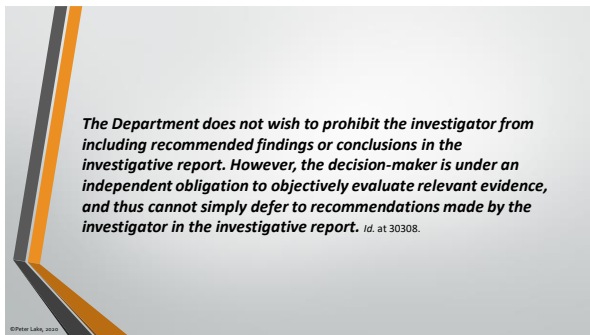


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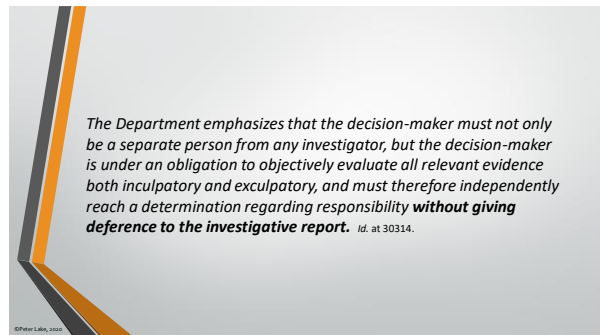


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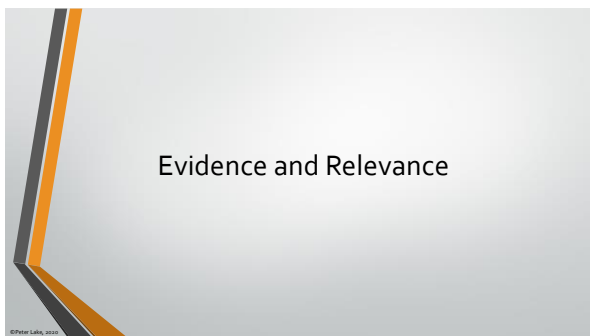




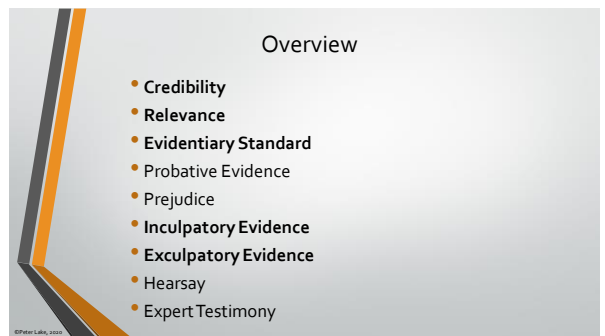
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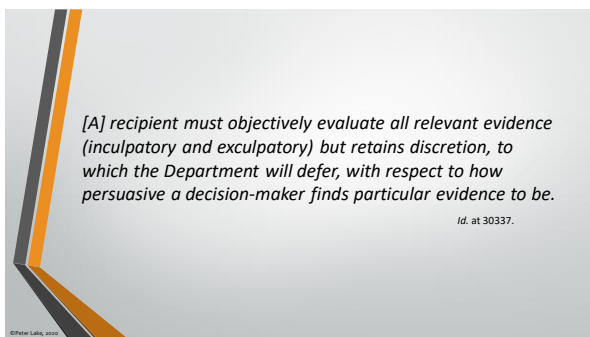
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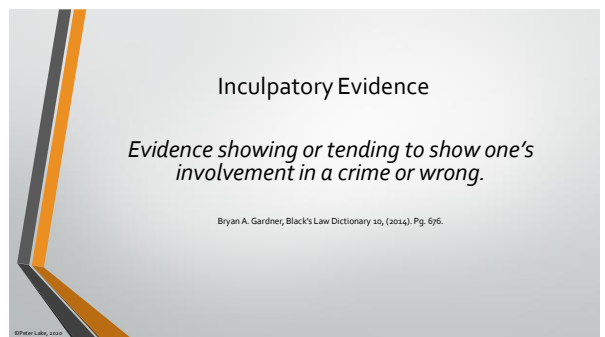
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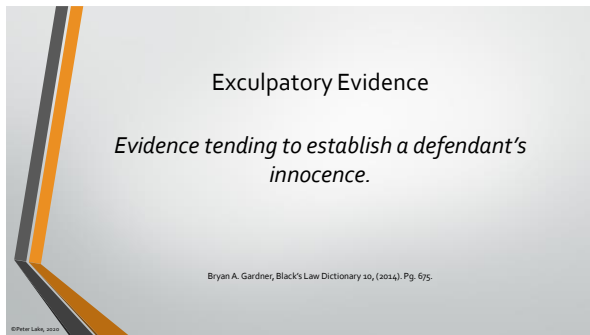
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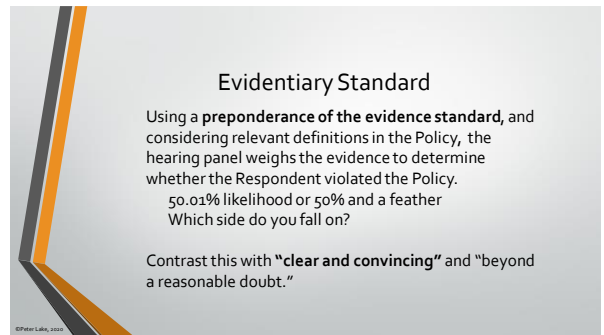
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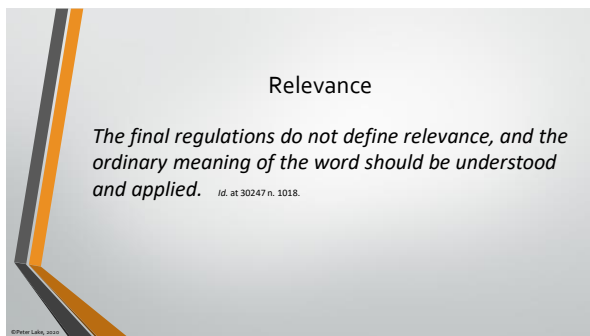
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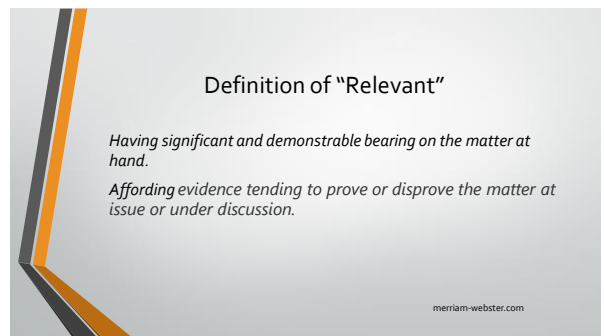
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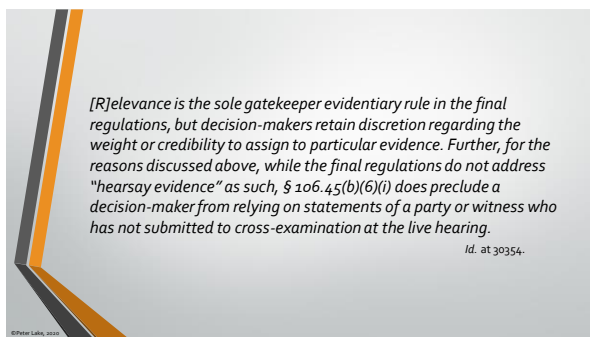
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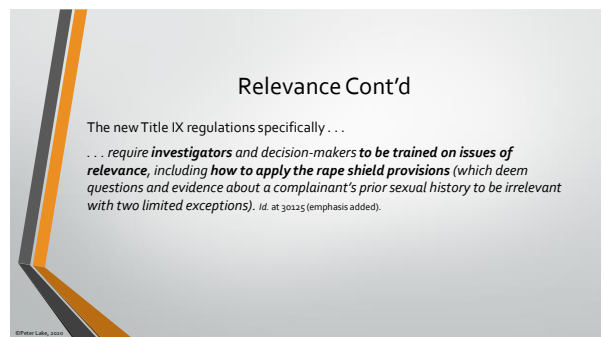
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274



275



276

## Prior Sexual History/Sexual Predisposition

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

*Id.* at 30303 (emphasis added).

## Rape Shield Language

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

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

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

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## Consent and Rape Shield Language

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

## Rape Shield Language

*[T]he rape shield language in this provision:*

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

*Id.* at 30352 (emphasis added).

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## Rape Shield Protections and the Investigative Report

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

## 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

281

282

### Credibility Determinations Cont'd

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

### Advisors and Hearings

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### § 106.45(b)(5)(iv)

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

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

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

See id. at 30299 (emphasis added).

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### "Advisors"

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

### "Witnesses" as "Advisors"

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

Id. at 30299.

## "Witnesses" as "Advisors" Cont'd

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

## "Advisors" Cont'd

How can/should advisors participate in the process?

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

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

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

289

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## § 106.45(b)(6)(i)

(6) Hearings.

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

## § 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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292

## Hearings

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

## Adopting Rules Outside of § 106.45(b)

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

293

294

### More on § 106.45

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

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

### Recipients may not...

... adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45 ...

... adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice ...

... adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege) ...

*Id.* at 30294 (internal citations omitted).

295

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### Rules for Evaluating Evidence

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

### Rules Regarding Weight and Credibility

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

*Id.* at 30294 (emphasis added).

297

298

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### Statements Not Subject to Cross Examination

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

One question that a postsecondary institution may have is **whether not relying on a party's statement—because that party has not submitted to cross-examination—means not relying on a description of the words allegedly used by a respondent if those words constitute part of the alleged sexual harassment at issue**. The answer to that question is "no."

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

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

### Prior Sexual History

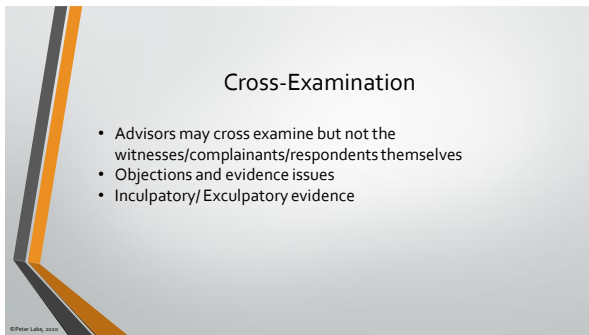
Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from **questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal courts**.

*Id.* at 30103 (emphasis added).

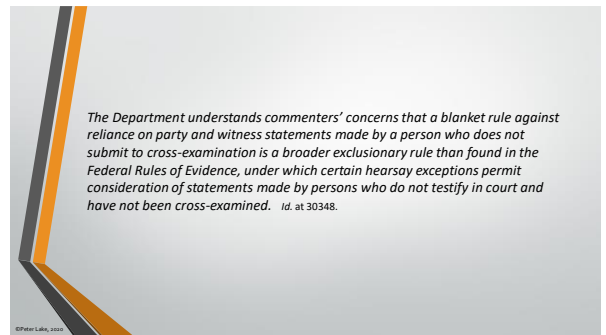
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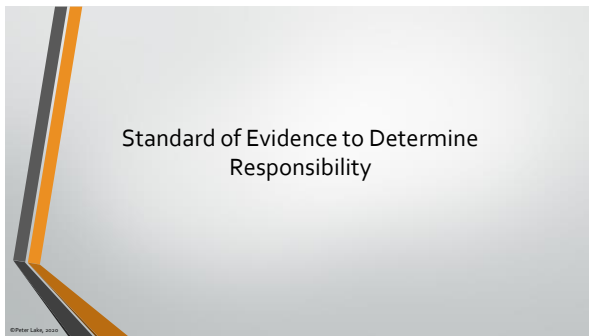




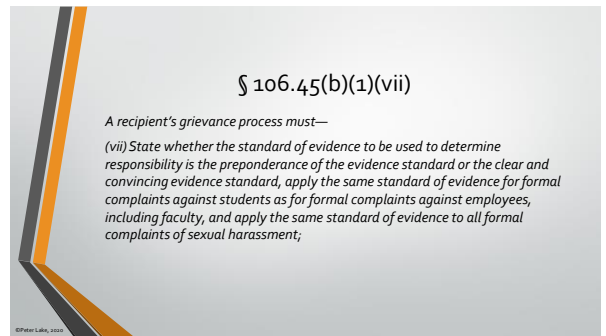
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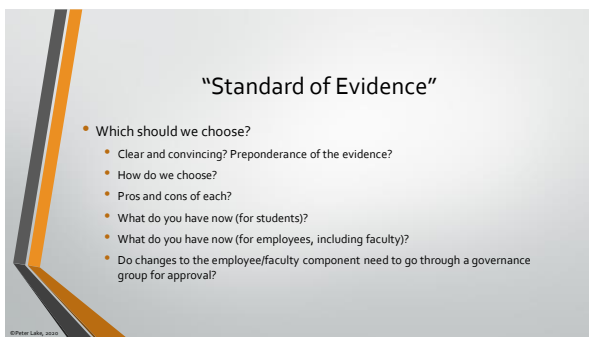
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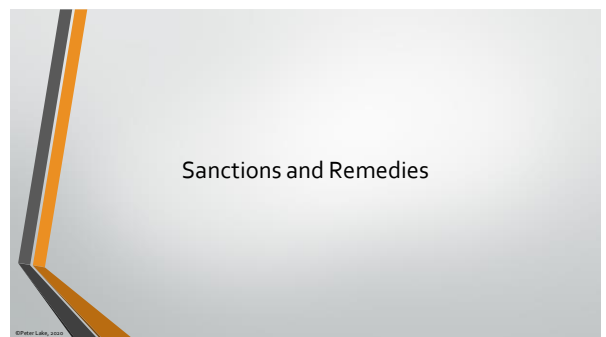
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## Sanctions

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

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

The Department acknowledges that this approach departs from the 2001 Guidance, which stated that where a school has determined that sexual harassment occurred, **effective corrective action “tailored to the specific situation” may include particular sanctions against the respondent**, such as counseling, warning, disciplinary action, or escalating consequences. . . . For reasons described throughout this preamble, the final regulations modify this approach to focus on remedies for the complainant who was victimized rather than on second guessing the recipient’s disciplinary sanction decisions with respect to the respondent. However, the final regulations are consistent with the 2001 Guidance’s approach inasmuch as § 106.45(b)(1)(i) clarifies that “remedies” may consist of individualized services similar to those described in § 106.30 as “supportive measures” except that remedies need not avoid disciplining or burdening the respondent. *Id.* at 30096 (emphasis added).

## Disciplinary Decisions/Sanctions Must Themselves Not Be Discriminatory

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

*Id.* at 30104.

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## Sanctions

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

## § 106.45(b)(1)(i)

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

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

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310

## Remedies

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

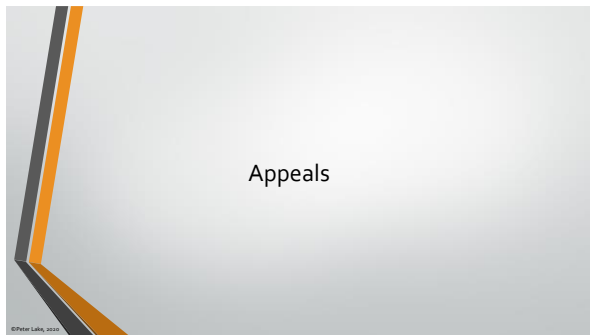
*Id.* at 30083 (emphasis added).

## Remedies

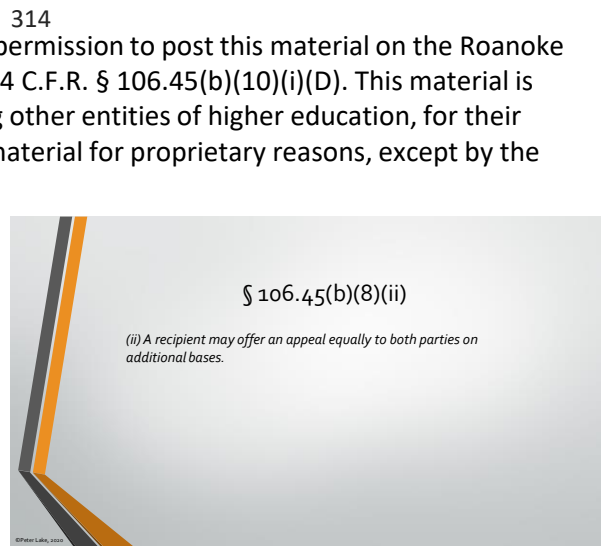
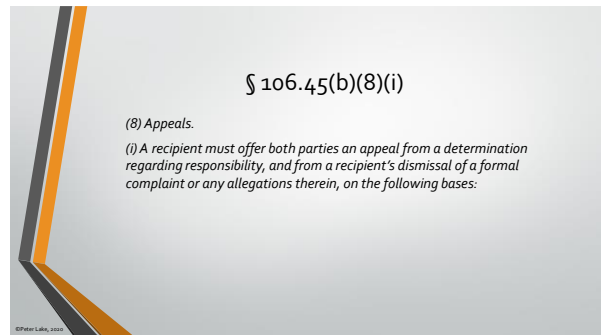
- Examples of remedies for an individual complainant
  - Can be a continuation of supportive measures (such as a no-contact order)
  - Academic accommodations/academic support services
  - Counseling services
  - Residence accommodations
- What about remedies for the broader community?
- Again, issuing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

311

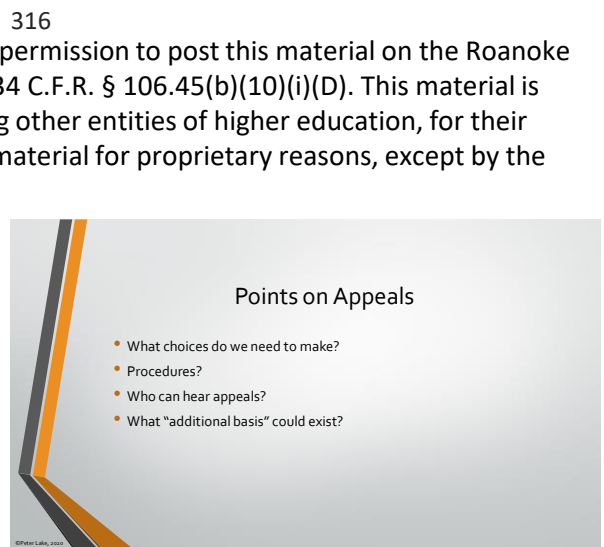
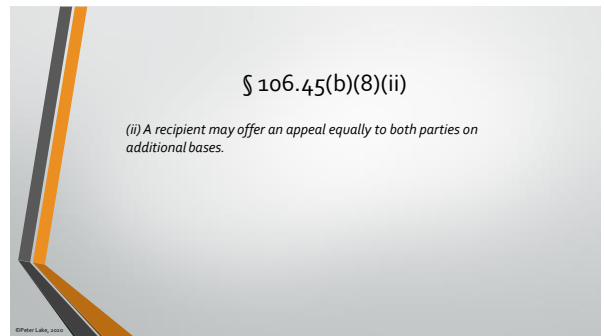
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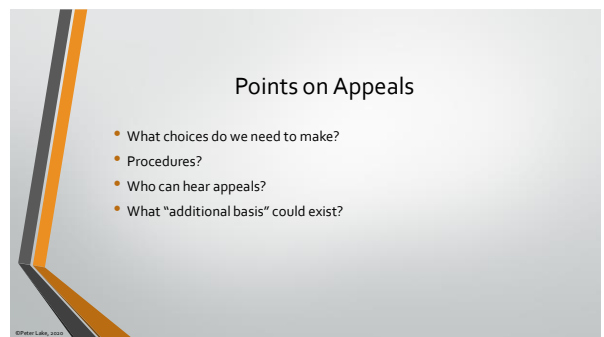
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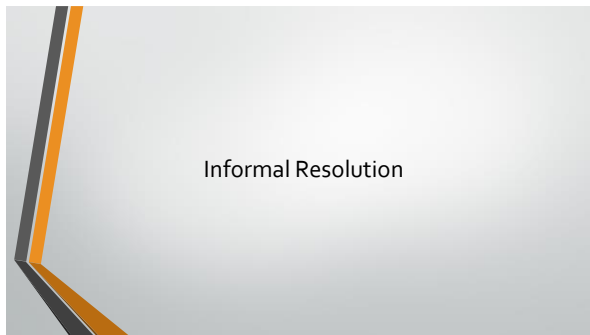
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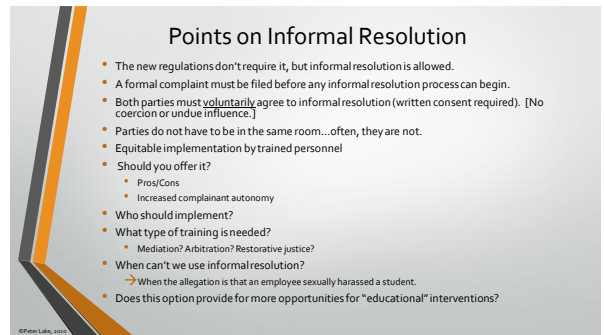
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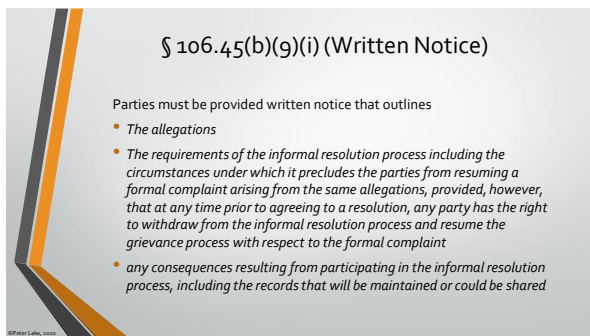
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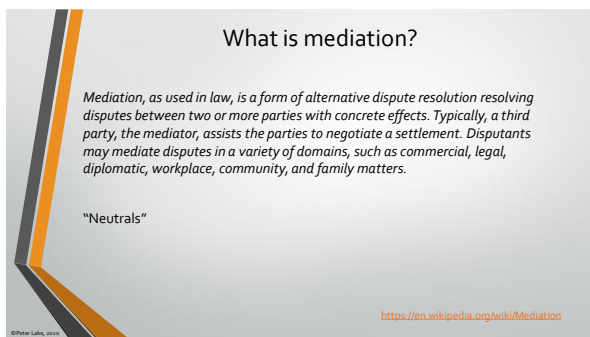
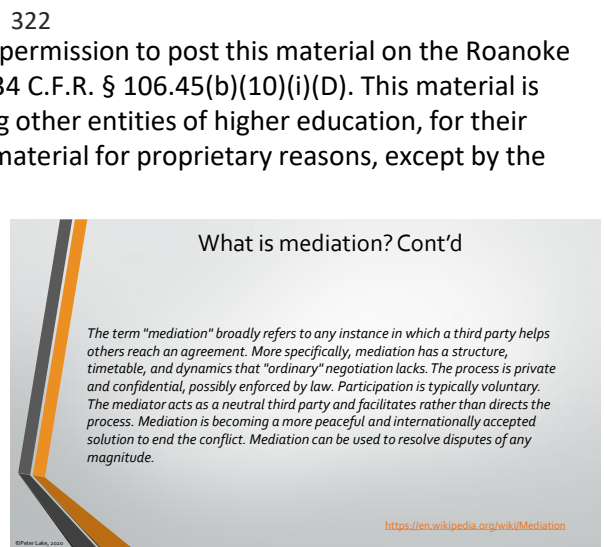
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 What is mediation?

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

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



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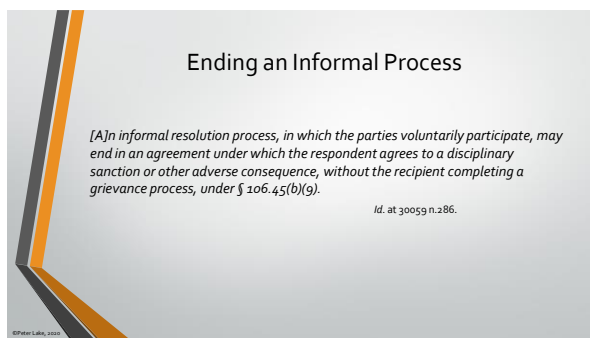


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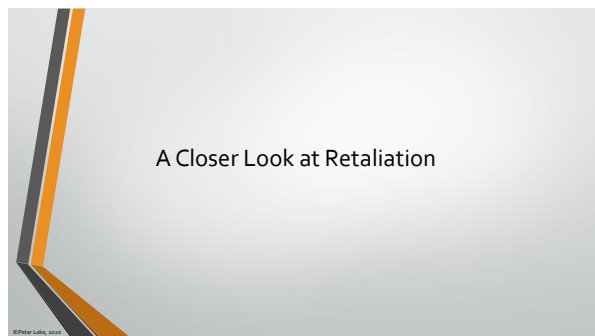


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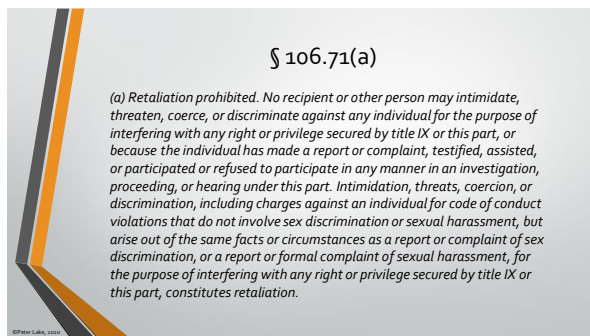


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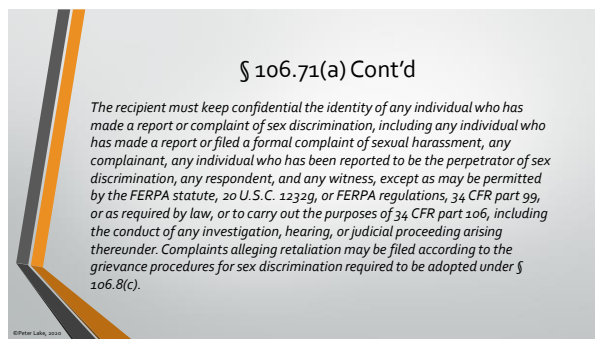


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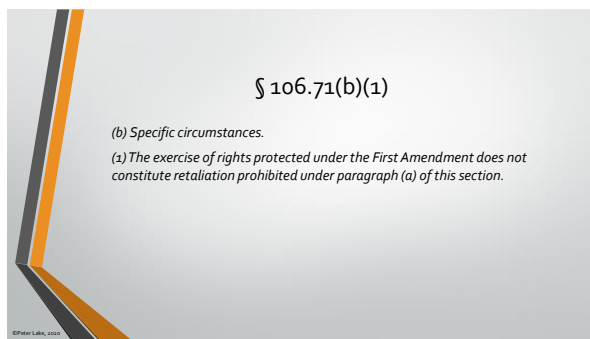
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328



329



330

### § 106.71(b)(2)

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

### Retaliation

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

331

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### Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

### Bias/Prejudice/Stereotypes/Prejudgment/Conflicts of Interest

*[S]ome complainants, including or especially girls of color, face school-level responses to their reports of sexual harassment infected by bias, prejudice, or stereotypes.*  
*Id.* at 30084.

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

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### Bias/Conflicts of Interest

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

*Id.* at 30103 (emphasis added).

### "Bias" in *Ikpeazu v. University of Nebraska*

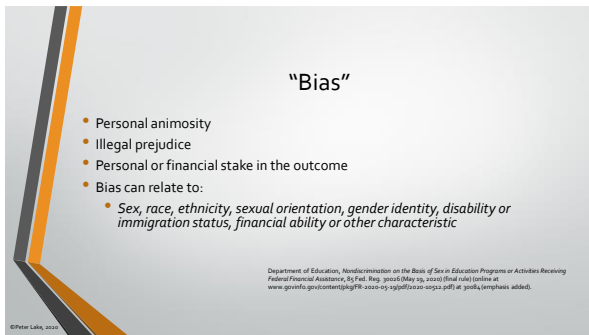
*With respect to the claim of bias, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as **personal animosity, illegal prejudice, or a personal or financial stake in the outcome** can be proven. . . . The allegations Ikpeazu makes in support of his bias claim are generally insufficient to show the kind of actual bias from which we could conclude that the committee members acted unlawfully.*

*Ikpeazu v. University of Nebraska*, 775 F.3d 250, 254 (8th Cir. 1985) (internal citations omitted).

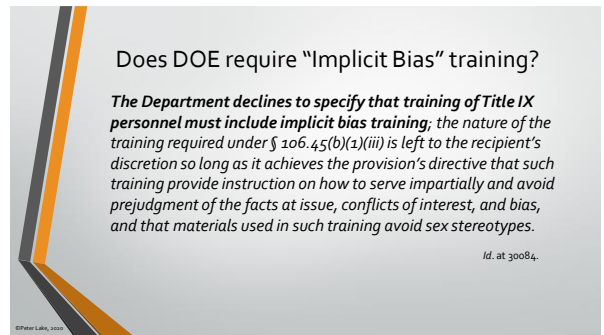
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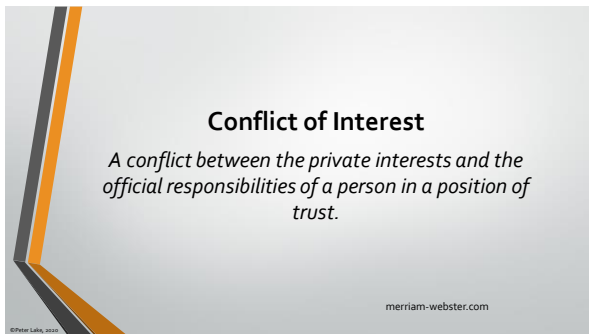




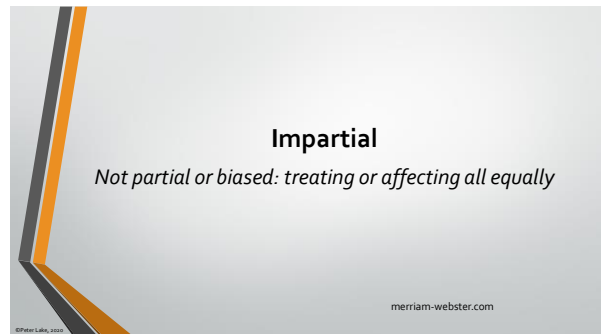
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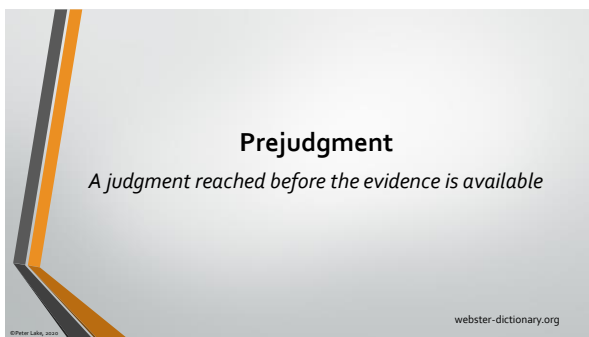
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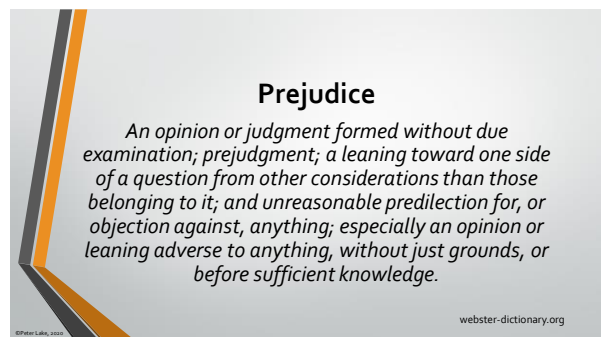
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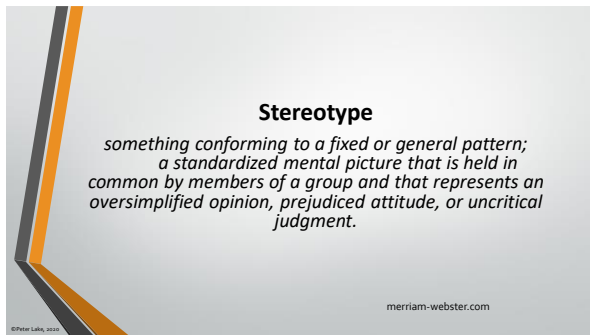
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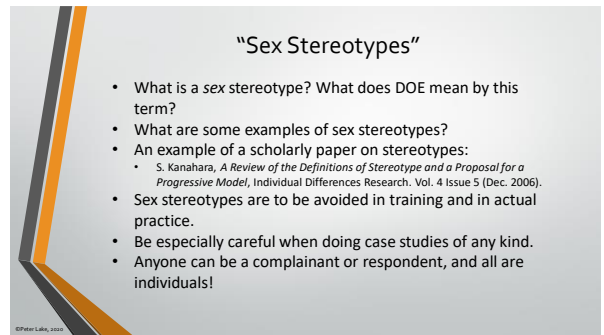
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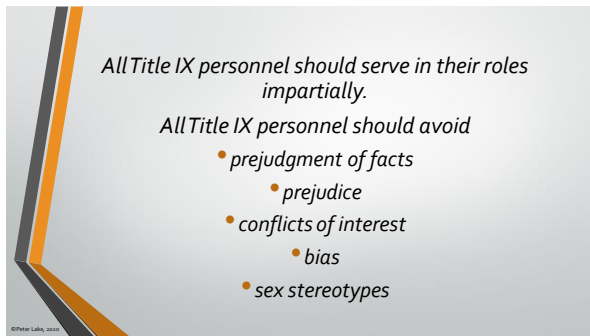
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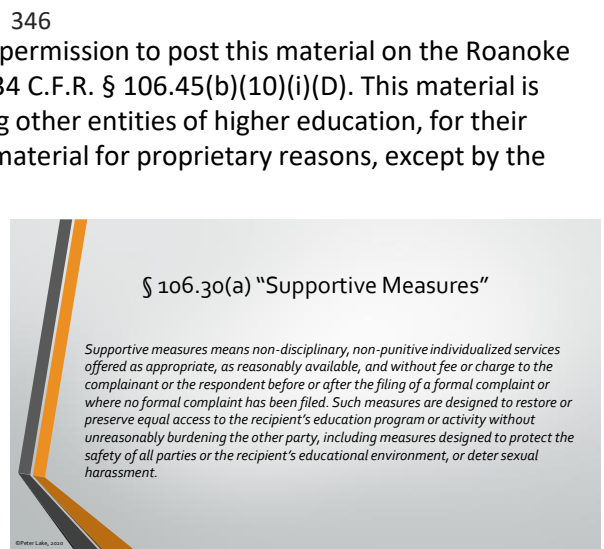
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Whose side are you on as a Title IX operative?

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



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347

348

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

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

### § 106.44(a) Cont'd

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

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### More on Supportive Measures...

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

*Id. at 30046 (emphasis added).*

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

*Id. (emphasis added).*

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

*Id. at 30064 (emphasis added).*

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

*Id. at 30069-70 (emphasis added).*

### Supportive Measures and Respondents

*The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a perpetrator of sexual harassment or the experience of a person accused of sexual harassment. Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties. Further, supportive measures may be offered to complainants and respondents (see § 106.30 defining "supportive measures"), and § 106.45(b)(5)(iv) requires recipients to provide both parties the same opportunity to select an advisor of the party's choice. These provisions recognize that the stress of participating in a grievance process affects both complainants and respondents and may necessitate support and assistance for both parties. *Id. at 30003 n.477.**

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

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

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### Thoughts on Supportive Measures

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

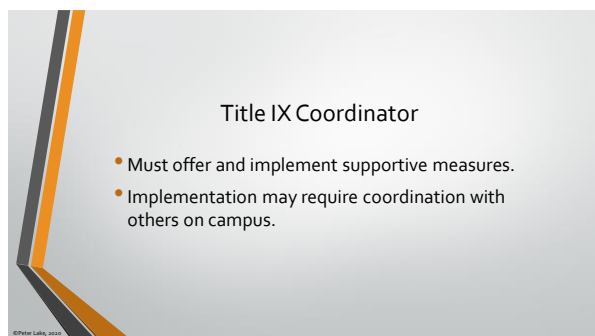
*Id. at 30521.*

### One-Way No-Contact Orders

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

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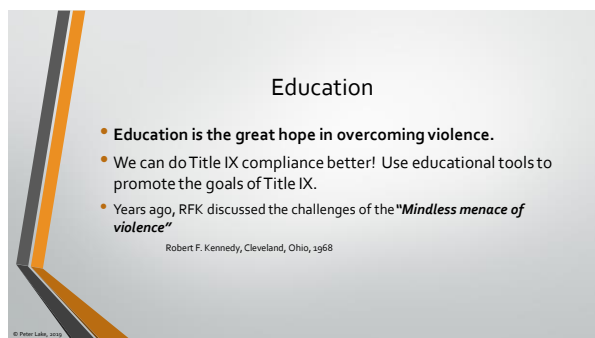


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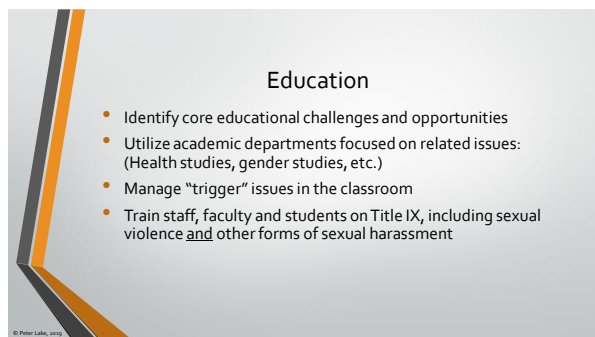
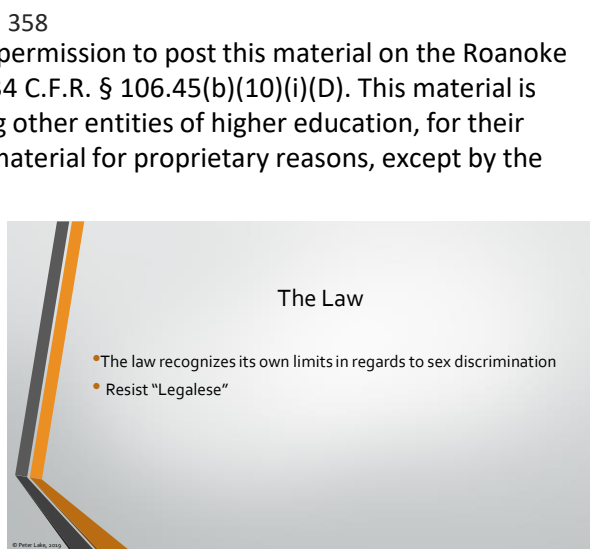
*"What we need in the United States is not violence or lawlessness; but love and wisdom, and compassion toward one another, and a feeling of justice toward those who still suffer within our country..."*

Robert F. Kennedy,  
 Indianapolis, Indiana, 1968

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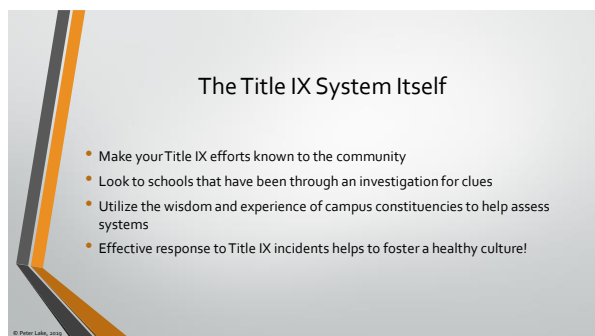


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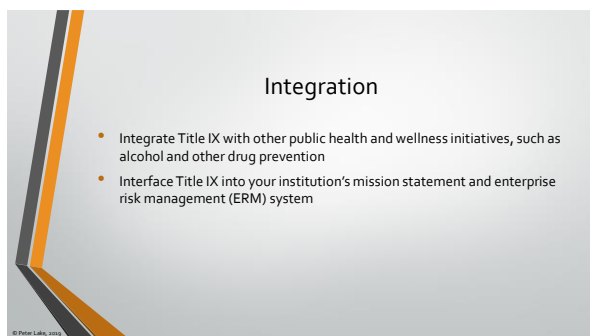


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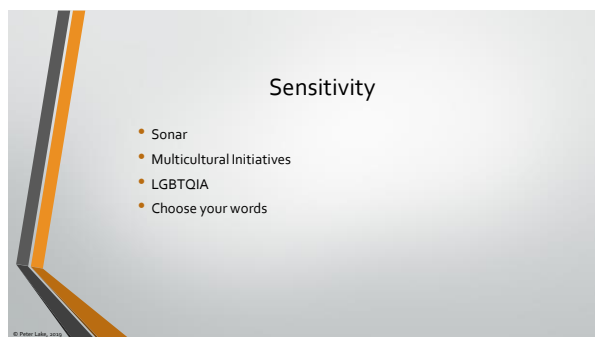
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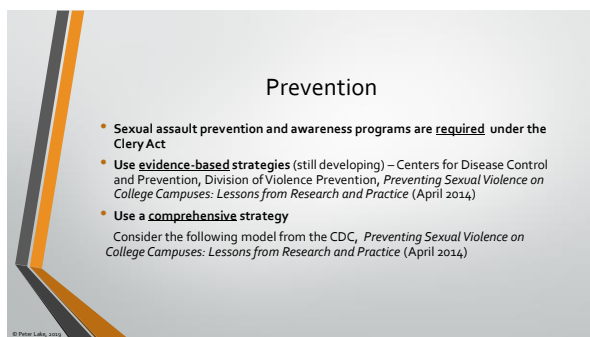
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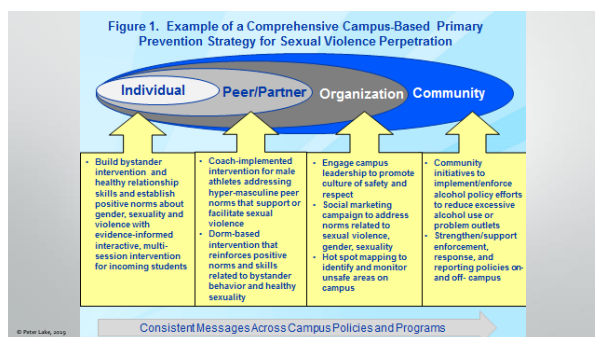
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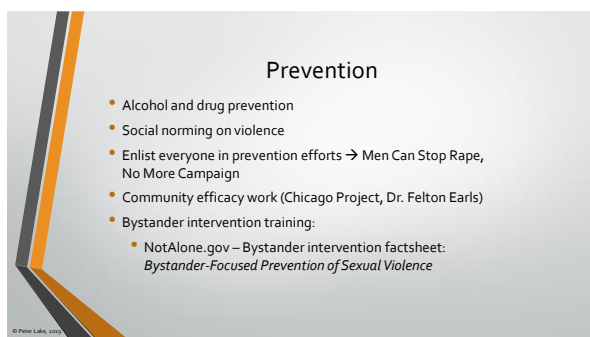
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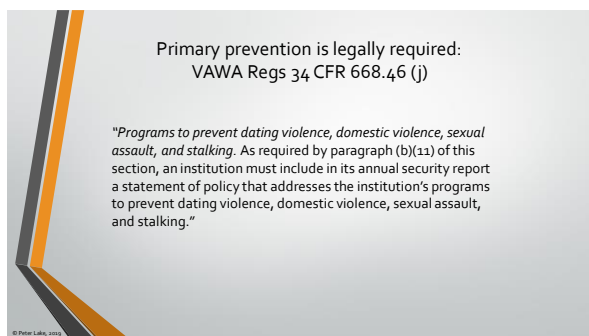
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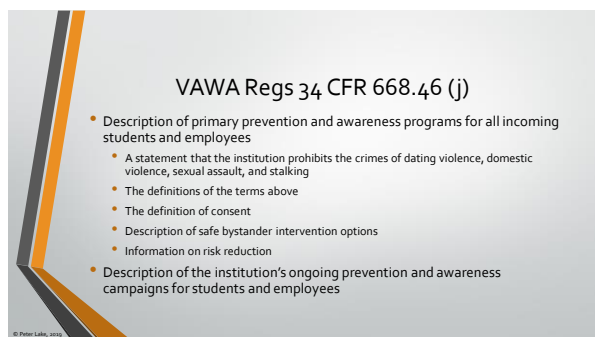


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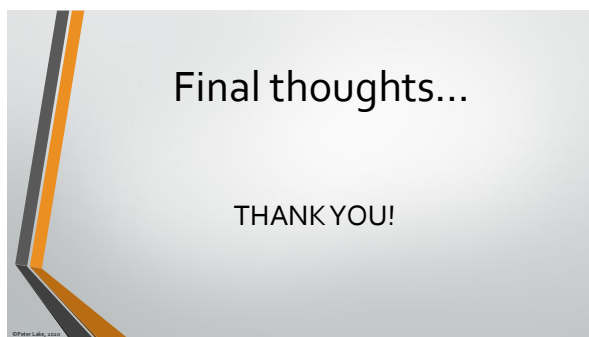


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