


**Welcome to
PBV & Title IX Policy
Issues in Higher Education**



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**Title IX, Title VII and the
Americans with Disabilities Act:
Responsibilities of Secondary
Institutions**

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DISCLAIMER

*This information is accurate as of the date of
presentation, is for informational purposes, and is
not a substitute for specific legal advice.*

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Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.

Education Amendments of 1972 20 U.S.C. § 1681 & 34 C.F.R. Part 106

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Title IX: What It Is

- Prohibits sexual harassment and discrimination based on sex within educational institutions
- Governed by the United States Department of Education Office for Civil Rights (OCR)
- Evolution: gender equity in athletics → sexual misconduct

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Title IX: What It Is Not

- Limited to athletics
- Limited to sexual assault
- Limited to women
- A recommendation

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 **Scope of Policy**

Prohibited conduct occurring:

- On campus or off-campus
- Within context of university program or activity

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 **Three Categories of Sexual Harassment**

There are three categories that meet OCR's definition of sexual harassment and must be reported:

- Quid pro quo
- Statutory
- Hostile environment

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 **Category 1: Quid Pro Quo**

- "Something for Something"
- Threats or rewards in exchange for sexual behavior
- Involves abuse of supervisory authority

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Category 2: Statutory

“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)
 “Stalking” as defined in 34 U.S.C. § 12291(a)(30)

Conduct that falls within any of these definitions must be reported.

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Consent

- Permission for something to happen or an agreement to do something
- Presence of coercion, intimidation, threats, force, incapacitation → absence of consent
- Consent to one form of sexual activity does not imply consent to other forms
- Something to consider: power dynamics and consent

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Category 3: Hostile Work Environment

“Sex-based harassment is 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.”
U.S. Department of Education

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What Does All This Mean?

NO:

- Prohibitions on participation based on sex
- Unequal funding of athletics
- Discrimination based on pregnancy
- Sexual harassment
(includes sexual assault, stalking, domestic/dating violence)

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Pregnancy and Title IX

“A recipient (of federal funds) shall not apply any rule concerning a student’s actual or potential parental, family or marital status which treats students differently on the basis of sex.”

U.S. Department of Education

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What Does This Mean?

- No discrimination against a person based on pregnancy, childbirth, termination of pregnancy, or recovery
- Cannot exclude
- Appropriate and reasonable accommodations

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 **True or False?**

Sexual assault that occurs during a university's study abroad program is covered by Title IX procedures.

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 **True or False?**

Quid pro quo must occur on more than one occasion to be actionable under Title IX.

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 **True or False?**

Sexual harassment cannot be perpetrated by a subordinate against their supervisor.

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 **True or False?**

A person cannot withdraw consent after consenting to a sexual act.

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 **True or False?**

Conduct must happen on more than two occasions in order to be “severe, pervasive, and objectively offensive.”

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 **True or False?**

Discriminating against a person because they have had an abortion is not a violation of Title IX.

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 **Responsible Parties**

- Institution
- Responsible Employees


→ Actual notice of sexual harassment or misconduct

→ What is actual notice?

- Notice of sexual harassment is given to the Title IX Coordinator or other personnel who have the authority to institute corrective measures

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 **Responsible Parties, Continued**

- **Requires** schools to investigate and address gender-based discrimination, sexual harassment, and sexual misconduct.
- Standard: must act in a manner that is not deliberately indifferent
- Under oversight of Title IX Coordinator
- **With few exceptions, ANY employee triggers requirement**
- Exceptions: licensed counselors, clergy, medical professionals

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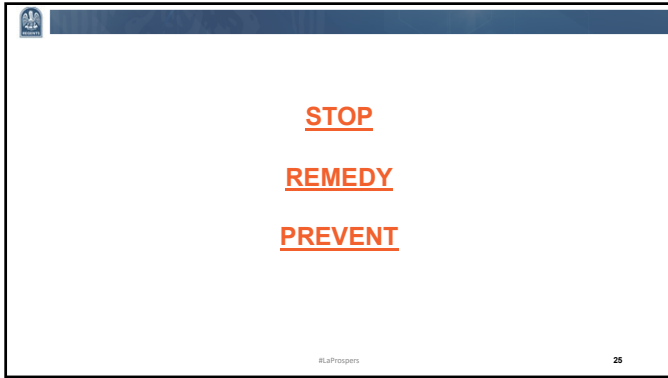
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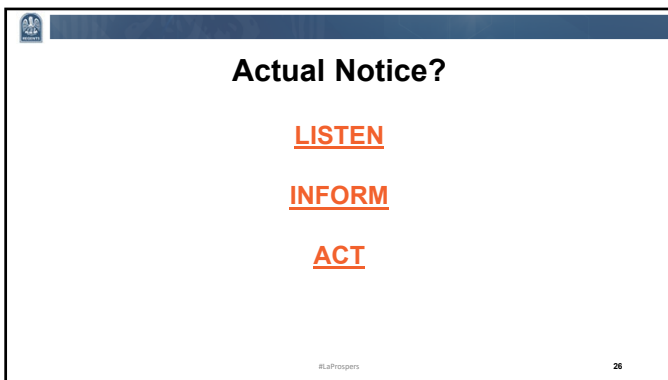
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Slide 25 features a dark blue header with a small logo on the left. The main content area is white and contains three lines of text in orange, underlined, all-caps font: "STOP", "REMEDY", and "PREVENT". At the bottom left, there is a small "#LaProspers" hashtag, and at the bottom right, the number "25" is displayed.

25



Slide 26 features a dark blue header with a small logo on the left. The main content area is white and contains the text "Actual Notice?" in bold black font at the top. Below it are three lines of text in orange, underlined, all-caps font: "LISTEN", "INFORM", and "ACT". At the bottom left, there is a small "#LaProspers" hashtag, and at the bottom right, the number "26" is displayed.

26



Slide 27 features a dark blue header with a small logo on the left. The main content area is white and contains the text "Listen" in bold black font at the top. Below it is a bulleted list with three items: "• No judgment", "• Be cognizant of revictimization", and "• Get just enough information". At the bottom left, there is a small "#LaProspers" hashtag, and at the bottom right, the number "27" is displayed.

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Inform

- Your obligation – to report
- Option to report to someone who can maintain confidentiality
- Resources: counseling services, student health services, clergy, Title IX office
- Civil/criminal complaints

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Act

“When a responsible employee knows or reasonably should know of possible sexual misconduct, the Office of Civil Rights deems an institution to have notice of the sexual misconduct.”

- Report to Title IX Coordinator
 - *What to report:*
Identity of Complainant
Identity of Respondent
Alleged misconduct
Details (date, time, witnesses, etc.)

U.S. Department of Education

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Constructive Notice is back y'all! (Probably)

Evolution:
 Constructive notice →
 Actual notice (current) →
 Constructive notice (*proposed* Title IX regulations)

What does constructive notice mean?
 → Responsible employee knew or should have known of the sexual harassment
 → Higher standard
 → Considerations

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 **Formal Complaint**

- Can be filed by Complainant or Title IX Coordinator (risk of substantial harm to community)
- Formal complaint → determination of Title IX applicability
 - If Title IX is not triggered, proceed with investigation pursuant to university's Code of Conduct

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 **Supportive Measures**

- Non-punitive, non-disciplinary, individualized services to protect safety of parties and educational environment
 - Implemented when report is made
- **Offered to both parties** (counseling referral, safety planning, academic accommodations, housing accommodations)
- Can include suspension of Respondent on emergency basis

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 **Investigation**

- Investigation requires a formal complaint by complainant or Title IX Coordinator
 - Investigators
 - Notice
 - Standard: ~60 days (but you can set your own)
 - No prohibition on discussing investigation
 - Conclusion of investigation: draft investigative report
- Parties have 10 business days to review report and submit response
 - Final report

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 **Advisors**

- Each person is allowed an advisor to be present at all meetings and proceedings
- Advisor cannot answer questions on behalf of advisee or generally cannot act as spokesperson
- Institution must provide advisor at no cost, if requested

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 **Determination**

- Hearing panel/Decisionmaker determines outcome
- Title IX Coordinator is responsible for implementation of sanctions
- Sanctions/corrective actions – suspension, warning, expulsion/termination, psychological assessment, restrictions, revocation of admission/degree – all communicated in writing

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 **Appeal**

- Either party can appeal a decision
 - Inappropriate sanctions
 - Erroneous outcome
 - Procedural irregularity
 - Conflict of interest or bias
- New evidence not previously available

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Resolution Options

- **Informal** – not all cases are appropriate for this.
→ Cannot be used when it involves teacher and student, for example.
→ Parties work with professional to reach resolution.
- **Formal** – possible violation of Title IX
→ Hearing

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Responsibility of a Title IX Coordinator

Oversee “all complaints of sex discrimination and identifying and addressing any patterns or systemic problems that arise during the review of such complaints.”

U.S. Department of Education

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Retaliation

Cannot retaliate against a person who made a complaint or participated in an investigation

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Title IX vs. Title VII (Civil Rights Act of 1964)

- **Title IX** prohibits sex-based employment discrimination in schools, education programs, and activities that receive federal funding.
 - **Governed by:** Office for Civil Rights, U.S. Department of Education
 - **Bottom line:** equal access for students regardless of gender
- **Title VII** prohibits discrimination in the workplace, which includes discrimination based on sex.
 - **Governed by:** Equal Employment Opportunity Commission
 - **Bottom line:** equal treatment of employees and prohibition against discrimination for those belonging to protected classes (race, color, sex, religion, and national origin)

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History of Title VII

- Title VII of the Civil Rights Act of 1964
- Unlawful to discriminate against a person (employee) based on race, color, religion, sex, or national origin.
- Evolution of application
 - Years of disagreement about applicability to and protection of employees who identify as gay or transgender. Historically, courts interpreted Title VII's prohibitions on discrimination in employment based on an individual's race, color, religion, sex, or national origin as extending only to an individual's gender assigned at birth. That started to change in 1989 when the United States Supreme Court held that discrimination based on sex stereotyping is unlawful sex discrimination under Title VII.

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Title IX vs. Title VII

- Title VII applies to employees in the workplace and it is not tied to funding.
- Title IX is tied to funding and is limited to the context of education.
- Title VII is motivated by a desire to ensure equal employment opportunities.
- Title VII comes with money damage provisions to ensure that the law is followed.
- Title IX is compliance-based although there can be damages under Title IX based on court precedent.

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Material Differences Between Title IX vs. Title VII

Standard for Legal Liability

- **Title IX:** deliberate indifference by institution to known acts of discrimination
- **Title VII:** employer did not take prompt and appropriate corrective action; employer negligence in prevention of discriminatory conduct

Jurisdiction

- **Title IX:** schools are required to act when sexual harassment or assault happens in the U.S. within an educational program or activity
- **Title VII:** a school can be held responsible for extra-territorial sexual harassment

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Material Differences Between Title IX and Title VII

Informal resolution

- **Title IX:** acceptable form of resolution as long as both parties consent in writing
Exception: allegations involving employee and student in sexual harassment and sexual assault cases
- **Title VII:** no specific guidance, although informal resolution is permitted

Hearing format

- **Title IX:** recording or transcript required; provide live hearings for formal complaints of sexual harassment and sexual assault
- **Title VII:** no such requirements in this capacity
- **Title IX:** cross-examination must be performed orally and by the party's advisor, it cannot be by a party
- **Title VII:** no such requirements in this capacity

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Material Differences Between Title IX and Title VII

Consequences

- **Title IX:** withdrawal of federal funding, no authority for suits against individual school officials
- **Title VII:** no authority for suits against individual school officials

Document retention

- **Title IX:** records must be maintained for seven years
- **Title VII:** no specific guidance on this → prudent to ensure records are preserved in the event of an EEOC charge or lawsuit

Litigation

- **Title IX:** no requirement that administrative remedies are pursued first, no statute of limitations → lawsuit?

State statute of limitations

- **Title VII:** administrative remedies (EEOC) and right to sue letter prior to lawsuit, normally 180-300 days after alleged misconduct
- **Title IX:** no limit on monetary damages
- **Title VII:** cap on monetary damages

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Evolving Distinction Between Title IX and Title VII: Hostile Work Environment

Title VII: [conduct that is] "severe, pervasive, or objectively offensive..."

Title IX: [conduct that is] "so severe, pervasive, and objectively offensive..."

Proposed Title IX regulations

- Broader definition → investigation under more circumstances
- Discrimination based on sex is prohibited if it is "sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively or objectively, it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (Proposed Rule § 106.2).

May 2020 regulations

- Narrowed definition
- Discrimination based on sex is prohibited only when it is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."

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Employees and the Title IX Process: Yes or No?

- Can employee complaints initiate a formal complaint and trigger the formal grievance process requirements under Title IX?
- Can employees be respondents in a Title IX complaint initiated by a student?
- Can employees be subject to the grievance process under Title IX if a formal complaint is filed against them by a student?
- Can a Title IX Coordinator dismiss a formal complaint if an employee-respondent is no longer employed by the school?

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Title IX and Title VII: Preemption

Circuit splits
First, Third, and Fourth Circuits: Title IX not preempted by Title VII

United States Supreme Court: silent

Fifth Circuit (Louisiana)

- **Congress:** purpose of Title VII is to adjudicate cases of employment discrimination versus purpose of Title IX is to enable federal agencies to withdraw funding when instances of employment discrimination occurs
- **Bottom line:** Title IX to bolster and support Title VII where applicable, not supersede
- Employment discrimination based on sex → Title VII preempts Title IX

"We are not persuaded that Congress intended that Title IX offer a bypass of the remedial process of Title VII. We hold that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995)

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Balancing Title IX and Title VII

Process claims where actionable

- Learn more information? Adjust course of action accordingly.
- Stop and restart? Yes.

Process claims through Title IX grievance process AND Title VII grievance process as applicable

- Considerations for litigation: timing of filing, available monetary remedies, question of preemption

Bottom line: there is no inherent conflict; comply with both.
U.S. Department of Education

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Bostock v. Clayton County

Bottom line: pursuant to Title VII, employees are protected against discrimination based on sexual orientation or gender identity

District Court & Eleventh Circuit holding

- no discrimination based on sexual orientation

Supreme Court holding

- discrimination based on sexual orientation violates Title VII of Civil Rights Act of 1964 and is discrimination "because...of sex"
- "[a]n employer who fires an individual merely for being gay or transgender defies the law."
- Violations of Title IX based on sexual orientation and gender identity – could be considered gender discrimination under Title IX
- Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020)*

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Adams v. St. John

Bottom line: "...separating school bathrooms based on biological sex passes constitutional muster and comports with Title IX."

School board policy → violation of constitutional equal protection rights and Title IX?

District Court holding

- School board policy violated Equal Protection Clause of Fourteenth Amendment and Title IX

11th U.S. Circuit Court of Appeals holding

- Three judge panel
- Did not reach Title IX issue
- Ruling on narrower grounds
- En banc
- School board policy did not violate constitutional equal protection rights of student
- Policy did not violate Title IX

Drew Adams v. School Board of St. Johns County, Florida, No. 18-13592 (11th Cir. 2022)

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U.S. Department of Education’s 2022 Proposed Amendments to Its Title IX Regulations

Bostock parallel
 → “impossible to discriminate against a person” based on sexual orientation or gender identity without “discriminating against that individual based on sex.”

Protections against all forms of sex discrimination expansive
 → Title IX protections against sex discrimination apply to sexual orientation and gender identity

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Transgender Student-Athletes

Lia Thomas
 Uniform eligibility criteria → Transgender student-athlete participation determined on a sport-to-sport basis, according to the policy of the national governing body (or international federation policy) of each sport (2022)
 → Alignment with International Olympic and Paralympic and United States Olympics Committees

Transgender student-athletes:
 → Document testosterone levels

Title IX
 → Intention to initiate separate rulemaking process for transgender student-athletes → pending
 → Proposed set of Title IX rules: includes sexual orientation and gender identity as protected classes
 Trajectory: public comment → litigation → congressional review

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NCAA – Transgender Student-Athletes

Opposition and support of transgender student-athletes’ participation in sports

Political implications

Then and now
 → Then: did not require degree of consistent testing
 → Now: possible excessive testing
 → Then: NCAA policy required transgender women to have a year of testosterone suppressants to compete
 → Now: transgender student-athletes must undergo and provide results of testosterone testing at beginning of season, six months after, and four weeks before championships

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Transgender Student-Athletes in Louisiana

18th state to ban transgender women and girls from participating in female sports
 → What about transgender men?

Fairness in Women's Sports Act
 → Became law August 1, 2022
 → Requires designation of team participants according to biological sex
 → Application: Public universities and private universities that receive public funds
 → Allows lawsuits against transgender women who play on female sports teams and protects whistleblowers

Governor John Bel Edwards did not sign or veto bill

State law versus NCAA guidelines

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Title IX Athletic Rule

- USDOE stated it would engage in a separate rule-making process regarding Title IX and athletics
- No proposed rule yet
- Proposed rule >>> Notice and comment period >>> Final rule
- Bottom line – it might be a while!

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The Americans with Disabilities Act of 1990

Protects persons with disabilities within educational institutions
 → "Person with a disability means a person with a physical or mental impairment that substantially limits a major life activity; has a record of such an impairment; or is regarded as having such an impairment."

Title II – publicly funded universities

Title III – privately funded schools, covers places of public accommodations

Section 504 of the Rehabilitation Act of 1973 – all public or private institutions that receive federal funding are required to make their programs accessible to those with disabilities

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Service Animals & Emotional Support Animals

Emotional support animal ≠ Service animal

Emotional support animals

- Often used in furtherance of medical treatment
- Not considered service animals
- Not limited to dogs
- Are not specially trained to perform tasks for the benefit of people with disabilities
- Not covered by federal law

Service animal definition (Title II and III)

- A dog that is trained to work for the benefit of an individual with a disability of any kind.
- Limited to dogs, generally (exception: miniature horses)

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Service Animals

- Not required to be professionally trained
- Must be fully trained, cannot be in-training
 - Educational institutions cannot ask for proof of certification documentation as a condition for animal's entry
- Service animals are not required to wear identification
- Educational institutions are not required to supervise or care for service animals
- Staff may ask if dog is a service animal, is required because of a disability, and what work the dog has been trained to perform
 - NOT permitted: requesting documentation for the dog, requesting the dog demonstrate work, or requesting information about the disability

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Limitations of Service Animals

- Legitimate safety requirements – i.e., service animal is out of control
- If the presence of a service animal fundamentally alters the nature of a service or a program

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Emotional Support Animals

- Fair Housing Act (FHA) applies to dormitories and student housing facilities
- Assistance animal = service animal or emotional support animal
 - Does not have to be trained to perform a specific task
 - Can provide emotional support that alleviates one or more identified symptoms or effects of a person's disability
 - Not a pet!
- If only an emotional support animal, must remain in dormitory/housing facility
- Documentation required to substantiate the disability alleviated by the emotional support animal

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Emotional Support Animals

- Animal must be under control or, if out of control, owner takes effective action to control it
- Animal must be housebroken
- Animal must not pose a direct threat to the health and safety of others that cannot be eliminated or reduced to an acceptable level by a reasonable modification to other policies, regulations, practices, and procedures

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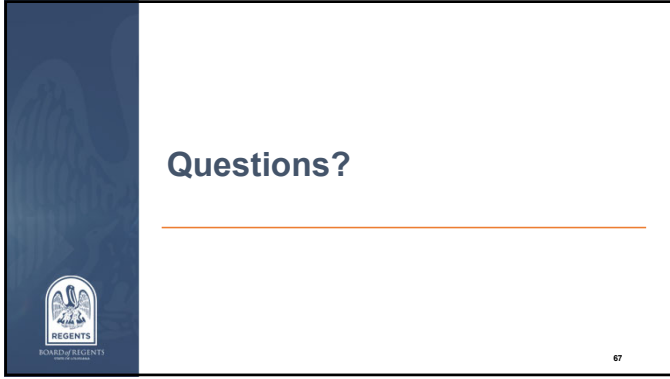
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Bottom Line


- **Err on the side of caution**
- **Document, document, document**
- **Familiarity with regulations, laws, policies, and procedures**
- **Holistic compliance & education**

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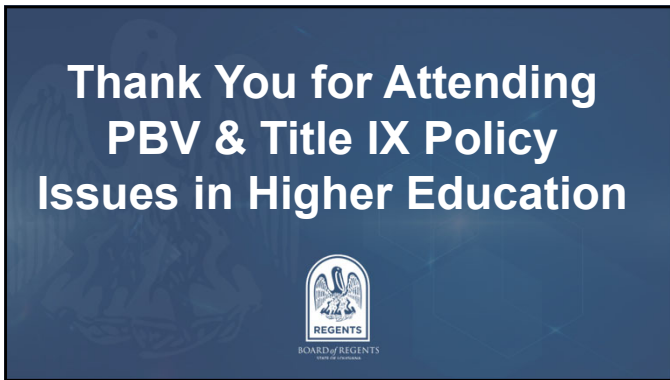


Questions?




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