



BOLDLY TRANSFORMING HIGHER EDUCATION

Critical Issues for Title IX: Four-Part Webinar Series
Session 1: Critical Issues for Title IX Coordinators
 October 20, 2020

Peter Lake & Julian R. Williams

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ACPA – College Student Educators International is the leading comprehensive student affairs association that advances higher education and engages students for a lifetime of learning and discovery. Although serving an international audience, our membership is primarily from the United States and our offices are headquartered in Washington, D.C. at the National Center for Higher Education.

Related to our mission of supporting and fostering learning through the generation and sharing of knowledge, ACPA acknowledges the painful history of genocide in the United States for native, aboriginal, and indigenous peoples. We honor and respect the many and diverse tribal nations and peoples who were forcefully removed from, as well as those still connected to, this land.

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We particularly acknowledge and recognize that the land upon which our international headquarters is located today has long served as a site of meeting and exchange amongst a number of indigenous people, including the Accohannock, Pacomake, Piscataway, Anacostank, Mattapanient, Nangemeick, Pamunkey, Tauxehent, Nanticoke, Chickahominy, Monacan, Mattiponi, Nansemond, Rappahannock, Ani-Stohini/Unami, and Assateague tribal nations as the original occupants of the Washington, D.C. region.

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Land Acknowledgement

ACPA strongly advocates for higher education and student affairs professionals to honor the land, the original tribal occupants, and the history of the place where you are located. Further, we have a responsibility to continually self-educate, reflect, and listen to the histories and people in our areas. Including tribal land acknowledgements in practice, and understanding and acknowledging history, is not only respectful and educational, it is the justice-oriented advocacy necessary for continuing the work of dismantling the devastating effects of settler colonialism in our society.

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How to Use Go To Webinar

- Conversation will be captioned and recorded
- Question box
- Questions will be answered throughout or at the end of the presentation
- Raise your hand feature

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We will take a short, 15-minute "stretch break" at approximately 2:15 pm.

6





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Please be advised: This webinar is not intended to be legal advice. Know when to consult legal counsel.

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We hope you will interact with us and ask questions!

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General Topic Areas

- Brief Overview of New Regulations
- Gatekeeping, Case Dismissal and Consolidation
- Advisors
- Informal Process
- Confidentiality
- Tuning with Other Campus Processes
- Managing Potential Litigation
- Counterclaims
- Appeals
- Question and Answer



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Brief Overview of the New Regulations



Title IX: FINAL RULE 34 CFR Part 106 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

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

Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 35 Fed. Reg. 30320 (May 19, 2020) (Final rule) (online at www.gpo.gov/interlocat/ita?pubid=2020-05-19/REG-2020-10212.pdf#st=1)



Some of the Major Changes to Title IX—FEDERAL COLLEGE SEX COURT Arrives on Campus

- Reporting requirements (fewer “mandated” reporters)
- Focus on formal complaints and actual knowledge
- New definition of “sexual harassment”
- Informal resolution—the rise of mediation?
- Jurisdiction
 - Title IX or conduct?
- Live hearing requirement (no single investigator models)
- Cross-examination by advisors
- The role(s) of advocates in college court
- Staffing
 - Title IX Coordinator
 - Title IX Investigator
 - Title IX Decision-Maker(s) (including one for appeals)—cannot be the Title IX coordinator or investigator



Some of the Major Changes to Title IX Continued

- Can use “clear and convincing” or “preponderance of the evidence”
- Can use videoconferencing for hearings (especially important in light of COVID-19)
- Retaliation is expressly prohibited.
- Training materials for Title IX coordinators, Title IX investigators, Title IX decision-makers and those involved in informal resolution must be posted to an institution’s website.
- Conflicts of interest and bias
- “Deliberate indifference” standard and *Gebser/Davis*

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§ 106.45 Grievance process for formal complaints of sexual harassment.

Summary of the 10 points under § 106.45

- Equitable treatment of parties/remedies
- Evaluation of evidence
- No bias and conflicts of interest/proper training of personnel
- **Presumption of non-responsibility of respondent until process is complete**
- Prompt timeframes
- Describe the range of possible sanctions
- State and evenly apply the evidence standard
- Provide procedures for appeal
- Describe supportive measures
- Legally-privileged information



§ 106.30 Definitions (a): “Sexual Harassment” [Three-Prong Test]

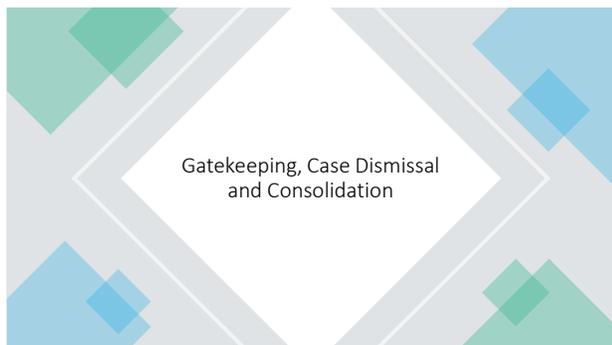
“Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (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).”

U.S. Dept. of Education, *Non-discrimination on the Basis of Sex in Education Programs or Activities Requiring Federal Financial Assistance* [FINAL RULE], at 2014–2015 (emphasis added).

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Gatekeeping, Case Dismissal and Consolidation



Title IX Coordinator/ Gatekeeping

Title IX Coordinators have always had to consider whether a report satisfies the criteria in the recipient’s policy, and these final regulations are not creating new obstacles in that regard. The criteria that the Title IX Coordinator must consider are statutory criteria under Title IX or criteria under case law interpreting Title IX’s non-discrimination mandate with respect to discrimination on the basis of sex in the recipient’s education program or activity against a person in the United States, tailored for administrative enforcement. Additionally, these final regulations do not preclude action under another provision of the recipient’s code of conduct, as clearly stated in revised § 106.45(b)(3)(i), if the conduct alleged does not meet the definition of Title IX sexual harassment.

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Assisting in Filing a Formal Complaint

Nothing in these final regulations precludes a Title IX Coordinator from assisting a complainant (or parent) from filling out a document intended to serve as a formal complaint; however, a Title IX Coordinator must take care not to offer such assistance to pressure the complainant (or parent) to file a formal complaint as opposed to simply assisting the complainant (or parent) administratively to carry out the complainant's (or parent's) desired intent to file a formal complaint. No person may intimidate, threaten, or coerce any person for the purpose of interfering with a person's rights under Title IX, which includes the right not to participate in a grievance process.

(emphasis added)



Dismissal/ Consolidation of Complaints

How and when are Title IX coordinators required or able to dismiss complaints?
Mandatory Dismissal
Discretionary Dismissal
How and when are Title IX coordinators able to consolidate complaints?
Is this a point of flexibility/choice?

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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.*

(emphasis added)



§ 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.

(emphasis added)

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§ 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.

(emphasis added)



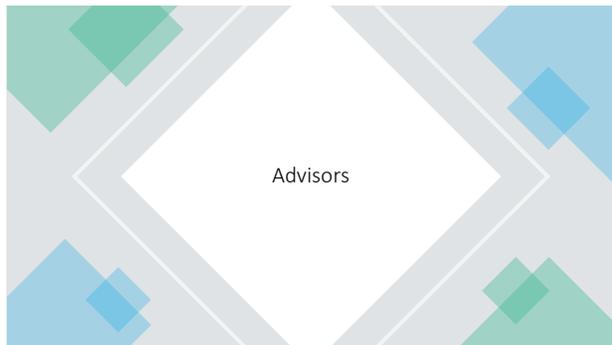
§ 106.45(b)(4)

(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.

(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.
- How are advisors designated? Changes in advisor midway through a process?

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“Advisors” Cont’d

- 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.
- Advisors conduct cross-examination. Effective representation?
 - *[P]roviding parties the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation.* Id. at 30297.
 - *Should not be viewed as practicing law, but rather “as providing advocacy services to a complainant or respondent.”* Id. at 30299.



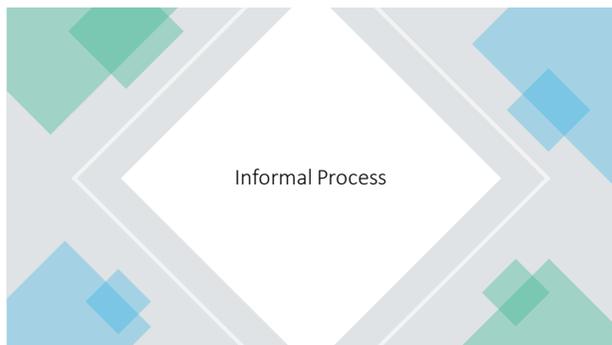
How Can/Should “Advisors” Participate in the Process?

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

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

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

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Informal Process

[A] recipient may choose to offer an informal resolution process under § 106.45(b)(9) (except as to allegations that an employee sexually harassed a student).

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Informal Process

- The new regulations don't require it, but informal resolution is allowed.
- A **formal complaint must be filed** before any informal resolution process can begin.
- Both parties must **voluntarily** agree to informal resolution (written consent required). [No coercion or undue influence.]
- Parties do not have to be in the same room...often, they are not.
- Equitable implementation by trained personnel
- Should you offer it?
 - Pros/Cons
 - Increased complainant autonomy?

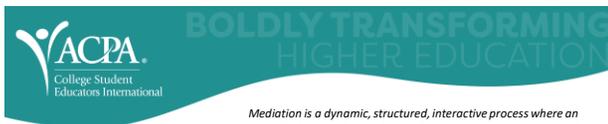


Informal Process

- Who should implement?
- What type of training is needed?
- When can't we use informal resolution?
 - When the allegation is that an employee sexually harassed a student.
- Does this option provide for more opportunities for "educational" interventions?
- "Disciplinary sanctions" as a result of informal resolution?
- The Title IX regulations allow for flexibility to choose an informal resolution process. What are the pros and cons of processes?
 - Mediation?
 - Restorative justice?

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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>



What is Mediation? Cont'd

Mediation, as used in law, is a form of alternative dispute resolution resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community, and family matters.

"Neutrals"

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

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"Neutrals"

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



What is Mediation? Cont'd

The term "mediation" broadly refers to any instance in which a third party helps others reach an agreement. More specifically, mediation has a structure, timetable, and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. Mediation is becoming a more peaceful and internationally accepted solution to end the conflict. Mediation can be used to resolve disputes of any magnitude.

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

What is Mediation? Cont'd

Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training. As the practice gained popularity, training programs, certifications, and licensing followed, which produced trained and professional mediators committed to the discipline.

- JAMS
- American Arbitration Association (AAA)
- American Bar Association, ADR Section
- Association for Conflict Resolution (ACR)
- CFR Institute for Dispute Resolution
- National Association for Community Mediation

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

What is Restorative Justice?

A restorative justice program aims to get offenders to take responsibility for their actions, to understand the harm they have caused, to give them an opportunity to redeem themselves and to discourage them from causing further harm. For victims, its goal is to give them an active role in the process and to reduce feelings of anxiety and powerlessness. Restorative justice is founded on an alternative theory to the traditional methods of justice, which often focus on retribution. However, restorative justice programs can complement traditional methods.

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

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What do the new Title IX regulations say about Restorative Justice?

With respect to the implications of restorative justice and the recipient reaching a determination regarding responsibility, the Department acknowledges that generally a critical feature of restorative justice is that the respondent admits responsibility at the start of the process. However, this admission of responsibility does not necessarily mean the recipient has also reached that determination, and participation in restorative justice as a type of informal resolution must be a voluntary decision on the part of the respondent.

Id. at 30406 (emphasis added).

What do the new Title IX regulations say about Restorative Justice?

Therefore, the language limiting the availability of an informal resolution process only to a time period before there is a determination of responsibility does not prevent a recipient from using the process of restorative justice under § 106.45(b)(9), and a recipient has discretion under this provision to specify the circumstances under which a respondent's admission of responsibility while participating in a restorative justice model would, or would not, be used in an adjudication if either party withdraws from the informal process and resumes the formal grievance process.

Id. at 30406 (emphasis added).

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What do the new Title IX regulations say about Restorative Justice?

Similarly, a recipient could use a restorative justice model after a determination of responsibility finds a respondent responsible; nothing in the final regulations dictates the form of disciplinary sanction a recipient may or must impose on a respondent.

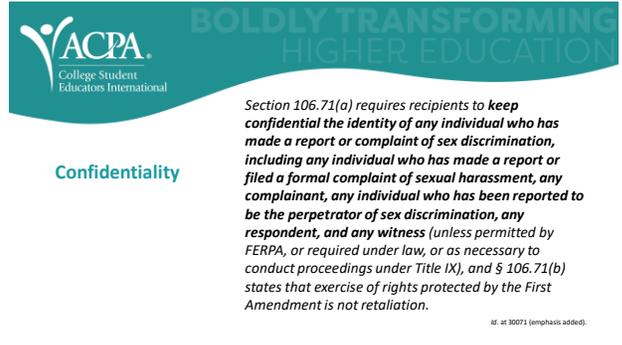
Id. at 30406 (emphasis added).

Restorative Justice vs. Mediation

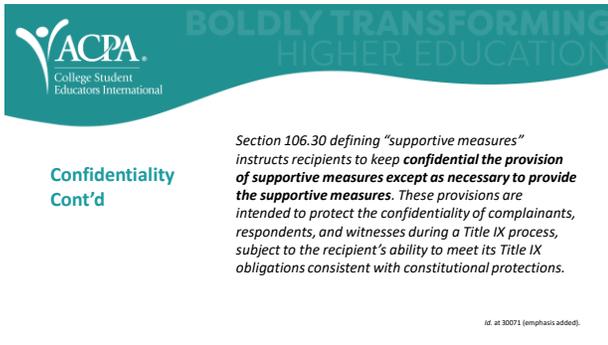
<u>Mediation</u>	<u>Restorative Justice</u>
<ul style="list-style-type: none"> • Dispute doesn't necessarily have to cause a harm, can be just a disagreement • One party doesn't have to admit wrongdoing/ parties are treated as moral equals • Focuses on coming to an agreement • settlement-driven • Not necessarily focused on emotional needs of the parties 	<ul style="list-style-type: none"> • A party has been harmed/ victimization has occurred • The offending party must admit to wrongdoing before the process begins • Focuses on reparations and looks to improve future behavior • dialogue-driven • Very focused on the emotional needs of the victim/victim empowerment



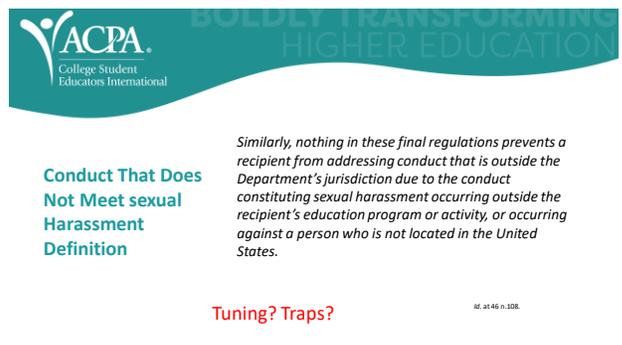
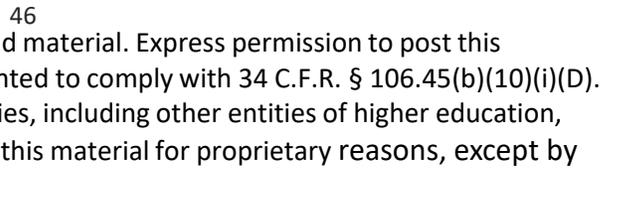
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Nothing in the final regulations precludes a recipient from applying the § 106.45 grievance process to address sexual assaults that the recipient is not required to address under Title IX.

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

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

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Classroom Behavior

Who is a "teacher" and what is a "classroom?"
Are teachers prohibited from addressing serious violations at the time they are occurring?

Nothing in the final regulations reduces or limits the ability of a teacher to respond to classroom behavior. If the in-class behavior constitutes Title IX sexual harassment, the school is responsible for responding promptly without deliberate indifference, including offering appropriate supportive measures to the complainant, which may include separating the complainant from the respondent, counseling the respondent about appropriate behavior, and taking other actions that meet the § 106.30 definition of "supportive measures" while a grievance process resolves any factual issues about the sexual harassment incident. If the in-class behavior does not constitute Title IX sexual harassment (for example, because the conduct is not severe, or is not pervasive), then the final regulations do not apply and do not affect a decision made by the teacher as to how best to discipline the offending student or keep order in the classroom.

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Court Activity

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



§ 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.

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Litigation Risk

- Will the new regulations cause an increased risk of litigation?
- The Department doesn't think so. For example: "[I]f recipients comply with these final regulations, these final regulations may have the effect of decreasing litigation because recipients with actual knowledge would be able to demonstrate that they were not deliberately indifferent in responding to a report of sexual harassment." *Id.* at 329.
- 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?



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?



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.

Id. at 257.

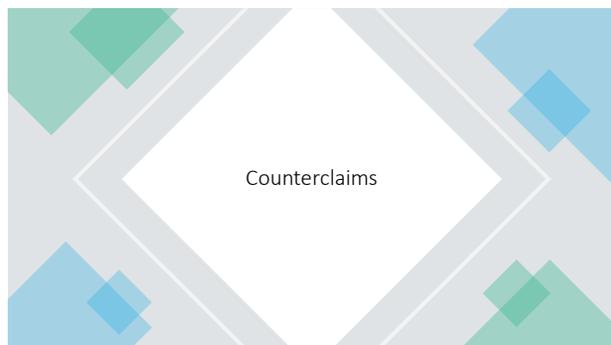
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Litigation

- Litigation potential always exists
- Follow your own policy
 - Do what you say and say what you do.
- Do not be afraid to consult with your attorney
- Equity, bias, impartiality



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Counterclaims

The Department cautions recipients that some situations will involve counterclaims made between two parties, such that a respondent is also a complainant, and in such situations the recipient must take care to apply the rape shield protections to any party where the party is designated as a “complainant” even if the same party is also a “respondent” in a consolidated grievance process.

Id. at 2022 (internal citation omitted, emphasis added).





§ 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:



§ 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.

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§ 106.45(b)(8)(ii)

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



§ 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.

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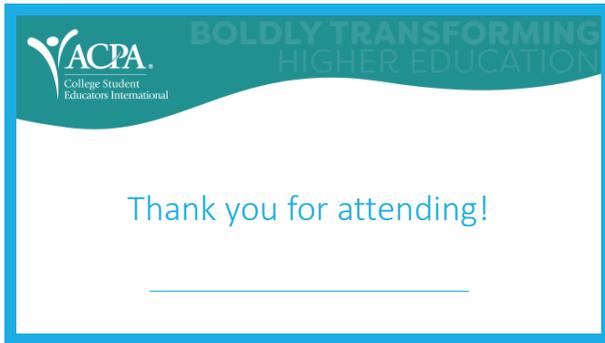


Points on Appeals

- What choices do we need to make?
- Procedures?
- Who can hear appeals?
- What "additional basis" could exist?



Questions?



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