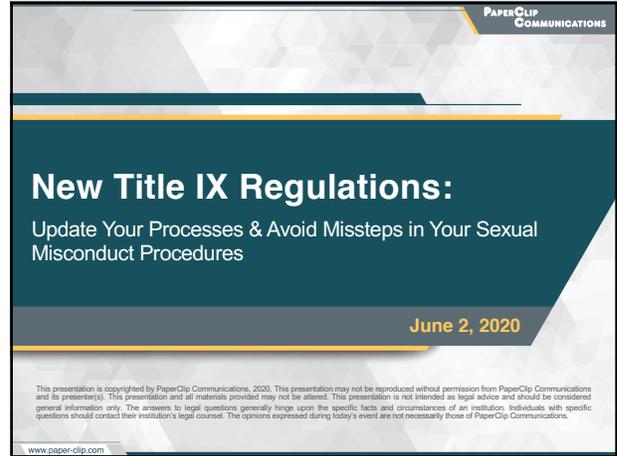
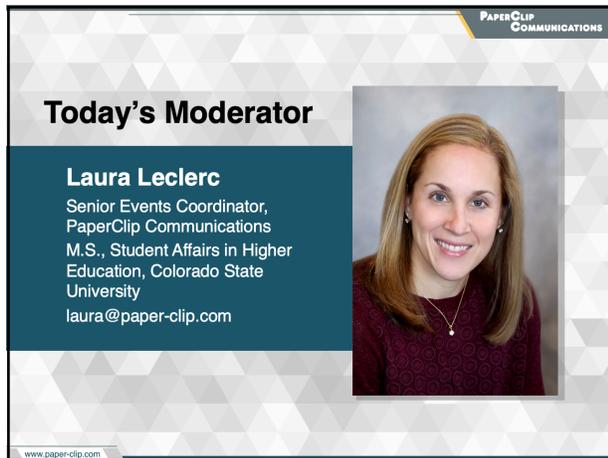




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## POLL QUESTIONS

What type of institution are you representing?

What are your primary concerns about implementing these new regulations?

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## General Considerations

- This presentation is meant to provide general information and is not intended to constitute legal advice.
- The presentation will focus on generalities, including the requirements of federal law with some allusions to state law. It is not a comprehensive legal summary.

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## General Considerations

- Legal questions should be referred to a lawyer licensed in the relevant jurisdiction who can analyze all specific facts of the case.

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## General Considerations

- What is legally required versus what is in the best interest of the students, employees, or institution should be part of your individual analysis of all of these issues.

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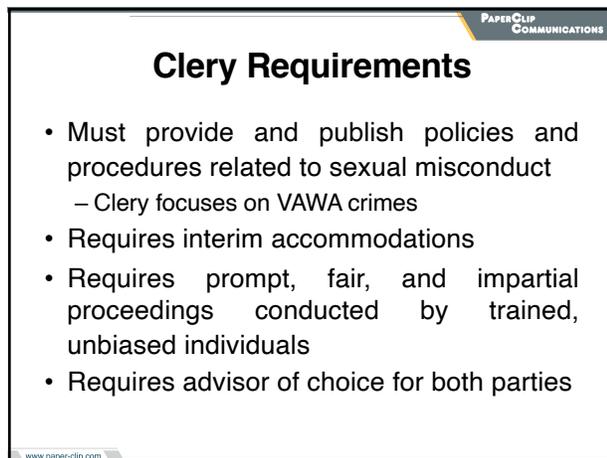
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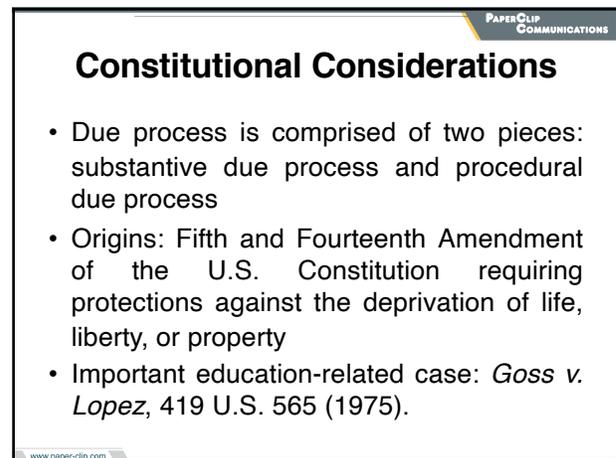
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## Active DOE/OCR Guidance

- With the issuance of interim guidance in September 2017, Secretary DeVos stated that “[t]his interim guidance will help schools as they work to combat sexual misconduct and will treat all students fairly... But the process also must be fair and impartial, giving everyone more confidence in its outcomes.”

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## Active DOE/OCR Guidance

- The September 2017 statement concluded with “...the era of rule by letter is over.”
- Initial speculation about the regulations indicated that they would include:
  - Allowance to choose evidentiary standard
  - Flexibility on appellate process
  - Formalization of evidence exchange and cross examination
  - Allowance of mediation

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## OCR COVID-19 Guidance

- Q and A document issued May 12, 2020
- Listed several considerations for institutions regarding ongoing operations during the current pandemic, including:
  - Disability accommodation requirements
    - Resource provision related thereto
      - Sign language versus closed captioning
  - Continuity of Title IX cases

“Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency.”

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## OCR COVID-19 Guidance

- Under question 5, the document states that “[i]nstitutions may not...adopt a blanket policy putting all investigations or proceedings on hold until campuses resume normal operations, or a policy of refusing to accept and respond to new complaints. Instead, institutions should make a good faith effort (and document the steps the institution took) to respond promptly and effectively to reports of discriminatory harassment...”

“Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency.”

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## OCR COVID-19 Guidance

- Under question 5, the document continues: "...and to conduct fair, impartial investigations of student and employee complaints of such harassment in a reasonably timely manner, while also taking into consideration the health, safety, and well-being of all their students and staff."

"Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency."

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## OCR COVID-19 Guidance

- Under question 6, the document states that "where in-person interviews or hearings are not possible, institutions should use technology, as appropriate to conduct these activities remotely, while ensuring that this is done timely, equitably, and consistent with due process protections..."

"Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency."

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## 2020 DOE/OCR Regulations

- On May 6, 2020, the Department of Education released new regulations entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," at 34 CFR Part 106.
- Implementation of these regulations is required by August 14, 2020.

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## 2020 DOE/OCR Regulations

- The preamble provides that "the final regulations: affirm that the Department's Office for Civil Rights ("OCR") may require recipients to take remedial action for discriminating on the basis of sex or otherwise violating the Department's regulations implementing Title IX, consistent with 20 U.S.C. 1682..."

"Nondiscrimination on the Basis of sex in Education Programs or Activities Receiving Federal Financial Assistance."

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### 2020 DOE/OCR Regulations

- Further, "...clarify that in responding to any claim of sex discrimination under Title IX, recipients are not required to deprive an individual of rights guaranteed under the U.S. Constitution; acknowledge the intersection of Title IX, Title VII, and FERPA, as well as the legal rights of parents or guardians to act on behalf of individuals with respect to Title IX rights..."

"Nondiscrimination on the Basis of sex in Education Programs or Activities Receiving Federal Financial Assistance."

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### 2020 DOE/OCR Regulations

- Further, "...update the requirements for recipients to designate a Title IX Coordinator, disseminate the recipient's non-discrimination policy and the Title IX Coordinator's contact information, and notify students, employees, and others of the recipient's grievance procedures and grievance process for handling reports and complaints of sex discrimination, including sexual harassment..."

"Nondiscrimination on the Basis of sex in Education Programs or Activities Receiving Federal Financial Assistance."

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### 2020 DOE/OCR Regulations

- Finally, "...eliminate the requirement that religious institutions submit a written statement to the Assistant Secretary for Civil Rights to qualify for the Title IX religious exemption; and expressly prohibit retaliation against individuals for exercising rights under Title IX."

"Nondiscrimination on the Basis of sex in Education Programs or Activities Receiving Federal Financial Assistance."

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## PRELIMINARY CONSIDERATIONS

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## Framing the Policy Process

- Requirements versus allowances
- Student processes versus faculty and staff processes
  - Collective bargaining agreements?
  - Faculty/staff handbooks?
  - At will, temporary, and other classification differences
- Policy revision processes
  - Cabinet and/or board approval

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## Identifying Relevant Partners

- EEO office/Title IX office
- General Counsel
- Human Resources
- Office of the Dean of Students
- Advisory boards

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## REQUIREMENTS

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## Policy Definitions

- Section 106.30
  - Actual Knowledge
  - Complainant
  - Formal Complaint
    - Grievance Process
  - Respondent
  - Sexual Harassment
  - Supportive Measures

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## Actual Knowledge

- “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.”

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## Actual Knowledge

- “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.”

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## Actual Knowledge

- “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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## Complainant

- “Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.”

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## 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.”

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## Formal Complaint

- “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.”

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## Respondent

- “Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”

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## Sexual Harassment

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

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## Sexual Harassment

- “Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
  - ...‘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).”

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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.”

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## Supportive Measures

- “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.”

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## Supportive Measures

- “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.”

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## Supportive 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.”

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## Resource Identification

- Section 106.8 requires the designation of one (1) employee as Title IX Coordinator
  - Must be displayed on the website and in each handbook and catalog available to all applicants for admission and employment, students, parents or legal guardians of minors, employees, etc.
  - Must include name or title, office address, email address, and telephone number of the Title IX Coordinator

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## Resource Identification

- Section 106.8 (*continued*):
  - Must also notify applicants, students, employees, etc., that the institution “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.”
    - Inquiries related to any issues should be directed to the Title IX Coordinator or the Assistant Secretary of Education

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## Report Structure

- Reports can be in person or with an online form (or submitted in an alternative format like email)
  - May be submitted by anyone
- Formal complaints only may be put forth by complainant(s) or the Title IX Coordinator (*see Section 106.30*)

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## Jurisdiction

- Section 106.44
  - Covers all students, faculty, and staff
  - Must be:
    - Part of “education program or activity”
    - “Against a person in the U.S.”

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## Dismissal

- Section 106.45(b)(3)(i)-(iii)
  - Required dismissal:
    - If the conduct does not constitute sexual harassment
    - Did not occur in the institution’s program or activity
    - Did not occur against a person in the U.S.
  - Optional dismissal:
    - Complainant withdrawal from process
    - Respondent no longer enrolled/employed
    - Insufficient evidence available to make a determination

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## Standard of Evidence

- 106.45(b)(1)(vii) and 106.45(b)(7)(i):
  - The standard of evidence must be publicized. Institutions may select between preponderance and clear and convincing.
  - In so choosing, the institution must “apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.”

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## Formal Grievance Procedure

- 106.45(b)(1)(i): Equitable Treatment of Complainants and Respondents
- 106.45(b)(1)(ii): Objective Evaluation of All Relevant Evidence
- 106.45(b)(1)(iv): Presumption of Non-Responsibility
- 106.45(b)(1)(v): Reasonably Prompt Time Frames

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## Formal Grievance Procedure

- 106.45(b)(1)(vi): Describe Range or List of Possible Sanctions and Remedies
- 106.45(b)(1)(vii): Describe Standard of Evidence
- 106.45(b)(1)(viii): Procedures and Bases for Appeal
- 106.45(b)(1)(ix): Describe Range of Supportive Measures
- 106.45(b)(1)(x): Privileged Information

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## Evidence

- Privileged information not permitted unless disclosed by individual holding the privilege
- Evidence may also be restricted based on rape shield-type policy or based on relevance
- No evidence (specifically statements) permitted to be considered if an individual does not present for cross-examination

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## Initiation of Grievance Procedure

- Section 106.45(b)(2): Written Notice of Allegations. Must include:
  - Details of the grievance process, including informal resolution
  - Allegations of sexual harassment including “sufficient details known at the time and with sufficient time to prepare a response before any initial interview.”
    - Including party identity, conduct, date and location of the incident

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## Initiation of Grievance Procedure

- Section 106.45(b)(2) (*continued*):
  - Statement indicating Respondent is presumed not responsible and determination regarding responsibility does not occur until the conclusion of the grievance process
  - Information regarding advisor of choice
  - Statement about the relevant section of the code of conduct that prohibits knowingly making false statements/submitting false information

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## Investigation

- The single investigator model is now prohibited (106.45(b)(7)(i)).
  - There must be autonomy between the Title IX Coordinator, the investigator(s), the adjudicator(s), appellate decision-maker(s), and facilitator(s) of informal resolution.

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## Investigation

- Burden of proof and evidence collection is placed upon the institution (106.45(b)(5)(i)).
- All parties must have an equal opportunity to present witnesses and other evidence (exculpatory and inculpatory) (106.45(b)(5)(ii)).
- No gag orders permitted (106.45(b)(5)(iii)).

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## Investigation

- Advisors of choice must be permitted. Participation in the process can be controlled by the institution, but must be done fairly (106.45(b)(5)(iv)).
- Written notice of all hearings, meetings, and interviews must be given with adequate time for the individual to prepare (106.45(b)(5)(v)).

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## Investigation Report

- The investigation report is required to “fairly” summarize “relevant” evidence (106.45(b)(5)(vii)).
- Parties must be given an opportunity to review and inspect all evidence.
- Additionally, parties must be given ten (10) days to review and comment upon the investigative report prior to finalization.

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## Hearings

- Live hearings required (*see 106.45(b)(6)(i)*)
  - Facilitating technology permitted
  - No barriers to sight/sound permitted
- Cross-examination required
  - All cross-examination must be conducted by advisor (either of choice or supplied by the institution)
  - Relevance determinations must be made prior to any question being answered and decisions to exclude must be placed on record in real time.

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## Determination of Responsibility

- 106.45(b)(7)(ii): Written Determination Regarding Responsibility Must Include Certain Details
  - Identification of the allegations
  - Description of the procedural steps from the initiation of the process onward
    - Includes determination of responsibility, notifications to parties, interviews with parties and witnesses, site visits, methods to gather evidence, and hearings

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## Determination of Responsibility

- 106.45(b)(7)(ii) (*continued*):
  - Findings of fact supporting the determination of responsibility
  - Application of the code of conduct to the facts
  - A statement of the result of each allegation and rationale
    - Includes determination of responsibility, sanctions, remedies provided to complainant
  - Notice of appellate process and procedure

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## Appeals

- 106.45(b)(1)(viii) and 106.45(b)(8) require that both/all parties must be offered the opportunity to appeal from a determination of responsibility or from a dismissal of a formal complaint (in its entirety or in parts) on the following grounds:
  - Procedural irregularity that impacted the outcome
  - New evidence that was not reasonably available
  - Staff/facilitator bias for/against complainants or respondents generally or the parties in the case

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## Retaliation

- Section 106.71: “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

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## Retaliation

- Retaliation includes: intimidation, threats, coercion, discrimination, “charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances” for the “purpose of interfering with any right or privilege secured by title IX.”

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## Training Requirements

- All individuals involved with the Title IX process (Title IX Coordinator, investigator(s), adjudicator(s), appellate decision-maker(s)) must be impartial and must receive mandatory training.
  - Must be posted on website
  - Must include information regarding relevancy determination and anti-bias

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## Record Retention

- An institution must maintain records for seven (7) years, including:
  - Sexual harassment investigation including determination regarding responsibility
  - Sanctions imposed
  - Remedies issued
  - Appeals, including results
  - Informal resolutions, including results
  - Training materials

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## ADDITIONAL OPTIONAL CONSIDERATIONS

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### Informal Resolution

- 106.45(b)(9): At any time after the filing of a formal complaint, but before reaching a determination regarding responsibility for allegations, an institution may facilitate an informal resolution process like mediation (that does not involve a full investigation and adjudication).
  - Written notice still required
  - Right to withdraw prior to resolution
  - Must have voluntary, written consent of parties

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### POLL QUESTION

What would you like additional training or resources on as it relates to these new regulations?

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Now it's time for a short break.

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## EXTRA-REGULATORY CONSIDERATION

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## State Statutes

- Attorney Representation
  - Arkansas (AC Section 6-60-109); North Carolina (NC Article 1, chapter 116-40.11); North Dakota (NDCC 15-10-56); Washington (WAC 495D-121-410)
- Reporting Requirements
  - California; Florida; North Carolina (SL 2019-245); Texas (SB 212); Virginia

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## Existing Case Law

- *Sterrett v. Cowan*, 85 F.Supp.3d 916 (E.D. Mich. 2015).
  - Memorandum opinion and order denying part of motion to dismiss
  - Grounds for partial denial of motion to dismiss:
    - Lack of sufficient, timely notice of allegations
    - Lack of a meaningful hearing

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## Existing Case Law

- *Sterrett* at 926 (*internal citations omitted*).
  - “A school is an academic institution, not a courtroom or administrative hearing room.’ Similarly, a school disciplinary proceeding is not a criminal trial, and a student is not entitled to all of the procedural safeguards afforded criminal defendants. Notice as to the identity of an accuser or the opportunity to cross-examine an accuser is not part of the due process requirement.”

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### Existing Case Law

- *Doe v. Salisbury University*, 123 F.Supp.3d 748 (D. Maryland 2015).
  - Memorandum opinion and order denying part of motion to dismiss
  - Examination of erroneous outcome allowed to proceed on the basis of numerous procedural defects, including:
    - Prohibition of asking critical questions of witnesses
    - Bar against review of witness statements or witness list prior to hearing
    - Bar against attorney at hearing
    - Inappropriate findings in violation of policy

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### Existing Case Law

- *Doe v. University of Cincinnati*, No. 16-4693 (6<sup>th</sup> Cir. 2017).
  - Holding: institutions must provide respondents an opportunity to respond, explain and defend against serious allegations.
  - The aforementioned includes cross examination. However, the Court indicated that it did not have to be direct cross examination, but rather could be circumscribed consistent with prior Office for Civil Rights Guidance (2014; rescinded in 2017).

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### Existing Case Law

- *Doe v. University of Cincinnati (cont.)* (*internal citations omitted*).
  - “Accused students must have the right to cross-examine adverse witnesses ‘in the most serious of cases.’ We alluded to what ‘the most serious of cases’ might entail in *Flaim*: If a case ‘resolve[s] itself into a problem of credibility, cross-examination of witnesses might . be [] essential to a fair hearing.”

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### Existing Case Law

- *Doe v. University of Michigan*, 2:16-cv-13174 (6<sup>th</sup> Cir. 2018).
  - Affirmed the holding in *Cincinnati* that institutions must provide respondents an opportunity to respond, explain and defend against serious allegations, which would include cross examination.

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## Existing Case Law

- *Doe v. University of Michigan (cont.)*.
  - “Thirteen years ago, this court suggested that cross-examination may be required in school disciplinary proceedings where the case hinged on a question of credibility. Just last year, we encountered the credibility contest that we contemplated in *Flaim* and confirmed that when credibility is at issue, the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination.”

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## Existing Case Law

- *Doe v. University of Michigan (cont.)*.
  - “Today, we reiterate that holding once again: if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”

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## Additional Case Law

- *John Doe v. Purdue University*, No. 17-3565 (7<sup>th</sup> Cir. 2019).
  - Provision of evidence issue
- *John Doe v. USC*, 30 Cal. App. 5th 1036, 1066 (Cal. Court of App. 2019).
  - Cross examination issue

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## Pending Litigation

- *Know Your IX v. U.S. Department of Education*, 1:20-cv-01224-RDB (U.S. Dist. MD. 2020).
  - Declare invalid:
    - Definition of “sexual harassment”
    - Provision requiring dismissal
    - “Actual knowledge” requirement and “deliberate indifference” standard
    - Standard of evidence “option”
  - Alternative request for vacatur or injunction

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## Resources and References

- *Doe v. Purdue*, No. 17-3565 (7<sup>th</sup> Cir. 2019).  
<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D06-28/C:17-3565:J:Barrett:aut:T:fnOp:N:2362429:S:0>
- *Doe v. Salisbury University*, 123 F.Supp.3d 748 (D. Maryland 2015).  
<https://www.leagle.com/decision/infdco20150821q82>

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## Resources and References

- *Doe v. University of Cincinnati*, No. 16-4693 (6<sup>th</sup> Cir. 2017). <https://caselaw.findlaw.com/us-6th-circuit/1875123.html>
- *Doe v. University of Michigan*, 2:16-cv-13174 (6<sup>th</sup> Cir. 2018).  
<https://www.leagle.com/decision/infdco20180706c63>
- *Doe v. USC*, 30 Cal. App. 5th 1036, 1066 (Cal. Court of App. 2019).  
<https://www.leagle.com/decision/incaco20190104083>

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## Resources and References

- *Know Your IX v. U.S. Department of Education*, 1:20-cv-01224-RDB (U.S. Dist. MD. 2020).  
<https://www.aclu.org/know-your-ix-v-devos>
- “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.” 34 CFR Part 106. Department of Education. 05.06.2020.  
<https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf>
- Office for Civil Rights Blog.  
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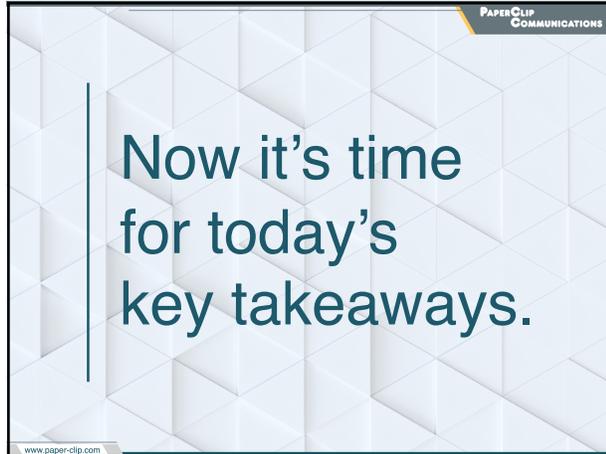
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## Resources and References

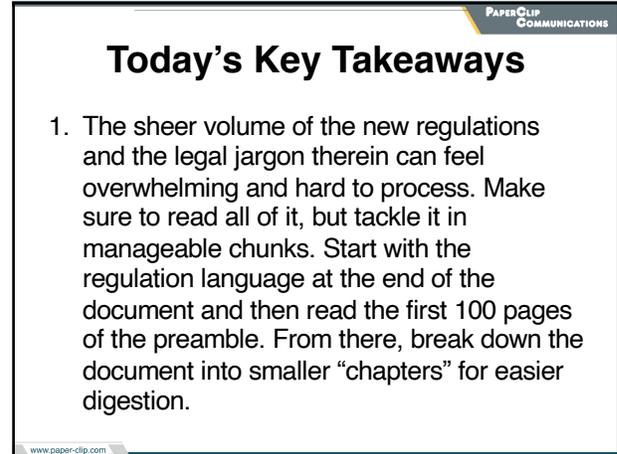
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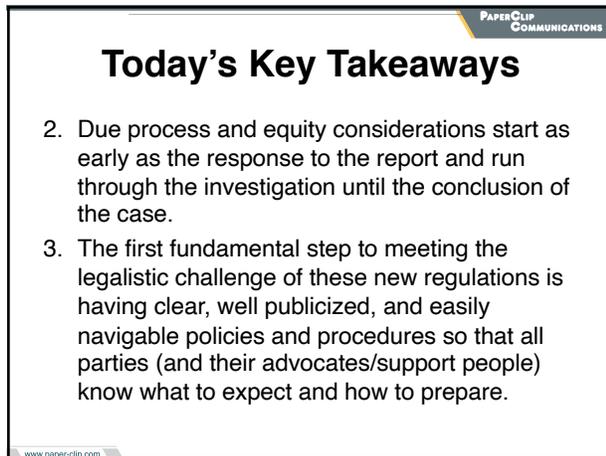
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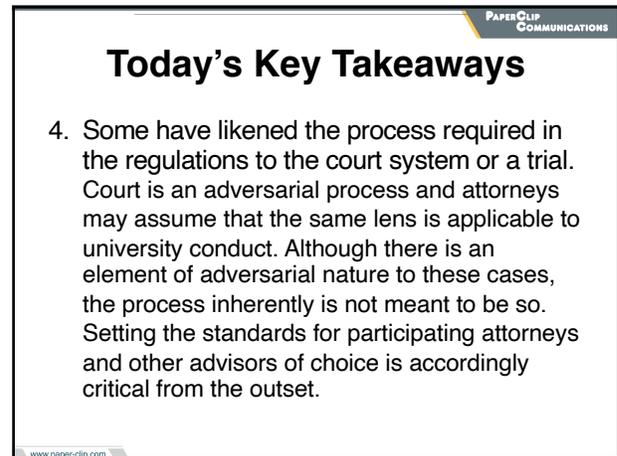
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## Today's Key Takeaways

5. Once the policies and procedural elements are put into place, the education of institutional constituents becomes key. Create guides and other supplementary items like a formal grievance guide folder, hearing scripts, or prehearing binders that help them navigate the process. The more well informed everyone is, the more smoothly (and consistently) execution of the process will go.

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## Now it's time for the Q&A.

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## Today's Presenter

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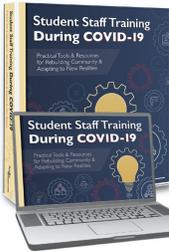


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