To Whom It May Concern:

I am a graduate student in Higher Education Administration, as well as a full time staff member at Boston University. I recently took a Legal Issues in Higher Ed class and the topic of my advocacy paper was on the need to re-define the role of the advisor in Title IX hearings to address both due process rights and prevent further trauma. I have attached the pdf copy of that paper and will also copy the text below my signature.

Thank you for your time,
Deanna Baker
she/her
Senior Program Coordinator
Undergraduate Academic & Career Development Center
Boston University Questrom School of Business
Rafik B. Hariri Building
595 Commonwealth Avenue, Suite 104
Boston, MA 02215
(617) 353-2650
http://questromworld.bu.edu/udc/
COVID-19 Information: http://questromworld.bu.edu/covid19/
Back2BU

Abstract

In May 2020, then-Secretary of Education, Betsy DeVos, published the Department of Education’s Final Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, codified in 34 C.F.R. §106. Among several changes to the regulation of Title IX was the requirement that students in sexual misconduct hearings be represented by student-selected advisors who could question the opposing student and any adverse witnesses. The intent behind this change was to increase the due process
protections for those accused of sexual assault. Critics of the Final Rule point to concerns around equity in advisor selection as well as the high potential for re-traumatization of students during cross-examination. This paper proposes a solution to these issues by redefining the role of the advisor in Title IX grievance hearings. Advisors should be assigned, neutral university officials who have undergone training around the definitions of sexual assault and violence, “rape shield” protections in cross-examination, and the grievance procedures. Assigning trained school advisors will remove the issue of equity in advisor selection and will still provide due process protections while minimizing re-traumatization during sexual misconduct hearings.

Keywords: Title IX, postsecondary, grievance procedures, advisor, sexual misconduct, due process, re-traumatization, higher education

Redefining the Role of Advisors in Postsecondary Title IX Grievance Procedures

In May 2020, the Department of Education published its Final Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (34 C.F.R. §106). The changes to the regulation of Title IX represented in the Final Rule sought to clarify procedures and guidance for institutional recipients of Title IX funds, especially in creating constitutional due process protections in the grievance procedures (34 C.F.R. §106, Executive Summary). One such change is the requirement of live hearings in
postsecondary sexual misconduct cases, including oral cross-examination by an advisor representing the student. Although this change added due process protections for students accused of sexual misconduct, it also raised concerns in equity issues around advisor selection, specifically around who would financially be able to hire an attorney as an advisor. Additionally, the cross-examination requirement led to concerns around re-traumatization of victims of sexual assault.

Within the Title IX grievance process, higher education institutions must strike a balance between providing due process for their students while avoiding foreseeable harm through re-traumatization. The Department of Education can create this balance by changing the provision around the selection of advisors in sexual misconduct hearings. On March 8, 2021, the Biden administration mandated a review of the Title IX Final Rule and guidance. No matter the outcome of the Biden administration's review, all governance must consider the issues of due process, equity, and trauma in the administration of Title IX grievance proceedings. A solution to these issues is to change the definition of the advisor role to be a neutral school official assigned to each party. These officials would be trained on the grievance procedures, as well as trauma-informed practices, allowing them to strike the balance between due process and preventing further trauma.

Title IX Guidance and Rulemaking Background

In 2011, the Obama administration released its Dear Colleague Letter, providing guidance for postsecondary recipients of federal funds on how the Department of Education interprets Title IX of the Education Amendments of 1972. The letter urged that schools take steps to end sexual harassment and sexual violence and moved towards a preponderance of evidence standards in sexual misconduct cases, while discouraging cross-examination of
students. Some administrators criticized the 2011 guidance claiming that the policies erred on the side of the complainant and ignored the due process rights of students accused of sexual assault. The New York Times tracked over 150 state and federal lawsuits from students accused of sexual misconduct since the 2011 Dear Colleague Letter guidance (Rogers & Green, 2021) with many lawsuits claiming institutions failed to protect students under Title IX due to lack of due process during hearings (Dowling, 2021).

In response to concerns and confusion around previous Title IX guidance, then-Secretary of Education Betsy DeVos withdrew the 2011 guidance in 2017 and in November 2018 the Department of Education announced a Notice of Proposed Rulemaking (83 Fed. Reg. 61462). The intent behind the rulemaking was to move from guidance to codified regulations to decrease confusion for institutional recipients of federal funds and make the new rules legally enforceable (34 C.F.R. §106, Executive Summary). In May 2020, after a review of public comments, the Department of Education released the Final Rule to the amended regulations in 34 C.F.R. §106. The new regulations went into effect on August 14, 2020. The Final Rule updated the definition of sexual harassment to include:

- any instance of quid pro quo harassment by a school’s employee; any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a personal equal educational access; and any instance of sexual assault (as defined in the Cleary Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women’s Act (VAWA) (Office for Civil Rights, 2020).

The Department defined parties in sexual harassment cases to be complainants (the alleged victim) and respondents (the alleged perpetrator).
To address the concerns over lack of due process rights for respondents, the Department updated the regulations to allow for both parties to be accompanied by the advisor of their choice. This advisor could be an attorney, but this was not a requirement (§ 106.45(b)(5)(iv)). Additionally, in §106.45(b)(6)(i), the Department outlined updated grievance procedures that require live hearings in sexual harassment cases for post-secondary institutions. During these hearings, institutions must allow cross-examination of the complainant, respondent, and any witnesses by the advisors and such cross-examination must be conducted directly, orally, and in real time, although it can be done via video livestream with the students in separate rooms (34 C.F.R. § 106.45(b)(6)(i)). The complainant and respondent are not allowed to directly cross-examine each other. The Final Rule provides for “rape shield” protections for complainants, which prohibits “questions and evidence about a complainant’s prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent” (Office for Civil Rights, 2020).

Critics of the new regulations around cross-examination point to the potential for re-traumatization of the complainant during proceedings. Because recipients cannot limit the choice or presence of the advisor (§106.45(b)(5)(iv)), it allows for parents, siblings, or friends to act as advisor to the students in these cases (Dowling, 2021). Such advisors could be hostile during cross-examination, due to their personal alignment with the student, and this could lead to questions that undermine the objectives of the “rape shield” protections. Additionally, critics note that it is unlikely that university decision makers in Title IX grievance proceedings could fully control participants in the same way as a judge in a court of law (Bizier, 2020). Cross-examination also has a history of being weaponized to discredit sexual assault victims (Dowling, 2021). In the Final Rule, the Department restated that many commenters on the Notice of
Proposed Rulemaking shared concerns around re-traumatization of the complainant, noting that it will exacerbate survivors post-traumatic stress disorder, rape trauma syndrome, anxiety, and depression. Commenters voiced additional fear that such potential for re-traumatization could have a “chilling effect” on reporting of sexual harassment and result in fewer victims reporting (34 C.F.R. §106, Retraumatizing Complainants). With the Final Rule, critics are concerned that the Department of Education has moved from criticism around favoring the protection of the complainant with the 2011 Dear Colleague Letter to giving more weight to the due process rights of respondents.

**Title IX Due Process and the Courts**

Both the First and Sixth Circuit have heard cases on this topic and the two have reached different conclusions in the matter of cross-examination during Title IX hearings. In *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), the Sixth Circuit adopted that in cases where credibility is disputed and a university must decide between two competing narratives, the university must give the accused student or their advisor the opportunity to cross-examine the accuser and any witnesses in front of a neutral factfinder. After an incident involving alleged sexual misconduct between two students at the University of Michigan, the university appeals board ruled in complainant Jane Roe’s favor, causing respondent John Doe to withdraw from the university shortly before completing requirements for graduation. Doe then filed suit against the university, alleging that because the decision relied on credibility the university denied him his due process rights by holding a hearing where he was not allowed to personally cross-examine Roe and any adverse witnesses. On appeal, the Sixth Circuit agreed that University of Michigan violated Doe’s due process rights.
In contrast, the First Circuit in *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56 (1st Cir. 2019) held that the university violated Haidak’s due process rights when it suspended him without prior notice or a fair hearing, but it did not subsequently violate his due process rights in expelling him once the university held a hearing where a neutral school official led cross-examination. Respondent Haidak and complainant Gibney were in a relationship that became violent. Gibney’s mother reported the violence to the university, which issued Haidak a charge for harassment. During the university hearing, UMass Amherst’s grievance policies allowed Haidak to submit questions in writing and be present during the hearing, although he was not allowed to directly ask questions during the proceedings. Instead, Haidak’s cross-examination questions were posed by a neutral school official. In the case before the First Circuit, Haidak pointed to the Sixth Circuit’s decision in *Doe v. Baum* (2018), arguing that due process requires more than cross-examination done by the university factfinder alone. The First Circuit declined to join the Sixth Circuit’s opinion noting that they had “no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation” (*Haidak v. Univ. Massachusetts Amherst*, 2019, p. 69). The First Circuit was concerned that a novice using cross-examination in a university misconduct case could lead to it being a debate rather than cross-examination. Furthermore, the First Circuit said student-led cross-examination could result in “displays of acrimony or worse” (*Haidak v. Univ. Massachusetts Amherst*, 2019, p. 69).

Indeed, Sixth Circuit Judge Ronald Lee Gilman in his concurring opinion in *Doe v. Baum* (2018) wrote that although Doe’s due process rights were violated, he believed the majority opinion went too far in ruling that if the university will not allow the accused to cross-examine the accuser in any scenario, then it must allow a representative to do so. Citing *Doe v. Univ. of*
Cincinnati, 872 F.3d 393, (6th Cir. 2017), Judge Gilman wrote that the Sixth Circuit has held that full-scale adversarial hearings have never been required by the Due Process Clause for school disciplinary hearings and that allowing a student’s advisor to cross-examine witnesses would add a significant burden due to added time, expense, and increased procedural complexity (Doe v. Baum, 2018).

**Proposed Solution**

There is value in having due process protections for both complainants and respondents in sexual misconduct cases, but this must be weighed with the need to prevent further trauma. By changing the definition of the advisor role to an assigned university official given to each student, this can help to minimize such re-traumatization while still allowing for due processes protections that have been affirmed in recent court cases. With training around Title IX, grievance procedures, and “rape shield” protections, assigned university advisors would be able to effectively cross-examine students while shielding them from additional trauma and creating a more equitable grievance process since students will not need to hire or find outside advisors.

Assigned advisors will solve the issue of equity in university sexual misconduct cases and will prevent occurrences of hostile cross-examination that could hurt students. All advisors would undergo training as defined by the Department of Education. This could include training on the scope of the “rape shield” protections so that advisors can work with the complainant/respondent around appropriate questioning during cross-examination. Additional training to understand the scope of trauma-informed practices when working with survivors of sexual assault would prevent re-traumatization. Topics covered in this training should include understanding the definition of sexual assault and violence; understanding how trauma and alcohol affect memory; and understanding how to interview both complainants and respondents.
with a focus on how “rape shield” protections are used in hearings (Nolan, 2018). The goal of such trainings is to allow advisors to understand the complexity of sexual misconduct cases so that they can apply this understanding to the grievance process. This allows advisors to provide due process for their students in advising them on allowable questioning to make their cases, which in turn will limit trauma that would come from hostile cross-examination.

Advisors will be required to disclose conflicts of interest involving either party. In cases where there is a conflict of interest, the advisor would be replaced by a school official who did not have a conflict. This disclosure will protect students further by ensuring the student does not have to be cross-examined by someone who may be close to them or who is close to the other student, which could lead to hostile questioning during the hearing. Some examples of conflicts of interest include athletic coaches, job supervisors, and current or former faculty or staff with whom the student has worked closely. For the duration of the grievance procedures, the advisor would be aligned with their advisee to ensure the student’s perspective and interests are heard and protected through due process. Additionally, the advisor’s neutral status ensures they will not incur personal gain or loss from the outcomes of the grievance procedures, thus promoting a fair process for both the complainant and the respondent.

This proposal allows for a middle ground between the Sixth and First Circuit decisions: the students will still have individual advisors who can conduct cross-examination as ruled by the Sixth Circuit, but the selection pool for the advisor role is limited so as not to allow for the issue of an inexperienced cross-examiner as noted in the First Circuit’s opinion. Furthermore, the 2020 Final Rule requires that the school provide an advisor for a student if the student does not already have one (34 C.F.R. §106.45(b)(6)(i)). This process of providing a school official to act as an advisor in sexual misconduct cases is already a familiar one, thereby increasing the
feasibility that schools will be able to implement this proposed solution. By making assigned advisors the standard for both parties from the beginning, the issues around due process, furthered trauma, and equity will be addressed, and violations of these key issues will be minimized.

Conclusion

The Obama administration’s 2011 Dear Colleague Letter sought to address the issue of sexual assault on campus and provide students with a process to pursue justice. However, this led to lawsuits from accused students alleging their due process rights were violated under the Obama-era guidance. Seeking to rectify this, the DeVos 2020 Final Rule, codified in 34 C.F.R. §106, mandated grievance procedures for postsecondary institutions that included oral cross-examination at live hearings by student-selected advisors. Critics of this shift in the grievance process highlight the prioritization of due process rights while ignoring foreseeable re-traumatization in such sexual misconduct cases. Without a change in the current regulations around advisors, legal issues around equity, trauma, and due process will arise.

Redefining the role of the advisor solves these issues. Having advisors who are assigned school officials will remove the issue of equity in advisor selection under the 2020 Final Rule. No student will have to be concerned with being able to hire an outside advisor for grievance proceedings nor will there be an imbalance between the experience levels of advisors. With training around understanding sexual assault and violence, “rape shield” protections in cross-examination, and the general grievance procedures, assigned advisors will minimize the potential trauma from the misconduct hearings themselves while providing due process protections for all students. Due process protections should not mean that trauma is an inherent risk in grievance proceedings. By making the advisor assigned university officials, due process and trauma-
informed practices will combine to provide better and more equitable misconduct hearings for all students.

References

34 C.F.R. §106 (2020)


Doe v. Baum, 903 F.3d 575 (6th Cir. 2018)


*Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56 (1st Cir. 2019)


Department of Education’s Title IX Final Rule.

https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf


Appendix

Proposed Language for 34 C.F.R. §106.45(b)(5)(iv) and §106.45(b)(6)(i)

§106.45(b)(5)(iv) language:

(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, a neutral school official assigned by the recipient without fee or charge to the complainant and respondent, who may be, but is not required to be, an attorney, and not limit the presence of the 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;
§106.45(b)(6)(i) language:

(6) Hearings. (i) For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. At the live hearing, the decision-maker(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 school assigned advisor 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. 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. 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. 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.

[1] The Dear Colleague Letter defined “sexual violence” as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.” The Letter also explained that the requirements around “sexual harassment” in Title IX were applicable to sexual violence.
Redefining the Role of Advisors in Postsecondary Title IX Grievance Procedures

Deanna R. Baker

Wheelock College of Education & Human Development, Boston University
Abstract

In May 2020, then-Secretary of Education, Betsy DeVos, published the Department of Education’s Final Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, codified in 34 C.F.R. §106. Among several changes to the regulation of Title IX was the requirement that students in sexual misconduct hearings be represented by student-selected advisors who could question the opposing student and any adverse witnesses. The intent behind this change was to increase the due process protections for those accused of sexual assault. Critics of the Final Rule point to concerns around equity in advisor selection as well as the high potential for re-traumatization of students during cross-examination. This paper proposes a solution to these issues by redefining the role of the advisor in Title IX grievance hearings. Advisors should be assigned, neutral university officials who have undergone training around the definitions of sexual assault and violence, “rape shield” protections in cross-examination, and the grievance procedures. Assigning trained school advisors will remove the issue of equity in advisor selection and will still provide due process protections while minimizing re-traumatization during sexual misconduct hearings.

Keywords: Title IX, postsecondary, grievance procedures, advisor, sexual misconduct, due process, re-traumatization, higher education
Redefining the Role of Advisors in Postsecondary Title IX Grievance Procedures

In May 2020, the Department of Education published its Final Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (34 C.F.R. §106). The changes to the regulation of Title IX represented in the Final Rule sought to clarify procedures and guidance for institutional recipients of Title IX funds, especially in creating constitutional due process protections in the grievance procedures (34 C.F.R. §106, Executive Summary). One such change is the requirement of live hearings in postsecondary sexual misconduct cases, including oral cross-examination by an advisor representing the student. Although this change added due process protections for students accused of sexual misconduct, it also raised concerns in equity issues around advisor selection, specifically around who would financially be able to hire an attorney as an advisor. Additionally, the cross-examination requirement led to concerns around re-traumatization of victims of sexual assault.

Within the Title IX grievance process, higher education institutions must strike a balance between providing due process for their students while avoiding foreseeable harm through re-traumatization. The Department of Education can create this balance by changing the provision around the selection of advisors in sexual misconduct hearings. On March 8, 2021, the Biden administration mandated a review of the Title IX Final Rule and guidance. No matter the outcome of the Biden administrations review, all governance must consider the issues of due process, equity, and trauma in the administration of Title IX grievance proceedings. A solution to these issues is to change the definition of the advisor role to be a neutral school official assigned to each party. These officials would be trained on the grievance procedures, as well as trauma-
informed practices, allowing them to strike the balance between due process and preventing further trauma.

**Title IX Guidance and Rulemaking Background**

In 2011, the Obama administration released its Dear Colleague Letter, providing guidance for postsecondary recipients of federal funds on how the Department of Education interprets Title IX of the Education Amendments of 1972. The letter urged that schools take steps to end sexual harassment and sexual violence and moved towards a preponderance of evidence standards in sexual misconduct cases, while discouraging cross-examination of students. Some administrators criticized the 2011 guidance claiming that the policies erred on the side of the complainant and ignored the due process rights of students accused of sexual assault. The New York Times tracked over 150 state and federal lawsuits from students accused of sexual misconduct since the 2011 Dear Colleague Letter guidance (Rogers & Green, 2021) with many lawsuits claiming institutions failed to protect students under Title IX due to lack of due process during hearings (Dowling, 2021).

In response to concerns and confusion around previous Title IX guidance, then-Secretary of Education Betsy DeVos withdrew the 2011 guidance in 2017 and in November 2018 the Department of Education announced a Notice of Proposed Rulemaking (83 Fed. Reg. 61462). The intent behind the rulemaking was to move from guidance to codified regulations to decrease confusion for institutional recipients of federal funds and make the new rules legally enforceable (34 C.F.R. §106, Executive Summary). In May 2020, after a review of public comments, the

---

1 The Dear Colleague Letter defined “sexual violence” as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.” The Letter also explained that the requirements around “sexual harassment” in Title IX were applicable to sexual violence.
Department of Education released the Final Rule to the amended regulations in 34 C.F.R. §106. The new regulations went into effect on August 14, 2020. The Final Rule updated the definition of sexual harassment to include:

- any instance of quid pro quo harassment by a school’s employee; any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a personal equal educational access; and any instance of sexual assault (as defined in the Cleary Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women’s Act (VAWA) (Office for Civil Rights, 2020).

The Department defined parties in sexual harassment cases to be complainants (the alleged victim) and respondents (the alleged perpetrator).

To address the concerns over lack of due process rights for respondents, the Department updated the regulations to allow for both parties to be accompanied by the advisor of their choice. This advisor could be an attorney, but this was not a requirement (§ 106.45(b)(5)(iv)). Additionally, in §106.45(b)(6)(i), the Department outlined updated grievance procedures that require live hearings in sexual harassment cases for post-secondary institutions. During these hearings, institutions must allow cross-examination of the complainant, respondent, and any witnesses by the advisors and such cross-examination must be conducted directly, orally, and in real time, although it can be done via video livestream with the students in separate rooms (34 C.F.R. § 106.45(b)(6)(i)). The complainant and respondent are not allowed to directly cross-examine each other. The Final Rule provides for “rape shield” protections for complainants, which prohibits “questions and evidence about a complainant’s prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent” (Office for Civil Rights, 2020).
Critics of the new regulations around cross-examination point to the potential for re-traumatization of the complainant during proceedings. Because recipients cannot limit the choice or presence of the advisor (§106.45(b)(5)(iv)), it allows for parents, siblings, or friends to act as advisor to the students in these cases (Dowling, 2021). Such advisors could be hostile during cross-examination, due to their personal alignment with the student, and this could lead to questions that undermine the objectives of the “rape shield” protections. Additionally, critics note that it is unlikely that university decision makers in Title IX grievance proceedings could fully control participants in the same way as a judge in a court of law (Bizier, 2020). Cross-examination also has a history of being weaponized to discredit sexual assault victims (Dowling, 2021). In the Final Rule, the Department restated that many commenters on the Notice of Proposed Rulemaking shared concerns around re-traumatization of the complainant, noting that it will exacerbate survivors post-traumatic stress disorder, rape trauma syndrome, anxiety, and depression. Commenters voiced additional fear that such potential for re-traumatization could have a “chilling effect” on reporting of sexual harassment and result in fewer victims reporting (34 C.F.R. §106, Retraumatizing Complainants). With the Final Rule, critics are concerned that the Department of Education has moved from criticism around favoring the protection of the complainant with the 2011 Dear Colleague Letter to giving more weight to the due process rights of respondents.

**Title IX Due Process and the Courts**

Both the First and Sixth Circuit have heard cases on this topic and the two have reached different conclusions in the matter of cross-examination during Title IX hearings. In *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), the Sixth Circuit adopted that in cases where credibility is disputed and a university must decide between two competing narratives, the university must
give the accused student or their advisor the opportunity to cross-examine the accuser and any witnesses in front of a neutral factfinder. After an incident involving alleged sexual misconduct between two students at the University of Michigan, the university appeals board ruled in complainant Jane Roe’s favor, causing respondent John Doe to withdraw from the university shortly before completing requirements for graduation. Doe then filed suit against the university, alleging that because the decision relied on credibility the university denied him his due process rights by holding a hearing where he was not allowed to personally cross-examine Roe and any adverse witnesses. On appeal, the Sixth Circuit agreed that University of Michigan violated Doe’s due process rights.

In contrast, the First Circuit in Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. 2019) held that the university violated Haidak’s due process rights when it suspended him without prior notice or a fair hearing, but it did not subsequently violate his due process rights in expelling him once the university held a hearing where a neutral school official led cross-examination. Respondent Haidak and complainant Gibney were in a relationship that became violent. Gibney’s mother reported the violence to the university, which issued Haidak a charge for harassment. During the university hearing, UMass Amherst’s grievance policies allowed Haidak to submit questions in writing and be present during the hearing, although he was not allowed to directly ask questions during the proceedings. Instead, Haidak’s cross-examination questions were posed by a neutral school official. In the case before the First Circuit, Haidak pointed to the Sixth Circuit’s decision in Doe v. Baum (2018), arguing that due process requires more than cross-examination done by the university factfinder alone. The First Circuit declined to join the Sixth Circuit’s opinion noting that they had “no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a
categorically unacceptable risk of erroneous deprivation” (*Haidak v. Univ. Massachusetts Amherst*, 2019, p. 69). The First Circuit was concerned that a novice using cross-examination in a university misconduct case could lead to it being a debate rather than cross-examination. Furthermore, the First Circuit said student-led cross-examination could result in “displays of acrimony or worse” (*Haidak v. Univ. Massachusetts Amherst*, 2019, p. 69).

Indeed, Sixth Circuit Judge Ronald Lee Gilman in his concurring opinion in *Doe v. Baum* (2018) wrote that although Doe’s due process rights were violated, he believed the majority opinion went too far in ruling that if the university will not allow the accused to cross-examine the accuser in any scenario, then it must allow a representative to do so. Citing *Doe v. Univ. of Cincinnati*, 872 F.3d 393, (6th Cir. 2017), Judge Gilman wrote that the Sixth Circuit has held that full-scale adversarial hearings have never been required by the Due Process Clause for school disciplinary hearings and that allowing a student’s advisor to cross-examine witnesses would add a significant burden due to added time, expense, and increased procedural complexity (*Doe v. Baum*, 2018).

**Proposed Solution**

There is value in having due process protections for both complainants and respondents in sexual misconduct cases, but this must be weighed with the need to prevent further trauma. By changing the definition of the advisor role to an assigned university official given to each student, this can help to minimize such re-traumatization while still allowing for due processes protections that have been affirmed in recent court cases. With training around Title IX, grievance procedures, and “rape shield” protections, assigned university advisors would be able to effectively cross-examine students while shielding them from additional trauma and creating a more equitable grievance process since students will not need to hire or find outside advisors.
REDEFINING THE ROLE OF ADVISORS IN TITLE IX

Assigned advisors will solve the issue of equity in university sexual misconduct cases and will prevent occurrences of hostile cross-examination that could hurt students. All advisors would undergo training as defined by the Department of Education. This could include training on the scope of the “rape shield” protections so that advisors can work with the complainant/respondent around appropriate questioning during cross-examination. Additional training to understand the scope of trauma-informed practices when working with survivors of sexual assault would prevent re-traumatization. Topics covered in this training should include understanding the definition of sexual assault and violence; understanding how trauma and alcohol affect memory; and understanding how to interview both complainants and respondents with a focus on how “rape shield” protections are used in hearings (Nolan, 2018). The goal of such trainings is to allow advisors to understand the complexity of sexual misconduct cases so that they can apply this understanding to the grievance process. This allows advisors to provide due process for their students in advising them on allowable questioning to make their cases, which in turn will limit trauma that would come from hostile cross-examination.

Advisors will be required to disclose conflicts of interest involving either party. In cases where there is a conflict of interest, the advisor would be replaced by a school official who did not have a conflict. This disclosure will protect students further by ensuring the student does not have to be cross-examined by someone who may be close to them or who is close to the other student, which could lead to hostile questioning during the hearing. Some examples of conflicts of interest include athletic coaches, job supervisors, and current or former faculty or staff with whom the student has worked closely. For the duration of the grievance procedures, the advisor would be aligned with their advisee to ensure the student’s perspective and interests are heard and protected through due process. Additionally, the advisor’s neutral status ensures they will
not incur personal gain or loss from the outcomes of the grievance procedures, thus promoting a fair process for both the complainant and the respondent.

This proposal allows for a middle ground between the Sixth and First Circuit decisions: the students will still have individual advisors who can conduct cross-examination as ruled by the Sixth Circuit, but the selection pool for the advisor role is limited so as not to allow for the issue of an inexperienced cross-examiner as noted in the First Circuit’s opinion. Furthermore, the 2020 Final Rule requires that the school provide an advisor for a student if the student does not already have one (34 C.F.R. §106.45(b)(6)(i)). This process of providing a school official to act as an advisor in sexual misconduct cases is already a familiar one, thereby increasing the feasibility that schools will be able to implement this proposed solution. By making assigned advisors the standard for both parties from the beginning, the issues around due process, furthered trauma, and equity will be addressed, and violations of these key issues will be minimized.

**Conclusion**

The Obama administration’s 2011 Dear Colleague Letter sought to address the issue of sexual assault on campus and provide students with a process to pursue justice. However, this led to lawsuits from accused students alleging their due process rights were violated under the Obama-era guidance. Seeking to rectify this, the DeVos 2020 Final Rule, codified in 34 C.F.R. §106, mandated grievance procedures for postsecondary institutions that included oral cross-examination at live hearings by student-selected advisors. Critics of this shift in the grievance process highlight the prioritization of due process rights while ignoring foreseeable re-traumatization in such sexual misconduct cases. Without a change in the current regulations around advisors, legal issues around equity, trauma, and due process will arise.
Redefining the role of the advisor solves these issues. Having advisors who are assigned school officials will remove the issue of equity in advisor selection under the 2020 Final Rule. No student will have to be concerned with being able to hire an outside advisor for grievance proceedings nor will there be an imbalance between the experience levels of advisors. With training around understanding sexual assault and violence, “rape shield” protections in cross-examination, and the general grievance procedures, assigned advisors will minimize the potential trauma from the misconduct hearings themselves while providing due process protections for all students. Due process protections should not mean that trauma is an inherent risk in grievance proceedings. By making the advisor assigned university officials, due process and trauma-informed practices will combine to provide better and more equitable misconduct hearings for all students.
References

34 C.F.R. §106 (2020)


Doe v. Baum, 903 F.3d 575 (6th Cir. 2018)


Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. 2019)


Appendix

Proposed Language for 34 C.F.R. §106.45(b)(5)(iv) and §106.45(b)(6)(i)

§106.45(b)(5)(iv) language:
(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, a neutral school official assigned by the recipient without fee or charge to the complainant and respondent, who may be, but is not required to be, an attorney, and not limit the presence of the 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;

§106.45(b)(6)(i) language:
(6) Hearings. (i) For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. At the live hearing, the decision-maker(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 school assigned advisor 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. 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. 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. 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.