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Panel Handout: Title IX, Academic Freedom and Due Process - Examining Title IX: Achieving Effective Enforcement While Protecting Academic Freedom, Due Process, and Shared Governance

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**NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING
IN HIGHER EDUCATION AND THE PROFESSIONS**

2016 CONFERENCE

**Examining Title IX: Achieving Effective Enforcement While Protecting Academic Freedom,
Due Process, and Shared Governance**

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Recent student and faculty activism has brought renewed attention to sexual harassment and assault within universities and has placed increased pressure on universities to comply with Title IX of the Education Amendments of 1972. These more forceful efforts to apply Title IX, however, have had uneven results. Some campuses have dealt with sexual assault more seriously and effectively, while others report cases in which university administrators fail to punish gross and repeated sexual harassment. Other problems have arisen, as well, due to interpretations of Title IX that disregard the academic freedom essential for campus life to thrive. In particular, the Department of Education's Office of Civil Rights (OCR) has adopted overly broad definitions of sexual harassment – as an issue apart from sexual assault – that interfere with protected speech and academic freedom. In multiple cases, university administrations have punished faculty for their protected speech, both in and outside of the classroom. These cases have compromised the realization of meaningful educational goals that enable the creation of sexually safe campuses; they also have upended due process rights and shared governance in unprecedented ways.

These interpretive problems with how to enforce and implement Title IX demand closer attention to the scope of actionable claims, to ensure that the procedural rights of the accused are respected. Sexual harassment's definitional imprecision has been accompanied by an OCR-mandated change in evidentiary standard that conflicts with due process protections of faculty and students. The OCR has prohibited using a "clear and convincing" (or, highly probable or reasonably certain) evidence standard, and replaced it with a "preponderance of evidence" (more likely than not) standard to assess sexual violence claims, and by extension, *all* sexual harassment claims.

The effects of such enforcement practices are compounded by the increasingly bureaucratic and service-oriented structure of the entrepreneurial (or "corporate") university, characterized by a client-service relationship between universities and their students. This client-service model can run counter to universities' educational mission when, as in the case of Title IX, universities may take actions that avoid OCR investigations and private lawsuits but that do not significantly improve gender equity. This client-service model, in turn, has serious implications for academic freedom, as universities create administrative offices that make and enforce Title IX policies outside of shared governance processes.

Finally, the current interpretation, implementation, and enforcement of Title IX can actually exacerbate gender and other inequities on campus. Recent student activism protesting institutionalized racial biases in universities reveals the need to ensure that Title IX enforcement initiatives do not, even unwittingly, perpetuate race-based biases in the criminal justice system, which disproportionately affect men who are racial minorities.

The presentation by Risa Lieberwitz will address constraints on academic freedom/free speech that have occurred due to overly broad interpretations of Title IX in defining sexual harassment – particularly, hostile environment harassment. She will also discuss the limits placed on due process by the lowered standard of proof (preponderance of evidence) mandated by the Office of Civil Rights’ “Dear Colleague Letter.”

Rana Jaleel will address American Association of University Professor (AAUP) policy statements and reports about sexual harassment, which relate to academic freedom and due process, as well as to faculty governance. Rana will also discuss the way that the context of the “corporate university” has influenced and affected interpretation and implementation of Title IX.

These presentations draw from a new AAUP report that is currently being prepared by a joint subcommittee of the AAUP Committee on Academic Freedom and Tenure and the AAUP Committee on Women in the Profession.