

YOUR FACULTY



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LEVEL 4 INVESTIGATIONS TRAINING: DUE PROCESS



Agenda

- History of Due Process – Caselaw
- What is Due Process?
 - Fundamental Fairness vs. Due Process
- Due Process in Decision (overview)
- Due Process in Procedure (overview)
- Comparative Due Process
- Methods of Resolution
- Due Process for Campus Constituencies
- What Constitutes a “Hearing”?
- Jurisdiction & Evidentiary Standard

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LEVEL 4 INVESTIGATIONS TRAINING: DUE PROCESS



Agenda

- VAWA & Due Process
- Title IX Due Process
- Selective Enforcement
- Erroneous Outcome
- Lessons from Caselaw
- Detailed Review of ATIXA’s Due Process Checklist
- Due Process in Appeals
- Hot Topics in Due Process
 - Free speech
 - Threats
 - Discrimination

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HISTORY OF DUE PROCESS

- *Dixon v. Alabama* (1961)
- *Esteban v. Central Missouri State College* (1969)
- *Goss v. Lopez* (1975)
- *Fellheimer v. Middlebury College* (1994)
- *Michigan v. Ewing* (1985) (Academic)

DIXON V. ALABAMA STATE BD. OF ED. 294 F. 2D 150 (5TH CIR., 1961)



- In February of 1960, six black students sat in at a public (all white) lunch counter and were arrested
- Alabama State summarily expelled all of them without any notice of the charges or of a hearing, and no opportunity to provide evidence or defend themselves
- 5th Cir. Court decision established minimum due process (reiterated by U.S. Supreme Court in *Goss v. Lopez* (1975))
 - Students facing expulsion at public institutions must be provided with at least notice of the charges and an opportunity to be heard
 - Ushered in most campus disciplinary and hearing-based processes

***DIXON V. ALABAMA STATE BD. OF ED.
294 F. 2D 150 (5TH CIR., 1961)***



- Specifically, the court set forth a number of due process-based guidelines, including:
 - Notice, with an outline of specific charges
 - A fair and impartial hearing
 - Providing names of witnesses to accused
 - Providing the content of witnesses' statements
 - Providing the accused an opportunity to speak in own defense
 - The results and findings of the hearing presented in a report open to the student's inspection

***ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE 415
F.2D 1077 (8TH CIR. 1969)***



- Written charge statement, made available 10 days prior to hearing
- Hearing before a panel with authority to suspend or expel
- Charged student given opportunity to review information to be presented prior to hearing
- Right of charged student to bring counsel to furnish advice, but not to question witnesses
- Right of charged student to present a version of the facts through personal and written statements, including statements of witnesses.

**ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE 415
F.2D 1077 (8TH CIR. 1969)**



- An opportunity for the charged student to hear all information presented against him and to question adverse witnesses personally
- A determination of the facts of the case based solely on what is presented at the hearing by the authority that conducts the hearing
- A written statement of the finding of facts
- Right of charged student to make a record of the hearing

**GOSS V. LOPEZ
419 U.S. 565 (1975)**



- Nine high school students were suspended for 10 days for non-academic misconduct
- The court held that since K–12 education is a fundamental right, students were entitled to at least a modicum of “due process”
- Reiterating the 5th Circuit, it noted that the minimum due process is notice and an opportunity for a hearing

GOSS V. LOPEZ
419 U.S. 565 (1975)



- The court further stated that the hearing could be informal and need not provide students with an opportunity to obtain private counsel, cross-examine witnesses, or present witnesses on their behalf
- Potential suspensions beyond 10 days or expulsions, however, require a more formal procedure to protect against unfair deprivations of liberty and property interests

FELLHEIMER V. MIDDLEBURY COLLEGE
869 F. SUPP. 238 (DIST. VT., 1994)



- Fellheimer, a Middlebury College student, had sexual intercourse with a female student in Jan. 1992
- In Feb. 1992, the Dean of Students sent him a letter indicating “you are being charged with rape”
- Following a criminal investigation, Vermont State’s Attorney declined prosecution
- In May 1992, Middlebury charged Fellheimer with “Rape/Disrespect of Persons.” Fellheimer sought clarification and was allegedly told by Middlebury to “concentrate on the issue of rape.”

FELLHEIMER V. MIDDLEBURY COLLEGE
869 F. SUPP. 238 (DIST. VT., 1994)



- Middlebury Code stated that the College "shall state the nature of the charges with sufficient particularity to permit the accused party to prepare to meet the charges"
- Middlebury held a hearing in May 1992 and found him not responsible for rape, but responsible for "disrespect of persons"
- He was suspended for a year and had to complete counseling before returning
- He appealed, but the decision was upheld

FELLHEIMER V. MIDDLEBURY COLLEGE
869 F. SUPP. 238 (DIST. VT., 1994)



- Fellheimer sued for breach of contract and intentional infliction of emotional distress
- District Court held that:
 - "Fundamental fairness" applied to the breach of contract claim for a private institution
 - Middlebury violated fundamental fairness because Fellheimer was never told what conduct...would violate the "disrespect for persons" portion of the Handbook"
 - "The College did not 'state the nature of the charges with sufficient particularity to permit the accused party to meet the charges' as it had promised to do"

REGENTS OF THE UNIV. OF MICHIGAN V. EWING 474 U.S. 214 (1985)



- Ewing, a medical student, was dismissed from the program after a long line of academic deficiencies, including failing a portion of the National Board exams
- The court held that when students are being suspended or expelled for academic reasons, the decision rests on the academic judgment of college officials and therefore, no due process hearing is required in this situation
- Because the university followed its written procedures and afforded Ewing the opportunity to argue against the dismissal, the court refused to require a hearing
- Academic decisions are typically afforded greater deference by the courts. Following written procedures is critical

DUE PROCESS

- What is Due Process?
- Due Process in Procedure
- Due Process in Decision
- Comparative Due Process

WHAT IS DUE PROCESS?



- Due Process (public institutions):
 - Federal and state constitutional and legal protections against a state institution taking or depriving someone of education or employment
- “Fundamental Fairness” (private institutions):
 - Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures

WHAT IS DUE PROCESS?



- Ultimately, both are the set of rights-based protections that accompany disciplinary action by an institution with respect to students, employees, or others
 - Informed by law, history, public policy, culture etc.
- Due process in criminal and civil courts vs. due process within an institution
- Due process analysis and protections have historically focused on the rights of the responding party

WHAT IS DUE PROCESS?



- Two overarching forms of due process:
 - **Due Process in Procedure:**
 - Consistent, thorough, and procedurally sound handling of allegations.
 - Institution substantially complied with its written policies and procedures.
 - Policies and procedures afford sufficient Due Process rights and protections.
 - **Due Process in Decision:**
 - Decision reached on the basis of the evidence presented.
 - Decision on finding and sanction appropriately impartial and fair.

WHAT IS DUE PROCESS?



- **Due Process in Procedure** – A school's process should include (at a minimum):
 - Notice — of charges and of the hearing/resolution process.
 - Right to present witnesses
 - Right to present evidence
 - Opportunity to be heard and address the allegations and evidence
 - Right to decision made based on substantial compliance and adherence to institutional policies and procedures
 - Right to appeal (recommended)

WHAT IS DUE PROCESS?



- **Due Process in Decision** - A decision must:
 - Be based on a fundamentally fair rule or policy
 - Be made in good faith (i.e., without malice, ill-will, or bias)
 - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
 - Not be arbitrary or capricious
- Sanctions must be reasonable and constitutionally permissible

MATTHEWS V. ELDRIDGE **423 U.S. 319 (1976)**



- State agency determined Matthews no longer qualified for Social Security Disability benefits
- Agency provided a rationale for their decision and Matthews provided a response
- Agency upheld the denial of benefits
- Matthews told he could seek reconsideration in six months
- Matthews sued, arguing he was entitled to additional due process, especially a pre-termination hearing
- Supreme Court ruled against Matthews

MATTHEWS V. ELDRIDGE **423 U.S. 319 (1976)**



- The specific dictates of due process generally requires consideration of three distinct factors:
 1. The private interest that will be affected by the official action
 2. The risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards
 3. The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail

COMPARATIVE DUE PROCESS



- Criminal Court
- Civil Court
- Regulatory Oversight
- Administrative Hearings
- School-based
 - K-12
 - Student – Undergraduate; Graduate/Professional
 - Faculty – Tenured vs. Non-tenured
 - Staff
 - At-will
 - Administrators
 - Unionized

METHODS OF RESOLUTION

- Traditional Student Conduct Model
- At-will Employee
- Tenured faculty
- Civil rights model

TRADITIONAL STUDENT CONDUCT MODEL



- “Judicial Affairs” & Castles of Due Process
- Accused-centric
- Peer and/or faculty-based Hearing Panels
- Hearing Panel as investigator
- Administrative Resolution: The Dean
- Predicated on a student-on-student construct
- Limited appeal

AT-WILL EMPLOYEE MODEL



- Minimal due process
- No hearing
- Investigation and decision by HR or supervisor
- Progressive discipline
- Termination more common and straight-forward
- No appeal
- Predicated on an employee-employee construct

TENURED FACULTY MODEL



- High level of due process (AAUP model?)
- Virtual property right
- Accused-centric
- Termination is comparatively rare, time-consuming, and layered
- Often involves multiple hearings
- Multiple levels of appeal
- Faculty as hearing panelists
- Union involvement/grievance process

CIVIL RIGHTS MODEL



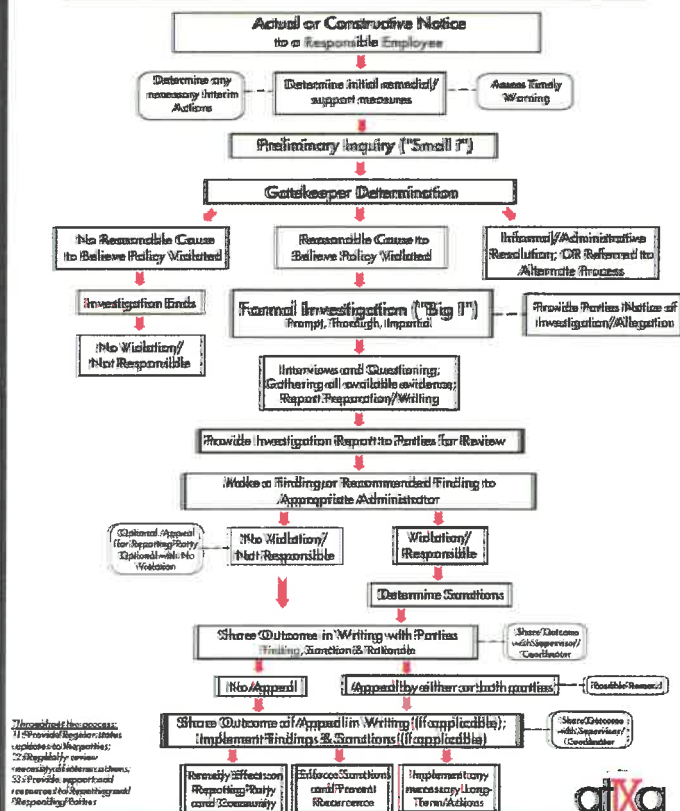
- Founded on principles of equity
- Best suited to victim-based situations
- Gatekeeping and preliminary investigation
- Investigation-centric – thorough, robust, active accumulation of evidence, trained investigators
- Informal resolution
- Formal resolution (option for a hearing or panel)
- Equitable appeal

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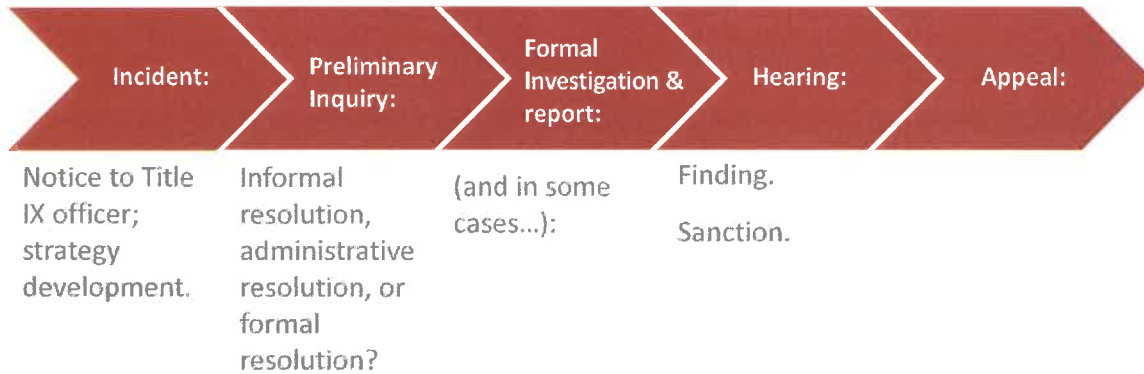
CIVIL RIGHTS INVESTIGATION MODEL

ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



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THE PROCESS



TEN STEPS



1. Complaint or notice
2. Preliminary inquiry (initial strategy)
3. Gatekeeper determination (earliest point)
4. Notice of allegation &/or Investigation (earliest point)
5. Strategize investigation
6. Formal comprehensive investigation
7. Witness interviews
8. Evidence gathering
9. Analysis
10. Finding

DUE PROCESS FOR CAMPUS CONSTITUENCIES

- Students
- Faculty
- Staff
- Student Organizations
- At-will Employees

WHAT CONSTITUTES A
“HEARING?”

WHAT CONSTITUTES A “HEARING?”



“On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.”

Goss v. Lopez, 419 U.S. 565 (1975)

WHAT CONSTITUTES A “HEARING?”



- The hallmarks of due process using a traditional hearing-based model are:
 - A resolution mechanism that substantially or materially complies with the school’s policies and procedures
 - Advanced written notice to both reporting and responding parties of each of the allegations (“charges,” in student conduct language) prior to issuing a finding
 - Opportunity for the parties to review and respond to all evidence and information that will be used to render a finding, prior to a final determination

WHAT CONSTITUTES A “HEARING?”



- Hallmarks of a hearing-based model (cont.)
 - Opportunity for the parties to address each allegation and the evidence and information pertaining to those allegations with unbiased and impartial decision-makers
 - Opportunity for the parties to suggest questions that should be asked of witnesses and the other party(ies)
 - A reasonable and rational decision based on the evidence presented
 - Timely written notification of the outcome, with a brief supporting rationale, to both parties

WHAT CONSTITUTES A “HEARING?”



- Hallmarks of a due process “hearing” using the Civil Rights Investigation Model
 - A team of two well-trained, impartial investigators who (often) meet multiple times with the parties to gather information, testimony, and evidence
 - The parties are provided ample opportunity to provide a list of witnesses and additional evidence
 - Detailed and written notice to the parties of the allegations and each of the policies alleged to have been violated
 - Meetings by the investigation team with all relevant witnesses
 - Opportunity for the parties to provide investigators with a list of questions for the other party(ies) and/or witnesses that may be asked at the investigators’ discretion.
 - Gathering of all available and relevant evidence by the investigators.

WHAT CONSTITUTES A “HEARING?”



- Hallmarks of a due process “hearing” using the Civil Rights Investigation Model (cont.)
 - Opportunity for the parties to review all evidence and information that will be used to render a finding, either in written form or verbally before the determination is finalized
 - Opportunity for the parties to address each allegation and the evidence and information pertaining to those allegations with the decision-makers. On many campuses, the parties are provided with a copy of the draft investigation report for review and comment
 - A reasonable and rational decision based on the evidence presented
 - A finding or recommendation on each alleged violation by the investigators, who met and/or spoke with the parties and the witnesses, and who examined all relevant evidence.

JURISDICTION & EVIDENTIARY STANDARD

WHEN DOES TITLE IX APPLY?



Jurisdiction

- The Davis standard is that jurisdiction is expected when the institution has:
 - Control over the harasser (discriminator); **AND**
 - Control over the context of the harassment (discrimination).

JURISDICTION



- Where: Geographic
 - On-campus
 - Off-campus
- When: Temporal
 - “Statute of limitations”?
 - Summer or winter break? Spring break?
- Who: “Person”
 - Faculty, staff, student, guest, visitor, patient, medical residents, visiting teams/athletes, etc.
 - When is a student a student?

JURISDICTION



- April 26, 2014: Weckhorst, a KSU student, attended a fraternity event at a location near campus
- At the party, Weckhorst was raped multiple times by two different fraternity members, multiple people
- Weckhorst reported the rapes to the Riley County Police Department
- KSU told Weckhorst that KSU did not have jurisdiction over off-campus rapes
 - However, KSU did suspend the fraternity for violation of their alcohol policy, based on Weckhorst's report of alcohol use at the party

JURISDICTION



- KSU did not investigate the rape or provide any remedial measures
 - This was despite the substantial impact the alleged incidents had on S.W.'s education, coupled with the "constant fear" of encountering her assailants
- Weckhorst sued KSU for violation of Title IX, negligence, and KCPA
- Court wrote, "the determination whether Title IX is implicated turns on whether the education institution 'exercises substantial control over both the harasser and the context in which the known harassment occurs,' and whether there is a **nexus** between the out-of-school conduct and the school"

JURISDICTION



- Court concluded:
 - “At one end, peer sexual assaults that occur at on-campus dormitories clearly implicate Title IX. At the other end, peer sexual assaults that occur off-campus, in private settings, and within contexts that have little or no connection to the funding recipient do not trigger Title IX liability. Peer sexual assaults that occur at off-campus fraternity houses or at official fraternity events that are subject to oversight, control, and disciplinary authority by a university appear to fall somewhere between these two bookends.”

CASE STUDY: MARIA & CHRIS



- Maria is a 25-year-old second-year student at the College. She is a single mother of a three-year old. She filed a complaint against Chris last month for sexual harassment, stalking and sexual misconduct.
- Chris is a tenured nursing professor at EJC, who is well-liked by his students and serves as a member of the faculty council.
- Two months ago, Chris invited his class to happy hour on a Friday night at a nearby bar. Maria and about 10 other students attended.
- Maria alleges that Chris became excessively intoxicated on multiple occasions at the conference and was “creepy” and “touchy-feely” with several women at the bar, including a few students.

CASE STUDY: MARIA & CHRIS



- Maria alleges that in front of a number of other students from the College, Chris, placed his hands on her hips, pulled her close against him and said, “I am so turned on by you right now. What will it take for me to get you back to my place?” He then moved his hands down cupped her buttocks in both hands and pulled her into him; Maria said she could feel his erect penis push against her. He then looked at her, winked and smiled said, “see, told you...I am ready when you are” while giving a small thrust.

CASE STUDY: MARIA & CHRIS



- Maria said that if she were out at a bar downtown and another man did that to her she “would have kneed him in the balls and slapped him in the face.” She alleges she did not know what to do so she got the bartender’s attention and ordered a drink, after which Chris let her go.
- Maria said that she was paralyzed by the incident and felt unable to address Chris’ behavior because she asked him to write a letter of recommendation for her. She hopes to complete her degree and begin working as a nurse’s assistant in the area and “she did not want to ruin her career before it even starts.”

CASE STUDY: MARIA & CHRIS



- Maria said that later that night, she was approached by two other women who witnessed the incident and relayed incidents where Chris had touched them in a way that also made them uncomfortable. One of the women is from the same program as Maria, but the other is not a student at the College.
- Maria alleges that since that night, Chris seemed more distant and she received a bad grade (C-) on her last assignment, even though she felt her work was on-par with her other A-level work. There was a note at the bottom of her assignment from Chris saying, "let's talk about how you can improve your grade. I know how you can earn extra credit..." Maria did not feel comfortable meeting with him, so she just let it go at the time.

CASE STUDY: MARIA & CHRIS



- Last week, Maria alleges that Chris sent nude pictures of himself with an erection along with text stating, "See what you are missing?"
- Still, she tells the Deputy Coordinator that she remains uncertain if she wants an investigation to ensue.
- Maria says she is finding it difficult to study, attend her lab and is having trouble focusing on anything.
- She says she does not feel safe on campus and is having anxiety attacks that are impacting her ability to focus
- She wants Chris removed immediately as the teacher in her course, but she does not want to ruin Chris' life
- Her mother, who is also a lawyer, is present with her

CASE STUDY: MARIA & CHRIS



- Discuss the jurisdictional issues
- Investigation Strategy Development
 - What potential violations of your policy would apply?
 - Are there any key issues that aren't policy violations?
 - Who do you want to talk with (order of interviews?)
 - What represents your next steps?
 - What interim actions should you take?

DO NOT READ THE NEXT SLIDE!

CASE STUDY: MARIA & CHRIS



You speak with Chris and he states:

- The system is rigged against him and he is going to sue the school for defamation.
- He alleges Maria sent him a text the previous week a picture of her in her bra and panties with text from Rihanna's "Birthday Cake" song,
 - "I know you wanna bite this. It's so enticing. Nothing else like this. I'mma make you my bitch."
- He tells you he did come on to Maria at the bar, and she kissed his neck, then pushed him away playfully saying "you can't handle this."
- Chris says he gave her the grades she earned.
- He says he and Maria hooked up that night after leaving the bar.
- He says Maria is mad because he hooked up with Maria's friend.

CASE STUDY: MARIA & CHRIS



- What are the disputed issues?
- Are there any undisputed issues?
- How has this changed your approach?
- What does due process demand in this situation?

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WHAT IS THE APPROPRIATE STANDARD OF PROOF?



- Different Standards: What do they mean? Why do they exist?
 - Beyond a reasonable doubt
 - Clear and convincing
 - **Preponderance of the evidence.**
- Use language the community understands.
 - 50.1% (50% plus a feather)
 - “More likely than not”
 - The “tipped scale”

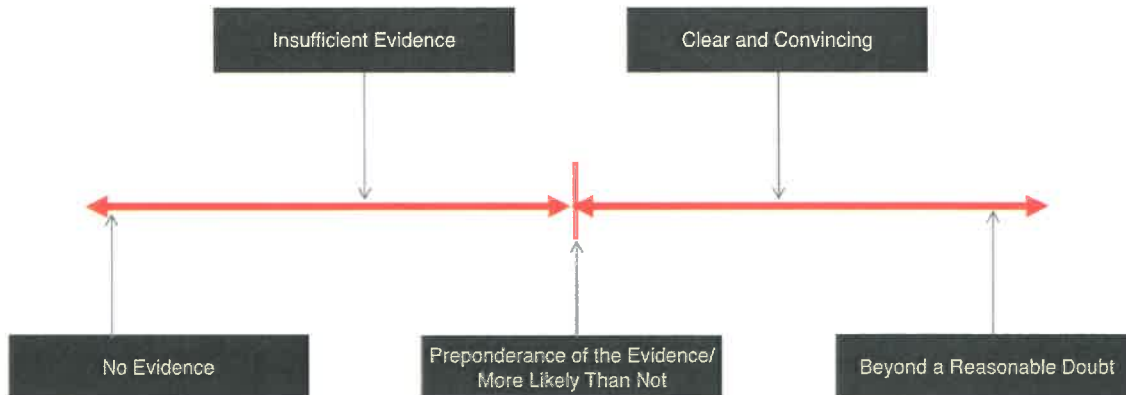
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UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



PROCEDURES FOR VICTIMS UNDER VAWA SEC. 304

- Written Information for Victims
- Reporting
- Involvement of Law Enforcement
- Orders of Protection etc.

VAWA: PROCEDURES FOR VICTIMS



- Your ASR statement must include “the procedures victims should follow if a crime of dating violence, domestic violence, sexual assault or stalking has occurred”
 - “Including **written** information about the importance of preserving evidence that:
 - May assist in proving that the alleged criminal offense occurred, or
 - May be helpful in obtaining a protection order”
 - Additionally, the Clery Handbook recommends that institutions:
 - “provide information about where to obtain forensic examinations,” that such exams do not require filing a police report, and are helpful to preserve evidence

VAWA: PROCEDURES FOR VICTIMS



- “How and to whom the alleged offense should be reported”
 - This includes any person or organization that can assist a victim
 - The Clery Handbook recommends providing a listing of local victim services organizations
 - It also tacitly recommends the institution develop a relationship with local victim services resources

VAWA: PROCEDURES FOR VICTIMS



- “Options about the involvement of law enforcement and campus authorities, including notification of the victim’s option to:
 - Notify proper law enforcement authorities, including on-campus and local police
 - Be assisted by campus authorities in notifying law enforcement authorities if the victim chooses, and
 - Decline to notify such authorities”
 - Clarifications from The Clery Handbook:
 - An institution’s ASR statement must provide specific contact information for the authorities
 - An institution’s ASR statement must also explain what is involved in making a police report

*Note: The Clery Handbook adds: “The statement that your institution will comply with a student’s request for assistance in notifying authorities is **mandatory**”*

VAWA: PROCEDURES FOR VICTIMS



- “Where applicable, the rights of victims and the institution’s responsibilities for orders of protection, “no contact” orders, restraining orders, or similar lawful orders issued by a criminal, civil or tribal court, or by the institution”:
 - This must include “all rights that a victim may have to obtain” such an order
 - The Clery Handbook adds that institutions must:
 - Let students know what legal options are available to them and under what circumstances
 - Tell students how to request information about the available options and provide specific contact information
 - Provide instructions and specific contact information for how to file a request for each of the options.
 - Disclose the institution’s responsibilities for honoring such requests and complying with these orders
 - Provide clear information about what the victim should do to enforce an order of protection

PROCEDURES INSTITUTIONS WILL FOLLOW...

- Confidentiality and Reporting
- Written Notification: Resources
- Accommodations
- Procedures for Disciplinary Action
- Standard of Evidence
- Sanctions
- Protective Measures

VAWA 2013 SEC. 304 PROCEDURES INSTITUTION WILL FOLLOW...



- Information about how confidentiality of victims and other necessary parties will be protected, including:
 - How publicly available recordkeeping will be accomplished without including identifying information about the victim, to the extent permissible by law
 - Maintain confidentiality of accommodations or protective measures provided to the victim (unless confidentiality would impair institution's ability to provide these measures)

VAWA 2013 SEC. 304 PROCEDURES INSTITUTION WILL FOLLOW...



- “Identifying information” includes:
 - First and last name
 - Home or other physical address contact information
 - Social security number, driver’s license number, passport number, or student ID number
 - Any other information...that would serve to identify any individual, including:
 - Date of birth
 - Racial or ethnic background
 - Religious affiliation

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VAWA 2013 SEC. 304 PROCEDURES INSTITUTION WILL FOLLOW...



- However, CSA crime reports should include sufficient detail to avoid under- or double-counting. Examples:
 - Dates
 - Locations
 - Where appropriate, personally identifying information
- The ASR, however, “must not include any personally identifying information about the individuals involved.”
 - The same applies for the Daily Crime Log

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VAWA 2013 SEC. 304 PROCEDURES INSTITUTION WILL FOLLOW...



- “In some cases, an institution may need to disclose some information about a victim to a third party to provide necessary accommodations or protective measures”
 - Should only disclose what is necessary to provide the accommodations or protective measures in a timely manner
 - Policy should also state:
 - Who determines what and to whom information about a victim should be disclosed
 - How the disclosure decision will be made
 - The Clery Handbook recommends informing victim of disclosure prior to disclosing
 - Institution should tell the victim what information, with whom, and why the identifying information will be shared

VAWA 2013 SEC. 304 PROCEDURES INSTITUTION WILL FOLLOW...



- Institution will provide written notification to students and employees about existing resources:
 - Counseling
 - Health
 - Mental health
 - Victim advocacy
 - Legal assistance
 - Visa and immigration assistance
 - Student financial aid
 - Other services available for victims
 - Both within the institution and in the community

VAWA 2013 SEC. 304 PROCEDURES INSTITUTION WILL FOLLOW...



- Written notification of existing on- and off-campus resources should also provide:
 - Information about how to access these resources
 - How to request information from or about these resources
 - Specific contact information
 - Should be updated at least annually
- The Clery Handbook:
 - Recommends “institutions reach out to [local] organizations that assist victims of dating violence, domestic violence, sexual assault and stalking” to prepare a detailed list of resources
 - Indicates (in bold) that “if there are no on- or off-campus services, you must state this fact in your policy statement”

VAWA 2013 SEC. 304 AVAILABLE ACCOMMODATIONS



- Policy statements to include:
 - Written notification to victims about options for, and available assistance in, and how to request changes to:
 - Academic
 - Living
 - Transportation
 - Working situations, or
 - Protective measures
 - The institution must make such accommodations if the victim requests them and they are reasonably available

VAWA 2013 SEC. 304 ACCOMMODATIONS FOR VICTIMS



- Accommodations must be available regardless of whether victim chooses to report to campus or local law enforcement
- Protective measures should minimize the burden on the victim – consider on a case-by-case basis
- Additionally, the statement should “state that the institution is **obligated** to comply with a student’s reasonable request for a living and/or academic situation change following an **alleged** sex offense”
 - Clarify all available options
 - Identify how and who will determine what measures to take

VAWA 2013 SEC. 304 REASONABLE ACCOMMODATIONS



- Considerations for reasonableness include, but are not limited to:
 - The specific need expressed by the complainant
 - The age of the students involved
 - The severity or pervasiveness of the allegations
 - Any continuing effects on the complainant
 - Whether the complainant and the alleged perpetrator share the same residence hall, dining hall, transportation or job location
 - Whether other judicial measures have been taken to protect the complainant (e.g.: civil protection orders)

VAWA 2013 SEC. 304 PROCEDURES FOR DISCIPLINARY ACTION



- ASR Policy statements must also include:
 - “A clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged” VAWA offenses AND that
 - “Describes **each type** of disciplinary proceeding used by the institution” including:
 - The steps
 - Anticipated timelines
 - Decision-making process
 - How to file a disciplinary complaint (including contact information for the person or office to whom a report should be made)
 - How the institution determines which type of proceeding to use based on the circumstances of an allegation of a VAWA offense

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VAWA 2013 SEC. 304 “PROCEEDING”



- “Proceeding” is defined broadly as:
 - “all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, **factfinding investigations, formal or informal meetings, and hearings**”
 - “Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim”
- This disclosure is required for **any and all** faculty, student, and staff disciplinary procedures
- “You must follow the procedures described in your statement regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred (i.e., on or off your institution’s Clery Act geography)”

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VAWA 2013 SEC. 304 STANDARD OF EVIDENCE



- ASR Policy statement of disciplinary procedures must also include a description of the “standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of” the four VAWA offenses
 - No specific standard required
- However, the institution must use the standard of evidence described in the statement in all such proceedings

VAWA 2013 SEC. 304 SANCTIONS



- ASR Policy statement of disciplinary procedures must also “list all the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of” the four VAWA offenses
- No specific sanctions are required
- “Must list ALL of the possible sanctions...for each VAWA offense”
 - Must be specific: e.g. type and length of a suspension, including requirements for reinstatement
 - If you use a sanction not in this list, it must be added in the next ASR

VAWA 2013 SEC. 304 PROTECTIVE MEASURES



- ASR Policy statement of disciplinary procedures must also “describe the range of protective measures that the institution may offer to the victim following an allegation of” a VAWA offense
- Unlike sanctions, institutions must not list all protective measures, “but they must describe the range of protective measures they may offer”
- Examples include:
 - Orders of protection, no contact orders, etc.
 - Transportation assistance or security escorts
 - Academic accommodations
 - Changes in living and work situations

INSTITUTIONAL DISCIPLINARY POLICIES & PROCEDURES: ASR DISCLOSURES

- Disciplinary Procedures
- Annual Training for Officials
- Advisors
- Simultaneous Notification

VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



- Prompt, Fair, and Impartial Process
 - Prompt, designated timeframes (can be extended for good cause with notice to parties)
 - Conducted by officials free from conflict of interest or bias for either party
 - Consistent with institutions' policies
 - Transparent to accuser and accused
 - Timely and equal access to parties “and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings”

VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



- Proceedings must “be conducted by officials who, at a minimum, receive **annual** training on:
 - Issues related to the four VAWA offenses
 - How to conduct an investigation and a hearing process that:
 - Protects the safety of victims
 - Promotes accountability
 - Caution: this does not mean the training should be biased or slanted in favor the reporting party
 - Ensure training is equitable and covers not just victim-based issues, but also those pertaining to a responding party

VAWA 2013 SEC. 304 ANNUAL TRAINING FOR OFFICIALS



- Institutions must describe the annual training
- The training should be “updated regularly to address the latest issues and techniques for conducting proceedings on these topics from beginning to end”
- Training “should include, but not be limited to:
 - Relevant evidence and how it should be used during a proceeding
 - Proper techniques for questioning witnesses
 - Basic procedural rules for conducting a proceeding
 - Avoiding actual and perceived conflicts of interest”

VAWA 2013 SEC. 304 ADVISORS



- Provide accuser and accused with the same opportunity to have others present including an advisor of their choice for “any institutional disciplinary proceedings” and “any related meetings”
 - An advisor is “any individual who provides the accuser or accused support, guidance or advice”
 - An advisor is optional and can be **anyone** (including an attorney or a parent)
 - Institutions can restrict role of advisors in proceedings as long as both parties’ advisors have the same restrictions
 - Institutions should notify parties of these restrictions prior to proceedings
 - Institutions can train a pool of advisors the parties can use, but cannot restrict advisors to just the pool
 - Advisors can serve as proxies if an institution so chooses

VAWA 2013 SEC. 304 SIMULTANEOUS NOTIFICATION



- Require simultaneous notification, in writing, to both accuser and accused, of:
 - The result of any institutional proceeding arising from allegations of VAWA offenses
 - Result “defined as any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution”
 - Result = Finding, Sanction, and Rationale
 - Note: The Clery Handbook contains an explicit FERPA exclusion*
 - Procedures for appeal (if any)
 - Any change to results
 - When such results become final

VAWA 2013 SEC. 304 SIMULTANEOUS NOTIFICATION



- What must be included in the rationale?
 - How evidence and information presented was weighed
 - How the evidence and information support the result and the sanctions (if applicable)
 - How the institution’s standard of evidence was applied
 - Simply stating the evidence did or did not meet the threshold is insufficient
- Simultaneous: “means that there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result”

VAWA 2013 SEC. 304 SIMULTANEOUS NOTIFICATION



- The ASR statement must include “a statement that when a student or employee reports they have been a victim of any of the VAWA offenses (either on or off campus) the institution “will provide the student or employee a written explanation of the [their] rights and options”
 - “Must be a prepared, standardized and written set of materials, including detailed information regarding a victim’s rights and options
 - “This does not mean that you hand the student a copy of the [ASR] or the policy statements contained in the [ASR]

TITLE IX DUE PROCESS

- OCR decisions
 - Wesley College decision
 - Additional decisions
- Implications for Title IX Causes of Action
 - Selective enforcement
 - Erroneous outcome

OCR RESOLUTION AGREEMENT: WESLEY COLLEGE (OCT. 12, 2016)



- Male student accused of planning and participating in live streaming of a male and a female student without the female student's knowledge
- He was suspended on an interim basis
- He was expelled one week later
- Male student filed a complaint with OCR alleging violation of Title IX and OCR took the case
- OCR found a number of inequitable issues within Wesley's policies and procedures

OCR RESOLUTION AGREEMENT: WESLEY COLLEGE (OCT. 12, 2016)



- Interim suspension must reflect the risk of the threat to the campus community
 - Provide (and uphold) the right of responding parties to challenge interim suspension
- College should have provided responding party:
 - With remedies and support resources (e.g.: counseling and/or academic services)
 - Written notice of hearing and of outcome
 - All evidence relied upon to make a finding
 - Robust opportunity to be heard
 - Rights detailed in Wesley College's policies and procedures
- Prompt should not come at expense of fairness
- Consider exculpatory evidence

OCR RESOLUTION AGREEMENT: WESLEY COLLEGE (OCT. 12, 2016)



- “OCR determined that the accused Student was entitled to procedural protections that the College did not afford him. In processing the complaint against the accused Student, the College did not satisfy Title IX, the College did not comply with its own procedures and, in fact, the College acted in direct contradiction of its procedures and as a result the resolution of the complaint was not equitable”

OCR Resolution Letter: Wesley College, 10/12/16

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OCR RESOLUTION: WESLEY COLLEGE (OCT. 12, 2016)



- “It is critical, for purposes of satisfying the Title IX requirement that procedures be “equitable,” that the accused Student have a reasonable opportunity to present his version of the events, particularly in response to adverse “findings” which the College relied upon in imposing the substantial penalty meted out to the accused Student – expulsion”
- “Thus, in conclusion, OCR determined that the College failed to provide an equitable investigation and resolution of the complaint involving the accused Student, including failures to follow many procedural elements set forth in its Title IX Policies and Procedures”

OCR Resolution Letter: Wesley College, 10/12/16

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TITLE IX DUE PROCESS: ERRONEOUS OUTCOME



- Erroneous outcome = School made an incorrect finding or a finding in error.
- Asks the court to re-evaluate the decision of the institution (courts are reluctant to do so)
- Title IX erroneous outcome claims are increasingly used by responding parties as basis for litigation
- For Title IX EO claims, **courts must find causation, i.e. that gender bias caused the incorrect outcome**

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TITLE IX DUE PROCESS: ERRONEOUS OUTCOME



- Courts examine the following for evidence of **gender bias**:
 - Institutional policies & procedures
 - Training materials for: Coordinators, Investigators, hearing officers, appellate officers, students, employees, etc.
 - Pressure from Public Affairs issues
 - Notes, emails, reports of investigators and hearing officers
 - Support provided to reporting and responding parties
 - Conflicts-of-interest
- Examples:
 - *Yu v. Vassar (2015)*
 - *John Doe v. Washington & Lee (2015)*
 - *John Doe v. Columbia Univ. (2015)*
 - *John Doe v. Univ. of Cincinnati (2015)*
 - *John Doe v. Cornell (2016)*
 - *John Doe v. George Mason Univ. (2016)*
 - *John Doe v. Brown Univ. (2016)*
 - *John Doe v. Amherst (2017)*

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TITLE IX DUE PROCESS: SELECTIVE ENFORCEMENT



- **Selective enforcement** = Institution treats one sex differently than the other for purposes of discipline
- Increasingly used by responding parties as basis for litigation (often in-tandem with EO claims)
- For Title IX selective enforcement claims, **courts must find intentionality, i.e. that gender bias caused the differential**
- Examples
 - *Yu v. Vassar (2015)*
 - *John Doe v. Washington & Lee (2015)*
 - *John Doe v. Univ. of Cincinnati (2015)*
 - *John Doe v. Columbia Univ. (2015)*
 - *John Doe v. Amherst (2017)*

LESSONS FROM RECENT CASELAW

- *John Doe v. GMU*
- *John Doe v. Brandeis*
- *John Doe v. Columbia*
- *Jane Doe (#1-9) v. Univ. of Tennessee*
- *Deborah Moore v. Univ. of California*
- *Sarah Butters v. James Madison*
- *John Doe v. Washington & Lee Univ.*
- *John Doe v. Brown Univ.*
- *Takla v. Univ. of California*

**JOHN DOE V. GEORGE MASON UNIV.
U.S. DIST. CT., C.D. CALIF. (NOV. 2, 2105)**



- GMU violated Doe's due process by:
 - Failing to provide **notice** of all allegations used to make a decision
 - **Deviating substantially** from its appellate procedures by having off-the-record meetings with Jane
 - **Re-hearing the case on appeal** without providing Doe adequate opportunity to "mount an effective defense"
 - **Failing to provide a detailed rationale** for the appellate decisions
 - **Pre-determining the outcome**
 - Creating a significant **conflict of interest**
 - Citing the Asst. Dean/Appellate officer's repeated contact with Jane prior to and while considering the appeal

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**JOHN DOE V. BRANDEIS UNIVERSITY
U.S. DIST. CT., MASS. (MARCH 31, 2016)**



- The court wrote a blistering and chastising decision, listing the numerous failures to provide a fundamentally fair process
- The court listed an array of issues of procedural fairness:
 - No right to counsel
 - No right to confront accuser or cross-examine witnesses
 - No right to examine evidence or witness statements
 - Impairment of the right to call witnesses and present evidence
 - No access to Special Examiner's report
 - No separation of investigatory, prosecution, and adjudication functions
 - No right to effective appeal
 - Burden of proof

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JOHN DOE V. BRANDEIS UNIVERSITY
U.S. DIST. CT., MASS. (MARCH 31, 2016)



- **Key Takeaways**

- Provide a responding party with detailed allegations and allow them to respond to each of the allegations prior to rendering a finding
 - Stop hiding the ball – let the parties review reports
- Ensure appellate procedures allow a party to appeal on the basis that the decision “was not supported by the evidence, unfair, unwise or simply wrong”
- It is not always enough to follow your procedures if those procedures are deficient in providing basic due process or fundamental fairness protections

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JOHN DOE V. COLUMBIA UNIVERSITY
U.S. CT. OF APPEALS, 2ND CIR. (JULY 29, 2016)



- **Key Takeaways**

- **Accused students and Title IX:** Students accused of sexual misconduct may have standing to sue for deliberate indifference
- **Title VII lens:** Court used a Title VII rubric indicating that a plaintiff need only present minimal evidence supporting an inference of retaliation
- Ensure that **training materials** are not biased
- Perform a thorough, **complete** investigation
- Provide resources and materials to reporting **AND** responding parties
- Make **decisions based on the evidence presented**, not political variables or external pressures. Provide a detailed rationale

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- **Title IX claims:**

- Deliberate Indifference **post**-assaults (inadequate and discriminatory response to reports of sexual assault): not dismissed
- Interference with investigations and disciplinary processes
 - At the highest levels of the university
 - Inadequate disciplinary responses and actions
 - Misapplication of standards (i.e., consent)
 - Use of Administrative Procedures Act in TN to discriminate
 - Lawsuit details an array of negative and discriminatory impacts on victims

- **Key Takeaways**

- Reliance on OCR's sub-regulatory guidance was insufficient to create a private cause of action for deliberate indifference
- "Institutions are not required to purge their school of actionable peer harassment, nor do victims of peer harassment have a Title IX right to make particular remedial demands. Instead, the standard is akin to 'an official decision by the institution not to remedy the violation' (citing *Gebser*)
 - "requires a showing of a response that was more deficient than merely negligent, lazy, or careless"

SARAH BUTTERS V. JAMES MADISON UNIVERSITY
U.S. DIST. CT., W.D. VA. (NOV. 6, 2015).



- Court stated that JMU possibly deliberate indifferent:
 - **Failure to take action:** JMU failed to investigate or take any other action after learning about the assault
 - **Continued harassment:** Given the continued existence and dissemination of the video
 - **Detailed report and information:** Butters provided a very detailed report and the video; JMU could have done something with it
 - **Minimal support and follow-up:** JMU only referred reporting party to counseling and sent her a single follow-up email asking if she wanted to take any action
 - **Policy not determinative:** While no action was consistent with JMU policy, it may be deliberately indifferent

JOHN DOE V. WASHINGTON AND LEE UNIVERSITY
U.S. DIST. CT., W.D. VIRGINIA (AUGUST 2105)



- Beware of biased training materials
- Bias by administrators, hearing officers, or appellate officers can be a significant issue (e.g., training materials, comments, or writings by administrators, hearing officers or investigators; all training should target issues of bias)
- Use caution when excluding evidence
- Consider the context of the relationship when analyzing consent, communication, etc.
- Provide a detailed rationale for findings and decisions (including appeals)

- Code of Conduct forms the basis of contract between student and institution
- Use the policy that is in place at the time of the incident, and the procedures at the time the complaint is filed
- Do not tell a party one thing and then do another
- investigation is supposed to be impartial
- Use caution excluding evidence.
 - Excluding potentially exculpatory evidence is a clear indicator of a lack of impartiality. While an investigator may not agree with a party (or their lawyer) whether evidence is relevant or not – exculpatory is a much different standard.

- **Key Takeaways**
 - Investigations must be prompt
 - Coordinator and others cannot discourage or seek to dissuade reporting parties from pursuing formal resolution
 - Raises the possibility that the faculty-centric process with only faculty panelists could be problematic
 - Sanctions should reflect the severity of the violations
 - Investigation reports and other evidence should be shared with reporting and responding parties
 - Follow your policies and procedures

CASE STUDY

- The “iPHONE” app.

CASE STUDY: IPHONE



- Maris has been dating Greg for the past few months after the two of them began hanging out following their Psychology 101 class. Greg is swimmer on the university team. Maris is a first-year student and Greg is a junior.
- Maris has had a few sexual partners in the past and was immediately attracted to Greg, who was outgoing and gregarious, and well liked on the team and at the parties they frequented together. Maris and Greg enjoyed an adventurous sex life that often included having sex in public places (like the bathroom at a restaurant and even in the swimming pool afterhours).

CASE STUDY: IPHONE

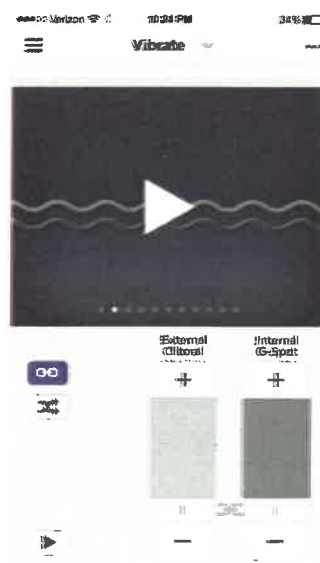


- Maris purchases a product called the we-vibe (<http://we-vibe.com>) that allows Maris to insert the vibrator and have the speed, duration, and vibration intensity controlled by an app on both her and Greg's phone.
- Their sex life includes the use of vibrators and toys and some light BDSM play. Both Greg and Maris have very high sex drives (having sex four to five times a day,) and this new toy is very much appreciated when they are apart.

CASE STUDY: IPHONE



- While Greg was at a party and Maris was in her dorm room, Greg received a text message from Maris, saying that she had turned on and inserted the vibrator and wanted Greg to help "get her off."
- Greg agreed and opened the app on his phone. Maris continued to text him while Greg adjusted the controls of the vibrator inside Maris.



CASE STUDY: IPHONE



- Jeff, a swimming teammate, saw Greg on his phone and asked what he was doing. Greg initially tried to avoid the conversation, but had consumed several drinks and eventually showed Jeff his phone.
- Greg showed him how the controls work on the phone — toggle slides for intensity — and how the top controls the pattern.
- A text notification from Maris popped up saying, “Want more. Harder.” Jeff asked to set the controls and Gregg shrugged and handed him the phone.

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CASE STUDY: IPHONE



- Four other teammates saw Jeff and Greg talking and came over to investigate. The phone was passed around the team and everyone took a turn adjusting the controls and reading the texts from Maris. She wrote, “I love this!” and “You are going to make me cum!”
- The group of six laughed at this and Greg pulled up some naked pictures of Maris for them to look at. They talked about how hot she was and soon all six of them were sharing pictures of their girlfriends and people they have slept in a competition to see who had the “dirtiest” and “hottest” images.

CASE STUDY: IPHONE



- Maris and Greg signed off the app and agreed to see each other after the party. Greg was pretty intoxicated and made a joke about how his teammates helped out with the app. Maris became very upset about this and they had a big argument before she broke up with him and told him to get out of her room.
- In the morning, Maris shared this story with her RA and asked to make a compliant.

CASE STUDY: IPHONE



- What are the possible policy violations?
- What are the jurisdictional issues?
- What involvement should athletics play in this situation?
- How do you notify the women involved?
- Do you handle these all as one case?
- Do you have multiple hearings (if applicable)?
- What about involving law enforcement?
- What if some of the women want to proceed with an investigation, but others do not?

REVIEW OF ATIXA DUE PROCESS CHECKLIST

DUE PROCESS CHECKLIST



- Right to access to an advisor of your choice throughout the process
 - May restrict role in meetings
 - Notify of right to advisor in Notice of Investigation
 - Remind in each meeting they may have an advisor present
 - For ALL meetings, interviews and proceedings
 - Attorney, parent, roommate, friend, etc.
 - Advisor should not hold up the process
 - Panel of trained advisors
 - What about union reps?

DUE PROCESS CHECKLIST



- Right to the least restrictive terms necessary if interim suspension is implemented, and a right to challenge the imposition of the interim suspension
 - Beware of overreacting
 - Interim measures should reflect the nature of the allegations
 - Threat of harm to reporting party and others
 - Mechanics of the opportunity to challenge

DUE PROCESS CHECKLIST



- Right to uninfringed due process rights, as detailed in the college's procedures, if subject to interim actions
 - Be sure procedures have such elements
 - Provide timeline for a prompt challenge
 - Recognize need to expedite resolution process if interim suspension is used
 - Right to advisor applies

DUE PROCESS CHECKLIST



- Right to clear notice of the policies allegedly violated if and when the formal allegation is to be made
 - Written notice (to both parties)
 - List each of the specific policies allegedly violated – include policy language, not just the name of the policy
 - Right to not have formal allegation made without reasonable cause

DUE PROCESS CHECKLIST



- Right to clear notice of any hearing in advance, if there is to be a hearing
 - Written notice
 - Provide the parties with a copy of hearing procedures
 - “Hearing” in this context is a formal, in-person hearing with either an administrator or a panel
 - With sufficient time to prepare (minimum of 2 days)
 - Opportunity to challenge hearing panel members for bias

DUE PROCESS CHECKLIST



- Right to receive **COPIES** of all reports and access to other documents/evidence that will be used in the determination, reasonably prior to the determination (these may be provided in redacted form)
 - Caselaw is increasingly overwhelming on this point
 - Neither FERPA nor employment laws prohibit providing copies
 - STOP making people come to an office to review evidence. NOT a best practice.
 - Transparency is important to fairness

DUE PROCESS CHECKLIST



- Right to suggest witnesses to be questioned, and to suggest questions to be asked of them (excluding solely character witnesses)
 - Institution should determine which witnesses are questioned (“suggest”)
 - If you do not have a formal hearing, this is even more important
 - Provides a right to a form of cross-examination without the negatives of in-person confrontation

DUE PROCESS CHECKLIST



- Right to decision-makers and a decision free of demonstrated bias/conflict of interest (and advance notice of who those decision-makers will be)
 - Not just ANY bias
 - Danger of wearing multiple hats
 - Previous interaction does not disqualify, but be careful
 - Doe v. George Mason Univ.
 - Cannot be decision-maker and appellate officer

DUE PROCESS CHECKLIST



- Right to clear policies and well-defined procedures that comply with state and federal mandates
 - Not enough to just follow your policies and procedures
 - Must be fundamentally fair, grounded in principles of due process
 - Courts increasingly looking for clear, detailed procedures
 - Laws, caselaw, and regulatory guidance

DUE PROCESS CHECKLIST



- Right to a process free of (sex/gender/protected class etc.) discrimination
 - Claims of selective enforcement on the rise in the courts
 - Equitable rights to the parties
 - Beware making decisions on basis of external variables (fear of OCR, courts, PR, etc.)

DUE PROCESS CHECKLIST



- Right to an investigation interview conducted with the same procedural protections as a hearing would be (because the interview is an administrative hearing)
 - Interviewee verification of notes
 - Right to ask questions of witnesses and other parties through the interviewer(s)
 - Right to review (receive copies of) all evidence prior to a decision being made
 - Right to suggest witnesses
 - Advisor
 - Right to review report

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DUE PROCESS CHECKLIST



- Right to a fundamentally fair process (essential fairness)
 - Notice of charges
 - Opportunity to be heard
 - Private schools: Fundamental Fairness
 - Public schools: Due Process
 - See: ATIXA's Due Process Checklist 😊

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DUE PROCESS CHECKLIST



- Right to know, fully and fairly defend all of the allegations, and respond to all evidence, on the record
 - Not possible without ability to review all evidence
 - Notice of Investigation
 - Detailed Notice of Allegations (including all applicable policies)
 - Review draft report prior to finalization (if no hearing)
 - Regardless of whether employee, faculty, or student
 - Need not be in a formal hearing

DUE PROCESS CHECKLIST



- Right to a copy of the investigation report prior to its finalization or prior to the hearing (if there is one)
 - Allows for full review of all evidence prior to decision being made
 - Serves as a check to ensure report is accurate and thorough
 - Enhances “opportunity to be heard”

DUE PROCESS CHECKLIST



- Right to know the identity of the reporting party and all witnesses (unless there is a significant safety concern or the identity of witnesses is irrelevant)
 - Except in limited situations, it is a violation of basic fairness to do otherwise.
 - More often see desire to remain anonymous in employment cases
 - Strengthen retaliation provisions in policy and practice
 - Inform all parties of retaliation provisions and provide examples

DUE PROCESS CHECKLIST



- Right to regular updates on the status of the investigation/resolution process
 - Lack of communication from investigators enhances fear, worry, and stress for all parties
 - Update at least weekly, even if nothing new to report
 - Helps encourage prompt inquiries
 - Opportunity to provide parties information about resources and remedies on a regular basis

DUE PROCESS CHECKLIST



- Right to clear timelines for resolution
 - Prompt: 60 days is requirement, but strive for faster
 - Promptness should almost never trump thoroughness
 - Due process lawsuits repeatedly allege “too prompt”
 - For each stage of the investigation
 - Typical stages: Gatekeeping/preliminary investigation, Investigation, Pre-hearing, Hearing, Appeals
 - In procedures, provide timelines but give yourself some flexibility.
 - E.g.: “typically within 14 days”, “absent mitigating circumstances...”, etc.

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DUE PROCESS CHECKLIST



- Right to have procedures followed without material deviation
 - Emphasis on the word “material”
 - Detailed procedures help ensure compliance
 - Be willing to have some flexibility as long as fairness is maintained

“Remember, you have no side other than the integrity of the process.”

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DUE PROCESS CHECKLIST



- Right to a process that conforms to all pertinent legal mandates and applicable industry standards
 - Caselaw
 - Federal laws: Title IX, VAWA/Clery, Title VII, ADA, Sec. 504, etc.
 - OCR Guidance
 - The “Standard of Care”
 - Associations: ATIXA, NACUA, ASCA, NASPA, AAAED, CUPA-HR, etc.

DUE PROCESS CHECKLIST



- Right to have only relevant past history/record considered as evidence
 - Disciplinary history of both parties is typically irrelevant, except during sanctioning
 - Sexual history of both parties typically irrelevant
 - However, sexual history between the parties can be relevant (e.g. to help determine what patterns exist as to how consent is given or received, etc.)
 - Previous good faith allegations that are substantially similar may be considered (even if found not responsible)
 - Proving pattern v. proving offense. Which are you investigating?

DUE PROCESS CHECKLIST



- The right to have the burden of proving a violation of policy borne by the institution
 - An allegation does not create a presumption that the policy was violated
 - Not up to the responding party to disprove the allegation
 - Preponderance of the evidence & equity

DUE PROCESS CHECKLIST



- Right to the privacy of the resolution/conduct process to the extent of and in line with the protections and exceptions provided under state and federal law
 - Does not abridge rights of parties to review all evidence as well as finding, sanction, and rationale (including in employment cases)
 - “Need to know” under FERPA
 - File management and protection
 - When a case is made public by one of the parties...

DUE PROCESS CHECKLIST



- Right to a finding that is based on the preponderance of the evidence
 - Not based solely on “gut,” the attitude of the parties, the likeability of the parties, or a presumption of responsibility
 - Credibility determinations are sufficient to reach preponderance of the evidence (but not at the expense of the evidence)
 - Must be able to articulate rationale
 - Is a function of credible, probative, and articulable evidence

DUE PROCESS CHECKLIST



- Right to a finding that is neither arbitrary nor capricious
 - Arbitrary and capricious decisions are often based on external variables
 - E.g.: personalities, identity, money, influence or status, power imbalance, corruption, discriminatory variables
 - “Picking the plaintiff” is arbitrary and capricious
 - Decisions should be based on evidence, credibility, prompt, thorough, and impartial investigation by trained investigators
 - Bias and partiality are everywhere....

DUE PROCESS CHECKLIST



- Right to be timely informed of meetings with each party, either before or reasonably soon thereafter (unless doing so would fundamentally alter or hamper the investigation strategy)
 - A right of the parties under VAWA Sec. 304
 - Fosters communication between investigators and the parties
 - Helps parties to prepare for possible retaliation
 - Allows opportunity for the parties to send questions to ask of the other
 - Investigation strategy example: Sometimes the first meeting with a party is strategically unannounced

DUE PROCESS CHECKLIST



- Right to sanctions that are proportionate with the severity of the violation and the cumulative conduct record of the responding party
 - Serious violations warrant serious sanctions
 - What about “precedent”?
 - Conflict at times with “educational” sanctions
 - Balancing act: Do not over-react or over-sanction
 - Avoid automatic sanctions as each case is different
 - Consider use of “presumptive” sanctions

DUE PROCESS CHECKLIST



- Right to the outcome/final determination of the process in writing as per VAWA §304
 - No longer sufficient to simply tell the parties the outcome
 - Must be provided to both parties
 - Need not be identical, but should contain same key elements
 - Must be provided “simultaneously”
 - Must provide each stage that could be “final”
 - Finding, sanction, and rationale (see next slide)

DUE PROCESS CHECKLIST



- Right to a detailed rationale for the finding/sanctions
 - VAWA requires finding, sanction, and rationale
 - Caselaw overwhelmingly supports this requirement
 - Written detailed rationale provided to the parties (allows for appeal)
 - Rationale for decision on any challenged interim measures, findings, appeals, any change in finding or sanction

DUE PROCESS CHECKLIST



- Right to an appeal on limited, clearly identified grounds:
 - A procedural error or omission occurred that significantly impacted the outcome of the hearing
 - To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially impact the original finding or sanction.
 - The sanctions imposed are substantially disproportionate to the severity of the violation (or: the sanctions fall outside the range of sanctions the university/college has designated for this offense)

DUE PROCESS CHECKLIST



- Right to competent and trained investigators and decision-makers
 - Competent:
 - Able, trained, unbiased, intelligent, analytical, commitment to due process and fairness
 - Trained: Minimum of 2-4 days per year
 - See ATIXA Training Chart for subjects
 - Title IX-compliant
 - VAWA-compliant
 - Key topics: Questioning, Credibility, Analyzing Evidence, Report writing, Consent, Victimology, Due Process, etc.

DUE PROCESS CHECKLIST



- Right to a written enumeration of these rights
 - Insert into your policies and procedures (see e.g.: ATIXA's 1P1P)
 - Fosters transparency
 - Visible representation of commitment to fairness
 - Fosters institutional accountability

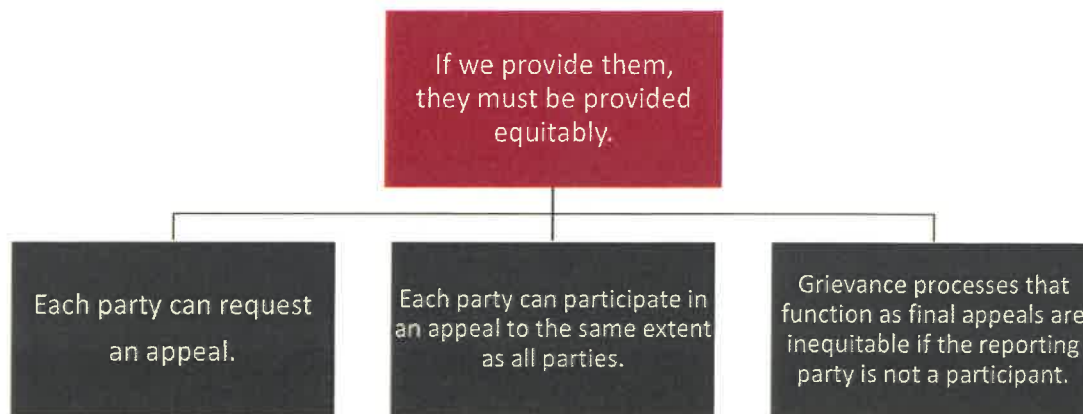
APPEALS

- Key Elements
- Where Appeals Go Off the Rails
- Grounds for Appeal
- Appeals Logistics
- Process Flowchart

INTRODUCTION



- Title IX, VAWA Section 304, and appeals best practices.
- Appeals are not required by federal law.



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APPEALS: KEY ELEMENTS



- One level of appeal.
- Limited grounds for appeal (see next slide).
- Deference to original hearing authority.
- Sanctions take effect immediately.
- Short window to request an appeal.
 - Can always grant an extension if necessary.
- Document-based and recording review.
 - NOT de novo.
- Request for an appeal.

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WHEN APPEALS GO OFF THE RAILS



Interventionist appeals officers who believe it is their job to second-guess.

Granting appeals for the chance at an educational conversation/to teach a lesson.

The liability risk of a too strong appellate authority.

Hierarchs as appeals officers – a common practice and is often a mistake.

Failure of adequate training.

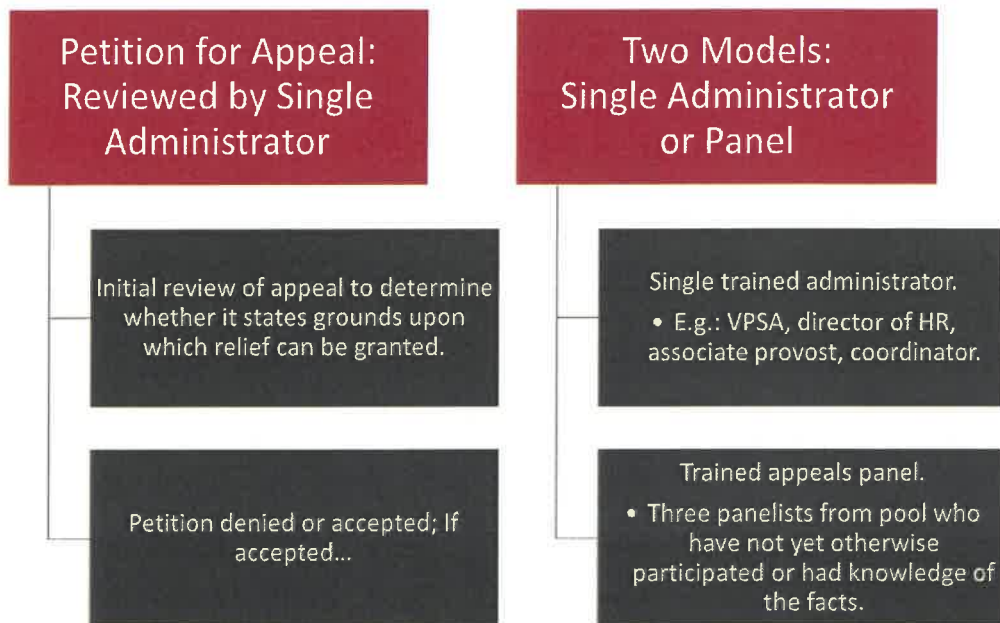
Too much deference can also bite you (if the initial decision is wrong, or results from lack of training, you do have to set things right).

APPEALS: GROUNDS FOR APPEAL



- A procedural error or omission occurred that significantly impacted the outcome of the hearing.
 - E.g.: Insufficient evidence to warrant the finding, substantiated bias, material deviation from established procedures, etc.
- To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially impact the original finding or sanction.
 - A summary of this new evidence and its potential impact must be included.
- The sanctions imposed are substantially disproportionate to the severity of the violation (or: the sanctions fall outside the range of sanctions the university/college has designated for this offense).

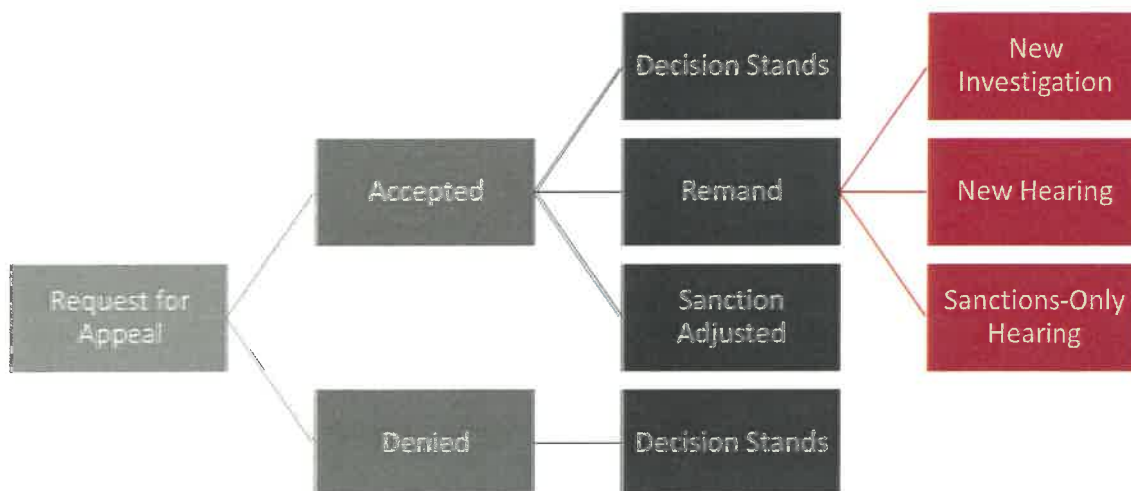
APPEALS LOGISTICS



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APPEALS: THE PROCESS



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HOT TOPICS IN DUE PROCESS

- Discrimination
- Threats
- Free Speech

TITLE IX DUE PROCESS: THREATS



“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death” *Virginia v. Black*, U.S. 04/07/2003

- Intent:
 - To carry out the threat
 - To place the victim in fear
- Entire context of the threat
- “Reasonable person” standard
- Directed towards a specific individual
- Communicated to the target

TITLE IX DUE PROCESS: DISCRIMINATION



- Freedom of association
- Religious freedom
- Student organizations
 - Fraternity & sorority life
 - “All comers” policies
 - Membership requirements or restrictions
 - Leadership requirements or restrictions
 - Trans* students & membership
 - Athletics
- Gender & pay equity
- Pregnancy

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TITLE IX & THE FIRST AMENDMENT



“Congress shall make no law...abridging the freedom of speech...”

- An important concern for all public institutions and any private campuses impacted by state law and constitutions (e.g., California and New Jersey).
- Impacts policy language regarding expression.
- Pay heed to vagueness and over-breadth concerns.
- Avoid incorporating “intent” or “purpose” language.
- Incorporate appropriate standard for context.

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TITLE IX & THE FIRST AMENDMENT



- Title IX cannot be enforced or use to infringe on First Amendment protections.
- **Time, place, and manner** limitations on expression must be applied consistent with the forum in question.
 - Content neutral
 - Narrowly tailored to serve a significant state/gov't interest
 - Leave ample alternative channels for communication of the information

TITLE IX & THE FIRST AMENDMENT



- Traditional Public Forum: campus mall, public streets through campus, and public sidewalks.
- Designated Public Forum: designated “free speech zones” such as green spaces.
- Limited Public Forum: auditoriums, meeting rooms, and athletic facilities.
- Nonpublic Forum: classrooms, residence halls, and campus offices.

TITLE IX & THE FIRST AMENDMENT



- Protected Speech
 - Offensive language
 - Hate speech
 - Time, Place, Manner restrictions
 - Being a jerk
- Unprotected Speech
 - Fighting Words; Obscenity; True Threat; Defamation
 - Sexual and Racial Harassment (Hostile environment)
 - Incitement of Imminent Lawless Action
- Controversial Speakers

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TITLE IX & THE FIRST AMENDMENT



- Protests
 - Time, Place, Manner Restrictions
- Disruptions
 - Class
 - Classroom management issues
 - Conduct code issues
 - Workplace/externships/internships
- Online behavior
 - Institutional sites and discussion forums
 - Using Institutional equipment or networks
 - Private forums (e.g.: Facebook, Twitter)

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SEPTEMBER 2017 DEAR COLLEAGUE LETTER

SEPTEMBER 2017 DEAR COLLEAGUE LETTER

- Overview
- Rulemaking: Notice and Comment
- Summary of Interim Q&A
 - What changed?
 - What did not change?

OVERVIEW OF OCR SEPT. 2017 ACTION



- Sept. 22, 2017 Dear Colleague Letter
 - Withdrew the April 4, 2011 Dear Colleague Letter
 - Withdrew the Questions and Answers on Title IX and Sexual Violence (April 29, 2014)
 - Rulemaking: Called for Notice and Comment on “Title IX responsibilities arising from complaints of sexual misconduct”
 - Provided “Interim Guide” – Q&A on Campus Sexual Misconduct

OVERVIEW OF OCR SEPT. 2017 ACTION



- OCR’s stated reasons for withdrawing 2011 DCL and 2014 Q&A
 - Released without providing for notice and comment requirements (APA)
 - “Created a system that lacked basic elements of due process”
 - “Created a system that...failed to ensure fundamental fairness”

- **Administrative Procedures Act (APA)**
 - Federal agencies typically must provide public notice and an opportunity for public comment before finalizing a rule.
 - Preliminary steps are largely unstructured and typically include informal conversations with interested parties
 - Agency then provides Notice of Proposed Rulemaking with rule published in Federal Register requesting public comment (typically for 30-60 days)
 - Agency then finalizes the rule, which goes into effect within 0-30 days.

Q&A ON CAMPUS SEXUAL MISCONDUCT

- Interim Guidance from OCR dated September 2017

*Note: Items in **red** represent changes from previous guidance or new guidance not previously given*

OCR “INTERIM GUIDE” SUMMARY



- **Actual or Constructive Notice**
 - OCR Maintains an actual or constructive notice standard (“knew or should have known”) as triggering an institution’s obligations under Title IX.
- **Hostile Environment**
 - Maintains definition of a hostile environment, “when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student’s ability to participate in or benefit from the school’s programs or activities, a hostile environment exists and the school must respond.”
- **Responsible Employees**
 - OCR provides little information other than that employees may be designated as such.

OCR “INTERIM GUIDE” SUMMARY



- **Title IX Coordinator**
 - Schools “must designate at least one employee to act as a Title IX Coordinator to coordinate its responsibilities in this area.”
 - 2015 DCL to Coordinators is still in place.
- **Consistent with Laws**
 - Schools “must formulate, interpret, and apply their rules” in a manner consistent with laws, court decisions and the First Amendment.
- **Clery/VAWA**
 - Schools must uphold Clery/VAWA and Title IX (if applicable) when addressing issues of dating violence, domestic violence, sexual assault and stalking.

OCR “INTERIM GUIDE” SUMMARY



• Interim Measures

- “Interim measures” are “individualized services” provided to BOTH reporting party and responding party prior to resolution of an allegation.
- Key elements regarding interim measures:
 - Institutions cannot “rely on fixed rules or operating assumptions that favor one party over another.”
 - Institutions cannot make “measures available only to one party.”

OCR “INTERIM GUIDE” SUMMARY



• Interim Measures (con’t)

- Key elements regarding interim measures:
 - May change over time.
 - Schools should make “every effort to avoid depriving any student of his or her education.”
 - Coordinator should communicate regularly with the parties to ensure any interim measures are “necessary and effective.”

OCR “INTERIM GUIDE” SUMMARY



- **Prompt and Equitable**
 - “A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct.”
- **Prompt**
 - “Prompt” is shifted from a 60-day time limit to providing “no fixed time frame.”
 - OCR will examine a school’s response to see if the school used a “good faith effort” to provide a prompt, fair and impartial resolution in a timely manner.

OCR “INTERIM GUIDE” SUMMARY



- **Prompt and Equitable procedures:**
 - Provide “notice of the school’s grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees.”
 - Apply “the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties.”
 - Designate “and follow a reasonably prompt time frame for major stages of the complaint process.”

OCR “INTERIM GUIDE” SUMMARY



- **Prompt and Equitable procedures (con’t):**
 - Ensure “an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.”
 - Notify “the parties of the outcome of the complaint.”
 - Provide “assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.”

OCR “INTERIM GUIDE” SUMMARY



- **Equitable**
 - School has the burden of gathering evidence and information, not the parties.
 - Investigation must be led by someone who is “free of actual or reasonably perceived conflicts of interest and biases for or against any party.”
 - Ensure institutional interests do not interfere with the impartiality of the investigation
 - Rights afforded to the parties should be on “equal terms.”

OCR “INTERIM GUIDE” SUMMARY



- **Equitable**

- Requires a trained investigator to:
 - Analyze and document the available evidence to support reliable decisions
 - Objectively evaluate the credibility of parties and witnesses
 - Synthesize all available evidence—including both inculpatory and exculpatory evidence; and
 - Take into account the unique and complex circumstances of each case.
- Gag orders and similar actions restricting the parties from discussing the investigation with others are likely inequitable because they may inhibit ability of the parties to obtain and present evidence and defend their interests.

OCR “INTERIM GUIDE” SUMMARY



- **Notice of Investigation**

- Written, detailed notice of investigation should be provided to the responding party once a school has decided to pursue an investigation.
- The Notice of Investigation should include sufficient details, including:
 - Identity of the parties involved.
 - Specific policies allegedly violated.
 - Precise misconduct alleged.
 - Date of the alleged incident.
 - Location of the alleged incident.

OCR “INTERIM GUIDE” SUMMARY



- **Notice of Hearing**
 - Provide parties advanced, written notice of any hearing “with sufficient time to prepare for meaningful participation.”
- **Investigation Report**
 - “Investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence.”
- **Notice of Interview**
 - Provide parties advanced, written notice of any interview “with sufficient time to prepare for meaningful participation.”

OCR “INTERIM GUIDE” SUMMARY



- **Access to information**
 - School must provide the reporting party, the responding party and appropriate officials with “timely and equal access to any information that will be used during informal or formal disciplinary meetings and hearings.
 - Decision-maker must provide the parties with “the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.”

OCR “INTERIM GUIDE” SUMMARY



- **Informal Resolution**

- Defined as a process that reaches a mutually voluntary resolution that “does not involve a full investigation and adjudication...including mediation.”
- Informal resolution is permissible if:
 - All parties voluntarily agree to engage in informal resolution.
 - Parties have received a full disclosure of the allegations.
 - Parties have received a full disclosure of their resolution options.
 - School determines the complaint is appropriate for informal resolution.

OCR “INTERIM GUIDE” SUMMARY



- **Decision-Maker**

- Can be an investigator or a separate decision-maker.
- Finding need not come from a formal hearing (investigation-based decision is permissible).
- Should focus on whether the conduct violated school’s policies.
- Should make a decision on each of the alleged violations.
- No formal hearing is necessary.

OCR “INTERIM GUIDE” SUMMARY



- **Standard of Proof**
 - School may use either Preponderance of the Evidence OR Clear and Convincing.
 - Whatever standard is used, the school must use the same standard for all other student misconduct cases.
- **Right to Respond to the Investigation Report**
 - Parties should be provided the opportunity respond in writing to the investigation report before a finding is made and/or before a hearing.

OCR “INTERIM GUIDE” SUMMARY



- **Sanctioning**
 - The decision-maker can also determine the sanction, or sanction can be determined by someone else.
 - Sanctioning should “be made for the purpose of deciding how best to enforce the school’s code of conduct.”
 - Sanctioning should also account for the impact of “separating a student from his or her education.”
 - Sanctions must represent a “proportionate response to the violation”
 - OCR restates the VAWA requirement that a college or university list all possible sanctions for DV, DV, S, SA in its Annual Security Report.

OCR “INTERIM GUIDE” SUMMARY



- **Notice of Outcome**

- OCR recommends that written notice of outcome is provided currently to the reporting party and the responding party.
- Content of the notice of outcome may vary based on the nature of the allegations, the institution, and the age of the parties.

OCR “INTERIM GUIDE” SUMMARY



- **Notice of Outcome**

- OCR restates the Clery requirement for colleges and universities to provide the parties with:
 - Simultaneous, written notification of the disciplinary proceeding.
 - Institution’s procedures for appeal (if any).
 - Any change “to the result when it becomes final.”
 - Must include “any initial, interim or final decision”
 - Any sanctions imposed.
 - Rationale for the results.
 - Rationale for the sanctions.

OCR “INTERIM GUIDE” SUMMARY



- **Notice of Outcome**

- For non-Clery-based allegations (harassment, K-12, etc.), “the school should inform the reporting party:
 - Whether it found that the alleged conduct occurred,
 - Any individual remedies offered to the reporting party, or
 - Any sanctions imposed on the responding party that directly relate to the reporting party,
 - Other steps the school has taken to eliminate the hostile environment (if the school found one to exist).”
 - In K-12, notice should be provided to parents if the student is <18 yrs. old and to the student if <18 yrs. old.

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OCR “INTERIM GUIDE” SUMMARY



- **Appeals**

- Are not required
- A school does NOT need to provide the parties the same rights to appeal.
- A “school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.”

- **Existing Resolution Agreements**

- Remain in full effect

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QUESTIONS?

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INFORMATION

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