LEGAL GUIDANCE FOR INVESTIGATIONS OF SEXUAL & INTERPERSONAL VIOLENCE WITHIN STUDENT CONDUCT

*NEW*

TITLE IX TRAINING MANDATE

Campus Investigators must be trained in:

• The definition of sexual harassment in the Final Rule §106.30

• The scope of the recipient's education program or activity

• How to serve impartially, including:
  • by avoiding prejudgment of the facts at issue
  • by understanding conflicts of interest and bias

• How to create an investigative report that fairly summarizes relevant evidence
Campus Investigators must be trained annually in:

- Conducting investigations of sexual violence
- Issues involved with domestic violence, dating violence, stalking or sexual assault
- Promoting victim safety and accountability
- Impartiality and avoiding “actual” and “perceived” conflicts of interest

Law and Investigation Basics

- Overview: Due Process in Investigations
- Focus on Title IX Final Rules
- Procedural Fairness and Conflicts of Interest
DUE PROCESS BASICS
FOR TITLE IX INVESTIGATIONS

DUE PROCESS
Public Colleges/Private Colleges
Due Process/Fair Process

*Does it make a difference anymore?*

*In sexual and interpersonal violence cases, the due process/fair process line has been erased.*
SOURCES OF DUE PROCESS

Constitution
Case law interpreting the Constitution
Sometimes Statute or Regulation or Guidance
• Clery Act/VAWA
• Title IX
• State law (e.g., N.Y. Education Law 129-B)

REMEMBER: Start with your Code
Your Code of Conduct defines process owed, notwithstanding any other constitutional/legal requirements

DUE PROCESS

The Constitution
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV, Sec. 1
**DUE PROCESS**

**The Theory**

Educational programs admitted to study in may be a property right or quasi-property right *(note case law often assumes with without deciding)*.

Therefore, due process is required before a deprivation, but not necessarily the same level of process as before deprivation of a life or liberty interest *(criminal justice system)*.

Due process is supposed to be “flexible” and is not subject to one-size-fits-all rules.

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**DUE PROCESS**

*Dixon v. Alabama, 293 F.2d 150 (5th Cir. 1961)*

- Landmark decision outlining what due process is required before removal from public institution
- Must include notice and opportunity to be heard
- Goodbye (for now) in loco parentis.
DUE PROCESS


- Public K-12 school must conduct a hearing before suspending students more than 10 days (public school is compulsory).
- Property interest and liberty interest.
- 10 day suspension not de minimis.

For many such cases, the notice and “hearing” can take place quickly (“need be no delay”).

- Cases of danger do not require immediate hearing.
- Short suspensions only require “informal give and take” prior to suspension, and do not require counsel, cross examination, or ability to call own witnesses.

DUE PROCESS: FLEXIBILITY

IT’S CALLED

DOWNWARD CAT
DUE PROCESS: WHAT'S AT STAKE?

WHEN YOU AIN'T GOT NOTHING
YOU GOT NOTHING TO LOSE

DUE PROCESS: IMPARTIALITY

Neutral cat
is neutral
FEDERAL LAWS AND REGULATIONS GOVERNING TITLE IX INVESTIGATIONS

TITLE IX AND CLERY

VAWA
Crimes of Sexual Violence

* State Law?

Primary Crimes

Crime Log

Drug, Alcohol & Weapons

Missing Persons

Hate Crimes

Timely Warning

Emergency Notification

Admissions & Financial Aid

Unequal Pay

Facilities

Athletics

CODE WORD ONE: GBBO

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TITLE IX AND CLERY
No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

-Title IX of the Education Amendments of 1972

1997/2001 Sexual Harassment Guidance

April 2011 Dear Colleague Letter

April 2014 Q&A Dear Colleague Letter

September 2017 Dear Colleague Letter

November 2018 Notice of Proposed Rulemaking ("NPRM")

May 19, 2020: Title IX Final Rules (effective August 14, 2020)
• Narrows the definition of “sexual harassment” under Section 106.30
• Shrinks scope of a college/university’s jurisdiction over complaints under Title IX
• Mandatory investigatory procedures
• Live hearing requirement with cross-examination
• Conflicts of interest and bias rules, including separation of investigatory and adjudicatory roles

TITLE IX FINAL RULE: MAJOR CHANGES

• Not all matters historically considered “Title IX” cases fall within this scope
• Narrows the geographic scope of institution’s obligation to respond
• Narrows the types of “sexual harassment” subjected to Title IX investigation and adjudication
• Conduct falling outside scope may still be resolved through a non-Title IX process

TITLE IX FINAL RULE: SCOPE
TITLE IX: SEXUAL HARASSMENT

2001 Revised Sexual Harassment Guidance

• Quid Pro Quo Sexual Harassment, or

• Hostile environment, which means conduct that is "sufficiently serious to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex."

Title IX Final Rule

• (Employee) Quid Pro Quo, or

• Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the educational institution’s education program or activity, or

• Sexual assault [Clery Act definition], or dating violence, domestic violence, or stalking [VAWA definition]

TITLE IX: JURISDICTION

• Only within the United States

• On-campus, or

• Off-campus, only if location is part of “operations” and institution has substantial control over the place and the respondent
  • Example: Building owned or controlled by institution and used by officially-recognized organization

• Possibly: Online harassment where network/software/hardware is part of “operations” and institution has substantial control
2001 Revised Sexual Harassment Guidance

Complaint/report by faculty, staff, students, or even third parties.

Jurisdiction over both parties is not required for institutional obligations to kick in!

Title IX Final Rule

Complaint/report to TIXC or official with authority to institute corrective measures.

Responsible employee framework not mandated, but allowed.

Jurisdiction over both parties is not required for some institutional obligations to kick in.

WHEN REQUIREMENTS KICK IN: THEN AND NOW

- Title IX Coordinator will offer parties supportive measures, even where no formal complaint is filed
- Examples of supportive measures (See, 85 Fed. Reg. 30026, 30401)
  - counseling
  - extensions of deadlines or other course-related adjustments
  - modifications of work or class schedules
  - campus escort services
  - restrictions on contact between the parties (no contact orders)
  - changes in work or housing locations
  - leaves of absence
  - increased security & monitoring of areas of the campus

TITLE IX: INTAKE PROCESS AND SUPPORTIVE MEASURES
• **CAUTION:** Interim suspensions are prohibited for Title IX student-respondents
  • Department of Education considers them disciplinary sanctions

• Emergency Removal may be used where
  • Person poses threat of immediate **physical** harm
  • Threat arises from allegations of sexual harassment
  • Depends on individualized safety and risk assessment

• Must provide opportunity for “immediate” opportunity to challenge the removal (need not be a formal hearing)

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**Title IX: Emergency Removals**

• Institutions **must** investigate all “formal complaints” filed with the Title IX Coordinator

• Who can file a formal complaint?
  • A person who is currently participating in the education programs or activities of the institution
  • A person who is attempting to participate in those programs or activities
  • The Title IX Coordinator

• Multiple complaints arising from same incidents can be consolidated
The college will protect privacy to the extent possible under the law

The Coordinator has to balance confidentiality with:
• Communications necessary to fulfill legal duties
• The safety of other members of the college community.

### Available Confidentiality

#### Timing
- Send to parties as soon as practicable after filing of formal complaint
- No investigative interviews until parties have sufficient time to review allegations

#### Contents
- Allegations of sexual harassment
- Identities of parties, if known, including the complainant’s name
- Date, time, and location of the incident, if known
- Parties’ basic procedural rights
- Presumption of non-responsibility

#### Advisor
- Notice must inform parties of right to advisor, who may be attorney
- School does not need to pay for attorney
- Reasonable restrictions ok...
- Unless they conflict with cross-examination role
• Institutions **must** dismiss formal complaints that don’t fall within the statutory criteria for the Title IX grievance process
  • Institution may still investigate through a non-Title IX process

• Institutions **may** dismiss complaints that do meet the criteria if:
  • A complainant notifies the TIXC in writing that they would like to withdraw the formal complaint or any allegations in it;
  • The respondent is not enrolled/employed by the institution; or,
  • If specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

• Any party may appeal a dismissal determination

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### Evidence Collection
- Interviews of parties & witnesses after Notice of Allegations
- Both inculpatory & exculpatory evidence must be collected
- Evidence will be directly related to the allegations
- May include evidence that institution does not intend to rely on

### Evidence Sharing
- Mandatory inspection process with 10-day min. review period
- Parties may review evidence with advisors present
- May set reasonable rules (e.g. confidentiality agreement)

### Investigative Report
- Summarizes relevant evidence directly related to allegations
- Cannot make determination regarding responsibility
- Parties have opportunity to review at least 10 days before hearing
PROMPT INVESTIGATION

- Final Rules do not mandate a specific time frame from filing of formal complaint to determination regarding responsibility
  - No “sixty-day” rule mandated
- Final Rules do require publication of a time frame based on a specific number of days (60/90/120 as examples) with room for “good cause” delay
- Final Rules anticipate balance between prompt resolution and adequate time to prepare and respond to charges
  - Between Notice of Allegations and first interview
  - Between receipt of evidence and response (10 day minimum)
  - Between receipt of Investigative Report and Hearing (10 day minimum)

- Reasonableness standard in the case law
  - Cannot be “lengthy and unjustified” or in breach of the code
- Clock starts when the incident is reported
- Clock stops if:
  - The Reporting Individual declines to act
  - Police investigation takes priority (10 day rule for NY institutions)
PROMPT INVESTIGATION

- Courts have found unjustified delays based on:
  - Nearly year-long delay in finishing investigation
  - Delays attributable to winter/summer break
    - Investigations as a year-round duty
  - Delays to accommodate athletic events/athletic eligibility
  - Multiple flawed investigations owing to institutional error
  - Delays resulting in material or physical harm to Respondent or Reporting Individual
    - Delay resulting in harmful contact between parties
    - Delays unduly burdening Respondent’s ability to obtain education

IMPARTIAL INVESTIGATION

- Does the investigator need to pursue every “lead”?
  - Final Rules make clear that a reasonable search is expected, but cases may be dismissed where “specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.” 34 C.F.R. 106.45 (3) (ii).
  - The Rule “appropriately obligates a recipient to undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.” 85 Fed. Reg. 30026, 30292 (May 19, 2020).
  - Courts have raised concerns where the investigators appear to be ignoring critical evidence or do not live up to their own representations or the guarantees within the code of conduct
AMNESTY

- New York, Illinois and several other states provide amnesty for bystanders and reporting parties. Generally include:
  - Requirement of acting in good faith
  - Who disclose any incident to institutional officials or law enforcement
  - Amnesty generally applies to at least violations of alcohol and/or drug use policies occurring at or near time of the sexual misconduct

LIVE HEARING

- All parties, advisors, witnesses, and decision-makers may be physically present in same location, or
- They may participate remotely via secure technology, but
- All parties, advisors, witnesses, and decision-makers must be able to see and hear one another.
• **Questioning Process**
  - Decision-maker asks questions of the parties and witnesses
  - Advisors ask “relevant” cross-examination questions
  - Decision-maker decides if questions are relevant

• **Relevance Determination**
  - **General rule:** does the question make a fact at issue more or less likely to be true?
  - Specific exclusions governing Title IX hearings:
    - “Rape Shield” (with two exceptions). 34 C.F.R. § 106.45(6)(i).
      - Offered to prove someone else committed alleged conduct
      - Offered to prove consent
    - Privileged information. 34 C.F.R. § 106.45(1)(x).
    - Undisclosed medical records. See, 85 Fed. Reg. 30026, 30294

• **CROSS-EXAMINATION**
  - All parties and witnesses must “submit” to cross-examination for their statements to be considered in the determination
  - Note: Decisions can be made in the absence of a party or witnesses, but cannot be based on their out-of-hearing statements
  - No inference of responsibility from decision not to testify
  - This rule applies in all Title IX cases, including those not necessarily resting on credibility
  - Compare: Sixth Circuit Court of Appeals; California state courts
  - “Submit” means answering all questions posed
  - Where the party or witness does not answer a question about a prior statement, such as statement made in a police report or SANE exam, that statement cannot be used in determination.
• Identify the allegations potentially constituting sexual harassment;
• Describe the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
• Identify findings of fact supporting the determination;
• Identify which section of the Code of Conduct, if any, respondent has/has not violated.
• For each allegation, provide:
  • A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
  • A statement of, and rationale for, any disciplinary sanctions the recipient imposes on the respondent; and
  • A statement of, and rationale for, whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
• Describe the recipient's appeal procedures

DETERMINATION REGARDING RESPONSIBILITY

• Title IX Final Rules mandate access to an appeal
• Parties can appeal dismissal of formal complaint and determination regarding responsibility
• Final Rules mandate three appeal grounds:
  • Procedural irregularity that affected the outcome of the matter (i.e. a failure to follow the institution's own procedures);
  • New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
  • The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter.

CODE WORD TWO: STAR BAKER
• New York and Virginia mandate
  • NY: required for Clery Act Primary Crimes.
  • VA: required for offense involving sexual violence

• NY permitted notations: “Suspended/Expelled after a finding of responsibility for a code of conduct violation” or “withdrew with conduct charges pending”

• VA permitted notations: “Suspended/Dismissed/Withdrawn while under investigation for a violation of {Name of Code}.”

• Removal processes: distinction between expulsion & suspension

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**TRANSCRIPT NOTATIONS**

**CODE WORD TWO:**

**STAR BAKER**

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**VIOLENCE AGAINST WOMEN ACT (2013)**

**CODE WORD TWO:**

**STAR BAKER**

Some issues of note:

• Definitions of reportable incidents (sexual assault, forcible fondling, domestic violence, dating violence & stalking)

• Broader Jurisdiction than Title IX Final Rules

• Disciplinary procedures must include a fair, prompt, and impartial investigation and resolution and be conducted by “officials” who receive “annual training”

• Publish clear Sanctions in your code

• Mandatory written notifications

• Access to advisor of choice, **including attorney**.

• Important: clear language in your code detailing dates & standards
CONFLICTS OF INTEREST AND BIAS

• Courts assume that investigators and decision-makers are honest "unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven." Doe v. Trustees of Boston College, 892 F.3d 67, 84 (1st Cir. 2018).

• Student would have to prove:
  1. Investigator or decision-maker was biased against them because of their gender identity, race, or status as a member of another protected class
  2. The investigator or decision-maker’s adverse actions “flowed” from that bias

BIAS AS DUE PROCESS VIOLATION
BIAS AS DUE PROCESS VIOLATION

"In the intimate setting of a college or university, prior contact between the participants is likely and does not per se indicate bias or partiality." Gorman v. Univ. of Rhode Island, 837 F.2d 7, 15 (1st Cir. 1988).

- Most perceptions of bias are not “actual” bias actionable at law
  - Investigators and hearing panelists may ask incisive questions “harsh in tone”
  - Investigators and panelists may have had prior contact with the parties

- The deeper the connections between panelists and parties, the greater likelihood of violation

TITLE IX FINAL RULE

Prohibited Conflicts of Interest and Bias

- Having a conflict of interest or bias for or against complainants and respondents generally
  - CAUTION: “Believe All Women” (or All Men)

- Having a conflict of interest or bias for or against the specific parties

- Overlapping investigator, decision-maker, and appeals roles

Not a per se conflict or bias

- Gender, research interests, work history
- Advocacy background
- Title IX Coordinator serving as Title IX Investigator
- Title IX Coordinator serving as facilitator in informal resolution process


**FINAL THOUGHTS**

- Limitations

  - Reporting Individual may not be able to maintain true “Confidentiality”

  - Reporting Individual may be questioned about factual inconsistencies

  - Reporting Individual need not participate in the proceeding, but may be informed that their case will be strengthened if they testify, and that a neutral hearing body may decide to exclude or give less weight to hearsay testimony
SUMMARY

- Actual bias is a high legal standard, but perception of bias is in the eyes of the parties to the process and should be avoided.
  - **Liability** arises from truly lop-sided investigations and adjudications:
    - Failing to review or preserve evidence or conduct any follow-up interviews to resolve inconsistencies.
    - Helping the accuser prepare their case without assisting the respondent.
  - Or, from statements of investigator or panelist showing presumption of responsibility based on sex stereotypes.
  - Or, from misapplying trauma-informed practice to explain away all inconsistencies in Reporting Individual's statements.