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For help with technical issues throughout the training:
send a private chat to **Student Conduct Institute**
or email studentconductinstitute@suny.edu



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August 2021

SCI TITLE IX INVESTIGATIONS

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 prejudice of the facts at issue
 - by understanding conflicts of interest and bias
- How to create an investigative report that fairly summarizes relevant evidence



CLERY ACT/ VAWA
ANNUAL
TRAINING
MANDATE



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



LEGAL GUIDANCE OVERVIEW



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



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.



HOW MUCH PROCESS?

Greater
Process
Owed

Public

Title IX: Public & Private
Private (*California: SB 967*)
Private (*NY: Ed. Law 129-b*)

Private (*contractually*)

***In many types of cases,
the line has been erased***

Less
Process
Owed

Private
(*constitutionally*)



HOW MUCH PROCESS?

Greater
Process
Owed

Greater the deprivation
or threat to reputation



EXPELLED



Less
Process
Owed

Lesser or trivial
deprivation



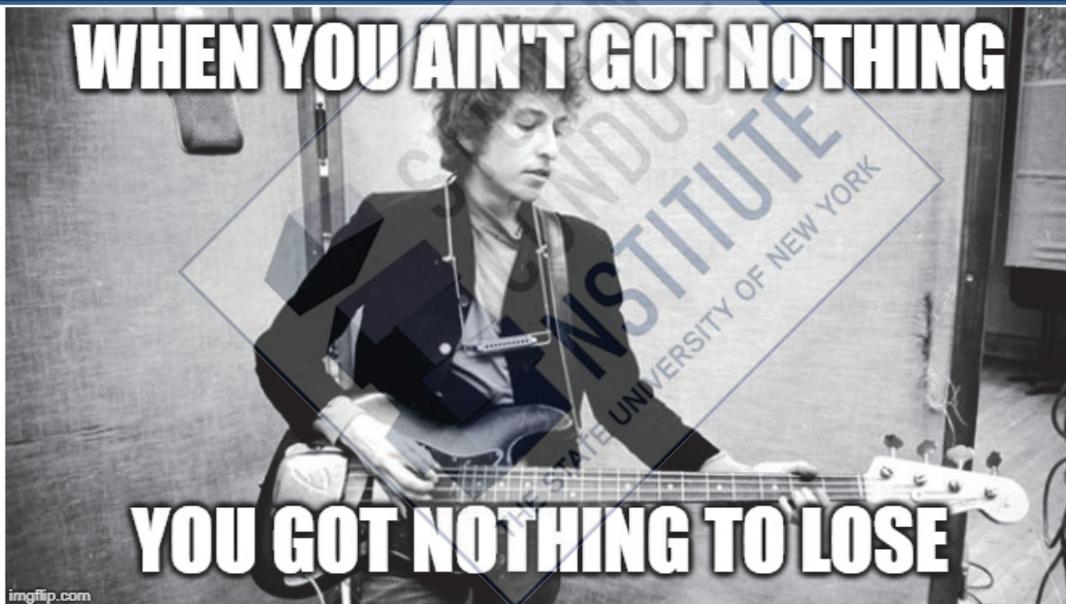
DUE PROCESS: FLEXIBILITY

IT'S CALLED



DOWNWARD CAT

DUE PROCESS: WHAT'S AT STAKE?

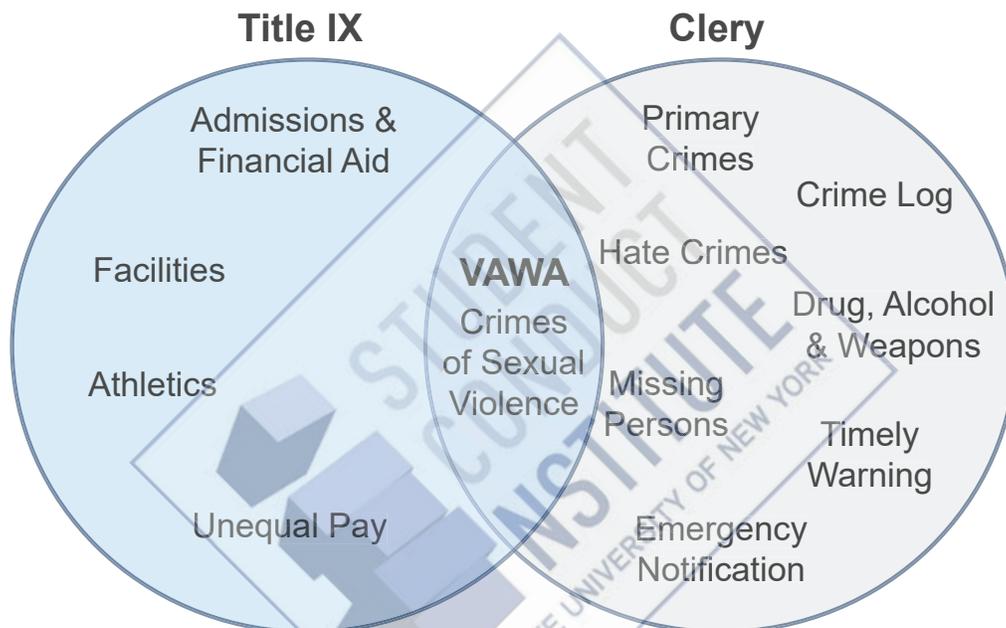


DUE PROCESS: IMPARTIALITY



**CODE WORD ONE:
SUMMER**

FEDERAL LAWS AND REGULATIONS GOVERNING TITLE IX INVESTIGATIONS



TITLE IX AND CLERY

**CODE WORD ONE:
SUMMER**



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



TITLE IX

**CODE WORD ONE:
SUMMER**



~~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)

April 6, 2021: Dear Stakeholders Letter

June 20, 2021: Title IX Q&A



RELEVANT DOCUMENTS





- 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 campus organization
- *Possibly*: Online harassment where network/software/hardware is part of “operations” and institution has substantial control



2001 Revised Sexual Harassment Guidance

"Responsible employee" framework:

- Duty to act based on report to individual with the express authority to act, or
- “an individual who a student could reasonably believe has this authority or responsibility.”

Title IX Final Rule

"Actual notice" is only received when person brings notifies TIXC or "official with authority" to institute corrective measures.

Responsible employee framework not mandated, but allowed.

Institution may designate employees as confidential.



WHEN REQUIREMENTS KICK IN: THEN AND NOW

- Title IX Coordinator is responsible for “coordinating the effective implementation of supportive measures,” even where no formal complaint is filed. 34 C.F.R. § 106.30(a).
- 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 and locations
 - campus escort services
 - restrictions on contact between the parties (no contact orders)
 - leaves of absence
 - increased security & monitoring of certain areas of 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)



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 (See, June 20, 2021 Q&A, Answer 24)
- Multiple complaints arising from same incidents can be consolidated



FORMAL COMPLAINT



The college will protect privacy to the extent possible under the law

The Coordinator will 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



NOTICE OF ALLEGATIONS AND RIGHT TO ADVISOR



- 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



MANDATORY AND DISCRETIONARY DISMISSAL



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



INVESTIGATIVE PROCESS



- **Prompt**
 - Final Rules require publication of time frame based on a specific number of days with room for “good cause” delay
 - Rules (and case law) balance prompt resolution and adequate time to prepare and respond to charges
- **Impartial**
 - Must collect exculpatory and inculpatory evidence
 - Must follow code
 - Cannot have bias or conflict of interest



PROMPT AND IMPARTIAL INVESTIGATION



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



- All parties, advisors, witnesses, and decision-makers may be physically present in same location, or
- They may participate remotely via secure technology, but
- Decision-makers must be able to see and hear parties and witnesses.



LIVE HEARING

Questioning Process

- Decision-maker asks questions of the parties and witnesses
- Advisors ask “relevant” cross-examination questions
- Decision-maker decides if questions are “relevant”



RELEVANT QUESTIONS



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
- Duplicative questions. See, 85 Fed. Reg. at 30331.



RELEVANT QUESTIONS



- **All parties and witnesses must “submit” to cross-examination**
 - 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
- **“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.
 - **Consider:** *Victims Rights Law Center v. Cardona* (D. Mass. 2021)



CROSS-EXAMINATION



- Identify the **allegations** potentially constituting sexual harassment;
- Describe the **procedural steps** taken;
- Identify **findings of fact** supporting the determination;
- Identify which **section of the Code of Conduct** respondent has/has not violated.
- **For each allegation**, provide statement of and rationale for:
 - the result, including a **determination regarding responsibility**;
 - any **disciplinary sanctions** imposed on the respondent; and
 - whether **remedies** designed to restore or preserve equal access to recipient’s education program or activity will be provided to 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.



APPEAL

CODE WORD TWO:
BEACH



VIOLENCE AGAINST WOMEN ACT (2013)

CODE WORD TWO:
BEACH



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



CODE WORD TWO:
BEACH



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).

- An impartial investigator and decision-maker are essential to due process
- Courts assume investigators & 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).



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

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

RETALIATION (SECTION 106.71)



Title IX prohibits retaliation against people who seek to assert their Title IX rights. Section 106.71 makes clear that no retaliation can result:

- Where the individual has made a report or complaint
- Where the individual testified, assisted, or participated in the Title IX Grievance Process
- Where the individual refused to participate in any manner in the Title IX Grievance Process

