



OCR TITLE IX REGULATIONS TRAINING & CERTIFICATION COURSE

January 28th-29th, 2020 | Orlando, FL

YOUR FACULTY



BRETT A. SOKOLOW, J.D.

CHAIR, TNG
PRESIDENT, ATIXA



W. SCOTT LEWIS, J.D.

PARTNER, TNG
CO-FOUNDER & ADVISORY
BOARD, ATIXA

Agenda

- History of Due Process
- Case Law
- Law, Regulations, Courts, Industry Standards
- Due Process in Decision
- Due Process in Procedure
- Context
- In-Depth Analysis of Proposed Regulations
- Informal Resolution
- Interim/Supportive Measures
- Presumption of Innocence & Equity
- Resolution Model for PreK-12, Higher Ed
- Evidence/Investigation Report Review
- Hearings & Related Details
- Advisors
- Appeals
- Interplay with Title VII/Impact on Employees
- Other Provisions

Agenda

- Recent Court Decisions: Due Process in Context
 - Bias, Conflict & Influence
 - Transparency
 - Questioning and Hearings
- Due Process Elements in Resolution Process: Proposed Regs, Court Decisions & Best Practices:
 - Consideration of Context
 - Jurisdiction
 - Notice
 - Interim Measures
 - Investigation
- Investigation Report
- Evidence Review by the Parties
 - Formal Hearing
 - Evidentiary Standard
- Title IX & VAWA Due Process
 - Impact on Evidentiary Standard
 - “Prompt” Mandate

TITLE IX OVERVIEW



Title IX of the Education Amendments of 1972 is a federal law intended to end sex discrimination in all areas of education

Sex (& gender?) equity in all institutional programs, events, operations involving employees, faculty, students, visitors, and others

All types of sex (& gender?) discrimination, including sexual harassment, sexual assault, and sex based partner violence, stalking, bullying, etc.

A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- Key Regulatory and Sub-Regulatory Guidance from OCR
 - 1997 Guidance → 2001 Revised Sexual Harassment Guidance.
 - 2011 Dear Colleague Letter (The “DCL”).*
 - Questions and Answers on Title IX and Sexual Violence (April 2014).*
 - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide.
 - 2016 Guidance on Transgender Students.*
 - 2017 Interim Guide: Q&A on Campus Sexual Violence.
- “Not Alone” – White House Task Force to Protect Students From Sexual Assault (April 2014) (disbanded).
- Also: The Clery Act, VAWA 2013: Section 304.
- *Since rescinded

OVERVIEW OF OCR SEPT. 2017 ACTION



- Sept. 22, 2017 Dear Colleague Letter
 - Withdrew the April 4, 2011 Dear Colleague Letter
 - Withdrew Q&A 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” on Campus Sexual Misconduct
- OCR’s stated reasons for withdrawing 2011 DCL/2014 Q&A
 - Released without providing for notice and comment (APA)
 - “Created a system that lacked basic elements of due process”
 - “Created a system that...failed to ensure fundamental fairness”

OVERVIEW OF PROPOSED REGULATIONS



- November 29, 2018: OCR published proposed amendments to Title IX regulations:
 - Provided 60 days for public comment – open until January 28th
 - OCR will then review comments and finalize the regulations
 - OCR has to respond materially to comments
 - Will amend the Code of Federal Regulations
 - **Will have the force of law once adopted**
 - Proposed amendments are significant, legalistic, and very due process-heavy
 - Will likely go into effect 30 days after final regulations published in Federal Register

INTERVENING VARIABLES



- Congress and a newly-installed Democratic House and Committees
- Title IX has become a political football
- Lawsuits & injunctions by:
 - Parties
 - States: Attorneys General
 - Possible enforcement injunctions by Federal judges
- Conflicts between proposed regulations and state laws (e.g.: CA and NY)
- Campus/school protests
- Public perception

ULTRA VIRES ACTION BY OCR?



- OCR can only enforce within the statutory ambit of Title IX
- Any action exceeding this authority is called *ultra vires*
- Many observers concerned that due process elements in the proposed regulations have no legal basis in Title IX
 - Sex-equity based law – not a due process-based law
 - What is source of OCR authority to require a formal hearing, cross examination by advisors, etc.?
 - Shouldn't due process be up to Congress and the courts?
 - Many due process elements are a best practice, but likely will be up to courts to decide if properly within OCR's regulatory purview
 - Obama's OCR also arguably exceeded Title IX's scope, but only in sub-regulatory guidance, not in regulations.

OBAMA OCR: (OVER?) ZEALOUS ENFORCEMENT AND EQUITY IMBALANCE



- Dramatically ramped up enforcement; became feared
- Provided extensive sub-regulatory guidance
- Made investigations and outcomes public
- Had a pro-reporting party imbalance to their approach
- Field shifted from an imbalance toward the responding party to an imbalance toward the reporting party
- Resulted in widespread abrogation of due process rights for responding parties

DUE PROCESS CASE LAW



- The pro-reporting party imbalance prompted hundreds of lawsuits by responding parties
 - Wave of John Doe cases with unfavorable findings toward schools
 - Rise in lawsuits alleging selective enforcement, negligence, deliberate indifference, etc.
- Courts began requiring heightened levels of due process
- Sixth Circuit leads this revolt
- Trump-era OCR shifting imbalance back toward responding parties, using courts and due process as their rationale
- Balance will not result from proposed new regulations

DELIBERATE INDIFFERENCE STANDARD



- In *Gebser* (1998) and *Davis* (1999), the Supreme Court held that a funding recipient is liable under Title IX for deliberate indifference **only** if:
 - The alleged incident occurred where the funding recipient controlled both the harasser and the context of the harassment; AND
 - Where the funding recipient received:
 - Actual notice
 - To a person with the authority to take corrective action
 - Failed to respond in a manner that was clearly unreasonable in light of known circumstances
- OCR has historically used a broader, less stringent standard

CIVIL LAW SUITS V. OCR ENFORCEMENT & TITLE IX (PRE-2019)



Lawsuit

- File in federal court
- Monetary damages, injunction
- Requires:
 - Actual notice
 - Employee with authority to take action
 - Deliberate indifference

Administrative Action

- Initiated by OCR
- Voluntary compliance or findings
- Requires:
 - Actual OR constructive notice (“knew or should have known”).
 - Investigate
 - End harassment
 - Remedy impact
 - Prevent recurrence

“NOT DELIBERATELY INDIFFERENT”



- Safe Harbors in the Proposed 2019 Regulations:
 - If the school follows procedures (including implementing any appropriate remedy as required), then not deliberately indifferent.
 - If reports by multiple complainants of conduct by the same respondent, Title IX Coordinator must file a formal complaint. If the school follows procedures (including implementing any appropriate remedy as required), not deliberately indifferent.
 - For IHEs, if no formal complaint and school offers and implements supportive measures designed to effectively restore or preserve the reporting party's access, not deliberately indifferent. Must inform reporting party of right to file formal complaint later.
 - No deliberate indifference merely because OCR would come to different determination based on the evidence. Biases process?

UNIFYING STANDARDS?



- Proposed regulations would mostly unify the court and administrative enforcement standards
 - Would raise administrative enforcement standard to match legal standard of deliberate indifference
 - Would significantly limit OCR's authority (and efficacy?)
 - Will likely lead to a wave of litigation by all parties
- In some ways, OCR going beyond court standard. *Davis* notice-based standard vs. formal complaint standard

LAWS, COURTS, AND REGULATIONS



- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by Courts and OCR
 - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
 - Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2001 Guidance)
 - Sub-Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2011 DCL)
- Federal Case law – **Force of law** based on jurisdiction
 - Supreme Court – binding on entire country
 - Circuit Courts of Appeal – binding on Circuit
 - District Court – binding on District
- State case law – **Force of law**; binding only in that state based on court jurisdiction

STAY ABOVE THE FLOOR



- Law, Case law, and Federal Regulations set the floor
 - OCR Guidance typically elevates the floor
 - States can pass laws that exceed federal requirements (e.g.: NY's "Enough is Enough" law)
- Regressing to the floor = doing the bare minimum
 - Will continue the cycle of inequity and unfairness
- Civil rights issues demand more than bare minimum
- Industry standards already exceed the floor
 - Regression to the floor increases risk of lawsuit and negligence-based liability

INDUSTRY STANDARDS



- The field has adopted numerous practices and created industry standards that exceed basic requirements
- Standards stem from Student Services/Affairs, HR, Legal Affairs, OCR Guidance, Courts, Law, Professional Associations
- ATIXA's policy and procedure model – 1P1P – encompasses industry standards
- ATIXA's publications and resources provide guidance where government does not

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 a hearing? (TBD)
 - 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, partiality, or bias).
 - Based on the evidence presented.
 - 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.

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)

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



- 1960: African-American students from Alabama State College sat at public lunch counter as part of protest - were arrested
- Alabama State summarily expelled 6 students as ringleaders of protest
- No notice of charges; no opportunity to offer evidence
- Court established minimum due process
 - Students facing expulsion at public institutions must receive **notice of charges** and an **opportunity to be heard**
 - Reiterated by Supreme Court in *Goss v. Lopez* (1975)

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



- Court set forth due process-based guidelines, including:
 - Notice, with specific charges
 - A fair and impartial hearing
 - Providing names of witnesses
 - Providing content of witnesses' statements
 - Providing opportunity to speak in own defense
 - Results and findings of hearing in a report open to student's inspection

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



- While on scholastic probation, Esteban suspended from College
- 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 (for advice, 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 charged student to hear all information presented against him and personally question adverse witnesses
- A determination of facts of case based solely on what is presented at 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 suspended for 10 days for non-academic misconduct
- Court determined PreK–12 education is fundamental right, so minimum due process is required (notice & opportunity for hearing)
 - Hearing can be informal – opportunity to obtain private counsel, present or cross-examine witnesses not needed
 - Potential suspensions > 10 days or expulsions require more formal procedure, given liberty and property interests

FELLHEIMER V. MIDDLEBURY COLLEGE

869 F. SUPP. 238 (DIST. VT., 1994)



- Fellheimer, a Middlebury College student, had sexual intercourse with female student
- Dean of Students sent him letter: “you are being charged with rape”
- Following criminal investigation, Vermont State’s Attorney declined prosecution
- 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.

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.
 - PreK-12
 - Student – Undergraduate; Graduate/Professional
 - Faculty – Tenured vs. Non-tenured
 - Staff
 - At-will
 - Administrators
 - Unionized

PROPOSED TITLE IX REGULATIONS

DUE PROCESS OVERVIEW



- Proposed regulations place heavy emphasis on due process protections for the responding party
- New standard of proof mandates
- Notice at various investigation stages
- Collection and production of evidence for review
- Mandate for determination and sanction process
- Live hearings with cross-examination
- Schools provide advisor; must allow advisor questioning of parties/witnesses

- “Notice” is the benchmark indicating when an institution is required to stop, prevent, and remedy
- Current OCR definition of notice – “knew or should reasonably have known”
 - Incorporates both actual and constructive notice
- Proposed regulations restrict to actual notice exclusively
 - *Actual knowledge* means notice to Title IX Coordinator or any official with authority to institute corrective measures
 - *Respondeat superior* or constructive notice insufficient
 - PreK-12 teachers are “officials” – post-secondary faculty are not
 - Mere ability or obligation to report does not qualify as “official”

NOTICE TO THE INSTITUTION



- Proposed regulations would not require a Title IX investigation unless the institution receives actual notice through a “formal complaint”:
 - Actual notice defined as:
 - The reporting party filing a formal, written, signed complaint with TIX Coordinator; or
 - The TIXC may file a formal written complaint on behalf of reporting party
 - Conflict of interest? Impartiality concern?
 - Eliminates OCR’s constructive notice standard
 - What to do if institution receives notice in some other way?
 - Industry standards

RESPONSIBLE EMPLOYEE SHIFTING?



- Currently, a **responsible employee** includes any employee who:
 - Has the authority to take action to redress the harassment;
or
 - Has the duty to report harassment or other types of misconduct to appropriate officials; or
 - Someone a student could reasonably believe has this authority or responsibility;

RESPONSIBLE EMPLOYEES?



- Proposed regulations shift “actual notice” to:
 - Anyone who has the authority to take action to redress the harassment
 - All PreK-12 teachers when conduct is student-on-student
- This is **ONLY** the standard for when OCR would deem a school to be on notice; it is the floor.
- ATIXA has not changed its recommendation to require all non-confidential employees to report harassment or discrimination
- Continue to train employees on obligation to report

- Jurisdiction
 - *Davis* standard – control over the harasser and the context of the harassment
 - “occurs within its education program or activity”
- Geography should not be conflated with the Clery Act – education programs or activities can be off-campus, online
- Proposed regulations specify “harassment...against a person in the United States”
 - Unclear effect on study abroad programs or school-sponsored international trips – “nothing in the proposed regulations would prevent...”
- Open question of student/employee harassment of non-student/employee

- Current requirement to address on-campus effects of off-campus misconduct
 - Even if conduct took place outside education program or activity, schools responsible for addressing effects that manifest in the program/activity
 - Students and/or employee conduct outside program, IPV
- Leaked draft of regulations prior to publication indicated schools “are not responsible” for exclusively off-campus conduct but could be responsible for on-going on-campus /in program effects
- Published proposal eliminated this comment, presume *Davis* standard still applies – “nothing in the proposed regulations would prevent...”

STANDARD OF PROOF

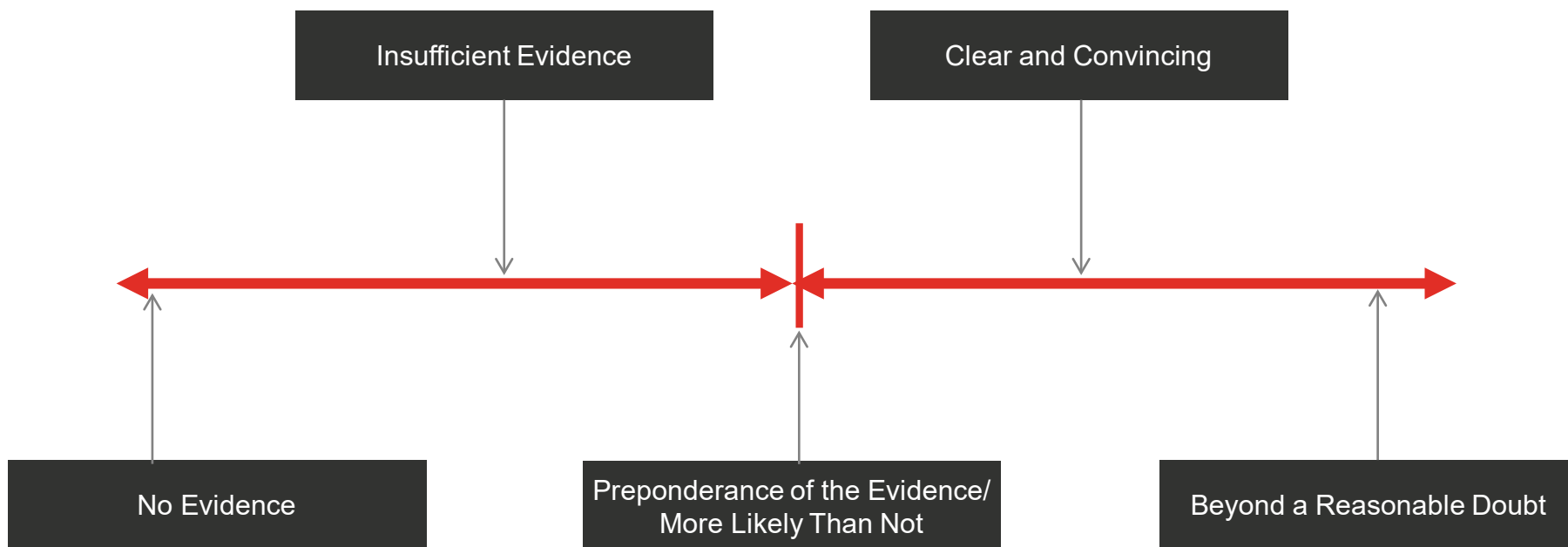


- Current OCR standard – preponderance of the evidence is standard civil court will use to evaluate school’s response
- Proposed regulations allow preponderance only if same for other conduct code violations, otherwise must use clear & convincing
- Effectively mandates clear & convincing for schools with higher standards for other proceedings (i.e. AAUP faculty hearings)
- May create incongruence between school process and court scrutiny (where preponderance will still be the standard)
- ATIXA position – preponderance only equitable standard

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



PROMPT



- Proposed regulations specify “prompt timeframes” written into grievance procedures
- Temporary delays only allowable for “good cause” and with written notice of the delay to parties
- OCR does not appear to contemplate reasonable delays at the earliest points of an investigation
- Responding party may not yet know of investigation or allegations – written notice of delay may be first indication

WRITTEN, DETAILED NOTICE



- Proposed regulations require several written, detailed notices to the parties
 - Any reasonable delay for good cause
 - Upon receipt of a formal complaint
 - Sufficient details – identity of parties, alleged violations, date, location
 - Sufficient time to prepare a response
 - Informal process requirements, if applicable
 - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare
 - Upon determination of responsibility, including sanctions
- Notice requirements may affect industry standard investigative practices
- *Doe v. Timothy P. White, et. al.*, (2018)

INFORMAL RESOLUTION OPTIONS



- Proposed regulations allow informal resolution at any time prior to a final determination, at discretion of TIXC
 - Requires detailed notice to the parties
 - Allegations
 - Requirements of the process
 - Circumstances which would preclude formal resolution
 - Consequences of participation
 - Obtain voluntary, written consent
- Does not preclude certain offenses from informal resolution
- May restrict restorative practices after a determination

SUPPORTIVE MEASURES



- Non-disciplinary, non-punitive individualized services
- Must not unreasonably burden other parties
- Proposed regulations address mutual restrictions, neglect unilateral or individualized restrictions
- Appears to anticipate, but also prohibit, that one party will sometimes be restricted more than the other
- May chill reporting if automatic mutual restrictions limit access to education program

BURDEN OF PROOF ON FUNDING RECIPIENT TO GATHER EVIDENCE



- Burden of proof and burden of gathering evidence on the school, not the parties
- “Sufficient to reach a determination” = appropriately thorough?
- Unclear if all relevant evidence must be collected
- Parties may be able to request certain evidence be obtained
- Evidence collected by law enforcement is admissible
- Who determines what evidence is relevant and sufficient?

“PRESUMPTION OF INNOCENCE”



- Proposed regulations require published grievance procedures include a presumption of innocence for the responding party
- No change from effective procedures – determination has always been based on evidence
- Presumption is a legal framework, may create inequity
- Unclear how presumption will work procedurally
- Should there be an equitable presumption that the reporting party is telling the truth?

CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS



- Existing mandate for impartial resolutions with fair procedures
- Proposed regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party
- Training mandates apply to PreK-12 as well as higher ed
- Unclear how prohibition of bias against reporting/responding parties establishes equity under Title IX or falls within OCR's statutory authority
- Due process mandate does not distinguish public v. private

INVESTIGATION AND RESOLUTION MODELS



- Treatment of reporting/responding parties may constitute discrimination
- The end of the single investigator model – live hearing required for all postsecondary resolution proceedings
- Must allow advisor to be present at all meetings, interviews, hearings
- If no advisor, school must provide one
- Statutory authority exceeded with procedural mandates?

PROVIDING PARTIES WITH COPIES OF ALL EVIDENCE



- All relevant evidence considered – inculpatory and exculpatory
- No restriction on discussing case or gathering evidence
- Equal opportunity to inspect all evidence, including evidence not used to support determination
- May chill reporting if irrelevant information must be provided to either party
- Unclear at what point in process evidence must be provided
- No limits on types/amount of evidence offered
- Creates possible equitable limits on evidence for both parties

PROVIDING COPIES OF INVESTIGATION REPORT FOR REVIEW AND COMMENT



- Proposed regulations mandate creation of an investigation report
- Must fairly summarize all relevant evidence
- Provided to parties at least 10 days before hearing or other determination
- Parties may review and submit written responses to report
- Unclear if analysis (including credibility) and findings of fact should be included
- Unclear if a full report or a summary is required

LIVE HEARING



- Proposed regulations mandate live hearing for postsecondary institutions, optional for PreK-12
- Parties must attend hearing, otherwise all testimony submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator or the investigator
- Must allow live cross-examination to be conducted exclusively by each party's advisor (separate rooms still allowed)
- Unclear how irrelevant questions will be screened, but rationale for excluding questions required (verbal or written?)

- Advisor can be anyone – no restrictions in proposed regulations
- If a party does not have an advisor to conduct cross-examination, the school must provide one
- Advisor must be “aligned with the party”
 - “Defense” and “prosecution” advisors?
- No prior training required, no mandate for school to train
- ED presumes no financial impact because all parties retain counsel; not at institutional expense
- Mandate for higher education only – PreK-12 may still conduct indirect cross-examination through hearing administrator

APPEALS



- If schools offer appeals (not required), must be made available equitably
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to all parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

IMPACT ON EMPLOYEES



- Proposed regulations often refer exclusively to “students,” but employees are also affected
- Tenured faculty cross-examining students at a live hearing
- Faculty found responsible – sanctions affirmed by committee?
- Union employees – diminished right to an advisor because of union representation?
- Extensive due process protections for at-will employees accused of misconduct
- Potential inequity in employee processes for Title VII-based sexual harassment
 - More due process for sex discrimination than race discrimination

OTHER ELEMENTS IN THE PROPOSED REGS



- Remedial action required by OCR for noncompliance with Title IX will not include money damages
 - OCR clarifies that reimbursements or compensation do not fall within the meaning of this provision
- Institutions may presume religious exemption
 - If under OCR investigation, may then be required to submit exemption justification in writing
 - Allows institutions to avoid public assertion of exemption from certain civil rights protections
 - Problematic for students/employees who deserve to know if certain protections are not honored at their institution

OTHER ELEMENTS IN THE PROPOSED REGS



- Statement that proposed regulations do not restrict or deprive rights under the First, Fifth, and Fourteenth Amendments, FERPA, the Clery Act, or Title VII of the Civil Rights Act.
 - Clery/VAWA and FERPA considerations?
 - Clery Act provisions do not apply to PreK-12 – the proposed regulations extend many Clery Act requirements to PreK-12

OPERATING OUTSIDE THE TIX FRAMEWORK



- *Ultra vires?*
 - Require signed formal complaint rather than actual notice
 - Prescribed standard of evidence for Title IX procedures
 - Mandated standard of proof for other conduct procedures
 - Extension of Clery/VAWA definitions and requirements to PreK-12
 - Require live hearings for Title VII sexual harassment procedures
 - Individualized safety and risk analysis prior to interim suspension on an “emergency basis”
 - Treatment of responding party may constitute discrimination
 - Regulation of due process elements in internal procedures – blanket application to public and private institutions
 - Notice requirement upon receipt of formal complaint
 - Mandatory live hearing at public and private higher education institutions
 - Recordkeeping requirements

LESSONS FROM RECENT CASE LAW

- Bias, Conflict of Interest, Inappropriate Influence
- Transparency in the Process
- Questioning and Hearings

- 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.

- **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.

- **Key Takeaways**

- 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).

JOHN DOE V. PENN STATE UNIVERSITY U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).



- Incident involved a male and a female student and an allegation of non-consensual sexual penetration in Sept. 2016.
- Investigation began in Sept. 2016; Jane Roe never provided a written statement.
- Investigator allowed Doe to view a draft copy of the report in her office in his **sixth** meeting, but he could not take the report with him. This was also the first time he had seen the incident reports from Res. Life and Univ. PD. (the documents that represented the formal complaint).
- Investigator.
- In May 2017, Administrative Hearing officer found him responsible and recommended suspension until the end of 2017.

JOHN DOE V. PENN STATE UNIVERSITY

U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).



- Hearing held in June 2017.
 - Hearing Panel adhered strictly (and to its detriment) to the information contained in the investigator’s flawed report (which excluded key evidence) and did not allow Doe to submit key evidence or have his questions asked.
- Doe was not allowed to see Roe while she testified via webcam transmission; PSU policy required that Doe be allowed to see her.
- Found responsible.
 - Suspended through the end of 2017; required to undergo counseling; lost on-campus living privileges; and panel recommended his removal from the accelerated pre-med program (a significant sanction).

JOHN DOE V. PENN STATE UNIVERSITY

U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).



- Doe sued PSU, the TIX Coordinator, the Investigator, Administrative Hearing officer, Student Conduct administrator, and obtained a TRO against PSU prohibiting implementation of the sanctions.
- Among his allegations, Doe alleged violations of Due Process, Title IX, and Section 1983.
- PSU filed a Motion to Dismiss, which was denied in part and granted in part.
- Section 1983 claim: MTD denied in relation to the TIXC, Hearing Officer, and Investigator --> allowed to proceed against them in their individual capacities.
 - E.g.: Doe alleged lack of notice of the charges, lack of rationale in the “cursory and perfunctory decision letter.”

Key Takeaways

- Title IX claim of Erroneous Outcome
 - Alleged PSU's process was unfair and biased toward the accuser – Court dismissed this argument, stating this may be a pro-victim bias, but not a sex or gender bias.
 - Alleged the DCL and external social and political pressure, including OCR investigation of PSU → Court said this does not infer gender bias, rather a pro-victim bias.
 - Alleged all students suspended or expelled for sexual misconduct were male → Court said this allegation was enough to survive the Motion to Dismiss.

JOHN DOE V. MIAMI UNIVERSITY, ET AL. **U. S. CT. OF APPEALS, 6TH CIRCUIT (FEB. 9, 2018)**



- John Doe alleged that he was found responsible for sexual misconduct because he was male.
 - Erroneous Outcome claim. Requires plaintiff to show:
 - 1) facts sufficient to cast some doubt on the accuracy of the discipline proceeding, and
 - 2) a causal connection between the flawed outcome and gender bias.
- Both Doe and the reporting party were highly intoxicated. Miami U's policy reads, "an individual cannot consent who is substantially impaired by any drug or intoxicant..."
 - BUT only Doe was charged, despite evidence he may have been more intoxicated.

JOHN DOE V. MIAMI UNIVERSITY, ET AL. **U. S. CT. OF APPEALS, 6TH CIRCUIT (FEB. 9, 2018)**



- Miami U.'s process was very quick and Doe had 48 hrs. to provide evidence and witnesses.
- Doe sought and obtained a medical leave due to stress of the process.
- Prior to hearing, Doe was not provided the names of witnesses, nor given access to the investigation report.
- Investigator that provided him the charges was a member of the hearing board and allegedly dominated the hearing and stated to him, "I bet you do this (i.e. sexually assault women) all the time" during the hearing.
- Doe was found responsible and suspended for 3 terms.

Key Takeaways

- Court held in Doe's favor:
 - Transcript Notation and Liberty Interest → heightened impact necessitates heightened due process.
 - Conflict of Interest: Administrator served conflicting roles. (investigator, hearing panel member, sanctioning agent)
 - Lack of Impartiality: Administrator had pre-determined Doe's guilt as demonstrated by her conduct in the hearing.
 - Withholding report reflected bias.

- **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.

DOE V. UNIVERSITY OF CINCINNATI

U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)



- Hearing Board found Doe in violation of sexual misconduct policy and suspended Doe for 2 years.
- On appeal, lessened to 1 year.
- Complainant did **not** attend the hearing.
- Doe sued under Title IX and Due Process, seeking a preliminary injunction to enjoin UC from enforcing the suspension.
 - Does' sole argument was that he was unable to confront his accuser (cross examine).
- Absence of corroborating evidence and decision rested almost wholly on credibility.
- 6th Circuit Court found in favor of Doe.

Key Takeaways

- 6th Circuit's decision
 - Due process: Complainant's absence from the hearing made it difficult and problematic for the "trier of fact" to assess credibility.
 - The inability to confront one's accuser rendered the process fundamentally unfair.
 - Cross examination in some form is essential to due process, even if indirect or via video conferencing; does not have to be at the same level as a judicial trial.
 - Limited their decision to the facts of the case and UC's procedures, but it is a reflection of the due process needed when a student is facing suspension or expulsion.

- This case involved an Ohio State University student who was charged twice for sexual misconduct. She was initially suspended, then expelled following the second hearing.
- Roe argued that she was denied her right to due process because she was unable to cross-examine adverse witnesses during the hearing.
- She sought, and was awarded, a preliminary injunction against the university for her expulsion.
- In this case, Ohio State conducted a thorough investigation and provided a written report to the hearing board including interview notes taken by the investigator.

- Both parties attended the first hearing - hearing panel felt Roe was not credible and her account was not plausible, as compared to the complainants and witnesses.
- The complainant did not attend second hearing, Roe objected to the statements from complainant and three adverse witnesses being read, but the statements were in hearing packet.
- Hearing officer found Roe in violation and expelled her; found her statement lacked credibility as compared with the credible and plausible statements of witnesses.
- Roe sued, stating OSU deprived her of due process because she could not cross-examine the reporting party and the witnesses.

Key Takeaways

- The Court held that a hearing was necessary.
- The hearing does not need to have the formalities of a criminal trial but the accused student must be given an opportunity to respond, explain and defend herself.
- Due process requires an opportunity to confront and cross examine adverse witnesses, especially where the evidence consists of the testimony of individuals whose memory might be faulty or motivated by malice or vindictiveness.
- Hearing panel should be given an opportunity to assess demeanor.

- Doe completed all graduation requirements then was accused of sexual assault. He sought a preliminary injunction preventing the investigation, indicating Michigan's policy violated due process rights.
 - Doe alleged that due process requires a live hearing and an opportunity for cross examination.
- Michigan's policy provides for an investigation. The investigator provides the opportunity for the parties to pose questions to each other or to witnesses; investigator makes a finding and provides a rationale to the TIXC and General Counsel.
- Court found in Doe's favor, citing the high risk of harm (expulsion).

Key Takeaways

- Court said Michigan's method of private questioning through an investigator leaves Doe with no way of knowing which questions are actually being asked of adverse witnesses or their responses.
- Without a live proceeding, the court said the risk of an erroneous deprivation of Doe's interest in his reputation, education and employment is significant.
- Interestingly, court did not require Michigan to change its process.

JOHN DOE V. BAUM, ET AL.
U. S. CT. OF APPEALS, 6TH CIRCUIT (SEPT. 7, 2018)



- Jane Roe accused John Doe of sexual misconduct – claiming she was incapacitated.
- The University of Michigan investigated over the course of 3 months, interviewing 25 people.
- “The investigator was unable to say that Roe exhibited outward signs of incapacitation that Doe would have noticed before initiating sexual activity. Accordingly, the investigator recommended that the administration rule in Doe’s favor and close the case.”
- Roe appealed.

JOHN DOE V. BAUM, ET AL.
U. S. CT. OF APPEALS, 6TH CIRCUIT (SEPT. 7, 2018)



- The 3-member Appellate Board reviewed the evidence and reversed the investigator's decision (did not meet with anyone or consider any new evidence). They felt Roe was more credible.
- Before sanctioning, Doe withdrew, one semester shy of graduation.
- Doe sued, alleging Title IX and Due process violations.
- On a Motion to Dismiss by Michigan, the District Court dismissed the case, but 6th Circuit reversed.
- The Due Process and the Title IX Erroneous Outcome claims survived.

Key Takeaways

- **Due Process**

- "Our circuit has made two things clear: (1) if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and (2) when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination."
- "If a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."
 - Either directly by the accused or by the accused's agent.

Key Takeaways

- Title IX Erroneous Outcome
 - The due process issues cited above inform their finding.
 - OCR investigation two years prior garnered and continued to garner attention, the complaint was female, Michigan could lose funding, news media beat up Michigan for not supporting victims enough
 - Appellate Board dismissed all evidence provided by male witnesses (case was basically men on Doe's side, women on Roe's side) stating that they were biased because they were fraternity brothers of Doe, no such qualification for Roe's witnesses (all sorority sisters).
 - The Appellate Board made these judgments on a "cold record."
- "Taken together, male bias is a plausible explanation that is better explored in discovery"

JOHN DOE V. CLAREMONT MCKENNA COLLEGE CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)



- John Doe was found responsible and suspended for nonconsensual sexual intercourse with Jane Doe, a student from Scripps College.
- The decision was made as a result of an “Investigation Findings and Review” committee – two CMC faculty/staff and the investigator.
- Procedures for the Committee “meeting” did not allow for questioning by the Committee or the parties, and Jane did not attend the Committee meeting.
- The Investigator also did not ask Jane the questions John requested the investigator ask.
- He petitioned in state court for a writ of administrative mandate to set aside the decision. Trial court denied the petition. Appellate court reversed.

- Court recognized: a college is not a court, cannot compel people to appear at hearing, the burden of added procedures on the college, and the possibility of intimidating/retraumatizing the reporting party.
 - *“In light of these concerns we emphasize...that the school’s obligation in a case turning on the complaining witness’s credibility is to “provide a means for the [fact finder] to evaluate an alleged victim’s credibility, not for the accused to physically confront his accuser.”*
 - “While we do not wish to limit the universe of ideas of how to accomplish this, we note that the mechanism for indirect questioning in *Regents*, including granting the fact finder discretion to exclude or rephrase questions as appropriate and ask its own questions, strikes a fair balance among the interests of the school, the accused student, and the complainant.”

Key Takeaways

- Different courts have approached the issue of cross examination differently. The judge's reference to a 6th Circuit Court of Appeal ruling involving a public school is notable because that ruling is not binding on California state courts and CMC is a private institution.
- While live, in-person cross-examination is not required by this decision, this ruling continues the pattern of judges who have underlined the importance of ensuring a) the ability of one party to question the other party and b) the ability of the decision-maker to assess the parties' credibility.

DOE V. USCB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



- Jane Roe attended a party at John Doe’s apartment, which he shared with his girlfriend (Witness 1) and roommate (Witness 2). Roe had been drinking and wasn’t feeling well. Witness 1 directed her to lay down on a mattress close to the couch she and Witness 2 were sitting on.
- Doe arrived home from another party, where he had been drinking. Doe lay down, fully clothed, on the same mattress.
- Roe reported to UCSB that Doe roughly touched and sucked her breasts and digitally penetrated her vaginally and anally. At first, Roe was unable to say anything and felt paralyzed. She eventually said, “whoever’s behind me is hurting me badly.”
- Roe reported that Witness 1 said Roe must be having a bad dream but when she saw Roe’s buttocks were half-bare, she screamed and told everyone to get out of the apartment.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



- Roe was medically examined by the Santa Barbara County Sexual Assault Response Team (SART). The report indicated that Roe had bruising and a laceration in her anal area. The report also indicated that Roe was on a prescription antidepressant.
- Three months later, Doe was placed on interim suspension.
- Eight months later, Doe was notified by UCSB that a hearing would take place in 12 days. The hearing was subsequently delayed for a month to allow the committee time to consult with counsel.
- Doe's objection to the delay was denied. For the hearing, Roe submitted a list of witnesses and two pages from the SART report – a cover page and a page that listed her current medications.
- The committee found Doe responsible for sexual assault and suspended him for eight semesters.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



- The court found Doe was denied a fair opportunity to cross-examine witnesses.
 - Doe was denied access to the full SART report. A detective testified about one line in the report but failed to answer Doe’s further questions about the remaining content of the report.
- The court cited the best evidence rule (now “secondary evidence” rule in CA) which precludes oral testimony to prove the content of a writing.
- The court also cited the rule of completeness, which should have allowed Doe to see the entire SART report.
 - Without the opportunity to inspect the report, Doe was unable to determine whether valuable information was not disclosed.
 - Doe was unable to properly cross-examine and properly prepare his defense.
 - The court found the Committee relied on the report to corroborate Roe’s testimony that she was penetrated with fingers and/or a penis.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



- The court also found the Committee inconsistently applied policies and procedures and selectively applied formal rules of evidence.
 - Doe was unable to secure an expert to testify about the side effects of mixing antidepressants with alcohol because he was only provided the name of the medication Roe was taking the night before the hearing.
 - Doe’s mother attempted to testify about the side effects but her testimony was excluded.
 - The Committee allowed the detective’s testimony about the SART report, which indicated that the physical injuries were consistent with the allegations, even though she was not an expert, did not conduct the examination, and did not write the SART report.
 - The Committee also allowed UCSB’s general counsel to actively participate in the hearing and make formal evidentiary objections but denied Doe’s counsel the opportunity to actively participate in the hearing.

Key Takeaways

- Inequities in access to evidence, cross-examination, and ability to introduce counterevidence corrupt the hearing and its outcomes.
- California courts are increasingly citing formal rules of evidence and expecting decision-makers to apply these rules equally.
- When documented evidence exists, decision-makers should rely on that evidence, rather than relevant testimony about that evidence.
- An entire document should be produced if and where any portion of that document is relied upon in the hearing.
- Parties are entitled to sufficient time to access an expert or allow non-expert testimony where the testimony relates to a viable theory.
- General counsels should not actively participate in a hearing where parties' counsel is denied the opportunity to actively participate.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



- Jane Roe and John Doe attended a “paint” party, which involved throwing paint at each other. After the party, Doe accompanied Roe back to her apartment. According to Roe, Doe then engaged in nonconsensual vaginal and anal assault. The next day, Roe visited a rape treatment center and also spoke with LAPD officers.
- After Roe reported the interaction to USC, Dr. Kegan Allee, who was both the investigator and adjudicator in the matter, began investigating. An outside attorney replaced Dr. Allee as the investigator. Although the attorney interviewed several critical witnesses, when the matter was transferred back to Dr. Allee, they did not re-interview these individuals.
- In August, Dr. Allee determined that Doe knew or should have known that Roe was too drunk to consent to the sexual interaction. Dr. Allee noted that although Roe could not remember much of the evening, Roe had reconstructed the events after speaking with three witnesses.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



- All 3 witnesses had been interviewed by the outside attorney, but not by Dr. Allee. In her determination, Dr. Allee assessed the credibility of other witnesses and determined they were not “sufficiently reliable.”
- Doe was expelled from USC and his internal appeal was denied.
- Doe petitioned for a writ of mandamus to set aside his expulsion, asserting procedural and substantive challenges.
 - USC’s findings were not supported by substantial evidence
 - the investigation was unfair
 - USC didn’t provide him with a fair hearing or independent adjudicator
 - he was unable to cross-examine witnesses, had to rely on Dr. Allee, and Dr. Allee did not interview the three central witnesses
- The trial court denied his petition.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



- The court of appeals reversed the trial court's decision.
- Because Dr. Allee's investigative report and adjudication turned on witness credibility, Dr. Allee should have interviewed all critical witnesses either in person or by videoconference to let her to observe the interviewees. This was especially important here where there were significant inconsistencies and a dispute over whether the substances observed in Roe's apartment after the sexual encounter were blood or paint from the party.
- Additionally, USC did not comply with its own procedures to conduct a fair and thorough investigation by failing to request that Jane provide her clothes from the incident and her consent to release her medical records from the rape treatment center.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



Key Takeaways

- When there are investigations that turn on credibility (as many do), the finder of fact needs to be able to observe the witnesses' demeanor to appropriately render determinations of credibility. Relying on another individual's report(s) is simply insufficient, according to the court.
- When you are aware that evidence exists or may exist, ask for it! The court made it quite clear that even though Roe may have refused consent to disclose her medical records from the rape treatment center, the university was still obligated to request it.
- While there is no obligation for a party to provide it, your institution may come under significant scrutiny for failing to follow up on potentially probative evidence.
- Asking for all relevant evidence (such as clothes or medical reports that have been discussed during the interviews) is vital to ensuring that you are conducting a thorough investigation.

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



- John Doe, a USC student-athlete, was accused of non-consensual sexual acts stemming from an incident with Jane Roe, a senior athletic trainer.
- Roe had been drinking in anticipation of attending a party. After Doe and Roe texted about his plans, she went to his apartment to smoke marijuana. When she arrived, they went out to get some food. Roe reported that when they returned to Doe's apartment, Doe pushed himself on her, held her hand down, pulled her hair, put his hand over her mouth, and engaged in intercourse. Doe reported it was consensual and cited her moans and facial expressions as evidence that that she was actively participating and enjoying the interaction.
- In an investigative interview, Doe described a previous sexual encounter with Roe during which Doe "fingered" Roe. Roe did not initially remember the encounter and became visibly upset when a Title IX investigator shared that Doe reported digitally penetrating

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



- USC began an investigation into Roe’s original allegations, and Doe was subsequently notified that the additional encounter he mentioned during the interview was added to the investigation.
- Doe suggested that Roe fabricated the allegation so she wouldn’t be fired as an athletic trainer.
 - The investigator did not pursue this theory. The investigator also disregarded testimony that Roe had been disciplined for having sex with a football player and had signed an agreement not to do so in the future.
 - The investigator did not inquire about the athletics consensual relationships policy, nor determine if Roe had previously signed an agreement.
- Doe was found responsible for non-consensual sexual acts stemming from the initial reported incident, and was found not responsible for the additional incident disclosed during interviews.
His expulsion was upheld by an internal appeal.

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



- The superior court upheld USC's action and Doe filed an appeal. While the appeal was pending, Doe was expelled from USC for unrelated conduct code violations.
- The appeals court vacated USC's findings against Doe on several grounds:
 - If credibility is a central issue and potential sanctions are severe, fundamental fairness requires a hearing, with cross-examination, before a neutral adjudicator with power to independently judge credibility and find facts.
 - Fundamental fairness dictates the factfinder cannot be a single individual with divided and inconsistent roles.
 - The investigator should fully explore theories that may shine light on credibility of a witness and not solely rely on the parties' lists to identify witnesses.

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



Key Takeaways

- USC's system placed a "single individual in the overlapping and inconsistent roles of investigator, prosecutor, fact-finder, and sentence." The investigator here had "unfettered discretion" to determine what evidence to consider, which witnesses to interview, and what determination and sanction to impose.
- Consider the levels of checks and balances present in your process and make sure there is a decision-maker who is at least one step removed.
- Do not solely rely on the parties for witnesses. A thorough investigation will likely result in additional witnesses which should be interviewed to ensure a complete review of all available evidence.
- The investigator should fully explore all theories that may shine light on the credibility of the parties.

Key Takeaways

- Court recognized a college is not a court, that it cannot compel people to appear at a hearing, the burden of added procedures on the college, and the possibility of intimidating or retraumatizing the complainant.
 - *“In light of these concerns we emphasize, as did Cincinnati, that the school’s obligation in a case turning on the complaining witness’s credibility is to “provide a means for the [fact finder] to evaluate an alleged victim’s credibility, not for the accused to physically confront his accuser.”*
 - *“While we do not wish to limit the universe of ideas of how to accomplish this, we note that the mechanism for indirect questioning in *Regents*, including granting the fact finder discretion to exclude or rephrase questions as appropriate and ask its own questions, strikes a fair balance among the interests of the school, the accused student, and the complainant.”*

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



- Haidak and Gibney (students at UMass) were involved in tumultuous relationship. Gibney reported a physical assault by Haidak that occurred during a summer study abroad program.
- UMass student conduct case opened, charges of physical assault and endangering behavior, no contact order between the parties.
- Parties resumed mutual contact almost immediately – Gibney ultimately reported the contact, though not the mutual nature, resulting in additional charges for Haidak for harassment and failure to comply.
- Additional charges also led to immediate suspension of Haidak pending a hearing
- Haidak remained suspended for five months until hearing date in November
- Updated hearing procedures provided indirect cross examination conducted by hearing board using questions submitted by opposing party

HAIIDAK V. UNIV. OF MASS.-AMHERST **933 F.3D 56 (1ST CIR. 2019)**



- At the hearing, the Board alternated questioning of Haidak and Gibney, examining each student three times
- Assistant Dean prescreened Haidak's 36 submitted questions – 16 were posed to Gibney, eliciting same information but not worded exactly as submitted
- Board conducted thorough questioning of both parties, including party-submitted questions but not limited to those submissions alone
- Board found Haidak responsible for assault and failure to comply, but not for endangerment or harassment
- Sanctioning administrator expelled Haidak due to prior disciplinary history
- Haidak brought suit in federal district court alleging violation of due process, equal protection, and Title IX
- District court granted summary judgment to UMass, and Haidak appealed to U.S. Court of Appeals for the First Circuit

HAIDAK V. UNIV. OF MASS.-AMHERST

933 F.3D 56 (1ST CIR. 2019)



- Haidak challenged UMass' decision not to allow him to directly cross-examine Gibney
- The court declined to adopt a cross-examination requirement like the Sixth Circuit did in *Doe v. Baum* (2018)
- "...we are simply not convinced that the person doing the confronting must be the accused student or that student's representative"
- The court was concerned that UMass' questioning procedures prioritized comfort over serious inquiry, and that the board never saw the 20 questions excluded by the Assistant Dean
- Thorough, iterative questioning by the Board cured the deficiencies created by the procedural instructions and the question-exclusion process
- The court found that the suspension, without notice and hearing, was a violation of Haidak's due process rights – circumstances did not warrant an immediate suspension and a hearing would have revealed the contact was mutual

• Key Takeaways

- The court expressly declined to adopt the *Baum* standard, setting up potential circuit split and possible USSC resolution
- Institutions in the First Circuit face tough decision if proposed Title IX regulations, contradictory to *Haidak*, are finalized
- Only upheld UMass's process because of Board's effective questioning Gibney and evaluating her credibility
- the decision-maker must directly evaluate parties' and witnesses' credibility
- Caution when screening parties' questions before they are presented to the hearing panel or decision-maker

- Evaluate the relevance of suggested questions and reframe as needed, document why questions were excluded
- Procedures must balance sensitivity to all parties with effective inquiry, examination of credibility and underlying factual issues
- Decision-makers should ensure that probing of credibility issues occurs in the hearing in the presence of the parties
- Public institutions have a Constitutional obligation to provide notice and hearing *before* a suspension – in an emergency, hearing should occur *immediately* thereafter
- First Circuit *tone* seems to trust institutions to run fair processes and serve as a neutral factfinders – stark contrast to tone of Sixth Circuit in *Baum* and other cases

DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)



- John Doe and Jane Roe, students in Purdue's Navy ROTC program
- Roe attempted suicide, Doe reported the attempt to the residence life staff, Roe broke up with Doe
- Sexual Assault Awareness Month, Roe made formal report to Purdue that she was sexually assaulted by Doe
 - Roe awakened to find Doe groping her over her clothes without her consent
 - At that time she chided Doe for his behavior, he responded that he had penetrated her digitally while she was sleeping several weeks earlier
 - Doe had gone through her underwear drawer, chased her through a hallway while joking about using a taser on her, gone to her room unannounced after their break-up, and lost his temper in front of her
- Roe did not file a formal complaint, but the University elected to open an investigation

DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)



- Doe submitted a written response denying all the allegations, other supporting evidence and witnesses
- Suggested Roe's emotional instability as motive for reporting false allegations
- Purdue's Advisory Committee on Equity held hearing, Doe did not get to review investigative report, not advised of its contents
- Roe did not attend hearing or supply written statement
- Two panel members had not read report, third posed apparently accusatory questions to Doe
- Doe was not allowed to provide contemporaneous witness during hearing

DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)



- Doe found responsible, suspended for one year, conditions for readmission
- Internal appeal upheld decision, Doe involuntarily resigned from the Navy ROTC program, loss of ROTC scholarship and his future career
- Doe filed suit, claimed flawed procedures (due process) and sex bias (Title IX)
- Claims dismissed in Purdue's favor in district court, Doe appealed to 7th Circuit Court of Appeals
- The Seventh Circuit noted that what is "fundamentally fair is always a context-specific inquiry"

DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)



- “Purdue’s process fell short of what even a high school must provide to a student facing a days-long suspension”
- Purdue did not provide investigation report and evidence to Doe
- Committee had not read the investigation report, failed to speak to Roe in person and examine her credibility directly
- Unwillingness to consider Doe’s evidence or witnesses
- Combined with procedural issues, court found bias claim based on 2011 DCL and two pending OCR complaints raised plausible inference
- “He said/she said” case, Title IX Coordinator and panel members chose to believe Roe without hearing directly from

- **Key Takeaways**

- Ensure decision-makers are trained and adequately prepared.
 - Court described hearing as a “sham” - had not read the investigation report, accusations as opposed to evidence
- Parties should have access to the evidence, opportunity to present evidence and witnesses in the investigation
- Decision-maker should hear directly from parties when credibility is at issue
- Be mindful of reputational harm when sharing disciplinary record
- Lower pleading standard “plausible inference” for Title IX claims may make it harder to prevail at MTD in 7th Circuit courts

- Doe and Roe met at a bar, went to a fraternity party, and Roe invited Doe back to her residence hall
- Roe performed oral sex on Doe and the two engaged in vaginal intercourse
- A few days later, Doe expressed to Roe his concern about pregnancy due to their having had unprotected sex
- Several days later, Doe heard a rumor that he had done “unspeakable things” to Roe; he was shocked and confused and began avoiding her
- Roe filed a formal Title IX report with Syracuse approximately two months later

- Roe alleged forcible, nonconsensual oral sex, withdrawn consent prior to vaginal intercourse, nonconsensual anal intercourse
- Also alleged Doe touched her inappropriately at a restaurant several days later
- Syracuse notice of investigation did not contain details of the alleged misconduct
- Doe learned that Roe's story had changed in multiple ways
 - Roe claimed that she had withdrawn consent to vaginal sex
 - Roe's story contained several internal inconsistencies
 - Roe's statements were contradicted by the testimony of other students, including her roommates

- Investigator ultimately characterized Roe's overall testimony as "consistent"
- Doe objected to investigator's "background in assisting, advising, and protecting the rights of victims of sexual assault"
- SANE report, not provided to Doe, contained Roe's statements regarding her own physical symptoms, which only identified vaginal intercourse, not anal intercourse
- Investigator and witnesses did not participate in Conduct Board hearing
- Doe was not permitted to question Roe or any of the other witnesses

- Contrary to policy, Roe's interview was not recorded "due to technical difficulties"

- Board found Roe’s account “wholly plausible, there were no contradictions or omissions noted”
- Doe found responsible for nonconsensual vaginal intercourse, suspended for one year or until Roe graduated, whichever was longer
- After internal appeal denied, Doe sued Syracuse under Title IX “erroneous outcome” theory
 - plaintiff must allege specific and sufficient facts to cast articulable doubt about the accuracy of the outcome of the disciplinary proceeding and that gender bias was a motivating factor
- Doe argued that the investigator’s background may have led to several biased actions

- Court was also persuaded that Syracuse’s training program for Title IX investigators and adjudicators reflected gender bias
- “Trauma-informed practices” inappropriately influenced the investigator and the Board to give undue weight to Roe’s story, reach conclusions contrary to the evidence
 - Evidence of trauma misinterpreted as evidence of policy violation
 - Doe was not able to use SANE letter to show contradictory testimony
 - Doe was not allowed to present witnesses to contradict Roe
- Doe also highlighted Syracuse’s heightened attention to sexual assault cases during this time period, possibly stemming from two ongoing OCR investigations

- **Key Takeaways**

- Trauma-informed practices should not influence the decision-maker in determining responsibility
- Parties should have the opportunity to explore the credibility of the other party and witnesses – directly or indirectly
- All evidence considered by the decision-maker should be provided for review to the parties
- Consider providing parties an opportunity to challenge investigators/adjudicators for conflicts or bias
- Carefully select investigators/decision-makers, review of their background, an invitation to disclose possible issues of perceived bias, and clear expectations for recusal when needed

ATIXA DUE PROCESS CHECKLIST

DUE PROCESS CHECKLIST



- Right to access to an advisor of your choice throughout the process for all meetings, interviews and proceedings.
 - May restrict role in meetings and hearing? (Proposed Regs may limit this)
 - Written notification of right to advisor at the outset of investigation
 - Attorney, parent, roommate, friend, etc.
 - Advisor should not hold up the process.
 - Panel of trained advisors.
 - Cross-examination? (TBD)
 - 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.
 - If interim suspension is used, reevaluate regularly during resolution process for continued necessity

DUE PROCESS CHECKLIST



- Right to un-infringed 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, detailed notice (to all 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 (Proposed Regs say 10 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).
 - Case law 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).
 - Danger of wearing multiple hats.
 - Previous interaction does not disqualify, but be careful
 - Bias - See: Doe v. George Mason University.
 - Not just ANY bias.
 - Cannot be the appellate officer or legal counsel
 - Separation of responsibilities
 - Proposed Regs indicate decision-maker should not be the investigator or the TIX Coordinator.

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.
 - Proposed Regs would dramatically increase the import of this point

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.
 - Interviewee verification of notes.
 - Consider recording interviews.
 - 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.

DUE PROCESS CHECKLIST



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

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.
 - Detailed and prompt Notice of Allegations (including all applicable policies).
 - Review draft report prior to finalization.
 - Regardless of whether employee, faculty, or student.
 - Right to cross-examination (TBD RE: Direct cross-examination)

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.
 - Additionally, failure of reporting party to participate may severely limit ability of an institution to proceed.

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:
 - No set # of days; “Good faith effort”
 - 60 days is good guide for more difficult cases, but strive for faster.
 - Very different in Pre-K-12
 - Promptness should almost never undermine 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.

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.”

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.
 - Federal Regulations
 - OCR Guidance.
 - Industry standards: The “Standard of Care”.
 - Associations: ATIXA, NACUA, ASCA, NASPA, AAAED, CUPA-HR, etc.
 - Remember to rise above the bare minimum of laws and case law – strive for best practices.

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.
 - Policies should clearly state that the responding party is presumed to be not responsible until a finding has been made.
 - 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.
 - Proposed Regs require much more sharing of information
 - 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 a detailed, specific 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 overreact or over-sanction.
 - Avoid automatic sanctions as each case is different.
 - Consider use of “presumptive” sanctions.
 - OCR indicates that sanctions should account for the impact on the responding party’s education or work.

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.
 - Case law 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 equitable 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.
 - 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.

QUESTIONS?

CONTACT INFORMATION

Brett A. Sokolow, J.D.

Brett.sokolow@atixa.org

W. Scott Lewis, J.D.

Scott.lewis@tngconsulting.com