20 MINUTES TO...TRAINED STUDY GUIDE:

DUE PROCESS

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Learning Outcomes

- Participants will be able to articulate the basic elements that due process requires in a Title IX context.
- Participants will understand why due process is important during an investigation.
- Participants will recognize the connection clear and well-defined policies and procedure and the provision of due process.

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Discussion Questions

- Due process only applies to public schools and colleges. Agree or disagree?
- Due process is only about providing notice and some kind of hearing. Any additional protections are only a matter of each school's preference.~~?~~ True or false?
- Can you provide due process if your policy defining the charged offense is materially flawed?
- Due process for private colleges/schools means only those rights you promise in your handbook. True or false? Why?
- Do you think it is wise to perform a due process audit in every case to be sure that you have done what your policies say you will do? Why or why not?

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Case Studies

Professor Jones

Frank, an openly gay student, comes to you to complain that Professor Jones, his (tenured) English professor, has made comments in class that make Frank "feel unsafe."
Specifically, he alleges that Prof. Jones made the following comments:

- After the transgender letter was repealed by the Trump administration, Prof. Jones brought it up in class and said, "Finally, some common sense from Washington – you are either a man or a woman. Period."
- When a student wore a gay pride shirt to class, Prof. Jones said, "I get not being ashamed of who you are having sex with, but is 'proud' really the word you should use?"
- He assigned all the students in class to write their persuasive essays on "trying to convince me that people should be able to use whatever bathroom they want to."

There are about 26 students in the class, and Frank brought with him Georgina, Haley, Isaiah, Jeremy and Ken. He tells you that all the students will back him up and that he has heard that Jones is not liked in the department as well.

He also says he knows a student who was born biologically male, but

identifies as a female. He says she is not comfortable even going to the English department offices because she also feels "unsafe."

Frank requests that you assist him in withdrawing from Jones' class, as do the other 5 students.

Further, Frank shares with you that a month ago, while walking across campus with Ken, he heard another student use the word "faggot." He cannot identify the other student, but thinks he is in student government.

He also heard from Georgina that, at a recent social function, a group of students made fun of the LBGTQ group on campus. As a result of this, he says that he feels even more "unsafe."

Frank threatens to go to the media/OCR/hire a lawyer if you do not follow through.

Professor Weber

As the Title IX Coordinator at a small community college, you were recently notified that a sociology faculty member, Professor Weber, had written a somewhat inflammatory memo regarding pregnancy and wage discrimination and circulated it throughout the department. Professor Weber, an older, outspoken, and staunchly conservative lifelong academic, is known for engaging his colleagues in often spirited (and sometimes public) debates on issues of race and gender-based discrimination, but this is the first time he's ever put it in writing and attempted to reach such a broad audience.

The memo – an arguably well-written, 4-page op-ed of sorts – argues that there is extensive research demonstrating that women who decide to take a year or two off from either school or their jobs have a

correlative drop in their earning potential. The memo asserts that women knowingly make the decision to have kids, accepting the temporary hold it places on their academic or professional careers, but then "whine" about wage discrimination when their male colleagues, who he emphasizes do not take such leaves, end up making more than they do. Though conceding that malicious wage-discrimination does exist in the workforce, he argues that such incidents are "anomalous," with the "vast majority of gender-based wage discrimination claims being propagated by women who are simply dissatisfied with the biological obligations of their sex and the corresponding vocational sacrifice associated with the decision to start a family." Professor Weber calls the typical college campus a "bastion of liberalism," which he argues "unwittingly encourages women to declare victim-status" rather than "being accountable for the decisions they, themselves, make," ultimately equating the decision to have children to "any other decision with career implications, such as leaving a management position at a large corporation to work for a promising startup." He concludes by acknowledging his unconventional approach of sending out a seemingly unprompted internal memo to his colleagues, but remarks that, as the self-proclaimed "island of conservativism in a sea of liberalism" and given the multiple discussions he has had with his female colleagues on the topic, he is tired of feeling pressured into silence as the minority viewpoint and felt it his moral obligation to present the opposing side.

After several intradepartmental female faculty members angrily forwarded the memo to other faculty members outside of the department, the memo rapidly became the prevailing gossip on campus. Students quickly learned of the memo, many from other faculty members who mentioned it during their lectures in vents of frustration. Within a few days, social media had erupted with calls for Professor Weber's termination – from students, faculty, and staff alike. The school newspaper ran several editorials addressing the situation and several student organizations became highly vocal as well, setting up shop in the

free speech area of campus and calling for a sit-in at the president's office.

Multiple faculty members have contacted you directly, insisting that Professor Weber's memo "clearly created a hostile educational environment in violation of College policy." The faculty members pointed to the palpable unrest on campus, the notable distraction the whole situation has caused, and the message it sends to the campus community if at least something is not done in response to something so clearly averse to the College's mission. One of the faculty members, with whom you've partnered on several occasions for outreach and prevention initiatives, asked you point blank how this could *not* meet the definition of hostile environment sexual harassment, given that it was "objectively offensive, sex-based, written behavior that is so pervasive that you would be hard pressed to find a member of the community who didn't know about it."

In your initial meeting with Professor Weber, he told you that he was stunned by the community response to his memo, insisting that not only was the memo never intended for anyone outside of his department, but that he was simply offering a differing viewpoint on a topic and never intended to offend anyone. He added that it was exactly this type of thin-skinned, overreaction that he was referring to in his memo and that undermines the free exchange of ideas.

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Q&A

Professor Jones

For Discussion

What are some due process considerations implicated by this situation?

- Make sure Professor Jones is aware of the report.
- Like every other reporting party, Professor Jones needs the opportunity to address the allegations and review the information that will be used to determine whether there has been violation of policy.
- Make sure that the investigators and decision makers are free of bias/conflict of interest. This may be more difficult here due to the fact that a) Professor Jones is faculty and b) that his views may not be shared by other faculty/staff of your institution.
- Like every investigation, ensure that you adhere to your policies and procedures without material deviation.
- As in every investigation, provide a detailed rationale for the finding and make sure that Professor Jones is aware of the avenues and available bases for appeal.

How, if at all, does Professor Jones's position affect how you handle the investigation?

- Academic freedom and First Amendment Rights. These related but distinct concepts often create tension when implicated in a Title IX investigation.
- Because he is faculty, make sure that you are well aware of (and follow) the criteria for discipline and termination of tenured faculty. The terms will be defined in your institution's policy and/or the collective bargaining agreement related to tenured faculty.

Professor Weber

<u>For Discussion</u>

First, let's visualize how this would play out on our own campuses. What are the politics you would likely have to manage in responding to this situation?

  - There will likely be protests from student populations as well as possibly by faculty/staff.
  - There may also be a response to the protests from other groups.

- What are some of the due process considerations presented in this situation?
  - Like the first situation, this scenario requires the consideration of academic freedom and First Amendment rights.
  - Is Professor Weber criticizing regulations he believes are unfair and/or he is violating these regulations?
  - Is Professor Weber tenured? Is there a collective bargaining agreement?
    - Both tenure agreements and CBAs have defined criteria for handling discipline.
  - Ensuring the investigation is free of bias and any conflicts of interest.

- Ensuring that you investigate the conduct and determine whether policy has been violated impartially. Even though the behavior and message at issue may be inflammatory and create upset on campus, you need to make sure that the behavior constitutes a hostile environment pursuant to your policy definitions in order to constitute a policy violation.

Due Process Commitment

We've been thinking about ways to advance the commitment of the field to due process, and since administrators are always asking students to sign pledges as a symbol of prevention, we came up the idea for this oath or commitment statement as a pledge you can make to prevent due process violations in your conduct or resolution process.

Maybe you'll frame it and hang it on your wall?

The NCHERM Group Statement of Commitment to Due Process Protections

As a college administrator, you have my commitment to your due process rights.
Specifically, I commit to the following ten assurances…

1. I promise to provide you with a neutral, unbiased, impartial, and objective decision on whether your behavior(s) violates college policy.
2. I commit to understanding and owning my own biases and to check them at the door.
3. I promise to recuse myself from the process should I identify a conflict-of-interest, or should a conflict be brought to my attention.
4. I promise to follow college procedures without material deviation.
5. I promise to honor your humanity and the equal dignity of all participants in the conduct process, and to conduct the process with as much transparency as I can.
6. I commit that I will not find you in violation of college policy unless a preponderance of the evidence establishes that a violation occurred.
7. I promise that the college has the burden of proving whether you violated policy or not; that burden is not on either party.
8. I commit to afford equitable procedural protections to all parties to an allegation of misconduct.
9. I promise not to prejudge the allegations that have been made, and to reserve judgment until all evidence has been gathered.
10. I commit to sufficient annual training and professional development to assure the competence of my role.

Due Process Checklist

Below, we've crafted a practical checklist of due process protections that should be afforded by every college. If you are intrigued by this content, please attend one of our upcoming due process trainings[95] to learn more about how to operationalize these ideas.

- Right to notice of investigation that includes a reasonable description of the allegations
- Right to access to an advisor of your choice throughout the process
- Right to the least restrictive terms necessary if interim suspension is implemented, and a right to challenge the imposition of the interim suspension

[95] https://atixa.org/events/training-and-certification/

- Right to uninfringed due process rights, as detailed in the college's procedures, if subject to interim actions
- Right to clear notice of the policies allegedly violated if and when the formal allegation is to be made
- Right to clear notice of any hearing in advance, if there is to be a hearing
- 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)
- Right to suggest witnesses to be questioned, and to suggest questions to be asked of them (excluding solely character witnesses)
- Right to decision-makers and a decision free of demonstrated bias/conflict of interest (and advance notice of who those decision-makers will be)
- Right to clear policies and well-defined procedures that comply with state and federal mandates
- Right to a process free of (sex/gender/protected class etc.) discrimination
- Right to an investigation interview conducted with the same procedural protections as a hearing would be (because the interview is an administrative hearing)
- Right to a fundamentally fair process (essential fairness)
- Right to know, fully and fairly defend all of the allegations, and respond to all evidence, on the record
- Right to a copy of the investigation report prior to its finalization or prior to the hearing (if there is one)
- 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)
- Right to regular updates on the status of the investigation/resolution process
- Right to clear timelines for resolution
- Right to have procedures followed without material deviation
- Right to a process that conforms to all pertinent legal mandates and applicable industry standards
- Right to have only relevant past history/record considered as evidence
- The right to have the burden of proving a violation of policy borne by the college
- 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
- Right to a finding that is based on the preponderance of the evidence
- Right to a finding that is neither arbitrary nor capricious
- 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)
- Right to sanctions that are proportionate with the severity of the violation and the cumulative conduct record of the responding party
- Right to the outcome/final determination of the process in writing as per VAWA §304
- Right to a detailed rationale for the finding/sanctions
- Right to an appeal on limited, clearly identified grounds
- Right to competent and trained investigators and decision-makers
- Right to a written enumeration of these rights

Cross-Claims, Counter-Claims, and Retaliation

Today, male students claim to be experiencing discrimination in a variety of ways as the college sexual misconduct resolution process unfolds. Administrators are often vexed by these claims and how to address them. There are a variety of answers, depending on the claim, and this section really applies to all responding parties, not just men, of course. In light of the OCR decision in the Wesley College investigation, administrators would be wise to view the rights of responding parties more expansively under Title IX.

First, if you are given notice of discrimination by a responding party, you are legally obligated to investigate it, assuming it is a good faith claim. You really won't know whether it is made in good faith in most cases until you conduct an investigation. Usually, the preliminary inquiry is used to determine the basis for the claim and how it should be disposed of or addressed. In some instances, you are facing a claim of discrimination as a result of your process, whether it is an assertion that investigators are biased, coordinators are conflicted, or that the process is somehow out to get men and that the administrators are gender-biased. In others, the responding party wants to file a cross-claim or counter-claim (we use the terms interchangeably) stating that the reporting party's allegations are, in fact, a form of discrimination against the responding party. But, they may just be alleging problematic behaviors rather than explicitly requesting a cross-claim, and you have to ascertain the true nature of their notice to you. Finally, the responding party may allege sexual harassment or retaliation directly by the reporting party, by third parties, or the by college itself, necessitating an appropriate response.

Given the way the deliberate indifference standard works in court, the worst thing you can do with any of these types of allegations is to ignore them. The best practice is to process these claims like any other allegation under your policies: to vet them for good faith, sufficiency, and reasonable cause to believe that college policies may have been violated. Give yourself some wiggle room in your policies to reserve the right to process cross-claims either together with the underlying claim or separately and thereafter. If you don't reserve the right to delay your process to address a counter-claim after you address the underlying claim, you'll be stuck using the same 60-day timeline you have in place for all allegations. The reason you can delay your processing of a counter-claim is to protect against the possibility that it is being made in retaliation against the reporting party, and you don't want the college to become party to that retaliation by entertaining it. Often, the best practice is to assess the counter-claim after the underlying claim is resolved, and in light of what was found in that underlying allegation. Delay is also often effective in discouraging the filing of retaliatory counter-claims, once the responding party realizes his claim isn't going to "cancel out" the underlying allegation.

Sometimes, the counter-claim and the underlying claim should be entertained simultaneously (as in the case of an allegation of mutual incapacity, for example), or both claims should be investigated jointly, even if their resolutions are bifurcated. Sometimes, it is most efficient to investigate all claims at once, especially when the facts alleged in both arise from the same sexual transaction. While we have said this previously, it bears mentioning again, and in very explicit terms. If two students have had sex in circumstances where their conditions were similar – let's