



# TITLE IX DUE PROCESS: CIVIL RIGHTS INVESTIGATOR TRAINING & CERTIFICATION LEVEL FOUR COURSE

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Spokane, WA | August 12-13, 2019

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- Sign in all days of training for certification eligibility
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# LEVEL 4 INVESTIGATIONS TRAINING: DUE PROCESS



## Agenda

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



# LEVEL 4 INVESTIGATIONS TRAINING: DUE PROCESS



## Agenda

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

# HISTORY OF DUE PROCESS

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

# ***DIXON V. ALABAMA STATE BD. OF ED.***

## **294 F. 2D 150 (5TH CIR., 1961)**



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



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



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

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



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

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



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



# **GOSS V. LOPEZ**

## **419 U.S. 565 (1975)**



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

# **GOSS V. LOPEZ**

## **419 U.S. 565 (1975)**



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

# ***FELLHEIMER V. MIDDLEBURY COLLEGE***

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



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



# ***FELLHEIMER V. MIDDLEBURY COLLEGE***

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



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

# **FELLHEIMER V. MIDDLEBURY COLLEGE**

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



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

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



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



# DUE PROCESS

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- 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 allegations/investigation 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.

# ***MATTHEWS V. ELDRIDGE***

## **423 U.S. 319 (1976)**



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

# ***MATTHEWS V. ELDRIDGE***

## **423 U.S. 319 (1976)**



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

# COMPARATIVE DUE PROCESS



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

# METHODS OF RESOLUTION

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- Traditional Student Conduct Model
- At-Will Employee
- Tenured Faculty
- Civil Rights Model

# TRADITIONAL STUDENT CONDUCT MODEL



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

# AT-WILL EMPLOYEE MODEL



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



# TENURED FACULTY MODEL



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

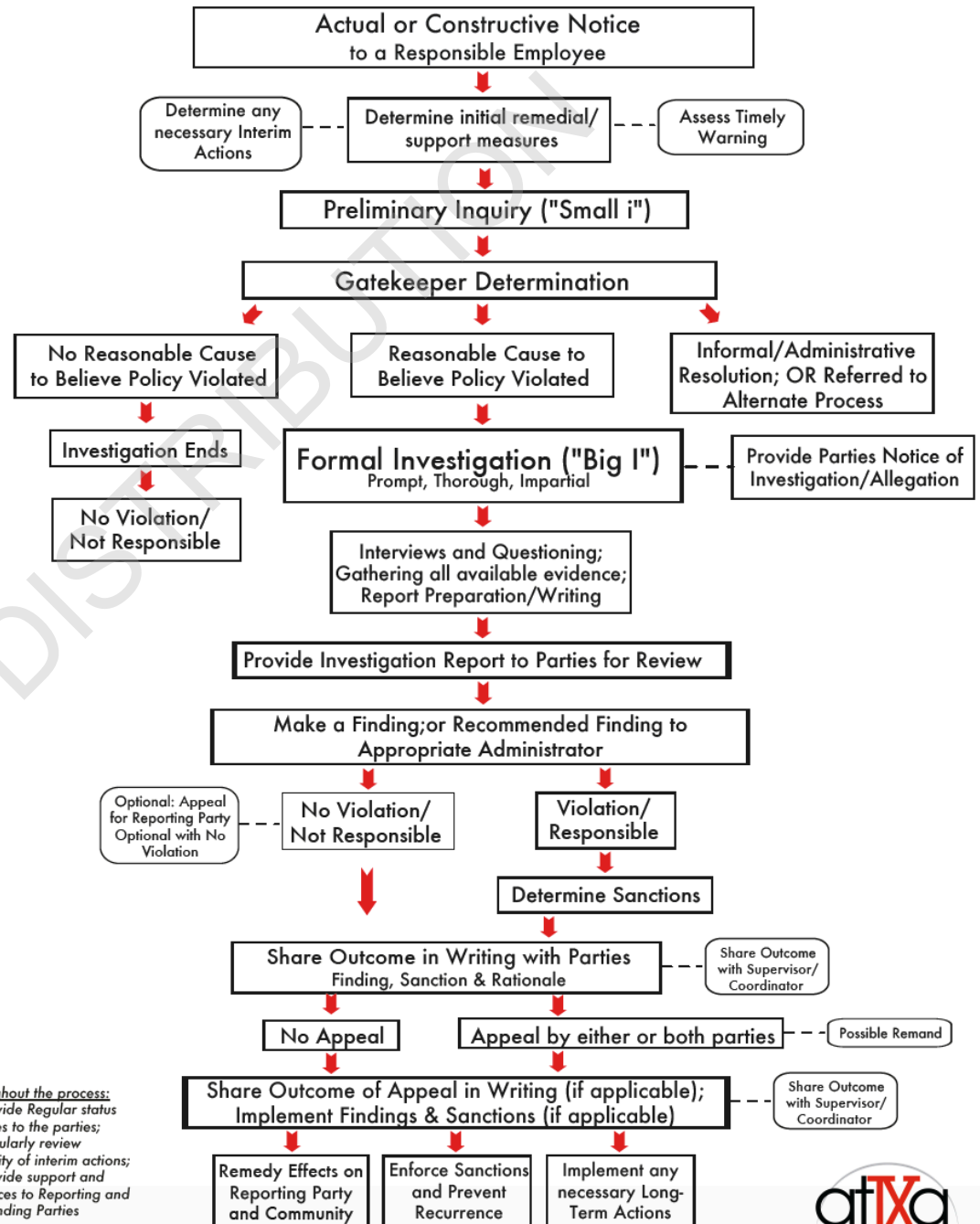
# CIVIL RIGHTS MODEL



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

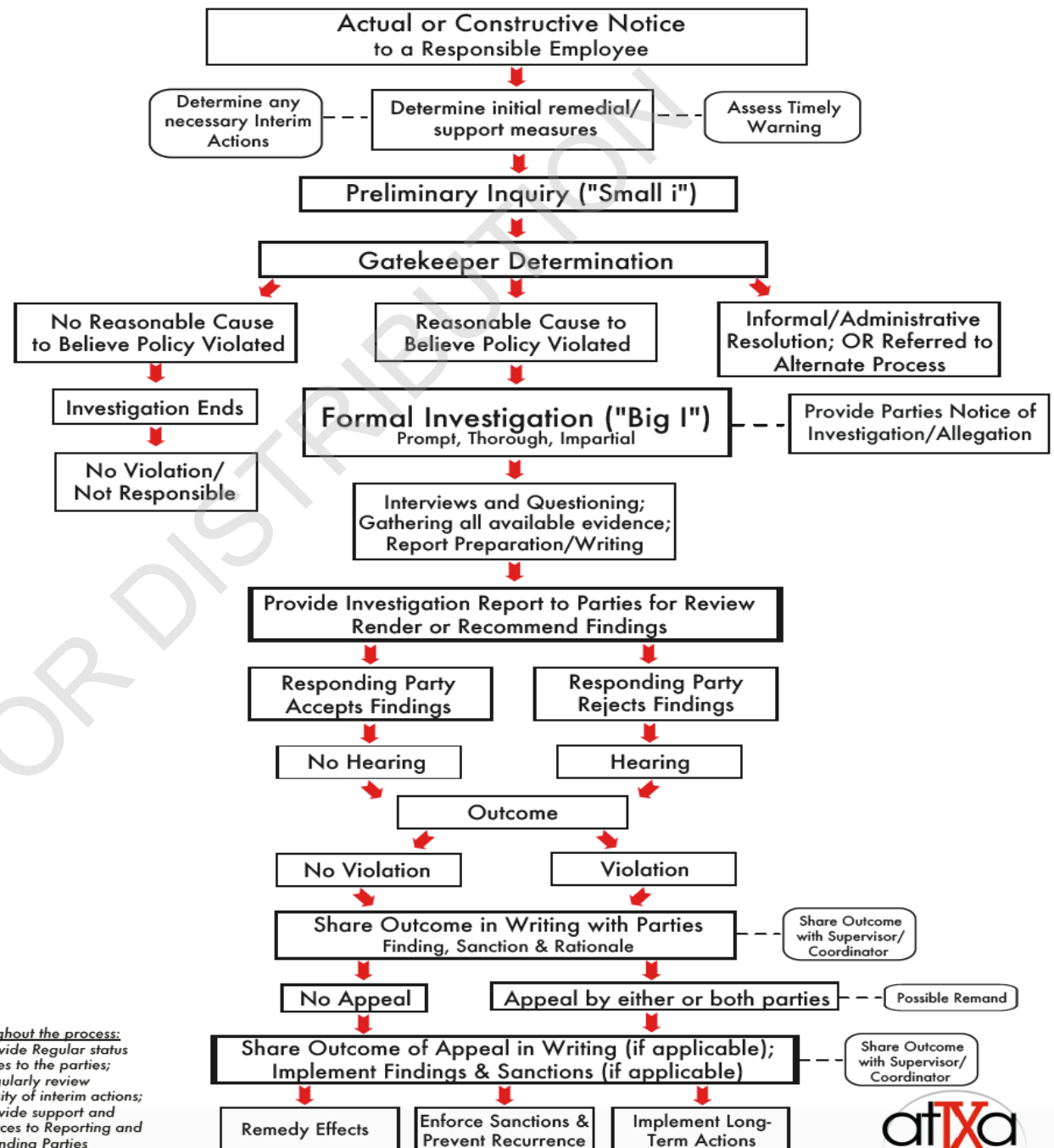
# CIVIL RIGHTS INVESTIGATION MODEL

## ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



# INVESTIGATION AND HEARING PANEL HYBRID MODEL

## INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



# THE PROCESS



# OVERVIEW OF BASIC STEPS OF DUE PROCESS



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

# DUE PROCESS FOR CAMPUS CONSTITUENCIES

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



# WHAT CONSTITUTES A “HEARING?”

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# WHAT ABOUT AN IN-PERSON HEARING?



- A formal in-person hearing, whether with a panel or an administrator, is not currently required.
- HOWEVER, courts, the Proposed Regs, and public opinion increasingly favor a hearing of some kind to allow the parties to review all available evidence and ask questions of witnesses and each other.
- In our experience, a well-conducted civil rights investigation results in an accepted finding (no hearing) in between 70–80 percent of cases.
- Hearings can still occur when information is disputed or when the matter is sufficiently severe, when necessary, and in a more limited, less adversarial, more efficient fashion.

# WHAT CONSTITUTES A “HEARING?”



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

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

# WHAT CONSTITUTES A “HEARING?”



- Hallmarks of a hearing using the Civil Rights Investigation Model
  - A team of two well-trained, impartial investigators who (often) meet multiple times with the parties to gather information, testimony, and evidence
  - The parties are provided ample opportunity to provide a list of witnesses and additional evidence.
  - Detailed and written notice to the parties of the allegations and each of the policies alleged to have been violated.
  - Meetings by the investigation team with all relevant witnesses

# WHAT CONSTITUTES A “HEARING?”



- Hallmarks of a hearing using the Civil Rights Investigation Model (cont.)
  - Opportunity for the parties to provide investigators with a list of questions for the other party(ies) and/or witnesses that may be asked at the investigators’ discretion.
  - Gathering of all available and relevant evidence by the investigators.
  - Opportunity for the parties to review all evidence and information that will be used to render a finding, either in written form or verbally before the determination is finalized.
  - Opportunity for the parties to address each allegation and the evidence and information pertaining to those allegations with the decision-makers.

# WHAT CONSTITUTES A “HEARING”



- Hallmarks of a hearing using the Civil Rights Investigation Model (cont.)
  - The parties are provided with a copy of the draft investigation report for review and comment prior to a decision.
  - A finding or recommendation on each alleged violation by the investigators, who met and/or spoke with the parties and the witnesses, and who examined all relevant evidence.
  - A formal hearing before an impartial decision-maker (administrator or hearing panel) for any disputed allegations
  - A reasonable and rational decision based on the evidence presented.

# JURISDICTION & EVIDENTIARY STANDARD

NOT FOR DISTRIBUTION

- Proposed Regs say Title IX does not apply outside the U.S.
- OCR will not enforce extraterritorial complaints.
  - Implications for Study Abroad
- The *Davis* standard is that Title IX applies and jurisdiction is required when the institution has:
  - Control over the harasser (discriminator); AND
  - Control over the context of the harassment (discrimination).



# GEOGRAPHIC JURISDICTION



- For Sexual Harassment and Discrimination cases.
  - There is an expectation that you should exercise SOME jurisdiction over off-site/off-campus incidents - “Nexus”
- If Title IX jurisdiction is not present, the behavior could still violate:
  - Institutional harassment/discrimination policies
  - Student Handbook/Conduct policies
  - Employee Handbook/Policies.
  - Professionalism standards

# GEOGRAPHIC JURISDICTION



- This means schools will likely be taking discretionary jurisdiction over incidents off-campus or on non-school property.
  - See, e.g., *Simpson v. Colorado*, *Weckhorst v. KSU*
- When?
  - Whenever our policy says.
  - “Nexus.”
    - When the behavior occurs on property we own or control.
    - When the behavior occurs in programs/events we sponsor.
    - When the downstream effects of purely off-site conduct may cause a discriminatory impact at school/on campus.

# PERSONAL JURISDICTION



- More Jurisdictional Limitations.
  - Temporal – Statutes of Limitations (OCR has one, Fed. Courts do not,, State Criminal courts vary)
- When is a student a “student”?
  - Upon **application** to the institution?
  - Once **admitted** to the institution?
  - Once **registered**?
  - Upon **matriculation**?
  - What about winter and summer **breaks**?
- When is an employee an employee?
  - Exempt vs. Non-Exempt Employees

# JURISDICTION - *WECKHORST V. KANSAS STATE UNIVERSITY*, 17-3208 (10TH CIR. 2019)



- (Note: Case is joined with *Farmer v KSU*, 17-3207 (10<sup>th</sup> Cir. 2019))
- April 26, 2014: Weckhorst, a KSU student, attended a fraternity event at a location near campus.
- At the party, Weckhorst was raped multiple times by two different fraternity members in a “sleep room.”
- Weckhorst reported the rapes to the Riley County Police Department.
- KSU told Weckhorst that KSU did not have jurisdiction over off-campus rapes.
  - However, KSU did suspend the fraternity for violation of their alcohol policy, based on Weckhorst’s report of alcohol use at the party.

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

- Court concluded:
  - “At one end, peer sexual assaults that occur at on-campus dormitories clearly implicate Title IX. At the other end, peer sexual assaults that occur off-campus, in private settings, and within contexts that have little or no connection to the funding recipient do not trigger Title IX liability. Peer sexual assaults that occur at off-campus fraternity houses or at official fraternity events that are subject to oversight, control, and disciplinary authority by a university appear to fall somewhere between these two bookends.”
- 2019 – The 10<sup>th</sup> Circuit upholds denial of dismissal of Title IX claims and remands to court. The Court is stunned that KSU would assert jurisdiction over the alcohol policy violations by individuals and the fraternity, but not the sexual misconduct by the individuals (and ostensibly, the culture and climate of the fraternity)

- November 2014: University of Mary Washington's student senate voted to authorize male-only fraternities. Student members of Feminists United at UMW questioned the decision and were subsequently subjected to offensive and threatening anonymous messages posted on Yik Yak.
  - Yaks referred to Feminists United members by “femicunts, feminazis, cunts, bitches, hoes, and dikes”
  - Included threats to “euthanize,” “kill,” and “[g]rape” FU members.
  - Some Yaks named specific members and reported the location of one member in hopes that she would be confronted on campus.
- Feb/Mar 2015: Feminist United members expressed concern for their safety due to online posts.

- Although UMW held a listening session, Title IX Coordinator told Feminist United members that UMW had “no recourse” for such online harassment.
- UMW never investigated the harassment and threats, and never asked any law enforcement agencies to investigate them citing concerns for infringing upon students’ First Amendment rights.
- In May 2017, plaintiffs filed suit in Eastern District of Virginia, alleging UMW was deliberately indifferent to sex discrimination which served to create and foster a hostile campus atmosphere.



- In September 2017, the district court dismissed the complaint finding that the alleged harassment “took place in a context over which UMW had limited, if any, control.”
- U.S. Court of Appeals for Fourth Circuit vacated the dismissal of Title IX sex discrimination complaint and remanded for further proceedings.
- Court relied on *Davis*, noting that an educational institution can only be liable for student-on-student sexual harassment when the institution “exercises substantial control over both the harasser and the context in which the known harassment occurs.”

- The court found that UMW had control or “disciplinary authority” over the harasser - UMW had ability to punish students who posted sexually harassing and threatening messages online.
- The court rejected the argument that UMW was unable to control the harassers because the offending Yaks were anonymous by noting UMW cannot escape liability when it never took any action to try to identify the harassers.
- The court found that although harassment occurred online, UMW had substantial control over the context of the harassment because the Yik Yak messages concerned events occurring on campus, specifically targeted UMW students, and originated on or within the immediate vicinity of the UMW campus utilizing the campus wireless network.

- The court noted UMW could have acted to disable access to Yik Yak campus-wide as it controlled activities that occurred on its network.
  - “[W]e cannot conclude that UMW could turn a blind eye to the sexual harassment that pervaded and disrupted its campus solely because the offending conduct took place through cyberspace.”
- UMW maintained that the First Amendment would be implicated if they punished students for their speech and barred students from accessing Yik Yak on UMW’s wireless network.
  - The court rejected this argument:
    - “(1) true threats are not protected speech, and
    - (2) the University had several responsive options that did not present First Amendment concerns.”

- The court agreed with the plaintiffs:
  - UMW could have addressed the conduct without exposing itself to First Amendment liability by:
    - Taking obvious and reasonable (such as more vigorously denouncing the conduct,
    - Conducting a mandatory assembly of the student body to discuss and discourage such harassment through social media,
    - Hiring an outside expert to develop policies for addressing and preventing harassment, or
    - Offering counseling services for those impacted by the targeted harassment).

# WHAT IS THE APPROPRIATE STANDARD OF PROOF?

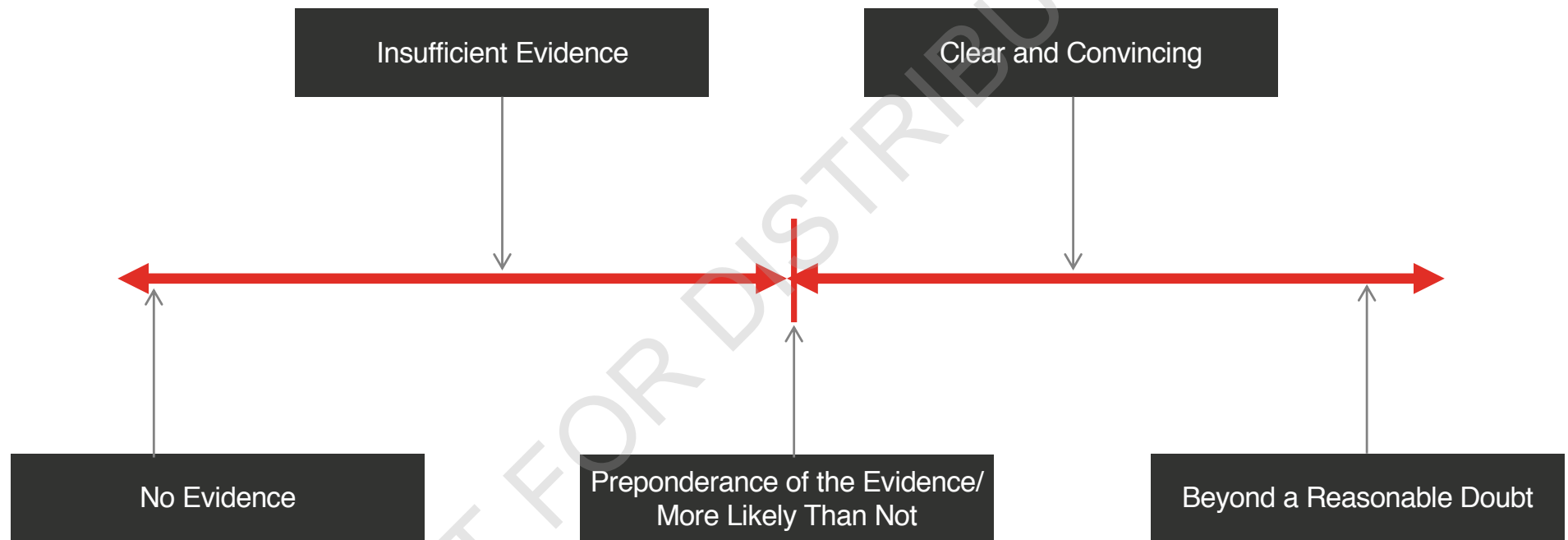


- Different Standards: What do they mean? Why do they exist?
  - Beyond a reasonable doubt.
  - Clear and convincing.
  - **Preponderance of the evidence.**
- The Proposed Regs skew towards Clear and Convincing (without fully requiring it), but ATIXA maintains Preponderance of the Evidence is the appropriate standard.
- See: *ATIXA Guide to Choosing Between Preponderance of the Evidence and Clear and Convincing Evidence*; located at <https://atixa.org/wordpress/wp-content/uploads/2017/09/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf>

# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



# PREPONDERANCE OF THE EVIDENCE



- Definition:
  - “The greater weight of the evidence” (Black’s Law Dictionary)
  - “More likely than not”.
  - 50.1%.
  - The “tipped scale”.
- Most commonly used standard. Used in processes such as:
  - Almost all civil litigation
  - Almost all employee disciplinary decisions across the country
  - By OCR to determine if a school has violated Title IX

***Campuses are determining whether internal administrative policies were violated, not whether a crime occurred.***

# CLEAR AND CONVINCING



- **Definition:**
  - “Evidence indicating the the thing to be proved is highly probable or reasonably certain.” (Black’s Law Dictionary)
  - “The standard of proof required for some civil cases or motions in which the party bearing the burden of proof must show that the truth of the allegations is highly probable.” (Merriam-Webster.com)
  - More than preponderance of the evidence, but less than beyond a reasonable doubt
- Used infrequently, but is used in cases of:
  - Fraud, punitive damages, wills, or family decisions (e.g.: end of life)
  - Faculty tenure revocation decisions
- Difficult to train towards, quantify, and to define.

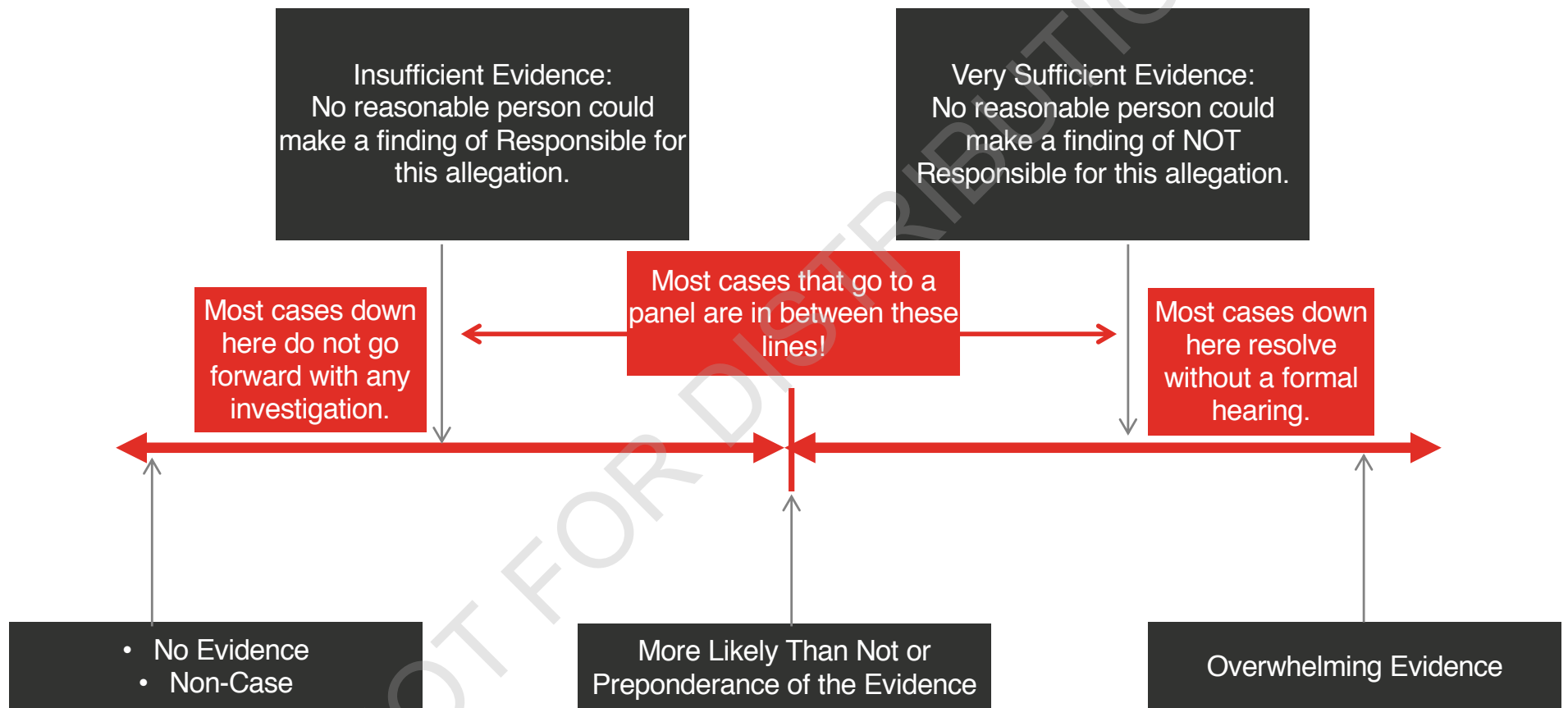


# BEYOND A REASONABLE DOUBT



- Definition:
  - “The doubt that prevents one from being firmly convinced of a defendant’s guilt, or the belief that there is a real possibility that a defendant is not guilty.”  
(Blacks’ Law Dictionary)
- Used in criminal court where there potential for imprisonment, confiscation of personal property, and even loss of life.
- Has no place in an institution’s internal, administrative policy determinations.
- Highly inequitable – places a significant burden of proof on the accuser. No burden of proof on the accused.

# STANDARD OF PROOF / EVIDENTIARY STANDARD atIXa



# VAWA SEC. 304 REQUIREMENTS

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# THE CLERY ACT & APPLICABILITY



- The Clery Act/VAWA Sec. 304 applies only to Post-Secondary Schools, Colleges, and Universities.
  - There is, however, is increasing traction within Congress to developing a similar mechanism within K-12.
- Most of the principles of The Clery Act/VAWA Sec. 304, are universal and instructive for all educational institutions, such as:
  - Policy best practices
  - Reporting
  - Transparency
  - Equitable resolution mechanisms
  - Due Process
  - Support for victims, etc.

# VAWA 2013 SEC. 304

## PROVIDING VICTIM WITH INFORMATION



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

# VAWA 2013 SEC. 304

## WRITTEN MATERIALS PROVIDED TO VICTIMS



- Written Materials provided to victim should explain the procedures a victim should follow, as well as the victim's right to:
  - Know what legal and protective options are available to them.
  - Seek orders of protection, “no contact” orders, restraining orders, or similar lawful orders issued by a criminal, civil or tribal court, or by the institution.
  - Notify proper law enforcement authorities, including on-campus and local police (should include contact information for L.E.).
    - Be assisted by campus authorities in notifying law enforcement authorities if the victim chooses, and
    - Decline to notify such authorities.
  - Know what is entailed in making a report to law enforcement.
  - Receive information about how to preserve evidence.

# VAWA 2013 SEC. 304

## WRITTEN MATERIALS PROVIDED TO VICTIMS



- Written information should be provided to students and employees about existing resources (updated regularly):
  - Counseling & Mental Health.
  - Health.
  - Victim advocacy.
  - Legal assistance.
  - Visa and immigration assistance.
  - Student financial aid.
  - Other services available for victims.
  - Both within the institution and in the community.
- Information should include contact information about these resources, including how to access these resources.

*NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.*

# VAWA 2013 SEC. 304

## WRITTEN MATERIALS PROVIDED TO VICTIMS



- Written Materials should also include victims about options for, and available assistance in, and how to request changes to:
  - Academic.
  - Living.
  - Transportation.
  - Working situations, or
  - Protective measures.
- The institution must make such accommodations if the victim requests them and they are reasonably available.
  - “The institution is **obligated** to comply with a student [victim]’s reasonable request for a living and/or academic situation change following an **alleged** sex offense.”

*NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.*



# VAWA 2013 SEC. 304

## REASONABLE ACCOMMODATIONS



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

# VAWA 2013 SEC. 304 & PRIVACY



- Requires institutions to notify victims and others of how recordkeeping will maintain victim's privacy and identifying information.
  - Must maintain privacy as possible for CSA reports and Daily Crime Log.
- Maintain confidentiality of accommodations or protective measures provided to the victim (unless confidentiality would impair institution's ability to provide these measures).
  - Should only disclose what is necessary to provide the accommodations or protective measures in a timely manner.
    - Policy should indicate who decides what to disclose and how the disclosure is made.

# VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



- Disciplinary procedures for VAWA-based violations should include:
  - The steps in the process.
  - Anticipated timelines.
  - Decision-making process.
  - How to file a disciplinary complaint (including contact information for the person or office to whom a report should be made).
  - How the institution determines which type of proceeding to use based on the circumstances of an allegation of a VAWA offense.
  - Procedures apply regardless of whether the conduct occurred on- or off-campus.

# VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



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

# VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



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

# VAWA 2013 SEC. 304 ADVISORS



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

# VAWA 2013 SEC. 304

## “PROCEEDING”



- “Proceeding” is defined broadly as:
  - “All activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, **factfinding investigations, formal or informal meetings, and hearings.**”
  - “Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim.”

# VAWA 2013 SEC. 304 STANDARD OF EVIDENCE



- VAWA Sec. 304 does not require a specific standard of evidence, but procedures must:
  - include a description of the “standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of” the four VAWA offenses, AND
  - the institution must use the standard of evidence described in the statement in all such proceedings.
  - ***Proposed regs may impact this as well.***



# VAWA 2013 SEC. 304 SANCTIONS



- No specific sanctions are required.
- Procedures should “list ALL of the possible sanctions...for each VAWA offense”.
  - Must be specific: e.g. type and length of a suspension, including requirements for reinstatement.
  - If you use a sanction not in this list, it must be added in the next ASR.

# VAWA 2013 SEC. 304 ANNUAL TRAINING FOR OFFICIALS



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

# VAWA 2013 SEC. 304

## SIMULTANEOUS NOTIFICATION



- Require simultaneous notification, in writing, to both accuser and accused, of:
  - The result of any institutional proceeding arising from allegations of VAWA offenses.
    - Result “defined as any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution”.
    - Result = Finding, Sanction, and Rationale.

*Note: The Clery Handbook contains an explicit FERPA exclusion*
  - Procedures for appeal (if any).
  - Any change to results.
  - When such results become final.

# VAWA 2013 SEC. 304 SIMULTANEOUS NOTIFICATION



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

# TITLE IX DUE PROCESS

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

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



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

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



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

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



- “OCR determined that the accused Student was entitled to procedural protections that the College did not afford him. In processing the complaint against the accused Student, the College did not satisfy Title IX, the College did not comply with its own procedures and, in fact, the College acted in direct contradiction of its procedures and as a result the resolution of the complaint was not equitable.”
- Note: Cases like this one (and hundreds of others) have helped create the current Proposed Regs.



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



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

# TITLE IX DUE PROCESS: ERRONEOUS OUTCOME



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

# TITLE IX DUE PROCESS: ERRONEOUS OUTCOME



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

# TITLE IX DUE PROCESS: SELECTIVE ENFORCEMENT



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

# LESSONS FROM RECENT CASELAW

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

# **JOHN DOE V. GEORGE MASON UNIV.**

## **U.S. DIST. CT., C.D. CALIF. (NOV. 2, 2105)**



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

# ***JOHN DOE V. BRANDEIS UNIVERSITY***

## **U.S. DIST. CT., MASS. (MARCH 31, 2016)**



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

# ***JOHN DOE V. BRANDEIS UNIVERSITY***

## **U.S. DIST. CT., MASS. (MARCH 31, 2016)**



- **Key Takeaways**

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



- **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.

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

# **DEBORAH MOORE V. UNIVERSITY OF CALIFORNIA**

## **U.S. DIST. CT., N.D. CAL. (MAY 23, 2016).**



- **Key Takeaways**

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

# **SARAH BUTTERS V. JAMES MADISON UNIVERSITY**

## **U.S. DIST. CT., W.D. VA. (NOV. 6, 2015).**



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

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

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

# **TAKLA V. UNIVERSITY OF CALIFORNIA**

## **U.S. DIST. CT., C.D. CALIF. (NOV. 2, 2015)**



- **Key Takeaways**

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

# ***DOE V. UNIVERSITY OF CINCINNATI***

## **U.S. CT. OF APPEALS, 6<sup>TH</sup> 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.
- 6<sup>th</sup> Circuit Court found in favor of Doe.



- **6<sup>th</sup> Circuit's decision**
  - Due process: **Where credibility is the deciding factor/pivotal issue**, the 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.

# 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”.

# JOHN DOE V. PENN STATE UNIVERSITY

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



- 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, 6<sup>th</sup> 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, 6<sup>th</sup> 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.

# ***JOHN DOE V. MIAMI UNIVERSITY, ET AL.***

## **U. S. Ct. of Appeals, 6<sup>th</sup> Circuit (Feb. 9, 2018)**



- 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.



***JANE ROE V. JAVAUNE ADAMS-GASTON, ET AL.***  
U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)



- 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.

# ***JANE ROE V. JAVAUNE ADAMS-GASTON, ET AL.***

**U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)**



- 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.
- In the second hearing, the complainant did not attend, but sent a statement directly to hearing officer and asked that statements be read aloud during the hearing; Roe objected to the statements being read, but the statements were in the hearing packet.
- 3 adverse witnesses did not attend, but their statements were in the hearing packet.
- Hearing officer found Roe in violation; found her statement lacked credibility as compared with the credible and plausible statements of witnesses.
- Roe was expelled.

# ***JANE ROE V. JAVAUNE ADAMS-GASTON, ET AL.***

U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)



- Roe sued, stating OSU deprived her of due process because she could not cross examine the reporting party and the witnesses.
- 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.

***JOHN DOE V. UNIV. OF MICHIGAN, ET AL.***  
**U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)**



- 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).

***JOHN DOE V. UNIV. OF MICHIGAN, ET AL.***  
U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)



- 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, 6<sup>th</sup> 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, 6<sup>th</sup> 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 6<sup>th</sup> Circuit reversed.
- The Due Process and the Title IX Erroneous Outcome claims survived.

- **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.



# ***JOHN DOE V. BAUM, ET AL.***

## **U. S. Ct. of Appeals, 6<sup>th</sup> Circuit (Sept. 7, 2018)**



- Title IX Erroneous Outcome
  - The due process issues cited above inform their finding.
  - The attention gained because OCR launched an investigation two years ago that garnered and continued to garner attention, the complaint was filed by a female, Michigan could lose all of its funding, the news media beat up Michigan for not supporting victims enough,
  - The Appellate Board dismissed all the evidence provided by male witnesses (caser was basically men on Doe's side, women on Roe's side) stating that they were biased because they were fraternity brothers of Doe, but made no such qualification for her witnesses (all of whom were her sorority sisters, but their decision made no mention of that).
  - 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., 2<sup>ND</sup> DIST. (AUGUST 8, 2018)



- May 2015, John Doe was found responsible for nonconsensual sexual intercourse with Jane Doe, a student from Scripps College.
- He was suspended for one year.
- 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.
- Jane did not attend the Committee meeting.
- The Investigator also did not ask Jane the questions John requested the investigator ask.

# JOHN DOE V. CLAREMONT MCKENNA COLLEGE

## CAL. CT. APP., 2<sup>ND</sup> DIST. (AUGUST 8, 2018)



- 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 approvingly cited 6<sup>th</sup> Circuit's Cincinnati decision regarding credibility determinations and the ability of the parties to pose questions to each other.
  - “We hold that where, as here, John was facing potentially severe consequences and the Committee’s decision against him turned on believing Jane, the Committee’s procedures should have included an opportunity for the Committee to assess Jane’s credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee’s asking her appropriate questions proposed by John or the Committee itself. ”
-

# JOHN DOE V. CLAREMONT MCKENNA COLLEGE

## CAL. CT. APP., 2<sup>ND</sup> DIST. (AUGUST 8, 2018)



- 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.”

## OTHER CASES

- Some even more recent decisions include....

NOT FOR DISTRIBUTION

# REVIEW OF ATIXA DUE PROCESS CHECKLIST

NOT FOR DISTRIBUTION

# 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 (or any interim measure) is implemented, and a right to challenge the imposition of the interim suspension/measures.
  - 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.
  - May also be the Notice of Investigation

# 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).
  - Caselaw is increasingly overwhelming on this point.
  - Neither FERPA nor employment laws prohibit providing copies.
  - STOP making people come to an office to review evidence. NOT a best practice.
  - Transparency is important to fairness.

# DUE PROCESS CHECKLIST



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

# DUE PROCESS CHECKLIST



- Right to decision-makers and a decision free of demonstrated bias/conflict of interest (and advance notice of who those decision-makers will be).
  - 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.).

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# 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”.

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# 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 caselaw
    - strive for best practices.

# 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 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 pattern 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 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 over-react 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.
  - Caselaw overwhelmingly supports this requirement.
  - Written detailed rationale provided to the parties (allows for appeal).
  - Rationale for decision on any challenged interim measures, findings, appeals, any change in finding or sanction.

# DUE PROCESS CHECKLIST



- Right to an 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.

# APPEALS

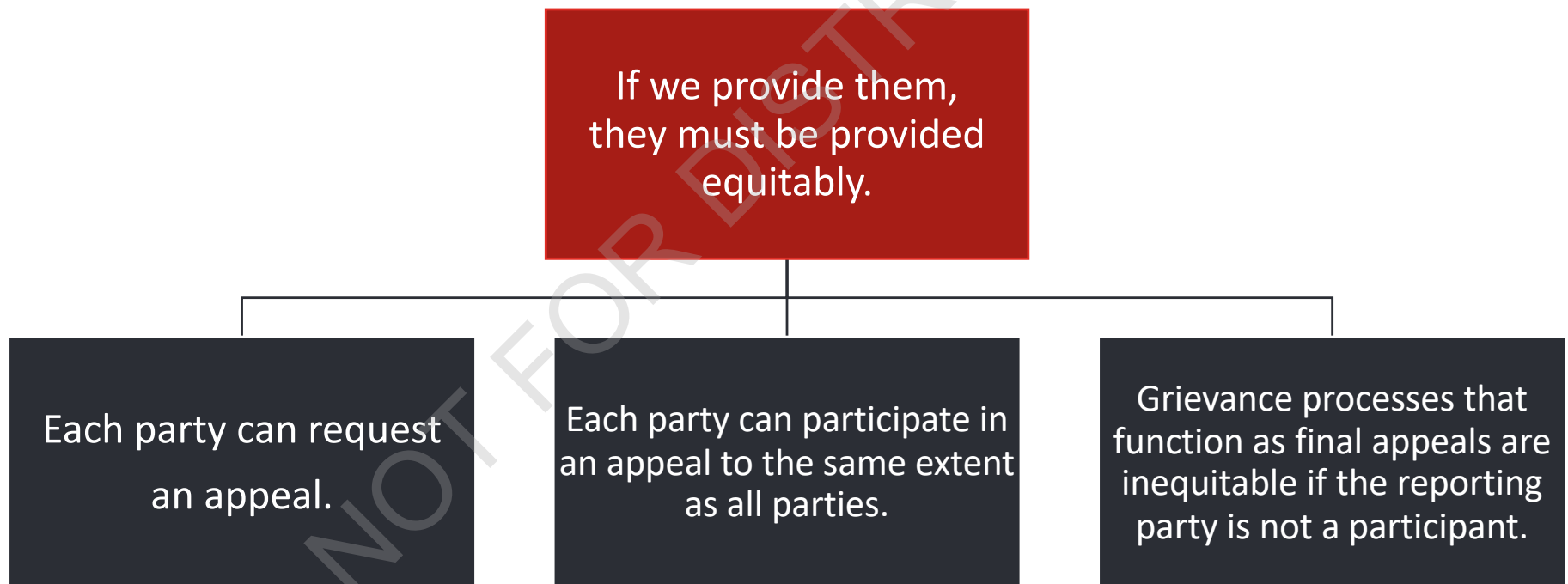
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- Key Elements
- Where Appeals Go Off the Rails
- Grounds for Appeal
- Appeals Logistics
- Process Flowchart

# INTRODUCTION



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



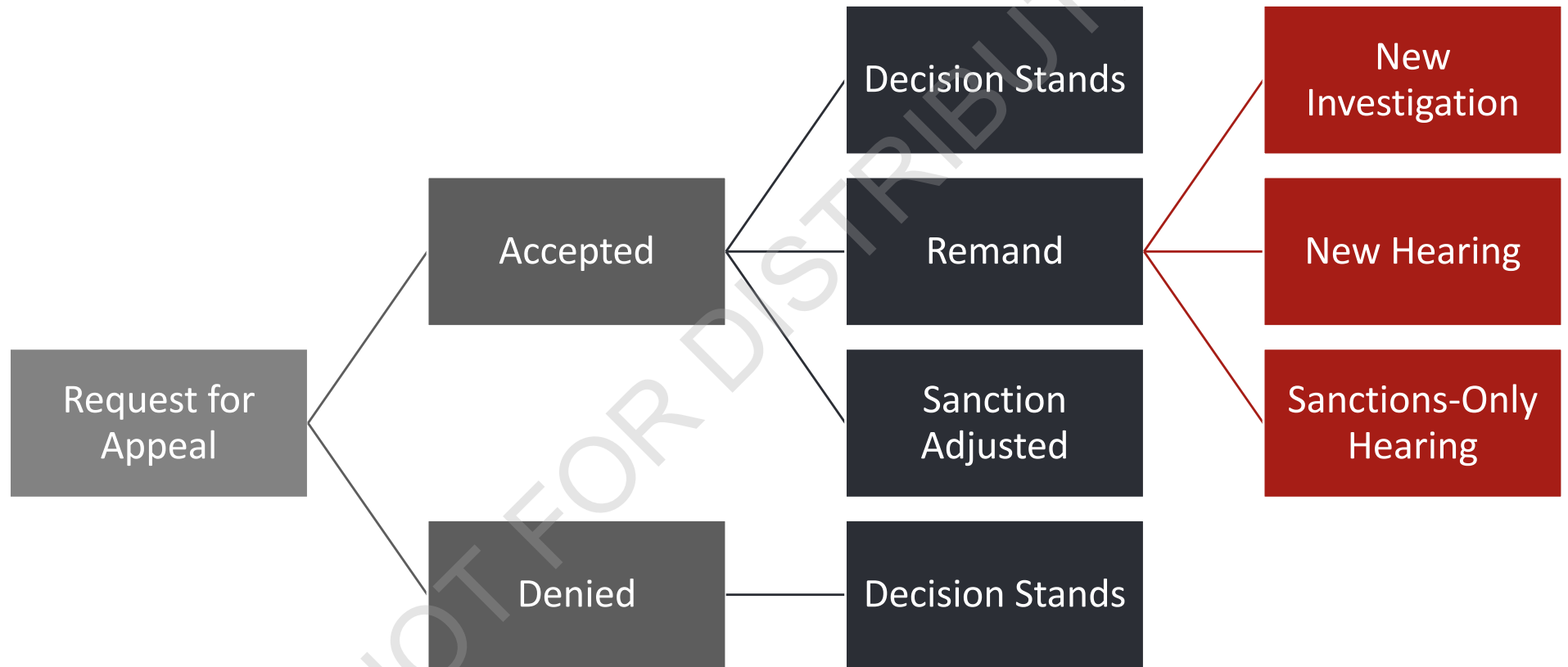
# APPEALS: KEY ELEMENTS



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



# APPEALS: THE PROCESS



# APPEALS: GROUNDS FOR APPEAL



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

## Petition for Appeal: Reviewed by Single Administrator

Initial review of appeal to determine whether it states grounds upon which relief can be granted.

Petition denied or accepted; If accepted...

## Two Models: Single Administrator or Panel

Single trained administrator.  
• E.g.: VPSA, director of HR, associate provost, coordinator.

Trained appeals panel.  
• Three panelists from pool who have not yet otherwise participated or had knowledge of the facts.

# WHEN APPEALS GO OFF THE RAILS



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

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

The liability risk of a too strong appellate authority.

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

Failure of adequate training.

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

# HOT TOPICS IN DUE PROCESS

- Discrimination
- Threats
- Free Speech

# TITLE IX DUE PROCESS: THREATS



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

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

# TITLE IX DUE PROCESS: DISCRIMINATION



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

# TITLE IX & THE FIRST AMENDMENT



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

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



# TITLE IX & THE FIRST AMENDMENT



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

# TITLE IX & THE FIRST AMENDMENT



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

# TITLE IX & THE FIRST AMENDMENT



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

# TITLE IX & THE FIRST AMENDMENT



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

# QUESTIONS?



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# CONTACT INFORMATION

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