



USM Title IX Convening

OFFICE OF THE ATTORNEY GENERAL OF MARYLAND

October 1, 2021

Subject to attorney-client privilege, deliberative process privilege,
and attorney work product doctrine



Agenda

- U.S. Department of Education's Q & A
- Change in enforcement by Department of Education (*Victim Rights Law Center v. Cardona*)
- Litigation update
- Best practices and common issues in investigation and adjudication
- Issues where there are related criminal cases



Questions and Answers on the Title IX Regulations (July 2021)

- Generally, the Department of Education simply restated the Preamble and Rule, in a more accessible format.
- Made multiple references to the Rule's Preamble, confirming its continued relevance; although it lacks the force of law, it clarifies OCR's interpretation of TIX.
- Confirmed that the 2020 amendments to the TIX regulations remain in effect for post-August 14, 2020, conduct and will be enforced by OCR.
- Made clear that for pre-August 14, 2020, conduct, institutions must follow the requirements of the TIX statute and regulations in place at the time of the alleged incident, even if the institution's response was on or after August 14, 2020.
 - For pre-August 14, 2020, conduct, although 2001, 2011, 2014, and 2017 guidance has been rescinded, it is still accessible on the OCR website and can be helpful in interpreting how the OCR will address institutions' responses to pre-August 14, 2020, conduct.

Invites further questions; send to OCR at ocr@ed.gov.



July 2021 Q & A (cont.)

- Provided an Appendix of examples of TIX policy provisions to provide clarity on how OCR interprets existing requirements.
- Reminded institutions that although they must dismiss formal complaints if they do not meet the § 106.30 definition of sexual harassment, did not occur in the education program or activity, or against a person in the United States, they can still respond to such conduct under other provisions in their codes of conduct.
- Prevention: Although the regulations focus on response to sexual misconduct, institutions are expected to prevent sexual harassment from occurring in the first place.
- Equal Access: Sexual harassment includes unwelcome conduct “so severe, pervasive, and objectively offensive that it effectively denies a person “equal access” to the education program. Remedies must restore equal access.
 - Complainant need not show total loss of access or a concrete injury.
 - Would a reasonable person in the same situation effectively be denied equal access?



July 2021 Q & A (cont.)

- Notice: An institution must respond when the Title IX coordinator or another official who has authority to institute corrective measures receives notice of alleged facts that, if true, could constitute sexual harassment.
 - An institution may expressly designate specific employees as officials with this authority and inform students of such designation.
 - Other employees may be required to report allegations of sexual harassment, but the institution will not be responsible unless an employee actually provided notice to an official with authority to institute corrective measures.
 - Officials with authority may receive notice through
 - An oral report by a complainant or anyone else
 - A written report
 - Personal observation
 - A newspaper article
 - An anonymous report
 - Various other means



July 2021 Q & A (cont.)

- **Substantial Control:** An institution with actual knowledge of sexual harassment in an education program or activity against a person in the United States must respond promptly. An education program or activity includes locations, events or circumstances over which the institution exercised substantial control over both the respondent and context in which the harassment occurred and includes a building owned by a recognized student organization.
- Whether an institution exercised substantial control over the context in which sexual harassment occurred is a “fact-specific determination.”
 - It may be helpful to consider factors such as whether institution funded, promoted or sponsored the event or circumstance where alleged harassment occurred but no single factor is determinative
 - There may be circumstances where an incident in an off-campus apartment occurred in a context in which the institution exercised substantial control
 - No distinction between in person or online “education program or activity.”
 - Student using personal device in classroom may constitute circumstance where institution exercised substantial control



July 2021 Q & A (cont.)

- **Deliberate Indifference:** An institution with actual knowledge of sexual harassment in any of its programs must respond promptly in a manner that is not deliberately indifferent.
 - An institution is deliberately indifferent if its response to sexual harassment is “clearly unreasonable in light of the known circumstances.”
 - Even if a complainant has not filed a formal complaint and is not participating or attempting to participate in the school’s education program or activity, where a Title IX coordinator has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority and does not file a formal complaint, OCR may find the institution to be deliberately indifferent.
 - Where the respondent has left the institution before a complaint has been filed, the institution must still respond by providing supportive measures to the complainant; the institution may dismiss the formal complaint but is not required to do so.



July 2021 Q & A (cont.)

- Cross Examination: Institutions are required to provide complainants and respondents with advisors to conduct cross-examination at hearings.
 - Parties must be provided with an opportunity to be accompanied by an advisor of their choice at other phases of the grievance process, but the institution is not required to provide an advisor for these other phases.
 - Institutions may limit the advisor's role to relaying questions drafted by the party and questions may be excluded where they are not relevant or duplicative/repetitive.
 - Parties and witnesses are not required to submit to cross examination or otherwise participate in the grievance process.



July 2021 Q & A (cont.)

- Other Forms of Sex Discrimination: Complaints alleging discrimination other than sexual harassment, such as complaints of discrimination based on pregnancy, differential treatment based on sex, do not require the formal Title IX grievance process, but institutions must respond to these complaints using “prompt and equitable grievance procedures.”
 - Procedures should be
 - clearly communicated to students
 - Provide for adequate, reliable and impartial investigations of complaints
 - Provide for reasonable timeframes for resolution
 - Provide notice to the parties of the outcome of a complaint



Victim Rights Law Center, et. al. v. Cardona

No. 20-11104-WGY, 2021 WL 3185743 (D. Mass. July 28, 2021)

- Case brought by VRLC and other organizations challenging the 2020 Amendments to the regulations implementing Title IX.
- Court upheld most provisions but found one to be product of “arbitrary and capricious decisionmaking,” and thus, procedurally defective: § 106.45(b)(6)(1).



34 C.F.R. § 106.45(b)(6)(1)

- If a party or witness does not submit to cross examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross examination or other questions.



Victim Rights Law Center v. Cardona

(cont.)

- The court noted that nothing in the administrative record indicated that the Department of Education:
 - considered the likely result of this provision: that a respondent would choose not to attend a hearing to prevent admission of inculpatory statements and would suggest that other witnesses not attend to avoid use of their prior statements.
 - provided a reasoned explanation why it nevertheless intended that result.
- Thus, that portion of the Rule was arbitrary and capricious. The court remanded it to the Department of Education for further consideration and explanation.
- On August 10, 2021, the Court entered a clarifying order stating that its July 28, 2021, order vacated, as well as remanded, § 106.45(b)(6)(1). (*Victim Rights Law Center v. Cardona*, No. 20-11104-WGY, 2021 WL3516475 (D. Mass. August 10, 2021)).



U.S. Department of Education

- Announced on August 24, 2021, that in light of the court’s decision in *Victim Rights Law Center v. Cardona*, the Department would “immediately cease enforcement of the part of § 106.45((b)(6)(i) regarding the prohibition against statements not subject to cross-examination.”



U.S. Department of Education

- As a result:
 - A decision maker is not prohibited from considering statements by parties and witnesses (not otherwise prohibited by the regulations), in reaching a decision regarding responsibility in a TIX case, even if those individuals do not participate in cross-examination.
 - This includes statements made to the investigator, emails or texts between the parties leading up to the alleged harassment, and statements about the alleged harassment.
 - The decision maker may also consider police reports, SANE documents, medical reports, and other documents, even if they contain statements of a party or witness who is not subject to cross-examination at the hearing.



Decision Point

USM and institutions are now free to modify their policies to remove the prohibition on the decision-maker's reliance on a party or witness's statement made during the investigation process or at the hearing if that party does not submit to cross-examination.

Current Policy Provisions

- USM Policy VI-1.60, § II.E.16.j:
 - If a Party or witness declines to answer any questions, the Hearing Officer will not rely on any prior statements made by that Party during the investigation process in making a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

SMCM Grievance Process to Resolve Complaints of Sexual Misconduct, § X.n.u.

- If a party or witness does not submit to Cross-examination at the live hearing, the hearing officer(s) will not rely on any statement of that party or witness in reaching a determination regarding responsibility. However, the hearing officer(s) will not draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer Cross-examination or other questions.



Language for Amendments

Association of Title IX Administrators (ATIXA), proposed the following instruction/procedure change:

Any party or witness may choose not to offer evidence and/or answer questions at the hearing, either because they do not attend the hearing, or because they attend but refuse to participate in some or all questioning. The decision-maker may only rely on whatever relevant evidence is available through the investigation and hearing in making the ultimate determination of responsibility. The decision-maker may not draw any inference solely from a party's or witness's absence from the hearing or refusal to submit to cross-examination.

Another option:

The decision-maker may rely on all relevant evidence that is available through the investigation and hearing in making the ultimate determination of responsibility. The decision-maker may not draw any inference solely from a party's or witness's absence from the hearing or refusal to submit to cross-examination.

To the extent USM and institutions decide to change their policies to address the change in enforcement, we recommend that the campus communities be informed about the change in enforcement and institution policy.



VAWA and Clery Act

- Increasingly, complaints are filed with the Clery Group of the Department of Education alleging violations of the Clery Act and implementing regulations, specifically 34 C.F.R. § 668.46, which incorporate the amendments to the Clery Act included in § 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA).
 - Complaint Assessment
 - Investigation
 - Outcome
 - Formal Program Review, if deemed appropriate
 - Resolution (no mediation but offers technical assistance)
- Broader Jurisdiction than Title IX: The Clery Act covers dating violence, domestic violence, sexual assault or stalking, both within and outside the United States, on- or off-campus. The complainant does not have to be participating or attempting to participate in the education program or activity. Students and employees are entitled to participate in the campus disciplinary process.



Clery Act

20 U.S.C. 1092(f)

- Prompt, fair, and impartial disciplinary process in response to a report of alleged sexual violence
- Provide written information about the complainant's rights and options, available accommodations and protective measures
- Timely warning if significant or ongoing threat to campus
- Advisor of choice
- Officials trained annually on issues related to VAWA crimes
- Reasonably prompt, designated timeframes
- Process that is consistent with written policies
- Transparency – parties and officials are entitled to broad access to information to be used in any stage of the proceeding
- Simultaneous written notification of outcome, including rationale for result and sanction, and any change to the results before they become final
- Information about right to appeal



Maryland Higher Education Commission

Title IX Updates



MHEC Training

Q: Any update on whether MHEC is going to do additional training or get more people for the attorney list ?

A: MHEC, in coordination with the Maryland Coalition for Sexual Assault (MCASA), is currently planning a training session for attorneys in mid-November.



MHEC Reimbursement of Attorneys

Q: If a matter starts as a Title IX complaint, but has to be dismissed as Title IX and handled under an institution's general sexual misconduct or non-discrimination policies, would the student still be eligible for an MHEC attorney ?

A: An attorney who represents a complainant or respondent after the initiation of Title IX proceedings is eligible for reimbursement from MHEC for legal services performed up until the termination of the Title IX proceedings. Accordingly, if a Title IX complaint is dismissed and handled under other institutional policies, the attorney could seek reimbursement for legal services performed up until the Title IX proceedings were dismissed.



Reminder: State-Required Sexual Assault Climate Student Survey report due to MHEC on or before **June 1, 2022**. Report must include:

1. Types of misconduct
2. Outcome of each complaint
3. Disciplinary actions taken by the institution
4. Accommodations made to students in accordance with the sexual assault policy
5. Number of reports involving alleged nonstudent perpetrators

Note: Institutions must also include data required under
VAWA



Questions?



Litigation Update



Doe v. Fairfax County School Board

1 F.4th 257 (4th Cir. 2021)

- 4th Circuit held that schools have potential liability for sexual harassment that occurred before the school had notice of the harassment, if the school's response was deliberately indifferent.
- Also held that a single act of sexual harassment or assault can be sufficient to trigger Title IX liability.



Elements of Deliberate Indifference Claim

Private right of action for deliberate indifference to student-on-student sexual harassment established by Supreme Court in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

To establish a Title IX claim based on student-on-student sexual harassment, a plaintiff must show that:

(1) they were a student at an educational institution receiving federal funds;



Elements of claim, continued

(2) they suffered sexual harassment that was so severe, pervasive, and objectively offensive that it deprived them of equal access to the educational opportunities or benefits provided by their school;

(3) the school, through an official who has authority to address the alleged harassment and to institute corrective measures, had actual notice or knowledge of the alleged harassment; and

(4) the school acted with deliberate indifference to the alleged harassment.

Doe, 1 F.4th at 263-64 (citing *Davis*, *Gebser*, and other cases).



For What Conduct is the School Liable?

- Supreme Court held that a school can only be liable for its *own* conduct (action or inaction), and that it is not vicariously liable for the conduct of others:
 - “A recipient of federal funds may be liable in damages under Title IX only for its own misconduct.”
Davis, 526 U.S. at 640.
 - “We concluded in *Gebser* that recipients could be liable in damages only where their own deliberate indifference effectively caused the discrimination.”
Davis, 526 U.S. at 642-43.



- Court specifically stated that “If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference subjects its students to harassment. That is, the deliberate indifference must, at a minimum, cause students to undergo harassment *or* make them liable or vulnerable to it.” *Davis*, 526 F.4th at 644-45 (emphasis added).



Is A School Liable for Pre-Notice Harassment?

- There is a split amongst the federal appellate courts as to what the foregoing language means.
 - Some courts have held that a Title IX plaintiff must demonstrate that he or she continued to suffer from harassment *after* the school had notice and that there was a causal nexus between school’s own conduct (i.e. its clearly unreasonable response) and the student’s experience of sexual harassment.
 - Others have held that post-notice harassment is not required, if plaintiff can demonstrate a clearly unreasonable response, which made the student “more vulnerable” or further contributed to the deprivation of his or her access to educational activities.
- *See, e.g., Doe v. Bd. of Trustees of Nebraska State Colleges*, No. 8:17CV265, 2021 WL 3146026, at *2 (D. Neb. July 26, 2021) (noting split and citing cases from several courts).



Fourth Circuit Position in *Fairfax County*

- Factual Background:
 - High school student alleged that another student sexually assaulted her on a bus on a school band trip, via non-consensual touching.
 - She told her friends, who told school administrators during the trip.
 - No action was taken during the trip.
 - Assistant Principal interviewed Doe after the trip, who provided a written statement.
 - Administrators interviewed Smith (the assailant), who initially denied everything but then admitted that he touched Doe.



Facts, cont.

- School did not institute a formal Title IX investigation.
- School officials ultimately decided that “the evidence that they had didn't show that they could call it a sexual assault.’ They also decided against disciplining either Doe or Smith for engaging in sexual activity while on a school trip.” *Fairfax County*, 1 F.4th at 262.
- Doe’s mother complained, asserting that the touching was not consensual and was therefore a sexual assault.
 - Administrators told her that they concluded “that what happened on the bus did not amount to sexual assault.” *Id.*



Jury Verdict

- Doe filed a Title IX deliberate indifference lawsuit.
- Jury found that:
 - Smith had sexually harassed Doe;
 - Harassment had been “severe, pervasive, and offensive enough to deprive Doe of equal access to educational opportunities”; BUT
 - School did NOT have actual knowledge of the harassment;
- Jury did not reach question of deliberate indifference.



4th Circuit Holding

- Court first held that “a school's receipt of a report that can *objectively* be taken to allege sexual harassment is sufficient to establish actual notice or knowledge under Title IX—regardless of whether school officials *subjectively* understood the report to allege sexual harassment or whether they believed the alleged harassment actually occurred.” *Id.* at 263.
 - Here, the undisputed facts demonstrate that school had received sufficient notice of harassment to trigger a Title IX duty to investigate, even if administrators subjectively did not believe the alleged conduct constituted harassment.
 - Therefore, the Court reversed the jury finding on this issue.



Holding, continued

- Court (2-1) held that Doe did not need to show that she suffered harassment *after* the school was advised of the incident. *Id.* at 273-74.
 - “Contrary to our dissenting colleague's assertion, Title IX liability based on student-on-student harassment is not necessarily limited to cases where such harassment occurs after the school receives notice and is caused by the school's own post-notice conduct.” *Id.* at 273.



Holding, continued

- “We hold that a school may be held liable under Title IX if its response to a single incident of severe sexual harassment, or the lack thereof, was clearly unreasonable and thereby made the plaintiff more vulnerable to future harassment *or* further contributed to the deprivation of the plaintiff’s access to educational opportunities.” *Id.* (emphasis added).
- The court focuses on the continuation of the *effects* of the initial harassment, not whether the harassment continues after the school has notice of it.



Holding, continued

- Court also stated that a clearly unreasonable response need not have the direct effect of depriving the student of educational benefits:
 - “The School Board misconstrues the law by claiming that *its own response* to the alleged sexual harassment did not exclude Doe from any educational opportunities or benefits.... The main object of inquiry for this [deprivation] prong is the alleged sexual harassment, rather than the defendant's response thereto.” *Id.* at 274.
 - School’s response is only relevant as it relates to the deliberate indifference element of the claim.
 - Therefore, if the plaintiff is suffering on-going effects from the harassment *and* the school’s response was clearly unreasonable, there is potential liability.



Holding, continued

- Other holdings of note:
 - Court confirmed that a school can be liable for a single incident of sexual harassment or assault (even if such incident occurred pre-notice):
 - “Even a single incident of sexual harassment, if sufficiently severe, can inflict serious lasting harms on the victim—physical, psychological, emotional, and social” and can cause the victim to be unable to fully participate in educational opportunities. *Id.* at 274.



Holding, continued

- Other courts have held that harassment must be ongoing in order to be “pervasive” and “systemic;”
- Supreme Court itself seemed to indicate that a single incident would be insufficient to trigger school liability:
 - “Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored.” *Davis*, 526 U.S. at 652-53.



Holding, continued

- Court also found that evidence could support finding of deliberate indifference (i.e. clearly unreasonable response).
 - School officials took no action to protect Doe during band trip;
 - Doe was asked a number of accusatory questions during interview and officials discussed with her – but not Smith – whether she broke school rules by engaging in sexual conduct;
 - Did not interview potential witnesses;
 - Generally trivialized incident and did not perform an adequate investigation.



Dissenting View

- Judge Niemeyer dissented on the question of whether a school can be liable for pre-notice, single-incident harassment, stating that the majority had a “fundamental misunderstanding of the school’s liability under Title IX.” *Id.* at 277.
 - He believes that the decision directly contradicts the plain holdings of *Gebser* and *Davis*.
 - “The Court made clear that only *the independent conduct of the school causing harassment* could result in the school's liability.” *Id.*



Dissenting View

- Thus, “for a school that does not directly discriminate, harassment must occur after it receives notice — making it something that the school can prevent.” *Id.* at 279.
 - “In short, no school conduct, or lack thereof, *caused* any sexual harassment, as is required for the school's liability under Title IX.”
- He also questioned whether a one-time act of harassment, however severe, can ever form the basis for a deliberate indifference claim, especially if the incident occurred pre-notice.



Further Proceedings in *Fairfax County*

- Fourth Circuit declined to rehear the case en banc, at Judge Niemeyer’s request, over two sharp dissents.
 - Both dissents focused on the “prospect of liability on the School Board due to harassment that occurred without any warning signs and which the School Board had no means of preventing.” *Doe v. Fairfax Cty. Sch. Bd.*, 10 F.4th 406, 415 (4th Cir. 2021).
 - The written dissents were a clear invitation for Supreme Court review: “Regretfully, we now leave the Supreme Court as the only possible venue for review of this important legal issue that will implicate educational institutions across the country.” *Id.* at 422.



United States' Statement of Interest

- The Department of Justice, with co-signature from the Department of Education, filed a “Statement of Interest” in June 2021 in a deliberate indifference case pending in the U.S. District Court for the District of Nebraska. *See Thomas v. Board of Regents of the Univ. of Nebraska*, Case No. 4:20-cv-03081-RFR-SMB (D. Ne.).
 - DOE claimed to “set forth the proper legal standards for Plaintiffs’ claims.”
- DOE took the same position as the Fourth Circuit in *Fairfax County* regarding whether harassment must continue post-notice to be actionable:
 - A plaintiff need not allege that an institution had actual knowledge that the accused harasser posed a prior risk of sexual harassment.



United States' Statement of Interest

- Plaintiffs are only required to allege facts supporting two elements:
 - The institution had actual knowledge of the sexual harassment; and
 - The institution's deliberately indifferent response to that knowledge subjected the plaintiffs to discrimination by either causing them to undergo further harassment *or* making them vulnerable to further harassment.
- *If* there is subsequent harassment, it need not be by the same harasser, so long as there exists a causal nexus between the school's deliberate indifference to the initial harassment and the later harassment.
 - This can include a peer's retaliatory harassment against a student who reported sexual harassment, even if the retaliator is not the original harasser.
- A single instance of rape or sexual assault is sufficient to satisfy the “pervasiveness” requirement.



Consequences of *Fairfax County*

- It is now clearly established in the Fourth Circuit that a plaintiff need not allege post-notice harassment and that a single incident of sexual harassment or assault may be actionable.
 - The question is whether the Supreme Court will take up this issue.
- The focus will be on whether the school's response to the notice was deliberately indifferent – clearly unreasonable under the circumstances – but there is no requirement of a causal nexus between the unreasonable response and the harassment or that the unreasonable response caused a further deprivation of educational opportunities – although the plaintiff may proceed on the theory that the inadequate response “further contributed to the deprivation of the plaintiff's access to educational opportunities.”



Consequences, continued

- *Doe v. MSU* – District Court denied MSU’s motion for summary judgment, based on *Fairfax County*:
 - Doe alleged sexual harassment by a fellow student, who was a teammate on the track team;
 - School initiated Title IX investigation following a report by Doe’s mother and issued a standard No Contact Order;
 - Assailant was ultimately found responsible and suspended;
 - No allegation of subsequent assault post-reporting, although there were claims of violation of no-contact order;
 - Doe complained that school failed to properly accommodate her participation on track team during the investigation period;
 - School official who heard appeal allegedly deviated from procedures by re-opening investigation and modifying sanction.



Claims by Respondents



Claims by Respondents

- **Erroneous Outcome:** claims that cast doubt on the outcome and suggest bias in violation of Title IX.
- **Selective Enforcement:** allegations that parties are treated differently throughout an institutions' sexual misconduct procedures, and/or the penalties/sanctions imposed on the responsible party are too harsh, and therefore violate Title IX.
- **Due Process (for public institutions):** allegations that institution failed to follow its policies and/or law; failed to provide parties with notice and opportunity to be heard.



Claims by Respondents

- **Breach of Contract:** allegations that an institution failed to meet a respondent's reasonable expectations through its implementation of its policy and procedures.
- **Negligence:** allegations that an institution owed the respondent a standard of care that the institution breached through implementation of its disciplinary process.
- **Petition for Writ of Administrative Mandamus:** challenge to an institution's final decision.



Respondent Claims, continued

Sheppard v. Visitors of Virginia State, 993 F.3d 230 (4th Cir. 2020) – 4th Circuit abandoned erroneous outcome and selective enforcement as separate claims and adopted a new “plausible inference” standard.

- “Do the alleged facts, if true, raise a plausible inference that the university discriminated against the student on the basis of sex?”
 - The categories of erroneous outcome and selective enforcement describe ways a party can allege discrimination on the basis of sex, but plaintiffs are not limited to those analytical approaches; “We merely emphasize that the text of Title IX prohibits all discrimination on the basis of sex.” *Id.* at 236.
- The court also held that a plaintiff must establish “but for” causation for claims alleging discriminatory school disciplinary hearings. *Id.*



Best Practices

Investigations and Adjudication



What should institutions be doing differently now that the 2020 regulations are in effect?



Hopefully your policy and procedures comport with the 2020 Title IX regulations...

Now, focus on enhancing due process measures and train your Title IX team.



What does it mean to afford due process?



Procedurally, to afford due process means to...

- Follow the processes set forth in your policy and procedures
- Apply those processes to all parties consistently and equitably
- Do not deviate from the written process unless you conclude there's a flaw/problem about the current process
- And if you do deviate...notify all parties and provide them with the same opportunity



Substantively, to afford due process means to...

- Inform parties of the allegations in writing and in person
- Notice must include:
 - Identity of parties involved
 - Date and location of alleged incident(s)
 - General term that covers the alleged conduct (e.g., non-consensual intercourse, non-consensual contact, stalking, verbal harassment)
 - Specific section of conduct code allegedly violated
 - Potential sanctions



Substantively, to afford due process means to...

- Notify parties of their rights to:
 - Advisors
 - Support Persons
 - Attorneys
 - Identify Witnesses
 - Interim Measures if Applicable
 - Protection from Retaliation



Substantively, to afford due process means to...

- Provide parties an opportunity to present their side through:
 - Interviews
 - In writing
 - Offering documentation
 - Identifying witnesses
- Provide them with the opportunity to hear the accounts of and challenge:
 - The other party's statements
 - Witness accounts



Applying *Doe v. Fairfax County School Board* to Practice



Responding to Sexual Harassment Reports

- When notified of reported sexual harassment, proceed based on what is reported – not what you or others suspect happened.
- Deliberate indifference does not only mean doing nothing, it can also mean:
 - Not doing enough
 - Not taking reasonable action (i.e., insufficient assessment, reaching conclusions based on assumptions/stereotypes/biases)
 - Ensure that dismissing a complaint is supported by the record and your institution's policy



Denial of Access to Educational Opportunities or Benefits

1. Results in physical exclusion from educational program or activity;
2. Undermines and detracts from educational experience as to effectively deny equal access to an institution's resources and opportunities;
3. Has a concrete, negative effect on the complainant's ability to participate in an educational program or activity.



Practical Tips



Interview/Hearing Questioning

- Create as comfortable an interview/hearing environment as possible for parties and witnesses
 - Being sensitive and kind can and should be the approach – however, it is important not to validate a person’s claims during an interview/hearing
- Ask the tough/awkward questions
 - Keep the elements of a claim as the focus of questioning
 - It may be necessary to re-interview an interviewee in person, via phone or electronically



Impartiality

- Investigation and adjudication should remain objective and impartial
- An investigator's role is that of a neutral fact finder, with the goal being to gather as much factual information as possible to reach a fair and balanced decision
- Maintain a balanced approach with parties and witnesses
 - Treating all parties with civility and respect (i.e., same tone, same approach to asking questions – mix of open-ended and direct)
 - Ensure that all parties have an opportunity to identify witnesses with information relevant to the allegations at issue



Victimology

Recognition and Limitations

- Memory gaps are understood to be a potential sign of trauma, and therefore it may be reasonable to ascribe gaps in a complainant's account to trauma associated with the incident.
- A respondent may have memory gaps or inconsistencies in their account as well for legitimate reasons.
- Be cautious with how you weigh memory gaps and inconsistencies when assessing the credibility of either party.



Assessing Credibility

- Check your own Impressions of a Party:
 - Being Likeable does not mean Credible
 - Being a Jerk does not mean Responsible



Assessing Credibility

- Is the account plausible – does it make sense?
- Are there past acts that are relevant?
- Do statements/testimony align with written documentation?



Assessing Credibility

- Assess each interviewee's relationship to the parties and consider whether their bias is playing a role in their statements.
- Is there a possibility that secondary gain motivated a party to take a certain position?
- What are the relationships between witnesses and the parties? Are there witnesses who have a vested interest in the outcome or an allegiance to one party or the other?



Assessing Credibility

- If a party ought to be able to supply evidence but declines to, address the reasonable inference/conclusion that results from that decision.
- If a party declines to testify – while the regs prohibit making a finding of responsibility *solely* on that basis, that does not mean a decisionmaker cannot draw any inference.



Assessing Credibility

- Think hard about whether both parties are truly “equally credible” and how that aligns with your outcome.



Assessing Credibility

- The written decision must explain how credibility was assessed, not just state whether the parties and witnesses were/were not found to be credible.
- The hearing panel's thought process and discussion post-hearing should be reflected in the written credibility analysis.



Concurrent Criminal Charges



Concurrent Criminal Charges

- The regs still acknowledge that the institution's process and criminal process may run concurrently.
- Where and when possible, continue your institution's investigation and adjudication.
- If a respondent refuses to testify, consider their reasoning...



Concurrent Criminal Charges

- A respondent may refuse to participate so as to not self-incriminate in the criminal case.

Question: Should an institution proceed with Investigation and Adjudication where Respondent declines to participate?



Concurrent Criminal Charges

Remember Title IX's charge is about ensuring equity and safety.

- Consider:
 - Gathering information from available witnesses.
 - Issuing a No Contact Order.
- If respondent has withdrawn from the institution, consider:
 - Issuing a No Trespass Order and flag student account.
 - Dismissing charge until criminal matter resolves, as you have likely met your Institution's obligations under Title IX.



Concurrent Criminal Charges

- If respondent continues with academic program and remains on campus, proceed with investigation and adjudication.
- Investigator may be able to obtain records from local law enforcement (i.e., police reports, interview transcript/video) by submitting a request under the Maryland Public Information Act.



Legal Sufficiency Review –
Working with Counsel
(we are here to help, really)



Legal Sufficiency Review

- Review for adherence to policy and procedures
- Review application of analysis to findings:
 - Do the findings include the required elements of the offenses?
 - Are the credibility analyses sufficiently explained?
 - Are there any open questions that suggest further assessment is needed?
 - Does the outcome make sense?
 - Are there any issues that might give grounds for an appeal that can be overcome at the stage of review?



Questions?

