University of Idaho
2017-2018 FACULTY SENATE AGENDA

Meeting #3

3:30 p.m. - Tuesday, September 5, 2017
Brink Hall Faculty-Staff Lounge & Zoom

Order of Business

I. Call to Order.

II. Minutes.
   • Minutes of the 2017-18 Faculty Senate Meeting #2, August 29, 2017 (vote)

III. Chair’s Report.

IV. Provost’s Report.

V. Other Announcements and Communications.

VI. Committee Reports.

VII. Special Orders.
   • ITS to TSP Presentation (Ewart/Cox)
   • Academic Initiatives (Hendricks)
   • Title IX (Craig/Agidius)

VIII. Unfinished Business and General Orders.

IX. New Business.

X. Adjournment.

Professor Patrick Hrdlicka, Chair 2017-2018, Faculty Senate

Attachments: Minutes of 2017-2018 FS Meeting #2
Handouts

Call to Order and Minutes: Chair Hrdlicka called the meeting to order at 3:30. He welcomed the new senators and invited members to introduce themselves briefly. After introductions, Professor Hrdlicka suggested that the agenda be amended by moving the election of the Secretary to Faculty Senate before the business begins. He explained that, pursuant to FSH 1520.V.3, the Faculty Secretary is not automatically the Secretary of the Senate. It was moved and seconded (Morrison/Watson) that the agenda be amended as suggested by the chair. The motion passed unanimously. Professor Hrdlicka then recommended that Faculty Secretary Liz Brandt serve as the Secretary to the Faculty Senate. A motion (Panttaja/Vella) that the chair’s recommendation be approved passed unanimously.

A motion (Johnson/Brown) to approve the minutes of 2016-17 Faculty Senate Meeting #27 May 9, 2017 was approved unanimously with 2 abstentions. A motion (Watson/Panttaja) to approve 2017-18 Faculty Senate Meeting #1 May 9, 2017 passed unanimously with 1 abstention.

Chair’s Report: Professor Hrdlicka reminded senators of regular Senate procedures:
- senators should raise their hand and be recognized by the chair before speaking,
- senators will not be recognized to speak a second time until all interested senators have had an opportunity to speak,
- reasonable follow-up discussion is permissible, and,
- brevity is encouraged.

Chair Hrdlicka reminded Senators that their role is to review and not to redo the work of committees, or of other groups appearing before Senate. He also encouraged senators to keep the welfare of the entire institution in mind while representing their constituencies.

The chair also stressed that Senators should serve not only as a source of information for colleagues, but also as a source of information on behalf of colleagues to the Senate, and to the university administration. He encouraged Senators to read the University of Idaho Register regularly. By way of example regarding issues of communication, he pointed out that faculty received an email, and that the Register has included announcements about, the Information Technology Services (ITS) to Technology Service Partners (TSP) transfer. This transfer will impact the way faculty and staff access help with technology. ITS has scheduled info sessions for faculty and staff that are ongoing now. Senate Leadership has invited Dan Ewart and Brian Cox to come to the September 5, 2017 Senate meeting to provide more information on this transition.

The chair also made three announcements:
- The Provost’s Office is seeking a faculty member to serve on a workgroup that will be preparing for our 2018 accreditation site visit from the Northwest Commission on Colleges and Universities (NWCCU). The committee will be advisory to the administration and will assist with preparation for the visit and the organization of the 2018 visit. Senators should forward suggestions to Ann Thompson annat@uidaho.edu.
- Faculty recently received an email from Brian Smentkowski, the new director of the Center for Excellence in Teaching and Learning. The email detailed a number of workshop opportunities for faculty. In particular, there will be a workshop on the use of Zoom for interactive video meetings. Chair Hrdlicka also indicated that Dr. Smentkowski will be attending a future Senate meeting to share his vision and approach.
The first University Faculty Meeting will be September 20. President Staben will preside and will address the faculty. Senators are encouraged to attend and bring their colleagues. The meeting is an excellent opportunity to meet other faculty as we start the new academic year.

Provost’s Report: The Provost began his report by stressing his desire to be engaged with Senate. He made a number of announcements:

- There is a football game against Sacramento State on August 31 and encouraged everyone to attend.
- The university has hired a number of new administrators: Dr. Cher Hendricks, Vice Provost for Academic Initiatives, Dr. Ginger Carney, Dean of the College of Science, Dr. Brian Smentkowski, Director of the Center for Excellence in Teaching and Learning.
- The College of Art and Architecture is soon likely to begin a search for a new dean.

Finally, the Provost updated the Senate on a number of ongoing initiatives:

- University Budget and Finance Committee (UBFC) process. The university has struggled to get a final report out by the end of the semester in which the UBFC makes its recommendations. Implementation of the UBFC recommendations relies on several important factors that are not available in the spring semester – enrollment figures for the coming year, tuition and fees, and the amount of money that might be available through reallocations. Going forward, requests to UBFC will still be due during late December or early January. However, the final announcements of recommended and funded projects will not be available until after the start of the following fall semester. While the final announcement will be forthcoming, the Provost informed Senate that two items strongly recommended by UBFC were: 1) funding market-based compensation initiatives; and 2) funding competitive stipends and tuition waivers for Teaching Assistants. Regarding the latter initiative, he is working with the Dean of Graduate Studies to develop information regarding competitive stipends. Finally, the Provost will recommend that UBFC develop a separate process for funding requests relating to program improvement.

- Market-based Compensation. The Provost will be working with the task force on its recommendations. There will be a mid-year salary increase this year that will contribute to our goal of reaching market in salaries. The initiative will require a number of years to catch up. Salary adjustments will initially focus on staff and faculty who are the furthest away from the market salary for their positions.

- Program Prioritization. The process is going forward and should give rise to about $2 million in funding. An additional $2 million will be added from other revenue and reallocation sources outside of the program prioritization process. Both of these fund sources will be directed toward the market-based compensation initiatives and toward providing for competitive TA stipends/tuition waivers. The deans and IPEC (Institutional Planning and Effectiveness Committee) have seen preliminary results. Currently, we are considering modifications regarding how the process should move forward. In all likelihood, the university will move away from the quintiles language but will look at the results as part of a continuous improvement process. Reallocation targets based on the results will be provided at the VP level who will be charged with how to implement the reallocations within their areas.

Chair Hrdlicka asked the Provost whether the Dean of Graduate Studies will form a committee to determine what the competitive stipends are for TAs. The provost answered that while there will be a process, we need to move forward using the data that is generally available from sources such as the Oklahoma State Salary Study. Dean McMurtry will likely report the results of his work to the Graduate Council for input. A Senator asked if the stipends will be market based, to which the Provost answered yes.

FS-18-001: FSH 4930 – Honorary Degrees. Faculty Secretary Brandt presented a seconded motion from the Commencement Committee on behalf of Committee Chair Prof. Beth Hendrix. The proposed change would update policy to clarify that a letter of support from the dean of the appropriate college is included in the nomination packet. The motion was unanimously approved.
Summer Graduates. It was moved and seconded (Panttaja/Miranda Anderson) that the list of Summer Graduates be approved. A senator questioned the first name on the list designated as a graduate of the College of Agriculture and Life Sciences (CALS) program in Medical Technology saying the program currently does not exist in CALS. After discussion, the mover and seconder of the motion agreed to accept a friendly amendment that the list of summer graduates be approved pending clarification of college affiliation and major of the graduate in question. The amended motion was approved unanimously. [N.B. The Registrar Heather Chermak confirmed by email that the listed college is correct.]

Election to Specific Senate Committees. The following Senators were elected to the Senate positions on committees by acclamation:
- Campus Planning Advisory Committee – Penny Morgan
- Student Appeals Committee – Joseph De Angelis
- Presidents Athletic Advisory Council – Rich Seamon

FS-18-002: FSH 4400 – College Level Examination Program (CLEP). This proposal would eliminate FSH 4400 regarding CLEP credits. It is out of date and covered by University Catalog Regulation I. It was moved and seconded (Tibbals/Grieb) that the policy be eliminated as recommended. At the request of a Senator, Registrar Heather Chermak explained the changes in more detail. She also explained that Senate would continue to play a key role in decisions about granting of academic credit because changes to the Regulation section of the Catalogue come to Senate for vote. Several Senators asked questions regarding the process for approving catalog changes and whether eliminating the CLEP provision from the FSH would affect students or the ability of faculty to have a voice in how credits are granted. The Registrar clarified that the revision would not change the way credit is granted, and it would not have an impact on students. She reiterated that the FSH provision is simply outdated as they were unaware that it existed. Given this discussion, the Senate unanimously approved the motion.

2016-17 Senate Annual Report and Retreat Follow-up. Secretary Brandt presented the Annual Report of activities by last year’s Senate stating that she hoped the report would provide background to new Senators on the nature and scope of the Senate’s work and responsibility for communication. She next reviewed UI’s governance process and detailed the timeline for consideration of policy changes/amendments. She commented that she worried faculty governance is in jeopardy. The Great College Survey gave low marks to faculty governance. This was surprising as in her opinion she believes it is much more robust at the UI than other universities. Part of the reason may be lack of communication about the governance process. The Faculty Secretary’ Office will work on an email with bulleted list following each meeting for senators to adjust or send out as is to their constituency. A Senator pointed out that forwarding an email was not a “silver bullet” for communication. He suggested that, though difficult, personal contact with colleagues is invaluable. Many agreed with a nod of their head with some who suggested walking the halls or announcing at a college or other unit meetings. Senate Leadership requested that senators forward other ideas/suggestions. The Provost will speak to the deans and VPs regarding providing support for senators to communicate.

Finally, Brandt sought additional input and comments on the list of issues developed by Senators at the Senate Retreat. Senator Nicotra offered that one of her colleagues had suggested a move to a MW/TTh class schedule. Senator Watson asked if Senate Leadership knew the status of the +/- grading system issue. Chair Hrdlicka indicated that the Teaching and Advising Committee is considering the issue.

Adjournment: Having reached the end of the agenda the chair entertained a motion (Panttaja/Watson) to adjourn at 4:51.

Respectfully Submitted,
Liz Brandt, Faculty Secretary & Secretary to the Faculty Senate
This month, ITS launched a new model for employee tech support: Technology Solutions Partners (TSPs).

In the past, the ITS Help Desk provided your tech support. Now, skilled, specialized teams of Technology Solutions Partners (TSPs) will take care of your daily technical needs.

- TSPs are your “go to” for daily technical service/support.
- Find your TSP at www.uidaho.edu/tsp/directory.
- UI departments/units with previously assigned technical support will not be impacted.
- ITS will continue to support UI students in the current Help Desk location.

To learn more about TSP services and how to contact your TSP for help, go to www.uidaho.edu/tsp
Region 1 TSP Team:
Myles Bogar, Brandon Jank

Web: Submit a TSP Service Ticket: www.uidaho.edu/tsp/ticket
Location: Facilities 136
Phone: 208-885-1101
Email: its-region1@uidaho.edu

Service Coverage:
Environmental Health and Safety (EHS)  
Public Safety & Security  
Facilities Services  
Shoup Hall  
South Campus Chiller Plant  
Steam Plant

Region 2 TSP Team:
Wes Russell, Sean Sullivan

Web: Submit a TSP Service Ticket: www.uidaho.edu/tsp
Location: Education Building, Rm. 412
Phone: 208-885-1102
Email: its-region2@uidaho.edu

Service Coverage:
Memorial Gym  
Physical Education Bldg.  
Golf Course Clubhouse  
Kibbie Dome  
Swim Center
The Technology Solutions Partners' #1 goal is to provide UI employees consistent, reliable, high-level technical support every day. TSPs are skilled professionals ready to serve and help when needed.

**How do I get help from my TSP team?**

**There are four ways.** You can expect a contact from your TSP within four business hours.

1. **WEB:** Submit a Service Ticket: Fill out an online service ticket at [www.uidaho.edu/tsp](http://www.uidaho.edu/tsp). Once received, your TSP will contact you, assess your technical need and take next steps.
2. **IN PERSON:** Go to your TSP’s office in the Education Building, Room 412.
3. **CALL** your TSP: 208-885-1102
4. **EMAIL** your TSP: ITS-Region1@uidaho.edu

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All TSPs offer and deliver the below set of services. If you have a need not on this list, please don’t hesitate to contact your TSP for guidance.

- Account Creation and Management
- Classroom Standard Technology Access and Response
- Computer and Telephone Moves, Adds or Changes
- Email Support
- Information and Computer Security
- Network-Store File Management and Recovery
- Network Connectivity
- Office 365 Guidance, Information and Support
- Printer Troubleshooting and Banner Print Queue
- Software Installation
- Standard Device Installation and Troubleshooting
- Surplus Coordination for Information Technology-Related Items
- Video Conferencing and Zoom Training and Scheduling Assistance

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**TSP Standard Technical Services**

All TSPs offer and deliver the below set of services. If you have a need not on this list, please don’t hesitate to contact your TSP for guidance.

- Account Creation and Management
- Classroom Standard Technology Access and Response
- Computer and Telephone Moves, Adds or Changes
- Email Support
- Information and Computer Security
- Network-Store File Management and Recovery
- Network Connectivity
- Office 365 Guidance, Information and Support
- Printer Troubleshooting and Banner Print Queue
- Software Installation
- Standard Device Installation and Troubleshooting
- Surplus Coordination for Information Technology-Related Items
- Video Conferencing and Zoom Training and Scheduling Assistance
Student TECHNOLOGY CENTER
(Formerly known as the Help Desk)

We can help!
Standard Services + More

Initial UI Account Setup | Hardware Troubleshooting
UI Supported Software—VLab, BbLearn and Office 365
UI Wireless and Networked Device Connectivity

Monday - Friday
8 a.m. - 5 p.m.  208.885.4357
help@uidaho.edu

Located in the Teaching & Learning Center (TLC), Room 128
Weekends and after hours: UI Library, First Floor (Information Desk)
UI FACULTY AND STAFF: Need Technical Help?

Contact your Technology Solutions Partners (TSPs)!

Region 2 TSP Team:
Wes Russell, Sean Sullivan

Web: Submit a TSP Service Ticket: www.uidaho.edu/tsp/ticket
Location: Education Building, Rm. 412

Phone: 208-885-1102
Email: its-region2@uidaho.edu

SERVICE COVERAGE:
• Education Building
• Golf Course Clubhouse
• Kibbie Dome
• Memorial Gym
• Physical Education Bldg.
• Swim Center
Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students’ right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 et seq., and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter “schools” or “recipients”) in meeting these obligations, this letter explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence. Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape,

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1 The Department has determined that this Dear Colleague Letter is a “significant guidance document” under the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at: http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf. OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR’s legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202.

2 Use of the term “sexual harassment” throughout this document includes sexual violence unless otherwise noted. Sexual harassment also may violate Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c), which prohibits public school districts and colleges from discriminating against students on the basis of sex, among other bases. The U.S. Department of Justice enforces Title IV.
sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college. The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college. According to data collected under the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f), in 2009, college campuses reported nearly 3,300 forcible sex offenses as defined by the Clery Act. This problem is not limited to college. During the 2007-2008 school year, there were 800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools. Additionally, the likelihood that a woman with intellectual disabilities will be sexually assaulted is estimated to be significantly higher than the general population. The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school’s programs and activities.

This letter begins with a discussion of Title IX’s requirements related to student-on-student sexual harassment, including sexual violence, and explains schools’ responsibility to take immediate and effective steps to end sexual harassment and sexual violence. These requirements are discussed in detail in OCR’s Revised Sexual Harassment Guidance issued in 2001 (2001 Guidance). This letter supplements the 2001 Guidance by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence. This letter concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR may use to end such conduct, prevent its recurrence, and address its effects. Although some examples contained in this letter are applicable only in the postsecondary context, sexual

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3 CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT xiii (Nat’l Criminal Justice Reference Serv., Oct. 2007), available at http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf. This study also found that the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol. Id. at xviii.

4 Id. at 5-5.

5 U.S. Department of Education, Office of Postsecondary Education, Summary Crime Statistics (data compiled from reports submitted in compliance with the Clery Act), available at http://www2.ed.gov/admins/lead/safety/criminal2007-09.pdf. Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person, forcibly and/or against that person’s will, or not forcibly or against the person’s will where the victim is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. 34 C.F.R. Pt. 668, Subpt. D, App. A.


8 The 2001 Guidance is available on the Department’s Web site at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. This letter focuses on peer sexual harassment and violence. Schools’ obligations and the appropriate response to sexual harassment and violence committed by employees may be different from those described in this letter. Recipients should refer to the 2001 Guidance for further information about employee harassment of students.
harassment and violence also are concerns for school districts. The Title IX obligations discussed in this letter apply equally to school districts unless otherwise noted.

**Title IX Requirements Related to Sexual Harassment and Sexual Violence**

**Schools’ Obligations to Respond to Sexual Harassment and Sexual Violence**

Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.⁹

As explained in OCR’s *2001 Guidance*, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.¹⁰

Title IX protects students from sexual harassment in a school’s education programs and activities. This means that Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school’s facilities, on a school bus, at a class or training program

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⁹ Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the *2001 Guidance*, and in the 2010 Dear Colleague letter on Harassment and Bullying, which is available at [http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf).

¹⁰ See, e.g., *Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006) (acknowledging that while not an issue in this case, a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists, and noting that courts look to Title VII cases for guidance in analyzing Title IX sexual harassment claims); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 n.4 (6th Cir. 2000) (“[w]hen the context of Title IX, a student’s claim of hostile environment can arise from a single incident”) (quoting *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999))); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (explaining that rape and sexual abuse “obviously qualify[] as…severe, pervasive, and objectively offensive sexual harassment”); see also *Berry v. Chi. Transit Auth.*, 618 F.3d 688, 692 (7th Cir. 2010) (in the Title VII context, “a single act can create a hostile environment if it is severe enough, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment”); *Turner v. Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010) (noting that “[o]ne instance of conduct that is sufficiently severe may be enough,” which is “especially true when the touching is of an intimate body part” (quoting *Jackson v. Cnty. of Racine*, 474 F.3d 493, 499 (7th Cir. 2007))); *McKinnis v. Crescent Guardian, Inc.*, 189 F. App’x 307, 310 (5th Cir. 2006) (holding that “[t]he deliberate and unwanted touching of [a plaintiff’s] intimate body parts can constitute severe sexual harassment” in Title VII cases (quoting *Harvill v. Westward Commc’ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005))).
sponsored by the school at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip.\footnote{\textsuperscript{11}}

If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.\footnote{\textsuperscript{12}} Schools also are required to publish a notice of nondiscrimination and to adopt and publish grievance procedures. Because of these requirements, which are discussed in greater detail in the following section, schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.

Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school’s education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator’s friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school’s grievance procedures or otherwise requests action on the student’s behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. As discussed later in this letter, the school’s Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct. The specific steps in a school’s

\footnote{\textsuperscript{11} Title IX also protects third parties from sexual harassment or violence in a school’s education programs and activities. For example, Title IX protects a high school student participating in a college’s recruitment program, a visiting student athlete, and a visitor in a school’s on-campus residence hall. Title IX also protects employees of a recipient from sexual harassment. For further information about harassment of employees, see \textit{2001 Guidance} at n.1.}

\footnote{\textsuperscript{12} This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. See \textit{2001 Guidance} at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. See \textit{Davis v. Monroe Cnty. Bd. of Ed.}, 526 U.S. 629, 643, 648 (1999).}
investigation will vary depending upon the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and administrative structure of the school, and other factors. Yet as discussed in more detail below, the school’s inquiry must in all cases be prompt, thorough, and impartial. In cases involving potential criminal conduct, school personnel must determine, consistent with State and local law, whether appropriate law enforcement or other authorities should be notified.\footnote{In states with mandatory reporting laws, schools may be required to report certain incidents to local law enforcement or child protection agencies.}

Schools also should inform and obtain consent from the complainant (or the complainant’s parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.\footnote{Schools should refer to the 2001 Guidance for additional information on confidentiality and the alleged perpetrator’s due process rights.}

As discussed in the 2001 Guidance, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant’s age; whether there have been other harassment complaints about the same individual; and the alleged harasser’s rights to receive information about the allegations if the information is maintained by the school as an “education record” under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.\footnote{For example, the alleged harasser may have a right under FERPA to inspect and review portions of the complaint that directly relate to him or her. In that case, the school must redact the complainant’s name and other identifying information before allowing the alleged harasser to inspect and review the sections of the complaint that relate to him or her. In some cases, such as those where the school is required to report the incident to local law enforcement or other officials, the school may not be able to maintain the complainant’s confidentiality.}

Compliance with Title IX, such as publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures, can serve as preventive measures against harassment. Combined with education and training programs, these measures can help ensure that all students and employees recognize the
nature of sexual harassment and violence, and understand that the school will not tolerate such conduct. Indeed, these measures may bring potentially problematic conduct to the school’s attention before it becomes serious enough to create a hostile environment. Training for administrators, teachers, staff, and students also can help ensure that they understand what types of conduct constitute sexual harassment or violence, can identify warning signals that may need attention, and know how to respond. More detailed information and examples of education and other preventive measures are provided later in this letter.

Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence

Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations. Specifically, a recipient must:

(A) Disseminate a notice of nondiscrimination;\textsuperscript{16}

(B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;\textsuperscript{17} and

(C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.\textsuperscript{18}

These requirements apply to all forms of sexual harassment, including sexual violence, and are important for preventing and effectively responding to sex discrimination. They are discussed in greater detail below. OCR advises recipients to examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in this letter and the 2001 Guidance. Recipients should then implement changes as needed.

(A) \textit{Notice of Nondiscrimination}

The Title IX regulations require that each recipient publish a notice of nondiscrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities, and that Title IX requires it not to discriminate in such a manner.\textsuperscript{19} The notice must state that inquiries concerning the application of Title IX may be referred to the recipient’s Title IX coordinator or to OCR. It should include the name or title, office address, telephone number, and e-mail address for the recipient’s designated Title IX coordinator.

The notice must be widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons. OCR recommends that the notice be prominently posted on school Web sites and at various

\textsuperscript{16} 34 C.F.R. § 106.9.
\textsuperscript{17} Id. § 106.8(a).
\textsuperscript{18} Id. § 106.8(b).
\textsuperscript{19} Id. § 106.9(a).
locations throughout the school or campus and published in electronic and printed publications of general distribution that provide information to students and employees about the school’s services and policies. The notice should be available and easily accessible on an ongoing basis.

Title IX does not require a recipient to adopt a policy specifically prohibiting sexual harassment or sexual violence. As noted in the 2001 Guidance, however, a recipient’s general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. OCR therefore recommends that a recipient’s nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.

(B) Title IX Coordinator

The Title IX regulations require a recipient to notify all students and employees of the name or title and contact information of the person designated to coordinate the recipient’s compliance with Title IX. The coordinator’s responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The Title IX coordinator or designee should be available to meet with students as needed. If a recipient designates more than one Title IX coordinator, the notice should describe each coordinator’s responsibilities (e.g., who will handle complaints by students, faculty, and other employees). The recipient should designate one coordinator as having ultimate oversight responsibility, and the other coordinators should have titles clearly showing that they are in a deputy or supporting role to the senior coordinator. The Title IX coordinators should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest.

Recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient’s grievance procedures operate. Because sexual violence complaints often are filed with the school’s law enforcement unit, all school law enforcement unit employees should receive training on the school’s Title IX grievance procedures and any other procedures used for investigating reports of sexual violence. In addition, these employees should receive copies of the school’s Title IX policies. Schools should instruct law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents. The school’s Title IX coordinator or designee should be available to provide assistance to school law enforcement unit employees regarding how to respond appropriately to reports of sexual violence. The Title IX coordinator also should be given access to school law enforcement unit investigation notes.

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20 Id. § 106.8(a).
and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation.

(C) **Grievance Procedures**

The Title IX regulations require all recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints. The grievance procedures must apply to sex discrimination complaints filed by students against school employees, other students, or third parties.

Title IX does not require a recipient to provide separate grievance procedures for sexual harassment and sexual violence complaints. Therefore, a recipient may use student disciplinary procedures or other separate procedures to resolve such complaints. Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution. These requirements are discussed in greater detail below. If the recipient relies on disciplinary procedures for Title IX compliance, the Title IX coordinator should review the recipient’s disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX.

Grievance procedures generally may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (e.g., participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the 2001 Guidance, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.

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21 Id. § 106.8(b). Title IX also requires recipients to adopt and publish grievance procedures for employee complaints of sex discrimination.

22 These procedures must apply to all students, including athletes. If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures. Additionally, if an alleged perpetrator is an elementary or secondary student with a disability, schools must follow the procedural safeguards in the Individuals with Disabilities Education Act (at 20 U.S.C. § 1415 and 34 C.F.R. §§ 300.500-300.519, 300.530-300.537) as well as the requirements of Section 504 of the Rehabilitation Act of 1973 (at 34 C.F.R. §§ 104.35-104.36) when conducting the investigation and hearing.

23 A school may not absolve itself of its Title IX obligations to investigate and resolve complaints of sexual harassment or violence by delegating, whether through express contractual agreement or other less formal arrangement, the responsibility to administer school discipline to school resource officers or “contract” law enforcement officers. See 34 C.F.R. § 106.4.
Prompt and Equitable Requirements

As stated in the 2001 Guidance, OCR has identified a number of elements in evaluating whether a school’s grievance procedures provide for prompt and equitable resolution of sexual harassment complaints. These elements also apply to sexual violence complaints because, as explained above, sexual violence is a form of sexual harassment. OCR will review all aspects of a school’s grievance procedures, including the following elements that are critical to achieving compliance with Title IX:

- Notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- Application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;
- Notice to parties of the outcome of the complaint;24 and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

As noted in the 2001 Guidance, procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes, and administrative structures, State or local legal requirements, and past experiences. Although OCR examines whether all applicable elements are addressed when investigating sexual harassment complaints, this letter focuses on those elements where our work indicates that more clarification and explanation are needed, including:

(A) Notice of the grievance procedures

The procedures for resolving complaints of sex discrimination, including sexual harassment, should be written in language appropriate to the age of the school’s students, easily understood, easily located, and widely distributed. OCR recommends that the grievance procedures be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs for students, parents of elementary and secondary students, faculty, and staff.

(B) Adequate, Reliable, and Impartial Investigation of Complaints

OCR’s work indicates that a number of issues related to an adequate, reliable, and impartial investigation arise in sexual harassment and violence complaints. In some cases, the conduct

24 “Outcome” does not refer to information about disciplinary sanctions unless otherwise noted. Notice of the outcome is discussed in greater detail in Section D below.
may constitute both sexual harassment under Title IX and criminal activity. Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation. In addition, a criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.

A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school’s internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the report.

Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation. Moreover, nothing in an MOU or the criminal investigation itself should prevent a school from notifying complainants of their Title IX rights and the school’s grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency’s fact-gathering is in progress. OCR also recommends that a school’s MOU include clear policies on when a school will refer a matter to local law enforcement.

As noted above, the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred. In addressing complaints filed with OCR under Title IX, OCR reviews a school’s procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints. The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e et seq. Like Title IX,

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25 In one recent OCR sexual violence case, the prosecutor’s office informed OCR that the police department’s evidence gathering stage typically takes three to ten calendar days, although the delay in the school’s investigation may be longer in certain instances.
Title VII prohibits discrimination on the basis of sex. OCR also uses a preponderance of the evidence standard when it resolves complaints against recipients. For instance, OCR’s Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX. OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings. Thus, in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred). The “clear and convincing” standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

Throughout a school’s Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing. For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant’s prior disciplinary records to support a tougher disciplinary penalty.

26 See, e.g., Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003) (noting that under the “conventional rule of civil litigation,” the preponderance of the evidence standard generally applies in cases under Title VII); Price Waterhouse v. Hopkins, 490 U.S. 228, 252-55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion); id. at 260 (White, J., concurring in the judgment); id. at 261 (O’Connor, J., concurring in the judgment). The 2001 Guidance noted (on page vi) that “[w]hile Gebser and Davis made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the Davis Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX.” See also Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”).

27 OCR’s Case Processing Manual is available on the Department’s Web site, at http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html.

28 The Title IX regulations adopt the procedural provisions applicable to Title VI of the Civil Rights Act of 1964. See 34 C.F.R. § 106.71 (“The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference.”). The Title VI regulations apply the Administrative Procedure Act to administrative hearings required prior to termination of Federal financial assistance and require that termination decisions be “supported by and in accordance with the reliable, probative and substantial evidence.” 5 U.S.C. § 556(d). The Supreme Court has interpreted “reliable, probative and substantial evidence” as a direction to use the preponderance standard. See Steadman v. SEC, 450 U.S. 91, 98-102 (1981).

29 Access to this information must be provided consistent with FERPA. For example, if a school introduces an alleged perpetrator’s prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records. Additionally, access should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant’s sexual history.
statement without also allowing the complainant to review the alleged perpetrator’s statement.

While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally. OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment. OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties. Schools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings.

All persons involved in implementing a recipient’s grievance procedures (e.g., Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient’s grievance procedures. The training also should include applicable confidentiality requirements. In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence. Additionally, a school’s investigation and hearing processes cannot be equitable unless they are impartial. Therefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.

Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

(C) **Designated and Reasonably Prompt Time Frames**

OCR will evaluate whether a school’s grievance procedures specify the time frames for all major stages of the procedures, as well as the process for extending timelines. Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident that

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30 For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.
occurred in a classroom during school hours with a single complainant.

(D) Notice of Outcome

Both parties must be notified, in writing, about the outcome of both the complaint and any appeal, \(^{31}\) i.e., whether harassment was found to have occurred. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently. Title IX does not require the school to notify the alleged perpetrator of the outcome before it notifies the complainant.

Due to the intersection of Title IX and FERPA requirements, OCR recognizes that there may be confusion regarding what information a school may disclose to the complainant. \(^{32}\) FERPA generally prohibits the nonconsensual disclosure of personally identifiable information from a student’s “education record.” However, as stated in the 2001 Guidance, FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student. This includes an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall. \(^{33}\) Disclosure of other information in the student’s “education record,” including information about sanctions that do not relate to the harassed student, may result in a violation of FERPA.

Further, when the conduct involves a crime of violence or a non-forcible sex offense, \(^{34}\) FERPA permits a postsecondary institution to disclose to the alleged victim the final results of a  

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\(^{31}\) As noted previously, “outcome” does not refer to information about disciplinary sanctions unless otherwise noted.

\(^{32}\) In 1994, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA “shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program.” 20 U.S.C. § 1221(d). The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. See 2001 Guidance at vii.

\(^{33}\) This information directly relates to the complainant and is particularly important in sexual harassment cases because it affects whether a hostile environment has been eliminated. Because seeing the perpetrator may be traumatic, a complainant in a sexual harassment case may continue to be subject to a hostile environment if he or she does not know when the perpetrator will return to school or whether he or she will continue to share classes or a residence hall with the perpetrator. This information also directly affects a complainant’s decision regarding how to work with the school to eliminate the hostile environment and prevent its recurrence. For instance, if a complainant knows that the perpetrator will not be at school or will be transferred to other classes or another residence hall for the rest of the year, the complainant may be less likely to want to transfer to another school or change classes, but if the perpetrator will be returning to school after a few days or weeks, or remaining in the complainant’s classes or residence hall, the complainant may want to transfer schools or change classes to avoid contact. Thus, the complainant cannot make an informed decision about how best to respond without this information.

\(^{34}\) Under the FERPA regulations, crimes of violence include arson; assault offenses (aggravated assault, simple assault, intimidation); burglary; criminal homicide (manslaughter by negligence); criminal homicide (murder and
disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concluded that a violation was committed. Additionally, a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution’s rules or policies.

Postsecondary institutions also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that “both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense.” Compliance with this requirement does not constitute a violation of FERPA. Furthermore, the FERPA limitations on redisclosure of information do not apply to information that postsecondary institutions are required to disclose under the Clery Act. Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.

**Steps to Prevent Sexual Harassment and Sexual Violence and Correct its Discriminatory Effects on the Complainant and Others**

**Education and Prevention**

In addition to ensuring full compliance with Title IX, schools should take proactive measures to prevent sexual harassment and violence. OCR recommends that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available. Schools may want to include these education programs in their (1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and “back to school nights.” These programs should include a non-negligent manslaughter); destruction, damage or vandalism of property; kidnapping/abduction; robbery; and forcible sex offenses. Forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include rape, sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses are incest and statutory rape. 34 C.F.R. Part 99, App. A.

35 34 C.F.R. § 99.31(a)(13). For purposes of 34 C.F.R. §§ 99.31(a)(13)-(14), disclosure of “final results” is limited to the name of the alleged perpetrator, any violation found to have been committed, and any sanction imposed against the perpetrator by the school. 34 C.F.R. § 99.39.

36 34 C.F.R. § 99.31(a)(14).

37 For purposes of the Clery Act, “outcome” means the institution’s final determination with respect to the alleged sex offense and any sanctions imposed against the accused. 34 C.F.R. § 668.46(b)(11)(vi)(B).

38 34 C.F.R. § 668.46(b)(11)(vi)(B). Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person's will, or not forcibly or against the person's will where the person is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses include incest and statutory rape. 34 C.F.R. Part 668, Subpt. D, App. A.

39 34 C.F.R. § 99.33(c).
discussion of what constitutes sexual harassment and sexual violence, the school’s policies and disciplinary procedures, and the consequences of violating these policies.

The education programs also should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities. Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved. As a result, schools should consider whether their disciplinary policies have a chilling effect on victims’ or other students’ reporting of sexual violence offenses. For example, OCR recommends that schools inform students that the schools’ primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.

OCR also recommends that schools develop specific sexual violence materials that include the schools’ policies, rules, and resources for students, faculty, coaches, and administrators. Schools also should include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive. These materials should include where and to whom students should go if they are victims of sexual violence. These materials also should tell students and school employees what to do if they learn of an incident of sexual violence. Schools also should assess student activities regularly to ensure that the practices and behavior of students do not violate the schools’ policies against sexual harassment and sexual violence.

Remedies and Enforcement

As discussed above, if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school’s overall services or policies. Examples of these actions are discussed in greater detail below.

Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school’s investigation. When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the

40 The Department’s Higher Education Center for Alcohol, Drug Abuse, and Violence Prevention (HEC) helps campuses and communities address problems of alcohol, other drugs, and violence by identifying effective strategies and programs based upon the best prevention science. Information on HEC resources and technical assistance can be found at www.higheredcenter.org.
complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain. In addition, schools should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.41

Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting. As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment. At a minimum, schools must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems, and should follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population. When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.

Schools should proactively consider the following remedies when determining how to respond to sexual harassment or violence. These are the same types of remedies that OCR would seek in its cases.

Depending on the specific nature of the problem, remedies for the complainant might include, but are not limited to:42

• providing an escort to ensure that the complainant can move safely between classes and activities;
• ensuring that the complainant and alleged perpetrator do not attend the same classes;
• moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
• providing counseling services;
• providing medical services;
• providing academic support services, such as tutoring;

41 The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs students of their options to notify proper law enforcement authorities, including campus and local police, and the option to be assisted by campus personnel in notifying such authorities. The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community. 20 U.S.C. §§ 1092(f)(8)(B)(v)-(vi).
42 Some of these remedies also can be used as interim measures before the school’s investigation is complete.
• arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant’s academic record; and
• reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined. 43

Remedies for the broader student population might include, but are not limited to:

**Counseling and Training**

• offering counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services;
• designating an individual from the school’s counseling center to be “on call” to assist victims of sexual harassment or violence whenever needed;
• training the Title IX coordinator and any other employees who are involved in processing, investigating, or resolving complaints of sexual harassment or sexual violence, including providing training on:
  o the school’s Title IX responsibilities to address allegations of sexual harassment or violence
  o how to conduct Title IX investigations
  o information on the link between alcohol and drug abuse and sexual harassment or violence and best practices to address that link;
• training all school law enforcement unit personnel on the school’s Title IX responsibilities and handling of sexual harassment or violence complaints;
• training all employees who interact with students regularly on recognizing and appropriately addressing allegations of sexual harassment or violence under Title IX; and
• informing students of their options to notify proper law enforcement authorities, including school and local police, and the option to be assisted by school employees in notifying those authorities.

**Development of Materials and Implementation of Policies and Procedures**

• developing materials on sexual harassment and violence, which should be distributed to students during orientation and upon receipt of complaints, as well as widely posted throughout school buildings and residence halls, and which should include:
  o what constitutes sexual harassment or violence
  o what to do if a student has been the victim of sexual harassment or violence
  o contact information for counseling and victim services on and off school grounds
  o how to file a complaint with the school
  o how to contact the school’s Title IX coordinator

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43 For example, if the complainant was disciplined for skipping a class in which the harasser was enrolled, the school should review the incident to determine if the complainant skipped the class to avoid contact with the harasser.
what the school will do to respond to allegations of sexual harassment or violence, including the interim measures that can be taken

- requiring the Title IX coordinator to communicate regularly with the school’s law enforcement unit investigating cases and to provide information to law enforcement unit personnel regarding Title IX requirements;⁴⁴
- requiring the Title IX coordinator to review all evidence in a sexual harassment or sexual violence case brought before the school’s disciplinary committee to determine whether the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee;⁴⁵
- requiring the school to create a committee of students and school officials to identify strategies for ensuring that students:
  - know the school’s prohibition against sex discrimination, including sexual harassment and violence
  - recognize sex discrimination, sexual harassment, and sexual violence when they occur
  - understand how and to whom to report any incidents
  - know the connection between alcohol and drug abuse and sexual harassment or violence
  - feel comfortable that school officials will respond promptly and equitably to reports of sexual harassment or violence;
- issuing new policy statements or other steps that clearly communicate that the school does not tolerate sexual harassment and violence and will respond to any incidents and to any student who reports such incidents; and
- revising grievance procedures used to handle sexual harassment and violence complaints to ensure that they are prompt and equitable, as required by Title IX.

**School Investigations and Reports to OCR**

- conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school’s policies against sexual harassment and violence;
- investigating whether any other students also may have been subjected to sexual harassment or violence;
- investigating whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties in responding to those allegations;
- conducting, in conjunction with student leaders, a school or campus “climate check” to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school; and

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⁴⁴ Any personally identifiable information from a student’s education record that the Title IX coordinator provides to the school’s law enforcement unit is subject to FERPA’s nondisclosure requirements.

⁴⁵ For example, the disciplinary committee may lack the power to implement changes to the complainant’s class schedule or living situation so that he or she does not come in contact with the alleged perpetrator.
• submitting to OCR copies of all grievances filed by students alleging sexual harassment or violence, and providing OCR with documentation related to the investigation of each complaint, such as witness interviews, investigator notes, evidence submitted by the parties, investigative reports and summaries, any final disposition letters, disciplinary records, and documentation regarding any appeals.

Conclusion

The Department is committed to ensuring that all students feel safe and have the opportunity to benefit fully from their schools’ education programs and activities. As part of this commitment, OCR provides technical assistance to assist recipients in achieving voluntary compliance with Title IX.

If you need additional information about Title IX, have questions regarding OCR’s policies, or seek technical assistance, please contact the OCR enforcement office that serves your state or territory. The list of offices is available at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. Additional information about addressing sexual violence, including victim resources and information for schools, is available from the U.S. Department of Justice’s Office on Violence Against Women (OVW) at http://www.ovw.usdoj.gov. 46

Thank you for your prompt attention to this matter. I look forward to continuing our work together to ensure that all students have an equal opportunity to learn in a safe and respectful school climate.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

46 OVW also administers the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus Program. This Federal funding is designed to encourage institutions of higher education to adopt comprehensive, coordinated responses to domestic violence, dating violence, sexual assault, and stalking. Under this competitive grant program, campuses, in partnership with community-based nonprofit victim advocacy organizations and local criminal justice or civil legal agencies, must adopt protocols and policies to treat these crimes as serious offenses and develop victim service programs and campus policies that ensure victim safety, offender accountability, and the prevention of such crimes. OVW recently released the first solicitation for the Services, Training, Education, and Policies to Reduce Domestic Violence, Dating Violence, Sexual Assault and Stalking in Secondary Schools Grant Program. This innovative grant program will support a broad range of activities, including training for school administrators, faculty, and staff; development of policies and procedures for responding to these crimes; holistic and appropriate victim services; development of effective prevention strategies; and collaborations with mentoring organizations to support middle and high school student victims.
Questions and Answers on Title IX and Sexual Violence

Title IX of the Education Amendments of 1972 ("Title IX") is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL"). The DCL explains a school’s responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX. Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school’s independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

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1 The Department has determined that this document is a “significant guidance document” under the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR’s legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

2 20 U.S.C. § 1681 et seq.

3 Throughout this document the term “schools” refers to recipients of federal financial assistance that operate educational programs or activities. For Title IX purposes, at the elementary and secondary school level, the recipient generally is the school district; and at the postsecondary level, the recipient is the individual institution of higher education. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that the law’s requirements conflict with the organization’s religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.


5 Although this document and the DCL focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.
• Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.

• Discusses proactive efforts schools can take to prevent sexual violence.

• Discusses the interplay between Title IX, the Family Educational Rights and Privacy Act (“FERPA”), and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (“Clery Act”) as it relates to a complainant’s right to know the outcome of his or her complaint, including relevant sanctions imposed on the perpetrator.

• Provides examples of remedies and enforcement strategies that schools and OCR may use to respond to sexual violence.

The DCL supplements OCR’s Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, issued in 2001 (2001 Guidance).8 The 2001 Guidance discusses in detail the Title IX requirements related to sexual harassment of students by school employees, other students, or third parties. The DCL and the 2001 Guidance remain in full force and we recommend reading these Questions and Answers in conjunction with these documents.

In responding to requests for technical assistance, OCR has determined that elementary and secondary schools and postsecondary institutions would benefit from additional guidance concerning their obligations under Title IX to address sexual violence as a form of sexual harassment. The following questions and answers further clarify the legal requirements and guidance articulated in the DCL and the 2001 Guidance and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects. In order to gain a complete understanding of these legal requirements and recommendations, this document should be read in full.

Authorized by

/s/
Catherine E. Lhamon
Assistant Secretary for Civil Rights

April 29, 2014

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Notice of Language Assistance

Questions and Answers on Title IX and Sexual Violence

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語, 或者使用英語有困難，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線: 1-800-877-8339), 或電郵: Ed.Language.Assistance@ed.gov.

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Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (службы для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.
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A. **A School’s Obligation to Respond to Sexual Violence**

A-1. **What is sexual violence?**

**Answer:** Sexual violence, as that term is used in this document and prior OCR guidance, refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent (e.g., due to the student’s age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.

A-2. **How does Title IX apply to student-on-student sexual violence?**

**Answer:** Under Title IX, federally funded schools must ensure that students of all ages are not denied or limited in their ability to participate in or benefit from the school’s educational programs or activities on the basis of sex. A school violates a student’s rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s educational program, i.e. creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.\(^9\)

A-3. **How does OCR determine if a hostile environment has been created?**

**Answer:** As discussed more fully in OCR’s 2001 Guidance, OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question from both a subjective and an objective perspective. Specifically, OCR’s standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim’s position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

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\(^9\) This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. See 2001 Guidance at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. See Davis v. Monroe Cnty Bd. of Educ., 526 U.S. 629, 643 (1999).
A-4. When does OCR consider a school to have notice of student-on-student sexual violence?

**Answer:** OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence. See question D-2 regarding who is a responsible employee.

A school can receive notice of sexual violence in many different ways. Some examples of notice include: a student may have filed a grievance with or otherwise informed the school’s Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher or dean may have witnessed the sexual violence.

The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents. For example, if school officials receive a credible report that a student has perpetrated several acts of sexual violence against different students, that pattern of conduct should trigger an inquiry as to whether other students have been subjected to sexual violence by that student. In other cases, the pervasiveness of the sexual violence may be widespread, openly practiced, or well-known among students or employees. In those cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry. A school’s failure to take prompt and effective corrective action in such cases (as described in questions G-1 to G-3 and H-1 to H-3) would violate Title IX even if the student did not use the school’s grievance procedures or otherwise inform the school of the sexual violence.

A-5. What are a school’s basic responsibilities to address student-on-student sexual violence?

**Answer:** When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E). If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its
effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. For additional information on interim measures, see questions G-1 to G-3.

If a school delays responding to allegations of sexual violence or responds inappropriately, the school’s own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately. For example, if a school’s ignoring of a student’s complaints of sexual assault by a fellow student results in the complaining student having to remain in classes with the other student for several weeks and the complaining student’s grades suffer because he or she was unable to concentrate in these classes, the school may need to permit the complaining student to retake the classes without an academic or financial penalty (in addition to any other remedies) in order to address the effects of the sexual violence.

A-6. **Does Title IX cover employee-on-student sexual violence, such as sexual abuse of children?**

**Answer:** Yes. Although this document and the DCL focus on student-on-student sexual violence, Title IX also protects students from other forms of sexual harassment (including sexual violence and sexual abuse), such as sexual harassment carried out by school employees. Sexual harassment by school employees can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, including but not limited to sexual activity. Title IX’s prohibition against

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Throughout this document, unless otherwise noted, the term “complainant” refers to the student who allegedly experienced the sexual violence.
sexual harassment generally does not extend to legitimate nonsexual touching or other nonsexual conduct. But in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment. Early signs of inappropriate behavior with a child can be the key to identifying and preventing sexual abuse by school personnel.

A school's Title IX obligations regarding sexual harassment by employees can, in some instances, be greater than those described in this document and the DCL. Recipients should refer to OCR's 2001 Guidance for further information about Title IX obligations regarding harassment of students by school employees. In addition, many state and local laws have mandatory reporting requirements for schools working with minors. Recipients should be careful to satisfy their state and local legal obligations in addition to their Title IX obligations, including training to ensure that school employees are aware of their obligations under such state and local laws and the consequences for failing to satisfy those obligations.

With respect to sexual activity in particular, OCR will always view as unwelcome and nonconsensual sexual activity between an adult school employee and an elementary school student or any student below the legal age of consent in his or her state. In cases involving a student who meets the legal age of consent in his or her state, there will still be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual. When a school is on notice that a school employee has sexually harassed a student, it is responsible for taking prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects. Indeed, even if a school was not on notice, the school is nonetheless responsible for remediying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when the employee engaged in the sexual activity in the context of the employee’s provision of aid, benefits, or services to students (e.g., teaching, counseling, supervising, advising, or transporting students).

A school should take steps to protect its students from sexual abuse by its employees. It is therefore imperative for a school to develop policies prohibiting inappropriate conduct by school personnel and procedures for identifying and responding to such conduct. For example, this could include implementing codes of conduct, which might address what is commonly known as grooming – a desensitization strategy common in adult educator sexual misconduct. Such policies and procedures can ensure that students, parents, and
school personnel have clear guidelines on what are appropriate and inappropriate interactions between adults and students in a school setting or in school-sponsored activities. Additionally, a school should provide training for administrators, teachers, staff, parents, and age-appropriate classroom information for students to ensure that everyone understands what types of conduct are prohibited and knows how to respond when problems arise.\textsuperscript{11}

\textbf{B. Students Protected by Title IX}

\textbf{B-1. Does Title IX protect all students from sexual violence?}

\textbf{Answer:} Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.

\textbf{B-2. How should a school handle sexual violence complaints in which the complainant and the alleged perpetrator are members of the same sex?}

\textbf{Answer:} A school’s obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence.

Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school’s obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses for all complaints involving sexual violence.

\textsuperscript{11} For additional informational on training please see the Department of Education’s Resource and Emergency Management for Schools Technical Assistance Center – Adult Sexual Misconduct in Schools: Prevention and Management Training, available at \url{http://rems.ed.gov/Docs/ASM_Marketing_Flyer.pdf}.
uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student’s actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

If a school’s policies related to sexual violence include examples of particular types of conduct that violate the school’s prohibition on sexual violence, the school should consider including examples of same-sex conduct. In addition, a school should ensure that staff are capable of providing culturally competent counseling to all complainants. Thus, a school should ensure that its counselors and other staff who are responsible for receiving and responding to complaints of sexual violence, including investigators and hearing board members, receive appropriate training about working with LGBT and gender-nonconforming students and same-sex sexual violence. See questions J-1 to J-4 for additional information regarding training.

Gay-straight alliances and similar student-initiated groups can also play an important role in creating safer school environments for LGBT students. On June 14, 2011, the Department issued guidance about the rights of student-initiated groups in public secondary schools under the Equal Access Act. That guidance is available at http://www2.ed.gov/policy/elsec/guid/secletter/110607.html.

B-3. What issues may arise with respect to students with disabilities who experience sexual violence?

Answer: When students with disabilities experience sexual violence, federal civil rights laws other than Title IX may also be relevant to a school’s responsibility to investigate and address such incidents. Certain students require additional assistance and support. For example, students with intellectual disabilities may need additional help in learning about sexual violence, including a school’s sexual violence education and prevention programs, what constitutes sexual violence and how students can report incidents of sexual

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12 OCR enforces two civil rights laws that prohibit disability discrimination. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits disability discrimination by public or private entities that receive federal financial assistance, and Title II of the American with Disabilities Act of 1990 (Title II) prohibits disability discrimination by all state and local public entities, regardless of whether they receive federal funding. See 29 U.S.C. § 794 and 34 C.F.R. part 104; 42 U.S.C. § 12131 et seq. and 28 C.F.R. part 35. OCR and the U.S. Department of Justice (DOJ) share the responsibility of enforcing Title II in the educational context. The Department of Education’s Office of Special Education Programs in the Office of Special Education and Rehabilitative Services administers Part B of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1400 et seq. and 34 C.F.R. part 300. IDEA provides financial assistance to states, and through them to local educational agencies, to assist in providing special education and related services to eligible children with disabilities ages three through twenty-one, inclusive.
violence. In addition, students with disabilities who experience sexual violence may require additional services and supports, including psychological services and counseling services. Postsecondary students who need these additional services and supports can seek assistance from the institution’s disability resource office.

A student who has not been previously determined to have a disability may, as a result of experiencing sexual violence, develop a mental health-related disability that could cause the student to need special education and related services. At the elementary and secondary education level, this may trigger a school’s child find obligations under IDEA and the evaluation and placement requirements under Section 504, which together require a school to evaluate a student suspected of having a disability to determine if he or she has a disability that requires special education or related aids and services.  

A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner that is accessible to students and employees with disabilities, for example, by providing electronically-accessible versions of paper forms to individuals with print disabilities, or by providing a sign language interpreter to a deaf individual attending a training. See question J-4 for more detailed information on student training.

B-4. What issues arise with respect to international students and undocumented students who experience sexual violence?

Answer: Title IX protects all students at recipient institutions in the United States regardless of national origin, immigration status, or citizenship status. A school should ensure that all students regardless of their immigration status, including undocumented students and international students, are aware of their rights under Title IX. A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner accessible to students who are English language learners. OCR recommends that a school coordinate with its international office and its undocumented student program coordinator, if applicable, to help communicate information about Title IX in languages that are accessible to these groups of students. OCR also encourages schools to provide foreign national complainants with information about the U nonimmigrant status and the T nonimmigrant status. The U nonimmigrant status is set

13 See 34 C.F.R. §§ 300.8; 300.111; 300.201; 300.300-300.311 (IDEA); 34 C.F.R. §§ 104.3(j) and 104.35 (Section 504). Schools must comply with applicable consent requirements with respect to evaluations. See 34 C.F.R. § 300.300.

14 OCR enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d.
aside for victims of certain crimes who have suffered substantial mental or physical abuse as a result of the crime and are helpful to law enforcement agency in the investigation or prosecution of the qualifying criminal activity. The T nonimmigrant status is available for victims of severe forms of human trafficking who generally comply with a law enforcement agency in the investigation or prosecution of the human trafficking and who would suffer extreme hardship involving unusual and severe harm if they were removed from the United States.

A school should be mindful that unique issues may arise when a foreign student on a student visa experiences sexual violence. For example, certain student visas require the student to maintain a full-time course load (generally at least 12 academic credit hours per term), but a student may need to take a reduced course load while recovering from the immediate effects of the sexual violence. OCR recommends that a school take steps to ensure that international students on student visas understand that they must typically seek prior approval of the designated school official (DSO) for student visas to drop below a full-time course load. A school may also want to encourage its employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence to approach the DSO on the student’s behalf if the student wishes to drop below a full-time course load. OCR recommends that a school take steps to ensure that its employees who work with international students, including the school’s DSO, are trained on the school’s sexual violence policies and that employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence are aware of the special issues that international students may encounter. See questions J-1 to J-4 for additional information regarding training.

A school should also be aware that threatening students with deportation or invoking a student’s immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX’s protections against retaliation. For more information on retaliation see question K-1.

16 For more information on the T nonimmigrant status, see http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status.
B-5. **How should a school respond to sexual violence when the alleged perpetrator is not affiliated with the school?**

**Answer:** The appropriate response will differ depending on the level of control the school has over the alleged perpetrator. For example, if an athlete or band member from a visiting school sexually assaults a student at the home school, the home school may not be able to discipline or take other direct action against the visiting athlete or band member. However (and subject to the confidentiality provisions discussed in Section E), it should conduct an inquiry into what occurred and should report the incident to the visiting school and encourage the visiting school to take appropriate action to prevent further sexual violence. The home school should also notify the student of any right to file a complaint with the alleged perpetrator’s school or local law enforcement. The home school may also decide not to invite the visiting school back to its campus.

Even though a school’s ability to take direct action against a particular perpetrator may be limited, the school must still take steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population. This may include providing support services for the complainant, and issuing new policy statements making it clear that the school does not tolerate sexual violence and will respond to any reports about such incidents. For additional information on interim measures see questions G-1 to G-3.

C. **Title IX Procedural Requirements**

*Overview*

C-1. **What procedures must a school have in place to prevent sexual violence and resolve complaints?**

**Answer:** The Title IX regulations outline three key procedural requirements. Each school must:

1. disseminate a notice of nondiscrimination (see question C-2);\(^{17}\)

2. designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (see questions C-3 to C-4);\(^ {18}\) and

\(^{17}\) 34 C.F.R. § 106.9.

\(^ {18}\) *Id.* § 106.8(a).
(3) adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints (see questions C-5 to C-6).\(^\text{19}\)

These requirements apply to all forms of sex discrimination and are particularly important for preventing and effectively responding to sexual violence.

Procedural requirements under other federal laws may also apply to complaints of sexual violence, including the requirements of the Clery Act.\(^\text{20}\) For additional information about the procedural requirements in the Clery Act, please see http://www2.ed.gov/lead/safety/campus.html.

**Notice of Nondiscrimination**

**C-2. What information must be included in a school’s notice of nondiscrimination?**

**Answer:** The notice of nondiscrimination must state that the school does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. The notice must state that questions regarding Title IX may be referred to the school’s Title IX coordinator or to OCR. The school must notify all of its students and employees of the name or title, office address, telephone number, and email address of the school’s designated Title IX coordinator.\(^\text{21}\)

**Title IX Coordinator**

**C-3. What are a Title IX coordinator’s responsibilities?**

**Answer:** A Title IX coordinator’s core responsibilities include overseeing the school’s response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school’s own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this, subject to the exemption for school counseling employees discussed in question E-3, the Title IX coordinator must be informed of all

\(^{19}\) Id. § 106.8(b).

\(^{20}\) All postsecondary institutions participating in the Higher Education Act’s Title IV student financial assistance programs must comply with the Clery Act.

reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office. The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the school, this individual (when properly trained) is generally in the best position to evaluate a student’s request for confidentiality in the context of the school’s responsibility to provide a safe and nondiscriminatory environment for all students. A school may determine, however, that another individual should perform this role. For additional information on confidentiality requests, see questions E-1 to E-4. If a school relies in part on its disciplinary procedures to meet its Title IX obligations, the Title IX coordinator should review the disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX as discussed in question C-5.

In addition to these core responsibilities, a school may decide to give its Title IX coordinator additional responsibilities, such as: providing training to students, faculty, and staff on Title IX issues; conducting Title IX investigations, including investigating facts relevant to a complaint, and determining appropriate sanctions against the perpetrator and remedies for the complainant; determining appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence; and ensuring that appropriate policies and procedures are in place for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers, including rape crisis centers. A school must ensure that its Title IX coordinator is appropriately trained in all areas over which he or she has responsibility. The Title IX coordinator or designee should also be available to meet with students as needed.

If a school designates more than one Title IX coordinator, the school’s notice of nondiscrimination and Title IX grievance procedures should describe each coordinator’s responsibilities, and one coordinator should be designated as having ultimate oversight responsibility.

C-4. **Are there any employees who should not serve as the Title IX coordinator?**

**Answer:** Title IX does not categorically preclude particular employees from serving as Title IX coordinators. However, Title IX coordinators should not have other job responsibilities that may create a conflict of interest. Because some complaints may raise issues as to whether or not how well the school has met its Title IX obligations, designating...
the same employee to serve both as the Title IX coordinator and the general counsel (which could include representing the school in legal claims alleging Title IX violations) poses a serious risk of a conflict of interest. Other employees whose job responsibilities may conflict with a Title IX coordinator’s responsibilities include Directors of Athletics, Deans of Students, and any employee who serves on the judicial/hearing board or to whom an appeal might be made. Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest.

**Grievance Procedures**

**C-5. Under Title IX, what elements should be included in a school’s procedures for responding to complaints of sexual violence?**

**Answer:** Title IX requires that a school adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence. In evaluating whether a school’s grievance procedures satisfy this requirement, OCR will review all aspects of a school’s policies and practices, including the following elements that are critical to achieve compliance with Title IX:

1. notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;

2. application of the grievance procedures to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties;

3. provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;

4. designated and reasonably prompt time frames for the major stages of the complaint process (see question F-8);

5. written notice to the complainant and alleged perpetrator of the outcome of the complaint (see question H-3); and

6. assurance that the school will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.
To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the school processes complaints, a school’s Title IX grievance procedures should also explicitly include the following in writing, some of which themselves are mandatory obligations under Title IX:

1. a statement of the school’s jurisdiction over Title IX complaints;
2. adequate definitions of sexual harassment (which includes sexual violence) and an explanation as to when such conduct creates a hostile environment;
3. reporting policies and protocols, including provisions for confidential reporting;
4. identification of the employee or employees responsible for evaluating requests for confidentiality;
5. notice that Title IX prohibits retaliation;
6. notice of a student’s right to file a criminal complaint and a Title IX complaint simultaneously;
7. notice of available interim measures that may be taken to protect the student in the educational setting;
8. the evidentiary standard that must be used (preponderance of the evidence) (i.e., more likely than not that sexual violence occurred) in resolving a complaint;
9. notice of potential remedies for students;
10. notice of potential sanctions against perpetrators; and
11. sources of counseling, advocacy, and support.

For more information on interim measures, see questions G-1 to G-3.

The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.
A school’s procedures and practices will vary in detail, specificity, and components, reflecting differences in the age of its students, school size and administrative structure, state or local legal requirements (e.g., mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

C-6. Is a school required to use separate grievance procedures for sexual violence complaints?

Answer: No. Under Title IX, a school may use student disciplinary procedures, general Title IX grievance procedures, sexual harassment procedures, or separate procedures to resolve sexual violence complaints. However, any procedures used for sexual violence complaints, including disciplinary procedures, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution (as discussed in question C-5), including applying the preponderance of the evidence standard of review. As discussed in question C-3, the Title IX coordinator should review any process used to resolve complaints of sexual violence to ensure it complies with requirements for prompt and equitable resolution of these complaints. When using disciplinary procedures, which are often focused on the alleged perpetrator and can take considerable time, a school should be mindful of its obligation to provide interim measures to protect the complainant in the educational setting. For more information on timeframes and interim measures, see questions F-8 and G-1 to G-3.

D. Responsible Employees and Reporting

D-1. Which school employees are obligated to report incidents of possible sexual violence to school officials?

Answer: Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is a responsible employee of the school. A responsible employee must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee, subject to the exemption for school counseling employees discussed in question E-3. This is because, as discussed in question A-4, a school is obligated to address sexual violence about which a responsible employee knew or should have known. As explained in question C-3, the Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or

22 This document addresses only Title IX’s reporting requirements. It does not address requirements under the Clery Act or other federal, state, or local laws, or an individual school’s code of conduct.
complaint was initially filed with another individual or office, subject to the exemption for school counseling employees discussed in question E-3.

D-2. Who is a “responsible employee”?

**Answer:** According to OCR’s 2001 Guidance, a responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.23

A school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees. A school must also inform all employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants’ option to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants’ right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

Whether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.

As noted in response to question A-4, when a responsible employee knows or reasonably should know of possible sexual violence, OCR deems a school to have notice of the sexual violence. The school must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E), and, if the school determines that sexual violence created a hostile environment, the school must then take appropriate steps to address the situation. The

23 The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 290 (1998), and Davis, 524 U.S. at 642. The concept of a “responsible employee” under OCR’s guidance for administrative enforcement of Title IX is broader.
school has this obligation regardless of whether the student, student’s parent, or a third party files a formal complaint. For additional information on a school’s responsibilities to address student-on-student sexual violence, see question A-5. For additional information on training for school employees, see questions J-1 to J-3.

D-3. **What information is a responsible employee obligated to report about an incident of possible student-on-student sexual violence?**

**Answer:** Subject to the exemption for school counseling employees discussed in question E-3, a responsible employee must report to the school’s Title IX coordinator, or other appropriate school designee, all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location. A school must make clear to its responsible employees to whom they should report an incident of alleged sexual violence.

To ensure compliance with these reporting obligations, it is important for a school to train its responsible employees on Title IX and the school’s sexual violence policies and procedures. For more information on appropriate training for school employees, see question J-1 to J-3.

D-4. **What should a responsible employee tell a student who discloses an incident of sexual violence?**

**Answer:** Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands: (i) the employee’s obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials, (ii) the student’s option to request that the school maintain his or her confidentiality, which the school (e.g., Title IX coordinator) will consider, and (iii) the student’s ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (e.g., sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers). As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request.
and should evaluate the request in the context of the school’s responsibility to provide a safe and nondiscriminatory environment for all students.

D-5. If a student informs a resident assistant/advisor (RA) that he or she was subjected to sexual violence by a fellow student, is the RA obligated under Title IX to report the incident to school officials?

**Answer:** As discussed in questions D-1 and D-2, for Title IX purposes, whether an individual is obligated under Title IX to report alleged sexual violence to the school’s Title IX coordinator or other appropriate school designee generally depends on whether the individual is a responsible employee.

The duties and responsibilities of RAs vary among schools, and, therefore, a school should consider its own policies and procedures to determine whether its RAs are responsible employees who must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee. When making this determination, a school should consider if its RAs have the general authority to take action to redress misconduct or the duty to report misconduct to appropriate school officials, as well as whether students could reasonably believe that RAs have this authority or duty. A school should also consider whether it has determined and clearly informed students that RAs are generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct to the Title IX coordinator or other appropriate school officials. A school should pay particular attention to its RAs’ obligations to report other student violations of school policy (e.g., drug and alcohol violations or physical assault). If an RA is required to report other misconduct that violates school policy, then the RA would be considered a responsible employee obligated to report incidents of sexual violence that violate school policy.

If an RA is a responsible employee, the RA should make every effort to ensure that before the student reveals information that he or she may wish to keep confidential, the student understands the RA’s reporting obligation and the student’s option to request that the school maintain confidentiality. It is therefore important that schools widely disseminate policies and provide regular training clearly identifying the places where students can seek confidential support services so that students are aware of this information. The RA

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24 Postsecondary institutions should be aware that, regardless of whether an RA is a responsible employee under Title IX, RAs are considered “campus security authorities” under the Clery Act. A school’s responsibilities in regard to crimes reported to campus security authorities are discussed in the Department’s regulations on the Clery Act at 34 C.F.R. § 668.46.
should also explain to the student (again, before the student reveals information that he or she may wish to keep confidential) that, although the RA must report the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location to the Title IX coordinator or other appropriate school designee, the school will protect the student’s confidentiality to the greatest extent possible. Prior to providing information about the incident to the Title IX coordinator or other appropriate school designee, the RA should consult with the student about how to protect his or her safety and the details of what will be shared with the Title IX coordinator. The RA should explain to the student that reporting this information to the Title IX coordinator or other appropriate school designee does not necessarily mean that a formal complaint or investigation under the school’s Title IX grievance procedure must be initiated if the student requests confidentiality. As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school’s responsibility to provide a safe and nondiscriminatory environment for all students.

Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. If a student discloses sexual violence to an RA who is a responsible employee, the school will be deemed to have notice of the sexual violence even if the student does not file a Title IX complaint. Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.

E. Confidentiality and a School’s Obligation to Respond to Sexual Violence

E-1. How should a school respond to a student’s request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address the alleged sexual violence?

Answer: Students, or parents of minor students, reporting incidents of sexual violence sometimes ask that the students’ names not be disclosed to the alleged perpetrators or that no investigation or disciplinary action be pursued to address the alleged sexual violence. OCR strongly supports a student’s interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student’s request
for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school’s response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. In the case of minors, state mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school’s response to incidents of sexual violence.\(^{25}\)

Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school’s response. To improve trust in the process for investigating sexual violence complaints, a school should notify students of the information that will be disclosed, to whom it will be disclosed, and why. Regardless of whether a student complainant requests confidentiality, a school must take steps to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. For additional information on interim measures see questions G-1 to G-3.

For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate

\(^{25}\) The school should be aware of the alleged student perpetrator’s right under the Family Educational Rights and Privacy Act (“FERPA”) to request to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained by the school as an education record. In such a case, the school must either redact the complainant’s name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. See 34 C.F.R. § 99.12(a) The school should also make complainants aware of this right and explain how it might affect the school’s ability to maintain complete confidentiality.
and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary. See question K-1 regarding retaliation.

If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. As discussed in question C-3, the Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests. Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them. For example, if a school has a sexual assault response coordinator, that person should be consulted in evaluating requests for confidentiality. The school should identify in its Title IX policies and procedures the employee or employees responsible for making such determinations.

If the school determines that it can respect the student’s request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request. Although a student’s request to have his or her name withheld may limit the school’s ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school’s policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.
E-2. What factors should a school consider in weighing a student’s request for confidentiality?

Answer: When weighing a student’s request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors.

These factors include circumstances that suggest there is an increased risk of the alleged perpetrator committing additional acts of sexual violence or other violence (e.g., whether there have been other sexual violence complaints about the same alleged perpetrator, whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence, whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, and whether the sexual violence was committed by multiple perpetrators). These factors also include circumstances that suggest there is an increased risk of future acts of sexual violence under similar circumstances (e.g., whether the student’s report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group). Other factors that should be considered in assessing a student’s request for confidentiality include whether the sexual violence was perpetrated with a weapon; the age of the student subjected to the sexual violence; and whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).

A school should take requests for confidentiality seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. For example, if the school has credible information that the alleged perpetrator has committed one or more prior rapes, the balance of factors would compel the school to investigate the allegation of sexual violence, and if appropriate, pursue disciplinary action in a manner that may require disclosure of the student’s identity to the alleged perpetrator. If the school determines that it must disclose a student’s identity to an alleged perpetrator, it should inform the student prior to making this disclosure. In these cases, it is also especially important for schools to take whatever interim measures are necessary to protect the student and ensure the safety of other students. If a school has a sexual assault response coordinator, that person should be consulted in identifying safety risks and interim measures that are necessary to protect the student. In the event the student requests that the school inform the perpetrator that the student asked the school not to investigate or seek discipline, the school should honor this request and inform the alleged perpetrator that the school made the decision to go forward. For additional information on interim measures see questions G-1 to G-3. Any school officials responsible for
discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence. See questions J-1 to J-3.

On the other hand, if, for example, the school has no credible information about prior sexual violence committed by the alleged perpetrator and the alleged sexual violence was not perpetrated with a weapon or accompanied by threats to repeat the sexual violence against the complainant or others or part of a larger pattern at a given location or by a particular group, the balance of factors would likely compel the school to respect the student’s request for confidentiality. In this case the school should still take all reasonable steps to respond to the complaint consistent with the student’s confidentiality request and determine whether interim measures are appropriate or necessary. Schools should be mindful that traumatic events such as sexual violence can result in delayed decisionmaking by a student who has experienced sexual violence. Hence, a student who initially requests confidentiality might later request that a full investigation be conducted.

E-3. **What are the reporting responsibilities of school employees who provide or support the provision of counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence?**

*Answer:* OCR does not require campus mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student’s consent, incidents of sexual violence to the school in a way that identifies the student. Although these employees may have responsibilities that would otherwise make them responsible employees for Title IX purposes, OCR recognizes the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need.

Professional counselors and pastoral counselors whose official responsibilities include providing mental-health counseling to members of the school community are not required by Title IX to report *any* information regarding an incident of alleged sexual violence to the Title IX coordinator or other appropriate school designee.\(^{26}\)

\(^{26}\) The exemption from reporting obligations for pastoral and professional counselors under Title IX is consistent with the Clery Act. For additional information on reporting obligations under the Clery Act, see Office of Postsecondary Education, *Handbook for Campus Safety and Security Reporting* (2011), available at [http://www2.ed.gov/admins/lead/safety/handbook.pdf](http://www2.ed.gov/admins/lead/safety/handbook.pdf). Similar to the Clery Act, for Title IX purposes, a pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious...
OCR recognizes that some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors. They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers (“non-professional counselors or advocates”), including front desk staff and students. OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student’s consent. These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.

Pastoral and professional counselors and non-professional counselors or advocates should be instructed to inform students of their right to file a Title IX complaint with the school and a separate complaint with campus or local law enforcement. In addition to informing students about campus resources for counseling, medical, and academic support, these persons should also indicate that they are available to assist students in filing such complaints. They should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary.

In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women’s centers, or

order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor. A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution’s community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the school, but are under contract to provide counseling at the school. This includes individuals who are not yet licensed or certified as a counselor, but are acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the school.

Postsecondary institutions should be aware that an individual who is counseling students, but who does not meet the Clery Act definition of a pastoral or professional counselor, is not exempt from being a campus security authority if he or she otherwise has significant responsibility for student and campus activities. See fn. 24.
health centers. Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.

**E-4. Is a school required to investigate information regarding sexual violence incidents shared by survivors during public awareness events, such as “Take Back the Night”?**

**Answer:** No. OCR wants students to feel free to participate in preventive education programs and access resources for survivors. Therefore, public awareness events such as “Take Back the Night” or other forums at which students disclose experiences with sexual violence are not considered notice to the school for the purpose of triggering an individual investigation unless the survivor initiates a complaint. The school should instead respond to these disclosures by reviewing sexual assault policies, creating campus-wide educational programs, and conducting climate surveys to learn more about the prevalence of sexual violence at the school. Although Title IX does not require the school to investigate particular incidents discussed at such events, the school should ensure that survivors are aware of any available resources, including counseling, health, and mental health services. To ensure that the entire school community understands their Title IX rights related to sexual violence, the school should also provide information at these events on Title IX and how to file a Title IX complaint with the school, as well as options for reporting an incident of sexual violence to campus or local law enforcement.

**F. Investigations and Hearings**

**Overview**

**F-1. What elements should a school’s Title IX investigation include?**

**Answer:** The specific steps in a school’s Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

For the purposes of this document the term “investigation” refers to the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions
the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.

In all cases, a school’s Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence. The investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing. Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be. All persons involved in conducting a school’s Title IX investigations must have training or experience in handling complaints of sexual violence and in the school’s grievance procedures. For additional information on training, see question J-3.

When investigating an incident of alleged sexual violence for Title IX purposes, to the extent possible, a school should coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator. A school should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event. If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a forensic expert to ensure that the evidence is correctly interpreted by school officials. For additional information on working with campus or local law enforcement see question F-3.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. If a school typically processes complaints of sexual violence through its disciplinary process and that process, including any investigation and hearing, meets the Title IX requirements discussed above and enables the school to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, then the school may use that process to satisfy its Title IX obligations and does not need to conduct a separate Title IX investigation. As discussed in question C-3, the Title IX coordinator should review the disciplinary process

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28 This answer addresses only Title IX’s requirements for investigations. It does not address legal rights or requirements under the U.S. Constitution, the Clery Act, or other federal, state, or local laws.

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to ensure that it: (1) complies with the prompt and equitable requirements of Title IX; (2) allows for appropriate interim measures to be taken to protect the complainant during the process; and (3) provides for remedies to the complainant and school community where appropriate. For more information about interim measures, see questions G-1 to G-3, and about remedies, see questions H-1 and H-2.

The investigation may include, but is not limited to, conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable; reviewing student and personnel files; and gathering and examining other relevant documents or evidence. While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator. A balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.29 Specifically:

- Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.

- The school must use a preponderance-of-the-evidence (i.e., more likely than not) standard in any Title IX proceedings, including any fact-finding and hearings.

- If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.

- If the school permits one party to submit third-party expert testimony, it must do so equally for both parties.

- If the school provides for an appeal, it must do so equally for both parties.

- Both parties must be notified, in writing, of the outcome of both the complaint and any appeal (see question H-3).

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29 As explained in question C-5, the parties may have certain due process rights under the U.S. Constitution.
Intersection with Criminal Investigations

F-2. **What are the key differences between a school's Title IX investigation into allegations of sexual violence and a criminal investigation?**

**Answer:** A criminal investigation is intended to determine whether an individual violated criminal law; and, if at the conclusion of the investigation, the individual is tried and found guilty, the individual may be imprisoned or subject to criminal penalties. The U.S. Constitution affords criminal defendants who face the risk of incarceration numerous protections, including, but not limited to, the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation. In addition, government officials responsible for criminal investigations (including police and prosecutors) normally have discretion as to which complaints from the public they will investigate.

By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required. Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence. Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.

Of course, criminal investigations conducted by local or campus law enforcement may be useful for fact gathering if the criminal investigation occurs within the recommended timeframe for Title IX investigations; but, even if a criminal investigation is ongoing, a school must still conduct its own Title IX investigation.

A school should notify complainants of the right to file a criminal complaint and should not dissuade a complainant from doing so either during or after the school’s internal Title IX investigation. Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws.
F-3. **How should a school proceed when campus or local law enforcement agencies are conducting a criminal investigation while the school is conducting a parallel Title IX investigation?**

**Answer:** A school should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, it is important for a school to understand that during this brief delay in the Title IX investigation, it must take interim measures to protect the complainant in the educational setting. The school should also continue to update the parties on the status of the investigation and inform the parties when the school resumes its Title IX investigation. For additional information on interim measures see questions G-1 to G-3.

If a school delays the fact-finding portion of a Title IX investigation, the school must promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation. The school should not delay its investigation until the ultimate outcome of the criminal investigation or the filing of any charges. OCR recommends that a school work with its campus police, local law enforcement, and local prosecutor’s office to learn when the evidence gathering stage of the criminal investigation is complete. A school may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act (“FERPA”) and other applicable privacy laws.

The DCL states that in one instance a prosecutor’s office informed OCR that the police department’s evidence gathering stage typically takes three to ten calendar days, although the delay in the school’s investigation may be longer in certain instances. OCR understands that this example may not be representative and that the law enforcement agency’s process often takes more than ten days. OCR recognizes that the length of time for evidence gathering by criminal investigators will vary depending on the specific circumstances of each case.
**Off-Campus Conduct**

F-4. Is a school required to process complaints of alleged sexual violence that occurred off campus?

**Answer:** Yes. Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

A school must determine whether the alleged off-campus sexual violence occurred in the context of an education program or activity of the school; if so, the school must treat the complaint in the same manner that it treats complaints regarding on-campus conduct. In other words, if a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus.

Whether the alleged misconduct occurred in this context may not always be apparent from the complaint, so a school may need to gather additional information in order to make such a determination. Off-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (e.g., a debate team trip to another school or to a weekend competition).

Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity. The school cannot address the continuing effects of the off-campus sexual violence at school or in an off-campus education program or activity unless it processes the complaint and gathers appropriate additional information in accordance with its established procedures.

Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct. The mere presence on campus or in an
off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment. A school should also take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and a school may have to take steps to protect other students from possible assault by the alleged perpetrator. In other words, the school should protect the school community in the same way it would had the sexual violence occurred on campus. Even if there are no continuing effects of the off-campus sexual violence experienced by the student on campus or in an off-campus education program or activity, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with any other applicable laws. For example, if a school, under its code of conduct, exercises jurisdiction over physical altercations between students that occur off campus outside of an education program or activity, it should also exercise jurisdiction over incidents of student-on-student sexual violence that occur off campus outside of an education program or activity.

*Hearings*[^30]

**F-5. Must a school allow or require the parties to be present during an entire hearing?**

**Answer:** If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety of a hearing, it must do so equally for both parties. At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means. Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school’s Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

[^30]: As noted in question F-1, the investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing. Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence.

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F-6. May every witness at the hearing, including the parties, be cross-examined?

**Answer:** OCR does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, to allow the parties to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.

F-7. May the complainant’s sexual history be introduced at hearings?

**Answer:** Questioning about the complainant’s sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence. The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.

**Timeframes**

F-8. What stages of the investigation are included in the 60-day timeframe referenced in the DCL as the length for a typical investigation?

**Answer:** As noted in the DCL, the 60-calendar day timeframe for investigations is based on OCR’s experience in typical cases. The 60-calendar day timeframe refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate. Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school’s response was prompt and equitable as required by Title IX.
OCR does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR recognizes that the investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks. A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.

Because timeframes for investigations vary and a school may need to depart from the timeframes designated in its grievance procedures, both parties should be given periodic status updates throughout the process.

G. **Interim Measures**

G-1. **Is a school required to take any interim measures before the completion of its investigation?**

**Answer:** Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow the complainant to change academic and extracurricular activities or his or her living, transportation, dining, and working situation as appropriate. The school should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. If a school does not offer these services on campus, it should enter into an MOU with a local victim services provider if possible.

Even when a school has determined that it can respect a complainant’s request for confidentiality and therefore may not be able to respond fully to an allegation of sexual violence and initiate formal action against an alleged perpetrator, the school must take immediate action to protect the complainant while keeping the identity of the complainant confidential. These actions may include: providing support services to the
complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.

G-2. How should a school determine what interim measures to take?

Answer: The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. A school should consider a number of factors in determining what interim measures to take, including, for example, 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 alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders).

In general, when taking interim measures, schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.

G-3. If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure?

Answer: No. Interim measures are determined by a school on a case-by-case basis. If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.
H. Remedies and Notice of Outcome

H-1. What remedies should a school consider in a case of student-on-student sexual violence?

Answer: Effective remedial action may include disciplinary action against the perpetrator, providing counseling for the perpetrator, remedies for the complainant and others, as well as changes to the school’s overall services or policies. All services needed to remedy the hostile environment should be offered to the complainant. These remedies are separate from, and in addition to, any interim measure that may have been provided prior to the conclusion of the school’s investigation. In any instance in which the complainant did not take advantage of a specific service (e.g., counseling) when offered as an interim measure, the complainant should still be offered, and is still entitled to, appropriate final remedies that may include services the complainant declined as an interim measure. A refusal at the interim stage does not mean the refused service or set of services should not be offered as a remedy.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without more, likely will not be sufficient to satisfy its Title IX obligation to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. Additional remedies for the complainant and the school community may be necessary. If the school’s student disciplinary procedure does not include a process for determining and implementing these remedies for the complainant and school community, the school will need to use another process for this purpose.

Depending on the specific nature of the problem, remedies for the complainant may include, but are not limited to:

- Providing an effective escort to ensure that the complainant can move safely between classes and activities;

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31 As explained in question A-5, if a school delays responding to allegations of sexual violence or responds inappropriately, the school’s own inaction may subject the student to be subjected to a hostile environment. In this case, in addition to the remedies discussed in this section, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately.
• Ensuring the complainant and perpetrator do not share classes or extracurricular activities;

• Moving the perpetrator or complainant (if the complainant requests to be moved) to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;

• Providing comprehensive, holistic victim services including medical, counseling and academic support services, such as tutoring;

• Arranging for the complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty; and

• Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the sexual violence and the misconduct that may have resulted in the complainant being disciplined.  

Remedies for the broader student population may include, but are not limited to:

• Designating an individual from the school’s counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual violence to be on call to assist students whenever needed;

• Training or retraining school employees on the school’s responsibilities to address allegations of sexual violence and how to conduct Title IX investigations;

• Developing materials on sexual violence, which should be distributed to all students;

• Conducting bystander intervention and sexual violence prevention programs with students;

• Issuing policy statements or taking other steps that clearly communicate that the school does not tolerate sexual violence and will respond to any incidents and to any student who reports such incidents;

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32 For example, if the complainant was disciplined for skipping a class in which the perpetrator was enrolled, the school should review the incident to determine if the complainant skipped class to avoid contact with the perpetrator.
• Conducting, in conjunction with student leaders, a campus climate check to assess the effectiveness of efforts to ensure that the school is free from sexual violence, and using that information to inform future proactive steps that the school will take;

• Targeted training for a group of students if, for example, the sexual violence created a hostile environment in a residence hall, fraternity or sorority, or on an athletic team; and

• Developing a protocol for working with local law enforcement as discussed in question F-3.

When a school is unable to conduct a full investigation into a particular incident (i.e., when it received a general report of sexual violence without any personally identifying information), it should consider remedies for the broader student population in response.

H-2. If, after an investigation, a school finds the alleged perpetrator responsible and determines that, as part of the remedies for the complainant, it must separate the complainant and perpetrator, how should the school accomplish this if both students share the same major and there are limited course options?

**Answer:** If there are limited sections of required courses offered at a school and both the complainant and perpetrator are required to take those classes, the school may need to make alternate arrangements in a manner that minimizes the burden on the complainant. For example, the school may allow the complainant to take the regular sections of the courses while arranging for the perpetrator to take the same courses online or through independent study.

H-3. What information must be provided to the complainant in the notice of the outcome?

**Answer:** Title IX requires both parties to be notified, in writing, about the outcome of both the complaint and any appeal. OCR recommends that a school provide written notice of the outcome to the complainant and the alleged perpetrator concurrently.

For Title IX purposes, a school must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence. The perpetrator should not be notified of the individual remedies offered or provided to the complainant.
Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school. Additional steps the school has taken to eliminate the hostile environment may include counseling and academic support services for the complainant and other affected students. Additional steps the school has taken to prevent recurrence may include sexual violence training for faculty and staff, revisions to the school’s policies on sexual violence, and campus climate surveys. Further discussion of appropriate remedies is included in question H-1.

In addition to the Title IX requirements described above, the Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the institution’s final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.33

I. Appeals

I-1. What are the requirements for an appeals process?

Answer: While Title IX does not require that a school provide an appeals process, OCR does recommend that the school do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the school, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process. Any individual or body handling appeals should be trained in the dynamics of and trauma associated with sexual violence.

If a school chooses to offer an appeals process it has flexibility to determine the type of review it will apply to appeals, but the type of review the school applies must be the same regardless of which party files the appeal.

I-2.  Must an appeal be available to a complainant who receives a favorable finding but does not believe a sanction that directly relates to him or her was sufficient?

Answer: The appeals process must be equal for both parties. For example, if a school allows a perpetrator to appeal a suspension on the grounds that it is too severe, the school must also allow a complainant to appeal a suspension on the grounds that it was not severe enough. See question H-3 for more information on what must be provided to the complainant in the notice of the outcome.

J. Title IX Training, Education and Prevention

J-1. What type of training on Title IX and sexual violence should a school provide to its employees?

Answer: A school needs to ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence. A school should ensure that professional counselors, pastoral counselors, and non-professional counselors or advocates also understand the extent to which they may keep a report confidential. A school should provide training to all employees likely to witness or receive reports of sexual violence, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors. Training for employees should include practical information about how to prevent and identify sexual violence, including same-sex sexual violence; the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue; the potential for revictimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported. The training should also explain responsible employees’ reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students’ requests for confidentiality, as well as provide the contact

34 As explained earlier, although this document focuses on sexual violence, the legal principles apply to other forms of sexual harassment. Schools should ensure that any training they provide on Title IX and sexual violence also covers other forms of sexual harassment. Postsecondary institutions should also be aware of training requirements imposed under the Clery Act.
information for the school’s Title IX coordinator. A school also should train responsible employees to inform students of: the reporting obligations of responsible employees; students’ option to request confidentiality and available confidential advocacy, counseling, or other support services; and their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement. For additional information on the reporting obligations of responsible employees and others see questions D-1 to D-5.

There is no minimum number of hours required for Title IX and sexual violence training at every school, but this training should be provided on a regular basis. Each school should determine based on its particular circumstances how such training should be conducted, who has the relevant expertise required to conduct the training, and who should receive the training to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX. A school should also have methods for verifying that the training was effective.

J-2. How should a school train responsible employees to report incidents of possible sexual harassment or sexual violence?

Answer: Title IX requires a school to take prompt and effective steps reasonably calculated to end sexual harassment and sexual violence that creates a hostile environment (i.e., conduct that is sufficiently serious as to limit or deny a student’s ability to participate in or benefit from the school’s educational program and activity). But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

OCR therefore recommends that a school train responsible employees to report to the Title IX coordinator or other appropriate school official any incidents of sexual harassment or sexual violence that may violate the school’s code of conduct or may create or contribute to the creation of a hostile environment. The school can then take steps to investigate and prevent any harassment or violence from recurring or escalating, as appropriate. For example, the school may separate the complainant and alleged perpetrator or conduct sexual harassment and sexual violence training for the school’s students and employees. Responsible employees should understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before reporting an incident to the school’s Title IX coordinator. Because the Title IX coordinator should have in-depth knowledge of Title IX and Title IX complaints at the school, he or she is likely to be in a better position than are other employees to evaluate whether an incident of sexual
harassment or sexual violence creates a hostile environment and how the school should respond. There may also be situations in which individual incidents of sexual harassment do not, by themselves, create a hostile environment; however when considered together, those incidents may create a hostile environment.

J-3. **What type of training should a school provide to employees who are involved in implementing the school’s grievance procedures?**

**Answer:** All persons involved in implementing a school’s grievance procedures (e.g., Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school’s grievance procedures. The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

In rare circumstances, employees involved in implementing a school’s grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school’s training. For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school’s current grievance procedures may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school’s grievance procedures. In-depth knowledge regarding Title IX and sexual violence is particularly helpful. Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school’s grievance procedures have the requisite training or experience is for the school to provide regular training to all individuals involved in implementing the school’s Title IX grievance procedures even if such individuals also have prior relevant experience.
J-4. What type of training on sexual violence should a school provide to its students?

Answer: To ensure that students understand their rights under Title IX, a school should provide age-appropriate training to its students regarding Title IX and sexual violence. At the elementary and secondary school level, schools should consider whether sexual violence training should also be offered to parents, particularly training on the school’s process for handling complaints of sexual violence. Training may be provided separately or as part of the school’s broader training on sex discrimination and sexual harassment. However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students. The school may want to include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights. A school should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals. OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school’s policies;
- the school’s definition of consent applicable to sexual conduct, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- how the school analyzes whether unwelcome sexual conduct creates a hostile environment;
- reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting;
- the school’s grievance procedures used to process sexual violence complaints;
- disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- effects of trauma, including neurobiological changes;
- the role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- strategies and skills for bystanders to intervene to prevent possible sexual violence;
- how to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX’s protections against retaliation.

The training should also encourage students to report incidents of sexual violence. The training should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a
hostile environment before reporting the incident. A school also should be aware that persons may be deterred from reporting incidents if, for example, violations of school or campus rules regarding alcohol or drugs were involved. As a result, a school should review its disciplinary policy to ensure it does not have a chilling effect on students’ reporting of sexual violence offenses or participating as witnesses. OCR recommends that a school inform students that the school’s primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.

It is also important for a school to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence. A school’s sexual violence education and prevention program should clearly identify the offices or individuals with whom students can speak confidentially and the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. It should also identify the school’s responsible employees and explain that if students report incidents to responsible employees (except as noted in question E-3) these employees are required to report the incident to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time, and location, although efforts should be made to comply with requests for confidentiality from the complainant. For more detailed information regarding reporting and responsible employees and confidentiality, see questions D-1 to D-5 and E-1 to E-4.

K. Retaliation

K-1. Does Title IX protect against retaliation?

Answer: Yes. The Federal civil rights laws, including Title IX, make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws. This means that if an individual brings concerns about possible civil rights problems to a school’s attention, including publicly opposing sexual violence or filing a sexual violence complaint with the school or any State or Federal agency, it is unlawful for the school to retaliate against that individual for doing so. It is also unlawful to retaliate against an individual because he or she testified, or participated in any manner, in an OCR or school’s investigation or proceeding. Therefore, if a student, parent, teacher, coach, or other individual complains formally or informally about sexual violence or participates in an OCR or school’s investigation or proceedings related to sexual violence, the school is prohibited from retaliating (including intimidating, threatening, coercing, or in any way
discriminating against the individual) because of the individual’s complaint or participation.

A school should take steps to prevent retaliation against a student who filed a complaint either on his or her own behalf or on behalf of another student, or against those who provided information as witnesses.

Schools should be aware that complaints of sexual violence may be followed by retaliation against the complainant or witnesses by the alleged perpetrator or his or her associates. When a school knows or reasonably should know of possible retaliation by other students or third parties, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and witnesses and ensure their safety as necessary. At a minimum, this includes making sure that the complainant and his or her parents, if the complainant is in elementary or secondary school, and witnesses know how to report retaliation by school officials, other students, or third parties by making follow-up inquiries to see if there have been any new incidents or acts of retaliation, and by responding promptly and appropriately to address continuing or new problems. A school should also tell complainants and witnesses that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation, but will also take strong responsive action if it occurs.

L. First Amendment

L-1. How should a school handle its obligation to respond to sexual harassment and sexual violence while still respecting free-speech rights guaranteed by the Constitution?

Answer: The DCL on sexual violence did not expressly address First Amendment issues because it focuses on unlawful physical sexual violence, which is not speech or expression protected by the First Amendment.

However, OCR’s previous guidance on the First Amendment, including the 2001 Guidance, OCR’s July 28, 2003, Dear Colleague Letter on the First Amendment, and OCR’s October 26, 2010, Dear Colleague Letter on harassment and bullying, remain fully in effect. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, when a school works to prevent

and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.

Title IX protects students from sex discrimination; it does not regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title IX. Title IX also does not require, prohibit, or abridge the use of particular textbooks or curricular materials. 37

M. The Clery Act and the Violence Against Women Reauthorization Act of 2013

M-1. How does the Clery Act affect the Title IX obligations of institutions of higher education that participate in the federal student financial aid programs?

Answer: Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX. The Clery Act requires institutions of higher education to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. The Clery Act requirements apply to many crimes other than those addressed by Title IX. For those areas in which the Clery Act and Title IX both apply, the institution must comply with both laws. For additional information about the Clery Act and its regulations, please see http://www2.ed.gov/admins/lead/safety/campus.html.

M-2. Were a school’s obligations under Title IX and the DCL altered in any way by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, including Section 304 of that Act, which amends the Clery Act?

Answer: No. The Violence Against Women Reauthorization Act has no effect on a school’s obligations under Title IX or the DCL. The Violence Against Women Reauthorization Act amended the Violence Against Women Act and the Clery Act, which are separate statutes. Nothing in Section 304 or any other part of the Violence Against Women Reauthorization Act relieves a school of its obligation to comply with the requirements of Title IX, including those set forth in these Questions and Answers, the 2011 DCL, and the 2001 Guidance. For additional information about the Department’s negotiated rulemaking related to the Violence Against Women Reauthorization Act please see http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html.

37 34 C.F.R. § 106.42.

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N. **Further Federal Guidance**

N-1. Whom should I contact if I have additional questions about the DCL or OCR’s other Title IX guidance?

**Answer:** Anyone who has questions regarding this guidance, or Title IX should contact the OCR regional office that serves his or her state. Contact information for OCR regional offices can be found on OCR’s webpage at [https://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm](https://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm). If you wish to file a complaint of discrimination with OCR, you may use the online complaint form available at [http://www.ed.gov/ocr/complaintintro.html](http://www.ed.gov/ocr/complaintintro.html) or send a letter to the OCR enforcement office responsible for the state in which the school is located. You may also email general questions to OCR at [ocr@ed.gov](mailto:ocr@ed.gov).

N-2. Are there other resources available to assist a school in complying with Title IX and preventing and responding to sexual violence?

**Answer:** Yes. OCR’s policy guidance on Title IX is available on OCR’s webpage at [http://www.ed.gov/ocr/publications.html#TitleIX](http://www.ed.gov/ocr/publications.html#TitleIX). In addition to the April 4, 2011, Dear Colleague Letter, OCR has issued the following resources that further discuss a school’s obligation to respond to allegations of sexual harassment and sexual violence:

- **Dear Colleague Letter: Harassment and Bullying** (October 26, 2010), [http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf)
- **Sexual Harassment: It’s Not Academic** (Revised September 2008), [http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf)
- **Revised Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties** (January 19, 2001), [http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf)
In addition to guidance from OCR, a school may also find resources from the Departments of Education and Justice helpful in preventing and responding to sexual violence:

- Department of Education’s Letter to Chief State School Officers on Teen Dating Violence Awareness and Prevention (February 28, 2013)  
  https://www2.ed.gov/policy/gen/guid/secletter/130228.html

- Department of Education’s National Center on Safe Supportive Learning Environments  
  http://safesupportivelearning.ed.gov/

- Department of Justice, Office on Violence Against Women  
  http://www.ovw.usdoj.gov/
SUBJECT
Board Policy III.P Student and I.T. Title IX– Second Reading

REFERENCE
April 2016 The Board approved the first reading of Board Policy I.T. Title IX and a second reading of III.P Students.

June 2016 The Board approved the second reading of Board Policy I.T. Title IX and discussed the institutions providing additional information regarding their compliance with the new policy requirements and their internal appeal processes at a future Board meeting.

December 2016 Board considered first reading of proposed changes to Board Policies I.T. and III.P.

June 2017 Board approved first reading of proposed changes to Board Policies I.T. and III.P.

APPLICABLE STATUTE, RULE, OR POLICY
Idaho State Board of Education Governing Policies & Procedures, Section I.T. and III.P.
Education Amendments of 1972, 10 USC §1681Title IX, CFR §106.1

BACKGROUND/DISCUSSION
Board Policy III.P.18

The attached revision to Board Policy III.P.18 clarifies that students are allowed to request Board review of any final institutional decision regarding a student’s attendance at the institution, except that for matters involving a violation of an institution’s code of student conduct, the matter will only be heard if the basis for the request is that the institution “substantially failed to follow its procedures resulting in a failure to give the student reasonable notice of the violation and opportunity to be heard, or to present testimony.”

Board Policy III.P.12

The attached policy revisions also include a revision to Board Policy III.P.12 which would require that an institution’s code of conduct also provide students with “an opportunity to appeal any disciplinary action.” Currently Board Policy III.P.12 requires that amendment to an institution’s statement of student rights and code of conduct requires review and approval by the institution’s chief executive officer. The Board may want to consider requiring institutional amendments to statements of student rights and codes of conduct be reviewed and approved by the Board, if the Board is concerned that future revisions might diminish existing student protections.
Board Policy I.T.

The attached policy revisions also include a revision to Policy I.T. to clarify that in cases involving allegations of sexual misconduct, an institution must provide both the complainant and respondent with an opportunity to review the institution’s investigation report and an opportunity to provide a written response within a reasonable amount of time.

IMPACT

The proposed policy amendments will clarify that students may request Board review of any final institution action except that matters involving student misconduct will only be heard if there is an allegation that an institution failed to comply with the requirements for its review process. Institutions will ensure reasonable timeframes are provided for complainants and respondents to review and respond to a Title IX investigation report.

ATTACHMENTS

Attachment 1 – Board Policy, III.P Students.  
Attachment 2 – Board Policy, I.T. Title IX

STAFF COMMENTS AND RECOMMENDATIONS

Prior to consideration of the proposed policy amendments each of the institutions provided a brief written summary to the Board at the June 2017 Board meeting of their procedures and status on appeals processes implementation of Board Policy I.T. Title IX. Institutions also addressed questions raised by the Board at the meeting. There were no changes between the first and second reading.

Staff recommends approval of the second reading of the proposed policy amendments.

BOARD ACTION

I move to approve the second reading of amendments to Board Policy III.P. Students and I.T. Title IX as submitted in Attachments 1 and 2.

Moved by __________ Seconded by __________ Carried Yes _____ No _____
The following policies and procedures are applicable to or for any person designated as a student at an institution under governance of the Board. A "student" means any person duly admitted and regularly enrolled at an institution under governance of the Board as an undergraduate, graduate, or professional student, on a full-time or part-time basis, or who is admitted as a non-matriculated student on or off an institutional campus.

1. Nondiscrimination

It is the policy of the Board that institutions under its governance must provide equal educational opportunities, services, and benefits to students without regard to race, color, religion, sex, national origin, age, handicap, or veterans status, including disabled veterans and veterans of the Vietnam era in accordance with:

a. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d et seq., which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance.

b. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap in programs and activities receiving federal financial assistance.

c. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 et seq., which prohibits discrimination on the basis of sex in education programs and activities receiving federal financial assistance.

d. The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 et seq., which prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance.

e. Chapter 59, Title 67, Idaho Code, and other applicable state and federal laws.

2. Sexual Harassment

Each institution must establish and maintain a positive learning environment for students that is fair, humane, and responsible. Sexual discrimination, including sexual harassment, is inimical to any institution.

Sexual harassment violates state and federal laws and the Governing Policies and Procedures of the Board. "Sexual harassment" means an un-welcomed sexual advance, request for sexual favors, or behavior, oral statements, or physical conduct of a sexual nature when:
a. submission to such conduct is made either explicitly or implicitly a term or condition of a student's grade, receipt of a grade, or status as a student;

b. an individual student's submission to or rejection of such conduct is used as a basis for a decision affecting the student; or

c. such conduct has the purpose or effect of substantially interfering with a student's learning or learning performance, or creating an intimidating, hostile, or offensive learning environment.

Each institution must develop and make public procedures providing for the prompt, confidential, and equitable resolution of student complaints alleging an act of sex-based discrimination, including sexual harassment.

3. Academic Freedom and Responsibility

Institutions of postsecondary education are conducted for the common good and not to further the interests of either the individual student or the institution as a whole. Academic freedom is fundamental for the protection of the rights of students in learning and carries with it responsibilities as well as rights.

Membership in an academic community imposes on students an obligation to respect the dignity of others, to acknowledge the right of others to express differing opinions, and to foster and defend intellectual honesty, freedom of inquiry and instruction, and free expression on and off the campus of an institution. Expression of dissent and attempts to produce change may not be carried out in ways which injure individuals, damage institutional facilities, disrupt classes, or interfere with institutional activities. Speakers on the campuses must not only be protected from violence but must also be given an opportunity to be heard. Those who seek to call attention to grievances must do so in ways that do not significantly impede the functioning of the institution.

Students are entitled to an atmosphere conducive to learning and to fair and even treatment in all aspects of student-teacher relationships. Teaching faculty may not refuse to enroll or teach a student because of the student's beliefs or the possible uses to which the student may put the knowledge gained from the course. Students must not be forced by the authority inherent in the instructional role to make personal or political choices.

4. Catalog and Representational Statements

Each institution will publish its official catalogue and admissions, academic, and other policies and procedures which affect students. (See also "Roles and Missions," Section III, Subsection I-2.)

Each institutional catalogue must include the following statement:

Catalogues, bulletins, and course or fee schedules shall not be considered as binding contracts between [institution] and students. The [institution] reserves the right at any time, without advance notice, to:
(a) withdraw or cancel classes, courses, and programs; (b) change fee schedules; (c) change the academic calendar; (d) change admission and registration requirements; (e) change the regulations and requirements governing instruction in and graduation from the institution and its various divisions; and (f) change any other regulations affecting students. Changes shall go into force whenever the proper authorities so determine and shall apply not only to prospective students but also to those who are matriculated at the time in [institution]. When economic and other conditions permit, the [institution] tries to provide advance notice of such changes. In particular, when an instructional program is to be withdrawn, the [institution] will make every reasonable effort to ensure that students who are within two (2) years of completing graduation requirements, and who are making normal progress toward completion of those requirements, will have the opportunity to complete the program which is to be withdrawn.

No employee, agent, or representative of an institution may make representations to, or enter into any agreement with, or act toward any student or person in a manner which is not in conformity with Board Governing Policies and Procedures or the approved policies and procedures of the institution.

5. Student Records

The collection, retention, use, and dissemination of student records is subject to the requirements of the Family Educational Rights and Privacy Act of 1974, as amended, and implementing regulations. Each institution will establish policies and procedures for maintenance of student records consistent with the act and implementing regulations and will establish and make public an appeals procedure which allows a student to contest or protest the content of any item contained in his or her institutional records.

6. Residency Status - Procedure for Determination

Rules and procedures for the determination of residency status for purposes of paying nonresident tuition are found in the State Board of Education Rule Manual IDAPA 08.01.04.

7. Full-Time Students

a. Undergraduate Student

For fee and tuition purposes, a “full-time” undergraduate student means any undergraduate student carrying twelve (12) or more credits (or equivalent in audit and zero-credit registrations).

i. Student Body Officers and Appointees

For fee and tuition purposes, the president, vice president, and senators of the associated student body government are considered full-time students when
carrying at least the following credit loads: (a) president, three (3) credits and (b) vice president and senators, six (6) credits.

ii. Editors

Editors of student published newspapers are recognized as full-time students when carrying a three credit load, and associate editors are recognized as full-time students when carrying a six credit load.

b. Graduate Student

For fee and tuition purposes, a “full-time” graduate student means any graduate student carrying nine (9) or more credits, or any graduate student on a full appointment as an instructional or graduate assistant, regardless of the number of credits for which such instructional or graduate assistant is registered.

8. Student Governance

The students at each institution may establish a student government constitution for their own duly constituted organization, which must be consistent with Board Governing Policies and Procedures. Each student constitution must be reviewed and approved by the Chief Executive Officer. Any amendments to the student constitution must also be reviewed and approved by the Chief Executive Officer.

9. Student Financial Aid

Each institution will establish policies and procedures necessary for the administration of student financial aid.

a. Transfer of Delinquent National Direct Student Loans. (See Section V, Subsection P)

b. Student Financial Aid Fraud

Each institution under governance of the Board should, as a matter of policy, initiate charges against individuals who fraudulently obtain or misrepresent themselves with respect to student financial aid.

10. Fees and Tuition

a. Establishment

Policies and procedures for establishment of fees, tuition, and other charges are found in Section V, Subsection R, of the Governing Policies and Procedures.

b. Refund of Fees

Each institution will develop and publish a schedule for refund of fees in the event a student withdraws in accordance with regulations governing withdrawal.
11. Student Employees

a. Restrictions

No student employee may be assigned to duties which are for the benefit of personal and private gain, require partisan or nonpartisan political activities, or involve the construction, operation, or maintenance of any part of any facility which is used for sectarian instruction or religious worship. No supervisor may solicit or permit to be solicited from any student any fees, dues, compensation, commission, or gift or gratuity of any kind as a condition of or prerequisite for the student's employment.

b. Policies and Procedures

Each institution will develop its own policies and procedures regarding student employment, including use of student employment as a part of financial assistance available to the student. Such policies and procedures must ensure that equal employment opportunity is offered without discrimination and that wage administration is conducted in a uniform manner. Such policies also must include a statement of benefits available to student employees, if appropriate.

c. Graduate Assistants

Each institution is delegated the authority to appoint within the limitations of available resources graduate assistants in a number consistent with the mission of the institution. Graduate assistantships are established to supplement a graduate student's course of study, with employment appropriate to the student's academic pursuits.

Each institution will establish its own procedures for appointment of graduate assistants which will include (a) qualifications, (b) clear and detailed responsibilities in writing, and (c) maximum number of hours expected and wages for meeting those requirements.

Matriculation, activity, and facility fees for graduate assistants will be paid either by the student or by the department or academic unit on behalf of the student. Graduate students will be covered by appropriate insurance in accordance with institutional procedures for work-related illness or injury.

d. Hourly or Contractual Employment

Each institution may employ students on an hourly or contractual basis in accordance with the needs of the various departments or units, available funds, and rules of the Division of Human Resources (or the University of Idaho classified employee system) or federal guidelines when work-study funds are used.
12. Student Conduct, Rights, and Responsibilities

Each institution will establish and publish a statement of student rights and a code of student conduct. The code of conduct must include procedures by which a student charged with violating the code receives reasonable notice of the charge and is given an opportunity to be heard and present testimony in his or her defense, and an opportunity to appeal any disciplinary action. Such statements of rights and codes of conduct, and any subsequent amendments, are subject to review and approval of the chief executive officer.

Sections 33-3715 and 33-3716, Idaho Code, establish criminal penalties for conduct declared to be unlawful.

13. Student Services

Each institution will develop and publish a listing of services available to students, eligibility for such services, and costs or conditions, if any, of obtaining such services.

14. Student Organizations

Each student government association is responsible, subject to the approval of the institution's chief executive officer, for establishing or terminating student organizations supported through allocation of revenues available to the association. Expenditures by or on behalf of such student organizations are subject to rules, policies, and procedures of the institution and the Board.

15. Student Publications and Broadcasts

Students are responsible for making arrangements for coverage of their medical needs while enrolled in a post-secondary institution on a part- or full-time basis. Accidents, injuries, illnesses, and other medical needs of students (with limited exceptions in the case of student employees of an institution who experience workplace injuries within the course and scope of their employment) typically are not covered by the institution's insurance policies. The types and levels of medical/clinical support services available to students varies among the institutions and among the local communities within which institutions conduct operations.

16. Student Health Insurance

The Board’s student health insurance policy is a minimum requirement. Each institution, at its discretion, may adopt policies and procedures more stringent than those provided herein.

a. Health Insurance Coverage Offered through the Institution

Each institution, at the discretion of its chief executive officer, may provide the opportunity for students to purchase health insurance through an institution-offered
Institutions are authorized to provide student health insurance plans through consortium arrangements, when this option serves the interests of students and administration. Institutions which elect to enter contractual arrangements to offer student health insurance plans (either singly or through consortium arrangements) should comply with applicable Board and State Division of Purchasing policies. Institutions which elect to offer health insurance plans to their students are authorized, at the chief executive officer’s discretion, to make student participation in such plans either optional or mandatory.

b. Mandatory Student Health Insurance

Each institution, at the discretion of its chief executive officer, may require all or specified groups (for example, international students, intercollegiate athletes, health professions students engaged in clinical activities, student teachers, etc.) to carry health insurance that meets coverage types and levels specified by the institution. Administration and enforcement of any such health insurance requirements, and procedures for dealing with any exceptions thereto, lie within the authority of the institution presidents or their designees.

c. Other Medical Support Services and Fees

Institutions are authorized to support or supplement students’ medical needs through services provided by college/university clinics, health centers, cooperative arrangements with community/regional health care providers, etc. In cases where such services are provided, institutions are authorized to establish optional or mandatory fees to cover the delivery cost of such services.

d. Financial aid considerations

Any medical insurance or health services-related fees which are mandated by an institution as a condition of participation in any institutional program are considered a bona fide component of the institution’s cost of college and are a legitimate expenditure category for student financial aid.

17. Students Called to Active Military Duty

The Board strongly supports the men and women serving in the National Guard and in reserve components of the U.S. Armed Forces. The Board encourages its institutions to work with students who are called away to active military duty during the course of an academic term and provide solutions to best meet the student’s current and future academic needs. The activated student, with the instructor’s consent, may elect to have an instructor continue to work with them on an individual basis. Additionally, institutions are required to provide at least the following:

a. The activated student may elect to completely withdraw. The standard withdrawal deadlines and limitations will not be applied. At the discretion of the institution, the
student will receive a “W” on his or her transcript, or no indication of enrollment in the course(s).

b. One hundred percent (100%) of the paid tuition and/or fees for the current term will be refunded, as well as a pro-rated refund for paid student housing fees, meal-plans, or any other additional fees. Provided, however, that if a student received financial aid, the institution will process that portion of the refund in accordance with each financial aid program.

18. Student Complaints/Grievances.

The State Board of Education and Board of Regents of the University of Idaho, as the governing body of the state’s postsecondary educational institutions, has established the following procedure for review of institution decisions regarding student complaints/grievances:

a. The Board designates its Executive Director as the Board’s representative for reviewing student complaints/grievances, and authorizes the Executive Director, after such review, to issue the decision of the Board based on such review. The Executive Director may, in his/her discretion, refer any matter to the Board for final action/decision.

b. A current or former student at a postsecondary educational institution under the governance of the Board may request that the Executive Director review any final institutional decision relating to a complaint or grievance instituted by such student related to such individual’s student attendance at the institution, except as set forth under paragraph (c). The student must have exhausted the complaint/grievance resolution procedures that have been established at the institution level. The Executive Director will not review complaints/grievances that have not been reported to the institution, or processed in accordance with the institution’s complaint/grievance resolution procedures.

b.c. Requests for review of matters involving a violation of an institution’s code of student conduct will may only be reviewed by the Board if the basis for the request for review is that the institution substantially failed to follow its procedures resulting in a failure to give the student reasonable notice of the violation and opportunity to be heard, or to present testimony. Sanctions imposed by the institution will remain in effect during the pendency of the review.

c.d. A request for review must be submitted in writing to the Board office to the attention of the Chief Academic Officer, and must contain a clear and concise statement of the reason(s) for Board review. Such request must be received in the Board office no later than thirty (30) calendar days after the student receives the institution’s final decision on such matter. The student has the burden of establishing that the final decision made by the institution on the grievance/complaint was made in error. A request for review must include a copy of the original grievance and all proposed resolutions and recommended decisions
issued by the institution, as well as all other documentation necessary to demonstrate that the student has strictly followed the complaint/grievance resolution procedures of the institution. The institution may be asked to provide information to the Board office related to the student complaint/grievance.

d.e. The Chief Academic Officer will review the materials submitted by all parties and make a determination of recommended action, which will be forwarded to the Executive Director for a full determination. A review of a student complaint/grievance will occur as expeditiously as possible.

e.f. The Board office may request that the student and/or institution provide additional information in connection with such review. In such event, the student and/or institution must provide such additional information promptly.

f.g. The Board’s Executive Director will issue a written decision as to whether the institution’s decision with regard to the student’s complaint/grievance was proper or was made in error. The Executive Director may uphold the institution’s decision, overturn the institution’s decision, or the Executive Director may remand the matter back to the institution with instructions for additional review. Unless referred by the Executive Director to the Board for final action/decision, the decision of the Executive Director is final.

The Board staff members do not act as negotiators, mediators, or advocates concerning student complaints or grievances.
Idaho State Board of Education

GOVERNING POLICIES AND PROCEDURES

SECTION: I. GENERAL GOVERNING POLICIES AND PROCEDURES

SUBSECTION: T. Title IX June 2016August 2017

1. This subsection shall apply to the University of Idaho, Boise State University, Idaho State University, Lewis-Clark State College, Eastern Idaho Technical College, College of Southern Idaho, College of Western Idaho, and North Idaho College (hereinafter “Institutions”).

Title IX of the Education Amendments of 1972 and its implementing regulations, 34 C.F.R. Sec. 106 (“Title IX”), prohibit discrimination on the basis of sex in federally funded education programs and activities. Title IX protects students, employees, applicants for admission and employment, and campus visitors from all forms of sexual harassment, including sexual violence and gender-based harassment.

Sexual violence includes sexual intercourse without consent, sexual assault, and sexual coercion. Prohibited gender-based harassment may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature.

This Policy is intended to supplement, not duplicate, Title IX guidance from the federal Department of Education’s Office of Civil Rights (“OCR”) for Institutions regarding their compliance with Title IX, specifically in regard to sexual harassment or sexual violence. Institutions should go beyond the requirements of this policy as necessary to address Title IX issues unique to individual campus populations so that students are able to fully receive the benefits of educational programs.

2. Institution Title IX policies.

Each institution shall publish its Title IX policies and procedures for students, staff and faculty. Such policies and procedures shall be updated as necessary and appropriate to comply with Title IX and guidance from OCR. Title IX coordinators shall be involved in the drafting and revision of such policies to ensure compliance with Title IX. If an institution is represented by legal counsel, its attorney also shall review the institution’s policies for compliance with Title IX and OCR guidance. Policies shall clearly describe the process for resolving alleged violations of Title IX.

3. Notification of institution Title IX policy and resources.

Notification of institution Title IX policy and resources shall be readily accessible. Institutions shall ensure that the notices of nondiscrimination on the basis of sex required by Title IX are placed prominently on their website home pages, in addition to the placement of notices in offices where students receive services, and included in printed publications for general distribution. Webpage notices shall include easily
accessible links to all applicable institution policies as well as a clear and succinct direction regarding:

- reporting Title IX violations
- accommodations and services available for complainants
- the investigation and hearing process, including appeal rights, and all applicable time frames
- the institution’s Title IX coordinator, including the Title IX coordinator’s name and contact information

4. Title IX Coordinators.

Each institution shall designate a Title IX Coordinator who shall be an integral part of an institution’s systematic approach to ensuring Title IX compliance. Title IX coordinators shall have the institutional authority and resources necessary to promote an educational environment that is free of discrimination, which includes stopping any harassment and preventing any reoccurring harassment, as well as the authority to implement accommodations during an investigation so that the complainant does not suffer additional effects of the sexual discrimination or violence.

Institutions are encouraged to facilitate regular communication between Title IX coordinators in order for them to share best practices and training resources.

5. Education of Students and Training to Prevent Sexual Violence.

Institutions shall implement evidence informed strategies that seek to prevent sexual harassment, sexual assault, gender based violence and high-risk activities, including alcohol education programming and other student outreach efforts (e.g. bystander education programming). Data shall be collected from an institution’s constituency on a regular basis to evaluate and improve on the institution’s efforts to prevent sexual discrimination.

6. Education of parties receiving or adjudicating Title IX complaints.

All employees shall receive training pertaining to Title IX and the institution’s Title IX policy. Employees likely to witness or receive reports of sexual harassment and sexual violence shall receive enhanced training which, at a minimum, includes the requirements of Title IX, the proper method for reporting sexual harassment and sexual violence, and the institution’s responsibilities for responding to reports of sexual harassment and sexual violence. Institution employees who will likely require enhanced training include: Title IX coordinators, campus law enforcement personnel, student conduct board members, student affairs personnel, academic advisors, residential housing advisors, and coaches. All employees who learn of an allegation of sexual harassment, including sexual violence and gender-based harassment, (and are not required by law to maintain the confidentiality of the disclosure, such as
licensed medical professionals or counselors) are required to report it to the Title IX coordinator within 24 hours.

Fact finders and decision makers involving resolution of Title IX violations shall also have adequate training or knowledge regarding sexual assault, including the interpretation of relevant medical and forensic evidence.

7. Investigation and resolution of Title IX violations

An institution shall take immediate steps to protect a complainant in the educational setting. Individuals reporting being subjected to sexual violence shall be notified of counseling and medical resources, and provided with necessary accommodations such as academic adjustments and support services, and changes to housing arrangements. In some cases, a complainant may need extra time to complete or re-take a class or withdraw from a class without academic or financial penalty. Institutions shall not wait for the conclusion of a criminal investigation or proceeding before commencing a Title IX investigation.

Institutions shall not wait for the conclusion of a criminal investigation or proceeding before commencing a Title IX investigation.

Institution Title IX policies shall include a prompt and equitable process for resolution of complaints as early as possible in order to effectively correct individual or systemic problems. Both the complainant and the respondent shall be provided an opportunity to explain the event giving rise to the complaint. Once an institution has completed its investigation report, both the complainant and the respondent shall be given an opportunity to review the report and to provide a written response to it within a reasonable amount of time. All timeframes shall be clearly communicated with the parties and regular status updates shall be provided. Both parties to a complaint shall be notified in writing of the outcome of the complaint, including whether sexual harassment or violence was found based upon a preponderance of the evidence to have occurred and, in accordance with federal and state privacy laws, the sanction imposed. Both the complainant and respondent shall have the same rights of appeal.

In cases involving a student-respondent, withdrawal from the institution shall not be used as a method to avoid completion of the investigation. An institution may place a hold on a student-respondent’s student account or otherwise temporarily restrict his or her ability to request an official transcript until completion of the investigation.

8. Disciplinary Actions

If a student is found to have violated an institution’s Title IX policy, disciplinary action shall be imposed in accordance with the institution’s student code of conduct. If the student is suspended or expelled, that action shall be noted in the student’s education records and communicated to a subsequent institution at which the student seeks to enroll, provided that the subsequent institution or student has requested the student’s education record from the prior institution. If an institution employee is found to have violated an institution’s Title IX policy, disciplinary action will be imposed in accordance with the applicable institution’s human resources policies and procedures.
Action for former students at state supported college seeking preliminary and permanent injunction restraining State Board of Education and others from obstructing their right to attend college. From a judgment of the United States District Court for the Middle District of Alabama, Frank M. Johnson, Jr., J., 186 F.Supp. 945, upholding the dismissal and denying requested relief, the students appealed. The Court of Appeals, Rives, Circuit Judge, held that due process required notice and some opportunity for a hearing before the students at the tax-supported college could be expelled for misconduct.

Reversed and remanded.

Cameron, Circuit Judge, dissented.

West Headnotes (1)

[1]  
> **Constitutional Law**

> **Disciplinary Proceedings**

Due process requires notice and some opportunity for hearing before a student at a tax-supported college can be expelled for misconduct.

367 Cases that cite this headnote

Attorneys and Law Firms

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Before RIVES, CAMERON and WISDOM, Circuit Judges.

Opinion

RIVES, Circuit Judge.

The question presented by the pleadings and evidence,¹ and decisive of this appeal, is whether due process requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct. We answer that question in the affirmative.

The misconduct for which the students were expelled has never been definitely specified. Defendant Trenholm, the President of the College, testified that he did not know why the plaintiffs and three additional students were expelled and twenty other students were placed on probation. The notice of expulsion² *152 which Dr. Trenholm mailed to each of the plaintiffs assigned no specific ground for expulsion, but referred in general terms to ‘this problem of Alabama State College.’

The acts of the students considered by the State Board of Education before it ordered their expulsion are described in the opinion of the district court reported in 186 F.Supp. 954, 947, from which we quote in the margin.³

As shown by the findings of the district court, just quoted in footnote 3, the only demonstration which the evidence showed that all of the expelled students took part in was that in the lunch grill located in the basement of the Montgomery County Courthouse. The other *153 demonstrations were found to be attended ‘by several if not all of the plaintiffs.’ We have carefully read and studied the record, and agree with the district court that the evidence does not affirmatively show that all of the plaintiffs were present at any but the one demonstration.
Only one member of the State Board of Education assigned the demonstration attended by all of the plaintiffs as the sole basis for his vote to expel them. Mr. Harry Ayers testified:

‘Q. Mr. Ayers, did you vote to expel these negro students because they went to the Court House and asked to be served at the white lunch counter? A. No, I voted because they violated a law of Alabama.

‘Q. What law of Alabama had they violated? A. That separating of the races in public places of that kind.

‘Q. And the fact that they went up there and requested service, by violating the Alabama law, then you voted to have them expelled? A. Yes.

‘Q. And that is your reason why you voted? A. That is the reason.’

The most elaborate grounds for expulsion were assigned in the testimony of Governor Patterson:

‘Q. There is an allegation in the complaint, Governor, that- I believe it is paragraph six, the defendants' action of expulsion was taken without regard to any valid rule or regulation concerning student conduct and merely retaliated against, punished, and sought to intimidate plaintiffs for having lawfully sought service in a publicly owned lunch room with service; is that statement true or false?

‘A. Well, that is not true; the action taken by the State Board of Education was- was taken to prevent- to prevent incidents happening by students at the College that would bring- bring discredit upon- upon the School and be prejudicial to the School, and the State- as I said before, the State Board of Education took- considered at the time it expelled these students several incidents, one at the Court House at the lunch room demonstration, the one the next day at the trial of this student, the marching on the steps of the State Capitol, and also this rally held at the church, where- where it was reported that- that statements were made against the administration of the School. In addition to that, the- the feeling going around in the community here due to- due to the reports of these incidents of the students, by the students, and due to reports of incidents occurring involving violence in other States, which happened prior to these things starting here in Alabama, all of these things were discussed by the State Board of Education prior to the taking of the action that they did on March 2 and as I was present and acting as Chairman, as a member of the Board, I voted to expel these students and to put these others on probation because I felt that that was what was in the best interest of the College. And the- I felt that the action should be- should be prompt and immediate, because if something- something had not been done, in my opinion, it would have resulted in violence and disorder, and that we wanted to prevent, and we felt that we had a duty to the- to the- to the parents of the students and to the State to require that the students behave themselves while they are attending a State College, and that is (sic) the reasons why we took the action that we did. That is all.’

Superintendent of Education Stewart testified that he voted for expulsion because the students had broken rules and regulations pertaining to all of the State institutions, and, when required to be more specific, testified:

‘The Court: What rule had been broken is the question, that justified *154 the expulsion insofar as he is concerned?

‘A. I think demonstrations without the consent of the president of an institution.’

The testimony of other members of the Board assigned somewhat varying and differing grounds and reasons for their votes to expel the plaintiffs.

The district court found the general nature of the proceedings before the State Board of Education, the action of the Board, and the official notice of expulsion given to the students as follows:

‘Investigation into this conduct were made by Dr. Trenholm, as president of the Alabama State College, the Director of Public Safety for the State of Alabama under directions of the Governor, and by the investigative staff of the Attorney General for the State of Alabama.

‘On or about March 2, 1960, the State Board of Education met and received reports from the Governor of the State of Alabama, which reports embodied the investigations that had been made and which reports identified these six plaintiffs, together with several others, as the ‘ring leaders' for the group of students that had been participating in the above-recited activities. During this meeting, Dr. Trenholm, in his capacity as president of the college reported to the assembled members of
the State Board of Education that the action of these students in demonstrating on the college campus and in certain downtown areas was having a disruptive influence on the work of the other students at the college and upon the orderly operation of the college in general. Dr. Trenholm further reported to the Board that, in his opinion, he as president of the college could not control future disruptions and demonstrations. There were twenty-nine of the Negro students identified as the core of the organization that was responsible for these demonstrations. This group of twenty-nine included these six plaintiffs. After hearing these reports and recommendations and upon the recommendation of the Governor as chairman of the Board, the Board voted unanimously, expelling nine students, including these six plaintiffs, and placing twenty students on probation. This action was taken by Dr. Trenholm as president of the college, acting pursuant to the instructions of the State Board of Education. Each of these plaintiffs, together with the other students expelled, was officially notified of his expulsion on March 4th or 5th, 1960. No formal charges were placed against these students and no hearing was granted any of them prior to their expulsion.


The evidence clearly shows that the question for decision does not concern the sufficiency of the notice or the adequacy of the hearing, but is whether the students had a right to any notice or hearing whatever before being expelled. The district court wrote at some length on that question, as appears from its opinion. Dixon v. Alabama State Board of Education, supra, 186 F.Supp. at pages 950-952. After careful study and consideration, we find ourselves unable to agree with the conclusion of the district court that no notice or opportunity for any kind of hearing was required before these students were expelled.

It is true, as the district court said, that ‘* * * there is no statute or rule that requires formal charges and/or a hearing * * *,’ but the evidence is without dispute that the usual practice at Alabama State College had been to give a hearing and opportunity to offer defenses before expelling a student. Defendant Trenholm, the College President, testified:

‘Q. The essence of the question was, will you relate to the Court the usual steps that are taken when a student's conduct has developed to the point where it is necessary for the administration to punish him for the conduct?

‘A. We normally would have conference with the student and notify him that he was being asked to withdraw, and we would indicate why he was being asked to withdraw. That would be applicable to academic reasons, academic deficiency, as well as to any conduct difficulty.

‘Q. And at this hearing ordinarily that you would set, then the student would have a right to offer whatever defense he may have to the charges that have been brought against him?

‘A. Yes.’

Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved. As stated by Mr. Justice Frankfurter concurring in Joint Anti-Fascist Refugee Committee v. McGrath, 1951, 341 U.S. 123, 163, 71 S.Ct. 624, 644, 95 L.Ed. 817:

‘Whether the ex parte procedure to which the petitioners were subjected duly observed ‘the rudiments of fair play’, * * * cannot* * * be tested by mere generalities or sentiments abstractly appealing. The precise nature or the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished- these are some of the considerations that must enter into the judicial judgment.’

*156 Just last month, a closely divided Supreme Court held in a case where the governmental power was almost absolute and the private interest was slight that no hearing was required. Cafeteria and Restaurant Workers Union v. McElroy et al., 1961, 81 S.Ct. 1743. In that case, a short-order cook working for a privately operated cafeteria on the premises of the Naval Gun Factory in the City of Washington was excluded from the Gun Factory as a security risk. So, too, the due process clause does not require that an alien never admitted to this Country be granted a hearing before being excluded. United States ex rel. Knauff v. Shaughnessy, 1950, 338 U.S. 537, 542,
543, 70 S.Ct. 309, 94 L.Ed. 317. In such case the executive power as implemented by Congress to exclude aliens is absolute and not subject to the review of any court, unless expressly authorized by Congress. On the other hand, once an alien has been admitted to lawful residence in the United States and remains physically present here it has been held that, ‘although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard.’ Kwong Hai Chew v. Colding, 1953, 344 U.S. 590, 597, 598, 73 S.Ct. 472, 478, 97 L.Ed. 576.

It is not enough to say, as did the district court in the present case, ‘The right to attend a public college or university is not in and of itself a constitutional right.’ 186 F.Supp. at page 950. That argument was emphatically answered by the Supreme Court in the Cafeteria and Restaurant Workers Union case, supra, (81 S.Ct. 1748,) when it said that the question of whether *** summarily denying Rachel Brawner access to the site of her former employment violated the requirements of the Due Process Clause of the Fifth Amendment *** cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. ‘One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law.’ As in that case, so here, it is necessary to consider ‘the nature both of the private interest which has been impaired and the governmental power which has been exercised.’

The appellees urge upon us the under a provision of the Board of Education's regulations the appellants waived any right to notice and a hearing before being expelled for misconduct.

‘Attendance at any college is on the basis of a mutual decision of the student's parents and of the college. Attendance at a particular college is voluntary and is different from attendance at a public school where the pupil may be required to attend a particular school which is located in the neighborhood or district in which the pupil's family may live. Just as a student may choose to withdraw from a particular college at any time for any personally-determined reason, the college may also at any time decline to continue to accept responsibility for the supervision and service to any student with whom the relationship becomes unpleasant and difficult.’

We do not read this provision to clearly indicate an intent on the part of the student to waive notice and a hearing before expulsion. If, however, we should so assume, it nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process. See Slochower v. Board of Education, 1956, 350 U.S. 551, 555, 76 S.Ct. 637, 100 L.Ed. 692; Wieman v. Updegraff, 1952, 344 U.S. 183, 191, 192, 73 S.Ct. 215, 97 L.Ed. 216; United Public Workers of America (C.I.O.) v. Mitchell, 1947, 330 U.S.75, 100, 67 S.Ct. 556, 91 L.Ed. 754; Shelton v. Tucker, 1960, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231. Only private associations have the right to obtain a waiver of notice and hearing before depriving *157 a member of a valuable right. And even here, the right to notice and a hearing is so fundamental to the conduct of our society that the waiver must be clear and explicit. Medical and Surgical Society of Montgomery County v. Weatherly, 75 Ala. 248, 256-259. In the absence of such an explicit waiver, Alabama has required that even private associations must provide notice and a hearing before expulsion. In Medical and Surgical Society of Montgomery County v. Weatherly, supra, it was held that a physician could not be expelled from a medical society without notice and a hearing. In Local Union No. 57, etc. v. Boyd, 1944, 245 Ala. 227, 16 So.2d 705, 711, a local union was ordered to reinstate one of its members expelled after a hearing of which he had insufficient notice.

The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.

There was no offer to prove that other colleges are open to the plaintiffs. If so, the plaintiffs would nonetheless be injured by the interruption of their course of studies in mid-term. It is most unlikely that a public college would accept a student expelled from another public college of the same state. Indeed, expulsion may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value.
Turning then to the nature of the governmental power to expel the plaintiffs, it must be conceded, as was held by the district court, that that power is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement. The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case. Indeed, that result is well nigh inevitable when the Board hears only one side of the issue. In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. Indeed, the example set by the Board in failing so to do, if not corrected by the courts, can well break the spirits of the expelled students and of others familiar with the injustice, and do inestimable harm to their education.

The district court, however, felt that it was governed by precedent, and stated that, 'the courts have consistently upheld the validity of regulations that have the effect of reserving to the college the right to dismiss students at any time for any reason without divulging its reason other than its being for the general benefit of the institution.' (186 F.Supp. 951.) With deference, we must hold that the district court has simply misinterpreted the precedents.

The language above quoted from the district court is based upon language found in 14 C.J.S. Colleges and Universities § 26, p. 1360, which, in turn, is paraphrased from Anthony v. Syracuse University, 224 App.Div. 487, 231 N.Y.S. 435, reversing 130 Misc.2d 249, 223 N.Y.S. 796, 797. (14 C.J.S. Colleges and Universities § 26, pp. 1360, 1363 note 70.) This case, however, concerns a private university and follows the wellsettled rule that the relations between a student and a private university are a matter of contract. The Anthony case held that the plaintiffs had specifically waived their rights to notice and hearing. See also Barker v. Bryn Mawr, 1923, 278 Pa. 121, 122 A. 220. The precedents for public colleges are collected in a recent annotation cited by the district court. 58 A.L.R.2d 903-920. We have read all of the cases cited to the point, and we agree with what the annotator himself says: ‘The cases involving suspension or expulsion of a student from a public college or university all involve the question whether the hearing given to the student was adequate. In every instance the sufficiency of the hearing was upheld.’ 58 A.L.R.2d at page 909. None held that no hearing whatsoever was required. Two cases not found in the annotation have held that some form of hearing is required. In Commonwealth ex rel. Hill v. McCauley, 1886, 3 Pa.Co.Ct.R. 77, the court went so far as to say that an informal presentation of the charges was insufficient and that a state-supported college must grant a student a full hearing on the charges before expulsion for misconduct. In Gleason v. University of Minnesota, 1908, 104 Minn. 359, 116 N.W. 650, on reviewing the overruling of the state's demurrer to a petition for mandamus for reinstatement, the court held that the plaintiff stated a prima facie case upon showing that he had been expelled without a hearing for alleged insufficiency in work and acts of insubordination against the faculty.

The appellees rely also upon Lucy v. Adams, D.C.N.D.Ala.1957, 134 F.Supp. 235, where Atherine Lucy was expelled from the University of Alabama without notice or hearing. That case, however, is not in point. Atherine Lucy did not raise the issue of an absence of notice or hearing.

It was not a case denying any hearing whatsoever but one passing upon the adequacy of the hearing, which provoked from Professor Warren A. Seavey of Harvard the eloquent comment:

‘At this time when many are worried about dismissal from public service, when only because of the overriding need to protect the public safety is the identity of informers kept secret, when we proudly contrast the full hearings before our courts with those in the benighted countries which have no due process protection, when many of our courts are so careful in the protection of those charged with crimes that they will not permit the use of evidence illegally obtained, our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.’ Dismissal of Students: ‘Due Process,’ Warren A. Seavey, 70 Harvard Law Review 1406, 1407. We are confident that precedent as well as a most fundamental constitutional principle support our holding that due process requires notice and some opportunity for hearing.
before a student at a tax-supported college is expelled for misconduct.

For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

CAMERON, Circuit Judge (dissenting).

The opinion of the district court in this case is so lucid, literate and moderate that I cannot forego expressing surprise that my brethren of the majority can find fault with it. In this dissent I shall try to avoid repeating what the lower court has so well said and to confine myself to an effort to refute the holdings of the majority where they do attack and reject the lower court's opinion.

A good place to start is the quotation made by the majority from the recent case of Cafeteria and Restaurant Workers Union v. McElroy, 1961, 81 S.Ct. 1743, wherein the discussion is made of one's right to 'go to Bagdad.' I would add to the language quoted by the majority from that case the sentences which follow it:

'It is the petitioner's claim that due process in this case required that Rachel Brawner be advised of the specific grounds for her exclusion and be accorded a hearing at which she might refute them. We are satisfied, however, that under the circumstances of this case such a procedure was not constitutionally required.

'The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interests. "* * * The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. * * * 'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions * * *' Joint Anti-Fascist (Refugee) Comm (ittee) v. McGrath, 341 U.S. 123, 162-163 (71 S.Ct. 624, 643, 95 L.Ed. 817) (concurring opinion).

'As these and other cases make clear, consideration of what procedure due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in over-simplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required.

CAMERON, Circuit Judge (dissenting).
The failure of the majority to follow the reasoning of McElroy, supra, results, in my opinion, from a basic failure to understand the nature and mission of schools. The problem presented is sui generis.

Everyone who has dealt with schools knows that it is necessary to make many rules governing the conduct of those who attend them, which do not reach the concept of criminality but which are designed to regulate the relationship between school management and the student based upon practical and ethical considerations which the courts know very little about and with which they are not equipped to deal. To extend the injunctive power of federal courts to the problems of day to day dealings between school authority and student discipline and morale is to add to the now crushing responsibilities of federal functionaries, the necessity of qualifying as a Gargantuan aggregation of wet nurses or baby sitters. I do not believe that a balanced consideration of the problem with which we are dealing contemplates any such extreme attitude. Indeed, I think that the majority has had to adopt the minority view of the courts in order to reach the determination it has here announced.

Nor do I find of favorable (to the majority) significance the introductory sentence quoted by it from the annotation in 58 A.L.R. at page 909. The quoted statement implies, rather, that there is no case where a student at a public college or university has taken the position that he was entitled to a hearing before being expelled. More in point, it seems to me, is the addition to the text found on page 4 of the July 1961 pocket part of American Jurisprudence, Vol. 55, § 22, page 16, of the article on Universities and Colleges. I quote the closing sentences of 55 Am.Jur., § 22, pp. 15-16 of that article, adding the paragraph appearing in the pocket part:

‘* * * Where the conduct of a student is such that his continued presence in the school will be disastrous to its proper discipline and to the morals of the other pupils, his expulsion is justifiable. Only where it is clear that such an action with respect to a student has not been an honest exercise of discretion, or has arisen from some motive extraneous to the purposes committed to that discretion, may the courts be called upon for relief.

‘There is a conflict of authority as to whether notice of the charges and hearing are required before suspensions or expulsion of a student. Assuming that a student is entitled to a hearing prior to his expulsion from an institution of learning, the authorities are not in agreement as to what kind of hearing must be given to him. A few cases hold that he is entitled to a formal hearing clothed with all the attributes of a judicial hearing. However, the weight of authority is to the effect that no formal hearing is required.’

The general rule covering the subtitle ‘Government and Discipline’ in the general treatise on Colleges and Universities is thus stated in the black-typed summary of the law in Vol. 14 C.J.S. Colleges and Universities, § 26, page 1360:

‘Broadly speaking, the right of a student to attend a public or private college or university is subject to the condition that he comply with its scholastic and disciplinary requirements, and the proper college authorities may in the exercise of a broad discretion formulate and enforce reasonable rules and regulations in both respects. The courts will not interfere in the absence of an abuse of such discretion.’

All of these expressions of the general rule seem to me to justify and require our adherence to that rule under the facts of this case. The majority opinion sets out many of them, but I think its statement should be supplemented and set forth in chronological order.

Appellants and other members of the student body of Alabama State College had, for a period prior to the happenings outlined, been attending meetings at Negro churches and other places where outsiders, including professional agitators, had been counseling that the students of that institution engage in ‘demonstrations.’ Appellants, along with a total of between twenty-nine and thirty-five students of the college, proceeded en masse into a snack bar in the basement of the county court house at Montgomery, Alabama, seating themselves in the privately owned facility so as to occupy nine tables. The lady in charge of the eating place asked them to depart and they refused. Officers were called and, upon their arrival, they first asked that all white patrons leave the premises, which was promptly done. The Negroes refused their request to leave until the lights were put out, whereupon they proceeded to the hall of the court house. Inasmuch as they were blocking ingress and egress therefrom, they were ordered by the officers to take their stands against the walls, which they did. They remained in the court house about one and one-half hours following
their entrance about 11:00 A.M. They refused to give their names to reporters who interviewed them. The occurrence took place on February 25, 1960.

The president of the college, H. Councill Trenholm, investigated the occurrence at the direction of the governor of Alabama and made his report and recommendation to the State Board of Education. About five o'clock on the afternoon of the occurrence he had released a mimeographed statement making an appeal to the students and staff that they ‘refrain from any activities which may have a damaging effect upon the reputation and relationships of college and * * * have concern that there not be any type of further involvement of any identified student of Alabama State College.’ He reported that, from his investigation conducted on the campus, it was his opinion that twenty-nine students who were the leaders in the activities he had investigated were subject to expulsion. 4

*162 On February 26, 1960, several hundred students, including appellants, staged another demonstration at the Montgomery Court House by attending a trial where a fellow student was charged with perjury to which he pleaded guilty. The several hundred demonstrators marched around the court house and then walked, two by two, back to the college about two miles away. A snapshot received in evidence depicted a mob-like gathering, on the college campus on the same day, of a large number of students ganged about the college president of thirty-five years tenure. The expressions on the faces of the participants, including at least some of appellants, portrayed a group in the grip of anger, exhibiting a threatening and menacing attitude. The scene spoke more eloquently to the trial court of the spirit and attitude of the appellants and the followers they had gathered than many reams of oral testimony could have.

February 27, several hundred Negro college students, including appellants, staged mass demonstrations in Montgomery and Tuskegee, some of which were attended by violence. On the same day a large group of students from the college, including appellants, gathered at a Negro church and one of appellants, Bernard Lee, filed a petition with the governor in which it was stated, among other things: ‘We strongly feel that our conduct was not of such that we should owe our college or state an apology. If our conduct has disturbed you or President Trenholm, we regret this. But we have no sense of shame or regret for our conduct * * *.

On the same day the governor was advised by the college president that he had called upon members of the student body to behave themselves and return to classes and had urged the students not to engage in conduct which might cause racial disturbances. A like plea was made by the Attorney General of Alabama both to white and colored people. March 1, 1960, at about 8:00 A.M., approximately six hundred students of the college marched to the steps of the state capitol, where student leaders, including appellants, made addresses calling on all the students to boycott and strike against the college if any students were expelled. The gathering was policed by a number of the state officials to prevent untoward incidents.

March 2, 1960, the States Board of Education met and heard Dr. Trenholm's report, ordering the nine students mentioned above to be expelled and twenty to be placed on probation. The Board had the benefit of reports made by agents of the Department of Public Safety, which revealed the names of the demonstrators and of their leaders, as well as that of college president and of the governor who had witnessed portions of the demonstrations.

March 3, 1960, the date of the expulsion order, about two thousand Negro students staged a demonstration at a church near the college campus at which appellants were the leaders. They urged the students to refrain from returning to classes and from registration for the new term, and publicly denounced the State Board and the college administration. The students stayed away from classes and milled about the campus in general disorder.

These events all transpired before the expulsion of appellants. But the ‘demonstrations' did not cease. March 4, a wildly cheering crowd of Negro students gathered at a church and were addressed by one or more agitators of national prominence, and an appeal was made for a meeting the following Sunday on the steps of the state capitol. At the meeting, one or more of appellants and a number of other students were very critical of the governor and the college administration.

*163 March 5, 1960, appellant Bernard Lee, representing the demonstrators, sent a telegram to the president of the student body at Tuskegee urging them to join in the demonstrations.

March 6, 1960, several thousand Negroes, including appellants and hundreds of the students of the college assembled near the steps of the capitol and approximately
ten thousand white people gathered in the same vicinity. A large gathering of city and county officers and the use of fire hose finally avoided an open clash between the two groups. For a number of days following, there were demonstrations on the campus of the college accompanied by some violence and some arrests were made by the police.

March 11, the entire group which had initiated the demonstrations were convicted and fined. Several months later, appellants and several other students were still engaged in constant efforts to stir up trouble and dissension among the students and faculty of the college.

After appellants were expelled a document signed by one of them, on behalf of the executive committee of the student body, issued a public call to the student body of every school in Alabama, in the South and in the nation to support the appellants, and the same document called upon parents, teachers and the people of the nation to give them support.

Each of the appellants had, in his application for admission to the college, agreed in writing to abide by college policies and regulations relating to admission, attendance, conduct, withdrawal or dismissal.

A part of the foregoing recital is taken from the affidavit of Governor Patterson of Alabama. It was attached to and offered as a portion of the answer of appellees to the complaint and the motion for preliminary injunction. This motion was considered along with all of the other motions filed and with the hearing of witnesses and was included in the order from which this appeal was taken. The affidavit was competent evidence even in a court. Rule 43(e) F.R.Civ.P., 28 U.S.C.A.

The opinion of the majority stresses that definite proof was not made of the attendance of all of the appellants at all of the ‘demonstrations’ (the work is taken from the testimony of the only appellant who testified in the court below). I think that ample showing was made to establish that the appellants were at all of the demonstrations and were the ringleaders of them. They participated in the enterprise as joint venturers from the start and every document emanating from them showed the adhesiveness of the group.

It is interesting to find what the majority considers to be the significance of an assumed absence of proof in the light of the fact that only one of the appellants took the witness stand in the court below, although they all announced at the outset that they were ready for trial and manifestly were present in court. Their presence and participation in all which transpired was shown by believable evidence and circumstances and stand wholly undenyed. In a recent case charging a fraudulent civil conspiracy against a defendant where the proof was very slim, this Court speaking through Judge Rives, stated the rule as follows:

‘Certainly, the proof was sufficient to make out a prima facie case of appellant's involvement in each of the transactions and liability to respond civilly in liquidated damages under the statute; * * * his failure either to take the stand, or show that he was unable to testify, or even to offer any excuse whatever for his failure to testify in explanation of suspicious facts and circumstances peculiarly within his knowledge, fairly warrants the inference that his testimony, if produced, would have been adverse.’ See to the same effect these additional cases from this Circuit: United States v. Leveson, 1959, 262 F.2d 659; United States v. Marlowe, 1956, 235 F.2d 366; Williams v. United States, 1952, 199 F.2d 921; Paudler v. Paudler, 1950, 185 F.2d 901, certiorari denied 341 U.S. 920, 71 S.Ct. 742, 95 L.Ed. 1354; and United States v. Priola, 1959, 272 F.2d 589.

A fortiori, in an equity case where parties are seeking the extreme remedy of injunction against state officers, it does not lie in the mouths of appellants to decry the weakness of the opposition proof when they, having all the facts in their possession, sit silently by when challenged by assertions which it behooved them to refute if they would support their case. They were accused and convicted by competent proof, including a picture and writings authored by them, of public boorishness, of defying the authority of the officials of their school and state, of blatant insubordination, of endeavoring to disrupt the school they had agreed to support with loyalty, as well as to break up other schools, and had openly incited to riot; and when their time came to speak, they stood mute, offering only one of their group along with the college president and two newspaper reporters as witnesses.

Before they were notified of their expulsion they had issued public statements admitting everything which was the basis of their expulsion, and had disclosed everything they could have brought forward in any hearing which might have been given them before they were notified that their conduct required their separation from connection with the college. It is difficult to perceive the validity of the
argument that they were not given a hearing when, called upon to refute proof offered against them and themselves carrying the burden of proof throughout, they failed to say a word in their defense.

We are trying here the actions of State officials, which actions we are bound to invest with every presumption of fairness and correctness. Certainly the Board had before it a responsible and credible showing which justified their finding that these appellants were guilty of wilful disobedience of the rules and directives of the head of the college they were attending and of conduct prejudicial to the school and unbecoming a student or future teacher in the schools of Alabama, as well as of insubordination and insurrection and inciting other peoples to like conduct. It is undisputed that the Board made a leisurely and careful investigation and passed its judgment in entire good faith. The State of Alabama had no statute and the school had no rule or regulation requiring any other hearing then that which was had, and the Board was entirely justified in declining ‘to continue to accept responsibility for the supervision and service to any student with whom the relationship becomes unpleasant and difficult.’ It is worth noting, too, that President Trenholm, testifying as a witness for appellants, stated that the rules of the school had been in effect more than thirty years; and that there was no requirement in them for notice or hearing and that prior practices did not include such as a precedent.

It is undisputed that failure to act as the Board did act would have resulted in a complete disruption of discipline and probable breaking up of a school whose history ran back many years, and whose president had held the position for thirty-five years. If he and the School Board had done less, they would, in my opinion, have been recreant to their duties. The moderate action they took did bring order out of chaos and enable the school to continue operation.

I do not feel that we are called upon here to volunteer our ideas of procedure in separating students from state colleges and universities. I think each college should make its own rules and should apply them to the facts of the case before it, and that the function of a court would be to test their validity if challenged in a proper court proceeding.

A sane approach to a problem whose facts are closely related to the one before us was made by the United States Court of Appeals for the Second Circuit in Steier v. New York State Education Commission et al., 1959, 271 F.2d 13. Its attitude is thus epitomized on page 18:

‘Education is a field of life reserved to the individual states. The only restriction the Federal Government imposes is that in their educational program no state may discriminate against an individual because of race, color or creed.

‘As so well stated by Judge Wyzanski in Cranney v. Trustees of Boston University, D.C., 139 F.Supp. 130, to expand the Civil Rights Statute so as to embrace every constitutional claim such as here made would in fact bring within the initial jurisdiction of the United States District Courts that vast array of controversies which have heretofore been raised in state tribunals by challenges founded upon the 14th Amendment to the United States Constitution. It would be arrogating to (the) United States District Courts that which is purely a State Court function. Conceivably every State College student, upon dismissal from such college, could rush to a Federal Judge seeking review of the dismissal.

‘It is contrary to the Federal nature of our system-contrary to the concept of the relative places of States and Federal Courts.

‘Whether or not we would have acted as did the Administrator of Brooklyn College in dismissing the plaintiff matters not. For a Federal District Court to take jurisdiction of a case such as this would lead to confusion and chaos in the entire field of jurisprudence in the states and in the United States.’

Certainly I think that the filing of charges, the disclosure of names of proposed witnesses, and such procedures as the majority discusses are wholly unrealistic and impractical and would result in a major blow to our institutions of learning. Every attempt at discipline would probably lead to a cause celebre, in connection with which federal functionaries would be rushed in to investigate whether a federal law had been violated. I think we would do well to bear in mind the words of Mr. Justice Jackson: 6

‘* * * no local agency which is subject to federal investigation, inspection, and discipline is a free agency. I cannot say that our country could have no central police without becoming totalitarian, but I can say with great conviction that it cannot become totalitarian without a centralized national police.’
I think, moreover, that, in these troublous times, those in positions of responsibility in the federal government should bear in mind that the maintenance of the safety, health and morals of the people is committed under our system of government to the states. More than a hundred year ago Chief Justice Marshall stated the principle in these words:

‘The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states.’

I dissent.

All Citations

294 F.2d 150

Footnotes

1 The complaint alleges that ‘Defendant Trenholm on March 4, 1960, notified plaintiffs of their expulsion effective March 5, 1960, without any notice, hearing, or appeal,’ and further avers:

‘Expulsion from Alabama State College came without warning, notice of charges, opportunity to appear before defendants or at any other hearing, opportunity to offer testimony in defense, cross-examination of accusers, appeal, or other opportunity to defend plaintiff’s right not to be arbitrarily expelled from defendant College. Defendants’ expulsion order, issued by the defendants functioning under the statutes, laws and regulations of the State of Alabama, thereby deprived plaintiffs of rights protected by the due process clause of the Fourteenth Amendment to the United States Constitution.’

To this averment the defendants respond:

‘* * * that the facts set forth in plaintiffs’ complaint show no violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; that plaintiffs have no constitutional right to attend Alabama State College; that the facts stated by plaintiffs in their complaint show that this Court is without jurisdiction for no arbitrary action is alleged except as conclusions unsupported by the facts alleged; that the defendants determined in good faith and within their authority as the governing authorities of Alabama State College that the expulsions of the plaintiffs were for the best interests of the college and based upon undisputed conduct of plaintiffs while students at said college.’

As will appear later in this opinion, the issue thus squarely presented by the pleadings was fully developed in the evidence.

2 Letter from Alabama State College, Montgomery, Alabama, dated March 4, 1960, signed by H. Councill Trenholm, President:

‘Dear Sir:

‘This communication is the official notification of your expulsion from Alabama State College as of the end of the 1960 Winter Quarter.

‘As reported through the various news media, The State Board of Education considered this problem of Alabama State College at its meeting on this past Wednesday afternoon. You were one of the students involved in this expulsion-directive by the State Board of Education. I was directed to proceed accordingly.

‘On Friday of last week, I had made the recommendation that any subsequently-confirmed action would not be effective until the close of this 1960 Winter Quarter so that each student could thus have the opportunity to take this quarter’s examinations and to qualify for as much OH-Pt credit as possible for the 1960 Winter Quarter.

‘The State Board of Education, which is made responsible for the supervision of the six higher institutions at Montgomery, Normal, Florence, Jacksonville, Livingston, and Troy (each of the other three institutions at Tuscaloosa, Auburn and Montevallo having separate boards) includes the following in its regulations (as carried in page 32 of The 1958-59 Registration-Announcement of Alabama State College):

‘Pupils may be expelled from any of the Colleges:

‘a. For willful disobedience to the rules and regulations established for the conduct of the schools.

‘b. For willful and continued neglect of studies and continued failure to maintain the standards of efficiency required by the rules and regulations.

‘c. For Conduct Prejudicial to the School and for Conduct Unbecoming a Student or Future Teacher in Schools of Alabama, for Insubordination and Insurrection, or for Inciting Other Pupils to Like Conduct.

‘d. For any conduct involving moral turpitude.’

In the notice received by each of the students paragraph ‘c,’ just quoted, was capitalized.

3 ‘On the 25th day of February, 1960, the six plaintiffs in this case were students in good standing at the Alabama State College for Negroes in Montgomery, Alabama * * * On this date, approximately twenty-nine Negro students,
including these six plaintiffs, according to a prearranged plan, entered as a group a publicly owned lunch grill located in the basement of the county courthouse in Montgomery, Alabama, and asked to be served. Service was refused; the lunchroom was closed; the Negroes refused to leave; police authorities were summoned; and the Negroes were ordered outside where they remained in the corridor of the courthouse for approximately one hour. On the same date, John Patterson, as Governor of the State of Alabama and as chairman of the State Board of Education, conferred with Dr. Trenholm, a Negro educator and president of the Alabama State College, concerning this activity on the part of some of the students. Dr. Trenholm was advised by the Governor that the incident should be investigated, and that if he were in the president's position he would consider expulsion and/or other appropriate disciplinary action. On February 26, 1960, several hundred Negro students from the Alabama State College, including several if not all of these plaintiffs, staged a mass attendance at a trial being held in the Montgomery County Courthouse, involving the perjury prosecution of a fellow student. After the trial these students filed two by two from the courthouse and marched through the city approximately two miles back to the college. On February 27, 1960, several hundred Negro students from this school, including several if not all of the plaintiffs in this case, staged mass demonstrations in Montgomery and Tuskegee, Alabama. On this same date, Dr. Trenholm advised all of the student body that these demonstrations and meetings were disrupting the orderly conduct of the business at the college and were affecting the work of other students, as well as work of the participating students. Dr. Trenholm personally warned plaintiffs Bernard Lee, Joseph Peterson and Elroy Embry, to cease these disruptive demonmembers immediately, and advised the members of the student body at the Alabama State College to behave themselves and return to their classes. * * *

‘On or about March 1, 1960, approximately six hundred students of the Alabama State College engaged in hymn singing and speech making on the steps of the State Capitol. Plaintiff Bernard Lee addressed students at this demonstration, and the demonstration was attended by several if not all of the plaintiffs. Plaintiff Bernard Lee at this time called on the students to strike and boycott the college if any students were expelled because of these demonstrations.’

FN 4 (Same as footnote 2, supra, of this opinion.)

4

The plaintiff Dixon testified:
‘Q. Now on the day- from February 25 until the date that you received your letter of expulsion, which you have already identified, will you tell the Court whether any person at the College gave you any official notice that your conduct was unbecoming as a student of Alabama State College? A. No.

‘Q. Did the president or any other person at the College arrange for any type of hearing where you had an opportunity to present your side prior to the time you were expelled? A. No.

‘Q. Your answer was no? A. No.’

The testimony of Governor Patterson, Chairman of the State Board of Education, was in accord:

‘Q. Did the State Board of Education, prior to the time it expelled the plaintiffs, give them an opportunity to appear either before the College or before the Board in order to present their sides of this pic- of this incident? A. No, other than receiving the report from Dr. Trenholm about it.

‘Q. Did the Board direct Dr. Trenholm to give the students formal notice of why they were expelled? A. No, the Board- the Board passed a resolution instructing Dr. Trenholm to expel the students and put twenty on probation, and Dr. Trenholm carried that out.’

State Superintendent of Education Stewart testified:

‘Q. Were these students given any type of hearing, or were formal charges filed against them before they were expelled? A. They were- Dr. Trenholm expelled the students; they weren't given any hearing.

‘Q. No hearing? A. I don’t think they would be given a hearing in any of our schools in this State; if they couldn’t behave themselves, I think they should go home.

‘Q. Do you- were they warned at all prior to expulsion? A. Not as I know of; I can’t answer that question. Dr. Trenholm was in the meeting, and that afternoon after the Board meeting, he was given the- the decision, and he was the one who took action.

‘Q. When the State Board of Education expels a student, is there any possibility of appeal or any opportunity for him to present his side of the story? A. I never have heard of it.’

5

People ex rel. Bluett v. Board of Trustees of University of Illinois, 10 Ill.App.2d 207, 134 N.E.2d 635, 58 A.L.R.2d 899.

1 1960, 186 F.Supp. 945.

2 The dissenting opinion in that case contains language which further illuminates the problem before us:

" * * * But the Court goes beyond that. It holds that the mere assertion by government that exclusion is for a valid reason forecloses further inquiry. That is, unless the government official is foolish enough to admit what he is doing- and few
will be so foolish after today’s decision- he may employ ‘security requirements’ as a blind behind which to dismiss at will for the most discriminatory of causes.

‘Such a result in effect nullifies the substantive right- not to be arbitrarily injured by Government- which the Court purports to recognize. * * * For under today’s holding petitioner is entitled to no process at all. She is not told what she did wrong; she is not given a chance to defend herself. She may be the victim of the basest calumny, perhaps even the caprice of the government officials in whose power her status rested completely. In such a case, I cannot believe that she is no entitled to some procedures.

“The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.” (Citing McGrath, supra.)

3 ‘The cases involving suspension or expulsion of a student from a public college or university all involve the question whether the hearing given to the student was adequate. In every instance the sufficiency of the hearing was upheld.’

4 The governor recommended, however, that only Bernard Lee, Norfolk, Va.; St. John Dixon, National City, Cal.; Edward E. Jones, Pittsburg, Pa.; Leon Rice, Chicago, Ill.; Howard Shipman, New York, N.Y.; Elroy Emory, Ragland, Ala.; James McFadden, Prichard, Ala.; Joseph Peterson, Newcastle, Ala.; Marzette Watts, Montgomery, Ala., be expelled at the end of the current term and that the remainder be placed on probation and allowed to remain in school pending good behavior.


6 ‘The Supreme Court in the American System of Government,’ p. 70.

7 Brown v. Maryland, 1827, 12 Wheat. 419, 6 L.Ed. 678.
**Goss v. Lopez**

Supreme Court of the United States

October 16, 1974, Argued ; January 22, 1975, Decided

No. 73-898

**Reporter**


GOSS ET AL. v. LOPEZ ET AL.

**Prior History:** [****1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

**Disposition:** 372 F.Supp. 1279, affirmed.

**Core Terms**

suspension, suspended, pupil, days, teacher, notice, procedures, discipline, requires, schools, public school, due process, misconduct, decisions, rights, school authorities, deprivation, high school, disciplinary, appellees, cases, expulsion, informal, routine, attend, public education, school official, infringement, entitlement, disruption

**Case Summary**

**Procedural Posture**

Defendant school officials appealed from the judgment of a three-judge panel of the United States District Court for the Southern District of Ohio granting declaratory and injunctive relief upon ruling that they violated the procedural due process rights of plaintiff students under U.S. Const. amend. XIV by suspending them for alleged wrongdoing without notice or an opportunity to be heard, pursuant to Ohio Rev. Code Ann. § 3313.66 (1972).

**Overview**

Ohio law provided for a free education and compulsory school attendance of youngsters. Although § 3313.66 gave certain procedural rights to those students facing expulsion, no such procedures were provided for students facing suspensions of up to 10 days in cases of misconduct. After each of them were suspended without a prior hearing, plaintiff students brought a class action seeking injunctive and declaratory relief. The district court determined that the statutory scheme violated the students' procedural due process rights and defendant school officials appealed directly to the Supreme Court. In affirming, the Court ruled that the students had protected liberty interests in a public education that could not be taken away by suspension without the minimal procedural safeguards of notice and an opportunity to be heard, flexibly applied to the given situation. Students did not shed their constitutional rights at the schoolhouse door and the Fourteenth Amendment forbid such arbitrary deprivations of liberty as unilateral suspensions
of up to 10 days without notice and hearing. Rudimentary due process was required to ensure fairness in disciplinary truth-seeking determinations.

**Outcome**
The judgment of the district court was affirmed.

**LexisNexis® Headnotes**

Education Law > ... > Student Discipline > Misconduct > Disruptive Behavior

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

Education Law > ... > Student Discipline > Disciplinary Proceedings > General Overview

Education Law > ... > Student Discipline > Disciplinary Proceedings > Appeals & Reviews

Education Law > ... > Student Discipline > Disciplinary Proceedings > Notice

Education Law > ... > Student Discipline > Methods of Discipline > Expulsions

Education Law > ... > Student Discipline > Methods of Discipline > Suspensions of Students

Education Law > ... > Student Records > Family Educational Rights & Privacy Act > Amendments & Challenges

**HN1 Misconduct, Disruptive Behavior**

Under Ohio Rev. Code Ann. § 3313.66 (1972), the principal of an Ohio public school is empowered to suspend a pupil for misconduct for up to 10 days or to expel him. In either case, he must notify the student's parents within 24 hours and state the reasons for his action. A pupil who is expelled, or his parents, may appeal the decision to the board of education and in connection therewith shall be permitted to be heard at the board meeting. The board may reinstate the pupil following the hearing. No similar procedure is provided in § 3313.66 or any other provision of state law for a suspended student.
The Fourteenth Amendment forbids the state to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally not created by the Constitution. Rather, they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits. Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process. So many welfare recipients who have statutory rights to welfare as long as they maintain the specified qualifications. The limitations of the Due Process Clause also apply to governmental decisions to revoke parole, although a parolee has no constitutional right to that status, and to official cancellation of a prisoner's good-time credits accumulated under state law, although those benefits are not mandated by the Constitution.

**HN3** Procedural Due Process, Scope of Protection

Ohio Rev. Code Ann. §§ 3313.48 and 3313.64 (1972 and Supp. 1973) direct local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law, Ohio Rev. Code Ann. § 3321.04 (1972), requires attendance for a school year of not less than 32 weeks. It is true that Ohio Rev. Code Ann. § 3313.66 permits school principals to suspend students for up to 10 days; but suspensions may not be imposed without any grounds whatsoever. Having chosen to extend the right to an education to certain persons generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.

**HN4** Constitutional Law, Substantive Due Process

Young people required by compulsory attendance laws to attend school do not shed their constitutional rights at the schoolhouse door. The Fourteenth Amendment, as now applied to the states, protects the citizen against the state itself and all of its creatures -- boards of education not excepted. The authority possessed by the state to prescribe and enforce standards of conduct in its schools although very broad,
must be exercised consistently with constitutional safeguards. Among other things, the state is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

**HN5**

Procedural Due Process, Scope of Protection

The Due Process Clause, U.S. Const. amend. XIV, forbids arbitrary deprivations of liberty. Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the clause must be satisfied, including in the case of school suspensions. If sustained and recorded, charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Education Law > ... > Student Records > Family Educational Rights & Privacy Act > Access & Inspection

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

Education Law > ... > Student Discipline > Disciplinary Proceedings > Due Process

**HN6**

Procedural Due Process, Scope of Protection

It is apparent that any claimed right of the state to determine unilaterally and without process whether misconduct by a public school student has occurred immediately collides with the requirements of the Due Process Clause, U.S. Const. amend. XIV, which is not limited to cases of severe detriment or grievous loss. In determining whether due process requirements apply in the first place, courts must look not to the weight but to the nature of the interest at stake. The length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, is not decisive of the basic right to a hearing of some kind. as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. A 10-day
suspension from school is not de minimis and may not be imposed in complete disregard of the Due Process Clause.

Once it is determined that due process applies, the question remains what process is due, recognizing that the interpretation and application of the Due Process Clause, U.S. Const. amend. XIV, are intensely practical matters and that the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. For instance, judicial interposition in the operation of the public school system of the nation raises problems requiring care and restraint. By and large, public education is committed to the control of state and local authorities, but there can be no doubt that at a minimum due process requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

The fundamental requisite of due process is the opportunity to be heard, a right that has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to contest. At the very minimum, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. The timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.
Students facing temporary suspension have interests qualifying for protection due process, which requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. There need be no delay between the time notice is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. However, students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school and the necessary notice and rudimentary hearing should follow as soon as practicable.
Brief disciplinary suspensions are almost countless. To impose in each case even truncated trial-type procedures might well overwhelm administrative facilities and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process. On the other hand, requiring effective notice and informal hearing permitting the student to give his version of 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 decide 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 the risk of error substantially reduced.

**Lawyers' Edition Display**

**Summary**

An Ohio statute empowered the principal of an Ohio public school to suspend a pupil for misconduct for up to 10 days or to expel him; in either case the principal must notify the student's parents within 24 hours and state the reasons for his action. In the instant class action brought by Ohio public high school students in the United States District Court for the Southern District of Ohio, the named plaintiffs alleged that they had been suspended from public high school in Columbus, Ohio, for up to 10 days without a hearing; the action was brought against the Columbus Board of Education and various administrators of the school system under 42 USCS 1983 for deprivation of constitutional rights. The complaint sought a declaration that the statute was unconstitutional in that it permitted public school administrators to deprive plaintiffs of their right to an education without a hearing of any kind, in violation of the procedural due process clause of the Fourteenth Amendment, and also sought to enjoin the public school officials from issuing future suspensions pursuant to the statute and to require them to remove references to the past suspensions from the records of the students in question. A three-judge District Court granted the relief sought by plaintiffs (372 F Supp 1279).

On direct appeal, the United States Supreme Court affirmed. In an opinion by White, J., expressing the view of five members of the court, it was held that the Ohio statute, insofar as it permitted up to 10 days' suspension without notice or hearing, either before or after the suspension, was invalid.

Powell, J., joined by Burger, Ch.J., Blackmun and Rehnquist, JJ., dissented, expressing the view that (1) the majority decision unnecessarily opened avenues for judicial intervention in the operation of the public schools that may affect adversely the quality of education; and (2) a student's interest in education is not infringed by a suspension within the limited period prescribed by Ohio law.

**Headnotes**

JUDGMENT §65 > construction -- opinion -- > Headnote: LEdHN[1A][I] [1A]LEdHN[1B][I] [1B]

James Craig
A judgment stating that a state statute is unconstitutional in that it provides for the suspension of a student without first affording him a hearing as required by due process of law must be read in the light of the language in the opinion which expressly contemplates that under some circumstances students may properly be removed from school before a hearing is held, so long as the hearing follows promptly.

ERROR §327 > from three-judge court -- injunctions -- > Headnote:
LEdHN[2][4]

The Supreme Court has jurisdiction, under 28 USCS 1253, of a direct appeal from an order of a three-judge district court which, in addition to declaratory relief, granted plaintiffs' request for an injunction ordering defendant public school officials to expunge their records.

LAW §527 > due process -- public schools -- suspension of students -- > Headnote:

The due process clause protects students against expulsion from the public school system, since expulsion deprives them of protected interests in property and liberty.

RIGHTS §1 > creation -- > Headnote:
LEdHN[4][4]

Protected interests in property are normally not created by the Federal Constitution; rather, they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits.

LAW §759 > due process -- state officials -- discharge -- > Headnote:
LEdHN[5][5]

A state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process.

LAW §751 > due process -- welfare benefits -- termination -- > Headnote:
LEdHN[6][6]

The protection of procedural due process may be demanded, prior to the administrative termination of public assistance payments, by welfare recipients who have statutory rights to welfare as long as they maintain the specified qualifications.
SCHOOLS §1 > students' misconduct -- fair procedures -- > Headnote:

Having chosen to extend the right to an education to public school students, a state may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred.

LAW §314 > SCHOOLS §1 > children -- protection -- > Headnote:
LEdHN[8]|8| [8]

Children do not shed their constitutional rights at the schoolhouse door; the Fourteenth Amendment, as applied to the states, protects the citizen against the state itself and all of its creatures, boards of education not excepted.

LAW §538 > SCHOOLS §1 > state's authority -- due process -- > Headnote:

The authority possessed by a state to prescribe and enforce standards of conduct in its schools, although very broad, must be exercised consistently with constitutional safeguards; among other things, the state is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the due process clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause.

LAW §525 > due process -- deprivation of liberty -- > Headnote:
LEdHN[10]|10| [10]

The due process clause forbids arbitrary deprivations of liberty; where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the clause must be satisfied.

SCHOOLS §1 > students' suspension -- without process -- > Headnote:

A state's claimed right to determine unilaterally and without process whether misconduct justifying a public school student's 10-days' suspension has occurred immediately collides with the requirements of the Federal Constitution, since if sustained and recorded, the charges of misconduct could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.

James Craig
LAW §514  > due process -- interest at stake -- > Headnote:  
LEdHN[12][_portal] [12]

To determine whether due process requirements apply, courts must not look to the "weight," but to the nature, of the interest at stake.

LAW §787  > due process -- property deprivation -- hearing -- > Headnote:  
LEdHN[13][_portal] [13]

While the length and consequent severity of the deprivation of a property right may be a factor to weigh in determining the appropriate form of hearing required by due process, it is not decisive of the basic right to a hearing of some kind.

LAW §529  > due process -- property deprivation -- de minimis -- > Headnote:  
LEdHN[14][_portal] [14]

As long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the due process clause.

LAW §538  > due process -- pupil's 10-day suspension -- > Headnote:  
LEdHN[15][_portal] [15]

A student's 10-day suspension from a public school is not a de minimis property deprivation and may not be imposed in complete disregard of the due process clause.

SCHOOLS §1  > public -- students' suspension -- > Headnote:  
LEdHN[16][_portal] [16]

Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation is so insubstantial that a student's suspension from a public school may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

LAW §514  > due process -- meaning -- > Headnote:  
LEdHN[17][_portal] [17]
The interpretation and application of the due process clause are intensely practical matters and the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.

SCHOOLS §1 > judicial interposition -- > Headnote:
LEdHN[18][↩] [18]

Judicial interposition in the operation of the public school system of the nation raises problems requiring care and restraint; by and large, public education is committed to the control of state and local authorities.

LAW §786 > due process -- notice and hearing -- > Headnote:
LEdHN[19][↩] [19]

The due process clause requires at a minimum that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

LAW §786 > due process -- hearing -- notice -- sufficiency -- > Headnote:
LEdHN[20][↩] [20]

The fundamental requisite of due process of law is the opportunity to be heard, a right that has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to contest.

LAW §818 > due process -- public schools -- students' suspension -- > Headnote:
LEdHN[21][↩] [21]

As a matter of due process, students facing suspension and the consequent interference with a protected property interest must, at the very minimum, be given some kind of notice, and afforded some kind of hearing, by the school authorities.

LAW §786 > notice -- hearing -- > Headnote:
LEdHN[22][↩] [22]

As a matter of due process, parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.

LAW §787 > notice -- content -- hearing -- > Headnote:
LEdHN[23][↩] [23]
The timing and content of the notice, and the nature of the hearing, required by due process depends on appropriate accommodation of the competing interests involved.

SCHOOLS §1 > student's suspension -- hearing -- > Headnote:  
LEdHN[24A][جابه] [24A] LEdHN[24B][جابه] [24B]  

Even though the suspension of students was imposed during a time of great difficulty for the school administrations involved, and at least in the case of one student there may have been an immediate need to send home every one in the lunchroom in order to preserve school order and property, and even though the administrative burden of providing hearings of any kind for a great number of students is considerable, nevertheless neither factor justifies a disciplinary suspension without at any time gathering facts relating to the one student specifically, confronting him with them, and giving him an opportunity to explain.

LAW §527 > students -- temporary suspension -- > Headnote:  
LEdHN[25][جابه] [25]  

Students facing temporary suspension have interests qualifying for protection of the due process clause.

LAW §818 > due process -- public school students -- temporary suspension -- > Headnote:  
LEdHN[26][جابه] [26]  

In connection with public school students' suspension of 10 days or less, the due process clause requires that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the school authorities have and an opportunity to present his side of the story; the due process clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school, under the following rules: (1) there need be no delay between the time "notice" is given and the time of the hearing; (2) in the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred; (3) in being given an opportunity to explain his version of the facts at this discussion, the student first must be told what he is accused of doing and what the basis of the accusation is; (4) since the hearing may occur almost immediately following the misconduct, notice and hearing should, as a general rule, precede the removal of the student from the school; (5) however, there are recurring situations in which prior notice and hearing cannot be insisted upon; (6) students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school; and (7) in such cases, the necessary notice and rudimentary hearing should follow as soon as practicable.

LAW §818 > due process -- public schools -- student's suspension -- notice and hearing -- > Headnote:  
LEdHN[27][جابه] [27]
Due process is violated by a state statute insofar as it, by empowering the principal of a public school to suspend a pupil for misconduct for up to 10 days and requiring notification of only his parents, permits suspensions for not more than 10 days without notice or hearing either before or after the suspension, and such a suspension is invalid.

Syllabus

Appellee Ohio public high school students, who had been suspended from school for misconduct for up to 10 days without a hearing, brought a class action against appellant school officials seeking a declaration that the Ohio statute permitting such suspensions was unconstitutional and an order enjoining the officials to remove the references to the suspensions from the students' records. A three-judge District Court declared that appellees were denied due process of law in violation of the Fourteenth Amendment because they were "suspended without hearing prior to suspension or within a reasonable time thereafter," and that the statute and implementing regulations were unconstitutional, and granted the requested injunction.

Held:

1. Students facing temporary suspension from a public school have property and liberty interests that qualify for protection under the Due Process Clause of the Fourteenth Amendment. Pp. 572-576.

   (a) Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred, and must recognize a student's legitimate entitlement to a public education as a property interest that is protected by the Due Process Clause, and that may not be taken away for misconduct without observing minimum procedures required by that Clause. Pp. 573-574.

   (b) Since misconduct charges if sustained and recorded could seriously damage the students' reputation as well as interfere with later educational and employment opportunities, the State's claimed right to determine unilaterally and without process whether that misconduct has occurred immediately collides with the Due Process Clause's prohibition against arbitrary deprivation of liberty. Pp. 574-575.

   (c) A 10-day suspension from school is not de minimis and may not be imposed in complete disregard of the Due Process Clause. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary. Pp. 575-576.

2. Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his version. Generally, notice and hearing should precede the student's removal from school, since the hearing may almost immediately follow the misconduct, but if prior notice and hearing are not feasible, as where the student's presence endangers persons or property or threatens disruption of the academic process, thus justifying immediate removal from school, the necessary notice and hearing should follow as soon as practicable. Pp. 577-584.

Counsel: Thomas A. Bustin argued the cause for appellants. With him on the briefs were James J. Hughes, Jr., Robert A. Bell, and Patrick M. McGrath.
James Craig

Peter D. Roos argued the cause for appellees. With him on the brief were Denis Murphy and Kenneth C. Curtin.

Judges: WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, post, p. 584.

Opinion by: WHITE

Opinion

MR. JUSTICE WHITE delivered the opinion of the Court.

This appeal by various administrators of the Columbus, Ohio, Public School System (CPSS) challenges the judgment of a three-judge federal court, declaring that appellees -- various high school students in the CPSS -- were denied due process of law contrary to the command of the Fourteenth Amendment in that they were temporarily suspended from their high schools without a hearing either prior to suspension or within a reasonable time thereafter, and enjoining the administrators to remove all references to such suspensions from the students' records.

I

Ohio law, Rev. Code Ann. § 3313.64 (1972), provides for free education to all children between the ages of six and 21. Section 3313.66 of the Code empowers the principal of an Ohio public school to suspend a pupil for misconduct for up to 10 days or to expel him. In either case, he must notify the student's parents within 24 hours and state the reasons for his action. A pupil who is expelled, or his parents, may appeal the decision to the Board of Education and in connection therewith shall be permitted to be heard at the board meeting. The Board may reinstate the pupil following the hearing. No similar procedure is provided in § 3313.66 or any other provision of state law for a suspended student. Nor, so far as the record reflects, had any of the individual high schools involved in this appeal at the time of the events involved in this case, the CPSS itself had not issued any written procedure applicable to suspensions. 1

At the time of the events involved in this case, the only administrative regulation on this subject was § 1010.04 of the Administrative Guide of the Columbus Public Schools which provided: "Pupils may be suspended or expelled from school in accordance with the provisions of Section 3313.66 of the Revised Code." Subsequent to the events involved in this lawsuit, the Department of Pupil Personnel of the CPSS issued three memoranda relating to suspension procedures, dated August 16, 1971, February 21, 1973, and July 10, 1973, respectively. The first two are substantially similar to each other and require no factfinding hearing at any time in connection with a suspension. The third, which was apparently in effect when this case was argued, places upon the principal the obligation to "investigate" "before commencing suspension procedures"; and provides as part of the procedures that the principal shall discuss the case with the pupil, so that the pupil may

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* John F. Lewis filed a brief for the Buckeye Association of School Administrators et al. as amici curiae urging reversal.

Briefs of amici curiae urging affirmance were filed by David Bonderman, Peter Van N. Lockwood, Paul L. Tractenberg, David Rubin, and W. William Hodes for the National Committee for Citizens in Education et al.; by Alan H. Levine, Melvin L. Wulf, and Joel M. Gora for the American Civil Liberties Union; by Robert H. Kapp, R. Stephen Browning, and Nathaniel R. Jones for the National Association for the Advancement of Colored People et al.; and by Marian Wright Edelman for the Children's Defense Fund of the Washington Research Project, Inc., et al.

1 At the time of the events involved in this case, the only administrative regulation on this subject was § 1010.04 of the Administrative Guide of the Columbus Public Schools which provided: "Pupils may be suspended or expelled from school in accordance with the provisions of Section 3313.66 of the Revised Code." Subsequent to the events involved in this lawsuit, the Department of Pupil Personnel of the CPSS issued three memoranda relating to suspension procedures, dated August 16, 1971, February 21, 1973, and July 10, 1973, respectively. The first two are substantially similar to each other and require no factfinding hearing at any time in connection with a suspension. The third, which was apparently in effect when this case was argued, places upon the principal the obligation to "investigate" "before commencing suspension procedures"; and provides as part of the procedures that the principal shall discuss the case with the pupil, so that the pupil may
case. Each, however, had formally or informally described the conduct for which suspension could be imposed.

The nine named appellees, each of whom alleged that he or she had been suspended from public high school in Columbus for up to 10 days without a hearing pursuant to § 3313.66, filed an action under 42 U. S. C. § 1983 against the Columbus Board of Education and various administrators of the CPSS. The complaint sought a declaration that § 3313.66 was unconstitutional in that it permitted public school administrators to deprive plaintiffs of their rights to an education without a hearing of any kind, in violation of the procedural due process component of the Fourteenth Amendment. It also sought to enjoin the public school officials from issuing future suspensions pursuant to § 3313.66 and to require them to remove references to the past suspensions from the records of the students in question.

The proof below established that the suspensions arose out of a period of widespread student unrest in the CPSS during February and March 1971. Six of the named plaintiffs, Rudolph Sutton, Tyrone Washington, Susan Cooper, Deborah Fox, Clarence Byars, and Bruce Harris, were students at the Marion-Franklin High School and were each suspended for 10 days on account of disruptive or disobedient conduct committed in the presence of the school administrator who ordered the suspension. One of these, Tyrone Washington, was among a group of students demonstrating in the school auditorium while a class was being conducted there. He was ordered by the school principal to leave, refused to do so, and was suspended. Rudolph Sutton, in the presence of the principal, physically attacked a police officer who was attempting to remove Tyrone Washington from the auditorium. He was immediately suspended. The other four Marion-Franklin students were suspended for similar conduct. None was given a hearing to determine the operative facts underlying the suspension, but each, together with his or her parents, was offered the opportunity to attend a conference, subsequent to the effective date of the suspension, to discuss the student's future.

Two named plaintiffs, Dwight Lopez and Betty Crome, were students at the Central High School and McGuffey Junior High School, respectively. The former was suspended in connection with a disturbance.

"be heard with respect to the alleged offense," unless the pupil is "unavailable" for such a discussion or "unwilling" to participate in it. The suspensions involved in this case occurred, and records thereof were made, prior to the effective date of these memoranda. The District Court's judgment, including its expunction order, turns on the propriety of the procedures existing at the time the suspensions were ordered and by which they were imposed.

According to the testimony of Phillip Fulton, the principal of one of the high schools involved in this case, there was an informal procedure applicable at the Marion-Franklin High School. It provided that in the routine case of misconduct, occurring in the presence of a teacher, the teacher would describe the misconduct on a form provided for that purpose and would send the student, with the form, to the principal's office. There, the principal would obtain the student's version of the story, and, if it conflicted with the teacher's written version, would send for the teacher to obtain the teacher's oral version -- apparently in the presence of the student. Mr. Fulton testified that, if a discrepancy still existed, the teacher's version would be believed and the principal would arrive at a disciplinary decision based on it.

The plaintiffs sought to bring the action on behalf of all students of the Columbus Public Schools suspended on or after February 1971, and a class action was declared accordingly. Since the complaint sought to restrain the "enforcement" and "execution" of a state statute "by restraining the action of any officer of such state in the enforcement or execution of such statute," a three-judge court was requested pursuant to 28 U. S. C. § 2281 and convened. The students also alleged that the conduct for which they could be suspended was not adequately defined by Ohio law. This vagueness and overbreadth argument was rejected by the court below and the students have not appealed from this part of the court's decision.

Fox was given two separate 10-day suspensions for misconduct occurring on two separate occasions -- the second following immediately upon her return to school. In addition to his suspension, Sutton was transferred to another school.
in the lunchroom which involved some physical damage to school property. Lopez testified that at least 75 other students were suspended from his school on the same day. He also testified below that he was not a party to the destructive conduct but was instead an innocent bystander. Because no one from the school testified with regard to this incident, there is no evidence in the record indicating the official basis for concluding otherwise. Lopez never had a hearing.

Betty Crome was present at a demonstration at a high school other than the one she was attending. There she was arrested together with others, taken to the police station, and released without being formally charged. Before she went to school on the following day, she was notified that she had been suspended for a 10-day period. Because no one from the school testified with respect to this incident, the record does not disclose how the McGuffey Junior High School principal went about making the decision to suspend Crome, nor does it disclose on what information the decision was based. It is clear from the record that no hearing was ever held.

There was no testimony with respect to the suspension of the ninth named plaintiff, Carl Smith. The school files were also silent as to his suspension, although as to some, but not all, of the other named plaintiffs the files contained either direct references to their suspensions or copies of letters sent to their parents advising them of the suspension.

On the basis of this evidence, the three-judge court declared that plaintiffs were denied due process of law because they were "suspended without hearing prior to suspension or within a reasonable time thereafter," and that Ohio Rev. Code Ann. § 3313.66 (1972) and regulations issued pursuant thereto were unconstitutional in permitting such suspensions. It was ordered that all references to plaintiffs' suspensions be removed from school files.

Although not imposing upon the Ohio school administrators any particular disciplinary procedures and leaving them "free to adopt regulations providing for fair suspension procedures which are consonant with the educational goals of their schools and reflective of the characteristics of their school and locality," the District Court declared that there were "minimum requirements of notice and a hearing prior to suspension, except in emergency situations." In explication, the court stated that relevant case authority would: (1) permit "[immediate] removal of a student whose conduct disrupts the academic atmosphere of the school, endangers fellow students, teachers or school officials, or damages property"; (2) require notice of suspension proceedings to be sent to the student's parents within 24 hours of the decision to conduct them; and (3) require a hearing to be held, with the student present, within 72 hours of his removal. Finally, the court stated that, with respect to the nature of the hearing, the relevant cases required that statements in support of the charge be produced, that the student and others be permitted to make statements in defense or mitigation, and that the school need not permit attendance by counsel.

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5 Lopez was actually absent from school, following his suspension, for over 20 days. This seems to have occurred because of a misunderstanding as to the length of the suspension. A letter sent to Lopez after he had been out for over 10 days purports to assume that, being over compulsory school age, he was voluntarily staying away. Upon asserting that this was not the case, Lopez was transferred to another school.

6 In its judgment, the court stated that the statute is unconstitutional in that it provides "for suspension . . . without first affording the student due process of law." (Emphasis supplied.) However, the language of the judgment must be read in light of the language in the opinion which expressly contemplates that under some circumstances students may properly be removed from school before a hearing is held, so long as the hearing follows promptly.
The defendant school administrators have appealed the three-judge court's decision. Because the order below granted plaintiffs' request for an injunction -- ordering defendants to expunge their records -- this Court has jurisdiction of the appeal pursuant to 28 U. S. C. § 1253. We affirm.

II

At the outset, appellants contend that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the public school system. This position misconceives the nature of the issue and is refuted by prior decisions. The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizen to certain benefits.

Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process. Connell v. Higginbotham, 403 U. S. 207 (1971); Wieman v. Updegraff, 344 U. S. 183, 191-192 (1952); Arnett v. Kennedy, 416 U. S. 134, 164 (POWELL, J., concurring), 171 (WHITE, J., concurring and dissenting) (1974). So many welfare recipients who have statutory rights to welfare as long as they maintain the specified qualifications. Goldberg v. Kelly, 397 U. S. 254 (1970). Morrissey v. Brewer, 408 U. S. 471 (1972), applied the limitations of the Due Process Clause to governmental decisions to revoke parole, although a parolee has no constitutional right to that status. In like vein was Wolff v. McDonnell, 418 U. S. 539 (1974), where the procedural protections of the Due Process Clause were triggered by official cancellation of a prisoner's good-time credits accumulated under state law, although those benefits were not mandated by the Constitution.

Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. Ohio Rev. Code Ann. §§ 3313.48 and 3313.64 (1972 and Supp. 1973) direct local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law requires attendance for a school year of not less than 32 weeks. Ohio Rev. Code Ann. § 3321.04 (1972). It is true that § 3313.66 of the Code permits school principals to suspend students for up to 10 days; but suspensions may not be imposed without any grounds whatsoever. All of the schools had their own rules specifying the grounds for expulsion or suspension. Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred. Arnett v. Kennedy, supra, at 164 (POWELL, J., concurring), 171 (WHITE, J., concurring and dissenting), 206 (MARSHALL, J., dissenting).

Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not "shed their constitutional rights" at the schoolhouse door. Tinker v. Des Moines School Dist., 393 U. S. 503, 506 (1969). "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted." West Virginia Board of Education v. Barnette, 319
The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without [***735] adherence to the minimum procedures required by that Clause.

LEdHN[3C] [3C]LEdHN[10] [10]LEdHN[11] [11]HN5 The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must be satisfied. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Board of Regents v. Roth, supra, at 573. School authorities here suspended appellees from school for periods of up to 10 days [*575] based on charges of misconduct. If sustained [****17] and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. 7 HN6 It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

[****18] LEdHN[12] [12]LEdHN[13] [13]LEdHN[14] [14]LEdHN[15] Appellants proceed to argue that even if there is a right to a public education protected by the Due Process Clause generally, the Clause comes into play only when the State subjects a student to a "severe detriment or grievous loss." The loss of 10 days, it is said, is neither severe nor grievous and the Due [**737] Process Clause is therefore of no relevance. Appellants' argument is again refuted by our prior decisions; for in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest [*576] at stake." Board of Regents v. Roth, supra, at 570-571. Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. Fuentes v. Shevin, 407 U.S. 67, 86 (1972). The Court's view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) [****19] (Harlan, J., concurring); Boddie v. Connecticut, 401 U.S. 371, 378-379 (1971); Board of Regents v. Roth, supra, at 570 n. 8. A 10-day suspension from school is not de [***736] minimis in our view and may not be imposed in complete disregard of the Due Process Clause.

7 Appellees assert in their brief that four of 12 randomly selected Ohio colleges specifically inquire of the high school of every applicant for admission whether the applicant has ever been suspended. Brief for Appellees 34-35 and n. 40. Appellees also contend that many employers request similar information. Ibid. Congress has recently enacted legislation limiting access to information contained in the files of a school receiving federal funds. Section 513 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 571, 20 U. S. C. § 1232g (1970 ed., Supp. IV), adding § 438 to the General Education Provisions Act. That section would preclude release of "verified reports of serious or recurrent behavior patterns" to employers without written consent of the student's parents. While subsection (b)(1)(B) permits release of such information to "other schools . . . in which the student intends to enroll," it does so only upon condition that the parent be advised of the release of the information and be given an opportunity at a hearing to challenge the content of the information to insure against inclusion of inaccurate or misleading information. The statute does not expressly state whether the parent can contest the underlying basis for a suspension, the fact of which is contained in the student's school record.
A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," Brown v. Board of Education, 347 U.S. 483, 493 (1954), and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary. 8

[*577] III

"Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S., at 481. We turn to that question, fully [*578] realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that "[the] very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). We are also mindful of our own admonition:

8 Since the landmark decision of the Court of Appeals for the Fifth Circuit in Dixon v. Alabama State Board of Education, 294 F.2d 150, cert. denied, 368 U.S. 930 (1961), the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion. Hargis v. Knowlton, 470 F.2d 201, 211 (CA2 1972); Wasson v. Trowbridge, 382 F.2d 807, 812 (CA2 1967); Esteban v. Central Missouri State College, 415 F.2d 1077, 1089 (CA8 1969), cert. denied, 398 U.S. 965 (1970); Vought v. Van Buren Public Schools, 306 F.Supp. 1388 (ED Mich. 1969); Whitfield v. Simpson, 312 F.Supp. 889 (ED Ill. 1970); Fielder v. Board of Education of School District of Winnebago, Neb., 346 F.Supp. 722, 729 (Neb. 1972); DeJesus v. Penberthy, 344 F.Supp. 70, 74 (Conn. 1972); Soglin v. Kaufman, 295 F.Supp. 978, 994 (WD Wis. 1968), aff'd, 418 F.2d 163 (CA7 1969); Stricklin v. Regents of University of Wisconsin, 297 F.Supp. 416, 420 (WD Wis. 1969), appeal dismissed, 420 F.2d 1257 (CA7 1970); Buck v. Carter, 308 F.Supp. 1246 (WD Wis. 1970); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 147-148 (WD Mo. 1968) (en banc). The lower courts have been less uniform, however, on the question whether removal from school for some shorter period may ever be so trivial a deprivation as to require no process, and, if so, how short the removal must be to qualify. Courts of Appeals have held or assumed the Due Process Clause applicable to long suspensions, Pervis v. LaMarque Ind. School Dist., 466 F.2d 1054 (CA5 1972); to indefinite suspensions, Sullivan v. Houston Ind. School Dist., 475 F.2d 1071 (CA5), cert. denied, 414 U.S. 1032 (1973); to the addition of a 30-day suspension to a 10-day suspension, Williams v. Dade County School Board, 441 F.2d 299 (CA5 1971); to a 10-day suspension, Black Students of North Fort Myers Jr.-Sr. High School v. Williams, 470 F.2d 957 (CA5 1972); to "mild" suspensions, Farrell v. Joel, 437 F.2d 160 (CA1 1971), and Tate v. Board of Education, 453 F.2d 975 (CA8 1972); and to a three-day suspension, Shonley v. Northeast Ind. School Dist., Bexar County, Texas, 462 F.2d 960, 967 n. 4 (CA5 1972); but inapplicable to a seven-day suspension, Limwood v. Board of Ed. of City of Pierce, 463 F.2d 763 (CA7), cert. denied, 409 U.S. 1027 (1972); to a three-day suspension, Dunn v. Tyler Ind. School Dist., 460 F.2d 137 (CA5 1972); to a suspension for not "more than a few days," Murray v. West Baton Rouge Parish School Board, 472 F.2d 438 (CA5 1973); and to all suspensions no matter how short, Black Coalition v. Portland School District No. 1, 484 F.2d 1040 (CA9 1973). The Federal District Courts have held the Due Process Clause applicable to an interim suspension pending expulsion proceedings in Stricklin v. Regents of Wisconsin, supra, and Buck v. Carter, supra; to a 10-day suspension, Banks v. Board of Public Instruction of Dade County, 314 F.Supp. 285 (SD Fla. 1970), vacated, 401 U.S. 988 (1971) (for entry of a fresh decree so that a timely appeal might be taken to the Court of Appeals), aff'd, 450 F.2d 1103 (CA5 1971); to suspensions of under five days, Vail v. Board of Education of Portsmouth School Dist., 354 F.Supp. 592 (NH 1973); and to all suspensions, Mills v. Board of Education of the Dist. of Columbia, 348 F.Supp. 866 (DC 1972), and Given v. Poe, 346 F.Supp. 202 (WDNC 1972); but inapplicable to suspensions of 25 days, Hernandez v. School District Number One, Denver, Colorado, 315 F.Supp. 289 (Colo. 1970); to suspensions of 10 days, Baker v. Downey City Board of Education, 307 F.Supp. 517 (CD Cal. 1969); and to suspensions of eight days, Hatter v. Los Angeles City High School District, 310 F.Supp. 1309 (CD Cal. 1970), rev'd on other grounds, 452 F.2d 673 (CA9 1971). In the cases holding no process necessary in connection with short suspensions, it is not always clear whether the court viewed the Due Process Clause as inapplicable, or simply felt that the process received was "due" even in the absence of some kind of hearing procedure.

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"Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." 


There are certain benchmarks to guide us, however. Mullane v. Central Hanover Trust Co., 339 U.S. 306 [*579] (1950), a case often invoked by later opinions, said that "[many] controversies have raged about the cryptic and abstract words of the [*471] Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id., at 313. "The fundamental requisite of due process of law is the opportunity to be heard," Grannis v. Ordean, 234 U.S. 385, 394 (1914), a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." Mullane v. Central Hanover Trust Co., supra, at 314. See also Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168-169 (1951) (Frankfurter, J., concurring). At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale, 1 Wall. 223, 233 (1864).

It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. Cafeteria Workers v. McElroy, supra, at 895; Morrissey v. Brewer, supra, at 481. The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it diserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never [*580] unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with [*812] the educational process.

The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. "[Fairness] can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving [*814] at truth than to
give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Anti-Fascist Committee v. McGrath, supra, at 170, 171-172 (Frankfurter, J., concurring). 9

There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is. Lower courts which have addressed the question of the nature of the procedures required in short suspension cases have reached the same conclusion. Tate v. Board of Education, 453 F.2d 975, 979 (CA8 1972); Vail v. Board of Education, 354 F.Supp. 592, 603 (NH 1973).

Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of

9The facts involved in this case illustrate the point. Betty Crome was suspended for conduct which did not occur on school grounds, and for which mass arrests were made -- hardly guaranteeing careful individualized factfinding by the police or by the school principal. She claims to have been involved in no misconduct. However, she was suspended for 10 days without ever being told what she was accused of doing or being given an opportunity to explain her presence among those arrested. Similarly, Dwight Lopez was suspended, along with many others, in connection with a disturbance in the lunchroom. Lopez says he was not one of those in the lunchroom who was involved. However, he was never told the basis for the principal's belief that he was involved, nor was he ever given an opportunity to explain his presence in the lunchroom. The school principals who suspended Crome and Lopez may have been correct on the merits, but it is inconsistent with the Due Process Clause to have made the decision that misconduct had occurred without at some meaningful time giving Crome or Lopez an opportunity to persuade the principals otherwise.

10Appellants point to the fact that some process is provided under Ohio law by way of judicial review. Ohio Rev. Code Ann. § 2506.01 (Supp. 1973). Appellants do not cite any case in which this general administrative review statute has been used to appeal from a disciplinary decision by a school official. If it be assumed that it could be so used, it is for two reasons insufficient to save inadequate procedures at the school level. First, although new proof may be offered in a § 2501.06 proceeding, Shaker Coventry Corp. v. Shaker Heights Planning Comm'n, 18 Ohio Op. 2d 272, 176 N. E. 2d 332 (1961), the proceeding is not de novo. In re Locke, 33 Ohio App. 2d 177, 294 N. E. 2d 230 (1972). Thus the decision by the school -- even if made upon inadequate procedures -- is entitled to weight in the court proceeding. Second, without a demonstration to the contrary, we must assume that delay will attend any § 2501.06 proceeding, that the suspension will not be stayed pending hearing, and that the student meanwhile will irreparably lose his educational benefits.

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disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable, as the District Court indicated.

In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions. Indeed, according to the testimony of the principal of Marion-Franklin High School, that school had an informal procedure, remarkably similar to that which we now require, applicable to suspensions generally but which was not followed in this case. Similarly, according to the most recent memorandum applicable to the entire CPSS, see n. supra, school principals in the CPSS are now required by local rule to provide at least as much as the constitutional minimum which we have described.

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

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.

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

IV

The District Court found each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was therefore invalid and the statute unconstitutional insofar as it permits such suspensions without notice or hearing. Accordingly, the judgment is
MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

The Court today invalidates an Ohio statute that permits student suspensions from school without a hearing. The decision unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education. The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools. It justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension.

The Court's decision rests on the premise that, under Ohio law, education is a property interest protected by the Fourteenth Amendment's Due Process Clause and therefore that any suspension requires notice and a hearing. In my view, a student's interest in education is not infringed by a suspension within the limited period prescribed by Ohio law. Moreover, to the extent that there may be some arguable infringement, it is too speculative, transitory, and insubstantial to justify imposition of a constitutional rule.

Although we held in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973), that education is not a right protected by the Constitution, Ohio has elected by statute to provide free education for all youths age six to 21, Ohio Rev. Code Ann. §§ 3313.48, 3313.64 (1972 and Supp. 1973), with children under 18 years of age being compelled to attend school. § 3321.01 et seq. State law, therefore, extends the right of free public school education to Ohio students in accordance with the education laws of that State. The right or entitlement to education so created is protected in a proper case by the Due

1 The Ohio statute, Ohio Rev. Code Ann. § 3313.66 (1972), actually is a limitation on the time-honored practice of school authorities themselves determining the appropriate duration of suspensions. The statute allows the superintendent or principal of a public school to suspend a pupil "for not more than ten days . . ." (italics supplied); and requires notification to the parent or guardian in writing within 24 hours of any suspension.

2 Section 3313.66 also provides authority for the expulsion of pupils, but requires a hearing thereon by the school board upon request of a parent or guardian. The rights of pupils expelled are not involved in this case, which concerns only the limited discretion of school authorities to suspend for not more than 10 days. Expulsion, usually resulting at least in loss of a school year or semester, is an incomparably more serious matter than the brief suspension, traditionally used as the principal sanction for enforcing routine discipline. The Ohio statute recognizes this distinction.

3 The Court speaks of "exclusion from the educational process for more than a trivial period . . .," ante, at 576, but its opinion makes clear that even one day's suspension invokes the constitutional procedure mandated today.

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[***742] In identifying property interests subject to due process protections, the Court's past opinions make clear that these interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, supra, at 577 (emphasis supplied). The Ohio statute that creates the right to a "free" education also explicitly authorizes a principal to suspend a student for as much as 10 days. *Ohio Rev. Code Ann.* §§ 3313.48, 3313.64, 3313.66 (1972 and Supp. 1973). Thus the very legislation which "defines" the "dimension" of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law. Rather, the right is [*587] encompassed in the entire package of statutory provisions governing education in Ohio -- of which the power to suspend is one.

The Court thus disregards the basic structure of Ohio law in posturing this case as if Ohio had conferred an unqualified right to education, thereby compelling the school [***34] authorities to conform to due process procedures in imposing the most routine discipline. 4

[****35] [**743] But however one may define the entitlement to education provided by Ohio law, I would conclude that a deprivation of not more than 10 days' suspension from school, imposed as a routine disciplinary measure, does not assume constitutional dimensions. Contrary to the Court's assertion, our cases support rather than "refute" appellants' [*588] argument that "the Due Process Clause . . . comes into play only when the State subjects a student to a 'severe detriment or grievous loss.'" *Ante*, at 575. Recently, the Court reiterated precisely this standard for analyzing due process claims:


In *Morrissey* we applied that standard to require due process procedures for parole revocation on the ground that revocation "inflicts [****36] a 'grievous loss' on the parolee and often on others." *Id.*, at 482. See also *Board of Regents v. Roth*, 408 U.S., at 573 ("seriously damage" reputation and standing); *Bell v.

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4 The Court apparently reads into Ohio law by implication a qualification that suspensions may be imposed only for "cause," thereby analogizing this case to the civil service laws considered in *Arnett v. Kennedy*, 416 U.S. 134 (1974). To be sure, one may assume that pupils are not suspended at the whim or caprice of the school official, and the statute does provide for notice of the suspension with the "reasons therefor." But the same statute draws a sharp distinction between suspension and the far more drastic sanction of expulsion. A hearing is required only for the latter. To follow the Court's analysis, one must conclude that the legislature nevertheless intended -- without saying so - - that suspension also is of such consequence that it may be imposed only for causes which can be justified at a hearing. The unsoundness of reading this sort of requirement into the statute is apparent from a comparison with *Arnett*. In that case, Congress expressly provided that nonprobationary federal employees should be discharged only for "cause." This requirement reflected congressional recognition of the seriousness of discharging such employees. There simply is no analogy between termination of nonprobationary employment of a civil service employee and the suspension of a public school pupil for not more than 10 days. Even if the Court is correct in implying some concept of justifiable cause in the Ohio procedure, it could hardly be stretched to the constitutional proportions found present in *Arnett*.

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[****37] The Ohio suspension statute allows no serious or significant infringement of education. It authorizes only a maximum suspension of eight school days, less than 5% of the normal 180-day school year. Absences of such limited duration will rarely affect a pupil's opportunity to learn or his scholastic performance. Indeed, the record in this case reflects no educational injury to appellees. Each completed the semester in which the suspension occurred and performed at least as well as he or she had in previous years.  

Despite the Court's unsupported speculation that a suspended student could be "seriously damaged" (ante, at 575), there is no factual showing of any such damage to appellees.

The Court also relies on a perceived deprivation of "liberty" resulting from any suspension, arguing -- again without factual support in the record [****38] pertaining to these appellees -- that a suspension harms a student's reputation. In view of the Court's decision in Board of Regents v. Roth, supra, I would have [**744] thought that this argument was plainly untenable. Underscoring the need for "serious damage" to reputation, the Roth Court held that a nontenured teacher who is not rehired by a public university could not claim to suffer sufficient reputational injury to require constitutional protections.

Surely a brief suspension is of less serious consequence to the reputation of a teenage student.

II

In prior decisions, this Court has explicitly recognized that school authorities must have broad discretionary authority [*590] in the daily operation of public schools. This includes wide latitude with respect to [****39] maintaining [***744] discipline and good order. Addressing this point specifically, the Court stated in Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969):

"[The] Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."  

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Indeed, the Court itself quotes from a portion of Mr. Justice Frankfurter's concurrence in Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171 (1951), which explicitly refers to "a person in jeopardy of serious loss." See ante, at 580 (emphasis supplied).

Nor is the "de minimis" standard referred to by the Court relevant in this case. That standard was first stated by Mr. Justice Harlan in a concurring opinion in Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969), and then quoted in a footnote to the Court's opinion in Fuentes v. Shevin, 407 U.S. 67, 90 n. 21 (1972). Both Sniadach and Fuentes, however, involved resolution of property disputes between two private parties claiming an interest in the same property. Neither case pertained to an interest conferred by the State.


7 See also Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), quoting the "grievous loss" standard first articulated in Anti-Fascist Committee v. McGrath, supra.

8 In dissent on the First Amendment issue, Mr. Justice Harlan recognized the Court's basic agreement on the limited role of the judiciary in overseeing school disciplinary decisions:

"I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions." 393 U.S., at 526.
Such an approach properly recognizes the unique nature of public education and the correspondingly limited role of the judiciary in its supervision. In *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), the Court stated:

"By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

[****40] The Court today turns its back on these precedents. It can hardly seriously be claimed that a school principal's decision to suspend a pupil for a single day would "directly and sharply implicate basic constitutional values." *Ibid*.

Moreover, the Court ignores the experience of mankind, as well as the long history of our law, recognizing [*591] that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office. Until today, and except in the special context of the First Amendment issue in *Tinker*, the educational rights of children and teenagers in the elementary and secondary schools have not been analogized to the rights of adults or to those accorded college students. Even with respect to the First Amendment, the rights of children have not been regarded as "co-extensive with those of adults." *Tinker, supra, at 515* (STEWART, J., concurring).

A

I turn now to some of the considerations which[****41] support the Court's former view regarding the comprehensive authority of the States and school officials "to prescribe and control conduct in the schools." *Id.*, at 507. Unlike the divergent and even sharp conflict of interests usually [*745] present where due process rights are asserted, the interests here implicated -- of the State through its schools and of the pupils -- are essentially congruent.

The State's interest, broadly put, [*745] is in the proper functioning of its public school system for the benefit of all pupils and the public generally. Few rulings would interfere more extensively in the daily functioning of schools than subjecting routine discipline to the formalities and judicial oversight of due process. Suspensions are one of the traditional means -- ranging from keeping a student after class to permanent expulsion -- used to maintain discipline in the schools. It is common knowledge that maintaining order and reasonable decorum [*592] in school buildings and classrooms is a major educational problem, and one which has increased significantly in magnitude in recent years. 9 Often the teacher, in protecting the rights of [****42] other children to an education (if not his or their safety), is compelled to rely on the power to suspend.

The facts set forth in the margin 10 leave little room for doubt as to the magnitude of the disciplinary problem in the public schools, or as to the extent of reliance upon the right to suspend. They also

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9 See generally S. Bailey, Disruption in Urban Secondary Schools (1970), which summarizes some of the recent surveys on school disruption. A Syracuse University study, for example, found that 85% of the schools responding reported some type of significant disruption in the years 1967-1970.

10 An *amicus* brief filed by the Children's Defense Fund states that at least 10% of the junior and senior high school students in the States sampled were suspended *one or more* times in the 1972-1973 school year. The data on which this conclusion rests were obtained from an
demonstrate that if hearings were required for a substantial percentage of short-term suspensions, school authorities would have time to do little else.

[****43] B

The State's generalized interest in maintaining an orderly school system is not incompatible with the individual [*593] interest of the student. Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite a challenge to the teacher's authority 11 -- an invitation which rebellious or even merely [***746] spirited teenagers are likely to accept.

[****44] The lesson of discipline is not merely a matter of the student's self-interest in the shaping of his own character and personality; it provides an early understanding [**746] of the relevance to the social compact of respect for the rights of others. The classroom is the laboratory in which this lesson of life is best learned. Mr. Justice Black summed it up:

"School discipline, like parental discipline, is an integral and important part of training our children to be good citizens -- to be better citizens." Tinker, 393 U.S., at 524 (dissenting opinion).

In assessing in constitutional terms the need to protect pupils from unfair minor discipline by school authorities, the Court ignores the commonality of interest of the State and pupils in the public school system. Rather, it thinks in traditional judicial terms of an adversary [*594] situation. To be sure, there will be the occasional pupil innocent of any rule infringement who is mistakenly suspended or whose infraction is too minor to justify suspension. But, while there is no evidence indicating the frequency of unjust suspensions, common sense suggests that they will not be numerous in relation [****45] to the total number, and that mistakes or injustices will usually be righted by informal means.

C

One of the more disturbing aspects of today's decision is its indiscriminate reliance upon the judiciary, and the adversary process, as the means of resolving many of the most routine problems arising in the classroom. In mandating due process procedures the Court misapprehends the reality of the normal teacher-pupil relationship. There is an ongoing relationship, one in which the teacher must occupy many

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11 See generally J. Dobson, Dare to Discipline (1970).

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roles -- educator, adviser, friend, and, at times, parent-substitute. It is rarely adversary in nature except with respect to the chronically disruptive or insubordinate pupil whom the teacher must be free to discipline without frustrating formalities.

The Ohio statute, providing as it does for due notice both to parents and the Board, is compatible with the teacher-pupil relationship and the informal resolution of mistaken disciplinary action. We have relied for generations upon the experience, good faith and dedication of those who staff our public schools, and the nonadversary means of airing grievances that always have been available to pupils and their parents. One would have thought before today's opinion that this informal method of resolving differences was more compatible with the interests of all concerned than resort to any constitutionalized procedure, however blandly it may be defined by the Court.

In my view, the constitutionalizing of routine classroom decisions not only represents a significant and unwise extension of the Due Process Clause, but it also was quite unnecessary in view of the safeguards prescribed by the Ohio statute. This is demonstrable from a comparison of what the Court mandates as required by due process with the protective procedures it finds constitutionally insufficient.

The Ohio statute, limiting suspensions to not more than eight school days, requires written notice including the "reasons therefor" to the student's parents and to the Board of Education within 24 hours of any suspension. The Court only requires oral or written notice to the pupil, with no notice being required to the parents or the Board of Education. The mere fact of the statutory requirement is a deterrent against arbitrary action by the principal. The Board, usually elected by the people and sensitive to constituent relations, may be expected to identify a principal whose record of suspensions merits inquiry. In any event, parents placed on written notice may exercise their rights as constituents by going directly to the Board or a member thereof if dissatisfied with the principal's decision.

Nor does the Court's due process "hearing" appear to provide significantly more protection than that already available. The Court holds only that the principal must listen to the student's "version of the events," either before suspension or thereafter -- depending upon the circumstances. Ante, at 583. Such a  

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12 The role of the teacher in our society historically has been an honored and respected one, rooted in the experience of decades that has left for most of us warm memories of our teachers, especially those of the formative years of primary and secondary education.

13 In this regard, the relationship between a student and teacher is manifestly different from that between a welfare administrator and a recipient (see Goldberg v. Kelly, 397 U.S. 254 (1970)), a motor vehicle department and a driver (see Bell v. Burson, 402 U.S. 535 (1971)), a debtor and a creditor (see Sniadach v. Family Finance Corp., supra; Fuentes v. Shevin, supra; Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974)), a parole officer and a parolee (see Morrissey v. Brewer, 408 U.S. 471 (1972)), or even an employer and an employee (see Arnett v. Kennedy, 416 U.S. 134 (1974)). In many of these noneducation settings there is -- for purposes of this analysis -- a "faceless" administrator dealing with an equally "faceless" recipient of some form of government benefit or license; in others, such as the garnishment and repossession cases, there is a conflict-of-interest relationship. Our public school system, however, is premised on the belief that teachers and pupils should not be "faceless" to each other. Nor does the educational relationship present a typical "conflict of interest." Rather, the relationship traditionally is marked by a coincidence of interests.

Yet the Court, relying on cases such as Sniadach and Fuentes, apparently views the classroom of teenagers as comparable to the competitive and adversary environment of the adult, commercial world.

14 A traditional factor in any due process analysis is "the protection implicit in the office of the functionary whose conduct is challenged . . . ." Anti-Fascist Committee v. McGrath, 341 U.S., at 163 (Frankfurter, J., concurring). In the public school setting there is a high degree of such protection since a teacher has responsibility for, and a commitment to, his pupils that is absent in other due process contexts.

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truncated "hearing" is likely to be considerably less meaningful than the opportunities for correcting mistakes already available to students and parents. Indeed, in this case all of the students and parents were offered an opportunity to attend a conference with school officials.

In its rush to mandate a constitutional rule, the Court appears to give no weight to the practical manner in which suspension problems normally would be worked out under Ohio law. One must doubt, then, whether the constitutionalization of the student-teacher relationship, with all of its attendant doctrinal and practical difficulties, will assure in any meaningful sense greater protection than that already afforded under Ohio law.

III

No one can foresee the ultimate frontiers of the new "thicket" the Court now enters. Today's ruling appears to sweep within the protected interest in education a multitude of discretionary decisions in the educational process. Teachers and other school authorities are required to make many decisions that may have serious consequences for the pupil. They must decide, for example, how to grade the student's work, whether a student passes or fails a course, whether he is to be promoted, whether he is required to take certain subjects, whether he may be excluded from interscholastic athletics or other extracurricular activities, whether he may be removed from one school and sent to another, whether he may be bused long distances when available schools are nearby, and whether he should be placed in a "general," "vocational," or "college-preparatory" track.

In these and many similar situations claims of impairment of one's educational entitlement identical in principle to those before the Court today can be asserted with equal or greater justification. Likewise, in many of these situations, the pupil can advance the same types of speculative and subjective injury given critical weight in this case. The District Court, relying upon generalized opinion evidence, concluded that a suspended student may suffer psychological injury in one or more of the ways set forth in the margin below. The Court appears to adopt this rationale. See ante, at 575.

It hardly need be said that if a student, as a result of a day's suspension, suffers "a blow" to his "self esteem," "feels powerless," views "teachers with resentment," or feels "stigmatized by his teachers,"

15 The Court itself recognizes that the requirements it imposes are, "if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions." Ante, at 583.

16 See Connelly v. University of Vermont, 244 F.Supp. 156 (Vt. 1956).


18 The psychological injuries so perceived were as follows:

"1. The suspension is a blow to the student's self-esteem.

"2. The student feels powerless and helpless.

"3. The student views school authorities and teachers with resentment, suspicion and fear.

"4. The student learns withdrawal as a mode of problem solving.

"5. The student has little perception of the reasons for the suspension. He does not know what offending acts he committed.

"6. The student is stigmatized by his teachers and school administrators as a deviant. They expect the student to be a troublemaker in the future." 372 F.Supp., at 1292.

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identical psychological harms will flow from many other routine and necessary school decisions. The student who is given a failing grade, who is not promoted, who is excluded from certain extracurricular activities, who is assigned to a school reserved for children of less than average ability, or who is placed in the "vocational" rather than the "college preparatory" track, is unlikely to suffer any less psychological injury than if he were suspended for a day for a relatively minor infraction. 19

If, as seems apparent, the Court will now require due process procedures whenever such routine school decisions are challenged, the impact upon public education will be serious indeed. The discretion and judgment of federal courts across the land often will be substituted for that of the 50 state legislatures, the 14,000 school boards, 20 and the 2,000,000 21 teachers who heretofore have been responsible for the administration of the American public school system. If the Court perceives a rational and analytically sound distinction between the discretionary decision by school authorities to suspend a pupil for a brief period, and the types of discretionary school decisions described above, it would be prudent to articulate it in today's opinion. Otherwise, the federal courts should prepare themselves for a vast new role in society.

IV

Not so long ago, state deprivations of the most significant forms of state largesse were not thought to require due process protection on the ground that the deprivation resulted only in the loss of a state-provided "benefit." E. g., Bailey v. Richardson, 86 U. S. App. D. C. 248, 182 F.2d 46 (1950), aff'd by an equally divided Court, 341 U.S. 918 (1951). In recent years the Court, wisely in my view, has rejected the "wooden distinction between 'rights' and 'privileges,'" Board of Regents v. Roth, 408 U.S., at 571, and looked instead to the significance of the state-created or state-enforced right and to the substantiality of the alleged deprivation. Today's opinion appears to abandon this reasonable approach by holding in effect that government infringement of any interest to which a person is entitled, no matter what the interest or how inconsequential the infringement, requires constitutional protection. As it is difficult to think of any less consequential infringement than suspension of a junior high school student for a single day, it is equally difficult to perceive any principled limit to the new reach of procedural due process. 22

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19 There is, no doubt, a school of modern psychological or psychiatric persuasion that maintains that any discipline of the young is detrimental. Whatever one may think of the wisdom of this unproved theory, it hardly affords dependable support for a constitutional decision. Moreover, even the theory's proponents would concede that the magnitude of injury depends primarily upon the individual child or teenager. A classroom reprimand by the teacher may be more traumatic to the shy, timid introvert than expulsion would be to the aggressive, rebellious extrovert. In my view we tend to lose our sense of perspective and proportion in a case of this kind. For average, normal children - the vast majority -- suspension for a few days is simply not a detriment; it is a commonplace occurrence, with some 10% of all students being suspended; it leaves no scars; affects no reputations; indeed, it often may be viewed by the young as a badge of some distinction and a welcome holiday.

20 This estimate was supplied by the National School Board Association, Washington, D. C.


22 Some half dozen years ago, the Court extended First Amendment rights under limited circumstances to public school pupils. Mr. Justice Black, dissenting, viewed the decision as ushering in "an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools' . . . is in ultimate effect transferred to the Supreme Court." Tinker v. Des Moines School Dist., 393 U.S. 503, 515 (1969). There were some who thought Mr. Justice Black was unduly concerned. But his prophecy is now being fulfilled. In the few years since Tinker there have been literally hundreds of cases by schoolchildren alleging violation of their constitutional rights. This flood of litigation, between pupils and school authorities, was triggered by a narrowly written First Amendment opinion which I could well have
References

16 Am Jur 2d, Constitutional Law 544-546, 549, 560, 561; 68 Am Jur 2d, Schools 269-274
22 Am Jur Pl & Pr Forms (Rev ed), Schools, Form 161

28 USCS, 1253; Constitution, 14th Amend
US L Ed Digest, Constitutional Law 527, 538, 818
ALR Digests, Constitutional Law 467; Schools 62
L Ed Index to Annos, Schools
ALR Quick Index, Due Process of Law; Schools
Federal Quick Index, Schools and School Districts

Annotation References:

Construction and application of 28 USCS 1253 permitting direct appeal to Supreme Court from order of three-judge District Court granting or denying injunction. 26 L Ed 2d 947.

Right of student to hearing on charges before suspension or expulsion from educational institution. 58 ALR2d 903. [****56]
Gorman v. University of Rhode Island

United States Court of Appeals for the First Circuit

January 19, 1988

No. 86-2101

Reporter
837 F.2d 7 *; 1988 U.S. App. LEXIS 402 **

Raymond J. Gorman, III, Plaintiff, Appellee, v. University of Rhode Island, et al., Defendants, Appellants


Core Terms
district court, hearings, due process, suspension, Manual, procedures, charges, notice, University's, deprivation, bias, cross-examination, sanctions, requires, fourteenth amendment, due process clause, due process of law, disciplinary, courts, due process requirement, opportunity to be heard, disciplinary action, circumstances, proceedings, procedural due process, disciplinary hearing, tape recording, participated, expulsion, Handbook

Case Summary

Procedural Posture
Appellant state university sought review of the decision of the United States District Court for the District of Rhode Island, which held that it was liable to appellee student, pursuant to 42 U.S.C.S. §§ 1983 & 1988, for deprivation, under color of state law, of his constitutionally protected civil rights.

Overview
Appellee student contested sanctions imposed upon him by appellant state university following disciplinary hearings. Appellee asserted and the district court found that appellant deprived appellee of his constitutionally protected civil rights. The court agreed with the district court on two findings: that appellee was not deprived of procedural due process as a result of any limitation upon his right of cross-examination and was not deprived of his constitutional right to retain counsel. The court reversed the remaining of the district court's findings and held that although the extensive hearings did not mirror common law trials, the hearings were fair and comported with requirements of due process. The court found that the right to tape record the hearings was not so essential that its denial rendered the hearing unfair, and was a violation of due process. The court also found that there was no evidence of bias or prejudice which would show that the board's independence was compromised to such an extent that the hearings were unfair and that due process was violated. The court affirmed in part and reversed in part.

Outcome
The court affirmed in part and reversed in part the decision of the district court, finding that the procedures employed in the disciplinary actions taken by appellant state university against appellee student did not violate the due process clause of Fourteenth Amendment.

**LexisNexis® Headnotes**

Constitutional Law > Substantive Due Process > Scope

**HN1** Constitutional Law, Substantive Due Process

U.S. Const. amend. XIV provides that no state shall deprive any person of life, liberty, or property without due process of law.

Constitutional Law > Substantive Due Process > Scope

**HN2** Constitutional Law, Substantive Due Process

There is no doubt that due process is required when a decision of the state implicates an interest protected by U.S. Const. amend. XIV. It is also not questioned that a student's interest in pursuing an education is included within the U.S. Const. amend. XIV's protection of liberty and property.

Constitutional Law > Substantive Due Process > Scope

Education Law > ... > Student Discipline > Methods of Discipline > Expulsions

Education Law > ... > Student Discipline > Methods of Discipline > Suspensions of Students

**HN3** Constitutional Law, Substantive Due Process

A student facing expulsion or suspension from a public educational institution is entitled to the protections of due process.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Substantive Due Process > Scope

**HN4** Fundamental Rights, Procedural Due Process
Due process, which may be said to mean fair procedure, is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation. The time-honored phrase due process of law expresses the essential requirement of fundamental fairness. Yet, it does not impose an unattainable standard of accuracy.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

**HN5** Procedural Due Process, Scope of Protection

Notice and an opportunity to be heard have traditionally and consistently been held to be the essential requisites of procedural due process.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

**HN6** Procedural Due Process, Scope of Protection

The hearing, to be fair in the due process sense, implies that the person adversely affected was afforded the opportunity to respond, explain, and defend. Whether the hearing was fair depends upon the nature of the interest affected and all of the circumstances of the particular case.

Administrative Law > ... > Hearings > Right to Hearing > Due Process

Constitutional Law > Substantive Due Process > Scope

**HN7** Right to Hearing, Due Process

In determining whether due process has been denied, the courts have had to ascertain the scope of the protection required in a particular setting, as well as an accommodation of the competing interests involved. The Supreme Court identified three factors that must be considered: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the state interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Education Law > ... > Student Discipline > Methods of Discipline > Expulsions

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Education Law > ... > Student Discipline > Disciplinary Proceedings > Notice

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Fair process requires notice and an opportunity to be heard before the expulsion or significant suspension of a student from a public school.

In fostering and insuring the requirements of due process, however, the courts have not and should not require that a fair hearing is one that necessarily must follow the traditional common law adversarial method. Rather, on judicial review the question presented is whether, in the particular case, the individual has had an opportunity to answer, explain, and defend, and not whether the hearing mirrored a common law criminal trial.

Beyond the right to notice and hearing, the span of procedural protections required to ensure fairness becomes uncertain, and must be determined by a careful weighing or balancing of the competing interests implicated in the particular case.

An impartial and independent adjudicator is a fundamental ingredient of procedural due process.

The right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.
Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

**HN13 Procedural Due Process, Scope of Protection**

On review, the courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial.

**Counsel:** Nicholas Trott Long with whom Barbara E. Grady was on brief, for Appellants.
Marc B. Gursky with whom, Lovett, Schefrin & Gallogly was on brief, for Appellee.

**Judges:** Breyer and Torruella, Circuit Judges, and Re, * Judge.

**Opinion by:** RE

**Opinion**

[*9] RE, Chief Judge:

Both parties to this action, Raymond J. Gorman, III (Gorman), and the University of Rhode Island (the University), appeal from a final order entered on October 14, 1986, in the United States District Court for the District of Rhode Island. Gorman, a student at the University, contests the validity of sanctions, including suspension, imposed upon him after certain university disciplinary hearings. The district court found that the disciplinary hearings held by the University violated Gorman's right to due process of law as secured by the fourteenth amendment to the Constitution. Hence, the district court held that the University of Rhode Island was liable to Gorman, pursuant to 42 U.S.C. §§ 1983 & 1988, for deprivation, under color of state law, of Gorman's constitutionally protected civil rights. Gorman v. University of Rhode Island, 646 F. Supp. 799, 815 (D.R.I. 1986).

The University contends that the district court committed error in holding that the public university's hearing procedures did not afford Gorman adequate due process protection. On cross-appeal, Gorman contends that the court erred in finding that due process did not entitle him to representation by counsel at the disciplinary hearings, nor to cross-examine hearing board members and witnesses on his allegations of bias.

The question presented on this appeal is whether the district court erred in holding that the disciplinary hearings conducted by the University denied Gorman the right to due process of law, in violation of the fourteenth amendment. Since we hold that, under the circumstances presented, Gorman's contentions are without merit, and that the University employed adequate procedures which satisfied the requirements of due process, the decision of the district court is affirmed in part and reversed in part.

**The Facts**

* Chief Judge of the United States Court of International Trade, sitting by designation.
Gorman enrolled in the University of Rhode Island in September 1981. Over the next few years, Gorman participated in student government, and was appointed to serve on the Student Senate. He was an active member of several student committees involved in university administration, and, in this capacity, often promoted "controversial" policies. The Student Senate budget proposals made by Gorman successfully cut the budget of the University's entertainment committee, and defeated a salary increase for the Student Senate's secretary, Melanie Murphy.

In September 1984, Gorman was involved in altercations with two university employees. On September 17, Gorman had an argument with Vera Carr, then Acting Director of the University Student Union, over staff use of a student van. On September 18, Gorman had another argument about the van, this time with the Student Senate's secretary, Melanie Murphy. Both women subsequently filed complaints with the University, charging Gorman with verbal abuse, harassment, and threats, in violation of section 2.4 of the University's student handbook entitled Student Rights and Responsibilities 1984-85 (Student Handbook).

Gorman was duly notified that separate hearings on these charges would be held pursuant to the provisions in the University Manual. The Preamble to the University Manual states that it is a "compilation of legislation, policies and administrative regulations for the government of the University of Rhode Island. . . ." Incorporated within the manual are provisions on the relationship between students and the administration, including their respective rights and responsibilities. The applicable provisions of the manual are also set forth in the Student Handbook.

The hearings on the charges against Gorman were held before the University Board on Student Conduct (UBSC), which was convened pursuant to section 9.23.10 of the University Manual. Pursuant to section 5.9.11 of the University Manual the board for each hearing consisted of one faculty member and five students. In addition, section 9.23.15 of the manual required that a staff member from the Office of Student Life serve as advisor to the UBSC in all stages of the university judicial process. The Acting Director of Student Life, Ronald Weisinger, served as the advisor to the University board, which heard the charges against Gorman, and participated in its meetings as a non-voting member.

The hearing on the Carr complaint was held on October 4, 1984 and lasted approximately 7 hours. The UBSC was chaired by a student, Julia Emmets, pursuant to section 5.19.13 of the University Manual which states that "the board shall be chaired by a student member elected by a majority vote of the board." After the hearing, the UBSC unanimously found Gorman guilty of harassing and intimidating Carr and impeding her in the performance of her duties. As a result, Gorman was placed on disciplinary probation for 6 months, and was required to attend one session at the University's counseling center. Gorman complied with both of these sanctions.

The hearing on the Murphy complaint was held on October 25, 1984, November 8, 1984, and January 14, 1985, and lasted approximately 20 hours. At this hearing, the UBSC consisted of three new student members and two students who had been members on the prior board, including Julia Emmets who again served as chair. Weisinger again served as the non-voting advisor to the board, and also participated as a witness. Gorman objected to the presence of several members of the UBSC on the grounds of bias. Specifically, Gorman alleged bias on the part of two students, Julia Emmets, who allegedly had expressed a dislike for "people who went against the system," and Roberto Pietersz, who had opposed Gorman's position on a student government committee. These objections were denied, and, at the conclusion of the hearing, Gorman was found guilty. The board imposed sanctions consisting of a
permanent ban from office in any recognized student organization, a mandatory examination by the University's consulting psychiatrist, and, if recommended, commencement of a course of treatment.

The UBSC's decision on the Murphy charge was appealed by Gorman to the University Appeals Board, which consisted of two faculty members and one student. The Appeals Board based its review on the record of the hearings prepared by Weisinger, the UBSC advisor. Pursuant to section 9.23.17 of the University Manual, a record of each hearing was made and maintained [*11] by the Office of Student Life. Weisinger appeared before the Appeals Board on behalf of the UBSC, and, in accordance with university practice, submitted a rebuttal brief concerning plaintiff's procedural objections. The Appeals Board upheld the decision of the UBSC.

Gorman [**7] failed to comply with the sanctions imposed by the UBSC, and, on March 5, 1985, formal charges were filed by the Vice President of the University, A. Robert Rainville. Gorman was notified that he was charged with three counts of violating section 2.2 of the Student Handbook, and a hearing was scheduled for March 28. Two days before the hearing, by letter to Weisinger, Gorman made several procedural requests. Specifically, he requested an open hearing, permission to have legal counsel present, permission to tape record the proceedings, total media access to the proceedings, and a stenographic record to be provided at the University's expense. Although these requests were denied, Gorman was informed that he would be allowed to make a stenographic record of the hearing at his own expense, provided that the University was also allowed to obtain a copy.

At the March 28 hearing, in addition to objecting to Weisinger serving as advisor to the board, Gorman again objected to the inclusion of two students whom Gorman had accused of bias at the November 8 hearing.

The UBSC found Gorman guilty of not complying with UBSC decisions in violation of section 2.2 of the Student Handbook, and imposed [**8] three sanctions against him: (1) immediate suspension from the University through the following academic year, (2) the suspension to continue until he complied fully with all sanctions which had been imposed against him, and (3) disciplinary probation throughout the remainder of his undergraduate enrollment. The decision of the UBSC provided for a stay of the suspension to allow Gorman to finish the spring 1985 semester on two conditions: (1) Gorman's immediate resignation from all student government positions, and, (2) within one week, examination and commencement of any recommended treatment by the University's consulting psychiatrist. The final sanctions were also reviewed and approved by the President of the University, Edward D. Eddy. Gorman appealed the decision of the UBSC, and on April 15, 1985, the University Appeals Board denied Gorman's appeal.

On April 16, 1985, Gorman filed this action in the United States District Court for the District of Rhode Island, and moved to enjoin enforcement of the sanctions. Judge Selya granted the motion, and issued a temporary restraining order, enjoining defendants from suspending Gorman before the end of the spring 1985 semester, "unless [**9] some other . . . cause is created or exists, . . . which would otherwise give them the right to suspension or expulsion." The court also ordered Gorman to refrain from serving as an officer in any Student Senate recognized organization. Both parties complied with the order, which expired on May 15, 1985.

Gorman also moved for a preliminary injunction seeking relief from the district court for the sanctions imposed against him by the University. On September 6, 1985, Judge Pettine enjoined the defendants

The case proceeded to trial, and the district court held that the University procedures violated the due process clause of the fourteenth amendment, and that, "pursuant to 42 U.S.C. § 1983, the defendants are liable to the plaintiff for depriving him . . . of rights secured by the Constitution." *Gorman v. University of Rhode Island*, 646 F. Supp. 799, 815 (D.R.I. 1986). In a thorough opinion by Judge [*10] Pettine, the district court held that Gorman's request to tape record the hearings should have been granted. The court also held that "Weisinger's involvement in the USBC's deliberations compromised their independence to a degree that violates the requirements of due process." *Id.* at 811. Hence, all sanctions [*12] were vacated, and the University was ordered to purge Gorman's records of all references to the proceedings and charges. The University was also ordered "to afford the plaintiff a *de novo* hearing or series of hearings that comply with the requirements of due process." *Id.* at 815.

**Discussion**

As early as Magna Carta, procedure was regarded as a valuable means for the protection of the rights of litigants. In America, with the object of preventing an arbitrary government, procedural safeguards were guaranteed to all persons by the inclusion of "due process" clauses in the federal and state constitutions. Few principles of law, applicable as well to the administrative process, are as fundamental or well established as "a party is not to suffer . . . without an opportunity of being heard." *Painter v. Liverpool Oil Gas Light Co.*, 11 Eng. Rep. 478, 484, 3 Adm. & Eccl. 433, 448-49 (K.B. 1836). [*11] For the American, in the words of Justice Frankfurter, "*audi alteram partem* -- hear the other side! -- a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment. . . ." *Caritativo v. California*, 357 U.S. 549, 558, 2 L. Ed. 2d 1531, 78 S. Ct. 1263 (1958) (Frankfurter, J., dissenting).

**HN1** The fourteenth amendment to the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. **HN2** There is no doubt that due process is required when a decision of the state implicates an interest protected by the fourteenth amendment. It is also not questioned that a student's interest in pursuing an education is included within the fourteenth amendment's protection of liberty and property. See *Goss v. Lopez*, 419 U.S. 565, 574-75, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975). Hence, **HN3** a student facing expulsion or suspension from a public educational institution is entitled to the protections of due process. See *id.* at 575-76; *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.), cert. denied, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961).

To say that an interest is protected by the due process clause of the Constitution, however, is only the beginning of the inquiry. In the language of the Supreme Court, "once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). **HN4** Due process, which may be said to mean fair procedure, is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation. See *Mathews v. Eldridge*, 424 U.S. 319, 334, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); *Morrissey v. Brewer*, 408 U.S. at 481. The time-honored phrase "due process of law" expresses the essential requirement of fundamental fairness. Yet, it "does not impose an unattainable standard of accuracy." *Grannis v. Ordean*, 234 U.S. 385, 395, 58 L. Ed. 1363, 34 S. Ct.
Hence, the procedures employed in a disciplinary action must be tested by the extent to which [*13] they comport with the requirement of fundamental fairness. See Buss, Procedural Due Process For School Discipline: Probing the Constitutional Outline, 119 U. Pa. L. Rev. 545, 551 (1971).

Notice and an opportunity to be heard have traditionally and consistently been held to be the essential requisites of procedural due process. See Goldberg v. Kelly, 397 U.S. 254, 267-68, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Frankfurter, J., concurring); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950). It has been stated with crystal clarity that "notice and opportunity to be heard are fundamental to due process of law." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 178, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Douglas, J., concurring). Suffice it to say that notice and a fair hearing require that a [*13] person be heard prior to being deprived of a vital legally protected interest.

The hearing, to be fair in the due process sense, [*14] implies that the person adversely affected was afforded the opportunity to respond, explain, and defend. Whether the hearing was fair depends upon the nature of the interest affected and all of the circumstances of the particular case. The courts have stated that an opportunity to be heard requires that an individual be afforded "some kind of hearing." See Goss v. Lopez, 419 U.S. at 579 (emphasis omitted). In the administrative process, the words "some kind of hearing" have acquired a meaning which implies all of those elements of fairness which go to the heart of the concept of due process in the particular case. See generally Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). In determining whether due process has been denied, the courts have had to ascertain the scope of the protection required in a particular setting, as well as an "accommodation of the competing interests involved." Goss v. Lopez, 419 U.S. at 579. In Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), the Supreme Court identified three factors that must be considered:

First, the private interest [*15] that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Although it dealt with the expulsion of students rather than with a suspension, a valuable discussion of the procedural due process rights of students is found in the case of Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961). Indeed, in student discipline cases, since that case, the federal courts have uniformly held that [*16] fair process requires notice and an opportunity to be heard before the expulsion or significant suspension of a student from a public school.

The plaintiffs, in Dixon, students in good standing at the Alabama State College, were protesting the practice or policy of segregation, and participated in several sit-in demonstrations off-campus. As a consequence, they were summarily expelled. The notice of expulsion stated no specific grounds for the action, and the students were not given an opportunity to explain or refute the charges of alleged
wrongdoing. The students sought injunctive relief, alleging a violation of their right to due process of law. The university maintained that, absent any statute or rule requiring further procedures, the action of the university in expelling them was legal and constitutional.

The trial court upheld the dismissal and denied relief. The United States Court of Appeals for the Fifth Circuit reversed, and stated that "whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law." 294 F.2d at 155. In determining the minimum procedural requirements necessary to satisfy due process, the court balanced the interests of the parties under the particular circumstances. Id. at 157. The plaintiffs' interest in remaining at the college in which they were students in good standing, was balanced against the interest of the school administration to dismiss or expel students [**17] for the general benefit of the institution. Id. The potential for arbitrary action on the part of the school officials, and the absence of any immediate danger posed by the students, led the court to hold that the Board of Education was required to exercise "at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense." Id.

In delineating the nature of the hearing, the court noted that a charge of misconduct, which may easily be colored by the point of view of the witness, "requires [*14] something more than an informal interview with an administrative authority of the college." Id. at 158. The court however, added that "this is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required." Id. at 159.

The Supreme Court in Goss v. Lopez, 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975), considered the procedural due process issue in the context of disciplinary action taken by a public educational institution. In that case, students suspended for disciplinary reasons, challenged [**18] the statutory authority of Ohio's public school principals to suspend students for up to 10 days without prior notice or a hearing.

The Court held that a 10-day suspension was not a de minimus deprivation of the students' property or liberty interests in an education, and, therefore, could not be imposed in "complete disregard of the Due Process Clause." 419 U.S. at 576. Hence, the Court held the statute to be unconstitutional, and concluded that, at the very minimum, students must be given "some kind of notice and afforded some kind of hearing." Id. at 579 (emphasis in original).

After balancing the competing interests involved, even in a short suspension, the Court determined that the procedures due to a student included notice, an explanation of the case against the student, and "an opportunity to present his side of the story." Id. at 581. The Court cautioned, however, that "further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." Id. at 583. [**19]

In this case, there is no doubt that Gorman was given notice of the charges against him, and an opportunity to be heard. Nevertheless, he maintains that the University denied him certain procedural protections guaranteed by the due process clause of the Constitution. Specifically, Gorman contends that he was entitled to, and was deprived of: (1) an impartial and independent decision-maker, (2) a transcript and/or a tape recording of the hearings, (3) cross-examination of any participant in the actions concerning possible bias, (4) representation by counsel at the hearings, and (5) review of the University's decision by a court under a "substantial evidence" standard. In essence, Gorman's argument rests on the premise that a...
university may not discipline its students without providing full-scale adversarial proceedings comparable to those afforded defendants in a criminal trial.

HN9 In fostering and insuring the requirements of due process, however, the courts have not and should not require that a fair hearing is one that necessarily must follow the traditional common law adversarial method. Rather, on judicial review the question presented is whether, in the particular case, the individual [**20] has had an opportunity to answer, explain, and defend, and not whether the hearing mirrored a common law criminal trial.

HN10 Beyond the right to notice and hearing, the span of procedural protections required to ensure fairness becomes uncertain, and must be determined by a careful weighing or balancing of the competing interests implicated in the particular case. See Mathews v. Eldridge, 424 U.S. 319, 334-35, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). The interests of students in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma are, of course, paramount. As the Supreme Court declared in Brown v. Board of Education, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954), "education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship." Id. at 493.

Although the protection of such a vital interest would require all possible safeguards, it must be balanced against the need to promote and protect the primary [**21] function of institutions that exist to provide education. Although fairness in disciplinary [*15] procedures serves the goals of both students and schools alike, the burdens imposed on the schools may become unjustifiable. School administrators and courts recognize that "procedural requirements entail the expenditure of limited resources, [and] that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection. . . ." Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. at 1276. Hence, it is no exaggeration to state that the undue judicialization of an administrative hearing, particularly in an academic environment, may result in an improper allocation of resources, and prove counter-productive.

In this case, the district court noted that, HN11 an impartial and independent adjudicator "is a fundamental ingredient of procedural due process." Gorman, 646 F. Supp. at 810; see Withrow v. Larkin, 421 U.S. 35, 46-47, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975). Gorman maintains that this fundamental requisite was lacking in the disciplinary actions taken against [**22] him. The district court agreed, and found that the UBSC's independence was compromised by the extensive participation of Weisinger, and that the potential bias of the board members violated the requirements of due process. See Gorman, 646 F. Supp. at 810-13.

As required by the University Manual, the decision-maker in disciplinary actions is not an administrator of the University, but is the UBSC, composed of students and faculty. It would seem clear that the role of the board before whom the student appears is quasi-judicial, which presupposes the indispensable prerequisites of integrity and objectivity. Nevertheless, it has been noted that "alleged prejudice of university hearing bodies must be based on more than mere speculation and tenuous inferences." Duke v. North Texas State Univ., 469 F.2d 829, 834 (5th Cir. 1972), cert. denied, 412 U.S. 932, 93 S. Ct. 2760, 37 L. Ed. 2d 160 (1973). Generally, in examining administrative proceedings, the presumption favors the administrators, and the burden is upon the party challenging the action to produce evidence sufficient to rebut this presumption.
Gorman has not met this burden[**23] of proof in this case. In the intimate setting of a college or university, prior contact between the participants is likely, and does not per se indicate bias or partiality. An examination of the record in this case reveals no evidence of bias or prejudice which would show that the board's independence was compromised to such an extent that the hearings were unfair and that due process was violated.

Nor do the various roles of Weisinger, while inappropriate in a judicial setting, necessarily violate the requirements of fairness. As Justice Blackmun noted in Richardson v. Perales, 402 U.S. 389, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971), "the advocate-judge-multiple-hat suggestion. . . . assumes too much and would bring down too many procedures designed, and working well. . . ." Id. at 410. Gorman's contention that Weisinger's various roles or "multiple-hats" are evidence of bias and undue influence, also "assumes too much." The University procedures are designed to give students an opportunity to respond and defend against the charges made, and there is no evidence which would show that Gorman was denied a fair hearing because of Weisinger's multiple[**24] roles. Consequently, in this case, it cannot be said that Gorman has borne his burden of demonstrating that the UBSC's independence was compromised, and that it did not afford him a fair hearing.

The district court also held that Gorman's due process rights were violated by the University's denial of his request to tape record the hearings. Although the absence of a written transcript has not been a ground for reversing disciplinary action, several courts have required some form of record. See, e.g., Marin v. University of Puerto Rico, 377 F. Supp. 613, 623 (D.P.R. 1974); Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967). Indeed, in this case, the University Manual, section 9.23.17, states that "a record of each hearing, comprised of a summary of the testimony and evidence [*16] presented and of the decision rendered, shall be made." These written accounts of Gorman's hearings, made and maintained by the Office of Student Life, clearly constituted a sufficient record of the proceedings. Hence, we disagree that, in this case, the right to tape record the hearings was so essential that its denial rendered the hearing[**25] unfair, and was a violation of due process.

The district court rejected Gorman's contention that he was deprived of his constitutional right to retain counsel, and to cross-examine his accusers on his allegations of bias. On these two allegations of error, we agree with the holding of the district court. As indicated in the district court's opinion, the weight of authority is against representation by counsel at disciplinary hearings, unless the student is also facing criminal charges stemming from the incident in question. Gorman, 646 F. Supp. at 806; see Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Jaksa v. Regents of the Univ. of Michigan, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984), aff'd mem., 787 F.2d 590 (6th Cir. 1986). This, however, does not preclude a student threatened with sanctions for misconduct from seeking legal advice before or after the hearings. Furthermore, as permitted by the University Manual, Gorman was allowed, and did in fact, choose someone from within the University community to assist him in presenting his case to the UBSC. As for the right to cross-examination, suffice[**26] it to state that the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases. See Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961); Jaksa v. Regents of the Univ. of Michigan, 594 F. Supp. 1245, 1252-53 (E.D. Mich. 1984). Gorman had the opportunity to cross-examine his accusers as to the incidents and events in question, and there is no evidence that any limitation on Gorman's cross-examination prevented him from eliciting the truth about the facts and events in issue. Under the circumstances presented, Gorman was not deprived of procedural due process as a result of any limitation upon his right of cross-examination.
A major purpose of the administrative process, and the administrative hearing, is to avoid the formalistic adversary mode of procedure. As stated by Justice White in *Goss v. Lopez*, "further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." 419 U.S. at 583. [**27**] Hence, HN13 on review, the courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial. The question presented is not whether the hearing was ideal, or whether its procedure could have been better. In all cases the inquiry is whether, under the particular circumstances presented, the hearing was fair, and accorded the individual the essential elements of due process. In the words of Justice White, "the Due Process Clause requires, not an 'elaborate hearing' before a neutral party, but simply 'an informal give-and-take between student and disciplinarian' which gives the student 'an opportunity to explain his version of the facts.'" See *Ingraham v. Wright*, 430 U.S. 651, 693, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977) (White, J., dissenting). A careful reading of the record in this case reveals that Gorman was given the opportunity to explain fully his version of the facts. In addition, Gorman had the opportunity to appeal the adverse decisions, and did in fact avail himself of the University's appeal process. Although the extensive hearings did not mirror common law trials, the hearings [**28**] were fair and comported with requirements of due process.

**Conclusion**

It is the holding of the court that the procedures employed in the disciplinary actions taken by the University of Rhode Island against Gorman did not violate the Due Process Clause of the fourteenth [*17*] amendment. The judgment of the district court is, therefore, affirmed in part and reversed in part.
**Plummer v. Univ. of Houston**

United States Court of Appeals for the Fifth Circuit

June 23, 2017,Filed

No. 15-20350

**Reporter**
860 F.3d 767 *; 2017 U.S. App. LEXIS 11268 **; 2017 WL 2704014

NATALIE PLUMMER; RYAN MCCONNELL, Plaintiffs - Appellants v. UNIVERSITY OF HOUSTON; RICHARD BAKER; RICHARD WALKER, Defendants - Appellees

**Subsequent History**: As Revised June 26, 2017.

**Prior History**: [**1**] Appeal from the United States District Court for the Southern District of Texas.


**Core Terms**

Female, University's, procedures, videos, sexual assault, sexual misconduct, investigated, cross-examination, due process, disciplinary, charges, sexual, proceedings, discipline, hearings, district court, adjudicating, questions, female student, allegations, misconduct, witnesses, adviser, graphic, Dorm, sex, sexual harassment, hearing panel, deprivation, suspension

**Case Summary**

**Overview**

**HOLDINGS**: [1]-The university had a strong interest in the educational process, including maintaining a safe learning environment for all of its students, while preserving its limited administrative resources; [2]-The students received multiple, meaningful opportunities to challenge the university's allegations, evidence, and findings, and in light of the graphic conduct depicted in the videos and photo, further procedural safeguards would not have lessened the risk of an erroneous deprivation of the students' interests or otherwise altered the outcome; [3]-The students' conduct, as detailed in the evidence, violated the university's Interim Sexual Assault Policy; [4]-The university's discipline was predicated on what the two charged students did, and during the process they, a male and a female, were treated equally, and there was no sound basis for an inference of gender bias.

**Outcome**

Judgment affirmed.
Disciplinary Proceedings, Due Process

It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking in wisdom or compassion. A university is not a court of law, and it is neither practical nor desirable it be one. Ultimately, courts must focus on ensuring the presence of fundamentally fair procedures to determine whether the misconduct has occurred.

Generally, the amount of process due in university disciplinary proceedings is based on a sliding scale that considers three factors: (a) the student's interests that will be affected; (b) the risk of an erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (c) the university's interests, including the burden that additional procedures would entail. An informal give-and-take between a high school student and the administration afforded sufficient process preceding a temporary suspension. The Court specified, however, that longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct. The interpretation and application of the Due Process Clause are intensely practical matters and the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. The nature of the hearing should vary depending upon the circumstances of the particular case.

Whether a state university has provided an individual student sufficient process is a fact-intensive inquiry and the procedures required to satisfy due process will necessarily vary depending on the particular circumstances of each case.
Standards of Review, De Novo Review

The appellate court reviews the dismissal and the district court's related conclusions of law de novo. The University, as a recipient of federal funding, can be held liable for intentional discrimination on the basis of sex or for deliberate indifference to discrimination against or harassment of a student on the basis of sex.

Education Law > Civil Liability > Harassment

Civil Liability, Harassment

A university can face Title IX liability for imposing discipline where gender is a motivating factor for the decision under two general theories. In the first instance, the claim is that the charged student (plaintiff) was innocent and wrongly found to have committed an offense. The second instance alleges selective enforcement, i.e., that regardless of the student's culpability, the severity of the penalty and/or the university's decision to initiate proceedings was affected by the charged student's gender. More recently, the same court held a student's case sufficient to proceed under Title IX where a male student alleged himself innocent of engaging in nonconsensual sex with a female student. He further alleged procedural bias and improprieties in the university's discipline process.

Education Law > ... > Student Discipline > Disciplinary Proceedings > Due Process

Disciplinary Proceedings, Due Process

Deliberate indifference to constitutional rights is a very high standard of misconduct.

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For UNIVERSITY OF HOUSTON, RICHARD BAKER, RICHARD WALKER, Defendants - Appellees: Sean Patrick Flammer, Esq., Office of the Attorney General, Austin, TX.


Opinion by: STEPHEN A. HIGGINSON

Opinion

[*770] STEPHEN A. HIGGINSON, Circuit Judge:

The University of Houston found two former students, Ryan McConnell and Natalie Plummer, to have violated the University's sexual misconduct policy. After two unsuccessful administrative appeals, McConnell and Plummer were ultimately expelled. McConnell and Plummer then sued the University and two University officials, alleging that they were denied constitutional due process and were discriminated against in violation of Title IX. The district court granted summary judgment to the University and the individual defendants, holding that no due process violation occurred and that the individual defendants
were entitled to qualified immunity. The district court dismissed the Title IX claims under Rule 12(b)(6). Finding no reversible error, we affirm.

I

McConnell and Plummer were students at the University of Houston in 2011. On the night of November 19, 2011, McConnell met, for the first time, "Female UH Student" at a bar in Houston. Both McConnell and Female UH Student became intoxicated. They were ejected from the bar for disruptive behavior and walked to McConnell's nearby dorm room. There, they engaged in sexual activity, but neither can remember exactly what occurred.

Later that evening, McConnell's girlfriend (now wife), Plummer, appeared at his dorm room and found McConnell and Female UH Student, both naked and unconscious on the floor. Plummer yelled expletives and took a photo of the two, which she posted on Facebook but removed sometime later. Plummer also made two brief videos. In one, the "Dorm Room Video," a drowsy McConnell appears to fondle the unresponsive Female UH Student as she lies on the dorm room floor and Plummer crudely berates him. After McConnell stands up, Plummer focuses the camera on Female UH Student's vagina and yells several lewd statements, including "Fucking yeah, yeah. Fucking get it, get it. Fucking get that pussy, bitch!" Simultaneously, slapping sounds can be heard in the background. In the other, the "Elevator Video," Plummer films Female UH Student, who is still fully naked, lying on the dormitory's communal hallway floor. Female UH Student stands up and walks toward Plummer, and Plummer leads the nude Female UH Student into an elevator and sends it to the lobby. Voices can be heard speaking throughout the video, but the precise statements are often unclear. Plummer later showed the videos to her friends and shared the videos and photo electronically.

Other students found Female UH Student lying naked in the elevator, and they contacted University police. A Sexual Assault Nurse examined Female UH Student and found injuries consistent with sexual assault. Police investigated the incident, but did not criminally charge McConnell or Plummer.

On February 12, 2012, Female UH Student submitted a complaint to the University alleging that she was a victim of sexual assault. Richard Baker, the Vice President of the University's Office of Equal Opportunity Services (EOS), notified McConnell that EOS was investigating the incident. Thereafter, McConnell and Plummer met with Baker to discuss the incident and provide their side of the story. At her meeting with Baker, Plummer presented the photo she took of McConnell and Female UH Student, as well as the Elevator Video. Plummer did not disclose the Dorm Room Video. Based on the evidence gathered, the University did not proceed with disciplinary actions at that time. More than a year and a half later, however, the University received a copy of the Dorm Room Video from the Harris County Sherriff's Office and then decided disciplinary proceedings were warranted.

The University provided both McConnell and Plummer with a formal, written declaration of the various allegations against them on September 30, 2013. Each student retained counsel, who formally responded to the charges and accompanied McConnell and Plummer to meetings with Baker. McConnell reported that he remembered nothing after he and Female UH Student arrived at his dorm room but denied sexually assaulting her. Plummer insisted that her actions were motivated by anger at her boyfriend, not an attempt

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1 At some point, Female UH Student decided not to pursue her complaint, and thus the University was the “Complainant” in both proceedings as provided for by the University's procedures.
to encourage him to assault Female UH Student. She also asserted that Female UH Student, when awakened, was pressing to "sex" her.\textsuperscript{2}

After completing his investigation, Baker authored a report finding that McConnell "violated the sexual assault and attempted sexual assault provisions . . . when he engaged in sexual activity with [Female UH Student] on November 19, 2011, without her consent."\textsuperscript{3} Baker also found that Plummer "facilitated/encouraged the sexual assault of another [UH] student[,"] "electronically recorded the sexual activity of another [UH] student and then shared that video . . . without that student's permission[,]" and "made lewd, lecherous and humiliating comments of a sexual nature against another [UH] student."

Pursuant to the University's procedures, each student appealed Baker's findings to a four-person panel of University personnel. The panels, tasked with upholding or rejecting EOS's findings based on a preponderance of the evidence standard, held separate appeal hearings for McConnell and Plummer. Neither student attended the other's full hearing, although Plummer testified as a witness at McConnell's hearing. Baker, an attorney, presented his findings to the panel, including by testifying about his investigation and providing a packet of investigatory materials. He called two witnesses at McConnell's hearing—two University police officers who responded to and investigated the incident—and none at Plummer's hearing. An additional University EOS attorney was present at each hearing to advise the panel.

McConnell's and Plummer's attorneys attended and participated in the hearings. Although the University's procedures explicitly allow a student's attorney only a minor role as an "adviser" at the appeal hearing, in this case, the University allowed McConnell's and Plummer's attorneys to participate more fully, including at times by examining and cross-examining witnesses and making statements to the panel. Additionally, McConnell's and Plummer's attorneys drafted and submitted formal responses to the University's allegations and met with University officials on several occasions to discuss the evidence against the plaintiffs.

McConnell and Plummer each made opening and closing arguments, testified, presented witnesses, cross-examined witnesses, and raised legal and factual objections to the panel. The University's procedures explicitly allow cross-examination of witnesses only through the submission of written questions. Here, however, the panels frequently allowed all parties (or their attorneys) to question witnesses (including Baker) in person at the hearing. McConnell and Plummer were informed of the investigatory evidence several days before each hearing, although some identities were redacted from materials based on educational privacy concerns. At each hearing, the panel was shown the Dorm Room and Elevator Videos, and all parties offered interpretations of the videos' contents. Female UH Student was not deposed and did not appear or testify at either hearing. Neither Baker nor any other witness testified to the substance of any conversations with Female UH Student about her memory of the night, and Female UH Student's original complaint—which was among the materials supplied to the panels—stated that she did not remember anything that occurred after she arrived at the bar the night of the incident.

\textsuperscript{2}The dissent observes that Female UH Student "was never investigated for her lascivious advances toward Plummer." Plummer never submitted a formal complaint to EOS, which would have required EOS to initiate investigative processes.

\textsuperscript{3}"Sexual activity" as defined by the University's 2013 Sexual Misconduct Policy includes "any intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch the Complainant or themselves with or any of these body parts; and any intentional bodily contact in a sexual manner, though not involving contact with/of/by breasts, buttocks, groin, genitals, mouth or other orifice."
Both hearing panels upheld Baker's findings. McConnell and Plummer then appealed to Richard Walker, the University's Vice President and Vice Chancellor for Student Affairs and Enrollment Services, as allowed by the University's procedures. In September 2014, Walker denied these further appeals. McConnell and Plummer were expelled and banned from the University and any activities connected with it. The disciplinary notations were, however, removed from their official transcripts.

In this lawsuit challenging their discipline, McConnell and Plummer complain that the University retroactively applied its 2013 Misconduct Policy to their 2011 conduct. They also assert that the University's hearing procedures failed to give them adequate notice of the adverse evidence, denied them confrontation rights against Female UH Student, and limited crossexamination to written questions. Finally, they charge that Baker's multiple roles created impermissible conflicts. These deficiencies, they allege, deprived them of constitutional due process.

The district court, in a 36-page opinion relying on Supreme Court and Fifth Circuit law, concluded that the process offered to McConnell and Plummer was constitutionally sufficient. McConnell v. Univ. of Hous., No. 4:14-CV-2959, 2015 U.S. Dist. LEXIS 189229, 2015 WL 12734039 (S.D. Tex. May 28, 2015). McConnell and Plummer appealed. We affirm.

II

HN1 "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking in wisdom or compassion." Wood v. Strickland, 420 U.S. 308, 326, 95 S. Ct. 992, [*773] 43 L. Ed. 2d 214 (1975); see also Davis ex rel LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) ("[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators."). "A university is not a court of law, and it is neither practical nor desirable it be one." Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 635 n.1 (6th Cir. 2005) (citation omitted). Ultimately, courts must focus on "ensuring the presence of 'fundamentally fair procedures to determine whether the misconduct has occurred.'" Id. at 634 (quoting Goss v. Lopez, 419 U.S. 565, 574, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)).

HN2 Generally, the amount of process due in university disciplinary proceedings is based on a sliding scale that considers three factors: (a) the student's interests that will be affected; (b) the risk of an erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (c) the university's interests, including the burden that additional procedures would entail. See Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In Goss v. Lopez, the Supreme Court held that an informal give-and-take between a high school student and the administration afforded sufficient process preceding a temporary suspension. 419 U.S. at 584. The Court specified, however, that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." Id. This court has held that "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct." Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961) [*10]. "[T]he interpretation and application of the Due Process Clause are intensely practical matters and . . . 'the very nature of due process negates any concept of inflexible procedures universally applicable to every

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4 McConnell graduated from the University before his sanction was imposed.
5 The dissent criticizes the University's use of a "preponderance of the evidence" standard for the panels' review of Baker's initial findings. McConnell and Plummer, however, do not challenge this aspect of their proceedings on appeal.

Here, the first and third Mathews factors are easily identified. On the one hand, McConnell and Plummer have a liberty interest in their higher education. See Univ. of Tex. Med. Sch. at Hous. v. Than, 901 S.W.2d 926, 929-30 (Tex. 1995) (recognizing a liberty interest in graduate higher education under the Texas Constitution); accord Dixon, 294 F.2d at 157 ("The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing."). The sanctions imposed by the University could have a "substantial lasting impact on appellants' personal lives, educational and employment opportunities, and reputations in the community." Doe v. Cummins, 662 F. App’x 437, 446 (6th Cir. 2016) (unpublished) (citing Goss, 419 U.S. at 574-75).

On the other hand, the University has a strong interest in the "educational process," including maintaining a safe learning environment for all its students, while preserving its limited administrative resources. See Goss 419 U.S. at 580, 583; see also Gorman v. Univ. of Rhode Island, 837 F.2d 7, 14-15 (1st Cir. 1998) ("Although the protection of [a student's private interest] would require all possible safeguards, [*774*] it must be balanced against the need to promote and protect the primary function of institutions that exist to provide education.").

Applying the second Mathews factor—the risk of erroneously depriving [*11] McConnell and Plummer's interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards—the unique facts of this case render it unnecessary that we draw any determinative line regarding sufficient procedures in state university disciplinary cases. McConnell and Plummer received multiple, meaningful opportunities to challenge the University's allegations, evidence, and findings. In light of the graphic conduct depicted in the videos and photo—which the panels viewed for themselves before affirming the University's findings—further procedural safeguards would not have lessened the risk of an erroneous deprivation of McConnell and Plummer's interests or otherwise altered the outcome. See Mathews, 424 U.S. at 335; see also Flaim, 418 F.3d at 639-43 (holding that additional procedures were not necessary in case without significant factual disputes); Cummins, 662 F. App’x at 446-451 (finding students accused of sexual assault received adequate due process in university disciplinary hearings where, "although the procedures employed by [the university] did not rise to the level of those provided to criminal defendants," students received an "opportunity to be heard at a meaningful time and in a meaningful manner" [*12] (quoting Mathews, 424 U.S. at 333)); cf. Dailey v. Vought Aircraft Co., 141 F.3d 224, 230 (5th Cir. 1998) ("There may be cases of such gross and outrageous conduct in open court as to justify very summary proceedings for an attorney’s suspension or removal from office, but even then he should be heard before he is condemned." (internal quotation omitted)); Scott v. Harris, 550 U.S. 372, 380-81, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (recognizing

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6 Texas has not recognized a property interest in graduate higher education. Than, 901 S.W. 2d at 930 n.1.

7 The dissent narrowly characterizes the University's interest as "impartially adjudicating quasi-criminal sexual misconduct allegations." Although it is true that the University is interested in providing a fair disciplinary process, the Supreme Court has emphasized that "[a] school is an academic institution, not a courtroom or administrative hearing room." Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 88, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978); see also Goss, 419 U.S. at 580, 583 ("[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."); Gorman, 837 F.2d at 15 ("[I]t is no exaggeration to state that the undue judicialization of an administrative hearing, particularly in an academic environment, may result in an improper allocation of resources, and prove counter-productive.").
that the existence of undisputed video evidence, which discredited the plaintiff's version of events, justified summary judgment). Thus, we [*775] hold that McConnell and Plummer did not meet their summary judgment burden to demonstrate a genuine factual dispute that the process surrounding their disciplinary cases was constitutionally defective.

McConnell and Plummer argue several potential violations of due process standards. They assert inadequate notice of the standards of conduct because the University's sexual harassment/misconduct policy was changed between 2011, when the incident occurred, and 2013, when they were formally accused. They contend the investigation against them was not full and fair, that Baker's role was suffused with conflicts and bias against them, that there was an "absence of direct evidence," and that they were denied confrontation of the [**13] victim and effective cross-examination. Each of these claims will be briefly discussed.

The claim that a standard of misconduct was retroactively imposed on McConnell and Plummer is unsupportable on the facts of this case. Their conduct, as detailed in the photo and two videos, violated the University's Interim Sexual Assault Policy (effective in November 2011), which prohibited sexual assault as "the touching of an unwilling person's intimate parts . . . through the use of the victim's mental or physical helplessness of which the accused was aware or should have been aware." The policy also prohibited ". . . sexual misconduct which is lewd, exhibitionistic or voyeuristic . . . [and] forbids . . . any act which demeans, degrades, or disgraces any person . . . ." The University's Interim Sexual Harassment policy (effective in November 2011) prohibited "the use of sexually oriented photos . . . unrelated to instruction and/or the pursuit of knowledge." The conduct captured in the videos and photo also violated the more broadly worded 2013 Sexual Misconduct Policy, which encompassed the following violations: (facilitating) sexual assault; taking abusive sexual advantage of another; and [**14] non-consensual electronic recording and transmitting sexual images without the knowledge and consent of the parties involved. As applied to this conduct, the charged violations are neither vague nor outside the legitimate purview of the policies.

McConnell and Plummer also assert that they were denied confrontation of Female UH Student and the opportunity to effectively cross-examine adverse witnesses. This case does not require that we determine whether confrontation and cross-examination would ever be constitutionally required in student disciplinary proceedings. The unique facts of this case demonstrate no procedural deficiency in this regard. The University's case did not rely on testimonial evidence from Female UH Student. Indeed, it is undisputed that Female UH Student remembered little about the incident, and no one testified to the substance of any conversations with her about her memory of the night. Rather, the primary evidence

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8The dissent criticizes our reliance on Flaim and Cummins. Flaim supports our decision not because it involved identical circumstances (it did not), but because it demonstrates that the amount of process constitutionally required in state university disciplinary proceedings will vary in accordance with the particular facts of each case. See 418 F.3d at 629 & n.8 ("It is because of the unique facts of this case that we find the procedures used by Medical College of Ohio adequate."). Cummins, which we observe for its persuasive analysis, arguably is distinguishable by a feature that would suggest more process was due those students than McConnell and Plummer: the sexual assault victims in Cummins testified at the accused students' hearings and the students were allowed limited cross-examination only by submitting written questions to the panel. 662 F. App'x at 439-442 (one of the accused students was precluded from cross-examining his accuser entirely). In rejecting the students' challenge to this alleged procedural flaw, the Cummins court explained that "[a]ny marginal benefit that would accrue to the fact-finding process by allowing follow-up questions in appellants' . . . hearings is vastly outweighed by the burden on [the university]." Id. at 448.

9Plummer's posting of the photo to Facebook and sharing the videos with her friends would constitute sexual harassment under the 2011 policy, as would her on-video remarks about Female UH Student.
Baker presented to the panels were the videos and photo, taken and distributed by Plummer. The conduct depicted in the videos and photo—combined with Plummer's subsequent distribution and publication—was sufficient to sustain the University's findings and sanctions. See Mathews, 424 U.S. at 335 (courts must weigh whether further procedural safeguards would have lessened the risk of an erroneous deprivation or otherwise altered the outcome). We emphasize that McConnell and Plummer do not argue that Female UH Student's testimony or cross-examination would have suggested that she consented to the degrading and humiliating depictions of her in the videos and photo, nor that such testimony could have otherwise altered the impact of the videos and photo. See Flaim, 418 F.3d at 641 (citing Winnick v. Manning, 460 F.2d 545, 549 (2d. Cir. 1972)) (concluding that crossexamination of arresting officer was not essential to due process in medical student's disciplinary hearing when the case did not turn on credibility of testimony and plaintiff was unable to identify any significant benefits that cross-examination would have provided). Further, because McConnell and Plummer do not challenge the authenticity of the videos and photo, it does not makes sense to criticize an "absence of direct evidence."

McConnell and Plummer's claims that the University failed to provide adequate notice of adverse evidence and that Baker's multiple roles suffused the proceedings with bias are similarly unpersuasive. Applying the second Mathews factor, even if the University could have provided notice further in advance of the hearings of the identities of relevant witnesses and other evidence, the ultimate disciplinary decisions were conclusively supported by the videos and photo, about which McConnell and Plummer had full knowledge. See Mathews, 424 U.S. at 335. McConnell and Plummer do not show how more timely knowledge of the adverse evidence could have aided in their defense. See id. Likewise, McConnell and Plummer have not demonstrated that Baker's dual roles amount to a constitutional violation. They argue that Baker's dual role as victim advocate and investigator prevented him from impartially investigating the incident, and that EOS's role in advising the panel created a conflict of interest. But McConnell and Plummer fail to show how any of these alleged impermissible conflicts undermined the integrity of their proceedings. Baker relied primarily on the videos and photo to support his findings before the panel, and there is nothing in the record or offered by McConnell and Plummer to suggest that a different investigator would have uncovered information diminishing the significance of that graphic evidence to the initial findings. See Mathews, 424 U.S. at 335; cf. Baran v. Port of Beaumont Nav. Dist. of Jefferson Cty., 57 F.3d 436, 446 (5th Cir. 1995) ("Where allegations of bias based on the prejudgment of the facts or outcome of a dispute generally stem from the fact that an administrative body or hearing officer has dual roles of investigating and adjudicating disputes and complaints . . . the honesty and integrity of those serving as adjudicators is presumed." (citing Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (5th Cir. 1975))). Notably, the separate EOS attorney advisor explicitly instructed the panels that they were free to disagree with the interpretations of the evidence offered by the parties, including Baker.

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10. Plummer contends that Female UH Student sexually harassed her by repeatedly asking to "sex her." This disputed allegation, if true, would at best demonstrate independent misconduct, not a defense to Plummer's own actions.

11. At the hearings, Baker offered interpretations of the graphic evidence, as well as legal argument about how the University's Sexual Misconduct Policy should be interpreted and applied to that evidence. McConnell and Plummer (on their own and through their attorneys) argued their own interpretations of the video and photo evidence and often vigorously contested the analysis offered by Baker. At both hearings, the separate EOS attorney serving as panel adviser counseled the panel members that they were free to interpret the video and photo evidence themselves and draw their own conclusions about the import of that evidence. This separate EOS attorney adviser also responded to panel questions regarding the meaning and application of the University's Sexual Misconduct Policy.
We have carefully reviewed the record, and we hold that the process Appellants received was sufficient. It follows that the question of qualified immunity for the individual defendants becomes moot. Again, we emphasize that we do not suggest a constitutional "floor" for state university disciplinary procedures. Whether a state university has provided an individual student sufficient process is a fact-intensive inquiry and the procedures required to satisfy due process will necessarily vary depending on the particular circumstances of each case. See Dixon, 294 F.2d at 158. As we noted at the outset, the Supreme Court has admonished that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking in wisdom or compassion." Wood, 420 U.S. at 326; see also Davis, 526 U.S. at 648 ("[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators.").

III

We now turn to McConnell and Plummer's argument that the district court erred in dismissing their Title IX claims. The district court carefully articulated the principles governing dismissals under Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim and for McConnell and Plummer's claims that the University and individual defendants should be liable for sex discrimination against them under Title IX. 20 U.S.C. § 1681(a). We find no error in the district court's dismissal.

According to the Second Circuit, a university can face Title IX liability for imposing discipline where gender is a motivating factor for the decision under two general theories. Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994). In the first instance, the claim is that the charged student (plaintiff) was innocent and wrongly found to have committed an offense. Id. The second instance alleges selective enforcement, i.e., that regardless of the student's culpability, the severity of the penalty and/or the university's decision to initiate proceedings was affected by the charged student's gender. Id. More recently, the same court held a student's case sufficient to proceed under Title IX where a male student alleged himself innocent of engaging in nonconsensual sex with a female student. Doe v. Columbia Univ., 831 F.3d 46, 50, 53, 59 (2d Cir. 2016). He further alleged procedural bias and improprieties in the university's discipline process. Id. at 56-59. He also alleged that he was singled out because Columbia University was in the midst of a public campaign criticizing its alleged weak response to female students' complaints of sexual assaults by males. Id. at 50-51, 53, 57-58. McConnell and Plummer and the University each rely on the theories adopted in Yusuf, so we need not speculate on any other possible theories of Title IX liability.

McConnell and Plummer's allegations here rest on selective enforcement and deliberate indifference to their rights. With regard to selective enforcement, they urge that the University was motivated by
gender bias in favor of Female UH Student. They assert essentially that McConnell and Female UH Student were in pari delicto, in that both had passed out and each engaged in sexual conduct with another extremely intoxicated individual. Plummer chides the University for not taking up her charge of misconduct against Female UH Student for pressing to "sex" her. We agree, however, with the district court's assessment of the undisputed facts: the photo and graphic videos, taken and later exhibited by Plummer, show McConnell touching Female UH Student in private areas. Female UH Student is unresponsive and inactive. Female UH Student was found naked in an elevator and taken to the hospital for sexual assault testing. The University's discipline was predicated on what the two charged students did, and during the discipline process they—a male and a female—were treated equally. There is no sound basis for an inference of gender bias.13

McConnell and Plummer tersely assert that the University was deliberately indifferent to the constitutional insufficiency of the procedures it employed in sexual misconduct discipline cases. Although the University [**21] may have been better advised in a number of procedural respects, there is a stark contrast between McConnell's and Plummer's culpability and case procedures applied to them and the allegations of student innocence and official refusal to conduct a thorough investigation in Columbia Univ., 831 F.3d at 49-50, 52-53, 56-57. Deliberate indifference to constitutional rights is a very high standard of misconduct. See Sanches v. Carrollton-Farmers Branch Ind. Sch. Dist., 647 F.3d 156, 169-70 (5th Cir. 2011). As the district court held, the pleadings here do not meet that standard.

IV

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Dissent by: EDITH H. JONES

Dissent

EDITH H. JONES, Circuit Judge, dissenting:

With due respect to my colleagues' refusal to set a "constitutional floor" for the students' procedural due process claims, I dissent. This case is the canary in the coal mine, auguring worse to come if appellate courts do not step in to protect students' procedural due process right where allegations of quasi-criminal sexual misconduct arise. Yes, there is undisputed graphic evidence—videos and a photo of what transpired among McConnell, Plummer and the Female Student on November 19, 2014. The panel's conclusion seems driven by the "unique facts" of graphic evidence to discount all of McConnell's and Plummer's serious arguments. [**22] Put bluntly, the panel implies that because they were guilty, they got enough due process.

The panel's mode of analysis, in my view, is contrary to Carey v. Piphus, 435 U.S. 247, 265, 98 S. Ct. 1042, 1053, 55 L. Ed. 2d 252 (1978). In Carey, high school students were suspended for a few weeks without any adjudicative hearing; the authorities did not challenge the lower courts' liability

13McConnell and Plummer assert that the district court should not have awarded the University "summary judgment" based on the University's list of 39 sexual harassment investigations conducted from 2010 forward, which revealed that nearly all involved male accused students and only 3 involved male accusers. The district court did not address this list, and we need not do so except to note that the same list shows that at least 41% of the investigations resulted in EOS making "no finding" against the accused.
determinations. Carey makes clear that the result of a deprivation of liberty or property does not justify the procedural means: "Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process." 435 U.S. at 265, 98 S. Ct. at 1053. Further, "[b]ecause the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." 435 U.S. at 266, 98 S. Ct. at 1054 (citations omitted). See also Zinermon v. Burch, 494 U.S. 113, 126 n.11, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990); Bowby v. City of Aberdeen, Miss., 681 F.3d 215, 219 (5th Cir. 2012); Caine v. Hardy, 943 F.2d 1406 (5th Cir. 1991) (en banc).

I would hold that several features of the process to which McConnell and Plummer were subjected, most prominently the intermingled and inherently conflicting duties of UH Title IX Coordinator Baker, violated their due process rights to defend against quasi criminal charges of sexual assault and facilitating sexual assault. I would reverse and remand for further proceedings, which necessarily include the question of qualified immunity.

The background of this controversy, left unmentioned by the panel although both parties cited and relied on it, is the promulgation by the United States Department of Education, Office of Civil Rights, of a circular that offered "guidance" on how universities must respond to complaints of sexual misconduct on campus. See United States Department of Education, Office of the Assistant Secretary for Civil Rights, Dear Colleague Letter, (2011), available at http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html . The circular was not adopted according to notice-and-comment rulemaking procedures; its extremely broad definition of "sexual harassment" has no counterpart in federal civil rights case law; and the procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt. Institutions of higher learning, like the University of Houston, flocked to embrace the "guidance." From a federal government database, it is estimated that between 20,000 and 25,000 complaints of sexual misconduct have been filed based on the "guidance" and thousands of students' discipline cases adjudicated using procedural standards far less demanding than those accorded most defendants. See K.C. Johnson & Stuart Taylor, Jr., The Campus Rape Frenzy 9-10 (Encounter Books 2017). A number of lawsuits challenging these procedures have survived preliminary motions to dismiss, see Johnson & Taylor passim, as state and federal courts exhibited concern about deficient procedures.

The University policies used in this case largely tracked the DOE guidance letter. For this reason, it is a hollow claim that the procedures are owed particular deference as products of "institutions of higher learning." These policies were developed by bureaucrats in the U.S. Department of Education and thrust upon educators with a transparent threat of withholding federal funding. Viewed as a whole, without the

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1 The Dear Colleague Letter is currently being challenged in the U.S. District Court for the District of Columbia on the grounds that it did not go through notice-and-comment rulemaking, is in excess of the Department of Education's statutory authority, and constituted arbitrary and capricious agency action. See Complaint at 18-22, Doe v. Lhamon, No. 1:16-cv-00158 (D.D.C. June 16, 2016), ECF. No. 1.

2 Cf. Davis v. Monroe Cty. Bd. Of Ed., 526 U.S. 629, 634, 119 S. Ct. 1661, 1667, 143 L. Ed. 2d 839 (1999) (student-on-student sexual harassment actionable only where it is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993) (sexual harassment must be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive").
panel majority's self-imposed blinkers, the procedures raise serious questions about the sufficiency of the University of Houston's procedures to adjudicate fully and fairly charges of sexual misconduct that will affect [**25] the students' future lives as surely as criminal convictions.

In part because the female had no recollection of these events, and she denied anyone had touched or hit her, she declined to file a charge against the students. Because of insufficient evidence, no criminal charges were filed.

Instead, McConnell and Plummer were investigated and charged by Baker, the Vice President of the UH Office of Equal Opportunity Services (EOS), with various violations of the UH sexual misconduct policy (2013 version). Baker's official Title IX position placed him in the multiple, and inherently conflicting, roles of advocating for the female student, investigating the events, prosecuting McConnell and Plummer, testifying as a witness at their hearings, and training and advising the disciplinary hearing panels. By a "more likely than not" standard, his investigative report found that McConnell "violated the sexual assault and attempted sexual assault provisions . . . when he engaged in sexual activity with another [sic] [female UH student] on November 19, 2011, without her consent." Under the same standard, Baker found that Plummer "facilitated/encouraged the sexual assault of another [UH] student." [**26]

During each student's separate hearings, Baker informed the panels that their only job was to determine "by a preponderance of the evidence," which he carefully distinguished from the beyond-a-reasonable doubt standard, whether the results of his investigation should be sustained. And lest it be overlooked, Baker ludicrously tried to persuade the panels that the video portrayed Plummer encouraging McConnell to rape the Female Student. Baker, in essence, assumed the roles of prosecutor, jury and judge, whose decision the hearing panels were required to approve only by a preponderance of the evidence.

Other aspects of the procedures are troubling. Although the students' attorneys participated in the proceedings to some extent, they were not permitted formally to represent their clients. Instead, McConnell and Plummer each played lawyer against the real lawyer, University EOS Vice President Baker. Thus, the students made opening and closing arguments, testified, [*781] raised legal and factual objections to the panel, and "cross-examined" witnesses. They were not fully informed of the investigatory evidence [**27] until less than a week before each hearing; even then, witness identities were redacted based on "privacy" concerns. Most important, there was no "confrontation" of the female student, who never appeared, was not deposed, and was never investigated for her lascivious advances toward Plummer.5

3 The hearing transcripts demonstrate that Baker pressed his accusations beyond the photo and videos, in the guise of "interpreting" the evidence, to assert that Plummer was encouraging McConnell to attempt rape. When challenged about this during one hearing, Baker responded: "I cannot interpret evidence, that [then?] I cannot be a Title IX coordinator because that's exactly what I've been hired to do. I've been hired to resolve these complaints by interpreting policy and by interpreting evidence . . . ." A university discipline panel is no place to adjudicate credible accusations of rape—and there were no such accusations here.

4 The University's procedures required only five business days' prior notice of evidence against the students.

5 UH's brief defends its practices, noting that "the Department of Education has stated that it 'strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence.'" The cited DOE guidance goes on to explain that this is because "[a]llowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment." See United States Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, http://www2.ed.gov/about/offices/list/ocr/docs/qna-201404-title-ix.pdf, at p. 31. It then recommends that schools limit cross-examination by pre-submitting questions to a hearing board and that the hearing board screen the questions, which is what happened in this case. Given the nature of charges against these students, limiting cross-examination to written questions seems dubious. See Doe v.
Based on the graphic video and photo evidence, it is unsurprising that the hearing panels upheld Baker's charges and the students' appeals were rejected. (The meaning of "sexual assault" in this context is open-ended but could have covered the conduct here.) They were expelled and permanently banned from UH and any activities connected with it. The disciplinary notations were removed from their official transcripts, but that matters little for the impact of the "sexual predator" stigma on their careers and reputations.  

The panel correctly cites this court's decision in Dixon for the proposition that the students have at least liberty interests protected under the due process clause. Dixon v. Alabama State Bd. of Ed., 294 F.3d 150, 151 (5th Cir. 1961). The panel concludes as a matter of law that the process offered to McConnell and Ryan was constitutionally sufficient, relying in large part on the "unique facts" and case law that has little in common with quasi criminal charges of sexual assault that will mar these students indefinitely. Two Sixth Circuit cases, one published and one unpublished, will be shown to be particularly weak reeds. Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 639-43 (6th Cir. 2005); Doe v. Cummins, 662 F. App'x 437, 446-451 (unpublished) (6th Cir. 2016).

In my contrary view, the process deployed against the students was fundamentally flawed because of (a) the absence of a complaint by and evidence from the Female Student; (b) the conflicting roles played by Baker; (c) the preponderance standard for adjudicating quasi criminal conduct (for which no actual criminal charges were brought), compounded by (d) the deference that Baker insisted was due by the hearing panels to his position. While it seems incontestable that punishment of some kind was due for the students' graphically depicted conduct, these watered-down elements of process conspired to assure that Baker's recommendations to throw the book at McConnell and Plummer would be approved in full.

Put in terms of the Matthews balancing test, Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976), the students' interests in preserving their educational status and reputations in the

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860 F.3d 767, *781; 2017 U.S. App. LEXIS 11268, **27

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I do not agree that the students lacked fair notice that their conduct was unauthorized.
face of serious sexual misconduct charges were compelling. Second, the risk of erroneous deprivation was exacerbated by (i) the Female Student's failure to participate or provide evidence in the disciplinary proceeding; (ii) Baker's role as her "advocate" while he also served as prosecutor, a witness, and legal adviser to the hearing panel; (iii) the preponderance test used by Baker in his report, along with the deference he claimed from the hearing panel; and (iv) the imbalance between the level of counsel participation allowed on each side.

Third, additional or substitute safeguards would have enhanced the quality of factfinding and adjudication by providing a confrontation right if material fact issues existed. Eliminating Baker's role in advising and directing the hearing panel would have enabled the panel to make independent findings and receive disinterested advice on issues such as the meaning of "sexual assault" and "facilitating sexual assault." Elevating the standard of proof to clear and convincing, a rung below the criminal burden, would maximize the accuracy of factfinding. Permitting counsel to represent the students would have resulted in more efficient hearings; the parties and hearing panels spent a lot of time sparring over trivial misunderstandings about procedure. Adopting some or all of the foregoing safeguards would not significantly impede the disciplinary process.

Fourth, the University's interest lies in impartially adjudicating quasi criminal sexual misconduct allegations. The University has no significant expertise in this area; indeed, as noted above, its policies and procedures derive directly from the Dear Colleague letter, not from inherently educational decisions. Further, to the extent that UH eliminates confrontation and counsel participation; allows one officer, Baker, to direct the investigatory, prosecutorial and adjudicative process; and relies on the lowest standard of proof, the integrity of its decisions may be questioned and discredited.

Even assuming that McConnell and Plummer forfeited a challenge to their inability to confront the Female Student, the problem of Baker's conflict of interest cannot be overstated. Baker could not conscientiously "advocate" for the Female Student while also conducting an impartial investigation of the...
accused students. He could not both prepare a report and testify as a principal witness while serving as the prosecutor and then insist that the adjudicatory hearing panel agree with his "preponderance" evaluations of the evidence by their preponderance standard. But he purported to do all these things. Even the Dear Colleague letter admonishes universities that: "The Title IX coordinator should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest." Dear Colleague Letter at 7. To the extent Baker's multiple roles substantially lessened the hearing panels' factfinding and adjudicatory autonomy, the integrity of the process was compromised. See also Brandeis Univ., 177 F.Supp. 3d at 606 ("The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, [**32] and may reach premature conclusions.").

As a final note, the Sixth Circuit case law cited by the panel is inapposite. In Flaim, the court upheld a medical student's expulsion after he had pled guilty to a felony criminal drug offense. While rejecting Flaim's individual procedural complaints, [*784] the court stated five times that the fact of a preexisting criminal conviction rendered his case "quite different from the ordinary" student discipline matter, 418 F.3d at 642-43, and "because of the unique facts," the court declined "to address whether these procedures would suffice under other facts." Id. at n. 8. Flaim, by its own terms, should not be relied on in a case where sexual assault is alleged only by the University's EOS Vice President and no criminal charges, much less convictions, were pursued. The Flaim court stated, "We strongly emphasize that a disciplinary hearing involving a record of conviction is wholly different from a case involving disputes of fact, even if the university believes the evidence to be overwhelming." Id. at n. 7.

The panel's reliance on the Sixth Circuit's unpublished opinion in Doe is also curious. First, that the opinion is "unpublished" means it is not to be cited as precedent. [**33] 6th Cir. R. 32.1; Crump v. Lafler, 657 F.3d 393, 405 (6th Cir. 2011) (en banc) ("Unpublished decisions in the Sixth Circuit are, of course, not binding precedent."). Second, the panel cites Doe for the uncontroversial proposition that students there, subjected to a different set of procedures, received an "opportunity to be heard in a meaningful time and in a meaningful manner," albeit not the level of protection that would have been offered to criminal defendants. 662 F.App'x. at 446 (quoting Mathews, 424 U.S. at 333). Third, the Doe court found no due process violation in the denial of active participation by the students' advisors because the university had not itself been represented by counsel in their disciplinary hearings. 662 F.App'x. at 448-49 (citing Flaim, 418 F.3d at 640). In this case, however, the students were out-gunned by attorney Baker. Fourth, the Doe court rejected the claim of official bias because any defects in the investigator's report were "cured" by the Administrative Review Committee's "subsequent handling of appellants' cases." 662 F.App'x. at 450. Contrary to several critical facts before us, Doe contains no indication that the allegedly biased investigator played any role in the committee's activity; the committee was bound by no formal standard of review; and no claim of deference to the investigator's report was made. [**34] Finally, the students in the case received, respectively, a 3-year suspension and a disciplinary suspension plus a research paper requirement, far more lenient treatment than that accorded McConnell and Plummer, even though the Doe defendants were found to have engaged in nonconsensual sex with female students.

In sum, I do not take the position that the students must be afforded the same procedural protections as criminal defendants. What drives my concern is the close association between the charges levelled against them and actual criminal charges. Sexual assault is not plagiarism, cheating, or vandalism of university
property. Its ramifications are more longlasting and stigmatizing in today's society. The University wants to have it both ways, degrading the integrity of its factfinding procedures, while congratulating itself for vigorously attacking campus sexual misconduct. Overprosecution is nothing to boast about.

Even though these students deserved punishment, they also deserved more protective procedures given the seriousness of the charges. See Carey, supra. Accordingly, I would reverse and remand for further proceedings.
Student Conduct Administration & Title IX:

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Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) requires that institutions of higher education address issues of sexual discrimination, which include sexual assault, affecting their students. The White House, Congress, the U.S. Department of Education’s Office of Civil Rights (OCR), the media, students, and parents are demanding effective and fair resolution procedures. Campuses are left searching for how to resolve these cases and are being questioned as to whether they can adequately address crimes of sexual violence that may come before them. In response, the chief leadership of the Association for Student Conduct Administration (ASCA) has compiled a summary of “gold standard” practices for resolving these cases through student conduct procedures. As the experts in student conduct administration, ASCA is the national association for student conduct professionals and currently has more than 3,100 members from more than 1,500 institutions.

There is no one-size-fits-all model for addressing incidents of sexual misconduct. With different missions, resources, staffing models, funding sources, system policies, and especially campus cultures and student populations at postsecondary institutions across the United States, each college or university must develop its own policies and procedures. This report (a) identifies the guiding principles that should underlie all student conduct policies and procedures, as well as the recommended practices that are required for an institution to be a “gold standard” in responding to allegations of sexual misconduct, (b) outlines differences among various types of resolution methods (i.e., single-investigator, hearing board, or hybrid model), and (c) provides guiding questions for institutions to consider as they determine the most effective resolution method(s) for their unique campus environments.

First and foremost, it is important to understand that a learning-centered, fundamentally fair student conduct process should occur on all campuses. Institutions must remember that they have an obligation to all students, including students who may have been harmed, students who are accused of causing harm, and the rest of the student body. All students (including victims, complainants, respondents, and witnesses) involved in the student conduct process should be treated with care, concern, honor, and dignity.

Campuses are not meant to be courtrooms, and the courts support this distinction. While television shows such as Law and Order might be the only frame of reference that parents, students, and others may have, we must teach them that campus proceedings are educational and focus on students’ relationships to the institution. The field of student conduct is rooted in ensuring that individual students’ rights are upheld as they engage in an educational process about the behavioral (and sometimes academic) standards of the campus community. This involves a reasonable process for the institution to determine whether behaviors have violated campus policies and to impose appropriate consequences if necessary. For behaviors that may violate college policies and the law, victims are encouraged to pursue criminal procedures if they seek outcomes beyond the jurisdiction of what the campus can offer or impose.

There are five stages of student conduct resolution procedures: policy, initial interactions, investigation, adjudication, and institutional response. Within each of these are recommended practices that can help an institution to address and resolve incidents of sexual violence effectively. This report is supplemented by appendices containing guiding documents that institutions can use to improve their student conduct resolution procedures.
Recommended practices include but are not limited to the following:

- All employees should be trained on the basics of the campus policy, resolution process, and how to provide information to students about their options for support.
- Mandated reporting, mandated sanctions, or other such requirements should be carefully considered, as they may discourage reporting.
- A victim’s request for confidentiality should be honored when possible, but the request must be weighed against the institution’s obligation to all students.
- Legalistic language (e.g., rape, judicial, justices, prosecutor, defense, guilty) should be removed from policies and procedures. ASCA recommends use of “student conduct” instead of “disciplinary” or “judicial” to reflect the spectrum of student conduct practices.
- Consider what students find reasonable when determining and writing policies and procedures; communicate procedures widely and follow them.
- Ensure that behavioral standards for employees, students, and community members are compliant with Title IX. If there are distinct resolution processes depending on whether the accused is an employee or a student, ensure that both operate effectively and are communicated clearly to students.
- Effective interim actions, including multiple forms of remedies for the victim and actions restricting the accused, should be offered and used while cases are being resolved, as well as without a formal complaint.
- Select a resolution method that fits the institutional culture and promotes the best resolution process for students. It should contribute to creating a culture of reporting; it should not mirror the criminal process.
- Use the preponderance of evidence (more likely than not) standard to resolve all allegations of sexual misconduct.
- The proceedings should be equitable and sensitive; there should be no direct questioning of respondents and victims by each other, and the parties need not be in the same room.
- Both complainants and respondents may consult with an advisor of choice, but institutions should impose guidelines limiting advisors’ participation in student conduct proceedings.
- Training campus experts should include the Title IX team/coordinators, investigators, adjudicators, appeals board members, and so forth. Trust in them to revise policy and procedure annually as needed.
- Devote adequate staff, resources, and funding to manage cases. Investigators must be able to set aside other responsibilities to ensure that investigations are prompt and thorough.
- A Title IX team should be developed to review and revise policy, assess campus climate, lead prevention efforts, and assist the Title IX Coordinator.

Given the importance of expanding understanding of the role of campus conduct processes in resolving the societal issue of sexual violence, the full report is available free to the public at http://theasca.org. This report will also be disseminated to the White House, the Department of Education’s OCR, higher education associations, legislators engaged in discussions about pertinent federal or state mandates, and other relevant entities.
Section I. Introduction: The Intersection of Title IX and Student Conduct Administration

On June 23, 1972, Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) was signed into law; it states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” Over the past 40 years, higher education has learned more about what the Department of Education’s OCR expects with regard to policies, procedures, investigations, interim and permanent remedies, and other aspects of cases subject to Title IX. As of June 2014, institutions strive to achieve compliance amid a critical atmosphere with many seemingly valid viewpoints as campus processes are under scrutiny by victims, parents, accused students, attorneys, the media, the U.S. government, and watchdog groups. Victims/survivors are filing OCR complaints about how colleges are (or are not) addressing incidents, forcing campuses to reconsider policies or procedures that may currently be weighted toward protecting accused students more than those whom they may have harmed. While there is discussion suggesting that campuses leave behaviors that also may constitute a crime (e.g., rape) to the police and courts, Title IX describes the campus’s obligation to respond when a potential criminal behavior based on sex or gender affects the ability of a students to participate in his/her education or campus programs. Further, student conduct practitioners have an unlegislated, philosophical obligation to address any misconduct that adversely affects the campus community. As “dedicated professionals striving to positively affect student behavior while respecting individual rights as defined by the law and the institutions’ missions,” student conduct administrators are positioned to be the most effective and impartial at leading campus management of these cases. In fact, many of ASCA’s long-held beliefs and training curricula have been consistent with the federal government’s recent guidance.

Often, student codes of conduct and their related procedures apply to behaviors exhibited by an institution’s students while policies under Human Resources govern the behaviors of employees. Regardless of whether the behavior was exhibited by a student, employee, or community member, the campus has an obligation under Title IX to protect a harassed/affected student’s access to an education. Sometimes a hostile environment may be present, even if the individual(s) who caused it cannot be identified. OCR has made it clear that student conduct processes to address sexual harassment and sexual violence on campus cannot exist in a vacuum and that imposition of sanctions alone is not an adequate institutional response. While there are many aspects to effective Title IX compliance, this document focuses on student conduct policies, investigation, and resolution procedures that are critical components of comprehensive institutional compliance efforts.

Since the enactment of Title IX in 1972, the field of student conduct administration has changed dramatically, moving from the in loco parentis Dean of Women/Dean of Men disciplinary model to one that includes an array of resolution options. In 1986, the Association for Student Judicial Affairs (ASJA) was formed to serve the unique needs of campus judicial officers. In 1993, ASJA began to offer an intentional training institute to equip student affairs professionals with skills to conduct effective adjudication efforts on their campuses. In 1994, the Violent Crime Control and Law Enforcement Act (Pub. L 103-322) was passed and raised the question as to “the ability of educational institutions’

1 *Title IX and Sex Discrimination*. U.S. Department of Education’s Office for Civil Rights. Retrieved from: [http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html).
3 Questions and Answers on Title IX and Sexual Violence, p. 25, Retrieved from [http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf).
disciplinary processes to address allegations of sexual assault adequately and fairly.” In 2000, Sophie Penney, Lawrence Tucker, and John Lowery led efforts to conduct a national baseline study on the adjudication of sexual assault cases, with a return rate of 41% from 170 residential, commuter, public, and private institutions. The survey explored institutional protocols for addressing reported incidents of sexual assault, including methods of adjudication, the standard of proof used, investigation procedures, training of hearing board members, roles of attorneys and advocates, and rights afforded to complainant and respondent. The study resulted in recommendations to ASJA practitioners that parallel some current OCR guidance, such as providing both the complainant and respondent with written notice of charges and employing practices that promote a culture of reporting.

In 2004, Ed Stoner and John Lowery published the “Model Code,” which became a blueprint document for campuses to benchmark and revise their policies and procedures to protect the rights of accused students and of complainants/victims while promoting campus community standards. The philosophy underlying the model code was to treat all students with equal care, concern, respect, and dignity, which is very much in line with the equity principle discussed in the April 2011 Dear Colleague Letter. In 2008, the Association’s name was changed to the Association for Student Conduct Administration (ASCA) to reflect the philosophical shift from antiquated legalistic and courtroom-like proceedings. In 2014, ASCA incorporates equity for all participants in the conduct processes to meet the needs of its 3,100+ members at more than 1,500 institutions, including residence hall directors, single-person conduct officers, community college professionals with multiple responsibilities, Vice Presidents, and Deans of Students. Membership in ASCA and attendance at the ASCA Gehring Academy are now common requirements in student conduct-related job descriptions. Despite the changing nature of the field, ASCA has consistently focused on equipping student conduct administrators with practical skills related to the overlap of legal influences and student learning in order to address student behavior effectively through an educational and socially just lens.

Ultimately, this resource serves to provide a set of best practices that underlie a fundamentally fair conduct process for all students affected by sexual misconduct. While there is overlap, this document does not address aspects of Title IX institutional compliance requirements often found outside of student conduct, such as preventative education or victim advocacy, nor does it focus on Clery Act reporting requirements. These recommendations for effective student conduct practice are based on a review of the existing administrative, legislative, and judicial guidance related to Title IX (see Appendix A for a list of sources), feedback from the ASCA Sexual Misconduct/Title IX Community of Practice, and the collective experiences of the practitioners serving as the chief leadership of ASCA. These principles and key concepts can also be applied to types of cases beyond sexual misconduct. We believe that this is the first document of its kind, written by and for current practitioners in the field, as well as for those who are involved in providing guidance or discussing potential laws regarding how colleges handle conduct complaints pertaining to sexual misconduct.

4Sophie W. Penney, Lawrence Tucker, and John Wesley Lowery, National Baseline Student on Campus Sexual Assault: Adjudication of Sexual Assault Cases: A Study by the Inter-Association Task Force of the Association for Student Judicial Affairs. Association for Student Judicial Affairs (2008): 2.

5Penney, Tucker, and Lowery.
Section II. Guiding Principles

Regardless of institutional type or campus culture, some overarching philosophies are at the heart of fundamentally fair and equitable student conduct procedures. These principles aim to treat all students with respect, care, and dignity, no matter what role they play in the student conduct process. These underlie the training and programs offered by ASCA and are re-iterated in the guidance from OCR.

First and foremost, student conduct is an educational process. Student conduct professionals transform student behavior by establishing and disseminating policies, providing preemptive education, having conversations to challenge students’ perspectives, facilitating resolution of complaints and conflicts, and implementing accountability measures (sanctions) when necessary. The educational nature of student conduct procedures is supported by a fundamental guiding legal document, the General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline at Tax-Supported Institutions of Higher Education (Western District of Missouri, 1968), which was written by a group of federal judges from Western Missouri. It states, “The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community.” Just as we offer academic instruction, we also have a responsibility to educate students on the impacts of their behaviors on others.

Effective student conduct procedures directly support the mission of the institution and the role of higher education in the United States. Student conduct policies and procedures promote a positive learning environment for all students, educate students about their responsibilities as members of the college/university community, and allow an institution to impose educational sanctions fairly when behavior violates those standards. Students voluntarily join campus communities, and appropriate behavioral standards should be imposed in addition to societal laws, so long as they further the mission of the institutions while upholding basic civil rights of students. Most college and university mission statements include some form of institutional duty to prepare students for lifelong success and learning. This reiterates Thomas Jefferson’s notion in the 1818 Report of the Commissioners for the University of Virginia regarding the need for institutions to teach students to form “habits of reflection and correct action, rendering them examples of virtue to others, and of happiness within themselves.” The functional role of student conduct administration on college campuses is to help students to translate knowledge into action—to form behavioral habits that will enable them to be successful beyond the brick-and-mortar or virtual walls of the institution. At times, to the dismay of parents, other students, faculty, and senior-level administration, decisions are not made for students nor do we control their actions, but we can influence their behavior.

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We have an obligation to respond to sexual violence that affects students. Recently, it has been asked why, when campuses do not respond to murder, they should respond to rape? The answer is that we would respond to murder. We would provide support and assistance to those affected by the behavior and we would most likely take action against the student who committed the act. We certainly would not wait for the legal system to act before we would act to protect the campus community. We would not call the act “murder”; the act would fall under a policy prohibiting physical abuse or physical harm. Our response to sexual assault is similar. We acknowledge that we are a microcosm of larger society and that no one can “guarantee” the safety of others, but we also recognize the significance of our influence on student behavior. We not only have an obligation to protect the members of our campus community; federal legislation requires us to do so—and it is the right thing to do. In his report Jefferson charged institutions “to establish rules for the government and discipline of the students.” We would be abandoning our own authority if we failed to address incidents of sexual violence affecting our students.

Campuses are not courtrooms. In cases involving behaviors that could violate college policy and law, we encourage use of the criminal and civil systems in addition to the campus process. We do not find students “guilty” of crimes such as rape or murder, but we have an obligation to determine whether they are responsible for conduct that threatens the health or safety of another person, including sexual misconduct. While campuses have a role in addressing sexual assault, our role is not to “bring perpetrators to justice.” The most serious consequence that we can impose on a student is to prohibit the student from attending our college or university. A student should not need a lawyer to participate on his/her behalf in an educational campus process. We do not seek to replicate adversarial or litigious proceedings on our campuses because we believe that they do not support cultures of reporting and that they are antithetical to the goal of student learning. A comprehensive overview of the judicial support for this principle is detailed in the May 1, 2014 Law and Policy Report #487: Campuses or Courts? Different Questions and Different Answers. Given the importance of this topic, the copyright to that document has been waived and it is available free to the public on the ASCA website.

“Some kind of notice and some kind of hearing” is still relevant. Dating back to Goss v Lopez (1975), our practices are built on ensuring that an accused student is informed of what policies may have been violated, has the opportunity to review any pertinent information, and has the opportunity to be heard by sharing his/her side of the story. To ensure the safety and the operations of the campus during this time, colleges may impose interim action (as well as other remedies under Title IX) while the situation is being resolved. Policies and procedures must be in compliance with applicable state and federal laws, while campuses have the flexibility to resolve complaints through whatever means are most effective, efficient, and equitable, given the variety of resources and support available on each campus. No single model fits all institutional types; there are important considerations for all options, including the single-investigator model, the administrative or panel hearing board model, or a hybrid model. Institutions are encouraged to think beyond the traditional formal “hearing” when considering resolution options.

Fundamentally fair means equitably fair to both parties. Student conduct professional are often caught between individuals and groups with competing interests. Victim advocate groups promote an approach that is victim centered, while attorneys and watchdog groups often seek to keep campus processes weighted to the rights of the accused. Campus attorneys often advise us to take great care to protect the rights of accused students, but we must do the same for those who feel that they have been

10 Jefferson, p. 309.
11 White House Task Force to Protect Students from Sexual Assault, Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault, April 2014: ii.
12 Stoner and Lowery: 12.
harmed. The complainant and the respondent are usually both students; we must treat them as such. This is not a new concept to student conduct professionals, as this value informed the Model Code and has been incorporated into the foundational training at the annual ASCA Gehring Academy since 1993.

**Consider what your sophomore self would want.** Think back to your sophomore year of college. What kind of policy would you understand and how would you even know to look for it? Who would you tell your story to first? Listen to victims on campus. Several OCR resolution agreements require campuses to create committees of students who give feedback about campus procedures and make suggestions for improvement to create a campus that does not tolerate sexual harassment. ASCA recommends that this be done proactively by having students involved in the policy revision process to ensure that policies and procedures make sense to them. OCR focuses on what students consider to be reasonable, especially in how to identify campus confidential and responsible reporters. In addition, the student body will likely have thoughts on who should hear these cases: a single administrator? a panel with a majority of students? We must respect the privacy of students once they are engaged in the process by sharing information only with those who need to know the information.

**“Other duties as assigned” is not enough.** Campuses must devote staff, resources, and funding to address cases involving sexual misconduct adequately. Calling Title IX compliances an “unfunded mandate” is not an excuse. Acknowledging that the caseload and nature of these cases looks very different on a residential campus with a team of hall directors and a centralized conduct office from a commuter technical school with one conduct officer, there is no one way to design a staffing model to process cases. Some campus officials may be wearing so many hats that the integrity of the process comes under question; there may be a need to provide staff who are dedicated to these cases. Each campus must assess its climate, caseload, and current staffing levels to determine whether enough staff and resources are provided to manage these situations effectively.

**The conduct process alone is not enough.** The Student Code of Conduct typically applies only to student misconduct. Under Title IX, students can also file complaints about behaviors by faculty, staff, and nonstudents when these behaviors affect access to education or programs. Also, the college may still need to conduct investigations and address behaviors affecting the campus, even if a victim does not wish to pursue the conduct process or if the identity of the person who engaged in the behavior is unknown. In addition to the formal conduct process, there are other ways to address campus incidents, such as education, additional monitoring, policy revision and dissemination, and remedies provided to those who are affected. OCR has put increased focus on the campus climate, so we should track trends and encourage reporting of themes and concerns, not just formal complaints. Finally, we cannot operate in a silo; the OCR guidance and White House Task Force reinforce a reality that we already know: It takes a campus-wide effort to change campus culture and to be compliant with Title IX.

**Training is critical.** No matter what resolution method is used, no matter who investigates or who makes decisions about complaints, those persons MUST be adequately trained. We must train anyone who interacts with students on a regular basis, including faculty, so they know how to refer students appropriately. Investigators and adjudicators must be trained on the complexities of same-sex relationships, the way trauma can be experienced by members of various ethnic backgrounds, and the dynamics of power in relationships, for example. Appendix C contains a list of suggested training topics.

**Be reasonable.** We have conversations every day about time, place, and manner. We cannot codify every possible student behavior that might violate campus standards. And yet, some of us seek specific and exact instruction from OCR or attorneys in order to implement new policy or to go forward. We must feel confident in determining what is reasonable, based on a comprehensive review of existing guidance, an understanding of our campus culture, and consideration of the experiences of our
students, especially those who may feel victimized or harassed. In addition, not all details in the national guidance and regional resolutions from the OCR offices are exactly aligned. While we welcome additional training opportunities and advanced guidance from the government, we must use professional judgment to do what is best for our campus, acting in the spirit of available guidance.

**Follow your policies.** This is a fundamental rule in student conduct. Do not create policies or procedures that you will not actually practice. Do not make a college President or an attorney the Title IX Coordinator if he or she is not available for students or does not have time or expertise to oversee the process. Be sure that all employees know what to do if a student reports an incident. Equally important, do not have policies that contradict, conflict, or are misaligned. The same standards should apply to any act of sexual harassment, whether by a student, employee, or campus visitor. The consequences and remedies may look different, depending on the relationship of that party to the institution. Finally, have policies and procedures that students can understand and navigate. This can be especially challenging if policies are overly legalistic or if the student body (as in many community colleges) includes a high percentage of ESL students, students with disabilities who may need alternate format materials, dual-enrollment high school students, or students who have lower cognitive functioning.

**These cases are complex.** Many cases involve alcohol or other influences, partial or absent memories of what happened, few or no witnesses, and a student who has been harmed by someone whom he/she knows. Many of these cases would not likely be prosecuted in a court of law and involve making decisions based on available information. Despite the complexity, we have the responsibility and the means to address them effectively. It is important to evaluate each case and make improvements where possible. We often survey accused students about their experience, but we should survey both students about their experiences and then make changes where appropriate and necessary. Any case could result in one or both students leaving the institution, so it is important to invest adequate resources toward successful resolution. Also, any case could result in a lawsuit or OCR complaint, which does not necessarily mean that anything was done wrong. These are often very emotionally charged cases, with strong feelings on both sides. Some cases, even when conducted flawlessly, result in no one being happy with the results.
Section III: Standards of Practice

This section describes critical elements and recommended practices pertaining to cases of sexual misconduct that every campus should be incorporating, regardless of student population, size, institutional type, mission, public or private status, or Carnegie classification. Many of these concepts can be extrapolated to all student conduct complaints, as they are found in the foundational training provided through the ASCA Gehring Academy, infused in other ASCA programs, and reiterated by the OCR in their recent and historic guidance on Title IX. Promising practices are described for each of the five stages of the student conduct resolution process:

A. **Policy:** the expectations for student behavior and the procedures for addressing potential violations, both of which should be published widely to the campus community and anyone who might be affected by students’ behavior on campus.

B. **Initial Interactions:** the initial interactions that a student has with the process, following an alleged incident. This includes the reporting and intake process, requests for confidentiality, and interim measures imposed. This is also the stage at which an institution determines whether it has official “notice” and what its obligations for action might be.

C. **Investigation:** the information gathering phase. This includes both formal and informal investigations, depending on the institution’s obligations to act, the extent to which a request for confidentiality can be honored, and the surrounding climate concerns.

D. **Adjudication:** the process by which a determination is made as to whether or not a policy was violated.

E. **Institutional Response:** the campus actions that occur as a result of the outcomes of the adjudication. This can include imposition of sanctions, continuation or imposition of remedies for the victim, targeted or campus-wide educational responses, and enforcement of additional security or other such measures.

Following the recommendations for each stage are questions for consideration. These questions are intended to serve as a starting point to help campus personnel to discuss the student conduct resolution process and identify areas that might need review or revision.

A. **Policy**

Include the critical components. We have developed a list of the key elements of a sexual misconduct policy based on effective student conduct practices, as well as a review of the guidance and settlement agreements from OCR (Appendix B). Many campuses already have many of these in place. As more guidance has been issued, the amount of information that must be contained in the policy has increased. This results in the need to balance compliance with effective and convenient delivery of the information. As Title IX applies to all behaviors of sexual or gender-based discrimination and the Clery Act applies to all crimes that may occur in Clery-reportable areas on or near the campus, institutions should also review policies and procedures beyond student codes of conduct and related procedures to ensure that students who experience discrimination by an employee receive appropriate remedies and procedural protections.

**Communicate effectively and transparently.** Whether it is in original or revised guidance, the recent Q & A Guidance, or the outcomes of OCR campus investigations, a common theme is that policies must be written in a way that students can understand them and they must be communicated to the campus in
an effective manner. Both recent guidance and the White House Task Force Report convey that it is not enough to believe that we have effective policies; we must conduct ongoing assessments to ensure that they are effective. Students should understand what will happen if they report, if they are accused, if the case proceeds to a hearing, and so forth. Policies and procedures should not be buried in websites, catalogs, or at the end of annual security reports. In addition to campus-wide climate surveys, consider surveying those who participate in the resolution process: accused, victims/complainants, and witnesses.

**Be nimble.** Because policies and procedures must be transparent for the campus community and reflect the campus culture, there should be some vetting or review during the policy revision process. However, it should not take months to get policies passed, and non-experts (e.g., faculty, untrained attorneys, administrators removed from the conduct process) should not be permitted to block or hinder implementation of a Title IX-compliant policy. As state laws change, campuses must keep relevant definitions and procedures up to date. ASCA has long advocated comprehensive reviews of campus conduct codes every 2 to 3 years to minimize the need for complete overhaul of policies that have gone unrevised for years.

**Questions for Consideration:**

1. Does the policy include the elements included in Appendix B?
2. What search words can a student type into the college website to find this policy?
3. Does every faculty member, staff member, and student know about this policy? Where are they most likely to look for it?
4. How would a parent, spouse, or other family member learn about the policy and procedure?
5. Do students see themselves in the policy or procedures, or would they feel the need to involve an attorney or a parent in order to understand it?
6. Is the policy within two to three clicks from the main college website?
7. How quickly can we revise this if the laws change or we realize that we need to update it?
8. Do prospective students have easy access to this information?
9. Does the policy reflect the values of the campus community?
10. How does the policy help articulate that we do not tolerate sexual misconduct on the campus?

**B. Initial Interactions**

**Make it easy to report.** We believe that the initial interaction that a victim has with the campus will dictate the rest of his/her campus experience surrounding the incident. For example, if the first conversation includes something like, “You’re not going to want to go before a hearing board of three older faculty members that you might later have as instructors and discuss intimate details of your sex life,” that student is not likely to file a formal complaint. Think about “reporting” from a student point of view – what does it mean to “report” informally or seek help? Who do students think have responsibility to take action? Once you have a policy in place, do what you can to promote reporting. Consider online reporting, a 24-hour hotline, and accepting reports in person. Do not create barriers – you are still on “notice” of a complaint even if it does not come on a specific form or by a certain time of day. You are even on notice just by reading something in the local newspaper. Once you are on notice, you must do something. Doing nothing is never the right answer. Give both the complainant and the respondent a supportive environment in which to share information – which requires adequate training of your campus and especially those involved in the initial intake of complaints. Develop a pool of trained support persons who can be present with a respondent when he/she is informed that a complaint has
been made. Remember, the primary responsibility of the person fielding the report is to capture a true and accurate narrative of the information, not to determine whether the information has merit.

**Keep the campus AND the individual in mind.** If an affected student does not want to proceed with the formal conduct process, follow the suggestions in the April 2014 OCR Q & A to determine whether the campus has a compelling need to pursue the complaint. Students should be aware that campus events designed to create space to discuss experiences in an open way, such as Take Back the Night, are not considered official notice of a complaint; although the College may be able to identify trends that should be addressed outside of a formal conduct process. The campus must also maintain the option to initiate complaints on its own behalf to protect the whole campus community if needed.

**Interim remedies are not predicated on a formal campus conduct process occurring.** Even without a formal complaint, the campus must take measures to protect an affected student. While our field has often focused on protecting the rights of accused students, we must put this focus on an equal level with that of the student complainant, and minimize burden on the complainant with regard to interim measures. If a student does not want to proceed with a complaint, the institution must still review and determine if it is part of a larger pattern of harassment and, if so, institute remedies to address it.

Questions for Consideration:

1. Who on campus do students talk to about their personal lives?
2. How can we expand faculty and staff skill sets in order to expand the possible pool of people that students might trust with their experiences?
3. How do we communicate to students that they can get help even if they don’t want to report something formally?
4. What standards do we use to determine if we go forward, even if a victim asks us not to?
5. Do faculty know how to respond if a student asks him/her directly for an interim remedy?
6. Is our entire student conduct resolution process easy to explain to someone so he/she can make an informed decision as to whether or not to file a formal complaint?
7. How does a student learn about how to report an incident at 2am on a Saturday morning?
8. What kinds of support do we offer to both the respondent and the complainant during the initial part of this process?

**C. Investigation**

**Honor the involved students.** Ensure that students know what to expect, including what will happen with information that they share. When possible, obtain consent from the student complainant prior to beginning an investigation. Be prompt and appropriate, and keep the complainant and respondent informed as to the progress when possible, including simultaneous written notice of outcomes. Reveal only as much as necessary to get the necessary information about the case. Take time to be appropriately thorough but do not cause unnecessary delay.

**Do not place the burden on either student to “prove” the case.** The institution has an interest in finding out what actually happened in order to make the most informed decision possible. Campuses may have an interest in conducting an investigation even if a student does not wish to file a formal complaint or have his/her identity disclosed. Conduct a broad sweep to learn what you can; there may be critical witnesses that neither the complainant nor respondent would seek to hear from. Look at social media, text messages, and emails for additional information.
A Title IX investigation is different from a law enforcement investigation. While a police report may be a source of information in your investigation, it focuses on whether a law has been broken and the establishment of probable cause, not whether a campus policy was violated. Depending on circumstances, police and the student conduct investigator may be able to interview a party at the same time to minimize the need to discuss the incident multiple times. On the other hand, there may be a need to time things so fact finding about possible criminal activity can conclude first. A Memorandum of Understanding (MOU) between campus and/or local law enforcement can be helpful in establishing guidelines on how and when information can and should be shared with campus investigators. Regardless, investigation files should tell a story from start to finish about the incident and the investigation, including any delays in the process.

Ensure a sustainable investigation model. Whether investigations are done through Human Resources, a single investigator, an outside company, the student conduct office, or the student affairs division, have an adequate number of well-trained people to do this work, especially during high incident times.

Questions for Consideration:

1. How are investigators trained? Would the campus tolerate external investigators?
2. Do students trust the people who conduct investigations?
3. Is there an MOU with local law enforcement officials to clarify multijurisdictional procedures before such a case arises?
4. How effectively and quickly does the campus and/or community law enforcement share information with campus investigators?
5. Is there a consistent template for investigation reports, so that no matter who conducts them, the process and report are similar?
6. Are there checklists to guide discussions with students about the process?
7. Are there enough investigators for the number of cases on campus?
8. Do the investigators have access to and good relationships with the Title IX Coordinator(s)?
9. What kind of trust does the campus have in the investigator(s)?
10. Do investigator job descriptions accurately portray the qualifications and time required?

D. Adjudication

There is no one-size-fits-all resolution method. Given the differences among institutional types, student bodies, campus cultures, and resources, it is unrealistic to apply one resolution model to the 7,000+ institutions across the United States. However, these standards of practice apply to all resolution models, including a student panel hearing, a single-investigator-and-adjudicator model, or some hybrid model. The key is to select the one that best fits campus needs.

Ensure that resolution method(s) promote a culture of reporting. Provide choices to students when possible, including the option for a complainant to not be in the same room as the respondent during adjudication. Procedures that permit the accused to be present at all stages of the hearing could result in a complainant not wanting to proceed further in order to avoid facing the accused student. If one student has the choice, both should have the choice.

Do not attempt to be a mini-courtroom. There is no need to “prove beyond a reasonable doubt” that someone violated a college policy in order to find that person responsible. There should never be direct

questioning between respondent and complainant or victim when resolving allegations of sexual violence. While students may have an advisor present, the campus should set and uphold clear parameters for that person’s involvement in the proceeding: to support and advise the student, not to represent or advocate on his/her behalf. Hearings and meetings should always be closed. Do not succumb to attempts to delay the process; offer prompt resolution (generally 60 days). Hearings should be structured so that they encourage the parties to tell their stories without personal attacks or reference to prior sexual histories, unless they have direct bearing on the question of responsibility in the case at hand.

Ensure that both students have the opportunity to tell their stories. Both complainant and respondent should have the chance to present information, review information ahead of time, vocalize experience, and present witnesses to the incident. Ensure that the resolution body and investigator have adequate training regarding how to engage students in the process. Offer a pool of trained advisors who can support students as they participate in the campus conduct process (depending on the campus, this can be students, staff, and/or faculty). Facilitate a process that is socially just and equitable; do not permit attorneys, parents, or anyone to create power differentials that adversely affect the process, or re-victimize anyone.

Use preponderance of evidence as the standard of proof. ASCA recommended this long before OCR stated it in the April 2011 Dear Colleague Letter. If the goal is to provide an equitable process, complainant and respondent must be allowed to participate in the process equally. These cases sometimes come down to believing one party as more credible than the other. If we start from the premise of clear and convincing or beyond a reasonable doubt, we are essentially saying to the victim, “Even if I believe you over the accused, if I don’t believe you by this higher standard, I have to find in the accused student’s favor.” This devalues the victim’s sense of personal value to the institution. Use of the “more likely than not” or 51% model is the only truly equitable standard for campus conduct cases.

Decision makers must be well trained. Given the complexity and sensitive nature of these cases, all adjudicators must be well trained. For a comprehensive suggested list of topics, refer to Appendix C.

Refer to Section IV for the questions pertaining to adjudication models.

E. Institutional Response

Be intentional and appropriate in sanction selection. As sexual misconduct ranges from repeated unwanted comments to single acts of sexual violence, there must be a wide range of sanctions available and a deep understanding of the factors relevant to sanction selection. While an act of sexual violence can never be “undone,” there may be situations in which sanctions or remedies can include some restoration of harm caused. Engage the campus community in conversation about appropriate sanctions and create a sanctioning guide. If you have minimum sanctions for certain violations, ensure that there are no unintended side effects, such as hindrance to reporting or a hearing board wanting to adjust a finding of responsibility in order to issue or avoid a specific sanction. Include the rationale for sanctions so that both students understand the decisions.

Implement ways to monitor future behavior. Ensure adequate measures to uphold sanctions. Include notations on transcripts if a student is suspended or expelled to reflect accurately the student’s new relationship to the institution. This can help a future institution to address behavior that may affect its students. Think beyond sanctions (if someone is not a student), reach out to other schools, talk to community police, and so forth. Work with other campus entities to ensure that climate check follow-up
occurs. Ensure that the Title IX Coordinator is informed of sanctions so he/she can assess trends. Finally, remember that sanctions are not enough with regard to remedies.

**Provide both parties the opportunity to appeal, based on specific criteria.** An appeal is not a rehearing of the case or an opportunity for the appellate body to substitute its judgment for that of the original hearing body. Typical criteria include an error of due process that adversely influenced the outcome, newly discovered material information that was not available at the time of the hearing and would have a significant impact on the outcome, demonstrable bias by a hearing official, or sanction(s) that are inappropriate for the violation(s). The appeals personnel should be adequately trained. There should only be one level of appeal. While appeals may not be completed within the 60-day guidance set by OCR, they should be resolved in a timely manner, relative to the case. Finally, sanctions should usually be enacted even while the appeal is being considered.

**Understand the difference between “processing” and retaliation.** Complainants and respondents may need to discuss what is happening to them as they engage in the conduct proceedings. They may seek support from formal (counselors, clergy, victim advocates, attorneys) and/or informal (parents, friends, advisors, coaches) resources. While “gag orders” should not be imposed, if their processing of the experience becomes problematic, educational conversations should take place to address this. A tangible adverse effect may result in some form of retaliation. If a complaint is filed and the respondent or respondent’s friends discuss the case in a way that adversely affects the complainant, the retaliation may be a continuation of a hostile environment that was created by the initial complaint (if the complaint is substantiated).\(^\text{14}\) Retaliation should be addressed immediately and effectively.

Questions for Consideration:

1. Do the hearing bodies issue sanctions or give recommendations for sanctions?
2. Are students, faculty, adjudicators, and senior administrators on the same page with regard to the kinds of sanctions that should be issued for certain cases?
3. How are members of appellate bodies trained?
4. Is retaliation addressed in the code of student conduct?

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\(^{14}\)Office for Civil Rights. *OCR Civil Rights Seminar*, Chicago, IL, April 25, 2014.
Section IV. Resolution Models

A common phrase in the field of student conduct administration is providing “some kind of hearing”, which translates to one or more members of the campus community reviewing the available case information; listening or reviewing information from the complainant, respondent, and witnesses; and determining a finding of responsible or not responsible for each alleged violation. A variety of options are available for resolution of complaints of sexual misconduct. Regardless of which resolution method is used, Title IX requires that an investigation occur for any complaint of sexual discrimination. Some campuses have specialized entities or processes that resolve only cases of this nature. Other campuses ensure that all adjudicators/hearing bodies can resolve any type of case.

Hearing Model

The hearing model is the traditional model of student conduct adjudication. The hearing is often an in-person event (although parties can participate via phone, Skype, or similar means) and varies in length depending on the complexity of the case. Some hearing bodies have the authority to issue sanctions, while others may give sanction recommendations to Student Conduct or Student Affairs staff members who have the authority to impose sanctions appropriate for the violation. The roles of the student conduct office/staff in the hearing process vary, and can include the following:

- Advisory: providing advice to board/hearing body as needed and ensuring that procedures are followed
- Logistical: coordinating scheduling, developing the hearing agenda, collecting information
- Investigative: conducting the investigation and presenting it to the hearing body so the hearing can focus on follow-up questions and offering an in-person opportunity to the complainant and respondent to share with the hearing body
- Complainant: the student may conduct staff initiate complaints on behalf of the college
- Supportive: some campuses offer advocates or advisors for students who are participating in a hearing as either a complainant or a respondent

In this model, an investigation typically occurs prior to the hearing to (a) ensure that there is enough information to substantiate a complaint going forward for consideration, (b) provide separation between investigation and adjudication of the case, and/or (c) promote an efficient hearing by having a trained professional conduct much of the fact-finding work for the hearing body.

Administrative Hearing

Administrative hearings most often involve one adjudicator who is trained in student conduct. Large and residential campuses may have student conduct offices with multiple administrative hearing officers, while small or commuter campuses may only have one adjudicator or may train employees from outside of student conduct or student affairs to serve as administrative hearing officers.

Panel Hearing

Panel hearings range in size, with at least three members. Composition varies and can include a combination of faculty, staff, and students. Both composition and size are often dependent on campus culture: A commuter college with a transient student population may have fewer students than employees on the panel. A small residential college with an activist student body may have more or all students on the panel. While OCR currently discourages campuses from having students serve on panels, we believe that there is value in ensuring that student perspectives are present in the process, so long as they are effectively trained to participate. Our society allows 18-year-olds to serve on juries.
that make decisions with much more at stake. We believe in the value of including the student voice in conduct processes, but we also understand the responsibility of adequate training and oversight of the process. While panel hearings with students may be the best resolution method for some campuses, they may not work at all for others.

Investigation Model
The investigation model removes the need for an in-person hearing, while still providing procedural protections to both complainant and respondent. In this paper we define an investigation as the process of collecting information pertaining to a complaint or incident, interviewing relevant parties, and synthesizing the material so it can be used to determine whether or not a policy violation occurred. This definition differs from the OCR definition of a Title IX investigation. The student conduct process can be used to fulfill the Title IX investigation requirement so long as it is compliant with Title IX. Here is the basic flow of the investigation model:

- Complaint is filed and assigned to an investigator.
- Complainant is interviewed and interim action/remedies may be implemented.
- Respondent is informed of the nature of the complaint and the policies in question.
- Complainant and respondent have the opportunity to meet with the investigator and provide information regarding the complaint, including suggesting witnesses.
- Witnesses may be interviewed.
- Complainant and respondent review a summary of the incident information prepared by the investigator and can provide additional response or information.
- An investigation report (including policy analysis) is completed and forwarded to an adjudicator to issue findings and sanctions (i.e., outcome).

Hybrid Models
Campuses may choose to use a hybrid model that combines aspects of these two models. For example, one student conduct staff member might conduct the investigation; a different staff member would review the information and offer an administrative resolution for the case. If either the complainant or respondent does not wish to accept the resolution, the case goes to a hearing body to analyze the information and determine outcomes and any sanctions. Another model might include a Title IX investigation completed by an equity office, with the case being referred to the campus conduct process to determine appropriate sanctions for policy violations.

Alternative Dispute Resolution
In addition to the traditional resolution methods, other options may be appropriate in certain cases. None of these should completely replace the other adjudication methods as the only resolution option available on a campus, but one or more may be effective in some cases. Keep in mind that interim and long-term remedies still should be provided to a complainant, even if these methods are used.

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15Page 24 of OCR’s April 2014 Q & A Guidance defines a Title IX investigation as “the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and the broader student population.”
Informal Resolution
Many campuses use an “informal resolution” process in which an accused student and a conduct officer reach agreement about the violations and imposed sanctions and resolve the case without a formal hearing. While this is a common practice for violations such as alcohol, noise, misuse of technology, academic dishonesty, and so forth, this process may not meet requirements of Title IX. In complaints of sexual harassment, there must still be an investigation, a finding as to whether sexual harassment occurred, notification to the complainant about the outcome, appropriate remedy(s), and option for appeal. With the need to ensure equity in the process for both parties, there is a flaw in this method of resolution if there is a complainant and yet only the accused student has to agree to the outcome. The institution should likely implement an appeal process for the complainant, or may reach informal resolution only when all three parties agree (complainant, respondent, and institution).

Mediation
The April 2011 Dear Colleague Letter made it clear that mediation may not be used to resolve complaints of sexual assault, and the reasons for this are obvious. The dynamics are not equal, and the potential for re-victimization as well as unintended effects are too great. However, following a Title IX investigation and notification of the outcomes, there may be cases of sexual harassment in which both parties wish to have mediation as part of moving forward as students on the same campus. An example is a case in which a male student is unaware of the effects of some of his comments on a female complainant and wants to understand them better. The female is interested in meeting with the male and a facilitator to share this information. With the help of a trained facilitator who provided the follow-up about their agreed future communication methods, this case can be resolved to the satisfaction of both parties. Mediation may also be helpful when an investigation determines that there was no violation of Title IX or college policy, and the college can assist the involved students in discussing how to move forward.

Restorative Justice
The restorative justice (RJ) model resonates with the concept of remedies under Title IX and suggests balance in considering the rights of both parties: those who were harmed and those who did the harming. When done effectively with willing parties who can engage in productive dialogue, an RJ process can provide deeper learning and engagement in the process. There are many ways to implement restorative justice that are worth exploring in a variety of cases. Some campuses have utilized RJ in place of a traditional hearing in which the accused acknowledges having caused harm to the other party and the violation is at a lower level. Others have successfully implemented RJ in addition to the traditional hearing to provide some closure to the parties. This option is especially worthy of consideration in cases in which the complainant says, “I just want him to know that what he did to me was wrong.” If your campus is interested in RJ as an option, we recommend that the facilitator be well trained and that much care is used in utilizing this option.

## Comparison of Resolution Models

<table>
<thead>
<tr>
<th></th>
<th>Investigation</th>
<th>Admin Hearing</th>
<th>Panel Hearing</th>
<th>Hybrid Model</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Staff Resources</strong></td>
<td>• Requires more time by fewer staff members</td>
<td>• With a pool of administrators or with one or more who focus on this, offers a flexible schedule</td>
<td>• Requires time from panel members for cases and training to promote consistency</td>
<td>• Allows for investigations to be done outside of student conduct</td>
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<td></td>
<td>• Can be overwhelming during high case time, especially if not the sole focus of the position</td>
<td>•</td>
<td>• Still requires advising by conduct staff and/or training</td>
<td>• Can be outsourced</td>
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<td>• Creates risk if staff turnover is common</td>
<td>•</td>
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<tr>
<td></td>
<td>• Can be outsourced</td>
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<tr>
<td><strong>Privacy of Information</strong></td>
<td>Fewest people are exposed to the information</td>
<td>• Limited number of people can access information</td>
<td>• Information usually exposed to greatest number of people</td>
<td>• Depends on size of hearing body</td>
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<td></td>
<td>• Can usually be the most expedient, depending on investigator's other duties</td>
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<tr>
<td><strong>Logistics</strong></td>
<td>• Requires ongoing training for investigator(s) and adjudicator(s)</td>
<td>• Requires ongoing training for the hearing officer</td>
<td>• Extensive training required to ensure effectiveness and minimize risk</td>
<td>• Allows most options for customization</td>
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<td></td>
<td>• Must address turnover</td>
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<tr>
<td><strong>Training Required</strong></td>
<td>• Offers potential for great consistency, depending on number of investigators and adjudicators</td>
<td>• Offers potential for great consistency, depending on number of adjudicators and communication among them</td>
<td>• Least likely to be consistent, depending on level of training and dedication of board members</td>
<td>• Depends on the number of people involved.</td>
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<td>• Must have credible investigator(s) to maintain support of process</td>
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<td></td>
<td>• Students may feel it is too “secretive” or it may be most trusted because of this</td>
<td>•</td>
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<td></td>
<td>• Requires openness by legal counsel</td>
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<td><strong>Consistency</strong></td>
<td>• Requires trust in the administration for students to report</td>
<td>•</td>
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<td></td>
<td>• May be most trusted by student body</td>
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<td></td>
<td>• Ensures that campus voice is heard in decision and sanctioning</td>
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<td></td>
<td>• May be seen by students as most supportive, depending on culture</td>
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<tr>
<td><strong>Campus Support</strong></td>
<td>• Must have credible investigator(s) to maintain support of process</td>
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<td>• Students may feel it is too “secretive” or it may be most trusted because of this</td>
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<td>• Varies, depending on process</td>
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*ASCA: the experts in student conduct administration*

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Phone: (979) 845-5262
Questions to Ask Your Campus

Campus Culture
1. What level of trust do students have in the student conduct office/staff?
2. Is the student body transient or consistent? Are there students who are engaged and willing to serve on boards consistently?
3. What involvement do faculty, staff, and students want to have in the conduct process?
4. What politics affect this decision?
5. Can the same process be used for student and employee misconduct? How well do Human Resources and Student Conduct employees communicate with each other?

Support From Campus Leadership
1. Does the campus leadership trust and support the conduct staff?
2. What models does the institution’s attorney support and why?
3. Do campus stakeholders understand the student conduct process?
4. What role(s) do senior staff want to have in the process?
5. Is funding for adequate training provided?

Staffing
1. Can staff members focus on investigations, or will that interfere with other job duties?
2. Are there faculty members who are willing to be trained and serve on boards consistently?
3. Is there adequate staffing to ensure appropriate separation between the initial adjudicating body and the appellate body, so students have a fair chance for an appeal?
4. Is enough staff involved to manage any perceptions of conflict of interest or bias?
5. Are faculty, staff, and students compensated accurately for time spent on these cases (release time, credit toward tenure, academic credit for training, etc.)?

Training
1. What level of training can be provided on campus?
2. What training should be obtained through national or local resources to fill the gaps?
3. Are there resources to ensure that all members of hearing boards are adequately trained on an ongoing basis?
4. How is turnover in investigators, adjudicators, or appellate boards addressed?
5. Are panels/hearing officers active enough to practice what they learned in training or can ways be created for them to practice the training through in-service or continuing education?

Resources and Funding
1. Are participants in the administration of the process adequately compensated?
2. What money is set aside for annual training, Association membership, and conference attendance to ensure that the campus is up to date on best practices?
3. Is there release time offered to investigators/adjudicators as needed?
4. What kind of support is available to staff members who investigate or hear these cases?
5. What are the relationships with local law enforcement agencies?
Section V. Conclusion and Next Steps

Given the recent attention to how colleges address incidents of sexual violence on campus, student conduct professionals are in the spotlight as never before. This presents an opportunity for ASCA to advance the profession to promote safer campuses for students. Student conduct professionals who are working at an institution with an antiquated process or an overly legalistic policy must work to change this. All conduct professionals have a responsibility to students and the profession to correct those who are not doing this work well. We are the ones who talk with students, who know how to write policies that fit our institutional culture and uphold professional standards, who facilitate procedures that are equitable and respectful for all of our students involved; we are the experts on this. As practitioners and as a profession, we must do a better job of describing the nature of student conduct, articulating how sound practices correlate to the educational mission of our campuses, and demonstrating effectiveness in transforming student behavior. ASCA has an interest in ensuring that each and every colleague does this well because the profession has an obligation to students and to the field of higher education. ASCA is committed to setting the “gold standard” for addressing sexual misconduct effectively through student conduct practices. Immediate steps toward this goal include the following:

- Distributing this white paper freely to promote transparency and understanding of the role of student conduct personnel in addressing sexual violence and harassment
- Developing for ASCA members a collection of proven practices, templates, sample policies, training materials, and other items through Sexual Misconduct/Title IX Community of Practice
- Providing timely information to ensure that members have up-to-date information about issues affecting their work
- Collecting data on current practices and trends to understand the national climate surrounding sexual misconduct cases and how to influence it through the Association
- Releasing follow-up white papers on leading practices, including how student conduct staff and campus security/law enforcement work together to address sexual misconduct on campuses, as well as recommended practices for transcript notations and evaluation of notations
- Continuing to provide effective initial and ongoing training through the ASCA Gehring Academy, annual conference, regional/state meetings, and webinars
- Strengthening relationships with external entities such as the White House, OCR, Congress, and other higher education associations, including a presentation on student conduct resolution procedures to the OCR Sexual Harassment Network in August 2014
- Continuing to challenge entities that seek to undermine the educational mission (including state governments, attorneys, and sometimes institutional stakeholders) by advocating for sound practices, equitable procedures, and productive legislation

This paper is intended to be a catalyst for action. We agree with President Obama’s introductory quotation in the Not Alone report: Sexual violence is a threat to campus communities and “we have the power to do something about it.” We invite you to join us in being part of the solution to addressing the societal problem of sexual violence as it affects our campuses.

**ASCA would like to acknowledge the following additional abbreviated resources: ATIXA One Policy, One Process (2013); NCHERM Group Wiki Model Code Project (2013); Reframing Campus Conflict by Schrage and Giacomini (2009); Student Conduct Practice by Lancaster & Waryold (2008); The Little Book of Restorative Justice by Karp (2013)**
Appendix A: Resources

Influential Guidance:
- Guidance: Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (1997)
- Pamphlet: Title IX and Sex Discrimination (Revised 1998)
- Guidance: Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001)
- Pamphlet: Sexual Harassment: It’s Not Academic (Revised September 2008)
- Dear Colleague Letter on Harassment and Bullying (October 26, 2010)
- Dear Colleague Letter on Sexual Violence (April 4, 2011)
- Dear Colleague Letter on Retaliation (April 24, 2013)
- Questions and Answers About Title IX and Sexual Violence (April 29, 2014)

Relevant and Notable Court Cases/Judicial Guidance:
- Dixon v Alabama, 294 F. 2d 150 (5th Cir. 1961)
- Goss v Lopez, 419 U.S. 565 (1975)
- Davis v Monroe County Board of Education, 526 U.S. 629 (1999)

Additional Governmental Influences:
The following documents provide practical examples of application of the OCR guidance, which campuses should consider as advisory:
- Eastern Michigan Resolution Agreement (November 2010)
- Notre Dame College Resolution Agreement (June 2011)
- University of Montana Resolution Agreement (May 2013)
- SUNY Resolution Agreement (September 2013)
- Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault (April 2014)

ASCA Resources:
Appendix B: Key Elements for Sexual Misconduct Policies and Procedures

The following key elements provide a guide for developing a gold standard sexual misconduct policy and procedure. They have been compiled from the April 2014 Q & A Guidance, prior OCR guidance, the resources released at http://notalone.gov, and OCR resolution agreements. (Appendix A contains more information on these sources.) As the Clery Act overlaps Title IX with some compliance requirements for institutional responses to reported incidents of sexual violence, some Clery Act requirements (including some anticipated as a result of the current negotiated rulemaking process) pertaining to behavioral expectations (i.e., policy) and resolution procedures have been included in this guide to streamline institutional communications and promote compliance with Clery. Note that this guide is focused on institutional policy and resolution procedures; it does not include requirements such as education, risk reduction, or crime statistic reporting, which must be addressed in the campus’s annual security report.

Institutions should review and carefully consider implementation of the elements in this guide, as many of them have implications for practice and may vary based on the institution’s needs. In addition, if the institution has a separate or different process for addressing employee behaviors, the same information about process, outcomes, should be communicated. Institutions are encouraged to make it as easy as possible to communicate and understand the process, regardless of who is victimized and who is the alleged harming party—student, employee, community member, or someone else.

NOTE: At the time of this publication, the public comment period pertaining to changes to the Clery Act as a result of the Violence Against Women Reauthorization Act of 2013 (VAWA) is occurring, and there are more than 60 active OCR investigations. As a result, this guide is subject to change and will be submitted to the ASCA Sexual Misconduct/Title IX Community of Practice to update and maintain for members of ASCA, as further guidance and legislation is finalized.

Introduction

- Statement of the prohibition against sex discrimination and all forms of sexual misconduct as defined by the institution, which includes behaviors that may also be criminal in nature, such as dating violence, domestic violence, sexual assault, and stalking
- Statement of the institution’s commitment to address sexual misconduct
- Assurance that the institution will take steps to prevent recurrence and remedy effects
- Reference to the institution’s core values, if relevant
- Statement that this guide explains the rights and options of (student/employee) victims of sexual misconduct, regardless of whether the act occurred on or off campus

Scope of Policy/Jurisdiction

- Identify the persons, conduct, locations, programs, activities, and relationships covered by the policy, including:
  - Application to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties
  - Off-campus conduct affecting the campus or the access to education of another student
  - Application to all students and employees, regardless of gender identity or sexual orientation
  - Application to third parties also
  - Application to online behavior and social media that may affect the educational experience
- State that the institution may initiate a complaint
• Explain that there is no time frame for submitting a complaint, with encouragement to report quickly to maximize the institution’s opportunity to respond and investigate
• Explain that this policy is not a substitute for law, that the procedure may apply to situations that are also subject to criminal action, and that the institution supports individuals in reporting criminal activity to appropriate law enforcement entities
• Explain the institution’s amnesty policy or other such statement to encourage reporting of sexual misconduct even if other violations (such as alcohol/drug use) may have occurred

Options for Initial Assistance
• Address immediate concerns:
  o Resources on and off campus, including contact information for trained advocates who can provide crisis response
  o Emergency numbers for on- and off-campus law enforcement/campus safety, and how the institution can assist in notifying law enforcement if desired
  o Health care options on and off campus
  o Institution-specific sexual assault response resources
  o Surrounding community sexual assault response resources
  o How to seek care for injuries, STI testing, etc.
  o Importance of and explanation of how to preserve evidence in case the behavior is also a potential criminal act
  o Encouragement of prompt reporting of all crimes to the appropriate law enforcement agency, paired with a commitment from the institution that appropriate support will be offered in any case
  o Where to get a rape kit/SANE examination
  o Institutional resources pertaining to visa/immigrant status
  o The victim’s rights and institutional support to assist in attempts to obtain orders of protection
• Address Counseling, Advocacy, and Support
  o Counseling and support options regardless of participation in conduct or criminal processes
  o Options and how to report confidentially on and off campus to counselors, medical personnel, or other such resources
  o Other support options during conduct or criminal process (designate whether they are confidential or not)
    ▪ Explain that individuals may have a support person of their choosing present during any “proceedings” and what role(s) that person may have
  o A reference or link to the section on Reporting Options to learn more about confidential resources and who at the institution has a responsibility to report or act on the information
• Explain Interim Measures
  o Describe the range of measures that can be offered, including:
    ▪ Potential immediate steps that can be taken by the institution to ensure safety/well-being of the victim (changing residence halls or class schedules, work schedules/situations, transportation assistance, withdrawal from a class without penalty, tutoring support, etc). Inform that the institution will make these accommodations if they are requested and reasonably available, regardless of whether the victim reports a crime to law enforcement.
- Additional possible steps that can be taken while an investigation is pending, such as campus no-contact orders, changing the accused student’s schedule, etc.)
  - State that interim measures will be imposed in a way that minimizes the burden on the victim to the extent possible while balancing the rights of the accused.
  - Explain differences between a campus no-contact order and a civil order of protection. Explain how to obtain a civil order of protection, including who from the campus can assist in obtaining one.
  - State that information will be maintained as private as long as it does not hinder the institution’s ability to provide interim measures.
- State that retaliation is not tolerated by Title IX or the institution, and explain how the campus will protect against retaliation.
- Describe how the college values the opportunity to address incidents of sexual misconduct and assure that any violation of alcohol, drug, or other such policies may be addressed outside of this process but should not be a reason not to report.

Definitions
- Provide adequate definitions of sexual misconduct include the following:
  - Discrimination and sexual harassment, including hostile environment caused by sexual harassment
  - Sexual assault, including rape, sodomy, sexual assault with an object, forced fondling, incest, and statutory rape
  - Sexual violence, including dating violence, domestic violence, and stalking
  - Other forms of nonconsensual sexual contact
  - Sexual exploitation
  - Retaliation
  - Any other gender-based misconduct such as intimidation, bullying, or other nonconsensual sexual conduct
- Ensure that definitions are the same, no matter who engages in the behavior—employees, students, or nonstudents.
- Explain that violations of the policy may occur between individuals or groups of any sexual orientation or actual or perceived gender identity.
- Identify the criteria for determining whether a relationship is intimate, domestic, dating, etc.
- Provide examples of behaviors that constitute violations of each type of sexual misconduct.
- Define consent and incapacitation, in compliance with relevant state laws; explain the difference between drunk, intoxicated, and incapacitated
- Include definitions of proceeding (all activities related to the institutional resolution of a complaint, including investigations, meetings, and hearings) and result (initial, interim, or final decision made by an entity authorized to resolve disciplinary matters, including both findings/sanctions and rationales) for Clery purposes.
Reporting Options and Confidentiality of Information

- State that an individual may reach a variety of decisions at any point as to how or whether to proceed, and that a complaint may be filed under Title IX, as well as in the criminal process.
- State that a victim has the option to report (or not) to law enforcement and that the institution will offer assistance in notifying law enforcement agencies.
- Explain what the college considers to be “notice.”
- Provide a reminder of confidential reporting options (referred to earlier in the policy).
- Distinguish formal reporting options
  - Criminal (may include on- and off-campus police)
  - Campus conduct process for student behavior, employee behavior, and unknown or third party behavior
  - Reporting to “responsible employees”
    - List these (consider what students might see as responsible or confidential employees).
    - Explain that responsible employees must report to the Title IX coordinator immediately if they receive a formal report or if they observe potential misconduct first hand or learn about it in another way.
  - Reporting to Title IX Coordinator
    - Include name and contact information.
- For all, describe how to file a complaint as well as an explanation of who will potentially be able to have access to what level of information once a report is filed, and what information is documented and retained
- Explain that the Title IX Coordinator(s)/supervisors will be kept informed and whether campus legal counsel may be consulted.
- Explain alternatives to formal reporting.
- Explain what happens if someone reports to a responsible employee but requests that his/her name be kept confidential or that no action be taken:
  - Identify who is responsible for evaluating requests for confidentiality.
  - Explain that the college’s ability to investigate may be limited, which can affect the kinds of things that may be done in those cases to remedy, end, or prevent recurrence without formal conduct process being initiated; provide examples of these.
- Describe any public recordkeeping obligations, including campus crime logs, reporting obligations under Clery and the annual reporting responsibilities of Campus Security Authorities (CSA), and the college’s obligation to issue timely warnings.
  - Provide examples of the kinds of information that could trigger a timely warning and give assurance that the complainant’s name or identifying information will not be released by the institution.
  - If CSAs are different from responsible parties defined earlier in the policy, explain that.
- Explain what happens with third-party and anonymous reporting, including that the college’s ability to respond may be limited.
- Reiterate that retaliation against anyone who files a complaint, a third-party report, or otherwise participates in a conduct process or investigation is prohibited and that the college will take strong responsive action if retaliation occurs.
- Explain that the privacy of student information is protected by FERPA, and that nothing in this policy or procedure constitutes a violation of FERPA.
Investigation Procedures

- Describe the difference between an investigation that the college initiates when it has notice and the Investigation that is initiated when a formal complaint is received. Explain the difference between a law enforcement investigation and a campus investigation. Include relevant information from an MOU with law enforcement, as well as what may or may not be shared between the investigations.

- Explain that a concurrent criminal investigation may delay the campus investigation temporarily only until the fact-finding portion of the former is completed. Suggest that a reporting or responding party may wish to make an initial report to both police and campus conduct officials, with the understanding that the two procedures have different standards and outcomes.

- Identify who conducts investigations and what the investigations entail, including information about the annual training that investigators receive.

- Ensure a reasonably prompt time frame for completion of the investigation, and explain how it will be communicated if the timeframe must be extended; give examples of why this happens.

- Describe provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both complainant and alleged perpetrator to present witnesses and evidence.

- State that interim measures are available during an investigation.

- State that the ability to investigate effectively may be limited if the complainant requests confidentiality.

- Explain the option for a support person to be present and what role(s) that person may play (i.e., silent support that does not interrupt the process), as well as prohibited conduct (such as advocating for, giving information on behalf of, or cross examining a participant).

Resolution/Adjudication Procedures

- Describe all types of resolution procedures that may be used, including the steps, the anticipated timelines, the decision-making process, and how the institution determines which procedure will be used to resolve a complaint.

- Explain the process:
  - State that the preponderance of evidence standard will be used.
  - State that mediation will not be used in cases of sexual assault/violence.
  - Explain the nature of the process (i.e., hearing model):
    - who will have access to information and what decisions they will make
    - how they are trained, including annual training.
  - Explain how to address concerns about conflict of interest or bias, including a statement that in the rare case in which conflict of interest occurs, how that will be disclosed, and a reminder of available appeal options.
  - Describe the format of adjudication, including the option to participate without being in the same room with other parties.

- Describe the rights of the complainant and respondent:
  - Notice of hearing/adjudication process
  - Opportunity to present witnesses and information
  - What kinds of things will NOT be permitted, including direct cross examination:
    - Questions about the complainant’s prior sexual conduct with anyone other than the perpetrator, and even in those cases, ONLY consider past sexual history if
there is a prior sexual relationship between the parties that is relevant to the issue of consent

- Clarify that evidence of a prior consensual relationship by itself does not imply consent or preclude a finding of sexual misconduct.
  - Opportunity to have a support person (in addition to any person providing accommodations under ADA) and that individual’s role(s) in process: specifically, to support the individual student, not to represent him/her
  - Depending on the institution’s practice, inform that, if an attorney is present during an institutional proceeding, the institution also reserves the right to have an attorney present.

Outcomes

- Explain possible findings (responsible/not responsible).
- Explain all possible final sanctions.
- Explain possible remedies, including the range of protective measures offered for the complainant and for the campus community.
- Describe how the parties will be informed of the outcomes:
  - In writing, simultaneously
  - A rationale for the findings and any sanctions will be shared
  - The explanation of how to appeal
  - Assurance that the institution will not impose a nondisclosure agreement on either party
  - Resources/support options that are available to assist with processing the outcomes
- Describe the grounds for appeal, including deadlines and how to submit the appeal:
  - Explain the timeframe for processing the appeal.
  - Explain the process for an appeal, including who can see the information and make decisions.
  - Explain how the other party will be informed if an appeal is submitted and what information he/she can submit at that time.
  - Explain how parties will be informed of the outcome, including any changes and when the outcomes are final.
- Reiterate the time frame by which outcomes can be expected (generally 60 days from filing of report, exclusive of appeals).

Title IX Coordinator Contact

- Reiterate the Title IX Coordinator’s role and contact information.
- Include OCR contact information.
Appendix C: Training Competencies for Adjudicators and Hearing Board Members

No matter what type of resolution is used, ensure that adequate, ongoing, and effective training is provided for participants. The following topics should be addressed to ensure that adjudicators and hearing board members understand the core competencies of the field.

- History of student conduct on campuses
- Students’ rights and procedural protections
- Terminology used in student conduct
- The campus’s Student Code of Conduct (as well as any policies on sexual misconduct if they are separate) and the role it plays on campus
- Overview of the campus conduct process, including appeals
- How campus processes differ from criminal or civil court
- Goals of the adjudication process
- Responsibilities and expectations of the hearing body
- Roles of the participants (complainant, respondent, witnesses, board, advisors, etc.)
- How to facilitate a hearing
- How to ask questions effectively and appropriately
- How to evaluate various types of evidence
- How to evaluate credibility
- How to analyze policy
- How to deliberate toward resolution
- The standard of proof (preponderance of evidence)
- Sanctions and how to determine appropriate ones
- FERPA and privacy of information
- Cultural competencies, including understanding of differences that may be exhibited during a hearing or investigation
- Common problems that may arise and how to address them

Additional topics should be covered with any entity that is involved with the resolution of complaints of sexual misconduct. The following list draws from the April 2014 OCR Q & A Guidance and recommendations from the Office of Violence Against Women, with additional suggestions that promote a fundamentally fair process for both complainant and respondent:

- Training or experience in handling sexual violence complaints
- Training or experience in the operation of the school’s grievance procedures
- Information on working with and interviewing persons subjected to sexual violence
- Information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence
- Information on consent and the possible role of drugs or alcohol in the ability to consent
- The importance of accountability for persons found to have committed sexual violence
- The need for remedial actions for the perpetrator, complainant, and school community
- The effects of trauma, including neurobiological change
- Cultural awareness training regarding how sexual violence may affect students differently, depending on their cultural backgrounds
- How both trauma and defense mechanisms can play out in a hearing
- Dispelling common misperceptions about sexual assault in society (e.g., “rape myths”)

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About the Authors

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Laura currently serves as the Student Conduct Officer at William Rainey Harper College, where she administers the student conduct process and chairs the campus threat assessment/behavioral intervention team. She conducts Title IX investigations for student-to-student misconduct is in the process of drafting revisions to the campus’s Guide to Sexual and Gender-Based Misconduct. Prior to her role in the community college setting, Laura served as the Assistant Director of the Center for Student Conduct and Community Standards at the University of California, Berkeley. There she experienced a hybrid adjudication model where she resolved cases informally and presented cases to boards on behalf of the University. Laura’s foundational student conduct experience is from Colorado College, where she oversaw the student conduct procedures in the residential halls, implemented an investigation-based resolution model and served as the campus’s lead investigator. Laura has advised a campus LGBT student organization, and a student organization devoted to sexual assault prevention with a 24-hour hotline offering response to victims/survivors. She has provided training to participants at all stages of the resolution process, including panel members, adjudicators, investigators, student advisors, and appellate boards at public, private, and community college campuses. Laura received a M.Ed. in College Student Services Administration with a minor in Gender Studies from Oregon State University and a B.G.S. in English from the University of Kansas. Her ASCA leadership experience includes serving as the 2012 Annual Conference Chair, the first Director of Community College, and faculty at the Gehring Academy.

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Matt serves as the Associate Dean of Students and Director of Student Advocacy & Accountability at Louisiana State University (LSU) in Baton Rouge. Matt serves on the CARE Team, aids in threat assessment, and recently was involved in drafting the system policy addressing Title IX on system campuses. Prior to his role at LSU, Matt served as a lead conduct officer within Housing & Residence Life at the University of Southern Indiana (USI). During Matt’s tenure at USI, he completed a doctoral degree in 2009; his dissertation focused on male advocacy against sexual violence on college campuses. Matt is a former law enforcement professional at both the campus and federal levels and is a certified Rape Aggression Defense (RAD) instructor. Prior to entering law enforcement, Matt had responsibility for addressing student behavior at Southern Illinois University, The College of William & Mary, and Western Kentucky University. Matt received a PhD in Education Administration from Southern Illinois University, a Master of Education degree with a concentration in counseling and student affairs from Western Kentucky University, and a Bachelors of Science degree in Biological Sciences from Southern Illinois University. Matt joined ASJA in 1996 and has since served ASCA in a variety of leadership capacities, including one term as the Association Secretary prior to serving as ASCA President.

Chris Loschiavo, Immediate Past President of ASCA
Chris Loschiavo is Associate Dean of Students and Director of Student Conduct and Conflict Resolution at the University of Florida (UF). He is responsible for oversight of the campus response to student behavioral and honor code-related issues, including cheating and plagiarism, alcohol and other drug issues, and physical violence, dating violence, and sexual misconduct. He is Deputy Title IX Coordinator for students, serves on the institution’s Behavioral Consultation Team, and teaches a conduct committee training class each spring semester for prospective conduct board members. Prior to coming to UF, Chris served as Director of Student Conduct and Community Standards at the University of Oregon (1999–2007). At both institutions, Chris has overseen major revisions to the Student Conduct
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Jennifer joined the organization in January 2012. She has worked in Residence Life at five institutions of
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The Association for Student Conduct Administration (ASCA) supports and serves professionals
who transform student behavior and address its impacts within higher education communities.
For more information or to become a member, visit http://theasca.org.