



DUFFY LAW
DEFENDING YOUR RIGHTS

Title IX, Sexual Assault, Conduct Code Violations, Due Process, and University Discipline Proceedings

A Comprehensive Guide for Students and Parents

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Title IX, Sexual Assault, Conduct Code Violations, and the University Discipline Process

The Essential Guide for Students and Parents

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Introduction to The Guide

Note: *The information in this Guide is drawn from the policies and handbooks of a wide range of colleges and universities as well as from our experience representing students across the country. Each case and each school is unique. In addition, the U. S. Department of Education announced in September of 2017 that it will seek changes in the coming months from its Office of Civil Rights on how schools should handle claims of sexual misconduct. Some changes have already begun and they are referenced in the relevant sections below. This guide is informational only and should not be construed as providing legal advice.*

When you are charged with a conduct violation by your school, or are bringing a complaint – no matter how seemingly simple or serious – you need to understand your rights and responsibilities. The process schools use for charging students with disciplinary and conduct code violations is often difficult to understand and navigate, and it can be very tricky to ensure that your rights are protected.

Yet it's critical that you *do* protect your rights because once a student has gone through the process and a determination has been made finding that student "responsible" for any violation whatsoever, it's very difficult to undo.

There are three basic categories under which you can be charged with a violation:

Academic violations which involve offenses such as plagiarism, cheating or improper collaboration, falsification or fabrication of material or projects, or academic dishonesty.

Conduct violations which include the following:

- violations of housing and residential living arrangements such as unsafe behavior in a dorm room, lighting candles against the fire code, safety violations, anti-noise violations, trespass and property damage
- offenses against a person such as hazing, harassment, social media misuse, assault and battery, threats in person or online
- weapons charges, drug offenses such as possession or distribution of any type of illegal drug including marijuana, alcohol possession and distribution to minors

Sexual misconduct violations which include a range of behaviors from sexual harassment, non-consensual sexual touching, sexual assault or rape, relationship and domestic violence, and stalking or cyberstalking. This category will be discussed in much more detail later in this Guide.

Getting Notice of a Charge and What to Do First

If you are going to be charged with a violation of a college disciplinary rule, you will likely be informed through an email or by a phone call from an administrator. Depending on the level of severity of the alleged violation, a student may also be informed of a conduct code violation (or a pending charge of such a violation) by campus or local police, after, for example, a dorm room search. Sometimes a student will be interviewed by campus or local police before being given formal notice of a violation.

Once you receive notice that you've been charged with a violation of your school's conduct code, the first thing that you should do is find your college's student handbook, student code of conduct, or disciplinary code. These have many different names, but this handbook should be available to you online in some form. You should be careful to make sure that the document you're looking at is the one that was in use in the same semester and



year in which the conduct that you've been accused of violating occurred. For example, if you're a junior and you're charged with (or being investigated for) a violation that happened in your freshman year, the policies in place at the time you were a freshman will govern the process you'll undergo.

Sometimes this conduct code is password protected and unless you have a student ID, you may not be able to get the current version (or past versions). Most colleges and universities discuss their conduct policies at freshman orientation meetings and again at back-to-school events early in the fall. This is considered sufficient notice for you to have knowledge of what's in the conduct code and to be charged with a violation. These conduct codes are

typically lengthy and contain a great deal of information.

You should also ensure that there isn't more than one conduct code and that the one you found applies to you as a student. There may be different handbooks for graduate students or employees (for example, if you're a student on work study or are being paid by the school for any service you perform). The conduct codes have a varying amount of information and include varying levels of detail. But they usually include the following sections:

Conduct Code Terminology

Conduct codes typically include definitions and terms; for example, a victim of an offense or a person who wants to bring the complaint is typically called a complainant. The person who is accused of a complaint is called a respondent. This is different from criminal or civil law in which people are referred to as plaintiffs and defendants.

The handbook will also contain very specific definitions for each one of the offenses that a student can violate. It is extremely important to make sure you and any outside advisors you bring on board to help you thoroughly understand these definitions so that you're clear on exactly what you've been charged with. That will help shape the entire strategy you build to respond to an alleged violation.

Standards of Evidence, the Complaint Process, and Timing

The handbook should also lay out which standard of proof the school is required to use to find a stu-

dent responsible for a violation. The standard is typically “a preponderance of evidence” which is more likely that not that somebody has committed an offense — even if that likelihood is “feather weight” over 50/50 (i.e., a 51 to 49 percent likelihood). Alternatively, some schools use “clear and convincing evidence” which is a higher standard than preponderance -- but both are very different than the criminal standard of “beyond a reasonable doubt.”

Handbooks also set forth the very specific process for making a complaint and resolving a complaint. This includes both the procedure that a complainant must follow to make a complaint, and the procedure that takes place when someone is being charged. These are very important to read and understand, and they usually have very specific timelines for each stage of a procedure. For example, if a respondent misses a deadline for responding or taking some required action, the investigation process may end with the accused being found responsible essentially by default. The procedures are very different at many schools and are particularly different for sexual misconduct charges, which will be discussed later. Typically, the processes become more detailed and extensive as the seriousness of the claimed violation increases.

Complaint procedures usually include an investigation and/or a hearing, and the handbook typically describes exactly who will be involved in each step of the process and who will be making the final judgment about responsibility. Some schools allow fellow students to be involved in the investigation and Conduct Board committees, some schools limit participation to administrators, and some schools allow a hybrid of both approaches. Many times, there is also an appeal process in which either the

complainant or the respondent can appeal a decision that they don't like and they don't believe was supported by the evidence.

These appeals typically set forth very specific bases for the grounds on which somebody can appeal a finding, and it's very important to understand what those are at the very beginning of the process so that you can prepare for an appeal in the event



you choose to bring one. Once the investigation or the hearing has taken place and, if there is an appeal, once the appeal has been heard and determined, it's very important to understand that there is very little, if anything, that a student can do at a college or university within the school's adjudication process to reverse the findings. (See the section on *After An Appeal*, page 21, for information about possible remedies through the U. S. Department of Education's Office for Civil Rights or civil court).

Does a Student Have a Right to a Lawyer?

Your school's handbook should state exactly who you are allowed to have advise you at each stage of the proceeding and what role that person can play at each stage. Many schools will not permit the advisor (or the “support person” as it is often called) to be an attorney for alleged violations of the conduct code other than sexual misconduct.

Whether it's an attorney or another person, most schools prohibit the support person from speaking at an interview, meeting or hearing. They may afford the support person the opportunity to speak with the respondent at breaks and assist with advice before and after these proceedings. It's very important to know whether a support person can be with you at a given step in the process and whether it can be an attorney. Again, the sooner you're advised by someone who is experienced in handling school discipline proceedings, the better. What to say, how to say it, what not to say, how to respond to questions that can be intensely nerve-rattling – your best outcome, whether as a complainant or respondent, will depend on how you act and what you say throughout the process.

Even if the handbook does not permit an attorney to be with you, many times schools will allow it if asked, and it becomes a strategic question as to whether an attorney should be your support person. Indeed, some states require by state law or statute that attorneys be present at school disciplinary proceedings. It's important to check state laws to ascertain whether you may have an attorney even if the handbook does not permit it.

FERPA: Your Privacy Rights

Student handbooks should also have a description of FERPA, which is the Family Educational Privacy Rights Act. Under this federal law, colleges and universities are not permitted to make public a stu-

dent's disciplinary or academic record unless the student signs a waiver. This will be important later when we discuss sanctions and their impact on future employment and educational opportunities if a student has been found responsible for a conduct code violation.

If a student wants to bring a support person, particularly if that person is an attorney, that person

will need to complete a FERPA waiver before the school is permitted to share information or discuss the case with that support person. That form can typically be found online and, if it is not available online, many times the office which is handling the procedure will be able to provide such a form to the student. There can be exceptions to FERPA such as in situations where there is a safety issue about which the university is required to inform law enforcement or some other state or federal agency.

If a respondent misses a deadline for responding or taking some required action, the investigation process may end with the accused being found responsible, essentially by default.

ment or some other state or federal agency.

Amnesty and Cooperation

The conduct code should set forth whether a school, as a matter of policy, will provide what is often referred to as amnesty to a person who is a witness, a victim or a complainant in a student disciplinary process. This means, typically, that a school will not charge a victim or a witness with any violation that may have occurred during a particular situation that forms the basis of the charged conduct code violation. For example, in the context of an assault, if the victim or witness was involved in underage drinking or drug use at the time, many

schools will not bring a charge of conduct code violation against the witness or victim involved in the assault event based on the drinking or drug use.

Most student handbooks require that students involved in the student conduct code violation process cooperate with the procedure. If the student does not cooperate, that can form the basis of another conduct code violation.

If a victim of an offense or complainant chooses not to participate or cooperate in the process, often the respondent will be found not responsible due to the victim's decision not to cooperate. On the other hand, if a student who has been charged chooses not to cooperate in the process, that student can -- and often will -- be found responsible under a preponderance standard. The handbook will also set forth any defenses available to the respondent.

Sanctions

College and university handbooks usually list the sanctions available for the school to impose for each specific offense. The sanctions vary from offense to offense and it's very important to understand which sanctions apply to the specific violation with which you are being charged.

It's also very important for a complainant or a victim of a crime to be aware of the potential sanctions faced by someone they name in a complaint. Many times, students are unaware of the severity of the sanction, and, once the process begins, it is

next to impossible for a complainant or victim to withdraw the complaint or change the sanction that the school is required to impose. For an example, if the least or lowest sanction for a particular offense is suspension, many times a victim or complainant would not want to have the respondent suspended but can do nothing about it once the complaint has been filed and the student has been charged or found responsible for that offense.

Sanctions vary widely depending on the type and severity of the violation ranging from being required to give the complainant an apology, to providing restitution (paying for any damages that occurred), to receiving educational sanctions. And sanctions can range from attending certain training programs or writing essays, to warnings or disciplinary probation, to deferred suspension, interim suspension, or suspension for a specific period (including years), and ultimately to expulsion. If a student has other disciplinary problems or past violations, these can affect the severity of the sanction imposed.



Having a Sanction on Your Record

Being found responsible for any violation matters because any imposed sanction

remains on a student's record typically for at least seven years. Many schools also set forth that a student's disciplinary record can be maintained in perpetuity if they are found responsible. If this is not set forth in the student handbook, it's important to understand what the consequences are before starting this process. It matters what's on your disciplinary record for a number of reasons, including the potential negative impact on your future edu-

cational and employment opportunities. For example, applications for employment or graduate school may require candidates to waive their FERPA rights, and disclose any prior disciplinary incidents or sanctions.

Potential employers may require applicant background checks, which often ask these same questions about a student's academic record. You may also be asked to provide your records when applying for various professional licenses. For example, applying for admission to a state or federal bar to be an attorney or to take the bar examination may require one to disclose this type of information. If a student is considering transferring or intending to go to graduate school, most institutions use a "common application" that will require a student to disclose in some form any disciplinary record or sanction at previous educational institutions.

Many times, even if a student chooses to transfer schools in the middle of a semester, for example, when a student conduct code investigation or procedure is in process, the school will continue to complete the investigation or process and the student will still be charged or found responsible even if they're no longer enrolled at that school. This may also need to be disclosed.

Additional Impacts of a Sanction

Another important consequence of a sanction is that many times, as the student handbook should set forth, these sanctions are effective as soon as the disciplinary process is complete. For example, if a student is found responsible and either suspended or expelled from the institution -- even in the very last days of a semester -- that student will likely lose any credits for that semester and any

money including tuition and room and board that have already been paid if the suspension and/or expulsion begins immediately. Students must also read the handbook to determine whether it provides this information, and, if it does not, a student should find out what other collateral consequences there may be attached to a given sanction. For example, a sanction may result in a student losing a merit scholarship, financial aid, an athletic scholarship or future participation in any school organizations or clubs.

Finally — and critically — schools will often include notations of conduct code violations in their students' general transcripts in addition to their specific academic and disciplinary records.

Due Process in Disciplinary Proceedings for the Accused

Due process refers to procedures, including things like hearings and appeals, that schools must follow so that respondents can tell their side of the story



and defend themselves. Before making a finding of a sexual misconduct or other conduct violation and imposing sanctions, such as a suspension or expulsion, state universities must provide students with due process as required in the United States Con-

stitution and in the constitutions of their respective states.

What process is due varies widely, however. The Supreme Court states only that due process means “the opportunity to be heard at a meaningful time and in a meaningful manner.” Schools are not required to provide students the same kind of procedures characteristic of criminal trials, and due process does not, unfortunately, guarantee correct or well-advised decisions. It requires only that disciplinary procedures contain rudimentary precautions against unfairness and arbitrary exclusion.

Generally, due process must include at least three things: The respondent is entitled to

- 1) notice of the charges;
- 2) an explanation of the evidence; and
- 3) an opportunity to present the respondent’s side of the story before an unbiased decisionmaker.

A school’s policies and procedures may allow a right to have a lawyer cross examine the complainant and call witnesses in a kind of full-blown mini-trial. Other schools may allow only the right to submit evidence or questions in written form to university administrators, who may or may not use these to question a complainant.

Due Process Applies Only to Public Colleges and Universities

The constitutional right to due process applies only to public institutions. It does not apply to private colleges or universities. The only source of rights to due process at a private institution is the contract that exists between the student and the school. Usually, this is interpreted to include the handbooks, policies, and procedures published by the

school. By the law of many states, these form a binding contract between a student and the university, once tuition is paid. If the university does not follow its own internal procedures, this could result in a “breach of contract” claim. Check your state law to see if this applies.

Some courts have also held that students of private schools have a right to “good faith and fair dealing”—a principle implied in any contract—such that schools may not suspend or expel students without some rudimentary safeguards of fairness. But this law is evolving rapidly across the country.

Disciplinary vs. Criminal Proceedings

School disciplinary proceedings are very different than criminal proceedings. For example, there are no judges, no lawyers in their regular roles, and no required rules of evidence. The people judging and determining the case are typically either administrators or students or both. Many times, “hearsay” is allowed and many other statements and procedures are allowed in a student disciplinary process that would never be allowed in a court. Many of the student conduct code violations, however, also can form the basis of a criminal charge.

Before you get involved in a student conduct code disciplinary process, it is very important to check the local, state, and federal statutes to understand whether what you’ve been charged with could also be a crime. For example, conduct code violations including drug sales or possession of drugs, purchase of chemicals to make synthetic drugs, steroid use or possession or sale, assault, weapons, hazing, harassment, and sexual assault and forcible rape may also be chargeable as a state crime.

How you handle the disciplinary proceeding can affect your criminal case if such charges are filed by law enforcement, and how the criminal case is handled can affect the student disciplinary proceeding. Most schools and universities will conduct their student disciplinary procedure either at the same time or before a criminal case, which makes it very difficult for a student to make sure that they are not charged or imprisoned for something they said or did in the disciplinary process. For example, any statements a student makes in the school process, although protected by FERPA, can be used at a later or simultaneous criminal proceeding against that student.



Campus police or the local, city, or state police typically have the authority to either subpoena or to issue search warrants based on probable cause to schools if they believe that such statements exist that would form the basis of a crime. This makes the student conduct code disciplinary proceeding very difficult to navigate because students are required to participate in the proceedings but many times would prefer not to make a record. It's vitally important to understand what you can, should, and need to say – and not say – in a student disciplinary proceeding (both verbally and in writing, email or text) to protect your rights.

Also, many times school disciplinary investigations and procedures rely on evidence such as texts, Facebook messages, and other types of social media, such as WhatsApp, Snapchat, photos, and phone calls, even if they have been deleted. Many times, students voluntarily provide these to a school to assist in the investigation as they are required, but these also can be used against them in any criminal case.

These records and statements may also be preserved by the school for a long time and may be used much later in any future criminal investigation if it falls within the statute of limitations for that crime. Other evidence such as polygraphs, fingerprints, and security camera footage that a student may wish to use to defend or to advance a complaint, can also be used in these circumstances and great care should be given into what is produced and provided.

Though understandable, it is all too common for complainants or respondents to communicate with their friends or witnesses to the alleged violation before, during or after an incident and by doing so create witnesses whose statements can come into both the school's process and any criminal case that may arise.

The Pressure in Bringing or Defending a Disciplinary Complaint

Student conduct code disciplinary procedures are lengthy, very detailed, and very time consuming. These occur while academic classes are in session and do not stop for exams or other intense periods of study. Yet it's essential to spend the amount of time, energy, and resources you need to be able to

assert your rights from the very beginning of a student conduct code disciplinary process.

Once a determination has been made about a student's responsibility and a sanction has been imposed, it is virtually impossible to undo that within the educational institution's parameters. Many times, the only way to proceed after that is through a lawsuit — a civil action — or by bringing charges through an independent state or federal agency that handles such charges. Lawsuits and administrative complaints are typically very expensive and costly in terms of energy, emotions and time and may take years to resolve during which a student may be missing valuable educational and employment opportunities.

Sexual Misconduct and Title IX

Title IX is a federal law that requires educational institutions including colleges and universities to treat students equally regardless of their gender, and it prohibits schools from discriminating against students and others based on their gender. The law has been in place since 1972, and many people associate Title IX with gender equity in school athletics. Title IX, however, has always covered sexual harassment.

The Department of Education (DOE) is the federal agency that is responsible for enforcing Title IX. The Office for Civil Rights (OCR) within DOE is responsible for issuing guidance, enforcing Title IX on college campuses, and handling complaints against schools for alleged violations of the law. In 2011, OCR issued a "Dear Colleague" letter to schools around the country making clear that all acts of

sexual violence and sexual harassment are covered under Title IX.

In response to research showing that one in five women was sexually assaulted on college campuses (and that such assaults are highly unreported), the White House Task Force to Protect Students from Sexual Assault on College Campuses was formed in 2011. One of its first major actions was to publish the report "You Are Not Alone." This



brought attention to Title IX and recent federal laws, including the Campus SaVE Act of 2013 (as part of the Violence Against Women Reauthorization Act of 2013).

Campus SaVE affords additional rights to victims or survivors of sexual violence, dating violence, domestic violence and stalking, and requires educational institutions to follow certain procedures related to the resolution of complaints of sexual assault. In response to this increased attention and to the legal requirements schools face in addressing the issue, many more complaints of sexual misconduct have been filed at colleges and universities in the last 7 years.

Prior to 2014, OCR was handling approximately 50 complaints mostly from victims or survivors of sexual misconduct on college campuses who claimed that their schools did not handle these procedures appropriately. In 2017, the Office of Civil Rights is currently investigating over 300 complaints at

many different universities across the country from both men and women, both survivors and accused, claiming that the colleges and universities have not handled their procedures appropriately.

On September 22, 2017, DOE rescinded two significant pieces of guidance regarding Title IX and sexual harassment and misconduct: the 2011 Dear Colleague Letter on Sexual Violence, and the 2014 Questions and Answers on Title IX and the Sexual Violence. Simultaneously it announced that OCR will enact rules after an opportunity for “public notice and comment.” OCR then issued its own Q&A on Campus Sexual Misconduct, which will be in place until public notice and comment is completed.

The Guide you’re reading now discusses the OCR guidance through September 22, 2017 and points out changes that may occur based on that September 22, 2017 OCR Q and A. Although the entire environment is in flux (and maybe precisely because of that), it is unclear whether schools will follow the new OCR guidance or the OCR guidance in effect at the time of the alleged misconduct. This new OCR guidance creates potential conflicts between a school’s handbook and the new requirements, and between the OCR’s requirements and some state laws.

Title IX Applies to the Vast Majority of Colleges and Universities in the U. S.

Title IX applies to all colleges and universities that receive any federal funding – meaning, most private and public schools except for a very few small religious schools. Title IX covers conduct that occurs on campus and off campus if it affects students on campus and at campus-sponsored events.

For example, if a varsity team is playing an away game at another school and one of the students commits, is charged with committing sexual misconduct, or is the victim of sexual misconduct at that away school, both schools are required to investigate that incident.



Fraternities and Athletic Programs and Title IX

Athletes and fraternities have become the focus of many institutions with respect to sexual misconduct based on research that the cultures of frats and athletic teams sometimes support sexual misconduct and the non-reporting of such conduct. If you’re an athlete or member of a fraternity, it’s important to be aware of any potential bias one way or another on the part of school officials when bringing or defending a complaint.

Rights and Requirements Under Title IX

Title IX requires that schools provide certain rights for victims (a.k.a. survivors or complainants) and certain rights for the accused (a.k.a. respondent or responding parties). The administration of Title IX on campuses across the country has become very complicated, detailed, and prescriptive. For example, schools are required to notify victims of any

disciplinary sanction it imposes on a person it finds responsible for a sexual misconduct violation under Title IX if it affects the victim.

Schools may, as they find appropriate, provide “interim safety measures” for any student making a complaint of sexual misconduct but also for the accused or respondent, even before an investigation begins or is completed and prior to a final determination of responsibility. These can include a “No Contact Order” between the complainant and the respondent. A No Contact Order (NCO) can prevent a respondent, and sometimes, the complainant, from having any direct contact, or any indirect contact through friends or other people either in person or through social media or the phone, with the complainant or witnesses.



The new guidance sets forth that restricting a party’s ability to discuss the investigation is likely to deprive a party of the ability to get or present evidence or defend their interests, which is a significant change. NCO’s may also have spatial requirements, such as a respondent cannot be in the same building as the complainant or within a specified distance of them. This can have the effect of a complainant or respondent being denied entrance to the library during certain hours, to certain cafe-

terias and sometimes to the same dormitory, or even in the fieldhouse if the complainant and respondent are both athletes that would otherwise be using the building at the same time.

Interim measures can also include counseling, changes to housing or to jobs, class schedules, extracurricular activities or clubs, and these can continue throughout an investigation and hearing and may continue after the completion of the school’s disciplinary process. The 2017 guidance clarifies that an institution may not make interim measures available to only one party and may not rely upon assumptions that favor one party over another in tailoring interim measures to the parties.

Although it appears the new guidance attempts to eliminate any favorable treatment to either party, intact OCR guidance (i.e. the Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, January 2001) makes clear that schools should minimize as much as possible the burden on the student who was harassed or the complainant. Many schools have interpreted this to mean the respondent is the party that must make accommodations.

What Title IX Covers and What It Requires

Title IX covers all sexual misconduct, sexual harassment, and gender discrimination. Sexual misconduct charges are frequently set forth in separate handbooks distinct from a school’s conduct or academic handbooks. While some schools have sections in their overall student handbook about sexual misconduct, make sure if you’re reading the student handbook that you read any additional materials about sexual misconduct. Many times, these

different handbooks or policies at the same school are not consistent with what may be set forth in the overall handbook.

Title IX requires colleges and institutions to follow certain procedures and policies and to maintain a policy and handbook with detailed rights made available to the entire school community. DOE and OCR, however, do not tell the schools exactly what they need to do or how to do it. The schools just need to be in compliance with Title IX's general rules. For example, Title IX does not require, but it does permit, schools to provide individualized services as appropriate to either or both the reporting party (victim) and the responding party (accused) involved in an alleged incident of sexual misconduct.

At the same time, schools are prohibited from making such measures available only to one party. For example, the rescinded OCR guidance prohibited mediation as an alternative method of resolving sexual assault complaints at colleges and universities. The new guidance now permits schools to use mediation if it determines that is appropriate. This seems to contradict intact OCR guidance (2001 Sexual Harassment Guidance) that frowns on mediation as a means of resolving sexual harassment, whether voluntary or not.

Current OCR Guidance Compared to Pre-October 2017

Under the rescinded OCR guidance, students were strongly discouraged from being on panels or hearing boards that are involved in the investigatory process for sexual misconduct violations at schools and universities. The new 2017 guidance does not mention this.

Also, under the rescinded OCR guidance, Title IX did not permit respondents to cross examine the complainant. The new 2017 guidance requires that any procedure concerning allegations of sexual misconduct should be made equally available to the other party, such as cross-examination, the right to submit questions to be asked of parties and witnesses, and the right to have an attorney or other advisor of their choice present.

Under the rescinded OCR guidance, Title IX required schools and universities to use a "preponderance of the evidence" standard when determining whether a student is responsible for any type of sexual misconduct. The new 2017 OCR



guidance permits schools to use either a "preponderance of the evidence" or "clear and convincing evidence" standard. Schools may now use the higher standard of evidence, so long as the standard is the same as that which the school applies to other kinds of student misconduct cases. For example, schools may not apply a higher standard of evidence for disciplinary actions against plagiarism than against sexual misconduct.

Some state laws, for example in Connecticut, require schools to use the preponderance standard, which could conflict with the new OCR guidance. A “preponderance of the evidence” standard can be particularly problematic in “he said/she said” situations, as discussed later. (Note: we’re using the term to also include same-sex incidents.)

The law also states that schools have an independent duty to investigate any complaint or any possibility of a sexual misconduct incident immediately. The law further requires schools to continue to investigate even during a criminal investigation. Under the rescinded OCR guidance schools were permitted to delay their proceedings for about three to ten days pending a criminal investigation and were required, in the absence of extenuating circumstance, to complete their investigation, charge, hearing, sanctions and appeal process within 60 days from the date that the school became aware of a sexual misconduct complaint. The new guidance removes any fixed time frame and now permits schools to “reasonably” delay proceedings pending criminal investigations and only requires schools to complete the entire process in timely manner and in good faith.

The old guidance did not require any particular form of reports or findings or notice, other than they be in writing. The new 2017 OCR guidance, however, requires schools to provide written notice to the respondent of the allegations with sufficient details, including the identities of the parties

involved, the specific sections of the handbook that were allegedly violated, and the date and location of the alleged incident with sufficient time to prepare a response BEFORE any initial interview. It also now requires schools to make findings of fact and conclusions about whether the facts support a finding of responsibility for a violation and to give the parties an opportunity to respond to the report in writing IN ADVANCE of any decision

or hearing. The new guidance also makes clear that the school must provide written notice to both parties with a rationale for the results and the sanctions.

Sexual Misconduct Definitions and Conditions

Again, Title IX requires schools to have policies and procedures, but it allows them to customize these to suit their own campus. Yet, in virtually all sexual misconduct policies, the following viola-

tions are covered and defined: non-consensual sexual conduct, sexual assault, rape, intimate partner violence, verbal or physical threats based on sex or sexuality, and stalking. Remember that it’s critical to understand the specific definition of the charge so you’ll know how to proceed.

The sexual misconduct policy will typically provide a definition of consent. In many states, colleges and universities have adopted an affirmative consent standard. This imposes on the initiator of any sexual activities the obligation to obtain affirmative consent, either verbally or by conduct, from the person from whom they want sexual conduct at each stage of any sexual activity. Most schools’

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definitions also provide that prior sexual consent up to each stage of sexual activity does not grant or imply consent for the current activity.

Alcohol and “He Said/She Said” Situations

Most schools state that intoxication is not a defense against a claim of sexual misconduct. This is often referred to as “the reasonable person standard,” meaning that if a student, acting as a reasonable person in his or her situation, knew or should have known that another student was intoxicated and unable to give consent to sexual conduct or sexual activity, then any sexual activity after that point is considered sexual misconduct. For exam-



ple, to apply these standards, if a male and female student engage in sexual activity after both had been drinking heavily, the school would investigate using the standards set forth in its policy as is required by Title IX. If there were no witnesses and no evidence about the specific alleged act that may have occurred (for example, in a dorm room between the two adult students), the school would rely on each student’s version of what happened or what they could remember happening.

If a complainant believed that he or she was too drunk to consent and had no memory of the sexual encounter — and if the respondent agreed they had sex but did not remember the version of events — under an affirmative consent rule and a preponderance of the evidence standard the school would need to rule in favor of the complainant. This is because the respondent, under the circumstances, can provide no evidence of affirmative consent whereas the complainant has provided evidence that he or she lacked capacity to consent. Moreover, in the all-too-common “he said/she said” scenario where there are no witnesses and no other evidence, and the respondent believed that the complainant was not too intoxicated to consent, the preponderance standard is still sufficient for the school to credit the complainant’s story that he/she was too drunk and hold the respondent responsible.

Sanctions for Sexual Misconduct

The sexual misconduct handbook or policy statement will, again, set forth the specific sanctions available for each type of sexual misconduct. Most schools’ policies state that the minimum sanction for non-consensual sexual intercourse, including he said/she said incidents, is suspension. And many schools adhere to the policy that if the conduct involves penetration and is non-consensual, the sanction will be expulsion. The new 2017 OCR guidance requires schools to consider the impact of separating a student from his or her education by imposing a sanction such as suspension or expulsion when enforcing the school’s code of conduct.

Most college and university policies set forth the “interim measures” to be afforded to a complain-

ant/respondent in a sexual misconduct complaint process. In addition to the availability of a no-contact order and other interim measures, many times schools suspend the accused pending the outcome of the investigation and disciplinary process, which can often take many months.

Appealing a Finding

While Title IX does not require schools to provide an appeal process, most colleges and universities do allow for some kind of appeal depending on the alleged violation and initial finding/sanction. Schools and universities usually allow appeals on both sides of a sexual misconduct claim. That is, both the complainant and the respondent can appeal a decision that they do not believe is warranted or that they do not feel is fair or accurate. Under the rescinded guidance, Title IX required that if a school allowed an appeal for one party, it must allow an appeal for the other party. The new 2017 guidance permits a school to choose to make an appeal process available to the responding party alone or to both parties. This seems to conflict with the federal regulations and intact OCR guidance that sets forth that a school must not provide separate or different sets of rules to students based on gender.

Retaliation is Prohibited

The school's sexual misconduct handbook should also reference Title IX's requirement that no retaliation is allowed against anyone, on either side, who is involved in a sexual misconduct investigation or proceeding. This is very important to understand, particularly if there is a no-contact order (NCO) in place. Here's why: most incidents of sexual misconduct or alleged sexual misconduct occur

between acquaintances. If a student finds out that they've been charged by a complainant/friend with sexual misconduct and then contacts the complainant to apologize or to discuss the situation, such action could constitute a violation of a no-contact order, and further, could be considered retaliation under the school's handbook and under Title IX – which in turn could result in an independent charge and set of sanctions under a separate violation of the school's Title IX sexual misconduct policy.

Concerns for the Complainant

While most complainants are female, an increasing number of complaints are being filed by males. And regardless of the gender of the complainant, the process of filing a complaint and working through the various stages of the investigative and hearing procedures is extremely taxing.

Because the collection of evidence in a sexual misconduct or sexual assault case is usually timely and sensitive, the school is required to inform complainants about their right to go to the police. If a complainant decides they do not want to inform the police at that moment, much of the evidence can be lost if it is not gathered immediately. These decisions are usually made under very stressful conditions. Many complainants are traumatized and do not understand the consequences of their actions at the time of, or after, a sexual assault. And many states have an anonymous rape kit statute, wherein complainants of sexual assault can get a confidential rape kit at a hospital and not pursue charges for a number of months or years, if ever.

The entire process can be overwhelming, and if the complainant is required to be involved in multiple interviews by different campus administrators (as well as police), they often can be re-traumatized. A complainant's memory may be faulty as a result of trauma from the assault and this can lead to personnel untrained in assault survivor psychology to mistakenly assume the complainant's credibility is lacking. Amplifying the possibility of re-traumatization is the fact that oftentimes the respondent will still be on campus or in classes with the complainant during the lengthy investigation and hearing phases of the disciplinary process.

Confidentiality requirements regarding a school investigation can isolate a complainant from her/his friends and social group. And a complainant can



also feel peer pressure from her or his friends or Greek life sisters or brothers to recant and withdraw the charges due to, for example, the popularity of the respondent (though, as stated above, schools rarely if ever allow this).

In addition, although most schools afford amnesty to a complainant of sexual misconduct or assault, many times information about the complainant, such as drug or alcohol use or sexual preferences, can become known to the university, which can be

embarrassing or problematic for the complainant. Finally, respondents of sexual misconduct and assault complaints at colleges and universities are increasingly filing cross-complaints against the complainant. This can be used as a strategy and can cause complainants additional emotional trauma.

Concerns for Witnesses

Students identified as witnesses by either party can be caught in the cross-hairs of a sexual misconduct investigation and hearing. The handbook should describe the rights and responsibilities of a witness in a proceeding. Most handbooks do not require witnesses to speak with investigators or school officials. Even if there is no Honor Code or section in the handbook requiring a witness to cooperate, the student witness can negatively affect the school's overall impression of them if they choose not to cooperate in a proceeding.

Also, because many sexual assault complaints arise where the parties know each other, witnesses may be friends of both parties and may not want to be swept up in the emotional turmoil surrounding the event. Witnesses might also have been involved in other potential violations of the school's conduct code, including drugs and alcohol, and may not wish to reveal that during an investigation or proceeding.

Read the handbook to determine whether a witness can have an adviser or an attorney represent them.

Concerns for Respondents

A respondent to a sexual misconduct allegation in an educational institution has very little control over the initiation or timing of the process. The respondent needs to react to the school's timeline, and to the complainant's allegations, witnesses, and evidence. A respondent is subject to any interim measures that the school decides to enforce.

Most schools do not provide for a statute of limitations after an alleged violation occurs (i.e., a timeframe by which a complainant must file a complaint). Most schools allow a complainant to bring a complaint against a student who is still enrolled at the school in any capacity. Sometimes that can extend to a student who becomes employed at the institution. Many times, complainants can bring charges years after an incident allegedly occurred. Charges can be brought even if the complainant is no longer at the institution. In addition, administrative charges can be brought by the institution, even if a complainant does not want to pursue a complaint.

As stated earlier, Title IX used to require and still permits the use of the preponderance standard of evidence, which many colleges and universities have adopted and will continue to adopt. This, in combination with the emphasis on recognizing victims' rights and protecting victims, means, in effect, that respondents must often prove that they are not responsible (i.e., guilty) – which is often an arduous, complicated task. Again, there are no rules of evidence. This is very different than a court of law, and in situations of he said/she said where there are no witnesses, it is particularly problematic for a respondent.

Before a complaint is filed, a potential respondent may find out about an upcoming charge because they've been questioned by the police, had their room searched, or heard about the complainant's intention from friends. It is only at this point before a complaint has been filed that a potential respondent can withdraw from school with nothing appearing on his/her disciplinary record or transcript. Once a student withdraws, a complaint filed after that will not be pursued by most institutions (although it can still be pursued criminally). However, if a respondent withdraws after a complaint has been filed, even if he/she is unaware of the complaint, the school is required to investigate and will do so even in the absence of the respondent. This almost always results in a finding of responsibility.

Once Notified

In most cases, respondents are notified by the school, typically through the school's email system, that a complaint has been filed and they need to schedule an appointment within the next few days to meet with the Title IX coordinator or a designee. The email rarely gives enough information for a respondent to have an idea of the specifics of the allegations.

Remember, the new 2017 guidance requires schools to provide written notice to the respondent of the allegations with sufficient details, including the identities of the parties involved, the specific sections of the handbook that was allegedly violated, and the date and location of the alleged incident, and with sufficient time to prepare a response BEFORE any initial interview, which is a significant change.

Many times, students charged in a complaint believe that if they show up and tell the truth that nothing negative will happen – whether they're confident in their innocence or are willing to admit wrongdoing of some sort. This is one of the times that a respondent should be the most careful. Yes, the respondent is required to be truthful and cooperate with the administration and, many times, that can go a long way toward the administration crediting the respondent with truthfulness. In that case, it's very important for respondents not to speak or email about what happened or presume they understand what the allegations are because they could end up providing much more information about other things that ultimately could expose them to other violations of the student conduct code or say things in a manner that administrators believe hurts their credibility.

The next step is typically a procedural interview with an administrator during which the administrator will explain what the procedure is, where and how the relevant conduct codes can be accessed, the timing of the process, and any interim measures that may be put in place. It is imperative at this point that the respondent does not do anything except listen to the administrator. Many times, the alleged conduct will have occurred so long ago that it's very difficult for the respondent to remember.

If the respondent tries to remember or indicates that he or she does not remember, and then later remembers more specifics, many times this is held against the accused student and negatively affects his or her credibility. In addition, it's at this point, before the student is aware of what the charges may be and that they may be much more serious than what the respondent believes they may be,

that there is a possibility of criminal charges being brought as well.

Witnesses and Preserving Evidence

In addition, any time a person charged with a conduct code violation starts speaking with others about what may or may not have happened, this can be highly problematic because they are inadvertently creating witnesses. Those witnesses may be asked what the respondent said at that time and even if the witnesses heard it incorrectly. This can be used against the respondent as well.

Another key task is determining what type of evidence is available and securing any evidence in a safe place. For example, sometimes texts messages can be the best evidence to show a student is not responsible, so saving (and not deleting) these



texts is critical. Many times, a complainant will present texts taken out of context, but if the total context is not available, the respondent's ability to defend him or herself is reduced or eliminated. Schools may tell respondents that they do not need to have a parent, an adviser or a lawyer involved. But it's important for you and your parents to assess whether there should at least be another person there to act as a witness on your behalf during these meetings. Title IX and some state laws require schools to permit students to have an attorney in sexual misconduct cases.

It's also important to understand that if there are interim measures in place such as a no-contact order, any violation of those interim measures can be grounds for immediate suspension or another charge being brought. Moreover, if the allegations are false and there is a victim or complainant who is vindictive, all this complainant needs to do is make a charge that you violated the no-contact order or that you violated any interim measure, which can cause immediate repercussions.

The many interviews and meetings that come with the disciplinary process may interfere with academics, athletic events, club activities and many other personal events. This can be extraordinarily stressful, but the school may require the respondent to adhere to their timeline. These meetings and interviews may also require preparation, such as of a statement or of evidence, which also requires time, energy and resources. And although Title IX used to give schools a maximum of 60 days to complete the entire process, many investigations take far longer.

Investigation Phase

Many schools employ the "single investigator model" in which the same investigator will interview the complainant and the respondent separately, back and forth, until they have all their questions answered over a period of time, maybe weeks, maybe months. The investigator will also interview witnesses and make a report, at which time the investigator may make a finding that the respondent is either responsible or not responsible. Note that the investigator typically only makes a "finding," which is a recommendation to school officials.

It is common for a respondent to walk into a first meeting with an investigator without fully knowing or understanding the charges they're facing. Sometimes, the investigator will ask for a respondent's phone, take it, and make an electronic copy of the phone, including emails, texts and possibly other data. Investigators may also harshly cross examine the respondent to test their credibility. They'll will



ask the respondent to identify witnesses and any evidence. If the respondent is not adequately prepared for this interview, many times they will leave out important witnesses and evidence or say things which they later contradict because they remember more clearly or they have reviewed evidence that assists them in understanding what really happened, all of which can negatively affect their credibility.

After an interview, investigators will often ask the student to review notes from the interview and sign off that the notes accurately represent what happened during the interview. An interview sometimes can last hours and a respondent who signs off on the notes is later held responsible for

agreeing that they were accurate. It's very important to review the notes and make sure that they were accurate to the best of your recollection. This is one of the times it's very helpful to have an adviser with you as these interviews can be quite stressful and tiring, leaving little energy to review notes carefully.

After an investigation is completed, the school will typically permit the student to have a copy of the investigative report (which is often redacted to keep names of other parties or witnesses confidential). Other times, schools will only permit the respondent to review the report in a room and take notes from it. These reports can be several pages or up to hundreds of pages long with the evidence attached. The new 2017 guidance requires schools to write a report after an investigation that summarizes both the good and bad evidence and makes clear that accused students have the right to see the evidence and respond to it before there is any finding of responsibility.

The schools may also have a multiple investigator model that follows the same basic steps. But whether it's a single or multiple investigator model, schools may also include a hearing process after an investigator or other school official determines that there is sufficient evidence to move forward for hearing.

Hearing Phase

If there is a hearing after the investigative report is completed, many times a respondent may only have two or three days to prepare for a hearing, get witnesses and secure any additional evidence. This also can include drafting an opening and closing

statement, and a position statement, if found responsible, on what these sanctions should be.

At a hearing, often before a panel of additional administrators/staff and students (despite Title IX's prior recommendation against the use of students on such panels) the panel will re-interview the respondent and the complainant and any witnesses. These hearings can include an opening statement, a presentation of evidence, questioning of witnesses by each party, and a closing statement. Some-



times the panel will decide responsibility and which sanctions apply at the same hearing. Sometimes only responsibility is decided at a hearing, and there is a separate panel and hearing for the determination of sanctions. Each hearing has its own set of rules and personnel deciding the outcome.

Hearings can last all day and sometimes several days. Again, even under the new 2017 OCR guidance, complainants and respondents may be prohibited from cross-examining complainants, and

often they're prohibited from cross-examining investigators or witnesses -- or asking any questions at all. Complainants and respondents are rarely in the same room at the same time in front of the hearing board, with each participating by video when the opposing party is being interviewed.

Panels will often decide the outcome at the hearing that day, but just as often the school will take several days or even longer to let the respondent know the outcome of the hearing or investigation. They may alert the student by an email or they may call the student into their office to relay the findings.

Appeals for Both Parties

Respondents and/or complainants are typically given a very short time frame within which to file an appeal. There are very limited bases for filing an



appeal, such as procedural error, the imposition of sanctions deemed not commensurate with the seriousness of the charge, or the discovery of new evidence that was not available at the time of the earlier hearing. Appeals require reviewing lengthy documents and usually need to be turned around in a very short time period. The handbook will explain the appeal process and timelines, and who

will be adjudicating the appeal. Typically, an appeal officer affirms the panel's (or investigator's) findings and recommendations simply because they did not attend the original hearing(s) and thus rely on credibility assessments made by the investigator or panel itself.

On the rare occasion that a finding or sanction is overturned on appeal, the appeal officer can request that the investigator or hearing board look at different facts or different legal issues and a new hearing may need to be conducted in order to address the issues raised in the appeal. If that is the case, another hearing will occur, and both the complainant and respondent will be re-interviewed along with witnesses and the evidence re-assessed.

After an Appeal

There are virtually no avenues left to pursue within the school itself after an appeal is concluded. However, students do have an option to file a complaint with the Department of Education's Office for Civil Rights to initiate an investigation into the policies and practices that the university or college followed and which the students believes were in violation either of the school's handbook or of Title IX laws. Information to file an OCR complaint is available online at www2.ed.gov/about/offices/list/ocr/index.html.

The person or group filing the complaint does not have to be the sexual assault survivor or the respondent or even a student. Student allies, faculties, alumni, parents and other concerned individuals can file a Title IX complaint on behalf of either respondents or complainants.

This process can take years to complete. A complaint must be filed within 180 days of the last date of the alleged Title IX violation (which is usually the date of the determination with which the student disagrees). OCR typically decides whether to take the case within 4 months of filing. This process is largely confidential, as the Office for Civil Rights will not publicly release any names in the complaint. Again, the number of complaints to the Office of Civil Rights since 2014 has multiplied exponentially. There are currently more than 300 schools under investigation by OCR for mishandling Title IX cases on their campuses.

Once an appeal has been concluded, you can still file a civil complaint against your school. If that happens, OCR will suspend any investigation it has underway while the civil lawsuit is in progress. The statute of limitations to file a Title IX complaint in federal court varies from state to state. It is typically between one and three years from the date of the claimed discrimination.

The typical legal standard for complainants who bring a complaint against a school require a person to show that the school a) had actual notice of the sexual misconduct complaint against it, and b) acted with deliberate indifference or acted unreasonably, for example by ignoring the complaint. Respondents have other theories under which they can file a federal Title IX complaint (for example, asserting “erroneous outcome” or “selective enforcement” claims).

Another claim that can be brought against schools by complainants and respondents alike is a breach of contract claim under state law. Check your state law to see if your school’s handbooks, policies, and procedures count as binding contracts.

A court procedure that has been employed with greater frequency is to bring a Temporary Restraining Order or a Preliminary Injunction to prevent a school from suspending or expelling a respondent based on violations of Title IX or other laws. These claims must be brought quickly, typically within one or two months of the suspension or expulsion.

Another claim that can be brought against schools by complainants and respondents alike is a breach of contract claim under state law. Check your state law to see if your school’s handbooks, policies, and procedures count as binding contracts.

Learning Exceptionalities and Disabilities

Many students at universities and colleges have learning exceptionalities or psychological or emotional conditions that fall under the Americans with Disabilities

Act (ADA). Students who fall within this Act are protected by federal laws (and many times state laws) on college campuses. Many times, students will sign up with the university’s office, sometimes called the Student Accessibility Office or Disability Office if they need accommodations or any other form of support for their particular learning exceptionalities or condition.

The school’s Accessibility Office can be very helpful in assisting a student with these issues to navigate a disciplinary process and to assist the school in understanding a student’s particular circumstances. In addition, if a student has another psychological or emotional condition, such as depression or

anxiety, this can also factor heavily in the disciplinary process. For instance, a student with any of these issues may be considered not credible or untruthful if the conditions interfere with the student's ability to recall or to maintain attention or to actively participate in the investigation.

There are many ways that a student can bring these issues to administrators' attention during this process. Moreover, these issues should be brought to an investigator or hearing board's attention to the extent they could explain any of the conduct that's at issue in the charge or explain a student's demeanor or behavior during an interview or during a hearing, which would affect credibility.

These issues are complicated, but students, whether respondents or complainants should be afforded every opportunity to be accommodated for their conditions.

Wrap Up

As you now know, the college and university disciplinary process can be extremely complicated. Whether complainant or respondent, male or female, if you find yourself involved in disciplinary matter whether seemingly trivial or severe, knowledge is power. The more you understand the process the better. The better prepared you are to navigate its many elements, the better your outcomes.

Our Title IX / College Conduct Code Attorneys are here to help. We regularly represent and advise students and parents across the country on both sides of these difficult situations. We work to hold schools accountable for treating all of their students fairly, respectfully, and in accordance with their own written policies and the requirements of Title IX.

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