



Ensuring Equitable Civil Rights Investigations

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What is Your Role?

► **Law Enforcement**

- ❑ Meeting elements of a crime under state law
- ❑ Consent may be defined in state law
- ❑ Need probable cause to affect an arrest
- ❑ Evidentiary standard for a finding of guilt is "beyond a reasonable doubt"
- ❑ You can compel people and seize evidence
- ❑ Constitutional safeguards in place
- ❑ Don't have to tell people you are investigating them

► **Civil Rights**

- ❑ Meeting elements of prohibited conduct under institutional policy
- ❑ Consent is defined in institutional administrative policy
- ❑ Thorough and equitable inquiry
- ❑ Evidentiary standard is most often "preponderance of the evidence"
- ❑ No ability to compel; no ability to seize (ask and receive)
- ❑ Process must be fundamentally fair to both parties (afford due process) and include written notice

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Learning Outcomes

Identify	Identify rights that must be afforded to complainants in sexual misconduct complaints as required by the Clery Act.
Identify	Identify rights that must be afforded to the parties in allegations of sexual harassment under Title IX.
Discuss	Discuss the basics on ensuring the parties access and opportunity to participate in the investigative and adjudication processes is fundamentally fair.

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2013 Regulations Summary Violence Against Women Act

"A benefit of these final regulations is that they will strengthen the rights of victims of dating violence, domestic violence, sexual assault, and stalking on college campuses."

But what about the rights of the accused?

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2020 Title IX Regulations Summary

"Too many students have lost access to their education because their school inadequately responded when a student filed a complaint of sexual harassment or sexual assault . . . this new regulation requires schools to act in meaningful ways to support survivors of sexual misconduct, without sacrificing important safeguards to ensure a fair and transparent process."

- Secretary Betsy DeVos, May 5, 2020

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VAWA Training Requirements for "Officials"

- No conflict of interest or bias for "officials"
- Annual training on the issues related to dating violence, domestic violence, sexual assault and stalking and on how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability
- Should include (at a minimum):
 - ❑ Relevant evidence and how it should be used
 - ❑ Proper interview techniques
 - ❑ Basic procedural rules for conducting a proceeding
 - ❑ Avoiding actual/perceived conflicts

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Title IX Training Requirements

- ▶ All Title IX Personnel
 - Definition of sexual harassment
 - Scope of the recipient's education program or activity
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- ▶ Decision-makers
 - Technology to be used at a live hearing
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- ▶ Investigators
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence

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VAWA Disciplinary Proceedings

Require	Require	Require	Require
Require institutions to describe each type of disciplinary proceeding (steps, anticipated timelines, decision-making process, and how to file).	Require institutions to list all of the possible sanctions that the institution may impose.	Require institutions to describe the range of protective measures that the institution may offer.	Require institutions to provide for a prompt, fair, and impartial disciplinary proceeding. . .

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VAWA – Prompt, Fair, and Impartial

Officials are **appropriately trained and do not have a conflict of interest or bias** for or against the accuser or the accused;

the accuser and the accused have **equal opportunities to have others present;**

the accuser and the accused receive **simultaneous notification, in writing, of the result of the proceeding and appellate rights;**

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VAWA – Prompt, Fair, and Impartial

the proceeding is completed in a reasonably prompt timeframe;




the accuser and accused are given timely notice of meetings at which one or the other or both may be present; and

the accuser, the accused, and appropriate officials are given timely and equal access to information that will be used during disciplinary meetings and hearings.

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VAWA Training Requirements for "Officials"

-  No conflict of interest or bias for "officials"
-  Annual training on Clery Offenses
-  Relevant evidence, interviewing, and procedural rules

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VAWA: Advisor of Choice



ATTEND ALL MEETINGS



CANNOT LIMIT CHOICE OF ADVISOR



CAN ESTABLISH RULES AND RESTRICTIONS

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VAWA: Prompt Timeframe

INCLUDE TIMEFRAMES FOR PROCEDURAL STEPS

EXTENSION FOR REASONABLE CAUSE

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VAWA: Notice

- Notice of extension for good cause
- Notice of meetings in which one or both may attend
- Simultaneous notification to both parties of any results, appeals procedures, changes and when outcome becomes final
- Simultaneous notification of initial and interim decisions

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VAWA: Access Information

- Timely
- Equal
- Meetings
- Hearings

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Title IX Grievance Process (General)

- Treat parties equitably
- Require objective evaluation of all relevant evidence
- Training for Title IX Personnel
- Presumption of not responsible
- Reasonably prompt time frames
- Describe the range of disciplinary sanctions
- State the standard of evidence
- Provide the parties an opportunity to appeal
- Describe the range of supportive measures
- Provide proper notice
- Allow dismissal and consolidation of complaints

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Title IX Grievance Process (Investigation)

- Burden of proof on the institution
- Equal opportunity to present facts and witnesses
- No restrictions on discussing allegations
- Right to advisor of choice
- Written notice of meetings
- Inspect and review evidence
- Investigative report

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Title IX: Burden of Proof

ON INSTITUTION

CANNOT ACCESS PRIVILEGED DOCUMENTS WITHOUT CONSENT

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Title IX: Evidence

Evidence	Discussing allegations
<ul style="list-style-type: none"> • Equal opportunity • Inculpatory and exculpatory 	<ul style="list-style-type: none"> • No restrictions

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Title IX: Advisor of Choice

ALL MEETINGS

NO RESTRICTIONS ON CHOICE

CAN RESTRICT PARTICIPATION

MUST PROVIDE ACCESS TO INFORMATION

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Title IX: Notice Rights

Formal Complaint

- Identities of the parties involved in the incident, if known
- The conduct allegedly constituting sexual harassment
- The date and location of the alleged incident, if known
- Presumption of "not responsible"
- Advisor of their choice,
- Prohibit false statements

During Investigation

- Written notice to all meetings

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Title IX: Inspect and Review Evidence

Inspect and review directly related evidence with an opportunity to respond

Provide an opportunity to receive and respond to the investigative report and evidence prior to a hearing

Provide for a live hearing with cross-examination

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Rights and Options, and Supportive Measures

VAWA

- Written Notification of Rights and Options
- What about Respondents?

Title IX

- Supportive Measures for both parties

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Written Notification of Rights and Options

Right to written information for victims, whether the offense occurred on or off campus, about the following:

1. Importance of preserving evidence
2. How and to whom to report alleged offenses
3. Options for involving law enforcement
4. Order of protection, no-contact order etc.
5. Confidentiality of accommodations or protective measures and in Clery Act reporting
6. Existing counseling, health, mental health, victim advocacy, legal assistance, visa/immigration assistance, financial aid
7. Options and assistance to change academic, living, transportation, and working situations
8. An explanation of the procedures for institutional disciplinary

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VAWA Language

"We note that responding to these sorts of allegations, whether in the criminal justice system or in an institution's disciplinary procedures will likely be very stressful for the accused as well as the accuser. Therefore, institutions should consider providing the accused with information about existing counseling, health, mental health, legal assistance, and financial aid services both within the institution and in the community. Although we encourage institutions to provide written notification of this sort to an accused student or employee, the statute does not refer to or support requiring it."

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Title IX: Supportive Measures

Provided to both the Complainant and Respondent

Non-disciplinary and non-punitive

Without fee or charge

Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party

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