**TITLE IX AND DUE PROCESS:**

**CURRENT LEGAL ISSUES IN**

**STUDENT SEXUAL MISCONDUCT PROCEDURES**

**MISSISSIPPI EDUCATION LAW CONFERENCE**

**UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW**

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**20 USC § 1681(a). Sex**

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 …

**Title IX:**

An implied private right of action exists under Title IX. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979). As Spending Clause legislation, the potential for Title IX liability flows with the money. *Pederson v. La. State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000). With state government, only the department or agency receiving aid faces liability. *Alegria v. Tex.*, No. G-06-0212, 2007 WL 2688446, at \*13 (S.D. Tex. Sept. 11, 2007), *aff’d sub nom. Alegria v. Williams*, 314 F. App’x 687 (5th Cir. 2009).

Title IX claims in the context of student disciplinary proceedings started with *Yusuf v. Vassar College*, 35 F.3d 709, 714-15 (2d Cir. 1994). Four theories of liability have developed.

**Erroneous Outcome:** reach wrong decision because of student’s sex

**Factors:** pressure from ongoing federal investigations and possible sanctions; pressure from campus groups; pressure from parents; panel member bias from campus or personal activities; favoring witness testimony by gender; statements made by pertinent university officials; patterns of decision-making; insufficient investigation; rejecting exculpatory evidence; policy-making process; training materials

**Selective Enforcement:** statistical data of allegations and findings

**Archaic Assumptions:** historical assumptions about physical abilities; sometimes limited to athletic context

**Deliberate Indifference:** designed for plaintiff alleging sexual harassment

**United States Constitution, Amendment XIV. Due Process Clause**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Due Process:**

 Due process means the “opportunity to be heard” *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). “[D]ue 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). “A university is not a court of law, and it is neither practical nor desirable it be one.”

The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that “a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.” All that is necessary is that the procedures be tailored, in light of the decision to be made, to “the capacities and circumstances of those who are to be heard,” to insure that they are given a meaningful opportunity to present their case.

*Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976).

No universal standard exists for due process in student conduct proceedings, and application involves a balancing of interests:

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.

*Mathews*, 424 U.S. at 335.

A student has a substantial interest at stake during school discipline hearings for sexual misconduct (*e.g.*, stigma, removal from housing, suspension, expulsion, monetary loss; long-term employment and education impacts).

A university has an interest in maintaining safe learning environment, preserving limited resources (*e.g.*, money, personnel, space, and time).

 **Degrees of Due Process:**

 **Physical Location:**

Separation – video/audio connection

Indirect Confrontation

Direct Confrontation

**Evidence:**

 Written interview statements

 Live witnesses

**Cross-examination:**

Written questions

 Oral questions

Cross-examination by panel

 Indirect cross-examination

 Cross-examination by accused

 Cross-examination by representative

 **Burden of proof:**

preponderance

clear and convincing

 **Composition of Panel:**

 Faculty, staff and/or students

 Manner of selecting and training panel

 **Role of Investigator:**

 Written evidence summary

 Written findings

 Prosecuting witness

**Obstacles:**

 Lack of subpoena power

 Duty to campus/ if accuser does not appear

 DOE proposed regulations