STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

January 17, 2017

Opinion No. 17-03

Tennessee Higher Education Student Due Process Rights and Requirements

Question 1

Are the contested-case procedures of the Tennessee Uniform Administrative Procedures Act ("UAPA"), Tenn. Code Ann. § 4-5-301 *et seq*; Tennessee Rules Chapters 1360-04-01; 1720-01-05, that apply in cases in which a student at a public institution of higher education faces discipline for alleged sexual assault or similarly serious allegations, preempted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution ("Due Process Clause"), Title IX of the Education Amendments of 1972 ("Title IX"), or the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act ("Clery Act")?

Opinion 1

The UAPA does not violate the Due Process Clause. And neither Title IX nor the Clery Act preempts the UAPA contested-case provisions applicable to the adjudication of sexual assault claims involving students at Tennessee public institutions of higher education.

Question 2

Does the Due Process Clause, Title IX, or the Clery Act impose any limits on the time within which a UAPA contested-case proceeding must be completed in a case in which a student at a public institution of higher education faces discipline for alleged sexual assault or similarly serious allegations?

Opinion 2

Disciplinary proceedings in a school sexual assault case must be completed "promptly." But neither the Due Process Clause, nor Title IX, nor the Clery Act imposes any specified or fixed time limit for the completion of a UAPA contested-case proceeding in sexual assault cases. Rather, they recognize the need for flexibility in timing because what is "prompt" in one case may not necessarily be "prompt" in another case.

Question 3

Does the Due Process Clause, Title IX, or the Clery Act require a public institution of higher education to allow an accuser, including an accuser who does not move to intervene in a UAPA contested-case proceeding, to participate in a UAPA contested-case proceeding (e.g.,

conduct discovery, conduct cross-examination, appeal) to the same extent as the accused in a case in which a student faces allegations of sexual assault or similarly serious allegations?

Opinion 3

The Due Process Clause, Title IX, and the Clery Act all require that an accuser be allowed to participate in a hearing, and the UAPA gives all parties the right to participate in a contested-case hearing.

Question 4

Would the Due Process Clause, Title IX, or the Clery Act preempt a state law requiring public institutions of higher education to refer all allegations of sexual assault or similarly serious allegations that may involve criminal acts to law enforcement authorities before suspending or expelling a student for a disciplinary violation, except when an on-going threat to campus safety exists?

Opinion 4

To comply with the requirements of Title IX, schools must independently investigate and adjudicate allegations of student-on-student sexual harassment and assault. Title IX would likely preempt a state law requiring public institutions to refer sexual assault or similar allegations to law enforcement before suspending or expelling a student.

Question 5

Would Title IX or the Clery Act preempt a state law requiring public institutions of higher education to meet a "clear and convincing evidence" burden of proof in disciplinary proceedings for alleged sexual assault or similarly serious allegations before suspending or expelling a student for a disciplinary violation, except when an on-going threat to campus safety exists?

Opinion 5

There is currently no federally codified evidentiary standard applicable to such disciplinary proceedings. However, guidance issued by the Department of Education interpreting Title IX regulations states that schools should apply a preponderance-of-evidence standard in disciplinary proceedings related to claims of sexual assault. The question of whether this kind of guidance has the force of law or should be accorded deference is currently pending before the United States Supreme Court; this Office must therefore decline to issue an opinion on this question.

Question 6

Would Title IX or the Clery Act preempt a state law requiring public institutions of higher education to provide due process similar to the processes specified in the Tennessee rules of civil procedure even in a non-judicial setting during disciplinary proceedings for alleged sexual assault

or similarly serious allegations before suspending or expelling a student, except when an on-going threat to campus safety exists?

Opinion 6

Without knowing the precise scope and the particulars of the proposed law, this Office cannot opine as to whether Title IX or the Clery Act would preempt such a state law.

Question 7

Is it legally permissible for a government agency to arbitrarily delay or withhold statutorily authorized and directed financial disbursements to public universities and colleges under capricious interpretations having no foundations or conditions specified, either, in duly enacted statute, or rule created under proper administrative rule making procedures?

Opinion 7

This Office cannot provide a response because the response depends on resolution of an issue that is currently pending before the United States Supreme Court.

ANALYSIS

All seven questions have been posed in the specific context of a Guidance document, a "Dear Colleague" letter, and a "Q&A" issued by the Office for Civil Rights for the U.S. Department of Education (the "OCR"), namely:

1. "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" (the "2001 Guidance"), which was issued on January 19, 2001, in accordance with the rulemaking procedures of the federal Administrative Procedures Act, 5 U.S.C. § 553;

2. "Dear Colleague Letter" on Title IX and sexual violence ("2011 DCL"), which was circulated on April 4, 2011—without benefit of the rulemaking process of the federal Administrative Procedures Act—to colleges and universities around the country as purported guidance on compliance with Title IX in sexual assault investigations; and

3. "Questions and Answers on Title IX and Sexual Violence" ("Q&A"), which was issued on April 29, 2014, without benefit of the rulemaking process of the federal Administrative Procedures Act.

To some extent, these OCR interpretations of Title IX and rules promulgated under Title IX appear to go beyond the scope of Title IX and may conflict with the Tennessee UAPA contested-case procedures. To determine what effect the OCR interpretations have in the context of the questions posed, one would have to determine whether these agency interpretations have the force of law or are owed substantial deference.

The U.S. Supreme Court has held that courts must defer to an agency's interpretation of its own regulations if (1) the regulation is ambiguous and (2) the agency's interpretation is not plainly erroneous or inconsistent with the regulation. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). But the Supreme Court has recently agreed to hear a case that may modify the "*Auer*" deference rule. That case is *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 716 (4th Cir. 2016), *cert. granted in part*, No. 16-273, 2016 WL 4565643 (U.S. Oct. 28, 2016). The Supreme Court will consider the question of whether *Auer* deference applies to an unpublished OCR Letter, which was "adopted in the context of the very dispute in which deference is sought." *See* Petition for Writ of Certiorari, *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273 (Filed August 29, 2016).

Thus, the Supreme Court decision in *Grimm*, which is expected by June 2017, may answer the question of whether the 2011 DCL and the Q&A have the force of law or are entitled to *Auer* deference. Because the issue is currently pending before the Supreme Court, this Office is not able to opine on the legal effect, if any, of those two OCR interpretations.

1. Preemption of UAPA Provisions Governing Contested Cases Involving Sexual Assault Claims

Title IX prohibits discrimination based on sex at institutions of higher education that receive federal financial assistance for education activities. Sexual harassment of students, including acts of sexual violence such as sexual assault, can be a form of sex discrimination prohibited by Title IX. Title IX and its implementing regulations require an institution to take prompt and effective action to end sexual harassment, prevent its recurrence, and, as appropriate, remedy its effects, and federal agencies are authorized to enforce those requirements by withholding federal funding.[1]

The Clery Act requires institutions of higher learning that receive federal funding to disclose crime statistics and campus security policies in published reports.[2] These annual reports must include "a statement of policy regarding" the "institution's programs to prevent domestic violence, dating violence, sexual assault, and stalking" and "the procedures that such institution will follow once an incident . . . has been reported, including a statement of the standard of evidence that will be used during any institutional conduct proceeding arising from such a report."[3]

The Due Process Clause requires states to provide due process of law before depriving any person of life, liberty, or property.[4] Students facing disciplinary proceedings at public colleges must be afforded constitutionally required procedural due process before they are suspended or expelled from the institution.[5]

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[1] *See* 20 U.S.C. § 1681-88; 34 C.F.R. Part 106.

[2] 20 U.S.C. § 1092(f)(1).

[3] 20 U.S.C. § 1092(f)(8)(A).

[4] U.S. Const. amend. XIV.

[5] *See Goss v. Lopez*, 419 U.S. 565, 574-76 (1975); 2011 DCL at 12 ("Public and state-supported schools must provide due process to the alleged perpetrator.") available at: http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

Generally, at a minimum, due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner."[6] But due process is a flexible standard and the process owed in a particular situation depends on the specific facts and circumstances involved.[7] In determining whether constitutionally sufficient process was accorded in a particular case, courts will balance the private interest affected by the government action, the risk of an erroneous deprivation of that interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.[8] Courts also consider the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[9]

States must comply with those portions of the federal Constitution that apply to the states, such as the Due Process Clause. That is, when the Due Process Clause requires that a state provide certain procedures to parties, state laws that fail to provide those procedures are simply unconstitutional and invalid.

But the Due Process Clause merely sets a floor, or lower limit on what is constitutionally adequate; individual states may offer greater due process protections than does the federal Constitution.[10] In the context of college and university disciplinary proceedings for sexual harassment, Tennessee does—through its Administrative Procedures Act—offer greater due process protections than what is required under the Due Process Clause.

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[6] *Mathews v. Eldridge*, 424 US 319, 333 (1976) (internal quotations omitted).

[7] For example, depending on the particular facts involved, courts have variously found: Due process in the context of college and university disciplinary proceedings does not guarantee any particular kind of investigation or hearing, only notice and an opportunity to be heard by a neutral decision-maker. *Doe v. Ohio State Univ.*, No. 2:15-CV-2830, 2016 WL 6581843, at *8 (S.D. Ohio Nov. 7, 2016). A hearing provides due process if it gives the administrative authorities of a college "an opportunity to hear both sides in considerable detail [and is] suited to protect the rights of all involved." *Dixon v. Ala. St. Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961). There is no clearly established due process right to formal discovery in school disciplinary proceedings. *Id.* at *9. The Due Process Clause generally does not guarantee the right to cross-examination in school disciplinary proceedings, *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 925-26 (6th Cir. 1988), but when a disciplinary proceeding depends on "a choice between believing an accuser and an accused . . . cross-examination is not only beneficial, but essential to due process." *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005). There is no due process right to active representation by legal counsel in a school disciplinary hearing. *Id.* Although a student must be afforded a meaningful opportunity to present his or her side, a full-scale adversarial proceeding is not required. *Id. at 640*. Neither rules of evidence nor rules of civil or criminal procedure need be applied. *See e.g., Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987) (no right to use of formal rules of evidence); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983) (same).

[8] *Mathews v. Eldridge*, 424 US 319, 334-335 (1976).

[9] *Id.*

[10] *See Mills v. Rogers*, 457 U.S. 291, 300 (1982) (Substantive rights provided by the Federal Constitution define only a minimum, state law may recognize liberty interests more extensive than those independently protected by the Federal Constitution).

Tennessee state colleges and universities that receive federal funding must comply with Title IX and the Clery Act and, as state agencies, they are also subject to Tennessee's UAPA.[11] A party who is legally entitled to a hearing regarding the determination of his legal rights or duties must be afforded an opportunity for such a hearing in accordance with the provisions of the UAPA.[12] Thus, students at state colleges and universities involved in disciplinary procedures are entitled to a hearing pursuant to and in accordance with the "contested-cases" provisions of the UAPA, which apply when a college or university seeks to suspend or expel a student.[13]

The UAPA contested-case procedures give parties the right to notice and a hearing, to be represented by counsel, to cross-examine witnesses, to present documentary evidence, and to conduct discovery.[14] The parties have the right to file pleadings, motions, objections, and offers of settlement. The process is generally subject to the Tennessee Rules of Civil Procedure and Rules of Evidence.[15] The parties are entitled to be heard by an administrative judge or hearing officer who is unbiased, impartial, and who has no conflict of interest.[16] An administrative decision issued in a contested-case disciplinary hearing may be appealed to Chancery Court, and thereafter to the Court of Appeals.[17] Thus, the UAPA provides all parties to a school disciplinary hearing due process protection that is in many respects greater than that provided by the Due Process Clause (see note 7, *supra*).

The UAPA does not conflict with the Due Process Clause by providing more extensive protections; process that satisfies the more demanding requirements of the UAPA will, *ipso facto*, satisfy the requirements of the Due Process Clause. As long as Tennessee law provides the minimum procedural protections required by the Due Process Clause it may also provide additional procedural protections, whether under the UAPA or otherwise. State laws that conflict with federal laws are preempted under the Supremacy Clause in three circumstances.[18] Express preemption occurs when Congress makes its intent to preempt state law known through explicit statutory language.[19] Field preemption occurs when state law "regulates conduct in a field that Congress

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[11] Tenn. Code Ann. § 4-5-102(2).

[12] Tenn. Code Ann. § 4-5-102(3).

[13] *See e.g.* Tennessee Board of Regents System Rules Chapter 0240-02-03-.06(2) ("Contested Case Procedure: All cases which may result in (a) suspension or expulsion of a student from the institution for disciplinary reasons, [are] subject to the contested case provisions of the UAPA, T.C.A. § 4-5-301 *et seq.*").

[14] Tenn. Code Ann. § 4-5-301 et *seq.*; Tennessee Rules Chapter 1360-04-01, Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies, used by the Tennessee Board of Regents System for and 1720-01-05, University of Tennessee contested case procedures.

[15] *See* Tenn. Code Ann. §§ 4-5-311 -to 323.

[16] *See* Tenn. Code Ann. §§ 4-5-302 and 303.

[17] *See* Tenn. Code Ann. §§ 4-5-311 -to 323.

[18] *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990).

[19] *Id*.

intended the Federal Government to occupy exclusively."[20] Conflict preemption occurs when a state law "actually conflicts with federal law" and "it is impossible for a private party to comply with both state and federal requirements."[21]

Neither Title IX nor the Clery Act expressly preempts state law, and the contested-case provisions of Tennessee's UAPA do not regulate conduct in a field that Congress intended the federal government to occupy exclusively. The question is, therefore, whether the UAPA conflicts with these federal laws in a way that makes compliance with both federal and state law impossible.

Because it is possible for a school to comply with the requirements of both Title IX and the UAPA in adjudicating sexual assault claims in a contested-case disciplinary hearing, Title IX does not preempt the UAPA. Indeed, the UAPA allows the administrative judge or hearing officer to modify the procedures for conducting a contested-case hearing when required to comply with federal law.[22] The governor may even exempt an agency from complying with any provision of the UAPA when "necessary to conform to any provisions of federal law or rules and regulations as a condition to the receipt of federal funds."[23]

The rights accorded the parties to a contested-case hearing under the UAPA, which have been summarized above, are consistent with Title IX. Title IX, according to the 2011 DCL,[24] requires schools to "provide due process to the alleged perpetrator" but provides that schools should not "restrict or unnecessarily delay the Title IX protections for the complainant."[25] Schools need not hold hearings, but must provide "equitable grievance procedures" as required by the Title IX regulations.[26] OCR "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing."[27] This does not, however, create an insurmountable conflict with the right to cross-examine witnesses under the UAPA, because it

[20] *Id.* at 79.

[21] *Id*.

[22] "[Hearing] procedures may be altered, at the discretion of the hearing examiner, in order to serve the ends of justice." Tenn. Comp. R. & Regs. 1720-01-05-.01(11); A departure from the general outline as to the conduct of a contested case proceeding to expedite or ensure fairness of the proceedings does not violate the rule. Tenn. Comp. R. & Regs. 1360-04-04-.14(3).

[23] Tenn. Code Ann. § 4-5-104(a).

[24] In issuing the 2011 DCL, the DOE did not engage in federal administrative notice-and-comment rulemaking, which raises a question about the legal force of the DCL. But since the DCL guidance does not conflict with the requirements of the UAPA, we do not reach the issue of whether such guidance should be afforded deference or has the force of law, a question that is currently before the Supreme Court, as explained at the beginning of the Analysis.

[25] *See* 2011 DCL at 12.

[26] *See* 2011 DCL at 10; 34 C.F.R. § 106.8(b); *see also* 2011 DCL at 1 n.11 (explaining that the DCL "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").

[27] *See* 2011 DCL at 12.

does not prohibit parties from personally cross-examining each other.[28] And even if it did prohibit personal confrontation, parties could still exercise their UAPA right to cross examination by conducting it through counsel or through the administrative judge or hearing officer, which has been found constitutionally sufficient.[29] Moreover, OCR also recognizes the need for flexibility because grievance "[p]rocedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience."[30]

In short, Title IX does not preempt the UAPA since a school can comply with the requirements of both Title IX and the UAPA in adjudicating sexual assault claims in a contested-case disciplinary hearing.

Similarly, because it is possible to comply with the requirements of both the Clery Act and the UAPA in adjudicating sexual assault claims in a contested-case disciplinary hearing, the Clery Act does not preempt the UAPA. Clery Act regulations require that institutional disciplinary action in cases of alleged sexual assault (i) include a prompt, fair, and impartial process from the initial investigation to the final result; (ii) be conducted by officials who, at a minimum, receive annual training on the issues related to . . . sexual assault . . . how to conduct an investigation and hearing process . . . ; (iii) provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice; (iv) not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.[31] The Clery Act regulations define a prompt, fair, and impartial proceeding to include a proceeding that is (A) completed within reasonably prompt timeframes designated by an institution's policy, including a process that allows for the extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay; (B) conducted in a manner that (1) is consistent with the institution's policies and transparent to the accuser and accused; (2) includes timely notice of meetings at which the accuser or accused, or both, may be present; and (3) provides timely and equal access to the accuser, accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings; and (C) conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused.[32]

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[28] *See also* Q&A at 31 (Question F-6), available at: http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[29] *See Doe v. Cummins*, 2016 WL 7093996, at *10 (6th Cir. Dec. 6, 2016) (internal citations omitted).

[30] 2001 Guidance at 20.

[31] 34 C.F.R. § 668.46(k)(2).

[32] 34 C.F.R. § 668.46(k)(3).

These Clery Act requirements do not conflict with the UAPA's contested-case procedures and protections, which have been summarized above. Thus, there is no conflict preemption of the UAPA by the Clery Act.

In sum, as the State may do, it affords greater due process protection through the UAPA than the protection guaranteed by the Due Process Clause, which satisfies and is consistent with the requirements of the Due Process Clause. And the UAPA is not preempted by Title IX or the Clery Act because there is no conflict; it is possible to comply with both these federal laws and with applicable state law.

2. Time Limits on Contested-Case Proceedings Under the UAPA

Due process is flexible and calls for such procedural protections as the particular situation demands.[33] Accordingly, whether the time in which a UAPA contested-case adjudication is completed satisfies due process will depend on the specifics of the particular situation. An excessive or unreasonable delay will amount to a denial of due process to the accused, but what is "excessive" or "unreasonable" will depend on the facts and circumstances of a given case.[34]

The Title IX regulations require institutions to provide "prompt" and equitable resolution of student sex discrimination complaints.[35] Whether an investigation is "prompt" varies by complexity of the investigation and severity and extent of the conduct.[36] The OCR recommends a timeframe of 60 days for investigation and resolution of a typical case of alleged sexual assault at an institution of higher education.[37] But this is a recommendation, not a mandate. Precisely because "prompt" will vary with the particular circumstances, "prompt" is not defined in terms of a particular time period. Rather, the OCR will evaluate on a case-by-case basis whether the resolution of a sexual violence complaint is prompt and equitable.[38]

Current Tennessee Board of Regents ("TBR") and University of Tennessee ("UT") regulations similarly require institutions to make reasonable efforts to conclude an inquiry into and resolve a sexual discrimination complaint within 60 days after the complaint is received.[39] But

[33] *Mathews v. Eldridge*, 424 U.S. at 334.

[34] *See Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550, 564 (6th Cir. 1983), *aff'd, Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) ("We hold only that the delay must be "excessive" or "unreasonable" before federal due process is denied.")

[35] 34 C.F.R. 106.8(b).

[36] *See* 2001 Guidance at 20; 2011 DCL at 12.

[37] *See* 2011 DCL at 12.

[38] *See* Q&A at 32, Question F-8.

[39] *See* TBR Sexual Misconduct Policy: 6:03:00:00, *available at*: https://policies.tbr.edu/policies/sexual-misconduct; UT Policy on Sexual Misconduct, Relationship Violence, Stalking and Retaliation at § 5.4.2, Procedure for Investigation and Resolving a Report Involving a Respondent Who is a University Student, *available at*: http://sexualassault.utk.edu/wp-content/uploads/sites/34/2015/08/sexual_misconduct_policy.pdf.

these regulations also allow for more time to complete an investigation when there is good cause for the delay and appropriate notice to the parties.[40]

The Clery Act requires colleges and universities to publish notice of "prompt, fair and impartial investigation and resolution" procedures that will be used in domestic violence, dating violence, sexual assault, and stalking cases, in which parties shall be "simultaneously" informed in writing of the outcome of covered disciplinary proceedings.[41] But, like Title IX, the Clery Act does not define "prompt" in terms of a specific time period and otherwise imposes no specific time limits for the resolution of disciplinary proceedings in cases of sexual assault.

The UAPA requires the administrative judge or hearing officer in a contested-case to issue an order within 90 days after the conclusion of the hearing unless that time period is waived or extended with the written consent of the parties.[42] However, the 90-day period is simply the outer limit for when an order must be issued. Thus, there is no conflict if due process or federal statutes require resolution in a shorter period.

In sum, neither Title IX nor the Clery Act requires a UAPA contested-case proceeding in sexual assault cases to be completed within a specified, delimited time. The statutes and the OCR interpretations recognize the need for flexibility because what is "prompt" in one case may not necessarily be "prompt" in another case. The OCR's recommendation of a 60-day timeframe for resolution of a campus sexual assault case is, accordingly, not mandatory but rather merely advisory.

3. Accusers' Rights to Participate in Contested-Case Disciplinary Proceedings

As explained in Section 1, the due process analysis in a school disciplinary context is fact-specific and depends on the circumstances of a particular case. But, at a minimum, due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner."[43] The due process right to a meaningful hearing will almost always include the right of an accuser to participate in a contested-case disciplinary proceeding adjudicating his or her claim against the accused.

Guidance from DOE interpreting Title IX requires that both parties to a sexual violence case receive equal procedural opportunities to review all of the evidence, attend all meetings and hearings on an equal basis, have the same rights to have an advisor present, and have an equal right

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[40] *See* TBR Sexual Misconduct Policy: 6:03:00:00, § III; UT Policy on Sexual Misconduct, Relationship Violence, Stalking and Retaliation at § 5.2.8, Time Frames.

[41] 20 U.S.C. § 1092(f)(8)(A); 34 C.F.R. § 668.46(k)(2)(v).

[42] *See* Tenn. Comp. R. & Regs. 1720-01-05-.01(12)(g) (An initial order shall be rendered within ninety (90) days after conclusion of the hearing or after submission of proposed findings unless such period is waived or extended with the written consent of all parties or for good cause shown); Tenn. Code Ann. § 4-5-314(g) (A final order … shall be rendered in writing within (90) days after the conclusion of the hearing in a contested case… unless such period is waived or extended with the written consent of all parties or for good cause shown).

[43] *Mathews v. Eldridge*, 424 US 319, 333 (1976) (internal quotations omitted).

to appeal a disciplinary decision.[44] Clery Act regulations similarly require an accuser and accused to have the same opportunities to have others present during any institutional disciplinary proceeding and require that both accuser and accused be given timely and equal access to any information that will be used during those hearings.[45] Institutions may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.[46]

Under the UAPA, "[a]ny party may participate in the hearing in person."[47] As the complainant, the accuser would, by definition, be a "party" in the contested case[48] and would, therefore, not be required to intervene[49] in order to participate in the hearing.

4. Preemption of State Law Requiring Referral of Campus Sexual Assault Cases to Law Enforcement Before Imposition of Serious Disciplinary Sanctions

Sexual assault is a crime that can be investigated and prosecuted through the criminal justice system, but schools also investigate and adjudicate allegations of sexual assault through their own internal investigatory systems. In fact, to comply with Title IX, schools must independently and separately investigate and adjudicate accusations of student-on-student sexual harassment and assault.[50]

Schools may not delegate this obligation to outside law enforcement, and the OCR has advised that, while criminal investigations may occur in parallel with school disciplinary proceedings, the investigations should not be determinative of one another.[51] Because the legal and procedural standards for criminal investigations are different from non-criminal procedures, police investigations or reports may not be determinative of claims under Title IX and do not relieve the school of its duty to respond promptly and effectively to those claims.[52] The 2001 Guidance that contains this directive was promulgated pursuant to rulemaking in accordance with the federal Administrative Procedures Act and has the force of law.[53]

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[44] 2011 DCL at 12.

[45] 34 C.F.R. § 668.46(k).

[46] *Id.*

[47] Tenn. Code. Ann. § 4-5-305(a).

[48] Tenn. Code. Ann. § 4-5-102(8) (defining "party" to include each person named as a party).

[49] *See* Tenn. Code. Ann. § 4-5-310(2); Tenn. Comp. R. & Regs. 1720-01-05-.01(9).

[50] *See* 2001 Guidance at 3-4.

[51] *See* 2011 DCL at 10; *see e.g. Doe v. Forest Hills Sch. Dist.*, No. 1:13-CV-428, 2015 WL 9906260, at *18 (W.D. Mich. Mar. 31, 2015); *McGrath v. Dominican Coll. of Blauvelt, New York*, 672 F. Supp. 2d 477, 488 (S.D.N.Y. 2009).

[52] *See* 2001 Guidance at 21.

[53] *See* 2001 Guidance, Preamble, at i-viii.

Given the regulatory directive that, to be in compliance with Title IX, schools must independently investigate and adjudicate accusations of sexual assault, it appears that Title IX would preempt a state law requiring completion of a law enforcement investigation into allegations of sexual assault before an institution may apply serious disciplinary sanctions for sexual misconduct.

5. Preemption of State Law Requiring Clear and Convincing Standard of Proof in Student Disciplinary Proceedings for Sexual Assault

The Clery Act does not address what standard of proof is to be applied in resolving sexual assault claims.[54] While the Act requires colleges to disclose that they have adopted a standard of evidence for adjudication of sexual violence claims, it does not specify what that standard should be.[55]

Title IX and its regulations are likewise silent regarding standards of proof to be used in adjudicating sexual assault claims in higher education institutions. Nevertheless, in its 2011 DCL, the OCR posited a preponderance-of-the-evidence standard of proof in evaluating sexual assault complaints.[56]

Whether an agency letter, like the 2011 DCL, which interprets the agency's own regulation and which has not been subjected to the rulemaking process of the federal APA, should be accorded deference and given the force of law is one of the issues currently pending before the U.S. Supreme Court in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (U.S. Oct. 28, 2016) (No. 16-273), and this Office must therefore decline to opine on this question.

6. Preemption of Potential State Law Expanding Due Process Protection

Without knowing the precise scope and the particulars of the proposed law, this Office cannot opine as to whether Title IX or the Clery Act would preempt a state law putatively requiring public institutions of higher education to provide due process similar to the processes specified in the Tennessee rules of civil procedure even in a non-judicial setting.

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[54] 20 U.S.C. § 1092(f). *See also Doe v. United States Dep't of Health and Human Svcs.*, 85 F. Supp. 3d 1, 11 (D.D.C. 2015) (explaining that VAWA Amendments to the Clery Act did not specify which standard of proof should be used in campus disciplinary proceedings for sexual assault).

[55] 34 C.F.R. 668.46(k)(1)(ii).

[56] 2011 DCL at 10-11.

7. Withholding Financial Disbursements by the Federal Government

Because the response to this question depends on resolution of an issue that is currently pending before the United States Supreme Court, this Office cannot provide a response. Please see Section 5, above.

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