Hope For Those Charged With Sexual Harassment:
New law in Title IX matters

By: Dan'L Bridges

THE TITLE IX PROCESS IN THE STATE OF WASHINGTON

Washington allows a patchwork of adjudicative procedures. Whether a student gets due process is dependent on which school they have the luck, or misfortune, of attending. Many recognized the due process involved, the APA, and implemented policies to comply with law.

The following in 2016 had largely appropriate processes for students accused of violating Title IX: (1) University of Washington, WAC 478-120-030, et. seq.; (3) Edmonds Community College, WAC 132Y-125-004, et. seq.; (4) Whatcom Community College, WAC 132U-125-130; (5) Big Bend Community College, WAC 132R-04-130; (6) Spokane Community College, WAC 132Q-30-325, et. seq; (7) Centralia Community College, WAC 132L-120-150, et. seq.; (8) Green River Community College, WAC 123J-300-010; (9) Shoreline Community College, WAC 132G-300-010, et. seq.; (10) Skagit Valley Community College, WAC 132D-310-005, et. seq. Ex. #2, 2016 Procedures. Procedures varied but all provided in some form: notice of the evidence and claims, cross-examination, to present a case, and a full hearing.

As one example, at what is essentially the smallest community college in the state, Big Bend CC in Moses Lake, provided students accused of violating Title IX the following due process; (ignoring more basic procedural issues not in dispute in the case at bar):

> (2) … The student has a right to a fair and impartial hearing…;
>
> (3) The student shall be given written notice of… (b) the charges against him/her including reference to the particular sections of the rules of student conduct involved;
>
> (4) The student shall be entitled to hear and examine the evidence against him/her and be informed of the identity of its source; he/she

> shall be entitled to present evidence in his/her own behalf and cross-examine witnesses testifying against him as to factual matters.

WAC 132R-04-130. Big Bend has an enrollment of approximately 2,000. It is capable of providing due process.

APPLYING OLD LAW IN A NEW WAY

> Washington colleges and universities are "agencies" and are subject to the APA, as are the "divisions, departments, or offices" that act on their behalf.

Arishi v. Washington State Univ., 196 Wn. App. 878, 884 (2016) (quotations in original).

The APA is long standing; adopted in 1988. Id. Most states have an APA as it is a model law.

The presumption under the APA is agencies, including schools, will provide "formal adjudication," referred to as "full adjudication," for material conflicts. Id. The APA has an abbreviated adjudication when full adjudication is not required. See RCW 34.05.482.

Only if four conditions are satisfied may a school use less than full adjudication. The first two are not material here; from RCW 34.05.482(1), the second two are:

> (c) The matter is entirely within one or more categories for which the agency by rule has adopted this section and RCW 34.05.485 through 34.05.494; and
>
> (d) The issue and interests involved in the controversy do not warrant use of the (full) procedures…

As to (c), Arishi explained a school desiring to use abbreviated adjudication shall "adopt a rule identifying the categories of matters for which it adopts the simplified procedures." Id. at 896. It indicated that is the "plain requirement" of RCW 34.05.482(1)(c). Id. If a school does not do so, it may not use abbreviated adjudication for anything. Id.

Although ruled unconstitutional because it allowed abbreviated adjudication for student conduct where expulsion could result, Arishi held WSU at least adopted the Rule required that stated: "The following proceedings are matters to be treated as brief adjudications pursuant to RCW 34.05.482 through 34.05.491," then actually listed them. Id.

Also under (c), "The matter (must be) entirely within one or more categories for which the agency by rule has adopted" abbreviated adjudication. Id. (underlined added). If "the matter" is not "entirely within" one of the categories, the school cannot use brief adjudication. Id.

As to (d) under RCW 34.05.438, Arishi held any matter that could result in suspension of 10 days or more requires full adjudication. Id. at 259.

Arishi did not pull that rule out of the air. It was based on the long-standing authority of Goss v. Lopez, 419 US 565 (1975). Arishi cited Goss heavily. Goss held State action to deprive access to public school for more than 10 days requires full process; 419 US at 576:

> The fundamental requisite of due process of law is the opportunity to be heard, a right that as little reality or worth unless one is informed that the matter is pending and can choose for himself whether to contest… At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.

That has been the law since 1975. ("if the suspension is for 10 days, (it) is a serious event…")

Arishi was handed down December 1, 2016.

SO WHAT IS THE ACCUSED TO DO?

Clearly, demand full and meaningful due process with full notice of the allegations, evidence, witnesses, and a hearing where full cross-examination of all evidence is permitted. That is compelled by Washington law in any sexual harassment situation. The days of single person investigations, where one person is the detective, judge, jury, and execution must be put to rest. They have led to the denial

of to many accused' due process rights. The rights of those making complaints must be respected. However, society does not protect their rights by taking away the rights of others.

I would go as far as to suggest that any person, particularly those with employment in the public sector or accused of something while volunteering with a public sector entity, make that demand.

The U.S. Supreme Court since 1975 in Goss made it clear suspensions greater than 10 days put "at stake" a student's "good name, reputation, honor (or) integrity… because of what the government is doing to him" and require full adjudication. Arishi, 196 Wn.App. at 899, citing Goss, 419 US at 574. Damage by that is a clear prejudice. That is no less true for an employee or volunteer who is at risk of being fired or dismissed.

A student need not prove a different result would have obtained. In Arishi, the court found prejudice as a matter of law when Arishi "undermine(d) the confidence of the outcome." Id. at 908. Showing that, he argued he: (1) Would have brought forward more evidence including examining the complainant. Id. (2) Was denied counsel and that "also undermines the result" because a lawyer would have "alerted" the school to the flaws in its evidence. Id.

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