



COMPLIANCE & CASE MANAGEMENT: TITLE IX  
COORDINATOR AND ADMINISTRATOR TRAINING &  
CERTIFICATION LEVEL THREE COURSE

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June 6<sup>th</sup> – 7<sup>th</sup>, 2019 | Minneapolis, MN

# YOUR FACULTY



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# COURSE AGENDA



- I. Managing Complex Cases and Related Issues**
  - a. Complex Cases
  - b. Outside Investigators
  - c. Multiple Reporting Parties or Responding Parties
- II. Caselaw Review and Application to Professional Practice**
  - a. Appeals
  - b. Retaliation
  - c. First Amendment
  - d. Title IX and Gender-Based Claims
  - e. Due Process Key Case Law
- III. OCR Update: Review of the Proposed Regulations**
- IV. Train the Trainer: VAWA Section 304 Compliance**

# A NOTE ABOUT TERMINOLOGY



- “Victim” versus “Survivor”
  - Complainant, accuser, and reporting party
- Gender pronouns
- Rape, sexual assault, sexual violence, and sexual misconduct:
  - Any nonconsensual contact between two or more people, regardless of gender, act or gratuitous violence
  - Law vs. campus policy
- Relationship/interpersonal violence:
  - Dating violence and domestic violence/abuse
- Accused, respondent, and perpetrator

# MANAGING COMPLEX CASES AND RELATED ISSUES

- Complex Cases
- Outside Investigators
- Multiple Reporting Parties or Responding Parties



# MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- Larry Nassar was a team doctor for USA Gymnastics and Michigan State University.
- He received an osteopathic medical degree (D.O.) in 1993 from MSU and in 1996 became the medical coordinator for USA Gymnastics.
- In 1997, he became the MSU gymnastics team physician and an Assistant Professor.

(<https://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/>)

# MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- In 2014, MSU performed an investigation based on a TIX complaint filed by an MSU student (Amanda Thomashow).
  - Thomashow accused Nassar of massaging her breasts and genital area during a medical exam.
  - The TIX Coordinator performed the investigation, concluding Nassar's actions were "medically appropriate."
    - The TIXC reached this conclusion after consulting with four of Nassar's colleagues at MSU.
    - The TIXC provided MSU with a different, more detailed report than what was provided to Thomashow.
- In August 2016, the *Indianapolis Star* published a piece (followed by many more) detailing the failures of USA Gymnastics in addressing sexual abuse.

(<https://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/>)

# MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- The morning the article was published, Rachel Denhollander, an attorney with three children wrote an email to the *Indianapolis Star*:
  - *“My experience may not be relevant to your investigation, but I am emailing to report an incident that may be. I was not molested by my coach, but I was molested by Dr. Larry Nassar, the team doctor for USAG. I was fifteen years old, and it was under the guise of medical treatment for my back.”*
- The *Indianapolis Star* began an investigation, interviewed Denhollander on camera, spoke with other former gymnasts and, in Sept. 2016, published another story, “Former USA Gymnastics doctor accused of assault.”

(<https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/>)



# MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- In 2016, following the *Indy Star's* articles, victims/survivors began filing lawsuits against MSU.
- Some of Nassar's behaviors included:
  - Using his bare hands to digitally penetrate the women and girls (penetration was almost always entirely unnecessary);
    - “Pelvic floor” adjustments.
  - Touching their breasts without medical necessity; and
  - Being visibly sexually aroused during treatments.
- Nassar denied the allegations.

# MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- Criminal charges filed against Nassar; in Nov. 2017, he pleaded guilty to 10 counts of first degree criminal sexual conduct.
  - Nearly 100 victims/survivors provided impact statements during sentencing hearing.
  - Nassar sentenced to over 100 years in prison.
- In May 2018, MSU agreed to a \$500 million settlement
  - \$425 million would be distributed among 333 claimants.
  - \$75 million would be set aside in a reserve fund for two years in case other survivors came forward.
  - MSU did not admit any wrongdoing as part of the settlement.
  - By comparison, Penn State's initial settlement was \$109 million for over 30 victims/survivors

# MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- Several high-level leaders hindered an appropriate University response and subsequently experienced consequences:
  - University President resigned and charged with lying to law enforcement about her knowledge of the details of MSU’s Title IX investigation by the school into Nassar.
  - Dean of the College of Osteopathic Medicine, who was Nassar’s boss, stepped down from dean position and was charged with willful neglect of duty related to the Nassar scandal, fourth-degree criminal sexual conduct, and misconduct in office.
  - MSU gymnastics coach charged with lying to law enforcement relative to when she first became aware of allegations against Nassar.
  - In January 2019, Interim President John Engler, stepped down in part because of comments re: victims/survivors seeking the “spotlight”
- Also, numerous USA Gymnastics and USOC officials have either been fired or resigned.

# MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT



- Incidents led to investigations by the Michigan Attorney General, OCR, NCAA, US congressional committees, and the Michigan House of Representatives
- MSU commissioned the Michigan Attorney General's office to conduct an investigation into the school's handling of the Nassar situation
  - The lead investigator described his role was to determine, "Who knew what, when they knew it and what, if anything, they did about it."
    - Investigators have accused MSU officials of attempting to “stonewall” their investigation, mislead the public
  - Of the 280 interviewed, 13 said they reported the abuse to an identified employee at or around the time it happened
  - Many reported to assistant coaches and athletic trainers
  - MSU had previously hired a law firm to conduct a privileged investigation into the matter; the results of that investigation are not public

# RECENT CASE LAW



# TOPICS



Due Process

Erroneous Outcome &  
Selective Enforcement

Negligence/Duty

Deliberate  
Indifference

First Amendment

Retaliation



# LAWS, COURTS, AND REGULATIONS



- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by Courts and OCR
  - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
    - Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2001 Guidance)
    - Sub-Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2011 DCL)
- Federal Case law – **Force of law** based on jurisdiction
  - Supreme Court – binding on entire country
  - Circuit Courts of Appeal – binding on states within that Circuit
  - District Court – binding on areas within that District
- State case law – **Force of law**; binding only in that state based on court jurisdiction

# DELIBERATE INDIFFERENCE & NOTICE

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# DELIBERATE INDIFFERENCE STANDARD



- In *Gebser* (1998) and *Davis* (1999), the Supreme Court held that a funding recipient is liable under Title IX for deliberate indifference **only** if:
  - The alleged incident occurred where the funding recipient controlled both the harasser and the context of the harassment;  
AND
  - Where the funding recipient received:
    - Actual Notice
    - To a person with the authority to take corrective action
    - Failed to respond in a manner that was clearly unreasonable in light of known circumstances
- OCR has historically used a broader, less stringent standard

# ***T.C. v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS***

**U.S. DIST. CT., M.D. TENNESSEE. (MAY 6, 2019)**



## **• Facts**

- Five consolidated cases involving various Nashville public high schools.
- Title IX Coordinator took position in 2012, with little training.
- Title IX Coordinator and other district employees had received some training on investigations.
- Principals and Assistant Principals received only minimal Title IX training.
- All underlying incidents occurred on school grounds.

### ***Incident #1:***

- Two freshmen women were involved in a sexual encounter with four older male students. One reporting party admitted that she expected flirting and kissing but not sexual activity. Both students reported feeling intimidated and not sure how to stop the activity.
- The sexual encounter was videotaped without their knowledge and circulated on social media among their peers.

# ***T.C. v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS***

**U.S. DIST. CT., M.D. TENNESSEE. (MAY 6, 2019)**



- **Facts (cont.)**

*Incident #1 (cont.):*

- Over the next few weeks, the video continued to circulate widely.
- People began to use demeaning sexual names like “whore” and “slut.”
- The girls and their parents reported the matter to school officials, and to the SRO.
- An Asst. Principal (AP) investigated somewhat, but did not view the video nor take any specific action beyond verbal discipline.
- The AP did not utilize the specified bullying/harassment process, which would have triggered notice to the Title IX Coordinator.
- The students were scared to remain at her high school. One student enrolled elsewhere. The second student remained initially but eventually transferred. She was harassed at her new school.

# ***T.C. v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS***

U.S. DIST. CT., M.D. TENNESSEE. (MAY 6, 2019)



## • **Facts (cont.)**

### *Incident #2:*

- A freshman female student engaged in a sexual encounter with a male student in a school restroom. She was pulled into the restroom and did not understand or expect that sexual activity was going to occur.
- She felt pressured to engage in it, but stopped the sexual activity before completion.
- The encounter was filmed by the boy on his phone. She did not know she was being recorded and did not consent to the recording.
- When administrators learned that she had been in the restroom, both students were placed on “overnight suspension.”
- About a month and a half later, another student posted the video and “tagged” the female student.



# ***T.C. v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS***

U.S. DIST. CT., M.D. TENNESSEE. (MAY 6, 2019)



## **• Facts (cont.)**

### *Incident #2 (cont.):*

- Her mother alerted the school to the situation, including the bullying she was now facing at school.
- She left school for the remainder of the year and finished her exams at home.
- She continued to face taunting and groping, and was involved in physical altercations with peers, which seemed partially motivated by students' reactions to the video.

### *Incident #3*

- A female freshman was involved in a sexual encounter with a male student that was coerced and unwelcome.
- Another female student recorded the encounter on video.
- Later that day, the student who recorded it told her the “video was out . . . everybody had it.”

# ***T.C. v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS***

**U.S. DIST. CT., M.D. TENNESSEE. (MAY 6, 2019)**



## **• Facts (cont.)**

### *Incident #3 (cont.):*

- A principal received a Facebook message from a community member with the video attached.
- Police and the school both investigated.
- The police detective informed her mother that the encounter had been consensual because her written statement did not state that she had been forced.
  - He determined that the content of the video suggested the activity was consensual, and that the reporting party was aware of the taping.
- Ultimately, the school punished eight students, including the reporting party.
- She ultimately moved to another school outside the MNPS system.
- The video was posted on Pornhub.
- Taunting continued in her neighborhood and new school.
- She and her family experienced threats for “snitching.”

# ***T.C. v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS***

U.S. DIST. CT., M.D. TENNESSEE. (MAY 6, 2019)



- **Facts (cont.)**

*Other facts*

- Students generally knew about the practice of “exposing.”
  - Sharing of sexual photos and/or videos that were not intended to be shared.
- A website existed specifically for this purpose in the Nashville area.
  - “615exposed.”

# ***T.C. v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS***

U.S. DIST. CT., M.D. TENNESSEE. (MAY 6, 2019)



- **Analysis**

- MNPS argued that it did not have notice or actual knowledge of the underlying systemic problem of illicit pictures/videos.
  - Court was not persuaded.
    - Ample evidence that MNPS was on notice of the risk of the dissemination of sexual images of its students without their consent.
    - Risk of subsequent harassment of the students in the pictures/videos.
    - “Obvious and inevitable danger, given the ages of the students involved and the realities of media and communication technology in this decade.”
    - MNPS had witnessed numerous cases in the past (beyond those in this lawsuit).
      - Behaviors like these had occurred in every MNPS high school and middle school (some of which involved off-campus behavior).
    - MNPS “recklessly disregarded” the widespread risk of “exposing” among its students.

# ***T.C. v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS***

U.S. DIST. CT., M.D. TENNESSEE. (MAY 6, 2019)



- **Analysis (cont.)**

- MNPS argued that the evidence was insufficient to show that the underlying encounters were unwelcome.
  - Court was (again) not persuaded.
  - The circulation of photos/videos is a distinct set of events that must be evaluated for Title IX implications.
  - These plaintiffs did not consent to being taped nor to the circulation of the videos.
  - There are also disputed facts as to whether the underlying sexual activity was consensual.

# ***T.C. v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS***

U.S. DIST. CT., M.D. TENNESSEE. (MAY 6, 2019)



- **Analysis (cont.)**

- MNPS also argued that the discrimination was not “sex-based.”
  - Court was (again) not persuaded.
  - “Bullying described follows the easily recognizable script of treating women and girls as uniquely tainted and lessened by their engagement in sexual activity . . .”
  - “Severe and objectively offensive”
  - Electronic communication makes it likely to be “pervasive,” too.
- MNPS responses could constitute “deliberate indifference.”
  - Vice Principals repeatedly did not notify the Title IX Coordinator (or the school principal).
  - MNPS system was overly reliant on parents’ complaints.



- **Analysis (cont.)**

- MNPS had no coordinated response to Title IX compliance:
  - A reasonable juror . . . [could see] not coordination, but a mass of already-busy, non-expert individual principals and assistant principals dealing with a new and systemic problem on an essentially ad hoc basis, with little support from the high-level administrators who were supposed to be the ones making sure that Title IX issues were properly addressed.”
- APs had a fundamentally flawed focus on the “consensualness” of the underlying sexual contact, without considering the impact of the videos’ circulation separately.
- The court also considered that for some of these plaintiffs/reporting parties, MNPS’s response *after* the incident could also be considered deliberate indifference.

# ***T.C. v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS***

**U.S. DIST. CT., M.D. TENNESSEE. (MAY 6, 2019)**



## **• Takeaways**

- **“Actual knowledge of a serious, widespread problem is at least enough to allow a [school] to reasonably respond in some way, even if it cannot predict or prevent every future incident.”**
- Must take some action to actual, known widespread risks, even without specific knowledge of any specific would-be harassers.
- Circulation of videos/photos is a separate consent analysis in addition to the investigation of the underlying sexual activity.
- Circulation of videos/photos is likely to meet the hostile environment test of “severe,” “pervasive,” and “objectively offensive.”

# ***T.C. v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS***

U.S. DIST. CT., M.D. TENNESSEE. (MAY 6, 2019)



- **Takeaways**

- Title IX Coordinator must take an active role coordinating an institutional or district-level response:
  - Widespread training needs.
  - Training must be done in a timely fashion to be effective.
  - Adequate supervision and monitoring.
  - Must be tracking trends across institution/district.
- There is danger in handling Title IX complaints as a part of the “regular” disciplinary process.
  - Ensure that school officials follow proper documentation and investigation procedures, and are trained on how to fully “stop, prevent, and remedy.”

# RAMOS V. WEBB CONSOL. INDEP. SCH. DIST.,

NO. 17-40826 (5TH CIR. MAY. 29, 2018).



## Facts

- A teacher reported seeing O.R., a minor student, and his teacher hugging.
- The school promptly began an investigation; requested statements from both teachers.
- The responding party teacher was placed on administrative leave.
- O.R. reported he did not have a relationship with his teacher but just wanted to give her a hug.
- A security guard was asked to complete a welfare check on O.R.
- After speaking with O.R., the security guard had no concerns.

## Facts

- That night, O.R. committed suicide.
- The teacher was arrested and found guilty of possession of child pornography and distributing harmful material to a minor; including nude photos.
- Parents filed sued under Title IX and failure to train theories.
- The district court granted summary judgment for the school district.

## Decision

- The 5<sup>th</sup> Circuit held that that the school district had not acted with deliberate indifference when it promptly initiated an investigation of the teacher's alleged harassment of O.R.
- The court also noted the school district had policies in place for teacher-student relationships and held regular training sessions on the policies.



## Takeaways

- Schools will not be considered deliberately indifferent when they respond reasonably to a known risk of harm to a student.
  - Must be an intentional choice *not* to respond; not merely an unintentional oversight.
- Schools should respond promptly to allegations of improper teacher-student relationships.
- Schools should have policies that address teacher-student relationships and train employees regularly.

# APPEALS

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# APPEALS: KEY ELEMENTS



- Appeal heard by an impartial person/board
  - No conflict of interest
- No new allegations permitted
- Typically no hearing
  - Document-based and recording review
- Limited exceptions to allowing new evidence for consideration on appeal
- Limited grounds for appeal
- Deference to original hearing authority
  - But not rubber-stamp.
- Written rationale for a decision
- Equitable and prompt

# JOHN DOE v. THE RECTORS AND VISITORS OF GEORGE MASON UNIV.

U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



## • Facts

- “John Doe”, student at GMU, had a romantic and sexual BDSM relationship with “Jane Roe.”
- On October 27, 2013, Jane and Doe had a sexual encounter in Doe’s room, where Jane used her hand to push Doe away and said “I don't know” in response to a request for a sexual act, but allegedly never used the agreed upon safe word (“Red”).
- The relationship ended in January 2014
- In March 2014, Doe sent Jane a text message that he would “shoot himself” if she would not contact him by the following day.

# JOHN DOE v. THE RECTORS AND VISITORS OF GEORGE MASON UNIV. U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



- **Facts (cont.)**

- In April 2014, Jane reported the events of October 2013 to her college's Police Department, who contacted GMU Dean of Students Office.
- GMU Asst. Dean had frequent contact with Jane over the summer regarding the report
- In August, GMU Asst. Dean sent an email to Doe, indicating that he was accused of four violations of GMU's sexual misconduct policy.
- Three-member, trained hearing panel found him “not responsible”

# JOHN DOE v. THE RECTORS AND VISITORS OF GEORGE MASON UNIV. U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



## • Facts (cont.)

- Jane appealed, citing procedural irregularities
- Appellate officer = Asst. Dean who did intake, interacted frequently with Roe, and provided Doe of notice of the allegations
- During appeal, Asst. Dean met with Roe (not allowed)
  - Met with Doe as well, but admitted he already made a decision at that point.
- Asst. Dean reversed the panel's decision and found Doe responsible for:
  - (i) penetration of another person without consent; and
  - **(ii) communication that may cause injury, distress, or emotional and physical discomfort (new allegation)**

# JOHN DOE v. THE RECTORS AND VISITORS OF GEORGE MASON UNIV. U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



- **Facts (cont.)**

- The Asst. Dean provided no rationale for the decision.
- Doe appealed to the Dean of Students, who affirmed, providing no rationale, other than consistency of sanctions with past practice
- Doe filed a lawsuit and the court rejected GMU's Motion to Dismiss a 14<sup>th</sup> Amendment claim and a Free Speech claim

# JOHN DOE v. THE RECTORS AND VISITORS OF GEORGE MASON UNIV. U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



- **Free Speech claim:**

- Court found that GMU infringed Doe’s right to free speech regarding the “shoot myself” comment
- GMU’s policy was overbroad
- The application of GMU’s policy abridged his right to free speech
- His comments did not fall under the “true threat” exception



# JOHN DOE v. THE RECTORS AND VISITORS OF GEORGE MASON UNIV. U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



- **Fourteenth Amendment claim:**

- Court found John Doe possessed a Liberty Interest
  - Expulsion, coupled with a permanent transcript notation, can do significant harm to his reputation, integrity and his career and educational prospects
- GMU deprived him of that interest
  - He was expelled and a permanent notation was made on his transcript
- Deprivation effectuated without constitutionally sufficient due process

# JOHN DOE v. THE RECTORS AND VISITORS OF GEORGE MASON UNIV.

U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)



- GMU violated Doe's due process by:
  - Failing to provide **notice** of all allegations used to make a decision
  - **Deviating substantially** from its appellate procedures by having off-the-record meetings with Jane
  - **Re-hearing the case on appeal** without providing Doe adequate opportunity to "mount an effective defense"
  - **Failing to provide a detailed rationale** for the appellate decisions
  - **Pre-determining the outcome**
  - Creating a significant **conflict of interest**
    - Citing the Asst. Dean/Appellate Officer's repeated contact with Jane prior to and while considering the appeal

# RETALIATION

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# ELEMENTS OF A RETALIATION CLAIM



- The following elements establish an *inference of retaliation*:
  - Did the reporting party engage in protected activity?
  - Was reporting party subsequently subjected to adverse action?
  - Do the circumstances suggest a connection between the protected activity and adverse action?
- What is the stated non-retaliatory reason for the adverse action?
- Is there evidence that the stated legitimate reason is a pretext?

## Facts

- While not a Title IX case, retaliation analysis under Title VII can be informative to Title IX practitioners.
- Lara Carlson was hired in 2009 as a tenure-track professor.
- In 2011, Paul Visich (Carlson's supervisor and tenure committee review chair) engaged in sexually harassing behaviors towards Carlson:
  - Touched Carlson's knee, thigh, and hand.
  - Stared at her chest while speaking with her.
  - Sent her inappropriate and sexually charged emails and comments.
- Carlson reported to HR and her Dean and asked he no longer supervise her or be the head of her tenure committee. Neither happened.

# CARLSON V. UNIV. OF NEW ENGLAND

NO. 17-1792 (1<sup>ST</sup> CIR. 2018), AUGUST 10, 2018.



## Facts

- She was forced her to meet with Visich directly, despite her objections.
- Six months later, Visich gave Carlson a very negative performance review. He also caused her to be removed as the head of College Bowl team and made changes to the prerequisite to one of her courses that had the effect of radically diminishing its enrollment.
- Promotion and tenure review committee rejected Visich's negative evaluation.
- At Carlson's second request, Visich was removed as chair of her tenure review committee and she again requested a new supervisor.

# CARLSON V. UNIV. OF NEW ENGLAND

NO. 17-1792 (1<sup>ST</sup> CIR. 2018), AUGUST 10, 2018..



## Facts

- The Dean instead transferred her to a different department. Carlson agreed to the transfer, “if she were allowed to ‘keep [her] classes and continue to do [her] job.’”
- Carlson awarded tenure in 2014 but was removed from teaching courses and advising students in previous department; also removed from their website, which had funding implications. Received minimal raise (smallest since arriving at UNE).
- Filed a complaint in federal court alleging retaliation under Title VII and the Maine Human Rights Act.
- District Court granted summary judgment for UNE.

# CARLSON V. UNIV. OF NEW ENGLAND

NO. 17-1792 (1<sup>ST</sup> CIR. 2018), AUGUST 10, 2018.



## Decision

- 1<sup>st</sup> Cir. Reversed, stated that the department transfer, removal from courses, etc. may constitute retaliation
- The court held that UNE induced Carlson to agree to the department transfer under false pretenses and misrepresentations.
- UNE's Dean was inconsistent in her explanations of the changes to Carlson's teaching responsibilities (possible pretext).
- Carlson would not have accepted the transfer but for the misrepresentations.



# CARLSON V. UNIV. OF NEW ENGLAND

NO. 17-1792 (1<sup>ST</sup> CIR. 2018), AUGUST 10, 2018.



## Takeaways

- When taking action that could be considered retaliatory, an institution must be able to put forward non-retaliatory justification for the action.
- If allegations of sexual harassment have occurred, institutions should work with the parties to determine how to stop, prevent, and remedy the behavior.
- Note that the First Circuit upheld the district court's finding that Carlson did not meet her burden of producing evidence to demonstrate that the salary issues could constitute an adverse action, because she did not produce sufficient evidence of the overall financial picture of the university during the years in question.

# FIRST AMENDMENT AND TITLE IX

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# TITLE IX & THE FIRST AMENDMENT



- **Title IX cannot be enforced or use to infringe on First Amendment protections.**
- **Time, place, and manner** limitations on expression must be applied consistent with the forum in question.
  - Content neutral
  - Narrowly tailored to serve a significant state/gov't interest
  - Leave ample alternative channels for communication of the information

# TITLE IX & THE FIRST AMENDMENT



- Traditional Public Forum: campus mall, public streets through campus, and public sidewalks.
- Designated Public Forum: designated “free speech zones” such as green spaces.
- Limited Public Forum: auditoriums, meeting rooms, and athletic facilities.
- Nonpublic Forum: classrooms, residence halls, and campus offices.

# TITLE IX & THE FIRST AMENDMENT



- Protected Speech
  - Offensive language
  - Hate speech
  - Time, Place, Manner restrictions
  - Being a jerk
- Unprotected Speech
  - Fighting Words; Obscenity; True Threat; Defamation
  - Sexual and Racial Harassment (Hostile Environment)
  - Incitement of Imminent Lawless Action
- Controversial Speakers

# FEMINIST MAJORITY FOUNDATION ET AL. V. HURLEY, PAINO, AND UNIVERSITY OF MARY WASHINGTON, NO. 17- 2220 (4<sup>TH</sup> CIR. 2018), DECEMBER 19, 2018.



## Facts

- Members of Feminist United (FU) at University of Mary Washington (UMW) raised concerns after UMW's student senate voted to authorize male-only fraternities.
- In response, they were subjected to offensive and threatening anonymous messages posted on Yik Yak (a now defunct social media app)
  - FU members were called “femicunts,” “feminazis,” “cunts,” and “bitches,” and there were threats to “euthanize,” “kill,” and “[g]rape” FU members.
  - Specific FU members were referenced by name.

## Facts

- FU members were also subjected to various incidents of verbal harassment by rugby team members chanting about sexual assault.
- Although the UMW President suspended the rugby team and sent a communication to the UMW community, the messages increased
  - Over 700 harassing messages were sent over the academic year and into the summer.
- The Title IX Coordinator told FU members that the University had “no recourse” for anonymous online harassment. The school didn’t initiate a Title IX investigation and didn’t ask for law enforcement’s assistance, citing First Amendment infringement concerns.

**FEMINIST MAJORITY FOUNDATION ET AL. V. HURLEY,  
PAINO, AND UNIVERSITY OF MARY WASHINGTON,** NO. 17-  
2220 (4<sup>TH</sup> CIR. 2018), DECEMBER 19, 2018.



## Facts

- FU sued, alleging UMW was deliberately indifferent to sex discrimination which served to create and foster a hostile campus atmosphere.
- District court dismissed the complaint, finding that the harassment took place in a context over which UMW had limited, if any, control.



## Holding

- The US Court of Appeals for the Fourth Circuit reversed the dismissal of the Title IX sex discrimination claim and remanded for further proceedings.
- The court found that despite the harassment occurring online, UMW had substantial control over both the harassers and the context in which the harassment occurred:
  - Messages concerned events occurring on campus;
  - Specifically targeted UMW students;
  - Originated on or within the immediate vicinity of the UMW campus;
  - Used the campus' wireless network.

**FEMINIST MAJORITY FOUNDATION ET AL. V. HURLEY,  
PAINO, AND UNIVERSITY OF MARY WASHINGTON,** NO. 17-  
2220 (4<sup>TH</sup> CIR. 2018), DECEMBER 19, 2018.



## Holding

- Court found UMW could discipline students who posted sexually harassing and threatening messages online and rejected UMW's claim that the messages were protected by the First Amendment.
  - “(1) true threats are not protected speech, and (2) the University had several responsive options that did not present First Amendment concerns.”
- Court rejected UMW's argument that they were unable to control the anonymous harassers.
  - UMW should have attempted to investigate or engage law enforcement to investigate.
  - UMW could have disabled Yik Yak campus-wide.

# FEMINIST MAJORITY FOUNDATION ET AL. V. HURLEY, PAINO, AND UNIVERSITY OF MARY WASHINGTON, NO. 17- 2220 (4<sup>TH</sup> CIR. 2018), DECEMBER 19, 2018.



## Takeaways

- Sets up a slippery slope - institutions may be held liable for failing to address discrimination/harassment that occurs online by unknown individuals within a forum not controlled by the institution.
- Institutions must take reasonable steps to investigate anonymous behavior where they control the context and, likely, the harasser; and perhaps on the whole.
- Doing nothing because the posts are anonymous is not an option.
- Assuming First Amendment protections apply to speech may or may not hold up once the courts weigh in, but you really can't know in a Title IX context without investigating whether the conduct is severe, pervasive, and objectively offensive. The First Amendment cannot inhibit investigation of whether the First Amendment applies.

# TITLE IX, FIRST AMENDMENT & BIT

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# **JOHN DOE v. VALENCIA COLLEGE**

## **U.S. 11<sup>TH</sup> CIR. CT OF APPEALS (SEPT. 13, 2018)**



- **Facts**

- Doe (age 42) and Roe (age 24) were biology lab partners in summer 2014.
- Doe bought Roe gifts and shared his affection for her.
- Roe said she was not interested, had a boyfriend, and did not want to give him the wrong impression.
- Doe saw a Facebook posting that made him think Roe was single again, so he reached out.
- Roe and her boyfriend called Doe and told him to stop.
- ***Doe did not stop.***

# ***JOHN DOE v. VALENCIA COLLEGE***

## **U.S. 11<sup>TH</sup> CIR. CT OF APPEALS (SEPT. 13, 2018)**



- **Facts (cont.)**

- During the investigation, Doe admitted he sent Roe inappropriate messages, many of them sexually and some sexually explicit photos.
- Roe and boyfriend filed a complaint with police.
- Police called Doe and told him to stop; **he didn't stop.**
- In August, an emotional Roe reported to Valencia's Dean of Students.
- DOS implemented a NCO and provided him notice of the charges.
- Doe then sent 20 messages to Roe to convince her to withdraw her complaint.

# ***JOHN DOE v. VALENCIA COLLEGE***

## **U.S. 11<sup>TH</sup> CIR. CT OF APPEALS (SEPT. 13, 2018)**



- **Facts (cont.)**

- Doe ultimately found responsible for Stalking – a violation of Valencia's Code of Conduct and suspended for one year.
- Decision upheld on appeal
- In his lawsuit, Doe alleged that Valencia:
  - Had policies that were overbroad and vague;
  - Violated his 1<sup>st</sup> Amendment rights;
  - Violated his due process rights; and
  - Violated Title IX (erroneous outcome)
- Court rejected all of his arguments

# ***JOHN DOE v. VALENCIA COLLEGE***

## **U.S. 11<sup>TH</sup> CIR. CT OF APPEALS (SEPT. 13, 2018)**



- The court upheld Valencia's stalking policy.
  - Doe argued it was subjective because it used the words “alarms, torments, or terrorizes,”
  - Court said Doe's conduct was “clearly proscribed” and the policy included language the actor's behavior must be willful, malicious, and repeated; and
  - Language that the victim must also be “reasonably and seriously alarm[ed], tormented, or terrorized.”
- 1st Amendment not violated because he continued to harass Roe even after repeated requests for him to stop from Roe and the police; and a no contact order from the College



# **JOHN DOE v. VALENCIA COLLEGE**

## **U.S. 11<sup>TH</sup> CIR. CT OF APPEALS (SEPT. 13, 2018)**



- Court relied on *Tinker v. Des Moines* (signature 1<sup>st</sup> Amendment case) to indicate:
  - He interfered with Roe’s rights
  - Valencia is entitled to take off-campus jurisdiction
- Due process claim failed because he did not have a constitutionally protected right to enrollment at Valencia
  - Even if he did, court noted the school did not act in an arbitrary or capricious manner
- No erroneous outcome under Title IX because:
  - He failed to provide facts that cast “some articulable doubt on the accuracy of the disciplinary proceeding”
  - There is no casual connection between the outcome and gender bias

# CASE STUDY #1: “iPHONE”



# CASE STUDY: IPHONE



- Maris has been dating Greg for the past few months after the two of them began hanging out following their Psychology 101 class. Greg is a swimmer on the university team. Maris is a first-year student and Greg is a junior.
- Maris has had a few sexual partners in the past and was immediately attracted to Greg, who was outgoing and gregarious, and well-liked on the team and at the parties they frequented together. Maris and Greg enjoyed an adventurous sex life that often included having sex in public places (like the bathroom at a restaurant and even in the swimming pool after hours).

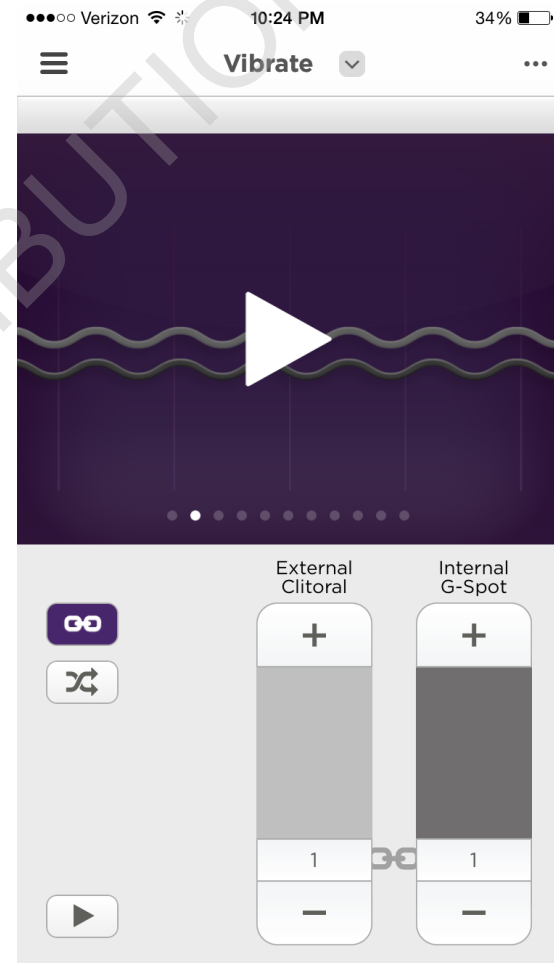
# CASE STUDY: IPHONE



- Maris purchases a product called the we-vibe (<http://we-vibe.com>) that allows Maris to insert the vibrator and have the speed, duration, and vibration intensity controlled by an app on both her and Greg's phone.
- Their sex life includes the use of vibrators and toys and some light BDSM play. Both Greg and Maris have very high sex drives (having sex four to five times a day,) and this new toy is very much appreciated when they are apart.

# CASE STUDY: IPHONE

- While Greg was at a party and Maris was in her dorm room, Greg received a text message from Maris, saying that she had turned on and inserted the vibrator and wanted Greg to help “get her off.”
- Greg agreed and opened the app on his phone. Maris continued to text him while Greg adjusted the controls of the vibrator inside Maris.



# CASE STUDY: IPHONE



- Jeff, a swimming teammate, saw Greg on his phone and asked what he was doing. Greg initially tried to avoid the conversation, but had consumed several drinks and eventually showed Jeff his phone.
- Greg showed him how the controls work on the phone — toggle slides for intensity — and how the top controls the pattern.
- A text notification from Maris popped up saying, “Want more. Harder.” Jeff asked to set the controls and Gregg shrugged and handed him the phone.

# CASE STUDY: IPHONE



# CASE STUDY: IPHONE



- Four other teammates saw Jeff and Greg talking and came over to investigate. The phone was passed around the team and everyone took a turn adjusting the controls and reading the texts from Maris. She wrote, “I love this!” and “You are going to make me cum!”
- The group of six laughed at this and Greg pulled up some naked pictures of Maris for them to look at. They talked about how hot she was and soon all six of them were sharing pictures of their girlfriends and people they had slept with in a competition to see who had the “dirtiest” and “hottest” images.



# CASE STUDY: IPHONE



- Maris and Greg signed off the app and agreed to see each other after the party. Greg was pretty intoxicated and made a joke about how his teammates helped out with the app. Maris became very upset about this and they had a big argument before she broke up with him and told him to get out of her room.
- In the morning, Maris shared this story with her RA and asked to make a complaint.

# CASE STUDY: IPHONE



- If you were in the role of taking the complaint, what additional questions or information would you need to know?
- What are the Title IX issues in this case?
  - How would you categorize the issues?
  - What issues involve Greg?
  - What issues involve his friends?
  - What are the concerns with the other images on Greg's teammates' phones?
- How does Maris and Greg's past sexual behavior impact the case?
- What would be the likely outcome of this case on your campus?

# CASE STUDY: IPHONE



- What kind of conversation could Greg and Maris have had before Greg shared the we-vibe app or the pictures on his phone?
- What kind of prevention or education messaging might VAWA like to see to prevent a case like this from occurring?
  - Which group or department should be involved in creating and sharing this message?
- What are some of the challenges technology presents in Title IX cases?

# TITLE IX & GENDER-BASED CLAIMS

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Gender Bias

Erroneous Outcome

Disparate Impact or Treatment

# **JOHN DOE v. PENN STATE UNIVERSITY**

**U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).**



## **Facts**

- Incident involved a male and a female student and an allegation of non-consensual sexual penetration in Sept. 2016.
- Investigation began in Sept. 2016; Jane Roe never provided a written statement.
- Investigator allowed Doe to view a draft copy of the report in her office in his sixth meeting, but he could not take the report with him. This was also the first time he had seen the incident reports from Res. Life and Univ. PD. (the documents that represented the formal complaint).
- Investigator.
- In May 2017, Administrative Hearing officer found him responsible and recommended suspension until the end of 2017.

# ***JOHN DOE v. PENN STATE UNIVERSITY***

**U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).**



## **Facts (cont.)**

- Hearing held in June 2017.
  - Hearing Panel adhered strictly (and to its detriment) to the information contained in the investigator's flawed report (which excluded key evidence) and did not allow Doe to submit key evidence or have his questions asked.
- Doe was not allowed to see Roe while she testified via webcam transmission; PSU policy required that Doe be allowed to see her.
- Found responsible.
  - Suspended through the end of 2017; required to undergo counseling; lost on-campus living privileges; and panel recommended his removal from the accelerated pre-med program (a significant sanction).

# ***JOHN DOE v. PENN STATE UNIVERSITY***

**U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).**



- Doe sued PSU, the TIX Coordinator, the Investigator, Administrative Hearing officer, Student Conduct administrator, and obtained a TRO against PSU prohibiting implementation of the sanctions.
- Among his allegations, Doe alleged violations of Due Process, Title IX, and Section 1983.
- PSU filed a Motion to Dismiss, which was denied in part and granted in part.
- Section 1983 claim: MTD denied in relation to the TIXC, Hearing Officer, and Investigator → allowed to proceed against them in their individual capacities.
  - E.g.: Doe alleged lack of notice of the charges, lack of rationale in the “cursory and perfunctory decision letter.”

# ***JOHN DOE v. PENN STATE UNIVERSITY***

**U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).**



- Title IX claim of Erroneous Outcome
  - Alleged PSU's process was unfair and biased toward the accuser
    - Court dismissed this argument, stating this may be a pro-victim bias, but not a sex or gender bias.
  - Cited the DCL and external social and political pressure, including OCR investigation of PSU
    - Court said this does not infer gender bias, but rather a pro-victim bias.
  - Alleged all students suspended or expelled for sexual misconduct were male
    - Court said this allegation was enough to survive the Motion to Dismiss.



***JOHN DOE v. MIAMI UNIVERSITY, ET AL.***  
**U. S. CT. OF APPEALS, 6<sup>TH</sup> CIRCUIT (FEB. 9, 2018)**



- Miami U.'s process was very quick and Doe had 48 hrs. to provide evidence and witnesses.
- Doe sought and obtained a medical leave due to stress of the process.
- Prior to hearing, Doe was not provided the names of witnesses, nor given access to the investigation report.
- Investigator that provided him the charges was a member of the hearing board and allegedly dominated the hearing and stated to him, "I bet you do this (i.e. sexually assault women) all the time" during the hearing.
- Doe was found responsible and suspended for 3 terms.

# ***JOHN DOE v. MIAMI UNIVERSITY, ET AL.***

## **U. S. CT. OF APPEALS, 6<sup>TH</sup> CIRCUIT (FEB. 9, 2018)**



- John Doe filed suit and alleged that he was found responsible for sexual misconduct because he was male.
  - Erroneous Outcome claim; Requires plaintiff to show:
    - 1) facts sufficient to cast some doubt on the accuracy of the discipline proceeding, and
    - 2) a causal connection between the flawed outcome and gender bias.
- Both Doe and the reporting party were highly intoxicated. Miami U's policy reads, "an individual cannot consent who is substantially impaired by any drug or intoxicant..."
  - BUT only Doe was charged, despite evidence he may have been more intoxicated.

***JOHN DOE v. MIAMI UNIVERSITY, ET AL.***  
**U. S. CT. OF APPEALS, 6<sup>TH</sup> CIRCUIT (FEB. 9, 2018)**



- Court held in Doe's favor:
  - Transcript notation and Liberty Interest → heightened impact necessitates heightened due process.
  - Conflict of Interest: Administrator served conflicting roles. (investigator, hearing panel member, sanctioning agent)
  - Lack of Impartiality: Administrator had pre-determined Doe's guilt as demonstrated by her conduct in the hearing.
  - Withholding report reflected bias.

## **Facts**

- John Doe accused Jane Roe of sexual misconduct – claiming he was incapacitated during the interaction.
- Roe and Doe, both UC students, drank alcohol together at an off-campus party.
- After Doe stated he was drunk, Roe walked him home. She said she was concerned about his level of intoxication.
- Doe's roommates asked Roe to leave but she refused.
- In Doe's room, Roe locked the door, made out with Doe and was digitally penetrated by him.
- Doe woke up in the morning to find Roe in his room and blood on his hands and sheets.

# ***ROE V. UNIVERSITY OF CINCINNATI***

**1:18-CV-00312 (S.D. OHIO 2018), FILED 8/21/2018.**



## **Facts**

- Doe reported the incident to his ROTC commander; Title IX Office.
- During the investigation, Roe claimed the encounter was consensual.
- Roe was found responsible and suspended until Doe graduated.
- Roe filed a lawsuit for violation of Title IX and violation of her constitutional rights to due process and equal protection.
- Roe sought a preliminary injunction to prevent UC from implementing her suspension.
- The district court denied the preliminary injunction and held that she was unlikely to be successful on the merits of her lawsuit.

## Decision

- Equal Protection
  - Roe’s Equal Protection claim failed. Roe claimed sex was consensual and therefore the university had a rational basis to treat Roe differently than Doe.
  - Roe provided no factual evidence indicating unequal treatment was due to gender bias.
- Due Process
  - The court declined to extend the 6th Circuit’s cross-examination mandate.
    - This was not a case based solely on credibility.
  - Text messages to a third friend indicated that Roe knew how intoxicated Doe was – supporting a finding of responsibility.
- Roe voluntarily dismissed her claims in September 2018.

## Takeaways

- Claims asserting gender bias require statistical evidence or something more than “external pressure” to show gender bias against female responding parties.
- While this case was decided prior to *Baum’s* credibility standard, the 6<sup>th</sup> Circuit may choose to follow *Roe v. Cincinnati* when credibility is not a central issue.
- A live hearing with cross-examination may not be required when tangible evidence (here, text messages) indicates responsibility and credibility is not a central issue.

***SNYDER-HILL, ET AL. v. THE OHIO STATE UNIV.*** U.S.  
DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)



- In July 2018, 10 former OSU students – Steve Snyder-Hill and nine other men – filed a lawsuit against OSU.
- The men alleged extensive sexual misconduct and assault by former OSU athletic team doctor, Student Health Services physician, and Assistant Professor, Dr. Richard Strauss:
  - Inappropriately touched and fondled their genitals during examinations.
  - Digitally penetrated their rectums, touched their bodies in other inappropriate ways, moaned during examinations
  - Made sexualized comments and asked inappropriate sexual questions.
  - Found reasons to examine their genitals even when the scope of their visit did not require such examination (example: an appointment for an ankle injury).
  - Plaintiffs also alleged Dr. Strauss completed rectal examinations when not medically necessary.



***SNYDER-HILL, ET AL. v. THE OHIO STATE UNIV.*** U.S.  
DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)



- Administrators, coaches, and Athletic Directors are alleged to have known about the abuse, but failed to take corrective action leading to more victimization
  - Allegations span from 1978-1998.
- Since its initial filing, the number of plaintiffs has grown to thirty-nine (39) former OSU students
- Dr. Strauss committed suicide in 2005.
- As evidence of an ongoing culture of abuse, Plaintiffs referenced:
  - OSU's decision to close its sexual assault prevention and response unit.
  - How OSU instructed students to see Dr. Strauss for exams after they had reported complaints of misconduct by Dr. Strauss.
  - OSU's pattern of permitting other sexual predators within the campus community.

***SNYDER-HILL, ET AL. v. THE OHIO STATE UNIV.*** U.S.  
DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)



- Many plaintiffs were unable to identify what happened to them as sexual assault until reports came out in 2018.
- The plaintiffs allege there could be thousands of victims given Dr. Strauss' 20 year tenure at OSU, as well as his prominent roles as an OSU Student Health Services physician and athletic teams doctor.
- Plaintiffs alleged that coaches and other professional staff members knew that Dr. Strauss was committing the abuse and that students regularly called him nicknames such as Dr. Balls, Dr. Nuts, Dr. Jelly Paws, and Dr. Cough.

DUE PROCESS

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# WHAT IS DUE PROCESS?



- Two overarching forms of due process:
  - **Due Process in Procedure:**
    - Consistent, thorough, and procedurally sound handling of allegations
    - Institution substantially complied with its written policies and procedures
    - Policies and procedures afford sufficient Due Process rights and protections
  - **Due Process in Decision:**
    - Decision reached on the basis of the evidence presented
    - Decision on finding and sanction appropriately impartial and fair

# ***JOHN DOE v. BRANDEIS UNIVERSITY***

## **U.S. DIST. CT., MASS. (MARCH 31, 2016)**



- **Facts**

- John Doe and J.C. met at new student orientation in Fall 2011.
- They became close friends and began a 21-month “intimate, sexually active, and...exclusive dating relationship”
- After their relationship ended, they maintained a friendship for four months, but their friendship deteriorated.
- Both Doe and J.C. were attracted to the same person, who rejected J.C.’s friend request.
- The next day (6 months after relationship ended), J.C. filed a two sentence complaint: “Starting in the month of September 2011, the Alleged Violator of Policy [Doe] had numerous inappropriate, nonconsensual sexual interactions with me.”

# ***JOHN DOE v. BRANDEIS UNIVERSITY***

## **U.S. DIST. CT., MASS. (MARCH 31, 2016)**



- **Facts (cont.)**

- Upon receipt of this complaint, and without any additional information, Brandeis' Dean of Students immediately removed Doe from the residence halls, classes, his campus job, and his student leadership position.
- Two days later, Doe was charged with six potential violations:
  - Sexual misconduct
  - Taking sexual advantage of incapacitation
  - Lack of consent to sexual activity
  - Sexual harassment
  - Causing physical harm to another
  - Invasion of privacy

# ***JOHN DOE v. BRANDEIS UNIVERSITY***

## **U.S. DIST. CT., MASS. (MARCH 31, 2016)**



- **Facts (cont.)**

- Brandeis had recently changed its procedures for sexual misconduct allegations that relied on the investigation and findings of a “Special Examiner” and:
  - Did not provide for a hearing
  - Did not allow the accused to know the details of the charges
  - Did not allow the accused to see the evidence prior to a decision
  - Did not allow the accused to see the Special Examiner’s report until the process had concluded (including appeal)
  - Did not allow for cross-examination of the parties or witnesses (even through an intermediary)

# ***JOHN DOE v. BRANDEIS UNIVERSITY***

## **U.S. DIST. CT., MASS. (MARCH 31, 2016)**



- **Facts (cont.)**

- Appeals

- “There was no right of appeal on the grounds
      - That there was insufficient evidence to sustain the findings
      - That the Special Examiner was mistaken as to any factual issue
      - That the Special Examiner acted arbitrarily or capriciously;
    - Moreover, the accused was expected to prepare his appeal without access to the Report on which the finding of responsibility was based.”



# ***JOHN DOE v. BRANDEIS UNIVERSITY***

**U.S. DIST. CT., MASS. (MARCH 31, 2016)**



## **Facts (cont.)**

- The Special Examiner reviewed 12 incidents and found Doe responsible for four of them:
  - Touching J.C.'s groin while they watched a movie (they had sex for the first time the next night)
  - Looking at J.C.'s privates when they showered together
  - Kissing J.C. to wake him up (something he did over the course of their relationship; Special Examiner rigidly determined J.C. was incapacitated and could not consent)
  - An incident where Doe allegedly attempted to perform oral sex on J.C. when he didn't want it.
- Special Examiner relied heavily on the fact that Doe's answers to questions were inconsistent; **however, the questions were rarely specific enough to allow Doe to even know what he was supposed to address in his response.**

# **JOHN DOE V. BRANDEIS UNIVERSITY**

## **U.S. DIST. CT., MASS. (MARCH 31, 2016)**



- **Facts (cont.)**

- Doe was not provided with the Special Examiner’s report
  - Had a summary read to him after the Special Examiner determined a finding
  - The Special Examiner’s finding was technically a “recommendation” to an administrator or panel, but in practice the recommendation was always adopted.
- Doe was found responsible by the Dean of Students and a panel of three met privately to determine sanction.
- They sanctioned Doe with a disciplinary warning, a requirement to undergo sensitivity training, and a permanent notation on his transcript.
- An appellate group of three faculty denied Doe’s appeal.

# **JOHN DOE v. BRANDEIS UNIVERSITY**

## **U.S. DIST. CT., MASS. (MARCH 31, 2016)**



- Doe sued Brandeis citing eight causes of action, of which four survived Brandeis' motion to dismiss:
  - **Breach of contract – Motion denied**
  - **Breach of the implied covenant of good faith and fair dealing – Motion denied**
  - Estoppel and reliance – Motion granted
  - **Negligence – Motion granted in-part (negligent supervision claim survives)**
  - Defamation – Motion granted
  - Invasion of privacy – Motion granted
  - Intentional infliction of emotional distress – Motion granted
  - **Negligent infliction of emotional distress – Motion denied**
- *Note: While Doe did not make a Title IX claim, this case is significant because of the due process and procedural elements involved in sexual misconduct cases.*

# ***JOHN DOE v. BRANDEIS UNIVERSITY***

## **U.S. DIST. CT., MASS. (MARCH 31, 2016)**



- The court wrote a blistering and chastising decision, listing the numerous failures to provide a fundamentally fair process
- The court listed ten separate issues of procedural fairness:
  - No right to counsel
  - No right to confront accuser
  - No right to cross-examine witnesses
  - No right to examine evidence or witness statements
  - Impairment of the right to call witnesses and present evidence
  - No access to Special Examiner's report
  - No separation of investigatory, prosecution, and adjudication functions
  - No right to effective appeal
  - Burden of proof

# *JOHN DOE v. BRANDEIS UNIVERSITY*

U.S. DIST. CT., MASS. (MARCH 31, 2016)



- **Key Takeaways**

- Provide a responding party with detailed allegations and allow them to respond to each of the allegations prior to rendering a finding.
- **Stop hiding the ball** – let the parties review reports
- Ensure appellate procedures allow a party to appeal on the basis that the decision “was not supported by the evidence, unfair, unwise or simply wrong.”
- It is not always enough to follow your procedures if those procedures are deficient in providing basic due process or fundamental fairness protections.
  - “Brandeis appears to have substantially impaired, if not eliminated an accused student’s rights to a fair and impartial process.” (p.12).

# ***DOE v. UNIVERSITY OF CINCINNATI***

## **U.S. CT. OF APPEALS, 6<sup>TH</sup> CIR. (SEPT. 25, 2017)**



- **Facts**

- John Doe was a graduate student at UC
- Aug-Sept 2015: John Doe met Jane Roe on Tinder and after a few weeks, met in person, then went to his apartment, where they engaged in sexual intercourse
- Three weeks later, Roe reported to UC's Title IX office that Doe had sexually assaulted her.
- UC's Title IX office investigated the allegation (took nearly 5 months), then referred the matter to a faculty/student hearing board
- Evidence is disclosed to the accused in advance of the hearing

# ***DOE v. UNIVERSITY OF CINCINNATI***

## **U.S. CT. OF APPEALS, 6<sup>TH</sup> CIR. (SEPT. 25, 2017)**



- **Facts (cont.)**

- Hearing provided a “circumscribed form of cross-examination”
  - Provide written questions to the panel who determine relevance and whether the question will be asked
- Hearing held on June 27, 2016, but Roe did not attend
- Doe did not know Roe would not attend
- UC altered its procedures in her absence and Doe was unable to ask her any questions
- Chair read Roe’s closing statement into evidence

# ***DOE v. UNIVERSITY OF CINCINNATI***

## **U.S. CT. OF APPEALS, 6<sup>TH</sup> CIR. (SEPT. 25, 2017)**



- **Facts (cont.)**

- Hearing board deliberated, found Doe responsible, and recommended a 2-year suspension, which UC's Asst. Dean accepted.
- Appellate administrator recommended that UC lessen the suspension to 1 yr.
- UC's Dean of Students accepted this recommendation
- Doe informed of final decision in Sept. 2016, with sanction to start at the end of Fall 2016.



# ***DOE v. UNIVERSITY OF CINCINNATI***

## **U.S. CT. OF APPEALS, 6<sup>TH</sup> CIR. (SEPT. 25, 2017)**



- Doe sued UC for violation of Title IX and violation of due process and moved for preliminary relief enjoining UC from enforcing the decision
  - Doe argued UC’s action was unconstitutional, as he was provided no opportunity to cross-examine Roe, per UC procedures.
  - District Court agreed.
- UC appealed the District Court’s decision on the preliminary injunction
- 6<sup>th</sup> Circuit upheld the District Court’s decision

# **DOE v. UNIVERSITY OF CINCINNATI**

## **U.S. CT. OF APPEALS, 6<sup>TH</sup> CIR. (SEPT. 25, 2017)**



- **6<sup>th</sup> Circuit's decision**
  - Due process: **Where credibility is the deciding factor/pivotal issue**, the Complainant's absence from the hearing made it difficult and problematic for the “trier of fact” to assess credibility
  - The inability to confront one's accuser rendered the process fundamentally unfair.
  - Cross examination in some form is essential to due process, even if indirect or via video conferencing; does not have to be at the same level as a judicial trial
  - Limited their decision to the facts of the case and UC's procedures, but it is a reflection of the due process needed when a student is facing suspension or expulsion.

# ***JOHN DOE v. CALIFORNIA STATE UNIV.***

## **SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)**



### **Due process-based case**

- **Facts**

- Doe expelled from Cal Poly, San Luis Obispo in 2016 for sexual assault
- Cal Poly received notice from Jane Roe's roommates
- Doe and Roe attended a fraternity party, danced, and kissed
- Roe alleged they went to a room at the party where Doe:
  - Forcibly kissed Roe
  - Held her down on a bed
  - Bit her lip until it bled, and removed her shirt.
- Roe alleged she fought back and was able to leave the house.

# ***JOHN DOE v. CALIFORNIA STATE UNIV.***

## **SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)**



- **Facts (cont.)**

- Roe was reluctant to participate and provided a statement
- Roe refused to provide Doe's name, related text messages, or to participate in a formal resolution
- University initiated a “confidential resolution”
- Doe argued encounter was consensual
- Eyewitness walked in on Doe and Roe and said it appeared consensual
- Doe provided text messages after alleged incident between him and Roe
- Doe recommended three additional witnesses, who were not interviewed
- Doe was expelled and his appeal was denied

# ***JOHN DOE v. CALIFORNIA STATE UNIV.***

## **SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)**



- In his filing, Doe cited due process issues, such as:
  - Three additional witnesses who were not interviewed
  - Doe was not able to pose questions to Roe because she did not participate in the process
  - Doe was not able to pose questions, directly or indirectly, to Roe's roommates or other witnesses.
  - Several key pieces of evidence were misrepresented in the investigation report
  - Doe was informed of the determination of responsibility, but was told the investigation report was not yet complete
  - Not allowed to review report

# ***JOHN DOE v. CALIFORNIA STATE UNIV.***

## **SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)**



- Judge ordered the expulsion be reversed.
- Judge noted that the University:
  - Failed to inform Doe of the complete allegations, including policies violated.
  - Failed to disclose all evidence on which the determination relied.
  - Failed to allow Doe to question Roe or witnesses, directly or indirectly, despite the university's reliance on the credibility of testimony.
  - Reached a determination that was not supported by substantial evidence.

# ***JOHN DOE v. CALIFORNIA STATE UNIV.***

## **SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)**



- **Key Takeaways**

- Reporting party's lack of participation is a significant due process concern.
- Provide parties an opportunity to review and respond to all relevant evidence.
- Question reporting and responding party's witnesses. If witnesses are not interviewed, document the rationale.
- Provide for direct or indirect questioning between the parties and of witnesses
- Provide an opportunity to review the investigation report once all evidence is collected.

# ***JANE ROE v. JAVAUNE ADAMS-GASTON, ET AL.***

**U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)**



- This case involved an Ohio State University student who was charged twice for sexual misconduct. She was initially suspended, then expelled following the second hearing.
- Roe argued that she was denied her right to due process because she was unable to cross-examine adverse witnesses during the hearing.
- She sought, and was awarded, a preliminary injunction against the university for her expulsion.
- In this case Ohio State conducted a thorough investigation and provided a written report to the hearing board including interview notes taken by the investigator.
- Both parties attended the first hearing.



***JANE ROE v. JAVAUNE ADAMS-GASTON, ET AL.***  
**U.S. DIST. CT., S. DIST. OHIO, E DIV. (APRIL 17, 2018)**



- Hearing panel felt Roe was not credible and her account was not plausible, as compared to the reporting party and witnesses.
- In the second hearing, the reporting party did not attend, but sent a statement directly to hearing officer and asked that statements be read aloud during the hearing; Roe objected to the statements being read, but the statements were in the hearing packet.
- 3 adverse witnesses did not attend, but their statements were in the hearing packet.
- Hearing officer found Roe in violation; found her statement lacked credibility as compared with the credible and plausible statements of reporting party and witnesses.
- Roe was expelled.

***JANE ROE v. JAVAUNE ADAMS-GASTON, ET AL.***  
**U.S. DIST. CT., S. DIST. OHIO, E DIV. (APRIL 17, 2018)**



- Roe sued, stating OSU deprived her of due process because she could not cross examine the reporting party and the witnesses.
- The Court held that a hearing was necessary.
- The hearing does not need to have the formalities of a criminal trial but the accused student must be given an opportunity to respond, explain, and defend herself.
- Due process requires an opportunity to confront and cross examine adverse witnesses, especially where the evidence consists of the testimony of individuals whose memory might be faulty or motivated by malice or vindictiveness.
- Hearing panel should be given an opportunity to assess demeanor.

***JOHN DOE v. UNIV OF MICHIGAN, ET AL.***  
U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)



- Doe completed all graduation requirements then was accused of sexual assault. He sought a preliminary injunction preventing the investigation, indicating Michigan's policy violated due process rights.
  - Doe alleged that due process requires a live hearing and an opportunity for cross examination.
- Michigan's policy provided for an investigation. The investigator provides the opportunity for the parties to pose questions to each other or to witnesses; investigator makes a finding and provides a rationale to the TIXC and General Counsel.
- Court found in Doe's favor, citing the high risk of harm (expulsion).

***JOHN DOE v. UNIV OF MICHIGAN, ET AL.***  
U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)



- Court said Michigan's method of private questioning through an investigator leaves Doe with no way of knowing which questions are actually being asked of adverse witnesses or their responses.
- Without a live proceeding, the court said the risk of an erroneous deprivation of Doe's interest in his reputation, education and employment is significant.
- Interestingly, court did not require Michigan to change its process.

# JOHN DOE v. CLAREMONT MCKENNA COLLEGE CAL. CT. APP., 2<sup>ND</sup> DIST. (AUGUST 8, 2018)



- May 2015, John Doe was found responsible for nonconsensual sexual intercourse with Jane Roe, a student from Scripps College.
- John was suspended for one year.
- The decision was made as a result of an “Investigation Findings and Review” committee – two CMC faculty/staff and the investigator.
- Procedures for the Committee “meeting” did not allow for questioning by the Committee or the parties.
- Jane did not attend the Committee meeting.
- The Investigator also did not ask Jane the questions John requested the investigator ask.

# JOHN DOE v. CLAREMONT MCKENNA COLLEGE CAL. CT. APP., 2<sup>ND</sup> DIST. (AUGUST 8, 2018)



- John petitioned in state court for a writ of administrative mandate to set aside the decision.
- Trial court denied the petition. Appellate court reversed.
- Court approvingly cited 6<sup>th</sup> Circuit's Cincinnati decision regarding credibility determinations and the ability of the parties to pose questions to each other.
  - *“We hold that where, as here, John was facing potentially severe consequences and the Committee’s decision against him turned on believing Jane, the Committee’s procedures should have included an opportunity for the Committee to assess Jane’s credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee’s asking her appropriate questions proposed by John or the Committee itself.”*

# JOHN DOE v. CLAREMONT MCKENNA COLLEGE CAL. CT. APP., 2<sup>ND</sup> DIST. (AUGUST 8, 2018)



- Court recognized a college is not a court, that it cannot compel people to appear at a hearing, the burden of added procedures on the college, and the possibility of intimidating or re-traumatizing the reporting party.
  - *“In light of these concerns we emphasize, as did Cincinnati, that the school’s obligation in a case turning on the complaining witness’s credibility is to “provide a means for the [fact finder] to evaluate an alleged victim’s credibility, not for the accused to physically confront his accuser.”*
  - *“While we do not wish to limit the universe of ideas of how to accomplish this, we note that the mechanism for indirect questioning in Regents, including granting the fact finder discretion to exclude or rephrase questions as appropriate and ask its own questions, strikes a fair balance among the interests of the school, the accused student, and the complainant.”*

# ***DOE V. BAUM***

## **903 F.3D 575 (6TH CIR. SEP. 7, 2018).**



### **Facts**

- Jane Roe accused John Doe of sexual misconduct – claiming she was incapacitated during the interaction.
- The University of Michigan investigated over the course of 3 months, interviewing 25 people.
  - “The investigator was unable to say that Roe exhibited outward signs of incapacitation that Doe would have noticed before initiating sexual activity. Accordingly, the investigator recommended that the administration rule in Doe’s favor and close the case.”
- The administration followed the investigator’s recommendation, found for Doe, and closed the case.
- Roe appealed.



# ***DOE V. BAUM***

## **903 F.3D 575 (6TH CIR. SEP. 7, 2018).**



### **Facts**

- The 3-member Appellate Board reviewed the evidence and reversed the investigator's decision. The Board did not meet with anyone or consider any new evidence. The Board felt Roe was more credible.
- Before sanctioning, Doe withdrew, one semester shy of graduation.
- Doe sued, alleging Title IX and Due Process violations.
- On a Motion to Dismiss by Michigan, the District Court dismissed the case, but 6<sup>th</sup> Circuit reversed.
- Due Process and the Title IX Erroneous Outcome claims survived.

## Decision

- Due Process
  - "Our circuit has made two things clear:
    - (1) If a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and
    - (2) When the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination."
  - "If a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."
    - "Either directly by the accused or by the accused's agent."

# **DOE V. BAUM**

## **903 F.3D 575 (6TH CIR. SEP. 7, 2018).**



### **Decision**

- Title IX Erroneous Outcome
  - The due process issues informed their finding.
  - The court cited significant public scrutiny and fear of losing federal funding due to an OCR investigation that began two years prior into whether UM's policy and procedure discriminated against female reporting parties.
  - While the court recognized that external pressure alone is not enough to state a claim that the university acted with bias, the court found that it could be possible here when:
    - Appellate Board dismissed all the evidence provided by male witnesses.
      - All the male witnesses were on Doe's side, and the female witnesses were on Roe's side.
    - Appellate Board found Doe's witnesses were biased because they were his fraternity brothers, but found Roe's sorority sisters credible.

# ***DOE V. BAUM***

## **903 F.3D 575 (6TH CIR. SEP. 7, 2018).**



### **Takeaways**

- In the 6th Circuit, decision-makers must hold a live hearing with cross-examination when credibility is a central issue – providing the parties with an opportunity to submit written statements is not sufficient.
- Additional due process may be required when the student is facing suspension or expulsion.
- Courts in the 6th Circuit may balance the rights of the responding party with the burden on the institution to provide more due process and rule in favor of the rights of the responding party as a consequence.
- This will likely continue to be a hot button area that will evolve in the legislatures and courts.

# ***DOE V. UNIV. OF DAYTON***

**NO. 18-3339 (6TH CIR. MAR. 15, 2019).**



## **Facts**

- Roe reported Doe sexually assaulted her to University Police.
- The University of Dayton hired TNG Partner and President Daniel Swinton to conduct an external investigation.
- University provided Doe w/ “Notice of Investigation” letter:
  - Provided Doe a copy of Roe’s complaint.
  - Directed him to the relevant Student Handbook provisions.
  - Identified the investigators.
  - Advised him of his right to a support person, including an attorney.
  - Advised he would not be able to submit information outside of the investigation.
  - Generally advised him of the process.

# ***DOE V. UNIV. OF DAYTON***

**NO. 18-3339 (6TH CIR. MAR. 15, 2019).**



## **Facts**

- Doe was found responsible of nonconsensual sexual intercourse and suspended for a year and a half.
- Doe appealed. The Appellate Board found that neither Doe nor Roe were given the opportunity to submit questions to the Hearing Board.
- To remedy the error, the Appellate Board sent Doe and Roe back to the Hearing Board where they:
  - Were given an opportunity to listen to a recording of the hearing.
  - Were given an hour to submit questions.
  - Had their questions considered by the Hearing Board.

# ***DOE V. UNIV. OF DAYTON***

**NO. 18-3339 (6TH CIR. MAR. 15, 2019).**



## **Facts**

- The Hearing Board found that none of those questions would have changed the outcome of the hearing.
- The Appellate Board upheld the Hearing Board's decision.
- Doe sued for defamation, breach of contract, negligence, and Title IX violations.

## Decision

- The 6<sup>th</sup> Circuit dismissed all of Doe's claims.
- Public policy requires that sexual assault victims have the ability to share details with those who can help them.
  - Telling friends, without broader publication is not defamation.
- Prohibiting students from directly cross-examining others -**not** a due process violation.
- Doe failed to plead facts sufficient to indicate Dayton deviated from its policies or procedures.
- Doe failed to plead any facts that indicated gender bias or that Dayton treated females more favorably than males.



## Takeaways

- Clearly articulate parties' rights - in writing.
  - Court favored comprehensiveness of ATIXA's model "Notice of Investigation."
- Errors found during an appeal should be referred back to Hearing Board/Decision-Makers – not adjusted by Appeals Officer/Board.
  - When error is immaterial, finding should be upheld.
- Remedies for errors should be applied equitably.
  - Both Doe and Roe had opportunity to submit questions.

# ***JOHN DOE v. U. OF SOUTHERN MISSISSIPPI***

## **S.D. MISS. (NOV. 27, 2018)**



- In July 2018, John Doe, a scholarship athlete, was accused of sexual misconduct
- The University conducted an investigation and sent Doe a summary of the interviews, requesting a response
- Doe did not respond and was subsequently found responsible and suspended for one year
- In September, he successfully filed for an injunction, prohibiting the University from implementing the sanction
  - He cited the draft, leaked regs as entitling him to more due process than the University provided him → Court rejected that claim
  - However, Court had concerns about the process, reinstated Doe as a student and a scholarship athlete.

# ***JOHN DOE v. U. OF SOUTHERN MISSISSIPPI***

## **S.D. MISS. (NOV. 27, 2018)**



- University conducted a new hearing under substantially revised and enhanced procedures:
  - University updated based on Doe v. Cincinnati and U. of Miss. caselaw
  - Each party provided a separate room to observe entire proceedings
  - Advisors (as well as any attorneys) were allowed to observe too
  - Parties could request a digital recording of the hearing
  - Parties received written summaries of evidence and provided an opportunity for review and respond
  - Parties could email follow-up questions to hearing panel, who would ask the questions, or reject a question at their discretion.

# **JOHN DOE v. U. OF SOUTHERN MISSISSIPPI**

## **S.D. MISS. (NOV. 27, 2018)**



- Doe filed a second injunction, citing the Proposed Regs. and the 6<sup>th</sup> Circuit's *Baum* decision
  - Argued the inability to be in-person during questioning limited ability to determine credibility
  - Argued that the Hearing Panel's ability to reject certain questions limited ability to cross-examine
- Court denied the injunction request, stating that the revised procedures “appear to adequately satisfy due process”

# JOHN DOE v. U. OF SOUTHERN MISSISSIPPI

## S.D. MISS. (NOV. 27, 2018)



- Court's decision
  - *Baum* went “well beyond what was required” and declined to decide the current case consistent with *Baum*
  - University's revised procedures were consistent with *Doe v. Cincinnati*, which required the decision-maker to see the parties
  - Extensively analyzed 6<sup>th</sup> Circuit's overreach in *Baum*
  - *Due process does not require asking ALL questions posed by the parties*
  - Rejected Proposed Regs argument
    - “[T]here is no guarantee, or even probability, that the proposed regulations will be adopted wholesale as proposed.”
    - “[I]t is not the federal agency's role to determine what constitutes adequate due process—such a determination remains the role of the courts.”

# JOHN DOE v. U. OF SOUTHERN MISSISSIPPI

S.D. MISS. (NOV. 27, 2018)



## • Key Takeaways

- Splits with the *Doe v. Baum* decision, citing *Baum*'s overreach
- Recognizes greater flexibility of due process in a school setting
- Credibility does not require physical presence, as long as decision-maker can see them
- Failure of injunction to require the University to wait for the Proposed Regs to be finalized likely chilled other similar injunctions
- Highlights possible Ultra Vires actions by Dept. of Ed.

# THE RISE OF THE WRIT OF ADMINISTRATIVE MANDAMUS



## Writ of Administrative Mandamus

- The writ is used to obtain judicial review of agency (public and private) decisions and actions.
- A writ of mandamus requires:
  - A final agency decision.
  - The decision resulted from a proceeding which was required by law.
  - Evidence was required to be taken.
  - Discretion in factual determinations is vested within the agency.
  - “Agency” can mean both governmental and private organizations.
- State courts, particularly in California, are allowing John Does to use the administrative tool of a writ of mandamus to overturn institution’s decisions.

## Facts

- Jane Roe and John Doe attended a “paint” party, which involved throwing paint at each other.
- After the party, Doe accompanied Roe back to her apartment. According to Roe, Doe then engaged in nonconsensual vaginal and anal assault.
- The next day, Roe visited a rape treatment center and spoke with local police.
- After Roe reported the interaction to the university on April 30, 2014, Dr. Kegan Allee, who was both the investigator and adjudicator in the matter, began investigating.



## **Facts**

- In May, an outside attorney replaced Dr. Allee as the investigator. The attorney interviewed several critical witnesses, but when the matter was transferred back to Dr. Allee on June 5, Dr. Allee did not re-interview these individuals.
- In August, Dr. Allee determined that Doe knew or should have known that Roe was too drunk to consent to the sexual interaction. Dr. Allee noted that although Roe could not remember much of the evening, Roe had reconstructed the events after speaking with three witnesses.
- In her determination, Dr. Allee assessed the credibility of these other witnesses and determined they were not “sufficiently reliable.”
- Doe was expelled from USC. Although he appealed on several bases, the university denied his appeal.

## Facts

- Doe petitioned for a writ of mandamus to set aside his expulsion, asserting procedural and substantive challenges.
  - Doe asserted that USC's findings were not supported by substantial evidence and the investigation was unfair.
  - Doe stated that USC did not provide him with a fair hearing or an independent adjudicator.
  - He pointed primarily to the facts that he was unable to cross-examine witnesses, had to rely on Dr. Allee, and Dr. Allee did not interview the three central witnesses, but instead relied on interview summaries by the outside investigator.
- The trial court denied his petition.

## Decision

- Court of appeals reversed the trial court's decision.
- Because Dr. Allee's investigative report and adjudication turned on witness credibility, Dr. Allee should have interviewed all critical witnesses either in person or by videoconference to observe interviewees.
  - Especially important here, when significant inconsistencies existed and dispute re: whether substances observed in Roe's apartment after sexual encounter were blood or paint from the party.
- Additionally, USC did not comply with its own procedures to conduct a fair and thorough investigation by failing to request that Jane provide her clothes from the incident and her consent to release her medical records from the rape treatment center.

## Takeaways

- When investigations turn on credibility (as many do), the finder of fact needs to be able to observe the witnesses' demeanor to appropriately render determinations of credibility.
- Relying on another individual's report(s) is simply insufficient, according to the court.
- When you are aware that evidence exists or may exist, ask for it!
  - Asking for all relevant evidence (such as clothes or medical reports that have been discussed during the interviews) is vital to ensuring that you are conducting a thorough investigation.
  - Court made it quite clear that even though Roe may have refused consent to disclose her medical records from the rape treatment center, the university was still obligated to request it.
- Although there is no obligation for a party to provide it, your institution may come under significant scrutiny for failing to follow up on potentially probative evidence.

# **DOE V. ALLEE**

**B283406 (CAL. APP. 2<sup>ND</sup>, 2019), JANUARY 4, 2019.**



## **Facts**

- John Doe, a student-athlete, was accused of non-consensual sexual acts stemming from an incident with Jane Roe, an athletic trainer.
- After drinking earlier in the evening, Roe went to Doe's apartment to smoke marijuana. Roe reported that Doe pushed himself on her, held her hand down, pulled her hair, put his hand over her mouth, and engaged in intercourse.
- Doe reported it was consensual and cited her moans and facial expressions as evidence that she was actively participating and enjoying the interaction.
- In an investigative interview, Doe described a previous sexual encounter with Roe during which Doe "fingered" Roe. Roe did not initially remember the encounter and became visibly upset when an investigator shared that Doe reported digitally penetrating her.

# **DOE V. ALLEE**

**B283406 (CAL. APP. 2<sup>ND</sup>, 2019), JANUARY 4, 2019.**



## **Facts**

- USC began an investigation into Roe's original allegations and added the additional encounter Doe reported in his interview.
- Doe suggested that Roe fabricated the allegations so she wouldn't be fired as an athletic trainer. The investigator did not pursue this theory.
- The investigator also disregarded testimony that Roe had been disciplined for having sex with a football player and had signed an agreement not to do so in the future.
- Doe was found responsible for non-consensual sexual acts stemming from the initial reported incident and was found not responsible for the additional incident. His expulsion was upheld.

# **DOE V. ALLEE**

**B283406 (CAL. APP. 2<sup>ND</sup>, 2019), JANUARY 4, 2019.**



## **Holding**

- Superior court upheld USC's action and Doe appealed. While appeal was pending, Doe was expelled from USC for unrelated conduct code violations.
- Appeals court vacated USC's findings against Doe on several grounds:
  - If credibility is a central issue and potential sanctions are severe, fundamental fairness requires a hearing, with cross-examination, before a neutral adjudicator with power to independently judge credibility and find facts.
  - Fundamental fairness dictates the factfinder cannot be a single individual with divided and inconsistent roles.
  - The investigator should fully explore theories that may shine light on credibility of a witness and not solely rely on the parties' lists to identify witnesses.

# **DOE V. ALLEE**

**B283406 (CAL. APP. 2<sup>ND</sup>, 2019), JANUARY 4, 2019.**



## **Takeaways**

- Consider the levels of checks and balances present in your process and make sure there is a decision-maker who is at least one step removed from the investigator.
  - USC’s system placed a “single individual in the overlapping and inconsistent roles of investigator, prosecutor, fact-finder, and sentencer.”
  - The investigator here had “unfettered discretion” to determine what evidence to consider, which witnesses to interview, and what determination and sanction to impose.
- A thorough investigation will likely result in additional witnesses which should be interviewed to ensure a complete review of all available evidence.
- The investigator should fully explore all theories that may shine light on the credibility of the parties.



# ***DOE V. WESTMONT COLLEGE***

2D CIV. NO. B287799 (CAL. CT. APP. 2019), FILED 4/23/2019.



## **Facts**

- The trial court issued a writ of administrative mandate requiring Westmont to conduct another hearing, with conditions:
  - Doe must be able to hear the evidence presented against him in a manner that allows him opportunity to reasonably respond.
  - Doe must be able to at least indirectly question witnesses.
  - The investigator may not serve as the adjudicator.

# ***DOE V. WESTMONT COLLEGE***

2D CIV. NO. B287799 (CAL. CT. APP. 2019), FILED 4/23/2019.



## **Decision**

- The appellate court held that Westmont failed to provide Doe with an opportunity to respond to all witness testimony.
- The Hearing Board did not interview all of Doe's witness nor hear direct testimony from many of Roe's witnesses.
  - The Hearing Board did however rely on Roe's witnesses statements for credibility purposes and to contradict Doe.
- The appellate court upheld the trial court's writ, with the exception of allowing the investigator to serve as an adjudicator so long as Doe was provided a fair hearing.

# ***DOE V. WESTMONT COLLEGE***

2D CIV. NO. B287799 (CAL. CT. APP. 2019), FILED 4/23/2019.



## **Takeaways**

- Courts are increasingly using the writ of administrative mandate as a tool to respond to unfair hearings.
- A fair hearing, particularly one that turns on witness credibility requires institutions to follow their own policies and procedures and provide the responding party student with a hearing before a neutral adjudicator.
- The responding party must be provided a list of all witnesses and a summary and the facts to which they will testify.
- The parties and critical witnesses must appear before the Hearing Board - in person or by video conference.

# LEE v. UNIVERSITY OF NEW MEXICO

## U.S. DIST. CT., DISTRICT OF NEW MEXICO

(SEPT. 20, 2018)



- UNM student, J. Lee was found responsible for sexual misconduct and expelled from UNM.
- Lee sued under Title IX, Breach of Contract, violation of due process, gender discrimination, and violation of NM Constitution.
- Due process claims survived a motion to dismiss
  - UNM provided an evidentiary hearing for non-sexual misconduct related resolutions, but not for sexual misconduct
  - UNM failed to properly inform Lee of all of the allegations (underage drinking)
- The court stated an ***investigation that relies on credibility requires a formal or evidentiary hearing including cross-examination of witnesses and presentation of evidence to preserve basic fairness.***

# **LEE v. UNIVERSITY OF NEW MEXICO**

## **U.S. DIST. CT., DISTRICT OF NEW MEXICO**

**(SEPT. 20, 2018)**



- Court stated that preponderance of the evidence standard is inappropriate where serious sanctions are possible, including expulsion and permanent transcript notation.
  - This is the first ruling to explicitly hold that the preponderance standard is constitutionally improper.
  - Favorably cited in the DOE’s proposed Title IX regulations to justify assertion that preponderance is inadequate “where the consequences of a finding of responsibility would be significant, permanent, and far-reaching.”  
(<https://www.federalregister.gov/d/2018-25314/p-142>)
- This decision falls in line with the 6<sup>th</sup> Circuit decision *Doe v. Cincinnati* relating to a formal evidentiary hearing when credibility is at issue and serious sanctions are possible.

# ***DOE v. SYRACUSE UNIVERSITY***

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Facts**

- Doe and Roe met at a bar, initially with a group of friends.
- Roe invited Doe back to her dorm, where they began to kiss.
- She performed what he believed to be consensual oral sex.
- She asked her roommates to leave and they had vaginal intercourse in her bedroom.
- They exchanged several texts over the next few days.
- Several days later they had drinks and went to a local restaurant together.

# ***DOE v. SYRACUSE UNIVERSITY***

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Facts**

- Four days later, Doe heard a rumor that he had done “unspeakable things” to Roe.
- Doe avoided Roe.
- Two months later, she brought a formal complaint for alleged sexual misconduct.
- She alleged that the oral sex was non-consensual, that she withdrew consent prior to the vaginal sex, and that he had engaged in non-consensual anal sex.
- Syracuse appointed an internal investigator.

# ***DOE v. SYRACUSE UNIVERSITY***

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



## **Doe's Allegations Regarding the Investigation**

- Doe's original notice did not provide any details of the allegations.
- Learned that Roe's allegations had changed over time.
  - At first she reported that the vaginal sex was consensual, but in a later interview she claimed that she had withdrawn consent during the sex.
- Claimed that the investigator was not neutral and impartial because of his extensive background with victims of sexual assault.
- Investigator characterized Roe's testimony as "consistent" despite the inconsistencies.
- Doe told the investigator that Roe was giving different accounts of what had happened to different people on campus.
  - Investigator only interviewed Roe once and did not investigate the issues Doe raised as to Roe's credibility.



# ***DOE v. SYRACUSE UNIVERSITY***

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



## **• Doe's Allegations Regarding the Investigation**

- Investigator did not provide Doe with all of Roe's submitted evidence.
  - Letter from a nurse that relayed Roe's own report of the incident and reports of vaginal bleeding.
  - However, in the investigation she reported anal bleeding.
- Investigator did not allow Doe to respond to all of Roe's evidence before it was provided to the Conduct Board.
  - Doe did not have an opportunity to show the inconsistencies in Roe's story.
- Doe did not know the identities of the other witnesses.
- Investigator's report characterizes her account as fully plausible and credible, despite witness testimony regarding the interactions between Roe and Doe, including her roommates who were present on the night in question.

# ***DOE v. SYRACUSE UNIVERSITY***

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Doe's Allegations Regarding the Hearing and Decision**

- Doe and Roe each appeared separately at the Conduct Board hearing.
- The investigator did not testify nor did any witnesses.
- Doe had no opportunity to question Roe nor any witnesses.
- Her interview was not recorded, despite SU policy.
- Board found credible her claim of withdrawn consent during vaginal sex.
  - “[Her] actions are consistent with a traumatic event such as she described in her statement.”
- Indefinitely suspended for one year or until Roe graduates.

# ***DOE v. SYRACUSE UNIVERSITY***

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Doe's Allegations Regarding the Appeal Process**

- Appealed even though he had not yet received a transcript of the hearing that he had requested.
  - The transcript did not include Roe's testimony or questions asked of her due to the "technical difficulties" with the recording.
- Appeals Board upheld the decision and rejected his procedural and substantive challenges to the investigation, hearing, and decision.

# ***DOE v. SYRACUSE UNIVERSITY***

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



## **• Court's Analysis**

- Doe's allegations here are enough to “cast an articulable doubt” on the outcome of his case, including ample allegations of gender bias.
- Court points to several of Doe's allegations raising significant questions about Roe's credibility.
- Syracuse officials, including the investigator and the adjudicators, did seem to be influenced by “trauma-informed investigation and adjudication processes.”

# ***DOE v. SYRACUSE UNIVERSITY***

U.S. DIST. CT., N.D.N.Y. (MAY 8, 2019)



- **Takeaways**

- Trauma-informed processes have a place in investigations, not hearings.
- Trauma-informed processes cannot be a substitute for credibility analyses.
- Responding party should:
  - Have access to all evidence that will be seen by the adjudicators.
  - Have an opportunity to raise credibility issues regarding the reporting party and all witnesses.
  - Have an opportunity to raise questions/concerns about the investigator.

# TITLE IX, DELIBERATE INDIFFERENCE, NOTICE, & HAZING

—

Doe v. Hamilton County Board of Education

## Facts

- Doe and Roe, freshmen members of the varsity basketball squad, traveled with the team to Gatlinburg, TN for a tournament and stayed together in a cabin for four days and nights.
- During the trip, Doe and Roe were hazed and sexually assaulted. Teammates used billiard sticks to penetrate their anuses and yelled, “don’t be a pussy” and “take it like a man.”
- Prior to the trip, upperclassmen hazed freshman by “racking,” which consisted of upperclassmen beating freshman players with the lights out.
  - More than once, their coach walked into the locker room during this conduct; he told the students to “knock off the horseplay” and turned on the lights.

## Facts

- In Gatlinburg, upperclassmen prodded Doe's anus so hard over his clothes that the fabric ripped and the billiard stick directly penetrated his anus.
- Doe was hospitalized with a perforated rectum and bladder and had to undergo emergency surgery. His recovery took months. Doe never returned to the school.
- Roe returned to school but was subjected to harassment from his assailant's friends and transferred to another school.
- Roe and Doe sued the school, teachers, and administrators for Title IX, § 1983, and state tort law claims.



## Holding

- The court found the school had control over both the harasser(s) and the context in which the conduct occurred.
- The trip was organized by the school and its purpose was to promote the team and facilitate its competition in a tournament.
- Court assessed “constellation of surrounding circumstances” including, but not limited to, comments made by the harassers during the assault.

## Holding

- Court found that a jury could reasonably infer the assault was motivated by the victims' gender and the harassment at issue was "so severe, pervasive, and objectively unreasonable...that it undermined and detracted from the victims' educational experience" and the students were effectively denied equal access to the school's resources and opportunities.
- Court cited Doe's lengthy hospitalization and recovery which prevented him from attending school and participating in basketball.
- For Roe, the court referenced how he felt he had to transfer after the incident due to the harassment he faced from other students.

## Holding

- The Court determined that the team's head coach, who was also a teacher and acted as a caretaker and guardian of the students on the Gatlinburg trip was an "appropriate person" under *Gebser*.
- The Court determined that a reasonable factfinder could find that the coach had actual knowledge of the conduct.
  - The Court referenced the coach's acknowledgment that he could hear the students' conversations through the cabin's thin walls. The attacks occurred daily, during which upperclassmen yelled at the freshmen, and multiple individuals screamed.

## Holding

- Because a jury could reasonably determine that the coach had actual knowledge, the school may have acted with deliberate indifference *prior* to the assault.
- The Court found that because the school acted swiftly to separate the harassers and discipline them, it did *not* act with deliberate indifference *after* the assault.
- The Court dismissed the §1983 claims against individuals and declined jurisdiction on the state tort claims.
- The Court did, however, find that the school officials may be liable under §1983 for failure to adequately train employees and staff.

## Takeaways

- For Title IX to apply, conduct must discriminate on basis of sex. Hazing may or may not be based on sex -- careful assessment of conduct is needed to determine whether it falls under the Title IX umbrella.
- Although certainly fact-specific, coaches and staff, while traveling for games and tournaments, who know or should know of sexual harassment will likely be considered to have put the school on actual notice of the conduct.
- Training specific to groups where harassment may be prevalent through hazing activities (Greek, Sport, Band, etc.) is recommended.
- Schools must properly train their Title IX Coordinators and those who may be considered “appropriate persons” per *Gebser*. Failure to report conduct up the chain will leave schools and school officials open to significant legal liability, including under §1983.



# OCR-COMPLIANT PROCEDURES

Minneapolis, MN | June 2019

# LAWS, COURTS, AND REGULATIONS



- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by Courts and OCR
  - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
    - Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2001 Guidance)
    - Sub-Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2011 DCL)
- Federal Caselaw – **Force of law** based on jurisdiction
  - Supreme Court – binding on entire country
  - Circuit Courts of Appeal – binding on Circuit
  - District Court – binding on District
- State caselaw – **Force of law**; binding only in that state based on court jurisdiction



# STAY ABOVE THE FLOOR



- Law, Caselaw and Federal Regulations set the floor
  - OCR Guidance typically elevates the floor
  - States can pass laws that exceed federal requirements (e.g.: NY's "Enough is Enough" law)
- Regressing to the floor = doing the bare minimum
  - Will continue the cycle of inequity and unfairness
- Civil Rights issues demand more than bare minimum
- Industry standards already exceed the floor
  - Regression to the floor increases risk of lawsuit and negligence-based liability



# INDUSTRY STANDARDS



- The field has adopted numerous practices and created industry standards that exceed basic requirements
- Standards stem from Student Services/Affairs, HR, Legal Affairs, OCR Guidance, Courts, Law, Professional Associations
- ATIXA's policy and procedure model – 1P1P – encompasses industry standards
- ATIXA's publications and resources provide guidance where government does not

# OVERVIEW OF PROPOSED REGULATIONS



- November 29, 2018: OCR published proposed amendments to Title IX regulations:
  - Provided 60 days for public comment – open until January 28th
  - OCR will then review comments and finalize the regulations
  - OCR has to respond materially to comments
  - Will amend the Code of Federal Regulations
  - **Will have the force of law once adopted**
  - Proposed amendments are significant, legalistic, and very due process-heavy
  - Will likely go into effect 30 days after final regulations published in Federal Register

# INTERVENING VARIABLES



- Congress and a newly-installed Democratic House and Committees
- Title IX has become a political football
- Lawsuits & injunctions by:
  - Parties
  - States: Attorneys General
  - Possible enforcement injunctions by Federal judges
- Conflicts between proposed regulations and state laws (e.g.: CA and NY)
- Campus/school protests
- Public perception

# DUE PROCESS CASELAW



- The pro-reporting party imbalance prompted hundreds of lawsuits by responding parties
  - Wave of John Doe cases with unfavorable findings toward schools
  - Rise in lawsuits alleging selective enforcement, negligence, deliberate indifference, etc.
- Courts began requiring heightened levels of due process
- Sixth Circuit leads this revolt
- Trump-era OCR shifting imbalance back toward responding parties, using courts and due process as their rationale
- Balance will not result from proposed new regulations

# DELIBERATE INDIFFERENCE STANDARD



- In *Gebser* (1998) and *Davis* (1999), the Supreme Court held that a funding recipient is liable under Title IX for deliberate indifference **only** if:
  - The alleged incident occurred where the funding recipient controlled both the harasser and the context of the harassment;  
AND
  - Where the funding recipient received:
    - Actual Notice
    - To a person with the authority to take corrective action
    - Failed to respond in a manner that was clearly unreasonable in light of known circumstances
- OCR has historically used a broader, less stringent standard

# “NOT DELIBERATELY INDIFFERENT”



- Safe Harbors in the Proposed 2019 Regulations:
  - If the school follows procedures (including implementing any appropriate remedy as required), then not deliberately indifferent.
  - If reports by multiple complainants of conduct by the same respondent, Title IX Coordinator must file a formal complaint. If the school follows procedures (including implementing any appropriate remedy as required), not deliberately indifferent.
  - For IHEs, if no formal complaint and school offers and implements supportive measures designed to effectively restore or preserve the reporting party's access, not deliberately indifferent. Must inform reporting party of right to file formal complaint later.
  - No deliberate indifference merely because OCR would come to different determination based on the evidence. Biases process?

# NOTICE, JURISDICTION, & DELIBERATE INDIFFERENCE

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# NOTICE TO THE INSTITUTION



- Proposed regulations would not require a Title IX investigation unless the institution receives actual notice through a “formal complaint”:
  - Actual notice defined as:
    - The reporting party filing a formal, written, signed complaint with TIX Coordinator; or
    - The TIXC may file a formal written complaint on behalf of reporting party
      - Conflict of Interest? Impartiality concern?
  - Eliminates OCR’s constructive notice standard
  - What to do if institution receives notice in some other way?
    - Industry standards



# RESPONSIBLE EMPLOYEE SHIFTING?



- Currently, a **responsible employee** includes any employee who:
  - Has the authority to take action to redress the harassment; or
  - Has the duty to report harassment or other types of misconduct to appropriate officials; or
  - Someone a student could reasonably believe has this authority or responsibility;

# RESPONSIBLE EMPLOYEES?



- Proposed regulations shift “actual notice” to:
  - Anyone who has the authority to take action to redress the harassment
  - All pre-K-12 teachers when conduct is student-on-student
- This is ONLY the standard for when OCR would deem a school to be on notice; it is the floor.
- ATIXA has not changed its recommendation to require all non-confidential employees to report harassment or discrimination
- Continue to train employees on obligation to report

- Jurisdiction
  - *Davis* standard – control over the harasser and the context of the harassment
  - “occurs within its education program or activity”
- Geography should not be conflated with the Clery Act – education programs or activities can be off-campus, online
- Proposed regulations specify “harassment...against a person in the United States”
  - Unclear effect on study abroad programs or school-sponsored international trips – “nothing in the proposed regulations would prevent...”
- Open question of student/employee harassment of non-student/employee

- Current requirement to address on-campus effects of off-campus misconduct
  - Even if conduct took place outside education program or activity, schools responsible for addressing effects that manifest in the program/activity
  - Students and/or employee conduct outside program, IPV
- Leaked draft of regulations prior to publication indicated schools “are not responsible” for exclusively off-campus conduct but could be responsible for on-going on-campus /in program effects
- Published proposal eliminated this comment, presume *Davis* standard still applies – “nothing in the proposed regulations would prevent...”

# DEFINITIONS

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# DEFINITIONS: SEXUAL HARASSMENT



- Current OCR Definition of Sexual Harassment is “unwelcome conduct of a sexual nature”
  - Includes quid pro quo “requests for sexual favors”
  - When sexual harassment constitutes sex discrimination by causing a hostile environment (discriminatory effect), prohibited by Title IX
- Proposed regulations
  - Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (QpQ)
  - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity (HE)
  - Sexual assault, as defined in 34 CFR 668.46(a)
- No mention of retaliatory harassment in proposed regs

# DEFINITIONS: SEXUAL HARASSMENT



- ATIXA model definitions

- *Quid pro quo* sexual harassment

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature by a person having power or authority over another when submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating, evaluating, or providing a benefit to an individual's educational or employment development or performance.

- *Hostile environment* sexual harassment

Unwelcome sexual, sex-based and/or gender-based verbal, written, online and/or physical conduct that is severe, or persistent or pervasive, and objectively offensive, such that it unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the institution's education or employment programs.

# DEFINITIONS: SEXUAL HARASSMENT



- ATIXA model definitions (cont.)
  - *Retaliatory* sexual harassment  
When adverse action required by the definition of retaliation takes the form of harassment, the conduct can be both sexual harassment and retaliation. It is also possible that retaliatory actions can take the form of hostile environment harassment.
- Proposed regulations written around a recipient's obligation to respond to sexual harassment
  - Conflate "sexual harassment" with "hostile environment"
- Neglect element of substantial harm within QpQ harassment
- "Unwelcome conduct" lower standard than "hostile environment"



# DEFINITIONS: SEXUAL HARASSMENT



- Confusion regarding “hostile environment” remains
  - Proposed regulations adopt problematic *Davis* definition:
    - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive...
  - Vulnerable to interpretation that conduct must be pervasive **and** severe
  - Neglects the difference between persistent and pervasive
- Industry standard aligns with Title VII caselaw & provides clearer standard
  - Unwelcome *sexual* conduct, *or conduct* on the basis of sex, that is so severe *or* pervasive (*or* persistent) **and** objectively offensive...

# DEFINITIONS: NOTICE



- “Notice” is the benchmark indicating when an institution is required to stop, prevent, and remedy
- Current OCR definition of notice – “knew or should reasonably have known”
  - Incorporates both actual and constructive notice
- Proposed regulations restrict to actual notice exclusively
  - *Actual knowledge* means notice to Title IX Coordinator or any official with authority to institute corrective measures
  - *Respondeat superior* or constructive notice insufficient
  - PK-12 teachers are “officials” – post-secondary faculty are not
  - Mere ability or obligation to report does not qualify as “official”

DUE PROCESS

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# DUE PROCESS OVERVIEW



- Proposed regulations place heavy emphasis on due process protections for the responding party
- New standard of proof mandates
- Notice at various investigation stages
- Collection and production of evidence for review
- Mandate for determination and sanction process
- Live hearings with cross-examination
- Schools provide advisor; must allow advisor questioning of parties/witnesses

# STANDARD OF PROOF

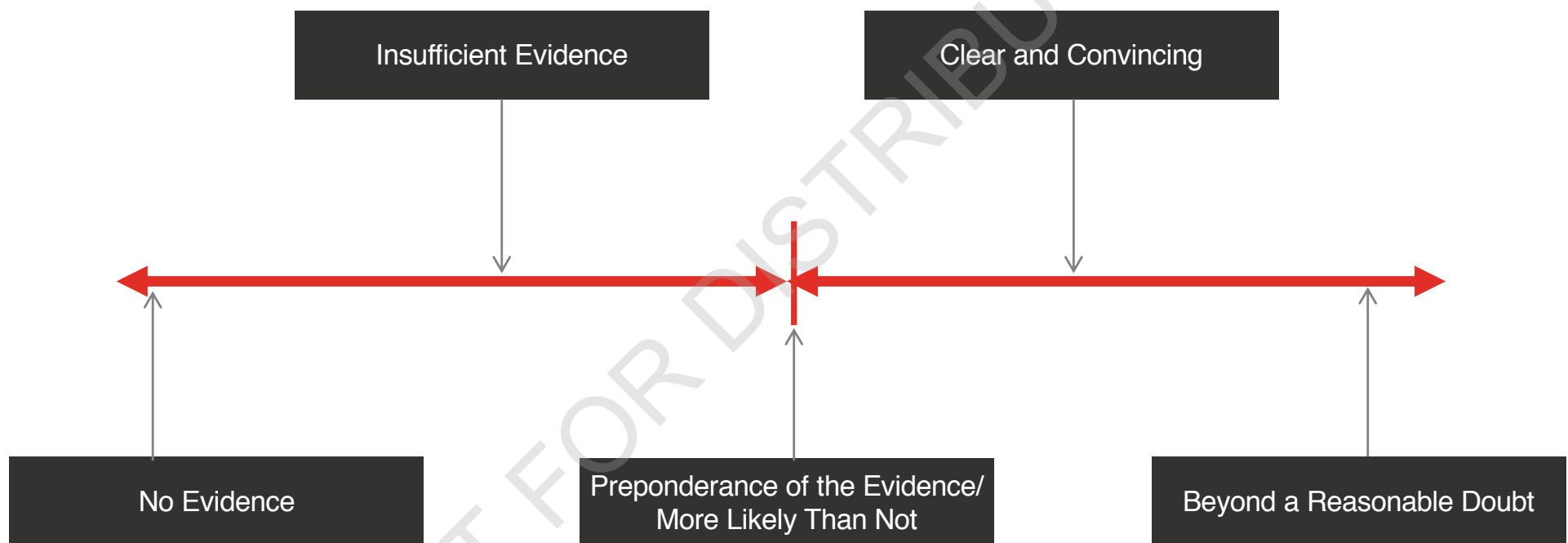


- Current OCR standard – preponderance of the evidence is standard civil court will use to evaluate school's response
- Proposed regulations allow preponderance only if same for other conduct code violations, otherwise must use clear & convincing
- Effectively mandates clear & convincing for schools with higher standards for other proceedings (i.e. AAUP faculty hearings)
- May create incongruence between school process and court scrutiny (where preponderance will still be the standard)
- ATIXA position – preponderance only equitable standard

# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



# PROMPT



- Proposed regulations specify “prompt timeframes” written into grievance procedures
- Temporary delays only allowable for “good cause” and with written notice of the delay to parties
- OCR does not appear to contemplate reasonable delays at the earliest points of an investigation
- Responding party may not yet know of investigation or allegations
  - written notice of delay may be first indication

# WRITTEN, DETAILED NOTICE



- Proposed regulations require several written, detailed notices to the parties
  - Any reasonable delay for good cause
  - Upon receipt of a formal complaint
    - Sufficient details – identity of parties, alleged violations, date, location
    - Sufficient time to prepare a response
  - Informal process requirements, if applicable
  - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare
  - Upon determination of responsibility, including sanctions
- Notice requirements may affect industry standard investigative practices
- *Doe v. Timothy P. White, et. al.,* (2018)



# INFORMAL RESOLUTION OPTIONS



- Proposed regulations allow informal resolution at any time prior to a final determination, at discretion of TIXC
  - Requires detailed notice to the parties
  - Allegations
  - Requirements of the process
  - Circumstances which would preclude formal resolution
  - Consequences of participation
  - Obtain voluntary, written consent
- Does not preclude certain offenses from informal resolution
- May restrict restorative practices after a determination

# SUPPORTIVE MEASURES



- Non-disciplinary, non-punitive individualized services
- Must not unreasonably burden other parties
- Proposed regulations address mutual restrictions, neglect unilateral or individualized restrictions
- Appears to anticipate, but also prohibit, that one party will sometimes be restricted more than the other
- May chill reporting if automatic mutual restrictions limit access to education program

# BURDEN OF PROOF ON FUNDING RECIPIENT TO GATHER EVIDENCE



- Burden of proof and burden of gathering evidence on the school, not the parties
- “Sufficient to reach a determination” = appropriately thorough?
- Unclear if all relevant evidence must be collected
- Parties may be able to request certain evidence be obtained
- Evidence collected by law enforcement is admissible
- Who determines what evidence is relevant and sufficient?

# “PRESUMPTION OF INNOCENCE”



- Proposed regulations require published grievance procedures include a presumption of innocence for the responding party
- No change from effective procedures – determination has always been based on evidence
- Presumption is a legal framework, may create inequity
- Unclear how presumption will work procedurally
- Should there be an equitable presumption that the reporting party is telling the truth?

# CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS



- Existing mandate for impartial resolutions with fair procedures
- Proposed regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party
- Training mandates apply to PK-12 as well as higher ed
- Unclear how prohibition of bias against reporting/responding parties establishes equity under Title IX or falls within OCR's statutory authority
- Due process mandate does not distinguish public v. private

# INVESTIGATION AND RESOLUTION MODELS



- Treatment of reporting/responding parties may constitute discrimination
- The end of the single investigator model – live hearing required for all postsecondary resolution proceedings
- Must allow advisor to be present at all meetings, interviews, hearings
- If no advisor, school must provide one
- Statutory authority exceeded with procedural mandates?

# PROVIDING PARTIES WITH COPIES OF ALL EVIDENCE



- All relevant evidence considered – inculpatory and exculpatory
- No restriction on discussing case or gathering evidence
- Equal opportunity to inspect all evidence, including evidence not used to support determination
- May chill reporting if irrelevant information must be provided to either party
- Unclear at what point in process evidence must be provided
- No limits on types/amount of evidence offered
- Creates possible equitable limits on evidence for both parties

# PROVIDING COPIES OF INVESTIGATION REPORT FOR REVIEW AND COMMENT



- Proposed regulations mandate creation of an investigation report
- Must fairly summarize all relevant evidence
- Provided to parties at least 10 days before hearing or other determination
- Parties may review and submit written responses to report
- Unclear if analysis (including credibility) and findings of fact should be included
- Unclear if a full report or a summary is required



# LIVE HEARING



- Proposed regulations mandate live hearing for postsecondary institutions, optional for PK-12
- Parties must attend hearing, otherwise all testimony submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator or the investigator
- Must allow live cross-examination to be conducted exclusively by each party's advisor (separate rooms still allowed)
- Unclear how irrelevant questions will be screened, but rationale for excluding questions required (verbal or written?)

# ADVISORS



- Advisor can be anyone – no restrictions in proposed regulations
- If a party does not have an advisor to conduct cross-examination, the school must provide one
- Advisor must be “aligned with the party”
  - “Defense” and “prosecution” advisors?
- No prior training required, no mandate for school to train
- ED presumes no financial impact because all parties retain counsel; not at institutional expense
- Mandate for higher education only – PK-12 may still conduct indirect cross-examination through hearing administrator

# APPEALS



- If schools offer appeals (not required), must be made available equitably
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to all parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

# IMPACT ON EMPLOYEES



- Proposed regulations often refer exclusively to “students,” but employees are also affected
- Tenured faculty cross-examining students at a live hearing
- Faculty found responsible – sanctions affirmed by committee?
- Union employees – diminished right to an advisor because of union representation?
- Extensive due process protections for at-will employees accused of misconduct
- Potential inequity in employee processes for Title VII-based sexual harassment
  - More due process for sex discrimination than race discrimination

# OTHER ELEMENTS IN THE PROPOSED REGS



- Remedial action required by OCR for noncompliance with Title IX will not include money damages
  - OCR clarifies that reimbursements or compensation do not fall within the meaning of this provision
- Institutions may presume religious exemption
  - If under OCR investigation, may then be required to submit exemption justification in writing
  - Allows institutions to avoid public assertion of exemption from certain civil rights protections
  - Problematic for students/employees who deserve to know if certain protections are not honored at their institution

# OTHER ELEMENTS IN THE PROPOSED REGS



- Statement that proposed regulations do not restrict or deprive rights under the First, Fifth, and Fourteenth Amendments, FERPA, the Clery Act, or Title VII of the Civil Rights Act.
  - Clery/VAWA and FERPA considerations?
  - Clery Act provisions do not apply to PK-12 – the proposed regulations extend many Clery Act requirements to PK-12

# OPERATING OUTSIDE THE TIX FRAMEWORK



- *Ultra vires?*

- Require signed formal complaint rather than actual notice
- Prescribed standard of evidence for Title IX procedures
- Mandated standard of proof for other conduct procedures
- Extension of Clery/VAWA definitions and requirements to PK-12
- Require live hearings for Title VII sexual harassment procedures
- Individualized safety and risk analysis prior to interim suspension on an “emergency basis”
- Treatment of responding party may constitute discrimination
- Regulation of due process elements in internal procedures – blanket application to public and private institutions
- Notice requirement upon receipt of formal complaint
- Mandatory live hearing at public and private higher education institutions
- Recordkeeping requirements

# CASE STUDY: SEXUAL ASSAULT



- [Jane Doe] is not a Steubenville High student; she attended a smaller, religion-based school, where she was an honor student and an athlete.
- At the parties, [Jane Doe] had so much to drink that she was unable to recall much from that night, and nothing past midnight, the police said. The girl began drinking early on, according to an account that the police pieced together from witnesses, including two of the three Steubenville High athletes who testified in court in October. By 10 or 10:30 that night, it was clear that the dark-haired teenager was drunk because she was stumbling and slurring her words, witnesses testified.

Source: New York Times, "Rape Case Unfolds on Web and Splits City", Dec. 16, 2012



# CASE STUDY: SEXUAL ASSAULT



- [Jane Doe] woke up long enough to vomit in the street, a witness said, and she remained there alone for several minutes with her top off. Another witness said [two football players] Mays and Richmond were holding her hair back.
- Afterward, they headed to the home of one football player who has now become a witness for the prosecution. That player told the police that he was in the back seat of his Volkswagen Jetta with Mays and the girl when Mays proceeded to flash [Jane Doe]’s breasts and penetrate her with his fingers, while the player videotaped it on his phone. The player, who shared the video with at least one person, testified that he videotaped Mays and the girl “because he was being stupid, not making the right choices.” He said he later deleted the recording.

Source: New York Times, “Rape Case Unfolds on Web and Splits City”, Dec. 16, 2012

# CASE STUDY: SEXUAL ASSAULT



- [Jane Doe] “was just sitting there, not really doing anything,” the player testified. “She was kind of talking, but I couldn’t make out the words that she was saying.”
- At that third party, the girl could not walk on her own and vomited several times before toppling onto her side, several witnesses testified. Mays then tried to coerce the girl into giving him oral sex, but the girl was unresponsive, according to the player who videotaped Mays and the girl.
- The player said he did not try to stop it because “at the time, no one really saw it as being forceful.”
- At one point, [Jane Doe] was on the ground, naked, unmoving and silent, according to two witnesses who testified. Mays, they said, had exposed himself while he was right next to her.
- Richmond was behind her, with his hands between her legs, penetrating her with his fingers, a witness said.

Source: New York Times, “Rape Case Unfolds on Web and Splits City”, Dec. 16, 2012

# CASE STUDY: SEXUAL ASSAULT



- “I tried to tell Trent to stop it,” another athlete, who was Mays’s best friend, testified. “You know, I told him, ‘Just wait — wait till she wakes up if you’re going to do any of this stuff. Don’t do anything you’re going to regret.’ ”
- He said Mays answered: “It’s all right. Don’t worry.”
- That boy took a photograph of what Mays and Richmond were doing to [Jane Doe]. He explained in court how he wanted her to know what had happened to her, but he deleted it from his phone, he testified, after showing it to several people.
- The girl slept on a couch in the basement of that home that night, with Mays alongside her before he took a spot on the floor.
- When she awoke, she was unaware of what had happened to her, she has told her parents and the police. But by then, the story of her night was already unfolding on the Internet, on Twitter and via text messages. Compromising and explicit photographs of her were posted and shared.

Source: New York Times, “Rape Case Unfolds on Web and Splits City”, Dec. 16, 2012

# CASE STUDY: SEXUAL ASSAULT



- What are the possible policy violations?
- What issues of jurisdiction arise?
- How should the Coach and the Athletic Department respond?
- How should the high school respond? The District?
- Are there others besides Mays and Richmond who have violated your policies?
- How do you deal with the fact that Jane Doe was drinking and is underage?
- What other concerns or questions do you have about how to proceed?

Source: New York Times, "Rape Case Unfolds on Web and Splits City", Dec. 16, 2012

# CLERY & VAWA 2013 – SECTION 304

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# THE CLERY ACT & APPLICABILITY



- The Clery Act applies only to Post-Secondary Schools, Colleges, and Universities.
  - There is, however, is increasing traction within Congress to developing a similar mechanism within PreK-12.
- Most of the principles of The Clery Act/VAWA Sec. 304, are universal and instructive for all educational institutions, such as:
  - Policy best practices
  - Reporting
  - Transparency
  - Equitable resolution mechanisms
  - Due Process
  - Support for victims, etc.

# THE CLERY ACT



## Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)

- Crime reporting
- Campus crime log
- Campus Sexual Assault Victims Bill of Rights (1992)
- Primary crimes (7+3)
- Hate crimes (8 categories)
- Policy and procedure disclosures
- Timely Warnings & Emergency Notifications
- Sex offender information dissemination
- Enforcement and fines
- Violence Against Women Reauthorization Act of 2013 (VAWA) – Section 304



# THE CLERY ACT: CAMPUS SECURITY AUTHORITY



- Clery identifies a CSA as:
  - Campus police
  - Non-police security staff responsible for monitoring campus property
  - Individuals and offices designated by the campus security policies as those to whom crimes should be reported
  - Officials of the institution with significant responsibility for student and campus activities
- Mandatory Reporting: All CSAs must report known crimes (primary and hate crimes) to chief campus CSA.
  - What about speak outs such as Take Back the Night?



# THE CLERY ACT: CAMPUS SECURITY AUTHORITY



The Clery Act requires “Campus Security Authorities” (CSAs) to report certain incidents to the campus’ Clery Coordinator

- Dean of Students
- Campus Public Safety/Campus Police
- Director of Athletics, all athletic coaches – including part-time and graduate assistants
- Faculty Advisor to student groups
- RAs
- Greek Life personnel
- Title IX Coordinator
- Most District Officials
- Director of Campus Health or Counseling Center
- Victim Advocates or others performing advocacy-based services
- Ombuds
- SART members
- Local law enforcement contracted with the institution to provide campus/school-safety related services

# RECENT CLERY AMENDMENT: VAWA REAUTHORIZATION & SECTION 304



## VAWA Section 304:

- Section 304 significantly amended the Clery Act.
- Created extensive new policy, procedure, training, education, and prevention requirements for:
  - Sexual assault.
  - Stalking.
  - Dating violence.
  - Domestic violence.
- Prohibits retaliation.

The “Big 4”

# VAWA 2013 – SECTION 304 “PRIMARY” CRIMES



- Criminal homicide:
  - Murder and non-negligent manslaughter
  - Negligent manslaughter
- **Sex offenses:**
  - **Rape**
  - **Fondling**
  - **Incest**
  - **Statutory rape**
- Robbery
- Aggravated assault
- Burglary
- Motor vehicle theft
- Arson
- **PLUS:**
  - **Dating violence**
  - **Domestic violence**
  - **Stalking**

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: SEXUAL ASSAULT



- **Sexual Assault:** *Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.*
  - Includes:
    - Rape
    - Fondling
    - Incest
    - Statutory Rape

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: SEXUAL ASSAULT



- **Rape**

- *The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.*

- **Statutory Rape:**

- *Sexual intercourse with a person who is under the statutory age of consent.*

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: SEXUAL ASSAULT



- **Fondling**

- *The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.*

- **Incest**

- *Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.*

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: DATING VIOLENCE



- **Dating Violence**

- *Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.*

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: DOMESTIC VIOLENCE



- **Domestic Violence**

- *By a current or former spouse or intimate partner of the victim;*
- *By a person with whom the victim shares a child in common;*
- *By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;*
- *By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred;*
- *By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.*



# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: STALKING



- **Stalking**

- *Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:*
- *Fear for the person's safety or the safety of others; or*
- *Suffer substantial emotional distress.*
- **Course of Conduct:** *two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.*

# VAWA 2013 – SECTION 304

## BIAS AND HATE CRIMES



- Added two categories of actual or perceived bias.
  - Race
  - Gender
  - **Gender identity\***
  - Religion
  - Sexual orientation
  - **Ethnicity\***
  - **National origin\***
  - Disability

# VAWA 2013 – SEC. 304: REPORTING CATEGORIES – HATE CRIMES



- **Reportable as hate crimes:**

- Murder and non-negligent manslaughter
- Forcible sex offenses
- Non-forcible sex offenses
- Robbery
- Aggravated assault
- Burglary
- Motor vehicle theft
- Arson
- Larceny-theft
- Simple assault
- Intimidation
- Destruction/damage/vandalism of property

# DISCIPLINARY PROCEDURES UNDER VAWA SEC. 304



NOT FOR DISTRIBUTION

# VAWA 2013 – SEC. 304

## DISCIPLINARY PROCEDURES



- Prompt, Fair, and Impartial Process
  - Prompt, designated timeframes (can be extended for good cause with notice to parties)
  - Conducted by officials free from conflict of interest or bias for either party
  - Consistent with institutions' policies
  - Transparent to accuser and accused
  - Timely and equal access to parties “and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings”

# VAWA 2013 – SEC. 304

## DISCIPLINARY PROCEDURES



- Policy statements must also include:
  - “A clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged” VAWA offenses AND that,
  - “Describes **each type** of disciplinary proceeding used by the institution” including:
    - The steps;
    - Anticipated timelines;
    - Decision-making process;
    - How to file a disciplinary complaint (including contact information for the person or office to whom a report should be made); and
    - How the institution determines which type of proceeding to use based on the circumstances of an allegation of a VAWA offense.

# VAWA 2013 – SEC. 304

## STANDARD OF EVIDENCE



- ASR Policy statement of disciplinary procedures must also include a description of the “standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of” the four VAWA offenses.
  - No specific standard required
- However, the institution must use the standard of evidence described in the statement in all such proceedings.

# VAWA 2013 – SEC. 304 TRAINING



- Proceedings must “be conducted by officials who receive **annual** training on”:
  - Issues related to the four VAWA offenses
  - How to conduct an investigation and a hearing process that:
    - Protects the safety of victims
    - Promotes accountability
    - Caution: this does not mean the training should be biased or slanted in favor the reporting party.
      - Ensure training is equitable and covers not just victim-based issues, but also those pertaining to a responding party.



# VAWA 2013 – SEC. 304

## “PROCEEDING”



- “Proceeding” is defined broadly as:
  - “all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, **fact-finding investigations, formal or informal meetings, and hearings.**”
  - “Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim.”
- This disclosure is required for **any and all** faculty, student, and staff disciplinary procedures
- “You must follow the procedures described in your statement regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred (i.e. on or off your institution’s Clery Act geography).”

# VAWA 2013 – SEC. 304

## ADVISORS



- Provide accuser and accused with the same opportunity to have others present including an advisor of their choice for “any institutional disciplinary proceedings” and “any related meetings”
  - An advisor is “any individual who provides the accuser or accused support, guidance or advice.”
  - An advisor is optional and can be **anyone** (including an attorney or a parent).
  - Institutions can restrict role of advisors in proceedings as long as both parties’ advisors have the same restrictions.
  - Institutions should notify parties of these restrictions prior to proceedings.
  - Institutions can train a pool of advisors the parties can use, but cannot restrict advisors to just the pool.
  - Advisors can serve as proxies if an institution so chooses.

# VAWA 2013 – SEC. 304

## WRITTEN MATERIALS PROVIDED TO VICTIMS



- When a student or employee reports they have been a victim of any of the VAWA offenses (either on or off campus) the institution will provide the student or employee a written explanation of their rights and options.
  - **"Must be a prepared, standardized and written set of materials, including detailed information regarding a victim's rights and options."**
    - This does not mean that you hand the student a copy of the ASR or the policy statements contained in the ASR.

# VAWA 2013 – SEC. 304

## WRITTEN MATERIALS PROVIDED TO VICTIMS



- Written information should be provided to students and employees about existing resources (updated regularly):
  - Counseling & Mental Health
  - Health
  - Victim advocacy
  - Legal assistance
  - Visa and immigration assistance
  - Student financial aid
  - Other services available for victims
  - Both within the institution and in the community
- Information should include contact information about these resources, including how to access these resources.

*NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.*

# VAWA 2013 – SEC. 304

## WRITTEN MATERIALS PROVIDED TO VICTIMS



- Written materials should also include information about options for, available assistance in, and how to request changes to:
  - Academic
  - Living
  - Transportation
  - Working situations, or
  - Protective measures (e.g., no contact orders, Orders of Protection, etc.)
- The institution must make such accommodations if the victim requests them and they are reasonably available.
  - “the institution is **obligated** to comply with a student [victim]’s reasonable request for a living and/or academic situation change following an **alleged** sex offense.”

*NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.*

# VAWA 2013 – SEC. 304

## LAW ENFORCEMENT



- Options about the involvement of law enforcement and campus authorities, including notification of the victim's option to:
  - Notify proper law enforcement authorities, including on-campus and local police;
  - Be assisted by campus authorities in notifying law enforcement authorities if the victim chooses; and
  - Decline to notify such authorities
  - Clarifications from The Clery Handbook:
    - An institution's ASR statement must provide specific contact information for the authorities
    - An institution's ASR statement must also explain what is involved in making a police report

*Note: The Clery Handbook adds: "The statement that your institution will comply with a student's request for assistance in notifying authorities is **mandatory**."*

# VAWA 2013 – SEC. 304

## NOTIFICATION OF OUTCOME



- Require simultaneous notification, in writing, to both accuser and accused, of:
  - The result of any institutional proceeding arising from allegations of VAWA offenses.
    - Result defined as “any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution.”
    - Result = Finding, Sanction, and Rationale
  - Note: The Clery Handbook contains an explicit FERPA exclusion.*
  - Procedures for appeal (if any)
  - Any change to results
  - When such results become final

# VAWA 2013 – SEC. 304

## NOTIFICATION OF OUTCOME



- What must be included in the rationale?
  - How evidence and information presented was weighed
  - How the evidence and information support the result and the sanctions (if applicable)
  - How the institution's standard of evidence was applied
    - Simply stating the evidence did or did not meet the threshold is insufficient.
- Simultaneous: “means that there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result.”



# ADDITIONAL VAWA 2013 SEC. 304 TRAINING REQUIREMENTS

- Prevention Programs
- Consent
- Bystander Intervention

# BRAINSTORMING TITLE IX AND VAWA SEC. 304



Some questions and thoughts to consider throughout our discussion:

- Inventory current practices?
- Strategic planning/incremental approach?
- What should your institution focus on first?
- Who takes the lead?
- How in the world are we going to do this?
- What are the barriers to fulfilling the training requirements for each level?
- What collaboration is needed to train each level?

# VAWA 2013 – SEC. 304 PREVENTION PROGRAMS



- VAWA 2013 Sec. 304 requires an array of In person prevention-based programming.
  - Primary prevention programs for **all incoming students** and **new employees**;  
AND
  - **Ongoing** prevention and awareness campaigns for **students and employees**” (includes faculty, staff, and administrators).

# VAWA 2013 – SEC. 304 PREVENTION PROGRAMS



## “Incoming Students”

- ✓ First-year students
- ✓ Transfer students
- ✓ Student-athletes
- ✓ International students
- ✓ Graduate students
- ✓ Professional students
- ✓ Online students
- ✓ Others?

## “New Employees”

- ✓ Full-time
- ✓ Part-time
- ✓ Faculty – all levels
- ✓ Staff
- ✓ Administrators
- ✓ Union and non-union
- ✓ Student employees:
  - RAs, TAs, GAs...
- ✓ Others?

# VAWA 2013 – SEC. 304 PREVENTION PROGRAMS



- **“Ongoing.”**
  - Go beyond orientation programs
  - Conduct follow-up programs
  - Shift mentality from compartmentalized “prevention months” to “prevention year”
  - Host speakers, film series, presentations by students, faculty, staff, online trainings/modules, discussion groups, social norming, etc.

# VAWA 2013 – SEC. 304 PREVENTION PROGRAMS



- The institution's prevention programming (both for incoming students/employees and ongoing campaigns) must include:
  - The applicable jurisdiction's “**definition of consent** in reference to sexual activity;”
    - <http://atixa.org/resources/consent-statutes-by-state/>
  - “A description of safe and positive options for **bystander intervention**;”
  - Information on Risk Reduction;
  - Information on Victim Services;

# VAWA 2013 – SEC. 304 PREVENTION PROGRAMS



- The institution's prevention programming (both for incoming students/employees and ongoing campaigns) must include (cont.):
  - “A statement that the institution...prohibits the crimes of...dating violence, domestic violence, sexual assault, stalking;” and
  - Definitions of consent, dating violence, domestic violence, sexual assault, and stalking “in the applicable jurisdiction”
  - Key Issue: Institutional definitions do NOT need to mirror VAWA/Clery or state-based definitions. Not considered a best practice.

# VAWA SEC. 304 RESOLUTION PROCESS TRAINING

- Requirements for All
- VAWA Training for “Level A”



# RESOLUTION PROCESS TRAINING REQUIREMENTS FOR ALL



- All students and employees
  - Each type of disciplinary proceeding used by the institution
    - How institution determines which type of proceeding to use
    - Steps, anticipated timelines, and decision-making process
  - Standard of evidence
  - Full range of possible or available:
    - Sanctions;
    - Remedies; and
    - Protective measures.

# VAWA 2013 – SEC. 304 RESOLUTION PROCESS TRAINING



- Rights of complainant and respondent during resolution processes (i.e. investigations, hearing, and appeal).
  - Advisors
    - Role
    - Function
  - Timely notification requirements
  - Notification of results (pre- and post-appeal).
    - (Parties may opt-out from receiving notification)
  - Procedures for appeal

# VAWA 2013 – SEC. 304

## TRAINING FOR TITLE IX ADMINISTRATORS



- Annual training for those who oversee Title IX compliance and those involved in disciplinary proceedings (e.g. investigators, hearing, and appellate officers) on:
  - Domestic violence, dating violence, sexual assault, and stalking;
  - How to conduct an **investigation** “that protects the safety of victims and promotes accountability;”
  - How to conduct a **hearing process** that protects the safety of victims and promotes accountability;” and
  - Applicable disciplinary policies and procedures

# VAWA 2013 – SEC. 304

## TRAINING FOR TITLE IX ADMINISTRATORS



- Should be trained on the following key disciplinary process policies and procedures:
  - Policies on SA, DV, DV, stalking, and consent
  - Available remedies
  - Thorough understanding of each stage of the processes
  - Promptness
  - Role and function of advisors for both parties
  - Timely notice requirements
  - Result notification
  - Appellate policies and procedures
  - Bias and conflicts of interest
  - Retaliation

# VAWA SEC. 304 TRAINING SAMPLE SCENARIO

- Angela & James
- Discussion Points



# SCENARIO DISCUSSION: ANGELA & JAMES



- On Friday, Sept. 5, Angela, a first-year student, attends an off-campus party after pre-gaming with her friends. From 9-10 p.m., Angela had four shots of vodka before arriving at the party, and upon arrival, was handed a solo cup of vodka-laden “punch” from a cooler. From 10 p.m.-12 a.m., Angela drinks two full cups of “punch.”
- Assume Angela has not eaten anything since 6 p.m.

# SCENARIO DISCUSSION: ANGELA & JAMES



- James arrives at the party at 10:00 p.m. and soon begins dancing with Angela. James had two “Jack and Cokes” before the party, and from 10:00 p.m.-12:00 a.m., drinks 1 ½ cups of the vodka-laden punch.
  - James is also taking anti-depressants and took some of his roommate’s Adderall prior to a test Friday afternoon.

# SCENARIO DISCUSSION: ANGELA & JAMES



- By midnight, James and Angela are getting more physically intimate and they are grinding into each other while dancing.
- Around midnight, Angela stumbles outside and throws up, leaning over the porch railing.
- Some of the partiers take video of Angela throwing up and post it to Twitter, tagging it #PartyFail.
- James goes looking for Angela and finds her outside, leaning over the porch looking queasy and offers to take her home. Angela's friends see her stumbling away with James, but don't want to get involved or "block" the situation.



# SCENARIO DISCUSSION: ANGELA & JAMES



- The next morning, Angela wakes up naked, alone, with a pounding headache, and in a room she has never been in. She looks around and sees some of James' things and realizes she is in James' room. She also sees an empty condom wrapper on the nightstand and can feel that something happened.
- Angela quickly gathers her clothes and returns to her room, where she locks herself in her bedroom and cries.

# SCENARIO DISCUSSION: ANGELA & JAMES



- Angela's roommate, Julia, can tell something is wrong with Angela, who is acting very withdrawn, crying a lot, and talking about going home because the institution is not a good fit for her. Julia also notices some new cuts on Angela's arms and thighs.
- Julia decides to address the situation directly with Angela, who then opens up about her experience with James. Angela shares that she feels James took advantage of her, but that she should have acted differently and not put herself in that situation, so she is really to blame.

# SCENARIO DISCUSSION POINTS



- Discussion points throughout the scenario:
  - Alcohol and its effects
  - Bystander intervention opportunities and techniques
  - Risk factors and risk mitigation
  - Range of available remedies and campus resources
  - Available disciplinary processes
  - Possible sanctions
  - Victimology and supporting victims
  - What else?

# QUESTIONS?

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