



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

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- I. Caselaw Review and Application to Professional Practice**
 - a. Deliberate Indifference
 - b. Appeals
 - c. Retaliation
 - d. First Amendment
 - e. Title IX: Due Process, Erroneous Outcome, Selective Enforcement and Gender-Based Claims
 - f. Title IX Potpourri
- II. Recent OCR Resolutions: Michigan State University and Chicago Public Schools**
- 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

RECENT CASE LAW

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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

Facts

- Two female students sued KSU alleging that the institution was deliberately indifferent in response to reported off-campus rapes.
- One assault occurred at a fraternity house. TF had consensual sex with one student, but a second student emerged from the closet and raped her.
- In the other case, the assaults occurred at an off-campus fraternity event and at the fraternity house. At the fraternity house, a male student raped SW and left her naked and passed out, and she was raped by a second student.
- Both female students reported to KSU and to the police.

Facts (cont.)

- KSU told both female students they could not investigate because the incidents occurred off-campus.
- In SW's case, one school official told the two male students about the complaint, and another school official forwarded a detailed email from SW to the Intra Fraternity Council.
- Plaintiffs stated they lived in fear of encountering their assailants on campus, they withdrew from campus activities, their grades suffered, and they suffered significant anxiety.
- Plaintiffs sued, alleging that the institution was deliberately indifferent and left them vulnerable to further harassment.
- KSU filed motions to dismiss, which were denied by the District Court.

Holding

- KSU appealed to the Tenth Circuit regarding the proper interpretation of “deliberate indifference.” The Tenth Circuit affirmed the decision:
 - Rejected KSU’s claim that the Plaintiffs must allege that KSU’s deliberate indifference caused actual further harassment; rather, it was sufficient for Plaintiffs to allege that KSU’s deliberate indifference left them vulnerable to harassment.
 - Reaffirmed the Supreme Court’s ruling in *Davis v. Monroe County Bd. of Ed.* that a person need not be assaulted again for Title IX to apply; making a student “vulnerable to” further harassment or assault is sufficient.

Takeaways

- When responding to student-on-student sexual harassment and assault, the institution can only be liable for its own deliberately indifferent response once the institution has actual notice.
- KSU's potential liability arises from its own conduct of “turning a blind eye,” not from the underlying harm caused by the alleged assaults.
- Even if an institution cannot address off-campus conduct under its policies, it still must remedy the effects of discrimination.
- The U.S. Departments of Education and Justice submitted a statement of interest in this matter, arguing that KSU's fraternities are “education activities” covered by Title IX. The proposed regs cite to *Farmer* re: “covered activity.”

Facts

- Case involves several plaintiffs: EK, SG, and Jane Roe 1. Each student was sexually assaulted by a male student, made a formal report, and used MSU's sexual misconduct complaint resolution process.
- EK
 - EK's alleged assailant was found responsible for violating MSU's sexual misconduct policy and was disciplined accordingly.
 - After, EK encountered the responding party at least nine times on campus. EK claimed the responding party stalked and/or intimidated her. She filed a retaliation complaint.
 - MSU evaluated EK's reports of retaliation and determined that she was "just seeing him" around campus. MSU found no facts to support retaliation.

Facts (cont.)

- SG
 - SG was assaulted by another MSU student. She engaged the sexual misconduct complaint resolution process, the responding party was found responsible, and was expelled.
 - The responding party filed an appeal that was denied. He filed a second appeal and the VPSA ordered a new investigation by an outside law firm.
 - The new investigation found no sexual assault and the responding student was reinstated.
 - SG had no further contact with the responding party but claimed she was “vulnerable to” further harassment because she could have encountered him at any time due to his mere presence on campus.

Facts (cont.)

- Jane Roe 1
 - Jane Roe 1 was assaulted and engaged the sexual misconduct complaint resolution process.
 - MSU’s investigation found insufficient evidence to hold the responding party responsible.
 - Roe 1 had no further contact with the responding party; in fact, he withdrew from MSU.

Decision

- The Sixth Circuit analogizes the “deliberate indifference” standard to tort law (common law legal theory of injury, causation, and harm).
- Like *Farmer*, this case confronts the legal question of what the U.S. Supreme Court meant in *Davis* when it used the phrase “vulnerable to further harassment.”
- The decision also addresses whether the administrators involved should be entitled to qualified immunity.

Decision

- The Sixth Circuit reached an arguably different conclusion than the Tenth Circuit in *Farmer*.
- To successfully bring a deliberate indifference claim, a plaintiff must plead and ultimately prove:
 - The school had actual knowledge of actionable sexual harassment
 - And, the schools deliberately indifferent response to the known harassment resulted in **further** actionable harassment
 - And that “Title IX injury is attributable to the post-actual-knowledge further harassment”
- To overcome an assertion of qualified immunity, a plaintiff must allege facts showing the official being sued violated clearly established constitutional rights.

Takeaways

- Emerging circuit split on whether “vulnerable to” requires an actual “second incident” of harassment or whether the effects of co-existing on campus on one’s educational experience and access is sufficient to state a claim under Title IX.
- Only the Supreme Court can resolve a split of opinion among U.S. Circuit Courts of Appeals.
- There is a high bar when alleging deliberate indifference and in some jurisdictions, the plaintiff must allege further harassment resulting from a deliberately indifferent response.

Takeaways

- Although students are entitled to have an institution do its work to stop, prevent, and remedy, a student has no right to their *preferred* remedy.
- Decision makers, particularly in public institutions, should maintain some knowledge of clearly established constitutional rights that may bear upon their decisions.

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., 149 F. SUPP. 3D 602 (E.D. VA. 2016).



- **Facts**

- “John Doe,” student at GMU, had a romantic and sexual BDSM relationship with “Jane Roe.”
- In October 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., 149 F. SUPP. 3D 602 (E.D. VA. 2016).



- **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., 149 F. SUPP. 3D 602 (E.D. VA. 2016).



- **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., 149 F. SUPP. 3D 602 (E.D. VA. 2016).



- **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 14th Amendment claim and a Free Speech claim

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JOHN DOE v. THE RECTORS AND VISITORS OF GEORGE MASON UNIV., 149 F. SUPP. 3D 602 (E.D. VA. 2016).



- **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

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- **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 occurred without constitutionally sufficient due process

JOHN DOE v. THE RECTORS AND VISITORS OF GEORGE MASON UNIV., 149 F. SUPP. 3D 602 (E.D. VA. 2016).



- 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?

TITLE IX RETALIATION FOUNDATIONS

JACKSON v. BIRMINGHAM BD. OF ED.



- *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167 (2005).
 - PreK–12 case.
 - 1999: Jackson, a high school P.E. teacher and girls' basketball coach, complained about inequity in sports programs' funding (gender).
 - 2000: He began to get negative evaluations.
 - 2001: He was dismissed as coach, but retained as teacher.
 - He sued under Title IX's private right of action.

TITLE IX RETALIATION FOUNDATIONS

JACKSON v. BIRMINGHAM BD. OF ED.



- Procedure:
 - District Court — School prevailed.
 - Eleventh Circuit — Upheld District Court.
 - Supreme Court — Overturned.
- Question: Does the private right of action for discrimination only apply to the direct victim of the discrimination, or does it also apply to a party who advocated on behalf of the victim?

Facts

- Plaintiffs comprised of a group of faculty members, former faculty members and graduate students in the Brain and Cognitive Sciences Department (BCS). They reported rampant sexual behavior by a BCS professor at Rochester, spanning years.
- The University conducted an internal investigation that cleared the professor.
- Following the issuance of the investigation report, a faculty member complained that the report had “named her and shamed her” in retaliation for speaking out in the investigative process.

Facts

- The University hired an outside investigator to look into the retaliation claim.
- The outside investigator found that the University did not mitigate the risk that the report could result in retaliation.
- The University rejected this finding.
- The Provost circulated a memo categorizing ongoing talk as “rumors and gossip.”

Facts

- Plaintiffs alleged that conditions at the University worsened substantially after the second investigation report, including exclusion from BCS department meetings, shaming and criticism at BCS department meetings, disqualification from leadership positions, increased workloads, and exclusion from faculty dinners.
- Plaintiffs sued the University alleging retaliation under Title IX and Title VII.
- Plaintiffs also claimed the University's conduct exacerbated and contributed to a hostile work and educational environment.

Retaliation Analysis Under Title VII:

- 1) Plaintiff participated in protected activity;
- 2) The employer knew of the protected activity;
- 3) There was an adverse employment action by the employer against the employee; and
- 4) A causal connection exists between the protected activity and the adverse action.

Holding

On the University's motion to dismiss, the District Court:

- Found that a pattern of possible retaliatory behavior exists, the impact of which cannot fairly be construed as trivial, e.g.:
 - Various forms of criticism about the Plaintiffs
 - Breach of confidentiality in how the University handled the two investigations
 - Searches of Plaintiffs' email accounts
 - Allowing the accused professor to participate in their performance evaluations
 - Failure to retain a tenured faculty member who was recruited by a competing university
 - Sabotaging Plaintiffs planned move to a neighboring university
 - Exclusion from meetings

Holding

- Although certain of the reported incidents occurred outside of the 300-day filing deadline set by the EEOC, the generic allegations of a hostile environment, which were not necessarily tied to any specific alleged incident, were sufficient to constitute a “continuing claim” of hostile work environment.
- The University’s motion to dismiss was mostly denied; one set of retaliation allegations from a former employee was dismissed because that individual’s protected activity occurred more than four years after they had left the University, i.e. after the employment relationship had ended.

Takeaways

- Institutional conduct that is usually otherwise permissible (e.g. email searches of university accounts and a provost's statements at meetings) can constitute retaliation in the context of "protected activity."
- It is crucial for someone with an independent purview to keep an eye out for patterns of retaliatory behavior, beyond isolated incidents of retaliation.
- Institutional leaders and supervisors should be trained to recognize when the institution's conduct could have the effect of dissuading employees or students from reporting harassment or participating in an investigation, i.e. engaging in protected activity.

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

911 F.3d 674 (4TH CIR. 2018).



Facts

- Members of Feminist United, an affiliate of Feminist Majority Foundation (FMF), at University of Mary Washington (UMW) raised vocal protests after UMW's student senate voted to authorize male-only fraternities.
- During contentious campus debates spanning many months, FMF members were subjected to offensive and threatening anonymous messages posted on Yik Yak (the now-defunct social media app).
 - FMF members were called “femicunts,” “feminazis,” “cunts,” and “bitches,” and there were threats to “euthanize,” “kill,” and “gang rape” FMF members.
 - Specific FMF members were referenced by name on Yik Yak.
 - Some Yaks articulated threats (with details) to specific FMF members.

FEMINIST MAJORITY FOUNDATION ET AL. V. HURLEY, PAINO, AND UNIVERSITY OF MARY WASHINGTON

911 F.3d 674 (4TH CIR. 2018).



Facts

- FMF members were also subjected to various incidents of verbal harassment by rugby team after they raised concerns about a video showing 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 during the academic year and into the summer.
- The Title IX Coordinator told FMF 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 concerns about infringing the First Amendment.

Facts

- FMF sued under Title IX, alleging UMW was deliberately indifferent to sex discrimination, which served to create and foster a hostile campus atmosphere.
- The federal district court dismissed the complaint, finding that the harassment took place in a context in which UMW had limited, if any, control.

Decision

- The Fourth Circuit reversed, finding that FMF had raised sufficient concerns that UMW was “deliberately indifferent” to the sex discrimination.
- 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 university’s wireless network.

Decision

- UMW could, theoretically, 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 was obliged to investigate or engage law enforcement to investigate.
 - UMW could have disabled Yik Yak campus-wide.
- UMW could also have more “vigorously denounced” the harassment, and have offered counseling services to students impacted.

FEMINIST MAJORITY FOUNDATION ET AL. V. HURLEY, PAINO, AND UNIVERSITY OF MARY WASHINGTON

911 F.3d 674 (4TH CIR. 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.
- Institutions/schools may not “do nothing” on the basis that the posts are anonymous.
- Don’t get blinded by First Amendment concerns initially. Title IX requires an investigation as to whether the conduct is severe, persistent or pervasive, and objectively offensive – and you can then determine if the First Amendment analysis requires the protection of speech.

Facts

- Following a separate lawsuit involving the student organization Business Leaders in Christ, Iowa reviewed all Registered Student Organization (RSO) constitutions for compliance with the University's group. Although the review looked at all RSOs, it focused on student religious groups.
- InterVarsity was a religious national organization and local chapter that was recognized as an RSO at Iowa.
- Although membership in the group was open to all, InterVarsity required that leaders affirm a statement of faith encompassing “the basic biblical truths of Christianity.”

Facts

- Iowa determined that InterVarsity's affirmation of faith violated its Human Rights Policy, which provided:
 - [I]n no aspect of [the University's] programs shall there be differences in the treatment of persons because of race, creed, color, religion, national origin, age, sex, pregnancy, disability, genetic information, status as a U.S. veteran, service in the U.S. military, sexual orientation, gender identity, associational preferences, or any other classification that deprives the person of consideration as an individual, and that equal opportunity and access to facilities shall be available to all.

Facts

- InterVarsity student leaders offered to change the requirement such that leaders could be “requested to subscribe” or “strongly encouraged to subscribe” to the group’s beliefs rather than be required to do so.
- Iowa officials denied this offer and deregistered the group.
- Plaintiffs sued based on First Amendment rights to free speech, freedom of association, and freedom of religious exercise.

Holding

- The HR Policy was not neutrally applied to all RSOs / was selectively enforced.
- Enforcing the HR Policy against faith-based groups violates the First Amendment:
 - Iowa violated InterVarsity's freedom of speech and freedom of association by disallowing the affirmation of faith.
 - Iowa violated InterVarsity's free exercise in allowing other student groups to have leadership requirements that were secular in nature.
- Iowa's interest was not *compelling* and the decision to deregister was not *narrowly tailored*.
- Iowa officials should have known they were acting contrary to clearly established law, per *Business Leaders in Christ*, and were not entitled to qualified immunity.

Takeaways

- Iowa had been admonished by the same court in *Business Leaders in Christ* yet engaged in similar actions, leading to the court's frustration and the potential for personal liability for school officials.
- Reliance on general counsel is not always persuasive to a court:
 - “Given the clarity of the Court’s preliminary injunction order [in *BLIC*], the individual Defendants’ reliance on counsel—to the extent it has been established by the record—does not make their actions reasonable.”

Takeaways

- Uniform application of an “all comers” policy or a non-discrimination policy is key. The court left the door open to deregistering *all* RSOs that do not adhere to the HR Policy, provided the requirement is applied uniformly:
 - “[I]t would be less restrictive to prohibit all RSOs from excluding students on the basis of protected characteristics than it is to selectively enforce the Human Rights policy against InterVarsity.”

CASE STUDY #1:
"iPHONE"

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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).

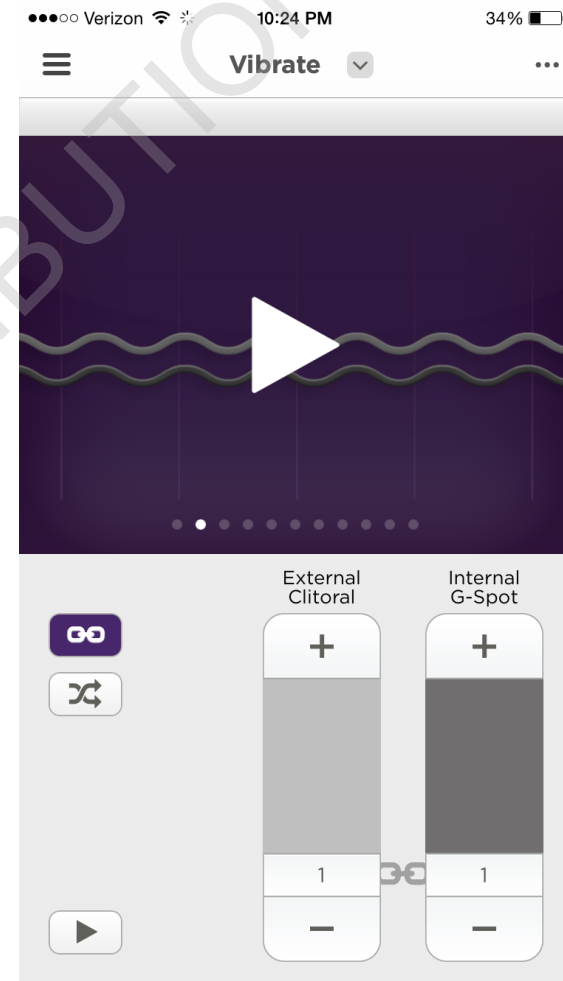
CASE STUDY: IPHONE



- 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?

DUE PROCESS FOUNDATIONS

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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

DIXON V. ALABAMA STATE BD. OF ED.

294 F. 2D 150 (5TH CIR. 1961).



- In February of 1960, six black students sat in at a public (all white) lunch counter and were arrested
- Alabama State summarily expelled all of them without any notice of the charges or of a hearing, and no opportunity to provide evidence or defend themselves
- 5th Cir. Court decision established minimum due process (reiterated by U.S. Supreme Court in *Goss v. Lopez* (1975))
 - Students facing expulsion at public institutions must be provided with at least **notice of the charges** and an **opportunity to be heard**
 - Ushered in most campus disciplinary and hearing-based processes

DIXON V. ALABAMA STATE BD. OF ED.

294 F. 2D 150 (5TH CIR. 1961).



- Specifically, the court set forth a number of due process-based guidelines, including:
 - Notice, with an outline of specific charges
 - A fair and impartial hearing
 - Providing names of witnesses to accused
 - Providing the content of witnesses' statements
 - Providing the accused an opportunity to speak in own defense
 - The results and findings of the hearing presented in a report open to the student's inspection

ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE, 415 F.2D 1077 (8TH CIR. 1969).



- Students were suspended from school following participation in campus riots. They sued MSC and won. The court asserted the school must provide the following elements to satisfy due process:
- Written charge statement, made available 10 days prior to hearing
- Hearing before a panel with authority to suspend or expel
- Charged student given opportunity to review information to be presented prior to hearing
- Right of charged student to bring counsel to furnish advice, but not to question witnesses
- Right of charged student to present a version of the facts through personal and written statements, including statements of witnesses

ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE, 415 F.2D 1077 (8TH CIR. 1969).



- An opportunity for the charged student to hear all information presented against him and to question adverse witnesses personally
- A determination of the facts of the case based solely on what is presented at the hearing by the authority that conducts the hearing
- A written statement of the finding of facts
- Right of charged student to make a record of the hearing

GOSS V. LOPEZ, 419 U.S. 565 (1975).



- Nine high school students were suspended for 10 days for non-academic misconduct from various public high schools. None were provided a hearing
- The court held that since PreK–12 education is a fundamental right, students were entitled to at least a modicum of “due process”
- Reiterating the 5th Circuit, it noted that the minimum due process is notice and an opportunity for a hearing and to present your side of the story

GOSS V. LOPEZ, 419 U.S. 565 (1975).



- The court further stated that the hearing could be informal and need not provide students with an opportunity to obtain private counsel, cross-examine witnesses, or present witnesses on their behalf
- Potential suspensions beyond 10 days or expulsions, however, require a more formal procedure to protect against unfair deprivations of liberty and property interests

KEY TITLE IX ISSUES

- Due Process
- Erroneous Outcome
- Selective Enforcement
- Gender-Bias

DOE v. UNIVERSITY OF CINCINNATI, 872 F.3D 393 (6TH CIR. 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

- **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

- **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, 872 F.3D 393 (6TH CIR. 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
- 6th Circuit upheld the District Court’s decision

- **6th 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.

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 three 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.

Facts

- The three-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 Sixth 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."

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.
 - Although 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.

Takeaways

- In the Sixth 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 Sixth 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.

Facts

- C.S. attended fraternity formal with Doe and his friend, Z.W.
- C.S. was intoxicated and unconscious after drug and alcohol consumption.
- Doe called friends of C.S. to pick her up from party.
- C.S. told friends “they [Doe and Z.W.] raped me.”
- Her friends brought to her the emergency room, she had a forensic exam, gave statement to police the next morning, Rhodes published a timely warning.
- Rhodes’ TIXC interviewed 14 witnesses.
- No corroborating witnesses or evidence; one witness (J.H.) claimed to be with C.S. during the whole party and saw nothing.

Facts (cont.)

- Rhodes held a hearing to determine responsibility.
- Doe and Z.W. attended the hearing but C.S. did not.
- Without advanced notice, Rhodes TIXC introduced new evidence from the forensic exam showing anal injuries.
- J.H. and other student witnesses were not questioned by panel or investigator regarding the incident.
- Rhodes expelled Doe and Z.W.
- Doe sued under erroneous outcome and selective enforcement.
- Doe's sought a temporary restraining order sought to prevent Rhodes from enforcing expulsion.

Key Issues

- One element of a TRO decision is an analysis of the underlying Title IX claim and the plaintiff's likelihood of success on the merits.
- The court granted the TRO, determining that because the case turned on a credibility assessment, due process required an opportunity for cross-examination.
- Although Rhodes is a private college not subject to constitutional due process, the Court asserted due process rights under Title IX.
- The court also emphasized preferential treatment given to female witnesses over male witnesses.
- Preferential treatment and campus protests cited by Court as possible evidence of selective enforcement.

Takeaways

- Due process coming from Title IX itself (rather than the 14th Amendment) is a potential game-changer, primarily because it removes any commonly-asserted distinction among public and private colleges.
- *Doe v. Baum* rationale continues to be persuasive. Be sure to evaluate how your hearing officers assess credibility.
- Responding party absence at the hearing is problematic and may not be a viable option (*see also* 2020 Title IX regs).
- Bias becomes a viable claim when supported by procedural irregularities or inequity – develop and follow sound processes!
- No surprises at the hearing – provide all evidence and opportunity to prepare *before* the hearing.

Facts

- UMass issued an immediate suspension of a male student after learning he violated the school's no contact order that had been issued two months earlier, related to a complaint of dating violence made by a female student.
- The immediate suspension lasted five months, until a hearing was held on the assault allegations.
- The male student submitted 36 questions for the hearing; an administrator pared it down to sixteen prior to the hearing.
- A Hearing Board conducted the hearing.
- The Board questioned both parties using an iterative back-and-forth method of questioning. No cross-examination occurred directly or via advisors.
- The Hearing Board rephrased the sixteen submitted questions, in a manner intended to elicit the same information.

Facts

- Some of the male student's evidence was disallowed and the Board never saw the questions that had been rejected by the administrator.
- The Board's written procedures called for the Board to start by "calming" the [reporting party] by asking easy questions.
- The Board found the male student responsible for assault and failure to comply, and he was expelled.
- The male student sued alleging violations of due process, equal protection, and Title IX.
- The District Court granted UMass's motion for summary judgment, dismissing the due process and Title IX claims.
- Plaintiff appealed to the First Circuit.

Holding

The First Circuit:

- Declined to adopt the Sixth Circuit’s “direct confrontation” requirement from *Doe v. Baum*.
- Upheld the expulsion, ruling that:

“[A] process that affords an opportunity for real-time cross-examination by posing questions through a hearing panel or other third party, like the process used by UMass, meets due process requirements”
- Found that the Board was so effective at questioning, it cured the errors related to “calming” questions and the administrator paring down questions that never got to the Board.

Holding

- Found no procedural harm resulted from the exclusion of the male student's evidence.
- Found that the immediate suspension violated the male student's due process rights, returning the case to the District Court for monetary damages for the five-month suspension.
 - Notice and a hearing must precede suspension except in extraordinary circumstances, not present in this case.
 - When an emergency occurs, the post-suspension hearing must occur immediately thereafter.

Takeaways

- This case arguably sets up a “circuit split” on direct cross-examination.
- Clear guidelines for higher educational institutions in the First Circuit (that arguably conflict with proposed regs).
- The Hearing Board’s thorough and extended questioning of the parties and evaluation of credibility is instructive.
- Probing of credibility issues should occur in the hearing in the presence of the parties.
- Screening of questions prior to the Board should be done sparingly.
- Rephrasing of questions by the Board may be permissible if the rephrased questions elicit the same information. Document the rationale for questions not posed.

JOHN DOE v. MIAMI UNIVERSITY, 882 F.3D 579 (6TH CIR. 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, 882 F.3D 579 (6TH CIR. 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 and Jane Roe were students in Purdue's Navy ROTC program and were in a dating relationship.
- After they broke up, Roe reported that Doe had admitted to her that he digitally penetrated her while she was asleep on one occasion when they were dating.
- Purdue opened a Title IX investigation. During the investigation Doe was excluded from ROTC as an interim measure.
- Investigators submitted an investigative report to a three-person panel, who would reviewed the report and heard from the parties in a hearing before making a recommendation to the Title IX Coordinator.
- Doe did not have an opportunity to review the report, and was not advised of its contents, until moments before the hearing.

Facts

- The Title IX Coordinator chaired the hearing.
- Roe did not appear at the hearing or submit a statement.
- Two panel members had not read the report; questioning by the third panel member was accusatory in nature and presumed that Doe had committed a violation.
- Panel did not allow Doe to present witnesses, including Doe's roommate who was present at the time of the alleged assault.
- Doe was found responsible and suspended for one year. Doe appealed and lost.
- Doe involuntarily resigned from the Navy ROTC program, resulting in the loss of his scholarship and a future career in the Navy.
- Doe sued, alleging that flawed procedures violated his due process rights under section 1983, and that sex bias in sanctioning was discrimination in violation of Title IX.

Facts

- The District Court granted Purdue's motion to dismiss on the basis that Doe failed to state a plausible claim under either theory.
- Doe appealed to the Seventh Circuit.

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Holding

The Seventh Circuit reversed and remanded, finding that:

- Doe adequately alleged violations of section 1983 and Title IX.
- Doe had a protected liberty interest in a future career choice (Naval career) via the “stigma-plus” test, because the state:
 - 1) inflicted reputational damage and
 - 2) altered his legal status, depriving him of a right previously held.
- Previously, the Seventh Circuit rejected the premise of a stand alone property interest in higher education.

Holding

- The due process provided to Doe was inadequate; not providing the investigation report and evidence to Doe was a fundamental flaw.
- Secondary issues included:
 - The failure of two committee members to read the report
 - The committee's failure to speak to Roe in person and examine her credibility directly
 - The committee's unwillingness to hear from Doe's witness

Holding

- The Court declined to decide whether direct cross-examination was fundamental to due process, because there were numerous other errors.
- The Court found that Doe's claim of gender bias under Title IX was plausible, due to the procedural errors in combination with pressure on Purdue to hold male students accused of sexual assault responsible in order to comply with the 2011 DCL and two pending OCR complaints against Purdue.
 - The Court noted that the panel members and the Title IX Coordinator chose to believe Roe without directly hearing from her, raising the spectre of gender bias, and creating the possibility that the committee believed Roe because she was a woman and disbelieved Doe because he is a man.

Holding

- The court was not particularly concerned that the Title IX Coordinator had oversight over both the investigation and hearing, because Doe did not establish a foundation for actual bias.

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Takeaways

- Trained decision-makers and hearing prep are crucial. There is no excuse for not having read materials prior to the hearing.
- Due process protections include providing the parties with an opportunity to present information and witnesses, and to review the evidence that will be used in the decision.
- Credibility assessments should be based on the decision-makers hearing directly from the parties, and a clear rationale should be given for these assessments.
- Institutions in the Seventh Circuit should take heed of the “stigma-plus” test.
- The theory of Title IX liability applied here is a novel one, which could have the effect of fewer institutions in this circuit winning at the motion to dismiss stage of Title IX litigation.

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.

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.

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.

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Decision

- The 6th 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.

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.

DOE V. ALLEE,

30 CAL. APP. 5TH 1036, 242 CAL. RPTR. 3D 109 (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,

30 CAL. APP. 5TH 1036, 242 CAL. RPTR. 3D 109 (2019).



Facts (cont.)

- 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 about her motivation.
- 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.

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.

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.

Facts

- John Doe was a student reporter at BC. Doe was assigned to cover a cruise organized by a registered student group.
- On the cruise, AB accused Doe of sexually assaulting her as Doe crossed a crowded dancefloor. AB started screaming at Doe. Doe was accompanied by JK who turned to Doe and said “. . . My bad” in reference to AB’s screaming at Doe.
- AB reported the incident and Doe was arrested by the State Police. BC also took jurisdiction over the matter (as it was a BC sponsored event involving two BC students) and immediately suspended Doe pending the outcome of BC’s complaint resolution process.
- The case was assigned to an associate dean of students (Hughes) who determined the case should proceed to an administrative hearing board, which would convene within two weeks.

Facts (cont.)

- The board served as both investigator and adjudicator.
- Hughes informed JK he was required to appear at Doe's hearing as witness and told him he was not being charged to put him at ease.
- Doe's hearing lasted two days. In the hearing, Doe denied committing the assault and provided raw video footage showing he was not near AB at the time of the assault. He testified to JK's comment and asked the board to postpone the hearing until the state finished forensic testing related to Doe's arrest. Doe's request was denied.
- Over the weekend, the hearing board informed Hughes they were struggling to reach a decision and were considering a "no-finding."
- Hughes spoke to DoS Paul Chebator who told Hughes he discouraged a "no-finding" determination.

Facts (cont.)

- Doe was eventually found responsible and suspended for two full semesters. Doe appealed and was denied.
- After serving his suspension, Doe returned to BC and his parents raised their concerns about the disciplinary process with the president. The president ordered a review of the case and determined BC had followed its procedures.
- Doe sued BC. The issues eventually decided at trial involved due process claims and allegations that BC breached its contractual obligations by denying Doe an impartial and fair process.

Decision

- First “Title IX” case to make it to a jury trial since 2011. Note that the “Title IX” claims were dismissed at an earlier point in the lawsuit, and the remaining questions of whether BC breached its contractual duty to Doe were a matter of state contract law.
- The jury sided with Doe on the grounds that:
 - BC breached its contractual obligations to provide basic fairness stated in its Code of Conduct.
 - The informal communications among the Deans and the hearing board supported the court’s decision.

DOE V. TRUSTEES OF BOSTON COLLEGE, NO. 15-10790-DJC (D. MASS. SEPT. 23, 2019).



Takeaways

- “Due process” guarantees for public institutions have analogous requirements for private institutions rooted in contract law.
- Private institution requirements are typically framed as “fundamental fairness,” which may be an implied guarantee under state law or may be expressly in the terms of a student handbook.
- Regardless of the investigative and adjudicative structure, all institutions must have a process that is thorough, adequate, reliable and impartial.
- Be mindful of the DoS role on your process as that person is usually the chief disciplinarian on campus, and there are likely actual or perceived conflicts of interest.
- There are many ways for a person could sue an institution for Title IX related matters in addition to a private cause of action under Title IX (ex: contract, defamation, negligence, etc.).

DOE v. SYRACUSE UNIVERSITY,

5:18-CV-377 (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,

5:18-CV-377 (N.D.N.Y MAY 8, 2019).



- **Facts (cont.)**

- 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,

5:18-CV-377 (N.D.N.Y MAY 8, 2019).



• Doe's Allegations Regarding the Investigation

- Doe's original notice did not provide details of the allegations.
- Roe's allegations had changed over time.
 - She first reported that the vaginal sex was consensual, but she claimed in a later interview that she had withdrawn consent.
- 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's Allegations Regarding the Investigation**
 - Investigator did not provide Doe with all of Roe's 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,

5:18-CV-377 (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,

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- **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,

5:18-CV-377 (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.”

- **Takeaways**

- Trauma-informed processes have a place in investigations, but 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 POTPOURRI

Hazing

Transgender Students

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Facts

- Maxwell Gruver was a freshman at LSU and a pledge at Phi Delta Theta fraternity. In 2017, Gruver died from alcohol poisoning in a hazing incident.
- Ten days before Gruver died, a concerned parent anonymously reported to LSU's Greek Life office that dangerous levels of alcohol were being consumed at a different fraternity's pledge events.
- The report described specific activities, at a specific fraternity on Bid Night, and significant abuse of alcohol by new members.
- LSU's Greek office claimed there was insufficient information to investigate the reported activity.

Facts (cont.)

- Gruver’s family sued LSU under Title IX under a theory that the university failed to enforce its anti-hazing policies against male fraternities in the same (strict) manner it applied to female sororities.
- The Gruvers alleged LSU has a clear pattern of failing to meaningfully address fraternity hazing, including examples of more than a dozen significant injuries or deaths of male students in recent years.
- LSU took a “boys will be boys” approach to fraternity oversight that relied on gender stereotypes about male fraternity members and masculine rites of passage.
- LSU filed a motion to dismiss the case.

Analysis

- The district court grappled with four threshold questions:
 - What types of facts must the Gruvers allege to raise a claim of intentional discrimination on the basis of sex?
 - Did Gruver need to be a member of a protected class?
 - Did the Gruvers need to allege their son was treated less favorably than similarly situated students?
 - Must LSU’s alleged discrimination have **caused** Gruver’s death?
- The court categorized this case as a “heightened risk claim” and evaluated whether LSU’s practices created a heightened risk of harm.

Decision

- The court looked to the *Baylor* case because it was conceptually analogous and the reasoning was persuasive.
- The court determined that the Gruvers met their burden of alleging sufficient facts to plead a case for intentional discrimination. They had clearly alleged that LSU had misinformed male students about the risks of fraternity hazing, LSU had actual notice of multiple hazing violations, and LSU failed to stop or correct dangerous hazing.
- The court denied LSU's motion to dismiss the lawsuit.

Takeaways

- This is the first time a federal court has applied this Title IX theory of discrimination to a fact pattern involving male students.
- The case creates a different avenue for liability for fraternity hazing deaths other than the traditional tort claims (ex. wrongful death, negligence, etc.).
- This bolsters the argument that school's may be held responsible for policies and practices that discriminate against one gender or the other when the discrimination puts those students at a heightened risk of harm.

Takeaways

- Institutions should evaluate whether gender stereotypes and related attitudes are affecting their enforcement of hazing and other student safety policies.
- TIXC's should add Greek Life to their audit schedule and review policies/practices across the institution for equitable construction and enforcement.
- This legal theory would only be applicable in cases involving gender segregated organizations (ex. Greek Life, athletics).

Facts

- Gavin Grimm was assigned the sex “female” at birth. Gavin enrolled at Gloucester High School in Virginia as a girl.
- During his freshman year, Grimm came out to his parents as transgender. He began to see a therapist and was diagnosed with gender dysphoria. Grimm’s therapist provided medical documentation that he should present as male in his daily life and be permitted to use restrooms consistent with his gender identity.
- Grimm legally changed his first name and began using male restrooms in public.

Facts (cont.)

- Grimm and his guidance counselor initially agreed he would use the restroom in the nurse's office. Over time, this situation proved unworkable and he felt anxious, stigmatized and embarrassed.
- Grimm was permitted to use the male restrooms and did so without incident for seven weeks.
- The administration began receiving complaints from members of the community. One student personally complained to the principal and the school board eventually passed a policy requiring students to use restrooms that correspond to their biological sex.
- The board also announced construction of single-stall, unisex restrooms for all students. Grimm was informed that he would face discipline if he continued to use the male restrooms.

Facts (cont.)

- Grimm began hormone therapy and began to present as predominately male before the unisex restrooms were complete. Grimm also encountered times when he could not access a suitable restroom for various reasons. Grimm also had chest reconstruction surgery.
- Grimm changed his license and birth certificate to reflect his male identity. The school refused to change his sex/gender designation on his transcript. Grimm was also admitted to the hospital with suicidal thoughts.

Decision

- Grimm’s litigation has been underway for years. It was bound for the U.S Supreme Court when the Trump administration rescinded the Department of Education’s 2016 transgender guidance that had previously provided the legal basis for his case.
- The Fourth Circuit Court of Appeals, in deciding in an earlier decision in Grimm’s case, said “a plaintiff must demonstrate exclusion from an educational program . . . because of sex . . .”. And, that the school’s discrimination harmed the plaintiff.
- In this 2019 decision, therefore, the district court was forced to confront the legal question of whether “on the basis of sex” in Title IX applies to the allegations that the school discriminated against him on the basis of his gender identity and gender expression.

Decision (cont.)

- The court reasoned that Title IX does protect a student in Grimm’s circumstances:
 - “[T]here is no question that the Board's policy discriminates against transgender students on the basis of their gender nonconformity. Under the policy, all students except for transgender students may use restrooms corresponding with their gender identity. Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go.”
- Not updating Grimm’s student records was also discrimination under Title IX.
- The Board tried to advance an argument based on concept of physical privacy, but the court was not persuaded.

Takeaways

- The court interpreted the term “on the basis of sex” in the text of the Title IX statute and did not rely on agency guidance making this a significant ruling in favor of transgender equity.
 - The U.S. Supreme Court heard oral argument on analogous cases in Title VII in October 2019.
- Although other bathroom cases are pending, this case echoes a growing number of decisions that construe Title IX to apply to transgender individuals.
- A best practice is to allow students to use facilities consistent with their gender identity.
- Allow students to utilize their preferred name, including changing formal records to conform to official state documents, such as birth certificates or licenses.

RECENT OCR RESOLUTION AGREEMENTS

- Michigan State University
- Chicago Public Schools

MICHIGAN STATE UNIVERSITY SCANDAL



- Allegations regarding Dr. Larry Nassar and Dean William Strampel
- Several concurrent federal investigations
 - Title IX Compliance (U.S. Department of Education’s Office for Civil Rights)
 - Title IX Compliance (U.S. Department of Health and Human Services’s Office for Civil Rights)
 - Clery Act Compliance (U.S. Department of Education and Federal Student Aid)
- MSU was already under a 2015 Resolution Agreement to resolve two Title IX complaints regarding student-on-student sexual violence allegations.

ALLEGATIONS AGAINST MSU



- In 2016, individuals began filing suits against MSU regarding Nassar's conduct.
- OCR decided to move forward with investigation concurrently despite pending litigation, which is unusual.
- Opened a “directed investigation” of MSU’s Title IX compliance.
- Reviewed documents from five separate data requests.
- Conducted an onsite visit.
- Coordinated with the separate Clery Act compliance investigation, including some joint interviews.

SEPTEMBER 2019 RESOLUTION AGREEMENT AND FINDINGS LETTER



- MSU and OCR reached a Resolution Agreement in September 2019, released with a 53 page findings letter.
- OCR formally found that MSU violated Title IX.
- Identified systemic and procedural changes MSU must make to increase impartiality, transparency, and address accountability shortcomings at MSU.
- Provides remedies to individuals adversely affected by Dr. Nassar and Dean Strampel.

RESOLUTION AGREEMENT: POLICY AND TITLE IX STRUCTURE



Required changes to MSU policy and Title IX structure, to include:

- Explicitly state that several individuals must be free from any conflict-of-interest or bias, including:
 - Title IX Coordinator and Deputy Coordinators
 - Investigators
 - Decision-makers
 - Medical or scientific expert witnesses
- Title IX Coordinator must:
 - Report to the President
 - Oversee all investigations
 - Have “proper authority and independence free from undue influence or pressure from other individuals or units within the University.”
- Greater separation from General Counsel’s office.

RESOLUTION AGREEMENT: INDEPENDENT OVERSIGHT AND MONITORING



- Three years of oversight of MSU investigations by OCR.
- MSU must commission an independent third-party overseer to review investigations and outcomes.
- Overseer will assess whether MSU is complying with its policies and Title IX.
- Overseer will provide a written report to the Title IX Coordinator, OGC, the President, and the Board of Trustees.

RESOLUTION AGREEMENT: TRANSPARENCY AND RECORDKEEPING



- Emphasizes transparency, oversight, and recordkeeping.
- Proper records maintenance to enable Title IX administrators to recognize and address patterns of behavior.
- Employee personnel files will include a substantive notation regarding any Title IX allegations and the final disposition.
- President and one trustee will receive a compiled report each semester regarding all investigations involving employees.
- Preliminary investigation reports provided to the parties for review before finalized and before a determination of responsibility.
- Provides a process to reopen investigations if new evidence becomes available.

RESOLUTION AGREEMENT: EMPLOYEE ACCOUNTABILITY



- MSU must ensure that all employees understand their obligation to report alleged misconduct.
- Must investigate prior failures to report.
 - Note this is a different framework than the proposed Title IX regulations, which would require a signed, written report provided to a limited group of institutional officials.
- Required to identify current and past employees with knowledge of potential misconduct by Nassar and Strampel and determine if employees failed to act under MSU policy and/or state/federal law.
 - Including former President, the Provost, the Associate Vice President for Academic Human Resources, OGC employees, and coaches of women's gymnastics
 - Sanctions could include revocation of tenure, revocation of titles, demotion, removal of pay or benefits

RESOLUTION AGREEMENT: TRAINING



- Mandates additional training for employees, students, and student-athletes
- Provide focused training provided by OCR officials for:
 - Board of trustees
 - President
 - Select staff from the Title IX office
 - Office of General Counsel
 - Other select administrators
- Provide training to all participants of youth programs

CLERY ACT FINDINGS AND AGREEMENT



- Non-compliance is costly. MSU agreed to pay a \$4.5 million fine for violating the Clery Act. Violations included:
- Failure to properly classify reported incidents and disclose crime statistics in the Annual Security Report (ASR)
 - Nassar’s crimes were not included
 - Coach who had just been trained as a Campus Security Authority (CSA) training failed to make a report
- Failure to issue Timely Warnings
 - Regarding Nassar’s pattern of abuse
 - 21 other incidents of criminal conduct that posed a serious, ongoing threat to the campus community
 - Robberies in which victims were able to provide identifying information about their assailants
 - String of burglaries that targeted students of a particular ethnicity

CLERY ACT FINDINGS AND AGREEMENT



- Failure to identify and notify CSAs of their duties and to establish an adequate system of gathering crime statistics from required sources
 - Self-taught Clery Coordinators, rather than required annual training
 - No systemic effort to regularly identify CSAs, notify them of their responsibilities, and train them
- Lack of administrative capacity
 - Substantial failure to develop and implement an adequate Clery compliance program
 - Location of the Clery Coordinator created “serious structural challenges”

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Resolution Agreement resolves complaints filed in March 2015 and November 2016.
- Agreement signed on September 10, 2019.
- OCR expanded its review to conduct a “systemic, district-wide investigation” of the District’s response to Title IX allegations.
- Chicago Public Schools District found in violation of Title IX
- Is an excellent insight into OCR’s current interpretations for PK-12 and Title IX policies and procedures.

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- For years, the District's management, handling, and oversight of complaints of student on student and adult on student sexual harassment have been in a state of disarray, to the great detriment of the students the District is responsible for educating.
- The District's investigations were poorly managed and were often conducted by staff who were not properly trained in effective investigative techniques or the specific requirements that Title IX imposes on recipients in addressing instances of sexual harassment.
- Investigations were conducted by a patchwork of both school-level personnel and District personnel without any District-wide coordination of efforts and results.

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- This patchwork structure compromised the ability of students to learn in a safe educational environment.
- Finally, the District's lack of organizational strategies to ensure adequate and reliable investigations and coordinated efforts to address and prevent sexual harassment was exacerbated by poor record-keeping.
- Documentation concerning complaint investigations was very often incomplete, and much of it was maintained in schools, rather than in a centralized location where it could be easily reviewed by high-level administrators.

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- OCR found the District's procedures lacking:
 - Failed to “ensure that students who reported sexual harassment received **interim services and appropriate remedies** in substantiated cases”
 - Failure to “have an obligation to **prepare an investigation report summarizing the results of the investigation**”,
 - Failure to “**notify the parties of the outcome of an investigation**, including whether the investigation substantiated the allegations and determined that harassment occurred.”
 - Failure to articulate “**reasonably prompt timeframes** in the Title IX Policy for completing its investigations.”

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Provide notice to students, parents, and employees of the Title IX Policy and Grievance Procedures, including **where complaints may be filed**, that is written in language appropriate to District students, **easily understood**, and **widely disseminated**;
- **Prohibit retaliation** against persons who report sex discrimination, including sexual harassment, or participate in related proceedings;
- Title IX policies and procedures “apply to complaints alleging sex **discrimination carried out by employees, other students, or third parties**”

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Include formal complaint procedures providing for:
 - designated, reasonably prompt **timeframes** for the major stages of the investigation and for completion of the investigation of a complaint;
 - investigations that are **adequate, reliable and impartial**;
 - an equal opportunity for both parties to **present witnesses and other evidence**;

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Include formal complaint procedures providing for:
 - a **written report** summarizing the relevant inculpatory and exculpatory evidence;
 - **timely and equal access to all parties of information** that will be used during disciplinary meetings and hearings;
 - **written notice of the determination to be provided to the parties**; and
 - if applicable, a requirement explaining who may appeal the District's determination and the basis for deciding an appeal.

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Also required the District to revise its policies and procedures to:
 - “Ensure that the Title IX Coordinator has the **appropriate authority** to effectively coordinate all of the District’s efforts to comply with Title IX.”
 - “Ensure that it has a comprehensive process for responding to all complaints of sex discrimination and that it fully documents responsive actions taken.”

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Also required the District to revise its policies and procedures to (cont):
 - Widely distribute its policies and procedures
 - Train administrators, students and parents
 - “Develop and implement a **record-keeping system** that captures all required documentation in connection with all complaints of possible sexual harassment and sex discrimination.”
 - Provide **equitable remedies** to both parties

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Training Personnel

- Training for those “responsible for processing, investigating, adjudicating and/or resolving complaints of sexual harassment:
 - The District’s Title IX Policy and Grievance Procedure;
 - **How to respond** to complaints of sexual harassment;
 - **How to identify** what constitutes sexual harassment, including a hostile environment;
 - **How to conduct and document** adequate, reliable, and impartial investigations of sexual harassment;

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Training Personnel

- Training for those “responsible for processing, investigating, adjudicating and/or resolving complaints of sexual harassment (cont):
 - **Resources** for reporting parties
 - **Record retention** requirements
 - Available **interim measures and resources** for the affected parties
 - Title IX prohibitions on retaliation
 - **Notice to all parties of the outcome of the investigation.**

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Student and Parent Training

- Annual age-appropriate training for students and parents covering:
 - The District’s revised Title IX Policy and Grievance Procedures
 - Including where to locate them on the District’s website
 - The existence of OCR and its authority to enforce Title IX
 - The District’s Title IX Coordinator, (including contact information), as well as school administrators and their Title IX-related roles

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Student and Parent Training

- Annual age-appropriate training for students and parents covering (cont):
 - What constitutes sexual harassment,
 - The District’s prohibition against sex discrimination, including sexual harassment
 - What students should do if they believe they or other students have been subjected to sexual harassment.

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Records Maintenance

- A. Track electronically all Title IX complaints, including
 - Relevant information related to the complaint
 - Information related to the complainant and respondent
 - All identified witnesses of the harassment
 - The person receiving the complaint
 - The date/time/nature/location of the incident
The date the District became aware of the incident
 - The date the Title IX Coordinator received notice of the incident;

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Documentation and Personnel Files

- “Document actions [the District] takes in response to all Title IX complaints at each stage of its investigation and grievance process, including when imposing sanctions against a District-affiliated adult or disciplining a student.”
- “The District will require that all final Title IX determinations against staff, faculty, or administrators (hereinafter respondents) be noted in the respondent’s personnel file, consistent with state and local laws, District policies, and applicable collective bargaining agreements. The notation shall provide a summary of the nature of the allegations, indicate whether a finding of violation was made and, if so, the sanctions imposed.”





OCR-COMPLIANT PROCEDURES

Orlando, Florida | January 2020

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
 - OCR reviewed comments and is working to finalize the regulations
 - Currently being finalized in concert with the Office of Management and Budget
 - 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
 - May go into effect 30 days after final regulations published in Federal Register

INTERVENING VARIABLES



- Congressional intervention (especially the House, but possibly the Senate, too).
- 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, TX, 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

NOT FOR DISTRIBUTION

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;

NOT FOR DISTRIBUTION

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

1

NOT FOR DISTRIBUTION

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

- 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.

- 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

NOT FOR DISTRIBUTION

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

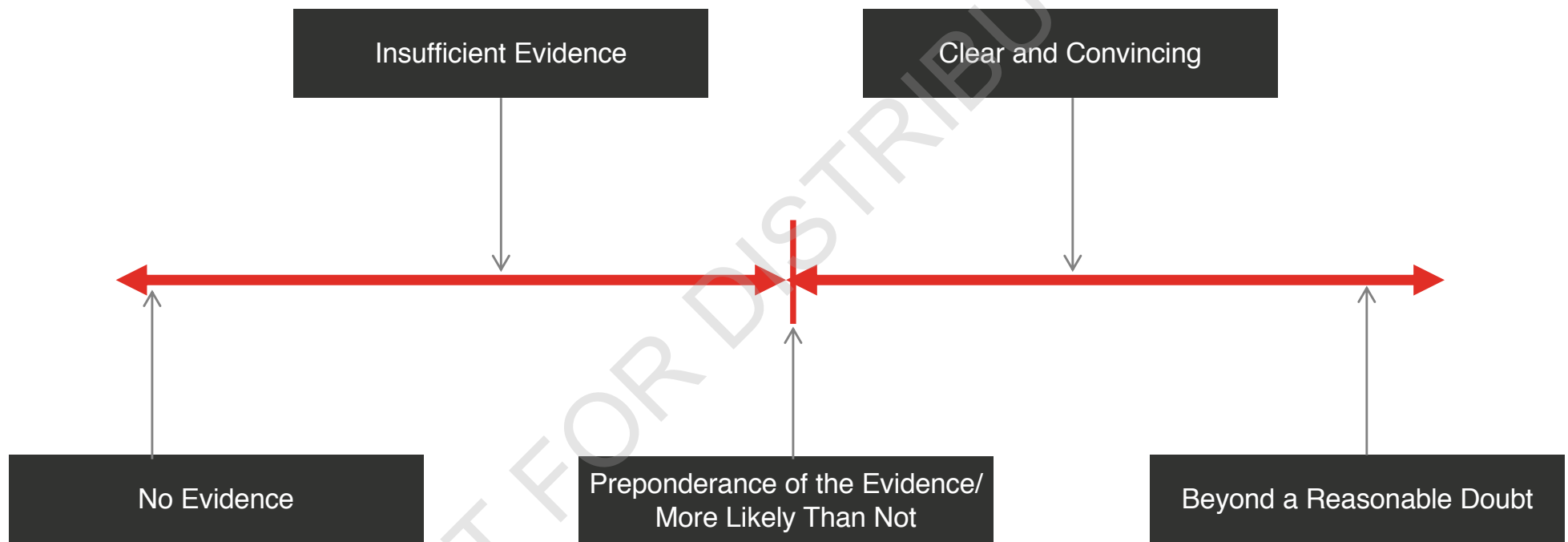


- Current OCR standard – preponderance of the evidence is standard civil court will use to evaluate school’s response
- Proposed regulations allow preponderance only if same for other conduct code violations, otherwise must use clear & convincing
- Effectively mandates clear & convincing for schools 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 K-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 K-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?)

- 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 – K-12 may still conduct indirect cross-examination through hearing administrator

- 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 currently apply to K-12; however, the proposed regulations extend many Clery Act requirements to K-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 K-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 postsecondary education, colleges, and universities.
 - There is, however, is increasing traction within Congress to developing a similar mechanism within K-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

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

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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

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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.

- 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 the 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
- Recommendations

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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